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Fall 2009

# ERISA: The Foundational Insufficiencies for Deferential Review in Employee Benefit Claims-- Metropolitan Life Ins. Co. v. Glenn

Donald T. Bogan, *University of Oklahoma Norman Campus*



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Citation: 27 Hofstra Lab. & Emp. L. J. 147 2009-2010

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**ERISA: THE FOUNDATIONAL  
INSUFFICIENCIES FOR DEFERENTIAL  
REVIEW IN EMPLOYEE BENEFIT CLAIMS—  
METROPOLITAN LIFE INSURANCE CO. V.  
GLENN**

*Donald T. Bogan\**

I. INTRODUCTION

When an ERISA<sup>1</sup> plan participant or beneficiary—a worker or a worker’s family member—presents a claim under their employment-provided health care plan, for example, to obtain coverage for physician-recommended medical treatment, the covered worker or beneficiary

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\* Professor of Law, the University of Oklahoma College of Law; A.B. 1974 Brown University; J.D. 1979 Wake Forest University School of Law: donbogan@ou.edu. This paper supports a presentation at an ERISA symposium, entitled The Grand Irony of ERISA: Intersectionality of ERISA Preemption and Remedial Issues, sponsored by the Hofstra Labor & Employment Law Journal on March 13, 2009 in New York City. I am grateful for the invitation to deliver my thoughts at the symposium and through this article. This paper continues themes presented in Donald T. Bogan, *ERISA: Rethinking 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 (2004). In 1989, the Supreme Court issued its landmark ERISA standard of review decision, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), which applied a trust law paradigm to resolve worker claims for benefits due under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). In 2008, the Supreme Court revisited the ERISA standard of review question in *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008). This paper now updates and expands my critique of the Supreme Court’s treatment of ERISA benefit claims to account for the Court’s effort in *Glenn* to clarify *Firestone*.

1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (2006) and in scattered sections of 26 U.S.C.). A selected history of ERISA, beginning in January 1973 with the introduction of House Bill 2 (H.R. 2, 93d Cong. (1973)), and Senate Bill 4 (S. 4, 93d Cong. (1973)), the bills which ultimately formed the basis for the final legislation, is compiled in a three-volume committee print. See SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY]. A comprehensive and excellent history of ERISA extending back beyond 1973 is detailed in JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY (Univ. of Cal. Press 2004).

enters a confusing morass of legal processes unknown to American law prior to ERISA. Americans with even a modest familiarity of our civil justice system believe they have a right to their day in court when they suffer a dispute with their health insurer or other payor over plan coverage questions. That is, if a sponsor of a health care benefit plan or the insurer for such a plan (acting through the ERISA plan administrator)<sup>2</sup> refuses to pay for treatment recommended by a worker's physician, we expect our courts to provide a dispute resolution system where the worker can challenge a plan administrator's denial of benefits. In that lawsuit to recover promised benefits, we expect that a neutral adjudicator will decide whether the plan administrator or plan insurer was correct in its decision to withhold benefits, but only after each side presents documentary evidence and live witness testimony, and where each party exercises the right to cross examine adverse witnesses. Most of us familiar with the rules of civil procedure also presume the right to utilize discovery processes to obtain documents and to depose witnesses prior to trial in an original, civil action filed in state or federal court. Arguably, a plan participant also enjoys the right to a jury trial when the worker seeks to recover legal damages arising under the terms of an employee health care benefit plan, as preserved in our federal constitution and protected under most state constitutions in a breach of contract lawsuit.<sup>3</sup> Unfortunately, the ERISA claims process does not

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2. ERISA requires a plan sponsor (the employer in a single employer plan sponsored by that employer), or a union in a single employer plan sponsored by an employee organization, to appoint a plan administrator to oversee the operation of the plan. See ERISA §§ 3(16)(A), (B)(i)-(ii). If the plan sponsor fails to appoint a plan administrator, ERISA declares that the plan sponsor is the plan administrator. See ERISA § 3(16)(A)(ii); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105 (1989). The plan is a promise to provide identified benefits, such as health care benefits, disability benefits, or pension benefits. See ERISA § 3(1)-(2). To the extent that a plan is a separate entity from the plan sponsor (see ERISA § 502(d)), the plan still must operate through individuals or a committee of individuals. When a plan sponsor appoints a committee of the plan sponsor's own employees to serve as plan administrator, arguably the plan administrator serves as an agent of the plan sponsor, though ERISA also imposes fiduciary duties (see ERISA § 3(21)(A)), on the plan administrator to operate the plan solely in the interest of plan participants and their beneficiaries, and for the purpose of "providing benefits to participants and their beneficiaries." See ERISA § 404(a)(1)(A)(i). When a plan sponsor funds a plan through the purchase of insurance, typically the insurer is appointed to serve as plan administrator. See, e.g., *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008) (holding that a plan insurer also serves as plan administrator with discretion to determine eligibility for benefits and to interpret plan terms). In a defined benefit plan, if the plan sponsor fails to adequately fund plan obligations, the employer/plan sponsor will be liable for any unfunded obligations. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050-51 (7th Cir. 1987) (Posner, J.) ("In the case of defined-benefit pension plans . . . the company has contractual obligations that it must honor whether or not the pension trust is adequately funded.").

3. See *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 569-70 (1990) (holding that the Seventh Amendment preserves the right to a jury trial in action to recover legal/money damages for

meet our reasonable expectations.

The modern ERISA benefit claims process is rooted in some ill-considered dicta included in the Supreme Court's 1989 *Firestone Tire & Rubber Co. v. Bruch*<sup>4</sup> opinion. The *Firestone* opinion, suggests that donative trust law, rather than contract law, governs employee benefit disputes.<sup>5</sup> Applying trust law, at least nominally, our lower federal courts now resolve employee benefit claims under a summary adjudicative process that prohibits or severely restricts discovery, eschews live-witness testimony, and denies litigants the right to confront adverse witnesses.<sup>6</sup> Instead, our federal trial courts uphold ERISA plan administrator claim denials without the advice of a jury by deferring to the views of the employer-appointed plan administrator, who is usually also the payor of approved claims, unless the plan administrator acted arbitrarily or capriciously in denying the claim.<sup>7</sup>

In *Firestone*, the employer urged that courts must defer to employer-appointed plan administrators under trust law.<sup>8</sup> Late in the litigation the former Firestone workers suggested that contract law provided the most apt legal theory to govern employee benefit claims under the federal common law of ERISA, but ultimately, the workers accepted that trust law governed and they argued forcefully that trust law required *de novo* review due to Firestone's conflict of interest.<sup>9</sup> Because all involved assumed that *de novo* review was essentially the same under contract law or trust law,<sup>10</sup> and because the parties focused on trust law

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breach of collectively-bargained labor contract). Compare *Wardle v. Cent. States, Se. & Sw. Areas Pension Fund*, 627 F.2d 820, 829 (7th Cir. 1980) ("We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable."), with *Stamps v. Mich. Teamsters Joint Council No. 43*, 431 F. Supp. 745, 746 (E.D. Mich. 1977) (comparing ERISA section 502(a)(3) claims, which are equitable, with section 502(a)(1)(B) claims, which are legal, court holds that right to jury trial attaches in claims for benefits due under a plan). See also *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996) (reversing trial court's denial of motion to strike jury demand).

4. 489 U.S. 101 (1989).

5. See *id.* at 110-111.

6. See, e.g., *Perlman v. Swiss Bank Corp.*, 195 F.3d 975 (7th Cir. 1999); *Perry v. Simplicity Eng'g.*, 900 F.2d 963 (6th Cir. 1990). See generally STEVEN J. SACHER ET AL., EMPLOYEE BENEFITS LAW Chap. 13, § IV (2d. ed. 2008) [hereinafter, EMPLOYEE BENEFITS LAW].

7. See, e.g., *MetLife*, 128 S. Ct. at 2346 (where the plan insurer also served as plan administrator with discretion to determine eligibility for benefits); *Firestone*, 489 U.S. at 111 (where a plan sponsor of an unfunded plan also served as default plan administrator).

8. *Firestone*, 489 U.S. at 111.

9. See *infra* notes 47-54, 82-83, 95-111 and accompanying text.

10. Courts typically hear breach of contract claims in a plenary proceeding where questions of contract interpretation are for the court to resolve *de novo*. See *Herzberger v. Standard Ins. Co. of Am.*, 205 F.3d 327, 330 (7th Cir. 2000) (Posner, J.) ("An ERISA plan is a contract . . . and the meaning of a contract is ordinarily decided by the court, rather than by a party to the contract, let alone the party that drafted it.") (citations omitted). That is also the general rule under trust law. See

arguments, the *Firestone* Court presumed, without deciding, that trust law governed the ERISA section 502(a)(1)(B) claims process, including the standard of review question.<sup>11</sup> In dicta that has come to define the opinion,<sup>12</sup> the *Firestone* Court remarked that deferential review, rather than *de novo* review, will apply under trust law if the plan sponsor expressly grants discretionary powers to the plan administrator or fiduciary.<sup>13</sup>

Following *Firestone*, the lower federal courts have compounded the problems created by mischaracterizing a claim for benefits due under a plan as a breach of trust action by then applying an administrative law-based deference, instead of a trust law-based deferential review, to govern the claims process. ERISA courts have treated the plan administrator as an adjudicator of the benefit dispute, more analogous to an administrative law judge (“ALJ”) than a trustee.<sup>14</sup> Treating the plan administrator’s investigation and claim denial as if it were an underlying trial and judgment that comports with due process standards, like a trial before a neutral ALJ, trial courts commonly deny plan participants a plenary trial in ERISA section 502(a)(1)(B) claims and instead substitute a truncated, appellate-type review proceeding to determine employee benefit claims.<sup>15</sup> Understand how this works then—in ERISA benefit

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*Firestone*, 489 U.S. at 112 (quoting WILLIAM F. FRATCHER, 3 SCOTT ON TRUSTS 219 (Little, Brown & Co. 1988) (1939)).

11. See *infra* notes 84-122 and accompanying text.

12. The Court’s discussion introducing the deferential review standard is dicta because deference hinged upon a grant of discretion and the *Firestone* plan did not contain any grant of discretion to the plan administrator. See *Firestone*, 489 U.S. at 111-112.

13. See *id.* at 115 (“Consistent with established principles of trust law, we hold that a denial of benefits challenged under [ERISA § 502(a)(1)(B), 29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. . . . [F]or purposes of actions under [ERISA § 502(a)(1)(B), 29 U.S.C.] § 1132(a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a ‘factor in determining whether there is an abuse of discretion.’” (quoting, RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959))).

14. See *Perlman v. Swiss Bank Corp.* Comprehensive Disability Prot. Plan, 195 F.3d 975, 980-82 (7th Cir. 1999) (stating deferential review means review on the administrative record); *Perry v. Simplicity Eng’g*, 900 F.2d 963, 966-7 (6th Cir. 1990) (stating *de novo* review in ERISA claims means review on the administrative record). But see *Herzberger v. Standard Ins. Co. of Am.*, 205 F.3d 327, 332 (7th Cir. 2000) (contrasting court review of an administrative law judge’s ruling in a Social Security disability benefits claim and the circumstance of a claim for benefits arising under an ERISA plan contract). See generally Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727, (2004) [hereinafter, *Administrative Law*].

15. 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

lawsuits, as expressly authorized by Congress in ERISA section 502(a)(1)(B), to enforce the terms of the plan and to obtain promised benefits, instead of resolving worker challenges to benefit claim denials *de novo* and in accordance with the rules of civil procedure and the rules of evidence, our federal courts treat the decision by one party to the contract (the plan sponsor-appointed plan administrator) not to perform as an adjudication<sup>16</sup> and defer to the decision of that party after it concluded that its own failure to perform did not violate the terms of the parties' agreement.<sup>17</sup>

Unsurprisingly, courts that apply the invented ERISA summary process have struggled to even categorize their actions.<sup>18</sup> Some courts say they award summary judgment when they defer to a plan administrator's claim denial, but there is no record of sworn testimony or other admissible evidence presented to the trial court in an ERISA claim to establish a lack of material factual questions.<sup>19</sup> Other trial courts,

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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 . . . . No jury is involved.") (citations omitted); *see also* *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 831 (1st Cir. 1997) (holding that the use of juries to resolve employee benefit disputes is inconsistent with the limited jurisdiction of federal courts); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (even where the plan sponsor failed to grant discretionary authority to the plan administrator, *de novo* review means review on the administrative record because nothing in the legislative history in ERISA suggests that Congress intended that federal district courts would function as substitute plan administrators).

16. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 619-31 (1993) (holding that trustees of a multi-employer plan who assess liability against withdrawing employer are not adjudicators; however, ERISA provision that requires an arbitrator to defer to decisions of such trustees is unconstitutional because the arbitrator does serve as the adjudicator and due process clause prohibits adjudicator from deferring to the biased decisions of a party litigant); *see also* notes 184-97 and accompanying text.

17. *See Concrete Pipe*, at 619-31 (holding that a provision of the Multiemployer Pension Plan Amendments Act (MPPAA) of 1980, 94 Stat. 1208, (codified at 29 U.S.C. § 1401(a)(3)(A)), requiring arbitrator to defer to plan administrator's liability assessment violates minimum due process standard demanding a neutral adjudicator, but that the statute can be saved by merely voiding that portion of the statutory scheme).

18. *See infra* notes 19-23 and accompanying text.

19. *See Leahy*, 315 F.3d at 16-18 (criticizing courts for applying summary judgment in ERISA benefits cases, but incorrectly analogizing court role in reviewing plan administrator claim denial to that of appellate body reviewing administrative law judge's decision); *see also Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) ("The district court entered its judgment after receiving a stipulation of the facts that made up the administrative record from the parties. Hartford urges that a judgment on stipulated facts is akin to a summary judgment, and accordingly that our review of the district court's decision should be *de novo*. It is true that the facts, to the extent they are stipulated, will not be in dispute, but we think that the procedure the parties followed here is more akin to a bench trial than to a summary judgment ruling."); *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094-95 (9th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 964 (1999) ("Because the summary judgment is reversed because of a genuine issue of fact, the genuine issue of fact must be resolved by trial. But there is a complexity, because this is an ERISA case. If

thinking they sit as appellate bodies,<sup>20</sup> “remand” the action back to the plan administrator—that is, to the party-litigant that refused to perform—when the court finds that the plan administrator abused its discretion in denying a benefit claim, again treating the defendant plan administrator as an adjudicator.<sup>21</sup> Finally, some courts just use a descriptive phrase, a “trial on the papers,” which does not exist in the rules of civil procedure, to label the process.<sup>22</sup>

So, while our lower courts proceed under the guise of trust law to hear ERISA benefit claims as if the suit presents an appeal from the ruling of an ALJ, the foundational question continues to elude Supreme Court scrutiny—does the worker seeking benefits under the terms of an employee benefit plan present a claim for breach of trust, or is the action proscribed in ERISA section 502(a)(1)(B) to recover benefits due under the plan better characterized as one for breach of contract? This question bedeviled courts dealing with pension benefit claims until benefit cases under the Labor Management Relations Act (“LMRA”)<sup>23</sup>

the trial starts from scratch, and any evidence is admissible whether it was furnished to the administrator or not, then the effect of a genuine issue of fact is to change the question. Instead of *de novo* review testing whether the individual was entitled to benefits based on the evidence before the administrator . . . ‘review’ would be converted into a trial *de novo* based on evidence entirely unrestricted by what had been presented to the administrator . . . . The Supreme Court has reminded us of . . . ‘the need for prompt and fair claims settlement procedures’ . . . . A full trial *de novo* in any ERISA dispute where there was a genuine issue of fact as to whether the individual qualified for a benefit would undermine these policies. Trial *de novo* on new evidence would be inconsistent with reviewing the administrator’s decision about whether to grant the benefit.” (citations omitted). See generally DeBofsky, *Administrative Law*, *supra* note 14.

20. See *Leahy*, 315 F.3d at 17-18 (“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.”).

21. See *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 977-80 (7th Cir. 1999) (criticizing practice of some courts in “remanding” ERISA benefit claims back to plan administrator to better document basis for its claim denial, and criticizing parties for not alerting courts to jurisdictional problems in such cases). In *Perlman*, Judge Easterbrook commented: “[a]lthough it is doubtful as an original matter that a district court may ‘remand’ ERISA claims, as if to administrative agencies, we have held that courts may treat welfare benefit plans just like administrative law judges implementing the Social Security disability-benefits program.” *Id.* at 978.

22. See *Muller v. First Unum Life Ins. Co.*, 341 F.3d 119, 124 (2d Cir. 2003) (“The question is how precisely to treat the District Court’s disposition of defendant’s ‘motion for judgment on the administrative record’—a motion that does not appear to be authorized in the Federal Rules of Civil Procedure.”); see also *Glenn v. Metro. Life Ins. Co.*, 461 F.3d 660, 665 (6th Cir. 2006), *aff’d*, *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008) (characterizing the trial court summary process as entering “judgment on the administrative record”); *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) (characterizing process as bench trial on stipulated facts); *Keamey v. Standard Ins. Co.*, 175 F.3d 1084, 1094-95 (9th Cir.) (en banc), *cert denied*, 528 U.S. 964 (1999) (characterizing process as bench trial based upon exhibit evidence).

23. Labor Management Relations Act of 1947, 29 U.S.C. § 186 (2006).



appeared to finally resolve that fringe benefit promises are part of the employment contract.<sup>24</sup> Remarkably, the application of donative trust law to govern ERISA section 502(a)(1)(B) claims has resurrected the gift law versus contract law argument in ERISA benefit claims litigation following *Firestone*.<sup>25</sup>

In 2008, the United States Supreme Court had the opportunity to reject the nominally trust law-based summary adjudicative process that has evolved in the lower courts since *Firestone* to determine employee benefit claims.<sup>26</sup> Unfortunately, in *Metropolitan Life Insurance Co. v. Glenn*,<sup>27</sup> the Court again failed to examine the underlying rationale for applying principles of donative trust law to settle a breach of contract lawsuit.<sup>28</sup>

The *Glenn* Court resolved a circuit split in holding that an ERISA plan administrator that both decides benefit claims and serves as payor for claims it approves suffers an inherent conflict of interest under trust law.<sup>29</sup> While the *Glenn* opinion clarified that issue,<sup>30</sup> the *Glenn* Court

24. See *infra* notes 55-83 and accompanying text; see also Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 597 n.79, 639 n.247 (1992) [hereinafter, *Foundations*].

25. Compare *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 145 (3d Cir. 1987) (employee benefit plans are contracts), with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (stating trust law controls employee benefit claims for benefits due under ERISA section 502(a)(1)(B)). See also *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987) (Posner, J.) (stating that pension fund trusts are not administrative agencies, and pension fund trustees are not policy-makers; they are interpreters of contracts). I suggest that this issue remains unresolved, even though both the *Firestone* and *Glenn* Courts applied trust law to govern section 502(a)(1)(B) claims, because neither *Firestone* nor *Glenn* actually decided the question—both Courts merely assumed trust law governed without any analysis, perhaps because the parties in each case relied upon trust law to support their arguments. Additionally, in *Glenn* the Court found that trust law governs employee benefit claims simply because that is what *Firestone* said. See *Glenn*, 128 S. Ct. at 2347, 2350. Because serious constitutional issues underlie the resolution of the trust law versus contract law question, including the right to a jury trial, the right to due process of law, and the right to have federal statutory claims between private parties resolved by an Article III judge, this paper urges workers to assert these foundational and constitutional questions.

26. See *Glenn*, 128 S. Ct. at 2347-48.

27. 128 S. Ct. 2343 (2008).

28. See *id.*

29. See *id.* at 2350-52.

30. The majority of circuits had determined that a dual role plan administrator suffers an inherent conflict of interest that must be accounted for in some manner as a factor in the ERISA deferential review process. See *EMPLOYEE BENEFITS LAW*, *supra* note 6 (citing cases); Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claims Cases*, 50 AM. U. L. REV. 1083, 1111 (2001). The First and Seventh Circuits had ruled that a plan administrator serving in dual roles presents only a possible conflict, and that to effect the deferential review standard, the claimant must present evidence that the conflict actually caused the dual role plan administrator to deny a claim that otherwise would have been approved, but for the conflict. See *Leahy v. Raytheon Co.*, 315 F.3d 11, 16 (1st Cir. 2002); *Mers v. Marriot Int'l. Group Accidental Death &*

failed to provide any helpful instructions on how the inherent conflict of interest should factor into the deferential review standard that provides the basis for summary adjudication of ERISA benefit claims.<sup>31</sup> Consequently, even for the issues the Court addressed, *Glenn* disappoints. More frustrating, however, the *Glenn* opinion represents a grievous waste of an opportunity to examine the summary adjudicative process that dominates employee benefit claims litigation and to establish, unequivocally, that ERISA section 502(a)(1)(B) claims to recover benefits due under a plan present an action for breach of contract, not breach of trust.

This manuscript criticizes the Supreme Court for ignoring the root defects that underlie deferential court review of benefit claim denials that in turn provide the foundation for summary adjudication of ERISA section 502(a)(1)(B) claims. Part II of the manuscript establishes that the *Firestone* Court presumed, without deciding, that trust law should govern worker claims for benefits due under an ERISA plan. Part III briefly highlights the history of ERISA's summary adjudicative process as developed in the lower federal courts following *Firestone*. Part IV explores the *Glenn* opinion and describes the peculiar circumstances of the *Glenn* appeal that encouraged the worker in *Glenn* to avoid seeking a thorough review of ERISA benefit claim processes and to accept the nominally trust law-based deferential standard of review. Finally, Part V exposes the lack of foundation for summary adjudication of employee benefit claims. The paper concludes that ERISA section 502(a)(1)(B) claims for benefits due under a plan sound in contract law. That conclusion then requires courts (not plan administrators) to adjudicate section 502(a)(1)(B) claims in a plenary, *de novo* civil action, where the right to a jury trial attaches in claims seeking money (legal) damages.

## II. *FIRESTONE* AND THE ORIGINS OF SUMMARY ADJUDICATION OF EMPLOYEE BENEFIT CLAIMS

### *A. Prior to the Supreme Court Firestone Decision Courts Struggled to Categorize the Nature of Employee Fringe Benefit Claims*

In his excellent 1992 narrative exploring common law rules applied to govern private pension plans prior to ERISA, Professor Jay Conison traced the history of pension plan litigation back to America's industrial

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Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir. 1998).

31. See *Glenn*, 128 S. Ct. at 2352; see also *id.* at 2352 (Roberts, C.J., concurring).

revolution.<sup>32</sup> Professor Conison's focus on the common law of pension plans provides useful context to examine the nature of all employee benefit plans, though welfare benefit plans as defined in ERISA are distinguishable from private pension plans due to the often different funding methods used to secure payment of pension plan promises and welfare plan promises.<sup>33</sup> Since the origin of federal regulation of labor relations, pension plans have usually been funded through the establishment of a trust,<sup>34</sup> whereas sponsors of welfare benefit plans, such as health care benefit plans or disability benefit plans, often purchase commercial insurance to pay such benefits or pay such benefits out of the employer's general treasury.<sup>35</sup>

Professor Conison's article describes a change in how employers viewed pension benefits after "America [became] largely a nation of employees" in the late nineteenth and early twentieth centuries.<sup>36</sup> Initially, some paternalistic employers offered pension benefits to long-

32. See Conison, *Foundations*, *supra* note 24, at 581-98. Professor Conison's article is well researched and thought provoking; however, I disagree with several of his conclusions. In particular, while Professor Conison identifies employers' significant interests in benefit plans and describes plans as both beneficial to employers and employees, he relies upon that fact to suggest that ERISA should be viewed as a mere continuum of common law rules that had been evolving prior to ERISA. See *id.* at 583-88. ERISA's legislative history does not support that view. Congress enacted ERISA because the common law and other regulation of employee benefit plans had failed to adequately protect workers' reasonable expectations to actually receive promised benefits. See ERISA § 2, 29 U.S.C. § 1001(a)(4)-(b)(1) (2006); S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 614-16; see also H.R. Rep. 93-533, at 13 (1973). Professor Conison also generally rejects contract law as the best paradigm to govern employee benefit claims (see Conison, *Foundations*, *supra* note 24, at 593-94, 594 n.64), but in my view he does not offer a clear theory of law that fits the circumstances of employee benefit claim litigation under ERISA section 502(a)(1)(B)—that is, the enforcement of plan participant expectations—any better than contract law.

33. See Conison, *Foundations*, *supra* note 24, at 653.

34. Both the LMRA and ERISA require plan sponsors to fund private pension plans. See LMRA § 302, 29 U.S.C. § 186(c)(5) (2006); ERISA § 301, 29 U.S.C. § 1081 (2006); ERISA § 302(a)(1), 29 U.S.C. § 1082(a)(1) (2006). However, ERISA's funding rules do not apply to welfare plans. See ERISA § 301(a)(1).

35. See, e.g., *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990) (involving a "self-funded" health care plan that Court held was exempt from state insurance laws under ERISA's deemer clause); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 43 (1987) (involving a fully insured disability benefit plan). Sponsors of health care benefit plans now often incorporate a hybrid funding mechanism where the plan is nominally unfunded, with the plan sponsor paying benefits out of operating capital, but where the sponsor then purchases a kind of reinsurance, known as stop loss insurance, to pay claims in excess of a defined attachment point. By incorporating this hybrid funding mechanism, plans that transfer the risk of loss associated with their nominally self-funded health care plans can avoid indirect state insurance regulation, yet still obtain the financial protection offered through the purchase of commercial insurance. See *Am. Med. Sec., Inc. v. Bartlett*, 111 F.3d 358, 361 (4th Cir. 1997).

36. Conison, *Foundations*, *supra* note 24, at 583 (quoting LOUIS D. BRANDEIS, *Our New Peonage: Discretionary Pensions*, in *BUSINESS – A PROFESSION*, 65-66 (1914)).

time employees on an *ad hoc* basis as an altruistic means of protecting aged workers who had exhausted their ability to serve.<sup>37</sup> Gradually, employers began to establish pension plans in a more systematic fashion as part of the employer's business model and for the purpose of benefiting the employer as well as the worker.<sup>38</sup>

Early employee benefit cases followed this development, with courts first refusing to enforce an employer's pension plan promises because courts characterized pension benefits as a gift.<sup>39</sup> Typical of the era, one court remarked that because the pension fund—meaning the trust or other account established by an employer to pay promised pension benefits—belonged to the employer, as a matter of property rights the employer could do whatever it wanted to do with its own property.<sup>40</sup>

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37. *Id.*

38. *See id.* at 583-89; *see also* MURRAY W. LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA 18-19 (1932).

39. *See* Menke v. Thompson, 140 F.2d 786, 790 (8th Cir. 1944) (“[B]enefits were, as declared in the plan, gratuities.”); Dolge v. Dolge, 75 N.Y.S. 386, 387 (App. Div. 1902) (“It was simply a benevolent plan proposed by him [the employer], and it was solely within his power and discretion to carry it out or not.”). Professor Conison challenges the widely accepted view of how courts slowly came to enforce workers’ legal rights to pension benefits as overly simplistic. He suggests that the common historical view—that courts initially treated employee benefits as an unenforceable promise to make a gift and then slowly recognized a workers’ rights to enforce the employee benefit promise—does not account for different employer motivations that developed over rapidly changing economic times for providing pension benefits. Professor Conison emphasizes that employers often use pension plans as a means of maintaining a lean workforce by constantly expelling workers not trained or not capable of responding to new industrial demands. *See* Conison, *Foundations*, *supra* note 24, at 588-89. For purposes of this article, I adhere to the commonly accepted history that at a time when our nation was not protective of workers’ rights, courts initially viewed employee benefits as gifts, and that courts then gradually began to accept the view that workers had some enforceable rights to receive such benefits, and that courts had a role in reviewing a worker’s challenge to an employer’s benefit claim denial. *See infra* notes 54-82 and accompanying text. ERISA’s legislative history documents how the private pension industry boomed during World War II and the Korean War years due to the imposition of a national wage freeze during those times of national emergency. With the demand for workers high due to the ramping up of the new wartime economy and the supply of workers suddenly reduced due to the large number of mostly male workers entering the military, employers offered more and better fringe benefit programs as a means to compete for the best workers. *See* S. Rep. 93-127 at 2-3 (1973).

40. *See* McNevin v. Solvay Process Co., 53 N.Y.S. 98, 99 (App. Div. 1898), *aff’d mem.*, 60 N.E. 1115 (N.Y. 1901) (“It must be conceded at the outset that a person or a corporation proposing to give a sum for the benefit of any person or any set of persons has the right to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute.”); *see also* Magnolia Petroleum Co. v. Butler, 86 S.W.2d 258, 262 (Tex. Civ. App. 1935) (upholding employer’s right to simply stop paying a worker’s retirement annuity, the court asked rhetorically: “[i]s it not lawful for me to do what I will with mine own?”) (citations omitted); Spiner v. W. Union Tel. Co., 73 S.W.2d 566, 568 (Tex. Civ. App. 1934) (“The fund . . . constituted a charitable enterprise.”). I suggest that these courts misconstrue the legal basis of a worker’s claim to receive promised employee benefits. When an employer creates a trust or other segregated fund from which to pay employee benefits, that fund merely provides security to help assure that the

After the early common law cases, employee benefit claims often arose in the context of federal labor law, and particularly, in actions arising under LMRA.<sup>41</sup> Judge Edward Becker described a series of LMRA benefit cases in his Third Circuit Court of Appeals opinion, *Bruch v. Firestone Tire & Rubber Co.*,<sup>42</sup> to document how ERISA courts imported the deferential review standard from worker breach of trust cases arising under LMRA section 302.<sup>43</sup> Relying on these District of Columbia cases in *Bruch*, Judge Becker demonstrated how courts gradually transformed from the view that pension plans were gifts, to an acknowledgment that workers held enforceable rights to receive promised benefits,<sup>44</sup> even though LMRA courts still limited the scope of judicial involvement by applying an arbitrary and capricious review standard.<sup>45</sup>

#### *B. Judge Becker's Bruch v. Firestone Tire & Rubber Co. Opinion*

Firestone Tire & Rubber Company ("Firestone") established a welfare benefit plan for its workers, which promised severance benefits to all employees terminated from Firestone due to a reduction in work force.<sup>46</sup> When Firestone sold its Plastics Division to Occidental Petroleum ("Occidental"), workers who lost their jobs with Firestone requested severance benefits, even though many of the fired workers were immediately hired by Occidental to perform the same or similar jobs they had held at Firestone.<sup>47</sup> Firestone denied the severance benefit

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underlying promise of the benefit will be accomplished. The worker's legal right to receive the benefit, however, arises under the employment contract; not the trust used to secure the promise. See discussion in text accompanying notes 298-307, *infra*.

41. LMRA § 302, 29 U.S.C. § 186 (2006).

42. 828 F.2d 134 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989).

43. See *id.* at 140-45.

44. See *id.* at 142-43.

45. See *id.* at 140-45. As described by the Supreme Court in *Firestone*, the trust law basis of LMRA section 302 claims arose because LMRA section 301 does not expressly grant individual workers the right to sue to enforce collectively-bargained employment contracts. Since workers were not given standing to sue for breach of contract under LMRA section 301, courts implied an individual remedy for breach of trust when a worker claimed that the subject employee benefit plan, as structured, violated the LMRA section 302 trust law duty to administer such LMRA plans for the sole and exclusive benefit of plan beneficiaries. See *Firestone Tire Rubber Co. v. Bruch*, 489 U.S. 101, 109-10 (1989). See also, *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987) (Posner, J.) ("[W]hen a plan provision as interpreted had the effect of denying an application for benefits unreasonably, or, as it came to be said, arbitrarily and capriciously, courts would hold that the plan as 'structured' was not for the sole and exclusive benefit of the employees, so that the denial of benefits violated the statute.").

46. *Bruch v. Firestone Tire & Rubber Co.*, 640 F. Supp. 519, 520-22 (E.D. Pa. 1986).

47. Occidental did not hire all of the former Firestone workers, and the workers that did join

claims based upon Firestone's interpretation of the phrase "reduction in work force", which was not well-defined in the plan document.<sup>48</sup>

Following Firestone's denial of severance benefits, several hundred former Firestone employees filed a class action to recover benefits due under the plan pursuant to ERISA section 502(a)(1)(B).<sup>49</sup> After significant discovery, the trial court entered summary judgment for Firestone.<sup>50</sup>

ERISA requires plan sponsors, like Firestone, to appoint a fiduciary to administer its employee benefit plans.<sup>51</sup> In *Bruch*, Firestone itself served as default plan administrator under ERISA because it had failed to designate a plan administrator for the severance benefit plan at issue.<sup>52</sup> District Judge Huyett noted that Firestone suffered a conflict of interest because it served as both payor of claims and as claims administrator,<sup>53</sup> but he also declared: "I am limited to determining whether the administrator's actions were arbitrary and capricious. Unless the decision was arbitrary and capricious, the administrator satisfied its fiduciary obligations under [ERISA § 404], 29 U.S.C. § 1104."<sup>54</sup>

Several items stand out in Judge Huyett's determination that he was limited to reviewing Firestone's claim denial under an arbitrary and capricious review standard. First, unlike post-*Firestone* cases, the parties in *Bruch* employed their full discovery rights under the rules of civil procedure.<sup>55</sup> Second, the former Firestone workers agreed that the arbitrary and capricious review standard applied, and merely argued that they should prevail under that standard.<sup>56</sup> The disappointed workers did not urge Judge Huyett to apply a contract law-based review process;

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Occidental complained that Occidental's fringe benefits programs were of less value than the Firestone fringe benefits plans. See Brief for Respondents at 6-8, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054) [hereinafter, Brief for Respondents].

48. *Bruch*, 640 F. Supp. at 522.

49. *Id.* at 520-21.

50. *Id.* at 526-35.

51. See ERISA §§ 3(16)(A)(ii), (B), 29 U.S.C. §§ 1002(16)(A)(ii), (B) (2006). The statute also requires that plans establish an internal appeals process so that a disappointed worker can obtain a second in-house evaluation of the worker's application for benefits. See ERISA § 503(2).

52. *Bruch*, 640 F. Supp. at 521.

53. *Id.* at 524.

54. *Id.* at 521-22.

55. See Brief for Respondents, *supra* note 47, at 6-14 (citing to deposition testimony included in record); Transcript of Oral Argument at 6, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-104) (quoting Mr. Wald, Counsel for Petitioner, "[i]n this case there were two years of discovery, thousands of pages of production of documents, numerous depositions and interrogatories . . .").

56. See *Bruch*, 640 F. Supp. at 522 n.1, 524 ("[P]laintiffs argue that they are entitled to termination pay because defendants' administration of the plan was so flawed by ERISA violations that it was per se arbitrary and capricious to deny termination pay.").

more surprisingly, they did not even ask Judge Huyett to apply *de novo* review under trust law.<sup>57</sup> Third, while Judge Huyett himself recognized that the termination plan created contractual rights,<sup>58</sup> he nonetheless applied trust law to determine the court's role in reviewing the plan administrator's decision to deny such contractual benefits.<sup>59</sup>

In the Third Circuit, the former Firestone workers continued to accept that trust law governed the standard of review question, but asserted that *de novo* review applied under trust law because Firestone suffered a conflict of interest.<sup>60</sup> Firestone argued to the Third Circuit that the workers had waived their right to raise the standard of review issue on appeal because the workers had failed to properly challenge Judge Huyett's application of the trust law-based arbitrary and capricious standard in the district court.<sup>61</sup> Third Circuit Judge Becker remarked:

It is true that the plaintiffs did not argue in the district court in terms that the arbitrary and capricious standard was inappropriate. But while plaintiffs accepted the label, they did disagree with the defendants in the district court about the amount of deference which the court should accord the plan administrator's decision. We therefore think that the substance of the question of deference was sufficiently raised in the district court.<sup>62</sup>

Interestingly, the workers did suggest to the Third Circuit, as an alternative theory, that *de novo* review should apply under contract law,<sup>63</sup> but because the workers assumed that *de novo* review under

57. See generally *id.* at 522 n.1.

58. *Id.* at 523-24.

59. See *id.* at 523-24 ("Plaintiffs . . . acquired a contractual interest in the termination benefits which interest is subject to the procedural protections of ERISA.").

60. See *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 138 (3d Cir. 1987).

61. *Id.* at 137 n.3.

62. *Id.*

63. See *id.* at 138 ("Plaintiffs advance two arguments to justify rejection of the arbitrary and capricious standard, and though these theories are based on different legal principles they produce essentially the same result. First, plaintiffs argue that the principles of trust law should control, that under trust law the plan administrator owes the employees a fiduciary duty, and that courts enforce that duty by construing all plan language 'solely in the interest of the beneficiary.' Plaintiffs argue further that the sole benefit standard requires courts to construe all ambiguities in plan language in favor of the beneficiaries, and in favor of coverage. Alternatively, plaintiffs argue that contract law controls, that the welfare plan at issue . . . is a unilateral contract drafted by defendant Firestone, and that the principles of contract law require that ambiguities be construed against the draftsman. The result under this theory is also to construe ambiguities regarding coverage in favor of the employee or former employee requesting benefits."). In his Third Circuit opinion, Judge Becker noted that the contract law *contra proferentum* rule was inconsistent with a deferential review standard. He ultimately found that the court should neither defer to the interpretations or decisions of the plan

contract law and *de novo* review under trust law produced essentially the same result,<sup>64</sup> the workers urged primarily “that both the common law of trusts and federal common law developed pursuant to ERISA counsel against deferring to decisions by fiduciaries with interests adverse to those of the claimants.”<sup>65</sup>

Judge Becker’s exhaustive Third Circuit opinion concluded that courts in the early ERISA benefit disputes mechanically imported the arbitrary and capricious review standard from the benefit claim processes applied under LMRA section 302 breach of trust cases.<sup>66</sup> Judge Becker was particularly troubled by this uncritical adoption of LMRA standards to ERISA cases because the ERISA plan administrator in *Bruch* suffered a self-interested bias,<sup>67</sup> whereas the LMRA assures trustee neutrality in collectively-bargained plans.<sup>68</sup>

Judge Becker first cited *Van Horn v. Lewis*<sup>69</sup> to record how even relatively recent pre-ERISA cases still analogized employee benefit plans to gifts.<sup>70</sup> *Van Horn* involved a collectively-bargained plan governed by the LMRA.<sup>71</sup> The *Van Horn* district court found that the plan was “a beneficial Fund, and [that] the rules applicable to charitable trusts undoubtedly apply . . .”<sup>72</sup> Further, the *Van Horn* court ruled that

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administrator, nor should courts apply the contract law *contra proferentum* rule. *Id.* at 145.

64. *See id.* at 138.

65. *Id.* at 137.

66. *Id.* at 139-44.

67. *See id.* at 143 (“The first ERISA cases to invoke the arbitrary and capricious standard did so without any discussion of the differences between the LMRA and ERISA contexts. So have most subsequent cases. We believe, however, that in applying the common law of trusts under ERISA courts must be cognizant of the features that distinguish the ERISA arrangements from the paradigmatic common law situation. Both ERISA and the LMRA permit the trust form to be used by employers for the benefit of their employees even though—since they deal with each other at arms’ length, like buyers and sellers of any other commodity—there will sometimes be conflicts of interest between those two groups. This difference does not prevent the trust form from being used, but it does require that trust principles not be applied mechanically in the new context.”).

68. *See id.* at 140-41, 141 n.7 (citing LMRA § 302(c)(5)(B))

In their oversight of a trust where the impartiality of the trustee had been carefully assured, the LMRA courts could easily adopt the principle of trust law applicable with respect to judicial review of an impartial trustee’s execution of his duties . . . . In the unfunded pension plan at issue . . . in this case, however, there is no assurance of the trustee’s impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone’s pocket.

*Id.* at 143-44.

69. 79 F. Supp. 541 (D.D.C. 1948).

70. *See Bruch*, 828 F.2d at 142.

71. *Van Horn*, 79 F. Supp. at 541-43.

72. *Id.* at 544.



the majority of the Trustees under an LMRA trust have a right to act so long as their decision is not “improper, unbusiness-like, or not in accordance . . . with the letter and the spirit of the Labor Management Relations Act.”<sup>73</sup> The *Van Horn* court did at least assume the power to review trustee decision-making, even if the review was deferential.<sup>74</sup> Under gift law, of course, the promise to make a gift is unenforceable by the promisee.<sup>75</sup> Judge Becker cited *Van Horn* to show that courts often confused employee benefit plans with “charitable trusts”<sup>76</sup> and to establish that ERISA courts imported deferential review in ERISA claims by analogizing the process to breach of trust claims arising under LMRA section 302.<sup>77</sup>

Judge Becker then discussed *Hobbs v. Lewis*,<sup>78</sup> another District of Columbia case decided a full decade after *Van Horn*, which appeared to initiate *de novo* review of employee benefit claims.<sup>79</sup> The *Hobbs* court rejected the plan trustees’ contention that deferential review governed because the pension fund was a charitable trust.<sup>80</sup> Judge Pine, of the *Hobbs* court, stated:

In the first place, I do not agree that this Fund is a charitable trust, involving mere gratuities, but am of the opinion that money paid from [the Fund] is in the nature of a fringe benefit, a term of recent origin, or deferred, contingent compensation which the employees of signatories may be entitled to receive in addition to their wages, and which was procured for them by their bargaining agent, . . . . An employee therefore has a contractual right to this pension if and when he comes within the regulations prescribed by the Trustees.<sup>81</sup>

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73. *Id.*

74. *See id.*

75. *See Maughs v. Porter*, 161 S.E. 242, 243 (Va. 1931) (quoting *Spooner v. Hillbush*, 23 S.E. 751, 753 (Va. 1895)).

76. *Bruch*, 828 F.2d at 142 (quoting *Van Horn*, 79 F. Supp. at 544).

77. *Id.* at 142.

78. 159 F. Supp. 282 (D.D.C. 1958).

79. *Bruch*, 828 F.2d at 142 (citing *Hobbs v. Lewis*, 159 F. Supp. 282, 286 (D.D.C. 1948)).

80. *Hobbs*, 159 F. Supp. at 286 (“[D]efendants also contended . . . that the Fund is a charitable trust and that the court cannot interfere in its decisions unless the Trustees act arbitrarily or unreasonably.”).

81. *Hobbs*, 159 F. Supp. at 286 (quoted in *Bruch*, 828 F.2d at 142). In *Hobbs*, the negotiated trust agreement granted the LMRA trustees “full authority in respect of coverage, eligibility, amounts of benefits, etc.” *Id.* at 283. Judge Pine found the case distinguishable from older cases that had applied limited judicial review when trust language provided that the trustees’ benefits decisions “shall be final and conclusive.” *Id.* at 286 (citations omitted). Judge Pine also claimed to distinguish the earlier *Van Horn* decision while applying *de novo* review in *Hobbs*, but the *Hobbs* opinion did not creditably point to any material difference in the facts to support application of a new review standard. *See id.* at 286-87.

Ultimately, Judge Pine concluded that promises made under a fringe benefit plan sound in contract law,<sup>82</sup> and he therefore applied a contract law-based *de novo* review standard in *Hobbs*, rather than the trust law-based standard applied in earlier District of Columbia cases.<sup>83</sup>

Six months after *Hobbs*, another District of Columbia trial court weighed in on the debate. In *Ruth v. Lewis*,<sup>84</sup> which Judge Becker also cited in *Bruch*,<sup>85</sup> Judge Youngdahl determined that a worker seeking to enforce an employer's promise to provide fringe benefits was merely a beneficiary of a non-charitable trust.<sup>86</sup> Consequently, Judge Youngdahl reviewed the claim under a deferential standard.<sup>87</sup>

Finally, Judge Becker described a District of Columbia trial court ruling two years after the *Hobbs* and *Ruth* decisions, *Kennet v. United*

82. *Hobbs*, 159 F. Supp. at 286 ("An employee therefore has a contractual right to his pension if and when he comes within the regulation prescribed by the Trustees.").

83. *Id.* at 286-87.

84. 166 F. Supp. 346 (D.D.C. 1958).

85. *Bruch*, 828 F.2d at 142.

86. *Ruth*, 166 F. Supp. at 348-49.

The problem of the administration of pension plans such as the one involved here is still very much unsettled in the law. It has recently been the subject of much critical comment in legal periodicals. Courts have divided on the amount of judicial review available in this situation. They are also divided as to what type of trust is here involved. This Court is of the opinion that despite the contractual provisions in the trust instrument giving absolute discretion to determine eligibility to the fund, judicial review does lie where applicants can show a breach of fiduciary trust, fraud or arbitrary action. In this case, plaintiff is in the position of a beneficiary of a noncharitable trust, not the possessor of a contractual right. The Court's review, therefore, is limited to insuring the proper administration by the Trustees of the Fund. It is not the Court's function to run the trust, but rather to see that it is run within the terms of the agreement in such a way that the benefits are properly distributed in order to protect beneficiaries from arbitrary or capricious action.

*Id.*

87. *Id.* at 349. Judge Youngdahl identified a further concern in *Ruth* that perhaps modern ERISA courts share. Judge Youngdahl worried about the deleterious effect on court dockets if federal courts had to provide plenary review in every employee benefit dispute.

There is also a practical reason for this holding [limiting the level of judicial review].

The trust here involved is quite large, consisting of over 65,000 members. It is also only one of many of this type now popular in industries throughout the country. This case has taken over two weeks to be heard because of the request made by the applicant, and has forced the Trustees to go to great expense to attempt to uncover the true facts. In these circumstances the Court believes it is administratively simpler and more practical to limit the Court's review to the application, the evidence of its support, and in the light of this, whether the Trustees acted in accordance with their fiduciary obligation and properly exercised their discretion.

See *id.* at 349. In *Bruch*, Judge Becker dismissed this consideration. See *Bruch*, 828 F.2d at 144 n.10. ("It has also been argued that deferring to the administrator's decision will make proceedings faster. We acknowledge that. But because the speed is attained by sacrificing the impartiality of the decision maker, we think that it comes at too great a cost.").

*Mineworkers of America*,<sup>88</sup> to further establish how confused the courts had become with the standard of review issue.<sup>89</sup> In *Kennet*, District Judge Holtzoff wrote as if he were having a conversation with himself about what standard of review should apply,<sup>90</sup> and while the approach nicely framed the question, unfortunately, his conclusion that courts did not have the power to provide a full plenary trial belied his suggestion that employee benefit claims sound in contract law.<sup>91</sup> Judge Holtzoff's announced that he was "overruling" the contention that the court was limited to reviewing the trustees decisions regarding the worker's eligibility for a pension to cases of fraud or arbitrary and capricious

88. 183 F. Supp. 315 (D.D.C. 1960).

89. See *Bruch*, 828 F.2d at 142.

90. See *Kennet*, 183 F. Supp. at 317-18.

91. See *id.* at 317-18. Judge Holtzoff stated:

The first question to be determined is the nature of the rights of employees for whose benefit the fund was established and the scope of judicial review of decisions of the trustees of the fund. It [is] urged . . . that employees for whose benefit the fund was established have no vested rights in the fund and that the action of the trustees in granting or denying applications is final and is not subject to judicial review except for fraud or on the ground that their action is arbitrary and capricious. The Court does not agree with this contention and overrules it.

While the factual situation presented here may be regarded as somewhat novel because welfare funds established by labor unions are of recent origin, nevertheless, the law is sufficiently flexible and potent to be adjusted to new problems. We must look to the fundamental principles of law in order to determine these questions. In effect, we are confronted with a trust fund governed by three trustees and a large group of beneficiaries of the trust fund. One of the principal branches of equity jurisprudence has traditionally been the protection of the rights of beneficiaries of trust funds. A beneficiary of a trust fund is entitled and has always been entitled to have recourse to a court of equity to secure the proper performance of the duties of the trustees and his rights in the fund. Consequently, on this ground alone the Court would have the power to determine the plaintiff's legal rights in the fund and the correctness of the action of the trustees in denying him a pension.

There is another approach to this problem. Contrary to the argument of defendant's counsel, the payments made from the fund are not gifts or gratuities. The employer, in making payments into the fund, is not making a gift. This fund was established pursuant to a contract between the union and the employers governing the terms of employment. Payments into the fund are part of the compensation received by the employee over and above his weekly wages. The services rendered by him are the consideration for both his wages and his pension. Whether the rights of the employees be deemed to be vested or inchoate is immaterial. They are legal rights. The employee who meets the test of eligibility has earned his pension as part of the compensation for his work over the required period and is not receiving a donation at the whim or choice of the trustees.

The employee may be regarded as a third party beneficiary to a contract.

*Id.* at 317-18. The better view is not to apply a third-party beneficiary theory, but to recognize that when a trust is utilized in the employee benefits context, it is best viewed as a security devise to guarantee payment of the underlying direct plan promises. Trusts used as a security devise are expressly not covered by the rules summarized in the Restatement of Trusts. See *infra* notes 222-28 and accompanying text.

decision-making,<sup>92</sup> but despite Judge Holtzoff's conclusion that a worker's right to pension benefits is founded in contract law,<sup>93</sup> he ultimately ignored that judgment and held that the LMRA trustees' decision could be overturned only if arbitrary or capricious, or if erroneous on a question of law.<sup>94</sup>

The significance of these LMRA cases, as stressed by Judge Becker, is that they document the slow development of workers' rights to enforce plan sponsor promises. The District of Columbia courts rejected what had been a historical reluctance by courts to review employer benefit claim denials under any review standard based upon a gift law analogy.<sup>95</sup> Having established that workers did have some rights and reasonable expectations to receive promised benefits, Judge Becker demonstrated that pre-ERISA courts still struggled to define the nature of the right and the appropriate level of judicial scrutiny.<sup>96</sup> Importantly, since the District of Columbia cases arose under the then-recently enacted Labor Management Relations Act, these courts looked to the LMRA to guide the courts in their evaluation of the nature of a worker's benefit claim.<sup>97</sup>

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92. *See Kennet*, 183 F. Supp. at 317-18.

93. *See id.*

94. *See id.* at 318

The Court concludes, therefore, that recourse to judicial action may be had to enforce rights under this fund and in such an action the Court will review the legal rights of the plaintiff and determine whether any erroneous decision has been reached by the trustees on questions of law. It will also review, to a limited extent, decisions of the trustees on questions of fact; certainly whether there is any substantial evidence sustaining the decision on questions of fact. The Court would not go as far as to review the question whether their decision is contrary to the weight of evidence, but it will determine whether there is substantial evidence in the record as a whole sustaining their finding. Finally, and it is not denied that this may be done, the Court will review the question whether the action of the trustees is in any way arbitrary or capricious.

95. *Bruch*, 828 F.2d at 142-45.

96. *Id.* at 142.

97. *See Kennet*, 183 F. Supp. at 316

[T]he Labor Management Relations Act of 1947, Act of June 23, 1947, 61 Stat. 157, 29 U.S.C. § 186, authorized the establishment of welfare funds by employers for the sole and exclusive benefit of the employees of the employer and their families and dependents, either separately or jointly with the employees of other employers making similar payments. The Act provided that such payments might be made by the employer to a representative of the employees and were to be held in trust for medical or hospital care, pensions on retirement or death, compensation for injuries or illness, unemployment benefits, and similar purposes. The statute further provided that the detailed basis on which such payments were to be made was to be specified in a written agreement with the employer and, further, that the employees and employers were to be equally represented in the administration of that fund, together with such neutral persons as the two groups might agree upon.

*See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109-10 (1989) (describing the trust

In *Bruch*, Judge Becker also showed that most pre-*Firestone* ERISA courts imported the LMRA section 302 deferential review standard into the ERISA claims process without carefully comparing implied LMRA section 302 breach of trust claims to the express ERISA section 502(a)(1)(B) action to recover benefits due under a plan.<sup>98</sup> Judge Becker made two cogent points. First, he showed that the trust law-based comparison between the LMRA and ERISA presented a false analogy because of the presumed bias of ERISA plan administrators appointed by plan sponsors.<sup>99</sup> Judge Becker stressed that because the LMRA assures the impartiality of LMRA trustees, courts naturally gravitated to a trust law-based review standard.<sup>100</sup> In ERISA, however, while a plan administrator may serve as a fiduciary under the statute,<sup>101</sup> the plan sponsor selects the plan administrator without input from the covered workers.<sup>102</sup> Judge Becker rejected *Firestone*'s invitation to apply a trust law deferential review standard in ERISA claims based upon the analogy to LMRA section 302 actions because trust law does not require courts to defer to the decisions of self-interested trustees, and because ERISA plan administrators are not neutral.<sup>103</sup>

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law basis for LMRA § 302 "structural defect" claims). The District of Columbia Circuit Court of Appeals finally concluded that trial courts should defer to the claims decisions of LMRA trustees, unless arbitrary or capricious. See *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963).

98. *Bruch*, 828 F.2d at 143.

99. *Id.* at 143-44.

100. *Id.*

101. See ERISA § 402(a)(1)-(c)(1), 29 U.S.C. § 1102(a)(1)-(c)(1) (2006).

102. See *Bruch*, 828 F.2d at 144 ("The [ERISA] plan is controlled entirely by the employer, not by a group evenly divided between employer and employees [like the LMRA trust]. Because the [Firestone] plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket. As we have already seen, the principle articulated in [RESTATEMENT (SECOND) OF TRUSTS] § 187 does not govern judicial review of such a trustee's decisions.").

103. *Id.* at 141. Importantly, Judge Becker cited the *Improper Motive* comment in section 187 of the Restatement to conclude that a fiduciary's self-dealing conflict of interest triggers *de novo* review. See *id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. g)

Comment (g) to RESTATEMENT [(SECOND) OF TRUSTS] § 187 explains, however, that courts will not defer to a trustee's judgment when a conflict of interest threatens the trustee's impartiality: 'g. *Improper motive*. The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive. . . . In the determination of the question whether the trustee in the exercise of power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.

In *Firestone*, the Supreme Court ignored *comment g* to § 187 of the Restatement. Interestingly, Justice Scalia's dissenting opinion in *Glenn* cites the *Improper Motive comment g*, but Justice Scalia's discussion of the issue is rather confused. See *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. at 2357-2360 (Scalia, J., dissenting). Judge Becker also rejected the analogy urged by *Firestone*, and commonly advanced to support deference under administrative law, that plan administrators are "experts" and therefore are better able to consistently apply plan terms than novice judges. See

Finally, Judge Becker examined the crucial difference between a donative trust where the trustee often must distribute a finite trust *res* among equally deserving trust beneficiaries, and an ERISA defined benefit plan.<sup>104</sup> In the circumstance of a donative trust, courts respect the settlor's selection of a trustee to make such discretionary choices.<sup>105</sup> However, Judge Becker noted that in ERISA benefit cases, the plan administrator was not deciding how to distribute trust assets among beneficiaries;<sup>106</sup> rather, the plan administrator was making a choice of whether to distribute money to a plan beneficiary or to keep the money for itself.<sup>107</sup>

Judge Becker ruled that *de novo* review should govern employee benefit claims where the plan administrator suffers a self-interested conflict of interest.<sup>108</sup> It is difficult to decipher, however, whether Judge Becker reached his holding on the basis of trust law or contract law. After a great deal of discussion of contract law,<sup>109</sup> Judge Becker ultimately confused the plan for a trust instrument, reciting that "[t]he trust at issue here provides severance benefits, which are a form of wages."<sup>110</sup> Of course, there was no trust involved in the case—Firestone did not establish a trust to fund the plan, but instead paid benefits out of its general treasury.<sup>111</sup>

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*Bruch*, 828 F.2d at 144

We reject this rationale for two reasons. First, in the context of claims for benefits, the questions which courts must address do not usually turn on information or experience which expertise as a claims administrator is likely to produce. As in this case, the validity of the claim is likely to turn on a question of law or of contract interpretation. Courts have no reason to defer to private parties to obtain answers to these kinds of questions . . . . Secondly, as we have explained, there is a significant danger that the plan administrator will not be impartial. The lack of impartiality offsets any remaining benefit which the administrators' expertise might be thought to produce.

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

105. See Brief for the United States as Amicus Curiae Supporting Respondents at 12-18, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054) [hereinafter, Solicitor General's Brief] (distinguishing Firestone plan from a trust because there was no trust *res* in Firestone's unfunded plan).

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

107. *Id.* Judge Becker also dismissed the argument that by deferring to administrator decisions, courts could resolve cases more quickly. He stated: "[i]t has been argued that deferring to the administrator's decision will make proceedings faster. We acknowledge that. But because the speed is attained by sacrificing the impartiality of the decisionmaker, we think that it comes at too great a cost." *Id.* at 144 n.10.

108. *Id.* at 149.

109. *Id.* at 147-48 (citing RESTATEMENT (SECOND) OF CONTRACTS § 204) (discussing contract law in instructions for trial court to apply on remand).

110. *Id.* at 145. See also Solicitor General's Brief, *supra* note 105, at 26-30.

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

*C. In Firestone the Supreme Court Assumed, But Did Not Decide, That Trust Law Governs ERISA § 502(a)(1)(B) Claims for Benefits Due Under a Plan*

In *Firestone Tire & Rubber Co. v. Bruch*,<sup>112</sup> the Supreme Court held that a worker's claim for benefits due under an ERISA welfare benefit plan filed pursuant to ERISA section 502(a)(1)(B) should be evaluated *de novo* by the trial court.<sup>113</sup> The Court's holding essentially endorsed the same fair and reasonable processes historically applied in state court breach of contract actions.<sup>114</sup> Crucial to the *Firestone* Court's holding was the realization that Congress intended ERISA to help safeguard plan participant rights that, for various reasons, had not been adequately protected when some pre-ERISA courts applied trust law to resolve benefit disputes prior to ERISA.<sup>115</sup> The *Firestone* Court notably remarked that:

ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," and "to protect contractually defined benefits." Adopting *Firestone's* reading of ERISA [that a trust law-based deferential review standard should apply] would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.<sup>116</sup>

The *Firestone* Court agreed with the Respondent *Bruch*,<sup>117</sup> and with

112. 489 U.S. 101 (1989).

113. *Id.* at 115.

114. *Id.* at 112 ("The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA.").

115. See S. Rep. No. 93-127 at 28-30 (1973); H.R. Rep. 93-533 at 11-12 (1973). See generally Donald T. Bogan, *ERISA: Rethinking Firestone in Light of Great-West—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 650-55, 664-68 (2004) (summarizing history of employee benefit plans legal status).

116. *Firestone*, 489 U.S. at 113-114 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) & *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)); see also *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1995). The former *Firestone* workers showed that prior to ERISA the case "would not have implicated the law of trusts for the simple reason that, in adopting its severance pay plan, *Firestone* did not choose to create a trust." Brief for Respondents, *supra* note 47, at 15-16. Consequently, the Brief for Respondents noted that *Firestone* was reduced to arguing that ERISA worked a substantial diminution of the pre-existing, contractual rights of employees under unfunded welfare plans. *Id.* at 16, 32.

117. See Brief for Respondents, *supra* note 47, at 32-33 (urging the Court to apply *de novo* review under the federal common law of ERISA where the plan sponsor of an unfunded plan also is the plan administrator, and therefore suffers a conflict of interest when serving as both payor of claims and as the claims administrator).

United States Solicitor General,<sup>118</sup> in holding that workers were entitled to a plenary, *de novo* trial when challenging an ERISA plan administrator's claim denial.<sup>119</sup> Unfortunately, and despite the Court's express rejection of a trust law paradigm as imported by lower ERISA courts from actions under LMRA section 302,<sup>120</sup> the *Firestone* Court failed to expressly approve the Solicitor General's rationale that contract law, not trust law, offered the proper legal paradigm to evaluate ERISA benefit claims.<sup>121</sup> The *Firestone* Court's statement that trust law governs ERISA benefit claims has produced a result exactly opposite of what the *Firestone* Court expressly tried to avoid, and contrary to Congress's intentions in enacting ERISA.<sup>122</sup> Due to the application of deferential review, nominally applied under trust law in the lower courts, workers are now presented with significantly greater burdens in their efforts to enforce their rights to promised welfare benefits than they were prior to ERISA.

In *Firestone*, the plan participants allowed the Court to presume trust law governed claims presented under ERISA section 502(a)(1)(B) by arguing for *de novo* review under trust law.<sup>123</sup> *Firestone* urged the Court to apply a deferential review standard to plan participant benefit claim challenges because under trust law, courts defer to the discretionary decisions of trustees, unless the trustee abused its discretion.<sup>124</sup> In their Brief for Respondents, the former *Firestone* workers countered that the trust law-based *de novo* review standard governed the unfunded plan at issue because the decision to interpret plan language is not a discretionary function.<sup>125</sup> Additionally, the workers argued that, at least in cases where the fiduciary suffered a self-

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118. See Solicitor General's Brief, *supra* note 105, at 10 (arguing benefit denials by employer-controlled administrators of unfunded employee benefit plans should be reviewed without deference to the administrator's interpretation of the terms of the plan).

119. *Firestone*, 489 U.S. at 114-15.

120. See *id.* at 110.

121. *Id.* at 109-10. The LMRA analogy is not entirely off the mark; however, courts have compared the wrong LMRA remedy to ERISA claims for benefits due under a plan. LMRA § 301, 29 U.S.C. § 185 provides an express breach of contract remedy that is analogous to ERISA's claim for benefits due under 29 U.S.C. § 1132(a)(1)(B). LMRA § 301 claims are resolved under contract law standards, not trust law. See *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 566-67, 570 (1990). See generally Bogan, *supra* note 115, at 656-60.

122. See *Firestone*, 489 U.S. at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law.") (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp. Inc.*, 472 U.S. 559, 570 (1985)).

123. See *id.* at 113.

124. See Brief for Petitioner at 26-46, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054).

125. See Brief for Respondents, *supra* note 47, at 41-42.



interested conflict of interest, “questions of plan interpretation should be resolved, as a matter of federal common law, by the courts.”<sup>126</sup>

While the workers relied upon a trust law-based analysis to obtain *de novo* review,<sup>127</sup> the workers also argued in the alternative that if trust law required deference to a conflicted fiduciary’s decision-making, the Court was not bound to apply trust law.<sup>128</sup> Here the workers suggested that Congress intended federal courts to develop a common law of ERISA that supported the Congressional purpose in enacting ERISA of protecting workers rights to contractually defined benefits.<sup>129</sup> Summarizing their arguments, the Brief for Respondents remarked:

Contrary to Firestone’s suggestions, the law of trusts does not support [the] conclusion [that deferential review applies]; rather, that law compels the same conclusion as the one derived from ERISA’s policies. The law of trusts does defer to a trustee’s exercise of discretionary authority, but trust law empowers the courts to direct trustees to perform mandatory functions. And trust law does not treat the power to interpret a trust instrument as a discretionary function of the trustee; rather like contract law, trust law assumes that it is ordinarily for the courts to determine the meaning of legal documents, including trust instruments, unless something in the trust instrument itself provides for a different division of authority. Thus, pre-ERISA, where trusts were created to provide employee benefits, the courts would defer to the trustees’ interpretation of the trust documents if the documents themselves so provided, but otherwise the courts proceeded on the premise that it was a judicial responsibility to determine the meaning of the trust instrument.<sup>130</sup>

At oral argument in the Supreme Court, the Court tried to clarify whether there was a contract law question presented by asking if the parties agreed that trust law governed.<sup>131</sup> David M. Silberman argued the case for the former Firestone workers before the Supreme Court.<sup>132</sup> Consistent with the workers’ brief, at oral argument Mr. Silberman

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126. *Id.* at 19, 32, 38.

127. *Id.* at 33.

128. *Id.* at 32-35.

129. *See id.* at 16-17 and 32-57.

130. *Id.* at 19-20.

131. *See* Transcript of Oral Argument at 7-8, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-104). The Court asked Mr. Wald, counsel for Petitioner, the following question: “I’m just trying to ascertain the relative positions of you and your opponents in this case. Do I correctly understand that everyone agrees that for the funded plan where there is no alleged conflict of interest, that the standard you proposed on abuse of discretion is the appropriate standard?” *Id.*

132. *Id.* at 23.

asked the Court to affirm the application of *de novo* review under trust law,<sup>133</sup> and he also asserted, in the alternative, that a claim for benefits due under a plan sounds in contract law.<sup>134</sup> Justice Scalia asked Mr. Silberman if he was saying that trust law does not apply at all. Mr. Silberman replied:

No. I, I perhaps misspoke . . . I'm saying—I want to be saying two things: first, that if it's a cause of action to enforce fiduciary duties of ERISA, as opposed to enforce the terms of a particular plan, then clearly those fiduciary duties were derived from trust law. So, that's one point. . . . I'm saying that if it's a [cause of] action to enforce the terms of the plan, a 502(a)(1)(B) action, that the Court is not bound to adopt trust law, but it can look to other sources, and that if there were a trust law rule that said in this kind of case that we defer to what the trustee does, that rule should not be borrowed here.<sup>135</sup>

After listening to Mr. Silberman argue that *de novo* review applied under either trust law or contract law, the Court asked him if the plan participants would be just as happy if the Court held that *de novo* review applied under trust law.<sup>136</sup> Mr. Silberman responded that “I think the fairer way of reasoning it is that this is more of a contract question. But certainly my clients would be just as happy by the decision you just

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133. *Id.* at 24 (“First, we think, as Justice Scalia developed it, Petitioner [Firestone] misunderstands trust law, that if trust law applies, we believe the court of appeals was correct here.”).

134. *Id.* at 26-28 (“First, it's important to bear in mind that this is not a claim for breach of trust. This is not a trust law claim. ERISA does contain causes of action for breach of trust like the cause of action this Court, Court [sic] had before it in the *Russell* case. That wasn't the claim we pled, that we brought. ERISA has a separate cause of action to enforce the terms of the trust [sic]. That's section 502(a)(1)(B) . . . ‘To recover benefits due under the terms of the plan or to enforce rights under the terms of the plan or to clarify rights to future benefits under the terms of the plan.’ That's the cause of action we pled here. It's the cause of action that the legislative history analogizes to a 301 Taft Hartley suit and instructs the Courts to develop a federal common law, much as the Court has developed a federal common law of labor contracts. And it's the cause of action that this Court carefully distinguished in the *Russell* case . . . . So, the, claim we're bringing here under the statute is a—more of a contractual claim than a trust claim, and we don't think that the Court in developing the federal common law is in any sense obligated to turn to trust law rather than contract law to decide this issue.”).

135. *Id.* at 29-30.

136. *Id.* at 30. The Court asked Mr. Silberman, counsel for Respondents, the following question:

But if there is no such [trust law] rule [that would require courts to defer to a conflicted trustee], it wouldn't make any difference, would it? And you'd be just as—just as happy if we said everything is governed by trust law but trust law comes out with the same [*de novo* review] result . . . .

*Id.* at 30.

proposed”<sup>137</sup>

In the Brief for Respondents, counsel for the former Firestone workers reformulated the question before the Court to ask: what standard of review does trust law require given an unfunded plan with a conflicted plan administrator, and plan language that does not include an express grant of discretionary powers to the trustee?<sup>138</sup> The workers urged the Court to answer that question by holding *de novo* review applied.<sup>139</sup>

Ultimately, the *Firestone* Court granted the Respondent workers exactly the relief they requested.<sup>140</sup> The *Firestone* opinion held that *de novo* review applied to govern the severance benefits dispute under trust law because the Firestone plan did not contain any express grant of discretionary powers to the fiduciary/plan administrator.<sup>141</sup> Based upon that holding, the Court avoided the contract law versus trust law issue,<sup>142</sup> and the Court did not have to address the workers’ argument that interpreting the plan document and determining eligibility for benefits is a mandatory, not a discretionary, function under trust law.<sup>143</sup> Unfortunately, dicta contained in the *Firestone* Court’s opinion that carelessly elaborated on trust law rules which may or may not apply in other circumstances that were not before the Court in *Firestone*, has caused great harm to plan participants.<sup>144</sup>

137. *Id.* at 31. The Court also asked Mr. Silberman if the contract law argument was made in the lower courts, but he said he could not answer that question because he was not involved in the case prior to the Supreme Court. *See id.* at 34-35.

138. Brief for Respondents, *supra* note 47, at 46 (“It follows, then, that the dispositive question posed here can be reformulated as follows: under the federal common law of employee benefit plans, are federal courts required to defer to the interpretation of plan instruments adopted by a self-interested employer/plan administrator where the plan instruments themselves do *not* purport to vest the administrator with the power to authoritatively determine the meaning of those documents.”) (emphasis in original).

139. *Id.* at 33 (“[U]nder the federal common law, no deference is owed to a self-interested administrator’s interpretation of the meaning of plan instruments . . .”).

140. *Firestone*, 489 U.S. at 115.

141. *Id.*

142. Even though the workers did not urge a contract law-based review standard, the Solicitor General did argue that contract law should control claim for benefits due under a plan pursuant to ERISA section 502(a)(1)(B), at least when the plan was not funded through a trust. *See* Solicitor General’s Brief, *supra* note 105, at 19-20.

143. *See Firestone*, 489 U.S. at 111 (“Firestone can seek no shelter in these principles of trust law . . . for there is no evidence that under Firestone’s termination pay plan the administrator has the power to construe uncertain terms of that eligibility determinations are to be given deference.”).

144. *See infra* notes 220-28 and accompanying text.

*D. The Sloppy Firestone Dicta*

In the Supreme Court *Firestone* opinion, Justice O'Connor agreed with Circuit Judge Becker that it was incorrect to import the LMRA section 302 trust law analogy to ERISA claims,<sup>145</sup> but then she inexplicably announced that the trust law deferential review standard governed a worker's claim for benefits due under a plan pursuant to ERISA section 502(a)(1)(B).<sup>146</sup> Justice O'Connor remarked that:

A comparison of the LMRA and ERISA . . . shows that the *wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted. . . . The LMRA does not provide for judicial review of the decisions of LMRA trustees. Federal courts adopted the arbitrary and capricious standard both as a standard of review and, more importantly, as a means of asserting jurisdiction over suits under [LMRA § 302(c), 29 U.S.C.] § 186(c) by beneficiaries of LMRA plans who were denied benefits by trustees. . . . Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans. Thus, the *raison d'être* for the LMRA arbitrary and capricious standard—the need for a jurisdictional basis in suits against trustees—is not present in ERISA. Without this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard insofar as [ERISA § 502(a)(1)(B), 29 U.S.C.] § 1132(a)(1)(B) is concerned.<sup>147</sup>

Following that passage, however, Justice O'Connor still ruled that trust law governs ERISA claims for benefits due under a plan.<sup>148</sup> Justice O'Connor made two observations to support that ruling. First, she remarked generally that "ERISA abounds with the language and terminology of trust law."<sup>149</sup> Second, Justice O'Connor recited that: "[i]n determining the appropriate standard of review for actions under section [502](a)(1)(B), we are guided by principles of trust law."<sup>150</sup>

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145. See *Firestone*, 489 U.S. at 109-11.

146. *Id.* at 111.

147. *Id.* at 109-10 (citations omitted). Justice O'Connor's statement is overbroad. The LMRA does, in fact, expressly contemplate judicial review of LMRA trustee decisions in "suits for violation of contracts between an employer and a labor organization . . ." See LMRA § 301, 29 U.S.C. § 185 (2006). However, individual worker "structural defect" claims for breach of fiduciary duty were implied under LMRA § 302, 29 U.S.C. § 186 (2006), rather than express claims.

148. See *id.* at 111.

149. *Id.* at 110.

150. *Id.* at 111 (citing *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)).

Unfortunately, the only citation Justice O'Connor included in the *Firestone* opinion to support the curious statement that principles of donative trust law guide ERISA section 502(a)(1)(B) breach of contract claims is sloppy at best, and perhaps more accurately described as grossly misleading.

Justice O'Connor relied upon *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*<sup>151</sup> to support her pronouncement that the Supreme Court looks to trust law as a guide to resolve claims for benefits due pursuant to ERISA section 502(a)(1)(B).<sup>152</sup> In fact, *Central Transport* did not involve a claim for benefits due under a plan pursuant to ERISA section 502(a)(1)(B).<sup>153</sup> Justice O'Connor's citation to *Central Transport*, therefore, offers no support for the application of a trust law-based review standard in an ERISA section 502(a)(1)(B) claim.

In *Central Transport*, the trustees of a collectively-bargained, multiemployer pension plan owed fiduciary duties to the plan and plan participants to assure that participating employers were contributing appropriate amounts into the LMRA trust on behalf of union workers.<sup>154</sup> In order to satisfy its fiduciary obligations, the trustees sought to randomly audit the records of several employers subject to the collective-bargaining agreement.<sup>155</sup> Some employers objected, requiring the trustees to pursue a remedy for injunctive and declaratory relief,<sup>156</sup> where the trustees sought an order directing such employers to open its books to an auditor.<sup>157</sup> The trustees sued under LMRA section 302 and ERISA section 502, but the trustees never further specified what subsection of ERISA section 502 provided relief.<sup>158</sup> It is clear, however, that *Central Transport* in no way involved a plan participant claim to recover benefits due under a plan. The Supreme Court opinion in

151. 472 U.S. 559 (1985).

152. See *Firestone*, 489 U.S. at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law." (citing *Central Transport*, 472 U.S. at 570)).

153. *Central Transport*, 472 U.S. at 561 ("The issue presented is whether an employer who participates in a multiemployer benefit plan that is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, must allow the plan to conduct an audit involving the records of employees who the employer denies are participants in the plan.").

154. *Id.* at 562-63.

155. *Id.*

156. *Id.* at 563-64.

157. See *id.* (citing *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 522 F. Supp. 658, 660 (ED Mich. 1981), *rev'd* *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 698 F.2d 802 (6th Cir. 1983)); see also *Central Transport*, 522 F. Supp. at 659-60.

158. See *Central Transport*, 472 U.S. at 564 n.4; see also *Central Transport*, 522 F. Supp. at 660.

*Central Transport* describes multiemployer trustees' efforts to clarify their rights in connection with their fiduciary duties to preserve and maintain trust assets.<sup>159</sup> The *Central Transport* opinion does not even cite ERISA section 502(a)(1)(B), and there certainly was no discussion or suggestion in *Central Transport* that courts resolve ERISA section 502(a)(1)(B) claims under trust law principles.<sup>160</sup>

Justice O'Connor's conclusion that donative trust law should guide a claim to recover what she herself had previously described as "contractually defined benefits"<sup>161</sup> is confounding, and particularly so, given that she had also rejected the LMRA section 302 trust law deferential review standard as not applicable to ERISA benefit claims.<sup>162</sup> The Supreme Court's sloppy language and misleading citation to *Central Transport* in *Firestone* has caused tremendous harm because lower courts have relied upon this shabby jurisprudence to impose a summary adjudicative process that denies workers the opportunity to pursue discovery, the right to confront adverse witnesses, the right to a jury trial, and most importantly, the right to a fair and neutral adjudication of their employee benefit claims.<sup>163</sup>

### III. POST-FIRESTONE DEFERENTIAL REVIEW

The Supreme Court accepted *Firestone* to resolve a circuit conflict on the question of what standard of review should apply in an ERISA plan participant's claim for benefits arising from an unfunded plan where the plan administrator suffered an interest adverse to the claimants.<sup>164</sup> Prior to *Firestone*, many lower federal courts had applied a trust law-based arbitrary or capricious standard of review in ERISA benefit claims;<sup>165</sup> however, in several circuits "the arbitrary and

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159. See *Central Transport*, 472 U.S. at 570-72.

160. See *id.* at 570-74.

161. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

162. *Id.* at 109-10.

163. See *Lasser v. Reliance Standard Life Ins. Co.*, 130 F. Supp. 2d 616, 620 (D.N.J. 2001); *Goldstein v. Johnson & Johnson*, No. 96-5643, 2000 U.S. Dist. Lexis 20932, at \*17-19 (D.N.J. Feb. 14, 2000).

164. See *Firestone*, 489 U.S. at 107-08.

165. Lower courts continued to import the LMRA trust law-based deferential review standard to ERISA claims, despite the fact that the Supreme Court had expressly stated in 1985 that Congress enacted ERISA to protect contractually defined benefits, see *Mass. Mut. Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985), and despite ERISA's legislative history, which indicates that one reason Congress reformed employee benefits law in ERISA was because the application of trust law standards to employee benefit claims prior to ERISA had failed to effectively protect plan participant rights. See S. Rep. No. 93-127, at 29-30 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4865-66, and in 1 LEGISLATIVE HISTORY, *supra* note 1 at 615-16.

capricious standard had been softened in cases where fiduciaries and administrators had some bias or adverse interest.”<sup>166</sup> The *Firestone* Court held that courts should review ERISA section 502(a)(1)(B) claims *de novo*, but the opinion also indicated that if a plan sponsor expressly empowered a plan administrator with discretionary authority, a deferential review standard may apply.<sup>167</sup>

Following *Firestone*, Professor John H. Langbein reasonably predicted that plan sponsors would rush to amend their plans to add express grants of discretionary powers to plan administrators in order to obtain the benefit of deferential court review based upon the *Firestone* dicta.<sup>168</sup> Unsurprisingly, most ERISA benefit cases appearing in the federal reporters filed after *Firestone* involve plans where the plan sponsor had granted the plan administrator express discretionary authority to interpret the terms of the plan and sole and final authority to determine eligibility for benefits.<sup>169</sup> Lower court ERISA cases following *Firestone* that applied a deferential review standard have also focused on plan administrator conflicts of interest because the *Firestone* dicta suggested that a plan administrator’s conflict of interest may modify the deferential standard under trust law.<sup>170</sup>

Without any more guidance from the Supreme Court, lower courts struggled to apply the conflict of interest factor in a less deferential, but still somewhat deferential review standard.<sup>171</sup> Interpreting *Firestone*, a

166. See *Firestone*, 489 U.S. at 107 (citing *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985)). The Third Circuit had also cited *Struble v. New Jersey Brewery Employees’ Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984), *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983), and *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986). In *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 139 n. 6 (3d Cir. 1987), Judge Becker also cited *In re Cross & Brown*, 4 A.D.2d 501, 167 N.Y.S.2d 573, 575 (App. Div. 1957) for “the well-recognized principle of natural justice that a man may not be a judge in his own cause.” (quotations omitted).

167. *Firestone*, 489 U.S. at 115.

168. See John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 217 (1990).

169. See, e.g., *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2353 (2008) (Roberts, C.J., concurring) (“[T]he lions share of ERISA plan claim denials are made by administrators that both evaluate and pay claims.”) (quotations omitted). See also EMPLOYEE BENEFITS LAW, *supra* note 6, at ch. 13, sec. IV.

170. Relying upon the RESTATEMENT (SECOND) OF TRUSTS § 187 comment d, Justice O’Connor instructed that courts must account for a plan administrator’s conflict of interest as a “factor” when applying the arbitrary and capricious standard to review plan participant section 502(a)(1)(B) benefit claims. See *Firestone*, 489 U.S. at 115; *Glenn*, 128 S. Ct. at 2357 (Scalia, J., dissenting) (describing *Firestone*’s “sheer dictum” citation to the RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d).

171. See *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1004 (10th Cir. 2004), *cert. den.*, 544 U.S. 1026 (2005); *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 383 (3d Cir. 2000).

number of courts simply applied a sliding scale as a means to factor the plan administrator's conflict of interest, granting less deference if the court perceived a higher level of conflict.<sup>172</sup> Other courts imposed a burden-shifting formula where the court did not modify the arbitrary and capricious standard at all unless the claimant presented evidence that the asserted conflict actually impacted the plan administrator's decision-making.<sup>173</sup> If such evidence existed, however, these courts shifted the burden to the plan administrator to prove that the conflict did not affect its decision to deny a claim.<sup>174</sup> Given the divergent views among the circuits, a number of lower federal courts asked the Supreme Court for further guidance.<sup>175</sup> Finally, the Supreme Court granted certiorari in *Glenn* to clarify the ERISA section 502(a)(1)(B) claim standard of review issue.<sup>176</sup>

#### IV. *METROPOLITAN LIFE INS. CO. V. GLENN*—AN OPPORTUNITY WASTED

Wanda Glenn's employer, Sears, Roebuck and Co. ("Sears"), established a long-term disability benefits plan for its workers.<sup>177</sup> To fund the long-term disability plan, Sears purchased a group disability insurance policy from Metropolitan Life Insurance Company ("MetLife").<sup>178</sup> As is common under fully insured plans, Sears appointed MetLife to serve as claims administrator, and it empowered MetLife with discretion to interpret the plan contract (the "MetLife policy") and it granted MetLife discretion to determine eligibility for benefits.<sup>179</sup>

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172. See *Pinto*, 214 F.3d at 392-93 (explaining that the intensity of the court's review is approximately calibrated to the intensity of the conflict; to determine where a case falls on the scale, court may take into account "the sophistication of the parties, the information accessible to the parties, and the exact financial arrangement between the insurer and the company"); see also *MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472, 479 (5th Cir. 2003); *Leahy v. Raytheon Corp.*, 315 F.3d 11, 15-16 (1st Cir. 2002); *Schatz v. Mut. of Omaha Ins. Co.*, 220 F.3d 944, 947 (8th Cir. 2000).

173. See *Atwood v. Newmont Gold Co., Inc.* 45 F.3d 1317, 1322-1323 (9th Cir. 1995) ("We hold that this 'heightened standard' does not alter our traditional abuse of discretion review in the absence of specific facts indicating that Newmont's conflicting interest caused a serious breach of the plan administrator's fiduciary duty to Atwood, the plan beneficiary.").

174. See *id.*; *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1567-68 (11th Cir.1990), *cert. denied*, 498 U.S. 1040 (1991); see Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1161 (2001).

175. Cf. *Fought*, 379 F.3d at 1006; *Pinto*, 214 F.3d at 390, 393 (discussing the conflicting standards of review formulas used in lower court decisions).

176. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 1117 (2008).

177. See *Glenn*, 128 S. Ct. at 2346.

178. *Id.*

179. See *id.*



MetLife initially approved Ms. Glenn's disability claim and it also referred Ms. Glenn to a lawyer to help her obtain Social Security disability benefits.<sup>180</sup> The MetLife policy contained an offset clause that allowed MetLife to reduce the disability benefits it had to pay to Ms. Glenn if she also received Social Security disability benefits.<sup>181</sup> On April 22, 2002, an ALJ found that Ms. Glenn was totally disabled and entitled to Social Security benefits, thereby reducing the amount of MetLife's payments to Ms. Glenn under the Sears disability benefits plan.<sup>182</sup>

At the same time that the ALJ was considering Ms. Glenn's eligibility for Social Security benefits, MetLife began a review of her private disability claim.<sup>183</sup> On July 15, 2002, MetLife advised Wanda Glenn that it concluded she was no longer disabled, and therefore, MetLife was terminating her private disability benefits.<sup>184</sup> Following MetLife's claim denial, Ms. Glenn exhausted all internal appeals and then she sued MetLife in federal district court under ERISA section 502(a)(1)(B) to recover benefits due to her under the plan.<sup>185</sup>

The United States District Court conducted a summary proceeding and entered "judgment on the administrative record"<sup>186</sup> for MetLife after finding that MetLife did not abuse its discretion in denying Ms. Glenn's request for benefits.<sup>187</sup> The Sixth Circuit reversed.<sup>188</sup> Like the district court, the court of appeals found that because MetLife both determined eligibility for benefits as plan administrator and paid approved claims as the funding source for plan promises, MetLife suffered a conflict of interest that was a "relevant factor in determining whether an abuse of discretion had taken place."<sup>189</sup> According to the Sixth Circuit, however,

180. *Id.*

181. *See id.*

182. *Id.* at 2346-47.

183. *See Glenn v. Metro. Life Ins. Co.*, No.2:2003CV0572, 2005 WL 12625, at \*1-2 (S.D. Ohio, June 8, 2005).

184. *See id.* at \*2.

185. *See Glenn*, 128 S. Ct. at 2347.

186. *Glenn v. Metro. Life Ins. Co.*, 461 F.3d 660, 666 (6th Cir. 2006) (describing the district court's action).

187. *See Glenn*, 2005 WL 1364625, at \*8. The administrative record contained materials gathered by MetLife in its claims investigation, as supplemented by documents offered by Ms. Glenn, in a manner similar to any pre-filing insurance claims investigation. There was no live witness testimony presented to the district judge, and there was no sworn deposition testimony in the record. Additionally, there was no basis to establish that documents in the record would be admissible under the rules of evidence. *See id.* at \*1-3 (describing evidence in administrative record).

188. *See Glenn*, 461 F.3d at 662.

189. *See id.* at 666 (citing *Firestone*, 489 U.S. at 115).

the district court had given insufficient “weight” to that conflict in reviewing MetLife’s decision to terminate Ms. Glenn’s benefits.<sup>190</sup>

Noting that a minority of the federal circuits adhered to the position urged by MetLife, that a dual role plan administrator/payor does not suffer an actual or inherent conflict,<sup>191</sup> the U.S. Solicitor General recommended that the Supreme Court accept MetLife’s petition for review to clarify the law.<sup>192</sup> Additionally, the Solicitor General urged the Supreme Court to resolve the related issue, also the subject of a circuit disagreement, concerning how courts should factor a plan administrator’s dual role conflict of interest into the arbitrary and capricious review formula.<sup>193</sup>

In the Supreme Court, both parties, plus the Solicitor General assumed, based upon *Firestone*, that trust law governs ERISA section 502(a)(1)(B) claims for benefits due under a plan.<sup>194</sup> Additionally, neither Ms. Glenn nor the Solicitor General urged the Court to hold that plan participants are entitled to *de novo* review in section 502(a)(1)(B) claims when the plan administrator suffers a dual role conflict of interest.<sup>195</sup> Given the Supreme Court’s statement in *Firestone* that the application of deferential review in ERISA section 502(a)(1)(B) claims would be contrary to Congress’ intentions in enacting ERISA by placing workers in a worse position to assert their right to benefits than they had been in prior to ERISA,<sup>196</sup> and given the “improper motive,”<sup>197</sup> which Judge Becker had cited in the Sixth Circuit *Bruch* opinion,<sup>198</sup> it is rather

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190. *See id.*

191. MetLife argued that serving in conflicting roles creates only a possible conflict of interest and that to establish an actual conflict that would impact the deferential review process, Ms. Glenn had to prove that serving in dual and conflicting roles actually caused MetLife to make an incorrect decision that it would not have made, but for the conflict. The Seventh Circuit had applied the rule proposed by MetLife by requiring plan participants to prove causation—that is, that the admitted conflict actually influenced the plan administrator and produced a biased decision. *See Mers v. Marriot Int’l Group Accidental Death and Disbursement Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998), *cert. denied* 525 U.S. 947 (1998). The *Glenn* Court wisely rejected that minority view. *See Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2351 (2008).

192. *See* Brief for the United States as Amicus Curiae at 5, *Metro. Life Ins. Co., et al. v. Glenn*, 128 S. Ct. 2343 (June 19, 2008) (No. 06-923).

193. *See Glenn*, 128 S. Ct. at 2347; Brief for the United States as Amicus Curiae, *supra* note 192, at 5.

194. *Glenn*, 128 S. Ct. at 2359 (Scalia, J., dissenting) (“[L]ooking to the common law of trusts (which is, after all, what the *holding* of *Firestone* binds us to do).” (emphasis in original)).

195. *See Glenn*, 128 S. Ct. at 2355 (Roberts, C.J., concurring) (“[N]o one here advocates [*de novo* review] as a *per se* rule [when the plan administrator serves dual roles].”)

196. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113-14 (1988).

197. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. g (courts will control trustee decisions when the trustee operates under an improper motive, including a self-dealing conflict of interest).

198. *See Bruch*, 828 F.2d at 14; *see also Glenn*, 128 S. Ct. at 2359-2360 (Scalia, J., dissenting)

surprising that Ms. Glenn, at least, did not ask the Supreme Court to hold that trial courts must review plan participant claims under section 502(a)(1)(B) *de novo*.<sup>199</sup> Presumably, because Ms. Glenn had prevailed in the Sixth Circuit under the deferential review standard, she merely sought to affirm the lower court ruling, without worrying about the state of the law.

Ultimately, the *Glenn* Court affirmed the Sixth Circuit decision that MetLife had abused its discretion in denying Ms. Glenn's disability benefits claim.<sup>200</sup> The Supreme Court found that a dual role plan administrator suffers an inherent conflict of interest that must be counted as a factor in the evaluation of whether a dual role plan administrator abused its discretion in denying a benefits claim.<sup>201</sup> Unfortunately, the court refused to provide any clear instructions to lower courts on how to apply this very nebulous standard, except to say that the conflict of interest factor must be seriously weighed.<sup>202</sup> Most importantly, however, the *Glenn* Court let stand, without inquiry, a constitutionally suspect summary court process that views employer promises to pay worker fringe benefits as a donative transfer, and that treats the payor of plan benefits as the adjudicator of employee benefit disputes.<sup>203</sup>

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(including confusing discussion of "improper motive" comment).

199. In *Firestone*, the United States Solicitor General urged the court to apply a contract law-based *de novo* review standard. See Solicitor General's Brief, *supra* note 105, at 4. Unfortunately, the Solicitor General in *Glenn* did not repeat the contract law-based argument for *de novo* review, and did not even urge the *Glenn* Court to apply *de novo* review under trust law due to MetLife's conflict of interest. See Brief for United States as Amicus Curiae, *supra* note 192, at 5.

200. See *Glenn*, 128 S. Ct. at 2348-50.

201. *Id.* The Supreme Court held that the dual role plan administrator/payor suffers an inherent conflict both when the plan is unfunded and the plan sponsor/employer serves dual roles, and in the insured plan circumstance where the payor/insurer also serves as plan administrator. *Id.*

202. *Id.* at 2352 ("[W]e note that our elucidation of *Firestone*'s standard does not consist of a detailed set of instructions."). See also *id.* at 2353 (Roberts, C.J., concurring) (ridiculing majority for its refusal to add some level of certainty and predictability in ERISA claims due to majority's failure to provide clear instructions on how courts should apply the conflict of interest factor).

203. The summary process applied in ERISA benefits claims violates due process standards because courts treat one party to the plan contract as the adjudicator of disputes that arise under the contract. See generally, Mark D. DeBofsky, *What Process is Due in the Adjudication of ERISA Claims*, 40 J. MARSHALL L. REV. 811 (2007) [hereinafter *Due Process*]. Additionally, the summary process prevents workers from exercising their Seventh Amendment right to a jury trial. Compare *Wardle v. Cent. States, Se. & Sw. Areas Pension Fund*, 627 F.2d 820, 829 (7th Cir. 1980) ("We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable."), with *Stamps v. Mich. Teamsters Joint Council No. 43*, 431 F. Supp. 745 (E.D. Mich. 1977) (comparing ERISA section 502(a)(3) claims, which are equitable, with section 502(a)(1)(B) claims, which are legal, court holds that right to jury trial attaches in claims for benefits due under a plan). See also, Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037 (1999); Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Nonarticle III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL OF RIGHTS J. 407 (1995). Finally, by

## V. CONGRESS NEVER INTENDED COURTS TO INVENT A NEW SUMMARY PROCESS TO RESOLVE EMPLOYEE BENEFIT CLAIMS

*A. Congress Did Not Leave a Standard Of Review “Gap” In ERISA; Rather, the Rules of Civil Procedure “Govern the Procedure in All Civil Actions and Proceedings in the United States District Courts”*<sup>204</sup>

Congress enacted ERISA to protect employee rights to their promised fringe benefits.<sup>205</sup> ERISA’s preamble, entitled “Findings and declaration of policy”<sup>206</sup> recites in part that:

It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.<sup>207</sup>

In holding that section 502(a)(1)(B) claims should proceed in a plenary, *de novo* trial, the *Firestone* Court expressly rejected a deferential review process, which would have provided less protection of workers rights than existed for workers prior to ERISA, as being inconsistent with Congress’s purposes.<sup>208</sup> Unfortunately, the *Firestone*

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treating the plan administrator as an adjudicator of employee benefit claims and then only providing what is essentially an appellate review standard, courts arguably violate Article III of the United States Constitution because the plan administrator is not a life-tenured, salary-protected federal judge. *But see* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARVARD L. REV. 916 (1988) (suggesting that stringent appellate review in an Article III court may cure the constitutional defect of relegating private dispute adjudication to legislative courts).

204. FED. R. CIV. P. 1.

205. *See* ERISA § 2, 29 U.S.C. § 1001 (2006).

206. *Id.*

207. *Id.* § 1001(b).

208. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113-14 (“ERISA was enacted to ‘promote the interests of employees and their beneficiaries in employee benefit plans’ . . . . Adopting *Firestone*’s reading of ERISA [as mandating deferential review] would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.”) (internal citation omitted). *See also* ERISA § 2 (congressional findings and declaration of policy); LEGISLATIVE HISTORY, *supra* note 1, at 4748 (statement of Sen. Javits) (“The absence of any supervision over these [retirement] funds and the lack of minimum standards to safeguard the interest of plan participants and beneficiaries has over the years led to widespread complaints signaling the need for remedial legislation.”).

dicta, and the *Glenn* holding, ignored that important *Firestone* rationale.

In *Firestone*, the Supreme Court remarked that Congress left a “gap” in the statute by failing to “set out the appropriate standard of review for actions under § [502](a)(1)(B).”<sup>209</sup> Rather than Congress leaving a gap in the statute, however, the failure of ERISA to include a designated standard of review demonstrates that Congress intended claims under ERISA section 502(a)(1)(B) to proceed as ordinary, original, plenary actions in federal district court.<sup>210</sup> The phrase “standard of review” is generally a term of appellate procedure, and is typically incorporated at the district court level only when the district court sits as a quasi-appellate tribunal, such as an appeal from the ruling of an ALJ under the Administrative Procedure Act.<sup>211</sup>

The Federal Rules of Civil Procedure govern lawsuits filed in federal court and contemplate a plenary, original trial process as the default rule.<sup>212</sup> Importantly, the Supreme Court has approved the use of a summary proceeding outside the ambit of the Rules of Civil Procedure only where Congress has absolutely and expressly established its intention to create such a summary proceeding.<sup>213</sup> Consequently, the

209. *Firestone*, 489 U.S. at 109 (“To fill this gap, federal courts have adopted the arbitrary and capricious standard developed under [LMRA § 302(c), 29 U.S.C. § 186(c)].”).

210. See Bradley R. Duncan, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986, 991 (1986) (“That Congress intended the courts to review fiduciaries decisions regarding benefit denials is confirmed by ERISA § 502(a)(1)(B).”).

211. In administrative law, a neutral ALJ adjudicates a dispute delegated by the legislature to the administrative law process. The Administrative Procedure Act or some enabling legislation typically authorizes the right to appeal from an administrative adjudication. See, e.g., 5 U.S.C. § 702 (2006) (establishing the right to judicial review); see 5 U.S.C. § 706(2)(A) (2006) (establishing deferential standard); see also *Universal Camera Corp. v. NLRB* 340 U.S. 474, 487-88 (1951) (reviewing court must canvas the whole record, not simply those portions supporting the agency decision). In such circumstances, the adjudicator—the ALJ—creates a trial record that the tribunal sitting in an appellate capacity can review. See 5 U.S.C. § 556(e) (2006) (record consists of transcript of testimony and exhibits together with all papers and requests filed in the proceeding). Arguably, there is no due process need for a plenary district court trial in such circumstances because the claimant’s rights were protected in the underlying adjudication before the neutral ALJ.

212. FED. R. CIV. P. 1 provides that: “[t]hese Rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.” Rule 81 includes a number of special matters and describes the application of the Rules of Civil Procedure to such special matters, but ERISA benefit claims under ERISA section 502(a)(1)(B) are not among the special circumstances identified in Rule 81. See FED. R. CIV. P. 81. Rule 2 recites that “[t]here shall be one form of action—the civil action.” FED. R. CIV. P. 2. See DeBofsky, *Due Process*, *supra* note 203, at 828-29.

213. See *N. H. Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406-408 nn.4-5, 7 (1960) (citing *Cent. Republic Bank & Trust Co. v. Caldwell*, 58 F.2d 721, 731-32 (8th Cir. 1932) (describing difference between a summary proceeding and a plenary proceeding)); *Clarke v. City of Evansville*, 131 N.E. 82, 84 (Ind. Ct. App. 1921) (“No cause can be tried summarily (otherwise than in due course), except perhaps cases of contempt of court; for our Code, as well as the common law, is a stranger to

Supreme Court has stated:

Summary trial of controversies over property and property rights is the exception in our method of administering justice . . . . [T]he Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a civil nature, with certain exceptions [not applicable in ERISA claims] stated in Rule 81. Rule 2 directs that "There shall be one form of action to be known as a civil action." . . . Rule 56 sets forth an expeditious motion procedure for summary judgment *in an ordinary, plenary civil action* . . . . The very purpose of summary rather than plenary trial is to escape some or most of these trial procedures. Such summary trials, it has been said, were practically unknown to the English common law and it may be added that they have little acceptance in this country. In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.<sup>214</sup>

Given that Congress did not indicate any intention in ERISA that

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such a mode of trial."); *see also* United States v. Casino, 286 F. 976, 978-79 (S.D.N.Y. 1923) (Hand, J.). The issue in *Scanlon* arose from a split in circuit court authority dealing with the procedure to challenge a tax levy. *Compare* Esra, Inc. v. Dudley, 234 F.2d 178, 180 (3d Cir. 1956) (claimant of property distrained by levy for tax delinquency need not resort to plenary action but could adjudicate rights summarily under 28 U.S.C. §§ 1340, 2463), *with* N. H. Fire Ins. Co. v. Scanlon, 267 F.2d 941 (2d Cir. 1959), *aff'g* 172 F. Supp. 392 (S.D.N.Y. 1959) (trial court is without jurisdiction to hear "petition" to determine respective rights in tax levy dispute in a summary proceeding—debt issue must be determined in a plenary action). *See also* Goldman v. Am. Dealers Serv., 135 F.2d 398, 399 (2d Cir. 1943) (parties from whom property was seized could not avail themselves of summary proceedings for recovery). The Supreme Court ruled that the Federal Rules of Civil Procedure required a plenary proceeding. *See Scanlon*, 362 U.S. at 409 ("Even if [the tax levy statute] could somehow be construed as transferring custody of property seized by revenue officers into the hands of officers of the federal courts it would by no means follow that cases and controversies involving ownership of property in their custody should be tried in summary fashion."). *See generally* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 1-9 (2009).

One area where the Supreme Court has at least impliedly approved of a summary adjudicative process is an action under the Federal Arbitration Act (FAA), 9 U.S.C. § 3 (2006), to stay a state court proceeding pending arbitration. In the FAA, Congress proscribed an abbreviated process for courts to rule on a "petition" to stay under a motion-type procedure. *See id.* § 4; *see also* Prima Paint Corp. v. Flood & Conklin Mfg., Co., 388 U.S. 395 (1967) (applying FAA, 9 U.S.C. § 3-4 where Prima Paint Corp. filed petition to stay state court action); Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 55 (3d Cir. 1980) ("An unequivocal denial that the agreement [to arbitrate] had been made, accompanied by supporting affidavits . . . in most cases should be sufficient to require a jury determination on whether there had in fact been a 'meeting of the minds.' Having supported the threshold issue by sworn affidavit, Par-Knit is entitled to a trial to determine whether or not an agreement was reached. . . .") (citation omitted).

214. *Scanlon*, 362 U.S. at 406-07.

courts should resolve ERISA benefit claims in a summary fashion, Congress had no reason to contemplate in 1974 that the Supreme Court would expect in *Firestone* some explicit instruction in ERISA directing trial courts to conduct plenary, *de novo* trials in claims for benefits due filed pursuant to ERISA section 502(a)(1)(B).<sup>215</sup> When Congress has enacted other federal statutes that create a federal cause of action, it typically has not included an express statement that the Rules of Civil Procedure shall govern such actions in the federal courts.<sup>216</sup> In fact, it appears that nowhere else but in ERISA claims has the Supreme Court found that the omission of statutory language instructing that the Rules of Civil Procedure apply creates a “gap” in the statute.<sup>217</sup> Until ERISA, courts rightly assumed that Congress intended federal causes of action filed pursuant to express statutory authority to be processed as plenary actions under the Rules of Civil Procedure, unless the statute expressly provided for some other procedure.<sup>218</sup>

*B. Congress Expressly Rejected Attempts to Create an “Inexpensive And Expeditious” Administrative Claims Process*

A number of courts, including the Supreme Court at times, have forgotten that Congress’s primary and stated purpose in enacting ERISA was “to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts.”<sup>219</sup> Instead, we see court opinions that suggest Congress enacted ERISA primarily to provide a uniform body of law regulating employee benefits,<sup>220</sup> or that Congress intended ERISA to provide a quick and inexpensive claims adjudication process.<sup>221</sup> Such cavalier statements are not well founded.

Providing access to the federal courts to ensure a full and fair

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215. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2006).

216. See, e.g., Civil Rights Act, 42 U.S.C. § 1983 (2006).

217. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

218. Of course, that is expressly required in the Rules of Civil Procedure themselves. FED. R. CIV. P. 1, 2.

219. ERISA § 2(b), 29 U.S.C. § 1001(b) (2006).

220. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (ERISA enacted “to provide a uniform regulatory regime over employee benefit plans.”). But see *Franchise Tax Bd. v. Constr. Lab. Vac. Trust*, 463 U.S. 1, 25 (1983) (“The phrasing of § 502(a) is instructive. Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief . . . . It does not purport to reach every question relating to plans covered by ERISA. Furthermore, section 514(b)(2)(A) of ERISA [the saving clause in ERISA’s preemption provision], makes clear that Congress did not intend to pre-empt entirely every state cause of action relating to such plans.”).

221. See, e.g., *Perry v. Simplicity Eng’g*, 900 F.2d 963, 966 (6th Cir. 1990).

opportunity for plan participants to enforce their claims to promised employee benefits was a vital aspect of ERISA that withstood several attempts to weaken plan participants' rights. As various drafts of ERISA proceeded through Congress, each including an express right of access to federal court to enforce employee benefit claims,<sup>222</sup> the Senate Finance Committee produced an alternate bill, which recommended that administrative adjudicatory authority be granted to the Department of Labor under ERISA.<sup>223</sup> After the Senate initially rejected this Finance Committee proposal,<sup>224</sup> a later attempt to reinsert the administrative adjudication provision was also defeated.<sup>225</sup> The delegation of adjudicatory authority did not appear in the final bill submitted to Congress,<sup>226</sup> and of course, does not appear in ERISA.<sup>227</sup> In an ironic and perhaps sinister twist, the legislative history which documents Congress's insistence on protecting plan participant enforcement rights through a civil action has been incorporated by several courts to suggest that Congress had exactly the opposite intentions in enacting ERISA.<sup>228</sup>

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222. See H.R. 2, 93d Cong. at 31 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 33; S. 4, 93d Cong. at 92 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 184; H.R. 9824, 93d Cong. at 84 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 769. For pension reform bills introduced prior to H.R. 2 and S.4, which ultimately provided the foundation for the ERISA as finally enacted, see S. 2167, 91st Cong. (1969); S. 2, 92d Cong. (1971); S. 3598, 91st Cong. (1972); see also S. 1103, 90th Cong. § 504 (1967) (predecessor bill to ERISA sponsored by Senator Jacob Javits, providing for breach of contract remedy); 113 CONG. REC. 4653 (remarks of Sen. Javits) (stating that the bill "permits private parties to sue for rights guaranteed by the bill as well as for breach of any contract or trust guaranteeing them any rights."); 2 LEGISLATIVE HISTORY, *supra* note 1, at 3376 (remarking on the enforcement provisions of proposed substitute bill H.R. 12906, 93d Cong. at 147-53, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 1, at 2907-13, Representative Dent stated: "[w]e have blended the civil contractual guarantees contained in H.R. 2 with the enforcement mechanisms of both the Labor and Treasury Departments. I view this substitute as a strengthened version of H.R. 2.").

223. See S. 1179, 93d Cong. § 602 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4999-5000, and in 1 LEGISLATIVE HISTORY, *supra* note 1, at 780, 988-90; S. REP. NO. 93-383 at 116-17 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 1184-86.

224. See 1 LEGISLATIVE HISTORY, *supra* note 1, at 1245-46.

225. See 119 CONG. REC. 30,400-01 (1973), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 1, at 1838.

226. See generally H.R. 2, 93d Cong. 566-76 (1974) (lacking delegation of adjudicatory authority).

227. See generally ERISA, 29 U.S.C. §§ 1001-1405 (2006) (lacking delegation of adjudicatory authority). Congress also rejected a proposal to allow arbitration of employee benefit claims, insisting instead on establishing a plan participant's right to pursue an employee benefit claim in federal district court as an original, plenary civil action. See H.R. 2, 93d Cong. 566-67 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 1, at 3813-14 (containing House Bill H.R. 2 as amended by Senate); 120 CONG. REC. 29,941 (1974) (remarks of Sen. Javits), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 1, at 4769.

228. See, e.g., *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805 (7th Cir. 2006); *Perry v. Simplicity Eng'g*, 900 F.2d 963 (6th Cir. 1990).



The circuit court case that established the “quick and inexpensive remedy”<sup>229</sup> myth to justify the abbreviated “record review” process in ERISA benefit claims is *Perry v. Simplicity Engineering, Inc.*<sup>230</sup> *Perry* involved a disability benefits claim filed under ERISA section 502(a)(1)(B) prior to *Firestone* where the plan sponsor had not granted express discretionary power to the plan administrator.<sup>231</sup> The district court in *Perry* had granted summary judgment to the plan sponsor after applying an arbitrary and capricious review standard.<sup>232</sup> On appeal, which occurred after the Supreme Court decided *Firestone*, the Sixth Circuit determined that the district judge should have evaluated the claim *de novo* based upon the new *Firestone* authority because the plan documents did not empower the plan administrator with discretionary powers.<sup>233</sup> The question then for the Sixth Circuit to decide in *Perry* was what *de novo* review means in the context of an ERISA plan participant’s challenge to a plan administrator’s denial of benefits.<sup>234</sup>

*Perry* had submitted evidence to the district judge, in the form of additional medical records, additional work records, and a vocational expert witness report, which had not been submitted to the plan administrator.<sup>235</sup> The Sixth Circuit determined that the *Firestone de novo* review standard meant courts should apply a non-deferential examination of the plan administrator’s decision to deny benefits based solely upon the information that the plan administrator had before it when it made its decision to deny the claim.<sup>236</sup> The *Perry* court determined that *de novo* review did not mean that the plan participant could engage in discovery or present live witness testimony in a plenary court action; rather suggested the Sixth Circuit, the district judge sits as an appellate court in ERISA claims to review the “administrative record” compiled by the plan administrator.<sup>237</sup> The Sixth Circuit stated:

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

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229. See *Perry*, 900 F.3d at 967.

230. 900 F.3d 963 (6th Cir. 1990).

231. *Id.* at 964-65.

232. *Id.* at 965.

233. See *id.*

234. *Id.*

235. *Id.*

236. See *id.* at 966-67.

237. See *id.* at 966.

prompt resolution of claims by the fiduciary under the ERISA scheme.

\* \* \*

A primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.<sup>238</sup>

Remarkably, the *Perry* court cited the legislative history in support of the rejected Senate Finance Committee proposal to adopt an administrative claims procedure in ERISA to support this statement that Congress intended ERISA to resolve ERISA disputes “inexpensively and expeditiously.”<sup>239</sup> Perhaps this misleading citation is just an example of sloppy opinion writing, but *Perry* has been relied upon and cited by a number of other circuit courts to create the myth that Congress intended ERISA claims to be resolved in summary fashion, and in disregard of the protections afforded by the rules of civil procedure, the rules of evidence, and the constitutional right to a jury trial.<sup>240</sup>

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238. *Id.* at 966-67 (citing ERISA of 1974, Pub. L. No. 93-406, 1974).

239. *See id.* This legislative history comes from the Senate Finance Committee report in support of the rejected Finance Committee proposal to relegate ERISA benefit claims to an administrative process operated by the Department of Labor. *See* S. REP. NO. 93-383, at 116-18 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 1184-86. Remarkably, Judge Gibbons (District Judge sitting by designation), not only relied upon a committee report in support of a proposed substitute bill that was not adopted as the basis for her conclusion that courts should dispose of ERISA benefit claims summarily, she failed to even recount the language in the report that explained how a disappointed plan participant would have the right to appeal from an administrative claim denial under the Administrative Procedure Act to a United States District Court where “the facts upon which the decision was based are subject to a trial *de novo* by the reviewing court.” *See id.* at 118, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 1, at 1186. I am indebted to Mark DeBofsky for tracking down the origins of the misguided reference to a purported Congressional intent that the ERISA claims process be “inexpensive[] and expeditious[.]” *See* DeBofsky, *Due Process*, *supra* note 203, at 821.

240. *See Semien v. Life Ins. Co. of Am.*, 436 F.3d 805, 815 (7th Cir. 2006) (“Congress has not provided Article III courts with the statutory authority, nor the judicial resources, to engage in a full review of the motivations behind every plan administrator’s discretionary decisions. To engage in such a review would usurp plan administrators’ discretionary authority and move toward a costly system in which Article III courts conduct wholesale reevaluations of ERISA claims. Imposing onerous discovery before an ERISA claim can be resolved would undermine one of the primary goals of the ERISA program: providing ‘a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.’” (quoting *Perry*, 900 F.2d at 967)); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993) (citing *Perry* with approval for proposition that Congress intended ERISA to provide an expeditious claims process, but modifying *Perry* standard somewhat in Fourth Circuit to give trial court discretion on whether to allow evidence in its *de novo* review of plan administrator claim denial); *see also Huffacker v. Metro. Life Ins. Co.*, 271 Fed. App’x 493, 504 n.4 (6th Cir. 2008); *Daniel v. UNUM Provident Corp.*, 261 Fed. App’x 316, 318 (2d Cir. 2008); *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466

*C. Congress Did Not Intend ERISA Plan Administrators to Serve as Adjudicators*

When federal courts utilize the summary “record review” process in ERISA benefit claims, courts confuse “adjudicative” deference common under administrative law with deference under donative trust law.<sup>241</sup> In particular, the summary record review proceeding employed in ERISA cases mistakes the underlying insurance investigation and claims adjustment activity for a formal “adjudication” of the dispute.<sup>242</sup> The Supreme Court has corrected a similar problem arising from a different section of ERISA,<sup>243</sup> but the Court has failed to apply this same reasoning to ERISA section 502(a)(1)(B) claims.<sup>244</sup>

In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*,<sup>245</sup> an employer seeking to withdraw from a multiemployer ERISA plan suffered an adverse liability assessment by the plan trustees.<sup>246</sup> The Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”),<sup>247</sup> empowers plan trustees to issue an initial liability assessment to withdrawing employers to approximate and account for the expected long term loss to the plan resulting from the departing employers ceasing to make ongoing contributions.<sup>248</sup> While an employer can appeal the trustees’ assessment to binding arbitration,<sup>249</sup> the MPPAA requires the arbitrator in such actions to presume that the trustees’ liability assessment is correct.<sup>250</sup>

F.3d 727, 731 n.2 (9th Cir. 2006); *DeGrado v. Jefferson Pilot Fin. Ins. Co.*, 451 F.3d 1161, 1169 (10th Cir. 2006); *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 831 (1st Cir. 1997).

241. See *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2000) (Posner, J.); see generally *DeBofsky, Administrative Law*, *supra* note 14 (arguing that administrative law concepts are misapplied in cases involving ERISA benefit claims, and that since ERISA benefit disputes differ from administrative proceedings, the summary claim dispositions in ERISA disputes are incongruous to the Federal Rules of Civil Procedure); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004) (arguing that there is confusion in the application of the term “deference” in administrative decisions).

242. See *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 619-620 (1993).

243. See *id.* at 618 (“Not all determinations affecting liability are adjudicative, and the ‘rigid requirements’ . . . designed for the officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity” (citing *Marshall v. Jerrico, Inc.*, 466 U.S. 238, 248 (1980))).

244. See *id.* at 619-20.

245. 508 U.S. 602 (1993).

246. *Id.* at 602.

247. Pub. L. 96-364, 94 Stat. 1208 (1980), *codified at*, 29 U.S.C. §§ 1381-1405.

248. See 29 U.S.C. §§ 1381-1399, 1405 (2006).

249. See 29 U.S.C. § 1401(a)(1).

250. See 29 U.S.C. § 1401(a)(3)(A)-(B); see also *Concrete Pipe*, 508 U.S. at 611.

In *Concrete Pipe*, the withdrawing employer argued that the plan trustees were conflicted because the trustees owed a fiduciary duty to increase the assets of the plan for the benefit of the remaining plan participants.<sup>251</sup> Since the trustees owed a duty that conflicted with the due process requirement that an adjudicator shall be unbiased, the determination of withdrawal liability by such conflicted trustees, said the withdrawing employer, rendered the MPPAA unconstitutional.<sup>252</sup> The Supreme Court agreed that the imposition of liability under the MPPAA must be performed by a neutral adjudicator, but in a context closely analogous to the summary adjudicative process utilized in section 502(a)(1)(B) claims,<sup>253</sup> the Court's holding that the conflicted trustees could render the assessment resulted from a careful analysis to identify who served as the adjudicator under the MPPAA.<sup>254</sup> Unfortunately, courts have not made this same careful analysis in ERISA section 502(a)(1)(B) claims.<sup>255</sup>

The *Concrete Pipe* Court held that the arbitrator provides the initial adjudication under the MPPAA, not the trustees.<sup>256</sup> Consequently, the Court found that the trustees did not have to provide due process protections to the withdrawing employer.<sup>257</sup> Since the trustees were not adjudicators, they could advocate for their position as an adverse party in making the initial assessment.<sup>258</sup> Importantly, however, the *Concrete Pipe* Court also found that the statutory presumption in favor of trustees' decisions,<sup>259</sup> which are analogous to the deference lower courts give to the discretionary decisions of ERISA plan administrators, were unconstitutional.<sup>260</sup> The *Concrete Pipe* Court held that MPPAA

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251. *Concrete Pipe*, 508 U.S. at 616.

252. *Id.* at 615-16.

253. *Id.* at 618.

254. *Id.* at 616-36.

255. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008).

256. *Concrete Pipe*, 508 U.S. at 619-20.

257. *Id.*

258. *Id.* at 618-19 (comparing the trustees to a criminal prosecutor exercising the prosecutor's statutory responsibility to file charges).

259. *Id.* See also ERISA § 4221(3)(A).

260. See *Concrete Pipe*, 508 U.S. at 625-26 ("If [the MPPAA] permitted an employer to rebut the plan sponsor's factual conclusions by a preponderance, merely placing a burden of persuasion on the employer, and permitting adjudication of the facts by the arbitrator without affording deference to the plan sponsor's determinations, the [arbitrator review] provision would be constitutionally unremarkable . . . . On the other hand, if the employer were required to show the trustees' findings to be either 'unreasonable or clearly erroneous,' there would be a substantial question of procedural fairness under the Due Process Clause . . . . In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.").

arbitrator/adjudicators must disregard the statutory presumption in favor of plan trustees in order to comply with due process requirements for a fair adjudication.<sup>261</sup>

Similar to the MPPAA's treatment of multiemployer plan trustees, Congress did not intend ERISA plan administrators, appointed by the plan sponsor, to serve as adjudicators of ERISA section 502(a)(1)(B) claims for benefits due under a plan.<sup>262</sup> Plan administrators are appointed by the plan sponsor, act for the plan, and are merely parties to the plan contract dispute presented by disappointed plan participants in an ERISA section 502(a)(1)(B) claim.<sup>263</sup> Consequently, due process concerns, Seventh Amendment concerns, and Article III concerns, just should not arise from plan administrator actions. However, because our courts have incorrectly treated plan administrators as adjudicators of employee benefit claims, as evidenced by the application of an appellate review process in such actions rather than district judges conducting plenary, *de novo* trials, all of those constitutional issues that are triggered by the identification of the adjudicator, are now in play in plan participant challenges to plan administrator claim denials under the ERISA claim summary adjudicative process.<sup>264</sup>

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261. *Concrete Pipe* did not raise, and the *Concrete Pipe* Court did not address, whether the statutory delegation of a dispute between private parties based upon a federal cause of action to resolution by an arbitrator violated Article III of the U.S. Constitution. *Id.* at 602; *see also* ERISA § 4221(b)(2) (providing judicial review of arbitrator's decision); ERISA § 4221(c) (creating a presumption on appeal to an Article III court that the arbitrator's findings of fact were correct). In ERISA section 502(a)(1)(B) claims for benefits due under a private employee benefit plan, Congress has essentially federalized what otherwise would have been a state court breach of contract action between private parties. When our federal courts dispose of such claims summarily by deferring to the decision of a conflicted plan administrator, courts treat the plan administrator as an adjudicator. This process then raises similar due process issues as raised in *Concrete Pipe*, and also Seventh Amendment and Article III issues. Unfortunately, the Supreme Court ignored all of these constitutional questions in both *Firestone* and *Glenn*. *See generally* DeBofsky, *Due process, supra* note 203 (ERISA's summary adjudicative procedures violate due process right to fair hearing); Judge Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975) (administrative hearing must provide an unbiased adjudicator, notice, opportunity to challenge the proposed action, right to cross-examine adverse witnesses, right to review evidence, right to evidentiary record, right to counsel, articulated reasons for any decision, right to public hearing, and right to judicial review).

262. *See* DeBofsky, *Due Process, supra* note 203, at 729-40.

263. *See id.* at 727 (explaining various administrative and due process issues with administrators).

264. *See Concrete Pipe*, 508 U.S. at 617-18 (citing a series of Supreme Court cases which indicate that a civil litigant is "entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge which might lead him not to hold the balance nice, clear and true . . . . Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.") (citations omitted).

*D. Congress Intended Contract Law to Govern Worker Claims for Benefits Due Under an ERISA Plan Filed Pursuant to ERISA Section 502(a)(1)(B)—Russell and the Recoupment Cases*

Congress established a comprehensive civil enforcement scheme in ERISA providing plan participants and their beneficiaries with a variety of remedies, including a remedy to recover benefits due under a plan,<sup>265</sup> plus a separate remedy for breach of fiduciary duty,<sup>266</sup> and a separate express right to recover “other appropriate equitable relief.”<sup>267</sup>

An action to recover benefits due under a plan states a claim to recover money damages for breach of contract—while trust law may impact the ERISA remedy for breach of fiduciary duty under ERISA section 502(a)(2),<sup>268</sup> trust law has no connection with the separate remedy to recover benefits due under a plan contract funded through the purchase of insurance.<sup>269</sup> The law abounds with circumstances where claimants may select from alternative remedies governed by different legal paradigms. For example, doctors serve as fiduciaries to their patients.<sup>270</sup> If a disgruntled patient decides to sue her doctor, she may assert a negligence claim, or perhaps a breach of contract claim, or a breach of fiduciary duty claim.<sup>271</sup> If the patient chooses to pursue a negligence action or a breach of contract claim against the doctor, courts do not apply trust law to the action and courts do not defer to the doctor’s decision-making, simply because the doctor owed a fiduciary duty to the patient.<sup>272</sup>

Outside of *Firestone*, *Glenn*, and the standard of review question, the Supreme Court appears to have accepted the rather clear instructions from Congress that a plan participant enjoys the contractual right under ERISA section 502(a)(1)(B) to enforce a plan sponsor’s promise to provide specified employee benefits. In *Massachusetts Mutual Life Insurance Co v. Russell*,<sup>273</sup> the Court characterized actions under ERISA

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265. ERISA § 502(a)(1)(B).

266. *Id.* § 502(a)(2).

267. *Id.* § 502(a)(3)(B); *see also* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (ERISA’s civil enforcement provision provides an “interlocking, interrelated, and interdependent remedial scheme.”).

268. ERISA § 502(a)(2).

269. *Id.* § 502(a)(9).

270. *See* *Norton v. Hamilton*, 89 S.E.2d 809, 812 (Ga. Ct. App. 1955).

271. *Id.*

272. *See* *Dingle v. Belin*, 749 A.2d 157, 164 (Md. 2000) (“Most [suits against doctors] are tort-based, . . . and occasionally, in misrepresentation or fraud; some are contract-based. When they are pursued either alternatively or in combination, care must be taken to keep the actions separate and not to allow the theories, elements, and recoverable damages to become improperly intertwined.”).

273. 473 U.S. 134 (1985).

section 502(a)(1)(B) as claims to recover “contractually authorized benefits.”<sup>274</sup>

The ERISA plan recoupment cases highlight how the Supreme Court has recognized that Congress provided different remedies for different entities in section 502, including both a claim for breach of contract and several equitable remedies.<sup>275</sup> In *Great-West Life & Annuity Insurance Co. v. Knudson*,<sup>276</sup> a plan insurer had paid medical bills for a plan beneficiary, but then wanted to recoup those payments when the plan beneficiary obtained a third-party tort recovery.<sup>277</sup> The express language of the health insurance plan arguably required the plan beneficiary to reimburse the plan insurer for any medical bills the health plan paid for injuries suffered in an automobile accident if the beneficiary received a tort recovery that also compensated the beneficiary for those same medical costs.<sup>278</sup> When the plan beneficiary refused to reimburse Great-West, the insurer evaluated its options.<sup>279</sup>

Unfortunately for Great-West, ERISA’s remedy section that authorizes a claim for breach of contract, ERISA section 502(a)(1)(B), does not grant standing to a plan insurer or fiduciary.<sup>280</sup> Since the insurer could not sue to enforce its contract rights under section 502(a)(1)(B), it tried to craft its remedy as a claim for equitable relief under ERISA section 502(a)(3), which remedy is available to a plan

274. *Id.* at 147. In *Russell*, the plan participant received all of her of contract benefits after some significant wrangling with her dual role insurer/plan administrator. While *Russell* remained unhappy with the process, she had no claim under ERISA section 502(a)(1)(B) because that section only offered a breach of contract remedy. Consequently, she sued under ERISA section 502(a)(2) seeking extra-contractual damages for the plan administrator’s alleged breach of fiduciary duty during the claims adjustment process. In comparing the various remedies contained in ERISA section 502, the *Russell* Court characterized actions under ERISA section 502(a)(1)(B) as claims to recover “contractually authorized benefits.” *Russell*, 473 U.S. at 147; *see also* *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-58 (1993) (distinguishing between “equitable” and “remedial” and “legal” relief under ERISA and holding that ERISA section 502(a)(3), which authorizes a claim for “other equitable relief” does not allow a claim for money damages, the classic form of legal relief). ERISA section 502(a)(2) expressly provides a remedy for a violation of ERISA section 409(a); however, the statutory language suggests any such remedy must be pursued on behalf of the plan, rather than as a claim for individual relief. *See Russell*, 473 U.S. at 141.

275. ERISA section 502(a)(1)(B) only authorizes plan participants or beneficiaries to sue for breach of the plan contract. However, Congress granted standing in ERISA section 502(a)(3) to plan fiduciaries to sue for other appropriate equitable relief. *Compare* ERISA § 502(a)(1)(B) [breach of contract], *with* § 502(a)(2) [plan participants can sue on behalf of the plan for breach of fiduciary duty], *and* § 502(a)(3) [fiduciary can sue to recover other appropriate equitable relief].

276. 534 U.S. 204 (2002).

277. *Id.* at 207-09.

278. *Id.*

279. Most states prohibit or limit an insurer’s ability to enforce recoupment provisions in health insurance contracts. *See* EMPLOYEE BENEFITS LAW, *supra* note 6, ch. 14, § V.

280. *See* ERISA § 502(a)(1)(B).

fiduciary.<sup>281</sup> The Supreme Court held that despite Great-West's characterization of the recoupment claim as one for equitable restitution, it was really just seeking money damages, which were not available under ERISA section 502(a)(3).<sup>282</sup> Notably, while evaluating the nature of Great West's section 502(a)(3) claim, the Court contrasted that claim for equitable relief with ERISA's express remedy allowing a plan participant "to enforce his rights under the plan" under section 502(a)(1)(B).<sup>283</sup>

In a subsequent recoupment action, *Sereboff v. Mid Atlantic Services, LLC*,<sup>284</sup> the Supreme Court found that a plan's right to reimbursement arising under the express terms of the plan sounds in contract law.<sup>285</sup> However, the *Sereboff* Court also ruled that the nature of the remedy pursued, whether seeking legal damages or equitable relief, should inform courts on how to characterize and process the claim.<sup>286</sup> In *Sereboff*, the plan's recoupment rights were asserted under express language detailed in the plan document;<sup>287</sup> therefore, the entitlement to relief was clearly based upon contract rights.<sup>288</sup> However, rather than just pursuing a judgment for legal (money) damages under section 502(a)(1)(B), the plan administrator sought to impose an equitable lien against specific property identified in the contract and in the possession of the defendant pursuant to section 502(a)(3).<sup>289</sup> The *Sereboff* Court concluded that if the remedy sought is properly characterized as equitable, the ERISA fiduciary's claim could proceed under section 502(a)(3), even though the duty giving rise to the obligation and remedy was legal and based in contract.<sup>290</sup>

Similar to the plan insurer's recoupment claim in *Sereboff*, a worker's claim for benefits due under a plan pursuant to section 502(a)(1)(B) is based solely upon the worker's contract rights expressly

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281. *Great-West*, 534 U.S. at 206. While Congress did not authorize plan insurers or plan fiduciaries to sue for breach of the plan contract under ERISA section 502(a)(1)(B), Congress did grant standing in ERISA section 502(a)(3) to plan fiduciaries to sue for "other appropriate equitable relief." See ERISA § 502(a)(3).

282. *Great-West*, 534 U.S. at 210; see also ERISA § 502(a)(3).

283. *Great-West*, 534 U.S. at 220-21.

284. 547 U.S. 356 (2006).

285. *Id.* at 363 (insurer sought equitable relief for plan participant's breach of contract).

286. *Id.* at 363-68.

287. *Id.* at 361-62.

288. *Id.* at 363.

289. Following *Great-West*, the lower federal courts had split on the question of whether a claim that seeks an equitable remedy (for example, imposition of a constructive trust), but which is based upon an express contractual obligation, should be characterized as an equitable or a legal claim. See *Sereboff*, 547 U.S. at 361 n.1.

290. *Id.* at 363-68.



detailed in the plan document.<sup>291</sup> As *Sereboff* instructs, though, the fact that a worker's rights are contractual in nature does not end the inquiry into how a claim to enforce such rights should proceed;<sup>292</sup> ERISA courts must also look to the nature of the remedy pursued to determine whether legal or equitable principles should control court processes.<sup>293</sup> Unlike *Sereboff*, however, which involved an attempt to enforce contract-based rights through an equitable remedy,<sup>294</sup> a worker's claim for benefits due under a plan pursuant to ERISA section 502(a)(1)(B) states a claim for breach of contract, and contemplates a judgment for money damages; it is not breach of fiduciary duty claim.<sup>295</sup>

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291. *See id.*

292. *Id.* at 363.

293. *Id.*

294. *Id.* at 356.

295. The only instance where the Supreme Court has explored ERISA's civil enforcement scheme to characterize the nature of the statute's various express remedies and suggested that claims for benefits due under a plan pursuant to ERISA section 502(a)(1)(B) may present a claim for breach of fiduciary duty occurred in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). In *Varity*, a number of workers sued their former employer seeking the individual equitable relief of reinstatement to plan participant status under one of ERISA's equitable relief provisions, section 502(a)(3), due to Varity's alleged breach of fiduciary duties. *Id.* at 492. The Varity plan fiduciary allegedly made misrepresentations that caused workers to release Varity from its obligations under an existing plan in exchange for coverage under a new plan with a new spin-off corporation, which ultimately proved to be insolvent. *Id.* at 493-94. Since the workers were no longer participants in the old plan or employees of Varity, they could not pursue their breach of contract claim for benefits due under ERISA section 502(a)(1)(B) against Varity. *Id.* at 515. Additionally, the Supreme Court had previously ruled that a claim for breach of fiduciary duty under ERISA section 502(a)(2) inures only to the benefit of the plan and does offer relief to individual plan participants. *See Russell*, 473 U.S. at 148. Consequently, the workers sued Varity for "other appropriate equitable relief" under an ERISA section 502(a)(3) asserting that Varity's misrepresentations constituted breaches of fiduciary duty and arguing that ERISA's "catchall" remedies provision of section 502(a)(3) allowed them to recover individual relief in the form of reinstatement to the Varity plan. *See Varity*, 516 U.S. at 507, 512. Varity argued that ERISA expressly authorizes a claim for breach of fiduciary duty under ERISA section 502(a)(2); therefore, to allow plan participants to pursue a breach of fiduciary duty remedy under ERISA's catchall remedy provision section 502(a)(3) by characterizing the claim as one for other equitable relief would be redundant. *See id.* at 511-12. Responding to Varity's redundancy argument, the *Varity* majority remarked in dicta that section 502(a)(1)(B) also provides a remedy for breach of fiduciary duty. *Id.* at 512. ("Why should we not conclude that Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligations in another, 'catchall' remedial section?"). In a persuasive dissenting opinion passage, Justice Thomas, joined by Justices Scalia and O'Connor, discredited the majority dicta: Justice Thomas stated:

The majority apparently believes that § 502(a)(1)(B) 'provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims.' *Ante* at 512 (citing *Russell*, 473 U.S. at 144). Since, in the majority's view, § 502(a)(1)(B) allows for individual recovery for fiduciary breach outside the framework created by §§ 409 and 502(a)(2), the majority wonders 'why should we not conclude that Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligations in another, 'catchall' remedial section.' *Ante*, 516 U.S. at 512. The Answer is simple. Contrary to the majority's misunderstanding, § 502(a)(1)(B) does *not* create a cause of action for fiduciary breach, and *Russell* expressly rejected the claim that it does

*E. Donative Trust Law is Inapplicable When a Trust is Utilized Merely as a Security Device to Help Guarantee Performance of Underlying Contractual Obligations*

ERISA requires sponsors of pension plans to fund such plans through the establishment of a trust or through the purchase of insurance annuity contracts,<sup>296</sup> however, the statute's funding rules do not apply to welfare benefit plans.<sup>297</sup> Consequently, welfare plan sponsors may choose to fund welfare benefit plans through the establishment of a trust, or through the purchase of insurance, or plan sponsors may pay promised benefits out of operating capital.<sup>298</sup> When plan sponsors use a trust to fund plan obligations, the trust merely serves as a security device to help guarantee that the employer's contractual promises to pay specified benefits will be performed.<sup>299</sup>

The ERISA trust, when utilized, serves a similar function as the deed of trust in a secured real estate transaction, where a promissory note is backed by an interest in the real estate subject of the purchase.<sup>300</sup> As in the real estate deed of trust, the ERISA trust does not form the basis of the parties' legal obligations and benefits; rather, it is the underlying contract—the promissory note in the real estate deal and the plan contract in ERISA—that contains the operative legal promises that define the parties' obligations and benefits.<sup>301</sup>

The authors of the Restatement of Trusts have recognized that principles of donative trust law do not necessarily apply to commercial trusts or to trusts used as a security device.<sup>302</sup> The Restatement (Third) of Trusts includes new language (added since *Firestone*) that addresses the applicability of the Restatement to the federal law governing pension plans.<sup>303</sup> The Restatement (Third) recites that:

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... Section 502(a)(1)(B) deals exclusively with contractual rights under the plan. See *id.* at 521 n.2 (Thomas, J., dissenting) (emphasis in original).

296. See ERISA § 403(a) (2006).

297. See *Id.* § 301(a)(1) (2006).

298. See Bogan, *supra* note 115, at 670-72.

299. *Id.* at 641 n.48.

300. RESTATEMENT (THIRD) OF PROPERTY § 4.1(a) ("A mortgage creates only security interests in real estate and confers no right to possession of that real estate on the mortgage.").

301. See Bogan, *supra* note 115, at 644.

302. See RESTATEMENT (THIRD) OF TRUSTS § 1, cmt. b (2003) ("The law relating to the use of trusts as devices for conducting business and investment activities outside the express private-and charitable-trust context is not within the scope of this Restatement . . . . The law relating to the use of a trust as a security device or as an arrangement for the benefit of creditors also is not within the scope of this Restatement.").

303. *Id.* at cmt. (a)(1).

Several bodies of state and federal legislation dealing with various types of charitable, public, or pension (governmental and private) funds expressly or implicitly incorporate general principles of trust law that is the subject of this Restatement. . . . The principles of this Restatement are generally appropriate to those statutory bodies of rules, both by analogy and insofar as those rules expressly or impliedly incorporate general principles of trust law. Specific provisions and special circumstances or relationships involved in the application of those statutory rules, however, often present fundamentally different considerations, thus expressly or impliedly calling for application of different rules that are not within the scope of this Restatement except as similar circumstances are taken into account in the elaboration of general trust-law principles.<sup>304</sup>

Congress also understood that donative trust law does not provide a proper paradigm to evaluate claims arising under an insured welfare benefit plan. Senate Report No. 93-127, recites that:

First, a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable. Predominantly, these are plans, such as insured plans, which do not use the trust form as their mode of funding. . . . [E]ven where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and *inter vivos* trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section, . . . courts applying trust law to employee benefit plans have allowed the same kind of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature. . . .

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304. *Id.*; see also Langbein, *supra* note 168, at 209-213.

It is expected that courts will interpret [ERISA's] fiduciary standards bearing in mind the special nature and purposes of employee benefit plans . . . .

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[The fiduciary responsibility section] when read in connection with the definition of the term "employee benefit fund" makes it clear that the fiduciary provisions apply only to those funds which leave assets at risk. While [ERISA] has the effect of requiring all retirement plans subject of that Act to be financed through the medium of a segregated fund, there may be welfare funds . . . such as those providing sickness or disability benefits, which may not be funded. Thus an unfunded plan in which the only assets from which benefits are paid are the general assets of the employer is not covered.<sup>305</sup>

Under donative trust law, where a settlor uses a trust to make a gift to several family members, a trustee may need to make decisions about the distribution of trust assets that affect all beneficiaries. Where a finite trust *res* provides the only funding source for the trust, a distribution to one beneficiary necessarily limits the assets available to distribute to the other deserving beneficiaries. Due to the limited source of funds under such a donative trust, the trustee often must balance the interests of one gift beneficiary against the interests of preserving the *res* for the remaining gift beneficiaries. These considerations, which form the foundation for court deference under donative trust law, have no relation to a contract of insurance.<sup>306</sup> The Supreme Court's undiscerning citation to the Restatement of Trusts, first in *Firestone*, and then again in *Glenn*, fails to contemplate the very different circumstances of fiduciary duty responsibilities in ERISA employee benefit contracts from the

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305. S. Rep. No. 93-127, at 28-30 (1973).

306. See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. L. REV. 1315, 1317 (2007).

There is . . . a profound difference of purpose between ordinary trust law and ERISA fiduciary law. Because the normal private trust is essentially a gift, trust law exhibits great deference to the wishes of the transferor. In ERISA, by contrast, Congress imposed trust law concepts for regulatory purposes, to restrict rather than to promote the autonomy of the employer over its employee benefit plans. This fundamental difference of purpose should lead the Court to restrict the power of an ERISA plan sponsor to alter the standard of judicial review.

See also Solicitor General's Brief, *supra* note 105, at 28; *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050-1051 (7th Cir. 1987) (Posner, J.) ("In the case of defined-benefit pension plans . . . the company has contractual obligations that it must honor whether or not the pension trust is adequately funded.").

circumstance of a donative trust.<sup>307</sup>

## VI. CONCLUSION

Federal trial courts currently resolve ERISA section 502(a)(1)(B) civil actions as summary “record review” proceedings, deferring to plan administrator decisions to deny worker benefit claims as if the plan administrator had provided a reliable and fair adjudication of the claim in a neutral underlying trial. That assumption is factually wrong. Plan administrators are not adjudicators. This convoluted process developed through a confused attempt to apply trust law to ERISA claims for breach of contract.

Because the workers in *Firestone* had convinced the Third Circuit Court of Appeals that they were entitled to a *de novo* trial, even under trust law, and because the individual worker in *Glenn* prevailed in the Sixth Circuit, even under a deferential review standard, the respondent workers in each case were content to just seek affirmance in the Supreme Court. Consequently, the larger worker/consumer interest in establishing that trial courts should conduct *de novo*, plenary proceedings in ERISA section 502(a)(1)(B) benefit claims was not effectively presented to the Supreme Court in either of these landmark cases. Consequently, the Supreme Court still has not addressed the underlying issue of whether Congress intended ERISA section 502(a)(1)(B) claims for benefits due to be viewed as actions for breach of trust or for breach of contract.

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307. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008).

