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Fifteen Years Later - Did the Unum Group Improve Its ERISA Claims Handling Practices?

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FIFTEEN YEARS LATER – DID THE UNUM GROUP IMPROVE ITS ERISA CLAIMS HANDLING PRACTICES?

Philip W. Thomas[*]

I. INTRODUCTION

In November 2004, Unum Life Insurance Company of America and related entities ("Unum") agreed to a Regulatory Settlement Agreement ("RSA") with state insurance regulators and the U.S. Department of Labor.[1] The RSA addressed "the Unum/Provident scandal."[2] The scandal resulted from Unum engaging "in a deliberate program of bad faith denial of meritorious benefit claims."[3] It has been over sixteen years since the RSA. This article evaluates Unum's post-RSA conduct.

Unum has argued, and some courts agreed, the practices the RSA addressed ended in 2004.[4] Did they? Or did Unum's biased practices continue? Spoiler alert: it is the latter.

Section I discusses fiduciary obligations ERISA imposes on plan administrators like Unum, then discusses pre-RSA court decisions criticizing Unum's claims administration practices, and ends with an examination of the RSA and 2005 RSA Amendment.

Section II discusses decisions criticizing Unum's claims administration practices after the RSA. It identifies Unum practices federal

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1. The RSA is discussed below. A significant amendment was added in 2005. *Regulatory Settlement Agreement*, https://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_regulatory_settlement_agreement.pdf [hereinafter *RSA*]. *Amendment to Regulatory Settlement Agreement*, https://www.sec.gov/Archives/edgar/data/5513/000119312505195355/dex102.htm.

2. 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).

3. *Id.* at 1315. Describing Unum's conduct as 'bad faith' is a misnomer, since ERISA bars extracontractual damages available in insurance bad faith cases.

4. *See, e.g.*, Meyer v. Unum Life Ins. Co. of Am., 96 F. Supp. 3d 1234, 1246 (D. Kan. 2015). (citing Swanson v. Unum Life Ins. Co., No. 13-CV-4107-JAR, 2015 WL 339313, at *8 (D. Kan. Jan. 26, 2015)). In *Swanson*, the court stated: "Unum's previous pattern of misconduct is 'no longer present.'" *Meyer*, 96 F. Supp. 3d at 1246, n.15 (citing *Swanson*, 2015 WL 339313, at *8 and n. 41).

courts repeatedly criticize when called to their attention. Many of the criticized practices were the same ones the RSA addressed.

Section III discusses decisions finding Unum's history of biased claims administration ended by 2004. It concludes these decisions resulted from thinly cited claimant/plaintiff briefs leading to courts accepting Unum's inaccurate summaries of recent decisions.

Section IV evaluates Unum's post-RSA conduct. It concludes that, if anything, Unum's systemic pattern of biased claims administration accelerated after 2004. The article concludes Unum is unlikely to change its practices without legislative intervention on ERISA laws.

II. BACKGROUND

A. Fiduciary obligations of ERISA plan administrators[5]

Effective January 1, 1975,[6] The Employee Retirement Income Security Act (ERISA) is codified at 29 U.S.C. §§ 1001 et seq. ERISA covers employee benefit plans, including medical, disability, and death.[7] 29 U.S.C. §§ 1101 et seq. sets ERISA's fiduciary responsibility. 29 U.S.C. § 1104 states an ERISA fiduciary shall discharge its duties solely in the interest of the participants and beneficiaries for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administration.[8]

B. Standard of review for ERISA administrators' disability decisions

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court imposed a de novo standard of review on ERISA administrators' benefits decisions *unless* the plan gives the administrator discretionary authority to determine eligibility for benefits or construe plan terms.[9] In that case, a "deferential standard of review" applies.[10] This translates to an 'abuse of discretion' standard.[11] Most plans impose the lower abuse of discretion standard because of Firestone, and courts decide most cases under this deferential standard. Courts sometimes refer to the

5. This is a brief overview of ERISA provisions pertinent to this article. It is not a comprehensive summary or analysis of ERISA.

6. 29 U.S.C. § 1114(a) (1989).

7. *See* 29 U.S.C. § 1002(1) (2019). This article focuses on disability plans.

8. 29 U.S.C. § 1104(a)(1) (2019).

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

10. *Id.* at 111.

11. *Id.* at 115.

standard as the 'arbitrary and capricious' standard, but they are essentially identical.[12]

An ERISA administrator has a conflict of interest when it determines benefits eligibility as administrator and pays benefits as the insurer.[13] Therefore, insurers wanting to make coverage decisions as plan administrators have a conflict of interest. Unlike attorneys, however, the conflict is not disqualifying for ERISA insurers. Despite a purported fiduciary duty to beneficiaries, insurer-administrators can enrich themselves by denying and terminating legitimate claims.

Under *Glenn*, the administrator's conflict of interest is only one factor courts must consider.[14] But in a direct reference to Unum, the Court stated: "[t]he conflict of interest… should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration."[15] Unum operates under this conflict of interest because it serves in the dual role as plan administrator and insurer.

C. Liability shields for ERISA administrators

ERISA remedies are defined in 29 U.S.C. § 1109. The statute permits beneficiaries to sue administrators who violate ERISA.[16] In 1985, the Supreme Court held ERISA does not permit recovery of extracontractual (punitive) damages.[17] 29 U.S.C. § 1132(g)(1) grants courts discretionary authority to award reasonable attorney fees and costs in ERISA actions filed by a participant, beneficiary, or fiduciary.

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12. James Goodley, The Effect of Metropolitan life v. Glenn on ERISA Benefit Denials: Time for the "Treating Physician Rule", 26 J. Contemp. Health L. & Pol'y 403, 407 (2010) (citing Ladd v. ITT Corp., 148 F.3d 753, 754 (7th Cir. 1998)). *See also* Meditrust Fin. Serv. Corp. v. Sterling Chem., Inc., 168 F.3d 211, 214 (5th Cir. 1999) (agreeing the difference between abuse of discretion standard and arbitrary and capricious standard is not substantive in ERISA benefits review context) (citing Wildbur v. ARCO Chem. Co., 974 F.2d 631, 635 (5th Cir. 1992)).

13. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008).

14. *Id.* at 108 (citing *Firestone*, 489 U.S. at 115).

15. *Id.* at 117 (citing *Langbein*, *supra* note 3, at 1317-21).

16. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985).

17. *Id.* at 137.

D. History of Unum Life Insurance Company

Unum originated in 1848 as Union Mutual, a Boston based life insurance company.[18] In 1986 Union Mutual changed its name to Unum.[19] In 1999 Unum merged with Provident Life and Accident Insurance Company to form UnumProvident Corporation.[20] In 2007 Unum Provident changed its name to Unum Group.[21] At various times, Unum operated through various subsidiaries, including: Unum Life Insurance Company of America, First Unum Life Insurance Company of America, The Paul Revere Life Insurance Company, Provident Life and Accident Insurance Company, Provident Life and Casualty Insurance Company.[22] Unum's principal place of business is in Chattanooga, Tennessee.[23]

E. Court decisions in Unum cases before the RSA

In 2004 a Massachusetts District Court examined Unum's history in *Radford Trust v. First Unum Life Ins. Co. of Am*.[24] The court uncovered "a disturbing pattern of erroneous and arbitrary benefits denials, bad faith contract misinterpretations, and other unscrupulous tactics."[25] *Radford Trust* listed many decisions criticizing Unum.[26] The court recognized some

18. *History*, UNUM.com, https://www.unum.com/about/corporate/history.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id. See also* RSA, *supra* note 2, at 1 (listing Unum subsidiaries bound by RSA).

23. RSA, *supra* note 2, at 1.

24. 321 F. Supp. 2d 226 (D. Mass. 2004).

25. *Id.* at 247 (citing Hedley-Whyte v. Unum Life Ins. Co. of Am., No. Civ. A. 94-11731-GAO, 1996 WL 208492, at *3 (D. Mass. Mar. 6, 1996); Keller v. Unum Life Ins. Co. of Am., No. 90 Civ. 5718(VLB), 1992 WL 346343, at *2 (S.D.N.Y. Sept. 30, 1992) (describing Unum's behavior as "culpably abusive")).

26 *See* Radley Radford Trust v. First Unum Life Ins. Co. of Am., 321 F. Supp. 2d, 226, 247 n.20 (D. Mass. 2004).

decisions were decided under de novo review.[27] Other decisions were decided under the arbitrary and capricious or abuse of discretion standard.[28]

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27. *Id.* (citing Lauder v. First Unum Life Ins. Co., Nos. 02-9152, 02-9232, 76 Fed. Appx. 348, 350, 2003 WL 21910757, at *2 (2d Cir. Aug. 8, 2003) (unpublished opinion) ("There was ample demonstration of bad faith on First Unum's part, including ... the frivolous nature of virtually every position it has advocated in the litigation."); Curtin v. Unum Life Ins. Co. of Am., 298 F. Supp. 2d 149, 159 (D. Me. 2004) ("[T]his Court finds that Defendants exhibited a low level of care to avoid improper denial of claims at great human expense."); Locher v. Unum Life Ins. Co. of Am., No. 96 Civ. 3828(LTS)(HPB), 2002 WL 362769, at *9-10 (S.D.N.Y. Mar. 7, 2002) (overturning Unum's denial of benefits, despite Unum's argument that the claimant was not disabled because she worked a full day the day she left her job); Barone v. Unum Life Ins. Co. of Am., 186 F. Supp. 2d 777, 787 (E.D. Mich. 2002); Wilkes v. Unum Life Ins. Co. of Am., No. 01-C-182-C, 2002 WL 926279, at *10 (W.D. Wis. Jan. 29, 2002) (finding "that the defendant's position was not substantially justified or taken in good faith"); Hall v. Unum Life Ins. Co. of Am., No. 97-CV-1828, 1999 WL 33485551, at *8 (D. Colo. Nov. 1, 1999) vacated in part on other grounds, 300 F.3d 1197 (10th Cir. 2002); Leva v. First Unum Ins. Co., No. 96 CIV 8590(DC), 1999 WL 294802, at *1-2 (S.D.N.Y. May 11, 1999) (noting that "Unum is 'culpable' in the sense that it did not consider [the plaintiff's] application with the care that she deserved," and that the only medical review of the claim was done by a registered nurse, who happened to be the claims examiner's mother); Jones v. Unum Life Ins. Co. of Am., No. 95-5808, 1998 WL 778366, at *6 (S.D.N.Y. Nov. 6, 1998), vacated in part on other grounds, 223 F.3d 130 (2d Cir. 2000); Ragsdale v. Unum Life Ins. Co. of Am., 999 F. Supp. 1016, 1026 (N.D. Ohio 1998); Dishman v. Unum Life Ins. Co. of Am., No. 96-0015-JSL, 1997 WL 906146, at *11-13 (C.D. Cal. May 9, 1997) (noting that the court would have reached the same decision under an arbitrary and capricious standard, and describing Unum Life's "unscrupulous conduct" in engaging in "bad faith denial of large claims as a strategy for settling them for substantially less than the amount owed"); Hamner v. Unum Life Ins. Co. of Am., No. C 96-1973 TEH, 1997 WL 257515, at *6 (N.D. Cal. May 6, 1997); Mays v. Unum Life Ins. Co. of Am., No. 95 C 1168, 1995 WL 631807, at *9 (N.D. Ill. Oct. 24, 1995)).

28. *See* Radley Radford Trust, 321 F. Supp. 2d at 247 n.20 (citing Morgan v. Unum Life Ins. Co. of Am., 346 F.3d 1173, 1178 (8th Cir. 2003); Lain v. Unum Life Ins. Co. of Am., 279 F.3d 337, 346-47 (5th Cir. 2002) (basing the decision in part on Unum's misinterpretation of its own policy); Shutts v. First Unum Life Ins. Co., No. 1:01-cv-1993, 2004 WL 615134, at *7-8 (N.D.N.Y. Mar. 24, 2004); Crespo v. Unum Life Ins. Co. of Am., 294 F. Supp. 2d 980, 994, 996-97 (N.D. Ill. 2003) (reversing in part because Unum based its denial on failure to prove "disability" before or near the last day of work); Mennenoh v. Unum Life Ins. Co. of Am., 302 F. Supp. 2d 982, 989-90 (W.D. Wis. 2003); Cheng v. Unum Life Ins. Co. of Am., 291 F. Supp. 2d 717, 721 (N.D. Ill. 2003); Pelchat v. Unum Life Ins. Co. of Am., No. 3:02CV7282, 2003 WL 21479170, at *3 (N.D. Ohio June 25, 2003) ("Unum's decision was therefore not based on a good faith interpretation of its policy language or an honest mistake."); Dirnberger v. Unum Life Ins. Co. of Am., 246 F. Supp. 2d 927, 935 (W.D. Tenn. 2002); Henar v. First Unum Life Ins. Co., No. 02 Civ. 1570(LBS), 2002 WL 31098495, at *5 (S.D.N.Y. Sept. 19, 2002); Holzschuh v. Unum Life Ins. Co. of Am., No. Civ. A. 02-1035, 2002 WL 1609983, at *9 (E.D. Pa. July 18, 2002); Winters v. Unum Life Ins. Co. of Am., 232 F. Supp. 2d 918, 932-33 (W.D. Wis. 2002); Heffernan v. Unum Life Ins. Co. of Am., No. C-1-97-545, 2001 WL 1842465, at *6 (S.D. Ohio Mar. 21, 2001); Newman v. Unum Life Ins. Co. of

After 2004, other courts have recognized Unum's history of biased and abusive claim reviews.[29] Some courts reached a contrary conclusion, finding there was no evidence Unum's abusive practices extended past 2003.[30]

F. The 2004 RSA and 2005 Amended RSA

On September 2, 2003, three state insurance regulators[31] launched an investigation of Unum's claims handling practices.[32] Regulators investigated whether Unum's disability income claims handling practices: "reflected systemic 'unfair claim settlement practices' as defined in the NAIC Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance Model Act (1972) or NAIC Claims Settlement Practices Model Act (1990)."[33] Examiners reviewed seventy-five randomly selected claims files from the Unum entities.[34] The review identified these general areas of concern applicable to individual disability ("IDI"), and long term disability ("LTD") claims:

Am., No. 99 C 7420, 2000 WL 1593443, at *6-7 (N.D. Ill. Oct. 23, 2000) (finding, in a case where Unum maintained a policy interpretation similar to First Unum's interpretation of the Policy in this case, that the "defendant contorted the meaning of its own policy in order to deny plaintiff's claim on a nonexistent technicality"); Hines v. Unum Life Ins. Co. of Am., 110 F. Supp. 2d 458, 460-61 (W.D. Va. 2000) (noting the "scathing failure by Unum Insurance to impartially administer the disability plan"); Lake v. Unum Life Ins. Co. of Am., 50 F. Supp. 2d 1243, 1257 (M.D. Ala. 1999); Russell v. Unum Life Ins. Co. of Am., 40 F. Supp. 2d 747, 751 (D.S.C. 1999); Riley v. Unum Life Ins. Co. of Am., 28 F. Supp. 2d 639, 643-44 (D. Kan. 1998); see also Dandurand v. Unum Life Ins. Co. of Am., 284 F.3d 331, 336-38 (1st Cir. 2002) (overturning an arbitrary and capricious calculation of benefits); Wyatt v. Unum Life Ins. Co. of Am., No. 97 C 8228, 1999 WL 116213, at *7 (N.D. Ill. Mar. 2, 1999) (overturning a decision to offset a claimant's benefits because of an alleged eligibility for benefits from the Federal Insurance Company)).

29. *See, e.g.*, McCauley v. First Unum Life Ins. Co., 551 F.3d 126, 137 (2d Cir. 2008) (noting Unum's well-documented history of abusive tactics).

30. *See, e.g.*, Swanson v. Unum Life Ins. Co., No. 13-CV-4107-JAR, 2015 WL 339313, at *8 (D. Kan. Jan. 26, 2015).

31. The three state regulators were the Maine Bureau of Insurance, the Massachusetts Division of Insurance and the Tennessee Department of Commerce and Insurance. Forty-nine other jurisdictions were listed as "participating jurisdictions." *See infra* note 33.

32. J. David Leslie, *Report of the Targeted Multistate Market Conduct Examination*, https://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_multi-state_exam.pdf (Nov. 18, 2004).

33. *Id.* at 4.

34. *Id.* at 5.

- Excessive reliance upon in-house medical professionals, especially to discount or dispute opinions from claimants' treating physicians;[35]
- Unfair interpretation of attending physicians or independent medical exam ("IME") reports, including focusing on apparent inconsistencies in medical records instead of trying to thoroughly understand claimant's medical condition;[36]
- Failure to evaluate claimants' total medical condition by failing to properly evaluate the cumulative effects of claimants' multiple conditions;[37] and
- Placing inappropriate burdens on claimants to justify benefits eligibility.[38]

Regulators and Unum agreed to a Plan of Corrective Action resulting in the RSA.[39] The RSA imposed a $15 million penalty.[40] The Plan included claims reassessment, changes in claim organization and procedures, changes in corporate governance, and quarterly meetings between regulators and Unum.[41] Effective October 3, 2005, Unum agreed to an amendment to the RSA that imposed additional requirements.[42]

The RSA and RSA Amendment required Unum to:

- Increase emphasis on employee accountability for compliance with law;[43]
- Consider and give weight to all diagnoses and impairments and their combined effect on the whole person when evaluating medical data;[44]

35. *Id.* at 5-6.
36. *Id.* at 6.
37. *Id.*
38. *Id.* at 7.
39. *Id.* at 8.
40. *Id.*
41. *Id.* at 8-10.
42. *Amendment to Regulatory Settlement Agreement*, https://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_rsa_amendment.pdf [hereinafter *RSA Amendment*].
43. RSA, *supra* note 2, at 10.
44. RSA, *supra* note 2, Exhibit 4, https://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_exhibit-4.pdf (last visited Jan. 3, 2021).

- Give significant weight to the Social Security Administration's ("SSA") disability decision unless compelling evidence justifies disregarding it;[45]
- Give significant weight to attending physicians' opinions;[46]
- Contact attending physicians to discuss disagreements;[47]
- Fairly interpret and apply information from attending physicians;[48] and
- Explain medical reasons for disagreeing with attending physicians.[49]

Exhibit 5 to the RSA was a Statement Regarding Medical Professional Conduct to be signed by Unum clinical, vocational, and medical professionals.[50] The Statement's requirements for Unum professionals included:

- Discuss medical and vocational facts honestly;
- Provide fair and reasonable evaluations considering objective and subjective evidence supporting impairment;
- Consider all diagnoses and impairments;
- Represent medical and vocational facts accurately; and
- Provide reasonable, clear, and accurate explanations of opinions.

G. The Amended RSA's imposition of the 'treating physician rule' on Unum

The requirement for Unum to give significant weight to attending physicians' opinions warrants attention. RSA Amendment paragraph five states:

> 5. [RSA] Section B.3.c.(i) shall be amended by adding the following factor to others relating to increased focus on policies relating to medical evidence:

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45. RSA, *supra* note 2, at 8.
46. RSA *Amendment* at p. 2.
47. RSA, *supra* note 2, at 8.
48. Id.
49. RSA *Amendment*, *supra* note 43, at 1-2.
50. RSA, *supra* note 2, Exhibit 5, https://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_exhibit-5.pdf (last visited Jan. 3, 2021).

> 'Giving significant weight to an attending physician's ("AP") opinion, if the AP is properly licensed and the claimed medical condition falls within the AP's customary area of practice, unless the AP's opinion is not well supported by medically acceptable clinical or diagnostic standards and is inconsistent with other substantial evidence in the record. In order for an AP's opinion to be rejected, the claim file must include specific reasons why the opinion is not well supported by medically acceptable clinical or diagnostic standards and is inconsistent with other substantial evidence in the record.'

Unlike other RSA provisions, this requirement had no expiration date and: "may only be amended by obtaining the consent of the Lead Regulators….two-thirds of the Participating Regulators and the DOL, to any such amended provision."[51]

In *Black & Decker*, the Supreme Court recognized: "[a]s compared to consultants retained by a plan, it may be true that treating physicians, as a rule, 'have a greater opportunity to know and observe the patient as an individual.'"[52] Yet the Court held: "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discreet burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation."[53] In doing so, the Court rejected imposing the 'treating physician rule" applicable in SSA disability claims.[54]

The SSA's treating physician rule requires that administrative law judges determining a claimant's disability status: "give deference to the opinions of the claimant's treating physician, because 'he is employed to cure and has a greater opportunity to know and observe the patient as an individual.'"[55] The treating physician rule does not require that administrative law judges always defer to treating physicians, but there must be substantial evidence not to.[56] *Regula* explained:

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51. RSA, *supra* note 2, at 16, § (C)(10)(ii).

52. Black & Decker v. Nord, 538 U.S. 822, 832 (2003) (citing Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1139 (9th Cir. 2001) (overruled in part by Black & Decker).

53. *Decker*, 538 U.S. at 834.

54. The Social Security Administration codified the treating physician rule. Regula, 266 F.3d at 1141 (citing 20 C.F.R. §§ 404.1527(d), 416.927(d) (2001)).

55. *Regula*, 266 F.3d at 1139 (citing Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999)).

56. *Regula*, 266 F.3d at 1140.

> 'When a nontreating physician's opinion contradicts that of the treating physician-but is not based on independent clinical findings, or rests on clinical findings also considered by the treating physician-the opinion of the treating physician may be rejected only if the ALJ gives `specific, legitimate reasons for doing so that are based on substantial evidence in the record.'' *Morgan,* 169 F.3d at 600 (quoting *Andrews v. Shalala,* 53 F.3d 1035, 1041 (9th Cir. 1995)). "[I]f the treating physician['s] opinions are uncontroverted, those reasons must be clear and convincing." *Smolen,* 80 F.3d at 1285. The opinions of a nonexamining (or reviewing) physician may serve as substantial evidence under the rule, when they are supported by other evidence in the record and consistent with the evidence in the record overall. *See Shalala,* 53 F.3d at 1041.[57]

Unum's obligation under the RSA imposes the same requirement as the treating physician rule worded differently:

- Judge must give deference to treating physician's opinion unless specific reasons not to based on substantial record evidence [treating physician rule].
- Unum must give significant weight to treating physician's opinion unless not well supported by medically acceptable clinical or diagnostic standards and is inconsistent with other substantial record evidence [RSA].

Unum pays lip service to the RSA. In most opinions, courts do not acknowledge the RSA and appear unaware it exists. Still, many opinions criticize Unum for disregarding treating physicians' opinions, as discussed below in section II D.

Unum employees acknowledge treating physicians' opinions but disregard them when they can cite any reason to do so. Unum often does not support its justification with clinical or diagnostic standards or substantial record evidence. Many decisions cited below found Unum cherry-picked from the record and/or ignored evidence favorable to the claimant.

57. *Id*. at 1140.

III. RECURRENT PATTERNS IN POST-RSA UNUM DECISIONS

A. Improper cherry-picking from medical records

As a fiduciary, ERISA plan administrators must interpret the administrative record in the beneficiaries' interests.[58] The RSA and RSA Amendment imposed additional requirements on Unum to discuss medical facts accurately and honestly.[59] 'Cherry-picking' occurs when administrators selectively emphasize evidence favoring denial or termination. Since 2002, many decisions faulted Unum for improperly cherry-picking from the administrative record.[60]

Doe v. Unum[61] is illustrative. Unum's employee-physician (Dr. Tony Smith) wrote he could find no evidence supporting the claimant's complaints of diarrhea and fatigue.[62] The court listed a full page of evidence contradicting Smith's statement.[63] The court stated: "Unum's

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58. 29 U.S.C. § 1104(a). The 'administrative record' is the administrator's claims file.

59. RSA, *supra* note 2, Exhibit 5, https://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_exhibit-5.pdf (last visited Jan. 3, 2021).

60. *See* Hines v. Unum Life Ins. Co., 2018 U.S. Dist. LEXIS 211995, at *15 (N.D. Ohio Dec. 17, 2018) ("Unum was still able to cherry-pick language and carry on with its preferred court of action"); Clark v. Unum Life Ins. Co. of Am., 2018 U.S. Dist. LEXIS 175341, at *44-7 (M.D. Tenn. Oct. 10, 2018) (criticizing Unum physician's selective review of record); Bencivenga v. Unum Life Ins. Co. of Am., 2015 U.S. Dist. LEXIS 39117, at *40 (E.D. Mich. Mar. 27, 2015) ("Unum cherry-picked notes favorable to its termination decision"); Doe v. Unum Life Ins. Co. of Am., 35 F. Supp. 3d 182 (D. Mass. 2014) (showing Unum's pattern of cherry-picking evidence); Doe v. Unum Life Ins. Co. of Am., 2014 .S. Dist. LEXIS 162042, at *8 (E.D. Pa. Nov. 18, 2014) (ruling for claimant who criticized Unum's selective reliance on evidence); Hannon v. Unum Life Ins. Co. of Am., 988 F. Supp. 2d 981, 991 (S.D. Ind. 2013) (criticizing Unum's practice of cherry-picking and ignoring evidence); *McCauley*, 551 F.3d at 136-7) (Unum's selective review of records indicative of abuse of discretion under Glenn); Glockson v. First Unum Life Ins. Co., 2006 U.S. Dist. LEXIS 47613, at *20 (N.D.N.Y. July 6, 2006) ("Unum has simply cherry-picked medical evidence in the record"); Mikrut v. Unum Life Ins. Co. of Am., 2006 U.S. Dist. LEXIS 92265, at *25 n.7 (D. Conn. Dec. 20, 2006) (Unum's approach is results-oriented, if not mere cherry-picking); Moon v. Unum Provident Corp., 405 F.3d 373, 381 (6th Cir. 2005) (selective review of record tainted Unum's review); Utter v. Unum Life Ins. Co. of Am., 404 F. Supp. 2d 1204, 1213 (C.D. Cal. 2005) (Unum doctor's cherry-picking records inconsistent with its role as fiduciary); Unum Life Ins. Co. of Am. v. Edwards, 210 S.W.3d 84, 92 (Ark. 2005) (Unum was cherry-picking medical records); *Holzschuh*, 2002 WL 1609983, at 24 (Unum acted more like plaintiff's adversary than impartial judge by selectively reading records).

61. Doe v. Unum Life Ins. Co. of Am.,35 F. Supp. 3d 182 (D. Mass. 2014).

62. *Id.* at 187.

63. *See id.* at 190-91 ("there is no doubt [claimant] documented a persistent history of debilitating fatigue").

reviewers paid little or no attention to this well-documented history in their reports. Smith stated that he could find no lab etiology or clinical evidence supporting the reported fatigue."[64] The court was apparently unaware of Unum's obligations under the RSA because it noted Unum owed no deference to claimant's treating physicians:

> But this case is not about giving insufficient weight to acknowledged conditions; it is about failing to acknowledge those conditions in the first place….Unum's physicians chose to either cursorily reference that evidence or ignore it all together. 'Engag[ing] with only that evidence which supports [the administrator's] conclusion' is not meaningful review."[65]

Dr. Tony Smith is a repeat offender for cherry-picking in Unum cases. Another case where Dr. Smith improperly cherry-picked was *Bencivenga v. Unum Life Ins. Co. of Am.*[66] In *Bencivenga*, the court found Unum improperly: (1) "cherry-picked notes favorable to its termination decision;"[67] (2) made credibility determinations supporting termination from reviewing the file;[68] (3) labeled claimant's disability as mental so it could apply a 24-month coverage limit to mental illness;[69] and (4) ignored claimant's treating physicians.[70]

That Dr. Tony Smith was faulted more than once for improper cherry-picking years after the RSA is significant. The RSA's Statement Regarding Medical Professional Conduct Dr. Smith had to sign warnings against the one-sided analysis Smith has repeated. This suggests Unum approves of Smith's improper methods, particularly when viewed in connection with the many other decisions faulting other Unum employees for cherry-picking.

B. Disregarding evidence favorable to claimants

Disregarding evidence favorable to claimants is another label courts use to describe Unum's selective review of the record. Many courts have

64. *Id.* at 192.
65. *Id.*
66. 2015 U.S. Dist. LEXIS 39117.
67. *Id.* at 32.
68. *Id.* at **33-34.
69. *Id.* at *26.
70. *Id.* at *25.

criticized Unum for disregarding evidence favorable to claimants.[71] *Hannon v. Unum Life Ins. Co. of Am.*[72] is illustrative. Plaintiff was a registered nurse disabled with a disorder affecting her connective tissues.[73] After first granting plaintiff's claim, Unum re-reviewed her file.[74] Unum terminated benefits ten years after originally granting the claim.[75]

Citing medical records that Unum failed to address, the court found Unum failed to adequately address the plaintiff's entire medical file.[76]

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71. *See, e.g.*, Tam v. First Unum Life Ins. Co., 2020 U.S. Dist. LEXIS 186477, at *28 (C.D. Cal. Sept. 30, 2020) (finding Unum's in-house physicians mischaracterized and/or ignored evidence in the record); Christoff v. Unum Life Ins. Co. of Am., 2019 U.S. Dist. LEXIS 167889, at *28 (D. Minn. Sept. 30, 2019) (Unum arbitrarily disregarded and selectively presented evidence); Kamerer v. Unum Life Ins. Co. of Am., 334 F. Supp. 3d 411, 417, 426 (D. Mass. 2018) (Unum's reviewers offered no reasons to disagree with numerous other medical professionals); Hines, 2018 U.S. Dist. LEXIS 211995, at *15) (Unum omitted potentially relevant medical information); *Clark*., 2018 U.S. Dist. LEXIS 175341, at *47 (" Unum disregarded unfavorable evidence, a hallmark of selective review); Dimopoulou v. First Unum Life Ins. Co., 162 F. Supp. 3d 250, 261 (S.D. N.Y. 2016) (citing evidence Unum ignored); Backman v. Unum Life Ins. Co. of Am., 191 F. Supp. 3d 1053, 1067 (N.D. Cal. 2016) ("Unum overlooked records that did not agree with its consultants' conclusions"); Warner v. Unum Life Ins. Co., 2014 U.S. Dist. LEXIS 178765, at *42 (N.D. Ill. Dec. 31, 2014) (Unum ignored substantial evidence); *Doe*, 35 F. Supp. 3d at 193 (Dr. Tony Smith and other Unum employees "did not fully and reasonably consider the evidence of Doe's physical condition"); *Doe*, 2014 U.S. Dist. LEXIS 162042, at **8-9 (Unum ignored concerns expressed by claimant's treating physicians); Petrusich v. Unum Life Ins. Co. of Am., 984 F. Supp. 2d 1112, 1124 (D. Or. 2013) (Unum ignored evidence supporting claimant's claim); Freeland v. Unum Life Ins. Co. of Am., 2013 U.S. Dist. LEXIS 116931 (W.D. Wisc. Aug. 16, 2013); Hannon, 988 F. Supp. 2d at 988 ((Unum ignored most of claimant's medical history); Schindler v. Unum Life Ins. Co. of Am., 2013 U.S. Dist. LEXIS 116837, at *44 (D. S.C. Aug. 19, 2013) ("Unum was willfully blind to the most relevant information"); Stephan v. Unum Life Ins. Co. of Am., 697 F.3d 917, 937-38 (2d Cir. 2012) (Unum's disregarding evidence supports conclusion its conflict of interest affected its decision making); Houston v. Unum Life, Ins. Co. of Am., 246 F. App'x 293, 301 (6th Cir. 2007) ("Unum did not give full consideration to [claimant's] objective vocational evidence"); Evans v. Unum Provident Corp., 434 F.3d 866, 879 (6th Cir. 2006); *Utter*, 404 F. Supp. 2d at 1211 (ERISA fiduciary may not turn blind eye to uncontroverted medical opinions supporting disability); *Lain* , 279 F.3d at 346 (Unum did not objectively consider all facts); *Dirnberger*, 246 F. Supp. 2d at 932 (W.D. Tenn. 2002) (Unum overlooked important evidence).

72. 988 F. Supp. 2d 981.

73. *Id.* at 984.

74. *Id.* at 985.

75. *Id.*

76. *Id.* at 989-90. Plaintiff's medical file exceeded 2,000 pages.

Unum "[selected] only a few snippets….and [took] them out of context."[77] This conduct was an abuse of discretion.[78]

C. Mischaracterization and failure to analyze claimant's job duties

Unum disability policies define 'disability' as when the claimant is unable to perform the material and substantial duties of their regular occupation.[79] This requires Unum, as plan administrator, to: (1) perform an analysis to identify claimant's job duties; and (2) analyze whether claimant can perform his/her job duties.[80] Courts often criticize Unum for mischaracterizing claimants' job duties and/or failing to analyze his/her job duties.[81] A recurrent theme is Unum applied a general sedentary job standard rather than analyzing the material duties of plaintiff's actual occupation.[82]

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77. *Id.*

78. *Id.* The court also criticized Unum for rejecting plaintiff's treating physicians' opinions without explanation. *See id.*

79. *See, e.g.*, *Doe*, 35 F. Supp. 3d 182) (quoting Unum plan's disability definition); Raithaus v. Unum Life Ins. Co. of Am., 335 F. Supp. 2d 1098, 1102 (D. Haw. 2004) (same).

80. *See, e.g.*, Kirkpatrick v. Liberty Mut. Grp., Inc., 856 F. Supp. 2d 977, 993 (S.D. Ind. 2012) (finding characterization of job as sedentary not illuminating of material and substantial duties); *Doe*, 35 F. Supp. 3d 182, 193 (D. Mass. 2014) (criticizing Unum's failure to analyze how claimant's conditions affected ability to perform job duties).

81. *See, e.g.*, Christoff, 2019 U.S. Dist. LEXIS 167889, at *25 (Unum abused its discretion by arbitrarily changing level of physical demand without substantial evidence); *Kamerer*, 34 F. Supp. 3d at 419- Unum doctor concluded claimant was not occupationally disabled from sedentary work but did not analyze material duties of her occupation as defined by vocational review); *Dimopoulou*, 162 F. Supp. 3d at 260 (Unum ignored evidence and failed to analyze plaintiff's functional capacity); Hertan v. Unum Life Ins. Co. of Am., 111 F. Supp. 3d 1075, 1087 (C.D. Cal. 2015) (Unum conflated sedentary nature of job with actual job duties); Warner, 2014 U.S. Dist. LEXIS 178765, at *31 (no evidence Unum compared description of physical demands of job with claimant's capabilities and limitations); *Doe*, 35 F. Supp. 3d at 193 (Unum seizes on sedentary nature of job rather than plaintiff's job duties); *Doe*, 2014 U.S. Dist. LEXIS 162042, at *17 (Unum failed to analyze plaintiff's job duties); *Petrusich*, 984 F. Supp. 2d at 1123 (nothing in record indicates Unum analyzed whether plaintiff could perform job duties); Clarke v. Unum Life Ins. Co., 852 F. Supp. 2d 663, 680 (D. Md. 2012) (Unum's FCE failed to analyze or explain how plaintiff could drive required 8 hours); *Houston*, 246 F. App'x 293 at 300 (faulting Unum for miss-classifying claimant's job as sedentary); *Hines*, 110 F. Supp. 2d at 465-66 (Unum failed to analyze whether cervical condition prevented legal secretary from using right arm).

82. *See, e.g., Doe*, 35 F. Supp. 3d at 193. *See also* Zurndorfer v. Unum Life Ins. Co. of Am., 543 F. Supp. 2d 242, 263 (S.D.N.Y. 2008) (stating Unum's characterization of plaintiff's job "bespeaks advocacy").

Kamerer v. Unum Life Ins. Co. of Am.[83] is typical of many Unum cases:

- Initially approved claim;[84]
- Terminated benefits;[85]
- Claimant's treating physicians explained she could not work;[86]
- Unum ordered an IME to analyze general sedentary job standard rather than claimant's occupational demands;[87]
- Following Unum's instructions, IME doctor did not address claimant's actual occupational demands;[88]
- Unum incorrectly labeled claimant's disability as mental;[89]
- Unum employees "did not analyze the material duties of her occupation as defined by the vocational review";[90]
- "None of Unum's reviewers offered any reasons to disagree with the numerous other medical professionals that had seen [claimant] over a period of many years and without any explanation 'arbitrarily refused to credit' their findings"[91];
- Unum disregarded treating physician opinions supported by objective evidence;[92]
- Unum's internal consultant stated "it was clinically reasonable" to conclude claimant's disability was mental based.[93]

Unum's vocational reviewer concluded plaintiff's occupation was 'systems project manager.'[94] Unum's in-house physician labeled plaintiff's occupation as 'sedentary' and did not analyze the material duties defined by the vocational review.[95] The IME doctor concluded plaintiff could

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83. Kamerer v. Unum Life Ins. Co. of Am., 334 F. Supp. 3d 411 (D. Mass. 2018).
84. *Id.* at 415.
85. *Id.* at 416.
86. *Id.*
87. *Id.* at 417.
88. *Id.* at 418.
89. *Id.* at 427. Unum policies limit payments for mental disability to two years.
90. *Id.* at 419.
91. *Id.* at 426 (citing Black & Decker Disability Plan v. Nord, 538 U.S. 822, 823 (2003)).
92. *Id.* at 427.
93. *Id.* at 429.
94. *Id.* at 417.
95. *Id.* at 419.

satisfy the physical demands of her occupation but admitted he knew little about her job duties.[96] The doctor had no recollection of seeing the plaintiff's job description.[97]

Several courts criticized Unum for not accurately defining a claimant's job duties when trying to secure an opinion of non-disability.[98] Courts have also criticized Unum for disregarding claimants' report that Unum's independent physician did not perform a thorough exam.[99]

In *Doe v. Unum Life Ins. Co. of Am.*,[100] Unum terminated an engineer's long-term disability benefits. The policy defined 'disability' as when due to sickness or injury, claimant is unable to perform the material and substantial duties of your regular occupation.[101] 'Material and substantial duties' means duties that are typically required for the performance of claimant's regular occupation and cannot be reasonably omitted or modified.[102] Unum's vocational consultant identified seven material and substantial duties for plaintiff's occupation.[103] None of Unum's consulting physicians considered plaintiff's job duties.[104] Instead, Unum exclusively focused on the physical demands of plaintiff's job.[105]

The court found plaintiff's occupation "involved much more than physical duties."[106] Unum's own vocational consultant concluded the job involved multiple intellectual, oral, written, social, and organizational duties.[107] Unum's failure to consider any material and substantial duties are required by the Plan's language "established that its decision 'was not reasoned and based on an individualized assessment of [Doe's] abilities.'"[108]

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96. *Id.* at 418, 426.

97. *Id.* at 418.

98. *See e.g*., (Unum employee changed physical demands for occupation to general sedentary level); *Kamerer*, 334 F. Supp. 3d at 417 (Unum asked IME doctor same questions it asked Dr. Lee); *Doe*, 2014 U.S. Dist. LEXIS 162042, at *17 (Unum cannot rely on consulting doctor's opinion when he does not consider her job duties).

99. *See e.g.*, *Kamerer*, 334 F. Supp. 3d at 411,424 (Unum ignored claimant's complaint that IME lasted 5 minutes); Meyer v. Unum Life Ins. Co. of Am., 96 F. Supp. 3d 1234, 1252 (D. Kan. 2015) ("Unum relied on an opinion by Lambrew, a tainted, highly paid Unum contractor who rendered his opinion in response to leading questions and discounted physical test results.")

100. No. 13-6900 (E.D. Pa. Nov. 18, 2014).

101. *Id.* at **6-7.

102. *Id.* at *7.

103. *Id.* at *8.

104. *Id*.

105. *Id.* at *9.

106. *Id.*

107. *Id.*

108. *Id.* (citing Miller v. American Airlines, Inc., 632 F.3d 837, 845 (3d Cir. 2011); Kuntz v. Aetna, Inc., No. 10-0877, 2013 WL 2147945, at *10 (E.D. Pa. May 17,

Several courts criticized Unum for not accurately defining a claimant's job duties to outside physicians when trying to secure an opinion of non-disability.[109] Courts also criticize Unum for disregarding claimants' complaints that Unum's independent physician did not perform a thorough exam.[110]

D. Requesting independent physicians opine on mis-defined job description.

Unum policies typically define the disability:

> You are disabled when Unum determines that: you are limited from performing the material and substantial duties of your regular occupation due to your sickness or injury; and you have a 20% or more loss in your indexed monthly earnings due to the same sickness or injury.[111]

Under this definition, "the issue is whether [claimants'] condition has rendered [them] physically unable to perform the duties of [their] occupation."[112]

The RSA addressed Unum consulting independent physicians to opine on whether a claimant can work. RSA exhibit 6 is 'Guidelines for Independent Medical Evaluations.' It begins:

> If a determination is made that the medical information in the claim file lacks clarity or sufficiency in assessing the insured's medical condition in order to validate the claim

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2013); Loomis v Life Ins. Co. of N. America, No. 09-3616, 2011 WL 2473727, at *6 (E.D. Pa. June 21, 2011); Simon v. Prudential Life Ins. Co., No. 10-4286, 2011 WL 2971203, *5 (D. N.J. July 20, 2011)).

109. *See, e.g., Christoff*, 2019 U.S. Dist. LEXIS 167889, at *10 (Unum employee changed physical demands for occupation to general sedentary level); *Kamerer*, 334 F. Supp. 3d at 417 (Unum asked IME doctor same questions it asked Dr. Lee); Doe, 2014 U.S. Dist. LEXIS 162042 at *17 (Unum cannot rely on consulting doctor's opinion when he does not consider her job duties).

110. *See e.g.*, Kamerer v. Unum Life Ins. Co. of Am., 334 F. Supp. 3d 411, 424 (D. Mass. 2018) (Unum ignored claimant's complaint that IME lasted 5 minutes); Meyer v. Unum Life Ins. Co. of Am., 96 F. Supp. 3d 1234, 1252 (D. Kan. 2015) ("Unum relied on an opinion by Lambrew, a tainted, highly paid Unum contractor who rendered his opinion in response to leading questions and discounted physical test results.")

111. *See Kamerer*, 334 F. Supp. 3d at 414 (quoting Unum policy's disability definition).

112. *Id.* at 421.

> under the requirements of the applicable policy or if the Company has reason to question the opinions or information provided by a claimant's AP [attending physician], the appropriate Company medical professional should contact the AP either by phone or by letter for clarification or additional information.

If the attending physician and Unum professional cannot agree, then Unum should generally order an independent medical examination.[113] But as shown above, Unum stacks the deck by not accurately defining claimant's job duties to the IME physician and requests the physician opine on a lesser work standard. An example is when Unum requests the physician evaluate whether claimant can perform any sedentary work instead of the material and substantial duties of her occupation.

Recent decisions point to Unum skirting the court core issue and addressing whether claimants have noticed that Unum and its hired physicians do not actually analyze claimants' material job duties. Instead, Unum analyzes whether claimants have the functional capacity to perform the physical demands of the job as defined by Unum.[114] Unum uses Department of Labor definitions to define physical demands.[115] Unum classifies claimants who work in offices as sedentary workers and analyze whether they "have functional capacity for a full-time occupation with sedentary physical demands as defined by the Department of Labor."[116]

In *Kamerer*, claimant was a highly compensated partner Unum classified as a systems project manager.[117] Unum's vocational review identified specific job requirements including travel.[118] But when Unum analyzed whether claimant could perform her material job duties, it applied the same general sedentary job demands it would apply to a secretary or receptionist.[119]

Unum's in-house physician noted claimant's sedentary occupation "but did not analyze the material duties of her occupation as defined by the vocational review."[120] Unum ordered an independent medical exam, but told the physician to address physical demands only rather than claimant's

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113. RSA exhibit 6 defines certain criteria under which an independent medical examination is not required. See RSA, ex. 6, section A.2.

114. *Kamerer*, 334 F. Supp. 3d at 417.

115. *Id.*

116. *Id.* at 417.

117. *Id.* at 415-16.

118. *Id.* at 416.

119. *Id.*

120. *Id.* at 419.

material job duties.[121] The IME physician testified he did not see claimant's job description and only knew "she worked as consultant for a large consulting firm."[122] He "concluded that, from a purely physical standpoint, [claimant] could satisfy the physical demands of a System Project Manager."[123]

Another example of Unum's failure to analyze claimant's material job duties was in *Doe v. Unum Life Ins. Co. of Am.*[124] Claimant worked as a validation process engineer.[125] The plan "required Unum to base its disability determination on [claimant's] ability to perform the material and substantial duties of her Validation Engineer position, not the presence of an impairment."[126] Unum's vocational consultant identified seven material and substantial job duties of a validation process engineer.[127] The first was "developing and executing validation protocols for processes and equipment to produce products meeting internal and external purity, quality, and safety standards."[128] But "none of Unum's consulting doctors considered [claimant's] job duties in concluding she was not mentally disabled."[129] The doctors could not consider claimant's job duties because Unum did not give them the job description.[130] In a familiar pattern, Unum instead gave reviewing physicians its description of the physical demands of the job.[131]

Recognizing the impropriety of Unum's focus on physical demands, the court stated: "[claimant's] Validation Engineer position involved much more than physical demands."[132] "The position involved multiple intellectual, oral, written, social, and organizational duties."[133] The court concluded: "Unum's failure to consider any of these 'material and substantial' duties, as required by the unambiguous Plan language, establishes that its decision 'was not reasoned and based on an individualized assessment of [claimant's] abilities.'"[134]

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121. *Id.* at 417.
122. *Id.* at 418.
123. *Id.* at 426.
124. No. 13-6900 (E.D. Pa. Nov. 14, 2014).
125. *Id.* at *1.
126. *Id.* at *10.
127. *Id.* at *8.
128. *Id.*
129. *Id.*
130. *Id.* at *9.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

Christoff v. Unum Life Ins. Co.[135] is similar. Unum asked its vocational reviewer to lower claimant's occupational level to a general sedentary level.[136] Presumably unaware of decisions showing this was a pattern, the court described the issue as a "red herring."[137] The court instead found Unum abused its discretion by employing other familiar improper tactics: (1) ignoring treating physicians' opinions;[138] (2) not applying Unum's policy to defer to treating physicians;[139] (3) not giving specialists' opinions more weight than Unum's generalists;[140] (4) fabricating evidence;[141] and (5) not following its policy regarding weighing SSA disability determinations.[142]

E. Disregarding attending physicians' opinions on disability

In *Black & Decker Disability Plan v. Nord*,[143] the Supreme Court recognized physicians repeatedly retained by administrators: "may have an 'incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements.'"[144] Nevertheless, the Court held administrators need not defer to claimant's treating physicians on the question of disability.[145] Further, "the Act [does not] impose a heightened burden of explanation on administrators when they reject a treating physician's opinion."[146] But administrators "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of treating physicians."[147] And while *Nord* dictates administrators have no *heightened* burden of explanation for rejecting a treating physician's opinion, failing to explain a legitimate basis for disagreeing with treating physicians constitutes an arbitrary refusal to credit claimant's reliable evidence.[148]

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135. 2019 U.S. Dist. LEXIS 167889.
136. *Id.* at *9.
137. *Id.* at *21.
138. *Id.* at **22-23.
139. *Id.* at *23.
140. *Id.* at *23.
141. *Id.*
142. *Id.* at ** 11-12, 29.
143. *Nord*, 538 U.S. 822.
144. *Id.* at 832 (citing Regula v. Delta Family-Care Survivorship Plan, 266 F.3d 1130, 1143 (9th Cir. 2001), abrogated on other grounds by Black & Decker, 538 U.S. 822).
145. *Id.* at 831.
146. *Id.*
147. *Id.* at 834.
148. Card v. Principal Life Ins. Co., 790 F. App'x 730, 743 (6th Cir. 2019); Majeski v. Metropolitan Life Ins. Co., 590 F.3d 478, 484 (7th Cir. 2009) (citing Love v.

29 U.S.C. § 1133 requires that administrators: "provide adequate notice in writing to any participant or beneficiary whose claim benefits under the plan has been denied, setting forth the reasons for such denial, written in a manner calculated to be understood by the participant."[149] 29 C.F.R. § 2560.503-1(g) imposes the additional requirement that administrators must give the *specific* reason or reasons for the adverse determination. Examples of cases faulting the administrator's failure to explain its basis for disagreeing with treating physicians include the Sixth Circuit's decision in *Kalish v. Liberty Mutual/Liberty Life Assurance Co.*[150] and the Seventh Circuit's decision in *Love v. National City Cor. Welfare Benefits Plan*.[151]

At least one Circuit Court misinterpreted *Nord*. In 2014 in *Menge v. AT&T, Inc.* the Tenth Circuit butchered *Nord* with this misstatement of the law: "[i]ndeed, plan administrators may, without explanation, 'credit reliable evidence that conflicts with a treating physician's evaluation.'"[152] *Nord* does not state administrators may disregard treating physician's opinions without explanation. It states there is no "heightened burden of explanation."[153] *Nord* states administrators may not disregard a claimant's evidence, including treating physicians' opinions.[154] Because of ERISA's notice requirements discussed below, contrary to *Menge*, courts interpret *Nord* as requiring administrators to explain their basis for disagreeing with treating physicians.[155]

For instance, in 2006 in *Evans v. Unum Provident Corp.* the Sixth Circuit stated: "a plan may not reject summarily the opinions of a treating physician, [and] must instead give reasons for adopting an alternative opinion."[156] The stated reasons must be objectively verifiable or

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Nat. City Corp., 574 F.3d 392, 397-98 (7th Cir. 2009)); Metropolitan Life Ins. Co. v. Conger, 474 F.3d 258, 265-68 (6th Cir. 2007); *Kamerer*, 334 F. Supp. 3d at 426.

149. 29 U.S.C. § 1133 (1974). Section 1133 also requires administrators to "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."

150. Kalish v. Liberty Mut., 419 F.3d 501, 510 (6th Cir. 2005).

151. *Love*, 574 F.3d at 397.

152. Menge v. AT&T, Inc., 595 F. App'x 811, 815 (10th Cir. 2014) (citing *Nord*, 538 U.S. at 834).

153. *Nord*, 538 U.S. at 831-34

154. *Id.* at 834.

155. *See e.g.*, *Kamerer*, 334 F. Supp. 3d at 426 (citing *Nord*, 538 U.S. at 823).

156. 434 F.3d at 877.

reasoned.[157] *Menge* is an outlier. As of May 2020, the author found only one case citing *Menge*, and it was on a different point.[158]

As explained in section I, F. above, the RSA imposes additional requirements on Unum not applicable to other ERISA administrators. Since the RSA, many courts have determined Unum unfairly disregarded attending physicians' opinions.[159] Apparently unaware of Unum's obligations under the Amended RSA, courts made these decisions based on regular ERISA duties.

Chistoff v. Unum Life Ins. Co. of Am.[160] is an example of a decision criticizing Unum for ignoring treating physicians. Recognizing an insurer may rely on reports from consulting non-examining physicians, the court explained the insurer must consider whether the conclusions are logical.[161] Plaintiff's treating physicians had specialized training and experience

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157. *Moon*, 405 F.3d at 381.

158. *See* Dahlin v. Wells Fargo Bank, no. 18-cv-00554-PAB-GFG, *12 (D. Colo. March 25, 2019).

159. *See e.g.*, *Christoff*, 2019 U.S. Dist. LEXIS 167889, at *28 (Unum's selective presentation of evidence and disregard for adamant opinions of claimant's doctors was abuse of discretion); Dewsnup v. Unum Life Ins. Co. of Am., 2018 U.S. Dist. LEXIS 208688, at *27 (D. Utah Dec. 10, 2018) (treating physicians best able to judge credibility); *Kamerer*, 334 F. Supp. 3d at 417, 426 Unum's reviewers offered no reasons to disagree with numerous other medical professionals); *Backman*, 191 F. Supp. 3d at 1066-67 (Unum favored reviews by employee doctors over every doctor who treated claimant); *Bencivenga*, 2015 U.S. Dist. LEXIS 39117 * 33 (calling Unum's approach suspect); *Doe*, 2014 U.S. Dist. LEXIS 162042, at *16-7 (Unum improperly disregarded opinions of treating doctors); *Hannon*, 988 F. Supp. 2d at 990 (Unum abused discretion by not articulating sufficient reasons for rejecting treating physicians); *Petrusich*, 984 F. Supp. 2d at 1119 (Unum improperly disregarded fact treating physicians supported disability); *Clarke*, 852 F. Supp. at 679 (Unum ignored treating physician's opinion that claimant could not work); Eichelmann v. Unum Life Ins. Co. of Am., 2008 U.S. Dist. LEXIS 92961, at *38-9 (E.D. Ark. Nov. 5, 2008) (improper for Unum to disregard specialist treating physicians in favor of employee non-specialist physicians); *Houston*, 246 F. App'x at 302 (Nord does not authorize administrator to disregard treating physicians' opinions); *Evans*, 434 F.3d at 879; Torgeson v. Unum Life Ins. Co. of Am., 466 F. Supp. 2d 1096, 1139 (N.D. Iowa 2006) (characterizing Unum's disregard of treating physicians' opinions as "cavalier"); *Mikrut*, 2006 U.S. Dist. LEXIS 92265, at *26-7 (Unum disregarded restrictions from treating physicians); *Utter*, 404 F. Supp. 2d at 1211 (ERISA fiduciary may not turn blind eye to uncontroverted medical opinions supporting disability); *Curtin*, 298 F. Supp. 2d at 156 (Unum had no basis to disbelieve information from treating physician); *Crespo*, 294 F. Supp. 2d at 994-95 (Unum's reliance on one-sided interpretation of an ambiguous note as basis to discount findings of treating physician was arbitrary and capricious); *Morgan*, 346 F.3d at 1178 (Unum disregarded opinions of two treating physicians); *Dirnberger*, 246 F. Supp. 2d at 932 (Unum failed to give sufficient weight to treating physicians).

160. No. 17-3512 (D. Minn. Sept. 30, 2019).

161. *Id.* at *22 (citing Willcox v. Liberty Life Assurance Co. of Boston, 552 F.3d 693, 700-01 (8th Cir. 2009)).

treating the disabling condition.[162] Further, "Unum's manual calls for deference to treating physicians' opinions and recognizes that the opinions of more experienced specialists should be weighed more heavily against those of less qualified doctors where applicable."[163] Unum's reviewers misstated the record and fabricated conflict and inconsistency in the records where none existed.[164] The court concluded Unum abused its discretion by terminating benefits because Unum's evidence was overwhelmed by contrary evidence.[165]

F. Failing to adequately communicate with attending physicians

The RSA requires Unum to communicate with attending physicians who support the claimant's disability. Unum included the requirement in its Benefits Center Claims Manual. In 2013 Unum Lead Appeal Specialist Jennifer Wellman explained the policy in an affidavit filed in *Vander-Leeuw v. First Unum Life Ins. Co.*[166] Wellman explained:

> Pursuant to the Manual, where a medical resource such as an onsite physician or clinical consultant reaches a conclusion different than that of the claimant's medical provider, the medical resource is to document the claim file with the basis for the differing medical conclusions, and make a peer-to-peer contact with the claimant's medical provider. The purpose of the peer-to-peer contact is to engage the claimant's medical provider in a conversation about the basis for the difference in medical opinions in order to obtain a coherent view of the claimant's medical conditions and restrictions and limitations.[167]

162. *Id.* at *23.
163. *Id.*
164. *Id.*
165. *Id.* at **23-24.
166. No. 11-CV-05685, Dkt. 31-5 (D. N.J. April 12, 2013).
167. *Id.* at ¶25 (Wellman affidavit).

Several courts criticized Unum's communications with treating physicians.[168] For instance, in *McCauley v. First Unum Life Ins. Co.*[169] the court found Unum seized on inconsistencies while avoiding following up with simple inquires to the treating physician.[170] The court described Unum's conductive as deceptive.[171] It found Unum abused its discretion, reversing the district court's summary judgment for Unum.[172]

G. Disregarding Social Security Administration's disability determination

Disabled claimants are eligible for social security disability benefits. Unum's policies allow it to reduce benefits by the amount received from Social Security. Unum and the SSA can reach different conclusions. An "administrator's decision cannot be considered arbitrary and capricious solely because [SSA] rendered a different decision."[173] However, "if the plan administrator (1) encourages the applicant to apply for Social Security disability payments; (2) financially benefits from the applicant's receipt of Social Security; and then (3) fails to explain why it is taking a position different from the SSA on the question of disability, the reviewing court should weigh this in favor of a finding that the decision was arbitrary or capricious."[174]

The RSA required Unum to "give significant weight to the [Social Security Administration's] determination that the claimant is disabled unless there is compelling evidence" that the award of SSDI was based on an error of law or abuse of discretion, inconsistent with applicable medical evidence; or inconsistent with the definition of disability contained in the applicable insurance policy.[175] And suppose Unum disagrees with SSA's finding. In that case, it must "articulate the reason and analysis" and "support that reason and analysis with reference to facts and information in

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168. *See e.g.*, Hart v. Unum Life Ins. Co. of Am., 253 F. Supp. 3d 1053, 1071-72 (N.D. Cal. 2017) (Unum's evidence of alleged phone call between doctors lacks credibility); *McCauley*, 551 F.3d at 136 (Unum avoided following up with treating physician); *Crespo*, 294 F. Supp. 2d at 994 (Unum's efforts to contact treating physician inadequate).

169. 551 F.3d 126.

170. *Id.* at 135-36.

171. *Id.* at 137.

172. *Id.* at 138.

173. Bennett v. Kemper Nat. Serv. Inc., 514 F.3d 547, 554 (6th Cir. 2008) (citation omitted).

174. *Id.*; *See also Mikrut,* 2006 U.S. Dist. LEXIS 92265, at *35 (finding Unum abused its discretion where it demanded a refund based on SSA's award while failing to consider SSA's disability determination).

175. RSA, *supra* note 2, at 8.

the claim file documentation."[176] Numerous courts found Unum improperly disregarded SSA's disability determination.[177]

Backman v. Unum Life Ins. Co. of Am.[178] is an example. Plaintiff was an account manager who stopped working due to back pain.[179] Unum initially agreed plaintiff was disabled and paid benefits.[180] With Unum's assistance, SSA approved plaintiff's claim.[181] After SSA's determination, Unum wrote plaintiff it would "apply significant weight to [SSA's] award of disability benefits."[182] Unum stated: "significant weight means that [SSA's] judgment that you were disabled at the time of the award will weigh heavily in your favor as we make ongoing disability determinations under your Long Term Disability policy."[183]

A year after SSA's approval, Unum terminated the plaintiff's benefits stating she was no longer disabled from performing the material and substantial duties of her occupation.[184] Unum claimed its decision differed from SSA's because Unum had additional information.[185] The court disagreed because Unum had not obtained SSA's file when it terminated benefits, meaning Unum was unaware SSA did not possess Unum's information.[186] The administrative record contradicted Unum's arguments to distinguish SSA's disability determination.[187] The court cited

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176. Chronister v. Unum Life Ins. Co. of Am., 563 F.3d 773, 776 (8th Cir. 2009) (quoting Unum's claims manual).

177. *See, e.g.*, *Tam*, 2020 U.S. Dist. LEXIS 186477, at *33 (finding SSA's disability determination suggests claimant suffers from some limitation to her work ability); *Christoff*, 2019 U.S. Dist. LEXIS 167889, at *34-35 (citing disregarding SSI findings as one of reasons supporting award of attorney fees); *Kamerer*, 334 F. Supp. 3d at 429 (Unum must prove more than it was reasonable to conclude mental illness contributed to disability); *Backman*, 191 F. Supp. 3d at 1078 (Unum disregarded SSA's decision after promising to give it substantial weight); *Chronister*, 563 F.3d at 776 (Unum's failure to follow internal procedures regarding SSA's determination required by RSA was egregious); *Zurndorfer*, 543 F. Supp. 2d at 262 (observing Unum assisting plaintiff in obtaining SSA disability meant Unum believed plaintiff disabled or Unum sought to defraud SSA); *Mikrut*, 2006 U.S. Dist. LEXIS 92265, at *27-8 (Unum disregarding SSA's decision is probative evidence Unum's conflict influenced decision); Curtin, 298 F. Supp. 2d at 158 (SSA decision is relevant). *See also Hines*, 110 F. Supp. 2d at 468 (finding in pre-RSA decision SSA's decision is substantial evidence claimant disabled).

178. 191 F. Supp. 3d 1053 (N.D. Cal. 2016).

179. *Id.* at 1056.

180. *Id.* at 1057.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1070.

186. *Id.*

187. *Id.* at 1071.

Unum's disregard of SSA's determination as one of several factors supporting reversal of Unum's termination.[188]

A variation of Unum disregarding SSA's disability determination is blaming the claimant's disability on mental illness and invoking the policy's two-year limit on disability due to mental illness. This allows Unum to disregard SSA's disability determination. The court rejected this tactic in *Kamerer v. Unum Life Ins. Co. of Am.*[189], finding Unum failed to meet its burden to show claimant's mental conditions was a but-for cause of her inability to work.[190]

H. Fabrication of evidence or misstating the administrative record

Cherry-picking and disregarding evidence are one thing. Fabricating evidence reaches a higher level of misconduct. Several courts found Unum employees fabricated evidence to support denial or termination of benefits.[191] Typically the people fabricating evidence were Unum's in-house medical employees.

For instance, in *Petrusich v. Unum Life Ins. Co. of Am.*[192], the court criticized Unum's reviewing physician Dr. Kevin Hayes for making multiple misstatements used to justify termination and denial of claimant's appeal.[193] The court determined: "these inaccurate statements support the conclusion that Unum conducted a superficial and cursory review rather than performing an adequate investigation of [claimant's] claim as required by law."[194]

188. *See id.*

189. 334 F. Supp. 411.

190. *Id.* at 428.

191. *See, e.g.*, *Tam*, 2020 U.S. Dist. LEXIS 186477, at *28 (finding Unum's physicians mischaracterized and/or ignored record evidence); *Petrusich*, 984 F. Supp. 2d at 1120-21 (Unum physicians made misstatements in the record); *Stephan*, 697 F.3d at 937 (Unum mischaracterized record); *McCauley*, 551 F.3d at 138 (Unum deceptively mischaracterized its rationale for denying benefits).

192. 984 F. Supp. 2d 1112.

193. *Id.* at 1120-21.

194. *Id.* at 1121.

IV. EVALUATING UNUM'S POST-RSA CONDUCT

A. Unum's characterization of its post-RSA conduct

Unum can cite a list of winning decisions in the last decade.[195] These decisions do not disprove Unum's pattern of biased claims administration.

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195. *See, e.g.*, Dorris v. Unum Life Ins. Co. of Am., 949 F.3d 297 (7th Cir. 2020); Feeney v. Unum Life Ins. Co. of Am., No. 18-1302, 2020 WL 1452099 (C.D. Ill. Mar. 25, 2020); Hinchey v. First Unum Life Ins. Co., No. 17-CV-08034 (NSR), 2020 WL 1331898 (S.D.N.Y. Mar. 20, 2020); Luzzi v. Unum Life Ins. Co. of Am., No. SACV 18-1506 JVS (JDEX), 2020 WL 945406 (C.D. Cal. Jan. 3, 2020); Gary v. Unum Life Ins. Co. of Am., 388 F. Supp. 3d 1254 (D. Or. 2019); Irving v. Unum Life Ins. Co. of Am., No. PJM 17-3206, 2019 WL 1331237 (D. Md. Mar. 25, 2019); Calcagno v. Unum Life Ins. Co. of Am., No. 3:17-CV-01890-YY, 2019 WL 2488716 (D. Or. Feb. 19, 2019), *report and recommendation adopted*, 2019 WL 2746729 (D. Or. July 1, 2019); Wittmann v. Unum Life Ins. Co. of Am., 793 F. App'x 281 (5th Cir. 2019); Mickel v. Unum Grp., 771 F. App'x 430 (9th Cir. 2019); O'Neill v. Unum Life Ins. Co. of Am., No. 18-1382, 2018 WL 7959523 (6th Cir. Nov. 19, 2018); Jones v. Unum Life Ins. Co., 730 F. App'x 170 (4th Cir. 2018); Dardick v. Unum Life Ins. Co. of Am., 739 F. App'x 481 (10th Cir. 2018); Gilewski v. Provident Life & Accident Ins. Co., 683 F. App'x 399 (6th Cir. 2017); Stoddard v. First Unum Life Ins. Co., 706 F. App'x 138 (4th Cir. 2017); Crox v. Unum Grp., Corp., 655 F. App'x 490 (6th Cir. 2016); Russell v. Catholic Healthcare Partners Emp. Long Term Disability Plan, 614 F. App'x 271 (6th Cir. 2015); St. Onge v. Unum Life Ins. Co. of Am., 559 F. App'x 28 (2d Cir. 2014); Truitt v. Unum *Life Ins. Co. of Am., 729 F.3d 497 (5th Cir. 2013); Floerke v. SSM Health Care Plan,* No. 17-CV-567-WMC, 2018 WL 5045770 (W.D. Wis. Oct. 17, 2018); *Cox v. Allin Corp. Plan,* No. C 16-4675 SBA, 2018 WL 9543021 (N.D. Cal. Sept. 28, 2018); *Koyuncu v. First Unum Life Ins. Co.,* No. 1:16-CV-04380-ELR, 2018 WL 9415108 (N.D. Ga. Sept. 28, 2018); *Arabaitzis v. Unum Life Ins. Co. of Am.,* No. 16-1273 TNM/DAR, 2018 WL 4610893 (D.D.C. Sept. 11, 2018)*, report and recommendation adopted,* No. 1:16-CV-01273 (TNM), 2018 WL 6530581 (D.D.C. Sept. 26, 2018), *reconsideration denied,* 351 F. Supp. 3d 11 (D.D.C. 2018); Reidy v. Unum Life Ins. Co. of Am., No. PX-16-2926, 2018 WL 3756740 (D. Md. Aug. 7, 2018); Western v. Unum Life Ins. Co. of Am., No. CV 16-9527-JFW (ASX), 2018 WL 6071090 (C.D. Cal. July 3, 2018), aff'd, No. 18-56039, 2020 WL 1277619 (9th Cir. Mar. 17, 2020); Dahlka v. Unum Life Ins. Co. of Am., No. 17-CV-245-BBC, 2018 WL 2944518 (W.D. Wis. June 12, 2018); Price v. Unum Life Ins. Co. of Am., No. GJH-16-2037, 2018 WL 1352965 (D. Md. Mar. 14, 2018), aff'd, 746 F. App'x 231 (4th Cir. 2018); Demko v. Unum Life Ins. Co. of Am., No. CV 17-2929-R, 2018 WL 5094893 (C.D. Cal. Mar. 13, 2018), aff'd, 780 F. App'x 537 (9th Cir. 2019); Gilrane v. Unum Life Ins. Co. of Am., No. 1:16-CV-403, 2017 WL 4018853 (E.D. Tenn. Sept. 12, 2017); Price v. Tyson Long-Term Disability Plan, No. 5:16-CV-05075, 2017 WL 3567531 (W.D. Ark. Aug. 17, 2017); Stone v. Unum Life Ins. Co. of Am., No. 15-CV-0630-CVE-PJC, 2017 WL 57831 (N.D. Okla. Jan. 5, 2017); Bellard v. Unum Life Ins. Co. of Am., No. 15-0428, 2016 WL 7108577 (W.D. La. Dec. 5, 2016); Correia v. Unum Life Ins. Co. of Am., No. 14 CIV. 7690 (KPF), 2016 WL 5462827 (S.D.N.Y. Sept. 29, 2016); Arrington v. Unum Life Ins. Co. of Am*.,* No. 1:14-CV-549, 2016 WL 7115970 (E.D. Tex. Sept. 13, 2016), *report and recommendation adopted,*

2016 WL 7104040 (E.D. Tex. Dec. 6, 2016); Allen v. Unum Life Ins. Co. of Am., No. 3:15-CV-219-JAG, 2016 WL 4571451 (E.D. Va. Sept. 1, 2016); Hans v. Unum Life Ins. Co., No. CV 14-02760-AB (MRWX) 2015 WL 5838462 (C.D. Cal. Oct. 5, 2015); Uqdah v. Unum Life Ins. Co. of Am., No. 14-6367 (SDW)(SCM), 2015 WL 5572678 (D.N.J. Sept. 21, 2015); Usztics v. Unum Life Ins. Co. of Am., No. 14-CV-11940, 2015 WL 5013854 (E.D. Mich. Aug. 24, 2015); Bilyeu v. Morgan Stanley Long-Term Disability Plan, No. CV-08-02071-PHX-SRB, 2015 WL 4134447 (D. Ariz. June 2, 2015), aff'd, 711 F. App'x 380 (9th Cir. 2017); Hinshaw v. Unum Life Ins. Co. of Am., No. CV 14-06157 DDP (PLAX), 2015 WL 2127085 (C.D. Cal. May 6, 2015), aff'd, 677 F. App'x 433 (9th Cir. 2017); Avena v. Unum Life Ins. Co. of Am., No. 13-5947, 2015 WL 1726173 (E.D. La. Apr. 15, 2015); Bennett v. Unum Life Ins. Co. of Am., No. 3:13-CV-426, 2015 WL 1476669 (S.D. Ohio Mar. 31, 2015); Swanson, 2015 WL 339313; Schussheim v. First Unum Life Ins. Co., 80 F. Supp. 3d 360 (E.D.N.Y. 2015); Decorpo v. Unum Life Ins. Co. of Am., No. 13-CV-484-LM, 2014 WL 4794345 (D.N.H. Sept. 25, 2014); Nelson v. Unum Grp. Corp., No. 1:13-CV-58, 2014 WL 3908183 (E.D. Tenn. Aug. 11, 2014); McGill v. Unum Life Ins. Co. of Am., No. 2:13-CV-00484, 2014 WL 2169329 (S.D. Ohio May 23, 2014); Ellis v. Unum Life Ins. Co. of Am., No. 2:13-CV-00080-JAW, 2014 WL 235212 (D. Me. Jan. 22, 2014); Pini v. First Unum Life Ins. Co., 981 F. Supp. 2d 386 (W.D. Pa. 2013); Hilton v. Unum Life Ins. Co. of Am., 967 F. Supp. 2d 1114 (E.D. Va. 2013); McKeown v. Unum Life Ins. Co. of Am., No. 12-2041, 2013 WL 4501183 (E.D. La. Aug. 21, 2013); Gonzales v. Unum Life Ins. Co. of Am., No. 09-CV-0468-AJB, 2013 WL 12057481 (S.D. Cal. Aug. 12, 2013), aff'd, 622 F. App'x 704 (9th Cir. 2015); Vander-Leeuw v. First Unum Life Ins. Co., No. 11-5685, 2013 WL 3479433 (D.N.J. July 9, 2013); Earhart v. Unum Life Ins. Co. of Am., No. 11-14891, 2013 WL 12180911 (E.D. Mich. July 3, 2013); Rice-Peterson v. Unum Life Ins. Co. of Am., No. 11-14565, 2013 WL 1250457 (E.D. Mich. Mar. 26, 2013); Neilson v. Unum Life Ins. Co. of Am., No. CCB-11-3317, 2013 WL 1010361 (D. Md. Mar. 13, 2013); Hegger v. Unum Life Ins. Co. of Am., No. C 11-04229 WHA, 2013 WL 785523 (N.D. Cal. Mar. 1, 2013); Mercado v. First Unum Life Ins. Co., No. 11 CIV. 4272 (RMB) (RLE) 2013 WL 633100 (S.D.N.Y. Feb. 21, 2013); Rozek v. New York Blood Ctr., 925 F. Supp. 2d 315 (E.D.N.Y. 2013); Franks v. Unum Life Ins. Co. of Am., No. 1:12-CV-166, 2013 WL 449566 (W.D. Mich. Feb. 6, 2013); King v. Unum Life Ins. Co. of Am., 913 F. Supp. 2d 290 (W.D. La. 2012); Johnson v. Unum Grp., No. CIV-11-306-FHS, 2012 WL 6569281 (E.D. Okla. Dec. 17, 2012); James v. Unum Life Ins. Co. of Am., No. 10 CIV. 9120(GBD), 2012 WL 4471541 (S.D.N.Y. Sept. 27, 2012), *aff'd,* 531 F. App'x 126 (2d Cir. 2013); Murphy v. Unum Grp., No. CV-11-104-M-DWM, 2012 WL 2359491 (D. Mont. June 20, 2012); St. Clare v. Unum Life Ins. Co. of Am., No. 1:11-0067-JMS-MJD, 2012 WL 1666619 (S.D. Ind. May 11, 2012); Preizler v. First Unum Life Ins. Co., No. 10 CV 8511(VB,), 2012 WL 1871640 (S.D.N.Y. Apr. 19, 2012); Trimble v. Unum Life Ins. Co. of Am., 846 F. Supp. 2d 999 (W.D. Ark. 2012); McClellan v. Unum Life Ins. Co. of Am., No. 3:11-CV-03022, 2012 WL 204157 (W.D. Ark. Jan. 24, 2012); Kaye v. Unum Grp./Provident Life & Acc., No. 09-14873, 2012 WL 124845 (E.D. Mich. Jan. 17, 2012); Yu-Wen Lu v. Unum Grp., No. 09-CV-03080 RMW, 2012 WL 44636 (N.D. Cal. Jan. 9, 2012); Fornash v. Unum Life Ins. Co. of Am., No. 2:10-205-DCR, 2011 WL 4715163 (E.D. Ky. Oct. 5, 2011); Eppley v. Provident Life & Acc. Ins. Co., 789 F. Supp. 2d 546 (E.D. Pa. 2011); Kagan v. Unum Provident, 775 F. Supp. 2d 659 (S.D.N.Y. 2011); Douglas v. First Unum Life Ins. Co., 429 F. App'x 24 (2d Cir. 2011); Lopes v. First Unum Life Ins. Co., No. 09-CV-2642 (RRM) (SMG), 2011 WL 1239899 (E.D.N.Y. Mar. 30, 2011); Schnare v. Unum Life Ins. Co., No. 07-0910-CV-W-FJG, 2010 WL 11619469 (W.D. Mo. Oct. 29, 2010); Daniel v. Unum Provident

Since 2004 Unum has argued that its era of abusive practices ended with the RSA. For instance, in *Murphy v. First Unum Life Ins. Co.*,[196] Unum argued its restructuring of claims practices connected with the RSA obviated the need for discovery related to Unum's conflict of interest.[197] The court rejected the argument, finding "the Court cannot take for granted First Unum's claim to have mended its ways."[198]

Often, however, courts agree with Unum's argument.[199] These decisions are surprising because of the many cases where Unum repeated the same unscrupulous practices the RSA addressed. To better understand

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Corp., No. CV-04-1073 (SJF) 2010 WL 8292157 (E.D.N.Y. Oct. 27, 2010); Richards v. Unum Life Ins. Co. of Am., No. 1:09-CV-953, 2010 WL 4117364 (W.D. Mich. Oct. 19, 2010); Owens v. Rollins, Inc., No. 1:08-CV-287, 2010 WL 3843765 (E.D. Tenn. Sept. 27, 2010); Hagopian v. Johnson Fin. Grp., Inc. Long-Term Disability Plan, an ERISA Plan, No. 09-C-926, 2010 WL 3808666 (E.D. Wis. Sept. 23, 2010); Corby v. Unum Life Ins. Co. of Am., No. C 09-5890 WHA, 2010 WL 3768040 (N.D. Cal. Sept. 21, 2010); Byrd v. Unum Life Ins., No. H-09-2822, 2010 WL 3119919 (S.D. Tex. Aug. 5, 2010), aff'd sub nom. Byrd v. Unum Life Ins. Co. of Am., 421 F. App'x 397 (5th Cir. 2011); Bush v. Unum Life Ins. Co. of Am., No. H-09-CV-1589, 2010 WL 3064076 (S.D. Tex. Aug. 3, 2010); Van Wright v. First Unum Life Ins. Co., 740 F. Supp. 2d 397 (S.D.N.Y. 2010); Burton v. Unum Life Ins. Co. of Am., No. A-09-CA-532-SS, 2010 WL 2430767 (W.D. Tex. June 14, 2010); Blackwell v. Unum Ins. Co. of Am., No. 04-CV-060-GKF-PJC, 2010 WL 1257587 (N.D. Okla. Mar. 24, 2010); Richardson v. Triad Hosps., Inc. Grp. Long Term Disability Plan, No. 4:09-104-TLW, 2010 WL 503103 (D.S.C. Feb. 8, 2010); Uquillas v. Unum Life Ins. Co. of Am., No. CV 07-00542 MMM (AJWx), 2010 WL 330255 (C.D. Cal. Jan. 21, 2010); Rosby v. Unum Life Ins. Co. of Am., 664 F. Supp. 2d 962 (E.D. Ark. 2009), aff'd sub nom. Rosby v. Unum Life Ins. Co., 391 F. App'x 579 (8th Cir. 2010).

196. 15-cv-820 (E.D.N.Y. Feb. 9, 2016).

197. *Murphy*, No. 15-cv-820, *10 (E.D.N.Y. Feb. 9, 2016). *See also* Wittman v. Unum Life Ins. Co. of Am., No. 19-30254, *10 (5th Cir. Dec. 6, 2019) (acknowledging court previously recognized Unum adopted new claims-handling practices that helped cure its history of biased administration) (citing *Truitt*, 729 F.3d at 514).

198. *Murphy*, No. 15-cv-820, *10 (E.D.N.Y. Feb. 9, 2016).

199. *See, e.g.*, Williamson v. Unum Life Ins. Co. of Am., No. CIV-19-481-R, 2019 WL 6683116, at *5 (W.D. Okla. Dec. 6, 2019) (plaintiff failed to establish how Unum's claim practices from over a decade ago had anything to do with current claim); Brugler v. Unum Grp., No. 4:15-CV-01031, 2019 WL 4452226, at, *42-3 (M.D. Penn. Sept. 17, 2019) (Unum presented evidence in other litigation they changed internal procedures in positive way); Kamerer v. Unum Life Ins. Co. of Am., 251 F. Supp. 3d 349, 352 (D. Mass. 2017) (court will not assume Unum biased because of claims practice more than a decade ago); *Swanson*, 2015 WL 339313, at, *9 (Unum's abusive practices primarily relates to practices used in decade ending in 2003); Mercado, 2013 WL 633100, at *43 (referencing Unum's evidence that it changed its internal procedures); Taylor v. Unum Life Ins. Co. of Am., No. 3:11-cv-2602-N, 2013 U.S. Dist. LEXIS 74357, at *10 (N.D. Tex. Feb. 20, 2013) (concern about Unum's history tempered by new claims-handling practices) (citing Burton, 2010 WL 2430767, at *10); *Uquillas*, 2010 WL 330255 , at *17 (plaintiff made no effort to show how Unum's "parsimonious claims-granting history" similar to conduct in instance case).

these decisions, the author reviewed plaintiffs' briefs filed in support or opposition of summary judgment. A recurrent pattern was plaintiffs thinly supported their arguments on Unum's biased history and did not link the practices to conduct in plaintiffs' claims.

For instance, in *Williamson v. Unum*[200], the only Unum case plaintiff cited was *Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997, 1002 (10th Cir. 2004).[201] In *Swanson v. Unum*, the only Unum case plaintiff cited was *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917, 933-34 (9th Cir. 2012).[202] Cases the court cited in Swanson included *Jones v. Unum Provident Corp.*[203] In *Jones*, the only Unum cases plaintiff cited were Radford (2008) and *Torres v. Unum Life Ins. Co. of America*, 405 F.3d 670 (8th Cir. 2005). In B*rugler v. Unum*, the court stated plaintiff's "historical research appears to be out of date and out of step with Defendants' current practices."[204]

In *Kamerer v. Unum*, Plaintiff focused on the RSA and cited only a few post-RSA cases focusing on pre-RSA conduct.[205] There is also an important historical footnote to the *Kamerer* decision Unum cites that courts omit. Unum ultimately lost *Kamerer* on the merits in a blistering opinion that echoed Unum's pre-2004 claims practices.[206] The court found: "none of Unum's reviewers offered any reasons to disagree with the numerous [attending physicians] and without any explanation 'arbitrarily refuse[d] to credit' their findings."[207]

In *Mercado v. First Unum*, Plaintiff cited *McCauley* (2008), which cited *Radford* (2004) and the 2007 law review article.[208] In *Taylor v. Unum*, plaintiff's brief cited no cases after the 2007 law review article.[209]

In B*urton v. Unum*, the briefs were sealed, but the court noted plaintiff conceded Unum changed its conduct after *Glenn*.[210] In *Uquillas v. Unum*, the only Unum cases plaintiff cited were *Radford* (2004) and

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200. No. CIV-19-481-R (W.D. Okla. Dec. 6, 2019)

201. Plaintiff's brief in Williamson is linked here.

202. In *Stephan* the court reversed the district court for failing to consider Unum's biased history, but cited pre-2003 authority. 697 F.3d at 933-34.

203. 596 F.3d 433 (8th Cir. 2010).

204. Brugler v. Unum, No. 4:15-CV-01031, *42 (M.D. Pa. Sept. 17, 2019).

205. Plaintiff's Motion for Discovery, Kamerer v. Unum Life Ins. Co. of Am., 334 F. Supp. 3d 411 (D. Mass. 2018).

206. *See Kamerer*, 334 F. Supp. 3d 411.

207. *Id.* at 426 (citing Black & Decker Disability Plan v. Nord, 538 U.S. 822, 823 (2003)).

208. Plaintiff's memorandum in *Mercado* is linked here.

209. Plaintiff's brief in *Taylor* is linked here.

210. Burton v. Unum Life Insurance Company of Am., No. A-09-CA-532-SS, at *18 (W.D. Tex. June 14, 2010).

McCauley (2008).[211] The court also noted plaintiff made did not show similarities between Unum's historical practices and its conduct in her claim.[212] In *Meyer v. Unum Life Ins. Co. of Am.*,[213] plaintiff's brief focused on the Unum reviewing physician rather than a survey of Unum's historical conduct.[214]

B. The myth of the walled off Unum claims department

In *Metropolitan Life Ins. Co. v. Glenn*, the Supreme Court stated an administrator's conflict "would prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits."[215] As previously noted, some courts have found Unum did so based on affidavits Unum submitted on the conflicts issue. Other courts were unconvinced.[216] However, comparing Unum affidavit to testimony of a company executive reveals Unum's ongoing link between claims and finances.

In 2013 Unum submitted the affidavit of Jennifer Wellman in *Vander-Leeuw v. First Unum Life Ins. Co.*[217] Wellman was a Unum Lead Appeal Specialist.[218] Wellman's affidavit included:

- Claims department has no role or responsibility in the management, reporting, or other functions regarding Unum's finances;[219]
- The claims department and appeal unit do not have to seek approval from financial underwriters;[220]

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211. Plaintiff's trial brief in *Uquillas* is linked here.

212. Uquillas v. Unum Life Insurance Company, No. CV 07-00542 MMM (AJWx), at *41 (C.D. Cal. Jan. 21, 2010).

213. 96 F. Supp. 3d 1234 (D. Kan. 2015).

214. Plaintiff's brief in *Meyer* is linked here.

215. Metro. Life. Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008).

216. *See, e.g.*, *Correia*, 2016 WL 5462827, at *68 (stating evidence established Unum failed to wall off claims personnel from firm finances); *Schindler*, 2013 U.S. Dist. LEXIS 116837, at *63 (finding no evidence Unum walled off claims administrators from persons interested in firm finances and management checks were ineffective).

217. Affidavit of Jennifer Wellman, 2:11-cv-05685-JLL-JAD, Dkt. 31-5 (April 12, 2013).

218. *Id.* ¶ 1.

219. *Id.* ¶ 14.

220. *Id.* ¶ 16.

- Employees not evaluated based on amount or number of claims paid or denied;[221]
- Financial underwriters do not advise or influence the claims department or appeal unit on whether to pay claims;[222] and
- Financial executives not involved in claim decisions.[223]

The 2018 deposition of former Unum Assistant Vice President of Claims Paul Peter reveals Wellman's testimony was misleading.

Plaintiffs deposed Peter on December 7, 2018 in *Biliack v. The Paul Revere Life Ins. Co.*[224] Plaintiff submitted Peter's deposition as an exhibit in *Jacob v. Unum Life Ins. Co. of Am.*[225] Peter worked at Unum for thirty years.[226] He explained Unum's organization structure:

- The claims department is called the Benefits Operation;[227]
- Claims adjusters are called Disability Benefits Specialists (DBS);[228]
- Disability benefits specialists report to Directors;[229]
- Directors have an inventory of 250 – 300 active claims;[230]
- Six Directors report to each Assistant Vice Presidents of Claims;[231]
- Vice Presidents of Claims were responsible for 1,500 – 1,800 active claims;[232]
- Assistant Vice Presidents reported to the Vice President of Individual Disability.[233]

There were 3-4 Assistance Vice Presidents of Claims in 2016.[234] Although Peter did not identify the total number of active claims, the data provided suggests 4,500 – 7,200 active claims.

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221. *Id.* ¶ 11.
222. *Id.* ¶ 17.
223. *Id.* ¶ 18.
224. No. 2:16-cv-03631-DJH (D. Ariz.).
225. Deposition of Paul Peter, Jacob v. Unum Life Ins. Co. of Am., 1:19-cv-00131-TRM-CHS, Dkt. 32-2 (E.D. Tenn. Nov. 27, 2019).
226. *Id.* 9.
227. *Id.* 17.
228. *Id.* 18.
229. *Id.*
230. *Id.* 14.
231. *Id.* 12, 18.
232. *Id.* 14.
233. *Id.* 19.
234. *Id.* 18.

Contrary to Wellman's affidavit, Peter testified finances infiltrated the claims department:

- Every open claim has a reserve dollar amount.[235]
- Reserves were released when recovery was made.[236]
- Recovery was made when Unum denied an initial claim or terminated a previously accepted claim.[237]
- Unum has monthly recovery plans setting targets for recoveries.[238]
- The targets include total number of claims and dollars to recover per month.[239]
- Recovery plans had targets for each Director.[240]
- Each Director's planned recovery was $1-2 million per month.[241]
- Each Assistant Vice President's planned recovery was $6-12 million monthly.[242]
- Directors and Assistant Vice Presidents were accountable for meeting their recovery targets.[243]
- Directors' and Assistant Vice Presidents' incentive compensation was based in part on the measure of actual recovery results.[244]
- Communication of recovery plans was done orally.[245]
- Assistant Vice Presidents and Directors wrote down their budgeted monthly recovery targets, but did not retain them.[246]
- Peter did not know why Unum's practice was to communicate recovery plans orally.[247]

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235. *Id.* 62.
236. *Id.* 38.
237. *Id.* 61.
238. *Id.* 57.
239. *Id.* 57-58.
240. *Id.* 58.
241. *Id.* If there were eighteen directors this resulted in target recoveries of $18-36 million per month.
242. *Id.* 58-59.
243. *Id.* 84.
244. *Id.* 127.
245. *Id.* 128-29.
246. *Id.* 131-32.
247. *Id.* 133.

- Unum did not provide financial information to Disability Benefits Specialists.[248]

Based on Paul's testimony, if Wellman's carefully worded affidavit is technically accurate, it is misleading. Unum does not wall off finances from claims. Financial pressure clearly influences claims decisions. Unum is uncomfortable with the optics of its system since it destroys recovery target data.

Withholding recovery targets from low level Disability Benefits Specialists does not absolve Unum from criticism. Most organizations do not share robust financial information with non-executives. Law firms are one example where non-partners rarely receive financial reports.

Unum's Disability Benefits Specialists may not know their Director's recovery targets, but they must know targets exist. Arguably, knowing Directors have targets for denials and/or terminations without knowing when targets are met would cause Disability Benefits Specialists to feel constant pressure to deny or terminate claims, whether or not needed to satisfy the monthly target.

C. Losing lawsuits involving termination of benefits

Another pattern in Unum cases is a proverbial forest hiding in the trees. Most decisions identifying Unum's recurrent conduct discussed above involve terminations of benefits previously granted, not initial denials. Cases cited in this article involving terminations of benefits include: *Chistoff v. Unum*[249], *Kamerer v. Unum*[250], *Clark v. Unum*[251], *Dimopoulou v. First Unum*[252], *Hart v. Unum*[253], *Backman v. Unum*[254], *Hertan v. Unum*[255], *Bencivenga v. Unum*[256], *Doe v. Unum*[257], *Freeland v. Unum*[258], *Hannon v. Unum*[259], *Eichelmann v. Unum*[260], *Houston v.*

248. *Id.* 118.
249. 2019 U.S. Dist. LEXIS 167889.
250. 334 F. Supp. 3d 411.
251. 2018 U.S. Dist. LEXIS 175341.
252. 162 F. Supp. 3d 250.
253. 253 F. Supp. 3d 1053.
254. 191 F. Supp. 3d 1053.
255. 111 F. Supp. 3d 1075.
256. 2015 U.S. Dist. LEXIS 39117.
257. 35 F. Supp. 3d 182.
258. 2013 U.S. Dist. LEXIS 116931.
259. 988 F. Supp. 2d 981.
260. 2008 U.S. Dist. LEXIS 92961.

Unum[261], *Glockson v. Unum*[262], *Chronister v. Unum*[263], *Mikrut v. Unum*[264], *Evans v. Unum*[265], *Moon v. Unum*[266], *Utter v. Unum*[267], *Crespo v. Unum*[268], *Morgan v. Unum*[269] and *Holzschuh v. Unum*.[270]

Paul Peter's testimony suggests the reason for this pattern. Unum imposes powerful financial incentives on directors to terminate claims. ERISA's liability limitations protect Unum from punitive damages. The result is a perverted system that turns fiduciary law on its head.

V. EVALUATING UNUM'S POST-RSA CONDUCT

A. Unum misled courts regarding its so-called improved claims handling

Since *Glenn* and the RSA, some courts recognize Unum's so-called improved claims-handling practices.[271] These courts reason that because of the 'improved' claims-handling practices, Unum's institutional bias noted in *Glenn* and other pre-RSA cases is stale and does not merit significant weight.[272] Unum misled these courts.

Unum's claims-handling practices did not improve after the RSA. Contrary to its intent, the RSA provided Unum a playbook to continue its unscrupulous practices under a thin layer of respectability. Courts and many claimants' attorneys took the RSA at face value and assumed Unum corrected its institutional bias. Unum did more than silently benefit from this misperception—it promoted it. Unum used the RSA's existence to argue its biased claims administration was ancient history. It was a ruse. Instead of a sword for claimants to keep Unum in check, the RSA became

261. 246 F. App'x 293.
262. 2006 U.S. Dist. LEXIS 47613.
263. 563 F.3d 773.
264. 2006 U.S. Dist. LEXIS 92265.
265. 434 F.3d 866.
266. 405 F.3d 373.
267. 404 F. Supp. 2d 1204.
268. 294 F. Supp. 2d 980.
269. 346 F.3d 1173.
270. 2002 WL 1609983.
271. *See, e.g.*, *Truitt*, 729 F.3d at 514 (citing Daniel v. UnumProvident Corp., No. CV-04-1073, 2010 WL 8292157, at *15 (E.D.N.Y. Oct. 27, 2010); (Hagopian v. Johnson Fin. Grp., Inc. Long-Term Disability Plan, No. 09-C-926, 2010 WL 3808666, at *11-12 (E.D. Wis. Sept. 23, 2010)); *Kamerer* 251 F. Supp. 3d at 352 (citing Swanson v. Unum Life Ins. Co., No. 13-CV-4107-JAR, 2015 WL 339313, at *8 (D. Kan. Jan. 26, 2015)); (Mercado v. First Unum Life Ins. Co., 2013 WL 633100, at *27 (S.D.N.Y. 2013); Burton v. Unum Life Ins. Co. of Am., 2010 WL 2430767, at *11 (W.D. Tex. 2010)).
272. *Kamerer*, 251 F. 3d at 352.

a shield protecting Unum from scrutiny even when the Supreme Court said it was warranted.

B. Unum has an ongoing pattern of biased claims administration

That Unum has lost many ERISA cases where it had a fiduciary duty to the claimant is not a pattern of biased claims administration. That alone is just a list of cases Unum lost. There is a pattern of biased claims administration because Unum repeatedly loses cases for the same underlying reasons. Pervasive in Unum terminations are cherry-picking from the record, disregarding claimants' favorable evidence, disregarding opinions of treating physicians and SSA disability determinations, mischaracterizing and not analyzing claimants' job duties and related improper practices. There are too many cases for these to be honest mistakes. It is a playbook and Unum has no interest in correcting its biased conduct. If it did, it would have done so years ago when repeated court losses exposed the pattern.

C. Unum's disability benefit terminations deserve heightened scrutiny

Unum's terminations should be viewed with heightened scrutiny compared to decisions denying initial claims. Unlike initial claims, terminations are where Unum previously decided claimant could not perform their occupation. Claimant's continued inability to work is usually supported by their treating physicians and the SSA's disability determination. Claimant's do not resubmit claims. Unum scours its files and selects claims for termination. Unum's justifications are manufactured to justify termination. The result is biased and flawed decision making.

There is no discernible change in Unum's claims administration after 2004. There is little or no evidence Unum changed its practices. Courts finding Unum changed its practices assume that fact based on the RSA. No court that made a comprehensive analysis of Unum's documented practices found Unum's biased conduct ended. Now sixteen years since the RSA, it is clear Unum never changed.

D. Unum profits from its unscrupulous practices

When a court overturns Unum's termination of a claimant's disability benefits, the claimant is made whole only if the court awards attorney fees and claimant had financial resources to withstand not timely receiving benefits. Conversely, Unum only pays the benefits owed, its attorney fees and occasionally, claimant's attorney fees. Math explains Unum's motivation.

For example, assume four claims where Unum terminates benefits, recovering $200,000 per claim in reserves. Next, assume Unum claimants sue Unum for the terminations and Unum spends $50,000 defending each claim.[273] Unum must win only one in four lawsuits to break even:

- Loss: -$50,000 (attorney fees; benefits reinstated)
- Loss: -$50,000 (attorney fees; benefits reinstated)
- Loss: -$50,000 (attorney fees; benefits reinstated)
- Win: $150,000 (-$60,000 attorney fees; +$200,000 benefits saved)

Unum wins more than one in four lawsuits. It may win more than half. Unum should win some lawsuits—not every termination is bogus. But judging by weak plaintiff briefs in many cases, inadequate briefing is a factor in many Unum wins. Unum pits experienced attorneys supervised by in-house counsel against plaintiff attorneys who are often novices in ERISA litigation. An axiom in the ERISA defense bar is: "file your motion for summary judgment; send your bill; and victory!" They would not find it funny if it did not ring true.

Not every termination ends in a lawsuit. An unknown percentage of claimants cannot find an attorney to take their case or do not even try. This percentage is greater than zero and known only to Unum. It does not take a mathematician to compute the percent of Unum's profit in these claims: 100%.

E. Unum usually also has more experienced attorneys

Companies sued often develop a stable of experienced attorneys. This gives the defense attorneys two advantages: (1) expertise in the law; and (2) institutional knowledge of the defendant. Consider the personal injury plaintiff attorney who files an automotive products liability case. Not only will she face an auto liability specialist, but she could also be against an attorney who specializes in the *defect* at issue. Similarly, in pharmaceutical litigation teams of lawyers focus on discrete fact or legal issues. It is a huge advantage for corporate defendants.

Few plaintiff attorneys focus on ERISA litigation due to the uneven playing field. In an era of tort reform legislation and judges and juries influenced by tort reform campaigns, many formerly viable types of cases

273. $60,000 is the estimated amount based on 200 hours of attorney time at an average billed rate of $300 per hour.

have been virtually eliminated. Mandatory arbitration clauses killed most consumer litigation and closed the courthouse doors for many victims.

ERISA cases are hard to win. Most plaintiff attorneys would rather focus on practice areas like personal injury that have a preponderance of the evidence burden of proof. This includes many of the most skilled plaintiff attorneys—the ones who stand the best chance of winning ERISA cases. The few attorneys who make a living representing ERISA claimants are unique. They are smart and talented. They could earn more money handling different cases and know it. They do not care. They believe in what they are doing and their clients' cause. Without these attorneys Unum and other unscrupulous insurers would act with impunity.

F. Congress should address ERISA's inequities

Congress could fix ERISA's structural inequities if it had the inclination to do so. All or a combination of the following would even the playing field:

- De novo review for all claim decisions
- Jury trials
- Prohibit insurers from also serving as claims administrator
- Authorize exemplary/ punitive damages for bad faith denials and terminations
- Mandatory attorney fees for successful claimants
- Grant courts authority to impose civil penalties.

Given the current political climate and issues competing for Congress's attention, the prospects for Congress repairing ERISA soon are bleak.

VI. CONCLUSION

Since 2004 most courts deciding Unum cases appear to be unaware of the RSA or the post-RSA decisions revealing Unum's continued pattern of biased claims administration. Contrary to ERISA's intent, Unum abrogates its fiduciary responsibility and administers claims as an adversary. Unum did not improve its claims handling practices after the 2004 RSA. Unum's criticized practices continued unabated to the present time.