

Whose Burden Is It Anyway? Protecting ERISA from an Unnecessary Burden-Shifting Framework

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I. INTRODUCTION

Employee Retirement Income Security Act (“ERISA”) litigation permeates the American justice system. On average, litigants file one new ERISA case somewhere in a district court every week.¹ These current cases are becoming increasingly “lawyer generated,” meaning that they are brought by plaintiffs’ attorneys targeting ERISA plans and not by ERISA plan participants themselves.²

A recent trend in ERISA litigation, proprietary fund cases, targets plan sponsors who are also financial institutions.³ Plaintiffs allege that their employers breached their fiduciary duties to the plan when the plan included the employers’ own investment funds.⁴ The employer pockets fees charged to the plan.⁵ The plaintiffs argue this transaction is a conflict of interest and, therefore, a breach of fiduciary duty under ERISA.⁶ While many employers elect to settle these proprietary fund cases to avoid excessive litigation costs, the burden of proof for fiduciary breach under ERISA may drastically affect their outcomes.

ERISA § 409(a) states that fiduciaries who breach duties to a plan

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1. John Manganaro, *PSNC 2017: ERISA Litigation in Perspective*, PLANADVISOR (June 12, 2017), <http://www.planadviser.com/PSNC-2017-ERISA-Litigation-in-Perspective/> [https://perma.cc/SD5R-4W7A].

2. *Id.*

3. Groom Law Grp., *Excessive Fee Litigation*, GROOM.COM (Oct. 31, 2016), <http://www.groom.com/resources-1086.html> [https://perma.cc/3PPG-G59K].

4. See David John Marotta, *Employers Who Offer a Retirement Plan Have a Fiduciary Responsibility*, FORBES (Dec. 20, 2017, 10:32 AM), <https://www.forbes.com/sites/davidmarotta/2017/12/20/employers-who-offer-a-retirement-plan-have-a-fiduciary-responsibility/#7b7d66486236> [https://perma.cc/EUL2-6SDD].

5. *Id.*

6. *Id.*

“shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.”⁷ The circuits are split as to whether a burden-shifting framework should apply to ERISA cases involving breach of fiduciary duty. Although the circuit split has existed since the early 1990s, two recent cases in the Fourth and Tenth Circuits outline the arguments for and against the burden-shifting framework.⁸ Fiduciaries and plan participants await a definitive ruling from the Supreme Court. Yet, the Supreme Court recently refused to hear a case which presented an opportunity to resolve the split.⁹

Despite the fear ERISA strikes into the hearts of seasoned lawyers and judges alike, this circuit split is framed around ordinary statutory construction principles, rather than substantive legal principles. Both the Tenth and Fourth Circuits present plausible arguments for their interpretations of ERISA § 409(a). The heart of the split is whether Congress intended to preserve the application of the common law of trusts’ burden-shifting framework to employee benefit plan fiduciaries when it enacted ERISA.

With thousands of cases and countless complicated fact patterns, this circuit split matters because application of a burden-shifting framework creates a participant-friendly environment. Ordinarily, the party filing the lawsuit will have the burden of proving the entirety of the case. If the burden of causation shifts to the plan fiduciary, however, plaintiff participants can survive the pleading stage of litigation more frequently. More cases against plans increases plan sponsorship and administration costs. Thus, the burden-shifting framework eliminates a statutory safeguard for plan fiduciaries because absent burden-shifting, cases in which the plaintiff is unable to prove the element of causation will not survive long in the court process, thereby decreasing costs and preventing fiduciary liability. Furthermore, claimants may face radically different prognoses for success depending upon the circuit, creating the inequity of uneven application of ERISA.

If courts elect to apply a burden-shifting framework to ERISA, a financial institution sponsoring plans that include its own financial products may face an almost default burden shift. Indeed, even without a uniform burden-shifting position among the circuits, many employers

7. 29 U.S.C. § 1109(a) (2012).

8. *Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324 (10th Cir. 2017), *cert. dismissed*, 139 S. Ct. 50 (2018); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

9. *RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 2887 (2015) (denying cert.).

opted to settle proprietary fund cases brought against them in 2016.¹⁰ A uniform burden-shifting framework would provide certainty.

Because the cases on either side of the split are numerous, this Comment is limited to the arguments for and against the burden-shifting framework presented in *Tatum v. RJR Pensions Investment Communications*¹¹ and *Pioneer Centres Holding Co. ESOP & Trust v. Alerus Financial, N.A.*,¹² and concludes that the burden-shifting framework is not supported by statute, case law, or equity. This Comment does not explore the complexities of the methods proposed to determine loss-causation used by the various circuits. While there are significant legal implications surrounding those loss-causation methods, they are beyond the scope of this Comment.

Part II of this Comment addresses relevant background principles necessary to understand the significance of the circuit split, including the history and policy behind ERISA, a brief overview of the relevant provisions of the common law of trusts, and a comparison of the ERISA fiduciary and common law trustee. Part III turns to the heart of the circuit split, reviewing two recent cases on either side of the burden-shifting argument. Part IV then explores the arguments for and against the burden-shifting framework. The relevant arguments for the burden-shifting framework include protecting ERISA's primary purpose, viewing ERISA in light of the common law of trusts, and considerations of equity. The arguments against the burden-shifting framework include that one should implement text-based and legislative-history-informed interpretations, which place the burden on the plaintiff, and that the competing objectives of ERISA require placing the burden on the plaintiff. This Part will ultimately conclude that the burden-shifting framework recently adopted by the Fourth Circuit in *Tatum* is not an appropriate interpretation of ERISA § 409(a). Part V looks ahead to the Supreme Court's role in resolving the circuit split and argues the Court should step in to affirm the lack of a burden-shifting framework.

II. BACKGROUND

The complexities of ERISA require an understanding of its history and its departure from the common law of trusts. Additionally, statutory construction issues often turn on the context of a statute at the time it was

10. Groom Law Grp., *supra* note 3.

11. *See infra* Section III.A.

12. *See infra* Section III.B.

passed, as well as the complexities within the statute. Relevant background on ERISA, fiduciary responsibilities, and the common law of trusts sets the stage for the circuit split discussed in Parts III and IV.

A. The Common Law of Trusts

The common law of trusts is relevant to this circuit split because the Fourth Circuit (and others) uses the common law of trusts as the backdrop for implementing a burden-shifting framework. The Restatement (Third) of Trusts provides an outline of the common law of trusts. A trust is a legal organization or entity that holds assets for the benefit of another, the beneficiary.¹³ The trustee of a trust is the person who holds or controls the assets that have been set aside in the trust.¹⁴ The trustee has a responsibility to act in the best interest of the beneficiary of the trust while managing the assets.¹⁵ The Restatement recognizes that, without a breach, a trustee is not liable for a loss but is accountable for a profit arising out of the trust.¹⁶ For example, a trustee is not liable for loss resulting from theft, if the trustee acted with reasonable care to protect the property from loss.¹⁷ A trustee whose breach is the cause of a loss to the trust is required to “restore the values of the trust” to what they would have been had the breach not occurred.¹⁸ This means a trustee is held personally liable to the trust beneficiaries for breaches resulting from the trustee’s failure to act prudently or to satisfy other duties.¹⁹

The Restatement also speaks to the burden of proof for the causation element of a breach of trust claim, placing it squarely on the defendant after a prima facie showing of breach and loss.²⁰ The Restatement comments indicate that equity requires placing that burden on the fiduciary.²¹

The duties of a common law trustee include: (1) administering the

13. WARD L. THOMAS AND LEONARD J. HENZKE, JR., TRUSTS: COMMON LAW AND IRC 501(C)(3) AND 4947, 4 (2003), <https://www.irs.gov/pub/irs-tege/eotopica03.pdf> [<https://perma.cc/4WPX-6BZ6>].

14. *Id.* at 5.

15. *Id.*

16. RESTATEMENT (THIRD) OF TRUSTS § 99 (AM. LAW INST. 2012).

17. *Id.* § 99 cmt. b.

18. *Id.* § 100.

19. *Id.* § 100 cmt. a.

20. *Id.* § 100 cmt. f.

21. *Id.*

trust in accordance with its terms and applicable law;²² (2) exercising prudence,²³ loyalty,²⁴ and impartiality;²⁵ (3) informing beneficiaries;²⁶ and (4) fulfilling certain obligations to co-trustees.²⁷ The trustee owes his or her duties to the current beneficiaries of the trust,²⁸ and if there are multiple beneficiaries in succession, any of which having an income interest, the trustee has a duty to invest and administer the trust to produce an income that will balance the interests of present and future beneficiaries.²⁹ Trustees may not delegate their duties except for rare circumstances.³⁰

A breach of trust occurs when a trustee fails to comply with any of the duties owed to a beneficiary.³¹ If a trustee breaches duties owed to a beneficiary, liability follows for the amount necessary to restore the trust to the position it would have been in had no breach occurred.³² In addition, the trustee must repay any amount he or she personally benefited from because of the breach.³³ Nevertheless, the common law of trusts permits a trust to relieve a trustee from liability for a breach, provided the trust does not relieve the trustee from liability for bad faith or for failure to account for profits arising from a breach.³⁴

B. The Employee Retirement Income Security Act

ERISA's statutory scheme deviates from the common law of trusts. Congress passed ERISA in 1974 to remedy "certain defects in the private retirement system" that limited the income security of private retirement plan holders.³⁵ Specifically, Congress passed ERISA after determining the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA") did not require adequate fiduciary accountability.³⁶ Through the WPPDA, Congress attempted to protect pension recipients and required disclosure

22. *Id.* § 76.

23. *Id.* § 77.

24. *Id.* § 78.

25. *Id.* § 79.

26. *Id.* § 82.

27. *Id.* § 81.

28. *See id.* § 79(1).

29. *Id.* § 79(2).

30. *See id.* § 80(1).

31. *Id.* § 93.

32. *Id.* § 100(a).

33. *Id.* § 100(b).

34. *Id.* § 96.

35. 29 U.S.C. §§ 1101–1461 (2012); H.R. Rep. No. 93-533, at 4639 (1973).

36. H.R. Rep. No. 93-533, at 4641.

of more information by plan fiduciaries.³⁷ However, the WPPDA only required that plan fiduciaries disclose certain, limited pension plan details to the Secretary of Labor.³⁸ Congress intended ERISA to remedy the fundamental flaws in the WPPDA—“weak” disclosure requirements and limited fiduciary responsibilities.³⁹

Through ERISA, Congress intended to protect consumer expectations by “promoting informed financial decision making,” preventing employer abuse in pension programs, and protecting the interests of employees who relied on employer provided plans.⁴⁰ Nevertheless, ERISA also protects an employer’s interest in creation, control, and design of plans, creating some tension between ERISA’s other consumer-protection-oriented policies.⁴¹ ERISA does not require a private employer to provide a plan to employees.⁴² The costs of administering a plan must be reasonable.⁴³ If the costs are too high, an employer may simply refuse to offer a plan to employees.⁴⁴ These dual, competing purposes of ERISA naturally create tension between the protection of plan participants and the policies designed to encourage voluntary employer participation.

Rather than requiring employer participation, ERISA creates “minimum standards” for retirement savings plans provided voluntarily by employers.⁴⁵ These minimum standards allow Congress to protect plan participants, leaving them better off under ERISA, while giving employers options.⁴⁶ Employers can choose to sponsor a plan meeting only the minimum requirements, or they can choose to exceed the minimum requirements in one area but not in others.⁴⁷ Ultimately, the flexibility of ERISA requirements for employers is notable because employers can tailor plans to meet the needs of the company and employees, so long as employers meet minimum standards.⁴⁸

37. *Id.* at 4642.

38. *Id.* at 4645–46.

39. *Id.* at 4642.

40. PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 14 (2010).

41. *Id.*

42. DAVID A. PRATT AND SHARON REECE, ERISA AND EMPLOYEE BENEFIT LAW: THE ESSENTIALS 6–7 (2010).

43. Employers are incentivized to offer benefit plans to attract and retain talented employees. Added expenses related to providing these benefits may not prevent a large employer from offering certain benefits, but small and mid-size businesses may feel the crunch of added costs.

44. WIEDENBECK, *supra* note 40, at 18.

45. *Id.*

46. *See id.* at 14, 18–19.

47. *See id.* at 19.

48. *Id.*

The ERISA fiduciary is distinct from the common law fiduciary. A fiduciary is a person who takes on special responsibilities on behalf of others.⁴⁹ All fiduciaries owe general duties of prudence and loyalty to persons to whom they are responsible.⁵⁰ The common law of trusts contains general fiduciary duties; however, trust-law may not provide a “one size fits all” approach.⁵¹ ERISA § 404 outlines duties for ERISA fiduciaries.⁵² Despite similarities to trustee duties under common law, Congress intended ERISA fiduciary duties to depart from the common law fiduciary duties to serve the particular needs of employer-sponsored plans.⁵³

An ERISA fiduciary must “discharge his duties” to the plan “solely in the interest of the participants and beneficiaries.”⁵⁴ Two “exclusive” purposes are stated: (1) providing benefits and (2) defraying administration costs.⁵⁵ Fiduciaries must use the skill, care, and diligence that a prudent person, familiar with the facts and plan matters, would use in like circumstances.⁵⁶

One goal of ERISA is to make plan decision makers accountable.⁵⁷ Accountability requires legal liability.⁵⁸ Under ERISA, benefit plan decision makers are accountable as fiduciaries, not just as traditional trustees.⁵⁹ Thus, ERISA bans certain transactions entirely due to their insider nature.⁶⁰ Further, ERISA does not allow plan documents to exculpate fiduciaries from liability, a departure from the common law of trusts.⁶¹ ERISA fiduciaries may follow “plan documents only insofar as they are consistent with ERISA.”⁶² If a plan document authorizes a departure from ERISA proscribed fiduciary duties, the plan provision is void.⁶³ Thus, while common law trustees may depart from the default

49. See LAW JOURNAL PRESS, *EMPLOYEE BENEFITS LAW: ERISA AND BEYOND* § 12.03 (2018).

50. RESTATEMENT (THIRD) OF TRUSTS §§ 76–79 (AM. LAW INST. 2012).

51. *Howard v. Shay*, No. CV 91-146 DT, 1993 U.S. Dist. LEXIS 20153, *19 (C.D. Cal. Sept. 15, 1993), *rev'd on other grounds*, 100 F.3d 1484 (9th Cir. 1996).

52. 29 U.S.C. § 1104 (2012).

53. WIEDENBECK, *supra* note 40, at 110.

54. 29 U.S.C. § 1104(a)(1).

55. *Id.* § 1104(a)(1)(A)(i)–(ii).

56. *Id.* § 1104(a)(1)(B).

57. LAW JOURNAL PRESS, *supra* note 49, § 12.07.

58. *Id.*

59. WIEDENBECK, *supra* note 40, at 110.

60. *Id.*

61. *Id.* at 110, 124.

62. *Id.* at 124.

63. *Id.*

rules in trust documents, ERISA fiduciaries must meet the minimum standards of ERISA.

III. CIRCUIT CONFLICT HISTORY

ERISA § 409(a) states:

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 . . .⁶⁴

The federal circuits split sharply as to who bears the burden of proving that a fiduciary breach caused a loss. Courts adopting the burden-shifting framework, placing the burden on the defendant, hold that Congress did not intend ERISA to supersede common law principles. Under this reasoning, courts should interpret ERISA using the common law of trusts as a guide.

The following cases exemplify the heart of the circuit split regarding who bears the burden of causation. The majority in the 2014 Fourth Circuit case *Tatum v. RJR Pension Investment Communications*⁶⁵ argues strongly for the burden-shifting framework, using principles of statutory construction and policy arguments. In contrast, the 2017 majority in the Tenth Circuit case *Pioneer Centres Holding Co. ESOP & Trust v. Alerus Financial, N.A.*⁶⁶ follows the arguments in the *Tatum* dissent, holding that statutory construction and policy call for no burden-shifting under ERISA.

A. The Fourth Circuit

In *Tatum*, the court implemented a burden-shifting framework in favor of plan participants.⁶⁷ *Tatum* arose out of a “spin-off” transaction involving the merged Nabisco and R.J. Reynolds (“RJR”) Tobacco companies to prevent tobacco litigation from affecting Nabisco’s stock price.⁶⁸ On the spin-off date, RJR created a new 401(k) plan (the

64. 29 U.S.C. § 1109(a) (2012).

65. 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

66. 858 F.3d 1324 (10th Cir. 2017), *cert. dismissed*, 139 S. Ct. 50 (2018).

67. *Tatum*, 761 F.3d at 362–63.

68. *Id.* at 350–51.

“Plan”).⁶⁹ The Plan included a “frozen” Nabisco fund (the “Fund”), allowing plan participants to retain their investment in the company fund from the prior, pre-spin-off plan, but preventing additional investment in the Fund.⁷⁰ Although the Plan required the Fund to remain in the Plan, Plan fiduciaries voted to remove the Fund only six months after the completion of the spin-off, spending only minutes discussing the potential options for the Fund.⁷¹ Unfortunately, the continuous tobacco litigation negatively impacted the Fund in the months leading up to its scheduled disposition.⁷²

Company executives considered what to do in light of the declining value of the Fund. Ultimately, they decided to continue with the removal of the Fund primarily to avoid both potential liability for changing course after some participants sold their assets in the Fund and any additional monitoring costs keeping the Fund would require.⁷³ The company also falsely informed participants that the law did not allow the Plan to keep company stock.⁷⁴

Prior to the disposition of the Fund, plaintiff Richard Tatum contacted company executives and asked them to wait to dispose of the funds.⁷⁵ He informed the executives that the disposal would cause him to lose 60% of the value of his assets in the Plan.⁷⁶ He cited examples where other acquired companies retained frozen funds from prior owners in their plans.⁷⁷ The company informed Tatum that nothing could be done to stop the disposal of the Fund.⁷⁸ The disposal took place, causing a significant loss to the participants in the Plan, including Mr. Tatum’s account.⁷⁹

Nabisco’s stock value started to rise only months after the disposal of the Fund.⁸⁰ A subsequent bidding war over Nabisco drove up the stock price.⁸¹ Nabisco was flushed with cash and later purchased by RJR.⁸²

69. *Id.* at 351.

70. *Id.* at 351–52.

71. *Id.* at 352.

72. *Id.* at 353.

73. *Id.*

74. *Id.*

75. *Id.* at 354.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

Stock prices had increased significantly, but it was too late for the Plan participants to realize the gains.⁸³ Tatum filed a class action suit against the company under ERISA, alleging the executives were plan fiduciaries and failed to act prudently with respect to the Plan.⁸⁴

1. The Majority's Analysis: The Burden of Proof

The Fourth Circuit ruled in favor of the plaintiffs, holding that a burden-shifting framework is consistent with the purpose of ERISA. The district court had held that it was “most fair” to require the defendant fiduciary to bear the burden of proving causation.⁸⁵ After the plaintiff made a prima facie case of breach and loss to the plan, the burden to prove causation, or rather the lack thereof, shifted to the defendant.⁸⁶ The circuit court looked to principles of statutory construction to determine if this was the proper burden of proof allocation.⁸⁷ Acknowledging that the general rule when a statute is silent as to the burden of proof is to assign it to the plaintiff, the court found that an exception to this rule may arise in the common law of trusts.⁸⁸ The court noted that it had previously adopted a burden-shifting framework in a 1982 case, holding that “one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably.”⁸⁹ The court further noted that, while a breach by itself does not automatically entail causation, imprudent fiduciary conduct will usually result in a loss.⁹⁰

The court reasoned that the burden-shifting framework “comports with the structure and purpose of ERISA” because ERISA’s primary objective is protecting plan participants.⁹¹ Quoting the Secretary of Labor’s amicus brief, the court said that forcing the plaintiff to bear the burden of causation after a prima facie case of breach of fiduciary duty creates an “unfair advantage to a defendant who has already been shown to have engaged in wrongful conduct.”⁹²

83. *Id.* at 354–55.

84. *Id.* at 355.

85. *Id.* at 362.

86. *Id.*

87. *Id.*

88. *Id.* (citing RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f (AM. LAW. INST. 2012); BOGERT & BOGERT, THE LAW OF TRUSTS AND TRUSTEES 871 (2d rev. ed. 1995 & Supp. 2013)).

89. *Id.* at 362–63 (quoting *Brink v. DaLesio*, 667 F.2d 420, 426 (4th Cir. 1981)).

90. *Id.* at 361.

91. *Id.* at 363 (citing 29 U.S.C. § 1001(b) (2012)).

92. *Id.* (quoting Brief of Seth D. Harris, the Acting Secretary of Labor as Amicus Curiae in

2. The Dissent's Analysis

Judge Wilkinson dissented and would have held that ERISA § 409(a) requires a plaintiff to prove loss causation because not every loss to a plan qualifies for § 409(a) relief.⁹³ Judge Wilkinson also disagreed with the method of determining loss causation.⁹⁴ Rather than looking at failure to investigate or evaluate a potential investment, liability under ERISA § 409(a) is only appropriate when an “imprudent” investment is made.⁹⁵

Judge Wilkinson pointed to three consequences of plaintiffs bearing the burden of causation: (1) loss causation is part of plaintiff's burden to establish fiduciary liability under ERISA, (2) establishing liability is difficult when a fiduciary acts prudently, and (3) there are other remedial options when plaintiffs cannot demonstrate loss causation.⁹⁶ Judge Wilkinson indicated that a burden-shifting framework is not appropriate because Congress did not provide for it under the statute.⁹⁷ When a statute is silent as to who bears the burden of proof, the default rule of statutory construction is to require plaintiffs to bear the burden of proof for their claims.⁹⁸ Most circuit precedent supports placing the burden on the plaintiff.⁹⁹ The cases advocating for a burden-shifting framework involved breaches of fiduciary responsibilities that were more serious.¹⁰⁰ The dissent also asserted that the burden of loss causation would be difficult in cases where the fiduciary is “objectively prudent.”¹⁰¹ Judge Wilkinson indicated Congress did not intend to punish honest fiduciaries when there are plan losses in all cases.¹⁰² Additionally, Judge Wilkinson stated ERISA sets out other remedies for plan participants if a loss causation cannot be demonstrated, including removal of a fiduciary,

Support of Plaintiffs-Appellants and Urging Reversal at 20, *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014) (No. 13-1360)).

93. *Id.* at 373 (Wilkinson, J., dissenting).

94. *Id.* at 374.

95. *Id.*

96. *Id.* at 374–76.

97. *Id.* at 375.

98. *Id.* (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)).

99. *Id.* (citing *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 105 (2d Cir. 1998); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995), *abrogated by on other grounds*, Fifth Third Bancorp v. Dudenhoefter, 134 S. Ct. 2459, 2467 (2014); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992)).

100. *Id.* (citing *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *N.Y. 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, 671–72 (8th Cir. 1982)).

101. *Id.* at 376.

102. *Id.*

saying “ERISA is a ‘comprehensive and reticulated statute’ and Congress crafted its provisions with care.”¹⁰³

Judge Wilkinson argued the majority wrongfully justified its burden-shifting framework as a deterrent for imprudent fiduciaries.¹⁰⁴ ERISA already imposes sufficient deterrents for imprudent fiduciaries, including removal and personal liability if breaches result in losses to the plan’s assets.¹⁰⁵

B. The Tenth Circuit

A panel of the Tenth Circuit, like Judge Wilkinson, rejected the burden-shifting framework in *Pioneer Centres Holding Co. ESOP & Trust v. Alerus Financial, N.A.* and affirmed the district court’s grant of summary judgment to an Employee Stock Ownership Plan (“ESOP”) fiduciary. The court also determined that evidence of causation was speculative.¹⁰⁶

Pioneer Centres Holding Company (“Pioneer”) operated several car dealerships in Colorado and California.¹⁰⁷ Pioneer had an ESOP with certain company executives serving as trustees.¹⁰⁸ Pioneer’s founder, Jack Brewer, initially owned all of Pioneer’s stock; however, a series of transactions over several years resulted in Brewer selling approximately one third of his stock to the Pioneer ESOP.¹⁰⁹ Pioneer’s ESOP trustees wanted the ESOP to own all of Pioneer’s stock.¹¹⁰ The ESOP proposed to buy out Brewer and the other company executives.¹¹¹ An independent trustee, Alerus, was hired due to the conflict of interest between the ESOP trustees and stockholders.¹¹²

As part of its contract with Pioneer, Land Rover, one of Pioneer’s partner dealers, had the right to approve any change in ownership, as well as a right of first refusal, for any Pioneer stock offered for sale.¹¹³

103. *Id.* (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993)).

104. *Id.* at 379.

105. *Id.*

106. *Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1326–27 (10th Cir. 2017), *cert. dismissed*, 139 S. Ct. 50 (2018).

107. *Id.* at 1327.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

The proposed stock transaction was sent to Land Rover for approval.¹¹⁴ Land Rover indicated that it never approved Brewer's initial sale of one third of his stock to Pioneer; their records still showed Brewer as the sole owner of Pioneer's stock.¹¹⁵ Pioneer claimed it did not need Land Rover's approval because only the ownership of the holding company changed, not the ownership of any dealerships.¹¹⁶ Land Rover disagreed.¹¹⁷ Land Rover demanded that Pioneer reverse the prior stock transactions.¹¹⁸ Land Rover indicated it would not approve the 100% ESOP ownership.¹¹⁹

Pioneer pushed back, challenging Land Rover's reasoning and restating its understanding that Land Rover would not approve ESOP-owned dealerships.¹²⁰ Land Rover responded that it did not disapprove of all ESOP ownership generally, but stood firm: Land Rover did not approve this transaction because Pioneer did not ask Land Rover for prior authorization and violated its agreement with Land Rover.¹²¹ However, Land Rover alleged that Pioneer was "free to submit any ownership transfer proposal . . . and [Land Rover] will consider it in good faith and on the merits."¹²² Pioneer did not respond.¹²³ Nearly a year later, Land Rover approved Brewer's sale of one third of his stock to Pioneer, but still maintained it would not approve 100% ESOP ownership.¹²⁴

Despite the dispute with Land Rover, the third-party trustee, Alerus, drafted a proposed stock transfer agreement to transfer ownership of all of Pioneer's stock to the ESOP.¹²⁵ Brewer revised the agreement substantially, but Alerus found the changes unacceptable and would not sign off on the transaction.¹²⁶ Ultimately, the parties abandoned the transaction.¹²⁷

After a year, Pioneer sold its assets to Kuni Enterprises ("Kuni") at a

114. *Id.*

115. *Id.* at 1327–28.

116. *Id.* at 1328.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1329.

121. *Id.*

122. *Id.*

123. *Id.* at 1330.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

price significantly higher than the price proposed in the abandoned transfer agreement with Alerus.¹²⁸ After completion of the Kuni transaction, the ESOP sued Alerus for breach of fiduciary duty under ERISA § 409 because Alerus had abandoned the transaction.¹²⁹

Alerus argued it did not breach its fiduciary duties to the ESOP and, even if it did, its actions did not cause plan losses because Land Rover would not have approved the transaction.¹³⁰ The district court granted summary judgment for Alerus, holding that the ESOP did not meet its burden to prove Alerus's breach caused the loss to the ESOP.¹³¹

A Tenth Circuit panel addressed the loss causation issue, holding that the plaintiff bore the burden of causation and specifically rejecting the burden-shifting framework.¹³² Citing a 2002 Tenth Circuit case and a 2011 Fourth Circuit case, the court recognized that the plaintiff must prove causation before a fiduciary is liable.¹³³ Furthermore, because ERISA § 409 itself is silent as to who bears the burden of causation, the default rule places the burden of proving all elements of a breach of fiduciary duty claim on the plaintiff.¹³⁴

The panel rejected as inapplicable certain exceptions to the default rule. These exceptions include cases where an element of a claim may be characterized as an affirmative defense and, specifically for fiduciary issues, the common law of trusts.¹³⁵ The panel gave reasons for rejecting both of these exceptions in this case: (1) legislative history does not support a burden-shifting framework under ERISA § 409, and (2) the law of trusts does not apply to ERISA.¹³⁶ Both reasons are discussed below.

First, the panel reviewed ERISA's legislative history and found no evidence Congress intended to implement a burden-shifting framework.¹³⁷ Causation may not be fairly characterized as an affirmative defense to fiduciary liability because causation may not be removed from ERISA § 409(a) without substantially changing the meaning and intention of the statute.¹³⁸ The court held that causation is

128. *Id.*

129. *Id.* at 1331, 1333.

130. *Id.* at 1331.

131. *Id.* at 1332–33.

132. *Id.* at 1334.

133. *Id.* at 1334–35 (citing *Allison v. Bank One-Denver*, 289 F.3d 1223, 1239 (10th Cir. 2002); *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 217 (4th Cir. 2011)).

134. *Id.* at 1335.

135. *Id.*

136. *Id.* at 1335–37.

137. *Id.* at 1336.

138. *Id.*

an element of the claim and the plaintiff, therefore, has the burden of proof.¹³⁹

Second, the panel rejected the rationale relied upon by the Fourth, Fifth, and Eighth Circuits when those courts adopted a burden-shifting framework.¹⁴⁰ The panel stated that “the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties.”¹⁴¹ The panel emphasized the importance of the plain language of the statute: “[w]here the plain language of the statute limits the fiduciary’s liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach.”¹⁴²

Ultimately, the Tenth Circuit found no reason to implement an exception to the default rule of statutory construction because the plain language of ERISA § 409(a) did not require it.¹⁴³ Furthermore, a concurring opinion by Justice Jacobs, citing a Second Circuit case, noted that the burden-shifting framework would remove a “check” on “sweeping [fiduciary] liability,” thus eliminating employer willingness to participate in ERISA plans.¹⁴⁴

IV. DISCUSSION

ERISA is a complicated statute with a long history. The cases on either side of the split are numerous and date as far back as the late 1980s. This Part weighs the arguments for and against the burden-shifting framework in light of the purposes of ERISA, case law, equity, and principles of statutory construction. First, Section A will address the uniqueness of the ERISA fiduciary. Second, Section B will explore the statute’s language, concluding that neither the plain language nor legislative history support a burden-shifting framework. Finally, Section C will consider the primary purposes of ERISA and the role of equity. This Part concludes that the burden-shifting framework is not appropriate.

Courts faced with the difficult task of interpreting ERISA acknowledge that the plaintiff would bear the burden of causation under

139. *Id.*

140. *Id.* at 1336–37.

141. *Id.* at 1337 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

142. *Id.*

143. *Id.*

144. *Id.* (Jacobs, J., concurring) (citing *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 106 (2d Cir. 1998)).

default rules. Yet, some courts, like the Fourth Circuit in *Tatum*, look beyond the plain language of ERISA § 409 to extrinsic evidence of Congress's supposed intent. They look to several provisions in the legislative history of ERISA and case law to support their interpretation of ERISA § 409. The three main arguments supporting the burden-shifting framework, discussed below, are: (1) ERISA's primary purpose calls for protecting plan participants, (2) ERISA fiduciary duties are based in the common law of trusts and Congress left the courts to develop the common law, and (3) equity requires shifting the burden when a participant has demonstrated a breach and a loss.

A majority of circuits, like the Tenth Circuit in *Pioneer Centres*, do not support a burden-shifting framework for ERISA § 409. Their justifications are numerous, but the three major arguments are (1) ERISA and the common law of trusts each provide for different fiduciary duties and remedies for breach, (2) statutory interpretation calls for placing the burden on the plaintiff, and (3) ERISA's competing purposes must be carefully balanced to achieve its ultimate purpose of encouraging private employers to provide retirement plans for employees. Each argument will be addressed below.

A. ERISA fiduciaries have separate duties from common law trustees.

ERISA is not a mere codification of the common law of trusts. Congress did not intend for the common law of trusts to apply to ERISA fiduciaries. Congress carefully created the ERISA fiduciary to account for the balance between plan participants and the plan administrator. For example, ERISA's fiduciary obligations make it possible for a plan fiduciary to be both a plan participant and company employee.¹⁴⁵ Unlike the common law of trusts, ERISA actually allows these fiduciary relationships to exist.¹⁴⁶ ERISA creates an "artificial definition of [a] 'fiduciary,'" which allows an employer to act as a fiduciary only when it is acting with discretion toward the plan.¹⁴⁷

There are three major differences between common law trustees and ERISA fiduciaries. First, ERISA fiduciaries owe their duty to the plan as a whole; they do not have a duty to act with impartiality toward multiple plan participants.¹⁴⁸ Second, ERISA fiduciary duties are mandatory; that

145. *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996); *id.* at 526 (Thomas, J., dissenting).

146. *Id.* at 527 (Thomas, J., dissenting).

147. *Id.* at 527–28 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, n.5 (1993)).

148. WIEDENBECK, *supra* note 40, at 121.

is, they are not subject to modification by individual plan documents.¹⁴⁹ Third, ERISA's duty of loyalty, also called the exclusive benefit rule, looks to the actual motivation of the fiduciary, creating a subjective test.¹⁵⁰

Congress envisioned a more tailored set of requirements for fiduciaries of ERISA plans, including a "prudent man" standard for conduct.¹⁵¹ The new fiduciary requirements in ERISA were a codification of "certain principles developed in the evolution of the law of trusts."¹⁵² Yet, there are several key departures from trust law. First, ERISA fiduciaries do not have an explicit duty of impartiality when dealing with multiple plan participants.¹⁵³ ERISA fiduciaries discharge their duties with respect to the plan itself, and the Supreme Court has held that individual plan participants may not recover for individual damages; instead, only the plan as a whole may recover plan losses.¹⁵⁴ Second, ERISA permits an employee of the plan sponsor employer to serve as a plan fiduciary even though that service may create a conflict of interest.¹⁵⁵

Congress intended for courts to interpret ERISA's new fiduciary standards "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by [ERISA]."¹⁵⁶ While Congress codified ERISA fiduciary standards, it adapted the common law to be "appropriate for employee benefit plans."¹⁵⁷ Congress considered the "voluntary nature of private retirement plans" when ERISA was passed.¹⁵⁸ ERISA's voluntary nature is significant because if ERISA requirements are too burdensome, an employer could opt out entirely. Congress considered this fact, striking a delicate balance between the needs of employees and employers.

In addition to new standards for ERISA fiduciaries, Congress added new remedies for plan participants under ERISA, increasing the risk for plan fiduciaries.¹⁵⁹ ERISA increases access to federal court and implements more judicial remedies, including "pecuniary, equitable (e.g.,

149. *Id.*

150. *Id.*

151. H.R. Rep. No. 93-533, at 4649 (1973).

152. *Id.*

153. 29 U.S.C. § 1104(a) (2012).

154. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985).

155. 29 U.S.C. § 1108(c)(3).

156. H.R. Rep. No. 93-533, at 4650.

157. *Id.* at 4651.

158. *Id.* at 4639.

159. LAW JOURNAL PRESS, *supra* note 49, § 12.07.

injunctive), and declaratory judgment relief,” which were not available under WPPDA.¹⁶⁰ Some argue that ERISA did not introduce new fiduciary liability because the common law of trusts pre-dates ERISA and ERISA merely codified certain sections. But ERISA makes it easier for a plaintiff to bring a claim in federal court.¹⁶¹ Rather than relying on non-uniform state law to protect plan participants, ERISA creates uniform federal standards.

Proponents of the burden-shifting framework assert Congress based ERISA on the common law of trusts and therefore the law of trusts should inform the analysis of whether the burden-shifting framework should apply to ERISA. However, this is merely a starting point for the analysis. As discussed above, the common law of trusts contains similar remedies for trust beneficiaries in the event of breach of trust as ERISA provides plan participants in the event of fiduciary breach.¹⁶² These proponents argue comments in the Restatement of Trusts support the burden-shifting framework even though it is not found in ERISA.¹⁶³ While the default rule of statutory construction calls for placing the burden on the plaintiff, the influence of the law of trusts, so the argument goes, allows an exception to this rule.¹⁶⁴ The Supreme Court has indicated that ERISA “borrowed” from the common law of trusts.¹⁶⁵ Nevertheless, the Court should not look to the common law of trusts before looking to the language of ERISA itself to determine the intent of Congress.¹⁶⁶ Additionally, the average ERISA plan “covers hundreds or even thousands of individual participants.”¹⁶⁷ This is a stark contrast to the average testamentary trust, which covers a limited number of individuals.¹⁶⁸ Thus, while the common law of trusts may have informed Congress, it is not the “entire story.”¹⁶⁹ Given its purpose, and numerous departures from the common law of trusts, ERISA is a complicated, carefully constructed statute; therefore, the starting place for analysis is

160. *Id.*

161. *Id.*

162. Compare 29 U.S.C. § 1109 (2012), with RESTATEMENT (THIRD) OF TRUSTS § 100 (AM. LAW INST. 2012).

163. RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f.

164. *Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017), *cert. dismissed*, 139 S. Ct. 50 (2018).

165. *Varity Corp. v. Howe*, 516 U.S. 489, 528 (1996) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)).

166. *Id.*

167. WIEDENBECK, *supra* note 40, at 121 & n. 56 (quoting H.R. Rep. 93-1280, at 302 (1974) (Conf. Rep.)).

168. *Id.*

169. *Varity Corp.*, 516 U.S. at 496–97.

the statute.¹⁷⁰

B. Statutory interpretation calls for placing the burden on the plaintiff.

The circuit split revolves around a disagreement about statutory interpretation. Courts often interpret the meaning of statutes with language that is subject to several logical interpretations. Courts use several methods to derive the meaning of a statutory provision, including textualism and intentionalism.¹⁷¹

1. Text-based interpretive methods do not support a burden-shifting framework.

A court should begin its analysis of the meaning of a statute with the plain meaning of the language of the statute.¹⁷² Next, it should examine the entire statute, as well as dictionaries or similar statutes in other jurisdictions, to clarify ambiguity in the language. The focus should be on what the text actually says, rather than on what certain members of Congress may have intended the text to mean.¹⁷³

Courts also often use canons of construction, or “rules of thumb,” that help determine the meaning of a statute.¹⁷⁴ There is no real definitive list of so-called canons, but most lists include canons for (1) determining the ordinary and specialized meaning of a word or phrase in a statute; (2) identifying important words such as “and,” “or,” “shall,” and “may;” and (3) determining the role of silence in a statute or exclusion of a term from a list.¹⁷⁵

Default rules of statutory construction call for the entire burden of proof for every element of a claim to fall on the plaintiff. When Congress shifts the burden of proof for a claim, we can presume it does so expressly. If a cause of action arises under a statute, the first place courts look to is the statute itself.¹⁷⁶ The ordinary rule calls for placing

170. *Id.* at 496–97, 516–517, 528.

171. LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 1 (2014), <https://fas.org/sgp/crs/misc/97-589.pdf> [<https://perma.cc/V94S-UQJD>].

172. *Id.* at 3 (recognizing that “[t]he Supreme Court often recites the ‘plain meaning rule,’ that, if the language of the statute is plain and unambiguous, it must be applied according to its terms.”).

173. Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justice Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 179 (1996).

174. EIG, *supra* note 171, at 5–6.

175. *Id.* at 6–17.

176. *Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

the burden on the plaintiff when the statute is silent as to the burden.¹⁷⁷ There are, however, some exceptions to this rule.¹⁷⁸ If an element of the cause of action could be characterized as an affirmative defense or an exemption, then the burden may be shifted to the defendant.¹⁷⁹

To determine whether causation could be characterized as an affirmative defense or an exemption in ERISA § 409(a), we begin with the language in the statute:

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 . . .¹⁸⁰

Here, the above language is silent as to who bears the burden of proof on this cause of action. To demonstrate the effect of the absence of a causation element, we can remove the causation element from the statute. If we remove the causal language “resulting from such breach” and re-read the statute

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 [omit “resulting from 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 . . .

the result is a provision that holds fiduciaries strictly liable for all losses to a plan in the event of a breach, no matter the cause. The provision is wide in scope and harsh in result: a clear deviation from the congressional intent expressed in ERISA § 409(a).

Alternatively, we could tinker with the statutory language to characterize the causation requirement as an affirmative defense. If causation were an affirmative defense, the statute may read like this:

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

177. *Id.*

178. *See id.* at 57–58.

179. *Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017), *cert. dismissed*, 139 S. Ct. 50 (2018).

180. 29 U.S.C. § 1109(a) (2012).

losses to the plan [omit “resulting from 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, **unless the fiduciary can show the losses did not result from the breach.**

This amended version of ERISA § 409(a) explicitly places the burden of causation on the defendant. The Tenth Circuit considered this in its analysis in *Pioneer* and found that causation cannot be fairly separated from the other parts of the statute without changing the meaning and result.¹⁸¹ The Fourth Circuit in *Tatum* did not conduct this analysis, instead choosing to focus on whether the common law of trusts applies to ERISA claims.¹⁸² These three statutory examples demonstrate that causation is an essential element of this claim and that the statutory language does not support a burden-shifting framework.

Finally, when a statute’s plain language gives a reasonable meaning, it is not necessary to proceed further to determine that meaning. Here, in ERISA § 409(a), there are no terms of art giving rise to ambiguity. The statute’s silence regarding the burden of causation triggers the default rule that plaintiffs bear the burden of proof on all elements of their claim. Although it is clear the common law and concern for plan participants influenced Congress, courts do not need to add to the meaning of the words of Congress here. The plain meaning is enough.

2. Intent-based interpretive methods do not support a burden-shifting framework.

Courts often utilize legislative history, whether they have text-based or intent-based interpretations, and can include a broad spectrum of materials. Some items hold more weight than others. For example, a committee report may be more persuasive than testimony from the floor of the House of Representatives because the committee likely heard more testimony about the issues and was more familiar with the statute.¹⁸³ The preference for written documents, especially summaries of the position of the group or committee ultimately responsible for the statute, makes sense given the difficulty of determining the intent of Congress (a very large group) by piecing together the testimony of individual members.¹⁸⁴

Although textualists argue that the text of the statute alone reflects

181. *Pioneer*, 858 F.3d at 1336.

182. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 357 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

183. EIG, *supra* note 171, at 45–46.

184. *Id.*

the intention of Congress, there are cases where otherwise strictly textual Justices have turned to legislative history for guidance.¹⁸⁵ It is common for Justices to review legislative history for relevant background on a statute.¹⁸⁶ The typical scenario where an otherwise textualist Justice turns to legislative history for more than relevant background information is a case where the language of the statute is “ambiguous.”¹⁸⁷ Additionally, a textualist may be at an interpretive disadvantage if the plain text of a statute leads to a result the legislature did not intend.¹⁸⁸

Even if a court turns to an intent-based method when interpreting ERISA § 409(a), legislative history indicates Congress carefully considered fiduciary liability and remedies for breach when drafting ERISA. Congress enacted ERISA to remedy perceived problems with the WPPDA’s fiduciary requirements.¹⁸⁹ Previously, plan participants were primarily responsible for policing employer plans.¹⁹⁰ Participants had to rely on common law, which was non-uniform among the states.¹⁹¹ Congress specifically mentioned reviewing fiduciary accountability standards and fiduciary conduct.¹⁹² The House Report includes several sections addressing the committee’s goals for ERISA fiduciaries.¹⁹³ Additionally, some courts reference the remedies, other than personal liability of the fiduciary for losses, available to plan participants as evidence that Congress did not intend for every loss or fiduciary breach to result in personal liability.¹⁹⁴

Congress also did not incorporate every principle under the common law of trusts into ERISA. The committee report indicates that “certain” common law principles are incorporated,¹⁹⁵ but this does not mean Congress intended ERISA to include all of the common law of trusts. Evidence of the careful consideration of the common law of trusts and current fiduciary liability under the WPPDA strengthens the conclusion that Congress intended to include only the common law trust principles found within ERISA and to exclude all others.

185. *Id.* at 43.

186. *Id.* at 46.

187. *See id.* at 44.

188. Dortzbach, *supra* note 173, at 168.

189. H.R. Rep. No. 93-533, at 4639 (1973).

190. *Id.* at 4642.

191. *Id.* at 4643, 4650.

192. *Id.* at 4645–4646.

193. *Id.* at 4645–46, 4648–4651.

194. *See, e.g.,* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 372–83 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015) (Wilkinson, J., dissenting).

195. H.R. Rep. No. 93-533, at 4649.

The Supreme Court disagrees internally about the proper way to interpret ERISA. One important example is the contrasting majority and dissenting opinions in *Variety Corp. v. Howe*.¹⁹⁶ After determining that several of ERISA's terms were ambiguous, Justice Breyer's majority opinion looked beyond the plain text of the statute, to the common law meaning of the terms "fiduciary" and "administration," and determined that Congress intended to refer to the common law of trusts definition of those terms.¹⁹⁷ Justice Scalia joined Justice Thomas's dissent, which sharply criticized the majority for looking outside of ERISA.¹⁹⁸ Justice Thomas focused on the use of canons of construction to find the meaning of the relevant portions of ERISA:

Congress went to great lengths to enumerate ERISA's fiduciary obligations and duties, to create liability for breach of those obligations, and to authorize a civil suit to enforce those provisions "The law is settled that however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment."¹⁹⁹

Justice Thomas found Justice Breyer's use of the common law of trusts as a "starting point" for interpreting ERISA to be an approach that "stands [the] traditional approach on its head."²⁰⁰ The starting point for every case involving statutory construction is, according to Justice Thomas, the language of the statute itself.²⁰¹

As mentioned above, courts do not apply text-based or intent-based interpretation methods uniformly. Neither does a single interpretation method yield consistent results. There are many cases where all of the Justices agree that a statute's language is plain, yet, disagree about the meaning of the "plain language."²⁰² Ultimately, reasonable Justices may disagree about the plainness of the language or the meaning of otherwise plain language in a statute.

Nevertheless, the Supreme Court recently declared that it is not appropriate to place artificial presumptions onto the text of ERISA if the

196. *Variety Corp. v. Howe*, 516 U.S. 489 (1996).

197. *Id.* at 502–03.

198. *Id.* at 533 (Thomas, J., dissenting).

199. *Id.* at 519 (citations omitted) (quoting *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957), *superseded by statute on other grounds*, 28 U.S.C. § 1391(c) (2012), *as recognized in Haddad Bros. v. Little Things Mean a Lot, Inc.*, No. 00 Civ. 0578 (AGS), 2000 U.S. Dist. LEXIS 11035, at *20–21 (S.D.N.Y. Aug. 4, 2000)).

200. *Id.* at 528.

201. *Id.*

202. EIG, *supra* note 171, at 44.

statute does not refer to any other rules.²⁰³ As discussed above, nothing in the plain text of ERISA § 409(a) or the legislative history of ERISA gives the indication that Congress intended for a burden-shifting framework to apply.²⁰⁴ When courts superimpose extrinsic statutory materials into their interpretation of ERISA, they are acting contrary to the intent of Congress.

C. Congress enacted ERISA with competing purposes, which must be carefully balanced.

When courts consider a burden-shifting framework, they consider a question of equity. Specifically, on whom is it more equitable to place the burden of proving causation? The Supreme Court recently acknowledged the “careful balanc[e]” of ERISA “between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.”²⁰⁵ Proponents of the burden-shifting framework argue that shifting the burden of causation to the defendant after a prima facie showing of breach and loss is more equitable to the plaintiff. The plaintiff has already demonstrated the defendant breached its duty and should therefore have no further requirement to demonstrate the losses resulted from the breach because the defendant has acted outside the scope of his or her fiduciary duties. The lack of burden-shifting, those proponents argue, creates “an unfair advantage to a defendant who has already been shown to have engaged in wrongful conduct.”²⁰⁶ However, employer sponsored plans sued under ERISA § 409(a) face the reality of proving a negative. The plan must bear the burden of proving lack of causation, rather than defending against only credible claims that survive summary judgment. If the only concern of ERISA is to protect individual plaintiffs (or classes of plaintiffs under a single Plan), this is the correct result.

The House Committee Report for ERISA lays out five primary purposes of the law:

- (1) establish equitable standards of plan administration; (2) mandate

203. See *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014).

204. See *supra* Section III.A.2.

205. *Fifth Third Bancorp*, 134 S. Ct. at 2470 (quoting *Conkright v. Frommert*, 559 U.S. 506, 517 (2010)).

206. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015) (quoting Brief of Seth D. Harris, the Acting Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal at 20, *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014) (No. 13-1360)).

minimum standards of plan design with respect to the vesting of plan benefits; (3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities; (4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.²⁰⁷

The report goes on to describe the defects in the WPPDA and its failure to protect plan participants.²⁰⁸ Proponents of the burden-shifting framework interpret the purposes of the law to mean that Congress was primarily concerned with the protection of plan participants, given the abuse and fraud under the prior act, and the steps taken to hold plan administrators accountable. However, ERISA only covers private plans from private employers. Courts must consider the balance between the conflicting purposes of the statute. On the one hand, ERISA provides consumer protection for plan participants, ensuring fiduciaries manage their plan investments prudently. Plaintiffs are often in an inferior position against more sophisticated parties. Shifting the burden of causation to the more sophisticated defendant will protect plaintiffs who would otherwise have little to no access to relevant information during the pleadings stage. A burden-shifting framework comports with one of ERISA's objectives: to protect the interests of participants in employee benefit plans and their beneficiaries.²⁰⁹ On the other hand, ERISA simultaneously encourages employers to provide plans to employees, without requiring employers to provide the plans in the first place. This makes costs to employers a viable concern for both Congress and the courts. If the cost of providing and administering a plan becomes too high, many employers may elect not to participate. The result: many employees in the private sector would be without any employer-sponsored plan.

Allowing burden-shifting after a prima facie showing of breach and loss will allow meritless cases to proceed through litigation. There are many reasons a plan may suffer a loss. In many cases, the loss is no fault of the fiduciary (e.g., losses due to business cycles, fiscal and monetary decisions by governments, natural disasters, technological disruption, etc.). Indeed, even an extremely prudent plan fiduciary can be unlucky sometimes. Conversely, a fiduciary who gives no thought to investment choices or ERISA requirements may make a prudent choice by sheer

207. H.R. Rep. No. 93-533, at 4639 (1973).

208. *Id.* at 4641-43.

209. *See* 29 U.S.C. § 1001(b) (2012).

blind luck. But ERISA was not intended to remedy harmless breaches as evidenced by the causation requirement in ERISA § 409(a). Proponents of the burden-shifting framework would remove one of ERISA § 409(a)'s requirements after only two parts of the cause of action are met—breach and loss—and ask plan fiduciaries to prove the *absence* of causation.

One of ERISA's primary objectives is to promote private pension plans. Congress considered the "voluntary nature" of private retirement plans and took steps to balance their competing objectives: (1) protect employee participants, and (2) promote voluntary plan sponsorship by employers. Threatening fiduciaries with costly litigation, and potentially personal liability, whenever a plan loses money after an unrelated minor breach of a fiduciary duty, may discourage employers from providing private retirement benefits for employees.

In the Fourth Circuit, where precedent supports a burden-shifting framework, the landscape for fiduciaries creates more potential for fiduciary liability.²¹⁰ The burden-shifting framework creates a "plaintiff-friendly" environment, out of balance from the remaining circuits.²¹¹ The additional burdens of increased litigation, settlements, and other administrative costs may impact employer willingness to voluntarily offer plans.²¹² Ultimately, both ERISA plans and ERISA plan participants are better off without an ERISA burden-shifting framework.

IV. RESOLVING THE SPLIT: ANOTHER OPPORTUNITY PRESENTS ITSELF

Since Congress passed ERISA in 1976, the Supreme Court has heard 128 cases related to the Act, but did not hear any ERISA cases in the 2017–2018 term.²¹³ While several Justices have been blunt about their opinion of ERISA cases, using words like "dreary," "sloughy," and "tedious,"²¹⁴ the Court has not shied away from hearing cases over the last forty-two years. Why? The answer may be the importance

210. See Jared Burtner, Note, *A Catalyst for Change: Tatum v. RJR Pension Inv. Committee, ERISA, and the Absence of a Uniform Loss Causation Standard*, 11 J. BUS. & TECH. L. 219, 234 (2016).

211. *Id.*

212. *Id.* (citing *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 383 (4th Cir. 2014) (Wilkinson, J., dissenting), *cert. denied*, 135 S. Ct. 2887 (2015)).

213. EVERSHEDES SUTHERLAND, STEP BY STEP: EMPLOYEE BENEFITS IN THE SUPREME COURT, 3 (2017), <https://www.jdsupra.com/legalnews/step-by-step-employee-benefits-in-the-55294/> [<https://perma.cc/MN8L-VQJR>].

214. *Id.* at 5 (these Justices include Justice Rehnquist, Justice Ginsburg, and Justice O'Connor).

employee benefits plays in the economy.²¹⁵ Private retirement plans account for almost 30% of personal wealth in the United States.²¹⁶ The delicate balance of employer and employee participation will necessarily lead to disputes in numbers proportional to ERISA's impact on the national economy.²¹⁷

Despite ERISA's important national role, the Supreme Court denied certiorari for *Tatum*.²¹⁸ The circuit split has endured for more than twenty years; however, the most recent cases illustrate that the debate is not yet over. Ultimately, it is a question of when, not if, the Supreme Court will take a burden-shifting case and resolve the split. Because ERISA should be applied uniformly across all states and jurisdictions, a split that creates such a disparity in litigation costs and plan administration concerns for fiduciaries should make the cut for review in coming terms.

In November of 2017, the plan in the *Pioneer Centres* case filed a petition for certiorari with the U.S. Supreme Court. The *Pioneer Centres* petition gave the Court another opportunity to address the question presented in *Tatum*:

whether a plaintiff bears the full burden of establishing loss causation under [ERISA § 409(a)], as the Sixth, Ninth, Tenth, and Eleventh Circuits have held, or whether, as the Second, Fourth, Fifth, and Eighth Circuits have held, the burden shifts to the fiduciary to establish the *absence* of loss causation once the beneficiary makes a *prima facie* case by establishing breach of fiduciary duty and associated loss.²¹⁹

Pioneer Centres asked the Supreme Court to uphold the burden-shifting standard from the Second, Fourth, Fifth, and Eighth Circuits and ignore the plain language of the statute and ERISA's balanced competing purposes. The Court asked the Solicitor General's office to make an official comment, but the parties voluntarily withdrew their petition before any comment was made.²²⁰

Another opportunity for the Supreme Court to resolve the circuit split may present itself in 2019. Plan participants sued Putnam

215. *Id.* at 5.

216. *Id.*

217. *Id.*

218. *RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 2887 (2015).

219. Petition for a Writ of Certiorari, at *1, *Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A.*, 2017 WL 5171490 (No. 17-667).

220. *Pioneer Centres Holding v. Alerus Financial*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/pioneer-centres-holding-company-stock-ownership-plan-trustees-v-alerus-financial/> (last visited Nov. 20, 2018) [<https://perma.cc/99Y5-ALC2>].

Investments, LLC on behalf of the Putnam Retirement Plan, alleging that Putnam Investments included its own investment products in the 401(k) offered to its employees without considering whether they were prudent investments.²²¹ The District Court held that the plaintiffs had not met their burden of proving causation.²²² But the First Circuit vacated the judgment and approved a burden-shifting framework for ERISA claims.²²³ Putnam Investments requested a delay in enforcement of a First Circuit decision to implement a burden-shifting framework so that it could file a petition for review with the Supreme Court.²²⁴ As of January 2019, the parties have not filed a petition. Nevertheless, this will be an important case to watch for over the next few months.

V. CONCLUSION

The Employee Retirement Income Security Act of 1974 does not provide for burden-shifting in the event of a loss resulting from breach of fiduciary duty. Courts should reject the burden-shifting framework proposed by some circuits in favor of a strictly textualist construction. The plain language of ERISA does not create a burden-shifting framework.

Even if a court rejects a purely text-based interpretation, Congress's clear departure from common law trust liability indicates Congress did not intend to merely codify common law requirements for trustees. ERISA fiduciary requirements allow for actions and relationships that common trust law does not.

Ultimately, the standard for ERISA fiduciaries needs clarification. With almost every circuit court taking a slightly different position, protections for plan participants are not equal. Conversely, employers in different states bear different burdens of risk. Clarification in the future is necessary to ensure equitable enforcement of ERISA.

221. Complaint at 1–3, *Brotherston v. Putnam Invs., LLC*, No 15-13825-WGY (D. Mass. Nov. 13, 2015), ECF No. 1.

222. *Brotherston v. Putnam Invs., LLC*, No. 15-13825, 2017 WL 2634361, at *11–12 (D. Mass. June 19, 2017).

223. *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 34 (1st Cir. 2018).

224. Jacklyn Wille, *Putnam to Take 401(k) Fund Dispute to Supreme Court*, BLOOMBERG LAW (Oct. 25, 2018, 11:29 AM), https://www.bloomberglaw.com/document/X9SVS35S000000?bna_news_filter=employee-benefits&jcsearch=BNA%252000000166ab5ad8dca7f7bb5b483e0000#jcite.