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Revival of Substantive Equity: Increased Household Risk, Safety Valve Litigation and Availability of the ERISA Stock Drop Jury

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Revival of Substantive Equity: Increased Household Risk, Safety Valve Litigation and Availability of the ERISA Stock Drop Jury

James F. Parker*

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I. Introduction

As the baby boomer generation ages, nations across the globe must face the increasing costs associated with supporting a growing elderly population.¹ Unlike many nations, the United States is fortunate that a large portion of this burden will fall on the shoulders of world's largest pool of private retirement assets.² However, of the 130 million Americans depending on employer provided private pensions, over 51 percent bear the risk of facing a reduced standard of living in retirement;³ the prospects are especially bleak for minority retirees.⁴ One result of the modern American trend toward adopting defined contribution pension schemes is that employees now have greater control over their pension's investment success in that they can now select from a pool of employer provided investment options. One inherent drawback to this increased employee control is that, unlike the previous system under which the employers were required to maintain either insurance of a specific reserve fund in case of loss, the employees now bear the risk of a poor return.⁵ This decision to

1. See JAMES C. CAPRETTA, GLOBAL AGING AND THE SUSTAINABILITY OF PUBLIC PENSION SYSTEMS: AN ASSESSMENT OF REFORM EFFORTS IN TWELVE DEVELOPED COUNTRIES 1 (2007), available at http://csis.org/files/media/csis/pubs/pension_profile.pdf (examining the problems facing, and current retirement infrastructure of, twelve different developed nations).

2. See *id.* at 48 (explaining the problems facing multiple developing nations regarding the increasing number of retirees globally and noting that the United States is uniquely situated due to possession of the world's largest private pension system).

3. See John C. Scott, Are Americans Losing The Chance To Retire Comfortably?, Scholars Strategy Network (2012), available at http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_scott_on_private_retirement_plans.pdf (explaining that the three major sources of retirement funding in the United States comes from Social Security, individual earnings and savings, and pension benefits and that three out of every five people in the active work force rely, at least in part, on a private employer retirement plan).

4. See *id.* (explaining that African American households are disproportionately affected by the increased instability in retirement savings).

5. See *id.* (explaining that the major effect of the modern shift from defined benefit to defined contribution plans is that the burden of risk is shifted from the employer to the plan enrollee).

place the burden-of-risk exclusively on plan enrollees invokes memories of the social injustices that pervaded the pre-Employee Retirement Income Security Act (ERISA)⁶ pension system and increases retirement instability for the millions of low-income households that lack the financial literacy required for prudent investment.⁷ Faced with the prospect of losing their retirement security, more and more prospective retirees are choosing to use stock drop lawsuits in a last ditch attempt to recover pension plan losses incurred from the selection of imprudently provided employer investment options.⁸ With this increased focus on litigation, comes a fundamental question: Are these retiree stock drop plaintiffs entitled to a Seventh Amendment jury?⁹ Assuming one believes that juries may be swayed by the relative financial resources of the opposing parties, an affirmative answer to this question could significantly increase a plaintiff's chances of successful recovery and might represent a small step toward softening the social injustice associated with placing investment risk on the shoulders of low-income households.¹⁰

As this Note will discuss, the availability of an ERISA jury trial boils down to whether the relief sought can be categorized as arising at law or in equity. In an attempt to resolve this question, courts have focused on the

6. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2000)).

7. See *infra* Part II (discussing several of the administrative risks associated with the largely unregulated pre-1974 private pension system and the destabilizing social effect of insufficient retirement security).

8. See VANGUARD CONSULTING, MITIGATING FIDUCIARY LIABILITY FOR DEFINED CONTRIBUTION PLAN INVESTMENT DECISIONS 1-7 (2013), available at https://institutional.vanguard.com/iam/pdf/mitigating_fiduciary_liability.pdf (explaining that an increased number of high profile "stock drop" class action suits had arisen against plan fiduciaries for poor plan provided investment options in defined contribution plans and discussing several strategies for reducing plan fiduciary liability); see also MORGAN LEWIS, WHITE PAPER: SUPREME COURT TO DECIDE APPLICABILITY OF THE 'PRUDENCE PRESUMPTION' IN ERISA STOCK CASES: ESOP AND 401(K) PLAN SPONSORS AND FIDUCIARIES, TAKE NOTES 1 (2013) (explaining that more than 200 ERISA employer "stock drop" class action lawsuits have been filed alleging that plan fiduciaries breach their ERISA duties of prudence and loyalty by allowing participants to invest in employer stock).

9. See *infra* Part V.

10. See Michael McCabe, Jr., Comment, *The Right To A Jury In Benefit Recovery Actions Brought Under ERISA Section 502(A)(1)(B)*, 20 U. BALT. L. REV. 479 (1991) ("The importance of a jury trial to the plaintiff becomes obvious if one believes that the jury may be swayed by the relative financial resources of the opposing parties."); See e.g., J. FRANK, COURTS ON TRIAL 111, 114, 121 & n.9 (1950) (discussing external factors which might sway jury opinion).

fact that several modern Supreme Court cases addressing ERISA's remedial regime are viewed as narrowing the definition of "equitable relief."¹¹ While the reasoning of these cases received some criticism, other scholars speculate that claims that were previously believed to be purely equitable under the old definition of "equitable relief" might now fall outside the court's narrower definition and, as a result, constitute "legal relief" entitled to a Seventh Amendment jury trial.¹² Despite a general consensus that the majority of ERISA's remedial provisions do not support a jury trial, little scholarly analysis addresses this question in the context of section 502(a)(2) stock drop actions.¹³ This Note will investigate the availability of a stock drop jury trial through a case study and critique of the recent Missouri District Court ruling *Hellman v. Cataldo*,¹⁴ in which the court held that the Supreme Court's new narrow definition of "equitable relief" required categorization of the stock drop recovery as "legal relief" for purposes of the Seventh Amendment.¹⁵

This Note's examination begins with a review of the social justice concerns that underpin the modern ERISA system and a brief study of the common law of trusts, which together facilitate the Note's first conclusion—trust law is fundamental to the foundation of the ERISA

11. See generally Thomas P. Gies & Jane R. Foster, *Leaving Well Enough Alone: Reflections on the Current State of ERISA Remedial Law*, 26 HOFSTRA LAB. & EMP. L.J. 449 (2009) (discussing the narrowing of the definition of "equitable relief" by the Supreme Court in cases addressing ERISA section 502(a)(3)).

12. See Andrew T. Kusner, Mertens v. Hewitt Associates, and *The ERISA Liability Of The Professional Service Provider*, 15 BERKELEY J. EMP. & LAB. L. 273, 282–85 (1994) (discussing the narrowing consequences of the Supreme Court equating the definition of "appropriate" in section 409(a) to "typically").

13. Compare Denise Drake Clemow & Lisa Hund Lattan, *ERISA Section 510 Claims: No Right To A Jury Trial Can Be Found*, 73 NEB. L. REV. 756 (1994) (focusing on the equitable foundations of the ERISA remedial provisions and concluding that no right to a jury trial exists for an action brought under ERISA section 510), with Amy Nixon, Note, *Employee Benefits: ERISA Enhanced Benefit Claims And The Seventh Amendment: No Common Ground in The Tenth Circuit—Adams v. Cyprus Amax Minerals Co.*, 52 OKLA. L. REV. 665 (1999) (arguing that some claims brought under ERISA section 502(a)(1)(B) are entitled to a jury trial because they seek "legal relief").

14. See *Hellman v. Cataldo*, No. 4:12CV02177, 2013 WL 4482889, *1 (E.D. Mo., Aug. 20, 2013) (concluding that the plaintiff was entitled to a jury trial because the remedy sought was substantively one for "legal relief" under the modern precedent of the Supreme Court).

15. See *id.* at *4 (basing its conclusion based upon the Great-West test and restitutionary distinction between restitutionary legal relief and traceable equitable restitution).

remedial regime.¹⁶ This Note will next examine the line of Supreme Court cases that courts use to determine whether a claim is equitable or legal for purposes of the Seventh Amendment and ERISA.¹⁷ Third, our case study begins with a summary of *Hellman v. Cataldo*, in which a Missouri district court found that the 401(k) pension plan beneficiary plaintiff was constitutionally entitled to a jury trial.¹⁸ Finally, after examining the District Court's reasoning in *Hellman*, this Note will examine several important questions that emerge from the opinion's reasoning and ultimately conclude that, despite ERISA's social injustice origins, no constitutional jury trial right exists for pension plan participants bringing section 502(a)(2) stock drop class actions.¹⁹

II. History of ERISA

Congress passed ERISA in 1974 to protect employees enrolled in private employer benefit plans from the under-inclusive and discriminatory practices that previously rendered such plans an unreliable source of retirement security.²⁰ Prior to 1974, “workers were often subject to significant pension plan vesting provisions . . . [and] premature plan termination[s]” which often resulted in either complete or partial loss of benefits.²¹ In addition, conflicting state schemes and an absence of national oversight frequently facilitated administrative abuse and mismanagement of plan assets.²² The inherent risk associated with deferral of pension payments far into the future became known as “default risk” and those that resulted from insufficient regulatory oversight became known as

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part IV.

19. See *infra* Part V.

20. See Chase A. Tweel, *Retirement Saving In The Face of Increasing Longevity: The Advantages of Deferring Retirement*, 14 N.C. BANKING INST. 103, 106–107 (2010) (noting that public opinion eventually “coalesced around the idea of federal protection of pensions based on concerns about mismanagement of assets, forfeiture of pension rights, and default by failing businesses”); see also ERISA, § 2, 29 U.S.C. §1001 (noting growth in popularity of private pension plans as one of the reasons for setting a national regulatory standard).

21. Jack E. Morris, *Small Employers and Group Health Insurance: Should ERISA Apply?*, 52 LA. L. REV. 971, 977 (1992).

22. See *id.* (highlighting the need to “protect workers from pension plan abuses and employers from multiple and conflicting state regulations” as some of the problems in the pre-1974 private pension system).

“administrative risk.”²³ Both forms of risk were especially harmful to low-income households that, unlike wealthier segments of the population, were exclusively reliant on their pensions for retirement savings.²⁴ As a result, several aspects of the pre-ERISA pension system were viewed as socially unjust. This inequity was eventually brought to national prominence as a result of the economic downturn of the Great Depression,²⁵ increased utilization of private pensions as an alternative form of compensation after World War II,²⁶ and catastrophic events like the 1963 Studebaker Corporation pension failure.²⁷

The Studebaker incident operates as the classic example of the type of Pre-ERISA private pension plan deficiencies that contributed to a public outcry for reform.²⁸ Studebaker’s closure of its plant in South Bend, Indiana resulted in a pension plan default.²⁹ Because the plan was funded on an ongoing basis, the trust ended up “\$15,000,000 short of being able to

23. See John H. Langbein, *What ERISA Means By “Equitable”: The Supreme Court’s Trial Of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1322 (2003) (“ERISA was primarily designed to protect pension plan participants and beneficiaries against two hazards, default risk and administrative risk.”).

24. See Stuart N. Alperin et al., *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 547 (1975) (explaining that inequalities with the pre-1974 pension system resulted in workers realizing that the pensions they had relied upon failed to materialize by their time of retirement).

25. See Michael S. Gordon, *Overview: Why Was ERISA Enacted? The Employee Retirement Income Security Act of 1974: The First Decade*, in SENATE SPECIAL COMM. ON AGING, 98TH CONG., 2D SESS., THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 1,2 (Comm. Print 1984).[hereinafter Gordon] (“By the onset of the Great Depression, of the 1930’s, many private pension plans were bankrupt[,] . . . insecure, inflexible and discriminatory.”).

26. See *id.* at 3 (identifying war-time tax incentives and wage-price controls as two reasons that “both management and labor rechanneled pressures for higher wage rates into fringe benefits”).

27. See *id.* at 8 (describing that closure of the facility resulted in failure of the private pension plan and that many blue collar employees “lost some or all of their vested pensions”).

28. See 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, 684 (2001) (describing the pension plan failure as a “focusing event” which served as a vivid symbol of the hazards regulation aimed to redress and which would be invoked “again and again in the decade before Congress passed ERISA”).

29. See *id.* at 729–30 (noting that years of fiscal decline, recent company bankruptcy, and closure of the South Bend plant rendered the fate of the pension plan “a forgone conclusion” and that one cause of the insolvency was the fact that the pension plan was a funded on an ongoing basis).

fund the company's pension promises to 4,392 present and former employees."³⁰ As a result, nearly 4,400 plan beneficiaries prior to retirement age, including many whose pension rights had already vested, either completely lost, or lost significant portions of, their anticipated benefits.³¹ The incident provided an ideal opportunity to get lawmakers to seriously consider reform and, as one Capitol Hill staffer put it, was viewed as "the most glorious story of failure in the business."³² Understanding the prevalence of these inequities in the pre-1974 pension system is fundamental to an acute appreciation of the role that trust law ultimately came to play in the modern ERISA framework.³³

Two years prior to the Studebaker incident, in an effort to address the problems in the private employer pension system, President Kennedy established the Commission on Money and Credit (Commission) to examine "private pension plans and [make] a series of recommendations concerning their regulation."³⁴ Three years after being established, the Commission put forward a series of recommendations including: the imposition of uniform minimum vesting standards,³⁵ uniform mandatory minimum funding levels,³⁶ and, in an effort to address plan mismanagement, "greater supervision over the investment of pension fund assets."³⁷ After roughly a decade of debate, and with the purpose of enacting many of the reforms identified by the Commission, Congress passed the Employee Retirement Income Security Act ("ERISA"); President Gerald Ford signed the Act into law on September 2, 1974.³⁸

30. *Id.* at 730.

31. *See id.* at 731 ("Vested employees less than sixty years of age . . . received a lump sum payment worth about 15% of the value of their pension . . . [while] employees under forty [] got nothing.").

32. *Id.* at 686.

33. *See infra* Part II, Section B.

34. Gordon, *supra* note 25, at 7.

35. *See Gordon id.* at 9 (proscribing "mandatory minimum vesting standards" for employees at fifteen and twenty years of continuous employment).

36. *See id.* (recommending that "all accrued benefit liabilities be amortized" over a thirty year period with a required certification process every three years to insure actuary compliance).

37. *Id.* at 7–8.

38. *See Wooten, supra* note 28, at 739 (observing that President Ford's signature came nearly a decade after the Studebaker shutdown ensured Congress would take a hard look at the pre-1974 private pension plan problems that the case eventually "came to symbolize").

A. Scope & Structure of ERISA

ERISA attempts to eliminate the socially unjust administrative risks that plagued the pre-1974 system through inclusion of a broad pre-emption provision that eliminates the relevance of conflicting state regulatory structures.³⁹ Scholars have described this pre-emption provision as “sweeping as broadly as the English Language allows.”⁴⁰ By establishing a single national regulatory scheme, Congress simplified compliance and eliminated widespread confusion surrounding efficient multi-state plan administration.⁴¹ The broad scope of preemption also created a “remedial void” in which ERISA operates as the sole source of regulation and relief.⁴²

The Act contains a broad range of substantive regulations that include specific disclosure requirements,⁴³ participation standards, vesting requirements,⁴⁴ minimum funding requirements,⁴⁵ and fiduciary obligations.⁴⁶ While no employer is required to provide retirement benefits, those that do must ensure that their plan complies with any applicable regulatory provisions.⁴⁷ It is important to note that each of these substantive provisions parallel reforms suggested in the 1964 Commission report.⁴⁸

39. ERISA § 514(a), 29 U.S.C. § 1144(a) (2012); *see also* DAVID A. PRATT & SHARON REECE, *ERISA AND EMPLOYEE BENEFIT LAW: THE ESSENTIALS* 363 (2010) (“In an apparent effort to federalize the field of employee benefit law, ERISA provides that it ‘shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.’”).

40. Langbein, *supra* note 23, at 1331 (quoting Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REFORM 109, 110 (1985)).

41. *See* Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987) (describing how inconsistent state regulations could force employers to “keep certain records[,] . . . make certain benefits available[,] . . . process claims in a certain way[,] . . . [or] comply with certain fiduciary standards” in some states but not others).

42. *See* Langbein, *supra* note 23, at 1332 (describing a “remedial void” and arguing the Court should be hesitant to interpret the federal protections, established to “protect plan participants and beneficiaries,” as providing fewer remedial options than were present under the prior regulatory scheme). Before ERISA, relief would have presumably been sought under either a state statutory scheme or the common-law of trusts. *Id.*

43. *See generally* ERISA §§ 101–111, 29 U.S.C. §§ 1021–1031.

44. *See generally id.* §§ 201–211, 29 U.S.C. §§ 1051–1061.

45. *See generally id.* §§ 301–306, 29 U.S.C. §§ 1081–1086.

46. *See generally id.* §§ 401–414, 29 U.S.C. §§ 1101–1114.

47. *See* PRATT & REECE, *supra* note 39, at 6–7 (discussing how, unlike Social Security and Medicare, retirement and welfare plans are optional for employers).

48. *See supra* notes 35–39 and accompanying text (listing minimum vesting standards,

ERISA pension plans come in two forms: the defined benefit plan⁴⁹ and the defined contribution plan.⁵⁰ Defined contribution plans place all contributions to the plan into one or more personalized accounts and benefit payments vary depending on the value of participant's individualized account.⁵¹ As such, defined contribution plan beneficiaries' retirement benefits are directly affected by the investment success or failure of the funds in their personalized account.⁵² In contrast, defined benefit plans include any pension plan that does not fall within the defined contribution scheme.⁵³ While this broad definition means that defined benefit plans can vary widely in structure, the traditional example involves a single mass employer held account subject to statutory funding requirements and over which the employer has exclusive investment control.⁵⁴ The modern private pension system experienced a shift from defined benefit plans, common at the statute's inception, to defined contribution plans.⁵⁵ As a result, a majority of contemporary private plans consist of individualized accounts and participant driven investment; a scheme that ultimately forces "employees [to] shoulder all the risks [of loss]" and increases the risk of

minimum funding levels, and fiduciary obligations to avoid administrative and default risk as potential solutions to pre-1974 deficiencies).

49. See ERISA § 3(35), 29 U.S.C. § 1002(35) (2012) (defining "defined benefit plan").

50. See *id.* at § 1002(34) (defining "defined contribution plan").

51. See PRATT & REECE, *supra* note 39, at 16 (explaining that the benefits payable under the plan depend on the amount of the total between (1) employer contributions, (2) employee contributions, (3) forfeitures from termination of employment prior to vesting, and (4) beneficiary's share of plan's investment earnings or losses).

52. See *id.* at 17 (explaining that defined contribution plans can never be underfunded or overfunded because the total value of participant's account is always equal to the total value of the plan assets).

53. See *id.* (explaining that, under a traditional defined benefit plan, the plan itself specifies the benefit payable on termination of employment determined by (1) average salary and (2) length of employee's service).

54. See *id.* (noting that the plan typically retains an actuary to calculate the amount that will be required at the employee's retirement date and such amount depends on (1) amount of annual pension, (2) predicted plan investment income, (3) mortality assumptions, and (4) form of benefit payment).

55. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 471 (2004) (explaining that a "significant reversal of historic patterns under which the traditional defined benefit plan was the dominant paradigm for the provision of retirement income" is underway).

retirement insecurity for low-income households that lack investment experience.⁵⁶

In addition to the substantive regulations discussed above, ERISA also contains remedial provisions.⁵⁷ Section 502(a) authorizes participants to bring enforcement actions where conduct violates either the employee's rights or an administrator's fiduciary obligations.⁵⁸ The remedial provisions relevant to this Note are sections 502(a)(1),⁵⁹ 502(a)(3),⁶⁰ and 502(a)(2).⁶¹ Despite the complex nature and broad scope of these provisions, Congress failed to address the issue of jury trial availability.⁶²

ERISA section 502(a)(1)(B) allows participants or beneficiaries "to recover benefits due" under "the terms of the plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights under the terms of the plan."⁶³ Although claims under 502(a)(1) have been largely uncontroversial, courts have disagreed on whether the recovery is legal or equitable—and thus whether plan participants can demand a Seventh Amendment jury trial.⁶⁴

56. See SCOTT, *supra* note 3 (explaining that neither the defined benefit nor defined contribution structure is "completely risk-free, but who bears the burden of risk is a key difference" and that under the new system an employee with sub-par investment returns is not guaranteed a fixed pension).

57. See ERISA § 502(a), 29 U.S.C. § 1132(a) (2012) (detailing remedial provisions).

58. Langbein, *supra* note 23, at 1333; see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (stating that ERISA's remedial provisions constitute "one of the essential tools for accomplishing the stated purposes" of the federal regulatory regime).

59. ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (2012).

60. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012).

61. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2012).

62. See PRATT & REECE, *supra* note 39, at 373 (observing that ERISA fails to address the availability of a jury trial and that courts have been forced to determine whether the actions brought are legal or equitable in nature in an effort to determine whether they fall within the purview of the Seventh Amendment).

63. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

64. See Eduard A. Lopez, *Equitable Remedies For Breach of Fiduciary Duty Under ERISA After Varity Corp. v. Howe*, 18 BERKELEY J. EMP. & LAB. L. 323, 331 (1997) (citing *Pane v. RCA Corp.*, 868 F.2d 631, 636 (3d Cir. 1989) as a case where an action for recovery of benefits under 502(a)(1)(B) was equitable in nature and *Novak v. Anderson Corp.*, 962 F.2d 757, 759 (8th Cir. 1992) as an example of a court finding it to be legal in nature); see also George Lee Flint, Jr., *ERISA: Jury Trial Mandated For Benefit Claims Action*, 25 LOY. L.A. L. REV. 361, 377 (1992) (identifying the major difference between courts that found "benefits-due lawsuits" to be legal was that they observed a "contract-like" theory of benefit plans, while courts that found the suit sounded in equity regarded them as "trust-like"); Note, *The Right To Jury Trial In Enforcement Actions Under Section 502(A)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 757 (1983) (arguing that no jury trial should be available in section

ERISA section 502(a)(3) allows plan participants, beneficiaries, or fiduciaries “to enjoin any act or practice which violates any [ERISA] provision” or “to obtain other appropriate relief [which may be necessary for redress].”⁶⁵ The Supreme Court has characterized section 502(a)(3) “as a catch-all provision giving the Court the flexibility to fashion any remedy necessary to prevent injustice.”⁶⁶ As Part II of this Note will discuss, the remedies available under the “catch-all” provision are considerably constricted by the Court’s narrowing definition of “equitable relief.”⁶⁷

ERISA section 502(a)(2), the focus of this Note, allows the Secretary of Labor or a plan participant, beneficiary, or fiduciary to bring a civil action “for appropriate relief under” section 409(a).⁶⁸ Section 409(a) provides that any plan fiduciary “who breaches any of [his] responsibilities, obligations, or duties . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate.”⁶⁹ Similar to section 502(a)(1), courts frequently disagree over whether the relief provided by section 502(a)(2) entitles the plaintiff to a jury trial, i.e., whether the relief is legal or equitable.⁷⁰ At least one district court has cited to the narrowing definition of ERISA “equitable relief” as proof that the provision provides “quasi-legal” relief within the scope of the Seventh Amendment.⁷¹

502(a)(1)(B) actions because the plan-enforcement actions are merely affirmative injunctions in disguise and thus within the pre-merger domain of equity).

65. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012).

66. PRATT & REECE, *supra* note 39, at 359.

67. *See infra* Part II. However, Yale Law School’s John Langbein criticized the Court for failing to fully appreciate the core role that common-law trust plays as a foundation of ERISA and for failing to realize that some forms monetary damages were historically “equitable” in nature. *See* Langbein, *supra* note 23, at 1320–21.

68. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2012).

69. ERISA § 409(a), 29 U.S.C. § 1109(a) (2012) (emphasis added).

70. *Compare* *Abbot v. Lockheed Martin Corp.*, No. 06-cv-0701-MJR, 2007 WL 2316481 (S.D. Ill. Aug. 13, 2007) (finding that analogous actions at common law were equitable and thus the action brought under 502(a)(2) pursuant to section 409(a) was equitable in nature for purposes of the Seventh Amendment); *with* *Chao v. Meixner*, No. 1:07-cv-0595-WSD, 2007 WL 4225069 (N.D. Ga. Nov. 27, 2007) (finding that the plaintiff’s 502(a)(2) action sought monetary relief for losses to the plan and sounded “at law at least in part” entitling them to a jury trial).

71. *See infra* Parts III & IV (discussing the evolution of the Court’s definition of “equitable relief” and the Missouri District Court’s ruling in *Hellman v. Cataldo*, No. 4:12-cv-02177-AGF, 2013 WL 4482889 (E.D. Mo. Aug. 20, 2013)).

B. ERISA's Trust Law Heritage

While some ERISA regulatory provisions only affect pensions,⁷² the sections governing fiduciary responsibilities are broadly applicable and govern all ERISA benefit plans.⁷³ Both legislative history and scholarly opinion indicate that the drafters of the fiduciary provisions intended to eliminate the retirement insecurity caused by the administrative risks of the pre-1974 system by applying “rules and remedies similar to those under traditional trust law.”⁷⁴ As a result, trust law lies at the core of the ERISA framework and a brief historical overview of that area of law is essential to our analysis of the Act’s remedial provisions.⁷⁵

1. Origin of the Trust

While remedies at law developed out of the early English writ system of resolving legal disputes, equitable remedies developed at the hands of the chancery courts as a supplementary source of relief.⁷⁶ Trusts developed as an exclusively equitable relationship in which the possessor of legal title, the trustee, would hold and manage real property for the benefit of the possessor of equitable title, the beneficiary.⁷⁷ Trusts eventually incorporated

72. See ERISA § 201, 29 U.S.C. 1051(1) (2012) (addressing the coverage of participation and vesting requirements); ERISA § 301, 29 U.S.C. 1081(a)(1) (2012) (addressing the coverage of funding requirements).

73. See ERISA § 401, 29 U.S.C. § 1101(a) (2012) (establishing fiduciary obligations without limiting applicability to a particular type of benefit plan, i.e., retirement or welfare); see also PRATT & REECE, *supra* note 39, at 80 (“The fiduciary standards of Title I of ERISA apply to all employee benefit plans, both welfare benefit plans and pension plans.”).

74. Michael J. Collins, *It's Common, But Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW 391, 395 (citing H.R. REP. NO. 93-1280, at 275 (1974) as stating that “[t]he objectives of [ERISA fiduciary responsibility] provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards . . . ; and to provide effective remedies for breaches of trust.”); see also Langbein, *supra* note 23, at 1323–25 (arguing that statutory rules such as ERISA’s mandatory trusteeship and expansive definition of “fiduciary” are indicative of the drafters’ intent to create fiduciary obligations and remedies similar to those available with common-law trusts).

75. See Lopez, *supra* note 64, at 338–39 (discussing the exclusive jurisdiction of trusts arising in courts of equity because of a refusal to enforce such relationships in courts at law).

76. See *id.* at 337–38 (discussing the separate development of courts of law based upon common-law precedent and the early chancery court basing substantive decisions on the kings consocius, cannon law, and ancient Roman law).

77. See DANAYA C. WRIGHT, *THE LAW OF SUCCESSION: WILLS, TRUSTS, AND ESTATES* 218 (2013) (observing that common law courts of King’s Bench and Common Pleas would

fiduciary duties whereby obligations of loyalty and care flowed from the trustee to his beneficiary.⁷⁸

Common-law trusts evolved with the passage of time to hold money in addition to real property.⁷⁹ As a result, additional fiduciary obligations, such as the requirement to conduct duties according to the standard of a prudent businessman, to invest with the prudence of cautious conservatism, and to prevent the intermingling of trustee and beneficiary funds, developed.⁸⁰ Beneficiaries possessed standing to bring a suit in chancery court to ensure that the trustee's conduct remained consistent with these duties.⁸¹ In addition to enjoining conduct, in the case of wrongful sale of trust assets, beneficiaries could bring suit to recover the proceeds of such sale or, if the wrongful profits were reinvested, to follow the funds and recover the proceeds.⁸² Finally, beneficiaries were permitted to bring suits

not look beyond "the simple fact of who had title"). The trust evolved from a special legal relationship called a *use* that aristocrats implemented as a mechanism to avoid the negative effects of *wardship*, which resulted from their estate *escheating* to the Crown when the title holder died before his heir reached the age of twenty-one. *Id.* at 216. Early attempts to avoid the negative effects of wardship required a permanent transfer of land to "religious orders or municipal organizations" with an agreement that the land was to be held for the benefit of the transferor or a third party. *Id.* at 218. While the equitable titleholder could still enjoy the benefits of ownership, because the new holder of legal title could not die, the land could not escheat and wardship was impossible. *Id.* at 217–18. Because courts at law would not recognize the legal fiction of equitable title, which was inherent to the concept of the use, one problem with the use was the possibility that the new titleholder would choose to move onto the estate and evict the individual for whom the beneficial interest in the land was held. *Id.* at 218. As a result, individuals turned to the courts of equity, which did recognize the legal fiction and relationship created by the use, to "do what was right and just" by either issuing an injunction or requiring the titleholder return legal title to the transferor. *Id.*

78. *See id.* at 219 (noting that "one of the most important aspects of the trust" is that the "trustee (legal title holder) must have active responsibilities toward the property and the beneficiaries"). In 1536 Parliament abolished all uses except for "active uses," which contained "some sort of affirmative duties or obligations toward the land or the beneficiaries," with the passage of the Statutes of Uses. *Id.* at 218. This legal fiction eventually became known as a trust and the legal duties and obligations, which were essential to the post-1536 survival of the active use, as fiduciary obligations. *Id.* at 219.

79. *See Lopez, supra* note 64, at 340 (discussing that that innovation of placing funds in trusts eventually led to additional fiduciary duties being placed on trustees).

80. *See id.* (citing FREDRICK W. MAITLAND, EQUITY: A COURSE OF LECTURES 91–92, 216–17 (2d ed. 1936) as a source illustrating the various fiduciary duties that developed with trust law).

81. *See id.* (noting that a trust beneficiary "could bring suit" for various purposes including to remove a trustee for breach of trust).

82. *See id.* (listing various mechanisms by which a trust beneficiary could enforce his rights under the trust).

in equity to hold a trustee “personally liable to restore to the trust any property that [was] wrongfully alienated or diminished” and “for any profits lost . . . as a result of [the trustee’s] breach of duty.”⁸³

2. Merger of Law and Equity

Several decades before the creation of ERISA, the federal courts of law and equity merged with the passage of the Federal Rules of Civil Procedure in 1938.⁸⁴ Merger “create[d] a single set of procedures for all legal claims.”⁸⁵ One important exception to this procedural standardization is that “jury trials [remain] [un]available in actions asserting . . . equitable remed[ies].”⁸⁶

Despite the unification of procedure, post-merger trusts continue to proscribe many of the same fiduciary obligations that originally developed in 14th century England.⁸⁷ The remedies “available for breach of trust [also remain] substantially the same.”⁸⁸ For example, post-merger trust beneficiaries may still compel a trustee to perform his duties as trustee,⁸⁹ enjoin a breach of trust,⁹⁰ or hold a trustee personally liable for losses incurred or profits made as a result of such breach.⁹¹ Thus, modern trusts are similar to their pre-merger predecessors in that they remain the subject of equitable relief.⁹² This general rule is subject to two exceptions—the

83. *Id.*

84. *See* Fed. R. Civ. P. 1 (providing that the new Federal Rules of Civil Procedure “govern the procedure in all civil actions and proceedings in the United States district courts”); *see also* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387–88 (1935) (identifying the congressional grant of authority which would allow the Supreme Court to make rules which would govern both law and equity and discussing the various reasons for merger).

85. Lopez, *supra* note 64, at 341.

86. *Id.*

87. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 169–85 (1959) (listing seventeen separate fiduciary provisions that govern trustee conduct); *see also supra* note 64 and accompanying text (outlining pre-merger trust remedies which parallel those found in the most recent restatement).

88. Lopez, *supra* note 64, at 341.

89. *See* RESTATEMENT (SECOND) OF TRUSTS § 199(a) (1959).

90. *See id.* § 199(b).

91. *See id.* § 199(c).

92. *See id.* § 197 (citing *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (1966) as

law permits concurrent legal remedies where a trustee is under a duty to immediately and unconditionally pay money or return a chattel to a beneficiary.⁹³ With the above caveat however the only difference between pre- and post-merger breach of trust claims is that modern actions can be brought in federal courts that simultaneously sit in law and equity.⁹⁴

3. Trust Model of ERISA

While ERISA's vesting, participation, and funding provisions address issues of default risk inherent in the long-term deferral of income, the fiduciary provisions seek to decrease socially inequitable administrative risk.⁹⁵ As such, the latter provisions seek to decrease retirement instability created by managerial abuse and frivolous plan investment.⁹⁶ This is accomplished by making administrators accountable to the households harmed by their mismanagement through adoption of "rules and remedies similar to those under traditional trust law."⁹⁷

Professor John Langbein argues that the trust origin of ERISA is further evidenced by the fact that section 502(a)(2) parallels the equitable remedies traditionally available for breach of trust.⁹⁸ For example, Langbein points to the fact that trust law supports an action to recover "(1) for loss incurred, (2) for any profits that the trustee made in breach of trust, and

supporting the proposition that breach of trust sounds in equity not as a breach of contract and thus abuse of plan administration requires an equitable remedy).

93. *See id.* §§ 198(1)–(2) (noting that these two legal remedies run concurrently with potential equitable relief).

94. *See* Fed. R. Civ. P. 1 (providing a single mechanism to invoke jurisdiction of all federal courts).

95. *See* Langbein, *supra* note 23, at 1322 (citing funding requirements as one way in which ERISA provisions have largely eliminated default risk by ensuring the sponsor contributes enough to pay plan promises on an "actuarially sound basis").

96. *See id.* at 1323 (observing the danger that "persons responsible for managing and investing plan assets and paying claims may abuse their authority", mismanage assets, or improperly refuse to pay benefits and terming that risk "administrative risk").

97. H.R. CONF. REP. NO. 93-1280, at 295 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (emphasis added); *see also* Langbein, *supra* note 23, at 1331 (quoting same language to support criticism of later Supreme Court cases which distance ERISA from its trust law base).

98. *See* Langbein, *supra* note 23, at 1333–34 ("[I]n capsule form, trust remedy law allows recovery for loss, restitution of profits, and recovery of foregone gains.").

(3) for any gains that would have accrued but for the breach.”⁹⁹ Similarly, section 409(a), which proscribes liability for breach of ERISA fiduciary duties, addresses the first two methods of recovery when it provides that the fiduciary (1) “shall be personally liable to make good to such plan any losses to the plan resulting from . . . breach, and [(2)] to restore to such plan any profits [that] such fiduciary . . . made through use of [plan] assets” and the third when it permits “such other equitable or remedial relief as the court may deem appropriate.”¹⁰⁰ Noting that no explanation exists for section 409’s use of the broader phrase “equitable and remedial relief” instead of the more precise trust standard, Langbein suggests that Congress meant to facilitate adaption to new problems that might arise as a result of applying trust remedies to ERISA benefit plans.¹⁰¹

The cumulative take away from these trust law parallels is that Congress sought to eliminate the socially unjust societal harms inherent in an unreliable retirement system.¹⁰² Making plan administrators accountable to plan enrollees provided an important layer of protection for low-income households and unskilled laborers that would otherwise lack any assurance of retirement stability.¹⁰³ The Supreme Court’s narrowing definition of ERISA “equitable relief” has drawn sharp criticism for ignoring these remedial goals and depriving plan participants of remedies that would be available if the action sounded in post-merger common-law trust.¹⁰⁴

99. *See id.* at 1333 (citing AUSTIN WAKERMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 205, at 237 (4th ed. 1988)).

100. ERISA § 409, 29 U.S.C. § 1109 (2012); *see also id.* at 1335 (arguing that both ERISA and trust law provide remedies for recovery of loss, recovery of profits, and recovery of forgone gains).

101. Langbein, *supra* note 23, at 1335.

102. *See id.* at 1323–24 (explaining that defined benefit pension plan enrollees were subject to administrative risk in the form of poor plan management, misuse of plan assets, and improper refusal to pay benefits).

103. *See* PAMELA PERUN & C. EUGENE STEUERLE, *ERISA AT 50: A NEW MODEL FOR THE PRIVATE PENSION SYSTEM I* (2000), *available at* http://www.urban.org/uploadedpdf/retire_4.pdf (explaining that ERISA was revolutionary in that it “established requirements for reporting and disclosure and standards for fiduciary responsibility, administration, and enforcement where previously none existed”).

104. *See e.g.*, Langbein, *supra* note 23, at 1338–62 (providing an in-depth analysis and critique of the various cases addressed in Part II of this note based upon what the author perceived to be the Supreme Court’s failure to recognize extent of ERISA’s trust based origin and misconstruction of what relief was “traditionally available in equity”); *see also* Collins, *supra* note 74, at 396 (drawing parallel between ERISA and pre-merger trust law).

III. Equitable or Legal Relief: The Jury Trial & ERISA

With a firm understanding of ERISA's trust law heritage in hand, Part III turns to examine the Supreme Court precedent on which our study case, *Hellman v. Cataldo*, relied when it determined that section 502(a)(2) entitles plaintiffs a constitutional jury trial. Availability of a civil jury trial depends on the answer to two questions.¹⁰⁵ First, whether congress expressly or implicitly provided for a jury in statutory framework.¹⁰⁶ Second, if congress remained silent, whether the Seventh Amendment nonetheless mandates a jury be made available.¹⁰⁷ Because sections 409(a) and 502(a)(2) are silent on the issue, this Note will focus on the second inquiry; whether the Constitution mandates a jury trial be made available to retirees bringing section 502(a)(2) "stock drop" suits.¹⁰⁸

A. The Seventh Amendment

The Seventh Amendment was passed in 1791 and provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"¹⁰⁹ In an effort to define "suits at common law" flexibly, the Supreme Court explained that

105. See McCabe, *supra* note 10, at 506 (concluding that in some instances jury trials should be made available in section 502(a)(1)(B) benefit actions after engaging in an examination of both the statutory test and, after finding it silent, the Seventh Amendment).

106. See, e.g., *Allen v. United Mine Workers*, 319 F.2d 594, 598 (6th Cir. 1963) (finding an express right to a jury trial under the Labor Management Relations Act of 1947); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 504 (1959) (finding an implicit statutory provision for a jury trial in a case brought under federal antitrust law).

107. See *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (noting that the constitutional analysis is only undertaken after it has been determined that federal statute cannot be interpreted in such a way that "the [constitutional] question may be avoided" (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971))).

108. See ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2012) (lacking any language which addresses the availability of a jury trial); see also *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 46 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) (noting that ERISA does not contain a provision addressing the right to a jury trial); PRATT & REECE, *supra* note 39, at 373 ("Congress . . . failed to specify whether a jury could try causes of action . . . arising under ERISA"). If a constitutional entitlement is found, courts will likely interpret the language of the statute to be consistent with such provision because courts will presume that statutes enacted by congress were drafted in a way that is constitutionally consistent. See *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

109. U.S. CONST. amend. VII (emphasis added).

the “phrase . . . is used in contradistinction to equity. . . [and means] not merely suits, which the common law recognized among its old and settled proceedings, but [all] suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.”¹¹⁰ Thus, “the amendment . . . embrace[s] all suits which are not of equity, . . . whatever might be [their] peculiar form.”¹¹¹

Because many modern statutory causes of action, including ERISA, lack a direct pre-1791 corollary, the Supreme Court developed the “historical test” to determine whether such actions adjudicate “legal” rights, i.e., whether the Seventh Amendment requires jury trial availability.¹¹² The “historical test” makes this determination through the use of a two-step analysis.¹¹³ First, courts must “compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity.”¹¹⁴ The Court made clear that identifying the appropriate historically analogous cause of action “depends on the nature of the *issue* to be tried rather than the character of the overall action.”¹¹⁵ Second, courts must “examine the remedy sought [to] determine whether it is legal or

110. *Curtis*, 415 U.S. at 193 (quoting *Parsons v. Bedford*, 28 U.S. 433, 446 (1830) (emphasis in original)); see also *Tull v. United States*, 481 U.S. 412, 417 (1987) (explaining that, prior to the Seventh Amendment’s adoption, the jury trial was customarily only allowed in the English law courts as opposed to those actions brought in the 18th century courts of equity or admiralty).

111. *Curtis*, 415 U.S. at 193; see also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962) (applying the Seventh Amendment to a statutory cause of action in trademark case); *Hepner v. United States*, 213 U.S. 103, 115 (1909) (applying the Seventh Amendment to a statutory cause of action in an immigration case); *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 31 (1916) (applying the Seventh Amendment to a statutory cause of action in the antitrust context)

112. See *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565–66 (1990) (observing that statutory rights “unknown in the 18th century” require the court identify “an analogous cause of action”); see also James Fleming, Jr., *Right to a Jury Trial in Civil Actions*, 72 *YALE L.J.* 655, 656 (1963) (noting that, because the Seventh Amendment meant to preserve the jury trial applicability as it existed at the time of the Amendment’s enactment, modern post-1791 statutory causes of action necessarily lack a direct pre-1791 parallel and thus must rely upon identifying historically analogous causes of action).

113. See *Chauffers*, 494 U.S. at 565 (citing *Tull*, 481 U.S. at 417–18 (1987) as a source which describes the goal of the “historical test” as identifying modern statutory claims that resolve “legal rights”).

114. *Id.*

115. *Id.* at 569 (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

equitable in nature.”¹¹⁶ Monetary relief is one example of a remedy that, with limited exception, was traditionally offered in courts of law.¹¹⁷

It is important to note that the forgoing test, which serves as the constitutional minimum for jury trial availability, was not altered with the merger of law and equity.¹¹⁸ The Federal Rules of Civil Procedure adopt a neutral stance on the issue and merely provide that “the right[s] . . . declared in the Seventh Amendment . . . shall be preserved to the parties in violation.”¹¹⁹ The Supreme Court has interpreted this language as an attempt to preserve, not expand, the pre-merger right.¹²⁰ Thus, whether the post-merger cause of action seeks to resolve equitable or legal rights remains the post-merger method of determining constitutional jury trial availability.¹²¹

B. Decisions Shaping the Post-1989 Availability of the ERISA Jury Trial

While the law and equity distinction is important for determining the scope of the constitutional jury trial, it is also important for understanding the effect of the recent Supreme Court’s ERISA cases. Justice Scalia’s narrow definition of “appropriate equitable relief” brought ERISA’s distinction in line with the Seventh Amendment “historical test” and led to

116. *Id.* at 565.

117. *See id.* at 570–71 (noting that monetary relief might be characterized as an equitable remedy when (1) restitutionary, such as the disgorgement of improper profits, or (2) “incidental to or intertwined with injunctive relief” (quoting *Tull*, 481 U.S. at 424 (1987)). The Court further retreated from this statement when it noted that, it has not been “held that ‘any award of monetary relief is necessarily ‘legal’ relief.’” *Id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (emphasis added)).

118. *See Fleming*, *supra* note 112, at 686 (discussing how both the “framers of [the] merged systems of procedure” took a “neutralist position toward [the] jury trial” in an attempt to neither “contract nor expand it”).

119. Fed. R. Civ. P. 38(a).

120. *See Chauffeurs v. Terry*, 494 U.S. at 565 (noting that, after the merger of law and equity, the court has carefully preserved the right to trial by jury in those circumstance where it existed prior to merger and highlighting the firm place the jury trial holds in the history of the United States).

121. *See id.* (“Since the merger of the systems of law and equity, the Court has carefully preserved the right to trial by jury where legal rights are at stake.”). However, “if a ‘legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.’” *Tull v. United States*, 481 U.S. 412, 425 (1987) (quoting *Curtis*, 415 U.S. at 196 n.11 (1974)).

Hellman's ERISA stock drop jury trial award.¹²² The following is a brief summary and analysis of the relevant Supreme Court precedent.¹²³

I. Massachusetts Mutual Life Insurance v. Russell

The Supreme Court first addressed limitations on the remedies available under section 502(a)(2) in *Massachusetts Mutual Life Ins. v. Russell*.¹²⁴ The case involved a defined benefit disability plan beneficiary who, after being denied and eventually reinstated welfare benefits for a disabling back ailment, brought suit alleging individualized injury resulting from the 132 day delay in benefit disbursements.¹²⁵ Russell claimed that the plan administrator's actions constituted an actionable breach of fiduciary duty under sections 409(a) and 502(a)(2).¹²⁶

The Supreme Court disagreed and explained in a five-to-four opinion authored by Justice Stevens that section "409 [does not] express[ly] authori[ze] an award of extracontractual [or punitive] damages."¹²⁷ The Court reasoned that the language of section 409, which stated that a fiduciary is personally liable "to make good to *such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*," evidenced a legislative intent to limit recovery to the plan alone.¹²⁸ After concluding that the express language of section 409(a) only permitted "remedies that would

122. See *infra* Part IV (noting that both the Historical Test utilized for purposes of the Seventh Amendment and ERISA traditional equity inquiry effectively asked the same two-pronged question).

123. See *infra* notes 131–185.

124. See *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134 (1985) (finding that 502(a)(2) does not support extra-contractual or punitive damages because the language of section 409 does not provide such a remedy for breach of fiduciary duty).

125. See *id.* at 136–37 (claiming that high-ranking company officials "(1) ignored readily available evidence documenting [her] disability, (2) applied unwarrantedly strict standards, and (3) deliberately took 132 days to process her claim").

126. See *id.* at 134–35 (noting that the plaintiff brought suit alleging individualized injury not injury to the welfare plan itself and despite the fact that the plan administrator ensured retroactive benefits were paid in full).

127. *Id.* at 144.

128. See *id.* at 140 (quoting ERISA § 409(a), 29 U.S.C. 1109(a) (1974) (emphasis added)). Also, the Court observed that "when the entire section [409] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent." *Id.*

protect the entire plan,” the Court refused individualized relief because ERISA’s “six carefully integrated civil enforcement provisions” represented “strong evidence that Congress did *not* intend to authorize . . . remedies that it [failed to] . . . incorporate expressly.”¹²⁹

In his concurrence, Justice Brennan explained that, while the express language of section 409(a) indicated it did not support individualized extra-contractual damages, the Court’s opinion should not be stretched to cover section 502(a)(3).¹³⁰ He also took issue with the majority’s characterization of the ERISA scheme as “exhaustive” and argued that the statute’s remedial goals compelled the conclusion that section 502(a)(3)’s provision for “appropriate equitable relief” anticipated a broader definition through which courts could craft new remedies necessary to “make [each plaintiff] whole.”¹³¹ The concurrence pointed to legislative history as evidence that congress intended to create a “federal common law” flexible enough to address novel problems in the application of trust law to a pension system and decrease socially unjust administrative risk.¹³²

2. Bowen v. Massachusetts

A year after the *Russell* decision, Justice Scalia provided a glimpse into the reasoning which would shape the Court’s later opinions in *Bowen v. Massachusetts*.¹³³ The case dealt with whether a federal court had jurisdiction to review a final order by the Secretary of Health and Human

129. *Id.* at 146; *see also* *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571–74 (1979) (“[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”).

130. *See* *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 151 (1985) (Brennan, J., concurring) (discussing his worry that the “dicta in the Court’s opinion” might mistakenly be construed “as sweeping more broadly than the narrow ground of resolution set forth above”).

131. *See id.* at 155 (Brennan, J., concurring) (explaining that section 502(a)(3) “can only be read precisely as authorizing the federal courts to ‘fine-tune’ ERISA’s remedial scheme”).

132. *See id.* at 156 (Brennan, J., concurring) (citing the Senate Conference Report and deriving a congressional intent that ERISA be “regarded . . . in a similar fashion to those brought under section 301 of the Labor Management Relations Act” (LMRA) which authorizes courts to fashion a body of federal law in the context of collective-bargaining agreements).

133. *See* *Bowen v. Massachusetts*, 487 U.S. 879, 913 (1988) (providing a narrower view of the term “appropriate equitable relief” under ERISA which sharply contrasts to the broader definition advocated by Justice Brennan in his *Russell* concurrence).

Services, and its resolution depended upon whether the plaintiff sought money or specific relief.¹³⁴ While not an ERISA opinion, the case serves as a preview of Justice Scalia’s understanding of the distinction between law and equity that underpins the analysis adopted by the Court in subsequent ERISA cases.¹³⁵ Justice Scalia urged the Court to ground its legal and equitable relief distinction in the substance, not form, of the particular claim.¹³⁶ In an attempt to contrast the “two broad categories of judicial relief,” he defined “damages” as “money awarded as reparation for injury resulting from breach of [a] legal duty . . . [which] compensates the plaintiff for a loss” and contrasted that definition with “specific relief . . . [which] prevents or undoes a loss.”¹³⁷ Unlike money damages, which merely seek to compensate the plaintiff, specific relief involves an order to “return to the plaintiff [] the precise property that has been wrongfully taken, or [to] enjoin[] acts that would damage the plaintiff’s person or property.”¹³⁸ Finally, the dissent notes “suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are [usually] suits for ‘money damages.’”¹³⁹ The Court’s narrower definition of “specific relief” harkens to a pre-merger substantive “equity” and sharply contrasts with the broader post-merger understanding Justice Brennan advocated in *Russell*.¹⁴⁰

3. Mertens v. Hewitt Associates

The tension between *Bowen*’s narrower definition and the *Russell* dissent’s broader interpretation came to a head when the Supreme Court

134. *See id.* at 882 (describing the order as “refusing to reimburse a State for a category of expenditures under its Medicaid program”).

135. *See infra* notes 167–217.

136. *See Bowen v. Massachusetts*, 487 U.S. at 915–16 (Scalia, J., dissenting) (noting that “[i]t does not take much lawyerly inventiveness to convert a claim for payment of past due sum (damages) into a prayer for an injunction against refusing to pay the sum”).

137. *Id.* at 914–15 (Scalia, J., dissenting).

138. *Id.* at 915 (Scalia, J., dissenting).

139. *Id.* at 918–19 (Scalia, J., dissenting). However, the dissent mentions an exception to this general rule when the sum of money is paid for incalculable future harm instead of pass loss and provided the example of the threat of multiplicity of lawsuits generating no adequate remedy at law. *Id.* at 918 (Scalia, J., dissenting).

140. *See supra* notes 137–139 (describing Justice Brennan’s suggested meaning of ERISA equitable relief, which, unlike Justice Scalia’s narrower pre-merger definition, focused on the diverse relief available to a modern trust litigant).

finally addressed the proper definition of section 502(a)(3) “equitable relief” in *Mertens v. Hewitt Associates*.¹⁴¹ The case involved a class action suit by Kaiser Steel Corporation (Kaiser) pension plan beneficiaries against a third-party plan actuary who, after Kaiser phased out the steelmaking operations, failed to change the actuary tables to properly reflect the increased retirement costs.¹⁴² This failure would eventually cause the plan to become under-funded and the substantial loss of benefits.¹⁴³ Because the plan actuary was not an ERISA plan fiduciary, the plaintiffs brought suit seeking to hold Hewitt Associates “liable . . . as a nonfiduciary that knowingly participated in the plan fiduciaries’ breach of their fiduciary duties” under section 502(a)(3).¹⁴⁴ Specifically, the plaintiffs sought monetary relief for losses resulting to the plan and asked the Court to fashion an appropriate remedy based upon the theory that it constituted “other appropriate equitable relief” necessary to make whole the wronged plaintiff.¹⁴⁵

In an opinion authored by Justice Scalia, the Court rejected the plaintiff’s argument and, after citing to *Russell* for the proposition that the Court was “unwilling to infer causes of action,” found that 502(a)(3) does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary’s breach.¹⁴⁶ The Court reasoned that, while both the broader definition meaning “all relief available for breach of trust at common law” and narrower definition limiting available relief to

141. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 259 (1993) (finding that the plaintiff could not hold the third party actuary liable under ERISA because such an action for compensatory monetary relief was not available under section 502(a)(3)’s provisions for “appropriate equitable relief”).

142. *See id.* at 250 (indicating that a plan actuary is not an affiliated entity with the Kaiser Steel Corporation or plan administrator and is not a plan fiduciary despite ERISA’s broad definition of that term).

143. *See id.* (noting that the beneficiaries received only limited benefits guaranteed by ERISA section 1322 that were “substantially lower” than the fully vested pensions due under the terms of the plan).

144. *See id.* at 251–53 (noting that 502(a)(2) was limited in applicability by its own terms to plan fiduciaries).

145. *See id.* at 253–55 (utilizing an argument that appears to incorporate the broader definition of “appropriate equitable relief espoused by Justice Brennan in his *Russell* concurrence” and emphasis of ERISA’s roots in common-law trusts found in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)).

146. *See Mertens*, 508 U.S. at 254–56 (noting that the plaintiffs substantively seek what is effectively “compensatory damages” and not “a remedy traditionally viewed as ‘equitable,’ such as an injunction or restitution).

only those “categories of relief that were *typically* available in equity” were feasible, the latter definition required adoption to avoid rendering the modifier “equitable” superfluous.¹⁴⁷ The Court explained that “injunction[s], mandamus and restitution” are examples of the typical equitable relief made available through section 502(a)(3).¹⁴⁸ Thus, *Mertens* rejected Justice Brennan’s view that allowed courts to fashion a federal common law by limiting the provision to remedies *traditionally available in pre-merger equity*.¹⁴⁹

The *Mertens* dissent, authored by Justice White, emphasized ERISA’s trust law foundation and criticized the majority opinion for stripping “ERISA trust beneficiaries of remed[ies] . . . which they enjoyed . . . [at] common-law.”¹⁵⁰ The dissent argued that the monetary relief should be made available under section 502(a)(3) because the “‘equitable remedies’ available to a [modern post-merger] trust beneficiary included compensatory damages.”¹⁵¹ In addition, the dissent disagreed with the majority’s belief that the statutory distinction between “equitable” and “remedial” relief in section 409(a) represented a congressional intent to adopt the majority’s narrow definition.¹⁵²

147. See *Mertens*, 508 U.S. at 248, 256–59 (reasoning that modern courts sitting in equity in an action regarding breach of trust could provide both legal and traditionally equitable relief and such a definition would effectively place no limit on the relief available).

148. See *id.* at 256 (providing examples of relief traditionally available in a court of equity prior to the merger of law and equity). However, Professor Langbein criticizes the Court for failing to place enough focus on ERISA’s trust law roots and the inaccuracy of these examples based upon the fact that mandamus was a classic form of writ only available in courts of law. See Langbein, *supra* note 23, at 1320–21.

149. See *supra* notes 130–132 (illustrating that Justice Brennan’s articulation of equitable relief necessarily encompassed broader remedial concepts than those available in pre-merger chancery).

150. See *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 263 (1993) (White, J., dissenting) (quoting *Bruch*, 489 U.S. at 114 for the proposition that the Court would not interpret ERISA in a way which “would afford *less* protection to employees and their beneficiaries than they enjoyed before ERISA was enacted”).

151. See *id.* at 266 (White, J., dissenting) (noting that equity for breach of common-law trust sought to make the “breach whole” and “‘endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed”).

152. See *id.* at 267–69 (White, J., dissenting) (arguing that Congress use both terms to convey its intent that the federal courts retained the power to craft whatever relief was necessary to make the beneficiary whole and did not intend to restrict the remedies available to beneficiaries under common law). However, the majority countered this point by noting that, even if the distinction is “artless” it is meaningful textual distinction that must be observed. *Id.* at 259 n.8 (majority opinion). It is also important to note that neither the

4. Great-West Life & Annuity Insurance Co. v. Knudson

While *Mertens* served as a keystone for defining the scope of “appropriate equitable relief,” the Court took another major jurisprudential step in *Great-West Life & Annuity Insurance Co. v. Knudson*.¹⁵³ The case involved a claim by Great-West, the provider of an ERISA plan “stop-loss” insurance agreement,¹⁵⁴ for injunctive and declaratory relief under section 502(a)(3) to enforce the plan reimbursement provision under which the beneficiary was liable for any benefit disbursement that was subsequently recovered from a third party.¹⁵⁵ The proceeds of the tort judgment that the plaintiff sought to recover were, pursuant to California law, placed in a “Special Needs Trust” for the benefit of the defendant.¹⁵⁶

Justice Scalia again authored the five-to-four opinion of the Court, which found against Great-West based upon its conclusion that the requested relief was, in substance, “legal relief” unavailable under section 502(a)(3).¹⁵⁷ Citing his dissent in *Bowen*, Justice Scalia explained that, because the funds sought were in a special needs trust instead of in the beneficiary’s possession, the plaintiff effectively sought “legal relief” by imposition of personal liability for the plan enrollee’s breach of a legal obligation to pay money.¹⁵⁸ The Court rejected the plaintiff’s argument that he sought restitution encompassed by section 502(a)(3) by explaining that

majority nor dissent attempted to define “remedial relief.” *Id.* at 267 (White, J., dissenting).

153. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213–18 (2002) (denying plaintiff’s requested relief based upon the fact that holding the beneficiary liable for a legal obligation to pay with a claim against her general assets was restitution-at-law outside section 502(a)(3)’s provision for “appropriate equitable relief”).

154. See *id.* at 208 (explaining that the plan had “‘assigned to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive’ any claim under the reimbursement provision” and that the plan had paid welfare benefits to the beneficiary for injuries received in a car accident).

155. See *id.* at 207 (explaining that the included reimbursement provision gives “‘the right to recover from the [beneficiary] any payment for benefits’ paid by the plan that the beneficiary is entitled to recover from a third party” and that the beneficiary recovered a tort judgment against the third party involved in the accident).

156. See *id.* (explaining that the “Special Needs Trust” was purposed with caring for the beneficiaries future medical expenses and was not under the direct control of the beneficiary).

157. See *id.* at 204.

158. See *id.* at 210 (“‘Almost invariably . . . suits seeking (whether by judgment, injunctions, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages’ . . . [and] seek no more than compensation for [a] loss.’”).

restitution was a post-merger construct consisting of two distinct categories of relief, legal restitution and equitable restitution.¹⁵⁹ The Court clarified that “restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case.”¹⁶⁰ As such, claims for restitution only constitute “equitable relief” when the plaintiff is able to, either in the form of constructive trust or an equitable lien, assert title or right to possession of particular funds or property wrongfully in the possession of the defendant.¹⁶¹ In contrast, when a plaintiff is unable identify particular assets, but is still able show grounds for recovering money “to pay for some benefit the defendant received,” he has a claim for restitution at law in the form of quasi-contract or contract implied-in-law.¹⁶² Thus, similar to the Seventh Amendment “historical test” whether a claim for restitution is legal or equitable depends on its substance, that is the basis of the claim and nature of the underlying remedy, not its form.¹⁶³ Justice Scalia explained that this determination would rarely require more than a reference to the “standard current works.”¹⁶⁴

Both Justice Stevens and Justice Ginsberg filed separate dissents in *Great-West*.¹⁶⁵ Noting that the majority test mirrored the Seventh Amendment “historical test,” Justice Ginsberg took issue with the assertion that Congress intended to invoke a pre-1791 law and equity inquiry for a statute passed in 1974.¹⁶⁶ Attempting to provide some flexibility in the

159. See *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 212 (explaining that “[i]n the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity”).

160. *Id.* at 213 (quoting *Reich v. Continental Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.)).

161. See *id.* at 213–14 (noting that where “the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff’s] claim is only that of a general creditor” and sounds only at law).

162. See *id.* at 213 (explaining that restitution-at-law derived from the common-law writ of assumpsit and was considered “legal relief” because it sought to impose mere personal liability for a sum of money).

163. See *id.* at 214 (emphasis added).

164. See *id.* at 217 (identifying *Dobbs*, *Palmer*, *Corbin*, and the Restatements as “standard current works” and noting that the same inquiry is required in the context of the Seventh Amendment).

165. See *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 222–34 (Stevens, J., dissenting) (Justice Stevens wrote separately to discuss what he believed to be Congress’s intended meaning of the work “enjoin” as used in section 502(a)(3)(A)).

166. See *id.* at 224–27 (Ginsberg, J., dissenting) (arguing that the majority’s “fanciful” interpretation, when combined with the effects of ERISA’s pre-emption of state causes of

Mertens rule, the dissent argued that because Great-West sought a form of restitution and restitution is *generally* available in equity, it should fall within the definition of “appropriate equitable relief.”¹⁶⁷

5. *Sereboff v. Mid Atlantic Medical Services*

The Court applied the *Great-West* test again, this time reaching the opposite conclusion, in *Sereboff v. Mid Atlantic Medical Services*.¹⁶⁸ The case involved a suit for enforcement of a plan reimbursement provision after a beneficiary, to whom the plan had issued benefit payments for injuries received in an automobile wreck, recovered \$750,000 from a third party.¹⁶⁹ This time, the plan fiduciary brought a claim under section 502(a)(3) which sought to enforce the terms of the plan and collect \$74,869.37 of the settlement for the plan beneficiary’s medical expenses.¹⁷⁰ While the case was pending before the District Court, the beneficiary agreed to place \$74,869.37 of the settlement in a separate account held by the beneficiary pending final resolution of the issue.¹⁷¹ The defendant

action, sacrifices Congress’s stated purpose of increasing beneficiary protections to an “archaic and unyielding doctrine”).

167. *See id.* at 228 (Ginsberg, J., dissenting) (arguing that this interpretation of “equitable relief” is consistent with congressional intent and that the Court’s previous decision in *Mertens* was not limited to relief *exclusively* available in equity). However, Justice Scalia countered that such vague notions of congressional intent could not override clear statutory language. *Id.* at 217–18 (majority opinion) (observing that the distinction is “specified by statute” and that such specification necessitates the Court’s distinction “between law and equity”).

168. *See Sereboff v. Mid Atl. Med. Servs. Inc.*, 547 U.S. 356, 360–63 (2006) (applying the same rule from *Great-West* but finding that the claim was to restitution at equity within the scope of section 502(a)(3) because it constituted a traceable claim to funds in the defendant’s possession which belonged in good conscious to the plaintiff).

169. *See id.* at 360 (explaining that the beneficiaries, the Sereboffs, received a benefits disbursement from the welfare plan administrator pursuant to the plans coverage provisions and that the beneficiaries subsequently recovered a monetary award for future medical expenses in a tort action).

170. *See id.* at 361 (observing that, because there was no dispute that Mid Atlantic was a plan fiduciary and that the suit was to enforce the terms of the plan, the only issue before the Court was “whether the relief . . . requested . . . was ‘equitable relief’ under” section 502(a)(3)(B)).

171. *See id.* at 360 (noting Sereboff’s attorney had already distributed the \$750,000 settlement to the defendants and that, in response to a request of temporary injunctive relief by the plan administrator, the parties stipulated to place the money in a special account until the case was resolved).

argued the remedy sought, enforcement of a contractual obligation to pay money, was not “typically available in equity” prior to the merger.¹⁷²

Chief Justice Roberts authored the opinion of the court, which rejected the defendant’s argument and clarified the court’s holding in *Great-West*.¹⁷³ After reiterating that the true test of whether relief is “legal or equitable depends on ‘the basis for [the plaintiff’s] claim and the nature of the underlying remedies sought,’”¹⁷⁴ the Court explained that, unlike the facts in *Great-West*, Mid Atlantic sought reimbursement of specifically identified funds which were separate from the defendant’s “general assets.”¹⁷⁵ As a result, while the action was for breach of contract and payment of money, the remedy sought was in substance an equitable lien, which is a form of restitution that *Great-West* identified as “typically available in equity.”¹⁷⁶

Reflection on the evolution of Supreme Court doctrine addressing ERISA’s remedial regime reveals a tension between recognizing what appeared to be a congressional intent to preserve pre-merger substantive equity’s remedial structure and the remedial social justice motivations that inspired the statute’s trust law model.¹⁷⁷ It was against this backdrop that our study case found a constitutional right to a jury trial.¹⁷⁸

172. *See id.* at 364 (arguing that the suit would not have satisfied the “strict tracing rules” of equitable restitution prevalent in the days of the divided bench).

173. *See id.* at 363 (explaining that the “Court in [*Great-West*] did not reject Great-West’s suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant”).

174. *Sereboff v. Mid Atl. Med. Servs. Inc.*, 547 U.S. 356, 363 (quoting *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 213 (2002)).

175. *See id.* at 362 (explaining that *Great-West* failed to involve an equitable lien because the funds claimed by Great-West were not in a “Special Needs Trust” instead of the possession of the beneficiary).

176. *See id.* at 363 (noting that because ERISA provides for “equitable remedies *to enforce plan terms*,” the fact that the action involves a breach of contract is not sufficient to prove the relief sought is not equitable). To support this point, the Court cited the pre-merger case *Barnes v. Alexander* to show that the basis of Mid Atlantic’s claim had long been recognized as a “familiar rul[e] of equity.” *See id.* at 363 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121 (1914) as proof that it is a “familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing”).

177. *See generally supra* Parts II & III.

178. *See generally infra* Part IV.

*IV. A Jury Trial & A Study Case: Hellman v. Catalado*¹⁷⁹

Theodore J. Hellman, an employee of CPI Corp. (“CPI”) and beneficiary of CPI’s 401(k) plan, brought suit as representative plaintiff in a “stock-drop” class action against plan administrators, including defendant Renato Cataldo, for breach of fiduciary duty.¹⁸⁰ Because CPI’s pension plan involved a defined contribution scheme, the size of the retirement disbursement depended upon the investment success of the various individual beneficiary accounts.¹⁸¹ The complaint alleged that, despite knowledge of the company’s poor fiscal condition, the plan administrators continued to permit plan beneficiaries to invest their employer contributions in CPI common stock, which resulted in a loss of pension benefits.¹⁸² The plaintiff argued that the defendants breached their fiduciary duties of prudence and loyalty, giving rise to liability under section 409(a), when they:

(a) . . . fail[ed] to act to protect the Plan and its participants despite knowledge of the CPI’s dire financial condition; (b) . . . continu[ed] to offer CPI common stock as an investment option under the Plan when it was imprudent to do so; and (c) . . . maintain[ed] the Plan’s pre-existing heavy investment in CPI stock when it was no longer a prudent investment.¹⁸³

The action sought “an order compelling Defendants to restore to the Plan all profits that the participants would have made if the Defendants had not breached their fiduciary obligations.”¹⁸⁴ In addition, the plaintiff requested a jury trial based upon a belief that the requested recovery sought “legal relief.”¹⁸⁵

179. *See* Hellman v. Cataldo, No. 4:12CV02177 AGF, 2013 WL 4482889, at *4 (E.D. Mo. Aug. 20, 2013) (concluding that the requested relief was restitution-at-law and that the Seventh Amendment requires the availability of the jury trial).

180. *See id.* at *1 (explaining that the relevant plan was an “employee benefit plan” within the meaning of ERISA § 3(2)(A) and that the plaintiff proceeded individually and on behalf of all others similarly situated).

181. *See generally supra* notes 50–56.

182. *See Hellman*, 2013 WL 4482889, at *1–2 (noting that the plaintiff originally brought suit against both CPI Corp. and the plan fiduciaries but the claims against CPI were dismissed after CPI declared bankruptcy).

183. *See id.* (citing ERISA §§ 404(a) and 405 as the sources of the breached fiduciary obligations).

184. *Id.* at *2.

185. *Id.*

Despite prior Eighth Circuit precedent suggesting that ERISA does not provide for a jury trial,¹⁸⁶ the district court concluded that “no . . . precedent squarely address[ed] . . . whether the Seventh Amendment affords a plaintiff the right to a jury trial where a beneficiary alleges violation of fiduciary duties and seeks restitution or money damages from the fiduciaries under [section 502(a)(2)].”¹⁸⁷ The District Court went on to deny the Defendants’ motion and conclude that, in light of modern developments in ERISA case law, the plaintiff sought legal relief entitled to a jury trial under the Seventh Amendment.¹⁸⁸ The district court based its reasoning on the Supreme Court’s two-step test in *Great-West*.¹⁸⁹ The first prong was found to weigh in the favor of equity since, based upon ERISA’s trust law foundation, the most analogous “18th-century action[]” would have been a common law breach of trust “traditionally within the jurisdiction of courts of equity.”¹⁹⁰ The second “weightier prong” of the test however indicated that the plaintiff sought “compensation for a loss resulting from [the] Defendants’ [fiduciary] breach.”¹⁹¹ Citing *Great-West’s* statement that a “judgment imposing a merely personal liability upon the defendant to pay a sum of money’ in return for ‘some benefit that the defendant had received from him’ seeks restitution at law,” the court concluded Hellman failed to identify traceable property belong to him in good conscious and, as a result, sought legal restitution.¹⁹² Finally, to distinguish the case from the Eight Circuit’s previous finding in *In re Vorpahl*, 695 F.2d 318, 322 (1982), in which the court found monetary relief turning on a determination of

186. See *In re Vorpahl*, 695 F.2d 318, 321 (8th Cir. 1982) (finding no right to a jury trial in an action brought under § 502(a)(1)(B) and § 502(a)(3)); see also *Langlie v. Onan Corp.*, 192 F.3d 1137, 1141 (8th Cir. 1999) (evaluating a § 510 claim and stating that “no right to a jury trial [exists] under ERISA”).

187. See *Hellman v. Cataldo*, No. 4:12CV02177 AGF, 2013 WL 4482889, at *3 (E.D. Mo. Aug. 20, 2013) (noting that district courts within the Eighth Circuit had reached differing conclusions on the issue).

188. See *id.* at *4–5 (ruling only on the defendant’s motion to strike the plaintiff’s request for a jury trial and permitting the issue to move forward to trial on the merits).

189. See *id.* at *4 (utilizing the Seventh Amendment *Granfinanciera* test adopted by *Great-West* as the proper to identify “equitable relief” under ERISA).

190. See *id.* (citing *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) for the as evidence that actions for breach of fiduciary duty “were within the exclusive jurisdiction of courts of equity”).

191. *Id.*

192. See *id.* (citing *White v. Martin*, No. Civ. 99–1447, 2002 WL 598432, at *4 (D. Minn. Apr. 12, 2002) as holding that no jury trial right existed under § 502(a)(2) when the plan sues a fiduciary for breach of duty in liquidating plan assets, but failed to address it).

benefits to be equitable, the district court observed that the action before it “turn[ed] on the question of fiduciary duty, not entitlement to benefits.”¹⁹³

V. Analysis & Critique of *Hellman v. Cataldo*

Hellman's conclusion that stock drop actions seek legal relief entitled to a constitutional jury trial gives rise to two questions:¹⁹⁴ (1) whether the monetary recovery can constitute “legal relief” when recoverable only “to the plan” instead of “to the plaintiff” and (2) if so, whether the court erred in its categorization under *Great-West*.

A. Relationship Between Seventh Amendment and ERISA Tests

Whereas ERISA's definition of relief “typically available in equity” hinges on the basis of the claim and nature of the remedy, the Seventh Amendment identifies an analogous pre-merger cause of action prior to an investigation of the nature of the recovery sought.¹⁹⁵ Because the two tests effectively undertake the same inquiry and are unlikely to produce differing results,¹⁹⁶ a cause of action determined to be equitable for the purposes of

193. See *Hellman*, 2013 WL 4482889, at *4. (utilizing the same reasoning that allowed the district court to independently frame the issue presented as uniquely addressing 502(a)(2) so as to avoid conflict with prior Eighth Circuit decisions on the availability of an ERISA jury trial).

194. See generally *supra* notes 195–261.

195. See *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993) (finding the action was not supported by 502(a)(3) because the cause of action was not on “traditionally available in equity”); see also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (determining that the restitution sought was not traditionally available in equity by looking to the basis of the claim and nature of the remedy); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565–66 (1990) (evaluating whether an action is legal relief as foreseen by the Seventh Amendment by utilizing the two step test utilized by the Court in *Tull v. United States*, 481 U.S. 412, 417–18 (1987)).

196. See *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 180 (Ginsberg, J., dissenting) (arguing that preserving founding-era provisions, such as the Seventh Amendment meaning of “equitable,” does not justify using the same historical analysis to determine its meaning under a modern statute passed in 1794). The majority also indicated that the inquiry under the test they were establishing in *Great-West* is the same as in the Seventh Amendment context when they listed *Curtis v. Loether*, 415 U.S. 189 (1974) as an example of other areas where the court had relied upon “standard common works” to determine if relief was legal or equitable. *Id.* at 217 (majority opinion).

ERISA is also equitable for the purposes of the Seventh Amendment.¹⁹⁷ It logically follows that, because every action must be either equitable or legal, an action falling outside of ERISA's definition of "traditional equitable relief" constitutes legal relief in the eyes of the Seventh Amendment.¹⁹⁸

B. Can Relief Restricted "to the plan" be Legal Relief?

Although the ERISA progeny began with *Russell's* restrictive interpretation of section 409(a), by 2008, a majority of the cases revolved around section 502(a)(3).¹⁹⁹ The Court eventually revisited its prior conclusion that section 502(a)(2) only supports actions brought "by the plan" for recovery to the "entire plan" in *LaRue v. DeWolf, Boberg & Associates*.²⁰⁰ When faced with the question of whether a defined contribution plan participant could hold a fiduciary personally liable under 502(a)(2) for losses incurred when the administrator failed to follow the beneficiary's investment instructions, the Court explained that "although [section] 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, [it] does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."²⁰¹ Thus, while *Russell* is still good law in the direct benefit plan context, its narrow holding is not applicable to defined contribution plans.²⁰² The differing results are justified by the nature of defined contribution plans, in which benefit disbursements vary with the investment success of individualized accounts instead of invariable distributions from a

197. *See id.* (Ginsberg J., dissenting) (arguing that the majority's utilization of a test similar to the Seventh Amendment similarly freezes the statutory definition of "equity" in a similar fashion).

198. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (defining suits involving legal relief as, "in contradiction to those where equitable rights alone are recognized").

199. *See generally supra* Part III.

200. *See LaRue v. DeWolf, Boberg & Assoc., Inc.*, 552 U.S. 248, 254–55 (2008) (recognizing a shift toward utilization of the defined contribution plan over the defined benefit plan).

201. *Id.* at 256.

202. *See id.* at 255 (explaining that the "entire plan" language in *Russell* was directed at plans with a defined benefits payment scheme because administrator misconduct would "not affect an individuals' entitlement to a defined benefit unless it creates or enhances the risk of default" to the entire plan.)

single-employer held defined benefit fund,²⁰³ and the fact that the modern pension landscape starkly contrasts with that which existed when *Russell* was decided.²⁰⁴

Justice Thomas authored a concurrence agreeing with the Court's result but criticizing the majority's reasoning.²⁰⁵ He explained that it was unnecessary to rely upon ERISA's contemporary shift towards defined contribution plans because the plaintiff stated "a cognizable claim flow[ing] from the unambiguous text of [sections] 409 and 502(a)(2)."²⁰⁶ As a result, because "all assets allocated to the petitioner's individual account were plan assets," individualized recovery for losses to those individual accounts satisfied section 409(a)'s requirement that a "recovery [be] for the plan."²⁰⁷ The concurrence took care to note that recovery under 502(a)(2) remained restricted "to the plan," which in a defined benefit context includes all individually held accounts containing plan assets, and not the beneficiary personally.²⁰⁸ This language begins to look like an attempt to pre-empt the jury trial issue once one realizes that Justice Scalia previously stated that "[a]lmost invariably . . . suits seeking . . . to compel the defendant to pay a

203. *See id.* at 254 (explaining in defined contribution plans "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amounts that participants would otherwise receive")

204. *See id.* at 254–55 (noting that the "[d]efined contribution plans dominate the retirement plan scene today" and that the holding in *Russell's* emphasis on protection the "entire plan" from fiduciary misconduct reflects the former landscape).

205. *See id.* at 262 (Thomas, J., concurring) (explaining that the majority erred in its reliance on the "trends in the pension plan market" and "ostensible 'concerns' of ERISA's drafters").

206. *See LaRue*, 552 U.S. at 261–62 (Thomas, J., concurring) (arguing that "Congress' repeated use of the word 'any' in [section] 409(a) clarifies that the key factor" to qualifying for the remedial provision "is whether the alleged losses can be said to be losses 'to the plan'").

207. *See id.* at 262 (Thomas, J., concurring) (explaining that a "defined contribution plan is not merely a collection of unrelated accounts," but instead a combination of plan "assets . . . held in trust and legally owned by the plan trustees").

208. *See id.* at 261 (Thomas, J., concurring) (explaining that section 502(a)(2) only authorizes recovery "to the plan").

sum of money *to the plaintiff* are suits for money damages”²⁰⁹ and that “money damages are . . . the classic form of *legal relief*.”²¹⁰

The question that naturally arises from the forgoing analysis is whether an action seeking lost profits for breach of fiduciary duty can constitute legal relief when recovery is limited “to the plan” instead of directly “to the plaintiff.”²¹¹ While *LaRue* informs us that beneficiaries can “recover for fiduciary breaches that impair the value of plan assets in a participant’s account,” it does not resolve the question of whether such recovery is the equivalent of recovery “to the plaintiff” for purposes of the Seventh Amendment.²¹²

In light of the existing Supreme Court precedent, the fact that section 409 requires recovery “to the plan” should not prevent the action from qualifying as “legal relief.”²¹³ In fact, the nature of a defined contribution plan and the *LaRue* majority’s analysis suggest that recovery “to the plan” and “to the plaintiff” can be considered equivalents.²¹⁴ Because CPI’s plan consisted of individual participant accounts subject to individual gains and losses instead of a single employer held fund, any monetary recovery is directly payable to an individual account.²¹⁵ Because each defined

209. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (quoting *Brown v. Massachusetts*, 487 U.S. 879, 918–919 (1988) (emphasis added)); *see also Sereboff v. Mid Atl. Med. Servs. Inc.*, 547 U.S. 356, 364 (2002) (describing monetary relief as equitable restitution only when it seeks a distinguishable set of funds distinct from the defendant’s “general assets”).

210. *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 210 (quoting *Mertens*, 508 U.S. at 255 (1993)).

211. *See* ERISA § 409(a), 29 U.S.C. 1109(a) (1974) (providing that the fiduciary shall be personally liable *to make good to such plan* any losses to the plan); *see also LaRue*, 552 U.S. at 256 (finding that section 409, in the defined contribution context, supports an action by plan beneficiaries for injuries to plan assets held in their individual accounts but not directly addressing the fact that any award would still be required to be paid “to the plan”).

212. *See LaRue*, 552 U.S. at 261 (Thomas, J., concurring) (noting that a defined benefit plan “is not merely a collection of unrelated accounts[,]” but rather the sum of all assets allocated for bookkeeping purposes to the participants’ individual accounts); *see also* 29 U.S.C. § 1002(34) (defining a “defined contribution plan” as a “plan which provides individual accounts for each participant”); 29 U.S.C. § 1103(a) (requiring that “all assets of an employee benefit plan shall be held in trust by one or more trustees”).

213. *See* *Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 140 (1985) (demonstrating section 409’s repeated use of the limiting phrase “to the plan”).

214. *See* PRATT & REECE, *supra* note 39, at 16 (“Under a defined contribution plan, all amounts contributed to the plan on behalf of an employee are credited to one or more accounts in his name.”).

215. *See LaRue*, 552 U.S. at 248 (explaining that section 502(a)(2) authorizes recovery for fiduciary breaches that impair the value of plan assets held in a participants individual

contribution beneficiary necessarily has some “right, title or interest in the amounts” in his own account, recovery should be viewed as analogous to direct compensation.²¹⁶

It is also important to note that the *Great-West* and Seventh Amendment tests hinge on the origin of the money sought and not on the ultimate depository of the eventual award.²¹⁷ Specifically, the inquiry requires courts look to see if the request sought restoration of “particular [traceable] funds’ now in the Defendants’ possession”²¹⁸ or funds indistinguishable from the defendants’ “general assets.”²¹⁹ Because the judgment recipient is never mentioned, the fact that the recovery is limited “to the plan” should not have any effect on whether the relief embodied in such award is equitable or legal.²²⁰

Accepting the above arguments and presuming section 409(a) is found to support actions for legal relief, it becomes clear that monetary recovery

account).

216. See *Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 733 (1978) (finding a particular pension plan was not a defined contribution plan because, while a record of contributions received to each participant were maintained by the Trustees, participants had no right, title or interest in those amounts).

217. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (describing the determination of whether an action for monetary relief is equitable or legal as focused on whether it merely sought to impose “personal liability” or “traced . . . particular funds or property in the defendant’s possession”); see also *Sereboff v. Mid Atl. Med. Servs. Inc.*, 547 U.S. 356–58 (2002) (clarifying the focus of the *Great-West* test and failing to mention the ultimate depository of the potential award as relevant to that inquiry).

218. *Hellman v. Cataldo*, No. 4:12CV02177 AGF, 2013 WL 4482889, at *4 (E.D. Mo. Aug. 20, 2013); see also *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 213 (explaining that restitution at law derived from the common-law writ of assumpsit because it sought “to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money”).

219. See *Sereboff*, 547 U.S. at 357 (highlighting the fact that the targeted money were identifiable, and particular funds within the defendant’s possession distinct from his “general assets” as proof the action was equitable).

220. See ERISA § 409(a), 29 U.S.C. 1109(a) (1974) (providing that the fiduciary shall be personally liable *to make good to such plan* any losses to the plan (emphasis added)); see also *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008) (finding that section 409, in the defined contribution context, supports an action by plan beneficiaries for injuries to plan assets held in their individual accounts but not directly addressing the fact that any award would still be required to be paid “to the plan”); see also *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 212 (drawing the distinction between restitution at law and restitution at equity as based upon the plaintiff’s ability to assert “title or right to particular property” and not mentioning the ultimate depository or relief as relevant to such inquiry).

to a participant's defined contribution account could potentially be, and is not inconsistent with, characterization as "legal relief."²²¹

C. Did the District Court Err in Light of CIGNA Corp. v. Amara?

Prior to the Supreme Court's most recent case in *CIGNA Corp. v. Amara*,²²² lower courts frequently split on the question of whether relief sought under sections 409(a) and 502(a)(2) constitutionally require a jury trial and demonstrate a wide diversity of reasoning in answering the question.²²³ In *CIGNA*, when faced with the question of whether plan beneficiaries could force a plan administrator to distribute benefits in accordance with the original terms of an illegally reformed plan, the Court suggested in dicta that, because "a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust)" would have been actionable in equity during the days of the divided bench,²²⁴ section 502(a)(3)'s catch-all provision might authorize the necessary relief.²²⁵ Any accompanying remedy would also be equitable due to the fact that "equity chancellors developed a host of . . . 'distinctively equitable' remedies—remedies that were 'fitted to the nature of the primary right.'"²²⁶ The Court noted ERISA's trust law origin and explained that monetary recovery in such a situation would not necessarily prevent the remedy from constituting traditionally equitable relief because "[pre-merger] equity courts possessed

221. See *supra* Part V, Section B (examining whether relief which is only payable "to the plan" can amount to "legal relief" for purposes of the Seventh Amendment).

222. 131 S. Ct. 1866 (2011).

223. Compare *Abbot v. Lockheed Martin Corp.*, No. 06-cv-0701-MJR, 2007 WL 2316481, at *3 (S.D. Ill. 2007) (focusing on the liability arising due to fiduciary breach and noting that the "great weight of authority in federal courts hold . . . that ERISA actions . . . are equitable in nature for purposes of the Seventh Amendment"), with *Chao v. Meixner*, No. 1:07-cv-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. 2007) (citing *Great-West* as compelling the conclusion that the plaintiff sought legal relief because it fell within the rubric of restitution at law).

224. See *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 (2008)).

225. See *id.* at 1876–77 (concluding that the district court ordered two steps of relief and that only the second, enforcing the reformed terms of the plan, was consistent with relief available under section 502(a)(1)(B)).

226. *Id.* at 1879 (quoting 1 S. SYMONS, POMEROY'S EQUITY JURISPRUDENCE § 108 (5th ed. 1941)).

the power to [award] . . . monetary ‘compensation’ for a loss resulting from a trustee’s breach of duty.”²²⁷ Thus, in a suit seeking make whole relief, “the fact that the defendant is, unlike the defendant in *Mertens*, analogous to a trustee [constitutes] a critical difference” for purposes of the Seventh Amendment.²²⁸

LaRue makes clear that Hellman’s request, which sought restoration to the Plan of all profits that would have accrued absent the CPI 401(k) plan administrators’ failure to follow investment instructions, amounts to an action for “lost profits.”²²⁹ As Part II of this Note explains, whether such action constitutes relief “typically available in equity,” i.e., equitable relief outside the scope of the Seventh Amendment, depends on a substantive examination of the *basis of the claim* and the *nature of the remedy*.²³⁰

Applying the first prong of this test, it appears that the basis of Hellman’s action is the breach of a fiduciary duty.²³¹ This conclusion is supported by the analysis of Part IB of this Note and the fact that scholars have consistently indicated that section 502(a)(2) is grounded in the common law of trusts; which traditionally arose in courts of equity during the days of the divided bench.²³² Thus, the first factor weighs in favor of

227. See *id.* at 1880 (observing that prior to the merger of law and equity this kind of monetary remedy against a trustee, often called a surcharge, was “exclusively equitable”).

228. See *id.*

229. See *Hellman v. Cataldo*, No. 4:12CV02177 AGF, 2013 WL 4482889, at *4 (E.D. Mo. Aug. 20, 2013) (explaining that the plaintiff seeks “declaratory relief, recovery of profits, and the imposition of a constructive trust on funds in Defendants’ possession”); see also *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008) (explaining that actions for lost profits fall squarely within the scope of relief available under sections 409(a) and 502(a)(2)); see also ERISA § 409(a), 29 U.S.C. § 1109(a) (1974) (“[F]iduciary . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.”(emphasis added)).

230. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (basing its determination that the restitution sought was restitution at law based upon analysis of the basis of the claim and the substantive nature of the relief sought); see also *supra* notes 167–82 and accompanying text.

231. See *Hellman*, 2013 WL 4482889, at *1 (describing the claim for lost profits, which was the focus of the court’s analysis in determining the applicability of the Seventh Amendment, was brought under ERISA section 502(a)(2) for breach of fiduciary duty giving rise to personal liability of the fiduciary under section 409(a)).

232. See *supra* Part II, section B; see also *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) (explaining that lawsuits by a beneficiary against a fiduciary could have been brought only in a court of equity prior to the merger of law and equity); see also *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993) (recognizing the common law trust foundation of claims for breach of fiduciary duty); see also *Ehlen Floor Covering, Inc. v. Lamb*, No. 2:07-cv-666-FtM-29DNF, 2012 WL 1698352, at *2 (citing *Pereria v. Farace*, 413 F.3d 330, 338

finding that the relief sought is equitable and not within the scope of the Seventh Amendment.²³³

Next, a consideration of the second factor becomes necessary: “whether the nature of the *remedy* sought is legal or equitable.”²³⁴ The inquiry is consistent with recognition of the fact that, while breach of fiduciary duty cases are “historically and substantively equitable,” corresponding post-merger remedies “might be legal.”²³⁵ Because the “contours of the term [equitable relief] are well known,” such a determination rarely takes more than an examination of the standard current works—i.e., “Dobbs, Palmer, Corbin, and the Restatements.”²³⁶ *Hellman*, however, fails to make reference to these materials or Justice Breyer’s dicta in *CIGNA* which suggests an order that requires a fiduciary “compensat[e]” a beneficiary for losses resulting from a breach of his duties historically fell within a set of “‘distinctively equitable’ remedies . . . that were ‘fitted to the nature of the primary right’ they were intended to protect.”²³⁷ The omission is critical because the relief sought, an injunction requiring CPI plan administrators to restore profits lost incurred as a result of their fiduciary breach, resembles an equitable pre-merger remedy known as a surcharge.²³⁸ A comparison of pre-merger trust remedies confirms the error.²³⁹

(2d Cir. 2005) for the proposition that actions for breach of fiduciary duty were within the jurisdiction of equity courts prior to the merger of law and equity); see also *Choa v. Meixner*, No. 1:07-cv-0595-WSD, 2007 WL 4225069, at *3 (N.D. Ga. Nov. 27, 2007) (“[A]s a general rule, breach of fiduciary duty claims were historically within the jurisdiction of the equity courts.”); see also *Abbott v. Lockheed Martin Corp.*, No. 06-cv-0701-MJR, 2007 WL 2316481, at *1 (S.D. Ill. Aug. 13, 2007) (recognizing that the action for breach of fiduciary duty had an historically analogous action in pre-merger equity).

233. See *CIGNA*, 131 S. Ct. at 1879 (shifting its analysis to the second prong of *Great-West* in a way that indicates its conclusion that breach of fiduciary duty actions indicate the relief sought is equitable).

234. *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 213 (quoting *Reich v. Cont’l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.) (emphasis added)).

235. See DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 2.6(3) (2d ed. 1993) (recognizing that courts in the past have found that a plaintiff seeking merely to recover monetary relief (assumpsit) or the return of a chattel to which he holds legal title (replevin) are restitutionary remedies “at law”).

236. See *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 217 (claiming that this static definition will be less confusing than the “rolling revision” of the term “equity” suggested by the dissents).

237. See *CIGNA*, 131 S. Ct. at 1879–80 (quoting 1 S. SYMONS, *POMEROY’S EQUITY JURISPRUDENCE* § 180 (5th ed. 1941)).

238. See *Hellman v. Cataldo*, No. 4:12CV02177 AGF, 2013 WL 4482889, at *4 (E.D. Mo. Aug. 20, 2013) (applying the second prong of the *Great-West* test, after determining

As the *CIGNA* majority observed, the fact that an action for lost profits “takes the form of a money payment does not [necessarily] remove it from the category of traditional equitable relief” because liability from the fiduciary defendant’s breach supports a fundamentally and substantively equitable remedy.²⁴⁰ Specifically, in the days of the divided bench a surcharge allowed a trust beneficiary to recover monetary relief from his fiduciary for any harm that resulted from that fiduciary’s breach of duty.²⁴¹ The equitable nature of such recovery is further supported by the standard current works, which provide that compensatory payments were frequently ordered pursuant to either restitution *or in the exercise of equity powers*.²⁴²

Closer examination reveals that the surcharge remedy stands wholly independent from the concept of restitution.²⁴³ Despite the fact that recognition of this fact is fundamental to correct remedial categorization of section 409(a)’s lost profits remedy, a proper understanding of the nuanced relationship continues to elude many courts.²⁴⁴ While pre-merger trust law permitted recovery of non-traceable monetary sums in conjunction with the restitutionary action of accounting, which frequently took the form of interest accrued to traceable property that was itself unreachable by constructive trust or equitable lien, several circuits have indicated that scope of the “surcharge” remedy extended beyond this context.²⁴⁵ One such

that the first prong weighed in favor of equity, without reference to *CIGNA*).

239. See *supra* Part II, section B (highlighting the trust law foundation of the ERISA fiduciary provisions).

240. See *CIGNA*, 131 S. Ct. at 1880 (explaining that, prior to the merger of law and equity, actions seeking money payment as relief for a loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust enrichment were “exclusively equitable”). In addition, the court noted that the pre-merger court in equity has the “power to . . . surcharge” a fiduciary with losses incurred to the plan. *Id.* (citing to *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 464 (1939)).

241. See *id.* (citing to the RESTATEMENT (SECOND) OF TRUSTS § 201(1957) for support).

242. See DOBBS, *supra* note 235, § 3.1, at 278 n.5 (explaining that some kinds of money awards are not traditionally referred to as damages for historical reasons).

243. See *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1013 (2004) (discussing restitution in the form of “accounting for profits” as a traditionally equitable remedy recognized prior to the merger of law and equity within the meaning of ERISA “equitable relief”).

244. See *e.g.*, *Ehlen Floor Covering, Inc. v. Lamb*, No. 2:07-cv-666-FtM-29DNF, 2012 WL 1698351, at *2 (M.D. Fla. May 14, 2012) (concluding that the relief sought by the 409(a)(2) lost profits plaintiffs was equitable in nature because “plaintiffs seek restitution, which is typically an equitable remedy”).

245. See DOBBS, *supra* note 235, § 4.3(5), at 608 (noting that accounting of profits could recover monetary sums which were not traceable to the defendant’s possession if they

example is the fact that all pre-merger actions for breach of fiduciary duty supported a “make whole” award of monetary compensation for any profits that the trust failed to realize as a consequence of breach.²⁴⁶ While the recovery of both the accrued interest and lost profits were treated as forms of “surcharge” because [in both instances] the trustee was ‘chargeable’ for the recovery on top of the trust balance reflected in his accounting,²⁴⁷ unlike an action for accounting of profits, which itself is a form of restitution, the latter remedy constituted a form of non-restitutionary relief.²⁴⁸ Thus, while it is true that restitution only “holds the defendant liable for his profits . . . [instead of the plaintiff’s] damages,”²⁴⁹ monetary compensation acquired through surcharge of a fiduciary is not bound by this principal because recovery is completely distinct from the concepts of restitution and legal relief.²⁵⁰

were attributable to the use of property which belonged in good conscious to him); *see also* *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 878–880 (7th Cir. 2013) (explaining that *CIGNA* fundamentally changed the court’s understanding of “equitable relief” available under ERISA in that monetary compensation does not automatically mean the remedy is “legal” rather than “equitable” and explaining the pre-merger equitable origin of the surcharge); *see also* *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) (remanding the case to the district court for consideration of whether the remedy sought in substance constitutes surcharge and rejecting the conclusion that all monetary relief is outside the scope of “equitable relief”); *see also* *McCrary v. Metro. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012) (concluding that the district court erred by limiting relief to premiums wrongfully withheld by the fiduciary when surcharge “make whole” relief was traditional equitable relief); *see also* *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1167 (9th Cir. 2012) (describing the surcharge as a remedy capable holding a fiduciary liable for either benefits gained through unjust enrichment or compensatory monetary relief for harm resulting from its breach).

246. *See* RESTATEMENT (THIRD) OF TRUSTS § 95 (2012) (“If a breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries . . . may have the trustee surcharged for the amount necessary to compensate fully for the consequences of the breach.”); *see also* *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (2011) (describing the lost profits recovery as “make whole” relief).

247. *See* MARY ELLEN SIGNORILLE & RAVEN MERLAU, *CIGNA CORPORATION V. AMARA: A WHOLE NEW WORLD*, ALI-ABA 159, 164 (2011).

248. *See* G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 862 (rev. 2d ed. 1995) (“For a breach of trust the trustee may be directed . . . to pay damages to the beneficiary out of the trustee’s own funds, *either for that purpose or on an accounting where the trustee is surcharged beyond the amount of his admitted liability.*” (emphasis added)).

249. DOBBS, *supra* note 235, § 4.3(5), at 611.

250. *See* CHARLES E. ROUNDS, JR., & CHARLES E. ROUNDS, III, *LORING AND ROUNDS: A TRUSTEES HANDBOOK* 698–99 (2014 ed.) (describing the potential monetary liability as either damages, restitution, or surcharge and describing surcharge as non-traceable monetary

The development of an “exclusively equitable” source of compensatory relief is not surprising because, for much of the trust’s existence, equity was the sole forum to recognize the trust relationship.²⁵¹ As a result, recognition of surcharge as a stand-alone substantive form of traditionally equitable relief stays true to both the trust law foundation of section 409(a) and allays Justice White’s fears by ensuring that ERISA’s remedial provisions are not read to afford the beneficiary with less protection than he would have had prior to 1974.²⁵² Instead, revival of the surcharge remedy gives ERISA beneficiaries access to the same form of trust based compensatory relief that would have been available to pension participants prior to 1974 without the mental contortion courts frequently undertook prior to *Great-West*.²⁵³ Recognition of such an award is also consistent with the Court’s earlier denial of compensatory “make whole” relief against a non-fiduciary in *Mertens* because surcharge is only available against fiduciaries.²⁵⁴

Because surcharge, unlike the restitution, does not sit on the line of law and equity, *Great-West*’s distinction between claims to traceable property versus claims against general assets is not relevant to categorization of the 502(a)(2) stock drop action.²⁵⁵ However, since both

compensation for losses incurred from breach of fiduciary duty).

251. See *supra* Part II.B.

252. See *supra* notes 1157–59 (identifying two major trends in the ERISA remedial scheme and highlighting Justice Whites’ major contention in his *Mertens* dissent that explained compensatory relief was available in post-merger pre-ERISA trust actions); see also Langbein, *supra* note 23, at 1350–51 (arguing that Justice Scalia’s statements in *Russell* and *Mertens*—specifically that monetary relief was legal relief not available as “appropriate equitable relief”—were overly generalized and incorrect because some monetary awards were exclusively equitable).

253. See Langbein, *supra* note 23, at 1361–62 (explaining that “[u]ntil *Great-West*, some courts had strained to grant consequential relief despite the holding in *Mertens* by characterizing the relief as restitution—for example, by treating as restitutionary the recovery of interest on a benefit payment long delayed”).

254. See *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (2011) (explaining that, “unlike the defendant in *Mertens*, [the current defendant] is analogous to a trustee [and therefore] makes a critical difference”).

255. See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (explaining that relief falling under the rubric of restitution can be either legal or equitable); DOBBS, *supra* note 235, § 4.1(2), at 556 (explaining that restitution sits on the line between law (replevin & assumpsit) and equity (constructive trust, equitable lien, accounting)); see also *CIGNA Corp.*, 131 S. Ct. at 1880 (explaining that, unlike restitution in which monetary claims were usually at law, a “monetary remedy against a trustee . . . was ‘exclusively equitable.’”).

the *Mertens* and Seventh Amendment inquiries still require a substantive examination beyond remedial labels,²⁵⁶ section 409(a)'s lost profits remedy is only "exclusively equitable" in the eyes of the Seventh Amendment where the defendant was a fiduciary in breach of a fiduciary duty and the lost profits compensate for losses to the plan that resulted from such breach.²⁵⁷ The equitable nature of Hellman's relief is confirmed when this standard is applied to the study case. Despite the fact that any potential monetary recovery would be solely recoverable from the defendant's general assets, Hellman was able to establish that the administrator was a plan fiduciary, a breach of duty resulted in the loss of his 401(k), and that the requested relief compensates a "failure to realize income, capital gain, or appreciation that would have resulted from proper [plan] administration[.]"²⁵⁸

Finally, the forgoing analysis should survive the *CIGNA* dissent's skeptical citation to *Knieriem v. Group Health Plan*²⁵⁹ because the case dealt only with the question of whether the relevant facts merited surcharge in conjunction with a restitutionary accounting of profits and completely failed to evaluate whether surcharge as a standalone non-restitutionary equitable remedy.²⁶⁰ Because ERISA is grounded in pre-merger trust law

256. See *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 211–14 (rejecting the plaintiff's characterization of the requested relief based upon a substantive inquiry in the actual nature of the relief requested); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (explaining that the second prong of the "historical test" requires an examination of the nature of the relief requested).

257. *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 880–82 (7th Cir. 2013) (basing its description of the elements necessary for a prayer to substantively constitute surcharge on the Supreme Court's description in *CIGNA*).

258. See RESTATEMENT (THIRD) OF TRUSTS § 95(b) (2012) (explaining that surcharge included both amounts charged in excess of traceable property identified in an accounting and independently for losses incurred by the trust due to fiduciary breach); see also *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 463–64 (1939) (finding that a remedy seeking to hold a plan fiduciary personally liable for losses to a trust plan resulting from plan mismanagement was a remedy within the court's equitable jurisdiction).

259. See 434 F.3d 1058, 1063–64 (8th Cir. 2006) (rejecting the plaintiff's argument that the remedy he sought, "restitution and surcharge" for alleged breach of fiduciary duty in denying medical benefits, constituted a surcharge awardable in equity).

260. See *id.* at 1063 (explaining that the plaintiff argued that the surcharge was available because it had been awarded under a similar fact pattern in *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999 (8th Cir. 1994)). The Eighth Circuit rejected this argument, reasoning that "*Knieriem* misapplie[d] *Parke*." *Id.* The court explained that, unlike the plaintiff in *Knieriem*, the *Parke* case involved a claim for payment of prejudgment interest under a 502(a)(1)(B) action for accounting of profits. *Id.* Contrary to the plaintiff's alleged meaning, *Parke* was found to only stand for the proposition that an accounting of

and Hellman's requested remedy mirrors an equitable surcharge "brought for [its own] purpose," unrelated to the restitutionary claims accounting of profits, constructive trust, equitable lien, or quasi-contract, the district court erred in concluding that it constituted a request for "legal relief" entitled to trial by jury.²⁶¹

VI. Conclusion

While the rise of the defined contribution plan provides several advantages, such as increased plan control, unique plan portability, and potentially higher investment returns, it also revives some of the socially unjust administrative risks prevalent in the pre-1974 pension system.²⁶² For example, making retirement security dependent on the sophistication of participant investors places low-income and low education households at higher risk of retirement insecurity because they lack expertise to evaluate the prudence of employer provided portfolios or financial flexibility to establish alternative retirement savings.²⁶³ Higher household risk combined with an aging population's increased reliance on the private pension system increased the frequency stock drop class actions.²⁶⁴ Questions regarding

profits, which is a traditionally equitable remedy invoked in conjunction with constructive trust, included the disgorgement of fiduciary profits when the wrongful conduct constituted a breach of fiduciary duty. *Id.* However, *Knieriem* failed to address the independent applicability of surcharge as an equitable remedy distinct from restitution. *Id.*

261. BOGERT, *supra* note 248; see also *supra* Part II, section B (discussing the contours of equitable and legal remedies and the impact such categorization has on questions of Seventh Amendment jury trial availability).

262. See PERUN & STEUERLE, *supra* note 103, at 6 (noting modern ERISA system supports larger investment earnings (\$117 billion for defined contribution plans and \$41 billion for defined benefit plans) and "pa[ys] out more in benefits (\$98 billion for defined contribution plans and \$85 billion for defined benefit plans)," but noting that all returns are employee driven).

263. See JOHN BROADBENT, MICHAEL PALUMBO, & ELIZABETH WOODMAN, THE SHIFT FROM DENIED BENEFIT TO DEFINED CONTRIBUTION PENSION PLANS—IMPLICATIONS FOR ASSET ALLOCATION AND RISK MANAGEMENT ii (2006), available at <https://www.bis.org/publ/wgpapers/cgfs27broadbent3.pdf> (explaining that the shift from defined benefit to defined contribution plans means shifting the risk of loss from shareholders to households, and that plan participants in both developed and emerging pension markets are more exposed to risks in the financial market).

264. See LEWIS, *supra* note 8, at 2 (explaining that more than 200 ERISA employer "stock drop" class action lawsuits have been filed alleging that plan fiduciaries breach their ERISA duties of prudence and loyalty by allowing participants to invest in employer stock).

jury trial availability flows naturally from the increased prevalence of the stock drop suit.²⁶⁵

Despite *Mertens's* and *Great-West's* narrowing definition of “traditional equitable relief,” a substantive examination of the stock drop action reveals that the elusive ERISA jury trial remains unavailable.²⁶⁶ In light of the Supreme Court’s holding in *LaRue*, which permitted beneficiaries to recover for injuries to their individualized defined contribution accounts, it is unclear whether a section 502(a)(2) stock drop class action should fail to constitute “legal relief” based upon section 409(a)’s restriction of recovery “to the plan” instead of “to the plaintiff” alone.²⁶⁷ However, even if recovery to individualized employer-held accounts could constitute legal relief, our case study of *Hellman* reveals that section 502(a)(2) “stock drop” actions nonetheless seek typically equitable relief.²⁶⁸ This is because the surcharge is a distinctly equitable remedy wholly independent from the concept of “legal relief” or post-merger concept of restitution.²⁶⁹ *Hellman's* section 502(a)(2) “stock drop” recovery, despite not being requested in conjunction with an accounting of profits, still constitutes a surcharge brought “for [its own] purpose.”²⁷⁰ Finally, because the Supreme Court’s narrowed definition of ERISA “equitable relief” parallels the pre-merger law and equity distinction of the Seventh Amendment “historical test,” it follows that *Hellman's* section 502(a)(2) stock drop action for recovery of section 409(a) lost profits is not constitutionally entitled to the availability of a jury trial.²⁷¹

265. See *supra* Part V.

266. See *supra* Part III.B.

267. See *supra* Part V.B (determining that the similar nature of recovery “to a plan” and “to the plaintiff” after *LaRue* should not be found to prevent the remedy’s categorization as legal relief).

268. See *supra* Part V.C (explaining that the basis of the claim and nature of the remedy sought in *Hellman's* stock drop action were “traditionally available in equity”); see also PERUN & STEUERLE, *supra* note 103, at 6 (explaining that defined contribution participants bear more risk than defined benefit participants due to their investment control).

269. See *supra* Part V.C (explaining the deficiencies and omissions of the *Knieriem* opinion cited by Justice Scalia’s dissent in *CIGNA*).

270. See *supra* Part V.C (referencing treatises and “standard current works” to conclude that the equitable surcharge is an independent distinctively equitable remedy).

271. See *supra* Part V.A (explaining the similarities between the two tests and concluding that it is impossible to reach differing determinations whereby a claim is equitable under one and legal under the other).

Resurrection of the surcharge partially remedies Justice White's concern that the Court was ignoring ERISA's remedial purpose in denying compensatory liability, but necessarily means that plan participants lack the extra protection of a jury trial.²⁷² While the jury trial would have probably provided some peace of mind, it is important to remember that its absence does not mean defined contribution plan enrollees are helpless.²⁷³ Any advantage provided by a jury trial would have only been relevant as a last line of defense for plan losses already incurred and there might be an advantage to keeping complicated ERISA actions before experienced judges that are more likely to be familiar with the statute's complexities.²⁷⁴ The unavailability of the jury trial should only serve as additional incentive for plan participants to attempt to educate themselves on reliability of employer provided investment options, establish independent personal savings whenever possible, and invest conservatively.²⁷⁵ In addition to self-help, Congressional legislation requiring that defined contribution plans secure independent investment advice for enrollees or employ third party advisors to govern the availability of company stock options would honor ERISA's social justice origins by protecting the low-income households most threatened by new participant driven scheme.²⁷⁶ Reforms like these,

272. See *supra* Part III.B (explaining that a narrower construction might deprive participants of compensatory relief that would be available if they had brought to action as a breach of trust prior to 1974).

273. See LEWIS, *supra* note 8, at 2 (demonstrating that, despite the rarity of the jury trial, plan participants are bringing an increased number of stock-drop complaints and tagalong securities fraud complaints against companies and their executives).

274. See PERUN & STEUERLE, *supra* note 103, at 4 (listing the complexity arising from ERISA's many rules, uncertainty arising from the ambiguity of statutory text, and inconsistency arising from a plethora of exceptions as some the problems non-experts have with the statute).

275. See BROADBENT, PALUMBO & WOODMAN, *supra* note 263, at 40–41 (listing inertia, procrastination, and myopia as suggesting improvement in “financial literacy” and as a potential path to improving returns and improving retirement security).

276. See *id.* at 38 (explaining that “a large body of research . . . demonstrates that financial planning and investing for retirement is not something that comes easily to most people” and that “financial literacy surveys find that many individuals lack even the basic knowledge required to successfully manage their own retirement plans”); see also VANGUARD CONSULTING, *supra* note 8, at 6 (explaining that investment loss on employer provided stock options is increased when employers place high-level corporate officials with potential conflicting interests on the review board in charge of ensuring portfolio reliability); Tim Kohn & Warren Cormier, *How to Improve the Experience of Defined Contribution Participants*, DIMENSIONAL FUND ADVISORS 1, 8 (2011), available at http://www.dfaus.com/pdf/DC_Experience.pdf (listing “get professional-grade help for your participants” as a way to improve retirement security under defined contribution plans).

which decrease the need for safety valve litigation by reducing administrative risk, will do more for retirement stability and comfort of mind than any jury.²⁷⁷

277. See BROADBENT, PALUMBO & WOODMAN, *supra* note 263, at 39–41 (listing several other researcher-developed ideas for ways to change the structure of administrative programs to improve the retirement security “for a large number of workers under [deified contribution] and 401(k)-type pension plans”).