ALLOCATING THE BURDEN OF PROVING LOSS-CAUSATION IN ERISA FIDUCIARY LITIGATION

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Since the enactment of the Employee Retirement Income Security Act ("ERISA") in 1974, federal courts heard numerous legal challenges from retirement plan members alleging the mishandling of plan funds. With trillions of dollars currently held in retirement plans for beneficiaries, federal courts have struggled to determine which party should bear the burden of proving what was the cause of any loss to the plan. Despite the long-standing split among the Courts of Appeals, the Supreme Court has yet to resolve this issue, leaving plan members and the fiduciaries in a constant struggle to know how the funds are maintained often producing different results depending on where in the country the case is heard.

This Note acknowledges the challenges that courts must face when adjudicating these issues and the competing rationales for and against shifting the burden of proving loss-causation. To resolve this issue, this Note recommends that there be a greater focus by the courts on the history of ERISA's enactment and its relation to trust law.

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I. INTRODUCTION

Everyone from recent graduates to individuals with established careers can reap the benefits of investing in a retirement savings plan.[1] Employer-sponsored savings plans, like 401(k)s, offer employees financial security so that once they choose to retire, they are ensured assets that they can live on.[2] But there are many factors that go into financing retirement, and as a result about "21% of Americans haven't saved anything for retirement, and almost 35% of millennials don't know how much to save[.]"[3] One factor that adds to this stress is the possibility of having one's retirement plan mismanaged by the very people and entities—called fiduciaries—legally tasked with ensuring the growth of such plans.[4]

Retirees like Heide Bartnett have sued their former employers seeking to recoup losses to their retirement plans.[5] Imagine the look of shock on Bartnett's face when she opened up her 401(k) statement to see that her expected balance of more than $200,000 was replaced with a line of zeros.[6] Bartnett spent more

1. *See* Carmen Reinicke, *Here's Why It's Smart to Start Saving for Retirement When You're in Your 20s*, CNBC (Sept. 2, 2021, 3:25 PM), https://www.cnbc.com/2021/09/02/why-you-should-start-saving-for-retirement-in-your-20s.html [https://perma.cc/C5LK-H6BT].

2. *See id.*; *Retirement Planning & Security*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/aging/retirement-planning-security/index.html (last visited Jan. 27, 2023) [https://perma.cc/QVN6-5E5P].

3. Newsweek Amplify, *Why Americans Are Under-Prepared for Retirement: 5 Mind-Boggling Facts You Must Know*, NEWSWEEK (Aug. 22, 2020, 3:18 PM), https://www.newsweek.com/amplify/why-americans-are-under-prepared-retirement-5-mind-boggling-facts-you-must-know [https://perma.cc/2R2U-XJD6]; *see also* JULIANA MENASCE HOROWITZ, ANNA BROWN & RACHEL MINKIN, A YEAR INTO THE PANDEMIC, LONG-TERM FINANCIAL IMPACT WEIGHS HEAVILY ON MANY AMERICANS 6–7 (2021), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2021/03/PSD_03.05.21.covid_.impact_fullreport.pdf [https://perma.cc/P7PE-37CH] ("About three-in-ten U.S. adults say they worry every day or almost every day about . . . their ability to save for retirement (29%).").

4. *See* Jonathan Peterson, *High Court Allows Workers to Sue Over 401(k) Losses*, L.A. TIMES (Feb. 21, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-feb-21-fi-nupension21-story.html [https://perma.cc/7UF6-JXWT].

5. Robert Channick, *Alleged Fraud Drains Abbott Retiree's 401(k); Plan's Administrator Facing Federal Probe into Unauthorized Distributions*, CHI. TRIB. (Apr. 10, 2020, 3:04 PM), https://www.chicagotribune.com/business/ct-biz-401k-fraud-abbott-alight-solutions-investigation-20200410-yaye2pmcgjhqzbvttsw2xfjcxi-story.html [https://perma.cc/7PPQ-Y7BZ].

6. *Id.*

than a year trying to get her former employer, Abbott, to restore the balance that she alleges was fraudulently depleted.[7] Issues like this rise to a level of seriousness that can even require the United States Department of Labor to begin an investigation.[8]

Like other beneficiaries[9] of retirement plans, Bartnett relied on the Employee Retirement Income Security Act of 1974 ("ERISA"), which sets forth guidelines on how to recover consequential losses because of misconduct by the fiduciary.[10] In certain cases, individual beneficiaries can see their nest egg be depleted by as much as $245,000,[11] with the loss for collective groups of beneficiaries reaching amounts "upwards of $65 million."[12]

Three elements must be proven for a successful fiduciary breach claim under ERISA: breach, loss, and causation.[13] Typically, plaintiffs bear the burden of successfully proving that a breach of fiduciary duty occurred in regard to the retirement plan and that there was a loss to the beneficiaries.[14] Some courts have also required plaintiffs to prove that the fiduciary breach caused the loss,[15] but others have shifted the burden by requiring fiduciaries to prove the loss would have occurred even without the breach.[16]

So far, the Supreme Court has remained silent on the issue of burden shifting in ERISA litigation, leaving the question to the courts of appeals.[17] Currently, there is a split among the circuits.[18] The First, Second, Fourth, Fifth, and Eighth Circuits have issued rulings that shift the burden of causation to the fiduciary,[19] while the Sixth, Ninth, Tenth, and Eleventh Circuits require the beneficiaries to provide proof of causation.[20] The current split has resulted in inconsistent

7. *Id.*

8. *See id.*

9. Throughout this Note, I frequently use the term "beneficiaries" as shorthand for "participants and beneficiaries," which are distinct groups as defined in 29 U.S.C. §§ 1002(7)–(8).

10. *See* Bartnett v. Abbott Lab'ys, 492 F. Supp. 3d 787, 792, 795 (N.D. Ill. 2020).

11. *Id.* at 793; Channick, *supra* note 5.

12. *E.g.*, Complaint at 2, Cutrone v. Allstate Corp., No. 20-CV-06463 (N.D. Ill. Oct. 30, 2020).

13. Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 30 (1st Cir. 2018).

14. *Cf. id.* at 30–33.

15. *Id.* at 35.

16. *Id.*

17. Nevine E. Adams, *Supremes Pass on ERISA Burden of Proof Case*, NAT'L ASS'N PLAN ADVISORS (Jan. 14, 2020), https://www.napa-net.org/news-info/daily-news/supremes-pass-erisa-burden-proof-case [https://perma.cc/E9M7-D4CB].

18. *Brotherston*, 907 F.3d at 35.

19. *Id.* at 39; Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021) ("Although plaintiffs bear the burden of proving a loss, the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty."); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014) ("In sum, the long-recognized trust law principle—that once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation—applies here."); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) ("Once the plaintiff has satisfied these burdens, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty." (quoting Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994))); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) ("[T]he burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty.").

20. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. V. Alerus Fin., N.A., 858 F.3d 1324, 1343 (10th Cir. 2017); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1344 (11th Cir. 1992); Kuper

outcomes and given plaintiffs the ability to "forum shop" for a venue that will shift the burden of proving causation to the defending fiduciary.[21]

This Note will argue that although the relevant portions of ERISA are silent as to any burden shifting, the Supreme Court should adopt the burden-shifting approach, in large part because Congress's intention in enacting ERISA was to protect employees.[22]

Part II will discuss the development, history, and inner workings of the relevant ERISA provisions. This Note will then provide an overview of the law of trusts and how it influenced ERISA enforcement and the fiduciary rules under ERISA. Finally, Part II will illustrate the current split among the circuit courts on whether the burden of causation lies with the beneficiaries or fiduciaries. Part III begins by taking a deep dive into how the Supreme Court interprets burden-shifting. This Note then explores the language of ERISA and its connection to the law of trusts. Part III then concludes with evidence that application of the burden-shifting framework is grounded in fairness and equity to plaintiffs. Part IV of this Note recommends that the Supreme Court adopt the burden-shifting approach or, alternatively, a more limited, middle-ground approach to allocating burdens of production and persuasion.

II. BACKGROUND

To understand the complex nature of ERISA, one must first understand its history.[23] The goal of Part II is to provide the reader with enough background knowledge to understand ERISA generally and to provide a roadmap for how courts have come to interpret ERISA today.

First this Part will provide a general overview of the creation of ERISA and the reasons for its enactment. From there, this Part will dive a bit deeper into the specific sections of ERISA defining fiduciaries and stating the rules that govern them. Next, this Part briefly covers the law of trusts and its connection to ERISA. Part II wraps up by outlining the current split among the circuit courts.

A. The Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act of 1974 was signed into law by President Gerald Ford in 1974 with the purpose of resolving "the weaknesses and problems with existing state and federal regulation of employee benefit plans."[24] Specifically, Congress sought to remedy "(1) inadequate disclosure

v. Iovenko, 66 F.3d 1447, 1459–60 (6th Cir. 1995), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 418–19 (2014); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004).

21. *See* Christine P. Bartholomew & James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. REV. 862, 876 (2019). *Compare Brotherston*, 907 F.3d at 39 (adopting the burden-shifting approach), *with Pioneer*, 858 F.3d at 1334–35 (holding that the plaintiff bears the burden).

22. *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

23. *See* Nancy E. Musick, Note, *Whose Burden Is It Anyway? Protecting ERISA from an Unnecessary Burden-Shifting Framework*, 67 KAN. L. REV. 665, 667–68 (2019).

24. KATHRYN L. MOORE, UNDERSTANDING EMPLOYEE BENEFITS LAW § 1.04 (1st ed. 2015).

of plan information, (2) inadequate safeguards against inappropriate plan administration, (3) the widespread loss of anticipated retirement benefits due to the lack of vesting provisions, and (4) the inability of plans to provide promised benefits due to inadequate funding."[25] In the simplest of terms, "ERISA regulates 'employee benefit plans.'"[26]

The different types of benefit plans that ERISA covers are known as welfare benefit plans and pension plans.[27] Briefly addressing welfare benefit plans, ERISA covers "any plan, fund, or program" that was established by an employer or employee organization and is "maintained for the purpose of providing its participants . . . [h]ealth care benefits, [d]isability benefits, [v]acation benefits, [p]repaid legal services, and [a]pprenticeship and other training programs."[28] The main focus of this Note, however, is on pension plans, which also occupied most of Congress's attention when it enacted ERISA.[29]

"[A]t its most fundamental level, a pension plan is an employee benefit plan that provides employees with retirement income or deferred income . . . ."[30] This income serves as a safety net for employees that they can tap into once they stop working for the employer that is sponsoring the pension plan.[31] Over the past thirty years, pension plans have shifted from defined benefit plans to defined contribution plans.[32] The old-fashioned defined benefit plans paid a fixed amount annually, starting at age sixty-five and continuing for the rest of the participant's life.[33] Defined contribution plans, on the other hand, act like savings accounts.[34] "Money is contributed to each participant's individual account, and each participant's benefit is equal to the total contributions allocated . . . plus any investment earnings (and losses) credited to the account."[35]

Not all plans are created equal. A pension plan must be "qualified" in order to receive favorable income tax treatment.[36] To meet the standard of a "qualified plan," the pension plan must meet the requirements of Internal Revenue Code § 401(a).[37] Two of the most commonly known qualified pension plans are 401(k) plans and employee stock ownership plans ("ESOPs").[38] 401(k) plans, named after the section of the Internal Revenue Code that regulates them,[39] are defined contribution plans that allow employees to contribute a percentage of their pay

25. *Id.* § 1.04[C].
26. *Id.* § 2.01; 29 U.S.C. § 1003(a).
27. MOORE, *supra* note 24, § 2.01; 29 U.S.C. §§ 1002(1)-(3).
28. MOORE, *supra* note 24, § 3.01[A]; *see also* 29 U.S.C. § 1002(1).
29. *See* MOORE, *supra* note 24, at § 3.01.
30. *Id.* § 2.02; 29 U.S.C. § 1002(2).
31. MOORE, *supra* note 24, § 2.02.
32. *Id.*
33. *Id.* § 2.02[A].
34. *Id.* § 2.02[B].
35. *Id.*
36. *Id.* § 2.04.
37. *Id.*
38. *Id.* § 2.06; *Types of Retirement Plans*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/retirement/typesofplans (last visited Jan. 27, 2023) [https://perma.cc/YB9N-E988].
39. MOORE, *supra* note 24, § 2.06[A].

to the plan.[40] 401(k) plans diverge from other qualified plans in the way that individual employees have the final say in whether they will participate in the plan.[41] Employers often try to encourage employee participation by offering to match some or all of the employee's contribution.[42] Employers also can adopt an automatic enrollment plan where the plan participants must opt out if they do not want to participate.[43]

ESOPs are another form of defined contribution plan and are designed to make investments "primarily in qualifying employer securities," meaning stocks.[44] Publix, a popular chain of supermarkets located in the southeastern United States, is one such example of an employer that has elected to use an ESOP.[45] The major goal of ESOPs is to help employees make enough money through returns from their ownership in the company to help fund their retirement.[46]

Ideally, a participant in a qualified plan will save enough money to provide financial security throughout retirement, either alone or in combination with Social Security benefits.[47] One danger to that ideal outcome arises when the plan administrators breach their fiduciary duty by engaging in misconduct that can result in substantial loss to plan participants.[48] One of the primary reasons why ERISA was enacted was to protect employee benefit funds from such misconduct, which can range from outright theft to mere carelessness.[49] The basic standards for fiduciaries are set out in § 1104 of ERISA and apply to most types of employee benefit plans.[50]

40. *Types of Retirement Plans*, *supra* note 38.

41. MOORE, *supra* note 24, § 20.6[A].

42. *Id.*

43. *Id.*

44. *Id.* § 2.06[B]; *Types of Retirement Plans*, *supra* note 38.

45. Mary Josephs, *There's a Reason Why These Companies Are Top-Notch: They're ESOPs*, FORBES (Feb. 20, 2020, 6:00 AM), https://www.forbes.com/sites/maryjosephs/2020/02/20/theres-a-reason-why-these-companies-are-top-notch-theyre-esops/?sh=62c82199a902 [https://perma.cc/9QGD-HRL4].

46. *See* MOORE, *supra* note 24, § 2.06[B].

47. *Benefits of Setting Up a Retirement Plan*, IRS, https://www.irs.gov/retirement-plans/plan-sponsor/benefits-of-setting-up-a-retirement-plan (last visited Jan. 27, 2023) [https://perma.cc/CVN4-MDDC].

48. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 414 (2014) (describing how "Fifth Third's stock price fell by 74% between July 2007 and September 2009" and as a result "eliminated a large part of the retirement savings that the participants had invested in the ESOP").

49. MOORE, *supra* note 24, § 6.01 (quoting Elaine McClatchey Darroch, *Mertens v. Hewitt Associates: The Supreme Court's Dismantling of Civil Enforcement Under ERISA,* 1994 DET. COLL. L. REV. 1089, 1092 (1994) (outlining how being exploited by those seeking to engage in getting "kickbacks, embezzlement, [charging] outrageous administrative costs, and excessive investments in the securities of plan sponsors/employers")); *see* H.R. REP. NO. 93-1280, at 306–09 (1974), *reprinted in* 1974-3 C.B. 1, 467–70 (1974).

50. 29 U.S.C. § 1104(a).

B. Fiduciary Rules Under ERISA

Under ERISA the fiduciary "manage[s] and control[s]" the retirement plan or its assets.[51] "[P]articipants [have] the right to sue for benefits and breaches of fiduciary duty."[52] ERISA sets out two different types of fiduciaries: named fiduciaries and functional fiduciaries.[53] For named fiduciaries, the statute establishes that a benefit plan must "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."[54] Typically, the named fiduciary is a corporate entity, an individual, or one or more corporate officer(s).[55]

A functional fiduciary, on the other hand, is one who exercises specific functions with respect to the plan.[56] Specifically, a person is deemed to be a functional fiduciary to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[57]

The statutory language is broad and allows the plan to have multiple fiduciaries; a person's status as a fiduciary is tied to the person's control of the plan or its assets.[58] ERISA diverges from the law of trusts, which is used as a tool of interpretation by several circuit courts when analyzing legal claims under ERISA.[59] Section 1002(21)(A) allows fiduciaries to hold positions that increase the possibility of there being a conflict of interest.[60]

ERISA § 1104 establishes a "[p]rudent man standard of care" to enforce the fiduciary standards set out in the statute.[61] It outlines that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[62] This requirement is often referred to as a "trustee's duty of loyalty," which comes from trust law's requirement that trustees make decisions with the interests of the participants and beneficiaries in mind.[63] "ERISA's

51. *ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/health-plans/erisa (last visited Jan. 25, 2023) [https://perma.cc/XH6J-WZ8N].

52. *Id.*; *see* 29 U.S.C. § 1002 (21)(A).

53. *See* 29 U.S.C. § 1102(a); 29 U.S.C. § 1002(21)(A).

54. 29 U.S.C. § 1102; Navarre v. Luna (*In re* Luna), 406 F.3d 1192, 1201 (10th Cir. 2005).

55. *See* MOORE, *supra* note 24, § 6.03[A].

56. *See* 29 U.S.C. § 1002(21)(A); *Navarre*, 406 F.3d at 1201.

57. 29 U.S.C. § 1002(21)(A).

58. *See* MOORE, *supra* note 24, § 6.03[B].

59. *See* Musick, *supra* note 23, at 668.

60. MOORE, *supra* note 24, § 6.03[B] (citing Pegram v. Herdrich, 530 U.S. 211, 225 (2000); Varity Corp. v. Howe, 516 U.S. 489, 498 (1996)).

61. 29 U.S.C. § 1104(a).

62. 29 U.S.C. § 1104(a)(1).

63. MOORE, *supra* note 24, § 6.04[B].

fiduciary standards [are] based in trust law," which can be very persuasive for ERISA's interpretation.[64]

To enforce liability against fiduciaries, § 1109(a) of ERISA provides beneficiaries the ability to bring a civil suit for a breach of responsibilities listed under the code.[65] Civil suits against fiduciaries are enforced under § 1132, in which "the Secretary [of Labor], . . . a participant, beneficiary or fiduciary" can sue for appropriate relief.[66]

It is well established that three elements must be proven for a successful ERISA claim: (1) breach of duty by the fiduciary, (2) actual loss to the plan, and (3) a showing that the fiduciary's breach was the cause for the loss.[67] Although these three elements somewhat resemble the *prima facie* case of negligence that most law students encounter in their first-year torts class, courts have continued to wrestle with the application of the causation element.[68] Part of the reason for this uncertainty is that courts differ as to how much weight to give to the law of trusts.[69]

C. The Law of Trusts

To better understand how ERISA works, it helps to look to the law of trusts. Before ERISA, federal law regulated plans in some respects.[70] But most claims for disloyalty or imprudence fell under state law—sometimes contract law, but often trust law.[71] Under the Internal Revenue Code, "benefits provided under 'tax-qualified' retirement plans" were provided with "favorable tax treatment."[72] Later revisions in 1938 required the "assets of qualified plans to be held in trust."[73] A trust is defined as a "relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another."[74] "The trustee of a trust is the person who holds or controls the assets

64. *Id.* § 6.04.

65. 29 U.S.C. § 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . .").

66. *Id.* § 1132(a)(2). Claims for fiduciary breach may also be brought under § 1132(a)(3). *See* Varity Corp. v. Howe, 516 U.S. 489, 507, 515 (1996).

67. *See* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 30 (1st Cir. 2018).

68. *See id.* at 34–39; Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1335–37 (10th Cir. 2017).

69. *Brotherston*, 907 F.3d at 36.

70. *See* Musick, *supra* note 23, at 667–68.

71. *See History of EBSA and ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa (last visited Jan. 27, 2023) [https://perma.cc/J26Y-EZ6U]; William G. McGrath, *Shifting the Burden out of Neutral: Why Burden-Shifting Is Necessary in ERISA Breach of Fiduciary Duty Claims*, 43 U. ARK. LITTLE ROCK L. REV. 567, 568–69 (2021).

72. Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, LAB. LAW. 391, 393–95 (2001).

73. *Id.* at 395.

74. *Definition of a Trust*, IRS, https://www.irs.gov/charities-non-profits/definition-of-a-trust (last visited Jan. 27, 2023) [https://perma.cc/7USX-7H2W].

that have been set aside in the trust" and is responsible for acting in the best interest of the beneficiary while serving in their role as trustee.[75]

The *Restatement (Third) of Trusts* sets the framework for what would later be adopted by ERISA.[76] The Restatement also contends that after a showing of breach and loss, the burden of proof for causation lies solely with the trustee to prove that the loss would have occurred regardless.[77] ERISA's legislative history makes clear that the "rules and remedies [are] similar to those under traditional trust law to govern the conduct of fiduciaries."[78] "ERISA imposes three basic fiduciary duties traceable to the law of trusts":[79] (1) fiduciaries/trustees are responsible for acting in the best interest of and for the purpose of providing benefits to members/beneficiaries;[80] (2) the trustee must act with reasonable care;[81] and (3) the fiduciary must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so."[82]

Comparing ERISA's fiduciary provisions to the common law of trusts, there are many similarities that tie the two together.[83] Despite the connection, the Supreme Court has recognized "that trust law does not tell the entire story."[84] "After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."[85] It is this difficulty that has given rise to disagreement among the circuit courts.[86] Unlike the law of trusts, ERISA is silent as to any burden-shifting on the causation element after a plaintiff has made a *prima facia* showing of breach and loss.[87] As a result, the circuit courts are split on which

75. Musick, *supra* note 23, at 668 (citing WARD L. THOMAS & LEONARD J. HENZKE, JR., TRUSTS: COMMON LAW AND IRC 501(C)(3) AND 4947, 4 (2003), https://www.irs.gov/pub/irs-tege/eotopica03.pdf [https://perma.cc/4WPX-6BZ6]).

76. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 99–100 (AM. L. INST. 2021) (discussing how a trustee is not liable for a loss if they acted with reasonable care), *with* 29 U.S.C. § 1132(c)(10)(D)(i) ("Penalty [under ERISA is] not to apply where failure not discovered exercising reasonable diligence.").

77. RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. F (AM. L. INST. 2021).

78. Collins, *supra* note 72, at 395 (citing H.R. REP. NO. 93-1280, at 295 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076)).

79. *Id.*

80. 29 U.S.C. § 1104(a)(1)(A).

81. *Id.* § 1104(a)(1)(B).

82. *Id.* § 1104(a)(1)(C).

83. *See* Collins, *supra* note 72, at 396–97.

84. Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996).

85. *See* Collins, *supra* note 72, at 397 (quoting *Varity*, 516 U.S. at 496–97).

86. *See generally* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 39 (1st Cir. 2018); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014) (holding that the district court erred when "it placed the burden on the plaintiffs to prove what, if any, damages were attributable to that breach"); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) (internal quotations omitted) ("O]nce the plaintiff has satisfied these burdens, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty."); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) ("[T]he burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty."); Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin. N.A., 858 F.3d 1324, 1336 (10th Cir. 2017).

87. *See* RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f. (AM. L. INST. 2021); 29 U.S.C. § 1109 (discussing breach and loss but silent on which party must show causation).

party bears the burden of proof, with some circuits relying on trust law and others rejecting it and applying the standard approach that requires plaintiffs to prove all elements of a claim.[88]

D. Circuit Split

Since the 1990s, circuit courts have come to opposing stances on the question of which party bears the burden of proving causation.[89] The First, Second, Fourth, Fifth, and Eighth Circuits have adopted the burden-shifting framework from trust law that places the burden of proof on the defendant to show that their actions as a fiduciary were not the cause of the plaintiff's loss.[90] The Sixth, Ninth, Tenth, and Eleventh Circuits have adopted the opposing view that absent any express language in the statute or an exception, the burden for proving causation lies with the beneficiary.[91] Currently, the Supreme Court has declined to grant certiorari on this issue.[92] As a result, where a case is heard can produce completely opposite results.[93]

The next three Subsections of this Note briefly cover the history and development of the split, what sources of authority each court relies on for its analysis, and what has been said by courts that have yet to definitively address this controversy surrounding ERISA.[94]

1. Circuit Courts That Apply the Burden-Shifting Framework

One of the first cases to shift the burden for causation to defendants arose in the Eighth Circuit.[95] In *Martin v. Feilen*, the Secretary of Labor brought a lawsuit against the stockholders and directors of Feilen Meat Company ("FMC"), claiming that they breached their fiduciary duty under ERISA.[96] In the 1970s, FMC established an ESOP "which . . . took over the assets of the profit-sharing plan."[97] After financial loss and a leveraged buy-out, FMC closed its doors in 1985.[98] This resulted in FMC's "employees lo[sing] both their jobs and the entire value of their retirement accounts in the ESOP."[99]

At trial, the district court found that FMC was an ERISA fiduciary and that the plaintiffs provided sufficient evidence to show that there was a breach of

88. *Compare Brotherston*, 907 F.3d at 39, *with Pioneer*, 858 F.3d at 1334–35.

89. *See* Hillary E. August, *Who Bears the Burden of Showing Loss Causation in an ERISA Fiduciary Breach Case? The Supreme Court May Tell Us Soon*, 2019 BENDER'S CAL. LAB. & EMP. BULL. 321, 324 (2019).

90. *See Brotherston*, 907 F.3d at 35, 39; *see* Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d. 2021) (holding that "the district court failed to shift the burden onto the defendant").

91. *See Pioneer*, 858 F.3d at 1335–36.

92. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 361–62 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

93. *See* August, *supra* note 89, at 326.

94. *See infra* Subsections II.D.1–3.

95. *See* Martin v. Feilen, 965 F.2d 660, 671–72 (8th Cir. 1992).

96. *Id.* at 662–63.

97. *Id.* at 663.

98. *Id.*

99. *Id.* at 664.

fiduciary duty.[100] Despite this, "[t]he district court declined to award damages because [it found that] the Secretary failed to prove that the breaches of fiduciary duty proximately caused measurable monetary loss to the ESOP."[101]

On appeal, the Eighth Circuit found that "ERISA imposes high standards of fiduciary duty upon those responsible for administering an ERISA plan" and that this standard comes from trust law.[102] Addressing the question of remedy for the plaintiffs, the court resolved the issue in favor of the plaintiffs, stating that upon a successful showing of breach and loss, "the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty."[103]

The next circuit to adopt the burden-shifting analysis was the Fifth Circuit in *McDonald v. Provident Indemnity Insurance Company*.[104] Following the path of the Eighth Circuit, the court in *McDonald* held that "'[o]nce the plaintiff has satisfied these burdens, 'the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty.'"[105]

Despite the Eighth and Fifth Circuits applying the burden-shifting analysis in 1992 and 1995, the first court to specifically address the circuit split was the Fourth Circuit in its 2014 decision in *Tatum v. RJR Pension Investment Committee*.[106] In *Tatum*, an employee and participant in his company's 401(k) plan filed a lawsuit against R.J. Reynolds Tobacco ("RJR"), claiming that the company breached its fiduciary duty when it eliminated certain stock from the retirement plan "on an arbitrary timeline without conducting a thorough investigation."[107] The district court held that once the employee established that there was a breach and loss, "RJR bore the burden of proving that its breach did not cause the alleged losses to the Plan."[108]

On appeal, the Fourth Circuit agreed with the district court that the fiduciary defendants should bear the burden of proof as to causation.[109] The court held that applying the burden-shifting framework was the "most fair" approach because the "default rule" of requiring plaintiffs to prove each element allows for exceptions, and "one such exception arises under the law of trusts."[110]

The court also bolstered its argument by analogizing to burden-shifting under the Labor-Management Reporting Disclosure Act.[111] There, the court made it clear that "[i]t is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably"

100. *See id.*
101. *Id.*
102. *Id.*
103. *Id.* at 671.
104. 60 F.3d 234, 237 (5th Cir. 1995).
105. *Id.* (quoting Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994)).
106. *See* 761 F.3d 346, 351 (4th Cir. 2014).
107. *Id.* at 351.
108. *Id.* at 355.
109. *Id.* at 362–63.
110. *Id.* at 362.
111. *Id.* at 362–63.

and that this reasoning should carry over to ERISA claims.[112] Concluding its analysis, the Fourth Circuit stated that ERISA's preamble implies that the "burden-shifting framework comports with the structure and purpose of ERISA."[113]

In 2018, the First Circuit aligned itself with the Fourth, Fifth, and Eighth Circuits by shifting the burden to the defendant.[114] In *Brotherston v. Putnam Investments, L.L.C.*, plaintiffs in a class action sued their former employer, Putnam Investments, claiming that it breached its fiduciary duty.[115] On appeal after the defendant won on summary judgment, the First Circuit—just like the Fourth, Fifth, and Eighth—concluded that upon a showing of breach and loss by the plaintiff, the element of causation rests with the defendant.[116]

One of the latest circuits to apply the burden-shifting approach comes from the Second Circuit.[117] In *Sacerdote v. New York University*, participants in a private university's retirement plan sued, alleging that the university breached its fiduciary duty under ERISA.[118] The Southern District of New York granted the university's motion to dismiss with respect to the imprudence claims, and the plaintiffs appealed.[119] Reviewing the district court's no-loss finding, the Second Circuit held that the district court erred in dismissing the plaintiffs' claim.[120] It held that the burden under ERISA shifts to the defendants to disprove that the loss was caused by any action/inaction on its part.[121] "This approach is aligned with the Supreme Court's instruction to "look to the law of trusts" for guidance in ERISA cases."[122]

2. Circuit Courts That Reject the Burden-Shifting Framework

Courts in other circuits have opted for the traditional approach, rejecting the burden-shifting analysis.[123] In *Willett v. Blue Cross & Blue Shield of Alabama*, former employees of Mays Enterprises, Inc. ("Mays") sued health care provider Blue Cross Blue Shield ("Blue Cross").[124] The plaintiffs claimed that Blue Cross breached its fiduciary duty when it failed to notify employees that their employer, Mays, failed to pay the premiums for their health insurance.[125]

112. *Id.* at 363.
113. *Id.*
114. *See* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 35 (1st Cir. 2018).
115. *Id.* at 22–23.
116. *Id.* at 35.
117. *See* Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021).
118. *Id.* at 103.
119. *Id.* at 104–05.
120. *Id.* at 113.
121. *Id.* (citing Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998).
122. *Id.* (quoting Tibble v. Edison Int'l, 575 U.S. 523, 529 (2015).
123. *See* Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin. N.A., 858 F.3d 1324, 1324 (10th Cir. 2017); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343–44 (11th Cir. 1992); Kuper v. Iovenko, 66 F.3d 1447, 1459–60 (6th Cir. 1995); Silverman v. Mut. Benefit Life Ins., 138 F.3d 98, 105 (2d Cir. 1998); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004).
124. 953 F.2d at 1338.
125. *Id.* at 1339.

As a result of the nondisclosure, employees under the health insurance plan accrued medical costs that climbed into the thousands.[126] After the lower court granted the beneficiaries' motion for summary judgment, Blue Cross appealed.[127]

On appeal, Blue Cross raised the issue of causation, claiming that it was not the proximate cause of the beneficiaries' injuries under § 1109 of ERISA.[128] The Eleventh Circuit reversed and remanded the case to the lower court.[129] Without much elaboration, the Eleventh Circuit stated that "[o]n remand, the burden of proof on the issue of causation will rest on the beneficiaries [to] establish that their claimed losses were proximately caused by . . . Blue Cross."[130]

In *Kuper v. Iovenko*, the Sixth Circuit also stated that the burden of causation in ERISA cases is on the plaintiffs.[131] This case arose when former employees of Quantum Chemical Corporation alleged that Quantum engaged in actions that resulted in substantial loss to the value of their stock under an ESOP.[132] The court took the stance that it "will presume that a fiduciary's decision to remain invested in employer securities was reasonable. A plaintiff may then rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision."[133] In short, plaintiffs are required to show a "causal link" to prevail against a defendant under ERISA.[134]

Briefly addressing the Ninth Circuit's position on causation, in *Wright v. Oregon Metallurgical Corporation* that circuit court explicitly stated that "plaintiff[s] must show a causal link between the failure to investigate and the harm suffered by the plan."[135] Although the reasoning for its causation analysis was brief, it seems as if the court relied on the analysis from the Sixth Circuit in *Kuper* to support its conclusion.[136]

Further, the Tenth Circuit's 2017 decision in *Pioneer Centres Holding Company ESOP & Trust v. Alerus Financial, N.A.* is one of the most recent decisions on the issue in favor of the traditional approach.[137] In *Pioneer*, Pioneer Centres Holding Company Employee Stock Ownership Plan and Trust and its trustees ("Pioneer") sued Alerus Financial ("Alerus"), a transactional trustee, claiming a breach of fiduciary duty.[138] Alerus was hired to negotiate the terms

126. *Id.* at 1338–39.
127. *Id.* at 1340.
128. *Id.* at 1343.
129. *Id.*
130. *Id.*
131. 66 F.3d 1447, 1459–60 (6th Cir. 1995).
132. *Id.* at 1449–50.
133. *Id.* at 1459.
134. *Id.*
135. 360 F.3d 1090, 1099 (9th Cir. 2004).
136. *See id.*; *Kuper*, 66 F.3d at 1459.
137. 858 F.3d 1324, 1334 (10th Cir. 2017).
138. *Id.* at 1326–27.

on which the ESOP would purchase shares of stock from the majority owner of Pioneer.[139]

Pioneer "owned and operated (through its subsidiaries) several automobile dealerships in Colorado and California, including Land Rover, Audi, and Porsche."[140] Pioneer's agreement with Land Rover required that Pioneer could not change ownership without the informed consent of both Land Rover and the present owner.[141] It soon became clear that Pioneer would not be able to obtain consent from either party.[142] Despite this, Pioneer continued to request Alerus' signature on transaction documents.[143] Alerus refused.[144]

Alerus eventually ended up abandoning the deal and Pioneer sued, claiming that Alerus breached its fiduciary duty, resulting in a loss.[145] At the trial level, the district court granted summary judgment in favor of Alerus, "bypass[ing] the issue of whether Alerus had breached its fiduciary duty because it concluded the Plan had not established loss, an element of its prima facie case."[146] Pioneer appealed to the Tenth Circuit.[147]

The Tenth Circuit's decision in *Pioneer* mentions that the lower court "acknowledged" but did not "resolve" the issue of "whether the burden shifts to the defendant to disprove causation once the plaintiff has established a prima facie case of breach of fiduciary duty under ERISA."[148] The Tenth Circuit then went on to conclude that the traditional rule of the plaintiff bearing the burden should apply and "reject[ed] outright [Pioneer's] argument that ERISA breach of fiduciary duty claims should be resolved under a burden shifting framework."[149]

3. Circuits Yet to Definitively Rule on Burden Shifting

The Third and Seventh Circuits are the only circuit courts that have not definitively concluded who should bear the burden of proof for causation.[150] One of the few cases in the Seventh Circuit to raise the issue of causation is *Leigh v. Engle*.[151] There, the court stated that it "believe[d] that th[e] language of section 1109 permits recovery of a fiduciary's profits only where there is a causal connection between the use of the plan assets and the profits made by fiduciaries on the investment of their own assets."[152] Although the court cited to another

139. *Id.* at 1327.
140. *Id.*
141. *Id.*
142. *Id.* at 1330.
143. *Id.*
144. *Id.*
145. *Id.* at 1326–27.
146. *Id.* at 1332.
147. *Id.* at 1333.
148. *Id.*
149. *Id.* at 1335–36.
150. *See id.* at 1336–37. *See generally* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17 (1st Cir. 2018).
151. 727 F.2d 113, 137–38 (7th Cir. 1984).
152. *Id.* at 137.

Seventh Circuit case as support for this proposition, it acknowledged that the "inquiry into causation may be exceedingly difficult."[153]

III. ANALYSIS

Part III will seek to identify why the circuit courts have had difficulty coming to an agreement on which party bears the burden of proof for causation in an ERISA cause of action, then dissect the rationale of arguments for and against the burden-shifting application. This Part will first offer an analysis of the Supreme Court's interpretation of the phrase "burden shifting" in civil cases and describe how, in the 1990s, the Supreme Court established two distinct meanings of burden of proof.[154] This analysis will also highlight cases in which the Court has departed from the usual approach by shifting burdens of proof from plaintiffs to defendants.[155]

Next, this Part will cover some of the most recent cases attempting to decipher how much of ERISA, and more specifically 29 U.S.C. § 1109, should follow the law of trusts.[156] Part III will then conclude with a probe into the relationship between Congress's interpretation of ERISA and how courts have relied on the legislative intent to come to fair and equitable results.[157]

A. Interpretation of Burden Shifting

The silence of 29 U.S.C. § 1109(a) with respect to the burden of proving causation has been at issue for quite some time now.[158] The Supreme Court has had multiple chances to come to a decision on the issue.[159] Most recently in 2018, the Court denied certiorari and left in place the First Circuit's holding that fiduciaries must prove absence of loss.[160] The Supreme Court has even gone so far as to request that the Solicitor General weigh in on the issue.[161]

153. *Id.* at 137–38.

154. Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 271–81 (1994).

155. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 57 (2005).

156. Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 39 (1st Cir. 2018); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014) (holding that the district court erred when "it placed the burden on the plaintiffs to prove what, if any, damages were attributable to that breach"); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) (internal quotations omitted) ("Once the plaintiff has satisfied these burdens, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty."); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) ("[T]he burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty."); *Pioneer*, 858 F.3d at 1324.

157. *See* H.R. REP. NO. 93-533, at 9–10 (1973), *reprinted in* 1974-3 C.B. 1, 218–19 (1974).

158. *Cf.* Varity Corp. v. Howe, 516 U.S. 489, 502 (1996) (discussing an early analysis of the burden shifting under 29 U.S.C. § 1109).

159. *See, e.g.*, Petition for Writ of Certiorari, Putnam Invs., L.L.C. v. Brotherston, 140 S. Ct. 911 (2020), (No. 18-926).

160. *See generally Brotherston*, 907 F. 3d 17, *cert. denied*, 140 S. Ct. 911.

161. *See* Putnam Invs. L.L.C. v. Brotherston, 139 S. Ct. 1614, 1614 (2019) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States.").

The burden-shifting analysis is defined by *Black's Law Dictionary* as "[a] court's scrutiny of a complainant's evidence to determine whether it is sufficient to require the opposing party to present contrary evidence."[162] An example provided in the definition that outlines burden shifting in a discrimination case states that "[i]f the plaintiff presents sufficient evidence of discrimination, the burden shifts to the defendant to show a legitimate, nondiscriminatory basis for its actions."[163] Although *Black's Law Dictionary* provides readers with a straightforward example, the difficulty of determining when to engage in the burden-shifting analysis can quickly become evident when researching the conflicting positions from the Supreme Court.[164]

In *Keyes v. School District No. 1*, the Supreme Court stated that "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation."[165] "The issue, rather, is merely a question of policy and fairness based on experience in the different situations."[166] In a subsequent case, the Supreme Court stated that "[f]or many years the term 'burden of proof' was ambiguous because the term was used to describe two distinct concepts."[167] When a plaintiff brings a cause of action, the court will generally hold that party responsible for proving their case.[168] The same rule generally applies when a statute is silent.[169] There are, however, exceptions to "[t]he ordinary default rule."[170]

Although ERISA does not explicitly lay out such an exception, the law of trusts, which mirrors ERISA on several key points, states that

> in matters of causation . . . when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach.[171]

This approach is "well-established," as evidenced by decisions in several of the circuit courts and supported by the Supreme Court's adoption of burden shifting in analogous civil cases.[172]

In *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, the Supreme Court addressed disputes related to the Black Lung Benefits Act ("BLBA") and the Longshore and Harbor Workers' Compensation Act ("LHWCA").[173] Under these Acts, the Department of Labor applies the "true

162. *Burden-Shifting Analysis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

163. *Id.*

164. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 209 (1973).

165. *Id.*

166. *Id.* (internal quotations omitted).

167. Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 272 (1994).

168. *See* Schaffer *ex rel.* Schaffer v. West, 546 U.S. 49, 56 (2005) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.").

169. *Id.*

170. *Id.* at 57; Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (4th Cir. 2014) (citing *Schaffer*, 546 U.S. at 56).

171. RESTATEMENT (THIRD) OF TRUSTS § 100, cmt. f (AM. L. INST. 2012) (internal citation omitted).

172. *Tatum*, 761 F.3d at 362; *cf.* Tibble v. Edison Int'l, 575 U.S. 523, 529 (2015).

173. Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 269 (1994).

doubt" rule.[174] The true doubt rule "essentially shifts the burden of persuasion to the party opposing the benefits claim."[175] The question posed to the Court was whether the application of that burden-shifting approach was consistent with § 7 of the Administrative Procedure Act ("APA"), which governs proceedings under the BLBA and LHWCA and states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[176]

The relevant portion of this case for purposes of this Note comes further in the opinion when the Court "turn[s] . . . to the meaning of [the phrase] 'burden of proof.'"[177] The respondents in *Greenwich* argued that the phrase burden of proof included the burden of persuasion, while the Department of Labor maintained that the burden of proof imposed "only the burden of *production* (*i.e.*, the burden of going forward with evidence)."[178] The breakdown of the phrase burden of proof into two separate standards, one for persuasion and one for production, is complex, with no obvious way "to construe it in accord with its ordinary or natural meaning."[179]

To do this the Court looked back to the year 1946 when "the APA was enacted," the history behind the development of the phrase "burden of proof," and congressional intent.[180]

> Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production—a party's obligation to come forward with evidence to support its claim.[181]

The history of the Supreme Court's interpretation of the phrase begins with the Massachusetts Supreme Judicial Court's view that "burden of proof should be limited to the burden of persuasion."[182]

Under this interpretation "the party whose case requires the proof of [a] fact, has all along the burden of proof."[183] Despite the burden remaining where it started, "once the party with this burden establishes a prima facie case, the burden to 'produce evidence' shifts."[184] When determining whether to shift the burden, the Court stated that it was proper only when an "affirmative defense" was raised, "as opposed to the burden to produce evidence."[185] Despite the analysis by the Massachusetts court, the term continued to be applied with the dual use throughout the 1800s and into the 1900s.[186]

174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 272.
178. *Id.* (emphasis in original).
179. *Id.*
180. *See id.* at 272–76.
181. *Id.* at 272.
182. *Id.* at 273.
183. *Id.* (quoting Powers v. Russell, 30 Mass. 69, 76 (1833)).
184. *Id.*
185. *Id.*
186. *See id.*

In 1923, the Supreme Court attempted to eliminate the confusion surrounding burden of proof by adopting Massachusetts' approach.[187] While proponents of the application of the traditional approach under ERISA may believe that this is explicit evidence that the burden of proof lies with the beneficiaries, they should not be too quick to count this as a victory. The Court elaborated further on its application of the meaning of burden of proof, citing cases where it "asserted the contradictory conclusion."[188]

In *NLRB v. Transportation Management Corporation*, the Court "reviewed the National Labor Relations Board's conclusion that the employer had discharged an employee because of the employee's protected union activity."[189] In cases like this, the NLRB applied a burden-shifting formula "typical in dual motive cases."[190] In dual motive cases before the NLRB, the employee first holds the burden of persuading the NLRB that antiunion hostility was a reason behind the employer's firing decision; the burden then shifts "to the employer to establish as an affirmative defense that it would have fired the employee for permissible reasons even if the employee had not been involved in union activity."[191]

Similar to arguments made by circuit courts that have held beneficiaries bear the burden of proving causation,[192] the employer in *Transportation Management* claimed that the burden-shifting formula "was inconsistent" with the governing statute.[193] The Supreme Court disagreed.[194]

The Court held that "[t]he NLRB's approach in *Transportation Management* is consistent with § 7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision."[195] Only after that was the burden of persuasion placed on the employer.[196] Although the Court ultimately rejected the application of the rule in *Transportation Management* for its holding in *Greenwich Collieries*, the Court made sure to clarify that the holding in *Transportation Management* "remains intact."[197]

Additional Supreme Court cases support the notion that burden shifting is appropriate across multiple areas of the law allowing for exceptions to the "ordinary default rule."[198]

The Supreme Court's clarification of the two meanings behind the phrase "burden of proof" sets up proponents of the burden-shifting framework for causes of action under ERISA to argue that the proper application of burden of proof should follow the Supreme Court's holding in *Transportation*

187. *Id.* at 274 (citing Hill v. Smith, 260 U.S. 592 (1923)).
188. *Id.* at 276.
189. *Id.*
190. *Id.*
191. *Id.*
192. *See, e.g.*, NLRB v. Trans. Mgmt. Corp., 462 U.S. 393, 397 n.3 (1983).
193. *See* Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 276 (1994).
194. *Id.*
195. *Id.* at 278.
196. *Id.*
197. *Id.*
198. *See* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 57 (2005).

Management that the burden of persuasion shifts to the opposing party.[199] The explanation behind the Court's definition of burden of proof can also be applied to ERISA, which is silent as to which party bears the burden of proof.[200] Looking to the history of ERISA and other persuasive authorities would likely help courts clarify the issue of burden shifting in this area of the law and come to the position that shifting the burden is the appropriate stance.[201]

B. Ambiguity of the Language in 29 U.S.C. § 1109 and Its Relation to the Law of Trusts

The governing language that courts must look to when determining the liability of a fiduciary under ERISA is found in 29 U.S.C. § 1109(a).[202] The statute provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[203]

From this, courts have been able to determine that ERISA establishes three elements that must be proven: (1) breach,[204] (2), loss,[205] and (3) causation.[206]

Section 1109 does not say which side must prove causation.[207] Under the ordinary default approach, this silence would mean that the burden of proof should stay with the plaintiff because they are seeking to "change the present state of affairs."[208] But ERISA's close relationship to the law of trusts points in the opposite direction, suggesting that courts should shift the burden of proof to defendants.[209]

The most divisive issue between circuits that follow the traditional approach and ones that follow the burden-shifting analysis boils down to whether courts should follow trust law when determining a successful claim under ERISA, and if so, how much should it influence the court's analysis.[210]

199. Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 276 (1994).

200. *See id.*

201. *See id.* at 278.

202. 29 U.S.C. § 1109(a).

203. *Id.*

204. *Id.* ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties . . . .").

205. *Id.* ("[F]iduciaries by this subchapter shall be personally liable to make good to such plan any losses . . . .").

206. *Id.* (describing that the "losses to the plan [must have] result[ed] from each such breach").

207. *See id.*

208. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1335 (10th Cir. 2017); Brotherston v. Putnam, Invs., L.L.C., 907 F.3d 17, 37 (1st Cir. 2018).

209. *Brotherston*, 907 F.3d at 37.

210. *See id.*; *Pioneer*, 858 F.3d at 1335.

Supporters of the burden-shifting approach typically argue that Congress used the law of trusts as a starting point for the creation of ERISA.[211] Those that oppose shifting the burden to the defendant typically argue that the list of responsibilities for fiduciaries in trust law is drastically different from those established under ERISA.[212] Comparing ERISA to the law of trusts points to a closer relationship than what opponents argue.[213]

Interpretation of ERISA and its provisions points to a clear deviation from trust law.[214] ERISA was first signed into law in 1974.[215] ERISA was the result "of more than a decade of Congressional hearings, reports, studies, and deliberations" that sought to remedy the flaws in the regulation of employee benefit plans."[216] "Congress also was concerned that large amounts of money in the hands of plan managers created a temptation for self-dealing and improper handling of these funds."[217]

When ERISA came into law it accomplished several key goals which were focused on the protection of employees.[218] Specific examples of ERISA's attempt to protect beneficiaries include:

> [E]xpand[ing] current reporting and disclosure provisions for all employee benefit plans covered by the Act, standards of diligence and honesty applicable to those managing employee benefit plans, minimum standards prohibiting the denial of certain earned pension benefits, increased financing requirements for pension plans, the establishment of an insurance program for the protection of guaranteed pension benefits in the event of a plan termination, and a retirement scheme for employees who are not covered by a company plan.[219]

This employee-protection purpose provides one of the strongest arguments for courts to engage in burden shifting despite the silence of the statute.[220]

When Congress began drafting ERISA, the statute's primary focus was to protect employees.[221] Records from the House of Representatives' introduction of ERISA show that the statute's supporters believed "the purpose[] of [ERISA was to] provide adequate protection for participants under the plan and their

211. *Brotherston*, 907 F.3d at 37.

212. Musick, *supra* note 23, at 680.

213. *See Brotherston*, 907 F.3d at 37; Brief of Law Professors as Amici Curiae in Support of the Respondents, Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, 594 (2020) ("[T]he 'duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law.'" (quoting Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 428 (2014))).

214. *See* H.R. REP. NO. 93-533, at 13 (1973), *reprinted in* 1974-3 C.B. 1, 222 (1974) ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans.").

215. MOORE, *supra* note 24, § 1.04.

216. *Id.*

217. Carlton R. Sickles, *Introduction: The Significance and Complexity of ERISA*, 17 WM. & MARY L. REV. 205, 206 (1975).

218. *See generally* 29 U.S.C. §§ 1109–32.

219. Sickles, *supra* note 217, at 206.

220. *See id.*

221. *See* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 37 (1st Cir. 2018).

beneficiaries . . . ."[222] Records from the Senate also reflect an identical motivation for ERISA's enactment.[223] The statements made discussing ERISA focus heavily on protections for the beneficiaries.[224]

Congress's focus on the security of beneficiaries' funds has also been recognized by federal courts.[225] In *Brotherston*, the court acknowledged that "ERISA itself is not so specific . . . [but] [b]ehind the text . . . stands" Congress's clear intent "to provide the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of fiduciary duty."[226] The most persuasive source of guidance, however, is the law of trusts.[227]

Although the Supreme Court has remained silent regarding burden shifting, it has instructed that if there is a lack of "explicit direction" lower courts can find answers in the law of trusts.[228] In this analysis of why courts should refer to trust law's burden-shifting approach, it must be clarified that the law of trusts is a persuasive authority, not authoritative.[229] Despite this, the Supreme Court has followed the approach of referencing trust law as a starting point.[230] After looking to trust law, "courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements."[231] The *Restatement (Third) of Trusts* states a clear rule of burden-shifting that would easily remedy the current split.[232]

Courts should follow the trust-law approach for two specific reasons: (1) a fiduciary has a duty to keep and render accounts and (2) a fiduciary is required to furnish information.[233] Comment f in § 100 of the Restatement provides the reader with a specific example of its application which states:

> [W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred, we believe that the burden of persuasion ought to shift to the trustee to prove, as a matter of defense, that the loss would have occurred in the absence of a breach of duty.[234]

222. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, § 304(a), *reprinted in* 1974-3 C.B. 1, 42 (1974).

223. *See* S. REP. No. 94-250, at 143 (1974) ("New protections and guarantees for employees covered by private pension and welfare plans and for their beneficiaries are provided in the Employee Retirement Income Security Act of 1974 (Public Law 93-406).").

224. *Cf. id.*

225. *See Brotherston*, 907 F.3d at 31.

226. *Id.*

227. *See id.* at 32.

228. *Id.* (citing Varity Corp. v. Howe, 516 U.S. 489, 496–97, 502, 506–07 (1996) (relying on "ordinary trust law principles" to fill gaps created by ERISA's lack of definition regarding the scope of fiduciary conduct and duties)).

229. *See Varity Corp.*, 516 U.S. at 497.

230. *Id.*

231. *Id.*

232. *See* RESTATEMENT (THIRD) OF TRUSTS § 100, cmt. f. (AM. L. INST. 2012).

233. *See id.*

234. *Id.* (quoting Estate of Stetson, 345 A.2d 679, 690 (Pa. 1975)).

For a court to require a beneficiary to provide information showing a causal connection between breach and loss, when the fiduciary is in charge of administering the plan, would be akin to asking the beneficiaries to read the minds of the fiduciaries.

ERISA requires that administrators of employee benefit plans maintain copies of records "for a period of not less than six years."[235] This provision of ERISA mirrors trust law's requirements that "a trustee maintain the material information necessary to protect the beneficiaries' interests. Not only is maintaining the records its own duty, but it is the prerequisite for the duty to inform and report."[236] It would follow that fiduciaries would also be expected to keep meticulous records to ensure that the beneficiaries are protected and would be the appropriate party to present evidence that they are not liable for any loss.[237]

Many of the individuals who contribute to their 401(k)s rely heavily on the administrator of the plan to know the specifics of any losses to that plan.[238] Requiring beneficiaries to know the exact cause of any losses would be to essentially ask them to run their own plans and somewhat defeats the purpose of needing a fiduciary to keep records in the first place.[239] Deviating from the arguments that supported ERISA's introduction into law and the logical application of the burden-shifting analysis from trust law would clearly be at odds with an equitable remedy for those that have successfully alleged a breach and loss to their employee savings plan.[240]

C. Fairness and Equity Call for Applying the Burden-Shifting Framework

When Congress first began drafting ERISA, one of the main issues it sought to remedy was the weak protections that were in place to ensure that employees' retirement plans were protected.[241] One reason to shift the burden to the defendant is to ensure that plaintiffs are not unfairly burdened with the task of proving the breach was the cause of the loss to the benefit plan.[242]

Shifting the burden to the defendants has been cited by several courts, including the Supreme Court, as a reason to deviate from the traditional approach.[243] The Fourth Circuit has also noted that "[c]ourts do not take kindly to

235. *See* 29 U.S.C. § 1027.

236. Adam J. Pabarcus & Rachel L. Cardwell, *Helping Trustees Avoid Liability—The Duty of Record Keeping and Identification of Trust Property*, FAEGRE DRINKER (July 9, 2019), https://www.faegredrinker.com/en/insights/publications/2019/7/helping-trustees-avoid-liability-the-duty-of-record-keeping-and-identification-of-trust-property#:~:text=Cardwell-,The%20duty%20of%20record%20keeping%20and%20identification%20of%20trust%20property,duty%20to%20inform%20and%20report [https://perma.cc/YG9Z-KHS8].

237. *See id.*

238. *See* Channick, *supra* note 5.

239. *See ERISA*, *supra* note 51.

240. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (4th Cir. 2014) (discussing that placing the burden of proof on defendant is the "most fair" approach).

241. *See* MOORE, *supra* note 24, § 1.04.

242. *See* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 35–36 (1st Cir. 2018).

243. *Cf.* United States v. N.Y., New Haven & Hartford R.R. Co., 355 U.S. 253, 256 (1957); *Tatum*, 761 F.3d at 362.

arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same."[244] Circuits that have ultimately declined to apply the burden-shifting approach have also cited to similar cases holding that "[t]he fiduciary obligations . . . to the participants and beneficiaries of the [ERISA] plan are . . . the highest known to the law."[245]

Proponents of the traditional approach argue that "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."[246] Requiring beneficiaries under the plan to know the inner workings of the fiduciary's actions would be akin to asking someone to read someone's mind. The Fourth Circuit successfully adopted this approach in *Tatum*.[247] After acknowledging the typical approach used by courts when a statute is silent, the court found that "[t]he ordinary default rule . . . admits . . . exceptions."[248]

Under employee benefit plans, the fiduciaries are the party that is in charge of controlling the growth of the funds for beneficiaries.[249] Without constant communication between the members of the plan detailing every step the fiduciaries are taking, it is extremely difficult for beneficiaries to come before a court and accurately describe that the actions of the fiduciary caused the loss.[250] Based on the many equity arguments in favor of the burden-shifting approach, I find three arguments especially compelling: (1) the number of Americans that currently use employee benefit plans,[251] (2) how much money in total many of these plans hold,[252] and (3) the level of control that the fiduciaries have in regard to the operations of the benefit plans.[253]

In 2020, about sixty million Americans were active participants in about 600,000 401(k) plans.[254] This number does not account for the additional fourteen million participants of the roughly 6,500 ESOPs.[255] With over seventy million people relying on pension plans for some form of financial security, it is quite clear that the goals of ERISA should trend towards protecting the large

244. *Tatum*, 761 F.3d at 365 (quoting *In re* Beck Indus., Inc., 605 F.2d 624, 636 (2d Cir. 1979)); *see also* Estate of Stetson, 345 A.2d 679, 690 (Pa. 1975) ("[A]s between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty.").

245. Adolyn B. Clark, *ERISA Breach of Fiduciary Duty: Shifting the Burden of Proving Causation to the Defendant*, 83 DEF. COUNS. J. 180, 198 (2016) (citing Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982)).

246. *N.Y., New Haven & Hartford R.R. Co.*, 355 U.S. at 256 n.5.

247. *Tatum*, 761 F.3d at 363.

248. *Id.* at 362 (quoting Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 48, 56 (2005)).

249. *See* Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021).

250. *See id.*

251. *See* JOHN J. TOPOLESKI & ELIZABETH A. MYERS, WORKER PARTICIPATION IN EMPLOYER-SPONSORED PENSIONS: DATA IN BRIEF 1 (2021).

252. *401(k) Plan Research: FAQs*, INV. CO. INST. (Oct. 2021), https://www.ici.org/faqs/faq/401k/faqs_401k#:~:text=How%20many%20Americans%20have%20401,of%20former%20employees%20and%20retirees [https://perma.cc/Z3V3-6ZTD].

253. *See Sacerdote*, 9 F.4th at 113.

254. *See 401(k) Plan Research*, *supra* note 252.

255. *Employee Stock Ownership Plan (ESOP) Facts*, NAT'L CTR. EMP. OWNERSHIP, https://www.esop.org/ (last visited Jan. 27, 2023) [https://perma.cc/36M8-GYNP].

number of participants.[256] To do otherwise would expose a large swath of citizens to mismanagement and fraudulent actions of a fiduciary and could result in the loss of millions for unsuspecting plan members.[257]

In addition to the total number of plan members that should be the focus of protection, the total capital held in pension funds also lends support to shifting the burden of causation to fiduciaries.[258] "As of June 30, 2021, 401(k) plans held an estimated $7.3 trillion in assets and represented nearly one-fifth of the $37.2 trillion US retirement market . . . ."[259] "According to a 2010 National Center of Employee Ownership ("NCEO") analysis of ESOP company government filings in 2008, the average ESOP participant receives about $4,443 per year in company contributions to [an] ESOP and has an account balance of $55,836."[260] Entrusting plan fiduciaries with this massive amount of money should understandably accompany a heightened standard for those overseeing the plan, which should include the burden of persuasion.[261]

One of the final, and most compelling, reasons offered to shift the burden of proof for causation is that the fiduciaries are the party responsible for "discharg[ing] [their] duties 'solely in the interest of the participants and beneficiaries . . . .'"[262] Recently, the Second Circuit Court of Appeals has come to the same conclusion, shifting away from precedent holding the opposite view.[263] In *Sacerdote v. New York University*, the court concluded that once a plaintiff has proved that there was a loss, "the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty."[264] The court then went on to explain that "it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles, only to be told [to] guess again."[265] To require the fiduciary to show that the loss was not caused by the breach "makes much more sense."[266]

Despite the Second Circuit's pivot to shifting the burden of causation to the defendants[267] and the Supreme Court's refusal to clarify the matter,[268] courts will continue to struggle with how to properly apply the standard. Thus, shifting the

256. *See id.*; *401(k) Plan Research*, *supra* note 252.

257. *See Quincy's Pension Fund Lost $3.5M in an Email Scam Last Year*, AP NEWS (Feb. 14, 2022), https://apnews.com/article/technology-business-email-quincy-f829ea3a761a1527e08ba1fbb48e273f [https://perma.cc/UP88-PBDF].

258. *See 401(k) Plan Research*, *supra* note 252.

259. *Id.*

260. *Employee Stock Ownership Plan (ESOP) Facts*, *supra* note 255.

261. *See* Clark, *supra* note 245, at 198 (citing Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982)).

262. MOORE, *supra* note 24, § 6.04.

263. *See* Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021).

264. *Id.*

265. *Id.* (citing Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 38 (1st Cir. 2018) (internal quotations omitted)).

266. *Id.*

267. *See id.*

268. *See* N.Y. Univ. v. Sacerdote, 9 F.4th 95 (2021), *cert. denied*, 142 S. Ct. 1112 (No. 21-724) (2022).

burden of proof to the fiduciary remains a high hurdle that beneficiaries in some circuits must clear.

IV. RECOMMENDATION

With the increase in ERISA litigation[269] and the split among the circuits as to which party should be required to prove the causation element,[270] this issue is ripe for the Supreme Court to grant certiorari and resolve the question. Since *Brotherston*, issues surrounding not only the increased likelihood that parties will attempt to forum shop for venues favorable to their case,[271] but also the disregard for the intent of Congress when it first enacted ERISA, adds to the confusion of how the courts should rule.[272] Further, past Supreme Court cases have proven that the Court has switched the burden of proof for other cases where there was a clear imbalance of power, and thus it could likely engage in a similar analysis for cases brought under ERISA.[273]

ERISA's reliance on the law of trusts for many key provisions pertaining to enforcement of fiduciary duties explicitly allows for courts to engage in equitable burden shifting.[274] My recommendation will then explain that if the court is reluctant to apply methods well established in the law of trusts, the second approach would be to borrow from other areas of the law that shift the burden when there is a presumption of undue influence.[275] Finally, Section IV.C will propose a third option: a hybrid approach that combines elements of both approaches and aims to serve as a middle ground between the opposing sides.[276]

A. ERISA's History and Relation to Trust Law Calls for a Burden-Shifting Analysis

One thing that proponents of the traditional and burden-shifting approach can agree to regardless of where they fall is that the law of trusts played a significant role in the formation of what ERISA looks like today.[277] Because of this close connection, it is impossible for courts to ignore the most practical reasons

269. Michael Doluisio et al., *A Look at the Current State of ERISA Class Action Litigation*, JD SUPRA (Nov. 20, 2020), https://www.jdsupra.com/legalnews/a-look-at-the-current-state-of-erisa-94344/ [https://perma.cc/9JZR-ZYZA].

270. Darren E. Nadel & Andrew Epstein, *Tenth Circuit Departs from Other Circuit Courts and Holds Plaintiff Bears the Burden of Proving Causation in ERISA Breach of Fiduciary Duty Cases*, LITTLER MENDELSON (June 20, 2017), https://www.littler.com/publication-press/publication/tenth-circuit-departs-other-circuit-courts-and-holds-plaintiff-bears [https://perma.cc/JG62-XSSA].

271. *See* Christine P. Bartholomew & James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. REV. 862, 876 (2019).

272. *See* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 31 39 (1st Cir. 2018).

273. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 49 (2005).

274. *See* H.R. REP. NO. 93-533, at 4 (1973), *reprinted in* 1974-3 C.B. 1, 213 (1974).

275. *See generally* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 15, 55 (AM. L. INST. 2011) (discussing the definition of a confidential relationship); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. h (AM. L. INST. 2003) (listing examples of suspicious circumstances).

276. *Cf.* Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d. Cir. 2021).

277. S. REP. NO. 93-127, at 5, 29 (1974).

to join the First, Second, Fourth, Fifth, and Eighth Circuits[278] and engage in shifting the burden of proof for causation in cases arising under ERISA.

In passing ERISA, Congress sought to remedy the flaws of pre-ERISA legislation.[279] Instead of starting from scratch, Congress was able to improve on what was already in place to bolster protections for beneficiaries.[280] Many of the sections that currently allow beneficiaries and the Secretary of Labor to enforce ERISA have direct ties to trust law.[281] Curtailing the violations of fiduciaries was,[282] and should still remain, the main focus of courts looking to address the causation prong of an ERISA claim.

Opponents of this approach say that trust law does not need to be consulted and that if the drafters of ERISA wanted the burden to shift to the fiduciary, then it would have been included in the language of the statute.[283] Although trust law is not mandatory authority, the Supreme Court and lower courts have explicitly held that they "look to the law of trusts"[284] for guidance in ERISA cases and that "the law of trusts . . . informs [its] interpretation of ERISA's fiduciary duties."[285] That reliance supports shifting the burden of proof for causation to the defending fiduciary.[286]

B. Adoption of a Presumption of Burden Shifting

One of the clearest reasons for adopting a burden-shifting analysis is that it would better protect participants from fiduciary misconduct.[287] "In situations where the beneficiary has proved duty, breach, and loss, it is more probable that the fiduciary caused the loss."[288] Forcing plaintiffs to show causation would subject beneficiaries across the nation to unfair standards of proof when the fiduciaries hold most of the information that can easily prove or disprove causation in their custody.[289]

One solution to remedy this problem is to adopt the analysis for a presumption of undue influence from cases that govern wills and trusts.[290]

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with [a] donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the

278. *See* Brotherston v. Putnam, Invs., L.L.C., 907 F.3d 17, 39 (1st Cir. 2018).

279. *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f. (AM. L. INST. 2012).

280. *See id.*

281. *See Enforcement*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement (last visited Jan. 27, 2023) [https://perma.cc/7P2V-PN2F].

282. Clark, *supra* note 245, at 186.

283. *See supra* Subsection II.D.2.

284. Tibble v. Edison Int'l, 575 U.S. 523, 528–29 (2015).

285. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 253 n.4 (2008).

286. *Cf. id.*

287. Clark, *supra* note 245, at 193.

288. *Id.* at 197.

289. *See* Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 36 (1st Cir. 2018).

290. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, § 8.3 cmt. f. (AM. L. INST. 2003).

> donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type.[291]

The term "confidential relationship" can be applied to several different types of relationships.[292] Fiduciary relationships are one of the types of relationships that is labeled a confidential relationship.[293] By itself, a

> confidential relationship is not sufficient to raise a presumption of undue influence [duress, or fraud]. There must also be suspicious circumstances surrounding the preparation, execution, or formulation of the donative transfer. Suspicious circumstances raise an inference of an abuse of the confidential relationship between the alleged wrongdoer and the donor.[294]

In determining whether a suspicious circumstance exists, "all relevant factors may be considered."[295]

This Note proposes that courts hearing cases that allege a breach of fiduciary duty under ERISA should adopt the analysis for a presumption of undue influence.[296] Although the origins of the presumption of undue influence are dissimilar to those of ERISA, a comparison between the two shows that the adoption of this legal analysis would fit easily into ERISA litigation.[297] First, the element that there is a confidential relationship between the opposing parties is clearly met.[298] An established fiduciary relationship is enough to be "called 'confidential' and give rise to a presumption of undue influence."[299] Sections 1101 through 1114 of ERISA also clearly establish that the relationship between a plan participant and administrator is a fiduciary relationship.[300] Second, an ERISA cause of action alleging a breach of fiduciary duty inherently includes a suspicious circumstance.[301] Since the duty element will often require the plaintiff to proffer some form of evidence that supports a finding in order to be successful, the requirement that there is a suspicious circumstance can be established.[302]

Opponents of this standard would likely claim that applying the undue influence analysis is unfair to fiduciaries. What this counterargument fails to consider is that the policy considerations behind imposing a presumption of undue influence are nearly identical to those presented for enacting ERISA.[303]

291. *See id.*

292. *See id.* § 8.3 cmt. g.

293. *Id.*

294. *Id.* § 8.3 cmt. h.

295. *Id.*

296. *See id.* § 8.3 (discussing both undue influence and fraud, which is also a contributor to a breach and loss under ERISA).

297. *See id.* § 8.3 cmt. e.

298. *See id.* § 8.3 cmt. g.

299. *See id.*

300. *See generally* 29 U.S.C. §§ 1101–14 (outlining the fiduciary responsibilities under ERISA).

301. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 361 (4th Cir. 2014) ("In sum, in support of its holding that RJR breached its duty of procedural prudence, the district court made extensive and careful factual findings, all of which were well supported by the record evidence.").

302. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. h. (AM. L. INST. 2003) ("In evaluating whether suspicious circumstances are present, all relevant factors may be considered . . . .").

303. *Compare* FLA. STAT. § 733.107 (2014), *with* 29 U.S.C. § 1104(a).

Adopting the presumption of undue influence seeks to use public policy to hinder possible abuses of "confidential relationships and is therefore a presumption shifting the burden of proof."[304] This adoption would be consistent with the purposes of ERISA's enactment and seeks to provide an equitable outcome.[305]

C. Common Ground Between the Two Approaches

Despite the majority of circuits choosing one side or the other, recent decisions have introduced an analysis that could satisfy both camps.[306] In *Sacerdote v. New York University*, the Second Circuit departed from its previous stance that the plan beneficiaries bear the burden of proof for causation.[307] The court found that "[i]t makes much more sense for the fiduciary to say what it claims it would have done and for the plaintiff to then respond to that."[308] The court in *Sacerdote* was able to come to this analysis in large part from the First Circuit.[309] In *Brotherston*, the court outlined this exact approach when it stated that it would not be a "farfetched" idea to apply the burden-shifting analysis from *Shaffer v. Weast* "while nevertheless requiring the fiduciary to first put forward its view of what likely would have happened but for the alleged fiduciary breach."[310]

This approach allows both parties to provide support in their defense rather than placing the entire burden on the plaintiffs.[311] Under this analysis, the burden of proof should first start with the plan beneficiaries to establish a breach and loss to the employee benefit plan.[312] Upon a successful showing of breach and loss, the burden then shifts to the defendants.[313] If the defendants are able to proffer evidence that establishes either that the loss would have occurred regardless of what was done or that they acted prudently in the care of the plan,[314] the burden of proof shifts back to the plaintiffs to respond.[315]

Although fairness and equity indicate that the burden of proof for causation should lie solely with the fiduciary, if courts continue to disagree over the application of burden shifting, this hybrid approach can possibly satisfy both camps by taking elements from the traditional approach and the burden-shifting method to meet in the middle.[316]

304. *See* FLA. STAT. § 733.107 (2014).
305. *See* MOORE, *supra* note 24, § 6.01.
306. Brotherston v. Putnam Invs., L.L.C., 907 F.3d 17, 39 (1st Cir. 2018); Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021).
307. *Sacerdote*, 9 F.4th at 113.
308. *Id.* (quoting *Brotherston*, 907 F.3d at 38).
309. *Brotherston*, 907 F.3d at 38.
310. *Id.* at 39.
311. *See id.*
312. *See id.* at 39–40.
313. *Id.* at 39.
314. Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021).
315. *See id.*
316. *See Brotherston*, 907 F.3d at 39; *Sacerdote*, 9 F.4th at 113.

V. CONCLUSION

Litigation arising under the Employee Retirement Income Security Act of 1974 must shift the burden for causation to the fiduciaries to ensure an equitable result and comport with the intentions of Congress.

While some courts hold that applying the traditional approach is the right answer to ERISA's silence, this approach will contribute to the loss of millions for plan beneficiaries and ensure that fiduciaries that breach their duty remain insulated from being held accountable due to the high hurdle that beneficiaries would face.[317] This issue is ripe for the Supreme Court to address.[318] A definitive holding from our nation's highest court would finally clarify an area of the law that up until this point has caused great confusion, and allowed for decisions deviating from the true purpose for ERISA's enactment, as well as inconsistent applications of a regulation that has the potential to rip a lifetime's worth of retirement savings away from hard working employees.

317. Willett v. Blue Cross & Blue Shield of Ala., 953 F.3d 1335, 1343–44 (11th Cir. 1992).
318. *See Brotherston*, 907 F.3d 17, *cert. denied*, 140 S. Ct. 911 (2020) (No.18-926).