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The Road Less Traveled is the Better Way: New Routes to the Right to Jury Trial in ERISA Section 502(a)(1)(B) Actions

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THE ROAD LESS TRAVELED IS THE BETTER WAY: NEW ROUTES TO THE RIGHT TO JURY TRIAL IN ERISA SECTION 502(a)(1)(B) ACTIONS

INTRODUCTION

In *Whitt v. Goodyear Tire & Rubber Co.*,[1] an Alabama federal district court struggled with both seventh amendment and congressional intent arguments in favor of a litigant's right to a jury trial in Employee Retirement Income Security Act[2] ("ERISA" or "the Act") plan enforcement actions brought under section 502(a)(1)(B) of the Act. Two grounds supported the court's holding that a prayer for legal remedies entitles ERISA parties to a jury trial in the federal courts.[3] First, Congress' failure to provide the right to jury trial in ERISA actions expressly in the Act does not preclude the right in all ERISA cases. Second, Congress would not have recognized the distinction in the Act between law and equity if it had not been aware of the seventh amendment implications of elimination of trial by jury in all ERISA actions.[4]

Approximately three weeks after this decision, the *Whitt* court attached to its opinion what it called an embarrassing "*mea culpa* Addendum"[5] in which it did an abrupt about-face from its passionate support of the right to jury trial. The court admitted that it had failed to discover a new circuit court case, *Chilton v. Savannah Foods & Industries, Inc.*,[6] which stood for the position that in the eleventh circuit, even in claims of the purely legal variety, there was no right to a jury trial in ERISA actions.[7] The *Whitt* court thereby abandoned its premature embrace of the United States Supreme Court decision in *Tull v.*

1. 676 F. Supp. 1119 (N.D. Ala. 1987), *rev'd*, Amos v. Blue Cross-Blue Shield of Alabama, 868 F.2d 430 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 158 (1989). Plaintiffs in three strikingly similar cases sued in state court and then the cases were removed to federal court under ERISA to recover money allegedly due immediately. The court treated the cases together only for the purpose of explaining its rationale for subsequent rulings on all three cases.

2. Employee Retirement Income Security Act of 1974 §§ 1-4402, 29 U.S.C. §§ 1001-1461 (1988) ("ERISA").

3. *Whitt*, 676 F. Supp. at 1123.

4. ERISA sections 502(a)(1)(B) and (a)(3) have been construed as providing separate legal and equitable relief. *See* Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745, 747 (E.D. Mich. 1977). *See also infra* text accompanying notes 16-17 for the text of these two sections.

5. *Id.* at 1132.

6. 814 F.2d 620 (11th Cir. 1987).

7. *Whitt*, 676 F. Supp. at 1132. Before the *Whitt* court reversed its earlier opinion as a result of discovering the precedential *Chilton* case, it took great pains to distinguish Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987), from the result in the *Whitt* case. *Howard*, the *Whitt* court stated, did not clarify the question of the right to jury trial in all ERISA actions when it analyzed the issue because it overlooked cases which dealt with traditionally legal relief. In any event, the *Howard* court did not decide the issue because of its lack of jurisdiction to review the district court's strike of the plaintiff's jury demand. *Whitt*, 646 F. Supp. at 1122 (quoting *Howard*, 807 F.2d at 1566).

United States[8] that the seventh amendment requires availability of a jury trial in statutory actions where Congress does not specifically deny that right. The *Whitt* court's hesitant and halfhearted justification for choosing *Chilton* over *Tull* was that the Supreme Court did not deal with the seventh amendment in an ERISA context.[9]

The *Whitt* decision did not end this district court's diligent attempts to find a right to jury trial for ERISA litigants. In yet another reversal of its position, the court in *Rhodes v. Piggly Wiggly Alabama Distributing Co., Inc.*,[10] flatly stated that based on recent Supreme Court decisions, the seventh amendment requires trial by jury in cases where claims of legal entitlement are concerned. The *Rhodes* court reasoned that the absence of provision for jury trial in ERISA is a conscious recognition by Congress of the seventh amendment imperative.[11]

The inconsistency of decisions within the eleventh circuit exemplifies the uncertainty in the federal court system surrounding the question of jury availability in ERISA actions. The *Rhodes* court managed to reach its long desired and arguably correct decision by adopting the Supreme Court trend to recognize a seventh amendment right to jury trial in statutory actions where Congress has failed to specify such a right. Of course, other courts could reach the same conclusion through a similar analysis. However, it would be more efficient for the Supreme Court to confront the seventh amendment implications of denial of jury trial in all ERISA actions and decide that ERISA section 502(a)(1)(B) permits jury trials for litigants who assert claims and/or remedies that are not equitable in nature in plan enforcement actions. This resolution would end at least fifteen years of conflicting opinion within the United States judicial circuits and establish a basis for uniform and consistent construction of the remedial measures of section 502 of the Act.

This Comment concludes that the Supreme Court should recognize that ERISA impliedly carries with it both seventh amendment and statutory rights to jury trial. Part I presents an overview of the purposes, scope, and remedies afforded in ERISA. As background for the remaining analysis, Part II examines the right to jury trial as provided in the seventh amendment. Part III deals with the arguments of three lines of authority regarding the availability of jury trial in ERISA section 502(a)(1)(B) actions: (1) jury trial is permitted in all such ERISA actions; (2) jury trial is available only when the plaintiff seeks legal rights or remedies; and (3) jury trial is prohibited under any ERISA claim. Part IV of this Comment provides three reasons why the Supreme Court should decide once and for all that ERISA section 502(a)(1)(B) requires jury trials for some ERISA litigants. The Conclusion summarizes the concrete propositions which this Comment recommends for Supreme Court adoption and submits that both the seventh amendment and congressional intent indicate the right to jury trial

8. *Whitt*, 676 F. Supp. at 1132 (referring to Tull v. United States, 481 U.S. 412 (1987)).
9. *Id.* at 1133.
10. 741 F. Supp. 1542 (N.D. Ala. 1990).
11. *Id.* at 1546.

in actions under ERISA section 502(a)(1)(B).

I. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

A. Scope and Purpose

The Employee Retirement Income Security Act establishes minimum federal standards governing private welfare and pension plans. The Act generally requires employers to disclose information and to provide adequate safeguards for the establishment, operation, and administration of the plans. ERISA consists of four titles. Title I, the labor title, deals with protection of employee benefits and is the focus of this Comment. Title II, the tax title, deals with pension, profit-sharing, and stock bonus plans. Title III provides the procedural processes of the Act. Title IV describes the termination of defined benefit pension plans and multiemployer plans.[12]

Specifically, ERISA is intended to remedy problems related to employer-provided retirement plans including: (1) loss of earned and anticipated retirement benefits because of a lack of mandatory vesting procedures; (2) unstable and unsound retirement plans due to an inadequacy of funds to pay benefits due; and (3) the premature termination of plans by employers before accumulation of necessary funds.[13] Provisions of the Act apply broadly to benefit plans established by all employers engaged in commerce-related activities, and to similarly engaged employee organizations or organizations representing employees.[14]

B. Remedies and Right to Jury Trial Under ERISA

Litigation can arise under all titles of ERISA. A party brings a lawsuit under section 502 of the Act (1) to force a plan administrator to furnish required information regarding a plan; (2) to recover benefits due under a plan; (3) to enforce rights, or to determine a right to future benefits; (4) for breach of fiduciary duty; and (5) to enjoin violations of ERISA or the terms of the plan.[15] Specifically, sections 502(a)(1)(B) and 502(a)(3), the civil enforcement provisions of the Act, provide that an action may be brought:

> (1) by a participant or beneficiary–
> (A). . .
> (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

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12. Solomon, *ERISA Litigation*, 243 PRACTISING LAW INSTITUTE 61, 63 (1986).

13. ERISA, 29 U.S.C. § 1001(a).

14. ERISA, 29 U.S.C. §§ 1003(a)(1-2). "Commerce" for the purposes of the Act is defined broadly as "trade, traffic, commerce, transportation, or communication between any state and any place outside thereof." ERISA, 29 U.S.C. § 1002(11).

15. Solomon, *supra* note 12, at 64-65.

> to future benefits under the terms of the plan;[16]
> (2) . . .
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [the] 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 [the] subchapter or the terms of the plan. . . .[17]

Questions involving a litigant's right to jury trial arise with respect to section 502(a)(1)(B) plan enforcement actions because that section does not on its face provide a right to jury trial. On the other hand, section 502(a)(3) does specify "equitable relief" under the Act and is interpreted to limit actions under that section to bench trials. Because section 502 does not expressly grant or deny the right to a jury trial, the issue is whether the claims and remedies are legal or equitable for purposes of applying the seventh amendment guarantee to jury trial in civil actions where the case arose at common law.

It is not surprising, therefore, that soon after Congress enacted ERISA in 1974, debate commenced over the right to jury trial under section 502(a)(1)(B). Since then, the authority has settled into three camps: those few courts which advocate unlimited jury access; those which argue for limited access in actions involving a legal right or remedy; and those which champion no right to jury trial under ERISA.

II. THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN ITS HISTORICAL CONTEXT

The seventh amendment of the United States Constitution provides the general standard for whether litigants have the right to jury trial in statutory actions. In an ERISA context, the right depends on whether actions for enforcement of ERISA plans, usually involving decisions of entitlement to future or back pension benefits, are analogous to traditional suits at common law. The seventh amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[18]

The right extends to issues of fact in civil actions which existed at common law

16. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). For example, a retired employee might sue his former employer for retirement benefits allegedly due and wrongfully withheld from a pension fund. Or, a plaintiff might bring an action to clarify his rights to future disability payments under a plan-sponsored medical program.

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

18. U.S. CONST. amend. VII.

at the time of adoption of the Constitution in 1791 and also in substantially similar cases which would have existed if they had been known in common law.[19] This historical test boils down to a determination of whether a case at the time the Constitution was adopted would have been "legal" under the common law of England and heard in a court of law, or "equitable" and heard without a jury in a chancery court, or court of equity.

Actions at law generally involved rights and remedies "legal" in character, such as the common law actions of debt, covenant, assumpsit, trover, replevin, trespass, and action on the case,[20] and claims for recovery of money or other damages, contract actions, or an action for ejectment in a real property suit.[21] In cases involving equity jurisdiction, equitable rights included probate and will contests, divorce cases, admiralty cases, court martial trials, and summary proceedings.[22] Injunction and specific performance are typical examples of equitable relief. Thus, if a legal right was available before adoption of the Constitution, it is preserved now as legal, and the legislature may provide for a trial with or without a jury in other cases where the seventh amendment does not control.[23]

Historically, in the English bifurcated system of English Chancery (equity) and Common Law (legal) courts, parties who had claims to legal rights could not raise equitable claims or defenses. Consequently, parties to actions in equity sometimes were unsuccessful because their proper recourse was solely in the court of law.[24] Additionally, the Chancery Equity Court afforded no right to a jury trial.[25] The United States Congress developed an equally cumbersome system in 1789, and then in 1938, unified law and equity in the Federal Rules of Civil Procedure ("FRCP" or "Rules") by providing for merger of legal and equitable issues into one lawsuit.[26] Under the broad joinder of claims provisions of the Rules, however, when a plaintiff sought both equitable and legal remedies, the pre-merger historical test was difficult to apply.

The Supreme Court responded to this problem in *Beacon Theatres, Inc. v. Westover*,[27] and introduced a new approach to interpreting the seventh amendment right to jury trial. The plaintiff, Fox West Coast Theatres, sought a declaratory judgment that its contract practices did not violate the Sherman Antitrust Act and an injunction against defendant Beacon Theatres' threats to bring an antitrust suit against Fox. Beacon Theatres counterclaimed on the same

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19. 47 AM. JUR. 2D *Jury* § 17 (1969 & Supp. 1990).
20. *Id.* § 39.
21. *Id.* §§ 42-45.
22. *Id.* § 39.
23. *Id.* § 17.
24. Comment, *The Right to Jury Trial in Complex Civil Litigation*, 16 SAN DIEGO L. REV. 1003, 1004 (1979) [hereinafter *The Right to Jury Trial*].
25. *Id.*
26. FED. R. CIV. P. 18(a) provides that a party may join any number of claims, "legal, equitable, or maritime," against the defendant.
27. 359 U.S. 500 (1959).

antitrust violations and demanded a jury trial. Both the district court and court of appeals denied the request.[28]

Although at common law there was no provision for declaratory judgment, the suit in *Beacon Theatres* was analogous to the situation where a plaintiff is forced to sue for injunction in equity against a potential lawsuit because there is no adequate remedy at law. Thus, at common law, Fox's claim and the remedy sought were equitable, and Beacon Theatres was denied the right to trial by jury even though its claim sought purely legal relief.[29]

The Supreme Court held that Beacon Theatres had a seventh amendment right to a jury trial on its counterclaim[30] even though the Antitrust Act does not provide for one. The Court reasoned that the seventh amendment was not necessarily to be applied to actions under the FRCP in exactly the same way as the pre-merger procedure.[31] The purpose of the seventh amendment "was not to freeze the jury trial picture as it existed in 1791," but to provide that a right to jury trial attaches in legal, not equitable cases.[32] Thus, with *Beacon Theatres*, a defendant could counterclaim and be provided with a jury trial even when the plaintiff's original underlying claim was equitable in nature.

Dairy Queen, Inc. v. Wood[33] supported *Beacon Theatres* and introduced a slightly different twist to the joinder of legal and equitable claims in a complaint. In that case, a Pennsylvania district court had denied a jury trial where the plaintiff licensor sought to enjoin the defendant from using a trade name, an accounting to determine what the plaintiff owed, and a judgment for that amount. On appeal, the Supreme Court looked beyond whether all claims would have been decided by a court of equity to whether a party could bring any of the claims in a court of law.[34] The Court reasoned that under FRCP 18, the plaintiff's claims for money damages and equitable relief must be joined[35] because they involved common factual issues. Consequently, the Court held that the legal issues must be tried to a jury before a court determines the equitable claim even if the legal claim is "incidental" to the equitable claim.[36]

In *Ross v. Bernhard*,[37] the Supreme Court moved from its historical analysis of separation and joinder of claims to extend the seventh amendment guarantee

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28. *Id.* at 503.

29. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 492 (1976).

30. *Beacon Theatres*, 359 U.S. at 506-07.

31. *Id.* at 510.

32. Redish, *supra* note 29, at 496.

33. 369 U.S. 469 (1962).

34. *The Right to Jury Trial*, *supra* note 24, at 1008.

35. *Dairy Queen*, 369 U.S. at 476.

36. *Id.* Some ERISA cases follow suit. In Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), the court held that a claim for additional benefits is triable to a jury after the judge's decision on reformation of the pension plan. *Id.* at 609. The suit involved a provision in the plan which if illegal would entitle the plaintiff to the purely equitable relief of reformation. Then, additional benefits due under the plan would present legal issues, triable to a jury.

37. 396 U.S 531 (1970).

to shareholder derivative suits. The Court rejected the rule that all shareholder derivative actions are equitable by dividing the derivative action into independent subactions concerning (1) the shareholder's right to bring a derivative action on behalf of the corporation, and (2) the underlying corporate claim.[38] The *Ross* Court found that under modern merged procedures in the federal courts, if the corporate claim was legal, a right to jury trial would exist[39] even though the equitable nature of the shareholder action historically prohibited the corporate claim from being heard in a law court. According to the *Ross* Court, the nature of the issue to be tried rather than the form of action was determinative in a decision on whether to grant a jury trial, and the right was no longer conditioned on the common law.[40] The significance of *Ross* for ERISA litigants is that plan enforcement actions might embody a "severable legal action giving rise to a jury trial."[41] For example, a court could separate a claim into an equitable action to determine a beneficiary's right to sue an allegedly dishonest trustee and a legal action triable to a jury if the claim against the trustee would have been enforced at law.[42]

Finally, *Tull v. United States*[43] exemplifies the Court's extension of these analyses to causes of action created by congressional enactment. In *Tull*, the Court held that the Clean Water Act[44] entitles a defendant to a jury trial under the seventh amendment in a civil liability and penalties claim for violation of the Act.[45] The Court analogized actions for civil penalty and injunctive relief under the Act to suits at common law, such as an action in debt, thus warranting a jury trial.[46] Additionally, suits for civil penalty produce a remedy enforceable historically only in a court of law, requiring a trial by jury,[47] and the government's argument that the legal claim for monetary relief was incidental could not be used to deny the right.[48] Significantly for ERISA litigants, the *Tull* Court reiterated its previously expressed position that "characterization of the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the seventh amendment guarantees a jury trial."[49] The *Tull* Court rejected the government's analysis of the Clean Water Act action as embodying a cause of action and remedy irrelevant to each other.

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38. Redish, *supra* note 29, at 499 (citing *Ross*, 396 U.S. at 539).

39. *Ross*, 396 U.S. at 542.

40. *Id.* at 540.

41. Comment, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 750 (1983) [hereinafter *Enforcement Actions*].

42. *Id.*

43. 481 U.S. 412 (1987).

44. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988).

45. *Tull*, 481 U.S. at 422.

46. *Id.* at 418-19.

47. *Id.* at 419, 422.

48. *Id.* at 424.

49. *Id.* at 421 (quoting Curtis v. Loether, 415 U.S. 189, 196 (1974). *See infra* text accompanying notes 150-56 for a discussion of *Curtis v. Loether*).

Instead, the cause of action and the remedy are two important factors in a search for a "single historical analog."[50]

In these landmark decisions, the Supreme Court has provided substantially wider access to trial by jury than was available in the past.[51] As a result of *Ross*, the equitable issues in a case will not prevent the legal issues from reaching a jury. The *Beacon Theatres* and *Dairy Queen* cases, as well, emphasize the Court's view that the new procedural devices have limited the scope of traditionally equitable remedies by "making them unnecessary in many cases."[52] Now a determination of whether the equity court controls "must reflect contemporary procedural reforms permitting greater enjoyment of jury trial."[53] Lower federal courts are not applying this rationale to the question of jury availability in ERISA cases, however, as evidenced by their constant disagreement on how the issue should be resolved.

III. THE JURISDICTIONAL SPLIT

The Alabama district court's vacillation in *Whitt v. Goodyear Tire & Rubber Co.*,[54] culminating with *Rhodes*, exemplifies the current status of the law concerning a litigant's right to a jury trial in certain ERISA actions. The various federal district courts have plausible reasons for the contrary decisions which are categorized and discussed below.

A. Jurisdictions Which Permit Jury Trial in all ERISA Section 502(a)(1)(B) Actions

The courts which find a right to jury trial in ERISA section 502(a)(1)(B) plan enforcement actions support their positions with contract law concepts and congressional intent arguments. Specifically, the focus is on (1) the contractual nature of ERISA section 502(a)(1)(B) claims and (2) the intent of Congress as evidenced by its silence and the statutory construction of ERISA sections 502(a)(1)(B) and (a)(3).

1. The Contractual Nature of ERISA 502(a)(1)(B) Claims. Some courts analogize ERISA actions to simple suits for breach of contract and money damages; therefore, ERISA actions are at law and triable to a jury under the seventh amendment. The courts often point out that Congress intended these suits to be analogous to those provided under section 301 of the Labor Management Relations Act ("LMRA") of 1947.[55] That section provides:

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50. *Id.* at 421-22 n.6.

51. 9 E. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2302 (1971).

52. *Id.*

53. *Id.* (quoting McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 14-15 (1967)).

54. *See supra* text accompanying notes 1-9.

55. Labor Management Relations Act §§ 1-503, 29 U.S.C. §§ 141-187 (1988) ("LMRA").

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to amount in controversy or without regard to the citizenship of the parties.[56]

The much disputed *Stamps v. Michigan Teamsters Joint Council No. 43*[57] explains the connection between LMRA section 301 and ERISA section 502. The *Stamps* court briefly examined ERISA's legislative history and found that it clearly mandates that section 502 actions should rely on the case law of section 301.[58] The Joint Explanatory Statement of the Committee of Conference stated that "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor Management Relations Act of 1947."[59]

Section 301 provides that a union may sue or be sued for breach of the collective bargaining agreement, and a union member or employee may sue the fund where the pension fund agreement is part of the contract between the employer and the union.[60] According to the *Stamps* court's interpretation of the legislative history, ERISA plan participants, beneficiaries, or fiduciaries may sue as well, and LMRA case law in support of trial by jury should apply.

The *Stamps* court, the first district court to adopt the contract analogy to find ERISA section 502(a)(1)(B) claims triable to a jury, held that a retired plaintiff's claim against a pension fund for payment of retirement benefits due is legal in nature and unequivocally entitles him to a jury.[61] The court reasoned that although ERISA does not expressly grant a litigant a jury trial in such cases, the right can be likened to classic actions for damages under LMRA section 301. An employee who alleges damages for breach of a collective bargaining contract, or a retiree who alleges damages for breach of a promise to pay benefits, is entitled to a jury trial on request, especially absent contrary language in the

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56. LMRA § 301, 29 U.S.C. § 185(a).

57. 431 F. Supp. 745 (E.D. Mich. 1977).

58. *Id.* at 747.

59. *Id.* (quoting H.R. CONF. REP. NO. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5107). The *Stamps* court held that this history clearly indicates that ERISA plan enforcement actions, like the plaintiff's claim for ERISA benefits, may be tried to a jury. Some courts, however, interpret the Conference Committee Report as simply intending that ERISA section 502 suits should be governed by federal rather than prior state law. *The Right to Jury Trial, supra* note 24, at 742. In Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), the court made short shrift of that argument by concluding that the committee suggested that LMRA section 301 and ERISA section 502(a)(1)(B) claims are to be considered in a "similar fashion," not that federal common law rules are to apply identically. *Id.* at 829. *See infra* text accompanying notes 120-22.

60. *Stamps*, 431 F. Supp. at 746.

61. *Id.* at 747.

statute.[62]

The Supreme Court has agreed with the analogy of section 301 claims to ERISA section 502(a)(1)(B) claims, at least with respect to the preemptive force of the latter over remedies sought in state court but not expressly provided by Congress. In *Pilot Life Insurance Co. v. Dedeaux*,[63] the Court examined the legislative history of section 502(a) and concluded that the provision's comprehensive civil enforcement remedies were intended to be exclusive.[64] The Court quoted the same Conference Report section upon which the *Stamps* court had relied to find access to jury trial[65] and stated that "Congress was well aware" that LMRA section 301's preemptive force "displaced all state actions for violation of contracts between an employer and a labor organization."[66] If it is so clear that Congress' specific reference to section 301 to explain ERISA's civil enforcement scheme is evidence of its intent that all suits brought to challenge processing of claims be treated as federal questions under section 502(a),[67] then it can be inferred just as easily that Congress intended to provide ERISA litigants with the LMRA's access to jury trial.

The purpose of the LMRA and its impact on the question of right to jury trial under ERISA were presented again in *Bugher v. Feightner*,[68] a post *Stamps* case. The *Bugher* court noted that the LMRA permits "the federal courts to create a federal common law of labor contracts."[69] Because the statute is silent on the question of access to a jury, the issue has been decided on a case-by-case basis by analogizing the rights and remedies claimed. Under LMRA section 301, a jury trial attaches in situations such as claimed breach of a union's duty of fair

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62. *Id.* at 746. The court quotes the Supreme Court in *Curtis*: "When Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Id.* at 746 n.1 (quoting *Curtis*, 415 U.S. at 195).

63. 481 U.S. 41 (1987). An ERISA plan participant who sporadically received permanent disability benefits based on a work-related injury brought a diversity action in federal district court, alleging tort and breach of contract claims under state common law for alleged improper processing of his claims for benefits. The Supreme Court found that ERISA preempted the state common law claims. *Id.* at 57.

64. *Id.* at 52.

65. *Id.* at 55 (quoting H.R. CONF. REP. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5107).

66. *Id.*

67. *Id.* at 56. *See also* Ingersoll-Rand Co. v. McClellan, 111 S. Ct. 478 (1990) (where the Court referred to LMRA section 301 in its holding that ERISA preempts a state common law claim that an employee was wrongfully discharged to prevent his eligibility for benefits under an ERISA plan in violation of section 510 of the Act).

68. 722 F.2d 1356 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984). Even more recently, the court in Smith v. Union Mutual Stock Life Insurance Co., No. 90 CIV 1888 (LBS) (S.D.N.Y. Dec. 13, 1990) (WESTLAW, Allfeds library), held that a plaintiff's action under section 502(a)(1)(B) to obtain disability benefits allegedly owed and to clarify his right to future benefits is a suit for damages that arise out of a contract. Therefore, the claim is legal rather than equitable and the right to jury trial attaches. *Id.*

69. *Bugher*, 722 F.2d at 1357.

representation and breach of a collective bargaining agreement by an employer.[70] Although an ERISA section 502 claim may seek equitable relief, for purposes of the seventh amendment and under *Dairy Queen* the form of remedy requested does not control a decision regarding the nature of the action as equitable or legal. Instead, the nature of the issue is determinative. Thus, the Seventh Circuit Court of Appeals concluded that an ERISA breach of contract claim enforced in an action at law is triable to a jury.[71]

Although the *Bugher* court noted that its ERISA analysis was limited to section 502(a)(3) and therefore did not extend to section 502(a)(1)(B), the *Bugher* rationale would be applied to section 502(a)(1)(B) actions regardless of the nature of the underlying claim. The contract rationale that the *Bugher* court applied to section 301—that pensions are a "condition of employment"—can be analogized to ERISA plan enforcement claims where the suit is for a right to past or future pension benefits. According to the *Bugher* court, ERISA was enacted to expand the scope of remedies available to plan trustees, participants, and beneficiaries.[72] This should be interpreted to pick up where the LMRA left off and to provide what the LMRA does not—standards for the protection of vested benefits and enforcement of those standards by civil sanctions.[73] Concurrently, then, it should be interpreted to provide the section 301 right to jury trial to decide entitlement to these protections.

2. Statutory Construction of ERISA Implies Congressional Intent to Provide a Jury Trial. In reaching the conclusion that ERISA litigants are entitled to a jury trial under section 502(a)(1)(B), some courts have relied on construction of the section and the intent of Congress in enacting the statute, as well as on analogy to contract actions at law. Thus, by locating an implied provision for a jury trial, courts have been able to avoid the constitutional question of whether the seventh amendment guarantees the right to a jury in 502(a)(1)(B) actions.[74] Although Congress did not caption the remedial provisions of section 502(a)(1)(B) as "equitable" or "legal," the jury trial advocates nonetheless maintain that the design of the statute clearly indicates Congress' intent to permit trial by jury in ERISA suits.

The *Stamps* court looked to the language of the statute to determine

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70. *Id.* at 1358.

71. *Id.* at 1357. In *Bugher*, plaintiffs were trustees of union trust funds who sued for payment of delinquent contributions under a collective bargaining agreement between the employer and union. They sought monetary relief but the complaint only requested the equitable remedies of accounting and specific performance under section 301 of the LMRA and section 502(a)(3) of ERISA. *Id.* Both the claim and request for jury trial were denied in the lower court. The court of appeals held that the plaintiffs, as third party beneficiaries to the collective bargaining agreement, had a legal remedy available for breach of contract damages under the LMRA, and an equitable remedy under ERISA. Because ERISA was found to support, not supersede, section 301 rights, and there was no showing that the legal remedy was inadequate, the plaintiffs were entitled to a jury trial. *Id.* at 1360.

72. *Id.*

73. *Id.* at 1359.

74. *Enforcement Actions*, *supra* note 41, at 750.

congressional intent. The court observed that section 502 sets forth two distinct remedies: (1) section 502(a)(3) specifically provides that a beneficiary may bring a civil action to obtain other "appropriate equitable relief," and (2) section 502(a)(1)(B) creates a different civil action for legal relief "to recover benefits due . . . to enforce . . . or to clarify [a] right to future benefits under the terms of the plan."[75] The *Stamps* court reasoned, therefore, that since section 502(a)(3) provides for equitable relief, section 502(a)(1)(B) must be construed to provide something else—here legal relief—and thus a statutory right to jury trial exists.[76] In fact, a number of cases have held that equitable relief is simply unavailable under section 502(a)(1)(B) because it is expressly mandated in section 502(a)(3) and thus superfluous in 502(a)(1)(B). This distinction, known as the "surplusage theory," stems from the general rule of statutory construction that statutes should be construed so that one does not make the other superfluous.[77]

Like *Stamps*, *Paladino v. Taxicab Industry Pension Fund*[78] combines contract and congressional intent analyses to resolve the ERISA jury trial issue. *Paladino*, a case where a union member sought a declaratory judgment as to his rights to receive pension benefits, stands for the proposition that a plaintiff is entitled to a jury trial based simply on Congress' intent that ERISA plan enforcement actions are by nature legal because they arise from contract.[79] The New York district court in *Paladino* reasoned that behind seemingly equitable plan enforcement issues are questions of fact, appropriate for jury resolution.[80] Additionally, the seventh amendment does not preclude Congress from making a remedy available to litigants. Thus, when a statute creates a new right which does not specify the right to a jury trial, a court must examine the statute to determine if Congress implied the right.[81] Most important to refute the argument that a jury trial is inappropriate when payment is not currently due is the *Paladino* court's statement that the right should adhere even where the plaintiff seeks a declaratory judgment regarding future availability of benefits.[82]

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75. 431 F. Supp. at 747.

76. *Id.*

77. *Id.* A *Harvard Law Review* author has presented a unique argument against the *Stamps* surplusage theory: plan enforcement actions provide broader relief than those brought under subsection (a)(3) because a plaintiff can chose forums, and narrower relief because plan enforcement actions enforce only the terms of the plan. Therefore, actions brought under each subsection are distinguishable. *Enforcement Actions, supra* note 41, at 741.

78. 588 F. Supp. 37 (S.D.N.Y. 1984).

79. *Id.* at 39.

80. *Id.*

81. *Id.*

82. *Id.* In another suit which involved traditionally legal actions resolved by contract law, the plaintiff's breach of contract and damages claims under ERISA section 502(a)(1)(B) and LMRA section 301 according to the provisions of a terminated pension plan were *both* triable to a jury. Haytcher v. ABS Industries, Inc., 7 Employee Benefits Cas. (BNA) 2158, 2162 (N.D. Ohio 1986). Similarly, in Bower v. Bunker Hill Co., 675 F. Supp. 1254, 1262 (E.D. Wash. 1986), retirees who sought a jury in an action to establish entitlement to lifetime medical insurance benefits alleged breach of contract arising from LMRA section 301 and from ERISA section502(a)(1)(B). The court focused on the remedy, and determined that since actions for money judgments are traditionally legal

The cases discussed above[83] adhere to the bright line rule that ERISA section 502(a)(1)(B) creates a right to jury trial. To reach this conclusion, the courts define the character of an ERISA action as contractual in nature rather than as springing from the law of trusts. They also scrutinized the language and structure of the Act, as well as its legislative history, to conclude that Congress had intended that litigants have a right to jury trial under the statute. One court's observation provides a quicker route to the same destination: "Perhaps because the right to a jury trial on claims of legal entitlement is so obvious, ERISA makes no express provision for jury trials."[84]

B. Jury Trial in ERISA Actions is Limited to Specific Circumstances

Recently some courts have interpreted ERISA section 502(a)(1)(B) as permitting limited but unequivocal access to a jury. These courts adopt one of the following two positions: (1) the very restricted view discussed below in Section C[85] of this Comment that only allegations of benefits due "unconditionally and immediately" are legal in nature and entitle a beneficiary to a jury trial; or (2) the view that there are only specific ERISA actions which can be analogized to contract, such as enforcement of rights under a pension plan or clarification of rights to future plan benefits, and which therefore merit a jury trial.

The courts which adopt the second view often cite *Katsaros v. Cody*[86] where the Second Circuit Court of Appeals stated that "[t]here is no right to a jury trial of ERISA actions against pension fund trustees seeking the equitable remedy of restitution."[87] This statement has been interpreted on the one hand to mean that jury trials are always inappropriate because all ERISA actions are equitable.[88] On the other hand, the New York district court in *Abbarno v. The*

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in nature, and since there is a strong federal policy favoring jury trial, where cases are questionable the right to trial by jury should be found. *Id.* This seems a fair and responsive answer to the problem.

83. *See Stamps*, 431 F. Supp 745; *Bugher*, 722 F.2d 1356; *Paladino*, 588 F. Supp. 37. *See also supra* text accompanying notes 57-62, 68-73, 75-82.

84. Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 885 (S.D.N.Y. 1990). *See infra* text accompanying notes 183-92.

85. *See infra* text accompanying notes 97-109.

86. 744 F.2d 270 (2d Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984). In *Katsaros*, appellants sought the equitable relief of removal of defendants as trustees and restitution of pension losses incurred.

87. *Id.* at 278.

88. The *Whitt* court distinguished *Katsaros* from this strict interpretation by pointing out that *Katsaros* dealt only with a claim for equitable relief and that in fact the *Katsaros* court itself distinguished the plaintiff's claim from one seeking damages for wrongdoing or non-payment of benefits. *Whitt*, 676 F. Supp. at 1123 (quoting *Katsaros*, 744 F.2d at 278). The court in Berlo v. McCoy would have agreed with this interpretation of *Katsaros*. *Berlo*, 710 F. Supp. 873 (D.N.H. 1989). *Berlo* involved a suit for trustee breach of fiduciary duty where the plan participant's demand for jury trial was denied. There the court found that the counts were equitable in nature, even though the plaintiffs alleged deprivation of substantial earnings, when the plan was terminated before the end

Carborundum Co.,[89] interpreted *Katsaros* differently. In *Abbarno,* the beneficiaries sued to recover benefits allegedly due under the terms of a written severance plan. The *Abbarno* court acknowledged that resolution of the jury trial question rests on a determination of the nature of the disputed claim. Here the court departed from what seems to be the majority opinion by interpreting *Katsaros* to stand for the rule that some ERISA actions are legal in nature and can be tried to a jury. According to *Abbarno,* a proper reading of *Katsaros* is that the plaintiff's claims were not equitable simply because they were ERISA claims, but because they sought strictly equitable relief.[90] Accordingly, *Katsaros* cannot stand for the flat proposition that a jury is simply not available under section 502(a)(1)(B), especially absent "some clearer statement from the United States Supreme Court regarding this issue."[91]

Other courts are more equivocal, holding that there is no right to jury trial under the particular circumstances of their cases, but that the right may exist in other cases. For example, in *Baker v. Universal Die Casting, Inc.*,[92] former employees and retirees sued an employer for his wrongful termination of an employee welfare benefit plan in violation of ERISA. In *Baker*, the Arkansas district court found that such claims were not triable to a jury, but left the door open for jury trials in other ERISA actions. Admitting that "[i]t is fairly well established that jury trials are not inappropriate in all actions under ERISA,"[93] the *Baker* court referenced cases which permitted jury trial in legal actions such as a suit to recover severance pay allegedly due under a written severance plan; payment of accidental death benefits under ERISA when the question was whether the death was accidental; and payments due unconditionally and immediately on an employee's resignation.[94] Nevertheless, the court relied on an earlier holding as controlling in the eighth circuit that a jury trial is not required by statutory scheme or the seventh amendment under section 502.[95] Thus, even the courts which follow such per se holdings admit that there can be another solution to the controversy.[96]

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of the annual accounting period. At the least a breach of equitable duty to pay must be found before recovery of damages. *Id.* at 874. This court joined several others in acknowledging disagreement between and among the circuits, and followed what seems to be the majority holding of no access to a jury.

89. 682 F. Supp. 179 (W.D.N.Y. 1988).

90. *Id.* at 181.

91. *Id.* The court also held that a jury trial is appropriate even when the claims are reviewable under an arbitrary and capricious standard, a scope of review which ordinarily would support denial of jury demand. *Id.* n.2.

92. 725 F. Supp. 416 (W.D. Ark. 1989).

93. *Id.* at 418.

94. *Id.*

95. *Id.* (quoting *In re* Vorpahl, 695 F.2d 318, 322 (8th Cir. 1982)).

96. Sometimes courts are inconclusive regarding reasons for their reluctance to expressly deny jury access. The plaintiff in Cox v. Keystone Carbon Co., 861 F.2d 390, 391 (3d Cir. 1988), for example, was a discharged employee who alleged that his former employer had terminated him for the purpose of interfering with his receipt of pension, medical, and life insurance benefits in violation of ERISA section 510. On appeal, the third circuit found that the plaintiff had no legal right to

C. Arguments in Support of the Position that there is No Right to Jury Trial in ERISA Actions

Three arguments support the notable number of federal courts which hold that there is no right to a jury trial in actions to recover benefits due under an ERISA-protected plan. First, the seventh amendment mandates that jury trials are simply unavailable to litigants in such actions because they traditionally are considered classical equitable trust enforcement claims by a beneficiary of a trust fund against the trust and its trustee to force payment from fund assets. Second, where a seventh amendment right does not exist and Congress has not expressly granted the right to jury trial in a particular statutory action, the only logical conclusion is that Congress never intended to do so. And third, there is no right to jury trial when the remedy is purely equitable in nature. A review of these positions follows.

1. ERISA Claims are Equitable Trust Enforcement Claims. A number of courts analogize ERISA plan enforcement actions to actions in trust because a trustee holds pension funds in trust for an employee or his beneficiary until the plan participant becomes eligible for distribution from the pension fund.[97] Therefore, historically ERISA lawsuits would have been equitable actions to declare and enforce a trust, and would have provided no constitutional right to jury trial.[98] The only recognized exception to this general rule in an equitable trust action is where the character of the action against the trustee is analogous to a common law action for "payment of money immediately and unconditionally

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recover under section 510, and since he failed to specify under which subsection of section 502 he brought his action, the court remanded the jury trial issue to the Pennsylvania district court to decide, based on the procedural and remedial sections of the statute which creates the civil right to sue. *Id.* at 392. The court of appeals in *Cox* did its own seventh amendment and congressional intent analysis in deciding that Cox was not entitled to have a jury hear claims brought under section 502(a)(3) when the remedy is explicitly equitable. *Id.* at 393. The *Cox* court provided little guidance, however, on what other criteria the district court was to apply on remand, thus leaving the door open and unresolved with respect to suits filed under section 502(a)(1)(B).

On remand, the district court in *Cox* found that plaintiffs who seek benefits under section 502(a)(1)(B) are not entitled to a jury. On the employee's second appeal, the court agreed, because it was bound by other circuit decisions that actions under the section were equitable in nature. *Cox*, 894 F.2d at 649. The plaintiff argued that he was not seeking benefits due, but "to enforce his rights under the terms of the plan." *Id.* at 650. He characterized the claim as a legal, under ERISA section 510 regarding arbitrary termination of employment. The court held an action to enforce rights is patently equitable. *Id.*

97. Three elements are necessary for a valid trust: (1) a trustee who holds trust property and is under an obligation to deal with it for the benefit of another; (2) a beneficiary to whom the trustee's obligation is owed; and (3) trust property (e.g., land, chattels, money) which the trustee holds for the beneficiary. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959 & Supp. 1990).

98. 76 AM. JUR. 2D *Trusts* § 643 (1975 & Supp. 1990). The courts which have held that trust law is inapplicable to ERISA plan enforcement claims look to the contract nature of the claims instead. Simply, those courts recognize a right to jury trial in actions for damages related to the trustee's (or employer's) breach of contract. Where a participant or a beneficiary claims a specific sum of money due under a contract of indemnity, the remedy is at law and entitles the party to a trial by jury. 47 AM. JUR. 2D *Jury* § 43 (1969 & Supp. 1990).

due."[99] Accordingly, a litigant is entitled to a jury trial for the legal remedy. At common law, the trustee who held legal title to a beneficiary's money was liable to that person in the common law action of account.[100] The actions of debt and general assumpsit superseded the action of account, and are now available to beneficiaries to enforce the trustee's duty to pay where the common law forms of action have been eliminated.[101] On the other hand, the trustee is not liable at law if the money is lost without a breach of trust, or if he is not under a duty to pay money immediately and unconditionally.[102]

The first case to apply the trust law analogy was *Wardle v. Central States, Southeast and Southwest Areas Pension Fund.*[103] In *Wardle,* the plaintiff brought suit under ERISA to challenge the union pension fund trustee's refusal to honor his application for retirement benefits. Relying on the much cited *Stamps* case, the plaintiff argued that both the statute and its legislative history provide a plaintiff who brings an action for pension benefits due and owing with a right to a jury.[104] The *Wardle* seventh circuit court disagreed, concluding that suits under the law of trusts are traditionally considered equitable in nature, and therefore permit a jury trial only when the fiduciary is obligated to pay immediately and unconditionally.[105]

Courts in several other circuits have followed the *Wardle* view that ERISA section 502(a)(1)(B) actions are controlled by the law of trusts, or at the least are limited by their wholly equitable character. One court, for example, which relied on the "sheer weight of opinion" that ERISA actions are essentially equitable, dismissed opposite positions by its suggestion that "the road less traveled may be a dead end."[106] The rationale in *Strout v. GTE Products Corp.*[107] was more expansive. The plaintiff asserted the right to jury trial in a suit to recover benefits due under the terms of her pension and welfare plans. The district court of Maine relied extensively on *Wardle* in reaching its conclusion that relevant legislative history and the equitable nature of a section 502(a)(1)(B) suit for pension benefits indicate no right to jury trial as a matter of law, except in cases where one seeks a legal remedy of payment of benefits due immediately and unconditionally.[108] In reaching this conclusion, the *Strout* court reasoned that alleging an action based on breach of contract alone does not activate a right to jury trial because the suit is based on the law of trusts and

99. 76 AM. JUR. 2D *Trusts* § 643 (1975 & Supp. 1990).
100. RESTATEMENT (SECOND) OF TRUSTS § 198 (1959 & Supp. 1990).
101. *Id.*
102. *Id.*
103. 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).
104. *Id.* at 828.
105. *Id.* at 829 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 197-198 (1959)).
106. Fuller v. Connecticut General Life Ins. Co., 733 F. Supp. 462, 463 (D. Mass. 1990).
107. 618 F. Supp. 444 (D. Me. 1985).
108. *Id.* at 445.

on the conduct of the trustee rather than on the law of contracts.[109]

2. Congress' Silence In Section 502(a)(1)(B) Indicates No Right to Jury Trial. The *Wardle* court concluded that Congress' silence on the matter of right to jury trial under section 502(a)(1)(B) indicates its intent that "suits for pension benefits by disappointed applicants are equitable"[110] and opened the door for other courts to follow. Again, *Wardle* relied on the law of trusts, which provides a legal remedy only when a trustee is obligated to pay the beneficiary unconditionally and immediately.[111]

The *Wardle* court reasoned that because suits under trust law have been heard in federal courts under diversity jurisdiction and are considered equitable in nature, the most reasonable construction of section 502 is that Congress intended to provide general federal jurisdiction over the equitable suits traditionally brought in state courts.[112] Also, according to *Wardle*, judges, not juries, have traditionally applied the "arbitrary and capricious" standard of review with respect to breach of fiduciary duty claims.[113] This acknowledged limited scope of review is incompatible with any implied legislative intent to grant this

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109. *Id.* Other courts have followed suit. Most recently, in Wise v. Dallas & Mavis Forwarding Co., 751 F. Supp. 90, 91 (W.D.N.C. 1990), a former employee sued his employer and union under LMRA section 301 for breach of contract, and his employer under ERISA section 502(a)(1)(B) for failure to make fringe benefit contributions. The court held that although he was entitled to a jury trial against the employer and union for breach of contract, he was not entitled to a jury on the related ERISA claim. *Id.* The court relied on the common law of trusts to determine that actions under ERISA were equitable in nature. *Id.* at 91.

In Turner v. CF & I Steel Corp., 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), the right to jury trial issue arose in a suit involving a trustee's evaluation of a plaintiff's assertion of a right to additional benefits under a pension plan. The *Turner* court decided that the plaintiff's remedy was equitable; thus no jury trial was required in a suit by a beneficiary or participant against a trustee under section 502(a)(1)(B). The court in *Turner* relied on Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985), where the Supreme Court held that Congress invoked the common law of trusts to define the scope of the trustee's authority and responsibilities under ERISA. *Id.* at 570. What the *Turner* court failed to distinguish, however, was that the plaintiffs in the *Central States* case sought an accounting of the employer's payroll tax and personnel records connected to the benefit plan, clearly an equitable and not a legal remedy.

The *Turner* court also precluded access to a jury because, it reasoned, most ERISA matters usually do not involve disputed factual matters, and therefore are not appropriate for jury consideration. *Turner*, 770 F.2d at 46. Illustrative of the confusion, a district court in the same circuit held that the *Turner* interpretation did not intend a "blanket prohibition" against jury trials in all ERISA section 502(a)(1)(B) cases, and that "plaintiffs are entitled to have factual ambiguities [in contract-like cases] resolved by a jury." Puz v. Bessemer Cement Co., 700 F. Supp. 267, 268 (W.D. Pa. 1988).

See also In re Vorpahl, 695 F.2d at 322 (a jury trial is not required in section 502 actions because breach of contract allegations are not involved); Moffitt v. Blue Shield of Mississippi, 722 F. Supp. 1391, 1395 (N.D. Miss. 1989) (citing *Calamia*, 632 F.2d at 1237 (holding that there is no right to a jury when claims are equitable in nature, even though the plaintiff sues to recover benefits due, and anticipates a monetary award)).

110. 627 F.2d at 829.

111. *Id.*

112. *Id.*

113. *Id.* at 830.

realm of decision making to any body other than the federal courts.[114] Therefore, Congress' silence may be read to imply the unlikelihood of any intent to convey to a jury the duty to apply such standards historically reserved to a judge.[115] This standard of review argument, of course, ignores any right to jury trial provided by the seventh amendment.

Calamia v. Spivey,[116] a seminal case decided just after *Wardle*, also discusses the issue of congressional intent. In *Calamia*, the plaintiff claimed that he was entitled to higher disability pension benefits under a collective bargaining agreement than the amount he had been awarded. He sued for a declaration of his rights and punitive damages. The Fifth Circuit Court of Appeals in *Calamia* affirmed dismissal of the suit and agreed with the Louisiana district court that the plaintiff was not entitled to a jury trial. It adopted the *Wardle* view that there is no right to jury trial absent congressional intent and took the intent argument one step farther. Returning to the seventh amendment historical analysis, the *Calamia* court recognized in dicta that a party is entitled to a jury trial when a newly created statutory right is of a legal rather than an equitable nature.[117] Since Congress can oblige courts of equity to enforce new statutory rights,[118] a court attempting to determine the nature of the a new action should examine the intent of Congress. When that intent is not apparent, courts should look to the pre-merger custom of how similar actions were treated at the adoption of the Constitution.[119]

The *Calamia* court rejected the *Stamps* rationale that by its silence, Congress expressed an intent that ERISA litigants should have access to a jury. The court

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114. *Id.* The arbitrary and capricious standard has been applied inconsistently between the circuits. In response, the Supreme Court has decided that claims for benefits brought under ERISA section 502(a)(1)(B) will be reviewed under a *de novo* standard unless the plan gives the administrator authority to determine eligibility or to interpret the plan's terms. Wellman & Clark, *An Overview of Pension Benefits and Fiduciary Litigation under ERISA*, 26 WILLAMETTE L. REV. 665, 689-90 (1990) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)). Thus, one of *Wardle's* arguments is academic. *See also infra* note 218.

115. *Wardle*, 627 F.2d at 830.

116. 632 F.2d 1235 (5th Cir. 1980). *Calamia* applied the "arbitrary and capricious" standard slightly differently. According to the *Calamia* court, this scope of review standard, applied when rights are declared under a pension plan, is traditionally determined by a court; the fact that compensatory and punitive money damages are involved does not shift the issue to a jury. *Id.* at 1237. Thus, the *Calamia* court focused on the implications of the standard for jury trial as well as on Congress' intention in limiting the scope of review.

117. *Id.* at 1237 (citing *Curtis*, 415 U.S. at 192-94).

118. *Id.* (citing *Curtis*, 415 U.S. at 195).

119. *Id.* at 1237 (citing *Ross*, 396 U.S. at 538 n.10.) Other courts which find Congress' silence on the ERISA jury trial issue dispositive of the problem build on *Wardle's* original brief holding. The Seventh Circuit Court of Appeals, for example, confirmed *Wardle* both in *Bugher*, 772 F.2d at 1360, and Brown v. Retirement Committee of Briggs & Stratton Retirement Plan, 797 F.2d 521 (7th Cir. 1986). In Nobile v. Pension Plan Committee of the Pension Plan for Employees of New Rochelle Hospital, 611 F. Supp. 725 (D.C.N.Y. 1985), the District of New York admitted that the answer to the issue is unclear. It was persuaded, however, more by the reasoning of the circuits represented by *Wardle* than by its own circuit in Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), which held that the test for determining the right to jury trial is whether the nature of the issue is legal, regardless of its intertwining with other equitable issues. *Nobile*, 611 F. Supp. at 728 (citing *Pollock*, 476 F. Supp. at 608).

reasoned that it is not necessary to construe sections 502(a)(1)(B) and (a)(3) as providing separate legal and equitable relief because they were meant to be jurisdictional as well as remedial statements.[120] It also rejected the *Stamps* construction of the Conference Committee statement that "actions under section 502 should be regarded as arising under the laws of the United States in similar fashion to those brought under LMRA section 301" to provide that ERISA claims, like LMRA section 301 claims, may be tried before a jury.[121] Instead, the *Calamia* court adopted *Wardle's* interpretation of legislative history—that Congress intended to authorize the federal courts to create federal common law to govern ERISA claims "in a similar fashion" to the way they created federal common law to govern LMRA section 301 claims.[122] Thus, the intent was not, as *Stamps* would contend, that ERISA claims should carry precisely the same rights as claims under section 301.

3. The Broad Holding of No Right to Jury Trial Based on the Remedy Sought. The cases which deny a jury trial based on the equitable nature of trusts[123] often reject the assumption that a jury should be available when the remedy sought is payment of money, regardless of the nature of the considerations underlying the defendant's duty to pay. For example, the judges in *Nobile v. Pension Committee of the Pension Plan for Employees of New Rochelle Hospital*[124] stated that the courts which afford a jury where the sole remedy claimed is the payment of money, regardless of the underlying equitable considerations for the defendant's duty to pay, are misconstruing the *Restatement* rule upon which they rely: "If the trustee is under a duty to pay money immediately and *unconditionally* to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment."[125]

"Unconditionally," according to the *Nobile* court, means "without the intervention of equity" because the only question is whether the trustee failed to perform a mandated ministerial act.[126] In *Nobile*, the court reasoned that until the equitable question of whether the trustee breached his fiduciary duty is resolved for the plaintiff, the trustee has no obligation to make any payment. Therefore, in this and other similar cases, until that duty is resolved, a plaintiff has no access to a jury.[127]

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120. *Calamia*, 632 F.2d at 1237. The federal courts under section 502(e) are given exclusive jurisdiction over all of section 502 actions except those arising under (a)(1)(B), where the state courts will have concurrent jurisdiction. *Id.*

121. *See supra* note 59.

122. *Id.*

123. *See Wardle*, 627 F.2d 820. *See also supra* text accompanying notes 97-109.

124. 611 F. Supp. 725 (S.D.N.Y. 1985).

125. *Id.* at 728-29 (quoting RESTATEMENT (SECOND) OF TRUSTS § 198 (1959)) (emphasis added).

126. *Id.* at 729.

127. *Id.* at 724. On the other hand, still another court created a "Catch 22" when it analyzed the trust/contract approach to ascertaining the availability of a jury for ERISA litigants. In Trogner v. New York Life Insurance Co., 633 F. Supp. 503, 511 (D. Md. 1986), the plaintiff sued for wrongful denial of benefits. The *Trogner* court held that even though ERISA provides a legal remedy for

A limited number of federal courts hold unequivocally that ERISA simply provides no access to jury trial without invoking the traditional trust law analysis. These decisions also focus on the equitable or legal nature of the remedy. *Bair v. General Motors Corp.*[128] is one of the most recent court of appeals decisions on the issue. The plaintiffs in *Bair* argued that the employer had agreed by contract to confer enhanced early retirement benefits, making the lawsuit legal in nature. The sixth circuit in *Bair* disagreed and applied its earlier decision that actions for recovery of benefits under section 502 provide no right to jury trial.[129] Relying on the remedy sought as the determining factor, the *Bair* court reasoned that the plaintiff sought solely the injunctive relief of instatement to the program and payments due if he were eligible.[130] Again, a court reached the harsh conclusion of no right to a jury in section 502 actions for recovery of benefits.[131]

In *Pane v. RCA Corp.*,[132] a New Jersey district court held that plaintiffs are not afforded the right to trial by jury where they seek injunctive and declaratory relief as well as damages under ERISA.[133] Following *Turner v. CF & I Steel Corp.*,[134] *Pane* made it clear that neither section 502(a)(1)(B) nor the equitable relief provisions of section 502(a)(3) entitle a plaintiff to a jury trial even when he sues under both.[135] The trend in cases which follow the *Pane* holding seems to foreclose the right to split claims and to try the legal action to a jury.

4. Movement Away from Strict Denial of Jury Trial Right in All ERISA Actions. Recent cases suggest a softening of the seemingly blind adherence to the rationale of cases such as *Chilton* and *Calamia*. For example, an Alabama district court in *Springer v. Wal-Mart Associates' Group Health Plan*[136] reluct-

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money owed unconditionally and immediately, the underlying right is based on trusts. *Id.* Because the claim was therefore equitable, it did not trigger the right to trial by jury. Only the legal claims raised in the stated breach of contract action were presentable to a jury. *Id.*

128. 895 F.2d 1094 (6th Cir. 1990).

129. *Id.* at 1096 (citing Daniel v. Eaton, 839 F.2d 263, 268 (6th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988)).

130. *Id.* at 1097.

131. *Id.* at 1097. *In re* Emhart Corp., 706 F. Supp. 153 (D. Conn. 1988), represents another opinion: in an action to recover severance pay, employees simply are not entitled to jury trial on claims under ERISA. *Id.* Although the district court recognized that courts within the second circuit had been unsettled on the issue, and that the resolution would turn on the equitable or legal nature of the claim, it was persuaded by the holdings in six other circuit courts of appeal that there is no such right. *Id.* at 155. It distinguished the two district court constructions in favor of the right to jury trial as falling outside of the traditional rule because the actions were legal in nature. *Id.* at 156 (citing Abbarno v. Carborundum Co., 682 F. Supp. 179, 181-82 (W.D.N.Y. 1988); Zotto v. Scovill, Inc., N-85-494, slip op. (D. Conn. May 27, 1987)). The silence of Congress and federal court treatment of state law diversity claims as equitable before enactment of ERISA was enough for the court to conclude that ERISA actions can only be brought as equitable claims. *Emhart*, 706 F. Supp. at 156.

132. 667 F. Supp. 168 (D.N.J. 1987).

133. *Id.* at 174.

134. 770 F.2d 43 (3d Cir. 1985). *See supra* note 109.

135. *Pane*, 667 F. Supp. at 174-75 (citing *Turner*, 770 F.2d at 46).

136. 714 F. Supp. 1168 (N.D. Ala. 1989), *rev'd*, 908 F.2d 897 (11th Cir. 1990).

antly followed its circuit's line of precedential authority in a case where a beneficiary sued to recover benefits under a group health plan. The *Springer* court recognized, however, that if and when the Supreme Court addresses the issue of right to jury trial in ERISA actions, the Court surely will follow its reasoning in *Tull*,[137] and will recognize a seventh amendment right in such legal actions. *Springer* forecast movement away from a flat denial of jury trials in all ERISA matters, regardless of the underlying claims of right or relief.[138]

A district court decision in California is another example of the retreat from the strict rule of denial in some circuits. *Trustees of the Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*,[139] involved the plaintiff's motion to amend a jury's unfavorable verdict of no liability against the pension fund and its manager. The court admitted that the plaintiff's contention that a trial judge, not a jury, must always decide an ERISA claim was based on the well-settled law that there is no statutory or constitutional right to a jury trial of an ERISA claim in the ninth circuit. However, the *Nugget* court acknowledged that when an earlier ninth circuit court applied the abuse of discretion standard for deciding the propriety of the denial of jury trial, that court indicated that a trial court may, by fiat or by consent of the parties, exercise its discretion and submit the case to a jury.[140] This acknowledgment of permissive resort to a jury defeats the argument of those who claim that Congress' silence precludes such access. Cases such as *Springer* and *Nugget* illustrate a slow but perceptible retreat from the draconian denial of jury trial in all ERISA actions without consideration of the right or remedy.[141]

IV. THE SUPREME COURT SHOULD FIND THAT LITIGANTS HAVE THE RIGHT TO JURY TRIAL UNDER ERISA SECTION 502(A)(1)(B)

From the foregoing case review it is apparent that painstaking analysis of congressional intent evidenced by ERISA's legislative history and statutory construction, as well as the language of the Act, has provided nothing but conflicting findings in the federal courts on the right to jury trial under section 502(a)(1)(B). Also, adding to the conflict, it is not unusual for the courts to

137. *Id.* at 1169 (noting *Tull*, 481 U.S. 412 (1987)).

138. *Id.*

139. 697 F. Supp. 1538 (C.D. Cal. 1988).

140. *Id.* at 1550 (citing Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1985), *cert. denied*, 474 U.S. 864 (1985)). The *Blau* court stated only that there is no constitutional or statutory right to jury trial in ERISA actions, foreclosing resort to both the seventh amendment and the Act without explanation. This unhelpful conclusion was tempered in the ninth circuit, however, when the court of appeals two years later decided in Transamerica Occidental Insurance Co. v. DiGregorio, 811 F.2d 1249 (9th Cir. 1987), that actions to recover benefits or enforce rights typically involve general principles of contract law. *Id.* at 1255 (quoting Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 n.2 (9th Cir. 1984)).

The *Nugget* court also pointed to FED. R. CIV. P. 39(c) as authority for courts to permit a jury trial upon consent of both parties, with the verdict as effective as if the trial had been to the jury by right. *Nugget*, 697 F. Supp. at 1550.

141. *Springer*, 714 F. Supp. at 1169.

manipulate analysis of the landmark cases to favor their individual opinions. As a result, some courts construe *Katsaros* and *Calamia* as flatly precluding a jury trial in any ERISA action, while other courts interpret the cases as offering a limited but accessible right.[142]

Several parties who have lost under the *Wardle* rule (that suits for pension benefits are equitable and do not fall under the seventh amendment guarantee of right to jury trial in civil actions in suits at common law)[143] have unsuccessfully petitioned the Supreme Court for Writ of Certiorari.[144] Since denials of the writs are unexplained, the battle continues within the federal courts as to whether a jury trial right exists under the statute or the seventh amendment of the Constitution. The Supreme Court should be persuaded by the existing case law finding a right to jury trial, and its own trend toward finding a right to seventh amendment jury trials under federal statutes such as the Age Discrimination in Employment Act ("ADEA")[145] and section 1981 of the Civil Rights Act of 1866.[146]

Although the cases as well as existing scholarship on the issue would recommend little or no access to a jury for ERISA litigants, this Comment advocates that the right exists and should be acknowledged by Supreme Court decision. The bright line rule adopted by several federal circuits that there is absolutely no access to a jury for ERISA litigants is vulnerable, and there are a number of considerations which should encourage the Supreme Court to grant certiorari to hear the jury trial issue raised by suits under ERISA section 502(a)(1)(B). First, the Court itself has expressed a broadening preference for civil jury trial as embodied in the seventh amendment, and has been especially willing to find the right in civil statutory actions in the absence of express provisions to the contrary.[147] Second, inequities are created when the issues of compensatory and punitive damages cannot be heard by a jury of one's peers. Finally, there is a need for a more flexible attitude toward defining and applying the concept of "legal" remedy.

A. The Seventh Amendment Guarantee of Right to Jury Trial in Civil Actions When Congress is Silent

1. The Supreme Court's Record. Supreme Court decisions finding a right to jury trial in actions for statutory violations where the statute fails to expressly

142. *See supra* text accompanying notes 86-91 and 116-22.

143. 627 F.2d at 829.

144. *See, e.g.,* Wardle v. Central States Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); Katsaros v. Cody, 744 F.2d 270 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 565 (1984); Turner v. CF & I Steel Corp., 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S 1058 (1986); Daniel v. Eaton, 839 F.2d 263 (6th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988); Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 47 (1990).

145. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988) ("ADEA").

146. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988).

147. *See infra* text accompanying notes 148-70.

provide for the right should make it difficult for lower federal courts to discount the *Tull* pronouncements as inapplicable to ERISA. The Court's position regarding the right to jury trial in statutes other than ERISA was established even before *Tull*[148] reiterated the Court's view that the seventh amendment guarantee of jury trial should be attributed to statutory causes of action where Congress did not expressly withhold the right.[149]

In *Curtis v. Loether*,[150] for example, a Black plaintiff who sued her landlord under section 812 of the Civil Rights Act of 1968[151] claimed damages for discriminatory refusal to lease her an apartment. The question the Court addressed on certiorari was whether the Civil Rights Act or the seventh amendment required a jury trial in an action for damages and injunctive relief.[152] Finding little guidance in the legislative history of Title VIII,[153] the Court examined the seventh amendment and noted its application in actions enforcing statutory rights "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[154] The *Curtis* Court reasoned that the damages action under section 812 was intended to enforce such seventh amendment "legal rights"—analogous to the common law duty of innkeepers not to refuse lodging to a traveler without reason—thus, the

148. *See supra* text accompanying notes 43-50.

149. *Whitt*, 676 F. Supp. at 1133; Beesley v. The Hartford Fire Ins. Co., 717 F. Supp. 781, 783-84 (N.D. Ala. 1989) (both interpreting *Tull*, 481 U.S. 412). What the Court will decide in the 1990's with respect to absence of statutory provision for jury trial will turn on its requirements for clear expression of congressional intent. Opponents of an ERISA jury trial will cite a trend requiring congressional clarity–a shift toward plain meaning illustrated by the Court's holdings in Aldinger v. Howard, 427 U.S. 1 (1976), and Finley v. United States, 490 U.S. 545 (1989), both regarding a federal district court's pendant party jurisdiction. The Court in *Aldinger* held that before jurisdiction can exist, under 42 U.S.C. §§ 1343(3) and 1983, a federal court must satisfy itself "that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Aldinger*, 427 U.S. at 18. Fourteen years after *Aldinger*, and with new membership, the Court progressed to its decision in *Finley* that the Federal Tort Claims Act ("FTCA") did not explicitly permit the exercise of pendant party jurisdiction over additional parties where no basis for federal jurisdiction existed, and therefore, it did not reach the defendants in question. *Finley*, 490 U.S. at 553-54. In response to arguments that an affirmative grant of jurisdiction can be upheld from changes made in 1948 to the FTCA's jurisdiction, the Court found no such suggestion absent a clear expression of intent to do so. *Id.* at 554. So, unless the recent changes in Court membership influence a return to *Aldinger's* reliance on the need for clear statutory exclusion of a right, the *Finley* shift toward requiring express statutory provision might prevail. It should be noted, however, that *Finley*'s pronouncement on pendant party jurisdiction has been expressly overruled by statute. An amendment of the Judicial Improvements Act of 1990 affirms pendant party jurisdiction in federal question cases where an action arises from a common nucleus of operative facts. 28 U.S.C. § 1367 (as adopted Dec. 1, 1990).

150. 415 U.S. 189 (1974).

151. Civil Rights Act of 1968 §§ 801-901, 42 U.S.C. §§ 3601-3631, 3612 (1988). Section 812 provides private plaintiffs with a civil cause of action for damage resulting from violation of Title VIII, the fair housing provisions of the Act: "the court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees. . . ." *Id. See Curtis*, 415 U.S. at 192.

152. *Curtis*, 415 U.S. at 190.

153. *Id.* at 191-92.

154. *Id.* at 194.

right to jury trial existed.[155] Furthermore, the court held that the relief sought was the traditional form of "legal" relief which was "[m]ore important" than a precisely analogous common law cause of action.[156] Thus, the legal aspect of the relief overrode the argument that congressional intent was to impose bench resolution of these claims. This broad reading of the implications of the rights and remedies provided by Title VIII should be applied to ERISA section 502(a)(1)(B) actions for back or future pension benefits which are an extension of, and as "legal" as, the common law action in debt.

Following *Curtis v. Loether,* the Court interpreted another statute which on its face is silent on the jury trial issue. In *Lorillard v. Pons,*[157] the plaintiff sued her former employer for wrongful discharge because of her age in violation of the Age Discrimination in Employment Act of 1967. She demanded a jury trial on the issues of fact.[158] At the end of the appeals process, the Supreme Court held that the structure of the Act indicated Congress' intent to grant the right.[159]

The Supreme Court did not address the seventh amendment issue.[160] Instead it examined the text of the legislative debates and *Congressional Record* preceding passage of the Act and found that the final version of the Bill reflected Congress' desire to enforce the ADEA in accord with the "powers, remedies and procedures" of the Fair Labor Standards Act ("FLSA"),[161] an act long interpreted to permit a right to jury trial in private actions under its provisions.[162]

Section 7(b) of the ADEA[163] directs that actions for lost wages, like ERISA actions for back pension benefits, "be treated as claims for unpaid minimum wages or overtime compensation under FLSA."[164] Therefore, the FLSA right to jury trial is available for actions for lost wages under the ADEA.[165] This holding parallels and strengthens the analogy ERISA jury trial proponents make between ERISA section 502(a)(1)(B) and LMRA section 301. Some will point

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155. *Id.* at 195-96 n.10.

156. *Id.* at 196. This holding forecast the *Tull* decision that the characterization of the relief sought–in *Tull*, monetary penalties for violation of the Clean Water Act–is more important than discovering an analogous pre-merger common law cause of action in deciding a guaranteed jury trial. *Tull*, 481 U.S. at 421 (citing *Curtis*, 415 U.S. at 196). *See supra* text accompanying notes 43-50.

157. 434 U.S. 575 (1978).

158. *Id.* at 576. The plaintiff sought reinstatement, lost wages, and liquidated damages, as well as attorney's fees and costs. The district court granted the defendant's motion to strike the jury demand. The Fourth Circuit Court of Appeals vacated the order, ruling that the ADEA and the seventh amendment provided the right to a jury trial regarding the plaintiff's claim for lost wages. *Id.* at 576-77 (quoting Lorillard v. Pons, 549 F.2d 950, 952-53 (4th Cir. 1977)).

159. *Id.* at 577.

160. *Id.* The Court was bound, it said, to the "cardinal principle" which mandates an attempt to construe the statute so as to avoid the constitutional question. *Id.* (quoting United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971)).

161. *Id.* at 579 (quoting 29 U.S.C. § 626(b) (1970)). *See* Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988).

162. *Id.* at 580.

163. ADEA, 29 U.S.C. § 626(b).

164. *Lorillard,* 434 U.S. at 582.

165. *Id.* at 582-83.

out that ADEA section 7(b) empowers the court to grant "legal" or "equitable" relief and section 7(c)[166] allows individuals to claim "legal" or "equitable" relief, the inference being that Congress knew the difference between the impact of legal and equitable remedies on the right to jury trial.[167] Arguably, however, the specific provision for equitable relief in section 502(a)(3) suggests that Congress intended that legal relief and jury availability extend to section 502(a)(1)(B). Both lines of reasoning—one which analogizes section 502(a)(1)(B) to LMRA section 301, and the other which looks strictly to construction—have merit and should serve to convince the Supreme Court to take a closer look at the issue.

Recently, the Court revisited its seventh amendment teachings. In *Granfinanciera, S.A. v. Nordberg*,[168] the Court upheld a bankruptcy trustee's right to jury trial even though the bankruptcy statute has been regarded as a non-jury statute. The ground for the holding was that the trustee's action to recover money damages related to a fraudulent conveyance was analogous to state common law claims by the bankrupt. These types of actions, when the object was the recovery of money, were heard in the law courts in 1791. Therefore, unless the legal cause of action involved a "public right," litigation of which is more efficiently assigned to a forum where juries typically are unavailable, Congress may not "strip parties contesting matters of private right of their constitutional right to a trial by jury."[169]

The impact for ERISA litigants of this continuum of cases is that statutory causes of action, where the statute itself is silent on the right to jury trial, are not beyond the reach of the seventh amendment. If Title VIII of the Civil Rights Act of 1968, the ADEA, the Clean Water Act, and the Bankruptcy Code are no longer considered "non-jury statutes," how can the parties assume that ERISA involves exclusively equitable claims, or that its purposes would be thwarted by the availability of trial by jury?[170]

2. The Lower Federal Courts React. Not surprisingly, the lower federal courts have taken disparate approaches to the ERISA seventh amendment issue. The *Whitt* court, for example, first espoused rather liberal jury access under a "fundamental right" interpretation of the seventh amendment; then it embraced a severely limited right; and finally it renounced any right, including that expressed by the Supreme Court in *Tull*. The *Whitt* court, well-supported by recent Supreme Court decisions, now has taken the opposite approach in *Rhodes* and revived its rationale in favor of a seventh amendment right to jury trial.

Even before *Rhodes*, the Alabama district court had broken from the eleventh

166. ADEA, 29 U.S.C. § 626(c).

167. *Lorillard*, 434 U.S. at 583.

168. 109 S. Ct. 2782 (1989).

169. *Id.* at 2795. The Court concluded that Congress, by defining a fraudulent conveyance as a "core" bankruptcy proceeding, had not created a public right, but had "simply reclassified a pre-existing common-law cause of action. . . ." *Id.* at 2800.

170. *Vicinanzo*, 739 F. Supp. at 890.

circuit's strong policy of finding no jury right in many statutory actions. In *Beesley v. The Hartford Fire Insurance Co.*,[171] a suit under Title VII of the Civil Rights Act of 1964[172] for employment discrimination based on sex, the Alabama court held that the plaintiff was entitled to a jury trial, even though she sought the equitable remedy of restitution as well as compensatory and punitive damages for sexual harassment.[173] The court discounted the cases which "perpetuate the myth" that plaintiffs are not entitled to a jury as a matter of right in a Title VII action, and rejected the defendant's seeming reliance on the precedential value of the Supreme Court's denial of certiorari in similar cases.[174] The *Beesley* court stressed that the Supreme Court had repeatedly admonished that denial of certiorari does not imply the court's views of the merits of the case which it has declined to review.[175]

A substantial number of legislators have attempted to codify the right to jury trial in Title VII. Where the 1964 Civil Rights Act is silent on the issue, proposed section 8(A) of the Civil Rights Act of 1990[176] assured in part that "compensatory and punitive damages *and jury trials* shall be available only for claims of intentional discrimination. . . . [and] any party may demand *a trial by jury.*"[177] The President vetoed the bill on October 22, 1990, and the Senate two days later tallied one vote short (66-to-34) of the two-thirds majority needed to overturn the veto.[178] The proposed Civil Rights Act of 1991[179] retains the language that "any party may demand *a trial by jury*" in cases involving compensa-

171. 717 F. Supp. 781 (N.D. Ala. 1989).

172. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

173. The *Beesley* court analogized to Title VII the Supreme Court's proclamation in *Tull* that "a cause of action created by Congress carries a jury trial as a matter of right if analogous to '[s]uits at common law.'" *Beesley*, 717 F. Supp. at 782-83 (quoting *Tull*, 481 U.S. at 417). *Beesley* points to United States v. M.C.C. of Florida, Inc., 863 F.2d 802 (11th Cir. 1989), as the eleventh circuit's admission that the seventh amendment is final on the right to trial by jury where legal issues are involved, even though the trial is on "a statutory cause of action, where Congress is silent on the issue." *Beesley*, 717 F. Supp. at 784 (noting *M.C.C.*, 863 F.2d 802). "[U]nless the relief sought is purely equitable," the *Tull* and *Granfinanciera* decisions should overrule and bind all eleventh circuit decisions, especially where the plaintiff seeks both compensatory and punitive damages. *Id.* at 784.

174. *Id.* at 783. The *Beesley* court acknowledged that Title VII of the Civil Rights Act of 1964 does not expressly grant or deny trial by jury. It reasoned that the federal courts' failure to apply the seventh amendment guarantee in related cases was based on judicial mistrust of southern juries in Title VII actions. That rationale, however, is no longer legitimate, because southern juries today probably would behave much differently than they did twenty-five years ago. *Id.* at 782-83.

175. *Id.* at 783 (quoting Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1949)).

176. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S. 9966 (daily ed. July 18, 1990).

177. *Id.* at S. 9967 (emphasis added). Opponents of the right argue that the Civil Rights Act of 1964 was intended to provide victims of discrimination with swift and just compensation, not to create proliferation of litigation and court delay. *Id.* at S. 9965 (statement of Sen. Grassley).

178. N.Y. Times, Oct. 25, 1990, at A1, col. 3. The Presidential veto apparently was not based on the jury trial provision, but on the President's opinion that the 1990 Act would create employee quotas in the workplace as a protection against discrimination suits under the proposed Act. Proponents of the legislation argued that "the bill explicitly ruled out quotas as a remedy for discrimination." *Id.*

179. H.R. 1, 102d Cong., 1st Sess., 137 CONG. REC. H53 (daily ed. Jan. 3, 1991) (introducing the Civil Rights Act of 1991).

tory or punitive damages arising from a claim of intentional discrimination.[180] If legislative persistence and near success are any indication of a trend toward clarifying the right to jury trial where statutes are silent, the opportunity is not foreclosed for Congress to respond to a similar void in ERISA by amending the Act to permit trial by jury under section 502(a)(1)(B) when the rights and remedies sought are legal.[181]

The lower federal courts have had various reactions to *Granfinanciera*[182] and its predecessor Supreme Court cases which uphold the right to jury trial in some statutory actions where Congress has not expressly provided the right. For example, the disabled plaintiff in *Vicinanzo v. Brunschwig & Fils, Inc.*,[183] sued to challenge cancellation of insurance coverage under group medical and longterm disability policies. The New York district court denied a motion to strike her jury demand on two grounds: (1) ERISA impliedly confers a right to jury trial on contractual issues, such as the plaintiff's rights under an employee benefit plan;[184] and (2) the plaintiff had a seventh amendment right to jury trial on issues involving mixed questions of law and fact even though ERISA does not provide expressly for jury trial.[185]

As part of its seventh amendment rationale in favor of a jury trial, the *Vicinanzo* court adopted *Granfinanciera*'s public/private right analysis.[186] With ERISA, Congress did not "devise [a] novel cause of action involving public rights free from the strictures of the Seventh Amendment . . . [by] assign[ing] their adjudication to tribunals without statutory authority to employ juries as

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180. 4 Daily Lab. Rep. (BNA) F-1 (Jan. 7, 1991) (reporting the proposed text of the Civil Rights Act of 1991) (emphasis added).

181. Additionally, Blacks and women are exemplifying their new-found confidence in juries. As noted by the *Beesley* and *Whitt* courts, these minorities are seeking punitive damages reviewable by juries under 42 U.S.C. § 1981 at the same time they file a Title VII claim (*see* Civil Rights Act of 1866, 42 U.S.C. § 1981). The right to jury review under section 1981 is clearly evident in case law, but not expressed in section 1981. This, in addition to access to trial by jury under 42 U.S.C. § 1983, is proof of the growing tendency, at least at common law, to recognize such a right (*see* Civil Rights Act of 1871, 42 U.S.C. § 1983).

182. *See supra* text accompanying notes 168-69, and *infra* text accompanying notes 186-89.

183. 739 F. Supp. 882 (S.D.N.Y. 1990).

184. *Id.* at 882-83. The employer and insurer defendants unsuccessfully argued that the plaintiff's jury demand was impermissible because ERISA section 510 creates no statutory right to jury trial and is not within the reach of the seventh amendment because it embodies equitable provisions. *Id.* at 882.

185. *Id.* at 886. The plaintiff in *Vicinanzo* raised issues regarding determination of her rights under the insurance policy and the extent to which the defendant interfered with those rights. Even if the issues involving the nature and extent of the plaintiff's rights under the plan were only "incidental" equitable claims, there must be a jury trial under the seventh amendment on the underlying claims of legal entitlement which amounts to a declaratory judgment. *Id.* Additionally, the *Vicinanzo* court referred to the Supreme Court's decision in *Firestone* that ERISA section 502 actions challenging denial of benefits resulting from plan interpretation will be reviewed *de novo* by looking at the terms of the plan and the parties' intent. *Vicinanzo*, 739 F. Supp. at 890. This holding is consistent with the fact that prior to the enactment of ERISA, disputes over pension plan interpretation were reviewed "like 'any other contract claim'. . . ." *Id.* (quoting *Firestone*, 489 U.S. at 112).

186. *See supra* text accompanying notes 168-69.

factfinders."[187] Further, the *Vicinanzo* court reasoned, Congress lacks the authority to remove the constitutional right to a jury trial from parties litigating strictly private rights.[188] The court concluded that recognition of the power of the seventh amendment in *Granfinanciera* and other similar Supreme Court cases indicates a "doctrinal change" affecting a number of federal statutes, including ERISA, "which do not involve the adjudication of 'public rights'."[189]

The eleventh circuit court holding in *Blake v. Unionmutual Stock Life Insurance Co. of America*,[190] however, seems to overrule *Vicinanzo*. The *Blake* plaintiffs sued under section 502(a)(1)(B) for additional compensation under a group health policy and demanded a jury trial under the seventh amendment. The *Blake* court held that even though the plaintiffs claimed money damages, they actually sought benefits allegedly due under the plan.[191] If the plaintiffs were still under treatment, the court reasoned, an order for continuing benefits would provide traditionally equitable relief. Therefore, a jury was not available.[192]

The court which decided *Vicinanzo*, however, expressly refused to follow *Blake*. In *Blue Cross and Blue Shield of Alabama v. Lewis*,[193] the court noted that a district court is not bound by its circuit court decisions if a subsequent Supreme Court opinion undercuts that intermediate appellate holding.[194] The *Blue Cross* court stated that the Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*[195] gave it the "'green light' to fashion ERISA remedies beyond mere enforcement of claims for unpaid benefits."[196] The *Ingersoll-Rand* holding that section 502 does not limit ERISA actions to recovery of lost pension benefits, but extends possible recovery to tort-like damages, indicates the right to trial by jury.[197] The determination of lost wages or back pay as part of compensatory damages is "the substance of a commonlaw [sic] right to trial by jury."[198]

Finally, a Louisana court in *Fonner v. Georgia-Pacific Corp.*[199] blatantly rejected the right to jury trial in any ERISA action along with the recent line of Supreme Court cases as "seemingly" inapplicable to determine the right to jury trial where a plaintiff sues for past due retirement benefits.[200] For example, the ERISA action in *Fonner* could not be analogized to either a common law action in debt, as in *Tull*, or to an action for the return of an allegedly preferential

187. *Vicinanzo*, 739 F. Supp. at 889 (quoting *Granfinanciera*, 109 S. Ct. at 2795).
188. *Id.* (quoting *Granfinanciera*, 109 S. Ct. at 2795).
189. *Id.*
190. 906 F.2d 1525 (11th Cir. 1990).
191. *Id.* at 1526.
192. *Id.*
193. 753 F. Supp. 345 (N.D. Ala. 1990).
194. *Id.*
195. 111 S. Ct. 478 (1990).
196. *Blue Cross*, 753 F. Supp. at 347.
197. *Id.* (citing *Ingersoll-Rand*, 111 S. Ct. at 486).
198. *Id.*
199. 747 F. Supp. 340 (M.D. La. 1990).
200. *Id.* at 341.

payment in a bankruptcy proceeding, as in *Granfinanciera*.[201] Where other courts strive to find an analogy, the *Fonner* court found that the facts were different, so any analogy failed.

Because the arguments regarding an ERISA right to jury trial are so contradictory, the following questions will continue to arise: Is it not more equitable from a litigant's viewpoint to accept the reasoning of the *Stamps* court in light of the Supreme Court's own decisions on the seventh amendment right to jury trial under Title VIII, the Clean Water Act, the ADEA, and the Bankruptcy Code, when the statutes are silent? Can Congress' failure to label actions under section 502(a)(1)(B) as "equitable" not be interpreted to imply that the section offers "legal" remedies different than the "other appropriate equitable relief" available in section 502(a)(3)? The Supreme Court's answer to both of these questions should be "Yes."

B. Inequities and the Need for Uniformity

The goal of ERISA is to ensure "that all workers receive the pension benefits that they have earned."[202] The statement on its face indicates that the entitlements of retirees and their beneficiaries are eventually monetary, and thus legal in nature. This evidence of congressional intent, together with the strong federal preference for jury trial and arguments that there are both seventh amendment and statutory rights to a jury trial in ERISA plan enforcement actions, seem to leave no choice but to provide a jury when requested by a litigant. Additionally, ERISA's provisions for determination of a participant's right to receive past and future benefits under the terms of a plan and the related amount are broad remedies to be construed liberally.[203] Thus, the remedial nature of the statute and congressional intent support expansive avenues for redress of statutory violations. The set of rules and remedies is uniform and supplants application of various rules on a state-by-state basis. This standard of uniformity, however, is not reflected in federal district court decisions on the right to jury trial under ERISA. The goal of Congress in ERISA actions, to provide prompt and fair claims settlement, can hardly be achieved while the courts argue over an issue as elementary and seemingly long-decided as the right of an individual to jury trial in civil actions similar to those brought under ERISA section 501(a)(1)(B).

Further, the Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell*[204] has decided that the remedial language of ERISA section 502(a)(3) does not afford punitive damages.[205] An analysis of the six "carefully integrated" enforcement provisions of section 502(a) support the conclusion that "Congress did *not* intend to authorize other remedies that it simply forgot to

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201. *Id.* at 342.

202. 119 CONG. REC. 30,041 (1973) (statement of Sen. Bentsen).

203. Wellman & Clark, *supra* note 114, at 703 (quoting H.R. REP. No. 533, 93rd Cong., 2d Sess. 17, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4655).

204. 473 U.S. 134 (1985).

205. *Id.* at 146.

incorporate expressly."[206] This is a blow to the constructionists who interpret the silence of Congress on jury access under section 502(a)(1)(B) to mean approval. Additionally, the *Russell* decision and the line of cases which agree isolate the litigant from review by his peers. If punitive damages, traditionally offering relief of a legal character and therefore warranting access to a jury, are not available under ERISA, *and* ERISA affords no right to jury trial in any action, a party is totally precluded from trial by jury. Jury access could be protected under section 502(a)(1)(B), thus preserving that fundamental right in cases which define rights so critical to the future of the nation's retirees and their beneficiaries.[207]

Finally, public policy favoring a jury of one's peers must override any contention that the use of juries in ERISA suits will create undue delay and hardship on plaintiffs seeking pension benefits, or that such suits involve fact finding far too confusing and complicated for the average juror. First, allegations of remediable slowdowns of process and procedure should not undermine the constitutional right to jury trial. Second, the ability of a jury to comprehend the complexities of statutory rights and obligations seem limited only by the ability of counsel to present the details understandably. Once the rules are laid out and exemplified, the jury can apply its "average common sense" to the facts.[208] ERISA actions do not involve issues of typically "complex civil litigation," such as claims of securities fraud, anticompetitive acts involving complicated accounting problems, and cases where juror inexperience and lack of education can be fatal. The controversies are limited in scope by the statute governing civil actions under ERISA, and the damage calculations are traditionally related to simple computations of back pay. The circumstances of the dispute and the contract provisions should provide adequate basis for a verdict.

In any event, a party who seeks a jury must have weighed the time consequences and jury competency issues in a decision to request a jury trial. Once that decision is made, the result should hinge on the litigant's balance of the pros and cons of a jury in a given situation, not on a court's arbitrary decision regarding whether the right to a jury even exists. The inequity for the litigant lies in his lack of opportunity to choose when the right arguably is there.

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206. *Id.* (emphasis in original).

207. This proposition is supported by the holdings in *Haytcher* that ERISA section 502(a)(1)(B) claims are traditionally legal actions resolved on contract principles and can be tried to a jury for both liability and damage claims, and that when pension plan violations under section 502(a)(1)(B) are "willful," plaintiffs may show that they are entitled to extra-contractual and punitive damages for mental distress. *Haytcher,* 7 Employee Benefits Cas. (BNA) at 2162-64. Most circuit courts, however, follow the Supreme Court by applying the common law of trusts, where "equitable remedies" do not include extra-contractual compensatory or punitive damages. *See Bower,* 675 F. Supp. at 1259; *Moffitt,* 722 F. Supp. at 1394. Some find that section 502 could have provided for punitive damages but did not, and that breach of labor contract cases generally do not result in punitive damages. *See* Diano v. Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds, 551 F. Supp. 861, 862 (N.D. Ohio 1982).

208. Redish, *supra* note 29, at 507.

C. A More Flexible Attitude Toward Defining and Applying Legal Remedy

If and when the Supreme Court does consider the jury trial issue, it should return to two of its declarations: first, in cases such as *Curtis* and *Tull*, and most recently in *Granfinanciera*, that the remedy sought is more critical to a finding of a seventh amendment guarantee of a jury trial than "a precisely analogous common law cause of action;"[209] and second, that both the cause of action and remedy are not necessarily required to be legal in character before attachment of a seventh amendment right to jury trial.[210] These interpretations applied to ERISA actions would temper those arguments which characterize ERISA claims as trust-based and strictly equitable. Also, since the merger of law and equity sometimes makes the right to jury trial ambiguous, and the distinctions between equitable rights under trust law and legal rights under contract law are so fine, consideration of the remedy rather than the right may simplify the task. To make ERISA plan enforcement claims triable by a jury, all that is necessary is expansion of the holding that suits for immediate payment on indebtedness are legal in nature, to include suits regarding any entitlement to benefits, past or present.

The law of trusts states that a beneficiary cannot bring an action at law against a trustee who has misappropriated money which is his duty to hold in trust because it is not due immediately.[211] Traditionally, "where the only relief demanded or demandable on the facts alleged is recovery of money," the claim is legal and triable to a jury as a matter of right.[212] By analogy, suits for instatement or reinstatement into a plan, or for declaration of rights to future benefits, at some point will involve entitlement to money or to a future indebtedness from the trust. The right to jury trial should not rest on the tenuous distinction between right to past or future benefits when the remedy eventually will result in money paid to the participant or beneficiary. Once a participant's right to pension benefits has vested, it seems illogical that his right to jury trial in a dispute over the benefits should be determined by whether he also has a right to immediate distribution.[213]

The technical distinction between benefits due immediately and unconditionally and restoration of money to a fund to be held in trust has a significant impact on a litigant's ultimate rights at trial. Accordingly, the distinction should be discarded. The courts should operate under the clear federal policy in favor of

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209. *Curtis*, 415 U.S. at 196; *Tull*, 481 U.S. at 421; *Granfinanciera*, 109 S. Ct. at 2795.

210. *Tull*, 481 U.S. at 421-22 n.6.

211. RESTATEMENT (SECOND) OF TRUSTS § 198 (1959 & Supp. 1990).

212. 47 AM. JUR. 2D *Jury* § 42 (1969 & Supp. 1990).

213. The court in *Vicinanzo* followed the Supreme Court implication in *Firestone* that disputes which end in recovery of monetary damages or declaration as to future benefits are more legal than equitable. *Vicinanzo*, 739 F. Supp. at 890 (interpreting *Firestone*, 489 U.S. 101).

seventh amendment jury trials[214] and their own policy that in doubtful cases jury trials should be permitted to insure constitutional rights,[215] as well as the holding that legislation should be construed in favor of the right.[216]

CONCLUSION

The Supreme Court in *Tull* expressly stated that it had granted certiorari to resolve the question of the intent behind the seventh amendment and the conflict between the circuits regarding a litigant's right to trial by jury.[217] After nearly two decades of debate on the issue in an ERISA action, the Court should grant certiorari to consider that conflict as well. Better yet, in light of the authority presented in this Comment, the Court should settle the issue and rule that litigants in plan enforcement actions are entitled to a trial by jury. The Supreme Court has decided other knotty problems regarding interpretation of ERISA where there is no express statutory requirement.[218] It should do the

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214. E. WRIGHT & A. MILLER, *supra* note 51, § 2306. Indeed, the Supreme Court paved the way for wider availability of jury trials now than in the past when it held in *Simler v. Conner* that "[t]he federal policy favoring jury trials is of historic and continuing strength." *Id.* (quoting *Simler*, 372 U.S. 221, 222 (1963)). In that case, jury trial was a matter of constitutional right in a suit to determine the amount of attorney's fees owed under a contingent fee contract which the client alleged was fraudulent and overreaching. *Id.*

215. E. WRIGHT & A. MILLER, *supra* note 51, § 2302 (quoting Dixon v. Northwestern Nat'l Bank of Minneapolis, 297 F. Supp. 485, 489 (D.C. Minn. 1969)).

216. 47 AM. JUR. 2D *Jury* § 13 (1969 & Supp. 1990).

217. 481 U.S. at 417. In the suit, the government sought imposition of a civil penalty for violation of the Clean Water Act against the defendant. The Court reversed a lower court decision that assessment of the amount of monetary penalties was a statutorily conferred equitable power. *Id.* at 416.

218. For example, until 1987 the circuits were split on the question of whether a litigant in an ERISA case brought in state court with concurrent jurisdiction may remove the case to federal court under 28 U.S.C § 1441(b). Wellman & Clark, *supra* note 114, at 678. The Supreme Court analogized ERISA's jurisdictional subsection to that of LMRA section 301, which the Court for years had held required such removal, and found that Congress had manifested the same intent for removal of ERISA section 502(a) claims. *Id.* at 678-79 (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 66 (1987)).

On the other hand, in another case the Court held that the purpose of the LMRA arbitrary and capricious standard as scope of judicial review–to provide a jurisdictional basis in suits against trustees–was not present in ERISA and so offered no support for its adoption in section 502(a)(1)(B) actions. Thus, a *de novo* standard was applicable. *Id.* at 689-90 (quoting *Firestone*, 489 U.S. at 115).

The Court also held "[c]onsistent with established principles of trust law" that denial of benefits under section 502(a)(1)(B) should be reviewed *de novo*. *Id.* at 705 (quoting *Firestone*, 489 U.S. at 115). This should not be read, however, to mean that the Court may need persuasion to adopt a contract action theory for application to the ERISA jury trial question. The call in *Firestone* for application of trust law doctrine was limited to determination of the appropriate standard of review for section 502(a)(1)(B) actions involving the trustee's discretionary power to construe the terms of a plan.

Other questions which the Court has resolved after some years of argument involve the definition of "participant" under the Act and the scope of remedies available under section 502(a). *Id.* at 671-72. With regard to the latter, the Court has held that there are strong arguments for the conclusion that ERISA civil enforcement remedies were intended to be exclusive, barring claims for extra-contractual damages. *Id.* at 705 (quoting *Pilot Life*, 481 U.S. at 54). Also, a punitive damages award is not available under section 502(a)(3)'s provision for "other appropriate equitable relief." *Id.* at 706 (referencing *Russell*, 473 U.S. at 146).

same for the lower courts and for ERISA litigants in section 502(a)(1)(B) actions. First, the Court should determine the legal or equitable nature of the claim by applying the pre-merger historical test. Following recent cases, the Court should then conclude that ERISA actions for enforcement of plan benefits are contract actions, equivalent to common law actions in debt, assumpsit, or covenant. A finding that commonly litigated rights under ERISA section 502(a)(1)(B) are contractual, and therefore legal, defeats the analogy to trust actions, and the door would be open for the ERISA litigant, like the LMRA litigant under a collective bargaining agreement, to access a jury.

If contract analogies stray too far from the *Beacon Theatres, Dairy Queen*, and *Ross*[219] historical model of determining the seventh amendment guarantee, the Court should apply its holdings in *Curtis, Tull*, and *Granfinanciera* that the remedy is the critical determining factor in a right to jury trial issue. Then the legal nature of the monetary remedies in ERISA will control. Whether a plan participant seeks past or future pension payments, the outcome involves entitlement to benefits and the remedy should be coined "legal." The argument that money held in trust is not due immediately or unconditionally has little to do with the nature of the actual judgment.[220]

Also, the Court could mandate that where combinations of clearly legal and equitable claims in an ERISA action are easily split, courts should return to the FRCP provision for merger of legal and equitable claims and separate the claims requiring submission of the legal remedies to a jury, thus preserving and satisfying the right for legal claims. The Court's holdings in *Beacon Theatres, Dairy Queen,* and *Ross* support this position. Alternatively, when the claims are ambiguous, or their "equitable" or "legal" character is difficult to determine, the cases could be combined and on request of a litigant all claims could be heard by a jury as a matter of policy, if the lower court in its discretion finds no detriment to the judicial system.[221] This result supports Congress' policy in favor of prompt and fair claims settlement and the right to jury trial in questionable cases.

Finally, the Court could find that a jury trial is appropriate in ERISA matters, without relying on constitutional issues. One method is to construe liberally the construction of section 502(a)(1)(B) and Congress' silence as evidence of its intent not to forbid jury trials in the ERISA context. Such silence should not be interpreted to preclude jury trial where it is not guaranteed by the seventh amendment, but rather to permit a forum of a jury of one's peers for the

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219. *See supra* text accompanying notes 27-32, 33-36, and 37-42.

220. Indeed, the Court has refused to strike a demand for jury trial, although the suit appeared to be for rescission, when the legal remedy of damages was an alternative under the statute. E. WRIGHT & A. MILLER, *supra* note 51, § 2306 (citing Gen. Ins. Co. v. Ackerman, 37 F.R.D. 38, 40 (D.C.N.Y. 1964)).

221. In any event, the Court has determined that the solution where "a single issue may be either legal or equitable depending on the remedy awarded, is to have a jury present to decide the issue," even though the court may have to decide whether to grant historically equitable relief. E. WRIGHT & A. MILLER, *supra* note 51, § 2306 (citing Prudential Ins. Co. of America v. Bonney, 299 F. Supp. 794 (W.D. Okla. 1969)).

congressionally created cause of action. Additionally, federal policy favoring jury trials, based on the character of jury trial as a fundamental right, warrants meticulous examination of any remediable limitation on that right. In any event, ERISA litigants anxiously await a Supreme Court opinion which upholds the right to jury trial in section 502(a)(1)(B) actions and confirms, finally, that "the road less traveled"[222] always has been the better way.

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222. *Fuller*, 733 F. Supp. at 463.

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