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DENIAL OF BENEFIT CLAIMS UNDER ERISA: THE RISE AND FALL OF DE NOVO REVIEW

I. INTRODUCTION

The Employee Retirement Income Security Act (ERISA)\(^1\) was enacted to provide beneficiaries of employee benefit plans with increased protection against the loss of deferred benefits.\(^2\) Unfortunately, however, some federal courts have interpreted ERISA to provide a peculiar protection for plan administrator decisions that deny applications for benefits.\(^3\)

Prior to ERISA, state common law governed suits challenging a plan administrator's eligibility determinations.\(^4\) Under state common law, state courts generally reviewed administrator decisions de novo and interpreted plan documents in the same manner they would have interpreted contracts made between parties bargaining at arm's length.\(^5\) With the enactment of ERISA, however, Congress preempted state law governing most employee benefit plans and subjected plan administrators to fiduciary responsibilities under federal law.\(^6\) Consequently, challenges to plan administrator eligibility determinations are commonly brought in federal court and are governed by federal law. Unfortunately, because of ERISA's addition of fiduciary duties some federal courts have been more deferential to plan administrator eligibility determinations than were the pre-ERISA state courts.\(^7\) Thus, in a number of recent cases, federal courts have interpreted ERISA in a manner which


\(^{2}\) For a discussion of Congress's intent to increase existing protection for beneficiaries, see infra notes 14-36 and accompanying text.

\(^{3}\) For a discussion of how some federal courts have interpreted ERISA in a manner which provides a peculiar protection for the decisions of plan administrators, see infra notes 13, 59-69 and accompanying text.

\(^{4}\) For a discussion of how state law governed challenges to benefit eligibility determinations prior to ERISA, see infra notes 43-50 and accompanying text.

\(^{5}\) The courts followed a somewhat different approach if the benefits plan provided for the permissive exercise of a plan administrator's power. See infra notes 49-50 and accompanying text. For a discussion of the use of contract principles to determine benefit entitlement prior to ERISA, see infra notes 37-48 and accompanying text.

\(^{6}\) For a discussion of ERISA's fiduciary requirements, see infra notes 29-36, 58-62 and accompanying text.

\(^{7}\) Generally, federal courts prefer to review administrator decisions under an arbitrary and capricious standard, even if the administrator has not been granted discretion to construe plan terms or to determine eligibility. See infra notes 80, 137-43, 148-56 and accompanying text. For a discussion of how the Supreme Court's opinion in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), attempted to change such a practice, see infra notes 106-20 and accompanying text.

(1219)
provides less protection against the wrongful denial of benefits than existed under prior law.

Recently, in *Firestone Tire & Rubber Co. v. Bruch*, the Supreme Court attempted to remedy this problem of decreased protection for beneficiaries of employee benefit plans. The Court recognized that applying a deferential standard of review to all plan administrator decisions in denial of benefit cases is inconsistent with congressional intent. Nevertheless, the Court's well-intentioned decision provides a method whereby employers may ensure that courts will apply a deferential standard of review to plan administrators' decisions concerning benefit entitlement.

This Comment analyzes the implications flowing from Congress's imposition of fiduciary responsibilities on administrators of employee benefit plans, and the Supreme Court's attempted solution to the problem of decreased protection that has resulted from the application of ERISA's standards. In addition, this Comment analyzes the minimal attention the Supreme Court has given to the fact that ERISA affirmatively permits an economic conflict of interest to exist in the administration of employee benefit plans. Finally, this Comment examines why eligibil-

9. The Supreme Court's holding with respect to determining the appropriate standard of review is specifically limited to administrator decisions that impact on eligibility. *See id.* at 115. Therefore, it does not encompass the entire spectrum of administrator decisions which might be judicially reviewed. Presumably, the appropriate standard of review for all other administrator decisions will continue to be governed by the developing body of caselaw unaffected by the Supreme Court's decision in *Bruch*.
10. *Id.* at 114. The Supreme Court recognized that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans . . . and to protect contractually defined benefits." *Id.* at 113 (citations omitted) (emphasis added). For a discussion of Congress's intent to promote the interests of beneficiaries under employee benefit plans, see *infra* notes 14-36 and accompanying text.
11. For a discussion of the Supreme Court's requirement that an abuse of discretion standard be applied where an administrator has been granted the appropriate degree of discretion, see *infra* notes 111-20 and accompanying text. For a discussion of how some courts are eager to find such a grant of discretion in the language of the employee benefit plan so that a deferential standard of review might be applied, see *infra* notes 157-43, 148-56 and accompanying text.
12. Conflicts are usually encountered in plans which are structured in one of three ways. First, conflicts may arise when benefits are paid out of an employer's general funds under a plan managed by the employer. Under ERISA, it is "perfectly proper" for the employer to administer its own benefits plan and make eligibility determinations. *See Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987). If the benefits are paid out of an employer's general funds, the plan is defined as being unfunded. A clear example of an unfunded welfare plan is the typical severance or termination pay plan, under which funds are not specifically set aside by the employer for the purpose of paying benefits. *See, e.g., Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987) (termination pay plan was unfunded because employer paid benefit from general funds), *aff'd in part and rev'd in part*, 489 U.S. 101
ity decisions of employer/administrators under ERISA-covered plans are likely to receive deferential review under current law. This result could not have been intended by the drafters of ERISA, and this Comment proposes a solution to this dilemma. The proposed solution would provide greater protection against the wrongful denial of benefits when a conflict of interest exists in the administration of a benefits plan, while avoiding needless heightened judicial scrutiny of impartial plan administrator decisions.

II. LEGISLATIVE INTENT: INCREASING PROTECTION THROUGH ADDITION OF FIDUCIARY RESPONSIBILITY

In 1972, following reports of abuses and mismanagement within the private pension system in the United States, the Senate of the 91st (1989); accord Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989); Simmons v. Diamond Shamrock Corp., 844 F.2d 517 (8th Cir. 1988); Accardi v. Control Data Corp., 836 F.2d 126 (2d Cir. 1987); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 628 (6th Cir. 1987); Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985), cert. denied, 477 U.S. 903 (1986); Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985); Bowman v. Firestone Tire & Rubber Co., 724 F. Supp. 493 (N.D. Ohio 1989); Maryonovich v. Market Data Retrieval, Inc., 716 F. Supp. 343 (N.D. Ill. 1989). For a discussion of other types of unfunded plans generally subject to ERISA's requirements, see infra note 31.

Second, conflicts may arise where benefits are paid out of an insurance fund to which the employer has paid a premium for coverage. For a discussion of the vested interest that an insurance company might have in making eligibility decisions, see infra note 87.

Third, conflicts may arise where benefits are paid out of a trust fund managed by the employer. If the employer's contributions to the fund will be affected by the employer's entitlement decisions, then the employer will have an economic interest in making the eligibility decision. This argument was raised in De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989), but the court in that case found insufficient evidence that eligibility decisions favorable to the employer had an effect on employer contributions to the pension fund. See id. at 1191-92.

13. Where the administrator of a plan has been granted the appropriate discretion, the Supreme Court has held that the administrator's decisions must be granted deference by the reviewing court. See Bruch, 489 U.S. at 111, 115. Although the Supreme Court's opinion in Bruch requires that a conflict of interest in the administration of a benefits plan be considered as one factor in determining the reasonableness of administrator decisions, see id. at 115, courts remain free to assign whatever weight they wish to the factor. Because courts need not seriously consider the effects of a conflict in determining reasonableness, as was predominantly the practice in cases prior to Bruch, see infra note 80, the Court's opinion has led to a lack of uniformity of application in cases where a conflict is present. For a discussion of the deferential approach employed by some courts, even when a conflict of interest is present, see infra notes 117, 193 and accompanying text.

Congress passed a series of resolutions directing the Senate Labor and Public Welfare Committee to conduct an in-depth study of the largely unregulated pension system. As a result of this sweeping study, a number of abuses were documented, some of which stemmed from the conflict of interest inherent when employers both provide employee benefits and administer their own employee benefit plans.

For example, the study uncovered numerous cases in which employees had worked a sufficient number of years to qualify for pensions, only to have their pensions denied on technical grounds. The studyjavits indicating that absence of supervision over administration of private pension funds led to widespread complaints signaling need for remedial legislation).

Also, in 1973, Ralph Nader and Kate Blackwell published a book entitled You and Your Pension, intended to educate potential beneficiaries of pension plans as to the barriers they might face when attempting to collect promised pension benefits. R. NADER & K. BLACKWELL, YOU AND YOUR PENSION (1973). The authors gathered information about pension plan practices through the use of questionnaires distributed to over 800 individuals. Over 500 individuals responded, many of whom were disappointed pensioners. The authors were able to document numerous instances in which workers had lost all or part of their promised pension benefits because of abuses in the private pension system. *Id.* at 2, Appendix A, 30-78. From the responses, the authors determined that loss of benefits frequently resulted from, inter alia: (1) underfunding of pension plans, *id.* at 23-29; (2) failure of employees to qualify for pensions because unknown technical requirements for eligibility were not met, *id.* at 30-40; (3) business shutdowns or layoffs, *id.* at 48-50; (4) self-dealing, *id.* at 65-78; or (5) the fact that the pension fund ran out of money, *id.* at 58. The authors indicated that proposed legislation in Congress might be part of an overall solution to the problems within the private pension system. *Id.* at 108. In addition, the authors suggested that pension plan participants needed to become educated concerning their rights in order to prevent some of the abuses. *Id.* at 126.

15. Pursuant to a series of resolutions passed by the 91st Congress, and specifically pursuant to Senate Resolution No. 235, 92nd Congress, March 6, 1972, the Committee on Labor and Public Welfare conducted a comprehensive and exhaustive study of the private pension and welfare system. S. REP. NO. 127, 93rd Cong., 1st Sess. 11, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4847-48; *see also* 120 CONG. REC. 29,929 (1974) (statement by Sen. H. Williams, Chairman of Senate Committee on Labor and Public Welfare, indicating that Committee's study was initiated pursuant to resolution of the 91st Congress), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5177.

16. *See generally* 120 CONG. REC. 29,934-65 (1974) (remarks by numerous senators following Committee's investigation citing abuses within private pension system such as self-dealing and imprudent investments); *see also*, 120 CONG. REC. 29,932 (1974) (remarks by Sen. H. Williams, upon introduction of Conference Report on H.R. 2, citing such abuses as self-dealing, imprudent investments, and misappropriation of funds in administration of employee benefit plans), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5186. For a discussion of the conflicts of interest which may exist in the administration of certain employee benefit plans, see *infra* note 87 and accompanying text.

17. *See generally* 120 CONG. REC. 29,949-52 (1974). Drawing from the study conducted by the Senate Labor and Public Welfare Committee, Senator Benson, one of the chief Senate sponsors of the Employee Retirement Income Security Act, recounted the case of a Wichita Falls, Texas woman who had lost her pension on a technicality. She had retired at age 65, confidently expecting a pension after 17 years of service with the same employer, only to find that she...
also showed that many employees had lost their pension benefits because their pension plans had been underfunded by their employers, or because their pension benefits were used by employers for their own benefit rather than for the benefit of the pension plan and its beneficiaries. Finally, the Committee found that a lack of adequate information supplied to employees concerning their rights under pension plans contributed to the loss of pension benefits.

As a result of this study, Congress enacted ERISA to remedy the abuses and shortcomings found to exist in the private pension system. Prior to the Senate vote on the House and Senate Conference Committee's compromise version of the bill, several Senators of the 93rd Congress voiced their belief that the legislation was needed because it had become apparent that existing remedies were insufficient to afford employees proper protection for their earned deferred benefits. Introduced as a bill to "strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare bene-

had lost "every single cent" of her expected entitlement because she failed to satisfy a continuous service requirement when she missed two years of service due to family illness during her employment. By providing minimum vesting requirements for pensions, Senator Bentsen stated that ERISA should prevent countless similar economic tragedies in the future.

18. Id. at 29,949. Senator Bentsen indicated that government statistics showed that during 1972 alone more than 15,000 pension plan participants lost retirement benefits because their pension plans were terminated with insufficient assets to meet all plan obligations. Minimum funding standards and a program of insurance were included in the new legislation in order to correct this problem.

19. Id. at 29,951. Note that where an employer manages funds which it has set aside for the payment of benefits, there is tremendous temptation for the employer to use such funds for its own benefit. Senator Bentsen cited the case of a pension plan for a large retail store in Washington, D.C., which purchased the real estate to be used by the retail store for its retail operation at a price of $625,000. Eight years later, the pension plan sold the real estate to the retail store for the same price for which it was purchased, with the pension plan realizing no profit from the sale. Eight months later, the retail store sold the real estate to a third party for over $2,000,000.

20. Id. at 29,934. Senator Javits highlighted instances in which beneficiaries who were unfamil iar with the terms of their pension plans had lost entitlements to expected benefits.


22. 129 Cong. Rec. 29,932 (1974) (statement by Sen. H. Williams), reprinted in 1974 U.S. Code Cong. & Admin. News 5177, 5177. Note that the bill was designed not only to protect pension benefits, but also to protect and regulate the administration of welfare benefits. For a discussion of the meaning of "welfare benefits" under ERISA, see infra note 31.

fit plans,"24 the legislation included, inter alia, requirements for mandatory vesting of pension benefits,25 requirements that certain benefits be minimally funded and held in trust,26 requirements that pension plans participate in plan termination insurance,27 and requirements for mandatory disclosure of information concerning benefits to plan beneficiaries.28

The legislators realized, however, that any comprehensive program designed to prevent abuses in the private pension system, in addition to requiring funding and vesting for certain retirement benefits, must also focus on the area of fiduciary responsibility.29 The legislators believed that workers' pension funds deserved "strong fiduciary protections" in order to ensure that employee interests were not "subordinated to the self-enriching intrigues of 'insiders' to the plan."30 Therefore, ERISA was drafted to impose fiduciary duties on those persons who exercise discretionary control or management over "employee benefit plans".31

30. Id.
31. Although popularly thought of as protection only for employee retirement benefits, ERISA is broadly written to include protection for most other forms of deferred compensation as well. "Employee benefit plan" is defined by ERISA to include both "pension" benefits and "welfare" benefits. See 29 U.S.C. § 1002(3) (1988). An "employee welfare benefit plan" is defined as any "plan, fund, or program . . . established or maintained . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . ." 29 U.S.C. § 1002(1) (1988).

Examples of benefits generally considered by courts to be "welfare benefits" within the scope of ERISA coverage are the typical severance pay plan, e.g., Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134 (3d Cir. 1987) (termination pay plan covered by ERISA), aff'd in part and rev'd in part, 489 U.S. 101 (1989); accord Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989); Simmons v. Diamond Shamrock Corp., 844 F.2d 517 (8th Cir. 1988); Accardi v. Control Data Corp., 836 F.2d 126 (2d Cir. 1987); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623 (6th Cir. 1987); Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985), cert. denied, 477 U.S. 903 (1986); Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985); Bowman v. Firestone Tire & Rubber Co., 724 F. Supp. 493 (N.D. Ohio 1989); Maryonovich v. Market Data Retrieval, Inc., 716 F. Supp. 343 (N.D. Ill. 1989), health insurance plans, e.g., Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556 (11th Cir. 1990) (health insurance plan sponsored by employer covered by ERISA), cert. denied, 111 S. Ct. 712 (1991); accord Dozsa v. Crum & Forster Ins. Co., 716 F. Supp. 131 (D.N.J. 1989), and certain employee stock option plans, if the plans are considered a form of de-
or their assets.\textsuperscript{32} Under ERISA a fiduciary is required to administer a plan "solely for the benefit" of the beneficiaries\textsuperscript{33} of the plan,\textsuperscript{34} and to use the care and skill of a "prudent man" in the management of the assets of the plan.\textsuperscript{35} Through the imposition of these fiduciary duties, Congress apparently believed that beneficiaries of employee benefit plans would receive greater protection against the loss of deferred benefits than existed under prior law.\textsuperscript{36}


\textsuperscript{33} Note that a plan "participant" must be an employee or a former employee of the sponsor of the plan, 29 U.S.C. § 1002(7) (1988), but that a beneficiary may be any "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). Therefore, a beneficiary need not be an employee or former employee of the sponsor in order to bring an action to recover benefits under 29 U.S.C. § 1132(a) (1988). For a further discussion of the right to bring an action under 29 U.S.C. § 1132(a), see infra notes 53 and accompanying text.

\textsuperscript{34} ERISA specifically requires those identified as fiduciaries under the plan to discharge "their duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries . . . ." 29 U.S.C. § 1104(a)(1)(A)(i) (1988). In his comments at the introduction of the Senate & House Conference Committee Report, Senator Nelson remarked that:

[i]f fiduciaries are required to discharge their duties solely in the interest of participants and their beneficiaries and in a manner which will not jeopardize the income or assets of the fund. They are also specifically prohibited from engaging in actions where there would be a conflict of interest with the fund, such as representing any other party dealing with the fund.

120 CONG. REC. 29954 (1974).


\textsuperscript{36} In his remarks just prior to the vote on the Conference Committee's Compromise of the Senate and House versions of ERISA, Senator Harrison Williams stated:

Despite the value of full reporting and Code disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 CONG. REC. 29932 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5186; see also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113-14 (1989) (confirming that Congress's intent in enacting ERISA was "to promote the interests of employees and their beneficiaries in employee benefit plans")
III.  How ERISA Has Altered Traditional Employee Benefit 
Entitlement Analysis

A.  State Law and ERISA's Preemption Provisions

ERISA is not a source of employee benefits, but is designed as a 
source of protection for benefits already promised by an employer.37 
The employee's right to benefits, therefore, must spring from a source 
other than ERISA. That source is primarily state contract and trust 
law.38 An employee's right to receive benefits may arise from a collec-
tive bargaining agreement,39 a written or express contract of employ-
ment between the employer and the employee,40 a trust established by 
the employer for the benefit of the employee or other beneficiary,41 or a 
unilateral promise made by the employer to pay benefits that is sup-
ported by consideration on the part of the employee.42

Under state law prior to ERISA, an employee's rights in a dispute 
over entitlement to benefits allegedly promised by an employer would 
have been determined under common law contract principles, if the 
employer had not established a trust for the payment of benefits, and if the 
plan did not provide for the permissive exercise of the plan administra-
tor's power.43 If an employer's contractual obligation to an employee 
or beneficiary was to make contributions to a trust fund out of which

(citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983)), and "to protect 
contractually defined benefits" (citing Massachusetts Mut. Life Ins. Co. v. Rus-
sell, 473 U.S. 134, 148 (1985)).

37.  See generally H. PERRITT, EMPLOYEE BENEFITS CLAIMS LAW AND PRACTICE 
§ 3.1, at 120 (1990).
38.  See id. §§ 3.1-3.4. 
39.  See id. § 3.9, at 136 (collective bargaining agreements create written obli-
gation on part of employer).
40.  See generally C. BAKALY, JR. & J. GROSSMAN, MODERN LAW OF EMPLOY-
MENT CONTRACTS—FORMATION, OPERATION AND REMEDIES FOR BREACH §§ 3.1-
3.3.4, at 21-35 (Supp. 1986).
41.  See H. PERRITT, supra note 37, § 3.4, at 128.
42.  For example, the employer's promise might be found in a vacation pay 
policy, see, e.g., Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 647 P.2d 122, 
183 Cal. Rptr. 846 (1982) (employee's right to vacation pay found in employer's 
vacation pay policy), or in a statement contained in an employee handbook, see, 
e.g., Morse v. Adams, 857 F.2d 339, 342 (6th Cir. 1988) (entitlement to benefits 
found in employer handbooks, brochures and circulars). The employer's promise 
to pay may be enforced through a finding that the promise has acted as an 
ducement for the employee to continue employment in order to collect the 
promised benefits. For a general discussion of unilateral employment contracts, 
see H. PERRITT, supra note 37, § 3.8, at 134 (employer's unilateral promise is 
supported by employee's performance, thus creating obligation).
43.  See generally H. PERRITT, supra note 37, § 3.27, at 167-172. Note also 
that in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112-13 (1989), the 
Supreme Court stated that:
[a]ctions challenging an employer's denial of benefits before enactment 
of ERISA were governed by principles of contract law. If the plan did 
not give the employer or administrator discretionary or final authority 
to construe uncertain terms, the court reviewed the employee's claim as
benefits were to be paid, the employee could have sued to compel the employer's contribution to the fund. Further, if benefits were administered from a separate trust fund, the trustee of the fund would have been subject to fiduciary duties and charged with managing the fund solely for the benefit of the employee and with performing all duties in accordance with the terms of the trust instrument. If the trustee failed to honor the terms of the trust, the beneficiary could have sued the trustee at law or in equity for failure to adhere to the terms of the trust instrument, or for a violation of the trustee's fiduciary duties.

It would have any other contract claim—by looking to the terms of the plan and other manifestations of the parties' intent. Id. (citing Conner v. Phoenix Steel Corp., 249 A.2d 866 (Del. 1969); Atlantic Steel Co. v. Kitchens, 228 Ga. 708, 187 S.E.2d 824 (1972); Sigman v. Rudolph Wurlitzer Co., 57 Ohio App. 4, 11 N.E.2d 878 (1937)). Presumably, where an administrator had been given discretionary authority of the kind indicated by the Court, under pre-ERISA law the administrator's exercise of discretion would have been subject to a duty to perform in good faith. See Restatement (Second) of Contracts § 205 (1979). Under the Restatement, "[g]ood faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party . . . ." See id. § 205 comment a.

44. See H. Perritt, supra note 37, § 3.4, at 128; § 4.5, at 191.
45. See Restatement (Second) of Trusts § 170 (1959); H. Perritt, supra note 37, §§ 4.1-4.6, at 186-95; § 4.11, at 200-02.
46. See Restatement (Second) of Trusts § 164 comment a (1959). Note that this trust concept is expressly incorporated into ERISA. See 29 U.S.C. § 1104(a)(1)(D) (1988) (under ERISA fiduciary must discharge duties in accordance with documents and instruments governing plan insofar as they are consistent with ERISA).

47. Historically, if the trustee failed to make a payment that was unconditionally due to the beneficiary under the trust instrument, the beneficiary could maintain an action at law. See Restatement (Second) of Trusts § 198(1) (1959). Otherwise, the beneficiary's remedy was in equity to force the trustee to honor the terms of the trust instrument. See id. § 197. In either case, a trust law "de novo" standard of review would have been used to determine the meaning of the trust terms. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989) (trustee's powers and duties determined according to terms of trust instrument as court interprets them, without deferring to either party's interpretation) (citing 3 W. Fratcher, Scott on Trusts § 201, at 221 (4th ed. 1988)). The de novo standard is similar to an analysis under traditional rules of contract construction. In such cases, the court would determine and enforce the intent of the settlor of the trust by construing the language of the trust instrument. See id.; see also Restatement (Second) of Trusts § 4 comment d (1959) (terms of trust created by written instrument are determined by provisions of instrument as interpreted in light of all circumstances and such other evidence of intention of settlor with respect to trust); id. § 164(a) (nature and extent of trustee's duties and powers determined by terms of trust); H. Perritt, supra note 37, § 3.27, at 168; § 4.11, at 201.

48. For a discussion of a trustee's fiduciary obligations, see Restatement (Second) of Trusts § 2 comment b (1959) (defining trustee's fiduciary obligation); id. § 170 (defining a trustee's duty of loyalty to beneficiary); see also NLRB v. Amex Coal Co., 453 U.S. 322, 329 (1981) (trustee bears unwavering duty of complete loyalty to beneficiaries of trust to exclusion of interests of all other parties). Note that under state common law trust principles, if the beneficiary
If, however, the trustee exercised lawfully granted discretion under the trust instrument, the trustee’s discretionary decisions would have been upheld unless the trustee abused his discretion. But if the trustee had acted under a conflict of interest in the administration of the trust, even though the trustee had exercised lawfully granted discretion, the trustee’s decisions would have received the strictest scrutiny.

With the passage of ERISA, however, employees may no longer sue under state law to obtain promised benefits under an ERISA-covered plan, because Congress has broadly preempted the field from state regulation.

sues the trustee for a violation of the trustee’s duty of loyalty, the arbitrary and capricious standard of review is not applicable. See, e.g., Struble v. New Jersey Employees’ Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984). Note also that the trustee might violate the duty of loyalty by dealing in trust assets for the trustee’s own benefit. See Restatement (Second) of Trusts § 170 comments b-e (1959). In addition, the trustee could violate fiduciary duties by delegating duties under the trust instrument to others, id. § 171, by failing to keep accounts and provide the beneficiary with information, id. §§ 172-73, or by failing to deal with the trust assets with the care and skill of a man of ordinary prudence dealing with his own property, id. § 174.

49. See Restatement (Second) of Trusts § 187 (1959) (trustee’s exercise of discretion not subject to control by court except to prevent abuse of discretion); id. § 186 comment e (defining difference between mandatory powers and discretionary powers); see also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989) (trust law de novo review is used where plan does not grant discretion, but abuse of discretion standard is used where trustee has been granted discretion) (citing G. Bogart & G. Bogart, Law of Trusts and Trustees, § 560, at 193-208 (2d rev. ed. 1980)); H. Perritt, supra note 37, § 4.17, at 214.

50. See Restatement (Second) of Trusts § 187 comment g (1959) (courts will not defer to trustee’s judgment when conflict of interest threatens trustee’s impartiality); see also Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 145 (3d Cir. 1987) (in face of conflict of interest, trustee’s decisions are to be “scrutinized with the greatest possible care”), aff’d in part and rev’d in part, 489 U.S. 101 (1989); Struble v. New Jersey Brewery Employees’ Welfare Trust Fund, 732 F.2d 325, 333-34 (3d Cir. 1984) (case remanded for lower court to review employer trustee’s decision under stricter standards where trustees with divided loyalties were faced with decision of whether to give surplus plan assets to beneficiaries or employer).
loration in order to promote uniformity. Consequently, the employee's only remedy under an ERISA-covered plan is to sue under federal law. In that regard, ERISA's preemption provision has been interpreted broadly by the federal courts, which has essentially eliminated a beneficiary's previous remedies under state law. Because the

51. ERISA's preemption section is 29 U.S.C. § 1144(a) (1988). It reads that, "[e]xcept as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." Id. Therefore, the employee's state common law claim is barred if the plan is covered by ERISA. See McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426, 428 (6th Cir. 1989) (employer's group health insurance plan covered by ERISA, thus state law claim to recover life insurance proceeds on death of participant barred); Garavuso v. Shoe Corp. of Am. Indus., 709 F. Supp. 1423, 1425 (S.D. Ohio 1989) (employee's state law claim for breach of contract to pay severance benefits preempted by ERISA); Morishige v. Spencecliff Corp., 720 F. Supp. 829, 839 (D. Haw. 1989) (recovery for retirement or severance benefits, and for damages arising out of administration of employee benefit plan, preempted by ERISA). Note, however, that claims for future wages or any other damages unrelated to the employee benefit plan in question are not preempted by ERISA. Morishige, 720 F. Supp. at 839 (citing Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987)).

52. See H.R. 533, 93d Cong., 1st Sess. (1973), reprinted in Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, 2348, 2359 (1976) ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."); see also Pilot Life Ins. Co. v. Dedieux, 481 U.S. 41, 55-56 (1987) (comparing ERISA to Labor Management Relations Act and concluding that both preempt state regulation for reasons of uniformity); McMahan, 888 F.2d at 429 (court held that preemption of state contract claim was mandated by 29 U.S.C. § 1144(a) because "applying Kentucky contract law to disputed benefits claims could potentially subject [the life insurance company administrator] to inconsistent obligations under the laws of various states"); Northern Group Servs. v. Auto Owners Ins. Co., 833 F.2d 85, 87-89 (6th Cir. 1987) (court stated that when state law threatens to subject an ERISA plan administrator to inconsistent administrative obligations, relevant state law is within scope of ERISA's pre-emption clause), cert. denied, 486 U.S. 1017 (1988).

53. Employee suits to recover benefits are authorized under 29 U.S.C. § 1132(a)(1)(B) (1988). Section 1132(a)(1)(B) permits a participant or beneficiary to bring a civil action "to recover benefits due 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." Id. See generally H. Perritt, supra note 37, § 3.3, at 124-25.

54. The Supreme Court has interpreted this exemption provision broadly, stating that, if a state law "has a connection with or reference to" an employee benefits plan, the state law "relates to" a benefits plan for the purposes of exemption. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985); accord Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983); see also Baxter v. Lynn, 886 F.2d 182, 185 (8th Cir. 1989) (court stated that "any provision of state law which conflicts with a proper provision of an ERISA plan must give way to the latter") (quoting Davis v. Line Constr. Benefit Fund, 589 F. Supp. 146, 149 (W.D. Mo. 1984))); Garavuso v. Shoe Corp. of Am. Indus., 709 F.
beneficiary's enforcement action is limited to rights granted under federal law, beneficiary entitlement under ERISA turns on federal court interpretation of ERISA's fiduciary standards.

B. ERISA's Fiduciary Requirements and Their Impact on Beneficiary Entitlement Analysis

In his treatise on employee benefits, Professor Perritt explains the appropriate process for determining beneficiary entitlement under ERISA.55 First, the beneficiary's rights are determined under federal common law contract or trust principles as borrowed from state common law.56 "Once a common law contract right exists, ERISA may dictate contract terms or standards for determining breach and affording remedies different from those applicable under common-law contract doctrines."57 As we shall see, it is the application of these ERISA standards, as interpreted by the federal courts, which may now make it more difficult for beneficiaries of certain employee benefit plans to recover in wrongful denial of benefits cases.

ERISA expressly provides that an individual who exercises a significant amount of discretion with respect to the administration of an employee benefit plan is subject to ERISA's fiduciary standards,58 regardless of whether or not the individual administers a "true" trust as a trustee.59 This definition of fiduciary has been construed broadly,60 with the result that all employee benefit plan administrators61 are generally subject to ERISA's fiduciary requirements.62

Supp. 1423, 1425 (S.D. Ohio 1989) (any state law breach of contract claim relating to employee benefits is preempted by ERISA).

Recall that the term "employee benefit plan" is defined broadly by ERISA. See supra note 31. The result is that almost all state action touching or tending to affect in some way an employee's entitlement to benefits is preempted by ERISA.

55. H. PERRITT, supra note 37, § 3.3, at 126.

56. Id. For a discussion of the development of a federal body of common law through enforcement of ERISA's requirements, see infra notes 77-82 and accompanying text.

57. See PERRITT, supra note 37, § 3.3, at 126.


60. The intent of the drafters of ERISA is that the term "fiduciary" should be "liberally interpreted to effect the remedial purposes of ERISA, and the courts have taken a broad view in deciding whether a particular person should be considered a fiduciary." See R. Cooke, supra note 14, § 6.02, at 6-4.


62. Plan administrators have been generally considered fiduciaries under ERISA, and are subject to its fiduciary duties. See R. Cooke, supra note 14, § 6.02, at 6-8, 6-9; see also Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155,
As intended by the drafters of ERISA, federal courts have adopted state common law trust principles in applying ERISA's fiduciary requirements. Under these principles, as noted earlier, fiduciaries generally receive the benefit of a deferential standard of review for decisions involving the exercise of lawfully granted discretion. Prior to the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, however, federal courts universally applied a deferential standard when reviewing the eligibility decisions of all plan administrators, regardless of whether or not discretion had been granted in the plan. Because the

1158 (3d Cir. 1990) (holding that plan administrators are fiduciaries under ERISA because they exercise discretion contemplated by ERISA's definition of "fiduciary").

Third parties exercising discretionary authority over control or management of plan funds may also be considered fiduciaries under ERISA. See R. Cooke, supra note 14, § 6.02, at 6-8, 6-9; see also 29 U.S.C. § 1102 (1988).

In addition, ERISA requires that there be a named administrator in the plan. See 29 U.S.C. §§ 1002(16)(A)(i) & 1102(a) (1988). If there is no named administrator, then the plan sponsor is the administrator and is subject to ERISA's fiduciary duties. See 29 U.S.C. § 1002(16)(A)(ii). These provisions appear directed at holding a named individual accountable for ERISA's reporting requirements. See 29 U.S.C. §§ 1021-31 (1988).

63. For a discussion of the intent of the drafters of ERISA that federal courts develop a body of federal common law through the application of ERISA's fiduciary requirements, see infra note 78 and accompanying text. For a discussion of the adoption of state common law trust principles by federal courts in defining ERISA's fiduciary requirements, see infra notes 77-85 and accompanying text.

64. For a discussion of traditional trust principles which call for the application of an abuse of discretion standard of review where an administrator has been granted discretion, see supra note 49. See generally Comment, The Arbitrary and Capricious Standard Under ERISA: Its Origins & Applications, 23 Duq. L. Rev. 1033, 1035-41 & 1041 n.23 (1975). Note that, where the trustee is acting under a conflict of interest, a deferential approach is not appropriate. See supra note 50 and accompanying text.


66. Prior to the enactment of ERISA, if the administrator had not been granted discretion, courts applied principles of contract construction to determine the rights of beneficiaries, with the result that ambiguous terms would have been construed by looking at the terms of the plan and other manifestations of the parties' intent. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112-13 (1989) (Court noted that "'[a]ctions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law . . . [if] the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms"); Lowry v. Bankers Life and Casualty Retirement Plan, 871 F.2d 522, 524 (5th Cir.) (before ERISA, courts reviewed administrator decisions de novo where plan did not provide for permissive exercise of plan administrator's power), cert. denied, 110 S. Ct. 152 (1989).

Following the enactment of ERISA, and until the Supreme Court's decision in Bruch, most courts applied a deferential standard of review when reviewing plan administrator decisions, whether or not the administrator had been granted discretion. See infra note 80 and accompanying text. Thus, until Bruch, there was a significant decrease in protection for beneficiaries of employee benefit plans over pre-ERISA law. For a discussion of the requirement that administrators must now be granted appropriate discretion under the plan before deferential
definition of “fiduciary” under ERISA is interpreted broadly, the significance of granting deference to fiduciaries in all denial of benefit cases is enormous.67 The result in nearly every case decided prior to Bruch was that the decision of the plan administrator was upheld, as long as that decision rested on a reasonable interpretation of the plan’s terms.68

Because the federal courts universally adopted a deferential approach following the enactment of ERISA, the beneficiary’s traditional state contract action was replaced as the beneficiary’s method of enforcing entitlement. In some cases, the employer’s contractual obligations were transformed into fiduciary obligations, resulting in the application of a lighter standard of review of plan administrator decisions than existed under prior law.69 This change in entitlement analysis ultimately forced beneficiaries to argue that ERISA did not apply to their benefit plan, while employers invariably argued that their plans were covered by

review will be applied, see infra notes 111-16. For a discussion of the inadequate protections afforded beneficiaries under the Supreme Court’s approach in Bruch, see infra notes 79-76, 117, 121-79, 195 and accompanying text.

67. The broad application of fiduciary responsibility under ERISA has important ramifications for beneficiaries. An exercise of significant discretion by an administrator under an ERISA-covered plan imposes fiduciary duties on the administrator, which in turn provides a lighter standard of review for the acts of the individual exercising discretion.

68. See Jung v. FMC Corp., 755 F.2d 708, 711-12 (9th Cir. 1985) (standard is reasonableness in reviewing administrator decisions); accord Sly v. P.R. Mallory & Co., 712 F.2d 1209, 1211 (7th Cir. 1983); Elser v. I.A.M. National Pension Fund, 684 F.2d 648, 654-55 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983); Fenton Indus. v. National Shopmen Pension Fund, 674 F.2d 1300, 1307 (9th Cir. 1982); Smith v. CMTA-IAM Pension Trust, 654 F.2d 650, 654-55 (9th Cir. 1981); Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433, 438 (9th Cir. 1980). For a discussion of the process of determining whether or not an administrator’s decision is reasonable, see infra notes 83-85 & 129-31 and accompanying text.

69. In Maryonovich v. Market Data Retrieval, Inc., 716 F. Supp. 343 (N.D. Ill. 1989), the district court recognized the changes wrought by ERISA. The court explained that “[f]or decades prior to the enactment of ERISA severance policy enforcement was relegated to state courts, which reviewed them pursuant to ordinary rules of contract construction.” Id. at 348. The court stated that it was ironic then, that:

[T]he enactment of ERISA—a statute clearly intended to provide protection for employees’ rights to pensions and benefits—led at first under the pre-Firestone deferential standard to a body of case law which made it easier for management to avoid payment even though state courts would have enforced the employees’ rights to those benefits under the same policies.

Id. at 349; see also Baxter v. Lynn, 886 F.2d 182, 188 (8th Cir. 1989) (court stated that “[b]efore the passage of ERISA, courts reviewed the acts of plan administrators under a de novo standard where the terms of the instrument did not provide for the permissive exercise of a plan administrator’s power”) (citing Lowry v. Bankers’s Life & Casualty Retirement Plan, 871 F.2d 522, 524 (5th Cir.), cert. denied, 110 S. Ct. 152 (1989)).

It is important to remember that, because of ERISA’s preemption provision, an employee’s chance of receiving a full review of the plan instrument under traditional contract principles prior to Bruch was limited. See supra notes 51-54 and accompanying text.
ERISA.\textsuperscript{70} Only if a plan were not covered by ERISA could a beneficiary have obtained closer judicial scrutiny of the plan administrator's denial of benefits decision according to traditional contract principles in state court.\textsuperscript{71}

C. Bruch Fails to Solve the Problem of Decreased Protection

Although the Supreme Court in \textit{Bruch} acknowledged that federal court interpretation of ERISA's fiduciary standards had resulted in a peculiar protection for some plan administrator decisions, a protection which did not exist under prior law, the Supreme Court's solution in \textit{Bruch} has failed to ensure that the protection lost as a result of federal court interpretation of ERISA's fiduciary obligations will be restored. Regardless of the language included in employee benefit plans, it is clear that some federal courts are still quite eager to find a sufficient grant of discretion in a plan so that administrator decisions might be reviewed with deference.\textsuperscript{72}

Further, the Court's solution fails largely because its analysis ig-

\textsuperscript{70} See \textit{Wallace v. Firestone Tire \\ & Rubber Co.}, 882 F.2d 1327, 1329 (8th Cir. 1989) (employees argued that ERISA did not apply to unfunded severance pay policy so that they might sue in state court under a breach of contract theory); \textit{Brundage-Peterson v. Compcare Health Servs. Ins. Corp.}, 877 F.2d 509, 510 (7th Cir. 1989) (court denied plaintiff's petition to remand case to state court on theory that health benefit plan was not really ERISA plan); \textit{Holland v. Burlington Indus., Inc.}, 772 F.2d 1140, 1144 (4th Cir. 1985) (employees first sought relief in state court under breach of contract theory for denial of severance pay benefits), \textit{cert. denied}, 477 U.S. 903 (1986); \textit{Garavuso v. Shoe Corp. of Am. Indus.}, 709 F. Supp. 1423, 1424-25 (S.D. Ohio 1989) (employees asserted state law claim for breach of contract to pay severance benefits while employer argued that ERISA applied to plan in question), \textit{aff'd}, 892 F.2d 79 (6th Cir. 1989); \textit{Ahne v. Allis Chalmers Corp.}, 640 F. Supp. 912, 920 (E.D. Wis. 1986) (employees claimed wrongful denial of severance benefits turned on issues too remote to plan to be preempted by ERISA).

\textsuperscript{71} For example, in \textit{Brundage-Peterson v. Compcare Health Services Insurance Corp.}, 877 F.2d 509 (7th Cir. 1989), the plaintiff argued that she had "less legal protection against the insurer's refusal to pay benefits than she would have if ERISA had never been enacted," and that the case should be governed by state law. \textit{Id.} at 511. The plaintiff stated that in state court she could have sued for "simple breach of contract," but under ERISA she must "prove that the trustee ... abused its discretion." \textit{Id.} The court in \textit{Brundage-Peterson}, however, rejected the plaintiff's argument by indicating that the arbitrary and capricious standard had been repudiated by the Supreme Court in \textit{Firestone Tire \\ & Rubber Co. v. Bruch}, at least in cases where benefit plans do not give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe ambiguous terms of the plan. \textit{Id.} at 511-12 (citing \textit{Firestone Tire \\& Rubber Co. v. Bruch}, 489 U.S. 101, 115 (1989)). Note, however, that the arbitrary and capricious standard of review has not gone away. \textit{See infra} notes 111-79 and accompanying text.

\textsuperscript{72} If a court finds a grant of discretion in the plan, then the beneficiary must settle for a superficial review of the denial of benefits claim. For a discussion of how some courts are eager to find a grant of discretion in any plan language, see \textit{infra} notes 137-62 and accompanying text.

It should also be noted that these courts tend to give little weight to the
noes an important purpose for applying a higher standard of review. In *Bruch*, the Court announced that a decision on the standard of review to be applied in denial of benefit cases turns on the presence or absence of a grant of discretion in the benefits plan, regardless of the presence or absence of a conflict of interest in the administration of the plan. The presence of a conflict, however, is arguably a more compelling focus for determining the appropriate standard of review to be applied in denial of benefit cases. The Court's present approach gives little attention to the fact that many ERISA plans are administered by persons having a vested interest in making eligibility decisions. Instead of requiring de novo review in order to sufficiently guard beneficiary rights in these cases, the Court has relegated consideration of any conflict of interest to a subsidiary analysis within the framework of a deferential standard of review. Consequently, the federal courts are free to give little or no weight to the existence of a conflict of interest in determining whether the administrator has acted reasonably.

existence of a conflict of interest in the administration of the benefits plan. See infra note 117 and accompanying text.

Even if the plan grants the appropriate discretion to the plan administrator, it might be argued that there is a significant difference between subjecting discretionary administrator decisions to a good faith requirement, as would have been the standard applied under pre-ERISA law, see supra note 43, and subjecting the administrator decision to a reasonableness standard under post-*Bruch* law. Under pre-ERISA law, § 205 of the *Restatement (Second) of Contracts* would seem to require performance by the administrator "emphasizing faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Restatement (Second) of Contracts* § 205 comment a (1979) (emphasis added). On the other hand, an abuse of discretion standard would permit the administrator's decision to stand, even if it is not the interpretation that the court or the other party would have given to the plan. See infra note 85 and accompanying text. For a discussion of how courts defer to the reasonable interpretation of plan administrators, see infra notes 83-85 and accompanying text.

73. Instead of requiring a heightened standard of review when a conflict is present, the Court's approach requires only that the reviewing court consider the conflict as a factor in determining whether or not the administrator's decision was reasonable. *Bruch*, 489 U.S. at 115.

74. Notwithstanding the differences between a good faith analysis under prior law, and the current analysis under an abuse of discretion standard, it is important to recognize that the Supreme Court's decision masks a very practical problem confronting beneficiaries in denial of benefit cases. Because many courts are willing to find a grant of discretion in almost any plan language, the denial of benefits claim is likely to be reviewed under an abuse of discretion standard. Under the Supreme Court's approach, a reviewing court need only consider the conflict of interest as a factor in determining reasonableness, leaving courts somewhat free to fashion differing degrees of inquiry within the framework of the abuse of discretion standard. The danger in this approach is that the beneficiary is not guaranteed to receive the benefit of strict judicial scrutiny in cases involving a conflict, because federal courts are still inclined to approach conflict cases deferentially in the same manner as they did prior to *Bruch*. See infra note 80 and accompanying text. For a further discussion of the extremely deferential approach taken by some courts in denial of benefit cases, see infra notes 117, 121-62, 193 and accompanying text.
As a result, the Supreme Court's approach in *Bruch* has led to conflicting opinions in two areas: (1) the plan language necessary for an appropriate grant of discretion, and (2) the degree of consideration to be given to the existence of a conflict of interest in determining the reasonableness of administrator decisions. Because federal courts differ on these issues, the goal of uniformity of treatment sought to be accomplished by the drafters of ERISA has suffered.\textsuperscript{75} Further, and more importantly, the decrease in protection for beneficiaries of employee benefit plans under the current federal common law in some circuits is contrary to the intended greater protection of benefits sought by the drafters of ERISA.\textsuperscript{76}

**IV. PRE-BRUCH DEFERENTIAL APPROACH IN DENIAL OF BENEFIT CASES CALLED INTO QUESTION BY SOME COURTS**

ERISA is silent on the standard by which a plan administrator's denial of benefits is to be reviewed.\textsuperscript{77} When Congress enacted ERISA, it contemplated that federal courts would develop a body of federal common law with respect to the application of ERISA's fiduciary requirements in denial of benefit cases.\textsuperscript{78} Because trust terms permeate ERISA,\textsuperscript{79} most courts originally elected to adopt an arbitrary and capricious standard of review for all administrator decisions under ERISA-covered plans\textsuperscript{80} because such a review was consistent with traditional

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\textsuperscript{75} For a discussion of the inconsistency of decisions concerning the sufficiency of plan language necessary to grant discretion, see *infra* notes 119-79 and accompanying text. For a discussion of the inconsistent approaches taken by different federal courts when a conflict of interest is present, see *infra* notes 117, 193 and accompanying text. For a discussion of ERISA's goal of uniformity of decision, see *supra* note 52 and accompanying text.

\textsuperscript{76} For a discussion of the intent of the drafters of ERISA to provide greater protection for beneficiaries of employee benefit plans, see *supra* notes 14-36 and accompanying text.

\textsuperscript{77} See *Bruch*, 489 U.S. at 108-09 (Court stated that ERISA does not set out appropriate standard of review for actions under 29 U.S.C. § 1132(a)(1)(B) (1988)).

\textsuperscript{78} In his treatise on employee benefit claims, Professor Perritt explains that ERISA contemplates that federal courts will borrow from state common law principles of contracts and trusts, "modifying them if necessary to serve some identified policy interest of ERISA." H. PERRITT, *supra* note 37, § 3.3, at 124-25 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989)); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56-57 (1987) (courts are to develop substantive federal law derived from federal policy regarding private welfare and pension plans in fashion similar to way that courts have fashioned substantive federal law under § 301 of Labor Management Relations Act of 1947 in accordance with policy of national labor laws).


\textsuperscript{80} In Questech, Inc. v. Hartford Accident & Indemnity Co., 713 F. Supp. 956 (E.D. Va. 1989), the court indicated that, at least until the Supreme Court's decision in *Bruch*, the law in most circuits was clear that "benefit determinations
state common law trust principles,81 and because the same standard had previously been adopted by federal courts when reviewing cases brought under section 302 of the Labor Management Relations Act (LMRA).82

were reviewed only to determine whether they were arbitrary or capricious. Id. at 962. Most courts did not consider as a factor whether or not the administrator of the plan was acting under a potential conflict of interest in the administration of benefits. See Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1049, 1052 (7th Cir. 1987) (black letter law is that courts adopted arbitrary and capricious standard without apparently noticing that employers often held “whiphand” under ERISA trusts); Jung v. FMC Corp., 755 F.2d 708, 711-12 (9th Cir. 1985) (decisions of welfare plan trustee reviewed under arbitrary and capricious standard); Ahne v. Allis Chalmers Corp., 640 F. Supp. 912, 917 (E.D. Wis. 1986) (decisions of employer/administrator concerning termination pay plan benefits reviewed under arbitrary and capricious standard); Wesley v. Monsanto Co., 554 F. Supp. 93, 96 (D. Mo. 1982) (decisions of administrator of employee welfare plan reviewable only if administrator acted arbitrarily or capriciously), aff'd, 710 F.2d 490 (8th Cir. 1983).

In support of an across-the-board deferential standard of review, some courts rationalized that a heightened scrutiny of the decisions of trustees acting under a conflict of interest was not warranted, even though otherwise seemingly called for under Restatement (Second) of Trusts § 187 comment g (1959). See supra note 50 and accompanying text. Courts have posited two reasons for such an approach. First, trustees of pension and welfare benefit plans have more experience than judges in the management of benefit plans and the trustees are more likely to have answered correctly the question about the meaning of plan terms. See Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985); Ponce v. Construction Laborers Pension Trust, 628 F.2d 537, 542 (9th Cir. 1980). The second rationale is that the court should generally review with deference a trustee's decision to aid one group of beneficiaries at the expense of another. See Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333-34 (3d Cir. 1984). This second rationale is not applicable, however, where the decision of the plan administrator advantages the employer and not other beneficiaries of the plan—which was the case in Struble. See id.


82. The rationale for the adoption of the arbitrary and capricious standard when reviewing decisions of ERISA plan administrators was strengthened because of its previous application in claims brought under § 186(c)(5) of the LMRA. 29 U.S.C. § 186(c)(5) (1988). See, e.g., Struble, 732 F.2d at 333 (court adopted standard applied in LMRA cases); accord Bayles v. Central States, Southeast & Southwest Areas Pension Fund, 602 F.2d 97, 99-100, 100 n.3 (5th Cir. 1979); see also Comment, supra note 64 at 1035-41, 1041 n.23 (courts generally adopted arbitrary and capricious standard from LMRA cases). Federal court jurisdiction to hear claims for breach of contract under the LMRA is granted under 29 U.S.C. § 185 (1988), and it is under this section that it was contemplated that courts would develop a federal body of common law construing the LMRA. Professor Perritt points out that the grant of jurisdiction to enforce rights created through contract or trusts under § 502(a) of ERISA (29 U.S.C. § 1132(a) (1988)) is modeled on this section of the LMRA (29 U.S.C. § 185 (1988)). H. PERRITT, supra note 97, § 3.5, at 125 (citing Barrowslough v. Kidder, Peabody & Co., 752 F.2d 923, 926 (3d Cir. 1985); Amato v. Bernard, 618 F.2d
Courts have articulated several considerations relevant in determin-

559, 567 (9th Cir. 1980)). Professor Perry further states that courts have noted the link between the two sections and have borrowed the standards developed under the LMRA. *Id.*

The LMRA provides that a collectively “bargained for” benefit may be separately funded by the employer by agreement. 29 U.S.C. § 186(c) (1988). If so funded, the fund must be managed for the “sole and exclusive benefit of the employees” of the employer. *Id.* The supervision and administration of this fund is to be conducted jointly by an equal number of employee and employer representatives, with a deadlock to be broken by a neutral arbitrator. *Id.* Because the LMRA does not specifically grant federal courts jurisdiction to review the decision of trustees under LMRA plans, federal courts use a “bootstrap” approach in order to gain jurisdiction over the decisions of the trustees of these plans, and these courts have historically reviewed the decisions of this “panel” under an arbitrary and capricious standard. See Duncan, Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test, 71 COLUMBIA L. REV. 986, 992-94 (1986); Comment, supra note 64 at 1039. By analogy, because of the similarities in language between 29 U.S.C. § 186(c)(5) (provision of LMRA setting out a trustee’s fiduciary duties) and 29 U.S.C. § 1104(a)(1) (provision of ERISA setting out ERISA’s fiduciary standards), courts borrowed the standard of review established under the LMRA section to review the decisions of ERISA plan administrators. See Jung v. FMC Corp., 755 F.2d 708, 710-11 (9th Cir. 1985) (court stated that trustees’ actions are subject to same standard of review under ERISA’s fiduciary obligation as under LMRA, even where plan is unfunded and administered by employer); Music v. Western Conference of Teamsters Pension Trust Fund, 712 F.2d 413, 418 (9th Cir. 1983) (holding that trustees require broad discretion in fashioning eligibility requirements for pensions; actions of trustees are subject to same standard of review under ERISA as under LMRA). Additionally, courts used as support for the adoption of the standard from the LMRA what was perceived as Congress’s intent that the fiduciary duties of the LMRA were to be incorporated into ERISA, thus leading to the conclusion that the standard of review used in LMRA cases was to be the same for cases brought under ERISA. See NLRB v. Amex Coal Co., 455 U.S. 322, 331-32 (1981).

It is interesting to note, however, that the Supreme Court in *Bruch* questioned the adoption of the arbitrary and capricious standard from the LMRA for cases under ERISA, noting that the standard was used under the LMRA specifically as a means of exercising jurisdiction over the decisions of trustees. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109-10 (1989). Such a need to establish jurisdiction over the decisions of trustees is not present under ERISA, because ERISA specifically grants federal courts jurisdiction to review decisions of fiduciaries of ERISA plans under 29 U.S.C. § 1132(a)(1)(B) (1988). Therefore, the reason for adopting the standard under the LMRA, i.e., the need to exercise jurisdiction over decisions of trustees, is not present under ERISA, and thus the wholesale adoption of the standard from the LMRA is misplaced. *Bruch*, 489 U.S. at 109-10; see also Duncan, supra note 82 at 992-94, 994 n.40. For a further discussion of the rationale used by the Supreme Court in refusing to adopt the standard used for LMRA cases, see *infra* notes 109-10 and accompanying text.

Finally, it is worth noting that early cases construing the provisions of the LMRA held that a beneficiary’s claim was most appropriately analyzed under traditional contract principles. See *infra* note 185. It was not until a few years later that courts settled on using the arbitrary and capricious standard to review decisions of trustees administering plans set up pursuant to the LMRA’s provisions, reasoning that it was the appropriate standard because the LMRA provided for a neutral system of administration. See *Bruch* v. Firestone Tire & Rubber Co., 828 F.2d 134, 141-43 (3d Cir. 1987) (setting out evolutionary his-
ing whether a plan administrator's decision was arbitrary and capricious. Although the application of the standard "defies generalization," courts have stressed the importance of such factors as the uniformity of a plan administrator's construction of a disputed provision of the plan, the reasonableness of the plan administrator's construction of plan terms in light of the express terms of the plan, whether the administrator's interpretation was fair, and whether the interpretation attempts to prevent unanticipated costs. In addition, some courts have considered the good faith of the administrator in assessing whether the administrator's decisions were arbitrary and capricious. Generally, if the administrator's construction of the plan has been uniform and was reasonable interpretation of the terms of the plan, the administrator's construction will be upheld, even if it is not the construction that a court would have given to the terms of the plan.

83. See generally Comment, supra note 64 at 1047-57 (outlining some relevant factors courts use in determining whether standard has been violated). Also, in Duncan, supra note 82 at 994-95, the author indicates that the arbitrary and capricious test is abstract and that courts are not uniform concerning factors to be used in its application.

A good example of the application of some of these factors can be found in Hoover v. Blue Cross & Blue Shield, Inc., 855 F.2d 1588 (11th Cir. 1988). In Hoover, the employee benefits plan called for co-payment of health related medical expenses related to a hospital stay, between the insurance company providing the coverage and the covered employee. Id. at 1540. The employee was required to pay any hospital inpatient deductible plus 20% of any amount over the hospital inpatient deductible. Id. When Blue Cross paid its share of the hospital bill, however, it received a discount on its payment to the hospital. Id. The employees argued that the plan required that employees share in the discount provided by the hospital to the insurance carrier, or in other words, that the employees were required to pay only 20% of the amount actually paid by the insurance company to the hospital. Id. The court held that, as a matter of law, the administrator's refusal to pass along the discount to the beneficiaries did not violate the arbitrary and capricious standard. Id. at 1542. The court stated that if the plan is reasonably susceptible to two interpretations, the "subjective expectations of a plan beneficiary do not provide the proper measure of a plan administrator's interpretation of a disputed plan provision." Id.

84. Cases in which the good faith of the administrator was considered are, Hoover, 855 F.2d at 1541; Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623, 626 (6th Cir. 1987); and Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982).

85. See Dennard, 681 F.2d at 314; see also Batchelor v. International Blvd. of Elec. Workers Local 861, 877 F.2d 441, 444 (5th Cir. 1989) (court must determine legally correct interpretation of plan, then decide whether plan administrator acted arbitrarily and capriciously in light of that interpretation); Slover v. Boral Henderson Clay Prods., Inc., 714 F. Supp. 825, 831 (E.D. Tex. 1989) (even if court determines that administrator's interpretation was incorrect, no provision of ERISA is violated unless administrator's decision can be viewed as...
Predictably, however, a few courts began to question the wisdom of rigidly applying an extremely deferential standard of review in all denial of benefit cases under ERISA, at least where a plan administrator has acted under a potential conflict of interest. Some courts pointed out

arbitrary and capricious; see also Comment, supra note 64 at 1051 & n.72 (decision reached by fiduciary need not be “correct” one in order to be upheld (citing Griffis v. Delta Family-Care Disability & Survivorship Plan, 723 F.2d 822, 825 (11th Cir. 1984)).

86. See Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1563 (11th Cir. 1990) (greater scrutiny required where conflict exists), cert. denied, 111 S. Ct. 712 (1991); Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134 (3d Cir. 1989) (where employer administers own benefits plan, stricter scrutiny required), aff'd in part and rev'd in part, 489 U.S. 101 (1989); Van Boxel v. Journal Co. Employees’ Pension Trust, 836 F.2d 1048, 1053 (7th Cir. 1987) (greater the conflict of interest on part of trustees, less court will defer to their decision); Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1152 (9th Cir. 1986) (where administrator acts under divided loyalties, greater scrutiny required); Jung v. FMC Corp., 755 F.2d 708, 711-12 (9th Cir. 1985) (where employer avoids sizable cash outlay because of eligibility decision, greater scrutiny required); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983) (burden is on trustee to show reasonableness if eligibility decision excludes sizable number of beneficiaries); Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982) (factual background of case important in determining whether or not administrator acted reasonably); McKinnon v. Blue Cross & Blue Shield, 691 F. Supp. 1314, 1319-22 (N.D. Ala. 1988) (conflict of interest must be taken into account in determining whether or not trustee acted reasonably), aff'd, 874 F.2d 820 (11th Cir. 1989).

87. A conflict of interest is most obvious in cases where an ERISA-covered plan is unfunded and the employer not only pays benefits out of its general funds, but administers the plan as well. Under ERISA it is perfectly proper that the employer administers its own benefits plan and make eligibility determinations under the plan. See Van Boxel v. Journal Co. Employees’ Pension Trust, 836 F.2d 1048, 1050 (7th Cir. 1987). Because the payment of benefits under the plan will be made out of the employer’s general funds, the employer has a vested interest in making the eligibility determination. See Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 144 (3d Cir. 1987), aff’d in part and rev’d in part, 489 U.S. 101 (1989).

Less obvious is the conflict of interest which exists when benefits are funded through an insurance carrier, such as a health insurance company, and the insurance carrier is charged with the responsibility of paying out benefits upon a determination of entitlement while the employer merely pays a premium to the insurance carrier for coverage. In these cases, if the insurance company is responsible for making the eligibility determination, the insurance company’s administrator has an economic incentive in refusing to pay benefits not unlike that of the employer who administers its own unfunded benefits plan. See, e.g., Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1561 (11th Cir. 1990) (court stated that “[b]ecause an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business”), cert. denied, 111 S. Ct. 712 (1991); Dozsa v. Crum & Forster Ins. Co., 716 F. Supp. 131, 139 (D.N.J. 1989) (Prudential Insurance Company had economic interest in decisions to deny benefits as administrator of employee’s company health care plan, even though, to some extent, costs of paying benefits would be passed on to employees). But when the insurance carrier receives full reimbursement from the plan sponsor for covered medical claims, the insurance company does not suffer any direct, immediate expense as a result of benefit determinations favorable to plan

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that the uniform adoption of a deferential standard from the LMRA was not justified, particularly in light of the fact that the LMRA contemplates a neutral administration of employee benefit funds while ERISA expressly permits the employer to administer its own benefit plan. At least one court reasoned that, even under traditional common law trust principles, a deferential standard of review was inappropriate when a trustee was acting under a possible conflict of interest.

Initially, courts that questioned the wisdom of adopting a deferential approach when a conflict of interest was present took different approaches in determining the appropriate standard of review to be applied. In Bruch v. Firestone Tire & Rubber Co., the landmark case which eventually reached the Supreme Court, the United States Court of Appeals for the Third Circuit applied a de novo standard of review because the benefit plan was administered by the employer/sponsor of the plan. Under this approach, because there was potential for abuse, the.

participants, and deferential review of eligibility decisions is appropriate. See, e.g., Jett v. Blue Cross & Blue Shield, Inc., 890 F.2d 1137, 1139 (11th Cir. 1989); cf. Bali v. Blue Cross & Blue Shield Ass’n, 873 F.2d 1043, 1047 n.5 (7th Cir. 1989) (no conflict of interest implicated where third party made determinations on benefits). Recall that in Hoover v. Blue Cross & Blue Shield, Inc., 855 F.2d 1538 (11th Cir. 1988), supra note 83, the administrator of a health benefits plan interpreted the language of the plan to mean that the insurance company need not share the discount it received from hospitals with the employees under the plan’s co-payment provisions. Id. at 1540. In Hoover, because the insurance company had an economic interest in not passing the discount on to the employees, a potential conflict of interest existed in the administration of the plan. Under the approach adopted by most courts, and the court in Hoover, instead of reviewing the decisions of the administrator carefully under traditional contract principles, the administrator’s decision would be reviewed under an arbitrary and capricious standard. See supra note 80 and accompanying text.

88. See, e.g., Bruch, 828 F.2d at 141-44 (LMRA provides for neutral administration of benefits while ERISA permits conflict to exist); Van Boxel, 836 F.2d at 1052 (courts adopted arbitrary and capricious standard from LMRA without apparently noticing that employers often held “whiphand” under ERISA trusts).

89. For a discussion of the administration of funds established in accordance with provisions of the LMRA, see supra note 82.

90. See 29 U.S.C. §§ 1102, 1002(16) (1988); see also Van Boxel, 836 F.2d at 1050 (under ERISA trustees are appointed by company/employer); Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 535 (7th Cir.) (ERISA permits “Plan” to specify composition of retirement committee, which may include only management if collective bargaining agreement so provides), cert. denied, 479 U.S. 1094 (1987).

91. See Bruch, 828 F.2d at 141, 144. For an analysis of traditional trust principles which call for heightened scrutiny when reviewing the decisions of a trustee acting under a conflict of interest, see supra note 50 and accompanying text.


93. Id. at 145. The Supreme Court affirmed the Third Circuit’s decision on the appropriate standard of review for the case, but on different grounds. See infra notes 106-17. For a discussion of the de novo standard of review, see supra note 47.
court held that the rights of beneficiary and employer were to be determined under principles governing the construction of contracts made between parties bargaining at arm's length.94 Other courts, refusing to move entirely to a straightforward contract analysis, applied varying degrees of deference within the framework of the arbitrary and capricious standard of review.95

V. BRUCH v. FIRESTONE TIRE & RUBBER CO.—TWO COURTS TAKE AIM AT RESTORING LOST PROTECTION FOR BENEFICIARIES OF EMPLOYEE BENEFIT PLANS

Confronted with the apparent decrease of protection for the beneficiaries of some employee benefit plans, the Third Circuit and the Supreme Court, in differing approaches to the same case, attempted to remedy the problem and restore the lost protection. Both courts, however, left open the possibility that some classes of beneficiaries in need of greater protection might still have their claims subjected to a superficial standard of review.96

In BRUCH v. FIRESTONE TIRE & RUBBER CO.,97 the Third Circuit heard an appeal from former employees of the Firestone Tire & Rubber Company (Firestone) who alleged that, following the sale by Firestone of the division in which they worked, they had been wrongfully denied severance pay benefits,98 certain early retirement benefits, and non-vested

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94. Bruch, 828 F.2d at 145. The court stated that principles of contract construction warranted steering a middle ground between plaintiff's and defendant's interpretation, and held that past practice and industry practice with respect to the severance pay plan at issue were relevant in construing the agreement which was the embodiment of the parties' bargain. Id.

95. See, e.g., Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1152-53 (9th Cir. 1986) (court stated that if administrator is acting under divided loyalties, court must define standard of review with great care, shaping it in response to countervailing tugs of divided loyalty pulling at administrator); Jung v. FMC Corp., 755 F.2d 708, 711-12 (9th Cir. 1985) (if employer denies benefits to class of employees and prevents sizable outlay of funds by employer, reviewing court must consider that as factor in determining whether administrator violated arbitrary and capricious standard and whether less deference should be given to administrator's decision); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983) (if plan provision excludes disproportionate number of beneficiaries from benefits, burden shifts to trustees to show reasonable purpose for exclusion); Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982) (factual background of case must influence district court's review of administrator's decision); McKinnon v. Blue Cross & Blue Shield, 691 F. Supp. 1314, 1319-22 (N.D. Ala. 1988) (conflict of interest to be taken into account in deciding whether or not administrator's decision was reasonable).

96. For a discussion of how the decisions of the Supreme Court and the Third Circuit in BRUCH do not sufficiently protect certain beneficiaries against the wrongful denial of benefits, see infra notes 190-99 and accompanying text.


98. Severance benefits are benefits paid upon the termination of an em-
rights under an employee stock purchase plan. The benefits were contained in three separate plans, all administered by Firestone. With respect to each claim under the three separate plans, Firestone's administrator based a denial of benefits on a construction of the applicable plan language.

The United States District Court for the Eastern District of Pennsylvania initially granted summary judgment for Firestone, holding that the court "could not reverse the plan administrator's constructions of the plans' terms unless they were arbitrary and capricious," and that the administrator's interpretations of the plans in this case did not violate the standard. On appeal, the Third Circuit reversed the district court decision. The court of appeals held that application of an arbitrary and capricious standard of review in cases where an employer is the administrator of an unfunded welfare plan is inappropriate, because of the potential for abuse in the administration of the plan. The court of appeals determined that the decisions of Firestone's plan administrator should have been judged under principles governing the construction of contracts.

Employee's employment with the company. The former employees of Firestone in this case argued that, even though they continued employment with a new company upon the sale of their division by Firestone, they nevertheless were entitled to termination pay under Firestone's Severance Pay Plan since they no longer worked for Firestone. Bruch, 828 F.2d at 196.

99. Id. at 136-37.
100. Id. Firestone maintained: (1) a termination pay plan, providing severance pay benefits to salaried employees under certain conditions; (2) a retirement plan, which offered, in addition to retirement benefits, somewhat diminished benefits to employees who were eligible for early retirement, and deferred vested benefits for those who were not yet eligible for either retirement or early retirement benefits; and (3) an employee stock purchase plan giving certain employees the right to accumulate Firestone common stock. Id.
101. Id. at 137.
102. Id.
103. The opinion was written by Circuit Judge Becker, writing for a panel of three judges including Circuit Judge Higgenbotham and District Court Judge Dumbauld. Bruch, 828 F.2d at 135-36.
104. Bruch, 828 F.2d at 144-45. The Third Circuit indicated later in its opinion that the application of the arbitrary and capricious standard was outcome determinative, and that the case must be remanded to the district court for a determination in light of the new standard to be applied. Id. at 147. Apparentely the court was persuaded that, because the arbitrary and capricious standard was outcome determinative, the beneficiaries would summarily be denied the benefit of their bargain. Because there is always the potential for abuse when an employer administers its own unfunded plan, the court held that all administrator decisions in such cases were to be reviewed de novo. Id. at 145.
105. Id. at 145. In pointing out that Firestone had incentive to deny the claims for benefits, the court stated that because Firestone was not "disinterested in the amount of severance pay awarded; its impartiality . . . cannot be relied upon to produce a fair result." Id. Note that the court did not accept the plaintiff's contention that any ambiguity in the trust instrument should be construed in favor of the beneficiaries, but chose to steer a middle course between
On writ of certiorari, the United States Supreme Court affirmed the Third Circuit's holding that a de novo standard of review of the plan administrator's decisions was appropriate. In an opinion authored by Justice O'Connor, the Court agreed that a wholesale adoption of the standard used to review trustee decisions under section 302 of the LMRA was inappropriate for all cases brought under ERISA. The Court acknowledged that universal application of the arbitrary and capricious standard of review in denial of benefit cases would provide employees with less protection than they enjoyed prior to the enactment of ERISA. Justice O'Connor indicated that the trust law de novo standard of review was more consistent with the pre-ERISA judicial practice of applying contract law principles to determine benefit entitlement.

Justice O'Connor, however, disagreed with the Third Circuit's reasoning that the de novo standard of review was appropriate in every case.

The constructions offered by plaintiffs and defendants. The court believed that the principles governing construction of contracts provide for such an approach. *Id.* The court suggested several principles of contract construction which were relevant in the further proceedings of this case, such as usage of trade, course of dealing, and any memorandum indicating a party's construction of the plan. *Id.* at 147. The court also indicated that where the parties never agree on a particular term of the contract, such as where a benefit is bestowed unilaterally by the employer, then the court's problem on remand is "akin to the difficulties a court faces when parties omit an essential term [of the contract]." *Id.*

106. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Firestone had argued that the arbitrary and capricious standard of review should be applied in all cases under ERISA, because Congress refused to amend ERISA specifically to require that a de novo standard of review be applied in denial of benefit cases. *Id.* at 113-14. Justice O'Connor responded to this argument by stating that this "bit of legislative inaction" should not be taken as conclusive of Congress's view on the appropriate standard of review because there could conceivably be many reasons why the proposed legislation does not pass. *Id.* In addition, the Court stated that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* (quoting United States v. Price, 361 U.S. 304, 313 (1960)).

107. *Id.* at 109. The Court pointed out that the arbitrary and capricious standard of review was adopted by federal courts in LMRA cases in order to establish a jurisdictional basis for suits against trustees. *Id.* at 108. This need is nonexistent under ERISA, because ERISA specifically authorizes suits against fiduciaries and plan administrators to remedy statutory violations. *Id.* at 109; see 29 U.S.C. §§ 1132(a), 1132(f) (1988). For a discussion of the questionable importation of the standard of review under the LMRA to claims under ERISA, see *supra* note 82. See also Comment, *supra* note 61 at 1038-39.

108. *Bruch,* 489 U.S. at 113-14 (1989); see also *Penn v. Howe-Baker Eng'rs,* Inc., 898 F.2d 1096, 1100 (5th Cir. 1990) (court stated that Supreme Court pointed out in *Bruch* that an arbitrary and capricious standard of review would contravene purposes of ERISA and afford less protection to employees than they had prior to ERISA).

109. For a discussion of the de novo standard of review, see *supra* note 47 and accompanying text.

110. *Bruch,* 489 U.S. at 111.
where an employer administers an unfunded plan.\textsuperscript{111} Refusing to embrace the Third Circuit's approach, the Supreme Court chose not to make the presence or absence of a conflict of interest the determining factor of the appropriate standard of review to be applied in denial of benefit cases. Instead, it held that the language of the plan, rather than the existence of a conflict of interest, should govern the selection of the appropriate standard of review to be applied.\textsuperscript{112} The Court explained that where a plan administrator has been granted authority to determine eligibility or to construe ambiguous provisions of a plan, an abuse of discretion standard\textsuperscript{113} is appropriate for reviewing plan administrator decisions.\textsuperscript{114} Relying on trust concepts, the Court reasoned that "where trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act."\textsuperscript{115} As a result, if the benefits plan contains the necessary grant of discretion to the plan administrator to interpret ambiguous or disputed provisions of the plan, or to determine eligibility, the denial of benefits claim will be reviewed under an abuse of discretion standard.\textsuperscript{116} In such a case, the existence of a con-

\textsuperscript{111} The Third Circuit indicated that because a plan was unfunded and administered by the employer, there should be a heightened judicial scrutiny of the administrator's decisions. \textit{Bruch}, 828 F.2d at 145.  

\textsuperscript{112} Thus, the Court has left open the possibility that a plan administrator with a vested interest in making eligibility decisions might receive a deferential judicial review of those decisions.  

\textsuperscript{113} Note that the Court used the term "abuse of discretion standard" instead of "arbitrary and capricious standard." \textit{Bruch}, 489 U.S. at 115. It is not clear whether the two standards are synonymous with each other. At least one court has raised this question, and indicated that several courts have held the two standards to be synonymous. \textit{See} Richards v. United Mineworkers Health & Retirement Fund, 895 F.2d 133, 135 (4th Cir. 1990) (citing Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir. 1989)); \textit{see also} Penn v. Howe-Baker Eng'rs Inc., 898 F.2d 1096, 1100 n.2A (5th Cir. 1990) (because an abuse of discretion standard requires courts to determine whether or not plan administrator's decision was arbitrary and capricious, both standards are essentially the same); De Nobel v. Viro Corp., 885 F.2d 1180, 1187-88 (4th Cir. 1989) (court indicated that \textit{Bruch} discarded arbitrary and capricious standard in favor of abuse of discretion standard, but both standards include an inquiry into reasonableness of administrator actions). On the other hand, another court has stated that courts are unsure of the proper deferential standard of judicial review and that the Supreme Court seemed to have referred to several possibilities: arbitrary and capricious, abuse of discretion and reasonableness. \textit{See} Gust v. Coleman Co., Inc., 740 F. Supp. 1544, 1551 (D. Kan. 1990). The \textit{Gust} court would appear to believe that the standards are not the same.  

\textsuperscript{114} \textit{Bruch}, 489 U.S. at 115.  

\textsuperscript{115} \textit{Id.} at 111 (citing Nichols v. Eaton, 91 U.S. 716, 724-25 (1875)).  

\textsuperscript{116} This is assuming that the employer has the economic power to require inclusion of such a clause in the plan. But even if the employer does not have the power to bargain for the inclusion of such a clause, there is a danger that employees might agree to the inclusion of such a clause without knowledge of its implications. At least one court has questioned whether employees would ever knowingly agree to place their rights to benefit entitlement "at the mercy of a
Conflict of interest is to be considered only as one factor in determining whether an administrator has acted reasonably.117

Therefore, under the Supreme Court's present approach, because the presence of a conflict of interest is only one factor in determining the reasonableness of the administrator's decision, it is entirely possible that the eligibility decision of an employer/administrator might be subjected to minimal judicial scrutiny even though the administrator has a vested interest in making the eligibility determination.118 Further, the biased tribunal." Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987).

117. See Bruch, 489 U.S. at 115. Recall that under traditional trust principles, if the trustee is acting under a conflict of interest, the trustee's decisions are to receive the strictest scrutiny. See supra note 50 and accompanying text. It is unfortunate that courts have not used this part of the Court's opinion in Bruch to apply a stricter review in cases where there appears to be a conflict. A possible explanation for the tendency of courts not vigorously to adopt this part of the Supreme Court's approach is that this language was only an addendum to the Court's analysis, and not central to the resolution of the case. Further, since ERISA's enactment, courts have been reluctant to apply a heightened standard of review in denial of benefit cases, even when the administrator is acting under a conflict of interest. See supra note 80 and accompanying text. As a result, many courts have diminished the significance of this language, or have ignored it altogether. See, e.g., Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 694-95 (6th Cir. 1989) (court failed to consider possible conflict of interest on part of employer trustees of pension fund); DeNobel v. Vitro Corp., 885 F.2d 1180, 1191-92 (4th Cir. 1989) (employer trustees not acting under conflict of interest even though trustees made eligibility decisions that might have affected employer contributions to pension fund); Bowman v. Firestone Tire & Rubber Co., 724 F. Supp. 493, 501 (N.D. Ohio 1989) (fact that Firestone administered plan not considered); Steever v. Bristol-Meyers Co., 727 F. Supp. 986, 988-89, 990 (D. Md. 1989) (court failed to consider whether health benefits administrator, who was Senior Vice-President of Human Resources of defendant company, was acting under conflict of interest); Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 501 (W.D. Pa. 1989) (conflict of interest did not taint administrator's decision denying termination pay to troublesome employee); Questech, Inc. v. Hartford Accident & Indemnity Co., 713 F. Supp. 956, 963-65 (E.D. Va. 1989) (court failed to consider that insurance company decisionmaker might be acting under conflict of interest in making death benefit eligibility determination); Ferrara v. Allentown Physicians Anesthesia Assocs., 711 F. Supp. 206, 210 (E.D. Pa. 1989) (although administrator of plan was physician with medical group, court found no conflict of interest because there was no evidence that physician was employer).

Some courts, however, have strictly followed the Supreme Court's approach in Bruch and have subjected plan administrator decisions to heightened review where a conflict in the administration of benefits is present. See infra note 132 and accompanying text. If applied with vigor, this part of the Supreme Court's approach might well subject biased administrator decisions to the strict scrutiny contemplated by the Restatement (Second) of Trusts § 187 (1959), a result which is sought by the approach suggested in this Comment. Requiring courts to consider a conflict only as a factor in determining reasonableness, however, has historically led to inconsistency of application, thus defeating the goal of uniformity contemplated by the drafters of ERISA. For a discussion of legislative intent to create uniformity of decision under ERISA, see supra note 52 and accompanying text.

118. Although the Supreme Court's decision attempts to restore entitle-
Court’s approach defeats ERISA’s goal of providing increased protection for beneficiaries of employee benefit plans, and leads to an erosion of two other significant policy aims of ERISA: that of creating uniformity of decisions through ERISA’s preemption provisions,119 and that of providing full disclosure to employees and beneficiaries of ERISA-covered plans with respect to their entitlement to benefits.120

VI. Firestone Tire & Rubber Co. v. Bruch—The Aftermath: What Constitutes a Valid Grant of Discretion?

In light of the Supreme Court’s holding in Firestone Tire & Rubber Co. v. Bruch,121 it is logical for employers to include in their employee benefit plans “boilerplate language” granting discretion to their plan administrators to interpret ambiguous or disputed plan provisions or to determine eligibility, so that they might gain the advantage of a deferential standard of review for the decisions of their plan administrators.122

119. For a discussion of the intent of the drafters to provide uniformity of decision under ERISA, see supra note 52. For a discussion on how the Supreme Court’s opinion defeats this goal, see supra notes 75 & 117.

120. ERISA’s disclosure requirements are found at 29 U.S.C. §§ 1021-26 (1988). Recall that under ERISA a fiduciary must carry out duties in accordance with the terms of the plan instrument. See 29 U.S.C. § 1104(a)(1)(D) (1988). If a plan were drafted ambiguously, however, it would provide greater latitude to the administrator in making eligibility decisions. The Supreme Court’s holding, therefore, would seem to foster an incentive for the employer to include a clause granting discretion to interpret ambiguous terms, and then to draft the plan as ambiguously as possible. This would have the effect of decreasing the level of the employee’s understanding with respect to benefit entitlement, and would conflict with ERISA’s policy of full disclosure. See Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir. 1990). In Meza, however, the Fifth Circuit stated that ERISA was intended to require employers to spell out benefits and make it clear to the employees their exact entitlement under any benefits plan. Id. at 1278 (citing H.R. Rep. No. 533, 93rd Cong., 2d Sess. 11, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4646).


122. Also, if the benefit is funded through payment of premiums by the employer to an insurance company, with the insurance company making the eligibility determinations and paying the benefits, the insurance company benefits from a favorable eligibility decision and from the inclusion of a grant of discretion in the plan instrument to make the final determination on all questions of eligibility. In fact, the insurance company could require inclusion of such a
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If this practice were to become universal, it might result in the application of an abuse of discretion standard in virtually every benefit entitlement case. The divergence of opinion following *Bruch* illustrates the difficulty some courts have had reconciling the Supreme Court's approach with the intent of the drafters of ERISA. Indeed, as one court stated, the Supreme Court's approach in *Bruch* has simply replaced the old disputes over the appropriate standard of review in denial of benefit claims with new ones.\(^{125}\)

A. *The New Debate, and Some Old Problems*

Although some courts follow the Supreme Court's holding in *Bruch* and require a plan to contain an explicit grant of discretion\(^{124}\) before the plan administrator's decisions will be granted deference,\(^{125}\) many

clause in every health benefit plan before the company would provide coverage. For a discussion of the conflict of interests which might exist in the administration of health benefit plans, see *supra* note 87 and accompanying text.


124. The Supreme Court in *Bruch* stated that there must be evidence in the plan instrument of the grant of power to construe ambiguous terms or that eligibility determinations are to be given deference, and that it found no such language in Firestone's plan. *Bruch*, 489 U.S. at 111-12. Therefore, the decisions of the administrator were to be reviewed de novo, even though the administrator was granted authority to make eligibility decisions under the plan. Most courts have interpreted *Bruch* to mean that explicit language granting discretion is required in the plan before deference will be given. For a discussion of how most courts have interpreted *Bruch* to require a specific grant of discretion, see *infra* note 147.

125. See, e.g., *Bowman v. Firestone Tire & Rubber Co.*, 724 F. Supp. 493 (N.D. Ohio 1989). In *Bowman*, the reviewing court found a specific grant of discretion in the instrument to determine eligibility for severance benefits with respect to senior grade salaried employees, but not with respect to field grade salaried employees. *Id.* at 500-01. Therefore, the court reviewed the decisions of the administrator of the plan under a de novo standard with respect to severance benefits for field grade salaried employees, and under an abuse of discretion standard with respect to senior grade employees. *Id.; see also* Michael Reese Hosp. v. *Solo Cup Employee Health Benefit Plan*, 899 F.2d 639, 641 (7th Cir. 1990) (de novo review applied where language in plan was insufficient to grant administrator discretion to interpret plan); *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 427 (4th Cir. 1990) (court found grant of discretion to determine eligibility and interpret other provisions requiring deference to administrator's decisions); *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1559 (11th Cir. 1990) (health benefits plan specifically gave Blue Cross discretion to make eligibility determinations, so arbitrary and capricious standard was appropriate), *cert. denied*, 111 S. Ct. 712 (1991); *Ulmer v. Harshco Corp.*, 884 F.2d 98, 101-03 (3d Cir. 1989) (plan did not contain grant of discretionary authority, so court interpreted meaning of disputed terms under traditional contract principles); *Parsons v. West Virginia Works Hourly Employees Pension Plan*, 879 F.2d 130, 132 (4th Cir. 1989) (court unable to find grant of discretion in plan instrument and held de novo review proper); *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989) (neither party could point to provision in plan giving administrator discretionary authority to determine eligibility or construe plan terms, so administrator's decision reviewed de novo); *Batchelor v. International Bhd. of Elec. Workers Local 861*,
courts have found an implied grant of discretionary authority in plans that merely grant administrators authority to make eligibility determinations. These courts have continued to follow the pre-Bruch approach of applying a lesser degree of scrutiny to decisions of plan administrators. On the other hand, a few courts have applied a de novo standard of review even when plan language could easily have been interpreted as having granted the necessary discretion envisioned by the Supreme Court.

The decisions made by these reviewing courts when determining the standard of review to be applied are crucial, because the application of an abuse of discretion standard by a reviewing court tends to be outcome determinative. As stated previously, if a court finds a sufficient

877 F.2d 441, 442-43 (5th Cir. 1989) (abuse of discretion standard applied where trustees were given broad discretion to interpret plan); Soule v. Retirement Income Plan, 723 F. Supp. 1138, 1148-50 (W.D.N.C. 1989) (because Committee, and not employer, was given discretion to interpret plan, interpretation by Committee received deference, but interpretation by employer reviewed under de novo standard); Adams v. Avondale Indus., 712 F. Supp. 1291, 1294 (S.D. Ohio 1989) (administrator's decision reviewed de novo where no grant of discretion found in plan), aff'd in part and rev'd in part, 905 F.2d 943 (6th Cir.), cert. denied, 111 S. Ct. 517 (1990); Lesman v. Ransburg Corp., 719 F. Supp. 619, 620-21 (W.D. Mich. 1989) (plan did not contain grant of discretion to determine eligibility or interpret plan so administrator's decisions reviewed de novo), aff'd, 911 F.2d 732 (6th Cir. 1990). For a further discussion concerning the fact that most courts require the plan to specifically grant the appropriate discretion before deference will be given, see infra note 147 and accompanying text.

126. For a discussion of the analysis some courts use in finding a grant of discretion implied in a grant of authority to make eligibility determinations, see infra notes 137-47 and accompanying text.

127. For a discussion of how courts have continued to grant deference to plan administrator decisions, even where the plan does not contain a grant of discretion to interpret the plan or to make eligibility determinations, see infra notes 137-56 and accompanying text.

128. For a discussion of how some courts have applied de novo review on the same facts that might lead other courts to apply an abuse of discretion standard, see infra notes 163-79 and accompanying text.

129. See De Nobel v. Vitro Corp., 885 F.2d 1180, 1188-90 (4th Cir. 1989) (administrator's interpretation upheld under arbitrary and capricious standard where, although beneficiaries' interpretation of retirement plan found "considerable support" in language of plan, fiduciary's alternative interpretation was reasonable); Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 694-95 (6th Cir. 1989) (under arbitrary and capricious standard committee did not act unreasonably in making factual determination that decedent was not an employee at time of death, denying claim by widow for death benefits), cert. denied, 110 S. Ct. 1924 (1990); Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 499 (W.D. Pa. 1989) (plan administrator's interpretation of language regarding severance benefits was reasonable under arbitrary and capricious standard of review); Ferrara v. Allentown Physician Anesthesia Assocs., 711 F. Supp. 206, 211 (E.D. Pa. 1989) (under arbitrary and capricious standard administrator may choose between two reasonable interpretations of ambiguous plan language, and administrator's interpretation that benefits had not vested was not arbitrary because interpretation was "allowed" by plan language); O'Dom v. Graphic Communication Int'l Union Supplemental Retirement & Disability Funds, 722 F.
grant of discretion in the plan, the court will not find that an administrator has violated fiduciary duties unless the administrator's decisions have been unreasonable.\textsuperscript{130} In fact, several circuits have held that where an administrator must select between two reasonable alternative

\textsuperscript{130} Courts have used varying analyses in determining whether or not an administrator has acted reasonably. For example, in Batchelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441, 444-48 (5th Cir. 1989), the court stated that in reviewing the trustees' decisions, the court must engage in a two step process. First, the court must determine the legally correct interpretation of the plan, and then determine whether the trustees acted arbitrarily and capriciously in light of the interpretation they gave the plan in the particular instance. \textit{Id.} at 444. A review of the legally correct interpretation involves a consideration of: (1) the uniformity of construction; (2) what a fair reading of the plan would be; and (3) whether either of the interpretations would result in unanticipated costs. \textit{Id.}

Further, if the trustees' interpretation departs from the clear language of the plan, the court must still consider whether the trustees abused their discretion. Factors probative of the good faith of a trustee or administrator include: (1) the internal consistency of the plan under the construction given by the trustee; (2) any relevant regulations formulated by the appropriate administrative agencies charged with regulating labor; and (3) the factual background of the determination of a plan and inferences of lack of good faith. \textit{Id.} at 445. The fact that a trustee's interpretation is not the correct one is only a factor in determining whether or not the trustee abused discretion. \textit{Id.} at 448 (quoting \textsuperscript{\textsuperscript{131}} Denhard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982)); \textit{see also} Slover v. Boral Henderson Clay Prods., Inc., 714 F. Supp. 823, 831 (E.D. Tex. 1989)
interpretations of a plan, the administrator's choice of either alternative will be upheld.\(^\text{131}\) Adding still further to the confusion following \textit{Bruch} is the diversity of opinion concerning the appropriate level of scrutiny to be applied in cases where discretion is granted, but a conflict is present.\(^\text{132}\) Where the reviewing court finds that a conflict of interest may

(employing same factors as \textit{Batchelor} court in determining good faith of administrator).

Alternatively, in De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989), the court outlined a number of rules to guide an analysis of the reasonableness of an administrator's actions. Among the considerations were: (1) whether the administrator's interpretation is "consistent with the 'goals of the plan'" (citing Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1149 (4th Cir. 1985), \textit{cert. denied}, 477 U.S. 903 (1986)); (2) whether the administrator's interpretation might "render some language in the plan documents 'meaningless'" (citing Bayles v. Central States, Southeast & Southwest Areas Pension Fund, 602 F.2d 97, 100 (5th Cir. 1979)) or "internally inconsistent" (citing Reiberger v. Shannon, 581 F.2d 1266, 1273-74 (7th Cir. 1978)); (3) "whether the challenged interpretation is at odds with the procedural and substantive requirements of ERISA" (citing Blau v. Del Monte Corp., 748 F.2d 1948, 1353 (9th Cir. 1984), \textit{cert. denied}, 474 U.S. 865 (1985)); (4) "whether the provisions at issue have been 'consistently'" (citing Morgan v. Mullins, 643 F.2d 1320, 1324 n.4 (8th Cir. 1981)); and (5) "whether the fiduciaries' interpretation is 'contrary to the clear language of the [plan]'" (citing Denard v. Richards Group, Inc., 681 F.2d 306, 316 (5th Cir. 1982)). \textit{Id. at 1188; see also Hoover v. Blue Cross & Blue Shield, Inc., 855 F.2d 1538 (11th Cir. 1988): supra note 83 and accompanying text; Retirement & Sec. Program for Employees of Nat'l Rural Elec. Co-op Ass'n v. Oglethorpe Power Corp. Retirement Income Plan, 712 F. Supp. 223, 227 (D.D.C. 1989) (among factors to be considered in determining whether interpretation was reasonable are whether such interpretation: (1) was contrary to language of plan, (2) was consistent with purposes of plan, (3) was consistent with purposes of particular provision itself, and (4) was consistent with prior interpretations).

131. See Stewart v. National Shopmen Pension Fund, 795 F.2d 1079, 1083 (D.C. Cir. 1986) (court stated that choice between two reasonable alternatives is for trustees, not courts (citing Roark v. Lewis, 401 F.2d 425, 429 (D.C. Cir. 1968))); Edwards v. Wilkes-Barre Publishing Co. Pension Trust, 757 F.2d 52, 57 (3d Cir. 1985) (court stated that it is for trustee, not courts, to choose between two alternative interpretations (citing Tomlin v. Board of Trustees, 586 F.2d 148, 151 (9th Cir. 1978)), \textit{cert. denied}, 474 U.S. 843 (1985); Oglethorpe Power, 712 F. Supp. at 226-27 (court stated that it is for trustees and not courts to decide between two reasonable alternatives (citing Edwards., 757 F.2d at 56-57)).

132. After \textit{Bruch}, courts have not been in agreement as to the level of scrutiny to be applied in cases where a conflict is present. Where a conflict of interest is present, even though the administrator has been granted the appropriate discretion, a few courts have considered the conflict an important factor in determining whether the administrator of a benefits plan has acted reasonably. \textit{See} Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1563-64 (11th Cir. 1990) (holding that de novo review would deprive insurance carrier of benefit of its bargain and that arbitrary and capricious standard should be applied, but that arbitrary and capricious standard must be "contextually tailored" and its application must be "shaped by the circumstances of the inherent conflict of interest"), \textit{cert. denied}, 111 S. Ct. 712 (1991); Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1053 (7th Cir. 1987) (arbitrary and capricious standard gives less deference to decision of trustee the more trustee's impartiality can fairly be questioned (citing Holland v. Burlington Indus., Inc., 772 F.2d
have influenced an eligibility decision, unless the court applies the
Supreme Court’s approach in *Bruch* vigorously, beneficiaries will fail to
receive the protections that were available under pre-ERISA law.133
Conversely, where a plan fails to grant the appropriate discretion, a
greater judicial role in reviewing entitlement determinations generally
affords the beneficiary a better chance of success in challenging an
administrator’s denial of benefits.134

made pension decision during time of labor unrest at plant, court held it was
unrealistic to grant same substantial deference to administrator who was also
senior member of management as court would grant to decisions of wholly
independent fund trustee in similar circumstances).

133. As pointed out earlier, under an abuse of discretion standard, the
presence of a conflict is only a factor in determining whether or not the adminis-
trator’s decision was a reasonable interpretation of the plan. *See Firestone Tire
& Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (using as support RESTATE-
MENT (SECOND) OF TRUSTS § 187 comment d (1959)). In these cases, however,
the administrator’s interpretation could still presumably be upheld, even though
it is not the interpretation that would have been given to the plan by the court.
*See supra* note 85. Although some courts have strictly enforced the conflict
requirement, under the approach of most courts beneficiaries of employee benefit
plans do not receive the full protection that a traditional contract analysis might
provide. For a full discussion of the divergence of opinion in this area of the
law, see *supra* notes 80 & 117.

134. The Supreme Court referred to the *de novo* standard of review as pro-
viding greater protection for employees against denial of benefits than under an
arbitrary and capricious standard of review. *Bruch*, 489 U.S. at 112-14. *See*, e.g.,
*Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 147 (3d Cir. 1987) (case
remanded to district court for review under *de novo* standard because applica-
tion of arbitrary and capricious standard by district court was outcome determi-
native), *aff’d in part and rev’d in part*, 489 U.S. 101 (1989); *Soule v. Retirement
Income Plan*, 723 F. Supp. 1138, 1155 (W.D.N.C. 1989) (held for beneficiaries
under *de novo* review, because employer’s interpretation of plan was clearly
inconsistent with plan language).

In many cases, however, the *de novo* heightened standard of review has
failed to provide beneficiaries with the relief sought. *See* Michael Reese Hosp. v.
Solo Cup Employee Health Benefit Plan, 899 F.2d 639, 641 (7th Cir. 1990)
(even under *de novo* review claim for psychiatric inpatient care properly denied
because administrator’s decision was supported by testimony of only expert wit-
ness accepted by trial judge); *Shultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676,
679 (5th Cir. 1989) (under *de novo* review court upheld plan administrator’s
interpretation of coordination of benefits clause subject to two different inter-
pretations, considering conduct of parties prior to controversy); *Adams v.
review defendant’s decision not to pay termination benefits to employees as a
result of sale of company was valid interpretation of unwritten severance pay
policy considering all circumstances surrounding decision); *Lesman v. Ransburg
Corp.*, 719 F. Supp. 619, 621 (W.D. Mich. 1989) (even under *de novo* review,
court upheld administrator’s decision not to award severance pay to employees
of company which was liquidated because plan conferred severance benefits only
in event of reduction of work force or elimination of position, and sale of com-
pany was qualitatively different); *Bowman v. Firestone Tire & Rubber Co.*, 724
F. Supp. 493, 502 (N.D. Ohio 1989) (administrator’s decision to deny severance
benefits upheld under *de novo* standard of review because administrator’s con-
As a result, a beneficiary's chance of success in a wrongful denial of benefits claim now depends upon the sufficiency of a plan's language purporting to grant the necessary discretion to the administrator, as interpreted by the reviewing court. The following survey of cases

...
highlights the diversity of opinion that has developed among the federal courts since the Supreme Court's decision in *Bruch*, and indicates that a new approach is required in order to provide uniformity as well as appropriate protection.

898 F.2d 424, 427 (4th Cir. 1990) (court found grant of discretion to determine eligibility and interpret other provisions of plan in language giving administrator duty to "interpret and construe the provisions of the Plan and to make regulations which are not inconsistent with the terms thereof"); Richards v. United Mine Workers of Am. Health & Retirement Fund, 895 F.2d 133, 135 (4th Cir. 1990) (plan providing that trustees "shall have full and final determination as to all issues concerning eligibility for benefits" was broad enough grant for deferential review); Stoetznr v. United States Steel Corp., 897 F.2d 115, 119 & n.5 (3d Cir. 1990) (grant of authority to construe plan found in plan language giving plan administrator "the final and conclusive [decision] as to all questions of interpretation and application of these Pension Rules and as to all other matters arising in the administration thereof"); Batchelor v. International Bhd. of Elec. Workers Local 861, 877 F.2d 441, 443 (5th Cir. 1989) (language granting trustees power to "have full and exclusive authority to determine all questions of coverage and eligibility . . . [and] . . . full power to construe the provisions of [the] Agreement" was sufficient grant of discretion); Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 693-94 (6th Cir. 1989) (arbitrary and capricious standard applicable where plan gave retirement committee authority to resolve all factual disputes "giving due weight to all evidence available . . . [and to] interpret the Plan . . . [and] determine all questions arising in the administration, interpretation and application of the Plan"); De Nobel v. Vitro Corp., 885 F.2d 1180, 1187 (4th Cir. 1989) (grant of full discretionary authority found in plan language giving trustees power to "determine all benefits and resolve all questions pertaining to the administration, interpretation and application of the Plan provisions"); Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 550 (6th Cir. 1989) (authority to exercise discretion to interpret plan not found where plan provided that termination occurs when Ampco no longer intends to recall employees who are laid off, because once decision was made not to recall, eligibility was automatic); Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 499 (W.D. Pa. 1989) (grant of discretion found where plan provided that "[a]ll questions concerning interpretation or administration of this policy shall be referred to the Vice President . . . whose decisions on matters of interpretation shall be final"); Ferrara v. Allentown Physician Anesthesia Assocs., 711 F. Supp. 206, 209 (E.D. Pa. 1989) (valid grant of discretion found in plan language providing that "Plan Administrator shall administer the Plan in accordance with its terms and shall have the power to determine all questions arising in connection with the administration, interpretation, and application of the Plan"); Buchholz v. General Elec. Employee Benefit Plan, 720 F. Supp. 102, 104 (N.D. Ill. 1989) (court interpreted plan language giving carrier right to "make all determinations with respect to benefits under this Plan" as delegation of fiduciary duties to the carrier and not a grant of discretion to interpret plan language); Soule v. Retirement Income Plan, 723 F. Supp. 1138, 1148-50 (W.D.N.C. 1989) (although plan gave committee discretion to interpret plan, court found that employer actually interpreted plan so de novo review was applied); Reesner v. Esmark, Inc., Pension Bd., 714 F. Supp. 412, 413 (S.D. Iowa 1989) (court found valid grant of discretion in plan that provided that "[a]ll decisions of the Pension Board as to the facts of any case and the meaning and intent of any provision in this Plan or of its application to any case shall be final and conclusive"). For a discussion of the split of authority among the circuits, see supra notes 124-28, infra notes 137-79 and accompanying text.
B. Some Courts Still Prefer a Deferential Approach

Some courts have declined to apply a de novo standard of review and have continued to review plan administrator decisions deferentially,\textsuperscript{137} even where the administrator has clearly not been granted the discretion required under \textit{Bruch}.\textsuperscript{138} For example, in \textit{Steever v. Bristol-Meyers Co.},\textsuperscript{139} the United States District Court for the District of Maryland attempted to distinguish \textit{Bruch}, holding that a general grant of authority to the plan administrator to determine eligibility necessarily includes an implied grant of discretion. Therefore, the court concluded that a deferential standard of review in the case was appropriate.\textsuperscript{140} The \textit{Steever} court reasoned that the administrator in \textit{Bruch} had engaged in contractual interpretation, an area where the administrator had no special expertise which would have warranted deferential treatment.\textsuperscript{141} The court concluded, however, that the plan administrator had “made a decision plainly within his authority as expressed in the Plan” and that because of the administrator’s daily and continual experience in determining eligibility, deference should be provided.\textsuperscript{142} The court found it incomprehensible that a grant of authority to make eligibility determinations did not include a grant of discretion to interpret the plan.\textsuperscript{143}

While the \textit{Steever} court’s analysis may appear persuasive at first, it hinges on an unworkable premise.\textsuperscript{144} The administrators of the plans in \textit{Bruch} and \textit{Steever} were both granted authority to determine eligibility for benefits under their respective plans. In \textit{Bruch}, the administrator engaged in a construction of the term “termination pay,” while in \textit{Steever} the administrator rendered an interpretation of the term “totally dis-

\begin{itemize}
\item \textsuperscript{137} For a discussion of how courts continue to grant deference to plan administrator decisions, despite the lack of a grant of discretion in the plan, see infra notes 139-62 and accompanying text.
\item \textsuperscript{138} For a discussion of the requirements of \textit{Bruch}, see supra note 124.
\item \textsuperscript{139} 727 F. Supp. 986 (D. Md. 1989).
\item \textsuperscript{140} \textit{Id.} at 989.
\item \textsuperscript{141} \textit{Id.} at 988-89. The court stated that the thrust of \textit{Bruch} was that the exercise of de novo review is “both necessary and proper” where the question is interpretation of contractual terms. \textit{Id.} at 988.
\item \textsuperscript{142} \textit{Id.} at 989.
\item \textsuperscript{143} \textit{Id.} Specifically, the plan provided that the administrator had the “authority and responsibility . . . to grant or deny Participants’ claims for benefits under the Plan.” \textit{Id.} The court in \textit{Steever} attempted to justify its interpretation of \textit{Bruch} by claiming that “[i]t would be impossible for a plan administrator to exercise any authority in granting or denying benefits without exercising discretion.” \textit{Id.}
\item \textsuperscript{144} The court’s premise is that there is a clear dividing line between interpreting a contract and making a factual eligibility determination. See \textit{id.} at 988-89. The difficulty with this approach is that the line between the two activities is often blurred. See, e.g., \textit{Sly v. P.R. Mallory & Co.}, 712 F.2d 1209 (7th Cir. 1983). For a brief discussion of \textit{Sly}, see infra note 153.
\end{itemize}
abiled.” In both cases the administrators engaged in some level of contract interpretation in order to arrive at their eligibility decisions.

Furthermore, the distinction the court attempted to draw in Steeuer is of little consequence, because the Supreme Court intended to encompass all administrator decisionmaking activity under the standards of Bruch. In Bruch, the Court specifically held that a denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) must be reviewed de novo “unless the benefits plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”145 In Steeuer, the court essentially confused the issue of whether the administrator had exercised lawfully granted discretion in determining eligibility under the plan,146 with the issue of the appropriate standard of review to be applied in denial of benefit cases. Accordingly, the approach in Steeuer has been rejected by most courts.147

145. Bruch, 489 U.S. at 115 (emphasis added). For a discussion of Bruch’s requirement that a separate grant of discretion to make eligibility determinations exist before deference will be given to eligibility determinations, see infra note 160 and accompanying text.

146. See, e.g., Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327, 1329 (8th Cir. 1989). In Wallace, Firestone argued that its administrator necessarily engaged in “interpreting” the employee benefit policies set forth in an employee handbook as a result of administering the benefits, and that deference should be granted. Id. at 1329. The court was of the opinion that an implied power to interpret was not sufficient to satisfy Bruch, holding that the issue was “whether the terms of the plan give Firestone added discretion, not whether Firestone acts as if it has such discretion.” Id. The court further stated that “[i]ndeed, the thrust of [the employees’] claim is that Firestone is exercising discretion it does not have.” Id.

147. For example, in Graham v. Federal Express Corp., 725 F. Supp. 429 (W.D. Ark. 1989), the court stated that it was confronted by the difficult task of determining where the line is to be drawn between “a mere delegation of fiduciary duty and the grant of discretionary authority.” Id. at 434. In rejecting the argument that a grant of discretion to interpret is implied from the grant of authority to determine eligibility, the court stated that “[a] grant of discretionary authority must be found in the express language of the plan and will not be implied. To do otherwise, would result in finding such authority existent in nearly every ERISA plan.” Id. For a further discussion of Graham, see infra notes 148-64.

Other courts have specifically held that extending authority to trustees to make final determinations of an employee’s eligibility under a benefits plan does not confer discretionary authority on those trustees to interpret ambiguous provisions of the plan. See, e.g., Cathey v. Dow Chem. Co., Medical Care Program, 907 F.2d 554, 558-59 & 558 n.5 (5th Cir. 1990) (express grant of discretion is required before deference will be given), cert. denied, 111 S. Ct. 964 (1991); Baxter v. Lynn, 886 F.2d 182, 188 (8th Cir. 1989) (holding that if plan is silent as to administrator’s role then action taken by administrator should be reviewed as any other contract dispute); Dzingliski v. Weirton Steel Corp., 875 F.2d 1075, 1079 (4th Cir. 1989) (authority to determine whether employee met eligibility standards under disability benefits plan does not constitute discretionary authority to grant or deny benefits), cert. denied, 110 S. Ct. 281 (1989); Gust v. Coleman Co., 740 F. Supp. 1544, 1548 (D. Kan. 1990) (plan need not contain the “magic” word “discretion,” but whether or not plan grants discretion will be determined from face of instrument); Graham, 725 F. Supp. at 434 (court required express
In contrast to the approach taken in Steever, several other courts have utilized slightly different rationales in holding that the decisions of plan administrators should not be subjected to heightened judicial scrutiny, even though a plan contains no appropriate grant of discretion.\(^{148}\) For example, in Questech, Inc. v. Hartford Accident & Indemnity Co.,\(^{149}\) Questech had purchased a life insurance policy covering one of its executives, and the insurance company was faced with determining whether death benefits should be paid under the policy.\(^{150}\) The determination of eligibility hinged on deciding whether death resulted “directly and independently of all other causes from accident.”\(^{151}\) The plan under consideration in Questech did not contain an explicit grant of discretion to the administrator to determine eligibility or to construe ambiguous or disputed plan provisions.\(^{152}\) Nevertheless, the court applied a deferential standard of review to the administrator’s decision, reasoning that determining whether death resulted “directly and independently of all other causes from accident” was a factual question,\(^{153}\) and not one of plan

grant of discretion to determine eligibility or to interpret ambiguous plan terms in order to comply with Bruch standard). But see De Nobel v. Vitro Corp., 885 F.2d 1180, 1186-87 (4th Cir. 1989) (although plan did not expressly grant discretion, court found grant of discretion in grant of authority to “determine all benefits and resolve all questions”); Slover v. Boral Henderson Clay Prods., Inc., 714 F. Supp. 827, 831 (E.D. Tex. 1989) (abuse of discretion standard adopted in face of plan language giving administrator authority to determine eligibility and to decide appeals).

Requiring an explicit grant of discretion appears to be consistent with traditional trust principles. Absent a clear grant of discretion to the trustee, the trustee does not have discretionary authority under the trust instrument, and the decisions of the trustee will be reviewed in order to determine whether the trustee has acted in accordance with the terms of the trust instrument. For a discussion of traditional trust principles which call for a de novo standard of review of trustee decisions where the trust does not grant discretion, see supra notes 45-49.


In Curtis v. Noel, 877 F.2d 159 (1st Cir. 1989), for example, the court found a grant of discretionary authority to interpret the plan in a provision requiring that the administrator “provide all parties dealing with the Plan an interpretation of Plan provisions on request.” Curtis, 877 F.2d at 161. This language could be read, however, to create an obligation on the part of the administrator to supply its interpretation, and not a grant of discretion to interpret the plan.


150. Id. at 957.

151. Id. at 959.

152. Id. at 963.

153. Id. The court’s assumption here is that determining eligibility does not involve contract interpretation. There is a strong argument, however, that in making an eligibility determination, the administrator necessarily had to interpret the terms “directly” and “independently.” The fact that a dispute has arisen under the plan is an indication that the terms are subject to two different interpretations, and that the meaning of the terms is not clear. It would also
interpretation.\textsuperscript{154}

In reaching this conclusion, the court in \textit{Questech} rationalized that Congress never intended "federal courts to review \textit{de novo} every factual determination inherent in coverage decisions."\textsuperscript{155} It held that, because the administrator's decision did not involve plan interpretation, it fell outside the scope of \textit{Bruch} and that application of an arbitrary and capricious standard of review was inappropriate.\textsuperscript{156}

The \textit{Questech} court's interpretation of \textit{Bruch} suffers from a deficiency similar to that of the court's interpretation in \textit{Steever}, although the holding operates on a different premise. In \textit{Steever} the court found that the administrator had been impliedly granted the necessary discretion to make eligibility determinations.\textsuperscript{157} In \textit{Questech}, however, the court found that such a grant of discretion, implied or otherwise, was not required in order for the factual determination of the administrator to receive deferential scrutiny.\textsuperscript{158}

The \textit{Questech} court's holding runs contrary to the Supreme Court's decision in \textit{Bruch}. Under \textit{Bruch}, unless the administrator is given discretion to determine eligibility or to construe ambiguous terms of the plan, a \textit{de novo} standard of review is to be applied.\textsuperscript{159} The Supreme Court's holding, framed in the disjunctive as it is, specifically requires a separate


\textsuperscript{155} \textit{Questech}, 713 F. Supp. at 963. The \textit{Questech} court was apparently fearful that a flood of litigation would result from the application of a higher standard of review in all denial of benefit cases. Note that the Supreme Court explicitly disapproved of this rationale as a basis for holding that a deferential standard of review is more appropriate. The Court stated that the policies of ERISA outweigh the concerns that a higher standard of review would increase litigation over entitlement to pension and welfare benefits. \textit{See Bruch}, 489 U.S. 101, 114-15 (1989).

\textsuperscript{156} \textit{Questech}, 713 F. Supp. at 963. Although the court eventually held that the administrator's decision would have withstood scrutiny under the de novo standard, \textit{see id.} at 964, the case illustrates the court's reluctance in using such a standard in denial of benefit cases.


\textsuperscript{158} \textit{Questech}, 713 F. Supp. at 963.

\textsuperscript{159} \textit{See Bruch}, 489 U.S. at 115.
grant of discretion to the administrator to determine eligibility before a factual eligibility determination will receive deference.\textsuperscript{160} The Questech court, however, would apparently provide deference for any factual determination made by a plan administrator, even if the plan contains no grant of discretion to determine eligibility or to construe ambiguous plan terms. Thus, the Questech court’s holding reaches the opposite result than that which would have been reached prior to the enactment of ERISA,\textsuperscript{161} and opinions in other courts are in direct conflict.\textsuperscript{162}

160. The Supreme Court’s holding leads to the conclusion that there are two separate and distinct grants of discretion, and that a plan administrator might receive discretionary authority to make determinations in one area and not the other. In Gust v. Coleman Co., 740 F. Supp. 1544 (D. Kan. 1990), the court stated that the “deliberate choice of words” used by the Supreme Court in Bruch “cannot be easily overlooked.” \textit{Id.} at 1556. The court indicated that, in phrasing the test in the disjunctive, the Supreme Court implied that “the determination of eligibility necessarily entails the exercise of interpretative powers.” \textit{Id.}

Similarly, in De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989), the court seemed to recognize a distinction between the grant of discretion to interpret the plan and the grant of discretion to determine eligibility. The court stated that under \textit{Bruch}, the “threshold question for reviewing courts is now whether the particular plan at issue vests in its administrators discretion either to settle disputed eligibility questions or to construe ‘doubtful’ provisions of the plan itself.” \textit{Id.} at 1186. This court held that in order for an administrator to receive deference with regard to eligibility decisions, \textit{Bruch} requires a specific grant of discretion to resolve eligibility disputes. \textit{Id.} In addition, the discretion to make eligibility determinations under a benefits plan is not tantamount to a grant of discretion to interpret all ambiguous portions of a plan. \textit{Id.}

This difference was illustrated in Cotter v. Eastern Conference of Teamsters Retirement Plan, 898 F.2d 424 (4th Cir. 1990), where the beneficiaries under the plan sought to obtain a de novo review of the administrator’s decision, despite the inclusion in the plan of a grant of discretion to interpret and construe provisions of the plan. \textit{Id.} at 427. The beneficiaries argued that the Supreme Court limited \textit{Bruch} to determinations of eligibility, and therefore, deference to the administrator’s decisions should not extend to interpretations of plan language regarding procedural requirements. \textit{Id.} The court, however, refused to limit \textit{Bruch} in such a way, holding that \textit{Bruch} applies to all claims brought under 29 U.S.C. § 1132(a)(1)(B) (1988) for a denial of benefits, whether or not the administrator is determining eligibility or interpreting other portions of the plan. \textit{Id.} Although the court indicated that the interpretation of the procedural element in this case was, in fact, part of the eligibility determination, it seems clear from the opinion that a grant of discretion to determine eligibility does not necessarily include a grant of discretion to interpret other provisions of the plan. \textit{See id.}

161. For a discussion of the approach that courts would have taken prior to ERISA, where the plan administrator had not been granted discretion, see supra notes 43-50, 55-71 and accompanying text.

162. For example, in Buchholz v. General Electric Employee Benefit Plan, 720 F. Supp. 102 (N.D. Ill. 1989), the court reviewed the administrator’s factual eligibility determination as to entitlement under an accidental death and dismemberment policy de novo, because the benefits plan did not give the administrator discretionary authority to grant or deny benefits. \textit{Id.} at 104-05. \textit{See also} Sejman v. Warner-Lambert Co., 889 F.2d 1346, 1348 n.1 (4th Cir. 1989) (where eligibility under severance pay plan was determined by formulas based upon age and years of service, administrator exercised no discretion in determining eligibility, and therefore de novo review of administrator’s actions was appropriate.
C. A Few Courts Prefer De Novo Review

Some courts have had difficulty applying an abuse of discretion standard even when a plan would appear to grant the necessary discretion. For example, in Graham v. Federal Express Corp., Federal Express's disability plan provided for two years of short-term total disability payments, in the event an employee was unable to “perform substantially all of the duties of his employment with the company by reason of any medically determined physical or mental impairment.” Under the plan, the payment of short-term benefits was to be replaced by long-term disability benefits if the employee qualified. If eligible, payment of long-term total disability benefits would continue under the plan until the employee reached age sixty, unless the condition of long-term disability ceased to exist prior to that time.

After an employee seeking continued benefits under the plan failed to attend two medical examinations scheduled by Federal Express to determine whether the employee was eligible for continued benefits, Federal Express suspended and later terminated payment of disability benefits to the employee. Thereafter, the employee's attorney requested an independent medical examination of the employee, but the administrator of Federal Express's plan refused the request. In a letter to the employee, the benefits administrator stated that the examination would be “futile inasmuch as the [independent medical exam] could only assess [the employee's] current medical condition or at best, speculate about her late 1986 ... condition.” The administrator went on to write that disability benefits could only have continued if the employee had been determined to be disabled at the time her short-term benefits expired. Federal Express argued that the employee was procedurally barred from pursuing her benefits under the plan.

The Graham court first undertook to determine the appropriate standard of review to be applied to the denial of benefits decision under the Bruch standard. Pointing out that trust law makes a deferential standard of review appropriate when a trustee exercises discretionary pow-

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164. Id. at 430.
165. Id.
166. Id.
167. Id. at 431.
168. Id.
169. Id.
170. Id. at 432. Federal Express based its argument on the employee's failure to attend the medical examinations and also to request a timely review of the termination of her benefits. Id.
The court analyzed whether or not the instrument granted the administrator such discretion in this case.\textsuperscript{172}

The plan at issue specifically granted the company’s eligibility committee the authority to adopt rules and regulations in furtherance of the administration of the plan. In addition to this general power, the plan granted the committee the power:

as may be necessary to perform its duties hereunder, including, without limiting the generality of the foregoing, the power to:

(i) interpret and construe the Plan; and (ii) determine within the terms of the Plan all questions of (A) eligibility, (B) the costs of the Plan, (C) the amount of contributions to be made to the Trust in each Fiscal Year, (D) participation, (E) value of benefits, and (F) similarly related matters for the purposes of the Plan.\textsuperscript{173}

The court examined several cases decided after \textit{Bruch}, and determined that the above language did not grant the necessary discretionary authority to interpret the plan as envisioned by \textit{Bruch}.\textsuperscript{174} The court failed to address, however, the significance of the language granting the committee the authority to adopt rules and regulations in furtherance of the administration of the plan. Instead, the court found the language to be only a delegation of responsibility to determine eligibility, not a grant of discretion to construe doubtful terms, and therefore, held that a deferential review was not appropriate.\textsuperscript{175}

Although other courts agree with the court’s analysis in \textit{Graham},\textsuperscript{176} the language granting the committee the authority to make rules and regulations in \textit{Graham} could be interpreted as a sufficient grant of discretionary authority. At least one court has so held.\textsuperscript{177} Alternatively, the court could have found that the language in the plan as a whole was sufficient to grant discretion to interpret the plan and to determine eligibility, especially in light of Federal Express’s use of such phrases as “to interpret and construe,” and to “determine all questions of eligibility.”\textsuperscript{178} These terms might otherwise have no meaning under the plan,

\begin{itemize}
  \item 171. \textit{Id.} at 432 (citing Firestone Tire & Rubber Co. v. \textit{Bruch}, 489 U.S. 101, 111 (1989)).
  \item 172. \textit{Id.} at 432-34.
  \item 173. \textit{Id.} at 433.
  \item 174. \textit{Id.} at 433-34.
  \item 175. \textit{Id.} at 434.
  \item 176. For a discussion concerning the fact that most courts do not equate a grant of authority with a grant of discretion to determine eligibility or to construe ambiguous plan terms, see \textit{supra} note 147.
  \item 177. \textit{See} \textit{Gust v. Coleman Co.}, 740 F. Supp. 1544, 1551 (D. Kan. 1990) (plan went further than to just grant authority to make eligibility determinations, but granted rulemaking power to committee thereby calling for deferential review).
  \item 178. \textit{See, e.g., De Nobel v. Vitro Corp.}, 885 F.2d 1180, 1186-87 (4th Cir. 1989) (where fiduciary has been granted the “power to construe disputed or doubtful terms” then discretion is granted even though plan did not contain
\end{itemize}
unless given the construction offered by the employer. The court, however, appeared intent on analyzing the committee's actions under a de novo standard of review.\footnote{Although the court held in favor of the committee, the court's reluctance to provide the committee with the benefit of an abuse of discretion standard is significant for future cases. For a possible explanation why courts might provide deference to plan administrators even under a de novo standard of review, see \textit{supra} note 134.}

The preceeding cases demonstrate that the Supreme Court's attempt to remedy the problem of decreased protection of employee benefits has fallen well short of providing a systematic approach to determining appropriate standard of review to be applied in denial of benefit cases. A fresh approach to the problem is required in order to provide the protections and uniformity of decision envisioned by the drafters of ERISA.

\section*{VII. \textbf{Suggested Approach for Determining the Appropriate Standard of Review in Denial of Benefit Cases}}

Because ERISA permits a conflict of interest to exist in the administration of employee benefits, ERISA's policy of providing increased protection for beneficiaries of employee benefit plans demands the application of a standard of review that ensures protection of beneficiary rights despite the presence of a conflict. Because employee benefit plans are creatures of contract and trust law,\footnote{For a discussion concerning the fact that a beneficiary's rights under a benefits plan spring from state law of contracts and trusts, see \textit{supra} notes 55-57 and accompanying text. \textit{See also} H. \textsc{Perritt}, \textit{supra} note 37, §§ 4.1-4.4, at 186-91; §§ 3.1-3.4, at 120-29; § 3.36, at 180; § 5.26, at 286-91.} it makes sense to retain the basic analytical framework that existed prior to ERISA for determining beneficiary rights. The addition of fiduciary responsibility was meant to ensure the availability of funds for the payment of benefits and to increase accountability,\footnote{For a discussion of Congress's intent to enlarge a beneficiary's protections through the imposition of fiduciary duties on all persons who exercise discretion in the administration of benefit plans, see \textit{supra} notes 14-36 and accompanying text.} not to limit an employee's common law contract remedies. Therefore, the fiduciary requirements of ERISA should not be used as a vehicle for providing a more deferential review of administrator eligibility decisions than existed under prior law.

Additionally, when a conflict of interest in the administration of a...
benefits plan is present, there are compelling reasons for providing beneficiaries with heightened scrutiny, even where an administrator has been granted appropriate discretion.\textsuperscript{182} On the other hand, where there is no conflict of interest in the administration of a plan,\textsuperscript{183} such as where a separate fund has been established and is administered by a neutral third party, it makes sense that the impartial administrator of the plan should receive the benefit of an abuse of discretion standard of review if the plan grants the appropriate discretion.\textsuperscript{184} The following approach would retain the traditional contract and trust law protections which existed prior to ERISA, while providing for deferential treatment of the neutral administrator's decisions.

The suggested approach would provide for de novo review in all denial of benefit cases, unless: (1) the benefits plan explicitly grants the appropriate discretion as outlined in \textit{Bruch},\textsuperscript{185} and; (2) no potential conflict of interest exists in the administration of the benefits plan.\textsuperscript{186} Note

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\textsuperscript{182} For a discussion of trust principles that call for heightened judicial scrutiny of trustee discretionary decisions where the trustee is acting under a conflict of interest, see \textit{supra} note 50 and accompanying text.

\textsuperscript{183} For a discussion of the types of conflicts that can exist in the administration of employee benefits, see \textit{supra} note 87 and accompanying text.

\textsuperscript{184} For a discussion of the standard of review as developed under the LMRA for the decisions of neutral trustees, see \textit{supra} note 82. For a discussion of the review of trustee decisions under traditional trust principles, see \textit{supra} notes 45-50 and accompanying text.

\textsuperscript{185} For a discussion of the necessity of having a grant of discretion in the plan instrument before deference will be given, see \textit{supra} notes 111-17, 124 and accompanying text.

This approach is consistent with traditional contract principles, and with the reasoning of some early opinions interpreting the standard of review to be applied in LMRA cases. In \textit{Bruch v. Firestone Tire \\& Rubber Co.}, 828 F.2d 134, 141-43 (3d Cir. 1987), \textit{aff'd in part and rev'd in part}, 489 U.S. 101 (1989), the Third Circuit reviewed these early cases decided under \textsection 302 of the LMRA, 29 U.S.C. \textsection 186 (1988), in an attempt to determine the appropriate standard of review to be applied in denial of benefit cases under ERISA. The court stated that, under the LMRA, early courts attempted to determine whether an employee's interest in a pension benefit was contractual or equitable. \textit{Id.} at 141. If it were contractual, then the court would review a denial of benefits de novo, as would a court under a breach of contract claim. \textit{Id.} If it were equitable—as is a beneficiary's interest in a right to receive benefits pursuant to a trust—then the courts would be more deferential. \textit{Id.} Note particularly that in \textit{Hobbs v. Lewis}, 159 F. Supp. 282 (D.D.C. 1958), the district court held that if the payment were in the nature of a fringe benefit, which was defined as deferred contingent compensation which employees might be entitled to receive in addition to wages, then the employee had a contractual right that must be reviewed de novo. \textit{Id.} at 286.

\textsuperscript{186} This approach is consistent with traditional trust principles. For a discussion of traditional trust principles calling for a strict scrutiny when the trustee is acting under a conflict of interest, see \textit{supra} note 50 and accompanying text.

In addition, this approach has the benefit of supplying the protection which the Supreme Court's approach fails to provide. For a discussion of how the Supreme Court's approach fails to provide sufficient protection for beneficiaries, see \textit{supra} note 117, \textit{infra} note 193.
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that, the suggested approach would not provide for de novo review in all denial of benefit cases, and should sufficiently guard against the danger that neutral administrator decisions would be subjected to heightened judicial review.187

More importantly, this approach would re-introduce into the ERISA analysis the contract doctrines that protected employee benefits prior to ERISA,188 and would ensure the protection of those beneficiary rights that are most in need of protection. While the critical analysis in the Supreme Court's present approach revolves around the sufficiency of the language granting discretion in the plan, an approach which has been applied with varied results,189 this suggested "conflict of interest" test would be capable of a more uniform application. Furthermore, although the sufficiency of the language in the plan would remain an important factor in determining the level of review to be applied to neutral administrator decisions, review of the granting-language in these cases would be less critical because it is likely that the neutral administrator's decision would survive both a deferential and a heightened standard of review.

Under the suggested approach an employer's eligibility decisions

187. Even though a concern over a flood of litigation should not be a valid consideration after Bruch, courts might continue to consider it an important factor in determining the appropriate standard of review to be applied. To combat the effects of this judicial concern even further, it might prove beneficial for Congress to amend ERISA to require that eligibility disputes be submitted to a neutral arbitration panel prior to the beneficiary obtaining the right to sue in court. Such a procedure might eliminate the tendency of courts to consider, either consciously or subconsciously, the burdens of an overworked judicial system when determining the standard of review to be applied in denial of benefit cases.

188. The approach of the Third Circuit in Bruch closely resembles the approach taken in denial of benefit cases prior to ERISA. The Third Circuit indicated that a traditional contract analysis was most appropriate where the plan was unfunded and administered by the employer. Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 144-45 (3d Cir. 1987), aff'd in part and rev'd in part, 489 U.S. 101 (1989). The court stated that principles of contract construction dictated steering a middle course between the constructions offered by plaintiff and defendant. Id. at 145. Under the court's analysis, industry practice and past practice, and any indication of the parties' intent as evidenced in other writings would shed light on the meaning of the plan. See id.

Conversely, under the Supreme Court's approach in Bruch, whether the plan is funded or unfunded is irrelevant. The Court's decision raises the possibility that the administrator of an unfunded plan might receive deferential review of eligibility decisions, even though prior to ERISA such administrator decisions would have been reviewed de novo. For a discussion of the Supreme Court's approach to the standard of review to be applied in denial of benefit cases, see supra notes 111-20 and accompanying text.

189. Note that the Supreme Court's test, which has promoted diverse and inconsistent approaches among the federal courts, has failed to provide the uniformity of decision envisioned by the drafters of ERISA. For a discussion of the diversity of opinion that has resulted, see supra notes 72-76, 121-79 and accompanying text.
with respect to an unfunded benefit plan will always receive de novo review, because payment of the claim would be made out of the employer's general funds and the employer/administrator would have an economic incentive in making the eligibility determination. Note that, the suggested approach would subject the decisions of the employer who administers such a plan to de novo review not because the plan is unfunded, but because a potential for conflict exists. In this way, the suggested approach goes further than the approach taken by the Third Circuit in Bruch and provides the protections lacking in the Supreme Court's approach.

Additionally, under the suggested approach, the decision of a plan

190. The danger of providing deference to the decisions of the employer/administrator of an unfunded plan was recognized by the Third Circuit in Bruch. Judge Becker wrote that in such cases an employer/administrator will always benefit from a contract interpretation favorable to the employer, where the plan is unfunded and benefits are paid out of the employer's general funds. See Bruch, 828 F.2d at 144.

191. The distinction which the Third Circuit seemed to draw in Bruch was between funded and unfunded plans. Id. at 137-45.

192. The Third Circuit held that the decisions of the administrator of an unfunded plan would receive de novo review because the administrator of such a fund would always be acting under a conflict of interest. Id. at 144. The suggested approach goes further because it extends heightened judicial scrutiny to all cases in which the underlying reason for the extension of heightened review is the same—the potential for abuse.

193. In addition to the confusion surrounding what constitutes a sufficient grant of discretion in the plan, the Supreme Court's approach concerning the existence of a conflict of interest permits a court to fashion its own standard of review when a conflict is present. Recall that the Supreme Court's approach considers a conflict of interest only as a factor in determining reasonableness under an abuse of discretion standard. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Therefore, courts are free to assign little or no weight to the conflict as a factor in determining reasonableness. The Court's approach could potentially lead beneficiaries of employee benefit plans to forum shop, and defeats the goal of uniformity sought under ERISA. It also provides beneficiaries with less protection than intended by the drafters of ERISA. For a discussion of the goal of uniformity sought by the drafters of ERISA, see supra notes 52, 72-76 and accompanying text. For a discussion of the intent of Congress to provide greater protection for beneficiaries, see supra notes 14-36, 117 and accompanying text.

On the other hand, the suggested approach operates on the premise that the motive of the administrator should determine the standard of review to be applied, because a stricter scrutiny will "smoke out" the improper motive for making a particular eligibility decision while upholding a proper interpretation of the plan. To ensure that courts actually apply a heightened review of administrator decisions when the administrator is acting under the pressures of a conflict of interest, the spirit of the Restatement (Second) of Trusts § 187 comment g (1959) calls for the application of traditional contract principles in order to determine beneficiary eligibility. By applying a strict review in conflict of interest cases, the suggested approach would lead to the consistency of decision sought by the drafters of ERISA, and would ensure that beneficiaries receive adequate protection. For a discussion of the approach taken by the Restatement in conflict cases, see supra note 50.
 administrator of a plan in which funds have been set aside for the payment of benefits might also receive de novo review. An example would be the case of an insurance company administering a health insurance plan funded by the insurance company from premiums paid by the employer. The insurance company administrator of such a plan would also be acting under an economic conflict of interest with regard to making eligibility decisions, and such decisions should receive a heightened level of scrutiny. If, in some cases, it is necessary for a court to find justification for overriding an appropriate grant of discretion in the benefits plan in order to apply a heightened level of scrutiny, the court could find justification for such an override under traditional contract principles. Alternatively, a court might simply find that some policy objective of ERISA mandates against giving such a clause effect where a conflict of interest in the administration of the benefits plan exists.

On the other hand, where there is no potential for a conflict of in-

194. In these cases, the party administering the plan is acting under a similar economic conflict of interest as the employer/administrator of an unfunded plan. In both cases, traditional trust principles would require a closer judicial scrutiny, and the result should not be different under ERISA. For a discussion of the conflicts that exist in the administration of health insurance plans, see supra note 87 and accompanying text. For a discussion of the principles calling for a closer judicial scrutiny in the face of a conflict, see supra note 50.

195. For example, a court could find that employees were not aware of, and had not intended to agree that the plan instrument as written would give the employer/administrator the benefit of the arbitrary and capricious standard of review for denial of benefit decisions, and could hold that a clause granting such discretion is not enforceable. In Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987), for example, the Seventh Circuit intimated that it would be implausible for employees to knowingly agree that the administrator's decisions should receive such deference because pension benefits are "too important these days for most employees to want to place them at the mercy of a biased tribunal subject only to a narrow form of 'arbitrary and capricious' standard, no matter what." Id. at 1052.

196. Much federal legislation has been interpreted to alter the traditional freedom to contract. See, e.g., Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1563 n.6 (11th Cir. 1990) (Eleventh Circuit indicated that parties' freedom to contract may be overcome by finding that deferential standard of review in cases where there is conflict is contrary to the policies of ERISA), cert. denied, 111 S. Ct. 712 (1991); Van Boxel, 836 F.2d 1052 (court stated that "[a] Congress committed to the principles of freedom of contract would not have enacted a statute that interferes with pension arrangements voluntarily agreed on by employers and employees").

Also, Professor Perritt suggests that traditional common law principles of contract and trust should apply under ERISA, giving way where necessary to serve an important policy objective of ERISA. See H. Perritt, supra note 37, § 3.3, at 124-25 (courts should borrow from state common law of trusts and contracts in defining ERISA's standards, "modifying them if necessary to serve some identified policy interest of ERISA."); see also Retirement Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1280 (9th Cir. 1990) ("Trust documents cannot excuse ERISA trustees from their duties under ERISA and the documents must be construed in light of ERISA's policies." (citing Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 568 (1985))).
interest in the administration of employee benefits, and where the plan contains the necessary grant of discretion as contemplated by the Supreme Court in Bruch, the suggested approach would properly subject administrator decisions to only a deferential review. As indicated above, while the suggested approach would still require a determination of the sufficiency of the language in the plan purporting to grant discretion, such a determination is not critical because the administrator of such a plan is a neutral third party and would not be acting against the interests of the beneficiaries of the plan and in favor of its own economic interests. In these cases, a reasonable interpretation of the plan by the neutral administrator should be expected. This approach would parallel traditional trust principles which require granting deference to the impartial trustee's decision, while serving to protect against the increased litigation which some courts fear would be the result of applying a heightened level of judicial review in all denial of benefit cases.

VIII. Conclusion

The suggested approach outlines an attempt to provide the added protection sought by the drafters of ERISA, while remaining true to traditional contract and trust principles. It has the advantage of restoring the protections which beneficiaries enjoyed prior to ERISA, while also ensuring that beneficiaries most in need of protection receive de novo review of their denial of benefit claims. Additionally, the suggested approach provides this much needed protection while guarding against a flood of litigation over neutral administrator decisions. It is hoped that such an approach might guide federal courts in their continuing attempt to fashion the body of federal common law, consistent with ERISA's policies and principles, that was envisioned by the drafters of ERISA.

W. Douglas Holdren

197. For a discussion of traditional trust principles requiring deference to be given to a trustee's decisions, see supra notes 45-50 and accompanying text.
198. See, e.g., Questech, Inc. v. Hartford Accident & Indemnity Co., 713 F. Supp. 956, 963 (E.D. Va. 1989) (court was concerned with burden of subjecting all administrator decisions to de novo review). For a discussion of the concerns of the Questech court, and the approach taken by the court, see supra notes 149-62 and accompanying text.