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Reply to Judge Easterbrook: The Unsupported Delegation of Conflict Adjudication in ERISA Benefit Claims under the Guise of Judicial Deference

Donald T. Bogan

THE UNSUPPORTED DELEGATION OF CONFLICT ADJUDICATION IN ERISA BENEFIT CLAIMS UNDER THE GUISE OF JUDICIAL DEFERENCE

DONALD T. BOGAN*

Cynics, and there are a few of us, worry that sometimes, some judges employ principles of statutory construction as a means to justify a predetermined end. As the devil quotes the Bible for his or her own purposes, do judges advance political agendas on a case-by-case basis, supporting their policy-motivated decisions by selective application of rules of statutory interpretation? Do canons of construction direct a court's conclusions, or do some judges apply either a textualist or a nontextualist brand of statutory interpretation, depending upon which method of construction more persuasively produces the judge's personally desired political result?[1]

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* Director of Clinical Education and Associate Professor of Law, University of Oklahoma College of Law. J.D. 1979, Wake Forest University School of Law; A.B., 1974, Brown University. I am grateful to ERISA practitioner and Adjunct Professor of Law Mark DeBofsky for sharing his insights on the misapplication of administrative law-based judicial deference in ERISA claims litigation. *See* Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004).

1. Consider the arguably inconsistent application of the textualist statutory interpretation method in cases construing ERISA, which is found at 29 U.S.C. §§ 1001-1461 (amended 2004) and in scattered sections of the Internal Revenue Code. In its early ERISA cases interpreting the statute's preemption clause, which provides that ERISA "shall supersede any and all State laws . . . [that] relate to any employee benefit plan," the U.S. Supreme Court applied a plain meaning interpretation of the "relate to" phrase in the preemption language, which often resulted in the preemption of state consumer protection laws. ERISA § 514(a), 29 U.S.C. § 1144(a) (2000); *see, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (holding that state law claim for bad faith breach of disability insurance contract relates to an ERISA plan and is not saved from preemption as a law that regulates insurance). Then later, when ERISA's express savings clause exception to preemption for "any law of any State which regulates insurance" was asserted by consumers as a defense to ERISA's preemption of a state law that arguably provided a state law remedy aimed at the insurance industry, the Supreme Court discarded its plain meaning interpretive method and suggested that ERISA's implied preemption of state law remedies was so strong that it trumped even the express language of the statute. ERISA §514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (2000); *see* Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377-78 (2002) (in dicta, opining that a state insurance law would be impliedly preempted by ERISA's civil enforcement provisions if the insurance law provided a remedy in addition to those remedies set forth in ERISA § 502, 29 U.S.C. § 1132); *see also* Aetna Health Inc. v. Davila, Nos. 02-1845, 03-83, 2004 WL 1373230 (U.S. June 21, 2004) (confirming *Moran's* dicta in holding that implied preemption of state law remedies trumps ERISA's express savings clause exception to preemption for state laws that regulate insurance).

The Honorable Frank H. Easterbrook, in his entertaining Henry Lecture at the University of Oklahoma College of Law, provides insight into some of the processes of judicial law-making that both encourages the cynic with the candid recognition of the cynic's concerns,[2] and soothes the mind of the moderate by explaining systematic judicial methods that justify court decisions that defer, in appropriate circumstances, to the policy-driven rulings of administrative bodies under the *Chevron*[3] doctrine.

Judge Easterbrook identifies three separate subjects — delegation, respect, and persuasion — that fall within the rubric of judicial "deference" to administrative agencies, as commonly described by courts and scholars.[4] Judge Easterbrook argues that each of these subjects of judicial deference should be separately acknowledged, because "[c]onsiderations applicable to one . . . may be off the mark for the other."[5] Distinguishing "delegation" in particular, Judge Easterbrook states that courts must accept administrative agency action, within the sphere of its delegated authority, when Congress has granted to the agency "the power to adopt legal norms via a formal rulemaking or administrative adjudication."[6]

In addition to his recommendation that courts unpack the multiple meanings of administrative discretion in statutory interpretation, Judge Easterbrook remarks that courts quite appropriately allow political considerations to infuse the interpretation of statutes when the policy choices are made by Article II officers subject to public accountability, as opposed to tenured Article III officers.[7] Here Judge Easterbrook suggests that courts consider "the link between the identity of the decider and the appropriate interpretive norms" when applying deference.[8] I do not quarrel with Judge Easterbrook's process for deferential judicial review of interpretive discretion granted to Article II officers. Rather, I borrow Judge Easterbrook's foundational structure and

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2. *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 20 (2004) ("Now consider again: is choosing the method of interpretation inherently political? That most of the decisions I have discussed are unanimous — or lopsided with no apparent political spin to the voting — suggests not. It can *be* political if the interpreter is intellectually dishonest, switching between 'plain meaning' and more expansive styles according to the judge's estimate of the preferable outcome. It can be political if the interpreter uses rhetoric of low generality to disguise other methods. . . . When we worry about tenured officers exalting their will over that of the legislature — that is, all the time — we ought to prefer a model of construction under which this is a sin rather than one under which it is the norm.").

3. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

4. *See* Easterbrook, *Judicial Discretion*, *supra* note 2, at 4-5.

5. *Id.* at 5.

6. *Id.* at 4.

7. *See id.* at 4-9.

8. *Id.* at 4.

transfer those sound considerations of judicial deference to a distinct area of the law, the Employee Retirement Income Security Act of 1974 (ERISA)[9], to see if some reason can be introduced into ERISA benefit claims litigation, which currently suffers from an unsupportable judicial deference to the decisions of nongovernmental, ERISA plan claims administrators.[10]

I. Congress Did Not Delegate Adjudicatory Powers to Any Agency in ERISA

For Judge Easterbrook's purposes in examining judicial deference in statutory interpretation, he found it acceptable to bundle "rulemaking" and "administrative adjudication" into the same subcategory of judicial deference, which he termed "delegation," even though he otherwise urged courts to examine the various subjects of judicial deference separately.[11] I suggest that delegation of "rulemaking" powers and delegation of powers of "administrative adjudication" should also be distinguished by courts and viewed separately when courts seek to determine what, if any, deference is due to an ERISA plan administrator's "adjudication" of a plan participant's employee benefit claim.[12] The reason is simple; Congress delegated rulemaking authority under ERISA to the Department of Labor (DoL),[13] but

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9. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in 29 U.S.C. §§ 1001-1461 and scattered sections of 26 U.S.C.).

10. *See, e.g.*, De Nobel v. Vitro Corp., 885 F.2d 1180, 1188 (4th Cir. 1989) ("[W]ere we to consider *de novo* review appropriate, we might well hold for the retirees. Indeed, the appellants have offered an interpretation of the Plan which could be considered not only 'reasonable,' but 'more reasonable' than Vitro's."); Brown v. Ret. Comm. of Briggs & Stratton, 797 F.2d 521, 529 (7th Cir. 1986) ("'When [discretionary] power has been conferred [by a plan on the plan administrator], the judicial role is limited to determining whether the . . . [Committee's] interpretation was made rationally and in good faith — not whether it was right.'") (second alteration in original) (quoting Riley v. MEBA Pension Trust, 570 F.2d 406, 410 (2d Cir. 1977)).

11. *See* Easterbrook, *Judicial Discretion*, *supra* note 2, at 4-5.

12. I highlight the term "adjudication" here to emphasize that I do not consider a claims adjuster's refusal to pay benefits an adjudication analogous to the decisions of an Administrative Law Judge, which is how I perceive Judge Easterbrook uses the term.

13. *See generally* CONF. REP. NO. 93-1280 (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RET. INCOME SEC. ACT OF 1974, at 326-33 (1976) (Comm. Print) [hereinafter LEGISLATIVE HISTORY]. ERISA's legislative history demonstrates that Congress weighed the interests of both the Department of Labor and the Treasury Department when it was debating this new comprehensive legislation and chose to delegate regulatory authority to both agencies in the final legislation. *See, e.g.*, Remarks of Sen. Benston Introducing S. 1179, 93d Cong. (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 211.

it considered, and decided against, delegating adjudicatory powers to the DoL or any other government agency.[14]

Instead of organizing an administrative hearings apparatus within the DoL to adjudicate plan participant claims for benefits under ERISA-governed employee benefit plans, Congress provided express jurisdiction in federal court and an express remedy for workers to recover benefits due under their employment-provided fringe benefit programs.[15] Given ERISA's express grant of a federal court remedy to plan participants, it is a cruel curiosity that federal judges commonly refuse workers the right to conduct discovery in ERISA claims litigation[16] and refuse to conduct evidentiary hearings, where witnesses can be examined and cross-examined, to entertain the merits of

14. The Senate Finance Committee recommended that administrative adjudicatory authority be granted to the Department of Labor under ERISA. *See* S. 1179, 93d Cong. § 602 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 13, at 780, 988-90; S. REP. NO. 93-383, at 116-17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4999-5000. The delegation of adjudicatory powers provisions of the Senate Finance Committee bill did not appear in the final Senate bill submitted to Conference. Congress also dismissed a proposal to require arbitration of plan participant benefit claims. *See* H.R. 2, 93d Cong. 566-67 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 13, at 3813-14; 120 CONG. REC. 29,941 (1974) (remarks of Sen. Javits), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 13, at 4769. An attempt to reinsert administrative adjudicatory authority was also defeated. *See* 120 CONG. REC. 29,563 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 13, at 1245; 119 CONG. REC. 30,401 (1973), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 13, at 1838.

15. *See* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000) (creating a federal remedy for plan participants to recover benefits due under an ERISA-governed employee benefit plan); ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (creating federal court jurisdiction). ERISA also provides state courts with concurrent jurisdiction to hear plan participant claims for benefits, *see id.*, but because of the opportunity for federal question jurisdiction, most benefits cases filed in state court are removed by defendants to federal court. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). *See generally* Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Prememption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105 (2001).

16. *See, e.g.*, Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 981-82 (7th Cir. 1999) (Easterbrook, J.) ("Deferential review of an administrative decision means review on the administrative record. We have allowed parties to take discovery and present new evidence in ERISA cases subject to *de novo* judicial decisions, but never where the question is whether a decision is supported by substantial evidence, or is arbitrary and capricious.") (citations omitted); *see also* Vega v. Nat'l Life Ins. Serv., Inc., 188 F.3d 287, 300 (5th Cir. 1999) ("[T]he administrative record consists of relevant information made available to the administrator prior to the complainant's filing of a lawsuit and in a manner that gives the administrator a fair opportunity to consider it. . . . [W]e will not permit the district court or our own panels to consider evidence introduced to resolve factual disputes with respect to the merits of the claim when that evidence was not in the administrative record.").

workers' benefits claims.[17] Courts justify this apparent contradiction to Congress's express mandate by misapplying principles of deference.

Judge Easterbrook's warning that uniform applications of judicial deference — without appreciation for the many nuanced circumstances where the occasion for some issue of deference arises — can be "off the mark" is dramatically presented in ERISA cases in which courts have confused deference as applied under trust law with administrative law-based adjudicatory deference.[18] Because ERISA requires that employers fund some (but not all) employee benefit plans through the establishment of a trust,[19] the Supreme Court has ruled that trust law principles govern ERISA claims for benefits.[20] Trust law, however, provides for a type of judicial deference unrelated to administrative law deference.

Under trust law, where the settlor of a trust grants discretionary authority to a nonconflicted trustee, courts defer to the trustee's discretionary acts, unless the trustee abused its discretion.[21] The application of trust law

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17. *See* Leahy v. Raytheon Co., 315 F.3d 11, 17-18 (1st Cir. 2002) ("In an ERISA benefit denial case, trial is usually not an option: in a very real sense, the district court sits more as an appellate tribunal than as a trial court. It does not take evidence, but, rather, evaluates the reasonableness of an administrative determination in light of the record compiled before the plan fiduciary."); Perry v. Simplicity Eng'g, 900 F.2d 963, 966 (6th Cir. 1990) ("Nothing in the legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators, a role they would inevitably assume if they received and considered evidence not presented to administrators concerning an employee's entitlement to benefits. Such a procedure would frustrate the goal of prompt resolution of claims by the fiduciary under the ERISA scheme."); *see also* Crespo v. UNUM Life Ins. Co. of Am., 294 F. Supp. 2d 980, 992 (N.D. Ill. 2003) (mem.) (urging a trial on the papers as the most efficient process to resolve ERISA benefit disputes).

18. *See* Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004).

19. ERISA section 403, 29 U.S.C. § 1103 (2000), requires that all assets of an employee benefit plan shall be held in trust. However, ERISA's funding provisions exempt welfare benefit plans from the statute's funding requirements. *See* ERISA § 301, 29 U.S.C. § 1081. Consequently, employee pension plans must be funded through a trust (or through the purchase of insurance), but the trust-as-funding-device requirement only applies to nonpension fringe benefit programs that choose to separately fund their plans. If an employer decides to pay nonpension plan benefit programs out of its operating capital, the employer does not need to establish a trust to fund the plan. *See* Donald T. Bogan, *ERISA: Retaining* Firestone *in Light of* Great-West — *Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 670-72 (2004).

20. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989).

21. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."); *see also Bruch*, 489 U.S. at 111.

deference in ERISA claims might be supportable if it were applied only to those ERISA plans funded through a trust (which it is not[22]) and only to the discretionary acts of *nonconflicted* trustees (which it is not[23]). But even with those caveats, court deference to ERISA plan administrators' benefit claim denials is all wrong because courts have applied an administrative law-based adjudicatory deference, rather than a trust law-based deference in ERISA benefit claims.

Trust law-based deference is vastly different than the administrative law-based adjudicatory deference referenced by Judge Easterbrook. Trust law deference deals with evidentiary burdens, but it does not assume to replace (or discard) the adjudicatory process. When a trust beneficiary challenges a trustee's discretionary acts, courts apply a deferential abuse of discretion standard of review, but the beneficiary is still entitled to conduct discovery on the issue of the trustee's abuse of discretion, and a court, applying state law, conducts the trust law trial as it would any other nonjury trial — by hearing testimony, admitting evidence, and rendering a decision.[24]

In administrative law-based adjudicatory deference, an administrative agency (presumably neutral) makes an initial determination of contested matters, and courts then review the administrative action, hopefully according to Judge Easterbrook's unbundled and separate levels of deference. For example, the process in Social Security Administration disability claims involves a federal government employee, the neutral Administrative Law Judge (ALJ), conducting an administrative trial where the disability claimant offers evidence and typically has the opportunity to cross-examine witnesses

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22. *See, e.g.*, Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1148 (4th Cir. 1985), *aff'd sub. nom.* Brooks v. Burlington Indus., Inc., 477 U.S. 901 (1986); Jung v. FMC Corp., 755 F.2d 708, 711 (9th Cir. 1985); Brief for the United States as Amicus Curiae Supporting Respondents, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1988) (No. 87-1054) (arguing that it is inapposite to apply trust law principles in ERISA benefit claims when plan at issue is not funded through a trust).

23. *See* Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 378 (3d Cir. 2000) ("This appeal concerns the standard courts should use when reviewing a denial of a request for benefits under an ERISA plan by an insurance company which, pursuant to a contract with an employing company, both determines eligibility for benefits, and pays those benefits out of its own funds. This question, and variations thereof, have bedeviled the federal courts since considered dicta in *Firestone Tire & Rubber Co. v. Bruch* gave opaque direction about how courts should review discretionary benefits denials by potentially conflicted ERISA fiduciaries.") (citation omitted); Van Boxel v. J. Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987) (suggesting a sliding scale application of deference to the decisions of conflicted ERISA plan administrators). *See generally* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959).

24. *See generally* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870 (rev. 2d ed. 1977).

who might appear in opposition to his or her claim.[25] Article III judges then review Social Security Administration adjudicatory rulings with deference to the ALJ's actions because Congress delegated the adjudicatory function in such cases to the agency.[26] Additionally, deference is justified in cases where a district court is reviewing a Social Security Administration benefit claim determination because the claimant had the opportunity to be heard before a neutral officer in an administrative trial prior to the appeal to the federal district court.

In ERISA cases, while reciting trust law-based deference (which, again, would still allow for discovery and a trial to prove the trustee's abuse of discretion), federal courts actually apply administrative law-based adjudicatory deference at the trial court level (foreswearing an evidentiary hearing), even though there has been no administrative trial below. In ERISA benefits cases, courts incongruously equate the ERISA plan administrator's claim investigation and claim denial with an administrative law trial, and wrongly equate the plan administrator's or plan insurer's claims file with the "administrative record" one would expect to see in a social security disability action.[27]

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25. *See also* Herzberger v. Standard Ins. Co., 205 F.3d 327, 332 (7th Cir. 2000). *See generally* Taylor v. Callahan, 969 F. Supp. 664 (D. Kan. 1997).

26. *See* 42 U.S.C.A. § 405 (West Supp. 2004) (amended 2004). *See generally* Richardson v. Perales, 402 U.S. 389 (1971).

27. *See Herzberger*, 205 F.3d at 332 ("What may have misled courts in some cases is the analogy between judicial review of an ERISA plan administrator's decision to deny disability benefits and judicial review of the denial of such benefits by the Social Security Administration. . . . Judicial review of the latter sort of denial is of course deferential, and it is natural to suppose that it should be deferential in the former case as well. But the analogy is imperfect, . . . quite apart from the fact that the social security statute specifies deferential ('substantial evidence') review. 42 U.S.C. § 405(g). The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by [ERISA] plan administrators."); *see also* Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 978-80 (7th Cir. 1999) (Easterbrook, J.) (equating ERISA with Social Security claims for analysis of remand question); Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556, 1564 n.7 (11th Cir. 1990) ("We express caution, however, at wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions. Use of the administrative agency analogy may, ironically, give too much deference to ERISA fiduciaries. Decisions in the ERISA context involve the interpretation of contractual entitlements; they 'are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers.' Moreover, the individuals who occupy the position of ERISA fiduciaries are less well-insulated from outside pressures than are decisionmakers at government agencies.") (quoting *Van Boxel*, 836 F.2d at 1050) (citation omitted). *Contra Perlman*, 195 F.3d at 985-86 (Wood, J.,

Judges who have failed to distinguish between trust law-based judicial deference and administrative law adjudicatory deference in ERISA cases have instigated the absurd result that workers who receive fringe benefit packages through their employment — for example health care benefits or disability benefits — are deprived of their right to discovery in benefit claim litigation, denied the right to cross-examine witnesses, and denied the right to an evidentiary hearing before a neutral arbiter when a plan administrator or plan insurer denies the worker's request for benefits.[28] Yet Congress did not delegate adjudicatory powers to any agency in ERISA. By viewing the underlying insurance claims process as if it were akin to an administrative trial, courts have denied ERISA plan participants their day in court. Congress granted plan participants the right to sue and seek justice in federal court. Federal district judges are not doing their jobs when they limit claimants to argument on an unsworn paper record as their only court hearing, based upon an unthoughtful assertion of deference.

II. No Rule of Statutory Construction Justifies Judicial Deference to Adjudicatory Decisions of ERISA Plan Administrators Who Are Neither Trustees nor Administrative Law Judges

Perhaps ERISA's titles and nomenclature have tricked judges. Despite the statute's use of the term "administrator" to describe the person or entity in charge of running private pension and welfare benefit plans, ERISA plan administrators are not employees of any agency of the government.[29] Particularly in welfare plans, which are often unfunded,[30] neither is a plan administrator a neutral "trustee" entitled to trust law deference — you cannot have a trustee without a trust *res*.

When courts defer to an ERISA plan administrator's discretionary decisions, courts are merely crediting one litigant's view of the dispute over

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dissenting) (debunking the analogy to Social Security Administration claims).

28. *See* Meditrust Fin. Serv. Corp. v. Sterling Chems., Inc., 168 F.3d 211 (5th Cir. 1999).

29. *See Brown*, 898 F.2d at 1564 n.7. Courts also may have confused ERISA's requirement that plans establish an internal appeals process with the delegation of adjudicative powers. *See* ERISA § 503, 29 U.S.C. § 1133 (2000). By requiring plans to fairly review claims, ERISA merely imposes a good faith duty on the plan administrator, similar to a state insurance regulation that governs an insurance company's claims process. *See, e.g.*, 36 OKLA. STAT. § 1250.5 (2001) (acts constituting unfair claims settlement practices). It is not comparable to a delegation of adjudicatory authority, which would look something like the processes that govern Social Security Administration disability claims.

30. *See, e.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 105 (1989) (unfunded severance benefit plan); Mass. Life Ins. Co. v. Russell, 473 U.S. 134, 136 (1985) (unfunded disability benefit plan).

that of the other litigant, without providing due process of law to the unfavored party. What results is a judicially created animal known as a "trial on the papers,"[31] where the insurance claims file is submitted to the court as the "administrative record,"[32] and the judge enters a decision that the plan administrator/claims adjuster did, or did not, abuse its discretion in denying the workers claim for benefits without the claimant ever having the opportunity to cross-examine a witness.

Without appreciating the "link between the identity of the decider and the appropriate interpretative norms,"[33] courts that defer to ERISA plan administrators have left the fox in charge of the hen house. ERISA plan administrators are the appointed representatives of employers who sponsor fringe benefit programs for their employees.[34] In fact, plan insurers who are obligated to pay earned ERISA benefit claims often serve as the plan administrator.[35] Where the decider is neither an agency, nor an ALJ, nor a trustee, nor neutral, there is no reason in law for courts to delegate their adjudicatory powers to a private party litigant.

III. Conclusion

The ERISA plan claims administrator is not a judge, and the process of pretrial attempts to settle claims without litigation do not create an administrative record. Courts have failed to recognize that Congress delegated rulemaking, but not adjudicatory powers, to the Department of Labor in

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31. *See* Crespo v. UNUM Life Ins. Co. of Am., 294 F. Supp. 2d 980, 991 (N.D. Ill. 2003) ("[T]he Court . . . strongly suggest[s] that . . . parties consider proceeding by means of a trial on the papers under Federal Rule of Civil Procedure 52(a) [in lieu of cross-motions for summary judgment]").

32. *See Perlman*, 195 F.3d at 981-82 (Easterbrook, J.) (deferential review means review on the administrative record as presented to the claims administrator); LaBarge v. Life Ins. Co. of N. Am., No. 00-C-0512, 2001 WL 109527, at *1 (N.D. Ill. Feb. 6, 2001) (court enters findings of fact and conclusions of law based upon administrative record).

33. Easterbrook, *Judicial Discretion*, *supra* note 2, at 4.

34. *See* ERISA § 3(16)(A)(i), 29 U.S.C. § 1002 (16)(A)(i) (2000) (plan administrator is the person so designated by the terms of the plan operating document); ERISA § 3(16)(A)(ii), 29 U.S.C. § 1002 (16)(A)(ii) (plan sponsor serves as the default plan administrator if the plan document fails to designate administrator); ERISA § 3(16)(B), 29 U.S.C. § 1002 (16)(B) (employer or union identified as plan sponsor); ERISA § 402, 29 U.S.C. § 1102(21)(A) (fiduciaries can serve in several capacities).

35. *See, e.g.*, Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 378 (3d Cir. 2000). Further, even where the plan insurer is not the named plan administrator, the insurer often has preliminary authority to process claims, and as a practical matter, the plan insurer often controls claims decisions, despite contrary language in plan documents saying that the plan administrator retains final discretion and authority to make benefit claims determinations. *See* Computer Aided Design Sys. Inc. v. SAFECO Life Ins. Co., 235 F. Supp. 2d 1052 (S.D. Iowa 2002).

ERISA. Additionally, ERISA courts have failed to "link the identity of the decider" in ERISA claims — the non-neutral private representative of the employer provider of benefits, or the plan insurer — with the "appropriate interpretative norms" for applying judicial deference. Where the identity of the decider in ERISA claims is not an Administrative Law Judge or some other government agency or neutral adjudicatory body, no deference is due.