

Standards of Review

INTRODUCTION

It is important for the student of self-funded plans to know how litigation is crafted so that, if an appeal is required, the litigant will have the greatest chance of winning. For this reason, the logic that will be followed by the appeals court should be examined. This logic is the *standard of review*.

There are three common standards of review in use:

- Substantial Evidence Test
- De Novo Review
- Abuse of Discretion Test.

It is important that each of these standards be understood.

Substantial Evidence Test

Without witnesses, new evidence, new arguments, etc., the appeals court reviews the records to see if any *legal* or *procedural* errors were made and, absent such errors, would a different result have occurred.

De Novo Review

De novo means to *take a new look* at the decision being reviewed. There is no presumption of correctness. The case is essentially retried from the beginning. The appeals court will, in effect, substitute its judgment for that of the lower court.

Instances where the *de novo* review will be made:

- Case involves only written materials.
- Litigation involves only the application of law to undisputed facts.
- Motions for summary judgment are involved.

Typically, one party will strongly favor the *de novo* review and the other party will be equally opposed.

Abuse of Discretion Standard

This standard of review in effect says this appeals court will let the decision stand unless the court sees that something is so egregious, arbitrary, capricious, etc. that the court must step in. Unless the decision is outside the bonds of reason, the court will permit it to stand. Great deference is given to the original decision.

This standard is applied to appeals of the following types:

- Granting relief from default

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- Permitting the court pleadings to be amended
- Involving actions of fiduciaries.

The abuse of discretion is between the limits of the *de novo* and the substantial evidence test. The appeals court may not agree with the lower court's holding but unless such holding was *off the chart* it must stand unless other mitigating factors are present.

The abuse of discretion standard has gradations, however:

- **Highest level of discretion**
The appeals court will give the highest level of discretion where the litigant seeking the appeal has no conflicted interests and is, in other ways, faultless.
- **Lowest level of discretion**
The one seeking the appeal has a conflicted interest and is, in other ways, at fault.

***Firestone v Bruch* Decision**

The Supreme Court held in this decision that with a self-funded plan, the courts are to review using the abuse of discretion where the plan document *explicitly* puts the decision to interpret and adjudicate on the hands of a fiduciary.

Participants want the *de novo* review; employers want the abuse of discretion review. An appeals court can apply the *de novo* standard to the lower courts finding of law and the abuse of discretion standard to findings of fact.

FACTORS DETERMINING STANDARDS OF REVIEW

The following is a list of factors that the appeals court might use in deciding that the review should be (a) *de novo* or abuse of discretion and (b) if abuse of discretion, where on the preference continuum it should be (as regards a self-funded plan):

1. Was the *Firestone v. Bruch* rule followed?
2. Was a plan fiduciary guilty of any of the following error?
 - Ignoring claims-related evidence
 - Ignoring the opinions of participants, physician(s), etc.
 - Denial with inadequate explanation
 - Inconsistent actions
 - Failure to obtain needed information
 - Violation of a law (labor law, e.g.)
 - Stubbornly ignoring the facts
 - Failure to timely and properly communicate
 - Being imprudent (does not connote that prudence and perfection are the same)
 - Manipulative plan language
 - Failure to substantiate evidence
 - ERISA procedural violations
 - Benefit reduction without financial urgency
 - Poorly-reasoned benefit denial

- Inconsistent with plan purposes
 - Favoritism among participants
 - Actions resulting in a *windfall* profit
 - Failure to inform participants of plan's *shaky* condition
 - Not perfecting the claim
 - Not following clear plan language
 - Ignoring the opinion of participant's physician
 - Reliance on *hired-gun* type of consulting firms
 - Coercion on participant to make a decision
 - Using ambiguous plan/SPD wording without clarification
 - *Textbook* and not *hands-on* type of decisions
 - Making the facts so complicated that only the court can understand them
 - Implausible actions
 - Clear misconstruction of plan terms
 - Decision is harmful to a group of participants
 - Overall purpose of ERISA is thwarted
 - Decision was made by an unauthorized person
 - Facts are outside of the plan's confines
 - Not performing a reasonable investigation
 - Refusal to supply requested and/or needed items.
3. Most importantly are these four considerations:
- A conflicted interest may result in either a *de novo* review or the lowest level of deference of the abuse of discretion standard.
 - A conflicted interest will usually be deemed a possibility where the insurer and claims adjudicator are the same; it will sometimes be deemed a possibility when the employer uses a plan supervisor (TPA, ASO, e.g.) and the employer is the arbiter of last resort.
 - Plans governed by a VEBA or a MEWA will nearly always be given the highest level of deference.
 - Employer-dominated trust, even if qualified, may or may not be deemed by the court to create a conflicted interest.