Circuit Split: The Pleading Standard for ERISA § 406 Violations

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I. INTRODUCTION

In 2017, a complaint was filed against the industrial giant General Electric (GE), for mismanagement of GE's 401k plan.[1] The plaintiffs accused GE of losing $283 million in retirement plan investments.[2] The case ended up settling for $61 million,[3] which was "the largest settlement ever in an ERISA case alleging a retirement plan improperly offering proprietary funds."[4] In this case, the plaintiffs could invest up to 30% of their eligible earnings in GE's plans.[5] The employees' money was lost due to mismanagement on the part of GE. The Employee Retirement Income Security Act of 1974 (ERISA) exists to protect plan participants, such as the plaintiffs in the GE case, from monetary loss by giving "plan participants and beneficiaries substantial legal protections from fiduciary misconduct."[6]

ERISA regulates employer-sponsored benefit plans.[7] Employer-sponsored benefit plans are retirement plans where an employee contributes a fixed amount or a percentage of their income to a retirement account.[8] Fiduciaries manage these plans and work to achieve the best possible results for the plan participants while complying with ERISA regulations.[9] ERISA regulates retirement plans themselves and fiduciaries in their oversight of these plans.[10] Specifically, Section 406 of ERISA prohibits certain transactions involving parties with conflicting interests (party in interest transactions).[11] Section 408 of ERISA then provides exemptions to ERISA § 406 prohibited transactions.[12] This Note discusses a circuit split regarding necessary fiduciary duties that fall within the defined party in interest prohibited transactions of ERISA § 406 and the subsequent possibility for perpetual litigation.[13]

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1. *In re* G.E. ERISA Litig., No. 17-cv-12123, 2019 WL 5592864, at *1 (D. Mass. Oct. 30, 2019); *see also* Remy Samuels, *GE Agrees to Pay Record $61 Million to Settle 401(k) Lawsuit*, PLANSPONSOR (Oct. 10, 2023), https://www.plansponsor.com/ge-agrees-to-pay-record-61m-to-settle-401k-lawsuit [https://perma.cc/UEJ9-NP9J] (outlining the history and result of the GE mismanagement case).

2. Samuels, *supra* note 1.

3. *Id.*

4. *Id.*; *see also* Brian Anderson, *$61 Million Settlement Finalized in GE ERISA Case*, 401K SPECIALIST (Mar. 8, 2024), https://401kspecialistmag.com/61-million-settlement-finalized-in-ge-erisa-case/ [https://perma.cc/L3YX-39MV].

5. *In re G.E. ERISA Litig.*, 2019 WL 5592864, at *2.

6. Ezzat Nsouli, Note, *Why the Supreme Court Should've Clarified ERISA's Breach of the Duty of Prudence Standard in* Hughes v. Northwestern University, 48 J. CORP. L. 427, 431 (2023).

7. Employee Retirement Income Security Act § 1, 29 U.S.C § 1001.

8. *See infra* Part II.C; Adam Hayes, *What Are Defined Contribution Plans, and How Do They Work?*, INVESTOPEDIA (Sept. 30, 2024), https://www.investopedia.com/terms/d/definedcontributionplan.asp [https://perma.cc/D5NK-6PKY].

9. *Fiduciary Responsibilities*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/fiduciaryresp [https://perma.cc/E2PJ-NWT2].

10. *Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/erisa [https://perma.cc/UWC5-FYJ2].

11. Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106.

12. *Id.* § 408.

13. *See* cases cited *infra* note 15 and accompanying text.

Amidst the complicated legal landscape surrounding ERISA, a circuit split emerged. The split implicates a fiduciary, or "plan administrator's" ability to fulfill their lawful duties without the threat of perpetual liability looming overhead.[14] Currently, five Circuits—the Second, Fourth, Fifth, Eighth, and Ninth—all allow a potential plaintiff to have a viable claim for relief for a prohibited transaction claim under ERISA § 406 despite pleading no facts showing an intent to benefit a party in interest on the part of the fiduciaries.[15]

In 2019, the Third Circuit Court of Appeals diverged from five of its sister courts in S*weda v. University of Pennsylvania*, creating a circuit split.[16] The Third Circuit held, for the first time, that a potential plaintiff's pleading must contain factual allegations of an intent to benefit a party in interest to have a viable claim under ERISA § 406(a)(1).[17] These facts can be anything such as emails, meeting minutes, or other types of internal communications that show intent by a fiduciary or plan administrator to benefit a party in interest.[18] This "intent element" used by the Third Circuit raises the pleading standard for plaintiffs claiming ERISA § 406(a)(1) violations to protect fiduciaries against meritless claims and perpetual litigation.[19] In *Sweda*, the Third Circuit found absurd results in employing a low pleading standard and interpreted ERISA § 406(a)(1) to require a plaintiff to bring facts showing intent to benefit a party in interest to combat the absurd results.[20]

The Third Circuit's ruling has far-reaching implications for corporations sponsoring benefit plans, the fiduciaries or plan administrators in charge of servicing the plans, and potential plaintiffs of ERISA § 406 violations. The holding in *Sweda* impacts corporations and their employed fiduciaries and plan administrators because, in the Third Circuit, their liability exposure is significantly reduced.[21] In the Third Circuit, corporations and their plan administrators now have a heightened incentive to administer and service plans, avoiding any facts that may imply an intent to benefit a party in interest. Corporations in

14. The term "plan administrator" is defined at § 3(16) of the Act and the administrator's fiduciary duties are imposed at § 3(21). Employee Retirement Income Security Act of 1974 § 3, 29 U.S.C. § 1002.

15. *See* Marshall v. Snyder, 572 F.2d 894, 900 (2d Cir. 1978) (holding that the burden of proof is always on the party to the self-dealing transaction); Donovan v. Cunningham, 716 F.2d 1455, 1467 n.27 (5th Cir. 1983) (holding that the burden of proof should be on the "party who seeks to bring his conduct within a statutory exception"); Elmore v. Cone Mills Corp., 23 F.3d 855, 865 (4th Cir. 1994) (holding the accused has the burden of proving transactions were in compliance with an exception); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 602 (8th Cir. 2009) (holding that § 408 exceptions are affirmative defenses that must be proven by the defendant); Howard v. Shay, 100 F.3d 1484, 1489 (9th Cir. 1996) (holding a fiduciary has the burden of proving an adequate consideration exemption); s*ee also* Part II.G, (explaining, while all of these cases deal with the burden of proving an exemption, the intent element is intricately related to § 408 exemptions). Note the circuit split appears to cut across traditional notions of what circuits are traditionally considered to be liberal or conservative. *See Circuit Status*, BALLS & STRIKES, https://ballsandstrikes.org/circuit-status/ [https://perma.cc/8XT9-8QYH].

16. Sweda v. Univ. of Pa., 923 F.3d 320 (3d Cir. 2019).

17. *Id.* at 338*; contra* Bugielski v. AT&T Servs., Inc., 76 F.4th 894 (9th Cir. 2023); Allen v. GreatBanc Tr. Co., 835 F.3d 670 (7th Cir. 2016). This is not the only pleading standard issue regarding ERISA. For a discussion regarding the pleading standard for breach of fiduciary duty and of the duty of prudence, see Nsouli, *supra* note 6.

18. *Sweda*, 923 F.3d 320 at 338.

19. *Id.*

20. *Id.*

21. *See id.* at 325–26. Because facts showing intent to benefit a party in interest are required in the Third Circuit, potential plaintiffs have an increased burden of pleading, thus reducing the potential liability of fiduciaries. *Id.*

other jurisdictions lack the elevated pleading standard,[22] diminishing an incentive to reduce the occurrence of facts indicating an intent to benefit a party in interest.[23]

On the other hand, employees participating in these plans are greatly affected in the Third Circuit. These potential plaintiffs have more of a burden at the outset to even have a chance at prevailing in a section 406 claim. However, in the other circuits, potential plaintiffs will almost always have a viable claim because they can bring a claim with no factual allegations showing intent.[24] Instead, the other circuits read ERISA § 406 prohibited party in interest transactions as "per se" prohibitions.[25] Meaning, plaintiffs only need a conclusory statement that a prohibited transaction occurred, a much lower bar.[26]

This Note will begin with an exploration of ERISA's foundational principles and the legislature's purpose in its creation, with a particular focus on ERISA § 406. Then it will scrutinize the decisions of each circuit court that has decided this issue. Then it will dive into the intricate details and implications of both sides. In conclusion, this note will advocate for the resolution of the circuit split and the adoption of the Third Circuit's interpretation of the correct pleading standard for ERISA § 406 violations.

II. BACKGROUND

A. The Pleading Standard

The pleading standard is a cornerstone of legal proceedings. A pleading standard is a criterion for what a potential plaintiff must bring to have a viable claim for relief. The pleading standard helps to promote fairness amongst adversaries by filtering out meritless claims.[27] It is important because a claim can be dismissed before it has a chance to persuade.[28] Thus, a pleading standard can cause otherwise successful claims to be dismissed on the merits.[29] The pleading standard is critical in the context of ERISA § 406 claims, hence the circuit split. The Third Circuit aims to a heightened pleading standard to restore fairness between fiduciaries and claimants. The heightened pleading standard eliminates ERISA § 406(a)(1) claims that would otherwise have little or no chance of succeeding because no facts showing intent to benefit a party in interest were brought. However, when a prohibited transaction occurs, if a plaintiff cannot show facts alleging intent to benefit a party in interest, the claim is dead, even if there was intent on part of the fiduciaries, which would incriminate the fiduciary in later proceedings.[30] Therefore, the pleading standard can be outcome-determinative. Thus, at the heart of this circuit split is balancing the interests of a fiduciary's time in defending meritless claims against a claimant's interests in having a chance to persuade when their claim has merit. The Third Circuit sacrifices a claimant's previously held power in bringing a claim without facts

22. *See* cases cited *supra* note 15 (listing each Circuit court opposing *Sweda* in the circuit split).

23. *Id.* Without the elevated pleading standard, potential plaintiffs have a lesser burden at pleading, so a lack of facts of intent to benefit a party in interest does not benefit fiduciaries or corporations at the pleading stage.

24. *Id.*

25. *Id.*

26. Bugielski v. AT&T Servs. Inc., 76 F.4th 894, 909 (9th Cir. 2023).

27. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007).

28. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); *see also Twombly*, 550 U.S. at 544.

29. *Id.*

30. Sweda v. Univ. of Pa., 923 F.3d 320, 320 (3d Cir. 2019).

alleging intent, in favor of a fiduciary's autonomy in not constantly defending meritless claims.[31] Therefore, the level of pleading required to have a viable claim is important in the legal landscape as this circuit split exemplifies.

B. Background of Pleading Standards: Where Does Each Side Fit in Their Interpretation?

To bring a viable claim in any area of the law, the Supreme Court has held "[a] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" and that a claim has "'facial plausibility' when [a] plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged."[32] The Twiqbal standard, as it is known, is the pleading standard used in all Federal Civil Procedure claims.[33] The Twiqbal standard must "operate with contextual specificity."[34] Moreover, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[35] In *Wesco*, the Third Circuit clarified this principle in regard to ERISA claims stating, "[w]hen assessing the sufficiency of the complaint, we pay attention to 'the context of [the] claim, including the underlying substantive law.' This means we evaluate the allegations bearing in mind ERISA's twin goals of protecting participants and encouraging plan creation through a predictable set of liabilities for employers."[36] Therefore, the Twiqbal standard must be interpreted and applied with consideration for the purpose and design of ERISA as explained by the Third Circuit in *Wesco*.

C. The Employee Retirement Income Security Act

The Employee Retirement Income Security Act of 1974 was signed into law by President Ford on Labor Day 1974.[37] Before ERISA, federal labor laws "left it to employers, employees, and unions to establish the terms of pension plans."[38] This left employees with uncertainty and concerns about the possible risks involved with this

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31. *Id.* at 338.

32. *Iqbal*, 556 U.S. at 678. This standard is widely referred to as the Twiqbal standard, a portmanteau of the party names Twombly and Iqbal from the cases quintessential to creating this standard. *See also Twombly*, 550 U.S. 544.

33. *Iqbal*, 556 U.S. at 678.

34. Sweda v. Univ. of Pa., 923 F.3d 320, 343 (3d Cir. 2019) (citing Renfro v. Unisys Corp. 671 F.3d 314, 321 (3d Cir. 2011) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993))).

35. Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989); *see also* Lockheed Corp. v. Spink, 517 U.S. 882, 896 (1996) (applying a plain reading of a statute's proper reach).

36. Mator v. Wesco Distribution, Inc., 102 F.4th 172 (3d Cir. 2024) (citing Renfro v. Unisys Corp., 671 F.3d 314, 320 (3rd Cir. 2011) (quoting Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 46 n.12 (2011))).

37. *President Ford Signing ERISA of 1974*, PENSION BENEFIT GUAR. CORP. (Apr. 27, 2017), https://www.pbgc.gov/about/who-we-are/pg/president-ford-signing-erisa-of-1974 [https://perma.cc/4RQV-KWG8]. *See also Fact Sheet: What is ERISA*, U.S. DEPT. OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://web.archive.org/web/20230820025620/https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa].

38. James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 1*, 14 J. PENSION BENEFITS, no. 1, 2006, at 31, 32 (explaining how pension plans were the most common form of retirement fund at this time).

"private pension system."[39] Due to the uncertainty, the government wanted uniform standards for retirement plans.[40] This concern, along with the rapid growth of employee benefit plans around this time, led to the enactment of ERISA, which safeguarded retirement funds through government standards.[41] The objective of enacting ERISA was to provide safeguards for individuals who are participants in retirement plans or other benefit plans.[42] "ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans."[43]

Congress, through creating ERISA, intended to make "security of pension promises a basic goal of federal policy."[44] ERISA was enacted during a time when pension plans were the most common form of retirement plans, but ERISA's scope extends to all types of retirement plans.[45] ERISA "sets minimum standards for most voluntarily established retirement and health plans."[46]

Moreover, ERISA covers far more than just pension plans.[47] ERISA covers both defined benefit plans and defined contributions plans.[48] A defined benefit plan guarantees a specific monthly retirement payout; an example of this would be a typical pension plan.[49] Unlike a defined benefit plan, a defined contribution plan is not guaranteed.[50] The employee and/or the employer contribute to an employee's account under defined contribution plans.[51] These plans include, among other plans, 401(k)'s, Employee Stock Ownership Plans (ESOP), and profit-sharing plans.[52] The scope of ERISA, however, "goes far beyond retirement benefits."[53] ERISA includes many health benefit plans as well.[54] As defined contribution plans lack guarantees, ERISA regulations are extremely important in securing the funds employees need and expect for their retirement.[55] One way ERISA does this is by implementing standards fiduciaries and plan administrators must abide by, such

39. *See id.* (meaning pensions regulated entirely by the company who sponsors it, therefore without any outside standards).

40. *See id.* (explaining how the goal of ERISA was uniformity in pension plan standards).

41. Joshua P. Booth & Larry I. Palmer, *ERISA Preemption Doctrine as Health Policy*, 39 HOFSTRA L. REV. 59, 59 (2011); *see* Nsouli, *supra* note 6, at 430 ("Because it was determined that such plans affect interstate commerce to a large extent, Congress found that ERISA was necessary to protect both interstate commerce and the employees engaged in such benefit plans.").

42. *Employee Retirement Income Security Act (ERISA)*, *supra* note 10.

43. Conkright v. Frommert, 559 U.S. 506, 507 (2010) (quoting Aetna Health Inc. v. Davila, 542 U.S. 200, 215 (2004)).

44. Wooten, *supra* note 38, at 32.

45. *See id.* (explaining ERISA as applied to pension plans).

46. *Employee Retirement Income Security Act (ERISA)*, *supra* note 10.

47. *Types of Retirement Plans*, U.S. DEPT. OF LABOR, https://www.dol.gov/general/topic/retirement/typesofplans [https://perma.cc/HBN4-PXCQ].

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Types of Retirement Plans*, *supra* note 47.

53. Booth & Palmer, *supra* note 41, at 59.

54. *Employee Retirement Income Security Act (ERISA)*, *supra* note 10.

55. *See generally* Employee Retirement Income Security Act of 1974 § 1, 29 U.S.C. § 1001; *see also What is ERISA Law - and Why Does it Matter?*, AM. PUB. UNIV. (Aug. 15, 2023), https://www.apu.apus.edu/area-of-study/security-and-global-studies/resources/what-is-erisa-law-and-why-does-it-matter/ [https://perma.cc/4LL3-4JQG].

as "prudent process."[56] Among the many standards within ERISA, some of the most important standards consist of minimum funding requirements, disclosure requirements, and fiduciary duties, which is the main point of consideration in this Note.[57]

D. How Fiduciaries are Regulated by ERISA

A paramount regulation of ERISA is setting standards for fiduciaries in the administration and management or (servicing) of plans.[58] Fiduciaries are responsible for overseeing and making decisions regarding the transactions these plans engage in.[59] When servicing these plans, fiduciaries are required to apply "prudent" processes.[60] For prudent processes, almost all fiduciaries are held to a "prudent man standard."[61] The Prudent Man standard requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ."[62]

Therefore, fiduciaries bear significant responsibility in servicing plans, exposing them to liability when a plaintiff alleges a violation of ERISA regulations.[63] For example, in cases where an Employee Stock Ownership Plan (ESOP) underperforms, a plaintiff may sue the fiduciary.[64] While the fiduciary has no control over stock prices, they are responsible for decisions regarding which stocks are invested in.[65] Participants in ESOPs, in seeing the funds of their retirement fall, may sue without knowing whether their fiduciaries had any intent to benefit themselves or another party in interest or if they were even acting prudently. This exemplifies the disconnect between the Third Circuit and the other courts. The Third Circuit's requirement for plaintiffs to present factual allegations demonstrating an intent to benefit a party in interest serves to reduce the likelihood of

56. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C. § 1104; *see also* Sweda v. Univ. of Pa., 923 F.3d 320, 328 (3d Cir. 2019) (stating "fiduciaries are held to the 'prudent man' standard of care").

57. *See* Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106 (detailing the transactions that fiduciaries are explicitly prohibited from engaging a plan in).

58. *See generally id.* §§ 1106, 1108 (setting minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans).

59. *See Fiduciary Responsibilities*, *supra* note 9 ("Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA. They also must avoid conflicts of interest.").

60. Employee Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108.

61. *See* Sweda v. Univ. of Pa., 923 F.3d 320, 327–30 (3d Cir. 2019) (explaining the Prudent Man standard in relation to Prudent Process).

62. Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C. § 1104. *See also* Nsouli, *supra* note 6, at 428 (explaining the prudence standard).

63. *See* Clare Staub, Note, *Fiduciary Liability Issues in ERISA Pension Plan Terminations*, 11 HOUS. BUS. & TAX L.J. 427, 438 (2011) (listing fiduciary duties of pension plan administrators).

64. *See* Fifth Third Bancorp. v. Dudenhoeffer, 573 U.S. 409, 427–30 (2014) (explaining that fiduciaries in charge of ESOPS are not exempt from ERISA standards).

65. *Id.*

baseless claims. This is particularly relevant in situations where fiduciaries face liability due to losses resulting from high-risk investments.[66]

E. Sweda v. University of Pennsylvania

Recently, there has been a "wave of ERISA lawsuits filed against several elite private universities alleging mismanagement of their defined contribution plans (University fees cases)."[67] *Sweda* is one of these University fees cases. In *Sweda*, the plaintiffs claimed a breach of fiduciary duty claim as well as prohibited transaction claims regarding mismanagement of defined contribution plans.[68] Specifically, the plaintiffs claimed that the plan fiduciaries breached ERISA duties by failing to properly manage the plan's investments and for engaging in prohibited party in interest transactions. Sweda, the plaintiff, filed seven claims for relief, three of those claims being prohibited party in interest transaction claims.[69] The plaintiffs brought their case in the Eastern District of Pennsylvania. The District Court dismissed all seven claims, holding that the plaintiffs failed to state a claim under the *Twiqbal* pleading standard because the claims were not plausible.[70] The *Sweda* plaintiffs then appealed to the Third Circuit, which then affirmed the dismissal of the three prohibited party in interest transaction claims.[71] In affirming the dismissal of these claims, the court created the circuit split at issue in this Note.[72]

F. Rationale of Exemptions as a Basis for the Intent Requirement in Sweda

In *Jordan*, the Sixth Circuit explains Congress' intent behind adopting ERISA 406(a) specifically, stating:

> Congress adopted § 406(a)(1) of ERISA to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries. Prior to the implementation of ERISA, benefit plans normally engaged in transactions with related parties so long as the transactions were at "arm's-length." However, this rule was difficult to monitor and therefore "provided an open door for abuses" by plan trustees. Congress then enacted § 406(a) with the goal of creating a bar

66. Most investments always carry some degree of risk. Individual stocks are among the riskiest. *See* Jason Fernando, *What Are Index Funds, and How Do They Work?*, INVESTOPEDIA (July 25, 2024), https://www.investopedia.com/terms/i/indexfund.asp [https://perma.cc/LZ83-4BEQ].

67. Theresa S. Gee, Elizabeth F. Drake & Anthony G. Provenzano, *Sweda v. University of Pennsylvania: Give and Take from the Third Circuit*, MILLER & CHEVALIER (May 6, 2019), https://www.millerchevalier.com/publication/sweda-v-university-pennsylvania-give-and-take-third-circuit [https://perma.cc/6AEU-HVL9].

68. *Id.*

69. Sweda v. Univ. of Pa., 923 F.3d 320 (3d Cir. 2019).

70. Gee, Drake & Provenzano, *supra* note 67; *see also* Sweda v. Univ. of Pa., No. 16-4329, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *aff'd in part, rev'd in part and remanded*, 923 F.3d 320 (3d Cir. 2019).

71. *Sweda*, 923 F.3d at 320.

72. The Third Circuit disagreed with other circuit courts which have held ERISA § 406 prohibited party in interest claims to be per se prohibitions. *See generally id.*

> to certain types of transactions that were regarded as likely to injure a plan.[73]

Therefore, Congress adopted a prohibition on transactions with a party in interest (ERISA 406(a)(1)) because these transactions were considered transactions "likely to injure the plan." Courts have interpreted section 406(a)(1) of ERISA to create "per se" prohibitions against specific transactions.[74] However, a breach of these rules does not automatically garner a conviction or redress.[75] This is because section 408 contains "exemptions" to these "per se" rules, which automatically relieve the accused of liability if proven.[76] The prohibitions contained in ERISA § 406 and the subsequent exceptions within section 408 have a unique relationship due to the nature of a fiduciary's job. Servicing plans is a requirement for fiduciaries and plan administrators as a part of their job responsibilities.[77] ERISA, in prohibiting transactions "likely to injure the . . . plan", prohibits transactions between a plan and a party in interest.[78] While this prohibition serves ERISA's purpose,[79] it is over-inclusive. Servicing a plan "would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a 'party in interest' to the plan."[80] Therefore, fiduciaries and plan administrators are required, as a part of their job responsibilities, to engage a plan in ERISA § 406 prohibited transactions. This subjects fiduciaries and plan administrators to liability for performing necessary functions of their job. Resolving this conflict is in part the intention of ERISA § 408 exemptions. However, this begs the question: why must fiduciaries and plan administrators defend their lawful and necessary actions against claims which would no doubt be excused by an ERISA § 408 exemption? This is the issue the Third Circuit wrestled with in *Sweda*.[81]

The Third Circuit held that a potential plaintiff factually alleging intent to benefit a party in interest is the answer to balancing this dilemma.[82] The Third Circuit recognized that such an intent element, could, in some cases, nullify an otherwise applicable

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73. Jordan v. Michigan Conf. of Teamsters Welfare Fund, 207 F.3d 854, 859 (6th Cir. 2000) (internal citations omitted).

74. Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106; *see also* cases cited *supra* note 15 (listing each Circuit court opposing *Sweda* in the circuit split).

75. *See, e.g.*, *Sweda*, 923 F.3d at 320.

76. Employment Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108.

77. Employment Retirement Income Security Act of 1974 § 404, 29 U.S.C. § 1104; *see Sweda*, 923 F.3d at 337 (stating "ERISA specifically acknowledges that certain services are necessary to administer plans").

78. *See* Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242 (2000) (stating that ERISA § 404 categorically bars "transactions deemed 'likely to injure the . . . plan'").

79. *See supra* Part II.C. (explaining ERISA's purpose).

80. *See* Bugielski v. AT&T Servs., Inc., 76 F.4th 894 (9th Cir. 2023) (citing Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012) (codified at 29 C.F.R. pt. 2550) (stating "a service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a 'party in interest' to the plan").

81. *Sweda*, 923 F.3d at 320.

82. *See id.* at 338 (stating that without a fact alleging intent to benefit a party in interest a plaintiff "does not plausibly allege that transaction that constitutes direct or indirect furnishing of goods, services, or facilities between plan and party in interest prohibited by ERISA has occurred").

exception.[83] Therefore, this approach uses the rationale that without the requisite intent, an exemption would apply. Essentially, the Court moves the rationale of the exception up in time and puts the burden of negating it by showing a fact of intent to benefit a party in interest to a plaintiff's pleading standard.[84] Thus removing the burden on fiduciaries to defend meritless claims. In other words, by requiring potential plaintiffs to allege facts showing intent to benefit a party in interest, the Third Circuit circumvents ERISA's unique prohibition of necessary duties of a fiduciary's job, while continuing to prohibit possibly injurious transactions. Simply put, the Third Circuit tailors ERISA § 406 more narrowly to its purpose. While curbing the over-inclusiveness of ERISA § 406 prohibited transactions with a heightened pleading standard, otherwise winning claims possibly will go unheard if a potential plaintiff fails to meet this standard. Thus, plaintiffs would have no remedy to redress an unlawful action by their fiduciary. There is a delicate balance at play between combating perpetual liability exposure for fiduciaries caused by a statute that prohibits then subsequently exempts a fiduciary's essential duties, and the interests of potential plaintiffs in making it past the pleading stage.

Until *Sweda*,[85] plaintiffs bringing claims under ERISA § 406(a)(1) had never been obligated to show facts alleging intent to benefit a party in interest. ERISA § 406(a) prohibits defined transactions between a plan and a party in interest.[86] "The elements of a party-in-interest prohibited transaction claim are (1) the fiduciary causes (2) a listed transaction to occur, (3) between the plan and a party in interest."[87] A party in interest is an individual with a financial connection to a retirement plan, such as a fiduciary.[88] Fiduciaries have exemptions listed in ERISA § 408,[89] that exempt them from liability for an ERISA § 406 prohibited transaction.[90] One of these exceptions is "adequate consideration," meaning an individual received a fair value for their retirement fund.[91] Adequate consideration also contains a good-faith element that fiduciaries must abide by.[92]

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83. *Id.*

84. *See infra* Part II.F. (explaining the rationale of exemptions as a basis for the intent requirement in Sweda).

85. *Sweda*, 923 F.3d at 337.

86. Bugielski v. AT&T Servs., Inc., 76 F.4th 894, 901–02 (9th Cir. 2023) (citing Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012) (to be codified at 29 C.F.R. pt. 2550) ("The Department of Labor's Employee Benefits Security Administration's ('EBSA') explanation for amending the regulation implementing § 408(b)(2) confirms our reading of § 406. In pertinent part, that explanation provides: The furnishing of goods, services, or facilities between a plan and a party in interest to the plan generally is prohibited under section 406(a)(1)(C) of ERISA. As a result, a service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a 'party in interest' to the plan.").

87. *Sweda*, 923 F.3d at 335; Employee Retirement Income Security Act of 1974 § 406(a)(1), 29 U.S.C. § 1106.

88. *See* 29 C.F.R. § 2510.3-21 (2024) (providing the definition of fiduciary).

89. *See* Employee Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108 (explaining exemptions from prohibited transactions).

90. *See* Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106 (listing prohibited transactions).

91. *See also* Employee Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108(b)(17) (stating the definition of "adequate consideration" in the context of ERISA § 408 exemptions).

92. *See supra* Part II.F (explaining rationale for the intent requirement). The court in *Sweda* may have reasoned that the intent requirement could serve to show the possibility that the good faith requirement of an adequate consideration exemption had been breached.

Another exemption is reasonableness,[93] often applied when a fiduciary has exercised "prudent process," a standard of care a fiduciary must give a plan.[94] The relevant exemption here is the "necessary services" exemption which exempts transactions that are considered essential to the operation of the plan, so long as they are considered reasonable.[95] ERISA § 406(a)(1) generally prohibits transactions between a plan and a party in interest, but the necessary services exemption under § 408(b)(2) allows certain transactions involving necessary services, even when the service provider is a party in interest, as long as the services are reasonable and essential for plan operations. Thus, necessary services sometimes violate ERISA because the operator of such services becomes a party in interest, then the operator of such services must prove the exemption applies if a plaintiff brings a prohibited transaction party in interest claim. The Third Circuit's intent element targets this issue.

G. The Rationale Behind the Third Circuit's Intent Element

The added intent element uses the rationale that these exemptions will apply down the road because the purpose of ERISA is not to prohibit harmless necessary transactions;[96] rather it aims to prohibit those likely to injure the plan, which might require some intent to benefit a party in interest.[97] Thus, where the Third Circuit diverges from the other courts, is that it puts the burden of factually alleging an intent to benefit a party in interest element on the potential plaintiff to put into the pleading to have a viable claim.[98] This heightened pleading standard appears to challenge the applicability of an exemption at the pleading stage. Thus, with the intent element in place, it serves to preempt the necessity of raising and proving those exemptions that would have been successful in the absence of any facts alleging intent to benefit a party in interest. Therefore, if a fiduciary causes a plan to engage in a section 406(a)(1) prohibited transaction, the Third Circuit puts the burden of factually alleging intent to benefit a party in interest onto potential plaintiffs, whereas the rest of the circuit courts do not impose this heightened pleading standard, exposing fiduciaries to perpetual liability for performing necessary duties of their job.[99] The Third Circuit specifically held:

> [A]bsent factual allegations that support an element of intent to benefit a party in interest, a plaintiff does not plausibly allege that a "transaction that constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest" prohibited by § 1106(a)(1)(C) has occurred.[100]

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93. *See* Employee Retirement Income Security Act of 1974 § 408; 29 U.S.C. § 1108.

94. *See* Sweda v. Univ. of Pa. 923 F.3d 320, 332 (3rd Cir. 2019) (explaining prudent process as an exemption).

95. Employee Retirement Income Security Act of 1974 § 408(b)(2)(A), 29 U.S.C. § 1108.

96. *Id.* at 338. Hence why these transactions are prohibited then subsequently exempted.

97. Employee Retirement Income Security Act of 1974 § 408(b)(2)(A), 29 U.S.C. § 1108; *see also* Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242 (2000) (explaining the intent of ERISA being to prohibit transactions likely to injure the plan).

98. *Sweda*, 923 F.3d at 337–38.

99. Perpetual liability because every time a fiduciary, as an effect of their job duties, becomes a party in interest to the plan, they engage the plan in prohibited transactions, leaving themselves open to liability for doing their job. *Id.* at 338.

100. *Id.*

Despite the Third Circuit's holding, no intent element is present within ERISA § 406,[101] hence why none of the other circuit courts have interpreted ERISA § 406 and 408 to mean this.[102] However, the Third Circuit found absurd results from interpreting ERISA § 406 as a "per se" bar against necessary transactions, allowing the Court to impose the intent requirement.[103] The Third Circuit found "absurd results" because ERISA § 406 prohibits transactions with a party in interest, and a fiduciary becomes a party in interest when they render services to a plan. Therefore, the Third Circuit found that it would be "absurd" to prohibit a fiduciary from performing necessary services to a plan.[104] The reasoning of both sides will be dealt with in the following Parts.

H. The Circuit Court's Decisions in Creating this Circuit Split

1. The Second Circuit

The Second Circuit, in *Marshall v. Snyder*, decided just four years post-enactment of ERISA in 1978, that the burden was on the fiduciary to prove an exemption.[105] While not directly addressing the question of whether an intent element was necessary, the court stated, "[t]he settled law is that in such situations the burden of proof is always on the party to the self-dealing transaction to justify its fairness."[106] Thus, the court treated ERISA § 406 as a "per se" bar, allowing a showing that the prohibited transaction occurred to be enough to pass the pleading stage. Therefore, the court never considered adding an intent element and held firmly that the burden to prove an exemption under ERISA is always on the defendant.[107]

2. The Fifth Circuit

The Fifth Circuit Court of Appeals then followed suit. In 1983, the Fifth Circuit faced this issue in *Donovan v. Cunningham*.[108] In this case, the plaintiffs claimed fiduciaries caused an ESOP to enter a transaction with a party in interest as barred by ERISA § 406.[109] The court held "ESOP fiduciaries will carry their burden to prove that adequate consideration was paid,"[110] Here, the court cited the Supreme Court in *SEC v. Ralston Purina Co.*, which stated that it is reasonable "to place the burden of proof upon a party who seeks to bring his conduct within a statutory exception to a broad remedial scheme."[111]

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101. Employee Retirement Income Security Act Of 1974 § 406, 29 U.S.C. § 1106.

102. *See* cases cited *supra* note 15 and accompanying text (listing the five Circuit Court holdings which put the burden of proving an exemption on the defendant, and do not require intent in the pleading).

103. In finding absurd results, the court said, "when one interpretation of a statute leads to an absurd result, we may consider an alternative interpretation that avoids the absurdity." Sweda v. Univ. of Pa. 923 F.3d 320, 337 (3rd Cir. 2019) citing *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 263 (3d Cir. 2014).

104. Sweda v. Univ. of Pa. 923 F.3d 320, 337 (3rd Cir. 2019).

105. Marshall v. Snyder, 572 F.2d 894 (2d Cir. 1978).

106. *Id.* at 900.

107. *Id.*

108. Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983).

109. *Id.* at 1459–60; *see also* Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106 (barring transactions between a plan and a party in interest).

110. *Donovan*, 716 F.2d at 1467.

111. SEC v. Ralston Puring Co., 346 U.S. 119, 126 (1953).

Further, the court cited the Second Circuit in *Snyder* saying, "[the] burden of proof is on ERISA fiduciary claiming a § 408 exemption from [the] self-dealing prohibition of § 406."[112] While following the holding in *Snyder*, the court extended it by recognizing the specific statutory text in which this concept applies.[113] Therefore, the Court did not consider an intent element; rather, it emphasized the defendant's responsibility to prove an ERISA § 408 exemption.[114]

3. The Fourth Circuit

Then, in 1994, the Fourth Circuit in *Elmore v. Cone Mills Corp.* held, "to avoid liability for a prohibited transaction under 406 . . . [the defendant] bears the burden of proving the transaction was for adequate consideration in compliance with § 408(e)."[115] Here, the Fourth Circuit did not specifically mention a subsection in which this applied, rather, this was a blanket holding for all prohibited transactions under section 406.[116] Once again, an intent to benefit a party in interest element was never considered; rather, the Court reinforced the defendant's burden of proving an exemption.[117] Therefore, contemplation of perpetual liability of fiduciaries, generated from the unique relationship between ERISA § 406 and 408, was neglected.

4. The Eighth Circuit

The Eighth Circuit fell in line with the rest of these courts in *Braden v. Wal-Mart Stores* when it held "statutory exemptions established by § 1108 (ERISA § 408) are defenses which must be proven by the defendant."[118] The court cited *Lowen* and *Donovan* in coming to this conclusion,[119] with little discussion otherwise, and no discussion of intent.

5. The Ninth Circuit

The Ninth Circuit in 2015, before *Bugielski*, in *Howard v. Shay*, also citing *Snyder*, held that under ERISA § 408(e) a fiduciary "has the burden of proving that he fulfilled his duties of care and loyalty and that the ESOP received adequate consideration."[120] The court further noted, "[t]his burden is a heavy one."[121] Then, the Ninth Circuit, in *Harris v.*

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112. Marshall v. Snyder, 572 F.2d 894, 900 (2d Cir. 1978); *see also* Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1215 (2d Cir. 1987) (burden on fiduciary to prove exemption); *infra* Part II.H.1 (explaining, that while this court held the burden was on the fiduciary, it did so in the specific context of section 406(b)(3)). The court in *Sweda* acknowledges that section 406(a) and (b) have distinct purposes and must be read with those purposes in mind. Sweda v. Univ. of Pa. 923 F.3d 320, 338 (3d Cir. 2019).

113. *See generally*, SEC v. Ralston Puring Co., 346 U.S. 119 (1953).

114. *Id.*

115. Elmore v. Cone Mills Corp., 23 F.3d 855, 864 (4th Cir. 1994).

116. *Id.*

117. *Id.*

118. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 601 (8th Cir. 2009); Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996).

119. *See Braden*, 588 F.3d at 601; Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1215 (2d Cir. 1987); Donovan v. Cunningham, 716 F.2d 1455, 1467–68 (5th Cir. 1983).

120. *Howard*, 100 F.3d at 1488.

121. *Id.*

Amgen, used language from *Howard* and held, "because § 1108(e) (ERISA § 408(e)) is an affirmative defense, a defendant has the burden to prove its applicability."[122] Therefore, the court put no burden on a potential plaintiff to assert any facts of intent to have a viable claim. Like every preceding court, this court also dismissed the problem of perpetual fiduciary liability created by ERISA § 406 and 408.[123]

The Second, Fourth, Fifth, Eighth, and Ninth Circuits all held that the defendant has the complete burden of proving an ERISA § 408 exemption.[124] None of the courts added an intent element to a plaintiff's pleading standard for ERISA § 406 claims. While the intent element does not directly negate ERISA § 408 exemptions, it is intricately related because the rationale is the same. The purpose behind some ERISA § 408 exceptions is to allow necessary transactions, which are not likely to injure the plan.[125] The intent requirement serves this purpose by filtering out claims that lack factual evidence demonstrating an intent to benefit a party in interest, as such intent would likely harm the plan. However, the intent element does this at the pleading stage, thus relieving the fiduciary of the burden of responding to meritless claims.

6. The Third Circuit

In *Sweda*, the Third Circuit in 2019, despite all the previously mentioned case decisions and commentary at its disposal, came to the opposite conclusion.[126] The Third Circuit held, as applied only to ERISA § 406(a), that a plaintiff must factually allege intent to benefit a party in interest to have a viable ERISA § 406 claim.[127] Instead of having the defendant claim an exemption under ERISA § 408 *after* the pleading stage, the court made factually alleging intent to benefit a party in interest, and thus factually alleging the insufficiency of an ERISA § 408 exemption, an element of a plaintiffs pleading.[128] Without accomplishing this, potential plaintiffs do not have a viable claim of relief. The Third Circuit reasons that without the intent element, fiduciaries are open to liability for every service rendered to the plan.[129] Therefore, the Third Circuit requires a potential plaintiff to have factual allegations of intent to show that these exemptions would be insufficient. The objective is to relieve fiduciaries from the burden of proving these exemptions each time they perform necessary services to a plan and are consequentially engaging in an ERISA § 406 prohibited party in interest transaction. Without the requisite intent, the danger ERISA § 406 aims to prevent is absent. Therefore, claims lacking facts alleging intent to benefit a party in interest would likely fail.

Further, the court distinguished claims under section 406(a) from 406(b), stating "[o]ur ruling today does not conflict with our earlier decisions holding that transactions between a plan and plan fiduciaries are per se prohibited under § 1106(b)."[130] The court

122. Harris v. Amgen, Inc., 788 F.3d 916, 943 (9th Cir. 2015), *rev'd on other grounds*, 577 U.S. 308 (2016).

123. *Id.*

124. *See supra* Parts II.G.1–5.

125. Employee Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108(b)(2)(A) (exempting "services necessary for the establishment or operation of the plan").

126. Sweda v. Univ. of Pa., 923 F.3d 320 (3d Cir. 2019).

127. *Id.*

128. *Id.*; *see also* Part II.G (explaining the intent requirement).

129. *Sweda*, 923 F.3d at 334.

130. *Id. at* 336.

looked to the purpose of sections 406(a) and 406(b), explaining how these sections "have distinct purposes."[131] The court stated, "[s]ubsection (a) erects a categorical bar to transactions between the plan and a 'party in interest' deemed likely to injure the plan," and "[s]ubsection (b) prohibits plan fiduciaries from entering into transactions with the plan tainted by conflict-of-interest and self-dealing concerns."[132] The court found that the protective purpose of ERISA[133] is "at its height in the latter scenario when there is a risk of fiduciary self-dealing."[134] Therefore, although the court does not state it outright, the court believes this purpose is non-existent or exists to a much lesser degree in the first scenario.[135]

Regarding section 406(a)(1) specifically, the court focuses its attention on the "absurd results" that would stem from interpreting ERISA § 406(a)(1) as a "per se rule barring all transactions between a plan and party in interest."[136] The court says a per se rule with this effect is absurd "because it would expose fiduciaries to liability for every transaction whereby services are rendered to the plan."[137] A ban with this effect, as the Third Circuit believes it to be, would be unworkable because certain services by fiduciaries are "necessary to administer plans."[138] In essence, the Third Circuit believes a reading of ERISA that per se prohibits necessary services by a fiduciary would be self-contradictory, and in assuming ERISA is not self-contradictory, the court finds a different interpretation warranted. Despite the circuit split, in 2020, the United States Supreme Court denied certiorari to resolve the issue.[139]

III. ANALYSIS

This circuit split carries implications for all parties involved in ERISA § 406 claims. The intent issue at the heart of this circuit split has implications for not only potential plaintiffs but also for the fiduciaries and the courts involved. Corporations are also impacted because ERISA affects the retirement and health plans sponsored by corporations.

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131. *Id.*

132. *Id.*

133. *See* Part II.B (explaining how a pleading standard must be read in the context of the statute in which the claim is being brought).

134. *Sweda*, 923 F.3d at 336.

135. *Id.* The Court essentially sees in the latter scenario (as described in § 406(b)), that it is more narrowly tailored to the conduct ERISA intends to prohibit. *Id.*

136. *Id.* at 337.

137. *Id.* at 336–37.

138. *Sweda*, 923 F.3d at 337; *see also* Renfro v. Unisys Corp., 671 F.3d 314, 321 (3d Cir. 2011) (explaining that "an entity is only a fiduciary to the extent it possesses authority or discretionary control over the plan").

139. *Sweda*, 923 F.3d 320, *cert. denied*, 140 S. Ct. 2565 (2020). The Supreme Court abrogated Sweda on a narrow comment regarding the pleading standard specific to antitrust claims. In *Sweda*, the Court recognized that the district court had made a mistake in applying a heightened pleading standard based on an antitrust carve-out mentioned in the *Twombly* decisions. The Sweda court stated that that carve-out was specific to antitrust cases, and thus did not apply to ERISA cases. In *Hughes*, as recognized in a footnote in *Wesco*, the Supreme Court abrogated this narrow holding stating that in ERISA cases, courts are to apply the pleading standard discussed in *Twiqbal*, which is what the court did in *Sweda*. The Court did not change the *Sweda* court's application of the general *Twiqbal* standard, but it did make clear that the *Twombly* antitrust carve-out (which focuses on allegations of competitive misconduct) should not be applied to ERISA claims.

This circuit split diverges the pleading standard that plaintiffs must satisfy to bring a viable claim under ERISA § 406. Therefore, this will affect which cases the plaintiffs decide to bring and which cases plaintiffs can successfully get through the early stages of litigation. Under the Third Circuit's view, plaintiffs have a heightened pleading standard, leading to fewer cases making it through the early stages of litigation. The heightened pleading standard may chill potential plaintiffs from bringing cases, thinking they will not have a viable claim. Under the majority view, its lower pleading standard encourages plaintiffs to bring more claims, knowing they have a higher likelihood of success. Claims in jurisdictions employing the majority interpretation will more easily advance through the early stages of litigation.

Moreover, the pleading standard for plaintiffs necessarily affects the liability a fiduciary is leaving themselves open for when servicing a plan. Fiduciaries are responsible for countless decisions regarding servicing plans.[140] Therefore, a greater possibility of liability will significantly affect how they carry out the duties of their job. Fiduciaries have great discretion in how they do their job, including when it comes to servicing plans.[141] While their discretion is not unlimited,[142] discretion is still a significant aspect of a fiduciary's job.[143] With this discretion, fiduciaries are open to more liability under the majority standard. The potential for legal liability may deter them from performing their duties in the manner they would otherwise follow. Even in servicing a plan with prudent processes, fiduciaries may still fear liability under the majority view, whereas under the Third Circuit's view, that fear will not be as pervasive. Therefore, the pleading standard of ERISA § 406 claims significantly impacts fiduciaries.

Further, the pleading standard influences which cases make it through the early stages of litigation, impacting the courts' resources. Under the Third Circuit's view, the courts would likely see less of these disputes, while under the majority's view, courts would likely see much more.

A. Affirmative Defenses and Exemptions

In the United States civil system, plaintiffs bear the burden of proving their case by a preponderance of the evidence.[144] For the most part, the burden of proving exemptions and especially affirmative defenses falls on the defendant.[145] This is implicit in the definition of an affirmative defense.[146] Exemptions generally work the same way.[147] Therefore, the Third Circuit putting the burden on the plaintiff to essentially bring evidence addressing an

140. *See id.* at 337 (explaining opening up liability every time a fiduciary services a plan is absurd).

141. *See id.* at 333 (discussing the importance of fiduciary discretion).

142. *See id.* (stating "if there is indeed a 'hallmark' of fiduciary activity identified in the statute, it is prudence").

143. *Id.* (quoting Pohl v. Nat'l Benefits Consultants, Inc., 956 F.2d 126, 129 (7th Cir. 1992)) (stating "Penn is not incorrect that the exercise of discretionary authority over plan assets is a characteristic of fiduciaries such that courts can identify fiduciaries by this trait").

144. *Burden of Proof*, CORNELL: LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden_of_proof [https://perma.cc/T7AY-QUAU].

145. Gomez v. Toledo, 446 U.S. 635, 640 (1980) (explaining that the burden of pleading an affirmative defense rests with the defendant).

146. *Affirmative Defenses*, CORNELL: LEGAL INFO. INST., https://www.law.cornell.edu/wex/affirmative_defense [https://perma.cc/8QSU-WVXQ].

147. Suiter v. Mitchell Motor Coach Sales, Inc., 151 F.3d 1275, 1279 (10th Cir. 1998).

exemption in their pleading is contrary to the affirmative defense definition and traditional thought on exemptions. If the split were to be decided in favor of the Third Circuit's perspective, it could open the door for imposing a heightened burden on potential plaintiffs in other areas of the law based on similar reasoning. While this is certainly a huge uphill battle for the Third Circuit and other proponents of this view, it would have huge implications across the legal landscape. Defendants in other claims may attempt to show similarities to the absurd results the Third Circuit bases its reasoning on and argue for a heightened pleading standard.

B. Pros of Resolving the Circuit Split

Generally, uniformity in the law is a positive thing. Regarding the issue presented by this circuit split, plaintiffs, fiduciaries, and the courts would benefit from uniformity in the law. Corporations often operate in many different jurisdictions, complicating the applicability of different circuit court rulings. This may create uncertainty for corporations and their fiduciaries in analyzing which law applies. Thus, reconciling this circuit split will eliminate uncertainty for these corporations and fiduciaries.

The Supreme Court receives thousands of petitions for certiorari every year.[148] Many of those being circuit splits.[149] As the Supreme Court denied certiorari in *Sweda*,[150] it is unlikely that the Supreme Court will provide a definitive resolution to this issue in the near future. Despite this, the interpretation of ERISA § 406 has a substantial impact on potential plaintiffs and fiduciaries. Therefore, once a uniform law is implemented, there will no longer be confusion, allowing potential plaintiffs and fiduciaries to act accordingly.

C. Comparing and Contrasting the Conflicting Viewpoints

This circuit split arises from weighing the considerations of parties in breach of ERISA suits, but it also stems from the complexities of interpreting statutes. In this case, this is the language of ERISA § 406 and 408. Currently, the debate is one-sided with all but the Third Circuit ruling in a similar way.[151]

The Third Circuit, in *Sweda*, required that a plaintiff plead "factual allegations that support an element of intent to benefit a party in interest" to have a viable prohibited-transaction claim under ERISA § 406.[152] The Ninth Circuit, and presumably the other courts, believe the Third Circuit *added* this intent element to ERISA § 406, then put the burden of proving intent on the plaintiff.[153] Whereas the Third Circuit believes this element is essential to effectuate the *intent* of ERISA § 406.[154] The court states ERISA § 406(a) "is

148. Jonathan M. Cohen & Daniel S. Cohen, Iron-*ing Out Circuit Splits: A Proposal for the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 994 (2020).

149. *Id.*

150. Sweda v. Univ. of Pa., 923 F.3d 320 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020).

151. *See supra* Parts II.G.1–6 (explaining how the Second, Fourth, Fifth, Eighth, and Ninth Circuits are all in agreement on this issue and the Third Circuit is alone).

152. *Sweda*, 923 F.3d at 338.

153. *See generally* Bugielski v. AT&T Servs., Inc., 76 F.4th 894, 906 (9th Cir. 2023) (noting that the Third Circuit opted to create an intent requirement that the statute did not demand).

154. *See Sweda*, 923 F.3d at 338 (claiming "[t]he element of intent to benefit a party in interest effects the purpose of § 1106(a)(1) which is to rout out transactions that benefit such parties at the expense of participants").

not meant to impede necessary service transactions, but rather transactions that present legitimate risks to participants and beneficiaries."[155] Thus, the court does not read section 406(a) to prohibit necessary service transactions, but only transactions that carry real risk.[156] The Third Circuit thus believes those risks are only present where intent to benefit a party in interest is also present.[157] In interpreting section 406(a) in this way, the Third Circuit reasons that potential plaintiffs must *factually* allege intent to benefit a party in interest. This standard, according to the Court, is crucial for differentiating between claims that carry legitimate risk and those that are necessary service transactions.[158] The court states that conclusory statements of intent are not enough to have a viable claim under ERISA § 406(a)(1).[159] Therefore, taking the statutory text, and looking at its purpose, the Third Circuit believed this was the more faithful interpretation of the text.[160]

D. The Ninth Circuit's Reply to Sweda

Now on the other side of this coin, in *Bugielski*, the Ninth Circuit decided oppositely, consistent with the precedent it set in *Howard* and *Harris*.[161] While other courts have decided this issue the same way as *Bugielski* in the past,[162] being decided about four years post-*Sweda*, the *Bugielski* Court, aware of the Circuit Split, dedicated a significant portion of the opinion replying to the reasoning the Third Circuit used in *Sweda*.[163] The Ninth Circuit disagreed with the reasoning used in *Sweda*, claiming the Third Circuit "does not follow the statutory text."[164] Instead of following the statutory text of ERISA § 406(a)(1), the Ninth Circuit claimed that the Third Circuit had "*unnecessarily created*" an intent requirement.[165] Whereas the Third Circuit believes the intent requirement is essential to the *purpose* of ERISA and thus falls in line with the statutory text.[166]

The Third Circuit believes ruling in a way consistent with its sister courts would create absurd results.[167] The Third Circuit states that reading ERISA § 406 as the Seventh Circuit (and Ninth Circuit) does "would prohibit ubiquitous service transactions and require a fiduciary to plead reasonableness as an affirmative defense under § 1108 [ERISA § 408] to avoid suit."[168] The court claimed this result was "absurd."[169] The court reasoned that

155. *Id.* (citing Leigh v. Engle 727 F.2d 113, 127 (7th Cir. 1984)) (listing examples of legitimate risks section 406(a) is trying to combat such as "securities purchases or sales by a plan to manipulate the price of the security to the advantage of a party-in-interest").

156. *Id.*

157. *Id.*

158. *Id.*

159. *Sweda*, 923 F.3d at 338.

160. *Id.*

161. Bugielski v. AT&T Servs., Inc., 76 F.4th 894 (9th Cir. 2023); *supra* Part II.H.5 (explaining the holdings in *Howard* and *Harris*).

162. *See supra* Part II. H (explaining each court that has ruled on this issue).

163. *Bugielski*, 76 F.4th at 894.

164. *Id.* at 906.

165. *Id.* (emphasis added).

166. *Id.* at 907.

167. Sweda v. Univ. of Pa., 923 F.3d 320, 337 (3d Cir. 2019).

168. *Id.* at 336.

169. *Id.*; *see also* Lockheed Corp. v. Spink, 517 U.S. 882, 888 (1996) (rejecting interpreting a similar law to 406 in a "hyper-literal" way because it reached an absurd result).

interpreting ERISA § 406 as "prohibit[ing] necessary services" of fiduciaries would be absurd, and therefore an alternative reading of the statute was warranted.[170] The Ninth Circuit found this line of reasoning wholly unpersuasive.[171] The Ninth Circuit believes this requirement is wholly unnecessary as it stated reasons why it would not be "absurd" to "prohibit necessary services", as stated in *Sweda*.[172] The Ninth Circuit stated that it knows interpreting section 406(a)(1) as a per se bar would prohibit necessary services.[173] However, the court does not see this as a problem. The Ninth Circuit states that a fiduciary is exempt from this per se bar because ERISA § 408(b)(2)(A) exempts "services necessary for the establishment or operation of the plan."[174] Thus, the Ninth Circuit believes ERISA recognizes the per se bar and creates an exemption for the exact issue the Third Circuit would call absurd.[175] Further, although the Ninth Circuit claims it knows section 401(a)(1)(C) prohibits necessary services,[176] in the very next paragraph, the court states, "§ 406(a)(1)(C) does not completely 'prohibit necessary services,'"[177] rather it "ensures that when transacting with a party in interest, a fiduciary understands the compensation the party in interest will receive from the transaction and determines that compensation is reasonable."[178] In other words, the court is saying that despite the apparent prohibition of necessary services, the presence of an exemption renders the necessary services effectively non-prohibited. The court sees this as merely a check on fiduciaries to do their job without any intent to benefit a party in interest. Therein lies the problem. Because the court sees this as a check on fiduciaries, fiduciaries now must prove they acted lawfully when they rendered necessary services to a plan in violation of ERISA § 406.

Finally, if the Ninth Circuit did not already disagree enough, it further stated that this issue had already been decided by the Supreme Court.[179] The Ninth Circuit quotes the Supreme Court and says, "§ 406(a) creates '*per se* prohibitions on transacting with a party

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170. *Sweda*, 923 F.3d at 337.

171. Bugielski v. AT&T Servs., Inc., 76 F.4th 894 (9th Cir. 2023).

172. The court makes this observation by noting:

> First, § 406(a)(1)(C) only applies to service contracts with a "party in interest," and therefore it poses no bar to contracts with parties that do not meet that definition. Second, even if a party in interest were the sole provider of a necessary service, § 406(a)(1)(C) does not completely "prohibit necessary services" or "impede necessary service transactions." Instead, it simply ensures that, when transacting with a party in interest, a fiduciary understands the compensation the party in interest will receive from the transaction and determines that compensation is reasonable.

Id. at 906 (internal citations omitted).

173. *Id.*

174. *Id.*; Employee Retirement Income Security Act of 1974 § 408(b)(2)(A), 29 U.S.C § 1108.

175. *Bugielski*, 76 F.4th at 907; *see infra* Part IV (explaining how the Ninth Circuit mischaracterizes the issue of absurdity the Third Circuit is suggesting).

176. *Bugielski*, 76 F.4th at 907 (stating "we know that Congress recognized that § 406(a)(1)(C) would prohibit necessary services").

177. *See id.* at 906–07 (stating ERISA § 406 does not completely "prohibit necessary services" or "impede necessary service transactions").

178. *Id.* at 907.

179. *Id.*; *see also* Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238. (2000) (referencing § 406(a) as being a per se prohibition but not directly ruling on that point); *see also infra* Part IV (explaining how because this was not at issue in this case the Supreme Court did not have to interpret it).

in interest.'"[180] Therefore, the Ninth Circuit believes this issue is already decided and needs no further consideration.

To summarize, the Third Circuit looks towards the "absurd" effects that reading ERISA sections 406 and 408 in a "hyper-literal" way would have.[181] Then, in judging these effects, decides to implement the intent to benefit a party in interest element into the requirements of the plaintiff's pleading to combat these absurd results and stay faithful to the intent of ERISA § 406. Whereas the Ninth Circuit, along with most of the Circuit courts, reads the statute and applies it in a stringently literal way[182] while denying the existence of the absurd results posed by the Third Circuit.

IV. RECOMMENDATION

A. The Third Circuit's Interpretation Should be Adopted

This section recommends adopting the Third Circuit's interpretation of ERISA § 406(a) and therefore recommends implementing an element of intent into a plaintiff's pleading to have a viable claim under ERISA § 406(a). This view falls in line with the purpose of ERISA,[183] is more consistent with the pleading standard of *Twiqbal*,[184] and lastly, ruling oppositely would lead to absurd results.[185]

1. The Third Circuit's Interpretation Falls in Line with the Purpose of ERISA

To begin, section 406(a)(1) is a unique prohibition within the section 406 prohibitions because it prohibits necessary transactions.[186] The court in *Sweda* recognized this and noted the distinct purposes of sections 406(a) and 406(b).[187] Section 406(a) categorically prohibits transactions between a plan and a party in interest,[188] whereas 406(b) "prohibits plan fiduciaries from entering into transactions with the plan tainted by conflict-of-interest and self-dealing concerns."[189] While section 406(a) takes a broad preventative approach by categorically prohibiting transactions with parties-in-interest, section 406(b) imposes more specific restrictions based on conflict-of-interest and self-dealing.

While the purpose of ERISA is to protect plan beneficiaries,[190] the disputes that ERISA is meant to resolve are "not all in favor of potential plaintiffs."[191] Thus, ERISA

180. *Bugielski*, 76 F.4th at 907; *see infra* Part IV (explaining how this quote from the Supreme Court was stated in articulating a party's argument).

181. Sweda v. Univ. Of Pa., 923 F.3d 320, 327 (3d Cir. 2019).

182. The other circuit courts do this as well they just do not directly respond to *Sweda* as *Buglieski* does. *Bugielski*, 76 F.4th at 905.

183. *See supra* Part II.C (explaining ERISA's purpose in regard to the danger it attempts to combat through § 406).

184. *See supra* Part II.B. (explaining the *Twiqbal* standard).

185. *See generally supra* Part II.H.6 (explaining the absurd results mentioned by *Sweda*).

186. Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106.

187. *See supra* note 115 and accompanying text (explaining the distinction between ERISA § 406(a) and 406(b)).

188. Employee Retirement Income Security Act of 1974 § 406, 29 U.S.C. § 1106.

189. Sweda v. Univ. of Pa., 923 F.3d 320, 336 (3d Cir. 2019).

190. *See supra* Part II.C (explaining the purpose of ERISA).

191. *See* Renfro v. Unisys Corp., 671 F.3d 314, 321 (3d Cir. 2011) ("In enacting ERISA, Congress 'resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.'").

should not be interpreted as giving plaintiffs an automatic advantage over fiduciaries in these disputes. There is an even playing field when interpreting ERISA, specifically ERISA § 406. Therefore, concerning the intent of ERISA, the interests of both parties should be weighed equally and in doing so, effectuating ERISA's purpose.

2. The Third Circuit's View Aligns Better with the Twiqbal Standard

The plausibility standard outlined in Twiqbal[192] aligns with the interpretation of ERISA § 406(a) which places the burden on potential plaintiffs to factually allege intent to benefit a party in interest. *Twiqbal* discourages the filing of baseless claims by setting a plausibility standard.[193] In the ERISA context, if a plaintiff is unable to present factual allegations that reasonably suggest an intent to benefit a party in interest, their claim would be akin to a baseless claim under *Twiqbal*. This is because intent to benefit a party in interest is likely to injure the plan, and injuring the plan is what ERISA § 406(1) attempts to prohibit.[194]

The reason section 406 needs exceptions is because the law is overinclusive. Section 406 includes prohibiting necessary services, then section 408 exempts them.[195] The law is not intended to prohibit necessary services, because there is an exemption for them.[196] The true behavior that section 406(1) aims to prohibit is fiduciaries engaging in transactions "deemed likely to injure a plan."[197] This is the intent the Third Circuit correctly found. Necessary services do not fall into the category of transactions deemed likely to injure a plan, hence the exception.[198] Therefore, the intent element narrows this law to its purpose.[199] Factually alleging this intent creates a heightened standard that filters out necessary transactions and transactions made in good faith.[200] This does not completely eradicate the need for section 408 exemptions, however. These exemptions can still be used after a plaintiff has sufficiently factually *alleged* intent to benefit a party in interest. However, the intent element filters out claims lacking a factual basis of actions the law aims to prohibit—specifically, the intent to benefit a party in interest, leading to transactions likely to injure the plan. Thus, it prevents meritless lawsuits and protects fiduciaries from the burden of defending against baseless allegations, akin to the *Twiqbal* standard.

3. The Third Circuit's Interpretation of ERISA § 406 Avoids Absurd Results

In keeping an even playing field between parties, a reading of ERISA which creates absurd results that unfairly benefit potential plaintiffs and unduly burden fiduciaries should

192. *See supra* Part II.B (explaining the "Twiqbal" standard).
193. *Id.*
194. *See generally supra* Part II.C. (explaining what conduct ERISA aims to prohibit).
195. *See generally* Employee Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108.
196. Employee Retirement Income Security Act of 1974 § 408(b)(2), 29 U.S.C. § 1108 (the necessary services exemption).
197. *See generally id.* (explaining the distinct purposes of ERISA sections 406 and 408).
198. *Id.* § 408.
199. *See supra* Part III.D (explaining how ERISA § 406(a) is overinclusive and ERISA § 406(b) is narrower).
200. *See supra* Part II.F (explaining the rationale that an exemption will apply in the absence of intent).

be reconsidered.[201] Further, when absurd results arise, courts then look to the purpose of the text for a different interpretation to avoid the absurdity.[202] The Third Circuit does exactly this.

Despite the Ninth Circuit's holding,[203] the Third Circuit correctly found absurd results. The Third Circuit better characterizes the core of the absurd results, than what the Ninth Circuit addressed. The Ninth Circuit states that it knows section 406(a)(1)(c) would prohibit necessary services.[204] However, the court claims this is not an absurd result because "that is why [Congress] created an exemption."[205] ERISA § 408(b)(2)(A) exempts "services necessary for the establishment or operation of the plan."[206] However, this reasoning from the Ninth Circuit assumes the absurdity lies in the fact that ERISA prohibits a necessary aspect of a fiduciary's job. Therefore, the exemption under section 408(b)(2)(a) seems to be an adequate remedy. Although this may be absurd itself, this is not exactly the absurdity the Third Circuit seeks to eradicate. The actual absurdity arises when fiduciaries are consistently burdened with the obligation to prove an exemption applies every time they perform a necessary service to a plan. Without the intent requirement, potential plaintiffs can bring a meritless claim that will pass the pleading stage, knowing an exemption will apply later, yet in bringing this claim, forces fiduciaries to prove the exemption. This gives potential plaintiffs extreme power over their fiduciaries. Fiduciaries should not be exposed to this liability for performing necessary services and then be burdened with proving an exemption for performing necessary services absent any showing of intent to benefit a party in interest. This interpretation puts the rights of plan participants over the rights of fiduciaries; thus, the Third Circuit's interpretation should be adopted.

Although the Third Circuit never clearly makes this distinction, it is clear from the remedy posed that perpetually proving exemptions in combating meritless claims is the absurdity at issue.[207] While the fact that ERISA § 406 prohibits necessary services and then exempts those services is what causes fiduciaries to constantly prove the exemption, it is not itself the absurdity in need of correction. If this were the case, a different remedy may be warranted, or there may be no remedy warranted at all. Placing the burden on potential plaintiffs to factually allege intent to benefit a party in interest strikes the perfect balance of holding fiduciaries accountable while allowing them to perform necessary

201. *See* Sweda v. Univ. of Pa., 923 F.3d 320, 337 (3d Cir. 2019) (stating "when one interpretation of a statute leads to an absurd result, we may consider an alternative interpretation that avoids the absurdity"); Thorpe v. Borough of Thorpe, 770 F.3d 255, 263 (3d Cir. 2014) (claiming "[s]tatutory interpretations 'which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available'").

202. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (explaining when "meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act"); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (stating "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

203. *See* Bugielski v. AT&T Serv., Inc., 76 F.4th 894 (9th Cir. 2023) (claiming there was no absurd results from interpreting ERISA § 406 and § 408 in a stringently literal way).

204. *See id.* (explaining how the Ninth Circuit acknowledges that ERISA § 406 prohibits necessary services).

205. *Id.*

206. Employee Retirement Income Security Act of 1974 § 408, 29 U.S.C. § 1108(b)(2)(A).

207. *See* Sweda v. Univ. of Pa., 923 F.3d 320, 328 (3d Cir. 2019) (stating the remedy to this dilemma is showing intent).

services to plans without fearing liability and without the obligation to prove they did their job ethically in every instance by proving an exemption to a service done out of necessity.

All but one of the circuit court holdings on this issue, including that of the Ninth Circuit, create absurd results because they essentially transform a mechanism meant to facilitate the operation of these plans into a perpetual legal defense for fiduciaries.[208] Thus, with the majority interpretation of section 406(a), the obligation to defend against legal liability through proving an exemption every time necessary services are rendered to the plan may as well be in a fiduciary's job description. The critical point to note is that the true absurdity does not lie in the mere existence of this regulatory framework that prohibits necessary services and then subsequently exempts them. Instead, it comes to light when fiduciaries are forced to engage in a continuous cycle of proving their eligibility for an exemption solely for completing their necessary duties as fiduciaries.

The remedy posed by the Third Circuit is a clear indication of the absurd result it is trying to resolve. Through the intent requirement, the Third Circuit strikes a perfect balance in keeping fiduciaries liable when they intend to benefit a party in interest, while not unduly burdening them through requiring perpetually proving an exemption.

V. CONCLUSION

In summary, the purpose of ERISA is to protect employees' retirement benefits by establishing standardized guidelines for employer-sponsored retirement plans. However, in applying ERISA, not every decision should favor potential plaintiffs,[209] thus the application of ERISA should treat fiduciaries and plan participants equally. The Third Circuit's intent requirement perfectly balances the autonomy of fiduciaries and interests plan participants. In this way, the intent requirement applies ERISA more narrowly to its purpose. Therefore, if the Supreme Court ever grants certiorari on this issue, the Supreme Court should follow the Third Circuit's interpretation of ERISA § 406 by requiring potential plaintiffs to factually allege intent to benefit a party in interest in their pleading.

208. *See* cases cited *supra* note 15 and accompanying text.

209. *See supra* Part IV.A.1 (explaining how ERISA does not favor potential plaintiffs).