

# RESOLVING THE UNCERTAINTIES OF ERISA LITIGATION BY ALLOWING “OPT- INS” TO AGENCY ADJUDICATION OF STATUTORY CLAIMS

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## INTRODUCTION

The United States may be less than ten years away from failing to make Social Security payments on time and in full.<sup>1</sup> As the share of the population that is over sixty-five continues to grow, alternative pension and welfare benefit plans will become increasingly crucial in sustaining Americans through decades of retirement.<sup>2</sup> The Employee Benefits Security Administration, which exists within the Department of Labor (DOL), oversees about \$15.4 trillion in assets from such private plans, as well as the 155 million people who benefit from them—almost half of the total population.<sup>3</sup>

At least one fiduciary manages each plan, meaning the future of U.S. retirement savings is in the hands of hundreds of thousands of plan fiduciaries.<sup>4</sup> Plan participants and beneficiaries must have a reliable and consistent mechanism for ensuring fiduciaries prudently manage their pension funds. That is not the case today.

Congress passed the Employee Retirement Income Security Act of 1974 (ERISA)<sup>5</sup> to protect employee plans by expanding the definition and

1. Drew DeSilver, *What the Data says About Social Security*, PEW RSCH. CTR. (May 20, 2025), <https://www.pewresearch.org/short-reads/2025/05/20/what-the-data-says-about-social-security/> [https://perma.cc/6SYG-CXZB].

2. Zoe Caplan, *2020 Census: 1 in 6 People in the United States were 65 and Over*, U.S. CENSUS BUREAU (May 25, 2023), <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html> [https://perma.cc/9RF8-NNZS] (forecasting that the growth in the number of retirees will not slow until 2030).

3. *About EBSA*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa> [https://perma.cc/HFE2-UKFB] (last visited May 30, 2026) (including “more than 837,000 private retirement plans, 2.8 million health plans, and 521,000 other welfare benefit plans”); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [https://perma.cc/833L-Y82L] (last visited May 30, 2026) (estimating the U.S. population to be approximately 342 million people). As of 2022, private sector employer-sponsored pension plans managed approximately \$11.8 trillion in pension assets, about as much as is held in Individual Retirement Accounts. *See* JOHN H. GORMAN, ELIZABETH A. MYERS & JOHN J. TOPOLESKI, CONG. RSCH. SERV., R47699, U.S. RETIREMENT ASSETS: DATA IN BRIEF 1 (2023).

4. *See* 29 U.S.C. § 1103(a) (“[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees.”); Eric D. Chason, *Redressing All ERISA Fiduciary Breaches Under Section 409(a)*, 83 TEMP. L. REV. 147, 148 (2010) (“ERISA fiduciary duties largely track the duties of a trustee.”). The definition of fiduciary is broad, encompassing anyone who “exercises material discretion over the plan or its assets.” 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, 1324–25 (2003) (noting that the statutory definition is broader than the definition in traditional trust law).

5. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.). ERISA titles are broken into subsections (parts) that are not reflected in the U.S. Code. *See id.* Accordingly, I refer to the name of the section under ERISA in the body of this comment but cite to its proper place in the U.S. Code.

responsibilities of a fiduciary beyond what exists at common law.<sup>6</sup> In practice, however, remedy confusion and forced arbitration undermine these rights by creating uncertainty in ERISA litigation.<sup>7</sup> In federal court, judges at all levels misapply trust law principles and confuse legal and equitable remedies, leading to a recent rise in jury trials for ERISA statutory claims.<sup>8</sup> Arbitration clauses, on the other hand, force employees to waive rights guaranteed under ERISA as a condition of employment, leading to a severe decline in suits against fiduciaries.<sup>9</sup>

However, there is a third forum available for ERISA plaintiffs—administrative hearings at the DOL. Agency adjudication, in the DOL as in other executive departments, provides parties with an efficient claims process, executed by officials who are well-versed in ERISA’s regulatory framework, while creating a comprehensive administrative record that federal courts can review.<sup>10</sup> Parties should have access to this mechanism if they so choose. Accordingly, pension plans subject to ERISA should give beneficiaries the option to choose agency adjudication. Authorizing an administrative law judge (ALJ) at the DOL to review statutory ERISA claims would allow both employees and employers to reap the benefits of extrajudicial review while minimizing the uncertainty that plagues ERISA litigation today.<sup>11</sup>

Giving parties a choice between adjudication by an agency or by a federal court is not a new idea. In the lead-up to the Supreme Court’s opinion in *SEC v. Jarkesy*,<sup>12</sup> Christopher Walker and David Zaring proposed that the SEC adopt

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6. See H.R. REP. NO. 93-533 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639; Langbein, *supra* note 4, at 1326–28 (expanding fiduciary duties to include “the duty to inform beneficiaries about significant aspects of trust administration; the duties to collect, segregate and earmark, and protect trust property; and the duties to enforce and defend claims”) (footnotes omitted); see also Chason, *supra* note 4, at 151 (noting that the statute adds rights not available at common law).

7. See, e.g., *Garthwait v. Eversource Energy Co.*, No. 3:20-CV-00902, 2022 WL 17484817, at \*1, \*4 (D. Conn. Dec. 7, 2022).

8. Jacklyn Wille & Austin R. Ramsey, *Rare Pentegra 401(k) Jury Verdict Is ERISA Plaintiffs’ Roadmap*, BLOOMBERG L. (Apr. 25, 2025, at 13:15 ET), <https://news.bloomberglaw.com/employee-benefits/rare-pentegra-401k-jury-verdict-is-erisa-plaintiffs-roadmap> [<https://perma.cc/Y5WC-Z5FC>].

9. See Lauren K. Valastro, *Vindicating Retirees*, 41 GA. ST. U. L. REV. 257, 277, 315 (2025) (“Succinctly put, employers’ expansive use of mandatory employment arbitration agreements has diminished to an almost non-existent likelihood that they will ever be held liable for their misconduct.”).

10. See *Comm’ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994) (lauding administrative review of ERISA benefits claims for creating an administrative record).

11. See *id.*

12. 144 S. Ct. 2117 (2024). In *SEC v. Jarkesy*, the Supreme Court compared the Securities Exchange Commission’s (SEC) antifraud claims brought against George Jarkesy with common law fraud to find that Mr. Jarkesy had a Seventh Amendment right to a jury trial. *Id.* at 2135–36. The majority removed jurisdiction from the SEC to adjudicate fraud claims in-house. *Id.* at 2127, 2139. This holding unconstitutionally forced administrative adjudication for claims that are analogous to

a rule allowing parties to “opt-out” of agency adjudication to exercise their Seventh Amendment right to a jury trial.<sup>13</sup> This Comment adapts Walker and Zaring’s approach to the ERISA context, where federal courts are the default forum.<sup>14</sup> Allowing parties to “opt-in” to agency adjudication, as they would arbitration, empowers employers and employees to make choices that work best for their plans, and preserves federal courts’ jurisdiction over ERISA claims.<sup>15</sup>

Part I of this Comment gives a brief background of ERISA’s notoriously complicated statutory framework, looking narrowly at civil penalty claims.<sup>16</sup> Part II first outlines ERISA’s procedural requirements for bringing a claim in federal court.<sup>17</sup> It then traces current circuit splits regarding whether civil penalties under ERISA are legal or equitable in nature and how the difference bears on the parties’ right to a jury.<sup>18</sup> Part III examines the mechanics of arbitration, then evaluates the defects in arbitrating statutory ERISA claims, looking at current applications of the effective vindication doctrine.<sup>19</sup> Part IV gives an overview of the Secretary of Labor’s (Secretary’s) rulemaking powers under ERISA and the procedure for making rules.<sup>20</sup> Finally, Part V incorporates the merits of administrative review and of arbitration to recommend the Secretary promulgate a set of rules and guidelines promoting an “opt-in” provision for adjudication of ERISA statutory claims at the DOL.<sup>21</sup>

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private rights, stripped the SEC of their power to adjudicate such claims in-house, and significantly narrowed the scope of agency enforcement power. *Id.* at 2127, 2139, 2156–67.

13. See Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO ST. L.J. 1, 3–4 (2024); U.S. CONST. amend. VII.

14. See Walker & Zaring, *supra* note 13, at 3–4.

15. See *Stephens v. Pension Benefit Guar. Corp.*, 755 F.3d 959, 966 (D.C. Cir. 2014) (noting that plan administrators know what is best for their plans). The Supreme Court will hear a case next term, *Sun Valley Orchards, LLC v. U.S. Department of Labor*, discussing the validity of agency adjudication at the Department of Labor (DOL) under Article III where both public and private rights are at issue. 148 F.4th 121, 124–25 (3d Cir. 2025), *cert. granted*, No. 25-966 (U.S. 2026).

16. See *infra* Part I; Kris Alderman, Note, *ERISA’s Remedial Irony: Narrow Interpretation Paves the Way for Jury Trials in Suits for Breach of Fiduciary Duty Under ERISA*, 26 GA. ST. U. L. REV. 971, 971 (2010).

17. See *infra* Part II.A.

18. See *infra* Part II.B–C.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

## I. MEET ERISA

### A. Provisions, Agencies, and Importance

In 1963, the Studebaker company closed its flagship automobile plant in South Bend, Indiana, and with it its underfunded pension plan program.<sup>22</sup> Studebaker was in default, and its pension plan was fifteen million dollars short after years of inadequate funding.<sup>23</sup> Though Studebaker paid its retirement-eligible employees their full pension amount, thousands of employees under the age of sixty lost the pension they thought was guaranteed.<sup>24</sup>

Before ERISA's enactment, employers like Studebaker could terminate unfunded pension plans, avoid liability for additional contributions, and leave employees with no legal recourse.<sup>25</sup> The Studebaker closure served as the "focusing event" compelling Congress to enact pension reforms.<sup>26</sup> Congress, in conjunction with the presidential Committee on Corporate Pension Funds, spent a decade investigating pension plans and devising a scheme to minimize corruption and default risk.<sup>27</sup> The result was ERISA.<sup>28</sup> Congress passed ERISA in 1974 to protect the interests of private-sector pension beneficiaries, encourage collective bargaining, and incentivize employer contributions.<sup>29</sup> Though ERISA also deals with health benefits, "[m]ost ERISA provisions deal with pension plans."<sup>30</sup>

22. 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, 683–84 (2001).

23. *Id.* at 726.

24. *Id.* at 730 (noting that the average age of employees at the time of default was fifty-four).

25. PATRICK PURCELL & JENNIFER A. STAMAN, CONG. RSCH. SERV., RL34443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 3 (2009).

26. Wooten, *supra* note 22, at 726.

27. See Langbein, *supra* note 4, at 1321–22, 1324 ("Default risk is the danger that the employer (or other plan sponsor) might dishonor the pension promise."); *50 Years of ERISA and EBSA*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-50th/timeline> [<https://perma.cc/RUZ6-MK7E>] (last visited July 15, 2026).

28. See Langbein, *supra* note 4, at 1324–25.

29. See PURCELL & STAMAN, *supra* note 25, at 2; H.R. REP. NO. 93-533, at 1, 4, 11, 17 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4639, 4642, 4649, 4655 ("The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans.").

30. See PURCELL & STAMAN, *supra* note 25, at 1; *History of EBSA and ERISA*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/7WSH-E3B9>] (last visited Apr. 18, 2026).

Of the four titles into which ERISA is split, Title I is most relevant here.<sup>31</sup> Title I outlines minimum plan standards, reporting and disclosure requirements, and enforcement powers delegated to the DOL.<sup>32</sup> ERISA does not require employers to provide pensions or welfare benefit plans to their employees, but those who do participate must comply with administrative standards and uphold fiduciary responsibilities.<sup>33</sup>

These administrative standards include “[ (1) ] who must be covered (participation), [ (2) ] how long a person has to work to be entitled to a pension (vesting), and [ (3) ] how much must be set aside each year to pay future pensions (funding).”<sup>34</sup> Employers, plan administrators, and advisors who handle decisionmaking on behalf of employees are plan fiduciaries subject to the responsibilities enumerated in § 404.<sup>35</sup> Section 404 imposes a duty of “care, skill, prudence, and diligence under the circumstances” using the conduct of a “prudent man acting in a like capacity” as its standard.<sup>36</sup> Courts assess whether a fiduciary has violated the duty of prudence by scrutinizing the fiduciary’s decisionmaking with respect to plan assets regardless of an investment’s success or failure.<sup>37</sup>

Title I also creates rights guaranteed to plan participants that are enforceable through adjudication for civil penalties.<sup>38</sup> An employee or beneficiary can bring

31. See generally Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.). Title II amends the Internal Revenue Code to incorporate provisions of ERISA relating to tax-qualified plans, Title III addresses the limited jurisdiction of the Treasury Secretary to investigate and impose tax-based fines and establishes a task force to address Employee Stock Ownership Plans, and Title IV establishes the Pension Benefit Guaranty Corporation, which administers pension benefit insurance. See *id.*; PURCELL & STAMAN, *supra* note 25, at 45, 53.

32. See generally PURCELL & STAMAN, *supra* note 25, at 6–44 (explaining the features of Title I in detail); *History of EBSA and ERISA*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/J56P-MTE3>] (last visited Apr. 18, 2026).

33. PURCELL & STAMAN, *supra* note 25, at 1, 24.

34. *Id.* at 1. Congress was especially concerned with vesting and funding when drafting ERISA. See H.R. REP. NO. 93-533, at 1, 4, 11, 17.

35. 29 U.S.C. § 1104(a)(1)(B); see also § 1105 (outlining liability for a co-fiduciary). One such responsibility is disclosure of the plan details to participants. *Plan Information*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/general/topic/health-plans/planinformation> [<https://perma.cc/S7AB-PG3J>] (last visited June 10, 2026).

36. 29 U.S.C. § 1104(a)(1)(B). Section 404 also imposes a duty to diversify plan investments to “minimize the risk of large losses,” while making an exception for instances where a lack of diversification is prudent. § 1104(a)(1)(C).

37. PURCELL & STAMAN, *supra* note 25, at 25.

38. *History of EBSA and ERISA*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/J56P-MTE3>] (last visited Apr. 18, 2026); 29 U.S.C. § 1132.

two types of civil penalty claims: an appeal of a grant or denial of benefits and a suit alleging plan mismanagement.<sup>39</sup> Section 502 addresses both.<sup>40</sup> Section 502 reads as follows:

(a) Persons empowered to bring a civil action.

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for [failure to supply requested information], or

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

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) 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 such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.<sup>41</sup>

Section 502(a)(1) allows beneficiaries to appeal benefits decisions in federal court, enforcing the provisions of the plan itself.<sup>42</sup> The remainder of § 502 enumerates statutory rights governing the conduct of plan administrators and fiduciaries.<sup>43</sup> Though benefits-based claims are relevant for the discussion on exhaustion of administrative remedies, this Comment focuses on statutory claims.<sup>44</sup>

Section 502(a)(2) is the primary mechanism for bringing a § 409 breach of fiduciary duty claim.<sup>45</sup> It allows the Secretary of Labor, plan participant, or fiduciary to bring a civil claim for harms suffered by the plan as a result of fiduciary misconduct that violates the duties of loyalty and prudence.<sup>46</sup> Section 409 claims

39. 29 U.S.C. § 1132(a)(1) (benefits-based claims); § 1132(a)(2) (breach of fiduciary claims); § 1132(a)(3) (all other claims). Plan fiduciaries and the Secretary of Labor (Secretary) can also bring claims under certain provisions of ERISA, but such claims are beyond the scope of this Comment. *See, e.g.*, § 1132(a)(2); *see also* § 1131 (allowing the Secretary to impose criminal penalties in federal court).

40. *See* 29 U.S.C. § 1132 (civil penalties).

41. § 1132(a)(1)–(3). Section 409(a), incorporated into Section 502(a)(2), outlines the elements and remedies for a breach of fiduciary duty. §§ 1109(a), 1132(a)(2).

42. *See* § 1132(a)(1); Brendan S. Maher, *Thoughts on the Latest Battles Over ERISA's Remedies*, 30 HOFSTRA LAB. & EMP. L.J. 339, 345 (2012) (“Recall that [S]ection 1132(a)(1)(B) claims *must* turn on the content of the plan.”).

43. *See generally* 29 U.S.C. § 1132 (allowing suits by plan participants and the Secretary for violations of notice, disclosure, and contribution requirements among others, and allows the Secretary to levy fines and penalties for noncompliance).

44. *See infra* Part III.A.

45. 29 U.S.C. § 1132(a)(2); *see supra* note 41 and accompanying text.

46. 29 U.S.C. § 1132(a)(2) (permitting suit for breach of fiduciary duty); *see* § 1104

could only address harms incurred to the plan as a whole until the Supreme Court in *LaRue v. DeWolff, Boberg & Associates*<sup>47</sup> allowed plaintiffs to reclaim losses to their individual account.<sup>48</sup> Section 502(a)(3) is a catch-all provision for claims that do not fit in another subsection of 502, and encompassed claims for harms to individual plans before the decision in *LaRue*.<sup>49</sup>

One final provision of note, Section 502(a)(6) permits only the Secretary to collect civil penalties for both prohibited transactions detailed in § 406, and breach of fiduciary duty violations.<sup>50</sup> Section 502(a)(6) allows the Secretary to conduct an administrative assessment of a civil penalty against a plan fiduciary.<sup>51</sup> These administrative assessments occur within the DOL, in front of an ALJ.<sup>52</sup> Prohibited transaction suits brought by beneficiaries in federal court are functionally a per se subset of breach of fiduciary duty claims, and are often brought at the same time.<sup>53</sup> However, Section 502(l) only allows the Secretary to assess a civil penalty for breach of fiduciary duty pursuant to a settlement or court order.<sup>54</sup>

### B. ERISA's Trust Law Roots

In establishing legal responsibilities between employers and employees, ERISA codifies principles of trust law.<sup>55</sup> Trusts create fiduciary relationships in which one person holds property on behalf of another and manages the

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(defining fiduciary duties as acting “solely in the interest of the participants and beneficiaries” and “with the care, skill, prudence, and diligence under the circumstances.”); *see also* Chason, *supra* note 4, at 151 (describing ERISA’s duty of loyalty as the “Exclusive Benefit Rule.”).

47. 552 U.S. 248 (2008).

48. *Id.* at 250; *see* Chason, *supra* note 4, at 158.

49. *See* Colleen E. Medill, *Resolving the Judicial Paradox of “Equitable” Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827, 834 (2006).

50. 29 U.S.C. § 1132(a)(6).

51. *Id.*; *see* § 1132(i) (implementing Section 502(a)(6)); *Enforcement Manual - Civil Penalties*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/civil-penalties> [<https://perma.cc/2RRX-SCDZ>] (last updated Feb. 2025).

52. 29 C.F.R. § 2570.1 (1998).

53. Medill, *supra* note 49, at 878–79; *see* Jennifer S. Kiesewetter, *Retirement Plan Fiduciaries Must Adjust to New Era of ERISA Litigation: How a Recent SCOTUS Ruling and \$39M Jury Award Changed the Game*, FISHER PHILLIPS: INSIGHTS (June 11, 2025), <https://www.fisherphillips.com/en/news-insights/retirement-plan-fiduciaries-must-adjust-to-new-era-of-erisa-litigation.html> [<https://perma.cc/LS75-THB9>].

54. 29 U.S.C. § 1132(l); EMP. BENEFITS SEC. ADMIN., *supra* note 51.

55. S. REP. NO. 93-127, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (“The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.”); *see* Langbein, *supra* note 4, at 1321, 1324–25 (calling ERISA a “[r]egime of [f]ederal [t]rust [l]aw”).

property pursuant to equitable duties of loyalty and prudence.<sup>56</sup> The duty of loyalty requires fiduciaries act to the exclusive benefit of the plan, “forbidd[ing] . . . self-serving behavior.”<sup>57</sup> The duty of prudence sets the objective standard of a “prudent man acting in a like capacity” by which to judge the fiduciary’s actions.<sup>58</sup> In trust law, courts cure breaches of this equitable duty by imposing equitable remedies, not compensatory damages.<sup>59</sup> Though equitable remedies are generally injunctions, trust law also carries a tradition of equitable monetary relief meant to make the plaintiff whole.<sup>60</sup>

Rights created by ERISA, like that of fiduciary duty, parallel those of the common law of trusts but are tailored to address issues unique to employee benefit plans.<sup>61</sup> Through its initial investigations, Congress had found extensive evidence of “widespread looting of plan funds” that traditional trust law could not address.<sup>62</sup> Congress devised ERISA to expand the common law rights available “by subjecting []covered plans to a double dose of trust law.”<sup>63</sup> Not only are plan administrators required to hold assets in a trust for the employee, ERISA expands the scope of fiduciary beyond the trustees to everyone who “exercises material discretion over the plan or its assets.”<sup>64</sup>

56. Langbein, *supra* note 4, at 1325 (“There are two great principles of trust fiduciary law, the rules of loyalty and of prudence. ERISA codifies both.”).

57. *Id.*; see also 29 U.S.C. § 1106 (setting out a cause of action against prohibited transactions, a violation of the duty of loyalty).

58. Langbein, *supra* note 4, at 1326 & n.48 (comparing the standard of care codified in 29 U.S.C. § 1104(a)(1)(b) with the duty of prudence as defined in the Restatement (Second) of Trusts, § 174 (1959)).

59. See Chason, *supra* note 4, at 149. *But see, e.g.,* *Pereira v. Farace*, 413 F.3d 330, 339 (2d Cir. 2005) (holding that the structure of the trust at issue makes legal remedies available to the parties); *Garthwait v. Eversource Energy Co.*, No. 3:20-CV-00902, 2022 WL 17484817, at \*4 (D. Conn. Dec. 7, 2022) (applying *Pereira* in the ERISA context). Ascertaining whether the remedy requested is legal or equitable is not as easy as it sounds. See *infra* Part II.B.

60. See Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1039 n.69 (2011); Chason, *supra* note 4, at 149 (addressing a limitation in the make whole approach: that it does not redress harm that is personal to the beneficiary).

61. H.R. REP. NO. 93-533, at 13 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4651 (“The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans.”); see Langbein, *supra* note 4, at 1326–27.

62. Langbein, *supra* note 4, at 1324; H.R. REP. NO. 93-533, at 12 (“[E]ven where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries.”); see Chason, *supra* note 4, at 153 (asserting that traditional trust law does not neatly apply to corporate life).

63. Langbein, *supra* note 4, at 1324.

64. *Id.* at 1324–25. The current definition of fiduciary involves a five-step test: [A] person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in,

## II. ERISA LITIGATION IN FEDERAL COURT: THE PROCESS AND THE PITFALLS

### A. *The Exhaustion Principle*

Though ERISA delegates jurisdiction exclusively to federal courts for adjudication of nearly all claims, it also implies that an employee's benefits claim must first go through an administrative review.<sup>65</sup> ERISA instructs the Secretary to set procedures for the mandatory administrative review of benefits claims.<sup>66</sup> "Administrative review" generally refers to the claim procedures that plan administrators establish and carry out, not to agency adjudication.<sup>67</sup> These seemingly contradictory mandates have led federal courts to impose an exhaustion principle requiring plaintiffs to complete the plan's administrative review process before a claim can proceed in federal court.<sup>68</sup>

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purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122, 32,128–29 (Apr. 25, 2024) (to be codified at 29 C.F.R. pt. 2510); *see* 29 C.F.R. § 2510.3-21(c)(1) (2025) (codifying the five-step test). Recent attempts to further expand this definition have been fruitless. Lucian Wells, Comment, *Chevron's Retirement and ERISA's Future: Judicial Review of EBSA Rules After Loper*, 78 ADMIN. L. REV. 201, 221–23 (2026).

65. 29 U.S.C. § 1001(b) (stating ERISA provides participants with appropriate remedies, sanctions, and ready access to federal courts); H.R. REP. NO. 93-533, at 12 ("[W]ithout . . . access to the courts . . . he is not equipped to safeguard either his own rights or the plan assets."); *see* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (codified as amended in scattered sections of 29 U.S.C.); 29 U.S.C. § 1132(e)(1) (sharing concurrent jurisdiction with state courts for certain claims).

66. 29 U.S.C. §§ 1133, 1135.

67. *See* 29 C.F.R. § 2560.503-1 (1987) (setting out mandatory and voluntary guidelines for administrative review and appeals by the plan administrator). For suits brought by the Secretary, ERISA regulation includes adjudication procedures to resolve disputes in front of a Department of Labor (DOL) administrative law judge (ALJ). 29 C.F.R. pt. 2570 (2025) (laying out the procedures for administrative adjudication before an ALJ for various ERISA claims); *e.g.*, 29 U.S.C. § 1132(i) (allowing the Secretary to assess a civil penalty for a prohibited transaction).

68. Art Marrapese, *ERISA Exhaustion Defense Still Viable In Some Jurisdictions*, LAW360 (Jan. 7, 2021, at 17:44 ET), <https://www.law360.com/articles/1340094/print?section=appellate> [<https://perma.cc/N6DJ-WLBH>]. Although ERISA does not *explicitly* require administrative review, almost every jurisdiction has read in an exhaustion requirement based on language establishing a review process. *See* 29 U.S.C. § 1133(2); *Enforcement Manual - Civil Penalties*, EMP. BENEFITS SEC.

This administrative review must provide a “full and fair” opportunity for review of a claim denial.<sup>69</sup> Accordingly, each plan document must include internal rules and procedures for filing a benefits claim, notifying claimants of an adverse decision, and initiating an appeal.<sup>70</sup> Regulations emphasize a reasonable claims procedure that promotes accessibility of review in keeping with ERISA’s purpose.<sup>71</sup> Before plaintiffs can file suit in federal court, they must complete all claims procedures required under their plan.<sup>72</sup>

The exhaustion principle allows federal courts to retain jurisdiction over ERISA claims while managing an overloaded docket.<sup>73</sup> Federal courts praise the exhaustion principle for its similarity to agency review: it protects their dockets from frivolous claims and establishes a comprehensive administrative record.<sup>74</sup> Also, as a judicially created mechanism, courts have discretion over whether and how to enforce it.<sup>75</sup>

ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/civil-penalties> [<https://perma.cc/BYR6-8F9V>] (last updated Feb. 2025).

69. 29 C.F.R. § 2560.503-1(b), (h)(1)–(2) (2025).

70. *Id.*

71. *See, e.g.*, 29 C.F.R. §§ 2560.503-1(b)(3), (g)(1) (2025). They also address additional, voluntary levels of the appellate process that involve fora outside of the plan infrastructure and federal courts. § 2560.503-1(c)(3) (group health plans); § 2560.503-1(j)(4)(i) (all other plans). “Voluntary” appeals levels refer both to options that are voluntary for the parties, and to those that are not necessary under ERISA but are nevertheless required for administrative exhaustion of remedies included in the plan. *See* § 2560.503-1(a), (c)(3) (stating ERISA sets forth only minimum requirements for claim procedures). Possible fora for voluntary appeals include arbitration, mediation, “or any other form of dispute resolution.” *See* § 2560.503-1(c)(3); *see also* § 2560.503-1(j)(4)(i) (cross-referencing procedures laid out in (c)(3) and applying them to all plans).

72. Marrapese, *supra* note 68.

73. *See* Mattathias Schwartz & Zach Montague, *Artificial Intelligence Floods Court Dockets with Home-Brewed Lawsuits*, NY TIMES (May 28, 2026), <https://www.nytimes.com/2026/05/25/us/politics/artificial-intelligence-courts.html> [<https://perma.cc/BN7Y-P895>]; Samidh Guha & Kelly McGee, *In Loper Bright’s Shadow: An Overworked Judiciary Becomes Further Burdened*, THOMSON REUTERS (Oct. 3, 2024), <https://www.thomsonreuters.com/en-us/posts/government/loper-bright-judiciary-impact/> [<https://perma.cc/9MBW-HML5>].

74. *See, e.g.*, *Makar v. Health Care Corp. of the Mid-Atlantic*, 872 F.2d 80, 83 (4th Cir. 1989) (“This case illustrates the value of ERISA’s internal claims procedures.”); *Comm’n Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994).

Much like the exhaustion doctrine in the context of judicial review of administrative agency action, the exhaustion requirement in the ERISA context . . . enables plan administrators to apply their expertise and exercise their discretion to manage the plan’s funds, correct errors, make considered interpretations of plan provisions, and assemble a factual record that will assist the court reviewing the administrators’ actions. *Id.*

75. Andrew M. Campbell, Annotation, *Exhaustion of Administrative Remedies as Prerequisite to Suit Under Employee Retirement Income Security Act of 1974*, 29 U.S.C.A. §§ 1001 *et seq.*, 162 A.L.R.

Once a claimant has exhausted the plan's review procedures, courts review benefits determinations *de novo*.<sup>76</sup> The more developed the administrative record is, the more likely the reviewing court will keep the record closed to new evidence.<sup>77</sup> This flexibility encourages a more robust administrative review and appeals procedure while preserving the jurisdiction and discretion of federal judges.

In the context of the exhaustion principle, benefits claims and statutory claims are distinct.<sup>78</sup> ERISA regulations governing claims and appeals apply narrowly to benefits claims, reviewable in federal court under Section 502(a)(1).<sup>79</sup> Statutory claims, in contrast, are excluded from the regulations requiring review procedures and are thus exempt from the exhaustion principle.<sup>80</sup> Many courts consider statutory claims as challenges to the manner of administering the plan, making fiduciaries untrustworthy judges of their own character.<sup>81</sup>

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Fed. 1 (2000). In fact, courts regard the exhaustion principle not as a threshold jurisdictional question but as an affirmative defense. *Id.*

76. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112–13 (1989). Where a plan administrator has discretion, courts review ERISA claims under an “arbitrary and capricious” standard. Robert Mason Hogg, Note, *Evidentiary Scope of De Novo Review in ERISA Benefits Litigation after Firestone Tire & Rubber Co. v. Bruch*, 78 MINN. L. REV. 1575, 1576 (1994).

77. See *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993) (“[W]here additional evidence is not necessary for adequate review of the benefits decision, the district court should only look at the evidence that was before the plan administrator or trustee at the time of the determination.”). Though there is a circuit split on this issue, the balance of courts favors *de novo* review of a closed or mostly closed administrative record. See, e.g., *Dorris v. Unum Life Ins. Co. of Am.*, 949 F.3d 297, 304 (7th Cir. 2020); see also *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (refusing to allow admission of any new evidence); *Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246, 256–57 (5th Cir. 2018) (finding a *de novo* standard of review of a closed factual record satisfies ERISA's twin goals of “efficient yet meaningful judicial review”). But see *Harris v. Lincoln Nat'l Life Ins. Co.*, 42 F.4th 1292, 1295 (11th Cir. 2022) (accepting “all relevant evidence, irrespective of whether it was presented to the administrator”).

78. See *Campbell*, *supra* note 75.

79. 29 C.F.R. § 2560.503-1(a) (2025); 29 U.S.C. § 1132(a)(1); see § 1133 (allowing the Secretary to regulate benefits claims procedures before such claims proceed to federal court).

80. *Campbell*, *supra* note 75.

81. *Id.* This is most uniformly applied to waive the exhaustion requirement in § 510 cases where claimants allege discrimination in plan management. *Id.* In § 510 cases, courts presume alleged discrimination in plan administration would likewise taint the plan's review process. *Id.* Breach of fiduciary duty claims, however, exist in more of a gray area. See, e.g., *D'Amico v. CBS Corp.*, 297 F.3d 287, 292 (3d Cir. 2002) (holding that the conduct at issue constituted a denial of benefits under the plan's vesting provision, not a breach of fiduciary duty). Though a statutory claim, a breach of fiduciary duty claim can resemble a benefits claim depending on the facts alleged and relief requested. See *id.* Instead of finding such claims exempt, courts have enforced the exhaustion principle to prevent plaintiffs from using a breach of fiduciary duty claim to circumvent mandatory administrative review. See, e.g.,

Instead of purporting to act as a complete bar to administrative review of statutory claims, the Seventh and Eleventh Circuits evaluate whether the claimant is denied meaningful access to the review scheme in place.<sup>82</sup> In doing so, they also apply the exhaustion principle to breach of fiduciary and other statutory remedies so long as a “full and fair” opportunity for review exists in the plan.<sup>83</sup> It also encourages plan holders to go above and beyond the requirements of the Secretary’s regulations to establish a fair review process for claims that address their own misconduct.

The exhaustion principle has proven useful for managing benefits litigation by reducing frivolous claims and assembling factual records that courts can review *de novo*.<sup>84</sup> Using the “full and fair” review test, courts can extend the exhaustion principle to statutory claims while protecting the integrity of administrative review and preserving their jurisdiction over such claims.

### *B. Law-Equity Confusion in Categorizing Remedies*

Judges exempt statutory claims from exhaustion in part because they “have particular expertise in interpreting statutory terms.”<sup>85</sup> However, federal courts have long struggled to establish what remedies ERISA allows for statutory breaches.<sup>86</sup>

Congress built ERISA on a solid foundation of trust law but selectively deviated from traditional remedies to expand employee rights.<sup>87</sup> Though this likely reflects the legislature’s intent to modernize trust law, the Supreme Court instead adopted an inflexible historical analysis to determine the remedies available under ERISA.<sup>88</sup> In this analysis, Justice Scalia repeatedly mischaracterized historic trust

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Simmons v. Willcox, 911 F.2d 1077, 1081 (5th Cir. 1990); Blahuta-Glover v. Cyanamid Long Term Disability Plan, No. CIV. A. 95-7069, 1996 WL 220977, at \*4 (E.D. Pa. Apr. 30, 1996).

82. See, e.g., Perrino v. S. Bell Tel. & Tel. Co., 209 F.3d 1309, 1315 & n.6, 1316 (11th Cir. 2000) (waiving exhaustion requirement only when administrative review would be futile or “where a claimant is denied ‘meaningful access’ to the administrative review scheme”); Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649–50 (7th Cir. 1996) (noting that the exhaustion principle “minimize[s] the number of frivolous lawsuits, promote[s] a non-adversarial dispute resolution process, and decrease[s] the cost and time of claims settlement”).

83. Campbell, *supra* note 75.

84. See *supra* notes 74, 77.

85. Stephens v. Pension Benefit Guar. Corp., 755 F.3d 959, 966 (D.C. Cir. 2014).

86. Chason, *supra* note 4, at 164–65.

87. *Id.* at 149; H.R. REP. NO. 93-533, at 13 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4651; see also Langbein, *supra* note 4, at 1326–27 (noting how ERISA departed from trust law in several ways, including in remedies).

88. See Langbein, *supra* note 4, at 1327–28; Chason, *supra* note 4, at 149.

law remedies, creating confusion in lower courts as to what remedies ERISA allows for statutory claims despite the Court's attempts to correct the record.<sup>89</sup>

An ERISA breach of fiduciary duty claim under Section 409(a) affords four potential remedies: (1) recovery of losses suffered by the plan, (2) restoration of profits made by fiduciary misconduct back to the plan, (3) removal of the fiduciary, and (4) "such other *equitable or remedial* relief" that the court finds is appropriate.<sup>90</sup> Each of the first three parallel equitable remedies available at common law.<sup>91</sup> The last remedy, however, is the subject of considerable debate and confusion as jurists and academics struggle to categorize remedial monetary relief as traditionally legal or equitable.<sup>92</sup>

Congress included such vague language expecting that the judiciary would develop a federal common law of ERISA jurisprudence that adapts ancient legal principles to modern life.<sup>93</sup> By 1974, Congress likely considered courts as beyond distinctions of law and equity, and that federal common law would follow suit.<sup>94</sup> Further, when courts develop federal common law, they draw on state common law principles so long as they do not conflict with ERISA's express provisions or "frustrate its objectives."<sup>95</sup> Thus, while courts use trust law principles to interpret ERISA's ambiguities, Congress likely

89. Chason, *supra* note 4, at 164–65; see Susan Harthill, *The Supreme Court Fills a Gaping Hole: Cigna Corp. v. Amara Clarifies the Scope of Equitable Relief Under ERISA*, 45 J. MARSHALL L. REV. 767, 776 & n. 65, 777 (2012) [hereinafter Harthill, *The Supreme Court Fills a Gaping Hole*] (describing confusion among lower courts about which precedent to follow); see, e.g., Cunningham v. Cornell Univ., No. 16-cv-6525, 2018 WL 4279466, at \*4 (S.D.N.Y. Sep. 6, 2018).

90. 29 U.S.C. § 1109(a) (emphasis added). Section 409 defines breach of fiduciary duty and outlines the available remedies, and § 502(a)(2) provides the mechanism for bringing a suit. 29 U.S.C. §§ 1109(a), 1132(a)(2). Under § 502(a)(3), the claimant may request only "appropriate" equitable relief. *Id.* § 1132(a)(3) (emphasis added).

91. Chason, *supra* note 4, at 155–56.

92. See *id.* at 155–56, 181 ("[E]quitable and remedial relief' . . . is obviously broader than the limited 'equitable relief' available under section 502(a)(3)."); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1074–76, 1082 (2003) (tracing Justice Scalia's mistaken and contradictory characterizations of legal and equitable relief); Harthill, *The Supreme Court Fills a Gaping Hole*, *supra* note 89, at 779–86.

93. Langbein, *supra* note 4, at 1326; see H.R. REP. NO. 93-533, at 4 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4642–43 ("In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts.").

94. In 1932, Congress merged legal and equitable judicial procedures, calling the combination "civil" procedure. *Pereira v. Farace*, 413 F.3d 330, 337 (2d Cir. 2005). This merger was part of a century-long trend towards "the eradication of distinctions between law and equity" that likely shaped Congress's view of the courts. Chason, *supra* note 4, at 164–65.

95. *Chi. Dist. Council of Carpenters Pension Fund v. Skender Constr. Co.*, 22 F. Supp. 2d 787, 792 (N.D. Ill. 1998) (citing *Boggs v. Boggs*, 520 U.S. 833, 841 (1997)).

would have expected the federal common law to break from tradition where equitable.<sup>96</sup>

The Supreme Court first attempted to resolve the ambiguity in Section 409(a) in *Massachusetts Mutual Life Insurance Co. v. Russell*.<sup>97</sup> In *Massachusetts Mutual*, an employee sued plan fiduciaries for damages after a mistaken termination of her benefits aggravated an underlying health condition.<sup>98</sup>

The Court rejected the plaintiff's claims, interpreting the open-ended language in Section 409(a) to limit recovery to losses suffered by the plan, not to "extracontractual" individual harms.<sup>99</sup> This reflects the principle that remedies under trust law must only redress property harms.<sup>100</sup> The Court did not address the equitable "make-whole" theory of relief in trust law, however, which allows compensatory damages to remedy consequential injuries.<sup>101</sup>

The Court then tackled Section 502(a)(3), which expressly allows only equitable remedies.<sup>102</sup> Constrained by its decision to limit Section 502(a)(2) remedies in *Massachusetts Mutual*, the Court in *Mertens v. Hewitt Associates*<sup>103</sup> and *Great-West Life & Annuity Insurance Co. v. Knudson*<sup>104</sup> narrowed the scope of equitable remedies available to preclude almost any kind of monetary relief by characterizing it as almost always legal in nature.<sup>105</sup>

In *Mertens*, an actuarial miscalculation made by a nonfiduciary caused several employees to lose their benefits when they retired early.<sup>106</sup> The majority held that Section 502(a)(3)'s grant of "appropriate equitable relief" for statutory violations cannot mean all relief that courts of equity could give because

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96. Chason, *supra* note 4, at 149, 164–65.

97. 473 U.S. 134 (1985).

98. *Id.* at 136.

99. *Id.* at 144 (noting that ERISA does not provide for punitive or compensatory damages).

100. Chason, *supra* note 4, at 149.

101. Langbein, *supra* note 4, at 1321 ("[I]t is particularly ironic that the term that the Court interpreted to deny routine make-whole relief to the victims of ERISA-proscribed wrongdoing is 'equitable.' Equity has long been associated with an opposite policy, the maxim 'Equity suffers not a Right to be without a Remedy.'"); Susan Harthill, *A Square Peg in a Round Hole: Whether Traditional Trust Law "Make-whole" Relief is Available Under ERISA Section 502(a)(3)*, 61 OKLA. L. REV. 721, 723–25 (2008) [hereinafter Harthill, *A Square Peg in a Round Hole*] (highlighting how the Court's interpretation of ERISA leaves many without remedies for clear harms).

102. 29 U.S.C. § 1132(a)(3); Chason, *supra* note 4, at 149, 164.

103. 508 U.S. 248 (1993).

104. 534 U.S. 204 (2002).

105. Chason, *supra* note 4, at 149, 164; see Thomas, *supra* note 92, at 1068–69 (criticizing the Court's recurring reliance on the pecuniary-injunctive dichotomy). At the time, § 502(a)(3) was the only mechanism for bringing a breach of fiduciary duty claim that did not affect the plan as a whole. *Supra* text accompanying note 49.

106. *Mertens*, 508 U.S. at 250.

they often imposed legal remedies.<sup>107</sup> To rule otherwise, per Justice Scalia, would be to collapse the distinction between equitable and legal remedies.<sup>108</sup> Instead, “equitable relief” must only mean “those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution . . .).”<sup>109</sup> In drawing this line, the Court essentially held that “any general award of money is legal, not equitable, relief.”<sup>110</sup>

In *Great-West*, the fiduciary was the plaintiff.<sup>111</sup> The fiduciary petitioned the court under Section 502(a)(3) for reimbursement of insurance payments paid to the beneficiary pursuant to a provision in the plan.<sup>112</sup> The reimbursement would restore losses to the plan, so the fiduciary argued the payment amounted to restitution authorized under *Mertens*.<sup>113</sup> Justice Scalia disagreed, characterizing the remedy as *legal* restitution rooted in contract law.<sup>114</sup> To support this conclusion, Justice Scalia characterized “suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff [as almost invariably] suits for money damages.”<sup>115</sup> Justice Scalia also pointed to trust law principles that required the defendant have equitable entitlement over property that the plaintiff actually possessed.<sup>116</sup>

Between *Massachusetts Mutual* and *Mertens*, the Court switched its method of statutory interpretation from a congressional intent analysis to a textual and historical analysis of equitable remedies.<sup>117</sup> In doing so, the Court seems to conclude that monetary awards are not available for any breach of fiduciary duty claims. This adds a level of absurdity to *Massachusetts Mutual*: though Congress included open-ended language in only one section, the Court imposed essentially the same constraints on both Section 409(a) and Section 502(a)(3).<sup>118</sup>

Further, Justice Scalia emphasizes the historical distinction between legal or equitable remedies while highlighting how the differences are increasingly

107. *Id.* at 255–57.

108. *Id.* at 257.

109. *Id.* at 256.

110. Chason, *supra* note 4, at 167.

111. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 208 (2002).

112. *Id.*

113. *Id.* at 208, 212; see *supra* text accompanying note 109.

114. *Great-West*, 534 U.S. at 210, 215 (“*Mertens* did not purport to change the well-settled principle that restitution is not an *exclusively* equitable remedy”) (internal quotations omitted).

115. *Id.* at 210 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting)).

116. *Id.* at 214–16; Thomas, *supra* note 92, at 1073 (“[Justice Scalia] uses these distinguishing factors to conclude that equitable restitution only includes claims for constructive trust, equitable lien, or accounting for profits, which expressly seek the return of specific funds or property belonging to the plaintiff now in the defendant’s possession.”).

117. Chason, *supra* note 4, at 149.

118. *Id.* at 149, 164.

difficult to ascertain in our modern civil law system.<sup>119</sup> In *Mertens*, Justice Scalia misstated that courts of chancery could impose legal remedies for situations “involving enforcement of a trust” that would otherwise be outside of the scope of its authority.<sup>120</sup> Courts of chancery could only impose legal remedies when exercising concurrent jurisdiction over a case, as they did for contract claims, for example.<sup>121</sup> Because courts of chancery had exclusive jurisdiction over trust law claims, legal remedies were “impossible.”<sup>122</sup> Justice Scalia instead concluded that lower courts should consider on a case-by-case basis whether a court of chancery would have imposed legal or equitable remedies under the same circumstances.<sup>123</sup> Not only did Justice Scalia acknowledge that modern courts may struggle with this distinction, but he also inadvertently demonstrated his point by making significant mistakes himself.<sup>124</sup>

In *CIGNA Corp. v. Amara*,<sup>125</sup> the Court backtracked, allowing equitable monetary remedies of estoppel and surcharge.<sup>126</sup> In *Amara*, the plaintiffs sued the plan fiduciary for misrepresenting key changes in the plan that reduced their benefits.<sup>127</sup> The district court, wary of the severe remedial limitations that *Mertens* and *Great-West* created, had avoided a Section 502(a)(3) analysis.<sup>128</sup> The majority in *Amara* seems to address this reticence by explaining how courts of chancery used monetary compensation as equitable relief.<sup>129</sup> Despite this expansion of possible remedies, *Amara* does not resolve the damage done by Justice Scalia in *Great-West* and *Mertens*.<sup>130</sup>

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119. *Id.* at 161–62 (quoting *Mertens*, 508 U.S. at 256–57).

120. *Mertens*, 508 U.S. at 256–57; Chason, *supra* note 4, at 161–62.

121. Chason, *supra* note 4, at 162–63. Justice Scalia did not, however, consider ERISA as a creature of contract law warranting possible legal remedies. *See id.* at 161–62; *Mertens*, 508 U.S. at 256–57.

122. Chason, *supra* note 4, at 163.

123. *Mertens*, 508 U.S. at 256–57 (identifying “injunction, mandamus, and restitution, but not compensatory damages” as “typically available in equity”).

124. Chason, *supra* note 4, at 162 (characterizing mandamus not as equitable, but as an “extraordinary legal remedy”). Professor Chason argues that the Court’s characterization is fundamentally flawed with respect to restitution because as a field of law it did not exist until just before the merger of law and equity. *Id.* at 163. Unfortunately, a deep dive into restitution is beyond the scope of this Comment. *See generally* Roberts, *supra* note 60 (giving a comprehensive review of restitution, its evolution, and recent developments).

125. 563 U.S. 421 (2011).

126. *Id.* at 442–45.

127. *Id.* at 424–25.

128. *Id.* at 434.

129. *Id.* at 439–44.

130. *See id.* at 449 (Scalia, J., concurring) (“The Court’s discussion of the relief available under § 502(a)(3) and *Mertens* is purely dicta, binding upon neither us nor the District Court.”);

The Court's continued reliance on historical distinctions between law and equity erases Congress's vision that ERISA serve as a modern adaption of trust law that incorporates civil law principles.<sup>131</sup> Congress enacted ERISA to promote consistency in pension plan enforcement, recognizing that private sector plans might not always mirror traditional trusts.<sup>132</sup> Instead of creating a body of federal common law focused on achieving this end, the Supreme Court's reliance on strict textual analysis and historical tests has fractured ERISA remedies jurisprudence, rendering relief unavailable to many plaintiffs.<sup>133</sup>

### C. Rise of Jury Trials in ERISA Civil Penalties Cases

ERISA's strong foundation in trust law suggests the statute is equitable and thus decidedly exempt from the Seventh Amendment.<sup>134</sup> Still, the Supreme Court's confused characterizations of the remedies available under Section 409(a) have opened the door to jury trials in ERISA cases by mischaracterizing equitable monetary remedies as legal.<sup>135</sup> The lack of jury trial in ERISA litigation, once extolled by plan administrators as a profound benefit to employees, introduces uncertainty that does not always serve plaintiffs in practice.<sup>136</sup>

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Harthill, *A Square Peg in a Round Hole*, *supra* note 101, at 776 ("Lower courts are, unfortunately, seizing on Justice Scalia's conclusion and rejecting claims for equitable relief by essentially rejecting *Amara* and continuing to apply prior circuit cases restrictively interpreting *Great-West*"); Maher, *supra* note 42, at 348 n.73 (listing cases that treat the majority's holding as dicta).

131. See Langbein, *supra* note 4, at 1326; H.R. REP. NO. 93-533, at 12 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4650.

132. PURCELL & STAMAN, *supra* note 25, at 38–39; H.R. REP. NO. 93-533, at 12.

133. See Chason, *supra* note 16, at 149.

134. Alderman, *supra* note 16, at 983–84; H.R. REP. NO. 93-533, at 1, 13 ("[T]he bill is designed to . . . establish equitable standards of plan administration . . . . The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans.").

135. Alderman, *supra* note 16, at 974.

136. See Peter K. Stris & Victor O'Connell, *ERISA & Equity*, 29 ABA J. LAB. & EMP. L. 125, 127 (2013) (quoting a "now-infamous" memo from an insurance executive extolling ERISA's lack of jury trials as a profound benefit for employers). Even when courts grant jury requests, juries themselves do not return consistent awards for complex issues. Compare Wille & Ramsey, *supra* note 8 (discussing *Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan*, No. 20-CV-07561, 2023 WL 6237862 (S.D.N.Y. Sep. 26, 2023), in which the jury returned a \$39 million award for the employees), with *2nd Circuit Considers New Trial Request in Yale Retirement Fee Battle*, HALL BENEFITS L. (Nov. 12, 2024) [hereinafter *2nd Circuit Considers New Trial*], <https://hallbenefitslaw.com/2nd-circ-considers-new-trial-request-in-yale-retirement-fee-battle/> [<https://perma.cc/T64W-HFF8>] (reporting that the jury in a recent case had found for the plaintiff-employees but awarded no damages).

The Seventh Amendment limits a party's right to a jury trial only to "[s]uits at common law," not in equity.<sup>137</sup> In the days of the "divided bench," in which courts of equity alone adjudicated trust law claims, only courts of law could convene juries.<sup>138</sup> Today, courts apply a two-part "history-plus-remedy test" outlined in *Granfinanciera, S.A. v. Nordberg*<sup>139</sup> to determine whether the Seventh Amendment applies in civil cases.<sup>140</sup>

The *Granfinanciera* test compounds this remedies confusion by placing undue weight on the type of remedy requested instead of on the cause of action itself.<sup>141</sup> In turn, an internally divided Second Circuit has repeatedly applied *Granfinanciera* to find that ERISA civil penalties claims are legal in nature, and entitle the parties to a jury trial.<sup>142</sup> Because the applicability of the Seventh Amendment varies from judge to judge, this confusion functionally conditions the parties' Seventh Amendment right on which judge is assigned to the case.<sup>143</sup>

Part one of the *Granfinanciera* test analyzes whether the claim has a historical analog that would be heard in an eighteenth-century English court of chancery.<sup>144</sup> If a court of chancery heard a similar claim, then the claim is equitable and may not be subject to the Seventh Amendment.<sup>145</sup> Part two of the test focuses on the remedy requested, asking if the remedy is traditionally obtained in a court of law or equity.<sup>146</sup> Because a claim can incur both legal and equitable remedies, courts must focus on the remedy.<sup>147</sup> ERISA's firm basis in trust law

137. See U.S. CONST. amend. VII; see also 1 MOORE'S FEDERAL PRACTICE – CIVIL § 2.06 ("The Seventh Amendment right to a trial by jury extends beyond traditional common-law forms of action. It applies to statutes that create legal rights and remedies, as well as to judicially created causes of action.").

138. Alderman, *supra* note 16, at 982–83; see Chason, *supra* note 4, at 162.

139. 492 U.S. 33 (1989).

140. See *id.* at 41–42; Roberts, *supra* note 60, at 1031. *Granfinanciera v. Nordberg* applies to private causes of action. See 492 U.S. at 51. Conversely, *Tull v. United States* applies where the government seeks to enforce a public right. See *Tull v. United States*, 481 U.S. 412, 418 (1987). The Supreme Court recently reaffirmed both tests in *Jarkesy*. See *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132–33 (2024).

141. See *Granfinanciera*, 492 U.S. at 42.

142. See *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2018 WL 4279466, at \*1, \*4 (S.D.N.Y. Sep. 6, 2018); *Garthwait v. Eversource Energy Co.*, No. 3:20-CV-00902, 2022 WL 17484817, at \*3 (D. Conn. Dec. 7, 2022) (acknowledging the circuit's internal split regarding *Pereira*).

143. Judges within a single District court—the Southern District of New York—are split on whether jury trials are allowed for ERISA cases. Compare *Cunningham*, 2018 WL 4279466, at \*4 (denying motion to strike jury demand) with *Pravda v. Prudential Ins. Co. of Am.*, No. 16-cv-2750, 2016 WL 3842741, at \*2 (S.D.N.Y. July 12, 2016) (granting motion to strike jury demand).

144. Mark I. Greenberg, *The Right to a Jury Trial in Non-Article III Courts and Administrative Agencies after Granfinanciera v. Nordberg*, 1990 U. CHI. LEGAL F. 479, 484 (1990).

145. *Id.*

146. *Pereira v. Farace*, 413 F.3d 330, 337, 339 (2d Cir. 2005).

147. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2129 (2024).

means its claims would have been heard in a court of chancery.<sup>148</sup> Thus, part one of *Granfinanciera* weighs in favor of denying any requests for a jury trial.<sup>149</sup> Part two is more contested.<sup>150</sup>

First, the Supreme Court's erroneous characterizations of equitable relief available under Section 502(a)(3) created a false dichotomy that any other monetary relief necessarily equals legal relief.<sup>151</sup> By limiting the scope of monetary equitable remedies opened the door to a reinterpretation of § 409's ambiguous language as allowing legal remedies.<sup>152</sup>

Second, the Court's rigid adherence to history in both ERISA remedies jurisprudence and in *Granfinanciera* prevents ERISA from adapting to modern challenges, as Congress intended it to.<sup>153</sup> Congress hoped that the DOL and the judiciary would work together to develop ERISA's own wing of common law.<sup>154</sup> This included an understanding that employment pensions may look different than traditional trusts, but should nonetheless be regulated according to statute and principles of trust law.<sup>155</sup> The judiciary, in focusing its remedies analysis in part on possession or location of assets under historic trust law, has undermined the key congressional goal of promoting uniformity in application despite variances in plan structure.<sup>156</sup>

The Second Circuit's holding in *Pereira v. Farace*<sup>157</sup> and the cases that follow illustrate this issue.<sup>158</sup> Though lower courts in the Second Circuit have cited

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148. See, e.g., *Garthwait v. Eversource Energy Co.*, No. 3:20-CV-00902, 2022 WL 17484817, at \*2 (D. Conn. Dec. 7, 2022); see also *Pereira*, 413 F.3d at 337–39 (regarding a bankruptcy case, not an ERISA case). Professor Chason highlights that courts of equity had exclusive, not concurrent, jurisdiction over claims in trust, and thus were not able to grant legal remedies in trust cases. Chason, *supra* note 4, at 163. Accordingly, the *Granfinanciera* test should end here for ERISA cases and any case involving a trust.

149. See *Pereira*, 413 F.3d at 339.

150. See, e.g., *Garthwait*, 2022 WL 17484817, at \*3–4.

151. See *supra* text accompanying notes 106–110.

152. Alderman, *supra* note 16, at 983, 985–86; see *Garthwait*, 2022 WL 17484817, at \*3–4. But see *CIGNA Corp. v. Amara*, 563 U.S. 421, 442–44 (2011) (granting new forms of monetary equitable relief—estoppel and surcharge—to ERISA claimants).

153. Chason, *supra* note 4, at 162–63.

154. Langbein, *supra* note 4, at 1326.

155. H.R. REP. NO. 93-533, at 1, 12 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4650 (“First, a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable . . . . It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act.”).

156. See Harthill, *The Supreme Court Fills a Gaping Hole*, *supra* note 89, at 794.

157. 413 F.3d 330 (2d Cir. 2005).

158. See *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2018 WL 4279466, at \*4

*Pereira* to allow jury trials in ERISA cases, *Pereira* itself does not involve pension plans.<sup>159</sup> In *Pereira*, the Second Circuit addressed the question of whether equitable monetary relief is appropriate where a third party depleted funds from a corporation's general assets.<sup>160</sup> Citing Justice Scalia in *Great-West*, the Second Circuit held that the trustee's claim for monetary relief stemming from defendants' breach of fiduciary duty is a legal remedy because the fiduciaries did not possess the funds in question, were not unjustly enriched, and could not be disgorged through an equitable remedy.<sup>161</sup> Instead, this resembles a claim for breach of contract or gross negligence, warranting legal damages.<sup>162</sup> *Pereira* demonstrates the pitfalls of traditional trust law that Congress attempted to circumvent in creating ERISA.<sup>163</sup>

District courts in the Second Circuit have applied *Pereira* to ERISA cases where employers work with third-party services providers who hold pension funds on their behalf.<sup>164</sup> Their reasoning rests on the technicality that the funds were never in the fiduciaries' possession, as would be the case under traditional trust law, citing *Great-West* and *Mertens*.<sup>165</sup> The strict conception of equitable remedies set forth in *Great-West* and *Mertens* contravenes Congress's intent to promote consistency in application where a factual technicality in pension structure determines rights available to the parties.<sup>166</sup>

*Granfinanciera* exacerbates the issue *Pereira* created by focusing on the remedy requested.<sup>167</sup> Every court, including those in Second Circuit, agrees that cases arising out of trust law fall squarely under the jurisdiction of eighteenth-century courts of equity, which could not convene juries.<sup>168</sup> Instead of ending the inquiry there, the *Granfinanciera* test subjects judges to a painful exercise of matching civil remedies to their eighteenth-century legal or equitable

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(S.D.N.Y. Sep. 6, 2018); *Garthwait v. Eversource Energy Co.*, No. 3:20-CV-00902, 2022 WL 17484817, at \*3–4 (D. Conn. Dec. 7, 2022). A Tennessee court even found that parties cannot include a provision creating a jury trial right because the underlying ERISA claim would not otherwise qualify under the Seventh Amendment. *Silva v. Hartford Life & Accident Ins. Co.*, No. 3:18-CV-435, 2019 WL 13196901, at \*2 (E.D. Tenn. Mar. 27, 2019).

159. See, e.g., *Garthwait*, 2022 WL 17484817, at \*3–4. See generally *Pereira*, 413 F.3d 330 (2d Cir. 2005) (regarding a shareholder's breach of fiduciary duty claim following a company's bankruptcy).

160. *Pereira*, 413 F.3d at 333–34, 339.

161. *Id.* at 340.

162. See *id.* at 346.

163. See Langbein, *supra* note 4, at 1324–29.

164. See, e.g., *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2018 WL 4279466, at \*4 (S.D.N.Y. Sep. 6, 2018); *Garthwait*, 2022 WL 17484817, at \*3–4.

165. See *Cunningham*, 2018 WL 4279466, at \*4; *Garthwait*, 2022 WL 17484817, at \*3–4.

166. See *PURCELL & STAMAN*, *supra* note 25, at 39; *Garthwait*, 2022 WL 17484817, at \*3–4.

167. See *Pereira*, 413 F.3d at 346.

168. See *supra* text accompanying note 143; *Garthwait*, 2022 WL 17484817, at \*2.

counterparts.<sup>169</sup> Step two of the *Granfinanciera* test ignores the expansion of modern remedies available to plaintiffs and the breadth of remedies historically available to Chancery courts.<sup>170</sup> In turn, the application of *Granfinanciera* leads to wildly disparate outcomes as judges insert their own interpretation of history into their cases.<sup>171</sup> Some courts adhere to *Pereira*, refusing to disregard the decision until the Second Circuit formally overrules it, while others insist the Supreme Court overruled *Pereira* in *CIGNA Corp. v. Amara*.<sup>172</sup>

Despite some wariness to adopt the reasoning in *Amara*, the majority seems to undermine the *Granfinanciera* test by emphasizing step one in the ERISA context.<sup>173</sup> The Court first establishes an ERISA claim would have been heard in a court of chancery, then stops just short of *presuming* the remedy would be equitable.<sup>174</sup> This new characterization of equitable remedies cuts against the rationale for placing greater weight in the type of remedy requested: that a claim could incur both legal or equitable remedies.<sup>175</sup>

In this confusing patchwork of case law and historical analysis, the *Granfinanciera* test is becoming unworkable as applied to ERISA. As the Supreme Court's decision in *Jarkesy* suggests, however, it is here to stay.<sup>176</sup> Perhaps the Supreme Court will rule on this novel issue of asset structure and the right to a jury trial under ERISA as more cases move up through the courts.<sup>177</sup> In

169. See *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 224 (2002) (Ginsburg, J., dissenting) (criticizing the Court's approach to ERISA's remedies for viewing "Congress' placement of the word 'equitable' in that provision [as] signal[ing] an intent to exhume the 'fine distinction[s]' borne of the 'days of the divided bench;' [and] to treat as dispositive an ancient classification unrelated to the substance of the relief sought") (internal citations); Chason, *supra* note 4, at 162–63.

170. Thomas, *supra* note 92, at 1065 ("[T]he dearth of scholarship on historical equity creates a dangerous opportunity for courts, like the Supreme Court in *Great-West Life*, to issue decisions unguided by accurate knowledge, yet insulated from knowing challenge.").

171. See *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2018 WL 4279466, at \*4 (S.D.N.Y. Sep. 6, 2018) (mentioning another judge in the same court recently denied a jury trial under the same circumstances).

172. *Garthwait*, 2022 WL 17484817, at \*4 (referencing the ongoing *Pereira-Amara* debate); *CIGNA Corp. v. Amara*, 563 U.S. 421, 439–40 (2011).

173. See *Amara*, 563 U.S. at 439–40 ("It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law.").

174. See *id.* ("[T]he remedies available to those courts of equity were traditionally considered equitable remedies . . . . [R]emedies that were 'fitted to the nature of the primary right' they were intended to protect." (quoting 1 S. Symons, *Pomeroy's Equity Jurisprudence* § 108, pp. 139–140 (5th ed. 1941))).

175. See *supra* note 147, and accompanying text.

176. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024) ("Our analysis of this question follows the approach set forth in *Granfinanciera* . . .").

177. See, e.g., *2nd Circuit Considers New Trial*, *supra* note 136.

the meantime, ERISA claimants and defendants need the option of a more consistent forum that preserves the rights Congress set out to protect.

### III. ARBITRATION IS AN INADEQUATE ALTERNATIVE FORUM

#### A. *Mechanics of Arbitration*

The primary alternative forum for ERISA adjudication is arbitration.<sup>178</sup> Arbitration is a type of dispute resolution that resembles an administrative hearing.<sup>179</sup> Parties elect to send their case to arbitration, typically through the arbitration clause of a contract, and present their claim to an arbitrator or panel of arbitrators they have chosen.<sup>180</sup> Because it is a private mechanism, the parties bear all associated costs.<sup>181</sup>

Arbitration is a creature of consent: both parties must waive their right to a trial in a state or federal court to proceed to arbitration.<sup>182</sup> Parties to a contract may consent to arbitration once a dispute has arisen or bind themselves in advance via an arbitration clause.<sup>183</sup> In the ERISA context, arbitration is most frequently invoked through arbitration clauses included in the plan document.<sup>184</sup> Plan documents, required by ERISA, set out the terms of the plan and must be provided to all participants in an easily-understood format.<sup>185</sup>

Given the federal policy favoring arbitration, the bar for showing consent to arbitrate is low.<sup>186</sup> Merely signing a contract containing an arbitration

178. Valastro, *supra* note 9, at 276–77.

179. Dana Eischen, *Nature of the Arbitration Hearing*, in LABOR AND EMPLOYMENT ARBITRATION § 1.01 (Tim Bornstein, Ann Gosline, Marc D. Greenbaum & Sheila Mayberry eds., 2026).

180. *Id.*

181. *See id.*; *see also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (holding that the parties must bear the costs of arbitration, even if the costs outweigh any potential award).

182. Valastro, *supra* note 9, at 304 (“[T]he trial court found the arbitration provisions unenforceable, under basic principles of contract law, because the plaintiffs had not consented to, received consideration for, or signed the amendment.”).

183. *Arbitration Clause*, INT’L CHAMBER COM. [hereinafter *Arbitration Clause*], <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/arbitration-clause/> [https://perma.cc/DJ2G-BA9G] (last visited Apr. 16, 2026).

184. *See* Elizabeth Hopkins, *The Limits of Arbitration Provisions in the ERISA Context*, KANTOR & KANTOR (Mar. 9, 2023, at 00:00 ET), <https://www.kantorlaw.net/the-limits-of-arbitration-provisions-in-the-erisa-context/> [https://perma.cc/J4GA-FWUU].

185. 29 U.S.C. § 1102(a)(1) (“Every employee benefit plan shall be established and maintained pursuant to a written instrument.”); H.R. CONF. REP. NO. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5077 (“A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.”).

186. *Arbitration Clause*, *supra* note 183.

clause is sufficient to meet the consent requirement.<sup>187</sup> Where plaintiffs challenge the arbitration clause, courts look for “clear and unmistakable” evidence the parties did *not* intend to arbitrate.<sup>188</sup> The presence of the clause in a contract, regardless of whether a party knew of or understood its consequences, meets this standard.<sup>189</sup>

ERISA regulations allow benefits plan documents to include binding arbitration clauses.<sup>190</sup> These clauses send all disputes arising under the plan to arbitration governed by the Federal Arbitration Act (FAA), including for statutory claims like breach of fiduciary duty.<sup>191</sup> This is a popular mechanism for employers to keep employee claims out of federal court where plaintiffs can secure large damages awards.<sup>192</sup> With courts lowering the threshold for statutory ERISA claims, the demand for alternative fora, like arbitration, will likely increase.<sup>193</sup>

More and more, employers include arbitration clauses in plan documents that cover all disputes arising under the plan.<sup>194</sup> As arbitration is already widely accepted as a reasonable dispute resolution mechanism, it serves as a helpful template for building an administrative adjudication option for ERISA plan holders that satisfies jurisdictional requirements.<sup>195</sup>

### *B. Forced Arbitration and the Effective Vindication Doctrine*

Though courts initially did not permit arbitration of ERISA statutory claims, the Supreme Court in *American Express Co. v. Italian Colors Restaurant*<sup>196</sup> implicitly authorized their arbitration, subject to the limited effective vindication doctrine.<sup>197</sup> When applied, the effective vindication doctrine can protect statutory rights of employees and beneficiaries.<sup>198</sup> However, limitations of the doctrine and inconsistency in its application undermine claimants’ rights and render arbitration an ineffective forum for ERISA’s statutory claims.<sup>199</sup>

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187. *Id.*

188. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944–45 (1995).

189. *See id.*

190. *See* 29 C.F.R. §§ 2560.503-1(b)(6), (c) (2025).

191. Valastro, *supra* note 9, at 282–84 (cataloging the gradual acceptance of arbitration of ERISA benefits and statutory claims).

192. Hopkins, *supra* note 184.

193. *See* Kiesewetter, *supra* note 53.

194. Valastro, *supra* note 9, at 292–93, 293 n.203.

195. *See infra* Part B; *see, e.g.*, 29 C.F.R. §§ 2560.503-1(b)(6), (c) (2025) (permitting arbitration of certain claims).

196. 570 U.S. 228 (2013).

197. *Id.* at 236–39.

198. Valastro, *supra* note 9, at 276–77.

199. *See id.* at 261–62, 285.

At first, circuit courts considered statutory claims as distinct from benefits claims in the arbitration context, with the former widely considered not arbitrable.<sup>200</sup> Benefits claims concern contractual rights covered by the FAA.<sup>201</sup> Statutory claims, in contrast, involve claims for substantive rights that courts were reluctant to share with arbitral tribunals.<sup>202</sup> However, as the Supreme Court reified the pro-arbitration policy of the FAA through a series of cases, lower courts quickly recognized that arbitration of ERISA's statutory claims is possible.<sup>203</sup>

However, the concern that statutory rights would be subverted by arbitration persisted.<sup>204</sup> The FAA allows courts to invalidate arbitration clauses "upon such grounds as exist at law or in equity for the revocation of any contract."<sup>205</sup> Courts developed the effective vindication doctrine on the grounds of unconscionability, which allows for contract revocation where ruling otherwise would shock the conscience, to preclude arbitration clauses that undermine rights or relief guaranteed to the parties by statute.<sup>206</sup> This includes attempts to incorporate prospective waivers of guaranteed rights into the arbitration clause.<sup>207</sup>

In the ERISA context, class action waivers in arbitration clauses may violate the effective vindication doctrine.<sup>208</sup> Breach of fiduciary duty cases under § 409 allow plaintiffs to seek plan-wide relief, contemplating class action suits.<sup>209</sup> Though this does not always mean plaintiffs bring breach of fiduciary duty cases as class actions, recent cases have read this provision to mean class action suits are guaranteed under ERISA and cannot be implicitly waived by signing onto a plan containing a class action waiver in its arbitration clause.<sup>210</sup> Where a court finds the effective vindication doctrine applies, the arbitration clause is invalid and the claim can proceed in federal court.<sup>211</sup>

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200. Valastro, *supra* note 9, at 279–81.

201. *Id.* at 278 & n.111.

202. *Id.* at 279–81.

203. See Okezie Chukwumerije, *The Evolution and Decline of the Effective Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 375–77 (2014).

204. Valastro, *supra* note 9, at 282–84.

205. 9 U.S.C. § 2.

206. See Chukwumerije, *supra* note 203, at 376; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (“[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”).

207. See *Mitsubishi Motors Corp.*, 473 U.S. at 626–27; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

208. Valastro, *supra* note 9, at 284–86.

209. 29 U.S.C. § 1109; see Medill, *supra* note 49, at 932.

210. See *Hopkins*, *supra* note 184; see, e.g., *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1112 (10th Cir. 2023).

211. Valastro, *supra* note 9, at 292–93.

The Supreme Court limited claimants' right to a class action in *Italian Colors*, which held the effective vindication doctrine allows class action waivers in arbitration clauses if the relief requested is not plan-wide.<sup>212</sup> Even though the Court recognizes plan-wide relief as a right under ERISA, the effective vindication doctrine does not protect the class action mechanism if the underlying substantive right is not at issue.<sup>213</sup> For the plaintiffs in *Italian Colors*, this meant the effective vindication doctrine did not apply where class certification was necessary to make individual claims cost-effective.<sup>214</sup>

Most concerning, especially where pension plans are at issue, are the several circuits that reject the effective vindication as a means of precluding waiver of claims seeking plan-wide relief.<sup>215</sup> In these cases, courts assure claimants that their right to bring an *individual* claim remains intact.<sup>216</sup> As in *Italian Colors*, however, arbitration may not be cost effective for bringing a single claim, essentially invalidating the right to bring a statutory claim altogether.<sup>217</sup> This directly undermines ERISA's purpose to expand access to adjudication for statutory and benefits claims, as well as to hold fiduciaries accountable and deter misconduct.<sup>218</sup>

Finally, critics of ERISA arbitration argue that it does not empower employees or contribute to the mission of creating federal common law.<sup>219</sup> Parties often choose to arbitrate claims because the proceedings are private and possibly confidential, though the exact rules depend on the laws governing the arbitration.<sup>220</sup> As a result, the public, including other plan holders, often do not know the facts or outcome of the claim being arbitrated.<sup>221</sup> Once the arbitration concludes, the parties submit the outcome to a court for their review.<sup>222</sup> The court can then vacate the award only if there is evidence of fraud, partiality or corruption,

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212. See *Italian Colors*, 570 U.S. at 231–32, 236 (finding that prohibitive cost of bringing an individual claim does not impede statutory rights under ERISA).

213. See *id.* at 236.

214. *Id.* at 231–32, 236.

215. Valastro, *supra* note 9, at 292–93, 293 n.203.

216. *Id.*

217. See *id.* at 277 (“[Arbitration] has dramatically depressed the number of claims filed by employees against employers.”); *Italian Colors*, 570 U.S. at 236 (“But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

218. Valastro, *supra* note 9, at 280.

219. *Id.*

220. *Confidentiality in U.S. Arbitration*, AM. BAR ASS'N (Mar. 23, 2023), <https://www.americanbar.org/groups/gpsolo/resources/ereport/archive/confidentiality-us-arbitration> [perma.cc/Y6RC-Z63J].

221. *Id.*

222. 9 U.S.C. § 9.

misconduct, or abuse of discretion.<sup>223</sup> Otherwise, the award must be confirmed.<sup>224</sup> Accordingly, courts have little discretion to weigh in on the merits of the case and contribute to ERISA jurisprudence.

#### IV. RULEMAKING UNDER ERISA

ERISA grants the Secretary civil penalties and rulemaking powers under two provisions: § 503 and § 505.<sup>225</sup> Under § 503, the Secretary must promulgate regulations regarding benefits claims procedures included in each plan.<sup>226</sup> These regulations govern the administrative review of benefits claims discussed above.<sup>227</sup>

Under the more general § 505, the Secretary is permitted to “prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [ERISA] . . . .”<sup>228</sup> Though the provision continues with a list of examples, like definitions of key terms and methods of accounting and bookkeeping, § 505 remains a broad delegation of authority to the Secretary.<sup>229</sup> In fact, the Secretary has already used § 505 to outline procedures for bringing prohibited transactions claims in front of an ALJ.<sup>230</sup> As of now, these procedures apply only to claims brought by the Secretary under Section 502(i).<sup>231</sup>

Pursuant to the Administrative Procedure Act (APA), the Secretary must publish notice of any proposed rules in the Federal Register and give an opportunity for the public to make comments.<sup>232</sup> The notice must include a description of the proposed rule and the legal authority supporting it.<sup>233</sup> Typically, the notice-and-comment period is between thirty and sixty days, but can be longer for more complicated or important issues.<sup>234</sup>

223. *Id.* § 10(a).

224. *Id.* § 9.

225. 29 U.S.C. §§ 1133, 1135.

226. § 1133.

227. *See* 29 C.F.R. § 2560.503-1 (2025); *supra* note 71.

228. 29 U.S.C. § 1135.

229. *Id.* (“Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records . . .”).

230. 29 C.F.R. pt. 2570 (2025) (citing 29 U.S.C. § 1135 as the Secretary’s source of rulemaking authority).

231. § 2570.1.

232. 5 U.S.C. § 553(b)–(c).

233. ACUS, IIB-014, NOTICE-AND-COMMENT RULEMAKING (2021), <https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf> [<https://perma.cc/WY4D-CVB7>].

234. *Id.*; *see, e.g., Rescission of Executive Order 11246 Implementing Regulations; Extension of Comment Period*, 90 Fed. Reg. 42,711, 42,712 (Sep. 4, 2025), (to be codified at 41 C.F.R. pt. 60) (“DOL believes this 15-day extension is sufficient and balances the agency’s need for stakeholder input with the Department’s desire to proceed with the rulemaking in a timely manner.”).

The Secretary, through the Employee Benefits Security Administration, can also promulgate guidelines.<sup>235</sup> Guidance documents help courts and practitioners interpret rules or serve as a general statement of agency policy.<sup>236</sup> Because guidance documents are not binding, they are not subject to the notice-and-comment process required for rulemaking.<sup>237</sup>

## V. RECOMMENDATION

### A. *Proposed Rule*

To resolve the apparent uncertainties in ERISA litigation of statutory claims, the Secretary should propose a rule requiring that plans include an administrative review process for statutory as well as benefits claims. As a starting point, this would lend credence to the Seventh and Eleventh Circuits' view that the exhaustion principle applies where the plan includes a viable review procedure.<sup>238</sup>

The proposed rule would read as follows:

(a) *Obligation to Establish and Maintain Reasonable Statutory Claims Procedures.* Every employee benefit plan shall establish and maintain reasonable procedures governing the initial review and appeal of statutory claims (hereinafter collectively referred to as claims procedures).

(b) The claims procedures for a plan will be deemed to be reasonable only if they do not contain any provision, and are not administered in a way, that unduly inhibits or hampers the rights guaranteed by statutory claims.

This rule is consistent with the broad rulemaking powers delegated to the Secretary by Section 505(b).<sup>239</sup> By evoking the familiar language of regulations for ERISA benefits claims procedures, this rule encourages plan administrators to replicate the complexity of their benefits claims procedures in the statutory context.<sup>240</sup> However, it leaves discretion with the administrators to decide what dispute resolution mechanisms work best for the plan.<sup>241</sup>

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235. 5 U.S.C. § 553(b)(A); 29 U.S.C. § 1137 (incorporating this provision of the APA); *see, e.g., Voluntary Compliance Guidelines*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/voluntary-compliance-guidelines> [<https://perma.cc/6XWY-S2KE>] (last updated Feb. 2025).

236. KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS 1 (2021).

237. *Id.*

238. *See supra* Part II.B.

239. 29 U.S.C. § 1135.

240. *See* 29 C.F.R. §§ 2560.503-1(b)(1), (3).

241. *See* H.R. REP. NO. 93-533, at 1 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 (“The primary purpose of the bill is the protection of individual pension rights, but the

Though this places a mandate on employers to set up a review mechanism, courts retain discretion to evaluate the fairness of these procedures.<sup>242</sup>

### B. Proposed Guidelines

In tandem with the above rule, the Secretary must propose guidelines that shed light on what mechanisms are likely unduly prohibitive given Congress's intent in drafting ERISA.<sup>243</sup> The guidelines would signal to plan administrators that each forum discussed above raises serious problems for the proper and just enforcement of ERISA statutory rights.

The Secretary should outline the law-equity confusion in federal court.<sup>244</sup> Federal courts at every level misinterpret trust law and mischaracterize remedies, often precluding plaintiffs from obtaining monetary relief they are owed under ERISA.<sup>245</sup> ERISA occupies a unique place between law and equity, reflecting the modern trend to merge law and equity into one field.<sup>246</sup> By casting ERISA as purely equitable and mooring ERISA jurisprudence in centuries-old legal distinctions, the Supreme Court has limited the availability of relief in some courts and created the right to a jury trial in others.<sup>247</sup> Such disparate results confuse parties and undermine ERISA's goal of standardizing pension policy.<sup>248</sup>

Arbitration is also likely prohibitive.<sup>249</sup> Federal courts, in failing to apply the effective vindication doctrine, permit arbitration to narrow the scope of employees' access to meaningful review of their claims.<sup>250</sup> Arbitration can thus subvert the rights carefully chosen by Congress.<sup>251</sup> Not only are these grounds sufficient to categorize arbitration as prohibitive, the inconsistency

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committee has been constrained to recognize the voluntary nature of private retirement plans.”); S. REP. NO. 93-127, at 13 (1973), as reprinted in 1974 U.S.C.C.A.N., 4838, 4849–50 (“[T]he legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system.”); *Stephens v. Pension Benefit Guar. Corp.*, 755 F.3d 959, 966 (D.C. Cir. 2014).

242. See *supra* text accompanying note 82.

243. See BOWERS, *supra* note 236.

244. See *supra* Part II.B–II.C.

245. Chason, *supra* note 4, at 162–63.

246. *Id.* at 151.

247. See *Pereira v. Farace*, 413 F.3d 330, 339–40 (2d Cir. 2005).

248. See Valastro, *supra* note 9, at 272.

249. See *supra* Part B.

250. See Valastro, *supra* note 9, at 261–62.

251. See *id.*

with which courts apply the effective vindication doctrine likewise diminishes ERISA's goal of uniformity across the country.<sup>252</sup>

Finally, plan administrators should not adjudicate statutory ERISA claims.<sup>253</sup> The majority of circuit courts disclaim those that allow administrators to rule on their own misconduct, even if the review process otherwise gives claimants a "full and fair" opportunity to make their case.<sup>254</sup> To encourage judicial participation in extrajudicial review of statutory claims, the Secretary should disclaim administrator oversight in favor of other "full and fair" options.<sup>255</sup>

Accordingly, the DOL must recommend an opt-in mechanism for intra-agency adjudication as their official policy. In lieu of arbitration or filing suit directly in federal court, a plan should first ask whether the employee or beneficiary would like to bring their claim in front of an ALJ at the DOL. As in arbitration, employers can include a clause in the plan document implementing this policy.<sup>256</sup> However, unlike in arbitration, an employee can only give their consent once the dispute arises to avoid any Seventh Amendment confusion.<sup>257</sup>

### C. *Mechanics of DOL Adjudication*

Some of the infrastructure this set of rules and guidelines seeks to establish is already in place in other contexts: through administrative review of benefits claims, and procedures outlining how the Secretary can bring a claim in front of an ALJ at the DOL. Adopting existing frameworks will help streamline adoption of "opt-in" provisions by making intra-agency review seem familiarly legitimate.

Two circuits, the Seventh and Eleventh, already allow administrative review of statutory claims under the exhaustion principle as long as a full and fair opportunity exists to adjudicate.<sup>258</sup> This approach reflects a deference to the administrative review procedures outlined by the Secretary while safeguarding the integrity of the review.<sup>259</sup>

An informal adjudication process fits within this scheme.<sup>260</sup> Informal agency adjudications are those not mandated by statute and therefore not regulated by

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252. *Id.* at 272.

253. *See* Campbell, *supra* note 75.

254. *See id.*

255. *See supra* text accompanying note 215.

256. *See Arbitration Clause, supra* note 183.

257. *See id.*

258. Campbell, *supra* note 75; *see supra* text accompanying notes 82–83.

259. *See* 29 C.F.R. § 2560.503-1 (2025).

260. *See generally* BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021) (defining informal adjudication and explaining how agencies use it).

the APA.<sup>261</sup> As such, federal courts can still retain jurisdiction over ERISA cases through a de novo standard of review, which is not available in a formal process.<sup>262</sup> Though informal adjudications do not always require a hearing in front of an ALJ, the Secretary can tailor procedural requirements to ERISA's specific needs.<sup>263</sup> Administrative adjudication would thus serve to give claimants access to an inexpensive, public, and efficient process that creates a reliable record for a federal court should the claim proceed to judicial review.<sup>264</sup>

In practice, the opt-in provision would function as the inverse to the opt-out provision suggested by Christopher Walker and David Zaring in their article discussing a right to remove in anticipation of the *Jarkesy* decision.<sup>265</sup> Walker and Zaring described a system in which the SEC would issue a notice of potential civil penalties, at which point the respondent would be able to file a notice to remove to federal court.<sup>266</sup> If the respondent does not file the notice to remove, they implicitly consent to continuing in administrative court.<sup>267</sup>

This scheme would not work in the ERISA context because the statute grants only federal courts jurisdiction to adjudicate ERISA claims, so an implicit waiver may be interpreted as a step too far in divesting the judiciary of its power.<sup>268</sup> Instead, after receiving notice of potential civil penalties, the respondent in an ERISA claim must expressly waive their right to an initial federal review and proceed with agency adjudication.<sup>269</sup> Their silence on the issue would be taken as desire to challenge the penalty in federal court, preserving their rights under the statute.<sup>270</sup>

Though the majority in *Jarkesy* addressed the right of parties to adjudicate claims subject to the Seventh Amendment in federal courts, it did not discuss Seventh Amendment *waiver*.<sup>271</sup> In federal court, parties are presumed to have waived their right to a jury unless one is specifically demanded.<sup>272</sup> This vests

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261. *Id.* at 1. Informal hearings must still guarantee due process. JACOB A. STEIN & GLENN A. MITCHELL, 4 ADMIN. LAW § 33.01(1) (2026).

262. HARRINGTON & SHEFFNER, *supra* note 260.

263. *Id.*; 4 ADMIN. LAW § 33.01(2).

264. *See, e.g.,* Commc'ns Workers of Am. v. Am. Tel. & Tel. Co., 40 F.3d 426, 432 (D.C. Cir. 1994) (demonstrating judicial preference for a well-developed administrative record in ERISA cases).

265. Walker & Zaring, *supra* note 13, at 13.

266. *Id.*

267. *Id.*

268. 29 U.S.C. § 1132(e)(1).

269. § 1132(l).

270. *See* § 1132(a)(2), (e).

271. *See generally* SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (affirming the respondents' request for a jury trial).

272. Fed. R. Civ. P. 38(d). The Supreme Court recently held that agency adjudication

parties, not courts, with the power to choose whether to invoke their Seventh Amendment right. Unlike the SEC's fraud provisions challenged in *Jarkesy*, ERISA regulations endow plan administrators and participants with the ability to choose their own enforcement structures and potentially waive their right to a jury trial.<sup>273</sup> Accordingly, ERISA creates the potential for a provision allowing parties to "opt-in" to agency adjudication, replacing the 'opt-out' approach for avoiding potential constitutional challenges.<sup>274</sup>

## CONCLUSION

As the retired population becomes increasingly dependent on private pensions, employees and beneficiaries need a reliable and effective means of asserting their statutory rights to hold plan fiduciaries accountable for misconduct.<sup>275</sup> Unfortunately, uncertainties in both federal courts and arbitration, the predominant fora for adjudicating ERISA claims, undermine Congress's attempt at expanding employee rights and can prevent employees from obtaining relief. First, federal courts at all levels have been unsuccessful in uniformly characterizing ERISA remedies as equitable or legal in nature.<sup>276</sup> Under the *Granfinanciera* test, which emphasizes categorization of remedies, this confusion bears on claimants' Seventh Amendment right to a jury trial, leading to wildly different outcomes within the Second Circuit.<sup>277</sup> The alternative to federal courts, arbitration, is no better. Arbitration allows employers to force employees to prospectively waive their statutory rights as a condition of joining a plan.<sup>278</sup> Though some courts invalidate arbitration clauses containing such provisions, any mitigation of rights

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at does not implicitly waive or foreclose the parties' right to a jury trial upon review in federal court. Fed. Commc'ns Comm'n v. AT&T, Inc., No. 25-406, slip op. at 6–7 (U.S. 2026) (allowing "nonjury adjudications" within the FCC make "initial findings of fact that are subject to *de novo* review in a subsequent jury trial.").

273. Compare *Jarkesy*, 144 S. Ct. at 2124–26 (discussing the Dodd-Frank Act, which allowed the SEC to bring and litigate fraud claims against defendants in-house), with 29 C.F.R. § 2560.503-1 (2017) (delegating the creation of administrative review procedures to the plan administrator). See also *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994) ("[T]he exhaustion requirement enables plan administrators to apply their expertise and exercise their discretion to manage the plan's funds . . .").

274. See Walker & Zaring, *supra* note 13, at 13.

275. See *supra* text accompanying notes 1–3.

276. See Chason, *supra* note 4, at 162–63; *Pereira v. Farace*, 413 F.3d 330, 339–40 (2d Cir. 2005).

277. See *Pereira*, 413 F.3d at 339–40; *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2018 WL 4279466, at \*4 (S.D.N.Y. Sep. 6, 2018) (mentioning another judge in the same court recently denied a jury trial under the same circumstances).

278. See *supra* Part B.

under ERISA contravenes Congress's intent to empower, not limit, employees and beneficiaries.<sup>279</sup>

An opt-in provision could solve these problems and allow employees to choose the forum that works best for them. Including an "opt-in" provision allowing agency review of statutory claims would enable the DOL to better work with the judiciary in establishing what remedies are available or appropriate for breach of fiduciary claims.<sup>280</sup> It would also end the jury trial ambiguity for individual claimants, as the opt-in provision would double as an explicit Seventh Amendment waiver.<sup>281</sup> Finally, it would encourage a move away from arbitration to a similarly efficient and cost-effective mechanism: intra-agency adjudication.<sup>282</sup>

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279. Langbein, *supra* note 4, at 1326–29.

280. *Id.*

281. *See supra* Part II.C.

282. *See Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994).