

DEFERENTIAL REVIEW FOR A NONFIDUCIARY'S
DECISION?: HOW *GEDDES V. UNITED STAFFING
ALLIANCE* SPLIT THE CIRCUITS, ERISA, AND A PLAN
PARTICIPANT'S RIGHT TO DISCRETIONARY REVIEW

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INTRODUCTION

In 1974, Congress passed the Employee Retirement Income Security Act ("ERISA") "to promote the interests of employees and their beneficiaries in employee benefit plans . . . and to protect contractually defined benefits."¹ Congress found that the economic impact of employee benefit plans, including pension plans and welfare plans, was substantial and that employees lacked information and plans lacked adequate safeguards to protect the "equitable character" and "financial soundness" of the plans.² Thus, ERISA established reporting and disclosure requirements and "standards of conduct, responsibility, and obligation[s] for fiduciaries of employee benefit plans" to protect employees and their beneficiaries.³ Specifically, ERISA requires that benefit plans name fiduciaries and provides a high fiduciary standard of conduct, namely that fiduciaries are charged with acting solely in the interests of plan participants and beneficiaries.⁴ Because Congress found state common law inadequate to protect the interests of benefit plan participants, ERISA preempts the state common law of trusts.⁵

Additionally, ERISA provides appropriate remedies for statutory violations and access to the federal courts.⁶ A plan participant may resort to the federal courts for a review of an administrator's decision to deny benefits under the plan.⁷ However, ERISA fails to provide a judicial standard of

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¹ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (internal quotations and citation omitted).

² Employee Retirement Income Security Act (ERISA) of 1974 § 2(a), 29 U.S.C. § 1001(a) (2000).

³ *Id.* § 2(b), 29 U.S.C. § 1001(b).

⁴ ERISA FIDUCIARY LAW 12, 31 (Susan P. Serota & Frederick A. Brodie eds., 2d ed. 2006); *see also* ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (detailing an ERISA fiduciary's specific duties).

⁵ ERISA FIDUCIARY LAW, *supra* note 4, at 738.

⁶ ERISA § 2(b), 29 U.S.C. § 1001(b).

⁷ *Id.* § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

review.⁸ In response to this shortcoming, the Supreme Court has established a de novo standard of review for denial of benefits claim unless the plan documents grant the plan administrator or fiduciary discretionary authority to construe the plan's terms.⁹ A more deferential arbitrary and capricious standard of review applies if the plan documents grant discretionary authority to the plan administrator or fiduciary.¹⁰

While some commentators have expressed concerns that this deferential standard of review is too favorable to plan administrators,¹¹ it is important to note that discretionary authority under ERISA comes with the designation of fiduciary.¹² Specifically, an ERISA fiduciary's duties include the duty of prudence and loyalty to plan participants.¹³ ERISA also provides for remedies against plan administrators and fiduciaries who violate ERISA.¹⁴

However, recognizing that fiduciaries often need aid in administering ERISA plans, ERISA also allows a plan administrator to designate "persons other than named fiduciaries to carry out fiduciary responsibilities."¹⁵ The issue then becomes what standard of review applies to the discretionary decisions of the nonfiduciary third party, and whether courts will defer to the nonfiduciary's decision to deny benefits. In *Baker v. Big Star Division of the Grand Union Co.*,¹⁶ the Eleventh Circuit ruled that an ERISA plan administrator must delegate its claims-handling procedures only to other fiduciaries to qualify for judicial deference.¹⁷ The Tenth Circuit declined to follow *Baker* in *Geddes v. United Staffing Alliance Employee Medical Plan*¹⁸ and ruled that judicial deference extends to the benefit denial decisions of third-party nonfiduciaries.¹⁹ Under *Geddes*, not only has the plan participant been denied benefits under the plan, the plan participant no longer has the right to a discretionary review by an ERISA fiduciary, and the courts then defer to the nonfiduciary's decision.²⁰

This Casenote analyzes the ruling in *Geddes* and its extension of the arbitrary and capricious standard of review in benefit denial claims. Part I discusses the adoption of this deferential standard of review by the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*. Part I also discusses the

⁸ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989).

⁹ *Id.* at 115.

¹⁰ *Id.*

¹¹ See, e.g., John H. Langbein, *Trust Law as Regulatory Law: The UNUM/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1316 (2007).

¹² ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

¹³ *Id.* § 404(a), 29 U.S.C. § 1104(a).

¹⁴ *Id.* § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

¹⁵ *Id.* § 405(c)(1), 29 U.S.C. § 1105(c)(1).

¹⁶ 893 F.2d 288 (11th Cir. 1989).

¹⁷ *Id.* at 290-91.

¹⁸ 469 F.3d 919 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 2993 (2008) (mem.).

¹⁹ *Id.* at 927.

²⁰ *Id.*

development of the resulting circuit split on the issue of whether a plan administrator can claim the benefit of this deference when the administrator delegates fiduciary functions to a nonfiduciary. Part II examines the definition and responsibilities of an ERISA fiduciary. Part III analyzes the Tenth Circuit's interpretation of *Firestone* in *Geddes*. Finally, Part IV examines how the Tenth Circuit's ruling in *Geddes* violates the substantive provisions of ERISA and suggests an alternative interpretation of *Firestone* in delegation of benefits determination cases that is consistent with ERISA's substantive provisions and policy.

I. BACKGROUND

A. *Firestone Deference*

The Supreme Court addressed ERISA's failure to provide a standard of review for a plan participant's ERISA § 502(a)(1)(B) action challenging an administrator's benefits denial determination in *Firestone Tire & Rubber v. Bruch*.²¹ The Court chose between two potential standards of review in *Firestone*: the arbitrary and capricious standard and the de novo standard.²² The arbitrary and capricious standard of review "effectively presumes the correctness of the plan's decision to deny the claimed benefit."²³ On the other hand, under the de novo standard of review, "the reviewing court examines the merits afresh."²⁴

In *Firestone*, the Supreme Court held that courts should review a denial of benefits determination "under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."²⁵ The default standard of review is de novo.²⁶ However, the de novo standard is effectively defeated as the default standard because the drafter can insert language requiring the reviewing court to defer to the administrator's or fiduciary's decision.²⁷

In selecting de novo review as the default standard, the Supreme Court expressly stated that the "wholesale importation of the arbitrary and capri-

²¹ 489 U.S. 101, 108 (1989).

²² *Id.* at 113.

²³ Langbein, *supra* note 11, at 1322.

²⁴ *Id.*

²⁵ *Firestone*, 489 U.S. at 115. *Firestone* applies to a participant's challenge of a plan's benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000). *Id.* at 106.

²⁶ Langbein, *supra* note 11, at 1322.

²⁷ *Id.* at 1323.

cious standard into ERISA is unwarranted” for two reasons.²⁸ First, “ERISA abounds with the language and terminology of trust law”²⁹ and under the common law principles of trusts, courts do not always give deference to a fiduciary’s determinations.³⁰ Second, “widespread use of [the arbitrary and capricious] standard would frustrate ERISA’s manifest purposes of (1) promoting the interests of employees and their beneficiaries in employee benefit plans and (2) protecting contractually defined benefits.”³¹

The Supreme Court also relied on trust principles to determine the appropriate standard of review under ERISA § 502(a)(1)(B).³² “Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers.”³³ The Court relied on the Restatement (Second) of Trusts’ logic that “[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion.”³⁴ The Court also stated that “[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act.”³⁵ It is on this basis that the Supreme Court recognized that an arbitrary and capricious standard of review is appropriate only when the plan document grants the fiduciary discretion to interpret the plan’s terms and make benefits decisions.³⁶

However, the Court also suggested that “[n]either general principles of trust law nor a concern for impartial decision making . . . foreclose[s] parties from agreeing upon a narrower standard of review.”³⁷ Consequently, the Court provided plan administrators an escape from the default *de novo* standard of review by allowing the plan’s provisions to grant the administrator or fiduciary discretionary authority to interpret the plan’s terms.

Professor John Langbein classified the Court’s holding as an invitation to evade *Firestone*’s *de novo* standard of review.³⁸ Professor Langbein further suggested that once plans are amended or drafted to grant discretion to plan fiduciaries, the issue of when and under what circumstances courts would defer to the decisions of plan administrators would return.³⁹ In fact,

²⁸ *Firestone*, 489 U.S. at 109 (emphasis added); see also JAMIE RUTH EBENSTEIN & MARK E. SCHMIDTKE, ERISA LITIGATION PRIMER ch. 4 (2004).

²⁹ *Firestone*, 489 U.S. at 110.

³⁰ *Id.* at 115.

³¹ EBENSTEIN & SCHMIDTKE, *supra* note 28, at ch. 4.

³² *Firestone*, 489 U.S. at 111.

³³ *Id.*

³⁴ *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)).

³⁵ *Id.* (quoting *Nichols v. Eaton*, 91 U.S. 716, 724-25 (1875)).

³⁶ Langbein, *supra* note 11, at 1323.

³⁷ *Firestone*, 489 U.S. at 115.

³⁸ John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 220.

³⁹ *Id.* at 222.

since *Firestone*, plan sponsors routinely draft plan documents to retain discretionary powers for the administrator in order to avail themselves of the deferential standard of review.⁴⁰ After fifteen years, *Firestone* remains a controversial decision in the circuit courts.⁴¹

B. *Deference to a Nonfiduciary*

Soon after the Supreme Court decided *Firestone*, the issue arose in the Eleventh Circuit of whether courts should grant deferential treatment to a nonfiduciary administrator's decision to deny benefits. In *Baker v. Big Star Division of the Grand Union Co.*,⁴² the Eleventh Circuit read *Firestone* as requiring de novo review unless the plan fiduciary has been granted discretionary authority to interpret the terms of a plan or the plan administrator has been granted discretionary authority under the plan.⁴³ Hence, the decision to grant deference turned on whether the party making the decision had been granted discretionary authority by the plan.

In *Baker*, plan participant Richard Baker, a long-time employee of Big Star, received monthly disability benefits for two years.⁴⁴ Mr. Baker discontinued working as an assistant store manager in a Big Star supermarket as a result of lower back pain.⁴⁵ Under the terms of the Grand Union plan, a participant was eligible for disability benefits after two years "only if he or she is 'totally disabled' or 'unable to perform any occupation for which [he or she] is qualified based on his or her education, training or experience.'"⁴⁶ After two years, Mr. Baker submitted medical evidence of total disability and applied for disability benefits.⁴⁷ Connecticut General, the plan administrator, denied the claim for disability benefits after making Mr. Baker undergo an evaluation by a doctor of its choice.⁴⁸ Mr. Baker did not pursue review of the benefit plan determination because he was told that Connecticut General would review its own decision to deny benefits and the outcome would likely be the same.⁴⁹

⁴⁰ Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1116 (2001); ERISA FIDUCIARY LAW, *supra* note 4, at 172-73.

⁴¹ ERISA FIDUCIARY LAW, *supra* note 4, at 35.

⁴² 893 F.2d 288 (11th Cir. 1989).

⁴³ *Id.* at 291.

⁴⁴ *Id.* at 289.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Baker*, 893 F.2d at 289.

⁴⁹ *Id.* In addition, Department of Labor regulations mandate that another party must conduct the review of a benefits denial decision, specifically, the named fiduciary of the plan, and that the review must not defer to the initial benefits denial determination. 29 C.F.R. § 2560.503-1(h)(3)(ii) (2008).

The employer-fiduciary in *Baker* argued that the claims administrator was indeed an ERISA fiduciary, because the claims administrator's interpretation of the plan and benefit determinations were "inherently discretionary."⁵⁰ However, the Eleventh Circuit determined that a claims administrator who "perform[s] administrative functions and claims processing within a framework of rules established by an employer . . . [and] has not been granted the authority to review benefits denials and make the ultimate decisions regarding eligibility" is not an ERISA fiduciary.⁵¹

The court found that the plan granted the authority to review claim denials to the fiduciary, not to the nonfiduciary third-party administrator, and remanded the case to the district court for review of the participant's claim de novo.⁵² The logic was that "any entity or person found not to be an ERISA 'fiduciary' cannot be an 'administrator with discretionary authority' subject to the arbitrary and capricious standard."⁵³

In *Madden v. ITT Long Term Disability Plan for Salaried Employees*,⁵⁴ the Ninth Circuit decided the similar, although not identical, issue of whether courts should apply a deferential standard of review to a benefits denial claim when a named fiduciary designates someone other than a named fiduciary to carry out fiduciary responsibilities under ERISA § 405(c).⁵⁵ Ervin Madden, a plan participant and long-time employee of Federal Electric Corporation, suffered a spinal injury that rendered him unable to work as a management employee at Federal.⁵⁶ The terms of the ITT Long Term Disability Plan for Salaried Employees provided that Mr. Madden was eligible for long-term disability benefits in the first year if he was unable to perform his regular job duties. After the first year, Mr. Madden was eligible for long-term disability benefits if he was unable to engage in any occupation for which he was qualified, based on his training, education, or experience.⁵⁷ For two years, Mr. Madden's physician determined that he was unable to engage in any occupation for which he was qualified, and was thus totally disabled.⁵⁸ After that time, however, Mr. Madden's physician determined that although Madden could not return to his regular job duties, he was not totally disabled and was able to perform other job responsibilities.⁵⁹ Three years after his injury, Metropolitan Life Insurance

⁵⁰ *Baker*, 893 F.2d at 291.

⁵¹ *Id.* at 290.

⁵² *Id.* at 291-92.

⁵³ *Id.* at 291.

⁵⁴ 914 F.2d 1279 (9th Cir. 1990).

⁵⁵ *See id.* at 1283-84. Under ERISA § 405(c), the named fiduciary may delegate fiduciary responsibilities in accordance with the plan documents. ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (2000); *see also* ERISA FIDUCIARY LAW, *supra* note 4, at 212.

⁵⁶ *Madden*, 914 F.2d at 1281.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Company, the plan's delegate, terminated Mr. Madden's benefits.⁶⁰ Metropolitan reviewed its decision three separate times, and each time affirmed its decision to deny Mr. Madden's benefits.⁶¹ The district court correctly reviewed Metropolitan's decision to deny benefits under the arbitrary and capricious standard, but noted that "even if the decision were subject to *de novo* review, Metropolitan did not violate its fiduciary duty."⁶²

Under the plan's terms, the plan administrator reserved discretionary authority in accordance with *Firestone* and then delegated the reserved discretionary authority to another fiduciary, Metropolitan.⁶³ The Ninth Circuit extended *Firestone* to allow the arbitrary and capricious standard of review when, "pursuant to ERISA [§ 405], a named fiduciary properly designates another fiduciary, delegating its discretionary authority."⁶⁴

Madden is distinguishable from *Baker* on two grounds. First, in *Baker*, the plan did not grant the nonfiduciary the discretionary authority to interpret the plan's terms, whereas in *Madden*, the plan specifically allowed the named fiduciary to delegate discretionary authority.⁶⁵ Second, the court determined that the third-party administrator was not an ERISA fiduciary in *Baker*, whereas in *Madden*, the named fiduciary delegated its discretionary authority to another fiduciary party.⁶⁶ However, the cases are consistent in their interpretation of *Firestone*—that judicial deference turns on whether the plan reserves discretion to the plan administrator and if the party making benefit determinations is vested with discretion under the plan's terms.

C. *Splitting the Circuits*—Geddes⁶⁷

1. The Plan

Michael Geddes' employer maintained the United Staffing Alliance Employee Medical Plan, an employee welfare benefit plan as defined by ERISA, to provide healthcare coverage for the plan's participants.⁶⁸ Michael Geddes was a participant in the plan, and his family relied on the plan for healthcare coverage.⁶⁹

⁶⁰ *Id.*

⁶¹ *Id.* at 1282.

⁶² *Madden*, 914 F.2d at 1282-83.

⁶³ *Id.* at 1284.

⁶⁴ *Id.* at 1283-84.

⁶⁵ *Id.* at 1284.

⁶⁶ *Id.*

⁶⁷ *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919 (10th Cir. 2006).

⁶⁸ *Id.*

⁶⁹ *Id.*

The plan named United Staffing as fiduciary and administrator.⁷⁰ Pursuant to the plan's terms, United Staffing engaged Everest Administrators, Inc., an independent third-party administrator, to review participants' claims and administer plan benefits.⁷¹ The contract between United Staffing and Everest provided that Everest would perform administrative functions and that Everest was not an ERISA fiduciary.⁷² Under the plan's explicit terms, United Staffing retained the right to make all final decisions regarding benefits paid and the authority to interpret disputed plan provisions.⁷³

2. Andrew Geddes' Injury

On June 27, 2002, Michael Geddes' son, Andrew Geddes, dove into shallow water in Lake Powell and suffered a serious neck and spinal column injury.⁷⁴ Andrew was transported from Lake Powell to St. Mary's Hospital in Grand Junction, Colorado.⁷⁵ At St. Mary's, Andrew underwent surgery to repair his spinal cord and was placed in intensive care with a halo device screwed to his skull.⁷⁶ During his hospital stay, Andrew was fed intravenously and splints were attached to his legs.⁷⁷

When it came time for Andrew to be transported from St. Mary's Hospital to Primary Children's Hospital in Salt Lake City, Utah, the plan denied coverage for helicopter transportation, despite Andrew's fragile condition and his physicians' recommendation that he be transferred by helicopter.⁷⁸ Andrew was transported to Primary Children's by ambulance.⁷⁹ At Primary Children's, Andrew received in-patient care for two months and his physician recommended two months of rehabilitation and further medical attention for his injuries, infections, and pain.⁸⁰

Andrew's medical bills totaled \$185,892.⁸¹ At the direction of Everest, the plan covered only \$40,921.⁸² The plan paid less than half the cost of Andrew's treatment at St. Mary's, determining that the cost of the treatment exceeded the "usual and customary" rate under the plan's terms.⁸³ Everest

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 922-24.

⁷³ *Geddes*, 469 F.3d at 922.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Geddes*, 469 F.3d at 922.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 922-23.

also denied coverage for nearly all of the fees from Primary Children's, finding that the treatment Andrew received there was rehabilitation, which was capped at \$2,500 under the plan.⁸⁴ The Geddes disputed the claims with Intracorp, another claims review agency employed by United Staffing, and were again denied benefits "based on the terms of the Plan."⁸⁵

3. The District Court's Decision

After the benefits denial, the Geddes filed suit in federal district court alleging that United Staffing denied benefits in violation of ERISA § 502(a)(1)(B).⁸⁶ The first issue the district court addressed was the appropriate standard of review for United Staffing's benefits denial to Andrew Geddes.⁸⁷ The district court recognized the rule from *Firestone* that "a denial of benefits challenged under [ERISA § 502(a)(1)(B)] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."⁸⁸

Although the plan reserved discretion for United Staffing, United Staffing engaged Everest as a claims administrator in accordance with the plan's terms. The court considered the Ninth Circuit's holding in *Madden*, that

where (1) the ERISA plan expressly gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan and (2) pursuant to ERISA . . . a named fiduciary properly designates *another fiduciary*, delegating its discretionary authority, the 'arbitrary and capricious' standard of review for ERISA claims brought under [ERISA § 502(a)(1)(B)] applies to the designated ERISA-*fiduciary* as well as to the named fiduciary.⁸⁹

⁸⁴ *Id.* at 923.

⁸⁵ *Geddes*, 469 F.3d at 923.

⁸⁶ *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 2:03CV00440(PGC), 2005 WL 1414268, at *3 (D. Utah Mar. 23, 2005), *aff'd in part and rev'd in part*, 469 F.3d 919 (10th Cir. 2006). Under § 502(a)(1)(B), a participant may bring a civil action "to recover benefits due under the plan, to enforce rights under the terms of the plan, and to obtain a declaratory judgment of future entitlement to benefits under the provisions of the plan contract . . ." *Id.* at *4 (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989)). The claim also alleged violations of ERISA for improper denial of benefits under ERISA § 502(a)(3), breach of fiduciary duty under ERISA § 404(a) and 502(a)(3), and a violation of ERISA § 502(c)(1)(B) due to the Defendants' failure to provide requested Plan documents. *Id.* at *3.

⁸⁷ *Id.* at *4.

⁸⁸ *Id.* (quoting *Firestone*, 489 U.S. at 115).

⁸⁹ *Id.* at *5 (quoting *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1283-84 (9th Cir. 1990)).

Thus, the court extended *Firestone* deference to a named fiduciary's delegates so long as the plan reserves discretionary authority for the named fiduciary.

However, the court found that Everest, a nonfiduciary, had full authority to review and evaluate claims and that United Staffing never reviewed any of the Geddes' claims.⁹⁰ Consequently, *no* fiduciary ever evaluated the Geddes' claims.⁹¹ Because the plan and the contract between Everest and United Staffing contemplated that Everest was not a plan fiduciary, the arbitrary and capricious standard did not apply.⁹²

The court further relied on the Tenth Circuit's decision in *Gilbertson v. Allied Signal, Inc.*⁹³ to support application of the de novo standard of review to Everest's decision to deny benefits.⁹⁴ In *Gilbertson*, the Tenth Circuit ruled that the district court must review denial of benefits de novo, even when the ERISA plan administrator has discretionary authority to decide claims, when a claim is "deemed denied" because the administrator failed to comply with the regulatory deadlines for determining claims.⁹⁵ *Gilbertson* reasoned that "'de novo review is appropriate because the trustee has forfeited the privilege to apply his or her discretion; it is the trustee's analysis, not his or her right to use discretion or a mere arbitrary denial, to which a court should defer.'"⁹⁶ Thus, *Gilbertson* mandated that "[t]o be entitled to deferential review, not only must the administrator be given discretion by the plan, but the administrator's decision in a given case must be a valid exercise of that discretion."⁹⁷

In *Geddes*, the court determined that because Everest was not a plan fiduciary, United Staffing waived its right to deferential review and the de novo standard of review applied.⁹⁸ Hence, the court's holding was consistent with both *Madden* and *Baker*, requiring the exercise of a fiduciary's discretion before the courts will apply a deferential standard of review.

4. The Tenth Circuit's Decision

The Court of Appeals for the Tenth Circuit disagreed with the district court's conclusion to review the benefits denial claim under a de novo stan-

⁹⁰ *Geddes*, 2005 WL 1414286, at *4.

⁹¹ *Id.*

⁹² *Id.* at *7.

⁹³ 328 F.3d 625 (10th Cir. 2003).

⁹⁴ *Geddes*, 2005 WL 1414286, at *7.

⁹⁵ *Gilbertson*, 328 F.3d at 631.

⁹⁶ *Geddes*, 2005 WL 1414268, at *4 (quoting *Gilbertson*, 328 F.3d at 633).

⁹⁷ *Id.* (quoting *Gilbertson*, 328 F.3d at 631). *Gilbertson* held that a plan administrator that failed to render a decision on a disability claim prior to the plan's deadline, and the claim was accordingly "deemed denied" pursuant to ERISA regulations, was not entitled to deferential review. 328 F.3d at 631.

⁹⁸ *Geddes*, 2005 WL 1414268, at *7.

dard of review and found that United Staffing's decision to delegate authority to Everest "accord[ed] with *Firestone*" and did not "constitute a failure of fiduciary judgment sufficient to warrant *de novo* review."⁹⁹

Under ERISA § 405(c)(1), "[t]he instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities . . . among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities . . . under the plan."¹⁰⁰ Determining that *Firestone* "requires only that ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document," the court then ruled that "*Firestone* does not limit the parties to whom a fiduciary may delegate its authority, beyond those limits implicit in the principles of trust law."¹⁰¹ The court determined that neither ERISA nor trust law prevented the plan administrator from delegating its reserved discretionary authority to nonfiduciary third parties, so long as the administrator remained personally liable for the nonfiduciary's actions.¹⁰²

The court distinguished *Gilbertson* on the basis that *Gilbertson* was a "deemed denied" decision, which is not entitled to deference because the decision was made "by operation of law rather than the exercise of discretion."¹⁰³ The court also read *Gilbertson* narrowly, stating that *Gilbertson* does not imply that "plan fiduciaries qualify for *Firestone* deference only if they delegate their authority to other named fiduciaries."¹⁰⁴ The Tenth Circuit effectively interpreted ERISA § 405 "to mean that plan fiduciaries can delegate fiduciary functions and authority to non-fiduciaries, and that the decisions made by the non-fiduciaries are entitled to abuse of discretion review."¹⁰⁵

5. The Dissent

Judge Holloway dissented from the majority's holding in *Geddes*, stating that the issue is not "whether a fiduciary's decision to delegate part of its *Firestone* authority to an independent claims administrator triggers *de novo* review," but is "simply whether any discretion was exercised to which the courts owe deference."¹⁰⁶

⁹⁹ *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 926 (10th Cir. 2006).

¹⁰⁰ ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (2000).

¹⁰¹ *Geddes*, 469 F.3d at 925 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

¹⁰² *Id.* at 926-27.

¹⁰³ *Id.* at 926.

¹⁰⁴ *Id.*

¹⁰⁵ Petition for Writ of Certiorari at 11, *Geddes v. United Staffing Alliance Employee Med. Plan*, 128 S. Ct. 2993 (2008) (mem.) (No. 06-1458), 2007 WL 1318994.

¹⁰⁶ *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting) (quoting the majority opinion at 921-22).

The dissent read *Gilbertson* in a similar manner as the district court and concluded “that to be entitled to deferential review, the administrator must actually exercise the discretion granted by the plan.”¹⁰⁷ Under the facts of *Geddes*, the dissent found that “[n]o party exercised the discretion granted by the plan; therefore, the plan administrator is not entitled to deferential review.”¹⁰⁸ The dissent supported its conclusion with trust law principles, which hold that “[f]ailure to use judgment is by definition an abuse of discretion.”¹⁰⁹

Furthermore, the dissent criticized the majority’s “unprecedented” holding, stating that it effectively held “that *any* act authorized by a party vested with discretion must be reviewed with deference” and “is contrary to . . . the common law of trusts, [and] contrary to the manifest intent of Congress for ERISA plans to be administered by a fiduciary.”¹¹⁰

II. THE ERISA FIDUCIARY

ERISA imposes high standards of conduct on plan fiduciaries to protect the interests of employee benefit plans and the participant’s beneficiaries.¹¹¹ This towering standard has been referred to as the “highest known to law.”¹¹² Additionally, ERISA fiduciaries are potentially liable for plan losses as a result of breaches of fiduciary duty under ERISA § 409.¹¹³

ERISA manifests the importance of its fiduciary standards of conduct in multiple provisions. First, ERISA mandates that every plan designate a named fiduciary who is responsible for controlling, operating, and administering the plan.¹¹⁴ Second, ERISA preempts the state common law of trusts with regard to fiduciary conduct, establishing specific duties and liabilities for plan fiduciaries.¹¹⁵ Third, ERISA provides that any “agreement or instrument which purports to relieve a fiduciary from responsibility or liability . . . , obligation, or duty . . . shall be void as against public policy.”¹¹⁶

¹⁰⁷ *Id.* at 933.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. e (1959) (“If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.”)).

¹¹⁰ *Id.* at 932.

¹¹¹ ERISA FIDUCIARY LAW, *supra* note 4, at 82.

¹¹² *Id.* at 31 (citing *Reich v. Nat’l Bank of Ariz.*, 837 F. Supp. 1259, 1273 (S.D.N.Y. 1993)).

¹¹³ ERISA § 409, 29 U.S.C. § 1109 (2000); ERISA FIDUCIARY LAW, *supra* note 4, at 31.

¹¹⁴ ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

¹¹⁵ ERISA FIDUCIARY LAW, *supra* note 4, at 4; *see also* ERISA § 514(a), 29 U.S.C. § 1144(a).

¹¹⁶ ERISA § 410(a), 29 U.S.C. § 1110(a); *see also* *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1418 (9th Cir. 1997) (holding that “a contract exonerating an ERISA fiduciary from fiduciary responsibilities is void as a matter of law”).

Finally, ERISA requires that plan documents be consistent with the provisions of ERISA.¹¹⁷

ERISA defines “fiduciary” functionally. Under ERISA § 3(21)(A)(i), a party is an ERISA fiduciary to the extent that the party exercises discretionary authority or control in the administration or management of a plan.¹¹⁸ The negative inference also applies, in that parties operating without a grant of discretionary authority are not fiduciaries under ERISA.¹¹⁹ Additionally, because fiduciary is defined functionally, and because courts broadly construe the definition of fiduciary, ERISA fiduciaries may be created by “express designation in the plan documents or the assumption of fiduciary obligations (the functional or de facto method).”¹²⁰ Thus, discretion is the “touchstone” of the definition of an ERISA fiduciary.¹²¹

A. *The ERISA Fiduciary's Duties and Liability*

“[T]rust law principles imply that the actor’s fiduciary status would cause the actor to owe a very high level of obligation to plan participants and beneficiaries.”¹²² Consequently, fiduciary status under ERISA also comes with fiduciary obligations and potential liabilities.

First, an ERISA fiduciary has the duties of loyalty and care.¹²³ Under ERISA § 404(a), an ERISA fiduciary “must act solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.”¹²⁴ In addition to the duty of loyalty, the ERISA fiduciary is held to a “prudent man standard of care” whereby the fiduciary must discharge his duties “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity . . . would use.”¹²⁵

¹¹⁷ Langbein, *supra* note 38, at 210 (“Lest plan drafters be tempted to use the plan documents to squelch the safeguards of ERISA fiduciary law, the statute contains an anti-opt-out measure, section 404(a)(1)(D), requiring that plan documents be ‘consistent with the provisions of [ERISA].’” (quoting ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D))).

¹¹⁸ EBENSTEIN & SCHMIDTKE, *supra* note 28, at ch. 5; ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Note that fiduciary status is limited by this definition, in that fiduciary status only applies to a party’s performance of fiduciary functions. ERISA FIDUCIARY LAW, *supra* note 4, at 696.

¹¹⁹ ERISA FIDUCIARY LAW, *supra* note 4, at 270.

¹²⁰ *Holdeman v. Devine*, 474 F.3d 770, 777 (10th Cir. 2007) (quoting *In re Luna*, 406 F.3d 1192, 1201 (10th Cir. 2005)).

¹²¹ Dana M. Muir, *Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 412 (2000); EBENSTEIN & SCHMIDTKE, *supra* note 28, at ch. 5.

¹²² Muir, *supra* note 121, at 412.

¹²³ See ERISA 404(a), 29 U.S.C. § 1104(a).

¹²⁴ *Id.* § 404(a)(1), 29 U.S.C. § 1104(a)(1).

¹²⁵ *Id.* § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

Second, ERISA provides remedies for breaches of fiduciary duties under § 409.¹²⁶ Additionally, under ERISA § 502(a)(1)(B), a plan participant may bring suit against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with plans.¹²⁷ ERISA, however, does not regulate the duties of nonfiduciary plan administrators. Nonfiduciaries cannot be held liable under ERISA.¹²⁸

B. *The ERISA Named Fiduciary*

Given the crucial importance of the ERISA fiduciary's duties, the statute "does not leave to chance that someone will be responsible for fiduciary acts."¹²⁹ ERISA § 402(a)(1) specifically provides that every employee benefit plan "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."¹³⁰

Requiring one party to manage the plan fulfilled the legislative purpose of "focus[ing] the responsibility, as well as the liability, for proper management and operation of a plan, for the benefit of the participants and the plan sponsor."¹³¹ Establishing a named fiduciary also allows an employee to examine the plan and determine the specific party responsible for operating the plan.¹³² ERISA further protects the interests of plan participants and their beneficiaries by requiring that every employee benefit plan "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate *named fiduciary* of the decision denying the claim."¹³³

Additionally, an ERISA named fiduciary may "designate persons other than named fiduciaries to carry out fiduciary responsibilities."¹³⁴ Under ERISA § 405(c)(1), "[t]he instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities . . . among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsi-

¹²⁶ *Id.* § 409(a), 29 U.S.C. § 1109(a).

¹²⁷ *Id.* § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

¹²⁸ Generally speaking, there is one situation in which a nonfiduciary may be held liable for "knowing participation" in a fiduciary breach. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 239 (2000).

¹²⁹ ERISA FIDUCIARY LAW, *supra* note 4, at 364.

¹³⁰ ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

¹³¹ ERISA FIDUCIARY LAW, *supra* note 4, at 189.

¹³² H.R. REP. NO. 93-1280 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5077-78 [hereinafter Conf. Rep.].

¹³³ ERISA § 503(2), 29 U.S.C. § 1133(2) (emphasis added).

¹³⁴ *Id.* § 405(c)(1), 29 U.S.C. § 1105(c)(1).

bilities under the plan.”¹³⁵ Congress purposefully provided that only named fiduciaries could delegate fiduciary responsibilities under ERISA § 405(c)(1) so plan participants could easily identify the party responsible for operating the plan.¹³⁶ If the named fiduciary properly allocates fiduciary responsibility under § 405(b)(2), ERISA § 405(c)(2) relieves the named fiduciary of liability for the designee’s acts or omissions.¹³⁷

C. *United Staffing’s Delegation of Fiduciary Responsibilities*

In *Geddes*, the Tenth Circuit found that United Staffing, the plan’s named fiduciary, established procedures in the plan instruments for delegating its responsibilities to a third-party claims administrator.¹³⁸ These delegated responsibilities, which included granting or denying benefits, do not necessarily entail the exercise of discretionary authority under ERISA § 3(21)(A).

Neither the plan documents nor the contract between United Staffing and Everest expressly provided that Everest was a plan fiduciary. Because of ERISA’s fiduciary duties and liabilities, “individuals who undertake actions connected with a benefit plan might prefer to avoid direct grants of discretion, and thus, to avoid fiduciary status.”¹³⁹ Similarly, the plan “explicitly reserves to United Staffing the right to make all final decisions . . . as well as the authority to interpret disputed plan provisions.”¹⁴⁰ Also, the contract between United Staffing and Everest specifically stated that Everest was not an ERISA fiduciary.¹⁴¹

However, because ERISA’s fiduciary analysis is functional and is based on the party’s exercise of discretion, neither the plan nor the contract between United Staffing and Everest conclusively determines whether Everest was acting as a fiduciary. A third-party claims administrator is not necessarily a de facto ERISA fiduciary. To determine whether the claims administrator is an ERISA fiduciary, “the central question is which person, group, or entity actually had the authority to make the particular benefits decision in question, and whether that decision-maker was permitted to exercise discretion in making this specific benefits determination.”¹⁴² Con-

¹³⁵ *Id.*, 29 U.S.C. § 1105(c)(1).

¹³⁶ Conf. Rep., *supra* note 132, at 5081.

¹³⁷ ERISA § 405(c)(2), 29 U.S.C. § 1105(c)(2).

¹³⁸ *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 926 (10th Cir. 2006).

¹³⁹ Muir, *supra* note 121, at 412.

¹⁴⁰ *Geddes*, 469 F.3d at 922.

¹⁴¹ *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 2:03CV00440(PGC), 2005 WL 1414268, at *6 (D. Utah Mar. 23, 2005).

¹⁴² E. Haavi Morreim, *Benefits Decisions in ERISA Plans: Diminishing Deference to Fiduciaries and an Emerging Problem for Provider-Sponsored Organizations*, 65 TENN. L. REV. 511, 518-19 (1998).

sequently, the Department of Labor has issued guidance that “a person who performs purely ministerial functions . . . within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting the management of the plan.”¹⁴³ Claims administrators who lack discretionary authority are exempt from fiduciary status because “[p]urely ministerial duties do not require fiduciary care.”¹⁴⁴ Applying these rules, the district court determined that Everest was not a fiduciary.¹⁴⁵

However, as the majority in *Geddes* found, the fiduciary analysis is not dispositive of whether the courts will grant deference to benefits denial decisions—even if the party denying the benefits is a fiduciary.¹⁴⁶ The question then becomes, if the plan reserves discretion on behalf of the fiduciary or plan administrator, is it this mere reservation of discretion, or the plan’s actual exercise of discretion, that vests the party with the right to judicial deference? That is the root of confusion from *Firestone*. The plan conferred discretionary authority, and therefore, the Tenth Circuit chose to apply arbitrary and capricious standard of review.¹⁴⁷ Yet it was the fiduciary’s exercise of discretionary authority that was important in the court’s decision to grant a deferential standard.¹⁴⁸

III. ANALYSIS OF *GEDDES* UNDER *FIRESTONE*

This fine distinction caused the split between the Eleventh Circuit in *Baker* and the Tenth Circuit in *Geddes*. The Tenth Circuit’s interpretation and application of *Firestone* when a fiduciary reserves discretionary authority under the plan and then delegates authority under ERISA § 405 is reasonable. The question is whether *Firestone* and ERISA require that a fiduciary party actually exercise discretion.

To determine whether *Firestone* actually requires a fiduciary’s exercise of discretion, it is important to understand the complexities of the *Firestone* decision. First, the Supreme Court held that the default standard for an action under ERISA § 502(a)(1)(B) is de novo review.¹⁴⁹ However, there is a notable exception to this default standard of review when “the benefit

¹⁴³ 29 C.F.R. § 2509.75-8 (1975); see also ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (2000).

¹⁴⁴ 3 COMPENSATION & BENEFITS § 33:38 (HR Series, 2008).

¹⁴⁵ *Geddes*, 2005 WL 1414286, at *6.

¹⁴⁶ *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 926-27 (10th Cir. 2006).

¹⁴⁷ *Id.* at 927.

¹⁴⁸ *Id.*

¹⁴⁹ Langbein, *supra* note 11, at 1322.

plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”¹⁵⁰

In reaching this holding, the Supreme Court relied on trust law principles to conclude that a deferential, or arbitrary and capricious, standard of review is appropriate “when a trustee exercises discretionary powers.”¹⁵¹ This is an appropriate conclusion under ERISA, given that the exercise of discretion creates a fiduciary in an ERISA plan and fiduciary status comes with statutorily-defined duties of loyalty, care, and prudence as well as potential liability.

Firestone supports the proposition that the plan’s terms govern.¹⁵² Contract law analysis is relevant in ERISA.¹⁵³ As Judge Posner succinctly stated, “[a]n ERISA plan is a contract.”¹⁵⁴ Judge Posner went on to say that an ERISA plan is “a special kind of contract.”¹⁵⁵ This special contract is the result of the importation of trust law principles into ERISA and is created to “confer greater protection on one of the parties, namely the participant or beneficiary, than the other, the plan administrator.”¹⁵⁶ Because of the Supreme Court’s reliance on both contract law and trust law principles in *Firestone*, an analysis of the plain-language holding and reasoning of the *Firestone* decision does not necessarily resolve the split *Geddes* created.

The dissent in *Geddes*, as well as the courts in *Madden* and *Baker*, relied on the reasoning of *Firestone* that trust law principles dictate that it is the fiduciary’s exercise of discretion to which a court should defer.¹⁵⁷ However, the majority in *Geddes* read the grant of *Firestone* deference more broadly, as granting a de novo standard of review if the agreed upon terms of the plan reserve discretion.¹⁵⁸ Because the plan administrator reserved discretion under the terms of the United Staffing Plan and properly delegated its discretionary authority pursuant to ERISA § 405, the *Firestone* requirements for the arbitrary and capricious standard of judicial review were satisfied.

¹⁵⁰ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

¹⁵¹ *Id.* at 111.

¹⁵² James G. McMillan III, Comment, *Misclassification and Employer Discretion Under ERISA*, 2 U. PA. J. LAB. & EMP. L. 837, 849 (2000).

¹⁵³ *Id.*

¹⁵⁴ *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000) (Posner, J.).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 933 (10th Cir. 2006) (Holloway, J., dissenting) (citing *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1283-85 (9th Cir. 1990); *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 291 (11th Cir. 1990)).

¹⁵⁸ *Id.* at 925 (majority opinion) (“To qualify their decisions for deferential review, *Firestone* requires only that ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document.”).

This paradigmatic difference is also apparent in the differences between the majority's and the dissent's reliance on *Gilbertson*. The majority distinguished *Gilbertson* because the claim was "deemed denied" by operation of law, rather than by the fiduciary's failure to exercise discretion.¹⁵⁹ United Staffing also delegated its authority pursuant to ERISA § 405.¹⁶⁰ Thus, United Staffing's failure to review the denial of benefits, or to act in any manner, was not a failure to exercise discretion because United Staffing properly delegated its responsibilities.¹⁶¹ The Tenth Circuit read *Firestone* in conjunction with ERISA as stating that the ability to delegate discretionary authority pursuant to the plan's terms, and not the exercise of discretion, was the governing principle.¹⁶² In that sense, *Gilbertson* does not say that delegation is prohibited.¹⁶³

The dissent's reliance on *Gilbertson*, like the district court's opinion, supports the more limited reading of *Firestone* that a fiduciary's actual exercise of discretion is what is important in applying an arbitrary and capricious standard.¹⁶⁴ Indeed, courts have routinely required an exercise of discretion before granting deferential review because, absent a fiduciary's exercise of discretion, there is no decision to which the court can defer.¹⁶⁵ For example, the Second Circuit in *Nichols v. Prudential Insurance Company of America*¹⁶⁶ held that courts should apply a de novo standard of review when a plan administrator fails to comply with regulatory deadlines, resulting in a deemed denial.¹⁶⁷ The court reasoned that "inaction is not a valid exercise of discretion and leaves the court without any decision or application of expertise to which to defer."¹⁶⁸ Additionally, some courts grant deference only if the party vested with discretionary authority under the plan decided the claim.¹⁶⁹

IV. ANALYSIS OF *GEDDES* UNDER ERISA'S STATUTORY PROVISIONS

Because the *Firestone* opinion is ambiguous in that it supports both the *Geddes* majority's and dissent's interpretations, other sources must be eva-

¹⁵⁹ *Id.* at 926.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 927.

¹⁶² *Id.*

¹⁶³ *Geddes*, 469 F.3d at 926.

¹⁶⁴ *Id.* at 933 (Holloway, J., dissenting).

¹⁶⁵ JAYNE E. ZANGLEIN & SUSAN J. STABILE, *ERISA LITIGATION* 500 (2d ed. 2005).

¹⁶⁶ 406 F.3d 98 (2d Cir. 2005).

¹⁶⁷ *Id.* at 109.

¹⁶⁸ *Id.* (citing *Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1106-07 (9th Cir. 2003)).

¹⁶⁹ *EMPLOYEE BENEFITS LAW* 909 (Jane Kheel Stanley et al. eds., 2d ed. Supp. 2007) (citing *Sanford v. Harvard Indus., Inc.*, 262 F.3d 590, 597 (6th Cir. 2001)).

luated to determine whether deference should be granted to the nonfiduciary. The Tenth Circuit's interpretations of ERISA § 405 and *Firestone* in *Geddes*, although reasonable in light of *Firestone*'s reliance on both contract law and trust law principles, are inconsistent with other provisions of ERISA and with the public policy concerns surrounding ERISA.

First, the Tenth Circuit misinterpreted ERISA § 405 and failed to take into account § 405's relationship with other provisions of ERISA, namely § 3. ERISA § 405(c)(1) states "[t]he instrument under which a plan is maintained may expressly provide for procedures . . . (B) for named fiduciaries to designate persons other than named fiduciaries to carry out *fiduciary* responsibilities . . . under the plan."¹⁷⁰ Under ERISA § 3, one is a fiduciary to the extent that he exercises any discretionary authority or control.¹⁷¹ Conversely, if a party does not exercise discretionary authority or control, the party is not a fiduciary.¹⁷² In *Geddes*, the district court found, and the parties agreed, that Everest was not a fiduciary.¹⁷³ Therefore, because ERISA's definition of fiduciary is based on the party's exercise of discretionary authority, the duties that United Staffing delegated to Everest were not fiduciary responsibilities.¹⁷⁴ Everest was not carrying out fiduciary responsibilities under ERISA § 405 because Everest was not granted discretion.¹⁷⁵ Therefore, ERISA § 405 is inapplicable in the present case.

Because ERISA § 405 is inapplicable, the result is exactly as the *Geddes* dissent recognized: United Staffing simply failed to exercise its discretionary authority. The fact that an "agent" of United Staffing rendered the decision is a result of the contractual relationship between United Staffing and Everest and has no meaning to the ERISA plan participant. The *Geddes* court's reliance on ERISA § 405 and the United Staffing Plan's terms, without considering Everest's nonfiduciary status, is inconsistent with the substantive provisions of ERISA.

Additionally, the court determined that United Staffing's delegation to Everest was appropriate based on trust law principles, because United Staffing remained liable for Everest's decision and retained final authority over benefit determinations.¹⁷⁶ However, ERISA § 405 relieves a named fiduciary of liability for the acts and omissions of its delegate, so long as the named fiduciary properly delegates its responsibilities and monitors the

¹⁷⁰ ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (2000) (emphasis added).

¹⁷¹ *Id.* § 3(21)(A), 29 U.S.C. § 1002(21)(A); *see also* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

¹⁷² *See Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 291, 291 (11th Cir. 1989) ("[O]ne who is not a fiduciary is also not an administrator with discretionary control.").

¹⁷³ *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 2:03CV00440(PGC), 2005 WL 1414268, at *6 (D. Utah Mar. 23, 2005).

¹⁷⁴ *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

¹⁷⁵ *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 933 (10th Cir. 2006) (Holloway, J., dissenting).

¹⁷⁶ *Id.* at 926 (majority opinion).

performance of the delegate.¹⁷⁷ Thus, the court's provision for United Staffing's retention of liability signals that United Staffing's delegation was not a proper § 405 delegation.

The Tenth Circuit's misinterpretation of § 405 allowed United Staffing, through the plan documents and its contract with Everest, to create a system in which no party would exercise fiduciary discretion and the courts would then defer to a non-discretionary decision to the detriment of plan participants. This is contrary to the congressional intent of ERISA, which details fiduciary duties and obligations and requires the establishment of a named fiduciary for the benefit of plan participants.¹⁷⁸

Allowing delegation of the ability to review denial of benefits pursuant to ERISA § 405 is inconsistent with the express mandate of ERISA § 503. ERISA § 503 states that "every employee benefit plan shall . . . (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim."¹⁷⁹

Although it is unclear whether Andrew Geddes actually invoked the provisions of ERISA § 503, this section is relevant in the delegation analysis to the extent that the *Geddes* court interpreted ERISA § 405 to allow delegation of fiduciary duties to a nonfiduciary. If the ability to delegate responsibilities under ERISA § 405 and the plan terms override any fiduciary analysis, ERISA § 503 duties could be delegated based on ERISA § 405. However, ERISA § 405 should not be read so broadly. Granting deference to this decision effectively limits the participants' ability to obtain a full and fair review under ERISA § 503, in violation of ERISA's procedural requirements.

If, on the other hand, ERISA § 405 is read in light of ERISA § 503, the named fiduciary must review claims procedures, and thus, the courts should grant deference only if plans follow this ERISA procedural requirement. Under this reading, the fiduciary status of the reviewing party is important. Assuming that the reviewing party is a fiduciary, specifically, the appropriate named fiduciary of the plan, the split among *Geddes*, *Madden*, and *Grand Union* is resolved because a fiduciary actually exercises discretion when the named fiduciary reviews the benefits denial decision. Under *Firestone*, courts should then grant deference to this decision because the fiduciary properly exercised discretion in reviewing the claims.

Further, the practical implication of the *Geddes* decision is interesting. The decision uses contract law principles to grant judicial deference for a denial of benefits decision while allowing the fiduciary to escape exercising discretion and fiduciary liability by delegating nondiscretionary authority to

¹⁷⁷ ERISA § 405(c)(2), 29 U.S.C. § 1105(c)(2); ERISA FIDUCIARY LAW, *supra* note 4, at 212-13.

¹⁷⁸ ERISA § 2(b), 29 U.S.C. § 1001(b).

¹⁷⁹ ERISA § 503(2), 29 U.S.C. § 1133(2).

a nonfiduciary.¹⁸⁰ As the Supreme Court stated in *Firestone*, “ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits.”¹⁸¹ It is in this sense that an ERISA plan is more than simply a contract between the participant and the administrator. Specifically, when ERISA conflicts with a plan’s terms, “the provisions of the ERISA policies as set forth in the statute and regulations prevail” over those of the plan.¹⁸² The majority’s reasoning in *Geddes* essentially allows the contract terms to override the explicit provisions of ERISA, namely ERISA §§ 405 and 503, disregarding ERISA’s stated purpose. The Tenth Circuit’s decision fails to recognize the importance of fiduciary standards of conduct in ERISA’s regulatory scheme, which requires the fiduciary to act solely in the interest of plan participants for the benefit of plan participants. *Geddes* also undermines the importance of the named fiduciary in protecting the interests of plan participants.

Finally, *Geddes* is inconsistent with the language of ERISA because it allows for the plan administrator to delegate administrative duties that should be performed by a fiduciary to a nonfiduciary third party. If a court then defers to a nonfiduciary’s benefits denial decision, the plan participant loses the benefit of judicial review and the plan participants are not guaranteed to have their interests protected. Further, the nonfiduciary party is not subject to ERISA’s fiduciary duties and liabilities provisions. As Andrew Geddes recognized in his Petition for Certiorari, the Tenth Circuit’s deference to Everest’s decisions “has created a scheme under which a nonfiduciary, who cannot even be hailed into court to answer for its decisions, is nonetheless given deference in its decision making.”¹⁸³

CONCLUSION

Granting judicial deference for a nonfiduciary’s benefits denial determination violates the explicit language and procedural requirements of ERISA. Specifically, ERISA § 3 defines an ERISA fiduciary based on the exercise of discretionary authority. Furthermore, ERISA § 503 grants plan participants a full and fair review of a denial of benefits decision by the appropriate named fiduciary. The Tenth Circuit’s unprecedented decision in *Geddes* is potentially harmful to plan participants who lose the benefit of a fiduciary’s exercise of discretion and the court’s discretion when the court then applies the arbitrary and capricious standard of review. In order for

¹⁸⁰ See *Geddes*, 469 F.3d at 927.

¹⁸¹ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (internal quotations omitted).

¹⁸² *Laborers Nat’l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999).

¹⁸³ Petition for Writ of Certiorari, *supra* note 105, at 17.

plan administrators to benefit from judicial deference to their claims procedures and to comply with the explicit provisions of ERISA, the plan administrator should delegate claims administrator procedures only to other fiduciaries, or the courts should review denial of benefits de novo.