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EMPLOYMENT LAW—The Split Over the Shift: The Burden of Proving Causation in Claims for Breach of Fiduciary Duty Under ERISA

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PROPERTY LAW—LANDLORD-TENANT LAW—THE IRON TRIANGLE OF RESIDENTIAL LEASES: LANDLORDS, TENANTS, AND ECONOMIC POLICY IN AMERICA'S LAST STATE WITHOUT IMPLIED WARRANTY OF HABITABILITY. *ALEXANDER APARTMENTS V. CITY OF LITTLE ROCK,* 60CV-15-6339 (2017).

I. INTRODUCTION

Last among the states in its absence of an implied duty in residential leases for landlords to repair and maintain[1] their properties in habitable condition,[2] Arkansas carries forward a tradition from the Middle Ages[3] in which tenants were expected, equipped, and qualified to work their rented lands to generate income and conduct repairs necessary to continue earning a living.[4] In the Information Age,[5] residential tenants are no longer equipped or qualified to work rented lands for income,[6] instead using their rented residences as refuges from harm. Beyond a mere embarrassment for Arkansas, the absence of what is known as an "implied warranty of habitability" places undue burden on tenants with carryover effects that undermine property values,[7] increase public health and related costs,[8] and lower employee productivity.[9]

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1. Order Granting in Part & Den. in Part Tenant Intervenors' Mot. for Partial Summ. J. Against Alexander Apartments, LLC, Alexander Apartments, LLC v. City of Little Rock, 60CV-15-6339 (2017) [hereinafter *Alexander Order for Intervenors*].

2. Symposium, Ark. Non-Legislative Commission on the Study of Landlord-Tenant Law, *Report,* 35 U. ARK. LITTLE ROCK L. REV. 739, 764 (2013) [hereinafter *The Commission*].

3. *Middle Ages*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Middle%20Ages (last visited Dec. 29, 2018).

4. Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L.J. 356, 356 (2004).

5. *Information Age*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Information%20Age (last visited Dec. 29, 2018).

6. Lynn Foster, *The Hands of The State: The Failure to Vacate Statute and Residential Tenants' Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1, 35 (2013).

7. *See* Paul Emrath, *Impact of Home Building and Remodeling on the U.S. Economy* 1–5 (May 1, 2014), https://www.nahb.org/en/research/housing-economics/housings-economic-impact/impact-of-home-building-and-remodeling-on-the-u-s--economy.aspx. The inference is clear: Remodeling increases home and property values, but allowing homes to fall into disrepair has the opposite effect.

8. David E. Jacobs et al., *The Relationships of Housing and Population Health: A 30-year Retrospective Analysis*, 117 ENVTL. HEALTH PERSP. 597, 603 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2679604/pdf/ehp-117-597.pdf.

9. *See id*. at 602; Arindrajit Dube, Eric Freeman, & Michael Reich, *Employee Replacement Costs*, INST. FOR RES. ON LAB. & EMP. U.C. (2010), http://irle.berkeley.edu/files/2010/Employee-Replacement-Costs.pdf. This note argues, among other

In health care, the iron triangle of access, quality, and cost are equal priorities that, when balanced, optimize the system.[10] A similar triad of interests exists in residential leases through the relationships between landlords, tenants, and economic policy. Where the interests of one group are skewed against the others, inefficiencies undermine the entire relationship. This note argues in favor of the August 9, 2017 order on an issue of first impression by the Pulaski County Circuit Court, which held that the City of Little Rock's ("the City") housing code effectively operates as an implied warranty of habitability in residential leases.[11] This interpretation of the housing code compliance requirements will provide some relief for Pulaski County tenants, advancing a portion of Arkansas law from its current last-place position and into alignment with every other state.[12] The possibility exists that rent rates could increase[13] if landlords are required to maintain rental units in accordance with applicable housing codes. However, the Arkansas economy will benefit overall from a reduced public health burden[14] and related economic benefits.[15] Furthermore, any increase in rent would likely be marginal, and the benefit substantially outweighs the cost.[16]

This note advocates for the interpretation that the housing code creates an implied warranty of habitability in residential leases and further advocates for a more comprehensive and predictable statutory solution that implements the Revised Uniform Residential Landlord-Tenant Act (RURLTA).[17] Recognizing this interpretation and codifying it in statutory form will bring Arkansas in line and follow the recommendations of a comprehensive 2012 Arkansas legislative study,[18] which coincides with every other American jurisdiction.[19]

Arkansas courts should recognize the Pulaski County Circuit Court's interpretation that the housing code is an implied part of residential lease

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things, that substandard housing detrimentally impacts health, which burdens businesses and the economy through reduced productivity and increased employee replacement cost.

10. WILLIAM L. KISSICK, MEDICINE'S DILEMMAS: INFINITE NEEDS VERSUS FINITE RESOURCES 2–3 (1994).

11. *Alexander Order for Intervenors*, *supra* note 1, at 8.

12. *Id*. at 6.

13. *Why is Arkansas the Only State in U.S. Without this Law?*, KNWA NEWS (Oct. 16, 2014), http://www.nwahomepage.com/news/knwa/why-is-arkansas-the-only-state-in-us-without-this-law/146701136.

14. *Fact Sheet: Health and Housing*, ARK. CTR. FOR HEALTH IMPROVEMENT (Mar. 2017), http://www.achi.net/docs/462/.

15. *Id*.

16. *See infra* Section III.B.

17. *See infra* Section III.A.

18. *The Commission*, *supra* note 2, at 773–74.

19. *See infra* Section III.A.2.

contracts, violations of which create private rights of action for tenants, and should apply it within their respective jurisdictions. Furthermore, appellate decisions should affirm this interpretation and apply the standard to all jurisdictions with housing codes in Arkansas. Housing codes should be enforced in residential leases in Arkansas to provide tenants some protection under lease contracts and protect landlords' investments. Implementing a statutory implied warranty of habitability that expands existing Arkansas landlord-tenant law to include the landlord duties under the RURLTA would afford greater market predictability and economic benefit to the State while also ensuring basic protections for tenants.[20]

Part II of this note begins with a background of landlord-tenant law in Arkansas, including developments with the implied warranty of habitability.[21] Next, Part III discusses the Pulaski County Circuit Court's order construing housing codes as an implied warranty of habitability in residential leases and the scope of the order.[22] Finally, the note considers the implied warranty of habitability from an economic perspective, analyzing research data and comparable situations as evidenced by corporate reactions to social issues.[23] The final section incorporates additional public policy considerations, including the extreme imbalance in the landlord-tenant relationship that places undue burden on tenants, exposes landlords to risk, and leaves Arkansas in last place in advancement from an agrarian society.

II. BACKGROUND

Landlord-tenant law has a long history that can be traced back to England in the Middle Ages.[24] This section gives a brief overview of the original thinking behind landlord-tenant law and traces it through the twentieth century. With the contextual history outlined, the section continues with context for the development of the implied warranty of habitability, including its expansion throughout the United States and its history in Arkansas. The section ends with a case history of *Alexander Apartments, LLC v. City of Little Rock*.

A. Landlord-Tenant Law: A Brief History

Throughout the Middle Ages, tenants were expected, equipped, and qualified to work their rented lands to generate income and conduct repairs

20. *See infra* Section III.B.
21. *See infra* Section II.
22. *See infra* Section II.C.
23. *See infra* Section III.B.
24. *See* Geurts, *supra* note 4.

necessary to continue earning a living.[25] These ancient leases were both residential and commercial in nature. As our society began to move from its generalized agrarian roots, tenants began to specialize in trades or other advanced roles and gradually lost the skills and time necessary to conduct their own repairs.[26] As society moved into the contemporary era, residential tenants no longer worked land to earn income as they ventured further away from their leased properties to carry out their specialized work.[27] In contrast with ancient leases, the contemporary leases contemplated in this note are residential in nature and not commercial.

In the 1970s, laws began to catch up to changes in the expectations on tenants and their relationships with rented property and landlords.[28] In a landmark federal case that recognized the fundamental shift into our contemporary, specialized society, the United States Court of Appeals for the District of Columbia held in *Javins v. First National Realty* that "adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance" were implied components of a residential lease.[29] The *Javins* court held that "the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability."[30]

One of the earliest examples of a court recognizing an "implied warranty of habitability" was in *Lemle v. Breeden*.[31] The *Lemle* court noted that the tenant discovered rats not present during a move-in inspection,[32] which the court found to be in violation of the contractual relationship.[33] Popularized as a precedent in *Javins*,[34] the notion of a landlord's implied contractual duty to repair and maintain leased residential premises was followed by a string of other jurisdictions,[35] leading to the creation of a

25. Geurts, *supra* note 4, at 356.

26. *Id.*

27. Foster, *supra* note 6, at 35.

28. *See*, *e.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970); Kline v. Burns, 276 A.2d 248 (N.H. 1971); Hinson v. Delis, 102 Cal. Rptr. 661 (Cal. App. 1972); Gillete v. Anderson, 282 N.E.2d 149 (Ill. App. 1972); Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

29. 428 F.2d at 1074.

30. *Id.* at 1076–77.

31. 462 P.2d 470 (Haw. 1969); J. Clifford McKinney, II, *Caveat Who?: A Review of The Landlord/Tenant Relationship in The Context of Injuries and Maintenance Obligations*, 35 U. ARK. LITTLE ROCK L. REV. 1049, 1067 (2013).

32. *Lemle*, 462 P.2d at 471.

33. *Id*. at 476.

34. *Javins*, 428 F.2d at 1074.

35. *See, e.g.,* Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978); Green v. Superior Court of S.F., 10 Cal. 3d 616, 517 P.2d 1168 (1974); Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Bos. Hous.

uniform law. In 1972, the Uniform Law Commission attempted to evenly balance the interests of landlords and tenants in the Uniform Residential Landlord-Tenant Act (URLTA).[36] Twenty-one states have enacted the URLTA.[37] An overwhelming majority of the states that have not enacted the URLTA have nonetheless created statutory protections for tenants.[38] Some of the statutory protections are modeled after the original URLTA and others are based on the nuanced needs of states where they are enacted.[39]

Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972). *See also* ALA. CODE § 35-9A-204 (West, Westlaw through 2018); ALASKA STAT. § 34.03.100 (West, Westlaw through 2018); ARIZ. REV. STAT. ANN. § 33-1324 (West, Westlaw through 2018); CALIF. CIV. CODE § 1941, et seq. (West, Westlaw through 2018); COLO. REV. STAT. ANN. § 38-12-503 (West, Westlaw through 2018); CONN. GEN. STAT. ANN. § 47a-7 (West, Westlaw through 2018); DEL. CODE ANN. tit. 25 § 5305 (West, Westlaw through 2018); D.C. Mun. Regs. tit. 14 § 301 (West, Westlaw through 2018); FLA. STAT. ANN. § 83.51 (West, Westlaw though 2018); GA. CODE ANN., § 44-7-13 (West, Westlaw though 2018); HAW. REV. STAT. ANN. § 521-42 (West, Westlaw through 2018); IDAHO CODE ANN. § 6-320 (West, Westlaw through 2018); IND. CODE ANN. § 32-31-8-5 (West, Westlaw through 2018); IOWA CODE ANN. § 562A.15 (West, Westlaw through 2018); KAN. STAT. ANN. § 58-2553 (West, Westlaw through 2018); KY. REV. STAT. ANN. § 383.595 (West, Westlaw through 2018); LA. CIV. CODE ANN. art. 2691 (West, Westlaw through 2018); ME. REV. STAT. ANN. tit. 14 § 6021 (West, Westlaw through 2018); MD. CODE ANN. REAL PROP. § 8-211 (West, Westlaw through 2018); 105 Mass. Code Regs. § 410:351 (West, Westlaw through 2018); MICH. COMP. LAWS ANN. § 554.139 (West, Westlaw through 2018); MINN. STAT. ANN. § 504B.161 (West, Westlaw through 2018); MISS. CODE ANN. § 89-8-23 (West, Westlaw through 2018); MO. ANN. STAT. § 441.234 (West, Westlaw through 2018); MONT. CODE ANN. § 70-24-303 (West, Westlaw through 2018); NEB. REV. STAT. ANN. § 76-1419 (West, Westlaw through 2018); NEV. REV. STAT. ANN. § 118A.290 (West, Westlaw through 2018); N.H. REV. STAT. ANN. § 48-A:14 (West, Westlaw through 2018); N.M. STAT. ANN. § 47-8-20 (West, Westlaw through 2018); N.Y. REAL PROP. LAW § 235-b (McKinney, Westlaw through 2018); N.C. GEN. STAT. ANN. § 42-42 (West, Westlaw through 2018); N.D. CENT. CODE ANN. § 47-16-13.1 (West, Westlaw through 2018); OHIO REV. CODE ANN. § 5321.04 (West, Westlaw through 2018); OKLA. STAT. ANN. tit. 41, § 118 (West, Westlaw through 2018); OR. REV. STAT. ANN. § 90.320 (West, Westlaw through 2018); 34 R.I. GEN. LAWS ANN. § 34-18-22 (West, Westlaw through 2018); S.C. CODE ANN. § 27-40-440 (West, Westlaw through 2018); S.D. CODIFIED LAWS § 43-32-8 (West, Westlaw through 2018); TENN. CODE ANN. § 66-28-304 (West, Westlaw through 2017); TEX. PROP. CODE ANN. § 92.052 (West, Westlaw through 2018); UTAH CODE ANN. § 57-22-4 (West, Westlaw through 2018); VT. STAT. ANN. tit. 9 § 4457 (West, Westlaw through 2018); VA. CODE ANN. § 55-248.43 (West, Westlaw through 2018); WASH. REV. CODE ANN. § 59.18.060 (West, Westlaw through 2018); W. VA. CODE ANN. § 37-6-30 (West, Westlaw through 2018); WIS. STAT. ANN. § 704.07 (West, Westlaw through 2018); WYO. STAT. ANN. § 1-21-1203 (West, Westlaw through 2018); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1978).

36. *See generally*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. LAW COMM'N 1972), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta%201974.pdf.

37. Foster, *supra* note 6, at 36.

38. *Id.* at 36–37.

39. *Id.* at 37.

The URLTA originally required landlords to comply with housing codes related to health and safety; maintain premises in a fit and habitable condition; keep common areas clean and safe; maintain utility infrastructure; provide for garbage removal; and provide water, hot water, and heat.[40] The uniform law was developed with balance between the interests of tenants and landlords in mind.[41] In 2015, the Uniform Law Commission revised the URLTA, created the RURLTA, and added requirements for landlords to provide for "effective waterproofing and weather protection of the roof and exterior walls;"[42] reasonable measures to control vermin and prevent exposure to hazardous substances; "floors, doors, windows, walls, ceilings, stairways, and . . . railings" in good repair; and working locks; safety equipment; and recycling receptacles.[43] These revisions reflect contemporary recognition of the economic[44] and environmental benefits[45] of improving energy efficiency, promoting factors that contribute to health and safety, and reducing waste.[46]

B. Arkansas Landlord-Tenant Law

Arkansas remains the lone torchbearer in carrying on the ancient tradition of casting the entire burden to repair and maintain on the tenant while relieving the landlord of responsibility.[47] In 2007, the Arkansas General Assembly enacted the pro-landlord provisions of the URLTA but omitted the tenant-protection provisions.[48] Every other state has enacted some form of tenant protection and many have enacted some form of landlord protection, but Arkansas sits alone in its position of protecting only

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40. *Id.*

41. *Id.*

42. REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 302 (UNIF. LAW COMM'N 2015), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act_2017mar30.pdf.

43. *Id.*

44. *Packaging and Recycling*, U.S. CHAMBER COM. FOUND. (2017), https://www.uschamberfoundation.org/initiative/packaging-and-recycling.

45. RECYCLING ECONOMIC INFORMATION (REI) REPORT, U.S. ENVTL. PROTECTION AGENCY (2017), https://www.epa.gov/smm/recycling-economic-information-rei-report.

46. *Benefits of Recycling*, U.S. DEP'T HEALTH & HUMAN SERVS. & NAT'L INSTS. OF HEALTH ENVTL. MGMT. SYS., https://nems.nih.gov/environmental-programs/Pages/Benefits-of-Recycling.aspx (last visited Sept. 29, 2018).

47. *Alexander Order for Intervenors*, *supra* note 1, at 2.

48. *See* Arkansas Residential Landlord-Tenant Act of 2007, No. 1004, sec. 1, 2007 Ark. Acts 5110, 5113 (codified at ARK. CODE ANN. § 18-17-101, *et seq.* (West, Westlaw through 2018)). *See also* Ginny Monk, *'Habitable' Not in Rules for State Landlords*, ARK. ONLINE (Jul. 8, 2018, 4:30 AM), https://www.arkansasonline.com/news/2018/jul/08/habitable-not-in-rules-for-state-landlo/ (articulating a more comprehensive history of attempts to enact tenant protections in Arkansas).

landlords.[49] Although the initial weight of the push to bring landlord-tenant law in line with the other areas of the law that have recognized the balance of interests requisite in an economically healthy society was made following the creation of the URLTA,[50] recent attention from a wide variety of domestic and international news outlets, independent research foundations, and human rights organizations has focused on Arkansas's position, which has been left behind by the rest of the country.[51]

In 2011, the Arkansas General Assembly created by statute a non-legislative commission to study the state of landlord-tenant laws in Arkansas.[52] The Commission consisted of members "appointed by the Governor, legislators, [professors from each of] the two Arkansas law schools, [and] the Arkansas Bar Association."[53] The Commission also included representatives from the Arkansas Realtor's Association, Arkansas Bankers' Association, Landlords' Association of Arkansas, and Arkansas Affordable Housing Association.[54] The Commission's conclusions were consistent with much of what has been covered by the various authors noted previously, including that Arkansas stands alone and is considerably out of balance with other states regarding the state of its landlord-tenant laws.[55]

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49. *Alexander Order for Intervenors*, *supra* note 1, at 8.

50. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389 (2011).

51. Monk, *supra* note 48; Ron Wood, *Renters Have Few Rights Under Arkansas Law*, ARK. ONLINE (May 7, 2017), https://www.arkansasonline.com/news/2017/may/07/renters-have-few-rights-under-arkansas-/; John Pacenti, *Renters Beware: What's That Smell?*, FOX BUS. (Apr. 20, 2012), http://www.foxbusiness.com/features/renters-beware-whats-that-smell; Zaneta Lowe, *Renters Have Few Rights in Arkansas*, WREG NEWS (Feb. 5, 2015, 10:31 AM), http://wreg.com/2015/02/05/renters-have-few-rights-in-arkansas/; Eli Hager, *Can You Go to Jail for Not Paying Rent?*, MARSHALL PROJECT (Apr. 16, 2015, 5:42 PM), https://www.themarshallproject.org/2015/04/16/can-you-go-to-jail-for-not-paying-rent; Janet Portman, *Breaking Your Lease When Roaches Go Wild*, CHI. TRIB. (Nov. 19, 2010), http://articles.chicagotribune.com/2010-11-19/classified/ct-mre-1121-renting-20101119_1_landlord-roaches-habitable-premises; Christof Putzel, *In Arkansas, a Real Estate Loophole That Lets Landlords Neglect Renters*, AL JAZEERA (Feb. 2, 2016), http://america.aljazeera.com/watch/shows/america-tonight/2016/2/in-arkansas-a-real-estate-loophole-that-lets-landlords-neglect-renters.html; Spencer Chumbley & Mark Scialla, *Arkansas: Worst Place to Rent in America*, VICE NEWS (June 25, 2014, 11:25 AM), https://news.vice.com/video/arkansas-the-worst-place-to-rent-in-america; *Arkansas: Tenants Face Prosecution Over Rent Problems*, HUM. RTS. WATCH (Feb. 5, 2013, 12:45 AM), https://www.hrw.org/news/2013/02/05/arkansas-tenants-face-prosecution-over-rent-problems [hereinafter *Tenants Face Prosecution*]; *10 Things Your Landlord Won't Tell You*, N.Y. POST, (June 15, 2014, 5:22 PM), http://nypost.com/2014/06/15/10-things-your-landlord-wont-tell-you/ [hereinafter *10 Things Your Landlord Won't Tell You*].

52. *See The Commission*, *supra* note 2.

53. Foster, *supra* note 6, at 3.

54. *Id.*

55. *The Commission*, *supra* note 2, at 2.

1. Scholarly Research and Public Attention on Arkansas Landlord-Tenant Law

A growing body of legal,[56] public health,[57] and economic research[58] joins an already expansive list of public interest[59] and media reporting[60] on the subject of the detrimental impacts resulting from the imbalance between landlord and tenant interests. Scholarly legal writing from around the country continues to analyze the absence of an implied warranty of habitability in Arkansas.[61] For example, the absence of an implied warranty of habitability has been juxtaposed with the existence of Arkansas's failure to vacate and criminal eviction statutes.[62] Another recent article discusses the doctrine of caveat lessee and the obligations currently imposed on landlords and tenants in Arkansas.[63] An article by a Louisiana State University law professor includes comparative foreign examples for implementing the RURLTA.[64] Yet another article by a Seton Hall Law School professor discusses the continued existence of the implied warranty of habitability and the current state of the law in the context of its development through case law in New Jersey.[65] This article is particularly relevant in the context of this note because, as one of the earliest adopters of

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56. *See*, *e.g.*, Foster, *supra* note 6; McKinney, *supra* note 31; Melissa T. Lonegrass, *A Second Chance for Innovation—Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 U. ARK. LITTLE ROCK L. REV. 905 (2013); Super, *supra* note 50; Marshall Prettyman, *Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007, Ark. Code Ann. §§ 18-17-101 et seq.*, 35 U. ARK. LITTLE ROCK L. REV. 1031 (2013).

57. *See*, *e.g.*, Ashley E. Bachelder et al., *Health Complaints Associated with Poor Rental Housing Conditions in Arkansas: The Only State Without a Landlord's Implied Warranty of Habitability*, 4 FRONTIERS PUB. HEALTH 1 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5120100/pdf/fpubh-04-00263.pdf.

58. *See*, *e.g.*, MIKE ROYS, MAGGIE DAVIDSON, SIMON NICOL, DAVID ORMANDY, & PETER AMBROSE, THE REAL COST OF POOR HOUSING 43 (2010), https://www.hud.gov/sites/documents/REAL_COST_POOR_HOUSING.PDF.

59. *Pay the Rent or Face Arrest: Abusive Impacts of Arkansas's Draconian Evictions Law*, HUM. RTS. WATCH (Feb. 4, 2013), https://www.hrw.org/report/2013/02/04/pay-rent-or-face-arrest/abusive-impacts-arkansass-draconian-evictions-law [hereinafter *Pay the Rent*].

60. *See, e.g.*, Monk, *supra* note 48; Wood, *supra* note 51; Pacenti, *supra* note 51; Lowe, *supra* note 51; Hager, *supra* note 51; Portman, *supra* note 51; Putzel, *supra* note 51; Chumbley & Scialla, *supra* note 51; *Tenants Face Prosecution*, *supra* note 51; *10 Things Your Landlord Won't Tell You*, *supra* note 51.

61. *See*, *e.g.*, Foster, *supra* note 6, at 3; Paula A. Franzese, Abbott Gorin, & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 68 RUTGERS L. REV. 1 (2016); McKinney, *supra* note 31, at 1069; Lonegrass, *supra* note 56, at 905; Super, *supra* note 50, at 394.

62. Foster, *supra* note 6, at 20.

63. McKinney, *supra* note 31, at 1049.

64. Lonegrass, *supra* note 56, at 916–22.

65. Franzese, Gorin, & Guzik, *supra* note 61, at 1.

an implied warranty of habitability interpreted in case law,[66] the New Jersey Supreme Court offers a potential template for its adoption in Arkansas.

The disparity between Arkansas's laws and the rest of the country has been gaining attention in national press[67] and among international groups.[68] Notably, an international group that monitors atrocities around the world, including places such as Afghanistan, Russia, Rwanda, and Syria,[69] reported on the status of Arkansas's landlord-tenant laws in 2013.[70]

2. Impact of Public Pressure

This attention has placed pressure on lawmakers and elected officials in Arkansas, leading to several attempts toward bringing Arkansas up to the basic nationwide standards included in the RURLTA.[71] As recently as 2017, competing bills were introduced in the Arkansas General Assembly. In one bill, sponsored by state Representative Laurie Rushing, implied quality standards were to be applied to residential leases, including requirements for landlords to maintain working heating, cooling, electrical, potable water, and sewage systems in addition to a "functioning roof and building envelope."[72] However, this bill gave landlords complete discretion over whether the standards were met, failed to include enforcement measures, and after its last amendment, actually deprived tenants of the meager rights they have under constructive eviction.[73] The bill failed *sine die* in committee in the Arkansas Senate.[74] Another another bill, sponsored by state Representative Warwick Sabin in the same legislative session, included a comprehensive list of provisions that reflected the landlord obligations under the URLTA that were excluded from the 2007 enactment by the

66. Reste Realty Corp. v. Cooper, 251 A.2d 268, 276–77 (N.J. 1969).

67. Monk, *supra* note 48; Wood, *supra* note 51; Pacenti, *supra* note 51*;* Lowe, *supra* note 51; Hager, *supra* note 51; Portman, *supra* note 51; Putzel, *supra* note 51; Chumbley & Scialla, *supra* note 51; *Tenants Face Prosecution*, *supra* note 51; *10 Things Your Landlord Won't Tell You*, *supra* note 51.

68. *Pay the Rent, supra* note 59.

69. *Publications*, HUM. RTS. WATCH, https://www.hrw.org/publications (last visited Dec. 16, 2017).

70. *Pay the Rent, supra* note 59; *Arkansas: Tenants Face Prosecution Over Rent Problems*, HUM. RTS. WATCH (Feb. 5, 2013, 12:45 AM), https://www.hrw.org/news/2013/02/05/arkansas-tenants-face-prosecution-over-rent-problems.

71. *See, e.g.*, H.B. 1166, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 2135, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

72. H.B. 1166, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (The bill failed sine die in Senate committee.).

73. *Id*.

74. *Id*.

Arkansas legislature.[75] The provisions included were substantially identical to those required under the URLTA. Critically, Representative Sabin's bill specified the landlord's rights that accompanied the implied duties and provided procedures and remedies available to tenants in the event of landlord oversight.[76] Balancing the interests of landlords and tenants is at the heart of the failure of these bills.

On one hand, landlords point to the risks they take in leasing their properties, which may be damaged far beyond the dollar amount of the security deposit.[77] On the other hand, tenants and tenant groups point to the insecurity they face at the mercy of landlords,[78] who can have the ability to unilaterally evict them for even minor infractions with no corresponding recourse of their own.[79] Tenants may also be effectively forced, because of their options limited by income or credit, to live in uninhabitable conditions with no legal recourse.

One of the common criticisms against implementing the tenant-friendly portions of the RURLTA is the increased risk exposure for landlords, who are able to provide a market of among the lowest rent costs in the United States.[80] The argument holds that bringing Arkansas landlords in line with their interstate peers will increase their overhead costs, thus increasing rent prices, and put Arkansas landlords at the mercy of unscrupulous tenants.[81] However, the argument presumes that the market will not level itself by attracting scrupulous tenants to improved units and implies that landlords artificially control rent prices at their tenants' expense. It also assumes that all Arkansas landlords offer substandard housing requiring substantial expense to bring it to a habitable standard. Furthermore, the Arkansas General Assembly enacted a statute that expressly limits landlord liability in tort.[82] The effect of this statutory limit on liability in tort for landlords[83] is that most tort liability passes on to tenants, who are held to premises liability standards for injuries sustained by licensees and invitees.[84] Therefore,

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75. H.B. 2135, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (The bill failed sine die in House committee.).

76. *Id*.

77. *See* Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107 (1986).

78. *Pay the Rent*, *supra* note 59.

79. Super, *supra* note 50, at 394.

80. *The Cheapest U.S. Cities for Renters: #14. Little Rock Arkansas*, CBS NEWS (Sept. 27, 2016, 6:11 AM), https://www.cbsnews.com/media/cheapest-rent-housing-us-cities/8/.

81. Laura Kelton, *The Top Ten Ways to Annoy Your Landlord*, U. OF TENN. AT CHATTANOOGA: THE LOOP (Sept. 19, 2009), https://blog.utc.edu/TheLoop/2009/09/19/the-top-ten-ways-to-annoy-your-landlord/.

82. ARK. CODE ANN. § 18-16-110 (West, Westlaw through 2018).

83. *Id*.

84. *Id*.

minimal risk exposure exists for landlords, whose liability is limited to circumstances where damages result from lease contract breach[85] unless the landlord agrees to maintain and repair and fails to perform in a reasonable manner.[86]

C. Case Summary: Alexander Apartments, LLC v. City of Little Rock

Alexander Apartments, LLC, owns an apartment complex consisting of 141 units, which has been cited by the City for numerous housing code violations since the complex was purchased by Alexander Apartments, LLC, in March 2014.[87] On December 21, 2015, the Little Rock Fire Department issued a notice that it intended to terminate utility services to Alexander Apartments following repeated violations of the City's ordinances pertaining to housing codes[88] resulting in immediate threats to health and safety of residents.[89] According to the Little Rock Fire Department, terminating utility services meant the apartments were no longer habitable.[90] Later that same day, in response to a motion for a temporary restraining order against the City from Alexander Apartments,[91] the Pulaski County Circuit Court ruled that it lacked sufficient jurisdiction to interfere with the fire department's action.[92] After the hearing, notice was placed on the door of each of the residents, requiring the tenants to vacate by 5:00 p.m. on December 28, 2015, because of the pending termination of utility services.[93]

1. Tenant Intervention

The tenants intervened in the ongoing litigation between the City and Alexander Apartments.[94] The intervenors cited numerous claims against the City, including violations of due process and federal and state laws.[95] The tenant intervenors also requested a temporary restraining order to prevent injury in the form of losing access to their rented residences during the

85. McKinney, *supra* note 31.

86. ARK. CODE ANN. § 18-16-110 (West, Westlaw through 2018).

87. Third Party Compl. & Mot. for TRO at 2, Alexander Apartments, LLC v. City of Little Rock, No. 60CV-15-6339 (Dec. 22, 2016) [hereinafter *Complaint and TRO*].

88. LITTLE ROCK, ARK., MUN. CODE § 8 (2018), https://library.municode.com/AR/little_rock/codes/code_of_ordinances?nodeId=COOR_CH8BUBURE.

89. *Complaint and TRO*, *supra* note 87.

90. *Id.*

91. *See generally*, Mot. for TRO, Alexander Apartments, LLC v. City of Little Rock, No. 60CV-15-6339 (Dec. 21, 2015).

92. *Complaint and TRO*, *supra* note 87.

93. *Id.* at 3.

94. *See generally id.*

95. *Id.* at 3.

winter and in a period of time that would have included a major holiday.[96] The intervenors also cited numerous claims against Alexander Apartments, including breach of contract,[97] breach of the implied covenant of quiet enjoyment,[98] conversion,[99] negligence,[100] and breach of the implied warranty of habitability.[101]

The intervenors filed a motion for partial summary judgment against Alexander Apartments on the issue of the intervenors' claim that the minimum standards included in the City's housing code are implicitly included as part of residential lease agreements and thereby creates an implied warranty of habitability in those residential lease agreements.[102] The motion included two possibilities: (1) "Local laws or ordinances establishing minimum standards of habitability must be read into residential leases, and by implication create a warranty of habitability in residential leases which is measured by the standards set out in those local law[s] or ordinances; and"[103] (2) "[t]hat a general implied warranty of habitability exists in all residential lease agreements in the State of Arkansas, regardless of the existence of local laws or ordinances."[104]

2. Two Theories for Finding Minimum Standards in Existing Law

On the first possibility, that local laws or ordinances establish minimum standards of habitability that must be read into residential leases, the court began by examining the City's Housing Code ("Code").[105] The Code applies to all leased properties irrespective of when they were "constructed, altered or repaired."[106] The Code requires buildings to be maintained, safe, and sanitary, and it further stipulates that noncompliant dwellings cannot be let or sublet.[107] The court noted that the Code includes minimum standards that "include sanitary facilities, hot and cold water supply, water heating facilities, heating facilities, cooking and heating

96. *Id.* at 5.
97. *Id.* at 6.
98. *Complaint and TRO*, *supra* note 87, at 6.
99. *Id.* at 7.
100. *Id.*
101. *Id.* at 8.
102. *See generally* Mot. for Partial Summ. J. Against Alexander Apartments, LLC, Alexander Apartments, LLC v. City of Little Rock, No. 60CV-15-6339 (Aug. 23, 2016).
103. *Alexander Order for Intervenors*, *supra* note 1, at 1.
104. *Id*. at 2.
105. *Id.* at 5.
106. LITTLE ROCK, ARK., MUN. CODE § 8-330 (2018), https://library.municode.com/AR/little_rock/codes/code_of_ordinances?nodeId=COOR_CH8BUBURE_ARTVHOCO_DIV1GE_S8-330SCCO.
107. *Id*. § 8-401.

equipment, . . . garbage disposal facilities[,][108] . . . [l]ight and ventilation[,][109] . . . [e]lectrical systems[,][110] . . . dwelling space,"[111] and structural requirements.[112]

3. Pulaski County Circuit Court Granted Summary Judgment

Considering the overwhelming weight of authority from other jurisdictions throughout the United States, the court pointed to court decisions from around the country in which the minimum standards in housing codes have been interpreted as implied by operation of law in residential housing contracts.[113] In *Javins*, the United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia housing code created a privately enforceable duty and "that the basic validity of every housing contract depended upon substantial compliance with the housing code at the beginning of the lease term."[114] In issuing its order granting summary judgment, the Pulaski County Circuit Court acknowledged the long-held view of the Arkansas Supreme Court that laws in existence at the time when contracts are made and performed enter into and form part of those contracts.[115] Additionally, the court pointed to the Arkansas Supreme Court's position that parties are presumed to contract with existing laws in mind.[116] Here, the court noted that the City's Code in effect at the time the tenant intervenors' leases were entered included minimum standards. Therefore, those requirements formed part of the lease contracts between the tenants and Alexander Apartments.[117] The ruling is entirely consistent with the United States Court of Appeals for the District of Columbia Circuit's ruling in *Javins* and the nationwide trend toward balancing the rights of tenants and landlords.[118]

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108. *Id*. § 8-403.
109. *Id*. § 8-404.
110. *Id*. § 8-405
111. *Id*. § 8-406.
112. LITTLE ROCK, ARK., MUN. CODE §§ 8-421 to -435 (2018), https://library.municode.com/AR/little_rock/codes/code_of_ordinances?nodeId=COOR_CH8BUBURE_ARTVHOCO_DIV3MIST_PTBSTRE_S8-421FOUN.
113. *Alexander Order for Intervenors*, *supra* note 1, at 6 (citing Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970); Kline v. Burns, 276 A.2d 248 (N.H. 1971); Hinson v. Delis, 102 Cal. Rptr. 661 (Cal. App. 1972); Gillete v. Anderson, 282 N.E.2d 149 (Ill. App. 1972); Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973)).
114. *Id.* at 7 (citing *Javins*, 428 F.2d 1071).
115. *Id*. at 8 (citing Adams v. Spillyards, 187 Ark. 641, 61 S.W.2d 686 (1933)).
116. *Id.* (citing Ellison v. Tubb, 295 Ark. 312, 749 S.W.2d 650 (1988)).
117. *Id.*
118. *See supra* Section II.A.

4. The Arkansas General Assembly Bears Responsibility for Implementing an Implied Warranty of Habitability

On the second possibility, whether a general implied warranty of habitability exists throughout Arkansas irrespective of local ordinances, the court noted Arkansas appellate decisions,[119] which have consistently upheld the doctrine of caveat lessee in lease contracts.[120] The court noted the Arkansas Supreme Court's reluctance to establish a warranty of habitability through its powers, deferring the decision to the Arkansas General Assembly.[121] The court also noted the General Assembly's enactment of a statute that eliminates the possibility of tort liability for landlords' liability to tenants or tenants' invitees proximately caused by defects or disrepair on a landlord's leased property.[122] Furthermore, the court acknowledged the 2007 enactment of the landlord-friendly portions of the URLTA, noting that the pro-tenant provisions had been removed and that the 2011 Non-Legislative Commission on the Study of Landlord-Tenant Law had recommended creating implied warranty of habitability in Arkansas law.[123] In acknowledging previous appellate decisions, the circuit court wrote "Arkansas is the only state without a general warranty of habitability in all residential lease agreements."[124]

III. ARGUMENT

Although the implied warranty of habitability has been considered from various angles in other states for more than fifty years, the concept that housing codes constitute implied portions of residential leases is an issue of first impression in Arkansas.[125] This section considers this first issue in an Arkansas court and weighs the health and economic impacts of implementing the implied warranty of habitability in Arkansas.

A. Impact as an Issue of First Impression

The Pulaski County Circuit Court's order establishes that the minimum standards included in the City's housing code forms part of residential lease

119. *Id.* at 3 (citing Hadder v. Heritage Hill Manor, Inc., 2016 Ark. App. 303, 495 S.W.3d 628; Thomas v. Stewart, 347 Ark. 33, 60 S.W.3d 415 (2001); Propst v. McNeill, 326 Ark. 623, 932 S.W.2d 766 (1996)).

120. *Alexander Order for Intervenors*, *supra* note 1, at 3.

121. *Id.* (citing *Thomas*, 347 Ark. 33, 60 S.W.3d 415; *Propst*, 326 Ark. 623, 932 S.W.2d 766).

122. *Id.* (citing ARK. CODE ANN. § 18-16-110 (West 2016)).

123. *Id.* at 4.

124. *Id.*

125. *Alexander Order for Intervenors*, *supra* note 1, at 5.

agreements and thereby creates an implied warranty of habitability in those residential lease agreements.[126] This is an issue of first impression in Arkansas. Arkansas circuit courts only carry persuasive weight and not precedential authority in other Arkansas counties. Therefore, other jurisdictions must hear a case with similar facts before deciding on the issue and either agreeing or disagreeing with the Twelfth Division's interpretation. However, appellate courts may agree with the order and conclude that the interpretation applies to all jurisdictions in Arkansas under contract theory, merely requiring them to enforce existing housing codes and giving tenants a private right of action.

Approximately 44% of housing units in Little Rock, Arkansas, are rental units, which means that more than 40,000 of the city's 91,288 housing units are rentals.[127] Statewide, more than 34% of housing units are rental units, which translates to nearly 465,000 of Arkansas's 1,354,762 housing units.[128] With an average of 2.53 people per household statewide,[129] approximately 1,000,000 people live in rental housing in Arkansas and more than 100,000 of Little Rock residents live in rental units. These 1,000,000 Arkansans, who comprise more than 34% of the State's population, are the only renters in the United States living without basic guarantees of habitable housing.[130] The unimplemented landlord responsibility provisions of the RURLTA, when combined with the tenant responsibilities, offer the most balanced guidance between the interests of landlords and tenants.

1. Health Impact of Unstandardized Housing on Arkansas Citizens

Feces and raw sewage on the floor,[131] a dead cat,[132] mold,[133] broken smoke detectors,[134] and bed bugs[135] are just some examples of actual

126. *Id.* at 8.

127. *Quick Facts: Little Rock, Arkansas*, U.S. CENSUS BUREAU (2016), https://www.census.gov/quickfacts/fact/table/littlerockcityarkansas/PST045216.

128. *Quick Facts: Arkansas*, U.S. CENSUS BUREAU (2016), https://www.census.gov/quickfacts/AR.

129. *Id.*

130. *Alexander Order for Intervenors*, *supra* note 1, at 8; Monk, *supra* note 48; Wood, *supra* note 51; Pacenti *supra* note 51*;* Lowe, *supra* note 51; Hager, *supra* note 51; Portman, *supra* note 51; Putzel, *supra* note 51; Chumbley & Scialla, *supra* note 51; *Tenants Face Prosecution*, *supra* note 51; *10 Things Your Landlord Won't Tell You*, *supra* note 51.

131. Jason Pederson, *Alexander Apartments*, KATV NEWS (Nov. 14, 2014), http://katv.com/community/7-on-your-side/alexander-apartments.

132. Chelsea Boozer, *Little Rock Held Liable for Eviction Damages; Judge Says City's 2015 Order to Leave Apartments Violated Constitution*, ARK. ONLINE (Dec. 9, 2017, 4:30 AM), http://www.arkansasonline.com/news/2017/dec/09/lr-held-liable-for-eviction-damages-201/.

problems not only reported by tenants but also observed by housing inspectors in Arkansas.[136] As repulsive as these problems can be to current and potential tenants,[137] their detrimental effects on human health can lead to serious problems, including respiratory ailments, headaches, high blood pressure, and bites or infections[138] in addition to the more difficult to quantify impacts of living under stressful conditions with no way to leave.[139] A University of Arkansas for Medical Sciences study compared the substandard housing conditions with incidences of preventable but serious health issues.[140] Out of 951 Arkansas renters surveyed, more than one-third reported unresolved repair issues with their landlords and one-quarter of those reported experiencing health problems related to their housing conditions.[141] In the study, Hispanic tenants were 51% more likely to face repair problems and were more likely to face a health issue than their white counterparts.[142]

Scholarly research suggests that the elderly are more sensitive to their environments compared with younger people,[143] possibly putting elderly tenants at even greater risk. Tragically, children are at the greatest risk from environmental hazards and face exposure-related negative outcomes such as "growth retardation, diminished IQ, precocious puberty, microcephaly, and diminished lung volume."[144] As the economy continues to recover from the housing market crash, people fifty-five and older have turned to the rental

133. Jonathan Rozelle, *Mold in Apartment Making Resident Sick*, ARK. MATTERS (Feb. 15, 2017, 7:40 PM), http://www.arkansasmatters.com/news/local-news/mold-in-apartment-making-resident-sick/657141628.

134. Boozer, *supra* note 132.

135. *Why is Arkansas the Only State in U.S. Without this Law?*, *supra* note 13.

136. *Complaint and TRO*, *supra* note 87, at 2.

137. John Lynch, *Little Rock Apartments Seek up to $589,692 in Damages After City Closed Complex*, ARK. ONLINE (Dec. 12, 2017, 4:30 AM), http://www.arkansasonline.com/news/2017/dec/12/apartments-seek-up-to-589-692-in-damage/.

138. Bachelder et al., *supra* note 57, at 1–2.

139. Ginny Monk, *Study Links Sick Arkansas Tenants to Run-down Apartments*, ARK. ONLINE (Jul. 8, 2018, 4:30 AM), https://www.arkansasonline.com/news/2018/jul/08/study-links-sick-tenants-to-run-down-ap/.

140. Bachelder et al., *supra* note 57, at 1.

141. *Id.*

142. *Id.* at 3–4.

143. *See, e.g.*, Suanne Iwarsson, *A Long-term Perspective on Person-environment Fit and ADL Dependence Among Older Swedish Adults*, 45 GERONTOLOGIST 327, 355 (June 1, 2005); Hans-Werner Wahl et. al, *The Home Environment and Disability-related Outcomes in Aging Individuals: What is the Empirical Evidence?* 49 GERONTOLOGIST 355, 355 (June 1, 2009).

144. Cynthia Bearer, *Environmental Health Hazards: How Children Are Different from Adults*, 103 ENVTL. HEALTH PERSP., at 10 (Sept. 1995).

market by an increase of 29% since 2009.[145] Although younger renters are more likely to recover from illnesses from their environment, they are more likely to rent than previous generations.[146] Perhaps more significantly, millennials—Americans born between 1981 and 1997[147]—have overtaken baby boomers—Americans born between 1946 and 1964[148]—as the largest living generation.[149] As the number of population segments who are renters increases, this exposes more people to the harmful effects associated with substandard housing.

Because housing codes, where they exist, establish minimum standards generally requiring the prevention of hazards and threats to human safety, enforcing them through a private right of action available to tenants would provide basic protections for people living in or considering moving to Arkansas. However, implementing standardized minimums for ensuring the protection of human life under residential lease contracts would offer uniformity for courts, landlords, tenants, and enforcement mechanisms, such as municipal inspectors or law enforcement. Such standards would also establish uniformity for property owners statewide.

2. Comparison with Other States

Arkansas's implementation of only the tenant responsibility portions of the URLTA, which includes landlord obligations, tenant obligations, and remedies along with limitations and landlord liability,[150] fell far short of the Act's intent of balancing the interests of landlords and tenants. Arkansas is the only state that has not implemented any obligation to maintain minimum standards on landlords.[151] As has been discussed at length, every other state in the union has implemented some form of protections for tenants, and some have not implemented protections for landlords.[152] Despite strong

145. Bob Sullivan, *Renting is Overtaking the Housing Market. Here's Why*, USA TODAY (Nov. 11, 2017, 11:00 AM), https://www.usatoday.com/story/money/personalfinance/real-estate/2017/11/11/renting-homes-overtaking-housing-market-heres-why/845474001/.

146. *Millennials Are Driving Up the Single-Family Rental Market--Here's Why*, FORBES (Oct. 17, 2017), https://www.forbes.com/sites/forbesrealestatecouncil/2017/10/17/millennials-are-driving-up-the-single-family-rental-market-heres-why/#15fefff4d2a8.

147. Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. (Apr. 25, 2016), http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/.

148. *Id*.

149. *Id*.

150. Lawrence R. McDonough, *Then and Now: The Uniform Residential Landlord and Tenant Act and the Revised Residential Landlord and Tenant Act-Still Bold and Relevant?*, 35 U. ARK. LITTLE ROCK L. REV. 975, 978 (2013).

151. *See supra* notes 1, 2, 6, 13, 31, 35, 48, 51, 57, 59, 87, 131, 132, 133, 137, & 139.

152. *Id.*

support from Arkansas landlords[153] and broad consensus on the need for tenant protections,[154] Arkansas stands alone as the only state without any protections for tenants but strong protections for landlords.

B. Economic Implications of Implementing an Implied Warranty of Habitability in Arkansas

On a small scale, becoming a landlord may occur by circumstance, as with an inheritance,[155] marriage,[156] or divorce,[157] or it can occur intentionally through purchasing an investment property or buying a new property and retaining the previous property to lease.[158] On a larger scale, an investor or group of investors may purchase a number of single or multifamily housing units and make a business out of providing housing to lessees.[159] Absentee ownership has been linked to a decrease in property value, increased crime, and substantial investment to revitalize historic neighborhoods.[160] In all cases, the leased properties are investments to the owner or owners and homes to the lessees. Because of the costs associated with not protecting their investments, landlords should welcome minimum standards as guides for long-term value increases of their properties.[161] Furthermore, because landlords can only recover monthly expenses or see profit returns when properties are leased and generating revenue, occupancy rates are of critical importance.[162] Because of the costs associated with decreased occupancy rates, it is in landlords' best interests to maximize occupancy rates over the

153. LANDLORDS ASS'N OF ARK., LEGIS. COMMITTEE, http://www.arkansaslandlords.org/legislative-committee (last visited Dec. 29, 2018) ("[T]he LAA is an organization of roughly 1,000 'mom and pop' landlords, with memberships in chapters across the state [, which] support[s] . . . a Habitability Bill with minimum standard requirements that is fair to both landlords and tenants.").

154. *The Commission*, *supra* note 2.

155. *See, e.g.,* ARK. CODE ANN. § 28-9-201, et seq. (West, Westlaw through 2018).

156. *See, e.g.,* ARK. CODE ANN. § 28-11-101, et seq. (West, Westlaw through 2018).

157. *See, e.g.*, ARK. CODE ANN. § 9-12-315. (West, Westlaw through 2018).

158. Laura Agadoni, *7 Things to Know Before Becoming a Landlord*, TRULIA: BLOG (Jul. 19, 2017, 4:00 PM), https://www.trulia.com/blog/think-can-landlord-7-things-consider/.

159. Marty Cook, *Oklahoma Investor Buys Mountain View Apartments in Fayetteville (NWA Real Deals)*, ARK. BUS. (Oct. 26, 2015, 12:00 AM), http://www.arkansasbusiness.com/article/107781/oklahoma-investor-buys-mountain-view-apartments-in-fayetteville.

160. *Community Development Group Transforms Arkansas Town*, FED. RES. BANK OF ST. LOUIS (2000), https://www.stlouisfed.org/publications/bridges/fall-2000/community-development -group-transforms-arkansas-town.

161. Luke Jones, *Sin City: How Apartment Managers Can Avoid Crime, Despair*, ARK. BUS. (Nov. 12, 2012, 12:00 AM), http://www.arkansasbusiness.com/article/88596/apartment-managers-face-crime-disrepair.

162. *2016 NAA Survey of Operating Expense Income & Expenses in Rental Apartment Communities,* NAT'L APARTMENT ASS'N (Aug. 2016), https://www.naahq.org/news-publications/units/august-2016/article/2016-naa-survey-operating-income-expenses-rental.

long term.[163] In the short term, occupancy results in reliable income, which can be used to cover expenses, including maintenance. Maintaining properties helps to retain and increase property value, which delivers an even greater return on investment for the landlord through refinancing or selling the property.

1. Dispelling the Myth of Increased Rental Prices

"Lemon tenants," or those who commit waste on leased properties, are major sources of risk for landlords.[164] It is these tenants and landlords' corresponding desire to protect their investments that have brought about protections in the law for landlords to mitigate potential damages caused by tenants.[165] In addition to this risk to landlords, limited evidence supports the notion that enforcing a quality standard in housing, under specific circumstances, could increase the cost to landlords, which would be passed on to tenants.[166] However, a quantitative study of existing literature on the subject of the effects of housing codes on housing costs found that while a positive correlation exists, it is limited to less than 5% and the majority of cost increases come from building codes and zoning requirements.[167] Considering Arkansas's median gross rent price of $689 in 2016,[168] even the maximum 5% increase would only increase rent by less than $35.[169]

2. Economic Benefits to Landlords

Short term costs for not repairing minor problems such as water intrusion and electrical malfunctions can be catastrophic to landlords, averaging $4,700 nationwide for water damage repair and mold remediation and $10,500 to repair smoke and fire damage after a small electrical fire.[170]

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163. *Id*.

164. John D. Benjamin, Kenneth M. Lusht, & James D. Shilling, *What Do Rental Contracts Reveal About Adverse Selection and Moral Hazard in Rental Housing Markets?* 26 REAL EST. ECON. 309, 309 (1998).

165. *See* ARK. CODE ANN. § 18-17-110 (West, Westlaw through 2018).

166. Corbett A. Grainger, *The Distributional Effects of Pollution Regulations: Do Renters Fully Pay for Cleaner Air?* 96 J. PUB. ECON. 840, 840 (2012).

167. David Listokin & David Hattis, *Building Codes and Housing*, 8 CITYSCAPE 1, 21 (2005), https://www.huduser.gov/periodicals/cityscpe/vol8num1/ch2.pdf.

168. *Quick Facts: Arkansas*, *supra* note 128.

169. 689 * (.05) = 34.45.

170. *How Much Does it Cost to Repair & Cleanup Water Damage?*, HOME ADVISOR (2007), https://www.homeadvisor.com/cost/disaster-recovery/repair-water-damage/; *How Much Does it Cost to Remove Mold and Toxic Materials?*, HOME ADVISOR (2017), https://www.homeadvisor.com/cost/environmental-safety/remove-mold-and-toxic-materials/; *How Much Does it Cost to Repair Fire & Smoke Damage?*, HOME ADVISOR (2017), https://www.homeadvisor.com/cost/disaster-recovery/repair-fire-and-smoke-damage/.

However, the costs of substantively correcting small problems immediately can prevent those drastic expenses in the long term and even increase the value of the property, preventing as much as a 10% reduction in value on appraisal.[171] A study jointly conducted by the University of Connecticut School of Business and Syracuse University's Department of Economics suggests "maintenance adds roughly 1% per year to the value of the home."[172] Investments in improvements, such as kitchen, bath, and infrastructure upgrades, can more than offset the cost of investment in these areas by increasing the resale value of the property.[173] The value return is often immediate.[174] However, rental property investment returns are most commonly realized in the long-term.[175] Therefore, it is in the inherent interest of landlords to ensure rental properties have no defects that could interrupt or deter occupancy rates. If all landlords were subject to the same minimum standards, true market competition would exist between them and promote a positive correlation between property desirability and occupancy.

3. Economic Benefits to Tenants

Tenants would also benefit from this structure through reduced expenditures on repairs undertaken on their own behalf, some of which may not meet landlord expectations and diminish property value. Tenants would benefit from fewer interruptions to their lives, including health related issues and missed work.[176] Decreased productivity increases employee turnover, which burdens Arkansas businesses by imposing higher training and opportunity costs.[177] Simply put, time and money spent on medical treatment for preventable illnesses associated with poorly maintained housing are time and money taken away from the Arkansas economy.[178] These expenses

171. John Riha, *How Much Does Regular Maintenance Add to Your Home?*, NAT'L ASS'N REALTORS: HOUSE LOGIC (2017), https://www.houselogic.com/organize-maintain/home-maintenance-tips/value-home-maintenance/.

172. John P. Harding, Stuart S. Rosenthal, & C. F. Sirmans, *Depreciation of Housing, Capital, Maintenance, and House Price Inflation: Estimates from a Repeat Sales Model* (June 30, 2006), at 4, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.571.5618&rep=rep1&type=pdf.

173. Judy Dutton, *The Renovations That Will Pay Off the Most for Your Home in 2017*, REALTOR.COM (Jan. 11, 2017), https://www.realtor.com/news/trends/best-and-worst-renovations -to-make-in-2017/.

174. *Id*.

175. John Larson, *Top Reasons Why Real Estate Investing is so Popular*, FORBES (Oct. 30, 2017), https://www.forbes.com/sites/forbesrealestatecouncil/2017/10/30/top-reasons-why-real-estate-investing-is-so-popular/#21cfcaa17c53.

176. *See* Dube et al., *supra* note 9, at 2.

177. *Id.* at 2.

178. *Id.*; Jacobs et al., *supra* note 8, at 603.

contribute to the need for expansion in healthcare subsidization and decreased productivity for businesses.

4. Benefits to the Arkansas Economy

These economic factors combine to the detriment of Arkansas and its communities. Businesses currently in Arkansas may find their growth restrained[179] and those interested in relocating might never consider it as an option because of its treatment of its residents.[180] Issues such as the absence of implied warranty of habitability contribute to the negative stigma Arkansas has long fought to overcome[181] and add doubt in the minds of companies who might otherwise plant seeds of investment in its fertile ground.[182]

Economics research by the National Bureau of Economic Research has shown that improved "health has a positive and statistically significant effect on economic growth."[183] The research suggests that improving a person's life expectancy by one year contributes to a 4% increase in output.[184] This means a mere one-year increase in the life expectancy of the one million Arkansans who lease their residences could unlock $1.65 billion.[185] If the study's results carry beyond the initial year, the compounding impact on Arkansas's economy could be enormous.

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179. Jim Carlton, *Housing Crunch Threatens Reno's Tech Boom*, FOX BUS. (Apr. 20, 2017), http://www.foxbusiness.com/features/2017/04/20/housing-crunch-threatens-renos-tech-boom.html (The article points to a lack of adequate housing as a restraint on growth potential, but the principle that disruption in housing prevents worker availability and consequently prevents smooth business operation and growth holds true in both contexts.).

180. Dan Schulman, *PayPal Withdraws Plan for Charlotte Expansion*, PAYPAL (Apr. 5, 2016), https://www.paypal.com/stories/us/paypal-withdraws-plan-for-charlotte-expansion.

181. C. Fred Williams, *Arkansas's Image*, ENCYCLOPEDIA ARK. HIST. & CULTURE (May 5, 2017), http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=1.

182. Nathan Layne, *Wal-Mart Support of Gay Rights Turns on Business*, REUTERS (Apr. 2, 2015, 6:04 AM), https://www.reuters.com/article/us-walmart-arkansas-analysis/wal-mart-support-of-gay-rights-turns-on-business-idUSKBN0MT13E20150402.

183. David E. Bloom, David Canning, & Jaypee Sevilla, *The Effect of Health on Economic Growth: Theory and Evidence*, NAT'L BUREAU ECON. RES. 5 (Nat'l Bureau of Econ. Research, Working Paper No. 8587, 2001), *available at* http://www.nber.org/papers/w8587.pdf.

184. *Id*.

185. *Regional Facts: Arkansas*, U.S. BUREAU ECON. ANALYSIS (Sept. 26, 2017), https://bea.gov/regional/bearfacts/pdf.cfm?fips=05000&areatype=STATE&geotype=3 (The U.S. Department of Commerce's Bureau of Economic Analysis reported Arkansas's gross domestic product for 2016 as $121.4 billion. Because renters comprise approximately 34% of Arkansas's population, increasing their productivity by 4% would contribute to an overall gross domestic product increase of $1.65 billion.).

Considering corporate reactions[186] to more divisive social issues, such as transgender bathrooms and laws denying discrimination protection on the basis of sexual orientation,[187] the economic downsides in the form of lost opportunity costs[188] and businesses overlooking Arkansas are potentially staggering.[189] For example, the opportunity cost North Carolina lost during its highly publicized transgender bathroom debate[190] included an initial investment of between $77 million and $201 million, $42 million annually in salaries, and 650 jobs.[191] Although such specific examples are not readily available for Arkansas, its tourism industry alone attracts $7.2 billion annually.[192] Damage to the Arkansas tourism industry and its associated jobs may serve as an indicator of other businesses opting to look elsewhere when making their decision to open a new location or headquarters.[193] Those

186. *See* Schulman, *supra* note 180.

187. *See* Jonathan M. Katz & Erik Eckholm, *Anti-Gay Laws Bring Backlash in Mississippi and North Carolina*, N.Y TIMES (Apr. 5, 2016), https://www.nytimes.com/2016/04/06/us/gay-rights-mississippi-north-carolina.html; Garrett Epps, *Public Accommodations and Private Discrimination*, ATLANTIC (Apr. 14, 2015), https://www.theatlantic.com/politics/archive/2015/04/public-accommodations-and-private-discrimination/390435/.

188. Tasneem Nashrulla, *Here's Everyone Who Refuses to Work in North Carolina and Mississippi Over Anti-LGBT Laws*, BUZZFEED NEWS (May 20, 2016, 9:37 AM), https://www.buzzfeed.com/tasneemnashrulla/here-are-the-people-and-companies-that-refuse-to-work-in-nor?utm_term=.rfBWn6PNPD#.nf8G3E7O7o.

189. U.S. CONGRESS JOINT ECON. COMMITTEE DEMOCRATIC STAFF, THE ECONOMIC CONSEQUENCES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (Nov. 2013), https://www.jec.senate.gov/public/_cache/files/8e0d743a-ec6b-4474-88e7-7e59e3938cd9/enda---final-11.5.13.pdf.

190. *North Carolina Transgender 'Bathroom Bill' Flushed by Lawmakers*, FOX NEWS (Mar. 30, 2017), https://www.foxnews.com/politics/north-carolina-transgender-bathroom-bill-flushed-by-lawmakers.

191. Will Doran, *North Carolina Economic Official Says HB2 Has Not Harmed the State Economy*, POLITIFACT (Oct. 28, 2016, 8:40 AM), http://www.politifact.com/north-carolina/statements/2016/oct/28/john-skvarla/top-north-carolina-economic-official-says-hb2-has-/.

192. Wesley Brown, *Arkansas Tourism Industry Hopes to Build Off Two-Year 'Hot Streak,' May Face Some Economic Headwinds in 2017*, TALK BUS. & POL. (Jan. 23, 2017, 11:37 AM), https://talkbusiness.net/2017/01/arkansas-tourism-industry-hopes-to-build-off-two-year-hot-streak-may-face-some-economic-headwinds-in-2017/.

193. Jill Disis, *The Controversy That Could Hold Back Some Amazon HQ2 Contenders*, CNN MONEY (Nov. 7, 2017, 1:03 PM), http://money. cnn.com/2017 /11/07/technology/business/amazon-hq2-state-laws/index.html; Rick Morgan, *Atlanta bid for Amazon HQ2 gets new political problem: Georgia Adoption Bill*, CNBC (Feb. 23, 2018, 5:22 PM), https://www.cnbc.com/2018/02/23/atlanta-bid-for-amazon-hq2-didnt-need-georgia-anti-lgbt-adoption-bill.html.

social concerns may be mere indicators of a looming change in corporate thinking from short-term gains to long-term impact.[194]

IV. CONCLUSION

Despite Arkansas's entrepreneurial spirit that surely carries forward from its origins on America's frontier, the State carries reputational baggage that weighs heavily in the minds of companies that might otherwise consider Arkansas in their expansion plans.[195] This baggage, one form of which is the unwillingness to adopt even the most basic of protections for renters, weighs on the minds of employers who increasingly consider employee happiness as part of their business calculus. Arkansas will likely never even cross these employers' minds as they look to better reputations and more inviting places from which to conduct their business.

This is an easy fix. Arkansas should follow the longstanding trend among every other state by enacting statutes that make basic moral, religious, and economic sense by ending the archaic tradition of forcing tenants to improve and maintain landlords' property investments. In the near-term, Arkansas courts should adopt the approach taken by the *Alexander* court and uphold existing laws, regulations, and ordinances. Arkansas appellate courts should recognize this approach and apply it statewide as a private right of action under contract theory.

Enforcing housing codes and enabling private rights of action for tenants encourages landlords to maintain their investments for their own economic gain and for the betterment of tenants. Landlords will suffer from fewer interruptions to their leases, enjoy increased and sustained occupancy rates, and enjoy increases in property values as the overall market increases

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194. *BlackRock CEO to Companies: Pay Attention to Societal Impact*, FOX BUS. (Jan. 17, 2018), http://www.foxbusiness.com/features/blackrock-ceo-to-companies-pay-attention-to-societal-impact.

195. *See*, *e.g.*, Disis, *supra* note 193; Doran, *supra* note 191; Hayley Miller, *HRC Announces 60 Companies Launch Business Coalition for the Equality Act*, HUM. RTS. CAMPAIGN (Mar. 10, 2016), https://www.hrc.org/press/hrc-announces-60-companies-launch-business-coalition-for-the-equality-act.

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in value. Beyond the economic benefit to landlords, the state and its businesses will benefit from more stable employees, who will suffer from fewer distractions of threats to their health and safety in their rented residences. Balancing the interests of all parties will unlock untapped potential in the Arkansas residential lease market and make Arkansas a more appealing choice for businesses interested in expanding operations.

Wesley N. Manus[*]

EMPLOYMENT LAW—THE SPLIT OVER THE SHIFT: THE BURDEN OF PROVING CAUSATION IN CLAIMS FOR BREACH OF FIDUCIARY DUTY UNDER ERISA

I. INTRODUCTION

Congress enacted The Employee Retirement Income Security Act of 1974 (ERISA) to govern the administration of employee benefit plans[1] and to protect plan participants and their beneficiaries.[2] Prior to ERISA's enactment, the law governing employee benefit plans did not adequately protect the interests of the benefitting employees.[3] ERISA addresses this shortcoming by imposing specific duties on the fiduciaries[4] responsible for administering plans, and lists certain acts that constitute a breach of those duties.[5] ERISA also provides beneficiaries with a remedy in the event such a breach occurs.[6]

However, beneficiary protection under ERISA is not absolute. ERISA, although enacted to protect program participants, was also created to promote public interest by encouraging the formation of employee benefit plans.[7] Congress determined that if ERISA placed burdens on employers that were so great as to increase "administrative costs, or litigation expenses, [it would] unduly discourage employers from offering [ERISA] plans in the first place."[8]

A fiduciary's liability for breaching a duty to a beneficiary under ERISA is governed by Section 409 of ERISA ("§ 1109").[9] This statute provides that

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1. Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (finding that "Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'").

2. 29 U.S.C. § 1001 (2016); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

3. *See infra* text accompanying notes 20–26; Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (finding that the common law of trusts was inadequate to protect ERISA beneficiaries).

4. 29 U.S.C. § 1002(21)(A) (2016) (defining fiduciary as one who (1) exercises any discretionary authority or control over a plan or its assets, (2) renders investment advice for a fee with respect to any asset of the plan, or has any authority or responsibility to do so, or (3) "has any discretionary authority or discretionary responsibility in the administration of such plan.").

5. 29 U.S.C. § 1104 (2016) (listing fiduciary duties).

6. 29 U.S.C. § 1109 (2016).

7. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("In sum, the detailed provisions of § 502(a) [of ERISA at 29 U.S.C.S. § 1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.").

8. Conkright v. Frommert, 559 U.S. 506, 517 (2010).

9. 29 U.S.C. § 1109 (2016).

when the fiduciary breaches a duty imposed on him by ERISA, he will be required to reimburse the employee benefit plan for any losses his breach of fiduciary duty caused the plan to incur.[10] The plain language of this statute limits liability to instances where (1) the allegedly breaching party is a fiduciary within the definition of ERISA, (2) this fiduciary breaches a duty ERISA imposes on him, (3) the benefit plan incurs losses, and (4) the fiduciary's breach caused those losses to the plan.[11]

Courts disagree on the number of barriers ERISA imposes on beneficiaries bringing claims for breach of fiduciary duty.[12] After a plan beneficiary demonstrates the first two elements, does the plaintiff have to prove that the breach was the cause of the plan's loss, or does a presumption exist that shifts the burden to the plan fiduciary to disprove any such causation?[13]

This note addresses the circuit split introduced above, and argues that after an employee benefit plan participant has proven (1) a plan fiduciary breached a fiduciary duty established by ERISA and (2) the plan has incurred losses, it is inappropriate for a court to assume there is a causal connection between the breach and the incurrence of plan losses that would shift the burden to the fiduciary to disprove any such connection.

Part II of this note provides background information on the development of ERISA and the duties imposed on ERISA fiduciaries that led to this current two-way circuit split.[14] Part III summarizes the circuit split and discusses the leading case from each side of the split.[15] Part IV argues (1) neither the plain language nor legislative intent of ERISA indicates the burden of proving causation should shift to the defendant, (2) although the common law of trusts is instructive in ERISA interpretation, the fundamental differences between trust law and ERISA weigh against its application to proving causation under § 1109(a), and (3) public policy favors leaving the burden of proof with the plaintiff in an action against an ERISA fiduciary for breach of duty.[16]

II. BACKGROUND

ERISA is a "comprehensive and reticulated" statutory scheme that regulates private employee benefit plans and is the product of a decade of

10. 29 U.S.C. § 1109(a).
11. *Id.*; Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017).
12. *Pioneer Ctrs. Holding*, 858 F.3d. at 1336.
13. *Id.*
14. *See infra* Part II.
15. *See infra* Part III.
16. *See infra* Part IV.

study by Congress.[17] Prior to ERISA's enactment, the Internal Revenue Service (IRS) regulated employee benefit plans, and the Department of Labor played no role.[18] The IRS's primary role in regulating employee benefit plans was to ensure plans produced revenue, and to ensure those taking advantage of their use did not use them to evade tax obligations.[19] In a series of legislative enactments, the responsibility for regulating employee benefit plans transferred from the IRS to the Department of Labor, and plan participants were slowly given more protection.[20] However, even after these bills passed, the protection was insufficient; in the event of fiduciary misconduct, plan participants were left to rely on the equitable remedies of the common law of trusts.[21] For example, the Welfare and Pension Plans Disclosure Act required fiduciaries to disclose a plan's contents to the government and provide plan information to plan participants upon request.[22] These requirements lacked standards to govern fiduciary behavior and essentially left it up to the participant to police his own plan without any framework by which to hold fiduciaries accountable.[23] Congress then passed the Labor-Management Relations Act, which provided guidelines for the establishment and operation of pension funds administered jointly by an employer and a union.[24] However, this Act was not intended to establish, nor did it provide, standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.[25]

In response to these legislative inadequacies, Congress enacted ERISA.[26] From 1940 to 1973, the number of employees participating in private pension

17. Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993); 29 U.S.C. § 1001 (2013) (referring to congressional findings that the growth in size, scope, and numbers of employee benefit plans in recent years had been rapid and substantial, and thus the need for a comprehensive regulatory scheme was greater than ever).

18. *History of EBSA and ERISA*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa (last visited Oct. 20, 2018) ("The Revenue Acts of 1921 and 1926 allowed employers to deduct pension contributions from corporate income, and allowed for the income of the pension fund's portfolio to accumulate tax free. The participant in the plan realized no income until monies were distributed to the participant, provided the plan was tax qualified. To qualify for such favorable tax treatment, the plans had to meet certain minimum employee coverage and employer contribution requirements. The Revenue Act of 1942 provided stricter participation requirements and, for the first time, disclosure requirements.").

19. S. REP. NO. 93-127, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841.

20. *Id.* at 4840–42.

21. *Id.* at 4840–41.

22. *Id.*

23. *Id.*

24. *Id.*

25. S. REP. NO. 93-127, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 4840–41.

26. 29 U.S.C. § 1001 (2016); H.R. REP. No. 93-533, at 3–5, 11–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

plans grew from four million to over thirty million.[27] As a result of this growth, Congress determined that the enactment of ERISA as a uniform regulatory scheme was necessary to protect the well-being and security of these employees and their dependents, and also to protect the stability of employment and development of industrial relations.[28] Specifically, Congress sought to protect the following four plan interests:[29] (1) vesting,[30] (2) funding,[31] (3) reinsurance,[32] and (4) portability.[33]

Congress sought to bring efficiency and predictability to employee benefit plans, and, despite the immense level of protection ERISA gives to plan participants, Congress did not completely ignore the interests of the employers administering these benefit plans.[34] "ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan" and encouraging the creation of plans.[35] Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."[36] ERISA encourages the creation of employee benefit plans by assuring employers a "predictable set of liabilities under uniform standards" of conduct and a uniform system of remedies for beneficiaries when a violation of those standards occurs.[37]

In addition to reinforcing previously enacted plan disclosure requirements, ERISA sets out the standard of conduct a plan fiduciary must abide by in his administration of the benefit plan.[38] Violation of any of the duties imposed by ERISA may result in civil liability if the plan beneficiary brings suit against the fiduciary for perceived misconduct.[39]

Once a court determines that, under ERISA, a given defendant qualifies as a fiduciary[40] and is thus subject to liability, the court must decide whether he has breached a duty imposed on him.[41] These duties are derived from the

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27. H.R. REP. NO. 93-533, at 3–5, 11–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.
28. 29 U.S.C. § 1001; Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004).
29. S. REP. NO. 93-127, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841.
30. *Id*. (providing assurance that benefits would be available upon retirement).
31. *Id.* (correcting the lack of requirement prior to ERISA to fund past service liabilities).
32. *Id.* (providing an insurance program to protect plan assets from the sponsoring employer terminating the plan or going out of business).
33. *Id.* (giving the employee the ability to bring his benefit plan with him when switching jobs).
34. *See* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2470 (2014).
35. *Id.*
36. *Id.*
37. *Id.*
38. S. REP. NO. 93-127, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841.
39. 29 U.S.C. § 1109(a) (2016).
40. 29 U.S.C. § 1002(21)(A) (2016).
41. 29 U.S.C. § 1104(a)(1)(B) (2016).

common law of trusts.[42] ERISA requires that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan participants and with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims."[43] Additionally, a fiduciary must: (1) discharge his duties for the exclusive purpose of "providing benefits and paying plan expenses,"[44] (2) diversify the plan's investments,[45] (3) follow the terms of plan documents to the extent the plan terms are consistent with ERISA,[46] (4) avoid conflicts of interest,[47] and (5) not engage in those prohibited transactions listed in § 1106.[48] "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed [on him by ERISA], shall be personally liable" to the plan for any losses that result from such a breach.[49]

III. CIRCUIT SPLIT

A two-way circuit split currently exists regarding whether the burden of proving causation should or should not shift to the defendant fiduciary after the plaintiff shows that the benefit plan incurred a loss and the fiduciary engaged in wrongful conduct.[50] The Fourth, Fifth, and Eighth Circuits favor shifting the burden,[51] while the Second, Sixth, Ninth, Tenth, and Eleventh Circuits have chosen to leave the burden with the plaintiff.[52]

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42. Cent. States Pension Fund v. Centr. Transp., Inc., 472 U.S. 559, 570 (1985).

43. 29 U.S.C. § 1104(a)(1)(B).

44. *Retirement Plans, Benefits & Savings, Fiduciary Responsibilities*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/fiduciaryresp (last visited Oct. 20, 2018).

45. 29 U.S.C. § 1104(a)(1)(C).

46. 29 U.S.C. § 1104(a)(1)(D).

47. *Retirement Plans, supra* note 44.

48. 29 U.S.C. § 1106 (2016) (enumerating certain prohibited transactions, such as self-dealing or engaging in other transactions that may implicate a conflict of interest).

49. 29 U.S.C. §1109(a) (2016).

50. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1333 (10th Cir. 2017).

51. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (4th Cir. 2014); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992).

52. *Pioneer Ctrs. Holding*, 858 F.3d at 1337; Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 105 (2d Cir. 1998) (Jacobs, J. and Meskill, J., concurring); *see also* Wright v. Ore. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004); Kuper v. Iovenko, 66 F.3d 1447, 1459–60 (6th Cir. 1995) *abrogated on other grounds by* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343–44 (11th Cir. 1992).

Of the courts that shift the burden, the only court to acknowledge the circuit split itself and make an argument in favor of the shift was the Fourth Circuit in 2014 in *Tatum v. RJR Pension Investment Committee*.[53] In Tatum, an employee who participated in his employer's benefit plan brought a suit for breach of fiduciary duty alleging the employer liquidated two of the plan's funds on an arbitrary timeline without conducting a thorough investigation to first determine if such a liquidation was a wise investment decision.[54] Once the employee proved both that the benefit plan incurred losses and that his employer breached his fiduciary duty, the court shifted the burden to the employer to prove his breach did not cause the loss to the benefit plan.[55] The court reasoned that, although causation is a required element under § 1109(a), and under the default rule the burden of proof lies with the plaintiff,[56] the exception to the default rule found in the common law of trusts[57] should be applied because it is consistent with ERISA's goal to protect plan participants.[58] Additionally, the court believed that keeping the burden with the plaintiff to prove a fiduciary's breach caused a plan's loss would create a significant barrier for those plan beneficiaries seeking relief.[59]

Tatum's holding is consistent with several other circuit decisions. The Fifth Circuit in *McDonald v. Provident Indemnity Life Insurance Company* held,

> To establish a claimed breach of fiduciary duty, an ERISA plaintiff must prove a breach of a fiduciary duty and a prima facie case of loss to the plan. "Once the plaintiff has satisfied these burdens, 'the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty.'"[60]

Prior to the Fifth Circuit's decision in *McDonald*, the Eighth Circuit in *Martin v. Feilen* held,

> "[O]nce the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan . . . the burden of persuasion shifts to

53. 761 F.3d 346 (4th Cir. 2014).
54. *Id.* at 350.
55. *Id.* at 363.
56. *Id.* at 361.
57. *Id.* at 362; RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f (AM. LAW INST. 2012) (providing an exception to the default rule that the plaintiff bears the burden of proving his claim by stating that "in matters of causation . . . when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach.").
58. *Tatum*, 761 F.3d at 363.
59. *Id.*
60. 60 F.3d 234, 237 (5th Cir. 1995).

> the fiduciary to prove that the loss was not caused by . . . the breach of duty."[61]

However, most federal circuit courts evaluating the issue agree the burden of proving that a fiduciary's breach caused losses to a plan lies with the plaintiff, and no exceptions apply.[62] The Tenth Circuit in *Pioneer Centres Holding Co. v. Alerus Financial* held, "[T]he burden falls squarely on the plaintiff asserting a breach of fiduciary duty claim under § 1109(a) of ERISA to prove losses to the plan 'resulting from' the alleged breach of fiduciary duty."[63]

In the *Pioneer* case, Pioneer Centres Holding Company ("Pioneer") hired Alerus Financial ("Alerus") as an independent "transactional trustee" to oversee the creation of an Employee Stock Ownership Program ("ESOP"), a type of employee benefit plan governed by ERISA.[64] Alerus's job was to determine the terms on which the ESOP would purchase shares of stock from one of the present owners of Pioneer.[65] Pioneer owned multiple car dealerships, one of which was a Land Rover dealership.[66] Pioneer's agreement with Land Rover provided that Pioneer could not change its ownership without first receiving Land Rover's consent and, in order to move forward with selling his stock to the ESOP, the present owner of Pioneer had to receive this consent.[67] Even after it became apparent this consent would never be given, Pioneer attempted to move forward and requested Alerus's signature on certain transaction documents.[68] Alerus, not approving of the terms in the documents, refused to sign them and advised Pioneer to abandon the proposed deal.[69]

Much later, after the deal had been abandoned, the participants of the Pioneer ESOP (the "Plan Participants") brought suit against Alerus, on behalf of the benefit plan, because the stock purchase had never gone through.[70] These Plan Participants alleged Alerus's failure to sign the transaction documents caused the deal to fail. Alerus countered that because Land Rover

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61. Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992).

62. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1337 (10th Cir. 2017); Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 105 (2d Cir. 1998) (Jacobs, J. and Meskill, J., concurring); *see also* Wright v. Ore. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004); Kuper v. Iovenko, 66 F.3d 1447, 1459–60 (6th Cir. 1995) *abrogated on other grounds by* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

63. *Pioneer Ctrs. Holding*, 858 F.3d at 1337.

64. *Id.* at 1327.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1330.

69. *Pioneer Ctrs. Holding.*, 858 F.3d at 1330.

70. *Id.* at 1331.

was never going to consent to the deal anyway, Alerus's failure did not cause the loss to the plan.[71] The court held that the Plan Participants, as the plaintiffs, had to prove Alerus's failure to sign the transaction documents caused the plan's losses, despite the Plan Participants' argument that the court should adopt the common law of trusts' burden shifting approach.[72]

In coming to the conclusion that the burden of proving causation should not shift to Alerus, the court relied primarily on the statutory language of § 1109(a).[73] The court held that when the plain language of the statute expressly limits the fiduciary's liability to losses that "result from" a breach, there is little reason to require the plaintiff to prove only that the loss was "related to" the fiduciary's breach.[74] As a result, the court saw "no reason to depart from the 'ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'"[75] In response to the argument that the common law of trusts should apply, the court briefly reasoned, "[The] law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties."[76]

IV. ARGUMENT

Courts that follow a burden shifting approach to claims for breach of fiduciary duty justify such an approach based on (1) its use in the common law of trusts, (2) fairness and public policy, and (3) the structure and purpose of ERISA.[77] The following analysis addresses each of these rationales for shifting the burden of proof and argues (a) the plain language of the statute does not support shifting the burden;[78] (b) ERISA does not have to be interpreted to provide as much protection as the common law of trusts provides;[79] (c) the common law of trusts should not apply to this situation;[80] and (d) public policy—as well as the purpose of ERISA—would be better served by leaving the burden of proving causation with the plaintiff.[81]

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71. *Id.*
72. *Id.* at 1337.
73. *Id.* at 1334.
74. *Id.*
75. *Pioneer Ctrs. Holding Co.*, 858 F.3d at 1334 (quoting Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005)).
76. *Id.* (citing Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)).
77. Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (4th Cir. 2014); New York State Teamsters Council Health & Hosp. Fund v. Estate of DePerno, 18 F.3d 179, 182 (2d Cir. 1994); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (citing trust law as support for its decision to shift the burden to the fiduciary).
78. *See infra* Subsection A.
79. *See infra* Subsection B(1).
80. *See Infra* Subsection B(2).
81. *See infra* Subsection C.

A. The Plain Language of 29 U.S.C. § 1109(a) Makes a Causal Connection Between Loss and Breach of Duty a Necessary Element of a Plaintiff's Claim

The plain language of 29 U.S.C. § 1109(a) does not support shifting the burden of proving causation to the fiduciary. The first step in determining whether Congress intended the beneficiary or the fiduciary to carry the burden of proving causation in claims under ERISA for breach of fiduciary duty is to look at the plain language of the statute.[82] A fiduciary's liability for breaching statutory duties as laid out in 29 U.S.C. § 1109(a) provides, "[A] fiduciary . . . who breaches any . . . duties imposed upon fiduciaries . . . shall be personally liable . . . [for] any losses to the plan resulting from each such breach."[83] The plain language dictates that the fiduciary is only liable for a plan's losses if those losses were caused by the fiduciary's breach of duty. Courts on both sides of the circuit split have agreed that as a result of this language, "there must be a showing of some causal link between the alleged breach and the loss [the] plaintiff seeks to recover" before liability will be imposed on the fiduciary.[84]

While both sides of the circuit split recognize causation as a necessary element of a claim for breach of fiduciary duty, courts disagree over which party bears the burden of proving or disproving that element.[85] When a statute is silent on burden allocation, as it is here, the default rule is the plaintiff bears the burden of proving his claim because he is "the one who wishes to change the current state of affairs."[86] In determining which party should bear the

82. Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute.").

83. 29 U.S.C. § 1109(a) (2016) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.").

84. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 361 (4th Cir. 2014); Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 217 (4th Cir. 2011) (finding a breach of fiduciary duty "does not automatically equate to causation of loss and therefore liability," and consequently, a "fiduciary can only be held liable upon a finding that the breach actually caused a loss to the plan."); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343–44 (11th Cir. 1992) ("Section 409 of ERISA establishes that an action exists to recover losses that 'resulted' from the breach of a fiduciary duty; thus, the statute does require that the breach of the fiduciary duty be the proximate cause of the losses claimed.").

85. *See Pioneer Ctrs. Holding*, 858 F.3d at 1334. *But see Tatum*, 761 F.3d at 362 (2014).

86. *Pioneer Ctrs. Holding*, 858 F.3d at 1335 ("This is because the 'burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who

burden of proving causation, the court should follow this default rule and place the burden on the plaintiff. There are exceptions to this default rule, and the burden of proving that one of these exceptions applies falls on the party seeking to benefit from its application.[87] These exceptions include (1) when one of the elements of the claim qualifies as an affirmative defense,[88] (2) when there is a congressional intent to place the burden on the defendant, or (3) when there is an exception rooted in the substantive body of law, such as the one present in the common law of trusts.[89]

In § 1109(a), there is no evidence that "lack of causation" is an affirmative defense that a defendant who has breached his fiduciary duty must prove to avoid liability; causation is an element of the claim, not an affirmative defense.[90] "Whether something constitutes an element, as opposed to an affirmative defense or exception, turns on whether one can omit the exception from the statute without doing violence to the definition of the offense."[91] Here, if one were to remove the requirement that losses to the plan must result from a fiduciary's breach before a plan can recover those losses from a breaching fiduciary, the definition of the "offense" would change

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generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.'"); Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005) ("[W]e have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims."); Gross v. FBL Fin. Servs., 557 U.S. 167, 168 (2009) ("When the statute is silent as to who bears the burden of proving a resulting loss, the 'ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.'"); *Tatum*, 761 F.3d at 362 ("Generally, of course, when a statute is silent, the default rule provides that the burden of proof rests with the plaintiff."); KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 337 (7th ed. 2013).

87. *Pioneer Ctrs. Holding*, 858 F.3d at 1335; *Schaffer*, 546 U.S. at 57 ("There are exceptions to the default rule, such as when 'certain elements of a plaintiff's claim . . . can fairly be characterized as affirmative defenses or exemptions.'"); FTC v. Morton Salt Co., 334 U.S. 37, 44–45 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

88. *Pioneer Ctrs. Holding*, 858 F.3d at 1335; *Schaffer*, 546 U.S. at 57 ("There are exceptions to the default rule, such as when 'certain elements of a plaintiff's claim . . . can fairly be characterized as affirmative defenses or exemptions.'").

89. *Pioneer Ctrs. Holding*, 858 F.3d at 1335; *Schaffer*, 546 U.S. at 57 ("The Supreme Court cautioned, however, that 'while the normal default rule does not solve all cases, it certainly solves most of them . . . [a]bsent some reason to believe that Congress intended otherwise . . . the burden of persuasion lies where it usually falls, upon the party seeking relief.").

90. *Pioneer Ctrs. Holding*, 858 F.3d at 1336 ("To begin, there is nothing in the language of § 1109(a) or in its legislative history that indicates a Congressional intent to shift the burden to the fiduciary to disprove causation. Nor is there anything that suggests Congress intended to make the lack of causation an affirmative defense or an exemption to liability. Whether something constitutes an element, as opposed to an affirmative defense or exception, turns on whether "one can omit the exception from the statute without doing violence to the definition of the offense.").

91. *Id.*, *quoting* United States v. Prentiss, 256 F.3d 971, 979 (10th Cir. 2001).

substantially;[92] it would allow plan participants to recover any loss suffered by a plan from a defendant who has breached his fiduciary duty, regardless of whether that fiduciary's breach actually caused the loss. For example, if the economy dropped into a recession, and this economic downturn caused losses to the plan, these losses would not have been caused by any breach of duty. If that fiduciary later, unrelated to the economic downturn, breached a duty to the plan, he could be held liable for all losses to the plan, even losses that occurred through no fault of his own.

If plaintiffs were not required to prove causation when bringing a claim under § 1109(a), there would be broad sweeping liability that would discourage solvent companies from managing and sponsoring ERISA plans.[93] In light of the plain language of § 1109(a), causation cannot "fairly be characterized as [an] affirmative defense or exemption;" causation is an express element of a claim for breach of fiduciary duty.[94]

Additionally, there is nothing in the statute or its legislative history to indicate a congressional intent to shift the burden to the fiduciary to disprove causation. Congress, having researched employee benefit plans extensively, and having drafted such a "comprehensive and reticulated statute,"[95] could have very easily put a provision into ERISA showing an intent for the burden to shift from the plaintiff to the defendant in an action for breach of fiduciary duty if it had desired to depart from the default rule. Additionally, the "assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme."[96] In light of the plain language of § 1109(a), and the absence of any indication to the contrary, courts should follow the default rule and require the plaintiff in an action for breach of fiduciary duty to prove

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92. *Id.* (finding that the requirement that the losses to the plan have resulted from the breach cannot be omitted from the statute without substantially changing the definition of the claim, thereby doing violence to it).

93. Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 106 (2d Cir. 1998) (Jacobs, J. and Meskill, J., concurring) ("The causation requirement of § 1109(a) acts as a check on this broadly sweeping liability, to ensure that solvent companies remain willing to undertake fiduciary responsibilities with respect to ERISA plans.").

94. *Pioneer Ctrs. Holding*, 858 F.3d at 1337 ("Viewing the plain language, causation cannot "fairly be characterized as [an] affirmative defense or exemption, but is an express element of a claim for breach of fiduciary duty under 29 U.S.C. § 1109(a).").

95. Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) ("ERISA is . . . the product of a decade of congressional study of the Nation's private employee benefit system."); Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980) ("As a predicate for this comprehensive and reticulated statute, Congress made detailed findings.").

96. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146–47 (1985) ("The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly . . . [where] a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

every element of his claim, including the causal connection between the losses the plan incurred and the fiduciary's breach of duty.

B. The Common Law of Trusts' Burden Shifting Framework Should Not Be Applied to Claims for Breach of Fiduciary Duty Under ERISA

The common law of trusts, although providing an exception to the default rule that the plaintiff bears the burden of proving his claims, should not be applied to ERISA interpretation in this instance.[97] Trust law provides a burden shifting approach where once "a beneficiary has succeeded in proving that the trustee has committed a breach of trust and a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach."[98] The fact that ERISA's fiduciary duties were based on a trustee's duties in the common law of trusts provides much of the support for the argument that the burden of proof in the ERISA context should shift to a defendant who has breached his fiduciary duty.[99] The Tenth Circuit in *Pioneer Centres Holding Company*, while providing an excellent argument against burden shifting based on the plain language of § 1109,[100] failed to adequately address the opposition's argument that the common law of trusts should apply.[101]

1. ERISA Does Not Have to Always Provide as Much Protection to Beneficiaries as the Common Law of Trusts Offers

Those in favor of applying trust law's burden shifting framework to ERISA argue that—because one of Congress's reasons for enacting ERISA was to rectify the inadequate protection the common law of trusts provided to employee benefit plans—offering less protection to beneficiaries than common law offered would be contrary to ERISA's purpose.[102] But the areas

97. *Pioneer Ctrs. Holding*, 858 F.3d at 1335 (quoting RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f (AM. LAW INST. 2012) ("Another exception to the default rule unique to the fiduciary duty question arises under the common law of trusts. Trust law advocates a burden-shifting paradigm whereby once 'a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach.'")).

98. *Id.*

99. Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (4th Cir. 2014).

100. *See supra* text accompanying notes 73–75; *Pioneer Ctrs. Holding Co.*, 858 F.3d at 1334.

101. *Pioneer Ctrs. Holding Co.*, 858 F.3d at 1337.

102. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) ("We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.").

in which the common law of trusts was lacking were plan vesting, funding, disclosure, reinsurance, and portability—areas that Congress specifically remedied in ERISA.[103] Additionally, ERISA's enactment created much-needed national uniformity that was not present under the common law of trusts.[104] In these ways, ERISA countered the common law's lack of beneficiary protection; there is no indication that the common law of trusts was thought to be inadequate in any other ways that would require ERISA to always be interpreted to provide at least as much protection as trust law provided.

ERISA actually provides less protection than trust law in some areas.[105] These include disclosure of changes to plan benefits, the ability of ERISA fiduciaries to wear "two hats" as settlor and fiduciary,[106] the ability of ERISA fiduciaries to have financial interests that are adverse to beneficiaries,[107] and the allowance of fiduciaries to serve as officers, employees, agents, and other representatives of a party in interest rather than requiring undivided loyalty as is required in the common law of trusts.[108] Any argument that ERISA should

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103. *Id.*

104. H.R. REP. NO. 93-533, at 3–5, 11–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650 ("Third, even assuming that the law of trusts is applicable, without detailed information about the plan, access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state.").

105. *See* Pegram v. Herdrich, 530 U.S. 211, 225 (2000); H.R. REP. NO. 93-533, at 3–5, 11–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640.

106. Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW. 391, 407 (2001) ("The courts' reliance on the common law of trusts in developing a fiduciary duty to disclose serious consideration of benefit changes is improper. Most importantly, this approach is inconsistent with the statutory text of ERISA. It also has the effect of turning non-fiduciary 'settlor' functions into fiduciary functions and is inconsistent with ERISA's 'written plan document' requirement. In addition, as a public policy matter, increased disclosure obligations may have the effect of deterring employers from offering early retirement windows, which may result in more layoffs.").

107. *Id.*; Bussian v. RJR Nabisco, Inc., 223 F. 3d 286, 294–95 (5th Cir. 2000) ("Under ERISA, for example, a fiduciary may have financial interests adverse to beneficiaries, but under trust law a 'trustee "is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries."'").

108. Melissa Elaine Stover, *Maintaining ERISA's Balance: The Fundamental Business Decision v. The Affirmative Fiduciary Duty to Disclose Proposed Changes*, 58 WASH. & LEE L. REV. 689, 715–17 (2001) ("The fiduciary duty provisions are grounded in trust law; however, to protect the balance established between the competing interests of employers and employees, Congress specifically modified trust law to fit the employee benefit context. Trust law requires a trustee to have an undivided duty of loyalty to its beneficiaries. This type of undivided loyalty does not apply to the employee benefit context because ERISA's prohibited transaction rules allow a fiduciary also to serve as an officer, employee, agent, or other representative of a party in interest.").

always offer as much protection as the common law of trusts is severely misguided.

2. *Trust Law Should Not Apply Here with Respect to the Burden of Proving Causation in a Claim for Breach of Fiduciary Duty*

Although the common law of trusts will not *always* be instructive in ERISA interpretation, there will undoubtedly be times when it is. The "law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties."[109] Where ERISA is silent—as it is in regard to who bears the burden of proving causation—trust law is merely a starting point to ERISA interpretation.[110] Courts will then need to evaluate whether the trust law provision at issue is consistent with either ERISA's (1) purpose or (2) language and structure.[111]

a. Trust law's burden shifting framework is inconsistent with ERISA's overall purpose

Although the primary purpose of ERISA is to protect plan participants,[112] it is not the only purpose, and trust law's burden-shifting framework is inconsistent with ERISA's overall purpose. Congress understood that an employer's participation in the private pension system is voluntary and, in drafting ERISA, balanced the primary goal of protecting employees' interests with the goal of containing pension costs so as not to unduly burden plan creation.[113] As a result, ERISA has two competing purposes: (1) enhanced protection for employee benefits and (2) incentivizing employers to create employee benefit plans in the first place.[114] Although applying a burden

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109. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

110. *Id.*; Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) ("The common law of trusts, which offers a 'starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes.'").

111. *Hughes Aircraft Co.*, 525 U.S. at 447.

112. 29 U.S.C. § 1001 (2016) ("It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries.").

113. H.R. REP. NO. 93-533 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans."); *see* Stover, *supra* note 108 at 715 ("Because of the voluntary nature of the private pension system, Congress drafted ERISA by balancing the primary goal of protecting employees' interests with the subsidiary goal of containing pension costs").

114. *Varity Corp.*, 516 U.S. at 497 ("[C]ourts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.").

shifting framework to § 1109(a) would give more protection to the plan participant, it would essentially create a system wherein a fiduciary would be liable for all plan losses anytime he breaches any fiduciary duty, even if the breach was honest or incidental. Such an imposition of liability could have the effect of deterring plan creation in the first place, leaving ERISA with fewer plan participants to protect.[115] Thus, the common law burden shifting framework is only consistent with one of ERISA's purposes—to protect plan participants. It is not consistent with the balanced purpose of protecting plan participants, while also encouraging the creation of employee benefit plans.

b. Trust law's burden shifting framework is inconsistent with the language and structure of ERISA

The next step in evaluating trust law's consistency with ERISA is to look at whether the burden shifting approach is consistent with the language and structure of ERISA. It is true that in enacting ERISA, Congress intended to codify the principles of trust law with whatever alterations were needed to fit employee benefit plans.[116] However, trust law can only apply to ERISA when its application is consistent with ERISA's statutory language.[117] The statutory language of § 1109(a) under ERISA requires proof of causation before liability will be imposed on the fiduciary,[118] while the trust law principle at issue here attempts to impose liability on the fiduciary first, then asks him to disprove any causal connection between his wrongful conduct and the loss experienced by the plan.[119] The direct collision between these two ideas

115. Reich v. Rowe, 20 F.3d. 25, 32 (1st Cir. 1994) ("Exposure not only to liability for damages but to other forms of liability as well 'would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves.'" (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993))).

116. Free v. Briody, 732 F.2d 1331, 1337–38 (7th Cir. 1984) ("Our reading of section 1109 is based upon the legislative history of ERISA, which demonstrates that Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans.").

117. Bussian v. RJR Nabisco, Inc., 223 F. 3d 286, 294 (5th Cir. 2000) ("Although ERISA's duties gain definition from the law of trusts, the usefulness of trust law to decide cases brought under ERISA is constrained by the statute's provisions.").

118. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 361 (4th Cir. 2014) (quoting Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 217 (4th Cir. 2011) ("A breach of fiduciary duty 'does not automatically equate to causation of loss and therefore liability,' and consequently a 'fiduciary can only be held liable upon a finding that the breach actually caused a loss to the plan.'")); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343 (11th Cir. 1992) ("Section 409 of ERISA establishes that an action exists to recover losses that 'resulted' from the breach of a fiduciary duty; thus, the statute does require that the breach of the fiduciary duty be the proximate cause of the losses claimed.").

119. RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f (AM. LAW INST. 2012).

necessitates a finding that the common law of trusts, in this instance at least, is inconsistent with the language and structure of ERISA.

c. The inherent differences between trusts and employee benefit plans justify leaving the burden of proof as to causation with the beneficiary of the employee benefit plan

In addition to the inconsistencies between the common law of trusts' burden shifting framework and ERISA, there are fundamental differences between trusts and the types of benefit plans contemplated by ERISA. These differences justify less onerous liability for an ERISA fiduciary than that imposed on a common law trustee, and weigh in favor of trust law's inapplicability in the ERISA context.

ERISA, while providing more protection to plan participants than the common law of trusts, also provides more benefits to the fiduciary. Because the creation of benefit plans under ERISA is voluntary, plans will not be created unless they are in the mutual interest of the employer and employee.[120] Among these mutual benefits is the deferment of tax payments,[121] the reduction in the total cost of labor,[122] and cheaper costs associated with health insurance plans.[123] Additionally, the creation of benefit plans gives employers a greater ability to attract and retain employees.[124] These benefits result from a congressional intent to incentivize plan creation.[125] Trusts, on the other hand,

120. Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule,* 55 U. CHI. L. REV. 1105, 1117 (1988) ("Pension and other benefit plans will not be established unless they are in the mutual interest of employers and employees. Plans are strictly voluntary arrangements. Neither ERISA nor the tax code nor the labor laws require the firm to offer any of these plans as a condition of employment. Vast numbers of firms, especially smaller firms in the retailing, service, and agricultural industries, have no plans or have skimpy ones.").

121. *Id.* at 1117–18 ("Among the mutual interests of employers and employees that lead to the creation of plans, two stand out. First, compensation in the form of pension benefits is tax advantaged. Most forms of contribution to pension accounts are tax deferred, meaning that income tax is paid not when the employee earns the money that is contributed to his account, but years later when the money is drawn down for distribution[.]").

122. *Id.* at 1118 ("Tax advantages aside, benefit plans, especially pension plans, may reduce the overall cost of labor. For example, pension eligibility and forfeiture requirements, to the extent that ERISA still permits them, reduce employee turnover and thus enable employers to economize on recruitment and training costs.").

123. *Id.* ("Similarly, group insurance plans, through which a firm buys life, health, accident, or other coverage for its workers and their dependents, offer significant economic advantages over individual policies, primarily by reducing sales, underwriting, and administrative costs. The gains from reduced labor costs as well as from the tax subsidy will be shared in some fashion by employers and employees.").

124. Collins, *supra* note 106, at 408.

125. *Id.*

do not provide these benefits to their trustees.[126] In fact, trust law contemplates a disinterested trustee with no incentive to make decisions in the best interest of trust funds or beneficiaries.[127]

Furthermore, due to the nature of trusts, their settlors and beneficiaries are less likely to monitor them, and thus more burdensome liability is warranted.[128] Trusts sometimes involve a donative intent, or a gift by a settlor who has died or is not around to supervise and monitor the trustee.[129] Many times, the beneficiary of a trust will be one whom the settler is "wary of transferring complete ownership and dominion over property or funds," such as one who is incapacitated, immature, or not financially savvy.[130] In comparison to the mutually beneficial creation of an employee benefit plan, with parties who have the incentive and means by which to monitor the plan,[131] the parties at issue in a trust arrangement, one of which may be unascertainable, are much less likely to be in a position to monitor the actions of the trustee.[132]

C. Public Policy Favors Leaving the Burden of Proof with the Plaintiff

As mentioned previously, one of Congress's goals in enacting ERISA was to balance the interests of the fiduciary with that of the plan participant in order to incentivize the creation and growth of employee benefit plans.[133] Courts should be hesitant to disturb this balance.[134] One of the issues originally holding back the enactment of ERISA was the concern that stringent standards might impede plan growth.[135] Congress believed if liability was too easily imposed on an employer/fiduciary, employers might not even offer employee benefit plans in the first place, and employer participation in

126. *Id.*
127. See Fischel & Langbein, *supra* note 120, at 1131.
128. *Id.* at 1114.
129. *Id.* at 1113.
130. *Id.* at 1113–14.
131. *Id*. at 1119.
132. *Id*. at 1114.
133. Siskind v. Sperry Ret. Program, 47 F.3d 498, 505 (2nd Cir. 1995) ("One of Congress' purposes in adopting ERISA was to further the formation of retirement benefit plans."); *See* H.R. REP. NO. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans.").
134. Reich v. Rowe, 20 F.3d. 25, 32 (1st Cir. 1994) ("We will normally not attempt to adjust the balance between the competing goals of protecting employees' interests and containing pension costs that Congress has struck in the ERISA statute.").
135. H. R. REP. NO. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643 (discussing the fact that plan growth was a major concern in enacting ERISA, and in fact, one of the things holding back its enactment in the first place was the wide concern that these standards might impede growth).

employee benefit plans was essential for the success of the plans and the well-being of American workers.[136] Thus, although some degree of employer liability was necessary to protect plan participants, it was important to determine how easily liability should be imposed without driving sponsoring employers "to the brink of bankruptcy, impos[ing] substantial economic hardship, or discourag[ing] the establishment of plans or the reasonable liberalization of benefits."[137] ERISA "represents an effort to strike an appropriate balance" between the needs and interests of employers in creating and managing employee benefit plans and the needs of employees for the adequate protection of their rights.[138]

V. CONCLUSION

Once the plaintiff in an action for breach of fiduciary duty has proven (1) the fiduciary breached one of the duties enumerated in ERISA and (2) the employee benefit plan has incurred a loss, it is erroneous to create a presumption in favor of the plaintiff that shifts the burden of proving causation to the fiduciary. The ordinary default rule is that the plaintiff bears the burden of proving his claim, and in the absence of any statutory language or legislative history to the contrary, it is inappropriate to create an exception. Although the common law of trusts creates such an exception to the default rule, it should not apply here in contradistinction to the plain language of the statute. The common law of trusts, while serving as the foundation upon which ERISA was created, contemplates a trustee/beneficiary relationship that is inherently different from that created under ERISA. This fact, together with the statutory structure of ERISA, supports the conclusion that ERISA is not required to provide the same protection to beneficiaries as that provided under common law.

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136. Conkright v. Frommert, 559 U.S. 506, 517 (2010) ("Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" (quoting Varity Corp. v. Howe, 516 U.S. 489, 497 (1996))).

137. H.R. REP. NO. 93-533, at 3–5, 11–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4654; *Reich*, 20 F.3d. at 32 ("Exposure not only to liability for damages but to other forms of liability as well 'would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves.'" (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993))).

138. H.R. REP. NO. 93-533, at 3–5, 11–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

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Additionally, there is evidence of a congressional intent to balance the interests of the beneficiary with those of the administering fiduciary, and although the primary purpose of ERISA is to protect the beneficiaries of employee benefit plans, this does not mean every dispute of ERISA interpretation must be resolved in favor of the beneficiary. Doing so would create an undue burden on plan fiduciaries and discourage employers from sponsoring employee benefit plans.

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