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ERISA: Reformulating the Federal Common Law For Plan Interpretation

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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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². As used in this Article, the word “participant” includes beneficiaries, if applicable.
state trust law to recover their benefits in the courts. 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. The procedural obstacles varied depending on the recovery theory used.

Under state contract law, litigants developed four recovery theories. 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, effectively providing a block to the participant's recovery. Consequently, many plans had provisions stating

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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].").


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.\footnote{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).}

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.\footnote{See \textit{RESTATEMENT OF CONTRACTS} § 270 (1932).} The participant had no
rights until he satisfied all conditions, including age and service.\footnote{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).}

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 plan\footnote{See \textit{RESTATEMENT OF CONTRACTS} § 53 cmt. a (1932).} to divest the participant of his
(Illinois law), \textit{aff’d}, 234 F.2d 942 (7th Cir.), \textit{cert. denied}, 352 U.S. 918 (1956).}

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.\footnote{See \textit{RESTATEMENT OF CONTRACTS} § 90 (1932).} Employers frequently made statements which destroyed
reasonable reliance.\footnote{See, e.g., Hughes v. Encyclopedia Britannica, Inc., 117 N.E.2d 880, 882-83 (Ill.
App. Ct. 1954) (cert. denied).}

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
(codified as amended at 29 U.S.C. § 141-187 (1988)).} required employers to fund multi-
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 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 . . .

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16. See Restatement of Trusts § 75 (1935).
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).
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.
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).


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.

(5) participants may not recover extracontractual damages under ERISA;\textsuperscript{32} and
(6) successful participants may not recover legal fees except in rare instances.\textsuperscript{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 \textit{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


\textsuperscript{33}E.g., Eaves v. Penn, 587 F.2d 453, 465 (10th Cir. 1978); \textit{contra} Ann Bertino, \textit{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.
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.”

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.

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 altogether or punishing employees. In particular, these rules may

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 pre-determine 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.\textsuperscript{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.

\textbf{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.\textsuperscript{40} Subsequent efforts have developed two ways to get around ERISA's preemption in some narrow

\textsuperscript{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).

\textsuperscript{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.

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. 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. Other critics have recommended amending ERISA to permit an exception to ERISA preemption for the benefits-due lawsuit.

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


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. The second approach would establish federal procedures and judicial remedies for improper claims handling only with respect to welfare plans. 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. 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. 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.”

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 select 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.

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

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.\(^\text{55}\)

Since ERISA has a preemption provision eliminating all state law insofar as it relates to employee benefit plans,\(^\text{56}\) federalism is of little concern under ERISA. Under the federalist approach, preemption itself constitutes the authorization to make federal common law\(^\text{57}\) 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.\(^\text{58}\)

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.\(^\text{59}\) 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.\(^\text{60}\)

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; Doemberg, 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.").


\(^{57}\) Doemberg, supra note 51, at 777; Merrill, supra note 51, at 36-39; Redish, supra note 51, at 790-92.


\(^{59}\) 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, acquire jurisdiction predominantly by federal question jurisdiction arising from federal statute. 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.

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. For these commentators, this limit is not compelled by any statutory or constitutional authority, but instead is imposed by pru-
The limitations are derived by analogy to the congressional authority to pass statutes contained in *McCulloch v. Maryland*. 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. Justice John Marshall interpreted this to mean that Congress can pass any act in furtherance of a listed power. 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.

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

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70. 1974 U.S.C.C.A.N. XCII.
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.” Since the benefits-due lawsuit was not specifically provided for in LMRA, it arose and developed under a federal common law. LMRA benefits-due lawsuits were brought both under LMRA’s contractual section for collective bargaining agreements and under LMRA’s trust section.

73. 120 Cong. Rec. 29,933 (1974), reprinted in 3 Legislative History, supra note 4, at 4745.
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, 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." 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. Although courts generally use committee reports to confirm statutory construction or to determine the meaning of ambiguous language and often treat the explanations of committee reports made by a committee member or the committee chairman merely as supplemental committee reports, the Supreme Court has used such items to imply the congressional authority to create federal common law for LMRA.

78. 120 CONG. REC. S29,942 (daily ed. Aug. 22, 1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 4, at 4771.
The Supreme Court similarly has done so for ERISA. In *Franchise Tax Board v. Construction Laborers Vacation Trust* 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. Brennan, in his concurring opinion in *Massachusetts Mutual Life Insurance Company v. Russell*, again accepted Senator Javits' statement as the directive supported by Williams' "indirect" directive involving the LMRA. In *Pilot Life Insurance Company v. Dedeaux*, 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. Hence, ERISA actions must rely upon federal common law since state law is gone.

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

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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).
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, the LMRA rule of acceptance of the trustee's plan interpretation, and the LMRA anti-jury rule in ERISA cases. The Supreme Court also has used this directive as authority to incorporate into ERISA some LMRA procedural rules. As a result, some courts and commentators 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. 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. Moreover, the two statutes

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.
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).
97. H.R. REP. NO. 533, supra note 28, 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.\textsuperscript{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.\textsuperscript{100} The second cause is trustee malfeasance with respect to plans of the International Brotherhood of Teamsters.\textsuperscript{101}

Another possible explanation for the LMRA reference could be that courts should use state law as a source of rules. In \textit{Textile Workers Union v. Lincoln Mills of Alabama},\textsuperscript{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.\textsuperscript{103} The Supreme Court has similarly incorporated state law into ERISA. Justice Brennan, in his concurring opinion in \textit{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

\begin{itemize}
\item \textsuperscript{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 . . . .")
\item \textsuperscript{100} 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).
\item \textsuperscript{101} \textit{Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.,} 89th Cong., 2d Sess. 128 (1966).
\item \textsuperscript{103} 353 U.S. 448 (1957).
\end{itemize}
state anti-trust law. Then, he similarly examined ERISA's legislative history and found a congressional intent to incorporate state trust 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.

In Firestone Tire and Rubber Co. v. Bruch, Justice O'Connor made Justice Brennan's view law. Further, since Justice Marshall had previously used trust 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. In Ingersoll-Rand Co. v. McClendon, 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

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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.


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. Bihl v. Eisenberg, 113 S. Ct. 61 (1992) (disparaging the idea); McRae v. Seaarers’ 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.


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


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

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.

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.

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).

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

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).

1. Protection of Participant Expectations

The policy of participant protection was the concern of the labor committees. 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.

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."

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

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documents must inform participants of their rights.\footnote{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.\footnote{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.\footnote{126} Both the Senate and House Labor Committees indicated trust law entered ERISA only for this purpose: "The 

\textit{fiduciary responsibility section}, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the \textit{law of trusts}."\footnote{127} The reason was obvious. Trust law had failed in the pre-ERISA benefits-due lawsuit.\footnote{128} Therefore, trust law required modification before courts could apply it to employee benefit plans:

\begin{quote}
(Even 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. \ldots [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],
\end{quote}

\begin{flushright}
128. See supra notes 14-17 and accompanying text and infra notes 247-62 and accompanying text.
\end{flushright}
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{132} Consequently, both the Senate and House Labor Committees provided for very broad remedies.\textsuperscript{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.\textsuperscript{134} Both the Senate and House Labor Committees concluded that the absence of vesting in pension


\textsuperscript{133} See supra note 18 and accompanying text.

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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{142} The Supreme Court has also acknowledged that the congressional concern is that participants receive their promised benefits. \textit{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).

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

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:

[The 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. 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 labor. . . . 151

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 Act . . . . 152

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).


employee may have been made in lieu of additional compensation or some other benefits which he would have received.\textsuperscript{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 \textit{contractual} requirements of vesting or funding."\textsuperscript{154}

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

\begin{footnotesize}


155. \textit{See supra} notes 5-17 and accompanying text for the five pre-ERISA liability theories.

156. \textit{See S. REP. No. 634, 92d Cong., 2d Sess. 111 (1972) (Statement of Javits)} ("While, 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."); \textit{id.}, at 113 (recommending imposition of minimum vesting, funding, and fiduciary standards to overcome plan inadequacies); \textit{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. \textit{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 everyday meanings"); \textit{Wis. STAT. ANN. § 422.303(2)} (West 1988) (consumer credit sale contract must use type of stated size); \textit{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); \textit{UNIF. CONSUMER CREDIT CODE § 2.201, 7 U.L.A. 643-44} (1985) (prohibiting provision setting finance charges above a specified rate). \textit{See generally} 1 E. ALLAN FARNSWORTH, \textit{CONTRACTS} § 4.29, at 517-22
\end{footnotesize}
under general contract theory, one party's duty to the other operates on the low standard of the morals of the marketplace. 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. 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.

159. See, e.g., Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) ("Not honesty alone but the punctilious of an honor the most sensitive is . . . the standard of behavior.") (Cardozo, J.).
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):
[This 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 . . . . If] 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.\textsuperscript{161}

\ldots

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.\textsuperscript{162}

\ldots

The same opposition is voiced for new plans, which invariably assume a large unfunded liability at the outset of the plan . . . .\textsuperscript{163}

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."\textsuperscript{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."\textsuperscript{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

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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.\textsuperscript{166}

The Senate Finance Committee and House Ways and Means Commit-
tee, 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 improve-
ments in pension and related plans. In general, it retains the tax incentives
granted under present law for the purpose of \textit{encouraging the establishment of}
plans which contain socially desirable provisions.\textsuperscript{167}

Present law \textit{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.\ldots

The favorable tax treatment granted qualified plans is substantial.\ldots\textsuperscript{168}

[T]he objective [of the tax portions of ERISA] \textit{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 obligations \ldots.\textsuperscript{169}

A fundamental aspect of present law, which \textit{[the bill] continues, is reliance on}
voluntary action by employers \ldots for the establishment of qualified retirement
plans \ldots [and] \textit{encouraging the establishment} of retirement plans which
contain socially desirable provisions through the granting of tax inducements.
\ldots Since the favorable tax treatment is quite substantial \ldots it is anticipated
that plans \textit{will have a strong inducement to comply} with the new qualification
rules \ldots.\textsuperscript{170}

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

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\item[166.] S. REP. No. 127, supra note 18, at 13, \textit{reprinted in} 1974 U.S.C.C.A.N. 4838,
4849-50; H.R. REP. No. 533, supra note 18, at 9, \textit{reprinted in} 1974 U.S.C.C.A.N. 4639,
4647.
\item[167.] S. REP. No. 383, supra note 136, at 2, \textit{reprinted in} 1974 U.S.C.C.A.N. 4890,
4890 (emphasis added).
\item[168.] S. REP. No. 383, supra note 136, at 2, \textit{reprinted in} 1974 U.S.C.C.A.N. 4890,
4891 (emphasis added); H.R. REP. No. 807, supra note 136, at 2-3, \textit{reprinted in} 1974
\item[169.] S. REP. No. 383, supra note 136, at 10, \textit{reprinted in} 1974 U.S.C.C.A.N. 4890,
4898 (emphasis added); H.R. REP. No. 807, supra note 136, at 8, \textit{reprinted in} 1974
\item[170.] S. REP. No. 383, supra note 136, at 2 (without parallel in House report), 2, 10,
added); H.R. REP. No. 807, supra note 136, at 2-3, 8, 8-9, \textit{reprinted in} 1974
\end{enumerate}
\end{footnotes}
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.\textsuperscript{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.... \textsuperscript{172} It would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy.\textsuperscript{173}

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.\textsuperscript{174}

[Early participation tends to spread the cost of providing employees with adequate pensions more evenly.... \textsuperscript{175}

[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.\textsuperscript{176}

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.\textsuperscript{177} It would be counterproductive to increase employer costs by more rapid vesting to such an extent as to significantly curtail the creation of new


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


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.\(^2\) The scope of the authority is limited by the requirement that the federal common law rule cannot conflict with ERISA principles.\(^3\) In


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

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.


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., Saltaralli 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 (Niemeyer, J., concurring) (equitable estoppel); Reich, 20 F.3d at 32 (non-fiduciary liability); Coar v. Kazimir, 999 F.2d 1413, 1424 (3d Cir.) (set-off for fiduciary breach), cert. denied, 114 S. Ct. 179 (1993); Lumpkin v. Enviroydne 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); Kwachik 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, 502 U.S. 1008 (1992) (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. 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

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.

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.

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.\textsuperscript{190} For ERISA this presently is of little significance, since most circuit courts do not permit jury trial.\textsuperscript{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.

\textbf{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.\textsuperscript{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


\textsuperscript{191} See Flint, \textit{supra} note 1, at 383-93.

\textsuperscript{192} E.g., 4 WILLISTON, \textit{supra} note 190, § 600, at 284-85; 3 CORBIN, \textit{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).

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

\footnote{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.}

\footnote{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.}

\footnote{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 ....").}

\footnote{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 ....").}


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.\textsuperscript{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 \textit{contra proferentem} principle.\textsuperscript{199} One explanation for the \textit{contra proferentem} principle is morality-based: the draftsman created the ambiguity and so should bear the loss.\textsuperscript{200} Of course, if a court did not desire to use the \textit{contra proferentem} principle, which favors participants, the judge needs only to find the language unambiguous.\textsuperscript{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.\textsuperscript{202} In the absence of common meaning, the court selects the meaning of the ignorant party

\begin{itemize}
\item \textsuperscript{198} See supra note 110 and accompanying text.
\item For an advocacy of the application of the \textit{contra proferentem} principle to ERISA plans, see Fisk, supra note 26, at 212.
\item \textsuperscript{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, \textit{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).
\item \textsuperscript{201} See Frederick Schauer, \textit{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.").
\item \textsuperscript{202} RESTATEMENT (SECOND) OF CONTRACTS § 201(a) (1981) ("Where the parties have attached the same meaning . . . it is interpreted in accordance with that meaning . . . "); \textit{id.} § 201 cmt. c; 3 CORBIN, supra note 190, § 538, at 57-75.
\end{itemize}
over the knowledgeable party. 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. 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

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) "[l]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 ... ").


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

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The reasonable 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. 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. Numerous state courts have adopted this principle. Other courts apply the reasonable expectation principle only in the presence of an ambiguity. In practice, these two versions may provide the same result.

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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).


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


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

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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. Huntingdon, 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. Stephenson, 1005
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.

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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.*

First, the objective plain meaning principle is applied. If the plain meaning principle results in ambiguities, property law allows extrinsic evidence to aid interpretation. 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.


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).

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. However, federal common law governing the interpretation of collective bargaining agreements is not exactly the same as the common law of contract. 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. Other than this difference, federal courts generally follow the usual principles of classical contract theory, admitting other extrinsic evidence to resolve ambiguities. In addition, some courts may apply the contra proferentem principle as a last resort.

227. E.g., Stewart v. KHD Deutz of Am., 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 Élec. 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.

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

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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. 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. Therefore, these

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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. In unambiguous cases, courts used the classical contract theory’s plain meaning principle.

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

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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 law); 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., 500 S.W.2d 482, 492 (Mo. Ct. App. 1975) (disability plan, bilateral contract: construe strongly against the employer, citing ambiguity case); Brulotte v. Cormier Hosier 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. 123, 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); *Pssubka*, 264 N.W. at 388 (pension plan, bilateral contract: resolve ambiguities against employer).


Some cases mentioned the rule and then reversed a judgment for the participant. *See, e.g.,* *Jobby 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).


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. Some courts received extrinsic evidence before applying the contra proferentem principle, but others did not. 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. 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.

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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.").


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. When an ambiguity existed, these courts also used the contraproferentem principle. A few pre-ERISA courts using state contract law noted a trust law origin of the contraproferentem principle. Finally, courts using the contractual gratuity theory also developed a default principle of not construing against the employer. 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).


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 contraproferentem 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.\(^\text{243}\)

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.\(^\text{244}\)

\(^{243}\). 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.

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'n's, 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 Prod's. 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. 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. When faced with ambiguities, judges used the extrinsic evidence principle, followed by the contractual contra proferentem principle favoring the employee. 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. However, these courts did not

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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).
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. 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. 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. Further, in dicta, the Court indicated that the term "contract" includes employee benefit plans mentioned in the collective bargaining agreement. 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


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.


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).


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. 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 Circuit applied trust law in LMRA cases. The First, Second, Fifth, Eighth and Ninth 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,
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. Similarly, the trustee's acceptance principle serves as another method to get the matter out of the federal courthouse. This is contrary to the function of ERISA, which was to provide access to the federal courts for ERISA participants.

Nevertheless the District of Columbia, First, Second, Fifth, Eighth, and Ninth Circuits continued to follow the


265. See supra note 18 and accompanying text.


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).


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'r's 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. 1988) (any reasonable resolution of ambiguity by the trustees must be upheld);
LMRA plan interpretive rule in LMRA cases under ERISA. The Third, Fourth, Sixth, and Seventh 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).


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); Wimneyer v. Kilroy, 788 F.2d 1021, 1025 (4th Cir. 1986).


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).

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. 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, First, Second,

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.
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


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


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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 Ninth 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 rule to ERISA cases. 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 (8th Cir. 1987) (recognizing the contra proferentem principle). Only Brown made reference to the plan granting interpretive discretion to the plan administrator.

286. Quinn v. Burlington N. Inc. Pension Plan, 694 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 1344, 1352 (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); Winzer 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 reference to the plan granting 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 Cooper Creamery, 877 F.2d 1415, 1420 (9th Cir. 1989); Smith v. California Metal Trades Ass’n & Int’l Ass’n of Machinists Pension Trust, 654 F.2d 650, 653 (9th Cir. 1981); Gordon v. International Longshoremen’s & Warehousemen’s Union Pac. Maritime Ass’n’s 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. The Eleventh Circuit, formed in 1981 from the Fifth Circuit, followed the Fifth Circuit.

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. 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.

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).


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).

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


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. Neco 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.").

courts rely upon their jurisdiction’s law rather than develop a federal common law.\textsuperscript{295}

\textbf{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 \textit{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.\textsuperscript{296} Justice O’Connor chose to be guided by trust law principles.\textsuperscript{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.\textsuperscript{298} Contract law, as well as trust law, also provides for an abuse of discretion standard when one party is granted discretion.\textsuperscript{299}

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

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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).  

\textsuperscript{296} 489 U.S. 101, 112 (1989).

\textsuperscript{297} Id. at 111.

\textsuperscript{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).

\textsuperscript{299} See Flint, supra note 1, at 372-76.
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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." This is definitely not a well-settled rule of trust law. 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.

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."

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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).


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); McNelly 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); Kunin 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." This is a true statement, but it is also true of the cases where the plan granted the plan administrator interpretive discretion. 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.

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. 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.
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, 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, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and various post-Bruch LMRA cases support the use of the arbitrary and capricious standard in ERISA cases.

For example, 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., 896 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).


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. Kotrotsos 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,
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).


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 Blvd. 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 Blvd. 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).


For post-Bruch LMRA cases to the same effect, see Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan, 23 F.3d 616, 621-22
and Eleventh\textsuperscript{319} Circuits use the LMRA interpretive rule for those

\begin{itemize}
\item \textbf{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 \textit{contra proferentem} principle), \textit{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), \textit{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), \textit{cert. denied}, 498 U.S. 1087 (1991).

For post-\textit{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).

\item \textbf{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 Intl 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 Dists. 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).

\item \textbf{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), \textit{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 \textit{contra proferentem} principle); Blank v. Bethlehem Steel Corp., 926 F.2d 1090, 1093 (11th Cir.) (plan administrator upheld on plain meaning principle), \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{323} Under this test, an interpretation


\textsuperscript{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).

\textsuperscript{322} \textit{Batchelder}, 877 F.2d at 444; \textit{Bayles}, 602 F.2d at 100.

\textsuperscript{323} \textit{Batchelder}, 877 F.2d at 443; \textit{Bayles}, 602 F.2d at 99.
contrary to the plain meaning principle is arbitrary and capricious.\textsuperscript{324} After \textit{Bruch}, the Fifth Circuit mandated the use of the plain meaning and extrinsic evidence principles to determine a fair meaning.\textsuperscript{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.\textsuperscript{326} The Eleventh Circuit also follows the two-step process of the Fifth Circuit.\textsuperscript{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.\textsuperscript{328}

The Fourth Circuit, since the \textit{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.\textsuperscript{329} An interpretation


\textsuperscript{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).

\textsuperscript{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).


\textit{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).


\textsuperscript{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); Lockhart
contrary to the plain meaning principle is an abuse of discretion. The Eighth Circuit adopted this five factor test from the Fourth Circuit.

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.

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. 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. This means de novo review. The Sixth Circuit ignores the directive, applying the arbitrary and capricious standard even in the presence of a conflict of interest. The Ninth Circuit gives less deference in the event of a pecuniary conflict of interest, the standard the Ninth Circuit used before Bruch. 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).


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).

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).
335. Doe, 3 F.3d at 89.
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).
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.\textsuperscript{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 \textit{Bruch} under the arbitrary and capricious standard.\textsuperscript{340} The Fourth\textsuperscript{341} and Ninth\textsuperscript{342} 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.\textsuperscript{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 rule\textsuperscript{344} while the Seventh Circuit claims a contractual origin for the rule.\textsuperscript{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.\textsuperscript{346}

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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).

\textsuperscript{339} Brown v. Blue Cross & Blue Shield, 898 F.2d 1556, 1566 (11th Cir. 1990), \textit{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).

\textsuperscript{340} See Flint, \textit{supra} note 28, at 140-41.

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

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


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

\textsuperscript{345} Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990); see \textit{Restatement (Second) of Contracts § 228} cmt. a (1981) (satisfaction of a party called for in a contract must be reasonable); see also Flint, \textit{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).

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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. In the presence


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 principle followed by the contra proferentem principle of insurance contract law.

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. In the presence of ambiguities, they apply the extrinsic evidence principle followed by the contra proferentem principle of insurance contract law.

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.

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 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.

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).

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 principle followed by the contra proferentem principle of insurance contract law. 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.

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." 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); Carey 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); Carey, 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.
of ambiguities, the reasonable expectation principle.\textsuperscript{355} In the presence of ambiguities, these circuits use the partial-extrinsic evidence principle\textsuperscript{356} followed by the default principle. However, based on \textit{Bruch}, the default principle does not defer to either party's interpretation.\textsuperscript{357} Therefore, the Sixth and Eighth Circuits have rejected the \textit{contra}

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\textsuperscript{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).


Only \textit{Wulf}, \textit{Harper}, \textit{Johnson}, and \textit{Jacobs} dealt with a plan without insurance contracts.

\textsuperscript{356} For the Sixth Circuit, see \textit{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); \textit{Jacobs}, 933 F.2d at 652 (plan administrator reversed); \textit{Brewer}, 921 F.2d at 153-54 (remand to obtain extrinsic evidence).

Only \textit{Wulf} and \textit{Jacobs} dealt with a plan without insurance contracts.

\textsuperscript{357} For the Sixth Circuit, see \textit{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); \textit{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 \textit{Wulf}, \textit{Franklin}, \textit{Adams}, and \textit{Brown} dealt with a plan without insurance contracts.
proferentem principle\textsuperscript{358} for the most reasonable interpretation of the plan in the opinion of the court.\textsuperscript{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.\textsuperscript{360} The Sixth Circuit limits the extrinsic evidence reviewed by the court to that before the plan administrator when it rendered its interpretation.\textsuperscript{361}

In exceptional circumstances, the Fourth Circuit allows an exception to this subrule,\textsuperscript{362} and the Eleventh Circuit has abrogated it altogether-

\textsuperscript{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).

\textsuperscript{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.


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, 606 (8th Cir. 1992); Jacobs v. Pickands Mather & Co., 933 F.2d 652, 656 (8th Cir. 1991); Howe v. Varity 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).

\textsuperscript{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).

\textsuperscript{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.
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. Therefore, de novo review in the absence of ambiguities involves the reasonable expectation principle, and in the presence of ambiguities the partial-extrinsic evidence principle is followed by the contra proferentem principle. The reason given by the Ninth Circuit for the contra proferentem principle.

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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.\textsuperscript{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.\textsuperscript{369} In the absence of ambiguities, these circuits apply the plain meaning principle.\textsuperscript{370} In the presence of ambiguities, they apply the extrinsic evidence principle\textsuperscript{371} followed by the contra proferentem principle.\textsuperscript{372} In the Second Circuit, extrinsic evidence is not limited to that submitted to the plan administrator.\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{368} Kunin, 910 F.2d at 540.
\item \textsuperscript{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).
\item \textsuperscript{370} For the Third Circuit, see Heasley v. Belden \& Blake Corp., 2 F.3d 1249, 1257-58 (3d Cir. 1993); accord Smith v. Hartford Ins. Ass’n-Int’l Ass’n of Machinists Pension Trust, 654 F.2d 650, 655 (9th Cir. 1981) (same); Rehmar v. Smith, 555 F.2d 1362, 1369 (9th Cir. 1976).
\item \textsuperscript{371} For the Second Circuit, see Kunstenaar, 902 F.2d at 183 (upholding the plan administrator under the plain meaning principle).
\item \textsuperscript{372} 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).
\item \textsuperscript{373} For the Second 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).
\end{itemize}
\end{footnotesize}
absence of ambiguities the plain meaning principle and in the presence of ambiguities the extrinsic evidence principle. But the First, Second, and Ninth Circuits have yet to specify the default principle, while the Third Circuit applies a default principle that favors neither party.

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

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 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) (remand to use extrinsic evidence).

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).


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. They generally follow the same variations as the federal circuit courts, applying the rule to all cases, using the plain meaning principle, using extrinsic evidence, and refusing to adopt the contra proferentem principle.

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, 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

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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).


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 English... 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 fight...  

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

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 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. 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 subchapter . . .

The most similar entity providing benefits for numerous beneficiaries is an insurance company. In fact, many of the same insurance comp-
nies administer contracts under ERISA plans and non-ERISA plans. 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.

Congress imposed minimum standards of behavior on plan administrators with ERISA. 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. 1995) (applying Oklahoma insurance law, the contra proferentem principle, to a church plan not covered by ERISA).

397. For courts not sleeping, see Witmeyer 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-Intl' Bd. 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 1635 (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

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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.

**I. 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

\(^{399}\) 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.

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.
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).
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. Congressional intent was to incorporate certain trust law fiduciary standards into employee benefit plans through ERISA section 404(a). Among those fiduciary standards of trust law are duties running to the beneficiaries in the payment of trust benefits. Congress clearly indicated that this trust duty applied to employee benefit plans under ERISA.

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).


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 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 3081 & 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.\textsuperscript{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.\textsuperscript{414}

However, the employer may indemnify the fiduciary. Department of Labor regulations, however, permit indemnity agreements only to the extent that insurance is available.\textsuperscript{415} ERISA permits plans to purchase insurance for a fiduciary, if the insurer has recourse against the fiduciary for breach of fiduciary duty.\textsuperscript{416} The employer is permitted to purchase insurance for the fiduciary without the recourse limitation.\textsuperscript{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 \textit{contra proferentem} principle applies and those plans without insurance contracts.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{414} \textit{Id.} §§ 408(c)(2), 409(a), 410(a), 29 U.S.C. §§ 1108(c)(2) (fiduciary reimbursement for reasonable expenses); \textit{id.} § 1109(a) (fiduciary personally liable for breaches of fiduciary duty); \textit{id.} § 1110(a) (agreement to relieve a fiduciary of fiduciary liability is void).
  \item \textsuperscript{415} 29 C.F.R. § 2509.75-4 (1990).
\end{itemize}
\end{footnotesize}
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.

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418. See *supra* note 100 and accompanying text for management failures to prevent LMRA plan fiascoes; see also *supra* note 99 and accompanying text for union incompetence to avoid collectively-bargained single-employer plan fiascoes.


420. See Jones v. Mountain States Tel. & Tel. Co., 670 F.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. 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. 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. 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, 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

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.