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The Jury Trial, the Magna Carta, and ERISA

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The 800-pound gorilla in ERISA litigation is the question of whether jury trials are available for class action fiduciary breach claims. In what follows we have peered behind the dusty drapes of history to better understand this difficult issue.

One thousand years ago, most Anglo-Saxon disputes were settled by ordeal, battle, judicial inspection, or compurgation. For example, debtor controversies were resolved by judicial inspection of documents or by compurgation, a procedure where the debtor could be exonerated if he could produce 12 men to swear on his behalf.¹ Criminal cases were resolved by battle or by ordeal, which was torture using cold water or hot irons.²

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The arrival of William the Conqueror in 1066 not only brought French language and culture to Great Britain, it also brought the use of jurors to settle property disputes. The Normans had a practice of putting together a group of local people under oath (hence the term juror) to tell the truth. As far as we know, the first jurors in England acted as sources of information about property by gathering information for William the Conqueror's *Domesday Book*.

The Magna Carta

It took over 300 years for jury trials to slowly displace ordeal, battle, and compurgation. Henry II (1154–1189) is generally considered to be the father of the common law. Henry and his successors introduced a permanent system of royal justice administered by professional, royal courts. This new system of royal justice became known as the “common law” because the same law applied to the entire kingdom. The new royal justice system was administered by a small group of professional judges who normally sat in Westminster or traveled with the King.³

Common law further developed when the English monarchy had been weakened by the enormous cost of fighting for control over large parts of France. King John was forced by his barons to sign a document limiting his authority to pass laws. Known as the “Great Charter,” the Magna Carta of 1215 also required that the King's entourage of judges establish courts at a certain place rather than dispense autocratic justice in unpredictable places around the country. In 1297 the highest court in England, the English Court of Common Pleas, had five judges. A powerful and tight-knit judiciary gave rise to a rigid and inflexible system of common law. As a result, increasing numbers of citizens petitioned the King to override the common law, and on the King's behalf the Lord Chancellor could intercede in the judgment to do what was equitable in a case. Henry VIII appointed Sir Thomas Moore as the first lawyer to serve as Lord Chancellor. After Sir Thomas Moore, a systematic body of equity law grew up alongside the rigid common law, and it developed into what is now called the Court of Chancery.

The High Court of Chancery was very unlike the courts of law. The common law was rigidly applied based on formal causes of action and precedent. To counterbalance the growing unfairness and arbitrary results found in the courts of law, the Lord Chancellor was given jurisdiction to act on behalf of the King according to fairness rather than the strict letter of the law.

Part of the problem with the courts of law was that juries were not really independent. Early juries were usually prodded to reach

the right result. They could be starved into submission or jailed if they reached the wrong verdict. For example, the Star Chamber in Westminster (established as a court of law to try nobles) was known to punish jurors who refused to convict by seizing their land and possessions.

The *Bushell* case turned the tide for the independence of juries.⁴ Quakers William Penn and William Meade were charged with unlawful assembly. They had gathered together to protest the Conventicle Act, which restricted certain religious practices. The judge told the jury that they “shall not be dismissed until we have a verdict that court will accept.”⁵ When the jury decided to acquit Penn and Meade, the judge would not accept the verdict and sent them back, fining them. After one of the jurors, Edward Bushell, refused to pay the fine, the judge threatened that “you shall be locked up without meat, drink, fire and tobacco. You shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.”⁶ Four jurors including Bushell filed a writ of habeas corpus. In a landmark decision, the Lord Chief Justice released the four jurors and established the jury as the sole judge of fact.⁷ Thereafter, a jury had the power to give a verdict according to its own conscience and could not be penalized for taking a view of the facts at odds with those of the judge.

Law and Equity in Modern Times

The most important distinction in modern times between law and equity is the remedy each provides. At law, the most common civil remedy is damages. A court sitting in equity, however, can issue an injunction or a decree telling someone either to do or not do something. A significant difference between trials at law versus trials in equity is that juries are not available in equitable proceedings—the judge is the trier of fact.

The right to a jury trial can arise either from statute or from the Seventh Amendment to the U.S. Constitution.⁸ In evaluating a motion to strike a plaintiff’s demand for a jury trial, a court must examine both sources of authority to determine if a jury trial is proper.⁹

In 1938, the Federal Rules of Civil Procedure merged law and equity into a single civil jurisdiction and established uniform rules of procedure. Legal and equitable claims, which previously were brought as separate claims on different sides for the court, could now be joined in a single action. As the Supreme Court explained in *Ross v. Bernhard*,¹⁰ the right to a jury trial ultimately depends on the nature of the claim to be tried rather than the procedural framework in which it is raised.¹¹

Jury Trials and ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) regulates the operation of private pension and health care plans. ERISA protects plan participants and beneficiaries by requiring certain disclosures and establishing standards of conduct for plan administrators. In addition, ERISA Section 502(a)(2),¹² allows a plan fiduciary, participant, or beneficiary to bring a civil action for relief under Section 409 of ERISA.¹³ ERISA Section 409 requires that a fiduciary be held personally liable “to make good ... any losses to the plan resulting from [a breach of the fiduciary’s duty], and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary.” ERISA Section 409 also allows the imposition on a breaching fiduciary of “other equitable or remedial relief as the court may deem appropriate.”¹⁴ Although plaintiffs seeking relief under ERISA Section 502(a)(2) have occasionally demanded a jury trial, there is neither a statutory right nor a constitutional right to a jury trial in such cases.

Absence of a Statutory Right

No court has ever found a statutory right to a jury trial under ERISA in the statute’s 30-year existence. In fact, “federal courts have noted the complete absence in the ERISA statute of any mention of the right to trial by jury.”¹⁵

In light of the heavy weight of authority against a statutory right to a jury trial, courts are reluctant to infer a new remedy or right into the statute. The Supreme Court has repeatedly cautioned federal courts to be reluctant to tamper with ERISA’s “carefully crafted and detailed enforcement scheme,” which “provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.”¹⁶

Absence of a Constitutional Right

The Seventh Amendment guarantees the right to jury trials in civil cases and federal court but only for “suits at common law.”¹⁷ The Amendment’s limitation to suits at common law refers to “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.”¹⁸ In *Granfinanciera*, the Supreme Court crafted a two-part test for determining whether a particular action is a suit at common law that entitles a litigant to a trial by jury.¹⁹ The first question is whether the action would have been deemed legal or equitable in eighteenth-century England prior

to the merger of law and equity. This requires a court to compare the action in question to analogous eighteenth-century actions: actions tried in English courts of law are suitable for jury trials, whereas actions tried in courts of equity or admiralty do not require a jury trial.²⁰ The second inquiry is whether the remedy sought is legal or equitable in nature. The Court must give greater weight to the latter factor.²¹

Attending to the first step of the Supreme Court's two-part inquiry, claims of fiduciary breach historically were within the exclusive province of the equity courts.²² The common law courts did not recognize trusts, and beneficiaries could only seek redress in courts of equity.²³ The Supreme Court has acknowledged that "it is true that, at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust."²⁴

ERISA traces its origins to trust law. As such, an action under Section 502(a)(2) for breach of fiduciary duty is equitable because a plaintiff seeks rights that are creatures of trust law. Although the right to recover gains from breaches of fiduciary duties may be provided for in the statute, the substantive right is wholly derived from equity jurisprudence.²⁵ As a result, an ERISA breach of fiduciary duty claim would have sounded in equity in eighteenth-century England. Accordingly, jury trials are improper under the first step of the *Granfinanciera* analysis.

In the second step of the *Granfinanciera* analysis, the Court considers whether the remedy sought is legal or equitable. It is well established that the mere fact that a plaintiff seeks an award of money damages does not transform the remedy from equitable to legal.²⁶ In a Section 502(a)(2) claim for breach of fiduciary duty, the traditional rule is that virtually all remedies against a fiduciary are equitable in nature. As the Restatement of Trusts explains, "the remedies of the beneficiary against the trustee are exclusively equitable."²⁷ Included among the remedies that the Restatement describes as "exclusively equitable" are actions to redress a breach of trust by payment into the trust estate of any loss resulting from the breach of trust.²⁸ These causes of action were not considered to be suits at law for the recovery of damages but equitable actions to surcharge the trustee for breach of fiduciary duty.²⁹ Consequently, although the remedy of surcharge may superficially resemble an award of damages at law, it is actually a creature of equity, governed by equitable principles and awarded only by a chancery court.

Federal courts have consistently held that actions under ERISA Section 502(a)(2) are equitable in nature for the purposes of the Seventh Amendment analysis.³⁰ Every Circuit Court of Appeal that has considered this issue has concluded that claims under ERISA are equitable in nature and as such do not fall within the purview

of the Seventh Amendment.³¹ The demand for a jury trial therefore fails under the second step of the Supreme Court's *Granfinanciera* analysis.

The ERISA Plaintiffs' bar, of course, sees things differently. They consistently assert that the United States Supreme Court's ruling in *Great-West Life & Annuity Insurance Co. v. Knudson*³² effectively overruled all previous decisions finding there is no right to a jury in ERISA cases. According to Plaintiffs, the Supreme Court's analysis of the distinction between legal and equitable claims in *Great-West* compels a finding that a "plan-wide" ERISA fiduciary breach claim for money damages is a legal claim, thus providing them with a constitutional right to a jury trial. This argument has been raised all across the country.³³ The majority of district courts have concluded that because *Great-West* had nothing to do with jury trials or plan-wide fiduciary breach claims, it did not implicitly overrule the existing jurisprudence finding there is no right to a jury trial under ERISA. A few courts have, however, agreed with Plaintiffs.³⁴ In the end, "The jury is still out..." No appellate court has yet addressed the question of whether there is a right to a jury trial for class action fiduciary breach claims under ERISA Section 502(a)(2).

Notes

1. Daniel Klurman & Paul Mahoney, "Legal Origin?" 35 *J. Comp. Econ.*, 278 (2007).
2. *Id.*
3. *Id.*
4. 124 Eng. Rep. 1006 (C.P. 1670).
5. *Id.* at 1107.
6. *Id.* at 1012.
7. *Id.* at 1018.
8. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999).
9. *See* Fed. R. Civ. P. 12(f) (providing a court may strike an insufficient defense or any redundant, immaterial, or scandalous matter).
10. 396 U.S. 531 (1970).
11. *Id.* at 540.
12. 29 U.S.C. § 1132(a)(2).
13. 29 U.S.C. § 1109.
14. 29 U.S.C. § 1109.
15. *Ellis v. Rycenga Homes, Inc. Profit-Sharing 401(k) Plan*, 2007 WL 1032367, at *1 (W.D. Mich. Apr. 2, 2007) (citing *Berry v. CEIBA-Geigy*, 761 F.2d 1003, 1007 (4th Cir.

1985); *see In re Vorpab I*, 695 F.2d 318, 320 (8th Cir. 1982); *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 995 (9th Cir. 2000) (affirming there is no independent statutory right to jury trial in ERISA actions); *Lamberty v. Premier Millwork & Lumber Co.*, 329 F. Supp. 2d 737, 744 (E. D. Va. 2004).

16. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 151 L. Ed.2d 635, 122 S. Ct. 708 (2002) (emphasis in original; internal quotation and citations omitted); *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 254, 124 L. Ed.2d 161, 113 S. Ct. 2063 (1993).

17. U.S. Const. amend. VII.

18. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 31, 41, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989).

19. *Id.* at 42.

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

21. *Id.*

22. *Evans v. Pearson Enter.*, 434 F.3d 839, 849 (6th Cir. 2006).

23. *See* 1 Dan B. Dobbs, *Law of Remedies*, § 2.3(2) (2d ed. 1993).

24. *Mertens*, 508 U.S. at 256.

25. *Beesley v. Int'l Paper Co.*, No. 06-703DRH, 2009 WL 260782, at *5 (S.D. Ill. Feb. 5, 2009).

26. *Curtis v. Loether*, 415 U.S. 189, 196, 39 L. Ed. 2d 260, 94 S. Ct. 1005 (1974).

27. *Restatement (Second) of Trusts*, § 197 (1959).

28. *Id.* at § 205; *see Bogert on Trusts* § 862.

29. *See, e.g., Mosser v. Darrow*, 341 U.S. 267, 272–273, 95 L. Ed. 927, 71 S. Ct. 680 (1951) (reorganization trustee may be surcharged for loss to estate under equitable principles).

30. *See Spano v. Boeing Co.*, 2007 WL 1149192, at *8 (S.D. Ill. Apr. 18, 2007) (collecting cases).

31. *See, e.g., Thomas*, 228 F.3d at 996–997 (reaffirming prior holdings that there is no right to a jury under ERISA because in enacting ERISA, Congress “created a right that is essentially equitable in nature”); *Hampers v. W.R. Grace & Co.*, 202 F.3d 44, 54 (1st Cir. 2000) (affirming district court’s denial of plaintiff’s demand for a jury trial under ERISA); *Thomas*, 228 F.3d at 996 (holding that Congress limited participant remedies under ERISA to “those available in equity: and jury trials are not available “to all claims by participants and beneficiaries seeking remedies under section 502”); *Langlie v. Onan Corp.*, 192 F.3d 1137, 1141 (8th Cir. 1999) (holding that “[t]here is no right to a jury trial under ERISA”), *cert. denied*, 529 U.S. 1087 (2000); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1162 (10th Cir. 1998) (same); *Broadbuss v. Florida Power Corp.*, 145 F.3d 1283, 1287 n.** (11th Cir. 1998) (same); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998) (same), *cert. denied*, 525 U.S. 1054 (1998); *Borst*, 36 F.3d at 1324 (same); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 298 (4th Cir. 1993) (same); *Bair v. Gen. Motors Corp.*, 895 F.2d 1094, 1096 (6th Cir. 1990) (same); *Pane v. RCA Corp.*, 868 F.2d 631, 637 (3d Cir. 1989) (same).

32. 534 U.S. 204 (2002) (involving a claim for subrogation under ERISA § 502(a)(3)).
33. *See, e.g.*, *Graham v. Hartford Life & Acc. Ins. Co.*, 2008 WL 4826314, at *3 (N.D. Okla. Oct. 29, 2008); *Yolton v. El Paso Tenn. Pipeline Co.*, 2008 WL 275685, at *1 (E.D. Mich. Jan. 31, 2008); *Jetseck v. Prudential Ins. Co. of Am.*, 2007 WL 3449031, at *1–2 (N.D. Ill. Nov. 15, 2007); *Reese v. CNH Global N.V.*, 2007 WL 2484986, at *2 (E.D. Mich. Aug. 29, 2007).
34. *Kirse v. McCullough*, 2005 U.S. Dist. Lexis 17023, at *8 (W.D. Mo. May 12, 2005); *see Bona v. Barasch*, 2003 WL 1395932 (S.D.N.Y. Mar. 20, 2003).

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