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Attorneys' Alert
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What did Chief Justice Sir Edward Coke declare in 1610? (And who should care anyway?)

The answer to the first question is not to be found in Justice Scalia's foray into the annals of equity to define the term "equitable relief" in *Great-West v. Knudson*. Nor does it appear in Chief Justice Roberts' book-end reply relying on a late 19th century case describing an equitable lien by agreement in *Sereboff*.

In fact, it is more fundamental than the two cases above, which dealt with reimbursement claims against personal injury plaintiffs' tort recoveries by health plans – as important as that issue may be in its own right.

The answer is to be found in U.S. District Judge Acker's outspoken attack on the self-granted benefit-of-the-doubt behind which insurance companies cloak their payment decisions. (In deciding to deny or to pay money to beneficiaries in ERISA employee benefit plans, the insurance companies judge the correctness or not of their own benefit claim decisions.)

The case is *Criss v. Union Security Ins. Co.*, 2014 WL 2707774 (N.D. Ala., June 11, 2004). It is also available on FastCase and Google. And here is the answer:

> "If Congress itself had enacted the weird scheme created by the *Bruch* court out of whole cloth, ERISA would have been promptly and successfully attacked for its patent unconstitutionality as a violation of 'due process'. A quick application of the universally recognized legal maxim, *nemo judex in causa sua*, would have kept any such statute off the statute books. Chief Justice Sir Edward Coke in *Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610), carved in granite for all time this fundamental jurisprudential principle when he said, using the vernacular: 'No man should be a judge in his own case.'"

Dale Carnegie obviously this is not. So, why did Judge Acker cite a pronouncement itself over five hundred years old? This maxim is presumably at the root of our common law here in the United States of America. Judge Acker questions how a federal district court in the Northern District of Alabama can dispense justice in the 21st century while facing the dictates of Congress

on the one hand and the case law construing ERISA as handed down by the Supreme Court (and the Eleventh Circuit) on the other hand.

Judge Acker's memorandum and opinion begins:

> "This court devoutly wishes that the Supreme Court of the United States had not blindly stumbled off on the wrong foot and in the wrong direction when . . . it invented a strange quasi-administrative regime for court review of denials of ERISA benefit claims."

Judge Acker decries the Supreme Court's "misguided step, a misstep that has led to a series of further judicial glosses, distillations, penumbras and emanations, eventuating in the sad state of affairs now faced by ERISA claimants and by the courts who have to deal with ERISA benefits claims."

Judge Acker contrasts Chief Justice Coke's 1610 maxim with the present day state of affairs:

> "[t]oday, clearly conflicted ERISA plan administrators and insurers . . . are routinely allowed, even required, to rule on their own cases. . . . There is no scheme remotely like the one created by *Bruch* in the annals of Anglo-American jurisprudence. Chief Justice Coke is uncomfortable in his crypt."

Judge Acker then turns to the "actual state of ERISA jurisprudence, as it has evolved from *Bruch*." Judge Acker continues: "Especially, this court cannot alter or ignore what the Eleventh Circuit has done to produce its own *sui generis* brand of fruit from the poisonous tree."

He notes that the Eleventh Circuit in 1990 in *Brown v. Blue Cross*, etc. "recognized that the *Bruch* regime could lead to the Frankenstein that it has come to be." After quoting *Brown's* warning, he continues: "This ominous footnote did not slow down the Eleventh Circuit in its march toward achieving the reputation as the circuit court of appeals least likely to rule against a plan administrator or insurer." Judge Acker explains:

> "[t]he Eleventh Circuit has created its 'six-step' analysis which puts plan administrators and insurers firmly in the driver's seat, and invites them to sit in judgment on their own denial decisions, and to ignore, as if meaningless, their fiduciary obligations of strict loyalty to their plan beneficiaries."

Judge Acker remanded the denial to the insurer for review. The case then reportedly settled. Alas, therefore, there will be no rebuttal by the Eleventh Circuit to *Criss*.