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The Availability of Jury Trials in ERISA Section 510 Actions: Expanding the Scope of the Seventh Amendment

Nancy L. Pirkey

THE AVAILABILITY OF JURY TRIALS IN ERISA SECTION 510 ACTIONS: EXPANDING THE SCOPE OF THE SEVENTH AMENDMENT

I. INTRODUCTION

> An employee is seriously injured in an automobile accident that results in complete, but not permanent, disability. The employee requires round-the-clock medical care at a cost of approximately $300,000 per year. The employee's medical expenses are paid by her employer's group health and long-term disability policies. Suddenly, after three and one-half years of insurance payments, the employee receives a letter from her employer indicating she has been discharged from employment because of the high cost of her medical care.[1]
>
> Does this employee have any recourse? Yes, the employee has a valid claim under section 510[2] of the Employee Retirement Income Security Act of 1974[3] (ERISA).

ERISA is a comprehensive federal statute designed to promote the interests of employees and their beneficiaries in employee pension and benefit plans.[4] Congress enacted ERISA in 1974 out of concern for the thousands of workers who were not receiving employer-promised pensions and benefits because of inadequate funding or unfair vesting requirements.[5] Before ERISA was enacted, regulation of pension and benefit plans at the state and federal levels was minimal and evidence of corruption and mismanagement was widespread.[6] ERISA was designed to replace the patchwork of state and federal laws that failed to adequately protect employees' jobs and benefits by creating a comprehensive and all-encompassing federal scheme to safeguard employee benefits.

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1. Facts taken from Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990).
2. 29 U.S.C. § 1140 (1988).
3. Employee Retirement Income Security Act of 1974 §§ 1-4402, 29 U.S.C. §§ 1001-1461 (1988) [hereinafter ERISA].
4. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).
5. S. REP. NO. 127, 93rd Cong., 1st Sess. 5-7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4842-44.
6. Peter H. Turza & Lorraine Holloway, *Preemption of State Laws Under the Employee Retirement Income Security Act of 1974*, 28 CATH. U. L. REV. 163, 169-74 (1979).

One small but significant section of ERISA, section 510, is designed to protect more than the receipt of employer-promised benefits. Section 510 is a non-discrimination clause designed to protect employees from an employer's arbitrary acts of discrimination or discharge designed to harass employees or to prevent receipt of ERISA-regulated benefits.[7] More specifically, section 510 prohibits an employer from discharging, fining, suspending, expelling, disciplining, or discriminating against any participant[8] or beneficiary[9] for the purpose of interfering with the attainment of any right that the employee may become entitled to under ERISA or a benefit plan.[10] Section 510 guarantees employees the right to claim plan benefits and to exercise their rights under ERISA without fear of reprisal and without employer interference.[11] Despite these broad protections against discriminatory acts and discharges, section 510 has been largely ignored by both litigants and the courts.[12] However, in light of the broad preemptive powers of ERISA,[13] federal courts should anticipate

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7. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 485 (1990).

8. A participant is an employee or former employee who is or may become eligible to receive a benefit from an employee benefit plan. ERISA § 3(7), 29 U.S.C. § 1002(7) (1988).

9. A beneficiary is a person designated by a participant to receive benefits or a person who can receive benefits under the terms of a plan. ERISA § 3(8), 29 U.S.C. § 1002(8) (1988). For the remainder of this Note, the term "employee" will be used to describe both participants and beneficiaries who fall within the scope and coverage of § 510.

10. The full text of ERISA § 510 states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. §§ 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1140 (1988).

11. 29 U.S.C. § 1140 (1988). For a detailed explanation of the scope and coverage of ERISA § 510, *see* Terry Collingsworth, *ERISA Section 510 - A Further Limitation on Arbitrary Discharges*, 10 INDUS. REL. L.J. 319 (1988) and William C. Martucci & John L. Utz, *Unlawful Interference with Protected Rights Under ERISA*, 2 LAB. LAW. 251 (1986).

12. Collingsworth, *supra* note 11, at 320 (concluding that courts have applied ERISA § 510 in limited contexts, but have given little attention to a systematic formula to enforce ERISA § 510 or to the larger question of the section's effect on an employer's right to discharge at will). *See also* William F. Highberger, *The Impact of ERISA on Discrimination Claims of People with AIDS*, 17 EMPL. REL. L.J. 449, 450 (1991) (plaintiffs' bar have spurned ERISA § 510 as a cause of action in favor of state and local discrimination laws).

13. *See infra* notes 27-35 and accompanying text for discussion of ERISA preemption. ERISA's preemptive power is so broad that any state cause of action purporting to provide a remedy under state law must yield to an ERISA preemption defense even when the state action authorizes a remedy unavailable under the federal provision. Ingersoll-Rand Co. v. McClendon, 111 S. Ct.

an increase in discrimination and discharge cases alleging arbitrary denial of ERISA-regulated benefits under section 510. With this expected increase in section 510 discrimination claims, the question arises whether ERISA cases that would have been tried to a jury in state court should also be permitted a jury trial in federal court.

This Note concludes that the Supreme Court should recognize that ERISA implicitly carries with it both Seventh Amendment and statutory rights to a jury trial in section 510 actions. Part II of this Note provides an overview of section 510. Part II also examines the two different causes of action available to a private litigant alleging a section 510 violation and discusses whether the right to a jury trial applies in either case. Part III examines early common law discussing the right to a jury trial under ERISA generally, and section 510 specifically. Part IV analyzes recent Supreme Court cases expanding the right to a jury trial for statutory causes of action. Part V discusses the Supreme Court's current two-part test for determining if the Seventh Amendment guarantees the right to a jury trial and then applies this test to section 510 to decide if employees are constitutionally entitled to a jury trial. This Note concludes with a proposed statute that would unequivocally grant the right to a jury trial under ERISA section 510 to give full force to the protections of the Seventh Amendment and achieve the congressional intent of ERISA to provide uniformity and consistency.

II. PURPOSE AND SCOPE OF ERISA SECTION 510

ERISA establishes minimum federal standards for private pension and benefit plans[14] and imposes participation, funding, and vesting requirements on pension plans. ERISA also establishes various uniform standards on both pension and benefit plans, including rules on reporting, disclosure, and fiduciary responsibility.[15] Congress imposed these requirements to reduce the arbitrariness that had characterized employer decisions regarding who received benefits and in what amount.[16] As part of this regulatory system, Congress included various safeguards to prevent abuse and "to completely secure the

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478, 486 (1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987)). Thus, a state cause of action for wrongful discharge that alleges discharge to avoid paying benefits to a pension plan is preempted by ERISA and must be removed to federal court. *Id.*

14. Martucci & Utz, *supra* note 11, at 251. *See also* HENRY H. PERRITT, JR., EMPLOYEE BENEFIT CLAIMS LAW AND PRACTICE § 5.1, at 234 (1990) (stating that an employer is not required to establish a pension or benefit plan, but once established, the plan must meet minimum requirements for reporting and disclosure, fiduciary responsibility, participation, vesting, funding, and plan terminations).

15. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983).

16. Martucci & Utz, *supra* note 11, at 251.

rights and expectations brought into being by this landmark reform legislation."[17] These safeguards include three prominent provisions protecting individual employee rights to ERISA benefits: section 510, prohibiting employer discrimination or discharge intended to interfere with rights protected by ERISA; section 514(a), offering a broadly worded preemption provision; and section 502(a), a carefully integrated civil enforcement scheme that is an essential tool for accomplishing the stated purposes of ERISA.[18]

A. Protections Offered by ERISA Section 510

Section 510 prohibits an employer from adversely interfering with an employee's attainment of any right that the employee may become entitled to under an employee benefit plan.[19] Specific employer conduct prohibited by section 510 includes discharge, suspension, discrimination, fines, expulsion, and discipline.[20] This Note, like most court cases, will focus on employer discharge because ERISA section 510 directly prohibits wrongful discharge and because discharge is most likely to spur the filing of a private cause of action. However, the analysis, conclusions, and recommendations made in this Note apply equally to other forms of employer conduct prohibited by section 510, including suspension, discrimination, fines, expulsion, and discipline.

Fear that employers were discharging employees to avoid payments of pension and other plan benefits led Congress to enact section 510.[21] Additionally, Congress was concerned for those employees who were not discharged, but were being coerced into not asserting claims for benefits owed.[22] For example, Congress believed employers were harassing their employees to convince employees not to exercise their right to benefits. In light of these concerns, section 510 was essential not only to preclude this type of employer abuse, but also to correct pre-ERISA abuses.[23] In sum, Congress enacted section 510 primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."[24] Some courts have expanded the scope of section 510

17. Ingersoll-Rand v. McClendon, 111 S. Ct. 478, 482 (1990) (quoting S. REP. NO. 127, 93rd Cong., 1st Sess. 36 (1973)).

18. *Id.*

19. *See supra* note 10 for text of ERISA § 510.

20. *Id.*

21. Martucci & Utz, *supra* note 11, at 254.

22. S. REP. NO. 127, 93rd Cong., 1st Sess. 35-36 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872.

23. Martucci & Utz, *supra* note 11, at 254.

24. Zipf v. American Telephone & Telegraph Co., 799 F.2d 889, 891 (3d Cir. 1986) (citing West v. Butler, 621 F.2d 240, 244-46 (6th Cir. 1980)) (the legislative history of ERISA reveals that § 510 was enacted to prevent employers from discharging employees to avoid receipt of statutory

to include protection from discharge after pension rights have vested.[25] Accordingly, section 510 may protect employees from discharge after benefits have vested, if the purpose of the discharge is to prevent accrual of ERISA rights or benefits.[26]

B. Preemptive Effect of ERISA Section 510

Congress included a broadly worded preemption provision to ERISA in section 514(a).[27] This preemption clause establishes that pension plan regulation is exclusively a federal concern[28] and ensures that benefit plans are subject to a uniform body of federal law.[29] Congress' goal was to minimize the administrative and financial burden of employer compliance with conflicting

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or plan based benefits).

25. Clark v. Resistoflex Co., 854 F.2d 762, 770-71 (5th Cir. 1988) (employee states a claim under § 510 by alleging that his employer terminated him to prevent accrual of additional benefits under the vested plan); Kross v. Western Electric Co., 701 F.2d 1238, 1243 (7th Cir. 1983) (plaintiff stated a claim cognizable under ERISA § 510 when he alleged his discharge was for the purpose of depriving him of continued participation in his employer's benefit plan); Conkwright v. Westinghouse Elec. Corp., 739 F. Supp. 1006, 1018-19 (D. Md. 1990) (the legislative history of § 510 does not prohibit an employee from filing a claim alleging interference in accrual of future benefits after his benefits are vested); Nemeth v. Clark Equipment Co., 677 F. Supp. 899, 909 (W.D. Mich. 1987) (ERISA protects employees from employer action taken to prevent the accrual of additional rights or benefits under a qualified plan.); Garry v. TRW, Inc., 603 F. Supp. 157, 162 (N.D. Ohio 1985) (section 510 does not preclude an employee from pursuing a claim simply because his benefits were vested). *But see* Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988) (section 510 does not protect every employee from discharge until he or she has fully vested in the employer's benefit plan); Moehle v. NL Industries, Inc., 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986) *aff'd*, 845 F.2d 1027 (8th Cir. 1988) (plaintiffs have not stated a claim under § 510 because plaintiffs were vested and § 510 is designed to prevent employers from discharging employees in order to prevent vesting); Corum v. Farm Credit Services, 628 F. Supp. 707, 717 (D. Minn. 1986) (where plaintiff's rights were vested, plaintiff cannot maintain that defendant fired him in order to prevent plaintiff from obtaining vested pension rights).

26. *See, e.g.*, Clark v. Resistoflex Co., 854 F.2d 762, 770-71 (5th Cir. 1988) (section 510 does not preclude an employee from pursuing a claim after his benefits have vested); Kross v. Western Elec. Co., 701 F.2d 1238, 1243 (7th Cir. 1983) ("Congress did not enact ERISA with the intent to negate the long established practice of affording greater benefits and protections to those employees who have more seniority . . . [than] junior employees"); Conkwright v. Westinghouse Elec. Corp., 739 F. Supp. 1006, 1019 (D. Md. 1990) (vested employee states cause of action under § 510 for alleged interference in accrual of future benefits).

27. ERISA § 514(a) provides:

> Except as provided in subchapter (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

29 U.S.C. § 1144(a) (1988).

28. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (Congress intended ERISA to be a comprehensive, broadly worded statute and to establish pension plan regulation as exclusively a federal matter).

29. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 484 (1990).

regulations among states or between states and the federal government.[30] To meet the congressional goal of uniformity, ERISA's preemption clause precludes state law claims relating specifically to subjects covered by ERISA as well as state law claims having any connection with or reference to an ERISA plan.[31] ERISA's preemptive force is strong enough to reach not only claims based directly on plan documents, but also claims indirectly related to the administration of an ERISA plan. Thus, section 514(a) has such a sweeping impact that it also preempts state laws that are not designed to affect ERISA plans or that have only an indirect effect.[32]

As applied to actions filed under section 510, the broad preemption powers of section 514(a) displace state law wrongful discharge claims, even if the state law claim authorizes a remedy unavailable under ERISA.[33] Correspondingly, when a state cause of action challenges employer conduct protected by ERISA section 510, that state cause of action must yield to the federal forum.[34] Therefore, the exclusive remedy available to a plaintiff alleging wrongful discharge designed to interfere with attainment of benefits is a federal action under ERISA section 510.[35]

C. Private Rights of Action Under ERISA Section 510.

Congress created broad civil enforcement mechanisms under ERISA section 502(a)[36] that allow a private party to sue to enforce her rights under section 510. Congress intended the enforcement provisions of section 502(a) to provide participants and beneficiaries broad remedies to redress or prevent ERISA violations.[37] Section 502(a)'s civil enforcement mechanisms are the exclusive remedies available to preserve rights guaranteed under ERISA, including those

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30. *Id.*

31. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-98 (1983) (Congress intended the phrase "relate to" in § 514(a) to be read broadly and specifically rejected more limited preemption language that would have made § 514(a) applicable only to state laws relating to the specific subjects covered by ERISA).

32. *Pilot Life*, 481 U.S. at 47.

33. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 485-86 (1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)).

34. *Id.* at 486.

35. *Id.* at 485 (quoting *Pilot Life*, 481 U.S. at 54).

36. 29 U.S.C. § 1132(a) (1988).

37. H.R. REP. NO. 533, 93rd Cong., 1st Sess. 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 ("The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the Act."); *see also* S. REP. NO. 127, 93rd Cong., 1st Sess. 5-7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 (stating goal of enforcement provisions is to give beneficiaries broad remedies for redressing violations of the Act).

rights and remedies provided by section 510.[38] Because of this exclusivity, an employee must file a cause of action using the enforcement mechanisms of section 502(a) to remedy any violation of section 510.

Section 502(a) recognizes two separate and distinct enforcement mechanisms that a participant or beneficiary may use to challenge an employer's action under section 510. First, section 502(a)(3) permits a participant or beneficiary to enjoin any act or practice that violates ERISA or the terms of the plan, to obtain other appropriate equitable relief, to redress such violations, or to enforce ERISA provisions or the terms of the plan.[39] A close examination of the language of section 502(a)(3) reveals that the language provides equitable relief only. The word "equitable" is a term of art historically used to describe actions that were heard by courts of equity sitting without a jury.[40] When words are used in a statute that, at the time of the statutes's enactment, had a well-known meaning at common law, then these words are presumed to have been used in that sense.[41] By using the terms "enjoin" and "equitable relief," Congress likely intended these words to have their plain and well-known meaning--that no right to a jury trial be permitted under section 502(a)(3).[42]

However, the fact that the rules of statutory construction indicate that Congress did not intend such a right under section 502(a)(3) does not complete the inquiry. Courts must also examine whether the right to a jury trial is guaranteed by the Seventh Amendment.[43] The remedies of an injunction and other "equitable relief" are inherently equitable in nature, since the basis for obtaining equitable relief in the federal courts is an inadequacy of legal remedies.[44] The Seventh Amendment does not recognize the right to a trial by

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38. Ingersoll-Rand v. McClendon, 111 S. Ct. 478, 485 (1990).

39. Section 502(a)(3) provides that an action may be brought:

> by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of [the] subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [the] subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (1988).

40. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

41. Standard Oil v. United States, 221 U.S. 1, 59 (1911) (When a statute is enacted, the words used are presumed to have the common, well-known meaning of the common law or the laws of this country, unless the context of the statute compels a contrary result).

42. Cox v. Keystone Carbon Co., 861 F.2d 390, 393 (3d Cir. 1988) (The use of the words "equitable relief" in § 502(a)(3) implies that Congress knew the significance of the term "equitable relief" and intended that no jury trial be available on demand).

43. Tull v. United States, 481 U.S. 412, 417 n.3 (1987) (when a statute does not imply any congressional intent to grant the right to a jury trial, the constitutional question must then be addressed).

44. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959) (in the federal courts equity has always acted only when legal remedies were inadequate).

jury where equitable rights and remedies are at stake.[45] Because section 502(a)(3) offers equitable remedies to civil litigants, the Seventh Amendment does not afford a right to a jury trial for section 502(a)(3) actions. Thus, neither congressional mandate nor the Seventh Amendment require that actions brought under section 502(a)(3) be tried before a jury.

The second mechanism available to a participant or beneficiary to challenge an employer's adverse action under ERISA is the civil enforcement scheme of section 502(a)(1)(B).[46] Civil actions may be brought under section 502(a)(1)(B) to recover benefits due under the terms of an employee benefit plan, to enforce rights in an employee benefit plan, and to clarify rights to future benefits.[47] The distinction between section 502(a)(3) causes of action and section 502(a)(1)(B) causes of action is important because each section creates independent rights and remedies. While section 502(a)(3) offers ERISA litigants equitable remedies, section 502(a)(1)(B) offers more traditional legal remedies for plan enforcement actions and recovery of benefits owed. When a statute expressly provides particular remedies, a court must be extremely cautious in reading other remedies into it.[48] Thus, the fact that section 502(a)(3) does not provide the right to a jury trial is not determinative of whether such a right exists for actions filed under section 502(a)(1)(B).

Plaintiffs challenging an employer's decision under section 510 generally file a cause of action using the enforcement mechanisms set forth in section 502(a)(1)(B), rather than requesting equitable relief under section 502(a)(3).[49] Many section 510 plaintiffs include a demand for jury trial in their complaint.[50] Nothing in the statute characterizes these section 502(a)(1)(B) actions as either legal or equitable in nature, nor does the statutory language provide a right to

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45. *Tull*, 481 U.S. at 417. *See infra* notes 182-203 and accompanying text for a discussion of the right to a jury trial preserved by the Seventh Amendment.

46. 29 U.S.C. § 1132(a)(1)(B) (1988).

47. Section 502(a)(1)(B) provides that an action may be brought:

> (1) by a participant or beneficiary-
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> (A) . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B) (1988).

48. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985) ("Courts are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.").

49. *See generally* Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir. 1990); Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.) *cert. denied*, 484 U.S. 979 (1987); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990).

50. *See* cases cited *supra* at note 49.

jury trial on its face.[51] Therefore, the remainder of this Note will examine both the legislative history of ERISA and the Seventh Amendment to determine if either source provides litigants with the right to a jury trial in section 510 actions.

III. THE REASONING OF COURTS IN DENYING JURY TRIALS IN ERISA SECTION 510 ACTIONS

Two primary steps determine whether a civil litigant is entitled to a jury trial. The first step examines the statute to determine whether Congress either explicitly or implicitly granted the right to a jury trial.[52] The second step considers whether the Seventh Amendment grants the right to a jury trial as a constitutional matter.[53] If the statute either explicitly or implicitly provides the right to a jury trial, then the constitutional issue need not be addressed.[54] Applying this two-step process, early cases deciding the issue of the right to a jury trial in ERISA actions frequently relied on statutory grounds to both grant and deny plaintiffs' demands for a jury trial. Because most lower courts found that analyzing ERISA and its legislative history resolved the question of the right to a jury trial, the Seventh Amendment was rarely discussed in early ERISA cases.[55]

A. Lower Courts Granting the Right to a Jury Trial

One of the first courts to decide the issue of the right to a jury trial under ERISA was the federal district court in *Stamps v. Michigan Teamsters Joint Council 43*.[56] The court concluded that a claim for benefits due under ERISA was analogous to a breach of contract claim and triable to a jury.[57] The *Stamps* court examined the two enforcement schemes available to private litigants and concluded that section 502(a)(3) creates a civil action for equitable

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51. *See supra* note 47 for language of § 502(a)(1)(B).

52. Curtis v. Loether, 415 U.S. 189, 191-92 (1974).

53. *See* cases cited *infra* notes 192-98 and accompanying text.

54. *Curtis*, 415 U.S. at 192 n.6 (discussing the Supreme Court's cardinal principle that requires a court first ascertain whether construction of the statute is fairly possible so as to avoid addressing the constitutional question raised).

55. The cases discussed in this section are not restricted to interpretations of § 510, but also include court interpretations of the rights and remedies provided by § 502(a)(1)(B). In determining if a jury trial must be provided, the court examines the remedial and procedural sections of the statute. Cox v. Keystone Carbon Co., 861 F.2d 390, 392 (3d Cir. 1988). In this case, § 502(a)(1)(B) establishes the procedures and remedies available to § 510 litigants. Therefore, cases interpreting the question of the right to a jury trial under § 502(a)(1)(B) are relevant to the question of the right to a jury trial for § 510 actions.

56. 431 F. Supp. 745 (E.D. Mich. 1977).

57. *Id.* at 747.

relief and section 502(a)(1)(B) provides a separate civil action for legal relief.[58] The court relied on principles of statutory construction to find that the two statutes must have different meanings or one would be superfluous.[59] The *Stamps* court also examined the legislative history of ERISA and concluded that Congress relied on section 301 of the Labor-Management Relations Act of 1947[60] (LMRA) when it fashioned the civil enforcement language of section 502(a).[61] To comply with legislative intent, the *Stamps* court concluded that actions filed under section 502(a) of ERISA should be guided by the case law developed under LMRA section 301 which includes the right to a jury trial.[62]

Similarly, the U.S. District Court for the Southern District of New York found an implied right to a jury trial in ERISA actions in *Paladino v. Taxicab Industry Pension Fund*.[63] The district court first assumed that because ERISA actions are "essentially equitable in nature," they include no Seventh Amendment right to a jury trial.[64] Notwithstanding the Seventh Amendment issue, the *Paladino* court found an implied right to a jury trial based on a congressional intent to treat ERISA plan enforcement actions as legal in nature.[65] The court analogized the right to pension benefits to a breach of contract claim that carries with it the right to a jury trial.[66] The court also analogized between a LMRA section 301 action for money damages that is triable to a jury and a contract action for past due benefits under a pension plan to find an implied right to a jury trial under ERISA.[67]

More recently, a district court relied on both statutory and constitutional grounds to find a right to a jury trial under ERISA. In *Whitt v. Goodyear Tire*

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58. *Id.*

59. *Id.* at 747 (explaining that the language of § 502(a)(1)(B) would be meaningless if the remedies available under this section also provide equitable relief, since this interpretation would make § 502(a)(3) superfluous).

60. Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1988) [hereinafter LMRA].

61. Stamps v. Michigan Teamsters Joint Council 43, 431 F. Supp. 745, 747 (E.D. Mich. 1977) (citing 1974 U.S.C.C.A.N. 5038, 5107).

62. *Id.* at 746. *Accord* Pollock v. Castrovinci, 476 F. Supp. 606, 609 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980) (holding that the legislative history of ERISA indicates that § 502 actions should be guided by the caselaw under § 301 of the LMRA, including the right to a jury trial upon request).

63. 588 F. Supp. 37, 39 (S.D.N.Y. 1984).

64. *Id.* at 39. The court relied on the arbitrary and capricious standard of review to find that an "equitable" issue exists when the trier of fact in an ERISA action is not permitted to substitute his judgment for that of the trustees. *Id.* This case was decided before the Supreme Court imposed a de novo standard of review for denial of benefit claims. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

65. *Paladino*, 588 F. Supp. at 39.

66. *Id.* at 39-40.

67. *Id.* at 40. (citing Allen v. United Mine Workers of America, 319 F.2d 594 (6th Cir. 1963)).

& Rubber Co.,[68] the district court determined that Congress intentionally recognized the distinction between law and equity in ERISA because it was aware of the Seventh Amendment implications of the use of these terms.[69] The court concluded that Congress intentionally used the term "equitable relief" in section 502(a)(3) to completely eliminate the right to a jury trial for section 502(a)(3) actions.[70] Similarly, Congress' failure to describe actions under section 502(a)(1)(B) as "equitable" evidences its intent to provide legal relief for section 502(a)(1)(B) actions.[71] The court held that because ERISA does not explicitly recognize the right to a jury trial, Congress intended to follow the Seventh Amendment distinction between legal and equitable remedies.[72]

In *Whitt*, the court confirmed the critical importance of the Seventh Amendment by relying on the recently issued Supreme Court decision of *Tull v. United States*.[73] However, three weeks after its decision, the *Whitt* court reversed itself in a "mea culpa" addendum and found no right to a jury trial for ERISA actions.[74] The court found that it had prematurely embraced the Supreme Court decision in *Tull v. United States*, since *Tull* did not specifically address the issue of the Seventh Amendment right to a jury trial under ERISA.[75] Instead, the *Whitt* court found itself bound by a recent Eleventh Circuit decision addressing this specific issue under ERISA and found no right to a jury trial for any ERISA action.[76]

B. Lower Courts Denying the Right to a Jury Trial

The Seventh Circuit conclusively rejected the right to a jury trial in ERISA actions in *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*.[77] The Seventh Circuit held that ERISA's statutory scheme does not

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68. 676 F. Supp. 1119 (N.D. Ala. 1987).

69. *Id.* at 1123-24.

70. *Whitt*, 676 F. Supp. at 1124.

71. *Id.*

72. *Id.* at 1123-34.

73. 481 U.S. 412 (1987). *See infra* notes 125-135 and accompanying text for an analysis of the *Tull* decision.

74. Whitt v. Goodyear Tire & Rubber Co., 676 F. Supp. 1119, 1132-34 (N.D. Ala. 1987). The court found it embarassing to make a "180-degree turn," but felt it could not ignore the Eleventh Circuit's flat holding in Chilton v. Savannah Foods & Industries, Inc., 814 F.2d 620 (11th Cir. 1987). *Id.* at 1132.

75. *Whitt*, 676 F. Supp. at 1132-34.

76. *Id.* at 1132-33. The court found itself bound by Chilton v. Savannah Foods & Industries, Inc., 814 F.2d 620 (11th Cir. 1987), even though Tull v. United States, 481 U.S. 412 (1987), was decided two weeks after *Chilton*, since "*Tull* did not deal with the Seventh Amendment *in the ERISA context.*" *Whitt*, 676 F. Supp. at 1132-33 (emphasis added).

77. 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

suggest that claims filed under section 502(a)(1)(B) are legal in nature.[78] Instead, the Seventh Circuit determined that Congress' silence on the jury trial issue reflected its intent to treat section 502(a)(1)(B) claims analogously to trust actions, which have traditionally been viewed as equitable in nature.[79] The problem with this conclusion is that Congress' silence is subject to many different interpretations, only one of which equates ERISA claims with trust actions.[80]

The *Wardle* court interpreted the reference to LMRA section 301 in the legislative history of ERISA differently than the court in *Stamps*. *Wardle* reasoned that the reference to LMRA section 301 actions indicated Congress' intent that federal courts should create federal common law in section 502(a)(1)(B) actions just as the courts did in LMRA section 301 actions.[81] *Wardle* concluded that Congress did not mean that the identical common law already created under LMRA section 301 actions, including the right to a jury trial, should be applied to section 502(a)(1)(B) actions.[82] Finally, *Wardle* relied on the standard of review for ERISA actions, the arbitrary and capricious standard, to conclude that section 502(a)(1)(B) actions are equitable suits.[83] Because judges, rather than jurors, traditionally applied the arbitrary and capricious standard of review, the Seventh Circuit found that use of this standard demonstrates an implied congressional intent to treat section 502(a)(1)(B) claims as equitable actions.[84]

Most federal circuit courts have adopted the *Wardle* line of reasoning in

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78. Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (the reason Congress divided § 502(a) into two types of remedies was to distinguish § 502(a)(1)(B) claims that have concurrent state and federal jurisdiction from § 502(a)(3) claims that have exclusive federal jurisdiction).

79. *Id.*

80. *But see* Case Comment, *The Right to a Civil Jury Trial in ERISA Section 502(a)(1)(B) Actions:* Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 65 MINN. L. REV. 1209, 1215-16 (1981) (because an ERISA action is a pension beneficiary claim against the trustees of a pension fund, it appears more analogous to the old beneficiary-trustee form of action).

81. Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)) (federal courts can establish federal common law for claims arising under § 301 of the LMRA).

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

83. *Id.* at 829-30.

84. Several years after *Wardle*, the Supreme Court rejected the arbitrary and capricious standard and applied a de novo standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). The Court concluded that the appropriate standard of review for actions under § 502(a)(1)(B) should be guided by principles of trust law which utilizes a de novo standard of review. This standard is consistent with the scope of review utilized by the courts prior to the enactment of ERISA, when actions challenging a denial of benefits were governed by principles of contract law. *See* cases cited *infra* at note 106.

finding that a jury trial is not required under section 502(a)(1)(B).[85] For example, the Fifth Circuit cited *Wardle* with approval in *Calamia v. Spivey*.[86] The Fifth Circuit did not independently analyze prior cases or the legislative history of ERISA to conclude that ERISA does not entitle plaintiffs to a jury trial.[87] Instead, the Fifth Circuit examined the reasoning of both *Wardle* and *Stamps* and concluded that *Wardle* properly decided the jury trial issue.[88]

The Second Circuit reached a slightly different result in *Katsaros v. Cody*.[89] The court ruled that plaintiffs in an ERISA section 502(a)(1)(B) action were not entitled to a jury trial on claims seeking equitable relief in the form of removal and restitution, as distinguished from damages for wrongdoing or non-payment of benefits.[90] Thus, the Second Circuit interprets the case law to preclude the right to a jury trial only when traditionally equitable claims are at issue.

In applying the *Katsaros* rule, the federal district courts have reached

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85. Crews v. Central States, Southeast and Southwest Areas Pension Fund, 788 F.2d 332, 338 (6th Cir. 1986) and cases cited therein (most courts have rejected *Stamps* and followed the holding of *Wardle*, citing cases decided by the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits as well as several federal district courts). *See generally* Bair v. General Motors Corp., 895 F.2d 1094 (6th Cir. 1990); Chilton v. Savannah Foods & Indus., Inc., 814 F.2d 620 (11th Cir. 1987); Turner v. CF & I Steel Corp., 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984), *cert. denied*, 474 U.S. 864 (1985); Katsaros v. Cody, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); Bugher v. Feightner, 722 F.2d 1356, 1359 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984); *In re* Vorpahl, 695 F.2d 318, 321 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235, 1236-37 (5th Cir. 1980); Strout v. GTE Products Corp., 618 F. Supp. 444, 445 (D. Me. 1985); Gilliken v. Hughes, 609 F. Supp. 178, 181 (D. Del. 1985); Hollenbeck v. Falstaff Brewing Co., 605 F. Supp. 421, 430-31 (E.D. Mo. 1985); Sixty-Five Sec. Plan v. Blue Cross & Blue Shield of Greater New York, 583 F. Supp. 380, 389 (S.D.N.Y 1984); Cowden v. Montgomery County Society for Cancer Control, 591 F. Supp. 740, 746-47 (S.D. Ohio 1984). *But see* Paladino v. Taxicab Indus. Pension Fund, 588 F. Supp. 37, 38 (S.D.N.Y. 1984); Pollock v. Castrovinci, 476 F. Supp. 606, 609 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980).

86. 632 F.2d 1235 (5th Cir. 1980).

87. *Id.* at 1237.

88. *Id.* The *Calamia* court considered the *Wardle* court's explanation of the reference to LMRA § 301 as a much more plausible interpretation of the legislative history of ERISA. The *Calamia* court also agreed with *Wardle's* reliance on the arbitrary and capricious standard of review as evidence that Congress intended to have judges and not juries decide § 502(a)(1)(B) actions. *See also In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982) ("We agree with *Wardle* that the *Stamps* construction is flawed.").

89. 744 F.2d 270 (2d Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984).

90. *Id.* at 278.

opposite results.[91] One interpretation concludes that *Katsaros* creates a bright-line rule that jury trials are never appropriate in ERISA actions.[92] The other interpretation concludes that some ERISA actions are triable to a jury.[93] These courts read *Katsaros* as establishing a rule that ERISA claims for non-payment of benefits are legal in nature and triable to a jury.[94]

The Third Circuit relied on statutory grounds to find that section 510 offers equitable remedies with no right to a jury trial.[95] In *Cox v. Keystone Carbon Co.*,[96] the court rejected the plaintiff's argument that his claim to enforce his right to be free from tortious interference was a legal claim guaranteed by section 510.[97] Instead, the court found plaintiff's section 510 claim to be an equitable claim under the second clause of section 502(a)(1)(B), a claim to enforce his *rights* under the terms of the plan.[98] The court found no congressional intent to provide section 510 with legal remedies, but did find an explicit intention to provide equitable remedies under section 502(a)(1)(B).[99]

Taken together, these cases demonstrate that no bright-line rule exists concerning when, or even if, the right to a jury trial exists for actions filed under ERISA section 502(a)(1)(B). The lower courts have used varying

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91. *Compare* Resnick v. Resnick, 763 F. Supp. 760, 765 (S.D.N.Y. 1991) (*Katsaros* endorses the rule that the right to a jury trial of an ERISA claim depends upon the relief sought), Weber v. Jacobs Mfg. Co., 751 F. Supp. 21, 24 (D. Conn. 1990) (*Katsaros* permits a jury trial when plaintiff seeks relief other than that which is considered equitable in nature) and Abbarno v. Carborundum Co., 682 F. Supp. 179 (W.D.N.Y. 1988) (some ERISA actions may appropriately be tried to a jury) *with* Nobile v. Pension Comm'n, 611 F. Supp. 725 (S.D.N.Y. 1985) (*Katsaros* creates a bright-line rule that denies the right to jury trial in all ERISA actions).

92. Berlo v. McCoy, 710 F. Supp. 873, 874 (D.N.H. 1989); Nobile v. Pension Comm'n, 611 F. Supp. 725, 727-28 (S.D.N.Y. 1985).

93. *See* Resnick v. Resnick, 763 F. Supp. 760, 765 (S.D.N.Y. 1991); Weber v. Jacob Mfg. Co., 751 F. Supp. 21, 24 (D. Conn. 1990); Abbarno v. Carborundum Co., 682 F. Supp. 179, 181-82 (W.D.N.Y. 1988).

94. *Abbarno*, 682 F. Supp. at 181 (holding that claim of non-payment of benefits is legal in nature and triable to a jury under the *Katsaros* rule).

95. Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 47 (1990). This is a remand case from Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988). In the first *Cox* case, the Third Circuit held that § 502(a)(3) provides equitable relief only. The court ruled that Congress knew the significance of the term "equitable relief" when it placed that language in § 502(a)(3). The court then remanded the case to the district court to determine whether the plaintiff's claim was also filed under § 502(a)(1)(B) and whether plaintiff was entitled to a jury trial thereunder.

96. Cox v. Keystone Carbon Co. 894 F.2d 647, 650 (3d Cir.), *cert. denied*, 111 S. Ct. 47 (1990).

97. *Id.* at 650.

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

99. *Cox*, 894 F.2d at 650.

interpretations of the statute and its legislative history to reach very different results. Some courts find unequivocally that Congress intended no right to a jury trial be provided in any ERISA action. Other courts find a limited right to a jury trial when the claim involves recovery of benefits or other legal remedies. Finally, some courts find that the statute and its legislative history demonstrate an implied right to a jury trial for all claims under ERISA section 502(a)(1)(B).

These conflicting views require action by Congress or the Supreme Court to decide this issue to provide uniformity and consistency. The purpose of ERISA is to create uniformity in enforcement of benefit and pension plans among the states and between the states and the federal government.[100] On the question of the right to a jury trial, this goal has failed to create a uniform standard that all federal courts can follow. Therefore, Congress should act to clarify the rights provided under ERISA's civil enforcement scheme.

IV. RECENT SUPREME COURT DECISIONS THAT IMPACT ON THE RIGHT TO A JURY TRIAL IN ERISA SECTION 510 ACTIONS

In the last five years, the Supreme Court has rendered several decisions that significantly impact on the question of the right to a jury trial in ERISA section 510 actions. Two of these cases undermine the rationale used by the lower courts to deny jury trials in ERISA actions.[101] The remaining cases demonstrate the expansive view adopted by the Supreme Court in granting the constitutional right to a jury trial in actions for violations of a statute.

A. Recent Supreme Court Decisions Undermining Lower Court Decisions

In *Firestone Tire & Rubber Co. v. Bruch*,[102] the Supreme Court ruled that the de novo standard of review is the appropriate standard to review section 502(a)(1)(B) actions challenging a denial of benefits based on an interpretation of plan documents.[103] The Court rejected the lower courts' adoption of an arbitrary and capricious standard of review, finding that the arbitrary and

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100. *See supra* notes 21-26 and accompanying text for discussion of purpose of ERISA.

101. *See supra* notes 77-99 and accompanying text discussing the rationale of the lower courts in denying the right to a jury trial in ERISA actions generally and § 510 actions specifically.

102. 489 U.S. 101 (1989).

103. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). *Firestone* recognized one exception to the use of the de novo standard of review. This standard does not apply to plans where the terms of the plan expressly delegate to the plan administrator the authority to determine eligibility for benefits or to interpret the terms of the plan. *Id. See also* Leslie J. Wellman & Shari J. Clark, *An Overview of Pension Benefit Fiduciary Litigation Under ERISA*, 26 WILLAMETTE L. REV. 665, 689-90 (1990) (noting that the Court has eliminated some of the confusion surrounding the arbitrary and capricious standard, but has raised a whole new series of questions on the application of the de novo standard to ERISA actions).

capricious standard would give employees less protection than they enjoyed before ERISA was enacted.[104] The Court held that the de novo standard of review is consistent with pre-ERISA interpretations of employee benefit plans.[105] Prior to ERISA, courts applied principles of contract law to decide employee benefit disputes.[106] Courts looked at the specific terms of the benefit plan and other manifestations of the parties' intent to decide benefit disputes before Congress enacted ERISA.[107]

The *Firestone* decision raises serious doubts about the rationale adopted by the majority of federal courts that have denied jury trials in ERISA section 502(a)(1)(B) actions. Many federal courts relied on the arbitrary and capricious standard of review as evidence of Congress' intent that section 502(a)(1)(B) actions be tried to a judge because determining whether the plan acted arbitrarily and capriciously in denying benefits was a role traditionally performed by judges.[108] These courts recognized that the arbitrary and capricious standard had been adopted from the equity courts, and naturally concluded that ERISA must offer equitable remedies only.[109] The *Firestone* decision undermines this rationale and raises questions as to the validity of cases that relied on the arbitrary and capricious standard to deny jury trials to litigants in ERISA actions.

Further undermining the lower courts' rationale, *Firestone* explicitly recognized the historical connection between breach of contract claims and ERISA claims. In *Firestone*, the Court held that employees bringing claims under ERISA are entitled to at least the same level of protection that existed prior to ERISA's passage, when benefit claims were governed by principles of contract law.[110] This historical analogue is particularly important to the question of whether the Seventh Amendment guarantees the right to a trial by jury. The *Firestone* Court's recognition of the relationship between ERISA claims and breach of contract claims satisfies the first part of the Seventh Amendment test for establishing the constitutional right to a jury trial.[111]

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104. *Id.* at 112-14.

105. *Id.* at 112-13.

106. *See, e.g.*, Conner v. Phoenix Steel Corp., 249 A.2d 866 (Del. 1969); Atlantic Steel Co. v. Kitchens, 228 Ga. 708, 187 S.E.2d 824 (1972); Sigman v. Rudolph Wurlitzer Co., 57 Ohio App. 4, 11 N.E.2d 878 (1937).

107. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112-13 (1989).

108. *See supra* notes 77-99 and accompanying text analyzing the court's rationale in *Wardle* and its progeny.

109. *See, e.g.*, Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) and cases cited *supra* at note 85.

110. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989).

111. *See infra* notes 184-98 and accompanying text for a detailed discussion of the Seventh Amendment test for the right to a trial by jury.

In another recent case, the Supreme Court applied ERISA's preemption clause to a state law claim that an employer wrongfully discharged an employee to avoid payment of pension benefits. In *Ingersoll-Rand Co. v. McClendon*,[112] the Court issued a forceful ruling in favor of federal preemption of all state statutory and common law remedies alleging a right guaranteed under ERISA section 510.[113] In *Ingersoll-Rand*, the plaintiff filed a wrongful discharge action in a Texas state court, seeking compensatory and punitive damages under various tort and contract theories. The Texas Supreme Court noted that federal courts had held similar claims of wrongful discharge preempted by ERISA, but distinguished the present action because the plaintiff was seeking lost wages, mental anguish, and punitive damages, rather than pension benefits. The U.S. Supreme Court reversed, holding that ERISA section 510 preempted the state cause of action.[114]

The *Ingersoll-Rand* ruling is relevant to the discussion of the right to a jury trial in ERISA section 510 actions for several reasons. First, the broad preemption rule[115] established by *Ingersoll-Rand* prevents a discharged employee from filing a statutory or common law claim for wrongful discharge in state court in order to obtain a jury trial, if the state claim overlaps with the protections afforded by ERISA section 510.[116] Therefore, employees wrongfully discharged to prevent their receipt of ERISA benefits are precluded from "forum shopping" to find the judge or jury most sympathetic to their cause of action.

The *Ingersoll-Rand* decision is also important because of the Court's analogy between the preemption clause of ERISA and the exclusive remedy provided by section 301 of the LMRA.[117] The Court examined the legislative history of ERISA and concluded that Congress intended the preemptive force of ERISA to mirror the preemptive force of LMRA section 301, including the requirement that federal law displace all state law claims, even when the state action did not authorize the same remedies as the federal provision.[118] This analogy between the LMRA and ERISA preemption provisions is significant because several federal courts have relied on a similar analogy to transfer the

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112. 111 S. Ct. 478 (1990).

113. *Id.* at 484-85.

114. *Id.* at 486.

115. *See supra* notes 27-35 and accompanying text for discussion of ERISA's broad preemption powers.

116. Ingersoll-Rand v. McClendon, 111 S. Ct. 478, 485-86 (1990).

117. *Id.* (noting that the parallel between LMRA § 301 and ERISA § 502(a) is so strong that ERISA's preemption clause provides a sufficient basis for removal of a state cause of action to the federal forum).

118. *Id.* at 486 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987)).

right to a jury trial granted in LMRA section 301 actions to ERISA actions.[119] If the Court in *Ingersoll-Rand* found that Congress clearly intended to pattern ERISA's preemption clause after the preemption clause in LMRA section 301, then it can also be inferred that Congress intended that section 301's right to a jury trial also transfer to ERISA actions.

The final reason the Court's ruling in *Ingersoll-Rand* is relevant herein is because of the Court's analysis of the remedies available to an ERISA section 510 litigant. In *Ingersoll-Rand*, Justice O'Connor left open the possibility of plaintiffs obtaining extra-contractual damages for emotional distress and punitive damages for violations of section 510.[120] Justice O'Connor's opinion is particularly interesting because federal courts have routinely denied compensatory and punitive damages to plaintiffs in section 510 actions.[121] In responding to the argument that ERISA section 510 did not apply to the claim at issue because the plaintiff was not seeking recovery of pension benefits, Justice O'Connor stated:

> [T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits". *It is clear that the relief requested here is well within the power of federal courts to provide.* Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.[122]

Whether successful plaintiffs can recover extra-contractual damages in ERISA section 510 actions is a subject still to be decided by the Supreme Court. However, if extra-contractual and punitive damages are permitted as remedies for violations of section 510, then the constitutional right to a jury trial attaches because these damages are traditional legal remedies entitling litigants to a trial by jury.[123]

B. Recent Supreme Court Decisions Granting Jury Trials for Statutory Causes of Action

Three recent decisions represent strong indications that the Supreme Court will take an expansive view of the right to a jury trial for statutory violations

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119. *See supra* notes 56-62 and accompanying text discussing *Stamps* and its rationale for finding a right to a jury trial under ERISA by analogy to LMRA § 301.

120. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 486 (1990).

121. *See infra* notes 233-34 and accompanying text for discussion of the availability of punitive damages under § 510.

122. *Ingersoll-Rand*, 111 S. Ct. at 486 (emphasis added).

123. Curtis v. Loether, 415 U.S. 189, 197 (1974) (actual and punitive damages are the traditional form of relief offered in the courts of law).

when the statute is silent on the right. Although the Court's expansion of the right to a jury trial for statutory causes of action began several years earlier,[124] *Tull v. United States*[125] serves as a strong example of the Supreme Court's view of the Seventh Amendment. In *Tull*, the Court held that the Clean Water Act[126] entitled a civil litigant to a jury trial under the Seventh Amendment for civil penalties sought by the government.[127] The Court first determined that because neither the language of the Clean Water Act nor its legislative history implied any right to a jury trial, the Court had to determine if the defendants had a constitutional right to a trial by jury.[128]

The Court then examined the current two-part test for determining the Seventh Amendment right to a jury trial.[129] The Court analogized actions for civil penalties under the Clean Water Act to an action in debt at common law, which required a jury trial.[130] Turning to the remedies portion of the Seventh Amendment test, the Court concluded that the civil penalties imposed in this case were similar to punitive damages because the penalties were intended to punish polluters and to deter future acts of degrading wetlands.[131]

The Court rejected the government's argument that the fines served as disgorgement of improper profits,[132] an equitable remedy, because the penalties imposed far exceeded the amount needed to restore the status quo.[133] In response to the government's argument that the legal remedy of civil fines was so intertwined with the equitable request for injunctive relief that a jury trial was not required, the Court held that mixed claims of legal and equitable relief require a jury trial on the legal claims, including all issues common to both claims.[134] Since the right to a jury trial guaranteed by the Seventh

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124. *See Curtis*, 415 U.S. at 198 (right to a jury trial granted for violations of Title VIII (the fair housing provisions) of the Civil Rights Act of 1968); Lorillard v. Pons, 434 U.S. 575 (1978) (right to a jury trial for violations of ADEA based on an interpretation of the statute and its legislative history).

125. 481 U.S. 412 (1987).

126. 33 U.S.C. §§ 1251-1387 (1988).

127. *Tull*, 481 U.S. at 425.

128. *Id.* at 417 n.3 (relying on the cardinal principle that, whenever possible, the Court must first construe the statute to avoid ruling on the constitutional question presented).

129. *See infra* notes 184-98 and accompanying text for discussion of the Supreme Court's current two-part test to determine the right to a jury trial.

130. Tull v. United States, 481 U.S. 412, 418 (1987).

131. *Id.* at 422-23.

132. The government based this argument on the fact that the district court determined the amount of fines by multiplying the number of contaminated lots sold by the profit earned on each sale. The Court rejected this argument because the formula for calculating the fines owed was much greater than the amount needed to restore the status quo. *Id.* at 424.

133. *Tull*, 481 U.S. at 424.

134. *Id.* at 425 (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974)).

Amendment cannot be abridged by characterizing the legal claim as "incidental" to equitable relief, the Court granted the defendants' right to a jury trial on all legal claims.[135]

Tull is significant for several reasons. First, the Court made clear that congressional silence on the right to a jury trial does not affect the protections offered by the Seventh Amendment. Both the Clean Water Act and ERISA are silent on the right to a jury trial; nevertheless, the Seventh Amendment still grants the right to a jury trial if the statute provides legal rights and remedies. Further, *Tull* rejected the argument that Congress' failure to designate the remedies as either legal or equitable in nature results in an inference that the remedies provided are inherently equitable in nature. Thus, the fact that Congress did not designate the remedies for a violation of ERISA section 510 as either legal or equitable does not resolve the jury trial question. Courts must then turn to the Seventh Amendment to determine if the remedies provided by the statute are equitable or legal remedies.

Finally, *Tull* confirms the rule that jury trials cannot be denied where a legal remedy is requested in addition to an equitable remedy. *Tull* requires that a request for both legal and equitable relief be tried to a jury on all issues common to both remedies. Applying *Tull* to ERISA, the fact that ERISA litigants request legal and equitable remedies in the same suit should not affect the constitutional right to a jury trial for a claim under section 510.

Another case of key significance in this area is *Granfinanciera, S.A. v. Nordberg*,[136] where the Supreme Court continued its expansion of the constitutional right to a jury trial for statutory actions. *Granfinanciera* granted a bankruptcy trustee's request for a jury trial on a claim of fraudulent conveyance, even though the Bankruptcy Code[137] has traditionally been viewed as a non-jury statute.[138] Applying its current two-part test,[139] the Court compared the fraudulent conveyance claim to a state common law claim to recover fraudulent transfers by bankrupts, a claim triable to a jury before 1791.[140]

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135. *Id.*

136. 429 U.S. 33 (1989).

137. 11 U.S.C. §§ 101-1330 (1988).

138. *See* S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 997 (1988); Terry E. Welch, *Of Bankruptcy Judges and Jury Trials: the Past, the Present . . . and the Future*, 1990 UTAH L. REV. 347, 350.

139. *See infra* notes 184-98 and accompanying text for an explanation of the Supreme Court's two-part test for granting the right to a jury trial under the Seventh Amendment.

140. *Granfinanciera*, 429 U.S. at 45-47. *See infra* notes 186-98 and accompanying text for an explanation of the significance of the year 1791 to the question of the Seventh Amendment guarantee of the right to a jury trial.

The Court distinguished "public rights" created by Congress from non-public or "private rights."[141] The Court defined a "private right" as the liability of one individual to another under existing law.[142] In contrast, a "public right" involves statutory rights that are an integral part of a government regulatory scheme and whose adjudication Congress has assigned to either an administrative agency or a specialized court of equity.[143] Congress has the power to create "public rights" and to place causes of action over these rights beyond the scope of the Seventh Amendment by assigning their resolution to a forum in which jury trials are not available.[144] However, *Granfinanciera* noted that Congress' power to restrict the right to a jury trial is limited by Article III of the Constitution.[145] The Court held that Congress may not deprive private litigants of their Seventh Amendment right to a jury trial unless the cause of action involves public rights.[146] The *Granfinanciera* Court then held that a claim to recover a fraudulent conveyance was not a public right because the action was only peripheral to the bankruptcy proceeding and, thus, the claim could be tried to a jury.[147]

Similarly, claims for violation of ERISA section 510 do not involve "public rights." ERISA specifically permits private actions by employees against employers, plan administrators or fiduciaries without government intervention.[148] Further, the civil enforcement scheme of ERISA does not delegate adjudication of ERISA claims to any administrative body or other forum where jury trials are not available. Therefore, just as a fraudulent conveyance in a bankruptcy proceeding does not involve a public right, violations of section 510 do not involve public rights. Because Congress may not "strip parties contesting matters of private right of their constitutional right to a trial by jury,"[149] the Seventh Amendment should guarantee the right to a jury trial to private litigants in ERISA section 510 actions.

In its most recent pronouncement on this subject, the Supreme Court has

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141. *Id.*

142. *Id.* at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22 (1932)).

143. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 55 n.10 (1989).

144. *Id.* at 51-54. The Court cited temporary emergency regulation of rental real estate and workplace safety regulations as examples of "public rights" disputes that are beyond the scope of the Seventh Amendment. *Id.*

145. *Granfinanciera*, 492 U.S. at 53-54.

146. *Id.*

147. *Id.* at 56-57. The Court held that Congress did not intend to create a "public right" by defining a fraudulent conveyance as a core proceeding in bankruptcy, but intended simply to reclassify an existing common law cause of action.

148. *See supra* notes 36-48 and accompanying text for discussion of private rights of action available under ERISA § 502(a).

149. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-52 (1989).

again expanded the right to a jury trial to a statutory cause of action where Congress did not specify if such a right exists statutorily. In *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*,[150] the Supreme Court granted the plaintiffs' request for a jury trial on a claim of breach of a union's duty of fair representation under LMRA section 301.[151] The Supreme Court again applied its current two-part test to determine if the Seventh Amendment guaranteed the plaintiffs a jury trial.[152] First, the Court determined that the Seventh Amendment question depends on the nature of the *issue* involved, rather than the character of the overall action.[153] Comparing the duty of fair representation claim to an action for breach of contract, the Court found that both represent legal issues.[154]

However, the Court deemed its characterization of the claim as a legal issue as a preliminary matter.[155] The more important issue was whether the remedies of backpay and benefits sought by plaintiffs were legal or equitable remedies.[156] The Court concluded that backpay remedies that target the harm done to an individual employee are legal remedies, rather than equitable relief.[157] The Court specifically rejected any comparison between claims for backpay under Title VII[158] and backpay for a breach of the duty of fair representation because Congress specifically characterized backpay under Title VII as a form of "equitable relief."[159] In *Terry*, the Court held that requests for backpay in LMRA section 301 actions that represent wages and benefits plaintiffs would have received had they not been improperly discharged represent legal, not restitutionary, relief.[160] Similarly, the remedies of backpay and benefits for a violation of ERISA section 510 represent wages and benefits the employee would have received had the employer not discharged the employee illegally. In light of *Terry*, this remedy for a violation of section 510

150. 494 U.S. 558 (1990).

151. *Id.* at 573. The plaintiffs originally brought suit against their employer for breach of the collective bargaining agreement in violation of LMRA § 301 and against the union for breach of the duty of fair representation for refusing to process the plaintiffs' grievances. After the employer filed for bankruptcy, the lower court dismissed all claims against the employer, including a claim for injunctive relief. Thus, the Supreme Court addressed only the issue of whether plaintiffs were entitled to a jury trial on claims for breach of the duty of fair representation, with plaintiffs requesting damages in the form of backpay and benefits.

152. *See infra* notes 184-98 and accompanying text for discussion of the Supreme Court's two-part test for the right to a jury trial under the Seventh Amendment.

153. *Id.* at 569 (emphasis added).

154. *Terry*, 494 U.S. at 569-70.

155. *Id.*

156. *Id.*

157. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 572 (1990).

158. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

159. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 572 (1990).

160. *Id.* at 570.

is also legal rather than restitutionary in nature.

The significance of *Tull*,[161] *Granfinanciera*,[162] and *Terry*[163] is that the Supreme Court will incorporate the right to a jury trial into statutes where the language of the statute is silent, even if those statutes have traditionally been viewed as not providing a right to trial by jury. The rule to be drawn from these three cases is that Congress cannot defeat the right to a jury trial by statutory silence. Congress must explicitly state that it does not intend to grant the right to a jury trial, and may only abrogate such a right in "public rights" cases where the decisionmaking is assigned to an administrative forum where juries are not available. Otherwise, the Court will find a constitutional right to a jury trial in cases where legal rights and remedies are at issue, regardless of statutory silence or ambiguities in the language of the statute and its legislative history.

C. The Response of the Lower Courts

Not surprisingly, federal trial courts have relied on these new Supreme Court decisions to grant the right to a jury trial to litigants in ERISA section 510 actions. For example, the court in *Blue Cross & Blue Shield of Alabama v. Lewis*[164] relied on *Ingersoll-Rand* to grant the plaintiffs' request for a jury trial in an ERISA section 510 action. The district court initially granted a motion to strike a jury demand, but then reconsidered its order sua sponte in response to the Supreme Court's ruling in *Ingersoll-Rand*.[165] In its reconsideration opinion, the court held that "[a]lthough *Ingersoll-Rand* does not speak directly to the question of the Seventh Amendment's application to ERISA cases, the fact that *Ingersoll-Rand* now recognizes the possibility of a recovery of tort-like damages in ERISA cases leads inexorably to the right to the trial by jury." [166] The district court concluded that it could not ignore the new direction taken by the Supreme Court and deny the plaintiffs' request for a jury trial under ERISA section 510.[167]

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161. Tull v. United States, 481 U.S. 412 (1987).

162. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

163. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990).

164. 753 F. Supp. 345 (N.D. Ala. 1990).

165. *Id.* at 347.

166. *Id.* (citing Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990)).

167. *Id.* at 348. *See also* International UAW v. Midland Steel Products Co., 771 F. Supp. 860 (N.D. Ohio 1991); McDonald v. Artcraft Elec. Supply Co., 774 F. Supp. 29 (D.D.C. 1991). The *Midland* court held that even though the Supreme Court did not "address the issue of jury trials per se, their decision in *Ingersoll-Rand* indubitably quashes the argument that ERISA actions are strictly equitable. As the Supreme Court now recognizes that legal and equitable remedies may arise under ERISA, they must also recognize the constitutional right to a jury trial for such legal claims." *Midland*, 771 F. Supp. at 864.

Federal district courts have also relied on the reasoning of *Tull*, *Granfinanciera*, and *Terry* to find a right to a jury trial under ERISA. In *Vicinanzo v. Brunschwig & Fils, Inc.*,[168] a district court relied on both statutory and constitutional grounds to find a right to a jury trial in ERISA section 510 actions.[169] On the Seventh Amendment issue, the court concluded that *Granfinanciera* and *Terry* suggest that statutory causes of action claiming money damages are rarely, if ever, beyond the scope of the Seventh Amendment.[170] The *Vicinanzo* court adopted *Granfinanciera's* distinction between public and private rights. The court then concluded that the Seventh Amendment protects a host of federal statutes, including ERISA, that do not involve the adjudication of public rights.[171] If the Bankruptcy Code cannot be viewed as inherently a non-jury statute, the district court concluded that it made little sense to assume that ERISA involved exclusively equitable claims.[172] The court rejected the notion that ERISA is intrinsically an equitable statute or that its purpose would be frustrated by the advent of jury trials.[173]

Similar results were reached by a federal district court in *Weber v. Jacobs Manufacturing Co.*[174] The district court relied on *Terry* to find that damages in an ERISA section 510 action are void of equitable attributes.[175] The court held that *Terry* determined that remedies of backpay and health benefits, when compensatory in nature, are forms of legal relief to be tried to a jury.[176] The *Weber* court also relied on an analogy between section 510 actions and wrongful termination or breach of contract claims to conclude that section 510 actions are legal in nature.[177]

The *McDonald* court relied on *Ingersoll-Rand v. McClendon* to find that a jury trial is constitutionally permitted for an ERISA § 510 action. The court stated that *Ingersoll-Rand* is not only "powerful support for the proposition that Congress intended for ERISA to provide a statutory right to a jury [trial] in such cases, but that a jury trial is a constitutional imperative in such cases." *McDonald*, 774 F. Supp. at 35.

168. 739 F. Supp. 882 (S.D.N.Y. 1990).

169. *Id.* at 886, 890.

170. *Id.* at 890.

171. Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 889 (S.D.N.Y. 1990).

172. *Id.* at 890.

173. *Id.*

174. 751 F. Supp. 21 (D. Conn. 1990).

175. *Id.* at 25.

176. *Id.* at 25-26.

177. *Weber*, 751 F. Supp. at 25. *See also* Gangitano v. NN Investors Life Ins. Co., Inc., 733 F. Supp. 342 (S.D. Fla. 1990) (since a claim for recovery of benefits under ERISA § 502(a)(1)(B) is essentially a breach of contract action, plaintiffs are entitled to a jury trial under the Seventh Amendment). *Contra* Fonner v. Georgia Pacific Corp., 747 F. Supp. 340 (M.D. La. 1990) (holding that a claim under ERISA § 502(a)(1)(B) is equitable in nature and that Supreme Court decisions in *Granfinanciera* and *Terry* are inapplicable).

These recent cases demonstrate the shift in the federal courts' views of the right to a jury trial for violations of section 510. This shift is due in large part to the Supreme Court's most recent rulings on the constitutional right to a trial by jury when legal rights and remedies are asserted for statutory violations. Although the Supreme Court has read the protections of the Seventh Amendment expansively in *Tull*,[178] *Granfinanciera*,[179] and *Terry*,[180] the Court has not yet addressed whether ERISA section 510 actions provide legal rights and remedies protected by the Seventh Amendment.[181] Applying the Supreme Court's current two-part test to the rights and remedies offered by section 510 results in a finding that the Seventh Amendment guarantees a right to a jury trial in section 510 actions.

V. EXAMINATION OF THE CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER ERISA SECTION 510

The Seventh Amendment[182] applies to civil actions enforcing statutory rights and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law.[183] The question raised herein is whether ERISA section 510 creates legal rights and remedies enforceable in an action for damages in a court of law.

A. Historical Analysis

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[184] The phrase "suits at common law" refers to suits in

178. Tull v. United States, 481 U.S. 412 (1987).

179. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1990).

180. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990).

181. Several commentators have concluded that the Seventh Amendment guarantees the right to a jury trial for all ERISA plan enforcement actions. *See* Ann Bersi, Comment, *The Road Less Traveled Is the Better Way: New Routes to the Right to Jury Trial in ERISA Section 502(a)(1)(B) Actions*, 27 CAL. W. L. REV. 431 (1991); Kevin R. Dean, Comment, *The Right to Jury Trial in ERISA Civil Enforcement Actions*, 15 AM. J. TRIAL ADVOC. 157 (1991); Comment, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737 (1983).

182. U.S. CONST. amend. VII.

183. Curtis v. Loether, 415 U.S. 189, 194 (1974).

184. U.S. CONST. amend. VII. Prior to the adoption of the Federal Rules of Civil Procedure in 1938, actions at law and in equity proceeded as separate actions. The Rules Enabling Act, 28 U.S.C. § 2072 (1988), eliminated the distinction between legal and equitable actions. In lieu of separate actions, the Federal Rules of Civil Procedure created a single action in which parties could assert both legal and equitable claims. FED. R. CIV. P. 2, 18. The Federal Rules of Civil Procedure require that a party assert all of its legal and equitable claims relating to a set of circumstances in one proceeding. FED. R. CIV. P. 13(a). Thus, legal and equitable claims are tried

which legal rights are to be ascertained and determined in contrast to those suits where equitable rights alone are recognized and equitable remedies are administered.[185] Prior to 1791, when the Seventh Amendment was adopted, a jury trial was customary in actions brought in the English law courts.[186] The right to a jury trial was generally recognized for common law actions of debt, assumpsit, trover, replevin, trespass and action on the case.[187] Jury trials were also permitted for money damage claims, breach of contract actions, and real property actions.[188] Actions tried in courts of equity or admiralty did not permit a jury trial.[189] Jury trials were not recognized for the equitable actions of divorce, probate of wills, admiralty, court martials and summary proceedings.[190] This distinction between actions in law and in equity applies not only to common law forms of action, but also to causes of action created by statute.[191]

The purpose of the Seventh Amendment was to preserve the right to a jury trial in suits at common law as that right existed in 1791 when the Seventh Amendment was enacted.[192] To meet this purpose, the right to a jury trial has been extended to actions brought to enforce statutory rights that are analogous to common law causes of action existing in 1791.[193] The inquiry thus becomes whether a statutory cause of action is more similar to cases tried in courts of law before 1791 as opposed to cases tried in courts of equity.[194]

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to both judge and jury in a single proceeding. *See* FED. R. CIV. P. 38, 39.

185. Parsons v. Bedford, 3 Pet. 433, 447, 7 L. Ed. 732 (1830). In *Parsons*, Justice Story concluded that the framers of the Seventh Amendment meant the phrase "common law" not just to include suits "which the *common* law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Id.* at 446-47 (emphasis in original).

186. Tull v. United States, 481 U.S. 412, 417 (1987).

187. 47 AM. JUR. 2D *Jury* § 39 (1969 & 1991 Supp.).

188. 47 AM. JUR. 2D *Jury* §§ 42-45 (1969 & 1991 Supp.).

189. Parsons v. Bedford, 3 Pet. 433, 447, 7 L. Ed. 732 (1830).

190. 47 AM. JUR. 2D *Jury* §§ 39, 46 (1969 & 1991 Supp.).

191. Curtis v. Loether, 415 U.S. 189, 193 (1974) (noting that Congress may affirmatively imply a right to a jury trial).

192. *Id. See also* Martin H. Redish, *Seventh Amendment Right To Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 490 (1975) (purpose of Seventh Amendment was not to freeze the jury trial picture as it existed in 1791, but to provide that a right to a jury trial attaches in legal, not equitable cases); Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963) (Seventh Amendment did not create a new right to a jury trial, but rather preserved the right as it existed in 1791).

193. *Curtis*, 415 U.S. at 193.

194. When causes of action are brought to enforce statutory rights that did not exist at common law, this prong of the test requires the court to use its imagination by seeking out common law analogies. This search need not produce an exact match. FLEMING JAMES, JR. & GEOFFREY HAZARD, JR., CIVIL PROCEDURE § 8.1, at 411 (3d ed. 1985) (courts fit the new cause of action into

This analysis involves a two-step process examining both the nature of the action and the remedy sought.[195] The first step in this two-part analysis is to compare the statutory action to eighteenth century actions brought in England prior to the merger of the courts of law and equity.[196] The second step of this test then examines the remedy sought to determine whether it is legal or equitable in nature.[197] It is this second inquiry that is the more important factor in this analysis.[198] Applying this two-part test to the rights and remedies created by ERISA section 510 results in the conclusion that the Seventh Amendment guarantees the right to a trial by jury in section 510 actions.

B. The First Prong of the Seventh Amendment Test: The Nature of the Issues Involved

Since ERISA did not exist in eighteenth century England, courts must look for an analogous cause of action that existed before 1791 to determine whether

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the nearest historical analogy to determine whether there is a right to a jury trial).

195. Tull v. United States, 481 U.S. 412, 417 (1987) (To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and the remedy sought.). The current Seventh Amendment test was first articulated by Justice White in Ross v. Bernhard, 396 U.S. 531 (1970). Justice White proposed a three-part test considering "first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* at 538 n.10. Since *Ross*, the Supreme Court has been silent regarding the use of the third factor in the White test. *See* Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974).

Instead, the Court has refined Justice White's standard into a two-part test, examining the nature of the action and the remedy sought. Tull v. United States, 481 U.S. 412, 417 (1987). Although Justice White's third factor has created much academic debate, the Court has never denied the right to a jury trial because of the practical limitations of jurors. *See Tull*, 481 U.S. at 418 n.4 (noting that the Court has not used jury capacity as an independent basis for extending the right to a jury trial). *See generally* Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984); David M. Nocenti, *Complex Jury Trials, Due Process and the Doctrine of Unconstitutional Complexity*, 18 COLUM. J.L. & SOC. PROBS. 1 (1983).

196. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990). In *Terry*, the court adopted the two-part test of *Tull*. However, two justices recommended changes to this test. Justice Stevens would add a third factor which would consider whether the issues presented by the claim are typical grist for the jury's judgment. *Terry*, 494 U.S. at 583 (Stevens, J., concurring). The majority rejected this view, finding this factor relevant only to the determination of whether Congress has delegated resolution of the dispute to an administrative agency or specialized court of equity and whether jury trials would impair the functioning of the legislative scheme. *Terry*, 494 U.S. at 566 n.4. Justice Brennan argued for elimination of the first factor in the two-part test, finding that the historical analysis needlessly convolutes the court's Seventh Amendment jurisprudence. Thus, Justice Brennan would examine only the remedy sought to decide Seventh Amendment questions. *Terry*, 494 U.S. at 574 (Brennan, J., concurring). This singular test for determining the right to a jury trial has not been adopted by the Supreme Court.

197. *Tull*, 481 U.S. at 417-18.

198. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989).

a section 510 action is legal or equitable in nature. Some courts have analogized ERISA actions for benefits to the law of trusts[199] because ERISA "abounds with the language of trust law."[200] The legislative history of ERISA confirms that the statute's fiduciary responsibility provisions are based on the law of trusts.[201] However, this comparison is not appropriate to ERISA section 510 actions since section 510 is primarily a non-discrimination statute.[202] The purpose of section 510 is to protect employees from adverse employment actions intended to prevent employees from receiving pension or other ERISA-regulated benefits.[203] Thus, section 510 claims must be distinguished from the more common ERISA claims for benefits due under the plan or breach of fiduciary duties.

A plaintiff may file several different ERISA claims in the same lawsuit. For instance, a plaintiff may file a section 510 wrongful discharge claim along with a general ERISA claim for benefits denied after discharge and a claim for breach of fiduciary duties.[204] A federal court would have jurisdiction to hear all claims based on ERISA,[205] but must consider each claim individually to determine whether the plaintiff has a right to a jury trial.[206] The Seventh Amendment question of whether a statutory cause of action includes the right to a jury trial depends on *the particular issue to be tried*, not the character of the entire action.[207] Therefore, in a multi-claim lawsuit under ERISA, each claim must be reviewed individually to determine if a jury trial is permissible on that

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199. *See* Chilton v. Savannah Foods & Industries, Inc., 814 F.2d 620 (11th Cir. 1987); *In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

200. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989).

201. H.R. REP. NO. 533, 93rd Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (the Act's fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries "certain principles developed in the evolution of the law of trusts").

202. *See supra* note 10 for text of ERISA § 510 and notes 21-24 and accompanying text for discussion of Congress' purpose in enacting § 510.

203. *See supra* notes 21-24 and accompanying text.

204. ERISA is a comprehensive statute intended to offer extensive protections to participants and benefits of private pension and welfare plans. Section 502(a) gives private parties the right to file lawsuits to recover benefits due under a plan, to enforce rights or determine a right to future benefits or for breach of fiduciary duty. 29 U.S.C. § 1132(a)(1)(B) (1988). Congress also gave the federal courts exclusive jurisdiction over the specific subjects covered by ERISA. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983).

205. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (ERISA's deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern).

206. Ross v. Bernhard, 396 U.S. 531 (1970) (finding a right to a jury trial in a shareholder's derivative suit after dividing the suit into smaller sub-actions and examining the nature of the issue to be tried in each sub-action).

207. *Id.* at 538 (emphasis added).

claim.

As recently recognized by the Supreme Court, the closest common law action analogous to an ERISA section 510 action is a wrongful termination action brought as a breach of contract suit.[208] Such actions are traditionally legal, not equitable, in nature.[209] The common law courts recognized a cause of action for wrongful discharge as a breach of contract claim.[210] The remedy for breach of contract by wrongful discharge was compensatory damages for lost wages subsequent to the breach less any interim earnings the discharged employee received or could have received in employment elsewhere.[211] The damages awarded under this common law cause of action for wrongful discharge were determined by a jury.[212]

The most sought after remedies for a violation of ERISA section 510, lost wages and benefits, are the same as those provided by courts for wrongful discharge at common law.[213] Thus, a section 510 action for wrongful discharge finds its historical counterpart in the common law action for breach of contract by wrongful discharge, which was tried to a jury. The significance of the similarity between the historical common law wrongful discharge action and the present section 510 cause of action is that the Seventh Amendment should guarantee trial by a jury for both causes of action.

Section 510 actions have also been analogized to claims under section 301 of the LMRA. In fact, the legislative history of ERISA demonstrates a congressional intent to model ERISA's enforcement mechanisms on section 301

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208. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113-14 (1989) (ERISA was meant to afford the same level of protection to employees as they received before ERISA was enacted when benefit claims disputes were governed by principles of contract law); International UAW v. Midland Steel Products Co., 771 F. Supp. 860, 865 (N.D. Ohio 1991) (section 510 action is analogous to a contract issue and is therefore legal in nature); Weber v. Jacobs Mfg. Co., 751 F. Supp. 21, 25 (D. Conn. 1990) (the closest common law analogues to a § 510 action under ERISA is a wrongful termination or breach of contract suit); Gangitano v. NN Investors Life Ins. Co., Inc., 733 F. Supp. 342, 344 (S.D. Fla. 1990) (statutory right created under § 502(a)(1)(B) for recovery of benefits is essentially a breach of contract action).

209. *See, e.g.*, Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 569 (1990); UAW v. Park-Ohio Indus., 687 F. Supp. 338 (N.D. Ohio 1987), *modified on other grounds*, 876 F.2d 894 (6th Cir. 1989); Woods v. Dunlop Tire Corp., 673 F. Supp. 117, 119 (W.D.N.Y. 1987); Sixty-Five Sec. Plan v. Blue Cross & Blue Shield, 583 F. Supp. 380 (S.D.N.Y. 1984).

210. *See, e.g.* Emmens v. Elderton, 10 Eng. Rep. 606, 615 (1853) (the dismissed servant sued for breach of contract to recover such damages as a jury may think the loss occasioned, less any amount the employee might reasonably have earned in other employment).

211. *Id.*

212. *Id.* at 614.

213. *See infra* notes 226-34 and accompanying text discussing the remedies available for a § 510 violation.

of the LMRA.[214] While the Seventh Circuit may have rejected the comparison between LMRA section 301 actions and ERISA section 502(a)(1)(B) actions in *Wardle*,[215] the Supreme Court has explicitly recognized that ERISA was modeled after the exclusive remedy provided by section 301.[216] LMRA section 301 claims are legal issues comparable to breach of contract actions and thus triable to a jury.[217] By analogy, if LMRA section 301 claims can be tried to a jury, then ERISA claims should have the same access to a jury trial.

The Third Circuit has recognized an analogy between ERISA section 510 actions and claims of employment discrimination.[218] The statutory language of section 510 reinforces this comparison because section 510 makes illegal any act of discrimination or discharge done for the purpose of interfering with an employee's benefits.[219] Perhaps the most obvious analogy between statutory protections against employment discrimination and ERISA section 510 is that to the Age Discrimination in Employment Act of 1967 (ADEA).[220] The ADEA broadly prohibits arbitrary discrimination or discharge in the workplace based on age,[221] including protections against differential treatment of pension or health care obligations.[222] Under the ADEA, litigants are entitled to a jury trial as a statutory right.[223] The protections of section 510 cannot be

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214. The Joint Explanatory Statement of the Committee of Conference states that "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. CONF. REP. NO. 1280, 93rd Cong., 1st Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107. *See also* remarks of Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, 120 CONG. REC. 515, 737 (Aug. 22, 1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5188 (noting that Congress intended that "such actions will 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").

215. Wardle v. Central States, Southeast, and Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

216. Ingersoll Rand Co. v. McClendon, 111 S. Ct. 478, 486 (1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987) (Congress was well aware of the powerful preemptive force of LMRA § 301 when they modeled the preemptive force of ERISA § 502(a) after LMRA § 301).

217. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 569 (1990).

218. Gavalik v. Continental Can Co., 812 F.2d 834, 843 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (since § 510 does not provide a specific statute of limitations, the court determined the appropriate time limit should be drawn from causes of action most analogous to a § 510 violation, either a claim of employment discrimination or breach of fiduciary duty).

219. *See supra* note 10 for text of ERISA § 510.

220. Age Discrimination in Employment Act of 1967, §§ 1-15, 29 U.S.C. §§ 621-634 (1988) [hereinafter ADEA].

221. ADEA § 4(a), 29 U.S.C. § 623(a) (1988).

222. ADEA §§ 4(f), (j), 29 U.S.C. § 623(f), (j) (1988).

223. The Supreme Court first awarded private litigants the right to a jury trial in ADEA actions in Lorillard v. Pons, 434 U.S. 575 (1978). The Court found that Congress chose to describe the remedies available under the ADEA as "legal and equitable relief." Since the ADEA does not specify which remedies are legal and which are equitable in nature, the court made such a

distinguished from the protections of the ADEA, since both statutes provide the same remedies[224] and have the same goals of eliminating arbitrary discrimination and discharge.[225] As a result, the right to a jury trial should be granted to plaintiffs filing claims under the ADEA and ERISA section 510 because both actions involve suits for legal relief.

C. The Second Prong of the Seventh Amendment Test: The Remedy Sought

The second part of the Seventh Amendment test requires courts to characterize the relief sought as either legal or equitable in nature. The remedies available for violations of ERISA section 510 are not explicitly stated in section 510 or in its enforcement provision, section 502(a). Clearly, if Congress did not identify the remedies available for a violation of section 510, Congress also did not specify if these remedies were legal or equitable in nature. Congress did specify that it intended ERISA section 502(a) to offer the full range of legal and equitable remedies available in the federal courts.[226] Federal courts have awarded relatively broad remedies for section 510 violations including reinstatement,[227] backpay,[228] the value of lost employee benefits,[229] attorney's fees,[230] and other remedies as appropriate[231] to make

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determination. The Court concluded that remedies of employment, reinstatement or promotion are equitable relief, whereas liability for unpaid wages and overtime are legal remedies. *Id.* at 583 n.11. The Court then found that the Seventh Amendment provides a right to a jury trial in cases in which legal relief is available and legal rights are determined. *Id.* at 583. Additionally, the court found Congress adopted these remedies from the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1988) which allows a jury trial in actions for back wages. *Id.* at 582-83.

Congress amended the ADEA to reflect the *Lorillard* holding in 1980. Thus, the ADEA explicitly provides the right to a jury trial in ADEA actions. 29 U.S.C. § 626(c)(2) (1988).

224. *See infra* notes 226-34 and accompanying text for remedies available to successful § 510 litigants and *supra* note 223 for remedies available to successful ADEA litigants.

225. *See supra* notes 21-24 and accompanying text describing the purpose of ERISA § 510.

226. S. REP. NO. 127, 93rd Cong., 1st Session 35 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. (The enforcement provisions have been designed to provide participants and beneficiaries with broad remedies for redressing violations of ERISA, including the full range of legal and equitable remedies available in state and federal courts).

227. Folz v. Marriott Corp., 594 F. Supp. 1007, 1016 (W.D. Mo. 1984); Bittner v. Sadoff & Rudoy Indus., 490 F. Supp. 534, 536 (E.D. Wis. 1980), *aff'd in part, rev'd in part and remanded,* 728 F.2d 820 (7th Cir. 1984).

228. Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990); Folz v. Marriott Corp., 594 F. Supp. 1007, 1016 (W.D. Mo. 1984); Bittner v. Sadoff & Rudoy Indus., 490 F. Supp. 534, 536 (E.D. Wis. 1980), *aff'd in part, rev'd in part and remanded,* 728 F.2d 820 (7th Cir. 1984).

229. Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990); Folz v. Marriott Corp., 594 F. Supp. 1007, 1016 (W.D. Mo. 1984); Bittner v. Sadoff & Rudoy Indus., 490 F.Supp. 534, 536 (E.D. Wis. 1980), *aff'd in part, rev'd in part and remanded,* 728 F.2d 820 (7th Cir. 1984).

230. Attorney's fees may be provided to prevailing plaintiffs, pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1988).

231. Other remedies have included prejudgment interest and front pay (in lieu of reinstatement), Folz v. Marriott Corp., 594 F. Supp. 1007, 1016 (W.D. Mo. 1984).

the plaintiff whole for injuries suffered as a result of unlawful employment discrimination.[232] Extra-contractual damages in the form of compensatory or punitive damages are generally not available to employees improperly discharged in violation of section 510,[233] but some recent authority exists to the contrary.[234]

Since backpay is a common remedy for a violation of section 510, this remedy will be examined in detail to determine if it offers legal or equitable relief. While early cases on the right to a jury trial for section 510 actions ruled that the remedies of backpay and benefits are equitable in nature,[235] more recent cases view damages in an ERISA section 510 violation as void of equitable attributes.[236] This drastic change in position is attributable to the

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232. Weber v. Jacobs Mfg. Co., 751 F. Supp. 21 (D. Conn. 1990); Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984); Ursic v. Bethlehem Mines, 556 F. Supp. 571 (W.D. Pa. 1983), *aff'd. in relevant part*, 719 F.2d 670 (3d Cir. 1983); Bittner v. Sadoff & Rudoy Indus., 490 F. Supp. 534 (E.D. Wis. 1980), *aff'd. in part, rev'd in part and remanded*, 728 F.2d 820 (7th Cir. 1984).

233. Pane v. RCA Corp., 868 F.2d 631, 635 n.2 (3d Cir. 1989) (punitive damages are not available for § 510 claims, since § 502(a) does not authorize such relief); Bishop v. Osborn Transp., Inc., 838 F.2d 1173 (11th Cir. 1988) (although employer violated § 510, extra-contractual damages are not available under § 502, the enforcement mechanism for § 510 claims); Drinkwater v. Metro. Life Ins. Co., 846 F.2d 821, 825 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988) (extra-contractual damages are unavailable under § 502(a)(3)); Sage v. Automation, Inc. Pension Plan & Trust, 845 F.2d 885, 888 n.2 (10th Cir. 1988) (punitive damages are not available in an ERISA action); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (an award of punitive damages was inappropriate in this § 510 claim, but the court did not conclude as a matter of law that punitive damages are never appropriate); Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618, 626 (7th Cir. 1987) (Congress did not intend punitive damages to be available under § 502(a)(3)). *See also* Larry I. Stein, *Punitive Damages Under ERISA: Are Participants Entitled to Awards?*, 36 LAB. L.J. 892 (1985).

234. *See supra* notes 120-23 and accompanying text discussing Justice O'Connor's views that § 510 litigants may be entitled to extra-contractual, tortlike damages for emotional distress and punitive damages.

235. *In re* Vorpahl, 695 F.2d 318, 322 (8th Cir. 1982) (because any award of monetary relief turns on a determination of entitlement to benefits, we consider such relief to be an integral part of an equitable action); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980) (the fact that plaintiff would receive a monetary award if he prevailed does not compel the conclusion that he is entitled to a jury trial); Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (relying on the law of trusts, the court found a beneficiary is entitled to a jury trial only when the remedy requested is money the trustee is under a duty to pay unconditionally and immediately).

236. Weber v. Jacobs Mfg. Co., 751 F. Supp. 21, 25 (D. Conn. 1990) (damages for an ERISA action § 510 violation are void of equitable attributes in light of *Terry* which determined that backpay and benefits are forms of legal relief); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 889 (S.D.N.Y. 1990) (the Supreme Court's recent cases suggest that statutory causes of action giving rise to individual claims for money damages are rarely, if ever, beyond the scope of the Seventh Amendment); Gangitano v. NN Investors Life Ins. Co., Inc., 733 F. Supp. 342, 343 (S.D. Fla. 1990) (*Terry* establishes that money damages in the form of backpay and benefits are of the type

Supreme Court's holding in *Terry* that backpay and benefits can be either a legal remedy or an equitable remedy, depending on the claim giving rise to the request for backpay.[237] When an award of backpay and benefits results from the harm done to the individual employee, then the Supreme Court views backpay as a legal remedy.[238] Similarly, when the backpay sought by plaintiffs is not money wrongfully withheld, but wages and benefits the employees would have received but for the employer's wrongful act, the relief of backpay is legal, not restitutionary, in nature.[239] In an ERISA section 510 action, the plaintiff seeks backpay and benefits in the form of wages and benefits she would have earned but for the wrongful discharge. Therefore, this remedy, like the remedy in *Terry*, is legal in nature.

A review of other analogous statutory schemes also demonstrates that backpay is treated as a legal remedy. Congress explicitly intended that the enforcement procedures of ERISA be patterned after section 301 of the LMRA.[240] LMRA section 301 actions and ERISA section 510 actions have much in common. Both statutes create rights of action for private litigants.[241] Both statutes allow improperly discharged employees to sue their employer

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traditionally awarded by courts of law); Abbarno v. Carborundum Co., 682 F. Supp. 179, 181 (W.D.N.Y. 1988) (an award of damages for non-payment of benefits is essentially legal in nature).

237. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 572 (1990). In *Terry*, the Court held that respondent's claim for backpay was not one for restitution or disgorgement, but rather for wages and benefits respondents would have received from their employer had the union processed their grievances in a timely manner. *Id.* at 570-71. The Court concluded that a claim for breach of the duty of fair representation raises claims for compensatory backpay, rather than restitutionary backpay, because the claim targets "the wrong done the individual employee." *Id.* at 573 (quoting Electrical Workers v. Foust, 442 U.S. 42, 49 n.12 (1979)).

238. *Terry*, 494 U.S. at 572.

239. *Id.* at 570-71.

240. *See supra* notes 60-62 and accompanying text explaining congressional intent to follow procedures of LMRA § 301 in creating enforcement mechanisms under ERISA.

241. *See supra* notes 46-48 discussing causes of action available under § 502(a)(1)(B) of ERISA. LMRA § 301 allows unions and employers to sue each other for violations of the collective bargaining agreement. LMRA § 301 provides:

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

29 U.S.C. § 185(a) (1988).

Actions under LMRA § 301 should not be confused with actions under the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988) [hereinafter NLRA]. Actions under the NLRA typically involve the filing of unfair labor practice charges with the National Labor Relations Board (NLRB), an administrative agency established to investigate and adjudicate unfair labor practice charges. No right to a jury trial exists for actions brought under the NLRA. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937).

directly to remedy the harm caused by the illegal act.[242] Moreover, neither statute explicitly grants nor denies the right to a jury trial,[243] nor permits punitive damages as a general matter.[244]

Finally, courts award remedies of backpay, reinstatement, the value of lost benefits, and restoration of seniority and benefits to employees improperly discharged under ERISA section 510 and LMRA section 301.[245] Courts view the remedy of backpay under LMRA section 301 as damages rather than a form of restitution, even when the wrongfully discharged employee seeks equitable remedies as well.[246] This characterization of backpay as money damages was recently affirmed by the Supreme Court in *Terry*.[247] When a claim is made for wages and benefits the discharged employee would have received from the employer had the illegal conduct not occurred, such relief is legal, not

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242. *See supra* notes 36-48 and accompanying text discussing private rights of action available to ERISA § 510 litigants. LMRA § 301 permits an employee to sue an employer for violation of the collective bargaining agreement, but must also join the union as a defendant in most cases. Most collective bargaining agreements contain grievance arbitration clauses that require individual employees to pursue claims of breach of the collective bargaining agreement by filing a grievance with the union. Once the employee has exhausted these internal union remedies, the employee can then bring both a § 301 action against the employer and a claim for violation of the duty of fair representation against the union. *See generally* Clayton v. UAW, 451 U.S. 679, 696 (1981); Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990).

243. *See supra* note 241 for language of LMRA § 301, 29 U.S.C. § 185(a) (1988). Section 301 actions usually involve a hybrid action alleging both a violation of the collective bargaining agreement by the employer (a claim under LMRA § 301) and a breach of the duty of fair representation by the union (a claim under the NLRA).

244. *See supra* notes 120-23, 233-34 regarding the courts position on awards of punitive damages to ERISA § 510 litigants. Similarly, federal labor policy disfavors an award of punitive damages in LMRA § 301 actions, since federal labor law is meant to be remedial, not punitive, in nature. International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979).

245. *See supra* notes 226-34 and accompanying text discussing remedies available under ERISA § 510. Remedies awarded for violations of LMRA § 301 include backpay, reinstatement, lost benefits, and seniority rights. *See* Bowen v. United States Postal Service, 642 F.2d 79 (4th Cir. 1981), *rev'd on other grounds*, 459 U.S. 212 (1983) (award of reinstatement and backpay); Frisco v. Transportation Co., 626 F.2d 55 (8th Cir. 1980) (award of reinstatement); Nicely v. USX, 709 F. Supp. 646 (W.D. Pa. 1989) (award of backpay); Woods v. Dunlop Tire Corp., 673 F. Supp. 117 (W.D.N.Y. 1987) (award of lost wages and benefits, reinstatement, and restoration of seniority).

246. In an LMRA § 301 action, backpay is a legal remedy "because it will compensate the plaintiff for the wages he would have earned if the defendant had not breached the employment agreement and terminated the plaintiff's employment." Massey v. Whittaker Corp., 661 F. Supp. 1151, 1153 (N.D. Ohio 1987). *See also* Nicely v. USX, 709 F. Supp. 646 (W.D. Pa. 1989) (jury award of backpay); Woods v. Dunlop Tire Corp., 673 F. Supp. 117 (W.D.N.Y. 1987) (jury granted lost wages and benefits, reinstatement, and seniority rights); Nedd v. United Mine Workers, 556 F.2d 190, 206 (3d Cir. 1977).

247. Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990). *See supra* notes 156-60 for discussion of the Supreme Court's view of backpay as a legal remedy in section 301 actions.

restitutionary, in nature.[248]

The ADEA[249] also treats backpay as a form of legal relief. The Fourth Circuit, in *Pons v. Lorillard*,[250] held that a plaintiff in an ADEA action is entitled to a jury trial because "a monetary award for back wages is a traditional legal remedy and . . . the computation of such an award would not be beyond the practical capabilities of a jury."[251] The Supreme Court affirmed on statutory grounds, finding that Congress intended to enforce the ADEA in accordance with the powers, remedies, and procedures of the Fair Labor Standards Act (FLSA).[252] Because the Court found a well-established right to a jury trial for private actions under the FLSA, the Court found a corresponding right for private actions brought under the ADEA.[253]

Backpay awards in a section 1981 action[254] alleging racial discrimination in employment are also deemed legal remedies.[255] Backpay for a violation of section 1981 is neither an equitable remedy nor a form of restitution.[256] Instead, backpay in section 1981 actions is more appropriately characterized as

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248. *Id.* at 571.

249. 29 U.S.C. §§ 621-634 (1988).

250. 549 F.2d 950 (4th Cir. 1977), *aff'd on statutory grounds*, 434 U.S. 575 (1978).

251. *Id.* at 954.

252. Lorillard v. Pons, 434 U.S. 575, 579 (1978). The Court reviewed the legislative history of the ADEA and determined that Congress intended the ADEA be enforced in accordance with the powers, remedies and *procedures* of the FLSA. (emphasis in original, quoting 29 U.S.C. § 626(b)). *See* Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988). The Court presumed that Congress was aware of any administrative or judicial interpretations of the FLSA and intended to adopt that interpretation when it enacted the ADEA. *Lorillard*, 434 U.S. at 580-81. By directing that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA, Congress intended that the right to a jury trial be available to enforce FLSA liability also be available in private actions under the ADEA. *Id.* at 582-83.

The Court reinforced this inference of congressional intent by examining the available remedies under the ADEA. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), empowers a court to grant "*legal* or equitable relief" and section 7(c), 29 U.S.C. § 626(c), authorizes private actions for "*legal* or equitable relief." *Lorillard*, 434 U.S. at 583 (emphasis in original). The Court inferred that Congress knew the significance of the term "legal" and intended there would be a right to a jury trial for private actions to recover backpay as unpaid minimum wages or unpaid overtime compensation. *Id.*

253. Lorillard v. Pons, 434 U.S. 575, 583 (1978).

254. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988). Section 1981 prohibits race discrimination in the making and enforcing of contracts, or suits to enforce such contracts. Because § 1981 prohibits race discrimination in employment contracts, a plaintiff claiming employment discrimination because of race has separate and distinct claims under § 1981 and Title VII. *See, e.g.*, Lytle v. Household Mfg. Co., 494 U.S. 545 (1990).

255. Setser v. Novak Inv. Co., 638 F.2d 1137 (8th Cir.), *amended* 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981).

256. *Id.* at 1141-42.

compensatory, legal damages.[257] As such, section 1981 litigants are entitled to a jury trial on claims for backpay.[258]

The Supreme Court has not addressed the issue of whether private litigants are entitled to a jury trial for backpay claims under Title VII of the Civil Rights Act of 1964.[259] Courts[260] and commentators[261] disagree about the answer to this question. Federal judges routinely deny the right to a jury trial in Title VII actions, finding that the statute makes no mention of legal relief, but that the statute explicitly authorizes "equitable relief."[262] Commentators and a

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257. *Id.* at 1142.

258. Lytle v. Household Mfg. Co., 494 U.S. 545, 550 (1990) (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989)).

259. Lytle v. Household Mfg. Co., 494 U.S. 545, 549 n.1 (1990) ("This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial."). Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment against any individual in hiring, discharging or other terms, conditions, and privileges of employment because of such person's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII specifically limits available relief to certain proscribed remedies:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or *any other equitable relief* the court deems appropriate.

§ 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1988) (emphasis added).

260. The majority view is that Congress meant for federal judges to decide relief in all Title VII actions. Great Am. Fed. Sav. & Loan Assn. v. Novotny, 442 U.S, 366, 375 (1979) (noting that "[b]ecause [Title VII] expressly authorized only equitable remedies, the courts have consistently held that neither party has a right to a jury trial"). *See also* Wilson v. City of Aliceville, 779 F.2d 631, 635 (11th Cir. 1986); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 940 (10th Cir. 1979); Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Harkless v. Sweeney Indep. Sch. Dist., 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied,* 400 U.S. 991 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

261. Commentators reject the majority view that Title VII does not permit jury trials. *See* Charles A. Horowitz, Note, *Judge Acker's Last Stand: The Northern District of Alabama's Lonesome Battle for the Right to Trial By Jury Under Title VII*, 39 WASH. U. J. URB. & CONTEMP. L. 135 (1991); Matthew F. Davis, Note, *Beyond The Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 KAN. L. REV. 1003 (1990); Vincenza G. Aversano et al, Note, *Jury Trial Right Under Title VII: The Need for Judicial Reinterpretation*, 6 CARDOZO L. REV. 613 (1985); Sheila Jordan Cunningham, Case Comment, *Right to Jury Trial in Suits for Backpay: Title VII or Section 1981*, 12 MEM. ST. U. L. REV. 355 (1982).

262. Courts noted that Title VII authorizes courts to award injunctions, reinstatement, backpay or other equitable relief. Courts routinely concluded that each of these remedies were equitable in nature, and that any monetary awards that might be deemed legal in nature (e.g. backpay) were so intertwined with equitable relief (e.g. reinstatement) that jury trials are inappropriate. *See, e.g.,* Gurmankin v. Costanzo, 626 F.2d 1115, 1122 (3d Cir. 1980), *cert. denied,*450 U.S. 923 (1981); Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979); Harmon v. May Broadcast Co., 583 F.2d 410, 411 (8th Cir. 1978); Morelock v. NCR Corp., 546 F.2d 682, 687 (6th Cir. 1976), *reh'g denied,* 555 F.2d 1348 (1977), *vacated,* 435 U.S. 911 (1978); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975).

minority of courts that argue for the right to a jury trial in Title VII cases believe backpay is a form of legal relief that entitles the parties to a right to a jury trial.[263]

The conflict over this issue was recently resolved by Congress through the enactment of the Civil Rights Act of 1991.[264] This legislation explicitly grants the right to a jury trial to Title VII litigants who seek punitive and compensatory damages for acts of intentional discrimination, remedies that had not previously been available under Title VII.[265] By definition, Congress made clear that litigants seeking existing equitable remedies are not entitled to a jury trial.[266] As a practical matter, however, plaintiffs in Title VII suits are now entitled to a jury trial if they request backpay and punitive damages or non-pecuniary damages, with the jury entitled to hear all issues common to both the legal and equitable claims.[267]

Establishing that a claim for backpay is a legal remedy to be tried before a jury does not end the analysis. A plaintiff filing an ERISA section 510 cause of action is likely to request additional remedies in addition to backpay. For example, the wrongfully discharged employee may request backpay and benefits,

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263. Recently, one federal district court has granted a plaintiff the right to a jury trial in a Title VII suit requesting backpay and reinstatement. Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N. D. Ala. 1989), *aff'd on reconsideration*, 723 F. Supp. 635 (N.D. Ala. 1989). Judge Acker concluded that the majority view rested on a conceptually flawed rule that backpay is a form of equitable relief. *Id.* at 646. Judge Acker based his decision on recent Supreme Court cases that undermine the majority view that backpay is an equitable remedy. *Id.* at 640-46 (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Tull v. United States, 481 U.S. 412 (1987); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Curtis v. Loether, 415 U.S. 189 (1974)). *See supra* note 261 citing commentators who agree with Judge Acker's view that backpay under Title VII is a legal remedy which entitles plaintiffs to jury trials.

264. Civil Rights Act Of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

265. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 102(b) and (c) (1991) ("if a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury").

266. Civil Rights Act of 1991, No. Pub. L. 102-166, 105 Stat. 1071, § 102(b)(2) (1991). ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.") Compensatory damages can be sought for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses. Civil Rights Act of 1991, Pub. L. 102-166 , § 102(b)(3).

267. Tull v. United States, 481 U.S. 412, 425 (1987) (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974)) (if a legal claim is joined with an equitable claim, the right to a jury trial guaranteed by the Seventh Amendment applies to all issues common to both claims).

plus reinstatement to the position formerly held.[268] Such a demand includes both legal and equitable remedies. When legal and equitable remedies are included in the same action, "the right to a jury trial on the legal claim, including all issues common to both claims, remains intact."[269] The right to a jury trial on the legal claims cannot be abridged simply by characterizing the legal claims as "incident to" the claims for equitable relief.[270] Thus, a plaintiff has a right to a jury trial on the legal claims, including all issues common to both claims, followed by a bench trial on the equitable claims.[271]

VI. PROPOSAL FOR CHANGE

Recent Supreme Court cases recognize the true force of the Seventh Amendment. These cases suggest doctrinal change adding the right to a jury trial to a host of federal statutes, including ERISA.[272] With the emergence of its two-part test,[273] the Supreme Court has expanded the constitutional right to a jury trial into areas traditionally viewed as beyond the scope of the Seventh Amendment. Recent Supreme Court decisions have added the right to a jury trial to such traditional "non-jury" statutes as Title VIII (the fair housing provision) of the Civil Rights Act of 1968, the ADEA, the Clean Water Act, the Bankruptcy Code, section 301 of the LMRA, and section 1981 of the Civil Rights Act of 1866.[274] With the Supreme Court utilizing this two-part test to add the right to a jury trial in such non-traditional areas, ERISA cannot be far behind. Federal district courts clearly believe, in light of the Supreme Court's most recent pronouncements, that ERISA section 510 actions involve legal

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268. Reinstatement is a make whole remedy that places the plaintiff in the position she would have been in but for the discriminatory discharge. Reinstatement is characterized as an equitable remedy. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (reinstatement and restoration of seniority is an equitable order that returns a wrongfully discharged employee to her former position with seniority). *See generally* JAMES MOORE, 5 MOORES'S FEDERAL PRACTICE ¶ 38.21 (2d ed. 1992) (judgments compelling reinstatement to employment are equitable remedies).

269. Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974).

270. *Id.* at 196 (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962)).

271. Lytle v. Household Mfg. Co., Inc., 494 U.S. 545, 553 (1990) (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)). The order in which legal and equitable claims are tried is particularly important because res judicata or collateral estoppel would prevent re-litigation of the legal claim before a jury if the judge first decided both legal and equitable claims in a bench trial. *Lytle*, 494 U.S. at 550.

272. Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882 (S.D.N.Y. 1990).

273. *See supra* notes 192-98 and accompanying text.

274. *See* Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990) (section 301 of the LMRA); Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) (section 1981, 42 U.S.C. § 1981); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (the Bankruptcy Code); Tull v. United States, 481 U.S. 412 (1987) (the Clean Water Act); Lorillard v. Pons, 434 U.S. 575 (1978) (the ADEA); Curtis v. Loether, 415 U.S. 189 (1974) (Title VIII (the fair housing provisions) of Civil Rights Act of 1968).

claims triable to a jury.[275]

Rather than wait for federal courts of appeal and the Supreme Court to rule on the validity of recent lower court decisions awarding jury trials in section 510 actions, Congress should act now to decide this matter. Decisive action will end any uncertainty and avoid the inconsistency in decisions issued by the federal courts. Congress should amend ERISA to provide the right to a jury trial in section 510 actions only, until the federal courts definitively rule on whether additional ERISA claims offer legal claims amenable to a trial by jury. The proposed language to be enacted would parallel that found in the ADEA, a statute Congress amended after the Supreme Court granted the right to a jury trial to ADEA litigants.[276] The new proposed statute would read:

> In an action brought under section 502 of this chapter, a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of section 510, regardless of whether equitable relief is sought by any party in such action.

This statutory amendment serves several purposes that would not be served if litigants are forced to wait for Supreme Court application of the Seventh Amendment to ERISA section 510 actions. The statutory language creates the uniformity Congress was striving for when it enacted ERISA eighteen years ago. The language creates this uniformity more quickly than awaiting action by the Supreme Court because the Supreme Court has not accepted certiorari on any of the circuit court cases deciding the question of the right to a jury trial under ERISA. This statutory amendment also resolves the split in authority as to the proper interpretation of congressional silence on the right to a jury trial. Further, the amendment allows federal courts to consistently grant the right to a jury trial, regardless of the remedies sought by plaintiff and regardless of the potential for awards of compensatory and punitive damages in ERISA section 510 actions. Finally, a jury trial would grant litigants a right that is a "basic and fundamental feature of our system of federal jurisprudence . . . [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the court."[277] Clearly, the broad protective effect of ERISA section 510 can only be furthered by adding the right to a jury trial to strengthen and advance the uniform body of benefit law Congress created when it enacted ERISA.

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275. *See supra* notes 164-77 and accompanying text.

276. *See supra* note 223.

277. Jacob v. New York City, 315 U.S. 752, 752-53 (1942).

VII. CONCLUSION

The Supreme Court has not yet decided whether ERISA participants wrongfully terminated for the purpose of interfering with rights under a benefit plan are entitled to a jury trial. Appellate courts have consistently decided that ERISA section 510 litigants are not entitled to a jury trial based on two different lines of reasoning. The first argument is based on judicial interpretation of ERISA itself. These courts interpret Congress' silence on the right to a jury trial for ERISA section 510 violations as an implied admission that Congress did not intend such a right to exist. The second line of reasoning relies on the Seventh Amendment and examines whether ERISA section 510 offers rights and remedies that are legal in nature. These courts have denied section 510 litigants access to a jury trial because the remedies of reinstatement and backpay have traditionally been viewed as equitable in nature and not subject to the Seventh Amendment guarantee of a jury trial.

Plaintiffs in ERISA section 510 actions should be entitled to a trial by jury under the Seventh Amendment. Recent Supreme Court rulings in *Tull*, *Granfinanciera*, and *Terry* require a re-evaluation of the right to a jury trial in ERISA section 510 actions. These recent Supreme Court cases do not simply restate the existing law on the constitutional right to a jury trial. Instead, these cases substantively alter and significantly expand the right to a jury trial guaranteed by the Seventh Amendment. These cases recognize and reinforce that the Seventh Amendment is a force to be reckoned with. Federal courts that have addressed the jury trial question in light of these new Supreme Court cases also recognize the broad protections offered by the Seventh Amendment and the expansive view the Supreme Court has taken on this issue. Recent lower court decisions like *Vicinanzo* and *Blue Cross* properly decided that ERISA section 510 offers legal rights and remedies triable to a jury on demand. To resolve the conflict that presently exists in the federal courts on this question and to provide the full protections ERISA was intended to offer, Congress should act now to protect the fundamental right to a jury trial guaranteed to ERISA section 510 litigants by the Seventh Amendment.

Nancy L. Pirkey