DISCLOSURE: DECONSTRUCTING THE "FRAUD OR CONCEALMENT" EXCEPTION UNDER ERISA SECTION 413

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I. INTRODUCTION

This Article addresses whether the "fraud or concealment" exception to the statute of repose found in 29 U.S.C. § 1113 for alleged breaches of an Employee Retirement Income Security Act of 1974[1] ("ERISA") fiduciary's duty applies only when a defendant takes affirmative steps to hide the alleged breach, or if the exception can be invoked any time the underlying claim is premised on a fraud theory. There is a split amongst the federal circuits as to this issue. The First,[2] Third,[3] Seventh,[4] Eighth,[5] Ninth,[6] and D.C. Circuits[7] have held that the exception applies to the former. The Second[8] Circuit has not affirmatively ruled on this matter.

The Seventh Circuit observed that statutes of limitations are "rarely the subject of sustained scholarly attention."[9] While this may be true, the issue is of grave importance. Statutes of limitations are important in the administration of justice. Courts have philosophized that as time passes, the accused must have guardrails in place in the instance that accumulating evidence may make a defense untenable.[10] To boot, the passage of time may also erode evidence disproving

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1. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2018).
2. J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1252-55 (1st Cir. 1996).
3. Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1551-52 (3d Cir. 1996).
4. Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220-21 (7th Cir. 1990).
5. Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491-92 (8th Cir. 1988).
6. Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401-02 (9th Cir. 1995).
7. Larson v. Northrop Corp., 21 F.3d 1164, 1172-74 (D.C. Cir. 1994).
8. Caputo v. Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001).
9. Wolin v. Smith Barney Inc., 83 F.3d 847, 849 (7th Cir. 1996).
10. United States v. Eliopoulos, 45 F. Supp. 777, 781 (D.N.J. 1942) ("Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability.").

guilt.[11] As retirement assets peaked at $44.3 trillion in 2021,[12] it is high time we have the conversation regarding a six-year statute of repose and lay the foundation for a bedrock principle.

The Supreme Court of the United States (the "U.S. Supreme Court" or the "Court" or the "High Court" or "SCOTUS") has elucidated that one intent of Congress enacting ERISA is to protect participants in employee benefits plans and their interests.[13] Congress was concerned that plan managers handling significant amounts of money might be lured into self-dealing and other mismanagement.[14] "At the time ERISA was signed into law, there was consternation amongst the general public as *incidents of fraud with pension plans were occurring across the nation*."[15] Additionally, the legislative branch thought it necessary to further the statute's "general objective" of protecting participants and beneficiaries.[16] Hence, fiduciaries are subject to strict duties of loyalty and care.[17] It seems straightforward enough that courts would construe the statute to provide robust protections.[18] Howbeit, the judiciary is confined by the text of the law. The spirit of the law shall not prevail over its letter.

The crux of the split is interpreting when the exception of "fraud or concealment" is triggered. Most courts of appeals have held that this exception may be invoked *after* the underlying breach of fiduciary duty. The Second and Tenth Circuits have rejected this approach and ruled that *any* underlying breach of fiduciary duty allegedly involving fraud or concealment can trigger the excep-

11. People v. Ross, 156 N.E. 303, 304 (Ill. 1927) ("[T]he very existence of the statute is a recognition by the legislature of the fact that time gradually wears out proofs of innocence and a notification that a fixed and positive period established by it destroys all proofs of guilt.").

12. John Iekel, *U.S. Retirement Assets and Participation: The State of Things*, AM. SOC'Y OF PENSION PROS. & ACTUARIES (Sept. 22, 2023), https://www.asppa.org/news/us-retirement-assets-and-participation-state-things.

13. Massachusetts v. Morash, 490 U.S. 107, 115 (1989); *see also* David M. Deptula, *Pension Regulation from Eligibility to Plan Termination Insurance: ERISA Cases in the Sixth Circuit, 1980-1982*, 14 U. TOL. L. REV. 935, 935-36 (1983) ("The Act has been described as 'the greatest development in the life of the American worker since social security' but has also been labeled 'cruel and misleading bunk.'").

14. *See* H.R. REP. NO. 93-533, at 4 (1973); S. REP. NO. 93-127, at 11 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4864-71.

15. Max Birmingham, *The Paper Chase: Should the Principles of Contract Law Govern ERISA Section 302?*, 37 HOFSTRA LAB. & EMP. L. J. 293, 297 (2020) (emphasis added).

16. Varity Corp. v. Howe, 516 U.S. 489, 513 (1996).

17. *See* 29 U.S.C. § 1104 (2018).

18. *See also* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 11, 14 (2011) (arguing the term "filed" should be construed broadly).

tion.[19] This is a complex matter. The Seventh Circuit noted that "[t]he 'except' clause, however, is deeply puzzling."[20]

Notwithstanding, both the majority view and minority view are incorrect. They both insert "fraudulent concealment" into the text of the statute, which requires the fiduciary to take an active step. Aside from misinterpreting the plain text, federal appellate courts are ignoring the pragmatics involved.[21] In the ERISA context, the fiduciary controls almost all, if not all, of the relevant and pertinent information. This allows any wrongdoing to be obscured from the beneficiaries.[22] To provide color, the Third Circuit maintains that a fiduciary must take active steps for concealment for the exception to apply.[23] This does not take into account the scenario of a fiduciary simply remaining silent. In its opinion, the court uses the term "affirmative steps" to delineate its reading of the statute.[24]

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19. *See generally* Caputo v. Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001) ("Therefore, to be entitled to the six-year 'fraud or concealment' limitations period, these courts require that, in addition to alleging a breach of fiduciary duty (be it fraud or any other act or omission), the plaintiff must also allege that the defendant committed either: (1) a 'self-concealing act'—an act committed during the course of the breach that has the effect of concealing the breach from the plaintiff; or (2) 'active concealment'—an act distinct from and subsequent to the breach intended to conceal it.") (citation omitted); Fulghum v. Embarq Corp., 778 F.3d 1147, 1166 (10th Cir. 2015) ("There remains the question of whether the breach of fiduciary duty claims raised by Plaintiffs fall under the exception to the six-year statute of repose. The district court concluded Plaintiffs have not asserted Defendants concealed their alleged breach of fiduciary duty; Plaintiffs do not contest this conclusion on appeal. Thus, Plaintiffs' claims are timely only if the alleged breach of fiduciary duty is based on a fraud theory.").

20. Wolin v. Smith Barney Inc., 83 F.3d 847, 850 (7th Cir. 1996).

21. *See generally* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996) ("The pragmatist judge thus regards precedent, statutes, and constitutions both as sources of potentially valuable information about the likely best result in the present case and as signposts that must not be obliterated or obscured gratuitously, because people may be relying upon them. But because the pragmatist judge sees these 'authorities' merely as sources of information and as limited constraints on his freedom of decision, he does not depend upon them to supply the rule of decision for the truly novel case. For that he looks also or instead to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify.").

22. *See* TAMAR FRANKEL, FIDUCIARY LAW 29 (Oxford ed., 2011); *see also* Norman Stein, *Three and Possibly Four Lessons About ERISA That We Should, but Probably Will Not, Learn from Enron*, 76 ST. JOHN'S L. REV. 855, 869-70 (2002) (describing the extraordinary case of Enron. "Congressional hearings and a civil action brought by participants in Enron's 401(k) plan suggest that the Enron employees who served as plan fiduciaries may have acted in their own interest rather than in the plan participants' interest. Several fiduciaries, including Cynthia Olsen and Kenneth Lay, knew that the market was overvaluing Enron stock because market participants were unaware how significantly the company's prospects were undermined by accounting fraud." While Enron may have been on a grand scale, the ability of ERISA fiduciaries to easily conceal fraud is prevalent due to the structure and nature of the legislation.).

23. Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1552 (3d Cir. 1996) ("[W]hen a lawsuit has been delayed because the defendant itself has taken steps to hide its breach of fiduciary duty, the limitations period will run six years after the date of the claim's discovery. The relevant question is therefore not whether the complaint 'sounds in concealment,' *but rather whether there is evidence that the defendant took affirmative steps to hide its breach of fiduciary duty*.") (emphasis added) (internal citation omitted).

24. *Id.*

This argument proceeds as follows. Part II analyzes the case law and dissects the courts' syllogisms. Part III explores standing and the practicalities of setting the machinery of courts into operation. Part IV propounds various canons of construction. Part V makes a public policy plea. Part VI identifies why some court opinions are subject to *reductio ad absurdum*, notably because there is a conflation of textualism and strict constructionism, as well as courts failing to pinpoint the origins of the common law "fraudulent concealment" doctrine falling within the sweep of 29 U.S.C. § 1113. Part VII concludes.

II. CURRENT STATE OF THE LAW

A. Courts That Have Held the Fiduciary's Duty Applies Only when a Defendant Takes Affirmative Steps to Hide the Alleged Breach

1. United States Court of Appeals for the First Circuit

The First Circuit subtly disclosed how it went beyond the text of the statute[25] to justify its decision.[26] In *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, the court performs statutory somersaults by alleging that Section

25. J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1252-53 (1st Cir. 1996) ("*In support of this argument, Appellants point to the plain language of Section 1113 and to the fact that Congress did not include the phrase 'knew or should have known.'* In addition, they maintain that adopting a subjective standard comports with Congress' mandate that ERISA be liberally construed to protect pension beneficiaries and to ensure the highest standards of fiduciary conduct. *See* 29 U.S.C. § 1001(a), (b). In this regard, they contend that the Congressional mandate is not properly served by requiring that participants heed storm warnings and exercise reasonable diligence where affirmative acts of fraud and concealment are alleged.") (emphasis added); *id.* at 1254 (*"First, Appellants' argument seems to ignore the plain language of Section 1113* explicitly calling for a 'discovery' standard, *which has been interpreted to employ a 'known or should have known' standard*. *See United States v. James Daniel Good Property*, 971 F.2d 1376, 1381 (9th Cir. 1992).") (emphasis added); United States v. James Daniel Good Prop., 971 F.2d 1376, 1380 (9th Cir. 1992) (illustrating if the statutory language is plain, the court should point to the text instead of another case. But the case centers on the Controlled Substances Act, not ERISA.).

26. *J. Geils Band Emp. Benefit Plan*, 76 F.3d at 1253. In this case, the court takes a leap from "plain meaning" to an *in pari materia* interpretation with securities law to "incorporated by reference" by stating the following:

> As always, we begin with the relevant statutory language. Section 1113's tolling provision provides that 'in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.' 29 U.S.C. § 1113. … By its very language, then, Section 1113 explicitly *incorporates* the federal common law 'discovery rule,' which postpones the beginning of the limitation period from the date when the plaintiff is injured to the date the injury is discovered. As we noted when interpreting the statute of limitations contained in Section 13 of the Securities Act of 1933, which is applicable to Section 12(2) of that Act, 'the doctrine of fraudulent concealment is the common law counterpart of the 'discovery' standard prescribed by § 13 to limit actions brought under § 12(2).' … We find that Section 1113's discovery rule is almost identical to that of Section 13 and perceive no reason why we should not follow *Cook*'s approach and hold that Section 1113 also *incorporates* the fraudulent concealment doctrine.

Id. (Emphasis added) (internal citations omitted).

1113 is expanded by the federal common law.[27] The court stated this because the federal common law includes the "discovery rule."[28] And the federal common law discovery rule incorporates, in turn, the doctrine of fraudulent concealment.[29] As explained *infra*,[30] there is a distinction between "fraud or concealment" and "fraudulent concealment."

In the landmark case of *Erie Railroad Co. v. Tompkins*, the U.S. Supreme Court declared that "[t]here is no federal *general* common law."[31] Now, the U.S. Supreme Court did allow for federal common law under ERISA 502(a). It is not clear common law is appropriate in this context. Specifically, it has been noted common law pertains to "rights and obligations."[32] From a practice standpoint, this issue is ripe for the Supreme Court (and an excellent idea for a law review article): Whether there is ERISA federal common law. Therefore, if a case arises with the question presented in this Article, crafty counsel would be wise to make this argument before proceeding to that described.[33]

Even if there is ERISA federal common law, it is for "rights and obligations"[34] and has not been extended to statutes of repose. The First Circuit makes a significant leap without any explanation. It cites the so-called "discovery rule," but

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27. *Id.*

28. *Id.*

29. *Id.* at 1252.

30. Mitchell A. Lowenthal et al., *Special Project–Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1019-20 (1980).

31. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added) (explaining how "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

32. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (discussing Congress's intent for federal courts to develop a "federal common law of rights and obligations under ERISA-regulated plans…."); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("[Courts are developing] federal common law of rights and obligations under ERISA-regulated plans."); Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 990 (4th Cir. 1990) ("[W]e must… develop and add to the growing federal common law of ERISA rights and obligations.").

33. The Supreme Court of the United States *rarely* overturns its own precedent. *See* Dave Roos, *8 Landmark Supreme Court Cases That Were Overturned*, HISTORY (Oct. 11, 2022), https://www.history.com/news/landmark-supreme-court-cases-overturned. Notwithstanding, it is a significant issue.

34. *Pilot Life Ins. Co.*, 481 U.S. at 56 ("Congress' specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA makes clear its intention that all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans be treated as federal questions governed by § 502(a). See H. R. Rep. No. 93-533, p. 12 (1973)… reprinted in 2 Senate Committee on Labor and Public Welfare, Legislative History of ERISA, 94th Cong., 2d Sess., 2359 (Comm. Print 1976) ('The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.'); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams) (suits involving claims for benefits 'will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act'); *id.* at 29942 (remarks of Sen. Javits) ('It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans')").

there is no precedent for it under ERISA.[35] The court cites the Seventh Circuit,[36] but even a concurring opinion by Judge Posner admits that there is confusion over it.[37] The High Court has displayed disdain for the discovery rule.[38]

To make matters even more egregious, Judge Posner further states that "[w]hether a plaintiff can use equitable tolling to extend the six years *we fortunately need not decide in this case*."[39] The First Circuit's reliance on this case to prove its point illustrates its real motive—judicial activism.[40]

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35. J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1253 (1st Cir. 1996).

36. *Id.*

37. Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1104 n.17 (7th Cir. 1992) (stating, in part, "[i]n *Cada* the court recognized that there is considerable confusion in the cases among fraudulent concealment, tolling and the discovery rule.").

38. *See* TRW Inc. v. Andrews, 534 U.S. 19, 27 (2001) ("The Court of Appeals rested its decision on the premise that all federal statutes of limitations, regardless of context, incorporate a general discovery rule 'unless Congress has expressly legislated otherwise.' 225 F.3d, at 1067. *To the extent such a presumption exists, a matter this case does not oblige us to decide, the Ninth Circuit conspicuously overstated its scope and force.*") (emphasis added); *id.* ("The only other cases in which we have recognized a prevailing discovery rule, moreover, were decided in two contexts, latent disease and medical malpractice, 'where the cry for [such a] rule is loudest….'") (internal citations omitted); Gabelli v. SEC, 568 U.S. 442, 443 (2013) ("[T]he Government argues that the discovery rule should apply instead. Under this rule, accrual is delayed 'until the plaintiff has "discovered"' his cause of action. This doctrine… [is] an 'exception' to the standard rule… [This Court, however, has] *never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense*, but is instead the Government bringing an enforcement action for civil penalties.") (emphasis added) (internal citation omitted); Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 670 (2014) ("A claim ordinarily accrues when [a] plaintiff has a complete and present cause of action. In other words, the limitations period generally begins to run at the point when the plaintiff can file suit and obtain relief. A copyright claim thus arises or accrue[s] when an infringing act occurs.") (internal quotations and citation omitted); *id.* at 670 n.4 ("Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a 'discovery rule,' which starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.' *William A. Graham Co. v. Haughey,* 568 F.3d 425, 433 (C.A.3 2009) (internal quotation marks omitted). See also 6 W. Patry, Copyright § 20:19, p. 20-28 (2013)… ('The overwhelming majority of courts use discovery accrual in copyright cases.')."

39. *Martin*, 966 F.2d at 1103 (emphasis added).

40. *J. Geils Band Emp. Benefit Plan*, 76 F.3d at 1252, 1254 ("After noting the approach followed in *Larson* and *Martin* [*v. Consultants & Administrators, Inc.,* 966 F.2d 1078, 1093-96 (7th Cir. 1992)], the district court concluded that, even if we were to hold that Section 1113 could be tolled by showing something less than 'fraudulent concealment,' Appellants would still not prevail…. Next, with respect to the scope of 'discovery' in the fraud or concealment exception, we believe that the term encompasses both actual and constructive discovery. As the Seventh Circuit noted in *Martin,* Congress knew how to require 'actual knowledge,' and did so for the three-year limitations period under Section 1113(2). Holding that the fraud or concealment exception extends the limitations period to six years from the date of actual discovery would conflict with the fact that the preceding three-year period runs from the date of 'actual knowledge.' In addition, incorporating the notion of constructive discovery comports with the general requirement under the fraudulent concealment doctrine that there be a showing of reasonable diligence before tolling is allowed.") (citations omitted); *Judicial Activism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.").

2. United States Court of Appeals for the Third Circuit

In the second iteration of *Kurz v. Philadelphia*[41] ("*Kurz II*"), the Third Circuit incorrectly ruled the "fraud or concealment" standard does not apply to breach of fiduciary duty claims based on a fraud theory but applies only when a fiduciary conceals the alleged breach. Unlike the First Circuit,[42] the court blatantly admits its judicial activism: "This was not a technical violation of ERISA, nor a cleverly concealed plan amendment."[43] Henceforth, if it is not a concealment, as per the court's admission, then it must be fraud to fall within the statute: "fraud *or* concealment."

The court cited a cockamamie "serious consideration"[44] test without any basis. Rather, it is a figment of its imagination. In *Kurz II*, the plaintiffs alleged they were harmed because they retired between February 1, 1987, and June 1, 1987, and were ineligible to benefit from a change to Service Annuity Plan (the "Plan").[45] "The change was announced in [Philadelphia Electric Company ("PECo")]'s official bulletin on July 2."[46] "The improvement to the Plan provided a substantial increase (approximately 17.6%) in the pension for those employees with over 40 years of service who retired at age 65."[47] Additionally, there is no realized harm in the complaint.[48] Instead, it says the plaintiffs are injured for future harm they *may* have received. As the injury is speculative,[49] their standing is questionable.

The first time this came before the Third Circuit ("*Kurz I*"), the court published an opinion riddled with errors.[50] Most of the plaintiffs met with Senior

41. Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1552 (3d Cir. 1996) [hereinafter referred to as "*Kurz II*"].

42. *See J. Geils Band Emp. Benefit Plan*, 76 F.3d at 1253.

43. *Kurz II*, 96 F.3d at 1551.

44. *Id.* at 1547 ("Applying the rule established in *Fischer v. Philadelphia Elec. Co.,* 994 F.2d 130 (3d Cir.) ('*Fischer I*')…, we held that genuine issues of material fact remained as to whether PECo, acting in its role as fiduciary under the Employee Retirement Income Security Act ('ERISA'), had made affirmative material misrepresentations to its employee-beneficiaries by denying, or failing to disclose when asked, that it was seriously considering changes in its pension benefits program. On remand, after a bench trial, the district court entered judgment for those members of the plaintiff class who had asked about a change in benefits after March 1, 1987, the date on which the district court found that serious consideration began. We will apply the formulation of 'serious consideration' established in *Fischer v. Philadelphia Elec. Co.,* 96 F.3d 1533 (3d Cir.1996) ('*Fischer II*'), and on the basis of that analysis we will reverse the district court's decision and enter judgment for defendants.") (internal citations omitted).

45. *Id.*

46. Kurz v. Phila. Elec. Co., 994 F.2d 136, 138 (3d Cir. 1993).

47. *Id.*

48. *Kurz II*, 96 F.3d at 1553 ("There is no conduct suggesting that PECo sought to profit at the expense of its employees, no showing of repeated misrepresentations over time, no suggestion that plaintiffs are particularly vulnerable.").

49. *Id.*

50. *See generally Kurz*, 994 F.2d at 139-40. For instance, the court distorts the analysis by ignoring the text of the statute 29 U.S.C. § 1113 and instead imposes its own Third Circuit-made "serious consideration test." Moreover, this concoction is spawned from caselaw not directly on point. *See id.* at 137 (alleging a violation of 9 U.S.C. § 1001 et seq.); *see also* Basic Inc. v. Levinson,

Benefits Counselor Jack McCartney, while others met with different benefits counselors.[51] Said counselors were not apprised of the change until it was announced.[52] Furthermore, there is a discrepancy in allegations made. First, the plaintiffs describe it as a "conspiracy of silence."[53] Subsequently, plaintiffs claim that defendant PECo made material misrepresentations.[54] The court's analysis is tormented, to say the least.

Firstly, the opinion posits that whether the counselors were telling the truth is irrelevant.[55] The statute is silent as to *mens rea*. This raises an interesting question, in a broader sense, regarding whether a *mens rea* is a requirement for fraud[56] or concealment under this statute. However, the court saves this for another day.

Secondly, if the counselors were relaying messages from their supervisor to the plaintiffs, it is not clear that they were committing fraud or concealment. Moreover, even if they were telling the truth, it is even more perplexing how they could be found in violation of the statute. The Second Circuit's canon concurs.[57] If the Third Circuit wants to dissent, it may exercise its discretion. Notwithstanding, it needed to explain the elements. Instead, it bloviates without stating what constitutes the elements for either fraud or concealment.

Thirdly, the appellate court arrogated findings, which is the job of the district court. The Sixth Circuit has delivered a clear message on this point: "Any decision to overturn the district court's finding of facts and well-reasoned decision would cast this court in the role of judicial activists."[58] The opinion cites a previous case, *Fischer v. Philadelphia Electric Co.*,[59] as the conduit allowing for overturning the district court.[60] To exacerbate the matters, it is not a "fact" that certain "material misrepresentations" were made.[61] The court considers "the statements [were]

485 U.S. 224 (1988) (focusing on securities law (§ 10(b) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 881, as amended, 15 U.S.C. § 78a *et seq.,* and the Securities and Exchange Commission's Rule 10b-5, 17 CFR § 240.10b-5 (1987)).

51. *Kurz*, 994 F.2d at 138.

52. *Id.* ("The benefits counselors, however, knew nothing of the change until it was announced. Indeed, they had been instructed 'to give employees the facts as of [the time of the interview], and… not to speculate.'").

53. *Id.* ("As in *Fischer*, this policy of confidentiality, which plaintiffs describe as a 'conspiracy of silence,' extended even to PECo's benefits counselors, whose job it was to provide prospective retirees with information about retirement benefits.").

54. *Id.* at 139-40.

55. *Id.* at 139 ("It was thus irrelevant in *Fischer*, as it is here, that the responses PECo's benefits counselors gave to questions asked of them were truthful based on what the counselors themselves knew at the time. *Fischer* governs our approach in this case.").

56. *See infra* note 184 and accompanying text.

57. *See infra* note 154 and accompanying text.

58. Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409, 437 (6th Cir. 2021).

59. Fischer v. Phila. Elec. Co., 994 F.2d 130 (3d Cir. 1993).

60. *Kurz*, 994 F.2d at 139 ("As in *Fischer*, the district court here granted PECo's motion for summary judgment because it found that plaintiffs 'failed to produce any evidence' that PECo made affirmative material misrepresentations. For substantially the same reasons we gave in *Fischer*, we disagree.").

61. *Fischer*, 994 F.2d at 136.

allegedly made by PECo."[62] And the court fails to articulate what standard of review it employed when it was scrutinizing the district court's factfinding.

Fourthly, the court waffles between "silence"[63] and "material misrepresentations."[64] With regard to the latter, the court cites an interaction in which Counselor McCartney allegedly stated that no changes to the Plan were on the horizon.[65] Nowhere in the record does it claim that McCartney knew of a change. To reiterate, if he was telling the truth at the time, that is a very strong argument that there is no fraud or concealment. Withal, upon a sur petition for rehearing, three judges voted yay.[66]

3. United States Court of Appeals for the Seventh Circuit

In *Radiology Center, SC v. Stifel, Nicolaus & Co.*,[67] the court's analysis is frightening, as it completely misinterprets the purported canon (*noscitur a sociis*) it is utilizing and then openly confesses as such in its conclusion.[68] The court alleges that "fraud" is the same as "fraudulent concealment"[69]—a recurring theme for courts on this side of the split.[70] In its opinion, or rather, its campaign ad,[71] it neglects to broach the elements. The elements of a claim are, of course, the constituent parts of a legal definition—which must prove to sustain its case. Moreover, the court completely, and perhaps purposefully, offers up a pathetic

62. *Id.* at 134 (emphasis added).

63. *Kurz*, 96 F.2d at 138.

64. *Id.* at 139-40.

65. *Id.* at 139.

66. *Id.* at 140.

67. Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216 (7th Cir. 1990).

68. *Id.* at 1221 ("Of course, it is possible that Congress intended § 1113 to single out fraud claims for a six-year limitations period. As the division of judicial opinion on the interpretation of § 1113 suggests, however, it did not express this intent unambiguously. Resort to the legislative history of § 1113 also provides no clear answer. A precursor to § 1113 at first seems to support plaintiffs' reading, establishing a longer limitations period for fraud claims and claims where concealment is alleged. *See* S. 4, 93d Cong., 1st Sess. § 11 (draft, Jan. 4, 1973), *reprinted*, 1 Legislative History of the Employee Retirement and Income Security Act of 1974 at 315 (1976) ('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.').").

69. *Id.* at 1220 ("Moreover, this interpretation of 'fraud or concealment' harmonizes the phrase's meaning with the widely known doctrine of fraud*ulent* concealment, which tolls the running of a statute of limitations when the defendant has prevented the plaintiff's timely discovery of the wrong she has suffered.").

70. *See supra* notes 2-7 and accompanying text.

71. *See* Richard A. Posner, *Supreme Court Year in Review: Justice Scalia Offers No Evidence to Back Up His Claims About Illegal Immigration,* SLATE (June 27, 2012, 10:21 AM) https://slate.com/news-and-politics/2012/06/supreme-court-year-in-review-justice-scalia-offers-no-evidence-to-back-up-his-claims-about-illegal-immigration.html ("These are fighting words. The nation is in the midst of a hard-fought presidential election campaign; the outcome is in doubt. Illegal immigration is a campaign issue. It wouldn't surprise me if Justice Scalia's opinion were quoted in campaign ads.").

attempt at a "plain meaning" interpretation.[72] It likely did so to justify reaching its predetermined outcome. In addition to the erroneous statutory analysis, there may have been an argument that could have dismissed the ERISA claims before it decided the statute of limitations question. Notwithstanding, there are no allegations the defendant committed fraud or concealment.

In May 1981, plaintiff Enrique Schwarz, president of Radiology Center, executed a brokerage agreement with Robert Shields, a stockbroker and vice president of defendant Stifel, Nicolaus & Co. ("Stifel").[73] As part of the brokerage agreement, Shields was instructed to invest in Radiology Center's Profit-Sharing Plan.[74] In December 1981, the parties executed a second agreement regarding Schwarz's Keogh Plan.[75] This time, however, Shields was directed to invest in low-risk securities, though he had the authority of buy and sell at his discretion.[76]

Shields provided financial statements detailing trades made for both accounts.[77] While the 1981-82 annual report was profitable, the 1982-83 report detailed substantial losses.[78] In September 1983, Schwarz directed Shields to purchase stock of particular securities.[79] Two weeks later, Shields sold the aforementioned stocks.[80] Schwarz was adamant this heavily influenced his opinion of Shields.[81]

In December 1986, Shields brought a lawsuit alleging Shields and Stifel had violated ERISA § 409(a), 29 U.S.C. § 1109(a),[82] as well as federal securities laws and state laws.[83] For this discussion, we are focusing solely on the ERISA allegations. It is not clear from the allegations that a violation occurred. From the record, the trades were disclosed.[84] At the very least, it is not a *prima facie* case.

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72. *Radiology Ctr.*, 919 F.2d at 1221. Instead of analyzing the text of the statute, the court disregards this and looks to legislative history; *see supra* note 68; *see also* United States v. Ron Pair Enters., Inc., 489 US 235, 241 (1989) ("The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself.") (citing Landreth Timber Co. v. Landreth, 471 U. S. 681, 685 (1985)).

73. *Radiology Ctr.*, 919 F.2d at 1217.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1218.

83. *Id.* at 1217 ("He sent Schwarz confirmation slips after each trade, showing the security traded, the number of shares purchased or sold, and the price per share. For trades executed on behalf of his Keogh Plan, Schwarz returned signed copies of the confirmation slips to Stifel. In addition to the confirmation slips, Shields received monthly account statements that summarized activity for the preceding month, showing securities purchased or sold, the number of shares of each issuer that were purchased or sold, and the amount charged or credited to the relevant account because of each purchase or sale. Schwarz also received annual statements in July of 1982 and 1983 summarizing account activity in the preceding twelve-month period ending on June 30. These annual summaries showed the value of funds remaining in each account at the end of the fiscal year.").

84. *Id.*

Shields disclosed the trades to his client.[85] Hence, "concealment" is out. There is no allegation he committed "fraud or concealment." To reiterate, discussion regarding whether the claims were "low-risk" or if there were violations of the other laws is beyond the scope of this Article. Hence, it may have been sagacious for defendant's counsel to make a motion for summary judgment specifically on the ERISA claim *before* doing so for statute of limitations.[86] To clarify, there is no indication in the record said motion was made. However, it may have provided the court with an offramp from deciding the statute of limitations question.

The panel's façade of a plain meaning interpretation is effortlessly perforated. It begins by confessing that Congressional intent may have been to limit fraud claims to a six-year period, but then alleges it is done ambiguously.[87] Rather than focus on the text—i.e., the plain meaning interpretation—the court delves into legislative history.[88] The court does not explain what language is ambiguous, let alone why it is ambiguous. This is circular reasoning[89]: "[T]he statute is ambiguous, so we need to go beyond the plain text. We went beyond the plain text because the statute is ambiguous." This flawed reasoning served the purpose of furthering the court's agenda. In other words, it demonstrates judicial activism.

4. United States Court of Appeals for the Eighth Circuit

The Eighth Circuit incorrectly ruled that fraudulent concealment is incorporated under 29 U.S.C. § 1113.[90] In *Schaefer v. Arkansas Medical Society*, the Eighth Circuit affirmed the district court's ruling that ERISA's three-year statute of limitations barred claims of fiduciary duty.[91] As an aside, unlike the Third Circuit,

85. *Id.* at 1217-18.

86. *Id.* at 1218.

87. *Id.* at 1221.

88. *Id.* ("*Resort to the legislative history* of § 1113 also provides no clear answer. A precursor to § 1113 at first seems to support plaintiffs' reading, establishing a longer limitations period for fraud claims and claims where concealment is alleged. *See* S. 4, 93d Cong., 1st Sess. § 11 (draft, Jan. 4, 1973), *reprinted*, 1 Legislative History of the Employee Retirement and Income Security Act of 1974 at 315 (1976) ('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.').") (emphasis added).

89. DOUGLAS N. WALTON, PLAUSIBLE ARGUMENT IN EVERYDAY CONVERSATION 206 (1992) ("Wellington is in New Zealand. Therefore, Wellington is in New Zealand.").

90. Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988) ("Furthermore, 29 U.S.C. § 1113 incorporates 'the fraudulent concealment doctrine,' which requires 'that plaintiffs show (1) that defendants engaged in a course of conduct designed to conceal evidence of their alleged wrongdoing and that (2) they were not on actual or constructive notice of 2 that evidence, despite (3) their exercise of due diligence.' *See Foltz v. U.S. News & World Report, Inc.*, 663 F. Supp. 1494, 1537 & n.66 (D.D.C. 1987); *see also* Hobson v. Wilson, 737 F.2d 1, 33-34 & nn.102-03 (D.C. Cir. 1984). Hence, the AMS and the Trustees needed to show that, despite their exercise of due diligence or care, they were not on notice of Schaefer's breach of duty. *See Walsh v. Ingersoll-Rand Co.*, 656 F.2d 367, 369 n.3 (8th Cir. 1981).").

91. *Id.* at 1493.

the Eighth Circuit did not engage in factfinding.[92] Plaintiff, Paul C. Schaefer, a retired executive vice president of the Arkansas Medical Society ("AMS"), sued to recover value of an annual cost-of-living adjustment ("COLA") to his pension benefits.[93] AMS and the Trustees of the Arkansas Medical Society Pension Trust ("Trustees") counterclaimed, claiming he breached his fiduciary duty.[94] Schaefer served as a trustee of the AMS Pension Plan.[95] "The board of trustees, which administered the Plan, consisted of Schaefer and four physicians."[96]

In 1975, Schaefer made a recommendation to the AMS Executive Committee that the Plan be amended to include an annual COLA.[97] There was no due diligence performed on the viability of the COLA provision or the fringe benefits prior to Schaefer's lobbying.[98] Nevertheless, the council approved.[99] Unbeknownst to them, thereafter Shaefer hired two consultants who voiced concerns about his recommendations.[100] One was doubtful AMS could afford the COLA.[101] Additionally, he pondered the legality of the fringe benefits provision.[102] The other consultant also alluded to concerns over COLA, noting it would be "an expensive addition to the plan."[103]

The Eighth Circuit's analysis is inconsistent with the plain meaning of the statute. As noted *supra*, it alleges 29 U.S.C. § 1113 "incorporates the fraudulent concealment doctrine,"[104] yet it eschews providing a canon of construction.[105] Moreover, the court does discern that AMS and the Trustees did not pursue particulars.[106] Therefore, according to the court, this should be categorized as a failure to disclose rather than concealment.[107]

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92. *Id.* at 1490 ("It is basic that, on appellate review, the findings of fact of a district court, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous…. A finding of fact may be said to be clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Since the function of an appellate court is not to decide factual issues de novo, findings of fact cannot be reversed merely because the appellate court would have made different factual findings.") (internal quotations and citations omitted).

93. *Id.* at 1488.

94. *Id.*

95. *Id.* at 1489.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1491.

105. Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 FLA. A&M U. L. REV. 1, 1 (2017) ("Courts engage in judicial activism when they interpret laws without regards to a canon of construction.").

106. *Schaefer*, 853 F.2d at 1491 ("In this case the record leaves no doubt that the AMS and the Trustees failed to investigate the merits of the proposals made by Schaefer to determine whether they were in the best interests of the Plan.").

107. *Id.* ("It is evident from the record that Schaefer's failure to investigate adequately and relay warnings about the feasibility and legality of the COLA and fringe benefits provisions does not rise

This case is an excellent illustration of why an active step should not be required for concealment. This set of circumstances encapsulates how untroubling it may be for fiduciaries to circumvent Section 1113 by nondisclosure. Granted, in this instance, both the AMS Executive Committee and the Trustees should have delved into details. But they neglected to do so. This situation is not an outlier. This momentous issue deserves profound attention and an adequate remedy.

5. United States Court of Appeals for the Ninth Circuit

In *Barker v. American Mobil Power Corp.*,[108] the Ninth Circuit held the "fraud or concealment" standard does not apply to breach of fiduciary duty claims based on a fraud theory, but applies only when a fiduciary conceals the alleged breach.[109] Much like the Seventh Circuit,[110] there is nothing in the record suggesting the defendants committed fraud.[111] Again, in this case, it would have been more favorable to file a motion for summary judgment.[112]

It is not clear from the allegations that the defendants, William Bro and Douglass Smith, committed fraud.[113] In *Barker*, a company named Spartan Associates created the Spartan Service Associates Profit Sharing and Retirement Plan and

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to the level of active concealment, which is more than merely a failure to disclose.") (internal citation omitted).

108. Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1401 (9th Cir. 1995) ("Likewise, the plaintiffs have failed to produce any evidence of affirmative steps by Bro or Smith to conceal any alleged fiduciary breaches. As a result, the plaintiffs cannot rely on the 'fraud or concealment' exception to the statute of limitations.") (citing Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990)).

109. *Id.* at 1401-02.

110. *See supra* Section II.A.3.

111. *Barker*, 64 F.3d at 1401 ("Neither the plaintiffs' complaint nor the memorandum in support of their motion for summary judgment sets forth specific facts to establish that Bro and Smith committed fraud. The plaintiffs point to the fact that in the early 1970's, funds were transferred from the Plan to Spartan's parent company and replaced with promissory notes executed by the parent company. This 'loan' of Plan funds apparently was never repaid. While these facts may allege a mismanagement of Plan funds and therefore a breach of fiduciary duty, they do not establish fraud. *There is no indication that Bro and Smith themselves made knowingly false misrepresentations with the intent to defraud the plaintiffs. The plaintiffs simply have not presented any specific evidence of fraudulent activity by Bro and Smith*.") (emphasis added).

112. *Id.*; Because the record was not developed favorably for the plaintiffs, the defendants should have moved to expedite the proceeding. *See* Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L. J. 689, 691, 699 (2012) ("Summary judgment produces valuable fact clarification well before a plenary trial, a significant efficiency. The nonmovant is essentially forced to identify facts in the record that demonstrate issues of fact that need to be tried. This 'put up or shut up' feature forces the nonmovant and movant to advance cogent facts that either support or oppose summary judgment. The Rule 56 motion essentially mandates the pretrial production of facts by the party assigned the burden of persuasion at trial." … "Heavy reliance on summary judgment's 'killer motion' character has led some judges and commentators to question the fairness of Rule 56. Summary judgment is assumed by these critics to be too common and frequent….").

113. *Barker*, 64 F.3d at 1401 ("We find, however, that the plaintiffs' claim does not fall within the 'fraud or concealment' exception to the statute of limitations, because the plaintiffs have not produced specific evidence of fraudulent activity or concealment on the part of Bro and Smith.").

Trust (the "Plan") for its employees.[114] Bro and Smith were appointed Trustees of the Plan.[115] The complaint stems from a "loan" that was never repaid.[116] Funds were transferred from the Plan to Spartan's parent company in exchange for promissory notes.[117] If the loan was not repaid, the plaintiffs would be better suited to bring a an action against the parent company for the unpaid loan.

Because the plaintiffs ultimately argued subsequent fiduciaries covered up, or "concealed," the fraud of previous fiduciaries, the court held the fraudulent concealment doctrine does not apply.[118] In *dicta*, which is binding in the Ninth Circuit,[119] the court not-so-subtly implies that an active step is needed for fraud or concealment under the statute due to the fraudulent concealment doctrine.[120]

6. United States Court of Appeals for the D.C. Circuit

In *Larson v. Northrop Corp.*,[121] the verisimilitude of the D.C. Circuit Court of Appeals' fraud or concealment analysis is fallacious. Firstly, the court issues an advisory opinion, which it is "constitutionally forbidden to render."[122] The *Larson* court affirmed Northrop Corp.'s cross-motion for summary judgment due to the

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114. *Id.* at 1399.

115. *Id.*

116. *Id.* at 1401.

117. *Id.*

118. *Id.* at 1401-02 ("The plaintiffs argue that the statute of limitations may nonetheless be tolled against Bro and Smith by the fraud or concealment of successor fiduciaries. The plaintiffs argue that Ayres and other subsequent fiduciaries concealed the prior breaches that were allegedly committed by Bro and Smith while they were Trustees of the Plan, and that therefore, the 'fraud or concealment' exception is applicable.").

119. Li v. Holder, 738 F.3d 1160, 1165 n.2 (9th Cir. 2013) ("Well-reasoned dicta is the law of the circuit. *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc)."); Ford v. Peery, 9 F.4th 1086, 1087 n.2 (9th Cir. 2021) (Vandyke, J., dissenting) ("Though we have referred to this rule as the '[w]ell-reasoned dicta' rule, *see Li v. Holder*, 738 F.3d 1160, 1165 n.2 (9th Cir. 2013), the line between well-reasoned dicta and not-well-reasoned dicta seems to lie largely in the eye of the beholder. I therefore refer to this rule as the 'binding dicta' rule.").

120. *Barker*, 64. F.3d at 1402 ("Substantial authority indicates, however, that the exception applies only when the defendant himself has taken steps to hide his breach of fiduciary duty. Other circuits have held that the 'fraud or concealment' exception in the statute incorporates the common law doctrine of fraudulent concealment. Under that doctrine, a statute of limitations may be tolled only if the plaintiff establishes affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. [T]he doctrine of fraudulent concealment tolls the statute of limitations only as to those defendants who committed the concealment. Plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants.") (internal quotations and citations omitted).

121. Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994).

122. Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 90-91 (D.C. Cir. 1986) ("The doctrine of mootness is a logical corollary of the case or controversy requirement of Article III of the Constitution. A federal court is constitutionally forbidden to render advisory opinions or to decide questions that cannot affect the rights of litigants in the case before them.") (internal quotations and citations omitted).

statute of limitations.[123] Due to this ruling, the court should have refrained from commenting about its viewpoint on the question presented.

Secondly, regarding the fraudulent concealment doctrine, the court did not engage in independent analysis. Rather, it cited a previous Circuit opinion—*Foltz v. U.S. News & World Report, Inc.*[124] In *Foltz*, the court's opinion focused on ERISA § 502.[125] Section 1113 is mentioned twice—in two footnotes.[126] "Some judges have held that footnotes are not binding."[127] "[O]ften, the opinion writer will have placed material in a footnote because he was not quite sure it was right and yet the material seemed in some way necessary to complete his argument or at least supportive of it."[128] Discussion of the fraudulent concealment doctrine is in the context of ERISA § 502.[129] When *Foltz* came back before the court for a second time,[130] Section 1113 is not mentioned once in the opinion. It is irresponsible to rely on *Foltz* without conducting the de rigueur research.

Thirdly, aggravating the matter, the *Larson* court went beyond "active" concealment under the fraudulent concealment doctrine. "[*A*]*ctive concealment*—it must undertake some 'trick or contrivance' to 'exclude suspicion and prevent inquiry.' Such concealment must rise to something 'more than merely a failure to disclose.'"[131] While this Article disagrees with the latter, the "trick or contrivance" statement is alarming. Trick qualifies contrivance.[132] SCOTUS held this when

123. *Larson*, 21 F.3d at 1166.

124. Foltz v. U.S. News World Rep., Inc., 865 F.2d 364 (D.C. Cir. 1989); Foltz v. U.S. News World Rep., 663 F. Supp. 1494 (D.D.C. 1987).

125. *Foltz*, 663 F. Supp. at 1537 ("The first consists of those claims premised upon intentional or fraudulent conduct and includes those for breach of the fiduciary duty of loyalty under ERISA § 502(a)(3), securities and common-law fraud, common-law breach of fiduciary duty, and unjust enrichment. The second comprises claims based upon arbitrary, capricious, negligent, or imprudent conduct and embraces those for breach of the fiduciary duty of care under ERISA § 502(a)(3), for benefits due under ERISA § 502(a)(1)(B), and for negligence and negligent misrepresentation.").

126. *Id.* at 1539 nn.66, 69.

127. Max Birmingham, *Still Strictly for the Birds II: Reviewing the Southern District of New York's Decision to Vacate an Agency Opinion*, 19 ANIMAL & NAT. RES. L. REV. 43, 80 (2023) (citing Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 649 (1985)).

128. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 352 (1996).

129. *Foltz*, 663 F. Supp. at 1537 ("The statute of limitations as to claims in the first category may be tolled, if at all, under the doctrine of fraudulent concealment…. The statute may be tolled as to claims in the second category either under the fraudulent concealment doctrine or under the discovery rule. The latter doctrine applies in certain cases in which a plaintiff who has relied upon the advice or expertise of another—generally, a professional—and who is injured thereby is not in a position to discover the injury within the limitations period. In such cases, the plaintiff's cause of action will not be said to accrue until he discovers, or with reasonable diligence could discover, the injury.").

130. *See* Foltz v. U.S. News World Rep., Inc., 865 F.2d 364 (D.C. Cir. 1989).

131. Larson v. Northrop Corp., 21 F.3d 1164, 1174 (D.C. Cir. 1994) (internal quotation marks omitted).

132. Lozman v. Riviera Beach, 568 U.S. 115, 115 (2013) (syllabus) ("The District Court found the floating home to be a 'vessel' under the Rules of Construction Act, which defines a 'vessel' as including 'every description of *watercraft* or other artificial *contrivance* used, or capable of being used, as a means of transportation on water,' 1 U.S.C. §3, concluded that admiralty jurisdiction was proper, and awarded the City dockage fees and nominal judges.") (emphasis added).

reviewing the Rules Construction Act, noting watercraft qualified contrivance.[133] The High Court has not defined "trick."[134] As most other courts have (much like "fraud"),[135] the Court has used "trick" when defining "defraud"—which means "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching."[136] When applying a *noscitur a sociis* ("a word is known by the company it keeps")[137] interpretation, we arrive at the conclusion that a so-called "active" action is not part and parcel to "trick." Black's Law Dictionary defines "deceit" as "[t]he act of intentionally giving a *false impression*."[138] It defines "chicanery" as "[t]rickery; deception."[139] And "overreaching" is defined as "1. The act or an instance of taking unfair commercial advantage of another, esp. by fraudulent means. 2. The act or instance of defeating one's own purpose by going too far."[140] Please note that under ERISA, fiduciaries have a duty to disclose when a reasonable person may be under a false impression.[141]

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133. *Id.* at 116 (syllabus) ("This view of the statute is consistent with its text, precedent, and relevant purposes. The statute's language, read naturally, lends itself to that interpretation: The term 'contrivance' refers to something 'employed in contriving to effect a purpose'; 'craft' explains that purpose as 'water carriage and transport'; the addition of 'water' to 'craft' emphasizes the point; and the words, 'used, or capable of being used, as a means of transportation on water,' drive the point home.") (citations omitted).

134. Leaving key terms open-ended may have deleterious effects. "Trick" has a sexual definition, according to some courts. State v. Cavness, 381 P.2d 685, 686 n.2 (Haw. 1963) ("One definition of 'trick' given in Webster's Third New International Dictionary is: 'A professional engagement of a prostitute.' See also People v. Vetri, 178 Cal. App. 2d 385, 388."); People v. Vetri, 2 Cal. Rptr. 795, 797 (Cal. Ct. App. 1960) ("In the conversation Lee said she had 'turned a trick' for $22.50 in the hotel with another man. Prostitutes use the word 'trick' to mean 'a man with whom they engage in an act of sexual intercourse.'"). While this illustrates a meaning that is pertinent to our discourse, it underscores how undefined terms are potentially susceptible to various definitions; *see* Webster's Third New International Dictionary 317-18 (2002) (discussing the various definitions of "call").

135. Fulghum v. Embarq Corp., 785 F.3d 395, 415 ("ERISA does not define the terms 'fraud' or 'concealment' and, therefore, our 'inquiry focuses on the ordinary meaning of the [term] at the time Congress enacted' the statute. *Nat'l Credit Union Admin. Bd.*, 764 F.3d at 1227.").

136. Carpenter v. United States, 484 U.S. 19, 27 (1987) (internal quotations omitted) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)); McNally v. United States, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt*, 265 U. S. at 188 (1924)).

137. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012); *see also* Birmingham, *supra* note 15, at 297 (discussing the *noscitur a sociis* canon of construction in the context of ERISA, specifically section 1083(j)(C)(ii)); Birmingham, *supra* note 105, at 16-18 (discussing this canon in the context of a whistleblower statute.).

138. *Deceit*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

139. *Chicanery*, BLACK'S LAW DICTIONARY (11th ed. 2019).

140. *Overreaching*, BLACK'S LAW DICTIONARY (11th ed. 2019).

141. Newby v. Enron Corp., 490 F. Supp. 2d 784, 794 (S.D. Tex. 2007) ("An affirmative duty to disclose may arise in four circumstances: … (4) when a person makes a partial disclosure and conveys a false impression.") (citations omitted); Donovan v. Bierwirth, 680 F.2d 263, 273 (2d Cir. 1982) ("The omission of this clause was important because it created the false impression, on the basis of which the trustees could well have acted, that LTV had a single pension fund which had unfunded liabilities in the considerable amount stated.").

B. Court That Has Not Squarely Addressed this Matter

1. United States Court of Appeals for the Second Circuit

The Second Circuit correctly held "fraud or concealment" does not absorb fraudulent concealment.[142] In *Caputo v. Pfizer, Inc.*, the court did not squarely address the "active concealment" argument.[143] In this case, though, nondisclosure was not at issue.[144] This case centered on a "golden handshake," (an incentive given to employees in exchange for their early retirement)[145] in which an employee was misled, at best, if not outright lied to.[146]

Interestingly, the court seemingly concurs regarding lying, as it offers rationale[147] which is subject to *reductio ad absurdum* (reduction to absurdity).[148] The Second Circuit waxes poetic that the plaintiffs, who were told there would not be a golden handshake, should have "suspected" one could be put on the table.[149] This strains credulity. Employees are not omnipresent. This is ridiculous burden-shifting and has zero textual basis. Much to their detriment, the plaintiffs relied on the employer's word, and they retired before the golden handshake was made available.[150] The court's explanation makes our case. In an astonishing lack of

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142. Caputo v. Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001) ("For a number of reasons, we decline to follow our sister circuits in fusing the phrase 'fraud or concealment' into the single term 'fraudulent concealment.'").

143. *Id.* at 196 n.3 (stating, "[i]ndeed, for purposes of this case, Pfizer's argument in favor of our sister circuits' limitation of the provision to cases of fraudulent concealment presents a distinction without a difference. The majority of circuits interpreting § 413 in this manner have concluded that affirmative misrepresentations of a material fact are self-concealing acts bringing the action within the 'fraud or concealment' provision.").

144. Fulghum v. Embarq Corp., 785 F.3d 395, 415 n.22 (10th Cir. 2015) (stating, "[e]ven under the approach taken by the Second Circuit, there remains the further question of whether fraudulent concealment encompasses both self-concealing ERISA violations or only overt acts taken subsequent to the alleged breach.").

145. Hudson v. Gen. Dynamics Corp., 118 F. Supp. 2d 226, 229 (D. Conn. 2000).

146. *Caputo*, 267 F.3d at 184 ("Plaintiffs are four senior citizens who worked for Pfizer for many decades. In the late 1980s when Pfizer made the decision to downsize, the plaintiffs were dissuaded from postponing their retirement. What they did not know was that generous severance packages would be announced in the months to come."); *id.* at 186 ("[P]laintiff, Paul B. Pebbles, a millwright in the Engineering Department at Groton, allegedly asked Schachner, Provencher and Nowack whether there was any chance of a golden handshake in the near future. The answer was always no. According to Pebbles, Schachner went so far as to say: 'Paul, you will never live long enough to see a golden handshake.' Pebbles retired, after 33 years of employment, on June 1, 1991.")

147. *Id.* at 193 ("Although the announcement should have (and did) give plaintiffs reason to *suspect* that Pfizer had lied to them, 'it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they sued].' *Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987).").

148. *See infra* Section VI, absurdity section.

149. *See supra* note 147 and accompanying text.

150. Caputo v. Pfizer, Inc., 89 F. Supp. 2d 237, 238 ("Plaintiffs, Anthony Caputo, Paul Pebbles, Duncan Robertson and David Cook, are former employees of defendant Pfizer at its Groton, Connecticut manufacturing facility. Between January and June, 1991, all of the plaintiffs voluntarily retired."); *id.* at 240 n.1 ("Plaintiffs' dates of retirement are: David Cook—January 1, 1991; Duncan Robertson—March 1, 1991; Anthony Caputo—April 1, 1991; and Paul Pebbles—June 1, 1991.").

awareness, it professes that offering the golden handshake in November 1991 is "not inherently suspect."[151] It then contradicts itself, writing, "Pfizer breached its fiduciary duty only if the responses to the plaintiffs' questions were *untruthful at the time they were made*, or if material information *known to Pfizer* was withheld when the plaintiffs inquired about their pension benefits."[152] If Pfizer or any fiduciary were to simply remain silent, then those harmed would be left without an adequate remedy at law. Although the court uses the term "withheld," it is qualified by a time component—i.e., at the time of questioning.[153] It is not plausible that Pfizer, a global conglomerate,[154] did not know it was going to offer a golden handshake as early as January 1, 1991, or as late as June 1, 1991, before it was put forward in November 1991.

Adding to the obstacles, *Caputo* was decided before *Twiqbal*.[155] The opinion already philosophized about how the plaintiffs could not plead with sufficient particularity.[156] If a fiduciary is allowed to remain silent, as other circuits have held, or be allowed to make misrepresentations or withhold material information allegedly "at the time," employers can easily game the system. They can simply keep employee-facing fiduciaries in the dark about all plans. This way, whatever is said will not be "untruthful" or "withheld" at the time of the disclosure. Or, as other circuits have ruled, it may be even better to stay silent (i.e., nondisclosure). Policies, plans, and procedures should just be implemented. There will undoubtedly be deleterious consequences. ERISA was propagated to protect employees.[157] Somewhere along the way, the statute's intent, meaning, and purpose got lost at sea.

III. STANDING

With the Supreme Court's promulgation of the plausible pleading standard, introduced through *Bell Atlantic Corp. v. Twombly*[158] in 2007 and *Ashcroft v. Iqbal*[159] in 2009, (collectively, referred to as "*Twiqbal*"),[160] this could close the

151. *Caputo*, 267 F.3d at 193.

152. *Id.* at 194.

153. *Id.* at 193 ("We have held that a breach of fiduciary duty occurs when an employer makes 'guarantees regarding future benefits that *misrepresent present facts*.'") (internal quotations and citations omitted).

154. *Id.* at 194 ("If Pfizer's prior representations to the plaintiffs were true and complete at the time they were made, the announcement of the 1991 VSO certainly would not have given the plaintiffs 'actual knowledge' of a breach or violation. Rather, Pfizer breached its fiduciary duty only if the responses to the plaintiffs' questions were *untruthful at the time they were made*, or if material information *known to Pfizer* was withheld when the plaintiffs inquired about their pension benefits.").

155. *See infra* Section III.

156. *Caputo*, 267 F.3d at 191 ("B. Leave to Amend the Complaint"); *id.* ("The district court, therefore, correctly held that the plaintiffs failed to plead fraud with the requisite particularity.").

157. *See supra* notes 13, 14 and accompanying text.

158. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

159. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

160. Brian A. Garner, *New Legalese: You May Have Heard a Deepfake, How About 'Twiqabal'?*, AM. BAR ASS'N J. (Apr. 1, 2024, 1:40 AM), https://www.abajournal.com/magazine/article/new-lega

courthouse doors to potential claims if a person could simply remain silent and not be in violation of Section 1113. *Iqbal* has had a momentous effect, being cited in 85,000 federal court decisions within the first six years of its publication.[161] It is one of the top five most cited Supreme Court cases.[162] *The New York Times* once reckoned it as "the most consequential ruling in Chief Justice John G. Roberts Jr.'s… tenure."[163]

In *Twombly*, the Court adopted a more restrictive plausibility pleading, which abrogated the previous standard of notice pleading, affirmed in *Conley v. Gibson*.[164] The standard for notice pleading is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[165] The Court then promulgated "plausibility pleading" when it handed down Twombly, necessitating plaintiffs to allege "enough facts to state a claim to relief that is plausible on its face."[166] This flies in the face[167] of the "liberal ethos" of the Federal Rules of Civil Procedure.[168] During the 1980s, federal courts started to disfavor motions for summary judgment due to concerns over burdens of

lese-you-may-have-heard-a-deepfake-but-what-about-twiqbal; *see also* Leslie A. Gordon, *For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22,* AM. BAR ASS'N J. (Jan. 1, 2011, 8:50 AM), https://www.abajournal.com/magazine/article/for_federal_plaintiffs_twombly_and_iqbal_still_present_a_catch-22#google_vignette; Debra C. Weiss, *Dissatisfied Investors, Employees Stymied by Twombly, Iqbal*, AM. BAR ASS'N J. (Sept. 10, 2010, 10:30 AM), https://www.abajournal.com/news/article/corporate_defendants_benefit_from_rulings_raising_pleading_requirements#google_vignette; A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013).

161. Adam Liptak, *Supreme Court Ruling Altered Civil Suits, to Detriment of Individuals*, N.Y. TIMES (May 18, 2015), http://www.nytimes.com/2015/05/19/us/9-11-ruling-by-supreme-court-has-transformed-civil-lawsuits.html; *see also* Carl A. Schaffer, *Twiqbal's Impact on Federal District Courts in Ohio*, 43 U. TOL. L. REV. 199 (2011).

162. Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389-93 (2016).

163. *See* Liptak, *supra* note 161.

164. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

165. *Id.*

166. Bell Atl. Corp. v. Twombly, 550 US 544, 570 (2007).

167. *Conley*, 355 U.S. at 47 ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.").

168. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) ("Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

proofs,[169]as well as confusion and indifference to Rule 56.[170] It is noteworthy that many of the cases delineated hereto were decided before *Iqbal*.[171]

While the *Twiqbal* opinions do not elaborate as to the reasons for discarding notice pleading, perhaps it was too lenient and left defendants susceptible to having a nuisance settlement extracted.[172] The Court may have concluded notice pleading, which was "retired,"[173] is trivially easy to satisfy and has a particularly pernicious effects on American businesses. On the other hand, the effects are far reaching, and may have devastating consequences for litigants who, oftentimes, lack direct evidence at the outset. Therefore, their claims are vulnerable to a motion to dismiss because there is a lack of detail required to sufficiently plead to reach discovery. For proof, look no further than Judge Colleen McMahon describing the deluge of motions to dismiss in wake of *Twombly*.[174]

Regardless of the reasoning, the pendulum swung the other direction. As it pertains to the question presented herein, if a person may remain silent, this could prevent plaintiffs from having their day in court. In general, civil litigants often lack direct evidence of the defendant's acts or omissions at the outset. The defendant could cloak the breach, or simply stick to being surreptitious by failing to properly disclose. Consequently, their allegations are pregnable to either a motion to dismiss or a motion for summary judgment. This now puts courts in a precarious position. They must make judgment calls in the early stages of litigation as to whether the claim or claims are allowed to proceed.[175] Aside from this likely

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169. WILLIAM W. SCHWARZER ET AL., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS 6-88 (1991).

170. D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273 (2007) ("The term 'summary judgment' suggests a judicial process that is simple, abbreviated, and inexpensive. But the federal summary judgment process is none of those. Lawyers say it's complicated and that judges try to avoid it. Clients say it's expensive and protracted. Judges say it's tedious and time-consuming. The very name for the procedure is a near-oxymoron that creates confusion and frustrates expectations."); *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 626 (7th Cir. 2010) ("[When a motion to dismiss comes before the court, there is] a question of the meaning of a common law doctrine-namely the federal common law doctrine of pleading in complex cases, announced in *Twombly*.").

171. *See supra* notes 2-9 and accompanying text.

172. *See generally* Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html.

173. Ashcroft v. Iqbal, 556 U.S. 662, 670 ("The Court of Appeals considered *Twombly*'s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's standard for assessing the adequacy of pleadings.") (internal quotations and citation omitted).

174. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 852 (2008) ("*Twombly*'s seismic impact is apparent when one considers that in the first six months after the decision was handed down, it was cited in more than 2,000 district court opinions and 150 circuit court opinions.").

175. *See* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009) ("Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an

leading to forum shopping,[176] courts should not be tasked with making these kinds of decisions. Without the necessary specificities, a simple allegation of "harm" or "loss causation" will not suffice as it obviates the gatekeeping function in which SCOTUS has declared as the law of the land.

IV. STATUTORY INTERPRETATION

A. Plain Meaning

The great Justice Scalia brought textualism to the forefront.[177] He forever changed statutory interpretation and left an indelible mark on the judiciary.[178] As Justice Kagan stated, "we're all textualists now."[179] Textualism may be described as emphasizing the primacy of text and staying within the boundaries of statutes.

Statutory analysis begins with the plain meaning rule.[180] This means the judiciary is supposed to consider the ordinary meaning of words before it can look to another canon of construction.[181] The Fifth Circuit pointed out that "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."[182]

Courts traditionally look to general reference dictionaries to ascertain the common meaning of statutory language.[183] Black's Law Dictionary defines fraud as, "1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. 2. A reckless misrepresentation made without justified belief in its truth to induce another person to act."[184] It defines concealment as "1. *The act of… refraining from disclosure; esp., the injurious or intentional suppression or nondisclosure of facts that one is obliged to reveal; cover-up*. 2. The act of removing from sight or notice."[185] The definition

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ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.").

176. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *Forum Shopping*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The practice of choosing the most favorable jurisdiction or court in which a claim might be heard."); R.R. St. & Co. v. Transp. Ins., 656 F.3d 966, 981 (2011) (citing Black's Law Dictionary).

177. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:12 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&t=5s ("Justice Scalia has taught everybody how to do statutory interpretation differently.").

178. *Id.* at 8:28 ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

179. *Id.*

180. Moskal v. United States, 498 U.S. 103, 108 (1990).

181. United States v. Ron Pair Enter., 489 U.S. 235, 242 (1989) ("*The plain meaning of legislation should be conclusive*, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).") (emphasis added).

182. Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941).

183. Sullivan v. Stroop, 496 U.S. 478, 482-83 (1990).

184. *Fraud*, BLACK'S LAW DICTIONARY (10th ed. 2014).

185. *Concealment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

of fraudulent concealment is "[t]he affirmative suppression or hiding, with the intent to deceive or defraud, of a material fact or circumstance that one is legally (or, sometimes, morally) bound to reveal."[186] Moreover, Merriam Webster's Dictionary defines concealment as "(1) To prevent disclosure or recognition of" and "(2) To place out of sight."[187] Cambridge Dictionary says it means "[t]he act of hiding something."[188] Black's Law Dictionary is the premier source[189] and usually the first cited by courts.[190] A law review article centering on the American Disabilities Act exulted that "Black's Law Dictionary is considered to be the gold standard for law, but the Fifth Circuit blatantly avoided using it when defining the pertinent phrase components."[191] Here again, we see courts alleging "plain language" but not disregarding Black's Law Dictionary, or in some cases not exploiting other dictionaries or definitions at all.[192]

"Fraudulent concealment" is a legal doctrine that is not present in the statute. Application of traditional tools of statutory construction yields an easy answer: the courts have misinterpreted 29 U.S.C. § 1113 and it needs to be remedied immediately. Under the triumph of textualism, only the written word is the law.

The text of the law is the law. To reiterate, the language at issue under 29 U.S.C. § 1113 is "fraud *or* concealment." It is *not* "fraudulent concealment." None of the courts[193] scrutinized hereunder justify discarding the plain meaning of the statutory text.

The plain language of "fraud or concealment" reflects a congressional policy choice, and it does not extend to "fraudulent concealment." To reiterate, statutory interpretation begins with the text and its "plain meaning."[194] As the Supreme

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186. *Fraudulent Concealment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

187. *Concealment,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/concealment (last visited Oct. 10, 2024).

188. *Concealment,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/concealment (last visited Oct. 10, 2024).

189. *Contra* Pac. Indem. Co. v. Interstate Fire & Cas. Co., 488 A.2d 486, 488 (Md. 1985) ("In so doing, we accord words their ordinary and accepted meanings. The test is what meaning a reasonably prudent layperson would attach to the term. This Court has consulted *Webster's Dictionary*, *Random House Dictionary*, or, less often, *Black's Law Dictionary*.") (citations omitted).

190. *See generally* Roy M. Mersky et al., *The Dictionary and the Man: Garner's Black's Law Dictionary*, 63 WASH. & LEE L. REV. 719, 730 (2006) ("But the relevance of dictionaries in general, and of *Black's* in particular, to modem jurisprudence is best illustrated by the attention given to those works by American courts, most notably the United States Supreme Court."); *see also* Virginia v. Black, 538 U.S. 343, 369 (2003) (citing Black's Law Dictionary, and no other dictionary is mentioned in the opinion); Kawaauhau v. Geiger, 523 U.S. 57, 61 n.3 (1998) (citing Black's Law Dictionary, and no other dictionary is mentioned in the opinion); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (citing Black's Law Dictionary, and no other dictionary is mentioned in the opinion); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 n.16 (1983) (citing Black's Law Dictionary, and no other dictionary is mentioned in the opinion).

191. Max Birmingham, *Where the Sidewalk Ends: Are Sidewalks, Curbs, Parking Lots, and Other Infrastructure "Services, Programs, or Activities" Under Title II of the American Disabilities Act?*, 48 W. ST. U. L. REV. 1, 9 (2021).

192. *See* Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 956 n.3 ("The word 'call' has several plain and ordinary meanings. *See generally* Webster's Third New Int'l Dictionary 317-18 (2002).").

193. *See supra* Section II.

194. Babb v. Wilkie, 589 U.S. 399, 404 (2020).

Court has "stated time and again… courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[195] Sensitive policy questions, such as extending federal laws for broader protection of ERISA participants, are for the legislative branch, not the courts. When the courts usurp Congress's policymaking authority, they both circumvent constitutional strictures designed to protect the separation of powers interests and prematurely halt legislative efforts.

B. Meaningful Variation

The word "or" appears in the statute eight total times, six times outside of the exception. Incorporation of the fraudulent concealment doctrine, as these courts have alleged, also violates the meaningful-variation canon[196] because it is giving "or" a different meaning.

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (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 latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> *except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation*.[197]

In no other instance does the caselaw suggest the courts omitted "or." If they did, it would lead to ambiguous language—"six years after (A) the date of the last action which constituted a part of the breach [] violation, [] (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach [] violation." The term "breach violation" is susceptible to the rule of lenity. Black's Law Dictionary defines breach as "[a] violation or infraction of a law [or]

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195. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

196. Sw. Airlines Co. v. Saxon, 596 U.S. 450, 457-58 ("Context confirms this reading. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), we considered whether § 1 exempts all employment contracts or only those contracts involving 'transportation workers.' *Id.*, at 109, 121 S.Ct. 1302. In concluding that § 1 exempts only transportation-worker contracts, we relied on two well-settled canons of statutory interpretation. First, we applied the meaningful-variation canon. See, *e.g.*, A. Scalia & B. Garner, Reading Law 170 (2012) ('[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea'). We observed that Congress used 'more open-ended formulations' like 'affecting' or 'involving' commerce to signal 'congressional intent to regulate to the outer limits of authority under the Commerce Clause.' *Circuit City*, 532 U.S. at 115-116, 118, 121 S.Ct. 1302. By contrast, Congress used a 'narrower' phrase—'engaged in commerce'—when it wanted to regulate short of those limits. *Id.*, at 118, 121 S.Ct. 1302.") Please note that Reading Law describes it as the "Presumption of Consistent Usage."

197. 29 U.S.C. § 1113 (2024) (emphasis added).

obligation."[198] Black's Law Dictionary defines violation as: "1. An infraction or breach of the law; a transgression. 2. The act of breaking or dishonoring the law… 3. Rape; ravishment. 4. Under the Model Penal Code, a public-welfare offense. In this sense, a violation is not a crime. See Model Pen Code § 1.04(5)."[199] Discarding the last three definitions of violation, there is an argument for incongruency. Violation pertains to "law or *obligation*," whereas violation concentrates on "infraction or breach of the *law*." Combining these two terms into one phrase, it may be argued, eliminates obligation since it is not present in both. Therefore, a cause of action may only be brought under this situation. To boot, it could even be advanced that such a "breach violation" must be alleged to occur regarding another law, as claiming it trespasses on ERISA is insufficient since the statute at play discusses obligations, namely those of the fiduciary kind. Going further, this "breach violation" now reads to have a sweep beyond the scope of 29 U.S.C. § 1113, as it is attempting to reach possible actions outside of a fiduciary's duties into a cause of action. Whatever the policy merits, reading "or" to mean "or" best respects due process, Congress's legislative choices, and the separation of powers. It is not the court's role to rescue Congress from its policy choices as expressed in the text of enacted legislation. If Congress meant "fraudulent concealment" when it wrote "fraud or concealment," then Congress is free to amend the statute.

C. Rule Against Surplusage

The rule against surplusage is a staple of statutory interpretation.[200] However, the Court has given caution. The Court has often stressed "statutes should be read to avoid superfluity."[201] To expound, SCOTUS has emphasized that because statutory drafting involves some redundancy and surplusage, the canon against superfluity "is not an absolute rule."[202] With further guidance, SCOTUS has repeatedly held that "the canon against surplusage 'assists *only* where a competing interpretation gives effect to every clause and word of a statute.'"[203]

Here, the interpretation is clear: plain meaning. On the other hand, courts are not furnishing a canon of construction, but rather purporting that the common law displaces the wording at issue. The general principle of the surplusage canon is that courts assume Congress conveys meaning.[204] While Congress sometimes does

198. *Breach*, BLACK'S LAW DICTIONARY (10th ed. 2014).

199. *Violation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

200. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29 (Amy Gutmann ed., 1997) ("The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity.").

201. Marx v. Gen. Revenue Corp., 568 U.S. 371, 392 (2013); *see also* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

202. *Marx*, 568 U.S. at 385.

203. *Id.;* Microsoft Corp. v. I4I Ltd. P'ship, 564 U.S. 91, 106 (2011); *Duncan*, 533 U.S. at 174.

204. Conn. Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("Because giving effect to both §§ 1291 and 158(d) would not render one or the other wholly superfluous, we do not have to read §

use redundant language,[205] said canon obligates courts to give each word and clause of a statute operative effect.[206] Stated another way, courts should not interpret any statutory provision in a way that would render it, or another part of the statute, inoperative or redundant. As noted *supra*,[207] eliminating "or" offends the rule against surplusage because of the problematic reading it causes with the rest of the text.

The preference for avoidance does not prevail over other expressions of plain congressional intent.[208] In the instant action, "or" should be given a real and substantial effect.[209] Said effect posits "fraud" and "concealment" are independent and are to be understood according to their own respective ordinary, common, contemporary, natural, normal meaning, and dictionary definitions are helpful aids. Furthermore, the courts mentioned *supra,*[210] do not acknowledge that their own interpretations render the mentions of "or" superfluous.

The courts that metamorphosize "fraud *or* concealment" into "fraudulent concealment" run afoul of the surplusage canon. This isn't close. If any of the opinions discussed in this Article would have discussed that "or" is not disjunctive, but rather means "and" to be conjunctive, or that "fraud or concealment" is redundant, then we would be having a different conversation. The errors in the courts' construction of the 29 U.S.C. § 1113 run deeper than the flaw in its understanding of the canon against superfluity. Even by the courts' own accounts, their respective readings do not give effect to every word of the provision at issue. Thence, any reliance on the canon of avoiding surplusage is therefore unavailing.

V. PUBLIC POLICY

ERISA requires plan administrators to meet high standards of skill, prudence, and diligence in the sole interest of participants and beneficiaries.[211] To protect American workers, ERISA requires plan administrators to be fiduciaries who shall

158(d) as precluding courts of appeals, by negative implication, from exercising jurisdiction under § 1291 over district courts sitting in bankruptcy. We similarly do not have to read § 158(d) as precluding jurisdiction under § 1292. While courts should disfavor interpretations of statutes that render language superfluous, in this case that canon does not apply. In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

205. *See, e.g.*, McEvoy v. IEI Barge Servs. Inc., 622 F.3d 671, 677 (7th Cir. 2010) ("Congress may certainly choose to use both a belt and suspenders to achieve its objectives[.]").

206. *See Duncan*, 533 U.S. at 174.

207. *See supra* Section IV.B.

208. Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004).

209. *See* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

210. *See supra* Section II.

211. ERISA § 502(a)(1)(B).

discharge their duties in a manner prescribed in the preceding sentence.[212] It is a duty that has repeatedly been characterized by the courts as the "highest known to the law."[213] When these fiduciaries violate their duties, ERISA relies on lawsuits brought by plan participants to remedy those violations.

ERISA is steeped in the traditions of trust law. Congress built a robust statutory structure in which private litigants, along with the Secretary of Labor, can prosecute claims against plan fiduciaries arising from injuries to the plan caused by breaches of the fiduciary liability standards imposed under the statute.[214] The common law of trusts establishes the duties of loyalty, prudence, and diversification that fiduciaries owe. While ERISA's fiduciary duties are derived from the law of trusts, there are crucial differences between ERISA's fiduciary duties and the duties of common law trustees.[215] Namely, the standards under ERISA are higher and more stringent.[216] ERISA's protective focus and congressional purpose to provide ready access to remedies in federal courts are informative. Congress enacted ERISA to protect workers from the risks of loss of their retirement savings at the hands of those entrusted with administering their benefit plans.[217] The saga of this landmark statute began in 1963, when financially troubled automaker Studebaker defaulted on its pension obligations, robbing thousands of workers and retirees of the assets they had worked for.[218]

It seems counterintuitive that Congress would intend for a narrow reading of "concealment" while simultaneously creating an exception and extending the timeframe (six years *after* the date of discovery)[219] to bring a cause of action than for others (i.e., "six years after (A) the date of the last action which constituted a part of the breach or violation").[220] And further, SCOTUS has greenlit standing for cases in which plaintiffs assert there is a cognizance injury due to fiduciary misfeasance, malfeasance, and nonfeasance.[221] ERISA incorporates that funda-

212. 29 U.S.C. § 1104(a)(1); *see also* Leigh v. Engle, 727 F.2d 113, 122 (7th Cir. 1984) ("ERISA requires those who control employee benefit plans to act solely in the interests of the plan beneficiaries.").

213. Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

214. ERISA § 502(a).

215. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (Congress "determin[ed] that the common law of trusts did not offer completely satisfactory protection to beneficiaries.").

216. *See* Moench v. Robertson, 62 F.3d 553, 569 (3d Cir. 1995) ("… ERISA's stringent fiduciary duties on the other, the courts' task in interpreting the statute is to balance these concerns so that competent fiduciaries will not be afraid to serve, but without giving unscrupulous ones a license to steal.") (internal quotation marks and citation omitted).

217. *See* 29 U.S.C. § 1001(b) (1999) ("[T]he policy of this chapter [is] to protect… the interests of participants in employee benefit plans and their beneficiaries…."); *see also* James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001) (detailing how the demise of the Studebaker automotive plant in Indiana and the harm that befell its employees was a major catalyst for Congress enacting ERISA).

218. 29 U.S.C. § 1113(2).

219. *Id.* § 1113(1).

220. *Id.* § 1113.

221. *See* LaRue v. DeWolff, Boberg & Assoc., Inc., 552 U.S. 248, 255-56 (2008) ("For defined contribution plans, however, *fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary*

mental principle of trust law, assigning to beneficiaries the right of the plan to sue and recover for breach of fiduciary duty.[222] To be clear and consistent with traditional trust law, such a suit is in substance one on behalf of the plan to seek redress for the plan's injuries. Henceforth, if fiduciaries are simply able to evade responsibility and liability based upon an erroneous interpretation the term "concealment," participants and beneficiaries are exposed to significant harm—harm which both a textualist reading and Congressional intent sought to prevent.

Public policy instructs that courts should interpret "concealment" under 29 U.S.C. § 1113 to include nondisclosure in order to achieve the goals of ERISA.[223] As a disclaimer, the thesis of this Article is that there is a fundamental misinterpretation of the statute[224]—courts should interpret statutory language in accordance with the understanding of the ordinary or reasonable reader.[225]

> Congress enacted ERISA to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans. Broadly stated, ERISA established minimum standards for vesting of benefits, funding of benefits, carrying out fiduciary responsibilities, reporting to the government, *and making disclosures to participants*.[226]

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breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409. Consequently, our references to the 'entire plan' in Russell, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.") (emphasis added).

222. *See* 29 U.S.C. §§1109(a), 1132(a)(2).

223. S. COMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, S. Doc. No. 93-406, at 2358-60 (1976); *see also* Varity Corp. v. Howe, 516 U.S. 489, 496 (1996) (citing H.R. REP. No. 93-533, at 3-5, 11-13 (1973)).

224. Marx v. Gen. Revenue Corp., 568 U.S. 371, 376 (2013) ("As in all statutory construction cases, we assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.") (internal quotations and citations omitted).

225. Becerra v. Empire Health Found., 597 U.S. 424, 434 (2022) ("HHS's regulation correctly construes the statutory language at issue. The *ordinary meaning* of the fraction descriptions, as is *obvious to any ordinary reader*, does not exactly leap off the page.") (emphasis added); Van Buren v. United States, 593 U.S. 374, 397 (2021) (Thomas, J., dissenting) ("The question here is straightforward: Would an *ordinary reader* of the English language understand Van Buren to have 'exceed[ed] authorized access' to the database when he used it under circumstances that were expressly forbidden? In my view, the answer is yes. The necessary precondition that permitted him to obtain that data was absent.") (emphasis added); Gamble v. United States, 587 U.S. 678, 742 (2019) (Gorsuch, J., dissenting) ("Viewed from the perspective of an *ordinary reader* of the Fifth Amendment, whether at the time of its adoption or in our own time, none of this can come as a surprise. Imagine trying to explain the Court's separate sovereigns rule to a criminal defendant, then or now.") (emphasis added); *Marx*, 568 U.S. at 391 (2013) (Sotomayor, J., dissenting) ("Although the instruction to take the medication in the morning is not incompatible with taking it twice a day—it could be taken in the evening as well—an *ordinary English speaker* would interpret 'otherwise' to mean that the doctor's more specific instructions entirely supersede what is printed on the bottle.") (emphasis added).

226. Donovan v. Dillingham, 688 F.2d 1367, 1370 (11th Cir. 1982) (citing H.R. REP. NO. 533, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639); *see also* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) ("'The statute imposes participation, funding, and vesting

Natheless, legislative history is another indicator that we have the persuasive argument. Congress had a near obsessive disquietude over the prospect of abuses by fiduciaries.[227]

It contravenes the objectives of ERISA when a court refuses to hold a fiduciary responsible for nondisclosure when plaintiffs allege the risk was not properly reported.[228] In certain cases, plaintiffs will be without any avenue to cure their harm. To explicate, complainants may avail themselves of remedies prescribed under securities law.[229] But, to reiterate, this is not a failsafe as some may be left with no recourse. In any event, it is not advantageous for parties to explore other regulatory schemes for relief, cobbling together causes of action as if piecing together an elaborate jigsaw puzzle.

A person charged with stewardship of the safety and soundness of retirement plans and other benefit plans[230] being allowed the running room for nondisclosure of material information has the odor of mendacity. Under ERISA, those who manage employee retirement plans bear strict fiduciary duties of prudence and loyalty, derived from the common law of trusts.[231] It is astonishing that courts have decided to skip the common or ordinary[232] meaning of concealment "likely to be understood by the ordinary and average reader."[233] In practicality, holding that "concealment" requires an active step under 29 U.S.C. § 1113 creates a glaring loophole that leaves the statute toothless.

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requirements on pension plans. *It also sets various uniform standards*, *including rules concerning* reporting, *disclosure*, and *fiduciary responsibility*, for both pension and welfare plans.' *Id.*, at 91 (citation omitted). As part of this closely integrated regulatory system *Congress included various safeguards to preclude abuse* and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.' S. REP. NO. 93-127, p. 36 (1973).") (emphasis added); *contra* Paul H. Zalecki, *The Corporate Governance Roles of the Inside and the Outside Directors*, 24 U. TOL. L. REV. 831, 840 (1993) ("Although the report suggests that 'ERISA appears to provide latitude for fiduciaries,' it is inconclusive in its discussion as to whether ERISA, as now interpreted, enables 'fiduciaries to deal with the difficult investment policy issues that now confront them.'").

227. 120 CONG. REC. 29198 (1974); 120 CONG. REC. 29932 (1974); 120 CONG. REC. 29951 (1974); 120 CONG. REC. 29954 (1974); 120 CONG. REC. 29957 (1974); 120 CONG. REC. 29957 (1974); 120 CONG. REC. 29961 (1974); 120 CONG. REC. 29194 (1974); 120 CONG. REC. 29196-29197 (1974); 120 CONG. REC. 29206 (1974).

228. *In re* Lehman Bros. Sec. & ERISA Litig., 113 F. Supp. 3d 745, 764-69 (S.D.N.Y. 2015) ("The Court concludes that ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information.").

229. *See generally* 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, 423-24 (2004) ("The more difficult question arises with respect to behavior that arguably constitutes both a violation of ERISA and a violation of the federal securities laws. There, to allow a cause of action to proceed in the absence of the procedural requirements imposed by the PSLRA, is not a step that should be taken lightly.").

230. 29 U.S.C. § 1002 (34)-(35) (2000).

231. *See* Varity Corp. v. Howe, 516 U.S. 489, 496 (1996).

232. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L. J. 788 (2018).

233. James v. Gannett Co., 40 N.Y.2d 415, 419 (N.Y. 1976) (quoting Mencher v. Chesley, 297 N.Y. 94, 100 (1947)).

VI. REDUCTIO AD ABSURDUM

A. Strict Construction

The courts holding that "fraud or concealment" encompasses the "fraudulent concealment" doctrine give reasoning that is subject to *reductio ad absurdum* ("reduction to absurdity").[234] The courts disregard the dictionary definition of "concealment" which includes "a material fact or circumstance that one is legally (or, sometimes, morally) bound to reveal"[235] and engage in a strict constructionist interpretation—not textualism. There is a clear difference between these two canons. Justice Scalia elaborated, "I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a non-textualist. *A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means*."[236]

Moreover, if a court is going to deploy a strict constructionist interpretation with "concealment," then it must do so for "fraud." Recall, there is no consensus regarding the legal definition of fraud.[237] And neither fraud nor concealment is defined under ERISA.

Redlining Congress's work is the embodiment of judicial activism.[238] Black's Law Dictionary is the preeminent source for law.[239] It is intriguing when courts avoid invoking this source.[240] To exacerbate the situation, none of the opinions cite sources to support their position that the everyday meaning of "concealment" involves an active step. Fraud is defined by nontechnical standards and is not to be restricted by any common-law definition of false pretenses.[241] If courts are going to give that much flexibility to "fraud" then they should afford the same courtesy

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234. *Reductio Ad Absurdum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[I]n logic, disproof of an argument by showing that it leads to a ridiculous conclusion.").

235. *See supra* note 186 and accompanying text.

236. ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

237. 29 U.S.C. § 1002 (2022); *see supra* note 182 and accompanying text; *see also* Ragsdale v. Kennedy, 209 S.E.2d 494, 500 (N.C. 1974) ("*While fraud has no all-embracing definition* and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.") (citations omitted) (emphasis added); *see also* Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001) ("A common definition of 'fraud' is 'an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.' *Webster's Third New International Dictionary* 904 (1981).").

238. *See* Bruce G. Peabody, *Legislating From the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007).

239. Birmingham, *supra* note 191, at 9 ("Black's Law Dictionary is considered to be the gold standard for law, but the Fifth Circuit blatantly avoided using it when defining the pertinent phrase components. Black's Law Dictionary defines 'service' as a noun and a verb.").

240. *Id.*

241. Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941); *see also* United States v. Grainger, 701 F.2d 308, 311 (4th Cir. 1983) ("[F]raud is a broad term, which includes false representations, dishonesty and deceit.").

to "concealment" when reviewing the phrase "fraud or concealment." This will give rise to congruency between these two terms.

B. Common Law

ERISA is an uncommon law. The courts reference the "common law" for borrowing the fraudulent concealment doctrine,[242] yet none of the opinions depict the origin. This is the genesis for many of these erroneous rulings. To illustrate:

- The First Circuit (*J. Geils Band Employee Benefit Plan*) cited[243] the Eighth Circuit (*Arkansas Medical Society*);
- The Third Circuit (*Kurz II*) cited[244] the First Circuit (*J. Geils Band Employee Benefit Plan*) and the Eighth Circuit (*Arkansas Medical Society*);
- The Seventh Circuit cited (*Radiology Center*)[245] the Eighth Circuit (*Arkansas Medical Society*);
- The Ninth Circuit cited (*Barker*)[246] the Eighth Circuit (*Arkansas Medical Society*);
- The D.C. Circuit Court of Appeals cited (*Larson*)[247] the Eighth Circuit (*Arkansas Medical Society*).

The Second Circuit called out this illness, which as noted herein, has metastasized. "For a number of reasons, we decline to follow our sister circuits in fusing the phrase 'fraud *or* concealment' into the single term 'fraudulent concealment.' First, the genesis of this uniformly adopted theory is a footnote in a district court opinion that cites no legal support for the proposition."[248]

As courts remind lawyers to be careful about copy-and-pasting when submitting work product,[249] they would be wise to heed their own advice. A classic example is *Singleton v. United States Gypsum Co.*, which states in relevant part:

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242. *See supra* notes 26-34 and accompanying text.

243. J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1252 (1st Cir. 1996) ("As the district court noted, *other circuits have interpreted Section 1113 to incorporate the federal doctrine of 'fraudulent concealment,'* which operates to toll the statute of limitations until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment.") (emphasis added) (citations omitted).

244. Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1551-52 (3d Cir. 1996) ("*With rare exceptions, the courts of appeals have interpreted the final clause of § 413's as incorporating the federal doctrine of fraudulent concealment*: The statute of limitations is tolled until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment.") (emphasis added) (citations omitted).

245. Radiology Ctr. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990) ("*We share the conclusion reached by the Eighth Circuit* that the phrase 'fraud or concealment' in § 1113 'incorporates the fraudulent concealment doctrine.'") (emphasis added).

246. Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1402 (9th Cir. 1995) ("*Other circuits have held* that the 'fraud or concealment' exception in the statute incorporates the common law doctrine of 'fraudulent concealment.'") (emphasis added).

247. Larson v. Northrop Corp., 21 F.3d 1164, 1172-74 (D.C. Cir. 1994) ("'[T]he phrase "fraud or concealment" in § 1113 incorporates the fraudulent concealment doctrine.'").

248. Caputo v. Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001).

249. Debra Weiss, *3rd Circuit Calls Out Lawyers for 'Copy-and-Paste' Appeal, Orders Him to Pay Attorney Fees*, ABA J. (Mar. 23, 2021, 11:34 PM), https://www.abajournal.com/news/article/3rd-circuit-calls-out-lawyer-for-copy-and-paste-appeal-orders-him-to-pay-attorney-fees.

"The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or *works* (generally, physical touching is more offensive than unwelcome verbal abuse)[.]"[250] The court meant "words"—*not* works.[251] This mistake spread when a court—*Mokler v. County of Orange*[252]—quoted "works" when citing *Singleton*.[253] Too much dismay, another court—*Brennan v. Townsend & O'Leary Enterprises, Inc.* followed suit.[254]

Secondly, pertaining to our discussion, the courts have a dearth of analysis regarding how 29 U.S.C. § 1113 assimilates the common law. The fact that they do so is frightening. Common law is a gap filler,[255] which can be traced to sixteenth-century English caselaw.[256] There is a place for the common law, even as the U.S. Supreme Court has evolved into embracing textualism.[257] But it is not meant to supplant the statute.

VII. CONCLUSION

"Or" means "or." Courts do not gratuitously read words out of a statute. The word "or" is critical to this ERISA statute. The conjunctive/disjunctive canon[258] cuts against reading "or" to effectively mean "and." Courts interpret words accord-

250. Singleton v. U.S. Gypsum Co., 45 Cal. Rptr. 3d 597, 603 (Cal. Ct. App. 2006) (emphasis added).

251. *Id.* at 1555 ("The trial court then went on to note that Singleton's claim was that he was regularly insulted by *words* and gestures of a sexual nature which he [Singleton] found demoralizing.") (emphasis added) (internal quotations omitted); *id.* at 1556 ("[T]hat *words* have sexual content or connotations does not, standing alone, constitute harassment.") (emphasis added); *id.* at 1559 ("The show [Friends] revolved around a group of young, sexually active adults, featured adult-oriented sexual humor, and typically relied on sexual and anatomical language, innuendo, wordplay, and physical gestures to convey its humor.") (internal quotations omitted); *id.* at 1561 ("Consequently, the high court stated, workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations.") (internal quotations and citation omitted); *id.* at 1563 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.").

252. Mokler v. Cnty. of Orange, 68 Cal. Rptr. 3d 568 (Cal. Ct. App. 2007).

253. *Id.* at 583.

254. Brennan v. Townsend O'Leary Ent., Inc., 132 Cal. Rptr. 3d 292, 300-01 (Cal. Ct. App. 2011).

255. P.S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1 (1985).

256. Fermor's Case (1602) 76 Eng. Rep. 800, 803; 3 Co. Rep. 77a, 77b-78a; Chudleigh's Case, 76 Eng. Rep. 270, 303 (1595); 1 Co. Rep. 120a, 134a (dissenting opinion).

257. *See supra* notes 178-79; *see also* George T. Conway III, *Why Scalia Should Have Loved the Supreme Court's Title VII Decision*, WASH. POST (June 16, 2020, 7:55 PM), https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-have-loved-supreme-courts-title-vii-decision/.

258. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116-19 (2012); *see also* Loja v. Main Street Acquisition Corp., 906 F.3d 680, 683 (7th Cir. 2018) (citing this treatise to discuss this canon of construction); Serafine v. Branaman, 810 F.3d 354, 366 n.29 (5th Cir. 2016) (same); State v. Hensley, 206 N.E.3d 77, 86 (Ohio Ct. App. 2023) (same).

ing to their ordinary meaning.[259] "Or" is disjunctive. In contrast, "and" is conjunctive.[260]

Statutory interpretation begins with the text and its "plain meaning."[261] In many instances, this inquiry goes from "text to meaning"—from the words of the statute to evidence of the meaning of the text by ordinary people. Sometimes, however, the inquiry takes a "meaning to text" approach, in which the court begins with a hypothesis about statutory meaning and investigates whether the text as enacted is an ordinary way to express that meaning. When interpreting "fraud or concealment," both the "text to meaning" and "meaning to text" approaches are implicated. Both highlight the need for empirical evidence of ordinary meaning.

Neither the presumption against surplusage nor the courts' preferred result under a disjunctive reading can modify the statute's ordinary, plain terms. If there is a notion that "or" could include "and," it is stuck in the doldrums. The "fraudulent concealment" doctrine cannot be taken to mean the "fraudulent *and* concealment" doctrine, like the courts above make it. In any event, reading "or" to mean "and" is improper. A natural reading[262] of the statute is to read "fraud" and "concealment" separately. Courts should reject any invitation to edit 29 U.S.C. § 1113 to omit "or."[263] Holding that "and" means "or" as a conjunctive would create surplusage—"or."

Caselaw on the question presented sails into a sea of troubles. Courts have left *dicta*, analogous to driftwood abandoned on an otherwise barren shore, suggesting Congress rewrite the statute. Be forewarned, navigating these waters is perilous. Hopefully, this Article will serve as a lifeboat.

Traditional tools of textualism have been cast away. Plain meaning is the first to fall prey. Courts should interpret the language of law in the way it would be

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259. Bostock v. Clayton Cnty., 590 U.S. 644, 674-75 (2020); *see also* Wis. Cent. Ltd. v. United States, 585 U.S. 274, 277 (2018) ("[O]ur job is to interpret the words consistent with their 'ordinary meaning… at the time Congress enacted the statute.'") (citation omitted).

260. United States v. Garcon, 54 F.4th 1274, 1278 (11th Cir. 2022) ("[W]hen 'and' is used to connect a list of requirements, the word ordinarily has a 'conjunctive' sense, meaning that all the requirements must be met.").

261. Babb v. Wilkie, 589 U.S. 399, 404 (2020).

262. Transcript of Oral Argument at 51-52, Facebook, Inc. v. Duguid, 592 U.S. 395 (2021) (No. 19-511) (Chief Justice Roberts: "[O]ur objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English, right?… So, the most probably useful way of settling all these questions would be to take a poll of 100 ordinary -- ordinary speakers of English and ask them what it means, right? That's -- that would be the most useful rule of construction?").

263. Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1103 (7th Cir. 1992) (Posner, J., concurring) ("*I don't know why Judge Cudahy insists on using the term 'fraudulent concealment' to cover two categories of conduct with different legal consequences*. It is not under the compulsion of the cases cited in his note 17. The reference to diligence in *Bailey v. Glover*, 88 U.S. 342, 348 (1875), is to the plaintiff's discovering that he has a fraud claim (equitable tolling). Likewise, *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 456 (7th Cir. 1987). *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984), confusingly uses the term 'equitable tolling' to cover equitable estoppel as well, but makes clear that diligence is required of the plaintiff only if the defendant has not interfered with the plaintiff's ability to bring a timely suit. *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975), is the same. *Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975), states clearly that only if there is no concealment is there a duty of diligence. Nothing in these cases is inconsistent with either *Cada* or this concurrence.") (emphasis added).

understood by an "ordinary reader."[264] There is no rule of statutory interpretation identified here that the courts will not set aside to achieve their desired result.[265] When courts decide to disperse their own brand of justice, it is a pitfall of society.

264. Becerra v. Empire Health Found., 597 U.S. 424, 434 (2022).
265. *See supra* Section II.A.