ERIC BUCHANAN AND ASSOCIATES

Eric Buchanan & Associates, PLLC
Attorneys at Law

# ERISA & DISABILITY BENEFITS NEWSLETTER

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## ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the National Board of Social Security Disability Advocacy. For more information, visit our website at www.buchanandisability.com.

R. Chandler Wilson, R. Scott Wilson, Eric Buchanan & Hudson Ellis.

## ERISA AND THE SUPREME COURT AFTER 40 YEARS
## CLAIM RULES AND STANDARD OF REVIEW BY ERIC BUCHANAN

This is the third newsletter in our discussion of the important U.S. Supreme Court cases decided under the Employee Retirement Income Security Act of 1974 ("ERISA"). Our first newsletter in this series, from June 2016, discussed ERISA preemption, while the second, from August 2016, discussed remedies under ERISA.

In this article we turn to the topic of ERISA standard of review for claims decisions, the authority ERISA fiduciaries have to make decisions and interpret their plans, and the rules that apply to claim decisions.

**Standard of Review of ERISA Fiduciaries' and Administrator's Plan Interpretations and Decisions.**

One of the most important ERISA cases decided by the Supreme Court is *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), which answered the question of what standard of review courts should apply when reviewing a plan's denial of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B). The Court first noted that, although ERISA "is a 'comprehensive and reticulated statute,' " it does not "set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." *Id.* at 108-9. Firestone argued for a deferential standard of review, while the plan participant argued for de novo review.

The Court first engaged in a lengthy explanation of how ERISA was based in trust law and was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," and "to protect contractually defined benefits," *Id.* at 110-14. The Court also explained that, "Adopting Firestone's reading of ERISA [to require a deferential standard of review] would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.* at 113-14. Therefore, the Court held that, "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard. . ." *Id.* at 115. However, despite the long discussion about why the *de novo* standard was the correct standard, and consistent with the purposes of ERISA, the Court finished the same sentence taking away *de novo* review if, "the benefit plan gives the administrator or

fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* Lastly, with no additional discussion, the Court explained that if a fiduciary has discretion, but that "administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' " *Id.* at 115, citing Restatement (Second) of Trusts § 187, Comment *d* (1959).

In *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008) the Supreme Court clarified its explanation in Firestone Tire that when an ERISA decision-maker has discretion and a financial interest in the outcome of a claim, "this dual role creates a conflict of interest [and] that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case." In this case, Metropolitan Life Ins. Company denied Glenn's claim for ongoing disability benefits, and argued that its inherent conflict of interest should not be relevant because the employer who purchased the policy approved the relationship, and thus there was not really a conflict.

In responding to insurance company's arguments, the Court noted that of course there is a conflict where "every dollar provided in benefits is a dollar spent by ... the employer; and every dollar saved ... is a dollar in" the insurance company's pocket. *Id.* at 112. Further, "ERISA imposes higher-than-marketplace quality standards on insurers." Specifically, ERISA "sets forth a special standard of care upon a plan administrator, namely, that the administrator 'discharge [its] duties' in respect to discretionary claims processing 'solely in the interests of the participants and beneficiaries' of the plan." *Id.* at 115, citing ERISA § 404, 29 U.S.C. § 1104(a)(1). The Court also noted ERISA "simultaneously underscores the particular importance of accurate claims processing by insisting that administrators 'provide a "full and fair review" of claim denials,' " *Id*, citing *Firestone,* 489 U.S., at 113 and quoting ERISA § 503(2), 29 U.S.C. § 1133(2)). ERISA also "supplements marketplace and regulatory controls with judicial review of individual claim denials." *Id,* citing ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

In deciding how to take the conflict-of-interest into account, the Supreme Court explained that such a conflict would not change the standard of review to *de novo*, but does "require[] the reviewing judge to take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion. *Id*. at 115, citing Restatement of Trusts§ 187, Comments *d-j; id.,* § 107, Comment *f.* The Court also rejected "special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict," but rather, simply, the conflict should be a "factor" for reviewing courts to consider. *Id*. at 116. In explaining how to weigh the "factor" of a conflict of interest, courts can consider it as a factor that is a "tiebreaker when the other factors are closely balanced," and that the court should look at the "case-specific importance" of the factor. *Id.* at 117. A conflict of interest such as this one, where an insurance company pays benefits with its own funds and makes the decision "should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration." *Id.* On the other end of the spectrum, the court should find the factor "less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decision making irrespective of whom the inaccuracy benefits." *Id.*

The Court also gave guidance as to what other "factors" a court properly considers in determining whether an ERISA fiduciary with discretion acted reasonably. The Supreme Court noted that the lower court had "found questionable the fact that MetLife had encouraged Glenn to argue to the Social Security Administration that she could do no work," and further "received the bulk of the benefits of her success in doing so (the remainder going to the lawyers it recommended)," and then MetLife "ignored the [Social Security Administrations]'s finding in concluding that Glenn could in fact do sedentary work." *Id*. at 118. The Supreme Court found the way MetLife considered the Social Security decision to be "an important factor in its own right (because it suggested procedural unreasonableness)." *Id*. Further, this "justified the court in giving more weight to the conflict (because MetLife's seemingly inconsistent positions were both financially advantageous)." *Id.* The Supreme Court

also noted favorable that the court below properly considered the factor that "MetLife had emphasized a certain medical report that favored a denial of benefits, had deemphasized certain other reports that suggested a contrary conclusion, and had failed to provide its independent vocational and medical experts with all of the relevant evidence." *Id.*

In *Conkright v. Frommert*, 559 U.S. 506 (2010) the Supreme Court addressed whether an ERISA administrator could lose its grant of discretion after making an honest mistake in a plan interpretation. The underlying issue dealt with the calculation of accrued pension benefits for previously employed plan participants who were rehired after a break in service. The employer/plan administrator used a calculation that was found to be unreasonable and the case was remanded, but when the case returned to court the lower courts found that the plan administrator's new interpretation should not be entitled to deference. The Supreme Court characterized this as "a single honest mistake in plan interpretation" that did not justify stripping the administrator of deference when making subsequent interpretations of the plan. *Id.* at 509. The Supreme Court rejected what it called the "one-strike-and-you're-out" approach. *Id.* at 513.

The *Conkright* case is important because it is often cited for the proposition that deference is important to the administration of ERISA plans and encourages employers to offer plans. After finding that the ERISA administrator/employer in this case had only made a one-time mistake, and that was not enough to strip it of deference in plan interpretations, the Supreme Court, in dicta, went through a long explanation why deference was an important part of ERISA's scheme:

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. *Lockheed Corp. v. Spink,* 517 U.S. 882, 887, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). We have therefore recognized that ERISA represents a " 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc. v. Davila,* 542 U.S. 200, 215, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)). Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity Corp., supra,* at 497, 116 S.Ct. 1065. ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 379, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002). 5 *Firestone* deference protects these interests and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the "careful balancing" on which ERISA is based. Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."

*Conkright*, 559 U.S. at 516-17.

**How Administrators Must Consider Evidence in ERISA Claims.**

In *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) the Supreme Court rejected

lower courts' findings that a "treating physician rule" applied in ERISA benefits claims. Further, courts may not "impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." *Id.* However, the Court also explained that "Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." *Id.*

The Court rejected a general treating physician rule in ERISA cases, first because nothing in ERISA requires "special deference to the opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion." *Id.* at 831. The Court further noted that unlike the Commissioner of Social Security, the Secretary of the Department of Labor, who issues ERISA regulations had not issued a regulation creating a treating physician rule; if the Secretary were to issue such a regulation it would be entitled to *Chevron* deference. *Id.* Further, under ERISA "employers have large leeway to design disability and other welfare plans as they see fit. . . the validity of a claim to benefits under an ERISA plan, . . . is likely to turn, in large part, on the interpretation of terms in the plan at issue." *Id.* at 833, internal quotations omitted.

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**We appreciate the opportunity to work with you on any of these cases.**
**Contact our Intake Team at intaketeam@buchanandisability.com.**

## ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the upcoming ACI Litigating Disability Insurance Claims Conference in Miami, Florida on Wednesday, February 1, 2017.

**Topic:** Penalties for Failing to Provide Plan Documents Under ERISA Section 502 (c).

## NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates, PLLC are available to speak to your organization regarding social security disability, ERISA long-term disability, group long-term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

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