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## DID THE SUPREME COURT FLUNK[1] CONSTITUTIONAL LAW WHEN IT PERMITTED DISCRETIONARY REVIEW OF INSURED ERISA BENEFITS CASES?

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Beginning with *Firestone Tire & Rubber Co. v. Bruch*,[3] and its affirmance in *Metropolitan Life Ins. Co. v. Glenn*,[4] and most recently in *Conkright v. Frommert*,[5] the Supreme Court permitted District Courts to treat insured ERISA welfare benefits cases as summary review proceedings. In each case, the court focused on trust law, but never addressed whether the regulatory scheme it set up by these cases satisfies the requirements of Article III of the Constitution. The authors argue that

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1 *See* John Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 228 (1990) (noting in *Firestone Tire & Rubber Co. v. Bruch* the Supreme Court "garbles long-settled principles of trust law, confuses trust and contract rubrics, and invites plan drafters to defeat the stated objectives of the decision.").

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3 489 U.S. 101 (1989).

4 554 U.S. 105 (2008).

5 559 U.S. 506 (2010).

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*Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System*

# DID THE SUPREME COURT …

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discretionary review, without a full trial on the merits, violates Article III.

In the 1983 comedy *Trading Places* the amoral Duke brothers conduct an experiment in social Darwinism debating whether genetics or nurturing is the source of success. They make a wager, and then put their theories to the test. They manipulate the life of Louis Winthorp III (Dan Akroyd), a successful commodities trader, by "trading places" with Billy Ray Valentine (Eddie Murphy), a street con artist.

We'll bet the same amount wagered by the Duke brothers with our readers – identify any litigation in the federal courts between *private* litigants, other than discussed in this paper, where the Article III Judge must defer to the decision of the defendant without conducting a full trial on the merits. We bet you can't.

## I. THE OVERVIEW: WHY DEFERENCE TO THE DEFENDANT VIOLATES ARTICLE III OF THE CONSTITUTION.

- Article III[6] of the Constitution grants a federal litigant asserting a "private right" the constitutional right to "an impartial and independent federal adjudication of claims." Consequently, in the context of an "ERISA Insurance Case,"[7] a Court must provide a litigant with a plenary *de novo* proceeding. To do less, by deferring to the determination of an insurance company, the Court unconstitutionally relegates its judicial power to a decision maker (the insurance company) who is not impartial and independent.[8]
- There is no authority in the Supreme Court's constitutional precedent, ERISA or ERISA's legislative history for denying a litigant her constitutional right to an impartial and independent federal adjudication under Article III. Indeed, to the contrary, ERISA specifically authorizes participants to commence "civil actions" subject to the jurisdiction of the federal courts. *See, e.g.,* 29 U.S.C. §§1001(b), 1132(a)(1)(B), 1132(f).
- Relegation of judicial power to a financially conflicted insurance company is constitutionally impermissible. Doing so, threatens the independence of the federal judiciary. The Supreme Court recognizes two very narrow exceptions to unfettered Article III adjudication of private rights; neither applies to ERISA Insurance Cases. The first exception is the creation of an Article I Court or tribunal. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). ERISA, however, establishes no such Court or tribunal. The second is by waiver. *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). A plan participant, however, cannot readily waive her right to Article III adjudication. Nor is there a constructive waiver by the participant when an employer buys an insurance policy to fund a welfare-benefit-plan. Constructive waivers of fundamental constitutional rights are not permissible. *See, e.g. College Sav. Bank v. Fla. Prepaid Post-Secondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999).
- Social Security Administration disability appeals do not provide an analogous rubric that justifies deferential review. Social Security disability claims are decided in the first instance by neutral administrative tribunals, and in contrast to ERISA insurance cases, concern public benefits not private property rights.
- Similarly, arbitration decisions do not provide an analogous rubric. Deference to arbitration decisions is different, because in arbitration the litigation is decided by a presumably neutral party, not the defendant as in the typical ERISA Insurance Case.

## II. ARTICLE III OF THE CONSTITUTION REQUIRES A DE NOVO PLENARY PROCEEDING WHEN AN ERISA INSURANCE CASE IS DEFENDED BY A CONFLICTED INSURANCE COMPANY

6 Art. III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts…." Art. III, Section 2: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority…."

7 "ERISA Insurance Case" means a case involving a fully-insured welfare benefit plan governed by ERISA.

8 The insurance company is not impartial and independent because it has an inherent conflict of interest because it both pays and decides the claim. *See Glenn*, 554 U.S. at 112.

An ERISA welfare-plan beneficiary has a "private right"[9] to benefits adjudicated under the "Judicial Power" of an Article III Court. To protect her constitutional right, a *de novo* plenary proceeding is required. Granting any level of deference to a conflicted insurance company, would be a constitutionally impermissible relegation of judicial power.

Article III of the Constitution not only serves as an inseparable element of the constitutional system of checks and balances, but it also confers a personal right on litigants to have an Article III judge preside over a civil trial. *Peretz v. United States*, 501 U.S. 923, 936 (1991). Article III "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States." *Schor*, 478 U.S. 833 at 850. A primary purpose of an independent judiciary is to protect the rights of individuals arising under the laws of the United States. Delegating decision making to a party in the litigation undermines the independence and duty of Article III Courts, and denies a litigant a fundamental constitutional right. This right includes having an impartial Article III judge render an independent decision. Deference to the defendant insurance company conflicts with this constitutional right of the plan participant and the constitutional duties of the court.

The Supreme Court has held that Article III restricts Congress from relegating adjudicative functions to non-Article III courts and tribunals when the dispute is over "private" rather than "public" rights. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Congress may not give away Article III "judicial" power to an Article I judge). The Supreme Court held that Congress could not constitutionally remove from an Article III court most, if not all, of "the essential attributes of the judicial power" and vest those powers in an Article I judge. *Id.* The Supreme Court emphasized this point again before the end of the 1980s:

> Our prior cases support administrative factfinding in only those situations involving "public rights," e.g. where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.[10]
>
> …if a statutory cause of action,… is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking the essential attributes of the judicial power.

*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989).

Just two years ago the Supreme Court again reaffirmed that litigation over private rights may not be taken away from Article III judges:

> What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

*Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011), *reh'g denied,* 132 S. Ct. 56 (U.S. 2011).

Thus, "private rights" must be decided by an impartial and independent Article III court. A "federal litigant" has a personal right, subject to exceptions in certain classes of cases, to demand Article III adjudication of a civil suit. Surely, if the Constitution prohibits Congress from delegating the determination of private rights from

9 *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (Distinguishing between "private right" requiring Article III adjudication and the exception for "public rights" which may be resolved by administrative agencies or Article I Courts) Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988) (concluding that meaningful judicial review in an Article III court is a necessary and sufficient requirement under the Constitution). Authorities support the premise that Article III adjudication is, in part, a personal right of the litigant." *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

10 In his concurring opinion, Justice Scalia indicated that he would hold that public rights are only those affecting the government. All other rights are private rights. Justice Scalia indicated that he departed with the exceptions described in *Thomas* and *Schor*: "The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine. The language of Article III itself, of course, admits of no exceptions. . . ." 492 U.S. 33 at 66.

an Article III Court to an Article I Court, the federal judiciary cannot delegate its duties to a defendant charged with deciding the claim in the first instance.

Judge Harvey Wilkinson of the Fourth Circuit made this point by analyzing the theory behind discretionary review. He wrote, "Under no formulation, however, may a court, faced with discretionary language like that in the plan instrument in this case, forget its duty of deference and its secondary rather than primary role in determining a claimant's right to benefits." *Evans v. Eaton Corp. Long Term Disabilty Plan*, 514 F.3d 315 (4th Cir. 2008). In other words, the court is asked to give up its power to judge and to defer to the defendant, elevating procedure over substance. Judge Wilkinson even cited to *Universal Camera Corp. v. NLRB*, the seminal case holding that discretionary review of agency decision still requires judges to judge and not merely to defer to the decision maker. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951). The Constitution demands that an Article III Court cannot "outsource" its duty to exercise Judicial Power. But this is exactly what deferential review does. Although Judge Wilkinson may not have had Constitutional law on the forefront of his mind when he wrote *Evans,* his analysis underscores that deferential review results in the Article III judge abdicating his primary obligation – judging.

## III. ERISA INSURANCE BENEFITS ARE "PRIVATE RIGHTS" REQUIRING ARTICLE III ADJUDICATION

A claim for long-term-disability-benefits arising under an ERISA plan against a private insurance company is a quintessential "private right." Prior to the enactment of ERISA, employer-provided long-term-disability insurance claims were adjudicated under state insurance law. When Congress passed ERISA, however, it effectively "federalized" all private sector employee benefits, including long-term-disability-benefits: "ERISA contains one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). "It preempts any claim that "relates to" a covered employee benefit plan, 29 U.S.C. § 1144(a), such that "it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983). "[A] common-law cause of action premised on the existence of an ERISA plan" will be preempted by ERISA. *See Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 324 (1997). In so doing, 29 U.S.C. §1132(a) (1) (B) displaced traditional State causes of action under State insurance laws.[11] *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) (holding state common law causes of action arising from the improper processing of a claim are preempted under ERISA).

Because the ERISA insurance case arises from a private property dispute that, prior to the passage of ERISA, was historically resolved under State laws, the claim is one that requires Article III resolution. *See Thomas, 473 U.S.* 568 at 587 ("Most importantly, the statute in *Crowell* displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts . . . "). To protect this right, a full trial is required.

ERISA litigation is distinct from a Social Security Administration appeal. Whereas an ERISA insurance case is a dispute between private parties, a Social Security Administration appeal involves a government conferred benefit. That distinction is significant. The Supreme Court has held that decisions regarding government benefits do not require Article III adjudication, but private rights do. *Granfinanciera, S.A.*, 492 U.S. at 52. *See also* Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. Marshall L. Rev. 727 (2004) (suggesting that courts wrongly defer to ERISA plan administrators and fiduciaries as if the underlying claim denial arose in the context of an administrative hearing similar to a Social Security Administration disability benefits claim).

## IV. AN ARTICLE III ADJUDICATION MUST BE MEANINGFUL AND NOT A RUBBER STAMP

The standard for determining whether there is improper interference with or delegation of the independent power of a branch of government is whether the alteration prevents or substantially impairs the performance of the essential role of the branch in the constitutional system. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977). In order to retain the essential attributes of Judicial Power, "there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Pacemaker Diagnostic Clinic*, 725 F.2d at 544. The required control must be more than simple appellate review. This is the teaching of *Northern Pipeline*. 458 U.S. at 86, n. 39, 102 S.Ct. at 2879, n. 39.

11 State insurance law is not entirely pre-empted. 29 U.S.C. §1144(b)(1) saves certain insurance law from federal preemption in connection with fully-insured ERISA plans.

The provisions of Article III "guarantee that the process of adjudication itself remain[ ] impartial." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (Brennan, J., plurality). Without Article III protections, "the judge might behave with all the violence of an oppressor." The Federalist No. 47, at 246 (James Madison) (Bantam Classic ed., 1982). But, when the federal judiciary defers to the insurance company's benefit decision it undermines its own power and that of Congress.

First, by bowing to the private litigant and validating the insurer's decision, the court aggrandizes the insurer's decision at the court's expense. Investing the prestige of a federal court by entering a judgment in favor of a private party when that judgment has been decided without the court exercising its Judicial Power detracts from the court's authority vested under Article III. Instead of deciding a case, after listening to admissible evidence and applying the law, the court is approving a private party's decision without the rigors applied to all other private litigation.

The Supreme Court recognizes that private parties may not use the sanctity of the federal courts for their private gain. For instance, parties may not freely demand that a court vacate a decision if settled on appeal. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) (parties who settle a case on appeal are not automatically entitled to the vacatur of the judgment below). There remains a public interest in court decisions, and vacatur can undermine confidence in the impartiality of the judiciary. Therefore, parties do not have unfettered right to demand that a court vacate an opinion merely because the parties have resolved litigation privately.

Second, in not conducting a *de novo* proceeding, the judiciary is shirking its duty to interpret law passed by Congress. The court is stripping itself of its Judicial Power to decide federal law. Also this implicates a separation of powers issue. The federal judiciary cannot delegate its role in the tripartite system of government by granting deference to a private party to decide federal law. But that is what happens when the courts defer to the conflicted insurer's decision.

In enacting ERISA, Congress expected the federal courts to interpret and enforce the statute. Congress never suggested that the federal courts should limit judicial review by deferring to a conflicted party's application of the law and facts. Nowhere in the ERISA statute did Congress attempt to limit the role of Article III courts. In fact, Congress included in the preamble to the ERISA statute the need for ready access to the federal courts. Therefore, a plenary proceeding is necessary under Article III to protect individual rights under ERISA, and to maintain the will of Congress.

A court cannot fulfill its constitutional duties in a case under deferential review. Contrary to basic principles of our adversary system, the District Court is often asked to make credibility decisions based on unsworn testimony, documents that would not be admissible under the Federal Rules of Evidence, and without live testimony. Too often the District Court is asked to defer to the opinions of physicians who never examined the participant. The physician's opinion may be based on layer after layer of hearsay. The so-called expert, if really questioned, often would not be able to testify if the District Court exercised its gatekeeping function under *Daubert.* How can the District Court assure that it exercises its constitutional mandate and afford the participant her Article III protections without conducting a trial, without hearing live testimony to aid in making credibility calls? It cannot. But, that is what typically happens in this type of ERISA litigation.

On the pension side of ERISA, meaningful adjudication that meets constitutional protections fares better. Under 29 U.S.C. §§ 1301, 1461, Multiemployer Pension Plan Amendments Act of 1980, if an employer withdraws from a multiemployer plan, it incurs "withdrawal liability" determined initially by the multiemployer plan using professional standards. If the withdrawing employer does not agree with the calculation, it may have the amount determined by an arbitrator. The arbitrator's decision is subject to judicial review. To avoid ruling this process was unconstitutional, the Supreme Court held that so long as the arbitrator's decision of the underlying decision made by the multiemployer plan is made without any deference to facts or law Due Process is satisfied. *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 618 (1993).

The holding in *Concrete Pipe* demands adjudication of the claim by a true neutral, an arbitrator who does not defer to the multiemployer plan's calculation of benefits. The reason that the courts will yield to the arbitrator's decision is because the underlying action has been decided by an ostensible neutral, and the Supreme Court has emphasized that Congress adopted a pro-arbitration policy when passing the FAA in 1925. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748

(2011) (Congress not only intended to promote private arbitration, but "to facilitate streamlined [arbitration] proceedings" as well). Why then should an ERISA Insurance claim be treated differently? No rationale that passes basic notions of fairness is evident. As the statute requires "ready access" to the federal courts, limiting District Court scrutiny by deferring to the insurance company's decision cannot be squared. An ERISA welfare benefit claim decided by an insurance company that is ultimately liable to pay the bill if it is on the losing side of the decision, does not fit the arbitration model. Yet when discretion is granted in ERISA Insurance Cases, this is what the District Court does – too often acts as a rubber stamp.

## V. RELEGATION OF JUDICIAL POWER, IN THE FORM OF DEFERENCE TO A CONFLICTED INSURANCE COMPANY, IS CONSTITUTIONALLY IMPERMISSIBLE

There is no authority in the Supreme Court's constitutional precedents, ERISA or ERISA's legislative history for denying a litigant her constitutional right to an impartial and independent federal adjudication under Article III.

### 1. The Two Limited Exceptions Specified In *Thomas* And *Schor* Do Not Authorize the Relegation Of Judicial Power To A Conflicted Insurance Company

There are only two limited instances in which Congress is authorized to relegate adjudicative authority of "private rights" for resolution by a non-Article III court or tribunal. *See* *Thomas*, 473 U.S. 568 (1985); *Schor*, 478 U.S. 833 (1986). In enacting ERISA, Congress invoked neither.

In *Thomas*, the Supreme Court permitted an Article I arbitration adjudication, subject to judicial review only for fraud, misrepresentation, or other misconduct, because: (1) the right created by the Federal Insecticide, Fungicide, and Rodenticide Act as to the use of a registrant's data was not a purely "private" right, but bore many of the characteristics of a "public" right; (2) the arbitration scheme was necessary as a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health and environmental impact of a potentially dangerous product; and (3) the scheme contained its own sanctions and subjected no unwilling defendant to judicial enforcement power. Given the nature of the right at issue and the concerns motivating Congress, the Supreme Court held that the Article I adjudication did not violate Article III. 473 U.S. 568 at 590.

On its face, the *Thomas* exception is inapplicable to ERISA Insurance Cases because Congress did not even create an Article I Court or tribunal (including a private insurance company) to decide employee benefit disputes arising under ERISA. *See e.g.* *Downs v. Liberty Life Ass. Co. of Boston*, 2005 WL 2455193 (N.D. Tex. 2005) (". . . Congress did not delegate any adjudicative authority to employers or plan administrators when enacting ERISA. . . ."); *Black v. UNUMProvident Corp.*, 245 F. Supp. 2d 194, 199 (D.Me. 2003) ("ERISA does not delegate any adjudicative functions to an otherwise private party."). Thus, there is no *Thomas*-like relegation to an administrative agency or legislative Article I tribunal.

In *Schor*, the Supreme Court held that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. 833 at 848-849. The *Schor* waiver exception, however, cannot justify deference to a conflicted insurance company because: (1) Congress did not establish a method under which a claimant could waive her Article III rights; and (2) there is no voluntary, knowing and intelligent waiver by claimants in ERISA insurance cases.

First, in *Schor*, Congress specifically established an Article I tribunal under which a claimant could voluntarily assert a claim. 478 U.S. 833 at 855 ("Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties. . . ."). ERISA is different. As argued, *infra*, neither the ERISA statute, nor its legislative history, contains any language establishing an Article I tribunal at the Department of Labor or otherwise. Moreover, the ERISA statute does not contain any language establishing a waiver scheme under which a claimant may voluntarily waive her right to an Article III proceeding in favor of a deferential review.

Second, in *Schor*, there was no dispute that the plaintiff voluntarily waived her right to Article III adjudication by voluntarily filing a counterclaim before the CFTC. In the context of ERISA Insurance Cases, no argument can be made that the typical plan participant meaningfully waives her Article III rights. Constitutional rights cannot be waived haphazardly, but, rather, only in a voluntarily, knowing and intelligent manner. *See*, *e.g.*, *Adams v.*

*United States ex rel. McCann*, 317 U.S. 269 (1942) (waiver of right to jury trial). "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *See e.g.* *College Sav. Bank*, 527 U.S. 666 at 682. The reality is that the policies offered to claimants in ERISA Litigation cases are was more akin to contracts of adhesion. There is no evidence or belief that plan participants bargain over their terms.

Third, certain Constitutional interests may not be waived under any circumstance. Those are when the rights are institutional rather than personal. 478 U.S. 833 at 851. Rights belonging to the federal judiciary to exercise Judicial Power seem to fall within this realm.

A waiver cannot be inferred by the mere fact that an employee voluntarily enrolled as a plan participant or commenced a lawsuit in federal court. Never has there been evidence that the participant is provided an opportunity to elect coverage subject to a *de novo* proceeding versus coverage permitting deference review. Nor are plan participants known to have been given a document explaining their constitutional rights afforded under Article III and what the consequence of waiving those rights might be.

Moreover, the fact that an employer agreed to the inclusion of discretionary language in the plan document of the long-term-disability plan is insufficient to constitute a meaningful constitutional waiver on the part of the participant. A third-party "constructive waiver" is far afield from the undisputed waiver in *Schor* and the meaningful waiver required of *Adams*, 317 U.S. 269 at 272-273. As the Supreme Court stated in *College Savings Bank*:

> We think that the constructive-waiver experiment of *Parden* was ill conceived . . .
>
> Indeed, *Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges. As we said in *Edelman*, "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."

527 U.S. 666 at 680, 682 (citation omitted).

The Supreme Court requires that waiver of a constitutional right, such as to Article III adjudication, must be made affirmatively and in conformity with waivers of other personal constitutional rights. Such a waiver cannot be made by implication or construction. *Id.*

### 2. The Text And Legislative History Of ERISA Do Not Authorize A Relegation Of Judicial Power To A Conflicted Insurance Company

Not only did Congress decide not to create a *Thomas*-like regulatory scheme or a *Schor*-like waiver scheme, but Congress explicitly created a regulatory scheme that grants ERISA participants and beneficiaries full and unimpeded access to the federal courts. 29 U.S.C. §1001(b) declares that it is the policy of the statute to protect the interests of participants and their beneficiaries "by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1132(a)(1)(B) grants participants and beneficiaries the right to commence a "civil action" and provides no limitation on the procedural protections conferred by the Federal Rules of Civil Procedure. 29 U.S.C §1132(f) provides that "the district courts shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties." 29 U.S.C §1132(e)(2) then makes it easy for participants and beneficiaries to file a civil action by creating one of the most liberal venue provisions in federal law. An action may be brought "in the District Court where the plan is administered, where the breach took place, or where a defendant resides or may be found." The text of the ERISA statute does not place limits on an individual's rights to bring suit, nor does the statute say that the Federal Rules of Civil Procedure do not apply. Likewise, the Federal Rules of Civil Procedure do not state that ERISA cases are to be treated differently than other civil litigation. ERISA claims are not appeals from administrative agencies.

Indeed, in early drafts of ERISA, Congress considered creating an Article I tribunal, *i.e.*, a grievance or arbitration proceeding before the Secretary of Labor,[12] to resolve disputes. The final bill, however, did not contain either of these proposals. Rather, it unambiguously provides for a private right of action in the District Courts. (29 U.S.C. §1132(f)). The fact that Congress considered and then purposefully rejected an Article I tribunal is strong proof that Congress did not intend to limit the Article III rights of claimants.

Because the text of ERISA is clear, the courts are not free to create a different regime when Congress chose not to. *See* *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("'[O]ur starting point must be the language employed by Congress,' and we assume 'that the

12 *See* S. Report 93-383, *reprinted in*, 1974 U.S.C.C.A.N. 4890, 4999-5000 ("[T]he opportunity to resolve any controversy over [ ] retirement benefits under qualified plans in an inexpensive and expeditious manner . . . Accordingly, the committee has decided to provide that controversies as to retirement benefits are to be heard by the Department of Labor.").

legislative purpose is expressed by the ordinary meaning of the words used'") (internal citations omitted). The Supreme Court has repeatedly described ERISA as a "comprehensive and reticulated statute," addressing the nation's employee benefit structure. *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 258 (2008). Courts, therefore, should be very reluctant to create a non-Article III Court or tribunal that Congress did not expressly authorize. Plainly, if Congress wanted the courts to relegate judicial power to a conflicted insurance company, it would have said so. Since Congress did not, inferring that result is unwarranted.

### 3. *Firestone, Glenn and Conkright* Do Not Authorize The Relegation Of Judicial Power To A Conflicted Insurance Company

The relegation of judicial power to the insurance company defendant is not authorized by *Firestone*,[13] *Glenn* or *Conkright*. These cases never considered the applicability of Article III. Moreover, *Firestone* did not evaluate or consider the significant differences between a fully insured welfare benefit plan and a fully funded or unfunded trust. Rather, the three plans litigated before the *Firestone* Court were: (1) an unfunded termination pay plan; (2) an unfunded stock purchase plan; and (3) an unfunded pension plan. *Firestone* specified that its holding applied regardless of whether a plan was "funded or unfunded," *Id.* at 109, but did not specify that it applied to insured plans. None of the more recent cases reaffirming *Firestone* have tackled the constitutional issue raised in this paper. *Conkright v. Frommert*, 559 U.S. 506, (2010).

There are good reasons for treating insured plans differently from funded or unfunded plans. First, *Firestone* recognized the imperative of not applying a standard of review that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 489 U.S. 101 at 114. Granting deference to a conflicted insurance company, however, undermines the protection of employees for the benefit of an insurance company.

Historically, insurance claims have always been treated as *de novo* plenary proceedings in court. Certainly, Congress did not intend for ERISA to make it easier for insurance companies to deny benefits to private sector employees. By turning to trust law Congress sought maximum protection. Moreover, allowing the welfare-benefit plan to contract around the normal trust protections makes no sense. But that is what *Firestone* allows. Indeed, following *Firestone,* Judge Posner provided safe harbor language - "Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them." *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000).

As Professor Langbein suggests, Congress had no intention of allowing plan drafters to gut ERISA's trust protections by contract. "The Conference Committee explained that the drafters wanted to "apply rules *and remedies* similar to those under traditional trust law to govern the conduct of fiduciaries." John Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West,* 103 Columbia Law Review 1317, 1331 (2003). Congress steeped ERISA in trust law for a reason. Getting around those protections should not be as simple as using a boiler plate sentence suggested by Judge Posner.

Second, in the trust law context, a trustee's decision is granted deference only after a full trial on the merits. *See e.g. Huntington Nat'l Bank v. Wolfe*, 651 N.E.2d 458, 462 (Ohio Ct. App. 1994) (holding, after trial, that trustees who were officers of family corporation in which trust held stock did not breach their fiduciary duty); *Estate of Gilliand*, 140 Cal. Rptr. 795, 797, 801-02 (Cal. Ct. App. 1977) (holding, "after a lengthy trial," that trustees did not abuse discretion because they relied on an independent evaluation by an accounting firm, and declining to remove trustee with a conflict of interest because the trustee's decision furthered the settlor's objectives). Therefore, the deferential review currently applied by the courts is not even consistent with the principles of trust law.

Third, insurance cases have always been treated as breach of contract cases and have not been subject to concepts of trust law. Although at times, the Supreme Court looks to the Restatement of Trusts, that guidance is

13 The Court held the appropriate standard of review was *de novo,* but then, in *dicta,* stated:

Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.* 489 U.S. 101 at 109 (emphasis added). The quoted language is *dicta* because none of the plans at issue in the *Firestone* case had language granting the plan administrator or fiduciary discretionary authority. The language is, therefore, not necessary to the holding. Seizing on this *dicta*, insurance companies have readily amended their policies to include grants of discretionary authority, making the vast majority of welfare benefit claims subject to the arbitrary and capricious standard of review.

misplaced. *Firestone* looks to Trust law but then allows insurance companies to contract around as noted *supra*. Moreover the Supreme Court never explains why it cites to the Restatement (2d) of Trusts § 187, which is a summary of the law of charitable trusts and not business trusts. 489 U.S. 101, 115 (1989). *See* Restatement (2d) of Trusts § 1, Comment a. This Restatement "does not deal with business trusts…" Id. at Introduction p. 1. This is significant, because charitable trusts are not the same as insurance companies operating through a trust. Insured ERISA welfare-benefit-plans are not gifts, and are not comprised of an identifiable *res*. LTD benefits are paid from the general assets of the insurance company. The insurance policy is nothing more than a funding device used to secure contract rights between an employer and employee. The funds are not even segregated but paid from the insurance company's general assets. Thus, insured ERISA plans are more in the nature of contracts than having attributes of trusts.

So take our bet. Prove us wrong.

## UNCLAIMED PROPERTY …

*Continued from page 5*

Most of the defendant insurers have filed motions to dismiss the Treasurer's complaints, arguing that no such "duty to search" exists.

### Beneficiary Challenges Insurer's Alleged Asymmetric Use of the DMF

Private litigation has also been initiated on issues related to unclaimed property and the DMF. On January 30, 2013, a beneficiary filed a putative class action in the United States District Court for the District of Massachusetts against John Hancock Life Insurance Company, alleging that the insurer has a "pattern and practice of avoiding payment of life insurance policy death benefits that are owed to beneficiaries." The complaint accuses the insurer of using the DMF asymmetrically, by routinely searching the database to end payments to annuity clients but not using it to promptly notify beneficiaries of life insurance policies when a policy-holding relative dies.

The lead plaintiff, who was the beneficiary of a life insurance policy purchased by his mother, claims that he was not notified of the policy until four years after his mother's death, and only then by the Illinois Treasurer. After receiving from the State a small amount of dividends from demutualization, the lead plaintiff filed a claim with the insurer and received an additional sum of life insurance proceeds without an explanation of why the money "was not escheated to the state of Illinois when the dividend monies were escheated." The complaint alleges that the insurer is liable for damages caused to policy holders and beneficiaries as a result of its asymmetric death benefit payment practices, even though the company has entered into Global Resolution Agreement and settlements with States, because the company is not shielded from liability from those who were neither parties to the Agreement nor recipients of compensation from the settlement. The insurer has filed a motion to dismiss, arguing that the complaint seeks to discard settled law by requiring payment or escheatment of life insurance proceeds where a beneficiary has made no claim on the policy.

### Ohio Court of Appeals: No Duty to Search the DMF

In other private litigation, the Ohio Court of Appeals held that life insurance companies in Ohio have no affirmative duty to search the DMF or otherwise seek out information on possible deaths. *Andrews v. Nationwide Mutual Insurance Company*, No. 97891, 2012 WL 5289946 (Ohio Ct. App. Oct 25, 2012). Affirming the dismissal of a putative class action filed by private plaintiffs, the Ohio Court of Appeals held that the life insurance contracts at issue "do not impose a duty on [the insurer] to search the DMF to determine whether their insureds are deceased," and, therefore, "obligating [the insurer] to solicit or gather information pertaining to an insured's death would be contrary to the terms contained in the insurance policy." The court found "no validity to appellants' allegations that [the insurer] has breached the implied covenant of good faith and fair dealing by failing to utilize the DMF for the benefit of its life insureds."

The court found that the life insurance contracts instead "expressly require[d] 'receipt' of 'proof of