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Recommended Citation

George Lee Flint, Jr., ERISA: Reformulating the Federal Common Law for Plan Interpretation, 32 San Diego L. Rev. 955 (1995).

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ERISA: Reformulating the Federal Common Law For Plan Interpretation

GEORGE LEE FLINT, JR.*

This Article develops a standard to judge the correctness of the ERISA federal common law rules. That standard requires the protection of participants' reasonable expectations. Using the plan interpretation rule as an example, the Article shows the present court rules fail the standard and then develops the proper plan interpretation rule.

I. INTRODUCTION

Before the Employee Retirement Income Security Act of 1974 (ERISA)¹ became law, participants² denied benefits from private employee benefit plans used state contract law and, to a lesser extent,

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1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.). For a general introduction to ERISA, see RONALD J. COOKE, *ERISA PRACTICE AND PROCEDURE* (1993); HENRY H. PERRITT, *EMPLOYEE BENEFITS: CLAIMS LAW AND PRACTICE* (1990).

For a brief discussion of the structure and regulation of employee benefit plans, see George L. Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 *LOY. L.A. L. REV.* 361, 362-71 (1992).

2. As used in this Article, the word "participant" includes beneficiaries, if applicable.

state trust law to recover their benefits in the courts.³ However, these “pre-ERISA” participants faced several jurisdictional and procedural hindrances. The jurisdictional obstacles concerned such matters as legal rules requiring service on all trustees.⁴ The procedural obstacles varied depending on the recovery theory used.

Under state contract law, litigants developed four recovery theories.⁵ Under contract law’s gratuity theory, courts treated the employer’s promise to pay benefits as a future gift. The promise was unenforceable until the gift was actually made,⁶ effectively providing a block to the participant’s recovery. Consequently, many plans had provisions stating

3. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) (describing pre-ERISA law as contractual); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (ERISA to protect contractually-defined benefits); see also David Ziskind, *The Law of Employee Benefit Plans*, 1955 WASH. U. L.Q. 112, 117-25 (explaining that participants used contract law to recover denied benefits and used trust law supplementally to prevent mishandling of funds before participants had rights to draw on those funds); Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 916-24 (1970) (same); cf. W.E. Shipley, Annotation, *Rights and liabilities as between employer and employee with respect to general pension or retirement plan*, 42 A.L.R.2d 461, 467-72 (1955) (using both contract and trust law to recover denied benefits).

4. See, e.g., *Planten v. Lester B. Knight & Assoc., Inc.*, 198 N.Y.S.2d 902, 903-04 (Sup. Ct. 1960); see also 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR & PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, P.L. 93-406 274 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY] (Sen. Javits’s introduction of bill: “[I]n view of the problems of service of process and jurisdiction involved in maintaining individual suits against funds or their administrators, I have great reservations about [a proposed \$10,000 amount in controversy for federal jurisdiction].”).

5. For one interpretation of the history of pre-ERISA cases using the contractual approach, see Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 589-617 (1992) (history reveals the failure of contract law to handle the subject). Traditional histories record a development from a gratuity theory to a unilateral contract theory. Robert D. Wieck, Comment, *The Pension Reform Act of 1974: An Alternative to Contractual Theories of Preserving Retirement Benefits*, 14 J. FAM. L. 97, 102-14 (1975); Timothy J. Heinsz, Note, *A Reappraisal of the Private Pension System*, 57 CORNELL L. REV. 278, 282-85 (1972); Note, *supra* note 3, at 916-21; Comment, *Consideration for the Employer’s Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 97-103 (1955); Note, *Legal Status of Private Industrial Pension Plans*, 53 HARV. L. REV. 1375, 1377-79 (1940). A better interpretation is the gradual recognition of a negotiations imbalance between employer and employees that required legislative intervention. See *infra* notes 155-59 and accompanying text.

6. See RESTATEMENT OF CONTRACTS § 406 illus. 4, § 414 cmt. a (1932). A gift of personal property ordinarily is the realm of property law; however, future promises to make gifts are encompassed in the subject of contracts. See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES 441-42 (1st Amer. ed. reprint 1967) (“A true and proper gift or grant is always accompanied with delivery of possession and takes effect immediately But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot be compelled to perform . . .”).

that the participant acquired no enforceable contractual rights under the plan.⁷

Second, under the bilateral contract theory, the participant's continued employment constituted consideration for the employer's promise to pay the benefit. The drawback to the bilateral contract theory was that, until ERISA, the employer could place sufficient conditions in the plan to defeat enforcement of the resulting contract.⁸ The participant had no rights until he satisfied all conditions, including age and service.⁹

Third, under the unilateral contract theory, the participant's benefit constituted deferred compensation, retention of which would result in unjust enrichment of the employer. The drawback to the unilateral contract theory was that, until ERISA, the employer could place sufficient conditions in the plan¹⁰ to divest the participant of his deferred compensation.¹¹

Fourth, under the estoppel theory, the court held that the participant's right to a plan benefit arose because of his reliance on the promise of benefits in continuing his work with that employer. Unfortunately, this too seldom led to recovery of the benefit because reliance must be reasonable.¹² Employers frequently made statements which destroyed reasonable reliance.¹³

In addition to the four contract theories, state trust law provided litigants with another legal framework for recovery. Under state trust law, when an employer established a benefit plan, a trust was created for the participants. Unfortunately, some employers did not pay into trusts until the Taft-Hartley Act (LMRA)¹⁴ required employers to fund multi-

7. See, e.g., *Menke v. Thompson*, 140 F.2d 786, 790 (8th Cir. 1944) (Missouri law); *Fickling v. Pollard*, 179 S.E. 582, 583 (Ga. Ct. App. 1935).

8. See RESTATEMENT OF CONTRACTS § 270 (1932).

9. See, e.g., *Wallace v. Northern Ohio Traction & Light Co.*, 13 N.E.2d 139, 143 (Ohio Ct. App. 1937); *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 35 A.2d 346, 349 (Pa. 1944).

10. See RESTATEMENT OF CONTRACTS § 53 cmt. a (1932).

11. See, e.g., *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125, 134 (N.D. Ill. 1955) (Illinois law), *aff'd*, 234 F.2d 942 (7th Cir.), *cert. denied*, 352 U.S. 918 (1956).

12. See RESTATEMENT OF CONTRACTS § 90 (1932).

13. See, e.g., *Hughes v. Encyclopedia Britannica, Inc.*, 117 N.E.2d 880, 882-83 (Ill. App. Ct. 1954) (*cert. denied*).

14. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 141-187 (1988)).

employer plans.¹⁵ Since there was no trust *res*,¹⁶ participants failed to recover benefits under a trust theory.¹⁷ As a result, many courts adopting the trust approach followed the passage of the LMRA.

By passing ERISA, Congress attempted to change this unfavorable legal climate for participants. Congress intended to afford participants denied benefits the full range of legal and equitable remedies to obtain their promised benefit. The House Education and Labor Committee, considering the purposes of ERISA, expressed that intent:

The enforcement provisions [of ERISA] have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA] The intent of the Committee is to provide the *full range of legal and equitable remedies* available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.¹⁸

This intent appeared in ERISA's statement of congressional findings: "[O]wing to the lack of . . . adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that safeguards be provided with respect to the establishment, operation, and administration of such plans . . ." ¹⁹ This intent can also be found in ERISA's declaration of policy: "It is hereby declared to be the policy of [ERISA] to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . .

15. See Labor Management Relations Act of 1947 § 302(c)(5), 29 U.S.C. § 186(c)(5) (1988).

16. See RESTATEMENT OF TRUSTS § 75 (1935).

17. See, e.g., *Lewis v. Jackson & Squire, Inc.*, 86 F. Supp. 354, 359-60 (W.D. Ark. 1949) (Ark. law), *appeal dismissed*, 181 F.2d 1011 (8th Cir. 1950); *Gearns v. Commercial Cable Co.*, 42 N.Y.S.2d 81, 82-83 (N.Y. App. Div. 1943), *aff'd*, 56 N.E.2d 67 (N.Y. 1944).

18. H.R. REP. NO. 533, 93d Cong., 2d Sess. 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 (emphasis added); S. REP. NO. 127, 93d Cong., 2d Sess. 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 (same, but considering different language); see 120 CONG. REC. 29,196 (1976), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 4, at 4665 (Statement of Rep. John Dent that initially there was only one ERISA aim and "that was to give to a pension participant his entitlements under the contract of the pension plan he belonged to."); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989) (refusing to interpret ERISA to provide less protection for participants than before ERISA); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (ERISA is to protect contractually defined benefits); *George L. Flint, Jr., ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 621, 643-47 (1994) (correcting an erroneous interpretation of S. REP. NO. 127, *supra*, appearing in *Russell*, 473 U.S. at 146).

19. Employee Retirement Income Security Act of 1974 § 2(a), 29 U.S.C. § 1001(a) (1988).

providing for appropriate remedies, sanctions, and ready access to the Federal courts.²⁰

To achieve these fundamental policies, Congress engaged in a three-step process. First, Congress eliminated the participant's state law hindrances with an ERISA preemption provision, uprooting all state law relating to employee benefit plans.²¹ Second, Congress replaced state law with standards for vested benefit preservation, funding adequacy, investment security, and fiduciary conduct required of all employee benefit plans.²² Third, Congress made federal causes of action and remedies available to participants in either federal or state court.²³

A. Creation of the Problem

Unfortunately, lawyers representing plan administrators have seriously undermined congressional intent by misapplying the doctrine of federal common law.²⁴ There are at least two ways to explain the improper development of federal common law pertaining to ERISA. First, the fundamental nature of the American adversary system led to the undermining of congressional intent. Lawyers representing plan administrators—which include in-house counsel of insurance companies—had more time and money to devote to a particular lawsuit formulating the initial federal common law rule than lawyers representing deprived participants.²⁵ Second, an incompetent federal judiciary failed to follow legislative intent. Federal judges did not know the principles of developing federal common law, were politically opposed

20. *Id.* § 2(b), 29 U.S.C. § 1001(b).

21. *Id.* § 514(a), 29 U.S.C. § 1144(a).

22. H.R. REP. NO. 533, *supra* note 18, at 5-8, reprinted in 1974 U.S.C.C.A.N. at 4643-46. See Employee Retirement Income Security Act of 1974 §§ 201-211, 301-306, 401-414, 29 U.S.C. §§ 1051-1061, 1081-1086, 1101-1114 (1988).

23. See Employment Retirement Income Security Act of 1974 § 502(a), (e), 29 U.S.C. § 1132(a), (e) (1988) (participants may bring civil actions against employers and fiduciaries in various situations in federal court; the benefits-due lawsuit may also be brought in state court).

24. See *infra* notes 50-115 and accompanying text for the federal common law doctrine; *infra* notes 27-33 and accompanying text for the cases adopting rules which have undermined congressional intent.

25. See William K. Carr & Robert L. Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 4 STAN. L. & POL'Y REV. 221, 225 (1993) (suggesting ignorance of ERISA and the role of federal common law by employees' attorneys).

to making decisions favoring employees over employers, or were more concerned with decreasing their caseloads with quick, unreasoned summary judgment opinions than rendering justice.²⁶

By 1986, the misapplication of federal common law by federal courts led to the adoption of a number of substantive legal rules regulating ERISA. These rules thwart recovery by many—perhaps deserving—participants. The following is a list of rules, among others,²⁷ that are extremely detrimental to litigating participants denied benefits:

(1) courts review the plan administrator's benefit-denial decision with the arbitrary and capricious standard—a standard which only requires the use of one of many logical reasons and some minimal documentation to confirm the administrator's decision;²⁸

(2) courts accept the plan administrator's interpretation of ambiguous ERISA plan terms;²⁹

(3) participants may not have a jury trial under ERISA;³⁰

(4) only the written terms of the plan, and not estoppel doctrines, define the employee's reasonable expectations;³¹

26. See *id.* at 222-23; see also *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 487 (1st Cir. 1989) (sympathetic but refusing to provide benefit under strict construction for one who had substantially fulfilled the condition); *Carr & Liebross*, *supra* note 25, at 222 (suggesting federal courts are hostile to statutes favoring workers); Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 159-60 (1995) (claiming the problem is the adoption of an outdated contract model rather than modern contract law).

27. Other rules, which may also be detrimental to participants, include: (1) exhaustion of remedies, *e.g.*, *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980), (2) waiver of conditions, *e.g.*, *Pitts v. American Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991), (3) substantial compliance, *e.g.*, *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 562-65 (4th Cir. 1994), and (4) period of limitations, *e.g.*, *Jenkins v. Local 705 Int'l Bhd. of Teamsters*, 713 F.2d 247, 251 (7th Cir. 1983); see also Jim Greiner, Comment, *Federal Common Law and Gaps in Federal Statutes: The Case of ERISA Plan Limitation Periods for Section 502(a)(1)(B) Actions*, 93 MICH. L. REV. 382 (1994).

28. *E.g.*, *Bueneman v. Central States, S.E. & S.W. Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978); *contra* *George L. Flint, Jr., ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133, 167-79 (1990) (providing the correct ERISA position, which in a few rare instances becomes the arbitrary and capricious standard). See *infra* notes 48-49 and accompanying text for the proper review standard.

29. *Smith v. California Metal Trades Assoc.-Int'l Ass'n of Machinists Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981). See *infra* notes 48-49 and accompanying text for the proper interpretation rule.

30. *E.g.*, *Wardle v. Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *contra* *Flint*, *supra* note 1, at 383-87, 399-417 (explaining the error of the *Wardle* decision and setting forth the proper ERISA position). See *infra* notes 48-49 and accompanying text for the proper jury rule.

31. *E.g.*, *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1986). *Contra* *Kimberly Kralowec, Estoppel Claims Against ERISA Employee Benefit Plans*, 25 U.C. DAVIS L. REV. 487 (1992) (arguing for estoppel enforcement through federal common law). See *infra* notes 48-49 and the accompanying text for the proper estoppel rule.

- (5) participants may not recover extracontractual damages under ERISA;³²
and
(6) successful participants may not recover legal fees except in rare instances.³³

These substantive legal rules create a situation in which plan administrators need not pay out benefits as provided in ERISA and as intended by Congress. Instead, administrators can find some logical reason to deny paying benefits, make the decision not to pay, and await a lawsuit. Of course, the lawsuit might not be filed because the participant may die. If the lawsuit *is* filed, the action might settle for considerably less than the benefit specified in the plan documents because of the threat posed by the above six detrimental rules. If the lawsuit goes to trial, the odds favor a court affirming the plan administrator's decision under the arbitrary and capricious standard of review. If the arbitrary and capricious standard is not sufficient to support the plan administrator's decision, the favorable interpretation rule, the absence of a jury, and the anti-estoppel rule favor a court finding in favor of the plan administrator. Finally, if a court does rule in favor of the participant, the absence of recovery for extracontractual damages and attorney fees will limit recovery to the original amount specified in the plan documents.

Under these new court-adopted ERISA rules, there is no incentive to pay benefits, leading to a result contrary to congressional intent. Testimony before both houses of Congress has revealed the callousness of ERISA insurance companies with respect to payment of rightfully-due benefits. Participants before the Senate bemoaned:

[The insurance company]'s actions were motivated by money alone and "[The insurance company] would be better off if Devon died." . . . Why pay claims

32. *E.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (dicta for the benefits-due lawsuit). *Contra* Flint, Jr., *supra* note 18, at 634-65 (explaining the error of the *Russell* decision and setting forth the proper ERISA position). See *infra* notes 48-49 and accompanying text for the proper extracontractual damages rule.

33. *E.g.*, *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978); *contra* Ann Bertino, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefit Claims*, 41 CATH. U. L. REV. 871, 899-905 (1992). See *infra* notes 48-49 and accompanying text for the proper attorney fee rule.

in a timely fashion or at all, when at worst that failure or delay will result in merely having to pay what the policy offered to begin with?³⁴

Insurance regulators before the House bewailed: "Since 1987, insurers have had a virtual incentive not to act in good faith, as their exposure for delaying, compromising, or refusing outright legitimate claims has been limited to the contractual amounts they owed in the first place."³⁵ The House Committee on Education and Labor found:

[L]ittle financial downside exists for an insurance company that routinely delays payments or refuses to pay large claims. . . . [E]ven if a suit is brought and the court finds that the insurance company has behaved in the most egregious and outrageous way, the worst that could happen to the insurance company is that it would be forced to pay the claim it should have paid in the first place.³⁶

Finally, these new court-adopted ERISA rules are antithetical to or incompatible with legal theories traditionally used to curb egregious behavior by plan administrators, such as evading the payment of benefits altogether³⁷ or punishing employees.³⁸ In particular, these rules may

34. *The ERISA Preemption Amendments of 1991: Hearings on S. 794 Before the Subcomm. of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 93 (1991) (statement of Cindy and Devon Ferguson).

35. *Bills Relating to ERISA's Preemption of Certain State Laws: Hearings on H.R. 1602 and H.R. 2782 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 38 (1991) (statement of Masako Dolan, Deputy Comm'r, Cal. Dep't of Ins.).

36. H.R. REP. NO. 1023, 102d Cong., 2d Sess. 23-24 (1992) (recommending passage of the Health Insurance Fairness Act of 1992, H.R. 1602 as amended).

37. In the welfare plan situation, for example, a participant had a kidney stone, checked with the plan administrator under his medical reimbursement plan, and was informed that the treatment for this disease was covered. *See Rodrigue v. Western and S. Life Ins. Co.*, 948 F.2d 969, 970 (5th Cir. 1991). The participant, led to believe he had a benefit, had the treatment and afterwards the plan administrator refused to pay the hospital bill, confessing a mistake since the treatment was not covered due to an exclusion for ailments of the genitourinary system. *Id.* The participant, unable to pay the bill, suffered loss of his credit rating and other savings not exempt from levy. *Id.*

38. In the pension plan situation, for example, a bank vice-president changed bank employers, taking some of his borrowing clients with him to the new employer. *See Denton v. First Nat'l Bank*, 765 F.2d 1295, 1297 (5th Cir. 1985). The original employer, furious over the loss of business, denied a lump sum payment of a retirement benefit from a defined benefit plan upon termination, which payment it had made for all other separating employees. *Id.* at 1298. This act delayed payment until the vice-president reached retirement age. *Id.* The logical reason to support the denial was an actuary's report indicating that the employer had so under-funded the plan that the payment could not presently be made without jeopardizing the plan's fund, meaning typically selling assets at below cost. *Id.* Anyone who has dealt with actuaries knows that such calculations depend on various assumptions, the choice of which will predetermine the desired result. *See, e.g.*, Internal Revenue Code of 1954, § 415(b)(2)(E), 26 U.S.C. § 415(b)(2)(E) (1988) (specifying interest rate of five percent for actuarial equivalency; an attempt to limit the discretion in selecting assumptions); Treas. Reg. § 1.416-1 Q&A T-26(c), 26 C.F.R. § 1.416-1 Q&A T-26(c) (1994) (specifying an

limit the application of bad faith breach of contract doctrine. State courts invoke this doctrine to prevent insurance companies from unreasonably refusing to pay when required by contract to do so.³⁹ However, federal courts should seriously consider applying a common law doctrine of bad faith breach of contract in ERISA cases in order to deter unscrupulous behavior.

B. *Efforts to Rectify the Situation*

Some lawyers representing deserving participants denied benefits for various wrongful reasons recognize that they have little chance of success under ERISA as presently interpreted. As a result, lawyers have attempted to reformulate their lawsuits to avoid ERISA's preemption by relying on state law instead of ERISA. The initial attempts of the participant's lawyers to use bad faith claims processing law under the insurance exception to preemption failed.⁴⁰ Subsequent efforts have developed two ways to get around ERISA's preemption in some narrow

interest rate of between five and six percent as reasonable for top-heavy plans; same).

39. *E.g.*, *Blue Cross & Blue Shield, Inc. v. Campbell*, 466 So. 2d 833, 842 (Miss. 1984). *See generally* 16A JOHN A. APPELMAN & JEAN APPELMAN, *INSURANCE LAW & PRACTICE* § 8878.15, at 422 (1981).

40. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987) (preempting Mississippi tort of bad faith for improper processing of claims in lieu of ERISA claim as not within the insurance law exception to ERISA preemption and refusing to adopt it as ERISA common law as not uniform); *see* Employee Retirement Income Security Act of 1974, § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988).

For a discussion of the hopelessness of no remedy when the court finds that ERISA preempts the state action, see Paul O'Neill, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 OHIO ST. L.J. 723 (1994); Carr & Liebross, *supra* note 25, at 221.

For a discussion of the glee of insurance defenders for the application of ERISA preemption to their lawsuit, see James L. Nolan & Eunice L. Bumgardner, *Defending the Insurance Company Against Claims for Wrongful Denial in Administration of Employee Benefits Plans*, ALI-ABA Course of Study, Jan. 16, 1992, available in WESTLAW, C719 ALI-ABA 129, at 169 (ERISA provides strategic advantages in defending insurers against claims of improper administration of employee benefit plans); E. Thomas Bishop & Paula Denney, *Hello ERISA, Good-bye Bad Faith: Federal Preemption of DTPA, Insurance Code, and Common Law Bad Faith Claims*, 41 BAYLOR L. REV. 267, 288-89 (1989) (explaining advantages of ERISA over state law for group insurance-related areas); Richard G. Mandel, *Must Claims Denials Be Upheld Under Arbitrary and Capricious—What Standard of Review Applies to Group Policies Issued to ERISA Plans?*, 19 FORUM 457 (1984) (suggesting that insurance companies convert state insurance contract cases into federal ERISA claims to take advantage of the favorable ERISA rules).

situations. First, lawyers avoid triggering ERISA when their complaints allege that enrollment in a plan was induced by coverage misrepresentations because the lawsuit does not sufficiently relate to the administration of an ERISA plan.⁴¹ Second, participant's lawyers have successfully argued that the simple purchase of an insurance policy by the employer does not create an employee benefit plan, especially if the employer does not directly or indirectly own, control, administer, or assume responsibility for the policy or its benefits.⁴² Other critics have recommended amending ERISA to permit an exception to ERISA preemption for the benefits-due lawsuit.⁴³

Congress has attempted to rectify the situation. Initially, Congress called on the courts to create new remedies by developing federal common law.⁴⁴ Then, Congress considered three approaches to

41. *E.g.*, *Ingram v. American Chambers Life Ins. Co.*, 643 So. 2d 575, 578 (Ala. 1994) (misrepresentation of kidney stone coverage); *HealthAmerica v. Menton*, 551 So. 2d 235, 237 (Ala. 1989) (induced participant to drop health policy covering an ailment for enrollment in ERISA plan but not providing the same coverage), *cert. denied*, 493 U.S. 1093 (1990); *Pace v. Signal Technology Corp.*, 628 N.E.2d 20, 24 (Mass. 1994) (misrepresentation about extended coverage on termination); *Kelly v. Fort Dearborn Life Ins. Co.*, 641 N.E.2d 717, 718 (Mass. 1994) (misrepresentation on scope of coverage for preexisting exclusion).

42. *E.g.*, *Taggart Corp. v. Life & Health Benefits Admin.*, 617 F.2d 1208, 1210 (5th Cir. 1980) (health insurance policy), *cert. denied sub nom. Taggart Corp. v. Efos*, 450 U.S. 1030 (1981); *Sindelar v. Canada Transp., Inc.*, 520 N.W.2d 203, 207 (Neb. 1994) (life insurance policy); *Universe Life Ins. Co. v. Giles*, 881 S.W.2d 44, 50-51 (Tex. Ct. App. 1994) (health insurance policy); *see also McQueen v. Salida Coca-Cola Bottling Co.*, 652 F. Supp. 1471, 1472 (D. Colo. 1987) (stating single deferred compensation agreement not requiring any insurance).

43. *E.g.*, *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (stating estoppel rule not permitted); *see O'Neill, supra note 40*, at 780; Karen Peterson, Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519, 522 (1988); Robert Aldisert, Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux*, 21 LOY. L.A. L. REV. 1342, 1399 (1988); Laura Bond, Note, *ERISA—Preemption—Pilot Life Insurance Co. v. Dedeaux: Congress's Cue to Reassess ERISA's Preemptive Effect*, 36 KAN. L. REV. 611, 625 (1988).

44. *See H.R. REP. NO. 247*, 101st Cong., 1st Sess. 55-56 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1948 (Budget Committee recommendation on the Omnibus Budget Reconciliation Act of 1989).

The House Budget Committee had received numerous complaints from constituents that *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), left them with no legal remedy for improper denials of medical claims, improper denial of continuation coverage, or unreasonable delays in processing claims. H.R. REP. NO. 247, at 55. The Committee disagreed with that portion of *Pilot Life* refusing to develop a common law remedy, but felt it was not necessary to amend ERISA. *Id.* at 56. The Committee felt that the legislative history of ERISA clearly indicated that Congress intended courts, through federal common law, to develop "appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA," for improper claims processing. *Id.* The Committee reaffirmed the "authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those

amending ERISA. Under the first approach, ERISA would be amended to preserve state law remedies only against insurance companies.⁴⁵ The second approach would establish federal procedures and judicial remedies for improper claims handling only with respect to welfare plans.⁴⁶ The third approach would remove health care plans from ERISA and establish for them a new system of procedures, administrative hearings, and judicial review intended to protect health care claimants.⁴⁷ None of the three amendments has passed. None of the proposals would solve the problem for retirement plans because of the proposals' limited application to insured, welfare, or health plans.

This Article takes a different approach by reformulating the federal common law of ERISA.⁴⁸ Part II of this Article articulates the

remedies may not be specifically mentioned in ERISA," by "drawing upon principles enunciated in state law, including such remedies as the awarding of punitive and/or compensatory damages against the person responsible for the failure to pay claims in a timely manner." *Id.*

45. Senator Howard Metzenbaum and Representative Howard Berman introduced the Health Insurance Claims Fairness Act of 1991. S. 794, 102d Cong., 1st Sess. (1991); H.R. 1602, 102d Cong., 1st Sess. (1991). This bill would exempt from ERISA preemption state laws allowing workers to sue insurance companies, but not plan sponsors, for compensatory and punitive damages arising from unfair insurance claims practices in connection with the administration of benefit plans or the processing of benefit claims. *Id.*

46. In 1993 Representative Berman introduced the Health Insurance Claims Fairness Act of 1993 that would: (1) add a specified time frame for processing claims, (2) permit mediation to resolve disputed claims, (3) allow a federal action for actual damages, including compensatory and consequential damages, caused by violation of ERISA or the terms of an ERISA plan, (4) permit recovery of punitive damages against certain parties in cases of fraud, and (5) require an award of attorney fees for prevailing plaintiffs. H.R. 1881, 103d Cong., 1st Sess. (1993); see H.R. REP. NO. 1023, 102d Cong., 2d Sess. (1992) (recommending passage of the Health Insurance Fairness Act of 1992, H.R. 1602 as amended, a predecessor version of H.R. 1881).

47. In 1993 the Clinton Administration proposed the Health Security Act that would: (1) establish time limits for claims processing and plan review procedures of denials, (2) permit aggrieved claimants to elect alternative dispute resolution, plan administrative hearings, or court remedies, (3) establish the National Health Board to review plan administrative decisions with appeals to the circuit courts for amounts in excess of \$10,000, and (4) establish substantial civil penalties for wrongful denial or delay of claims. H.R. 3600, 103d Cong., 1st Sess. (1993); S. 1757, 103d Cong., 1st Sess. (1993).

48. Carr & Liebross, *supra* note 25, at 229 (recommending development of a strong federal common law of ERISA without specifying any operative principle plus Department of Labor regulations changing the definition of "plan" to include employer representations); J.E. Zanglein, *Closing the Gap: Safeguarding Participants Rights by Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 723 (1994)

principle federal courts should use to fashion federal common law for a statute such as ERISA. Part III examines one of the above-stated court-adopted rules: the plan interpretive rule. The examination begins with an investigation of interpretive rules from various bodies of state and federal common law to derive possibilities for the component parts of an ERISA plan interpretive rule. This Article then proceeds to investigate pre- and post-ERISA cases to determine the foundations of current ERISA plan interpretive rules. Careful analysis of these rules shows that federal courts have ignored fundamental principles of federal common law development. As a result, current ERISA plan interpretive rules are invalid. Next, this Article suggests that a similar examination of other court-adopted ERISA rules would reveal their invalidity. Finally, with respect to the plan interpretive rule, Part IV outlines the analysis the federal courts should conduct with respect to reformulating the correct rule.

This Article asserts that the federal common law of ERISA must be consistent with and further the purpose of ERISA. The statute's principal purpose is to facilitate recovery of promised benefits by beneficiaries. The current court-fashioned rules fail to achieve Congress' purpose. Instead, federal courts should adopt the following rules in order to better achieve Congress' goals for ERISA: (1) review the ERISA plan administrator's decisions under the *de novo* rule in most situations, allowing the court to replace the administrator's decision with its own based on additional facts not before the administrator, (2) construe ERISA plan wording in lay terms and read ambiguities in favor of participants, (3) make jury trial available under ERISA, (4) enforce employer representations concerning benefits, (5) make extracontractual damages available under ERISA in certain situations, and (6) allow prevailing participants to recover attorney fees.

Some federal circuit courts have already adopted the reformulated rule for plan interpretation in certain situations.⁴⁹ Hopefully, this process of turning to the correct ERISA rules will continue with respect to the other five rules. In sum, adopting this Article's proposals would deter improper conduct by plan administrators and reduce the federal courts' caseload by removing all the cases in which administrators routinely deny rightfully due benefits.

(urging development of federal common law); *see also* Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 4 (1992) (recommending against the use of state and LMRA rules in ERISA common law).

49. *See infra* note 385 and accompanying text.

II. FEDERAL COMMON LAW PRINCIPLES

The federal common law is generally defined as “any rule of federal law created by a court when the substance of that rule is not clearly suggested by federal enactment.”⁵⁰ The ability of federal courts to fashion federal common law is a much-discussed subject.⁵¹ The discussion generally revolves around two concerns: (1) confining federal courts under the doctrine of federalism in order to permit adequate state lawmaking capabilities⁵² and (2) confining the federal courts under the doctrine of the separation of powers in order to permit adequate congressional consideration of political matters.⁵³ The commentators’ formulations of the proper extent to which federal courts may fashion common law are spread between the two positions.

A. *Interstitial Common Lawmaking*

One position protects federalism. This federalist position sees state law as the pre-existing backdrop against which federal law is made. Under the Supremacy Clause,⁵⁴ federal law made by Congress or the courts ousts state law. However, a vibrant federalism requires that federal law not oust state law easily. Representation of state interests in Congress provides the desired restraint on excessive or objectionable

50. George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—a (New) Erie Problem?*, 12 PACE L. REV. 229, 230 (1992).

51. E.g., George D. Brown, *Of Activism and Erie—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984); Donald L. Doernberg, *Judicial Chameleons in the “New Erie” Canal*, 1990 UTAH L. REV. 759; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761 (1989); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

52. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (use state law unless governed by an act of Congress); see Brown, *supra* note 50, at 244.

53. *Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (striking compromises between competing interests is better left to the politically accountable legislators); *Carlson v. Green*, 446 U.S. 14, 35 (1980) (Rehnquist, J., dissenting); see Brown, *supra* note 50, at 244.

54. U.S. CONST. art. VI, cl. 2.

federalization by statute. But there is no corresponding structural restraint on the federal and state courts. The federalist position imposes a restraint through the following principle: Courts are incapable of generating common law rules about a subject matter unless authorized, directly or indirectly, by federal statute.⁵⁵

Since ERISA has a preemption provision eliminating all state law insofar as it relates to employee benefit plans,⁵⁶ federalism is of little concern under ERISA. Under the federalist approach, preemption itself constitutes the authorization to make federal common law⁵⁷ when ERISA fails to provide a rule for the situation. No statute can comprehend all the rules necessary for regulating a particular area. Courts must address the gaps, oversights, ambiguities, and neglected procedural questions to successfully implement the statute through the court's interstitial common lawmaking power.⁵⁸

The second position discussed by commentators preserves the separation of powers. Separation of powers requires clear delineation of authority among the branches of government to maintain the checks and balances system. Although the legislature and judiciary can make legal rules, the Constitution gives the lawmaking power to Congress.⁵⁹ Unlike the federalist approach, the separation of powers position takes the opposite tack: Courts can generate federal common law about a subject matter unless barred by the presence of a congressional statute.⁶⁰

Since Congress has acted for employee benefit plans by passing ERISA, under the separation of powers approach federal courts may only make federal common law for the subject matter of employee benefit plans that is not inconsistent with ERISA and that fills the gaps, oversights, ambiguities, and neglected procedural questions in the statute. Therefore, the two positions—federalist and separation of pow-

55. Redish, *supra* note 51, at 766; Brown, *supra* note 51, at 618; Doernberg, *supra* note 51, at 761; Merrill, *supra* note 51, at 8. The position is based on the Rules of Decision Act, part of the Judiciary Act of 1789, 1 Stat. 73 (1789) (codified at 28 U.S.C. § 1652 (1988)) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

56. Employee Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 1144(a) (1988).

57. Doernberg, *supra* note 51, at 777; Merrill, *supra* note 51, at 36-39; Redish, *supra* note 51, at 790-92.

58. Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 6-7 (1990).

59. U.S. CONST. art. I.

60. Weinberg, *supra* note 51, at 805 (to the extent the federal government is itself authorized by the Constitution); *accord* Field, *supra* note 51, at 884 (less extreme); Friendly, *supra* note 51, at 421 (same); Kramer, *supra* note 51, at 301 (same).

ers—provide the same subject matter over which federal courts may formulate ERISA rules.

There is also a practical reason why, under both positions, courts may only create federal common law for statutory interstices. Federal courts, which create most federal common law,⁶¹ acquire jurisdiction predominantly by federal question jurisdiction arising from federal statute.⁶² As a result, federal common lawmaking is often contingent on a statute that creates federal court jurisdiction. State common lawmaking, however, is not similarly limited because many state courts have general jurisdiction.⁶³

B. *The Limit of the Furtherance of Policy*

Even within the authorized subject matter—ERISA's statutory interstices—the ability of a federal court to make a rule is circumscribed. Some commentators place a limit on the rule-making ability within the authorized area: the created rule must further the policy of the statute.⁶⁴ For these commentators, this limit is not compelled by any statutory or constitutional authority, but instead is imposed by pru-

61. ERISA provides concurrent jurisdiction for federal and state courts for the benefits—due lawsuit, Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C. § 1132(e) (1988), so state courts obviously also have authority to create interstitial federal common law for ERISA with respect to the benefits-due lawsuit.

62. 28 U.S.C. § 1331 (1988) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). Federal courts also develop some common law under their other sources of jurisdiction, namely, the federal common law of interstate relations, federal admiralty law, and the common law of rights and obligations of the United States. U.S. CONST. art. III, § 2 (controversies between two or more states, cases of admiralty and maritime jurisdiction, and controversies to which the United States is a party). Rarely do federal courts make federal common law under their diversity jurisdiction. See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-06 (1988) (developing federal common law occurs in the context of a tort defense to liability to third parties under a government contract).

63. E.g., TEX. CONST. art. V, § 8 (jurisdiction of district court over all actions unless deprived by constitution or statute); TEX. GOV'T CODE § 24.007 (1988) (jurisdiction of district court as in constitution).

64. Doernberg, *supra* note 51, at 804 (from the federalism viewpoint); Kramer, *supra* note 51, at 288 (from the separation of powers viewpoint); Weinberg, *supra* note 51, at 851 (same); accord *Heydon's Case*, 76 Eng. Rep. 637, 638 (1584) (to interpret a statute the court examines the problem that the legislature set out to solve and the remedy it developed and then construes the statute in light of achieving those ends).

dence.⁶⁵ The limitations are derived by analogy to the congressional authority to pass statutes contained in *McCulloch v. Maryland*.⁶⁶ The Constitution contains an enumeration of the subjects on which Congress can legislate, with an authorization to make such laws as shall be necessary and proper to achieve those ends.⁶⁷ Justice John Marshall interpreted this to mean that Congress can pass any act in furtherance of a listed power.⁶⁸ Thus, some commentators argue that a federal court's ability to make law is similarly circumscribed: it must be in furtherance of a statutorily-authorized policy.

1. *Legislative History for Federal Common Law of ERISA*

With regard to ERISA, policy-driven limits on federal common law are not merely a matter of prudence. Instead, Congress, in enacting ERISA, has imposed upon federal courts the responsibility of furthering a statutorily-authorized policy. ERISA's legislative history mentions that federal courts will fashion a federal common law for ERISA for benefits-due lawsuits. This reference appears indirectly in a committee report and directly in an explanation made by a principal committee member.

The Conference Committee report indicates that courts should treat the benefits-due lawsuit as arising under the federal law in the same fashion as pre-ERISA benefits-due lawsuits under LMRA:

[S]uits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of [ERISA's] provisions . . . may be brought . . . also in State courts All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.⁶⁹

Senator Harrison A. Williams, Jr., then chairman of the Senate Committee on Labor and Public Welfare,⁷⁰ co-sponsor of the original draft of the ERISA legislation⁷¹ and floor manager of the bill,⁷²

65. Brown, *supra* note 50, at 252; see also 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.09, at 42-44 (5th ed. 1992).

66. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

67. U.S. CONST. art. I, § 8, cl. 18.

68. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

69. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 76-77 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5107.

70. 1974 U.S.C.C.A.N. XCII.

71. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985); Theodore P. Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 61 (1979).

explained the legislation similarly in the final passage debates: "It is intended that such [ERISA benefits-due] actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under § 301 of the Labor Management Relations Act."⁷³ Since the benefits-due lawsuit was not specifically provided for in LMRA, it arose and developed under a federal common law.⁷⁴ LMRA benefits-due lawsuits were brought both under LMRA's contractual section for collective bargaining agreements⁷⁵ and under LMRA's trust section.⁷⁶

72. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 113 (1985).

73. 120 CONG. REC. 29,933 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 4, at 4745.

74. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451, 457 (1957) (Section 301 "authorizes federal courts to fashion a body of federal law" in the context of collective bargaining agreements). See Flint, *supra* note 1, at 365-68 (development of the pre-ERISA benefits-due lawsuit under LMRA).

75. Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (1988). See, e.g., *Rehmar v. Smith*, 555 F.2d 1362, 1366-67 (9th Cir. 1976) (widow sued trustees for survivor's benefits); *Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir. 1965) (former employee sued for denied pension benefit); *Rhine v. Union Carbide Corp.*, 343 F.2d 12, 15 (6th Cir. 1965) (former employee sued for denied disability benefit); *United Auto. Workers v. Textron, Inc.*, 312 F.2d 688, 691 (6th Cir. 1963) (union action on behalf of employees to determine their rights in terminated pension plan); *Hayes v. Morse*, 347 F. Supp. 1081, 1087 (E.D. Mo. 1972) (former employee sued trustees for denial of pension benefit), *aff'd*, 474 F.2d 1265 (8th Cir. 1973); *Brune v. Morse*, 339 F. Supp. 159, 159 (E.D. Mo. 1972) (same), *aff'd*, 475 F.2d 858 (8th Cir. 1973); *Knoll v. Phoenix Steel Corp.*, 325 F. Supp. 666, 668 (E.D. Pa. 1971) (action by former employees to discontinue pension fund and distribute assets to beneficiaries upon closing of plant), *aff'd*, 465 F.2d 1128 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *accord Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176-77 n.17 (1971) (dictum in unfair labor practice case); *Beam v. International Org. of Masters*, 511 F.2d 975, 978 (2d Cir. 1975) (spouse of deceased union member sought denied accidental death benefits).

76. Labor Management Relations Act of 1947 § 302(c)(5), 29 U.S.C. § 186(c)(5) (1988). See, e.g., *Johnson v. Botica*, 537 F.2d 930, 933 (7th Cir. 1976) (former employee sued to challenge denial of disability pension); *Lugo v. Employees Retirement Fund of the Illumination Prods. Indus.*, 529 F.2d 251, 254-56 (2d Cir.) (former employee sued for declaration and injunctive relief for denial of disability pension), *cert. denied*, 429 U.S. 826 (1976); *Pete v. United Mine Workers Welfare & Retirement Fund*, 517 F.2d 1267, 1269-70 (D.C. Cir.) (former employee sued to review pension benefit denial), *reh'g granted*, 517 F.2d 1274 (D.C. Cir. 1974); *Kiser v. Huger*, 517 F.2d 1237, 1244 (D.C. Cir.) (class action brought to review denial of pension benefits), *reh'g granted sub. nom. Kiser v. Boyle*, 517 F.2d 1274 (D.C. Cir. 1975); *Kosty v. Lewis*, 319 F.2d 744, 745 (D.C. Cir. 1963) (union member sued trustees to determine eligibility for pension), *cert. denied*, 375 U.S. 964 (1964).

Senator Jacob Javits, the other co-sponsor of the original draft legislation and the senior ranking Republican on the Senate Committee on Labor and Public Welfare,⁷⁷ made it clear that this LMRA reference meant the federal common law power when he explained that a “body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.”⁷⁸

The Supreme Court recognizes this congressional reference to the LMRA practice as at least a mandate to develop a federal common law for the benefits-due lawsuit within the interstices of the statute.⁷⁹ Although courts generally use committee reports to confirm statutory construction⁸⁰ or to determine the meaning of ambiguous language⁸¹ and often treat the explanations of committee reports made by a committee member or the committee chairman merely as supplemental committee reports,⁸² the Supreme Court has used such items to imply the congressional authority to create federal common law for LMRA.⁸³

77. 1974 U.S.C.C.A.N. XCII; Manno, *supra* note 71, at 61.

78. 120 CONG. REC. S29,942 (daily ed. Aug. 22, 1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 4, at 4771.

79. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (acknowledging that the statement binds the Supreme Court); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55-57 (1987) (courts are to develop a “federal common law of rights and obligations under ERISA-regulated plans”); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 & n.26 (1983) (concurring opinion) (adopting Sen. Javits’s statement); *see also* H.R. REP. NO. 247, *supra* note 44, at 55-56, *reprinted in* 1989 U.S.C.C.A.N. 1906, 1948 (suggesting the federal courts have authority to fashion ERISA remedies even if not specifically enumerated).

80. *Commissioner v. Bilder*, 369 U.S. 499, 502 (1962); *McLean v. United States*, 226 U.S. 374, 380 (1912); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 610 (1869), *overruled on other grounds by* *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553 (1870); *see* 2A SINGER, *supra* note 65, § 48.06, at 332-33.

81. *Wright v. Vinton Mountain Trust Bank*, 300 U.S. 440, 459 (1937); *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929); *Railroad Comm’n v. Chicago, B. & Q.R.R.*, 257 U.S. 563, 589 (1922); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921); *see* 2A SINGER, *supra* note 65, § 48.06, at 332-33.

82. *See Deering*, 254 U.S. at 475-77; *see also Wright*, 300 U.S. at 459 (explanations given in Congress make meaning plain); *Helvering v. Twin Bell Oil Syndicate*, 293 U.S. 312, 322 (1934) (chairman of committee so stated); *Missouri Pac. R.R.*, 278 U.S. at 278 (statements by those in charge); *Chicago, B. & Q.R.R.*, 257 U.S. at 589 (explanatory statements of members in charge); *United States v. St. Paul, M. & M. Ry. Co.*, 247 U.S. 310, 318 (1918) (remarks in nature of supplementary report); *United States v. Coca Cola Co.*, 241 U.S. 265, 281 (1916) (chairman explaining the provision); *see* 2A SINGER, *supra* note 65, § 48.14, at 361-62 (committee member in charge), § 48.15, at 364 (sponsor of the bill).

83. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 449, 452-56 (1957) (House, Senate, and Conference Reports and sponsor pronouncements; LMRA lacks a preemption provision).

The Supreme Court similarly has done so for ERISA. In *Franchise Tax Board v. Construction Laborers Vacation Trust*⁸⁴ Justice Brennan, in dicta, quoted Senator Javits's statement. The Justice's opinion concluded that where federal jurisdiction over ERISA lawsuits is exclusive (all except the benefits-due lawsuit) the suits are governed solely by ERISA and federal common law.⁸⁵ Brennan, in his concurring opinion in *Massachusetts Mutual Life Insurance Company v. Russell*,⁸⁶ again accepted Senator Javits' statement as the directive supported by Williams' "indirect" directive involving the LMRA.⁸⁷ In *Pilot Life Insurance Company v. Dedeaux*,⁸⁸ Justice O'Connor, accepting the ERISA committee report backed by the statements of its sponsors, noted in dicta that state law was preempted by ERISA to avoid the possibility of subjecting plans to varying state law.⁸⁹ Hence, ERISA actions must rely upon federal common law since state law is gone.⁹⁰

2. *The Meaning of the LMRA Reference*

The basic federal common law principles discussed above provide the necessary mandate to develop federal common law for ERISA in the absence of any reference in the legislative history. The reference to the

84. 463 U.S. 1 (1983) (unanimous).

85. *Id.* at 20 n.20. See Employee Retirement Income Security Act of 1974 § 502(e), 29 U.S.C. § 1132(e) (1988) for jurisdiction.

The plan was a welfare plan and hence not required to have the anti-alienation provision required by ERISA of pension plans. *Id.* § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988); see also 26 U.S.C. § 401(a)(13) (1988) (the Internal Revenue Code's portion of ERISA). The plan argued that whether a tax levy was enforceable against a plan's anti-alienation provision that was not required by ERISA was within the class of questions for which Congress (quoting Javits) intended federal courts to create federal common law. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 5-6 & n.3, 26 & n.30. Brennan never reached the issue posed by the plan's argument since the state's action to enforce its tax levy against the account of two participants in the plan did not arise under ERISA and hence was not removable from state court to federal court. *Id.* at 27. The action did not arise under ERISA since the state was not one of the authorized parties to sue under ERISA. Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132 (1988).

86. 473 U.S. 134 (1985) (joined by White, Marshall, and Blackmun).

87. *Id.* at 156.

88. 481 U.S. 41 (1987) (unanimous). The case held that a state bad-faith insurance processing claim against an ERISA plan was preempted by ERISA.

89. *Id.* at 55-56.

90. *Id.*

LMRA is more than a mere mandate. The LMRA reference is susceptible to three possible explanations.

First, the LMRA reference could be that, when formulating ERISA's federal common law, courts should commence with pre-ERISA LMRA cases, which provide a body of pre-ERISA federal common law relating to employee benefit plans. The federal courts have already done this with respect to the fiduciary review standard, plan interpretive rule, and jury decision by using the LMRA arbitrary and capricious standard,⁹¹ the LMRA rule of acceptance of the trustee's plan interpretation,⁹² and the LMRA anti-jury rule⁹³ in ERISA cases. The Supreme Court also has used this directive as authority to incorporate into ERISA some LMRA procedural rules.⁹⁴ As a result, some courts⁹⁵ and commentators⁹⁶ have stated that the reference means the courts should import the rules developed under LMRA into ERISA.

However, LMRA law was the same body of law that created the problems forcing ERISA's passage.⁹⁷ The benefits-due lawsuit under LMRA, an ERISA predecessor for union plans, also met jurisdictional problems and procedural hindrances. The jurisdictional hurdles included legal rules against suing nonresident trusts, service on all trustees, and insufficient violations under the act.⁹⁸ Moreover, the two statutes

91. *E.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989); *see Flint*, *supra* note 28, at 165-67 & n.155.

92. *Miniard v. Lewis*, 387 F.2d 864, 865 (D.C. Cir.), *cert. denied*, 393 U.S. 873 (1968); *see infra* notes 252-64 and accompanying text.

93. *E.g.*, *Wardle v. Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *see Flint*, *supra* note 1, at 386, 387 & n.150.

94. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987) (removal rule). *But see Conison*, *supra* note 48, at 17-20 (1992) (explaining the danger of incorporating LMRA rules into ERISA).

95. *E.g.*, *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 939 (3d Cir. 1985); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

96. Richard P. Donaldson, *The Use of Arbitration to Avoid Litigation Under ERISA*, 17 WM. & MARY L. REV. 215, 216-17 (1975); Whitman F. Manley, *Civil Actions Under ERISA Section 502(a): When Should Courts Require that Claimants Exhaust Arbitral or Intrafund Remedies?*, 71 CORNELL L. REV. 952, 965-69 (1986) (student work); Randy J. Schneider, *Surviving ERISA Preemption: Pension Arbitration in the 1980's*, 16 COLUM. J.L. & SOC. PROBS. 269, 279 (1980); G. Richard Shell, *ERISA & Other Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 547 (1990).

97. H.R. REP. NO. 533, *supra* note 18, at 4, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642 ("The [LMRA] is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.").

98. *See, e.g.*, *Bass v. International Bhd. of Boilermakers, Local No. 582*, 630 F.2d 1058, 1066-67 (5th Cir. 1980) (insufficient violations); *Miller v. Davis*, 507 F.2d 308, 310-11 (6th Cir. 1974) (D.C. law under Kentucky choice of law rule; nonresident trust); *Conway v. Cross*, 16 Misc. 2d 451, 452 (N.Y. Sup. Ct. 1958) (service); *Kane v. Lewis*,

indicate different objectives with respect to remedies, suggesting that courts formulating federal common law for ERISA are not to incorporate the LMRA rules wholesale.⁹⁹ Finally, with respect to the ability to recover benefits, commentators usually list two causes for the passage of ERISA, both involving plans subject to LMRA. The first cause identified is the Studebaker incident, during which the termination of Studebaker's United States' operations resulted in a union-negotiated plan termination under which employees under age sixty received fifteen cents on the dollar.¹⁰⁰ The second cause is trustee malfeasance with respect to plans of the International Brotherhood of Teamsters.¹⁰¹

Another possible explanation for the LMRA reference could be that courts should use state law as a source of rules. In *Textile Workers Union v. Lincoln Mills of Alabama*,¹⁰² the first LMRA case recognizing the courts' ability to develop a federal common law under the LMRA, the Supreme Court suggested state law as a source for federal common law rules. The Court stated that an incorporated rule, once adopted, would be the uniform federal rule throughout the United States.¹⁰³ The Supreme Court has similarly incorporated state law into ERISA. Justice Brennan, in his concurring opinion in *Russell*, suggested incorporation of state law through an improper method of determining ERISA's federal common law. He examined the Sherman Act and its legislative history, both of which indicated the Sherman Act's origin in

125 N.Y.S.2d 544, 546 (1953) (same); *Hobbs v. Lewis*, 270 S.W.2d 352, 353-54 (Tenn. 1954) (nonresident trust).

99. LMRA declares a preference for non-judicial dispute resolution of collective bargaining agreements (including employee benefit plans) by grievance and arbitration. Labor Management Relations Act of 1947, 29 U.S.C. § 173 (d) (1988) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method of settlement or interpretation of disputes arising over the application or intent of an existing collective-bargaining agreement . . .").

In contrast, ERISA states as its purpose to provide "ready access to the Federal courts." Employee Retirement Income Security Act of 1974 § 1, 29 U.S.C. § 1001(b) (1988).

100. *Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 89th Cong., 2d Sess. 128 (1966).

101. COMM. ON GOV'T OPERATIONS, REPORT ON DIVERSION OF UNIONS WELFARE-PENSION FUNDS OF ALLIED TRADES COUNCIL AND TEAMSTERS LOCAL 815, S. REP. NO. 1348, 89th Cong., 2d Sess. (1966); see, e.g., JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 53-69 (1990).

102. 353 U.S. 448 (1957).

103. *Id.* at 457.

state anti-trust law.¹⁰⁴ Then, he similarly examined ERISA's legislative history and found a congressional intent to incorporate state law into ERISA. Although his technique for determining federal common law was incorrect, Justice Brennan concluded that courts should use this body of law to supplement ERISA.¹⁰⁵

In *Firestone Tire and Rubber Co. v. Bruch*,¹⁰⁶ Justice O'Connor made Justice Brennan's view law. Further, since Justice Marshall had previously used trust law treatises by Scott and Bogert, as well as the Restatement Second of Trusts, to determine ERISA trustees' powers, Justice O'Connor extended Justice Brennan's view to the benefits-due lawsuit.¹⁰⁷ In *Ingersoll-Rand Co. v. McClendon*,¹⁰⁸ O'Connor suggested in dicta that the authority to incorporate state common law into the federal common law for ERISA extended to permitting a wrongful

104. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 n.15 (1985) (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978)); see ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 1-46 (1910).

105. *Russell*, 473 U.S. at 156-57; see H.R. REP. No. 533, *supra* note 18, at 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts."); S. REP. No. 127, *supra* note 18, at 28-29, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (same); H.R. REP. No. 533, at 13, *reprinted in* 1974 U.S.C.C.A.N. at 4651 ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans."); S. REP. No. 127, at 18, *reprinted in* 1974 U.S.C.C.A.N. at 4866 (same).

Brennan's technique for determining federal common law was incorrect because it does not seek to further the legislative purpose. See *infra* notes 114-15 and accompanying text. Moreover, he ignores the ERISA legislative history explaining the shortcomings of trust law's application to ERISA plans. See *infra* notes 127-30 and accompanying text. But his shortcomings in *Russell* are understandable.

Brennan wrote the concurring opinion to dispel the majority's notion that plan administrators might not fully be subject to the strict fiduciary duties in claims processing under traditional trust law. 473 U.S. at 151-52. The majority under Justice Stevens had denied extracontractual damages to a participant suing under the breach of fiduciary section, based solely on the express language of the statute. *Id.* at 139-44; see Employee Retirement Security Income Act of 1974 § 409, 29 U.S.C. § 1109 (1988). Brennan's opinion might be overbroad.

106. 489 U.S. 101 (1989) (unanimous). The case involved whether courts reviewed an administrator's plan interpretations without a grant under the LMRA arbitrary and capricious standard.

107. *Id.* at 111. Marshall's use of AUSTIN SCOTT, LAW OF TRUSTS (3d ed. 1967), GEORGE G. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS AND TRUSTEES (2d rev. ed. 1980), and RESTATEMENT OF TRUSTS (SECOND) (1959) appeared in *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) (whether plan could conduct field audit of employer; since Congress incorporated trust law into ERISA, trust law determines the extent of trust powers).

108. 498 U.S. 133 (1990) (unanimous).

termination action based upon an employer's attempt to avoid payment of ERISA benefits.¹⁰⁹

Justice White, in his dissenting opinion in *Mertens v. Hewitt Associates*,¹¹⁰ made state law incorporation clear through another improper method of determining ERISA's federal common law. Justice White stated that treatises and restatements of the law represented the settled experience of the law, and could be used to create federal common law.¹¹¹ This body of state law, however, led to so many problems before ERISA's passage that it was preempted.¹¹² Moreover, other

109. *Id.* at 145. The federal courts have ignored this suggestion. See Harsch v. Eisenberg, 956 F.2d 651, 659 (7th Cir.), *cert. denied sub nom. Bihler v. Eisenberg*, 113 S. Ct. 61 (1992) (disparaging the idea); *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 823 (11th Cir.), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991) (same); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 31-32 (5th Cir. 1993) (same).

110. 113 S. Ct. 2063 (1993) (joined by Rehnquist, Stevens, and O'Connor). Justice Scalia for the majority had rejected the federal common law argument to determine what the terms "other equitable relief" in ERISA meant and held that "other equitable relief" excluded extracontractual damages for the benefits-due lawsuit. *Id.* at 2070.

111. *Id.* at 2073 (trust law).

Treatises and the restatements do not necessarily represent well-settled law. See *infra* notes 301-02 and accompanying text (unsettled trust law in well-respected treatises); GRANT GILMORE, *THE DEATH OF CONTRACT* 59-76 (1974) (explaining the different approaches of the first Restatement of Contracts and Samuel Williston's treatise from the Restatement (Second) of Contracts and Arthur Corbin's treatise). State common law rules for plan interpretation are anything but well-settled, even though expressed in treatises and restatements. See *infra* notes 198 (classical contract theory), 202 (neoclassical contract theory), & 219 (trust law) and accompanying text.

However, the uncertainty of the law in this area is irrelevant to developing the federal common law of ERISA. The issue is whether a rule, well-settled or not, furthers the purposes of ERISA. See *infra* notes 114-15 and accompanying text.

112. Employee Retirement Income Security Act of 1976 § 514, 29 U.S.C. § 1144 (1988); see H.R. CONF. REP. NO. 1280, *supra* note 69, at 383, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5162 ("Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce."); 120 CONG. REC. S15737 (daily ed. Aug. 22, 1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5188 (statement of Sen. Harrison A. Williams, Jr.) ("It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans."); H.R. REP. NO. 1785, 94th Cong., 2d Sess., 47-48 (1977) ("Based on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field preempted. Similarly it is our belief that the Federal interest and the need for national uniformity are so great that the enforcement of a state regulation should be

legislative history indicates that while courts may rely on well-settled rules of trust law, such reliance must take into proper consideration differences between trust law and ERISA.¹¹³

Under the third possible explanation for the reference to LMRA practice, courts should apply the common law pertaining to ERISA the same as they do under the LMRA. In *Lincoln Mills*, the Supreme Court addressed the question of how to exercise the federal common law power for LMRA. For matters lying outside the penumbra of express statutory provisions, the court was to “look . . . at the policy of the legislation and fashion[] a remedy that will effectuate that policy.”¹¹⁴ The *Lincoln Mills* Court also indicated that a source of such rules could be state law, provided the rules would best effectuate federal policy.¹¹⁵

C. *The ERISA Policies to be Advanced*

When courts create a body of federal common law under ERISA, judges must not only deal with matters not expressly provided for, but must also further the purposes of ERISA. Courts are aware of ERISA’s purposes or policy rationales because of the statute’s declaration of policy. ERISA lists only three policies. Other than the obvious matter of governmental concern—namely Congress’ interest in the protection of interstate commerce¹¹⁶—the only remaining expressed ERISA policies are (1) “to protect . . . the interests of participants in employee benefit plans” and (2) “to protect . . . the Federal taxing power.”¹¹⁷

precluded. Accordingly, any activity by a state or political subdivision thereof, which relates to employee benefit plans . . . is preempted by section 514(a).”

113. For caution in using trust law, see H.R. CONF. REP. NO. 1280, *supra* note 69, at 302, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083 (“The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.”).

For the inadequacies of pre-ERISA trust law, see *infra* notes 127-30 and accompanying text.

114. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). That federal common lawmaking is limited by the requirement to further the purposes of the statute is the general position of the Supreme Court. See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-43 (1981) (Sherman Act); *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 & n.5 (1972) (Water Pollution Control Act); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966) (Mineral Leasing Act).

115. *Lincoln Mills*, 353 U.S. at 457.

116. U.S. CONST. art. I, § 8, cl. 3.

117. Employee Retirement Income Security Act of 1974 § 2, 29 U.S.C. § 1001 (1988).

The Supreme Court has gleaned another ERISA policy from legislative history, namely a policy to achieve national uniformity of ERISA rules. *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); see H.R. REP. No. 533, *supra* note 18, at 12, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650 (“The uniformity of decision

This second policy is related to fostering plan growth.¹¹⁸ The Supreme Court generally uses congressional declarations of policy along with other items of legislative history to interpret statutory interstices.¹¹⁹

The various committee reports confirm these latter two policies. Essentially four bills resulted in ERISA. One bill dealt with labor aspects and another bill dealt with the tax aspects in both the Senate and House. Committees considering the labor bills acted first, with the Senate reporting first in each case.¹²⁰

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."); *id.* at 17, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 ("[T]he Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports."). Senate Report No. 127 uses language virtually identical to the House Report. *See* S. REP. No. 127, *supra* note 18, at 29, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865; *id.*, at 35, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. Legal uniformity is actually part of the policy to protect participant interests. Once a right is recognized under ERISA in one part of the nation, it will also be recognized throughout the nation.

One commentator suggests several ERISA provisions point to another unstated policy: preserving the employer's ability to use employee benefit plans for business purposes. *E.g.*, Conison, *supra* note 5, at 623-24, 630. This policy was a distortion of the policy to foster plan formation, *see infra* notes 160-81 and accompanying text, and it was probably a response to limit an attempt to gut the exclusive benefit rule. *See* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1118 (1988) (arguing that plans are established to the benefit of both employer and employee).

118. *See infra* notes 160-81 and accompanying text.

119. *E.g.*, *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 & n.8 (1987) (declaration of policy, case law, and legislative history to support the plain meaning rule for the Fair Labor Standards Act); *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 456 (1987) (declaration and legislative history to grant federal jurisdiction for Railroad Vitalization and Regulatory Reform Act).

The Supreme Court has done similarly for ERISA. *E.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (with cases to avoid the arbitrary and capricious rule); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) (with legislative history to permit state law).

120. *See* 1974 U.S.C.C.A.N. 4639 (Senate labor report on April 18, 1973; Senate tax report on August 21, 1973; House labor report on October 2, 1973; House tax report on February 21, 1974).

1. Protection of Participant Expectations

The policy of participant protection was the concern of the labor committees.¹²¹ The Senate Labor and Public Welfare Committee announced that the function of ERISA was to protect participant interests:

[T]he bill (S.4) [is] to strengthen and improve the *protections and interests* of participants and beneficiaries of employee pension and welfare benefit plans.

∴ [T]he Committee recognizes the absolute need that *safeguards for plan participants* be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many.

∴ It is intended that coverage under the Act be construed liberally to provide the maximum degree of *protection to working men and women* covered by private retirement programs.¹²²

On the other hand, the House Education and Labor Committee declared participant protection was ERISA's principal purpose, limited only by the second express ERISA policy of plan formation: "The primary purpose of the bill [H.R. 2] is the *protection of individual pension rights*, but the committee has been constrained to recognize the voluntary nature of private retirement plans."¹²³

ERISA's declaration of policy lists six methods Congress would use to protect participant interests. Several impose specific plan provisions. First, ERISA requires adequate disclosure of participant interests to the participants themselves. In some instances, language in the plan

121. The Supreme Court has acknowledged that one ERISA policy is to protect the interests of participants. *E.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) (to safeguard the operation and administration of employee benefit plans for participants); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 43 (1987) (policy to protect interest of participants in employee benefit plan); *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983) (to promote interest of beneficiaries); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) (to insure the equitable character of plans for participants); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (to ensure employee expectations are not defeated); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980) (to promote interest of beneficiaries); *id.* at 366 (protect employees from risk of insufficient funds); *accord* *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2072 (1993) (White's dissent: policy to protect interest of participants in employee benefit plans).

122. S. REP. NO. 127, *supra* note 18, at 1, 13, 18, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838, 4850, 4854 (emphasis added).

123. H.R. REP. NO. 533, *supra* note 18, at 1, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 (emphasis added).

documents must inform participants of their rights.¹²⁴ Both the Senate and House Labor Committees determined that a major pre-ERISA cause of lost benefits was the inability of participants to obtain plan information or comprehend it:

It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had *no knowledge* of these acts, or if these conditions were stated in a *misleading or incomprehensible* manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often *cannot comprehend* them because of the technicalities and complexities of the language used.¹²⁵

The second method Congress used to protect participant interests was to establish standards for judging plan fiduciary behavior of employers, plan administrators, and trustees.¹²⁶ Both the Senate and House Labor Committees indicated trust law entered ERISA only for this purpose: "The *fiduciary responsibility section*, in essence, codifies and *makes applicable* to these fiduciaries certain principles developed in the evolution of the *law of trusts*."¹²⁷ The reason was obvious. Trust law had failed in the pre-ERISA benefits-due lawsuit.¹²⁸ Therefore, trust law required modification before courts could apply it to employee benefit plans:

[E]ven where the funding mechanism of the plan is in the form of a trust, reliance on *conventional trust law often is insufficient* to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. . . . [C]ourts applying trust law to employee benefit plans have allowed the same kinds of deviations [allowing exceptions to fiduciary duties if specified by the settlor],

124. Employee Retirement Income Security Act of 1974 § 2(b), 29 U.S.C. § 1001(b) (1988) (labor matters); *see id.*, §§ 101(a), 104(a), 105(a), 29 U.S.C. §§ 1021(a), 1024(a), 1025(a).

125. S. REP. NO. 127, *supra* note 18, at 11, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4847 (emphasis added); H.R. REP. NO. 533, *supra* note 18, at 8, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646 (same).

126. Employee Retirement Income Security Act of 1974 § 2(b), 29 U.S.C. § 1001(b) (1988) (labor matters); *see id.* §§ 404-06, 29 U.S.C. §§ 1104-06.

127. S. REP. NO. 127, *supra* note 18, at 29, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (emphasis added); H.R. REP. NO. 533, *supra* note 18, at 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (same).

128. *See supra* notes 14-17 and accompanying text and *infra* notes 247-62 and accompanying text.

even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

... [E]ven assuming that the law of trusts is applicable ... without standards by which a participant can measure the fiduciary's conduct [] he is not equipped to safeguard either his own rights or the plan assets.

...
[The bill] incorporate[s] the core principles of fiduciary conduct as adopted from existing trust law, but *with* modifications appropriate for employee benefit plans.¹²⁹

Courts, too, would have to modify trust law because Congress adopted ERISA in order to make up for the inability of traditional trust law to provide for participant protection: "In the absence of adequate federal regulation, the participant is left to rely on the traditional equitable remedies of the common law of trusts."¹³⁰ It was as if Congress realized that contemporary employee benefit law relied too much on trust law principles. Thus, members of Congress limited trust law's application to employee benefit plans by imposing other principles.

The third method Congress used to protect participant interests was to provide federal remedies.¹³¹ The Senate Labor Committee found a need to provide a new source of remedies because pre-ERISA law failed to protect a participant's benefit claims: "The purpose of S.4 is to prescribe legislative remedies for the *various deficiencies* existing in the private pension plan systems. [A] substantial number of plans *fail to provide* adequate and fair procedures to participants and beneficiaries when their benefit claims or applications are denied."¹³² Consequently, both the Senate and House Labor Committees provided for very broad remedies.¹³³

The fourth method Congress employed to protect participant interests was to require vesting standards for inclusion in the plan document for pension plans, but not welfare plans.¹³⁴ Both the Senate and House Labor Committees concluded that the absence of vesting in pension

129. S. REP. NO. 127, *supra* note 18, at 29, 30, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865, 4866 (emphasis added); H.R. REP. NO. 533, *supra* note 18, at 12, 13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650, 4651.

130. S. REP. NO. 127, *supra* note 18, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841; H.R. REP. NO. 533, *supra* note 18, at 4, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.

131. Employee Retirement Income Security Act of 1974 § 2(b), 29 U.S.C. § 1001(b) (1988) (labor matters); *see id.* § 502, 29 U.S.C. § 1132.

132. S. REP. NO. 127, *supra* note 18, at 1, 34, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838, 4870 (emphasis added).

133. *See supra* note 18 and accompanying text.

134. Employee Retirement Income Security Act of 1974 § 2(c), 29 U.S.C. § 1001(c) (1988) (revenue matters); *see id.* § 203, 29 U.S.C. § 1053 (1988); Internal Revenue Code of 1954 § 411, 26 U.S.C. § 411 (1988).

plans was another major cause of the loss of pre-ERISA benefits: “[I]f pension promises are to be meaningful to workers, there is need for federal statutory requirements which will compel an employer to grant such vesting benefits.”¹³⁵ Both the Senate Finance Committee and the House Ways and Means Committee concluded similarly: “Unless an employee’s rights to his accrued pension benefits are non-forfeitable, he has no assurance that he will ultimately receive a pension.”¹³⁶

The fifth method by which participant interests were protected was to require minimum funding provisions in the plan document for pension plans, but not welfare plans.¹³⁷ Both the Senate and House Labor Committees decided that the absence of funding was another major cause of the loss of pre-ERISA benefits: “The Promise and commitment of a pension can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a promise of a pension which [sic] may be illusory and empty.”¹³⁸ Both the Senate Finance Committee and the House Ways and Means Committee stated similarly: “[A] significant portion of existing tax qualified pension plans have not been adequately funded and are not accumulating sufficient assets to pay benefits in the future to covered employees. . . . As a result [the] bill provides that unfunded past service liabilities must be amortized”¹³⁹

The sixth method Congress identified to protect participant interests was to require plan termination insurance for defined benefit plans, but not defined contribution plans or welfare plans.¹⁴⁰ Both the Senate and

135. S. REP. NO. 127, *supra* note 18, at 8, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4845; H.R. REP. NO. 533, *supra* note 18, at 6, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4644.

136. S. REP. NO. 383, 93d Cong., 2d Sess. 45 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930; H.R. REP. NO. 807, 93d Cong., 2d Sess. 53 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4719.

137. Employee Retirement Income Security Act of 1974 § 2(c), 29 U.S.C. § 1001(c) (1988) (revenue matters); *see id.* § 302, 29 U.S.C. § 1082; Internal Revenue Code of 1954 § 412, 26 U.S.C. § 412 (1988).

138. S. REP. NO. 127, *supra* note 18, at 10, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4846; H.R. REP. NO. 533, *supra* note 18, at 7, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4645.

139. S. REP. NO. 383, *supra* note 136, at 56, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4941; H.R. REP. NO. 807, *supra* note 136, at 74, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4739 (same, slight variation).

140. Employee Retirement Income Security Act of 1974 § 2(c), 29 U.S.C. § 1001(c) (1988) (revenue matters); *see id.* §§ 4001-4068, 29 U.S.C. § 1301-1368.

House Labor Committees concluded that plan termination prior to funding was another major cause of the loss of pre-ERISA benefits:

When a pension plan is terminated, an employee participating in it can lose all or a part of the benefits which he has long been relying on, even if his plan is fully vested [E]ven one worker whose retirement security is destroyed by the termination of a plan is one too many.¹⁴¹

ERISA also contains thirteen congressional findings that define the participant interest ERISA was to protect. These findings indicate that congressional concern for the protection of participant interests includes the benefits promised to the participant by the employer.¹⁴² Five findings relate to interstate commerce and government revenues. Two findings relate to acknowledging the growth of plans and their importance for employment stability. The remaining six findings support several of the above mentioned policy methods to protect the interests of participants. Three of those findings refer to anticipated or promised benefits.¹⁴³

The six findings are: (1) participants' continued well-being is dependent on plans; (2) participants' lack of information requires disclosure; (3) participants are losing anticipated benefits due to lack of vesting; (4) participants' promised benefits are endangered by inadequate funding; (5) participants are deprived of anticipated benefits due to premature plan terminations; and (6) participants need minimum standards to assure the equitable character and financial soundness of plans. Only the first finding does not relate directly to one of the policy methods. Of all the policy methods, only federal remedies are not directly supported.

Labor Committee reports confirm congressional concern with insuring that participants received the benefits they believed their employers had promised them. The Senate Labor and Public Welfare Committee

141. S. REP. NO. 127, *supra* note 18, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4842 (quoting a message sent to Congress by President Nixon); H.R. REP. NO. 533, *supra* note 18, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.

142. The Supreme Court has also acknowledged that the congressional concern is that participants receive their promised benefits. *E.g.*, *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992) (goal of protecting pension benefits; policy to safeguard stream of income for pensioners); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (policy to safeguard stream of income for pensioners); *Firestone Tire & Rubber Co v. Bruch*, 489 U.S. 101, 113 (1989) (to promote interest of beneficiaries; to protect contractually defined benefits for participants); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (to protect contractually defined benefits for participants).

143. Employee Retirement Income Security Act of 1974 § 2(a), 29 U.S.C. § 1001(a) (1988).

declared that ERISA seeks to protect the benefits employers promised to participants or led them to believe they had:

The provisions of S.4 are addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been *led to believe* would be theirs upon retirement from working lives. It responds by mandating protective measures, and prescribing minimum standards for *promised benefits*.

....
... The *Promise and commitment of a pension* can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a *promise of a pension* which [sic] may be illusory and empty.

....
... One of the more dramatic evidences of the deficiencies of pension plans, illustrated by the Studebaker case in 1964[,] is the failure of employees to receive all of the pension benefits to which they are entitled, when a company shuts down, relocates or merges with another corporate entity.¹⁴⁴

Both the Senate and House Labor Committees concluded that the protection was for anticipated benefits, promises of benefits, and just expectations of benefits: "Our primary consideration in [ERISA] has been to help assure that workers now covered by pension plans get their *expected benefits*."¹⁴⁵ The Senate report also stated:

The Internal Revenue Code provides only limited safeguards for the security of *anticipated benefit* rights in private plans

....
[I]f *pension promises* are to be meaningful to workers, there is need for federal statutory requirements which will compel an employer to grant such vesting benefits.

....
The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and *just expectations*.¹⁴⁶

The Senate Finance Committee indicated that protection was for promises of benefits: "[M]any employees now covered by pension plans

144. S. REP. NO. 127, *supra* note 18, at 1, 10, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838, 4846 (emphasis added).

145. H.R. REP. NO. 533, *supra* note 18, at 40, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4666 (emphasis added).

146. S. REP. NO. 127, *supra* note 18, at 5, 8, 13, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841, 4845, 4850 (emphasis added); H.R. REP. NO. 533, *supra* note 18, at 4, 6, 9, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642, 4644, 4647.

may not actually receive the *pensions they have been promised*, because the needed funds will not be available.”¹⁴⁷ The House Ways and Means Committee came to similar conclusions: “[M]any employees now covered by tax qualified pension plans may not actually receive the *pensions they have been promised*, because the present minimum funding requirements for plans qualified under the Internal Revenue Code is not adequate to prevent this underfunding”¹⁴⁸

Careful analysis of legislative sources shows that Congress passed ERISA to insure that plans protected participant expectations. In other words, under ERISA, participants should receive the benefits they reasonably believed their employers had promised them.

Committee reports discussing ERISA explain the reason for Congress’ concern for participants’ expectations. Benefits accumulated under a plan are the property of the participants, representing remuneration for labor already completed for the employer. Both the Senate Labor and Public Welfare Committee and the House Education and Labor Committee stated that benefits were deferred wages and that the employer owed benefits to plan participants. The House report stated: “The Act presumes that promised pension benefits are in the form of a *conditional deferred wage*. While popular attention focuses on the *deferred wage* aspect of pensions, the Act recognizes that the pension promise is conditional upon completion of minimum periods of service.”¹⁴⁹ Likewise, the Senate report came to the following conclusions:

[T]he issue basically resolves itself into whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits they have earned as *deferred compensation* and which have been placed for them in a fund for retirement purposes.

As a matter of equity and fair treatment an employee covered by a pension plan is *entitled*, after a reasonable period of service, to protection of his future retirement benefit against any termination of his employment.

[A] pension can be fulfilled only when funds are available to pay the employee participant what is *owed* to him.¹⁵⁰

147. S. REP. NO. 383, *supra* note 136, at 44, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4941 (emphasis added).

148. H.R. REP. NO. 807, *supra* note 136, at 74, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4739 (emphasis added).

149. H.R. REP. NO. 533, *supra* note 18, at 13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651 (emphasis added).

150. S. REP. NO. 127, *supra* note 18, at 5, 9, 10 (without parallel in House report), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4843, 4845, 4846 (emphasis added); *see* H.R. REP. NO. 533, *supra* note 18, at 5, 6, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643, 4644-45. The language “they have earned as deferred compensation and” quoted above in the

Both the Senate and House Labor Committees concluded recognition of benefits as deferred wages resulted from the World War II experience. The Senate report states:

Increases in fringe and retirement benefits during [World War II and the Korean conflict] became a means of compensating workers in lieu of increased wages, thus making pension benefits a *form of deferred wages*. In 1947, stemming from a suit filed with the National Labor Relations Board, the U.S. District Court decided that pensions were a form of remuneration for labor¹⁵¹

Likewise, the House report states:

The wage freezes imposed during World War II and the Korean conflict focused increased attention in the *deferred component* of compensation as a means of avoiding the freeze restrictions In 1947 a series of administrative proceedings and court decisions under the National Labor Relations Act of 1935 held that pensions were a form of remuneration for the purposes of the Act¹⁵²

Both the Senate Finance Committee and the House Ways and Means Committee also recognized benefits as deferred compensation: “[L]osses of pension rights [from the absence of a vesting provision] are inequitable, since the pension contributions previously made on behalf of the

Senate report does not appear in the House report. *Id.*

One commentator denigrates conditional deferred compensation, implying Congress had little concern for the contractual relationship. *See* Conison, *supra* note 5, at 610-17 (arguing for a rejection of the contractual approach). Conison’s argument, however, fails to consider the practical concerns involved in calculating a deferral based in part on prior years’ salaries under a non-qualified deferred compensation agreement. For management executives, the amount deferred each year not only reflects a portion calculated from the current year’s salary, but portions calculated from increased vesting on prior years’ salary as well as portions calculated from earnings on prior years’ deferrals. There is nothing “conditional” about the amount deferred in each year. Rather, the deferred amount reflects a detailed formula reflecting vesting and earnings. *See, e.g.,* Albertson’s, Inc. v. Commissioner, 42 F.3d 537, 544 (9th Cir. 1994) (taxpayer claimed calculated amounts under deferred compensation plans representing interest were currently deductible).

151. S. REP. NO. 127, *supra* note 18, at 3, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839 (emphasis added); *see, e.g.,* Inland Steel Co., 77 N.L.R.B. 1 (1948), *enfd.*, Inland Steel v. National Labor Relations Bd., 170 F.2d 247, 251 (7th Cir. 1949), *aff’d, sub nom.* American Communications Assoc. v. Doud, 339 U.S. 382 (1950); *accord* W.W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enfd.*, 174 F.2d 875 (1st Cir. 1949).

152. H.R. REP. NO. 533, *supra* note 18, at 2, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640 (emphasis added).

employee may have been made *in lieu of additional compensation* or some other benefits which he would have received.¹⁵³

The reports also clarify that the congressional method for protecting participant interests requires contractual provisions delineating the relationship created by the plan. Both the Senate and House Labor Committee reports indicate that Congress viewed the relationship between the participant and the plan as contractual: "In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its *contractual* requirements of vesting or funding."¹⁵⁴

It is clear that Congress accepted the unilateral contractual theory for establishing the right to benefits.¹⁵⁵ A large portion of ERISA merely specifies what must be included in the contract.¹⁵⁶ This is the traditional legislative approach to regulating adhesion contracts.¹⁵⁷ But

153. S. REP. NO. 383, *supra* note 136, at 45, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930 (emphasis added); H.R. REP. NO. 807, *supra* note 136, at 53, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4719.

154. S. REP. NO. 127, *supra* note 18, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841-42 (emphasis added); H.R. REP. NO. 533, *supra* note 18, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643 (same); *accord* S. REP. NO. 127, *supra*, at 8, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844. The President's Commission found "defective private pension plans were failing to provide the elderly with adequate income to meet economic needs when their productivity had ended." *Id.*

155. See *supra* notes 5-17 and accompanying text for the five pre-ERISA liability theories.

156. See S. REP. NO. 634, 92d Cong., 2d Sess. 111 (1972) (Statement of Javits) ("[W]hile, admittedly, pension rights and obligations are basically matters of contractual liability, Congress must not ignore the need for ascertaining solutions to the problems which were brought to the surface Those in need can turn only to Congress to provide corrections for the deficiencies in the system."); *id.* at 113 (recommending imposition of minimum vesting, funding, and fiduciary standards to overcome plan inadequacies); see also I.R.C. §§ 401(a)(8), 401(a)(9), 401(a)(12), 401(a)(13), 401(a)(14), 401(a)(16), 401(a)(25), 410, & 411, 26 U.S.C. §§ 401(a)(8) (defined benefit plan must prohibit forfeitures from increasing benefit), 401(a)(9) (plan must provide for distribution of entire interest), 401(a)(12) (plan must provide for benefit equality upon plan merger), 401(a)(13) (plan must provide anti-alienation provision), 401(a)(14) (plan must provide for benefit distribution time limits), 401(a)(16) (plan must provide for maximum benefit limitations), 401(a)(25) (defined benefit plan must specify actuarial assumptions), 410 (plan must provide minimum participation), & 411 (plan must provide minimum vesting) (1988).

157. *E.g.*, N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1989) (consumer contracts up to \$50,000 must be written "in a clear and coherent manner using words with common and every day meanings"); WIS. STAT. ANN. § 422.303(2) (West 1988) (consumer credit sale contract must use type of stated size); U.C.C. § 2-316(2), 1A U.L.A. 465 (1989) (disclaimer of implied warranty of merchantability must mention merchantability and, if written, be conspicuous); UNIF. CONSUMER CREDIT CODE § 2.201, 7 U.L.A. 643-44 (1985) (prohibiting provision setting finance charges above a specified rate). See generally 1 E. ALLAN FARNSWORTH, CONTRACTS § 4.29, at 517-22

under general contract theory, one party's duty to the other operates on the low standard of the morals of the marketplace.¹⁵⁸ With respect to the duties of the ERISA plan's non-employee parties—the employer, the plan administrator, and the trustee—Congress implemented a higher standard. Non-employee parties are subject to the more stringent legal standard of fiduciaries, as seen in trust law.¹⁵⁹ In sum, Congress recognized the employee benefit plan as a sort of unilateral adhesion contract that gives rise to fiduciary duties on the part of the dominant party.

2. *The Policy to Encourage Plan Formation*

Protection of federal revenues was the concern of the tax committees. Protecting tax revenues reflects the second ERISA policy, fostering the growth of plans through tax subsidies.¹⁶⁰

(1990).

158. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829 (1983).

159. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) ("Not honesty alone but the punctillio of an honor the most sensitive is . . . the standard of behavior.") (Cardozo, J.).

160. The Supreme Court has recognized that another ERISA policy is to foster plan formation. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 658 (1990) (encourage use and maintenance of pension plans) (Stevens, J., dissenting); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) (concern to reduce employer costs so as not to discourage the growth of private pension plans); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 379-80 n.30, 385 n.35 (1980).

See also 3 LEGISLATIVE HISTORY, *supra* note 4, at 4706-07 (Rep. Rostenkowski on conference bill):

The goal of the legislation was to strengthen the rights of employees under existing pension systems, while at the same time encouraging the expansion of these plans and the creation of new ones As a result, the conference report on H.R. 2 represents a true balance of the interests of all concerned. For example, its early vesting provisions will insure that each employee will have rights and not just empty promises as retirement approaches. Similarly the tax provisions . . . will . . . continue to encourage the establishment of retirement plans by corporate employers.

Id. at 4791 (Sen. Bentsen):

[T]his legislation recognizes the importance of expanding private retirement coverage to the tens of millions of American workers who do not now have the opportunity to participate in private retirement plans. . . . The purpose of this legislation is not to establish an ideal pension plan but rather to set up minimum standards to prevent real abuses Hopefully, companies and unions would establish plans that, in fact, are more generous than the minimum standards. . . . [I]f minimum standards are set too high, we would discourage the creation of new plans.

Both the Senate and House Labor Committees, which dealt with the policy to protect participant expectations, refer to the policy of fostering growth of plans as if it were not their policy but the policy of the opponents of ERISA:

[G]overnmental supervision of mandated and essential improvements has been resisted due to the belief that such legislation might impede plan growth.¹⁶¹

.....
Opponents of mandatory vesting believe that compulsory vesting provisions will discourage development of new plans and impede flexibility and latitude in formulating employee benefits because of excessive costs that are certain to result.¹⁶²

.....
The same opposition is voiced for new plans, which invariably assume a large unfunded liability at the outset of the plan¹⁶³

But each Labor Committee separately recognized fostering plan growth as of some concern. The Senate report states: "The Committee also concluded that an exemption for plans of small size was necessary in order to prevent discouraging small employers from establishing pension plans."¹⁶⁴ Similarly, the House report states: "[W]e have been careful not to inhibit benefit improvements for these covered workers and not to retard the expansion of the pension system in such a way as to deny retirement benefits to workers not now covered."¹⁶⁵

The reason for the Labor Committees' indifference to this ERISA policy was that it was already taken care of by the tax committees. Consequently, these Committees acted as if ERISA itself would be sufficient to encourage new plan formation:

[Enactment of the labor bill] should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers [The labor bill's] approach of establishing minimum standards and safeguards for private pensions is not only consistent

161. S. REP. NO. 127, *supra* note 18, at 8, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844; H.R. REP. NO. 533, *supra* note 18, at 5, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.

162. S. REP. NO. 127, *supra* note 18, at 9, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4845; H.R. REP. NO. 533, *supra* note 18, at 6, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4644.

163. S. REP. NO. 127, *supra* note 18, at 8, 9, 10, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844, 4845, 4846; H.R. REP. NO. 533, *supra* note 18, at 5, 6, 7, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643, 4644, 4645.

164. S. REP. NO. 127, *supra* note 18, at 18, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4854.

165. H.R. REP. NO. 533, *supra* note 18, at 41, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4666.

with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system.¹⁶⁶

The Senate Finance Committee and House Ways and Means Committee, on the other hand, did deal with achieving desired social goals through the tax subsidy. Both stated that the ERISA policy was to encourage new plan formation:

The bill continues to rely primarily on the tax laws to secure needed improvements in pension and related plans. In general, it retains the tax incentives granted under present law for the purpose of *encouraging the establishment* of plans which contain socially desirable provisions.¹⁶⁷ Present law *encourages employers to establish* retirement plans for their employees by granting favorable tax treatment where plans qualify by meeting nondiscrimination and other rules set forth in the Internal Revenue Code The favorable tax treatment granted qualified plans is substantial¹⁶⁸ [T]he objective [of the tax portions of ERISA] is to *increase the number of individuals participating* in employer-financed plans; to make sure to the greatest extent possible that those who do participate in such plans actually receive benefits and do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations¹⁶⁹ A fundamental aspect of present law, which [the bill] continues, is reliance on voluntary action by employers . . . for the establishment of qualified retirement plans . . . [and] *encouraging the establishment* of retirement plans which contain socially desirable provisions through the granting of tax inducements Since the favorable tax treatment is quite substantial . . . it is anticipated that plans will have a strong inducement to comply with the new qualification rules¹⁷⁰

Both the Senate Finance Committee and the House Ways and Means Committee recognized that new plan formation would occur through the subsidy as long as the costs of the ERISA requirements were not greater

166. S. REP. NO. 127, *supra* note 18, at 13, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4849-50; H.R. REP. NO. 533, *supra* note 18, at 9, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

167. S. REP. NO. 383, *supra* note 136, at 2, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890 (emphasis added).

168. S. REP. NO. 383, *supra* note 136, at 2, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4891 (emphasis added); H.R. REP. NO. 807, *supra* note 136, at 2-3, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4671-72.

169. S. REP. NO. 383, *supra* note 136, at 10, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4898 (emphasis added); H.R. REP. NO. 807, *supra* note 136, at 8, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676-77.

170. S. REP. NO. 383, *supra* note 136, at 2 (without parallel in House report), 2, 10, 10-11, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890, 4891, 4898, 4898-99 (emphasis added); H.R. REP. NO. 807, *supra* note 136, at 2-3, 8, 8-9, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4671-72, 4676-77, 4677.

than the subsidy. As a result, the Committees engaged in a balancing process:

[T]he committee recognizes that private retirement plans are voluntary on the part of the employer, and, therefore, it has weighed carefully the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits.¹⁷¹

[T]he committee is aware that . . . unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, . . . the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits [I]t would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy.¹⁷²

Both the Senate Finance Committee and the House Ways and Means Committee balanced in the three areas of interest for the tax subsidy: coverage, vesting, and funding:

[for coverage:] provide a balance between the need to grant employees the right to participate in pension plans at a relatively early age so that they can begin to acquire pension rights and the need to avoid the administrative drawbacks that would be involved in granting coverage to transient short-term employees whose pension benefits would in any event be small.¹⁷³

[E]arly participation tends to spread the cost of providing employees with adequate pensions more evenly¹⁷⁴

[for vesting:] In considering the minimum vesting provision, it is especially important to balance the protection offered by the provision against the additional cost involved in financing the plans.¹⁷⁵

The first [consideration] relates to the need to balance the protection offered by the minimum vesting provisions against the additional cost involved in financing the plan.¹⁷⁶

[I]t would be counterproductive to increase employer costs by more rapid vesting to such an extent as to significantly curtail the creation of new

171. S. REP. NO. 383, *supra* note 136, at 1, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890; H.R. REP. NO. 807, *supra* note 136, at 2, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4671.

172. S. REP. NO. 383, *supra* note 136, at 1, 18, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890, 4904; H.R. REP. NO. 807, *supra* note 136, at 2, 14-15, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4671, 4682.

173. S. REP. NO. 383, *supra* note 136, at 19, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4904; H.R. REP. NO. 807, *supra* note 136, at 15, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682.

174. S. REP. NO. 383, *supra* note 136, at 39, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4924; H.R. REP. NO. 807, *supra* note 136, at 44, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4709-10.

175. S. REP. NO. 383, *supra* note 136, at 18, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4905.

176. H.R. REP. NO. 807, *supra* note 136, at 19, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4686.

retirement plans (or significantly curtail the increase of benefits in existing plans).¹⁷⁷

[for funding:] [I]t is essential for plans to be adequately funded in accordance with a contributions schedule which will produce sufficient funds to meet the obligations of the plan when they fall due. . . .

. . . . [T]he level payment method, while providing for adequate amortization of the past service costs, initially adds only relatively moderate amounts to an employer's existing funding costs.¹⁷⁸

The House Ways and Means Committee also understood that the mechanism by which the tax subsidy operated was to provide a tax shelter for management employees:

[The] committee recognizes the importance of tax incentives in creating a strong private pension system. At the same time, however, [the] committee believes it is appropriate to provide some limitations to prevent the accumulation of corporate pensions out of tax-sheltered dollars which are swollen completely out of proportion to the reasonable needs of individuals for a dignified level of retirement income.¹⁷⁹

It's clear that one of the greatest reasons for excessive executive salaries is the tax avoidance which can be managed by earmarking large portions of these salaries for pension or profit-sharing plans. . . .

. . . . [I]f we are to continue to use our tax system to subsidize private pension benefits, we'll need a lot more progress in distributing the tax benefits involved more equitably among all workers.¹⁸⁰

So ERISA was composed of two parts, a labor part and a tax part, each with a different policy to foster. Moreover, the two policies need not conflict.¹⁸¹ Plan formation by providing management employees

177. S. REP. NO. 383, *supra* note 136, at 45, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930; H.R. REP. NO. 807, *supra* note 136, at 54, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4720 (same).

178. S. REP. NO. 383, *supra* note 136, at 18 (without parallel in House report), 19, 22, 39, 45, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4904, 4905, 4907-08, 4924, 4930; H.R. REP. NO. 807, *supra* note 136, at 15, 19 (without parallel in Senate report), 21-23, 44, 54, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682, 4686, 4690-92, 4709-10, 4720.

179. H.R. REP. NO. 807, *supra* note 136, at 108, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4777.

180. H.R. REP. NO. 807, *supra* note 136, at 108, 166, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4777, 4835 (statements of Reps. James A. Corman and Sam Gibbons).

181. See SPECIAL COMM. ON AGING, U.S. SENATE, 98TH CONG., 2D SESS., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 20-24 (1984) (explaining the opposition to ERISA's passage involving industry and the craft unions concerned about the costs only of minimum vesting requirements that might

with a tax shelter is the role of the tax portion of ERISA. Payment of benefits rightfully due participants is the role of the labor portion of ERISA. Moreover, the tax portion, the portion that encourages plan formation, only relates to coverage, vesting, and funding for all ERISA plans, not payment of anticipated benefits from one plan. The purpose of fostering plans relates to all plans in the aggregate, not one discrete plan. Payment of benefits from one plan, due to litigation rules favorable to participants, might discourage the one employer sued from establishing further plans. But payment has no plan discouraging effect on other employers, except those planning to engage in skulduggery. Employers concerned about paying more than they desire to participants should be more careful in drafting benefit promises.

D. Federal Courts' Recognition

Many federal circuit courts considering ERISA have recognized the above principles. These courts have stated that the power to make federal common law exists only within the interstices in the statute.¹⁸² The scope of the authority is limited by the requirement that the federal common law rule cannot conflict with ERISA principles.¹⁸³ In

discourage new plan formation, which opposition vanished when studies revealed only moderate costs). *Contra* Conison, *supra* note 5, at 581 (describing ERISA policies as participant interests versus employer interests); Fisk, *supra* note 26, at 168-69.

182. *E.g.*, Heasley v. Belden & Blake Corp., 2 F.3d 1249, 1257 (3d Cir. 1993) (plan interpretation); Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1351 (8th Cir. 1980) (same); *see also* Buckley Dement, Inc. v. Travelers Plan Adm'rs of Ill., Inc., 39 F.3d 784, 788 (7th Cir. 1994) (non-fiduciary liability); Miller v. Taylor Insulation Co., 39 F.3d 755, 758 (7th Cir. 1994) (promissory estoppel); Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1347 (11th Cir. 1994) (waiver); Slice v. Sons of Nor., 34 F.3d 630, 633 (8th Cir. 1994) (equitable estoppel); Reid v. Connecticut Gen. Life Ins. Co., 17 F.3d 1092, 1098 (8th Cir. 1994) (late claim filing); Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 280 (2d Cir. 1992) (non-fiduciary liability); Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 303-04 (5th Cir. 1992) (employer reimbursement); PM Group Life Ins. Co. v. Western Growers Assurance Trust, 953 F.2d 543, 546 & n.3 (9th Cir. 1992) (conflicting insurance provisions); Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 18 (2d Cir. 1991) (contribution and indemnity), *cert. denied*, 505 U.S. 1212 (1992); Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 991 (4th Cir.) (plan reimbursement), *cert. denied*, 498 U.S. 982 (1990); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 284 (7th Cir.) (en banc) (waiver), *cert. denied*, 498 U.S. 820 (1990); Board of Trustees of Watsonville Frozen Food Welfare Trust Fund v. California Coop. Creamery, 877 F.2d 1415, 1424 (9th Cir. 1989) (multiemployer collections); Northern Group Services, Inc. v. Auto Owners Ins. Co., 833 F.2d 85, 94 (6th Cir. 1987) (coordination of benefits); Anderson v. John Morrell & Co., 830 F.2d 872, 877 (8th Cir. 1987) (promissory estoppel).

183. *See, e.g.*, Butler v. Encyclopedia Britannica, Inc., 41 F.3d 285, 294 (7th Cir. 1994) (substantial compliance); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 562 (4th Cir. 1994) (substantial compliance); Elmore v. Cone Mills Corp., 23 F.3d 855, 869

addition, the federal common law rule must further the policies of ERISA.¹⁸⁴ The circuit courts have even recognized that ERISA fosters employee benefit protection¹⁸⁵ and plan growth.¹⁸⁶

But recitation of the shibboleths does not necessarily produce correct results. An examination of cases dealing with the plan interpretation rule for the benefits-due lawsuit indicates that federal circuit courts either paid no attention to the principles for developing federal common law or intentionally acted to oppose these principles.

(4th Cir. 1994) (en banc) (equitable estoppel); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58 (4th Cir. 1992) (equitable estoppel), *cert. denied*, 113 S. Ct. 1051 (1993); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1335 (5th Cir.) (extracontractual damages), *cert. denied*, 113 S. Ct. 812 (1992); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992) (equitable estoppel); *Rodrigue v. Western & S. Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991) (equitable estoppel); *Chemung*, 939 F.2d at 18 (Altimari, J., dissenting) (arbitration); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989) (promissory estoppel); *Degan v. Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989) (preemption); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 971 (5th Cir. 1981) (preemption).

184. See, e.g., *Adams*, 30 F.3d at 565 (substantial compliance); *Reich v. Rowe*, 20 F.3d 25, 31 (1st Cir. 1994) (non-fiduciary liability); *Whitworth Bros. Storage Co. v. Central States S.E. & S.W. Areas Pension Fund*, 982 F.2d 1006, 1015 (6th Cir.) (employer reimbursement), *cert. denied*, 114 S. Ct. 67 (1993); *Diduck*, 974 F.2d at 281 (nonfiduciary liability); *Davidowitz v. Delta Dental Plan, Inc.*, 946 F.2d 1476, 1480 (9th Cir. 1991) (assignment); *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1186 (3d Cir. 1991) (employer reimbursement); *Chemung*, 939 F.2d at 18 (contribution and indemnity); *Waller*, 906 F.2d at 992 (plan reimbursement); *Plucinski v. International Assoc. of Machinists Nat'l Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) (employer reimbursement); *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 302 (9th Cir. 1989) (promissory estoppel).

185. E.g., *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 386 (9th Cir. 1994) (plan interpretation); see, e.g., *Elmore*, 23 F.3d at 874 (Niemyer, J., concurring) (equitable estoppel); *Reich*, 20 F.3d at 32 (non-fiduciary liability); *Coar v. Kazimir*, 990 F.2d 1413, 1424 (3d Cir.) (set-off for fiduciary breach), *cert. denied*, 114 S. Ct. 179 (1993); *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 466 (7th Cir.) (statute of limitations), *cert. denied*, 502 U.S. 939 (1991); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1185 (4th Cir. 1989) (plan review standard); *Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 962 (1st Cir. 1989) (exclusive benefit rule); *Board of Trustees of the Mill Cabinet Pension Trust for N. Cal. v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 774 (9th Cir. 1989) (disregard of corporate form).

186. E.g., *Albertson's, Inc. v. Commissioner*, 42 F.3d 537, 544 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3800 (1995) (taxpayer claimed calculated amounts under deferred compensation plans representing interest were currently deductible).

III. COURT DECISIONS ON THE PLAN INTERPRETIVE RULE

A major rule that a benefits-due litigant might face deals with plan interpretation, for which ERISA contains no express provision.¹⁸⁷ Thus, ERISA's plan interpretive rule is a fertile ground for developing federal common law. A court faced with developing an appropriate rule could devise its own original rule or adopt one from some other body of law. Since few federal courts feel authorized to use the first method, they generally have confined their efforts to the second method. Courts adopting rules from other bodies of law also make modifications of the rule they select.

A. *Common Law Principles*

The most likely bodies of common law that can be used to fashion an ERISA rule are federal labor law and state contract, trust, and property law. Each of these areas of law, like ERISA, deals with privately drafted documents or oral agreements, which on occasion require interpretation. Courts have developed several rules under each body of law to resolve disputes over interpretation.

All of the interpretive rules essentially involve three successive steps. The first step, the understanding principle, searches in the words to be interpreted and intrinsic evidence for a single understanding. The various interpretive rules take one of two approaches to this determination. One group of rules uses an elite standard; another group uses a lay standard. The lay standard favors participants since they are more likely to possess the lay understanding than are the experienced plan administrators. The lay standard is also more likely to result in ambiguities and a multiplicity of possible interpretations, since participants, being more numerous than plan administrators, will have more different understandings. Of course, some principles for resolving ambiguities favor participants.

Often, the first step fails to find a single interpretation because an ambiguity exists. In this situation, the second step, the ambiguity principle, resolves the ambiguity by selecting one interpretation as the single understanding. The selection is made after an investigation of

187. *Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1038 (4th Cir. 1993) ("ERISA does not contain a body of contract law to govern interpretation . . . of employee benefit plans."); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1147 n.5 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985); *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (not specifying one after determining whether interpretive discretion is present).

evidence outside the document—known as extrinsic evidence—suggests the most reasonable meaning. The various interpretive rules have yet to set up a rigorous hierarchy governing the order of types of extrinsic evidence to use. The various rules generally accept any number of items presented by the parties in toto and weigh them to select the correct understanding. But the various rules differ in the use of extrinsic evidence with respect to ambiguity. One group of interpretive rules uses the extrinsic evidence principle to bar extrinsic evidence unless the understanding principle results in the finding of an ambiguity, in which case the court uses the extrinsic evidence only to resolve the ambiguity. A second group of interpretive rules uses the partial-extrinsic evidence principle to admit some extrinsic evidence without a finding of an ambiguity. Of course, extrinsic evidence frequently facilitates the finding of an ambiguity and bars all remaining extrinsic evidence, unless the first portion of the second step results in a finding of an ambiguity, in which case the court uses the remaining extrinsic evidence only to resolve the ambiguity. A third group of interpretive rules use the anti-extrinsic evidence principle to omit the second step, proceeding immediately to the third step upon the finding of an ambiguity. In this latter case, the court considers extrinsic evidence, if at all, to determine the presence of an ambiguity. The extrinsic evidence principle, admitting all extrinsic evidence together, generally favors the plan administrator since much of it is technical, relates to facts not readily known by participants, and is of easier access to plan administrators.¹⁸⁸

Unfortunately, sometimes the second step also fails to find a single understanding. A third step specifies a default principle to resolve the ambiguity. Interpretive rules take two approaches to this default principle. One group of interpretive rules uses a default principle favoring the draftsman; another group uses a default principle favoring the non-draftsman, the *contra proferentem* principle. The latter standard favors participants since they are very unlikely to have had a hand in drafting the plan.¹⁸⁹

188. See *Masella v. Blue Cross & Blue Shield, Inc.*, 936 F.2d 98, 105 (2d Cir. 1991).

189. Some courts assert that for collectively-bargained plans the negotiating union represents the participant and so the participant participated in the drafting and is not entitled to a construction against the employer. See *Rehmar v. Smith*, 555 F.2d 1362, 1369 (9th Cir. 1976) (federal labor law presumes equal bargaining power of collectively-bargained plans). This position contradicts the federal labor statutes, which recognize

Generally, the application of the three steps is a question of law for the court, except the weighing of extrinsic evidence is for the jury or other fact finder as a question of fact.¹⁹⁰ For ERISA this presently is of little significance, since most circuit courts do not permit jury trial.¹⁹¹ In addition, sometimes courts describe steps two and three in an inverted fashion. These courts specify a rebuttable presumption in the second step and then use extrinsic evidence to rebut the presumption in the third step.

Because of the frequency of interpretive success at step one, the other steps may seem superfluous. But no good faith interpretive dispute exists without ambiguities that lead to steps two and perhaps three. Therefore, interpretive resolution at step one means the absence of a good faith interpretive dispute or judicial reluctance to rule for participants.

If a court devised its own rule from these three steps, it could devise twelve different combinations. It could choose two variations for step one, the understanding principle. The court could choose among three rules for step two, the ambiguity principle. And it could choose two for step three, the default principle. Despite the large number of permutations, there are only six common law interpretive rules under the above-mentioned bodies of law.

1. Contract Law

Contract law uses four of the six interpretive rules. The basic contract interpretive principle law is to determine the intent of the negotiating parties at the time of contracting.¹⁹² Determining intent requires the selection of objective or subjective standards.

Classical contract theory, prevalent during the early development of employee benefit plans in the late nineteenth and early twentieth

union malfeasance in operating employee benefit plans to the detriment of participants. See *supra* notes 99-100 and accompanying text and *infra* note 243 and accompanying text.

190. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 554, at 224-27 (1960) (neoclassical contract theory). *Contra* 4 SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 600, at 284-85 (Walter H. E. Jaeger ed., 3d ed. 1961) (classical contract theory explains that interpretation is for the judiciary and not the jury).

191. See Flint, *supra* note 1, at 383-93.

192. E.g., 4 WILLISTON, *supra* note 190, § 600, at 284-85; 3 CORBIN, *supra* note 190, § 538, at 55; see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 35 (1992) (describing the subjective will theory of contract of the early nineteenth century).

Some jurisdictions have codes mandating the interpretive rules. E.g., CAL. CIV. CODE §§ 1635-1662 (Deering 1994 & Supp. 1995) (including the *contra proferentem* principle); P.R. LAWS ANN. tit. 31, §§ 3471-3474 (1990).

centuries, provides an objective standard. In the case of employee benefit plans under ERISA, there is generally a written contract.¹⁹³ Under the plain meaning principle, the court examines the specific language of the contract, interpreting words as a reasonably intelligent person would.¹⁹⁴ The court gives words their ordinary dictionary or technical meaning as appropriate.¹⁹⁵ If the words are ambiguous, then the court examines extrinsic evidence and weighs it to select the most reasonable meaning.¹⁹⁶ Some state courts, when presented with an ambiguity, apply the default principle automatically without first examining extrinsic evidence.¹⁹⁷

193. Employee Retirement Income Security Act of 1974 § 402(a), 29 U.S.C. 1102(a) (1988). If a court recognized application of estoppel doctrines to ERISA plans, the plan could include those additional representations whether oral or written. *See* *Averhart v. US West Management Pension Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994) (not reaching issue of whether court can use estoppel evidence to interpret ambiguities, since plan had no ambiguity); *Peckham v. Gem State Mut.*, 964 F.2d 1043, 1050 n.13 (10th Cir. 1992); *see also supra* notes 48-49 and accompanying text.

194. RESTATEMENT OF THE LAW OF CONTRACTS § 230 (1932) ("The standard of interpretation . . . except where it produces an ambiguous result . . . is the meaning that would be attached . . . by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances. . . ."); 4 WILLISTON, *supra* note 190, § 607, at 378-79.

195. RESTATEMENT OF THE LAW OF CONTRACTS §§ 235 (a) ("[T]he ordinary meaning of language . . . is given to words.") & 235(b) ("[T]echnical . . . words . . . are given their technical meaning . . .").

196. *Id.* § 235(c) (aids to apply the standard: "A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together."); *id.* § 235(d) ("All circumstances accompanying the transaction may be taken into consideration . . ."); *id.* 235(e) ("If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted . . .").

197. *E.g.*, *Bruder v. Country Mut. Ins. Co.*, 620 N.E.2d 355, 358 (Ill. 1993); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), *cert. denied*, 479 U.S. 1060 (1987); *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. 1992) (en banc); *United States Bronze Powders, Inc. v. Commerce & Indus. Ins. Co.*, 611 A.2d 667, 670 (N.J. Super. Ct. Law Div. 1992); *Gunn v. Aetna Life & Casualty Co.*, 629 S.W.2d 59, 61 (Tex. Ct. App. 1981); *Tempelis v. Aetna Casualty & Sur. Co.*, 485 N.W.2d 217, 221 (Wis. 1992).

Criticism of the *contra proferentem* principle generally focuses on this practice of some courts to apply the principle immediately upon finding an ambiguity, the anti-extrinsic evidence principle. *See* Stephen M. Hoke, *Contract Interpretation in Commercial Insurance Disputes: The Status of the Sophisticated Insured Exception and Alternatives to the Ambiguity Rule*, 40 FED'N INS. & CORP. COUNS. Q. 259 (1990); David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988).

Because of this significant rule variation, classical contract theory does not provide a well-settled interpretive rule. As a result, classical contract theory does not satisfy Justice White's requirements for the federal common law's use of state common law as a source of rules.¹⁹⁸ If the extrinsic evidence principle did not resolve the ambiguity or was omitted, then the court selects the reasonable meaning least favorable to the draftsman of the words—the *contra proferentem* principle.¹⁹⁹ One explanation for the *contra proferentem* principle is morality-based: the draftsman created the ambiguity and so should bear the loss.²⁰⁰ Of course, if a court did not desire to use the *contra proferentem* principle, which favors participants, the judge needs only to find the language unambiguous.²⁰¹

Neoclassical contract theory provides a subjective standard, seeking the common meaning of the parties at the time of entering the contract, rather than a court-imposed interpretation.²⁰² In the absence of common meaning, the court selects the meaning of the ignorant party

198. See *supra* note 110 and accompanying text.

199. RESTATEMENT OF THE LAW OF CONTRACTS § 236(d) ("Where words . . . bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed . . ."); see, e.g., Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983) (New York law); Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17 (1st Cir. 1982) (Mass. law), *cert. denied*, 460 U.S. 1028 (1983); Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mut. Ins. Co., 641 F. Supp. 297, 307, 309 (E.D. Pa. 1986) (Pennsylvania law), *aff'd*, 833 F.2d 307 (3d Cir. 1987); Rainier Credit Co. v. Western Alliance Corp., 171 Cal. App. 3d 255, 263, 217 Cal. Rptr. 291, 295 (1985); Playtex FP, Inc. v. Columbia Casualty Co., 609 A.2d 1087, 1092 (Del. Super. Ct. 1991); M-Z Enter., Inc. v. Hawkeye Sec.-Ins. Co., 318 N.W.2d 408, 412 (Iowa 1982); Collier v. MD-Individual Practice Ass'n, Inc., 607 A.2d 537, 539 (Md. 1992). See generally 13 APPELMAN & APPELMAN, *supra* note 39, at § 7401.

For an advocacy of the application of the *contra proferentem* principle to ERISA plans, see Fisk, *supra* note 26, at 212.

200. RESTATEMENT OF THE LAW OF CONTRACTS § 236 cmt. d (1932) (since that individual could have more easily prevented the mistake). In the insurance contract context, where the terms are not negotiated and the parties have unequal bargaining power, this rationale is intended to prevent the more sophisticated insurer from taking advantage of the insured. Hoke, *supra* note 197, at 262; Barry R. Ostrager & David W. Ichel, *Should The Business Insurance Policy Be Construed Against the Insurer? Another Look At The Reasonable Expectations Doctrine*, 33 FED'N INS. & CORP. COUNS. Q. 273, 278-79 (1983).

201. See Frederick Schauer, *Statutory Construction And The Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 252 ("Plain meaning, quite simply, is a blunt, frequently crude, and certainly narrowing device, cutting off access to many features of some particular conversational or communicative or interpretive context that would otherwise be available to the interpreter or conversational participant.").

202. RESTATEMENT (SECOND) OF CONTRACTS § 201(a) (1981) ("Where the parties have attached the same meaning . . . it is interpreted in accordance with that meaning . . ."); *id.* § 201 cmt. c; 3 CORBIN, *supra* note 190, § 538, at 57-75.

over the knowledgeable party.²⁰³ The intentional meaning portions of the neoclassical contract theory should have no application to ERISA plans because the employee does not generally become aware of the plan's details until long after entering employment.²⁰⁴ Hence, the

203. RESTATEMENT (SECOND) OF CONTRACTS, § 201(2) (1981):

Where the parties have attached different meanings . . . it is interpreted in accordance with the meaning attached by one if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

See also id. § 201(c) ("Except as stated in this section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.").

204. Employee Retirement Income Security Act of 1974 §§ 102, 104(b), 29 U.S.C. §§ 1102, 1104(b) (1988) (provide summary plan description within 90 days after the employee first becomes a participant, which occurs after the participant satisfies the age and years of service under the participation requirements).

The employer's and participants' interests might not be the two intents to match. The plan is an agreement between the employer, trustee, and plan administrator. *E.g.*, 5A JACOB RABKIN & MARK H. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS 13-1083 (sample form for defined benefit plan between company and trustees); *id.* at 13-1549 (sample form for money purchase pension plan between company and trustees); *id.* at 15-2077 (sample form for profit-sharing plan between company and trustees). The participant enters the situation as a third party beneficiary of the plan "contract"; *see Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 467-71 (1960) (treating plan as third party beneficiary of collective bargaining agreement between union and employer); *accord Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv. Inc.*, 870 F.2d 1148, 1151-52 (7th Cir. 1989); *Goldies, Inc. v. Alaska Hotel & Restaurant Employees Health & Welfare Fund*, 622 P.2d 979, 980-81 (Alaska 1981). The participant's congressionally recognized consideration of deferred compensation or present salary reduction runs to the employer, not the plan; *see RESTATEMENT (SECOND) OF CONTRACTS* § 311 cmt. c (1981) (beneficiary of life insurance is a third party beneficiary of contract between insurance company and mutual benefit association). Third party beneficiaries are subject to the same rules as are parties to the contract, *Conrad v. Thompson*, 137 Cal. App. 2d 73, 77, 290 P.2d 36, 39 (1955) (party rescission for failure of consideration), including the same interpretive rule. *Automobile Underwriters v. Camp*, 28 N.E.2d 68, 70 (Ind. 1940) (extrinsic evidence principle); *Lomont v. State Farm Mut. Auto. Ins. Co.*, 151 N.E.2d 701, 704 (Ind. App. 1958) (plain meaning principle). *See generally* 8 APPELMAN & APPELMAN, *supra* note 39, § 4811, at 342 & n.7.

Generally employee benefit plans, other than those subject to collective bargaining, do not result from negotiation. Instead, an entity seeking business prepares and sells a form document to several unrelated employers. *See, e.g.*, Rev. Proc. 76-15, 1976-1 C.B. 553 (pattern plan of a law firm); Rev. Proc. 77-23, 1977-2 C.B. 530 (field prototype plan of a firm other than a professional association, bank, insurance company, or regulated investment company); Rev. Proc. 75-38, 1975-2 C.B. 567 (prototype plan of a professional association or regulated investment company); Rev. Proc. 62-23, 1963-2 C.B. 757 (master plan of a bank or insurance company). Interpretive rules for non-

employee has no intent to match or contradict the employer's intent. In the absence of intentional meaning, neoclassical contract theory reverts to classical contract theory: first the court looks for a single understanding, then it employs the ambiguity evidence principle and lastly it resorts to the default principle.²⁰⁵

Neoclassical contract theory also differs from classical contract theory by using a different understanding principle. For adhesion contracts, where one party significantly dominates the other so that there is no negotiation of terms—a situation recognized by Congress for ERISA plans—neoclassical contract theory adopts an interpretive rule developed for insurance contracts. Under the reasonable expectation principle, the court interprets words, not as a reasonably intelligent person, but as a person similarly situated with the less dominant party.²⁰⁶ The reason-

negotiated contracts would therefore be the most appropriate interpretive rules.

205. RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981) ((1)“Words . . . are interpreted in light of all the circumstances . . .”; (2) “A writing is interpreted as a whole, and all writings that are part of the same transactions are interpreted together”; (3) “Unless a different intention is manifested, (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning; (b) technical . . . words . . . are given their technical meaning . . .”; and (5) “[I]ntentions of the parties . . . are interpreted as consistent with . . . any relevant course of performance, course of dealing, or usage of trade.”); *id.* § 202 cmt. e (language understood throughout the country, and not particular to a locality or group); *id.* § 206 (“In choosing among the reasonable meanings . . . that meaning is generally preferred which operates against the party who supplies the words . . .”).

206. *Id.* § 211 (reasonable standard lowered to that of reasonable consumer); *see, e.g.*, *Insurance Co. of N. Am. v. Gibrasco, Inc.*, 847 F.2d 530, 534 (9th Cir. 1988) (California law); *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 741 F. Supp. 515, 520 (D.N.J. 1990) (New Jersey law), *rev'd on other grounds*, 989 F.2d 635 (3d Cir. 1993); *Gordinier v. Aetna Casualty & Sur. Co.*, 742 P.2d 277, 283 (Ariz. 1987); *Travelers Ins. Co. v. Kulla*, 579 A.2d 525, 531 (Conn. 1990); *Property Owners Ins. Co. v. Hack*, 559 N.E.2d 396, 402 (Ind. Ct. App. 1990); *West Trucking Line, Inc. v. Northland Ins. Co.*, 459 N.W.2d 262, 264-65 (Iowa 1990); *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985); *Central Waste Sys., Inc. v. Granite State Ins. Co.*, 437 N.W.2d 496, 498 (Neb. 1989); *National Union Fire Ins. Co. v. Caesars Palace Hotel & Casino*, 792 P.2d 1129, 1130 (Nev. 1990); *Sparks v. St. Paul Ins. Co.*, 495 A.2d 406, 413-14 (N.J. 1985); *DiFabio v. Centaur Ins. Co.*, 531 A.2d 1141, 1143 (Pa. Super. 1987); *Hazen Paper Co. v. U.S. Fidelity and Guar. Co.*, 555 N.E.2d 576, 583 (Mass. 1990) (reasonable insured). *See generally* ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 6.3(a), at 350-57 (1988); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966-67 (1970) (explaining the doctrine's origin in the 1960s); 2 GEORGE COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 15:16, at 171-74 (2d ed. Anderson 1984); 13 APPELMAN & APPELMAN, *supra* note 39, § 7386, at 144-46.

A rule of this sort governs international transactions, where industrialized traders draft the documents for their trading with third world traders. The United Nations Convention on the International Sale of Goods provides that the intent of the speaker or actor governs only where the other party knew or could not have been unaware of that intent. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CONF. 97/18, Annex I (1980), article 8. In all other cases the

able expectation principle is more favorable to participants than the *contra proferentem* principle because a court need not find an ambiguity before construing in favor of some participants.²⁰⁷ The reasonable expectation principle's rationale is that insurance contracts involve disproportionate bargaining power and the typical insured is not able to understand the language used in insurance contracts.²⁰⁸ Numerous state courts have adopted this principle.²⁰⁹ Other courts apply the reasonable expectation principle only in the presence of an ambiguity.²¹⁰ In practice, these two versions may provide the same result.²¹¹

statements are interpreted according to the understanding that "a reasonable person of the same kind as the other party would have in the same circumstances." *Id.* (emphasis added). See also Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 293-314 (1994) (explaining the origin of the classical contract theory's objective interpretive rule of a reasonably intelligent person as a method to enforce the dominant American norms and encourage immigrants to abandon minority beliefs and practices).

One of ERISA's fiduciary standards also is of this sort. Plan administrators are to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a *like capacity* and familiar with such matters would use in the conduct of an enterprise of *like character with like aims*." Employee Retirement Income Security Act of 1974 § 404(1)(B), 29 U.S.C. § 1104(1)(B) (1988) (emphasis added). One would think the insurance contract situation would fit this description and so mandate the insurance contract rules. See Flint, *supra* note 18, at 651-53 (suggesting insurance law application by analogy).

207. ALLAN WINDT, *INSURANCE CLAIMS & DISPUTES* § 6.03, at 233-38 (1988).

208. *National Indem. Co. of Minn. v. Ness*, 457 N.W.2d 755, 757 (Minn. Ct. App. 1990); see also *Gordinier*, 742 P.2d at 283 (following RESTATEMENT (SECOND) OF CONTRACTS § 211 for adhesion contracts which applies a reasonableness standard lowered to that of average consumer).

ERISA plans suffer the same incomprehensible language problem. See *supra* note 125 and accompanying text.

209. BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 1.03[b](2)(B) (6th ed. 1993) (30 states in 1993); Roger Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 n.5 (1990) (stating that as many as 16 states may be viewed as having adopted the reasonable expectation doctrine).

But some state courts have rejected the reasonable expectation principle to retain the plain meaning principle. *E.g.*, *Sterling Merchandise Co. v. Hartford Ins. Co.*, 506 N.E.2d 1192, 1196-97 (Ohio App. 1986) (rejecting reasonable expectation principle); *Allstate Ins. Co. v. Mangum*, 383 S.E.2d 464, 467 (S.C. Ct. App. 1989).

210. *E.g.*, *Enterprise Tools, Inc. v. Export-Import Bank of U.S.*, 799 F.2d 437, 442 (8th Cir. 1986) (applying federal law), *cert. denied*, 480 U.S. 931 (1987); *Waranch v. Gulf Ins. Co.*, 218 Cal. App. 3d 356, 359, 266 Cal. Rptr. 827, 828 (1990); *Mutual of Enumclaw Ins. Co. v. Wood By-Products, Inc.*, 695 P.2d 409, 413 (Idaho 1984); *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495-96 (W. Va. 1987); *St. Paul Fire & Marine v. School Dist. No. 1*, 763 P.2d 1255, 1263 (Wyo. 1988);

In sum, because of rule variations, neoclassical contract theory also does not provide a well-settled interpretive rule.

2. Trust Law

Trust law provides three interpretive rules, but only one differs from contract rules. Trust law takes a different approach from contract law because it does not deal with a negotiated transaction. Instead, it deals with a donation by one party. The basic interpretive principle under trust law is to determine the intent of the settlor in making the donation.²¹²

Traditional trust theory uses the same method as classical contract theory to determine the settlor's intent. The settlor's intent is determined by the specific language of the trust document. In addition, traditional trust theory provides an objective plain meaning principle.²¹³ Once again, the plain meaning principle might result in ambiguities. In that case, traditional trust theory allows extrinsic evidence to aid interpretation.²¹⁴ If the words remain ambiguous or if the court omits extrinsic

see Yancey v. Floyd West & Co., 755 S.W.2d 914, 925 (Tex. Ct. App. 1988) (dicta); Keenan v. Industrial Indem. Ins. Co., 738 P.2d 270, 275 (Wash. 1987) (dicta).

211. *See* DiFabio v. Centaur Ins. Co., 531 A.2d 1141, 1143 (Pa. Super. 1987) (using the reasonable expectation principle to determine ambiguity).

212. *E.g.*, Corretti v. First Nat'l Bank, 276 So. 2d 141, 146 (Ala. 1973); *State ex rel. Goddard v. Coerver*, 412 P.2d 259, 262 (Ariz. 1966); *West Coast Hosp. Ass'n v. Florida Nat'l Bank*, 100 So. 2d 807, 810 (Fla. 1958); *American Rubbermaid & Plastics Corp. v. First Nat'l Bank*, 277 N.E.2d 840, 842 (Ill. 1971); *Department of Revenue v. Kentucky Trust Co.*, 313 S.W.2d 401, 404 (Ky. 1958); *State Tax Comm'n v. Loring*, 215 N.E.2d 751, 754 (Mass. 1966); *First Nat'l Bank v. Anthony*, 557 A.2d 957, 960 (Me. 1989); *see also* RESTATEMENT OF TRUSTS § 4 (1935) ("'terms of the trust' means the manifestation of the intention of the settlor . . . in a manner which admits of its proof in judicial proceedings"); RESTATEMENT (SECOND) OF TRUSTS § 4 (1955); 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 4, at 53 (4th ed. 1987); GEORGE G. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS AND TRUSTEES § 182, at 255 (2d ed. rev. 1979).

213. *E.g.*, *In re Fiske's Trust*, 65 N.W.2d 906, 910-11 (Minn. 1954); *Commerce Trust Co. v. Starling*, 393 S.W.2d 489, 494 (Mo. 1965); *Ohio Citizens Bank v. Mills*, 543 N.E.2d 1206, 1208 (Ohio 1989) (ordinary sense); *Industrial Nat'l Bank v. Rhode Island Hosp.*, 207 A.2d 286, 291 (R.I. 1965). *See also* RESTATEMENT OF TRUSTS § 164 cmt. e (1935) ("determined by the provisions of the instrument"); RESTATEMENT (SECOND) OF TRUSTS § 164 cmt. e (1959) (same); 2A SCOTT & FRATCHER, *supra* note 212, § 164.1, at 253 (same); BOGERT & BOGERT, *supra* note 212, § 182, at 31 n.22.5.

214. *E.g.*, *Goddard*, 412 P.2d at 263; *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 93 (N.Y. 1990); *Freed v. Judith Realty & Farm Prods. Corp.*, 113 S.E.2d 850, 854 (Va. 1960); *Rigg v. Lawyer*, 408 P.2d 252, 256 (Wash. 1965); *In re Fortwin Trust*, 203 N.W.2d 711, 715 (Wis. 1973); *see* *Halter v. First Nat'l Bank & Trust Co.*, 336 P.2d 701, 702 (Mont. 1959) (even if unambiguous); *see also* RESTATEMENT OF TRUSTS (FIRST) § 164 cmt. e (1935) ("if . . . ambiguous, evidence of the circumstances [extrinsic evidence] is admissible"); RESTATEMENT OF TRUSTS (SECOND) § 164 cmt. e (1959) (same); 2A SCOTT & FRATCHER, *supra* note 212, at

evidence, then many courts select the reasonable meaning least favorable to the draftsman of the words—a *contra proferentem* principle in favor of the beneficiary.²¹⁵ Other courts use a default principle in favor of the settlor or his designate, the trustee.²¹⁶ Because of these variations in the use of extrinsic evidence and the default principle, traditional trust theory does not provide a well-settled rule. This fact is recognized by the restatements and treatises since they do not specify a default principle.

Trust law, like contract, has developed another interpretive rule for trusts granting the trustee interpretive discretion. The discretionary trust theory's interpretive rule operates the same as the traditional trust theory's rule, except for the default principle. Under the discretionary trust theory's default principle, the court accepts the trustee's interpretation, unless it is arbitrary or capricious.²¹⁷ The rationale for this abuse

§ 164.1, 254 (same); BOGERT & BOGERT, *supra* note 212, § 182, at 31 n.22 (Supp. 1994).

215. *E.g.*, Brennehan v. Bennett, 420 F.2d 19, 24 (8th Cir. 1970) (applying Iowa law after considering extrinsic evidence); Funsten v. Commissioner, 148 F.2d 805, 808 (8th Cir. 1945) (applying Missouri law without mentioning extrinsic evidence); Seasongood v. United States, 331 F. Supp. 486, 491 (S.D. Ohio 1971) (applying Ohio law after considering extrinsic evidence); Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14, 18 (1923) (uses only intrinsic evidence); *In re Greenleaf's Estate*, 101 Cal. App. 2d 658, 667, 225 P.2d 945, 948 (1951) (same); Perling v. Citizens and S. Nat'l Bank, 300 S.E.2d 649, 651 (Ga. 1983) (does not mention extrinsic evidence); *In re Miller's Trust*, 397 P.2d 443, 447 (Haw. 1964) (same); St. Louis Union Trust Co. v. Clarke, 178 S.W.2d 359, 365 (Mo. 1944) (same); Dibert v. D'Arcy, 154 S.W. 1116, 1125 (Mo. 1913) (same); Damiani v. Lobasco, 79 A.2d 268, 271 (Pa. 1951) (same); Wood v. Paul, 95 A. 720, 722 (Pa. 1915) (same); Price v. Johnston, 638 S.W.2d 1, 4 (Tex. Civ. App. 1982) (uses only intrinsic evidence).

216. *Malone v. Malone*, 379 So. 2d 926, 929 (Miss. 1980) (applying ambiguities in favor of settlor and mentioning only intrinsic evidence); Deposit Guar. Nat'l Bank v. First Nat'l Bank, 352 So. 2d 1324, 1327 (Miss. 1977) (same); Davison v. Duke Univ., 194 S.E.2d 761, 784 (N.C. 1973) (after considering extrinsic evidence, trustees' interpretation due some weight); *United States Nat'l Bank v. Duling*, 592 P.2d 257, 261 (Or. App. 1979) (after considering extrinsic evidence, adopt a construction most consistent with settlor's other intentions).

217. *See, e.g.*, American Bd. of Comm'rs of Foreign Missions v. Ferry, 15 F. 696, 699 (Cir. Ct., W.D. Mich., 1883) (Michigan will; if in good faith, court cannot reverse); *Greene v. Huntington*, 46 A. 883, 885 (Conn. 1900) (uphold unless abuse of power); *Howe v. Sands*, 194 So. 798, 800 (Fla. 1940) (if reasonable, court cannot interfere); *Talladega College v. Callahan*, 197 N.W. 635, 637 (Iowa 1924) (cannot be arbitrary or in bad faith); *In re Barbey's Will*, 32 N.Y.S.2d 191, 193 (N.Y. Supr. Ct. 1942) (in absence of abuse of discretion, court cannot interfere); *In re Cowen's Estate*, 265 N.Y.S. 40, 42 (Surr. Ct. 1933) (final in absence of fraud or bad faith); *Nations v. Ulmer*, 139 S.W.2d 352, 356 (Tex. Civ. App. 1940) (if reasonable, is conclusive); *Grant v. Stephens*,

of discretion interpretive rule is to avoid consuming the trust estate with costly litigation.²¹⁸

Not all state courts have adopted this abuse of discretion interpretive rule when the trust grants the trustee interpretive discretion. Instead, other courts use a default principle, construing interpretations in favor of the beneficiary.²¹⁹ Because of this variation in the default rule, discretionary trust theory does not yield a well-settled rule. This fact, too, is recognized by the restatements and treatises since they do not specify an abuse of discretion interpretive rule.

3. *Property Law*

Property law provides two interpretive rules, but they do not differ from the rules articulated by classical contract theory. In addition, judges applying property law construe real estate instruments the same way they would under trust law. The basic interpretive principle under property law is to determine the intent of the grantor.²²⁰ The grantor's intent is determined by reading the language used in the instrument.

200 S.W. 893, 896 (Tex. Civ. App. 1918) (same); *Couts v. Holland*, 107 S.W. 913, 916 (Tex. Civ. App. 1908) (same); *Old Nat'l Bank & Trust Co. v. Hughes*, 134 P.2d 63, 66 (Wash. 1943) (in absence of fraud or arbitrary conduct, court cannot interfere); *Moore v. Harper*, 27 W. Va. 362, 373-74 (1886) (if without fraud or corruption, final); see also 3 SCOTT & FRATCHER, *supra* note 212, §§ 187.2-187.5, at 32-48 (the four parts of the abuse of discretion standard: (1) reasonableness, (2) failure to use judgment, (3) dishonesty, and (4) improper motive); BOGERT & BOGERT, *supra* note 212, § 559, at 169-71 (subject to reasonableness).

218. *Barbey*, 32 N.Y.S.2d at 194.

219. See, e.g., *Lydick v. Lydick*, 76 P.2d 876, 879 (Kan. 1938) (not conclusive if erroneous); *Taylor v. McClave*, 15 A.2d 213, 216 (N.J. 1940) (court must construe rightly); *In re Jones' Estate*, 99 N.W.2d 365, 367 (Mich. 1959) (not contrary to the plain intention of the testator); *In re Reilley's Estate*, 49 A. 939, 940 (Pa. 1901) (cannot deprive the court); see also 3 SCOTT & FRATCHER, *supra* note 212, § 187, at 25-26 (cannot oust court of jurisdiction); BOGERT & BOGERT, *supra* note 212, § 559, at 171 n.43 (cannot deprive court of its powers); Note, *Trusts—Implication from General Plan—Power of Trustees to Construe Instrument*, 41 COLUM. L. REV. 761, 762-63 (1941) (depicting de novo review as the minority rule); Alfred Rothman, Note, *Wills—Provisions for Construction of the Will by Umpire Named by Testator*, 39 MICH. L. REV. 1255, 1257 (1940) (same).

220. E.g., *Gibson v. Pickett*, 512 S.W.2d 532, 535 (Ark. 1974); *In re Estate of Fleck*, 154 N.W.2d 865, 867 (Iowa 1967); *Winsor v. Powell*, 497 P.2d 292, 299 (Kan. 1972); *Root v. Mackey*, 486 S.W.2d 449, 451 (Mo. 1972); *Bauer v. Bauer*, 141 N.W.2d 837, 840 (Neb. 1966); *Northwestern Pub. Serv. Co. v. Chicago & N.W. Ry.*, 210 N.W.2d 158, 160 (S.D. 1973); *Chesapeake Corp. v. McCreery*, 216 S.E.2d 22, 25 (Va. 1975). See generally 1 RUFFORD G. PATTON & CARROLL G. PATTON, *LAND TITLES* § 214, at 500 (1957). But see *Creason v. Peterson*, 470 P.2d 403, 405 (Utah 1970) (intention of the parties); GEORGE W. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 3094, at 804 (1962) (same).

First, the objective plain meaning principle is applied.²²¹ If the plain meaning principle results in ambiguities, property law allows extrinsic evidence to aid interpretation.²²² If the words remain ambiguous or if the court omits extrinsic evidence, then the court selects the reasonable meaning least favorable to the presumed draftsman—in other words, the court applies the *contra proferentem* principle in favor of the grantee.²²³

221. *E.g.*, *Barnes v. Barnes*, 627 S.W.2d 552, 552 (Ark. 1982); *Bokock v. Noon*, 215 A.2d 899, 901 (Pa. 1966) (reasonable); *Gillespie v. Worcester*, 322 A.2d 93, 95 (Me. 1974) (ordinary meaning); *Payne v. Campbell*, 164 So. 2d 780, 784 (Miss. 1964) (not unreasonable); *Phelps v. Sledd*, 479 S.W.2d 894, 896 (Ky. 1972) (ordinary meaning); *Conner v. Hendrix*, 72 S.E.2d 259, 264 (Va. 1952); *Wasser & Winters Co. v. Jefferson*, 528 P.2d 471, 473 (Wash. 1974) (ordinary meaning); *Wellman v. Tomblin*, 84 S.E.2d 617, 620 (W. Va. 1954); *Weekley v. Weekley*, 27 S.E.2d 591, 595 (W. Va. 1943). *See generally* 1 PATTON & PATTON, *supra* note 220, § 214, at 501; THOMPSON, *supra* note 220, § 3094, at 804.

222. *E.g.*, *Brown v. Huckabaa*, 89 So. 2d 180, 182 (Ala. 1956); *State v. Hawaiian Dredging Co.*, 397 P.2d 593, 607 (Haw. 1964); *Gardner v. Fliegel*, 450 P.2d 990, 994 (Idaho 1969); *Siegel v. Hackler*, 310 P.2d 914, 917 (Kan. 1957); *In re Moreck*, 100 N.W.2d 758, 762 (Minn. 1960); *Payne*, 164 So. 2d at 784; *see Darman v. Dunderdale*, 289 N.E.2d 847, 850 (Mass. 1972) (without reference to ambiguity). *See generally* 1 PATTON & PATTON, *supra* note 220, at 504-06; THOMPSON, *supra* note 220, § 3094, at 804.

223. *E.g.*, *Griffith v. Utah Power & Light Co.*, 226 F.2d 661, 667 (9th Cir. 1955) (applying Idaho law after evaluating extrinsic evidence); *Shell Petroleum Corp. v. Ward*, 100 F.2d 778, 779 (5th Cir.) (applying Texas law with no mention of extrinsic evidence), *cert. denied*, 307 U.S. 632 (1939); *Gibson v. Pickett*, 512 S.W.2d 532, 536 (Ark. 1974) (after extrinsic evidence); *Clevenger v. Continental Oil Co.*, 369 P.2d 550, 552 (Colo. 1962) (no mention of extrinsic evidence); *Faiola v. Faiola*, 238 A.2d 405, 408 (Conn. 1968) (after extrinsic evidence); *Hawaiian Dredging Co.*, 397 P.2d at 608 (same); *Patton v. Vining*, 150 N.E.2d 606, 608, (Ill. 1958) (same); *Corbin v. Moser*, 403 P.2d 800, 804-05 (Kan. 1965) (same). *See generally* 1 PATTON & PATTON, *supra* note 220, § 214, at 505; THOMPSON, *supra* note 220, § 3094, at 803.

When the grantee prepares the deed, the default principle is to construe in favor of the grantor. *E.g.*, *Baker v. Columbia Gulf Transmission Co.*, 218 So. 2d 39, 41 (Miss. 1969) (examining intrinsic evidence); *Hampton v. Kessler*, 145 P.2d 955, 957 (Okla. 1944) (examining extrinsic evidence); *McBride v. Hutson*, 306 S.W.2d 888, 891 (Tex. 1957) (same).

The court applies the default principle only after examining extrinsic evidence. *Hodges v. Owings*, 13 A.2d 338, 340 (Md. 1940); *Strauss v. J.C. Nichols Land Co.*, 37 S.W.2d 505, 508 (Mo. 1931); *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.*, 137 S.W. 171, 179 (Tex. Civ. App. 1911), *aff'd*, 157 S.W. 737 (Tex. 1913).

4. Labor Law

Federal labor law provides the sixth interpretive rule. When courts interpret collective bargaining agreements under federal labor law, the judge takes an approach similar to contract law: the judge seeks to determine the intent of the parties.²²⁴ However, federal common law governing the interpretation of collective bargaining agreements is not exactly the same as the common law of contract.²²⁵ When applying the understanding principle, federal labor law and contract law differ because the former limits the use of extrinsic evidence of related collective bargaining agreements to show practice, usage, and custom.²²⁶ Other than this difference, federal courts generally follow the usual principles of classical contract theory, admitting other extrinsic evidence to resolve ambiguities.²²⁷ In addition, some courts may apply the *contra proferentem* principle as a last resort.²²⁸

224. FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 348 (4th ed. 1985).

225. *Transportation-Communication Employees Union v. Union P.R.R.*, 385 U.S. 157, 160-61 (1966); *accord* *Mastro Plastics Corp. v. National Labor Relations Bd.*, 350 U.S. 270, 281 (1956) (construing liberally, not technically, to achieve statutory purposes: holding anti-strike clause against "any strike" not to include strike to protest unfair labor practice).

226. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 311 (1989); *Transportation-Communication Employees Union*, 385 U.S. at 161; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) (the common law of a particular industry); *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-80 (1960) (gaps to be filled in by references to the practices of a particular industry). *See generally* ELKOURI & ELKOURI, *supra* note 224, at 360-61 (limiting it to ambiguities).

227. *E.g.*, *Stewart v. KHD Deutz of Am. Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) (health plan); *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 544, 551 (8th Cir. 1990); *Smith v. ABS Indus., Inc.*, 890 F.2d 841, 845-46 & n.1 (6th Cir. 1989) (pension plan); *Griesmann v. Chemical Leaman Tank Lines, Inc.*, 776 F.2d 66, 72 (3d Cir. 1985); *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 566 (9th Cir. 1984) (retirement plan); *National Elec. Contractors Ass'n, Inc. v. National Constructors Ass'n*, 678 F.2d 492, 498 (4th Cir. 1982). *See generally* ELKOURI & ELKOURI, *supra* note 224, at 348-60.

228. *See* *Northwest Adm'rs, Inc. v. B.V. & B.R., Inc.*, 813 F.2d 223, 226 (9th Cir. 1987) (did not use *contra proferentem* since in a negotiated deal it is difficult to determine who offered the language). *See generally* ELKOURI & ELKOURI, *supra* note 224, at 362-63.

Arbitrators, however, routinely use the *contra proferentem* principle. *E.g.*, *Passavant Retirement & Health Ctr. v. Teamsters Local 538*, 103 Lab. Arb. (BNA) 808 (1994) (Hewitt, Arb.); *Food 4 Less Supermarkets, Inc. v. United Food & Commercial Workers Union Local 770*, 102 Lab. Arb. (BNA) 817 (1994) (Grabuskie, Arb.); *Southwest Airlines Co. v. Transport Workers Union of Am. Local 556*, 102 Lab. Arb. (BNA) 207 (1993) (Helburn, Arb.); *United Can Co. v. Cannery, Warehousemen, Food Processors, Drivers & Helpers, Teamsters Local 748*, 102 Lab. Arb. (BNA) 806 (1993) (Hoh, Arb.);

It is important to make one other note with regard to the substantive differences between collective bargaining agreements and typical insurance contracts. First, collective bargaining agreements generally involve negotiated deals between various employers and union representatives, unless a union is so strong as to dictate the terms or so weak as to capitulate to the employer's demands. Second, collective bargaining agreements generally provide for resolution of disputes by arbitrators.²²⁹

B. Pre-ERISA Choices for Employee Benefit Plans

In general, depending on which legal theory a court used to analogize a plan interpretive rule, it would select one of six rules:

(1) The understanding of a reasonably intelligent person, followed, if needed, by the extrinsic evidence principle and, if needed, the trustee's reasonable interpretation. As classified by this Article, this method represents one of the two rules of discretionary trust theory and one of the three rules of traditional trust theory.

(2) The understanding of a reasonably intelligent person, followed, if needed, by the extrinsic evidence principle and, if needed, by the *contra proferentem* principle. This method reflects one of the two rules of classical contract theory, one of the three rules of traditional trust theory, one of the two rules of discretionary trust theory, and one of the two rules of property law.

(3) The understanding of a reasonably intelligent person, followed, if needed, by the anti-extrinsic evidence principle and the *contra proferentem* principle. This method represents one of the two rules of

Atascadero Unified Sch. Dist. v. Atascadero Dist. Teachers Aides Ass'n, 101 Lab. Arb. (BNA) 673 (1993) (Bickner, Arb.); Carrier Air Conditioning Corp. v. Sheet Metal Workers' Int'l Ass'n, Local 483, 101 Lab. Arb. (BNA) 618 (1993) (Mathews, Arb.).

229. The Railway Labor Act requires carriers and employees to establish boards to resolve grievances, 45 U.S.C. § 184 (1988), and judicial review is available only if such board oversteps its jurisdiction or commits fraud. *Id.* § 153(q). Some ERISA plans are within the scope of the Railway Labor Act, *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 627 F.2d 272, 275 (D.C. Cir. 1980), and so a court cannot review a board's decision under ERISA. *Long v. Flying Tiger Line, Inc.*, 994 F.2d 692, 695 (9th Cir. 1993) (holding that if the court were to find jurisdiction "we would eviscerate the Railway Labor Act's system of arbitration"); *accord* Employee Retirement Income Security Act of 1974 § 514(d), 29 U.S.C. § 144(d) (1988) (leaving federal law intact).

classical contract theory, one of the three rules of traditional trust theory, and one of the two rules of property law.

(4) The understanding of a reasonably intelligent person along with some extrinsic evidence, followed, if needed, by additional extrinsic evidence, and, if needed, by the *contra proferentem* principle. This is the rule of federal labor law.

(5) The understanding of a reasonably intelligent person, except to determine ambiguities, in which case the understanding of a reasonable lay person, followed, if needed, by extrinsic evidence and, if needed, by the *contra proferentem* principle. This method represents one of the two rules of neoclassical contract theory.

(6) The understanding of a reasonable lay person, followed, if needed, by the partial-extrinsic evidence principle and, if needed, by the *contra proferentem* principle. This method reflects one of the two rules of neoclassical contract theory.

Pre-ERISA employee benefit law used four of these plan interpretive rules. Courts considering state law, including union-negotiated single-employer plans separate from their collective bargaining agreements, used the first three of the above rules. Courts also used the first rule under federal law for the trusts of the LMRA plans.²³⁰ Courts used the fourth rule under federal labor law for union-negotiated, single-employer plans contained within their collective bargaining agreements. These four rules differed in choices for the understanding principle, the ambiguity principle, and the default principle.

1. State Law Decisions

By far, the predominantly used principles under state law came from contract law. The reason was that by the mid-twentieth century, most pre-ERISA courts using state law had concluded that the employees' relation to the plan was an enforceable contract.²³¹ Therefore, these

230. As used in this Article, the word "LMRA plan" means the multiemployer plans satisfying the special requirements of LMRA.

231. See, e.g., Shipley, *supra* note 3, at 467-72.

courts used contract rules of interpretation.²³² In unambiguous cases, courts used the classical contract theory's plain meaning principle.²³³

When ambiguities arose, courts used the *contra proferentem* principle of classical contract theory.²³⁴ A few courts, using state law, eschewed

232. The courts in the foundational cases, those not citing earlier employee benefit cases, all claimed to use general contract theory. *E.g.*, *Gladden v. Pargas, Inc.*, 575 F.2d 1091, 1094 (4th Cir. 1978) (North Carolina law); *Hudson v. John Hancock Mut. Life Ins. Co.*, 314 F.2d 16, 20-21 (8th Cir. 1963) (Arkansas law); *Western Union Tel. Co. v. Hughes*, 228 F. 885, 887-88 (4th Cir. 1915) (South Carolina law); *Psutka v. Michigan Alkali Co.*, 264 N.W. 385, 388 (Mich. 1936); *Elby v. Livernois Eng'g Co.*, 194 N.W.2d 429, 430 (Mich. Ct. App. 1971); *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494, 500 (Mo. 1971); *Russell v. Princeton Labs., Inc.*, 231 A.2d 800, 805 (N.J. 1967); *Kristt v. Haire*, 155 N.Y.S.2d 362, 366 (Sup. Ct. 1956), *rev'd on other grounds*, *Kristt v. Whelan*, 164 N.Y.S.2d 239 (N.Y. App. Div. 1957), *aff'd*, 155 N.E.2d 116 (N.Y. 1958); *Taint v. Kroger Co.*, 247 N.E.2d 794, 796 (Ohio Com. Pl. 1967); *Sigman v. Rudolph Wurlitzer Co.*, 11 N.E.2d 878, 879 (Ohio Ct. App. 1937).

233. *E.g.*, *Fernckes v. CMP Indus., Inc.*, 195 N.E.2d 884, 887 (N.Y. 1963) (profit-sharing plan, unspecified contract: reversing judgment for participant); *Alt v. Long Island R.R.*, 365 N.Y.S.2d 480, 484 (Sup. Ct. 1975) (profit-sharing plan, bilateral contract: reversing judgment for participant); *Garner v. Girard Trust Bank*, 275 A.2d 359, 361 (Pa. 1971) (profit-sharing plan, bilateral contract: rational and probable construction preferred, citing general contract law; reversing judgment for participant); *Schofield v. Zion's Coop. Mercantile Inst.*, 39 P.2d 342, 345 (Utah 1934) (pension plan, bilateral contract: between two reasonable constructions, select the one establishing a valid contract, citing contract and property law; affirming judgment for participant); *Frank v. Day's Inc.*, 535 P.2d 479, 482 (Wash. Ct. App. 1975) (pension plan, unilateral contract: construe from language alone when unambiguous; reversing judgment for plan).

234. Some courts used the rule to aid the participant by affirming judgments for participants. *See, e.g.*, *Western Union Tel. Co.*, 228 F. at 887-88 (South Carolina life insurance plan, unspecified contract: by analogy to insurance contracts, construe ambiguities strongly against insurance company, most favorable to insured, citing insurance contract law); *Elby*, 194 N.W.2d at 430 (profit-sharing plan, unspecified contract theory: construe ambiguities against drafter); *Hinkeldey*, 470 S.W.2d at 500 (severance pay plan, bilateral contract: resolve ambiguities strongly against employer, citing employment contract case); *Ehrle v. Bank Bldg. & Equip. Corp. of Am.*, 530 S.W.2d 482, 492 (Mo. Ct. App. 1975) (disability plan, bilateral contract: construe strongly against the employer, citing ambiguity case); *Brulotte v. Cormier Hosiery Mills, Inc.*, 387 A.2d 1162, 1163 (N.H. 1978) (profit-sharing plan, unspecified theory: construe ambiguities against the company); *Sigman*, 11 N.E.2d at 879 (pension plan, bilateral contract: construe against employer as it could have restricted implications); *Dangott v. ASG Indus., Inc.*, 558 P.2d 379, 383 (Okla. 1976) (severance pay plan, bilateral contract: construe strongly in favor of employee, citing ambiguity case); *Levitt v. Billy Penn Corp.*, 283 A.2d 873, 876 (Pa. Super. Ct. 1971) (profit-sharing plan, unilateral contract: construe ambiguities most favorable to employee, citing contractual LMRA case); *see also* *Dierks v. Thompson*, 295 F. Supp. 1271, 1278 (D.R.I. 1969) (Rhode Island profit-sharing plan, bilateral contract: for ambiguities draw inferences favorable to non-drafter; judgment for participant), *rev'd on other grounds*, 414 F.2d 453 (1st Cir. 1969); *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125, 134 (N.D. Ill. 1955) (Illinois

pension plan, unilateral contract: *contra proferentem*; same), *aff'd*, 234 F.2d 942 (7th Cir. 1956); *Kristt*, 155 N.Y.S.2d at 366 (profit-sharing plan, bilateral contract: construe ambiguities in favor of employees, citing contract and trust law; same).

Other courts reversed judgments for the plan administrator. *See, e.g., Gladden*, 575 F.2d at 1094 (North Carolina disability plan, bilateral contract: construe ambiguity in favor of insured); *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 868 (Del. 1969) (pension plan, bilateral contract: if ambiguous, construe liberally in favor of employee); *Pstuka*, 264 N.W. at 388 (pension plan, bilateral contract: resolve ambiguities against employer).

Some cases mentioned the rule and yet still ruled in favor of the plan administrator by affirming judgments for the plan administrator. *See, e.g., Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 533 n.14 (3d Cir. 1970) (New York law, pension plan, unspecified contract: construe ordinary and technical meaning when unambiguous, but citing ambiguity cases from state employee benefit law, no ambiguity); *Siss v. United States Steel Corp.*, 339 N.E.2d 279, 283 (Ill. App. Ct. 1975) (Pennsylvania law for pension plan, unspecified theory: resolve ambiguities in interests of employees, without citation, no ambiguity); *Leonard v. Washington Employers, Inc.*, 461 P.2d 538, 546 (Wash. 1969) (dissenting opinion) (retirement plan, unspecified contract: construe in favor of employees, citing ambiguity case); *see also Brinzo v. Phoenix Steel Corp.*, 304 A.2d 66, 67 (Del. Ch. 1973) (pension plan, unspecified theory but cites bilateral cases: if ambiguous, construe liberally in favor of employee; judgment for employer, no ambiguity); *Evo v. Jomac, Inc.*, 289 A.2d 551, 557 (N.J. Super. Ct. Law Div. 1972) (profit-sharing plan, unilateral contract: resolve ambiguities against company, citing general contract law cases; same).

Some cases mentioned the rule and then reversed a judgment for the participant. *See, e.g., Jacoby v. Grays Harbor Chair & Mfg. Co.*, 468 P.2d 666, 671 (Wash. 1970) (pension plan, unilateral contract: construe ambiguities against party preparing it, citing an LMRA case, no ambiguity).

A number of courts cited the favorable construction rule without mentioning the ambiguity requirement. Some courts used the rule to aid the participant by affirming judgments for participants. *See, e.g., Rochester Corp. v. Rochester*, 450 F.2d 118, 121 n.4 (4th Cir. 1971) (Virginia pension plan, bilateral contract: because normally drafted by the employer, construe liberally in favor of employees); *Paddock Pool Constr. Co. v. Monseur*, 533 P.2d 1188, 1190 (Ariz. Ct. App. 1975) (profit-sharing plan, theory unspecified but cites bilateral contract case: construe in favor of employee, against employer); *Parenti v. Wytmar & Co.*, 364 N.E.2d 909, 915 (Ill. App. Ct. 1977) (profit-sharing plan, unspecified contract: construe in favor of employee); *Anger v. Bender*, 335 N.E.2d 122, 125 (Ill. App. Ct. 1975) (pension plan, theory unspecified but cites trust cases: construe liberally in favor of employee); *Weesner v. Electric Power Bd. of Chattanooga*, 344 S.W.2d 766, 768 (Tenn. Ct. App. 1961) (retirement plan, bilateral contract: construe most strongly against the employer); *Ruditys v. Wing*, 260 N.W.2d 794, 798 (Wis. 1978) (profit-sharing plan, unilateral contract: construe liberally in favor of employee); *Rosploch v. Alumatic Corp. of Am.*, 251 N.W.2d 838, 841 (Wis. 1977) (profit-sharing plan, unspecified contract: construe liberally in favor of employee); *Holsen v. Marshall & Ilsley Bank*, 190 N.W.2d 189, 192 (Wis. 1971) (profit-sharing plan, unspecified contract: construe liberally in favor of employee).

Other courts used the rule to aid the participant by reversing judgments for the plan administrator. *See, e.g., In re Home-Stake Prod. Co. Deferred Compensation Trust*, 598 P.2d 1193, 1196 (Okla. 1979) (pension plan, unspecified contract theory: construe in favor of beneficiary, citing contractual plan case); *Voigt v. South Side Laundry & Dry Cleaners, Inc.*, 128 N.W.2d 411, 413 (Wis. 1964) (group annuity plan, bilateral contract: construe liberally in favor of the employees).

Courts also cited the rule without mentioning the ambiguity requirement and yet still rule in favor of the plan by affirming judgments for the plan administrator. *See, e.g.,*

the *contra proferentem* principle, relabelling the doctrine as a method of construction to avoid forfeitures.²³⁵ Some courts received extrinsic evidence before applying the *contra proferentem* principle, but others did not.²³⁶ In sum, pre-ERISA courts using state contract law applied both interpretive rules of classical contract theory.

With respect to the default principle, some pre-ERISA contracts establishing the plan contained language to the effect that the "sole, absolute, and final" interpretive authority lay with the plan administrator.²³⁷ Under one version of discretionary trust interpretation, this language would give rise to the abuse of discretion rule. However, the most analogous contract was the adhesion contract. Courts using contract law found the interpretive authority provision of no effect because of employer control, just as some courts did under the second version of discretionary trust theory.²³⁸

Fritzsche v. First W. Bank & Trust Co., 168 Cal. App. 2d 705, 707, 336 P.2d 589, 590 (1959) (pension plan, theory unspecified but cites bilateral contract case: construe liberally in favor of employee); *Thornbery v. MGS Co.*, 176 N.W.2d 355, 360 (Wis. 1970) (retirement plan, bilateral contract: construe liberally in favor of employees); see also *Taint v. Kroger Co.*, 247 N.E.2d 794, 796 (Ohio C.P. 1967) (pension plan, unspecified theory: strictly construe against employer in favor of employee, citing lease law; judgment for employer).

235. *E.g.*, *Evo*, 289 A.2d at 557 (profit-sharing plan, unilateral contract: construe to avoid forfeiture; judgment for plan); *Stopford v. Boonton Molding Co.*, 265 A.2d 657, 665 (N.J. 1970) (pension plan, bilateral contract: construe to avoid forfeiture; affirming judgment for participant); *Russell v. Princeton Labs., Inc.*, 231 A.2d 800, 805 (N.J. 1967) (profit-sharing plan, bilateral contract: construe to avoid forfeiture; reversing judgment for plan); see *Zimmermann v. Brennan*, 254 N.W.2d 719, 721 (Wis. 1977) (profit-sharing plan, unspecified contract: construe to avoid forfeiture, on basis of restraint of trade in anti-competition clause; affirming judgment for participant); see also RESTATEMENT OF THE LAW OF CONTRACTS § 236(a) (1932) ("An interpretation which gives a reasonable, lawful, and effective meaning to all manifestation of intention is preferred to an interpretation which leaves part of such manifestation unreasonable, unlawful, or of no effect.").

236. *Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc.*, 448 F.2d 501, 505 (7th Cir. 1971) (last resort); *Hurd*, 136 F. Supp. at 134 (same); *Jones v. Mountain States Tel. & Tel. Co.*, 670 P.2d 1305, 1311-12 (extrinsic evidence first). *Contra Conner*, 249 A.2d at 869 (without extrinsic evidence); see also *Moore v. Adkins*, 576 P.2d 245, 251 (Kan. Ct. App. 1978) (pre-ERISA plan: plan administrator upheld on intrinsic evidence, default principle unspecified).

237. See, e.g., *Russell*, 231 A.2d at 805.

238. *E.g.*, *Hurd*, 136 F. Supp. at 154-55 (Illinois law: rejecting contract version of arbitrary and capricious standard to review plan interpretation); *Siss*, 339 N.E.2d at 283; *Wilson v. Rudolph Wurlitzer Co.*, 194 N.E. 441, 443 (Ohio Ct. App. 1934) (deeming a forfeiture interpretation as arbitrary and capricious); *Russell*, 231 A.2d at 805 (same).

A few pre-ERISA courts using state law viewed the employee-plan relationship as a trust and used trust law interpretive rules. When language was unambiguous, these courts used the plain meaning principle.²³⁹ When an ambiguity existed, these courts also used the *contra proferentem* principle.²⁴⁰ A few pre-ERISA courts using state contract law noted a trust law origin of the *contra proferentem* principle.²⁴¹ Finally, courts using the contractual gratuity theory also developed a default principle of not construing against the employer.²⁴² Therefore, pre-ERISA courts using state trust law applied all three interpretive rules of traditional trust theory and both interpretive rules of discretionary trust theory.

These cases belie an implication of Justice O'Connor concerning the pre-ERISA plan interpretive rule:

The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions 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, the court reviewed the employee's claim as it would have any other contract claim—by looking to the terms of the plan and other manifestations of the parties' intent.

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112-13 (1989) (considering a severance pay plan lacking the grant of discretion). But the same review rule also applied even if the plan gave the employer or administrator discretion provided the court viewed the plan as a bilateral or unilateral contract. Those cases using a different review rule applied the gratuity theory. See *infra* note 242 and accompanying text.

239. E.g., First Nat'l Bank of Birmingham v. Adams, 203 So. 2d 124, 129 (Ala. 1967) (profit-sharing plan: construe to give effect of settlor, reversing judgment for participant); *id.* at 131 (give legal terms legal meaning, citing trust law).

240. E.g., Connell v. United States Steel Corp., 371 F. Supp. 991, 1001 (N.D. Ala. 1974) (retirement plan for union employees under Alabama law: construe in favor of employees, applying LMRA principles to private employer plan; plan administrator violated arbitrary and capricious standard).

241. E.g., Kristt v. Haire, 155 N.Y.S.2d 362, 366 (Sup. Ct. 1956) (contract and trust law), *rev'd on other grounds*, Kristt v. Whelan, 164 N.Y.S.2d 239 (N.Y. App. Div. 1957), *aff'd*, 155 N.E.2d 116 (N.Y. 1958).

242. E.g., Menke v. Thompson, 140 F.2d 786, 791 (8th Cir. 1944) (Missouri law not to be interpreted strictly against the employer since it was voluntary and gratuitous contract; affirming judgment for plan); Burgess v. First Nat'l Bank, 220 N.Y.S. 134, 139 (App. Div. 1927) (plan administrator is court of last resort upon all questions of interpretation; it is absolute right of employer to put its own construction on plan); McNevin v. Solvay Process Co., 53 N.Y.S. 98, 103 (App. Div.), *aff'd*, 60 N.E. 115 (N.Y. 1901) (dissenting opinion) (criticizing majority for not construing contract to avoid forfeiture); McLemore v. Western Union Tel. Co., 171 P. 390, 392 (Or. 1918) (rejecting the *contra proferentem* principle under gratuity theory as plan not like a commercial contract with an insurance company).

2. LMRA Law

The other major body of pre-ERISA law developed under the LMRA. Employee benefit plans under LMRA are of two sorts: (1) plans resulting from the collective bargaining process, administered unilaterally by employers because the plans are subject to the LMRA proscription against payments to union officials and (2) plans administered jointly by both union and management pursuant to a collective bargaining agreement, exempted from LMRA provisions proscribing payment to union officials.²⁴³

Under both plans, there are generally at least two documents: the collective bargaining agreement and the plan. Different interpretive rules apply to each document because federal labor laws focus primarily on union-management disputes. As a result, federal labor law's interpretive rule only applies to the collective bargaining agreement and not the plan.²⁴⁴

243. See Schneider, *supra* note 96, at 275-78. Both types settled disputes through arbitration prior to ERISA. *Id.* at 276.

Unilaterally administered plans are of two types. One type is the subject of a collective bargaining agreement. But an employer can also establish an employee benefit plan outside of the collective bargaining agreement for union employees when it is not the subject of the collective bargaining agreement with the union. See Employee Retirement Income Security Act of 1974 § 1014(a), 26 U.S.C. § 413(a) (1988) (special rules for collectively-bargained plans); 26 C.F.R. § 1.413-1(a)(2) (1991). Since employee benefit plans are mandatory subjects of negotiation, these plans result when the employer and union fail to agree on a collectively-bargained plan. See, e.g., Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180-81 (1971).

In the employee benefit area, LMRA attempted to eliminate the extortion, bribery and mismanagement plaguing union pension and welfare programs by controlling their establishment and operation. Eliot A. Landau et al., *Protecting a Potential Pensioner's Pension—An Overview of Present and Proposed Law on Trustees' Fiduciary Obligations and Vesting*, 40 BROOK. L. REV. 521, 535-41 (1974). Congress also became concerned that union officials might convert program resources to their own use and, through LMRA, made it illegal to set up a program administered solely by a union. *Id.* at 535.

244. Compare Communications Workers v. American Tel. & Tel. Co., 40 F.3d 426, 433 (D.C. 1994) (applying arbitrary and capricious standard to union-negotiated single-employer plan, but not to the collective bargaining agreement) with Kefer v. H.K. Porter Co., 872 F.2d 60, 62 (4th Cir. 1988) (applying federal labor law interpretive rule to collective bargaining agreement, but not the plan). See Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 371 (1984) (federal labor law presumption in favor of arbitration applies to union-employer agreement, not the plan-employer agreement); Anderson v. Alpha Portland Indus., Inc., 752 F.2d 1293, 1296 n.3 (8th Cir.) (party making the distinction), *cert. denied*, 471 U.S. 1102 (1985).

Before ERISA's passage, state law interpretive rules applied to the plan. Employers and unions created plans under state law with provisions specifying governance by a particular jurisdiction's law. The courts respected these provisions.²⁴⁵

a. Union-Negotiated Single-Employer Plans

Pre-ERISA courts treated union-negotiated, collectively-bargained plans created under state law the same as other state plans. They used contract rules of interpretation. Therefore, courts applied the plain meaning principle of classical contract theory, followed by the extrinsic evidence principle and the *contra proferentem* principle.²⁴⁶

245. For single-employer plans, see, e.g., *Craig v. Bemis Co., Inc.*, 517 F.2d 677, 680 (5th Cir. 1975) (governed by Alabama conflict of law rule that acknowledges plan provision for Minnesota law); *Connell v. United States Steel Corp.*, 516 F.2d 401, 405 (5th Cir. 1975) (governed by state law on basis of legislative history).

For multi-employer plans, see, e.g., *Bricklayers, Masons & Plasterers Int'l Union, Local Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1025 (5th Cir. 1975) (governed by state law); *Miller v. Davis*, 507 F.2d 308, 311 n.3 (6th Cir. 1974) (governed by Kentucky conflict of law rule that acknowledges plan provision for D.C. law); *Snider v. All State Adm'rs, Inc.*, 481 F.2d 387, 390 (5th Cir. 1973) (governed by state law), *cert. denied*, 415 U.S. 957 (1974).

246. For cases using the rule to aid the participant by affirming judgments for participants, see, e.g., *Jones v. Mountain States Tel. & Tel. Co.*, 670 F.2d 1305, 1315 (Idaho Ct. App. 1983) (pre-ERISA pension plan, unilateral contract: construe in favor of employee, citing ambiguity employee benefit case; rejecting non-insurance plan analogy since the two types of plans are sufficiently similar to be subject to the same rules); *Luli v. Sun Prods. Corp.*, 398 N.E.2d 553, 556 (Ohio 1979) (pension plan, unspecified contract: construe against employer, citing ambiguity case); *see also* *Smith v. Union Carbide Corp.*, 231 F. Supp. 980, 985 (E.D. Tenn. 1964) (collectively bargained pension plan under Tennessee law, unspecified contract: construe liberally in favor of employees, citing statutory construction rule for public pension, judgment for participant), *rev'd on other grounds*, 350 F.2d 258 (6th Cir. 1965).

For cases mentioning the rule and yet still ruling in favor of the plan administrator (1) by affirming judgments for the plan administrator, see, e.g., *Hudson v. John Hancock Mut. Life Ins. Co.*, 314 F.2d 16, 21 (8th Cir. 1963) (Arkansas group annuity plan, bilateral contract: construe ambiguities against scrivener); or (2) by reversing judgments for the participant, see, e.g., *Connecticut Gen. Life Ins. Co. v. Craton*, 405 F.2d 41, 49 (5th Cir. 1968) (Florida disability plan, bilateral contract under collective bargaining agreement: construe against insurance company); *see also* *Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc.*, 448 F.2d 501, 505 (7th Cir. 1971) (Illinois pension plan, unspecified theory: literal and clear meaning, mentions ambiguities).

For cases using the forfeiture avoidance rules, see, e.g., *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 6 (1st Cir. 1978) (pre-ERISA Massachusetts pension plan, bilateral contract: public policy long required construction to avoid forfeiture; affirming judgment for participant).

b. LMRA Plans

LMRA plans may be derived from collective bargaining agreements, but LMRA plans also are trusts under the statute.²⁴⁷ As a result, courts have applied interpretive rules from both contract and trust law to LMRA plans.

Because the collective bargaining agreement is a contract, many LMRA courts used state contract interpretive rules for the LMRA plans. Courts used the plain meaning principle.²⁴⁸ When faced with ambiguities, judges used the extrinsic evidence principle,²⁴⁹ followed by the contractual *contra proferentem* principle favoring the employee.²⁵⁰

Other courts rejected the *contra proferentem* principle when faced with ambiguities in a negotiated contract unresolved by extrinsic evidence. Courts followed this general method because the terms of the plan had been freely negotiated and there was thus no reason to believe that the LMRA plan was a plan of adhesion.²⁵¹ However, these courts did not

247. Labor Management Relations Act of 1947 § 186(c)(5), 29 U.S.C. § 302(c)(5) (1988).

248. *E.g.*, Johnson v. Central States, S.E. & S.W. Areas Pension Fund, 513 F.2d 1173, 1175 (10th Cir. 1975) (not using the *contra proferentem* principle as plan unambiguous).

249. *E.g.*, Hurd v. Hutnik, 419 F. Supp. 630, 655 (D.N.J. 1976) (construing ambiguity as participant's desire, not trustee's, on basis of extrinsic evidence).

250. *E.g.*, Apponi v. Sunshine Biscuits, Inc., 652 F.2d 643, 648-49 (6th Cir. 1981) (Ohio law, pension plan, unspecified contract: strictly construe against the employer); Rehmar v. Smith, 555 F.2d 1362, 1369 (9th Cir. 1976) (federal labor law assumes equal bargaining power of union and employers, so the *contra proferentem* principle only appropriate as a tie-breaker; did not use since had no evidence on who drafted the language); Hart v. United Bhd. of Carpenters Local No. 626, 352 A.2d 423, 426 (Del. Super. Ct. 1976) (construe in favor of employee, citing state pension contract cases); Forrish v. Kennedy, 105 A.2d 67, 70 (Pa. 1954) (UMW health plan: if ambiguous, construe in favor of pensioner, citing Pennsylvania public pension law); Dorward v. International Longshoremen's & Warehousemen's Union-Pacific Maritime Assoc. Pension Plan, 452 P.2d 258, 264 (Wash. 1969) (construe most strongly against the trustees, without citation); *see also* Neuffer v. Bakery & Confectionery Workers Int'l Union, 307 F.2d 671, 673 (D.C. Cir. 1962) (citing Illinois law: contract law abhors forfeitures, without citation).

251. *See* Beam v. International Org. of Masters, Mates, & Pilots, 511 F.2d 975, 980 (2d Cir. 1975) (rejecting insurance contract interpretive rule since LMRA plan not a boilerplate contract with a consumer); Lowenstern v. International Ass'n of Machinists and Aerospace Workers, 479 F.2d 1211, 1213 (D.C. Cir. 1973) (rejected insurance interpretive rule as must follow precedent of D.C. Circuit's rule accepting trustee's interpretation); Mirigliano v. Local 259, United Auto. Workers, 396 N.Y.S.2d 685, 687

adopt the trust law version of the *contra proferentem* principle for LMRA plans. Instead, federal circuit courts deferred to the trustee's interpretation. This rule effectively adopted an unsettled principle from traditional and discretionary trust theory for the special situation of interpretive discretion, which is not always the case for LMRA plans.²⁵² The foundational cases, arising from the District of Columbia Circuit, concluded the courts must accept the trustee's plan interpretation unless clearly arbitrary and capricious.²⁵³ The reason was that they had already selected the arbitrary and capricious standard to review trustee actions.

The District of Columbia Circuit erred in developing this interpretive rule. The Supreme Court, prior to ERISA's passage, held that the word "contract" in LMRA section 301 encompasses more than just collective bargaining agreements.²⁵⁴ Further, in dicta, the Court indicated that the term "contract" includes employee benefit plans mentioned in the collective bargaining agreement.²⁵⁵ Consequently, courts before and after ERISA have held that both employee benefit plans and trusts are "contracts" under LMRA section 301 for purposes of the benefits-due

(App. Div. 1977) (reject insurance interpretive rule since trust law governs).

It is these cases that the early ERISA courts chose to follow. See *Schwartz v. Newsweek, Inc.*, 827 F.2d 879, 883 (2d Cir. 1987) (ERISA case: rejected in other circuits); *Jung v. FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) (ERISA case: the *contra proferentem* principle previously rejected); *Gordon v. International Longshoremen's & Warehousemen's Union-Pacific Maritime Assoc. Benefit Funds*, 616 F.2d 433, 439 (9th Cir. 1980) (ERISA and LMRA case: the *contra proferentem* principle previously rejected); *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979) (rejecting the *contra proferentem* principle on the basis of other circuits' opinions).

One commentator has chosen to distort history by ignoring the acceptance of this LMRA plan interpretive rule by early ERISA courts in order to claim the *contra proferentem* principle as the accepted pre-ERISA rule as well as the accepted post-ERISA rule. STEPHEN R. BRUCE, *PENSION CLAIMS, RIGHTS AND OBLIGATIONS* 341-43 (2d ed. 1988).

252. For an example of an LMRA plan that specifically denies plan interpretive discretion, see *infra* note 296.

253. *Miniard v. Lewis*, 387 F.2d 864, 865 (D.C. Cir.), *cert. denied*, 393 U.S. 873 (1968); *accord* *Roark v. Lewis*, 401 F.2d 425, 427, 429 (D.C. Cir. 1968) (trustees, not judges, select which of two reasonable alternatives).

However, some subsequent courts confronted with the arbitrary and capricious review rule applicable to ERISA plan administrators, concluded oppositely, that the *contra proferentem* principle still applied. See *Moore v. Reynolds Metal Co. Retirement Program For Salaried Employees*, 563 F. Supp. 1372, 1374 (S.D. Ohio 1983) (ERISA retirement plan: construe ambiguities in favor of employees).

254. *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 26-28 (1962).

255. *Allied Chem. & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971) (retirees, not necessarily represented by union, have breach of contract lawsuit under LMRA § 301 if pension benefits are unilaterally changed).

lawsuit.²⁵⁶ Thus, the District of Columbia Circuit should have used contract law, not trust law, to develop an interpretive rule.

Nevertheless, before ERISA's passage, the District of Columbia Circuit²⁵⁷ applied trust law in LMRA cases. The First,²⁵⁸ Second,²⁵⁹ Fifth,²⁶⁰ Eighth,²⁶¹ and Ninth²⁶² Circuits adopted this rule from the District of Columbia Circuit in pre-ERISA LMRA cases. Most of the circuits adopted the rule without bothering to determine whether the plan administrator had actual plan interpretive discretion specified in the plan, as if using one of the traditional trust theory interpretive rules rather than one from discretionary trust theory.

C. Pre-Bruch ERISA Law

Federal circuit courts first confronted interpretation ambiguities in employee benefit plans under the LMRA since many of these cases already were before the federal courts upon ERISA's passage. However,

256. *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1215 (6th Cir.) ("contracts" in LMRA § 301 include collectively-bargained pension plans), *cert. denied*, 484 U.S. 820 (1987); *Whelan v. Colgan*, 602 F.2d 1060, 1061 (2d Cir. 1979) (LMRA plan enforceable contract under LMRA § 301); *Rehmar v. Smith*, 555 F.2d 1362, 1367 (9th Cir. 1977) (same); *Alvares v. Erickson*, 514 F.2d 156, 161 (9th Cir.) (same), *cert. denied*, 423 U.S. 874 (1975); *see International Union, United Auto., Aircraft & Agric. Implement Workers v. Textron, Inc.*, 312 F.2d 688, 691 (6th Cir. 1963) (rights of employee to pension benefit grow out of collective bargaining agreement); *Vallejo v. American R.R.*, 188 F.2d 513, 515-16 (1st Cir. 1951) (treats employee benefit plan under contract theory); *American Fed'n of Labor v. Western Union Tel. Co.*, 179 F.2d 535, 538 (6th Cir. 1950) (contract includes trust since collective bargaining agreement refers to trust).

257. *Lowenstern v. International Ass'n of Machinists and Aerospace Workers*, 479 F.2d 1211, 1213 (D.C. Cir. 1973) (no mention of discretion); *Lavella v. Boyle*, 444 F.2d 910, 912 n.2 (D.C. Cir. 1971) (no mention of discretion).

258. *Rueda v. Seafarers Int'l Union*, 576 F.2d 939, 942 (1st Cir. 1978) (pre-ERISA case citing the D.C. Circuit with no mention of discretion).

259. *Beam v. International Org. of Masters, Mates & Pilots*, 511 F.2d 975, 979-80 (2d Cir. 1975) (pre-ERISA LMRA case: adopting rule for plan administrator fact decisions, suggesting also applies to plan interpretation, citing the D.C. Circuit, plan granted interpretive discretion).

260. *Connell v. United States Steel Corp.*, 516 F.2d 401, 406-07 (5th Cir. 1975) (citing the D.C. Circuit with no mention of discretion).

261. *Bruce v. Morse*, 475 F.2d 858, 860 n.2 (8th Cir. 1973) (citing the D.C. Circuit with no mention of discretion).

262. *Rehmar v. Smith*, 555 F.2d 1362, 1372 (9th Cir. 1976) (pre-ERISA case, citing the D.C. Circuit; plan granted interpretive discretion); *accord Aitken v. International Printing & Graphic Communications Union-Employer Retirement Fund*, 604 F.2d 1261, 1264-66 (9th Cir. 1979) (pre-ERISA case, plan granted plan interpretive discretion).

federal circuit courts, rather than examining first principles or legislative history, erroneously applied the District of Columbia Circuit's interpretive rule, under which a trustee's interpretation would be upheld unless it was arbitrary and capricious. State courts followed this lead.

1. *The LMRA Plans*

The circuit courts should not have adopted the trustee's acceptance principle under the LMRA because it was intimately tied to federal labor policy, which favors removal of disputes from the federal courts through the arbitration process.²⁶³ Similarly, the trustee's acceptance principle serves as another method to get the matter out of the federal courthouse.²⁶⁴ This is contrary to the function of ERISA, which was to provide access to the federal courts for ERISA participants.²⁶⁵

Nevertheless the District of Columbia,²⁶⁶ First,²⁶⁷ Second,²⁶⁸ Fifth,²⁶⁹ Eighth,²⁷⁰ and Ninth²⁷¹ Circuits continued to follow the

263. Labor Management Relations Act of 1947 §§ 201(c), 203(d), 29 U.S.C. §§ 171(c), 173(d) (1988); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) (Congress approved contract grievance procedures as the preferred method of settling disputes over the application or interpretation of collective bargaining agreements); *Drake Bakeries, Inc. v. American Bakery & C.W.I.*, 370 U.S. 254, 263 (1962) (same); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

264. *United Mine Workers, Dist. No. 2 v. Barnes & Tucker Co.*, 561 F.2d 1093, 1095 (3d Cir. 1977).

265. See *supra* note 18 and accompanying text.

266. *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986).

267. *Govoni v. Bricklayers, Masons & Plasterers Int'l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984).

268. *Riley v. Maritime Eng'r Beneficial Ass'n Pension Trust*, 570 F.2d 406, 410 (2d Cir. 1977) (whether interpretation was rational, not that it was right); *accord Dellacava v. Painters Pension Fund*, 851 F.2d 22, 25 (2d Cir. 1988) (dicta); *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 601 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983).

269. *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979); *accord James v. Louisiana Laborers Health & Welfare Fund*, 29 F.3d 1029, 1033 (5th Cir. 1994); *Kennedy v. Electricians Pension Plan, Int'l Bhd. of Elec. Workers #995*, 954 F.2d 1116, 1121-23 (5th Cir. 1992); *Batchelor v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 444-46 (5th Cir. 1989).

270. *Morgan v. Mullins*, 643 F.2d 1320, 1321-23 (8th Cir. 1981).

271. *Gordon v. International Longshoremen's & Warehousemen's Union-Pacific Maritime Ass'n Benefit Funds*, 616 F.2d 433, 440 (9th Cir. 1980) (trustees, not judges, select which of two reasonable alternatives); *accord Board of Trustees of the Watsonville Frozen Food Welfare Trust Fund v. California Co-op Creamery*, 877 F.2d 1415, 1420 (9th Cir. 1989) (arbitrary and capricious); *Johnson v. District 2 Marine Eng'rs Beneficial Ass'n-Associated Maritime Officers, Medical Plan*, 857 F.2d 514, 516 (9th Cir. 1988) (same); *Atkinson v. Sheet Metal Workers' Trust Fund*, 833 F.2d 864, 865 (9th Cir. 1987) (any reasonable resolution of ambiguity by the trustees must be upheld);

LMRA plan interpretive rule in LMRA cases under ERISA. The Third,²⁷² Fourth,²⁷³ Sixth,²⁷⁴ and Seventh²⁷⁵ Circuits joined their sister circuits by adopting, from the District of Columbia Circuit, the LMRA interpretive rule for LMRA plans under ERISA.

2. *The Non-LMRA Plans*

When federal district courts initially confronted plan interpretation of ambiguities under ERISA for non-LMRA plans, many used the pre-ERISA state law principle of *contra proferentem*.²⁷⁶

Bance v. Alaska Carpenters Retirement Plan, 829 F.2d 820, 822 (9th Cir. 1987) (same); *McDaniel v. National Shopmen Pension Fund*, 817 F.2d 1370, 1373 (9th Cir. 1987) (same), *cert. denied*, 494 U.S. 1092 (1990); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1304 (9th Cir. 1983) (same); *Smith v. California Metal Trades Ass'n-Int'l Ass'n of Machinists Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981) (rejecting the *contra proferentem* principle for trustee's interpretation).

272. *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 191 (3d Cir. 1984) (citing its earlier adoption of the rule for fact resolution traceable to the District of Columbia Circuit); *accord* *Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 769 F.2d 140, 146 (3d Cir. 1985); *Gaines v. Amalgamated Ins. Fund*, 753 F.2d 288, 289 (3d Cir. 1985); *Strubble v. New Jersey Brewing Employee's Welfare Trust Plan*, 732 F.2d 325, 338 (3d Cir. 1984) (if in good faith); *see* *United Steelworkers v. Pension Benefit Guar. Corp.*, 706 F.2d 1289, 1299 (3d Cir. 1983) (cannot use Internal Revenue Service regulations to interpret terms of plan under plain meaning principle).

273. *District 17, District 29, Local Union 7113 & Local Union 6023, United Mine Workers v. Allied Corp.*, 765 F.2d 412, 416-17 (4th Cir.) (citing its earlier adoption of the rule for fact resolution from the District of Columbia Circuit), *cert. denied*, 473 U.S. 905 (1985); *accord* *Skelton v. Lowen*, 850 F.2d 200, 201 (4th Cir. 1988); *Witmeyer v. Kilroy*, 788 F.2d 1021, 1025 (4th Cir. 1986).

274. *Van Gunten v. Central States, S.E. & S.W. Areas Pension Fund*, 672 F.2d 586, 587-88 (6th Cir. 1982); *accord* *Rhoton v. Central States, S.E. & S.W. Areas Pension Fund*, 717 F.2d 988, 989-90 (6th Cir. 1983).

275. *Reiheizer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978); *accord* *Van Fossan v. International Bhd. of Teamsters Union Local No. 710 Pension Fund*, 649 F.2d 1243, 1246 (7th Cir. 1981).

276. *Moore v. Reynolds Metal Co. Retirement Program*, 563 F. Supp. 1372, 1374 (S.D. Ohio 1983) (retirement plan: construe ambiguities in favor of employees); *Michota v. Anheuser-Busch, Inc.*, 526 F. Supp. 299, 316 (D.N.J. 1980) (pension plan: resolve ambiguities in favor of employees); *Terones v. Pacific States Steel Corp.*, 526 F. Supp. 1350, 1354 (N.D. Cal. 1981) (pension plan: construe in favor of employees, citing California employee benefit law); *Bonar v. Barnett Bank*, 488 F. Supp. 365, 369 (M.D. Fla. 1980) (pension plan: resolve ambiguities in favor of employees, citing pre-ERISA cases from the First and Fourth Circuits); *Baeten v. Van Ess*, 474 F. Supp. 1324, 1329 (E.D. Wis. 1979) (profit-sharing plan: construe liberally in favor of employee, citing Wisconsin employee benefit law); *Pension Benefit Guar. Corp., v. Ouimet Corp.*, 470 F. Supp. 945, 957 n.27 (D. Mass. 1979) (public policy demands construction to

However, when first confronted with ambiguities in plan interpretation in the ERISA context for the non-LMRA plans, the federal circuits did not bother with first principles or legislative history; they relied on precedent. The circuit courts followed the LMRA plan-interpretive principle, accepting the trustee's interpretation unless arbitrary and capricious.

This LMRA principle should not have been applied to non-LMRA plans, even if it were applicable to the LMRA plans, for two reasons. First, LMRA plans are the end product of negotiation between presumptively equal bargaining powers. Labor law provides a framework to work out differences in interpretation through a grievance arbitration process.²⁷⁷ However, the negotiation and grievance process is absent for many non-LMRA plans. Second, in the labor situation, both parties' ability to negotiate resulted in the rejection of the *contra proferentem* principle for LMRA plans. Therefore, it is inappropriate for the circuit courts to have adopted the LMRA interpretive rule for non-LMRA plans.

Nevertheless, the District of Columbia,²⁷⁸ First,²⁷⁹ Second,²⁸⁰

avoid forfeiture, citing Massachusetts employee benefit law); *Shaw v. Kruidenier*, 470 F. Supp. 1375, 1382 (S.D. Iowa 1979) (profit-sharing plan: trust is unilateral adhesion contract so construe ambiguities in favor of employees, citing Ohio employee benefit law); *Keller v. Graphic Systems, Inc.*, 422 F. Supp. 1005, 1011 (N.D. Ohio 1976) (profit-sharing plan: since employer could have restricted implications construe against the employer, citing Ohio employee benefit law).

Occasionally a circuit court would use insurance interpretive rules or general contract rules after having adopted the LMRA interpretive rule for ERISA plans. *See Connick v. Teachers Ins. & Annuity Ass'n*, 784 F.2d 1018, 1020 & n.1 (9th Cir. 1986) (using California plain meaning principle for insurance contracts, the same rule as New York requires, to interpret annuity plan that provided for governance by New York law); *Noell v. American Design, Inc., Profit Sharing Plan*, 764 F.2d 827, 832-33 (11th Cir. 1985) (using Alabama contract extrinsic evidence principle to interpret profit-sharing plan that provided for governance by Alabama law). Plans routinely provide that the law of some state shall govern interpretation. *E.g.*, *Loffland Bros. Co. v. Overstreet*, 758 P.2d 813, 817 n.10 (Okla. 1988) (plan provides for Texas law); *5A RABKIN & JOHNSON*, *supra* note 204, at 13-1021 (defined benefit plan form for New York); *id.* at 13-1542 (money purchase pension plan form for Ohio); *id.* at 13-2039 (profit-sharing plan form for Ohio). Although ERISA provides that plans shall be governed by the terms of the plan, those terms must be consistent with ERISA and ERISA specifically has eliminated state law, Employee Retirement Income Security Act of 1974 §§ 404(a)(1)(D), 514(a), 29 U.S.C. §§ 1104(a)(1)(D), 1144(a) (1988), which should include governance under state law provisions.

277. *Fisk*, *supra* note 26, at 201.

278. *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453-54 (D.C. Cir. 1992).

279. *Jestings v. New England Tel. and Tel. Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *accord Sampson v. Mutual Benefit Life Ins. Co.*, 863 F.2d 108, 109 (1st Cir. 1988); *Bouchard v. Crystal Coin Shop, Inc.*, 843 F.2d 10, 13-14 (1st Cir. 1988); *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 521 (1st Cir. 1988).

None of these cases made reference to the plan granting interpretive discretion to the plan administrator.

Third,²⁸¹ Fourth,²⁸² Fifth,²⁸³ Sixth,²⁸⁴ Seventh,²⁸⁵ Eighth,²⁸⁶

280. *Birmingham v. SoGen-Swiss Int'l Corp. Retirement Plan*, 718 F.2d 515, 522 (2d Cir. 1983); *accord Accardi v. Control Data Corp.*, 836 F.2d 126, 129 (2d Cir. 1987); *Schwartz v. Newsweek, Inc.*, 827 F.2d 879, 883 (2d Cir. 1987).

Only the *Birmingham* and *Schwartz* plans granted interpretive discretion to the plan administrator.

281. *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56-57 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985); *accord Ashenbaugh v. Crucible Inc. 1975 Retirement Plan*, 854 F.2d 1516, 1522 (3d Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989); *Anthius v. Colt Indus. Operating Corp.*, 789 F.2d 207, 213 n.5 (3d Cir. 1986).

None of these cases made reference to the plan granting interpretive discretion to the plan administrator.

The Third Circuit created a short-lived exception to the arbitrary and capricious rule for plan administrator conflicts of interest. *See Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 145 (3d Cir. 1987) (de novo standard of review applies regardless of plan administrator's conflicts of interest), *rev'd*, 489 U.S. 101, 115 (1989); *accord Haeffele v. Hercules, Inc.*, 839 F.2d 952, 957 (3d Cir. 1988).

282. *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149 (4th Cir.) (citing the Fourth Circuit's prior adoption of the arbitrary and capricious review standard for factual determinations of the plan administrators), *cert. denied sub nom. Slack v. Burlington Indus., Inc.*, 477 U.S. 903, *affirmed sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986); *accord Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986).

None of these cases made reference to the plan granting interpretive discretion to the plan administrator.

283. *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981); *accord Lowry v. Bankers Life & Casualty Retirement Plan*, 865 F.2d 692, 694 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989); *HECI Exploration Co., Inc. v. Holloway*, 862 F.2d 513, 524 n.20 (5th Cir. 1988); *Tully v. Ethyl Corp.*, 861 F.2d 120, 123 (5th Cir. 1988); *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1304 (5th Cir. 1985); *Ganze v. Dart Indus., Inc.*, 741 F.2d 790, 793 (5th Cir. 1984); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314-18 (5th Cir. 1982).

None of these cases made reference to the plan granting interpretive discretion to the plan administrator. However, the original LMRA case adopting the LMRA interpretive rule did. *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979).

284. *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 457 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *accord Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329, 334 (6th Cir. 1988); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 625-26 (6th Cir. 1987) (using uniformity in application and internally consistent factors of Fifth Circuit to determine reasonableness); *Varhola v. Doe*, 820 F.2d 809, 813 (6th Cir. 1987); *Cook v. Pension Plan for Salaried Employees of Cyclops Corp.*, 801 F.2d 865, 869-70 (6th Cir. 1986); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1151 (6th Cir. 1985); *McBarron v. S & T Indus., Inc.*, 771 F.2d 94, 100 (6th Cir. 1985) (remanding for a determination of drafter's intent).

Only *Blakeman* made reference to the plan granting interpretive discretion to the plan administrator.

285. *Martinez v. Swift & Co.*, 656 F.2d 262, 263 (7th Cir. 1981); *accord Shull v. State Machinery Co. Employees Profit Sharing Plan*, 836 F.2d 306, 308 (7th Cir. 1987);

and Ninth²⁸⁷ Circuits extended the LMRA interpretive rule to post-ERISA cases. The Tenth Circuit joined its sister circuits by adopting, indirectly from the District of Columbia Circuit, the LMRA interpretive

Brown v. Retirement Comm. of the Briggs & Stratton Retirement Plan, 797 F.2d 521, 529 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (rejecting the *contra proferentem* principle); *but see Van Boxel v. Journal Company Employees' Pension Trust*, 836 F.2d 1048, 1053 (de novo review if plan administrator has conflict of interest).

Only *Brown* made reference to the plan granting interpretive discretion to the plan administrator.

286. *Quinn v. Burlington N. Inc. Pension Plan*, 664 F.2d 675, 678 (8th Cir.) (rejecting the contract rules previously used), *cert. denied*, 456 U.S. 928 (1982); *accord Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 521 (8th Cir. 1988) (same); *Redmond v. Burlington N.R.R. Co. Pension Plan*, 821 F.2d 461, 465 (8th Cir. 1987); *Pabst Brewing Co. v. Anger*, 784 F.2d 338, 338 (8th Cir. 1986); *see also Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1352 (8th Cir. 1980) (claiming to use the contractual rule, but not going beyond use of the extrinsic evidence principle; thus, reaching a choice between the acceptance of the trustee's interpretation and the *contra proferentem* principle); *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 312 (8th Cir. 1979) (cannot use arbitrary and capricious rule when trustee's interpretation violates ERISA, but means when trustee's interpretation violates arbitrary and capricious review rule, court will interpret).

Only *Landro* made reference to the plan granting interpretive discretion to the plan administrator. In dicta, the *Landro* court noted that resolving the ambiguity through extrinsic evidence provided the same result as would have the *contra proferentem* principle. *Landro*, 625 F.2d at 1354 (plan under exclusive control of employer is unilateral contract in nature of adhesion contract so it can be construed against the draftsman, citing Minnesota insurance law). The Eighth Circuit subsequently repudiated this dicta because it did not comport with the arbitrary and capricious review standard. *See Simmons*, 844 F.2d at 521; *Quinn*, 664 F.2d at 678.

287. *Jung v. FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985); *accord Pilon v. Retirement Plan for Salaried Employees of Great N. Nekoosa Corp.*, 861 F.2d 217, 218 (9th Cir. 1988) (deferring unless arbitrary and capricious); *Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781 n.2 (9th Cir. 1988) (same); *MacDonald v. Pan Am. World Airways, Inc.*, 859 F.2d 742, 744-45 (9th Cir. 1988) (same); *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1257 (9th Cir. 1987) (trustees, not judges, select which of two reasonable alternatives); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986); *Hancock v. Montgomery Ward Longterm Disability Trust*, 787 F.2d 1302, 1308 (9th Cir. 1986) (same).

Only *MacDonald* made a reference to the plan granting plan interpretive discretion to the plan administrator, although several of the LMRA cases indicated plan interpretive discretion. *See Board of Trustees of the Watsonville Frozen Food Welfare Trust Fund v. California Coop. Creamery*, 877 F.2d 1415, 1420 (9th Cir. 1988); *Smith v. California Metal Trades Ass'n & Int'l Ass'n of Machinists Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981); *Gordon v. International Longshoremen's & Warehousemen's Union Pac. Maritime Ass'n Welfare Plan*, 616 F.2d 433, 436 (9th Cir. 1980); *Aitken v. International Printing & Graphic Communications Union-Employer Retirement Fund*, 604 F.2d 1261, 1264-70 (9th Cir. 1979).

The Ninth Circuit created an exception to the arbitrary and capricious rule for plan administrator conflicts of interest, requiring heightened scrutiny. *See Pilon*, 861 F.2d at 219; *Fielding*, 815 F.2d at 1256; *Dockray*, 801 F.2d at 1152; *Jung*, 755 F.2d at 711-12.

rule for employee benefit plans under ERISA.²⁸⁸ The Eleventh Circuit, formed in 1981 from the Fifth Circuit, followed the Fifth Circuit.²⁸⁹

3. Union-Negotiated Single-Employer Plans

Under ERISA, the courts continued the distinction between union-negotiated, single-employer plans and the collective bargaining agreement. But the courts extended the LMRA arbitrary and capricious rule to the union-negotiated single-employer plans.²⁹⁰ In some cases, participants could avoid the LMRA arbitrary and capricious rule by asking a court to apply the rule of interpretation under federal labor law because a collective bargaining agreement covered the matter.²⁹¹

288. *Torix v. Ball Corp.*, 862 F.2d 1428, 1429-30 (10th Cir. 1988) (citing the Ninth and Eleventh Circuits, as well as prior Tenth Circuit LMRA cases not involving interpretation) (no mention of discretion).

289. *Griffis v. Delta-Family & Disability & Survivorship Plan & Delta Family Care Medical Plan*, 723 F.2d 822, 825 (11th Cir.) (citing the Fifth Circuit), *cert. denied*, 467 U.S. 1242 (1984); *accord Hoover v. Blue Cross & Blue Shield*, 855 F.2d 1538, 1541 (11th Cir. 1988); *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1497-98 (11th Cir. 1987); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Helms v. Monsanto Co.*, 728 F.2d 1416, 1420 (11th Cir. 1984).

Only *Griffis* made reference to the plan granting interpretive discretion to the plan administrator.

The Eleventh Circuit holds that Fifth Circuit opinions prior to October 1, 1981 bind the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981); *accord Helms*, 728 F.2d at 1420 n.5 (for ERISA opinions).

290. See *Printing Specialties & Paper Prod. Union Local 680 v. Nabisco Brands, Inc.*, 833 F.2d 102, 104-05 (7th Cir. 1987) (employees denied early retirement under plan with interpretive discretion seek arbitration under collective bargaining agreement to avoid arbitrary and capricious standard; participants unsuccessful).

291. *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989) (collective bargaining agreement to provide health and life insurance benefits: use collective bargaining history and practice, usage, and custom for all such agreements; participants successful); *Delgrosso v. Sprang & Co.*, 769 F.2d 928, 933 (3d Cir. 1985) (collective bargaining agreement to prohibit reversion to employer on termination: using collective bargaining history; participants unsuccessful), *cert. denied*, 476 U.S. 1140 (1986); *Anderson v. Alpha Portland Indus., Inc.*, 752 F.2d 1293, 1298-99 (8th Cir.) (collective bargaining agreement to provide life and health benefits: retirees need not exhaust administrative remedies based on intrinsic evidence and summary plan description), *cert. denied*, 471 U.S. 1102 (1985); *International Union, United Auto., Aerospace & Agric. Implement Workers v. Yard Man, Inc.*, 716 F.2d 1476, 1479-80 & n.1 (6th Cir.) (collective bargaining agreement to provide life-time health benefits: use intrinsic evidence to resolve ambiguities since no extrinsic evidence presented; participants successful), *cert. denied*, 465 U.S. 1007 (1984).

4. State Court Opinions

Under ERISA, state courts have concurrent jurisdiction over the benefits-due lawsuit.²⁹² Therefore, state courts also participate in developing the federal common law of ERISA. However, state courts carry out this task under two handicaps. First, the Supremacy Clause requires many state courts to defer to the opinions of the federal circuit courts.²⁹³ Consequently, state courts considering non-LMRA plans under ERISA also adopted the arbitrary and capricious rule of the LMRA.²⁹⁴ Second, in fashioning new federal common law, state

292. Employee Retirement Income Security Act of 1974 § 512(e)(1), 29 U.S.C. § 1132(c) (1988).

Due to the ability to remove the lawsuit to federal court, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987), state court opinions are not as numerous as the federal circuit opinions.

293. *E.g.*, *Gurganus v. Continental Am. Life Ins. Co.*, 603 So. 2d 903, 906 (Ala. 1992) (ERISA jury trial denial: bound by appropriate federal circuit court but not federal district courts); *Golden Bear Family Restaurants, Inc. v. Murray*, 494 N.E.2d 581, 583-84 (Ill. App. Ct. 1986) (ERISA preemption: bound by all federal courts, including district court); *Schultz v. Nepco Employees Mut. Ben. Ass'n, Inc.*, 528 N.W.2d 441, 443 n.5 (Wis. Ct. App. 1994) (ERISA plan review rule: bound by U.S. Supreme Court but not federal circuit courts whose opinions merely serve as a guide); *see* U.S. CONST., art. VI, cl. 2 (“[T]he laws of the United States which shall be made . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby.”).

294. *Gesina v. General Elec. Co.*, 780 P.2d 1380, 1383-84 (Ariz. Ct. App. 1989); *Arnold v. Babcock & Wilcox Co.*, 525 N.E.2d 59, 65 (Ill. 1988) (determining plan administrator’s decision was valid based on consistent prior interpretations); *Solivan v. Commonwealth Edison Mut. Benefit Ass’n*, 497 N.E.2d 119, 122 (Ill. App. Ct. 1986) (reversing plan administrator because plain meaning principle violated); *Rizzo v. Travelers Ins. Co.*, 549 N.E.2d 810, 814 (Ill. App. Ct. 1984) (determining plan administrator’s interpretation was valid under plain meaning principle and rejecting *contra proferentem*); *Associates Inv. Co. v. Claeys*, 533 N.E.2d 1248, 1256 (Ind. Ct. App. 1989) (plan administrator’s interpretation was arbitrary and capricious because it rendered part of plan superfluous); *Hebert v. Red Simpson, Inc.*, 544 So. 2d 751, 752 (La. Ct. App. 1989) (plan administrator upheld under plain meaning principle); *Barry v. Dymo Graphic Sys., Inc.*, 478 N.E.2d 707, 714 (Mass. 1985) (remand for facts under arbitrary and capricious standard); *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218, 1220 (N.H. 1988) (plan administrator upheld under plain meaning principle); *Coyne v. General Motors Corp.*, 546 N.E.2d 414, 417 (Ohio Ct. App. 1988) (plan administrator upheld on consistent priors); *Davis v. Simpson Employees Retirement Trust*, 659 P.2d 990, 993 n.5 (Or. Ct. App. 1983) (plan administrator upheld on consistent priors); *Hepler v. CBS, Inc.*, 696 P.2d 596, 600 (Wash. Ct. App.) (determining plan administrator’s interpretation was invalid due to lack of disclosure; rejecting *contra proferentem* and reasonable expectation principles as incompatible with arbitrary and capricious standard), *cert. denied*, 474 U.S. 946 (1985); *Evans v. Wisconsin Educ. Ass’n Ins. Trust*, 361 N.W.2d 630, 636 (Wis. 1985) (plan administrator reversed as violated plain meaning principle); *see also* *Erich v. GAF Corp.*, 540 A.2d 518, 521 (N.J. 1988) (recognizing arbitrary and capricious standard, but case remanded for proceedings under heightened scrutiny of Third Circuit), *cert. denied*, 490 U.S. 1034 (1989).

courts rely upon their jurisdiction's law rather than develop a federal common law.²⁹⁵

D. Post-Bruch ERISA Law

Since the interpretive rule used by the circuit courts was based on the arbitrary and capricious rule, when that rule was slightly modified by the Supreme Court in 1989 the modification resulted in some rethinking of the plan interpretive rule.

In *Firestone Tire and Rubber Co v. Bruch*, the Supreme Court dealt with the plan administrator review rule for plan interpretation under a plan not providing the plan administrator with discretion to interpret the plan.²⁹⁶ Justice O'Connor chose to be guided by trust law principles.²⁹⁷ Trust law principles, however, might not govern the situation in light of the fact that several of the trust cases claim the abuse of discretion review rule has a contractual origin.²⁹⁸ Contract law, as well as trust law, also provides for an abuse of discretion standard when one party is granted discretion.²⁹⁹

Nevertheless, Justice O'Connor claimed that if the trustee has interpretive discretion, trust law accepts the trustee's interpretation

For LMRA cases to the same effect, see *Winston v. Trustees of the Hotel & Restaurant Employees & Bartenders Int'l Union Welfare Fund*, 441 N.E.2d 1217, 1219 (Ill. App. Ct. 1982) (plan administrator's interpretation found invalid because it violated plain meaning principle).

295. *E.g.*, *McGarrah v. Southwestern Glass Co.*, 852 S.W.2d 328, 330 (Ark. Ct. App. 1993) (using Arkansas law to avoid ambiguity principle to apply immediately *contra proferentem* principle to ERISA plan interpretation without extrinsic evidence); *Head v. Central Reserve Life of N. Am. Ins. Co.*, 845 P.2d 735, 742 (Mont. 1993) (using Montana law to avoid ambiguity principle to apply immediately *contra proferentem* principle to ERISA plan interpretation without extrinsic evidence); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994) (using Texas law to uphold plan administrator under the plain meaning principle, denying ERISA applies to the benefits-due); *Schultz v. Nepco Employees Mut. Benefit Ass'n, Inc.*, 528 N.W.2d 441, 445-46 (Wis. 1994) (using Wisconsin make-whole rule to interpret plan subrogation provision under ERISA).

296. 489 U.S. 101, 112 (1989).

297. *Id.* at 111.

298. *See American Board of Comm'rs of Foreign Missions v. Ferry*, 15 F. 696, 699 (Cir. Ct., W.D. Mich. 1883) (building contracts); *Moore v. Harper*, 27 W. Va. 362, 373-74 (1886) (general contract law); *see also Penn v. Howe-Baker Eng'rs*, 898 F.2d 1096, 1100 (5th Cir. 1990) (determining that the plan interpretive rule under the abuse of discretion standard is a contractual interpretive rule).

299. *See Flint*, *supra* note 1, at 372-76.

provided it is reasonable—in other words, the Court adopted the abuse of discretion standard: “A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee’s interpretation will not be disturbed if reasonable.”³⁰⁰ This is definitely not a well-settled rule of trust law.³⁰¹ Justice O’Connor’s support for this proposition is a case supporting the exact opposite rule, namely that courts will interpose their own correct interpretation, the *de novo* review rule.³⁰²

Then, Justice O’Connor noted that if the trustee lacks interpretive discretion, trust law reviews the trustee’s interpretation under the *de novo* review standard: “[O]ther settled principles of trust law point to *de novo* review of [beneficiary] eligibility determinations based on plan interpretations[.] As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party’s interpretation.”³⁰³

300. *Bruch*, 489 U.S. at 111.

301. *See supra* notes 217-19 and accompanying text.

302. *See* BOGERT & BOGERT, *supra* note 212, § 559, at 169-71 (citing only *Taylor v. McClave*, 15 A.2d 213, 216 (N.J. 1940)).

This is another example of a Supreme Court Justice not checking research from submitted briefs before incorporating it in an opinion. *See* Brief for the United States as Amicus Curiae Supporting Respondents, at 14-15 n.11, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054); *see also* Flint, *supra* note 18, at 647 (Justice Stevens guilty of the same practice with respect to ERISA’s extracontractual damages rule).

Courts do use the abuse of discretion standard (reasonableness) for review of discretionary decisions not involving trust interpretation. *See* RESTATEMENT OF TRUSTS § 187 (1935); RESTATEMENT (SECOND) OF TRUSTS § 187 (1959); 3 SCOTT & FRATCHER, *supra* note 212, § 187, at 14-51; BOGERT & BOGERT, *supra* note 212, § 560, at 185-208.

303. *Bruch*, 489 U.S. at 112; *see* 3 SCOTT & FRATCHER, *supra* note 212, § 201, at 221 (1988) (citing no cases but dealing with the determining extent of powers, that is, the extent of discretion granted); BOGERT & BOGERT, *supra* note 212, § 559, at 169-71 & n.43 (same).

Some courts have taken this language about not accepting either party’s interpretation to mean that the *contra proferentem* principle must be rejected. *See, e.g.*, *Brewer v. Lincoln Nat. Life Ins. Co.*, 921 F.2d 150, 154 (8th Cir. 1990); *Franklin v. Pitney Bowes, Inc.*, 919 F.2d 45, 48 (6th Cir. 1990). This position reflects the practicalities of how judges construe in favor of a party. They do not, however, merely accept that party’s interpretation.

Other courts reject the *Brewer* conclusion since it involves the failure to distinguish between accepting one party’s interpretation and using a rebuttable presumption in favor of one party to arrive at the correct interpretation. *See* *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1258 (3d Cir. 1993); *McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993); *Phillips v. Lincoln Nat’l Life Ins. Co.*, 978 F.2d 302, 312 (7th Cir. 1992); *Kumin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540-41 (9th Cir. 1990). This position inverts interpretive steps two and three, using the default principle first as a rebuttable presumption and extrinsic evidence under the ambiguity principle last to rebut it.

Next, Justice O'Connor observed that this trust law rule was compatible with the contractual pre-ERISA rule: "The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA."³⁰⁴ This is a true statement, but it is also true of the cases where the plan granted the plan administrator interpretive discretion.³⁰⁵ Nevertheless, Justice O'Connor held that the arbitrary and capricious standard did not apply to the review of a plan administrator's interpretation when the plan administrator lacked discretion; instead, courts were to use *de novo* review.³⁰⁶

Consequently, circuit courts must first determine whether a plan administrator has interpretive discretion. If the administrator has interpretive discretion, courts must develop a federal common law plan interpretive rule for handling the abuse of discretion standard. If the administrator does not have discretion, courts must develop a federal common law plan interpretive rule for handling *de novo* review of the decision.

1. Discretion Granted

When a plan administrator has interpretive discretion, all of the federal circuits have equated the abuse of discretion standard with the arbitrary and capricious standard and continue to use the LMRA interpretive rule.³⁰⁷ When plan interpretive discretion is absent, requiring *de novo*

304. *Bruch*, 489 U.S. at 112.

305. See *supra* notes 237-38 and accompanying text.

306. *Bruch*, 489 U.S. at 115.

307. For the District of Columbia Circuit, see *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992) (Van Graafeiland, J., concurring) (equating the abuse of discretion standard as equivalent to the arbitrary and capricious standard).

For the First Circuit, see *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (describing the *Bruch* abuse of discretion standard as the arbitrary and capricious standard).

For the Second Circuit, see *Shelden v. Barre Belt Granite Employer Union Pension Fund*, 25 F.3d 74, 80 (2d Cir. 1994) (describing the *Bruch* abuse of discretion standard as the arbitrary and capricious standard).

For the Third Circuit, see *Nazay v. Miller*, 949 F.2d 1323, 1336 (3d Cir. 1991) (equating the arbitrary and capricious standard with the *Bruch* abuse of discretion standard).

For the Fourth Circuit, see *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1185-88 (4th Cir. 1989) (develops its abuse of discretion standard from old arbitrary and capricious standard cases).

review,³⁰⁸ it is incorrect to suggest use of trust law in this situation without justifying the rule with one of ERISA's defined purposes.

Nevertheless, the First,³⁰⁹ Second,³¹⁰ Third,³¹¹ Fourth,³¹²

For the Fifth Circuit, see *Batchelor v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund Trust*, 877 F.2d 441, 444-46 (5th Cir. 1989) (calling the standard abuse of discretion, but citing old arbitrary and capricious standard cases).

For the Sixth Circuit, see *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989) (dictum) (calling the new standard to review discretionary interpretations the arbitrary and capricious standard).

For the Seventh Circuit, see *Cuddington v. Northern Ind. Pub. Serv. Co.*, 33 F.3d 813, 816 (7th Cir. 1994) (equating the two); *see also Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1295-96 (7th Cir. 1993) (abuse of discretion standard may be the same as the arbitrary and capricious standard); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 688 (7th Cir. 1992) (citing *Bruch* as support for the arbitrary and capricious standard); *Lister v. Stark*, 942 F.2d 1183, 1188 (7th Cir. 1991) (equating the two).

For the Eighth Circuit, see *Shell v. Amalgamated Cotton Garment*, 43 F.3d 364, 366 (8th Cir. 1994) (equating abuse of discretion standard with arbitrary and capricious standard); *Lakey v. Remington Arms Co.*, 874 F.2d 541, 544 (8th Cir. 1989) (citing *Bruch* as authority for arbitrary and capricious standard).

For the Ninth Circuit, see *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1321 n.1 (9th Cir. 1995); *contra Eley v. Boeing Co.*, 945 F.2d 276, 278 & n.1 (9th Cir. 1991).

For the Tenth Circuit, see *Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 657 (10th Cir. 1990) (describing the post-*Bruch* rule as the arbitrary and capricious standard).

For the Eleventh Circuit, see *Jett v. Blue Cross & Blue Shield*, 890 F.2d 1137, 1139 (11th Cir. 1989) (describing the post-*Bruch* rule as the arbitrary and capricious standard).

308. *E.g.*, *Wickman v. Northwestern Nat'l Life Ins. Co.*, 908 F.2d 1077, 1084 (1st Cir.) (using common sense canons of contract interpretation in absence of plan interpretive discretion), *cert. denied*, 498 U.S. 1013 (1990); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir. 1989) (same); *see infra* note 360 and accompanying text for similar pronouncements by the Fourth, Sixth, Seventh, and Eighth Circuits. *But see Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990) (abuse of discretion standard is a contractual rule); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990) (same).

309. *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (plan administrator's decision upheld as consistent with ERISA).

For a post-*Bruch* LMRA case to the same effect, see *Diaz v. Seafarers Int'l Union*, 13 F.3d 454, 456-57 (1st Cir. 1994) (plan administrator upheld under plain meaning principle).

310. *O'Shea v. First Manhattan Co. Thrift Plan & Trust*, 55 F.3d 109, 112 (2d Cir. 1995) (plan administrator upheld as interpretation comports with ERISA); *O'Neil v. Retirement Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 59 (2d Cir. 1994) (plan administrator upheld on extrinsic evidence of prior interpretation and intent); *see Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 443 (2d Cir. 1995) (plan administrator upheld under plain meaning principle); *Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271-72 (2d Cir. 1995) (plan administrator upheld on extrinsic evidence of legislative intent).

For a post-*Bruch* LMRA case to the same effect, see *Shelden v. Barre Belt Granite Employer Union Pension Fund*, 25 F.3d 74, 80-81 (2d Cir. 1994) (remand based on intrinsic evidence).

311. *Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 970 F.2d 1165, 1172 (3d Cir.) (plan administrator upheld under plain meaning principle), *cert. denied*, 113 S. Ct. 657 (1992); *Nazay v. Miller*, 949 F.2d 1323,

Fifth,³¹³ Sixth,³¹⁴ Seventh,³¹⁵ Eighth,³¹⁶ Ninth,³¹⁷ Tenth,³¹⁸

1335-36 (3d Cir. 1991) (plan administrator upheld as its interpretation favors beneficiary); *Stoetznner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (plan administrator upheld as had logical reason).

For a post-*Bruch* LMRA case to the same effect, see *Moats v. United Mine Workers Health & Retirement Funds*, 981 F.2d 685, 688 (3d Cir. 1992) (plan administrator upheld under plain meaning principle).

312. *Hickey v. Digital Equip. Corp.*, 43 F.3d 941, 945 (4th Cir. 1995) (plan administrator satisfied five factor test); *Shepherd & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 124 (4th Cir. 1994) (same); *Aliff v. BP Am., Inc.*, 26 F.3d 486, 489 (4th Cir. 1994) (plan administrator upheld as had logical reason); *Crosby v. Crosby*, 986 F.2d 79, 83 (4th Cir. 1993) (same); *Davis v. Burlington Indus., Inc.*, 966 F.2d 890, 894 (4th Cir. 1992) (plan administrator overruled as contrary to plain meaning principle); *Dewitt v. State Farm Ins. Cos. Retirement Plan for United States Employees*, 905 F.2d 798, 801 (plan administrator upheld as faithful to plain meaning principle) (4th Cir. 1990); *PPG Indus. Pension Plan A CIO v. Crews*, 902 F.2d 1148, 1151 (4th Cir. 1990) (plan administrator upheld as had logical reason); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1184 (4th Cir. 1989) (plan administrator satisfied five factor test).

For post-*Bruch* LMRA cases to the same effect, see *Hale v. Trustees of United Mine Workers Health & Retirement Funds*, 23 F.3d 899, 901-02 (4th Cir. 1994) (plan administrator upheld as had logical reason); *Lockhart v. United Mine Workers 1974 Pension Trust*, 5 F.3d 74, 77-78 (4th Cir. 1993) (plan administrator satisfied five factor test); *Gauer v. Connors*, 953 F.2d 97, 99 (4th Cir. 1991) (same); *O'Connor v. Central Va. U.F.C.W. & Subscribing Employers Welfare Fund*, 945 F.2d 799, 801 (4th Cir. 1991) (plan administrator upheld as had logical reason).

See *infra* notes 329-30 and accompanying text for the Fourth Circuit's five-factor test.

313. *Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local Union 4-447*, 47 F.3d 139, 145-46 (5th Cir. 1995) (non-LMRA ERISA plan: plan administrator was legally correct under step one); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1519 n.25 (5th Cir. 1994) (same); *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1307 n.3 (5th Cir. 1994) (court refuses to apply two step analysis after it finds plan administrator had documentation and logical reason for decision); *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1337 (5th Cir. 1994) (plan administrator was legally correct under step one); *Jones v. SONAT, Inc. Master Employee Benefits Plan Admin. Comm.*, 997 F.2d 113, 115 (5th Cir. 1993) (plan administrator reversed as violated plain meaning principle); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 637-38 (5th Cir. 1992) (remanded for extrinsic evidence not before plan administrator); *Vasseur v. Halliburton Co.*, 950 F.2d 1002, 1005 (5th Cir. 1992) (plan administrator correct under plain meaning principle); *Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 55 (5th Cir.) (plan administrator legally correct under first step of a two-step process in analyzing interpretations), *cert. denied*, 498 U.S. 939 (1990).

For post-*Bruch* LMRA cases to the same effect, see *James v. Louisiana Laborers Health & Welfare Fund*, 29 F.3d 1029, 1033 (5th Cir. 1994) (plan administrator legally correct under step one of two-step process); *Kennedy v. Electricians Pension Plan, Int'l Bhd. of Elec. Workers No. 995*, 954 F.2d 1116, 1121 (5th Cir. 1992) (plan administrator legally incorrect, but no abuse of discretion found); *Batchelor v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 444-46 (5th Cir. 1989) (plan administrator legally incorrect and abused discretion due to direct conflict with express plan language).

See *infra* notes 321-27 and accompanying text for the Fifth Circuit's two-step process.

314. *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1071 n.11 (6th Cir. 1994) (plan administrator upheld as had logical reason); *Richards v. General Motors Corp.*, 991 F.2d 1227, 1231-32 (6th Cir. 1993) (plan administrator reversed as against plain meaning principle); *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1574 (6th Cir. 1992) (plan administrator upheld as had logical reason); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1248-49 (6th Cir. 1992) (plan administrator reversed as violated plain meaning principle); *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 458-60 (6th Cir. 1991) (same); *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 694-95 (6th Cir. 1989) (plan administrator upheld as consistent with prior interpretations and in good faith), *cert. denied*, 495 U.S. 905 (1990).

315. *Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 291 (7th Cir. 1994) (plan administrator upheld as had logical reason); *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 279 (7th Cir. 1994) (plan administrator satisfied three factor test); *Cuddington v. Northern Ind. Pub. Serv. Co.*, 33 F.3d 813, 816-17 (7th Cir. 1994) (plan administrator upheld as had logical reason); *Loyola Univ. of Chicago v. Humana Ins. Co.*, 996 F.2d 895, 899-900 (7th Cir. 1993) (plan administrator upheld as had logical reason); *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1298-99 (7th Cir.) (plan administrator upheld under plain meaning principle), *cert. denied*, 114 S. Ct. 308 (1993); *Fought v. Evans Prods. Co. Racine Pension Plan Agreement*, 966 F.2d 304, 306-07 (7th Cir. 1992) (plan administrator upheld as had logical reason); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 695-96 (7th Cir. 1992) (plan administrator overruled as made no interpretation); *Lister v. Stark*, 942 F.2d 1183, 1188 (7th Cir. 1991) (plan administrator overruled as did not consider extrinsic evidence); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir. 1990) (plan administrator upheld as filled gap in contract with summary plan description in employee handbook); *Sisters of the Third Order of St. Francis v. SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1372 (7th Cir. 1990) (plan administrator upheld under plain meaning principle); *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1038 (7th Cir. 1990) (plan administrator reversed as violated plain meaning principle).

For post-*Bruch* LMRA cases to the same effect, see *Russo v. Health, Welfare & Pension Fund, Local 705, Int'l Bhd. of Teamsters*, 984 F.2d 762, 766 (7th Cir. 1993) (plan administrator upheld under plain meaning principle); *Saracco v. Local Union 786 Bldg. Material Pension Fund*, 942 F.2d 1213, 1216 (7th Cir. 1991) (same); *Exbom v. Central States, S.E. & S.W. Areas Health & Welfare Fund*, 900 F.2d 1138, 1143 (7th Cir. 1990) (plan administrator upheld as had logical reason).

316. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 371 (8th Cir.) (plan administrator reversed under plain meaning principle), *cert. denied*, 116 S. Ct. 300 (1995); *Brandis v. Kaiser Aluminum & Chem. Corp.*, 47 F.3d 947, 950 (8th Cir. 1995) (plan administrator upheld as correct); *Shell v. Amalgamated Cotton Garment*, 43 F.3d 364, 366 n.4, 337 (8th Cir. 1994) (same); *Bennett v. Soo Line R.R.*, 35 F.3d 334, 336 n.4, (8th Cir. 1994) (plan administrator upheld as had logical reason); *Kennedy v. Georgia-Pacific Corp.*, 31 F.3d 606, 609 (8th Cir. 1994) (plan administrator reversed as violated plain meaning principle); *Brumm v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433, 1437-40 (8th Cir. 1993) (plan administrator reversed as violated four of the five factors, including plain meaning principle); *Sturges v. Hy-Vee Employee Benefit Plan & Trust*, 991 F.2d 479, 480-81 (8th Cir. 1993) (plan administrator reversed as violated plain meaning principle); *Cox v. Mid-America Dairymen, Inc.*, 965 F.2d 569, 572-73 (8th Cir. 1992) (remand as trial court used de novo review); *Finley v. Special Agents Mut. Benefit Ass'n, Inc.*, 957 F.2d 617, 621-22 (8th Cir. 1992) (plan administrator upheld as complied with all five factors); *Lakey v. Remington Arms Co.*, 874 F.2d 541, 545 (8th Cir. 1989) (plan administrator upheld as consistent with prior interpretations).

For post-*Bruch* LMRA cases to the same effect, see *Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan*, 25 F.3d 616, 621-22

and Eleventh³¹⁹ Circuits use the LMRA interpretive rule for those

(8th Cir. 1994) (plan administrator reversed as violated all five factors).

317. *Parker v. BankAmerica Corp.*, 50 F.3d 757, 768 (9th Cir. 1995) (plan administrator upheld under plain meaning principle); *Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 554 (9th Cir.) (trial court incorrectly used *contra proferentem* principle), *cert. denied*, 64 U.S.L.W. 3249 (1995); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995) (plan administrator upheld under plain meaning principle); *Barnett v. Kaiser Found. Health Plan, Inc.*, 32 F.3d 413, 417 (9th Cir. 1994) (plan administrator upheld on extrinsic evidence); *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1525 (9th Cir. 1993) (plan administrator upheld under plain meaning principle); *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1471 (9th Cir. 1993) (plan administrator upheld on extrinsic evidence limited to that before the administrator); *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1325 (9th Cir. 1992) (plan administrator upheld under plain meaning principle), *cert. denied*, 113 S. Ct. 1847 (1993); *Eley v. Boeing Co.*, 945 F.2d 276, 279 (9th Cir. 1991) (same); *Williams v. Caterpillar, Inc.*, 944 F.2d 658, 666 (9th Cir. 1991) (same); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1285-86 (9th Cir. 1990) (same), *cert. denied*, 498 U.S. 1087 (1991).

For post-*Bruch* LMRA cases to the same effect, see *Carpenters Pension Trust Fund v. Underground Constr. Co.*, 31 F.3d 776, 780 (9th Cir. 1994) (plan administrator upheld under plain meaning principle); *Clark v. Washington Teamsters Welfare Trust*, 8 F.3d 1429, 1431 (9th Cir. 1993) (plan administrator upheld on intrinsic evidence); *Jones v. Laborers Health & Welfare Trust Fund*, 906 F.2d 480, 482 (9th Cir. 1990) (plan administrator upheld on extrinsic evidence before plan administrator); *Johnson v. Trustees of W. Conference of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989) (plan administrator upheld under plain meaning principle).

318. *Averhart v. US West Management Pension Plan*, 46 F.3d 1480, 1485-86 (10th Cir. 1994) (plan administrator upheld under plain meaning principle); *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1276 (10th Cir. 1994) (same); *Pitman v. Blue Cross & Blue Shield*, 24 F.3d 118, 123-24 (10th Cir. 1994) (remand to give proper deference for conflict of interest); *Rademacher v. Colorado Ass'n of Soil Conservation Dist. Medical Benefit Plan*, 11 F.3d 1567, 1570 (10th Cir. 1993) (plan administrator upheld as had logical reason); *Counts v. Kissack Water & Oil Serv., Inc.*, 986 F.2d 1322, 1324-25 (10th Cir. 1993) (plan administrator reversed as interpretation contrary to ERISA); *Winchester v. Prudential Life Ins. Co.*, 975 F.2d 1479, 1488 (10th Cir. 1992) (plan administrator upheld on extrinsic evidence); *Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp.*, 968 F.2d 1005, 1009-10 (10th Cir. 1992) (plan administrator upheld as had logical reason); *Arfsten v. Frontier Airlines, Inc. Retirement Plan for Pilots*, 967 F.2d 438, 440 (10th Cir. 1992) (plan administrator upheld on extrinsic evidence); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1200-01 (10th Cir. 1992) (plan administrator upheld on plain meaning principle); *Pratt v. Petroleum Prod. Management Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir. 1990) (plan administrator upheld as had logical reason).

319. *Florence Nightingale Nursing Serv. Inc. v. Blue Cross/Blue Shield*, 41 F.3d 1476, 1483 (11th Cir. 1995) (plan administrator's interpretation reversed as based on documents not part of the plan), *cert. denied*, 115 S. Ct. 2002 (1995); *Lee v. Blue Cross/Blue Shield*, 10 F.3d 1547, 1551 (11th Cir. 1994) (plan administrator's interpretation reversed under *contra proferentem* principle); *Blank v. Bethlehem Steel Corp.*, 926 F.2d 1090, 1093 (11th Cir.) (plan administrator upheld on plain meaning principle), *cert. denied*, 502 U.S. 938 (1991); *Anderson v. Blue Cross/Blue Shield*, 907

ERISA plans granting the plan administrator interpretive discretion. State courts similarly use the LMRA interpretive rule for the plan interpretive discretion situation.³²⁰

Several circuits have developed subrules—corollaries to the trustee’s acceptance principle—to assist in the determination of whether a plan administrator’s interpretation was arbitrary and capricious. These subrules, developed after ERISA’s passage, generally insure that violation of the plain meaning principle is an arbitrary and capricious act.

The Fifth Circuit was the first federal circuit to develop the subrules. The Fifth Circuit uses a two-step process for applying the arbitrary and capricious standard. The court must: (1) determine whether the plan administrator’s interpretation is correct and, if not, (2) determine whether the plan administrator’s decision is arbitrary and capricious.³²¹

Under the first step, the court uses a three factor test: (1) whether the plan administrator gives the plan a uniform meaning over time, (2) whether the plan administrator’s interpretation is consistent with a fair reading of the plan, and (3) whether a different interpretation would result in unanticipated costs.³²²

Under the second step, the court uses a four-factor test: whether the plan administrator’s interpretation (1) is internally consistent, (2) comports with federal regulations, (3) is supported by facts, and (4) suggests no inference of bad faith.³²³ Under this test, an interpretation

F.2d 1072, 1076 (11th Cir. 1990) (remand as trial court used de novo review); *Newell v. Prudential Ins. Co.*, 904 F.2d 644, 651-2 (11th Cir. 1990) (plan administrator upheld on plain meaning principle); *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1569 (11th Cir. 1990) (remanded for conflict of interest evidence), *cert. denied*, 498 U.S. 1040 (1991); *Jett v. Blue Cross & Blue Shield, Inc.*, 890 F.2d 1137, 1538 (11th Cir. 1990) (remanded as trial court used de novo review).

For post-*Bruch* LMRA cases to the same effect, see *Guy v. Southeastern Iron Workers’ Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989) (plan administrator upheld as had logical reason); *Dixon v. Seafarers’ Welfare Plan*, 878 F.2d 1411, 1412 (11th Cir. 1989) (plan administrator reversed as violated plain meaning principle).

320. *Bertrand v. Metropolitan Life Ins. Co.*, 635 So. 2d 579, 582 (La. Ct. App. 1994) (plan administrator upheld under plain meaning principle); *Talley v. Enserch Corp.*, 589 So. 2d 615, 618-19 (La. Ct. App.) (plan administrator reversed as did not use plan definitions), *writ denied*, 592 So. 2d 1342 (La. 1992); *Lessard v. Metropolitan Life Ins. Co.*, 568 A.2d 491, 496-98 (Me. 1989); (plan administrator upheld as legally correct); *St. Louis Children’s Hosp. v. Commerce Bancshares, Inc.*, 799 S.W.2d 87, 95 (Mo. Ct. App. 1990) (plan administrator upheld on intrinsic evidence); *Hamilton, Johnston & Co. v. Johnston*, 607 A.2d 1044, 1048-49 (N.J. Super. Ct. App. Div. 1992) (plan administrator reversed as provided no logical reason).

321. *Batchelder v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 444 (5th Cir. 1989); *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979).

322. *Batchelder*, 877 F.2d at 444; *Bayles*, 602 F.2d at 100.

323. *Batchelder*, 877 F.2d at 445; *Bayles*, 602 F.2d at 99.

contrary to the plain meaning principle is arbitrary and capricious.³²⁴ After *Bruch*, the Fifth Circuit mandated the use of the plain meaning and extrinsic evidence principles to determine a fair meaning.³²⁵

More recently, the Fifth Circuit questioned the usefulness of the first step. It would seem easier to determine one of many logical reasons under the arbitrary and capricious standard, rather than which one of the many is the correct one.³²⁶ The Eleventh Circuit also follows the two-step process of the Fifth Circuit.³²⁷

The Ninth Circuit applies the arbitrary and capricious standard under a different two-step process. A court must (1) determine compliance with the plain meaning principle and then (2) determine compliance with four other factors—good faith, consistency of application, provision of a rationale, and accordance with the drafter's intent.³²⁸

The Fourth Circuit, since the *Bruch* decision, uses a five factor test under which the court must consider: (1) whether the plan administrator's interpretation is consistent with the goals of the plan, (2) whether it might render some other language in the plan meaningless or inconsistent, (3) whether the interpretation is consistent with the procedural and substantive requirements of ERISA, (4) whether the interpretation is applied consistently, and (5) whether the interpretation is contrary to the clear language of the plan.³²⁹ An interpretation

324. *Batchelder*, 877 F.2d at 445; see Employee Retirement Income Security Act of 1974 § 404(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1988) (operate plan in accordance with plan documents).

325. *Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local Union 4-447*, 47 F.3d 139, 145 (5th Cir. 1995) (can use court's own interpretation and explanations given workers under the ambiguity principle); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1520 (5th Cir. 1994) (plain meaning principle and extrinsic evidence principle); *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1338-39 (5th Cir. 1994) (plain meaning principle).

326. See *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1307 n.3 (5th Cir. 1994) (non-LMRA ERISA plan: refusing to use step one).

327. *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989) (LMRA case); *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1498 (11th Cir. 1987); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985).

But see Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir. 1983) (rejecting the Fifth Circuit's two-step process).

328. *Pilon v. Retirement Plan for Salaried Employers of Great N. Nekoosa Corp.*, 861 F.2d 217, 219-20 (9th Cir. 1988).

329. *Hickey v. Digital Equip. Corp.*, 43 F.3d 941, 947 (4th Cir. 1995); *Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 126 (4th Cir. 1994); *Löckhart*

contrary to the plain meaning principle is an abuse of discretion.³³⁰ The Eighth Circuit adopted this five factor test from the Fourth Circuit.³³¹

The Seventh Circuit recently set forth a three-factor test under the abuse of discretion standard. This test requires the court to consider extrinsic evidence on: (1) whether the plan administrator's interpretation is consistent with the intent of the plan sponsor, (2) whether the plan administrator applies the interpretation consistently, and (3) whether the interpretation results in additional costs to the plan.³³²

The circuits have also developed other variations on the abuse of discretion standard. The *Bruch* decision directs courts to subject potential conflicts of interest by the plan administrators to de novo review.³³³ As a result, some circuits apply a slightly different standard to conflicts under the abuse of discretion standard. In the Fourth Circuit, a plan administrator with a conflict must have offered an interpretation consistent with one the court would expect from a fiduciary without a conflict.³³⁴ This means de novo review.³³⁵ The Sixth Circuit ignores the directive, applying the arbitrary and capricious standard even in the presence of a conflict of interest.³³⁶ The Ninth Circuit gives less deference in the event of a pecuniary conflict of interest,³³⁷ the standard the Ninth Circuit used before *Bruch*.³³⁸ If a plan administrator

v. United Mine Workers 1974 Pension Trust, 5 F.3d 74, 77 (4th Cir. 1993); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989) (citing various circuits for each part).

330. *Davis v. Burlington Indus., Inc.*, 966 F.2d 890, 895 (4th Cir. 1992).

331. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 371 (8th Cir.), *cert. denied*, 116 S. Ct. 300 (1995); *Shell v. Amalgamated Cotton Garment*, 43 F.3d 364, 366 (8th Cir. 1994); *Kennedy v. Georgia-Pacific Corp.*, 31 F.3d 606, 609 (8th Cir. 1994); *Brum v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433, 1437 (8th Cir. 1993); *Finley v. Special Agents Mut. Benefit Ass'n, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992).

For post-*Bruch* LMRA cases to the same effect, see *Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan*, 25 F.3d 616, 620-22 (8th Cir. 1994).

332. *Karwczyk v. Harnischfeger Corp.*, 41 F.3d 276, 279 (7th Cir. 1994).

333. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *id.* at 108 (limiting opinion to interpretive cases involving an absence of interpretive discretion).

334. *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80, 87 (4th Cir. 1993); *accord Hickey v. Digital Equip. Corp.*, 43 F.3d 941, 946 (4th Cir. 1995).

335. *Doe*, 3 F.3d at 89.

336. *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 459 (6th Cir. 1991).

337. *Parker v. BankAmerica Corp.*, 50 F.3d 757, 767 (9th Cir.), *cert denied*, 64 U.S.L.W. 3249 (1995); *Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 553 (9th Cir. 1995); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1321 (9th Cir. 1994); *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1525 (9th Cir. 1994).

338. *Pilon v. Retirement Plan for Salaried Employers of Great N. Nekoosa Corp.*, 861 F.2d 217, 219 (9th Cir. 1988); *Fielding v. International Harvester Co.*, 815 F.2d

has a conflict, the Eleventh Circuit shifts the burden of proof to the plan administrator, who must show the interpretation was not tainted by self-interest.³³⁹

The circuits have different approaches for how they limit a trial court's use of extrinsic evidence. Some courts limit the extrinsic evidence that can be considered to the evidence before the plan administrator when it made its determination. This was the rule before *Bruch* under the arbitrary and capricious standard.³⁴⁰ The Fourth³⁴¹ and Ninth³⁴² Circuits continue this limitation. On the other hand, the Fifth Circuit has abrogated this variation and allows courts to investigate evidence not before the plan administrator.³⁴³

Another variation among the circuits deals with the origin of the abuse of discretion standard. The Sixth Circuit claims this interpretive rule is a trust law rule³⁴⁴ while the Seventh Circuit claims a contractual origin for the rule.³⁴⁵

The Sixth Circuit has also determined that courts make the determination whether the plan grants plan interpretive discretion to the plan administrator under the de novo standard.³⁴⁶

1254, 1256 (9th Cir. 1987); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986); *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985).

339. *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1566 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991); *accord* *Florence Nightingale Nursing Serv. Inc. v. Blue Cross/Blue Shield*, 41 F.3d 1476, 1481 (11th Cir. 1995); *Lee v. Blue Cross/Blue Shield*, 10 F.3d 1547, 1550 (11th Cir. 1994); *Anderson v. Blue Cross/Blue Shield*, 907 F.2d 1072, 1076 (11th Cir. 1990); *Newell v. Prudential Ins. Co.*, 904 F.2d 644, 651 (11th Cir. 1990).

340. *See* *Flint*, *supra* note 28, at 140-41.

341. *Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 125 (4th Cir. 1994).

342. *Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 553 (9th Cir.), *cert denied*, 64 U.S.L.W. 3249 (1995); *Taft v. Equitable Life Ins. Soc'y*, 9 F.3d 1469, 1471 (9th Cir. 1994).

343. *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 638-39 (5th Cir. 1992).

344. *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1248 (6th Cir. 1991).

345. *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990); *see* RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. a (1981) (satisfaction of a party called for in a contract must be reasonable); *see also* *Flint*, *supra* note 1, at 372-76 (explaining the parallel development of the arbitrary and capricious standard under both state contract law and state trust law).

346. *Tiemeyer v. Community Mut. Ins. Co.*, 8 F.3d 1094, 1099 (6th Cir. 1993).

2. Discretion Absent

When plan interpretive discretion is absent, the circuits divide into two sets. One set applies the same rule under de novo review to all types of plans, although the rule chosen may vary from circuit to circuit. The other set divides the plans into two groups. For those plans using insurance contracts, de novo review in these circuits means an insurance contract rule. Therefore, the court applies either the classical contract rule, including the *contra proferentem* principle for ambiguous language, or the neoclassical contract theory of reasonable expectation. When a plan does not involve an insurance contract, the circuits in this set use a default principle that does not defer to either party's interpretation.

The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits comprise the first set. This set further divides over the understanding principle and the default principle. The Fourth, Fifth, and Eleventh Circuits use an elite standard, while the Sixth, Seventh, Eighth, and Tenth Circuits use a lay standard. The Sixth and Eighth Circuits also use a default rule that does not favor either party.

When plan interpretive discretion is absent, the Fourth, Fifth, and Eleventh Circuits resort to de novo review. In the absence of ambiguities, these courts apply the plain meaning principle.³⁴⁷ In the presence

347. For the Fourth Circuit, see *Hendricks v. Central Reserve Life Ins. Co.*, 39 F.3d 507, 512 (4th Cir. 1994) (plan administrator correct under plain meaning principle); *Hardester v. Lincoln Nat'l Life Ins. Co.*, 33 F.3d 330, 334 (4th Cir. 1994) (plan administrator a person of average intelligence); *Gill v. Moco Thermal Indus., Inc.*, 981 F.2d 858, 860 (6th Cir. 1992) (same); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 57-58 (4th Cir. 1992) (same).

For the Fifth Circuit, see *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1452 n.1 (5th Cir. 1995) (as understood by a person of average intelligence); *Southern Farm Bureau Life Ins. Co. v. Moore*, 993 F.2d 98, 101 (5th Cir. 1993) (plan administrator correct under plain meaning principle); *Nesom v. Brown & Root, U.S.A., Inc.*, 987 F.2d 1188, 1191 & n.4 (5th Cir. 1993) (same); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 939 (5th Cir.) (same), *cert. denied*, 114 S. Ct. 196 (1993); *Harms v. Cavenham Forest Indus.*, 984 F.2d 686, 688 (5th Cir. 1993) (non-insurance plan, plan administrator correct under plain meaning principle), *cert. denied*, 114 S. Ct. 382 (1993).

For the Eleventh Circuit, see *Bedinghaus v. Modern Graphic Arts*, 15 F.3d 1027, 1029 (11th Cir.), *cert. denied*, 115 S. Ct. 426 (1994) (plan administrator reversed under plain meaning principle); *Arnold v. Life Ins. Co.*, 894 F.2d 1566, 1567 (11th Cir. 1990) (plan administrator upheld under plain meaning principle); *Moon v. American Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir. 1989) (plan administrator reversed under plain meaning principle); *see also Kirwin v. Marriott Corp.*, 10 F.3d 784, 789 (11th Cir. 1994) (remand for de novo review when trial court used arbitrary and capricious standard); *Baker v. Big Star Division of the Grand Union Co.*, 893 F.2d 288, 291 (11th Cir. 1989) (same).

Only *Harms*, *Bedinghaus*, and *Kirwin* dealt with a plan without insurance contracts.

of ambiguities, they apply the extrinsic evidence principle³⁴⁸ followed by the *contra proferentem* principle of insurance contract law.³⁴⁹

When plan interpretive discretion is absent, the Tenth and Seventh Circuits use the de novo review. In the absence of ambiguities, these courts apply the lay meaning principle.³⁵⁰ In the presence of ambigui-

The use of a person of average intelligence by *Hardester*, at 334, and *Todd*, at 1452 n.1, suggests the Fourth and Fifth Circuits also soon may go to a lay standard.

348. For the Fourth Circuit, see *Adkins v. Reliance Standard Life Ins. Co.*, 917 F.2d 794, 796-97 (4th Cir. 1990) (defer to neither party, but plan administrator lost on extrinsic evidence of court cases interpreting similar insurance provisions).

For the Fifth Circuit, see *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991) (ambiguity unresolved after using extrinsic evidence).

For the Eleventh Circuit, see *Blake v. Union Mut. Stock Life Co. of Am.*, 906 F.2d 1525, 1527 (11th Cir. 1990) (plan administrator upheld on extrinsic evidence).

All of these cases dealt with plans with insurance contracts.

349. For the Fourth Circuit, see *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992) (remanded for de novo review); see also *Doe v. Group Hospitalization & Medical Service*, 3 F.3d 80, 89 (4th Cir. 1993) (discretion but with conflict of interest: use de novo and construe ambiguities against the draftsman; plan administrator overruled on construction).

For the Fifth Circuit, see *Hansen*, 940 F.2d at 982 (construing in favor of employee on the basis of an insurance contract case); accord *Todd*, 47 F.3d at 1451-52 (accepting employee interpretation); *Ramsey v. Colonial Life Ins. Co. of Am.*, 12 F.3d 472, 479 (5th Cir. 1994) (same).

For the Eleventh Circuit, compare *Marecek v. Bellsouth Servs., Inc.*, 49 F.3d 702, 705 (11th Cir. 1995) (plan administrator upheld as correct under de novo; correctness determined under de novo review and arbitrary and capricious standard by same method) with *Lee v. Blue Cross/Blue Shield*, 10 F.3d 1547, 1551 (11th Cir. 1994) (plan administrator incorrect under arbitrary and capricious standard, the *contra proferentem* principle is appropriate to resolve ambiguities).

Only *Marecek* dealt with a plan without insurance contracts.

Participant lawyers in the Eleventh Circuit have attempted to introduce extrinsic evidence of oral representations of ambiguous language under interpretive doctrines. See *Glass v. United of Omaha Life Ins. Co.*, 33 F.3d 1341, 1347 (11th Cir. 1994) (cannot if the plan is unambiguous); *Lordmann Enters., Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1534-35 (11th Cir. 1994) (same); *Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468, 472 (11th Cir. 1993) (same); *Meadows v. Cagle's Inc.*, 954 F.2d 686, 698 (11th Cir. 1992) (same); *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 617 (11th Cir. 1991) (same); *Alday v. Container Corp.*, 906 F.2d 660, 666 (11th Cir. 1990) (same); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (same). But see *National Cos. Health Benefit Plan v. St. Joseph's Hosp., Inc.*, 929 F.2d 1558, 1565 (11th Cir. 1991) (can if plan is ambiguous); *Kane v. Aetna Life Ins. Co.*, 893 F.2d 1283, 1285-86 (11th Cir. 1990) (same).

350. For the Tenth Circuit, see *Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1221 (10th Cir. 1992) (reasonable participant); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (same); accord *Bartlett v. Martin Marietta Operations Support, Inc. Life Ins. Plan*, 38 F.3d 514, 517 (10th Cir. 1994) (plan administrator upheld under ordinary meaning principle); *Awbrey v. Pennzoil Co.*, 961

ities, these courts apply the partial-extrinsic evidence principle³⁵¹ followed by the *contra proferentem* principle of insurance contract law.³⁵² The rationale the Tenth Circuit gives for the *contra proferentem* principle is that it is consistent with the ERISA policy of protecting the interests of the participants.³⁵³

The Sixth and Eighth Circuits also use the de novo standard. Mindful that *Bruch* cautioned against favoring either party's interpretation, these circuits have changed both the understanding principle and the default principle used by other circuits. ERISA requires plan administrators to provide participants with a plan description "written in a manner calculated to be understood by the average plan participant."³⁵⁴ To this end, these circuits use, as the understanding principle in the absence

F.2d 928, 930-31 (10th Cir. 1992) (same).

For the Seventh Circuit, see *Brewer v. Protexall, Inc.*, 50 F.3d 453, 457 (7th Cir. 1995) (person of average intelligence); *Casey v. Uddeholm Corp.*, 32 F.3d 1094, 1096 (7th Cir. 1994) (as understood by an average participant); *McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993) (as understood by a lay person); *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1052-53 (7th Cir. 1991) (same); *accord Edwards v. Great W. Life Assurance Co.*, 20 F.3d 748, 749 (7th Cir.) (plan administrator upheld under ordinary meaning principle), *cert. denied*, 115 S. Ct. 424 (1994); *Bechtold v. Physicians Health Plan, Inc.*, 19 F.3d 322, 325-26 (7th Cir. 1994) (same); *Fuja v. Benefit Trust Life Ins. Co.*, 18 F.3d 1405, 1408 (7th Cir. 1994) (same); *Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 431 (7th Cir. 1994) (same); *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1357-58 (7th Cir. 1994) (plan administrator reversed as contrary to the ordinary meaning principle); *Shanks v. Blue Cross & Blue Shield United*, 979 F.2d 1232, 1233 (7th Cir. 1992) (plan administrator upheld under ordinary meaning principle); *Hammond v. Fidelity & Guar. Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992) (same); *Petrilli v. Drechsel*, 910 F.2d 1441, 1446 (7th Cir. 1990) (remanded for de novo review); *see also Preze v. Board of Trustees, Pipefitters Welfare Fund Local 597*, 5 F.3d 272, 274 (7th Cir. 1993) (LMRA plan: plan administrator upheld under ordinary meaning principle); *Chapter v. Monfort, Inc.*, 20 F.3d 286, 288 (7th Cir. 1990) (court will abandon plain meaning principle when it produces absurdities).

Only *Awbrey* and *Meredith* dealt with a plan without insurance contracts.

351. For the Seventh Circuit, see *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993) (ambiguity unresolved after using extrinsic evidence).

For the Tenth Circuit, see *Blair*, 974 F.2d at 1221 (plan administrator reversed on reasonable expectations evidence).

Only *Hickey* dealt with a plan without insurance contracts.

352. For the Seventh Circuit, see *Brewer*, 50 F.3d at 457 (reversing plan administrator to construe in favor of insured); *Casey*, 32 F.3d at 1096 (same); *McNeilly*, 999 F.2d at 1201 (same); *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1992) (same).

For the Tenth Circuit, see *Blair*, 974 F.2d at 1222 (dicta).

All of these cases dealt with plans with insurance contracts.

353. *Blair*, 974 F.2d at 1222.

354. Employment Income Security Act of 1974 § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988); *see also* 29 C.F.R. § 2520.102-2(a) (1994) (Department of Labor regulation on summary plan description); 29 C.F.R. § 2520.104b-10(c)(3) (1994) (same on summary annual report).

of ambiguities, the reasonable expectation principle.³⁵⁵ In the presence of ambiguities, these circuits use the partial-extrinsic evidence principle³⁵⁶ followed by the default principle. However, based on *Bruch*, the default principle does not defer to either party's interpretation.³⁵⁷ Therefore, the Sixth and Eighth Circuits have rejected the *contra*

355. For the Sixth Circuit, see *Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1376-77 (6th Cir. 1994) (plan administrator reversed on the basis of letters made to employee); see *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (employer right to terminate case: use contractual methods for resolving ambiguities in plan).

For the Eighth Circuit, see *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 985 (8th Cir. 1992) (reasonable participant); *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652, 658 (8th Cir. 1991) (lead to believe); *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990) (lay persons, not experts). Some commentators depict *Brewer*, due to its result, as standing for the plain meaning rule of classical contract theory rather than the radical acceptance of the neoclassical contract theory. Mary P. Benz, *Interpretation of Insurance Policies Governed by ERISA*, 59 DEF. COUNS. J. 74, 76 (1992) (depicting *Brewer* as the counter to the *contra proferentem* principle). Frequently, the Eighth Circuit describes the understanding principle in terms of the plain meaning principle. *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 660 (8th Cir. 1992) (plan administrator upheld under the plain meaning principle); *Harper v. R.H. Macy & Co., Inc.*, 920 F.2d 544, 545 (8th Cir. 1990) (same); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990) (same); *Howe v. Varsity Corp.*, 896 F.2d 1107, 1109 n.4 (8th Cir. 1990) (same).

Only *Wulf*, *Harper*, *Johnson*, and *Jacobs* dealt with a plan without insurance contracts.

356. For the Sixth Circuit, see *Wulf*, 26 F.3d at 1376-77; *Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc.*, 900 F.2d 963, 967 (6th Cir. 1990).

For the Eighth Circuit, see *Dvorak v. Metropolitan Life Ins. Co.*, 965 F.2d 606, 607 (8th Cir. 1992) (remand to use extrinsic evidence); *Kirk v. Provident Life & Accident Ins. Co.*, 942 F.2d 504, 505 (8th Cir. 1991) (plan administrator upheld); *Jacobs*, 933 F.2d at 652 (plan administrator reversed); *Brewer*, 921 F.2d at 153-54 (remand to obtain extrinsic evidence).

Only *Wulf* and *Jacobs* dealt with a plan without insurance contracts.

357. For the Sixth Circuit, see *Wulf*, 26 F.3d at 1373 (plan administrator reversed on the basis of letters made to employee); *Anderson v. Great W. Life Assurance Co.*, 942 F.2d 392, 394 (6th Cir. 1991) (reversed to determine whether had grant of plan interpretive discretion); *Franklin v. Pitney Bowes, Inc.*, 919 F.2d 45, 47 (6th Cir. 1990) (plan administrator upheld as no evidence of a contrary interpretation); *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 950 (6th Cir. 1990) (plan administrator upheld under plain meaning principle); *Perry*, 900 F.2d at 965 (plan administrator upheld as no evidence of a contrary interpretation: no presumption); *MacMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 430 (6th Cir. 1989) (plan administrator upheld under plain meaning principle); *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119, 122 (6th Cir. 1989) (plan administrator reversed as employee interpretation more reasonable); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989) (remanded as trial court used arbitrary and capricious standard).

Only *Wulf*, *Franklin*, *Adams*, and *Brown* dealt with a plan without insurance contracts.

proferentem principle³⁵⁸ for the most reasonable interpretation of the plan in the opinion of the court.³⁵⁹

These circuits have also developed other aspects of the de novo review standard. The Fourth, Sixth, Seventh, and Eighth Circuits recognize a contractual origin for the review standard.³⁶⁰ The Sixth Circuit limits the extrinsic evidence reviewed by the court to that before the plan administrator when it rendered its interpretation.³⁶¹

In exceptional circumstances, the Fourth Circuit allows an exception to this subrule,³⁶² and the Eleventh Circuit has abrogated it altogether.

358. For the Sixth Circuit, see *Franklin*, 919 F.2d at 48 (oral severance pay plan). For the Eighth Circuit, see *Maxa*, 972 F.2d 985 (cannot use the *contra proferentem* principle, so use reasonable expectation principle).

359. For the Sixth Circuit, see *Aubrey*, 886 F.2d at 123.

For the Eighth Circuit, see *Maxa*, 972 F.2d at 985 (cannot use *contra proferentem* principle so use reasonable expectation principle). *Contra* *Jensen v. Sipco, Inc.*, 38 F.3d 945, 951 (8th Cir. 1994) (decided for employees as plan administrator provided no extrinsic evidence); *Delk v. Durham Life Ins. Co.*, 959 F.2d 104, 106 (8th Cir. 1992) (*contra proferentem* principle is last tool to resolve ambiguity).

The Eighth Circuit generally is credited with being against the *contra proferentem* principle since the circuit once stated that ERISA preempts state law, including the *contra proferentem* principle. *Brewer*, 921 F.2d at 153-54 (remand to obtain extrinsic evidence); see, e.g., *Benz*, *supra* note 355, at 78 (insurance defense counsel arguing against the *contra proferentem* principle as not leading to uniform interpretation of the same insurance language). But the *Brewer* court had little need for the *contra proferentem* principle since it adopted the reasonable expectation principle. *Brewer*, 921 F.2d at 153-54.

360. For the Fourth Circuit, see *Hardester v. Lincoln Nat'l Life Ins. Co.*, 33 F.3d 330, 334 (4th Cir. 1994); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992).

For the Sixth Circuit, see *Wulf*, 26 F.3d at 1376.

For the Seventh Circuit, see *Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 431 (7th Cir. 1994); *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1357-58 (7th Cir. 1993); *Preze v. Board of Trustees, Pipefitters Welfare Fund Local 597*, 5 F.3d 272, 274 (7th Cir. 1993); *McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993); *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993); *Shanks v. Blue Cross & Blue Shield United*, 979 F.2d 1232, 1233 (7th Cir. 1992); *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1992); *Hammond v. Fidelity & Guar. Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992).

For the Eighth Circuit, see *Dvorak v. Metropolitan Life Ins. Co.*, 965 F.2d 606, 608 (8th Cir. 1992); *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652, 656 (8th Cir. 1991); *Howe v. Varsity Corp.*, 896 F.2d 1107, 1109 n.4 (8th Cir. 1990); *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327, 1330 (8th Cir. 1989) (remand to use de novo review). For post-*Bruch* LMRA cases to the same effect, see *Baxter v. Lynn*, 886 F.2d 182, 188 (8th Cir. 1989) (discretion absent so remand to use de novo review).

361. *Wulf*, 26 F.3d at 1376-77 (limiting the extrinsic evidence to that before the plan administrator); *Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc.*, 900 F.2d 963; 967 (6th Cir. 1990) (same).

362. *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993). This case dealt with a plan with insurance contracts.

er.³⁶³ De novo review, however, should mean that the court is not limited on the extrinsic evidence it can examine, because the court is to derive its own interpretation.

The First, Second, Third, and Ninth Circuits comprise the second set. For plans involving insurance contracts, these circuits divide into two groups based on the understanding principle used. The First and Ninth Circuits use a lay standard; the Second and Third Circuits use an elite standard.

The First and Ninth Circuits, when considering de novo review for cases with plan interpretive discretion absent and involving insurance policies, adopted the rule of neoclassical contract theory.³⁶⁴ Therefore, de novo review in the absence of ambiguities involves the reasonable expectation principle,³⁶⁵ and in the presence of ambiguities the partial-extrinsic evidence principle³⁶⁶ is followed by the *contra proferentem* principle.³⁶⁷ The reason given by the Ninth Circuit for the *contra*

363. Moon v. American Home Assurance Co., 888 F.2d 86, 89 (11th Cir. 1989) (since that would be inconsistent with de novo review).

364. For the First Circuit, see Hughes v. Boston Mut. Life Ins. Co., 26 F.3d 264, 267-68 (1st Cir. 1994); Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1084 (1st Cir. 1990); Burnham v. Guardian Life Ins. Co. of Am., 873 F.2d 486, 489 (1st Cir. 1989).

For the Ninth Circuit, see Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 386-87 (9th Cir. 1994); Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990) (interpret insurance policies as a lay person would); Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 536 (9th Cir. 1990) (as a lay person); see also Lea v. Republic Airlines, Inc., 903 F.2d 624, 629 (9th Cir. 1990) (de novo review, plan administrator upheld under plain meaning principle).

365. For the First Circuit, see Wickman, 908 F.2d at 1084 (plain meaning of the average person, citing insurance law treatises; plan administrator upheld under lay meaning principle); accord Burnham, 873 F.2d at 489 (natural meaning under the canons of contract interpretation; plan administrator upheld under lay meaning principle).

For the Ninth Circuit, see Saltarelli, 35 F.3d at 386-87 (plan administrator overruled under reasonable expectation principle).

366. For the First Circuit, see Hughes, 26 F.3d at 268 (extrinsic evidence failed to resolve ambiguity).

For the Ninth Circuit, see Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 943 (9th Cir. 1995) (remanded for consideration of extrinsic evidence); Evans, 916 F.2d at 1441 (plan administrator upheld on extrinsic evidence); Kunin, 910 F.2d at 537 (reversing plan administrator on basis of extrinsic evidence).

367. For the First Circuit, see Hughes, 26 F.3d at 268 (only in the insurance contract context).

For the Ninth Circuit, see Mongeluzo, 46 F.3d at 942 (if ambiguous construe against insurance company); Patterson v. Hughes Aircraft Co., 11 F.3d 948, 950 (9th Cir. 1993) (plan administrator reversed under *contra proferentem* principle); Kunin, 910 F.2d at 539

proferentem principle is the unanimity of the state decisions from which the uniform federal rule should not vary.³⁶⁸

When plan interpretive discretion is absent, the Second and Third Circuits take de novo review of cases involving insurance policies. These circuits adopt the rule of classical contract theory.³⁶⁹ In the absence of ambiguities, these circuits apply the plain meaning principle.³⁷⁰ In the presence of ambiguities, they apply the extrinsic evidence principle³⁷¹ followed by the *contra proferentem* principle.³⁷² In the Second Circuit, extrinsic evidence is not limited to that submitted to the plan administrator.³⁷³

If an ERISA plan does not involve an insurance policy, these circuits also divide into two groups based on the default principle. The First, Second, Third, and Ninth Circuits follow a similar rule, using in the

(if ambiguous, construe against insurance company).

The Ninth Circuit does not apply the rule to LMRA plans since they are collectively-bargained and unlike the plans drafted by the insurance companies. *Kunin*, 910 F.2d at 540; see *Jung v. FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) (rejecting the *contra proferentem* principle); *Smith v. California Metal Trades Ass'n-Int'l Assoc. of Machinists Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981) (same); *Rehmar v. Smith*, 555 F.2d 1362, 1369 (9th Cir. 1976).

368. *Kunin*, 910 F.2d at 540.

369. For the Second Circuit, see *Masella v. Blue Cross & Blue Shield, Inc.*, 936 F.2d 98, 103 (2d Cir. 1991); *Kunstenaar v. Connecticut Gen. Life Ins. Co.*, 902 F.2d 181, 183 (2d Cir. 1990).

For the Third Circuit, see *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257-58 (3d Cir. 1993); *accord Smith v. Hartford Ins. Group*, 6 F.3d 131, 139 (3d Cir. 1993); *Flick v. Borg-Warner Corp.*, 892 F.2d 285, 291 (3d Cir. 1989) (dissent: "expressed intentions . . . (even if pro-employer), but silence or ambiguity is construed in favor of the employee participants").

370. For the Second Circuit, see *Kunstenaar*, 902 F.2d at 183 (upholding the plan administrator under the plain meaning principle).

For the Third Circuit, see *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 231 (3d Cir. 1994) (plan administrator upheld on plain meaning principle).

371. For the Second Circuit, see *Masella*, 936 F.2d at 104-05 (allowing participant to introduce expert testimony not presented at administrative level since plan administrator has superior access to such information; plan administrator reversed on extrinsic evidence).

For the Third Circuit, see *Smith*, 6 F.3d at 138-39 (plan administrator reversed on extrinsic evidence); *Heasley*, 2 F.3d at 1256-57 (plan administrator upheld on extrinsic evidence).

372. For the Second Circuit, see *Masella*, 936 F.2d at 107 (the contrary rule does not "promot[e] the interest of employees and beneficiaries [nor] protect . . . contractually defined benefits").

For the Third Circuit, see *Smith*, 6 F.3d at 138-39 (dicta); *Heasley*, 2 F.3d at 1256-57 (dicta); see *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 158 (3d Cir. 1993) (mandamus to remove judge: can use reasonable understanding of beneficiary to resolve ambiguity).

373. *Masella*, 936 F.2d at 104.

absence of ambiguities the plain meaning principle³⁷⁴ and in the presence of ambiguities the extrinsic evidence principle.³⁷⁵ But the First, Second, and Ninth Circuits have yet to specify the default principle,³⁷⁶ while the Third Circuit applies a default principle that favors neither party.³⁷⁷

For union-negotiated, single-employer plans, when there is plan interpretive discretion, courts use the arbitrary and capricious standard.³⁷⁸ But if the collective bargaining agreement covers the matter, courts continue to use the federal labor law interpretive rule.³⁷⁹

374. For the First Circuit, see *Pizzuti v. Polaroid Corp.*, 985 F.2d 13, 14 (1st Cir. 1993) (plan administrator upheld on plain meaning principle); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 29-30 (1st Cir. 1991) (same).

For the Second Circuit, see *Bradwell v. GAF Corp.*, 954 F.2d 798, 800 (2d Cir. 1992) (plan administrator upheld on plain meaning principle). For post-*Bruch* LMRA cases to the same effect, see *Jordal v. Simmons*, 926 F.2d 223, 225 (2d Cir. 1991) (reversing plan administrator on plain meaning principle).

For the Third Circuit, see *Frank v. Colt Indus. Inc.*, 910 F.2d 90, 96 (3d Cir. 1990) (plan administrator reversed under plain meaning principle); *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101 (3d Cir. 1989) (same).

For the Ninth Circuit, see *Orozco v. United Air Lines, Inc.*, 887 F.2d 949, 952 (9th Cir. 1989) (plan administrator upheld on plain meaning principle).

375. For the First Circuit, see *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 586-87 (1st Cir. 1993) (plan administrator upheld on extrinsic evidence); *Allen v. Adage, Inc.*, 967 F.2d 695, 697 (1st Cir. 1992) (same).

For the Second Circuit, see *Heidgerd v. Olin Corp.*, 906 F.2d 903, 909 (2d Cir. 1990) (using participant's reliance on summary plan description as most reasonable interpretation).

For the Third Circuit, see *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227, 1232-33 (3d Cir. 1991) (remand to use extrinsic evidence to resolve ambiguity); *Anderson v. Pittsburgh-Des Moines Corp.*, 893 F.2d 638, 639-41 (3d Cir. 1990) (same).

For the Ninth Circuit, see *Nelson v. EG & G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1388 (9th Cir. 1994) (plan administrator upheld on extrinsic evidence principle).

376. For the First Circuit, see *Allen*, 967 F.2d at 701 (rejecting the *contra proferentem* principle under the *Bruch* directive not to favor either party).

377. *Taylor*, 933 F.2d at 1233 (refusing to adopt the *contra proferentem* principle except possibly as a last effort).

378. See *Communications Workers v. American Tel. & Tel. Co.*, 40 F.3d 426, 433 (D.C. 1994) (can not apply arbitrary and capricious standard until participant exhausts administrative remedies).

379. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993) (collective bargaining agreement to provide lifetime benefits: use extrinsic evidence and *contra proferentem* principle; remanded for extrinsic evidence); *Smith v. ABS Indus., Inc.*, 890 F.2d 841, 845-46 (6th Cir. 1989) (collective bargaining agreement to provide health benefits: use extrinsic evidence, participants win on basis of employer representations).

State courts, exercising their concurrent jurisdiction over the benefits-due lawsuit in the absence of plan interpretive discretion, also recognize *de novo* review.³⁸⁰ They generally follow the same variations as the federal circuit courts, applying the rule to all cases,³⁸¹ using the plain meaning principle,³⁸² using extrinsic evidence,³⁸³ and refusing to adopt the *contra proferentem* principle.³⁸⁴

IV. FURTHERING THE PURPOSE OF ERISA

The federal circuit courts have recognized that the reasonable expectation principle and the *contra proferentem* principle from contract law have a place in the federal common law of ERISA. The First, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have adopted the reasonable expectation principle. The Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have adopted the *contra proferentem* principle in all cases. The First, Second, Third, and Ninth Circuits have adopted the *contra proferentem* principle for plans with insurance contracts. Unfortunately, this minor success for participants may be short-lived. Although the Sixth Circuit asserts that grants of plan interpretive discretion are not common,³⁸⁵ employers are beginning to include the plan interpretive discretionary grant to achieve the more favorable abuse of discretion review standard.

The determinative issue should not be plan interpretive discretion and either following some version of neoclassical contract theory in the absence of that discretion or following some version of discretionary trust theory in the presence of that discretion. By focusing on the grant

But see Stewart v. KHD Deutz of Am. Corp., 980 F.2d 698, 702 (11th Cir. 1995) (collective bargaining agreement to provide health benefits to retirees: do not use federal labor interpretive rule but ordinary contract interpretive rule since relates to retirees, not employees; remand to consider extrinsic evidence due to ambiguity).

380. Brown v. Hartford Life Cos., 593 So. 2d 1376, 1386-87 (La. Ct. App. 1992) (dicta); Guiles v. University of Mich. Bd. of Regents, 483 N.W.2d 637, 641 (Mich. Ct. App. 1992) (dicta); Holchuk v. Connecticut Gen. Life Ins. Co., 558 N.Y.S.2d 673, 674 (App. Div. 1990) (dicta); Gorman v. Life Ins. Co. of N. Am., 811 S.W.2d 542, 548 (Tex. 1991) (dicta); Siska v. Travelers, 467 N.W.2d 174, 177 (Wis. Ct. App. 1991) (dicta).

381. UNC Teton Exploration Drilling, Inc. v. Peyton, 774 P.2d 584, 589 (Wyo. 1989).

382. Thomas v. General Am. Life Ins. Co., 568 N.E.2d 937, 939 (Ill. Ct. App. 1991) (plan administrator upheld under plain meaning principle); Peyton, 774 P.2d at 589 (plan administrator reversed under plain meaning principle).

383. Kennedy v. Deere & Co., 548 N.E.2d 610, 612 (Ill. Ct. App. 1990) (remand for acceptance of more extrinsic evidence).

384. Overcash v. Blue Cross & Blue Shield, 381 S.E.2d 330, 335 (N.C. Ct. App. 1989).

385. Anderson v. Great W. Life Assurance Co., 942 F.2d 392, 394 (6th Cir. 1991).

of discretion, federal circuit courts avoid the real issues and continue to adhere to precedent based on erroneous premises. The issue the federal circuits should confront is which rule of plan interpretation best furthers ERISA's policies. As this Article discussed in Part II, one of ERISA's principal purposes is to protect the reasonable expectations of plan participants.

At present, courts have considered essentially four rules. The first is an interpretive rule of state discretionary trust theory. Courts should interpret the plan language in accordance with the plain meaning principle as a reasonably intelligent person, use extrinsic evidence to resolve ambiguities, and, if any ambiguities remain, accept the trustee's interpretation unless it is arbitrary and capricious.

The second rule is an interpretive rule of state classical contract theory, traditional trust theory, and property law. Courts should interpret the plan language in accordance with the plain meaning principle as a reasonably intelligent person, use extrinsic evidence to resolve ambiguities, and, if any ambiguities remain, construe the ambiguities in favor of the participants.

The third rule is the interpretive rule of federal labor law of collective bargaining agreements. Courts should interpret the plan language in accordance with the plain meaning principle plus some extrinsic evidence, use the remaining extrinsic evidence to resolve ambiguities and, if any ambiguities remain, construe the ambiguities in favor of the participants.

The fourth rule is an interpretive rule of state neoclassical contract theory. Courts should interpret the plan language in accordance with the understanding of a reasonable participant plus some extrinsic evidence, use the remaining extrinsic evidence to resolve ambiguities, and, if any ambiguities remain, construe the ambiguities in favor of the participants.

These four rules essentially differ in two ways. The first rule differs from the second, third, and fourth rules in the choice of default principle. The first rule construes ambiguities in favor of plan fiduciaries; the second, third, and fourth rules construe ambiguities in favor of the participants. The fourth rule differs from the first, second, and third rules in using a less stringent understanding principle. The fourth rule uses the understanding of the participants, while the first and second rules use the understanding of the plan fiduciaries' lawyers and the third rule modifies that by the parties' experience and industry customs.

The problem a court should confront when developing the federal common law of plan interpretation is which of the two initial understanding principles, which of the three ambiguity principles, and which of the two default rules furthers the purposes of ERISA. Examination of the policy Congress intends ERISA to foster, express provisions in ERISA, and ERISA's legislative history leave little doubt as to the correct resolution of that problem.

A. The Policy of Protecting Participant Expectations

The policy that ERISA seeks to further is to protect the reasonable expectations of the participants. This policy mandates a particular selection for the component parts of the plan interpretive rule.

Only one of the understanding principles even seeks to find reasonable expectations: the reasonable expectation rule from neoclassical contract theory. Under this principle, the understanding of a significant portion of the participants would govern the interpretation.

The other option for an understanding principle—the plain meaning rule—would fail to achieve ERISA's fundamental policy goals. The plain meaning rule was developed for the express purpose of frustrating the reasonable expectations of individuals like plan participants. Justice Oliver Wendell Holmes, a leading proponent of the objective plain meaning principle, acknowledged that the principle led to court interpretation:

If it turns out that one meant one thing and the other another[,] the only choice possible . . . is either to hold both parties to the judge's interpretation . . . or to allow the contract to be avoided The latter course not only would greatly enhance the difficulty of enforcing contracts . . . but would run against a plain principle of justice. For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English³⁸⁶

And that court imposed interpretation was not that of the participants:

If I am right it will be a slow business for our people to reach rational views, assuming that we are allowed to work peaceably to that end [And] competition from new races will cut deeper than working men's disputes and will test whether we can hang together and can fight³⁸⁷

386. Oliver Wendell Holmes, *The Theory of Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

387. Oliver Wendell Holmes, *Law and the Court, Speech at the Harvard Law School Association of New York Dinner* (Feb. 15, 1913), in *THE HOLMES READER* 66 (Julius J. Marke ed., 2d ed. 1964).

Samuel Williston, another leading proponent of the objective plain meaning principle, recognized that the principle reflects the interests of those groups in power and not the majority of the people:

[I]t has only been a section of the people, and, until recently, not a very large section that has had a hand in the work [of law]. If [a legal] result was in accordance with the *mores* of the rest of the people it could often only be because it was the habit of the masses to submit to what they could not help.³⁸⁸

Later critics of the plain meaning principle noted its tendency to sacrifice the lay person to those in power.³⁸⁹ Choice of the reasonable expectation principle, as mandated by the policies of ERISA, would merely comport the court-imposed interpretation with democratic principles.

With respect to the second interpretive step, only one of the possible ambiguity principles adequately supports the reasonable expectation principle: the partial-extrinsic evidence principle. This interpretive step is superior to the others for the following reasons. First, the reasonable expectation of the participants is likely to be embedded in and typified by extrinsic evidence, such as oral representations and written materials. Second, lay testimony on word usage would also be necessary to satisfy the demands of the reasonable expectation principle. Third, the use of extrinsic evidence should not be limited to situations in which there is an ambiguity, otherwise courts cannot determine the reasonable expectations of the participants. Exclusion of extrinsic evidence in the unambiguous situation, or exclusion of all extrinsic evidence, does not facilitate finding the expectations of the participants. Fourth, the partial-extrinsic evidence principle permits the court to bar technical evidence introduced by plan administrators in the same way that courts currently bar employers from introducing technical evidence in the interpretation of collective bargaining agreements. Thus, ERISA's use of the partial-extrinsic evidence principle is geared not to using industry custom or

388. SAMUEL WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 11 (1929).

389. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 242-43 (1968) (Objective standards "may exempt those who . . . are obviously grossly incapable, but apart from this, if men are too weak in understanding or in will-power, they must be sacrificed to the common good."); Austin T. Wright, *Opposition of the Law to Business Usages*, 26 COLUM. L. REV. 917, 929 (1926) ("[A]s to the standardized contracts . . . the group whose understandings determines the meaning . . . is a smaller one.").

bargaining history, but to admitting evidence bearing on the participant's reasonable expectations.

With respect to the default principle, obviously only a construction in favor of the participants—the *contra proferentem* principle—comports with the policy of protecting the reasonable expectations of the participants. The acceptance of the plan administrator's interpretation clearly frustrates ERISA's policy mandate because it rarely is made with participant expectations in mind. However, construction of the plan documents need not be the one demanded by a particular litigating participant. ERISA only mandates the protection of the reasonable expectations of the participants.

B. The Policy of Fostering Plan Growth

The three component parts of the ERISA plan interpretive rule suggested by this Article do not conflict with the other major ERISA policy—fostering plan growth. Under the congressional scheme, plan growth is fostered by tax subsidies to management employees. The interpretive rule chosen by this Article does not adversely affect tax subsidies. The interpretive rule, like most interpretive rules, leaves tax subsidies in place and plan costs within the control of management employees.

The plan interpretive rule suggested by this Article will not increase plan costs in the same fashion as congressionally-mandated participation and fiduciary rules, or the vesting and funding rules. Employers cannot directly control congressional mandates. However, employers can control the impact of the interpretive rule. The interpretive rule suggested by this Article does not increase a particular plan's costs over those already promised by the sponsoring employers, because it is limited to merely enforcing promises as understood by a certain number of participants. Thus, the impact of this interpretive rule is under the control of sponsoring employers. Costs of litigation and settlement can be reduced through careful wording and representations. Insurance companies exist under similar interpretive rules and continue to thrive.

The interpretive rule suggested by this Article does not discourage new sponsoring employers from adopting new plans. Rather, the rule only adversely affects those sponsoring employers that engage in reprehensible practices. Employers adopting new plans to benefit employees seldom intend to engage in those reprehensible practices. Ethically, employers that slyly mislead their employees through the use of non-understandable language or deceptive representations, either intentionally or through negligence, should bear the loss. By passing ERISA, Congress intended to allocate the risk of loss to employers.

C. Specific ERISA Provisions

Not only does the ERISA plan interpretive rule selected by this Article serve the fundamental purposes of ERISA, but the rule also comports with the statute itself. ERISA's penchant for lay language mandates the reasonable expectation principle. In addition, ERISA's prudent person standard mandates the *contra proferentem* principle.

1. Layman's Language

ERISA expressly takes into account that the understanding of rank and file participants may not be up to the level of the fiduciary's attorney. The statute requires that summary plan descriptions and summary annual reports delivered to participants contain language understandable by the average participant. Section 102(a)(1) states: "The summary plan description . . . shall be written in a manner calculated to be *understood by the average plan participant*, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."³⁹⁰ Section 104(b)(3) states: "[T]he administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan[,] such other material as is necessary to *fairly summarize* the latest annual report."³⁹¹

Employer compliance with the provision of understandable summary annual reports was so weak as to prompt Department of Labor regulations specifying the language of those reports.³⁹² One of Congress' major pre-ERISA concerns was that participants could not understand the technical language used in plans nor the misleading and incomprehensible plan booklets.³⁹³ The only plan interpretive component that

390. Employee Retirement Income Security Act of 1974 § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988) (emphasis added); 29 C.F.R. § 2520.102-2(a) (1994).

391. *Id.* § 104 (b)(3), 29 U.S.C. § 1024(b)(3) (1988) (emphasis added).

392. 29 C.F.R. § 2520.104b-10(d) (1994). Compare 41 Fed. Reg. 32,522, 35,528 (Aug. 3, 1976) (temporary regulation allowed sponsor to add information to summary annual report) with 44 Fed. Reg. 19,400, 19,402 (April 3, 1979) (rejecting sponsor additions to summary annual report since uniform format more understandable than sponsor's variable format). See also 29 C.F.R. § 2520.104b-5 (1994) (specifying the form of the ERISA notice of participant rights).

393. See *infra* note 401 and accompanying text (technical language) and *supra* note 125 and accompanying text (incomprehensible language).

recognizes participant understanding and strives to protect it is the reasonable expectation principle.

It would be a mistake to select the plain meaning principle, which would impose the fiduciary lawyer's understanding. Choosing the plain meaning principle as a component of the plan interpretive rule would clearly defeat Congress' goal that participants understand their plans. There is a difference between the elite and lay understanding of plan language. Congress opted for the lay understanding. Some circuit courts have correctly followed congressional intent, adopting the lay understanding of plan language. When there is a conflict between the summary plan description (which is actually given to a participant) and the plan document (usually made available for a participant's inspection), these courts recognize the plan's terms as those specified in the summary plan description.³⁹⁴ If sponsoring employers desire to impose their will through ERISA plans, their lawyers need to use language understandable by lay persons.

2. Prudent Person Standard

The real question behind the plan interpretive rule is the standard under which the court will review the interpretation of the plan documents by the plan administrator. ERISA provides such a standard.

The plan administrator is to behave as a prudent person acting in a similar function for a similar entity:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a *prudent man acting in a like capacity* and familiar with such matters would use in the conduct of an *enterprise of a like character and with like aims* . . . and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter³⁹⁵

The most similar entity providing benefits for numerous beneficiaries is an insurance company. In fact, many of the same insurance compa-

394. See, e.g., *Heidegerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990) (ERISA "contemplates that the summary will be an employee's primary source of information regarding employee benefits, and employees are entitled to rely on the descriptions contained in the summary. To allow the Plan to contain different terms that supersede the terms of the [summary plan description] would defeat the purpose of providing the employees with summaries."); accord *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140 (4th Cir. 1993); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-82 (5th Cir. 1991); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir. 1990). *Contra* *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1318 (3d Cir. 1991).

395. Employee Retirement Income Security Act of 1974 § 406(1)(B), (D), 29 U.S.C. § 1104(1)(B), (D) (1988) (emphasis added).

nies administer contracts under ERISA plans and non-ERISA plans.³⁹⁶ One would have thought that this prudent behavior provision means that the behavior in both instances would be the same. Yet these plan administrators contend, despite the prudent person provision, that they can ignore the *contra proferentem* principle that would constrain their interpretive powers under insurance law merely by providing an interpretive discretion grant in the plan documents. This can only continue so long as the circuit courts continue sleeping.³⁹⁷

Congress imposed minimum standards of behavior on plan administrators with ERISA.³⁹⁸ The prudent person standard under section

396. See, e.g., Employee Retirement Income Security Act of 1974 § 4(b), 29 U.S.C. § 1003(b) (1988) (ERISA does not apply to governmental plans, church plans that have not made the ERISA coverage election, worker's compensation plans, alien plans, and excess benefit plans for the highly compensated); *Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 799-800 (10th Cir. 1985) (applying Oklahoma insurance law, the *contra proferentem* principle, to a church plan not covered by ERISA).

397. For courts not sleeping, see *Witmeier v. Kilroy*, 788 F.2d 1021, 1025 (4th Cir. 1986) (trustees acted in a reasonable and prudent manner); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 334 (3d Cir. 1984) (using prudent person principle if the decision affects a class and not just one individual); *Pierce v. National Elec. Contractors Ass'n-Int'l Bhd. of Elec. Workers Welfare Trust Fund*, 620 F.2d 589, 591 (6th Cir. 1978) (agreeing with district court opinion using the prudent man standard to review a trustee amendment reducing extended welfare plan coverage), *cert. denied*, 449 U.S. 1015 (1980).

Contra Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984) (noting the prudent person standard but when reviewing benefit claim denial uses the arbitrary and capricious standard); *Allen v. United Mine Workers 1979 Benefit Plan & Trust*, 726 F.2d 352, 353-54 (7th Cir. 1984) (rejecting the prudent person standard for the arbitrary and capricious standard when reviewing a benefit denial); *Palino v. Casey*, 664 F.2d 854, 857-58 (1st Cir. 1981) (same).

One reason for the failure to follow the statutory standard for review of plan administrator action may be the trust law use of the standard also for investment purposes. See RESTATEMENT (SECOND) OF TRUSTS § 227 (1959) (prudent person standard for investments); BOGERT & BOGERT, *supra* note 212, § 612, at 8 (same); 3 SCOTT & FRATCHER, *supra* note 212, § 227, at 431 (same). Courts apparently neglect that the standard also applies to other fiduciary actions. See RESTATEMENT (SECOND) OF TRUSTS § 174 (1959) (prudent person standard for administering the trust); BOGERT & BOGERT, *supra* note 212, § 541, at 158 (same); 2 SCOTT & FRATCHER, *supra* note 212, § 227, at 466 (same).

398. 1 LEGISLATIVE HISTORY, *supra* note 4, at 204 (Javits's introduction of bill: "[T]he legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system."), 2 LEGISLATIVE HISTORY, *supra* note 4, at 1633 (Bentsen's floor debate: "The purpose of this legislation is not to establish an ideal pension plan, but rather set up certain minimum standards to assure that all workers receive the pension

406(1)(B) demands, at a minimum, the use of the same *contra proferentem* principle used by all the states under their insurance laws.³⁹⁹ This minimum standard certainly rejects the default principle of accepting the trustee's interpretation. No state court rule applies a similar standard for any similar functionary working for any similar entity. The trustee's acceptance rule is only used in some states for testamentary trusts, which in no way constitutes an entity similar to an ERISA plan.⁴⁰⁰

D. Legislative History

The ERISA plan interpretive rule suggested by this Article also comports with the legislative history of ERISA. As discussed in Part II of this Article, Congress stated that trust law had failed pre-ERISA participants and incorrectly led to far too technical interpretations. Further, Congress specifically stated that the application of trust law required modification before its use on ERISA plans. Therefore, Congress rejected the old trust law interpretive rules then prevalent for pre-ERISA plans. Recall that the LMRA plan interpretive rule's components are the plain meaning principle, the extrinsic evidence principle, and the trustee's acceptance principle. This Article's plan interpretive rule consists of the reasonable expectation principle, the partial-extrinsic evidence principle, and the *contra proferentem* principle. As the following discussion shows, each of the component elements of the rule suggested by this Article is more in keeping with ERISA's legislative history.

1. Against Technical Wording

ERISA's legislative history specifically mentioned, as one of the shortcomings of the pre-ERISA plan interpretive rule, that the rule relied too much on technical document wording: "Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording. Thus, under present law, accumulated pension credits can be lost . . ."⁴⁰¹ Concerns about

benefits that they have earned.").

399. 2 COUCH, *supra* note 206, § 15:83, at 399 n.4 (citing cases from D.C. and 47 states with no cases cited for contrary position); 13 APPELMAN & APPELMAN, *supra* note 39, § 7401, at 197 n.1 (citing cases from D.C. and 48 states including 3 not included in list of 47 by Couch); WINDT, *supra* note 207, § 6.02, at 286 (applied in all jurisdictions).

400. See *supra* notes 127-30 and accompanying text.

401. S. REP. NO. 127, *supra* note 18, at 5, reprinted in 1974 U.S.C.C.A.N. 4838, 4842; H.R. REP. NO. 533, *supra* note 18, at 4, reprinted in 1974 U.S.C.C.A.N. 4639, 4643 (same).

technical wording arise in two plan interpretive components: the plain meaning principle and the use of extrinsic evidence to ascertain technical meanings. These two components were used by almost all pre-ERISA courts, whether under state law or under LMRA.

There could not be a more clear condemnation of the plain meaning principle and use of extrinsic evidence on technical matters. Both were applied by courts dealing with employee benefit plans. Congress clearly intended that this would be one rule eliminated by ERISA preemption. The only component selections consistent with this desire to eliminate technical interpretations is the reasonable expectation principle and the partial-extrinsic evidence principle.

2. *Trust Law Failure*

Congress also noted that the conventional trust law had failed during the pre-ERISA period. ERISA's legislative history stated that conventional trust law is insufficient to protect the reasonable expectations of the participants.⁴⁰²

The only trust law interpretive rule prevalent during the pre-ERISA era was the LMRA interpretive rule. This rule, as previously stated, consisted of the plain meaning principle, the extrinsic evidence principle barring extrinsic evidence in the absence of an ambiguity, and the trustee's acceptance principle. Continuation of the pre-ERISA plan interpretive rule in federal court opinions today only continues this failure and clearly was not what Congress expected.

It is as if the federal judiciary were asleep when ERISA was passed. When the offending elements of conventional trust law are eliminated, the plan interpretive rule that remains consists of the reasonable expectation principle, the partial-extrinsic evidence principle or anti-extrinsic evidence principle, and the *contra proferentem* principle.

3. *Modification of Trust Law*

Congress also intended to eliminate the trustee's acceptance rule as the default rule. ERISA's legislative history indicated that trust law rules, one of which is the trustee's acceptance rule, were to be used under ERISA only after modification to reflect the differences between typical

402. See *supra* notes 113, 129, and accompanying text.

trusts designed for the settlor's donative purposes and employee benefit plans, which embody property of participants.⁴⁰³

Some of the differences between trusts and employee benefit plans include: (1) pension trusts are tax-exempt and individuals need not invest by reference to tax consequences; (2) pension trusts need no special provisions to balance needs of income and principal beneficiaries; (3) pension trusts receive a continual infusion of cash from the settlor; (4) participants are numerous; (5) participants are presumed to have comparatively small interests in the whole and so are unlikely to invoke legal protection for their interests, therefore participants require legal protection; and (6) participants are presumed to be unsophisticated and likely to be cheated unless the law provides them special help.⁴⁰⁴

The purpose of the trustee's acceptance rule is to prevent consumption of the trust estate by litigation fees. This is not a problem for an ERISA plan. A plan is not limited in assets like a conventional trust. A conventional trust increases through income and gains attributable to its original capital. In contrast, a plan receives continuing infusions of new money from subsequent employer contributions.

In addition, ERISA plans generally do not pay legal fees. If the plan wins the lawsuit, the employer generally pays the legal fees to obtain the income tax deduction that plans can not obtain.⁴⁰⁵ Any expense incurred by an employer in connection with an employee benefit plan is deductible under Internal Revenue Code section 162 for trade or business expenses or section 212 for production of income expenses to the extent they are ordinary and necessary.⁴⁰⁶ If the fiduciary has paid the legal fees, the plan may reimburse fiduciary legal fees⁴⁰⁷ and be reimbursed by the employer desirous of the deduction. Or the fiduciary can seek legal fees under ERISA from the participant.⁴⁰⁸

403. See *supra* notes 113, 129, and accompanying text.

404. See Daniel C. Knickerbocker, Jr., *Trust Law with a Difference: An Overview of ERISA Fiduciary Responsibility*, 23 REAL PROP. PROB. & TR. J. 633, 634-35 (1989).

405. See 5A RABKIN & JOHNSON, *supra* note 204, at 13-1073 (defined benefit plan: company intends to pay any expenses of administering the trust); *id.* at 13-1511 (money purchase plan: expenses of administering the plan may be paid by the employer); *id.* at 13-2072 (profit-sharing plan: company intends to pay any expenses of administering the trust).

The plan cannot use the deduction since it ordinarily does not pay income taxes. Internal Revenue Code of 1954 § 501(A), 26 U.S.C. § 501(a) (1988).

406. 26 C.F.R. § 1.404(a)-3(d) (1994).

407. See *Firstier Bank v. Zeller*, 16 F.3d 907, 913 (8th Cir. 1994) (where provided in plan); *Leigh v. Engle*, 858 F.2d 361, 369 (7th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); see 3 SCOTT & FRATCHER, *supra* note 212, § 188.4, at 66-67 (trust law).

408. In a benefits-due lawsuit the court may award, in its discretion, attorney fees to either party. Employee Retirement Income Security Act of 1974 § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1988). To determine whether to award attorney fees, the circuit

If the plan loses the lawsuit, either the plan fiduciary or employer will be liable for costs of the unnecessary litigation. Wrongful denial of benefits always involves a fiduciary breach.⁴⁰⁹ Congressional intent was to incorporate certain trust law fiduciary standards into employee benefit plans through ERISA section 404(a).⁴¹⁰ Among those fiduciary standards of trust law are duties running to the beneficiaries in the payment of trust benefits.⁴¹¹ Congress clearly indicated that this trust duty applied to employee benefit plans under ERISA.⁴¹²

courts have developed a five-factor test, the greater presence of which leads to the award: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy the fee award; (3) whether the award against a particular party will deter other persons acting under similar circumstances; (4) whether the party requesting the fees sought to benefit all participants and beneficiaries of the plan or to resolve significant questions regarding ERISA; and (5) the relative merits of the parties' positions. *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986); *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983); *Miles v. New York State Teamsters Conference Pension Plan and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 602 n.9 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Marquardt v. North Am. Car Corp.*, 652 F.2d 715, 717 (7th Cir. 1981); *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980); *Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978). Some circuits also apply the test to prevailing defendants, *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984), but others, due to the limited resources of participants look only to factors two and five. *Chicago Painters & Decorators Pension v. Karr Bros. Inc.*, 755 F.2d 1285, 1292 (7th Cir. 1985); *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984).

409. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 152 (1985) (concurring opinion).

410. *E.g.*, H.R. REP. NO. 533, *supra* note 18, at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts."); *see also* Employee Retirement Income Security Act § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. 1993).

411. *E.g.*, RESTATEMENT (SECOND) OF TRUSTS § 2 (1959) ("A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person . . ."); *id.* § 182 ("Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him . . ."); RESTATEMENT OF TRUSTS §§ 2, 182 (1935); BOGERT & BOGERT, *supra* note 212, § 814, at 314; 2A SCOTT & FRATCHER, *supra* note 212, § 182, at 550.

412. H.R. CONF. REP. NO. 1280, *supra* note 69, at 301 & n.1, *reprinted in* 1974 U.S.C.C.A.N. at 5081 & n.1 (procedures for delegating fiduciary duties include "allocation or delegation of duties with respect to payment of benefits").

If the plan paid the expenses, the fiduciary whose breach of fiduciary duty caused the loss is liable to reimburse the plan for any losses to the plan.⁴¹³ If the fiduciary paid the expenses, the plan cannot reimburse the fiduciary. Under ERISA, the fiduciary is entitled to reimbursement only for reasonable expenses properly and actually incurred, not those from breaches of fiduciary duties.⁴¹⁴

However, the employer may indemnify the fiduciary. Department of Labor regulations, however, permit indemnity agreements only to the extent that insurance is available.⁴¹⁵ ERISA permits plans to purchase insurance for a fiduciary, if the insurer has recourse against the fiduciary for breach of fiduciary duty.⁴¹⁶ The employer is permitted to purchase insurance for the fiduciary without the recourse limitation.⁴¹⁷

Either the fiduciary or the employer, not the plan, will bear the cost of attorney fees. This is the congressional mechanism under ERISA to replace the function of the trustee's acceptance rule under trust law. The trustee's acceptance rule is at best redundant for employee benefit plans.

E. Distinctions

Courts considering interpretive rules for employee benefit plans have made three distinctions. Before ERISA's passage, courts divided employee benefit plans into two groups: LMRA plans to which a discretionary trust theory interpretive rule applied and the non-LMRA plans to which a classical contract theory interpretive rule applied. More recently, the circuit courts have divided employee benefit plans between (1) plans providing interpretive discretion to which the discretionary trust interpretive rule still applies, and (2) those not providing plan interpretive discretion to which a contractual interpretive rule applies. Some circuit courts further subdivide the last group between those plans with insurance contracts to which the *contra proferentem* principle applies and those plans without insurance contracts.

413. Employee Retirement Income Security Act of 1974 § 409, 29 U.S.C. § 1109 (1988).

414. *Id.* §§ 408(c)(2), 409(a), 410(a), 29 U.S.C. §§ 1108(c)(2) (fiduciary reimbursement for reasonable expenses); *id.* § 1109(a) (fiduciary personally liable for breaches of fiduciary duty); *id.* § 1110(a) (agreement to relieve a fiduciary of fiduciary liability is void).

415. 29 C.F.R. § 2509.75-4 (1990).

416. Employee Retirement Income Security Act of 1974 § 410(b), 29 U.S.C. § 1110(b) (1988).

417. *Id.* See generally John R. Cornell & James J. Litter, *Indemnification of Fiduciary and Employee Litigation Costs Under ERISA*, 25 B.C. L. REV. 1 (1983).

But the component parts of the ERISA plan interpretive rule suggested by this Article make no such distinctions. The same ERISA interpretive rule should apply to all ERISA plans.

1. LMRA Distinction

There is no reason to single out LMRA plans for a special interpretive rule that favors the plan administrator. The LMRA plans were what caused Congress to adopt ERISA to prevent future union and management malfeasance.⁴¹⁸ Therefore, LMRA plans should be subject to an ERISA plan interpretive rule different from the prior one.

ERISA eliminated the jurisdictional rationale behind the LMRA plan interpretive rule.⁴¹⁹ Courts no longer need it.

LMRA plans, from the participant's viewpoint, are adhesion contracts lacking in sufficient negotiation on behalf of the participant, as much as any other ERISA plan.⁴²⁰ LMRA plans should be subject to the same reasonable expectation principle and *contra proferentem* principle as are other ERISA plans.

Moreover, ERISA's preservation of prior federal law does not apply to the LMRA plan interpretive rule because it developed as a branch of state law.⁴²¹ ERISA eradicated such state law.

418. See *supra* note 100 and accompanying text for management failures to prevent LMRA plan fiascoses; see also *supra* note 99 and accompanying text for union incompetence to avoid collectively-bargained single-employer plan fiascoses.

419. *Guiles v. University of Mich. Bd. of Regents*, 483 N.W.2d 637, 641 (Mich. Ct. App. 1992) (the Supreme Court rejected the LMRA plan interpretive rule); see *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (ERISA eliminated the jurisdictional purpose of the arbitrary and capricious standard by providing jurisdiction, so LMRA principles do not apply to the benefits-due lawsuit).

420. See *Jones v. Mountain States Tel. & Tel. Co.*, 670 P.2d 1305, 1315 (Idaho Ct. App. 1983) (recognizing that a plan under a collective bargaining agreement is sufficiently similar to an insurance contract to subject it to the *contra proferentem* principle).

421. *Bricklayers, Masons & Plasterers Int'l Union, Local Union No. 15 v. Stuart Plastering Co., Inc.*, 512 F.2d 1017, 1025 (5th Cir. 1975) (federal law impinges on LMRA plans only to prohibit payment of moneys to union officials, otherwise state law controls); accord *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (LMRA principles have no application to the benefits-due lawsuit); see *Hobbs v. Lewis*, 159 F. Supp. 282, 286 (D.D.C. 1958) (first LMRA case to use arbitrary and capricious standard, citing only federal cases decided under state law for the proposition); see also Employee Retirement Income Security Act of 1974 §§ 514(a), (d), 29 U.S.C. §§ 1144(a), (d) (1988) (provisions addressing preemption of state law and how ERISA leaves intact other federal law).

2. Discretion Distinction

There is no reason to provide a special interpretive rule that favors the plan administrator when plan documents grant the administrator discretion. Pre-ERISA courts routinely ruled plan interpretive discretion provisions to be of no effect and proceeded to reject the trustee's acceptance rule.⁴²²

Even state courts using discretionary trust theory do not uniformly use the trustee's acceptance rule, with many state courts adopting the *contra proferentem* principle for the interpretive discretion situation.⁴²³ Thus, the trustee's acceptance rule is not a well-settled rule of common law.

Nothing in the legislative history of ERISA suggests a discretion distinction. Further, courts considering ERISA plans prior to 1989 ignored plan interpretive discretion provisions which called for the application of the trustee's acceptance rule even in cases denying the plan interpretive discretion.⁴²⁴ This action reflects an absence of a rationale for the distinction.

The Supreme Court has yet to specify an ERISA plan interpretive rule for the interpretive discretion situation. The *Bruch* decision, requiring de novo review for the absence of interpretive discretion, dealt with a plan not granting interpretive discretion.⁴²⁵ Thus, *Bruch* does not necessarily require the trustee's acceptance rule.

Moreover, the discretionary grant situation typifies the situation under which participants need ERISA's protection. ERISA recognizes employee benefit plans as non-negotiated contracts that require legislative intervention to insure fair provisions for participants.⁴²⁶ Discretionary grant provisions are likely to arise in that situation where employees lack the negotiating power to prevent them. It is the duty of the courts to assure protection of participants' reasonable expectations for benefits through the ERISA plan interpretive rule consisting of the reasonable expectation principle and the *contra proferentem* principle.

422. See *supra* notes 237-38 and accompanying text.

423. See *supra* note 219 and accompanying text.

424. See *supra* notes 257-62, 279-89.

425. *Firestone Tire & Rubber Co.*, 489 U.S. 101, 111 (1989). *But see id.* at 111 (dicta) (court guided by trust principles provide a deferential review for discretionary grants); *id.* at 115 (specification of de novo review only for the absence of discretionary grants suggests some other rule for presence of discretionary grant).

426. See *supra* notes 155-59 and accompanying text.

3. *Insurance Distinction*

There is no reason to single out plans without insurance contracts for a special interpretive rule that favors the plan administrator. The adhesion contract nature of employee benefit plans does not depend on the investment of the plan assets in insurance contracts, but on the absence of an employee's negotiating power when accepting employment at reduced salary to cover contributions to the employee benefit plan.

Plans without insurance contracts are likely to need more supervision. Insurance companies administer numerous employee benefit plans with large legal departments and will have more expertise in interpreting employee benefit plans than plan administrators of a single employer's plan.

Furthermore, insurance companies are regulated by state agencies. ERISA leaves this regulation intact,⁴²⁷ so insurance companies will have some state supervision. Employee benefit plans without those insurance contracts will receive no such supervision.

V. CONCLUSION

When developing the federal common law of ERISA, courts cannot choose rules willy-nilly. Judges must not draw upon rules articulated by pre-ERISA case law or draw upon some analogy to well-accepted state law. Instead, courts must develop common law rules that consider the history, foundations, and policies of ERISA. In almost every case, federal courts have yet to conduct this process. The result of this failure has been a body of ERISA law extremely hostile to participants and the policies Congress intended ERISA to foster.

There is some reason for hope for finally achieving justice through the federal judiciary. This becomes evident from an examination of the progress of the plan interpretive rule. Prior to ERISA's passage, employee benefit law engaged in two struggles. The first dealt with the ownership of plan property. State courts resolved this battle to recognize plan property as belonging to participants and began the second struggle to develop common law rules to insure the participants eventually

427. Employee Retirement Income Security Act of 1974 § 514(b)(2), 29 U.S.C. § 514(b)(2) (1988).

received their fair share of the plan property. Consequently, state courts, upon ERISA's passage, were developing a plan interpretive rule using the *contra proferentem* principle. These state courts' efforts did not progress quickly enough, however, to adequately protect participants' property. Congress passed ERISA to impose certain plan provisions to provide that protection.

Upon ERISA's passage, the federal courts lagged behind the state courts in the two struggles. The federal courts had not yet resolved the first struggle; some courts still recognized ownership of plan property in the employer. Consequently, some federal courts had developed a plan interpretive rule accepting the plan interpretation of the trustee as agent of the employer. After ERISA's passage, the federal courts continued to lag behind, using ERISA's preemption to eliminate the state courts' *contra proferentem* principle and imposing their trustee's acceptance interpretive rule on all ERISA plans.

The Supreme Court redirected the federal judiciary in 1989 with respect to the plan interpretive rule. Incrementally, the federal judiciary began to resolve the struggles. Although seldom following the proper principles for the development of the federal common law of ERISA, the federal judiciary has—for a narrow sub-set of ERISA plans—developed a plan interpretive rule fostering the policies of ERISA. The interpretive rule uses a lay understanding principle, allows extrinsic evidence to determine that understanding as well as resolve ambiguities, and employs a default principle of construing the plan in favor of participants. Unfortunately, this interpretive rule is used only by some circuits, and only if the plan denies the plan administrator plan interpretive discretion. Once the judiciary and participants' bar understand the foundations for this minor success, however, they can apply the proper plan interpretive rule to all ERISA plans and, hopefully, develop all the proper ERISA rules for the benefits-due lawsuit.