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ARTICLES

THE PRACTICAL ENTRY AND UTILITY OF A LEGAL-MANAGERIAL FRAMEWORK WITHOUT THE ECONOMIC ANALYSIS OF LAW

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The author gives special thanks to Dr. Robert E. Schellenberger, Ph.D., Operations Research, Professor and Former Chairman, Department of Decision Sciences, School of Business, East Carolina University, Greenville, North Carolina 27834. Dr. Schellenberger gave many thought-provoking suggestions on the utility of legal-managerial framework to use law and public policy in the process of business decision-making. He also commented on how a legal-managerial framework would support the use of law and its analysis in management methodology and thinking, as well as speaking about the need for a managerial analysis with law to be valid in theory, practice and practice. A version of this article was presented at the Annual Meeting of the Academy of Legal Studies in Business in Baltimore, Maryland in August 2000. The author gives a special thanks to his colleagues at this meeting for their suggestions and comments.

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I. INTRODUCTION

Practicality controls and guides the entry and utilization of law and public policy by lawyers and managers in business decision-making that must use both legal analysis and information provided through legal advice. This article explores how practicality that is the genesis of a theory of law and business would affect the managerial entry and utility of law and public policy in business decision-making. The process of business decision-making is management methodology that acts as an analytical and informational portal for legal advice, thus affecting the managerial uses of law and public policy in decision-making in order to create and manage practices, actions and plans. This article leaves theoretical and pedagogical frameworks for another time, and thus limits its observations of a practical framework to the combined, practical effects of legal methodology and information and management methodology and thinking which operates simultaneously in the process of business decision-making.

The practicality of law and business must provide an effective entry and utilization of legal analysis and information by practitioners of law and business directly into business methodology or decision-making. This practical framework that integrates legal analysis and business methodology on an analytic level is a legal-managerial framework. The legal-managerial framework delivers and uses legal-managerial ("L-M") analysis and legal information in the process of business decision-making. The framework relies on pre-decisional evaluation of laws and policies, utilizing business theories and principles to ascertain the effects of these laws and policies on business methodology and thinking. It includes an evaluation and stepwise entry and utilization of law and public policy in business decision-making.

The legal-managerial framework is difficult to find, explain and understand. It exists in the uncharted space between law and business. But, the coexistence of law and business in time, matter and logic, without an economic analysis of law, accounts for its existence. This coexistence creates the need to develop a conceptual framework to bring logic and rationality to this uncharted space. On one hand, the absence of a legal-managerial framework that enters law and public policy in business decision-making results in mostly imprecise deliveries and inexact uses of L-M analysis and legal information in the process of business decision-making by managers. Presently, the use of a legal-managerial framework to deliver and use L-M analysis and

legal information is not in the practice of law and business or their teaching. On the other hand, the absence of a legal-managerial framework to evaluate the impact of law and public policy on business methodology and thinking results in mostly incomplete L-M analysis and information before and after the entry and utilization of a particular law and public policy in the process of business decision-making. Presently, the pre-decisional utility of business principles and theories to evaluate the impact of law and public policy on business methodology and thinking is not within any study of law and management. Analytically, these absences of a pre-decisional evaluation and decisional preciseness and exactness in the entry and utilization of L-M analysis and legal information in business decision-making - an unguarded analytic portal - greatly justify consideration of a legal-managerial framework in the practice, pedagogy and theory of law and business disciplines.

This article examines the practicality underlying the entry and utilization of a L-M analysis and legal information into the process of business decision-making by lawyers and managers who generally do not understand or use each others' methodology and thinking, such as business methods and legal analysis, in their professional works and practices. The article uses the Employee Retirement Income Security Act of 1974[1] (ERISA) to demonstrate the utility, necessity and validity of a legal-managerial framework for the delivery and use of L-M analysis and legal information in business decision-making, as well as the use of business theories and principles to evaluate the impact of law and public policy on business methodology and thinking. Part I, the Introduction, strongly suggests the need for greater rationality in the use of lawyers' advice by business managers in the process of business decision-making. It recognizes that increasing rationality requires

1. Pub. L. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 and 26 U.S.C. §§ 401-415 (1994 & Supp. IV 1998)). The Employee Retirement Income Security Act of 1974 (hereinafter ERISA), 29 U.S.C. §§ 1001-1461 (1994 & Supp. IV 1998)), affects both subject matter and methodology of business disciplines and functions. ERISA analysis and information is legal analysis and legal information of regulation, common law and public policy. *See infra* notes 24-78. First, ERISA analysis includes legal methodology that affects business methodology that is the process of business decision-making. This process consists of several decisional steps, and each step has some unique analytical and informational needs. *See infra* notes 4 and 7. Second, ERISA includes substantive law or legal information, that affects the use of analysis and the operation of steps in the process of decision-making. *See infra* notes 78-282. ERISA greatly affects other analysis and information, such as finance and accounting, entering each step of this process and also effects the outcome of each step.

entry and exploration into the uncharted space laying directly between boundaries of legal methodology and business methodology, including their thinking. Into this space, it enters ERISA and uses it to chart an integrated framework of those methodologies and thinking. Part II discusses the purpose, nature and scope of the legal-managerial framework for integrating ERISA and other managerial analyses and information in the process of decision-making. Part III discusses how competing public interests, market interests and organizational interests affect plan administration and plan management by causing companies to confront ERISA analysis and information in business decision-making. Parts I, II and III explain the analytical and informational nature of ERISA analysis and information under a managerial analysis of law. These Parts define the nature and role of L-M analysis and legal information in process of business decision-making, and recognize business decision-making as the analytical and informational portal for business functions and other discipline specific approaches.

ERISA analysis and information are not self-executing in the process of business decision-making and demonstrate the effects of L-M analysis and legal information on general decision-making to further business objectives and goals for organizational effectiveness. Part IV recognizes that common law thinking and judicial review, which governs ERISA analysis and information, affect the management and administration of employee benefits plans and thus affect how lawyers and managers use legal and management methodologies, respectively, in making employee benefits plan decisions. Part V explains how ERISA analysis and information create uncertainty in exercises of corporate authority by requiring decision-making procedures to implement particular plan decisions. Part VI explains how ERISA analysis and information increase the decision risks of particular plan decisions by requiring their disclosure and thus making their consequences prematurely public. Parts IV, V and VI illustrate how ERISA analysis and information affect management methodology and thinking by requiring closer scrutiny of plan decisions, imposing decision-making procedures on plans, and requiring the disclosure of information. Part VII, the Conclusion, recognizes that ERISA analysis and information definitely affect managerial discretion by imposing limits on management methodology and thinking, such as business decision-making and principles. It finds a pre-decisional (or process) evaluation and the entry and utility of legal analysis and information in the process of decision-making requires a legal-managerial framework in theory, practice and pedagogy. At this time, the article addresses only the practicality of entering and utilizing a L-M analysis with legal

information in the process of business decision-making. This practicality includes unbundling legal analysis so that its analytical methodology forms a L-M analysis on entry into the process of business decision-making.

A. *Finding Compatibility in the Practicality of Law and Business*

In fact, if the delivery and use of legal analysis and information in the judicial decision-making process takes place in such unstructured methodology, legal thinkers will find many judicial decisions analytically unsound on findings of law and facts and the formulation of a logical rationale. Moreover, one discipline-specific method that includes analysis and information may not fit the analytical and informational needs of every step of the decision-making process or other methodologies. The present framework that delivers and uses legal analysis and information can be described as Asking-the-Lawyer (ATL) for legal advice. Lawyers do not make business decisions, nor do they use management methodologies, such as the process of business decision-making. Also, the present study of the effects of law on management thinking and methodologies that also use the findings of economics, statistics and other approaches is, at best, a piecemeal scholarship. Using legal advice through a legal-managerial framework in business decision-making includes L-M analysis and legal information that managers must inevitably evaluate and use in the process of business decision-making. The legal-managerial framework explains how managers use legal analysis and information of legal advice so that the managerial process and substance of legal analysis and information match the analytical and informational needs of each step of the process of business decision-making of managers. This managerial process is a legal-managerial framework, and the substance is legal information. Managers must use both process and substance in business decision-making.

Lawyers provide legal advice to managers, who use it in making business decisions and plans for their organizations. Yet neither law nor management offers a school or field of thinking to study how managers enter and use legal analysis in management methodology and thinking. Law begins its entry into the process of business decision-making as legal advice. But if managers must use legal advice, it then enters the process of business decision-making in the form of L-M analysis and legal information. Lawyers and managers do not use the same analytical and informational methodologies. Law is not self-executing; someone must use it. From a managerial perspective, both legal analysis and information must be consistent with the analytical

and informational needs of management methodology to produce a business decision. Combining legal-analytical methodology and business decision-making must produce lawful and ethical decisions that can be justified by the decision situation and further company objectives.

Lawyers use legal analysis, reasoning and knowledge in providing legal advice to managers and organizations. Like other students of jurisprudence, lawyers ascertain legal advice using legal methodology that possesses a coherent structure and substance through analyzing facts and law, formulating issues and fashioning rationales. Moreover, legal-analytic methodology is too sophisticated for the novice manager or executive. But mere legal advice lacks a coherent framework or structure to integrate or mesh with the nature of managerial analysis and information entering each step of the process of business decision-making. Managers need an integrated analysis to guide the precise delivery and exact use of legal information (statutes and other legal rules) and analyses (issue, situational and rule analyses) in the process of decision-making. Managers would be better served by a legal-managerial (L-M) analysis to use legal advice that, now, includes analysis that is congruent with and attaches directly to information entering the business decision-making. L-M analysis and legal information are inherent parts of a broad legal-managerial framework that uses business theories and principles to evaluate the impact of law and public policy on business methodology and thinking and that enters law and policy into the process of business decision-making. I refer to the use of the legal-managerial framework as a managerial analysis with law.

A managerial analysis with law includes an integrated analysis that attaches to the delivery of legal information in order to affect its entry and use in the process of decision-making. L-M analysis integrates management methodology and elementary legal methodology (analysis) to assess continuously the analytical and informational needs of each step of the decision-making process. L-M analysis ascertains changes caused by new circumstances and influences on the decision situation, selection of the decision or other steps of the process of decision-making process. New circumstances in the decision situation or another step may require new legal advice or render past legal advice ineffective to effect the desired results of a decision. L-M analysis permits managers to seek legal advice more timely, precisely and accurately throughout the process of decision-making. The effective use of legal advice depends on the delivery and use of legal information and legal-managerial (L-M) analysis in each step of the process

of business decision-making. On one hand, a part of L-M analysis is legal methodology that routinely analyzes factual patterns, determines the fit between a decision and its ends, and ascertains the implications of decisions. On the other hand, a part of L-M analysis is management methodology that routinely requires the definition of situations, an examination of alternatives, and the determination of decisional consequences. The integration of management and elementary legal methodologies forms a legal-analytic methodology. This integrated methodology precisely delivers and accurately uses L-M analysis and legal information in the business decision-making. Integrated methodology uses legal-analytical methods to provide more particular information and thinking in each decisional step. These methods complement each step of management methodology by forming and providing unique L-M analysis to accompany legal information, which in turn produces more specific findings and thinking for a decisional step. These methods are aids in analyzing situations and issues, coordinating the decision-objective fit and selecting and implementing decisions in the decision-making process. Making business decisions is management practice. Yet the entry of legal-analytical methods and the formation of L-M analysis to accompany legal information in the process of decision-making are not the first level in legal-managerial framework.

B. Weighing the Law and Public Policy Before the Need for a Decision

An earlier level in the legal-managerial framework is the evaluation of law and public policy using business concepts rather than factual circumstances. Analytically, such an evaluation must precede the entry of legal-analytical methods and formation of L-M analysis accompanying legal information into the process of business decision-making. Such a pre-decisional evaluation studies the managerial effects of law and public policy on managerial discretion, before managers ever consider using L-M analysis and legal information in the process of business decision-making. Examining law and public policy only on the occurrence of specific circumstances is not an examination using management concepts, which should explain and guide managerial actions in business situations and environments. Law and public policy can impose unreasonable restraints on managerial discretion and thus restrain the use of L-M analysis and information to effect steps in the process of business decision-making. Such analysis and information can aid in examining the decision situation and evaluating alternatives. Such an evaluation analyzes and ascertains those restraints of a specific rule of law and then deduces or infers the range of manage-

rial discretion or judge (practicality) that should be available under this particular law through the process of decision-making.

The use of business theories and principles to evaluate a particular law and policy produces L-M analysis and legal information on the specific impact of a particular law or policy on management methodology and thinking. This pre-decisional evaluation must precede the delivery and use of L-M analysis and legal information in the process of business decision-making. L-M analysis attaches to the delivery of legal information that should have been evaluated by business theories before a need arose for its use in the process of decision-making. Business concepts include established business principles that business practitioners and scholars declare or attest are valid in business practices. These concepts include employee retention, organizational flexibility and organizational effectiveness. There must be logical or rational concepts underpinning managerial actions, other than a factual or situational analysis that could be charged with emotions and feelings, such as greed. In a managerial analysis with law, the application of these concepts would explain, in part, how any particular statutory provision, administrative regulation or public policy would limit or support a particular decision situation. To illustrate, organizational flexibility is the ability of business organizations to respond to market and organizational demands. Organizational flexibility might evaluate an employment or labor statute that limits the use of contingent work relationships in order to ascertain how provisions of this particular statute might affect the use of contingent workers by business organizations. Such an evaluation enhances L-M analysis and produces legal information. Later this analysis and information would be used in the process of business decision-making to make decisions regarding contingent work relationships. L-M analysis and legal information are inseparable in a legal-managerial framework to enter and use law and public policy as legal information in the process of business decision-making. The provision of L-M analysis and legal information to managers gives them greater control over the use of law and public policy in the business decision-making process.

C. *Utilizing Law at Any Place and Time in the Decision-Making Process*

The entry of legal analysis and information in the process of business decision-making may come too early, too late or not at all when legal and management methodologies do not provide for the precise delivery and exact use of the appropriate L-M analysis and legal information. Each step of the business decision-making process is manage-

ment methodology in the determination of a specific means, possessing unique analytical and informational needs. Each step and its needs require specific L-M analysis and information to produce particular findings and thinking in selecting a means to further an objective. Any one method of L-M analysis and legal information cannot be used at any step in the business decision-making process. This process demands specific L-M analysis and legal information, which produces particular findings and thinking, to fit the unique analytical and informational needs of a particular step.

Legal information is not self-executing in the business decision-making process. When legal information enters the process of business decision-making, but is not attached to or accompanied by L-M analysis, this unaccompanied information greatly reduces the managerial utility of legal-analytic methodology throughout the process of decision-making. Legal-analytic methodology within the legal-managerial framework provides structure and substance to legal-analytic methods that form specific L-M analysis that attaches to legal information to produce particular findings and thinking, such as assumptions, conclusions and inferences, within management methodology. Legal-analytical methods enter a step in the decision-making process to form specific L-M analysis that makes legal information more usable by managers. These methods are legal-analytic methodology for the formation of L-M analysis to accompany the entry (or delivery and use) of legal information in the steps of the business decision-making process.

Legal advice includes legal analysis and information that managers rely on to make business decisions, but at any step or moment in the decision-making process, the use of only legal information or "yesterday's advice" may not be relevant under changes in business situations and environments. There are often managerial needs for new and timely advice. Situational and environmental changes are only apparent through knowledge of how law and public policy would be implicated by new circumstances and information occurring in each step of the decision-making process. A legal-managerial framework for the entry of L-M analysis and legal information in business decision-making should be valid under legal and management methodologies and thinking, if it provides specific L-M analysis to accompany legal information before the existence of any decision situation and continues to provide more specific L-M analysis to accompany legal information throughout the process of decision-making.

II. INTEGRATING METHODOLOGIES IN BUSINESS DECISION-MAKING

Legal-managerial analysis must always accompany the legal and policy information that managers enter into the process of business decision-making. In management methodology, L-M analysis and legal information also produce more particularized findings and thinking in each step of the decision-making process. Under Asking-the-Lawyer (ATL), there have been many instances where managers have made decisions that have not given enough weight or consideration to the appropriate law or public policy in one or more steps of the decision-making process. Consequently, a genuine need exists for a legal-managerial framework that permits the precise delivery and exact use of law and public policy in the process of business decision-making, while also allowing a timely theoretical evaluation of the impact of law and public policy on business methodology and thinking of business disciplines.

The process of business decision-making is management methodology that uses finance, accounting, statistics, economics and other analytical approaches in the process of managerial analysis to deliver both discipline-specific analysis and information, such as L-M analysis and legal information.[2] A legal-managerial framework for the introduction and use of law in management methodology and the evaluation of the impact of law on management thinking is conspicuously absent in theory, practice and pedagogy. A legal-managerial framework includes legal and management methodologies that together deliver L-M analysis and legal and policy information to produce specific findings and thinking throughout the decision-making process.

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2. Legal analysis and information that jointly produce findings and thinking may affect the analysis and subject matter of one or more steps in the process of business decision-making. *See infra* Part I.B and accompanying notes. ERISA analysis and information show how law and public policy, which consist of analysis and information, affect the subject matter (information) and methodology (decisional steps) of business decision-making.

See Robert E. Schellenberger, MANAGERIAL ANALYSIS 7 (1969). Dr. Schellenberger states that "[m]anagerial analysis is an analytical process which aids or assists the manager to make decisions." *Id.* at 7. "It may be said that managerial analysis is the systematic investigation, compilation, manipulation, and presentation of information to a decision-maker in order to aid the decision-making process." *Id.* at 8.

Managerial analysis with law includes both a legal-managerial ("L-M") analysis and legal and public policy information. L-M analysis is part legal analysis that consists of legal-analytical methodology, *infra* note 3, to deliver and use law and public policy in the process of business decision-making. L-M analysis accompanies the entry and utilization of legal information into the decision-making process and aids in finding, analyzing and applying legal and policy information such as rules, statutes and regulations.

Legal-analytic methodology illustrates an analysis that operates in a methodological process to deliver and use information and works with this information to produce more specific findings and thinking. Appendix A illustrates that the legal-managerial framework relies on the analytical compatibility of legal-analytic methodology and managerial methodology to enter precisely and timely L-M analysis that often accompanies legal information into the decision-making process. Legal-analytic methodology on entry into business decision-making forms L-M analysis, which accompanies legal information, to produce specific findings and thinking, such as assumptions, conclusions and inferences.[3]

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3. The use of managerial analysis in legal writing and scholarship is not novel. Other commentators have recognized the need to conduct a managerial analysis in preventing antitrust violations in business decision-making and planning. Shumandine and others state that:

> Many newspapers and broadcasters are not familiar with the scope of the antitrust laws and the possible business consequences of an antitrust violation. However, as the subsequent sections of this outline will reveal, there are antitrust considerations in virtually every major business decision which a newspaper or broadcaster makes. Thus, a working knowledge of the antitrust laws is essential to an informed managerial analysis of business alternatives. It is the possible consequences of an antitrust violation which demands that newspapers and broadcasters pay heed to antitrust considerations in their business planning. A technical antitrust violation, even a good faith violation, can have disastrous financial consequences for a small newspaper or broadcaster and often can stagger even the largest media conglomerate. Full knowledge of the extreme nature and consequences of an antitrust violation often sensitizes even the most hardened competitor to the importance of complying with the antitrust laws.

Conrad M. Shumadine, *et al.*, *Antitrust and the Media*, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 58-59 (2000). Another commentator finds that a managerial analysis exists in determining the justifications for corporate decisions that are made by the board of directors and thus states that:

> Given this conflict of interest, the burden is on the managers to show "reasonable grounds to believe that a danger to corporate policy and effectiveness existed." Cheff v. Mathes, 199 A.2d 548, 555 (Del. Ch. 1964). The directors met this burden by showing that there was a reasonable threat to the continued existence of the corporation, at least a threat to its existing form. *Id.* at 556. In the end, the only way the managers would be liable for the repurchase of shares at a premium would be if the board "acted solely or primarily because of the desire to perpetuate themselves in office."' *Id.* at 554. Since retention of control was not the sole or primary cause for the payment of greenmail, the directors were protected by the business judgment rule. The lower level of scrutiny of the managerial analysis and judgment was easily satisfied. *Id.* at 555-56.

Marcia L. Walters, Note, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer Be Held Liable?*, 39 Case Western Res. L. Rev. 1271, 1304 (1988/1989). *A*

A. *The Scope of an Integration of Legal and Management Methodologies*

Legal-analytic methodology matches both legal analysis and information to the steps of the process of decision-making[4] of management

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managerial analysis with law offers a legal-managerial framework to evaluate and then enter (actually deliver and use) law and public policy, through a legal-managerial analysis accompanying legal and policy information in the process of business decision-making and planning.

The link between law and other disciplines requires the use of legal analytic methodology. This link is *legal theory*. *See* Richard A. Posner, LAW AND LITERATURE: A MISUNDERSTOOD RELATION, x & 9 (1988). Judge Posner states that: "Legal analytic methods (which centered on the careful reading of legal texts against a background of comprehensive knowledge of legal doctrines and institutions, and heavily emphasized logical reasoning), deployed entirely on legal texts and problems, seemed adequate equipment for a law professor." *Id.* at 9-10. *In the legal-managerial framework or a managerial analysis with law*, legal-analytical methods find information, examine circumstances, support consistent thinking, and deliver and use information in the process of decision-making. The most basic legal-analytical methods include the following: situational/factual analysis, issue/question recognition, gathering/finding information, consistent/continuous thinking and applying/using law.

The article also discusses the existence, utility and power of using business theories and principles to evaluate the impact of law and public policy on business methodology and thinking and to entry by delivery and use of legal-managerial (L-M) analysis with legal information in the process of decision-making. The legal-managerial framework ascertains how ERISA and its analysis and information affect business methodology and thinking that includes both business decision-making and principles.

4. "Decision making is the process of generating and evaluating alternatives and making choices among them . . . ." *See* R. Wayne Moody et al., MANAGEMENT: CONCEPTS AND FUNCTIONS 6-7 (3d ed. 1986) (Hereinafter MANAGEMENT CONCEPTS). The classical decision-making model relies on logic and rational thinking, elimination of uncertainty and complete information. Ricky W. Griffin, MANAGEMENT 269 (6th ed. 1999). Griffin lists six steps in the classical model for decision-making. First, *recognizing and defining the decision situation* includes "the need to define precisely what the problem is. The manager must develop a complete understanding of the problem, its causes, and its relationship to other factors." *Id.* at 270. Second, *identifying alternatives* involves identifying alternative courses of effective action," including "obvious, standard alternatives and creative, innovative alternatives . . . ." *Id.* at 271. Third, *evaluating alternatives* involves an evaluation of each alternative "in terms of its feasibility, its satisfactoriness, and its consequences." *Id.* at 272. Fourth, *selecting the best alternative* is generally "choos[ing] the alternative with the highest combined level of feasibility, satisfactoriness and affordable consequences." *Id.* at 273. Fifth, *implementing the chosen alternative* "is simply putting it in effect." *Id.* "When they are implementing decisions, managers must also consider people's resistance to change" and other potential resistance. *Id.* Sixth, *following up and evaluating results* "requires the managers to evaluate the effectiveness of their decisions—that is, they should make sure that the chosen alternative has served its original purpose." *Id.* at 274. Griffin notes that a "[f]ailure to evaluate decision effectiveness may have serious

methodology. Each step of the decision-making process varies in its informational and analytical needs and thus statistical, economic, financial and other analytical methodologies provide analysis and information to fit a particular need of a step within the decision-making process.[5] Should law be any different? The delivery of legal advice that includes legal analysis and information should not be any less precise than the delivery of financial, statistical or economic analysis and information to the process of managerial analysis. Any imprecision in the delivery of law that includes analysis and information dooms many decisions to failure as irrational management thinking. But lawyers still argue that those decisions are rational. We do not generally educate lawyers to make business decisions. Likewise, we do not educate managers to make legal conclusions, but we must educate both lawyers and managers to understand the analytical and informational nature of legal and management methodologies for decision-making. Educating managers takes place in schools and colleges of business.

Lawyers are not students of managerial analysis, and managers are not students of legal analysis. In educating managers, a need exists for a legal-managerial framework that integrates legal and business analyses and thinking. Meeting this need is long past due. The process of business decision-making is a conduit for all other disciplines' analysis and information, including law and public policy. The potential for disputes, conflicts and grayness among these analyses and

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consequences." *Id.* Griffin recommends that "[w]henever possible managers should strive to apply rationality and logic to the decisions they make." *Id. at* 274. He also observes that American business organizations use rational decision-making 20% of the time. *Id. See also supra* note 1 and accompanying text (discussing the use of managerial analysis to control and manipulate the process of business decision-making). For another different list and explanation of the steps in the process of business decision-making, *see* Earnest R. Archer, *How To Make a Business Decision: An Analysis of Theory and Practice*, MANAGEMENT REVIEW 54-61 (1990) (business decision-making process consists of nine steps.).

Other legal scholars in studying and teaching business law recognize that "[l]aw and business decision-making are intimately related." *See also* John Collins, *Learning to Make Business Decisions in the Shadow of the Law*, 17 J. LEGAL STUD. ED. 117, 118 (1999) (citing John Allison, *The Role of Law in the Business School Curriculum*, 9 J. LEGAL STUD. ED. 239 (1991)); Debra Dobray & David Steinman, *The Application of Case Method Teaching to Graduate Business Law Courses*, 11 J. LEGAL STUD. ED. 81, 86 (1993)).

5. Schellenberger, *supra* note 1, at 14. Professor Schellenberger finds that "[c]ertain analytical tools such as operations research, management science, statistical analysis, economic analysis, econometrics, systems analysis, and others are used as approaches to managerial analysis." *Id.*

information as they enter the decision-making process demands a legal-managerial framework. In the absence of such a framework, lawyers and managers do not and shall never understand the relationship between law and business within the decision-making process and business thinking. Therefore the introduction and use of analysis and legal information in the process of business decision-making are uncertain and problematic. They are a source of disputes when managers cannot grasp changes in situations or environments that affect the use of recent legal advice. Legal and policy environments, business interests and organizational objectives affect the use of L-M analysis and legal information in the decision situation and other steps of decision-making. These environments, interests and objectives cause changes in old situations and create new situations that justify the precise delivery and use of L-M analysis and legal information of a legal-managerial framework.

The legal-managerial framework studies and explains how law and management interact in the decision-making process and business thinking. ERISA demonstrates the utility, necessity and validity of a legal-managerial framework in understanding the impact of analysis and legal information on the process of decision-making. ERISA involves labor markets, financial markets and business functions. ERISA also broadly involves public policy that includes social, economic and political influences. The impact of ERISA on the process of decision-making requires an understanding of business functions, economics, regulation, common law and public policy. The breadth of the impact of ERISA points out the need to weigh more precisely the impact of law and public policy on the decision and the impact of the decision on law and public policy.

Presently, legal information that includes common law, public policy and legislation do not enter the process of decision-making through any analytical tools of any legal-managerial framework. Legal advice that includes legal analysis and information is not self-executing unless managers do nothing other than blindly follow precedents that may be totally outdated for current business practices. Yet management would not be very innovative. Consequently, the delivery and use of legal analysis and legal information to effect the decision situation, ultimate outcome and potential consequences have always been unsystematic or untidy. This lack of an analytical framework increases the likelihood that L-M analysis and legal information are not precisely delivered to and concisely used by managers in the decision-making process. Simply put, the means of integrating law and management may be overly dependent on lawyerly skills and not on legal-analytic

methodology underpinning these skills. A *managerial analysis with law* offers a L-M analysis and legal information for business decision-making and represents analytical and informational needs of management practitioners by insuring obedience to the law, conformity to public policy, the ability to improve organizational effectiveness, and the innovative use of managerial discretion and judgment.

B. *The Purpose of an Integration of Legal and Management Methodologies*

This article explains how law and social policy affects *managerial discretion* by limiting the alternatives of the process of decision-making, affecting the implementation of the decision and demanding a watchful eye on the policy consequences of business decisions. Inserting ERISA analysis and information precisely into the process of decision-making illustrates the impact of financial, labor and other analyses and information. Labor and financial markets greatly affect employee benefits plans governed by ERISA. First, inserting ERISA analysis and information precisely into the decision-making process shows the impact of business decisions on public policy that drives the making of social and economic regulation. Second, inserting ERISA analysis and information helps to ascertain the effect of law and public policy on business objectives and interests that are implemented through business decision-making. Third, using ERISA analysis and information in a legal-managerial framework evaluates law and public policy by using business concepts and thinking, such as finance and management theories and principles. A legal-managerial framework scrutinizes the making of plan decisions under ERISA analysis and information throughout the process of decision-making. In fact, this framework is a practical mechanism to determine whether benefit plan decisions that are subject to financial, managerial and other business concepts are either unlawful or lawful, including gray area decisions.

A legal-managerial framework combines legal and managerial methodologies within the process of managerial analysis for business decision-making. This framework uses and delivers L-M analysis and legal information to the process of decision-making that concurrently accepts delivery and then uses business, economic and other analyses and information. As stated above, this legal-managerial framework is a *managerial analysis with law*. The necessity, utility and validity of managerial analysis with law for business decision-making rest on several analytical and informational recognitions of legal and management methodologies underlying the interdisciplinary use and delivery of L-M analysis and legal information. First, a managerial analysis

with law recognizes that business decisions should rest on rational business theories, principles and concepts to support their findings, outcomes, implementation and consequences. Second, a managerial analysis with law recognizes that business decisions should further established goals and objectives of the organization. Third, a managerial analysis with law recognizes that legal analysis and information affect the business situation, influence various inputs, restrict business outcomes and affect the policy consequences of business decision-making. Fourth, a managerial analysis with law recognizes that the use and delivery of legal analysis and information to the process of business involve compliance, negotiation or litigation or combinations thereof. Fifth, a managerial analysis with law recognizes that the delivery and use of analysis and legal information take place in two types of business decision-making. One type of decision-making is compliance decision-making, to comply with law and public policy. It brings company objectives, strategies and policies into compliance with law and public policy. The other type is general decision-making to further business and economic objectives. General decision-making implements company objectives, strategies and policies solely for business purposes, such as survival and profits. It requires the use and delivery of analysis and legal information to ascertain whether business and other analyses and information of any step of the process of business decision-making do not purposefully create too great a risk or liability under law or public policy. Consequently, a managerial analysis with the law evaluates and then introduces and uses legal analysis and information in the form of a L-M analysis accompanying legal information or advice that can be more precisely used in the process of business decision-making.

Do not misunderstand me. Lawyers are not using faulty analysis and giving bad advice, and managers are not ignoring legal advice or not using legal information, in many instances. But, studying how and when managers enter and use legal advice in the process of decision-making is still necessary. The systematic study of when, where and how managers enter and use legal advice in the process of decision-making actually increases the effectiveness of business decision-making with law and public policy. Using legal advice that includes inappropriate analysis with legal information at the wrong place and time in the process of decision-making may adversely affect decision results on the objectives and goals of management. It would be disastrous for a manager to draw a conclusion when he or she should be defining the issue or problem. In jurisprudence, legal thinking does not accept such inconsistent or uncoordinated decision-making by

courts. To illustrate, a judge finds the issue and establishes a rationale, but the nature of the specific analysis and information of the issue and rationale would not be identical or similar. Apparently, the analysis in formulating an issue is not the same as the deductive reasoning in the rationale. Applying this same thinking to business decision-making means that the use of legal analysis and information across the steps of the business decision-making process would be different in the nature and level of discipline-specific analysis and information. There is the likelihood that when analysis and information that effects the first step of the process of business decision-making are used solely to effect the final step, this analysis and information may be imprecisely delivered and inconsistently used throughout the process of decision-making. For example, the follow-up to a decision implemented in the present regulatory and company environments is not always identical to the definition of the decision situation examined in a past regulatory and company environments.[6] Yet the law and public policy apply to all environments. Therefore, the routine use of the same analysis and information at the end and beginning of the process of decision-making is just too imprecise and inexact, especially in the dynamic business environments of technologically advanced domestic and foreign economies. Simply, we need a legal-managerial framework.

C. *The Nature of an Integration of Legal and Management Methodologies*

Legal analytic methodology uses legal analysis concisely and delivers legal information precisely across the *thought-process of judicial and other legal thinking that is not methodologically identical from beginning to end.* Likewise, the analytical and informational requirements and needs of the steps of the process of business decision-making are not methodologically identical in management thinking.[7] Yet we assume that if lawyers use good legal analysis and give good legal information, managers will use this analysis and information properly and thus avoid intentional or unintentional violations of civil and criminal law in the process of business decision-making. In practice, this assumption is often proven false by disputes. There is no legal-

6. *See supra* note 3 and accompanying text.

7. *See* Charles R. Schwenk, THE ESSENCE OF STRATEGIC DECISION MAKING 13-34 (1988). *See also* Appendix A (Appendix A describes the structural similarities between legal-analytical methodology and management methodology. It also describes how the most basic legal methodology can deliver and use legal analysis and information in management methodology for decision-making.).

managerial framework to eliminate such an assumption. In pedagogy and practice, a managerial analysis with law must use and deliver analysis and legal information, which, in turn, provides conclusions, findings and observations at the right place and at the right time in the business decision-making process. In pedagogy and theory, a managerial analysis with law uses managerial and other business theories to evaluate the (pre-decisional) impact of law and public policy on business thinking. Therefore a managerial analysis with law includes the entry of law and public policy into the process of decision-making and an evaluation of the impact of law and public policy on business methodology and thinking.

The methodological underpinning of the legal-managerial framework matches informational and analytical needs of the process of business decision-making with legal-analytical methods and their findings and thinking. This framework thus provides information and analysis consistent with the managerial needs of the decision situation and other steps of the process of decision-making. This framework also weighs the impact of the business decision on public policy that eventually leads to new regulation to effect managerial discretion.[8] The effects of illegal practices, unlawful decisions and policy errors by management illustrate the need for and utility of a legal-managerial framework that would help managers routinely use the analysis and information of law and public policy in the business decision-making process. In entering law and public policy in the decision-making process, the framework offers a precise insertion of law and public policy through legal-analytical methods that deliver and use unbundled legal analysis with legal information in the decision-making process to form a L-M analysis.

This article uses ERISA analysis and information to outline the utility, validity and necessity of using a legal-managerial framework in the process of business decision-making. This process of decision-making relies on law and other discipline-specific approaches that provide analyses and information of law and other methodologies, such as finance, economic and statistics. In our example of the legal-managerial framework, ERISA is law and public policy that includes both analysis and information of a broad, complex regulation.[9] ERISA analysis and information include fields of regulation, common law and public policy.[10] Management cannot ignore ERISA analysis and information

8. *See supra* note 3 and accompanying text.
9. *See* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980).
10. *See infra* notes 25-78 and accompanying text.

in making business decisions that affect the management[11] and administration[12] of employee benefit plans,[13] including pension[14] and welfare.[15] On one hand, ERISA affects plan administration that includes

11. *See infra* note 12 and accompanying text.

12. Companies that establish employee benefit plans may play three roles in the operation of these plans. *See* Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988). These roles may create a potential conflict of interest. *See id.* at 910. In *Musto*, the court of appeals observed that the company could play three different roles in maintaining an employee benefit plan. First, the company plays its traditional role as employer that *manages* such plans to further its business interests. Second, the company may be the plan administrator that *administers* the plan solely for the benefit of employees under fiduciary obligations. Third, the company may be an insurance carrier that *implements* the employee benefits plan in accordance with state insurance regulation. *Id.* The potential conflict of interest arises when the company is both plan administrator and plan manager or employer. When the employer is acting as the plan administrator, the employer is subject to fiduciary standards under 29 U.S.C. § 1104(A)(1) and thus must administer the plan on behalf of retirees, employees and their spouses and dependents. *Id.* at 911. In *Musto*, the court of appeals succinctly describes the crux of the manager-administrator conflict in stating that "[t]here is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second." *Id.* Management establishes and later modifies or terminates the terms and conditions of employee benefit plans. *See id.*

13. 29 U.S.C. § 1002(3) (1994 & Supp. IV 1998). ERISA defines an employee benefit plan as follows:

> "The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Id.

14. *Id.* at § 1002(2)(A) (1994 & Supp. IV 1998). ERISA defines an employee pension benefit plan as follows:

> Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id. See also 29 C.F.R. § 2510.3-2 (2002) (Federal regulations define and list employee compensation and benefits that are employee pension benefits.).

15. 29 U.S.C. § 1002(1) (1994 & Supp. IV 1998). ERISA defines an employee welfare benefit plan as follows:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which has heretofore or is hereafter established or

fiduciary and other actions in the administration of the terms and conditions of benefits plan on behalf of the plan participants.[16] On the other hand, ERISA affects plan management that includes business decisions to establish, modify or eliminate the terms and conditions of benefits plans on behalf of the company for business interests.[17] ERISA permits employees and retirees to protect their rights and obligations under the terms and conditions of employee benefits plans.[18] Retirees and employees frequently file ERISA claims to challenge decisions of plan administrators and plan managers in providing and managing, respectively, pension benefits and welfare benefits plans.[19]

ERISA analysis and information affect business decision-making for plan administration and management that responds directly to business interests, organizational objectives and market demands.[20] A managerial analysis with law that is heavily or entirely dependent on ERISA analysis and information shows the nature of restraints imposed on managerial discretion[21] and judgment in the process of

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> maintained by an employer or by an employee organization, or both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id. *See also* 29 C.F.R. § 2510.3-1 (2002)(Federal regulations define and list employee compensation and benefits that are employee welfare benefits.).

16. *See supra* note 12 and accompanying text.

17. *Id.*

18. *See infra* notes 25-51 and accompanying text.

19. *See infra* notes 43-51 and accompanying text.

20. *See infra* notes 25-51 and accompanying text.

21. *See* Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, *in* RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS 371 (L. L. Cummings & Barry M. Straw eds., 1987). Hambrick and Finkelstein define managerial discretion as the "latitude of managerial action." *Id.* "*Managerial action* is domains that executives operate in . . . ." *Id.* at 370. Most importantly, these domains include "resource allocation and administrative choices (*e.g.*, reward systems and structure) and staffing." *Id.* at 371. Managerial discretion exists in the management and administration of employee benefit plans. *See* McNab v. General Motors Corp., 162 F.3d 959 (7th Cir. 1998). In *McNab*, Judge Easterbrook, writing for majority, states that:

> There's nothing wrong under ERISA with a system that gives plan administrators discretion. Subject to a few explicit rules in the statute, an

decision-making for the management of employee benefits plans.[22] The process of managerial analysis also includes financial, statistical, economic and other analytical approaches to deliver and use analyses and information throughout the process of business decision-making. A managerial analysis with law or the legal-managerial framework integrates ERISA and other managerial analyses and information into the process of decision-making that plan managers and corporate executives use to make decisions. A managerial analysis with ERISA affects the use and delivery of ERISA analysis and information to the decision-making process, while concurrently using financial, accounting, economic and other analytical approaches to produce more particular findings and thinking.[23]

III. The Nature of ERISA Analysis in Business Decision-Making

There would be no need for a legal-managerial framework or a managerial analysis with law if legal analysis and information did not affect business subject matter, or the methodology and thinking that eventually enters the process of business decision-making.[24] ERISA demonstrates the necessity of such a framework by its effect on business subject matter, methodology and thinking. This framework recognizes and examines the interaction of political, economic and social conditions that cause organizations to modify, terminate or amend employee benefits plans, which also drive changes in public policy and regulation. Managerial analysis with law is sensitive to other managerial analyses that include business, social science, mathematical and other analytical approaches. These approaches of managerial analysis in general produce discipline-specific analyses and information for the

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> employer may design a pension or welfare plan with features of its choosing, provided it is willing to pay the cost. (citations omitted) Plaintiffs concede that GM is entitled to adopt an early-retirement plan under which the eligibility standard is the best interests of GM, as GM's board of directors sees those interests. This is exactly what GM did, having put up the extra money necessary to pay for the benefits. If it is unlawful to adopt a plan that gives discretion to senior managers, it must be lawful to use that discretion to evaluate what the "best interests" of a firm are.

Id at 961-62. *McNab* is a clear indication that regulation reduces managerial discretion and that the exercise of managerial discretion through decision-making furthers corporate objectives. Moreover the broad managerial discretion provided by ERISA is consistent with its purpose and structure. *See infra* note 79.

22. *See* James E. Holloway & Douglas K Schneider, *ERISA, FASB and Benefit Plan Amendments: A Section 402(b)(3) Violation As a Loss Contingency for a Plan Amendment*, 46 Drake L. Rev. 97, 148 (1997).

23. *See supra* note 1 and accompanying text.

24. *See infra* notes 61, 67 and accompanying text.

process of decision-making. This analysis and information can affect each step in the process of decision-making differently and thus require the delivery and use of a particular L-M analysis to accompany legal information in each step of the decision-making process.

This legal-managerial framework ascertains, examines and weighs the impact of ERISA analysis and information on plan decisions of managers and the impact of plan decisions on ERISA and other policies. The framework considers how economic, social science and other analyses affect the delivery and use of ERISA analysis and information within the decision-making process. The framework recognizes the need for consistency between business decisions and business concepts as well as consistency with company objectives. The managerial analysis with law relies on managerial, financial and other discipline-specific principles and theories to establish grounds for plan decisions that must further rational company objectives and be justified by the actual decision situation.

A. The Role of ERISA Analysis and Information in Decision-Making

ERISA is the regulation of plan administration and management that involves accounting, finance, management and other business functions and that affects both the subject matter of decisions and the process of making decisions. These functions play essential roles in plan management and administration that includes establishing, modifying and terminating employee benefit plans. ERISA protects employee welfare and pension benefit plans of employee and retirees from abuse by employers and plan administrators.[25] ERISA governs pension benefit plans[26] and welfare benefit plans.[27] Welfare benefits include severance benefits[28] and health care benefits.[29] ERISA broadly regulates employee benefit plans by mandating technical or procedural requirements for reporting and disclosure,[30] participation and vesting[31] and fiduciary responsibilities.[32] These provisions govern employee pension benefit plans more stringently than welfare benefit plans.[33] Fiduciary responsibility requirements govern both pension

25. 29 U.S.C. § 1001 (1994 & Supp. IV 1998).
26. *Id.* at § 1002(2)(A).
27. *Id.* at § 1002(1).
28. Massachusetts v. Morash, 490 U.S. 107, 111-13 (1989).
29. Curtis-Wright Corp. v. Schoonejongen, 514 U.S. 73, 77-78 (1995).
30. 29 U.S.C. §§ 1021-1031 (1994 & Supp. IV 1998).
31. *Id.* at §§ 1081-1086.
32. *Id.* at §§ 1101-1104.
33. *See* Adams v. Avondale Industries, Inc., 905 F.2d 943, 947 (6th Cir. 1990).

and welfare benefit plans.[34] Moreover, reporting and disclosure requirements govern both pension and welfare benefit plans.[35] Congress excluded welfare benefit plans from the coverage of participation and vesting[36] and funding[37] provisions of ERISA.[38] ERISA changes the way managers managed and administered benefits plans under the common law and thus affects business functions, subject matters and methodology.

ERISA establishes fundamental standards and requirements for the regulation of employee benefits plans. It does not require employers to grant employee welfare or pension benefits.[39] ERISA does not govern the substantive contents of employee benefit plans.[40] It mandates guidelines for the administration of employee benefit plans,[41] such as requiring plans to be written.[42] The ERISA regulatory framework provides beneficiaries and plan participants protection that had not been provided by federal and state law, but increases the regulation of employee benefit plans.[43] Plan participants and beneficiaries can file claims for a wrongful denial, unlawful termination or improper modification of pension and welfare benefits under section 502(a)[44] of ERISA.[45] Section 502(a), in part, seeks "to enforce . . . [an employee's] rights under the terms of . . . [the] plan, [and] to clarify . . . [the employee's] rights to future benefits under the terms of the plan."[46] ERISA also creates unique claims that are distinct from common law claims.[47] ERISA provisions establish claims for failing to comply with reporting and disclosure requirements,[48] failing to include terms to

34. *See* Spink v. Lockheed, 517 U.S. 882 (1996); *Adams*, 905 F.2d at 947.

35. *Curtiss-Wright Corp.*, 514 U.S. at 81-83; *Adams*, 905 F.2d at 947.

36. 29 U.S.C. §§ 1051-1061 (1994 & Supp. IV 1998).

37. *Id.* at §§ 1081-1086.

38. *See Curtiss-Wright Corp.*, 514 U.S. at 77-78.

39. *See* 29 U.S.C. § 1001 (1994 & Supp. IV 1998).

40. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 91 (1983); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985).

41. 29 U.S.C. § 1101 (1994 & Supp. IV 1998).

42. *Id.* at § 1102(a).

43. *Id.* at § 1001. *See infra* notes 44-55 and accompanying text.

44. 29 U.S.C. § 1132(a) (1994 & Supp. IV 1998).

45. *See supra* notes 25-38 and accompanying text.

46. 29 U.S.C. § 1132(a)(1)(B) (1994 & Supp. IV 1998).

47. *See supra* notes 25-38 and accompanying text.

48. 29 U.S.C. §§ 1021-1031 (1994 & Supp. IV 1998). The reporting and disclosure requirements affect decisional methodologies that include principles and processes for determining, implementing and following up on decisional outcomes. *See supra* notes 4, 7 and accompanying text. ERISA's reporting and disclosure requirements affect the identity of the decision-makers and the distribution of

modify or terminate plans,[49] and failing to conform to fiduciary standards in the administration of benefit plans.[50] As federal courts hear and review these unique ERISA claims, they apply ERISA and supplement it with the federal common law of contracts, trusts and corporations.[51] ERISA protects employee benefits plans, but it imposes greater managerial restraints on managing and administering employee benefits plans.

Although ERISA analysis and information limit both managerial discretion and judgment in plan administration and management, Congress clearly wanted federal courts to rethink the analysis and rules of common law. Section 514(a)[52] is the ERISA preemption provision that implicitly includes the mandate for federal courts to develop federal common law of contracts, trusts and corporations to supplement ERISA.[53] The Court has consistently held that Congress intended for ERISA preemption to be broad and expansive in addressing conflict between ERISA and state law.[54] Section 514(a) states that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[55] The Court

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decisions. *See infra* notes 193-275 and accompanying text. Here ERISA obligations control the beginning and ending of the decision-making process by requiring the company to delegate authority with specificity before decision-making begins and to make a full disclosure of a decision at a specific time before or at implementation. Other ERISA obligations impose obligations for plan termination, modification, funding, fiduciary standards and participation. *See supra* notes 25-38 and accompanying text. This ERISA subject matter or legal information primarily affects the inputs entering the process. Such inputs or information affects one or more steps of the decision-making process, and each step may require different analysis and information. *See infra* notes 4, 7 and accompanying text. *See also* Appendix A (illustrating the compatibility of legal-analytical and managerial methodologies).

49. 29 U.S.C. § 1102(b)(3) (1994 & Supp. IV 1998).

50. *Id.* at §§ 1101-1114.

51. *See infra* notes 79-95 and accompanying text.

52. 29 U.S.C. § 1144(a) (1994 & Supp. IV 1998).

53. *See* Firestone Tire & Rubber Co. v. Burch, 489 U.S. 101, 110-12 (1989) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983). In *Franchise Tax Board*, the Court states that "'A body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.'" *Franchise Tax Board*, 463 U.S. at 24 n.26 (quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)).

54. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985); Pilot Life Ins. Co., 481 U.S. 41, 47 (1987); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990).

55. 29 U.S.C. § 1144(a) (1994 & Supp. IV 1998).

concluded that a broad preemption furthers the intent of Congress by establishing uniform and consistent federal law to regulate employee benefit plans.[56] Thus ERISA invalidates state law and public policy and limits the impact of state common law under ERISA analysis and information. Other federal and state public policies still abound.

B. *Policy Interests Affecting the Role of ERISA in Decision-Making*

Under a managerial analysis with law, ERISA analysis and information affect plan decisions that must consider public policy concerns regarding social welfare, retirement security and health care. A legal-managerial framework must deliver policy information and address policy concerns closely related to the law, such as ERISA and retirement security. Plan and business decisions respond to changes in labor, financial, health care and other markets and thus cannot ignore public policy that may end in regulation of business. Business decisions include plan amendments, terminations and modifications that can impose personal and social hardships on retirees and employees. When these benefits are lost, employees often challenge plan decisions to modify, amend and terminate plans.[57] Companies terminate or modify plans when financial or other circumstances create economic or financial hardships.[58] Companies also amend benefit plans by clarifying and adding terms to identify events that would automatically terminate or modify plans.[59] Courts scrutinize plan decisions to address issues involved in the making and implementing plan amendments and modifications. For example, retirees have requested a federal court to determine whether a company had established a procedure to identify the person who could make decisions to amend a benefits plan. The Supreme Court found that this company had established a procedure, but it could not determine if the company had followed this procedure.[60] Under a legal managerial framework, legal challenges to business decisions, such as plan terminations, amendments and modifications, raise public policy concerns for plan managers and administrators because they may eventually lead to

56. *Metropolitan Life Ins. Co.*, 471 U. S. at 732.

57. *See generally infra* note 70 and accompanying text (listing commentary on plan terminations and their effects under ERISA).

58. Varity Corp. v. Howe, 516 U.S. 489 (1996).

59. *Curtiss-Wright Corp.*, 514 U.S. at 75-76.

60. *See* 29 U.S.C. § 1102(b)(3) (1994 & Supp. IV 1998). Section 1102(b)(3) states that "[e]very employee benefit plan shall . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." *Id.*

regulation and affect the implementation and follow-up to business (plan) decisions.

ERISA analysis and information includes public policy and its impact on the process of decision-making and thus creates the need to scrutinize institutional and organizational means-ends relationships, such as the regulation-objective and decision-objective fits, respectively. Social factors and economic conditions influence business decisions to amend, modify or terminate benefit plans[61] and thus raise policy concerns regarding employee welfare and retirement security. Plan decisions directly affect retirees, employees and their families who believed that pension and welfare benefits were certain and then found that these benefits could be terminated or modified by their former employers without their consent.[62] Employees eventually learned that an employer's decision to establish a benefit plan did not create retirement or other security. These benefits were merely gratuities of prosperous economic conditions and stable social conditions. In addition, creditors, investors and others also want a certain and stable financial performance. Establishing irrevocable employee benefits, such as pension and health care, could greatly affect profitability by limiting company responses to financial and other markets affecting growth in profits and financial equity. Public and private rethinking of employee benefit needs and liabilities results from changes in social, economic and business conditions[63] and thus drives decision-making in plan management and affects the relationships between public need-business interest and business decision-company objective.

Several factors create the need for companies to scrutinize the institutional fit or relationship between public needs and business interests. Social, economic or business conditions create the business need to amend, terminate or modify benefits plans. First, demographic trends indicate increasing numbers of and longer life expec-

61. *See* D. L. Salisbury, *Foreword in* RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE? xiii (Employee Benefit Research Institute ed. 1989) (Hereinafter cited as Salisbury-EBRI); D. L. Glifford and C. A. Seltz, FUNDAMENTALS OF FLEXIBLE COMPENSATION 6-7 (1988); A. C. Enthoven, *Retiree Health Benefits as a Public Policy Issue, in* RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE? 3-5 (Employee Benefit Research Institute ed. 1989) (Hereinafter cited as Enthoven-EBRI).

62. *See generally infra* note 70 and accompanying text (listing commentary on plan terminations and their effects under ERISA).

63. *See e.g.*, John Thatcher McNeil, *The Failure of Free Contract in the Context of Employer-Sponsored Retiree Welfare Benefits: Moving Towards a Solution*, 25 Harv. J. on Legis. 213, 214 (1988); McMahon, *Labor-Management Health Care Cost Containment: Present and Future Challenges to Cooperative Problem Solving*, Employee Benefits Journal, June 1987, at 14.

tancy for older Americans in the workforce.[64] The aging of the population creates a greater need for health care and other benefits. Second, federal policy-makers are reluctant to enact a national health care program to address inadequate health care. It is doubtful whether the federal government wants to assume employers' responsibilities for providing medical care to employees and retirees.[65] Third, many employers are paying for retiree and employee health care expenses while health care costs are still increasing.[66] Many employers do not have pre-funded welfare benefit plans. Instead, most welfare benefit plans are created on a pay-as-you-go basis.[67] Fourth, the Financial Standards Accounting Board (FASB) requires many companies to accrue plan expenses and accumulate liabilities of postretirement benefits plans to prevent plan costs and liabilities from undermining investor and market confidence.[68] Companies must now report accrued expenses on the income statement, accumulated liabilities on the balance sheet and disclose benefit-related financial information.[69] Social conditions, public policy concerns and financial disclosures increase the risks of granting pension and welfare benefits and thus create the need for the precise delivery and use of public policy analysis and information regarding ERISA and its purposes in business planning and decision-making. A managerial analysis with law is sensitive to

64. *See* C. J. Loomis, *The Killer Cost Stalking Business*, Fortune, Feb. 27, 1989, at 61; McNeil, *supra* note 63, at 219.

65. *Retiree Medical Coverage Poses Multiple Liabilities*, Employee Benefit Plan Review, Oct. 1987, at 34, 35 (Hereinafter cited as *Retiree Medical Coverage*); Jane Bryant Quinn, *Financing Long-Term Care, The Choice: Better Insurance or More Taxes*, Newsweek, Jan. 30, 1989, at 52.

66. *See* Meg Delaney, *Who Will Pay for Retiree Health Care?*, Personnel Journal, Mar. 1987, at 83; D. L. Salisbury, *A Rude Awakening On Retiree Health Benefits*, Across the Board, Oct. 1987, at 8; M. Beck *et al.*, *You Afford to Get Sick*, Newsweek, Jan. 30, 1989, at 45; F. Luthans & E. Davis, *The Healthcare Cost Crisis: Causes and Containment*, Personnel, Feb. 1990, at 24; *Retiree Medical Benefits Costs' Keep Rising*, Employee Benefit Plan Rev., Sept. 1990, at 10, 10-13; *Health Care Costs Threaten Future Retirees*, Employee Benefit Plan Rev., Feb. 1992, at 45, 45-46.

67. *See e.g.*, FASB, ORIGINAL PRONOUNCEMENTS: ACCOUNTING STANDARDS AS OF JUNE 1, 1991, VOL. 1, 1993/94 ED., FASB STATEMENTS OF STANDARDS, *Statement of Financial Accounting Standards No. 106: Employers' Accounting for Postretirement Benefits Other Than Pensions*, 1273, 1278, June 1991 (Hereinafter cited as FASB Standard No. 106). For the implications of FASB Standard No. 106 on plan terminations and modifications, *see generally* Marilyn J. Ward Ford, *Broken Promises: Implementation of Financial Accounting Standards Board Rule 106, ERISA, and Legal Challenges to Modification and Termination of Postretirement Health Care Benefit Plans*, 68 St. John's L. Rev. 427 (1994).

68. FASB Standard No. 106, *supra* note 67, at 1278.

69. *Id.*

institutional relationships involving public policy and regulation and thus makes managers aware of the need to consider the impact of their actions on public policy.

Economics and finance enter the analyses and information through discipline-specific approaches that also affect the organizational relationship between a business decision and company objectives. Plan benefit costs and liabilities reduce profits and slow growth, leading managers to make unilateral changes to pension and welfare benefit plans. Few managers discontinue welfare benefit plans, but many managers modify their health care benefit plans by instituting managed care, imposing caps on benefits and imposing copayment requirements.[70] These measures shift greater risk to retirees and employees. Indeed, these measures require retirees and employees to assume financial responsibilities for the cost of health care and other benefits.[71] Those retirees who are not eligible for Medicare[72] and Medicaid[73] must pay the full cost of medical care[74] if they are not

70. *See* Gregory J. Ossi, Note, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. Contemp. Health L. & Pol'y 233 (1996); Ford, *supra* note 67; McNeil, *supra* note 63; Leonard R. Page, *Retiree Insurance Benefits: Enforcing Employer Obligations*, 38 Lab. L. J. 496 (1987); K. H. Goeppinger, *Postemployment Welfare Benefit Plans: An Emerging Priority of the 80's*, Employee Benefits J., 32 (Mar. 1987); Joan Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 Indus. Rel. L.R. 183 (1987).

"Vested benefits are defined as those which an employer has a contractual or statutory obligation to provide." McNeil, *supra* note 63, at 223 n.65. Vested benefits are for the lifetime of the retiree. *Id.* Commentators, analysts and judges wrestled during the 1980's and 1990's with the issue of terminating and modifying welfare benefits under ERISA. *See e.g.*, McNeil, *supra* note 63, at 214-15 nn.10-17; Vogel, *supra* note 70, at 184 nn.3-4. Vogel, McNeil, and others suggest that Congress should amend ERISA or enact other legislation to partially or fully vest or protect welfare benefits.

71. *See supra* note 70 and accompanying text.

72. Health Insurance for the Aged, Pub. L. No. 89-97, §§ 100 *et seq.*, 79 Stat. 290 (1965) (codified as amended at 42 U.S.C. §§ 1395-1395 ll, and in scattered parts of 26 U.S.C. and 45 U.S.C.). Eligibility for participation in Medicare is set forth under 42 U.S.C. §§ 1395(c) and 1395(j). Medicare consists of two insurance programs: Part A - Hospital Insurance Benefits for the Aged and Disabled, 42 U.S.C. § 1395(c), and Part B - Supplementing Medical Insurance Benefits for the Aged and Disabled. *Id.* at § 1395(j).

73. Grants to States for Medical Assistance Program, Pub. L. No. 89-97, §§ 121 *et seq.*, 79 Stat. 343 (1965) (codified at 42 U.S.C. §§ 1396-1396(d)). Medicaid is a state health care assistance program subsidized by the federal government. 42 U.S.C. § 1396. It provides medical assistance for the poor, disabled, aged and minor dependent children and their parents. *See id.* at § 1396. The states establish minimum eligibility and medical service standards that must be consistent with federal guidelines. *Id.* at § 1396(a).

receiving health care benefits under a welfare benefits plan. Public needs often cause changes in public policy that drives the need for social and employment regulation. Consequently, a legal-managerial framework that provides discipline-specific analysis and information may be doomed if it does not consider the policy implications of business plans and decisions that must anticipate and respond to public interests. A managerial analysis with law includes consistency and continuity between means and ends of organizational relationships that must not further objectives by irrational and unlawful decisions, and institutional relationships that must recognize business interests in making lawful decisions.

C. *An Interdisciplinary Approach to Decision-Making Using ERISA*

ERISA analysis and information constrain managerial discretion and judgment, which in turn affects the need for and use of financial, labor and other resources in the management of benefit plans, in several ways.[75] First, ERISA analysis and information affect a particular step in the process of business decision-making by imposing technical procedures and obligations. ERISA can alter the definition of the decision situation, eliminate some decision alternatives, affect implementation of some decisions, or limit use of practices and other actions of earlier decisions.[76] ERISA constrains a plan amendment, termination or modification with technical procedures and guidelines. ERISA greatly limits the managerial discretion of common law and its thinking. Second, ERISA analysis and information do not include an evaluation of management methodology and thinking before business decision-making. A managerial analysis with law uses business theories and principles to ascertain the impact of ERISA analysis and information on management methodology and thinking. This evaluation produces analysis and information that may enter the process of business decision-making with L-M analysis and legal information. Third, business theories and principles should underlie any business decision and provide a logical or rational basis for a decision and its implications. Profitability and cost reduction are quintessential business concepts. Other business principles, such as employee security or organizational flexibility, provide the grounds for many business decisions and thus must be included along with law and public policy in the process of business decision-making. In the process of managerial

74. *See infra* notes 94-100 and accompanying text.
75. *See* 29 U.S.C. § 1001(a) (1994 & Supp. IV 1998).
76. *See infra* notes 148-276 and accompanying text.

analysis, a legal-managerial framework integrates legal analysis and management methodology to form L-M analysis to accompany legal information that must be usable by managers and executives on entry into the process of business decision-making.

The legal-managerial framework that employs this interdisciplinary or combined analysis and methodology more precisely examines business situations that require consideration of law and public policy in the context of business decision-making. Business decisions and acts may violate civil and criminal law and thus may impose litigation costs, disruptive effects and negative publicity on business organizations. These negative consequences justify the need for a legal-managerial framework that is interdisciplinary in methodology and thinking. Just adding law and using business intuition in business decision-making will not logically address the interaction of external markets, environments and conditions.[77] An analytical framework that integrates law and management in the process of managerial analysis for decision-making provides more insight into business decisions, management thinking and their consequences. For example, the framework would examine and explain that a plan modification is an at-will employment decision, but still is justified by management concepts and thinking in the process of decision-making. ERISA abolishes or diminishes many common law rules, but it still does not go far enough for many individuals. Common law that permits business decisions with few risks and liabilities does not promote a broad analysis of decision situations and decisional consequences in business and policy environments and economic markets. Common law thinking does not necessarily cause an integration of law, finance, and other business concepts and thinking on matters of employee welfare, organizational flexibility and cost management in making business decisions, especially employee benefit plan decisions. A managerial analysis with law must do so. Thus a managerial analysis with law must apply ERISA analysis and information in business decision-making to address the availability, amount and quality of welfare and pension benefits under accounting, financial, economic and other approaches of a managerial analysis for business decision-making.[78]

IV. EFFECTS OF ERISA ANALYSIS ON COMMON LAW DISCRETION

There is an extensive, if not continuing, erosion of managerial discretion in selecting among competing alternatives that are constantly

77. *See supra* notes 1-3 and accompanying text.

78. *See supra* note 1 and accompanying text.

being diminished and eliminated through the impact of federal regulation and its changes to state common law. Such losses give impetus to a coherent or systematic delivery and use of law and its analysis and information in the process of business decision-making. A managerial analysis with law recognizes that state common law gave and still gives greater managerial latitude in choosing among competing alternatives of decision situations and implementing decisions in the legal and policy environments. ERISA alters this latitude only to implement federal employee benefit policy, but uses common law where the federal law is silent.[79] ERISA imposes federal obligations on management to comply with reporting and disclosure requirements.[80] It requires plan managers to establish procedures to modify and terminate plans[81] and to comply with fiduciary duties in the administration of plans.[82] Federal courts apply only ERISA and supplement it with federal common law on particular issues.[83] ERISA's obligations exceed contract, trust and other duties of state common law that previously governed employee benefit plans. Therefore, ERISA analysis and information give less managerial discretion to managers and administrators in the management of employee benefits plans that were once governed by common law.

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79. *See infra* notes 148-276 and accompanying text. In *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997), the Court states that:

> The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that "requiring the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "they would err initially on the side of omission."

Id. at 515 (internal citations omitted). *See also* Lockheed Corp. v. Spink, 517 U.S. 882, 894 (1996) ("obtaining waivers of employment-related claims" does not offend the policy of ERISA); K. A. Jensen & A. M. Kelly, *The Impact of Lockheed: More Flexibility for Employers in Pension Benefit Plans*, 22 Emp. Rel. L. J. 25 (1996) (commentary on the impact of *Lockheed* on organizational flexibility).

80. 29 U.S.C. §§ 1021-1031 (1994 & Supp. IV 1998).

81. *Id.* at § 1102(b)(3).

82. *Id.* at §§ 1101-1114. *See also* James E. Holloway, *The ERISA Amendment Provision as a Disclosure Function: Including Workable Termination Procedures in the Functional Purpose of Section 402(b)(3)*, 46 Drake L. Rev. 755 (1998) (arguing that plan terminations should not be subject to the same procedures applied to plan amendments).

83. *See infra* notes 84-105 and accompanying text.

A. *The Role of Common Law Thinking under ERISA and Its Policy*

Congress limits the managerial discretion that existed under common law by expressly invalidating state common law and public policy pertaining to employee benefits plans. The ERISA preemption provision states that ERISA shall "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."[84] The United States Supreme Court has held that "federal courts are to develop a federal common law of rights and obligations under ERISA-regulated plans."[85] Federal courts have developed federal common law of contract and trusts to supplement ERISA.[86] This supplemental law must be consistent with federal labor policy.[87] In *Alessi v. Raybestos-Manhattan, Inc.*,[88] the Court held that Congress intended for ERISA preemption to be broad and expansive in the preemption of state law.[89] The Court concluded that a broad preemption furthers the intent of Congress so that uniform and consistent federal substantive law regulates employee benefit plans.[90] Other federal labor policy is

84. 29 U.S.C. § 1144(a) (1994 & Supp. IV 1998).

85. *Pilot Life Ins. Co.*, 481 U.S. at 56.

86. *See e.g.*, Firestone Tire & Rubber Co. v. Burch, 489 U.S. 101, 110-12 (1989) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)). *See also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983).

87. *Firestone Tire & Rubber Co.*, 489 U.S. at 112-15.

88. 451 U.S. 504 (1981).

89. *See Alessi*, 451 U.S. at 523; *Shaw*, 463 U.S. at 98; *Metro. Life Insurance Co.*, 471 U.S. at 732; *Pilot Life Ins. Co.*, 481 U.S. at 47; *Ingersoll-Rand Co.*, 498 U.S. at 136. For commentary on the preemption of state law and policy by ERISA, *see, e.g.*, Peter H. Turza & Lorraine Hollaway, *Preemption of State Laws Under the Employee Retirement Income Act of 1974*, 28 Cath. U. L. Rev. 163 (1974); James D. Hutchinson & David M. Ifshn, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23 (1978); Michael S. Ackerman, Note, *ERISA: Preemption of State Health Care Laws and Worker Well Being*, 1981 U. Ill. L. Rev. 825; David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. Pitt. L. Rev. 427 (1987); Laura J. Bond, Note, *ERISA-Preemption–Pilot Life Insurance Co. v. Dedeaux: Congress's Cue to Reassess ERISA's Preemptive Effect*, 36 U. Kan. L. Rev. 611 (1988); Mary A. Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*, 24 U. C. Davis L. Rev. 255 (1990); Robert I. Lorio, Note, *Ingersoll-Rand Co. v. McClendon: State Actions for Wrongful Employment Discharge Subject to ERISA Preemption*, 37 Loy. L. Rev. 375 (1991); James E. Holloway, *ERISA, Preemption and Comprehensive Federal Health Care: A Call for "Cooperative Federalism" to Preserve the States' Role in Formulating Health Care Policy*, 16 Campbell L. Rev. 405 (1994).

90. *Metro. Life Ins. Co.*, 471 U. S. at 732. The Court has held that ERISA preempts state legislation and common law. District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (preempts District of Columbia Workers' Compensation amendment that requires employers to continue and extend health care coverage);

not as explicit regarding the preemption of state law. Section 301[91] of the Labor Management Relations Act[92] (LMRA) does not contain a preemption provision, but the Court has held that federal substantive law applies exclusively to breaches of collective bargaining agreements ("CBAs").[93] Under Section 301(a),[94] federal and state courts have concurrent jurisdiction.[95] LMRA and ERISA are federal labor policies that invalidate common law by not allowing states to effect the administration and management of employee benefit plans. Both of these Acts abolish or diminish common law analysis and reasoning. Thus the common law does not determine the level of managerial discretion or judgment. ERISA does.

Although ERISA analysis and information exclusively regulate employee benefit plans, ERISA does permit states to affect employee benefit plans in providing for the welfare and security of employees and retirees. State law can still affect health care policy through insurance. ERISA exempts state regulation of insurance from preemption and thus permits states to enact mandated-benefit regulation to provide particular health care benefits under group insurance plans.[96] Moreover, federal social policies support retirement welfare and security through medical insurance and assistance. Retirees older than 65 years of age are eligible for Medicare, a federally managed medical insurance program.[97] Coverage is not always available to early retirees

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Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (preempts state wrongful discharge); FMC Corp. v. Holliday, 498 U.S. 52 (1990) (preempts state anti-suborgation law); Pilot-Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (preempts state tort and contract law claims); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (preempts common law insurance claims); Alessi v. Raybestos-Manhattan Inc., 451 U.S. 504 (1981) (preempts provision of New Jersey Workers' Compensation Act).

91. 29 U.S.C. § 185 (1994 & Supp. IV 1998).

92. Chap. 20, 61 Stat. 326 (1947) (codified as amended at 29 U.S.C. §§ 151-187).

93. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957); Teamsters, Chauffeurs, Warehouseman & Helpers v. Lucas Flour Co., 369 U.S. 95 (1962); *Metro. Life Ins. Co.*, 471 U.S. at 747-48.

94. 29 U.S.C. § 185(a) (1994 & Supp. IV 1998).

95. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Boys Mkts., Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

96. 29 U.S.C. § 1144 (b)(2)(A) (1994 & Supp. IV 1998); *Metro. Life Ins. Co.*, 471 U.S. at 739-44. In *Metropolitan Life Insurance Co.*, the Court held that the ERISA preemption provision, 29 U.S.C. § 1144(a), does not preempt mandated-benefit regulation of insurance contracts that mandate that insurance companies provide coverage for mental health illnesses. *Id* at 739-47. Such contracts are exempted from preemption by the ERISA saving clause, 29 U.S.C. § 1144 (b)(2)(A), which exempts insurance contracts from preemption under the ERISA preemption clause. *Id.* at 739-44.

97. 42 U.S.C. §§ 1395 *et seq.* (1994 & Supp. IV 1998).

who are less than 65 years of age. Retirees who are not eligible for Medicare but receive low incomes and possess few assets may be eligible for Medicaid. Medicaid is a federally supported, state means-tested, medical care assistance program that provides medical care and related services to the needy.[98] Medicaid does not cover retirees who do not meet the requirements of its means test.[99]

ERISA regulates the management of employee benefit plans but explicitly exempts the regulation of insurance by the states from its preemption provision.[100]

Federal courts have developed federal common law of contract to supplement ERISA and other federal labor policy.[101] These courts created federal rules of contract construction to ascertain the intent of parties to CBAs where one or both parties raise an issue regarding ambiguity of a CBA provision.[102] Federal courts construe the terms and conditions of employee benefit plans using at-will employment contracts.[103] Federal common law trust principles also apply in adopting a standard of review for claims filed under section 502(a)(1)(B) of ERISA.[104] These courts must apply federal common law consistent

98. *See id.* at §§ 1396 *et seq.* Some early retirees, who are less than 65 years old, may not have enough health care benefits and thus may need assistance under Medicaid. *See id.* Medicaid provides medical assistance for millions of poor, low-income, and other individuals. It provides medical assistance to "low-income elderly, blind, disabled, pregnant, or those caring for minor dependent children." J. Dimeo, *Congress Restricts Medicaid Financing*, Pension World, 23, 24 (June 1992).

99. *See id.* at § 1396. Many employees participate in early retirement programs, usually choosing to retire before 65 years of age. ERISA and other regulatory requirements must be considered in implementing early retirements of downsizing and restructuring programs. *See generally* B. Seibert, *Downsizing: An Overview of Legal Consideration*, 43 Lab. L. J. 483, 483-487 (1992).

100. 29 U.S.C. § 1144(b)(2)(A) (1994 & Supp. IV 1998). States mandate that insurance companies provide certain health care and medical coverage under group health insurance plans. Such mandated-benefit regulation is not preempted by ERISA. *Metro. Life Ins. Co.*, 471 U.S. at 739-747. ERISA exempts from preemption state regulation of insurance contracts. 29 U.S.C. § 1144(b)(2)(A). ERISA does not mandate the contents of welfare benefits; it regulates their administration. *Shaw,* 463 U.S. at 91; *Metro. Life Ins. Co.*, 471 U.S. at 732.

101. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

102. *E.g., Textile Workers Union*, 353 U.S. at 456-57; Kellogg Co. v. NLRB, 452 F.2d 519, 524 (6th Cir. 1972); Forrest Indus., Inc. v. Local Union No. 3-436, Int'l Woodworkers of Am., AFL-CIO, 381 F.2d 144, 146 (9th Cir. 1967).

103. *See supra* note 70 and accompanying text.

104. 29 U.S.C. § 1132(a)(1)(B) (1994 & Supp. IV 1998). ERISA does not include a statute of limitation for claims alleging unlawful termination and modification of welfare benefit plans under 29 U.S.C. § 1132(a)(1)(B). *See* Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987).

with federal labor policy and thus the delivery and use of ERISA analysis and information are not subject purely to state common law and its thinking.[105] ERISA federalizes common law analysis and thinking, thus creating new federal limits on managerial discretion and judgment.

B. *Review of Plan Decision to Deny Benefits under ERISA and LMRA*

ERISA analysis and information include the judicial review of benefit plan decisions of plan administrators and managers. Federal and state courts apply ERISA analysis and information to review the exercise of managerial discretion by plan administrators and managers. The courts construe terms, conditions and provisions of employee benefit plans to give them meaning and also determine the reasonableness of plan managers and administrators' decisions.[106] When these courts do so, they question the exercise of managerial discretion by plan administrators and managers in the interpretation of plan terms and provisions.[107] When *management* retains the discretion to interpret plan terms and conditions, it retains greater latitude under federal law in decision-making to accomplish its objectives and strategies under benefits plans. Federal law and policy govern at-will contracts and CBAs and thus require the application of ERISA analysis and information to business decisions regarding labor and employment. Section 301(a) of LMRA, on one hand, covers breaches of CBAs, though these breaches are not unfair labor practices.[108] Federal and state courts decide whether a breach of a CBA violates the rights of labor or management. When provisions of CBAs are ambiguous, these courts construe the provisions to ascertain their meaning.[109] Federal courts do not give deference to management's interpretation of ambiguous CBA terms and provisions by applying an *arbitrary and capricious standard.*[110] Federal courts use rules of contract construction to construe

105. *See Textile Worker Union*, 353 U.S. at 457 (a LMRA claim); Transp. Communication Employers Union v. Union Pac. R. R., 385 U.S. 157, 160-61 (1966) (a LMRA claim); *Firestone Tire & Rubber Co.*, 489 U.S. at 112-15 (an ERISA claim).

106. *See infra* notes 114-147 and accompanying text.

107. *See id. See also supra* note 21 and accompanying text (discussing the discretion of managers and administrators under ERISA).

108. *See* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass, 404 U.S. at 181 n.20 (1971); Copra v. Suro, 236 F.2d 107 (3d Cir. 1956); United Steelworkers of Am. v. Rome Indus., 437 F.2d 881 (5th Cir. 1970), *cert. denied*, 409 U.S. 1041 (1972).

109. *See infra* notes 110-112 and accompanying text.

110. *See Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *Firestone Tire & Rubber Co.*, 489 U.S. at 112-13. *See also* Page, *supra* note 70, at 50.

terms and provisions of CBAs.[111] Section 301(a) permits labor and management to file claims to clarify plan rights and obligations under CBAs.[112]

ERISA regulates the decisions of plan administrators and plan managers under at-will contracts and CBAs.[113] Section 502(a) of ERISA covers plan decisions by plan administrators and managers who often reserve managerial discretion to make unilateral plan decisions. In *Firestone Tire & Rubber Company v. Bruch*,[114] the Supreme Court decided the standard of review for reviewing claims filed under Section 502(a)(1)(B)[115] when an employee alleges an unlawful denial of employee welfare benefits by plan administrators. In *Firestone Tire & Rubber Co.*, the Firestone Tire and Rubber Company (Firestone) sold its Plastics Division (Division) to Occidental Co. (Occidental). Occidental rehired the Division's employees. Firestone had maintained a severance or termination pay plan. Firestone was the administrator and fiduciary of the termination pay plan, but it had failed to comply with ERISA requirements for reporting, disclosure and claims procedures. Its plan was an employee benefit plan enforceable under ERISA. Although Occidental hired former Firestone employees, they still requested severance benefits from Firestone under its termination pay plan. Firestone denied their requests on the grounds that the Firestone plant did not suffer a reduction in workforce when it was sold to Occidental. Such a reduction was required to authorize the payment of benefits under the terms of the termination pay plan. Employees brought a civil action against Firestone under Section 502(a)(1)(B) to recover severance benefits due them under the termination pay plan. The district court entered summary judgment for Firestone and held that Firestone's denial of severance benefits was not arbitrary and capricious.[116] The United States Court of Appeals for the Third Circuit held that the *de novo* standard of judicial review was more appropriate for Firestone's decision denying claims for severance benefits.[117] Firestone requested review by the Supreme Court under a *writ of certiorari* to the United States Court of Appeals for the Third Circuit.

111. *See infra* note 112 and accompanying text.

112. *See Pittsburgh Plate Glass*, 404 U.S. at 157; Manning v. Wiscombe, 498 F.2d 1311 (10th Cir. 1974); Mumford v. Glover, 503 F.2d 878 (5th Cir. 1974); Int'l Union v. Yard-man, Inc., 716 F.2d 1476 (6th Cir. 1983).

113. *See supra* note 11 and accompanying text.

114. 489 U.S. 101 (1989).

115. 29 U.S.C. § 1132 (a)(1)(B) (1994 & Supp. IV 1998).

116. Firestone Tire & Rubber Co. v. Bruch, 640 F. Supp. 519 (E.D. Pa. 1986).

117. Firestone Tire & Rubber Co. v. Bruch, 828 F.2d 134 (3d Cir. 1987).

The Supreme Court granted *certiorari*.[118] It held that a *de novo* standard of review was appropriate in light of pre-ERISA decisions and present ERISA policy.[119] The Supreme Court concluded that the claim brought by an employee to challenge the denial of a benefit claim had been governed by contract law prior to the enactment of ERISA.[120] The Court further concluded that: "[I]f the plan did not give employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim—by looking to the terms of the plan and the manifestations of the parties' intent."[121] The Supreme Court reasoned that the *de novo* standard effectuates the policy of ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans"[122] and "to protect contractually defined benefits."[123] However if

118. Firestone Tire & Rubber Co. v. Bruch, 485 U.S. 986 (1988).

119. *Firestone Tire & Rubber Co.*, 489 U.S. at 108-17. The application of the *arbitrary and capricious* standard to review welfare benefit claim denials under ERISA has resulted in much criticism and commentary on the appropriate standard of review. *E.g.*, J. A. McCheary, Note, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033 (1985); Gregory M. Shumaker, Note, *Employee Benefits Law: Serving Employee Welfare Benefits Through ERISA*, 61 Notre Dame L. Rev. 551 (1986); B. R. Duncan, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 Cornell L. Rev. 986 (1986); J. L. Johnson, *Judicial Review of ERISA Plan Administrator Under the Arbitrary and Capricious Standard*, 10 Ind. Rel. L. J. 400 (1988); George I. Flint, *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 Cath. U.L. Rev. 133 (1989).

Firestone Tire & Rubber Co. resulted in scholarly comment and criticisms on the Court's wisdom and knowledge of trust law and its application to employee welfare benefit plan claims arising under 29 U.S.C. § 1132 (a)(1)(B). *E.g.*, M.S. Beaver, *The Standard of Review in ERISA Benefits Cases After Firestone Tire & Rubber Co. v. Bruch*, 26 Tort & Ins. L. J. 1 (1990); J.C. Newsome, Note, *ERISA - Firestone Tire & Rubber Co. V. Burch: Standard of Review for Denial of Benefits*, 20 Memphis St. U. L. Rev. 487 (1990); D. W. Holdren, Note, *Denial of Benefits Claims Under ERISA: The Rise and Fall of De Novo Review*, 36 Vill. L. Rev. 1219 (1991); J. R. Cox, Note, *Pierre v. Connecticut General Life Insurance Co., Piecing Together ERISA-Plan Administrator Fact Finding Discretion After Firestone Tire v. Bruch*, 66 Tul. L. Rev. 1532 (1992); N. C. Capps, *Firestone Tire and Rubber Co. v. Bruch: Are Lower Courts Following The United States Supreme Court Decision in ERISA Benefit Determination?*, 31 Washburn L. J. 280 (1992); J. H. Longbeen, *The Supreme Court Flunks Trusts*, 1990 Sup. Ct. Rev. 207 (1990); G. A. Hwett, Note, *De Novo Review of ERISA Plan Administrators' Factual Determinations*, 71 Wash. U. L. Q. 165, 165-74 (1993).

120. *Firestone Tire & Rubber Co.*, 489 U.S. at 112-15.

121. *Id.* at 113.

122. *Id.* (citing *Shaw*, 463 U.S. at 90).

123. *Firestone Tire & Rubber Co.*, 489 U.S. at 113 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985)).

the plan administrator or manager retains the authority to construe ambiguous terms of benefit plans, federal courts must defer to the plan administrator or manager's construction under claims filed under section 502(a)(1)(B). ERISA analysis and information permit administrators to retain the latitude to interpret terms and conditions of benefit plans. Such interpretations are more than likely consistent with company objectives and are not necessarily harmful to the interests of plan participants. Thus ERISA analysis and information preserve managerial discretion for plan administrators and managers to further business objectives that are the ends of business decisions, which are business means.

C. *Review of a Plan Decision to Terminate Benefits Under ERISA*

ERISA exposes business decisions by plan managers and administrators to review by courts, but the effects on managerial discretion may not differ much from the common law. ERISA limits scrutiny to particular circumstances, thus preserving the managerial discretion of plan managers and administrators. The standard of review for claims challenging the elimination of a welfare benefit plan under Section 502 (a)(1)(B) was announced in *DeGreare v. Slattery Group, Inc.*[124] In *DeGreare*, the Court made the *de novo* standard applicable to the termination and modification of welfare benefits under Section 502(a). The Court granted *certiorari* and instructed the lower federal courts to apply the *de novo* standard to actions brought under Section 502(a)(1)(B) of ERISA for the termination and modification of health and life insurance benefits.[125] In *DeGreare*, the Court vacated the judgment and remanded the case to the United States Court of Appeals for the Eighth Circuit with instructions to consider *Firestone Tire & Rubber Co.*[126] In *DeGreare*, plaintiffs alleged that vested postretirement welfare benefits were unilaterally terminated by their former employer in violation of ERISA. The plaintiffs were retired salaried employees of Alpha's Cement Division (Alpha). The retirees filed a suit alleging that Alpha violated ERISA by terminating their life and health insurance benefits without their consent. The retirees alleged that their welfare benefits vested upon retirement and thus could not be unilaterally terminated by Alpha. Alpha construed the terms and conditions of the amendment and termination clause and argued that it had

124. 489 U.S. 1049 (1989), *sub nom.*, DeGreare v. Alpha Portland Ind., Inc., 652 F. Supp. 946 (E.D. Mo. 1986), 837 F.2d. 812 (8th Cir. 1988).

125. *Id.*

126. *Id.*

reserved the right to terminate welfare benefits and these benefits did not vest at retirement.[127]

The United States District Court for the Eastern District of Missouri found that language of the welfare benefit plan was ambiguous.[128] The district court considered extrinsic evidence offered by Alpha's personnel manager that employees had been informed of the indefinite duration of welfare benefits and that other Alpha employees at two other plants had been informed to seek insurance elsewhere upon the closing of those plants. Moreover, the district court found that retirees had not objected to a statement printed in an earlier Summary Plan Description[129] ("SPD") in which they were informed by Alpha that it reserved the right to terminate and modify the welfare benefit plan. The district court held that welfare benefits did not vest upon retirement,[130] and the United States Court of Appeals for the Eighth Circuit affirmed the district court's holding.[131] The Eighth Circuit held that postretirement health and life insurance benefits did not vest upon retirement.[132] The Eighth Circuit found that terms of the welfare benefit plan were ambiguous.[133] It concluded that continuation language in the welfare benefit plan did not support vesting.[134] The Eighth Circuit found that the deference that was given by the district court to the administrator's decision in construing the plan documents was appropriate.[135]

On the remand of *DeGreare* by the Court, the Eighth Circuit followed the Court's instructions and subsequently gave its reasoning in a footnote of another decision on the termination of a welfare benefits plan.[136] Although *DeGreare* had not been decided under a *de novo* standard of review, the Eighth Circuit states emphatically that it did not reverse its judgment after the Court's remand of *DeGreare*.[137]

127. *Id.* at 816.

128. DeGreare v. Alpha Portland Ind., Inc., 837 F.2d 812, 816 (8th Cir. 1988), *vacated by*, 489 U.S. 1049 (1989).

129. *See* 29 U.S.C. § 1022(a) (1994 & Supp. IV 1998). ERISA requires that a Summary Plan Description (hereinafter cited as SPD) be furnished participants and beneficiaries of employee welfare benefit plans. 29 U.S.C. § 1022(a). ERISA lists specific information that should be contained in a SPD. *Id.* at § 1022(b).

130. *DeGreare*, 837 F.2d at 813.

131. *Id.* at 817.

132. *Id.* at 815.

133. *Id.* at 816.

134. *Id.* at 815-16.

135. *Id.*

136. Howe v. Varity Corp., 896 F.2d 1107, 1109 n.4 (8th Cir. 1990).

137. *Id.*

Although the judgment of the district court in *DeGreare* was made under the arbitrary and capricious standard of review, the Eighth Circuit still found that the judgment of the district court would not change under a *de novo* standard of review.[138] It observed that in its review of *DeGreare*, it concluded that the district court had taken sufficient testimony and reviewed enough documents under the arbitrary and capricious standard and thus the district court's decision would have the same outcome under a *de novo* review.[139]

If the analysis and legal information of common law is consistent with federal policy, then supplementing ERISA analysis and information with common law trusts and contracts turns ERISA toward the common law by preserving for employers and managers broad managerial discretion and judgment to allocate labor, capital and other resources. The arbitrary and capricious standard preserves greater discretion for plan decision-makers in deciding benefit plans. This standard preserves managerial discretion that had been vested in plan managers and administrators by contract, employment and trust doctrines. Fairness and equity may not favor employees and retirees, especially when plan managers or administrators retain the discretion to interpret ambiguous terms and provisions of their welfare benefits plans and terminate these plans at will.[140] Managers or employers have a strong economic interest to maintain profits and reduce costs, which just happens to be a dominant self-interest of any business organization.[141] *Firestone Tire & Rubber Co.* permits employers to reserve the discretionary power to construe ambiguous terms and pro-

138. *Id.*

139. *Id.*

140. *See supra* note 21 and accompanying text. Plan administrators are still bound by fiduciary standards under ERISA and thus cannot ignore the interests of participants and beneficiaries of employee benefit plans. *See* 29 U.S.C. §§ 1101-1104. For commentary on the fiduciary responsibilities of plan administrators and plan managers, *see generally* Mary O. Jensen, Note, *Separating Business Decision and Fiduciary Duty in ERISA Litigation?*, 10 BYU. Pub. L. 139 (1996); Nancy G. Ross & Judith A. Kelley, *Employer Duties to Make Benefits Disclosures: The Emerging Case Law*, 8 Benefits L. J. 5, 5-23 (Summer 1995); Nancy G. Ross & Judith A. Kelley, *Misrepresenting Future Plan Changes: Fiduciary Liability under ERISA*, 21 Employee Relations L. J. 73 (1995); Jon C. Bruning, *ERISA Plan Fiduciaries Beware*, 45 LAB. L. J. 402 (1994); Nick C. Geonnacopulos & Daniel J. Julius, *Understanding Document Disclosure Requirements under ERISA*, 45 Lab. L. J. 359 (1994); Edward E. Bintz, *Fiduciary Responsibility under ERISA: Is There Ever a Fiduciary Duty To Disclose?*, 54 U. Pitt. L. Rev. 979 (1993).

141. *See* Holdren, *supra* note 119, at 1252-55; Cox, *supra* note 119, at 1532. *See also supra* note 21 and accompanying text (recognizing that discretion permits employers to make decisions in their best interest).

visions of employee benefit plans.[142] If they reserve this discretionary power, federal courts must apply the arbitrary and capricious standard of review in evaluating plan terms and conditions in the management of benefit plans by plan administrators.[143] The arbitrary and capricious standard, which gives deference to plan managers and plan administrators,[144] requires only that the employer's decision be reasonable (not correct or just) and thus makes it difficult for retirees to prove that benefits had vested or were due them under ambiguous amendment and termination clauses.[145] *Firestone* and *DeGreare* retain much common law discretion[146] and thus limit the impact of ERISA analysis and information on the process of decision-making by not imposing heightened review of plan decisions.[147]

142. *Firestone Tire & Rubber Co.*, 489 U.S. at 112-13. Several factors must be taken into consideration in determining whether plan administrators were arbitrary and capricious in denying, terminating or modifying a welfare benefit plan. Courts have considered the following factors: "[T]he uniformity of a plan administrator's construction of a disputed provision of the plan, the reasonableness of the plan administrator's construction of plan terms in light of the express terms of the plan, whether the administrator's interpretation was fair, and whether the interpretation attempts to prevent unanticipated costs." Holdren, *supra* note 119, at 1237-38 (citing J. A. McCheary, Note, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033, 1047-57 (1985)). *See* B. R. Duncan, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 Cornell L. Rev. 986, 994-95 (1986). *See also* Holdren, *supra* note 119, at 1238 n.83 (citing Hoover v. Blue Cross & Blue Shield, Inc., 855 F.2d 1538 (11th Cir. 1988)) (applying those factors). "Some courts have considered the good faith of the administrator in assessing whether the administrator's decisions were arbitrary and capricious." Holdren, *supra* note 119, at 1238 n.83 (citing *Hoover*, 855 F.2d at 1538; Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623, 626 (6th Cir. 1987); Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982)). Finally, an actual or potential conflict of interest between plan administrator and the plan may need to be taken in consideration when the court selects a standard of review. *See Firestone Tire & Rubber Co.*, 489 U.S. at 115; *infra* note 147 and accompanying text.

143. *Firestone Tire & Rubber Co.*, 489 U.S. at 112-13.

144. *Id.*

145. *See, e.g.*, Page, *supra* note 70, at 50; Holdren, *supra* note 119, at 1238.

146. *Firestone Tire & Rubber Co.* may have little short-term or long-term effects on the unilateral termination and modification of employee benefit plans. *See infra* note 147 and accompanying text.

147. *See generally supra* notes 119-135 and accompanying text (The Court observed that plan managers or employers have broad latitude under many ERISA provisions.). In employment relations that are contractual relationships, the Court permits a deferential standard of review where a potential conflict of interest exists and thus favors the business discretion of economics relationships such as employment and labor. This preference maintains broad management discretion rather than imposing a strict standard of review to limit abuses of discretion by administrators. Management can successfully shift the risk, thus leaving retirees and employees to find

ERISA analysis and information still limit managerial discretion by imposing technical guidelines and procedures on the process of business decision-making. Part V describes the affects of ERISA analysis and information on management methodology and thinking. Management thinking provides rational decisions that are subject to theories and principles of business functions, such as management, finance and accounting. These theories and principles are business thinking and recognize many managerial actions and benefits, including increasing profits and reducing costs. The need and utility of managerial benefits that are recognized by finance, management and other principles often drive business decision-making, which must also weigh the impact of law and public policy. The impact of law and public policy on business has greatly diminished managerial practices and thinking, thus justifying a legal-managerial framework to evaluate law and use legal advice.

V. EFFECTS OF ERISA PROCEDURES ON BUSINESS METHODOLOGY

ERISA demonstrates the need for a legal-managerial framework that can study the impact of law and public policy on business methodology and thinking. Managing and admininstering employee benefit plan create complex managerial needs[148] and thus justify a legal-mana-

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their own solution to health care and other plan needs. This risk shifting is plain and simple externalization. In avoiding a potential conflict of interest, the Court did not turn a deaf ear to a conflict of interest in plan administration. It considered this. The Court concluded that such conflicts should be considered the same as any other factor in determining reasonableness of employer and plan administrator's decisions. *See Firestone Tire & Rubber Co.*, 489 U.S. at 115.

148. *See generally supra* note 3 and accompanying text (discussing the steps in the process of decision-making). For a fuller discussion of the impact of decision-making procedures under section 402(b)(3) on plan amendments and terminations, *see* James E. Holloway, *The ERISA Amendment Provision as a Disclosure Function: Including Workable Termination Procedures in the Functional Purpose of Section 402(b)(3)*, 46 Drake L. Rev. 755 (1998); James E. Holloway & Douglas K Schneider, *ERISA, FASB and Benefit Plan Amendments: A Section 402(b)(3) Violation As a Loss Contingency for a Plan Amendment*, 46 Drake L. Rev. 97, 148 (1997).

Basic management science textbooks teach that decision-making often takes place under uncertainty for some events and activities. *See, e.g.*, David R. Anderson, *et al.*, AN INTRODUCTION TO MANAGEMENT SCIENCE: QUANTITATIVE APPROACHES TO DECISION-MAKING 593 (7th ed. 1994). Law and public policy are not absolutely clear. *See* David Landsbergen & Janet F. Orosz, *Why Public Managers Should Not Be Afraid to Enter the "Gray Zone,"* 28 Admin. & Soc'y 238, 239 (1996); *infra note 156* and accompanying text. Courts and legislatures may purposely create this ambiguity. Landsbergen & Orosz, *supra*, at 239. Legal ambiguity creates a gray zone where the risks and liabilities associated with decisional consequences are not known with any degree of

gerial framework to understand how ERISA analysis and information affects the decision situation and other steps of the process of business decision-making.

A. *Decision-Making Procedures for Benefits Plan Management*

ERISA analysis and information affect human resources and financial management decisions by imposing rigid and restrictive decisional procedures on the process of decision-making. The nature of rigid and restrictive decisional procedures justifies a legal-managerial framework to study and then enter L-M analysis and legal information in the process of decision-making. Decisional procedures can delay

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certainty. In discussing the gray zone in public management, Landsbergen and Orosz state:

> Because the law is very often silent and ambiguous, managers need to make use of this "gray zone" when considering strategic management options.
>
> . . .
>
> The ambiguity of the gray zone could result from vague political compromise, insufficient facts upon which a clear legislative decision could have been made, or a decision by a legislature to avoid making hard choices. . . . Part of the value of ambiguity in law is that it can unite diverse interests and provide managers with options because problems change in structure and definition as other plausible interpretations are advance.
>
> . . .
>
> Despite the fact that the creation of law and legal ambiguity is the product of social discourse and interpretation [R. J. Green, *Constitutional Jurisprudence: Reviving Praxis in Public Administration*, 24 Admin. & Soc'y 3, 3-21 (1992)], public managers are noticeably absent from this discourse because of their simplistic understanding that they cannot act unless they have been told how to act. By default, managers have ceded the gray zone to the lawyers. As a result, public management has developed an excessive focus on legal norms, especially procedural due process, to the exclusion of managerial norms.

Landsbergen & Orosz, *supra*, at 239. Private sector managers need not worry about procedural due process, but they may not be selecting the better alternatives occurring in the gray zone. If their lawyers see that legal liabilities and risks are too great, they may not consider alternatives in the gray zone. Selecting an alternative that included a gray zone issues may make a manager look as if he or she is a hardened criminal or evil wrongdoer. Gray zone issue that later prove to be unlawful will be considered unlawful from the very beginning and thus the manager should have known or could have known he or she was committing a wrong. Often managers and lawyers do not know outcomes of gray zone issues and thus must take risk. Gray zone issues create uncertainty and thus business decision-making must take place under uncertainty. But competitors, prosecutors and injured parties do not want to hear that the managers made a bad decision under legal and policy uncertainty. *See also supra* note 148 and accompanying text.

For commentary on strategic management in the private sector under legal, political and regulatory environments, *see also* Richard H. K. Veitor, STRATEGIC MANAGEMENT IN THE REGULATORY ENVIRONMENT: CASES AND INDUSTRY NOTES (1989).

and restrain the ability of plan managers to respond to financial markets and other circumstances by limiting the utility of results of a step in the decision-making process. Moreover, decisional procedures burden managerial discretion by imposing *assurances* on the decision-making process that involve actions of various persons, exercises of different authority and uses of diverse thinking. For example, in *Curtiss-Wright Corp. v. Schoonejongen*,[149] Curtiss-Wright Corp. established a postretirement health benefit program for its employees at its Wood-Ridge, New Jersey plant.[150] In September 1976, Curtiss-Wright established a welfare benefit plan (CW Plan) to comply with the recently enacted ERISA.[151] The major documents of the CW Plan were the Constitution and Summary Plan Description (SPD).[152] In the CW Plan, Curtiss-Wright had always reserved the right to amend, modify and terminate its Plan.[153] In 1983, Curtiss-Wright Corp. issued a new SPD and also changed carriers.[154] This SPD included a new provision that stated: "TERMINATION OF HEALTH CARE BENEFITS . . . . Coverage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."[155] The primary authors of the new provision were the director of benefits and labor counsel, who stated that they only intended to clarify the terms of the reservation clause.[156] These decision-makers overlooked the fact that ERISA analysis and information would affect the selection of plan decisions by imposing decisional procedures. In fact, such a direct influence on the process of decision-making controls and limits company decision-makers who could exercise specific managerial discretion and judgment under the plan.

149. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995).

150. *Id.* at 75-76.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* ERISA and other law delay or prohibit the consideration of alternatives and selection of business decisions when these alternatives and decisions violate law that is not perfectly clear. Gray areas consist of ambiguity, uncertainty and generality that affect the evaluation and then delivery and use of L-M analysis and legal information. Gray area decisions that appear lawful may not be sustainable under future interpretations of law and public policy. Consequently, regulation, common law and public policy can even limit or restrict apparently lawful decisions that later show inconsistency with law or public policy during subsequent steps of decision-making, namely implementation and follow-up steps. *See supra* note 148 and accompanying text.

When plan decision-makers allegedly select unlawful decisional alternatives, ERISA analysis and information can add uncertainty in the implementation and follow-up of the decision until courts decide the disputes arising under any ambiguous provision of ERISA. For example, in November 1983, Curtiss-Wright announced that it was closing the Wood-Ridge plant and that it would terminate retiree benefits for non-union employees who had retired from Wood-Ridge.[157] The executive vice president wrote retirees "a series of letters informing them that their postretirement health benefits were being terminated" by Curtiss-Wright.[158] In 1984, retirees sued Curtiss-Wright Corp. for a violation of section 402(b)(3)[159] of ERISA, alleging that revisions were actually new terms rather than the clarification of old terms.[160] Retirees asserted that the new term that reserved the right to terminate in the event of a plant closure was an amendment to the CW Plan.[161] Curtiss-Wright responded to retirees' claim by stating that the new term of the new SPD was merely language clarifying its plan.[162] Curtiss-Wright implemented the plan decision, assuming that this decision had certain consequences - termination of the plan at the closing of the plant. It was not certain. In 1990, the United States District Court for the District of New Jersey concluded that Curtiss-Wright had made an amendment to its plan in 1983, when it revised its SPD to state that its plan would terminate at the closing of its facilities.[163] The district court found that Curtiss-Wright's revision to its SPD was a plan amendment to the CW Plan in violation of section 402(b)(3) of ERISA.[164] Next, the district court found that the CW Plan failed to provide a plan procedure for identifying who possessed authority to amend the plan and a procedure for amending the plan as required by section 402(b)(3) of ERISA.[165] The district court concluded that adding the new term was a substantial change to the CW Plan.[166] It further concluded that Curtiss-Wright amended the plan but did not provide the necessary procedures to identify who could amend the plan, nor how to amend the plan and therefore violated section

157. *Curtiss-Wright Corp.*, 514 U.S. at 75-76.
158. *Id.*
159. 29 U.S.C. § 1102(b)(3) (1994 & Supp. IV 1998).
160. *Curtiss-Wright Corp.*, 514 U.S. at 75-76.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*

402(b)(3).[167] The United States Court of Appeals for Third Circuit affirmed the judgment of the district court.[168] Here, Curtis-Wright and other companies learned that ERISA's decisional procedures are rigid and thus must be followed by plan managers in making some plan decisions.

The Court did not agree that ERISA's technical procedures and guidelines should operate, in this instance, the same as substantive mandates. Acting more like a common law court, the Court recognized that ERISA analysis and information do not usurp the managerial discretion existing under corporate authority, namely the authority to change past decisions. Curtiss-Wright asked the Court to grant a *writ of certiorari* to the United States Court of Appeals for the Third Circuit to decide whether Curtiss-Wright provided a procedure to identify who possessed authority to amend the plan and whether it also provided a procedure to amend the plan.[169] The Court granted a *writ of certiorari*[170] and reversed the Third Circuit on its interpretation of section 402(b)(3).[171] The Court concluded that "[t]he Company" was sufficient under the reservation clause of the CW plan to identify persons who possessed amendment authority because "[t]he Company" required persons to look only to Curtiss-Wright for the exercise of this authority.[172] Next, the Court concluded that the reservation clause provided a procedure for amending the plan by stating "by the Company."[173] The Court found "by the Company" to be "the barest of

167. *Id.* The district court also held that the Curtiss-Wright Corporation's [hereinafter Curtiss-Wright Corp.] plan termination was ineffective under the amended term of its plan. *Id.* As a remedy for Curtiss-Wright Corporation's procedural violation, the district court awarded retirees a $2.6 million judgment. *Id.* Both retirees and Curtiss-Wright Corporation appealed. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034 (3d Cir. 1994), *rev'd,* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 84 (1995).

168. *Curtiss-Wright Corp.*, 18 F.3d at 1042, *rev'd,* Curtiss-Wright Corp. v. Schoonejongen, 541 U.S. 73, 84 (1995).

169. *Curtiss-Wright Corp.*, 514 U.S. at 78.

170. Curtiss-Wright Corp. v. Schoonejongen, 512 U.S. 1288 (1994).

171. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 84 (1995). The Court concluded that section 402(b)(3) requires companies to establish "a *procedure* for identifying persons with amendment authority, rather than identification of those persons outright." *Curtiss-Wright Corp.*, 514 U.S. at 79.

172. *Id.* at 79. The Court noted that "the Company's amendment procedure is substantial because it requires beneficiaries, retirees, employees, and others to look to the company, and not to outside parties, to exercise amendment authority. *The Company* functions as an identification procedure as required by ERISA. In addition, ERISA requires companies to establish a procedure for amending the plan." *Id.*

173. *Id.*

procedures" but was "more substantial than it first appeared" and that section 402(b)(3) was "indifferent to the level of detail" in these procedures.[174] The Court reasoned that Curtiss-Wright could amend its plan at-will without the consent of retirees or third parties and thus recognized managerial discretion to make decisions in the best interest of the company.[175] Under a managerial analysis with law, the Court's interpretation of section 402(b)(3) affects financial, labor and other decisions by requiring decision-making procedures that must identify who possesses and uses management authority in selecting among competing alternatives in plan management. Effectively, ERISA limits plan decision-making to a few managers.

The common law would rarely limit managerial discretion by imposing decisional procedures to execute authority in the allocation of labor and other resources. One has only to remember the employment at-will doctrine. ERISA differs from the common law, but other

174. *Id.* at 79-80.

175. *See id.* at 82. The Court concluded that section 402(b)(3) "ensure[s] that every plan has a workable amendment procedure." *Id.* The court of appeals had concluded that section 402(b)(3) "ensures that interested parties will know how a plan may be altered and who may make such alterations." *Curtiss-Wright Corp.*, 18 F.3d at 1038. The Third Circuit also concluded that retirees and others persons should "be able to determine with certainty at any given time exactly what the plan provides." *Id.* The Supreme Court did not agree with the court of appeals' interpretation of section 402(b)(3) and concluded that detail and specification were not requirements of section 402(b)(3) and that other provisions of ERISA provided adequate protection for the rights of retirees and employees. *Curtiss-Wright Corp.*, 514 U.S at 80.

The Court's interpretation of section 402(b)(3) did not end all uncertainty that had been caused by the failure of companies to comply with section 402(b)(3) when they made substantial changes in plan terms and conditions. Now the federal circuits do not agree on whether section 402(b)(3) should be applied to a plan termination that is by far more devastating than many plan amendments.

The Third and Eleventh Circuits are split on whether "the requirements of section 402(b)(3) apply to plan terminations . . . ." Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995). The Third Circuit reasoned that ERISA protects against both a plan amendment and plan termination, finding that plan terminations and plan amendments are categorically similar in effects. *Id.* (citing Deibler v. United Food & Commercial Workers' Local Union 23, 973 F.2d 206 (3d Cir. 1992)). The Eleventh Circuit concluded that section 402(b)(3) requires "employers to adopt written plan instruments and establish written amendment procedures" to apprise employees and retirees of their obligations and rights." Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 40 F.3d 1202, 1210 (11th Cir. 1994). The Third Circuit concluded that refusing to apply section 402(b)(3) to a plan termination undermines the purposes of section 402(b)(3). *Aldridge*, 40 F.3d at 1210. Both circuits disagree regarding the functional nature of section 402(b)(3) that protects against changing or amending benefit plans under many circumstances that are less onerous than plan terminations.

law may not be as broad as ERISA. Consequently, the business need for certainty and flexibility justifies a managerial analysis with law that evaluates and then enters ERISA analysis and information into the business decision-making process.

B. *Decision-Making Procedures to Identify the Sources of Authority*

Common law permits corporate managers to exercise authority in the absence of corporate officials and thus does not impose restrictive decisional procedures on the exercise of managerial discretion under corporate authority. Decision-makers must have authority to make the decision, but delegating certain decisions to particular managers limits decision-making to one person or a group of persons. Thus, delegation may delay making and implementing a plan decision if only one manager has authority to make certain decisions. ERISA analysis and information affect the decision-making process by restricting who can be a plan decision-maker within business organizations for plan management. ERISA limits the definition of business situation in plan management to the fewest decision-makers who must provide for the delivery and use of other analyses and information in the decision-making process. In doing so, ERISA relies on the law of corporations to identify who possesses and exercises authority to make decisions on behalf of the corporation. The Revised Model Business Corporation Act ("RMBCA") states that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of its board of directors, subject to any limitation set forth in the articles of incorporation."[176] The board of directors uses its power to establish business policy and define tasks for officers and managers.[177] ERISA federalizes corporate law and may create less flexibility in initiating decisions to amend plans.

176. Revised Model Business Corporation Act § 8.01 (1984) [hereinafter RMBCA].

177. *See* Frederick G. Kempin, Jr. *et al.*, LEGAL ASPECTS OF THE MANAGEMENT PROCESS: CASES AND MATERIALS 372-74 (4th ed. 1990); Richard I. Henderson, COMPENSATION MANAGEMENT: REWARDING PERFORMANCE 38-48 (5th ed. 1989). The board of directors can also create committees unless prohibited by the articles of incorporation. RMBCA § 8.25 (1984). These committees may exercise the authority of the board of directors, with some exceptions. *Id.* at § 8.25(d) & (e). These committees also could be delegated authority by the board of directors to modify and amend benefits pension and welfare benefit plans. *See id.* Senior management that consists of chief operating officer, president, vice president and other executive managers implement corporate policies of the board of directors. *See id.* § 8.40. These officers and managers are appointed by the board of directors or described in the bylaws. *Id.* The board of directors, bylaws, and articles of incorporation define the duties and authority of these officers and managers. *Id.* Corporate officers are granted authority to implement board

ERISA analysis and information impose decisional obligations by limiting explicitly the exercise of authority to named persons and thus affects the *nature and timing* of plan decisions responding directly to market conditions and organizational problems. In *Curtiss-Wright*, the Court concluded that it could not determine on the record whether Curtiss-Wright's board of directors had delegated the authority to amend the CW Plan to a corporate officer or senior manager.[178] Corporate officers are authorized to act on behalf of the corporation.[179] The Court noted that authority may be "inferred from circumstances or implied from the acquiescence of the corporation or its agents in a general course of business."[180] The Court observed that if the new provision was not properly authorized when issued, then subsequent actions could later ratify the unauthorized amendment.[181] The Court instructed the court of appeals to consider whether letters that had been written by the executive vice president[182] stating that the CW Plan was being terminated, served to ratify this amendment if the amendment was unauthorized under Curtiss-Wright's procedure for amending its plan.[183] ERISA analysis and information create the need to identify particular decision-makers for certain company decisions that are influenced by events and transactions in dynamic political, economic and social conditions. The impact of ERISA on decision-makers and their exercise of authority affects business methodology by imposing limits on the process of business decision-making, including the nature of the process, the timing of the decision and the presence of the decision-makers. Therefore, legal-managerial framework is the better mechanism to ascertain a regulation's effects on business methodology and thinking.

C. *Decision-Making Procedures to Effect Unauthorized Acts*

ERISA analysis and information require senior decision-makers to ratify or approve unauthorized decisions that reflect company efforts

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of directors' business policies and other corporate tasks, including establishing employee benefits and other compensation plans. *See id.*. Corporate officers can implicitly or explicitly grant authority to senior management to amend, modify or terminate employee pension and welfare benefit plans. *Id.* *See Curtiss-Wright Corp.*, 514 U.S. at 80-81.

178. *Curtiss-Wright Corp.*, 514 U.S. at 85.

179. Kempin, *supra* note 177, at 388, 397.

180. *Curtiss-Wright Corp.*, 514 U.S. at 85 (citing 2 W. Fletcher, Encyclopedia of the Law of Private Corporations § 444, 397-98 (1990)).

181. *Curtiss-Wright Corp.*, 514 U.S. at 85.

182. *Id.*

183. *Id.*

to manage employee benefit plans and thus may create uncertainty regarding the validity of decisions and stability of plans when companies implement unauthorized decisions. The board of directors and corporate officers can ratify many types of agreements, actions and contracts.[184] They cannot ratify the contracts of corporate officers and senior managers who engage in "extraordinary or fundamental acts," such as the mortgaging of corporate assets, that require the approval of shareholders.[185] Amending certain plan terms should not be deemed an extraordinary or fundamental act but should be a simple compensation management decision that does not require shareholder approval.[186] In *Curtiss-Wright*, the Court held that "[t]he Company" identified that Curtiss-Wright possessed authority to amend and that "by the Company" reserved for Curtiss-Wright's board of directors the authority to amend the plan.[187] The Court did not conclude that this authority could only be exercised if the board of directors approved the amendment.[188] It only required that Curtiss-Wright delegate the authority to a named person(s) who would make the decision and then follow a procedure to amend the plan.[189] Thus, the Court made ratification a viable alternative so long as a Curtiss-Wright officer or the board of directors had the power to authorize the amendment.[190] Until ratification takes place, uncertainty and instability exist under the imprecise delivery and inexact use of ERISA analysis and information. Thus, complete implementation and follow-up could be delayed while an executive or the board of directors recognizes the decision.

Ratification adds to ERISA analysis and information the common law thinking that gave broad managerial discretion in plan management and administration. The board of directors can ratify unauthorized decisions of its officers and senior managers if the board of directors could legally approve these acts without shareholder approval.[191] In *Curtiss-Wright,* the Court instructed that ratification could be considered on remand if the "new plan provision is found not to have been properly authorized . . . ."[192] Although ERISA analysis and

184. Kempin, *supra* note 177, at 392, 397.

185. *See id.* (citing Lee v. Jenkins, 268 F.2d 367 (2d Cir. 1959)); *Curtiss-Wright Corp.*, 514 U.S. at 77-80.

186. *See Curtiss-Wright Corp.*, 514 U.S. at 77-80; Henderson, *supra* note 177, at 409-11.

187. *Curtiss-Wright Corp.*, 514 U.S. at 77-80.

188. *Id.*

189. *Id.* at 80, 84-85.

190. *See id.* at 77-78.

191. *See Curtiss-Wright Corp.*, 514 U.S. at 85; Kempin, *supra* note 177, at 397.

192. *Curtiss-Wright Corp.*, 514 U.S. at 85.

information create uncertainty regarding the validity of unauthorized plan decisions, the Court permits ratification to save unauthorized decisions that were exercises of corporate authority under managerial discretion. Here ERISA analysis and information affect the process of decision-making by making the implementation and follow-up vulnerable to legal and policy challenges as unlawful exercises of corporate authority to make plan decisions.

A legal-managerial framework includes the formation of L-M analysis to accompany legal information. Using this framework to enter ERISA analysis and information in the process of the business decision-making makes it more likely that plan managers will ascertain the possession and exercise of corporate authority. This entry and utility of ERISA analysis and information in plan decision-making should have raised business concerns regarding the possession and exercise of corporate authority by decision-makers *long before the definition of a decision situation*. The point here is that an evaluation of the validity, utility and impact of ERISA regulation under business concepts, such as decision theories and principles, should have taken place long before the existence of any decision situation that would require the entry and utility (or application in practice) of ERISA analysis and information in the decision-making process. This evaluation provides a broad understanding of the impact of ERISA on managerial discretion in advance of any manager's use of ERISA analysis and information in the process of decision-making. In summing up, the use of pre-decisional analysis moved the decision-making process beyond a factual analysis (comparison) of past precedents (common law thinking) into an expansive managerial analysis of the law that weighs the impact of law and public policy on business methodology and the impact of the business decision on a particular regulation and public policy. A managerial analysis with law uses business principles and theories to evaluate the impact of law and public policy on business methodology and thinking before the use of L-M analysis to accompany legal information in the decision-making process.

VI. Effects of ERISA Disclosure on Business Methodology

A legal-managerial framework has its roots in common law analysis and information that did not require broad disclosure of findings and thinking of the business decision-making to allocate labor, financial and other resources. ERISA is just the opposite of common law; managers must include the disclosure of decisions and their findings and thinking. ERISA restrains managerial discretion, which includes organizational flexibility, by imposing decisional procedures and

guidelines on plan decision-making for plan management and administration before or during the decisional steps of implementation or follow-up to the decision. ERISA may limit quicker external and internal reactions and responses through plan decision-making. For example, section 402(b)(3)[193] of ERISA does not require detailed amendment procedures for a company to amend a benefits plan,[194] and *Curtiss-Wright* is silent on applying termination procedures to the termination of welfare benefit plans.[195] Benefit plans can be changed with few plan procedures in place, but eventually plan administrators or plan managers must disclose amendments, terminations and modifications to benefit plans. Section 104(b)(1)[196] requires plan administrators to disclose plan modifications and changes to plan participants and beneficiaries.[197] Congress responded by amending section 104(b)(1) to give greater protection to group health care benefits by imposing different requirements on modifications to heath care benefit plans.[198] These requirements of ERISA analysis and information impose different restrictions on different types of employee benefits and thus require different findings and thinking on decision-making for the administration and management of employee benefit plans.

Only a legal-managerial framework can address the decisional complexities raised by the impact and entry of ERISA in business decision-making and thinking. Business decisions and concepts must respond directly to organizational needs, market conditions, and finance, accounting and other discipline-specific findings and information. Part VI illustrates the validity and utility of a legal-managerial framework to evaluate and enter ERISA disclosure (or make public) requirements into the process of decision-making, including the use of

193. 29 U.S.C. § 1102(b)(3) (1994 & Supp. IV 1998). For a complete discussion of the application of section 402(b)(3) to a plan termination and amendment, *see supra* note 148 and accompanying text.

194. *Curtiss-Wright Corp.*, 514 U.S. at 85.

195. *See, e.g.*, Ackerman v. Warnaco Inc., 53 F.3d 117 (3d Cir. 1995). *See also* James E. Holloway, *The ERISA Amendment Provision As a Disclosure Function: Including Workable Termination Procedures in the Functional Purpose of Section 402(b)(3)*, 46 Drake L. Rev. 755 (1998) (arguing that plan terminations should not be subject to the same procedures applied to plan amendments).

196. 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998).

197. *See Ackerman*, 55 F.3d at 124 n.7; Rucker v. Pacific FM, Inc., 806 F. Supp. 1453, 1458-59 (N.D. Cal. 1992).

198. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 101-191, § 101(c)(1), 110 Stat. 1951 (Aug. 26, 1996), *codified as amended at*, 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998).

decisional findings, such as assumptions, inferences and conclusions, before and after the *selection of the decision*.

A. *Affecting Managerial Discretion through Disclosure Requirements*

ERISA analysis and information impose managerial obligations on plan administrators and managers to prohibit them from taking advantage of plan participants by not disclosing plan decisions and events. The disclosure of changes to or adverse effects on benefit plans may give labor, capital, financial and securities markets and local, state and federal policy-makers usable information and facts on a company's financial condition, but the latter disclosure may not be in the company's best interest. A managerial analysis with law uses ERISA and other laws and public policies concurrently with business analyses and information to minimize disruptions in evaluating alternatives, implementing the decision and other decisional steps that contain findings and thinking of *plan decision-making* not generally available to public markets, institutions and officials. To illustrate, disclosure requirements govern welfare benefit plans but generally do not require plan managers or administrators to promptly notify plan participants and beneficiaries of a plan termination.[199] Section 104(b)(1)[200] of ERISA requires that plan administrators must give notice to partici-

199. 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998).

200. *Id.* The pertinent language of section 104(b)(1) of ERISA, 29 U.S.C. § 1024(b)(1)(1994 & Supp. IV 1998), states that:

> § 1024. Filing and furnishing of information
>
> . . .
>
> (b) Publication of summary plan description and annual report to participants and beneficiaries of plan. . . .
>
> (1) The plan administrator shall furnish to each participant, and each beneficiaries receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 102(a)(1)–
>
> . . .
>
> If there is a modification or change described in section 102(a)(1) (other than a material reduction in covered services or benefits provided in the case of group health plan (as defined in section 733(a)(1))), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

Id. Section 102(a)(1) of ERISA, 29 U.S.C. § 1022(a)(1), states that: "A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title." 29 U.S.C. § 1022(a)(1) (1994 & Supp. IV 1998).

pants and beneficiaries after the plan has been modified or changed but is silent on whether they must give notice after the plan has been terminated.[201] Section 104(b)(1) applies to modifications and changes that are not as devastating as a complete elimination of benefits.[202] The harshness of a complete elimination of welfare benefits leads one to ask whether such an elimination of benefits should require prompt notice.[203] ERISA analysis and information could easily lead one to respond positively. The "two . . . purposes behind ERISA's reporting and disclosure provisions . . . ensure that 'the individual participant knows exactly where he stands with respect to the plan' and . . . 'enable employees to police their plans.'"[204] ERISA looks as though it justifies prompt notice, but ERISA analysis and information is in the gray areas on prompt notice; therefore, any decision eventually raising a *prompt notice issue* may be ripe with managerial uncertainty for plan administrators and managers.

Few courts have decided whether section 104(b)(1) applies to the termination of non-health and health care benefits and few have had opportunities to consider the question of prompt notice. One such court is the United States District Court for the Northern District of California. It concluded that section 104(b)(1) applied to a complete elimination of benefits and that notice of 210 days was not prompt enough.[205] In *Rucker v. Pacific FM, Inc.*,[206] the plaintiff, a disabled worker, filed an ERISA claim, alleging among other things, that defendants, Pacific FM, Inc. (Pacific FM and its insurance carrier), violated

201. *See* 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998). *See also Ackerman*, 55 F.3d at 123; *Rucker*, 806 F. Supp. at 1459.

202. *See Ackerman*, 55 F.3d at 123; *Rucker*, 806 F. Supp. at 1459.

203. *See infra* note 205 and accompanying text.

204. Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).

205. *Rucker*, 806 F. Supp. at 1453. A court of appeals addressed this issue and concluded that 104(b)(1) applies to a plan termination but refused to decide whether 210 days were not prompt enough. *Id.* A district court addressed the same issue and concluded that section 104(b)(1) applies to the termination of welfare benefits and that 210 days was not prompt enough for a termination of benefits. *Ackerman*, 55 F.3d at 125. Moreover, recent amendments to section 104(b)(1) do not significantly affect the district court and court of appeals' interpretation of section 104(b)(1). These amendments and administrative regulations define a *material reduction in covered services* but are not absolutely clear on whether a material reduction includes a complete elimination of benefits. These regulations provide prompt or shorter notice periods but a district court had already concluded that 210 days were not prompt enough. *Rucker*, 806 F. Supp. at 1456.

206. 806 F. Supp. 1453 (N.D. Cal. 1992).

procedural requirements of ERISA.[207] Defendants moved for summary judgment and argued that they owed no fiduciary duties to the plaintiff and that they did not violate any procedural requirements of ERISA.[208] The defendants discharged the plaintiff from his position on July 10, 1991.[209] Defendants' employee benefit plan "included a long-term disability benefits (LTD) policy."[210] In a cost-cutting program, defendants terminated LTD benefits so that these benefits were not available to the plaintiff when he was discharged.[211] Defendants argued that they had notified plaintiff of changes to their employee benefit plan.[212] However, the disclosures did not state that LTD benefits were being terminated.[213]

ERISA analysis and information impose specific obligations on plan administrators and other obligations on plan managers (employers) that are, at times, the same entity. Pacific FM argued that they had discharged their fiduciary duties owed to the plaintiff under section 104(b)(1).[214] The defendants stated that they had provided plaintiff notice of material changes or modifications within 210 days.[215] They noted that the plan year ended on December 31, 1990 and that plaintiff knew by July 29, 1991 that the LTD benefits had been terminated by them.[216] Section 104(b)(1) requires that plan administrators notify plan participants and beneficiaries of changes or modifications to the plan.[217] Thus, employees and retirees litigating a section 104(b)(1) claim must establish that plan administrators failed to notify them of modifications or changes or had delegated authority to do so to plan sponsors.[218] In *Rucker*, defendants argued that they did not owe a fiduciary duty to the plaintiff because they were acting as an employer or plan managers and thus were not required to give notice to the plaintiff when they canceled the LTD benefits.[219] The district court concluded that giving notice of a plan termination is a fiduciary

207. *Id.* at 1456.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 1458.
215. *Id.*
216. *Id.*
217. 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998). *See Curtiss-Wright Corp.*, 514 U.S. at 82-83.
218. *See Rucker*, 806 F. Supp. at 1456-57.
219. *Id.* at 1456.

responsibility of the plan administrator.[220] The court concluded that providing misleading information is a breach of a fiduciary duty.[221] The court noted that that the plaintiff provided evidence showing that the insurance carrier, Union Mutual Stock Life Insurance Company (USLIC), had delegated its authority to notify Pacific FM's employees to Pacific FM.[222] Thus it concluded that a triable issue of fact was raised regarding a breach of a fiduciary duty by defendants in the cancellation of their LTD benefits.[223] Statutory and policy ambiguities of ERISA information that is being used by plan administrators and managers affect the disclosure of decisions and their findings. These ambiguities also underscore the need for a legal-managerial framework to integrate law and business, such as human resources and finance, to discover and assess ERISA-related uncertainties and risks in business decision-making. Uncertainties regarding applications and interpretations under ERISA provisions leave the implementation and follow-up to the decision *subject to business changes* until trial courts resolve these ambiguities. But, the financial, legal, managerial and policy risks are much better understood by plan administrators and managers when courts resolve them.

A legal-managerial framework includes L-M analysis that weighs the impact of the decision on public policy during selection, implementation and follow-up to the decision. This public policy includes

220. *Id.* at 1457 (citing Willet v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1340 (11th Cir. 1992); Presley v. Blue Cross - Blue Shield of Ala., 744 F. Supp. 1051, 1058 (N.D. Ala. 1990)).

221. *Id.* at 1457 (citing Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163-64 (6th Cir. 1988)). *See also* Varity Corp. v. Howe, 516 U.S. 489 (1996) (duty to disclose accurate information).

222. *Rucker,* 806 F. Supp. at 1457.

223. *Id.* at 1458. *See also* Steven Davi, *To Tell The Truth: An Analysis of Fiduciary Disclosure Duties And Employee Standing to Assert Claims under ERISA*, 10 St. John's Legal Comment. 625 (1995) (analysis of fiduciary duties of employers and plan administrators).

Once the claimants establish that the defendant is the plan administrator and owes them a fiduciary duty to notify of changes or modifications to the plan, a court can decide whether section 104(b)(1) applies to a plan termination and whether 210 or more days are prompt or sufficient notification for a plan termination. *Rucker*, 806 F. Supp. at 1453. In *Rucker*, the plaintiff alleged that his employer violated ERISA. The defendant argued that it did not violate ERISA. *Id.* Defendants argued that they had notified plaintiff of changes to their employee benefit plan. *Id.* Defendants' disclosures did not state that the LTD benefits were being terminated. *Id.* The defendants claimed that they had provided plaintiff notice of material changes or modifications within 210 days. *Id.* They noted that the plan year ended on December 31, 1990 and that plaintiff knew by July 29, 1991 that the LTD benefits had been terminated by them. *Id.*

the purposes of regulation and common law and present public needs and their importance, such as health care, to society. The district court noted that ERISA disclosure and reporting requirements "ensure that individual participants know[ ] exactly where . . . [they stand] with respect to the plan and . . . enable employees to police their plans."[224] The court further stated "that these requirements permit employees 'to bargain further or seek other employment if they are dissatisfied with their benefits.'"[225] The district court also noted that defendants' precedent and analysis failed to explain why section 104(b)(1) does not apply to the termination of benefits.[226] It weighed the impact of the elimination of benefits on plan participants[227] and concluded "a termination leaves the individual without any coverage whatsoever."[228] The court recognized that prompt notification would give plan participants an opportunity to find alternative means of coverage."[229] It did not define a suitable notification period, but the court noted that 210 days was not prompt enough.[230] A legal-managerial framework recognizes that ERISA analysis and information impose obligations on administrators and managers, but does not always obligate plan administrators to make timely disclosures to plan participants. In a legal-managerial framework that evaluates law under management theories or concepts, a lengthy disclosure period under ERISA or other statutes gives managers the time to implement and follow-up on plan decisions that affect business organizations, financial markets and policy environments. Thus, a framework would allow managers time to prepare for possible disruptive effects of labor, capital and securities markets and government policy-making and regulation.

224. *Id.* at 1459 (citing Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1170 (3d Cir. 1990)).

225. *Id.* (citing Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992)).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* The district court denied defendants' motion for summary judgment, noting defendants failed to put forth sufficient evidence to establish that they neither owed nor breached a fiduciary duty to the plaintiff, and that they complied with ERISA procedural requirements. *Rucker*, 806 F. Supp. at 1460. The district court concluded that section 104(b)(1) applies to plan terminations and that 210 days to notify of a plan termination was not prompt enough to protect against such a devastating plan action under ERISA. *Rucker*, 806 F. Supp. at 1459. *See also* Willet v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1340 (11th Cir. 1992).

B. *Requiring the Disclosure of the Decision and Its Effects*

ERISA analysis and information can require that findings in the final steps of the process of decision-making be disclosed, though managers may not be ready or want to disclose these findings or implement the decision and follow-up its effects on organizations, markets and society. For example, in *Ackerman v. Warnaco, Inc.*,[231] the United States Court of Appeals for the Third Circuit concluded that the section 104(b)(1) applied to a plan termination. In *Ackerman*, the plaintiffs were 169 former employees "who were in production positions" at Warnaco's Altoona, Pennsylvania plant.[232] Warnaco manufactured fashion apparel.[233] In January 1988, Warnaco published an "Employee Handbook" (1988 Handbook) and distributed the Handbook to its employees.[234] The 1988 Handbook described a severance benefit or termination allowance policy.[235] It also listed conditions and circumstances that made employees eligible or ineligible for the termination allowance.[236] One such circumstance was that employees would "not be entitled to a termination allowance if, prior to termination of . . . [their] employment, management has altered or rescinded this termination allowance policy."[237] In a memorandum dated December 26, 1990, Warnaco rescinded its termination allowance policy, effective on December 19, 1990.[238] The Secretary and Assistant General Counsel of Warnaco issued the memorandum.[239] The memorandum stated that a meeting would be held to disclose to employees the decision to rescind the termination allowance policy.[240] Compli-

231. 55 F.3d 117 (3d Cir. 1995).
232. *Id.* at 119.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 119-120.
238. *Id.* at 119.
239. *Id.*
240. *Id.* Employees alleged that such a meeting was not held at Warnaco's Altoona plant, though a meeting was held at the Duncanville, Pennsylvania warehouse. *Id.* At the meeting at the Duncanville plant, one of Warnaco's vice presidents informed the employees of the rescission of the termination allowance policy. *Id.* However, one employee at the Altoona plant alleged that employees at the Altoona plant had not received notice of the rescission of the termination allowance policy until January 22, 1992. *Id.* Employees asserted that the notice was given by a Warnaco Vice President when he was asked whether they would receive severance benefits that had been provided under provisions of the 1988 Handbook. *Id.* This meeting was to discuss issues raised by the closing of the Altoona plant. Warnaco terminated all of the employees between October 1991 and January 1992. *Id.*

ance by Warnaco with ERISA obligations may still result in litigation regarding disclosure issues where ERISA is not clear.

Knowing the impact of law-imposed disclosures may still create uncertainty regarding the effectiveness of a decision to further a company objective under a particular decision situation. In *Ackerman*, Warnaco disclosed its decision to its employees, though some employees alleged they never received the disclosures under ERISA. Employees and Warnaco did not dispute that Warnaco published an updated Employee Handbook in 1991 (1991 Handbook) that reflected an elimination of the termination allowance policy.[241] They also did not dispute that Warnaco's President informed employees by letter about "unfavorable economic times,"[242] noting "a salary freeze and change in our severance policy are difficult . . . ."[243] Employees acknowledged receipt of the letter but considered it to be vague regarding rescission of the termination allowance policy.[244] But employees of Altoona alleged that they did not receive a copy of the 1991 Handbook.[245] They acknowledged that Warnaco distributed the 1991 Handbook to employees at its other locations.[246] Warnaco did not produce any evidence that it distributed the 1991 Handbook to its employees at the Altoona plant.[247] Furthermore, the 1991 Handbook or record made no reference "*to the procedure that was followed in eliminating the termination allowance or the precise date such action was accomplished.*"[248] Warnaco's disclosure reflects economic conditions of the decision situation. It was a business decision to limit the impact of these conditions on the company objectives, but this disclosure raises questions regarding the effect of ERISA disclosure procedures on the timeliness and effectiveness of the plan decision.

Warnaco employees did not agree with Warnaco's business decision to terminate the plan or the disclosure of the plan termination decision. The immediate benefits of Warnaco's plan termination were purely economic, though this decision's consequences were harsh on employees. Note that in *Ackerman*, employees filed suit against Warnaco in the United States District Court for the Western District of Pennsylvania to recover severance benefits denied them under the 1988

241. *Ackerman*, 55 F.3d at 119.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id* (emphasis added in original).

Handbook.[249] Warnaco moved for summary judgment and argued, among other things, that it owed no fiduciary duties to the plaintiff and did not violate any procedural requirements of ERISA.[250] The district court granted summary judgment for Warnaco.[251] The employees appealed to the United States Court of Appeals for the Third Circuit.[252] They argued that section 1024(b)(1)[253] applied to a complete elimination of benefits and thus they did not receive timely notice under ERISA. The Third Circuit concluded that section 1024(b)(1) applied to the complete elimination of benefits and reversed the district court by finding that a triable issue of fact existed regarding whether Warnaco's employees received notice of the termination of benefits.[254] The Third Circuit noted that:

> Warnaco argues that a termination of benefits is different from an amendment and is therefore not covered by the language of 29 U.S.C. § 1024(b)(1) which speaks of a plan "modification" or "change." We find this argument unpersuasive for the same reasons we found Warnaco's argument concerning section 402(b)(3)[, 29 U.S.C. § 1102(b)(3),] unpersuasive—we do not believe Congress intended to protect employees from undisclosed plan amendments, but leave them defenseless with respect to a plan termination, a change with potentially more dramatic effects.[255]

The Third Circuit did not decide whether 210 days at the end of the plan year were prompt enough.[256] *Ackerman* applies section 104(b)(1) to the elimination of employee welfare benefit plans where the elimination of severance, dental, health care and other benefits often create social and economic hardships for retirees, employees and their families and thus imposes disclosure requirements on the latter steps of the process of decision-making.[257]

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249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 123.
254. *Id.* In *Ackerman*, the Third Circuit also held that the district court must determine whether Warnaco acted in bad faith, or actively concealed the rescission of the termination allowance policy. *Id.*
255. *Id.* at 123 n.5.
256. *Id.* at 123-24.
257. *Id.* at 123. *See also* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) (amending a plan to add a contingency that could eventually eliminate the benefits plan); Gregory J. Osso, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Returns*, 13 J. Contemp. Health L. Pol'y 233 (1996) (discussing promises breached by employers under employee benefits plans).

Obviously plan managers want to disclose findings, conclusions and decisions of the process of decision-making when their effects have a lesser impact or influence business, government or community. The timely, effective disclosure of decisions and their findings and conclusions limit disruptive reactions and permit well-planned decisional responses during implementation and follow-up of the decisions. Yet the consequences of disclosures on business, government and the community are not entirely certain, especially when public policy or law is not entirely clear. Under *Ackerman's* decision situation, a legal-managerial framework points out quickly that ERISA analysis and information, on one hand, do not prohibit a business decision to terminate or amend an employee benefits plan, but notes that ERISA analysis and information, on the other hand, will definitely affect the timing of the selection, implementation and follow-up to a decision, and thus creates new decisional risks and liabilities in the process of decision-making. These new risks and liabilities are law-imposed uncertainties in business decision-making.

Using a legal-managerial framework shows how ERISA analysis and information affect the process of decision-making and thus requires plan managers and administrators to understand legal, labor, financial and policy effects of benefit plan decisions. Often, these business decisions rest squarely on the outcomes of legal issues and policy concerns that are within gray areas. Such gray-area decisions do not permit certain or conclusive legal advice through any present analysis and information. Litigation is ample proof. Uncertainty in the decision-making process caused by the need to address gray area issues requires that legal issues and policy concerns be examined under an analytical framework that would take in consideration business and economic concepts and social and political conditions before disclosing a business decision and its findings and thinking. A managerial analysis with law addresses gray area issues that often are uncertain or unstable in decision-making, by using business theories and principles to ascertain more precisely policy and legal risks in the process of decision-making, including implementation and follow-up. Gray-area issues regarding the meaning and application of law can

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The application of ERISA disclosure standards to the disclosure of an early retirement benefit that is still under consideration and in the process of decision-making (perhaps even an alternative) demonstrates the impact of ERISA analysis and information on business methodology and thinking. *See* Michael J. Collins, *It's Common, But Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 Lab. Law. 391, 400-12 (2001).

often make decisional disclosure disruptive to the selection, implementation and follow-up to the decision.

C. *Requiring a Dual Decision-Making Process to Disclose Information*

ERISA analysis and information demonstrate the need for a legal-managerial framework to uncover how business has influenced policy-making to make regulation and why business should weigh the impact of the decision on public policy in the selection, implementation and follow-up steps of the decision-making process. Many seemingly unnoticed decisions of companies have an incremental effect on public policy-making by creating unwanted or unneeded problems that are inconsistent with public needs and wants. The cumulative effects of these decisions can lead to regulation, such as ERISA and its amendments, that imposes mandatory obligations on companies and their managers. Regulation requires or encourages employers to provide for the safety, health and welfare needs of retirees, employees and their dependents. Such mandates affect both business methodology and thinking, such as requiring the considerations of policy concerns in incremental decisions of unrelated decision-makers and requiring changes in the particular decision-making process. For example, an amendment to section 104(b)(1) by the Health Insurance Portability and Accountability Act of 1996[258] (HIPAA) is implemented by administrative regulations that do not clearly include a complete plan elimination as a material reduction in covered services but definitely do provide prompt notice for a modification and an elimination of some benefits.[259] *Rucker* concluded that 210 or more days were not prompt,[260] and HIPAA significantly reduces the notice period for health care benefits.[261] The HIPAA amendment to section 104(b)(1) states that:

> If there is a modification or change described in section 102(a)(1), that is a material reduction in covered services and benefits provided under a group health plan (as defined in section 733(a)(1), a summary description of such modification or change shall be furnished to par-

258. Pub. L. 104-191, § 101(c)(1), 110 Stat. 1951 (1996), *codified as amended at*, 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998). The Health Insurance Portability and Accountability Act of 1996 (hereinafter HIPAA), amends section 104(b)(1) by creating an exception for particular *changes or modifications to group health care plans*. 29 U.S.C. § 1024(b)(1).

259. *See infra* notes 270-274 and accompanying text.

260. *Rucker*, 806 F. Supp. at 1459. *See also* Willet v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1340 (11th Cir. 1992) (The court of appeals concludes that 210 days was not prompt enough.).

261. *See infra* note 262 and accompanying text.

> ticipants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsor may provide such description at regular intervals of not more than 90 days.[262]

The HIPAA amendment includes some significant requirements that affect accessibility and portability of group health insurance plans.[263] *The most significant is the prompt notice of 60 days after the adoption of the change or modification to health care benefits plans.*[264] This amendment creates different substantive requirements for health care and non-health care benefits of employee benefits plans and may require a different decision-making process for health care plans.

The cumulative impact on public policy of unrelated decision-makers making the same decision always causes a broad legislative response, such as ERISA, and thus HIPAA and other regulation may not limit managerial discretion of an entire field, such as employee benefits. In regulating the provision of non-health care benefits, the requirements of section 104(b)(1) still give plan managers great managerial discretion that permits the disclosure of decisions with minimum disruption in the implementation and follow-up steps of the decision-making process. These requirements permit plan administrators to wait at least 210 days after the end of the plan year to notify plan participants and beneficiaries of plan changes or modifications, and if a change was made on January 1, the plan administrator could take 574 days to notify plan participants and beneficiaries.[265] The HIPAA amendment requires prompt disclosure of a material reduction cause by a plan change or modification to health care services and benefits. The administrative regulations that implement the HIPAA amendment to section 104(b)(1)[266] define a material reduction in covered health care services and benefits as follows:

> (3) "Material Reduction". (i) . . . [A] "material reduction in covered services or benefits" means any modification to the plan or change in the information required to be included in the summary plan description that, independently or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important reduction in covered services or benefits under the plan.[267]

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262. 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998).
263. *See supra* note 262 and accompanying text.
264. 29 U.S.C. § 1024(b)(1) (1994 & Supp. IV 1998) (emphasis added).
265. Kytle v. Stewart Title Company, 788 F. Supp. 321, 324 (S.D. Tex. 1992).
266. 29 C.F.R. § 2520.104b-3 (2002).
267. *Id.* at § 2520.104b-3(d)(3)(i).

The HIPAA regulations explicitly affect communications between plan administrators and plan participants by requiring administrators to scrutinize welfare benefit plan decisions to ascertain whether these decisions could, singly or jointly with other plan decisions, result in a material reduction in covered services and benefits.[268] HIPAA imposes an obligation that benefit plan managers should have recognized long ago. It is managerially problematic to fail to disclose the termination of health care benefits during an exponential growth in health care policy. Should we blame managers? No. The lack of a legal-managerial framework to evaluate the ultimate impact of the incremental effects of hundreds of plan decisions on *heated* health care policy is absent in both law and business.

A managerial analysis with law cannot eliminate the uncertainty created by administrative regulations, precedents, common law principles and statutes, but it is an analytical, reasoned framework to evaluate legal and public policy questions. The framework also enters L-M analysis with legal information in gray area decision-making, which usually creates the greatest uncertainty. To illustrate, earlier regulations did not define a modification or change but noted that under section 104(b)(1), a modification or change must be material.[269] Thus courts must define a material modification or change in disputes involving the loss of pension and welfare benefits.[270] Administrative regulations that implement the HIPAA amendment list plan transactions that are a reduction in covered services and benefits.[271] These regulations state that:

> (ii) A "reduction in covered services or benefits" generally would include any plan modification or change that eliminates benefits payable under the plan, including a reduction that occurs as a result of a change in formulas methodologies or schedules that serve as the basis for making benefit determinations; increases deductibles, co-payments, or other amounts to be paid by a participant or beneficiary; reduces the service area covered by a health maintenance organization; establishes new conditions or requirements (e.g., preauthorization requirements) to obtaining services or benefits under the plan.[272]

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268. *See id. See also Curtiss-Wright Corp.*, 514 U.S. at 82-83 (The Court observes that plan administrator should screen day-to-day communications to determine the effects on the administration of the plan.).

269. *See* 29 C.F.R. § 2520.104b-3(a) (2002).

270. *See* Baker v. Lukens Steel Co., 79 F.2d 509 (3d Cir. 1986) (The deletion of a form from an early retirement package was a material modification.).

271. 29 C.F.R. § 2520.104b-3(d)(3)(ii) (2002).

272. *Id.*

These regulations do not explicitly state that section 104(b)(1) applies to a complete elimination of benefits and thus could definitely raise gray area issues in the process of decision-making, most notably in evaluating alternatives and selecting the decision. The regulations state that section 104(b)(1) "include[s] any plan modification or change that eliminates benefits payable under the plan . . . ."[273] One interpretation of such language is that section 104(b)(1) applies to an elimination of benefits under the plan. The pertinent language is any "*plan modification or change*"[274] that results or causes an elimination of benefits and services. A plan modification or change does not necessarily include a plan termination, though a plan termination would also completely eliminate benefits. A plan termination is a unilateral decision of a plan manager who is not acting as a plan administrator under ERISA, and must make decisions under uncertainty. Absolute certainty is not a requirement of business decision-making and thus a legal-managerial framework must automatically address the liability and other consequences of decision-making under uncertainty.

Weighing the impact of public policy that leads to broad regulation is justified by the impact of regulation on business methodology and thinking, such as a reduction in managerial discretion. ERISA regulations that implement HIPAA do not list a plan termination as a transaction covered by section 104(b)(1) of ERISA. They explicitly list unilateral plan decisions (changes or modifications) that would eliminate particular benefits or services. Section 104(b)(1) interpretation by courts provides ERISA analysis and more information. If ERISA analysis and information of these interpretations apply to plan terminations, they could affect business decision-making by making the plan management less flexible and responsive to market, government and economic conditions. This inflexibility results if management prematurely discloses plan decisions that are business actions under accounting, finance or other business functions that also affects business decisions of labor, financial, securities and other markets.[275]

ERISA analysis and information force managers to consider the social and economic consequences of disclosing business information and other findings and thinking of decision-making. However, ERISA analysis and information also force managers to weigh the public policy effects of imposing hardships on employees and retirees. ERISA analysis and information include policy analysis and information to scrutinize the effect of plan decisions on an employee, retiree or depen-

273. *Id.*
274. *See id.*
275. *See supra* notes 1-3 and accompanying text.

dents. Therefore, a managerial analysis with law evaluates the impact of ERISA on business thinking and then enters through the delivery and use of ERISA analysis and information into the process of business decision-making. Poor plan decisions by business organizations beget regulation that is a direct response to existing public policy.

VII. CONCLUSION

A managerial analysis with law is a legal-managerial framework for the entry and use of law and public policy in the process of business decision-making. Prior to this entry and utilization, a managerial analysis with law would use management, finance and other business theories to evaluate the impact of law and public policy on business theories and other thinking. Moreover, a managerial analysis with law provides entry and utility through legal-analytic methodology. Analytical methodology of law and business integrate to form L-M analysis and to accompany legal information, which, in turn, produces specific findings and thinking in the process of business decision-making. A managerial analysis with law includes addressing the impact of law and public policy on business methodology and thinking through pedagogy, theory and practice of business and legal disciplines. This article examined the practicality of using a legal-managerial framework in the process of business decision-making or business methodology and left pedagogy and theory for another time.

Under a managerial analysis with law that includes a legal-managerial framework, business concepts apply to law and public policy to examine and explain the validity, necessity and utility of common law, regulation and public policy. Such evaluation should take place long before law and public policy affect the decision-making process that uses L-M analysis and legal information. ERISA analysis and information is not novel in business methodology and thinking. Employers must use ERISA to establish and maintain employee benefit plans for their employees. These plans provide retirement, post-employment and employment welfare and security for employees, retirees and their dependents.[276] These plans generally include both welfare benefits[277] and pension benefits.[278] Welfare benefits such as life insurance,

276. *See* 29 U.S.C. § 1001(1994 & Supp. IV 1998); *supra* note 13 and accompanying text.

277. 29 U.S.C. § 1002(1) (1994 & Supp. IV 1998); 29 C.F.R. § 2510.3-1 (2002); *supra* note 15 and accompanying text.

278. 29 U.S.C. § 1002(2) (1994 & Supp. IV 1998); 29 C.F.R. § 2510.3-2 (2002); *supra* note 14 and accompanying text.

dependent care, and health care provide security,[279] but they do not vest at retirement and thus can be terminated at anytime by employers.[280] Employers provide these benefits to their employees to attract and maintain a stable work force.[281] Consequently, employee benefits are still under the control of plan managers who are subject to ERISA analysis and information, but these managers exercise corporate authority to make benefit plan decisions within the bounds of permissible managerial discretion that is governed by business methodology and thinking.

Common law principles, analysis and thinking gave, and still give, plan managers and administrators much latitude in managing and administering both welfare and pension benefits.[282] The common law did not rely on management concepts and thinking to explain its principles, analysis and thinking. Often managers make decisions that later show little regard for finance, accounting, management and other business theories and principles. Yet they defend these decisions based on their rights to manage as they see fit, i.e., making profits and reducing costs. They often overlook public policy. In fact, government efforts to advance public policy rarely, if at all, involve saving money or making profits for business organizations of our society. Public policy needs provide public benefits and programs that alleviate public and private hardships that are caused by irrational or inept business decisions and practices for a particular time and place. Obviously, much common law and its thinking, such as the employment-at-will doctrine, do not inherently fit the complexity of today's business markets, government regulation and public policy, when they are implemented through a non-analytical framework that cannot weigh effects and influences caused by law and public policy on business methodology and thinking.

ERISA's impact on business functions, economic markets and public policy illustrate in several ways the need for a legal-managerial framework to evaluate the impact of law and then enter L-M analysis with legal information in the process of business decision-making.

279. Staff of the House Select Comm. on Aging, 101st Cong., Second Sess., *Emptying the Elderly's Pocketbook–Growing Impact of Rising Health Care Costs* 23-31 (Comm. Print 1990) (Hereinafter cited as Emptying the Elderly's Pocketbook); A. C. Enthoven, *Retiree Health Benefits as a Public Policy Issue*, *in* RETIREE HEALTH BENEFITS: WHAT IS THE PROMISE? 4-4 (Employee Benefit Research Institute, ed., 1989).

280. *See supra* note 70 and accompanying text.

281. *See* Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 917 (1970); D. L. Glifford & C. A. Seltz, FUNDAMENTALS OF FLEXIBLE COMPENSATION 5 (1988).

282. *See supra* note 70 and accompanying text.

First, ERISA analysis and information affect the process of decision-making by requiring companies to disclose more information and findings, thus requiring managers to understand the complete effects of legal requirements and issues on business decisions and their consequences. Second, ERISA analysis and information affect business principles and theories that govern reactions and responses by managers to the impact of the regulation on organizational decisions and objectives. A managerial analysis with law looks for a rational basis or ground under business concepts for business decisions that must address rational concerns and points of law and public policy. Third, ERISA analysis and information demand that managers pay close attention to public policy concerns in the selection, implementation and follow-up of decisions. A managerial analysis with law weighs how social and other policies affect business decision-making and how regulation implements social and other policy goals to achieve public ends. Fourth, ERISA analysis and information are evidence that business and government need to address more closely interrelated public needs and business objectives. Managerial analysis with law examines the connection between public ends and business interests. Business often complies with new regulation, but then finds another public policy concern to exacerbate. Business and law share a vicious cycle in the absence of managerial analysis with lawbecause too many poor decisions beget more regulation. A legal-managerial framework requires management to consider law and public policy in the beginning through the end of the decision-making process. A managerial analysis with law evaluates the impact of law and public policy and guides the entry and utility of legal analysis and information in business methodology and thinking, including finance, accounting, marketing, management and decision sciences.

Managerial analysis with law studies the impact of law and public policy on business methodology and thinking rather than relying solely on the "bottom-line," common law thinking that is profits for today and precedents of yesterday, respectively.

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APPENDIX A

THE STRUCTURAL SIMILARITIES BETWEEN LEGAL METHODOLOGY AND MANAGEMENT METHODOLOGY UNDER A *MANAGERIAL ANALYSIS WITH LAW*

Appendix A illustrates the structural similarities between legal methodology and business methodology. A managerial analysis with law has three analytical levels and each level has three or more horizontal stages or steps. A *managerial analysis with law* explains and examines the impact of law on management thinking and the impact of management actions on law and public policy. A legal-managerial framework implements a managerial analysis with law. The legal-managerial framework uses legal-analytic methodology in the application of business methodology and thinking to business situations.

LEVEL 1: COMMONALITY IN THINKING AND KNOWLEDGE IN INTEGRATING MANAGEMENT AND LEGAL METHODOLOGIES

Analysis-Based Thinking and Knowledge	Coordination-Based Thinking and Knowledge	Decision-Based Thinking and Knowledge
Situational, Point and Informational Analyses	Coordinating the Alternative with Objectives	Determining Outcomes and Evaluating Results
Managerial, Societal, and Legal Information	Coordinating the Alternative with Interests	Providing Precise Information and Analyses

LEVEL 2: LEGAL-MANAGERIAL FRAMEWORK TO IMPLEMENT LEGAL-MANGERIAL ANALYSIS AND LEGAL INFORMATION

Level 2A: The Stages of the Process of Decision-Making or Management Methodology

Recognizing and defining the decision situation	Identifying alternatives	Evaluating alternatives	Selecting the best alternative	Implementing the chosen alternative	Follow-up and evaluating results

Level 2B: The Analytical Nature of the Legal Methodology of Judicial Decision-Making

Analysis-Based Methodology and Information	Coordination-Based Methodology and Information	Decision-Based Methodology and Information
Situational/Factual Analysis>>>>>	Analytical Frameworks for Continuity>>>>>	Issue/Question Recognition>>>>>
Gathering/Finding Information>>>>>	Situational/Factual Analysis>>>>>	Using/Applying Law>>>>>

This illustration shows two of the levels and their stages and steps in a managerial analysis with law. **Level 1** displays the stages of a managerial analysis with law. It shows the analytical commonality of legal methodology and managerial methodology in the use of facts and information. It shows the compatibility of legal and business methodologies, and thus permits the use of legal-analytic and business methodology to form legal-managerial analysis to accompany legal information in the process of business decision-making. The decision-making process is management methodology that is analytical and informational portal. The steps are portals for the entry of business and other discipline-specific analyses and information, such as finance, statistics, economics and law, which produces particular findings and thinking, such as assumptions and conclusions. **Level 2** is the implementing level of a managerial analysis with law. Level 2 integrates legal analysis and management methodology to implement a legal-managerial framework. Level 2 consists of two levels. First, **Level 2A** is management methodology, *a model of the process of business decision-making. The process of business decision-making* consists of six methodological steps that possess unique informational and analytical needs. Level 2A may also include strategic, administrative and operational decision-making. Second, **Level 2B** is legal-analytic methodology, *representing methods of judicial decisions and law.* The methods overlay particular steps in the process of business decision-making of Level 2A. Level 2B lists the legal-analytical methods that help form the legal-managerial analysis to accompany legal information in the process of business decision-making.