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ABUSING ABUSE OF DISCRETION: JUDICIAL REVIEW OF ERISA FIDUCIARIES’ DISCRETIONARY DECISIONS IN DENIAL OF BENEFITS CASES

Christopher R. Stevenson

I. INTRODUCTION

In 1974, Congress passed the Employee Retirement Income Security Act1 (“ERISA” or the “Act”) to provide strong2 and uniform3 protections for employees’ benefits.4 While underfunded pension plans were the prime impetus for the enactment of ERISA,5 the Act covers other benefits, including health care plans.6 For most of the intervening time,
the jurisprudence of the federal courts has failed to live up to these goals of ERISA.

ERISA provides for a private right of action to recover benefits under an employee benefit plan, and places a fiduciary responsibility on the administrators of the plan. Under these fiduciary duties, the ERISA plan is to be administered solely for the benefit of the employees who are covered by the plan. The statute lays out some guidelines for fiduciaries, but ERISA's provisions contain no guidance for courts regarding the proper standard of review to apply when hearing challenges to the decisions of plan administrators.

In addition to the statutory text of ERISA, various provisions have been promulgated in the Code of Federal Regulations regarding employee benefit plans. However, none of these provide guidance to the courts regarding standards of review for denial of benefits claims or non-trivial guidelines for how ERISA fiduciaries should conduct themselves around conflicts of interest.

Despite Congress's good intentions, employees whose ERISA health claims had been denied still faced an uphill battle in federal court. Circuit courts erroneously imported the overly-deferential arbitrary and capricious standard of review into ERISA, making it unlikely for any but the most blatantly unreasonable administrator's decisions to be overturned. In 1989, the Supreme Court recognized this problem in deciding Firestone Tire and Rubber Co. v. Bruch, discarding the arbitrary and capricious standard. While establishing de novo review as the default

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(B) any benefit described in [29 USC § 186(c)],... " ERISA § 3(1).

7. ERISA § 502(a) ("A civil action may be brought--(1) by a participant or beneficiary... (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.").

8. ERISA § 3(21)(A) ("[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority... respecting management or disposition of its assets... or (ii) he has any discretionary authority... in the administration of such plan.").

9. ERISA § 404(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -- (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.").

10. ERISA §§ 401-412.

11. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 108-09 (1989) ("Although it is a 'comprehensive and reticulated statute,' ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations.") (citations omitted).


13. See id.


15. Id. at 109-10 ("A comparison of the LMRA and ERISA, however, shows that the whole-
for ERISA denial of benefits claims, Firestone also allowed ERISA plans to grant full discretion to plan administrators, changing the standard of review to abuse of discretion. However, even in these cases, the Court in Firestone warned that conflicts of interest on the part of the ERISA plan administrators must be taken into account in judicial review.

Despite Firestone, most of the circuit courts declined to break with their prior use of the arbitrary and capricious standard. The realities of the health care industry dictate that most employee benefits plans grant discretion to the ERISA plan fiduciary regarding plan interpretation and benefits determination. As such, arbitrary and capricious review continued as the de facto default standard. More worrisome, while the circuit courts adopted various modifications to their standards of review to putatively deal with conflicted ERISA plan fiduciaries, these modifications achieved a semblance of uniformity only in the ease with which they tended to brush aside these conflicts of interest.

If a worker lived in the wrong circuit, it was possible for an insurance company acting as an ERISA fiduciary to deny that worker health care benefits, have that decision considered on appeal by a panel consisting solely of insurance company employees, and be subject to only a cursory review in federal court. This cursory review would be based almost exclusively on an administrative record prepared by the insurance company and would effectively ignore the tremendous structural conflict of interest that arises when a fiduciary must pay beneficiary claims out of general company coffers.

In the wake of inconsistent application—or non-application—of Firestone, the Supreme Court recently revisited these issues in Metropolitan Life Ins. Co. v. Glenn. In MetLife, the Supreme Court reiterated its holding in Firestone that conflicts of interest must be taken into

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16. Id. at 115 ("[A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.").

17. See id. at 111 ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (1959))).

18. See Firestone, 489 U.S. at 115 ("Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959))).

19. See, e.g., Williams v. BellSouth Telecommns., Inc., 373 F.3d 1132, 1134-37 (11th Cir. 2004) (applying the heightened arbitrary and capricious review).

account, and clarifying that insurers making benefits determination and paying claims out of pocket were operating under a conflict of interest.

The state of affairs prior to MetLife failed ERISA's goals of protecting workers and providing uniformity in their benefits determinations. This Article's goal is to propose a method for the circuit courts to implement a standard consistent with Firestone and MetLife and that fulfills ERISA's legislative objectives.

This Article is divided into seven parts. Part II will examine how the arbitrary and capricious standard was imported into ERISA jurisprudence, and how it was applied.21 Part III will review the Court's decision in Firestone.22 Part IV will discuss the form of discretionary review used in the lower courts from the Firestone decision to today, and how it has (or has not) been modified by the presence of conflicts of interest in the ERISA plan fiduciaries.23 Part V will address the Court's decision in MetLife and the impact it has had so far on circuit court jurisprudence.24 Finally, Part VI will put forth the author's suggestion for how judicial review of ERISA plan administrator's decisions should be conducted, in order to maintain consistency with Firestone and MetLife and the purpose and language of ERISA.25

II. ARBITRARY AND CAPRICIOUS: JUDICIAL REVIEW PRE-FIRESTONE

When courts first began hearing ERISA denial of benefits claims, they were unfettered by statutory limitations, but unassisted by statutory guidance.26 Out of this vacuum, the circuit courts unanimously adopted an arbitrary and capricious standard originating in pre-ERISA labor law.27 This standard proved to be a poor fit for ERISA.

The arbitrary and capricious standard that would later plague ERISA litigation arose out of the Labor-Management Relations Act of

21. See discussion infra Part II.
22. See discussion infra Part III.
23. See discussion infra Part IV.
24. See discussion infra Part V.
25. See discussion infra Part VI.
26. See supra notes 10-13 and accompanying text.
27. Firestone, 489 U.S. at 109 (observing that "[t]o fill this gap, federal courts have adopted the arbitrary and capricious standard [of review] developed under. . . 29 U.S.C. § 186(c), a provision of the Labor Management Relations Act of 1947."); see also Kennedy, supra note 4, at 1109 ("[C]ourts continued the pre-ERISA standard of arbitrary and capricious."); Rozbruch, supra note 4, at 522-23; Michael S. Beaver, The Standard of Review in ERISA Benefits Denial Cases After Firestone Tire & Rubber Co. v. Bruch: Revolution or Déjà Vu?, 26 TORT & INS. L.J. 1, 3 (1990) ("[C]ourts determining benefits cases under the new federal statute simply reasoned by analogy that the arbitrary and capricious standard should be transplanted from LMRA actions to ERISA actions.").
The LMRA did not create a private right of action to challenge the decisions made by trustees pursuant to the law. Federal courts adopted the highly deferential arbitrary and capricious standard in order to justify asserting jurisdiction to hear challenges to LMRA trustee decisions.

The federal courts imported this arbitrary and capricious standard from the LMRA for a number of reasons. The two laws both operate in the general category of employer-employee relations and employee benefits. ERISA incorporates a significant amount of language from the LMRA, such as plan definitions and language relating to fiduciary duties. Adopting the same standard in these two related laws avoided the increased complication of having different standards of review for different types of employee benefits lawsuits. In addition, significant judicial apprehension over a potential explosion of employee benefits litigation may have caused the courts to lean towards a standard that was less favorable for plaintiffs.


29. Firestone, 489 U.S. at 109 ("The LMRA does not provide for judicial review of the decisions of LMRA trustees.").

30. Id. at 109 ("Federal courts adopted the arbitrary and capricious standard both as a standard of review and, more importantly, as a means of asserting jurisdiction over suits under § 186(c) by beneficiaries of LMRA plans who were denied benefits by trustees."). See also John A. McCreary, Jr., Comment, The Arbitrary and Capricious Standard Under ERISA: Its Origins and Applications, 23 DUQ. L. REV. 1033, 1037-38 (1985) ("The remarkable aspect of this evolution is that the federal courts took state common law fiduciary standards and fashioned a body of federal common law peculiar to [LMRA] trusts, without apparent jurisdiction or authority to do so.").

31. Employment Retirement Income Security Act (ERISA) of 1974 § 3(l)(B), 29 U.S.C. § 1002(1)(B) (2006) (defining covered plans as including "any benefit described in section 302(c) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c) (other than pensions on retirement or death, and insurance to provide such pensions).").

32. NLRB v. Amax Coal Co., 453 U.S. 322, 332 (1981) ("ERISA essentially codified the strict fiduciary standards that [an LMRA] § 302(c)(5) trustee must meet."). See Rozbruch, supra note 4, at 521-22 (observing that federal courts justified the use of the LMRA’s arbitrary and capricious standard on the grounds that Congress had deliberately drafted ERISA’s fiduciary provision to be similar to those in the LMRA).

33. See M. Gregg Bloche, The Invention of Health Law, 91 CAL. L. REV. 247, 250-51 (2003) (identifying growing caseload concerns as a primary motivator behind the federal courts’ cases limiting ERISA preemption, pushing more lawsuits against managed care providers back into state courts); Paul O’Neil, Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform, 55 OHIO ST. L.J. 723, 761-63 (1994) (asserting that concerns about a burgeoning federal caseload and clogging the federal docket with ERISA claims are a strong factor in the weakness of the protections provided to plan participants in ERISA litigation); see also JUDICIAL CONFERENCE OF THE UNITED STATES, COMM. ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 23, 34-37 (1995) (identifying the removal of many ERISA claims to state court as a means of reducing crowded dockets); Crespo v. Candela Laser Corp., 780 F. Supp. 866, 867 (D. Mass. 1992) ("ERISA cases generally . . . constitute a burgeoning area of federal courts' caseload."); David Greenwald & Frederick A. O. Schwarz, Jr., The Censorial
The decision to use the LMRA's arbitrary and capricious standard in ERISA denial of benefits litigation was inappropriate. First, ERISA contains specific provisions creating private rights of action, obviating the need to create a justification for judicial review. Second, LMRA trustee boards are composed of equal numbers of representatives from the employer and from the employee's union, while the administrators of ERISA plans are composed entirely of individuals chosen by the employer or the health insurance company managing the plan. Third, federal policy under the LMRA favored the arbitration of labor disputes, while ERISA was designed to create and ensure access to the federal courts for plan participants.

The arbitrary and capricious standard defined ERISA's denial of benefits litigation for fifteen years. Although it is an overstatement to say that a decision is not arbitrary or capricious whenever a court can review the reasons stated for the decision without a loud guffaw, it is not much of an overstatement. The circuit courts produced a variety of tests under the standard—whether the decision was supported by evidence, rational, in good faith, not contrary to the plain

Judiciary, 35 U.C. DAVIS L. REV. 1133, 1145 (2002) ("The 1960s and 1970s saw a large increase in the number of laws (e.g., civil rights laws, environmental laws, ERISA) and private causes of action thereunder, which increased the caseloads of the district courts and those of the circuit courts in turn."); Jay Conison, Suits for Benefits Under ERISA, 54 U. PITT. L. REV. 1, 61 (1992) ("[C]aseload reduction is not a value easily reconciled with ERISA."); Thomas J. Meskill, Caseload Growth: Struggle to Keep the Pace, 57 BROOK. L. REV. 299, 300 (1991) (listing ERISA as one piece of federal law that has spurred significant litigation in the federal courts). This is not an isolated instance of the placement of procedural barriers as a response to apprehensions of a particular class of litigation overrunning the courts. See Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZ. L. REV. 987, 1020-21 (2003) (identifying the differing dispute resolution goals of the LMRA and ERISA).

34. Firestone, 489 U.S. at 110 (holding that "[w]ithout this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard ... ").
35. ERISA § 502(a)(3).
37. See O'Neil, supra note 33, at 746-47 (identifying the differing composition of administrative boards as a reason for the inappropriateness of the importation of the arbitrary and capricious standard from the LMRA to ERISA).
38. ERISA § 2(b) ("It is hereby declared to be the policy of this chapter to protect the interests of participants in employee benefit plans and their beneficiaries by providing for ready access to the Federal courts."). See Flint, supra note 4, at 1020-21 (identifying the differing dispute resolution goals of the LMRA and ERISA).
40. See, e.g., Bayles v. Cent. States, Se. & Sw. Areas Pension Fund, 602 F.2d 97, 100 (5th Cir. 1979).
41. See, e.g., Niagara of Wis. Paper Corp. v. Paper Indus. Union Mgmt. Pension Fund, 800 F.2d 742, 746 (8th Cir. 1986).
language of the plan, or wrong on the law. These tests are all very deferential and lacking concern for conflicts of interest.

III. FIRESTONE

In 1989, the Supreme Court unanimously tossed fifteen years of arbitrary and capricious review of ERISA denial of benefits claims.

A. The Holding of Firestone

The Court first considered whether the arbitrary and capricious standard was appropriate for ERISA, and unanimously held that since ERISA provides an explicit right of action against plan fiduciaries, the jurisdictional reason for the use of the arbitrary and capricious standard in the LMRA is not present. The Court therefore needed to determine the proper standard of review. Based on both statutory language and legislative history, the Court used trust law to guide this determination.

The default standard of review for trust law decisions is de novo, and a court is to construe the trust agreement without any deference to

42. See, e.g., Rueda v. Seafarers Int'l Union, 576 F.2d 939, 942 (1st Cir. 1978).
43. See, e.g., Stanton v. Gulf Oil Corp., 792 F.2d 432, 434 (4th Cir. 1986).
44. See, e.g., Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1307 (9th Cir. 1986).
45. See, e.g., Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 (9th Cir. 1983).
46. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 104 (1989). Justice Scalia filed a separate opinion that did not concur with Part III of the Court's opinion, which dealt with the meaning of the word "participant." Id. at 119-20 (Scalia, J., concurring).
47. Id. at 110.
48. Id. at 109-10.
49. Id. at 110 ("Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans.").
50. Id. at 110 ("Thus, the raison d'etre for the LMRA arbitrary and capricious standard—the need for a jurisdictional basis in suits against trustees—is not present in ERISA.").
51. Id. at 110 ("ERISA abounds with the language of terminology of trust law.").
52. Id. at 110 ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codify] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.' (quoting H.R. REP. NO. 93-533, at 11 (1973))).
53. Id. at 111 ("In determining the appropriate standard of review for action under § 1132(a)(1)(B), we are guided by principles of trust law.").
54. Id. at 112. (noting that "settled principles of trust law, which point to a de novo review of benefit eligibility determinations based on plan interpretations, belie this contention [that a more relaxed standard of review is inherently applicable].").
either party’s preferred reading.\textsuperscript{55} This is consistent with pre-ERISA judicial interpretations of employee benefit plans.\textsuperscript{56} Firestone and amici curiae argued that the \textit{de novo} standard was improper for policy reasons,\textsuperscript{57} but the court found these arguments unpersuasive.\textsuperscript{58} The \textit{de novo} standard of review is the default for any ERISA plan, regardless of whether or not there is a conflict of interest.\textsuperscript{59} However, the terms of a trust agreement can alter this standard by giving the fiduciary discretion with regards to interpretation and implementation of the plan.\textsuperscript{60} When the administrator is given discretion, judgments made pursuant to that discretion are not disturbed when reasonable.\textsuperscript{61} The Court looks to the Restatement (Second) of Trusts, which instructs “[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.”\textsuperscript{62} The Court does not make a bare reference to the name of the standard of review from the Restatement, but also looks at the commentary to the Restatement for what shape this abuse of discretion review should take.\textsuperscript{63} The Court makes a particular point of noting that conflicts of interest on the part of the ERISA plan administrator must be taken into account when reviewing that administrator’s decisions for an abuse of discretion.\textsuperscript{64}

\textsuperscript{55.} Id.

As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party’s interpretation. “The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney.”

Id. (quoting 3 W. Fratcher, Scott on Trusts § 201 at 221 (4th ed. 1980)).

\textsuperscript{56.} Id. at 112 (“The trust law \textit{de novo} standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA.”).

\textsuperscript{57.} Id. at 113-14 (asserting that general statutory language, Congressional inaction and the need to promote corporate willingness to create employee benefit plans all demanded a default standard more lenient than \textit{de novo} review).

\textsuperscript{58.} Id. (holding that the use of \textit{de novo} review was favored by ERISA’s public policy to promote protection of workers’ benefits and by the fact that using arbitrary and capricious review would afford less protection than workers enjoyed before ERISA was enacted).

\textsuperscript{59.} Id. at 115 (“[F]or purposes of actions under § 1132(a)(1)(B), the \textit{de novo} standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest.”).

\textsuperscript{60.} Id. at 111 (“Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers.” (citing Restatement (Second) of Trusts § 187 (1959))).

\textsuperscript{61.} Id. at 111 (“A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee’s interpretation will not be disturbed if reasonable.” (citing G. Bogert & G. Bogert, Law of Trusts and Trustees, § 559, at 169-71 (2d rev. ed. 1980))).

\textsuperscript{62.} Id. at 111 (quoting Restatement (Second) of Trusts § 187 (1959)).

\textsuperscript{63.} Id. at 115.

\textsuperscript{64.} Id. (“[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating
B. The Lesson of Firestone

While the default standard of review for denial of benefits cases under ERISA may be de novo, most fiduciaries adjusted plan language in order to grant discretion. Firestone and the Restatement (Second) of Trusts can be examined for guidance regarding performing abuse of discretion review, so as to provide a measuring stick against which later cases in the circuit courts can be judged.

In Firestone, the court rejected the use of arbitrary and capricious, and replaced it with abuse of discretion review. Firestone asserted that, despite a default de novo review standard, it should be subject to arbitrary and capricious review, but the Court rejected this position. Lower courts should as well.

The Restatement lists six factors that, according to the circumstances, may be relevant in determining whether the trustee has committed an abuse of discretion. These six factors are (1) the extent of the discretion conferred on the trustee, (2) the purposes of the trust, (3) the nature of the power, (4) external standards against which the trustee’s conduct can be judged, (5) the trustee’s motive in making the decision, and (6) whether the decision was made under a conflict of interest, that conflict must be weighed as a ‘facto[r] in determining whether there is an abuse of discretion.’

65. Id. at 112.
66. See Dana M. Muir, Fiduciary Status As An Employer’s Shield: The Perversity of ERISA Fiduciary Law, 2 U. Pa. J. Lab. & Emp. L. 391, 411-14 (2000) (discussing how basing whether or not the plan administrator has discretion on the plan document gives said administrator complete control over the standard of review its actions will face); O’Neil, supra note 33, at 747-51 (expressing disappointment at the ease with which plans can avoid facing de novo review).
67. See also G. Bogert & G. Bogert, Law of Trusts and Trustees, § 559, at 169-71 (2d rev. ed. 1980) (for the notion that the trustee’s decision be overturned on the basis of reasonableness). Unfortunately, unlike the Restatement, this work does not provide any further guidance on the subject, making it an unhelpful resource.
68. Firestone, 489 U.S. at 109-10.
69. Id. at 113-16.
70. Id. at 113 (“Despite these principles of trust law pointing to a de novo standard of review for claims like respondents’...”).
71. Id. at 113-14 (“[Firestone would have us read ERISA to require the application of the arbitrary and capricious standard to such claims... Firestone maintains that congressional action after the passage of ERISA indicates that Congress intended ERISA claims to be reviewed under the arbitrary and capricious standard.”).
73. Id. (providing, “the extent of the discretion conferred upon the trustee by the terms of the trust”).
74. Id. (providing “the purposes of the trust”).
75. Id. (providing “the nature of the power”).
76. Id. (providing “the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee’s conduct can be judged”).
cision, and (6) whether or not the trustee is operating under a conflict of interest.

Of these, the most important is the presence of any conflicts of interest on the part of the plan fiduciary. While ERISA allows for conflicted plan fiduciaries, they are strongly disfavored under the law of trusts. Therefore, it is no coincidence that this factor was the impetus for the Third Circuit decision leading to Firestone and was singled out by the Supreme Court in Firestone and later cases. In addition, the commentary to the Restatement contains additional comments dealing with conflicted fiduciaries. In the Restatement, the necessity of considering a conflict of interest even where it cannot be shown that the conflict affected the fiduciary's decision is demonstrated by the presence of distinct provisions that a conflict of interest is a factor in the abuse of discretion analysis and a stronger provision dealing with the situation where it can be shown that a conflict guided the fiduciary's decision.

Based on guidelines from the Court, proper abuse of discretion review should: (1) not simply substitute arbitrary and capricious for abuse of discretion, (2) take into account relevant Restatement factors, and (3) give weight to any conflict of interest on the part of the fiduciary, even when the claimant cannot prove that the conflict guided the fiduciary's decision.

IV. AN ABUSE OF DISCRETION: JUDICIAL REVIEW POST-FIRESTONE

Having rejected arbitrary and capricious review in ERISA denial of

77. Id. (providing "the motives of the trustee in exercising or refraining from exercising the power").
78. Id. (providing "the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries").
83. Pegram v. Herdrich, 530 U.S. 211, 219-20 (2000) (noting the potential for conflicts of interest inherent in the HMO system); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 384 n.15 (2002) ("[I]mplicated by this case . . . is the degree to which a plan provision for unfettered discretion in benefit determinations guarantees truly deferential review. In Firestone Tire itself, we noted that review for abuse of discretion would hinge on any conflict of interest on the plan fiduciary's part, if a conflict was plausibly raised.").
84. RESTATEMENT (SECOND) OF TRUSTS § 187 cmts. f-g (1959). In instances where the beneficiary can actually prove that the fiduciary acted dishonestly, or with improper motive, the court is free to impose its will on the fiduciary. Id.
benefits claims, and presented guidelines for abuse of discretion review of those claims; the Supreme Court handed the matter back to the circuit courts. Despite the Supreme Court's rejection of the arbitrary and capricious standard, most of the circuits have simply equated *Firestone* abuse of discretion with the pre-*Firestone* arbitrary and capricious. While this is an improper identification, this misidentification has not always generated an inappropriate substantive standard, as some-circuits kept the name "arbitrary and capricious" while changing the nature of the test. What follows is a circuit-by-circuit review of the assorted standards and tests the lower courts have devised for denial of benefits claims against ERISA plan fiduciaries.

**A. D.C. Circuit**

The D.C. Circuit considered the arbitrary and capricious and abuse of discretion standards to be interchangeable. Either way, the circuit stated, it was really a "reasonableness" standard.

**B. First Circuit**

The First Circuit took the position that *Firestone* established "same standard for review of trustees' discretionary actions under ERISA as for review of trustees' actions under LMRA." As such, it was not surprising that the First Circuit at first did not even discuss whether the "abuse of discretion" and "arbitrary and capricious" standards were equivalent, but simply continued to use arbitrary and capricious. It later came to use the two interchangeably.

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87. Id. at 113-16
88. Id. at 118.
89. Block v. Pitney Bowes, Inc., 952 F.2d 1450, 1454 (D.C. Cir. 1992) (Ginsburg, J.) ("[W]e are satisfied, there is no need to adopt one phrase and avoid the other."); Wagener v. SBC Pension Benefit Plan – Non Bargained Program, 407 F.3d 395, 402 (D.C. Cir. 2005) (conflating abuse of discretion and arbitrary and capricious standards); Moore v. CapitalCare, Inc., 461 F.3d 1, 11 (D.C. Cir. 2006) (opining that the *Firestone* court had described the standard as abuse of discretion or arbitrary and capricious).
90. Block, 952 F.2d at 1454 ("The reasonableness of the Plan Committee’s decision is our polestar . . ."); Wagener, 407 F.3d at 402 (using reasonableness and finding discriminatory behavior clearly unreasonable); Moore, 461 F.3d at 11 (applying a reasonableness standard).
91. Mahoney v. Bd. of Trs., 973 F.2d 968, 972 (1st Cir. 1992).
92. Id. at 971-73; see Recupero v. New Eng. Tel. & Tel. Co., 118 F.3d 820, 827 (1st Cir. 1997) (*Firestone* and its progeny mandate a deferential 'arbitrary and capricious' standard of judicial review.).
93. See Terry v. Bayer Corp., 145 F.3d 28, 37 n.6 (1st Cir. 1998) ("There is no need to adopt
from its first post-Firestone ERISA denial of benefits case, simply reviewed the plan administrator’s decision for reasonableness, “an unreasonable determination would necessarily constitute an abuse of discretion, and a reasonable determination necessarily would not.”

The First Circuit adopted an arbitrary and capricious test with “more bite” for a conflict, meaning that the court would place a “special emphasis” on reasonableness, but that the claimant retains the burden of showing that the fiduciary’s decision was “improperly motivated.” It was “not enough,” however, that the fiduciary must pay the benefits out of its own pocket, and in such a case the circuit proceeded without further consideration of the conflict.

C. Second Circuit

The Second Circuit applied an arbitrary and capricious standard in ERISA denial of benefits cases, holding that the court “may overturn a
decision to deny benefits only if it was 'without reason, unsupported by substantial evidence or erroneous as a matter of law.' While the arbitrary and capricious standard was applied consistently before 1995, the three-factor test found in Pagan v. NYNEX Pension Plan became the lodestar application of the test. The final addition to the test, used in cases without conflicts of interest, was a precise definition of substantial evidence as more than a scintilla but less than a preponderance.

In addition to establishing the Second Circuit's default standard of review, Pagan more ominously set the stage for the Second Circuit's treatment of conflicts of interest, dismissing such a conflict because the claimant could not show that the reasonableness of the fiduciary's decision was affected. Pagan was later ratified and expanded by Sullivan v. LTV Aerospace & Defense Co., which expressed the position more emphatically, and in particular made a point that paying claims out of company assets created an inherent conflict of interest that needed to be weighed as a factor. While sometimes described as a burden shifting
test, the reality was that under Sullivan, conflicts of interest were effectively rendered irrelevant, being disregarded unless the claimant could perform the nearly impossible task of proving (without discovery) "that the administrator was in fact influenced by such conflict."

D. Third Circuit

The Third Circuit applied an arbitrary and capricious standard in ERISA denial of benefits cases, allowing a plan administrator’s decision to be overturned if “without reason, unsupported by the evidence or erroneous as a matter of law." It took the circuit many years to settle on this version of arbitrary and capricious review.

The Third Circuit employed a standard that actually gave weight to conflicts of interest on the part of the ERISA plan fiduciary. After a false start, the circuit produced an expansive and well-considered decision concerning how to best deal with conflicts of interest in ERISA denial of benefits decisions. In Pinto v. Reliance Standard Life Insurance Co., the court adopted a sliding scale approach to conflicts of interest since this approach better reflected the Supreme Court’s approach.
mandate to consider conflicts of interest as a factor. Scrutiny was to be handled by treating the standard of review as a range rather than a point, "calibrating the intensity of our review to the intensity of the conflict." The circuit even provided specific factors for the reviewing court to consider in determining how serious the conflict is. These included the sophistication of the parties, the information accessible to the parties, the exact financial arrangement between the insurer and the company, and (if the fiduciary is an employer) the fiduciary's long-term interests in keeping employees happy. In addition, the Third Circuit in Pinto acknowledged that an insurance company acting as an ERISA fiduciary is generally conflicted.

E. Fourth Circuit

Quickly holding that arbitrary and capricious review had been rendered inappropriate, the Fourth Circuit always applied an abuse of discretion standard to ERISA denial of benefits after Firestone. The Fourth Circuit noted that the arbitrary and capricious standard of review

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117. Pinto, 214 F.3d at 392 (finding that "the sliding scale approach better adheres to Firestone's dictate that a conflict should be considered as a 'factor' in applying the arbitrary and capricious standard.").

118. Id. at 393 (holding that "we can find no better method to reconcile Firestone's dual commands than to apply the arbitrary and capricious standard, and integrate conflicts as factors in applying that standard, approximately calibrating the intensity of our review to the intensity of the conflict.").

119. Id. at 392 ("The court may take into account the sophistication of the parties, the information accessible to the parties, and the exact financial arrangement between the insurer and the company... Another factor to be considered is the current status of the fiduciary.").

120. Id. at 383-84 ("Third, the employer may pay an independent insurance company to fund, interpret, and administer a plan... [T]oday we address the third arrangement for the first time, concluding that it generally presents a conflict and thus invites a heightened standard of review.").

121. Boyd v. Trs. of the United Mine Workers Health & Ret. Funds, 873 F.2d 57, 59 (4th Cir. 1989) ("Until the Supreme Court's recent decision in Firestone, the standard for reviewing Trustees' disability decisions under this pension plan was, in this and most other circuits, whether the decision was arbitrary or capricious. [Firestone] made that no longer appropriate.") (citation omitted).

122. Id. ("Where the administrator or fiduciary has discretionary authority, an abuse of discretion standard should apply. That standard now controls our review here.") (citation omitted); see also De Nobel v. Vitro Corp., 885 F.2d 1180, 1186-87 (4th Cir. 1989) ("If the plan's fiduciaries are indeed entitled to exercise discretion of that sort, reviewing courts may disturb the challenged denial of benefits only upon a showing of procedural or substantive abuse... [W]e are compelled under [Firestone's] express mandate to apply the deferential 'abuse of discretion' standard... "); Gauer v. Connors, 953 F.2d 97, 99-100 (4th Cir. 1991) (noting that the appropriate standard of review is abuse of discretion standard rather than arbitrary and capricious standard); Bedrick v. Travelers Ins. Co., 93 F.3d 149, 152-55 (4th Cir. 1996).
was more deferential than the proper abuse of discretion standard. For pure medical claim cases, abuse of discretion review was often applied by asking whether the denial was the result of a reasoned, principled decisionmaking process and supported by substantial evidence. For the remaining cases, the Fourth Circuit produced a variety of tests, such as the abuse of discretion without further nuance test, the reasonableness without specification test, a five-factor reasonableness test, or an eight-factor reasonableness test.

While the Fourth Circuit was not monolithic in its generic application of the abuse of discretion standard, it had produced a unified means of dealing with conflicts of interest in ERISA denial of benefits cases. The circuit applied a sliding scale, reducing deference to the degree ne-

123. Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan, 201 F.3d 335, 341 (4th Cir. 2000) ("First, we continue to recognize that an 'arbitrary and capricious' standard is more deferential to the fiduciary than is an 'abuse of discretion' standard.").

124. See Bernstein v. Capitalcare, Inc., 70 F.3d 783, 790 (4th Cir. 1995) (assessing a medical coverage determination based on whether the decision was supported by substantial evidence and resulted from a deliberate, reasoned process); Bynum v. CIGNA Healthcare of N.C., Inc., 287 F.3d 305, 311 (4th Cir. 2002). See also Bedrick, 93 F.3d at 152-55 (overturning insurance company's decision denying benefits to child with cerebral palsy based solely on the statement of a company-employed doctor who had not practiced in seven years, and had never been an expert on cerebral palsy).


126. See Hale v. Trs. of the United Mine Workers Health & Ret. Funds, 23 F.3d 899, 901 (4th Cir. 1994) (noting that an administrator's decision will not be disturbed if reasonable); Colucci v. Agfa Corp. Severance Pay Plan, 431 F.3d 170, 176-78 (4th Cir. 2005).

127. See, e.g., De Nobel, 885 F.2d, 1180, 1187-88 (applying abuse of discretion by determining reasonableness, considering whether the decision was consistent with the goals of the plan, might render plan language meaningless or internally inconsistent, was at odds with the procedural or substantive requirements of ERISA, was consistent with prior decisions, or was consistent with the clear language of the plan); Lockhart v. United Mine Workers of Am. 1974 Pension Trust, 5 F.3d 74, 77 (4th Cir. 1993) (applying the five De Nobel factors). The Circuit has also used just one of these factors, without mentioning the others, to strike down a decision. See, e.g., Cotter v. E. Conference of Teamsters Ret. Plan, 898 F.2d 424, 427-28 (4th Cir. 1990) (striking down a fiduciary’s plan interpretation as an abuse of discretion because it produced a forfeiture of vested benefits, which is impermissible under the explicit statutory commands of 29 U.S.C. section 1053(a)).

128. Booth, 201 F.3d at 342-43 ("Combining these various criteria [De Nobel, the Restatement (Second) of Trusts, Firestone, and other Fourth Circuit cases] for determining the reasonableness of a fiduciary’s discretionary decision, we conclude that a court may consider, but is not limited to, such factors as: (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary’s interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decisionmaking process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standards relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have."). See also Myers v. Hercules, Inc., 253 F.3d 761, 766 (4th Cir. 2001) (noting Booth’s eight-factor test).
cessary to neutralize the untoward influence of the conflict. In addition, an insurer making benefits determinations and paying claims out of company coffers was considered to be operating under a substantial conflict of interest.

**F. Fifth Circuit**

The Fifth Circuit never settled on whether arbitrary and capricious or abuse of discretion review was appropriate for ERISA denial of benefits cases, or whether the two standards are interchangeable. Each of these positions was supported by a series of cases, many of which cite to the other, contradictory line of cases in support of their own position. Whatever language the circuit chose to apply in a particular instance, a case would probably be analyzed using a two-step approach. First

129. Doe v. Group Hospitalization & Med. Servs., 3 F.3d 80, 85-87 (4th Cir. 1993). The court does not refer to it as a sliding scale standard, and actually cites to the Eleventh Circuit's decision in *Brown*, which applied a burden-shifting standard. *Id.* at 87. Nonetheless, the Fourth Circuit in Doe reduced the deference given to the insurance company, rather than shifting the burden to the insurance company to prove that it was not affected by the conflict. *Id.* at 87 ("[T]his deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict. . . . With that lessened degree of deference to Blue Cross' discretionary interpretation of the group insurance contract, we turn to review Blue Cross' decision to deny benefits."). *See also Bedrick*, 93 F.3d at 152, 154 (noting that deference must be reduced to neutralize fiduciary conflict of interest); Stupp v. UNUM Life Ins. Co. of Am., 390 F.3d 301, 307 (4th Cir. 2004).

130. *Doe*, 3 F.3d at 86. The court specifically noted this conflict in deciding against the insurer, "we conclude Blue Cross abused its discretion, particularly when we factor into our review the less deferential standard applied by reason of Blue Cross' financial interest in the outcome of its decision." *Id.* at 89.


132. *Batchelor*, 877 F.2d at 444 (holding that "a district court 'should engage in a two step process. First, the court must determine the [legally] correct interpretation of the Plan's provisions. Second, the court must determine whether the Plan administrators acted arbitrarily or capriciously in light of the interpretation they gave the Plan in the particular instance.'") (quoting Denton v. First Nat'l Bank of Waco, 765 F.2d 1295, 1304 (5th Cir. 1985)); *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 455 (5th Cir. 2007) ("Those determinations [of an ERISA administrator] are granted
three factors were applied uniformity of interpretation, whether the reading of the plan was fair and reasonable, and unanticipated costs that could result from the interpretation—to determine the correct interpretation.  

Then, if the actual decision being reviewed differed, another three factors were applied—internal consistency, relevant regulations, and factual background—to determine if the discrepancy constituted an abuse of discretion.

From its first post-Firestone case on point, the Fifth Circuit held that under a conflict of interest, the standard of review is a range rather than a point, with the sliding scale varying on how strong the suspicion of bias is.

### G. Sixth Circuit

The Sixth Circuit consistently applied the arbitrary and capricious standard from its first post-Firestone review of an ERISA fiduciary’s discretionary decision denying benefits to a claimant. When the circuit did give further specification of this standard it required either a reasoned explanation based on the evidence, rationality in light of the deference using a two-step process. First, the court determines whether the administrator’s interpretation of the plan was legally correct. If so, then the inquiry ends. If not, the court then determines whether that interpretation constitutes an abuse of discretion. (citing Rhorer v. Raytheon Eng’rs & Constructors, Inc., 181 F.3d 634, 639-40 (5th Cir. 1999)).

133. Batchelor, 877 F.2d at 444.
134. Id. at 445.
135. See, e.g., Rhorer, 181 F.3d at 643-44 (5th Cir. 1999) (applying two-step, three-factor abuse of discretion review); see also Worthy v. New Orleans S.S. Ass’n/Int’l Longshoremen’s Ass’n, 342 F.3d 422, 428 (5th Cir. 2003) (applying two-step, three-factor abuse of discretion review, but finding that administrator’s interpretation was correct and therefore not reaching second inquiry). But see Penn, 898 F.2d at 1100-01 (applying arbitrary and capricious without specification).
136. Lowry v. Bankers Life & Cas. Ret. Plan, 871 F.2d 522, 525 n.6 (5th Cir. 1989) (noting the use of a sliding scale in conflict of interest cases); see also Vega, 145 F.3d at 677-78 (engaging in a review of how other circuits treat conflicts of interest, and reaffirming the use of the sliding scale); MacLachlan v. ExxonMobil Corp., 350 F.3d 472, 478-79 (5th Cir. 2003) (applying sliding scale deference).
138. Davis, 887 F.2d at 693 (“When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.”); see also Killian v. Healthsource Provident Adm’rs., Inc., 152 F.3d 514, 520 (6th Cir. 1998); Calvert v. Firstar Fin., Inc., 409 F.3d 286, 296 (6th Cir. 2005) (holding the decision to be arbitrary and capricious and not based on a rational reading of the evidence).
plan’s provisions, or both. The court looked at the sliding scale standard, but rejected it. The Sixth Circuit held that an insurance company acting as fiduciary inherently operates under a substantial and perpetual conflict of interest, and its decisions must be reviewed accordingly.

H. Seventh Circuit

The Seventh Circuit primarily used the arbitrary and capricious standard when reviewing the decisions of an ERISA plan fiduciary with discretion. The circuit had presented some factors to consider on occasion, but mostly applied the standard as one of reasonableness, or

139. Miller v. Metro. Life Ins. Co., 925 F.2d 979, 984 (6th Cir. 1991) (holding that “an ERISA benefit plan administrator's decisions on eligibility for benefits are not arbitrary and capricious if they are 'rational in light of the plan's provisions.'” (quoting Daniel v. Eaton Corp., 839 F.2d 263, 267 (6th Cir. 1988))).

140. Gismondi v. United Techs. Corp., 408 F.3d 295, 298 (6th Cir. 2005) (holding that a decision is not arbitrary and capricious when reasoned and based on the evidence and that decision is not arbitrary and capricious if it is rational in light of the plan's provisions).

141. See, e.g., Miller, 925 F.2d at 984 (weighing fiduciary's conflict of interest as a factor without further specification as to the method of so doing); see also Calvert, 409 F.3d at 292-93, 295-96 (noting treatment of conflict as one factor).

142. Peruzzi v. Summa Med. Plan, 137 F.3d 431, 433 (6th Cir. 1998) (rejecting appellants argument that the arbitrary and capricious standard is a range, rather than a point, based on how conflicted the plan fiduciary is).

143. Miller, 925 F.2d at 984 (“Because an insurance company pays out to beneficiaries from its own assets rather than from the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business, and the conflict of interest is substantial. . . . Application of the standard should be shaped by the circumstances of the inherent conflict of interest.” (citing Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556, 1561-63 (6th Cir. 1990)); see also Kil- lian, 152 F.3d at 521 (“Healthsource characterizes this situation as giving rise to a 'potential conflict' of interest. This characterization is incorrect: there is an actual, readily apparent conflict here, not a mere potential for one.”); Darland v. Fortis Benefits Ins. Co., 317 F.3d 516, 527-28 (6th Cir. 2003) (holding that there is an apparent conflict when an insurance company acting as plan fiduciary pays plan benefits); Calvert, 409 F.3d at 292 (noting potential conflict).

144. See, e.g., Rizzo v. Caterpillar, Inc., 914 F.2d 1003, 1004 (7th Cir. 1990) (reversing and remanding a district court's decision because it applied the abuse of discretion standard instead of arbitrary and capricious); Eget v. Conn. Gen. Life Ins. Co., 900 F.2d 1032, 1035 (7th Cir. 1990) (applying arbitrary and capricious review). But see Gallo v. Amoco Corp., 102 F.3d 918, 921 (7th Cir. 1996) (asking whether the plan administrator “had abused its discretion, or, what amounts to the same thing, had acted arbitrarily and capriciously . . . .”); Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032, 1040 (7th Cir. 1998) (noting that “such administrative action can only be reviewed if it is arbitrary and capricious, an abuse of discretion.”).

145. Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995) (noting the following as factors for review: “the impartiality of the decisionmaking body, the complexity of the issues, the process afforded the parties, the extent to which the decisionmakers utilized the assistance of ex-
whether the decision was "downright unreasonable." The Seventh Circuit buttressed the arbitrary and capricious standard by laying out several circumstances where a fiduciary's decision may not be overturned. The ERISA claimant could at least hope to reverse the fiduciary decision where it had made a wildly improper decision, contro-

146. See, e.g., Lister v. Stark, 942 F.2d 1183, 1188-89 (7th Cir. 1991) (reviewing in terms of reasonableness because the district court had, and holding that a fiduciary must articulate an explanation for its decision that includes a rational connection between the facts and the decision, must demonstrate that it considered all important aspects of the problem, can offer an explanation consistent with the evidence, and is not so implausible that it cannot be ascribed to differing views by the experts); Hess v. Reg-Ellen Mach. Tool Corp., 423 F.3d 653, 658 (7th Cir. 2005) (upholding plan administrator's decision unless unreasonable).

147. See Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund, 390 F.3d 1040, 1045 (7th Cir. 2004) (using not just clearly incorrect but "downright unreasonable" as a measure of arbitrary and capricious).

148. There are four such circumstances. The first is where there is a reasoned explanation based on the evidence. See Exbom v. Central States, Se. & Sw. Areas Health & Welfare Fund, 900 F.2d 1138, 1142 (7th Cir. 1990) ("The arbitrary and capricious standard holds that a trustee's decision shall not be overturned on a § 1132(a)(1)(B) matter, absent special circumstances such as fraud or bad faith, if "it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome." (quoting Pokratz v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985))); see also Houston v. Provident Life & Accident Ins. Co., 390 F.3d 990, 995 (7th Cir. 2004) (arbitrary and capricious standard only requires that the plan administrator offer a reasoned explanation, supported by the evidence, for its decision); Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771, 774-75 (7th Cir. 2003) ("Even under the deferential review we will not uphold a termination when there is an absence of reasoning in the record to support it."). The second circumstance is where the decision was based on relevant factors concerning the important part of the issue. See, e.g., Exbom, 900 F.2d at 1143 ("Nor will it [set aside the denial of a claim] . . . where the trustee has based its decision 'on a consideration of the relevant factor's that 'encompass the important aspect[s] of the problem' before it." (citations omitted). The third circumstance is where there is a rational connection between the evidence, the plain text, and the conclusion reached. See, e.g., Exbom, 900 F.2d at 1143 ("If the trustee makes an informed judgment and articulates an explanation for it that is satisfactory in light of the relevant facts, i.e., one that makes a "rational connection" between the issue to be decided, the evidence in the case, the text under consideration, and the conclusion reached, then the trustee's decision is final."). See also Dabertin v. HCR Manor Care, Inc., 373 F.3d 822, 827-28 (7th Cir. 2004) (using the finding of a rational connection between facts, plan language and the final decision as a mark for the absence of an arbitrary or capricious decision); Loyola Univ. v. Humana Ins. Co., 996 F.2d 895, 898 (7th Cir. 1993) (finding no arbitrary and capricious behavior when the fiduciary makes an informed decision and can provide an explanation that is satisfactory in light of the evidence). The fourth is where the fiduciary did not overlook something important or seriously err in assessing the evidence. See, e.g., Patterson v. Caterpillar, Inc., 70 F.3d 503, 505 (7th Cir. 1995) ("Before concluding that a decision was arbitrary and capricious, a court must be very confident that the decisionmaker overlooked something important or seriously erred in appreciating the significance of the evidence.").


A decision is arbitrary or capricious only when the decisionmaker "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . ., or is so implausible that it could not be ascribed to difference in view or
verted the plain meaning of the plan,150 or defied common sense.151

The Seventh Circuit employed an arbitrary and capricious standard with “more bite” when there was a conflict, adjusting the deference in accordance with how serious the conflict is.152 However, the circuit found no conflict (or at least no serious conflict) when a company paid benefits for an unfounded plan, based largely on the suspect reasoning that the company’s overall revenues are large compared to an individual benefit claim.153 The circuit extended this to include insurers who pay benefits claims out-of-pocket.154 Instead, claimants are required to provide specific evidence of a conflict before it will be considered.155

the product of . . . expertise.”

Id. (quoting Pokratz, 771 F.2d at 209).

150. See, e.g., Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104, 1107-08 (7th Cir. 1998) (finding that if a decision “controverts the plain meaning of a plan” it is arbitrary and capricious).

151. See, e.g., Gallo v. Amoco Corp., 102 F.3d 918, 922 (7th Cir. 1996) (noting that “[s]ometimes . . . sheer common sense . . . will provide the court with a handle for pronouncing the administrator's determination arbitrary and capricious,” but failing to find such); Hess v. Hartford Life Ins. Co., 274 F.3d 456, 461 (7th Cir. 2001) (“In some cases, the plain language or structure of the plan or simple common sense will require the court to pronounce an administrator’s determination arbitrary and capricious.” (citing Gallo, 102 F.3d at 922)); Dabertin v. HCR Manor Care, Inc., 373 F.3d 822, 828 (“Where the committee's interpretation of the plan defies all common sense, the district court must overturn that decision.”).

152. See, e.g., Donato v. Metro. Life Ins. Co., 19 F.3d 375, 380 n.3 (7th Cir. 1994) (noting that "the arbitrary and capricious standard of review is a sliding scale standard that should be 'more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.'" (quoting Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987))); see also Chojnacki v. Ga.-Pac. Corp., 108 F.3d 810, 815 (7th Cir. 1997) (“While a conflict of interest does not change the standard of review we apply to an administrator's decision, it will cause us to give the arbitrary and capricious standard more bite. The more serious the conflict, the less deferential our review becomes.”) (citation omitted); Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1020 n.1 (7th Cir. 1998) (“The arbitrary and capricious standard does not pose an all-or-nothing choice between full deference or none. Courts may vary the deference incrementally to account for the strength or weakness of a specific conflict of interest.”); Hess v. Reg-Ellen Mach. Tool Corp., 423 F.3d 653, 660 (using a "slightly more penetrating review").

153. Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (comparing the claim of $240,000 with total revenues of over $6 billion and finding that “[t]he impact on a company's welfare of granting or denying benefits under a plan will not be sufficiently significant as to threaten the administrators' partiality.”) (citation omitted); Chojnacki, 108 F.3d at 815 (comparing the claim of $134,000 with total revenues of over $12 billion and concluding that such a conflict was not serious enough to warrant consideration). But see Hess, 423 F.3d at 659-60 (finding a meaningful conflict where plan fiduciary admitted that making the payout would have significantly affected plan resources).

154. See, e.g., Cozzie, 140 F.3d at 1108 ("Although MetLife acts as both administrator and insurer of the plan, that factor, standing alone, does not constitute a conflict of interest."); Mers, 144 F.3d at 1020 (concluding that acting as plan fiduciary and paying claims out of pocket does not constitute a conflict of interest).

155. See, e.g., O'Reilly v. Hartford Life & Accident Ins. Co., 272 F.3d 955, 960 (7th Cir. 2001) (holding that claimant "has not presented any specific evidence of a conflict of interest and, therefore, we shall not consider that factor in our determination of the reasonableness of Hartford's decision.").
I. Eighth Circuit

From 1994, the Eighth Circuit used an abuse of discretion standard to review discretionary denials of ERISA benefits.¹⁵⁶ This was a departure from the prior post-Firestone use of arbitrary and capricious standard.¹⁵⁷ Since the switch, however, later panels found the two standards interchangeable, and used the same particular standards for both.¹⁵⁸ When plan interpretation was at issue, a five-factor test regarding the consistency of the interpretation was used.¹⁵⁹ Where the dispute was more fact based in nature, the most frequently applied standard was whether the administrator’s decision was supported by substantial evidence.¹⁶⁰ These standards were often presented in the context of reasonableness,¹⁶¹ or “extremely unreasonable.”¹⁶²

When there was a conflict of interest, less deferential (heightened or sliding scale) review was to be applied,¹⁶³ but only when the benefi-

¹⁵⁶. See, e.g., Cox v. Mid-Am. Dairymen, Inc. Ret. Plan, 965 F.2d 569, 571-72 & n.3 (8th Cir. 1992) (“Now that [Firestone] has liberated the ERISA standard from this LMRA analogy, the applicable deferential standard should be the abuse of discretion standard from the law of trusts.”); Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998).

¹⁵⁷. See, e.g., Oldenburger v. Cent. States Se. & Sw. Areas Teamsters Pension Fund, 934 F.2d 171, 173 (8th Cir. 1991) (applying arbitrary and capricious review).

¹⁵⁸. See, e.g., Bounds v. Bell Atl. Enters. Flexible Long Term Disability Plan, 32 F.3d 337, 339 (8th Cir. 1994) (identifying either abuse of discretion or arbitrary and capricious as appropriate for deferential review under Firestone); Donaho v. FMC Corp., 74 F.3d 894, 898 n.5 (8th Cir. 1996) (noting that the choice between arbitrary and capricious and abuse of discretion may be a distinction without a difference) (citations omitted); Hebert v. SBC Pension Benefit Plan, 354 F.3d 796, 798-99 (8th Cir. 2004) (noting that an abuse of discretion is when the administrator acted in an arbitrary and capricious manner).

¹⁵⁹. See, e.g., Finley v. Special Agents Mut. Benefits Ass’n., Inc., 957 F.2d 617, 621 (8th Cir. 1992) (using five consistency factors—whether a plan interpretation was consistent with plan goals, past interpretations, the clear language of the plan, and the substantive and procedural requirements of ERISA, and whether it renders other plan language meaningless or internally inconsistent—to examine whether fiduciary’s decision was arbitrary and capricious); Kennedy v. Ga. Pac. Corp., 31 F.3d 606, 609 (8th Cir. 1994) (applying abuse of discretion standard by examining Finley factors); Buttram v. Cent. States, Se. & Sw. Areas Health & Welfare Fund, 76 F.3d 896, 899-901 (8th Cir. 1996) (applying abuse of discretion standard by examining Finley factors).

¹⁶⁰. See, e.g., Wise v. Kind & Knox Gelatin, Inc., 429 F.3d 1188, 1190 (8th Cir. 2005) (applying abuse of discretion review as a test of reasonableness, where a reasonable decision is one supported by substantial evidence); see also Donaho, 74 F.3d at 900 (in applying the abuse of discretion standard, the decision would only be overturned if it was made “without reason, unsupported by substantial evidence, or erroneous as a matter of law” (citing Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 (3d Cir. 1993))).

¹⁶¹. See, e.g., Finley, 957 F.2d at 621 (holding that decision will be upheld under arbitrary and capricious review if reasonable); see also Cox, 13 F.3d at 274 (applying an abuse of discretion standard by examining the reasonableness of the ERISA plan administrator’s decision).

¹⁶². See, e.g., Kennedy, 31 F.3d at 609 (applying abuse of discretion review by asking whether the decision was extremely unreasonable).

¹⁶³. See, e.g., Buttram, 76 F.3d at 900 (noting the possibility of heightened review where there
The Ninth Circuit was unsteady in its post-Firestone review of ERISA denial of benefits decisions. Prior to 1994, the circuit used either abuse of discretion or arbitrary and capricious review, without much distinction between the two. However, from 1994 through 2006, the cases diverged between those which the circuit conflated the two standards, and those where the circuit simply applied abuse of discretion.
There was little divergence in the non-conflicted administrator jurisprudence of the two lines of cases, with each line appearing in various iterations with similar results. Which line of decisions a case fell into was, however, very important if the case involved a conflicted plan fiduciary. In its early conflict of interest jurisprudence, the Ninth Circuit applied less deferential review to fiduciary decisions when the fiduciary was operating under a conflict of interest. During this period the circuit held that even an

‘abuse of discretion’ terminology as well.”) (citations omitted); Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 875 (9th Cir. 2004) (using the abuse of discretion standard and the arbitrary and capricious standard interchangeably).

169. See Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., 125 F.3d 794, 797-98 (9th Cir. 1997) (applying abuse of discretion review, but reducing deference to de novo review because of a conflict of interest); Winters v. Costco Wholesale Corp., 49 F.3d 550, 552 (9th Cir. 1995) (applying abuse of discretion review). See also Estate of Shockley v. Alyeska Pipeline Serv. Co., 130 F.3d 403, 405 (9th Cir. 1997) (applying abuse of discretion review); Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1122 (9th Cir. 1998); Friedrich v. Intel Corp., 181 F.3d 1105, 1109-10 (applying abuse of discretion standard, but reducing to de novo review due to a conflict of interest); Bendixen v. Standard Ins. Co., 185 F.3d 939, 942, 944 (9th Cir. 1999) (applying abuse of discretion review); Tremain v. Bell Indus. Inc., 196 F.3d 970, 976 (9th Cir. 1999) (applying abuse of discretion standard, but reducing deference to de novo review to account for conflict of interest); McDaniel v. Chevron Corp., 203 F.3d 1099, 1107-08 (9th Cir. 2000) (applying abuse of discretion review); Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1144-45 (9th Cir. 2001) (applying abuse of discretion review); Nord v. Black & Decker Disability Plan, 296 F.3d 823, 828 (9th Cir. 2002) (applying abuse of discretion standard, but reducing deference to de novo review to account for conflict of interest); Alford v. DCH Found. Group Long-Term Disability Plan, 311 F.3d 955, 957 (9th Cir. 2002) (applying abuse of discretion review); Nord v. Black & Decker Disability Plan, 356 F.3d 1008, 1010 (9th Cir. 2004); Boyd v. Bell, 410 F.3d 1173, 1178-79 (9th Cir. 2005); Abatie v. Alta Health & Life Ins. Co., 421 F.3d 1053, 1060 (9th Cir. 2005).

170. See Johnson, 879 F.2d at 654 (abuse of discretion occurs where the fiduciary makes decisions without providing an explanation, or “in a way that clearly conflicts with the plain language of the plan”). See Atwood, 45 F.3d at 1323-24 (finding an abuse of discretion where fiduciary makes a decision without explanation, a decision that contradicts the clear language of the plan, or a decision that relies on clearly erroneous findings of fact); Shockley, 130 F.3d at 405 (holding that a decision should be upheld if based on a reasonable interpretation and made in good faith); see, e.g., Clark, 8 F.3d at 1432 (administrator’s decision is arbitrary and capricious where unreasonable); see also Hensley v. Nw. Permanente P.C. Ret. Plan & Trust, 258 F.3d 986, 1001-02 (9th Cir. 2001) (holding that a court may overturn a decision only where it is “so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law.” (quoting Oster v. Barco of Cal. Employees’ Ret. Plan, 869 F.2d 1215, 1219 (9th Cir. 1988))); Canseco v. Constr. Laborers Pension Trust, 93 F.3d 600, 608 (9th Cir. 1996) (holding that it is arbitrary and capricious when a plan administrator makes decisions that conflict with the plain language of the plan or that impose additional eligibility standards not contained within the plan); Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d 956, 960 (9th Cir. 2001) (finding arbitrary and capricious behavior where fiduciary makes a decision without explanation, a decision that contradicts the plain language of the plan, or a decision that relies on insufficiently developed facts).

171. Dytt v. Mountain State Tel. & Tel. Co., 921 F.2d 889, 894 (9th Cir. 1990) (implementing Firestone’s directive to weigh conflicts of interest as a factor by applying a less deferential review); Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1524 (9th Cir. 1993) (applying less deferential review for “serious” conflicts of interest); Nelson v. EG & G Energy Measurements Group, 37

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employer acting as a plan fiduciary could trigger less deferential review. In 1995, the circuit switched to a “burden-shifting” model, requiring the claimant to prove not only that there was a conflict, but that the conflict in fact caused a breach of a fiduciary duty. If the claimant could not show this, then the court would ignore the conflict of interest. Such proof, if not rebutted, placed the burden on the administrator to prove that the decision was not a result of the conflict. While this standard was generally insurmountable in other circuits, the Ninth Circuit had been known to be reasonable in finding that claimants have actually met the standard—but only in the pure abuse of discretion line of cases.

In 2006, the Ninth Circuit started over with Abatie v. Alta Health & Life Insurance Co. In Abatie, the Ninth Circuit, sitting en banc, held that abuse of discretion was the proper standard, that a plan administrator paying claims out of pocket is operating under a conflict of interest, that the weight given to a conflict of interest will vary from case

F.3d at 1384, 1388 (9th Cir. 1994) (noting less deferential review for conflicts).

172. Dyri, 921 F.2d at 894 (noting that the circuit reduced deference for employers acting as plan fiduciaries pre-Firestone, and so doing in the present case); Bogue v. Ampex Corp., 976 F.2d 1319, 1325 (9th Cir. 1992) (applying less deferential review when employer acted as administrator of unfunded benefits plan, even though administrator was indemnified against the payments); Watkins, 12 F.3d at 1524-25 (applying less deferential review when fiduciary committee is heavily staffed with management-level employees of employer).

173. Atwood, 45 F.3d at 1322 (“We hold that this ‘heightened standard’ does not alter our traditional abuse of discretion review in the absence of specific facts indicating that [the fiduciary’s] conflicting interest caused a serious breach of the plan administrator's fiduciary duty to . . . the plan beneficiary.”). This serious breach of fiduciary duty must be proven by material, probative evidence. Id. at 1323. See also Shockley, 130 F.3d at 405 (applying the burden-shifting approach to conflicts of interest outlined in Atwood, but not finding a conflict); McDaniel v. Chevron Co., 203 F.3d at 1099, 1107-09 (9th Cir. 2000); Alford, 311 F.3d at 957-59; Nord, 356 F.3d at 1010; Lang, 125 F.3d at 797-98 (applying the burden-shifting approach and finding a conflict sufficient to warrant de novo review).

174. Atwood, 45 F.3d at 1323 (“If not, we apply our traditional abuse of discretion review.”).

175. Id. (“Where the affected beneficiary has come forward with material evidence of a violation of the administrator's fiduciary obligation, we should not defer to the administrator's presumptively void decision. In that circumstance, the plan bears the burden of producing evidence to show that the conflict of interest did not affect the decision to deny benefits.”).

176. The Second and Eighth Circuits use similar language in their review of discretionary decisions of ERISA plan administrators, but seem to use a higher standard as a practical matter. See supra text accompanying notes 107-18, 163-72.

177. See Lang, 125 F.3d at 798-99; Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1144-47 (9th Cir. 2001); Nord v. Black & Decker Disability Plan, 296 F.3d 823, 828-32 (9th Cir. 2002).

178. 458 F.3d 955, 966-67 (9th Cir. 2006) (overruling all aspects of Atwood's holdings on conflicts of interest).

179. Id. at 965.

180. Id. at 965-67.
to case tailored to the particular circumstances presented, and that plaintiffs were not required to present “smoking gun” evidence that the conflict affected the decision.

K. Tenth Circuit

The Tenth Circuit applies an arbitrary and capricious standard. The circuit found arbitrary and capricious conduct where the ERISA fiduciary’s decision is not supported by substantial evidence or erroneous as a matter of law, or unreasonable.

The Tenth Circuit in the past has applied a sliding scale reducing deference for conflicts of interest. This has resulted in insurers who were acting as plan administrators being found to operate under a conflict of interest. Recently, the circuit has paid closer attention to such conflicts...
ABUSING ABUSE OF DISCRETION

inherent conflicts of interest. In these situations, the circuit has merged its sliding scale with a two-tier approach which includes burden-shifting. Under the merged sliding scale/burden shifting approach, the sliding scale applies except when there is an inherent conflict of interest, a proven conflict of interest, or a serious procedural irregularity, the burden shifts to the plan fiduciary to prove that its interpretation of the plan was reasonable and that its findings of fact were supported by substantial evidence.

L. Eleventh Circuit

The Eleventh Circuit applies an arbitrary and capricious standard in reviewing ERISA discretionary denial of benefits claims, though it does not consider the distinction between this and abuse of discretion material. The circuit has generally applied this as a reasonableness standard. In applying this reasonableness standard, the circuit first asks whether the administrator's decision was wrong, and then applies the appropriate review if it was. This review is broken down into six steps: (1) determine whether decision was wrong and affirm if not; (2) determine whether the administrator had discretion and reverse if not; (3) determine whether reasonable grounds supported the decision; (4) if there are no reasonable grounds, reverse the decision; if not then determine whether there is a conflict of interest; (5) if there is no conflict, af-

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188. Fought, 379 F.3d at 1006.
189. Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co., 491 F.3d 1180, 1189-90 (10th Cir. 2007) (this approach has since been altered under Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343).
190. See, e.g., Guy v. Se. Iron Workers' Welfare Fund, 877 F.2d 37, 38-39 (11th Cir. 1989) (applying arbitrary and capricious standard); see also Florence Nightingale Nursing Serv. v. Blue Cross/Blue Shield of Ala., 41 F.3d 1476, 1481-82 (11th Cir. 1995) (applying arbitrary and capricious review). Despite the court's assertion that it is not, the court ends up at no deference only after applying arbitrary and capricious modified for conflict of interest and finding a failure on the part of the insurer to dispel the conflict.
192. See, e.g., Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321, 1325-26 (11th Cir. 2001) (finding decisions not to be arbitrary and capricious if reasonable); see also Guy, 877 F.3d at 39 ("Factors taken into account include '1) uniformity of construction; (2) 'fair reading' and reasonableness of that reading; and (3) unanticipated costs.'" (quoting Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984))).
193. See, e.g., Brown v. Blue Cross & Blue Shield of Ala., 898 F.2d 1556, 1566-67 (11th Cir. 1990) ("[O]ur first step in the application of arbitrary and capricious standard is determining the legally correct interpretation of the disputed plan provision."); see also Williams v. Bellsouth Telecommunications, Inc., 373 F.3d 1132, 1138 (11th Cir. 2004) (noting that the correct legal interpretation must first be determined).
firm; and (6) if there is a conflict, apply heightened arbitrary and capricious review.\footnote{194}

In the Eleventh Circuit, when reviewing the decision of a conflicted fiduciary, the court has held that the contours of the arbitrary and capricious review should be “shaped by the circumstances of the inherent conflict of interest.”\footnote{195} If a plan beneficiary demonstrates a substantial conflict of interest on the part of the fiduciary, the burden then shifts to the fiduciary to prove that its decision was not tainted by the conflict of interest.\footnote{196} The circuit finds a strong, inherent conflict of interest when a plan administrator (either an insurer or an employer) pays benefits out of pocket, an insurance company employee doctor makes decisions of medical necessity, or an insurance company employee serves on the review board.\footnote{197}

V. METLIFE

A. The Holding in Glenn

After 19 years of uneven circuit court application of Firestone, the

\footnote{194. Williams, 373 F.3d at 1138 (identifying these six steps).
195. Brown, 898 F.2d at 1563-64. (“The degree of deference exercised in review of a fiduciary’s decision ranges from slight to great, depending upon the dynamics of the decisionmaking process. In Posnerian terms, ‘the arbitrary and capricious standard may be a range, not a point.’” Id.) (citations omitted).
196. Id. at 1566 (“[W]hen a plan beneficiary demonstrates a substantial conflict of interest on the part of the fiduciary responsible for benefits determinations, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest.”); see also Newell v. Prudential Ins. Co. of Am., 904 F.2d 644, 651-52 (11th Cir. 1990) (applying the Brown two-step burden shifting test); Lee v. Blue Cross & Blue Shield of Ala., 10 F.3d 1547, 1552 (11th Cir. 1994) (noting Brown two-step, but remanding to the district court to determine whether the decision was arbitrary and capricious under that standard); Florence Nightingale, 41 F.3d at 1481-82 (noting arbitrary and capricious review, then shifting the burden to the defendant to rebut an inherent conflict). The court went on to apply de novo review after the defendant failed to rebut, thus performing all the functions of Brown arbitrary and capricious burden-shifting, despite asserting that it is not applying arbitrary and capricious review. See also Adams v. Thiokol Corp., 231 F.3d 837, 842 (11th Cir. 2000) (shifting the burden of proving proper decisionmaking to the fiduciary).
197. See, e.g., Brown, 898 F.2d at 1561-62 (“Because an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business. [A] ‘strong conflict of interest [exists] when the fiduciary making a discretionary decision is also the insurance company responsible for paying the claims . . . .'” (quoting Jader v. Principal Mut. Life Ins. Co., 723 F. Supp 1338, 1343 (D. Minn 1989))); see also Newell, 904 F.2d at 650 (finding a conflict of interest when insurance company employees determine medical necessity); HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co., 240 F.3d 982, 1001 (11th Cir. 2001) (finding conflict of interest when insurance company pays benefits out of pocket); Adams, 231 F.3d at 842-43 (finding a conflict of interest in an employer's potential losses due to claims payments to justify heightening scrutiny).}
Supreme Court revisited the issue of conflicted ERISA fiduciaries. In *MetLife*, the Supreme Court first held that an ERISA plan administrator who both evaluates claims for benefits and pays benefits out of pocket is operating under a conflict of interest, regardless of whether that administrator is an employer or an insurer.

The Court then turned to the question of how such a conflict was to be considered, and reiterated and expanded upon its statement in *Firestone* that the conflict should be weighed as a factor in determining whether there was an abuse of discretion. The Court rejected using the existence of a conflict of interest to reduce the abuse of discretion review to de novo review, and also rejected the use of "special burden-of-proof rules, or special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict." The Court stated that "Firestone means what the word 'factor' implies... and that judges will take into account a conflict of interest as one of many considerations." In examining the facts of *MetLife*, the Court noted that it was not creating a talismanic list of details that lower courts were required to examine.

In *MetLife*, as in *Firestone*, the Court relied on principles of trust law in reaching its holdings.

B. The Impact of Glenn In The Circuits

*MetLife* has already induced a number of changes in circuit court case law. The circuits have almost universally moved in the direction of comporting with *MetLife*, although they have not universally had the opportunity to address each aspect of the case.

The reiteration in *MetLife* that structural conflicts of interest are the sort of conflicts of interest that must be considered prompted the First, Fifth, and Seventh Circuits to reject their prior holdings to the contrary. Further, circuits have rejected burden-shifting methodology.

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200. Id. at 2348-50 ("The first question [before us] asks whether the fact that a plan administrator both evaluates claims for benefits and pay benefits claims creates the kind of 'conflict of interest' to which *Firestone*’s fourth principle refers. In our view, it does.").
201. Id. at 2348-49.
202. Id. at 2350-52.
203. Id. at 2350-51.
204. Id. at 2351.
205. Id.
206. Id. at 2352.
207. See supra Part III.A
209. The First and Fifth Circuit’s explicitly overruled their prior holdings. See *Denmark v.*
and old holdings that a claimant had to prove that a conflict actually affected the decision before that conflict could be considered. The Eleventh Circuit also rejected its “heightened arbitrary and capricious” standard. Most of the circuits which formerly applied a “sliding scale” approach have now rejected that as inconsistent with MetLife. The Tenth Circuit, however, harmonized the “sliding scale” aspects of its review with MetLife.

The one instance of continued non-conformity with Supreme Court precedent so far has come in the Second Circuit. The first Second Circuit panel to address MetLife held that MetLife abrogated that circuit’s rule that a conflict of interest could be disregarded unless the claimant proves that the conflict actually affected the decision. However, a later panel saddled complainants with the worst of both worlds, applied the old requirement that a claimant was required to make this showing of actual affect, while at the same time holding that MetLife abrogated the circuit’s old rule that such a showing reduced the review to de novo.

VI. THE PROPER STANDARD

A proper standard for judicial review of the decisions of ERISA plan fiduciary’s in discretionary denial of benefits cases must follow the Supreme Court’s decisions in Firestone and Glenn and comport with
ERISA’s goals of providing uniformity and protecting plan participants. In the wake of MetLife, the circuits have begun moving in the right direction, replacing the prior jumble of standards that did not meet these criteria. Now is time for the circuit courts to adopt a proper, universal standard of review,\textsuperscript{217} to be applied to ERISA denial of benefits cases.\textsuperscript{218}

\textbf{A. Abuse of Discretion Review Rather Than Arbitrary and Capricious Review}

To determine the proper standard, the starting point must be the Supreme Court’s decisions in \textit{Firestone} and \textit{Glenn}. Under the holding of those cases, the standard should be abuse of discretion. Whether the standard is called "arbitrary and capricious" or "abuse of discretion" is irrelevant, if the result is the same in the end. However, it is important that the abuse of discretion standard be used for two reasons.\textsuperscript{219} First, if there is no effect on the substance of the test based on the language used, then the test should use language consistent with \textit{Firestone}. Second, the use of the term "arbitrary and capricious" has not produced correct results. Arbitrary and capricious is as deferential a test as one could devise, and most of the circuit courts have been applying it as such. There must be a clean break between the flawed jurisprudence of the past and a better jurisprudence of the future. Using the correct terminology will further this goal.

\textsuperscript{217} It has been argued that taking the procedural posture of these cases to be a review of an administrative decision, rather than a suit under contract, is improper. See Conison, \textit{supra} note 33, at 58, 60. This argument is buttressed by the contrast between the Social Security Act, which provides for a civil action to obtain review of a decision, and ERISA’s language providing for a civil action that is a suit for benefits. O’Neil, \textit{supra} note 33, at 751 (comparing the language of the Social Security Act and ERISA private rights of action, as codified at 42 U.S.C. § 405(g) and 29 U.S.C. § 1132(a)(1)(B)). This option is, however, not consistent with \textit{Firestone} and MetLife, and will not be considered. See generally Roy F. Harmon III, \textit{The Debate Over Deference In The ERISA Setting – Judicial Review of Decisions By Conflicted Fiduciaries}, 54 S.D.L. REV. 1, 2-6, 18-20 (2009) (asserting that review of ERISA benefit determinations has been becoming more similar to review of agency administrative decisions).

\textsuperscript{218} New, universal standards for review of these cases have been suggested before. See Kennedy, \textit{supra} note 4, at 1168-73 (proposing arbitrary and capricious review using a four-factored reasonableness standard burden-shifting test to compensate for conflicts of interest); Bradley R. Duncan, \textit{Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test}, 71 CORNELL L. REV. 986, 1008 (1986) (arguing that the arbitrary and capricious standard should be replaced with a "solely in the interest of the plan participants" test, which would require that a denial be based on an unambiguous provision with either a demonstrated actuarial need for such provision or the administrator showing that the claimant’s proposed reading of the provision would constitute a threat to the plan’s health).

\textsuperscript{219} But see Jenkins v. Price Waterhouse Long Term Disability Plan, 564 F.3d 856, 861 n.8 (7th Cir. 2009) (“Nit-pickers might argue that there is a distinction between the arbitrary and capricious standard of review and testing for an abuse of discretion.”).
Not only does the arbitrary and capricious test carry the weight of its past, but the words themselves carry the wrong connotations for the task at hand. By plain meaning, something is arbitrary and capricious if it is unpredictable, determined by chance, whim or impulse and not by necessity, reason, or principle. An abuse of discretion simply means to misuse the power to act on one's own. Even if as terms of art these two phrases had the same connotation, they carry a meaning from their English usage. Certainly, ERISA fiduciary decisions that are arbitrary and capricious are an abuse of discretion, but most ERISA denial of benefits claims do not assert that the denial was based on whim, chance or impulse. Rather, they assert that the decision was based on a desire on the part of the fiduciary to increase profits. There is no assertion that these decisions are not motivated by a reasoned principle, the issue is whether or not the reasoned principle involved was the benefit of the plan participants or the bottom line of the company making the decision. In ERISA denial of benefits cases, arbitrary and capricious does not properly address the issues at hand. As directed by *Firestone* and *Glenn*, the circuit courts should use abuse of discretion language instead of arbitrary and capricious.

**B. Nonexclusive Factors That Courts May Consider**

In *MetLife*, the Supreme Court disavowed the use of a talismanic list of details that courts were required to consider in every case. Such a standard gives judges the greatest leeway to examine all the information available in whatever fashion is most efficient for the case at hand. Unfortunately, vague standards in the past have led to excessive deference to the decisions of ERISA fiduciaries. Furthermore, the use of completely freeform determinations could undermine one of the primary goals of ERISA, the creation of uniformity in the field of employee benefits. However, the flexible approach of *MetLife* is consistent with the use of a list of nonexclusive factors that lower courts may—but are not required to—consider. By identifying an array of nonexclusive factors, the circuit courts can provide district courts with a universal framework to reference when making their decisions and litigants will be

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221. Id. at 8.
223. See Champion v. Black & Decker (U.S.) Inc., 550 F.3d 353, 359 (4th Cir. 2008) (reiterating post-*MetLife* eight nonexclusive factors that a court may consider in assessing whether there was an abuse of discretion (citing Booth v. Wal-Mart Stores, Inc. Ass’n Health & Welfare Plan, 201 F.3d 335 (4th Cir. 2000))).
better able to gauge in advance what the case will turn on and what the outcome should be. This blended approach allows for flexibility and judicial discretion, is helpful to district courts, and furthers the uniformity goal of ERISA. For these reasons, the standard of review adopted to review ERISA denial of benefits cases should contain substantial guidance for district courts.

C. Preliminary Matters

Before applying the heart of the abuse of discretion standard, there are two issues the court should examine, as they can be determinative of the outcome regardless of other factors.

The first issue deals with whether the administrator’s decision was correct. The correct interpretation of any disputed plan provisions can be settled under standard contract interpretation procedures, and the court can make any necessary findings of fact. The purpose of engaging in a determination of the correct plan interpretation and/or finding of fact is to compare this to the actual interpretation or finding of fact made by the administrator. If the administrator’s decision was correct, then the court may simply end its inquiry. While the court still has to deal with substantive elements of the claim, it can avoid entering the procedural aspects of abuse of discretion review. This promotes efficiency since the correctness review requires examination of the same materials as the full abuse of discretion review.224

The second matter is whether the ERISA administrator’s decision hinges on a pure question of law. While ERISA plan administrators may have discretion to interpret their own plan documents, it is the province of the courts to decide what the law is. Where the review concerns a pure question of law, the review must be de novo regardless of plan provisions granting discretion.225

224. This article does not seek to address what circumstances should allow the court to consider evidence presented by the parties in court that was never presented to the plan administrator during the original claims process. See generally O’Neil, supra note 33, at 754-61 (discussing the problems with allowing the court’s review to be controlled by the fiduciary’s construction of the administrative record).

225. This application is well-established. See, e.g., Gauer v. Connors, 953 F.2d 97, at 99-100 (4th Cir. 1991) (reviewing plan administrator’s interpretation of ERISA law de novo); Weil v. Ret. Plan Admin. Comm. of Terson Co., Inc., 913 F.2d 1045, 1048-49 (2d Cir. 1990) (applying de novo review to an administrator’s interpretation of the meaning of “partial termination” in the federal tax codes); Penn v. Howe-Baker Eng’rs, Inc., 898 F.2d 1096, 1101 (5th Cir. 1990) (applying de novo review to a plan administrator’s interpretation of whether claimant was an employee or an independent contractor at common law); Izzarelli v. Rexene Prods. Co., 24 F.3d 1506, 1514 (5th Cir. 1994); Matassarin v. Lynch, 174 F.3d 549, 563 (5th Cir. 1999) (reviewing legal conclusions regarding the meaning of a contract or statute de novo); Williams v. Midwest Operating Eng’rs Welfare Fund, 125
Before plunging into the heart of its abuse of discretion review, the court should first determine whether the plan administrator’s decision was correct. If the decision was correct, then it should be upheld, and the court need not proceed further. Otherwise, the court must determine if the administrator’s decision was erroneous as a matter of law. If it was, then the court should simply apply *de novo* review. The administrator’s decision will then be overturned, as the court has already determined that the decision was incorrect.

**D. Conflicts of Interest**

The core of abuse of discretion review hinges on a balancing act between a variety of factors. One of these factors is the existence of a conflict of interest. This factor is present in the Restatement,\(^ {226}\) is mandated by *Firestone*\(^ {227}\) and *MetLife*\(^ {228}\) and a proper abuse of discretion review cannot be performed without considering it. The decision is whether or not the conflict of interest factor should be singled out from the others, and if so, how. Before *MetLife*, most of the circuit courts had chosen to single this factor out, either in an all-or-nothing burden-shifting,\(^ {229}\) or by using a sliding scale test.\(^ {230}\) Since the Supreme Court’s statement in *MetLife* against the creation of “special burden-of-proof rules,”\(^ {231}\) however, many circuits have joined the Sixth\(^ {232}\) and Ninth\(^ {233}\) Circuits in declining the single out the conflict of interest factor for special treatment.\(^ {234}\) In light of *MetLife*, and in the interest of uniformity, no special alteration of the deference given to a plan administrator’s decision should be applied to conflicts of interest.

Even considering *MetLife*, sliding scale review for conflicted fiduciaries is arguably an appropriate way of weighing the conflict as a factor because the sliding scale method is still a balancing test. Separately labeling this particular factor would serve to emphasize its importance,

\(^ {227}\) See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 384 n.15 (2002) (“In *Firestone Tire* itself, we noted that review for abuse of discretion would hone in on any conflict of interest on the plan fiduciary’s part, if a conflict was plausibly raised.”).
\(^ {229}\) See supra notes 111-16, 182-89, 293-96 and accompanying text.
\(^ {231}\) *MetLife*, 128 S. Ct. at 2351.
\(^ {232}\) See supra notes 149-150 and accompanying text.
\(^ {233}\) See supra notes 189 and accompanying text.
\(^ {234}\) See supra notes 236, 239 and accompanying text.
as appropriate in light of the Supreme Court’s special mention of it in Firestone and Glenn, and given the lower courts’ history of neglecting it. A sliding scale standard protects plan participants by making sure that conflicted fiduciaries are always called to count, and in a way that is still fair to those fiduciaries.

However, the “sliding scale” method is, ultimately, a special burden-of-proof rule. Considering conflicts of interest as one factor among many—albeit often a very important one—produces nearly the same practical results as the “sliding scale” method, while strictly adhering to Glenn. Further, the strong shift away from the “sliding scale” after Glenn means that the goal of uniformity is more easily within reach for a standard that does not single out conflicts of interest.

The burden-shifting alternative should be rejected for two reasons. First, it tends to inappropriately dismiss conflicts of interest altogether when the claimant cannot prove that the conflict actually affected the decision. This is inconsistent with the Supreme Court’s requirement that such a conflict be “weighed as a factor” in judging an abuse of discretion. It is clearly a problematic special burden-of-proof rule, and it does not comport with ERISA’s goal of protecting plan participants and beneficiaries because it lays an almost insurmountable burden on claimants. The second problem with burden-shifting approach is that when the claimant does meet this burden, the technique inappropriately presumes that the claimant is correct and places the burden of proof on the fiduciary to show otherwise. This is not supported in the statutes, it is not supported in Firestone or Glenn, and it is not supported in the Restatement (Second) of Trusts. The most stringent review under ERISA is de novo, with no deference to either party. To go further is inappropriate.

In addition, meaningful implementation of this factor requires courts to properly recognize when there is a conflict of interest. In particular, as the Supreme Court recognized in MetLife, when the plan fiduciary is paying benefits claims directly out of company coffers, there should be no doubt that it creates a conflict. The fiduciary is in the

236. See generally supra Part IV.
237. Compare supra note 239 and accompanying text, with supra note 240 and accompanying text.
238. Even in cases where the plan participant is able to prove that the fiduciary’s decision was made in bad faith, the result is simply for the court to substitute its own judgment, not for the court to defer to the wishes of the beneficiary. RESTATEMENT (SECOND) OF TRUSTS § 187 cmts. f-g (1959).
239. See MetLife, 128 S.Ct. at 2348.
business of making money. Every claim denied not only profits the fiduciary immediately, but sets precedent for denials of similar claims in the future. While there may be other countervailing factors, such as the long-term ability to attract good employees, this does not make the central conflict disappear. Further, claimants should not be required to prove an actual effect on the decision in question before a conflict may be considered. This sort of extra burden-of-proof fails to weigh the conflict of interest as a factor, and is contrary to Firestone, MetLife, and the principles of the Restatement.

Prior to MetLife, circuit courts had shied away from these positions, because so many ERISA fiduciaries have placed themselves in this sort of serious conflict, and courts perhaps wished to avoid seriously reviewing every single ERISA claim where benefits were denied. This approach ignores the elephant in the room—the ubiquitous nature of these conflicts of interest cries out for increased, rather than reduced, judicial involvement. Congress did not pass legislation to protect employee benefit plan participants because it was a small problem. Thus, the legislature’s will should not be thwarted because the problems that the legislation addresses are so widespread. The response to fiduciaries’ willingness to place their own interests at odds with the interest of the beneficiaries is to “clamp down” on those plan administrators.

Conflicts of interest are avoidable. Companies can use funded trusts so that payments of claims do not translate directly into corporate losses. Fiduciaries can use truly independent claims handlers, or at the very least independent claims denial review boards, rather than their own interested employees. For medical benefits determinations, ERISA fiduciaries can seek out independent medical review, rather than relying on company employees or a small stable of hand-picked doctors whose continued employment depends on their producing results favorable to the fiduciary. A claims process whereby a doctor, who is employed by the insurance company, provides a recommendation to an adjuster, who is similarly employed by the insurance company, that is reviewed by others, who are also employed by the insurance company, does not dissipate a conflict of interest. ERISA fiduciaries have the choice to mi-


241. Indeed, Chief Justice Roberts, although concurring in the judgment in MetLife, wrote separately because he disagreed with the majority’s conclusion that a claimant need not show in advance that the conflict affected the decision. MetLife, 128 S.Ct. at 2352-55 (Roberts, J., concurring).
nimize their conflicts of interest, and the courts should not simply excuse those who choose not to do so.\footnote{242}{See MetLife, 128 S.Ct. at 2350 ("ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator 'discharge [its] duties' in respect to discretionary claims processing 'solely in the interests of the participants and beneficiaries' of the plan." (quoting ERISA § 404, 29 U.S.C. § 1104(a)(1) (2006))).}

Conflicts of interest should be considered as one factor among many, with no special procedural consideration, although the importance of this factor should not be understated. In applying this standard, courts must not ignore the serious conflicts that arise when an ERISA fiduciary, especially a third-party insurance company, pays all claims out of company coffers. Likewise, they must not impose a special burden-of-proof rule requiring claimants to prove the effect of a conflict of interest before the court will weight it as a factor.

\section*{E. Other Factors Available for Consideration}

As identified by the Court in \textit{Firestone},\footnote{243}{See Firestone, 489 U.S. at 111 (citing \textsc{Restatement (Second) of Trusts} § 187 cmt. d (1959)); see also \textsc{MetLife}, 128 S.Ct. at 2348-51.} Comment "d" to Section 187 of the Restatement (Second) of Trusts is the appropriate place to examine for additional factors to be used in abuse of discretion review.\footnote{244}{\textsc{Restatement (Second) of Trusts} § 187 cmt. d (1959).} Comment "d" identifies five factors, other than a conflict of interest, which are to be considered in this analysis.\footnote{245}{Id. These factors are (1) the extent of the fiduciary's discretion, (2) the purposes of the trust, (3) the nature of the power, (4) any external standards against which the fiduciary's conduct can be judged, and (5) why the fiduciary did or did not exercise the power in the fashion that he did. \textit{Id.}} Each of these factors should be examined for its applicability in the ERISA denial of benefits context.

The first factor put forth by the Restatement is the extent of the fiduciary's discretion.\footnote{246}{\textit{Id.}} This factor is moot for ERISA abuse of discretion review because by the time the court is applying the test, it has already determined that the action taken by the fiduciary falls within its discretion in administering the ERISA plan. If it were outside the fiduciary's discretion, then the court would simply be applying \textit{de novo} review.\footnote{247}{\textit{Firestone}, 489 U.S. at 111-13.}

The second Restatement factor is the purpose of the trust.\footnote{248}{\textsc{Restatement (Second) of Trusts} § 187 cmt. d (1959).} All ERISA plans have the general purpose of providing for the plan partici-
pants and beneficiaries; on these general grounds alone this factor is not helpful. Some ERISA plans, however, intend to provide for the plan participants in certain ways. In those situations, it is possible for this purpose to affect whether or not an administrator has abused its discretion. The plan administrator could be justified in taking into account a dichotomy between the purpose of a plan provision and the actual circumstances when determining whether or not to pay out benefits. Since the general application of this factor from the Restatement is taken into account, by conflict of interest dimensions of deferential review already discussed, a meaningful way to apply it is to determine if the administrator's decision was consistent with any particular purpose of a plan provision.

The third factor presented by the Restatement is the nature of the power being exercised by the administrator. Since this abuse of discretion test is concerned only with denials of benefits under ERISA plans, the power will in all instances be the same—the power to grant or deny participants claims for benefits, thus, this factor is not helpful here.

The fourth factor for abuse of discretion review under the Restatement is the presence and character of any external standard against which the administrator's decision may be judged. There are three sources against which the conduct of an ERISA fiduciary can be judged: (1) factual evidence such as medical information, (2) the provisions of the employee benefits plan from which the fiduciary derives its power, and (3) the federal statutes and regulations governing the administration of ERISA plans.

An ERISA administrator's findings of fact can be judged against a number of criteria. Any finding of fact should meet the general standard of being supported by substantial evidence. In addition, however, the plan administrator should have properly considered all relevant information in making the decision. In particular, evidence that must be considered by ERISA plan fiduciaries often includes medical reports. A plan fiduciary denying benefits should ensure that sufficient medical information has been considered and personnel who are equipped to do so have considered it. If a doctor does not make the final decision, then it should at least include some review by medical staff and an explanation to enable the non-specialist to make an appropriate final decision. Independent medical review should also be included to support a medical deter-

249. See supra Part V.D.
251. Id.
252. See supra notes 101, 107, 109-10, 117, 129, 166, 191, 196 and accompanying text.
The review should be full meaning that the review should at least consist of a doctor examining the entire medical file, rather than reviewing a narrow portion prepared by the fiduciary. The record of this review should demonstrate that the doctor considered all significant issues raised by the plan participant during the claims procedure. Findings of fact outside the medical realm should also include all significant issues. Therefore, the factors available for consideration to a court applying an abuse of discretion test should include: (1) whether the administrator’s decision was supported by substantial evidence, (2) whether all significant issues were considered in the decisionmaking process, and (3) for medical benefits whether the decision was made after a full independent medical review, and the individual making the final decision made it on the basis of fully-understood information.

Review of an ERISA administrator’s decision involving a plan interpretation should include some comparison to the actual plan language. Review of a denial of benefits should generally examine (1) whether the interpretation is consistent with the clear language of the plan, and (2) whether the interpretation would render parts of the plan inconsistent or meaningless.

The third external standard against which an administrator’s decision can be compared is the body of law governing ERISA plans. These consist of both general statutory commands, and the precise regulations promulgated by the Secretary of Labor. In particular, breaches of the Code of Federal Regulations provisions regarding claims procedures could weigh against a plan administrator in a determination of whether that administrator’s decision was an abuse of discretion. Given the extensive nature of federal regulation in this area, it would be difficult to identify them all, and it suffices to note that a reviewing court should consider examining whether the fiduciary’s decisionmaking pro-

253. The treating physician rule does not apply in ERISA denial of benefits cases, so the courts may not place any heightened burden of explanation on plan administrators for rejecting the opinion of a treating physician in favor of the opinion of a non-treating physician. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825, 831 (2003) ("Nothing in [ERISA] itself, however, suggests that plan administrators must accord special deference to the opinions of treating physicians. Nor does [ERISA] impose a heightened burden of explanation on administrators when they reject a treating physician's opinion.").


256. 29 C.F.R. § 2560.503-1 (2005). The requirements include providing plan beneficiaries with a written description of the claims procedure, id. at (b)(2); not charging additional fees for appeals of benefits denials, id. at (b)(3); providing prompt notification of adverse benefits determinations including the specific reason or reasons for the determination, id. at (g)(1)(i); and a crafting an appeal process that provides full and fair review with significant procedural protections to plan participants and their beneficiaries, id. at (h)-(j).
procedure comports with the substantive and procedural requirements embodied in ERISA regulations.

The fifth and final factor presented in the Restatement are the reasons why the trustee chose to exercise the power to deny benefits.257 While this Restatement factor does include considerations of completely improper motivation, these concerns have been sufficiently dealt with by the attention focused on conflicts of interest.258 However, this Restatement factor also encapsulates concerns regarding the reasoning process that went into the decision. This includes whether the decision was reached by chance, whim, or impulse rather than reason or principle.259 These concerns also include ensuring consistent application of the plan from one participant to another. Therefore, abuse of discretion review should weigh as factors (1) whether the decision was the result of a reasoned or principled decisionmaking process,260 and (2) whether any interpretations of plan provisions were consistent with prior interpretations of the same provision.

F. The Proposed Test

Bringing these considerations together, the author proposes the following test. A discretionary denial of benefits made by an ERISA fiduciary is subject to abuse of discretion review. The court’s first step should be to determine the correct decision. If the administrator’s decision was in fact the correct one, then the court’s inquiry ends and the decision is upheld. If not, then the court must determine if the decision was erroneous on the law. If it was the court overturns the administrator’s decision. Otherwise, the reviewing court must proceed to weigh applicable factors to determine whether the plan administrator has abused its discretion. In so doing, the court may consider the following nonexhaustive list of factors: (1) whether the plan fiduciary was operating under a conflict of interest, and the nature and severity of that conflict; (2) whether or not the decision is consistent with the purpose of the plan, if the plan has a particular purpose within the general interests of the participants; (3) whether the administrator’s decision was supported by substantial evidence; (4) whether all significant issues were considered in the decisionmaking process; (5) whether the fiduciary’s plan interpretation is consistent with the clear language of the plan; (6) whether

258. See supra notes 219-24 and accompanying text.
259. That is, whether the decision was arbitrary or the result of caprice.
260. See supra notes 130, 132 and accompanying text.
the fiduciary’s plan interpretation would render parts of the plan inconsistent or meaningless; (7) whether the decision and decisionmaking process comport with the regulatory protections of ERISA, (8) whether the decision was the result of a reasoned and principled decisionmaking process; (9) whether the fiduciary’s plan interpretation is consistent with prior interpretations; and (10) for medical benefits, whether the decision was made after a full independent medical review, and the individual making the final decision made it on the basis of information he could fully understand. The manner in which these factors interact will vary depending on the specifics of the case involved—in many instances, some of the factors may not be at issue at all. Further, these factors are nonexclusive and the reviewing court may consider additional fact-specific issues as appropriate.

VII. CONCLUSION

ERISA promised the American worker protection and uniformity in the handling of employee benefits. For thirty years, those workers have looked to the federal judicial system to review fiduciary denials of benefits and to ensure that the legislative goals of ERISA were achieved, but the federal courts have historically failed to produce an adequate system for reviews that ensures the protection of workers and the uniform fair handling of their claims. The author has proposed a test for deferential review of these fiduciary decisions, one that protects employees from conflicted plan fiduciaries, gives guidance to the district courts to promote uniform decisions, and still preserves the role of the courts as providing review of discretionary decisions. In the wake of MetLife, it is past time for the circuit courts to reconcile their conflicting precedents and bring them in line with the purposes of ERISA and the guidance the Supreme Court has provided in this area.