ERISA'S REMEDIAL IRONY: NARROW INTERPRETATION PAVES THE WAY FOR JURY TRIALS IN SUITS FOR BREACH OF FIDUCIARY DUTY UNDER ERISA

INTRODUCTION

When Eugene Scalia, son of Supreme Court Justice Antonin Scalia, filed an amicus brief arguing that monetary relief for a breach of fiduciary duty was "traditionally, typically, and exclusively" available in courts of equity, the suggestion was clear that the remedial provisions of the Employee Retirement Income Security Act (ERISA) of 1974[1] were capable of dividing even families.[2] Through a series of opinions, two of which were written by Justice Scalia, the Supreme Court has narrowly construed the term "equitable" as used in ERISA's remedial provisions,[3] by excluding from that term's ambit the classic form of legal relief, *i.e.*, money damages.[4] In the process, the Court paved the way for plaintiffs seeking money damages under ERISA § 502(a)(2) to exercise their Seventh Amendment right to a jury trial.[5]

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1 29 U.S.C. §§ 1001–1461 (2000).

2 John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1352 (2003).

3 ERISA § 502, 29 U.S.C. § 1132 (2000).

4 Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (Stevens, J.); Mertens v. Hewitt Assoc., 508 U.S. 251 (1993) (Scalia, J.); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (Scalia, J.). Also relevant to the trilogy of *Russell*, *Mertens*, and *Great-West* is Justice Scalia's dissenting opinion in *Bowen v. Massachusetts*, 487 U.S. 879, 913 (1988).

5 *See generally* Donald T. Bogan, *ERISA: Re-Thinking Firestone in Light of Great-West – Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37

The purpose of this Note is to determine whether ERISA, in light of its interpretation by the Supreme Court, permits a jury trial for plaintiffs seeking damages for a breach of fiduciary duty. First, the Note examines the nature, purposes, and scope of ERISA.[6] In light of this brief background, the Note surveys the development of Supreme Court case law relevant to whether damages are available under § 502(a)(2), and whether damages are legal rather than equitable relief.[7] Next, this Note discusses the requirements for invoking the Seventh Amendment right to a jury trial.[8] Part II applies relevant Supreme Court jurisprudence to demands for jury trials under § 502(a)(2) and discusses rationales of lower courts addressing the question directly.[9] Finally, the Note suggests an answer to the question, hypothesizes contrary arguments, and discusses the

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J. MARSHALL L. REV. 629, n. 284 (2004); Mark D. Debofski, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727, 742 (2004); Andrew T. Kusner, Mertens v. Hewitt & Associates*, and the ERISA Liability of the Professional Service Provider*, 15 BERKELEY J. EMP. & LAB. L. 273, 304 (1994).

6 *See* discussion *infra* Part I.A–B.

7 *See* discussion *infra* Part I.C. The Court recognizes that some forms of restitution, for which money damages are available, are equitable rather than legal. *Great-West*, 534 U.S. at 212–13 (holding restitution is a legal remedy when the "plaintiff could *not* assert title or right to possession of particular property, but in which he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him;" but it is an equitable remedy "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession").

8 *See* discussion *infra* Part I.D.

9 *See* discussion *infra* Part II.

likelihood of the Supreme Court squarely addressing the question.[10] In this manner, the Note concludes that at least some claims brought under ERISA § 502(a)(2) for breach of fiduciary duty permit a jury trial upon demand.

I. BACKGROUND

A. Nature, Purposes, and Scope of ERISA

ERISA was enacted by the 93rd Congress[11] after a decade of legislative and executive branch inquiries into the private pension and employee welfare system.[12] ERISA was enacted for the benefit of pension and welfare plan participants and their beneficiaries by regulating employee benefit plans and protecting the funds invested in such plans.[13] In spite of these stated purposes, ERISA is "an enormously complex and detailed statute that resolved innumerable

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10 *See* discussion *infra* Part III.

11 ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW lxxxix (Steven J. Sacher, Jeffrey L. Gibbs, Howard Shapiro, et al. eds., BNA Books 1991). The 93rd Congress was one of the most active and influential, enacting two other pieces of landmark legislation, the War Powers Act and the Budget Reform and Impoundment Act. *Id.* Additionally, the 93rd Congress only avoided impeachment proceedings against President Nixon because he resigned first. *Id.*

12 *Id.* at 6–7.

13 ERISA FIDUCIARY LAW 3 (Susan P. Serota, ed., BNA Books 1995). *See also* 29 U.S.C. §1001. For a general discussion of the purposes of ERISA, *see* ABA SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 11, at 17–19.

disputes between powerful competing interests—not all in favor of potential plaintiffs."[14] Since its enactment, ERISA's scope has been evident from the burden it has placed on the federal courts—and the courts have noticed ERISA's complexity.[15] The Court has often noted the careful drafting and integration of ERISA's enforcement provisions.[16]

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[14] Mertens v. Hewitt Assoc., 508 U.S. 251, 262 (1993). The Court is thus cognizant of legislation's challenge to balance interests between protecting employees promised benefits under private plans offered by employers and employers' interests in controlling costs. *Id.* at 264. The Court previously recognized that Congress was concerned that the cost of federal standards would discourage growth of private pension plans. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 n.17 (1985). Presumably the Court recognized that its ERISA jurisprudence was subject to the same concerns.

[15] Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 Iowa L. Rev. 1, 3 (1995) (reporting that in 1993 Justice White lamented that Supreme Court Justices "have ERISA cases coming out of their ears"). The Court has perhaps also been lamenting when it has repeatedly observed that ERISA is a "comprehensive and reticulated statute." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

[16] *Great-West*, 534 U.S. at 209; *Mertens*, 508 U.S. at 261–62; *Russell*, 473 U.S. at 146–47. In spite of the Court's repeated insistence that the remedial provisions were carefully drafted an integrated, these provisions have not been regarded as perfect. *Mertens*, 508 U.S. at 259 n.8; *Russell*, 473 U.S. at 156–57 (Brennan, J., dissenting). For a more thorough argument regarding the legislative short-comings of the ERISA enforcement scheme, see Langbein, *supra* note , at 1345.

ERISA fiduciary law undoubtedly draws heavily from the common law of trusts.[17] However, ERISA does not merely codify the common law of trusts. For example, ERISA defines a fiduciary functionally as anyone who exercises control or authority over a plan, rather than in terms of formal trusteeship, as at common law.[18] In this way, ERISA expands its coverage beyond that of common law trust principles.[19] ERISA § 404 outlines fiduciary duties. The basic premise is that fiduciaries must act solely in the interest of beneficiaries, with fiduciary actions being tested under the prudent man standard.[20] ERISA § 409 describes the liability of

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17 LaRue v. DeWolff, Boberg & Assoc., 128 S. Ct. 1020, 1024 n.4 (2008) (citing Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996)); *Russell*, 473 U.S. at 153 n.6 (Brennan, J., concurring); Muir, *supra* note 15, at 18; Langbein, *supra* note 2, at 1317; ERISA FIDUCIARY LAW, *supra* note 13, at 4.

18 *Mertens*, 508 U.S. at 262. ERISA § 401, 29 U.S.C. § 1101 (2000), provides:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

19 *Mertens*, 508 U.S. at 262.

20 ERISA FIDUCIARY LAW, *supra* note 13, at 19–21; s*ee* 29 U.S.C. § 1104 (2000).

fiduciaries for breaches of their duty.[21] Finally, ERISA § 502 creates causes of action.[22] Importantly, § 502(a)(2) establishes a right of action for fiduciary liability created under § 409.[23] Despite ERISA's complexity and integration, the statute does not expressly provide whether a jury trial is available.[24]

B. ERISA § 502(a)(2) and Other Relevant Enforcement Provisions

ERISA § 502(a)(2) permits the Secretary of Labor or a plan participant, beneficiary, or fiduciary to bring a civil action for "appropriate relief under section 409."[25] In turn, under § 409, "the fiduciary is personally liable for damages . . . for restitution . . . and for such other equitable

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21 29 U.S.C. § 1109 (2000).

22 29 U.S.C. § 1132 (2000).

23 29 U.S.C. § 1132(a)(2).

24 ABA SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 11, at 527, 634–40; ERISA FIDUCIARY LAW, *supra* note 13, at 403.

25 29 U.S.C. § 1132(a)(2). The use of the word "appropriate" is interesting in this context. Although the Court has never expressly interpreted that language in the statute, Chief Justice Roberts recently suggested that it should be interpreted in the same way that the Court has interpreted "appropriate" in the phrase "other appropriate equitable relief" in § 502(a)(3)—to preclude relief under this section if any other section would afford the plaintiff an adequate remedy. LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 1026–27 (2008) (Roberts, C.J., concurring). Regardless of the merits of this suggestion, it at least raises the question of why Congress thought it important to use the word "appropriate."

or remedial relief as the court may deem appropriate, including removal of the fiduciary."[26] Two other remedial provisions are important in understanding the Court's jurisprudence in the area of ERISA remedies. Section 502(a)(1)(B) provides that a participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[27] Section 502(a)(3) is a "catchall provision," providing for equitable relief for injuries not adequately remedied by the other provisions of § 502.[28] ERISA's other enforcement provisions are not pertinent to understanding § 502(a)(2).

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[26] Mertens v. Hewitt Assoc., 508 U.S. 251, 253 (1993) (internal quotations omitted). 29 U.S.C. 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

[27] 29 U.S.C. § 1132(a)(1)(B).

[28] Varity Corp. v. Howe, 516 U.S. 489, 512 (1998). 29 U.S.C. § 1132(a)(3) provides:

> A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress

C. Supreme Court Jurisprudence Relevant to ERISA's Remedial Provisions

1. Massachusetts Mutual Life Ins. Co. v. Russell[29]

In a 5-4 decision, the Court decided that a participant or beneficiary cannot recover extracontractual or punitive damages for a claim brought under § 502(a)(2).[30] Justice Stevens, writing for the Court, said that § 409 was clearly concerned with protecting the plan as a whole from misuse of assets rather than providing a cause of action to individual beneficiaries.[31] The principal duties imposed on fiduciaries "relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."[32] Given that ERISA is comprehensive legislation with an integrated system of enforcement, there is a strong presumption that Congress did not intend to allow any remedies not expressly provided by statute.[33]

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such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 437 U.S. 134 (1985).

30 Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). The Court expressly decided the narrow question presented, *i.e.*, whether a beneficiary or participant is entitled to recover extracontractual and punitive damages for a breach of fiduciary duty, rather than the broader question of whether a fiduciary may ever be liable for extracontractual or punitive damages, *e.g.*, where the plaintiff seeks recovery inuring to the plan itself. *Id.* at 144 n.12.

31 *Id.* at 142.

32 *Id.*

33 *Id.* at 146–48. The Court also found support from the fact an early version of the bill included a provision for legal and equitable relief, described as providing the full range of legal

Concurring in judgment only, Justice Brennan agreed that § 502(a)(2) was not the proper vehicle for recovery to an individual beneficiary or participant.[34] However, apparently because he suspected the Court suggested that the plaintiff was not entitled to recovery, Brennan argued that § 503(a)(3), the catchall provision, allows an individual plaintiff to recover extracontractual or punitive damages from a fiduciary for a breach of duty.[35] Brennan relies on the common law of trusts, which traditionally constructed make-whole remedies to strictly enforce fiduciary duties and protect beneficiaries.[36]

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and equitable remedies, but in the version finally enacted the reference to legal relief was deleted. *Id.* at 145–46. It is not clear how crucial this factor was in the Court's decision, although the fact that the Court did not use it to reject outright the possibility that the legal remedies sought were unavailable under any set of facts is evidence that it was not controlling. *Id.* at 144 n.12.

[34] *Id.* at 150 (Brennan, J., concurring).

[35] *Id.* Brennan's argument embraces the broader meaning of "equitable," *i.e.*, relief that was available in courts of equity for a breach of fiduciary duty, which is thoroughly rejected by the Court in *Mertens* and *Great-West*.

[36] *Russell*, 473 U.S. at 156 (Brennan, J., concurring). The argument relies on ERISA's legislative history for the propositions that ERISA engrafted the common law of trusts on fiduciaries with modifications, allowing the courts to develop a federal common law of ERISA. While a majority of the Court's jurisprudence in this area has developed without the use of legislative history, these two arguments have been unquestionably accepted. *See, e.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("Given [the statutory] language and

2. Bowen v. Massachusetts[37]

Although not an ERISA decision, *Bowen* is relevant because it previews Justice Scalia's arguments as to the nature of legal and equitable relief that dominate later developments in ERISA remedial law.[38] Scalia's arguments, made in dissent, urge that differentiation between damages[39] and specific relief must be based on the claim's substance rather than form.[40] Damages compensate the plaintiff for a loss or injury resulting from a breach of legal duty;

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history, we have held that courts are to develop a federal common law of rights and obligations under ERISA-regulated plans.").

[37] 487 U.S. 879 (1988).

[38] The principal question presented was whether the federal courts had jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse the state for certain expenditures under Medicaid. Bowen v. Massachusetts, 487 U.S. 879, 882 (1988). Resolution of the jurisdictional question was dependent upon whether the plaintiff sought money damages or specific relief. *Id.* at 893.

[39] Scalia notes initially that "money damages" is a redundancy since "the term 'damages' refers to money awarded as reparation for injury resulting from breach of legal duty." *Id.* at 913 (Scalia, J., dissenting). *See* BLACK'S LAW DICTIONARY 416 (8th Ed. 2004) (defining damages as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury;" not defining the term "money damages").

[40] *Bowen*, 487 U.S. at 915–16 (Scalia, J., dissenting). Indeed, if the division focused on form rather than substance, the line between specific relief and money damages could be manipulated by lawyerly inventiveness (and perhaps little of it would be required) in wording the claim. *Id.*

whereas, specific relief prevents or undoes a loss, *e,g,*, ordering the return of the precise property wrongfully taken or enjoining acts that would cause a future injury.[41] "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages.'"[42] Not only the rationale, but exact language from Scalia's dissent in *Bowen* becomes the majority opinion in subsequent ERISA cases.

3. Mertens v. Hewitt Associates[43]

The Court again split 5-4,[44] holding that a nonfiduciary is not liable for knowingly participating in a breach of fiduciary duty that results in injury to a plan.[45] The plaintiffs

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41 *Id.* at 913–14. Conceding that claims may fit both the classic definition of a suit for money damages and also fit the description of specific relief, Scalia asserts that, according to the common law tradition, recovery of a past due sum that does nothing more than compensate the plaintiff is recognized as a claim for money damages rather than specific relief. *Id.* at 917–18.

42 *Id.* at 918–19.

43 508 U.S. 251 (1993).

44 The particular alignment of justices in this decision is worth noting – Scalia wrote the opinion of the Court, joined by Thomas, Souter, Kennedy, and Blackmun, and White, joined by Rehnquist, Stevens, and O'Connor dissented. Mertens v. Hewitt Assoc., 508 U.S. 248, 249 (1993).

45 *Id.* at 263.

expressly disclaimed reliance on § 502(a)(2), instead suing under § 502(a)(3).[46] The plaintiffs sought money damages—"the classic form of *legal* relief"—for losses resulting from the breach of fiduciary duty.[47] However, unlike § 502(a)(2) which expressly makes a fiduciary personally liable in damages,[48] § 502(a)(3) authorizes only equitable relief.[49] Plaintiffs argue that money damages are authorized under § 502(a)(3) pursuant to the authority for courts to award "other appropriate equitable relief."[50] The Court concedes that "other appropriate equitable relief" could mean either "whatever relief a court of equity was empowered to provide in the particular case at issue" or it could mean only "those categories of relief that were *typically* available in equity."[51]

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[46] Given that plaintiff sought liability against a nonfiduciary, it is exceedingly unlikely that the result would have been different if the claim was brought under § 502(a)(2). *See id.* at 254; 29 U.S.C. § 1109(a) (2000).

[47] *Mertens*, 508 U.S. at 256 ("[Plaintiffs] do not . . . seek a remedy traditionally viewed as equitable, such as injunction or restitution"). Notably, Scalia later backs away from any implication that restitution is typically an equitable remedy. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215 (2002) (citing Reich v. Continental Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.). And Scalia had already said that an injunction to merely pay a sum of money was a suit for money damages, *Bowen*, 487 U.S. at 918–19 (1988) (Scalia, J., dissenting), and Scalia reiterated that view in *Great-West*, 534 U.S. 204, 210 (2002).

[48] *Mertens*, 508 U.S. at 253.

[49] 29 U.S.C. § 1132(a)(3) (2000); *Mertens*, 508 U.S. at 253.

[50] *Mertens*, 508 U.S. at 253; 29 U.S.C. § 1132(a)(3).

[51] *Mertens*, 508 U.S. at 256.

The Court determines that the latter meaning is undoubtedly correct,[52] because the former meaning would render the modifier "equitable" superfluous[53] and would be inconsistent with the meaning ascribed to "equitable" elsewhere in ERISA.[54]

In dissent, Justice White points out the anomaly of interpreting ERISA to provide participants and beneficiaries with less protection than they had before ERISA, under the common law of trusts.[55] Echoing Brennan's *Russell* dissent, White asserts that Congress did not carefully craft the enforcement provisions. For example, Congress did not likely carefully differentiate between "equitable" and "remedial" relief.[56] The majority answered this argument, stating that even if the distinction is "artless," it nonetheless must be observed as a distinction.[57]

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[52] *Id.* at 257.

[53] *Id.* at 258 ("Since all relief could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to equitable relief in the sense of whatever relief a common-law court of equity could provide for breach of fiduciary duty would limit the relief not at all. We will not read the statute to render the modifier superfluous.").

[54] *Id.* (asserting that Congress' distinction between "equitable" and "remedial" (ERISA § 409) and between "equitable" and "legal" (ERISA § 502(g)(2)(e)) would be meaningless if the Court interpreted "equitable relief" to mean all forms of relief available in equity for a breach of fiduciary duty and ascribed that meaning to these parallel ERISA provisions).

[55] *Id.* at 263–64 (White, J., dissenting).

[56] *Id.* at 270 n.4 ("What limiting principle Congress could have intended to convey by [remedial] I cannot readily imagine. 'Remedial,' after all, simply means 'intended as a remedy' and 'relief' is commonly understood to be a synonym for 'remedy.'").

[57] *Id.* at 259 n.8 (majority opinion).

The Court did not, however, clarify or suggest a possible meaning of "remedial" in § 409, but reiterated that "[e]quitable relief" must mean *something* less than *all* relief."[58]

4. Great-West Life & Annuity Ins. Co. v. Knudson[59]

In *Great-West*, the Court again decided 5-4,[60] holding that plaintiffs could not enforce a reimbursement provision in an ERISA plan by bringing a claim under § 502(a)(3).[61] Regardless of whether the claim was drafted like a claim for injunctive or restitutionary relief, a claim that seeks nothing more than monetary compensation for a loss is merely a claim for damages[62]—the classic form of legal relief[63]—which are not available under § 502(a)(3)[64]. Restitution in the form of money is only equitable when the plaintiff identifies the money "belonging in good conscience" to him and traces it to particular funds in the defendant's possession.[65] Restitution

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[58] *Id.* The Court pointed out that Congress also used the phrase "other equitable or remedial relief" in 5 U.S.C. § 8477(e)(1)(A). *Id.* However, that language has not been interpreted by the courts.

[59] 534 U.S. 204 (2002).

[60] This time the breakdown of Justices was more traditional, with Scalia, Rehnquist, Thomas, O'Connor, and Kennedy against Ginsburg, Breyer, Souter, and Stevens. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 206 (2002).

[61] *Id.* at 218.

[62] *Id.* at 210 (citing Bowen v. Massachusetts, 487 U.S. 879, 918–19).

[63] *Id.* (citing *Mertens*, 508 U.S. at 255).

[64] *Great-West*, 534 U.S. at 218.

[65] *Id.* at 213.

seeking merely to hold the defendant personally liable to the plaintiff is legal relief.[66] Whether a claim is legal or equitable is determined with reference to the basis for the claim and the nature of the underlying remedies sought.[67] Determining whether relief sought in a particular case is legal or equitable will rarely require more than consulting "standard current works."[68] Perhaps sensitive to assertions that the majority result was contrary to congressional intention,[69] Justice Scalia wrote, "It is . . . not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect."[70]

Writing in dissent, Justice Ginsburg argued that it was "fanciful" to believe that Congress intended the technical distinction between legal and equitable relief that the majority attributed to it.[71] Further, she argued, the fact that the Court examines the state of the common law as it existed in 1791 to preserve the right to a jury trial as it existed does not justify an examination of the law in 1791 to give meaning to a statute enacted in 1974.[72]

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66 *Id.*

67 *Id.*

68 *Id.* at 217 (indentifying Dobbs, Palmer, Corbin, and the Restatements as "standard current works"). Perhaps out of character, Justice Scalia did not respond to Justice Ginsburg's complaint that the "standard current works" do not always yield a single, consistent answer. *See id.* at 232 (Ginsburg, J., dissenting).

69 *Id.* at 223 (Stevens, J., dissenting); *id.* at 234 (Ginsburg, J., dissenting).

70 *Id.* at 217–18 (majority opinion).

71 *Id.* at 225, 227 (Ginsburg, J., dissenting).

72 *Id.* at 233.

5. Sereboff v. Mid Atlantic Medical Services[73]

Writing for a unanimous court,[74] Chief Justice Roberts distinguished this case from *Great-West*, where an employer sought to enforce a reimbursement provision through a judgment for money not in the participant's possession.[75] Here, the Court applied the reasoning of *Great-West* to determine that since the plaintiff sought nothing more than recovery of "specific funds . . . within the possession and control of the Sereboff's," *i.e.*, a constructive trust or equitable lien on settlement proceeds, the plaintiff could recover under the "other appropriate equitable relief" provision of § 502(a)(3).[76] The result is uncontroversial. In fact, shortly after announcing the decision, the Chief Justice touted it as a simplification of the law.[77]

6. LaRue v. DeWolff, Boberg & Associates, Inc.[78]

Recognizing fundamental changes in pension plans since *Russell*, the Court revisited language in *Russell* suggesting relief was only available for breaches affecting the entire plan.[79]

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73 547 U.S. 356 (2006).

74 Sereboff v. Mid Atlantic Medical Servs., Inc., 547 U.S. 356, 359 (2006).

75 *Id.* at 362.

76 *Id.* at 362–63.

77 Colleen Medill, *Sereboff and the Future of ERISA Remedies*, WORKPLACE PROF BLOG, May 20, 2006, http://lawprofessors.typepad.com/laborprof_blog/2006/05/sereboff_and_th.html. Medill acknowledges *Sereboff* managed to sidestep the more difficult issues confronted in *Great-West* and moved the Court's analysis away from focus on 18th century causes of action; however, she concludes that *Sereboff* may be more appropriately described as "subtle change" than "simplification." *Id.*

78 128 S. Ct. 1020 (2008).

Since *Russell*, defined contribution plans have replaced defined benefit plans as the norm.[80] In light of this development, the Court held that "although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."[81] Aside from deciding that breaches affecting 401(k) or other individual plan participant accounts are remediable under § 502(a)(2), the Court also expresses its understanding that claims for lost profits are cognizable under § 502(a)(2).[82] Interestingly, the Court relies on the common law of trusts for this proposition, noting that § 409 closely resembles the Restatement of Trusts.[83]

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79 LaRue v. DeWolff, Boberg & Assoc., 128 S. Ct. 1020, 1022 (2008) (observing that although the language in *Russell* is consistent with the Fourth Circuit's decision, the rationale in *Russell* is not).

80 *Id.* at 1025. When ERISA was enacted and, later, when *Russell* was decided, most pension plans were "defined benefit plans." *Id.* Since *Russell*, "defined contribution plans" have emerged as the dominate form of pension plan. *Id.* Under defined benefit plans, employees receive a definite sum of money, usually determined by a formula factoring in yearly salary before retirement and number of years worked. Edward A. Zelinkski, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 455 (2004). Plan assets are usually maintained in a single account from which benefits are disbursed. *Id.* at 456. On the other hand, defined contribution plans promise a certain contribution from an employer to the participant's individual account. *Id.* at 455. Generally, participants make contributions and may maintain control over management of the assets in their individual accounts. *Id.* at 457.

81 *LaRue*, 128 S. Ct. at 1026.

82 *Id.* at 1024 n.4.

Finally, concurring in judgment only, Justice Thomas, joined by Scalia, argues that §§ 409 and 502(a)(2) unambiguously allow the beneficiary of an individual account to recover for fiduciary breach since the assets allocated to an individual account are plan assets within the meaning of ERISA.[84]

D. Seventh Amendment Right to a Jury Trial

The Constitution guarantees 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 . . . ."[85] The phrase "suits at common law" has consistently been interpreted as meaning "suits in which *legal* rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."[86] "When Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available

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83 *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 205). Section 205 of the Restatement provides:

> If the trustee commits a breach of trust, he is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or (b) any profit made by him through the breach of trust; or (c) any profit which would have accrued to the trust estate if there had been no breach of trust.

RESTATEMENT (SECOND) OF TRUSTS § 205.

84 *LaRue*, 128 S. Ct. at 1028–29.

85 U.S. CONST. amend. VII.

86 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989) (quoting Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433 (1830) (Story, J.)).

if the action involves rights and remedies[87] of the sort typically enforced in an action at law."[88] Thus, to determine whether the right to a jury trial attaches to particular claims, the Court first compares the claim to 18th century actions brought before the merger of law and equity courts; second, it determines whether the nature of the remedy sought is legal or equitable.[89] The second inquiry is more important.[90] If, on balance, legal rights are at issue, the parties are entitled to a jury trial so long as there is no functional justification for denying the right.[91]

II. ANALYSIS

A. If Claim Is Legal Rather Than Equitable Under ERISA, Parties Have a Right to Jury Trial

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87 Interestingly, even if not controlling in the area of ERISA remedial provisions, the Court decided that the claim at issue sought the legal remedy of money damages. Curtis v. Loether, 415 U.S. 189, 197 (1974). However, the Court expressly declined to hold that all claims for monetary relief are necessarily legal relief. *Id.* at 196. Nonetheless, the Court was willing to say that the right to a jury trial cannot be denied by classifying legal relief sought as "incidental" to the equitable relief sought. *Id.* at 196 n.11.

88 *Id.* at 195; s*ee also Granfinanciera*, 492 U.S. at 42 ("[T]he Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.").

89 *Granfinanciera*, 492 U.S. at 42.

90 *Id.*

91 *Id.* at 42–44; *Curtis*, 415 U.S. at 195; Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) at 433; s*ee also* ERISA FIDUCIARY LAW , supra note 13, at 403; ABA SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 11, at 635–36.

In *Great-West*, the Court announced that to determine whether a particular claim under ERISA was legal or equitable, it would examine the basis of the claim and the nature of the underlying remedies sought.[92] The Court proceeded to analogize the claim at issue to 18th century causes of action[93] and analyzed the nature of remedy sought by reference to treatises on remedies.[94] *Sereboff* did not change the test set forth in *Great West*.[95] Similarly, the

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92 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002).

93 *Id.* (analogizing the instant claim to the common law writ of assumpsit).

94 *Id.* (observing the nature of the remedy is legal where the plaintiff sought to obtain a judgment imposing personal liability on defendant for a sum of money).

95 *See* Evan Schwartz & Michail Z. Hack, *ERISA Litigation: Supreme Court Ruling Undermines Jury Trial Ban*, QUADRINO SCHWARTZ: NEWS AND UPDATES, June 15, 2006, http://www.disabilityinsurancelawyers.com/news/read/erisa-litigation-supreme-court-ruling-undermines-jury-trial-ban/ (writing after *Sereboff* and examining Second Circuit precedent in the wake of *Great-West*). If *Sereboff* had any impact on form of the Great-West rule, it would have been to convert the balancing of the two general inquiries into a rigid test requiring the satisfaction of both prongs. *See Sereboff*, 547 U.S. at 363 ("While [plaintiff]'s case for characterizing its relief as equitable does not falter because of the nature of the recovery it seeks, [plaintiff] must still establish that the basis for its claim is equitable."). Since it is possible that one prong weighs in favor of an equitable claim while the other prong weighs in favor of a legal remedy, *see* Bona v. Barasch, 2003 WL 1395932, No. 01-2289 (Mar. 20, 2003 S.D.N.Y.), and it is academic that relief must be either equitable or legal. BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "remedy" as "the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief"). *Sereboff* could not have created a rule that renders a remedy

Constitutional question of whether the Seventh Amendment right to a jury trial is preserved with respect to a given claim depends on a comparison to 18th century causes of action and determination of whether the remedy sought is legal or equitable in nature.[96] Indeed, it is entirely logical that the tests would be the same or substantially the same since both tests are aimed at determining whether the right or remedy at issue is legal or equitable.[97]

If the tests are almost identical on their faces, they are perhaps applied differently in their respective contexts. First, *Mertens* holds that in determining whether a claim is equitable in the context of ERISA, courts should look to only "those categories of relief that were typically available in equity" rather than whatever relief a plaintiff could receive in equity for a breach of fiduciary duty.[98] It is not clear that the Court has endorsed this approach when applying the Seventh Amendment test.[99] Since breach of fiduciary duty claims were brought in courts of equity, the first prong of the Seventh Amendment test will tilt toward an equitable remedy unless

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neither legal nor equitable. *See* Medill, *supra* note 77 (suggesting *Sereboff* only produced a small change in the way the Court would apply the Great-*West* rule).

[96] *Granfinanciera*, 492 U.S. at 42; *Curtis*, 415 U.S. at 195. The Court emphasizes that the nature of the remedy sought is the more important inquiry. *Granfinanciera*, 492 U.S. at 42.

[97] *Great-West*, 534 U.S. at 212–13; *Granfinanciera*, 492 U.S. at 41; *Curtis*, 415 U.S. at 193.

[98] Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993).

[99] *Granfinanciera*, 492 U.S. at 43 (examining 18th century common law actions in bankruptcy context to determine whether statutory bankruptcy claim was of the type that could have been brought at law prior to the merger).

the *Mertens* rule applies to the Seventh Amendment test as well as the ERISA remedy test.[100] Some district courts applying the Seventh Amendment test have held that although the claim sought legal relief, the first prong weighed against permitting a jury trial since the relief for breach of fiduciary duty was historically available only at equity.[101]

Second, the Court has been explicit in holding the second prong of the Seventh Amendment is more important than the first,[102] but has not been explicit in elevating the second inquiry over the first in the context of the ERISA remedy test.[103] A possible explanation is that the application of the *Mertens* rule to the ERISA remedy test renders the two inquiries under the ERISA remedy test virtually indistinguishable.

Even if the tests are slightly different, it remains almost inconceivable that a court could determine that the relief sought is legal under ERISA but equitable under the Seventh

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100 *See Mertens*, 508 U.S. at 258 (recognizing that all relief was available in equity for a breach of fiduciary duty).

101 Chao v. Meixner, No. 1:07-CV-0595-WSD, 2007 WL 4225069, at *3 (N.D. Ga. Nov. 27, 2007); Bona v. Barasch, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003).

102 Chauffers, Teamsters, and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990); *Granfinanciera*, 492 U.S. at 42.

103 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213–16 (2002). Perhaps the Court implicitly achieved this end in *Sereboff* when it made the second inquiry first and side-stepped the more difficult issues presented by the first inquiry as applied in *Great-West*. S*ee* Medill, *supra* note 77.

Amendment.[104] Assuming the validity of that assertion, the central question is whether a claim for legal relief is cognizable under §§ 409 and 502(a)(2).

B. ERISA §§ 409 and 502(a)(2) Provide Legal Remedies for Breach of Fiduciary Duty

Section 502(a)(2) permits suits against fiduciaries for breaches of their duties to recover "appropriate" relief in light of liability created for breach of fiduciary duty under § 409.[105] While § 409 creates liability for breaches causing loss to the plan,[106] the Court has definitively held that losses to individual accounts in defined contribution plans are remediable under § 502(a)(2).[107] Thus, any beneficiary[108] who alleges a breach of fiduciary duty caused a loss in value of his

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104 *See* Kusner, *supra* note 5, at 304 (hypothesizing that *Mertens*' recognition of legal remedies under § 502(a)(2) may open the door to jury trials and encourage settlement by fiduciaries).

105 29 U.S.C. §§ 1109 and 1132(a)(2) (2000); *see Mertens*, 508 U.S. at 252–53 (interpreting the interplay between ERISA §§ 409 and 502(a)(2)).

106 Mass. Mut. Life Ins. Co. v. Russell, 472 U.S. 134, 144 (1985); *see* LaRue v. DeWolff, Boberg & Assoc., 128 S. Ct. 1020, 1026 (2008).

107 *LaRue*, 128 S. Ct. at 1026.

108 Section 502(a)(2) expressly permits suits for appropriate relief under § 409 "by the Secretary [of Labor], or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(a)(2). In the context of losses to 401(k) or other individual accounts under a defined contribution plan, the beneficiary is the most likely plaintiff. *See* Meredith Z. Maresca, *Litigation: ERISA Practitioner Says* LaRue *Will Give Rise to Misrepresentation Claims in Lower Courts*, PENSION & BENEFITS DAILY LEGAL NEWS, Oct. 3, 2008.

401(k) plan can state a claim under § 502(a)(2) for the type of relief provided in § 409.[109] The Supreme Court has not decided a case that turned on whether legal remedies are available under §§ 409 and 502(a)(2), but the Court has made relevant observations about the types of remedies available under those sections. Most importantly, the Court has said that punitive and extracontractual damages are not available to a beneficiary,[110] fiduciaries are personally liable for damages—the classic form of legal relief,[111] Congress's distinction between equitable and remedial relief must be accorded meaning,[112] and claims for lost profits are cognizable.[113]

1. Punitive and Extracontractual Damages Are Not Available

The Court held that beneficiaries or participants could not recover punitive or extracontractual damages under § 502(a)(2), but explicitly left unanswered the question of whether a fiduciary or the Secretary of Labor could recover such damages on behalf of the plan.[114] *LaRue* suggests the proper question under § 409 is whether the breach has caused the

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109 *See LaRue*, 128 S. Ct. at 1024 n.4 (declaring that claims for lost profits are cognizable under § 502(a)(2)); *see also Mertens*, 508 U.S. at 252 (defining the types of personal liability of fiduciaries outlined in § 409).

110 *Russell*, 473 U.S. at 144.

111 *Mertens*, 508 U.S. at 253, 256.

112 *Mertens*, 508 U.S. at 259 n.8 (1993); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002).

113 *LaRue*, 128 S. Ct. at 1024 n.4.

114 *Russell*, 473 U.S. at 144, 144 n.12 (1985); *see also LaRue*, 128 S. Ct. at 1024 (explaining the holding in *Russell* as being based on the conclusion that the misconduct alleged did not "relate to the proper management, administration, and investment of fund assets, with an eye

beneficiary to receive a lesser benefit than he would have received absent the breach.[115] *LaRue* does not overrule *Russell*; thus, punitive and extracontractual damages remain unavailable to participants and beneficiaries.[116] To the extent fiduciaries may ever be liable for punitive and extracontractual damages, presumably the situation would have to be such that without their recovery beneficiaries would not receive "the benefits authorized by the plan."[117]

2. Congress's Distinction Between Equitable and Remedial Relief Is Meaningful

Justice White, dissenting in *Mertens*, vigorously argues it is impossible to take anything away from the apparent distinction between "equitable" and "remedial" relief in § 409.[118] Since "remedial" means "intended as a remedy" and "relief" is a synonym for "remedy," remedial relief is a hopeless redundancy.[119] Justice Scalia responded to White's lamentation, agreeing that the distinction is "artless," but nonetheless concluding that the distinction, plainly made in the text of § 409, may not be ignored.[120] Specifically, Scalia wrote that equitable relief must mean

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toward ensuring that the benefits authorized by the plan are ultimately paid to participants and beneficiaries").

115 *LaRue*, 128 S. Ct. at 125–26 (explaining that fiduciary breach need not compromise the entire plan value in order to decrease the value of benefits available to a beneficiary in a defined contribution plan, and holding that § 502(a)(2) "authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account").

116 *Id.* at 1024.

117 *Id.*; *see also Russell*, 473 U.S. at 142.

118 Mertens v. Hewitt Assoc., 508 U.S. 248, 270 n.4 (1993) (White, J., dissenting).

119 *Id.*

120 *Id.* at 259 n.8 (majority opinion).

something less than all relief.[121] However, for purposes of whether § 409 creates legal remedies, the meaning of remedial relief in that context is more interesting. Presumably, in the phrase "such other equitable or remedial relief,"[122] "remedial" means relief that is legal rather than equitable.[123]

Assuming ERISA distinguishes between equitable and remedial,[124] giving effect to that distinction requires recognition that § 409 creates remedies beyond equitable ones. The term "remedial relief" appears to have originated in the idea that courts of equity were empowered to fashion whatever remedy necessary to afford litigants in equity appropriate relief for harms suffered.[125] However, under *Mertens*, such remedies that may be granted by a court of equity in a particular case are nonetheless legal remedies to the extent they are not *typically* available in equity.[126]

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121 *Id.*

122 29 U.S.C. § 1109(a) (2000).

123 *See* Chao v. Meixner, No. 1:07-CV-0595-WSD, 2007 WL 4225069, at *2 (N.D. Ga. Nov. 27, 2007) (finding that causes of action under § 502(a)(2) may arise at law based in part on *Mertens*'s language giving effect to ERISA's distinctions between equitable and remedial relief).

124 The full *Mertens* Court apparently agreed that the text of § 409 creates a distinction between equitable and remedial. *See Mertens*, 508 U.S. at 270 n.4 (White, J., dissenting). The dissent argues that because Congress did not carefully differentiate and failed to communicate any "limiting principle," the distinction is meaningless. *Id.*

125 *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444, 449 (1911) (indicating that "remedial relief" means relief delivered by a court of equity).

126 *Mertens*, 508 U.S. at 257.

3. The Classic Form of Legal Relief Is Available

Damages are clearly available under ERISA.[127] The rationale of *Mertens* and *Great-West* establish that damages are legal rather than equitable.[128] The Court decided in *Mertens* that equitable relief means relief typically available in a court of equity without reference to the "particular case at issue."[129] Thus, the fact that prior to the merger of law and equity courts, remedies for breach of fiduciary duty were available exclusively at equity does not render those remedies equitable.[130] Rather, "whether [a remedy] is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies."[131] Yet it is not apparent what

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127 *Id.* at 252 (relying on language in § 409 making a breaching fiduciary "personally liable to make good to [the] plan any losses to the plan resulting from each such breach"); *see also* LaRue v. DeWolff, Boberg & Assoc., 128 S. Ct. 1020, 1024 n.4 (2008) (asserting that § 502(a)(2) provides relief losses suffered because assets that should have been sold declined in value or assets that should have been, but were not, purchased increased in value).

128 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002); *Mertens*, 508 U.S. at 256–59.

129 *Mertens*, 508 U.S. at 257–58 ("Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*.").

130 *Great-West*, 534 U.S. at 221.

131 *Great-West*, 534 U.S. at 213 (citing Reich v. Continental Casualty Co., 33 F. 3d 754, 756 (7th Cir. 1994) (Posner, J.)).

weight is accorded to "the basis for the plaintiff's claim,"[132] nor how that inquiry differs from the rejected inquiry into whether the remedy was available at equity in the "particular case at issue."[133] Nevertheless, damages are available, and they are not equitable within the meaning of ERISA.[134]

4. Claims for Lost Profits Are Cognizable

Losses for which the fiduciary is liable include not only where the breach causes a decrease in assets, but also where the breach prevents the plan from realizing an increase in assets.[135] Such lost profits are consequential damages, a clear form of legal rather than equitable relief.[136] However, *LaRue* relies on the Restatement (Second) of Trusts for the proposition that lost profits are recoverable.[137] The Restatement declares that such remedy, while available, is

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132 *Great-West*, 534 U.S. at 224 (Ginsburg, J., dissenting) (asserting that the majority decides the remedy sought is equitable by reference merely to the technical requirements of the claim honored prior to the merger).

133 *Mertens*, 508 U.S. at 256.

134 *Great-West*, 534 U.S. at 215. Notably, the entire Court in *Great West* would hold that compensatory damages are not equitable. *See id.* at 234 (Ginsburg, J., dissenting) (declaring that she would hold compensatory damages were not within the ambit of "equitable relief" under ERISA).

135 LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 1024 n.4 (2008).

136 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.3(3) (2d ed., Practitioner Treatise Series 1992).

137 *LaRue*, 128 S. Ct. 1020, 124 n.4.

equitable rather than legal.[138] Perhaps this conflict between "standard current works" epitomizes Justice Ginsburg's concerns with *Great-West*'s reliance on secondary sources to determine whether a particular remedy is legal or equitable in nature.[139] Examination of the "standard current works" thus requires greater attention.

C. Standard Current Works Are Not Definitive of Nature of Remedies

Great-West teaches that determining the nature of the remedy sought usually involves nothing more than consultation of the "standard current works."[140] The standard current works give a rather emphatic answer to whether remedies for breach of fiduciary duty are legal or

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[138] RESTATEMENT (SECOND) OF TRUSTS §§ 197–98 (asserting that the remedies of the beneficiary against the trustee are exclusively equitable except where the trustee fails to convey money or a chattel to the trustee despite an immediate and unconditional duty to do so). The exception to the exclusively equitable nature of remedies under the common law of trusts applies only to instances in which equitable remedies have become matured legal obligations. Langbein, *supra* note 2, at 1317 n.11. *But see* DOBBS, *supra* note 136 , at 163 (stating plaintiff seeking to recover a fixed sum of money has remedy at law) (citing RESTATEMENT (SECOND) OF TRUSTS §§ 197–98).

[139] *Great-West*, 534 U.S. at 232 (2002) (Ginsburg, J., dissenting) (questioning the majority's "confidence in the ability of the standard current works to make the answer clear," and observing the Court provides no direction for resolution of conflicts between such works). Justice Ginsburg is reacting to the majority's assertion that "[r]arely will there be need for any more antiquarian inquiry than consulting . . . standard current workds such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." *Great-West*, 534 U.S. at 217 (majority opinion).

[140] *Great-West*, 534 U.S. at 217.

equitable—they are historically, substantively, and exclusively equitable.[141] Yet, the Court explicitly rejects that question,[142] instead inquiring into the nature of the remedy without reference to the particular case at issue.[143] Thus, Dan Dobbs' admonition that although fiduciary cases are "historically and substantively" equitable they may be legal with respect to the nature of the remedy,[144] is of great significance under the Court's approach.[145]

The fact that damages are the classic form of legal relief,[146] is confirmed by treatises,[147] but perhaps provides a false resolution. Money awards other than restitution[148] may be ordered pursuant to equitable powers.[149] Equitable money awards are distinguished through means of

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141 RESTATEMENT (SECOND) OF TRUSTS § 197; DOBBS, *supra* note 136, at 163.

142 *Mertens* v. Hewitt Assoc., 508 U.S. 248, 256–58 (1993).

143 *Great-West*, 534 U.S. at 213; *Mertens*, 508 U.S. at 256–58.

144 DOBBS, *supra* note 136, at 163.

145 The majority opinion cites Dobbs seven times. *See Great-West*, 534 U.S. 204.

146 *E.g.*, *Mertens*, 508 U.S. at 255.

147 *E.g.*, DOBBS, *supra* note 136, at 3.

148 Restitution can be equitable or legal. *Great-West*, 534 U.S. at 213. The contours of restitution are important to discerning the Court's approach defining a remedy as equitable or legal, but it is of little consequence that restitution may be equitable. The important question is whether legal restitution is contemplated by § 409, not whether equitable restitution is contemplated as well. Section 409 unequivocally contemplates equitable remedies for which parties would not be entitled to a jury trial.

149 DOBBS, *supra* note 136, at 278.

enforcement.[150] Damages are enforceable by seizure of property, whereas equitable awards are enforceable by the courts' contempt powers.[151] Thus, the imposition of personal liability on the fiduciary without reference to the source of liability is not indicative of whether the remedy is legal or equitable. In practical terms, the purpose of damages is to put the party injured by breach in the position he would have occupied under full performance without a breach of duty, whereas the purpose of restitution is to restore the injured party to the position he occupied before the breach.[152] Corbin, like Dobbs, recognizes that restitution may be legal or equitable.[153] Cobin expressly does not differentiate between pre-merger causes of action for restitution.[154]

Personal liability is imposed "to make good to such plan any losses to the plan resulting from each [fiduciary] breach" (damages liability clause) and "to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary" (restitutionary liability clause).[155] The damages liability clause may encompass equitable money awards, but it clearly contemplates compensatory monetary relief traditionally available in a court of law.[156] The damages liability clause is broad enough to include monetary relief to compensate for such losses, putting the participant or beneficiary in the position he would have

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150 *Id.* at 278–79.

151 *Id.*

152 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1102 (1993).

153 *Id.*

154 *Id.*

155 29 U.S.C. § 1109(a) (2000); *see also* Mertens v. Hewitt Assoc., 508 U.S. 248, 252 (1993).

156 *See* DOBBS, *supra* note 136, at 3, 163.

occupied if the fiduciary had rendered performance without a breach of duty.[157] Indeed, damages for lost profits are available.[158] Claims for lost profits are clearly within the paradigm of damages, and, thus, legal rather than equitable relief.[159]

D. The Question of Whether Legal Relief Is Available Divides Lower Courts

Among courts that have considered whether a claim under § 502(a)(2) seeks a legal remedy entitling the parties to a jury trial, the weight of authority holds no right to trial by jury applies to actions for breach of fiduciary duty.[160] Nonetheless, some courts have determined that the right to trial by jury is preserved at least with respect to some claims cognizable under § 502(a)(2).[161] Courts striking jury trial demands have generally pointed to the inherently equitable nature of actions for breach of fiduciary duty,[162] while those recognizing the jury trial right have focused on the compensatory damages remedy sought by plaintiffs.[163]

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157 *See* CORBIN, *supra* note 152, § 1102.

158 LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 124 n.4 (2008).

159 *See* DOBBS, *supra* note 136, § 3.3(3). The broad admonition that remedies for breach of fiduciary duty are equitable remedies, RESTATEMENT (2D) OF TRUSTS § 197, is not to the contrary since *Mertens* rejects an answer based on the type of relief that a court cold provide in a particular case.

160 *E.g.*, Abbott v. Lockheed Martin Corp., No. 06-CV-0701-MJR, 2007 WL 2316481, at *3 (Aug. 13, 2007 S.D. Ill.).

161 *E.g.*, Chao v. Meixner, No. 1:07-CV-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. Nov. 27, 2007).

162 *E.g.*, *Abbott*, 2007 WL 2316481, at *2 (holding that ERISA claims have no antecedent in common law and analogous actions at common law were equitable).

1. Breach of Fiduciary Duty Is Inherently Equitable in Nature

Most courts which have considered whether parties are entitled to a jury trial for breach of fiduciary duty under § 409 have concluded that no right to trial by jury exists since the claim is historically and inherently equitable.[164] ERISA was drafted against the backdrop of the common law of trusts.[165] Courts may look to the common law of trusts to fill gaps in ERISA.[166] Thus, it seems logical to look to the common law of trusts given ERISA's silence on availability of jury trials.[167] This inquiry weighs against permitting a jury trial since remedies for breach of fiduciary duty were both completely and exclusively available in courts of equity.[168] Yet, *Mertens* rejected this inquiry when it concluded that equitable remedies were those typically available in equity rather than those that courts of equity were empowered to provide in a

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163 *E.g.*, *Meixner*, 2007 WL 4225069, at *3 (reasoning that monetary relief for losses to compensate the plan is an action for damages, which s legal relief).

164 *Abbott*, 2007 WL 2316481, at *2; Spano v. Boeing Co., No. 06-CV-743-DRH, 2007 WL 1149192, at *8 (S.D. Ill. Apr. 18, 2007) (collecting cases); Broadnax Mills, Inc. v, Blue Cross and Blue Shield of Va., 876 F. Supp. 809, 816 (E.D. Va. 1995) (collecting cases).

165 *Spano*, 2007 WL 1149192, at *5.

166 Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109–10 (1989).

167 *See Meixner*, 2007 WL 4225069, at *3; *Abbott*, 2007 WL 2316481, at *2; *Spano*, 2007 WL 1149192, at *4–5, 7–8; Bona v. Barasch, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003); *Broadnax Mills*, 876 F. Supp. at 816–17.

168 *Meixner*, 2007 WL 4225069, at *3; *Abbott*, 2007 WL 2316481, at *2; *Spano*, 2007 WL 1149192, at *4–5, 7–8; *Bona*, 2003 WL 1395932, at *35; *Broadnax Mills*, 876 F. Supp. at 816–17.

particular type of case.[169] Moreover, even the courts that rely on this inquiry to strike demands for jury trials concede that while ERISA may be grounded in the common law of trusts, the statute is not coextensive with the common law—importantly, fiduciary duties under ERISA are "broader and more stringent than the common law of trusts."[170]

2. Classic Legal Remedies Are Expressly Available Under § 502(a)(2)

Against the weight of authority, some courts, consistent with the Seventh Amendment test, have minimized the impact of the comparison of the statutory claim to its 18th-century analogue, and placed greater emphasis on the nature of the remedy sought.[171] The Supreme Court has perhaps supplied more ammunition than the lower courts have used in addressing this question. For example, the Court has said that claims for lost profits[172] and compensatory damages[173] are cognizable under § 502(a)(2). Yet permitting a jury trial remains the minority position.

The express language of ERISA permits legal and equitable remedies for breach of fiduciary duties.[174] Although some courts have made reference to the facial distinction between

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169 Mertens v. Hewitt Assoc., 508 U.S. 24, 256–58 (1993).

170 *Spano*, 2007 WL 1149192, at *4. Nonetheless, even courts which permitted a jury trial concluded that this part of the inquiry militated against its ultimate conclusion. *Meixner*, 2007 WL 4225069, at *3; *Bona*, 2003 WL 1395932, at *35.

171 *See generally Meixner*, 2007 WL 4225069; *Bona*, 2003 WL 1395932.

172 LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct. 1020, 1024 n.4 (2008).

173 *Mertens*, 508 U.S. at 252.

174 *Meixner*, 2007 WL 4225069, at *3; *Bona*, 2003 WL 1395932, at *34.

equitable and remedial relief,[175] courts have not relied on that distinction to recognize a legal remedy not encompassed by the damages or restitutionary liability created by § 409. Where plaintiffs seek compensatory damages they seek a remedy typically and traditionally available at law.[176] On the other hand, where plaintiffs seek to impose restitutionary liability under § 409, the courts must employ the rationale of *Great-West* to determine whether the restitution sought is legal or equitable.[177] This inquiry essentially requires a determination of whether plaintiffs seek return or accounting of specific funds—indicating equitable relief—or, merely compensation for losses—legal relief.[178]

III. PROPOSALS

If a claim is cognizable under § 502(a)(2) and seeks legal rather than equitable relief, as those terms have been given meaning under Mertens and Great-West, parties should be afforded a trial by jury pursuant to the Seventh Amendment.

Courts must determine whether they will continue to adhere to the logic that claims for breach of fiduciary are inherently equitable and, thus, not susceptible to the Seventh Amendment right to jury trial,[179] or whether they will faithfully apply doctrine and precedent to answer the difficult question of whether parties are entitled to a jury trial.[180] Moreover, courts have

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175 *Meixner*, 2007 WL 4225069, at *2.

176 *Id.* at *2, 3; Lamberty v. Premier Millwork and Lumber Co., 329 F. Supp. 2d 737, 745 (E.D. Va. 2004); *Bona*, 2003 WL 1395932, at *34.

177 *Meixner*, 2007 WL 4225069, at *4.

178 *Id.*

179 *E.g.*, In re Vorphal, 695 F.2d 318, 322 (8th Cir. 1982).

180 *See Meixner*, 2007 WL 4225069.

admonished that they are "reluctant to tamper with ERISA's carefully crafted and detailed enforcement scheme."[181] Yet the Supreme Court has decried the lack of sophistication in certain remedial provisions,[182] and Justices have often attacked lofty characterizations of the remedial provisions.[183] The refusal of some courts to fully engage the complicated analysis is not careful application of precedent but an unfaithful side-step of a complex issue. Concededly, the issue is made complex by the decision in *Mertens* to define equitable relief as that typically available in equity rather than that relief available at equity in a particular case.[184] *Mertens* could have easily chosen the broader interpretation, rendering all relief under § 502(a)(2) inherently equitable and removing any notion of a jury trial right for breach of fiduciary duty under ERISA.[185] Yet, *Mertens* and *Great-West* are controlling and the lower courts cannot pretend that they do not exist when considering jury trial demands.[186]

A. If Claim Is Legal Within the Meaning of ERISA, Parties Are Entitled to Trial by Jury

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181 *E.g.*, White v. Martin, No. 99-1447 (JRT/FLN), 2002 WL 598432, at *2 (D. Minn. Apr. 12, 2002).

182 Mertens v. Hewitt Assoc., 508 U.S. 248, 259 n.8 (1993).

183 *Id.* at 270 n.4 (White, J., dissenting); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156–57 (1985) (Brennan, J., dissenting).

184 *See* Langbein, *supra* note 2, at 1337–38.

185 *See id.* at 1355.

186 Bona v. Barasch, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *34 (S.D.N.Y. Mar. 20, 2003).

Whether a claim seeks equitable relief within the meaning of ERISA's remedial provisions depends on whether the remedy was typically available in a court of equity.[187] Courts determine whether claims are legal or equitable by inquiring into the basis of the claim and the nature of the remedy sought.[188] A claim must be either legal or equitable.[189] The Seventh Amendment jury trial right make be invoked where the claim is legal rather than equitable.[190] To determine whether a claim is legal or equitable in this context, courts must compare the claim to 18th century causes of action prior to the merger and examine the nature of the remedy sought—the more important of the two inquiries, and decide whether, on balance, the claim is legal or equitable.[191] If different in form, these tests cannot differ in substance to the extent that they might yield different results, since, at bottom, both tests are concerned with discerning legal from equitable rights.[192] For these tests to yield different results, a court would have to hold that a

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187 *Mertens*, 508 U.S. at 257.

188 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002).

189 *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989) ("We have consistently interpreted the phrase "Suits at common law" to refer to suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.") (internal quotations omitted).

190 *Id.*

191 *Id.* at 42.

192 *Great-West* , 534 U.S. at 213; *Granfinanciera*, 492 U.S. at 41. *But see Great-West*, 534 U.S. at 233 (2002) (Ginsburg, J., dissenting) (arguing that looking to pre-merger causes of action makes sense in the Seventh Amendment test but not in the ERISA test since the statute was enacted in 1974—long after the days of the divided bench). However, Congress clearly did refer

particular claim is legal within the meaning of ERISA, but equitable within the meaning of the Seventh Amendment. Without reference to the tests prescribed by the Court, there simply is no basis for defining legal and equitable differently based on context.[193] The distinction between legal and equitable must be the same in both contexts.[194] Thus, in the same manner that courts have excluded claims not within ERISA's meaning of equitable,[195] they must determine those types of claims are legal and subject to the Seventh Amendment right to jury trial so long as they are cognizable under § 502(a)(2).[196]

Starting from the premise that all relief is either legal or equitable, and accepting that all relief which is not equitable is legal and that equitable relief is that relief which was typically available in courts of equity, the conclusion is warranted that relief not typically available in courts of equity is legal relief. Since claims for damages, or monetary relief, were not typically

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specifically to "equitable relief" in ERISA and that modifier must be given meaning. *See id.* at 217–18 (majority opinion); *Mertens*, 508 U.S. at 258.

193 *See* Bona v. Barasch, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *34 (S.D.N.Y. Mar. 20, 2003) ("Although [*Great-West*] did not deal with the right to a jury trial per se, the Supreme Court's explication of the distinction between law and equity . . . is relevant here as well.").

194 *See* Schwartz & Hack, *supra* note 95.

195 *E.g.*, *Great-West*, 534 U.S. at 210.

196 The claim in *Great-West*, although legal, was not cognizable under 502(a)(2) because the plaintiffs did not allege a breach of fiduciary duty. *Id.* at 207–09.

available in equity,[197] they are claims for legal relief. Finally, damages are available for breach of fiduciary duty under § 502(a)(2);[198] thus, legal relief is available under § 502(a)(2).

B. Section 502(a)(2) Cognizes Claims for Legal Relief for Breach of Fiduciary Duty

Pursuant to §§ 409 and 502(a)(2), a "fiduciary is personally liable for damages" resulting from a breach of fiduciary duty.[199] Perhaps nothing is more apparent from the line of cases interpreting ERISA's remedial provisions than the declaration that a suit for damages is a suit for legal relief.[200] The test on which the Court relies to conclude the damages remedy is available is found in § 409: "[A fiduciary in breach of duty] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."[201] Before *LaRue*, few claims could be stated by a participant or beneficiary for damages under this section since it was concerned with losses to the plan rather than to individuals.[202] However, *LaRue* held that, because defined contribution plans have become the predominant form of pension plan, individuals could bring suit against fiduciaries for losses to individual accounts.[203] Thus, at least in a defined contribution plan—encompassing those plans which utilize 401(k) accounts as the means of

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197 *Id.* at 210.

198 Mertens v. Hewitt Assoc., 508 U.S. 248, 252 (1993).

199 *Id.*

200 *Great-West*, 534 U.S. at 213; *Mertens*, 508 U.S. at 255 (1993).

201 29 U.S.C. § 1109(a) (2000).

202 *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985) (explaining that although a participant or beneficiary is authorized to bring suit, potential personal liability of the fiduciary runs to the plan rather than the participant).

203 LaRue v. DeWolff, Boberg & Assoc., 128 S. Ct. 1020, 1026 (2008).

administering pension plans—participants and beneficiaries can easily state a claim for damages under § 502(a)(2) and fiduciaries of defined contribution plans are aware of greater potential for litigation concerning their actions.[204] *LaRue* suggests that the damages clause of § 409 has teeth that it did not have—or at least was not perceived to have—under *Russell*.

Justice Thomas, concurring in judgment, warns that "a participant suing to recover benefits on behalf of the plan is not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan."[205] In this way, Justice Thomas, joined by Justice Scalia, perhaps anticipates the jury trial argument and seeks to avoid it by treating the damages clause as creating only an equitable remedy to participants or beneficiaries. Yet, it is conclusive that Justices Thomas and Scalia did not agree with the rationale of the Court—instead reasoning that damages to an individual account were damages to plan assets.[206] The Court's opinion, focusing on the damage to an individual account rather than the "entire plan" is not susceptible to the same argument converting the participant's legal rights into equitable ones.[207] Ordinarily, successful suits by participants or beneficiaries under § 502(a)(2) for damages resulting from a

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204 Stephen D. Rosenberg, *Will* LaRue *Actually Lead to an Increase in Litigation?*, BOSTON ERISA AND INSURANCE LITIGATION BLOG, Feb. 29, 2008, http://www.bostonerisalaw.com/archives/401k-plans-will-larue-actually-lead-to-an-increase-in-litigation.html.

205 *LaRue*, 128 S. Ct. at 1029 (Thomas, J., concurring in judgment).

206 *Id.*

207 *Id.* at 1026 (majority opinion) (declaring "*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans," and "that landscape has changed").

breach of fiduciary duty will result in monetary recovery to the plaintiff's individual account.[208] "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages.'"[209] "'Damages' refers to money awarded as reparation for injury resulting from breach of legal duty" and "compensate plaintiff for a loss," while "specific relief prevents or undoes the loss."[210] Thus, monetary relief paid to the plaintiff's individual account for damages suffered as a result of a breach of legal duty satisfy the rubric of legal relief urged by Scalia and later accepted by the Court in *Mertens* and *Great-West*.

The final liability clause in § 409 subjects the breaching fiduciary to "such other equitable or remedial relief as the court may deem appropriate."[211] This provision indicates that "equitable" means a category of relief less than all relief.[212] By implication and extension of the same logic, "remedial relief" must include something other than "equitable" relief.[213] Assuming the validity of this construction, "remedial relief" must mean legal relief since it cannot refer only to equitable relief.[214]

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208 *See id.* at 1029 (Thomas, J., concurring in judgment).

209 Bowen v. Massachusetts, 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting).

210 *Id.* at 913–14.

211 29 U.S.C. § 1109(a) (2000). Nothing suggests that this appropriateness standard differs in any way from the appropriateness standard supplied by § 502(a)(2). *See* 29 U.S.C. § 1132(a)(2) (2000).

212 Mertens v. Hewitt Assoc., 508 U.S. 248, 259 n. 8 (1993).

213 *See id.*

214 *See id.* at 258 ("We will not read the statute to render the modifier superfluous.").

Therefore, the plain meaning of the text of § 409 indicates that at least some suits brought under § 502(a)(2) involve legal rights and obligations, which entitle the parties to a trial by jury.

C. The Supreme Court May Avoid Related Questions in Anticipation of Change

The Court recently declined an opportunity "to address when monetary awards for breaches of fiduciary can qualify as equitable relief . . . under ERISA."[215] It is not clear what role, if any, anticipation of healthcare reform and, hence, ERISA reform played in the Supreme Court's denial of certiorari in this case.[216] Regardless, speculation regarding healthcare and ERISA reform escalated upon the election of Barack Obama, and the expansion of Democrat control of Congress.[217] ERISA reform will necessarily be dependent upon healthcare reform. As an example, Obama's campaign plan to reform healthcare included a provision that employers who do not offer sufficient healthcare coverage will be required to contribute to a national healthcare plan.[218] Essentially a mandate to offer sufficient coverage, this requirement, if enacted, would alter the balance of interests struck when ERISA was enacted and no such

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215 Stephen D. Rosenberg, *From Preemption to ERISA Standing, and Lots of Things In-Between*, BOSTON ERISA & INSURANCE LITIGATION BLOG, June 30, 2008, http://www.bostonerisalaw.com/archives/cat-equitable-relief.html.

216 Amschwand v. Spherion Corp, 128 S. Ct. 2995 (2008) (denial of cert.).

217 Paul M. Secunda, *Obama and the Future of Labor and Employment Law*, WORKPLACE PROF BLOG, Nov. 5, 2008, http://lawprofessors.typepad.com/laborprof_blog/2008/11/obama-and-the-f.html.

218 Obama For America, *Barack Obama and Joe Biden's Plan to Lower Health Care Costs and Ensure Affordable, Accessible Health Coverage For All*, http://www.barackobama.com/pdf/issues/HealthCareFullPlan.pdf (last visited Nov. 10, 2008).

mandate existed.[219] Perhaps less documented, but more influential in the area concerning this Note, Obama has at least alluded to pension reform.[220] Even if the Court were to address the question prior to reforms, the Court would likely be keenly aware of the political environment in which it decided the question.

On the other hand, lower courts will operate in the same political environment without the freedom to decline to decide cases.[221] In light of the perceived expansion of participant and beneficiary rights of action under § 502(a)(2), lower courts would likely expand the analysis beyond the cursory observation that breach of fiduciary duty claims are inherently equitable and the weight of authority is against a jury trial in all such cases.

CONCLUSION

When the Supreme Court held that "equitable" means "those categories of relief typically available in a court of equity" rather than whatever relief a court of equity could have granted in a particular case, it began down the path of narrowing the number of cognizable claims under ERISA.[222] But as a by-product of the decision, the Court broadened the number of cognizable claims that would be defined as "legal" under the same rubric. This trend continued in *Great-*

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219 *See* Mertens v. Hewitt Assoc., 508 U.S. 248, 261–62 (1993); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 n.17 (1985).

220 Richard Bales, *Obama Discusses ERISA Reform*, WORKPLACE PROF BLOG, Oct. 29, 2008, http://lawprofessors.typepad.com/laborprof_blog/2008/10/obama-discusses.html.

221 The Northern District of Georgia has certified to the Eleventh Circuit for interlocutory appeal the question of whether a claim under § 502(a)(2) is subject to a demand for a jury trial. Chao v. Meixner, No. 1:07-cv-0595-WSD, 2008 WL 2691019 (N.D. Ga. July 3, 2008).

222 *Mertens*, 508 U.S. at 257.

West.[223] As a consequence of this development, those cognizable claims defined by default as legal rather than equitable became susceptible to the Seventh Amendment right to trial by jury, which attaches to claims concerning legal rather than equitable rights.[224] Since both the ERISA test for whether a claim is legal or equitable and the Seventh Amendment test for whether the parties are entitled to a jury trial are designed to determine whether the claim at issue is legal or equitable, it is unsurprising that they are similar.[225] It would be anomalous to hold that a claim is legal under one test and equitable under the other.[226]

A wide range of suits may be brought under ERISA. Claims for breach of fiduciary duty are brought under § 502(a)(2).[227] Despite the fact that courts of equity had exclusive jurisdiction over breach of fiduciary duty claims,[228] a claim for breach of fiduciary duty under ERISA is not automatically equitable.[229] Indeed, ERISA is grounded in the common law of trusts and, in certain instances, informed by that common law, but ERISA is not coextensive with the common law of trusts.[230] *Great-West* directs that when the question arises as to whether a particular claim is equitable or legal, the courts must inquire into the basis of the claim and nature of the remedy

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223 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210, 212–13 (2002).

224 Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830).

225 *See* Kusner, *supra* note 5, at 304; Schwartz & Hack, *supra* note 95.

226 *See* Kusner, *supra* note 5, at 304.

227 29 U.S.C. §§ 1109(a), 1132(a)(2) (2000).

228 Mertens v. Hewitt Assoc., 508 U.S. 248, 257 (1993).

229 *Id.* at 252.

230 Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109–11 (1989).

sought.[231] The inquiry into the basis of the claim analogizes the claim at issue to 18th century causes of action, but does so without regard to the fact that a claim for breach of fiduciary duty would have been brought in a court of equity which could have awarded all forms of relief.[232] The Court has recognized that some claims for legal relief are cognizable under § 502(a)(2)[233] and implied that other legal claims may be cognizable.[234]

If a particular claim is legal rather than equitable within the meaning of ERISA, it is highly unlikely that the constitutional right to trial by jury will not apply since the Seventh Amendment test emphasizes the inquiry into the nature of the remedy sought over the comparison of the particular claim to causes of action existing prior to the merger of law and equity courts.[235] Although the Seventh Amendment test is perhaps subtly different, the difference should not yield a different result than the ERISA test, as both seek to determine whether the underlying claim involves legal rights and obligations.[236]

After *LaRue*'s holding extended to participants and beneficiaries the right to recover losses to their individual defined contribution accounts, some members of the Court signaled a

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231 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002).

232 *Mertens*, 508 U.S. at 258; *Great-West*, 534 U.S. at 213, 215 (2002).

233 *Mertens*, 508 U.S. at 252 (declaring that fiduciaries are personally liable for damages).

234 *Id.* at 258 n.8 (1993) (implying that "remedial relief" entails legal relief as opposed to equitable relief).

235 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989).

236 *See* Kusner, *supra* note 5, at 304.

desire to temper this right by insinuating the claim would be equitable rather than legal.[237] The rationale of the Court would not support such a holding,[238] and even if the Court later adopts such a rule, it would not convert all § 502(a)(2) claims into equitable ones.

Thus, § 502(a)(2) recognizes claims involving legal rights and obligations that entitle parties to the constitutional right to trial by jury.

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[237] LaRue v. DeWolff, Boberg & Assoc., 128 S. Ct. 1020, 1029 (2008) (Thomas, J., concurring in judgment).

[238] *See id.* at 1026.