University of Cincinnati Law Review

Volume 88
Issue 3 *The 30th Annual Corporate Law Center Symposium*

Article 10

March 2020

Who Carries the Burden of Proving Causation in an ERISA Section 409(a) Suit for Breach of Fiduciary Duty?

Edward Rivin
University of Cincinnati, rivinei@mail.uc.edu

WHO CARRIES THE BURDEN OF PROVING CAUSATION IN AN ERISA SECTION 409(A) SUIT FOR BREACH OF FIDUCIARY DUTY?

Edward Rivin

I. INTRODUCTION

American law serves as a means to establish a society in which all Americans have an opportunity to prosper and pursue happiness. Throughout the last century, American jurisprudence has identified various segments of the population that often times need extra protections to achieve these goals. This Article focuses on one particular class that has benefited greatly from becoming a protected class: ERISA plan participants and beneficiaries (together, "Plan Beneficiaries").

While employer-sponsored benefit plans began in the early 1900s as an informal medium through which employers showed their appreciation to long-time employees, modern-day employer-sponsored plans are much more regulated, most notably by the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act").[1] In the words of the Department of Labor,

> ERISA protects the interests of employee benefit plan participants and their beneficiaries. It requires plan sponsors to provide plan information to participants. It establishes standards of conduct for plan managers and other fiduciaries. It establishes enforcement provisions to ensure that plan funds are protected and that qualifying participants receive their benefits, even if a company goes bankrupt.[2]

According to the Department of Labor, as of 2013, "[ERISA] plans cover about 141 million workers and beneficiaries [in the United States], and include more than $7.6 trillion in assets. About 54 percent of America's workers earn retirement benefits on the job, and 59 percent earn health benefits."[3]

Employees are incentivized to find employment that offers these benefits plans for many reasons. For one, these benefit plans offer strong safety nets in case the individual becomes ill or disabled. Moreover, these plans offer an almost effortless means to save for retirement through a 401(k) plan or the like.

Today, "ERISA does not require employers to provide pensions or

1. 29 U.S.C.S. § 1001 et seq.

2. U.S. DEPT. OF LABOR EMP. BENEFITS SEC. ADMIN., FACT SHEET: WHAT IS ERISA, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://perma.cc/32QA-8TPE] [hereinafter DOL FACT SHEET].

3. *Id*.

welfare benefit plans, but those that do must comply with its requirements."[4] In cases relating to employee benefit plans, ERISA usually preempts state law.[5] The development of ERISA's jurisprudence as well as other statutory developments, such as those within the Internal Revenue Code, make clear that employer-sponsored benefit plans are strongly valued and encouraged in the United States.[6] In enacting ERISA, the drafters made their intent expressly clear—they sought to protect Plan Beneficiaries from unforeseen risks and exploitation.[7] As Congress anticipated when it enacted ERISA, employer-sponsored benefit plans have indeed risen in popularity and are now common-place in the United States.

Since 1974, ERISA-based litigation has flushed out much of the ambiguity within the provisions of the Act and the regulations promulgated thereunder; however, some ambiguities remain. This Article focuses on one remaining ERISA ambiguity: who carries the burden of proving causation in a section 409(a)[8] suit for breach of fiduciary duty?

The United States Circuit Courts are split on this question. The Sixth, Ninth, Tenth, and Eleventh Circuits hold that the Plan Beneficiaries bringing the suit bear the burden of proving a causal link between the breach of fiduciary duty and the plan's losses.[9] As will be discussed, these Circuits' approach is based on the presumption that, absent clear congressional intent, traditionally, a party bringing suit bears the burden of proving all elements of a claim, including causation (this Article refers to this approach as the "Traditional Approach").[10] The Second, Fourth, Fifth, and Eighth Circuits disagree, holding that the burden of proving the absence of a causal link shifts to the plan fiduciary once the Plan Beneficiaries establish a prima facie case by showing breach of fiduciary duty and losses incurred by the plan (this Article refers to this approach as the "Burden-Shifting Approach").[11]

This Article reviews the two approaches and why various Circuit Courts have opted to implement one approach over the other. Part II outlines section 409(a) and explains its history and purpose within ERISA. In addition, Part II examines the previous rulings of various

4. PATRICK PURCELL & JENNIFER STAMAN, CONG. RESEARCH SERV., RL34443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) (2008) [https://perma.cc/5DUS-5XC9] [hereinafter SUMMARY OF ERISA].

5. *Id*.

6. *See* 29 U.S.C.S. § 1001(a) (stating that qualified plans "substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment").

7. *See generally* 29 U.S.C.S. § 1001.

8. ERISA § 409 is codified at 29 U.S.C.S. § 1109.

9. *See infra* Part II.D.

10. *Id.*

11. *Id.*

Circuit Courts on this issue and discusses relevant Supreme Court jurisprudence. Part III compares the two approaches and discusses the practical implications of each approach, respectively. Part IV then discusses various considerations, including previous Supreme Court ERISA jurisprudence and public policy considerations. Finally, Part V explains why the Supreme Court will most likely adopt the Burden-Shifting Approach when it decides this question of law.

II. BACKGROUND

This Part provides a summary of ERISA's purpose and the relevant statutory provisions to the circuit split in question. Further, this Part introduces the two approaches that have been adopted by various Circuit Courts in determining who carries the burden of proving breach of fiduciary duty under section 409(a) and examines each approach's underlying rationale.

A. ERISA Generally

ERISA is crucial to the protection of Plan Beneficiaries. The Act was intended to protect presumably less sophisticated Plan Beneficiaries from exploitation and unnecessary risk over which they have no control. In fact, the ERISA drafters' intent is expressly enumerated in the Act:

> [T]hat the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; … that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; … that they have become an important factor affecting the stability of employment and the successful development of industrial relations; … that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries[.][12]

Each of these reasons shows that while employee benefit plans have, for many years, been considered a societal good, they have left Plan Beneficiaries open to potential mistreatment by sophisticated entities, such as plan administrators. Citing to the above reasons, the Act concludes that "it is therefore desirable in the interests of employees and their beneficiaries … that minimum standards be provided assuring the equitable character of such plans and their financial soundness."[13] Those minimum standards are set forth within ERISA.

12. 29 U.S.C.S. § 1001(a).

13. *Id.*

B. The Text of Section 409(a) and Other Relevant Sections

ERISA section 409(a), in relevant part, reads:

> Any person who is a *fiduciary* with respect to a plan who breaches any of the . . . duties imposed upon fiduciaries by [ERISA] shall be personally liable to make good to such plan any losses to the plan *resulting* from each such breach . . .[14]

Section 3(21)(A) defines a "plan fiduciary" in the ERISA context:

> a person is a fiduciary with respect to a plan to the extent
> (i) he exercises any discretionary authority or discretionary control respecting management of such plan . . .,
> (ii) he renders investment advice . . . with respect to any moneys or other property of such plan. . . *or*
> (iii) he has any discretionary authority . . . in the administration of such plan.[15]

Common examples of plan fiduciaries are plan trustees, plan sponsors, and members of a plan's investment committee. Section 404(a)(1) imposes the following fiduciary duties on plan fiduciaries: (1) a duty of loyalty, (2) a duty of prudence, (3) a duty to diversify investments, and (4) a duty to follow plan documents to the extent that they comply with ERISA.[16]

It is undisputed that ERISA provides a private right of action to Plan Beneficiaries of a qualified plan.[17] Section 502(a)(2) provides that "a civil action may be brought . . . by the [Secretary of Labor], . . . by a participant [of a qualified plan], beneficiary [of a qualified plan] or fiduciary [of a qualified plan] for appropriate relief" for a breach of fiduciary duty under section 409(a) of the Act.[18]

It is also undisputed that one element of a claim under section 409(a) is causation.[19] The express language of section 409(a), which "imposes liability on a breaching fiduciary for 'any losses to the plan *resulting from* each such breach,"[20] makes clear that a claim of breach of fiduciary duty under section 409(a) requires a causal link between the breach of the duty and the plan's losses.

---

14. 29 U.S.C.S. § 1109(a) (emphasis added).

15. 29 U.S.C.S. § 1002(21)(A) (emphasis added).

16. *See* 29 U.S.C.S. § 1104; *see also* Summary of ERISA, *supra* note 4 at CRS-27.

17. 29 U.S.C.S. § 1132(a)(2).

18. 29 U.S.C.S. § 1132(a)(2).

19. *See e.g.*, Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1336 (10th Cir. 2017) (stating "causation is an element of the [section 409] claim"); Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 105 (2d Cir. 1998) (Jacobs, J. and Meskill, J., concurring) (stating that "[c]ausation of damages is . . . an element of the claim").

20. *Pioneer Ctrs. Holding Co. ESOP & Tr.*, 858 F.3d at 1336 (emphasis added).

In sum, the interplay between sections 404, 409, and 502 are crucial to the achievement of ERISA's goal of protecting Plan Beneficiaries.

C. The Circuit Split

As previously noted, within the context of section 409(a), there is a split among the Circuit Courts as to which party carries the burden of proving a causal link between the breach of fiduciary duty and a qualified plan's losses. Currently, the Sixth, Ninth, Tenth, and Eleventh Circuits all hold that the Plan Beneficiaries bringing the suit bear the burden of proving causation (*i.e.*, the "Traditional Approach") while the Second, Fourth, Fifth, and Eighth Circuits hold that the burden of disproving a causal link shifts to the fiduciaries once the beneficiary establishes a prima facie case by proving the other elements of a breach of fiduciary duty claim under section 409(a) (*i.e.*, the "Burden-Shifting Approach").[21]

Not only do the approaches adopted by the two sides of the circuit split potentially result in different case outcomes, they are founded on completely opposite theories—the Traditional Approach is founded on the widely accepted legal theory that where proving causation is an element of a claim, the burden of proof is *per se* on the plaintiff, while the Burden-Shifting Approach is founded on the shifting burden theory found in the common law of trusts.

1. The Traditional Approach

The Traditional Approach, held by the Sixth, Ninth, Tenth, and Eleventh Circuits, is premised in common law. In *Pioneer Ctrs. Holding Co. ESOP & Tr.*, the Tenth Circuit expressly analyzed the issue of which party carries the burden in a section 409(a) breach of fiduciary duty suit.[22] There, the court noted that section 409(a) "is silent as to who bears the burden of proving a resulting loss."[23] Therefore, in determining that the Plan Beneficiaries carry the burden of proving causation, the Tenth Circuit cited to Supreme Court jurisprudence for the proposition that the "ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims."[24] The Tenth Circuit also noted that the Supreme Court has cautioned that while there are a few exceptions to this default rule,[25] in which case the burden may shift to the defendant, "[a]bsent some reason

21. *See infra* Part II.D.1-2.

22. *Pioneer Ctrs. Holding Co. ESOP & Tr.*, 858 F.3d at 1336.

23. *Pioneer Ctrs. Holding Co. ESOP & Tr.*, 858 F.3d at 1336.

24. *Id.* (quoting Schaffer v. Weast, 546 U.S. 49, 56 (2005)).

25. *Id.* ("There are exceptions to the default rule, such as when 'certain elements of a plaintiff's claim . . . can fairly be characterized as affirmative defenses or exemptions.'").

to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief."[26] In extending this default rule to the section 409(a) context, the Tenth Circuit gathered extra support from the general rules of evidence which state that the "burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."[27] Citing these theories of law, the Tenth Circuit adopted the Traditional Approach.

Although the other Circuit Courts that have adopted the Traditional Approach have not explicitly justified their positions in separate cases, those circuits have impliedly justified their positions using these same general rules.[28]

2. The Burden-Shifting Approach

The Burden-Shifting Approach, held by the Second, Fourth, Fifth, and Eighth Circuits, is premised on the old common law of trusts.[29] These Circuits hold that, while the general default rule may be that the plaintiff carries the burden of proving the elements of a claim, exceptions to this general rule exist.[30] These Circuits hold that the common law of trusts provides one such exception:

---

26. *Id.* (quoting *Schaffer*, 546 U.S. 49 at 57-58 for the rule that "while the normal default rule does not solve all cases, it certainly solves most of them . . . Absent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief").

27. *Id.* (quoting 2 MCCORMICK ON EVIDENCE § 337 (2013)).

28. *See, e.g.*, Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 105 (2d Cir. 1998) (Jacobs, J. and Meskill, J., concurring) ("An ERISA plaintiff who seeks compensatory damages under § 1105(a)(3) must show, inter alia, that the losses "resulted from" the defendant's failure to take reasonable steps to remedy the co-fiduciary's breach . . . Causation of damages is therefore an element of the claim, and the plaintiff bears the burden of proving it."); Kuper v. Iovenko, 66 F.3d 1447, 1459-60 (6th Cir. 1995), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014) ("[A] fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision was not reasonable. Instead, to show that an investment decision breached a fiduciary's duty to act reasonably in an effort to hold the fiduciary liable for a loss attributable to this investment decision, a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan . . . In order to establish this causal link, a plaintiff must demonstrate that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident"); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343-44 (11th Cir. 1992) (stating that, "[o]n remand, the burden of proof on the issue of causation will rest on the beneficiaries; they must establish that their claimed losses were proximately caused either by a failure by [the fiduciary] to cure [the second fiduciary's] breach or knowing participation by [the fiduciary] in [the second fiduciary's] breach.").

29. *Pioneer Ctrs. Holding Co. ESOP & Tr.*, 858 F.3d at 1335 (citing *e.g.* RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f (2012)); GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 871 (2d rev. ed. 1995 & Supp. 2013) ("If [a beneficiary] seeks damages, a part of his burden will be proof that the breach caused him a loss. . . . If the beneficiary makes a prima facie case, *the burden of contradicting it . . . will shift to the trustee*." (emphasis added)).

30. *See* Schaffer v. Weast, 546 U.S. 49, 57 (2005).

> [t]rust law advocates a burden-shifting paradigm whereby once a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach.[31]

This exception recognizes the reality that the burden should be shifted to the plan fiduciary when the plan fiduciary possesses the relevant documents and knowledge needed to prove or disprove the element in question.[32]

In short, proponents of the Burden-Shifting Approach believe that because most ERISA plans function at least similarly, if not identically, to common law trusts, the common law of trusts is applicable to modern-day ERISA qualified plans.[33] Following this line of thought, the Second, Fourth, Fifth, and Eighth Circuits have held that "once an ERISA plaintiff has proven a breach and a prima facie case of loss to the plan, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by the breach of duty."[34]

III. WHY DOES IT MATTER?

ERISA is a federal statute. Consequently, the federal courts have subject matter jurisdiction over ERISA breach of fiduciary duty claims.[35] ERISA explicitly allows eligible plaintiffs—the Secretary of Labor, a plan participant, beneficiary, or a fiduciary of a qualified plan[36]—to bring suit in a district court where the "[qualified] plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."[37] However, this theoretical permission to bring suit is significantly limited by forum selection clauses that are now commonplace in ERISA plans.[38] Nevertheless, if ERISA Plan

31. *Pioneer Ctrs. Holding Co. ESOP & Tr.*, 858 F.3d at 1335 (internal quotations omitted).

32. *See* Brotherston v. Putnam Investments, LLC, 907 F.3d 17, 38 (1st Cir. 2018) (citing *Schaffer*, 546 U.S. 49, 60 (2005), the court stated "[t]hat exception recognizes that the burden may be allocated to the defendant when he possesses more knowledge relevant to the element at issue.").

33. *Id.*

34. *Id.* at 1336 (quoting Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (4th Cir. 2014), cert. denied, 135 S. Ct. 2887, 192 L. Ed. 2d 924 (2015)) (internal quotation marks omitted).

35. *See* 29 U.S.C.S. § 1132(e).

36. 29 U.S.C.S. § 1132(e)(1).

37. 29 U.S.C.S. § 1132(e)(2).

38. At least three circuits—the Sixth, Seventh, and Tenth—have now deemed forum selection clauses valid and enforceable in the ERISA context, finding that "selection clauses are consistent with ERISA's venue statute, promote uniformity, and reduce litigation costs." *HEATHER M. MEHTA*, *SUPREME COURT AGAIN DENIES REVIEW OF ERISA FORUM SELECTION CLAUSES,* https://www.greensfelder.com/employee-benefits-executive-compensation-blog/supreme-court-again-

Beneficiaries can either prove their ERISA plan did not contain a forum selection clause or that said forum selection clause was unenforceable for any number of reasons, then Plan Beneficiaries could presumably bring suit in a federal district court of their choosing that satisfies the requirements laid out in section 1132(e).[39] This broad language of section 1132(e) along with the globalization of modern-day corporations leads to this circuit split being heavily emphasized.

IV. THE COURT WILL LIKELY ADOPT THE BURDEN-SHIFTING APPROACH

As alluded to earlier, this circuit split is prime for the Supreme Court to weigh in on. But, which of the two positions will the Court adopt? This Part dissects the language of section 409(a), analyzes relevant Supreme Court jurisprudence, analyzes the public policy and practical considerations relevant to the circuit split, and concludes that the Supreme Court will most likely adopt the Burden-Shifting Approach. Because the Circuit Courts that have analyzed this question of law have not placed much weight on the legislative history of section 409(a), this Article also does not pay homage to ERISA's legislative history; instead, this Article analyzes the same considerations analyzed by the Circuit Courts that have confronted this question of law (*i.e.*, the aforementioned considerations).

A. Dissecting the Language of Section 409(a)

For decades, a purely textual analysis of a statute's text has been declared a starting point for statutory interpretation.[40] In relevant part, section 409(a) states that when a plan's fiduciary breaches an ERISA imposed fiduciary duty, that fiduciary is "*personally liable* to make good to such plan any losses to the plan *resulting from each such breach*[.][41] In other words, for Plan Beneficiaries to recover, the plan's losses must be *caused* by the breach of fiduciary duty. While section 409(a) clearly establishes that causation is an element of a section 409(a) claim, the language is not helpful in answering the question of who carries the burden of proving causation.

---

denies-review-of-erisa-forum-selection-clauses [https://perma.cc/QZX3-7RKU].

39. *See* 29 U.S.C.S. § 1132(e).

40. *See* United States v. Johnson, 680 F.3d 1140, 1144 (9th Cir. 2012) ("Statutory interpretation begins with the plain language of the statute . . . If the plain meaning of the statute is unambiguous, that meaning is controlling . . ..") (internal citations omitted).

41. *See* 29 U.S.C.S § 1109(a) (emphasis added).

B. Forecasting the Supreme Court's Position

The Supreme Court's ERISA jurisprudence is helpful in forecasting which approach the Court will adopt. Specifically, the Court's jurisprudence within section 404—the provision within ERISA that establishes the relevant fiduciary duties—provides insightful guidance. In interpreting the fiduciary duty imposed on plan fiduciaries by section 404, the Supreme Court has consistently held that "the common law of trusts . . . informs the interpretation of [ERISA] fiduciary duties."[42] Recently, in *Fifth Third Bancorp v. Dudenhoeffer*,[43] the Court discussed the appropriate method of interpreting the fiduciary duties under section 404 and noted that because "[s]ection [404(a)(1)] imposes strict standards of trustee conduct . . . *derived from the common law of trusts*," in interpreting the fiduciary duties imposed by ERISA, a court should reference the old common law of trusts.[44]

In essence, the Supreme Court has made clear that because ERISA fiduciary duties both derive from the common law of trusts and are modeled after the fiduciary duties in the common law of trusts, the common law of trusts is the touchstone in interpreting ERISA fiduciary duties and adjudicating breaches of the same.

Within the section 409(a) circuit split, only the Burden-Shifting Approach makes reference to the old common law of trusts and pays homage to the Supreme Court's instructions to use the common law of trusts to resolve ambiguities within ERISA.[45] Because the Traditional Approach makes no reference to the old common law of trusts, it is likely that the Supreme Court will adopt the Burden-Shifting Approach.

C. Public Policy Considerations

Public policy considerations also support the adoption of the Burden-Shifting Approach. As previously mentioned, one of ERISA's explicit purposes is to protect Plan Beneficiaries from potential abuse stemming from sophisticated administrators.[46] Applying this intent to the issue of who carries the burden of proving causation in a breach of fiduciary duty claim under section 409(a), it seems clear that the party who should carry the burden of proving or disproving causation is the party with better access to the documents and knowledge that can shed light on why the

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

43. 573 U.S. 409, 428 (2014).

44. *Id.* at 416 (quoting Cent. States, S.E. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

45. *See supra* Part II.D.2; *see also* Varity Corp. v. Howe, 516 U.S. 489, 502-07, 116 S.Ct. 1074-5, 134 L.Ed.2d 130 (1996).

46. *See infra* Part IV.A.2.

ERISA plan experienced losses.

Proponents of the Traditional Approach would argue that public policy supports the Plan Beneficiaries carrying the burden of proving each element of the case, including causation, because that is the tradition.[47] However, these same considerations regarding tradition were ignored in the Supreme Court's precedents analyzed previously. In other words, the Court appears to believe that a burden-shifting framework allocates the burden of proof in a more just manner and therefore is an exception to tradition.

Proponents of the Traditional Approach would also argue that public policy supports the Plan Beneficiaries carrying the burden of proving each element of the case, including causation, because shifting the burden of disproving causation onto the administrator-fiduciary would discourage employers from offering an ERISA qualified plan in the first place because of the risks involved. But, this argument does not hold weight. In fact, the First Circuit expressly rejected this as a reason not to adopt the Burden-Shifting Approach.[48] Furthermore, none of the Circuit Courts have cited to any empirical evidence that suggests shifting the burden discourages employers from offering ERISA qualified plans.

In sum, the public policy considerations also support the Burden-Shifting Approach because this approach accomplishes the goal of protecting Plan Beneficiaries who lack access to the type of information needed to establish causation within a section 409(a) breach of fiduciary duty lawsuit.

V. WHAT'S NEXT?

In March 2018, *Pioneer Ctrs. Holding Co. ESOP & Tr. v. Alerus Fin., N.A.*[49] was on the Supreme Court's docket. The importance of this case was that in adjudicating the matter, the Tenth Circuit had no choice but to squarely confront the circuit split analyzed in this Article. In adopting the Traditional Approach, the Tenth Circuit noted that "[v]iewing the plain language, causation cannot fairly be characterized as [an] affirmative defense or exemption, but [rather it should be characterized as] an express element of a claim for breach of fiduciary duty under [section 409(a)]" and concluded that it saw "no reason to depart from the ordinary default

47. *See, e.g.*, *Pioneer Ctrs. Holding Co. ESOP & Tr.*, 858 F.3d at 1336.

48. Brotherston v. Putnam Investments, LLC, 907 F.3d 17, 38 (1st Cir. 2018) (the court stated that "it would be strange to reject trust law's rules on burden allocation in favor of an attempt to reduce employer costs, especially where the benefit of such a reduction would flow exclusively to employers whose breaches were followed by losses to the plan.").

49. 858 F.3d 1324 (10th Cir. 2017).

rule that plaintiffs bear the risk of failing to prove their claims."[50] On September 20, 2018, the Supreme Court dismissed the case pursuant to a settlement reached by the parties.[51] Although the settlement stopped the Court from having an opportunity to weigh in on the circuit split, the Court did show its willingness to grant certiorari on this question of law.

The Supreme Court had another chance to settle this circuit split in *Brotherston v. Putnam Investments, LLC*.[52] In *Brotherston*, the district court held that the class of Plan Beneficiaries failed to carry its burden of proving that the plan's losses were caused by Putnam Investments, the plan administrator.[53] Adopting the Burden-Shifting Approach, the First Circuit reversed the district court and held that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent."[54] In supporting its conclusion, the First Circuit explained that, given the numerous investment options that plan fiduciaries have, it is unjust to make a plaintiff venture guesses as to what the fiduciary should have done; rather, "[i]t makes much more sense for the fiduciary to say what it claims it would have done and for the plaintiff to then respond to that."[55]

The Court denied certiorari in *Brotherston* on January 13, 2020,[56] again missing an opportunity to settle the circuit split. Although the Court's denial of certiorari means practitioners will have to wait for the Court to settle who carries the burden of proving causation under section 409(a), it can be argued that the Court's denial of certiorari signifies the Court's *quasi* acceptance of the First Circuit's analysis and indirectly endorses the Burden-Shifting Approach.

VI. CONCLUSION

A resolution of this well-documented circuit split within ERISA section 409(a) is much needed and the Court would be justified in granting certiorari to review this question of law. Using the considerations discussed in this Article, the Court will most likely adopt the Burden-Shifting Approach for section 409(a)'s causation element. Practically, this

50. *Id.* at 1336 (internal quotations omitted).

51. Pioneer Ctrs. Holding Co. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 139 S. Ct. 50 (2018).

52. 907 F.3d 17 (1st Cir. 2018).

53. *Id.* at 23.

54. *Id.* at 39.

55. *Id*. at 38.

56. Brotherston v. Putnam Investments, LLC, 907 F.3d 17 (1st Cir. 2018), *cert. denied*, --- S.Ct. ---- (U.S. January 13, 2020) (No. 18-926).

means that ERISA administrators and fiduciaries would be well-advised to keep thorough records of their investment strategies and supporting documentation in order to rebut a claim of breach of fiduciary duty should the need ever arise.