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# A Reflection on ERISA Claims Administration and the Exhaustion Requirement

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# A REFLECTION ON ERISA CLAIMS ADMINISTRATION AND THE EXHAUSTION REQUIREMENT<sup>†</sup>

James A. Wooten\*

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The final panel of the *Drexel Law Review* Symposium, *ERISA at 40: What Were They Thinking?*, held on October 25, 2013, addressed "Benefit Disputes and Enforcement under ERISA."<sup>1</sup> The rules and doctrines governing benefit-claims administration and the remedies available to plan participants under ERISA have generated a great deal of controversy, so this panel, not surprisingly, included spirited and interesting exchanges on these topics. This Reflection focuses on ERISA's regime for administering benefit claims and, in particular, the requirement that a participant or beneficiary generally may not bring a civil action to enforce her benefit rights until she has exhausted her plan's internal review procedures (the "exhaustion requirement"). Part I explains why many observers perceive the regime for administering benefit claims to be out of step with the purposes behind ERISA's substantive regulation of pension plans. Part II considers the debate among commentators and courts about whether federal labor law should serve as a guide for designing rules to regulate claims administration, and the panelists' discussion of this issue. Part III discusses some evidence in ERISA's text and legislative history that suggests that Congress rejected the idea that participants or beneficiaries should have to satisfy a prerequisite,

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1. Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409 (2014).

such as the exhaustion requirement, before filing suit to enforce benefit rights.

### I. ERISA'S ANOMALOUS REGULATION OF BENEFIT-CLAIMS ADMINISTRATION

The rules and procedures that govern the enforcement of benefit claims under ERISA seem inconsistent with the statute's broader protective purposes. The major reforms in ERISA reflect a legislative determination that there was a mismatch between what employees understood pension plans to be doing and what pension plans were doing in reality.<sup>2</sup> This mismatch had several causes. One was that pension plans served different purposes for employers and employees.<sup>3</sup> For employers, a pension plan provided a means of personnel administration, a tax shelter, or both. For employees, a pension plan was a source of retirement security. These purposes often corresponded. For example, when an employee stayed at a firm until he reached retirement age, providing a pension to the employee facilitated both the employer's interest in personnel administration (by smoothly moving an aged employee out of the workforce) and the employee's interest in retirement security (by granting the employee retirement income).<sup>4</sup> There were also many cases, however, in which the employer's and the employee's interests did not correspond. For example, an employee who left a firm before retiring or whose firm closed down was still going to need retirement income. The firm had no reason to pay a pension, however, because in the former case the employee had exited the firm without having to be paid to go and in the latter case the firm had left the employee.

Another element of the mismatch was that employers and labor unions were "repeat players" that, in their roles as sponsors or as bargainers of pension plans, established and managed many pension promises, while employees were "one-shotters" who were heavily dependent on a single pension promise.<sup>5</sup> As repeat players, employers and unions had a different perspective than employees.

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2. See Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 36 (1992) ("Plans . . . tend to present a substantial danger of defeating the expectations they systematically create.").

3. See generally *id.* (discussing these different purposes).

4. JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 9-10 (2004).

5. For a discussion of the concepts of "repeat players" and "one-shotters," see Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-108 (1974).

For one thing, employers and unions possessed specialized or expert knowledge about pension plans that would not have been feasible for employees to acquire.<sup>6</sup> Moreover, as stakeholders in a large number of pension promises, employers and unions could take a broader perspective than individual employees, who had all of their eggs in one basket.<sup>7</sup> Given that the repeat players in the private pension system had interests that sometimes diverged from the interests of employees and that employees—as one-shotters—were unlikely to fully understand their pension plan, it is not surprising that pension plans often failed to provide what employees believed they had earned. And since employees—as one-shotters—could not diversify or insure against the risks that threatened their pension expectations, the consequences of forfeiting pension accruals or of a default by an underfunded pension plan could be dire. As Stanley Surrey put it, long-service employees who failed to receive the pension they expected could not “retrace their steps and make other financial arrangements to fill the void . . . . For them, the private pension system [was] a failure.”<sup>8</sup> The major regulatory reforms in ERISA were meant to better align private pension plans with the expectations and capacities of employees.

The process of claims administration also involves employers and unions (as well as, among others, insurers) as repeat players and participants and beneficiaries as one-shotters. In the sphere of claims administration, however, the governing rules—including the exhaustion requirement, deferential judicial review of claims denials, and the limitation of judicial review to the record developed as part of the plan’s claims process—create a regime that leaves participants and beneficiaries extremely vulnerable.<sup>9</sup> As payers of benefit claims, the interests of employers and of insurers conflict with the interests of participants and of beneficiaries as prospective recipients of benefits. Although the majority of benefit claims may be processed without dispute, when a dispute does arise, participants and beneficiaries are thrust into an unfamiliar role, interacting in a situation of

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6. *Id.* at 98 (Repeat players “develop expertise and have ready access to specialists.”).

7. *Id.* at 99–100 (Repeat players “can play the odds” and “play for rules.”).

8. WOOTEN, *supra* note 4, at 149.

9. For discussion of the incongruity between ERISA’s substantive regulation of pension plans and the rules courts apply to benefit claims, see Conison, *supra* note 2, at 21, 33–34 *passim*; John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1335–40 (2007); Brendan S. Maher, *Creating a Paternalistic Market for Legal Rules Affecting the Benefit Promise*, 2009 WIS. L. REV. 657, 669–82 [hereinafter *Creating a Paternalistic Market*].

conflict with plan officials who, as specialists in claims administration, possess significant informational advantages. A participant or beneficiary who does not have expert assistance in navigating her plan's claims process risks making procedural or strategic mistakes—such as failing to exhaust a claim or to build an adequate record—that will torpedo a claim that otherwise would be granted. In contrast to plan administrators who make mistakes, however, participants and beneficiaries seem less likely to receive second chances. Here, then, is a set of rules that seems very ill adapted to the expectations and capacities of the people benefit plans exist to serve.

## II. THE SOURCES OF ERISA'S CLAIMS ADMINISTRATION REGIME

Some critics blame this anomalous governance regime on the courts.<sup>10</sup> This seems logical because key features of the regime, such as the exhaustion requirement, deferential judicial review of benefit denials, and the limited record available for judicial review, are not delineated in ERISA or its legislative history.<sup>11</sup> In the absence of specific instructions in the statute or from the legislative history, how did the courts arrive at these rules and doctrines? One major factor has been the idea that ERISA's drafters viewed federal labor law, and especially practices developed in grievance arbitration under section 301 of the Labor-Management Relations Act of 1947 (LMRA),<sup>12</sup> as an analog or blueprint for how benefit claims ought to be administered. The key text supporting this view is the following language from the ERISA Conference Report: "All such actions [un-

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10. See, e.g., Conison, *supra* note 2, at 21, 33–34 (describing the courts' "approach" to ERISA benefit claims as "unsupported by the text of the statute, the legislative history or any policy that is consistent with ERISA"); Donald T. Bogan, *The Unsupported Delegation of Conflict Adjudication in ERISA Benefit Claims Under the Guise of Judicial Deference*, 57 OKLA. L. REV. 21, 25 (2004) ("Courts justify [their] apparent contradiction to Congress's express mandate by misapplying principles of deference."); Mark D. DeBofsky, *What Process Is Due in the Adjudication of ERISA Claims*, 40 J. MARSHALL L. REV. 811, 820–23, 839 (2007); Langbein, *supra* note 9, at 1323 (referring to the Supreme Court's "disastrous misstep" in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 1 (1989)); *Creating a Paternalistic Market*, *supra* note 9, at 660 ("[W]hen faced with weakly ambiguous statutory text, courts have indulged their own policy intuitions and prioritized cost over robustness—contrary to ERISA's intent."); Brendan S. Maher, *The Affordable Care Act, Remedy, and Litigation Reform*, 63 AM. U. L. REV. 649, 664–68 (2014).

11. JOHN H. LANGBEIN, DAVID A. PRATT & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW 694 (5th ed. 2010) ("ERISA neglected to supply any express guidance about what standard of review courts should apply in reviewing the decisions of plan fiduciaries."); Denise Clark, *Is Exhaustion of Remedies Required?*, in ERISA LITIGATION 356 (Jayne E. Zanglein & Susan J. Stabile, 4th ed. 2011) ("Oddly enough, no statutory language sets forth [the exhaustion] requirement.").

12. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2012).

der section 502(a)(1)(B)] 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.”<sup>13</sup> Citing this language, commentators and courts have argued that Congress meant for the judiciary to import particular doctrines or procedures developed under section 301—for example, the general requirement that employees use and exhaust the dispute settlement procedures provided in their collective bargaining agreement—into the sphere of claims administration.<sup>14</sup>

Critics of the governance regime for benefit claims—most notably, Jay Conison in an important 1992 article entitled *Suits for Benefits Under ERISA*<sup>15</sup>—rejected this move, which Conison characterized as “The Spurious Appeal to Labor Law.”<sup>16</sup> The reason ERISA’s statutory text did not mention an exhaustion requirement, Conison argued, was that ERISA’s drafters did not have such a requirement in mind.<sup>17</sup> The general policy requiring claimants to use and to exhaust arbitration procedures may have served the purposes of federal labor law, Conison observed, but “[t]here [we]re . . . compelling reasons why Congress would not have wanted courts uncritically to extend rules for the enforcement of collective bargaining agreements to suits for benefits under ERISA.”<sup>18</sup> Most importantly, the basic policies of federal labor law, which require “individual access to courts” to give way to the broader goal of maintaining “a system of industrial self-government,” are inconsistent with ERISA’s “paramount goal”—“the protection of [individual] rights and the fulfillment of employee benefit expectations.”<sup>19</sup> In other words, the text of ERISA does not mention an exhaustion requirement because ERISA’s drafters would not have thought the purposes of federal labor law or the mechanisms labor law employed to pursue those

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13. Conison, *supra* note 2, at 16 (quoting H.R. REP. NO. 93-1280, at 327 (1974), reprinted in 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4594 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY]). The quoted language has been described as “[p]erhaps the most persuasive and frequently cited basis for applying the exhaustion doctrine under ERISA . . . .” ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 13-37 (3d ed. 2012).

14. Conison, *supra* note 2, at 17 nn.54-56.

15. *Id.*

16. *Id.* at 17.

17. *See id.* at 17-20.

18. *Id.* at 18.

19. *Id.* at 19-20.

purposes were necessarily relevant to the administration of benefit claims.<sup>20</sup>

Among the discussants on the Symposium panel entitled *Benefit Disputes and Enforcement Under ERISA*<sup>21</sup> were two former congressional staffers who played roles in drafting pension-reform bills: Bob Nagle, who participated in the drafting of ERISA as a member of the staff of Senate Labor Committee Chair Harrison Williams (D-N.J.), and Frank Cummings, who served on Jacob Javits's (R-N.Y.) Senate staff in the 1960s and 1970s. One topic that arose in the panel's discussion was section 503 of ERISA, which requires benefit plans to provide a participant or beneficiary with adequate notice of the reasons for a benefit denial and "a reasonable opportunity" for a review of the denial by a named fiduciary.<sup>22</sup> When asked whether ERISA's drafters "contemplate[d] that the claims procedure [in section 503] had to be used . . .," Nagle and Cummings told a different story than Conison.<sup>23</sup> "I don't know if we specifically provided [for] that," Nagle replied. "I think that everyone would have agreed that there should be exhaustion of the procedure."<sup>24</sup> Cummings agreed, stating that the exhaustion requirement "should have been provided, but it wasn't."<sup>25</sup> In other words, when asked "what they were thinking" with respect to the procedure that plans had to provide for administering benefit claims, these staffers indicated that they had in mind an exhaustion requirement.

What led staffers to think that participants and beneficiaries should be required to exhaust the claims procedure that section 503 mandated plans to provide? For his part,<sup>26</sup> Cummings explicitly linked "the administrative procedure that was in [ERISA]" to griev-

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20. See *id.* at 17–20.

21. Panel Discussion, *Benefit Disputes and Enforcement*, *supra* note 1.

22. 29 C.F.R. § 2560.503-1 (2013); see also *id.* at 434–35.

23. Remarks of Mary Ellen Signorille, in Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 434 (2014).

24. Remarks of Robert Nagle, in Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 434 (2014).

25. Remarks of Frank Cummings, in Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 435 (2014).

26. Bob Nagle disagrees with Cummings on this point. In Nagle's view, there was no intent to use grievance arbitration procedures under the LMRA as a model for processing benefit claims under ERISA. Email from Robert Nagle (Mar. 18, 2014) (on file with author).

ance procedures under traditional labor law.<sup>27</sup> In his words, “this was going to be like a labor arbitration.”<sup>28</sup> Likewise, Howard Shapiro, a moderator on Panel 6, spoke of “the traditional labor laws” and “the procedure of filing a grievance in arbitration in the work force under a collective bargaining agreement” as being “the blackboard that was being written on.”<sup>29</sup>

In Cummings’s account, then, at least some of the people who drafted section 503 (or its precursors) had the model of grievance arbitration in mind.<sup>30</sup> This model led them to infer that specific doctrines or procedures that applied in the context of grievance arbitration, for example, an exhaustion requirement, should be extrapolated to the administration of benefit claims.<sup>31</sup> The exhaustion requirement did not make it into ERISA’s text or legislative history, however, so the courts did not implement this requirement by way of a specific statutory directive. Rather, courts picked up the analogy to labor arbitration and, as Cummings had done, used it to extrapolate particular doctrines from labor arbitration to claims administration.<sup>32</sup> In this account, the courts’ use of the labor law analogy meant that the exhaustion requirement—a policy that legislative drafters meant to adopt—ended up being implemented even though that policy never made it into the statute.

If, as Cummings has it, ERISA’s drafters intended there to be an exhaustion requirement, the implementation of that requirement reflects the drafters’ thinking and may seem more legitimate. But that does not mean that the analogy to grievance arbitration is accurate or that the exhaustion requirement is a good policy. In his critique of the courts’ use of grievance arbitration as an analog for claims administration, Conison emphasized that federal labor law’s overrid-

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27. Cummings, *Benefit Disputes and Enforcement*, *supra* note 25, at 412–13. Cummings was not on Javits’s staff during the Ninety-third Congress and did not participate as a staff member in the drafting of ERISA § 503. The language in § 503 first appeared, however, in 1972, when the Senate Labor Committee, of which Jacob Javits was the ranking Republican member, reported S. 3598. S. REP. NO. 92-1159, at 176 (1972) (adding new § 15(l) to the Welfare and Pension Plans Disclosure Act). Cummings worked on Javits’s staff through June of 1972 and remained in contact thereafter. Email from Frank Cummings (Mar. 25, 2104) (on file with author).

28. Cummings, *Benefit Disputes and Enforcement*, *supra* note 25, at 413.

29. Remarks of Howard Shapiro, in Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 436 (2014).

30. Cummings, *Benefit Disputes and Enforcement*, *supra* note 25, at 412–14.

31. *See, e.g., id.* at 412–14, 430.

32. *See, e.g., Amato v. Bernard*, 618 F.2d 559, 566–67 (9th Cir. 1980); *Taylor v. Bakery & Confectionary Union & Indus. Int’l Welfare Fund*, 455 F. Supp. 816, 818–20 (E.D.N.C. 1978). *See also* Conison, *supra* note 2, at 25–26 (noting *Amato* and *Taylor* as “influential cases”).

ing purpose of creating “a system of industrial self-government” meant that the interests or perspectives of individual employees had to yield to broader collective interests hashed out between employers and unions.<sup>33</sup> The disconnect between this purpose and ERISA’s protective purpose means that policies drawn from federal labor law, such as the exhaustion requirement, were likely to make employees less, rather than more, secure if applied to claims administration.<sup>34</sup>

In her remarks at the Symposium, Karen Ferguson, Director of the Pension Rights Center, echoed Conison’s concerns and emphasized the mismatch between labor arbitration and claims administration and the deleterious consequences of transposing policies from the former sphere to the latter. In contrast to the typical grievance arbitration, in which the union (a repeat player that will meet the employer in future proceedings) represents the employee, Ferguson noted that employees are usually on their own when their benefit plan denies their claim.<sup>35</sup> As a result, a procedure that in the labor law context produced an interaction between “two equal parties” creates “an unequal system when you’re looking at the benefit claims.”<sup>36</sup> She concludes, as did Conison, that the model of grievance arbitration in the collective-bargaining context “does not really apply to most participant claims, and I think . . . that that is the problem.”<sup>37</sup>

### III. THE EXHAUSTION REQUIREMENT IN LIGHT OF ERISA’S TEXT AND LEGISLATIVE HISTORY

For several reasons, I thought the exchange in which Bob Nagle and Frank Cummings agreed that ERISA’s drafters had intended to create an exhaustion requirement was one of the most noteworthy events at the Symposium. One reason was that, as noted in Part II, neither the text of ERISA nor the Conference Report mention an exhaustion requirement for benefit claims. A second reason was that Jay Conison’s article, which provides the most detailed analysis of

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33. Conison, *supra* note 2, at 19 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)).

34. *Id.* at 20.

35. Panel Discussion, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 430–36 (2014).

36. Remarks of Karen Ferguson & Mary Ellen Signorille, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 431–32 (2014).

37. Remarks of Karen Ferguson, *Benefit Disputes and Enforcement Under ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 409, 436 (2014).

this issue, had concluded that ERISA's drafters did not mean to impose an exhaustion requirement. A third reason undoubtedly was that I agree with the critics who regard the rules governing administration of benefit claims, including the exhaustion requirement, as jarringly out of line with the protective goals that led Congress to pass ERISA. After the Symposium, I pored over the legislative history for what it had to say about the exhaustion requirement. What most struck me was some evidence in ERISA's text and legislative history that suggests that ERISA's drafters would have rejected the idea that participants or beneficiaries should have to satisfy a prerequisite, such as the exhaustion requirement, before filing suit to enforce benefit rights. I conclude my Reflection with a brief discussion of this evidence.

Section 502(a)(1)(B) provides that:

A civil action may be brought— (1) by a participant or beneficiary— . . . (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; . . .<sup>38</sup>

As Jay Conison observed, this language appears to authorize "an enforcement action."<sup>39</sup> There is nothing here to suggest that the authority to sue is conditioned on jumping through a hoop, and there is no language elsewhere in ERISA that sets forth a prerequisite that must be satisfied before a participant or beneficiary may file suit under section 502(a)(1)(B).

The courts, of course, have imposed such a prerequisite. Relying on the analogy to federal labor law discussed in Part II, courts have implied an exhaustion requirement from the mandate in section 503(2) that plans "afford a reasonable opportunity" for participants and beneficiaries to obtain "a full and fair review" of benefit denials.<sup>40</sup> As Conison observes, this construction treats sections 502(a)(1)(B) and 503(2) as "interdependent" provisions that establish "a consolidated, two-level procedure to govern claims for benefits, with a suit for benefits as the second phase."<sup>41</sup> Conison argues that this approach is inconsistent with ERISA's statutory text. "Section 502(a)(1)(B) makes no reference to section 503(2) or internal plan procedures . . .," he writes, while "section 503(2) makes no reference

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38. 29 U.S.C. § 1132(a) (2012).

39. Conison, *supra* note 2, at 21.

40. *Id.* at 21, 25–31.

41. *Id.* at 21.

to section 502(a)(1)(B) and suggests no connection with actions for benefits." Conison concludes from these statutory silences that sections 502(a)(1)(B) and 503(2) are "self-contained," which implies that section 503(2) should not be construed to impose conditions or qualifications such as the exhaustion requirement on the civil action authorized in section 502(a)(1)(B).<sup>42</sup>

Other evidence in ERISA's text and legislative history also suggests that if ERISA's drafters had meant to qualify the authority to file a civil action under section 502(a)(1)(B), they would have said so. The legislative history and statutory text reveal several instances in which legislative drafters clearly did mean to impose a condition on a participant's or a beneficiary's authority to sue. We can be sure about the intent of these provisions because in each instance the drafters used language that left little to the imagination. These various provisions suggest that legislative drafters were alert to the issue of placing limits on a statutory authorization to sue and that they had a settled practice: when a provision of a bill authorized a party to file a civil action and the drafters intended to create prerequisites to the exercise of that authority, the drafters prepared language to make their intention clear.

For example, section 503(e) of the version of H.R. 2 passed by the House provided as follows:

- (e) Civil actions under this title may be brought —
  - (1) by a participant or beneficiary —
    - (A) for the relief provided in subsection (b) of this section [the precursor of ERISA § 502(c)];
    - (B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;
  - (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 111(d) [the precursor of ERISA § 409(a)]; or
  - (3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this Act.<sup>43</sup>

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42. *Id.*

43. H.R. 2, 93d Cong. § 503(e) (1974), reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 4047.

Section 503(i)(2) of this bill, however, created a prerequisite in certain cases in which a participant, beneficiary, or fiduciary sought to bring an action under section 503(e):

Except as to actions brought pursuant to subsection (e)(1)(B) of this section and actions brought by the Secretary pursuant to subsection (e)(2) and (e)(3) of this section, *no action shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte.*<sup>44</sup>

This language, which derives from section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, first appeared in legislation introduced by the Johnson administration in 1967.<sup>45</sup> Similar language appears in the original and the reported versions of H.R. 2 and in bills Congressman John Dent (D-P.A.), who sponsored H.R. 2, introduced in earlier congresses.<sup>46</sup> Section 503(i)(2) delineates in precise terms a prerequisite that must be satisfied before filing a lawsuit and cross-references the provisions that are subject to the prerequisite. It is also important to note that the conference committee dropped this provision. It does not appear in ERISA.

On the Senate side, S. 4, the so-called Williams-Javits bill, provides a similar example. Section 603 of the bill authorized "any participant or beneficiary" to bring a civil action to redress a breach of fiduciary duty, while section 604 authorized a participant or beneficiary to bring suit "to recover benefits due."<sup>47</sup> Section 605(a)(2) qualified the authority to sue under section 603 or 604 by granting courts discretion to "require the plaintiff to post security for payment of costs of the action and reasonable attorney's fees" in any such proceeding.<sup>48</sup> This provision first appeared in legislation the Nixon administration

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44. H.R. 2, 93d Cong. § 503(i)(2) (1974), reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 4049 (emphasis added). As Conison notes, this provision would have treated benefit claims, which did not need court approval, more favorably than statutory claims, which did require such approval. See Conison, *supra* note 2, at 22 n.73.

45. See S. 1024, 90th Cong. § 9 (1967) (adding § 9(h)(2) to the Welfare and Pension Plans Disclosure Act).

46. See H.R. 2, 93d Cong. § 106(i)(2) (1973), reprinted in 1 ERISA LEGISLATIVE HISTORY *supra* note 13, at 35; H.R. 2, 93d Cong. § 503(i)(2) (1973), reprinted in 2 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 2336; H.R. 1046, 91st Cong. § 9(i)(2) (1969); H.R. 1269, 92nd Cong. § 106(i)(2) (1971).

47. S. 4, 93d Cong. §§ 603, 604 (1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 183-84.

48. *Id.* at § 605(a)(2), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 184-85.

introduced in 1970.<sup>49</sup> Similar language appears in bills Senator Javits introduced in the Ninety-second Congress,<sup>50</sup> and in the version of S. 4 the Senate Labor and Public Welfare Committee reported in April of 1973.<sup>51</sup> As in the case of section 503(i)(2) discussed in the preceding paragraph, section 605(a)(2) expresses in precise terms a circumstance in which a participant or beneficiary may be required to satisfy a prerequisite in order to maintain a civil action and it cross-references the authorizing provisions to which the qualification applies. And as in the case of section 503(i)(2), the limitation proposed by section 605(a)(2) was ultimately dropped. It does not appear in ERISA.

It is also worth noting the legislative history of ERISA section 502(h), which requires service upon the Secretary of Labor and upon the Secretary of the Treasury of:

[A] copy of the complaint in any action under [Title I of ERISA] by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under section (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) . . . .<sup>52</sup>

Interestingly, versions of this provision in earlier bills required service even in actions to recover benefits.<sup>53</sup> What is more, the Senate version of H.R. 2 made service upon the Secretary of Labor a prerequisite of court jurisdiction in actions by participants or beneficiaries (including actions to recover benefits). Here again, legislative drafters left little to the imagination.<sup>54</sup> And here again, lawmakers ultimately dropped the language that placed limits on participants' and beneficiaries' access to the courts. The ERISA conference committee declined to condition court jurisdiction upon service and cre-

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49. See S. 3589, 91st Cong. § 9(b) (1970) (adding § 9(h)(1)(B) to the Welfare and Pension Plans Disclosure Act).

50. See S. 2, 92d Cong. § 504 (1971); S. 3598, 92d Cong. § 605(a)(2) (1972).

51. See S. 4, 93d Cong. § 605(a)(2) (1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 581.

52. 29 U.S.C. § 1132(h) (2012).

53. See, e.g., S. 4, 93d Cong. § 605(b) (1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 185; H.R. 2, 93d Cong. § 503(i)(3) (1974), reprinted in 3 ERISA LEGISLATIVE HISTORY, 4049-50.

54. H.R. 2, 93d Cong. § 695(a) (1973), reprinted in 3 ERISA LEGISLATIVE HISTORY 3818 ("The jurisdiction of any court competent to hear an action brought by a participant or beneficiary under section 693 or 694 shall be conditioned upon the service of a copy of the complaint upon the Secretary by certified mail, who shall have the right in his discretion to intervene in the action.").

ated an exception to the service requirement for actions enforcing benefit claims.<sup>55</sup>

Another item of evidence appears in ERISA's statutory text. Section 502(a)(5) authorizes the Secretary of Labor to sue "(A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; . . ." <sup>56</sup> At the same time, section 502(b) provides that the Secretary may pursue a violation of the participation, vesting, or funding rules in Title I of ERISA by a qualified retirement plan (or a plan that has an application for qualification pending) "only if" the Secretary of the Treasury or a participant, beneficiary, or fiduciary of the plan requests such action.<sup>57</sup> In other words, section 502(b) describes circumstances in which a prerequisite must be satisfied before the Secretary of Labor may bring an action under section 502(a)(5). As in the examples discussed above, section 502(b) includes a cross-reference to section 502(a)(5). And section 502(a)(5) itself signals the limitation by noting that the Secretary is authorized to bring a civil action "except as otherwise provided in subsection (b)."<sup>58</sup>

A final piece of evidence appears in section 691 of the Senate version of H.R. 2, which provided as follows:

(a) ARBITRATION PROCEDURE.—Each employee pension benefit plan subject to this part shall provide—

- (1) a procedure for the fair and just review under the plan of any dispute between the administrator of the plan and any participant or beneficiary of the plan, and
- (2) an opportunity, after such review and a decision by the administrator (or a failure to make a decision within a reasonable period of time by the administrator), for the arbitration of such disputes.<sup>59</sup>

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55. See H.R. REP. NO. 93-1280, at 327, *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 4594.

56. ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) (2012).

57. ERISA § 502(b), 29 U.S.C. § 1132(b).

58. The ERISA Conference Report also makes note of this limitation. See H.R. REP. NO. 93-1280, at 328, *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 4595.

59. See H.R. 2, 93d Cong. § 691(a) (1973), *reprinted in* 3 ERISA LEGISLATIVE HISTORY 3813-14. As Jay Conison notes, this arbitration procedure "govern[ed] 'any dispute' between plan participants and plan administrators; not just disputes over benefit entitlements." See Conison, *supra* note 2, at 18 n.56.

The operation of this procedure and its interaction with the other enforcement provisions in the bill are a little complicated and require some explanation. When a dispute arose regarding a participant's or beneficiary's right to benefits under a pension plan, the procedure required by section 691 was not mandatory. A participant or beneficiary could use the procedure under section 691 or file a civil action under section 694 of the bill.<sup>60</sup> If a participant or beneficiary used the procedure under section 691, there was a two-step process. Section 691(a)(1) required the plan to "provide . . . a procedure for the fair and just review" of the dispute.<sup>61</sup> If a participant or beneficiary was not satisfied with the result of this review, she could arbitrate the dispute under section 691(a)(2) or file a civil action pursuant to section 691(b).<sup>62</sup>

Now to my point: the Senate bill appears to have foreseen that a participant or beneficiary who chose to use the procedure under section 691 would complete the initial review under section 691(a)(1) before moving to the second stage in the procedure. Section 691(a)(2) required a plan to provide a participant or beneficiary "an opportunity, *after such review and a decision (or a failure to make a decision within a reasonable period of time by the administrator)*, for the arbitration of such disputes."<sup>63</sup> The italicized language appears to have conditioned a participant's or beneficiary's invocation of the second step in the procedure on exhaustion (or something akin to exhaustion) of the review under section 691(a)(1).

In a passage quoted above, Jay Conison referred to the courts' treatment of sections 502(a)(1)(B) and 503(2) "as implementing a consolidated, two-level procedure to govern claims for benefits, with a suit for benefits as the second phase."<sup>64</sup> Section 691 of the Senate version of H.R. 2 foresaw "a consolidated, two-level procedure" with arbitration under section 691(a)(2) or a lawsuit pursuant to section 691(b) as the second phase. And section 691(a)(2) specified that the second phase was to begin "after" the first phase had run its course (either because the administrator had made a decision or had

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60. See Conison, *supra* note 2, at 24.

61. H.R. 2, 93d Cong. § 691(a)(1) (1973), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 3813.

62. Section 691(b) provided that "[a] participant or beneficiary of such a plan may bring a civil action in accordance with the provisions of section 693 of this Act *in lieu of submitting the dispute to arbitration under the plan.*" See § 691(b), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 3814 (emphasis added).

63. See § 691(a)(2), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 13, at 3813-14 (emphasis added).

64. Conison, *supra* note 2, at 21.

“fail[ed] to make a decision with a reasonable period of time”). Here again, drafters used express language when they meant to impose a condition on a participant’s or beneficiary’s power to pursue a claim. Moreover, it seems particularly telling that in this case the prerequisite was an exhaustion requirement and that neither ERISA section 502(a)(1)(B) nor section 503 includes language of the sort that appeared in section 691(a)(2).

What should we make of this evidence? The exhaustion requirement applied to claims under section 502(a)(1)(B) limits access to the courts by conditioning a participant’s or beneficiary’s authority to sue on the satisfaction of a prerequisite. These examples from ERISA’s text and legislative history suggest that the people who drafted pension-reform bills were alert to the issue of limiting access to courts and that they knew how to be clear when they meant to impose a condition on a party’s authority to sue. When drafters meant to impose such a condition, they used precise language to describe the condition and cross-referenced the authorizing provisions to which the condition applied. Moreover, the legislative history of ERISA also reveals a trend in congressional decision-making away from requiring participants and beneficiaries to jump through a hoop before going to court. Provisions with this effect, for example, section 503(i)(2) of the House version of H.R. 2, section 605(a)(2) of the Williams-Javits bill, and section 695(a) of the Senate version of H.R. 2, did not make it into ERISA. In light of the close attention drafters gave to provisions that imposed prerequisites on a statutory authorization to sue and the trend away from imposing such conditions on provisions that authorized participants and beneficiaries to sue, the drafters’ failure to include any reference to an exhaustion requirement in section 502 or 503 seems more consistent with an understanding that the authorization to sue under section 502(a)(1)(B) would be unconditional than with an understanding that benefit claims would be subject to an exhaustion requirement.

