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The Regulation of Severance Plans Under ERISA*

Mark Daniels†

Employees terminated by a corporate division after its sale who are then immediately rehired by the acquiring company have frequently brought suit against the selling company seeking severance benefits. Most courts dismissed such cases in the past because the employees never were unemployed. The 1989 U.S. Supreme Court decision in Firestone Tire & Rubber Co. v. Bruch held that courts reviewing cases where the benefit plan failed to give the plan administrator discretion to interpret or construe the plan should apply a de novo standard of review. Until that decision, courts applied the deferential arbitrary and capricious standard of review to all benefits determination cases that were governed by ERISA.

In this article, Mark Daniels shows that regardless of the standard of review applied, most courts continue to use the same rationale for upholding the plan administrator's action denying benefits. Severance plans are almost universally subject to ERISA and are immune from state law, yet under ERISA severance plans are exempt from most of the provisions of ERISA's regulatory scheme. The author argues that most severance plans are exempt, therefore, from both state and federal regulation and courts grant wide discretion to plan administrators to amend or terminate plans. Finally, the author argues that even where a severance plan is subject to and violates ERISA, courts generally rule that no remedy is available to the plan's participants.

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INTRODUCTION

The proliferation during the 1980's of corporate mergers and acquisitions, followed by downscaling and streamlining, brought about an explosion of lawsuits over severance benefits by displaced workers. One heavily litigated scenario involves the sale of a corporate division in which the division’s employees are terminated but immediately reemployed by the acquiring company. The affected employees bring suit against the selling corporation seeking severance benefits. The majority of courts facing the issue have dismissed these cases on the ground that the employees suffered no period of unemployment. This was the situation presented to the United States Supreme Court in 1989 in Firestone Tire & Rubber Co. v. Bruch,1 and in dozens of cases before and since. Traditionally, benefit determinations made under plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"),2 including severance plans, were reviewed by courts under a deferential "arbitrary and capricious" standard.3 Under the arbitrary and capricious

3. However, a few pre-Bruch Third Circuit cases applied a less deferential standard in review. See, e.g., Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 145 (3d Cir. 1987) (applying "contract construction standard"), aff'd in part and rev'd in part, 489 U.S. 101 (1989); Struble v. N.J.
standard, few courts were willing to upset the administrator’s decision to deny benefits under these circumstances.

In Firestone the Supreme Court ruled that unless the benefit plan gave the plan administrator discretion to interpret or construe his plan, the less deferential de novo standard of review would apply. In theory, Firestone’s de novo standard does not give any presumptive weight to the administrator’s decision, but instead attempts to discern a plan’s meaning in a neutral fashion. This, however, has not been the case in practice. Despite the de novo standard, most courts continue to uphold the plan administrator’s decision to deny benefits to employees who are immediately reemployed, often under the same rationale used prior to Firestone. Courts hold firmly to the position that a period of unemployment is an inherent prerequisite for severance benefits, and to grant severance to employees who are immediately reemployed would result in a windfall to those employees.

Severance plans, which provide compensation to employees in the event of separation or termination from employment, are almost universally subject to ERISA. Because ERISA has broad preemptive effect, severance plans are therefore exempt from most state laws. They are also exempt from most of ERISA’s regulatory provisions. With so little state and federal regulation, employers have considerable freedom to enforce their prerogative toward their severance plans. The decisions of many courts to grant employers wide discretion in amending and terminating their severance plans enhances this freedom. Moreover, courts have usually ruled that even when employers violate the few ERISA regulations which govern severance plans, no remedy is available to the plan’s participants.

This article will examine the effect of ERISA on severance plans in four parts: (1) the circumstances under which ERISA governs a severance plan; (2) cases which adjudicate, before and after Firestone, the denial of severance benefits to employees who are immediately reemployed; (3) the employer’s power to unilaterally amend or terminate severance plans; and (4) the circumstances under which remedies are available to participants when ERISA’s procedures are violated.

I
QUALIFYING FOR ERISA COVERAGE

A. Severance Plans are Routinely Classified as Employee Welfare Benefit Plans under ERISA

ERISA regulates employee benefit plans which are either employee


welfare benefit plans or employee pension plans, and preempts the state law which relates to such plans. Severance plans are routinely classified as welfare benefit plans under ERISA. ERISA subjects employee welfare benefit plans to significantly less regulation than pension plans.

The leading case addressing what constitutes a "plan" under ERISA is Donovan v. Dillingham. Donovan held that the phrase "plan, fund or program" under ERISA "implies existence of intended benefits, intended beneficiaries, a source of financing, and a procedure to apply for and collect benefits." Courts have often applied the Donovan test to determine that even sparse, informal or oral arrangements can be "plans" under ERISA. One court reasoned that an informal policy may constitute an

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6. 29 U.S.C. § 1002(3) (1988). An employee welfare benefit plan is defined as:
   [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).


Section 186(c)(6) concerns money paid to trust funds for the purpose of "pooled vacation, holiday, severance or similar benefits." 29 U.S.C. § 186(c)(6) (1988) (emphasis added).

29 C.F.R. § 2510.3-2(b) (1988) states the conditions under which a severance pay plan should be treated as an employee pension benefit plan, instead of an employee welfare benefit plan. Under this provision, the payment of severance benefits on the account of termination shall not be considered pension benefits if:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;
(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and
(iii) All such payments to any employee are completed,
   (A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and
   (B) In the case of all other employees, within 24 months after the termination of the employee's service.

7. See infra Section III.
8. 688 F.2d 1367 (11th Cir. 1982).
9. Id. at 1372.
10. For example, in Purser v. Enron, 10 Employee Benefits Cas. (BNA) 1561, 1563 (W.D. Pa. 1988), the court found that a change in control contract (also called a "golden parachute") was governed by ERISA as an employee welfare benefit plan because the contract stated that the corporation intended to provide benefits to a class of beneficiaries, stated the type of payments employees would receive in the event of an involuntary separation, and outlined the method of computing benefits due upon certain events. See also Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir. 1989) (under Donovan, promulgation of guidelines for layoff and payment of a termination payment created a plan for termination benefits which was subject to ERISA even though it was not communicated to employees); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503-04 (9th Cir. 1985) (applying Donovan to unwritten policy to find sufficient evidence of a plan); Bennett v. Gill & Duffus Chem., 9 Employee Benefits Cas. 1291, 1293 (S.D.N.Y. 1988) (applying the Donovan test, and find-
employee benefit plan because to hold otherwise would allow employers to ignore ERISA requirements in the hope that they could escape liability under ERISA. 11

Courts have also regularly found that arrangements that provide benefits in the event of separation are welfare benefit plans under ERISA. 12 Courts have rejected the argument that because a severance plan does not comply with ERISA reporting and other requirements, it is not an ERISA plan.

The Supreme Court cast some doubt over which severance benefits are covered by ERISA in Fort Halifax Packing Co. v. Coyne. 13 In Fort Halifax, the Supreme Court was called upon to decide whether a Maine statute was preempted by ERISA. The statute provided that any employer who terminated operations at a plant with 100 or more employees, or relocated those operations more than 100 miles away, had to provide one week’s pay for each year of employment to all employees who worked at the plant for at least three years. The employer had no liability if its employee accepted employment at the new location or if the employee was covered by a contract that dealt with the issue of severance.

11. Mylar Elec., Inc. v. McNeil, 27 Wage & Hour Cas. (BNA) 1406, 1408 (N.D. Ill. 1986). This reasoning is somewhat flawed, however, because employers often have more to fear from state court remedies. It is employees, not employers who often argue that ERISA does not apply to their plan; it is employers who seek out ERISA coverage.

12. See Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989) (termination benefits subject to ERISA); Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 520 n.4 (8th Cir. 1988) ("[c]ourts have uniformly held that unfunded severance pay plans are an 'employee welfare benefit plan' covered by ERISA"); Nevill v. Shell Oil Co., 835 F.2d 209 (9th Cir. 1987) (severance benefits offered to certain employees at a location, which was in the process of closing, to ensure that these employees remained on the job until they were no longer needed were subject to ERISA); Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985) (unfunded severance pay plan is 'welfare benefits plan subject to ERISA'), aff'd sub nom Roberts v. Burlington Indus., Inc., 477 U.S. 901 (1986); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985) (finding severance plan to be covered by ERISA, rather than an exempt payroll practice); Maryonovich v. Market Data Retrieval, Inc., 716 F. Supp. 343, 347 (N.D. Ill. 1989) ("[I]t is clear from almost every case cited herein that severance policies are 'employee welfare benefit plans' under ERISA. 29 U.S.C. § 1002(1)"); Henne v. Allis-Chalmers Corp., 660 F. Supp. 1464, 1470 (E.D. Wis. 1987); Mylar Elecs., Inc. v. McNeil, 27 Wage & Hour Cas. (BNA) 1406, 1407 (N.D. Ill. 1986) ("This court is not alone in its finding that a severance pay plan of an employer is covered by ERISA. To this court's knowledge, every federal appellate court which has addressed the issue has so held."); Coleman v. General Elec. Co., 643 F. Supp. 1229, 1240 (E.D. Tenn. 1986), aff'd without opinion, 822 F.2d 59 (6th Cir. 1987).

pay. The Court found that the Maine statute was not preempted by ERISA. In reaching its decision, the Court rejected the argument that the payment was similar to severance plans that were subject to ERISA. The Court distinguished the state statute by holding that it was a one time payment that required no ongoing administrative scheme on the employer's part: "Some severance benefit obligations by their nature necessitate an ongoing administrative scheme, but others do not. Those that do not, such as the obligation imposed in this case, simply do not involve a state law that 'relate[s] to' an employee benefit 'plan.'"

Several courts have confronted the argument that the severance plan before them carried an insufficient administrative scheme to be governed by ERISA under Fort Halifax. These courts have found such plans to be governed by ERISA because they imposed some administrative burden on the employer, albeit a minor burden such as requiring the employer to designate which employees were eligible for benefits or requiring the employer to make individual benefit determinations instead of automatically granting benefits to all employees.

B. Major Effect of Classification as ERISA Plans: Federal Preemption.

State law claims against severance plans subject to ERISA are preempted by ERISA. Federal jurisdiction over such claims is assured

14. Id. at 19.
15. Id. at 7-19.
16. Id. at 18 (quoting 29 U.S.C. § 1144(a)).
17. For instance, in Kocman v. Safeguard Business Sys., No. 88-5127 (E.D. Pa. June 28, 1989) (LEXIS, Genfed library, Dist file), the court found the fact that an employer had to designate which employee would be eligible for a supplemental lump sum severance policy enough to put the plan under ERISA. "This requirement of employer designation presents more than 'a lump sum payment, triggered by a single event,' which is the standard under Fort Halifax." Id. at 6. In Alvarez v. Alleco, Inc., 701 F. Supp. 183 (C.D. Cal. 1988) the court rejected a former employee's request for further discovery in order to determine whether his severance plan was covered by ERISA. The employee argued that under Fort Halifax not all severance plans are covered by ERISA. The court denied the request, ruling that the plan in question was covered by ERISA. A significant case finding that severance plans are still covered by ERISA after Fort Halifax is Pane v. RCA Corp., 667 F. Supp. 168 (D.N.J. 1987), aff'd, 868 F.2d 631 (3d Cir. 1989). The court found that the severance plan was covered by ERISA, distinguishing Fort Halifax because the severance plan required individual determinations: [W]hatever the specific provisions of the defendant's severance program, they surely involve a separate determination of each individual's eligibility for benefits. This is not a situation, like that in Fort Halifax, where the company was obligated to make a single set of payments to all employees, and thus did not need an ongoing administrative system. 667 F. Supp. at 171 (emphasis in original). Under this reasoning most severance plans would be subject to ERISA.
18. See cases cited supra note 17.
19. The preemption provision of ERISA is found in 29 U.S.C. § 1144(a) (1988). It provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(c)(1) (1988) provides that "State law" is "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State."
even if no federal claim appears on the face of the complaint. The Supreme Court has given ERISA preemption broad effect. Several re-


In Ingersoll-Rand, the Supreme Court’s most recent pronouncement on preemption, the Court considered a state common law wrongful discharge claim that a principal reason for an employee’s termination was the employer’s desire to avoid contributing to or paying benefits under the employer’s pension fund. ERISA preempts such a claim, the Court held. Since the cause of action was based on a pension plan, the Court held:

in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the court’s inquiry must be directed to the plan, this judicially created cause of action ‘relate[s] to’ an ERISA plan.

111 S. Ct. at 483 (emphasis added). The Court also found that the claim was covered by ERISA section 510, which protects participants from termination motivated by an employer’s desire to avoid a plan from vesting. Id. at 485.

In Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987), the Court held that state law claims for improper termination of disability benefits were preempted by ERISA. Similarly in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), plaintiff brought suit under common law tort and contract theories for improper processing of benefit claims under an ERISA plan. Plaintiff’s state law actions were preempted by ERISA because they arose directly out of the employer’s administration of a covered plan. Id. at 47. Cf. Massachusetts v. Morash, 490 U.S. 107, 114 (1989) (paying discharged employees from general assets for unused vacation time is not an employee welfare benefit plan, thus criminal prosecution for failure to comply was not preempted).

A three-step process has evolved for determining whether ERISA preempts a cause of action. First, there must be an ERISA regulated plan. Second, plaintiff’s action must “relate to” that plan. If the first two conditions are met then the action is preempted under ERISA Section 514(a). The third step involves a savings clause which removes an otherwise preempted law from preemption. If the action is based on a state law that regulates insurance and thus falls within the “savings” clause of Section 514(b)(2)(A), then it is not preempted.

With regard to the first step, the ease with which a severance plan is subject to ERISA is discussed above. The second step in preemption analysis, whether the actions relate to an ERISA plan, is equally easy to meet. Commenting on this requirement, in Pilot Life, the Court reiterated its position that:

the phrase “relate to” [is to be given] its broad common-sense meaning, such that a state law “relate[s] to” a benefit plan “in the normal sense of the phrase, if it has a connection with or reference to such a plan . . . . In particular we have emphasized that the preemption clause is not limited to “state laws specifically designed to affect employee benefit plans.”

481 U.S. at 47-48 (citation omitted). Based on this analysis, the Court concluded that the common law causes of action raised in Dedeaux’s complaint, each based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly met the criteria for preemption under 514(a). Id. at 47.

The final step, the insurance savings clause, is a narrow exception. As the Pilot Life court stated:

A common-sense view of the word “regulates” would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry. Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law.
cent cases illuminate the breadth of this effect.22

Id. at 50.

The Supreme Court has also made it clear that even if a plaintiff cannot restate a preempted cause of action under ERISA, this is not evidence that the claim is not preempted. The Court in Pilot Life stated very clearly that Congress' ERISA Section 502(a) sets forth a comprehensive civil enforcement scheme which provides strong evidence that Congress did not intend to authorize state remedies that are not provided for in ERISA. "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." Id. at 54. Thus, employees may be left with no remedy if none is provided under ERISA even if one had been available at common law.

Somewhat at odds with this reasoning, the Supreme Court has more recently permitted state law garnishment laws to be used on the grounds that otherwise there would be no way to enforce a judgment under ERISA because no comparable enforcement mechanism exists in the ERISA framework. Mackey v. Lanier Collections Agency & Serv., Inc., 486 U.S. 825, 833-34 (1988).

Finally, it should be noted that aside from the preemption framework certain state laws are barred because they conflict directly with an ERISA provision. Thus, in Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990), the Supreme Court found that state law constructive trusts violated ERISA's prohibition on assignment or alienation of pension benefits.

22. See Gibson v. Prudential Ins. Co., 915 F.2d 414, 418 (9th Cir. 1990) (ERISA preempts claims relating to any employee plan even if the defendant is a non-fiduciary); Howard v. Gleason Corp., 901 F.2d 1154, 1157 (2d Cir. 1990) (state law requiring employers to give employees notice of any right to convert group life insurance policy to another type of life insurance within 15 days of the employee's termination is preempted by ERISA); Lee v. E.I. DuPont de Nemours, 894 F.2d 755, 757 (5th Cir. 1990) (state law suits for fraud and negligent misrepresentation are preempted by ERISA notwithstanding plaintiffs' argument that the misrepresentation prevented them from receiving increased benefits under an early retirement plan; Iron Workers Mid-South Pension Fund v. Terotechnology, 891 F.2d 548, 556 (5th Cir.) (state lien statute preempted by ERISA and thus may not be used to collect delinquent contributions owed to a multi-employer benefit plan), cert. denied, 110 S. Ct. 3272 (1990); Hydrostorage Inc. v. Northern Cal. Boilermakers, 891 F.2d 719, 729 (9th Cir. 1989) (an apprenticeship program developed by a collective bargaining agreement and including a trust fund is an employee welfare benefit plan; thus an administrative order imposing sanctions against a contractor for violating employment standards is preempted by ERISA); Lister v. Stark, 890 F.2d 941, 945 (7th Cir. 1989) (fraud and breach of contract claims preempted), cert. denied, 111 S. Ct. 579 (1990); Orozco v. United Air Lines, 887 F.2d 949, 952 (9th Cir. 1989) (state law claims for breach of contract, bad faith breach of contract, and failure to pay wages are preempted); Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 696 (6th Cir. 1989) (state claims of equitable estoppel and punitive damages preempted by ERISA); Baxter v. Lynn, 886 F.2d 182, 186 (8th Cir. 1989) (state subrogation law preempted by ERISA); Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1292 (5th Cir. 1989) (state law breach of contract action to recover additional pension benefits is preempted because it relates to an employee benefit plan); Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 520 (8th Cir. 1988) (ERISA preemption applies to state decisional law as well as to state statutes); Nevill v. Shell Oil Co., 835 F.2d 209, 212 (9th Cir. 1987) (claims for breach of contract, breach of the covenant of good faith and fair dealing, and fraud were preempted where they related to the enforcement of benefit plans through which claimants attempted to force their former employers to provide severance benefits); Gilbert v. Burlington Indus., Inc., 765 F.2d 320, 327 (2d Cir. 1985) (ERISA preempts state and common law claims for severance benefits), aff'd sub nom Roberts v. Burlington Indus., Inc., 477 U.S. 901 (1986); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir.) (state law claim for tortious interference with severance plan preempted by ERISA), cert. denied, 454 U.S. 968, cert. denied, 454 U.S. 1084 (1981); Morshige v. Spencecliff Corp., 720 F. Supp. 829 (D. Haw. 1989) (claims for promissory estoppel, breach of contract, tortious breach of contract and intentional and/or negligent misrepresentation or infliction of emotional distress are preempted to extent of damages sought out of administration of employee benefit plan); Bowman v. Firestone Tire & Rubber Co., 724 F. Supp. 493, 504 (N.D. Ohio 1989) (breach of implied contract claim preempted); Kocman v. Safeguard Business Sys., No. 88-5127
The pre-ERISA case of *Chapin v. Fairchild Camera & Instrument Corp.* illustrates the significance of ERISA preemption of severance claims. In *Chapin*, a corporation sold one of its divisions. The division's employees were given the option to continue their employment in identical jobs, but without identical fringe benefits. In particular, the termination benefits provided by the buyer were lower than those provided by the seller. Most employees chose to work under these terms. Within a few months, many of the employees were terminated by the new employer. The trial court determined that the employees were not entitled to termination pay from the seller. The appellate court reversed, finding that the sale amounted to a layoff because it made it impossible for the employees to continue their employment. The court found that separation pay was intended to compensate for past services. It explained that:

> [U]nemployment is not a prerequisite to the right to separation pay which may, and frequently does, exist where there is no interruption whatever in the continuity of employment. Separation pay is not analogous to, nor is it a form of, unemployment compensation. Rather it is a kind of accumulated compensation for past services and a material recognition of their past value. It concerns the past, not the future, and once it is earned, it becomes payable no matter what may thereafter happen.

The *Chapin* decision is not the only decision outside of ERISA to reach this outcome. Courts applying ERISA, however, have over-
whelmingly rejected this reasoning. Still, if ERISA did not preempt state law, *Chapin* and other similar decisions could govern the analysis and lead to conclusions diametrically opposed to those which are regularly reached under ERISA.

II

**DENIALS OF SEVERANCE BENEFITS TO FORMER EMPLOYEES WHO SUFFER NO PERIOD OF UNEMPLOYMENT**

The following scenario has been repeatedly litigated: Company A has a severance plan in place providing for compensation in the event of separation. One day, a division of Company A is sold to Company B. The employees of the affected division are immediately reemployed by Company B, often at the same position, and sometimes with the same salary and benefits. As former Company A employees, these employees seek severance pay from Company A.26 Company A denies the claims on the ground that although the employees were separated from Company A, the claimants suffered no period of unemployment, a (usually unwritten) prerequisite for severance benefits. In more dramatic cases, Company B then proceeds to file for bankruptcy or terminates a large group of employees shortly after the takeover.27 The initial question

Corp., 277 Md. 471, 477, 356 A.2d 221, 225 (1976) ("[T]here is ample support elsewhere for the position that when part or all of a company is sold and the employees are told they cannot remain with their old employer, their employment has been terminated even though they immediately begin to work for the new owner."); Mace v. Conde Nast Publications, Inc., 155 Conn. 680, 688, 237 A.2d 360, 363 (1967). In upholding severance benefits for employees who were immediately reemployed by their company's successors, the *Dahl* and *Mace* cases focused on the fact that the employees had not entered into a novation with their new employers.

26. A recent case highlights the importance of not taking the basic facts for granted and of not placing form over substance in a sale transaction. In Pippin v. RCA Global Communications, 756 F. Supp. 446 (N.D. Cal. 1991), the district court granted summary judgment in favor of plaintiffs seeking severance benefits. Plaintiffs worked for a company whose severance plan provided that they would not receive benefits if the employer sold a business operation to another company under terms that allowed the employee to work for the acquiring company at substantially the same or at higher salaries.

The company for which the plaintiffs worked was sold to another company whose severance plan provided for a maximum of 30 weeks' severance. This was less than the seller's plan which had a 52-week maximum.

The acquiring company decided to terminate the plaintiffs before the transaction was completed. The day after the acquisition closed, the buyer sent a letter terminating the plaintiffs. The plaintiffs sought 52 weeks' severance under the seller's plan. The buyer rejected the request on the grounds that the plaintiffs were covered by the buyer's plan.

The court found that section 510 of ERISA prohibits discharge which prevents attainment of rights under an ERISA benefits plan and that the defendants structured the plaintiff's employment relationship to deprive them of the benefits under the 52-weeks plan.

In granting summary judgment to the plaintiffs, the court found that the arrangement was a sham, that employment with the buyer was a sham, and that the plaintiff was really "hired to be fired." *Id.* at 447.

27. *See Bruning v. Mrs. Smith's Frozen Food Co., 894 F.2d 401 (4th Cir. 1989).*
presented to the court in each case is whether an employer may deny severance benefits to employees because they were immediately rehired after their termination and thus suffered no period of unemployment.

If ERISA governs the severance plan, the analysis turns on whether the plan gives the administrator discretion to interpret and apply the plan. If the plan administrator has such discretion, courts must apply an "arbitrary or capricious" or "abuse of discretion" standard of review. Under this standard, the plan administrator's decision is usually upheld, especially where there are indications that the plan was meant to protect against unemployment, not to reward for past service. Under Firestone, where employers or plan administrators lack sufficient discretion, a de novo standard of review is applied. The de novo review standard, however, has not been well-defined and its use has not affected the outcome in most cases involving immediate reemployment.

A. The Firestone Decision

In Firestone, an employer sold one of its divisions, and the employees in the affected division who were hired by the employer's successor, sought severance benefits. The employer denied the request on the ground that there had not been a reduction in the work force. The trial court granted summary judgment in favor of the employer on the ground that the decision to deny benefits was not arbitrary or capricious. On appeal, the Supreme Court reversed this determination and held that the court had applied the wrong standard of review. The Court reasoned that because Congress intended ERISA's fiduciary responsibility provisions to codify and apply certain principles which had evolved in the law of trusts, trust law standards should be used. Therefore, the Court concluded that a denial of benefits is to be reviewed under a de novo standard unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. The Supreme Court gave sparse guidance for the application of the de novo standard, however, stating that: "[a]s they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation." In addition, the Court stated that if the decision maker is under a conflict of interest, the conflict must be weighed as a factor in determining whether there has been

29. See infra §§ II.B-C.
30. 489 U.S. at 115.
32. Id. at 110-11.
33. Id. at 111-15.
34. Id. at 112.
an abuse of discretion.\(^{35}\)

Thus under *Firestone* the threshold question is whether the plan grants the plan administrator sufficient discretion to qualify for review under the arbitrary and capricious standard.\(^{36}\) To determine the standard of review, courts have scrutinized the language of plans for an ex-

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35. *Id. at 115; accord* Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 693-94 (6th Cir. 1989), cert. denied, 110 S. Ct. 1924 (1990). *See* Haidet v. American Progressive Life & Health Ins. Co., No. 84 CIV 7641 (LBS) (S.D.N.Y. April 17, 1989) (LEXIS, Genfed library, Dist file) (the court noted that where there was a conflict of interest, a standard of review more strict than the arbitrary or capricious standard may apply; however, the court found that even taking into account the potential conflict in the case—the plan administrator also acted as insurer of the benefit plan—no arbitrariness was present); Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 501 (W.D. Pa. 1989). In Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan, 11 Employee Benefits Cas. (BNA) 1072 (W.D. Wis. 1989), the court held that a plan conferred sufficient discretion to justify abuse of discretion review of the trustee's decision to revert $4.2 million to the company's partners' surplus. However, because the trustees were also partners in the company, a conflict of interest was present which led the court to grant little deference to the trustee's decision. *Id. at 1078.*

In Becker v. Simpson Bldg. Supply Co., 675 F. Supp. 271, 277-78 (M.D. Pa. 1987), a U.S. district court, although not using the term "de novo", nonetheless applied the "arm's length" test followed by the Third Circuit in Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 145 (3d Cir. 1987) because the plan administrators profited by its decision to deny the plaintiffs' severance pay. The court first sought the intent of the parties. After that, the court looked for the reasonable construction of the policy based on past practice and industry standards. Applying this analysis, the court found that an employer's decision to deny severance benefits based on continuing employment was consistent with the policy's purpose and it was also the most reasonable construction of the policy. The plan contained language that severance compensation was "to provide a period of salary continuance following termination." 675 F. Supp. at 278. The court found that "the industry recognize[d] the position of both parties," *id. at 278 n.7*, but that the past practice of the employer was not to make payments to employees retained by purchasers of other branches. *Id. at 278.* The court also looked to the fact that the employees' compensation before and after the sale were not so different "as to compel the grant of severance pay in the instant case." *Id. at 279.* The court went on to rule:

In the final analysis, we would liken the Simpson Severance Pay Policy to an insurance policy against unemployment. In essence, Simpson's employees were insured against a loss of income while employed with Simpson. At the time of the sale of the facility to Hudson, the employees remained employed (although not by Simpson) and it appears that the vast majority of those employees have continued employment with Hudson up until the date of this Order. Therefore, the protection afforded by the severance policy did not arise at the time of the sale as the Plaintiffs had no claim of unemployment.

*Id. at 279.*

36. The *Firestone* decision was an abrupt shift in the way most circuits had been viewing decisions to deny ERISA benefits. Several cases were remanded by the Supreme Court for reconsideration in light of *Firestone.* *See e.g.* Adams v. Aeco Corp., 862 F.2d 316 (6th Cir. 1988), *vacated and remanded, 490 U.S. 1103 (1989).*

In *Adams*, the Sixth Circuit had reversed in part a district court grant of summary judgment in favor of several employees who had sued for severance benefits denied them by their employer when their division was sold and they were terminated. The Sixth Circuit rejected the argument that because a severance plan did not use the word "unemployment," unemployment could not be required as a condition of payment under the plan. The court deferred to the plan administrator's interpretation that severance pay provisions applied only to workers who suffered periods of unemployment. Employees who had taken jobs with the division's purchaser had been denied benefits. The court found that although the plan could be read to conform with the employees' argument, the employer's interpretation was not contrary to the language of the plan and thus should not be overturned under the arbitrary and capricious standard. In an opinion not recommended for publication, the Sixth Circuit held that it would reach the same conclusion under the *de novo* standard.
implicit statement that the plan administrator has discretion to determine benefit eligibility or to construe the terms of the plan. Some courts


Notwithstanding this change, several circuits have ruled that Firestone will apply retroactively. Jacobs v. Pickards Mather & Co., 933 F.2d 652 (8th Cir. 1991) (collecting cases).

37. The following post-Firestone cases have found that the plan administrator possessed sufficient discretion to warrant arbitrary or capricious review:

Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989) (plan administrator was given great discretion to interpret plan language), cert. denied, 110 S. Ct. 1924 (1990); Batchelor v. IBEW Local 861 Pension and Retirement Fund, 877 F.2d 441, 443 (5th Cir. 1989); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir. 1989) (trustees had authority to determine questions of coverage and eligibility); Curtis v. Noel, 877 F.2d 159, 161 (1st Cir. 1989) (retirement plan gave administrator responsibility to determine which employees were eligible to participate and to interpret plan provisions); Lakey v. Remington Arms Co., 874 F.2d 541, 544-49 (8th Cir. 1989) (company had power to construe uncertain terms); Bali v. Blue Cross and Blue Shield Ass'n, 873 F.2d 1043, 1047 (7th Cir. 1989) (requests for administrator for documentation of long term disability subject to arbitrary and capricious review where plan gave administrator discretion regarding the amount and kind of proof needed to prove disability); Lowry v. Bankers Life and Casualty Retirement Plan, 871 F.2d 522, 524 (5th Cir.), cert. denied, 110 S. Ct. 152 (1989) (plan gave committee authority to "interpret and construe" plan and power to "determine all questions of eligibility and status under the [plan]"); Boyd v. Trustees of United Mine Workers Health & Retirement Funds, 873 F.2d 57, 59 (4th Cir. 1989) (trustees of Pension fund have power of "full and final determination as to all issues concerning eligibility for [disability benefits]" and were authorized to promulgate rules and regulations to implement plan); McConnell v. Texaco, Inc., 727 F. Supp. 751, 756; (D. Mass. 1990); Morales v. Pan Am. Life Ins. Co., 718 F. Supp. 1297 (E.D. La. 1989), aff'd, 914 F.2d 83 (5th Cir. 1990); Adams v. Anchor Hocking Corp., 720 F. Supp. 491 (W.D. Pa. 1989) (severance plan administrator had discretion to interpret or administer the severance plan); Lister v. Stark, 11 Employee Benefits. Cas. (BNA) 1611 (N.D. Ill. 1989); Kocman v. Safeguard Business Sys., No. 88-5127 (E.D. Pa. June 28, 1989) (supplemental severance plan required that administrator specifically designate those employees who would be eligible); Reeser v. Esmark, Inc., 714 F. Supp. 412 (S.D. Iowa 1989) (pension board had final decision as to facts of any case and meaning of any plan provision); Slover v. Boral Henderson Clay Products, Inc., 714 F. Supp. 825 (E.D. Tex. 1989) (under terms of plan, plan fiduciary had authority to determine eligibility for benefits and to decide claims); Filary v. General Am. Life Ins. Co., 711 F. Supp 528, 530 (D. Ariz. 1989) (arbitrary and capricious standard applies to claim for benefits under an ERISA regulated health care benefit plan because the denial of coverage was based on administrator's discretionary authority to construe the terms of the plan); Bilka v. Blue Bell, Inc., 712 F. Supp. 509 (M.D.N.C. 1989) (plan explicitly granted fiduciaries discretion to determine which terminations qualified as layoffs entitling participants to fully vested benefits); Retirement & Sec. Program for Employees of Nat'l Rural Elec. Coop. Ass'n v. Oglethorpe Power Corp. Retirement Income Plan, 712 F. Supp. 223 (D.D.C. 1989); Paul v. Valley Truck Parts Inc., No. 88 C 7131 (N.D. Ill. April 19, 1989) (LEXIS, Genfed library, Dist file) (plan explicitly gave discretion to management to determine eligibility and to construe plan); Haidet v. American Progressive Life & Health Ins. Co., No. 84 Civ 7641 (LBS) (S.D.N.Y. April 17, 1989) (disability benefit plan at issue gave the plan administrator discretionary authority to make initial eligibility determinations and to review those determinations upon requests of claimants—decision of the administrator was to be final except as otherwise provided by law; determination of a plan administrator acting pursuant to a grant of final authority is entitled to even greater deference than the determination of a plan administrator acting pursuant to discretionary authority); Sandifer v. Central States Southeast and Southwest Areas Pension Fund, 709 F. Supp. 713 (E.D. La. 1989) (plan explicitly gave trustees discretionary authority to determine eligibility for benefits and to con-
have found that merely acting with such discretion, without explicit authority in the plan, is insufficient to justify arbitrary and capricious review. Other courts have striven to apply de novo review. For example, one court ruled that even a grant to plan trustees of the final author-

the following cases found insufficient discretion to warrant arbitrary or capricious review:

Petrilli v. Drechsel, 910 F.2d 1441 (7th Cir. 1990) (de novo review appropriate where employer conceded it had no discretion under plan); Ulmer v. Harso Corp., 884 F.2d 98 (3d Cir. 1989) (severance plan contained no discretion for administrator to determine eligibility); Parsons v. West Va. Works Hourly Employees Pension Plan, 879 F.2d 130 (4th Cir. 1989) (both parties agreed to de novo review where plan document conferred no discretion in plan administrators); Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546 (6th Cir. 1989) (court finds that provision proffered by employer was an eligibility provision which did not confer discretion on trustees); Schultz v. Metropolitan Life Ins. Co., 872 F.2d 676, 678 (5th Cir. 1989) (“[n]either party has pointed to any provision in the Plan which gives the administrator discretionary authority to determine benefit eligibility or to construe the plan terms”); Cochran v. AT&T Technologies, 753 F. Supp. 284 (E.D. Mo. 1991) (De novo review was appropriate where administrators had no discretionary authority to determine eligibility for benefits. Program established type of benefits depending on whether employee chose to transfer or separate from employment. Payment of separation benefits followed automatically from the course of conduct chosen by the employee.); Lesman v. Ransburg Corp., 719 F. Supp. 619 (W.D. Mich. 1989); Maryonovich v. Market Data Retrieval, Inc., 716 F. Supp. 343, 349 (N.D. Ill. 1989) (“Since there are no terms committing the payment decision to the discretion of MDR, we determine de novo whether the sale of NBL to MDR, its subsequent sale to D & B, or the formulation of plaintiff’s duties activated plaintiffs’ entitlement under the policies.”); Davidson v. St. Francis Regional Medical Center Employee Group Health Plan, 715 F. Supp. 1038 (D. Kan. 1989) (de novo review applied to coordination of benefits issue where plan did not grant discretionary authority to construe terms or determine eligibility); Stewart v. Borg-Warner Corp., No. 88 C 4258 (N.D. Ill., May 26, 1989) (LEXIS, Genfed library, Dist file) (no grant of discretionary authority); Adams v. Avondale Indus., Inc., 712 F. Supp. 1291 (S.D. Ohio 1989) (court finds no evidence that the plan administrator or fiduciary was vested with discretionary authority); Schiller v. Mutual Benefit Life Ins. Co., 713 F. Supp. 1064 (E.D. Tenn. 1989).

In Burnham v. The Guardian Life Ins. Co. of Am., 873 F.2d 486 (1st Cir. 1989), the court seemed to read Firestone as requiring de novo review and made no mention of a different standard when the plan gives discretion to plan administrators. See also Aubrey v. Aetna Life Ins. Co., 886 F.2d 119 (6th Cir. 1989) (where no language granted plan administrator with discretion, de novo review is required).

Garavuso v. Shoee Corps. of Am. Indus., Inc., 709 F. Supp. 1423 (S.D. Ohio), aff’d, 892 F.2d 79 (6th Cir. 1989). The defendant in Garavuso, through its personnel officers, served as administrator of the unfunded severance plan. The company made all decisions regarding eligibility for severance pay. Although the plan specifically vested discretion in the president of a division to grant “other” allowances based on the individual circumstances of involuntary terminations, the plan contained no language granting the company the power to construe uncertain terms or providing that eligibility determinations are to be regarded with deference. The court found that the mere fact that the company, as administrator, exercised discretion and control over the payment of benefits was not sufficient to permit review under the arbitrary and capricious standard.

In Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989), Firestone sold a plant to another employer. Plaintiffs had worked for Firestone at the plant and were reemployed by the successor with no period of unemployment. The court found that the plan did not grant authority to review eligibility or disputed terms. The employer supplied an affidavit by the Director of Compensation indicating that the plan was administered as if there was discretionary authority. The court rejected this as irrelevant to the main issue of whether the plan granted the employer discretion.
ity to determine all matters of eligibility would not defeat de novo review. On the other hand, some courts have cut back on the influence of Firestone by ruling that the questions raised in a particular case deal with factual findings beyond the scope of Firestone.

B. Cases Holding that a Denial of Severance Benefits Based on Immediate Reemployment in a Comparable Job is not Arbitrary or Capricious

Under the arbitrary and capricious standard of review, there is a long line of cases upholding ERISA plan administrators' decisions to deny severance benefits to employees who did not suffer a period of unemployment. These cases have reasoned that the purpose of severance benefits is to ease the period of unemployment and thus if there is no unemployment, there is no need for the benefits. Many of these cases rely on language in the plan which indicates this purpose to some degree. A case relied on extensively for this proposition is *Sly v. P.R. Mallory & Co.*

In *Sly*, the Seventh Circuit affirmed a summary judgment in favor of an employer which had denied plaintiffs' claims for severance benefits under its ERISA severance plan. The plaintiffs were terminated when the employer sold one of its divisions to another company. However, the new company immediately reemployed the plaintiffs at the same rate of pay with the same basic job responsibilities. In upholding the trial court, the Seventh Circuit found that the plan was an ERISA welfare plan, not a contract, and that the plan administrator had not acted arbitrarily, fraudulently, or in bad faith. Quoting from the district court opinion, the Seventh Circuit stated:

Severance pay is generally intended to tide an employee over while seeking a new job and should be considered an unemployment benefit.... To award severance benefits under these facts would result in a windfall to


41. The leniency afforded by the arbitrary and capricious standard is illustrated by Simmons v. Diamond Shamrock Corp., 658 F. Supp. 1053 (E.D. Mo. 1987), aff'd, 844 F.2d 517 (8th Cir. 1988). In *Simmons*, the court upheld an administrator's decision to deny separation benefits to employees transferred to a purchaser of the employer's business. In upholding the decision, the court expressed the broad deference given under the arbitrary or capricious standard:

Under the arbitrary, capricious, and abuse of discretion standard, this Court must sustain Diamond Shamrock's interpretation of the Separation Pay Policy if that interpretation was a reasonable one, regardless of whether the Court determines that it was the "best" interpretation or that plaintiffs' proffered interpretation would also be reasonable.

658 F. Supp. at 1056.

42. 712 F.2d 1209, 1212 (7th Cir. 1983).

43. Id. at 1213.
the employees . . . which was clearly not the intention or goal of either the . . . [plan] or of ERISA. 44

Though there was no explicit provision in the agreement requiring a period of unemployment, the Seventh Circuit found that the plan, read as a whole, supported such an interpretation, and that the plan had been consistently applied to deny benefits under similar circumstances in the past. 45

The Fourth Circuit reached a similar conclusion in Holland v. Burlington Industries. 46 The plan in question granted severance pay for job termination, including “terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.” 47 Plaintiffs were terminated when defendant sold certain divisions to another company but were immediately reemployed by the purchaser. Plaintiffs sued when they were denied severance benefits by the seller, claiming that their jobs with the original employer were terminated and that reemployment was irrelevant under the plan.

The employees argued that the plan was a form of accumulated compensation. 48 As proof, they suggested that the benefits did not end when a former employee found new work. 49 The court rejected this argument, finding that this feature of the plan could just as easily be attributed to the administrative convenience of avoiding the need to monitor former employees’ status for up to twelve months. 50 The court found that:

[Defendant] determined that there was no ‘job elimination’ as required by the plan because appellants had remained continuously employed in the same jobs they held before the transfer of ownership. This construction, though not compelled by the plan’s language, is certainly a reasonable one, especially when viewed in light of the goals of the plan. . . . Though it is true that the appellants stopped working for Burlington and started working for Kayser Roth, this change in employer could reasonably be said to fall outside the scope of ‘job elimination.’ The appellants never missed a day of work due to the transfer, and most continued in their same jobs without interruption. There was no time during which they were forced to go without income due to the sale of the divisions. . . . Under these circumstances, the denial of severance pay benefits to the appellants was not arbitrary and capricious but was in fact a perfectly reasonable interpretation of Burlington’s severance pay policy which

44. Id. at 1211.
45. Id. at 1213.
47. 772 F.2d at 1144.
48. Id. at 1149.
49. Id.
50. Id.
courts may not replace with an interpretation of their own.  

Thus, finding nothing arbitrary or capricious in the denial, the court affirmed summary judgment in favor of the defendant. The Ninth Circuit reached the same outcome, using similar reasoning in Jung v. FMC Corp.  

In Adcock v. Firestone Tire & Rubber Co., the Sixth Circuit found that it was not arbitrary or capricious to deny termination benefits to employees who suffered no period of unemployment. The stated purpose of the termination pay plan was to reduce the stress of terminated employees between the time of their release and securing other employment. In several other cases, courts have relied on the language of a plan to find an implied requirement of unemployment. 

51. Id. at 1149 (quoting LeFabre v. Westinghouse Elec. Corp., 747 F.2d 197 (4th Cir. 1984)).

52. 755 F.2d 708, 712-13 (9th Cir. 1985). In Jung, the Ninth Circuit affirmed summary judgment in favor of an employer who denied severance benefits to employees who were terminated when their division was sold but who continued in their jobs with the purchaser. The severance agreement specifically provided that: "when a lack of work situation occurs, there will be an effort to place the affected employee in other [of the employer's] locations, and if that is not accomplished, the employee is entitled to severance pay." The court found that the employer's denial of benefits was not arbitrary or capricious. The court pointed to language in the company's policy guide which indicated that the severance payments were intended when employees were unemployed for at least some period of time. Id. at 709.

53. 822 F.2d 623, 626-27 (6th Cir. 1987).

54. Lakey v. Remington Arms Co., 874 F.2d 541, 545 (8th Cir. 1989), is a post-Firestone case holding that it was not an abuse of discretion to deny employees severance benefits where they were immediately reemployed given language in the pertinent policy which made it clear that a lack of work was a prerequisite to severance pay. Because the change in employer caused the employees no lack of work, severance benefits, if granted, would simply have been a windfall for the newly rehired employees. See also Goggans v. Container Corp. of Am., 714 F. Supp. 282, 285 (S.D. Ohio 1989).

In Schwartz v. Newsweek, Inc., 827 F.2d 879 (2d Cir. 1987), the defendant employer told plaintiffs whose division was sold that if they joined the successor employer they would lose eligibility for severance benefits from defendant unless their employment with the successor terminated within three months. The policy manual provided that "[a]n employee who has been dismissed for any reason other than gross misconduct shall receive dismissal pay." Id. at 882. Plaintiffs joined the successor employer and were terminated after nine months when successor declared bankruptcy. The court held that defendant did not violate ERISA because the severance policy was publicly announced; it did not deceive plaintiffs nor defeat their reasonable expectations; it treated all employees uniformly; it was a reasonable interpretation of policy manual; and it was "sensible." Id. In Accardi v. Control Data Corp., 658 F. Supp. 881 (S.D.N.Y.), rev'd, 836 F.2d 126 (2d Cir. 1987), where the severance agreement had no requirement of unemployment, the district court found that the employer's action in denying severance pay to employees whose division was sold was arbitrary and capricious. 658 F. Supp. at 882-86. The district court found that the employer's purpose in establishing a severance plan was not to cushion the blow of unemployment, but rather was to reward employees for past service and to ensure continued loyalty and high morale of the company's other employees. Id. at 884. However, the Second Circuit found that the employer's denial was not arbitrary and capricious and reversed and remanded. 836 F.2d at 128. The plan did not address severance in the context of a sale of a division. Id. Payment under the plan was discretionary and proper only by mutually agreed resignation or dismissal for substandard performance. Id. The Manager's Manual provided that repayment of severance benefits may be required where an employee is rehired by the employer after a short time. Id. The Court found that these features led to the plausible interpretation that severance pay was intended as a discretionary unemployment benefit and thus was not available where an operating division was sold and no break in employment oc-
While many courts cite the fact that employees are given identical jobs by their subsequent employers, other cases have upheld a denial of benefits even where the plaintiff's immediate reemployment was not identical to the employment which offered severance benefits.\footnote{55} Thus, curred. \textit{Id.} at 129. In \textit{Agee v. Armour Foods}, 834 F.2d 144, 145 (8th Cir. 1987), under the arbitrary and capricious standard, the Eighth Circuit affirmed the decision of the trial court finding that the employer properly interpreted its separation pay policy to deny benefits to employees who took a job with successor and suffered no unemployment. Relying on language in a plan granting wide latitude for managers to interpret it, the court in \textit{Blakeman v. Mead Containers}, 779 F.2d 1146, 1151 (6th Cir. 1985) found that it was not arbitrary or capricious to deny benefits to employees whose division was sold, not closed.

Similarly, in \textit{Paul v. Valley Truck Parts, Inc.}, No. 88 C 7131 (N.D. Ill. April 19, 1989) (LEXIS, Genfed library, Dist file), the separation plan explicitly gave discretion to management to determine eligibility and to construe the plan. The court gave deference to a management decision not to provide separation pay to employees who suffered no period of unemployment after sale of their department. In \textit{Lumpkin v. International Harvester Co.}, 125 L.R.R.M. (BNA) 2244, 2260-61 (N.D. Ill. 1986) the court refused to grant summary judgment in favor of a group of employees who were denied severance benefits when their plant was sold. In \textit{Sutton v. Wierot Steel Div. of Nat'l Steel Corp.}, 567 F. Supp. 1184, 1202-03 (N.D. W. Va.), \textit{aff'd}, 724 F.2d 406 (4th Cir. 1983), \textit{cert. denied}, 467 U.S. 1205 (1984), the court found that the severance plan did not have a stated purpose to assist those employees who had been terminated and when defendant sold plaintiffs' division the plaintiffs were not terminated and the plant was not closed.

\footnote{55} See, \textit{e.g.}, \textit{Acton v. Tosco Corp.}, 815 F.2d 1161, 1162-63 (8th Cir. 1986) (even where the successor company offered no severance plan, an employee was not entitled to severance pay from original employer where there was no period of unemployment and "[r]ead as a whole, the severance plan anticipated that the recipient of the benefits be without employment."); \textit{Pabst Brewing Co. v. Anger}, 784 F.2d 338 (8th Cir. 1986) (despite the employees' loss of certain benefits when the brewery in which they worked was transferred from one company to another, it was not unreasonable for plan administrator to interpret the term "layoff" not to include the situation of workers who continued uninterrupted work after transfer).

In \textit{Coleman v. General Elec. Co.}, 643 F. Supp. 1229, 1244 (E.D. Tenn. 1986), \textit{aff'd without opinion}, 822 F.2d 59 (6th Cir. 1987), the court granted summary judgment in favor of an employer who denied ERISA severance benefits to employees after selling the division in which they worked and terminating them. The purchasing company hired workers at prior salaries, but lower benefits. The court found that the employer's policy of only paying for terminations when employees were left without work was not arbitrary or capricious. 643 F. Supp. at 1244. "Severance pay by nature is to ease the transition to unemployment." \textit{Id.} at 1241.

The court in \textit{Henne v. Allis-Chalmers Corp.}, 660 F. Supp. 1464 (E.D. Wis. 1987) granted summary judgment in favor of an employer who denied severance benefits to employees in a division which was sold to another corporation. The employees suffered a decline in certain benefits. A clause in the severance plan specifically excluded employees whose termination followed an offer of employment with another employer who continued a former operation of the original employer. \textit{Id.} at 1484. The court found no support for plaintiff's position that severance pay is intended to constitute a "bonus" for past services. \textit{Id.} at 1479.

In \textit{Ausloos v. Chromalloy Am. Corp.}, 625 F. Supp. 324, 325 (E.D. Wis. 1986) the court granted summary judgment in favor of an employer who denied severance benefits under its plan which provided that employees who separated without cause were eligible for severance pay. The employer sold a division and terminated its employees. \textit{Id.} The new employer offered the division's employees their previous jobs at somewhat reduced compensation. \textit{Id.} The court found that the employer's action was not arbitrary or capricious. \textit{Id.} at 327. The employer had followed a similar policy in the past and the employees did not suffer a financial blow due to unemployment. \textit{Id.} at 328.

See also \textit{Linz v. Champion Int'l Corp.}, 208 Mont. 99, 103, 675 P.2d 979, 981 (Mont. 1984) (employee properly denied severance pay because no termination occurred where after a merger, the employee was offered a comparable position at the same pay, subject to new employer's programs, policies, and management).
regardless of the type of reemployment, courts applying the deferential arbitrary and capricious standard under ERISA are likely to uphold a company's denial of severance benefits to former employees which is based on the immediate reemployment of those employees. In unusual cases, however, benefit denials have been successfully challenged under the arbitrary and capricious standard.

C. Cases Holding that a Denial of Severance Benefits Based on Immediate Reemployment is Arbitrary and Capricious where This Condition is not Mentioned as Part of the Plan

Even under the deferential arbitrary and capricious standard, a handful of courts have not permitted employers to deny benefits based on the immediate reemployment of plan participants. Most of these decisions rest on unusual fact patterns, including widespread procedural violations or a compelling clause in the severance plan.

In *Blau v. Del Monte Corp.*, the Ninth Circuit reversed a district court grant of summary judgment in favor of an employer who had denied severance benefits to employees whose company was sold as a going concern. The court found that the district court erred in finding that the employer's denial of severance benefits was not arbitrary or capricious as a matter of law.

Further, the *Blau* court faulted the employer's addition of an unwritten requirement that the employee suffer a period of unemployment to be eligible for severance benefits: "The plan does not condition receipt of benefits upon employees' subsequent unemployment, but upon job 'eliminat[ion].' The plan does not condition receipt of benefits upon failure of a successor corporation to offer employees jobs after their employment with Del Monte ceases, but upon job 'eliminat[ion].'" The court refused to consider the surreptitious nature of the plan's operation:

Nor can we permit resort to Del Monte's secret intentions behind its secret severance pay policy to imply these conditions into the plan. Del Monte claims that the secret purpose behind its secret severance benefit policy was to benefit only those employees who were without a job of any kind after termination. We decline to refer to the secret intent behind a secret plan to determine whether the denial of severance benefits in this case was not arbitrary and capricious.

The *Blau* court distinguished the decision in *Sly* in two ways. First,

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56. 748 F.2d 1348, 1356-57 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985).
57. 748 F.2d at 1353-54.
58. Id. at 1353-57.
59. Id. at 1354-55.
60. Id. at 1355.
the Blau court found that the overall administration of the Del Monte plan was arbitrary and capricious while the Sly plan had been administered in a rational and reasonable manner, in good faith.\(^{61}\) Second, the Blau court relied on the fact that the Sly court found that the plan in that case, "read as a whole," conditioned the availability of severance benefits upon the employee's subsequent and continued unemployment.\(^{62}\) By contrast, "Del Monte's plan says nothing of unemployment. In fact, the policy in this case exempts only three classes of people, of which plaintiffs comprise no part."\(^{63}\) The plan in Sly, however, did not mention unemployment either.

In Harris v. Pullman Standard, Inc.,\(^{64}\) the Eleventh Circuit affirmed a grant of summary judgment in favor of plaintiffs on grounds that denial of severance benefits was arbitrary and capricious. The employer had sold a manufacturing plant and had not offered its employees jobs within the company.\(^{65}\) The employees were employed by the plant's purchaser and their former employer denied their request for severance benefits.\(^{66}\) The language of the severance plan did not require a period of unemployment for eligibility.\(^{67}\) The court found that the employer's interpretation of the plan to deny benefits when employees suffer no unemployment was inconsistent with two of the plan's provisions.\(^{68}\) First, the plan stated that an employee would be eligible for termination allowance if the employee's job was eliminated and a new job could not be found for him within the company.\(^{69}\) The court found that the plaintiffs had not been offered new jobs by the employer and their employment with the subsequent employer was not within this provision.\(^{70}\) Second, the court found that the employer maintained a separate layoff policy which conditioned receipt of layoff benefits upon unemployment. The layoff policy stated that an employee would not be eligible for both layoff and termination benefits.\(^{71}\) Since the benefits were mutually exclusive, the court concluded that: "[s]uch an election of benefits signifies that unemployment compensation is not one of the purposes of severance pay."\(^{72}\) The Harris court also found that the employer had applied the plan inconsistently by not requiring unemployment as a condition for severance benefits in the

\(^{61}\) Id. at 1354 n.1.
\(^{62}\) Id. at 1354 n.2.
\(^{63}\) Id. at 1354 n.2.
\(^{64}\) 809 F.2d 1495, 1499 (11th Cir. 1987).
\(^{65}\) Id. at 1496.
\(^{66}\) Id. at 1497.
\(^{67}\) Id.
\(^{68}\) Id. at 1498.
\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) Id. at 1498-99.
\(^{72}\) Id. at 1499.
past. The employer was guilty of procedural violations for failing to furnish copies of the benefits policy to all salaried employees and by failing to have any claims procedures. The court considered these violations in reaching its conclusion that the company had acted arbitrarily and in bad faith when interpreting and implementing the policy.

In Bennett v. Gill & Dufus Chemicals, Inc., the court rejected the employer's argument that its denial of severance benefits to employees who continued in employment with the employer's successor was justified under what the employer termed the "sale of business" rule. The court held that there was "no 'sale of business' rule per se." The court noted that cases denying severance benefits in situations where employees continued in employment were based on specific written policy language. The plan in Bennett made no mention of an unemployment requirement nor was there any provision identifying severance as compensation for past service. The plan was unwritten. The court found that severance benefits served two purposes: to reward for past services as well as to provide protection against future unemployment.

The court looked to two other factors in making its decision. First, it considered the fact that the employer was guilty of numerous procedural violations of ERISA. Second, the court found that, in past cases, the employer had granted severance benefits regardless of whether its employees were reemployed. Thus the court found that the denial of severance benefits was arbitrary and capricious.

Aside from these few cases, the vast majority of cases confronting the issue of severance denials based on immediate reemployment under the arbitrary and capricious standard have ruled in favor of the administrator.

73. Id.
74. Id.
75. Id.
77. Id. at 459.
78. Id.
79. Id. at 460.
80. Id. at 459.
81. Id. at 457-58.
82. Id. at 461.
83. See supra notes 41-55 and accompanying text. For example, in Andersen v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir.), cert. denied, 474 U.S. 995 (1985), the severance plan provided for payments "when the Company terminates the employer-employee relationship unless the employee has been discharged or special contractual arrangements provide otherwise." 759 F.2d at 1520. The employer sold a subdivision to another company and terminated the subdivision's employees. The court rejected the employer's argument that since there was no period of unemployment, there was no termination under the plan:

The sale of [the subdivision] terminated the employer-employee relationship between [the employer] and plaintiffs. Termination may have been one of "form not substance," but it is clear that the "form" of termination is the controlling factor under [the employer's] own definition of the word. The Plan never specified a period of unemployment as a condition...
D. Analysis of Denials under the Abuse of Discretion Standard

A few courts following the *Firestone* decision have concluded that in *Firestone*, the Supreme Court meant to entirely displace the arbitrary and capricious standard of review. These courts find that not only did the *Firestone* Court impose de novo review where administrators possess insufficient discretion to interpret or apply a plan, but that the *Firestone* Court meant to replace the arbitrary and capricious standard with an abuse of discretion standard in cases where sufficient discretion is found to exist.\(^8^4\) Since the Supreme Court’s conclusion in *Firestone* was that the level of discretion present in that case was so low that the de novo standard was appropriate, the courts which are applying an abuse of discretion instead of an arbitrary and capricious test do so on the basis of Supreme Court dicta.

Whether or not the Supreme Court meant to entirely displace the arbitrary and capricious standard, the adoption of an abuse of discretion test by some courts warrants further analysis.\(^8^5\) The Ninth Circuit Court of Appeals summarized the abuse of discretion test by stating that “[t]he trustees abuse their discretion if they render decisions without any explanation, or construe provisions of the plan in a way that clearly conflicts with the plain language of the plan.”\(^8^6\) In *Eley v. Boeing Co.*,\(^8^7\) a federal district court sought to further refine this definition as follows:

In [*Firestone*], the Supreme Court pointed to trust law as the basis from which to evaluate these types of ERISA disputes. Trust law dictates that, as a general rule, a trustee will not be deemed to have abused his discretion “so long as he acts not only in good faith and from proper motives, but also within the bounds of reasonable judgment.” See, III A. Scott & W. Fratcher, *The Law of Trusts*, § 187 at 14. The elements of good faith, proper motive, and reasonability all play a part in evaluating precedent to receiving severance pay benefits. . . . Plaintiffs were “terminated” for severance pay purposes.

*Id.* at 1521 (citations omitted). However, the court went on to uphold the employer’s denial of severance benefits under an exception to the plan which provided that the plan “shall not be applicable in any special situation (such as the relocation of a major operating unit) where the Corporate Management Committee deems it necessary to establish a separate policy applicable to that situation only.” *Id.* at 1520. The court found no bad faith on the part of the employer under the arbitrary and capricious standard of review. The employees were given the same jobs at the same salary, but without accrued seniority rights or vacation benefits.


85. The application of two different standards in the circuits, where sufficient discretion is present, may create another opportunity for Supreme Court review of this area.

86. Johnson v. Trustees of the Western Conference of Teamsters, 879 F.2d 651, 654 (9th Cir. 1989).

Because the abuse of discretion test differs very little from the arbitrary and capricious test, it would be surprising if the abuse of discretion test changed the result of most benefit denials reached under the arbitrary and capricious standard. The fact that some employees have sought application of the arbitrary and capricious standard while their employers have sought the abuse of discretion standard illustrates the negligible benefit of the abuse of discretion standard to employees.

E. De Novo Review of Denials Based on Immediate Reemployment

After Firestone, several courts have applied the de novo standard to an administrator’s denial of benefits based on a terminated employee’s immediate reemployment. Many of these denials have withstood challenge despite the application of de novo review. Firestone offers little help for those seeking to hold plan administrators more accountable. By making the standard of review contingent on a plan’s language, the Supreme Court has invited ERISA plan drafters to incorporate grants of discretion to administrators in order to assure deferential review. Given the ease with which plans may be amended, even existing plans which did not contain discretionary language when Firestone was decided will undoubtedly be brought into line by well-advised employers.

In applying the de novo standard, courts have looked to the intent of the plan in order to determine whether the denial is consistent with the policy’s terms. In the context of severance plans, the search for intent focuses on whether the benefits were intended as a form of unemployment compensation (in which case immediate reemployment makes them unnecessary) or as a reward for past service (in which case immediate reemployment should not preclude receiving the benefits).

Many courts applying de novo review, however, have not started their analysis of the nature of severance benefits from a neutral position. While acknowledging that there may be instances in which severance is meant to reward past service, one court stated: “Severance pay is generally intended to provide an employee with income between jobs and should be considered more an unemployment benefit.” Another court

88. 742 F. Supp. at 570.
89. See, e.g., Bogue v. Ampex, 750 F. Supp. 424 (N.D. Cal. 1990) (holding that it is not an abuse of discretion to deny severance to employee who had found subsequent similar reemployment).
91. 489 U.S. at 111.
92. See infra Section III.
applying de novo review used the factor of industry practice as an opportunity to introduce the many decisions which find that severance benefits were intended as an unemployment benefit. On one hand, a predisposed view that severance benefits are meant as unemployment benefits is at odds with the purported focus of de novo review because it ignores the specific agreement reached between the parties in a given case. On the other hand, de novo review does not require courts to turn a blind eye toward the nature of severance benefits; since the purpose of severance benefits is to ease the transition through unemployment, any contrary purpose must be expressly stated.

The district court and the court of appeals gave an extended discussion of the application of the de novo standard to a severance dispute in *Adams v. Avondale Industries, Inc.* In *Adams*, the employer had an unwritten severance plan at one of its divisions. The employer sold the assets of this division, and the successor, although under no obligation to do so, hired many of the division's employees. Under the unwritten plan, employees involuntarily terminated from employment were eligible for severance benefits; the plan contained no mention of any restriction based on reemployment. Subsequent to execution of the division's sale, the predecessor employer adopted a written limited severance plan which made employees who accepted employment with the successor ineligible for benefits. The de novo standard of *Firestone* applied because there was no evidence of discretion in the administrator or fiduciary.

The district court found that the following factors should be considered in determining the validity of the denial of severance pay in the event of a sale of a company or one or more of its divisions:

a. **Consistency**—whether the employer followed the same approach in similar situations. *Adams* found that the denial of benefits to employees who accepted employment with the successor was not inconsistent with the seller's past practice and history. There was no prior sale of assets with which to compare the division's sale.

b. The employer's *purpose in granting severance pay*. The *Adams* court accepted the view that "[s]everance pay is generally intended to provide an employee with income between jobs and should be considered more an unemployment benefit." The court also found that there may

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96. 712 F. Supp. at 1295.
97. Id.
98. Id.
be instances where an employer grants severance pay as a reward and does not intend unemployment to be a prerequisite. 99 According to the Adams court, the employer’s intent in a given case may be disclosed in the terms of the plan or may be evident from the employer’s past practice. 100 The plan at issue contained no language stating what function the seller intended the plan to serve. The court rejected several arguments by the plaintiffs that the severance plan was intended to serve primarily as a reward for past service. 101 In view of the fact that it was limited to involuntarily terminated employees, the court ruled that the severance pay in this case constituted an unemployment benefit. 102

c. Whether the severance plan vested the administrator with flexibility or discretion to apply the plan in particular cases. The court found that there was no flexibility or discretion to apply the plan in individual cases. 103

d. The nature of the sale, e.g., whether the company or division was sold as an ongoing concern. (A company is sold as an ongoing concern when there is an agreement that all employees of the seller will be employed by the purchaser.) 104 The seller in Adams interpreted the plan to mean that those employees who accepted employment with the buyer were not involuntarily terminated. The court found it a significant factor in the seller’s favor that the seller knew the employees would not suffer the hardships associated with involuntary termination. 105 Although the successor’s benefits were not as generous, the employees did not lose a day of work, all but two received the same salaries, and the majority retained the same job. 106 The division was not sold as an ongoing concern but the buyer continued to operate the facility so the employees worked at the same location. The buyer also offered credit for years of service for vacation, sick pay, medical coverage, and life insurance benefits. 107

e. The extent to which the employer has complied with ERISA’s procedural requirements. 108 This factor will be examined in greater depth below. 109

f. Whether the employer has avoided a large outlay as a result of its decision. If so, the court should closely scrutinize the employer’s inter-

99. Id.
100. Id. (citations omitted).
101. Id. at 1296-97.
102. Id. at 1296.
103. Id. at 1295.
104. Id. at 1296-97.
105. Id. at 1297.
106. Id. at 1296-97.
107. Id. at 1297.
108. Id.
109. See infra section IV.
pretation of the plan. Here, the seller avoided an outlay of between $170,000 and $180,000, compelling the court to closely scrutinize seller's decision.\textsuperscript{110}

In \textit{Maryonovich v. Market Data Retrieval, Inc.},\textsuperscript{111} the court applied the de novo standard after finding insufficient discretion to warrant arbitrary or capricious review of the denial of severance benefits.\textsuperscript{112} The court noted that the de novo standard of review is consistent with judicial interpretation of employee benefit plans prior to the enactment of ERISA. Prior to ERISA, courts reviewed employee claims by looking at the terms of the plan and other manifestations of the parties' intent. Employers were not given discretion to construe uncertain terms.\textsuperscript{113}

The court would not adopt the employees' position that they were entitled to benefits because the plan's terms did not condition benefits on unemployment. The court found that other terms of the policy created a genuine issue of fact over the drafter's intent.\textsuperscript{114} Relying on the fact that the severance plan was part of the company's sale agreement, the court reasoned that, "[i]t would be reasonable for a fact-finder to conclude that the parties did not intend the triggering of the severance plan by the very act of its execution. This position is supported by the prospect that every employee at [the company] would have been entitled to normal severance benefits upon the sale, and yet there is no indication that any came forward on such a claim."\textsuperscript{115} The court also made reference to the fact that the severance policies allowed for payment of benefits to employees only if they were terminated within five years of the sale. The court found this five-year cap inconsistent with the employees' contentions that the plan was triggered by the sale itself. If this was true, the court reasoned, there would be no need for the five-year window and employees terminated more than five years after the sale would be just as deserving of

\textsuperscript{110} 712 F. Supp. at 1295.
\textsuperscript{111} 716 F. Supp. 343 (N.D. Ill. 1989).
\textsuperscript{112} The court began with a review of cases under the arbitrary and capricious standard and found that, under that standard, courts have upheld a denial of benefits in sale-of-business situations when the plan instrument expressed a specific concern for protection against the trauma of unemployment. Though severance benefit denials have been upheld when the plan expressly excluded payment on the sale of the company if the employee was hired to a comparable position by the successor company, the court found that:

Since all these cases were decided under the more lenient standard of review, it is not certain that the result would be the same after \textit{Firestone}. It is entirely possible that an employer's severance policy intends to provide protection against unemployment and to reward former devoted employees. That the policies in these cases expressly referred to protection provided evidence of "reasonable interpretation" by the employer; yet de novo review could warrant a different "reasonable interpretation."

716 F. Supp. at 348 n.6. The court found that under the arbitrary or capricious standard, courts were split when the plan failed to express a specific concern for either the "protection from unemployment" or a "reward for past services" purposes. \textit{Id.} at 348.

\textsuperscript{113} \textit{Id.} at 348-49.
\textsuperscript{114} \textit{Id.} at 349.
\textsuperscript{115} \textit{Id.} at 350.
benefits for past service.\textsuperscript{116}

In \textit{Garavuso v. Shoe Corps. of America Industries, Inc.},\textsuperscript{117} the court applied de novo review and granted summary judgment in favor of an employer who denied severance benefits to a plaintiff who was reemployed and suffered no unemployment. The court stated that the de novo review included "an examination of plan terms in light of all the circumstances and any evidence of the intent of the parties."\textsuperscript{118} The court examined treatment of other employees in the past and the language of the plan and found that it was intended to provide an unemployment benefit rather than "simply a bonus upon termination."\textsuperscript{119} "Such an interpretation of the plan is apparently a common one throughout industry, since there are many cases which have addressed the construction of similar plans in the context of ERISA."\textsuperscript{120}

In \textit{Lesman v. Ransburg Corp.},\textsuperscript{121} using a de novo standard of review, the court found that the severance plan did not address the effect of a sale of the business.\textsuperscript{122} Plaintiffs sought severance benefits when the business was sold.\textsuperscript{123} The court granted summary judgment in favor of the employer on the ground that it would not supply a new term to the plan in order to grant such benefits.\textsuperscript{124}

\textit{Bowman v. Firestone Tire \& Rubber Co.},\textsuperscript{125} upheld a denial of benefits based on immediate reemployment under both the arbitrary and capricious and de novo standards of review. The case implicated both standards because two different plans were involved, one granted sufficient discretion to obtain arbitrary and capricious review while the other did not. However, the court's analysis barely distinguishes between the two plans. The court found that a denial of benefits to workers whose employer changed through a divestiture was permissible under either standard.\textsuperscript{126}

In applying de novo review, some courts emphasize that they will not defer to the plans administrator's determination.\textsuperscript{127} Even when they have announced this intention explicitly, however, some courts have affirmed denials of benefits based on immediate reemployment. In \textit{Harper

\begin{footnotesize}
\textsuperscript{116} Id.
\textsuperscript{117} 709 F. Supp. 1423, 1432-33 (S.D. Ohio), aff'd, 892 F.2d 79 (6th Cir. 1989).
\textsuperscript{118} 709 F. Supp. at 1426.
\textsuperscript{119} Id. at 1428.
\textsuperscript{120} Id. (citing Holland v. Burlington Indus., 772 F.2d 1140 (4th Cir. 1985)).
\textsuperscript{122} 719 F. Supp. at 621.
\textsuperscript{123} Id. at 620.
\textsuperscript{124} Id. at 621.
\textsuperscript{125} 724 F. Supp. 493 (N.D. Ohio 1989).
\textsuperscript{126} Id. at 501-02.
\textsuperscript{127} See, e.g., Petrilli v. Drechsel, 910 F.2d 1441 (7th Cir. 1990) (holding that under de novo review, district court must make determination by itself, without deferring to plan administrator's determination).
\end{footnotesize}
v. R. H. Macy & Co., 128 a plan provided for severance benefits when an employee is "permanently terminated or laid-off for periods that exceed 90 days." 129 While the employees were working for Macy’s, Macy’s sold some of its stores in Kansas City to Dillard’s. The sales agreement required Dillard’s to offer employees continuing employment with comparable terms. Dillard’s complied and the employees suffered no period of unemployment. Applying de novo review, the court “[w]ithout deferring to either party’s interpretation of the disputed language,” 130 found that Macy’s did not permanently terminate the employees: “The plan’s language does not permit an interpretation that employees who continue to work without interruption on comparable terms for the purchaser of their employer’s business have been ‘permanently terminated’ by the sale.” 131

In Taylor v. Continental Group, 132 the Third Circuit Court of Appeals applied de novo review and reversed a grant of partial summary judgment awarding severance benefits. The court found that the construction of the ambiguous term “successor” was a question of fact. 133 In a ruling which will favor employer/drafters, the court rejected the employees’ argument that the ambiguous plan terms be construed against the drafter: “As we have noted, non-bargained severance plans raise special interpretational concerns. But we do not adopt a rule that would construe ambiguities against the drafter without first attempting to ascertain the intent of the parties.” 134 In remanding the case to the district court to determine the parties’ intention, the court instructed the district court as follows: “On remand, the district court may consider interpretive statements made by [the employer/drafter], past practices, customary usage in the trade, and other competent evidence bearing on the understanding of the parties.” 135

Under de novo review, only a minority of courts have rejected arguments by employers that immediate reemployment justifies denying severance benefits. An example is Ulmer v. Harsco Corp. 136 Harsco Corporation sold one of its divisions to another company. Former Harsco employees who were employed by the purchaser sued for severance benefits arguing that a substantial economic loss occurred because of a reduction in the terms and conditions of their employment. 137 The Third

128. 920 F.2d 544, 545 (8th Cir. 1990).
129. Id. at 545.
130. Id.
131. Id.
132. 933 F.2d 1227 (3d Cir. 1991).
133. Id. at 1234.
134. Id. at 1233-34.
135. Id. at 1233.
136. 884 F.2d 98 (3d Cir. 1989).
137. Id. at 101.
Circuit reversed summary judgment which the district court had granted in favor of Harsco Corporation.\textsuperscript{138} The court found that the original plan contained exemptions for death, military leave, disability and retirement, but made no mention of sale of a going concern.\textsuperscript{139} The court distinguished some cases which had reached an opposite conclusion on the grounds that they were decided under the more deferential arbitrary and capricious standard.\textsuperscript{140} The court chose to ignore other de novo decisions.\textsuperscript{141}

In \textit{Heidgerd v. Olin Corp.},\textsuperscript{142} the employee severance booklet provided that if one of the company’s operating units was sold and the new owner offered employment to the affected employees at substantially the same rate of pay, the employees would not be eligible for severance benefits if they decided to “leave instead.” Under de novo review, the Second Circuit Court of Appeals found that employees who took positions with the purchaser company were entitled to severance under this provision.\textsuperscript{143}

The circuits are divided over what evidence a court should consider in applying de novo review.\textsuperscript{144} The Sixth Circuit Court of Appeals has ruled that only evidence that was available to the plan administrator at the time the decision was made should be considered.\textsuperscript{145} In reaching its conclusion, the Sixth Circuit rejected the Eleventh Circuit’s view that considering only the facts available to the plan administrator is contrary to the concept of de novo review.\textsuperscript{146}

Case law will mold the de novo standard of review. This development may be abbreviated, however, to the extent that employers build discretion into plans in reaction to the \textit{Firestone} decision. The next section discusses the ease with which severance plans can be modified, and even rescinded, under ERISA.

III

RESCISSION OR MODIFICATION OF SEVERANCE PLANS

ERISA’s regulatory scheme has four major subparts.\textsuperscript{147} These subparts regulate the following conduct: Part 1—Reporting and Disclo-
sure;\textsuperscript{148} Part 2—Participation and Vesting;\textsuperscript{149} Part 3—Funding;\textsuperscript{150} and Part 4—Fiduciary Responsibility.\textsuperscript{151} Severance plans are explicitly excluded from coverage under Parts 2 and 3.\textsuperscript{152} Thus ERISA's vesting, accrual and funding requirements do not apply to them.\textsuperscript{153} Most courts have extrapolated from these statutory exclusions and granted employers wide discretion to amend or terminate severance plans.

Subparts 1 and 4 of ERISA do not carry much practical value for the participants and beneficiaries of severance plans either. Many courts have held that amending or terminating a severance plan is a business decision not subject to fiduciary standards because the action is taken by the employer qua employer, not acting within his fiduciary capacity. Only a minority of courts hold that fiduciary standards apply when an employer amends or terminates a severance plan. Moreover, violations of Part 1 do not usually offer any recourse to a participant of the plan. Courts have been lenient in reviewing employer's decisions to terminate or amend unfunded employee welfare plans under ERISA.\textsuperscript{154}

The leading case discussing an employer's right to freely amend its severance plans is Sutton v. Weirton Steel Division of National Steel Corp.\textsuperscript{155} As part of an employee buy-out of a steel mill, collective bargaining agreement amendments were proposed which included altering severance plans. The employer unilaterally imposed the changes for non-union workers. A minority of the employees objected to the changes, but the district court ruled that the changes were acceptable. On appeal, the Fourth Circuit Court of Appeals affirmed:

The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits. . . . An employer may change such benefits without violating ERISA.\textsuperscript{156}

The court ruled that the changes did not involve the employer's role as fiduciary:

Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, has not prohibited an employer who is also a fiduciary from

\begin{footnotes}
\item 149. 29 U.S.C. §§ 1051-1061 (1988).
\item 153. Severance plans are also not subject to the termination insurance provisions of Title IV of ERISA. 29 U.S.C. §§ 1301-1461 (1988).
\item 154. As noted by the court in Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989), the right to change or amend a plan is distinct from the discretionary authority to determine benefit eligibility.
\item 156. 724 F.2d at 410.
\end{footnotes}
exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age. The changes, accomplished in this manner, are not to be reviewed by fiduciary standards.\textsuperscript{157}

\textit{Young v. Standard Oil (Indiana)}\textsuperscript{158} also strongly supports an employer's right to modify severance plans:
Under ERISA, employee benefits are divided into two categories—"welfare" benefits and "retirement" or pension benefits. 29 U.S.C. § 1002(1)-(2). Although ERISA imposes stringent accrual, vesting, and funding requirements on retirement benefit plans, such requirements are not imposed on welfare benefit plans. 29 U.S.C. §§ 1051, 1081. As such, severance benefits are unaccrued, unvested benefits. Moreover, severance benefit plans, though subject to certain disclosure (20 U.S.C. §§ 1021-1031) and fiduciary (29 U.S.C. §§ 1101-1114) requirements, are exempt from the more stringent ERISA requirements. 29 U.S.C. §§ 1051, 1081. An employer may therefore, unilaterally amend or eliminate a severance plan without violating ERISA. This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. In short, an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.\textsuperscript{159}

The Ninth Circuit Court of Appeals recognized the distinction between severance benefits and certain non-forfeitable ERISA benefits in \textit{West v. Greyhound Corp.}\textsuperscript{160} In \textit{West} the court found that neither the seller nor the buyer of a business violated ERISA where employees of that business were terminated with notice after a majority of them voted against reductions in the unaccrued and unvested welfare and pension benefits. The reductions were offered as a condition precedent to their employment by the purchaser.

In distinguishing benefits under ERISA, the court stated:
One of the major purposes of ERISA is to ensure that employees receive their vested benefits when the pension plans are terminated. To assure the protection of vested pension benefits, ERISA prescribes vesting and accrual schedules and provides that an employee's right to his normal retirement benefits is "non-forfeitable." 29 U.S.C. § 1053(a). ERISA, however, expressly exempts employee welfare benefit plans from the sections concerned with vesting and accrual. 29 U.S.C. § 1051(1). While ERISA, in 29 U.S.C. § 1322, also guarantees the payment of "all non-forfeitable benefits," this protection is applicable only to pension, stock bonus or profit-sharing plans. 29 U.S.C. § 1321(a); 26 U.S.C. § 401(a).

\textsuperscript{157} Id. at 410-11.
\textsuperscript{158} 849 F.2d 1039 (7th Cir.), cert. denied, 488 U.S. 981 (1988).
\textsuperscript{159} 849 F.2d at 1045.
\textsuperscript{160} 813 F.2d 951 (9th Cir. 1987).
There is no language in ERISA which provides for the accrual of welfare benefits or guarantee [sic] that such benefits are vested or non-forfeitable.\textsuperscript{161}

More recently, in \textit{Adams v. Avondale Industries, Inc.},\textsuperscript{162} the Sixth Circuit Court of Appeals rejected the argument that decisions to amend severance plans should be subject to fiduciary duty. In \textit{Adams}, after agreeing to sell the assets of one of its divisions, a company estimated the cost of providing severance and vacation benefits to employees in the affected divisions at $170,000. The seller conceded that prior to the sale it had an unwritten plan in place under which there was no period of unemployment required for benefits and prior to the sale in question, the employer had not denied benefits to employees based on immediate reemployment.\textsuperscript{163}

After agreeing to the sale, the employer composed a written severance plan denying severance to employees of the affected division who accepted positions with the buyer, but still allowing benefits to employees who were either not offered employment or who were offered, but refused, employment. Less than two weeks before the closing of the sale, the severance plan was reduced to writing and distributed. The plaintiffs were 40 employees who experienced no period of unemployment due to the sale. Most received identical jobs and 38 received the same salary at the new company. The purchaser had no severance plan and had declined to assume any severance obligations that may have been owed by the seller. Nine employees involved in the sale were involuntarily terminated after the sale and received no severance pay.

The court found that the written plan constituted a valid amendment to the unwritten plan and that the unambiguous provisions of the written plan precluded the plaintiffs' claims for benefits.\textsuperscript{164} The plaintiffs unsuccessfully argued that the fiduciary duty imposed by ERISA should foreclose amendment or termination of the plan except when such action is in the interests of beneficiaries or participants. The court rejected this argument on the grounds that, under ERISA, there is no vesting requirement for welfare benefits such as severance benefits, and Congress' decision to limit vesting to pension plans was meant to keep costs within limits.\textsuperscript{165} The court concluded that to adopt the plaintiffs' argument would, in effect, afford employees a vested right to welfare benefits, "upsetting ERISA's delicate balance in this area."\textsuperscript{166} Thus, the court found that it was joining the majority of circuits that have ruled on the issue in

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\textsuperscript{161} \textit{Id.} at 954 (citations omitted).
\textsuperscript{162} 905 F.2d 943 (6th Cir.), \textit{cert. denied}, \textit{111 S. Ct} 517 (1990).
\textsuperscript{163} 905 F.2d at 946.
\textsuperscript{164} \textit{Id.} at 949-50.
\textsuperscript{165} \textit{Id.} at 946-49.
\textsuperscript{166} \textit{Id.} at 947.
\end{flushright}
concluding that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefit plan. Finally, the court also noted that its previous decision in In re White Farm Equipment Co. allowed parties to voluntarily set forth in plan documents whether welfare benefits may vest.

Several other cases have followed this broad reading of employer power with respect to severance plans. In addition, a recent series of cases has upheld amendments which took place in the context of the sale. In Anderson v. Sun Life Insurance Co. of America, a U.S. district court upheld an amendment to a severance plan made on the same day the employer informed its affected employees that it intended to sell the divisions which employed them. The amendment denied benefits to employees who worked for a successor employer. The amended plan withstood several challenges by the employees.

In Adams v. Avondale Industries, Inc., the Sixth Circuit Court of Appeals upheld an amendment concluded after the division had been sold and the projected benefits had been calculated. The amendment provided that employees who were reemployed would not receive severance benefits.

167. 788 F.2d 1186 (6th Cir. 1986).
168. 905 F.2d at 948-49.
169. See e.g. Musto v. American Gen. Corp., 861 F.2d 897, 913 (6th Cir. 1989). In Musto, employees challenged changes in medical insurance and pension benefits. The court rejected challenges that in making the changes the employer broke fiduciary obligations under ERISA. Citing to Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), the court found that an employer was not acting in his role as a fiduciary when he amended plan provisions regarding unfunded contingent benefits. 861 F.2d at 911. Similarly the court found that "[a]mendments to single-employer pension plans, like amendments to single-employer welfare plans, are not made in employer's role as fiduciary. There was no fiduciary duty to be broken insofar as the spousal survivor amendment is concerned. Id. at 913 (citations omitted). See also Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1159-61 (3d Cir. 1990) (employer not subject to fiduciary liability for decision to amend severance plan for two reasons: (a) subjecting decision to such liability would make it virtually impossible to limit such benefits because under fiduciary test, action must be taken in such interest of employees; and (b) exempting such decisions from fiduciary responsibility avoided complicating the administration of such plans and increasing their costs); Sejman v. Warner-Lambert Co., 889 F.2d 1346 (4th Cir. 1989), cert. denied, 111 S. Ct. 43 (1990); Harms v. Cavenham Forest Indus., Inc., No. 87-4068 (E.D. La. Oct. 28, 1988) (LEXIS, Genfed library, dist. file) (citing Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984)) (finding that amendment of severance benefit plan does not violate ERISA because under 29 U.S.C. § 1051 (1988) none of the provisions in Part 2 of ERISA, including vesting, accrual and nonforfeitability, apply to welfare benefits). Cf. Alaire v. Amoco Corp., 756 F. Supp. 1112 (N.D. Ill. 1991) (fiduciary standards did not apply to employer's decision whether to implement severance solely in a particular employee reduction situation).
Finally, in *Reichelt v. Emhart Corp.*,\(^{174}\) the Second Circuit Court of Appeals ruled, in broad terms, that an employer may amend its severance plan to eliminate benefits for employees who are employed by the division’s purchaser, even if the amendment takes place in the context of the sale:

Since severance benefits are welfare benefits and an employee’s interest in a welfare benefit plan is not vested, the employer has no continuing obligation to provide severance benefits; under ERISA, the employer has the right at any time to amend or terminate a severance pay plan.

Since an employer has the right under ERISA to amend or eliminate a severance benefit at any time, *a fortiori* it may do so in the context of the sale of a part of its business as a going concern.\(^{175}\)

Courts will not, however, uphold all purported amendments to severance plans. Attempted oral amendments in particular have not fared well. This may benefit employers facing claims by employees that their benefits were increased by oral representation. For example, in *Bakersky v. ITT*,\(^{176}\) several employees brought suit for increased severance benefits based on an alleged oral modification to their plan. The district court rejected the claims, finding that state law claims for severance benefits based on alleged oral representations (which were inconsistent with plan provisions) are preempted by ERISA and that ERISA does not permit oral modification of written plans.\(^{177}\)

On the other hand, the bar on oral modifications can work to the detriment of employers seeking to enforce purported oral amendments which sought to lower, or eliminate, benefits. In *Hozier v. Midwest Fasteners, Inc.*,\(^{178}\) the employer argued that its employees were not entitled to severance benefits under the terms of an unwritten amendment to the severance plan. In rejecting the employer’s argument, the court relied on cases in which courts have refused to find that employers are liable for increased benefits based on alleged oral modifications.\(^{179}\) Thus, the court found that ERISA precluded oral amendment to reduce benefits.\(^{180}\)

In addition to hostility toward oral modifications, some courts have identified a reliance interest in participants which may inhibit amendment of severance plans. In *Adams v. Avondale Industries, Inc.*,\(^{181}\) the reliance issue arose in the context of a procedural violation by the employer.\(^{182}\) The employer had failed to provide a procedure for amending


\(^{175}\) 921 F.2d at 430.


\(^{177}\) *Id.* at 6.

\(^{178}\) 908 F.2d 1155 (3d Cir. 1990).

\(^{179}\) *Id.* at 1163.

\(^{180}\) *Id.*


\(^{182}\) Procedural violations are discussed in section IV below.
its plan as required by ERISA. The court found that ERISA's amend-
ment requirement serves the purpose of insuring against the defeat of
employees' expectations by an unanticipated amendment. The court
found, however, that the failure to provide such a procedure would not
make a plan unamendable. Plaintiffs failed to show any detrimental
reliance and thus the court refused to impose any substantive remedy for
the violation.

In *Hamilton v. Air Jamaica Ltd.*, the court focused on the em-
ployees' reliance interest in rejecting a purported severance benefit
amendment which was not announced until after the affected employee
was terminated. The court found that severance plan provisions con-
tained in an employee handbook could not have been amended to lower
benefits of a terminated employee when the amendment was made
around the time of the termination and announced after the termina-
tion. The court reasoned that although the employer has the right to
amend the policy, the employees have a right to rely on written policy, at
least until such policies are amended.

An additional impediment to amending plans may arise where the
employer has not sufficiently demonstrated an intention to amend the
plan. Thus, in *Frank v. Colt Industries, Inc.*, the Third Circuit Court
of Appeals found that an employer's adoption of continuation benefits
designed to encourage employees to continue working for the buyer of
the division did not affect severance plans. The continuation benefit
agreements expressly provided that they would not affect current bene-
fits, and the court found that "current benefits" included the severance
plan. The court also found that internal company minutes explaining the
company's interpretation that the two plans were mutually exclusive
were not sufficient to serve as an amendment to the severance plan.
The minutes did not reflect an intent to amend the severance plan; for
example, they did not show an interest to incorporate these interpreta-
tions into the plan documents.

Thus, purported amendments which are attempted orally, upset reli-
ance interests, or do not sufficiently evidence an intent to amend a plan,
may fail to modify previously adopted plans, leaving employers respon-
sible for benefits under the earlier plans. The discussion which follows

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183. 905 F.2d at 949.
184. Id.
185. Id.
186. Id.
188. Id. at 1270-71.
189. Id. at 1270.
190. 910 F.2d 90 (3d Cir. 1990).
191. Id. at 96-97.
192. Id. at 97-98.
addresses issues of liability, under various theories, for attempted amendments.

A few decisions have held that employers are subject to fiduciary duties under ERISA for such changes.\textsuperscript{193} In \textit{Calhoun v. Falstaff Brewing Corp.},\textsuperscript{194} the district court denied an employer's motion for summary judgment seeking declaratory relief on a severance plan. The court rejected the employer's argument that it was free to terminate a plan at any time and for any reason.\textsuperscript{195} The court found that although the employer was correct that the severance plan was not a pension plan and the vesting requirements did not apply, the employer was not necessarily free to terminate the plan.\textsuperscript{196} Plaintiff alleged that the severance plan was amended expressly to deny him his anticipated severance benefits. The court found that such action by the employer could constitute a violation of his fiduciary duty under 29 U.S.C. § 1104(a)(1) (1988).\textsuperscript{197}

Similarly, in \textit{McCarroll v. Central Louisiana Telephone},\textsuperscript{198} the court found that an employer's action in amending a termination plan to reduce an employee's termination benefits was subject to the fiduciary duty requirements of ERISA. In a consolidation with plaintiff's previous employer, the defendant had acquired the company where plaintiff worked. Originally the defendant had agreed to give benefits according to the date when plaintiff had been hired by her previous employer. Later, the defendant amended the plan to calculate accrual of termination pay from time of the consolidation with plaintiff's previous employer. The court rejected the defendant's argument that this was a business decision not prohibited by ERISA.\textsuperscript{199} The court found that the motivating force for this amendment was to decrease the cost of consolidation. The court found the amendment to be arbitrary, capricious, and taken in bad faith.\textsuperscript{200} The court affirmed the trial court's grant of additional termination pay, attorneys' fees, and punitive damages.\textsuperscript{201}

\begin{footnotes}
\item[193] In a dispute that was not governed by ERISA because the claim arose prior to ERISA's enactment, one state court ruled that an employer could not amend its severance plans retroactively because the benefits accrued and vested as the employee worked. In a somewhat dubious dictum, the court said that the same result would have been reached even were ERISA to apply because although ERISA did not require the vesting of severance benefits, neither did it preclude such vesting. Kulins v. Malco, 121 Ill. App. 3d 520, 459 N.E.2d 1038 (1984). As discussed in the text at Section III, this conception of severance benefits is at odds with the rulings of virtually all other courts, even those which have not permitted unrestricted amendment.
\item[194] 478 F. Supp. 357 (E.D. Mo. 1979).
\item[195] Id. at 360-61.
\item[196] Id.
\item[197] Id. at 361.
\item[199] 533 So. 2d at 388-89.
\item[200] Id. at 389.
\item[201] Id.
\end{footnotes}
A third case imposing liability for amending severance plans is *Dependahl v. Falstaff Brewing Corp.*²⁰² In *Dependahl*, the U.S. District Court for the Eastern District of Missouri found that a change to a severance plan, made in contemplation of a mass firing and which deprived employees of benefits which would have otherwise been earned, violated the employer’s duty to act as a fiduciary for the exclusive benefit of the beneficiaries.²⁰³ The court found that the change was made only for the employer’s benefit.²⁰⁴ In assessing the scope of its ruling the court stated:

This decision does not mean that an employer may never cut back on benefits previously proffered to employees. This court merely holds that such a change is not permissible when made expressly in contemplation of actions which would otherwise entitle employees to the previously provided benefits.²⁰⁵

The Sixth Circuit Court of Appeals took another approach to imposing liability in *Berlin v. Michigan Bell Telephone Co.*²⁰⁶ The court reversed a district court’s grant of summary judgment in favor of the employer because the district court had rejected the possibility of employer liability for misrepresentations regarding an ERISA-covered employee welfare plan. The employer had offered severance plan benefits to encourage early retirement. Plaintiffs retired after the expiration of the plan. After plaintiffs retired, the employer made a second offering of a severance plan to encourage further retirements. Plaintiffs brought suit claiming wrongful denial of benefits. The district court granted summary judgment in favor of the employer and plaintiffs appealed. The court of appeals agreed with the district court’s conclusion that ERISA’s fiduciary standards do not apply to purely business decisions such as the decision to offer the second set of benefits.²⁰⁷ The Sixth Circuit Court of Appeals found, however, that although the decision was not subject to fiduciary liability, communications or representations regarding the decision to offer the second set of benefits were subject to ERISA’s fiduciary standards.²⁰⁸

The Seventh Circuit Court of Appeals recently reached a decision that may have ramifications for single employer severance plans. In *Black v. TIC Investment Corp.*,²⁰⁹ the court found that “estoppel princi-

²⁰³. 491 F. Supp. at 1196-97.
²⁰⁴. Id. at 1197.
²⁰⁵. Id. at 1197. The conclusion reached in *Dependahl* is of questionable validity in light of contrary later authority finding that this conduct is not subject to fiduciary liability. It is not a question of whether particular conduct violated fiduciary responsibility. Rather, the issue is whether amendments are ever subject to fiduciary liability. See *supra* notes 104-20 and accompanying text.
²⁰⁶. 858 F.2d 1154 (6th Cir. 1988).
²⁰⁷. Id. at 1163.
²⁰⁸. Id. at 1163-64.
²⁰⁹. 900 F.2d 112 (7th Cir. 1990).
pies are applicable to claims for benefits under unfunded single employer welfare benefit plans under ERISA.”210 The court found that the rationale for not allowing estoppel principles to be applied against employers in other situations (such as multi-employer plans, where one employer could bind a fund to pay better benefits to its employees) did not apply in the context of unfunded, single-employer, welfare benefit plans.211 Thus the court found that the general rule allowing misrepresentations to give rise to estoppel should not be preempted: “there is no reason for the employee who reasonably relied to his detriment on his employer's false misrepresentations to suffer.”212

The opinion in Black is subject to criticism, however, because it does not even attempt to follow the traditional preemption scheme discussed above. The Seventh Circuit Court of Appeals observed that ERISA does not mention estoppel. However, this is not sufficient to determine whether the estoppel theory “relates to” ERISA. The Seventh Circuit's approach flies in the face of several other decisions, discussed above, which find that ERISA preempts common law theories such as misrepresentation and fraud. There is no place in the preemption analysis for ad hoc analysis of whether estoppel principles should be applied to certain kinds of benefits. Up to this point, judicial analysis has been more formalistic, determining whether a state law related to an ERISA regulated plan. Black differs from this long line of cases by allowing the theory to proceed because the court finds that it benefits the plaintiffs and does not create an incentive for fraud among multiple plan contributors.213 This analysis is flawed, however, because it could be argued that many of the theories that are preempted could benefit potential plaintiffs in ways that outweigh the risks to plan assets. Essentially, the Seventh Circuit's reasoning proves too much. If accepted, many previously preempted claims would be allowed to go forward.

Up to now, the overwhelming majority of courts have reasoned that ERISA, as a detailed statute, expresses Congressional intent both by explicit provision and by omission. Thus, the failure of Congress to include a provision that estoppel (or other common law notions) should be followed, provides evidence that the estoppel theory should be preempted if it relates to an ERISA-regulated plan. Engaging in such substantive analysis opens the door for a hodgepodge of decisions not based on whether a state law relates to an ERISA plan, but on whether the potential state law remedy outweighs ERISA considerations. The Seventh Circuit's approach thus threatens to erode the certainty that has evolved from Supreme Court attention to ERISA preemption.

210. Id. at 114-15.
211. Id.
212. Id. at 115.
213. Id.
Cases subsequent to *Black* have disagreed over whether estoppel and misrepresentation suits should be preempted. In *Berger v. Edgewater Steel Co.*,\(^{214}\) the Third Circuit Court of Appeals found that state law misrepresentation claims were preempted by ERISA because they “related to” an employee benefit plan. Similarly, in *Ellis v. ANR Pipeline, Co.*\(^{215}\) an employee alleged that he sought to resign after discovering that his severance benefits were being reduced. The employer allegedly induced the employee to continue in his employment by promising that the employee would receive the original level of benefits even if the plan were amended. The federal district court in Michigan found that the employee’s claims for fraud and estoppel were preempted by ERISA.

On the other hand, in *Cochran v. AT&T Technologies, Inc.*\(^{216}\) a federal district court in Missouri, in a decision consistent with the Seventh Circuit’s decision in *Black*, approved the use of promissory estoppel in ERISA cases where employees seek benefits.

The conflict over an employer’s freedom to terminate or amend severance benefits stems in part from their treatment under ERISA. On the one hand, the plans are not subject to vesting or accrual requirements. Thus courts have reasoned that employees have complete control over these unfunded plans. This alone does not eliminate requirements of fiduciary care, however, because severance plans are governed by ERISA’s fiduciary standards. Those courts which find that amendments to and rescissions of severance plans are not subject to review under fiduciary standards do not deny that fiduciary standards apply in general. Rather, they find that these decisions are undertaken by employers not in their capacity as fiduciaries, but as business decisions outside the scope of fiduciary standards. The oddity which springs from the approach is that fiduciary standards do not prohibit those actions which can have the most severe effects on potential beneficiaries.

**IV**

**REPORTING, DISCLOSURE, AND OTHER PROCEDURAL VIOLATIONS**

*Blau v. Del Monte Corp.*\(^{217}\) is a critical case for analyzing the effect of an employer’s procedural violations on employer liability. In *Blau*, the Ninth Circuit Court of Appeals found that in extreme circumstances, employees have a remedy for procedural violations of ERISA: “Ordinarily, a claimant who suffers because of a fiduciary’s failure to comply with ERISA’s procedural requirements is entitled to no substantive rem-

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\(^{217}\) 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).
edy. . . . We do not deny the logic of this proposition in the ordinary case."218  In Blau, the employer had "failed to comply with virtually every applicable mandate of ERISA."219  The employer failed to provide a summary plan description; kept the plan a secret, and had neither a claim procedure nor any provision to inform participants of anything in writing. These circumstances contributed to the court's finding that the employer's denial of benefits violated ERISA.220

Although it reached a contrary outcome, the Ninth Circuit Court of Appeals reaffirmed the Blau analysis in Ellenburg v. Brockway, Inc.221  The Ninth Circuit held that "[p]rocedural defects do not necessarily require substantive remedies."222  The Ellenburg court went on to hold that "[a] substantive remedy would be appropriate only if the procedural defects caused a substantive violation or themselves worked a substantive harm."223

The district court's decision in Adams v. Avondale Industries, Inc.,224 contains a statement of the general rule regarding procedural violations. The court found that employees had no standing to complain about procedural violations of ERISA despite the defendant company's failure to comply with ERISA's requirements that the administrator file an annual report, distribute a summary plan description, and reduce the plan to writing.225  The court noted that ordinarily only the U.S. Secretary of Labor has standing to complain about violations of ERISA's procedural requirements. There is an exception when "plaintiffs [can] demonstrate reliance or prejudice resulting from such violations."226  The court found that the record did not reflect that the decision to deny severance pay was "made in the course of and infected by the procedural violations. Moreover, plaintiffs had not shown that they relied to their detriment on defendants' omissions or that they were prejudiced thereby."227

Thus, under current analysis, employees ordinarily have no right to directly assert procedural violations. However, if the procedural violations are sufficiently severe and have prejudiced the employees, courts may, in essence, convert them to substantive violations.228  Moreover, in

218. 748 F.2d at 1353.
219. Id.
220. See supra notes 56-63 and accompanying text.
221. 763 F.2d 1091 (9th Cir. 1985).
222. Id. at 1096.
223. Id.
226. 712 F. Supp. at 1297 (citations omitted).
227. Id.
228. Some courts have taken an even more restrictive view on the availability of private reme-
the context of a benefit denial, some cases have followed *Blau* in considering procedural violations against the employer in a claim for denial of benefits.\(^{229}\)

In the following cases, courts recognized that procedural violations may lead to liability, but found that the particular procedural violations at issue did not rise to the level necessary to impose such liability.\(^{230}\) It is difficult to read these cases without reaching the conclusion that *Blau* has been limited to its facts, and, even under those facts, many courts would not reach the same outcome.

In *Simmons v. Diamond Shamrock Corp.*,\(^{231}\) the Court of Appeals for the Eighth Circuit upheld a district court, finding that an employer's failure to comply with ERISA's reporting and disclosure requirements did not make its denial of severance benefits arbitrary and capricious. The court found that the employees did not show any substantial harm.\(^{232}\) The court distinguished *Blau* on the grounds that the employer in *Blau* had actively concealed its severance allowance policy. The company failed to publish or in any way inform salaried employees of the plan's existence, content, or terms. It also applied the plan in a discriminatory manner and neglected to respond to plaintiff's demand for severance pay.\(^{233}\) In *Diamond Shamrock*, the court found that the employer
dies for procedural violations. *See*, e.g., *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990) (rejecting employees' claim that they were entitled to severance pay because the employer failed to comply with ERISA's reporting and disclosure requirements, the court suggested that the violations did not rise to the level of *Blau*). The court went on to suggest, however, that the Third Circuit Court of Appeals had rejected the reasoning that substantive remedies are available for procedural violations, *cert. denied*, 111 S. Ct. 1310 (1991).

229. The Eighth Circuit Court of Appeals upheld violations of fiduciary duties for amendments to severance plans in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968, *cert. denied sub nom.* Dependahl v. Kalmanovitz, 454 U.S. 1084 (1988). The employer had increased eligibility requirements for its unfunded severance plan and its funded insurance benefit program shortly before imposing mass terminations. The court in *Bennett v. Gill & Duffus Chems.*, Inc., 699 F. Supp. 454 (S.D.N.Y. 1988), citing to *Blau*, considered other ERISA violations as part of its decision that the employer's decision not to pay severance benefits violated the arbitrary and capricious standard of review. "We are also particularly mindful of the plan administrator's procedural violations in implementing the severance policy." The employer did not give notice or description of the severance policy. Its actions were in violation of ERISA's reporting and disclosure requirements and claims procedure requirements. *Id.* at 457.

230. *See also* *Hozier v. Midwest Fasteners*, Inc., 908 F.2d 1155 (3d Cir. 1990) (court rejected the plaintiffs' argument for benefits based on a reporting violation that took place when the employer failed to notify the plaintiffs of the modification of severance plan within 210 days of the modification as required by 29 U.S.C. § 1024(b)(1)); *Weinfurther v. Source Servs. Corp.*, 759 F. Supp. 599, 603 (N.D. Cal. 1991) (participants in profit sharing plan were not entitled to substantive remedy for employer's possible procedural violation in not notifying participants of the amendment because the violations did not rise to the level of those in *Blau*); *Bowman v. Firestone Tire & Rubber Co.*, 724 F. Supp. 493, 502-03 (N.D. Ohio 1989) (finding no reliance or prejudice to claimant, court would not allow private suit for procedural deficiencies).

231. 844 F.2d 517, 518 (8th Cir. 1988).

232. *Id.* at 524.

233. *Id.* at 525.
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never concealed the severance policy, the policy was not applied in a
discriminatory manner and the employees never made a claim for separa-
tion pay prior to bringing suit.234

In Garavuso v. Shoe Corps. of America Industries, Inc.,235 the plain-
tiff claimed that a decision to deny his severance benefits was invalid be-
cause of ERISA violations by the employer in administering the
severance plan. The employer admitted to numerous violations, includ-
ing failing to furnish a summary plan description with either the employ-
ees or the Secretary of Labor and not filing modifications or annual
reports with the Secretary of Labor.236 The written plan instrument did
not specifically designate named fiduciaries to manage the operation and
administration of the plan or otherwise delegate responsibility.237 The
plan did not specify procedures for its amendment.238 The employer did
not maintain a claims procedure, provide written notice of denial of ben-
efits, or furnish its employees with a statement of their rights under
ERISA.239 Nonetheless, the court distinguished Blau and imposed no lia-
ibility for these deficiencies because plaintiff produced no evidence to
show "how any of these technical violations of ERISA resulted in preju-
dice to him."240 In the absence of reliance or prejudice to the claimants,
only the Secretary of Labor has standing to complain about violations of
ERISA's procedural requirements.241

In In re White Motor Corp.,242 the court stated that procedural de-
fects in an administrator's claims process are probative of arbitrary and
capricious decisionmaking and may provide an inference of bad faith.243
Further, citing to Blau, the court stated that substantive remedies are
appropriate when procedural violations cause a substantive harm.244
However, the court found that the particular procedural violations before
it did not rise to such a level.245

In Young v. Standard Oil (Indiana),246 the Seventh Circuit Court of
Appeals rejected the plaintiffs' argument that a more stringent standard

234. Id. at 525. Accord McConnell v. Texaco, Inc. 727 F. Supp. 751, 757 (D. Mass. 1990);
severance plan did not result in detrimental reliance or prejudice, no damages were awarded to
employees), aff'd, 911 F.2d 732 (6th Cir. 1990).
236. 709 F. Supp. at 1430.
237. Id.
238. Id.
239. Id.
240. 709 F. Supp. at 1430.
241. Id.
243. Id. at 789.
244. Id.
245. Id. at 790.
of review should apply due to the employer’s procedural violations.\textsuperscript{247} Although the defendants had committed procedural violations, the court found that they were not as flagrant as those in \textit{Blau}. The employer “made general statements about severance eligibility requirements to its employees. The employees were also told where to obtain additional information. The severance plan was not actively concealed from them and they were notified when their benefit claims were denied.”\textsuperscript{248}

In \textit{Aquin v. Bendix Corp.},\textsuperscript{249} an employer was charged with the improper denial of severance benefits. The court found that the employer had committed several procedural violations of ERISA, but found that they were insufficient to impose a separate remedy. The employer had not filed a copy of a modified severance plan with the Secretary of Labor nor had it given a summary plan description to plan participants. In addition the employer had not filed an annual report for the plan in a few years even though one is required every year under 29 U.S.C. § 1024(a)(1)(A) (1988). The court noted all of these violations, yet held:

In any case, these procedural delinquencies do not rise to the level seen in \textit{Blau v. Del Monte Corporation} so as to entitle plaintiffs to severance benefits. Unlike Del Monte’s actions as administrator, defendants did not conceal the Plan from participants, or fail to create procedural mechanisms for benefit determinations, or make “no attempt to comply with any of the duties that ERISA places upon a benefit plan administrator.” I just cannot say that the decision to deny benefits here “was made in the course of, and . . . infected by, these ERISA violations.” In a case such as this, a fiduciary’s failure to comply with ERISA’s procedural requirements does not entitle claimants to any substantive remedy. . . . Only the Secretary of Labor has standing to complain in the absence of reliance or prejudice to the claimants.\textsuperscript{250}

Other courts, while not finding \textit{Blau} violations sufficient to grant summary judgment in favor of employees, have used those violations to deny motions for summary judgment brought by employers. In \textit{Marynovich v. Market Data Retrieval, Inc.},\textsuperscript{251} the court, in refusing to grant summary judgment in favor of the employer, stated that it was troubled by evidence indicating that the employer failed to provide plaintiff with any documents or summaries concerning her rights under the plan. “Defendants cannot escape their severance obligations because plaintiff failed to satisfy the plan’s terms if they failed to inform her of those severance conditions. This too is a factual question precluding summary judgment.”\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{247} \textit{Id.} at 1045-46.
\item \textsuperscript{248} \textit{Id.} at 1046.
\item \textsuperscript{249} 637 F. Supp. 657 (E.D. Mich. 1986).
\item \textsuperscript{250} \textit{Id.} at 664-65 (citations omitted).
\item \textsuperscript{251} 716 F. Supp. 343, 350 (N.D. Ill. 1989).
\item \textsuperscript{252} \textit{Id.} at 350.
\end{itemize}
In *Brunner v. Sun Refining & Mktg. Co.*,\(^{253}\) the court found that the employer could not rely on uncirculated provisions of its severance plan but could use a circulated Policy Manual in lieu of a summary plan description. The court went on to deny the employer's motion for summary judgment.

Since even very informal plans qualify for treatment under ERISA, many plans suffer procedural infirmities. In challenging benefit denials, many potential beneficiaries suggest that these procedural violations should be considered. Although courts have developed an exception to the general rule that individual beneficiaries may not challenge procedural violations, the exception has been frequently rejected by courts.

**CONCLUSION**

Under the current case law and regulatory framework, an employer retains wide discretion in administering, modifying, and terminating its severance plan. Although the Supreme Court has announced a more strict standard of review for certain cases, the decision of whether to be subject to that standard is left in the hands of the plan drafter. Moreover, the courts have grafted much of the analysis they had applied under the arbitrary and capricious standard onto de novo review.

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