COMMENT

Judicial Review of ERISA Plan Administration Under the Arbitrary and Capricious Standard of Review

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Under ERISA, employee benefit plan fiduciaries are afforded a great deal of discretion in regard to plan administrative and benefit distribution decisionmaking. After discussing the historical genesis of the arbitrary and capricious standard by which courts review plan fiduciary decisions, the author suggests that post-ERISA application of the standard has led to curious and inconsistent results, affording plan fiduciaries too much discretion under certain circumstances. The author proposes that a proper review of plan fiduciary decisions should consider the legislative goals of ERISA, the type of decision made, and the structure of the plan for which the fiduciary exerts fiduciary authority. Only through considering such factors, the author concludes, will courts be affording proper weight to reasons underlying the grant of discretion to plan fiduciaries.

INTRODUCTION

By enacting the Employee Retirement Income Security Act of 1974 ("ERISA"), Congress sought to remedy abuses in the private pension system which resulted in the loss or erosion of benefits upon retirement. The Act regulates a variety of programs which deliver different types of benefits to employees in virtually every area of commerce, and preempts state laws which affect the structure and administration of benefit plans. It also brings the actions of plan administrators under a single standard of review which grants broad discretion to plan functionaries. This Comment will argue that this grant of discretion is the result of the historical

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2. See infra note 5 and accompanying text.
development of the law governing the administration of labor trusts and that in applying it to the broad variety of plans qualifying under ERISA, the courts have largely failed to recognize the loss of institutional justifications underlying the original grant of discretion, producing results which are anomalous to the purposes of the Act.

I

THE GOALS OF ERISA

A. ERISA Plans

Congress enacted ERISA to insure the delivery of benefits to employees who labored under a promise of a secure future. That promise had been, all too often, more illusion than reality. The imperative of the Act was the protection of individual pension rights. Therefore, Congress acted to insure the effectiveness of private benefit plans in delivering income security to retirees. To promote the delivery of benefits, Congress sought to enact a plan which would not overburden employers but which would at the same time introduce predictability and protect the just expectations of the retiree. Although many of the provisions of ERISA are concerned primarily with the liquidity of pension funds, the Act also regulates a broad spectrum of other benefit plans, including disability, medical, profit-sharing income and severance benefits for both employees and retirees.

As the problems ERISA was designed to cure were pervasive, the scope of its remedies was broad. Congress sought to regularize the administration of plans by expanding the impact of the Act in two ways. First, Congress defined the scope of benefit plans covered under ERISA broadly in order to affect the entire field of employee benefits. Under the Act, an "employee welfare benefit plan" is defined as:

[A]ny plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their bene-


6. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982); see supra note 5 and accompanying text.
ERISA applies to benefit plans whether administered solely by an employer, jointly with the employees' representative, or by trustees appointed by one or both parties. Its provisions also govern the administration and review of pension and welfare benefit plans, whether they are funded or unfunded programs. Secondly, Congress sought to establish the uniform application of law to the review of ERISA controversies by preempting the area of benefit plan administration from state law. Anything less would have been inconsistent with Congress' underlying policy of providing extensive—and virtually exclusive—regulation of employment relations. A primary result of section 514 is the preemption of state contract-law causes of action involving ERISA plans.

Although ERISA preempts states from regulating pension and welfare benefit plans, certain plans are jointly governed by the provisions of ERISA and the Labor Management Relations Act ("LMRA"). Prior to the enactment of ERISA, Congress had legislated standards for the administration of trust funds created subsequent to collective bargaining agreements. These funds, called Taft-Hartley trusts, must be administered in accordance with section 302(c)(5) of the LMRA, which requires that pension and benefit trust funds be jointly administered by an equal number of trustees appointed by each party to the agreement. One result of the joint regime of regulation of trusts by ERISA and the LMRA has been the wide application of rules judicially created in the particular context of Taft-Hartley trusts to ERISA plans.

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7. ERISA § 3(1).
8. See cases cited supra note 5.
9. See cases cited supra note 5. ERISA § 201, 29 U.S.C. § 1081(a) (1982), does not require that every type of plan be funded. The expense of some types of benefit plans may be borne directly by the employer, without any secondary insurers or trust funds to defray unexpected costs.

   Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance . . . [and] for evaluation of fiduciary conduct . . . .
15. Id. § 302(c)(5), 29 U.S.C. § 186(c)(5).
16. See infra notes 24-25 and accompanying text.
B. ERISA Fiduciaries

ERISA imposes duties on benefit plan fiduciaries. Consistent with the expansive nature of the Act, Congress imposed fiduciary obligations on a broad class of actors involved in the management and administration of employee benefit plans. The Act imposes fiduciary obligations on any person "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or . . . . (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." Under the Act, fiduciaries include virtually any management personnel who participate in decisionmaking on the granting or denial of benefits, and claims handlers for insurers administering group policies purchased by employers. Employers who are themselves the administrators of plans are also fiduciaries governed by the same standards.

In some respects, Congress was assertive in intruding into the administration of plans in order to achieve desired results. Its concern with the protection of worker's expectations expressed itself in the enactment of relatively strict provisions for the reporting and disclosure of the terms and conditions of ERISA plans. Under ERISA, plan administrators are required to issue to each beneficiary the plan's terms in a summary plan description. Congress was particularly concerned that employees be informed of circumstances which could result in the loss, forfeiture, or denial of benefits; presumably its concern was that beneficiaries be fully informed so as to better make crucial decisions in providing for their security after retirement.

ERISA fiduciaries both interpret the terms of the benefit plan and determine whether applicants are eligible under its provisions. The scope of judicial oversight of these aspects of pension and welfare plan administration is markedly different from the stricter reporting and disclosure provisions: "decisions of the trustees on pension eligibility are to be sustained by courts if they are not arbitrary or capricious, and if the trustees' factual judgments are supported by substantial evidence in the

19. See Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985).
20. ERISA § 102, 29 U.S.C. § 1022 (1982). Section 102 requires that the plan be written so as to be "understood by the average plan participant . . . and reasonably apprise such participants and beneficiaries of their rights and obligations." Id. § 102(a)(1), 29 U.S.C. § 1022(a)(1).
21. Id. § 102(b), 29 U.S.C. § 1022(b); see also 120 CONG. REC. 29,944 (1974) (statement of Sen. Humphrey): Too many workers have felt compelled to forego better job opportunities simply to preserve their right to pension benefits with their current employer. And too many workers, unable or unwilling to pack up and move their families all around the country following their employer, have seen their pensions vanish.
record as a whole."\textsuperscript{22} Under "the 'arbitrary and capricious' standard the scope of review is a narrow one."\textsuperscript{23}

The practice of using the arbitrary and capricious standard in the review of ERISA plans has its genesis in court decisions which reviewed the actions of Taft-Hartley fiduciaries.\textsuperscript{24} Yet in enacting ERISA, Congress drafted a single piece of legislation to regulate a myriad of diverse private arrangements promulgated by employers and employees facing differing circumstances and possessing varying resources with which to affect their formation and operation. A universe of different arrangements is now unified under a single regime of rules, duties and standards of accountability.

II

THE ARBITRARY AND CAPRICIOUS STANDARD

A. Origin of the Standard's Application to ERISA

The arbitrary and capricious standard, and the "substantial evidence" test which often accompanies it, have their origins in American legal lexicology in administrative law decisions of the District of Columbia Circuit. The D.C. Circuit is also credited with the use of the arbitrary and capricious standard to review the decisions of the trustees of Taft-Hartley pension trusts prior to the enactment of ERISA.\textsuperscript{25}

The purpose of the arbitrary and capricious standard is to accrete discretion to decisionmakers, and subject the decisionmaker's discretion to review by the court. As a corollary, the scope of review is limited in order to "avoid 'excessive judicial interference with plan administration'"\textsuperscript{26} and preserve the trustee's "broad discretion."\textsuperscript{27}

As one court has noted, "the concept of arbitrary and capricious review defies generalized application and must be contextually tailored."\textsuperscript{28} The context of ERISA plan review is vastly different from that of Taft-Hartley pension plans.

\textsuperscript{22} Short \textit{v.} UMW 1950 Pension Trust, 728 F.2d 528, 533 (D.C. Cir. 1984) (quoting Maggard \textit{v.} O'Connell, 671 F.2d 568, 570-71 (D.C. Cir. 1982), \textit{aff'd}, 703 F.2d 1284 (D.C. Cir. 1983)).


\textsuperscript{25} See Danti \textit{v.} Lewis, 312 F.2d 345, 349 (D.C. Cir. 1962); see also Rehmar \textit{v.} Smith, 555 F.2d 1362, 1371 (9th Cir. 1976) (crediting Danti with the development and application of the standard); LeFebre, 747 F.2d at 204 (quoting Wardle \textit{v.} Central States, 627 F.2d 820, 824 (7th Cir. 1980), \textit{cert. denied}, 449 U.S. 1112 (1981)).

\textsuperscript{26} Cook \textit{v.} Pension Plan for Salaried Employees of Cyclops Corp., 801 F.2d 865, 870 (6th Cir. 1986) (quoting Miles \textit{v.} New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan, 698 F.2d 593, 599 (2d Cir.), \textit{cert. denied}, 464 U.S. 829 (1983)).

\textsuperscript{27} Short \textit{v.} \textit{UMW}, 728 F.2d at 533 (quoting Pete \textit{v.} UMW Welfare and Retirement Fund of 1950, 517 F.2d 1275, 1283 (D.C. Cir. 1975)).

\textsuperscript{28} Maggard \textit{v.} O'Connell, 671 F.2d 568, 571 (D.C. Cir. 1982) (quoting Natural Resources Council, Inc. \textit{v.} SEC, 606 F.2d 1031, 1050 (D.C. Cir. 1979), \textit{aff'd}, 703 F.2d 1284 (D.C. Cir. 1983)).
of administrative agency review for a number of reasons. Although ERISA mandates that a plan provide for a claims procedure which must be disclosed to plan beneficiaries and participants,\textsuperscript{29} actual procedures themselves are minimally regulated, and may be of limited usefulness for the development and presentation of evidence when compared to administrative or quasi-judicial bodies.\textsuperscript{30} The procedures which do exist generally do not include a body of evidentiary rules.\textsuperscript{31} In fact, any record submitted later for review may not be contemporaneous with the proceeding, but prepared posthoc, in anticipation of litigation. Further, ERISA fiduciaries may occupy a variety of institutional relationships with the beneficiaries. Fiduciaries themselves may be personnel managers, insurance company employees, salaried trust administrators or management-labor trustee boards.\textsuperscript{32} Decisions using the arbitrary and capricious standard to review ERISA fiduciary decisions are far less likely to occur in the institutional setting of the District of Columbia Circuit, as the concentration of administrative agencies within that jurisdiction is not replicated by the dispersed ERISA plans.\textsuperscript{33}

The arbitrary and capricious standard itself is recited in ERISA decisions in a formulaic fashion. Attempts to define its component tests are difficult because courts do not consistently apply the standards and the results are often incongruous. Predictably, courts say very different things about the standard itself. One court has described the standard as leading “neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial intervention.”\textsuperscript{34} Another court has described the standard differently:

Although it is an overstatement to say that a decision is not arbitrary and capricious whenever a court can review the reasons stated for the decision without a loud guffaw, it is not much of an overstatement. The arbitrary or capricious standard is the least demanding form of judicial review . . . .\textsuperscript{35}

The standard therefore exists not as a coherent group of tests but rather

\textsuperscript{29} See Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985).


\textsuperscript{31} See LeFebre, 747 F.2d 197. One of the critical facts upon which the trustees’ denial of benefits rested was the inference that because the participant applying for benefits had shot his wife’s “paramour,” he was not disabled by his acute eye condition. \textit{Id.} at 205. It is doubtful that evidence this inflammatory could be used under the federal rules to support this proposition.

\textsuperscript{32} See supra note 8 and accompanying text.

\textsuperscript{33} District of Columbia Circuit judges seem more willing to rely on administrative law cases involving the arbitrary and capricious standard in deciding ERISA actions. See, e.g., Maggard, 671 F.2d 568.

\textsuperscript{34} Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976).

\textsuperscript{35} Pokratz v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985).
as a series of judicial decisions in which differing elements emerge to influence the judgment of the court. What may be usefully gleaned from cases as a whole is the diversity of institutional situations to which the standard of review is applied, and the variety of arguments which the courts will consider with contrasting results. What is largely missing from the opinions is insight on the rationale for deferring to ERISA fiduciaries, and an analysis of how differing institutional circumstances might reinforce or undercut that rationale.

B. Fiduciary Duty and the Arbitrary and Capricious Standard

ERISA plan administrators, because of their fiduciary status, must act solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and defraying the reasonable expenses of the plan. Under the LMRA, Taft-Hartley trustees act under a similar duty. Courts have deferred to this duty in the review of denial of benefits claims under the arbitrary and capricious standard. Yet because a fiduciary’s duties are owed to both present beneficiaries and to the preservation of funds to the plan, this duty can cut either towards the granting or denial of benefits depending upon which way the judicial wind is blowing.

In Music v. Western Conference of Teamsters Pension Trust Fund, the court held that the duty to act for the sole and exclusive benefit of beneficiaries prevented the trustees of a Taft-Hartley trust from promulgating eligibility requirements, ostensibly for the purposes of assuring actuarial soundness, when the requirements reduced the benefits of participants:

When pension trustees acting under the authority of the trust fund arbitrarily and capriciously deny pensions to employees a structural defect exists . . . because it is not deemed to be for the sole and exclusive benefit of the employees.

At stake was a trustee’s decision that the amount of benefits for disability were to be determined at the end of an otherwise valid five-month waiting period used for determining eligibility, rather than at the point in time at which the disabling injury occurred. In light of the duty to act for the sole benefit of beneficiaries and the plan’s primary purpose of providing benefits, the court reasoned that this construction, which had the effect of reducing benefits, was prima facie unreasonable.

38. 712 F.2d 413 (9th Cir. 1983).
39. Id. at 417 (emphasis added).
40. Music is a mystifying opinion in several respects. What may be most surprising is that this attenuated reasoning occurred after the Supreme Court had previously vacated and remanded the case for reconsideration. 459 U.S. 810 (1982).
In a later case, *Jung v. FMC Corp.*, the Ninth Circuit recognized that "one of the goals of ERISA [is] to keep plans within reasonable costs."\(^{41}\) Later in the same decision, the court also reasoned that if the fiduciary's "denial of benefits to a class avoids a very substantial outlay, the reviewing court should consider that fact in applying the arbitrary and capricious standard of review [and] [l]ess deference should be given to the trustee's decision."\(^{42}\)

When a court affirms a trustee's decision, it may just as likely note that such decisions are proper "if an alternative would require inappropriate or unanticipated costs to the fund so as to potentially limit [its] resources."\(^{43}\) A decision denying benefits is proper because "[a] trustee has the obligation to guard the assets of the trust from improper claims."\(^{44}\)

In short, the existence of the fiduciary duty in itself provides no basis for a principled method of defining a trustee's obligations in making benefit claim determinations given the conflicting duties to preserve monies and distribute them to beneficiaries. Any denial of benefits will serve to protect the assets of a fund. At best the existence of the fiduciary duty provides courts with a rationale for why denials of benefits which are otherwise legitimate are not undertaken for malevolent motives.\(^{45}\) In the absence of precise fiduciary standards for making benefit determinations, the courts have adopted the arbitrary and capricious standard, using three types of analysis for ascertaining whether a particular decision breaches fiduciary obligations.

### C. The Arbitrary and Capricious Standard as Applied to ERISA

Review of the denial of benefits by ERISA fiduciaries will occur primarily through the utilization of three types of analysis: (1) examination of trustees' interpretation of plan documents for reasonableness and fairness; (2) determination of whether factual findings were based on substantial evidence; and (3) examination of the record for extrinsic evidence.

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\(^{41}\) 755 F.2d 708, 714 (9th Cir. 1985).

\(^{42}\) *Id.* at 711-12; *see also* Dockray v. Phelps Dodge Corp., 801 F.2d 1149 (9th Cir. 1986) (following *Jung*).

\(^{43}\) Bayles v. Central States, Southeast & Southwest Areas Pension Fund, 602 F.2d 97, 100 (5th Cir. 1979); *see also* Short v. UMW 1950 Pension Trust, 728 F.2d 528 (D.C. Cir. 1984) (upholding trustee's revision of eligibility requirements undertaken to achieve mandated funding levels).


\(^{45}\) *But see* Comment, *supra* note 24, at 1054. Therein the author argues that decisions to avoid unanticipated costs made in order to preserve the assets of a plan have been accepted as a defense to charges of arbitrary and capricious action. This improperly suggests that conduct which otherwise would be found to be arbitrary and capricious may be exonerated if a plan is strapped financially. To argue that outlays are not contemplated by the plan is only evidence that a construction of the plan avoiding them is reasonable.
revealing bad faith on the part of plan administrators. These modes of scrutiny may be commingled in any variation.

1. **Reasonableness of Interpretation**

In the course of executing their duties as fiduciaries, ERISA plan administrators must interpret the written plan in order to determine whether an applicant is entitled to benefits. If the plan grants them the authority, trustees may promulgate additional guidelines for the operation of a pension agreement. Absent unusual circumstances, the courts construe the arbitrary and capricious standard as requiring the approval of any reasonable interpretation made by the administrator. In *LeFebre v. Westinghouse Electric Corp.*, for example, the Fourth Circuit upheld an interpretation by trustees that a disability plan required "in-ability to work" as a requirement of eligibility and, based on that interpretation, denied disability benefits to an employee who was legally blind.

In ascertaining whether an interpretation is reasonable, courts will examine the language of the plan to see if the construction of eligibility provisions promulgated by the administrator is fair or reasonable. Where the language of the plan is ambiguous, the administrator's interpretation will be upheld if "the provisions are susceptible of the construction given by the administrators." Courts will not intervene where the language could be construed in favor of the plan participants but a plausible construction results in the denial of benefit to plan participants: "[a]bsent special circumstances, a court should defer to the administrator's 'reasonable resolutions of any ambiguities in the Plan's language,' rather than construe ambiguities in favor of plan participants." Where the terms of the plan are ambiguous, "the judicial role is limited to determining whether the . . . interpretation was made rationally and in good faith." It is irrelevant whether a court or an administrative agency

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46. See, e.g., Short, 728 F.2d 528.
47. *See Cook v. Pension Plan for Salaried Employees of Cyclops Corp.*, 801 F.2d 865, 867 (6th Cir. 1986) ("Because the administrator's interpretation is rationally related to a valid plan purpose, we hold that the courts are obligated as a matter of law to respect it."); *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *Rehrman v. Smith*, 555 F.2d 1362, 1372 (9th Cir. 1977) ("[W]e find the interpretation reasonable. Therefore, the interpretation was not arbitrary and capricious . . . .").
48. 747 F.2d 197 (4th Cir. 1984). The peculiar facts surrounding *LeFebre* are discussed *infra* at notes 65-75 and accompanying text. See *also* *Pokratz v. Jones Dairy Farm*, 771 F.2d 206 (7th Cir. 1985) (upholding denial of benefits to participant suffering eye disease who was "disabled" under the Social Security Act).
49. *Cook*, 801 F.2d at 867.
50. *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986) (quoting *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981)).
51. *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 529 (7th
would construe the term differently.\textsuperscript{52}

In some instances, courts have taken drastic rhetorical measures to defer to an ERISA fiduciary’s interpretation denying benefits to a participant, with bizarre semantic results. In \textit{Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees},\textsuperscript{53} the court reviewed a denial of benefits by the employer operated disability plan. The spouse of a twenty-year employee of the company applied for benefits as a surviving spouse after her husband had filed for disability benefits, but died weeks before a required five-month waiting period had elapsed. The court upheld the administrator’s construction that “Mr. Moore was not ‘totally and permanently disabled’ as defined by” the plan, though it is difficult to imagine a more permanent or disabling condition.\textsuperscript{54}

Some courts, however, have struggled to maintain the posture of deference while mitigating the effects of semantically possible but practically undesirable constructions given plans by their administrators. The court in \textit{Dennard v. Richards Group, Inc.}, held that “[a] rational and reasonable interpretation of a plan may still be arbitrary and capricious if contrary to the plain meaning of the plan.”\textsuperscript{55} How an interpretation could be both “reasonable” and “arbitrary and capricious” or “contrary to [its] plain meaning” is a juristic cipher. This indicates the difficulties courts have had in applying the single standard of arbitrary and capricious to the broad area preempted by ERISA.\textsuperscript{56} The court in \textit{Dennard} was contending with an instance where the trustees had uniformly construed a profit sharing plan to the detriment of terminated employees with vested interests in plan funds. The offered construction conflicted with other provisions of the plan. The trial court had granted summary

\textsuperscript{52} See id.

\textsuperscript{53} 740 F.2d 454 (6th Cir. 1984), cert. denied, 469 U.S. 1109 (1985).

\textsuperscript{54} Id. at 456. Although the court framed the issue as turning on unambiguous language contained within the plan, some interpolation was necessary to achieve this result. The eligibility provision required that the participant qualify under the disability insurance provisions of the Social Security Act, 42 U.S.C. § 423 (1982). Identical provisions have been defended on the basis of being “necessary to confirm that the disability under consideration is permanent.” \textit{Music v. Western Conference of Teamsters Pension Trust Fund}, 712 F.2d 413, 419 (9th Cir. 1983). Why it was necessary to further confirm the decedent’s disability for purposes of determining survivor’s benefits, or if the program had an alternative rationale for the waiting period, is unstated. The court rationalized the program’s construction as being a possible “philosophical decision” to confer benefits on those forced to bear expenses of a long disability. \textit{Moore}, 740 F.2d at 456 n.3. Exactly why the plan would characterize funds to defray such expenses as “survivor’s benefits” is not apparent. The court’s enthusiastic deference was primarily the result of an overbroad reading of precedents concerning ERISA plans forged in the fires of collective bargaining. \textit{See infra} notes 116-27 and accompanying text.

\textsuperscript{55} 681 F.2d 306, 314 (5th Cir. 1982).

\textsuperscript{56} \textit{See Comment, supra} note 24, at 1050. Therein, the author cites \textit{Dennard} as signifying a separate test apart from reasonableness. \textit{See also infra} notes 105-40 and accompanying text.
judgment for the defendant plan on the ground that the interpretation offered by the committee administering the plan could be "fairly implied" from its terms, and was uniformly given in similar circumstances. The appeals court reversed, holding in effect that a good faith interpretation was not necessarily the same as a reasonable one. Without unnecessary juristic contortions, it seems plausible that a good faith interpretation, i.e., one not taken with an improper motive, which contradicts other express provisions of a plan could be held to be arbitrary.

Some plans have used the deference generally conceded to fiduciaries interpreting ambiguous or undefined terms to increase flexibility of ERISA plans through distribution of minimalist summary plan descriptions. By deliberate use of ambiguity in the language and statement of purpose in the ERISA plan description, the promulgator of an ERISA plan can infuse flexibility in the plan itself. In Blakeman v. Mean Containers, the court reviewed the denial of severance benefits under the terms of a plan which encouraged managers "to consider each case in the light of its own circumstances and make severance recommendations accordingly." The court held that this resulted in a plan with intrinsic flexibility to be used in making decisions, and that if the exercise of this almost limitless discretion was in good faith, that was sufficient under the arbitrary and capricious standard of review. The result is anomalous given ERISA's emphasis on insuring certainty and the protection of worker's expectations in pension and welfare benefit funds, because it rewards plan sponsors for ambiguity.

2. Substantial Evidence for Factual Determinations

Decisions by ERISA fiduciaries to deny benefits may be contested even if the construction of the plan is not. An administrator must often make factual determinations whether a particular applicant meets plan eligibility requirements. Typically, these determinations are whether a participant has met a condition of the plan, such as length of employment, or has the status she claims, such as being disabled. Where the
arbitrary and capricious standard is applicable, most courts reviewing
factual determinations will use the substantial evidence test.64 Where the
question involves a question of legal status, courts will not use a deferen-
tial standard but will review the administrator's decision de novo.65
Courts applying the substantial evidence test will do so with varying de-
gres of deference to the plan administrator's decision.

In LeFebre v. Westinghouse Electric Corp.,66 the plaintiff filed for
benefits under his employer's insurer administered disability plan, which
for eligibility required total disability, defined as a condition which pre-
vents an employee "from performing your regular job or any appropriate
work within the company."67 LeFebre suffered from acute retinosis pig-
mentosa, but continued to work until he was arrested for the shooting of
his estranged wife's lover.68 After his claim for disability was denied by
his employer's insurer, LeFebre brought suit and the district court held
the denial of benefits to be arbitrary and capricious.69

The court of appeals reversed, holding that the district court had
misread the substantial evidence test in evaluating the evidence.70 The
substantial evidence test was satisfied by any evidence that could lead to
the conclusion adopted by the fiduciaries.71 Testimony by Westinghouse
managers that LeFebre would still have been employed had he made
himself available was substantial evidence that he was not disabled under
the meaning contained in the plan, even if contradicted by the applicant's
evidence.72 Most significantly, the appeals court held that the trial court had
misapplied the substantial evidence standard by independently as-
suming the persuasiveness of the evidence.73

Other circuits sometimes allow more latitude to courts reviewing the
factual findings of ERISA fiduciaries denying claims for benefits. In
Maggard v. O'Connell,74 the District of Columbia Circuit Court of Ap-
peals reviewed the denial of benefits to a claimant under a United Mine-

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64. Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987); Dockray v. Phelps Dodge Corp., 801
    F.2d 1149 (9th Cir. 1986); Brown, 797 F.2d 521; LeFebre, 747 F.2d 197. But see Pokratz v. Jones
    Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985) (stating that "[t]he 'arbitrary and capricious' stan-
    dard calls for less searching inquiry than the 'substantial evidence' standard").
65. Holt, 811 F.2d at 1536; see also Dockray, 801 F.2d at 1153-54 (holding that striking em-
    ployee's status fixed by law).
66. 747 F.2d 197 (4th Cir. 1984).
67. Id. at 201.
68. Id. at 199-200.
70. LeFebre, 747 F.2d at 204.
71. Id. at 208.
72. Id. at 205.
73. Id. at 207-08.
74. 671 F.2d 568 (D.C. Cir. 1982), aff'd, 703 F.2d 1284 (D.C. Cir. 1983).
workers trust fund established under the LMRA. The sole issue was the trustee's resolution of the factual question of whether the participant had met length of service requirements. The court applied the arbitrary and capricious standard and the substantial evidence test to review the trustee's decision.\textsuperscript{75} The precise facts in contention were whether the participant had actually worked for three periods for which the records were incomplete. The court concluded that the trustees' decision had not been based on substantial evidence.

After noting that review under the arbitrary and capricious standard must be "contextually tailored," the court concluded that a reviewing court "may also be more or less likely to give the fact finder the benefit of the doubt depending on the circumstances."\textsuperscript{76} Given the trustee's obligation and predilection for preserving the assets of the trust, the court embarked on its "admittedly limited review with greater care than it might ordinarily."\textsuperscript{77} The court then drew into question the reliability of testimony relied upon by the trustees in making their decision. The court characterized as "undocumented" a county employee's testimony that Maggard (then age 13) had been enrolled in school in 1921, a year he claimed to have worked.\textsuperscript{78} The court was even more willing to call into question the inferences which the trustees were willing to draw from the evidence. The court concluded that the absence of records for certain years could not support the trustees' inference that the mines in question were not in operation, and the trustees' determination that Maggard was in school could not support the inference that he did not work a night or swing shift.\textsuperscript{79} Moreover, the court held, the trustees had erred in inferring testimonial unreliability from inconsistencies in the claimant's testimony regarding dates and work sites he claimed to have been employed on.\textsuperscript{80}

Some of the differences between the applications of the substantial evidence test in these two cases may be explained by the relative merit between the two claims. LeFebre, before claiming disability due to blindness, had been arrested for murder and claimed temporary disability due to a mental condition.\textsuperscript{81} Maggard's claim was denied, in part, on the basis of testimony by individuals to the effect that they could not remember Maggard working in their crowded mine—forty years later.\textsuperscript{82} The court in \textit{Maggard} studiously avoided weighing the evidence, and instead

\begin{footnotes}
\textsuperscript{75} \textit{Id.} at 570-71.
\textsuperscript{76} \textit{Id.} at 571.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 573.
\textsuperscript{79} \textit{Id.} at 576.
\textsuperscript{80} \textit{Id.} at 573-76.
\textsuperscript{81} \textit{LeFebre}, 747 F.2d at 200-01.
\textsuperscript{82} \textit{Maggard}, 671 F.2d at 574-76.
\end{footnotes}
focused on showing the weakness of the inferences upon which the trustees based their decision.\textsuperscript{83}

Significantly, neither court addressed the underlying rationale for granting deference to the ERISA fiduciary in terms of the fiduciary's relationship to the employee or the type of decision being made. In both cases, the arbitrary and capricious standard was used to review the fact-finding of an ERISA fiduciary. No distinction was made on the basis of the identity and interests of the fiduciary. In \textit{LeFebre}, full deference was accorded to the determination of the employer's insurance carrier.\textsuperscript{84} In \textit{Maggard}, the determination of a joint board of management-labor trustees was vigorously scrutinized.\textsuperscript{85}

3. \textit{Inferences of Bad Faith}

Implicit in the fiduciary status of ERISA plan administrators is the assumption that they will use good faith in making decisions regarding a participant's application for benefits. Accordingly, an administrator's decision may be reversed if made in bad faith.\textsuperscript{86} If an administrator changes the plan construction freely, a participant may argue that it is doing so for the sole purpose of achieving a particular result in his case. Accordingly, bad faith may be inferred by inconsistent application of plan terms. By contrast, "[e]venhandedness of treatment is evidence of good faith."\textsuperscript{87} It has been noted that courts seldom reverse the decisions of ERISA plan administrators on the basis of inconsistent construction.\textsuperscript{88} However, even if a plan is construed uniformly, that construction may be unreasonable; or other evidence allowing inferences of bad faith may exist.\textsuperscript{89}

Failure by an ERISA fiduciary to operate its plan in accordance with the Act or other action undertaken to frustrate participants may be taken as evidence of bad faith and arbitrary and capricious action. In \textit{Blau v. Del Monte Corp.}, the court reviewed the trial court's summary

\footnotesize{\textsuperscript{83} The flexibility of the \textit{Maggard} court in applying the substantial evidence test may be due to the familiarity with the standard the District of Columbia Circuit generally is presumed to have. \textit{See supra} note 33 and accompanying text.}
\textsuperscript{84} 747 F.2d at 201.
\textsuperscript{85} 671 F.2d at 569.
\textsuperscript{86} Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987); Dockray v. Phelps Dodge Corp., 801 F.2d 1149 (9th Cir. 1986); Cook v. Pension Plan for Salaried Employees of Cyclops Corp., 801 F.2d 865 (6th Cir. 1986); \textit{LeFebre}, 747 F.2d 197; Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982).
\textsuperscript{88} \textit{See Comment, supra} note 24, at 1046.
\textsuperscript{89} \textit{See Blau v. Del Monte Corp.}, 748 F.2d 1348 (9th Cir. 1984) (fraud and deceit rendered administrator/employer's action in bad faith), cert. denied, 474 U.S. 865 (1985); \textit{Dennard}, 681 F.2d 306 (uniform construction of plan arbitrary and capricious if in contradiction of terms of plan).}
judgment entered against the employee/participants. In operating the plan, the employer administrator had "failed to comply with virtually every applicable mandate of ERISA." The defendant operated a secret severance plan, failed to respond to participants' requests for information regarding its severance policy, and summarily denied their request for benefits. The court held that the administrator's decision to deny benefits was "made in the course of, and could have been infected by, these ERISA violations." The court also suggested that arbitrary and capricious may not be the only appropriate standard review when ERISA's prescriptions have been flagrantly violated.

Where the conduct of an ERISA fiduciary is not so egregious, courts have been reluctant to impose liability on a plan for procedural violations of the Act. Courts have affirmed the denial of benefits where administrators have failed to provide a benefits application in a timely manner or delayed deciding the claim. If an appellate court finds the plan construction reasonable and the administrator's decision supported by substantial evidence, it may reverse a finding of arbitrary and capricious action where the trial court found ERISA's procedural requirements to have been violated.

Where the plan is employer administered, the Ninth Circuit Court of Appeals will examine the relationship between the employer and employee if that relationship calls the decision to deny benefits into question. In Dockray v. Phelps Dodge Corp., the court held that the decision of an administrator would be given less deference because the applicant was an active participant in a bitterly contested strike. In instances where a denial of benefits will avoid a "very substantial outlay" by the employer, the administrator's decision will likewise be scrutinized more closely.

In any event, whether evidence from which a court could infer bad faith will result in a finding of arbitrary and capricious action depends largely on the situation and the interpretation of the judicial decisionmaker. If the construction which resulted in the denial of benefits is supported by the language of the plan, it is conceivable that virtually any

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90. 748 F.2d at 1350.
91. Id. at 1353.
92. Id. at 1352-53.
93. Id. at 1353.
94. Id. at 1352-53.
95. See, e.g., Pokratz v. Jones Dairy Farm, 771 F.2d 206, 210 (7th Cir. 1985) (delay of two and one-half years between request for benefits and denial).
97. 801 F.2d 1149 (9th Cir. 1986).
98. Id. at 1152.
violation may be overlooked if the court views the outcome as fair. 100

In this manner, courts have fashioned varying degrees of deference
when applying the arbitrary and capricious standard, which suggests that
they are troubled by the implications of applying a single standard of
review in the widely disparate circumstances ERISA encompasses. The
courts have analyzed these differing situations as inferences of bad faith
and failed to analyze the institutional situations justifying the accretion
of administrative discretion to plan fiduciaries and how that accretion
affects the substantive goals of the Act itself.

III

JUDICIAL DEFERENCE AND ERISA PLAN ADMINISTRATION

While courts have easily transposed the arbitrary and capricious
standard of review from its original application to trusts regulated by the
LMRA to those regulated under ERISA, they have done so without ex-
amining the underlying institutional relationships between the employer,
fiduciary, and participant which may have justified the discretion af-
forded fiduciaries under the LMRA. Courts have tailored the applica-
tion of the standard to fit different situations and it is likely that they will
continue to do so. They should not overlook factors which may justify
the ERISA fiduciary’s discretion but should evaluate them in terms of
their relationship to the goals of the legislation the courts seek to enforce.
The remainder of this Comment will analyze factors which should be
taken into consideration when courts undertake the review of ERISA
fiduciaries, both in terms of the institutional factors influencing adoption
of the standard under the LMRA, and in terms of implicit justifications
for the grant of discretion to ERISA plan administrators. This Com-
ment will argue that the failure to distinguish the situations confronted
by courts undertaking the review of ERISA administrators may result in
the application of either unwarranted scrutiny or deference.

A. Labor Relations and Judicial Deference

The LMRA’s provisions governing trusts are applicable to funds
created pursuant to collective bargaining between the employer and a
representative union. 101 Pension plan provisions elaborated directly
within the collective bargaining agreement represent one instance where
the courts have correctly altered the scope of arbitrary and capricious
review for reasons of public policy. Courts may not hold the action of
trustees of plans jointly governed by the LMRA and ERISA arbitrary

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100. See Pokratz, 771 F.2d at 209 (court finds ERISA violations insufficient to result in arbi-
trary and capricious conduct where beneficiary is portrayed by administrator as “a malingerer, more
interested in securing disability benefits than in overcoming his physical handicap”).
and capricious if the trustee is enforcing eligibility provisions contained within the collective bargaining agreement.\textsuperscript{102} Such provisions may not be overturned unless their application would violate federal law.\textsuperscript{103} Properly stated, this deference is not to the trustees but to the process of collective bargaining itself, recognizing that when "neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract."\textsuperscript{104}

Implicit in the context of an LMRA trust fund are specific structural conditions and relationships between the ERISA fiduciary, the employer and the beneficiary justifying deference which may not be present in other circumstances. Under the LMRA, trust funds must be administered by boards with equal representation of management and labor. In the event deadlocks occur, the issue is taken to arbitration.\textsuperscript{105} LMRA trusts are funded programs, unlike some instances in which ERISA plans are unfunded.\textsuperscript{106} In the case of unfunded plans, the costs of claims are borne directly by the employer-administrator, rather than being extracted from the corpus of a trust which must, in the case of a Taft-Hartley trust, be expended for the sole and exclusive benefit of the stated beneficiaries.\textsuperscript{107} Paradoxically, in the review of fiduciary decisions of employer-administered plans under ERISA, most courts are engaging in "the least demanding form of judicial review"\textsuperscript{108} where arguably the situation calls for a heightened standard of review precisely because of the fiduciary's self-interest.

The conduct of insurance companies has also been held subject to ERISA's deferential standard of review.\textsuperscript{109} Yet insurers, at least in the short term, bear the costs of benefits. In contrast, many states imply a stricter duty of good faith to insurers when making eligibility determinations. In Dockray v. Phelps Dodge Corp.,\textsuperscript{110} the Ninth Circuit Court of Appeals recently noted that:

Where the administrator's decision present[s] a serious conflict between the interests of the employer and those of the fund's beneficiaries, a court should give "less deference" than usual, under the arbitrary and capricious standard, to the decision of the administrator of the employer-administered fund.\textsuperscript{111}

\textsuperscript{102} UMW Health & Retirement Fund v. Robinson, 455 U.S. 562 (1982).
\textsuperscript{103} \textit{Id.} at 574.
\textsuperscript{104} \textit{Id.} at 576.
\textsuperscript{105} 29 U.S.C. § 186(c)(5).
\textsuperscript{106} See, e.g., Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985).
\textsuperscript{107} 29 U.S.C. § 186(c)(5).
\textsuperscript{108} Pokratz v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985).
\textsuperscript{109} See cases cited supra note 5.
\textsuperscript{110} 801 F.2d 1149 (9th Cir. 1986).
\textsuperscript{111} \textit{Id.} at 1152 (citing Jung, 755 F.2d at 711-12).
If the role of discretion in pension plan administration is analyzed in terms of its underlying structural justification under the LMRA, Dockray's reasoning makes sense.\(^{112}\)

In some instances under ERISA where the costs are borne directly by the insurer or employer, contribution is affected directly by the benefit determination. In the case of funded trusts under LMRA, courts rely on two institutional factors to justify the use of the arbitrary and capricious standard: (1) contribution to the plan is not linked directly to benefit determinations; and (2) employee representatives appoint half of the trustees. What the Dockray court seemed to sense but did not fully articulate was the way in which a highly deferential standard adopted under the specific context of the LMRA trust loses its underlying justification in an instance where a transaction is essentially self-interested.

While courts may be beginning to consider factors of interest and the collective bargaining agreement in formulating postures of deference, they have not analyzed the impact of the process of collective bargaining on judicial review of pension plan administration under the arbitrary and capricious standard. In enacting ERISA, Congress sought to inject both predictability and reliability into private pension arrangements.\(^{113}\) In significant ways, the presence of collective bargaining is amenable to these goals. One of the recurring problems which the courts are called upon to review is the reasonableness of a fiduciary’s construction.\(^{114}\) Pension benefits of current employees are a mandatory subject of bargaining, and therefore the terms of a pension plan are easily brought to the table.\(^{115}\) The process of negotiation forces parties forming an agreement to define their positions with a precision which they might not otherwise require. The end result is a clarification of rights under the plan, and a corresponding increase in predictability by participants. Collective bargaining may also serve to alleviate problems in the administration of a pension plan in areas which may be particularly troubling to its future beneficiaries, the employees. The substantive impact of negotiation may be restructuring the plan to better meet the needs of the beneficiaries if the original form of the plan fails to meet expectations.

Unfortunately, courts continue to apply the arbitrary and capricious standard of review without regard for the impact of collective bargaining. In *Moore v. Reynolds Metals Co. Retirement Program for Salaried Em-

\(^{112}\) But cf. Maggard v. O'Connell, 671 F.2d 568, 571 (D.C. Cir. 1982) (court holds administrators of funded trust to greater degree of scrutiny under the arbitrary and capricious standard because they are “naturally disinclined” to make awards), aff'd, 703 F.2d 1284 (D.C. Cir. 1983).

\(^{113}\) See supra notes 3-4 & 20-21 and accompanying text.

\(^{114}\) See supra notes 46-62 and accompanying text.

ployees, the court reviewed a denial of benefits under the employer-administrator's plan. In upholding the plan, which was unilaterally created by the employer and not the result of collective bargaining, the court curiously relied on the Supreme Court's decision in UMW Health & Retirement Funds v. Robinson. The Moore court framed the issue correctly: "[t]he sole issue on appeal is whether a federal court may review for reasonableness the provisions of a retirement program." But, citing Robinson, it reached a startling conclusion: "[A]bsent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan."

The Moore court dismissed appellant's argument that Robinson applied only to terms contained within collective bargaining agreements, and went on in dicta to exempt all ERISA plans from substantive review. Such a conclusion is probably false as a matter of law, and utterly unwarranted from a fair reading of Robinson. The Supreme Court in Robinson had concerned itself solely with the eligibility provisions contained within the collective bargaining agreement itself, and had left open for review any rules promulgated by trustees acting within the scope of their authority. Furthermore, the Robinson Court, in reversing the court of appeals, noted that the lower court had "relayed upon cases in which trustees of employee benefit trust funds, not the collective-bargaining agreement, fixed the eligibility rules and benefit levels." Finally, the Court held that the eligibility provisions contained in the agreement could not be changed because terms relating to pension funds are "entitled to the same respect as any other provision in a collective-bargaining agreement" and "a federal court has no authority to modify the substantive terms of a collective-bargaining contract."

The court in Moore simply exchanged "pension plan" for "collective-bargaining agreement," an unreasonable transposition. The distinction which it derived from Robinson was not that between the terms of a collective bargaining agreement and other sources of eligibility provi-

116. 740 F.2d 454 (6th Cir. 1984), cert. denied, 469 U.S. 1109 (1985); see also supra notes 53-54 and accompanying text.
117. 455 U.S. 562 (1982).
118. 740 F.2d at 456.
119. Id. If this doctrine were strictly interpreted, an employer could create a pension plan which excluded everyone born in months ending in "y" without running afoul of the law.
120. Id.
121. The court may have limited its holding to include only those terms which are unambiguous, noting in a footnote that "Moore has not alleged . . . that the challenged provision is vague and ambiguous." Id. at 457 n.5.
122. 455 U.S. at 573-74.
123. Id. at 573.
124. Id. at 575-76.
sions, but between eligibility provisions and plan administration. This distinction is problematic precisely where the Moore court sought to apply it, when the program is an employer-administered benefit plan. In that situation, the employer sets the initial terms, and it or an agent is charged with construing them and promulgating new conditions. The employer can alter the plan at will by issuing a new plan description, and if the holding of Moore is taken seriously, an employee who labored under the expectation of certain rights could have the expectation extinguished without review.

The rationale for deference which the Moore court offered was that judicial interference "would serve only to discourage employers from creating voluntary pension plans," a consideration which does indeed argue for no review. But there is no indication that Congress was unprepared to interfere in pension plans at all, only that they refused to mandate minimum benefit levels. Indeed, the bill containing the Senate version of the Act mandated arbitration for disputes over benefits. If Congress was willing to mandate reporting, funding and vesting requirements, and allow individuals to bring suit under the Act, requiring that the plan must at least be rational is also reasonable.

Moore seems to represent a failure to consider the importance of factors associated with the structure of management-labor trusts and the process of collective bargaining when considering judicial deference in cases arising under ERISA where these factors are absent. A corresponding danger is that courts reviewing the actions of trust fiduciaries within the larger arena of ERISA actions will fail to recognize the structural implications where joint management and collective bargaining are present.

In Music v. Western Conference of Teamsters Pension Trust Fund, the Ninth Circuit reviewed an appeal from summary judgment granted in favor of the defendant pension fund. The participant brought suit against the fund, claiming entitlement to benefits computed from the date of his disabling heart attack, rather than the less generous amount computed from the date of eligibility.

The plan required that a disabled employee qualify for federal disability benefits before being eligible for union benefits. In order to quali-

125. 740 F.2d at 457 ("[i]n contrast, once a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits").
126. Id. at 456.
127. 120 CONG. REC. 29,941 (remarks of Sen. Javits).
128. See supra notes 20-21 and accompanying text. It is possible that Moore badly stated its holding, and may have been willing to infer a rational purpose for the distinction which resulted in the denial of benefits. 740 F.2d at 456 n.3.
129. 712 F.2d 413 (9th Cir. 1983).
130. Id. at 416.
131. Id. at 415-16.
ify for federal disability, an applicant must complete a five-month waiting period. Music completed the waiting period, then submitted an application for union benefits which was subsequently granted. Under the rules promulgated by the trustees, the benefits were calculated and paid as of the completion of the five-month waiting period. In the interim, the amount of benefits paid to persons becoming eligible diminished. The plaintiff did not challenge the five-month waiting period. Rather, the sole issue was whether the trustees could calculate the amount of benefits from the time the applicant became eligible, rather than from the time the disabling event occurred.

The case had been previously decided, but vacated and remanded by the Supreme Court for reconsideration in light of the holding of Robinson. The court addressed Robinson, correctly reading its primary holding as a mandate for deference to terms contained in a collective bargaining agreement. Because the trustees and not the agreement fixed the terms, the action was subject to review. After determining that the trustees' rules were subject to review under the arbitrary and capricious standard, the court undertook that normally limited review with a vengeance. Holding that the limiting of benefits was prima facie unreasonable because it was not for the sole benefit of the participant, the court put the burden on the trustees to put forward a reasonable basis for the rule. The trustees' explanation was based on a need for actuarial soundness. They needed to estimate expenditures with some certainty without having to predict whether injuries were permanent or, in instances where the disabling condition was less sudden than a heart attack, when disability occurred. The court was not satisfied with this rationale and, while undertaking judicial review under the arbitrary and capricious standard, it mandated the date for the computation of benefits.

At first glance, the trustees' choice of the date of eligibility seems rational. Under the authority of the trust, the trustees had discretion to use any method to determine benefit levels, and conditions for eligibility. However, they were precluded from using any system which calculated benefits on any date other than the date of disability.

The court in Music recognized but overvalued the line drawn in Robinson between the collective bargaining agreement and other terms to the detriment of sound judicial policy. The terms at issue in Robinson

132. Id. at 415.
133. Id. at 416.
134. Id. at 420.
136. 712 F.2d at 417 (quoting UMW Health & Retirement Fund v. Robinson, 455 U.S. 562, 573 (1982): "[t]rustees, like all fiduciaries, are subject to judicial correction in a proper case").
137. Id. at 418.
138. Id. at 419-20.
were indeed contained within the collective bargaining agreement. However, they had been substantially adopted by the trustees and only subsequently incorporated by the parties into the agreement. The Music court viewed collective bargaining as a simple matter of offer and acceptance, which ignores the reality of a continuing process of bargaining. The rules in an LMRA trust will be promulgated by trustees appointed by both parties to the agreement, permitting at least de facto representation of their interests. Benefits will be drawn from a trust for which contributions are fixed by agreement and which must be expended for the sole benefit of plan participants. This is not to say that trustees’ rules should be entitled to complete insulation from review, because such accommodations may not be as considered and in any event lack the formality of collective bargaining agreements. It does, however, argue for the court’s application of the arbitrary and capricious standard with its traditional posture of deference.

The courts’ decisions in Music and Moore indicate a failure to analyze discretion in terms of its structural justifications. One way the courts can approach the problem of performing this analysis is to examine the underlying structure of the ERISA plan with reference to the institutional structure of the LMRA trust. Courts should also consider the presence or absence of equal representation and collective bargaining when reviewing fiduciary decisions.

B. Legislative Purpose and Judicial Deference

ERISA was enacted to remedy perceived defects in the private pension system. In forming the legislative remedy, Congress sought to balance “the interests of employers and labor organizations in maintaining the 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 just rights and expectations.” In so doing, Congress sought to design a bill which “brings the workers’ interests up to parity with those of employers.” Congress made provision for individual remedies by allowing participants to bring suit under the Act. Courts hearing such actions should consider the legislative purposes when undertaking judicial review of plan administrators.

140. But cf. NLRB v. AMAX Coal Co., 453 U.S. 322 (1981). AMAX held that LMRA trustees were not representatives for purposes of the Act, but rather fiduciaries owing their duty to the trust. As a practical matter, employees and employers will select trustees with whom they can identify closely. Moreover, the primary substantive impact of holding that LMRA trustees are not representatives for purposes of the Act is to make their selection open to bargaining. Id. at 334.
142. Id.
One of the primary purposes of the Act is to infuse reliability into private pension schemes and protect the expectations of workers, in order to allow them to make more informed choices about financial arrangements for their retirement. One of the factors judges should consider when applying their standard of review is how framing the standard will affect this substantive goal of the Act. A cursory examination of case law shows that courts are not properly considering this legislative goal when formulating the standard of review.

By deferring to a rational interpretation of ambiguous terms of an ERISA plan, courts reward purposive vagueness in the formulation of plans and summary descriptions, and have allowed virtually standardless case-by-case determination of benefits. Such a result is clearly detrimental to the Act's purposes of allowing greater predictability to participants trying to provide for the future by gauging a plan's effect and relying on its benefits. A brief comparison will illustrate this point. In one case, a corporation sold off one of its divisions. The benefit plan called for severance pay for employees whose positions are "eliminated . . . and for whom appropriate alternative employment opportunities are unavailable within the Corporation." The plan administrator denied severance benefits to employees on the basis that they had not lost their jobs. The court found this decision to be arbitrary and capricious since their continued employment was not within the corporation. Where benefit provisions dealing with severance pay are couched in more general terms, on the other hand, courts are likely to defer to plan constructions denying severance pay to employees involved in the sale of a division, although the status of their rights to any severance pay and their continued employment rests in the hands of their new employers. Thus, under current doctrine, more explicit and predictable plan formulations are disadvantaged at law. Courts are, in effect, rewarding ambiguity.

As a practical matter, vagueness may be alleviated over time if the ambiguity involves an interpretation of plan terms. Once a plan is defined, an administrator may be increasingly bound to apply that definition lest a court infer bad faith conduct in the interpretation. But where the plan itself omits standards and delegates discretion to the administrator, the result is even more antagonistic to the goals of the Act.

144. See supra notes 20-21 and accompanying text.
145. See infra notes 146-55 and accompanying text.
146. Blau v. Del Monte Corp., 748 F.2d 1348, 1350, 1354-56 (9th Cir. 1984) ("[i]mposition of conditions outside the plan amounts to arbitrary and capricious conduct"), cert. denied, 474 U.S. 865 (1985). Although the circumstances of Blau were somewhat unique (see supra notes 90-94 and accompanying text), the court seemed to hold independently that the construction was arbitrary and capricious.
147. See, e.g., Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985); Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985).
148. See supra notes 88-91 and accompanying text.
In *Blakeman v. Mead Containers*, the court upheld the action of a plan where the administrator was “encouraged to consider each case in the light of its own circumstances and to make severance recommendations accordingly.”149 Although the court noted that Mead had previously denied similar requests for severance payments, an administrator acting on a purely discretion-based system may not be bound by previous decisions considered within their “own circumstances.”150 This obviously increases the unreliability of expectations.

Consideration of judicial deference in light of legislative purpose need not result in different outcomes in the cases discussed above if one considers the legislative priorities under the Act. The emphasis in ERISA is on providing security and reliability to retirement income plans. Congress was less concerned with other short-term benefits. Accordingly, courts should consider the type of benefits at stake when considering an appropriate standard for review of fiduciary decisions. Congress' stricter requirements for funding and vesting of retirement and long-term disability plans are indicative of a ranking of legislative priorities. Courts already are responsive to this, although not explicitly. One can contrast the “greater care” taken in applying the arbitrary and capricious standard by the District of Columbia Circuit in *Maggard v. O'Connell*,151 a pension benefits case, with the general willingness to accede to an administrator's construction of plan terms in severance pay cases.152 While this willingness may be too great, courts in general are correct in viewing the stakes in the two instances as being very different.

One area in which the courts have actively undertaken to effect congressional intent is that of avoiding excessive costs on the part of employers. As noted above, the appeals court in *Moore v. Reynolds Metals Co. Retirement Plan for Salaried Employees* was quick to argue that “[j]udicial interference into the establishment of pension plan provisions is unwarranted. Such interference would serve only to discourage employers from creating voluntary pension plans.”153 Other courts have noted that “one of the goals of ERISA was to keep plans within reasonable costs.”154 While it is undoubtedly correct that Congress sought to balance factors of costs and reliability, courts should not read this intention too broadly. For Congress clearly anticipated “modest cost increases” while bringing “the workers' interests up to parity with those of

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149. 779 F.2d at 1148 (emphasis in original).
150. *Id.* at 1150-51.
151. 671 F.2d 568 (D.C. Cir. 1982).
152. *See supra* note 147 and accompanying text.
C. Judicial Deference and Tribunal Expertise

One of the implicit rationales for allowing discretion to pension plan administrators is the presumption of expertise in the administration of the program. Yet special expertise is not required for all aspects of plan administration where discretion is exercised. In some cases, any presumed expertise may be negligible when compared to that of courts. The arbitrary and capricious standard, as applied by the courts, governs decisionmaking by plan fiduciaries in three primary areas regarding benefit claims. Trustees or administrators may: (1) promulgate eligibility rules, if given authority under the plan; (2) interpret provisions of the plan in deciding claims; and (3) make factual determinations regarding an applicant’s status or eligibility.

That plan administrators have expertise in operating pension plans is a sound enough proposition. Presumably, this expertise lends itself to interpreting the plan and promulgating proper rules to execute the will of the sponsors of the plan. Accordingly, it may be wise judicial policy to give relatively more deference to administrators exercising discretion in these areas.

A proposition which seems less certain is that ERISA fiduciaries have more expertise than courts in deciding questions of fact. Cases regarding length of service requirements or a status such as disability may arise as questions of fact, and courts may apply the arbitrary and capricious standard to review the factual findings of the administrator. In the case of a disability claim, the case at the administrative level may be at least partially resolved on the testimony of experts. It is a commonly held truism in litigation that expert medical opinion is available in support of virtually any case. Under the substantial evidence prong of the arbitrary and capricious standard, any evidence which could rationally lead to the conclusion the administrator adopted is sufficient to affirm that decision. Because the review is so limited, courts will defer to company doctors or insurance company experts regardless of the extent to which the expert opinion relied upon is controverted. Moreover, courts have particular expertise in resolving these types of questions of fact. If

156. See Comment, supra note 24, at 1049-50.
158. See id.
159. See supra notes 63-85 and accompanying text.
the rationale for reviewing administrator's actions under the "least demanding" form of judicial review is tribunal expertise, this assumption may need some reworking in cases involving complicated issues of fact.

In ordinary cases of fact-finding, the very function of the trial court mirrors the presumed expertise to which the court is to defer. In these situations, a court should undertake this "limited review with greater care than it might ordinarily," 161 precisely because it is a highly competent fact-finding body.

CONCLUSION

In applying the arbitrary and capricious standard of review to the actions of ERISA, the courts have transferred the standard of review amenable to a subset of cases under the LMRA and broadened its application to the whole context of ERISA. In doing so, they encounter two problems. First, they may be applying a deferential standard of review to situations without the same structural indicators of reliability and without regard to the substantive impact of using the standard in the absence of such indicators. Second, the courts may be developing habits of applying greater scrutiny than necessary where factors indicating reliability are present and a more limited role is in harmony with the purposes of the Act. Finally, this Comment has suggested three ways in which to examine the exercise of discretion and the proper level of review: (1) in reference to the process and structure of collective bargaining where these justify reliance on the decisionmaker; (2) in terms of the legislative goals of ERISA; and (3) in terms of the type of decision made and the relative competence of plan administrators and trial courts. If the courts continue to categorize disparate cases together and reforge a single standard of review for application to each differing circumstance, they should consider both the reasons and the institutional relationships justifying the grant of discretion in determining the level of rigor with which they are going to apply that standard.