*Editors note: This issue of The Self-Insurer contains three articles on this important subject. We felt that our readers would be interested in the views, not only from the legal profession but from other persons long involved in our business community. Therefore we offer the article below from Carlton Harker, well known and respected in our industry in the actuarial field.*

By Carton Harker

## In Summary

Wanda Glenn contested the denial of her health care claim arising from an ERISA governed welfare plan. The District Court held in her favor; the Federal Appeals Court reversed. In Mid-June 2008, the Supreme Court ruled in her favor in what will prove to be a momentous design.

In brief, the court held in a 6-3 decision that the conflicted interest that exists whenever the claims adjudicator and the claims financier are the same must be used as a factor requiring the higher standard of review rule and denying the application of the more lenient abuse of discretion rule. This principle was enunciated in the Supreme Court decision *Firestone v. Bruch.*

This means that any claim contested in court, upon review will confer a significant advantage to the arrangement where the claims are adjudicated by an independent third party and paid by an independent payer (insurer, employer e.g.). Also, this means that a significant disadvantage will be conferred where the claims are both adjudicated and paid by the same two parties (employer's self-administered and self-funded, fully insured or ASO arrangement).

It is the opinion of this writer that the added legal burden on the payer of having to go to court with *one hand tied behind its back* whenever there is a claim in contest will be too great for most plan sponsors to be willing to bear. Presuming my opinion is correct, we can expect an immediate and significant shift from fully insured or ASO arrangement to TPA-administered self-funded health care plans where conflicted interest does not exist.

Dissenting justices to the majority opinion argued, that the specter of conflicted interest was real and significant further, the majority argued that the mere present thereof, whether or not significant, germane or provable, was a sufficient violation of the high fiduciary standards of ERISA.

## Implications

All health care plan sponsors and practitioners should at once accept the reality that it is now the *law of the land* that any conflicted interest in an ERISA governed welfare plan carries with it a significant financial and legal disadvantage because such conflicted interest violates the high fiduciary standards that congress embedded in ERISA.

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## Challeng ith Administered ns

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self-funded, TPA-administered heal
care plan one additional claims challenge should be discussed. What should the TPA do when a claim is questionable but needs to be expeditiously processed (year-end aggregate claim, e.g.) and the stop-loss carrier declines to commit that such claim is payable or not payable?

The steps believed by this writer to be most consistent with the *MetLife v. Wanda Glenn* decision are these:

| Step | Actions |
|---|---|
| 1 | The employer, with help and counsel from the TPA should affect an ad hoc plan amendment declaring that such claim is, or is not, payable. |
| 2 | Such amendment should be sent to the stop-loss carrier for approval or disapproval with sufficient data and documentation to support such amendment. |

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vides or beneficiaries and (c) claims timing problems with stop-loss reimbursements. As an alternative to these problems, the plan sponsor, by following any other
actions, will risk a lo

at best or bankrupting at worst. It is the opinion of the writer that clarifying court decisions removing the plan sponsor from the *rock and hard place* dilemma will eventually be needed.

## Enhanced Role of the TPA

The role of the TPA in the normal administration of a self-funded plan will be enhanced because such arrangement is almost always free of conflicted interest. That is, such TPA (a) I independent as respects recordkeeping and claims adjudication, (b) has no undisclosed plan-related sources of compensation and (c) does not use a proprietary network. Conflicted interest would come forth where the TPAs adjudication was supplanted or overridden by the Plan Sponsor. In this event such decision, if litigated and then reviewed, would be reviewed with a lower level of deference because of the presence of conflicted interest.

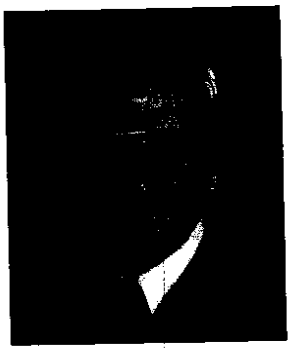
## Discussion of the Decision[1]

The majority opinion relied in large part on *Firestone v. Bruch*[2] which enunciated the four principles that were to be followed when reviewing the acts of an ERISA welfare plan:

1. The plan administration shall be deemed a trustee and the benefit determination a fiduciary act.
2. Trust principles require a *de novo*[3] review unless such benefit plan provides otherwise.
3. When the plan confers fiduciary discretionary authority upon the administrator, or fiduciary, a deferential standard[4] of review is appropriate. Such deferential review seeks to discern if there has been any abuse of discretion.
4. The *mere presence* of a conflict of interest is a factor that the reviewing court must consider in detecting abuse of discretion.[5]

The high fiduciary standards imposed by ERISA was a factor prominent in the majority opinion.

1 *594 U.S. (2008).*
2 *489 U.S. 101 (1989).*
3 *De Novo means that the entire review process begins without regard to the findings of the previous courts.*
4 *Deferential standard means that the reviewer may rely on the wisdom/judgment/fairness of the lower court with such reliance being on a sliding scale or continuum depending on facts/circumstances.*
5 *Abuse of discretion is where the appeals court finds that the fiduciary had for any reason advised its duties and obligations. The mere presence of potential conflicted interest creates the suspicion of abuse of discretion.*



*Carlton Harker, FSA, MAAA is a well known and respected member of the self-funding community and has been an active participant in the Self-Insurance Institute of America's educational programs for many years. He can be reached via e-mail at harker2@earthlink.net He maintains a web site at www.self-fundhealth.com*