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## ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials

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# ERISA: NO FURTHER INQUIRY INTO CONFLICTED PLAN ADMINISTRATOR CLAIM DENIALS

DONALD T. BOGAN\* & BENJAMIN FU\*\*

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*I. Preface*

In 1989, the United States Supreme Court triggered an avalanche of continuing litigation when the Court announced in *Firestone Tire & Rubber Co. v. Bruch*<sup>1</sup> that, where a plan sponsor empowers the administrator with discretionary authority to interpret plan provisions and to determine eligibility for benefits,<sup>2</sup> trial judges should review ERISA<sup>3</sup> claim denials under a trust law-based deferential standard.<sup>4</sup> The Court relied upon the *Restatement*

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1. 489 U.S. 101 (1989).

2. *See id.* at 115. In *Firestone*, the Supreme Court used the terminology “arbitrary and capricious” as developed in labor law cases, rather than the “abuse of discretion” terminology incorporated in the *Restatement (Second) of Trusts* (1959). Like most courts, this article uses the terms interchangeably. *See* Fought v. UNUM Life Ins. Co. of Am., 379 F.3d 997, 1003-04 n.2 (10th Cir. 2004) (per curiam), *cert. denied*, 125 S. Ct. 1972 (2005); Cox v. Mid-America Dairymen, Inc., 965 F.2d 569, 572 n.3 (8th Cir. 1992); Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556, 1558 n.1 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991); *see also* Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc., 168 F.3d 211, 215 & nn.5-6 (5th Cir. 1999) (citing cases, but reserving question whether abuse of discretion standard is equivalent to or less strict than the arbitrary and capricious standard). *But see* Booth v. Wal-Mart Stores, Inc., 201 F.3d 335, 341-42 (4th Cir. 2000); Morton v. Smith, 91 F.3d 867, 870 (7th Cir. 1996).

3. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2000) and in scattered sections of the Internal Revenue Code, 26 U.S.C.). A selected history of ERISA, beginning in January 1973 with the introduction of H.R. 2, 93d Cong. (1973), and S. 4, 93d Cong. (1973), the bills which ultimately formed the basis of the final legislation, is compiled in a three-volume committee print. *See* 1-3 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUB. WELFARE, 94TH CONG., LEGIS. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY].

4. Trust law generally requires courts to defer to the decisions of a non-conflicted trustee acting within the scope of its discretionary authority, even if the court believes the trustee acted wrongly, as long as the trustee did not abuse its discretion. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) (“Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.”). Under this trust law “abuse of discretion” review standard, a court will not interfere with a trustee’s discretionary choice “unless the trustee . . . acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.” *Id.* § 187 cmt. e; *see, e.g., Morton*, 91 F.3d at 870 (“A decision constitutes an abuse of discretion when it is ‘not just clearly incorrect but downright unreasonable.’” (quoting *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990))); *Brown v. Retirement Comm. of Briggs & Stratton Ret. Plan*, 797 F.2d 521, 529 (7th Cir. 1986) (“When [discretionary power] has been conferred, the judicial role is limited to determining whether the . . . [Committee’s] interpretation was made rationally and in good faith — not whether it was [correct].” (quotation omitted)); *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976) (stating that courts defer to the discretionary actions of a trustee so long as its conduct is not “arbitrary, capricious or made in bad faith, not supported by substantial evidence, or [is] erroneous on a question of law.”). In the Tenth Circuit, *see Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1013 (10th Cir. 2003) (“When reviewing under the arbitrary

(*Second*) of *Trusts* to declare that “if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a ‘facto[r]’ in determining whether there is an abuse of discretion.”<sup>5</sup> Now, sixteen years later, the circuits remain significantly divided in how they apply *Firestone*’s instructions, particularly when a plan participant asserts that a conflict of interest infected the plan administrator’s discretionary decision making.<sup>6</sup> Addressing the difficult chore of somehow assigning less deference to the deferential abuse of discretion standard, the Seventh Circuit wryly remarked, “Judges understand deferential and non-deferential review, but intermediate variations blur into one another without promoting understanding or consistent adjudication.”<sup>7</sup>

Deferential review as applied in ERISA benefit claims stands upon a house of cards. First, the stated foundation for deferential review rests upon the inappropriate application of donative trust law to claims that arise from contractual obligations between an employer and its employees.<sup>8</sup>

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and capricious standard . . . the [administrator’s] decision will be upheld unless it is not grounded on *any* reasonable basis. The reviewing court need only assure that the administrator’s decision fall[s] somewhere on a continuum of reasonableness — even if on the low end.”) (alterations in original) (internal quotations omitted).

5. *Firestone*, 489 U.S. at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (alteration in original)); see BLACK’S LAW DICTIONARY 319 (8th ed. 2004) (defining “conflict of interest” as “[a] real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties”).

6. See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 383 (3d Cir. 2000) (“[*Firestone* states that] ‘if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a “factor in determining whether there is an abuse of discretion.”’ Since *Firestone*, courts have struggled to give effect to this delphic statement, and to determine both what constitutes a conflict of interest and how a conflict should affect the scrutiny of an administrator’s decision to deny benefits.” (quoting *Firestone*, 489 U.S. at 115) (citations omitted)).

7. *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 981 (7th Cir. 1999); see also *Fought*, 379 F.3d at 1004 (“To say that there is a sliding scale of deference, however, merely begs the question: *how much* less deference ought a reviewing court afford?”); *Pinto*, 214 F.3d at 392 (“Once the conflict becomes a ‘factor’ however, it is not clear how the process required by the typical arbitrary and capricious review changes.”).

8. The *Restatement (Second) of Trusts* announces in its opening section that it is an attempt to summarize the law of charitable trusts and that it does not attempt to characterize the law of commercial trusts or the law governing trusts used as a security device. RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. b. The most crucial substantive problem with applying donative trust law in ERISA benefit claims stems from the gift, rather than the contract nature of the traditional trust beneficiary’s interest in the trust and the trust *res*. Where a trustee sets aside assets to be held in trust as a gift (historically, real property going to family members), the beneficiary has no legal claim against the settlor of the trust to enforce the gift; all of the trust beneficiary’s rights must be satisfied from the trust *res*, or perhaps from the trustee if the trustee has breached its duties. Since the *res* is limited, where a trustee must decide how to divide the

In ERISA, the trust (when employed) is not utilized to make a gift; rather it is used merely as a device to help guarantee payment of promised and earned benefits. Second, even if trust law is an appropriate mechanism to weigh rights and responsibilities in ERISA claims litigation, courts have bungled the process. While courts recite that trust law provides the context for deferential review in ERISA cases, they actually defer to the ERISA claims administrator as if it were a neutral administrative law judge that had conducted an underlying evidentiary hearing worthy of deference.<sup>9</sup> Deferential review in administrative law, founded on different criteria and applied in a different manner, is a different animal than deference granted to trustees administering

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trust *res* among a number of beneficiaries the trustee must consider the interests of all trust beneficiaries because a distribution to one necessarily leaves less to distribute to other beneficiaries. Under donative trust law, courts defer to the non-conflicted trustee in large part because the settlor specifically chose the trustee to make such discretionary decisions. *See* *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 139 n.5 (3d Cir. 1987) (“[W]hen one of the possible beneficiaries of the trustee’s decisions is the trustee himself, this degree of deference is inappropriate.”), *aff’d in part & rev’d in part*, 489 U.S. 101 (1989). A commercial trust is different. In a commercial trust — for example, a trust used to fund an ERISA benefit plan — the trust is merely a funding device used to secure separate contract rights. If the plan trust is unable to satisfy all of the plan beneficiaries’ claims, the plan sponsor usually must either replenish the trust, if one exists, or pay the benefits directly out of its general treasury. *See* *Van Boxel v. Journal Co. Employees’ Pension Trust*, 836 F.2d 1048, 1050-51 (7th Cir. 1987); *infra* notes 220-28 and accompanying text; *see also* Donald T. Bogan, *ERISA: Re-Thinking Firestone in Light of Great-West—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 650-54 (2004). *See generally* Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107 (1988); George Lee Flint, Jr., *ERISA: Reformulating the Federal Common Law for Plan Interpretation*, 32 SAN DIEGO L. REV. 955 (1995); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997); Dana M. Muir, *Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391 (2000).

9. *See, e.g.*, *Perry v. Simplicity Eng’g*, 900 F.2d 963, 966 (6th Cir. 1990) (“Nothing in [ERISA’s] legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators, a role they would inevitably assume if they received and considered evidence not presented to administrators concerning an employee’s entitlement to benefits. Such a procedure would frustrate the goal of prompt resolution of claims by the fiduciary under the ERISA scheme.”); *cf.* Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004) (suggesting that courts wrongly defer to ERISA plan administrators and fiduciaries as if the underlying claim denial arose in the context of an administrative hearing similar to a Social Security Administration disability benefits claim); *see also* *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2000); *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1564 n.7 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

a donative trust.<sup>10</sup> Further, and most importantly for purposes of this article, when reviewing a conflicted ERISA plan administrator's discretionary decision to deny a benefits claim,<sup>11</sup> courts have largely ignored trust law's most basic consumer protection against the cupidity of a self-dealing fiduciary by failing to apply the "no-further-inquiry rule."<sup>12</sup>

Perhaps the best recitation of the no-further-inquiry rule is Judge (later Justice) Cardozo's colloquy in *Wendt v. Fischer*.<sup>13</sup> The fiduciary in *Wendt* claimed that his sale of trust property to his own corporation was on fair terms, despite the inherent conflict of interest. Judge Cardozo replied:

[W]e are told that the [fiduciary] acted in good faith, that the terms procured were the best obtainable at the moment, and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer by a trustee forgetful of his duty. The law "does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case." Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion.<sup>14</sup>

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10. See DeBofsky, *supra* note 9. See generally Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004) (noting different types and levels of judicial deference). Unlike ERISA § 502(a)(1)(B) cases, in a modern common law breach of trust action the parties typically conduct discovery and present live witness testimony, subject to cross-examination, usually in a non-jury trial. See, e.g., *Barnett v. Ross*, 3 A.2d 923 (Pa. 1939); see also Donald T. Bogan, Reply, *The Unsupported Delegation of Conflict Adjudication in ERISA Benefit Claims Under the Guise of Judicial Deference*, 57 OKLA. L. REV. 21, 25-28 (2004).

11. ERISA provides an express remedy for plan participants or beneficiaries to recover benefits due under a plan. See ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000).

12. See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?* 114 YALE L. J. 929, 931 (2005).

13. 154 N.E. 303 (N.Y. 1926).

14. *Id.* at 304 (quoting *Munson v. Syracuse, Geneva & Corning R.R.*, 8 N.E. 355, 358 (N.Y. 1886) (citations omitted)); see also *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in the workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than

All circuit courts agree that an ERISA plan administrator's conflict of interest contaminates the plan administrator's decision making to some degree.<sup>15</sup> Recognition of that effect then requires some modification to the level of deference courts afford a conflicted plan administrator. Many courts account for the conflict by applying a sliding scale, adjusting the level of deference according to the perceived seriousness of the conflict.<sup>16</sup> Additionally, the Eleventh and the Ninth Circuits alter the deferential review standard by shifting the burden to the plan administrator to prove that its denial was not influenced by bias.<sup>17</sup> No court, however, has expressly adopted the irrebuttable presumption of taint that is the hallmark of the no-further-inquiry rule, as a component in its ERISA standard of review.<sup>18</sup>

Why not?

In *Firestone*, the Supreme Court directed lower courts to apply a trust law-based analysis to determine the appropriate standard of review in ERISA benefit claims. However, the Court did not limit that analysis only to section 187 comment d of the *Restatement (Second) of Trusts*. The no-further-inquiry rule has long been an integral part of the trust law duty of loyalty.<sup>19</sup> So long

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that trodden by the crowd.”) (citation omitted).

15. See *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 2004); cf. *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975 (7th Cir. 1999) (no inherent conflict of interest where large insurer or corporation serves as both payor of benefit claims and plan administrator).

16. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987) (arbitrary and capricious standard may be a range, not a point). See discussion *infra* text accompanying notes 78-82.

17. See *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1565-68 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991). Ninth Circuit claimants must first prove both a conflict and causation before burden-shifting applies. See *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 875-76 (9th Cir. 2004); see also *Abatie v. Alta Health & Life Ins. Co.*, 421 F.3d 1053 (9th Cir. 2005), *reh'g en banc granted*, 437 F.3d 860 (2006).

18. In *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, the court recited the substance of the no-further-inquiry rule, but did not apply the irrebuttable presumption of bias required under the rule. 898 F.2d at 1566-68; see *infra* text accompanying notes 208-28; see also *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 141 (3d Cir. 1987), *aff'd in part & rev'd in part*, 489 U.S. 101 (1989).

19. See *Munson*, 8 N.E. at 358-59 (citing *Davoue v. Fanning*, 2 Johns. Ch. 251, 252 (N.Y. Ch. 1816)); *Piatt v. Longworth's Devisees*, 27 Ohio St. 159, 195-96 (1875); see also UNIF. TRUST CODE § 802 cmt., 7C U.L.A. 230 (2000) (“[Transactions accomplished by a self-dealing trustee] are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration.”); Elizabeth T. MeHaffey, Comment, *The Punctilio of an Honor the Most “Cents”-itive: Trustees, Broker-Dealers, and North Carolina’s Self-Dealing Ban*, 78 N.C.L. REV. 1965, 1982-84 (2000) (discussing the differences in how the new Uniform Trust Code and the old Uniform Trust Act recommend state legislatures codify the no-further-inquiry rule).

as courts apply trust law to govern employee benefit claims, this essential trust law protection for trust beneficiaries should also be applied.

In *Fought v. UNUM Life Insurance Co. of America*,<sup>20</sup> the U.S. Court of Appeals for the Tenth Circuit re-evaluated its method for ascertaining the appropriate standard of review in conflict of interest-tainted ERISA benefit claims. In *Fought*, the Tenth Circuit joined the Ninth and Eleventh Circuits in imposing a burden-shifting scheme for reviewing claims where a seriously or inherently conflicted plan administrator has denied benefits to an ERISA plan participant.<sup>21</sup> The Tenth Circuit's switch to burden-shifting, after fifteen years of experience with *Firestone*, evidences continued dissatisfaction with the deferential review standard in ERISA benefit claims involving conflicted plan administrators.<sup>22</sup> Despite the Tenth Circuit's laudable attempt to clarify this tangled area of the law, however, the *Fought* opinion raises more questions than it answers. The *Fought* court's failure to fully explore trust law conflict of interest presumptions, and irrebuttable presumptions, doomed the Tenth Circuit to failure. Additionally, by placing evidentiary burdens on plan participants without addressing the consequential need for discovery and evidence outside the administrative record, the Tenth Circuit maintained a summary adjudicative process that tilts heavily against consumers.<sup>23</sup>

Setting aside any conviction that the *Firestone* Court erred when it applied the law of donative trusts to govern ERISA claims arising from plans that are neither donative in nature, nor, in fact, funded through a trust, and sidestepping the fact that courts actually apply an administrative law — not a trust law — standard of review in ERISA claims litigation,<sup>24</sup> this article incorporates an analysis of *Fought* to suggest that, where courts employ trust law standards to evaluate ERISA benefit claims, they should also apply the trust law no-further-inquiry rule. The no-further-inquiry rule dictates that courts grant plan participants a de novo review of conflicted plan administrator claim denials, even where the plan administrator enjoys discretionary authority. Application of the no-further-inquiry rule is consistent with the *Firestone* Court's view that trust law governs ERISA claims for benefits due under section 502(a)(1)(B). Further, by utilizing the no-further-inquiry rule in cases where the plan administrator suffers a conflict of interest, courts could

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20. 379 F.3d 997 (10th Cir. 2004) (per curiam), *cert. denied*, 125 S. Ct. 1972 (2005).

21. *See id.* at 1006.

22. In *Chambers v. Family Health Plan Corp.*, 100 F.3d 818 (10th Cir. 1996), the Tenth Circuit had previously rejected a burden-shifting standard of review in ERISA benefit claims involving conflicted plan administrators. *Id.* at 826-27.

23. *See infra* notes 192-207 and accompanying text.

24. *See generally* DeBofsky, *supra* note 9.



establish a simple, uniform, and familiar review standard that would govern the vast majority of ERISA benefit claims.

Part II below provides background analysis of the ERISA standard of review controversy. This Part illustrates the continuing failure of the circuit courts to produce a consistent and just claims process in employee benefit cases where courts defer to self-interested plan administrators. The analysis begins with *Firestone* and its pronouncement that trust law should guide review of challenged benefit claim denials. Next, Part II argues that the lower courts have struggled to tease a clear message from *Firestone*'s "opaque" standard of review analysis.<sup>25</sup> In particular, this Part explores the Tenth Circuit Court of Appeals's attempt in *Fought*<sup>26</sup> to cure this wounded process, and we describe the unfortunate failure of the Tenth Circuit to discover a trust law-based antidote to *Firestone*.

Finally, Part III of this comment works within the parameters of *Firestone* to re-introduce the historic trust law-based solution to the problem of self-dealing fiduciaries: the no-further-inquiry rule. Here the article capitalizes on prolific trust law and ERISA scholar Professor John H. Langbein's recent examination of the no-further-inquiry rule.<sup>27</sup> Professor Langbein's analysis is adapted to support a thesis that he did not reach, by applying his discussion of the no-further-inquiry rule to ERISA benefit cases. This Part describes how the summary adjudicative process, invented by contemporary ERISA courts under the guise of deferential review, mimics the archaic circumstances existing in courts of equity that spawned the no-further-inquiry rule. Finally, Part IV concludes that ERISA courts should apply the no-further-inquiry rule to irrebuttably counter the mischief that courts have historically presumed attach to the actions of self-dealing fiduciaries. Ultimately, by application of the no-further-inquiry rule in ERISA benefit claims, courts can, and should, return federal Article III trial judges to their role as neutral, de novo referees in plan participant claims for benefits due under ERISA.

## *II. The State of Deferential Review in ERISA Benefit Claims*

### *A. Firestone Directs Trial Courts to Defer Under Trust Law*

Firestone Tire & Rubber Co. ("Firestone") sponsored a Termination Pay Plan for its employees, promising a variable level of severance benefits to workers who lost their jobs at Firestone due to "a reduction in work force."<sup>28</sup>

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25. See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 378 (3d Cir. 2000).

26. 379 F.3d 997, *cert. denied*, 125 S. Ct. 1972.

27. See Langbein, *supra* note 12.

28. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105-06 (1989).

After Firestone sold its Plastics Division to Occidental Petroleum Corporation (Occidental), workers who lost their Firestone jobs, including both those Occidental hired and those Occidental did not hire, sought severance benefits from Firestone.<sup>29</sup>

Firestone interpreted the “reduction in work force” clause narrowly to deny the workers’ severance benefit claims.<sup>30</sup> Under Firestone’s view, workers who lost their jobs at Firestone due to the corporate restructuring, but who were then immediately hired to work in essentially the same jobs for Occidental, did not qualify for severance benefits. After Firestone refused to pay the severance claims, the former Firestone employees sued the tire company under ERISA section 502(a)(1)(B) to recover benefits allegedly due under the Termination Pay Plan.<sup>31</sup>

At first blush, the dispute appeared to present a simple contract action. Each party to the contract had its own construction of the severance benefit plan language. If the disagreement had not arisen in the context of an employment relationship, a court — or a jury if either party had so requested — would have heard evidence at trial, resolved factual disputes, and decided, *de novo*, which side was right. However, because the former Firestone workers sought to enforce their rights under an employee benefit plan, different rules applied. While the parties disagreed on how to interpret the plan contract, the controversy ultimately boiled down to who had the authority to do the interpreting, Firestone or the court. Rather than rely on the merits of its contract argument, Firestone asserted that ERISA gave Firestone the sole discretion to construe the plan document and to determine whether it had to pay the severance benefits.<sup>32</sup> Firestone argued that the court must defer to an ERISA plan administrator’s claims decision unless the plan administrator abused its discretion.<sup>33</sup>

Workers have struggled to enforce their rights to promised employee benefits since the industrial revolution brought American workers off the farm and into the factory.<sup>34</sup> In the early years of employee fringe benefit programs, courts viewed such benefits as a promise to make a gift, which the employer could alter or terminate in its discretion, and which the worker could not

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29. *See id.*

30. *See* Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 146 (3d Cir. 1987), *aff’d in part & rev’d in part*, 489 U.S. 101.

31. Five hundred former Firestone employees sued over the severance benefits. *See id.* at 136.

32. *See Firestone*, 489 U.S. at 112-13.

33. *See id.* at 113.

34. *See* Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575 (1992); JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 1-67 (3d ed. 2000).

enforce in court.<sup>35</sup> In *Bruch v. Firestone Tire & Rubber Co.*,<sup>36</sup> Third Circuit Judge Edward R. Becker traced the origins of deferential review in employee benefit claims litigation. Judge Becker found that court recognition of a worker's right to enforce benefit promises tended to coincide with the development of national labor law in the early to mid-Twentieth Century, including the enactment of the Labor Management Relations Act of 1947 (LMRA or Taft-Hartley Act).<sup>37</sup> When ERISA benefit claims began to appear in the federal courts after 1974, Judge Becker observed that most federal courts imported the abuse of discretion standard of review from individual worker claims brought under LMRA section 302,<sup>38</sup> which had first borrowed the deferential review standard from the common law of trusts.<sup>39</sup>

In *Bruch*, Judge Becker recognized that the Firestone workers' claims for benefits due under ERISA section 502(a)(1)(B) were unlike individual worker claims for breach of trust under LMRA section 302, primarily because of the conflict of interest question.<sup>40</sup> In LMRA cases, trustees who review worker claims under Taft-Hartley trusts are presumed to be neutral because labor enjoys equal power with management in selecting such trustees.<sup>41</sup> In *Bruch*, however, Judge Becker recognized that Firestone, as default plan administrator of the unfunded benefit plan, suffered a self-dealing conflict of interest. Firestone simultaneously served as plan sponsor and payor of approved severance benefits, as well as the plan administrator responsible for determining eligibility for benefits.<sup>42</sup> Because Firestone did not fund its severance plan through the purchase of insurance or a segregated trust,

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35. See, e.g., *Cowles v. Morris & Co.*, 161 N.E. 150 (Ill. 1928) (upholding employer's cancellation of a pension plan because workers had no vested right to the employer's money); see also *Conison*, *supra* note 34, at 590-93 (citing *Menke v. Thompson*, 140 F.2d 786, 790 (8th Cir. 1944)); *Cowles*, 161 N.E. at 152; *Fickling v. Pollard*, 179 S.E. 582 (Ga. Ct. App. 1935) (syllabus opinion); *Magnolia Petroleum Co. v. Butler*, 86 S.W.2d 258, 262 (Tex. Civ. App. 1935); *McNevin v. Solvay Process Co.*, 53 N.Y.S. 98, 99 (N.Y. App. Div. 1898), *aff'd mem.*, 60 N.E. 1115 (N.Y. 1901)).

36. 828 F.2d 134, *aff'd in part & rev'd in part*, 489 U.S. 101.

37. Labor Management Relations (Taft-Hartley) Act, ch. 120, Pub. L. No. 101, 61 Stat. 136 (1947) (codified as amended in scattered sections at 29 U.S.C.). As the labor movement gained some government support with the depression era New Deal legislation, workers earned the right to organize and to bargain collectively with employers to secure better pay, better working conditions, and fringe benefits. See generally *Bogan*, *supra* note 8, at 662-68; *Conison*, *supra* note 34.

38. LMRA § 302 is codified at 29 U.S.C. § 186 (2000).

39. See *Bruch*, 828 F.2d at 140-44; see also *Bogan*, *supra* note 8, at 662-68.

40. See *Bruch*, 828 F.2d at 144-45.

41. See 29 U.S.C. § 186(c)(5)(B).

42. See *Bruch*, 828 F.2d at 144-45.

benefits, approved by Firestone as plan administrator, were paid out of its own operating capital as plan sponsor.<sup>43</sup> Judge Becker remarked that:

[the Firestone severance] plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket.<sup>44</sup>

Judge Becker ruled that, given such direct financial conflict of interest, deference to the conflicted plan administrator would not be appropriate.<sup>45</sup> Judge Becker's opinion relied mostly upon trust law to impose a de novo review standard. He also provided directions for the district court to apply specific rules of contract interpretation when it reconsidered the matter de novo on remand.<sup>46</sup> Although Judge Becker did not articulate any specific trust law rule or maxim to support the *Bruch* holding, a careful reading of the *Bruch* opinion suggests an unstated application of the irrebuttable presumption of bias that is the predominant feature of the no-further-inquiry rule.<sup>47</sup>

In the Supreme Court, trust law clearly carried the day.<sup>48</sup> However, the *Firestone* Court also failed to mention the no-further-inquiry rule when it made its passing reference to conflicted plan administrators.<sup>49</sup> The *Firestone* Court affirmed the Third Circuit's application of de novo review, but not for the reasons advanced by Judge Becker in the *Bruch* opinion. The *Firestone* Court applied de novo review under trust law simply because the Firestone severance plan documents did not contain any language granting discretionary powers to the plan administrator.<sup>50</sup> While applying the de novo review standard under trust law, however, the Court famously instructed plan sponsors

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43. *See id.*

44. *Id.* at 144.

45. *See id.* (“[T]he principle articulated in § 187 [of the *Restatement (Second) of Trusts*] does not govern judicial review of a [self-dealing] trustee's decisions.”).

46. *See id.* at 147-48 (citing various sections of the RESTATEMENT (SECOND) OF CONTRACTS (1981)).

47. *See id.* at 145 (“[C]ommon sense and principles of trust law require rejection of [the] presumption [that a trustee serving in dual roles as plan administrator and payor of plan benefits should be considered impartial].”).

48. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (“ERISA abounds with the language and terminology of trust law.”).

49. *See id.* at 115.

50. *See id.* at 111-13.

how to obtain deferential review.<sup>51</sup> Quoting comment d of section 187 of the *Restatement (Second) of Trusts*, the Supreme Court stated:

Consistent with established principles of trust law, we hold that a denial of benefits challenged under [ERISA § 502 (a)(1)(B), 29 U.S.C.] § 1132 (a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. . . . [F]or purposes of actions under [ERISA § 502(a)(1)(B), 29 U.S.C.] § 1132 (a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a “facto[r] in determining whether there is an abuse of discretion.”<sup>52</sup>

Unfortunately, the *Firestone* Court’s “factor” reference left most lower courts with the impression that section 187, comment d of the *Restatement (Second) of Trusts* wholly resolved the conflict of interest question in cases where plan administrators enjoy specific grants of discretionary powers.<sup>53</sup>

By declaring *de novo* review the controlling standard where the plan administrator does not enjoy express discretionary powers, *Firestone* avoided an in-depth analysis of the conflict of interest question that deeply concerned Judge Becker at the circuit court level. With its offhand dicta, and its shorthand analysis of how trust law may weigh conflicts of interest, the Court laid the foundation for lower courts to defer to conflicted plan administrator

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51. See John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 217 (predicting that most plan sponsors would immediately add discretionary clauses to their ERISA plans); see also *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 383 n.2 (3d Cir. 2000).

52. See *Firestone*, 489 U.S. at 115 (final alteration in original).

53. See, e.g., *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004) (per curiam), *cert. denied*, 125 S. Ct. 1972 (2005). In *Bruch*, Judge Becker had rejected the notion that section 187, comment d of the *Restatement (Second) of Trusts* controlled the conflict of interest question. See *Bruch*, 828 F.2d at 144. Judge Becker instead cited the “improper motive” comment to section 187 to suggest that courts should not defer to a self-dealing fiduciary. See *id.* at 141 (“The Court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive. . . . In the determination of the question whether the trustee in the exercise of power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.” (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. g (1959))); see also *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1565 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991) (citing RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. g).

claim denials, even when such courts believed that the conflicted plan administrator had wrongfully denied a benefits claim.<sup>54</sup> By framing the issue as a breach of trust, instead of a breach of contract, and by then failing to plumb the full depth of trust law, the *Firestone* Court ironically ushered in an era where plan participants are worse off under ERISA than they were before Congress enacted this trumpeted consumer protection statute.<sup>55</sup>

### *B. The Divided Circuits Since Firestone*

One of the advantages gained by the application of the trust law no-further-inquiry rule in plan administrator conflict of interest cases is a simple, uniform, and familiar standard of review that would relieve courts from the near-impossible undertaking of trying to consistently apply an unarticulated, less deferential, yet still somewhat deferential standard of review.<sup>56</sup> The need for such a straightforward, uniform rule is reflected in the divergent approaches the circuit courts currently employ to weigh claims arising from plans incorporating a variety of funding mechanisms that often foster conflicts of interest.<sup>57</sup>

Trust law generally prohibits a trustee from entering transactions that create a conflict of interest.<sup>58</sup> In ERISA, however, conflicts of interest abound

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54. See, e.g., *Morton v. Smith*, 91 F.3d 867, 870 (7th Cir. 1996); see cases cited *supra* note 4.

55. See *Firestone*, 489 U.S. at 113-14 (“ERISA was enacted ‘to promote the interests of employees and their beneficiaries in employee benefit plans . . . .’ Adopting *Firestone*’s reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.”) (internal quotation omitted); see also ERISA § 2, 29 U.S.C. § 1001 (2000) (congressional findings and declaration of policy); 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 3, at 4747-76.

56. See *Fought*, 379 F.3d at 1004 (“Our failure to articulate clearly the requirements of a less deferential arbitrary and capricious standard has left district courts in this circuit without direction and has encouraged litigation.”).

57. See *infra* note 71 and cases cited therein.

58. See RESTATEMENT (SECOND) OF TRUSTS § 170; GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543 (rev. 2d ed., repl. vol. 1993) (“A trustee is under a duty to the beneficiary of a trust to administer the trust solely in the interest of the beneficiary. The trustee must exclude all self-interest, as well as the interest of a third party, in his administration of the trust solely for the benefit of the beneficiary. The trustee must not place himself in a position where his own interests or that of another enters into conflict, or may possibly conflict, with the interest of the trust or its beneficiary. Put another way, the trustee may not enter into a transaction or take or continue in a position in which his personal interest or the interest of a third party is or becomes adverse to the interest of the beneficiary.”); see also *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (“Speaking of the traditional trustee, Professor Scott’s treatise admonishes that the trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.”) (internal

because ERISA expressly authorizes the plan sponsor to serve in multiple capacities, including concurrently acting as both plan sponsor and plan administrator.<sup>59</sup> Depending on the mechanics of plan funding and the relationships between the plan sponsor and the plan administrator, or trustee, some courts have found that certain funding circumstances create an inherent conflict of interest that justifies a modification to the deferential standard of review.<sup>60</sup> Other courts evaluating the same funding mechanism and relationships do not find an inherent conflict of interest.<sup>61</sup>

For example, many courts hold that when an insurance company serves as both plan administrator and as plan insurer, an inherent conflict of interest exists.<sup>62</sup> Some circuits hold that an insurer's dual role does not, in and of

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quotation omitted).

59. See 29 U.S.C. § 1102(c)(1) (stating that any person may serve in more than one fiduciary capacity, including service both as trustee and administrator); *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1344 (7th Cir. 1995) (“ERISA contemplates less neutrality than is required in a judicial forum.” (citing 29 U.S.C. § 1108(c)(3))); see also *Fought*, 379 F.3d at 1005 (“ERISA envisions that a fiduciary may ‘wear two hats,’ one of a trustee or fiduciary and one of a settlor.” (quoting Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1161 (2001))).

60. See *Fought*, 379 F.3d at 1005-07 (although an insurer serving in dual roles is inherently conflicted, plan participant must still prove the seriousness of other types of dual role relationships in order to invoke burden-shifting); *Pinto v. Reliance Life Standard Life Ins. Co.*, 214 F.3d 377, 387-90 (3d Cir. 2000) (identifying several of the common methods employers choose to fund plans, discussing how conflicts of interest arise in such funding systems, examining the views of the various circuits, and adopting the view that an inherent conflict of interest arises when an insurance company serves the dual roles of payor of benefits and claims administrator under a fully insured plan).

61. See, e.g., *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 409 (7th Cir. 2004) (“[M]ost insurers are well diversified, so that the decision in any one case has no perceptible effect on the bottom line.”).

62. See *Pinto*, 214 F.3d at 383-90; see also *Stup v. UNUM Life Ins. Co. of Am.*, 390 F.3d 301, 307 (4th Cir. 2004); *Allison v. UNUM Life Ins. Co. of Am.*, 381 F.3d 1015, 1021-22 (10th Cir. 2004); *Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381, 385 (3d Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004); *Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 527 (6th Cir. 2003), *overruled on other grounds*, *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1561 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

In the Fifth Circuit, compare *Vega v. Nat'l Life Ins. Servs., Inc.*, 188 F.3d 287, 295-98 (5th Cir. 1999) (en banc) (insurer's interest in maintaining a good reputation for fair claims processing is outweighed by its incentive to self-deal where the insurer serves as both payor of plan benefits and plan administrator), with *Ellis v. Liberty Life Assurance Co.*, 394 F.3d 262, 270 n.18 (5th Cir. 2004) (“Unlike the dissent, we will not read into *Vega* a presumption that a conflict exists *ipso facto* merely because the plan fiduciary both insures the plan and administers it.”). In the Eighth Circuit, compare *Schatz v. Mut. of Omaha Ins. Co.*, 220 F.3d 944, 947-48 (8th Cir. 2000), and *Phillips-Foster v. UNUM Life Ins. Co. of Am.*, 302 F.3d 785, 795 (8th Cir.

itself, create a conflict of interest.<sup>63</sup> Similarly, where the employer/plan sponsor serves as plan administrator of an unfunded plan, or if it appoints a group of its officers or employees to serve as plan administrator, courts often find an inherent or structural conflict of interest.<sup>64</sup> However, even some courts that recognize an inherent conflict in the insurance company dual role circumstance do not recognize an inherent conflict of interest when an employer serves the dual roles of direct payor of plan benefits and plan administrator.<sup>65</sup> Additionally, where courts recognize an inherent conflict of interest or where the plan participant has proven a conflict of interest, several courts require further evidence that such conflict in fact impacted the plan administrator's decision making.<sup>66</sup>

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2002), *with* McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026, 1030 (8th Cir. 2000) (citing Davolt v. Executive Comm. of O'Reilly Auto., 206 F.3d 806, 809 (8th Cir. 2000)).

The Ninth Circuit appears to recognize a dual role insurer's inherent conflict, but it does not alter the deferential review standard unless the claimant also establishes that the conflict impacted the claims decision. *See* Jordan v. Northrup Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 875-76 (9th Cir. 2004); *see also* Abatie v. Alta Health & Life Ins. Co., 421 F.3d 1053 (9th Cir. 2005), *reh'g en banc granted*, 437 F.3d 860 (2006); *cf.* Tremain v. Bell Indus., Inc., 196 F.3d 970, 976 (9th Cir. 1999). Similarly, the Second Circuit requires evidence that a conflict actually infected the claims decision before it applies anything but the most deferential standard. *See* Whitney v. Empire Blue Cross & Blue Shield, 106 F.3d 475, 477 (2d Cir. 1997). *But see* DeFelice v. Am. Int'l Life Assurance Co., 112 F.3d 61, 66 & n.3 (2d Cir. 1997).

63. *See, e.g.*, Wagner v. First Unum Life Ins. Co., No. 03-7957, 2004 WL 1303637, at \*1 (2d Cir. June 14, 2004), *aff'g* No. 02 Civ. 9135(RLC), 2003 WL 21960997 (S.D.N.Y. Aug. 13, 2003), *cert. denied*, 543 U.S. 958 (2004); *Leipzig*, 362 F.3d at 409; Mers v. Marriott Int'l Group Accident Death & Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir. 1998); *see also* Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan, 402 F.3d 67, 75 (1st Cir. 2005); Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 981 (7th Cir. 1999); *cf.* Leahy v. Raytheon Co., 315 F.3d 11, 16 (1st Cir. 2002).

64. *See, e.g.*, Williams v. BellSouth Telecomms., Inc., 373 F.3d 1132, 1135 (11th Cir. 2004); Smathers v. Multi-Tool, Inc., 298 F.3d 191, 197-98 (3d Cir. 2002); Skretvedt v. E.I. DuPont de Nemours & Co., 268 F.3d 167, 174 (3d Cir. 2001); Yochum v. Barnett Banks, Inc. Severance Pay Plan, 234 F.3d 541, 544 (11th Cir. 2000); Univ. Hosps. of Cleveland v. Emerson Elec. Co., 202 F.3d 839, 846 & n.4 (6th Cir. 2000); Friedrich v. Intel, 181 F.3d 1105, 1109-10 (9th Cir. 1999).

65. *See, e.g.*, Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995); *see also* Colucci v. Agfa Corp. Severance Pay Plan, 431 F.3d 170, 179-80 (4th Cir. 2005); *Perlman*, 195 F.3d at 981; Hickey v. Digital Equip. Corp., 43 F.3d 941, 946 (4th Cir. 1995).

66. *See, e.g.*, Whitaker v. Hartford Life & Accident Ins. Co., 404 F.3d 947, 949 (6th Cir. 2005); *Jordan*, 370 F.3d at 875-76; Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998); Woo v. Deluxe Corp., 144 F.3d 1157, 1162 (8th Cir. 1998); Pagan v. NYNEX Pension Plan, 52 F.3d 438, 440-44 (2d Cir. 1995). *But see* Pinto, 214 F.3d at 389 (“[T]his is not a scenario where a ‘smoking gun’ is likely to surface, and direct evidence of a conflict [affecting the plan administrator] is rarely likely to appear in any plan administrator’s



Following *Firestone*'s express instructions, each of the circuits considers a plan administrator's conflict of interest as a factor in applying the arbitrary and capricious standard of review when the plan sponsor has granted discretionary powers to the plan administrator.<sup>67</sup> Applying the conflict of interest as a factor usually produces a "sliding scale" approach to the deferential standard of review. When courts apply a sliding scale approach, they modify the deferential standard by lowering the degree of deference bestowed upon the plan administrator in some manner.<sup>68</sup> Some courts simply recite that the sliding scale approach reduces the level of deference in proportion to the seriousness of the conflict,<sup>69</sup> while other opinions list factors that courts should consider when they contemplate modifying the level of deference in response to a conflict of interest.<sup>70</sup> The circuits vary, sometimes significantly, in the considerations or listed factors employed to analyze what standard of review they will apply.<sup>71</sup>

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decision.”).

67. See *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825-26 (10th Cir. 1996). Under the arbitrary and capricious review standard, courts do not evaluate whether the plan administrator correctly decided to deny a claim according to the facts, the language of the plan, and the dictates of ERISA. Rather, federal courts will uphold a plan administrator's claim denial, even if wrong, so long as the decision did not result from an abuse of discretion. See cases cited *supra* note 4, which define abuse of discretion or arbitrary and capricious actions as unreasonable and not supported by substantial evidence, made in bad faith, or erroneous on a question of law.

68. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987) (discussing cases prior to *Firestone* and noting that “[F]lexibility in the scope of judicial review need not require a proliferation of different standards of review; the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees' decisions . . . more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.”) (citation omitted).

69. See, e.g., *MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472, 479 (5th Cir. 2003); *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 269 (4th Cir. 2002); *Pinto*, 214 F.3d at 391-93; *Woo*, 144 F.3d at 1162; *McGraw v. Prudential Ins. Co. of Am.*, 137 F.3d 1253, 1258-59 (10th Cir. 1998); *Chambers*, 100 F.3d at 825-26.

70. See, e.g., *McLeod v. Hartford Life & Accident Ins. Co.*, 372 F.3d 618, 623 (3d Cir. 2004); *Chalmers*, 61 F.3d at 1344.

71. The First Circuit does not recognize an inherent conflict of interest resulting from an insurer serving in the dual roles of plan insurer and claims administrator, see *Glista v UNUM Life Ins. Co of Am.*, 378 F.3d 113, 125-26 (1st Cir. 2004), or from the employer serving the dual roles of plan sponsor and plan administrator, see *Doyle*, 144 F.3d at 184. If, however, a plan participant proves that a claim decision-maker was operating under a conflict of interest, courts will “adher[e] to the arbitrary and capricious principle, with special emphasis on reasonableness, but with the burden on the claimant to show that the [insurer's] decision was improperly motivated.” *Pari-Fasano v. ITT Hartford Life & Accident Ins. Co.*, 230 F.3d 415, 418 (1st Cir. 2000) (quoting *Doyle*, 144 F.3d at 184 (alterations in original)).

The Second Circuit adheres to the arbitrary and capricious standard of review unless the

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participant can show that a conflict affected the plan administrator's decision. *See Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 92 (2d Cir. 2000). If the plan participant can show that the conflict affected the plan's decision, the Second Circuit applies de novo review. *See Whitney v. Empire Blue Cross & Blue Shield*, 106 F.3d 475, 477 (2d Cir. 1997); *see also Pagan*, 52 F.3d at 441-44 (where plan sponsor established unfunded plan administered by employer-appointed committee, inherent conflict of interest considered as a factor in applying the arbitrary and capricious standard of review, but rejecting burden-shifting approach, and requiring plan participant to present evidence that conflict of interest caused the plan administrator to deny claim, whereupon court would review the claim denial de novo). *But cf. DeFelice v. Am. Int'l Life Assurance Co.*, 112 F.3d 61, 66 (2d Cir. 1997) (acknowledging that standard set forth in *Whitney* is the law in the Second Circuit, but criticizing that standard on ground that, under *Firestone*, the fact of a conflict of interest should be taken into account even if there is no evidence that the conflict affected the decision).

The Third Circuit suggests that an employer who administers an unfunded plan may have a competing incentive not to unfairly deny claims because the employer profits from administering claims fairly by maintaining high worker morale. *See Smathers v. Multi-Tool, Inc.*, 298 F.3d 191, 197 (3d Cir. 2002). The Third Circuit has also noted that an insurer does not have similar competing motivations of maintaining employee good will as does the plan sponsor/employer. *See Pinto*, 214 F.3d at 388-89. Consequently, the heightened, sliding scale review standard is less probing in the Third Circuit when an employer administers an unfunded plan than in the circumstance where an insurer serves the dual roles of claims administrator and payor of claims, though a moderate level of heightened review will still apply in cases where the employer administers an unfunded plan. *See Smathers*, 298 F.3d at 197 (applying "somewhat heightened" deferential standard where employer administered partially unfunded plan).

The Fourth Circuit holds that "[w]hen a plan administrator or fiduciary with a conflict of interest is vested with discretion, the deference normally given under the abuse of discretion standard is reduced 'to the degree necessary to neutralize any untoward influence resulting from the conflict.'" *Gallagher*, 305 F.3d at 268 n.3 (quoting *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233 (4th Cir. 1997)). The Fourth Circuit applies the conflict of interest factor on a case by case basis, incorporating a sliding scale. *See Humrickhouse ex rel. Bedrick v. Travelers Ins. Co.*, 93 F.3d 149, 152 (4th Cir. 1996); *see also Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 178-80 (4th Cir. 2005) (no inherent conflict merely because plan administrator also funds plan promises).

The Fifth Circuit employs a sliding scale standard when an insurer serves the dual roles of claims fiduciary and payor of benefits, holding that such inherent conflict of interest requires some modification of the arbitrary and capricious review standard. *See Vega v. Nat'l Life Ins. Servs., Inc.*, 188 F.3d 287, 295-97 (5th Cir. 1999) (affirming the sliding scale approach announced in *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 638-42 (5th Cir. 1992), after examination of approaches to conflict issues utilized in other circuits).

The Sixth Circuit holds that, although a conflict of interest is a factor to be considered in reviewing a plan administrator's decision to deny benefits, the existence of the conflict alone does not provide grounds for overturning the administrator's decision, absent an evidentiary demonstration that the conflict actually affected the decision. *See Whitaker*, 404 F.3d at 949; *Peruzzi v. Summa Med. Plan*, 137 F.3d 431, 433 (6th Cir. 1998).

In the Seventh Circuit, where a plan insurer also administers claims, no conflict of interest that would alter the review standard is presumed. *See Liepzig v. AIG Life Ins. Co.*, 362 F.3d

406, 408-09 (7th Cir. 2004). Applying its law and economics rationale, the Seventh Circuit appears to aggressively resist any modification to the arbitrary and capricious standard when a plan participant urges the court to consider such potential conflict as a factor in its review process. *See, e.g.,* *Mers v. Marriott Int'l Group Accident Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998) (“A decision to award Mers benefits would cost AIG [the plan insurer and claims administrator] \$200,000. AIG has consistently been named as one of the fifty largest companies in the ‘Fortune 500’ listing. The impact of granting or denying benefits in this case is minuscule compared to AIG’s bottom line.”); *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 981 (7th Cir. 1999) (“When the administrator is a large corporation, the firm has a financial interest, but the award in any one case will have only a trivial effect on its operating results. Corporations act through agents, and these agents usually lack any stake in the outcome. . . . Large businesses such as Swiss Bank want to maintain a reputation for fair dealing with their employees. They offer fringe benefits such as disability plans to attract good workers, which they will be unable to do if promised benefits are not paid. We have no reason to think that UNUM’s benefits staff is any more ‘partial’ against applicants than are federal judges when deciding income-tax cases. A further problem impedes treating UNUM’s self-interest as a strike against its decision: it may not have any stake in the decision. Although it insures the payment of the long-term benefits, the record does not reveal the terms on which the insurance was written. For many large firms, health and disability insurance on their labor forces is retrospectively rated. This means that the employer agrees to reimburse the insurer for all outlays, plus a loading charge and administration fee.”).

In *Woo*, 144 F.3d at 1162, the Eighth Circuit first established a two-part “gateway” test that must be met for the court to modify the ordinary abuse of discretion standard of review. The claimant must present material, probative evidence demonstrating that (1) a “palpable” conflict of interest existed, or that a “serious procedural irregularity” occurred, and (2) the conflict actually caused a serious breach of the administrator’s fiduciary duty to the claimant. *See Torres v. UNUM Life Ins. Co. of Am.*, 405 F.3d 670, 678 (8th Cir. 2005) (stating that “UNUM admits it serves as both insurer and administrator of long-term disability plan at issue. We have held this to be palpable evidence of a conflict of interest.” (citing *Farfalla v. Mut. of Omaha Ins. Co.*, 324 F.3d 971, 973 (8th Cir. 2002))). *Compare Davolt v. Executive Comm. of O’Reilly Auto.*, 206 F.3d 806, 809 (8th Cir. 2000) (“[Conflict of interest question] is fact specific and limited to instances where the relationship places the ERISA benefits plan administrator in a ‘perpetual’ conflict of interest.” (citing *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265-68 (8th Cir. 1997))), *with Phillips-Foster v. UNUM Life Ins. Co. of Am.*, 302 F.3d 785, 795 (8th Cir. 2002) (stating “[s]omething like a rebuttable presumption of conflict of interest exists when the insurer is also the plan administrator” (citing *Schatz v. Mut. of Omaha Ins. Co.*, 220 F.3d 944, 947-48 (8th Cir. 2000))). The Eighth Circuit has acknowledged that a claimant who can meet the “considerable hurdle” presented by the second prong of the test will more than likely have substantial evidence that the decision was arbitrary and capricious once a sliding scale analysis is adopted. *See, e.g., Armstrong*, 128 F.3d at 1265-66 (8th Cir. 1997) (finding a significantly less deferential standard of review required where evidence shows that Aetna attempted to minimize claims payments by providing incentives and bonuses to its claim reviewers that produced “claims savings”).

*See infra* notes 17 & 62 (regarding the Ninth Circuit approach to the standard of review question when the plan administrator suffers a conflict of interest).

*See infra* text accompanying notes 78-164 (regarding the Tenth Circuit approach to the standard of review question when the plan administrator suffers a serious or an inherent conflict

The many different approaches utilized to determine whether a plan administrator suffers a conflict of interest, and if so, how such conflict should be incorporated to modify the deferential review standard, have caused a significant lack of confidence in the process on the part of legal scholars.<sup>72</sup> The fact that different judges, sometimes within the same circuit, still disagree about what *Firestone* requires, reinforces the drastic need to clarify and simplify this chaos. Sound public policy is not well served by requiring judges to uphold admittedly wrong benefit claim denials, particularly where the process denies plan participants a meaningful day in court. What must plan participants think when they go to court to challenge a denial, only to learn that they do not have the right to testify on their own behalf,<sup>73</sup> to a jury trial,<sup>74</sup> that their lawyer cannot confront and cross-examine adverse witnesses,<sup>75</sup> and that the judge will defer to their adversaries' opinions over their own?<sup>76</sup>

In 2004, the United States Court of Appeals for the Tenth Circuit recognized both the confused state of ERISA standard of review jurisprudence, and the resulting damage to the civil justice system caused by such

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of interest).

*See infra* text accompanying notes 209-28 (regarding the Eleventh Circuit approach to the standard of review question when the plan administrator suffers a conflict of interest).

72. *See, e.g.*, Kevin Walker Beatty, Comment, *A Decade of Confusion: The Standard of Review for ERISA Benefit Denial Claims as Established by Firestone*, 51 ALA. L. REV. 733 (2000); Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1 (1992); George Lee Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133 (1989); Kennedy, *supra* note 59; Nola A. Kohler, Note, *An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis in Woo v. Deluxe Corporation*, 75 N.D. L. REV. (1999); Langbein, *supra* note 51; Muir, *supra* note 8. For pre-*Firestone* commentary, see Bradley R. Duncan, Note, *ERISA: Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986 (1986); John A. McCreary, Jr., Comment, *The Arbitrary & Capricious Standard Under ERISA: Its Origins and Applications*, 23 DUQ. L. REV. 1033 (1985).

73. Most courts review ERISA claim denials based upon the "administrative record" collected by the plan administrator when review is deferential. *See, e.g.*, *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1003 (10th Cir. 2004) (per curiam), *cert. denied* 125 S. Ct. 1972 (2005). *See discussion infra* text accompanying notes 189-207.

74. *See, e.g.*, *Wardle v. Cent. States, Se. & Sw. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980) (holding that ERISA plaintiff had no right to jury trial). *But see Nadworny v. Shaw's Supermks., Inc.*, 405 F. Supp. 2d 124, 139-40 (D. Mass. 2005) (citing *Bogan, supra* note 8, at 639-40 (suggesting that claims for benefits due under a plan seek legal relief and therefore, entitle plan participant the right to a jury trial)).

75. *See, e.g.*, *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1455, 1460 & n.1 (10th Cir. 1991).

76. *See infra* text accompanying notes 189-207.

confusion.<sup>77</sup> The Tenth Circuit's earnest, but unsuccessful, attempt to remedy the deferential standard of review problem again confirms the need to recalculate the ERISA benefits claim standard of review process. Happily, courts can employ the no-further-inquiry rule without running afoul of *Firestone*. This solution will produce a simplified, uniform, familiar, and more just ERISA claims approach. Before we analyze the no-further-inquiry rule, however, a brief examination of the Tenth Circuit's experiment in *Fought* warrants a visit.

*C. In Fought v. UNUM Life Insurance Co. of America, the Tenth Circuit Attempted to Clarify Its Standard of Review Analysis*

Following the Supreme Court's instructions in *Firestone*, the Tenth Circuit modified the arbitrary and capricious standard of review in ERISA benefit claims where a plan administrator who enjoyed discretionary powers also suffered a conflict of interest.<sup>78</sup> In the past, the Tenth Circuit implemented a sliding scale in all such cases to reduce the level of deference afforded to the plan administrator in inverse proportion to the degree of conflict that afflicted the plan administrator.<sup>79</sup> The Tenth Circuit shared that general formula with several other circuits.<sup>80</sup> However, circuits vary when addressing the finer details of the sliding scale approach.<sup>81</sup> Displeased with its own prior efforts to clarify the modified deferential review standard in ERISA benefit cases, the Tenth Circuit reconsidered its approach to this troublesome standard of review problem in *Fought v. UNUM Life Insurance Co. of America*.<sup>82</sup>

In *Fought*, a disability plan insurer, UNUM Life Insurance Company of America (UNUM), also served as plan administrator. UNUM denied *Fought*'s long term disability benefits claim based upon its interpretation of an ambiguous pre-existing condition exclusion in the plan insurance policy.<sup>83</sup>

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77. See *Fought*, 379 F.3d at 1004 (stating that lack of definite rules to apply in ERISA benefit claim conflict of interest cases has caused increased amounts of litigation).

78. See, e.g., *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996).

79. See *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1097 (10th Cir. 1999); *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999).

80. See, e.g., *McLeod v. Hartford Life & Accident Ins. Co.*, 372 F.3d 618, 623 (3d Cir. 2004); *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 269 (4th Cir. 2002); see also *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 392-93 (3d Cir. 2000).

81. See *Fought*, 379 F.3d at 1003-04 ("Since *Firestone*, all of the circuit courts agree that a conflict of interest triggers a less deferential standard of review. The courts, however, differ over how this lesser degree of deference alters their review process." (quoting *Chambers*, 100 F.3d at 825)). See discussion *supra* text accompanying notes 56-71.

82. 379 F.3d 997, *cert. denied*, 125 S. Ct. 1972.

83. *Id.* at 999. UNUM denied Ms. *Fought*'s disability claim resulting from a staph infection that arose from her surgery for a heart condition. *Id.* at 1009-10. Ms. *Fought*'s

The plan granted discretion to UNUM to interpret policy language and to determine eligibility for benefits.<sup>84</sup> UNUM confessed its dual role circumstance, which the court accepted as establishing a conflict of interest.<sup>85</sup> Consequently, the issue before the Tenth Circuit in *Fought* was how to account for the conflict in the deferential review analysis. Recognizing the lack of direction provided to trial courts applying intermediate levels of deference,<sup>86</sup> the *Fought* court worked to fix the problem. Ultimately, the Tenth Circuit adopted a mixture of the “presumptively void” burden-shifting process used by the Ninth and Eleventh Circuits<sup>87</sup> and the sliding scale abuse of discretion formula familiar to the court from its own precedents.<sup>88</sup>

Unfortunately, the *Fought* opinion failed to make clear when a trial court should apply the sliding scale approach and when it should apply the less deferential, burden-shifting approach in cases involving the various permutations of dual roles and different funding mechanisms commonly utilized by ERISA plan sponsors, except for the insurance company dual roles circumstance.<sup>89</sup> Further, the *Fought* court did not address the discovery and evidentiary issues that the Tenth Circuit process now presents to trial courts in the standard of review analysis. Trial judges must now consider various factors relevant to the conflict of interest question when deciding whether they must invoke the new burden-shifting portion of the conflict of interest standard of review formula.<sup>90</sup> Additionally, the *Fought* court did not expressly clarify whether plan participants must prove causation in addition to a serious or inherent conflict of interest in order to obtain a burden-shifting review standard. Finally, the *Fought* solution to the ERISA fiduciary conflict of

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coronary problems admittedly fell within the pre-existing condition exclusion; however, Ms. Fought and her doctors asserted that the staph infection was a separate and distinct condition from the heart ailment which did not predate the heart surgery. *Id.* at 1001-02. The Tenth Circuit agreed with Ms. Fought that UNUM’s interpretation of the pre-existing condition exclusion, based upon its chain of “non-proximate” causation, was “attenuated to the point of absurdity.” *Id.* at 1009-10.

84. *See id.* at 1003.

85. *Id.* at 999. UNUM admitted that it served as both plan administrator in charge of deciding benefit claims and as plan insurer responsible to pay claims it had approved as plan administrator. *Id.* Later in the opinion, the Tenth Circuit defined UNUM’s dual role relationship as creating an inherent conflict of interest. *Id.* at 1006-07.

86. *See id.* at 1004 & n.3.

87. *Id.* at 1004.

88. *See, e.g.,* Jones v. Kodak Med. Assistance Plan, 169 F.3d 1287, 1291 (10th Cir. 1999); Chambers v. Family Health Plan Corp., 100 F.3d 818, 825 (10th Cir. 1996).

89. *See infra* note 108 and accompanying text.

90. *See Fought*, 379 F.3d at 1005. When a plan administrator suffers an inherent conflict of interest under the *Fought* analysis, the factors test is immaterial. *See id.* at 1005-06.

interest problem still permits trial courts to uphold incorrect employee benefit claim denials.

1. “Standard” Versus “Serious” Versus “Inherent” Conflicts of Interest

The *Fought* opinion parses its standard of review analysis into several categories depending on whether the plan administrator suffers a “standard” conflict of interest, a proven “serious” conflict of interest, or an “inherent” conflict of interest.<sup>91</sup> The language of the opinion, however, creates overlaps that make it difficult to draw these attempted distinctions. In particular, the opinion does not clearly define when a plan administrator occupying dual roles presents a “standard” conflict of interest or when an administrator serving dual roles creates an “inherent” conflict of interest, outside of the insurance context.<sup>92</sup>

The *Fought* court held that when an insurance company serves in the dual roles of payor of plan benefits and plan administrator with discretion to decide benefit claims, an “inherent” conflict of interest exists.<sup>93</sup> To account for that inherent conflict, the *Fought* court shifted the burden to the conflicted plan administrator/insurer to prove that its discretionary claim denial was both reasonable and supported by substantial evidence.<sup>94</sup> Except for this circumstance of an insurance company serving in dual roles, the court lumped all other ERISA fiduciary dual role relationships into the category of a

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91. *See id.* at 1005-07.

92. *See id.* at 999, 1006-07 (after previously reciting that UNUM admitted a dual role relationship, holding that UNUM conceded an inherent conflict of interest).

93. *Fought*, 379 F.3d at 1005-07. Incorporating both the standard conflict of interest and the inherent conflict of interest, and also procedural irregularities into its new standard of review analysis the *Fought* court described its holding as follows:

When the plan administrator operates under either (1) an inherent conflict of interest; (2) a proven conflict of interest; or (3) when a serious procedural irregularity exists, and the plan administrator has denied coverage, an additional reduction in deference is appropriate. Under this less deferential standard, the plan administrator bears the burden of proving the reasonableness of its decision pursuant to this court’s traditional arbitrary and capricious standard. In such instances, the plan administrator must demonstrate that its interpretation of the terms of the plan is reasonable and that its application of those terms to the claimant is supported by substantial evidence.

*Id.* at 1006 (citations omitted).

94. *Id.* at 1006; *see also* Allison v. UNUM Life Ins. Co. of Am., 381 F.3d 1015, 1021-22 (10th Cir. 2004) (summarizing the new *Fought* burden-shifting approach as requiring the dual role plan administrator to demonstrate “the reasonableness of its decision pursuant to the [Tenth Circuit’s] traditional arbitrary and capricious standard” when the plan administrator suffers an inherent conflict of interest) (internal quotations omitted).

“standard” conflict of interest.<sup>95</sup> According to the Tenth Circuit, a standard conflict of interest results when an ERISA fiduciary serves in more than one ERISA capacity.<sup>96</sup> After explaining that an ERISA entity “may wear two hats, one of a trustee or fiduciary and one of a settlor,”<sup>97</sup> the *Fought* court proclaimed that “in every case in which the plan administrator operates under a conflict of interest — or a ‘standard’ conflict of interest case — the plaintiff

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95. The conflict of interest question becomes more complicated when plan sponsors use more varied means than the purchase of insurance to fund employee benefit plans. ERISA benefit plans may be fully insured as in *Fought*, 379 F.3d at 999, or fully self-funded through a segregated trust, *see, e.g.*, *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 45 n.5 (3d Cir. 1993); *Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 970 F.2d 1165, 1173 (3d Cir. 1992), or totally unfunded, *see, e.g.*, *Williams v. BellSouth Telecomms., Inc.*, 373 F.3d 1132, 1135 (11th Cir. 2004); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987), *aff'd in part & rev'd in part*, 489 U.S. 101 (1989). Benefit plans can also be partially funded through a segregated trust and partially insured, *see Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 70 (1st Cir. 2005), partially unfunded and partially self-funded through a trust, *see Skretvedt v. E.I. DuPont de Nemours & Co.*, 268 F.3d 167, 174 (3d Cir. 2001), or partially unfunded and partially insured, *see Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 977 (7th Cir. 1999).

Many small employers choose to self-fund health care benefit plans up to a stated attachment point and then purchase excess coverage, known as stop-loss insurance, to protect the plan against large claims. *See, e.g.*, *Smathers v. Multi-Tool, Inc.*, 298 F.3d 191, 196-98 (3d Cir. 2002) (finding a conflict where self-insured employer/plan administrator purchased stop-loss insurance but would still pay \$22,522.78 out of its own funds if claim was honored). Most courts hold that a nominally self-insured plan, which purchases stop-loss insurance, remains self-insured for purposes of ERISA’s express preemption language. *See, e.g.*, *Bill Gray Enters., Inc. Employee Health & Welfare Plan v. Gourley*, 248 F.3d 206, 214-16 (3d Cir. 2001); *Am. Med. Sec., Inc. v. Bartlett*, 111 F.3d 358 (4th Cir. 1997); *Lincoln Mut. Cas. Co. v. Lectron Prods., Inc., Employee Health Benefit Plan*, 970 F.2d 206 (6th Cir. 1992); *Brown v. Granatelli*, 897 F.2d 1351 (5th Cir. 1990); *United Food & Commercial Workers & Employers Ariz. Health & Welfare Fund Trust v. Pacyga*, 801 F.2d 1157 (9th Cir. 1986). Because health care benefit plans that are not insured enjoy freedom from state regulation due to ERISA preemption, many large employers also choose this hybrid funding mechanism for their health care benefit plans. *See Bill Gray Enters.*, 248 F.3d at 215. *See generally* Russell Korobkin, *The Battle over Self-Insured Health Plans, or “One Good Loophole Deserves Another,”* 5 YALE J. HEALTH POL’Y L. & ETHICS 89 (2005). Depending upon who ultimately pays benefit claims — the employer/plan sponsor or an insurer, how payments are made — out of an employer’s general treasury, by an employer through a segregated trust, or through insurance, who appoints the plan administrator, and the plan administrator’s relationship with the payor of claims, courts evaluate the relationships and funding mechanisms to determine whether the arbitrary and capricious standard of review should be applied without modification, or modified to some degree to apply a lesser level of deference, or abandoned in favor of de novo review. *See Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 383-84 (3d Cir. 2000).

96. *See Fought*, 379 F.3d at 1005.

97. *Id.* at 1005 (quoting Kennedy, *supra* note 59, at 1161).



is required [“]to prove the existence of the conflict.”<sup>98</sup> While that rather circular language sounds confusing, the court did attempt to explain its meaning by stating: “[e]vidence of a conflict of interest requires proof that the plan administrator’s dual role jeopardized his impartiality.”<sup>99</sup> The court then instructed: “[t]he mere fact that a plan administrator was a [company] employee is not enough *per se* to demonstrate a conflict [of interest].”<sup>100</sup> Finally, the opinion suggests that before applying the burden shifting approach, the claimant must prove that the standard conflict of interest was “serious.” The court then repeated four factors that lower courts should examine to evaluate the “seriousness” of a plan administrator’s conflict.<sup>101</sup>

The *Fought* court’s attempt to differentiate between a “standard” conflict of interest and an “inherent” conflict of interest is curious. The court defined both such conflicts as arising from a fiduciary serving in dual roles. To recount, the *Fought* court found that when a plan administrator serves in dual roles, thereby creating a standard conflict of interest,<sup>102</sup> the plaintiff must also prove that the existence of the dual role conflict was serious in order to prompt burden-shifting.<sup>103</sup> Later in the same opinion, however, the court held that because UNUM was wearing two hats, an inherent conflict of interest existed that was serious enough, without further proof, to require burden-shifting.<sup>104</sup> Regrettably, *Fought* does not reveal whether an ERISA fiduciary suffers a standard or an inherent conflict of interest in those cases involving the numerous different funding mechanisms utilized by plan sponsors, outside of the insurance context.<sup>105</sup>

For example, anytime a plan sponsor appoints an affiliated person or entity as plan administrator, while contemporaneously paying benefits out of its

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98. *Id.* (quoting Kennedy, *supra* note 59, at 1173).

99. *Id.* (quoting *Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1017 n.6 (10th Cir. 2003) (internal quotation marks omitted)).

100. *Id.* (second alteration in original); see *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1098 (10th Cir. 1999) (no inherent conflict where plan administrator was employee of plan sponsor, but not a corporate officer of shareholder).

101. *Fought*, 379 F.3d at 1005 (citing *Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1017 n.6 (10th Cir. 2003); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1097 (10th Cir. 1999)); see also *Pitman v. Blue Cross & Blue Shield of Okla.*, 217 F.3d 1291, 1296 (10th Cir. 2000); *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999).

102. See *Fought*, 379 F.3d at 1005.

103. *Id.*

104. See *id.* at 1006-07. In *Allison v. UNUM Life Ins. Co. of Am.*, 381 F.3d 1015, 1021-22 (10th Cir. 2004), a Tenth Circuit panel relied upon this portion of the *Fought* opinion, with little discussion, to hold that an inherent conflict of interest existed solely because an insurance company served in the dual roles of plan insurer and plan administrator.

105. See cases cited *supra* note 95 (describing identification of different plan funding mechanisms).

operating capital, such dual role plan administrator suffers a financial conflict of interest that arguably is equal in its seriousness to the insurance company dual role scenario. The *Fought* opinion is not clear whether such a dual role relationship may be categorized as creating an inherent conflict, or if the “inherent conflict” category is wholly reserved for dual role insurers.

If the plan sponsor creates a dual role scenario, which does not involve an insurance company, following *Fought*, a Tenth Circuit trial court has two options: (1) it may read *Fought* as allowing for other inherent conflicts of interest outside of the insurance company dual role pattern; or (2) it could read *Fought* to reserve the inherent conflict category exclusively for the insurance company situation. If the trial court does not identify an inherent conflict of interest from whatever dual role circumstance is presented, the next step in the *Fought* paradigm is to determine whether the non-insurance dual role circumstance creates a serious conflict of interest. Here, the *Fought* court referenced the four factors that it suggested bear on the question of seriousness.<sup>106</sup> Before the *Fought* opinion identified its four factors, however, the court inferred that if a dual role relationship “jeopardized [the plan administrator’s] impartiality,” there would be some impact on the standard of review analysis.<sup>107</sup> Before we move to the *Fought* factors, we must determine what the Tenth Circuit meant when it spoke of jeopardizing the plan administrator’s impartiality.

### *2. Proof That a Conflict “Jeopardized” the Plan Administrator’s Impartiality*

Perhaps the most difficult burden that many plan participants face when they seek to reduce deference is proving that the plan administrator’s self-interested conflict actually caused the plan administrator to deny a claim. While many circuits require ERISA claimants to prove both a conflict of interest and causation in order to obtain some modification of the deferential review standard, the Tenth Circuit’s subtle avoidance of this most significant question reflects the difficulty lower courts have had in coaxing a uniform standard of review principle from *Firestone*.

It is now clear from the *Fought* opinion that if a plan participant in the Tenth Circuit establishes a plan insurer’s inherent conflict of interest, the burden shifts to the plan administrator to prove that its claim denial was not arbitrary and capricious. This burden shifting analysis does not appear to require any prior showing that the plan administrator’s inherent conflict caused

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106. See *Fought*, 379 F.3d at 1005.

107. *Id.* (internal quotation marks omitted).

a biased decision.<sup>108</sup> However, if the plan participant can only prove a standard, and then a serious conflict, the causation query is cryptically imbedded in the Tenth Circuit's pronouncement that: "[e]vidence of a conflict of interest requires proof that the plan administrator's dual role jeopardized his impartiality."<sup>109</sup> Given the context, and prior Tenth Circuit authority, this article suggests that this phraseology is best construed as the Tenth Circuit's further instruction to district courts to closely examine ERISA plan funding mechanisms and fiduciary dual roles to assure that a financial conflict of interest actually exists, rather than as a charge requiring plan participants to prove causation resulting from the dual role conflict.

When other circuit courts require proof, beyond the actuality of a financial conflict, of a plan administrator's bias, they misunderstand trust law's displeasure with fiduciary conflicts of interest. Additionally, these courts misconstrue the trust law solution to the problem of self-dealing fiduciaries. Trust law proscribes conflicts of interest because of the significant danger that improper motivations *might* affect a conflicted fiduciary's decision-making, not because proof of a conflict establishes causation.<sup>110</sup> Under the common law of trusts, if a trustee operates under a self-dealing conflict of interest, the no-further-inquiry rule applies to relieve the beneficiary of the evidentiary burden of proving causation.<sup>111</sup> Additionally, the no-further-inquiry rule holds that once a self-interested conflict is demonstrated, courts not only presume that the conflict infected the trustee's decision-making, but also hold that the presumption of taint is irrebuttable.<sup>112</sup> Though ERISA courts have almost uniformly neglected to fully mine the trust law conflict of interest causation question, the Tenth Circuit's continued use of the term "jeopardize" in its standard of review analysis prompts reflection on the causation issue, which in turn implicates trust law presumptions and the no-further-inquiry rule.

The *Fought* court explained that when a dual role relationship exists, the plan participant must prove that serving in such dual roles "jeopardized [the

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108. *See id.* at 1006.

109. *Id.* at 1005 (emphasis added) (internal quotation marks omitted) (quoting *Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1017 n.6 (10th Cir. 2003)).

110. *See* Langbein, *supra* note 12, at 944-45 (2005) (citing JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW \*438; BOGERT & BOGERT, *supra* note 58, § 543(A) at 274-77); *see id.* at 931 ("Courts invalidate a conflicted transaction without regard to its merits — 'not because there is fraud, but because there may be fraud.' '[E]quity deems it better to . . . strike down all disloyal acts, rather than attempt to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests.") (alteration in original) (internal citations and quotations omitted). *See* discussion *infra* notes 166-81 and accompanying text.

111. *See* *Wendt v. Fisher*, 154 N.E. 303 (N.Y. 1926) (quoted *supra* at text accompanying notes 13-14).

112. *See* *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

fiduciary's] impartiality.”<sup>113</sup> The term “jeopardize” does not mean to “cause”; rather, it means “to expose to danger.”<sup>114</sup> Therefore, a plan participant meets this test if the claimant proves that the plan administrator’s dual role circumstance creates the danger of self-dealing. The use of the term jeopardize suggests that once the plan participant proves that serving in dual roles created a financial conflict of interest, the danger of a biased decision arises. Application of the no-further-inquiry rule here, as in common law trust cases, would then satisfy the causation element via its irrebuttable presumption of bias. In fact, it was in recognition of this danger of bias resulting from self-dealing conflicts that equity courts first developed the no-further-inquiry rule.<sup>115</sup> The Tenth Circuit’s use of the term “jeopardize” rather than “cause” indicates that the Tenth Circuit does not impose a burden of proving causation on ERISA plan participants. If that is the correct reading of *Fought*, it places the Tenth Circuit in sync with traditional trust law.<sup>116</sup>

Earlier Tenth Circuit cases utilizing the “jeopardize” term indicate that a plan participant is required to prove that the administrator’s dual roles merely caused a financial conflict of interest, rather than also requiring proof that the conflict was the proximate cause of the denial of benefits. In *Kimber v. Thiokol Corp.*,<sup>117</sup> the Tenth Circuit stated that “before applying the sliding scale, there must first be evidence of a conflict of interest, i.e., proof ‘that the plan administrator’s dual role jeopardized his impartiality.’”<sup>118</sup> Similarly, in *Jones v. Kodak Medical Assistance Plan*,<sup>119</sup> the court used the phrase “jeopardized his impartiality” in conjunction with the Tenth Circuit factors to underscore that no inherent conflict of interest is presumed “simply because the fiduciary works for the company funding the plan.”<sup>120</sup> This reading of *Fought* is further reinforced by the *Fought* court’s statement that “[t]he rationale for [reducing the level of deference afforded a self-interested plan administrator] is clear. A conflicted fiduciary may favor, *consciously or unconsciously*, its interests over the interests of the plan beneficiaries.”<sup>121</sup>

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113. See *Fought*, 379 F.3d at 1005 (quoting *Cirulis*, 321 F.3d at 1017 n.6).

114. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1213 (1976).

115. See *infra* text accompanying notes 185-88.

116. See *supra* text accompanying notes 13-14.

117. 196 F.3d 1092 (10th Cir. 1999).

118. *Id.* at 1097 (quoting *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999)).

119. 169 F.3d 1287.

120. *Id.* at 1291.

121. *Fought*, 379 F.3d at 1003 (emphasis added) (quoting *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1565 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991)).

### 3. *The Four Factors*

In addition to the ambiguity of whether serving in dual roles creates a standard or inherent conflict, the *Fought* court further complicated the analysis by listing factors intended to clarify what evidence may turn a “standard” conflict of interest into a “serious” conflict of interest.<sup>122</sup> Regrettably, except for the insurance company dual role circumstance, the court did not lend context to its factors test by providing detail regarding the various funding mechanisms typically utilized by plan sponsors. Additionally, the court did not anticipate the evidentiary dilemma its factors test raises in an ERISA process that shuns evidence.<sup>123</sup>

Relevant factors identified by the Tenth Circuit include: (1) whether “the plan is self-funded,” (2) whether the plan sponsor/employer “appointed and compensated the plan administrator,” (3) whether the plan administrator’s performance reviews or level of compensation were linked to “his or her record for denying of benefits,” and (4) whether “the provision of benefits had a significant economic impact on the company administering the plan.”<sup>124</sup> Unfortunately, *Fought* does not clarify how the factors should be weighed to prompt a finding of a “serious” conflict of interest.

#### a) [*Whether*] *the Plan Is Self-funded*<sup>125</sup>

What does the *Fought* court mean by “self-funded?”<sup>126</sup> Is the court suggesting here that if a plan is funded through an actuarially grounded trust, where periodic payments are made to fund the trust regardless of specific claims, that no conflict, or at least no serious conflict, exists? Or is the court saying that where an employer pays benefits out of its operating capital, where no trust has been established and where the employer has not purchased insurance to fund plan promises (an unfunded plan), that a serious conflict of interest exists? Because the Tenth Circuit has not applied a consistent definition of the term “self-funded” we do not know whether the *Fought* court intended self-funded plans to encompass unfunded plans.

Recall that ERISA requires plan sponsors to fund pension plans through the establishment of a trust or the purchase of insurance.<sup>127</sup> If a pension plan

122. *Id.* at 1005.

123. *See infra* text accompanying notes 196-207.

124. *Fought*, 379 F.3d at 1005 (quoting *Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1017 n.6 (10th Cir. 2003)); *see also Jones*, 169 F.3d at 1291.

125. *See Fought*, 379 F.3d at 1005.

126. The term “self-funded” is not included in ERISA’s reasonably lengthy definitions section. *See* 29 U.S.C. § 1002 (2000).

127. *See Bogan, supra* note 8, at 671-72 (describing inter-relation of ERISA § 403(a), 29

sponsor does not purchase insurance to fund plan promises, the plan sponsor must set aside assets to fund a trust from which such pension benefit claims will be paid. When a plan sponsor establishes a trust to fund an ERISA plan, benefit claims arguably do not present a “serious” conflict of interest for the dual-role employer because approval of a claim does not result in a direct, dollar-for-dollar loss to the employer, since payment does not come from the employer’s operating capital.<sup>128</sup> Similarly, claim denials arising from plans funded through such a trust may not cause an immediate, direct, dollar-for-dollar gain for the employer because the money saved typically stays in the trust, rather than being returned to the employer.<sup>129</sup> The Tenth Circuit championed this rationale in *Woolsey v. Marion Laboratories, Inc.*,<sup>130</sup> holding that a dual role administrator did not suffer an inherent conflict of interest because the trust was funded through regular contributions unrelated to claims and was governed by a non-reversion clause.<sup>131</sup>

Recall also that unlike pension plans, ERISA does not require plan sponsors to fund welfare benefit plans.<sup>132</sup> Consequently, without insurance or an established trust, sponsors necessarily pay benefits from their own general treasury.<sup>133</sup> In *Jones v. Kodak Medical Assistance Plan*,<sup>134</sup> the Tenth Circuit described such an unfunded plan, which arguably presented a significantly different risk of plan administrator self-dealing than the plan in *Woolsey*, as “self-funded.” The *Jones* court stated:

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U.S.C. § 1103(a); § 403 (b)(2), 29 U.S.C. § 1103(b)(2); § 301(a)(1), 29 U.S.C. 1081(a)(1)).

128. See, e.g., *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 388 (3d Cir. 2000); *Buckley v. Metro. Life*, 115 F.3d 936, 939-40 (11th Cir. 1997); see also *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1459-60 (10th Cir. 1991).

129. Arguably, an indirect conflict of interest remains here because the plan sponsor ultimately pays the claims, regardless of the funding mechanism, and because the employer may have to replenish the plan trust if it is under-funded. See *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987), *aff’d in part & rev’d in part*, 489 U.S. 101 (1989). Compare *Van Boxel v. Journal Co. Employees’ Pension Trust*, 836 F.2d 1048, 1050-51 (7th Cir. 1987) (if ERISA trust is under-funded employer must pay benefits out of its general treasury), with *Struble v. N.J. Brewery Employees’ Welfare Trust Fund*, 732 F.2d 325, 329 (3d Cir. 1984) (dual role trustees sought to distribute surplus trust funds to the employer rather than use such funds to purchase additional or better benefits for plan participants).

130. 934 F.2d 1452.

131. *Id.* at 1459 (the plan document recited that “the Company shall not have any right, title, or interest in the contributions made by it under the Plan and no part of the Trust Fund shall revert to it or for its benefit”); see also *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 45 n.5 (3d Cir. 1993); *Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 970 F.2d 1165, 1173 (3d Cir. 1992).

132. See *supra* note 127 (discussing *Bogan*, *supra* note 8).

133. See, e.g., *Bruch*, 828 F.2d at 144.

134. 169 F.3d 1287 (10th Cir. 1999).

The Plan Administrator has “full discretionary authority in all matters related to the discharge of his responsibilities . . . including, without limitation, his construction of the terms of the Plan and his determination of eligibility for Coverage and Benefits.” The Plan Administrator is an Eastman Kodak employee, and the Plan is entirely self-funded, which means that Eastman Kodak employees do not contribute toward the premiums. Rather, payment for covered medical care comes out of company revenues.<sup>135</sup>

The differing circumstances that the Tenth Circuit has described as producing a “self-funded” plan renders the *Fought* court’s use of that term ambiguous. Because *Jones* includes unfunded plans within its definition of self-funded plans,<sup>136</sup> it remains unclear whether the *Fought* court intended the self-funded nature of a plan to indicate that the conflict of interest is serious. If the *Fought* court did intend to include unfunded plans within the definition of a “self-funded” plan, as the *Jones* opinion suggests, then self-funding indicates a serious conflict of interest. However, if the *Fought* court only intended “self-funded” to mean plans funded through an actuarially grounded trust containing a non-reversion clause, as in *Woolsey*, then the description of a plan as being self-funded indicates that the dual-role conflict may not be sufficiently serious to warrant burden-shifting.

If the *Fought* court had cited *Pinto v. Reliance Standard Life Insurance Co.*,<sup>137</sup> the seminal case discussing this point,<sup>138</sup> or *Woolsey*,<sup>139</sup> it would have clarified how the nature of a self-funded plan should influence a court’s determination of a serious conflict of interest. The *Fought* court’s failure to cite *Woolsey* or *Pinto* leaves the court’s intended message unclear.<sup>140</sup>

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135. *Id.* at 1290 (alteration in original) (citations omitted).

136. *See also* Charter Canyon Treatment Ctr. v. Pool Co., 153 F.3d 1132, 1135 (10th Cir. 1998) (describing apparently unfunded health plan as a “self-funded” plan).

137. 214 F.3d 377 (3d Cir. 2000).

138. *Id.* at 388.

139. *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1459-60 (10th Cir. 1991).

140. *See also* Cirulis v. UNUM Corp., 321 F.3d 1010, 1017 n.6 (10th Cir. 2003) (“[I]n *Pitman v. Blue Cross & Blue Shield of Okla.*, we suggested that when the plan administrator and a third-party insurer are the same entity, this alone may suffice to show a conflict of interest. *Pitman*’s holding was expressly limited to exclude situations in which a plan is self-funded, i.e., where an employee of the company administers the plan. Unlike an insurer, an employer (or its agent-employee) does not usually derive its profit solely from the administration of the benefits plan. In this case, the plan administrator is an employee of UNUM, rather than a third-party insurer. This suggests that *Pitman* may not apply. However, as UNUM, unlike most other employers, presumably derives profits from administering employee benefit plans for other companies, it is arguable that the identity of the plan administrator as an UNUM employee may, standing alone, provide sufficient evidence of a conflict of interest warranting a reduced level

*b) [Whether] the Company Funding the Plan Appointed and Compensated the Plan Administrator*<sup>141</sup>

Although descriptive, this factor does not yield any useful basis on which to differentiate between a serious or non-serious conflict of interest. It appears that in every non-union, employer-sponsored ERISA plan, the employer retains the power to appoint the plan administrator. Typically, employers exercise this power without input from the covered workers.<sup>142</sup> Additionally, the employer who sponsors a plan always pays the plan administrator, if not directly through salary and bonuses, then either by paying premiums to an insurer who serves as plan administrator, or by paying a contracted fee to a Third Party Administrator.<sup>143</sup> The question then remains how this factor helps trial judges distinguish between dual role circumstances that create a standard conflict of interest from those that create a serious conflict of interest. While this factor always suggests some level of financial conflict, absent more direction from the court, identifying the circumstance does not determine whether a serious conflict exists. Further, the *Fought* opinion does not indicate whether this factor must exist in conjunction with other factors in order to produce a serious conflict.

*c) [Whether] the Plan Administrator's Performance Reviews or Level of Compensation Were Linked to the Denial of Benefits Claims*<sup>144</sup>

Although this third factor appears clear, it raises the question of evidence outside the administrative record. If an employer links the plan administrator's positive performance review, or its salary, compensation, or bonuses to its

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of deference.”) (citing *Pitman*, 217 F.3d 1291, 1296 & n.4 (10th Cir. 2000)); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1097-98 (10th Cir. 1999) (finding that first two factors were present because a “self-funded” plan was involved and the employer appointed the plan administrator; however, because the plan administrator was not an officer or corporate shareholder and because there was negligible evidence concerning the economic impact on the employer, no conflict of interest existed).

141. See *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1005 (10th Cir. 2004) (per curiam), cert. denied, 125 S. Ct. 1972 (2005).

142. See, e.g., *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 143-44 (3d Cir. 1987), *aff'd in part & rev'd in part*, 489 U.S. 101 (1989) (comparing LMRA, which mandates that management and labor shall have an equal voice in selecting plan trustees arising from a collectively bargained employee benefit plan, to ERISA, which contains no such mandate).

143. See *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1290 (10th Cir. 1999) (plan sponsor of unfunded plan delegated initial claims administration to outside Third Party Administrator, though Plan Administrator with final authority to determine claims was employee of plan sponsor/employer).

144. See *Fought*, 379 F.3d at 1005.



denial of claims, clearly a strong financial conflict of interest results.<sup>145</sup> Although the *Fought* opinion does not say so explicitly, evidence of such a direct financial conflict may be sufficiently “serious” to warrant burden-shifting, even absent any of the additional factors.<sup>146</sup>

While proof of this factor likely creates a “serious” conflict, placing the burden on the plan participant to prove such a link without also allowing discovery and evidence outside the administrative record presents a near impossible task. A plan administrator may deny such a direct link in an affidavit placed in the administrative record. However, it is easy to imagine that such plan administrator would find it difficult to maintain that denial under cross-examination by a skillful trial lawyer.

For example, one could assume that an administrator employed by a for-profit corporation would admit that profit is a primary goal for the employer. This same administrator would also likely admit that the employer highly values workers who help the employer reach or maintain this goal. Perhaps the administrator would also admit that if an employee’s job performance helped the employer earn more money, such action would be considered a positive factor in the employee’s performance evaluation, and that positive performance evaluations lead to advancement within the company. Absent discovery and evidence outside the administrative record, including the right to cross-examine witnesses, a plan participant remains unable to sift witnesses who may deny this potential job performance/compensation link to claim denials, thereby limiting the plan participant’s ability to prove this factor in the serious conflict of interest analysis.

*d) [Whether] the Provision of Benefits Had a Significant Economic Impact on the Company Administering the Plan*<sup>147</sup>

This “significant economic impact” factor raises questions of how to account for relative values of what may be “significant” to a particular employer or court. Also, it operates in tension with the Tenth Circuit’s moratorium on evidence outside the “administrative record” in such claims.<sup>148</sup>

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145. *Id.*

146. *See, e.g.,* *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997) (holding that significantly less deferential standard of review is required where evidence shows that Aetna attempted to minimize claims payments by providing incentives and bonuses to its claim reviewers that produced “claims savings”).

147. *Fought*, 379 F.3d at 1005.

148. *See Allison v. UNUM Life Ins. Co. of Am.*, 381 F.3d 1015, 1021 (10th Cir. 2004) (“In reviewing a plan administrator’s decision under the arbitrary and capricious standard, we ‘are limited to the “administrative record” — the materials compiled by the administrator in the course of making his decision.’” (quoting *Hall v. UNUM Life Ins. Co. of Am.*, 300 F.3d 1197, 1201 (10th Cir. 2002))).

Without the opportunity to pursue discovery and offer evidence outside the administrative record, a plan participant in the Tenth Circuit will necessarily struggle to establish how payment of benefit claims impacts an employer's finances.

Circuit courts differ over the amount of money they view as significant in particular cases. For example, in *Mers v. Marriott International Group Accidental Death & Dismemberment Plan*,<sup>149</sup> the Seventh Circuit found no conflict of interest where a major insurer denied a \$200,000 claim, because “[t]he impact of granting or denying benefits [was] minuscule compared to [the insurer’s] bottom line.”<sup>150</sup> However, in *Smathers v. Multi-Tool, Inc.*,<sup>151</sup> the Third Circuit decided that a conflict of interest existed where a dual role administrator of a nominally self-insured plan protected by the purchase of stop-loss insurance, would pay \$22,522.78 out of its own treasury if the claim was honored.<sup>152</sup>

Additionally, plan participants would have to pursue substantial amounts of discovery to produce evidence that a specific claim would likely have a significant economic impact on an employer serving in dual roles.<sup>153</sup> Further, certain claims that may not be significant standing alone may have a significant impact on the dual role administrator if the claim is one that could

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149. 144 F.3d 1014 (7th Cir. 1998).

150. *Id.* at 1020.

151. 298 F.3d 191 (3d Cir. 2002).

152. *See id.* at 197; *see also* *Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 970 F.2d 1165, 1172-73 (3d Cir. 1992) (discussing the impact of a \$2,000,000 liability to the plan and plan sponsor).

153. We know that some large employers consider employee benefit claims to be very significant in their ability to compete in the marketplace. General Motors Corporation complains that its employee benefits obligations add \$1500.00 to the cost of every new car it produces. *See* Ron Sherer, *Rising Benefits Burden*, CHRISTIAN SCI. MONITOR, June 9, 2005, at 1, available at <http://www.csmonitor.com/2005/0609/p01s01-usec.htm>. Additionally, several of the major United States-based airlines have either sought concessions from their unions to reduce fringe benefits in order to compete in the marketplace, or have filed bankruptcy, in part at least, to shed the economic burden of their employee benefits plans. *See Pressure Mounts on Other Airlines to Seek Pension Relief*, USA TODAY, May 12, 2005, available at [http://www.usatoday.com/travel/news/2005-05-12-pension-pressure\\_x.htm](http://www.usatoday.com/travel/news/2005-05-12-pension-pressure_x.htm); Michael Schroeder, *Big Stakes in Ailing Airlines Raise Questions for U.S. Pension Agency*, WALL ST. J., Nov. 3, 2005, at A1. *See generally* Johnathan E. Collins, Comment, *Airlines Jettison Their Pension Plans: Congress Must Act to Save the PBGC and Protect Plan Beneficiaries*, 70 J. AIR L. & COM. 289 (2005).

set a precedent for many future large dollar claims or for cumulative claims addressing the same issue,<sup>154</sup> or if the claim arises in a class action.<sup>155</sup>

Each of the factors discussed above requires the claimant to pursue discovery and to introduce evidence outside the administrative record in order to establish the existence of the identified factor(s). Outside of the insurance company dual role context, there is no other way for the plan participant to establish a right to the burden-shifting standard of review.

One primary justification for summary adjudicative proceedings in ERISA benefit claims is that Congress intended claimants to benefit from a simple administrative process that could provide a quick and inexpensive way to resolve claims.<sup>156</sup> With the factors complicating the determination of what level of review to apply, courts will now have to allow discovery and conduct evidentiary hearings on the collateral issue of a plan administrator's conflict of interest.<sup>157</sup> Arguably, these additional steps nullify the supposed benefit of

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154. For example, approximately 500 employees sued Firestone for severance benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105 (1989). While any individual claim may not have had a significant economic impact on Firestone, 500 claims may have reached a threshold that Firestone, or more importantly, a court would consider significant.

155. *See Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 139-40 (3d Cir. 1987) (citing *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985)), *aff'd in part & rev'd in part*, 489 U.S. 101.

156. *See Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 823-24 (10th Cir. 1996); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992); *see also Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805, 813 (7th Cir. 2006); *cf. Liston v. UNUM Corp. Officer Severance Plan*, 330 F.3d 19, 23-24, 26 (1st Cir. 2003) ("The ordinary rule is that review for arbitrariness is on the record made before the entity being reviewed. True, we have declined in cases like this one to adopt an ironclad rule against new evidence. For example, discovery may be needed because the decisional process is too informal to provide a record. And certain kinds of claims — e.g., proof of corruption — may in their nature or timing take a reviewing court to materials outside the administrative record. Still, at least some very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the administrator. This is the view of virtually all of the circuits with the possible exception of the Fifth Circuit. It is almost inherent in the idea of reviewing agency or other administrative action for reasonableness; how could an administrator act unreasonably by ignoring information never presented to it? . . . Where as here review is under the arbitrariness standard, the ordinary question is whether the administrator's action on the record before him was unreasonable. . . . Mandating discovery in such a situation would be at odds with the concerns about efficient administration that underlie the ERISA statute itself. True, Liston is handicapped by having to show that the outcome of discovery would be helpful before she can get access to materials that might show just this; but this is the standard situation in discovery and the reason why those in charge are expected to exercise judgment.") (citations omitted).

157. *See Allison v. UNUM Life Ins. Co. of Am.*, 381 F.3d 1015, 1021 (10th Cir. 2004); *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1003 (10th Cir. 2004) (per curiam), *cert. denied*, 125 S. Ct. 1972 (2005); *see also Calvert v. Firststar Finance, Inc.*, 409 F.3d 286, 293 n.2 (6th Cir. 2005) ("The Court would have a better feel for the weight to accord this conflict if [the

a simple, quick, and cheap claims process.<sup>158</sup> Regardless, plan participants would most likely prefer a fair, de novo claims hearing before a neutral fact-finder to a quicker process that is stacked against them.<sup>159</sup>

The *Fought* court stated that “[i]f the plaintiff cannot establish a serious conflict of interest,” according to the four factors test, the standard conflict of interest rules apply.<sup>160</sup> The *Fought* court did not indicate how many of the factors must be established to prompt burden-shifting,<sup>161</sup> or whether one of the identified factors should be weighted more heavily than another factor.<sup>162</sup> A similar problem in identifying factors that suggest whether a state law “regulates insurance” under ERISA’s savings clause exception to preemption<sup>163</sup> led to significant lower court confusion. Ultimately, the Supreme Court rendered two separate decisions to resolve that factors problem.<sup>164</sup>

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claimant] had explored the issue through discovery. . . . [A]n exception to [the general rule that discovery is prohibited in ERISA benefit claims premised on review of the administrative record] exists where a plaintiff seeks to pursue a decision-maker’s bias.” (citing *Wilkins v. Baptist Healthcare Sys., Inc.* 150 F.3d 609, 618 (6th Cir. 1998) (“The only exception to the . . . principle of not receiving new evidence at the district court level [in an ERISA case] arises when consideration of that evidence is necessary to resolve an ERISA claimant’s procedural challenge to the administrator’s decision, such as an alleged lack of due process afforded by the administrator or *alleged bias on his part.*”) (alterations in original) (emphasis added by *Calvert* court)); *Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 520 (1st Cir. 2005) (“There may be times when it is appropriate for courts to hear new evidence. . . . For example, evidence outside the administrative record might be relevant to a claim of personal bias by a plan administrator or of prejudicial procedural irregularity in the ERISA administrative review procedure.”).

158. Further, the rules of civil procedure provide the opportunity for emergent relief in those cases where time is of the essence in determining whether a particular medical procedure, for example, is or is not covered under a health care benefits plan. *See* FED. R. CIV. P. 65(a) (Preliminary Injunction); FED. R. CIV. P. 65(b) (Temporary Restraining Order; Notice; Hearing; Duration).

159. *See Bruch*, 828 F.2d at 144 n.10 (“It has been argued that deferring to the administrator’s decision will make proceedings faster. We acknowledge that. But because speed is attained by sacrificing the impartiality of the decisionmaker, we think that it comes at too great a cost.”).

160. *Fought*, 379 F.3d at 1005.

161. *But cf.* *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1098 (10th Cir. 1999) (court rules that conflict of interest not established, though first two factors present, where plan administrator/employee was not a corporate officer or shareholder and where court assumed no significant economic impact).

162. *See Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999) (listing identified factors “by way of example only”).

163. *See* 29 U.S.C. § 1144(b) (2000).

164. *See Ky. Ass’n of Health Plans v. Miller*, 538 U.S. 329, 339-42 (2003) (abandoning three factor McCarran-Ferguson Act test to determine which state laws regulate insurance);

#### 4. Upholding Admittedly Wrong Claim Denials

The *Fought* court continued to invoke the arbitrary and capricious standard even where burden-shifting is applied because *Fought* merely requires that a seriously conflicted plan administrator establish that its claim denial was reasonable and supported by substantial evidence. Under the new burden-shifting approach, then, the review standard remains deferential, even though the court shifted the burden to the plan administrator to prove that it did not abuse its discretion in denying a benefits claim.<sup>165</sup> By adhering to the arbitrary and capricious review standard even under burden-shifting, *Fought* continues the practice of requiring Tenth Circuit courts to uphold some claim denials that would otherwise be overturned if reviewed de novo.

It is bad public policy for courts to bless incorrect findings and to sanction judgments that reach incorrect conclusions. As discussed below, application of the no-further-inquiry rule to ERISA benefit claims will relieve courts from the confounding problem of trying to define intermediate levels of deferential review while also producing the salutary effect of allowing courts to seek out correct results.

### III. Trust Law Offers a Solution

#### A. The Trust Law No-Further-Inquiry Rule

The preeminent characteristic of a trust relationship is the duty of loyalty owed by the trustee to trust beneficiaries.<sup>166</sup> Section 170 of the *Restatement (Second) of Trusts* provides that: “[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.”<sup>167</sup> A trustee’s duty of loyalty may be compromised when the fiduciary suffers a self-dealing conflict of interest. Consequently, trust law generally prohibits

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UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 373-74 (1999) (rejecting argument that three McCarran-Ferguson Act factors must all be present to classify a state law as one that regulates insurance and holding that factors are merely considerations to be weighed in the analysis).

165. See *Fought*, 379 F.3d at 1006. The *Fought* court’s burden-shifting approach is remarkable because it does not alter the standard of review. Rather, it shifts the burden of proof between the parties: if there is no inherent or serious conflict in the Tenth Circuit, the plan participant must prove that the plan administrator abused its discretion; if the conflict of interest is inherent or serious, the burden shifts to the plan administrator to prove that it did *not* abuse its discretion. In both circumstances, however, the question is not whether the decision to deny the benefit was *correct*; the focus remains merely whether the decision was reasonable.

166. See BOGERT & BOGERT, *supra* note 58, § 543. See generally Conison, *supra* note 34.

167. RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).

the trustee from operating under a conflict of interest and self-dealing in trust property.<sup>168</sup>

When a trustee pursues a course of action that implicates self-interest, the common law no-further-inquiry rule relieves a complaining trust beneficiary of the burden of proving that the conflicted trustee's bias caused the trustee to neglect the beneficiary's sole interests.<sup>169</sup> Under the no-further-inquiry rule, if a trust beneficiary establishes a trustee's conflict of interest, the beneficiary can nullify the discretionary act or transaction.<sup>170</sup> Further, a court will prohibit the conflicted trustee from offering evidence to show that the alleged bias did not drive its decision-making, or that the transaction was fair and reasonable despite the conflict.<sup>171</sup>

Courts have applied the no-further-inquiry rule against conflicted fiduciaries for centuries<sup>172</sup> because fraud might have resulted from conflicted decision-making.<sup>173</sup> The rule proudly recognizes the sanctity of the fiduciary relationship<sup>174</sup> while cynically acknowledging that, where interests conflict, human nature suggests that a person will serve his or her own interests to the detriment of others.<sup>175</sup>

Application of the no-further-inquiry rule's irrebuttable presumption also acknowledges the difficulty of proving a conflicted trustee's selfish motivations or state of mind.<sup>176</sup> This principle reflects the rule's equitable origins, which predate the right to confront and cross-examine witnesses.<sup>177</sup>

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168. See BOGERT & BOGERT, *supra* note 58, § 543.

169. See *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926) (quoted *supra* at text accompanying notes 13-14).

170. *Id.*

171. *Id.* The popular name of the rule stems from this irrebuttable presumption of taint: once a beneficiary establishes a fiduciary's self-dealing conflict, courts will *not inquire further* into the asserted good faith of the fiduciary, but will void the transaction at the request of the beneficiary without seeking evidence of actual causation. See Langbein, *supra* note 12, at 931.

172. See, e.g., *Thorp v. McCullum*, 6 Ill. (1 Gilm.) 614 (1844); *Davoue v. Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816).

173. See Langbein, *supra* note 12, at 931 (citing *Piatt v. Longworth's Devises*, 27 Ohio St. 159, 195-96 (1875)); see also *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 571-72 (5th Cir. 1966).

174. See *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

175. See BOGERT & BOGERT, *supra* note 58, § 543 ("It is not possible for any person to act fairly in the same transaction on behalf of himself and in the interest of the trust beneficiary."); Langbein, *supra* note 12, at 933-35; see also *In re Ryan's Will*, 52 N.E.2d 909, 923-34 (N.Y. 1943) ("The [no-further-inquiry] rule is founded in the highest wisdom. It recognizes the infirmity of human nature, and interposes a barrier against the operation of selfishness and greed. It discourages fraud by taking away motive for its perpetration. It tends to insure fidelity on the part of the trustee . . . to a large class of persons whose estates . . . are intrusted to the management of others.") (internal quotation marks and citations omitted).

176. See Langbein, *supra* note 12, at 944-47.

177. See *id.*; see also John H. Langbein, *Fact Finding in the English Court of Chancery: A*

Even with today's modern discovery rules, proving that self-interest motivated a fiduciary's actions presents a significant hurdle.<sup>178</sup>

Eminent trust law and ERISA scholar Professor John H. Langbein recently published a critique of the no-further-inquiry rule, calling the underlying mantra that trustees must protect the sole interest of the trust beneficiary "unsound."<sup>179</sup> Professor Langbein's proposed modification to the sole interest rule is perhaps not so radical. In fact, he merely urges that courts re-cast the trustee's obligation as a duty to pursue the "best" rather than the "sole" interests of trust beneficiaries, and replace the irrebuttable presumption of the no-further-inquiry rule with a rebuttable presumption.<sup>180</sup>

Although Professor Langbein's critique of the no-further-inquiry rule only mentions ERISA in passing,<sup>181</sup> this comment employs Professor Langbein's work to support the view that courts *should* apply the irrebuttable presumption of the no-further-inquiry rule to ERISA benefit claims. Application of the no-further-inquiry rule counsels a de novo review standard, which would return trial courts to the business of deciding cases based upon admissible evidence.

#### *B. Rebuttable and Irrebuttable Presumptions*

The foundational tenet of Professor Langbein's proposal is that when a trustee pursues the most favorable investment strategies or transactions for trust beneficiaries, conflicts of interest occasionally cause no harm.<sup>182</sup> Professor Langbein envisions win/win conflict-laden transactions that simultaneously protect the best interests of both the trust beneficiaries and trustees.<sup>183</sup> Professor Langbein expresses concern that rigorous adherence to the no-further-inquiry rule can produce disincentives for well-meaning trustees. Trustees who trade in trust property at fair market value may be forced to sacrifice reasonable profits many years after a transaction when what appeared to be a good trade for beneficiaries at the time of the deal, also turned out to produce a gain for the trustee.<sup>184</sup>

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*Rebuttal*, 83 YALE L.J. 1620 (1974).

178. As stated by Circuit Judge Becker in an ERISA benefits case, "this is not a scenario where a 'smoking gun' is likely to surface, and direct evidence of a conflict [affecting the plan administrator] is rarely likely to appear in any plan administrator's decision." *Pinto v. Reliance Standard Ins. Co.*, 214 F.3d 377, 389 (3d Cir. 2000); *see, e.g., Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995).

179. Langbein, *supra* note 12, at 982.

180. *Id.* at 933-34.

181. *See id.* at 951-52, 976.

182. *Id.* at 954-57.

183. *Id.* at 959-60.

184. *Id.* at 951-52. Professor Langbein candidly admits that his proposal confronts a long and strong commitment to rigorously enforce the no-further-inquiry rule. *See id.* at 931-32; *see*

Professor Langbein argues that the no-further-inquiry rule should be abandoned in favor of a rebuttable presumption because the practical foundations for the no-further-inquiry rule, as it developed in courts of equity, no longer exist.<sup>185</sup> Historically, equity courts worried that an opportunistic trustee's self-dealing might easily be concealed.<sup>186</sup> At the time, interested parties were incompetent to give evidence, and no reasonable discovery was available to investigate a trustee's hidden motivations.<sup>187</sup> Moreover, Professor Langbein reports that equity court trials were conducted on a paper record where witnesses did not give live testimony and litigants did not enjoy the opportunity to confront and cross-examine their adversaries. Professor Langbein suggests that modern discovery rules and evidence rules render these concerns obsolete.<sup>188</sup>

ERISA plan participants and beneficiaries can only wish it were so. Because modern courts process ERISA benefit claims in a manner that recalls the failures of equity courts prior to their unification with courts of law and prior to the enactment of modern rules of civil procedure. Professor Langbein's exposition arguably supports the foundational need for the no-further-inquiry rule in the summary adjudicative system courts have devised for ERISA claims.

### *C. ERISA's Summary Adjudicative Process*

ERISA provides an express remedy, which can be pursued in either state or federal court, that allows a plan participant or beneficiary to recover benefits due under an ERISA plan.<sup>189</sup> The statute suggests an action governed by the rules of civil procedure; nowhere does ERISA expressly contemplate the abbreviated, appellate-type process that trial courts have designed to treat ERISA benefit claims so differently than any other lawsuit. Quite the contrary, ERISA's legislative history indicates that Congress considered a provision requiring parties to arbitrate benefit disputes, only to reject that option in favor of providing plan participants a range of remedies and

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*also* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928); *supra* notes 13-14.

185. Langbein, *supra* note 12, at 944-47.

186. *Id.*

187. *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*442-55; JOHN P. DAWSON, A HISTORY OF LAY JUDGES 154-59 (1960); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 353-69 (3d ed. 1944)).

188. *Id.* at 947.

189. *See* 29 U.S.C. § 1132(a)(1)(B) (2000).



guaranteed access to federal courts.<sup>190</sup> Congress also declined to establish an administrative process similar to social security.<sup>191</sup>

Despite this legislative history and the express remedy provided in ERISA section 502(a)(1)(B),<sup>192</sup> federal courts not only defer to plan administrator claim denials under the arbitrary and capricious review standard, but they have also invented a summary procedure to decide ERISA benefits claim.<sup>193</sup> While some commentators have questioned the legitimacy of this summary adjudicative process,<sup>194</sup> it continues to dominate employee benefit claims litigation.<sup>195</sup>

Courts do not typically try ERISA benefit claims in the traditional manner; rather, the procedure is perhaps best described as a “trial on the papers.”<sup>196</sup> First, the plan participant presents a claim to the plan administrator. Then, the administrator investigates the claim by gathering witness statements, medical, employment and other documents, including the plan documents, much like an insurance claims adjuster.<sup>197</sup> The conflicted administrator then determines whether or not to approve the claim based upon this unsworn “administrative record.”<sup>198</sup> If the administrator denies the claim, it notifies the plan participant of the claim denial and its reasons for rejecting the claim. Then, the administrator advises the participant of his or her internal appeal rights.<sup>199</sup>

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190. See H.R. 2, 93 Cong. § 691, at 566-68 (1974) (as passed by the Senate), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 3, at 3813-15; 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 3, at 4769.

191. See Bogan, *supra* note 8, at 691 n.279.

192. 29 U.S.C. § 1132(a)(1)(B).

193. See, e.g., Perry v. Simplicity, 900 F.2d 963 (6th Cir. 1990). *But see* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1050 (7th Cir. 1987) (expressing caution at the wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions).

194. See DeBofsky, *supra* note 9; Bogan, *supra* note 10.

195. The summary process is employed in ERISA actions arising from claims for benefits due under a plan that grants discretionary powers to the plan administrator. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

196. See *Crespo v. UNUM Life Ins. Co. of Am.*, 294 F. Supp. 2d 980, 991 (N.D. Ill. 2003) (noting that although many courts claim to decide ERISA claims on summary judgment, summary judgment is usually not appropriate due to the numerous factual issues that remain unresolved when the trial court conducts its non-evidentiary hearing to decide whether the plan administrator abused its discretion).

197. After *Firestone*, most plan documents include a clause which gives the plan administrator sole discretion to interpret plan provisions and to make eligibility determinations. See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 373, 383 n.2 (3d Cir. 2000).

198. See EMPLOYEE BENEFITS LAW 440-42 (Jane Kheel Stanley et al. eds., 2d ed. Supp. 2002).

199. See *id.* at 423-24. ERISA requires plans to include an internal appeals process. 29 U.S.C. § 1133 (2000).

On appeal, the plan participant can usually submit further documentation in support of the claim.<sup>200</sup> If the internal appeals panel affirms the claim denial, the plan administrator notifies the plan participant and provides the specific basis for the denial.<sup>201</sup> After exhausting internal appeals, the plan participant can sue to recover benefits due under ERISA section 502(a)(1)(B).<sup>202</sup>

The process then continues absent the hallmarks of a traditional civil lawsuit. Instead of conducting discovery and then presenting admissible evidence before the trial judge or jury, the parties submit the administrator's claim file to the trial court as the "administrative record."<sup>203</sup> When the plan administrator enjoys discretionary authority, the court examines this administrative record to determine whether the plan administrator abused its discretion in denying the claim.<sup>204</sup> Typically, the court prohibits evidence outside the administrative record;<sup>205</sup> the plan participant cannot testify or obtain a trial by jury,<sup>206</sup> and his or her lawyer cannot confront and cross-examine the plan administrator or other adverse witnesses.<sup>207</sup> The summary adjudicative process utilized in ERISA benefit claims evokes memories of the paper trials equity courts conducted years ago that generated the need for the no-further-inquiry rule. The modern, court-invented process governing ERISA benefit claims, boasting paper trials on limited, unsworn administrative

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200. See EMPLOYEE BENEFITS LAW, *supra* note 198, at 425-29.

201. See *id.* at 423-24.

202. 29 U.S.C. § 1132(a)(1)(B); see also EMPLOYEE BENEFITS LAW, *supra* note 198, at 432-34.

203. See EMPLOYEE BENEFITS LAW, *supra* note 198, at 440-42. Rules of evidence do not pertain to the plan administrator's gathering of the administrative record, and when this same administrative record is produced in court, no attempt is made to apply rules of evidence to the administrative record. See *id.* at 456. Consequently, the administrative record is comprised mostly of unsworn statements and documents generated without regard to foundational niceties.

204. See *id.* at 434-35.

205. See, e.g., *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805 (7th Cir. 2006); *Hall v. UNUM Life Ins. Co. of Am.*, 300 F.3d 1197, 1201 (10th Cir. 2002); *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 981-82 (7th Cir. 1999); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1460 (10th Cir. 1991) (citing cases); see also EMPLOYEE BENEFITS LAW, *supra* note 198, at 440-42.

206. See, e.g., *Wardle v. Cent. States, Se. & Sw. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980); see also EMPLOYEE BENEFITS LAW, *supra* note 198, at 405-06; *Bogan*, *supra* note 8, at 685-93.

207. See, e.g., *Perlman*, 195 F.3d at 981-82 ("It follows from the conclusion that review of UNUM's decision is deferential that the district court erred in permitting discovery into UNUM's decision-making. There should not have been any inquiry into the thought processes of UNUM's staff, the training of those who considered Perlman's claim, and in general who said what to whom within UNUM . . . Deferential review of an administrative decision means review on the administrative record."); *Woolsey*, 934 F.2d at 1455.

records, produces the same need for application of the no-further-inquiry rule today as existed in the relatively ancient courts of equity that developed the doctrine.

*D. In 1990, the Eleventh Circuit Alluded to the No-Further-Inquiry Rule*

ERISA incorporates the trust law duty of loyalty by requiring plan fiduciaries to administer ERISA plans solely for the benefit of plan participants and their beneficiaries.<sup>208</sup> Despite *Firestone* and despite Congress's pronouncement that trust law governs ERISA plan fiduciaries, no circuit court of appeals has expressly applied the no-further-inquiry rule to an ERISA benefits case. Immediately following *Firestone*, however, the U.S. Court of Appeals for the Eleventh Circuit flirted with the no-further-inquiry rule in *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*<sup>209</sup> Analysis of the *Brown* opinion illustrates why courts should indeed apply the no-further-inquiry rule in ERISA benefit claims.

In *Brown*, the Eleventh Circuit recited the substance of the no-further-inquiry rule in support of its application of a burden-shifting approach.<sup>210</sup> However, the *Brown* court applied a rebuttable, rather than an irrebuttable, presumption that self interest motivated the conflicted trustee.<sup>211</sup> Further, the *Brown* court's leniency toward conflicted plan administrators resulted from the

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208. 29 U.S.C. § 1104(a)(1).

209. 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991). As previously discussed, in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 147 (3d Cir. 1987), *aff'd in part & rev'd in part*, 489 U.S. 101 (1989), the Third Circuit appears to have enforced the no-further-inquiry rule, *sub silentio*. See *supra* text accompanying notes 36-47.

210. In the Eleventh Circuit, if there is a conflict, the burden shifts to the fiduciary to demonstrate that the denial was not tainted by self-interest. See *Brown*, 898 F.2d at 1566-67. If this burden is not met, the court will reverse a decision that it would find wrong under a de novo standard of review. See *id.* at 1560-61, 1567 n.12. The Eleventh Circuit burden-shifting formula applies, however, only if the court disagrees with the administrator's decision and interpretation of the plan; if the court deems the decision to be legally correct, the inquiry ends. See *HCA Health Serv. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993-94 & n.23 (11th Cir. 2001).

211. *Brown*, 898 F.2d at 1565; see also *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995) ("Under the common law of trusts, any action taken by a trustee in violation of a fiduciary obligation is presumptively void. . . . Where the affected beneficiary has come forward with material evidence of a violation of the administrator's fiduciary obligation, we should not defer to the administrator's presumptively void decision. In that circumstance, the plan bears the burden of producing evidence to show that the conflict of interest did not affect the decision to deny benefits. If the plan cannot carry that burden, we will review the decision *de novo*, without deference to the administrator's tainted exercise of discretion." (citation omitted)); see also *Bruch*, 828 F.2d at 147 (arguably applying the no-further-inquiry rule as a matter of common sense, without expressly identifying the rule by its popular name).

court's misunderstanding of the contract-based rights that motivate employee benefits.<sup>212</sup>

*Brown* involved a health care benefits claim that the dual role plan insurer/administrator denied based upon its conclusion that Mr. Brown's hospital admission, for which he did not obtain pre-admission approval, did not qualify as an emergency, and therefore did not escape the pre-certification requirements of the plan.<sup>213</sup> The insurer had discretionary authority, causing the arbitrary and capricious review standard to apply.<sup>214</sup> Nevertheless, this standard became subject to modification due to the insurer/plan administrator's inherent financial conflict of interest.<sup>215</sup>

As the *Brown* court struggled to "develop a coherent method for integrating factors such as self-interest" into the review standard,<sup>216</sup> it recited the no-further-inquiry rule as the historical precedent for folding conflicts of interests into the standard of review analysis:

"[T]he beneficiary need only show that the fiduciary allowed himself to be placed in a position where his personal interest *might* conflict with the interest of the beneficiary. It is unnecessary to show that the fiduciary succumbed to this temptation, that he acted in bad faith, that he gained an advantage, fair or unfair, that the beneficiary was harmed. Indeed, the law presumes that the fiduciary acted disloyally, and inquiry into such matters is foreclosed."<sup>217</sup>

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212. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050-51 (7th Cir. 1987); see also *Varity Corp. v. Howe*, 516 U.S. 489, 521 n.2 (1996) (Thomas, J., dissenting) ("Section 502(a)(1)(B) deals exclusively with contractual rights under the plan."); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985) (claims under § 502(a)(1)(B) seek contractually authorized benefits).

213. *Brown*, 898 F.2d at 1558.

214. *Id.* at 1559.

215. *Id.* at 1561. The administrative record apparently established that Blue Cross & Blue Shield both funded the plan and administered claims, which the Eleventh Circuit labeled as producing an inherent conflict of interest. *Id.* at 1562. The court also, in contrast, referenced other cases where an insurer administered claims, but did not actually fund approved benefits. In those cases the Eleventh Circuit imposed the highest level of deference because it found no conflict of interest. *Id.* at 1561-63, 1563 n.5 (citing *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137 (11th Cir. 1989); *Hoover v. Blue Cross & Blue Shield of Ala.*, 855 F.2d 1538 (11th Cir. 1988)).

216. *Brown*, 898 F.2d at 1561.

217. *Id.* at 1565 (quoting *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 571-72 (5th Cir. 1966)) (emphasis in original).

Rather than recognizing that “inquiry into such matters is foreclosed,”<sup>218</sup> however, the *Brown* court held that when a plan beneficiary establishes the plan administrator’s “substantial” conflict of interest, the burden shifts to the fiduciary to prove that its interpretation of plan provisions “was not tainted by self-interest.”<sup>219</sup> If the *Brown* court had applied the irrebuttable presumption of taint pursuant to the no-further-inquiry rule, the plan administrator would not have been offered the opportunity to explain away its presumed bias. Instead, de novo review would have applied, requiring the parties and the court to focus on the substantive merits of the claim.

*Brown*’s failure to apply the irrebuttable presumption appears to have arisen from the court’s confusion of an ERISA plan with a donative trust.<sup>220</sup> The *Brown* court declared that “a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries *unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries.*”<sup>221</sup>

The *Brown* court’s willingness to discriminate against an individual claimant for the perceived good of other plan participants fails to recognize a worker’s underlying contract right to receive promised benefits.<sup>222</sup> The *Brown* court held that an administrator owes a duty to protect an ERISA plan trust from depletion of its assets.<sup>223</sup> Additionally, the court seemed concerned with the cost of paying claims. Because employers voluntarily sponsor employee benefit plans, the *Brown* court worried that if insurance premiums rose significantly due to payment of claims, the employer might discontinue sponsoring benefit plans.<sup>224</sup>

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218. *Id.*

219. *Id.* at 1566-67.

220. *See supra* note 8 and accompanying text.

221. *Brown*, 898 F.2d at 1566-67 (emphasis added). The *Brown* court found that ERISA plan administrators “are obligated to act not only in the best interests of beneficiaries, but with due regard for the preservation of trust assets.” *Id.* at 1567-68 (quoting *DeNobel v. Vitro Corp.*, 885 F.2d 1180, 1191 (4th Cir. 1989)).

222. *See Varsity Corp. v. Howe*, 516 U.S. 489, 521 n.2 (1996) (Thomas, J., dissenting); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

223. *See Brown*, 828 F.2d at 1567-68; *see also Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1460 (10th Cir. 1991) (seemingly approving plan trustee’s “balancing of interests between [a] present claimant[] . . . and future claimants.” (quoting *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988) (alterations in original))).

224. *See Brown*, 898 F.2d at 1568. ERISA’s vesting rules do not apply to welfare plans; consequently, an employer can terminate welfare plans at will. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). However, to the extent a plan participant has become eligible for benefits under an existing plan, the right to receive such benefits vests pursuant to

In a donative trust, a trustee is often required to distribute finite assets among multiple gift beneficiaries while taking into account the competing demands on the trust, because a distribution to one beneficiary necessarily reduces the available funds for distribution to the remaining beneficiaries. This concern is generally absent in the commercial context of an ERISA plan. Even if a plan is funded through a trust, the trust is merely a funding device that secures contractually promised benefits supported by mutual consideration. The ERISA trust, when present, helps guarantee that plan sponsors will live up to their contractual obligations to provide defined benefits, by assuring that some money will be available to pay such claims. However, a plan's legal obligation to pay contract benefits to eligible plan beneficiaries is not limited by insufficient funding.<sup>225</sup> In contrast to a donative trust that is capped by the amount the settlor contributed to establish the trust *res*, there is no limit or cap on the amount of benefits a plan sponsor may have to pay through a defined benefit ERISA plan.<sup>226</sup> Consequently, one plan beneficiary's legal rights to receive benefits are unaffected by the legal rights other plan beneficiaries may also have to receive benefits under the same plan.

The *Brown* court did not recognize that employers must pay those benefits out of their general treasury if an ERISA plan is not adequately funded. As a result, the court mistakenly treated the plan as a donative trust, which operates under the constraints of a limited trust *res*. The *Brown* opinion enigmatically accepted this analysis despite the fact that the plan in question was fully insured.<sup>227</sup> The court accepted that an insurer acts in good faith when denial

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the plan contract and cannot be terminated by the employer. See *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir. 2005). While the possibility that a plan sponsor may decide to terminate a welfare plan in the future due to exorbitant costs is a real concern for all covered workers, plan participants with vested contract rights to recover benefits should not have their claims threatened by a court's concern for workers who do not have current vested rights. If an employer decides to limit benefits in the future, workers would know that prior to becoming eligible for benefits and could seek other employment with better fringe benefits if they are unhappy with the employer's actions in reducing its benefits package — that is not an option for the plan participant with a ripened claim.

225. See S. 4, 93d Cong., reprinted in 1 LEGISLATIVE HISTORY, *supra* note 3, at 91 (introductory remarks of Sen. Williams) (“Because vesting of rights to a worker without adequate funding is an empty promise, our bill will require funding of all pension benefit liabilities over a 30-year period . . .”).

226. See *supra* note 8 and accompanying text.

227. *Brown*, 898 F.2d at 1558, 1567. The *Brown* opinion did draw a distinction “between plans that are truly trusts and plans that are based solely on contracts or policies for insurance.” *Id.* at 1567 (“Decisions on behalf of a plan in the form of a trust lend themselves less readily to the accusation of conflicting interests and are more easily justified.”). When a plan is fully insured, claims decisions “inherently implicate the hobgoblin of self-interest.” *Id.* at 1568. Here the *Brown* court then made seemingly contradictory statements. The court first said that

is motivated by a fear of rising costs.<sup>228</sup> This practice mocks the conflict of interest analysis, and does not justify a court's failure to apply the irrebuttable presumption of taint required under the no-further-inquiry rule.

*E. De Novo Review Under the No-Further-Inquiry Rule*

As previously discussed, Professor Langbein would allow a conflicted fiduciary to rebut the presumption of taint arising from the fact of a modern fiduciary's self-dealing conflict of interest.<sup>229</sup> In support of his suggested departure from the no-further-inquiry rule, Professor Langbein relies, at least in part, upon modern corporation law's abandonment of the no-further-inquiry rule when dealing with conflicted corporate directors in favor of a fairness standard.<sup>230</sup> While this article suggests that the no-further-inquiry rule should apply in ERISA cases, the result urged here is that courts apply de novo review in ERISA claims.<sup>231</sup> This approach produces the same result as applied under the fairness standard, which Professor Langbein endorses.<sup>232</sup>

When a corporate fiduciary suffers a conflict of interest, the fairness standard operates as an exception to court deference under the business judgment rule.<sup>233</sup> Under the business judgment rule, if a non-conflicted corporate director engages in a transaction:

with due care, good faith, and in the honest belief that they are acting in the best interest of the stockholders . . . , the Court gives

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“[t]he presumption that the fiduciary is acting for the future stability of the fund cannot be entertained” in the fully-insured plan circumstance. *Id.* However, the court immediately followed that sentiment with the statement: “Of course, the facts may bear out an insurance company's assertion that its interpretation of its policy is calculated to maximize the benefits available to plan participants and beneficiaries at a cost that the plan sponsor can afford (or will pay).” *Id.* Ultimately, the *Brown* court remanded the action to the district court because the record did not contain evidence that would “demonstrat[e] that Blue Cross adopted its plan interpretations exclusively for the benefit of the plan participants and beneficiaries.” *Id.* at 1569.

228. Presumably, the plan insurer's actuaries considered the risk that benefits would have to be paid when the insurer quoted its premium cost to the employer. *But see* *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004) (per curiam) (suggesting that an insurance company's costs should somehow figure into the court's consideration into whether a claim denial should be upheld), *cert. denied*, 125 S. Ct. 1972 (2005).

229. Langbein, *supra* note 12, at 932-33.

230. *See id.* at 933, 958-62; *see also* *Pepper v. Litton*, 308 U.S. 295, 306-08 (1939) (recognizing the fairness rule).

231. When a plan is fully insured, state insurance law presumptions and burdens of proof should also impact ERISA benefits claims. *See Fought*, 379 F.3d at 1007 & n.4.

232. Langbein, *supra* note 12, at 933.

233. *See generally* DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, 1 THE BUSINESS JUDGMENT RULE ch. 1 (5th ed. 1998).

great deference to the substance of the director[']s decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute [its] views for those of the board if the latter's decision can be attributed to any rational business purpose.<sup>234</sup>

However, such deference is inapposite where a corporate fiduciary suffers a conflict of interest.<sup>235</sup> A corporate fiduciary's self-dealing conflict of interest prompts application of the fairness standard. Under this fairness standard, courts do not defer to conflicted corporate fiduciary decisions.<sup>236</sup> Instead, courts impose an "exacting" burden on conflicted corporate fiduciaries, requiring the fiduciary "to establish that the transaction attacked was on terms entirely fair to the corporation or . . . to the corporation's stockholders."<sup>237</sup>

Though Professor Langbein did not contrast how courts review ERISA claims with the fairness standard, because his recent article was not focused on ERISA, it is of particular significance here to make that comparison.<sup>238</sup> Application of the fairness standard in corporation law voids the deference courts normally apply to corporate fiduciary actions and substitutes a de novo evaluation by the court to determine, after hearing evidence concerning the overall transaction, whether the challenged action was entirely fair.<sup>239</sup> Similarly, courts deciding ERISA benefits claims involving conflicted plan administrators should hear evidence under a de novo standard of review.

The varying and often complicated processes that the circuits employ in ERISA claims demonstrates the urgent need to find a uniform, simple, and just review process. The lower courts are constrained, however, by the Supreme Court's instruction in *Firestone* to apply a trust law-based standard of review

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234. *Id.* at 21 (first and third alterations in original) (citations and internal quotation marks omitted).

235. *Id.* at 29, 41-74.

236. *See id.* at 30.

237. *Id.* (internal quotations omitted).

238. Professor Langbein suggested that courts modified how trust law controlled corporate fiduciaries because of the "mercenary" nature of for-profit corporations. *See* Langbein, *supra* note 12, at 960-61; *see also* 1 BLOCK ET AL., *supra* note 233, at 9-11. Contrasting the review applied in trust law to modern corporation law, he identified three principles that corporation law emphasizes in dealing with conflicted corporate fiduciaries: "disclosure, delegation, and fairness." Langbein, *supra* note 12, at 959. Corporate directors must disclose any personal conflicts of interest that impact a corporate transaction. *Id.* Additionally, a conflicted director must also delegate authority to non-conflicted directors to control the corporation transaction by abstaining from voting on a proposed corporate action potentially impacted by the director's personal conflict. *See id.* at 960-62. Further, the neutral fiduciaries must examine the transaction under a standard that ensures fairness to the corporation and its stockholders. *See id.* at 959.

239. *See* 1 BLOCK ET AL., *supra* note 233, at 28-29.



in ERISA claims litigation. Application of the no-further-inquiry rule allows courts to escape the frustration of trying to apply intermediate levels of deferential review by requiring simple de novo review. Such a result would be fair to all parties and comports with *Firestone*. Because plan participants and plan administrators should each enjoy the right to a de novo trial on the merits, this article urges courts to apply the trust law-based no-further-inquiry rule in conflict-laden ERISA benefit claims in order to guarantee real de novo review in employee benefits claim litigation.

#### *IV. Conclusion*

In *Firestone*, the Supreme Court instructed trial courts to apply a trust law-based standard of review in claims for benefits due under an ERISA plan. Following *Firestone*, lower courts have routinely applied some aspects of trust law in ERISA claims. Regrettably, they have not adhered to trust law's no-further-inquiry rule in the analysis of what standard of review to apply in ERISA benefits claims litigation tarnished by a plan administrator's conflict of interest. The abbreviated adjudicative process, which courts employ in ERISA benefit cases, mirrors the evidentiary problems that originally motivated development of the no-further-inquiry rule. This same trust law rule should be enforced by courts today to rid the court system of the perplexing search for a modified deferential review standard.