Abracadabra

Does Discretion Depend on "Magic Words"? Demystifying an ERISA Conundrum

By Rory Eric Jurman and Michael A. Monteverde

A common dispute in cases arising under ERISA, 29 U.S.C.S. §1001 *et seq.*, is what standard of review courts will employ when reviewing a determination made by an ERISA plan administrator to deny an insured/participant benefits under an ERISA plan.

Put another way, what kind of deference will be given by courts to the plan administrator's evaluation of the particular claim, and to the ultimate decision whether to pay benefits under the plan?

The most basic reason this issue comes in front of courts routinely is because ERISA itself does not provide guidance to plan administrators, courts, or legal practitioners as to what standard of review should be employed by courts. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). As a result, the issue has been molded and framed by the federal courts.

For that reason, the standard employed by courts is subject to change, more so than if it were statutorily declared by Congress. Recent decisions from a number of federal circuit courts of appeals demonstrate this ongoing change, and further demonstrate the uncertainty that the lack of a uniform standard of review can create for plan administrators, plan participants, and their respective attorneys.

In 1989, the Supreme Court set forth the general rule regarding the standard of review to be employed by federal courts when reviewing a challenge to a benefits determination made by a plan administrator. *Bruch*, 489 U.S. 101. The *Bruch* Court held that courts will conduct a *de novo* review of any such determination, *unless* the ERISA plan itself provides discretionary authority to the plan administrator. *Id.* It has been routinely held and reinforced that the language required in a plan to grant a plan administrator such authority must be clear and unambiguous. Simply put, the insured/participant must be put on adequate notice of the

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grant of discretion to the plan administrator. This ensures that the participant/insured is well aware of the rights and powers of the respective parties under the terms of the plan.

Many ERISA plans contemplate the grant of discretion to the plan administrator by way of the phrases and terms used in the plan. In many cases the phrase or term will indicate that proof that is "satisfactory" must be submitted to the plan administrator by the plan participant before the participant will be deemed eligible for plan benefits. Depending on the semantics of the phrase used, the use of "satisfactory" may or may not be deemed to grant discretionary review to the plan administrator.

For instance, language that reads "the participant is required to submit satisfactory proof to the plan administrator" can reasonably be said to have a much different meaning than "the participant is require to submit proof that is satisfactory to the plan administrator." The former connotes an objective standard of what is satisfactory (*e.g.*, the form of the proof), while the latter connotes a subjective standard of what is satisfactory (*e.g.*, does the plan administrator believe that the substance of the proof submitted is satisfactory?).

While there have always been differences of opinion amongst the United States courts of appeals as to what type of language will grant discretionary authority to a plan administrator, those differences seem to be diminishing. In fact, it appears that we may be moving slowly toward uniformity in the standard. That potential march toward uniformity appears likely to result in just what courts have indicated is not required: that so-called "magic words" will be required in an ERISA plan should the plan wish to reserve discretionary authority for the plan administrator. *See, e.g., Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999); *Viera v. Life Ins. Co. of N.A.*, 642 F.3d 407 (3d Cir. 2011); *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998). That is because the federal courts have taken language that appears clear and unambiguous on its face, and deemed it ambiguous so that no discretion is given to the plan administrator's benefit determinations by reviewing courts, which then apply a *de novo* review of the administrator's determinations.

The foregoing development appears to have started in the Second Circuit in *Kinstler*, 181 F.3d 243. In *Kinstler*, the Second Circuit was faced with language in an ERISA plan providing that in order for an insured to recover benefits the insured would have to "*submit[s] satisfactory proof* of Total Disability to [the plan administrator]." *Id.* at 250. (Italics supplied.) In its analysis, the Second Circuit acknowledged that the language at issue was different than language in other plans that provided that an insured must submit "*proof that is satisfactory* to the plan administrator."

Notwithstanding its recognition of the semantic difference between the two phrases, the Second Circuit ruled that neither phrase conveyed a clear and unambiguous intention to grant the plan administrator discretionary authority with regard to its benefit eligibility determinations. Accordingly, pursuant to the Second Circuit's reasoning, neither phrase would result in a heightened abuse of discretion standard of judicial review for a plan administrator's benefit eligibility determination. Rather, such language would result in the default *de novo* review under the rule of *Firestone v. Bruch, supra*. This decision in *Kinstler* started what appears to be a slow movement by the circuit courts away from "proof satisfactory to the plan administrator" language being sufficient to confer discretionary authority upon the plan administrator.

In 2005, the Seventh Circuit was presented with the opportunity to address the same issue addressed by the Second Circuit in *Kinstler*. In doing so, the Seventh Circuit reversed course from its prior precedent and issued a holding similar to that in *Kinstler*. *Diaz v. Prudential Ins. Co. of Am.*, 424 F.3d 635 (7th Cir. 2005). *Diaz* dealt with language in an ERISA long-term disability benefits plan providing that an insured, in order to recover benefits, would need to submit "proof of continuing disability, *satisfactory to Prudential*." *Id.* at 638. (Italics supplied.)

Interestingly, prior to *Diaz* the Seventh Circuit had already addressed substantially similar language on two occasions, and in both instances found that *it did* confer discretion on the plan administrator. *See Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375 (7th Cir. 1994); *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043 (7th Cir. 1998). Accordingly, in those cases the Seventh Circuit determined that the "arbitrary and capricious" standard of discretionary review should be employed by the reviewing courts, not a *de novo* standard as found by the Second Circuit in *Kinstler*.

Notwithstanding the *Donato* and *Bali* decisions, the Seventh Circuit in *Diaz* changed course and found that the language at issue *was not* sufficient to confer discretion on the plan administrator. The court justified receding from *Donato* and *Bali* by stating that they were not the most recent Seventh Circuit opinions on the issue. The *Diaz* court instead relied upon *Herzberger v. Standard Ins. Co.*, 205 F.3d 327 (7th Cir. 2000), reasoning that the *Herzberger* court determined that the language at issue was not sufficient to confer discretion on the plan administrator.

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The problem with the reasoning employed by the *Diaz* court was that when it decided *Herzberger* it was not analyzing the more subjective language that was before the court in *Diaz* (unlike *Bali* and *Donato*), *i.e.*, "submit proof that is satisfactory to the plan administrator"; rather, it was analyzing the similar but more objective language "satisfactory proof submitted to the plan administrator." In fact, the *Herzberger* court actually discussed its prior holding in *Donato*—which, again, dealt with language more similar to the language

at issue in *Diaz*—and did not suggest that there was anything wrong with the decision reached in *Donato, i.e.*, that "satisfactory to the plan administrator language" is sufficient to confer discretionary authority on the plan administrator. *See Herzberger*, 205 F.3d 327, 331.

Therefore, the Seventh Circuit's reliance on *Herzberger* seems misplaced. The precedent from that circuit interpreting plan language more similar to that at issue in *Diaz*, *i.e.*, *Bali* and *Donato*, actually found that such language *did confer* discretion upon the plan administrator. Consequently, it appears that the controlling precedent at the time *did not* support the Seventh Circuit's decision in *Diaz*. Notwithstanding that fact, the Seventh Circuit aligned itself with the Second Circuit and held that the "satisfactory to the plan administrator" language *is not* sufficient to avoid a *de novo* review of a ERISA benefit determination.

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As of early 2013, the circuits were split regarding what standard of review should be applied in ERISA benefit determination dispute cases, where the plan stated that the insured must submit evidence or proof that is "satisfactory to us" or "satisfactory to the plan administrator." At that time, the standard in the First, Fourth, Sixth, Eighth, and Tenth Circuits was that "proof satisfactory to the plan administrator" was sufficient to confer discretionary authority on a plan administrator. Conversely, the standard of review in the Second, Third, Seventh, and Ninth Circuits was that such language was not sufficient, and would result in a *de novo* judicial review of an ERISA benefits determination.

In August 2013, the First Circuit receded from its prior precedent on the issue. and joined the Second, Third, Seventh, and Ninth Circuits. *See Gross v. Sun Life Assurance Co. of Canada*, 734 F.3d 1 (1st Cir. 2013). In discussing the change, the *Gross* court cited a perceived change in the precedential landscape amongst the circuits. *Id.* at 12. It therefore determined that it did not need to follow its prior precedent established in *Brigham v. Sun Life of Canada*, 317 F.3d 72 (1st Cir. 2003), because, it reasoned, the *Brigham* decision was reached, in part, *because* there was a lack of authority from other circuits finding the "satisfactory to plan administrator" language insufficient to confer discretionary authority. Because at the time of the *Gross* decision *there was now* such authority from other circuits, the First Circuit determined that it could abandon its prior precedent on the issue.

Like the Second Circuit in *Kinstler*, the First Circuit in *Gross* determined that the phrase "proof satisfactory to us" could mean that the actual *substance* of the proof needs to be satisfactory to the administrator, or it could simply mean that the *form* of proof (*i.e*, how the proof is presented) needs to be satisfactory to the plan administrator. In so reasoning, the First Circuit determined that such language is ambiguous and should therefore be construed against the plan administrator. As a result, the First Circuit held that such language *did not* confer discretionary authority on the plan administrator, and supports *de novo* judicial review of benefit eligibility determinations.

Shortly after the *Gross* decision, the Fourth Circuit in *Cosey v. Prudential Ins. Co. of Am.*, 735 F.3d 161 (4th Cir. 2013), also receded from its prior precedent and joined the First, Second, Third, Fourth, and Ninth Circuits. In *Cosey*, the Fourth Circuit was faced with its own statement made in a prior case, *see Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264 (4th Cir. 2002), in which the court hypothetically noted that the phrase "proof... that is satisfactory to the plan administrator" required the application of an abuse of discretion standard of judicial review for a plan administrator's benefits determination.

The Fourth Circuit reasoned in *Cosey* that the language from *Gallagher* was mere dicta and therefore was not binding on the court. Just like the First Circuit in *Gross*, the Fourth Circuit in *Cosey* cited the changing precedential landscape on this issue, and held that "satisfactory to us" language *does not* confer discretionary authority on a plan administrator. *Cosey* also relied upon the *Gross* court's willingness to abandon its own prior precedent on the issue. Thus, the Fourth Circuit—like the First, Second, and Seventh—held that the language was ambiguous and therefore did not confer discretionary authority on the plan administrator. For that reason, the court held that a *de novo* standard of review was appropriate under the circumstances.

Two observations are particularly evident from a review of the foregoing decisional authorities and the change they have effected. First, in *Viera*, *Gross*, and *Cosey*, the respective circuit courts of appeal all tried to minimize their own recession from their prior precedent on this issue. In *Viera*, the Seventh Circuit ignored its own prior decisions, and instead followed a prior, easily distinguishable decision, *i.e.*, *Hertzberger, supra*. In doing so, it explained away its apparent willingness to ignore its prior holdings by claiming that it was, in fact, relying on the *controlling* Seventh Circuit precedent. This is despite the fact that the case relied upon by the Seventh Circuit, *Herzberger*, was less analogous to the issue before the court than were the cases that were ignored by the court, *i.e.*, *Donato* and *Bali*.

In *Gross*, the First Circuit essentially held that it did not need to follow its own prior decision in *Brigham v. Sun Life of Canada*, 317 F.3d 72 (1st Cir. 2003), because that decision was only issued because of a lack of decisional authority available at the time. Thus, the First Circuit implied in *Gross* that it was not really receding from *Brigham*, but rather was now in a better position to address the issue because of

the subsequent decisional authority that had come out after the *Brigham* decision. Finally, in *Cosey*, the Fourth Circuit held that it did not need to follow its own prior statement set forth in *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.2d 264, 268 (4th Cir. 2002), because that statement was mere "dicta".

Notwithstanding the foregoing positions taken by the Seventh, First, and Fourth Circuits regarding their own respective precedents, when referring to each other they acknowledged that each ignored and receded from its own precedential authority. Hence, while the Seventh Circuit in *Viera* stated that *it was* following its own precedent in reaching its decision, *i.e., Herzberger*, the First Circuit in *Gross* pointed out that it was partially relying on *Viera's willingness to recede from its prior precedent.* The same reasoning was employed in *Gross*, as the First Circuit reasoned that it was not really receding from its prior precedent set forth in *Brigham*, while the Fourth Circuit in *Cosey* relied, in part, on the First Circuit's willingness in *Gross* to *abandon* its own prior precedent.

While each of the foregoing courts appeared to try to avoid fully admitting that it was simply abandoning its own prior precedent on the issue to follow the changing "landscape," it appears clear to these authors, and apparently to the subsequent citing courts too, that this was exactly what the Seventh, First, and Fourth Circuits were doing. They were simply following the trend of change on this issue related to grants of discretionary authority to plan administrators in ERISA plans.

As a result of the foregoing, the circuit split on the issue of whether the phrase "satisfactory to the plan administrator" or "satisfactory to us" confers discretionary authority on a plan administrator now seems to weigh heavily against the grant of such authority. The First, Second, Third, Fourth, Seventh, and Ninth Circuits now all appear to hold that such language will result in a *de novo* standard of review of a plan administrator's benefit determinations under ERISA plans. The Sixth, Eighth, Tenth, and Eleventh Circuits all appear to fall on the other side of the issue, with the Fifth Circuit not clearly articulating a stance on the issue. However, with the way the Seventh, First, and Fourth Circuits simply changed their own standard, these authors are not confident that other circuits will not follow suit. This is especially true in light of the fact that each successive circuit court that has "changed sides" seems to find support and solace in the fact that other circuit courts before them have also abandoned their own prior precedent on the issue.

The second impact that has arisen from the recent trend towards *de novo* review is that the proverbial "magic words" mentioned at the beginning of this article might, in fact, need to be included in ERISA plans in order to effectuate an intended grant of discretionary authority to an ERISA plan administrator. While virtually all of the courts that have addressed the "satisfactory to us" issue have expressly held that particular words or specific phrases do not need to be included in an ERISA plan in order to grant discretionary authority to a plan administrator, such "magic words" may be the only way at this point that a drafter of an ERISA plan can be sure that such discretionary authority is upheld by federal courts. *See, e.g., Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243 (2nd Cir. 1999) (no particular or "magic words" are required in a plan in order to confer discretion to plan administrator); *Viera v. Life Ins. Co. of N.A.*, 642 F.3d 407 (3rd Cir. 2011) (same); *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (same). Without such "*magic words*"—*e.g.*, "discretion is reserved solely to the plan administrator" or "as determined solely by the plan administrator"—an ERISA plan administrator will never know if its benefit determinations will be reviewed under an abuse of discretion (*i.e.*, arbitrary and capricious) standard of judicial review, or whether they will be reviewed *de novo.*

The practical effect of this trend towards finding language such as "proof submitted that is satisfactory to the plan administrator" to be ambiguous, is that it will be difficult moving forward to determine what other types of language courts may find ambiguous. Henceforth, legal practitioners have to be cognizant from the beginning of any ERISA case involving such issues as to whether or not they can make a strong argument in favor of an abuse of discretion standard of review for challenges of ERISA benefit determinations. This will involve looking particularly closely at the language of the plan at issue in order to determine whether a strong argument can be made that the language of the plan is a "clear and unambiguous" grant of discretionary authority to the plan administrator. Most importantly, the authors of such ERISA plans need to make sure that they are crystal clear in the language used in their policies if they wish to grant such authority to the plan administrators. Otherwise, they risk a long, costly, and protracted battle in court, and also risk having courts determining that the language used, even if unambiguous on its face, is ambiguous and thus will result in the default *de novo* standard of review being applied.

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The practice point for plan administrators and legal practitioners is that while a plan's language granting discretionary authority to the plan administrator might seem acceptable now, after reviewing the foregoing decisions and looking forward, you may ultimately find yourself saying that such language is no longer "satisfactory to us." With the potential need for so-called "magic words" to confer the discretion discussed above, plan administrators may find themselves, like the Steve Miller Band in 1982, having to sing "abracadabra" over their plans. FD