ERISA: Rethinking Firestone in Light of Great-West--Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims

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ERISA: RE-THINKING FIRESTONE IN LIGHT OF GREAT-WEST—IMPLICATIONS FOR STANDARD OF REVIEW AND THE RIGHT TO A JURY TRIAL IN WELFARE BENEFIT CLAIMS

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I. PREFACE

With the enactment of the Employee Retirement Income Security Act (ERISA)1 in 1974, Congress created an express federal remedy for workers to recover benefits due under employment-provided fringe benefit programs.2 Now, almost thirty years later, courts remain confused about the character of that remedy.3 Is an ERISA plan participant's action to recover

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promised fringe benefits in the nature of a claim for breach of contract, or did Congress intend trust law to govern the remedy? The answer to that question is important—it may dictate what standard of review a court will apply in a worker’s claim for benefits. Correspondingly, the level of review a court applies, whether de novo or deferential, often determines the outcome of a benefits dispute. Further, the characterization of the remedy provided in ERISA § 502(a)(1)(B) to recover benefits due under a plan as either a contract claim for legal relief or a trust law claim for equitable relief determines whether the right to a jury trial attaches.

In a breach of contract lawsuit, a trial judge does not defer to any litigants’ declaration of facts or interpretation of contract terms. Rather, a court reviews the parties’ contentions de novo. Under a contract law de novo review standard, a court typically

hears evidence and, with the help of a jury if one of the parties so chooses, decides the facts and determines anew what the contract means. Under trust law, similar to contract disputes, courts review the parties' evidence and contentions de novo, unless the trustee is exercising a discretionary power. Trust law, however, differs substantially from contract law in the standard of review that courts apply when the settlor of a trust confers discretionary powers upon a trustee. Trust law instructs courts to defer to the decisions of a non-conflicted trustee acting within the scope of his or her discretionary authority, even if the court believes the trustee acted wrongly, so long as the trustee did not abuse his or her discretion. Under this trust law "abuse of discretion" review standard, a court will not interfere with the trustee's exercise of a discretionary power "unless the trustee... acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of reasonable judgment."

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9. See id. at 112, 115; discussion infra notes 16-17.
10. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). See also Brown v. Ret. Comm. of Briggs & Stratton Ret. Plan, 797 F.2d 521, 529 (7th Cir. 1986) ("When [discretionary power] has been conferred, the judicial role is limited to determining whether the... [Committee's] interpretation was made rationally and in good faith—not whether it was right." (quoting Riley v. MEBA Pension Trust, 570 F.2d 406, 410 (2d Cir. 1977)); Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1977) (explaining that courts defer to the discretionary actions of a trustee so long as its conduct is not "arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or [is] erroneous on a question of law.").
11. In Firestone, the Supreme Court uses the terminology "arbitrary and capricious" as developed in labor law cases, rather than the "abuse of discretion" terminology incorporated in the RESTATEMENT (SECOND) OF TRUSTS (1959), for defining a deferential standard of review. Firestone, 489 U.S. at 113-14. I will use the terms interchangeably in this article because most courts use the terms interchangeably. See Cox v. Mid-America Dairymen, Inc., 965 F.2d 569, 572 n.3 (8th Cir. 1992) (noting that the distinction between the two terms is a "distinction without a difference"); Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556, 1558, n.1 (11th Cir. 1990) (equating the two standards). But see Booth v. Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan, 201 F.3d 335, 341-42 (4th Cir. 2000) (affirming that the abuse of discretion standard, and not the arbitrary and capricious standard, is to be used for review of discretionary decisions); Morton v. Smith, 91 F.3d 867, 870 (7th Cir. 1996) (elaborating on the difference between the two standards). See also Meditrust Fin. Serv. Corp. v. Sterling Chems., Inc., 168 F.3d 211, 215 (5th Cir. 1999) (citing cases); Lowry v. Bankers Life & Cas. Ret. Plan, 871 F.2d 522, 525 (5th Cir. 1989) (reserving question whether abuse of discretion standard is equivalent to or less strict than arbitrary and capricious standard).
12. RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. e (1959). See, e.g., Morton, 91 F.3d at 870 ("A decision constitutes an abuse of discretion when it is 'not just clearly incorrect but downright unreasonable.'" (quoting Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990))).
In *Firestone Tire & Rubber Co. v. Bruch*, the United States Supreme Court ruled that a trial court evaluating an ERISA plan participant's claim for benefits arising from an employee fringe benefit program should examine the plan administrator's adverse benefits decision under a *de novo* review standard. In dicta, however, the *Firestone* Court suggested that if an ERISA plan granted the plan administrator discretion to interpret the terms of the plan or to make final benefits determinations, a court should review the plan administrator's claim denial under the deferential abuse of discretion standard. The only exception identified by the *Firestone* Court where the deferential review standard should be modified was the circumstance of a conflict of interest infecting the plan administrator's decision-making.

14. *Id.* at 115. In ERISA cases, the question often arises whether *de novo* review means that the trial court reviews the record before the plan administrator *de novo* or whether the trial court is free to consider evidence outside of the plan administrator's file. *Firestone* did not address this question and the circuits appear to be split. Compare *Perry v. Simplicity Eng'g.*, 900 F.2d 963, 966 (6th Cir. 1990) (stating that "[n]othing in the legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators, a role they would inevitably assume if they received and considered evidence not presented to administrators concerning an employee's entitlement to benefits. Such a procedure would frustrate the goal of prompt resolution of claims by the fiduciary under the ERISA scheme.") with *Masella v. Blue Cross & Blue Shield of Conn.*, 936 F.2d 98, 104 (2d Cir. 1991) (holding that a court may consider evidence outside the administrator's record on *de novo* questions of plan interpretation); *Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir. 1989) ("[The insurer's] contention that a court conducting a *de novo* review must examine only such facts as were available to the plan administrator at the time of the benefits denial is contrary to the concept of a *de novo* review."); *Sheehan v. Metro. Life Ins. Co.*, 01 Civ. 9182, 2002 U.S. Dist. LEXIS 11789, at *9-10 (S.D.N.Y. June 28, 2002) (noting conflict among circuits regarding court's review of evidence outside of the plan administrator's claims file). The question of whether ERISA actually involves an "administrative review" process is addressed elsewhere within this issue. See Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004). See also Donald T. Bogan, *The Unsupported Delegation of Conflict Adjudication in ERISA Benefit Claims under the Guise of Judicial Deference*, 57 OKLA. L. REV. (forthcoming Spring 2004). See also discussion infra note 42.

15. See *Firestone*, 489 U.S. at 115 (stating that a denial of benefits is to be reviewed *de novo*, unless the administrator has discretionary authority). See also John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207 [hereinafter *Supreme Court Flunks Trusts*] (presenting criticism of *Firestone* rationale because trust law does not require trust instruments to grant discretion in order for trustee to have discretionary powers).

16. See *Firestone*, 489 U.S. at 115 ("Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" (quoting *RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. d* (1959))).
The *Firestone* Court’s discussion of a deferential standard of review resulted from the Court’s understanding that trust law principles generally govern ERISA. Unfortunately, the *Firestone* Court failed to fully contemplate the rationale for anchoring its decision in trust law when the employee benefit plan under consideration in *Firestone* was not funded through a trust. Additionally, the *Firestone* Court failed to examine the nature of a plan participant’s remedy for “benefits due . . . under the terms of his plan” provided in ERISA § 502(a)(1)(B) to determine whether that remedy corresponded with the Court’s application of trust law.

ERISA requires employers to fund employee pension plans through the establishment of a trust, or through the purchase of insurance. However, the statute exempts welfare benefit plans, such as the severance pay plan at issue in *Firestone*, from ERISA’s funding requirements. *Firestone*, in fact, did not separately fund

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17. *See Firestone*, 489 U.S. at 115 (holding that “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.”).

18. *See id.* (“Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for 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.”) (internal citations omitted).

19. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000) authorizes a plan participant to sue in state or federal court “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” *See infra* note 208 for a complete recital of the remedies provided in ERISA § 502, 29 U.S.C. § 1132 (2000).


21. ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1) (2000). ERISA plans can be funded through the establishment of a trust, or through the purchase of insurance, or plans can be unfunded. *Id.* When this article refers to a plan as “unfunded,” it means that the plan sponsor, usually the employer, pays benefits due under the plan out of its general treasury or operating capital, rather than through a segregated trust or through insurance proceeds. Additionally, a plan can employ a hybrid funding mechanism, where the plan is self-insured (and typically unfunded) up to a certain dollar amount (known as the attachment point) and insured for losses above the attachment point through the purchase of commercial stop-loss insurance. *See Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311, 1313 n.2 (5th Cir. 1985), *rev’d*, 481 U.S. 41 (1987). Employers often utilize the hybrid funding mechanism to support their health care benefits plan. *See, e.g.*, Behavioral Scis. Inst. v. Great-West Life, 930 P.2d 933 (Wash. Ct. App. 1997). *See generally A. Foster Higgins & Co., Foster
its severance pay plan through a trust or through the purchase of insurance; rather, the plan was unfunded.\textsuperscript{22} The nature of a plan's funding mechanism seems a vital element in evaluating whether trust law or contract law principles should govern plan claims administration. It is worth repeating, therefore, that in \textit{Firestone}, the employer paid any approved severance benefits out of its operating capital. The employer did not segregate assets for the purpose of funding the plan and it did not appoint a trustee to oversee the administration of any segregated trust res.

As it happened in \textit{Firestone}, the Court's application of trust law to govern plan claims practices under the employer's unfunded severance pay plan did not significantly impact the outcome of the Court's standard of review decision. Since the Firestone plan contained no grant of discretionary power to the plan administrator, the contract law \textit{de novo} review standard and the trust law standard of review were essentially the same.\textsuperscript{23} The former Firestone employees, therefore, were fortunate to prevail in the Supreme Court under the Court's application of trust law. In cases subsequent to \textit{Firestone}, however, plan participants have suffered the fallout from \textit{Firestone}'s indiscreet dicta, and from the decision's incongruous underpinnings suggesting that trust law should control claims for benefits due under ERISA § 502(a)(1)(B) arising from a plan which is not funded through a trust.\textsuperscript{24}

Following \textit{Firestone}, many employers and other plan sponsors\textsuperscript{25} predictably added broad grants of discretion to the plan

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\textsuperscript{22} \textit{Firestone}, 489 U.S. at 105.

\textsuperscript{23} \textit{Id.} at 115. However, on remand, the Supreme Court's reliance on trust law would have affected the worker's right to a jury trial. \textit{See infra} notes 247-286 and accompanying text.

\textsuperscript{24} The \textit{Firestone} Court assumed, without really deciding, that trust law governed the standard of review question presented. The opinion remarks that "ERISA abounds with the language and terminology of trust law." \textit{Firestone}, 489 U.S. at 110. However, the Court also noted that because it based its decision on the plan's failure to grant the plan administrator discretionary powers, \textit{de novo} review applied "regardless of whether the plan at issue is funded or unfunded." \textit{Id.} at 115.

\textsuperscript{25} The "plan sponsor" is either the employer, or the employee's union,
administrator in their ERISA-governed employee benefit plans. Given such grants of discretion, lower courts have routinely applied an abuse of discretion review standard to ERISA claim(228,246),(958,693)

26. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 383 n.2 (3d Cir. 2000) (remarking that Professor John H. Langbein, in his article entitled The Supreme Court Flunks Trusts, supra note 15, at 217, accurately predicted that employers would quickly add grants of discretion to their plans and that “problems of how courts should deal with conflicted fiduciaries would resurface”). See also Muir, supra note 4, at 412 & n.146 (noting that it is not surprising that employers reserve discretion in order to get a deferential standard).

27. See, e.g., Jung v. FMC Corp., 755 F.2d 708, 711 (9th Cir. 1985) (“Here we are dealing with the interpretation by an employer-administrator of the terms of the employer’s unfunded welfare benefit plan. We see no reason why ERISA calls for a different [anything other than arbitrary and capricious] standard of review here.”); Holland v. Burlington Indus., 772 F.2d 1140, 1148 (4th Cir. 1985).

Though many cases applying this [arbitrary and capricious] standard to eligibility disputes do involve trusts, there is no reason to apply a different standard here [to an unfunded plan]. Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators ‘whose experience is daily and continual, not with judges whose exposure is episodic and occasional.’ . . . This objective holds true whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary and capricious manner, must remain with those who formulate and administer company plans and policies, whether formally trustees or not. To vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do. (internal citations omitted)

Id.

28. See, e.g., Van Boxel v. Journal Co. Employees’ Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987) (discussing cases prior to Firestone). In Van Boxel, Judge Posner noted that:

flexibility in the scope of judicial review need not require a proliferation of different standards of review; the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees’ decisions—more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.

Id. (internal citations omitted). See also Pinto, 214 F.3d at 384 (collecting cases); Crespo v. UNUM Life Ins. Co., 249 F. Supp. 2d 980, 989 (N.D. Ill. 2003) (identifying factors to consider in evaluation of what was reasonable behavior under the arbitrary and capricious standard). But see Jebian v. Hewlett-Packard Co. Empl. Benefits Org. Income Prot. Plan, 349 F.3d 1098 (9th Cir. 2003) (noting that even where plan grants discretion to plan administrator, de
standard of review applicable in ERISA claims has focused on the conflict of interest question, 29 or on critique of the Supreme Court’s pronouncements on trust law. 30 Largely absent from the post-


30. See, e.g., Supreme Court Flunks Trusts, supra note 15, at 223 (criticizing the Supreme Court’s application of trust law in Firestone, and suggesting that the Court could have applied contract law to achieve a better result). Professor Langbein has remarked upon the underlying contractual nature of trusts in John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L.J. 625 (1995) [hereinafter Langbein, Basis of the Law of Trusts], but his most penetrating criticism of the Supreme Court’s ERISA remedies decisions is not the Court’s selection of trust law as the paradigm to evaluate ERISA remedies. Rather, it is his view that the Supreme Court has applied trust law badly. Langbein, Trail of Error, supra note 4, at 1323. I agree with much of Professor Langbein’s ERISA scholarship, however, in the debate about whether trust law, or contract law, or some combination of common law principles should govern ERISA benefits claims, I believe that Professor Langbein fails to sufficiently credit the fact that ERISA regulates pension plans and welfare plans differently. In particular, ERISA § 302, 29 U.S.C. § 1082 requires plan sponsors to comply with minimum funding standards when they establish pension benefit plans, and ERISA § 403, 29 U.S.C. § 1103 requires that all plan assets, except insurance policies, be held in trust. However, ERISA § 301, 29 U.S.C. § 1081 exempts welfare plans from the statute’s requirement that plan sponsors fund plans. Consequently, if an employer chooses not to fund its welfare benefit plan by not setting aside specific assets to pay contemplated benefits, there are no plan assets for the welfare plan to hold in trust. See infra notes 184-193 and accompanying text. Throughout Professor Langbein’s several ERISA articles, he often broadly states that ERISA requires plan sponsors to fund plans through the establishment of a trust, without noting that because Congress expressly exempted welfare plans from ERISA’s funding requirements, non-pension ERISA plans are often unfunded. See, e.g., Langbein, Trail of Error, supra note 4, at 1324 (stating that “[f]irst, the statute imposes a rule of mandatory trusteeship, requiring that ‘all assets of an employee benefit plan shall be held in trust by one or more trustees,’ who are subject to... strict fiduciary duties . . . .’); Langbein, The Supreme Court Flunks Trusts, supra note 15, at 209 (noting “ERISA requires that pension and employee benefit plans take the trust form.”); Daniel Fischel & John H. Langbein, ERISA’s Fundamental
Firestone standard of review discussion, however, is academic comment which explores the underlying assumptions justifying the application of trust law, instead of contract law, when an ERISA welfare plan is unfunded or is funded through the purchase of insurance, rather than funded through the establishment of a trust.\(^3\)  

Recent Supreme Court ERISA cases suggest that it is time to reconsider the application of a trust law-based standard of review in claims for benefits under ERISA § 502(a)(1)(B) arising from unfunded or insured ERISA plans.\(^3\)  

In 2003, the Supreme Court

Contradiction: The Exclusive Benefit Rule, 55 U. CHI. L. REV. 1105, 1107 (1988) (stating that "[s]ection 403 imposes a rule of mandatory trusteeship. Apart from plan assets that take the form of insurance, 'all assets of an employee benefit plan shall be held in trust...'). The fact that a plan sponsor may choose not to fund a welfare benefit plan through the establishment of a trust argues against Professor Langbein's view that trust law principles should always govern the analysis of employee benefit claims, including the standard of review question. The impact of ERISA's express exemption from ERISA's trust-funding requirements granted by Congress to welfare plans has also received inappropriately short shrift from the courts, which typically assume that trust law dictates the standard of review courts should apply to plan participant claims for benefits under ERISA § 502(a)(1)(B), even in claims arising from unfunded or insured employee benefit plans. See, e.g., Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377 (3d Cir. 2000) (dealing with insured plan); Jung v. FMC Corp., 755 F.2d 708, 711 (9th Cir. 1985) (unfunded plan). See infra notes 194-207 and accompanying text.

31. A notable exception is a thoroughly researched article by Professor Jay Conison which challenges the foundational basis for applying a trust law-based standard of review to ERISA claims for benefits under § 502(a)(1)(B). Conison, supra note 4, at 62. Professor Conison rejects trust law, labor law, and state contract law as the framework to evaluate ERISA, and suggests instead that courts borrow from each of those fields to further develop a federal common law of ERISA to decide ERISA controversies. Id. See also Muir, supra note 4 at 437-38 (stating that trust law governs ERISA remedies, but trust law is influenced by contract law principles); Flint, supra note 4, at 959 (discussing judicial interpretation of ERISA under federal common law); Fischel & Langbein, supra note 30.

32. Since the Travelers opinion acknowledged that the Court's early ERISA decisions had not been helpful in defining the boundaries of ERISA's preemption of state law, the Supreme Court has shown a continued willingness to step back from the overbroad pronouncements found in the Court's early ERISA opinions. See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (stating "we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here."); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.,Inc., 519 U.S. 316, 336 (1997) (Scalia, J. concurring) (stating "I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on [ERISA] was wrong. . "). See also Ky. Ass'n of Heath Plans, Inc. v. Miller, 123 S. Ct. 1471, 1479 (2003) (abandoning the three-factor McCarran-Ferguson Act test to determine whether a law "regulates insurance" within the meaning of ERISA's savings clause exception to preemption).
revisited the ERISA standard of review issue for the first time since it decided *Firestone* in 1989. In *Black & Decker Disability Plan v. Nord*, the Supreme Court answered a narrow standard of review question. However, because the Court could resolve *Nord* narrowly, it did not address the larger problem, left unsettled following *Firestone*, of what effect a plan administrator's conflict of interest should have on the standard of review, assuming the trust law standard applies, when a plan administrator exercises its discretionary powers in denying a claim for benefits.

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34. In *Nord*, the Court addressed the question of whether the treating physician rule, as applied in Social Security Administration disability cases, should be imported to ERISA claims. *Id.* at 1969-70. The treating physician rule requires an Administrative Law Judge hearing Social Security disability cases to credit the opinion of a claimant's treating physician over the opinion of an independent medical evaluator, unless the agency provides a reason why the treating physician's medical opinion is less credible. See *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (holding that a procedural rule requires agency to explain why it rejected treating physician's opinion). The Social Security Administration has adopted the treating physician rule as an evidentiary standard requiring the agency to give "more weight" to the medical opinion of a treating physician than to other medical evidence. 20 C.F.R. §§ 404.1527(d), 416.927(d) (2003). The *Nord* Court held that only Congress or the Department of Labor, through its rule-making authority, could mandate that private ERISA plans adhere to the treating physician rule. See *Nord*, 123 S. Ct. at 1972. The Court noted:

Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But, we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation. 

*Id.*

35. In addition to the damage resulting from the *Firestone* Court's incongruous application of trust law to claims seeking legal relief from a plan that was not funded through a trust, the Court's failure to instruct the circuits on how a conflict of interest effects judicial review of an ERISA plan fiduciary's discretionary decisions has also helped fuel even greater confusion in the lower courts. See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 378 (3d Cir. 2000) noting that:

This appeal concerns the standard courts should use when reviewing a denial of a request for benefits under an ERISA plan by an insurance company which, pursuant to a contract with an employing company, both determines eligibility for benefits, and pays those benefits out of its own funds. This question, and variations thereof, has bedeviled the federal courts since considered dicta in *Firestone Tire & Rubber Co. v. Bruch* gave opaque direction about how courts should review discretionary benefits denials by potentially conflicted ERISA fiduciaries.

*Id.*

36. See *Nord*, 123 S. Ct. at 1969 n.2. (stating "[t]he Plan sought review only of the Court of Appeal's holding 'that an ERISA disability plan administrator's..."
Additionally, in Nord the Supreme Court again failed to question why courts should apply a trust law standard of review to a plan administrator's benefits claim denial when the subject plan is not funded through a trust, and where the underlying remedy sought by the plan participant sounds in contract, not trust law.

Intertwined with the standard of review issue when a plan participant sues under ERISA § 502(a)(1)(B) to recover benefits due is the question of a plan participant’s right to a jury trial. The constitutional right to a jury trial does not apply to claims seeking equitable relief, such as a claim for breach of fiduciary duty. However, the Seventh Amendment to the United States Constitution preserves the right to a jury trial in federal court actions at law, such as a claim for contract damages.

The Supreme Court has not addressed the question of an ERISA plan participant’s right to a jury trial. However, in the recent ERISA remedies decision, Great-West Life & Annuity Insurance Co. v. Knudson, the Court suggested that a claim for benefits under ERISA § 502(a)(1)(B) seeks legal, rather than equitable, relief. With that simple and seemingly incontestable observation, the Court undermined the equity-based trust law foundation for applying a deferential standard of review to plan participant actions challenging benefit claim denials under ERISA § 502(a)(1)(B). Further, the Knudson Court’s recognition that ERISA § 502(a)(1)(B) provides a claim for legal relief establishes a plan participant’s right to a jury trial in ERISA benefit actions.

Because courts currently apply a trust law standard of review in ERISA benefit claims litigation, this article comments briefly upon trust law and the trust law duty of loyalty. However, this

determination is subject to the ‘treating physician rule...’ We express no opinion on any other issues.”).


38. U.S. CONST. amend. VII. (stating “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.”). Id. See infra notes 247-86 and accompanying text.


40. Id. at 220. In the very same section as § 502(a)(3), 29 U.S.C. § 1132 (a)(3), Congress authorized “a participant or beneficiary” to bring a civil action “to enforce his rights under the terms of the plan,” without reference to whether the relief sought is legal or equitable. But Congress did not extend the same authorization to fiduciaries. Rather, § 502(a)(3), [29 U.S.C. § 1132 (a)(3)], by its terms, only allows for equitable relief. Id. See infra notes 212-46 and accompanying text.

article does not focus on the lingering trust law conflict of interest issue. Rather, this article inspects the more fundamental, underlying question: Did Congress intend courts to engraft a trust law-based standard of review to plan participant claims for legal relief under ERISA § 502(a)(1)(B) arising from ERISA welfare benefit plans which are not funded through a trust? 42

The Third Circuit Court of Appeals in Bruch v. Firestone Tire & Rubber Co. 43 reported that the first courts to apply a trust law-based deferential standard of review in ERISA cases imported that standard from worker claims arising under the Labor Management Relations Act (hereinafter LMRA or Taft-Hartley Act), 44 which had previously borrowed the standard from the common law of trusts. 45 Consequently, I begin Part II, below, with an examination of the trust law standard of review and the application of that standard in LMRA cases. Part III then explores the Firestone litigation to determine why the Supreme Court rejected the LMRA analogy, 46 yet still applied trust law

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42. Further complicating the standard of review question in ERISA benefit claims is the unfortunate confusion displayed by lower courts in their application of judicial deference. There are different levels and kinds of judicial deference. See Frank H. Easterbrook, Judicial Discretion in Statutory Interpretation, 57 OKLA. L. REV. (forthcoming Spring 2004). In ERISA, courts recite that they defer to plan administrator's decisions because trust law instructs courts not to control trustee discretionary actions unless the trustee abused its discretion. In reality, those courts apply administrative law-based deference rather than trust law-based deference. In trust cases, trust beneficiaries investigate their claims by employing standard discovery tools afforded under the rules of civil procedure and they present their claims at trial by offering evidence and by cross-examining witnesses against them. In administrative law-based deference, for example Social Security disability claims, the claimant employs discovery as authorized in administrative law and receives a hearing before a neutral Administrative Law Judge (ALJ) where evidence is presented. Consequently, in administrative law-based judicial deference, when a claimant appeals an adverse benefits decision by an ALJ to federal district court, the district court sits more as an appellate court than a trial court in reviewing the ALJ decision—there is no right to further discovery or to a de novo trial. In ERISA claims, even though claimants do not receive an administrative trial, federal district courts typically do not allow claimants to conduct discovery or to call witnesses at trial, even when applying de novo review supposedly under trust law. See supra note 14 and accompanying text. The confusion in ERISA cases with administrative law-based judicial deference is addressed elsewhere in this edition of the John Marshall Law Review. See DeBofsky, supra note 14. See also Bogan, supra note 14.

43. 828 F.2d 134 (3d Cir. 1987), rev'd in part and aff'd in part 489 U.S. 101 (1989) [Hereafter in text I will refer to the Third Circuit opinion as “Bruch” and to the Supreme Court opinion as “Firestone.”].


45. Bruch, 828 F.2d at 140-44.

46. Firestone, 489 U.S. at 109. The Third Circuit preceded the Supreme Court in rejecting the LMRA trust law analogy to ERISA benefit claims,
principles to claims arising from an ERISA plan that was not funded through a trust.

Surprisingly, few post-Firestone federal courts, weighing a claim for benefits under an insured or unfunded plan, have remarked on the incongruity of applying trust law to resolve employee benefit claims arising from ERISA plans which are not funded through a trust. In Part IV, I examine that incongruity and, unsurprisingly, conclude that the trust law model fails when applied to unfunded ERISA plans and to plans funded through the purchase of insurance. Finally, in Part V, the article summarizes the law which I suggest requires federal courts to grant ERISA plan participants the right to trial by jury based upon the legal nature of the remedy for benefits due under ERISA § 502(a)(1)(B).

Because it is inapposite to apply trust law to plans that are not funded through a trust, and because plan participant claims seeking legal relief under ERISA § 502(a)(1)(B) sound in contract, courts should grant ERISA plan participants a de novo trial by jury in § 502(a)(1)(B) benefit claims arising from insured or unfunded welfare plans.47

II. THE TRUST LAW-BASED DEFERENTIAL STANDARD OF REVIEW AND CLAIMS ARISING UNDER LMRA § 302

A. The Abuse of Discretion Standard of Review in Trust Law

Trust law originated in the world of donative transfers as a vehicle to pass wealth within the family, focusing particularly on transfers of real property.48 In modern times, the use of trusts to
convey property has expanded well beyond testamentary gifts. Drafters of commercial documents now employ the trust in an array of business contexts where assets may be segregated and administered for an assortment of specified purposes. Statutorily created trusts also abound to serve public policy goals. In the area of labor law and employee benefits, the Taft-Hartley Act directs that private pension and uninsured non-pension employee benefit plans created under collectively bargained contracts must be funded through a trust. Additionally, ERISA requires non-union, employment-provided, private pensions to be funded through a trust or through the purchase of insurance.

Despite the expanded use of trusts to accomplish a variety of asset transfers, modern trust law continues to reflect its equitable origins. Consequently, courts hear claims against a trustee for breach of fiduciary duty without a jury in most states. Additionally, courts continue to review a trustee’s discretionary decisions in non-commercial trusts under a deferential standard, absent a trustee’s conflict of interest. Since trust law and the use of a trust as a funding mechanism stand at the heart of ERISA standard of review controversies, we should examine some trust law fundamentals before we consider whether trust law should serve as the paradigm to evaluate plan participant claims for benefits under ERISA § 502(a)(1)(B).

1. The Elements of a Trust

The elements of a trust include: 1) a trustee who holds trust

See infra note 73 and accompanying text. Given those rulings, there exists a serious gap in ERISA’s remedies provision. How does a plan participant collect a judgment against an unfunded or under-funded welfare plan unless the employer is also a defendant, or against an insured plan unless the insurer is a defendant, or against a plan funded through a trust unless the trust and trustee are defendants?


51. LMRA § 302 (c), 29 U.S.C. § 186(c) (2000). This section of the LMRA also allows the trustee to use trust funds to purchase insurance to pay plan obligations under a collective bargaining agreement.


property and who owes equitable duties to deal with the trust property for the benefit of another; 2) a beneficiary; and 3) a "res" consisting of some segregated trust property held by the trustee for the beneficiary.\(^{55}\) Additionally, to create a trust, the settlor must manifest an intention to establish a trust relationship, with the accompanying enforceable duties.\(^{56}\)

One of the defining characteristics of a trust that distinguishes beneficiary expectations arising under a trust from those arising under a contract is the segregated trust res.\(^{57}\) Historically, the trust served as a funding mechanism for a gratuitous transfer.\(^{58}\) Under gift law, the gift beneficiary generally obtains no right to enforce the gift until there has been a transfer of the gift property, and then the beneficiary acquires rights only to what has been transferred.\(^{59}\) Reflecting the donative origins of trust law, trust distributions to beneficiaries are typically limited by the finite assets set aside by the settlor for the benefit of the trust beneficiaries.\(^{60}\) Trust beneficiaries, therefore, generally look only to the trust res to fulfill the settlor's grant in a donative trust, or perhaps to the trustee if its breach of fiduciary duty caused some depletion in the trust res.\(^{61}\) In the donative trust, however, trust beneficiaries have no trust law claim against the settlor for breach of their expectations under a trust created for their benefit.\(^{62}\)

Under contract law, mutual promises generally define the legal expectations of the contracting parties, not the amount of money or assets designated by the responsible contractor to fulfill the contract.\(^{63}\) Certainly, in practice, the ability of a contracting

\(^{55} \text{RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959).} \\
^{56} \text{See id. § 23 cmt. a (noting that no special language is required and the settlor's intentions do not need to be communicated to the beneficiary). Additionally, a trust can be created by statute without a manifestation of intention on the part of any settlor. Id. § 23 cmt. c.} \\
^{57} \text{See Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1214 (8th Cir. 1981) (noting that "[f]unding implies the existence of a res separate from the ordinary assets of the corporation."), cert. denied, 454 U.S. 968, 1084 (1981).} \\
^{58} \text{See Langbein, The Secret Life of the Trust, supra note 48, at 165 (arguing that the trust is "essentially a gift, projected on the plane of time and so subjected to a management regime." (quoting Bernard Rudden, John P. Dawson's Gifts and Promises, 44 MOD. L. REV. 610, 610 (1981) (book review)).} \\
^{60} \text{See generally BOGERT, THE LAW OF TRUSTS, supra note 59, § 203.} \\
^{61} \text{Id. § 203, at 861-71.} \\
^{62} \text{Id. § 203. See generally, Langbein, The Secret Life of the Trust, supra note 48 (comparing charitable trusts to commercial trusts).} \\
^{63} \text{Additionally, the government regulates even private contracts via the common law of contracts, and via legislative or administrative rules governing}
party to enforce the contract may be limited by the wealth of the other contracting party (or by the value of any security that may be posted to guarantee performance of the contract), but each party’s legal expectations and rights remain fixed by the contract, not by the depth of the opposing party’s pocket.\(^6\)

In ERISA, where the trust is sometimes, but not always, used as a funding mechanism to secure contractually obligated payments, the prophylactic application of trust law to plan participant claims under ERISA § 502(a)(1)(B) is not wholly consistent with ERISA’s remedial scheme or with plan participant expectations.\(^6\) Plan participants’ expectations under their ERISA employee benefit plans arise from the employer’s promise to provide benefits in exchange for the worker’s labor. The benefits are owed pursuant to a contract, not as a gift. In ERISA, a trust is sometimes used as an instrument to help guarantee enforcement of the contract by the plan sponsor, but the trust is not the source of the employer’s obligation. Whether an ERISA plan is funded through the establishment of a trust or is unfunded, the employer’s responsibility to provide the promised plan benefits exists independently and regardless of how the employer chooses to finance the obligation.

The suggestion that trust law exclusively governs ERISA’s remedies provision is problematic also because that view suggests plan participants may have no basis to collect benefits wrongfully withheld under their unfunded welfare benefit plans. Consider contracts in regulated industries. For example, insurance contracts incorporate the state’s insurance code into every insurance policy issued in the state. See THOMAS F. SEGALLA, COUCH ON INSURANCE § 19:1, at 19-2 to 19-4 (3d ed. 1995) (noting that “[e]xisting and valid statutory provisions enter into and form part of all contracts of insurance to which they are applicable”).

64. See BOGERT, THE LAW OF TRUSTS, supra note 59, § 121, at 359 (describing the factors that influence the selection of trustees). The reason courts defer to trustee discretionary decisions arises, at least in part, due to the finite nature of the trust res and the presumed confidence placed in the trustee as selected by the settlor. Id. The trust res is limited by assets chosen by the settlor to fund the trust. Where the settlor identifies several trust beneficiaries, a trustee’s discretionary decision to make a distribution to one beneficiary necessarily means that there are fewer assets left in the trust for the other beneficiaries. In such circumstances, where the trustee must choose how to distribute limited assets among a group of beneficiaries, trust law instructs courts not to interfere with the trustee’s discretionary acts in order to credit the selection of a trustee who was designated by the settlor to make such choices. Id. § 560; RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).

65. In ERISA, the trust is not used as an instrument to accomplish a donative transfer, rather the trust in ERISA is employed as a security devise to help insure that separate contract promises from the employer to the employees are fulfilled. See Bruch, 828 F.2d at 145 (providing such factual scenario). The court noted that “[t]he trust [sic] at issue here provides severance benefits, which are a form of wages. The benefits were offered as an inducement to the plaintiffs, to persuade them to work for Firestone.” Id.
the question of who is a proper party defendant in an ERISA benefits claim. ERISA § 502(d)(1) instructs that a plan can sue and be sued as an entity.66 Further, § 502(d)(2) provides that a judgment obtained against a plan as an entity can be enforced only against the plan entity.67 If a plan is adequately funded through a trust, presumably a plan participant can collect any judgment obtained for benefits due under the plan from the trust assets.68

Recall, however, that ERISA exempts non-pension employee benefit plans, such as health care benefit plans and disability benefit plans, from the statute's trust-funding requirements.69 What happens if a plan is unfunded—that is, there is no trust from which to collect a judgment? Did Congress intend ERISA to foreclose plan participant contract claims against employers who promise benefits, but who fail to establish a trust to fund such promises? When a plan is totally unfunded, which is a typical occurrence in welfare benefit plans, employees have no place to look but to the employer to satisfy plan promises because there is no trust res to distribute among plan participants in satisfaction of judgments obtained to recover benefits due under the plan.70

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67. Id. § 1132(d)(2). The language states that “[a]ny money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such other person is established in his individual capacity under this title.” Id.
68. Under trust law, generally a beneficiary must sue the trustee to enforce a judgment against the trust res. See BOGERT, THE LAW OF TRUSTS, supra note 59, § 871, at 174-75 (stating that “in suits involving trust property, generally both the trustee and all beneficiaries are deemed necessary parties . . . and must be joined as parties.”). In ERISA, the plan is not the same thing as the trust that (sometimes) funds the plan, and the plan administrator, while normally a fiduciary, is not the same thing as a trustee. Id. § 128. See also Mellor v. Sara Lee Corp., 292 F. Supp. 2d 902 (N.D. Miss. 2003) (stating that trustee is proper party defendant, along with employer/plan administrator, assuming trustee exerted control over the plan).
71. ERISA allows welfare plans to be unfunded. ERISA § 301, 29 U.S.C. § 1081(a)(3) (2000). In addition, court opinions suggest that ERISA § 502(a)(1)(B) provides the plan participant's exclusive remedy to recover benefits due under a plan 29 U.S.C. § 1132(a)(1)(B) (2000). See Pilot Life Ins. Co v. Dedeaux, 481 U.S. 41, 54 (1987). Further, a judgment against a plan can only be enforced against that unfunded plan. ERISA § 502(d)(2), 29 U.S.C. § 1132(d)(2) (2000). One of ERISA's main purposes is to assure that plan participants actually receive promised benefits. See 2 LEGISLATIVE HISTORY, supra note 1, at 1599 (remarks of Sen. Williams) (“[ERISA's] basic goal is to assure workers that they will receive the promised pension benefits earned for their retirement during their working lives”). This goal would often go woefully unfulfilled if a plan participant could not pursue contract remedies.
Many courts intuitively understand that the employer is ultimately responsible to pay earned employee benefit claims arising from unfunded plans,\(^{72}\) even though some courts suggest that the plan is the only proper defendant in a suit by a plan participant to recover benefits.\(^{73}\) Unfortunately, when courts evaluate benefit claims under a trust law paradigm where no trust exists, they fail to adhere to the contract law basis for employer liability. In Section IV, below, we will compare the basis for the application of contract law versus the application of trust law in ERISA § 502(a)(1)(B) claims for benefits arising from unfunded and insured employee benefit plans.

2. The Trustee's Duty of Loyalty

Along with the identification and segregation of the trust res, the preeminent characteristic of a trust relationship is the duty of loyalty owed by the trustee to trust beneficiaries.\(^{74}\) The Restatement (Second) of Trusts § 170 provides that: "[t]he trustee

against a plan sponsor who fails to fund an ERISA welfare benefit plan. Similarly, if plan benefit payments are due from an insurer, a judgment just against the plan does not give the claimant any enforceable rights against the responsible party. For example, when the employee benefit is health care coverage under a group insurance policy, arguably, the employer's promise is to purchase insurance—to make the premium payment, not to provide the medical care or even to pay the medical care providers. If the employer purchases the insurance and the insurer refuses to pay for some untenable reason (like insolvency), the worker presumably could not pursue a claim against the employer under ERISA § 502(a)(1)(B), and a judgment solely against the plan as an entity likely could not be collected as the plan likely owns no assets except the insurance policy—unless the insurer is a named defendant, the judgment cannot be enforced against the insurer. See Russell Korobkin, The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption, 51 U.C.L.A. L. Rev. 457 (2003).

72. See, e.g., Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1050-51 (7th Cir. 1987). In Van Boxel, Judge Posner remarked that "in the case of defined-benefit pension plans (the vast majority of ERISA plans and the type involved in this case) the company has contractual obligations that it must honor whether or not the pension trust is adequately funded." Id. See also Musmeci v. Schwegmann Giant Super Markets, Inc. 332 F.3d 339, 349-50 (5th Cir. 2003) (noting that recovery of benefits generally comes from the plan, however, employer is also a proper defendant if it decides claims and funds the plan).

73. See, e.g., Hackner v. Long Term Disability Plan for Employees of Havi Group LP, 2003 U.S. App. LEXIS 23605 (7th Cir. Nov. 17, 2003) (holding that although plan granted discretionary authority to make disability benefits determinations to plan insurer, insurer not a proper party defendant under ERISA § 502 (d)(2), 29 U.S.C. § 1132(d)(2)). See also Hall v. LHACO, Inc., 140 F.3d 1190, 1194 (8th Cir. 1998) (citing cases). But see Everhardt v. Allamerica Fin. Life Ins. Co., 275 F.3d 751 (9th Cir. 2001) (Reinhardt, J., dissenting) (§ 502 (d) merely provides that plan can be sued, but it was not intended to limit universe of proper defendants in § 502(a)(1)(B) claims for benefits), cert denied, 536 U.S. 958 (2002).

is under a duty to the beneficiary to administer the trust solely in
the interest of the beneficiary."

The greatest threat that a trustee's duty of loyalty might be compromised arises when the
trustee suffers a conflict of interest. Consequently, trust law
generally prohibits the trustee from operating under a conflict of
interest and from self-dealing in trust property.

In addition to the problem of applying trust law in ERISA
when there is no trust res, the application of trust law standards
to ERISA benefit claims is further complicated by the statute's
seemingly inconsistent loyalty rules. ERISA imposes a trust law
duty of loyalty on plan administrators, trustees, and other
fiduciaries, yet the statute also allows such fiduciaries to serve
while operating under a conflict of interest. For example, ERISA

75. Restatement (Second) of Trusts § 170 (1) (1959).
76. See Bogert, The Law of Trusts, supra note 59, § 543, at 218-19
"(A trustee is under a duty to the beneficiary of the trust to administer the
trust solely in the interest of the beneficiary. The trustee must exclude all
self-interest, as well as the interest of a third party, in his administration
of the trust solely for the benefit of the beneficiary. The trustee must not place
himself in a position where his own interests or that of another enters into
conflict, or may possibly conflict, with the interest of the trust or its
beneficiary. Put another way, the trustee may not enter into a transaction or
take or continue in a position in which his personal interest or the interest of a
third party is or becomes adverse to the interest of the beneficiary."). See also
Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) ("A trustee is
held to something stricter than the morals of the market place. Not honesty
alone, but the punctilio of an honor the most sensitive, is then the standard of
behavior.").

Judge (later Justice) Cardozo described the trust law review standard
in self-dealing conflicts of interest circumstances as follows:

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

Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.) (quoting Munson
v. Syracuse, Geneva & Corning R.R., 8 N.E. 355, 358 (N.Y. 1886)).
77. ERISA § 404, 29 U.S.C. § 1104 (2000). See also ERISA § 3(21)(A), 29
78. ERISA § 404, 29 U.S.C. § 1104; ERISA § 408(c)(3), 29 U.S.C.
"[a]lthough § 408(c)(3) of ERISA permits a trustee of an employee benefit fund
to serve as an agent or representative of the union or employer, that provision
in no way limits the duty of such a person to follow the law's fiduciary
standards while he is performing his responsibilities as trustee").
expressly authorizes employers, who have ultimate responsibility to pay employee benefit claims, to serve as plan administrators who decide whether or not to pay those claims. Additionally, the statute allows employers to appoint their agents or employees to serve as plan administrators, who decide which claims the employer is ultimately responsible to pay when the plan is unfunded. Further, insurance companies that pay benefit claims owed under a plan often serve as the plan administrator who decides whether a plan participant claim should be approved. Given ERISA’s contradictory duty of loyalty directions, it is easy to understand why courts have struggled when applying trust law conflict of interest rules to standard of review questions in ERISA benefit claims.


80. See 29 U.S.C. § 1102(c)(1) (stating that “[a]ny employee benefit plan may provide—(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator)...”).

81. See, e.g., Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311, 1312 (5th Cir. 1985) (ruling on a case where employer purchased group disability insurance policy from insurer to fund ERISA welfare benefit plan, however, insurer alone possessed discretion and authority to decide benefit claims), rev’d 481 U.S. 41 (1987). See also Shaw v. Conn. Gen. Life Ins. Co., 353 F.3d 1276, (11th Cir. 2003) (plan insurer also serving as claims administrator). Even when employers appoint themselves as plan administrators under fully insured plans, they often delegate at least preliminary responsibility to the plan insurer to process claims. See, e.g., Moon v. Am. Home Assurance Co., 888 F.2d 86 (11th Cir. 1989). Further, as a practical matter, the plan insurer often controls the claims administration process even when the plan language reserves final discretionary authority to the employer or plan administrator. See, e.g., Computer Aided Design Sys. Inc. v. SAFECO Life Ins. Co., 235 F. Supp. 2d 1052, 1053 (S.D. Iowa 2002) (discussing fact pattern where the employer was designated as plan administrator and fiduciary “with the sole authority and responsibility to review and make final decisions on all claims for benefits” but where stop loss insurer actually controlled claims decisions).

82. A conflict of interest affecting ERISA plan fiduciaries can involve both bias favoring an employer over employees, for example, where an employer hires and pays a third-party administrator to process claims, or it can involve the more sinister self-dealing conflict, for example, where the employer makes claims decisions directly as the plan administrator. If the employer contracts with a third party to serve as plan administrator under a renewable administrative services contract, the plan administrator will have an incentive to decide controverted benefit claims in favor of the employer in order to curry favor with the employer to help assure that the contract will be renewed. When an ERISA plan is unfunded or is funded through the purchase of insurance, a direct self-dealing conflict of interest often exists. In an unfunded plan where the employer also serves as the plan administrator (as was the
Several prominent scholars have examined how a trustee's conflict of interest impacts the standard of review in ERISA cases. For purposes of this article, three observations

in Firestone, every dollar saved by the plan administrator in denying a plan participant's claim is a dollar earned by the employer. Similarly, a self-dealing conflict of interest is present when a plan is funded through the purchase of insurance and the insurance company payor also controls the claims decisions, whether named as the plan administrator or not. See, e.g., Crespo v. UNUM Life Ins. Co., 294 F. Supp. 2d 980 (N.D. Ill. 2003) (plan insurer also serves as plan administrator); Computer Aided Design Sys., Inc., 235 F. Supp. 2d at 1052 (insurer, though not named as plan administrator, still controls claims process). Compare Judge Posner's discussion of the conflict of interest question in Van Boxel, 836 F.2d at 1050-53 (evaluating an employer's possible conflicts of interest in different circumstances and endorsing a sliding scale standard of judicial review) with Judge Becker's discussion of the direct conflict of interest in Bruch, 828 F.2d at 137-45 (employer who serves as plan administrator of unfunded plan suffers a direct, dollar-for-dollar conflict of interest when making benefit claims decisions), aff'd in part and rev'd in part, 489 U.S. 1 (1989). See Fought v. UNUM Life Ins. Co., 357 F.3d 1173 (10th Cir. 2004). See also Muir, supra note 4, at 406-10.

83. See Kennedy, supra note 29; Muir, supra note 4; Flint, The Arbitrary and Capricious Rule under Siege, supra note 29. I favor the analysis, supported in Justice Stevens opinion in Mass. Mutual Life Insurance Co v. Russell, 473 U.S. 134, 140-43 n.8 (1985), and advanced by Professor Muir of the University of Michigan. Professor Muir suggests that trust law is best applied in ERISA, when a plan is funded through a trust, to the trustee's investment activities and its duty to manage trust assets. Professor Muir observes, however, that trust law presents a more questionable fit when applied to benefit claim administration, and urges courts to apply different review standards to claims that involve asset administration from claims involving benefit administration. See Muir, supra note 4, at 406. Professor Muir states:

While pension plans raise asset concerns, prompting Congress to heavily regulate their terms and funding, health care plans are exempt from much of ERISA . . . . The issues that currently plague health care plans . . . have proven to be very different from the problems of asset administration that so concerned ERISA's drafters. In a health care plan typically no trust exists to hold assets; instead claims are paid through an insurance program or, in the case of a self-funded plan, on a current basis from the general assets of the employer. Therefore, diversification of plan investments and theft of plan funds do not tend to be frequent problems. Plan actors have little chance to engage in opportunistic behavior vis-à-vis plan assets when funds are not identified to the plan, much less invested for the future payment of benefit claims.

This does not mean, however, that health care plans do not give rise to opportunistic behavior by plan actors. Instead, the problematic behavior that has developed under health care plans and that has gained widespread attention in recent years is different in character than what occurred in pension plan operation prior to ERISA. Rather than issues of asset administration, health care plans spawn issues of benefit administration.

Id.
predominate: first, ERISA regulates pension plans and welfare plans differently; second, ERISA's civil enforcement scheme provides a variety of remedies, including both legal and equitable claims; and third, in ERISA, the trust, when employed, serves as a security instrument to guarantee separate contract promises made by the employer to its employees. The differences in how ERISA regulates welfare and pension plans, and the differences within ERISA's remedies provision impact whether trust law principles should apply to specific ERISA questions. Further, when courts fail to recognize that an ERISA trust is not used to implement a donative transfer, courts ignore the underlying contractual promises which the trust is designed to secure.84

B. Deferential Review of Employee Benefit Claims Prior to ERISA

1. Employee Benefits as Gratuities

The history of the organized labor movement in the United States tracks the metamorphosis of our nation from an agriculturally based economy to an industrial power dominated in the late nineteenth and early twentieth centuries by the steel, coal, railroad, oil and other heavy industries.85 As the country transformed from a nucleus of the largely self-employed to become a “nation of employees,”86 those new industrial employees, seeking better working conditions, began to organize in large numbers.

84. See generally Flint, Reformulating the Federal Common Law for Plan Interpretation, supra note 4 (describing participants' dependence on traditional equitable remedies of the common law of trusts). See also Conison, supra note 4 (reiterating the same rationale). Similarly, when a plan is insured, obligations under the insurance contract should be governed by insurance contract law principles. See ERISA §§ 403(b)(1) and (2), 29 U.S.C. §§ 1103(b)(1) and (2) (2000) (exempting insurance contracts from ERISA's trust requirements), and ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (2000) (saving state insurance laws from ERISA preemption).


86. BRANDEIS, supra note 85, at 65-66. See SASS, supra note 85, at 6-33.
One of the most significant dilemmas the growing class of industrial workers presented to employers and society was the need to accommodate the older workers' perceived declining productivity and his or her need for economic security post employment.

It is well documented that labor's initial efforts to band together in order to achieve improved compensation and working conditions met resistance from employers, and from the courts in the United States. Labor's attempts to unite in the nineteenth century exposed workers engaged in strikes, picketing, and boycotts to criminal prosecution under common law conspiracy charges. Following a relatively short duration of criminal prosecution of striking and boycotting workers, employers turned to civil anti-trust laws, and particularly to the remedy of injunction, in order to combat organized labor. Employers successfully attacked labor activities under the Sherman Antitrust Act obtaining restraining orders that prohibited strikes and boycotts, and subjecting union organizers to treble damage awards. In 1914, Congress passed the Clayton Act to overturn court interpretations which applied the Sherman Act to union activities.
activities, but narrow court applications of the Clayton Act rendered that statute ineffective in protecting labor unions. 94 Finally, in 1935, Congress passed the Norris-LaGuardia Act 95 which effectively prevented employers from obtaining injunctions against union strikes and boycotts under the claim that such activities constituted violations of anti-trust law. 96 

Labor's relative lack of power at the turn of the 20th century is reflected in the early development of the common law of pension benefits. Prior to the industrial revolution, employers tended to deal with aging workers on a case by case basis, perhaps finding less demanding jobs for some older workers, or rewarding some loyal workers with the equivalent of retirement benefits. 97 As employers faced the problems inherent with aging workers in an industrial workforce for the first time on a large scale, 98 more systematic methods had to be developed to cope with workers who no longer contributed economic value relative to younger workers. 99 Slowly, employers began to offer formal retirement plans for their workers, 100 however, when workers challenged

96. See United States v. Hutcheson, 312 U.S. 219, 236 (1941) (noting that "[t]he Norris-LaGuardia Act was a disapproval of Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) and Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n., 274 U.S. 37 (1927), as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act.").
97. Conison, Foundations, supra note 85, at 583-84. See also FRANKFURTER & GREENE, supra note 90, at 2. Before the Civil War, and before the mass exodus of the worker population to industrial and factory jobs, employers did not face the problem of the aging worker on a large scale. In addition to shorter life expectancies in the nineteenth century, the development of the frontier drove a westward migration which also contributed to a more transient work force and a relative scarcity of workers who remained as long-time employees for a single employer. LATIMER, supra note 85, at 20-60, quoted in Conison, Foundations, supra note 85, at 582-83. SASS, supra note 85, at 23-25.
98. See LANGBEIN & WOLK, supra note 85, at 3-6 (citing statistics which indicate that between 1900 and 1984 life expectancy in the United States increased from forty-seven years to seventy-five years).
employer action in canceling benefit programs,\textsuperscript{101} or altering eligibility requirements,\textsuperscript{102} or just denying particular claims,\textsuperscript{103} courts failed to recognize employee contract rights to such benefits.\textsuperscript{104}

Courts initially viewed employer provided retirement plans as gifts to the workers which the employer could alter in its discretion, or at its whim.\textsuperscript{105} Additionally, when employers set aside money or assets to fund such retirement plans, courts held that the fund was the property of the employer, with which the employer could do as it pleased.\textsuperscript{106} Seemingly predicting the \textit{Firestone} dicta half a century before ERISA’s enactment, employers often drafted their retirement plans so as to reserve to the employer discretion to change the terms of the plan and the absolute right to make benefit determinations.\textsuperscript{107} Courts strictly enforced such benefit plan language leaving employers in control of employee benefits because individual workers did not have the bargaining power to negotiate the terms of their fringe benefit programs.\textsuperscript{108}

Workers, of course, felt deceived when an employer failed to provide benefits according to the workers’ expectations. Employees suggested that they were induced to spend their best work years in service for the employer upon the promise that the employer would provide for them in retirement. While some

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\text{\textsuperscript{101}} Professor Jay Conison, in his examination of the common law foundations of employee pension plans, cites numerous examples of written pension programs containing language declaring the benefits to be awarded solely at the discretion of the employer, and without any right of the worker to seek review of the employer’s decision to deny the benefit. See Conison, \textit{Foundations}, supra note 85, at 590-93 (citing Menke v. Thompson, 140 2d 786, 790 (8th Cir. 1944); Magnolia Petroleum Co. v. Butler, 86 S.W. 2d 258, 262 (Tex. Civ. App. 1935); Cowles, 161 N.E. at 152; Fickling v. Pollard, 179 S.E. 582, 582-83 (Ga. App. 1935); McNevin, 53 N.Y.S. at 99).
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\text{\textsuperscript{104}} See Menke, 140 2d at 790. Conison, \textit{Foundations}, supra note 85, at 589-98.
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\text{\textsuperscript{105}} See, e.g., Menke, 140 2d at 790. Conison, \textit{Foundations}, supra note 85, at 589-98 (discussing the treatment of a pension plan as employer property).
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\text{\textsuperscript{106}} See Conison, \textit{Foundations}, supra note 85, at 590-98 (citing various cases). See also \textit{SASS}, supra note 85, at 34.
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\text{\textsuperscript{107}} See Menke, 140 2d at 790 (citing various cases). See also \textit{SASS}, supra note 85, at 34.
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employer's surely acted out of altruistic motivations in establishing fringe benefit plans, the growth in the number of pension plans during the Twentieth Century reflects the beneficial aspects to employers of providing pension programs for their employees.\textsuperscript{109} Employers offer retirement benefits as an incentive to attract good young workers, and to maintain a stable group of employees.\textsuperscript{110} The genesis of the employee benefit as contract right emerged from the expectations employees developed as a \textit{quid pro quo} for accepting employment and remaining loyal and hard-working over a course of years and for deferring compensation until retirement.\textsuperscript{111}


Congress enacted the National Labor Relations Act (NLRA),\textsuperscript{112} commonly known as the Wagner Act, in 1935 to create a statutory right for workers to organize and assert collective strength in contract negotiations with employers, and more broadly to encourage union representation and collective bargaining.\textsuperscript{113} In the Wagner Act, Congress endorsed the concept of a bargaining unit, chosen by a majority of the employees within the unit, to serve as bargaining agent for the union workers. The

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\textsuperscript{109}Conison, \textit{Foundations, supra} note 85, at 598-609.

\textsuperscript{110}See \textit{Bowler}, 200 N.W. at 260 (stating that "[t]he object of the corporation expending its money for pensions is continuity of service, or increasing the continuity of service, decreasing the turn-over of employees, making it an object for them to stay with us. . . . In my opinion it is an economic advantage to the company in providing this pension system for our employees; that is our real reason for setting aside the funds and making the expenditure for the pension. I believe the pension produces greater faithfulness on the part of the employee. The question of labor turn-over is an item of considerable expense to an industrial concern; it is very much to the advantage of the company to have employees in continuous employment. We look upon the pension as compensation for long service.") (quoted in Conison, \textit{Foundations supra} note 85, at 588 n.47)).

\textsuperscript{111}See generally Conison, \textit{Foundations, supra} note 85, at 575-618 (commenting on emergence of employee benefit contract right). Compare \textit{Van Horn v. Lewis}, 79 F. Supp. 541, 544 (D.D.C. 1948) (holding that benefit promises funded through LMRA trust are gratuities) \textit{with Hobbs v. Lewis}, 159 F. Supp. 282, 286 (D.D.C. 1958) (fringe benefits provided through LMRA plan are in the nature of deferred compensation which employees have contractual right to receive).

\textsuperscript{112}49 \textit{Stat.} 449 (1935) (codified as amended at 29 U.S.C. § 151 (West 2004)).

NLRA worked to encourage a system of self-government in labor-management relations,114 with the purpose of promoting industrial peace, and advanced through a preference for settlement of labor-management disputes by "the processes of conference and collective bargaining between employers and the representatives of their employees."115

The collective bargaining process and resulting self-government of labor disputes established under the NLRA sacrificed individual rights for labors' presumed collective good. The union negotiated with management on behalf of a group of workers. Individual workers, of course, may have disagreed with the will of the group; however, the collective bargaining process established the union as the exclusive bargaining agent for labor.116 Congress quickly reinforced its choice to serve labors' collective good rather than to focus on individual employee protections when it adopted the Labor Management Relations Act amendments to the Wagner Act in 1947.117 While the Wagner Act

115. Id. at 581-82. Consequently, courts have favored the enforcement of arbitration agreements contained in negotiated labor agreements. Further, the arbitration award resulting from a collectively bargained agreement will generally be enforced without review, unless the arbitrator based the award on something other than the labor agreement. Id. See generally Theodore J. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 Mich. L. Rev. 1137 (1977).

declared a public policy favoring collective bargaining, the NLRA did not address enforcement of collectively bargained contracts. The LMRA corrected that deficiency for the union and the employer; however, it did not create any express remedies for individual workers to enforce their rights under collectively bargained contracts.\(^{118}\)

3. The LMRA Does Not Provide an Express Remedy for Individual Union Members to Recover Benefits Due Under a Collectively Bargained Labor Agreement

The LMRA established a basis to enforce collectively bargained labor agreements by expressly granting labor unions and management the right to sue in federal court to enforce each party's contract rights. LMRA § 301 (a) instructs that "suits for violation of contracts between an employer and a labor organization ... may be brought in any district of the United States having jurisdiction of the parties."\(^{119}\) Absent a binding arbitration agreement,\(^{120}\) both the labor union and the employer can sue under LMRA § 301 to enforce Taft-Hartley agreements. In contrast to the way courts currently process ERISA benefit claims,\(^{121}\) in LMRA § 301 lawsuits, the rules of civil procedure

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119. 29 U.S.C. § 185(a). States have concurrent jurisdiction to hear LMRA § 301 suits, but state court judges must apply federal law in such proceedings. See Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). LMRA § 301(a) can be viewed as a rejection of the enforcement procedures Congress applied under the Railway Labor Act, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. 151), which created the National Railway Adjustment Board to determine disputes involving the interpretation of labor agreements between railroad workers and their employers. The National Railway Adjustment Board's decisions were deemed final and binding, except as to monetary awards. As to monetary awards, the statute authorized suit in federal courts to order compliance with the Board's orders, where such orders and findings were "prima facie evidence of the facts stated therein." Id.; Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., 353 U.S. 30 (1957).


121. See generally DeBofsky, supra note 14 (criticizing courts in ERISA cases for deciding ERISA benefit claims based upon an "administrative record"); see Consion, supra note 4, at 21-33 (exposing the myth of judicial review when
apply, trials are conducted de novo, and the right to a jury trial pertains.\textsuperscript{122}

Notably absent in LMRA § 301 is an express right of action for individual workers to enforce their rights arising from collectively bargained labor agreements. Prior to ERISA, which grants both union and non-union workers the express right to sue for benefits due under an employee benefit plan, individual workers denied benefits under a collectively bargained labor contract faced significant jurisdictional obstacles in attempting to obtain judicial relief.\textsuperscript{123} Workers could ask the union to bring their individual grievances to the employer, but if a union failed to pursue an individual worker's grievance, many courts held that the employee's only remedy was against the union for not fairly representing the worker's interests.\textsuperscript{124} As a result of the failure of the LMRA to expressly authorize individual worker suits, union members struggled under the LMRA to find a legal theory which would allow them to enforce their individual claims for benefits.\textsuperscript{125}


\textsuperscript{123} See generally Annot., Right of Individual Employee to Enforce Collective Labor Agreement Against Employer, 18 A.L.R. 2d 352 (Supp. 2003).

\textsuperscript{124} See, e.g., Haley v. Palatnik, 378 F. Supp. 499 (S.D.N.Y. 1974), rev'd on other grounds, 509 F.2d 1038 (2d Cir. 1975). The duty of fair representation under the NLRA derives from a union's exclusive authority to represent all employees in a bargaining unit. Chauffeurs, Teamsters & Helpers Local 391 v. Terry, 494 U.S. 558, 563 (1990). The procedure developed under the LMRA typically established a collective-bargaining agreement which contained a quasi-administrative enforcement procedure. If employees complained about an employer's denial of benefits, the employee was required to submit a grievance to his or her union. The union then would decide whether to present the grievance to the employer. If the union did file a grievance on behalf of a worker, the agreed procedure often, but not always, required the parties to then arbitrate the dispute. The arbitrator's ruling was deemed final, except for a challenge that the arbitrator relied on something outside the bargaining agreement to decide the claim. See United Steelworkers v. Warrior Gulf Nav. Co., 363 U.S. 574 (1960). See also Chauffeurs, 494 U.S. at 564 (stating that "[b]ecause most collective-bargaining agreements accord finality to grievance or arbitration procedures established by the collective-bargaining agreement, an employee normally cannot bring an LMRA § 301 action against an employer unless he can show that the union breached its duty of fair representation in its handling of his grievance." (citing DelCostello v. Teamsters, 461 U.S. 151, 163-64 (1983)).

\textsuperscript{125} See Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955) (holding that Congress did not confer on the federal courts jurisdiction to hear suits by a union suing on behalf of union members
4. The “Structural Defect” Basis for Jurisdiction in Claims Under LMRA § 302

LMRA § 302 requires that all payments made by an employer or a union to fund an employee benefit plan be held in trust.\(^{126}\) Further, the statute requires that Taft-Hartley trustees apply trust assets for the exclusive benefit of covered workers.\(^{127}\) In response to court decisions holding that the Taft-Hartley Act did not provide an express private remedy for individual union members,\(^{128}\) workers urged courts to imply an individual remedy for breach of the trust law exclusive benefit rule codified in LMRA § 302. Employees asserted that when LMRA trustees denied benefit claims based upon specific plan language, that the plan, as structured, violated § 302's requirement that trust assets be applied solely for the benefit of plan beneficiaries.\(^{129}\) A number of federal courts accepted the LMRA § 302 “structural defect” theory of liability and relied upon that implied remedy to support federal court jurisdiction to hear individual employee benefit claims.\(^{130}\) While the structural defect basis of liability and jurisdiction allowed workers to enter the federal courthouse, because the action arose under the trust law-based exclusive benefit rule, courts hearing employee benefit claims under LMRA § 302 applied to recover accrued wages), discredited in, Smith v. Evening News Ass'n, 371 U.S. 195, 198 (1962).

127. Id. The LMRA includes protections to prevent a party biased toward either the employees or the employer from controlling a Taft-Hartley trust. Specifically, the LMRA requires that both the employees and the employer appoint an equal number of trustees to administer the Taft-Hartley trust. LMRA § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B) (2000). Additionally, the LMRA details a procedure for the selection of a neutral umpire to decide issues when the trustees deadlock. Id. Despite the requirement of equal representation on the board, some suggest that unions have exerted undue control over Taft-Hartley multi-employer plans. SASS, supra note 85, at 181.
129. See, e.g., Insley v. Joyce, 330 F. Supp. 1228, 1231-32 (N.D. Ill. 1971). See also McCreary, supra note 29, at 1039-40 n.20 (citing Music v. W. Conference of Teamsters Pension Trust Fund, 712 F.2d 413 (9th Cir. 1983); Hurn v. Ret. Fund of Plumbing, Heating & Piping Indus., 703 F.2d 386 (9th Cir. 1983); Lugo v. Employees Ret. Fund of Illumination Prod. Indus., 529 F.2d 251 (2d Cir. 1976)). Professor Jay Conison suggests that Mr. McCreary's conclusion that the arbitrary and capricious standard of review in employee benefit cases originated with the LMRA structural defect cases is flawed. Conison, supra note 4, at n.117. While Professor Conison establishes that courts applied a deferential standard of review in pension cases before the enactment of the Taft-Hartley Act, Mr. McCreary's point that courts hearing ERISA cases looked to LMRA decisions as a guide in applying the deferential standard of review in ERISA benefit claims appears well founded. Van Boxtel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987); Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 140-45 (3d Cir. 1987).
130. See generally McCreary, supra note 29.
ERISA's civil enforcement provisions provide specific remedies for both union and non-union workers challenging benefit denials under employment provided benefit plans. Additionally, ERISA's legislative history indicates that Congress borrowed to some extent from the LMRA when it drafted ERISA. Consequently, when union members filed claims under ERISA § 502(a)(1)(B), courts applied the same standard of review that they had been applying in LMRA § 302 claims brought by individual workers, without stopping to compare the express remedy provided in ERISA to the implied trust law-based structural defect claim.

In most of the early ERISA benefit claim cases, courts followed the LMRA precedent of deferring to fiduciaries' decisions without serious consideration of the legal basis supporting a deferential standard of review under the ERISA law. Slowly, however, some courts began to express concern over the transparent unfairness in deferring to an ERISA plan administrator's decisions when a plan participant exposed the plan administrator's conflict of interest. In *Bruch v. Firestone Tire & Rubber Co.*, Circuit Judge Edward R. Becker finally analyzed the LMRA origins of the deferential standard of review in ERISA cases and found that the LMRA analogy did not fit...
ERISA's circumstances. \textsuperscript{138}

III. FIRESTONE TIRE \& RUBBER CO. V. BRUCH: PLAN PARTICIPANTS WIN THE BATTLE AND LOSE THE WAR

A. The Firestone Plan was Unfunded

In 1980, Firestone Tire \& Rubber Company sold its Plastics Division to Occidental Petroleum Company. At the time of the sale, Firestone sponsored an ERISA-governed employee benefit plan, known as the Termination Pay plan, which promised severance benefits to any employee if Firestone discharged the worker from employment because of a "reduction in work force." \textsuperscript{139}

Six Plastics Division workers who lost their jobs with Firestone as a result of the sale to Occidental, but who were re-hired by Occidental, sought severance benefits from Firestone. \textsuperscript{140} Firestone refused the employees' demands for benefits based upon its interpretation that the separation of a group of employees from the company due to the sale of the Plastics Division did not amount to a "reduction in work force" within the meaning of the Termination Pay Plan.

Firestone did not realize ERISA governed the Termination Pay Plan. \textsuperscript{141} Consequently, it did not comply with ERISA's formalities in operating the plan. \textsuperscript{142} In particular, Firestone neglected to appoint a plan administrator for the Termination Pay plan. As a result, Firestone itself became the plan administrator \textsuperscript{143} and the plan fiduciary \textsuperscript{144} under ERISA's default appointment rules. \textsuperscript{145} Additionally, Firestone did not separately

\textsuperscript{138} Id. at 143-46.
\textsuperscript{140} Id. Apparently, Occidental paid the same wages as Firestone, but the parties disagreed about whether the fringe benefits offered by Occidental were comparable to the benefits Firestone employees received. \textit{Id. See Brief of the United States as Amicus Curiae Supporting Respondents at 2 n.1, Firestone Tire \& Rubber Co. v. Bruch, 489 U.S. 101 (1989) (No. 87-1054) [hereafter United States Amicus Brief] available in LEXIS at 1987 U.S. Briefs 1054.}
\textsuperscript{141} Firestone, 489 U.S. at 105. Firestone's claim of innocent ignorance is belied somewhat by the fact that it also failed to follow ERISA's funding requirements in establishing its separate pension plan. \textit{Id.}
\textsuperscript{142} Id. ERISA directs that every employee benefit plan shall be established and maintained pursuant to a written instrument and that such instrument shall appoint one or more named fiduciaries who shall administer the plan. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (2000). Additionally, Firestone did not establish an internal claims process or appeals process as required by ERISA, and it did not comply with ERISA's reporting and disclosure requirements. ERISA § 101-111, 29 U.S.C. §§ 1021-1031, 1133 (2000).
\textsuperscript{144} ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).
fund the severance benefit plan.\footnote{146} Together, Firestone's failure to fund the plan and its default appointment as plan administrator placed Firestone in direct conflict with its employees in claims arising from the severance plan. Since Firestone had both the contractual responsibility to pay the employee benefits, and the power as the default plan administrator to decide whether to approve claims, every decision Firestone made to deny a plan participant's benefit claim resulted in a direct, dollar-for-dollar gain for the employer.\footnote{147}

The former Firestone workers sued under ERISA § 502(a)(1)(B) to recover benefits allegedly due to them under the terms of the Firestone severance plan.\footnote{148} Despite Firestone's admitted failure to comply with ERISA, the district court held that the Termination Pay plan was an ERISA welfare benefit plan, but then entered summary judgment against the workers. Based upon the prevailing authority from many circuits,\footnote{149} the district judge believed he could not interfere with a plan administrator's interpretation of an ERISA plan, unless the administrator acted arbitrarily.\footnote{150} The district judge found that Firestone's

\footnote{146. \textit{Firestone}, 489 U.S. at 105. Firestone's failure to fund the Termination Pay plan, in and of itself, did not violate ERISA, but it significantly impacted Judge Becker's standard of review analysis in his Third Circuit decision because it starkly presented the unfairness to plan participants when courts deferred to one of the contracting parties' interpretation of contract provisions. \textit{Bruch}, 828 F.2d at 144-45.}

\footnote{147. \textit{Bruch}, 828 F.2d at 144. The \textit{Firestone} conflict is typical of contracts where the law assumes self-interest motivates each of the parties to the contract. The presumed self-interest of contracting parties is the reason why courts apply \textit{de novo} review under contract law, deferring to neither party's interpretation of contract terms. The conflict of interest reflected in \textit{Firestone} is not the usual circumstance under a trust where the settlor typically places funds under the control of a neutral trustee to fund a promise (or gift) made to the beneficiary. Under trust law, the trustee must adhere to a duty of loyalty owed to the beneficiaries and must generally avoid any conflicting interest. Since the trustee is presumed to be free of self-interest, courts defer to the non-conflicted trustees exercise of discretionary powers. One of the most confounding problems in ERISA is the difficulty in applying trust law principles, which are based on the presumption that the trustee is not motivated by self-interest, where the statute expressly allows plan fiduciaries to serve while suffering a self-interested conflict of interest.}

\footnote{148. \textit{Bruch}, 828 F.2d at 136-37. The workers also sought statutory damages resulting from Firestone's alleged failure to provide information concerning their benefits package in violation of ERISA. \textit{Id.} Additional claims for increased retirement benefits, vacation benefits, and the right to participate in a stock purchase benefit plan were apparently settled. United States Amicus Brief, \textit{supra} note 140, at 2 n.3.}

\footnote{149. \textit{See Bruch}, 828 F.2d at 138 (citing cases).}

\footnote{150. \textit{Id.} at 137. District Judge Daniel H. Huyett apparently applied some form of sliding scale judicial review of Firestone's claim denial due to Firestone's conflict of interest. Though Judge Huyett concluded that Firestone's interpretation was not arbitrary or capricious, he stated that}
interpretation of the "reduction in work force" language was not arbitrary or capricious.

B. The Third Circuit Questioned the Basis for Applying a Deferential Standard of Review

In *Bruch v. Firestone Tire & Rubber Co.*, the Third Circuit Court of Appeals reversed the district court's award of summary judgment to Firestone because the trial court did not adequately account for Firestone's conflict of interest when it applied an arbitrary and capricious standard in reviewing the former employees' severance benefit claims. Judge Becker's opinion in *Bruch* laboriously traced the origins of the arbitrary and capricious review standard as applied in ERISA, first to the ERISA decisions importing the standard from LMRA cases, and then to the LMRA cases which imported the standard from the common law of trusts. While Judge Becker concluded that the trust law-based standard of review applied to ERISA benefit claims, he distinguished the application of trust law under ERISA from trust law applied under the LMRA and ruled that when an ERISA trustee operates under a conflict of interest, courts should apply a *de novo* review of benefit claim denials.

Judge Becker's opinion establishes that when courts first imported the LMRA deferential standard of review as the paradigm to review ERISA benefit claim denials, those courts failed to recognize a fundamental difference in the operation of Taft-Hartley trusts and trusts established under ERISA. The Taft-Hartley Act requires that trusts established under collective bargaining agreements to fund pension benefits be administered by a neutral board of trustees. In contrast, the employer who is ultimately responsible to pay promised benefits owed to ERISA plan participants also controls the selection of the plan administrator who decides claims, with no input from the plan administrator.

"because Firestone avoided the outlay of a substantial amount of money by denying plaintiffs termination pay...[the court] may scrutinize the decision more closely." Petitioner's Brief at 3, *Firestone*, (No. 87-1054) (hereinafter, Petitioner's Brief), available in LEXIS at 1987 U.S. Briefs 1054.

151. 828 F.2d 134 (3d Cir. 1987).
152. *Id.* at 145.
153. *Id.* at 140-41, 143-45.
154. *Id.* at 142-43.
155. *Id.* at 136.
156. *Id.* at 138-39. Here Judge Becker assumed that Firestone funded its severance plan through the establishment of a trust, which it did not. Elsewhere in the opinion Judge Becker emphasized that the Firestone plan was unfunded in order to establish the plan administrator's conflict of interest, but he failed to take the next logical step and hold that trust law should not be applied at all when there is no trust. See *infra* notes 194-207 and accompanying text.
members. The ERISA plan administrator, therefore, is never really neutral, and that is particularly true when the plan sponsor and the plan administrator are the same entity, either because the employer appointed itself, or a committee of its employees, to serve as plan administrator, or because ERISA’s default appointment rules apply. As a result of the inherent conflict of interest existing when a plan sponsor also serves as the plan administrator, which the Firestone facts presented most dramatically, the Third Circuit accorded no deference to the plan administrator’s benefits decision under trust law principles.

Judge Becker’s Third Circuit opinion ably discredited the blind application of LMRA standard of review precedents to ERISA benefit claims. Judge Becker also appropriately grounded his trust law analysis in Comment g to the Restatement (Second) of Trusts § 187 dealing with a trustee’s improper motive. Unfortunately, Judge Becker overlooked one additional and crucial difference between ERISA and the LMRA which impacts the application of trust law. In ERISA, welfare benefit plans are exempt from the statute’s trust funding requirements. The Third Circuit Bruch opinion remains unsatisfying because the opinion failed to recognize the paradigmatic inconsistency of applying trust law, rather than contract law, to govern ERISA benefit claims when the benefit plan under consideration is not

158. Bruch, 828 F.2d at 144.
159. See Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669, 674 (Cal. 2000) (holding that for the arbitration clause in a consumer contract to be enforceable, the arbitration must meet certain minimum requirements of fairness, including the neutrality of the arbitrator, a provision for adequate discovery, a written decision that permits a limited form of judicial review, and limitations on costs of arbitration); Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999) (holding that an arbitration clause is unenforceable where an employer who drafted the arbitration agreement created circumstances where it controlled who was on the panel of approved arbitrators).
160. Bruch, 828 F.2d at 145. The court stated that “[t]he principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of beneficiaries, his decisions are to be scrutinized with the greatest possible care. ‘Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty.’” Id. at 145 (citing Meinhard v. Salmon, 249 N.Y. 458, 464 (1928)).
161. Bruch, 828 F.2d at 141. Where the employer funds a plan through a trust and also serves as the ERISA plan administrator and fund trustee or where the employer appoints a committee of its employees to serve as plan administrator and fund trustee, courts evaluating the conflict of interest should apply trust law’s self-dealing rules. Under the common law of trusts, where a trustee is conflicted due to self-interest or self-dealing, courts apply the no-further-inquiry rule. Judge Cardozo’s famous recitation of the rule is contained in Wendt v. Fischer, 154 N.E. 303 (N.Y. 1926), and is quoted supra note 76.
162. See infra notes 185-193 and accompanying text.
funded through a trust. The Bruch opinion is especially disappointing because Judge Becker acknowledged the trust law versus contract law debate among the District of Columbia judges who decided the early LMRA cases, but he failed to examine that question in the ERISA benefit claim before the Court in Bruch.

The most substantial discussion of the overlapping application of trust law and contract law in claims arising from Taft-Hartley trusts examined by Judge Becker appears in Kennet v. United Mine Workers of America. In Kennet, Judge Holtzoff

163. Bruch, 828 F.2d at 136. Judge Becker carefully recited that Firestone never established a trust to fund its promises to provide benefits. Bruch, 828 F.2d at 136. However, despite the Judge's focus on the significance of the lack of a funding mechanism in creating Firestone's conflict of interest under trust law, Judge Becker never made the underlying connection that when an ERISA plan is unfunded, that means there is no trust and no trustee. Id. at 144-45. Absent a trust res and a trustee, trust law cannot apply.


165. 183 F. Supp. 315 (D.D.C. 1960). See generally Langbein, Basis of the Law of Trusts, supra note 30; FRANK H. EASTERBROOK & DANNIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). In Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948), the first LMRA case to mention the standard of review question, District of Columbia Judge Goldsborough characterized the United Mine Workers of America Welfare and Retirement Fund as a charitable trust. Id. at 544. Applying trust law doctrine, Judge Goldsborough found that no power existed with the courts to interfere with the reasonable acts of the fund trustees. Id. at 546. Judge Goldsborough's writing style, while revealing his stream of conscience, is perhaps not as precise as one might like, consequently, the foundational basis for his opinion is somewhat murky. Other District of Columbia District Judges subsequently rejected Judge Goldsborough's view that the United Mine Workers pension benefit was in the nature of a gift, and remarked upon the worker's contractual right to receive the benefit negotiated by the union with mine operators. See also Bruch, 828 F.2d at 142 (quoting Hobbs v. Lewis, 159 F. Supp 282, 286 (D.D.C. 1958)). The Court stated that:

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 plan] 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, the United Mine Workers of America. . . . An employee therefore has a contractual right to this pension if and when he comes within the regulations prescribed by the trustees.

Id. See also Ruth v. Lewis, 166 F. Supp. 346, 349 (D.D.C. 1958) (stating that "[the] Court is of the opinion that despite the contractual provisions in the trust instrument giving absolute discretion to determine eligibility to the fund,
appeared to favor the application of contract law when he expressly rejected the contention that employee benefits are gratuities. Judge Holtzoff identified the union worker as a third-party beneficiary of the contract between the mine workers union and the mine operators.\textsuperscript{166} But despite some helpful language indicating that de novo review applied, at least as to questions of law, Judge Holtzoff finally sought to determine whether the trustee's actions were arbitrary or capricious.\textsuperscript{167} Judge Holtzoff remarked:

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

\textsuperscript{166}. \textit{Kennet}, 183 F. Supp. at 317-18. In ERISA non-union plans, the contractual nature of a benefit claim is stronger than under the LMRA because the employee's contractual relationship is directly with the employer—there is no middle man union negotiating on behalf of the worker. When an employer's promises under an ERISA plan are funded through a trust, the trust serves as security to guarantee the employer's promises, however, the benefit is identified by the employer's separate written promises. When a plan is insured, the employer's promises are somewhat different than the trust promises. Arguably, the employer's promise is to purchase insurance, not to pay benefits. See Korobkin, \textit{supra} note 71. The employer contracts with an insurance company to assume the risk of paying the benefit, disability benefits, for example, or in traditional health insurance, the medical provider fees. In the group insurance plan, the insurer typically provides a certificate of insurance to each insured evidencing the contractual duties owed to the insureds. Where the benefit is HMO coverage, the employer pays for the workers membership in the HMO. The HMO contracts with the member to either directly provide medical care, or it promises to pay for services of a specified group of medical providers or services. In group insurance, the plan often recites that the group policy is the plan, and each Summary Plan Description distributed to each employee typically contains a certificate of insurance confirming the direct contractual relationship between the insurer and the insured.

\textsuperscript{167}. In \textit{Firestone}, the Supreme Court rejected the LMRA analogy as a model to support the application of trust law in ERISA claims because the Court said lower courts had applied the arbitrary and capricious standard of review in implied LMRA § 302 structural defect claims as a way to assert federal court jurisdiction. See infra notes 176-183 and accompanying text. Professor Conison criticizes the structural defect analysis, remarking that the arbitrary and capricious review standard had been applied to employee benefit claim denials long before the structural defect cases appeared. Conison, \textit{supra} note 4. The United Mine Worker series of cases support Professor Conison's view. None of these early LMRA cases even mention the basis for federal court jurisdiction, and the cases do not cite what section of the LMRA, for example either § 301 or § 302, the plaintiffs relied upon to support their claims.
wages. The services rendered by him are the consideration for both his wages and his pension .... The employee may be regarded as a third party beneficiary to a contract .... The court concludes, therefore, that recourse to judicial action may be had to enforce rights under the 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 .... Finally, and it is not denied that this may be done, the Court will review the questions of whether the action of the trustees is in any way arbitrary or capricious.168

In Bruch, after quoting the LMRA United Mine Worker district court cases to emphasize the debate concerning the contractual nature of an employee's claim for benefits,169 Judge Becker inexplicably ignored the case for contract law predominance in his own standard of review analysis. Judge Becker just assumed trust law governed benefit claims arising from all ERISA plans because the LMRA courts ultimately decided upon trust law to govern claims arising from Taft-Hartley Act trusts170 and because ERISA allows employers to use the trust as a

168. Kennet, 183 F. Supp. at 317-18. Later in the Kennet opinion Judge Holtzoff backtracked even further from his suggestion that contract law forms the foundation of employee benefit plans. Judge Holtzoff noted that "it is not for the Court to determine the matter de novo," and then he immediately followed that statement with the suggestion that "[t]he final question to be determined is whether the action of the trustees was arbitrary or capricious." Id. at 318.

169. Bruch, 828 F.2d at 142-43.

170. The District of Columbia Circuit Court of Appeals ultimately relied upon the District of Columbia Circuit Court of Appeals ultimately relied upon the United Mine Worker series of district court cases to summarily conclude that, since benefits provided under the LMRA were administered by trustees and paid out of a trust, the trust law standard of review governed in LMRA benefit cases. Bruch, 828 F.2d at 143. Here Judge Becker cites Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962) and Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963) to support his statement that, in reliance on the United Mine Worker district court cases, the District of Columbia Circuit "settled" on the arbitrary and capricious standard of review. However, in Danti the D.C. Circuit Court expressly noted a conflict among the United Mine Worker cases in the debate whether a worker's interest in his or her pension benefits under a Taft-Hartley trust is contractual or equitable in nature. Danti, 312 F.2d at 348. Because the Danti Court found the facts egregious enough in that case to hold in the claimant's favor under any standard of review, the Danti Court stated that it did not need to resolve the standard of review issue intertwined in the question of whether the worker's right to benefits derived from contract law or trust law. Id. Interestingly, it was the Kosty Court that first misread the Danti opinion. In Kosty, the D.C. Circuit Court applied an arbitrary and capricious standard of review to a worker's claim for pension benefits from the United Mine Workers of American Welfare and Retirement Fund. The Kosty Court stated that: "[t]his conclusion is fully in accord with the definition of the scope of judicial review
method to fund employee benefit plans.\textsuperscript{171} Unfortunately, Judge Becker overlooked the fact that, while ERISA allows the trust form to be used to fund plans, unlike the LMRA, it does not require employers to fund non-pension benefit plans through the establishment of a trust.\textsuperscript{172} Judge Becker proceeded to blur the foundational basis for the \textit{Bruch} opinion by repeatedly referring to the unfunded Firestone severance plan as a trust.\textsuperscript{173} Judge Becker created even further confusion when he found that trust law provided the basis for \textit{de novo} review, but then immediately provided instructions for the district court to apply rules of contract law construction on remand.\textsuperscript{174} 

\textsuperscript{171} See Kosty, 319 F.2d at 747 (citation omitted).

\textsuperscript{172} See \textit{Bruch}, 828 F.2d at 142-43 (noting that in reliance on the LMRA cases, the D.C. Circuit adopted the "arbitrary and capricious" standard, and that the Third Circuit followed suit in \textit{Gomez v. Lewis}, 414 F.2d 1312 (3d Cir. 1969)). Judge Becker discovered two themes in the early LMRA district court decisions affecting the standard of review analysis. Remarking on those themes, Judge Becker stated:

First, the courts discussed the impartiality of the LMRA decisionmakers, and they relied on that impartiality in settling on the arbitrary and capricious standard. Second, the cases also attempted to determine whether an employee's interest in his pension benefits was contractual or equitable. If the former, these first courts believed, then judicial review of an administrator's decision would be \textit{de novo}, as would a court's review of a standard breach of contract claim. If the interest was equitable, however—as is a beneficiary's interest in his right to receive benefits pursuant to a trust—then the court would be more deferential.

\textit{Id.} at 141.

\textsuperscript{173} See \textit{id.} at 143 (holding that "[w]e 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... 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.").

\textsuperscript{174} See \textit{id.} at 145 (noting that "[t]he trust [sic] at issue here provides severance benefits, which are a form of wages. The benefits were offered as an inducement to the plaintiffs, to persuade them to work for Firestone.").
It appears that Judge Becker failed to adhere to a consistent foundational basis for his Bruch opinion because it somehow never registered that the unfunded character of the Firestone plan meant no trust existed. In Bruch, despite heroic effort, the Third Circuit Court of Appeals missed an opportunity to clarify a muddled area of the law.\textsuperscript{175} When the Supreme Court got the case, it tangled things even further.

C. The Supreme Court Applies Trust Law to Evaluate Plan Participant Claims for Benefits Due Arising from an Unfunded Plan

In the Supreme Court, Firestone urged the Court to apply a trust law-based deferential standard of review in ERISA benefit claim actions similar to the arbitrary and capricious standard applied in the review of Taft-Hartley trustee denials of individual worker benefit claims under LMRA \textsuperscript{176} The employer argued that, in light of Congress’s intent to incorporate much of LMRA fiduciary law into ERISA, and because ERISA, like the LMRA, imposes a duty of loyalty on fiduciaries and plan administrators,\textsuperscript{177} now offered by the plaintiffs and defendants.”).

\textsuperscript{175} In fairness to the Third Circuit, it does not appear that Judge Becker and his colleagues had the benefit of hearing from the United States Department of Labor. The Supreme Court does not have the same excuse. As indicated below, the Solicitor General’s \textit{amicus curiae} brief filed in the Supreme Court based its argument that contract law should govern the action on the fact that Firestone did not fund its severance plan through the establishment of a trust. See \textit{infra} notes 194-207 and accompanying text.

\textsuperscript{176} Petitioner’s Brief, \textit{supra} note 150, at 8-9.

\textsuperscript{177} \textit{See Restatement (SECOND) OF TRUSTS} § 170 (1) (1959) (stating that “[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.”). LMRA § 302 (c) mirrors Restatement (Second) of Trusts § 170, and directs that employer contributions into an employee benefit plan must be placed in trust and, held “for the sole and exclusive benefit of the employees . . . and their families and dependants.” 29 U.S.C. § 186(c) (2000). Similarly, ERISA expressly incorporates Restatement (Second) of Trusts § 170 into the statute’s fiduciary responsibility provisions at ERISA § 404 by requiring an ERISA plan fiduciary to “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1) (2000). Since ERISA codified the same trust law standard that Congress codified in the LMRA, courts deciding early ERISA cases looked to LMRA § 302 decisions for guidance, without carefully analyzing Congress’s different goals in enacting ERISA and the LMRA, and without distinguishing between the implied “structural defect” trust claims arising under LMRA § 302 and the express contract remedies available in both LMRA § 301 and under ERISA § 502(a)(1)(B). \textit{See NLRB v. Amax Coal Co.}, 453 U.S. 322, 332 (1981) (discussing ERISA’s codification of the strict fiduciary standards that a Taft-Hartley trustee must meet). \textit{But see} Struble v. N.J. Brewery Employee’s Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984) (reviewing trustee decision to allocate surplus funds to non-beneficiary third party under \textit{de novo} standard, and reversing award of summary judgment to plan trustees).
the court should import the arbitrary and capricious standard of
review applicable in LMRA § 302 cases to ERISA.\textsuperscript{178} The Supreme
Court quickly rejected the LMRA analogy, but for a different
reason than enunciated by the Third Circuit. The \textit{Firestone} Court stated:

ERISA does not set out the appropriate standard of review for
benefit eligibility determinations. To fill this gap, federal courts
have adopted the arbitrary and capricious standard developed under
61 Stat. 157, [LMRA § 302 (c),] 29 U.S.C. § 186(c), a provision of the
Labor Management Relations Act, 1947 . . . . A comparison of the
LMRA and ERISA, however, shows that the \textit{wholesale} importation
of the arbitrary and capricious standard into ERISA is
unwarranted.\textsuperscript{179}

The Supreme Court explained that lower courts implied a
remedy under LMRA § 302, known as the \textquotedblleft structural defect\textquotedblright
theory of liability, in order to fashion federal court jurisdiction for
individual union worker claims under the LMRA, which did not
provide an express remedy for individual workers to challenge the
denial of benefits by a Taft-Hartley
trustee.\textsuperscript{180} In ERISA, however,
Congress expressly detailed federal court jurisdiction and there is
no need to infer a remedy for individual workers because the
statute expressly authorizes plan participants to sue to recover
benefits due under a plan. In \textit{Firestone}, the Court found that:

\begin{quote}
[T]he \textit{raison d'\textsc{etre}} 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.\textsuperscript{181}

After rejecting the Taft-Hartley Act trust law basis for
applying an arbitrary and capricious standard of review in ERISA
benefit denial cases, the Supreme Court nevertheless announced
that trust law governed benefit claims under ERISA
§ 502(a)(1)(B).\textsuperscript{182} It is hard to understand why the Supreme Court,
\end{quote}

\textsuperscript{178} \textit{Firestone}, 489 U.S. at 109.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} Quoting Seventh Circuit Judge Posner, the \textit{Firestone} Court, described
the structural defect theory as follows:
\begin{quote}
When a plan provision as interpreted had the effect of denying an
application for benefits unreasonably, or as it came to be said, arbi-
trarily 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 [§ 186(c)].
\end{quote}

\textit{Id.} at 109-10 (quoting \textit{Van Boxel v. Journal Co. Employees' Pension Trust}, 836
F.2d 1048, 1052 (7th Cir. 1987)).
\textsuperscript{181} \textit{Firestone}, 489 U.S. at 110.
\textsuperscript{182} \textit{Id.} at 111.
after carefully distinguishing the Taft-Hartley Act jurisdictional circumstances from ERISA, did not make the further distinction that the LMRA cases arose from plans funded through a trust, while the ERISA plan in *Firestone* was unfunded. It is especially confounding to contemplate why the Supreme Court ignored this obvious paradigmatic distinction when the United States Solicitor General focused its *amicus curiae* brief, filed in support of the employees, on the fact that Firestone did not create a trust to fund the severance plan.183

IV. THE TRUST LAW DEFERENTIAL STANDARD OF REVIEW IS INAPPLICABLE TO § 502(A)(1)(B) CLAIMS FOR BENEFITS ARISING FROM ERISA PLANS WHICH ARE NOT FUNDED THROUGH A TRUST

A. *ERISA Regulates Pension Plans and Welfare Plans Differently*

It seems such an obvious truism that it need not be stated, but remarkably, federal courts continue to overlook the fundamental premise that unfunded and insured ERISA plans are not trusts.184 In order for a trust to exist, there must be a trust

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183. United States Amicus Brief, *supra* note 140, at 4. The United States argued that:

Where benefits are paid out of the employer's general assets, it is unfair to employees to defer to the employer's interpretation of the terms of the plan. *Firestone*, like the courts that have reviewed employer's decisions under the arbitrary and capricious standard, nevertheless contends that it is appropriate to borrow common law trust rules, as was done in cases involving LMRA trusts, and defer to its interpretation even though it is biased. Trust analogies are plainly inapposite here, however, since *Firestone* established no separate body of trust assets to pay severance benefits, and the common law of trusts does not support application of the arbitrary and capricious standard to administrators' decisions in that instance. *ERISA*'s own reliance on trust principles is selective, and in no way suggests that Congress intended that a highly deferential standard be applied here. Cases arising under Section 302(c)(5) of the LMRA are doubly inapposite, since, besides the presence of a trust in those cases, the LMRA mandates impartial administrators.

*Id.*

184. *But see* Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1148 (4th Cir. 1985). The Court stated

[appellants argue that the arbitrary and capricious standard should apply only where a formal trust fund is involved. Though many cases applying this standard to eligibility disputes do involve trusts, there is no reason to apply a different standard here. Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators "whose experience is daily and continual, not with judges whose exposure is episodic and occasional," . . . Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary and capricious manner, must remain with those who formulate and administer company plans and policies, whether formally trustees or not.}
Rethinking Firestone

res—some segregated trust asset over which a trustee has ownership—to administer for the benefit of the settlor's designated beneficiaries. In an unfunded plan, there is no segregated res to be administered by a trustee, and therefore, no trust.

Congress regulated pension plans and welfare plans differently in ERISA. Viewed separately and out of context with the whole statute, ERISA § 403(a) suggests that employers must fund both pension plans and welfare plans through the establishment of a trust, unless a plan is insured. Section § 403(a) instructs that "all assets of an employee benefit plan [including both pension plans and welfare plans] shall be held in trust by one or more trustees." However, when ERISA's fiduciary

Id. (quoting Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985)).

185. The reasons for the regulatory differences become clear when we consider why Congress enacted ERISA. Congress passed ERISA to reform the private pension industry. The majority of the statute's "comprehensive and reticulated" provisions target the pension industry and do not apply to welfare plans. See Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) (referring to ERISA's regulation of pension plans). One of the most significant problems which Congress designed ERISA to correct was the unfunded or under-funded private pension plan. Prior to ERISA, no federal regulation required employers to set aside funds in anticipation of the employer's obligation to pay pension benefits in the future to non-union retired workers. Consequently, many employers paid retirement benefits out of the employer's general assets or operating capital. If the employer maintained good financial health, presumably retired workers would continue to receive benefits; however, when the employer struggled, retired workers often lost their benefits. The lightning rod for pension reform in the 1960's and leading up to ERISA's enactment was the tragic consequence of the Studebaker manufacturing plant closing. See James A. Wooten, The Most Glorious Story of the Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683 (2001); Dana M. Muir, Plant Closings and ERISA's Noninterference Provision, 36 B.C. L. REV. 201 (1995). S. REP. No. 93-383, at 32 (1973), reprinted in 1973 U.S.C.C.A.N. 4890, 4902. The circumstances are now well known. Studebaker did not separately fund its pension obligations; rather it paid retirement benefits out of its operating capital. When the automobile maker closed its doors in 1963, over 4000 workers lost their vested retirement benefits because there was no money to pay continuing obligations after the plant closed.

At least partly in response to the Studebaker debacle and other similar stories of unfunded pension plans failure to meet obligations, Congress enacted ERISA in 1974 to reform the private pension industry. ERISA's legislative history establishes, however, that Congress was not focused on reforming the non-pension employee benefits industry when it enacted ERISA. See Donald T. Bogan, Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?, 74 TUL. L. REV. 951, 963-77 (2000).


187. Id. Additionally, ERISA § 401(a), 29 U.S.C. § 1101(a) (2000), says that the fiduciary responsibility rules apply to all employee benefit plans. There is an exception to the trust funding requirements for pension plans, however, for "any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State" [ERISA § 403(b)(1),
responsibility provisions are read in conjunction with the statute's funding section, it becomes clear that employers can elect not to establish a trust to fund welfare plans.

ERISA's funding provisions, which require employers to set aside assets to fund pension plans, do not apply to welfare plans. Consequently, an employer must set aside assets to fund a pension benefit plan, and under ERISA § 403, such assets must be held in trust. However, since welfare benefit plans are exempt from the funding rules, employers are not required to set aside any assets to fund welfare plans; accordingly, if the employer chooses not to set assets aside, there is nothing to hold in trust. So long as the employer does not voluntarily elect to set aside assets to fund a welfare plan, it does not come within the trust funding requirements of ERISA § 403. The result of the rather opaque interaction of these rules is that many welfare plans are unfunded because ERISA says they can be unfunded, while pension plans must set aside assets to secure payment of the promised benefits, and those assets must be held in trust.

The problem with ERISA is not that Congress regulated welfare and pension plans differently, however, it is that courts have applied broad general principles, such as the application of trust law, to welfare and pension plans alike without accounting for the regulatory and operative differences of the various plans.

29 U.S.C. § 1103(b)(1)], and for "any assets of such an insurance company or any assets of a plan which are held by such an insurance company." ERISA § 403(b)(2), 29 U.S.C. § 1103(b)(2) (2000).


190. 29 U.S.C. § 1103(a).


Section 15(a) [Fiduciary Standards] 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 the Retirement Income Security for Employees Act has the effect of requiring all retirement plans subject to that Act to be financed through the medium of a segregated fund, there may be welfare funds subject to the Welfare and Pension Plans Disclosure Act such as those providing sickness and 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.

Id.


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B. The Solicitor General Made the Case for the Application of Contract Law

In Firestone, the United States Solicitor General alerted the Supreme Court to the significant incongruity and the inapt historical precedent of applying a trust law deferential review standard to plan participant claims arising from an unfunded employee benefit plan. The Solicitor General made several well-considered points.

First, the suggestion that ERISA's legislative history indicates some Congressional intent that courts apply a trust law-based deferential standard when reviewing a § 502(a)(1)(B) claim for benefits misinterprets that legislative history. Referring to ERISA § 502(a)(1)(B) claims, the Conference Report explained that "all such actions . . . are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947."194 The Solicitor General reminded the Court that, in reviewing that same legislative history, the Court had previously found the quoted legislative history to contain Congress's instruction that courts develop a federal common law of ERISA benefit claims, the same way courts had construed LMRA § 301 as authority to develop federal common law in LMRA cases.195

ERISA does not contain any express instruction to courts detailing what standard of review to utilize in ERISA benefit claims. The Solicitor General argued that Congress directed courts to develop standard of review rules under the common law of ERISA. In developing that common law, the Solicitor General suggested that courts should be guided by Congress's goal in enacting ERISA to assure that "every employee who becomes eligible for a benefit under an employee benefit plan 'actually receive it.'"196 To further that goal, the Solicitor General urged the Supreme Court to apply a contact law-based de novo review standard in claims arising from unfunded employee benefit

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2003) (Becker, J., concurring) (noting that because welfare benefits plans operate on “pay as you go” basis, they are far less regulated than pension plans under ERISA). See generally Bogan, supra note 185 (arguing that the difference between ERISA’s regulation of welfare plans and pension plans requires that courts interpret and apply ERISA’s preemption language differently due to Congress’s intent to occupy the field of pension regulation, but not welfare plan regulation).


The Solicitor General did not discuss the difference between LMRA § 301 and LMRA § 302 claims in response to Firestone’s reliance on LMRA § 302 precedent in urging the Court to apply a deferential standard of review in ERISA benefit cases. The difference in the character of claims grounded in those two different provisions of the LMRA, however, bears on the persuasiveness of applying the LMRA § 302 trust law-based standard of review. As previously discussed, claims arising under LMRA § 302 are implied causes of action, founded in trust law, to provide jurisdiction and a private remedy for individual workers. In contrast, LMRA § 301 expressly provides for federal court jurisdiction and expressly authorizes both unions and employers to sue to enforce collectively bargained contracts. While courts have applied a deferential standard of review to structural defect claims filed under ERISA § 302 due to the trust law foundation for that implied remedy, courts have always reviewed LMRA § 301 claims de novo, applying contract law principles.

If Congress intended courts considering ERISA § 502(a)(1)(B) claims for benefits to copy the procedures in use to decide claims under the LMRA, LMRA § 301 cases offer more apposite precedent than do LMRA § 302 cases. While LMRA § 301 does not provide an express remedy for individual workers like ERISA § 502(a)(1)(B), it does provide an express breach of contract remedy enforceable by the union or by the employer. Given that ERISA § 502(a)(1)(B) similarly grants plan participants the

197. Id. at 8-12.
198. See supra notes 119-138 and accompanying text.
200. See Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990). Many Taft-Harley collective bargaining agreements contain agreements to arbitrate disputes. Courts review challenges to arbitrator decisions under a deferential standard. See Gulf States Tel. Co. v. Local 1692, Int'l Brd. of Elec. Workers, AFL-CIO, 416 F.2d 198 (5th Cir. 1969) (where controversy involves review of arbitration decision, a court has narrowly circumscribed function and may not re-determine the facts or reach a legal conclusion on those facts as found by the consensually appointed arbitrator). However, not all disputes under collective bargaining agreements fall within the labor agreement’s arbitration clause and not all collective bargaining agreements contain agreements to arbitrate. Where labor and management are not required to arbitrate a dispute arising from a Taft-Hartley agreement, each party has the right under LMRA § 301 to seek to enforce the contract in federal court. The rules of civil procedure and the rules of evidence apply to such actions. The trial court reviews the matter de novo, the parties are entitled to a jury trial, and the parties are entitled to call witnesses and present evidence in support of their claims. See Blue Diamond Coal Co. v. United Mine Workers of America, 436 F.2d 551 (6th Cir. 1970) (upholding a jury trial award in action under LMRA § 301 against union for violation of no-strike clause contained in collective bargaining agreement).
express right to sue "for benefits due under [the] plan," plan participant standing under ERISA § 502(a)(1)(B) equals the standing employers and unions have under LMRA § 301.201

Further, a plan participant's express right to sue to recover benefits due under the plan more closely parallels the express LMRA § 301 breach of contract remedy available to unions and employers than the implied trust law remedy presented in LMRA § 302 structural defect claims.202

Turning to the obvious, but overlooked, incongruity of applying trust law to govern claims which do not arise from a trust, the Solicitor General presented the heart of his argument clearly and simply. The Solicitor General remarked:

[T]rust analogies on which other courts and Firestone so heavily rely are wholly in apt to an unfunded plan.... [I]t is obviously not a trust, since no source of benefit payments exists separately from the employer's own operating funds. As a result, there is no identifiable and segregated trust property and, perforce, no trustee with both legal title and an equitable duty to deal with such property for the benefit of others. Without these incidents, a trust relationship does not exist. The unfunded plan sponsor has only a contractual obligation to pay benefits from any source.203

The Solicitor General observed that the differences between unfunded plans and trusts affect the foundational rationale for deferring to a plan administrator's discretionary decisions in ERISA.

The Solicitor General stated:

The loose standard of review is also inappropriate because the absence of a separate, identified source of benefits fundamentally alters the trustee's task under a funded plan of "provid[ing] benefits to as many intended employees as is economically possible while protecting the financial stability of the [plan]." Unlike a funded plan's trustee, whose decision must "balance[] the interests of present claimants against the interests of future claimants," the administrator of an unfunded plan necessarily chooses between the

201. See Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 589-92 (1993) (comparing claims under LMRA § 301 to claims asserted to arise under LMRA § 302). See also Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976) (confusing claims filed under LMRA § 301 with those asserting jurisdiction and liability under LMRA § 302).


203. United States Amicus Brief, supra note 140, at 8 (internal citations omitted). See RESTATEMENT (SECOND) OF TRUSTS §§ 2, 74, cmt. a (1959), and BOGERT, THE LAW OF TRUSTS, supra note 59, §§ 1, 17, n.12, 111.
interest of individual plan beneficiaries on the one hand and the employer's desire to hold down business expenses on the other. This latter choice has little in common with an unbiased trustee's making of tradeoffs between various interests of different plan beneficiaries.204

The Supreme Court did not agree or disagree with the Solicitor General in Firestone. Because the Court found an alternative basis to hold that the requested de novo review standard governed the former Firestone worker's claims, the Court did not examine the Solicitor General's arguments.205 While lower courts have necessarily followed Firestone's instructions to apply trust law in resolving standard of review questions, the recent Supreme Court ruling in Great-West Life & Annuity Insurance Co. v. Knudson,206 casts doubt on the notion that trust law provides the only paradigm to review all § 502 claims. Contrary to the trust law-based foundational assumptions in Firestone, Great-West suggests that ERISA § 502(a)(1)(B) claims for benefits are based in contract and seek legal relief. Great-West, therefore, re-vitalizes the Solicitor General's arguments that contract law, not trust law, standards govern plan participant benefit claims arising from plans that are not funded through the establishment of a trust.207

204. United States Amicus Brief, supra note 140, at 9.
205. Firestone, 489 U.S. at 115. The Supreme Court apparently thought the distinction between funded plans and unfunded plans, as suggested by the Solicitor General, was rendered moot by the Court's holding that de novo review applied, though under trust law, not contract law. The Firestone Court stated:

Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus for 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[r]" in determining whether there is an abuse of discretion.

Id. The Firestone Court failed to comprehend that it mattered greatly whether the de novo review standard it applied arose from contract law or trust law. If contract law governed, on remand the plan participant would have been entitled to a jury trial; if de novo review applied under trust law's equitable nature, no right to a jury trial attached. See infra notes 247-286 and accompanying text. Further, by directing employers how to obtain deferential review under trust law, the Court set the stage for just the occurrence it apparently wanted to avoid—that court interpretations would render plan participants worse off under ERISA then they had been under pre-existing state law governance. Firestone, 489 U.S. at 115.

207. See Firestone, 489 U.S. at 113-14 (noting that "applying Firestone's reading of ERISA [calling for deferential review] would require us to impose a
C. Great-West Life & Annuity Ins. Co. v. Knudson

Suggests that Plan Participants Claims for Benefits Under ERISA § 502(a)(1)(B) Seek Legal Relief

The Supreme Court has been engaged in an internal struggle for a number of years trying to define what “equitable” remedies are available under ERISA § 502,\(^{208}\) the statute’s civil enforcement standard of review that would afford less protections to employees and their beneficiaries than they enjoyed before ERISA was enacted.

208. ERISA’s civil enforcement provision, 29 U.S.C. § 1132 (2000) provides:

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided in subsection (c) of this section [concerning requests to the administrator for information], or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [§ 1109] [breach of fiduciary duty];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan;

(4) by the secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [1025(c)] [information to be furnished to participants];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609[a)(2)(A]));

(8) by the Secretary, or by an employer or other person referred to in section 101[f](1)[ ], to enjoin any act or practice which violates subsection (f) of section 101[ ], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual’s status as a participant covered under a pension plan with respect to all or any portion of the participant’s pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

29 U.S.C. § 1132 (a). Paragraphs seven and eight were added to § 502 by amendment in 1993, while paragraph nine was added the following year.
scheme.\textsuperscript{209} In the process, and primarily by way of comparison to what "equitable relief" means, the Court has effectively established that claims for benefits under ERISA § 502(a)(1)(B) seek legal relief. Close examination of the series of ERISA remedies opinions issued by the Supreme Court since 1985, and culminating most recently in \textit{Great-West Life & Annuity Ins. Co. v. Knudson},\textsuperscript{210} reveals that § 502(a)(1)(B) actions for benefits due under a plan present claims for general money damages. The Supreme Court has repeatedly described a claim for money damages as the quintessential claim for legal relief.\textsuperscript{211} Each of the pertinent cases is discussed below.

1. \textit{Massachusetts Mutual Life Insurance Co. v. Russell}

Under ERISA § 409(a),\textsuperscript{212} an ERISA fiduciary can be held personally liable for losses suffered by the plan and for "other equitable or remedial relief as the court may deem appropriate" resulting from the fiduciary's "breaches of any of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA.\textsuperscript{213} ERISA § 409 is expressly enforceable in an action under § 502(a)(2) by the Secretary of Labor, or by a plan participant or beneficiary, or by an ERISA fiduciary.\textsuperscript{214}

In \textit{Massachusetts Mutual Life Insurance Co. v. Russell},\textsuperscript{215} a plan participant sought to personally recover extra-contractual compensatory and punitive damages under ERISA § 502(a)(2) for a plan administrator's alleged bad faith delay in processing a benefits claim, couched as a § 409 breach of fiduciary duty. A majority of the Supreme Court held that in ERISA § 409 (a), Congress did not provide, and did not intend the judiciary to infer, a cause of action running to individual plan participants for extra-contractual damages caused by improper or untimely processing of a benefit claim.\textsuperscript{216} Further, the \textit{Russell} Court found that any damages recoverable under ERISA § 409 (a), ran to the plan, not


\textsuperscript{210} \textit{Great-West}, 534 U.S. 204.


\textsuperscript{212} 29 U.S.C. § 1109(a) (2000).

\textsuperscript{213} The Secretary of Labor, and plan participants or beneficiaries, and plan fiduciaries are expressly authorized under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) to seek "appropriate relief" arising from a fiduciaries violation of ERISA § 409(a), 29 U.S.C. § 1109(a).

\textsuperscript{214} For the complete text of § 502 see supra note 208 and accompanying text.

\textsuperscript{215} 473 U.S. 134 (1985).

\textsuperscript{216} \textit{Id.} at 148.
to individual plan participants.\textsuperscript{217}

Because the plan participant in \textit{Russell} ultimately did receive her disability benefits, she did not bring a claim under ERISA § 502(a)(1)(B), and that part of ERISA's civil enforcement scheme was not at issue in \textit{Russell}. However, the \textit{Russell} Court compared a plan participant's various express remedies under § 502 and observed that a plan participant can bring an action under ERISA § 502(a)(1)(B), to recover benefits due under the provisions of the plan contract.\textsuperscript{218} Further, the Court characterized the benefits due under a plan as "contractually authorized benefits." \textsuperscript{219} \textit{Russell} does not directly discuss whether benefits due under ERISA § 502(a)(1)(B) arise as a breach of contract claim or as a claim for breach of fiduciary duty,\textsuperscript{220} but the opinion certainly recognized the contractual foundation for a worker's right to recover benefits.\textsuperscript{221}

Justice Brennan's concurring opinion in \textit{Russell} speaks directly to the application of ERISA's fiduciary's obligations in processing benefit claims. Justice Brennan wrote separately to emphasize that the majority opinion's focus on fiduciary responsibilities owed to the plan should not be interpreted to mean that plan fiduciaries owed no duties to plan participants and beneficiaries. Justice Brennan suggested that plan participants can obtain individual relief for an ERISA fiduciary's breach of duty, though under the catchall language of ERISA § 502(a)(3), rather than § 502(a)(2), as urged by the claimants in \textit{Russell}. While Justice Brennan stressed that plan administrators owe fiduciary duties to process claims fairly, he clearly viewed the remedy for breach of fiduciary duty as supplemental to a plan participant's § 502(a)(1)(B) claim for benefits due under the plan.\textsuperscript{222}

\textsuperscript{217} \textit{Id}. at 141 (noting that "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than the rights of an individual beneficiary."). The Court specifically held open the question whether extra-contractual damages may be available under ERISA § 502(a)(3), or any other provision of ERISA. \textit{Russell}, 473 U.S. at 139 n.5.

\textsuperscript{218} \textit{Id} at 147.

\textsuperscript{219} \textit{Id}.

\textsuperscript{220} Justice Stevens found that Congress designed ERISA's fiduciary responsibility provisions primarily to protect against mismanagement of plan assets. \textit{See Russell}, 473 U.S. at 140 n.8 (noting that "the floor debate also reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future"). \textit{See also} Muir, supra note 4.

\textsuperscript{221} \textit{See Russell}, 473 U.S. at 148 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374-75 (1980) (remarking on Congress's repeatedly emphasized purpose to protect contractually defined benefits)).

\textsuperscript{222} \textit{See Russell}, 473 U.S. at 154 (Brennan, J. concurring) (noting that "an
2. **Mertens v. Hewitt Associates**

In *Mertens v. Hewitt Associates*, a group of plan participants sued under ERISA § 502(a)(3) to obtain "appropriate equitable relief," including money damages, against a non-fiduciary actuarial firm, which allegedly worked in connection with an ERISA fiduciary to cause the plan to be under-funded. As a result of the under-funding, the plan participants received less than their fully earned retirement benefits. The Court found that "equitable" relief could, in theory, mean all relief available for breach of trust in the common law courts of equity, which would include the money damage claim presented by the plan participants. Since all relief available for breach of trust could be obtained from an equity court, however, the Court found that interpretation would render the modifier "equitable" superfluous, and that it would also remove the distinction Congress drew between "equitable relief" and "remedial" and "legal relief." Consequently, the *Mertens* Court held that "appropriate equitable relief" as provided in ERISA § 502(a)(3), does not allow the award of money damages, even though the Court acknowledged that money damages were available in some circumstances under the common law of trusts.

The *Mertens* Court did not examine claims under ERISA § 502(a)(1)(B), but the opinion supports the conclusion that claims for benefits due seek legal relief. Specifically, the Court described a claim for monetary damages as the "classic form of legal relief."

3. **Varity Corp. v. Howe**

In *Varity Corp. v. Howe*, plan beneficiaries sued their former employer, who was also the plan administrator, under ERISA § 502(a)(3) for appropriate equitable relief arising from the plan administrator's alleged breach of fiduciary duties, as outlined in ERISA § 404 (a)(1). The Court held that ERISA § 502(a)(3) administrator's claim processing duties and a beneficiary's corresponding remedies are not necessarily limited to the terms of §§ 502(a)(1)(B) and 503; 120 CONG. REC. 29933, reprinted in 1 LEGISLATIVE HISTORY, supra note 1, at 91 (remarks of Sen. Williams) (noting that beneficiaries are entitled to recover benefits "as well as to obtain redress of fiduciary violations.").

226. *Id.* at 255-256.
227. *Id.* at 255 (citing Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 570-571 (1990); Curtis v. Loether, 415 U.S. 189, 196 (1974)).
228. *Id.* at 256 (citing Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 570-571 (1990); Curtis v. Loether, 415 U.S. 189, 196 (1974)).
provided a catch-all basis for plan participants to recover individually for a fiduciary’s breach of its duties as imposed under ERISA. The Varity Court acknowledged that Congress invoked the law of trusts to define the general scope of an ERISA fiduciary’s duties. However, the Court recognized that “trust law does not tell the entire story . . . [since] ERISA’s standards and procedural protections partly reflect a Congressional determination that the common law of trusts did not offer completely satisfactory protection.” 231 “Consequently,” said the Court, “we believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties.” 232

While explaining the extent of a fiduciary’s duties under ERISA, the Varity Court suggested that a denial of benefits can amount to a breach of fiduciary duty. The context of the statement is important. Varity Corporation allegedly defrauded its workers by convincing workers to release the company from benefit obligations in exchange for new employment and benefits in a newly formed related company, which was insolvent the day it was formed. 233 The former workers could not recover benefits due under the new plan because the new plan was insolvent. Consequently, the workers sought individual relief, in the form of re-instatement to membership in the old Varity plan, as a result of Varity’s breach of fiduciary duty. The employer argued that, similar to claims under ERISA § 502(a)(2) as determined in Russell, the workers were not entitled to individual relief under ERISA § 502(a)(3) because ERISA only authorized the plan as an entity to recover damages for breach of fiduciary duties. The Varity Court disagreed. Distinguishing Russell because it involved a claim under § 502(a)(2) the Varity Court found that ERISA § 502(a)(3) is a “catchall” provision that authorizes appropriate equitable relief running to individuals who suffer injuries caused by fiduciary breaches that § 502 does not elsewhere adequately remedy. 234

231. Varity, 516 U.S. at 497.
232. Id.
233. Id. at 493-94.
234. Id. at 511-12. It was important to the Varity Court’s conclusion that ERISA § 502(a)(3) allows for individual relief, that the plaintiffs could not pursue individual relief under ERISA § 502(a)(1)(B) because they were no longer participants in the Varity plan. The plaintiffs resigned from Varity to become employees of a new spin-off corporation and were enrolled in the new benefit plan for that new spin-off corporation, which was insolvent the day it was established. Lower courts since Varity are divided on the question of whether a ERISA § 502(a)(3) claim must be dismissed where the plan participant also seeks benefits under ERISA § 502(a)(1)(B). See Tannenbaum v. UNUM Life Ins. Co., No. 03-cv-1410, 2004 U.S. Dist. LEXIS 5664 (E.D. Pa. Feb. 27, 2004) (citing cases).
While the majority opinion clearly describes fair claims processing as being among the fiduciary duties owed to plan participants, and for which plan participant’s could seek relief under ERISA § 502(a)(3), the majority opinion also establishes that the § 502(a)(3) remedy would be supplemental to the plan participant’s remedy to recover benefits due under the plan pursuant to ERISA § 502(a)(1)(B). Interestingly, Justice Thomas, in his dissent, takes the majority to task for its suggestion that a plan participant’s challenge to a plan administrator’s claims processing activities involves an action for breach of fiduciary duty. Justice Thomas’ wrote:

The majority apparently believes that § 502(a)(1)(B), 29 U.S.C. § 1132(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 obligation in another, ‘catchall’ remedial section?” Ante, 516 U.S. at 512.

The answer is simple. Contrary to the majority’s understanding, § 502(a)(1)(B) does not create a cause of action for fiduciary breach, and Russell expressly rejected the claim that it does. Thus, the entire premise of the question is flawed. Section 502(a)(1)(B) deals exclusively with contractual rights under the plan.236


Great-West Life & Annuity Insurance Co. v. Knudson,237 also did not deal directly with a claim for benefits due under ERISA, however, the Court similarly referred to that statutory provision to contrast claims for equitable relief from claims seeking legal relief. Great-West involved a claim by a plan insurer which had paid medical bills for a plan participant. The plan contained express language allowing the insurer to recoup its payments if the plan participant obtained a tort recovery against the third party that caused the injuries which resulted in the medical bills paid by the insurer. Great-West sought to enforce the contract’s recoupment provisions, but was stymied by ERISA. The insurer’s problem was that ERISA’s primary enforcement provision that allows for the recovery of contract damages, § 502(a)(1)(B), does not contemplate

235. Id. at 512 (asking “[w]hy should we not conclude that Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligation in another, ‘catchall’ remedial section?”).
236. Id. at 521 n.2. (Thomas, J. dissenting).
Rethinking Firestone breach of contract lawsuits by insurance companies against plan participants. Great-West was not an entity that could sue for contract damages under § 502(a)(1)(B) because that section only allows for claims by a plan participant or beneficiary. Further, Great-West was not seeking benefits due under the plan. Consequently, Great-West had to sue under a different section of ERISA § 502, but nothing else seemed to fit. The insurer chose to sue under § 502(a)(3) to recover equitable relief, but it clearly strained to make its claim against the plan participant sound like something other than a claim to recover money damages.

The Supreme Court held that, no matter that Great-West couched its claim as one for “restitution” or for an injunction to order the plan participant to pay money, what it was really seeking was money damages, and a claim for money damages presents the classic claim for legal relief. The Court stated: “Here, [Great-West] seek[s] . . . to impose liability on [the plan participant] for a contractual obligation to pay money—relief that was not typically available in equity.”

Even more to the point, Justice Scalia in Great-West questioned the equitable nature of the remedy the insurer was seeking under ERISA § 502(a)(3) by remarking on the difference between that section and section ERISA § 502(a)(1)(B), which the Court noted does not provide equitable relief. Justice Scalia stated:

In the very same section of ERISA as § 502(a)(3), Congress authorized a “participant or beneficiary” to bring a civil action “to enforce his rights under the terms of the plan,” without reference to whether the relief sought is legal or equitable. 29 U.S.C. § 1132 (a)(1)(B) (1994 ed.). But Congress did not extend the same authorization to fiduciaries. Rather, § 502(a)(3), by its own terms, only allows for equitable relief.

238. See supra note 208.
239. See Great-West, 534 U.S. at 210-12.
240. Id. at 210. The strength of that position is evident in the courts citations. The Court quoted Judge Posner in Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000) stating that “a claim for money due and owing under a contract is ‘quintessentially an action at law.’” The Court further quoted Bowen v. Massachusetts, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting) by noting that “[almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.” It also quoted Mertens, 508 U.S. at 255, stating that “[m]oney damages are, of course, the classic form of legal relief.” See also Tannenbaum v. UNUM Life Ins. Co., No. 03-cv-1410, 2004 U.S. Dist. LEXIS 5664, *17-20 (E.D. Pa. Feb. 27, 2004).
241. Great-West, 534 U.S. at 220-21. The inference that a claim “for benefits due” under ERISA § 502 (a)(1)(B) presents a claim for legal relief is even stronger than suggested in Great-West where Justice Scalia compared § 502
Great-West does not hold that claims for benefits due under ERISA § 502(a)(1)(B) are claims for legal relief—that was not the issue in the case, consequently, the above quoted language from Great-West is dicta. However, the logic of the argument that ERISA § 502(a)(1)(B) provides a contract claim for legal relief is overwhelming. Congress invoked the law of trusts selectively in ERISA\textsuperscript{242}, and aimed its fiduciary responsibility provisions at trustees primarily in their role as asset managers.\textsuperscript{243} Consistent with that selective application and incorporation of trust law, ERISA's remedies provision includes both equitable remedies consistent with trust law, and a claim for legal relief to recover benefits due under the plan, a claim that is consistent with contract and insurance law. The fact that ERISA does not require welfare benefit plans to be funded through a trust, as it does pension plans (unless the pension plan is funded through insurance), and the fact that ERISA exempts plans funded through the purchase of insurance from its trust funding rules suggests that Congress did not intend that courts look only to trust law to resolve ERISA disputes.\textsuperscript{244}

Standard of review controversies involve remedies issues and should hinge on the nature of relief a claimant requests, similar to how the question of a claimant's right to a jury trial hinges most importantly on the nature of the relief demanded.\textsuperscript{245} Where an ERISA plan participant seeks general monetary damages due under a plan contract pursuant to ERISA § 502(a)(1)(B), particularly where the plan is not funded through a trust, the claim seeks legal relief and the contract law \textit{de novo} standard of review should govern.\textsuperscript{246}

\begin{footnotes}
\footnote{241}{(a)(3) to a plan participant claim under § 502 (a)(1)(B) "to enforce his rights under the terms of his plan." \textit{Id.} at 221.}
\footnote{242}{Variety, 516 U.S. at 497.}
\footnote{243}{\textit{See Russell}, 473 U.S. at 140-42 (stating "[t]he floor debate also reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future"). \textit{See also Muir, supra} note 4, at 412 n.146.}
\footnote{244}{ERISA provides for both a contract law "legal" remedy and it provides for trust law "equitable" remedies. \textit{See Tannenbaum}, 2004 U.S. Dist. LEXIS 5664 at *18-20. There is no reason to think that Congress intended ERISA to differ from other areas of Anglo/American jurisprudence and suggest that one set of facts might not give rise to several and varied claims for relief. Facts that give rise to a breach of contract may also constitute a tort (bad faith breach of contract). The same conduct that is a violation of the securities laws can also amount to a common law fraud. Just because a plan administrator is designated by ERISA as a fiduciary, it does not necessarily follow that a plan administrator's refusal to approve and pay benefits due under a plan (particularly when a plan is not funded through a trust) is not a breach of contract. It is, and ERISA creates an express remedy for the breach in § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000).}
\footnote{245}{\textit{See infra} notes 249-288 and accompanying text.}
\footnote{246}{Some danger exists for plan participants if courts, in fact, apply}
\end{footnotes}
V. PLAN PARTICIPANTS ARE ENTITLED TO A JURY TRIAL IN CLAIMS SEEKING LEGAL RELIEF UNDER ERISA § 502(A)(1)(B)

ERISA does not expressly address the question of whether a claim presented under the statute’s civil enforcement provision triggers the right to a jury trial. Absent a statutory directive, contract law to govern employee benefit claims. If courts strictly construe plan language (drafted by the employer or its agents without input from plan participants) which grants the employer or plan administrator sole discretion to determine claims, then un-empowered plan participants could again find themselves unprotected from abusive claim practices in similar fashion to pension claimants at the turn of the 20th Century. See, e.g., Adams v. LTV Steel Mining Co., 936 F.2d 368, 370-71 (8th Cir. 1991), cert denied, 502 U.S. 1073 (1992) (stating that ERISA allows an employer’s self-interested contract provisions). In Bruch, 828 F.2d at 134, the Third Circuit suggested that plan language giving employers unfettered discretion would violate public policy. Id. at 139 (citing Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 142 (3d Cir. 1986) (stating that statute providing for presumption of correctness violates due process), aff’d without opinion by equally divided Court, 481 U.S. 735 (1987); Graham v. Scissor-Tail, Inc., 623 F.2d 165, 180 (Cal. 1981) (holding arbitration provision unconscionable because it designated conflicted former union official as arbitrator); In re Cross & Brown Co., 167 N.Y.S.2d 573, 575 (App. Div. 1957) (holding arbitration provision unenforceable where it appoints conflicted arbitrator, citing: “the well recognized principle of ‘natural justice’... that a man may not be a judge in his own cause.”). Additionally, in Firestone, the Solicitor General noted that a provision giving the employer sole and exclusive power to determine benefit eligibility would not be enforceable under ERISA. See United States Amicus Brief, supra note 140, at 6, 9 n.11. The brief argued that

[Language in a plan document purporting to give biased administrators unbounded discretion to decide what the terms of a plan mean... would not be enforceable under ERISA. Exculpatory language in plan documents ‘purport[ing] to relieve a fiduciary from responsibility or liability’ is expressly ‘void as against public policy’ (ERISA § 410(a), 29 U.S.C. § 1110(a))."

The Solicitor General also stated that benefit denials based upon language giving the administrator unbounded discretionary authority may be unreasonable and in bad faith. See United States Amicus Brief, supra note 140, at 7 (citing Gitelson v. Du Pont, 215 N.E.2d 336, 338 (N.Y. 1966); Garner v. Girard Trust Bank, 275 A.2d 359, 361 (Pa. 1971)). See also Herzberger v. Standard Ins. Co., 205 F.3d 327, 330-31 (7th Cir. 2000) (Posner, J.); Northeast Dep’t. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985); Langbein, supra note 15, at 222, 226-28; Consion, supra note 4, at 33-34. But see Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78-79 (3d Cir. 1991), cert. denied, 503 U.S. 938 (1992) (noting that despite the court’s misgivings, plan language which reserved the right to alter plan and change payment practices without notice is enforceable, even where it means that Air Jamaica promised nothing); Bruch, 828 F.2d at 145 (observing that employee benefit plans are contracts negotiated at arm’s length). See also Kyocera Corp. v. Prudential-Bache Trade Serv., Inc., 341 F.3d 987, 998 n.16 (9th Cir. 2003) (noting Firestone dicta that parties may be able to contract for a narrow standard of review). 247. See generally Charles W. Wolfrom, The Constitutional History of the
the question of a litigant’s right to a jury trial rises or falls upon
the application of the Seventh Amendment to the United States
Constitution.248 The Seventh Amendment to the United States
Constitution provides that “in Suits at Common law, where the
value in controversy shall exceed twenty dollars, the right of trial
by jury shall be preserved.”249 The phrase “Suits at common law”
describes claims in which legal rights and remedies, as opposed to
equitable rights and remedies, are to be ascertained.250 Any
suggested curtailment of the right to a jury trial must be
“scrutinized with the utmost care” because a litigant’s right to
have facts determined by a jury occupies a position of utmost
importance in our history and jurisprudence.251

The Constitutional right to a jury trial extends beyond
common law suits and also pertains to claims expressly created by
Congress.252 Where a statute, rather than the common law, provides a
specific remedy, trial courts must examine both the nature of the
issues involved and the remedies requested in evaluating a
litigant’s demand for a jury trial.253 First, the trial court must
compare the statutory remedy to what would have been the
analogous common law remedy in 1791 to determine whether the
action would have been adjudicated in the English law courts, as
opposed to courts of equity or admiralty.254 Second, the court

248. See Chauffeurs, 494 U.S. 558, 565 n.3 (1990) (citing Curtis v. Loether,
415 U.S. 189, 192 n.6 (1974)).
249. U.S. CONST. amend. VII. “[I]f the statute creates legal rights and
remedies, enforceable in an action for damages in the ordinary courts of law”
the Seventh Amendment applies and requires a jury trial upon demand.
Brown v. Ret. Comm. of Briggs & Stratton Ret. Plan, 797 F.2d 521, 527 (7th
Cir. 1986) (citing Curtis, 415 U.S. at 194). See also Chauffeurs, 494 U.S. at
565 (stating that the right of a jury trial exists, and will be “carefully
preserved” where legal rights are at issue).
250. See Chauffeurs, 494 U.S. at 564 (citing Parsons v. Bedford, 28 U.S. 433,
447 (1830)).
Dimick v. Schiedt, 293 U.S. 474, 486 (1935)). See Curtis, 415 U.S. at 195
(stating that “[w]hen Congress provides for enforcement of statutory rights in
an ordinary civil action in the district courts, where there is obviously no
functional justification for denying the jury trial right, a jury trial must be
available if the action involves rights and remedies of the sort typically
enforced in an action at law.”).
court must "determine whether a statutory action is more similar to cases that
were tried in courts of law than to suits tried in courts of equity or admiralty").
253. See Chauffeurs, 494 U.S. at 569 (observing that “the nature of the issue
to be tried rather than the character of the overall action,” determines
whether a court must recognize a litigant’s demand for a jury trial (quoting
Brown, 797 F.2d at 527 (citing Curtis, 415 U.S. at 194 (noting that “[t]he
examines the nature of the remedy requested to determine whether the claim seeks legal or equitable relief. The second inquiry, involving the nature of the remedy as legal or equitable, is most important.

In ERISA's early history, a number of courts acknowledged a plan participant's right to a jury trial in claims to recover benefits due under a plan. In the leading case allowing a jury trial, *Stamps v. Michigan Teamsters Joint Council No. 43*, the trial court applied the Supreme Court's Seventh Amendment analysis and ordered a jury trial because the claim for benefits due under § 502(a)(1)(B) seeking money damages presented a claim for legal relief.

ERISA's civil enforcement scheme provides a variety of remedies, consequently, courts must distinguish between the various remedies available in ERISA actions to determine the specific issue to be tried in order to fairly evaluate whether a litigant is entitled to a trial by jury in the ERISA action. In *Stamps*, the court compared claims under ERISA § 502(a)(3) to claims under § 502(a)(1)(B) to support its conclusion that § 502(a)(1)(B) claims seek legal relief. The court noted that § 502(a)(3) claims clearly provide for equitable relief. In order to construe the civil enforcement scheme so as not to duplicate remedies, the *Stamps* Court stated that Congress must have

Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

255. See Chauffeurs, 494 U.S. at 570-71 (stating that a claim for back pay is essentially legal in nature).

256. Id. at 571.


259. Id. at 747. See Pernell v. Southall Realty, 416 U.S. 363, 370 (1974) (stating that "where an action is simply for the recovery... of a money judgment, the action is one at law.") (quoting Whitehead v. Shattuck, 138 U.S. 146, 151 (1891)); Curtis, 415 U.S. at 196 (noting that an action for money damages was "the traditional form of relief offered in the courts of law."); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476 (1962) ("Petitioner's contention... is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention.").
intended § 502(a)(1)(B) to provide a legal claim for relief.260

The Stamps Court also supported its conclusion that the plan participant was entitled to a jury trial by analogizing the claim for benefits under ERISA § 502(a)(1)(B) to claims under LMRA § 301. The Stamps Court noted that ERISA’s legislative history instructed courts to look to the case law interpreting LMRA § 301 for guidance in considering claims under ERISA § 502(a)(1)(B).261 Since LMRA § 301 claims were essentially contract claims for monetary damages which allowed claimants the right to a jury trial, the Stamps Court found support in the LMRA cases to grant the plan participant seeking money damages under ERISA § 502(a)(1)(B) the right to a jury trial.262

Following Stamps, the Seventh Circuit Court of Appeals addressed the jury trial question in Wardle v. Central States, Southeast & Southwest Areas Pension Fund,263 and expressly rejected the Stamps Court analysis.264 In Wardle, the worker sought pension benefits of $92,000 under ERISA § 502(a)(1)(B). The primary issue for the court was whether the worker was an employee under the terms of the Teamsters’ pension plan for the necessary twenty years of continuous service, or whether the worker operated as an independent contractor for some period of those twenty years. The Court started its analysis by concluding, apparently with the worker’s agreement, that it was to review the plan administrator’s interpretation of the plan language under an arbitrary and capricious standard.265 The plan recited that in the determination of employee status, “the common law test, or the applicable statutory definition of master-servant relationship, shall control.”266 The Court then found that under applicable master-servant law, the specific question of the claimant’s status as either an employee or independent contractor turned on a question of fact.267 Since a fact question controlled, the Wardle Court addressed the worker’s demand for a jury trial.

The Wardle Court disagreed with the Stamps Court’s analysis that § 502(a)(1)(B) must present a claim for legal relief, because if it were an equitable claim, it would duplicate the claim expressly

260. Id. at 747.
261. Id.
263. 627 F.2d 820 (7th Cir. 1980).
264. Id. at 829.
265. See id. at 823-24.
266. Id. at 822.
267. Id. at 828.
Rethinking Firestone

granted in § 502(a)(3). The Wardle Court noted that Congress expressly granted state courts concurrent jurisdiction only in § 502(a)(1)(B) claims and found that distinction enough to overcome the Stamps Court's surplusage analysis. The Wardle Court then also dismissed the Stamps Court rationale founded in the analogy to LMRA § 301 by noting that ERISA's legislative history only said § 502(a)(1)(B) claims are to be regarded "in similar fashion" to § 301 claims—Congress did not say the claims are identical.

Wardle is a flawed opinion. The Supreme Court has often declared that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." The Wardle Court disagreed with the Stamps Court expressed rationale for holding that a claim for money damages under ERISA 502(a)(1)(B) seeks legal relief, but the Wardle Court never specifically examined the claim for benefits due under § 502(a)(1)(B) to determine itself if the nature of that remedy was legal or equitable—the Wardle Court did not consider "the nature of issue to be tried," instead, the Wardle Court focused on its perception that the overall character of ERISA is founded in trust law.

We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable. Such suits under the law of trusts have existed for quite a while in state courts and have been entertained in federal courts under their diversity jurisdiction. These suits have been considered equitable in character. This conclusion has been based primarily on the law of trusts, which provides a beneficiary with a legal remedy only with respect to money the trustee is under a duty to pay unconditionally and immediately to the beneficiary. Thus the most reasonable interpretation is that Congress intended to provide general federal jurisdiction over these equitable suits that had traditionally been brought in state courts.

268. Id. at 828-29.
269. Id.
270. Chauffeurs, Teamsters & Helpers Local No. 391, 494 U.S. at 569 (quoting Ross v. Bernhard, 396 U.S. 531, 538 (1970) (emphasis added by the Court). In Ross the Court found a right to a jury trial in a shareholder derivative suit, typically an equitable action, because the issues to be tried were breach of contract and negligence. Local No. 391, 494 U.S. at 569.
271. Wardle involved a collectively bargained pension plan presumably funded through the establishment of a trust, as required by LMRA § 302, 29 U.S.C. § 186. Wardle, 627 F.2d at 823.
272. Wardle, 627 F.2d at 829. The Wardle Court's suggestion that Congress' failure to include any express directions regarding the right to a jury trial should be considered as evidence that Congress intended no right to exist is totally unsupported and is contrary to the Supreme Court's oft-repeated instruction that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that
The Wardle Court then revealed perhaps the real basis for its opinion. The court went back its opening mantra that federal district courts review ERISA claims under an arbitrary and capricious standard of review. The Wardle Court found that “the limited scope of review bespeaks a legislative scheme granting initial discretionary decisionmaking to bodies other than the federal courts, with which federal jury trials have proved incompatible.” This statement suggests that the Wardle Court was thinking about a wholly separate body of judicial deference law, which allows Congress to delegate the resolution of a claim asserting “public rights” to an administrative agency or a specialized court of equity. In ERISA claims, courts typically recite that they defer to the discretionary decisions of trustees but trust law judicial deference does not limit a trust beneficiary’s right to conduct discovery and present evidence at a bench trial, as ERISA courts usually do. Here the Wardle Court seems to suggest that an administrative law type of judicial deference controls. Under administrative law judicial deference, a trial judge sits more like an appellate court than a trial court in reviewing the administrative record created at an administrative trial before a neutral Administrative Law Judge (ALJ). For example, in Social Security Administration disability benefits claims, the claimant is afforded the right to a hearing where witnesses are examined and cross-examined under oath before an ALJ. Because the social security disability claimant was afforded the opportunity to present evidence before a neutral judge at the administrative trial, a federal district court reviews the Social Security Administration disability claim appeal under a

any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” Chauffeurs, Teamsters & Helpers Local No. 391, 494 U.S. at 565 (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959)) (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

273. Wardle, 627 F.2d at 830 (stating that “[i]t is incompatibility is further evidence of the unlikelihood of any implied congressional intent to grant a jury right in these cases.”). Id.; Granfinanciera, 492 U.S. at 53. As discussed in DeBofsky, supra note 14, ERISA does not delegate adjudicatory powers in benefit claim disputes to the Department of Labor or to any other government agency or specialized court of equity. See also Bogan, supra note 14.


276. See generally BOGERT, supra note 59, § 870.

277. See Leahy v. Raytheon Co., 315 F.3d 11, 18 (1st Cir. 2002) (applying incorrectly administrative law type of deference to an ERISA claim). See generally Consion, supra note 4, at 21-33 (criticizing ERISA trial courts’ use of what the author describes as appellate review procedures in ERISA benefit claims).
deferential standard.\textsuperscript{278}

In ERISA, while courts continue to refer to an "administrative record," which is just the claims adjuster’s file—no sworn testimony subject to cross-examination is present—the fact remains that Congress did not delegate adjudicatory authority to the Department of Labor, or to any other governmental agency or court, to hear and decide ERISA benefit claims.\textsuperscript{279} The Wardle Court’s reference to a legislatively created body of initial decisionmakers in ERISA claims is just fiction. This confusion of an ERISA plan’s internal claims and appeals process with a real administrative law apparatus permeates many ERISA decisions and arguably presents the true reason that courts have gone so far astray in denying ERISA plan participants a fair opportunity to present their challenges to plan administrator claim denials.\textsuperscript{280}

Despite the Wardle opinion’s weaknesses, the vast majority of lower courts to address the jury trial question since Wardle have generally failed to parse ERISA’s various remedies or seriously consider the right to a jury trial in plan participant claims brought

\textsuperscript{278} Herzberger v. Standard Ins. Co., 205 F.3d 327, 332 (7th Cir. 2000).

\textsuperscript{279} ERISA’s Congress considered and decided against delegating adjudicatory authority to the Department of Labor, instead granting express jurisdiction to both state and federal courts to hear § 502(a)(1)(B) claims for benefits due under an ERISA plan. See supra note 208 and accompanying text. The Senate Finance Committee recommended that administrative adjudicatory authority be granted to the Department of Labor under ERISA. See S. 1179, 93d Cong. at § 602 (1973), reprinted in 1 LEGISLATIVE HISTORY, supra note 1, at 780, 988-90; S. REP. No. 383, at 116-117 (1973), reprinted in 1974 U.S.C.C.A.N. 4890, 4999-5000, and in 1 LEGISLATIVE HISTORY, supra note 1, at 1063, 1184-85. The delegation of adjudicatory powers provisions of the Senate Finance bill did not appear in the final Senate bill submitted to Conference. Congress also dismissed a proposal to require arbitration of plan participant benefit claims. See H.R. 2, 93d Cong. 566-567 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 1, at 3813-3814; 120 CONG. REC. 29,941 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 1, at 4769 (remarks of Sen. Javits). An attempt to reinsert administrative adjudicatory authority was also defeated. See 120 CONG. REC. 29,563 (1973) (proposing Amendment No. 482 to S.4, 93d Cong. 1st Sess.) reprinted in 1 LEGISLATIVE HISTORY, supra note 1, at 1245; 119 CONG. REC. 30,401, reprinted in 2 LEGISLATIVE HISTORY, supra note 1, at 1838. See generally DeBofsky, supra note 14.


What may have misled courts in some cases is the analogy between judicial review of an ERISA plan administrator’s decision to deny disability benefits and judicial review of the denial of such benefits by the Social Security Administration... The Social Security Administration is a public agency that denies benefits only after giving the applicant an adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by plan administrators. Id. See also Bogan, supra note 14.
under ERISA § 502(a)(1)(B) to recover benefits due. Because courts view the overall character of ERISA as being governed by trust law principles281 or because courts view the right to a jury trial as incompatible with an arbitrary and capricious standard of review,282 plan participants have suffered the denial of a basic and fundamental constitutional right to have fact questions determined by a jury of their peers in claims for money damages under ERISA § 502(a)(1)(B).283

281. See, e.g., Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994) (stating that ERISA law is analogous to the law of trusts); Blake v. Unionmutual Stock Life Ins. Co., 906 F.2d 1525, 1526 (11th Cir. 1990) (noting that courts generally follow the Wardle reasoning); Cox v. Keystone Carbon Co., 894 F.2d 647, 649-50 (3d Cir. 1990) (stating that under ERISA plaintiffs are not entitled to a jury trial); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988) (concluding that the district court properly denied a jury trial); Howard v. Parisian, Inc. 807 F.2d 1560, 1566-67 (11th Cir. 1987); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984); In re Vorpalh, 695 F.2d 318, 319 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980) (holding that because ERISA claims are equity claims, there is no right to a jury trial). See generally Flint, supra note 257, at 387-91.

282. See, e.g., Berry, 761 F.2d at 1006; Calamia, 632 F.2d at 1237 (discussing the question of jury trials under the common law of trusts). Additionally, some courts have held more particularly, prior to Great-West, that claims for benefits under § 502(a)(1)(B) are equitable in nature and therefore do not trigger the right to a jury trial, even where de novo review applies under trust law. See, e.g., DeFelice v. Am. Int'l Life Assurance Co., 112 F.3d 61, 64 n.2 (2d Cir. 1997) (citing cases); Daniel, 839 F.2d at 268 ("Although there may be actions under ERISA in which a jury trial is proper, in actions for recovery of benefits under section 502, there is no right to a jury trial.") (internal quotations and citations omitted). See generally Annot., Plaintiff's Right to Jury Trial in Civil Actions under § 502(a)(1)(B) of Employee Retirement Income Security Act, 56 A.L.R. FED. 880 (Supp. 2001).

The Supreme Court's instructions detailing the analysis lower courts should follow in evaluating a party's request for a jury focus most importantly on the nature of relief requested in a party's pleadings. Accordingly, the most crucial question courts must answer in evaluating whether the right to a jury trial attaches in a particular action is whether the claim seeks legal relief. Further, the Supreme Court's continuing remedies discussion from Russell to Mertens to Varity and finally to Great-West, exploring some of the differences contained in the various subsections of ERISA § 502, requires that lower courts reconsider the question of a plan participant's right to a jury trial in claims to recover benefits due under an ERISA plan. Following the Great-West Court's characterization of claims arising under ERISA § 502(a)(1)(B) as seeking legal relief, it seems clear that plan participants who sue to recover benefits due, particularly from an unfunded or insured plan, are entitled to a jury trial upon demand.

Great-West teaches that ERISA's civil enforcement provisions provide varying claims for relief, including both legal and equitable claims, and that a one-size-fits-all approach to ERISA jury trial issues fails to appreciate ERISA's flexibility. Given the differences in how ERISA regulates pension plans and welfare plans, and given the differences in how employers fund plans, either through a trust, or through the purchase of insurance (or in how they do not fund plans at all), and given the variety of remedies afforded in ERISA § 502, courts must separately examine each claim for relief in an ERISA action to determine whether the court must preserve the right to a jury trial.

284. Granfinanciera, 492 U.S. at 41.
285. See Great-West, 534 U.S. at 211 (noting that "[a] claim for money due and owing under a contract is 'quintessentially an action at law.'") (quoting Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000) (Posner, J.)); Bowen, 487 U.S. at 918-19 (stating that "[s]uits seeking to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages', as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.").
286. In Bona v. Barasch, 2003 U.S. Dist. LEXIS 4186 (S.D.N.Y Mar. 20, 2003), the District Court for the Southern District of New York applied Great-West to reach the conclusion that a claim for monetary damages under ERISA § 502(a)(2) is a claim for legal relief which triggers a litigant's Seventh Amendment right to a jury trial. The plan participant in Bona brought both a § 502(a)(2) claim and a § 502(a)(3) claim alleging breach of fiduciary duty. Id. at *24. In the claim under § 502(a)(2), the class plaintiffs sought money damages on behalf of the plan. The first prong of the test to determine if the right to a jury exists, comparing the statutory action to actions brought prior to the merger of the courts of law and equity, weighed against the plaintiffs' demand for a jury trial. However, the Great-West rationale resolved the second and more important portion of the test, whether the remedy sought is legal or equitable, in the plan participants' favor and required the Bona Court to grant the plan participant a jury trial. Id. at *101-06.
VI. CONCLUSION

ERISA regulates welfare plans and pension plans differently—in particular, the statute exempts welfare plans from the requirement that employers fund plans through the establishment of a trust. In *Firestone*, the employer did not establish a trust to fund its severance pay plan; instead the employer paid severance benefits out of its operating capital. Despite the fact that no trust existed to pay the benefits in question in *Firestone*, the Supreme Court applied trust law to determine the standard of review applicable to the employees’ claims for benefits. *Firestone* has created a legacy of nonsense, where courts routinely apply a trust law-based deferential standard of review to ERISA plan administrator claim denials where no trust exists, and where the claimant seeks the legal remedy of money damages. Because of the *Firestone* Court’s suggestion that trust law governs employee benefit claims, a majority of lower courts have also denied ERISA plan participants the right to a jury trial in their claims seeking money damages for benefits due under ERISA § 502(a)(1)(B).

The Supreme Court’s examination of ERISA’s civil enforcement provisions, culminating most recently in *Great-West Life & Annuity Life Insurance Co v. Knudson*, requires a reevaluation of *Firestone*, the ERISA standard of review issue, and the question of a plan participant’s right to a jury trial in claims for benefits due under an ERISA plan. In light of the Supreme Court’s strong suggestion that claims for benefits due under ERISA § 502(a)(1)(B) seek legal relief, courts must grant plan participants the right to a jury trial. Further, since trust law has no application in claims for benefits due arising from unfunded or insured ERISA plans—that is, plans not funded through the establishment of a trust—courts should apply *de novo* review to plan participant claims for benefit under ERISA § 502(a)(1)(B).