ST. MARY'S UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

1992

ERISA: Jury Trial Mandated for Benefit Claims Actions

George Lee Flint Jr
St. Mary's University School of Law, gflint@stmarytx.edu

Follow this and additional works at: https://commons.stmarytx.edu/facarticles

 Part of the Law Commons

Recommended Citation

George Lee Flint, Jr., ERISA: Jury Trial Mandated for Benefit Claims Actions, 25 Loy. L.A. L. Rev. 361 (1992).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

ERISA: JURY TRIAL MANDATED FOR BENEFIT CLAIMS ACTIONS

*George Lee Flint, Jr.**

I. INTRODUCTION

Through the Employee Retirement Income Security Act of 1974 (ERISA),[1] Congress intended to provide increased legal remedies for participant-beneficiaries[2] who are denied benefits from private employee benefit programs. To achieve this goal, Congress provided new federal remedies under federal causes of action that are tried in both federal and state courts.[3]

Following ERISA's passage, the federal courts, ever hostile to the jury trial that legal remedies entail, have endeavored to thwart this goal. Two facts have aided the federal courts' efforts: (1) ERISA lacks an express provision permitting jury trials in lawsuits by participant-beneficiaries;[4] and (2) employee benefit programs generally consist of two components—trusts and contracts[5]—which have radically different impacts when determining whether the right to a jury trial exists. Unfortunately, employee benefit law has yet to develop a theoretical legal independence from the body of law that relates to those two strands. Consequently, federal courts can depict employee benefit programs as trusts, a subject for the equity courts, and thereby deny a jury trial in an ERISA action.[6]

---

* Professor of Law, St. Mary's University School of Law, San Antonio, Texas; B.A., 1966, B.S., 1966, M.A., 1968, University of Texas at Austin; Nuc. E., 1969, Massachusetts Institute of Technology; Ph.D. (Physics), 1973, J.D., 1975, University of Texas at Austin.

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

2. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132 (1988) (civil action may be brought against employers and fiduciaries who have violated Act). See *infra* notes 233-41 and accompanying text for the congressional statement.

3. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132.

4. *Id.* § 502 (a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B); *see* Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 828 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

5. Employee Retirement Income Security Act of 1974, § 502(a)(1)-(4), 29 U.S.C. § 1132(a)(1)-(4); *see infra* notes 28-31 and accompanying text.

6. *See, e.g.*, Note, *The Right to Jury Trial in Enforcement Actions under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 739 (1983); *see also infra* notes 130-66 and accompanying text.

In contrast, state courts early characterized employee benefit programs as contracts, a subject for the law courts, thereby granting a right to jury trial in an ERISA action.[7] Juries typically respond more favorably to participant-beneficiaries than to the predominantly corporate sponsors of the employee benefit programs.[8]

Thus, whether a participant-beneficiary obtains a jury trial for review of his or her benefit claim denial depends on the forum selected by the participant-beneficiary and whether the plan administrator permits him or her to remain in that forum.

This Article outlines the statutory scheme that permits the dual jurisdiction over ERISA lawsuits for benefits and explains the significance of a jury trial to the participant-beneficiary's lawsuit.[9] This Article then discusses the principles used to determine whether the right to a jury trial exists and reviews the approaches of the appellate courts, emphasizing the failure of the federal circuit courts to properly resolve the jury trial issue.[10] Next, this Article provides the analysis that courts should use to determine whether a participant-beneficiary has a right to a jury trial.[11]

This Article asserts that both ERISA and relevant constitutional provisions require a jury trial in lawsuits by participant-beneficiaries relating to their employee benefits.[12] This eliminates a motive for forum shopping and fosters the congressional goal of providing increased legal remedies for participant-beneficiaries.

II. CONCURRENT JURISDICTION

A. Employee Benefit Programs in General

ERISA generally applies to two types of employee benefit programs: welfare plans and pension plans.[13] These employee benefit programs generally involve four parties: (1) the employer, who makes contributions to the plan and appoints both the plan administrator and the

7. *See infra* notes 205-08 and accompanying text.
8. *See infra* notes 92-99 and accompanying text.
9. *See infra* notes 13-112 and accompanying text.
10. *See infra* notes 113-93 and accompanying text.
11. *See infra* notes 194-311 and accompanying text.
12. *See infra* notes 315-21 and accompanying text.
13. Welfare plans provide benefits in the nature of medical, disability, death, severance, vacation or education benefits. Employee Retirement Income Security Act of 1974, § 3(1)(A), 29 U.S.C. § 1002(2)(A) (1988). A pension plan provides retirement income or deferred income. *Id.* § 3(2), 29 U.S.C. § 1002(3). There are two types of pension plans: (1) the "defined contribution plan" or "individual account plan" for which the plan document specifies the annual contribution, *id.* § 3(34), 29 U.S.C. § 1002(34); and (2) the "defined benefit plan," *id.* § 3(35), 29 U.S.C. § 1002(35), for which the plan document specifies the amount of the retirement benefit.

trustee;[14] (2) the plan administrator, who administers the plan;[15] (3) the trustee, who invests the plan's funds;[16] and (4) the participant-beneficiary, who receives the benefits.[17] A single party may serve in more than one of these four roles.[18] The employer, plan administrator and trustee are all plan fiduciaries.[19]

There are usually four separate types of plan administrators: (1) an employer;[20] (2) a management employee, a committee of such persons, or a committee dominated by such persons;[21] (3) a service provider, such as an insurance company operating under an administrative contract with the plan;[22] and (4) a committee with an equal number of representatives from management and rank and file employees.[23] Only the latter type of plan administrator can be disinterested,[24] or at least truly balanced.[25]

---

14. *Id.* § 3(5), 29 U.S.C. § 1002(5)(B); *id.* § 3(16), 29 U.S.C. § 1002(16)(A).

15. *Id.* § 3(16)(A), 29 U.S.C. § 1002(16)(A).

16. *Id.* § 403(a), 29 U.S.C. § 1103(a).

17. *Id.* § 3(6)-(8), 29 U.S.C. § 1002(6)-(8). *See generally* Robert A. Frei & James G. Archer, *Taxation & Regulation of Pension Plans Under the I.R.C.*, 1967 U. ILL. L.F. 691, 692-93 (discussing four parties in context of their role in pension plans and relevant tax consequences).

18. *See supra* notes 14-17 and accompanying text.

19. Employee Retirement Income Security Act of 1974, §§ 3(21), 403, 29 U.S.C. §§ 1002(21)(A), 1103(a) (1988); *see, e.g.*, H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 323 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103 ("[F]iduciaries include officers and directors of a plan, members of a plan's investment committee and persons who select these individuals.").

20. *See, e.g.*, Employee Retirement Income Security Act of 1974, § 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii) (employer plan administrator if none named).

21. *See, e.g.*, Varhola v. Doe, 820 F.2d 809, 812-13 (6th Cir. 1987) (committee of executive employees); Chilton v. Savannah Foods & Indus., 814 F.2d 620, 622 (11th Cir. 1987) (director of personnel); Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 535 (7th Cir. 1986) (committee of management employees), *cert. denied*, 479 U.S. 1094 (1987); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1093-94 (9th Cir. 1985) (director of personnel).

22. *See, e.g.*, McLaughlin v. Connecticut Gen. Life Ins. Co., 565 F. Supp. 434, 441-42 (N.D. Cal. 1983) (stating insurer with authority to deny or grant claims is fiduciary under ERISA); Schulist v. Blue Cross, 553 F. Supp. 248, 252 (N.D. Ill. 1982) (same), *aff'd*, 717 F.2d 1127 (7th Cir. 1983); Eaton v. D'Amato, 581 F. Supp. 743, 745-46 (D.D.C. 1980) (stating service provider acting as claims administrator could be fiduciary if it had ultimate responsibility for claims determinations).

23. *See, e.g.*, Labor Management Relations Act of 1947, § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B) (1988) (specifying membership of trustee for jointly administered union plan).

24. Plan administrators that have an interest in the outcome of their decision must satisfy a higher decisional standard than those not so interested. *See infra* notes 71-79 and accompanying text. The federal courts have long applied the disinterested decisional standard to the jointly administered union plan. *See, e.g.*, Danti v. Lewis, 312 F.2d 345, 348 (D.C. Cir. 1962) (treating this type of administrator as disinterested).

25. *See* George L. Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. L. REV. 133, 174-75 (1990); *see also* Donovan v. Bierwirth, 538 F. Supp. 463, 468 (E.D.N.Y. 1981) (ERISA "contemplates fiduciaries with dual loyalties" and this arrangement

Employee benefit programs divide into two types: single-employer plans in which the firm sponsors a plan only for its employees, and multiple-employer plans in which several firms together sponsor one plan for all of their employees.[26] Most multiple-employer plans are multi-employer plans maintained pursuant to a collective bargaining agreement with a union, designed to benefit the labor union members of the involved employers.[27]

Employee benefit programs that are not multi-employer plans ordinarily consist of two separate instruments, both of which govern the benefit program.[28] The plan instrument which is in the form of a contract defines the rights and duties of the employer, the plan administrator, and the third-party beneficiaries of the contract, namely the participant-beneficiaries. The plan is executed by the employer and initial plan administrators.[29] A trust instrument, in the form of a trust document, defines the rights and duties of the employer and trustee with respect to the assets of the benefit program, and is executed by the employer and initial trustee.[30] Sometimes, both instruments appear in the same document executed by the employer, the initial plan administrators, and the initial trustee.[31] Multi-employer plans also usually have two instruments: (1) the collective bargaining agreement (a contract); and (2) an instrument, labeled a trust document, that establishes a board of trustees,[32] defines the board's duties, and covers the affairs of both the trust and the plan.[33]

---

is "an unorthodox departure from the common law rule against dual loyalties"), *aff'd as modified*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982).

26. JOHN H. LANGBEIN & BRUCE WOLK, PENSION AND EMPLOYEE BENEFIT LAW 48 (1990).

27. Employee Retirement Income Security Act of 1974, § 3(37)(A), 29 U.S.C. § 1002(37)(A) (1988); EMPLOYEE BENEFITS RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d ed. 1987).

28. *See, e.g.*, Molumby v. Shapleigh Hardware Co., 395 S.W.2d 221, 223 (Mo. Ct. App. 1965) (plan and trust in separate instruments); *see also* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 223 (Gerhard Casper et al. eds., 1991) (pointing out that ERISA does not supplant either trust law or contract law relating to employee benefit programs).

29. *E.g.*, 5A JACOB J. RABKIN & MARK JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS (MB) 13-1001 to -0021 (1991) (defined benefit program's plan instrument, Form 13.01, without separate trust instrument).

30. *E.g.*, *id.* at 13-1074 to -1083 (trust instrument for defined benefit program, Form 13.03(II)).

31. *E.g.*, *id.* at 13-2045 to -2077 (profit-sharing plan and trust, so labeled, in one document, Form 13.13).

32. *See, e.g.*, Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. § 186(c)(5) (1988).

33. EMPLOYEE BENEFITS RESEARCH INSTITUTE, *supra* note 27, at 55-59. The Board typically hires a salaried plan administrator and staff or an outside administration firm to handle

B. Nongovernmental Civil Actions and Jurisdiction

Two federal statutes provide most of the regulation of employee benefit programs: the Labor Management Relations Act of 1947 (LMRA)[34] and ERISA.[35]

1. LMRA regulation

Government regulation of multi-employer plans and single-employer, union-negotiated plans began with LMRA. This Act primarily regulates collective bargaining agreements.[36] LMRA has two provisions of significance to employee benefit programs.

LMRA section 302(c)(5) mandates that employee benefit programs conform to three requirements. First, union officials can only participate in plan administration and fund management as members of a board of trustees on which both labor and management are equally represented.[37] As a result of this requirement, labor unions have developed two types of employee benefit programs: (1) programs administered jointly by both union and management pursuant to a collective bargaining agreement, exempted from LMRA provisions proscribing payment to union officials; and (2) programs resulting from the collective bargaining process administered unilaterally by employers and subject to the proscription.[38] Con-

---

day-to-day matters. *Id.* So even multi-employer plans separate plan administration from asset management.

34. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1988)).

35. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

36. Labor Management Relations Act of 1947, § 101, 29 U.S.C. § 151 (1988).

37. *Id.* § 302(c)(5), 29 U.S.C. § 186(c)(5).

In the employee benefit area, LMRA attempted to eliminate the extortion, bribery and mismanagement plaguing union pension and welfare programs by controlling their establishment and operation. Eliot A. Landau et al., *Protecting a Potential Pensioner's Pension—An Overview of Present and Proposed Law on Trustees' Fiduciary Obligations and Vesting*, 40 BROOK. L. REV. 521, 535-41 (1974). Congress also became concerned that union officials might convert program resources to their own use and, through LMRA, made it illegal to set up a program administered solely by a union. *Id.* at 535.

38. *See* Randy J. Schneider, *Surviving ERISA Preemption: Pension Arbitration in the 1980's*, 16 COLUM. J.L. & SOC. PROBS. 269, 275-78 (1980). Both types settled disputes through arbitration prior to ERISA. *Id.* at 276.

Unilaterally administered plans are of two types. One type is the subject of a collective bargaining agreement. But an employer can also establish an employee benefit plan outside of the collective bargaining agreement for union employees when it is not the subject of the collective bargaining agreement with the union. *See* Employee Retirement Income Security Act of 1974, § 1014(a), 26 U.S.C. § 413(a) (1988) (special rules for collectively bargained plans); 26 C.F.R. § 1.413-1(a)(2) (1991). Since employee benefit plans are mandatory subjects of negotiation, these plans result when the employer and union fail to agree on a collectively bargained

sequently, the jointly administered multi-employer plans possess a disinterested plan administrator.[39]

Second, LMRA section 302(c)(5) requires that programs be funded by a trust.[40] Third, this part of LMRA requires the trustees of multi-employer plans to operate them for the sole and exclusive benefit of the participant-beneficiaries. However, this requirement contains no enforcement mechanism.[41] Instead, courts have implied a number of non-governmental, civil actions.[42] Federal jurisdiction for these cases depends on a sufficient structural violation of section 302(c)(5).[43] Under this provision employers, participant-beneficiaries and trustees have sued to enforce fiduciary duties;[44] participant-beneficiaries have also used this provision to sue for benefits due under multi-employer plans.[45]

---

plan. *See, e.g.*, Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180-81 (1971).

39. *See supra* notes 23-25 and accompanying text.

40. Labor Management Relations Act of 1947, § 302(c)(5)(A), 29 U.S.C. § 186(c)(5)(A) (1988).

41. *Id.* (prohibiting employer payments to labor unions except for payments to employee trust funds for sole and exclusive benefit of employees and beneficiaries).

42. *See infra* notes 44-45 and accompanying text.

43. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109-10 (1989). Examples of sufficient structural violations are when the trust has an unevenly balanced joint administration, the trust is not established solely to benefit employees, the trust does not have an annual audit or the trust does not set forth a detailed basis for paying benefits. *See* Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 424 (1st Cir. 1968); Landau et al., *supra* note 37, at 538-39.

44. *See, e.g.*, Nedd v. United Mine Workers, 556 F.2d 190, 200 (3d Cir. 1977) (pensioners sued trustees to make plan whole for failure to get employer contributions), *cert. denied*, 434 U.S. 1013 (1978); Alvares v. Erickson, 514 F.2d 156, 165 (9th Cir.) (former union members who had withdrawn from plan sought transfer of moneys contributed on their behalf), *cert. denied*, 423 U.S. 874 (1975); Haley v. Palatnik, 509 F.2d 1038, 1040-41 (2d Cir. 1975) (new trustees sued old trustees to invalidate self-dealing contract); Quad City Builders Ass'n v. Tri City Bricklayers Union No. 7, 431 F.2d 999, 1001 (8th Cir. 1970) (builder's association sued for violation of administrator balance); Blassie v. Kroger Co., 345 F.2d 58, 75 (8th Cir. 1965) (employers challenged use of trust property to run pharmacy offering discounts to nonbeneficiaries); Employing Plasterers' Ass'n v. Journeymen Plasterers' Protective & Benevolent Soc'y Local No. 5, 279 F.2d 92, 97-99 (7th Cir. 1960) (employers sued trustees to enjoin plan administrator's misuse of funds for political contributions); Insley v. Joyce, 330 F. Supp. 1228, 1232 (N.D. Ill. 1971) (employee challenged break-in-service provision in plan); Porter v. Teamsters Health, Welfare & Life Ins., 321 F. Supp. 101, 104 (E.D. Pa. 1970) (union members sued trustees for diversion of trust funds); Giordani v. Hoffman, 295 F. Supp. 463, 471-72 (E.D. Pa. 1969) (union members sued for improprieties in administration of trust fund); Bath v. Pixler, 283 F. Supp. 632, 635-36 (D. Colo. 1968) (trustees sued to determine disposition of health and welfare funds on termination of old trust to establish new trust); Raymond v. Hoffmann, 284 F. Supp. 596, 598-99 (E.D. Pa. 1966) (trustees of new local sued trustees of old union plan for aliquot portion of reserves); *accord Bowers*, 393 F.2d at 426 (jurisdiction lacking without allegation of violation of section for trustees who sued nonparties for diversion of funds).

45. *See, e.g.*, Johnson v. Botica, 537 F.2d 930, 933 (7th Cir. 1976) (former employee sued to challenge denial of disability pension); Lugo v. Employees Retirement Fund of the Illumina-

LMRA section 301(a) provides specific causes of action to enforce contracts under collective bargaining agreements.[46] Courts consider employee benefit plans to be this type of contract.[47] Therefore, LMRA section 301(a) applies to both multi-employer and single-employer, union-negotiated employee plans. Under this interpretation trustees, as parties to the contract, have sued employers for contributions,[48] and participant-beneficiaries, as third party-beneficiaries of the contract, have sued for benefits due[49] and to rectify breaches of various fiduciary duties.[50] Both state and federal courts have jurisdiction for lawsuits under sections 301

---

tion Prods. Indus., 529 F.2d 251, 254-56 (2d Cir.) (former employee sued for declaration and injunctive relief for denial of disability pension), *cert. denied*, 429 U.S. 826 (1976); Pete v. United Mine Workers Welfare & Retirement Fund, 517 F.2d 1267, 1269-70 (D.C. Cir.) (former employee sued to review pension benefit denial), *reh'g granted*, 517 F.2d 1274 (1974); Kiser v. Huge, 517 F.2d 1237, 1244 (D.C. Cir.) (class action brought to review denial of pension benefits), *reh'g granted sub nom.* Kiser v. Boyle, 517 F.2d 1274 (D.C. Cir. 1974); Kosty v. Lewis, 319 F.2d 744, 745 (D.C. Cir. 1963) (union member sued trustees to determine eligibility for pension), *cert. denied*, 375 U.S. 964 (1964).

46. Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (1988) ("Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court" without meeting amount in controversy and diversity requirements.).

47. *See infra* notes 256-61 and accompanying text.

48. *See, e.g.*, Clark v. Kraftco Corp., 510 F.2d 500, 502 (2d Cir. 1975) (trustees sued employer for delinquent contributions); Lewis v. Seanor Coal Co., 382 F.2d 437, 439 (3d Cir. 1967) (same), *cert. denied*, 390 U.S. 947 (1968); Lewis v. Owens, 338 F.2d 740, 740 (6th Cir. 1964) (same); Calhoun v. Bernard, 333 F.2d 739, 740 (9th Cir. 1964) (same); Pennington v. United Mine Workers, 325 F.2d 804, 806 (6th Cir. 1963) (same), *cert. denied*, 381 U.S. 949 (1965); Lewis v. Lowry, 322 F.2d 453, 454 (4th Cir. 1963) (same); Lewis v. Mears, 297 F.2d 101, 102 (3d Cir. 1961) (same), *cert. denied*, 369 U.S. 873 (1962); Local No. 90 Stove Mounters' Union v. Welbilt Corp., 178 F. Supp. 408, 409 (E.D. Mich. 1959) (union sued employer to compel employer's payments to pension fund), *aff'd*, 283 F.2d 868 (6th Cir. 1960).

49. *See, e.g.*, Rehmar v. Smith, 555 F.2d 1362, 1366-67 (9th Cir. 1976) (widow sued trustees for survivor's benefits); Smith v. Union Carbide Corp., 350 F.2d 258, 268 (6th Cir. 1965) (former employee sued for denied pension benefit); Rhine v. Union Carbide Corp., 343 F.2d 12, 15 (6th Cir. 1965) (former employee sued for denied disability benefit); United Auto. Workers v. Textron, Inc., 312 F.2d 688, 691 (6th Cir. 1963) (union action on behalf of employees to determine their rights in terminated plan); Hayes v. Morse, 347 F. Supp. 1081, 1087 (E.D. Mo. 1972) (former employee sued trustees for pension benefit), *aff'd*, 474 F.2d 1265 (8th Cir. 1973); Brune v. Morse, 339 F. Supp. 159, 159 (E.D. Mo. 1972) (same), *aff'd*, 475 F.2d 858 (8th Cir. 1973); Knoll v. Phoenix Steel Corp., 325 F. Supp. 666, 668 (E.D. Pa. 1971) (action by former employees to discontinue pension fund and distribute assets to beneficiaries upon closing of plant), *aff'd*, 465 F.2d 1128 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *accord* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176-77 n.17 (1971) (dictum in unfair labor practice case); Beam v. International Org. of Masters, 511 F.2d 975, 978 (2d Cir. 1975) (spouse of deceased union member sought denied accidental death benefits).

50. *See, e.g.*, Nedd v. United Mine Workers, 556 F.2d 190, 197 (3d Cir. 1977) (pensioners sued trustees for not exercising trustees' rights under employee benefit plan), *cert. denied*, 434 U.S. 1013 (1978); Alvares v. Erickson, 514 F.2d 156, 161-64 (9th Cir.) (former union members who had withdrawn from plan sought transfer of moneys contributed on their behalf), *cert. denied*, 423 U.S. 874 (1975); United Steelworkers v. Butler, 439 F.2d 1110, 1111 (8th Cir.

and 302.[51]

2. ERISA regulation

The more comprehensive regulation of these collectively bargained plans and most of the remaining single-employer plans began with ERISA.[52] For these plans ERISA specifies reporting and disclosure

---

1971) (union sued on behalf of employees for wrongfully paid insurance premiums under health plan).

51. The LMRA provision for lawsuits on union contracts states only that these suits "may be brought" in federal court, Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (1988), so a litigant may also bring the lawsuit in state court, Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962).

Litigants have brought suits in state court to enforce contribution requirements to collective bargaining agreements. *See, e.g.*, Reeves v. Arizona Aggregate Ass'n Health & Welfare Fund, 435 P.2d 829, 830 (Ariz. 1967) (trustees sued to recover contributions); Barbers Local 552, Journeymen Barbers Int'l Union v. Sealey, 118 N.W.2d 837, 838 (Mich. 1962) (union sued for specific performance compelling contributions); List Indus. Corp. v. Gelber, 175 N.Y.S.2d 800, 801 (Sup. Ct. 1958) (trustees sued to recover contribution); Northwest Adm'rs., Inc. v. Wildish Sand & Gravel Co., 552 P.2d 547, 548 (Or. 1976) (trustees sued to enforce payments by employer); Trust Fund Serv. v. Heyman, 550 P.2d 547, 548 (Wash. Ct. App. 1976) (trustee suit to compel contributions to pension plan), *aff'd*, 565 P.2d 805, *cert. denied*, 434 U.S. 987 (1977). Participant-beneficiaries have also sued in state court for benefits due. *See, e.g.*, Atlantic Steel Co. v. Kitchens, 187 S.E.2d 824, 825 (Ga. 1972) (former employee sued for retirement benefits); Hoffman v. Cross, 183 N.Y.S.2d 652, 653 (Sup. Ct. 1958) (former employees sued for retirement benefits); Forrish v. Kennedy, 105 A.2d 67, 70 (Pa. 1954) (former employee sued trustees for retirement pension); Garrity v. United Mine Workers Welfare & Retirement Fund of 1950, 43 Lab. Cas. (CCH) ¶ 7216 (Pa. Ct. Com. Pleas 1960) (retired union members sued trustees for pension benefits), *aff'd*, 170 A.2d 117 (1961).

The LMRA provision for employee plans states that federal courts "shall have jurisdiction . . . to restrain violations of this section." Labor Management Relations Act of 1947, § 302(e), 29 U.S.C. § 186(e) (1988). Congress drafted this provision, however, to avoid the anti-injunction requirements of the Norris-Laguardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1988)). *See* 93 CONG. REC. S4678 (1947) (statement of Sen. Ball). As a result, courts have claimed that state jurisdiction also exists for restraining violations. *See, e.g.*, Nixon v. O'Callaghan, 392 F. Supp. 1081, 1085 (S.D.N.Y. 1975) (removal of case for benefits due when statute required state jurisdiction for removal; *see* 28 U.S.C. § 1441(e) (1988) (state jurisdiction no longer required)); Butchers' Union Local 229 v. Cudahy Packing Co., 66 Cal. 2d 925, 932, 428 P.2d 849, 852, 59 Cal. Rptr. 713, 716 (1967) (union sued to compel employer to arbitrate pension eligibility); Cox v. Superior Court of San Bernardino County, 52 Cal. 2d 855, 859, 346 P.2d 15, 19 (1959) (denied writ of prohibition against employer's enforcement of breaches of fiduciary duties).

52. ERISA contains provisions favorable to participants in collectively bargained, multiemployer plans. These provisions preserve participation and benefit rights for a highly mobile workforce on a union- or industry-wide basis. Changing employment between employers included in the plan does not interrupt accrual of benefits and vesting. Employee Retirement Income Security Act of 1974, § 1014, 26 U.S.C. § 413(c)(3) (1988); *see also* 29 C.F.R. § 2530.203-3 (1991) (distinguishing between multi-employer plans and other plans on this basis). The regulations apply the nondiscrimination tests for employee coverage as if a single employer employed the employees of all employers subject to the same benefit computation

requirements,[53] participation and vesting requirements,[54] funding requirements[55] and fiduciary standards.[56]

ERISA differs from LMRA by specifically providing for express actions with jurisdictional limits. Section 502(a) of ERISA authorizes several types of express, nongovernmental, civil lawsuits by plan fiduciaries and participant-beneficiaries: (1) a participant-beneficiary suit for information;[57] (2) a participant-beneficiary or fiduciary suit (a) to enjoin violations of ERISA or the plan, (b) to obtain other equitable relief to redress such violations, or (c) to enforce ERISA's or the plan's provisions;[58] and (3) a participant-beneficiary lawsuit "to recover benefits due [the participant-beneficiary] under the terms of [the] plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[59] Unlike LMRA, under the jurisdictional provision of ERISA, all litigants must bring suit in federal court except participant-beneficiaries suing for benefits, or the enforcement or clarification of rights, all provided under the plan and not ERISA.[60] The latter litigants may sue either in federal or state court.[61]

---

formula under the plan. Employee Retirement Income Security Act of 1974, § 1014, 26 U.S.C. § 413(b)(1); 26 C.F.R. § 1.413-1(b) (1990).

53. Employee Retirement Income Security Act of 1974, § 101-111, 29 U.S.C. §§ 1021-1031 (1988).

54. *Id.* §§ 201-211, 29 U.S.C. §§ 1051-1061.

55. *Id.* §§ 301-306, 29 U.S.C. §§ 1081-1086.

56. *Id.* §§ 401-414, 29 U.S.C. §§ 1101-1114.

57. *Id.* § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A)(c) (relief provided by § 1132(c) to participant-beneficiary for failure to provide information required by ERISA upon request); *see also id.* § 502(a)(4), 29 U.S.C. § 1132(a)(4) (appropriate relief to participant-beneficiary for violation of § 1025(c) requiring annual statement to participant of vested benefit).

58. *Id.* § 502(a)(3), 29 U.S.C. § 1132(a)(3) (equitable relief for participant-beneficiary or fiduciary for violations or to enforce statute and plan); H.R. CONF. REP. NO. 1280, *supra* note 19, at 323, *reprinted in* 1974 U.S.C.C.A.N. at 5107 (actions involving breach of fiduciary duty and to enforce or clarify benefit rights provided under statute); *see also* Employee Retirement Income Security Act of 1974, § 409, 29 U.S.C. § 1109 (1988) (fiduciary liability to plan for breach of fiduciary duty); *id.* § 502(a)(2), 29 U.S.C. 1132(a)(2) (appropriate relief for participant-beneficiary or fiduciary under § 1109).

59. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); H.R. CONF. REP. NO. 1280, *supra* note 19, at 323, *reprinted in* 1974 U.S.C.C.A.N. at 5107 (actions to enforce benefit rights under plan or to recover benefits under plan not involving statute).

In any ERISA action the court may award reasonable attorney's fees. Employee Retirement Income Security Act of 1974, § 502(g), 29 U.S.C. § 1132(g)(1).

60. Employee Retirement Income Security Act of 1974, § 502(e)(1), (a)(1)(B), 29 U.S.C. § 1132(e)(1), (a)(1)(B).

61. *Id.* § 502(e)(1), 29 U.S.C. § 1132(e)(1).

C. *Participant Preference for State Court*

The jury issue under ERISA typically arises in the context of the benefits-due lawsuit. Participant-beneficiaries desiring benefits from employee benefit programs normally apply to plan administrators or their designees,[62] who rule on the application.[63] Plans ordinarily provide plan administrators with discretion in making these decisions.[64] ERISA contemplates this discretion[65] and pre-ERISA law all but mandated it.[66] Tax law once indirectly mandated discretion in benefit payment.[67] State law indirectly mandated discretion in plan interpretation.[68]

---

62. Any designee of a plan administrator is also a fiduciary. *Id.* § 3(21)(A), 29 U.S.C. § 1002(21)(A); 29 C.F.R. § 2560.503-1(g)(2) (1991); *see supra* note 22 and accompanying text.

63. ERISA provides that the plan administrator must have procedures for making a claim, communicating any denial to the participant-beneficiary and appealing the decision. Employee Retirement Income Security Act of 1974, § 503, 29 U.S.C. § 1133 (1988); 29 C.F.R. § 2560.503-1 (1991).

64. *See* Langbein, *supra* note 28, at 220-23 (suggesting that after 1988 all properly drafted plans will provide discretion because of the United States Supreme Court's review rule); *see also infra* notes 65-68 and accompanying text.

65. ERISA defines a plan administrator as an entity with discretion in the administration of the plan. Employee Retirement Income Security Act of 1974, § 3, 29 U.S.C. § 1002(21)(A) (1988). The significance of the discretion presently deals with the courts' review standard for the decision, because of a misreading of the Supreme Court's directive by the circuit courts. The misreading involves the courts' application of the arbitrary and capricious standard in all cases involving discretion, rather than the abuse of discretion standard, of which the arbitrary and capricious standard is one part and de novo review the other part. *See infra* notes 71-79 and accompanying text. One commentator, speaking for those draftsmen who risked legal malpractice by ignoring pre-ERISA law and the proper drafting of ERISA plans, concluded that the Supreme Court's directive will mandate the discretion. *See* Langbein, *supra* note 28, at 220. ERISA plans based on forms from the pre-ERISA law generally have that discretion. *See, e.g.*, Menke v. Thompson, 140 F.2d 786, 787 (8th Cir. 1944) (action of board in all respects to be final and conclusive, the typical pre-ERISA language granting discretion).

66. *See infra* notes 67-68 and accompanying text.

67. The estate tax code defined a taxable lump sum to include an amount payable as a lump sum distribution at the election of the recipient. 26 U.S.C. § 2039(c) (1983) (relating to exemption from estate taxes for payments from qualified retirement plans other than lump sums), *repealed by* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1852(a)(1)(A), 100 Stat. 2085, 2868. Plan administrator discretion concerning payment method destroyed that taxable election. The income tax code included in taxable income those amounts paid or made available by a retirement plan. 26 U.S.C. § 402(a) (1980), *amended by* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §§ 311(c)(1), 314(c)(1), 95 Stat. 172, 277 (to delete availability language). Plan administrator discretion concerning payment times destroyed that taxable availability.

68. Several early decisions by courts held that, absent fraud, courts could not review a plan administrator's decision if the plan provided that the plan administrator had discretion to determine eligibility and other matters under the plan and that such decision was conclusive. *See, e.g.*, Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 (9th Cir. 1983) (under trust theory for LMRA plan); Clark v. New England Tel. & Tel. Co., 118 N.E. 348, 351 (Mass. 1918) (under contract theory for employee benefit plan); McNevin v. Solvay Process Co., 53 N.Y.S. 98, 100 (App. Div. 1898) (under gratuity theory for employee

If the plan administrator denies the application, the participant-beneficiary must first appeal the decision to the plan administrator.[69] If the plan administrator does not reverse the decision, the participant-beneficiary may sue for recovery of benefits in either federal or state court.[70]

1. Two approaches to the decision's review

Ordinarily, the issue for the courts in the benefits-due lawsuit is the review of the plan administrator's discretionary decision. The United States Supreme Court, in dicta, has mandated that courts conduct this review under the abuse of discretion standard of trust law.[71] This standard consists of essentially two parts: (1) the deferential (to the plan administrator) arbitrary and capricious standard for the disinterested plan administrator with proper motives;[72] and (2) de novo review for disinterested plan administrators with improper motives and for interested plan administrators.[73]

Which abuse of discretion review standard applies depends on the type of plan administrator. The disinterested, properly-motivated plan administrator fails the deferential arbitrary and capricious test when he

benefit plan), *aff'd*, 60 N.E. 1115 (N.Y. 1901). Without that discretionary provision, courts applied the usual contract construction rule, which requires that courts construe the contract against the employer-draftsman. *Compare Menke*, 140 F.2d at 791 (discretion so not construed against draftsman) *with* Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 879 (Ohio Ct. App. 1937) (no discretion so construed against draftsman). Writers of retirement plans could avoid problems of poor draftsmanship by providing the plan administrator with the discretion to interpret the plan and determine conclusively any controversy between the plan and the participant-beneficiary.

69. Employee Retirement Income Security Act of 1974, § 503(2), 29 U.S.C. § 1133(2) (1988); 29 C.F.R. § 2560.503-1 (1991).

70. *Id.* § 502(a)(1)(B), (e)(1), 29 U.S.C. § 1132(a)(1)(B), (e)(1). The participant-beneficiary must exhaust the plan's appeal procedure before bringing the benefit denial to a court. *See, e.g.*, Springer v. Wal-Mart Assocs. Group Health Plan, 908 F.2d 897, 899 (11th Cir. 1990); Merritt v. Confederation Life Ins. Co., 881 F.2d 1034, 1035 (11th Cir. 1989); Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 185 (3d Cir. 1984); Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan, 713 F.2d 247, 254 (7th Cir. 1983); Amato v. Bernard, 618 F.2d 559, 567-68 (9th Cir. 1980). *But see* Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 846-47 (11th Cir. 1990) (exception to exhaustion when resort to administrative process is futile); Anderson v. Alpha Portland Indus., 727 F.2d 177, 180-85 (8th Cir. 1984) (exception to exhaustion of remedies rule for retirees who are not owed duty of fair representation by union), *cert. denied*, 471 U.S. 1102 (1985).

71. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (dealing with plan not granting plan administrator discretion); *see also* Langbein, *supra* note 28 (suggesting Supreme Court drew review principle from wrong body of law). This Article agrees. However, the review principle is the same under either the trust law used by the Supreme Court or the contract law used by Langbein and this Article. *See infra* notes 82-87 and accompanying text.

72. *See, e.g.*, 1 RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. e (1959).

73. *See, e.g.*, *id.* § 187 cmt. g; *see also* Flint, *supra* note 25, at 168-72 (explaining application of this standard to plan administrators).

or she fails to have one of several logical reasons and some evidence to support his or her decision.[74] The disinterested, improperly motivated plan administrator is one who decides from an improper motive other than self-dealing, such as hatred, and is also described as acting in "bad faith."[75] The interested plan administrator is one who decides from a dishonest motive, such as self-dealing, and is described as acting in "bad faith."[76] These latter two types of plan administrators fail de novo review when their decision disagrees with the judicial fact finder's decision.[77]

Since only plan administrators of multi-employer plans are currently disinterested, the de novo review should apply to most plans.[78] Most courts, however, continue to use the deferential arbitrary and capricious standard in all benefits-due lawsuits involving a review of the plan administrator's decision.[79]

The Supreme Court's standard of review is the same as that used under contract law.[80] As is the case with any area of developing law dealing with a new instrument, courts have struggled with employee benefits law in an effort to determine which previously existing bodies of law should provide a basis of analogous rules. As the plan instruments are essentially founded on two bodies of law—contract law and trust law—each with a different nature, courts have eventually considered employee benefit programs as either one or the other. As contracts rarely provide for discretionary decisions,[81] courts which consider employee benefit pro-

74. Flint, *supra* note 25, at 140-43, 169-70.

75. *Id.* at 172 n.186.

76. *Id.* at 170-71.

77. *See, e.g., id.* at 167-72. Post-*Bruch* cases have failed to follow this rule since they interpret *Bruch* as denying de novo review in the presence of discretion. *See, e.g., In re* Gulf Pension Litig., 764 F. Supp. 1149, 1181 (S.D. Tex. 1991).

78. *See supra* notes 20-25 and accompanying text.

79. *E.g.*, Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1924 (1990); McConnell v. Texaco, 727 F. Supp. 751, 756 (D. Mass. 1990); Jader v. Principal Mut. Life Ins. Co., 723 F. Supp. 1338, 1340-41 (D. Minn. 1989); O'Dom v. GCIU Supplemental Retirement & Disability Funds, 722 F. Supp. 365, 370-71 (S.D. Ohio 1989).

The Court in *Firestone Tire & Rubber Co. v. Bruch* held that in the absence of discretion, ERISA mandated de novo review. 489 U.S. 101, 115 (1989). In dicta, the Supreme Court indicated that if the plan provided discretion to the plan administrator the trust review standard of abuse of discretion applied. *Id.*

80. *See infra* notes 81-87 and accompanying text.

81. *See, e.g.*, 3A ARTHUR CORBIN, CORBIN ON CONTRACTS § 644, at 78 (1964) (explaining that such provisions must be clearly expressed or courts will not enforce them); *see also* Clark v. New England Tel. & Tel. Co., 118 N.E. 348, 351 (Mass. 1918) (finding analogous provision to pension plan's discretion provision only in buyer's satisfaction clauses in sales contracts and architects' approval clauses in construction contracts).

grams to be contractual in nature have analogized them to construction contracts with a provision for an architect's certificate of progress,[82] or to sales contracts with a provision for buyer's satisfaction.[83] But whether

82. *See infra* note 84.

Construction contracts often contain a provision that an architect or engineer will conclusively determine the sufficiency of the contractor's work. Under this provision the architect or engineer supervises the work and issues a certificate of progress under which the owner pays the contractor. Courts review the architect's or engineer's decision under a standard containing both tests of the abuse of discretion standard, namely, a test for a logical reason when properly motivated (the arbitrary and capricious standard) and a test for improper motive when improperly motivated (the de novo review standard). *See, e.g.*, Public Water Supply Dist. No. 8. v. Maryland Casualty Co., 478 S.W.2d 293, 295 (Mo. 1972) (applying de novo review), *modified on other grounds*, 513 S.W.2d 311 (Mo. 1974); Travis-Williamson County Water Control & Improvement Dist. v. Page, 358 S.W.2d 158, 162 (Tex. Civ. App. 1962) (applying arbitrary and capricious standard), *aff'd in part, rev'd in part on other grounds*, 367 S.W.2d 307 (Tex. 1963). The architect's or engineer's decision is final and binds the parties unless in rendering a decision he or she acted fraudulently or made such a gross mistake as to imply bad faith or a failure to exercise an honest judgment. *E.g.*, Continental Casualty Co. v. Wilson-Avery, Inc., 156 S.E.2d 152, 155 (Ga. Ct. App. 1967) (architect upheld); James I. Barnes Constr. Co. v. Washington Township, 184 N.E.2d 763, 764 (Ind. Ct. App. 1962) (engineer overruled on conflicting evidence); *Public Water Supply Dist. No. 8*, 478 S.W.2d at 296 (engineer upheld); Antrim Lumber Co. v. Bowline, 460 P.2d 914, 921, 923 (Okla. 1969) (engineer overruled as evidence sustained jury finding of measurement error); *Travis-Williamson*, 358 S.W.2d at 162 (engineer overruled as evidence sustained jury finding of failure to issue certificate for substantial completion when only needed clean-up and adjustment work); *see* Ruckman & Hansen, Inc. v. Delaware River & Bay Auth., 244 A.2d 277, 278 (Del. 1968) (Director of Authority); O.K. Johnson Elec. v. Hess-Martin Corp., 464 P.2d 206, 210-11 (Kan. 1970) (in dicta, architect overruled as decision outside scope of clause); City of Baltimore v. Allied Contractors, 204 A.2d 546, 552 (Md. 1964) (Director of Public Works); Henry B. Byors & Sons v. Board of Water Comm'rs, 264 N.E.2d 657, 664 (Mass. 1970) (in dicta, architect overruled as decision outside scope of clause); *see also* 1 RESTATEMENT OF CONTRACTS § 303(b)-(f) (1932) (listing instances in which condition precedent requiring architect's certificate will be excused).

Failure to exercise an honest judgment is equivalent to "arbitrary and capricious" action. *E.g.*, Tobin Quarries v. Central Neb. Pub. Power & Irrigation Dist., 64 F. Supp. 200, 207 (D. Neb.) (court not to uphold architect or engineer for an arbitrary action), *aff'd*, 157 F.2d 482 (8th Cir. 1946); Clack v. State Dep't of Pub. Works, 275 Cal. App. 2d 743, 747, 80 Cal. Rptr. 274, 276-77 (1969) (engineer's arbitrary act without reason gross error, not bad faith); Edward Edinger Co. v. Willis, 260 Ill. App. 106, 121 (1931) (arbitrary non-action by architect is fraud); Terminal Constr. Corp. v. Bergen County Sewer Auth., 113 A.2d 787, 799 (N.J. 1955) (engineer's arbitrary action without reason is fraud); Savin Bros. v. State, 405 N.Y.S.2d 516, 519 (App. Div. 1978) (no indication that engineer's acts were unreasonable so as to constitute bad faith), *aff'd*, 393 N.E.2d 1041 (N.Y. 1979); Goodrum v. State, 158 S.W.2d 81, 86-87 (Tex. Civ. App. 1942) (court will not uphold architect or engineer for acting capriciously, arbitrarily or fraudulently); *accord* Huey v. Davis, 556 S.W.2d 860, 864 (Tex. Civ. App. 1977) (upholding architect approval in land covenant), *rev'd on other grounds*, 571 S.W.2d 859 (Tex. 1978); *see* 41 U.S.C. § 321 (1990) (government officer decision in government contract conclusive, unless fraudulent or capricious or arbitrary or so grossly erroneous as to imply bad faith or not supported by substantial evidence).

83. *See infra* note 84.

Sales contracts sometimes have a condition that the goods will be satisfactory to the buyer, thereby qualifying the buyer's obligation to purchase. A court reviews the buyer's dis-

the court used the contractual approach or the trust approach, the review standard for the discretionary decision was still the same. Thus, the abuse of discretion review standard for employee benefit programs has a dual origin: contract law[84] and trust law.[85] Even the plan document

---

cretionary decision under a standard containing both tests of the abuse of discretion standard. Courts interpret this provision in such commercial contracts to require satisfaction in good faith and after an exercise of an honest judgment. *E.g.*, Meredith Corp. v. Design & Lithography Ctr., 614 P.2d 414, 417 (Idaho 1980) (printed advertising); Frankfort Distilleries v. Burns Bottling Mach. Works, 197 A. 599, 602 (Md. 1938) (bottle labeling machine); Alper Blouse Co. v. E. E. Connor & Co., 127 N.E.2d 813, 815 (N.Y.), *reh'g denied*, 130 N.E.2d 598 (N.Y. 1955) (nylon cloth); Fulcher v. Nelson, 159 S.E.2d 519, 522 (N.C. 1968) (automobile); 2 RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. a (1981).

84. In the seminal state case concerning review of a plan administrator's discretionary decision under the contract approach, Clark v. New England Tel. & Tel. Co., 118 N.E. 348 (Mass. 1918), the court analogized the plan, comprised solely of employer contributions and administered by an employer-appointed plan administrator, to a construction contract with a provision for an architect's or engineer's certificate, or a sales contract with a provision for buyer's satisfaction. *Id.* at 349. Under these types of contractual provisions one party would provide the building or goods to the satisfaction of the architect, engineer or buyer. Following the precedent for these provisions, *see supra* notes 82-83, the court concluded that it would overturn the plan administrator's discretionary decision only after finding evidence of "want of good faith." *Id.* at 350. This is the second test of the abuse of discretion standard.

Many subsequent state courts adopted this contractual approach and viewed *Clark* as controlling the situation, frequently adding the other test of the abuse of discretion standard. *See, e.g.*, Western Union Tel. Co. v. Robertson, 225 S.W. 649, 652-53 (Ark. 1920) (no evidence of bad faith); Bird v. Connecticut Power Co., 133 A.2d 894, 897 (Conn. 1957) (whim); Schwartz v. Century Circuit, Inc., 163 A.2d 793, 796 (Del. Ch. 1960) (fraud, bad faith and the like); Van Pelt v. Berefco, Inc., 208 N.E.2d 858, 863 (Ill. App. Ct. 1965) (fair and reasonable but uses bad faith test); Norman v. Southern Bell Tel. & Tel. Co., 322 S.W.2d 95, 99 (Ky. 1959) (bad faith); Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 443 (Ohio Ct. App. 1934) (whim or caprice); Moore v. Postal Tel-Cable Co., 24 S.E.2d 361, 363 (S.C. 1943) (fraud or bad faith but court uses unreasonableness test); Long v. Southwestern Bell Tel. Co., 442 S.W.2d 462, 466-67 (Tex. Civ. App. 1969) (fraud and bad faith); Magnolia Petroleum Co. v. Butler, 86 S.W.2d 258, 262 (Tex. Civ. App. 1935) (good faith); Dowling v. Texas & N.O.R.R., 80 S.W.2d 456, 458 (Tex. Civ. App. 1935) (not subject to attack in court except upon showing of fraud or bad faith). Some state courts followed *Clark* even when viewing the situation as a gratuity. *See* Spiner v. Western Union Tel. Co., 73 S.W.2d 566, 568 (Tex. Civ. App. 1934) (not subject to attack in court absent actual fraud or bad faith). Other state courts have used the lack of good faith rule without an indication of its source. *See* Paddock Pool Constr. Co. v. Monseur, 533 P.2d 1188, 1190 (Ariz. Ct. App. 1975); Bos v. United States Rubber Co., 100 Cal. App. 2d 565, 570, 224 P.2d 386, 388 (1950). Therefore, under the contractual approach, the review standard comprises both tests of the abuse of discretion standard.

85. Another approach adopted by the courts considers the employee benefit plan as a trust and applies trust law. Trust law also mandates use of the abuse of discretion standard to review a trustee's discretionary decision. 1 RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). This standard also applies when the trustee has discretionary authority to interpret the trust instrument. *E.g.*, Taylor v. McClave, 15 A.2d 213, 215 (N.J. Ch. 1940); GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 559, at 169-71 (1980).

Most state courts use the contractual approach. *See infra* note 208 and accompanying text. However, following the trust law precedent, a few state courts concluded that they would overturn the plan administrator's discretionary decision only after finding evidence of want of

interpretive standard was the same under either contract law[86] or trust law.[87] The court thus should use the same review and interpretation

---

good faith or an absence of a reasonable judgment. *E.g.*, Leigh v. Estate of Leigh, 284 N.Y.S.2d 991, 994-95 (Sup. Ct. 1967) (arbitrary or bad faith).

The primary use of the trust law approach is in LMRA cases for purposes of reviewing plan administrator action only. LMRA specifically provides that the plans must be in trust form. Labor Management Relations Act of 1947, § 302(c)(5)(A), 29 U.S.C. § 186(c)(5)(A) (1988). So the federal and state courts considering a LMRA case usually follow the review standard of trust law. However, since they are generally dealing with disinterested plan administrators, hopefully with proper motives, they describe the standard as the arbitrary and capricious rule. Danti v. Lewis, 312 F.2d 345, 349 (D.C. Cir. 1962); Kennet v. United Mineworkers, 183 F. Supp. 315, 318 (D.D.C. 1960) (rule of *Hobbs*); Ruth v. Lewis, 166 F. Supp. 346, 349 (D.D.C. 1958) (rule for noncharitable trust); Hobbs v. Lewis, 159 F. Supp. 282, 286-87 (D.D.C. 1958) (rule for charitable trust); Barlow v. Roche, 161 A.2d 58, 63 (D.C. 1960) (citing AUSTIN W. SCOTT, SCOTT ON TRUSTS § 187 (2d ed. 1956)); Forrish v. Kennedy, 105 A.2d 67, 70 (Pa. 1954) (good faith and within bounds of reasonable judgment). Courts dealing with LMRA cases, however, regard the plan as a contract, not a trust. *See infra* notes 255-69 and accompanying text.

So under the trust approach, the review standard comprises both tests of the abuse of discretion standard.

86. Fact finders ordinarily construe ambiguous contracts against the drafter. Moulor v. American Life Ins. Co., 111 U.S. 335, 341-43 (1884) (insurance contract); Grace v. American Century Ins. Co., 109 U.S. 278, 282 (1883) (same); Liberty Mut. Ins. Co. v. Hercules Powder Co., 224 F.2d 293, 294 (3d Cir. 1955) (same). However, this rule does not apply when the plan administrator has interpretative discretion. *See supra* notes 65-68 and accompanying text. Instead, the fact finder must use the abuse of discretion standard. *See supra* note 84 and accompanying text.

87. To interpret trusts, courts generally use the construction rules applicable to written instruments, namely contracts, deeds and wills. *See, e.g.*, Murphy v. Morris, 141 S.W.2d 518, 520 (Ark. 1940); Storkan v. Ziska, 94 N.E.2d 185, 188 (Ill. 1950); *In re* Work Family Trust, 151 N.W.2d 490, 492 (Iowa 1967); *In re* Hauck's Estate, 223 P.2d 707, 710 (Kan. 1950); Hart v. First Nat'l Bank, 112 So. 2d 565, 567 (Miss. 1959); *In re* Mann's Estate, 56 N.W.2d 621, 623 (Neb. 1953); Marks v. Southern Trust Co., 310 S.W.2d 435, 437-38 (Tenn. 1958); William Buchanan Found. v. Shepperd, 283 S.W.2d 325, 333 (Tex. Civ. App. 1955), *rev'd on other grounds*, 289 S.W.2d 553 (Tex. 1956). In the event of ambiguity, courts ordinarily construe the trust in favor of the beneficiary and against the settlor. *See, e.g.*, Brenneman v. Bennett, 420 F.2d 19, 24 (8th Cir. 1970) (Iowa law); Funsten v. Commissioner, 148 F.2d 805, 808 (8th Cir. 1945) (Missouri law); Seasongood v. United States, 331 F. Supp. 486, 491 (S.D. Ohio 1971) (Ohio law); Sale v. World Oil Co., 6 F. Supp. 321, 327 (N.D. Tex. 1933) (Texas law), *aff'd sub nom.* Humble Oil & Ref. Co. v. Campbell, 69 F.2d 667 (5th Cir.), *cert. denied*, 292 U.S. 648 (1934); *In re* Greenleaf's Estate, 101 Cal. App. 2d 658, 661-62, 225 P.2d 945, 948 (1951); Lyman v. Stevens, 197 A. 313, 316 (Conn. 1938); St. Louis Union Trust Co. v. Clarke, 178 S.W.2d 359, 365 (Mo. 1944); Osborn v. Bankers Trust Co., 5 N.Y.S.2d 211, 215 (Sup. Ct. 1938); Damiani v. Lobasco, 79 A.2d 268, 271 (Pa. 1951); McCollum v. Braddock Trust Co., 198 A. 803, 805 (Pa. 1938); Wood v. Paul, 95 A. 720, 722 (Pa. 1915). But as with contract interpretation, this rule does not apply when the trustee has interpretative discretion. *See supra* notes 65-68. Instead, the fact finder must use the abuse of discretion standard. *See supra* note 85 and accompanying text. To the extent the interpretation of the trust instrument involves issues of fact, some courts have discretion to submit them to a jury. *See* Georgopolis v. George, 54 N.W.2d 137, 141 (Minn. 1952).

rules for benefits-due lawsuits regardless of whether courts and litigants treat the issues as arising under contract theory or trust theory.

2. Two different jury trial results

There is, however, a major difference between these two interpretational approaches when it comes to the right to trial by jury. Courts that consider benefits-due lawsuits contract-like, and therefore legal in nature,[88] submit them to a jury trial,[89] while courts that regard them as

88. Courts consider contract matters as legal in nature because in pre-1791 England, litigants brought these actions under writs of assumpsit or debt, at law with trial by jury. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 285-87 (2d ed. 1979). Consequently, an action for money damages from a breach of contract in federal court entitles one to a jury trial under the Seventh Amendment of the United States Constitution, *see, e.g.*, Ross v. Bernhard, 396 U.S. 531, 542 (1970) (New York law; even when action for money damages coupled with equitable action for breach of fiduciary duty, action merits jury trial), as does an action for a declaratory judgment on the amount owing under a contract. An action brought for declaratory relief does not obscure the essentially legal nature of the underlying issues if the questions involved are traditional common law issues that should be submitted to a jury. *See, e.g.*, Simler v. Conner, 372 U.S. 221, 223 (1963) (Oklahoma law; jury trial granted for declaratory action); Johnson v. Fidelity & Casualty Co., 238 F.2d 322, 324 (8th Cir. 1956) (Minnesota law). The same principal applies for an accounting under a contract for a money judgment. *See, e.g.*, Dairy Queen v. Wood, 369 U.S. 469, 476-77 (1962) (Pennsylvania law; claim for amount due under contract wholly legal in nature thus jury trial mandated). The only contract action that is not legal in nature but equitable, and thus does not require a jury, is an action for specific performance through an injunction. *See, e.g.*, Klein v. Shell Oil Co., 386 F.2d 659, 663 (8th Cir. 1967) (Minnesota law); Rash v. Peoples Deposit Bank & Trust Co., 192 F.2d 470, 471 (6th Cir. 1951) (Kentucky law), *cert. denied*, 343 U.S. 909 (1952). An action for rescission, not of interest to a benefits-due lawsuit, may be legal or equitable, depending on the remedy sought. 5 CORBIN, *supra* note 81, §§ 1102-1103, at 548-57.

One contract matter ordinarily is left to the court and not the jury, namely, interpretation of the contract. *E.g.*, Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989) (Michigan law); Ingram Coal Co. v. Mower Ltd. Partnership, 892 F.2d 363, 365 (4th Cir. 1989) (West Virginia law); Technical Consultant Servs. v. Lakewood Pipe of Tex., Inc., 861 F.2d 1357, 1362 (5th Cir. 1989) (Texas law); Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co., 681 F.2d 734, 735 (11th Cir. 1982) (Georgia law); Apponi v. Sunshine Biscuits, Inc., 652 F.2d 643, 651 n.12 (6th Cir. 1981) (Ohio law; pension plan is contract). However, when the contract language is ambiguous, then a jury determines the parties' intent from evidence. *See, e.g.*, *Technical Consultant Servs.*, 861 F.2d at 1362 (submitting question of intent to jury); *Brookhaven Landscape & Grading Co.*, 681 F.2d at 735; *Apponi*, 652 F.2d at 651 n.12; Nevets C.M., Inc. v. Nissho Iwai American Corp., 726 F. Supp. 525, 531 (D.N.J. 1989) (New Jersey law), *aff'd*, 899 F.2d 1218 (3d Cir. 1990). But a court, not a jury, determines whether an ambiguity exists. *E.g.*, Toren v. Braniff, Inc., 893 F.2d 763, 765 (5th Cir. 1990) (Texas law); *Fashion House, Inc.*, 892 F.2d at 1083; *Apponi*, 652 F.2d at 651 n.12; PPG Indus. v. Shell Oil Co., 727 F. Supp. 285, 287 (E.D. La. 1989) (Texas law); *Nevets C.M., Inc.*, 726 F. Supp. at 531; Williams v. National Can Corp., 603 F. Supp. 1268, 1275 (N.D. Ind. 1985) (Indiana law). Since benefits-due lawsuits frequently involve only plan interpretation, *see* Flint, *supra* note 25, at 134 n.5, the employee-beneficiary might not obtain a jury trial under contract law without an ambiguity.

89. *See infra* note 212 and accompanying text.

trust-like, and therefore equitable in nature,[90] will not submit them to a jury.[91]

Most participant-beneficiaries fare better with a jury.[92] Juries, an expression of democracy,[93] are generally unsympathetic to large corporations[94] and insurance companies,[95] namely, the sometime plan sponsors and frequent plan administrators. However, federal courts have a history of hostility to the jury trial.[96] Consequently, participant-beneficiaries file

90. Courts consider trust matters generally as equitable in nature since in pre-1791 England they were brought in the chancery court. BAKER, *supra* note 88, at 242-44. So courts try actions by beneficiaries involving trust matters without a jury, even when the only relief sought is the recovery of money. *E.g.*, Clews v. Jamieson, 182 U.S. 461, 479 (1901) (Illinois law); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 228 (1872) (federal law); *see* Boone v. Wachovia Bank & Trust Co., 163 F.2d 809, 812 (D.C. Cir. 1947) (trust matters are for court of equity); 1 RESTATEMENT (SECOND) OF TRUSTS §§ 197-198 (1959) (same). The exception to this rule is an action in the nature of money had and received to obtain money immediately and unconditionally due, which is legal and carries a right to a jury trial. *Id.*; *see* Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249, 1252 (9th Cir. 1987) (applying rule to pension plan and trust to permit jury trial).

91. *See infra* note 213 and accompanying text.

92. *See, e.g.*, JOHN GUINTHER, THE JURY IN AMERICA 44 (1988) (lawyers believe juries are more generous than judges for plaintiffs); HANS ZEISEL ET AL., DELAY IN THE COURT 72 (1959) (study of personal injury suits in New York City in 1950 showed juries award on average twice as much money as judges).

93. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 281, 283 (Henry Reeve trans., 1840) (jury places direction of society in hands of governed, not government); GUINTHER, *supra* note 92, at 27 (result of Bushel's case, 124 Eng. Rep. 1006, 89 Eng. Rep. 2 (1670)); *id.* at 220 (describing jury "as an instrument of the people to invoke changes in public policy and private conduct"); 7 THOMAS A. JEFFERSON, WRITINGS 422-23 (1903) (letter dated July 19, 1789, explaining that it is better to have people affect execution of laws through juries than in making laws); 12 THOMAS A. JEFFERSON, PAPERS 425, 440, 558 (1955) (various letters 1787-1788 expressing necessity of civil jury trial in Constitution to protect people's liberty); Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58-60 (1977) (describing jury as democratic check on judicial power).

94. *See, e.g.*, GUINTHER, *supra* note 92, at xiv (explaining origins of anti-jury movement in allegedly high awards in judgments against businesses); MARK A. PETERSON, CIVIL JURY VERDICTS IN COOK COUNTY 35-37 (1984) (study of Chicago lawsuits indicated corporate defendants pay two and one-half to four times more than do individuals when injuries are severe); RAND CORPORATION, REPORT ON THE FIRST FOUR YEARS 20-21 (1984) (same, in San Francisco).

95. Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 751 (1958) (discussing mock jury experiment in which plaintiff's recovery is greater when jury is aware of defendant's insurance coverage); Philip D. Caldevone, Comment, *Advertising the Economics of High Jury Awards*, 37 WASH. & LEE L. REV. 1175, 1185 (1980) (discussing insurance industry's advertising campaign to counter high jury awards against insureds); *see* Michael A. Hatchell, *Insurance Advertising: Much Ado about Nothing*, 10 ST. MARY'S L.J. 427, 428-35 (1979) (discussing Texas state law restrictions on interjecting matter of insurance in case); Thomas A. Vetter, *Voir Dire II: Liability Insurance*, 29 MO. L. REV. 305, 307-16 (1964) (same, Missouri law).

96. *See, e.g.*, Rhodes v. Piggly Wiggly Ala. Distrib. Co., 741 F. Supp. 1542, 1544-45 (N.D. Ala. 1990); Vicinanzo v. Brunschwig & Fils Inc., 739 F. Supp. 882, 889 (S.D.N.Y.

their benefits-due lawsuits in state court where they find the right to jury

1990). Besides the ERISA lawsuit, the federal judicial system has engaged in three jury restrictive practices that some states have refused to follow, namely (1) the attempt to remove complex litigation from the jury, (2) the disallowance of conscience verdicts by juries, and (3) the failure to use the merger of law and equity to expand the right to a jury trial. Former Chief Justice Burger advocated a complexity exception to the right to a jury trial. Donald P. Lay, *Can Our Jury System Survive*, TRIAL, Sept. 1983, at 50. The federal system has used this exception. *E.g.*, *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1090-91 (3d Cir. 1980); Las Vegas Sun Inc. v. Summa Corp., 610 F.2d 614, 621 (9th Cir. 1979); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 65-71 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 444-48 (N.D. Cal. 1978), *aff'd on other grounds sub nom.* Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 103-04 (W.D. Wash. 1976); *see also* THE FEDERALIST NO. 83, at 248-49 (Alexander Hamilton) (Encyclopaedia Britannica ed. 1952) (advocating use of equity proceedings for complicated matters). *But see In re* United States Fin. Sec. Litig., 609 F.2d 411, 424-31 (9th Cir. 1979) (denying exception), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). *See generally* Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981) (advocating no resolution of issue due to lack of studies); Constance S. Huttner, Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511 (1979) (arguing neither Seventh Amendment nor Due Process Clause provides constitutional justification for striking demands for jury trial in complex civil cases presenting legal claims). The exception is based on the idea that sophisticated business matters (especially accounting) were handled in equity in pre-1791 England, but the only cases cited are those involving disputes not readily remediable at law. *See* Blad v. Bahfield, 36 Eng. Rep. 922 (Ch. 1674) (within equitable jurisdiction as admiralty case); Townely v. Clench, 21 Eng. Rep. 13 (Ch. 1603) (equitable process was needed to secure documents and testimony).

American juries early on had the right to disregard the common law in rendering their decisions. *See, e.g.*, Witter v. Brewster, Kirby 422, 423 (Conn. 1788) (civil trespass); JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (17 How. St. Tr. 675 (1735)) 68-69, 72-74 (1735) (2d ed. Katz, 1972) (criminal); Preface, 1 D. Chip. (Vt. 1824) (civil and criminal matters in Connecticut, New Hampshire, Rhode Island and Vermont colonial juries). The Supreme Court however opposes this view, providing that the jury must follow the law as instructed by the judge at least in criminal matters. *E.g.*, Berra v. United States, 351 U.S. 131, 134-35 (1956); Sparf & Hanson v. United States, 156 U.S. 52, 101-03 (1895). *See generally* Leary J. Simson, *Jury Nullification in the American System*, 54 TEX. L. REV. 488 (1976) (providing modern rationale against jury nullification in criminal cases). Federal courts apply the rule in civil cases also. *See, e.g.*, Loew's Inc. v. Cole, 185 F.2d 641, 658-59 (9th Cir. 1950) (reversing prior decision which left question of law to jury), *cert. denied*, 340 U.S. 954 (1951); Union Bag & Paper Corp. v. Mitchell, 177 F.2d 909, 911 (5th Cir. 1949) (same); Wright v. Farm Journal, 158 F.2d 976, 978 (2d Cir. 1947) (same); Sprinkle v. Davis, 104 F.2d 487, 489 (4th Cir. 1939) (same); *see also* Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 58-59 (2d Cir.) (explaining arguments for and against jury nullification), *cert. denied*, 335 U.S. 816 (1948).

Prior to the merger of courts of law and equity, the right to a jury trial caused little problem since the matter depended on the court in which the plaintiff filed the action. LARRY TEPLEY & RALPH WHITTEN, CIVIL PROCEDURE 609 (1991). However, along with the merger, problems would arise for mixed actions and actions conditioned on a result from the other type of action. *Id.* When the federal courts began this merger in 1915, *see* Judiciary Act of 1915, Pub. L. No. 63-278, 38 Stat. 956 (adding § 274(c) to Judiciary Act of 1911 to permit equitable defenses to be interposed in actions at law), their goal was to prevent any expansion of jury trial. *See* Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 242 (1922) (requiring

trials to be more likely.[97] To avoid the prospect of a jury trial, plan administrators, in turn, remove the lawsuit as a federal cause of action to federal court[98] and then move to strike the jury request of the partici-

judge to try equitable defense). The adoption of the Federal Rules of Procedure in 1938 completed the merger with the goal that the rules not expand the right to jury trial. Fleming J. James, *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1025-26 (1936). See *infra* note 97 for the state reaction to these three matters.

97. Although generally the state judicial systems follow the federal lead concerning jury restriction, states have not followed the complexity exception and a few states have expanded the jury role by permitting jury nullification in criminal cases, namely, Indiana and Maryland, and by permitting jury trials in equity cases, namely, Alabama, Arizona, Georgia, Louisiana, North Carolina, Tennessee, and Texas. State courts that have faced the complexity exception to the right to a jury trial have denied it. *E.g.*, Farmer v. Loofbourrow, 267 P.2d 113, 115 (Idaho 1954); Cloonan v. Goodrich, 167 P.2d 303, 314 (Kan. 1946); Estey v. Holdren, 267 P. 1098, 1099 (Kan. 1928); Nordeen v. Buck, 82 N.W. 644, 644 (Minn. 1900); M.J. Murphy & Sons v. Peters, 62 A.2d 718, 719 (N.H. 1948); Douglas v. United States Fidelity & Guar. Co., 127 A. 708, 710 (N.H. 1924); Daley v. Kennett, 78 A. 123, 124 (N.H. 1910); Watkins v. Siler Logging Co., 116 P.2d 315, 322 (Wash. 1941).

Jury nullification for criminal matters is protected in the constitutions of Indiana and Maryland. IND. CONST. art. 1, § 19; MD. CONST. Declaration of Rights, § 23. *See generally* Mark Dewolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590-93 (1939) (describing various states permitting jury nullification or forgiveness at various times).

All states but three have constitutional provisions preserving the right to a jury trial in common law actions, with one of the remaining three preserving it through statute. *See infra* note 176. These states are equal to the federal system. Seven states have constitutional or statutory provisions extending it to equity actions. *See infra* note 183. These states exceed the federal system. Moreover, states began the merger of law and equity with the code promulgated by David Dudley Field, first adopted in New York in 1848, *see* Act of Apr. 12, 1848, ch. 379, § 208, 1848 N.Y. Laws 497, 536 ("[I]n an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury."), and widely adopted shortly thereafter elsewhere. *See, e.g.*, Charles Cook, THE AMERICAN CODIFICATION MOVEMENT (1981) (states and territories adopting the Field Procedural Code before 1865 were Missouri, California, Kentucky, Iowa, Minnesota, Washington, Nebraska, Wisconsin, Kansas, Georgia, Nevada, Dakota Territory, Idaho, Arizona and Montana); Fleming J. James, *Right to Trial in Civil Actions*, 72 YALE L.J. 655, 665, 669-85 (1963). The purpose of the Field Procedural Code was to increase the number of actions subject to a jury trial, FIRST REPORT OF THE NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS 185 (1848) ("We propose an extension of the right of trial by jury to many cases, not within the constitutional provision."), but the courts in the states adopting the Field Procedural Code limited the right to a jury trial to the state's constitutional provision preserving the jury trial in common law actions. James, *supra*, at 667 n.65.

98. Under the removal statute, plan administrators always have one ground for removal of an ERISA case filed in state court to federal court, namely a plaintiff's exclusive federal cause of action. 28 U.S.C. §§ 1331, 1441 (1989). An ERISA action arises exclusively under federal law. *E.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 67 (1987) (benefits-due lawsuit); Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250, 1254 (5th Cir. 1990) (denial of benefits due); Ramirez v. Inter-Continental Hotels, 890 F.2d 760, 762 (5th Cir. 1989) (benefits-due lawsuit); Fitzgerald v. Codex Corp., 882 F.2d 586, 588 (1st Cir. 1989) (retaliatory discharge in violation of ERISA § 510); Degan v. Ford Motor Co., 869 F.2d 889, 893 (5th Cir. 1989) (benefits-due lawsuit); *see, e.g.*, Avco Corp. v. Aero Lodge, 390 U.S. 557, 560 (1968) (employer injunction to enforce no-strike clause in collective bargaining agreement under LMRA § 301); Jackson v. Southern Cal. Gas Co., 881 F.2d 638, 641-42 (9th Cir. 1989) (dis-

pant-beneficiary.[99]

The main reason large entities fear juries is the possibility for extra-contractual and punitive damages, which involve prejudicial issues.[100] However, extra-contractual[101] and punitive[102] damages are not recoverable in an ERISA action. Because these prejudicial damages are outside the scope of the ERISA case, the jury should function well.[103] More-

---

criminatory termination violating collective bargaining agreement under LMRA § 301); Mitchell v. Pepsi-Cola Bottlers, Inc., 772 F.2d 342, 344-45 (7th Cir. 1985) (same), *cert. denied*, 475 U.S. 1047 (1986); Oglesby v. RCA Corp., 752 F.2d 272, 275-78 (7th Cir. 1985) (same).

With respect to the federal cause of action, a state cause of action is preempted by ERISA. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C. § 1144(a) (1988); *see, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-46 (1987) (bad faith insurance claims processing under long-term disability plan). Under the *Avco* doctrine, the plan administrator may raise the federal cause of action for removal against a state cause of action by merely alleging ERISA preemption in his answer. *E.g.*, *Metropolitan Life Ins. Co.*, 481 U.S. at 63-67; *see Avco Corp.*, 390 U.S. at 560 n.2 (LMRA preemption alleged in answer to part of complaint for purposes of well-pleaded complaint doctrine for determining removal for federal cause of action). The right to a jury trial in removal cases is determined under federal law. Phillips v. Moore, 100 U.S. 208, 213 (1879).

99. *See, e.g.*, Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073, 1076 (5th Cir. 1990) (participant-beneficiary sought remand to state court to have jury trial); Farlow v. Union Cent. Life Ins. Co., 874 F.2d 791, 792 (11th Cir. 1989) (same).

100. *See* GUINTHER, *supra* note 92, at 179 (size of jury verdicts prompted by severity of plantiff's injury or outrage at defendant's conduct). In cases involving extra-contractual damages, such as pain and suffering and punitive damages, studies reveal that jurors are more likely to accept plaintiff's claims for damages or add to pain and suffering. *Id.* at 97-98.

101. *See, e.g.*, Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985); Johnson v. District 2 Marine Eng'rs Beneficial Ass'n, 857 F.2d 514, 518 (9th Cir. 1988) (infliction of emotional distress); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 825 (1st Cir.) (same), *cert. denied*, 488 U.S. 909 (1988); Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986) (same); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424 (4th Cir. 1985) (same), *cert. denied*, 476 U.S. 1170 (1986). *See generally* Diane M. Sumoski, Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After* Massachusetts Mutual Life Insurance Co. v. Russell, 71 CORNELL L. REV. 1014 (1986) (advocating that courts should permit extra-contractual damages).

102. *See, e.g.*, Pane v. RCA Corp., 868 F.2d 631, 635 n.2 (3d Cir. 1989); *Johnson*, 857 F.2d at 518; *Drinkwater*, 846 F.2d at 825; Sage v. Automation Inc. Pension Plan & Trust, 845 F.2d 885, 888 n.2 (10th Cir. 1988); Bishop v. Osborn Transp., Inc., 838 F.2d 1173, 1174 (11th Cir.), *cert. denied*, 488 U.S. 832 (1988); Varhola v. Doe, 820 F.2d 809, 817 (6th Cir. 1987); Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 627 (7th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1464-65 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); Hancock v. Montgomery Ward Long-Term Disability Trust, 787 F.2d 1302, 1306-07 (9th Cir. 1986); *Powell*, 780 F.2d at 424; Dependahl v. Falstaff Brewing Co., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968, 1084 (1981); *see also* Deborah A. Geier, Comment, *ERISA: Punitive Damages for Breach in Favor of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743 (1985) (arguing in favor of recovery of punitive damages); Sumoski, Note, *supra* note 101 (arguing against recovery of punitive damages).

103. *See* GORDON BERMANT ET AL., PROTRACTED CIVIL TRIALS: VIEWS FROM THE BENCH AND BAR 26 (1981) (even in complicated cases "the jury had made the correct decision

over, modern courts have numerous techniques for controlling juries, such as motions to dismiss,[104] motions for judgments on the pleadings,[105] motions for summary judgment,[106] exclusion of evidence,[107] directed verdicts,[108] jury instructions,[109] special verdicts,[110] motions for judgment notwithstanding the verdict[111] and motions for new trial.[112] Litigants and courts should thus encounter few problems handling the benefits-due lawsuit by jury trial.

III. COURT DECISIONS

Several appellate courts have considered whether a litigant may require a jury trial for ERISA nongovernmental, civil lawsuits. Whether a remedy pursuant to a congressional enactment requires a jury trial ordinarily depends on whether the litigant files the lawsuit in federal or state court.

A. Jury Determination Principles

Federal law determines the right to a jury trial in federal court, even when the cause of action arises under state law.[113] A federal law determination involves two considerations. First, did Congress intend, either explicitly or implicitly, that the remedy require a jury trial?[114] If not, does the Seventh Amendment to the United States Constitution require a jury trial?[115]

The United States Supreme Court has developed a method for deter-

---

. . . [and] had no difficulty applying the legal standards to the facts"); GUINTHER, *supra* note 92, at 101-02 (studies show that juries do their job well in civil cases).

104. FED. R. CIV. P. 12(b).

105. FED. R. CIV. P. 12(c).

106. FED. R. CIV. P. 56.

107. FED. R. EVID. 104.

108. FED. R. CIV. P. 50(a).

109. FED. R. CIV. P. 51.

110. FED. R. CIV. P. 49(a).

111. FED. R. CIV. P. 50(b).

112. FED. R. CIV. P. 59(a). *See generally* TEPLEY & WHITTEN, *supra* note 96, at 607.

113. Simler v. Conner, 372 U.S. 221, 222 (1963) (right to jury trial in federal courts determined under federal law in diversity actions); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-40 (1958) (jury trial permitted where state law denies jury trial but federal courts permit jury trial); Herron v. Southern Pac. R.R., 283 U.S. 91, 94-95 (1931) (federal courts not bound by state law requiring jury trial). *See generally* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2303 (1971) (noting it is clear that federal law determines right to jury trial in federal court but acknowledging substantial authority to contrary).

114. Pernell v. Southall Realty, 416 U.S. 363, 365-66 (1974); *accord* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) (court will construe statute to avoid constitutional issue).

115. U.S. CONST. amend. VII; *Curtis*, 415 U.S. at 195.

mining whether the Seventh Amendment requires a jury trial.[116] Congressionally created causes of action[117] that are analogous to "suits at common law" prior to adoption of the Seventh Amendment in 1791 require a jury trial.[118] Actions that are analogous to suits tried in equity or admiralty prior to 1791 do not require a jury trial.[119] To make this determination the Court looks to both the nature of the action and the remedy sought. First the Court makes a comparison of actions.[120] Second the Court examines the remedy sought.[121]

In contrast, state law determines the right to a jury trial in state court even when the cause of action arises under federal law.[122] An exception is if the right to a jury trial is a substantial part of the substantive rights accorded by federal statute.[123] Thus, the state law determination involving a federal cause of action, such as a benefits-due lawsuit, involves three considerations. The first consideration is the same as under federal law: did Congress intend the cause of action to have a right to jury trial?[124] Second and third, does a state constitution or a state statute require a jury trial?[125]

In applying the principles for determining the right to a jury trial, courts use the same two approaches used by the pre-ERISA courts. The federal courts analogize the employee benefit program to multi-employer

116. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 110 S. Ct. 1339, 1349 (1990); Tull v. United States, 481 U.S. 412, 417-19 (1987).

117. *Curtis*, 415 U.S. at 193-94.

118. *Id.*

119. *Id.* at 193-95; Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).

120. *Terry*, 110 S. Ct. at 1348; *accord* Pernell v. Southall Realty, 416 U.S. 363, 371-79 (1974) (examining actions); Dairy Queen Inc. v. Wood, 369 U.S. 469, 473 (1962) (examining legal issues).

121. *Terry*, 110 S. Ct. at 1345; *accord Curtis*, 415 U.S. at 194-98; Ross v. Bernhard, 396 U.S. 531, 542 (1970).

122. *See, e.g.*, Brown v. Gerdes, 321 U.S. 178, 189-90 (1944) (Frankfurter, J., concurring); Herron v. Southern Pac. R.R., 283 U.S. 91, 93 (1931); Southern Ry. v. Durham, 266 U.S. 178, 179 (1924); Chicago, R.I. & Pac. R.R. v. Cole, 251 U.S. 54, 56 (1919); Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211, 221 (1916) (less than unanimous under Federal Employer's Liability Act of 1908, ch. 149, § 1, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51-59 (1988)).

123. *E.g.*, Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 363 (1952) (state of Ohio cannot deny jury trial in FELA action); Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943) (same, Vermont).

124. *See, e.g.*, *Brown*, 321 U.S. at 189-91.

125. The Seventh Amendment does not apply to state courts. *See* Fay v. New York, 332 U.S. 261, 288 (1947); *see also* Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226, 232 (1923) (holding petitioner's claim of entitlement to have cause heard before full court erroneous because it was matter of Missouri law); New York Cent. R.R. v. White, 243 U.S. 188, 207-08 (1917) (holding denial of trial by jury not inconsistent with due process).

plans.[126] In certain instances pre-ERISA law applied trust law to multi-employer plans, since LMRA specifically requires them to be in trust form.[127] Thus, federal courts conclude that employee benefit programs are trust-like in nature and consequently the ERISA actions are equitable actions, which generally do not require a jury trial.[128] In contrast, state courts continue to use their pre-ERISA law that applied contract law.[129] State courts therefore conclude that employee benefit programs are contractual in nature and consequently the ERISA actions generally are actions at law, which require a jury trial.

B. Federal Decisions

Most federal courts deny a jury trial for benefits-due lawsuits under ERISA. Their decisions derive solely from *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*.[130] This is a poorly reasoned opinion. In *Wardle* the Seventh Circuit Court of Appeals noted that ERISA does not contain an express provision that grants a right to a jury trial and rejected two arguments that ERISA impliedly granted such a right.[131]

1. The fallacious federal argument against jury trial

The court in *Wardle* relied on a statutory implication argument involving an invalid legal proposition. *Wardle* asserted that the statutory scheme mandates only legal, not factual issues.[132] A benefits-due lawsuit can only arise to review a plan administrator's discretionary action,[133] which, reviewed under the arbitrary and capricious standard, is a legal question for the judge, not a factual question for the jury.[134] This is not

126. *See, e.g.*, Flint, *supra* note 25, at 166 & n.155 (explaining that in each circuit first ERISA cases for review of fiduciary actions involved multi-employer plans so these courts adopted LMRA legal precedence for ERISA plans).

127. *See supra* note 85.

128. *See, e.g.*, Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *accord In re* Vorpahl, 695 F.2d 318, 320-21 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980).

129. *See supra* note 84.

130. 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). *Wardle* involved a plan administrator's denial of an owner-operator's application for retirement benefits under a jointly-administered union plan on the ground that the participant had a break-in-service. *Id.* at 823. The participant sued under ERISA § 502(a)(1)(B), and not LMRA, for the amount of the benefit, punitive damages and attorney's fees. *Id.*

131. *Id.* at 828-30. See *infra* notes 170-71 and accompanying text for the two arguments and disparagements.

132. *Wardle*, 627 F.2d at 828-29.

133. *See supra* notes 62-70 and accompanying text.

134. *Wardle*, 627 F.2d at 829-30.

the law.

The review standard mandated by the Supreme Court in dicta in *Firestone Tire & Rubber Co. v. Bruch* is the abuse of discretion standard.[135] This standard reduces to the arbitrary and capricious rule only for the disinterested, properly motivated plan administrator, which is the case only for some multi-employer plans.[136] The correct standard involves fact questions concerning the interest and motives of the plan administrator, as well as the possibility of selecting the best decision of several possible logical ones.[137] The result—denial of jury trial—also is not the correct law for contracts with a discretionary provision, although it is for trusts with a discretionary provision. Thus, denial of a jury trial may have been correct based on the type of action, but not based on the issues involved.[138]

The court in *Wardle* continued by noting that the Supreme Court declared review of a federal administrator's discretionary action incompatible with a jury trial.[139] Presumedly, that rule should also apply to

---

135. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

136. *See supra* note 78 and accompanying text.

Employee-participants have urged the recent recognition by the Supreme Court of this expanded abuse of discretion review standard to obtain jury trials in federal court. *See supra* notes 71-79 and accompanying text. However, rather than use the correct jurisprudence to disregard their impliedly overruled prior review standard of arbitrary and capricious, these federal courts continue to follow the arbitrary and capricious standard and deny jury trials. *E.g.*, Blake v. Union Mut. Stock Life Ins. Co., 906 F.2d 1525, 1526 (11th Cir. 1990); Wise v. Dallas & Mavis Forwarding Co., 751 F. Supp. 90, 92 (W.D.N.C. 1990); Pardini v. Southern Nev. Culinary & Bartenders Pension Plan & Trust, 733 F. Supp. 1402, 1403 (D. Nev. 1990). *But see* Resnick v. Resnick, 763 F. Supp. 760 (S.D.N.Y. 1991) (successful).

137. *See Bruch*, 489 U.S. at 115.

138. *See supra* notes 88-91 and accompanying text.

139. *Wardle*, 627 F.2d at 830; *e.g.*, Curtis v. Loether, 415 U.S. 189, 194-95 (1974) (commenting on earlier decision to that effect for review of proceedings of federal administrative body, those of NLRB).

This is a strange position. First, plan administrators are not disinterested, *see supra* notes 20-25 and accompanying text, as are administrative law judges.

Second, contract actions for money owed under a contract or an interpretation of a contract are very similar to the benefits-due lawsuit. Courts handle the analogous contractual situations under contract law with a jury trial, even though using the arbitrary and capricious portion of the abuse of discretion review standard. Courts have even prepared jury instructions in contract cases relative to review these discretionary determinations.

Courts uphold the architect's or engineer's decision under a construction contract unless he or she acts fraudulently or makes such a gross mistake as to imply bad faith or fails to exercise an honest judgment. *See supra* note 82. Whether the architect or engineer has failed to meet this standard is determined under contract law by a jury trial. *E.g.*, Continental Casualty Co. v. Wilson-Avery, Inc., 156 S.E.2d 152, 155 (Ga. Ct. App. 1967); James I. Barnes Constr. Co. v. Washington Township, 184 N.E.2d 763, 764 (Ind. App. 1962); Public Water Supply Dist. No. 8 v. Maryland Casualty Co., 478 S.W.2d 293, 294 (Mo. 1972) (jury waived), *modified on other grounds*, 513 S.W.2d 311 (Mo. 1974); Antrim Lumber Co. v. Bowline, 460

private plan administrators. The Supreme Court, however, excludes enforcement of statutory rights for a civil action in a district court from this rule.[140] Since benefits-due lawsuits brought under ERISA are civil actions to enforce a statutory right, they are thus not incompatible with trial by jury.[141]

As to constitutional considerations, the court in *Wardle* asserted

---

P.2d 914, 919 (Okla. 1969); Travis-Williamson County Water Control & Improvement Dist. No. 1 v. Page, 358 S.W.2d 158, 160 (Tex. Civ. App. 1962), *aff'd in part, rev'd in part on other grounds*, 367 S.W.2d 307 (Tex. 1963). Thus, courts instruct juries:

> [T]he court further instructs the jury that, if they believe from the evidence [that estimates were fixed as provided in the contract] said estimates must be considered by the jury as the correct prices, unless the jury further believes from the evidence that, in approving said estimates and in making his decision in reference thereto, and in giving the certificate approving the same, the said engineer was guilty of intentional fraud, or of such gross mistake as to necessarily imply bad faith on his part.

2 HENRY RANDALL, A TREATISE ON THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES § 1317 (1922) (citing Norfolk & W.R.R. v. Mills, 22 S.E. 556 (Va. 1895) (second part of abuse of discretion review standard)).

Courts uphold the buyer's satisfaction decision under a sales contract unless he or she acts in bad faith or fails to exercise an honest judgment. *See supra* note 83. Sellers bring the action against the allegedly dissatisfied buyer as a breach of contract claim and so try them before a jury. *See, e.g.*, Meredith Corp. v. Design & Lithography Center, Inc., 614 P.2d 414, 415 (Idaho 1980) (jury waived); Frankfort Distilleries, Inc. v. Burns Bottling Mach. Works, 197 A. 599, 601 (Md. 1938); Alper Blouse Co. v. E.E. Conner & Co., 127 N.E.2d 813, 815, *reh'g denied*, 130 N.E.2d 598 (N.Y. 1955); Fulcher v. Nelson, 159 S.E.2d 519, 522-23 (N.C. 1968); *see also* Fidelity Fuel Co. v. Martin Howe Coal Co., 15 F.2d 470, 470 (7th Cir. 1926) (triable before jury). Thus, courts instruct juries:

> The jury [is] instructed . . . that, under the above condition of the contract, if [the jury] believe[s] from the evidence that defendant refused to accept the said machines on the ground that it was dissatisfied with them, and that, in so acting, the defendant exercised good faith and was honestly dissatisfied, then you should find for defendant, although you may believe that the defendant did not have reasonable grounds for such dissatisfaction.

5 RANDALL, *supra*, § 4657(2) (citing Inman Mfg. Co. v. American Cereal Co., 100 N.W. 860 (Iowa 1904) (both parts of abuse of discretion standard)).

Similarly, courts have fashioned jury instructions for the review of plan administrator's decisions under a pension plan. *See, e.g.*, Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1005 (4th Cir. 1985) (jury made arbitrary and capricious finding for long-term disability plan under ERISA); Seafarers Pension Plan v. Sturgis, 630 F.2d 218, 221 (4th Cir. 1980) (jury made arbitrary and capricious finding for disability plan under LMRA); *see also* Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 350-53 (5th Cir. 1989) (formulating fiduciary responsibility jury instructions).

Jurors ordinarily have difficulty understanding jury instructions when couched in legal language; however, when instructions are written using simple language, juror comprehension rises dramatically. Amiram Elkwork & Bruce D. Sales, *Jury Instructions*, *in* SAUL KASSIN & LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY OF EVIDENCE AND COURTROOM PROCEDURE 280-97 (1984) (comprehension for mock juries in civil trials increased from 40% to 78%).

140. Curtis v. Loether, 415 U.S. 189, 195 (1974).

141. *E.g.*, Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988).

that trust law governs pension plans.[142] Trust law provides exclusively for an equitable remedy with one exception.[143] A legal remedy exists for the beneficiary only for monies due unconditionally and immediately,[144] which, according to *Wardle*, is not the case for a pension payable in the future over years.[145] A jury trial is available only in this situation. Benefits-due lawsuits, therefore, even when involving questions of fact, are equitable and hence do not require a jury trial.[146]

The court provided some erroneous propositions to support this conclusion. It claimed that state courts had traditionally dealt with benefits-due lawsuits under the law of trusts, but cited no cases previously decided under state law.[147] The reason is clear. Investigation of pre-ERISA state cases reveals that most courts viewed benefits-due lawsuits as contractual,[148] and hence most state courts did not use trust law for benefits-due cases. The court in *Wardle* further claimed that federal courts followed the state courts in treating benefits-due cases under trust law when entertaining them under diversity jurisdiction.[149] In support, the court cited only LMRA cases,[150] which courts handle as a federal cause of action, not a state cause of action with diversity.[151] Again the reason is clear. Investigation of diversity actions indicates that they followed state courts in treating benefits-due lawsuits as contractual.[152] Ac-

142. Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

143. *See infra* note 144.

144. 1 RESTATEMENT (SECOND) OF TRUSTS § 197 (1959) ("Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable."); *id.* § 198 ("If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment."). This legal trust action derived from the common law writs of debt and general assumpsit. Jefferson Nat'l Bank v. Central Nat'l Bank, 700 F.2d 1143, 1149 (7th Cir. 1983); Dixon v. Northwestern Nat'l Bank, 297 F. Supp. 485, 489 (D. Minn. 1969).

145. *Wardle*, 627 F.2d at 829.

146. *Id.* at 828-30.

147. *Id.* at 829.

148. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989); *see infra* notes 205-08 and accompanying text.

149. *Wardle*, 627 F.2d at 829.

150. *Id.*; *see* Genesta v. San Diego County Laborers' Pension Plan, 28 Fed. R. Serv. 2d (Callaghan) 1001, 1002 (S.D. Cal. 1979) (disability benefits from jointly-administered union plan under LMRA; arbitrary and capricious is question of law); Porter v. Central States, S.E. & S.W. Areas Pension Fund, 25 Fed. R. Serv. 2d (Callaghan) 1504, 1505 (N.D. Iowa 1978) (pension from jointly-administered union plan under LMRA; follows Restatement trust rule); Davis v. Huge, 91 L.R.R.M. (BNA) 2234, 2235-36 (E.D. Ky. 1975) (same); Sichko v. Lewis, 191 F. Supp. 68, 69 (W.D. Pa. 1960) (same).

151. *See supra* notes 37-51 and accompanying text.

152. *See* Apponi v. Sunshine Biscuits, Inc., 652 F.2d 643, 650 (6th Cir. 1981) (pre-ERISA pension plan is contract so remand for jury trial on ambiguous language), *cert. denied*, 484

cording to the court in *Wardle*, ERISA merely provides a federal forum for these trust lawsuits.[153] The court presumed that Congress intended to preserve this state law.[154] If this presumption is true, the result should be opposite. Thus, the court in *Wardle* not only failed to make an adequate case for the nonjury trial, but used dishonorable methods to thwart jury trial.

2. Other federal decisions

Nevertheless most circuit courts, lemming-like, have followed the *Wardle* decision in various forms rather than recognize its fallacious reasoning, a reasonable basis for disregarding it as precedent.[155] The Fourth[156] and Eighth[157] Circuits have mistakenly asserted that the ab-

U.S. 820 (1987); Wyper v. Providence Washington Ins. Co., 533 F.2d 57, 63 (2d Cir. 1976) (tried to jury following Connecticut's contractual approach for pension claim); Golden v. Kentile Floors, Inc., 512 F.2d 838, 846-47 (5th Cir. 1975) (nonjury trial following New York's contractual approach for pension claim); Bradford v. New York Times Co., 501 F.2d 51, 60-61 (2d Cir. 1975) (same for incentive compensation plan); Matthews v. Swift & Co., 465 F.2d 814, 816-18 (5th Cir. 1972) (following New York's contractual approach for disability pension); Rochester Corp. v. Rochester, 450 F.2d 118, 120-21 (4th Cir. 1971) (following Virginia's contractual approach for pension claim).

153. *Wardle*, 627 F.2d at 829.

154. *Id.*

155. *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 86-87 (1960) (explaining disregard of precedent due to faulty foundation, implied overruling or misapplication of legal principles).

156. *See, e.g.*, Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir. 1985). In *Berry* an employee sued to challenge a plan administrator's decision to terminate long-term disability benefits, presumedly under ERISA § 502(a)(1)(B). *Id.* The trial court had permitted a jury trial and the jury made the "arbitrary, capricious, unreasonable or made in bad faith" finding. *Id.* at 1006. The *Berry* court concluded, however, that "arbitrary and capricious" is too difficult a concept for a court to communicate to jurors and so a private administrative scheme, such as that mandated by ERISA is "incompatible with a jury trial scheme." *Id.* at 1007; *accord* Dameron v. Sinai Hosp., 815 F.2d 975, 981 (4th Cir. 1987). However, state courts have no such problem. See *supra* note 139 for (1) courts addressing contract provisions permitting discretion which let jurors decide the arbitrary and capricious issue and (2) jury instructions on "arbitrary and capricious."

District courts in the Fourth Circuit have generally concluded similarly. *See, e.g.*, Quesinberry v. Individual Banking Group Accident Ins. Plan, 737 F. Supp. 38, 40 (W.D. Va. 1990) (estate sued insurance company as plan administrator for accidental death benefit); Trogner v. New York Life Ins. Co., 633 F. Supp. 503, 511 (D. Md. 1986) (participant sued for denied disability benefit); *see also* Dameron v. Sinai Hosp., Inc., 595 F. Supp. 1404, 1415-16 (D. Md. 1984) (ERISA actions for benefits due are equitable so that doctrine of laches applies), *aff'd*, 815 F.2d 975 (4th Cir. 1989); Kolata v. United Mine Workers, 533 F. Supp. 313, 319-20 (S.D. W. Va.) (arbitrary and capricious review of trustee's plan interpretation reducing benefits is for court, not jury), *aff'd*, 696 F.2d 990 (4th Cir. 1982).

157. *In re* Vorpahl, 695 F.2d 318, 321-22 (8th Cir. 1982). In *Vorpahl* present and future employees sued for future and current benefits under a retirement plan under ERISA § 502(a)(1)(B). *Id.* at 319. The court concluded that such lawsuits do not involve any factual

sence of factual issues in benefits-due lawsuits does not require a jury. The Third,[158] Sixth[159] and Eleventh[160] Circuits have examined the rem-

issues so denial of a jury request was proper. *Id.* at 321. However, state courts do not agree. See *infra* notes 178-81, 184-89 for courts submitting the lawsuit to jury determination.

District courts in the Eighth Circuit have generally concluded similarly. *See, e.g.*, Bohlmann v. Logos Sch., 669 F. Supp. 951, 953 (E.D. Mo. 1987) (employee sued plan administrator for medical benefits); Hollenbeck v. Falstaff Brewing Corp., 605 F. Supp. 421, 431 (E.D. Mo.) (widow sued employer for benefit due), *aff'd*, 780 F.2d 20 (8th Cir. 1985); Hechenberger v. Western Elec. Co., 570 F. Supp. 820, 822 (E.D. Mo. 1983) (employee sued trustee for denial of benefits), *aff'd*, 742 F.2d 453 (8th Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985).

158. Turner v. CF & I Steel Corp., 770 F.2d 43, 47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). In *Turner* retired employees of one plan in a merged entity sued for increased pensions from a second plan under ERISA § 502(a)(1)(B). *Id.* at 44, 46. The court noted that most benefits-due lawsuits involved a nonfactual abuse of discretion standard incompatible with a jury trial. *Id.* at 46. Under the remedy test, however, these lawsuits seek an equitable remedy and hence require no jury. *Id.* at 47; *accord* Cox v. Keystone Carbon Co., 894 F.2d 649-50 (3d Cir.) (former employee sued for medical insurance benefit; suit involved appeal power, seeking equitable remedy), *cert. denied*, 111 S. Ct. 47 (1990); Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989) (former employees sued for severance pay; enforced by in personam or contempt so seeking equitable remedy). Normally, seeking money due under a contract is a legal remedy. *See supra* note 88.

District courts in the Third Circuit have generally concluded similarly. *See, e.g.*, Haeffele v. Hercules Inc., 703 F. Supp. 326, 331 (D. Del. 1989) (former employee challenged denial of early retirement); Young v. AT&T Transition Protection Payment Plan, 10 Employee Benefits Cas. (BNA) 1920 (D.N.J. 1989) (former employee sued for severance benefits for reorganization termination); Gilliken v. Hughes, 609 F. Supp. 178, 181 (D. Del. 1985) (beneficiary sued plan administrator for benefits). Some district courts have described the rule for denying jury trial as a per se rule: if the case involves an ERISA cause of action, there is no right to a jury trial. *See* Foulke v. Bethlehem 1980 Salaried Pension Plan, 565 F. Supp. 882, 883 (E.D. Pa. 1983) (participant sued for lump sum from pension plan; follows per se rule).

159. Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988). In *Daniel* a former employee challenged the denial of early retirement benefits, presumedly under ERISA § 502(a)(1)(B). *Id.* at 265. The court noted that for recovery of benefits there is no right to a jury, citing a prior case using the equitable remedy test for another type of ERISA lawsuit. *Id.* at 268 (citing Crews v. Central States, S.E. & S.W. Areas Pension Fund, 788 F.2d 332, 338 (6th Cir. 1986) (employer sought contribution refund under ERISA § 502(a)(3))); *accord* Bair v. General Motors Corp., 895 F.2d 1094, 1097 (6th Cir. 1990) (former employee sued for special early retirement benefits; no right to jury trial even if contract issues involved).

District courts in the Sixth Circuit have generally concluded similarly. *See, e.g.*, Cowden v. Montgomery County Soc'y for Cancer Control, 591 F. Supp. 740, 747 (S.D. Ohio 1984) (employee sued plan administrator for benefits); Diano v. Central States, S.E. & S.W. Areas Health & Welfare Pension Fund, 551 F. Supp. 861, 862-63 (N.D. Ohio 1982) (owner-employee sued for benefits due under jointly-administered union pension plan under ERISA, not LMRA; only equitable remedy available to beneficiaries of trust fund).

160. Blake v. Union Mutual Stock Life Ins. Co., 906 F.2d 1525, 1526 (11th Cir. 1990). In *Blake* an employee sued to recover additional benefits under a group health policy under ERISA § 502(a)(1)(B). *Id.* at 1526. Since this action involved the ordering of continuing benefits, it was an equitable action and hence no jury was required. *Id.*; *accord* Chilton v. Savannah Foods & Indus., 814 F.2d 620, 623-24 (11th Cir. 1987) (former employee sued for retirement benefit; no jury required); Howard v. Parisian, Inc. 807 F.2d 1560, 1567 (11th Cir. 1987) (former employee sued for additional health care under welfare plan; no jury required).

District courts in the Eleventh Circuit have generally concluded similarly. *See, e.g.*, Lips-

edy sought, erroneously deemed it equitable, and denied a jury trial. The Fifth,[161] Eleventh[162] and Ninth[163] Circuits have followed the trust law

---

comb v. Transac, Inc., 749 F. Supp. 1128, 1131 (M.D. Ga. 1990) (employee sued for long-term disability benefits); Springer v. Wal-Mart Assocs., Group Health Plan, 714 F. Supp. 1168, 1169 (N.D. Ala. 1989) (employee sued for health benefits; but used advisory jury), *rev'd on other grounds*, 908 F.2d 897 (11th Cir. 1990); Tucker v. Employers Life Ins. Co., 689 F. Supp. 1073, 1077 (N.D. Ala. 1988) (participant sued under employer's plan that had been switched from group insurance to individual insurance); Whitt v. Goodyear Tire & Rubber Co., 676 F. Supp. 1119, 1134 (N.D. Ala. 1987) (participants sued for benefits due under private company plans); Chambers v. Kaleidoscope, Inc. Profit Sharing Plan & Trust, 650 F. Supp. 359, 378 (N.D. Ga. 1986) (participant in private company plan sued for breach of fiduciary duty and failure to distribute benefits; jury trial unavailable for punitive damages); Zittrouer v. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471, 1478 (N.D. Ga. 1984) (widow sued plan administrator for medical benefits); Chastain v. Delta Air Lines, 496 F. Supp. 979, 985 (N.D. Ga. 1980) (widow sued plan administrator for disability and survivor benefit); *see also* Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, 827-28 (N.D. Ala. 1988) (dicta) (widow sued insurance company for non-payment of accidental death benefits); McKinnon v. Blue Cross-Blue Shield, 691 F. Supp. 1314, 1315 (N.D. Ala. 1988) (same), *aff'd*, 874 F.2d 820 (11th Cir. 1989) (deceased's representative sued insurance company to recover deceased's medical expenses); Amos v. Blue Cross-Blue Shield, 681 F. Supp. 1515, 1518 (N.D. Ala. 1988) (same), *rev'd on other grounds*, 868 F.2d 430 (11th Cir.), *cert. denied*, 493 U.S. 855 (1989) (beneficiaries sued to recover money allegedly due them under employee benefit plans).

The court in *Whitt* had earlier concluded that a suit for benefits was legal in nature and so had decided to allow jury trial, but reconsidered after finding *Chilton*. *Whitt*, 676 F. Supp. at 1132. A significant number of opinions from district courts in the Eleventh Circuit assert that jury denial is error. *See, e.g.*, Blue Cross & Blue Shield v. Lewis, 753 F. Supp. 345, 348 (N.D. Ala. 1990); Rhodes v. Piggly Wiggly Ala. Distrib. Co., 741 F. Supp. 1542, 1545-46 (N.D. Ala. 1990); Porter v. Mutual Serv. Life Ins. Co., No. CV-PT-700-S, 1990 WL 174716, at *3 (N.D. Ala. June 26, 1990); Gangitano v. NN Investors Life Ins. Co., 733 F. Supp. 342, 343 (S.D. Fla. 1990).

161. Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980). In *Calamia* an employee sued for a declaration that a disability benefit was higher than that paid from a jointly-administered union pension plan under ERISA § 502(a)(1)(B), without suing under LMRA. *Id.* at 1236. The court stated that it concurred with Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). *Calamia*, 632 F.2d at 1237.

District courts in the Fifth Circuit have generally concluded similarly. *See, e.g.*, Fonner v. Georgia-Pacific Corp., 747 F. Supp. 340, 341-42 (M.D. La. 1990) (retiree sued for past-due retirement benefits); Stage v. Life Ins. Co. of N. Am., Civ. A. 89-1251, 1990 WL 32941, at *1, *3 (E.D. La. Mar. 21, 1990) (employee sued under accidental death and disability plan); Moffit v. Blue Cross & Blue Shield, Inc., 722 F. Supp. 1391, 1395 (N.D. Miss. 1989) (employee challenged termination of health benefits upon severance); Juckett v. Beecham Home Improvement Prods., Inc., 684 F. Supp. 448, 452 (N.D. Tex. 1988) (beneficiary sued for benefits due); Sublett v. Premier Bancorp Self-Funded Medical Plan, 683 F. Supp. 153, 155 (M.D. La. 1988) (employee sued plan administrator for medical benefits).

162. *Wardle*, 627 F.2d at 829; *accord* Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 527 (7th Cir. 1986) (employee sued for disability benefits due; no jury required), *cert. denied*, 479 U.S. 1094 (1987); Jefferson Nat'l Bank v. Central Nat'l Bank, 700 F.2d 1143, 1149 (7th Cir. 1983) (former employee sued for lump-sum vested benefit; lawsuit fits trust law legal remedy so jury trial required).

District courts in the Seventh Circuit generally have concluded similarly. *See, e.g.*, Allison v. Duggan, 737 F. Supp. 1043, 1047 (N.D. Ind. 1990) (retiree sued for suspended retire-

rule, permitting a jury trial only for unconditional and immediately payable benefits. The First,[164] Second[165] and Tenth[166] Circuits have yet to

ment benefits); Grodsky v. Benefit Trust Life Ins., No. 89 C 463, 1990 WL 36261, at *2 (N.D. Ill. Mar. 5, 1990) (widow sued for health and life insurance benefits); Ovitz v. Jefferies & Co., 553 F. Supp. 300, 301 (N.D. Ill. 1982) (employee sued plan administrator for additional amounts from profit-sharing plan; unconditional and immediate so have jury trial under trust law's legal remedy); *see also* Senn v. AMCA Int'l, 118 Lab. Cas. (CCH) ¶ 10,637 (E.D. Wis. Sept. 10, 1990) (retirees sued for health and life insurance benefits; but used advisory jury).

163. Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249, 1252 (9th Cir. 1987). In *Transamerica* an insurer sued derivatively on behalf of a beneficiary for a declaration that its policy had no double indemnity with respect to that beneficiary, presumedly under ERISA § 502(a)(1)(B). *Id.* at 1251-52. Since this action requested a ruling on whether a benefit was unconditionally due and immediately payable, it fit the trust law's legal remedy and a jury was required. *Id.* at 1252; *accord* Nevill v. Shell Oil Co., 835 F.2d 209, 212 (9th Cir. 1987) (former employees sued employer for denied severance pay; no jury required); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir.) (former employees sued employer for benefits due under welfare plan; no jury required), *cert. denied*, 474 U.S. 865 (1985).

District courts in the Ninth Circuit generally have concluded similarly. *See, e.g.*, Pardini v. Southern Nev. Culinary and Bartenders Pension Plan & Trust, 733 F. Supp. 1402, 1403 (D. Nev. 1990) (beneficiary sued for benefits); *see also* Weinfurther v. Source Servs. Corp. Employees Profit-Sharing Plan & Trust, 759 F. Supp. 599, 601 (N.D. Cal. 1991) (dicta) (former employees sued to recover benefits accrued during employment).

164. In the First Circuit only district courts have considered the matter. Several of these courts have followed the trust law legal remedy rule to deny jury trials. *See, e.g.*, Fuller v. Connecticut Gen. Life Ins. Co., 733 F. Supp. 462, 464 (D. Mass. 1990) (employee challenging denial of medical benefits not entitled to jury trial); Turner v. Leesona Corp., 673 F. Supp. 67, 70 (D.R.I. 1987) (employee suing for benefit from former employer's group long-term disability policy; no jury required); Wilson v. Connecticut Gen. Life Ins. Co., 670 F. Supp. 52, 54 (D. Me. 1987) (husband sued for benefits due from deceased wife's employer's life insurance plan; no jury required); Strout v. GTE Prod. Corp., 618 F. Supp. 444, 445 (D. Me. 1985) (employee suing for benefits from former employer's pension and welfare plans; ERISA suit essentially based on law of trusts, not contracts; no jury required).

Some courts have even suggested that if a plan administrator denies eligibility, that alone defeats a jury trial since the unconditional provision is not satisfied. *Turner*, 673 F. Supp. at 70 (trust law's legal remedy inapplicable when contested eligibility involved); *Wilson*, 670 F. Supp. at 54 (trust law's legal remedy inapplicable when entitlement denial involved). Presumedly the denial is in good faith, not bad faith. The right to a jury trial should depend on the participant-beneficiary's cause of action, not prior action of the plan administrator. *See supra* notes 113-21 and accompanying text.

These courts provide the reason that the case involves interpretation of the trust document. *Turner*, 673 F. Supp. at 70. Traditionally, this was done under the same principles as those in contract law. *See supra* note 87. Contract interpretation is a question of law for the judge unless there is an ambiguity, in which case a jury determines the interpretation. *See supra* note 86. Therefore, the judge must find that the plan administrator made a possible error, there being more than one logical result, then submit the issue to a jury on the abuse of discretion standard.

165. An examination of Second Circuit suits involving other types of ERISA lawsuits indicates that the Second Circuit follows the remedy test. Katsaros v. Cody, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984). In *Katsaros* an employee sued under ERISA § 502(a)(3) for equitable relief of trustee removal and restitution to plan for breaches of fiduciary duty in making loans from the plan. *Id.* The court distinguished that case from the mooted ruling in Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd mem.*, 622

address the problem.

Not all the federal courts have reached the same conclusion as the court in *Wardle*. The first decision under ERISA to address whether benefits-due actions require a jury trial, *Stamps v. Michigan Teamsters Joint Council No. 43*,[167] determined that Congress implicitly intended courts to try some ERISA actions by jury.[168] The court in *Stamps* examined two indications of this intent. First, the legislative scheme sets forth two remedies for the participant—one for an injunction and the other for benefits.[169] The injunctive relief clearly was intended to be equitable with no right to a jury trial, so in order for the other not to be surplusage, it must relate to legal remedies that require a jury trial.[170]

F.2d 575 (2d Cir. 1980). *Katsaros*, 744 F.2d at 278-79. In *Katsaros* the remedy sought determined the outcome. In *Pollock* the court affirmed the lower court's mandate of a jury trial for determination of a benefit amount. However, as the court in *Katsaros* pointed out, the trial never occurred because the trial court on remand decided the equitable question, reformation of the plan, to avoid the legal question. *Katsaros*, 744 F.2d at 278-79.

Consequently, some district courts in the Second Circuit have found the participant-beneficiary seeking equitable remedies and, as a result, denied a jury. *See, e.g.*, Gardella v. Mutual Life Ins. Co., 707 F. Supp. 627, 629 (D. Conn. 1988) (employee sought benefits due); *In re* Emhart Corp., 706 F. Supp. 153, 155-56 (D. Conn. 1988) (former employees sued to recover severance pay; suit for benefits is equitable); Nobile v. Pension Comm. of Pension Plan, 611 F. Supp. 725, 727-28 (S.D.N.Y. 1985) (executor sued for death benefit from deceased's employer's pension plan; trust law's legal remedy inapplicable when trust document interpretation involved); Ruben v. Decision Concepts, Inc., 566 F. Supp. 1057, 1059 (S.D.N.Y. 1983) (employee sued for termination benefit from profit-sharing plan; trust law's legal remedy inapplicable when amount of damages is involved).

A significant number of opinions from the district courts in the Second Circuit assert the jury denial is error. *See infra* note 173.

166. The Tenth Circuit did note that the other circuits that have considered the issue denied the right to a jury trial. Peckham v. Board of Trustees of the Int'l Bd. of Painters & Allied Trades Union, 653 F.2d 424, 426 n.3 (10th Cir. 1981).

Some district courts in the Tenth Circuit have found the participant-beneficiary seeking equitable remedies and so denied a jury trial. *See, e.g.*, Bass v. Prudential Ins. Co., 751 F. Supp. 192, 194 (D. Kan. 1990) (beneficiary sued for benefits); Porterfield v. Deffenbaugh Indus., No. Civ. A. 88-2385-S, 1988 WL 143436, at *1 (D. Kan. Dec. 13, 1988) (employee sued for denied medical benefits).

167. 431 F. Supp. 745 (E.D. Mich. 1977) (retired employee sued for benefits under LMRA and ERISA for benefits due and owing).

168. *Id.* at 747.

169. ERISA provides essentially two participant remedies: (1) the right to recover benefits, enforce rights and clarify rights, all under the terms of the plan, Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988); and (2) injunctive and other equitable relief, *id.* § 502(a)(3), 29 U.S.C. § 1132(a)(3).

170. The argument is that the benefit claim action provision would be surplusage if it also provided only equitable relief. *See* Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249, 1251 n.2 (9th Cir. 1987) (claim for benefits under life insurance contract is legal remedy); Pollock v. Castrovinci, 476 F. Supp. 606, 608-09 (S.D.N.Y. 1979) (approving argument).

One commentator believes enforcement and clarification of rights are equitable. *See*

The second indication was ERISA's legislative history that required courts to follow LMRA procedures,[171] permitting a jury trial.[172] A few district courts have followed *Stamps'* lead.[173]

Note, *supra* note 6, at 756. Enforcement's characterization, though, depends on the remedy sought, *see infra* notes 289-311 and accompanying text, and a clarification of rights' characterization also depends on the remedy sought in the absence of the declaratory action, *see infra* note 296 and accompanying text.

The *Wardle* court contends that concurrent jurisdiction for benefits-due lawsuits mandates the statutory scheme, not the legal-equitable distinction. Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 828-29 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Even if all claim benefit actions were equitable, they would still need a separate section since these actions are triable in both state and federal court. *See* Employee Retirement Income Security Act of 1974, § 502(e), 29 U.S.C. § 1132(e) (1988) (providing concurrent jurisdiction in federal and state court for benefit claim lawsuits). See *infra* notes 217-32 and accompanying text for the response to this disparagement.

171. H.R. CONF. REP. NO. 1280, *supra* note 19, at 323, *reprinted in* 1974 U.S.C.C.A.N. at 5107. "All such actions in federal or state courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under § 301 of the Labor-Management Relations Act of 1947." *Id.*

The court in *Wardle* contends that this legislative history merely means that the courts should fashion a federal common law, not make such actions identical to LMRA actions. *Wardle*, 627 F.2d at 829; *see also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209-10 (1985) (LMRA § 301 means courts are to fashion common law for collective bargaining agreements).

However, in concluding that the courts under ERISA are to fashion a federal common law, the Supreme Court relies on other legislative history. It cites a senator's statement to that effect. 120 CONG. REC. S29,942 (1974) (statement of Sen. Javits) ("[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."); *see* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983); H.R. REP. NO. 533, 93d Cong., 2d Sess. 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (ERISA's fiduciary responsibility provisions "codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.").

In contrast, the Supreme Court treats the reference to LMRA § 301 as meaning that a benefits-due lawsuit be treated as a federal question for preempting state law, *see* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55-56 (1987), or authorizing grafting of LMRA procedures onto benefits-due lawsuits; *see* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987) (adopting LMRA *Avco* rule for benefits-due lawsuits, indicating that quoted legislative history cannot be "more specific reference to the Avco rule"); *see also supra* note 98.

172. *See infra* notes 253-62 and accompanying text.

173. Almost all of the district courts finding a right to a jury trial are located in two circuits.

The Second Circuit cases come primarily from New York, a state that permits jury trials in ERISA actions. *E.g.*, Resnick v. Resnick, 763 F. Supp. 760, 765-66 (S.D.N.Y. 1991) (participant sued for lump sum from pension plan); Smith v. Union Mut. Ins. Co., 90 Civ. 1888, 1990 WL 209456, at *1 (S.D.N.Y. Dec. 13, 1990) (former employee sued for disability benefits); Abbarno v. Carborundum Co., 682 F. Supp. 179, 181-82 (W.D.N.Y. 1988) (participants sued to recover severance pay from private company plan; damage action for nonpayment of benefits and so legal although involving review under arbitrary and capricious rule); Paladino v. Taxicab Indus. Pension Fund, 588 F. Supp. 37, 41 (S.D.N.Y. 1984) (participant sued for benefit denial from union plan without suing under LMRA; involving the arbitrary and capricious rule; permitting jury trial because these actions are legal in nature, arising out of contract

The circuit courts have permitted jury trials for benefits-due lawsuits when other matters that require a jury trial have also been involved.[174] With respect to other types of litigation under ERISA, their decisions have been mixed.[175]

---

between union, employers and trustees, with employee as third party beneficiary); Pollock v. Castrovinci, 476 F. Supp. 606, 609 (S.D.N.Y. 1979) (former employee sued trustee for prohibited transaction by terminated plan, treated as benefits-due lawsuit), *aff'd*, 622 F.2d 575 (2d Cir. 1980); *see* Reeves v. Continental Equities Corp., 765 F. Supp. 469, 474 (S.D.N.Y. 1991) (judge uncertain whether case concerns breach of fiduciary without jury trial or damages for nonpayment with jury trial; judge defers to gather evidence for jury determination); Sixty-Five Sec. Plan v. Blue Cross & Blue Shield, 583 F. Supp. 380, 389 (S.D.N.Y. 1984) (dicta); Gehrhardt v. General Motors Corp., 434 F. Supp. 981, 982 (S.D.N.Y. 1977) (employee sued employer for denied pension benefit; jury trial not questioned), *aff'd*, 581 F.2d 7 (2d Cir. 1978). See *infra* note 179 for New York state cases.

The Eleventh Circuit cases come primarily from Alabama, a state that permits jury trials in ERISA actions. *E.g.*, Blue Cross & Blue Shield v. Lewis, 753 F. Supp. 345, 348 (N.D. Ala. 1990) (subrogation action for medical benefits); Rhodes v. Piggly Wiggly Ala. Distrib. Co., 741 F. Supp. 1542, 1545-46 (N.D. Ala. 1990) (employee sued for benefits due); Porter v. Mutual Serv. Life Ins. Co., No. CV90-PT-700-S, 1990 WL 174716, at *3 (N.D. Ala. June 26, 1990) (beneficiary sued for benefits due); Gangitano v. NN Investors Life Ins. Co., 733 F. Supp. 342, 343 (S.D. Fla. 1990). See *infra* note 185 for Alabama state cases.

Similar isolated opinions have come from the Third Circuit, Puz v. Bessemer Cement Co., 700 F. Supp. 267, 268 (W.D. Pa. 1988) (retirees sued seeking entitlement to lifetime health insurance benefits; major issue contractual involving factual ambiguities in plan provisions), the Sixth Circuit, International Union, United Auto., Aerospace & Agricultural Implement Workers v. Park-Ohio Indus., 661 F. Supp. 1281, 1310 (N.D. Ohio 1987) (employee sued plan administrator for breach of fiduciary duties in terminating health benefits treated as benefits-due lawsuit), *aff'd*, 876 F.2d 894 (6th Cir. 1989), the Seventh Circuit, Boesl v. Suburban Trust & Sav. Bank, 642 F. Supp. 1503, 1511 (N.D. Ill. 1986) (employee sued plan administrator for wrongful denial of medical benefits), and the Tenth Circuit, Lawson v. Lapeka, Inc., 55 Fair Empl. Prac. Cas. (BNA) 987 (D. Kan. Mar. 19, 1991) (former employee sought additional retirement benefits, jury trial not questioned).

174. *E.g.*, Krause v. Dresser Indus., 910 F.2d 674, 676 (10th Cir. 1990) (affirming ERISA claim for lost benefits for wrongful termination in violation of Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (1988), which permits legal or equitable relief, 29 U.S.C. § 633a(c) (1988)); Olitsky v. Spencer Gifts, Inc., 842 F.2d 123, 125 (5th Cir.) (same), *cert. denied*, 488 U.S. 925 (1988).

175. The other ERISA actions primarily deal with fiduciary breaches, injunctions and other equitable relief, and contribution refunds.

In actions under ERISA § 502(a)(2) by participant-beneficiaries and fiduciaries for fiduciary breaches, typically violations of ERISA § 409(a), the federal courts generally deny jury trials. *E.g.*, Devine v. Combustion Eng'g, 760 F. Supp. 989, 994 (D. Conn. 1991) (participant requested injunction to prevent breach of fiduciary duty in plan amendment); Goodman v. S & A Restaurant Corp., 756 F. Supp. 966, 970 (S.D. Miss. 1990) (participant sued for breach of fiduciary duty for failure to process application for medical benefits in timely manner); Diduck v. Kaszycki & Sons Contractors, 737 F. Supp. 808, 810-12 (S.D.N.Y. 1990) (employees sued employer to make plan whole for breach of fiduciary duty; relief sought is equitable); Motor Carriers Labor Advisory Council v. Trucking Management, Inc., 731 F. Supp. 701, 702 (E.D. Pa. 1990) (employers sued trustees for breaches of fiduciary duty violating ERISA § 409); Baker v. Universal Die Casting, Inc., 725 F. Supp. 416, 418 (W.D. Ark. 1989) (former employees sued employer for wrongful termination of plan); Berlo v. McCoy, 710 F. Supp. 873, 874

C. State Decisions

Because the majority of federal decisions, which exclusively follow a

(D.N.H. 1989) (participant sued trustees for breach of fiduciary duty in failing to credit interest); Brock v. Group Legal Adm'rs, Inc., 702 F. Supp. 475, 476 (S.D.N.Y. 1989) (Department of Labor on behalf of participants sought restitution and injunction for breach of fiduciary duty); Browning v. Grote Meat Co., 703 F. Supp. 790, 794-95 (E.D. Mo. 1988) (former employee sued plan administrator for violation of ERISA § 409 for failing to provide medical insurance following termination); Trustees of Central States, S.E. & S.W. Areas Pension Fund v. Golden Nuggett, Inc., 697 F. Supp. 1538, 1549 (C.D. Cal. 1988) (plan administrator sued investment manager for fiduciary violations in permitting plan to sell discounted notes that were prepaid in full); Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 627 n.4 (D. Minn. 1988) (plan administrators sued investment manager for breach of fiduciary duty); Smith v. ABS Indus., 653 F. Supp. 94, 97-99 (N.D. Ohio 1986) (retirees sued employers for breaches of fiduciary duties violating ERISA § 409); Bigger v. American Commercial Lines, Inc., 652 F. Supp. 123, 128 (W.D. Mo. 1986) (participants sued plan administrators for breach of fiduciary duty in connection with transfer of assets from first pension plan to second one being spun off); Unitis v. JFC Acquisition Co., 643 F. Supp. 454, 461 (N.D. Ill. 1986) (participants challenged employer's decision to amend pension plan and terminate fund to recover excess funding as breach of fiduciary duty; equitable); Burud v. Acme Elec. Co., 591 F. Supp. 238, 248 n.9 (D. Alaska 1984) (employee sued to undo certain transactions constituting fiduciary breaches); Kahnke v. Herter, 579 F. Supp. 1524, 1526-28 (D. Minn. 1984) (participants sued plan administrators for breaches of fiduciary duty violating ERISA § 409).

However, some federal courts have permitted jury trials in ERISA actions involving fiduciary breaches. *E.g.*, Sommers Drug Stores Employee Profit-Sharing Trust v. Corrigan, 883 F.2d 345, 350-53 (5th Cir. 1989) (reviewing fiduciary responsibility jury instructions); Utilcorp United Inc. v. Kemper Fin. Servs., 741 F. Supp. 1363, 1366-67 (W.D. Mo. 1989) (employer sued investment manager for fiduciary breaches; involving legal issues and thus requiring jury trial).

In actions under ERISA § 502(a)(3), for injunctions and other equitable relief to prevent fiduciary breaches or enforce ERISA's statutory provisions, courts deny jury trials due to the express reference to equity. *E.g.*, Bair v. General Motors Corp., 895 F.2d 1094, 1097 (6th Cir. 1990) (in statement in plan sought by participant-beneficiary as well as benefits due); Cox v. Keystone Carbon Co., 861 F.2d 390, 392-93 (3d Cir. 1988) (remedy for retaliatory discharge for exercising ERISA rights under ERISA § 510, sought by participant-beneficiary as well as benefits due), *cert. denied*, 111 S. Ct. 47 (1990); Crews v. Central States, S.E. & S.W. Areas Pension Fund, 788 F.2d 332, 338 (6th Cir. 1986) (employer sought refund of mistaken contribution under ERISA § 403(c); restitution is equitable remedy); Turner v. CF & I Steel Corp., 770 F.2d 43, 46 (3d Cir. 1985) (dicta), *cert. denied*, 474 U.S. 1058 (1986); Katsaros v. Cody, 744 F.2d 270, 278-79 (2d Cir.) (trustee removal and plan restitution sought by participant-beneficiaries), *cert. denied sub nom.* Cody v. Donovan, 469 U.S. 1072 (1984); Haberern v. Kaupp Vascular Surgeons, Ltd., No. Civ. A. 88-1853, 1989 WL 71474, at *2 (E.D. Pa. June 26, 1989) (employee sued plan administrator for accounting relating to various breaches of fiduciary duty); Folz v. Marriott Corp., 594 F. Supp. 1007, 1010 (W.D. Mo. 1984) (former employee sued for retaliatory discharge due to exercise of ERISA rights in violation of ERISA § 510; court held equitable action); Kann v. Keystone Resources, Inc., 575 F. Supp. 1084, 1089 (W.D. Pa. 1983) (participant sued for wrongful withholding of termination benefit from profit-sharing plan).

But some federal courts have permitted jury trials in ERISA actions involving the allegedly equitable relief. *E.g.*, Garcia v. Danbury Hosp. Corp., No. Civ. B-90-232, 1991 WL 23537, at *1 (D. Conn. Jan. 9, 1991) (former employee sued for retaliatory discharge); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21, 25 (D. Conn. 1990) (retaliatory discharge under ERISA

trust approach to employee benefit programs, have concluded generally that ERISA did *not* grant an implied right to a jury trial, state courts focus on their own constitutions and statutes to resolve whether they try the benefits-due lawsuit by jury.

Most state constitutional provisions relating to the right to a jury trial in civil actions only preserve it.[176] State courts have held that their constitutions only protect the right to a jury trial available under the common law and statutes current in the colony, territory or state (although a few use English law) at the time of the adoption of the particular state of its constitution.[177] Under a constitutional provision of this

---

§ 510 involves fact questions; requiring jury trial); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 885-91 (S.D.N.Y. 1990) (same).

The circuit courts also generally deny jury trials for recovery of unpaid contributions under ERISA § 502(a)(3). *E.g.*, Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning, 934 F.2d 35, 39-40 (3d Cir. 1991) (jury trial was error).

Some circuit courts have permitted jury trials in ERISA actions involving unpaid contributions. *E.g.*, May v. Interstate Moving & Storage, 739 F.2d 521, 523 (10th Cir. 1984) (ambiguity in collective bargaining agreement permits jury trial).

176. Thirty-five state constitutions contain language stating that the right to a jury trial shall remain "inviolate." ALA. CONST. art. I, § 11; ARIZ. CONST. art. II, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. I, § 16; CONN. CONST. art. 1, § 19; FLA. CONST. art. I, § 22; GA. CONST. art. I, § 1, ¶ XI; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. 1, § 20 (for civil cases); IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights, § 5; KY. CONST. Bill of Rights, § 7; MINN. CONST. art. I, § 4; MISS. CONST. art. 3, § 31; MO. CONST. art. I, § 22(a); MONT. CONST. art. II, § 26; NEB. CONST. art. I, § 6; NEV. CONST. art. 1, § 3; N.J. CONST. art. I, ¶ 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. I, § 2; N.C. CONST. art. I, § 25; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I, § 6; R.I. CONST. art. I, § 15; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 6; TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15; WASH. CONST. art. I, § 21; WIS. CONST. art. I, § 5.

Five state constitutions "preserve" the right. ALASKA CONST. art. I, § 16 (civil cases); HAW. CONST. art. I, § 13; MD. CONST. Declaration of Rights art. 23; W. VA. CONST. art. III, § 13; *see* MICH. CONST. art. I, § 14 (shall remain). Four state constitutions provide the right except as heretofore otherwise stated. ME. CONST. art. I, § 20 (civil cases); MASS. CONST. pt. 1, art. XV; N.H. CONST. pt. 1, art. 20; *see* DEL. CONST. art. I, § 4 (granted as heretofore).

Two state constitutions hold the right sacred. VT. CONST. ch. I, art. 12; VA. CONST. art. I, § 11 (civil cases).

Utah's constitutional provision is ambiguous as mentioning only capital cases. UTAH CONST. art. I, § 10 (inviolate); *see* Ronan E. Degnan, *Right to Civil Jury Trial in Utah: Constitution and Statute*, 8 UTAH L. REV. 97, 101 (1963). On the basis of state constitutional convention history, Utah's highest court has held it covers civil suits. International Harvester Credit Corp. v. Pioneer Trailer & Implement Inc., 626 P.2d 418, 419 (Utah 1981).

Three states have no constitutional right to a jury trial in civil cases. *See* Firelock, Inc. v. District Court, 776 P.2d 1090, 1097 (Colo. 1989); Duplantis v. United States Fidelity & Guar. Ins. Corp., 342 So. 2d 1142, 1143-44 (La. Ct. App. 1977) (jury trial by statute only, LA. CODE CIV. PROC. ANN. art. 1731 (West 1990)); Farrell v. Hursh Agency, Inc., 713 P.2d 1174, 1181 (Wyo. 1986); *see also* James, *supra* note 96, at 1022 n.4 (noting, as of 1935, Colorado and Louisiana had no constitutional guarantee of jury trial in civil actions).

177. Eighteen states that have so decided have had only one constitution so there is no

type, the existence of a right to a jury trial depends on whether the court

problem concerning which constitution. Malvo v. J.C. Penney Co., 512 P.2d 575, 580 n.7 (Alaska 1973) (territorial law as looks to Seventh Amendment, U.S. CONST. amend. VII); Rothweiler v. Superior Court, 410 P.2d 479, 482 (Ariz. 1966) (1911; territorial law); Harada v. Burns, 445 P.2d 376, 380 n.1 (Haw. 1968) (territorial law as looks to Seventh Amendment); Sheets v. Agro-West, Inc., 664 P.2d 787, 791 (Idaho Ct. App. 1983) (1889; territorial law); State v. Pinkerton, 340 P.2d 393, 395 (Kan. 1959) (1859; territorial law as finds territorial statute); North School Congregate Housing v. Merrithew, 558 A.2d 1189, 1190 (Me. 1989) (1820; Massachusetts law); Freeman v. Wood, 401 N.E.2d 108, 109-10 (Mass. 1980) (1780; English and provincial law); Breinhorst v. Beckman, 35 N.W.2d 719, 734 (Minn. 1949) (1858; territorial law); Hudson v. City of Las Vegas, 409 P.2d 245, 246-47 (Nev. 1965) (1864; territorial law as looks to U.S. Constitution); Bliss v. Greenwood, 315 P.2d 223, 226 (N.M. 1957) (1911; territorial law); Smith v. Kunert, 115 N.W. 76, 77 (N.D. 1907) (1889; territorial law); Keeter v. State, 198 P. 866, 869 (Okla. 1921) (1907; territorial law); *In re* Idleman's Commitment, 27 P.2d 305, 310 (Or. 1933) (1859; territorial law as finds territorial statute); Briggs Drive, Inc. v. Moorehead, 239 A.2d 186, 187 (R.I. 1968) (1843; state law); Shaw v. Shaw, 133 N.W. 292, 292-93 (S.D. 1911) (territorial law as looks to Seventh Amendment); Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc., 795 P.2d 658, 661 (Utah 1990) (1896; territorial law); Firchau v. Gaskill, 558 P.2d 194, 197 (Wash. 1978) (1889; territorial law as finds territorial statute); Powers v. Allstate Ins. Co., 102 N.W.2d 393, 399 (Wis. 1960) (1848; territorial law as looks to Seventh Amendment).

Of the states with multiple constitutions, thirteen provide for the most recently passed constitution, meaning that a statute granting the right to a jury trial then in effect is also protected. *Ex parte* W & H Mach. & Tool Co., 283 So. 2d 173, 175-76 (Ala. 1973) (1901; state law); State v. Johnson, 26 Ark. 281, 292 (Ark. 1870) (naming present constitution; now 1874; state law); Gentile v. Altermatt, 363 A.2d 1, 17 (Conn. 1975) (naming existing of 1965); Doris v. McFarland, 156 A. 52, 57 (Conn. 1931) (state law as uses own decision); Cahill v. State, 411 A.2d 317, 322 (Del. Super. Ct. 1980) (naming last of 1897 to protect jury trial under 1792 statute; state law), *rev'd on other grounds*, 443 A.2d 497 (Del. 1982); State Line Elevator, Inc. v. State Bd. of Tax Comm'rs, 526 N.E.2d 753, 754 (Ind. 1988) (1852; state law as eschews Seventh Amendment); State Conservation Dep't v. Brown, 55 N.W.2d 859, 860-61 (Mich. 1952) (naming 1908, now 1964; state law as refers to state statutes); Vannoy v. Swift & Co., 201 S.W.2d 350, 354 (Mo. 1947) (naming 1875, now 1945; state law as looks to pre-constitution state cases); State v. Hauser, 288 N.W. 518, 520 (Neb. 1939) (constitution, presumedly current one of 1875; state law as refers to state statutes); Stizza v. Essex County Juvenile and Domestic Relations Court, 40 A.2d 567, 569 (N.J. 1945) (naming 1844, now 1947; state law); Daley v. Kennet, 78 A. 123, 124-25 (N.H. 1910) (naming 1784; state law as looks to this jurisdiction); White v. White, 196 S.W. 508, 517 (Tex. 1917) (naming 1876; state law); Dempsey v. Hollis, 75 A.2d 662, 663 (Vt. 1950) (naming 1793; state law); Hickman v. Baltimore & O.R.R., 4 S.E. 654, 655-56 (W. Va. 1887) (1880 when that provision of 1872 constitution was last amended; state law), *overruled on other grounds by* Richmond v. Henderson, 37 S.E. 653, 657 (W. Va. 1900).

Of those states with multiple constitutions, eleven provide for the first constitution. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 286-87, 231 P.2d 832, 835 (1951) (1850; English law); State v. Webb, 335 So. 2d 826, 828 (Fla. 1976) (1845); Dudley v. Harrison, McCready & Co., 173 So. 820, 825 (Fla. 1937) (territorial law as looks to Seventh Amendment); Iowa Nat'l Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 726-28 (Iowa 1981) (1846; territorial law as looks to Seventh Amendment); People v. Kelly, 179 N.E. 898, 902 (Ill. 1931) (1818; territorial law); Johnson v. Holbrook, 302 S.W.2d 608, 611 (Ky. 1957) (1792; territorial law as looks to Seventh Amendment); Houston v. Lloyd's Consumer Acceptance Corp., 215 A.2d 192, 198-99 (Md. 1965) (1776); Commonwealth v. Warren, 105 A.2d 488, 491 (Md. App. Ct. 1954) (provincial law); *In re* C.L.A. & J.A., 685 P.2d 931, 933-34 (Mont. 1984) (1889;

views the employee benefit program as a contract, legal in nature, or as a trust, equitable in nature. State courts in Nevada,[178] New York,[179] Virginia[180] and Wisconsin[181] have used the contractual approach to employee benefit programs to find the right to a jury trial in a benefits-due lawsuit. A court in Florida, using the trust approach, has found no right to a jury trial.[182]

In addition to this type of constitutional provision, seven states have constitutional or statutory provisions granting jury trials in equity matters under certain conditions, usually for fact questions.[183] Under provi-

---

territorial law as uses territorial statute); Mason v. State, 50 N.E. 6, 9 (Ohio 1898) (1802; territorial law); Byers v. Commonwealth, 42 Pa. 89, 96 (1862) (1776; English and colonial law); Patten v. State, 426 S.W.2d 503, 506 (Tenn. 1968) (1796; North Carolina law), *cert. denied*, 400 U.S. 844 (1970); Newberry v. Commonwealth, 66 S.E.2d 841, 843 (Va. 1951) (criminal jury under English and colonial law in 1776 under similar constitutional provision); Bowman v. Virginia State Entomologist, 105 S.E. 141, 148 (Va. 1920) (1776).

Of those states with multiple constitutions, four provide for some intermediate constitution. Cawthon v. Douglas Co., 286 S.E.2d 30, 32-34 (Ga. 1982) (naming 1798 as first such provision; but Georgia constitutions of 1777 and 1789 also had provision; *see* 2 FRANCIS THORP, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND ORGANIC LAWS 785, 789 (1909) (state law); Moot v. Moot, 108 N.E. 424, 425 (N.Y. 1915) (1846; constitution in effect when constitutional provision referring to earlier constitution adopted, thereby cutting off effect of Wynehammer v. People, 13 N.Y. 378, 425-27 (Ct. App. 1856) (specifying current constitution); state law)); North Carolina State Bar v. DuMont, 286 S.E.2d 89, 93-95 (N.C. 1982) (1868 constitution since 1979 constitution merely corrected its outdated language and arrangement; state law); Pelfrey v. Bank of Greer, 244 S.E.2d 315, 316 (S.C. 1978) (1868 constitution, unwittingly overruling State v. Gibbes, 95 S.E. 346, 347-48 (S.C. 1918) (first constitution of 1776 since all since then have such provision; state law)).

Mississippi's highest court has stated the constitution provides for an unspecified ancient time. Walters v. Blackledge, 71 So. 2d 433, 445 (Miss. 1954) (presumedly English).

178. *See* Herbst v. Humana Health Ins., 781 P.2d 762, 763 (Nev. 1989) (right to jury trial not questioned; medical plan).

179. Walker v. Sperry & Hutchinson Co., 544 N.Y.S.2d 958, 959-60 (Sup. Ct. 1989) (following Paladino v. Taxicab Indus. Pension Fund, 588 F. Supp. 37, 39 (S.D.N.Y. 1984); disability plan); Fuller v. INA Life Ins. Co., 533 N.Y.S.2d 215, 217-18 (Sup. Ct. 1988) (same; accidental death plan).

180. *See* Nicely v. Bank of Va. Trust Co., 277 S.E.2d 209, 210 (Va. 1981) (jury trial not questioned; profit-sharing plan).

181. Evans v. W.E.A. Ins. Trust, 361 N.W.2d 630, 638 (Wis. 1985) (benefits-due lawsuit is one for money damages with right to jury trial; health plan).

182. Pfeiffer v. Roux Lab., Inc., 547 So. 2d 1271, 1272 (Fla. Dist. Ct. App. 1989) (benefits-due lawsuit is equitable, not contractual, requires no jury; disability plan).

183. Prior to 1950, of the thirteen states that had experimented with a right to jury trial in equity actions, only four have retained it. *See* M.T. Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C. L. REV. 157, 158 (1953). Since 1845, Texas has provided it broadly by constitution. TEX. CONST. art. V, § 10 (all causes in state district courts); State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292-93 (Tex. 1975) (constitutional provision extends jury trial to all actions and suits in law or equity). North Carolina since 1873 provides a right to jury trial for fact questions in equity by an interpretation of its constitution. *See* Lee v. Pearce, 68 N.C. 76, 82 (1873) (interpreting 1868 constitution). Georgia since 1792 and Tennessee since 1846 provide it by statute for questions of fact. GA. CODE ANN. § 23-3-66 (Harrison 1991); TENN.

sions of this type, courts in Arizona,[184] Alabama,[185] Georgia,[186] North Carolina,[187] Tennessee[188] and Texas[189] have found a right to a jury trial in a benefits-due lawsuit. The remaining state permitting jury trials in some equity matters, Louisiana, denies a jury trial for benefits-due lawsuits.[190] That state's statute denies a jury trial if it is denied by federal law[191] and Louisiana courts interpreted the *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*[192] decision as invoking that

---

CODE ANN. § 21-1-103 (1980 & Supp. 1990). *See generally* James A. Gardner, *Anachronism of Modern Equity—Discretion of the Chancellor in the Use of the Jury*, 8 MERCER L. REV. 225 (1957) (explaining development of equity juries in Georgia); Frank C. Ingraham, Note, *Jury Trial in Chancery Court in Tennessee*, 7 VAND. L. REV. 393 (1954) (same; Tennessee).

Since 1950, three additional states have adopted jury trials for equity proceedings. Alabama adopted it by decision if money damages are sought. *See* Whitman v. Mashburn, 238 So. 2d 709, 715 (Ala. 1970) (bill in equity seeking accounting and money damages entitled to jury trial); Frank W. Donaldson & J. Michael Walls, *Merger of Law and Equity in Alabama—Some Considerations*, 33 ALA. LAW. 134, 143-44 (1972). Arizona by decision requires fact issues in equitable cases to be tried by jury. *See* Haynie v. Taylor, 213 P.2d 684, 689-90 (Ariz. 1950). Louisiana requires jury trials in all civil cases with enumerated exceptions, including probate, injunctive, divorce and federal admiralty matters and where denied by law, LA. CODE CIV. PROC. ANN. arts. 1731, 1732 (West 1990 & Supp. 1991), including federal law, *see* Cramer v. Association Life Ins. Co., 569 So. 2d 533, 541 (La. 1990) (courts deny jury trial under federal law for ERISA claims), *cert. denied*, 111 S. Ct. 1391 (1991).

184. *See* Elgin v. Great West Life Assurance Co., 786 P.2d 1027, 1032 (Ariz. Ct. App. 1989) (refusing to render on reformed cause of action in jury trial since defendant then could have removed to federal court to avoid jury; health plan).

185. *E.g.*, Haywood v. Russell Corp., 584 So. 2d 1291, 1298 (Ala. 1991) (following Blue Cross & Blue Shield v. Lewis, 753 F. Supp. 345 (N.D. Ala. 1990); disability plan); *Ex parte* Ward, 448 So. 2d 349, 351-52 (Ala. 1984) (ERISA plan contractual so jury trial; health plan); *see* Hoffman v. Chandler, 431 So. 2d 499, 500 (Ala. 1983) (jury trial not questioned; medical plan).

186. *See* Anderson v. Chatham, 379 S.E.2d 793, 797 (Ga. Ct. App. 1989) (jury trial not questioned; retirement plan); TRW, Inc. v. Ebersole, 341 S.E.2d 267, 268 (Ga. Ct. App. 1986) (remand for jury trial; disability plan).

187. Overcash v. Blue Cross & Blue Shield, 381 S.E.2d 330, 338 (N.C. Ct. App. 1989) (medical plan).

188. *See* Campbell v. Precision Rubber Prods. Corp., 737 S.W.2d 283, 283 (Tenn. Ct. App. 1987) (employee lawsuit to reinstate participation in health plan; chancellor decided without jury as waived).

189. Burghart v. Connecticut Gen. Life Ins. Co., 806 S.W.2d 324, 327 (Tex. Ct. App. 1991) (entitled to jury trial for ERISA action under long-term disability plan); *see* Petrolite Corp. v. Barnhouse, 812 S.W.2d 341 (Tex. Ct. App. 1991) (jury trial not questioned; retirement plan); Aetna Life Ins. Co. v. Forbau, 808 S.W.2d 664, 665 (Tex. Ct. App. 1991) (same; medical plan); Felts v. Graphic Arts Employee Benefit Trust, 680 S.W.2d 891, 892-93 (Tex. Ct. App. 1984) (same; health plan).

190. Cramer v. Association Life Ins. Co., 569 So. 2d 533, 534 (La. 1990), *cert. denied*, 111 S. Ct. 1391 (1991).

191. LA. CODE CIV. PROC. ANN. art. 1732(7) (West 1990 & Supp. 1991).

192. 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

limitation.[193]

IV. THE PROPER SOLUTION

Resolution of whether there is a right to a jury trial in benefits-due cases depends on two investigations. Both are essentially the same under either the federal system or the state systems. Since ERISA contains no express provision granting a jury trial for benefits-due lawsuits, did Congress impliedly intend for courts to try such lawsuits by jury?[194] If not, are benefits-due lawsuits analogous to a type of action that requires a jury trial under some constitution or statute?[195]

A. Implied Congressional Intent

Examination of ERISA's legislative history reveals four items of an implied intent by Congress to grant rights to a jury trial for benefits-due lawsuits. First, Congress expressed an intention not only to preserve pre-ERISA state remedies, but to expand them.[196] Those remedies were contractual and generally tried by jury.[197] Second, the statutory scheme provided for a contractual approach to employee benefit programs and Congress recognized that participant-beneficiary rights under these programs arise contractually and hence carry a right to a jury trial.[198] Third, Congress desired to increase legal remedies for participant-beneficiaries suing for benefits due.[199] Legal remedies mean a jury trial. Lastly, Congress, rather than work out a complete set of new ERISA procedures, incorporated LMRA procedures into ERISA actions, which treat employee benefit programs as contracts with a right to a jury trial.[200]

1. Preservation of state remedies

When Congress passed ERISA, it desired to expand, not constrict, the remedies already available under state law for benefits-due lawsuits. Committee reports in both houses clearly express this goal:

> The intent of the Committee [in providing the benefits-due lawsuit] is to provide the full range of legal and equitable remedies

193. *Cramer*, 569 So. 2d at 534 (no right to jury trial for ERISA claims as denied under federal law).

194. *See infra* notes 199-271 and accompanying text.

195. *See infra* notes 272-311 and accompanying text.

196. *See infra* notes 201-16 and accompanying text.

197. *See infra* notes 205-08 and accompanying text.

198. *See infra* notes 217-32 and accompanying text.

199. *See infra* notes 233-41 and accompanying text.

200. *See infra* notes 242-71 and accompanying text.

> available in both state and federal courts to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.[201]

ERISA was intended to improve the remedies already available under state law.

The early state approaches to handling benefits-due lawsuits revolved around misconceptions concerning whether the employee benefit program was a contract or a trust.[202] The problem of whether benefits-due lawsuits entail jury trials arose because most employee benefit programs were dual in nature, possessing a contractual plan instrument setting forth the participation requirements and benefits provided as well as a trust instrument setting forth the funding mechanism.[203] Some plans are unfunded and thus have no trust element.[204] Unfortunately, state courts, rather than recognize this dual nature, focused only on one aspect. Most state courts finally settled on the contract approach,[205] but a few settled on the trust approach[206] as did some federal courts for LMRA actions.[207] The contractual approach was so predominant that the United States Supreme Court has described pre-ERISA employee benefit law as contractual in nature.[208]

---

201. H.R. REP. NO. 533, *supra* note 171, at 17, *reprinted in* 1974 U.S.C.C.A.N. at 4655; S. REP. NO. 127, 93d Cong., 2d Sess. 1, 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871.

The jurisdictional obstacles concerned such things as legal rules against suing nonresident trusts. *See, e.g.*, Miller v. Davis, 507 F.2d 308, 310-11 (6th Cir. 1974). Even benefits-due lawsuits under LMRA met jurisdictional hurdles, such as insufficient violations under LMRA § 301. *See, e.g.*, Bass v. International Bhd. of Boilermakers, Local No. 582, 630 F.2d 1058, 1066-67 (5th Cir. 1980). See *infra* notes 279-81 for various procedural obstacles.

202. *See, e.g.*, Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 916-24 (1970) (explaining that participant-beneficiaries used contract law to recover denied benefits and used trust law supplementally to prevent mishandling of funds before participant-beneficiaries had right to draw on those funds).

203. *See supra* notes 28-31 and accompanying text.

204. *E.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 105 (1989) (severance pay plan from employer's general assets).

Employers pay benefits for unfunded plans solely from employer assets. Starting in 1921, income tax law required tax-sheltered plans to have trusts, Revenue Act of 1921, ch. 136, § 219(f), 42 Stat. 227, 247, and in 1947 LMRA required multi-employer plans to have trusts, Labor Management Relations Act of 1947, § 302, 29 U.S.C. § 186 (1988).

205. *See infra* note 208, 280.

206. *See infra* note 281.

207. *See supra* note 85 and *infra* note 264 and accompanying text.

208. *See Bruch*, 489 U.S. at 112; *see also* McKinnon v. Blue Cross-Blue Shield, 691 F. Supp. 1314, 1315 (N.D. Ala. 1988) (inconsistent with ERISA's goals for circuit courts to claim ERISA took away right to jury trial participant-beneficiaries had under pre-ERISA law), *aff'd*, 874 F.2d 820 (11th Cir. 1989).

As the legal rules under contract law and trust law are basically the same,[209] the significance of the different approaches lies in whether the participant-beneficiary has a right to a jury trial. Some states grant a right to a jury trial only for cases at law, namely contracts.[210] For those states granting a right to a jury trial for cases in equity, namely trusts,[211] the distinction is of little import. Since most states viewed employee benefit plans as contractual, most granted the right to jury trial for benefits-due lawsuits.[212] Only a few viewed the matter under trust law and so denied jury trials.[213]

---

209. *See supra* notes 80-87 and accompanying text.

210. *See supra* notes 88-91 and accompanying text.

211. *See supra* note 183 and accompanying text.

212. Since the state theory was that employee benefit programs were contracts, they permitted a jury trial without questioning it. *E.g.*, Wayte v. Rollins Int'l, 169 Cal. App. 3d 1, 9, 215 Cal. Rptr. 59, 63 (1985) (pre-ERISA plan contractual so jury trial; employee sued plan for medical benefit); Bird v. Connecticut Power Co., 133 A.2d 894, 894 (Conn. 1957) (former employee sued for pension payment from pension plan); Cotton v. Edward Don & Co., 245 So. 2d 881, 882 (Fla. Dist. Ct. App. 1971) (former employee sued employer for vested share in profit-sharing plan); General Electric Co. v. Martin, 574 S.W.2d 313, 315 (Ky. Ct. App. 1978) (former employee sued employer for disability benefit from pension plan); Montgomery Ward & Co. v. Williams, 47 N.W.2d 607, 608 (Mich. 1951) (employer sued employee to recover amount wrongfully paid under health and accident insurance plan); Rakness v. Swift & Co., 175 N.W.2d 429, 432 (Minn. 1970) (employee sued employer for denied disability benefit from retirement plan); Blacik v. Canco Division-American Can Co., 156 N.W.2d 239, 242 (Minn. 1968) (former employee sued employer for additional retirement benefit and vacation pay); Stopford v. Boonton Molding Co., 265 A.2d 657, 659 (N.J. 1970) (retiree sued employer for anticipatory breach of vested contractual right to pension from pension plan); Hindle v. Morrision Steel Co., 223 A.2d 193, 194 (N.J. Super. Ct. App. Div. 1966) (former employee sued employer to recover contractual rights in retirement fund); Gearns v. Commercial Cable Co., 42 N.Y.S.2d 81, 82 (App. Div. 1943) (employee sued employer for monthly payment due under retirement plan), *aff'd*, 293 N.Y. 105 (1944); Going v. Southern Mills' Employees' Trust, 281 P.2d 762, 762 (Okla. 1955) (employee sued trust to compel payment of share in profit-sharing plan); Amicone v. Kennecott Copper Corp., 431 P.2d 130, 130 (Utah 1967) (employee sued employer for disability benefits from pension plan).

North Carolina and Texas courts, which permit jury trials also in equity, *see supra* note 183, also followed the contractual approach to jury trials. *E.g.*, Bradlye v. Pritchard, 118 S.E.2d 422, 425 (N.C. 1961) (former employee sued trustee for cash value of policy on life); Neuhoff Bros. Packers Management Corp. v. Wilson, 453 S.W.2d 472, 472 (Tex. 1970) (former employee sued trustee for benefit due from profit-sharing plan); Hexter v. Powell, 475 S.W.2d 857, 861 (Tex. Civ. App. 1971) (former employee sued trustees for benefit from terminated pension plan); Bruner v. Mercantile Nat'l Bank, 455 S.W.2d 323, 325 (Tex. Civ. App. 1970) (former employee sued trustee for disability benefits from retirement plan); Long v. Southwestern Bell Tel. Co., 442 S.W.2d 462, 463 (Tex. Civ. App. 1969) (widow sued employer for death benefit under employee benefit plan).

213. Those courts using the theory that employee benefit programs were trusts permitted trials before the judge without questioning it. *E.g.*, Kennet v. United Mine Workers, 183 F. Supp. 315, 316 (D.D.C. 1960) (tried without jury; retiree suing for benefit termination from multi-employer plan); Ruth v. Lewis, 166 F. Supp. 346, 348 (D.D.C. 1958) (judge weighed evidence for former employee suing for pension benefit from multi-employer plan); Hobbs v. Lewis, 159 F. Supp. 282, 284 (D.D.C. 1958) (same); *Ex parte* Garner, 190 So. 2d 544, 546

When Congress passes new legislation to solve a problem, courts presume it considered prior case law relating to the problem.[214] The congressional reference to increasing the remedies of benefits-due lawsuits in state court by removing jurisdictional hurdles acknowledges that state courts tried these cases under a contract theory with a jury trial.[215] Congress therefore intended ERISA to expand the right to a jury trial granted by the states in the pre-ERISA benefits-due lawsuit. The drastic curtailment of this right engineered by the court in *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*[216] violates this congressional directive.

2. Statutory scheme

ERISA specifically acknowledges the dual nature of employee benefit plans through a contractual part and a separate trust part.[217] ERISA clearly delineates one of the two instruments as the one governing operations,[218] and names the plan fiduciary separate from the trust instru-

(Ala. 1966) (former employee sued trustee for benefit from profit-sharing plan; case transferred from law to equity; presumed nonjury trial as before Alabama required jury trial in equity; *see supra* note 183); Barlow v. Roche, 161 A.2d 58, 63 (D.C. 1960) (tried in equity even though brought as action at law for monies due and owing under multi-employer health plan); Forrish v. Kennedy, 105 A.2d 67, 68 (Pa. 1954) (employee sued trustees for retirement pension from multi-employer plan in equity). *But see* Dixon v. Northwestern Nat'l Bank, 297 F. Supp. 485, 489 (D. Minn. 1969) (former employees' suit for vested benefit upon profit-sharing plan termination has right to jury trial under trust law's legal remedy).

214. *E.g.*, Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986); District of Columbia v. Murphy, 314 U.S. 441, 453-54 (1941); Blake v. McKim, 103 U.S. 336, 339 (1880); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 50.01 (4th ed. 1984); *see* Communications Workers v. Beck, 487 U.S. 735, 759 (1988) (Congress presumed to know about labor union practices when passing labor laws).

215. See *infra* note 229 and accompanying text for congressional reference to pre-ERISA pension law as contractual.

216. 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

217. *See* 26 C.F.R. § 601.201(o)(3)(xviii)(a) (1991) (make available to participants for determination letter "updated copy of the plan and the related trust agreement (if any)"); 29 C.F.R. § 2520.104b-1(b)(3) (1991) (make available to participants during reasonable times plan documents consisting of "plan description, latest annual report, and the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.").

218. Employee Retirement Income Security Act of 1974, § 402, 29 U.S.C. § 1102(a) (1988) ("Every employee benefit plan shall be established and maintained pursuant to a . . . plan instrument" that shall provide for the operation and administration of the plan); *see id.* §§ 1015, 2003(a), 26 U.S.C. §§ 414(g)(1), 4975(d)(8)(C); *id.* §§ 3, 104, 405, 408, 414, 29 U.S.C. §§ 1002(16)(A)(i), 1024(a)(1)(B), (2), (4), (6), 1105(c)(1), 1108(b)(8)(C), 1114(b)(2) (all referring to instrument under which benefit program is established, maintained or operated); *see also id.* § 404, 29 U.S.C. § 1104(a)(1)(D) (indicating that instruments of benefit program are plural).

ment.[219] ERISA also clearly delineates one of the two instruments as governing the program's assets.[220] So ERISA recognizes that a part of the employee benefit plan is contractual in nature.

Clever arguments cannot avoid that contractual nature, and hence possible jury trials, by placing participation requirements in the trust instrument. ERISA merely defines the plan instrument, the contract, as that portion of the employee benefit program including participation provisions, regardless of the label on the actual instrument.

Congress made clear that employee benefit programs did not consist solely of a trust document governed by trust law.[221] Congressional reports indicate that trust law alone was inadequate to safeguard participant-beneficiaries' rights[222] and that the LMRA standards, namely the arbitrary and capricious review standard, were not good enough for ERISA.[223] Furthermore, courts were not to apply just pre-ERISA law. Instead, Congress directed them to take into consideration the special differences between employee benefit trusts and traditional testamentary trusts.[224] These differences should at least take into account that: (1) the employer has a continuing economic interest in the program to reduce its costs since the employer is ultimately liable for its benefits and costs; (2) the employee's interest in the program represents the employee's deferred compensation; and (3) the plan administrator's review process is geared to justify its own prior determination in a nonneutral fashion.[225] Thus,

---

219. *Id.* § 403, 29 U.S.C. § 1103(a); *see also* S. REP. No. 383, 93d Cong., 2d Sess. 95 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4978 n.2 (trust sometimes means plan whether or not in trust form).

220. Employee Retirement Income Security Act of 1974, § 403, 29 U.S.C. § 1103(a) (1988) ("[T]rustee shall be . . . named in the trust instrument" and shall have authority to manage and control the plan's assets.); *see also id.* §§ 403, 422, 29 U.S.C. §§ 1103(a), 1105(a)(1), (c)(5), 1403(b)(1) (all referring to trust instrument); *id.* § 404, 29 U.S.C. § 1104(a)(1)(D) (indicating that instruments of benefit program are plural); Internal Revenue Code of 1954, ch. 736, 26 U.S.C. §§ 401(a)(2), 501(c)(22)(D) (1988) (referring to employee benefit program's trust instrument).

221. See *supra* notes 217-20, *infra* note 229 and accompanying text for congressional recognition of non-trust employee benefit program documents, some governed by contract law.

222. H.R. REP. No. 533, *supra* note 171, at 12, *reprinted in* 1974 U.S.C.C.A.N. at 4650 ("Conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries.").

223. *Id.* at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4642 ("[LMRA] is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.").

224. H.R. CONF. REP. No. 1280, *supra* note 19, at 302, *reprinted in* 1974 U.S.C.C.A.N. at 5083 ("The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.").

225. *See* Flint, *supra* note 25, at 173; Langbein, *supra* note 28, at 211-12.

Congress recognized that employee benefit programs were far more than just trusts.

Congress provided that the rights of the participant-beneficiary arise in the contractual plan instrument relating to the establishment of the benefit program.[226] These rights, under the deferred wage theory of pre-ERISA law, were contractual.[227] They represented an exchange of the promise of deferred wages, the benefits, for the consideration of present services.[228] Congress recognized these rights as contractual in its committee reports:

> In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding.[229]

Moreover, these congressional committee reports specifically acknowledge that ERISA adopted the deferred wage theory for participant-beneficiary rights under employee benefit plans: "[ERISA] presumes that promised pension benefits are in the form of a conditional deferred wage."[230] Thus the document that creates the rights of the participant-beneficiaries, the one that establishes the plan, is contractual in nature under the congressional explanation. Moreover, it is under that plan document that participant-beneficiaries sue in a benefits-due lawsuit,[231] not under the trust instrument. The trust's only involvement in the benefits-due lawsuit is that it is contractually obligated to satisfy the participant-beneficiary's judgment.[232] Congress thus expected courts to enforce these contractual rights through the benefits-due lawsuit under contract law, which generally entails a right to a jury trial.

---

226. *See, e.g.*, Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132(a)(1)(B) (1988) (only reference to enforceable rights of participant-beneficiary as arising under terms of plan instrument).

227. See *infra* notes 229-30 and accompanying text for congressional recognition of the deferred wage theory giving rise to contractual rights.

228. *See* Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 99-103 (1955) (explaining contract theory of employee benefit plans with consideration in either longevity of service or in present services for deferred wages).

229. H.R. REP. NO. 533, *supra* note 171, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 4643; S. REP. NO. 127, *supra* note 201, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 4841-42.

230. H.R. REP. NO. 533, *supra* note 171, at 13, *reprinted in* 1974 U.S.C.C.A.N. at 4651.

231. *See* Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132(a)(1)(B) (1988) ("[T]o recover benefits due [the participant-beneficiary] under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.").

232. See *supra* note 144 for the legal remedy of the participant-beneficiary against the trustee.

3. The increase in legal remedies

Another strand of legislative history indicates that Congress intended the benefits-due lawsuit to provide the full range of legal remedies available to participant-beneficiaries.[233] The word "legal" in the legislative history is a term of art that means the right to a jury trial.[234] The *Wardle* interpretation of limiting the benefits-due lawsuit to the extremely narrow trust legal remedy[235] violates this congressional directive. *Wardle* fails to provide that full range, which certainly includes the contractual remedies associated with the contractual nature of employee benefit plans recognized by Congress. The *Stamps* interpretation, in contrast, provides that full range of legal remedies.[236]

Under the congressional directive, courts are to treat benefits-due lawsuits as contractual, providing the full range of legal remedies as dictated by contract law.[237] ERISA contains much language about trust law,[238] however, it is always in connection with fiduciary responsibilities.[239] Contract law ordinarily provides a low standard of behavior.[240] ERISA merely requires the higher altruistic standard of fiduciary behavior from the parties to the employee benefit program, namely the sponsor and the plan administrator.[241] Congress's efforts to raise the standard of fiduciary behavior should not be construed as an intent to deprive the participant-beneficiaries of their right to a jury trial in obtaining money damages for benefit denials.

4. Adoption of LMRA procedures

A fourth strand of legislative history indicates that courts should apply LMRA procedures to ERISA actions that mandate a right to a jury trial. The conference committee report on ERISA states that:

---

233. See *supra* note 201 and accompanying text for the portion of the congressional committee reports supporting the use of legal remedies.

234. *See* Lorillard v. Pons, 434 U.S. 575, 583 (1978) (Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (1988))).

235. *See supra* notes 143-45 and accompanying text.

236. *See supra* notes 167-73 and accompanying text.

237. *See supra* note 201 and accompanying text.

238. *See, e.g.*, Langbein, *supra* note 28, at 209-11.

239. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1988); H.R. REP. No. 533, *supra* note 171, at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4649 (ERISA "codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts."); S. REP. No. 127, *supra* note 201, at 29, *reprinted in* 1974 U.S.C.C.A.N. at 4865 (same).

240. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829-32 (1983) (explaining that contract law does not go beyond morals of marketplace, while fiduciary law is altruistic).

241. See *supra* notes 239-40 for congressional intention to incorporate into ERISA fiduciary law and explanation that fiduciary law is altruistic.

> [S]uits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of [ERISA's] provisions . . . may be brought . . . also in State courts . . . . All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.[242]

Senator Harrison A. Williams, Jr., then chairman of the Senate Committee on Labor and Public Welfare,[243] co-sponsor of the original draft of the ERISA legislation[244] and floor manager of the bill,[245] explained the legislation similarly.[246] The United States Supreme Court stated explicitly that this legislative history could not be a "more specific reference" to LMRA procedural rules.[247] Consequently, the Supreme Court has grafted the preemption removal procedures of LMRA onto ERISA actions.[248] Thus, in handling benefits-due lawsuits in the absence of express ERISA provisions concerning procedural matters, courts should examine the corresponding LMRA practice.

With respect to the right to a jury trial, some courts have tried to obfuscate the true LMRA practice. In *Wardle*, for example, the court disparaged this legislative history as indicative of another matter[249] and cited the only court cases involving LMRA that denied the right to a jury trial for benefits-due lawsuits[250] for another proposition.[251] The reason is clear. If courts examined that practice, they would conclude *Wardle*'s denial of the right to a jury trial is erroneous. In *Stamps* the court suggested the correct analysis, but failed to explain it fully.[252]

---

242. H.R. CONF. REP. NO. 1280, *supra* note 19, at 76-77, *reprinted in* 1974 U.S.C.C.A.N. at 5107.

243. 1974 U.S.C.C.A.N. XCII.

244. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (Brennan, J., concurring); Theodore P. Manno, *ERISA Preemption and the McCarron-Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 61 (1979).

245. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 113 (1985).

246. 120 CONG. REC. 29,933 (1974) ("It is intended that such [ERISA] actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under § 301 of the Labor Management Relations Act.").

247. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987).

248. *Id.* (adopting LMRA *Avco* rule for benefits-due lawsuits). See *supra* note 98 for a discussion of removal of benefits-due lawsuits.

249. Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *see supra* note 171.

250. Incidentally, these cases were from federal district courts and not circuit courts.

251. *Wardle*, 627 F.2d at 829; *see supra* note 150 and accompanying text.

252. Stamps v. Michigan Teamsters Joint Council, 431 F. Supp. 745, 746-47 (E.D. Mich. 1972); *see supra* notes 171-72 and accompanying text.

LMRA section 301 provides that litigants may enforce labor contract matters in federal court[253] or state court.[254] The Supreme Court, prior to ERISA's passage, held that the word "contract" in LMRA section 301 encompasses more than just the collective bargaining agreements.[255] Further, in dicta the Court indicated that the term "contracts" includes employee benefit plans mentioned in the collective bargaining agreement.[256] In fact, this reasoning provides the very jurisdictional basis under LMRA for federal courts to even consider disputes over multi-employer employee benefit plans.[257] Consequently, courts before and after ERISA have held that both employee benefit plans and trusts are encompassed in contracts under LMRA section 301.[258] In fact, the only courts not to so hold are essentially those three district court opinions seized by the court in *Wardle* to throttle the right to a jury trial.[259] Those cases were decided in the late 1970s based on one 1960 district court opinion applying trust law to a multi-employer pension plan.[260] In 1962, the Supreme Court pronounced that for section 301 purposes em-

253. *See supra* note 46.

254. *See supra* note 51.

255. Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17, 26-28 (1962).

256. Allied Chem. & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176-77 n.17 (1971).

257. Rehmar v. Smith, 555 F.2d 1362, 1367 (9th Cir. 1977).

258. Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir.) (en banc) (contracts include pension trusts), *cert. denied*, 484 U.S. 820 (1987); Whelan v. Colgan, 602 F.2d 1060, 1061 (2d Cir. 1979) (same); *Rehmar*, 555 F.2d at 1367 (plan enforceable under LMRA § 301); Alvares v. Erickson, 514 F.2d 156, 161 (9th Cir.) (contract consists of welfare trust plus collective bargaining agreement), *cert. denied*, 423 U.S. 874 (1975); International Union, United Auto., Aircraft & Agricultural Implement Workers v. Textron, Inc., 312 F.2d 688, 691 (6th Cir. 1963) (rights of employee to pension benefit grow out of collective bargaining agreement); Vallejo v. American R.R., 188 F.2d 513, 515 (1st Cir. 1951) (treats employee benefit plan under contract theory); American Fed'n of Labor v. Western Union Tel. Co., 179 F.2d 535, 538 (6th Cir. 1950) (contract includes trust since collective bargaining agreement refers to trust); NYSA-ILA GAI Fund v. Poggi, 617 F. Supp. 847, 849 (S.D.N.Y. 1985) (contract includes collective bargaining agreement plus pension plan); Stewart v. Trustees, Masters, Mates & Pilots Pension Plan, 432 F. Supp. 742, 748 (N.D. Cal. 1977) (describes plan as pension provisions of collective bargaining agreement), *vacated on other grounds*, 608 F.2d 776 (9th Cir. 1979); Smith v. DCA Food Indus., 269 F. Supp. 863, 868 (D. Md. 1967) (contract includes provisions of pension fund established by collective bargaining agreement); New York City Omnibus Corp. v. Quill, 73 N.Y.S.2d 289, 292 (Sup. Ct.) (treats employee benefit plan under contract theory), *aff'd*, 74 N.Y.S.2d 925 (App. Div. 1947), *modified*, 78 N.E.2d 859, 860 (N.Y. 1948) (same).

259. *See, e.g.*, Davis v. Huge, 91 L.R.R.M. (BNA) 2234 (E.D. Ky. Dec. 12, 1975); Genesta v. San Diego County Laborers' Pension Plan, 87 Lab. Cas. (CCH) ¶¶ 11702, 22827 (S.D. Cal. Oct. 5, 1979); Porter v. Central States Pension Fund, 98 L.R.R.M. (BNA) 3210 (N.D. Iowa June 26, 1978).

260. Sichko v. Lewis, 191 F. Supp. 68 (W.D. Pa. 1960); *see also* Rice v. Hutton, 487 F. Supp. 278, 279-80 (W.D. Mo. 1980) (no right to jury trial for review of pension denial since arbitrary and capricious review standard is question of law).

ployee benefit programs are contracts.[261] Reliance on an opinion impliedly overruled by the nation's highest court can hardly serve as legal precedent.[262]

Circuit court opinions since the Supreme Court's pronouncement have considered employee benefit plans under LMRA section 301 as contracts for purposes of determining the right to a jury trial.[263] These courts have required jury trials when requested for employees suing for benefits due,[264] for trustees suing for delinquent contributions[265] and

261. Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17, 26-28 (1962).

262. *See supra* note 155.

263. See *infra* notes 264-68 for courts allowing jury trials. See *supra* notes 259-60 for the few courts denying jury trials.

264. *E.g.*, Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir.) (en banc) (early retirement benefits), *cert. denied*, 484 U.S. 820 (1987); Wise v. Dallas & Mavis Forwarding Co., 751 F. Supp. 90, 93 (W.D.N.C. 1990) (employee sued pension trustees to establish service credits; sued employer, pension trustees and union to compel contributions on behalf; denied jury trial under ERISA but granted jury trial as LMRA § 301 claim); Senn v. AMCA Int'l, No. 87-C-1353, 1989 WL 248487, at *11 (E.D. Wis. May 9, 1989) (health and life insurance benefits); Local 836 v. UAW, 670 F. Supp. 697, 707-08 (E.D. Mich. 1987) (retirees sued for unpaid retirement benefits); Bower v. Bunker Hill Co., 114 F.R.D. 587, 597-98 (E.D. Wash. 1986) (retirees sued for wrongful termination of benefits); Smith v. ABS Indus., 653 F. Supp. 94 (N.D. Ohio 1986) (retirees sued employers to establish right to medical and life insurance benefits); Oil, Chem. & Atomic Workers Local 423 v. Texaco, 88 F.R.D. 86, 89 (E.D. Tex. 1980) (union for employees sued employer for reducing pension benefit); *see* Zuniga v. United Can Co., 812 F.2d 443, 447 (9th Cir. 1987) (jury trial not questioned for employee suing for sick leave benefits); Seafarers Pension Plan v. Sturgis, 630 F.2d 218, 219 (4th Cir. 1980) (jury trial not questioned for employee suing for monthly benefit); *see also* Coleman v. Kroger Co., 399 F. Supp. 724, 732 (W.D. Va. 1975) (used advisory jury for employee suing for disability pension cast as breach of fair representation case against union). *Contra* Hechenberger v. Western Elec. Co., 570 F. Supp. 820, 822 (E.D. Mo. 1983) (employees sued for workers compensation reduced by plan benefits; no jury trial under LMRA on basis of ERISA law), *aff'd*, 742 F.2d 453 (8th Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985).

One commentator asserted that since (1) no court had provided a jury trial in a LMRA benefits-due lawsuit as of 1981 and (2) several courts had tried such cases without jury trials, *see, e.g.*, Knauss v. Gorman, 583 F.2d 82, 85 (3d Cir. 1978) (pension benefit); Lugo v. Employees Retirement Fund of Illumination Prods. Indus., 529 F.2d 251, 253 (2d Cir.) (same), *cert. denied*, 429 U.S. 826 (1976) (same); Haynes v. Lewis, 298 F. Supp. 331, 332 (D.D.C. 1969); Bolgar v. Lewis, 238 F. Supp. 595, 596 (W.D. Pa. 1960) (same), there probably was not a right to a jury trial in such actions. *See* Comment, *The Right to a Civil Jury Trial in ERISA Section 502(a)(1)(B) Actions:* Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 65 MINN. L. REV. 1208, 1211 n.21 (1981). Presumedly, the argument would be that what the law is, is best reflected in the practices of the lawyers as being their understanding of it. *See* WILLIAM E. NELSON & JOHN P. REID, THE LITERATURE OF AMERICAN LEGAL HISTORY 268, 326 (1985) (describing John Reid's use of travel journals to glean law). However, the more likely explanation is the litigant's waiver of his or her jury trial. All constitutional provisions preserving the right to a jury trial in civil cases permit its waiver. *E.g.*, ARK. CONST. art. 2, § 7 (specifically providing for waiver); Duognan v. United States, 274 U.S. 195, 198 (1927) (under U.S. CONST. amend. VII). Some reasons for waiving jury trials are lower costs and speedier trials. RICHARDSON R. LYNN, JURY TRIAL LAW AND PRACTICE 30-31 (1986).

Cases in which jury trials occurred reflect a more accurate picture of the law since one

wrongfully paid benefits.[266] These courts grant jury trials even in the situations the court in *Wardle* abhorred—namely, when the jury must make an arbitrary and capricious finding[267] and when the court must order future benefits.[268] The only situation in which these courts deny a jury trial under LMRA section 301 is when the litigants clearly seek only equitable relief under the contract.[269] Thus, the courts have preserved the right to a jury trial for benefits-due lawsuits under LMRA section 301.

Courts should presume that when Congress passes new legislation to solve a perceived problem, Congress considered prior case law relating to the problem.[270] In 1974, when Congress referred to LMRA section 301, it was aware of the Supreme Court's 1962 pronouncement and the cases following it announcing that employee benefit plans under LMRA section 301 are contracts, and that such a pronouncement entails a right to jury trial.[271] Congress could not have provided a clearer indication that ERISA benefits-due lawsuits also entail a right to a jury trial.

B. Other Statutory and Constitutional Requirements

Constitutional and statutory considerations are unnecessary because

---

party definitely seeks to avoid the jury trial. However, this also is a defective indication of what the law is since parties may consent to jury trials even when there is no right to a jury trial. *E.g.*, FED. R. CIV. P. 39(c).

265. *E.g.*, Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning, 934 F.2d 35, 37 (3d Cir. 1991); Bugher v. Feightner, 722 F.2d 1356, 1358 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984); Oregon Laborers-Employers Trust Funds v. Pacific Fence & Wire, 726 F. Supp. 786, 788 (D. Or. 1989); *see* Lewis v. Benedict Coal Corp., 361 U.S. 459, 462 (1960) (permitting jury trial without challenge); Lewis v. Lowry, 322 F.2d 453, 454 (4th Cir. 1963) (same); Lewis v. Mears, 297 F.2d 101, 102 (3d Cir. 1961) (same), *cert. denied*, 369 U.S. 873 (1962); Lewis v. Kepple, 185 F. Supp. 884, 886 (W.D. Pa. 1960) (same), *aff'd*, 287 F.2d 409, 410 (3d Cir. 1961).

266. *See* Trucking Employees of N. Jersey Welfare Fund, Inc. v. Vrablick, 425 A.2d 1068, 1070 (N.J. Super. Ct. App. Div. 1980) (jury trial not questioned).

267. *See* Seafarers Pension Plan v. Sturgis, 630 F.2d 218, 219 (4th Cir. 1980).

268. *See id.*

269. *E.g.*, United Steelworkers v. Connors Steel, 847 F.2d 707, 709 (11th Cir. 1988) (trustees sought injunction to prevent plan termination), *cert. denied*, 489 U.S. 1096 (1989); Souza v. Trustees of the W. Conference of Teamsters Pension Trust, 663 F.2d 942, 944-45 (9th Cir. 1981) (injunction to stop enforcement of age requirement for vesting); Nedd v. United Mine Workers, 556 F.2d 190, 206-07 (3d Cir. 1977) (employees sued trustees for accounting), *cert. denied*, 434 U.S. 1013 (1978); United Elec. Radio & Mach. Workers v. Amcast Indus., 634 F. Supp. 1135, 1144 (S.D. Ohio 1986) (injunction to prevent termination of early retirement supplemental benefits); Nedd v. Thomas, 316 F. Supp. 74, 77 (M.D. Pa. 1970) (same), *cert. denied*, 434 U.S. 1013 (1978); Paddock v. L.W. Hembree Co., 763 P.2d 411, 413 (Or. Ct. App. 1988) (same).

270. *See supra* note 214.

271. *See supra* note 264.

ERISA impliedly grants the right to a jury trial. Nevertheless, even these considerations suggest that benefits-due lawsuits entail the right to a jury trial.

These considerations are irrelevant in: (1) the six states already treating benefits-due lawsuits as subject to the right to a jury trial because they grant jury trials in both legal and equitable actions;[272] and (2) the two states lacking both constitutional and statutory provisions preserving the right to trial by jury in civil actions.[273] Louisiana's statutory provision will be invoked since its courts only deny jury trials for benefits-due lawsuits due to federal law.[274] Therefore, these considerations are relevant to the federal system and the remaining forty-two state systems, all under their respective constitutional provisions.

The investigation of constitutional provisions under either the federal system or these state systems is the same, because all the relevant state constitutional provisions operate similarly to the Seventh Amendment of the United States Constitution,[275] except for the time and place reviewed.[276] Analysis of the relevant constitutional provisions reveals that the benefits-due lawsuit is an action and a sought remedy that is legal in nature; therefore, these constitutional provisions preserve the right to a jury trial for the benefits-due lawsuit.

1. The contractual nature of benefits-due lawsuits

The benefits-due lawsuit as an action is contractual, rather than trust-like in nature.[277] The participant-beneficiary's rights arise solely because of an exchange of services for the promised benefit from the employer. After the development of the first private employee benefit programs with exclusively employer contributions about 1875,[278] jurists have struggled with various theories of law to apply to the relationship, such as the gratuity theory,[279] the contractual theory,[280] the trust the-

272. *See supra* notes 183-84 and accompanying text.

273. *See supra* note 176.

274. *See supra* note 190-93 and accompanying text.

275. *See supra* notes 116-21, 176-82 and accompanying text.

276. *See supra* notes 176-77 and accompanying text.

277. *See infra* notes 278-88 and accompanying text.

278. *See* WILLIAM C. GREENOUGH & FRANCINE P. KING, PENSION PLANS AND PUBLIC POLICY 27 (1976) (describing first noncontributory private plan in North America as that of American Express in 1875).

279. *See, e.g.*, Menke v. Thompson, 140 F.2d 786, 790 (8th Cir. 1944); Hughes v. Encyclopaedia Britannica, 108 F. Supp. 303, 305 (N.D. Ill.), *vacated on other grounds*, 199 F.2d 295 (7th Cir. 1952); *In re* Schenectady Ry., 93 F. Supp. 67, 70 (N.D.N.Y. 1950) (for nonunion employees); *In re* Missouri Pac. R.R., 49 F. Supp. 405, 406 (E.D. Mo. 1943); Fickling v. Pollard, 179 S.E. 582, 583 (Ga. Ct. App. 1935); Hughes v. Encyclopaedia Britannica, 117

ory[281] and the estoppel theory.[282] However, only the contractual theory gained such near universal acceptance that both the Supreme Court[283]

N.E.2d 880, 882 (Ill. App. Ct. 1954); Umshler v. Umshler, 76 N.E.2d 231, 233 (Ill. App. Ct. 1947); Dolan v. Heller Bros., 104 A.2d 860, 861 (N.J. Super. Ct. Ch. Div. 1954); Korb v. Brooklyn Edison Co., 15 N.Y.S.2d 557, 557 (App. Div. 1939); Burgess v. First Nat'l Bank, 220 N.Y.S. 134, 139 (App. Div. 1927); Dolge v. Dolge, 75 N.Y.S. 386, 387 (App. Div. 1902); McNevin v. Solvay Process Co., 53 N.Y.S. 98, 99 (App. Div. 1898), *aff'd*, 60 N.E. 1115 (N.Y. 1901); MacCabe v. Consolidated Edison Co., 30 N.Y.S.2d 445, 447 (City Ct. 1941).

The gratuity theory treated the employer's promise to pay benefits as a promise to make a gift in the future. The promise was unenforceable until the gift was actually made, effectively providing a block to the participant-beneficiary's recovery. The gratuity theory was popular with courts since many plans had provisions stating that the employee acquired no enforceable contractual rights under the plan. *See, e.g.*, *Menke*, 140 F.2d at 790; *Fickling*, 179 S.E. at 583.

280. *See, e.g.*, West v. Hunt Foods, Inc., 101 Cal. App. 2d 597, 603-05, 225 P.2d 978, 982-83 (1951) (dicta); Bos v. United States Rubber Co., 100 Cal. App. 2d 565, 568, 224 P.2d 386, 388 (1950); Magee v. San Francisco Bar Pilots Benevolent & Protective Ass'n, 88 Cal. App. 2d 278, 286-88, 198 P.2d 933, 938-39 (1948); Hunter v. Sparling, 87 Cal. App. 2d 711, 722, 197 P.2d 807, 813-15 (1948); Cowles v. Morris & Co., 161 N.E. 150, 154 (Ill. 1928); Askinas v. Westinghouse Elec. Corp., 111 N.E.2d 740, 741 (Mass. 1953); Psutka v. Michigan Alkali Co., 264 N.W. 385, 386 (Mich. 1936); Gearns v. Commercial Cable Co., 32 N.Y.S.2d 856, 858 (Civ. Ct. 1942), *aff'd*, 42 N.Y.S.2d 81 (App. Div. 1943), *aff'd*, 56 N.E.2d 67 (N.Y. 1944); Wallace v. Northern Ohio Traction & Light Co., 13 N.E.2d 139, 143 (Ohio Ct. App. 1937); Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 879 (Ohio Ct. App. 1937); Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 443 (Ohio Ct. App. 1934); David v. Veitscher Magnesitwerke Actien Gesellschaft, 35 A.2d 346, 349 (Pa. 1944); Texas & N.O.R.R. v. Jones, 103 S.W.2d 1043, 1045 (Tex. Civ. App. 1937); Schofield v. Zion's Co-op Mercantile Inst., 39 P.2d 342, 344 (Utah 1934); Gilbert v. Norfolk & W.R.R., 171 S.E. 814, 816 (W. Va. 1933); *see also supra* note 84.

Under the contractual theory, the employee's continued employment constituted consideration for the employer's promise to pay the benefit. The drawback to the contractual theory was that, until ERISA, the employer could place sufficient conditions in the plan to defeat enforcement of the contract. The employee-beneficiary had no rights until he satisfied all conditions, including age. *See, e.g.*, *Wallace*, 13 N.E.2d at 143; *David*, 35 A.2d at 349. The contractual theory was by far the most popular with the courts. *See, e.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989) (describing pre-ERISA law as contractual).

281. *See, e.g.*, *Ex parte* Garner, 190 So. 2d 544, 546 (Ala. 1966).

The trust theory treated the establishment of the plan as also establishing a trust for the payment of the benefits to the employee-beneficiaries. Unfortunately, most employers never actually paid monies to any trust prior to LMRA's requirements to do so for multi-employer plans. The result was failure of the employees to recover benefits under a trust theory since there was no trust res. *See, e.g.*, Lewis v. Jackson & Squire, Inc., 86 F. Supp. 354, 359-60 (W.D. Ark. 1949), *appeal dismissed*, 181 F.2d 1011 (8th Cir. 1950); Gearns v. Commercial Cable Co., 42 N.Y.S.2d 81, 82 (App. Div. 1943), *aff'd*, 56 N.E.2d 67 (N.Y. 1944). As a result, most cases adopting this approach are LMRA cases. *See supra* note 85.

282. *See, e.g.*, Sessions v. Southern Cal. Edison Co., 47 Cal. App. 2d 611, 617, 118 P.2d 935, 939-40 (1941).

Estoppel theory held that the participant-beneficiary's right to the benefit arose because of his reliance on the promise in continuing his work with that employer. Unfortunately, this also seldom led to recovery of the benefit because the reliance must be reasonable. Employers frequently made statements destroying that reasonable reliance. *See, e.g.*, Hughes v. Encyclopaedia Britannica, Inc., 117 N.E.2d 880, 882-83 (Ill. App. Ct. 1954).

283. *Bruch*, 489 U.S. at 112; *see also* Puz v. Bessemer Cement, 700 F. Supp. 267, 268 (W.D.

and Congress[284] have recognized it.

From the employee's perspective the pension plan differs little from the situation in which an annuity contract is purchased from an insurance company. ERISA requires retirement plan benefits to be paid in the form of a joint-and-survivor annuity, unless the participant and spouse elect otherwise.[285] One of the possible elections is typically a lump-sum distribution.[286] Similarly, the welfare plan differs little from the situation in which the participant-beneficiary purchases a medical policy or disability policy from an insurance company. The only real difference, from the employee's viewpoint, is that for the employee benefit program (1) the employee pays labor and not the monies the labor produced, (2) the employee makes an exchange with the employer and not an insurance company, and (3) the employee's risk is the employer's bankruptcy and not the insurance company's bankruptcy. In fact, nothing in ERISA prevents the employer in the employee benefit program situation from acting solely as a middleman in an insurance policy situation. Frequently, employers fund employee benefit programs merely by purchasing annuity, disability or group medical policies,[287] rather than through a trust. Thus

---

Pa. 1988) (describing benefits-due lawsuit as contractual in nature); Jordan v. Reliable Life Ins., 694 F. Supp. 822, 827 (N.D. Ala. 1988) (describing ERISA causes of action as traditionally legal).

284. *See supra* note 229-30 and accompanying text.

285. Employee Retirement Income Security Act of 1974, § 1021(a), 26 U.S.C. § 401(a)(11) (1988); *id.* § 205, 29 U.S.C. § 1055.

286. *See id.* § 2005, 26 U.S.C. § 402(e)(4)(A) (taxation of lump-sum distribution from retirement plan).

287. Fully insured retirement plans are exempt from the minimum funding requirements for defined benefit and money purchase pension plans. *Id.* § 1011, 26 U.S.C. § 412(h)(2); *id.* § 301(a), 29 U.S.C. § 1081(a); H.R. CONF. REP. NO. 1280, *supra* note 19, at 323, *reprinted in* 1974 U.S.C.C.A.N. at 5085 ("[A] plan may be invested wholly in insurance or annuity contracts without violating the diversification rules . . . ."); *see also* Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc., 448 F.2d 501, 503 (7th Cir. 1971) (employer funded pension plan with group annuity policy). A fully insured plan is one that (1) is funded solely with individual insurance or annuity contracts that call for level periodic premiums that are paid-up, (2) calls for a benefit equal to that provided by the insurance contract, and (3) prohibits security interests in and loans against the insurance contracts. Employee Retirement Income Security Act of 1974, § 1013, 26 U.S.C. § 412(i) (1988); *id.* § 301(a), 29 U.S.C. § 1081(b); 26 C.F.R. § 1.412(i)-1(c) (1988). Reporting requirements are also simplified for fully-insured plans. They merely report data supplied by the insurance company. 29 C.F.R. § 2520.103-5 (1991).

Other retirement plans may invest some of their assets in life and health insurance and annuity contracts. *See* H.R. CONF. REP. NO. 1280, *supra* note 19, at 314, *reprinted in* 1974 U.S.C.C.A.N. at 5094 ("[ERISA] does not prohibit a plan from purchasing life insurance, health insurance, or annuities from the employer that maintains the plan . . . ."); RABKIN & JOHNSON, *supra* note 29, at 13-1100 (provision in plan permitting investment in contracts issued by sponsoring insurance company). These plans even provide for benefit payment in-kind, namely with the insurance contract. *See* RABKIN & JOHNSON, *supra* note 29, at 13-1096 (provision in split-funded defined benefit prototype plan sold by insurance company permitting

the benefits-due lawsuit, especially in the latter fully-funded situation, is extremely similar to one for nonpayment on an insurance contract. Courts handle lawsuits over insurance contracts generally as legal matters with the right to a jury trial.[288]

2. The remedy for a benefits-due lawsuit is damages

The remedy most frequently sought by the participant-beneficiary in a benefits-due lawsuit is damages, a legal remedy that has a right to a jury trial.[289] The participant-beneficiary actually seeks either (1) full payment, for lump-sum distributions from retirement plans or claims from welfare plans;[290] (2) the commencement or resumption of payment for annuity distributions or disability payments in the future;[291] or (3) a

transfer to participant as optional form of payment life insurance contracts on life and annuity contracts); *see also* Van der Meulen v. Southwestern Life Ins. Co., 514 S.W.2d 469, 470 (Tex. Civ. App. 1974) (profit-sharing plan bought deferred annuity contract for terminated employee). Investment powers of the employee benefit plan's trust are generally regulated by some state's trust act. Many of those statutes permit investment in insurance contracts. *E.g.*, ALA. CODE § 19-3-125 (Michie 1990) (life, endowment or annuity contracts); CAL. CIV. CODE § 2261(6) (Deering 1981) (same); IDAHO CODE § 68-406 (Michie 1990) (same); IND. CODE ANN. § 30-1-5-1(2) (Burns 1990) (same); IOWA CODE ANN. § 682.23(13) (West 1989) (same); KY. REV. STAT. ANN. § 386.020(1)(i) (Baldwin 1991) (same); *see, e.g.*, TEX. PROP. CODE ANN. § 113.056(b) (West 1991) ("acquire and retain every kind of property").

With respect to health and welfare plans, the employer normally pays for them on a pay-as-you-go basis. LANGBEIN & WOLK, *supra* note 26, at 70-71.

288. *E.g.*, Kansas City Life Ins. Co. v. Lathrop, 101 P.2d 29, 29 (Colo. 1940) (payments under disability provision of life insurance policy); Aetna Life Ins. Co. v. Daniel, 42 S.W.2d 584, 587 (Mo. 1931) (death benefit under life insurance policy); Wollums v. Mutual Beneficial Health & Accident Ass'n, 46 S.W.2d 259, 262-63 (Mo. Ct. App. 1931) (payments under disability insurance policy); Davis v. Prudential Ins. Co., 297 N.Y.S.2d 261, 262 (App. Div. 1969) (action to enforce "an annuity contract is an action for a money judgment triable by jury as of right"); Schenck v. Prudential Ins. Co., 3 N.Y.S.2d 856, 858 (Sup. Ct. 1938) (same; life insurance policy); Monetta v. Metropolitan Life Ins. Co., 115 N.E.2d 845, 846 (Ohio Ct. App. 1952) (death benefit under life insurance policy); *see also* Travelers Indem. Co. v. State Farm Mut. Auto. Ins. Co., 330 F.2d 250, 258 (9th Cir. 1964) (automobile liability insurance policy); Dixie Auto Ins. Co. v. Goudy, 382 S.W.2d 380, 382 (Ark. 1964) (same); Fratis v. Fireman's Fund Am. Ins. Co., 56 Cal. App. 3d 339, 341-42, 128 Cal. Rptr. 391, 393 (1976) (same); Clayton v. Alliance Mut. Casualty Co., 512 P.2d 507, 517 (Kan.) (same); Jones v. City of Kenner, 338 So. 2d 606, 607 (La. 1976) (liability insurance policy); Nassif Realty Corp. v. National Fire Ins. Co., 220 A.2d 748, 750 (N.H. 1966) (fire insurance policy); Oltarsh v. Aetna Ins. Co., 204 N.E.2d 622, 626 (N.Y. 1965) (public liability insurance policy); American Employers' Ins. Co. v. McGehee, 485 P.2d 754, 756 (Okla. Crim. App. 1971) (automobile liability insurance policy).

289. Equity courts could not grant damages. BAKER, *supra* note 88, at 272-73. Hence, litigants sought damages at law, with a jury trial. *Id.* at 285-86.

290. *See, e.g.*, Internal Revenue Code of 1954, § 402, 26 U.S.C. § 402(e)(4)(A) (1988) (providing for taxation of lump sum distributions from pension plans).

291. *See, e.g.*, Employee Retirement Income Security Act of 1974, § 205, 29 U.S.C. § 1055(d) (1988) (requiring pension benefits in form of qualified joint and survivor annuity unless waived).

declaration of the right to such payments.[292] Seeking lump-sum payments clearly would be a legal action.[293] Commencement of payments resembles specific performance, typically an equity action,[294] however, sometimes insurance law treats such actions as legal with the right to a jury trial.[295] The right to a jury trial in a declaratory judgment action depends on the underlying action, whether if brought it would seek a legal or equitable remedy.[296]

Under the insurance law analogy, there are nonetheless two legal hurdles to overcome in order to characterize the remedy as legal. First, the insured under an annuity or disability policy sometimes cannot sue for the entire benefit, either as a lump sum or as payments in the future. According to the courts, failure to pay some installment payments currently due, for which the insured can sue,[297] does not bear on the future

292. Massachusetts Mut. Life Ins. v. Russell, 473 U.S. 134, 146-47 (1987). Upon breach of an insurance contract, the insured normally has an election of remedies among (1) rescission of the contract and a suit in quasi-contract for the value rendered, namely the premiums less the cost of coverage, (2) waiting until the time of performance and suing for the entire amount due, (3) suing for damages under anticipatory breach, and (4) specific performance. *See, e.g.*, Brooklyn Life Ins. Co. v. Weck, 9 Ill. App. 358, 361 (1881) (life insurance); Marshall v. Franklin Fire Ins. Co., 35 A. 204, 205 (Pa. 1896) (same); Kerns v. Prudential Ins. Co., 11 Pa. Super. 209, 212 (1899) (same).

293. A court would try even an action under trust law, normally tried in equity without a right to a jury trial, as a legal action with a jury trial. Trust law recognizes actions for lump-sum benefits as amounts unconditionally and immediately due and thus legal actions. *E.g.*, Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249, 1251-52 n.2 (9th Cir. 1987); Jefferson Nat'l Bank v. Central Nat'l Bank, 700 F.2d 1143, 1149 (7th Cir. 1983); Ovitz v. Jefferies & Co., 553 F. Supp. 300, 301 (N.D. Ill. 1982); *see supra* note 105. Courts should also reject as ridiculous the idea common in the First Circuit that a plan administrator's erroneous interpretation of the plan contract thwarts the unconditional requirement of trust law. *See supra* note 164.

Under insurance law, insureds can recover unpaid amounts due under the policy as legal actions. *See, e.g.*, Hines v. Fidelity Mut. Life Ins. Co., 6 F. Supp. 692, 692 (E.D.N.Y. 1934) (at law); Menssen v. Travelers' Ins. Co., 5 F. Supp. 114, 116 (E.D.N.Y. 1933) (same; future damages unavailable as too difficult for jury); Wyll v. Pacific Mut. Life Ins. Co., 3 F. Supp. 483, 484 (N.D. Tex. 1933) (at law); Cobb v. Pacific Mut. Life Ins. Co., 4 Cal. 2d 565, 571-72, 51 P.2d 84, 87 (1935) (advisory jury); Brix v. Peoples Mut. Life Ins. Co., 2 Cal. 2d 446, 452-53, 41 P.2d 537, 540 (1935) (jury trial).

294. *See* BAKER, *supra* note 88, at 273, 279 (discussing performance covenants).

295. *See infra* notes 304-09 and accompanying text.

296. Simler v. Conner, 372 U.S. 221, 223 (1963).

297. *E.g.*, New York Life Ins. Co. v. Viglas, 297 U.S. 672, 678 (1936) (disability policy); Mobley v. New York Life Ins. Co., 295 U.S. 632, 638 (1935) (same); *Hines*, 6 F. Supp. at 693 (same); *Menssen*, 5 F. Supp. at 116 (same); *Wyll*, 3 F. Supp. at 484 (same); Kithcart v. Metropolitan Life Ins. Co., 1 F. Supp. 719, 720 (W.D. Mo. 1932) (same); *Cobb*, 4 Cal. 2d at 571-72, 51 P.2d at 87 (same); *Brix*, 2 Cal. 2d at 455, 41 P.2d at 542 (same); Scott v. Life & Casualty Ins. Co., 129 S.E. 903, 904 (Ga. Ct. App. 1925) (health policy); Howard v. Benefit Ass'n of Ry. Employees, 39 S.W.2d 657, 659 (Ky. 1931) (disability policy); Atlantic Life Ins. Co. v. Serio,

performance.[298] This problem does not affect all remedies sought by potential participant-beneficiaries, but only those paid in a form similar to annuities. Courts generally state the rule as follows: the doctrine of anticipatory breach, permitting the nonbreacher to treat current breaches as a total breach and sue also for total future damages, does not apply to unilateral contracts.[299] Almost all insurance contracts are unilateral in that either the premiums have been paid, or the premium payment is a condition to the insurance company's obligation to pay.[300] The above formulation is overbroad. This becomes evident when examining the life insurance policy cases, which recognize anticipatory breach for a breach before the insured's death and permit the insured to sue for future benefits presently.[301] Justice Benjamin Cardozo enunciated the correct rule: anticipatory breach lies for unilateral contracts unless the performer acts in good faith in not complying with its terms.[302]

---

157 So. 474, 474 (Miss. 1935) (same); Allen v. National Life & Accident Ins. Co., 67 S.W.2d 534-35 (Mo. Ct. App. 1934) (same).

298. *Viglas*, 297 U.S. at 678.

299. *E.g.*, John Hancock Mut. Life Ins. Co. v. Cohen, 254 F.2d 417, 424 (9th Cir. 1958) (period-certain annuity contract); Greguhn v. Mutual of Omaha Ins. Co., 461 P.2d 285, 287 (Utah 1969) (disability annuity); 1 RESTATEMENT OF CONTRACTS § 318 (1932).

300. *See* 4 CORBIN, *supra* note 81, § 968, at 880.

301. *E.g.*, Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal. 2d 94, 104, 142 P.2d 741, 746 (1943) (future damages for disability contract breached before disabled); Federal Life Ins. Co. v. Maxam, 117 N.E. 801, 804-06 (Ind. Ct. App. 1917) (cost of replacement for life insurance policy); O'Neill v. Supreme Council Am. Legion of Honor, 57 A. 463, 465-66 (N.J. 1904) (suggests future damages for life insurance policy); Speer v. Phoenix Mut. Life Ins. Co., 36 Hun. 322, 325 (N.Y. 1885) (present value of replacement less present value of unpaid premiums for life insurance policy); Garland v. Jefferson Standard Life Ins. Co., 101 S.E. 616, 619 (N.C. 1919) (policy amount less future premiums for life insurance policy); American Ins. Union v. Woodward, 247 P. 398, 399-401 (Okla. 1926) (face value less unpaid premiums for life insurance policy); Marshall v. Franklin Fire Ins. Co., 35 A. 204, 205 (Pa. 1896) (replacement cost for life insurance policy); Kerns v. Prudential Ins. Co., 11 Pa. Super. 209, 212 (1899) (same); Supreme Lodge Knights of Pythias v. Neeley, 135 S.W. 1046, 1048-49 (Tex. Civ. App. 1911) (face value less unpaid premiums discounted for life insurance policy); Mutual Reserve Fund Life Ass'n v. Taylor, 37 S.E. 854, 855 (Va. 1901) (suggests future value for life insurance policy); Clemmitt v. New York Life Ins. Co., 76 Va. 355, 363 (1882) (present value less present value of unpaid premiums for life insurance policy); Merrick v. Northwestern Nat'l Life Ins. Co., 102 N.W. 593, 595 (Wis. 1905) (uses New York rule for life insurance policy).

The only jurisdictions denying this rule are New York, overruling its earlier decisions recognizing the rule, *e.g.*, Kelly v. Security Mut. Life Ins. Co., 78 N.E. 584, 585 (N.Y. 1906) (since specific performance is available); Langan v. Supreme Council Am. Legion of Honor, 66 N.E. 932, 933 (N.Y. 1903) (same), and Massachusetts, which has never recognized anticipatory breach, *e.g.*, Porter v. American Legion of Honor, 67 N.E. 238, 239 (Mass. 1903) (life insurance); Daniels v. Newton, 114 Mass. 530, 532 (1874) (land transaction).

302. *Viglas*, 297 U.S. at 676, 678-81 (good faith; possible for anticipatory repudiation to occur).

Confusion over the correct rule probably arose due to the resistance to the anticipatory repudiation doctrine by the influential Samuel Williston, chief reporter of the First Restate-

With this rule for anticipatory breach, no problem as to the remedy sought should arise in the ERISA benefits-due lawsuit since the litigant must show abuse of discretion, namely, that the surrogate insurance company acted in bad faith.[303] Under insurance law, that showing would entitle the participant-beneficiary to sue presently for a lump sum payment representing all future payments because of anticipated breach, clearly a legal remedy with a right to a jury trial.

The second problem with characterizing benefits-due lawsuits as legal is that some courts have suggested that, for litigants not seeking a

---

ment of Contracts. *See* Samuel Williston, *Repudiation of Contracts (pts 1 & 2)*, 14 HARV. L. REV. 317, 421 (1901); *see also* GRANT GILMORE, THE DEATH OF CONTRACT 59-60 (1974) (noting that confusion arose because Williston and Corbin, his chief assistant in drafting First Restatement of Contracts, held antithetical points of view); Eric M. Holmes, *Anticipatory Repudiation and Insurance Installment Payment Obligations: Anachronistic Application of a Uniform Formula*, 40 INS. COUNSEL J. 396, 397-98 (1973) (noting that doctrine of anticipatory repudiation was hostilely received when first enunciated). Williston's position that anticipatory repudiation does not apply to unilateral contracts, 1 RESTATEMENT OF CONTRACTS § 318 (1932), is clearly wrong since it fails to explain the life insurance cases. *See supra* note 301. Other authors' distinctions between calculable damages for life insurance policies and incalculable damages for disability contracts, 4 CORBIN, *supra* note 81, § 968, at 880; *see* Mabery v. Western Casualty & Sur. Co., 250 P.2d 824, 828-30 (Kan. 1952) (future damages under disability annuity too speculative), and between unconditioned life insurance policies and conditioned disability contracts, JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 12-9 (1987), explain the life insurance cases but fail to explain a major portion of the disability contract cases.

The disability contract cases follow Cardozo's rule. They refuse to apply anticipatory breach to situations in which the insurance company failed to perform due to good faith compliance with its understanding of the annuity contract. *E.g.*, United Fidelity Life Ins. Co. v. Dempsey, 122 S.W.2d 170, 171 (Ark. 1938) (good faith, no anticipatory breach); Mutual Life Ins. Co. v. Holder, 105 S.W.2d 865, 866 (Ark. 1937) (relied on terms, no anticipatory breach); Industrial Health & Life Ins. Co. v. Buggs, 200 S.E. 537, 539-40 (Ga. Ct. App. 1938) (same); Moore v. Prudential Ins. Co., 192 S.E. 731, 734-36 (Ga. Ct. App. 1937) (same); Kentucky Home Mut. Life Ins. Co. v. Rogers, 270 S.W.2d 188, 194-95 (Tenn. 1954) (same). In the presence of that bad faith, courts find anticipatory breach. *E.g.*, Lumbermen's Mut. Casualty Co. v. Klotz, 251 F.2d 499, 504-05 (5th Cir. 1958) (disability, finding anticipatory breach); Williams v. Mutual Benefit Health & Accident Ass'n, 100 F.2d 264, 264-65 (5th Cir. 1938) (same); Equitable Life Assurance Soc'y v. Pool, 143 S.W.2d 25, 27 (Ark. 1940) (same); Home Life Ins. Co. v. Ward, 75 S.W.2d 379, 381 (Ark. 1934) (same); Metropolitan Life Ins. Co. v. Gregory, 67 S.W.2d 603, 605 (Ark. 1934) (same); Aetna Life Ins. Co. v. Davis, 60 S.W.2d 912, 915 (Ark. 1933) (same); Aetna Life Ins. Co. v. Phifer, 254 S.W. 335, 337 (Ark. 1923) (same); Travelers Ins. Co. v. Lancaster, 180 S.E. 641, 643 (Ga. Ct. App. 1935) (same); Indiana Life Endowment Co. v. Reed, 103 N.E. 77, 80-81 (Ind. Ct. App. 1913) (same); Universal Life & Accident Ins. Co. v. Sanders, 102 S.W.2d 405, 406-07 (Tex. Comm'n App. 1937) (same); Continental Casualty Co. v. Vaughn, 407 S.W.2d 818, 820-23 (Tex. Civ. App. 1966) (same); Continental Casualty Co. v. Boerger, 389 S.W.2d 566, 568 (Tex. Civ. App. 1965) (same); Southland Life Ins. Co. v. Gatewood, 115 S.W.2d 723, 727-28 (Tex. Civ. App. 1938), *aff'd*, 141 S.W.2d 588 (Tex. 1940); Needham v. American Nat'l Ins. Co., 97 S.W.2d 1016, 1020-21 (Tex. Civ. App. 1936).

303. *See supra* note 302 and accompanying text.

lump sum presently but a compulsion of payments as they come due, the court would have to order future benefits.[304] Thus, the remedy is specific performance and hence equitable. However, courts are presently working toward a solution in insurance contract law.[305] This solution involves money judgments payable in installments.[306] Installment judgments are common practice in civil law jurisdictions.[307] Early in the twentieth century several American courts concluded that courts could not issue installment money judgments for disability annuities.[308] More recently, however, several American courts have permitted such judgments.[309] Thus, a lawsuit for benefits payable in the future can also be a legal action seeking a money judgment.

Under the court's authority in ERISA actions to fashion a federal common law of ERISA,[310] the court may use this state law as its model.[311]

V. CONCLUSION

Some district courts have suggested that, when the United States Supreme Court faces the issue, it will decide in favor of the right to a jury trial for benefits-due lawsuits.[312] This is especially so in light of the con-

304. *E.g.*, Blake v. Unionmutual Stock Life Ins. Co., 906 F.2d 1525, 1526 (11th Cir. 1990) (ordering of continuing benefits from group health plan is equitable).

305. *See infra* note 309 and accompanying text.

306. *See infra* notes 308-09 and accompanying text.

307. German courts may require tortfeasors to pay damages representing decreased earning ability for tortious personal injuries in installments. Bürgerliches Gesetzbuch (BGB) art. 843 (F.R.G.), *translated in* THE GERMAN CIVIL CODE, AS AMENDED TO JANUARY 1, 1975 (Ian S. Forrester et al. trans., 1975). German courts similarly enforce contracts for annuities through money judgments payable in installment payments three months in advance. *Id.* art. 760.

308. Brotherhood of Locomotive Firemen v. Simmons, 79 S.W.2d 419, 424 (Ark. 1935) (overruling one as judgment would not be certain); Brix v. Peoples Mut. Life Ins. Co., 2 Cal. 2d 446, 452-53, 41 P.2d 537, 539-40 (1935) (overruling one as not authorized in declaratory judgment statute); Green v. Inter-Ocean Casualty Co., 167 S.E. 38, 42 (N.C. 1932) (same); New York Life Ins. Co. v. English, 72 S.W. 58, 59 (Tex. 1903) (overruling one as it has never been done before).

309. John Hancock Mut. Life Ins. Co. v. Cohen, 254 F.2d 417, 427 (9th Cir. 1958) (applying New Mexico law); Travelers Ins. Co. v. Thompson, 354 S.W.2d 519, 521 (Ky. 1961); Equitable Life Assurance Soc'y v. Goble, 72 S.W.2d 35, 37 (Ky. 1934); Prudential Ins. Co. v. Hampton, 65 S.W.2d 980, 983 (Ky. 1933); Equitable Life Assurance Soc'y v. Branham, 63 S.W.2d 498, 500 (Ky. 1933); Melancon v. Provident Life & Accident Ins. Co., 147 So. 346, 348 (La. 1933); Caporali v. Washington Nat'l Ins. Co., 307 N.W.2d 218, 225 (Wis. 1981).

310. *See supra* note 171.

311. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (under LMRA courts are to create uniform federal common law, in which state law is source of potentially compatible rules). Cardozo's opinion, *see supra* note 302, should be a strong indication of what that federal common law ought to be. *Textile Workers*, 353 U.S. at 457.

312. Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, 827 (N.D. Ala. 1988).

gressional legislative history indicating that Congress views the benefits-due lawsuit as contractual, realizes that both state and federal courts treated them as contractual under pre-ERISA law, even LMRA, and expressly intended to increase the legal remedies under benefits-due lawsuits. Contractual legal remedies require the right to a jury trial. But even in the absence of this legislative history, constitutional provisions preserving the right to a civil jury trial mandate the jury trial because the participant-beneficiary's rights in the benefits-due lawsuit arise under a contractual theory and the participant-beneficiary generally seeks a legal remedy. Moreover, the only case advanced against the right to a jury trial for the benefits-due lawsuit involves erroneous, if not dishonorable, obfuscations and cannot properly serve as legal precedent.

Until the correct decision comes down, some district courts refuse to strike the jury demand until the last possible moment in hopes that their circuit court will finally revive its legal sensibilities.[313] The federal circuit courts should desire to correct the legal error of denying jury trials for benefits-due lawsuits. Jury trials permit judges to escape the onus for clearly unjust results.[314] Judges then could avoid appearing as despots permitting an employer, through its hand-picked plan administrator, vindictively to deny a participant-beneficiary a lump-sum benefit because the former employee also took the employer's substantial clients to his new employer,[315] or reduce the benefit because the former employee participated in a strike against the employer.[316] Such an unjust result would be the jury's onus[317] or, more likely, the jury would sense the injustice and decide differently to correct that injustice.[318] And that was what Congress sought in passing ERISA: participant-beneficiaries ought to recover benefits they rightfully are owed.

313. *See* Brokke v. Stauffer Chem. Co., 703 F. Supp. 215, 221-22 (D. Conn. 1988) (noting that area of law concerning right to jury trial in ERISA action is fluid).

314. GUINTHER, *supra* note 92, at 40, 44 (judges have tendency to rigidly follow rule of law without regard to doing substantial justice).

315. Most circuit court opinions appear as cases without real malice between the employer and the former employee; however, occasionally there appears a fact pattern that experienced ERISA lawyers immediately recognize as a plan administrator decision resulting from the improper motives that the abuse of discretion standard should have overturned. But the judges blindly apply their version of that rule to enforce the miscarriage of justice. *See* Denton v. First Nat'l Bank, 765 F.2d 1295, 1297 (5th Cir. 1985) (bank); Morse v. Stanley, 732 F.2d 1139, 1141 (2d Cir. 1984) (financial printer).

316. *See* Edwards v. Wilkes-Barre Publishing Co. Pension Trust, 757 F.2d 52, 54 (3d Cir. 1985).

317. *See* GUINTHER, *supra* note 92, at 44 (jury serves as lightning rod to insulate judges from public outcry).

318. *Id.* at 40 (jury considers matters other than technical legal rules).