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## The ERISA Evolution — A Historical Perspective



By ANDREW L. ORINGER

It's been 30 years since I've been introduced to the now-ubiquitous acronym for the Employee Retirement Income Security Act of 1974, and the ride has been an interesting and eventful one. While I was not practicing quite at the time of ERISA's enactment, I nevertheless feel somewhat emboldened to do a bit of a retrospective on the statute. To borrow from the wisdom of that renowned philosopher-shortstop Chico Es-

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cuela (with a bit of additional grammatical clean-up), ERISA has been very, very good to me.<sup>1</sup>

### I. Entering the World of ERISA

My introduction into the world of ERISA began as I tried shortly after graduating from law school to crack New York's big-firm legal market. I had enrolled in an L.L.M. program in tax in an attempt to feign interest in that area of the law, and also to add a certain high-profile law school to my resume, looking for an angle that would allow me to work my way into the big-firm market.

A recruiter got a hold of my resume and called to offer some support. Perceptive woman that she was, she also noted an apparent lack of real commitment to tax on my part. "Have you ever thought of ERISA?" she asked. "What's ERISA? I never heard of it," I answered. "ERISA is something that, if you tell me you're willing to learn it, I'll get you a job." "I'm VERY interested in ERISA," was my enthused response.

Well, she was right, and the approach worked, as I landed my first big-firm job. Although the ability to get a big-firm job in ERISA merely by indicating a willingness to expose oneself to the area has noticeably waned, it is today still a matter of too few people chasing too much work in a highly technical and specialized area. It is almost uniformly a specialty covered in big firms with multiple practitioners, including at the senior levels. Increasingly, firms have sub-specialists within circumscribed areas under the ERISA umbrella. There are also widely varied opportunities within the government to get a strong start, many of which can lead to private-sector opportunities, and the ERISA side of the public sector can itself be a satisfying final destination. On the business side, examples of possible opportunities include positions in human-resources departments and, more recently, in groups responsible for the development and marketing of investments. ERISA, it turns out, can be quite the launching pad for the aspiring attorney.

Part of what drives the demand for ERISA lawyers and other practitioners is that the substance is difficult and dense, often dealing with concepts that are not

<sup>1</sup> For those of you who don't get the reference, you are heartily encouraged to look it up. See, e.g., <http://snltranscripts.jt.org/78/78hupdate.phtml>.

overly accessible from outside the practice. The area can be impenetrable, with a tendency to the creation of its own jargon and language often rooted in numbers, acronyms and other shorthand, acting almost like a proverbial secret handshake. What chance do non-experts have when ERISA lawyers ask about “411(d)(6) anti-cutbacks,” “410(b) problems under the QSLOB rules,” “409A toggling issues,” “PT issues addressed by the QPAM exemption” and the like? In addition, in that ERISA has historically been technical in nature and relatively out of the mainstream, many recent graduates are not attracted by the practice.

As a result, when things are good, ERISA lawyers are in high demand from the most junior to the most senior levels; and, when things are bad, ERISA lawyers are still in the mix to an arguably greater extent than those in many if not most other areas. There may be similar demand for bankruptcy lawyers in countercyclical times. And, as another example, perhaps intellectual-property lawyers are experiencing high demand, albeit with sometimes high background-related barriers to entry. If, however, one is looking for a vibrant, in-demand area that rings of access and mobility on a consistent basis through a variety of economic cycles, and that does not require a specific educational path, then one may well need look no farther than ERISA.

It is also worthy of note that the ERISA/compensation practice is virtually reinvented from time to time. In the 80s, the TEFRA/DEFRA/REA trifecta, followed by the Tax Reform Act of 1986 (and TAMRA, which was quite the collection of supposed “technical corrections”), reshaped many of the seminal tax-qualification rules. A regulatory initiative recast the critical 401(a)(4)/410(b) nondiscrimination requirements. The practice surrounding “401(k)” plans tilted in favor of safe-harbor approaches, and the use of “master and prototype” and “volume submitter” plans became more common. It now looks like the reliable “determination letter” program is about to be reinvented.<sup>2</sup> The Pension Protection Act of 2006 rewrote the requirements applicable to pension funding, as well as a number of key 401(k) rules and the rules governing prohibited transactions and other fiduciary matters. A whole new practice area came into being with the Enron-fueled addition of Section 409A (of the Internal Revenue Code of 1986), which is broad in its scope and often maddening in its application.<sup>3</sup> Executive compensation generally witnessed a collision of considerations arising under the tax laws (for example, Code Sections 162(m), 280G and 409A); Sarbanes-Oxley, “TARP,” Dodd-Frank and other securities laws and regulations affecting both design and disclosure; and substantive recommendations from none other than the U.S. Department of the Treasury. And we have health-care reform, which may be the newest 800-pound (or heavier) gorilla in the room. As a result, it is often the case that the young ERISA lawyer can enter the practice, and not be significantly “behind the eight ball” as to any number of important aspects of the practice. In fact, there can be almost an advantage to entry after another transformation, as the new lawyer learns the practice from the ground up and

dives into nuances as they unfold, unburdened by sometimes confusing recollections of how things once were.

## II. Who We Are and What We Do – the Nature of the Practitioner and the Practice

There is a further point that flows from the ability to get into the practice and to move around within it. As a result of the relatively greater opportunity to gain entry, the people who practice in the area tend to be relatively more educationally diverse. To be sure, the ERISA community has its share of the top students from the top schools. The point here, however, is that the club tends not to be an exclusive one. ERISA practitioners commonly come from one of the “other” schools, if but for no other reasons than that the bodies are needed, and that some candidates with easier paths may not be looking as hard for a job-related diamond in the rough.

This underlying openness leads to other positive aspects of the practice. Because so many ERISA lawyers have made their way into the practice through circuitous routes, there may be a greater receptiveness on their part to similarly-credentialed candidates. This overall context in turn affects the general approach of many to the day-to-day practice and to other practitioners. Many of us seem to tend to look for opportunities to boost each other, rather than looking for an edge at the expense of our colleagues.

In addition, maybe more than in some other areas, ERISA practitioners need each other from a substantive perspective. ERISA is an area somewhat devoid of authority in many situations, where “lore” can be as important (more important than?) law. Often, in situations in which there is no comprehensive authority, ERISA-folk may be left with at best a contacts-based search that supplements often futile research. “What are you doing with something like this?” and “How are you handling this issue?” are familiar refrains. Community lunch and discussion groups, non-work social interaction and other opportunities to meet as a group are often-seen staples of the ERISA practice. As a part of our general openness, and adding further to a sense of community, many of us share our thinking, authority, models and precedent with each other without hesitation.

The positive manner in which some ERISA lawyers interact generally can be seen in ostensibly adversarial settings that oftentimes wind up not being overly adversarial. Constructively advancing a project with a friend is simply a different matter than conflicting about dispute after dispute with an antagonistic adversary. The collegial approach taken by many ERISAns can color the day-to-day way in which the practice feels.

An anecdote occurs to me here. I got an apologetic call from a corporate partner to the effect that I was about to be brought into an extremely contentious transaction that was entering its final stages. “This is going to be pretty bad,” he said, “but I’ve got to do it to you. Sorry.” I asked him what firm was on the other side, and he told me. I responded, “Oh, I know the ERISA people there. This won’t be a problem.” “You just don’t understand,” he intoned, taking note of my apparent naiveté and indicating that, in the situation at hand, the two opposing firms were just not getting along. I told him that we’d just have to see about that, and went off to supposed battle.

<sup>2</sup> See IRS Ann. 2015-19, 2015-32 I.R.B. 157 (42 BPR 1297, 7/28/15).

<sup>3</sup> See, e.g., Oringer, “Release Us From Confusion Over Non-qualified Deferred Compensation” 36 Tax Mgmt. Compensation Plan. J. 223 (Oct. 3, 2008).

I was able to make my way to my “enemy” counterpart, and, sure enough, it was someone with whom I was quite friendly. I called her and we talked. We agreed on much of the drafting right off the bat, with some remaining disagreement on a point or two. After our call, I sent her a facsimile (yes, I date myself) of a proposed agreed-upon rider. After another tweak or two we were done. I brought the agreed-upon draft upstairs to my corporate colleague. The whole process took less than an hour, and maybe closer to a half-hour. “Hey, you people really do things differently, don’t you,” he suggested, now singing a different tune. He had seen real results in real time. Thereafter, when he needed a market check, he would ask me, with memorable flair, kindly “to consult the ERISA cabal” on his behalf – he now understood the way we work.

Aside from the way in which a lack of comprehensive ERISA authority across a variety of situations can have the effect of promoting collaboration among practitioners, the lack of authority can work to the benefit of the ERISA practitioner in another critical way. Writing and speaking can get one’s views “out there” with relative ease, if one wishes to try to fill the vacuum, and the appetite for written points of view on unresolved topics can be voracious. In the burgeoning ERISA area, almost any foot in the door can provide an opportunity to pry the door significantly open.

In addition, activities sponsored by bar-associations, ranging from seminars and other similar pursuits to comment letters on regulatory and legislative proposals, can serve as an effective platform for making a different kind of impact on the development of the law. These and other activities in the nature of speaking and writing can also have the potential to put one into direct contact with governmental regulators and other officials, who often tend to be quite receptive to productive back-and-forth as they evolve the guidance by which we professionally live.

### III. The Traditional Pension Practice

In terms of the substance of what ERISA practitioners do, the practice has evolved dramatically over the years. Going back to the 80s, the idea of a “pension” was still largely embodied by the traditional defined benefit plan. Benefits under a DB plan are formula-based and guaranteed (or, at least, specified), and are generally available as streams of income over time, often in the form of life annuities. The plans are largely, although not always, essentially employer-funded, and the risks surrounding the plans are basically on the employer. If the plan’s trust does well, the plan might be more secure, but generally benefits remain the same; if the plan’s trust underperforms, benefits would not decrease, short of an inability of the plan to pay combined with the financial distress of the plan sponsor.

Defined contribution plans were always a part of the benefits landscape, but were often ancillary enhancements included as part of an overall program. With a DC, the benefit is the account balance. A higher account balance means more benefits and a lower account balance means lower benefits, with investment performance generally being a critical component of the equation. In the DC environment, while participants would retain any run-ups, they likewise bare the risk of any downturns. Should retirement programs be conservative in nature, so that benefits are stable even at the ex-

pense of foregone upside? Or should there be the possibility of the accumulation of huge nest-eggs, on the back of speculation and possible gains in the stock market? Heading into the 80s, this debate was often resolved in favor of the staid, tried-and-true DB plan.<sup>4</sup>

Looking largely through the prism of DBs, practitioners tended to focus on the complex web of the tax-qualification rules, repeatedly focusing on Section 401(a) of the Internal Revenue Code of 1986.<sup>5</sup> Several soon-to-occur developments had not yet arisen. In particular: 401(k) plans, first provided for in the Internal Revenue Code in the late 70s, had only just started to percolate; Section 404(c) of ERISA was still a dormant statutory appendage; and the notion of a daily-valuation computer-based investment platform was probably at best a theoretical aspiration hidden away in the recesses of some designer geek’s mind’s eye. The work was intensely technical, and the training regarding the foundational aspects of tax-qualified retirement plans – really, the building blocks of the benefits practice – was extensive. If the downside was more than a bit of drudgery, the payoff was a potentially deeper understanding of structural and other underlying principles.

Who was “the client” at this point in the development of the practice? The client relationship often centered with a human-resources manager, and the questions were frequently compliance-oriented. The discussions generally focused on working through technical rules, or otherwise dealing with compliance difficulties or other issues.

Frequently, the ERISA consultation would be more about damage control than about creative design. While to be sure there was the occasional need to craft solutions to effectuate client proposals and implement client ideas, many times the ERISA lawyer would need to deliver bad news, and, at that, bad news that was difficult or almost impossible to understand. In many cases, the discussion regarding ERISA was one to be avoided by the client, both because of the numbing complexity surrounding so many of the questions,<sup>6</sup> as well as the fact that the need for a discussion often meant that something had gone wrong.

Similarly, on the transactional (mergers and acquisitions) side, the ERISA lawyer’s job was generally a combination of identifying and managing potential compliance-type and other benefits-related liabilities, and working through sometimes complicated transitional arrangements. To be sure, the ERISA lawyer’s role on transactions was always a key one, if but for no

<sup>4</sup> Thanks largely to the efforts of Senator Russell B. Long (D-La.), ERISA, in the name of aligning the interests of shareholders with the interests of employees, specifically contemplates the use of the “employee stock ownership plan” and other plans designed to invest in employer stock, which have investment strategies that stand in contrast to other, more conservatively invested and more diversified plans of general applicability.

<sup>5</sup> Reflecting the deep changes it made, the Tax Reform Act of 1986 changed the name of the Internal Revenue Code of 1954 to the Internal Revenue Code of 1986.

<sup>6</sup> The Wall Street Journal on May 1, 2009 in discussing Justice Souter’s then-impending retirement reported that “Justice Souter has complained about life in Washington and even about aspects of the court’s work, such as the numbingly technical cases involving applications of pension or benefits law.” Looks like ERISA may well have gotten the better of none other than a Supreme Court justice.

other reason than that ERISA liabilities were both potentially large in many cases and, in light of controlled-group issues, could spread among affiliated entities. To an extent, though, damage control was again central to the task.

Another anecdote occurs to me here. Early on in my career, a certain corporate partner made a comment to me about the role he desired for me. He said, "I will know that you were successful on a deal, when I didn't know you were on the deal." The comment was facially denigrating, but really was not meant to be. In fact, the comment, at the time, was quite astute and right-minded. He meant that, if I was conferring with him about an issue on a transaction, it must be because I had been unable to manage a liability or agree on a contractual provision, or otherwise dispose of the issue. Whatever issue was the issue du jour must have risen to being a business issue, if there was a need on my part to bring it onto his radar. On the other hand, had I been able to address the liability, documentary dispute or other issue in an acceptable manner, then, by extension, he would not have had to have been involved, allowing him to attend to whatever business and other deal-point issues with which he was presumably dealing.

To the extent that the ERISA lawyer's role was limited to the identification and management of liabilities and transition, his perspective arguably was not only accurate and perceptive, but also fair. Indeed, both in general and in the transactional context, it may well have been fair to say that, while certainly there were exceptions, the ERISA lawyer's role largely involved technical analysis, compliance and the addressing of logistics and risks.

#### IV. Retirement Benefits Evolve

A sea change was on the horizon both for the manner in which benefits were offered to employees and for the way in which ERISA practitioners conducted their practices. The paradigm shift would be fundamental and far-reaching, both for the market characteristics underlying the practice and for the practitioners themselves.

As the 80s unfolded, Congress got increasingly concerned with the solidity and reliability of DBs. There not only was a concern about the risk to participants that nonguaranteed benefits may have been at risk in underfunded plans; there also was the reality that the Pension Benefit Guaranty Corporation, and, by extension, the U.S. government and the taxpaying public, were becoming increasingly at risk for the cost of providing unfunded guaranteed benefits. The result was a ratcheting up of the funding obligations, an increase in PBGC premiums, the development of a more extensive PBGC early-warning system, a more activist PBGC in the context of companies in financial distress and other additional layers of regulation. The rules surrounding annuity distributions and related disclosure grew more complicated. And all of that was in addition to the existing actuarial and other administrative expenses surrounding DBs as a general matter. The escalating costs associated with the maintenance of DB plans became a material consideration for plan sponsors, and employers (and their accountants) took note of the extent to which the financial risks of maintaining DBs were on the employer.

On the employee side, rightly or wrongly, employees also started to sour on the DB approach. Plan partici-

pants became more frustrated with the lack of understandability of DB benefits as compared with the simplicity of the presentation of an account statement for an individual account. There was a discernible frustration on the part of plan participants with accrual patterns that tended to build greater value as the years progressed and with future benefit payments having aggregate present values in need of actuarial calculation. The younger members of the workforce, with a focus maybe more on "now" than on "later," seemed to be growing impatient with DBs, and an increasingly mobile employee population became more and more concerned with things like present accruals and portability.

Against this backdrop, the defined contribution plan steadily grew in popularity. From the employer's perspective, there tended to be greater levels of employee funding (especially given the rise of salary deferrals under 401(k) plans), and the risk of poor investment performance shifted away from the employer and squarely to the employee. Investment performance under a DC directly affects the participant's account. While downturns in the stock market tended to crystallize the economic risks to employers surrounding DBs, the lack of economic risk to the employer under a DC also became increasingly obvious. In addition, DC plans had reduced administrative costs and no PBGC premiums, and also no "controlled group" liability in connection with funding obligations and underfunding risks. From a high-level vantage point, DCs were easier and less costly to administer for the employer, more understandable to the employee and less complicated for everyone.

A number of additional factors converged to promote the emergence of DC plans. Section 401(k), added to the Internal Revenue Code in the late 70s, started to become better understood as a key component of the employee-benefits tool-kit. Here was a provision that permitted what in effect were employee contributions in their purest form, with an enormous economic advantage provided solely by the loss to the Treasury of the time-value of money connected with the deferral at taxation. The benefit here was substantial with no real funding-related cost to the employer, other than the cost of plan administration, and with no downside to the employee, aside from deferred access to the deferred portion of the employee's compensation.

In addition, in the mid-80s the Section 404(c) regulations under ERISA were finalized, with maybe unexpected impact. Employers rushed to permit what has come to be referred to as participant-directed investments, hastened by the technology-aided development of soon-to-be omnipresent computer-assisted platforms that permitted valuations and fund-to-fund transfers on a daily basis. Participants could be in control of their own accounts, with enthusiasm fueled by a rising stock market that was built on the expanding internet bubble and that seemed only to know how to go up. The question became less about whether an investment might make or lose money, and more about trying to guess just how high the investment would go. The age-old question regarding whether retirement plans should purely be a conservative vehicle for the consistent provision of dependable benefits or should be more oriented towards allowing participants to retain the possible upside of speculative investments was being more frequently answered in favor of speculation and hoped-for upside.

The result was a seismic shift from professionally managed pools of assets supporting guaranteed benefits to self-managed portfolios in individual accounts. Substantial portions of what may well be among the country's most important assets — retirement assets — came to be under the management and control of plan participants. Unfortunately, the converse of there being less risk to employers in the case of a DC plan is the concomitant existence of more risk to employees. And, sure enough, some years after Drexel collapsed, the internet bubble eventually burst, Enron and WorldCom failed and then the sub-prime crisis reared its ugly head. Such developments visibly confirmed the high level of significance that retirement assets have to the workforce, while simultaneously highlighting the shift in pension policy that now put benefits at risk for the vagaries of the stock market. As a related matter, ERISA, maybe perversely, doesn't necessarily encourage (and in fact may as a practical matter discourage) the facilitation by plan sponsors of the delivery of real investment advice to plan participants.

While this conundrum may not have been obvious during the stock-market run-up of the late 90s, when it was almost a challenge to lose money, the dangers of the retirement system as it moved to individual accounts and participant-directed investments became extremely obvious as the markets crashed. Accounts sharply diminished in value. In some cases, employees were forced to delay the date of their retirement. Tabloid newspapers and the financial press alike starting reporting the effect of economic crises as a function of the resulting negative impact on 401(k) balances. The fact that retirement assets were being invested by non-expert plan participants who may have been uneducated regarding investment matters was being brought into sharp focus.

Now, one might have thought that the evaporation of DC balances brought about by the collapse of the stock market would have caused a pause in the growth of DC plans, if not a discernible move back to DBs. However, the cumulative effect of the perceived negatives surrounding DBs and the perceived positives surrounding DCs proved daunting to those who might have preferred DB plans on policy or other design-based grounds. By the time that the dangers of DC plans as compared with DB plans had become manifest, DCs, and in particular 401(k) plans, had emerged as the primary way of delivering retirement benefits.

Thus, the aspects of DCs that had been seen as so appealing by both employers and employees eventually brought DCs — and in particular 401(k) plans — into an unshakably central place in the benefits world. Employers continued to be focused on the lack of administrative expense, the shift of market/financial risk to the employee and the general simplicity of the DC plan. Employees in general continued to appreciate the clarity that account statements gave them; and younger and more mobile employees continued to see the positives that DCs could offer relative to DBs. Employees also continued to prefer the control they had over the investment of their accounts, putting aside for the moment whether the performance of their accounts justified that preference. Congress got into the act by simplifying some of the rules applicable to 401(k) plans, and also went so far as to encourage savings through 401(k) plans with legislative initiatives like the auto-enrollment provisions that were added to the Internal Revenue

Code in 2006. As to DBs, the funding and PBGC rules continued to be shored up by Congress and the PBGC in a way that increased the expense and risk profile surrounding the maintenance of such plans. The cumulative effect was to lock in the DC, and in particular the 401(k) plan, as the country's go-to retirement plan.

In effect, DB plans, facing an uphill battle on so many levels, had become regulated out of existence, at least as to the establishment of new plans.<sup>7</sup> The tightening up of the rules may have been well-intentioned, but the effect was arguably the demise of the DB, other than as legacy plans. Lately, there has been some noise around the possibility that the annuity form of distribution might make a bit of a comeback, but that would be a far cry from a true reimplementation of the core of the DB structure. In fact, the controversial derisking efforts that are currently so in vogue may signal further contraction of the DB approach (while at the same time introducing yet another set of challenging legal issues).

As it would turn out, this transition would have a pivotal impact on the way that ERISA practitioners practice. If someone in the 70s or even early 80s had said that the centerpiece of American retirement policy would soon become a largely employee-funded, non-guaranteed program managed by non-expert plan participants that pays out in single sums, they'd probably have been met with a fair amount of incredulity, especially from retirement-policy wonks. Yet that is precisely what in fact transpired. For better or for worse, we are where we are, and it is suggested here that one should not expect the DB/DC pendulum to swing back to DBs anytime soon, if ever.

## V. The Benefits Practice Evolves

**A. Tax-Qualified Plans** What was happening to ERISA attorneys at law firms during this transition? General economic considerations pushed clients towards increased questioning of legal fees as an overall matter, and fees for ERISA advice were no exception. There was reduced complexity arising out of the move from DB plans to DCs, and clients were becoming more discerning in terms of their benefits-related legal costs. As a part of a trend that maybe started to solidify around the time of the Drexel crisis, plan sponsors started to get less sanguine with paying top-dollar legal fees for

<sup>7</sup> There is an interesting counterpoint here in the realm of public plans. Public retirement plans are relatively unregulated under applicable state and local law (various so-called "PERISA" (public ERISA) proposals tend not to pass, largely based on comity considerations), and also may be subject to less vigorous accounting rules. While it may be nice to be free of nettlesome regulation, the flip-side is that plans and their participants, and even the very states and municipalities that sponsor the plans, may be at significant risk as a result (the recent Detroit situation is instructive), especially where the political process supplants financial analysis. An example of the risk of reduced levels of regulation in the private sector includes the financial state of a number of multiemployer plans, where benefit and contribution levels have sometimes been set over the years in the bargaining process without comprehensive financial analysis and where the applicable funding requirements may be less stringent. Another example arose in connection with welfare plans before companies were required to account for retiree medical under Statement of Financial Accounting Standards No. 106 (often referred to as "FAS 106"), issued in 1990.

answers to technical and administrative questions. The call to outside counsel for the answer to questions like how much notice needs be provided in connection with an annuity distribution became noticeably less frequent. There was increasing availability of master-and-prototype and volume-submitter plans, and a general move to frugality and commoditization.

As clients became more frustrated with high legal costs for compliance matters, work started to move more to accountants and consultants, and even increasingly came in-house. At this critical juncture, there was an accompanying change in the way that ERISA practitioners practiced. It turned out that the ERISA practice had come to a key fork in the road — as Yogi Berra, another baseball-philosopher (and, this time, a real person), once said, “When you get to a fork in the road, take it.”<sup>8</sup>

**B. Executive Compensation** ERISA attorneys, rather than folding their tents, adapted. I’m not really sure that the reaction on the part of ERISA practitioners was part of any grand plan (no pun intended?). Rather, the then-impending evolution of the practice may have been more a function of the way in which resources made available by freed-up capacity were being deployed. A number of legal and market developments helped to facilitate the adjustment.

And so — to where did the ERISA lawyers gravitate? At around the time that clients were trending away from using ERISA lawyers for run-of-the-mill tax-qualification work, the world of executive compensation started to become more specialized and complicated. Market practices began to develop around any number of key terms and clauses, and securities-law and tax considerations intensified, all in a way that made it increasingly difficult for general corporate lawyers and other general practitioners to stay abreast of the latest multi-disciplinary rules, trends, practices and other developments.

Not all of the trending was towards complexity, however. For example, the “16(b)” rules applicable to “short-swing trading” in the public-company compensatory context, once themselves the foundation of their own sub-specialty, were completely rewritten and simplified, and are no longer a part of the executive-compensation practice to the extent they previously were.<sup>9</sup> The point here, though, is that executive compensation became a more nuanced and multi-disciplinary area of generally growing complexity, which became increasingly difficult for the corporate generalist to manage.

Because executive compensation like employee benefits is a form of compensation, and because both compensation and benefits involve employees (and other service providers), a number of ERISA practitioners naturally embraced the shift to executive compensation.<sup>10</sup> In light of the compensation elements in execu-

tive agreements, the practice increasingly extended to employment contracts and, in turn, to separation agreements. This movement was notwithstanding that ERISA itself isn’t applicable to a range of executive-compensation arrangements. As the practice developed, many an “ERISA” project had nothing much at all to do with ERISA.

The work started to be more fundamental to the client relationship. As executive compensation became more and more central to, ironically, the ERISA lawyer, other collateral effects became noticeable. The client contact was with increasing frequency the President or Chief Executive Officer, another executive in the so-called “C-suite” or a member of the board of directors. In addition, non-lawyer consulting regarding executive compensation has become a booming industry.

Unlike the HR contact in the benefits context, the executive contact frequently did not yearn for limited attorney interaction. In the executive-compensation arena, the attorney was frequently working to provide more effective and tax-efficient compensation design, sometimes resulting in a better and more tax-effective program for the very executive on the other end of the conversation. The longer the attorney stayed “in the room,” the more compensation arrangements might well improve and taxes might well diminish. In addition, mere foot-faults and errors in tone regarding executive compensation and its disclosure had the potential to be disproportionately embarrassing. On issues of importance at the highest levels of the company the ERISA/compensation lawyer had entered the world of “value added.” In some cases, the representation was of the executive individually, presenting still another opportunity to build and eventually expand key relationships. Whether a particular practitioner saw the relationship advantage of the move to executive compensation or just fell into it, the advantage was there. To use a phrase one sometimes hears, the ERISA/compensation practitioner had moved “from the backroom to the boardroom.”

Substantively, notwithstanding the layering of technical rules present in many aspects of the executive-compensation practice, the subject matter nevertheless often veers away from the hyper-technical. While the level of complexity surrounding executive compensation has grown appreciably, the area is still not as grounded at the core in hyper-technical minutia in the same way that the tax-qualification area is. Practitioners are more free to take creative and innovative approaches, unshackled by specific rules at every turn. While this freedom is becoming constricted as time progresses and layers of regulation are added, the practice is fundamentally a relatively flexible one. Commoditization has not come to executive compensation in the same way it is coming to tax-qualified retirement plans, and, given the seniority of the executives affected by ex-

<sup>8</sup> Actually, my favorite Yogi-ism is, “Nobody goes there anymore. It’s too crowded.”

<sup>9</sup> I recall the comment that, if a statutory provision like Section 16(b) of the Securities Exchange Act of 1934 could give rise to an entire treatise, then that, without more, amply shows that the rule is in need of simplification. (Further to that concept, can you say “Section 409A”?)

<sup>10</sup> While ERISA lawyers deal with employees, they tend to deal with employee compensation, including employee benefits, rather than with the terms and conditions of employment

itself. This nuance may be lost at times, and corporate attorneys, other “internal” clients and the ultimate clients themselves may sometimes expect an ERISA attorney to have some kind of high-level knowledge of labor/employment laws. In some cases, such as in the case of “ADEA” releases, a familiarity with labor/employment rules can be more directly relevant. It can be important, however, for the ERISA lawyer to know when to go the labor/employment expert, just as one might hope that non-ERISA practitioners know when to come to an ERISA expert.

executive compensation, it is not clear that it ever will. The kind of flexibility that remains the hallmark of executive compensation can also serve to enhance the perception of the practitioner as an advisor as opposed to a technician.

This general flow has also made its way into the mergers-and-acquisitions context. To be sure, the M&A-oriented role of the ERISA lawyer to manage and otherwise address risks, liability and transition continued and continues to be a vital and important role. But, now, the ERISA/compensation lawyer would have a more value-added role in the transactional context, with involvement in compensation structuring and design decisions that can be mission-critical to the interests of any number of departing, continuing and newly hired executives. Largely gone are the days in which the corporate attorney leading the transactional team measures the successfulness of the ERISA/compensation practitioner on a deal by how little the ERISA/compensation practitioner has to say.

**C. The Fiduciary Practice** The fiduciary aspect of the ERISA practice presents a somewhat different type of story, although at the end of the day one might get to a similar place. Title I of ERISA has always been there since ERISA's enactment, and has always had essentially the same structure that it has now. However, other than in certain corners of the ERISA practice, there wasn't nearly as much focus at the outset on Title I as there was on the tax-qualification rules. Maybe it was because the tax-qualification rules were more comprehensive, technical and complicated, and were in need of particularly intense scrutiny; maybe it was because consideration of the tax-qualification rules were always part and parcel of the process of establishing the plan itself; maybe it was just the way things initially went, for whatever reason.

Maybe it was only a matter of time before this state of affairs changed. After all, it is the family of Title I provisions that really are ERISA provisions. While the tax-qualification rules were modernized and essentially reinvented by ERISA's Title II, and while certain of those rules are admittedly repeated to a significant extent in Parts 2 and 3 of Subtitle B of Title I of ERISA, the tax-qualification regime is itself a creature of and contained within the Internal Revenue Code. On the other hand, when one cites to, for example, an ERISA fiduciary provision, one is citing to ERISA itself.

The catalyst for the emergence of Title I as fertile ground for a growing practice area within ERISA may have been the role that ERISA-covered employee benefit plans, and in particular pension plans, came to play in the capital markets. When those involved in fundraising talk about how Company X, Company Y or Company Z is in the fund as an investor, they are almost always talking about the Company X pension plan, the Company Y pension plan or the Company Z pension plan. Operating companies generally invest their money in operations; if they were better at investing in investment funds and financial products, then one could reasonably start to wonder why they're not in the business of investing money rather than operating their businesses. It is in their employee benefit plans that available investment capital is more frequently found. The plans have essentially nothing to do with their money other to pay benefits and invest the remaining funds, and, what's more, the plan's assets generally

grow tax free, leading to greater concentrations of assets in the plans than might otherwise arise. In some sense, ERISA plans are themselves tax-free investment funds with nothing to do other than to pay benefits and invest. With this flow of investment capital, some of the best and most capable investment professionals anywhere are now inside at the major pension plans.

Not surprisingly, there has been over time an increasing concentration of investment capital in ERISA plans. While once there might have been some general reticence in the financial sector to accept investment from ERISA-covered plan investors due to the surrounding complexity and risk, by the 1980s there was a noticeable willingness to accept ERISA investment, at least to the extent that doing so wouldn't implicate the full panoply of ERISA's rules. By the 2000s, there was a palpable willingness to accept ERISA investment where feasible to do so, even where doing so might cause ERISA to apply in full. A mid-80s NBC "white paper" perceptively called the aggregate of money in ERISA plans the "biggest lump of money in the world."<sup>11</sup>

Other factors have also played into the hands of Title I advisors. The general trend in the market towards collective (and multi-tiered) investment has resulted in structuring challenges that frequently require ERISA advice. In addition, ERISA-governed capital is being increasingly deployed overseas as the economy continues to globalize, resulting in a need to address ERISA in connection with work for overseas financial instruments, investment products and funds, and in turn giving a decidedly international flavor to an ERISA practice that is at base rooted in a distinctively American statutory scheme.

As this progression coalesced, the fiduciary provisions of Title I eventually emerged from the shadows to form the basis of what would become a high-profile area in its own right. Firm after firm started adding and developing fiduciary specialists, if not whole teams of attorneys focused on the fiduciary practice, and the non-lawyer consulting practice surrounding ERISA fiduciary matters has arrived as well.

Following a path somewhat similar to that of executive compensation, the fiduciary practice spawned client relationships with relatively more senior personnel, as the client contact was often an investment professional or other senior executive. The ERISA attorney was again looked to for creative structuring ideas, this time to gain access to more investment capital. The longer the ERISA lawyer stayed "in the room," the more likely it was that additional capital from ERISA plans could be accepted.

In this context, ERISA lawyers are frequently looked to for sensitivity regarding the subtle dynamics that may surround the relationship between those seeking investment from plans and the plan investors and their representatives. The personalities and preferences can be as distinct as they are critical. Is the fund or other financial product being sponsored by a large investment bank, a small manager or something in between the two? Is the investor a large plan, a small plan, a multi-employer plan or a collective "plan assets" vehicle that is itself subject to ERISA? The answers to these and other similar questions can have an impact on how the

<sup>11</sup> See generally Oringer, "Investment Funds and ERISA," ERISA Fiduciary Law (2nd ed. Serota and Brodie, eds.) (Bloomberg BNA Books, 2015 supp.), Ch. 12A, § I.

ERISA lawyer should be trying optimally to position the negotiation.

One of the challenges faced by ERISA lawyers is to try to ensure that sophisticated investment techniques and opportunities are feasibly available to ERISA plans, notwithstanding the ERISA gauntlet that needs to be run. In many contexts, ERISA has in effect become a gating matter, in that, if the proposed investment implicates ERISA concerns but neither avoids ERISA nor is ERISA-compliant, the investment from the ERISA plan may not be able to be consummated. It would arguably be ironic and unfortunate if the best of available investment techniques wound up being less available or maybe altogether unavailable to those managing assets as important as retirement assets, as a result of the very statute enacted to protect those plans.

ERISA lawyers have come to become important to the overall design of private-equity and hedge funds and other funds, really getting into the weeds surrounding basic structuring challenges. The work has become more central to fund implementation with the increase in the number of “plan asset” vehicles in the market. Involvement is not limited to fiduciary matters, and also extends to the compensatory aspects of the funds. In this regard, while compensation considerations for funds have generally been around for some time, Section 457A of the Internal Revenue Code (added in the 2000), where applicable, has put another new and interesting spin on things.

**D. Health-Care Reform** More recently, the once-sleepy welfare-plan practice under ERISA has burst onto the scene as a major practice area in its own right with the arrival of health-care reform. Welfare plans were once on simpler ground from the perspective of federal regulation, but health-care reform has been utterly transformative, giving rise to yet another discrete practice area. “Obamacare,” once a derogatory term, has been artfully parlayed by the President into being a merely descriptive (or possibly even complimentary) reference to this key legislative initiative. The health-care practice has become nothing short of vast, having definitively taken a seat at the table alongside the other existing elements of the ERISA practice. And it should not be forgotten that the labyrinth of “HIPAA” privacy rules has become its own world, as well.

**E. ERISA Litigation** On another front, as might be expected, litigation has made its way to ERISA. The world of ERISA litigation has truly exploded, having become its own cottage (or not-so-cottage) industry. Depending on the nature of the litigation, cases can advance the development of the law (“rule formation” cases, as one of my colleagues from academia has put it), particularly in the Supreme Court, and can be big-money cases, particularly in the case of certain class actions. The litigation can highlight ERISA’s dual purposes of protecting employees and of trying to avoid a “patchwork quilt” of state-and-local regulation. The Supreme Court certainly takes its share of cases,<sup>12</sup> and there have been innumerable high-profile class actions over the years.

<sup>12</sup> In the Supreme Court’s 2015-16 term alone, there are two pending ERISA cases (*Gobielle, Montanile*), and one additional non-ERISA case (*Spokeo*) with potentially significant ERISA implications.

Litigation is really a somewhat separate practice area in the ERISA context, and it is hard to imagine a truly full mix of advisory and litigation services in a single practitioner. Nevertheless, there can be worthwhile litigation-relation speaking and writing opportunities for non-litigation ERISA counselors and advisors. In addition, putting aside for a moment the direct relevance of judicial interpretation to the manner in which the rules are to be applied, attention to the cases can help the ERISA counselor better understand the way that others look at the rules with which ERISA practitioners deal every day. There can be an impact on how maybe best to draft, or more general impact on the way in which advice is delivered. Maybe ERISA counselors can get too close to the rules, and there can be room to re-address with a fresh perspective.

## VI. So Where Are We Now?

As indicated above, the market surrounding ERISA advice has moved in two complementary ways. First, there was the shift from defined benefit plans to defined contribution plans and, in particular, to 401(k) plans. Second, control of the investment of DCs has moved to plan participants, even as investments became more complicated. Regarding tax-qualified plans, ERISA lawyers are focusing more and more on the investment side of 401(k) plans, as the practice has moved noticeably away from technical tax-qualification issues.

While the world of tax-qualified plans may have become somewhat more simplified, particularly as DB plans gave way to DCs and as the 401(k) rules were simplified, a host of other emerged and emerging benefits and compensation areas have cried out for high-level advice. The practice has moved towards executive compensation and to the fiduciary side of the ERISA practice. “The client” has more frequently become the high-level executive or money-management professional. The executive values contact with the ERISA/compensation lawyer, seeing better compensation designs with more preferable tax treatment, and the money manager sees the ERISA lawyer as critical to the ability to attract greater amounts of investment capital, given the concentration of capital in ERISA plans.

These developments opened new vistas for the ERISA lawyer. Substantially less technical than the world of tax-qualification rules, the more well-rounded ERISA/compensation practice has become a more meaty and judgment-based area in which ERISA/compensation advice may well add value. ERISA lawyers now find themselves as key players in activities ranging from M&A transactions to investment funds and financial products. One managing partner once said to me that, to see how the firm was doing at any time, he would come to the ERISA group, as the ERISA group, more than any other, had infiltrated every corner of the firm’s corporate work, whether transactional or financial in nature, and whether domestic or international.

Once, when ERISA work was discussed with those outside of the ERISA area, there wasn’t much interest from the “other” party to the conversation. Even beloved family members have had trouble pretending to have any real interest. But much of that may have changed. The issues, while undoubtedly continuing to have numerous technical elements, have evolved towards more judgment-based, more understandable and

more generally accessible subject matter. 401(k) plans are of importance to rank-and-file employees up and down the line, and the nuances of participation are of broad interest. Executive compensation on issues ranging from general levels of compensation to high-profile abuses are a focus of politicians and reporters. Fiduciary issues make their way into the discourse in a variety of settings, including the effect of the market on 401(k) accounts, the effect of corporate scandals on plans invested in employer stock and the role of retirement assets in the capital markets generally. Health-care is a current flashpoint, in the news on a consistent basis.

ERISA and compensation have taken a front seat to other interesting trends during this somewhat wild ride. Politicians and journalists, particularly fueled by the Enron/WorldCom maelstrom and later by the sub-prime crisis, increasingly vilified previously respected corporate executives and money managers, who started to be in the cross-hairs of incessant criticism and new legislative initiatives. Behavior once regarded as creative, if aggressive, even started to be potentially criminalized. The scorecard of perceived heroes and perceived villains had become rewritten to a significant effect. Will this pendulum swing back? Whatever happens, the ERISA/compensation practitioner should continue to have a front-row seat from which to watch.

In addition, developments in the world at large keenly affected benefits practitioners. The whole country turned on a dime over cultural, political and legal battles relating to same-sex marriage, and benefits practitioners were on the front lines as difficult and complex benefits-related questions proliferated and still linger.

On the career front, yet another positive aspect of the movement of traditional ERISA and benefits work to accounting, consulting and advisory firms and the bringing of significant work in-house has given rise to additional employment and other similar opportunities for the ERISA practitioner at accounting, consulting and similar firms and inside at corporate and other employers, as well. Fiduciary opportunities are becoming increasingly available at financial institutions, as ERISA's importance to those institutions becomes increasingly evident.

Unfortunately, however, there is a distinct negative aspect to the way in which the practice has developed. Through it all, the foundation of much of the practice remains the bedrock tax-qualification requirements applicable to tax-qualified plans. However, for some firms, basic work has moved towards smaller firms, accounting firms, consultants and inside professionals, depriving many developing attorneys of a closer look at ERISA's nuts and bolts. Many of these trends show signs of accelerating. As the practice in some corners moves farther and farther away from compliance matters, it becomes harder and harder to get core training to developing practitioners. Technical compliance work may not have been as desirable and fulfilling for some, but, while the work that has arrived in its stead may well be meatier, the loss of projects homing in on the seminal requirements is unfortunate from a training perspective. While seminar-based and other educational opportunities can be helpful, it has become a challenge to get real project-based training to developing practitioners. Where possible, junior attorneys should look for opportunities to broaden their experi-

ences, if not with actual projects then at least with educational and other similar opportunities. There are lost opportunities with each technical project that fails to surface, and the opportunities that do surface should be jealously guarded. It can be worth the effort to try to get these training opportunities to junior practitioners, as the payoff can be a more fulsome understanding of the rules by which we professionally live.

And what of the vaunted defined benefit plan? Well, it should not be assumed that the movement to DC plans for newly adopted plans has resulted in the marginalization of the DB plan altogether. Enormous amounts of assets have accumulated in DBs. These plans require significant actuarial attention, and in some cases can have a material impact on the finances and financial health of the plan sponsor. While at one time there seemed to be the possibility that plan sponsors would rush to terminate overfunded plans, Congress added the excise tax on reversions to stem that tide. But for the addition of that excise tax, there might well have been further decrease in the use of DBs. However, the combination of the existing Title IV restrictions on the termination of underfunded plans, on the one hand, and the newer excise tax on reversions for overfunded plans, on the other, has helped insure that legacy DB plans, with their substantial assets, will be around for some time to come. As a result, much of the complicated fiduciary work under ERISA continues to revolve around the investment of DB assets, which are generally managed by professionals (as opposed to by plan participants, in the case of participant-directed plans).

## VII. The Road Ahead

The road ahead for ERISA looks to be a long and winding one. Existing practice areas continue to endure, and new areas will undoubtedly emerge. What will be the next big legislative or regulatory initiative? What area will be reinvented - or reinvented - next?<sup>13</sup> How will the practice next bend in a way that redirects the ERISA/compensation practitioner? The one thing that seems certain to stay the same is that there will always be change.

Current events will also be likely to affect the practice. As a looming example, what will the 2016 election bring? ERISA considerations have entered the regulatory vortex of the "retail" investment market with the watershed proposal (and reproposal) by the Department of Labor to recast the regulatory definition of "investment advice" under ERISA's fiduciary rules. Indeed, the then-impending reproposal (eventually released in April 2015) became the focus of a major February 2015 presidential policy speech. Who'd of think that we would get the President of the United States giving a speech focusing on . . . an ERISA defined term? Well, it happened.

As to health-care reform, what of the post-election future of Obamacare? We presently have a Congress that purports to be ready to vote to repeal the reform effort altogether. While we have seen major reform efforts be completely unwound before (for example, old Section

<sup>13</sup> Already, we are seeing any number of developments and new proposals intended to encourage basic retirement savings.

89 of the Internal Revenue Code<sup>14</sup>), a collapse of something of the magnitude of health-care reform might well be unprecedented. The combination of complexity, change, ever-expanding breadth and continuing evolution bodes well for the ERISA practice and practitioner. The practice area seems highly secure, and, frankly, if they were to repeal the whole shebang tomorrow, the transitional and grandfather rules alone would probably keep today's ERISA practitioners fully utilized for the foreseeable future and maybe for their remaining careers.

And what of the future of the practice itself? There was a time when the ERISA attorney covered the full range of retirement plans and welfare plans. The practice seemed broad and comprehensive, but manageable. Then, employment agreements were thrown into the mix, leading the practitioner towards the world of executive compensation. Now, we have the fiduciary practice and the comprehensive challenges presented by health-care reform. One can reasonably wonder whether we are past the point where the oxymoronic concept of the ERISA generalist is still viable. While it is still possible to practice simultaneously in the tax-qualification, executive-compensation and fiduciary worlds, it is getting harder and harder to do so. With the expansion of the once-narrower field of welfare benefits into full-blown health-care reform, it may well be that true expertise across all sub-specialties is no longer a practical aspiration.

Regardless of what is possible and what may be aspirational, it is clear that sub-specializing — whether it be, for example, as an executive-compensation practitioner, a fiduciary lawyer or a health-care specialist — is itself now a viable approach that can lead the practitioner to strong success. Clearly, we have reached the point where sub-specialization within ERISA is eminently possible, and there are now countless examples of leading and other highly successful practitioners who are executive-compensation, fiduciary, health-care and other specialists.

However, while sub-specializing is now clearly possible and greater breadth will not always be preferable, expanding one's horizons within the world of ERISA can have its advantages, particularly at the more junior

levels. The interaction between the various practice areas that may find their way under the ERISA banner can be significant, in both obvious and subtle ways, and the ability to see the way it all fits together can be a real advantage. Aside from the general potential advantage of having broader conceptual points of reference, there are times where being an ERISA generalist can be helpful in a concrete way. For example, an executive-compensation practitioner might be expected to know something about benefits, just as a fiduciary attorney might be expected to know something about tax-qualification rules. I would also point out that a younger attorney may not even be aware of an aspect of the practice that could be an ideal career fit, and so greater exposure to additional sub-specialties can be helpful in that regard, as well.

## VIII. Conclusion

All in all, ERISA remains a vibrant practice that should continue to grow in relevance and value in the coming years. Quite possibly, gone may be the days in which ERISA was appropriately summed up with the phrase, "Every Ridiculous Idea Since Adam."<sup>15</sup> While the technical foundational aspects of the practice surely remain, the issues being encountered have become somewhat less obtuse and more judgment-based, finding their way into the general discourse on issues that are understandable and of interest to non-practitioners. As the issues have become more rich and diverse, they have tended to go from being often incomprehensible to being more accessible. The client relationships have moved towards more senior personnel as the value-added opportunities for the practitioner have grown and expanded. At the same time, the barriers to entry into the practice remain relatively low and mobility within the practice remains relatively high. It could be worse (or, as a friend suggests, maybe it couldn't be better), and I would sum up here as I began above — ERISA has been very, very good to me.

<sup>15</sup> Precise original credit for this fun (to me) little backronym seems unclear. See, e.g., Zanglein, "Employee Benefits For General Practitioners: Ten Rules That Every Attorney Should Know About ERISA," 26 Tex. Tech L. Rev. 579, 580 (1995) ("[A]t least according to legend, ERISA is an acronym for Every Ridiculous Idea Since Adam."); England, "The Last Great Untapped Source of Capital," PlanSponsor (April 1993) ("'Bert Lance once told Jimmy Carter that ERISA really stands for Every Ridiculous Idea Since Adam,' says Joseph Simone . . ."); 150 Cong. Rec. 24,146 (Nov. 19, 2004) ("I ran a small business . . . , and I thought the better title for the bill was 'Every Ridiculous Idea Since Adam.'") (statement of Sen. D. Nickles (R-Okla.)).

<sup>14</sup> I am reminded of a New Year's card I received from a certain public-interest group towards the end of 1989. At first glance, one might have seen Father Time pushing 1989 over the cliff, signaling the onset of 1990. On closer inspection, however, Father Time was not pushing '89 of the cliff, but rather was pushing over that cliff none other than Section 89, which had just met its demise. My friend who has authored a comprehensive (if short-lived) treatise on Section 89 might well have found the sentiment not to be overly amusing.