

## A DECADE OF CONFUSION: THE STANDARD OF REVIEW FOR ERISA BENEFIT DENIAL CLAIMS AS ESTABLISHED BY *FIRESTONE*

### I. INTRODUCTION: HISTORY OF ARBITRARY AND CAPRICIOUS REVIEW UNDER ERISA

Prior to the enactment of the Employment Retirement Income Security Act ("ERISA")<sup>1</sup> in 1974, the field of private pension and benefit plans operated largely unfettered by any substantial federal regulation.<sup>2</sup> Although some limited aspects of pension plans were protected by various bodies of state or federal law prior to ERISA,<sup>3</sup> the general perception existed that this piecemeal protection was inadequate to ensure employee expectations regarding anticipated benefits.<sup>4</sup> Among the stated purposes of the statute were establishing a uniform source of law to govern the administration of pension plans<sup>5</sup> and promoting the interests of employees and their beneficiaries in employee benefit plans.<sup>6</sup>

To that end, ERISA mandates that the plan administrator<sup>7</sup>

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1. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994).

2. Charles B. Blakinger, Note, *Fiduciary Standards Under the Employee Retirement Income Security Act of 1974*, 63 GEO. L.J. 1109, 1109 (1975).

3. *Id.* (indicating that "federal regulatory statutes, the Internal Revenue Code, and state trust law partially protected pension plan participants and their beneficiaries" before ERISA was enacted (citations omitted)).

4. Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 576 (1992) ("Congress had determined that employee rights to anticipated benefits were woefully underprotected and concluded that the threats to employees' interests demanded an expansive and thorough legislative response." (citation omitted)).

5. Jonathan P. Heyl, Note, *Bedrick v. Travelers Insurance Co.: The Fourth Circuit's Continued Attempt to Work With the "Doctrinal Hash" of the Standard of Review in ERISA Benefit-Denial Cases*, 75 N.C. L. REV. 2382, 2390 (1997); see also H.R. REP. NO. 93-533, at 12 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4650 ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.").

6. 29 U.S.C. § 1001(a) (stating that "it is desirable in the interests of employees and their beneficiaries . . . that . . . safeguards be provided with respect to the establishment, operation, and administration of [employee benefit] plans").

7. See *id.* § 1102(a)(1) ("Every employee benefit plan . . . shall provide for one

"shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries."<sup>8</sup> To ensure compliance with this provision, ERISA contains an enforcement clause that grants plan participants or beneficiaries the explicit right to file suit against the plan to recover benefits that have been wrongfully withheld.<sup>9</sup> Intending the courts to develop a body of federal common law to apply to such suits,<sup>10</sup> Congress provided no guidance in the statute's text regarding the proper standard of review for denial of benefits claims arising under the statute.<sup>11</sup> Using trust principles as an analogy, appellate courts hearing early ERISA cases determined that the highly deferential "arbitrary and capricious" standard was the appropriate one to apply.<sup>12</sup> In light of ERISA's primary stated purpose of safeguarding the interests of plan participants,<sup>13</sup> a standard granting such a high level of deference to a plan administrator's decision or interpretation seems somewhat ill-advised.<sup>14</sup>

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or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.").

8. *Id.* § 1104(a)(1).

9. *Id.* § 1132(a)(1)(B) ("A civil action may be brought . . . by a participant or beneficiary . . . 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.").

10. *Pilot v. Dedeaux*, 481 U.S. 41, 56 (1978) ("[I]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." (citing 120 CONG. REC. 29942 (1974) (remarks of Sen. Javits))); see also *Conison*, *supra* note 4, at 577 (noting that "Congress wished the federal courts to work out the ramifications and details of the statute's principles and approaches"). *Conison* feels that Congress' decision to enact a preemption clause provides conclusive evidence of this intent. *Id.* at 579 n.9.

11. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989) ("ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations."). For a general discussion of the rationale behind Congress' grant of deference to the courts regarding benefit plan law, see *Conison*, *supra* note 4, at 576-79.

12. See, e.g., *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979); *Bueneman v. Central States, Southeast & Southwest Areas Pension Fund*, 572 F.2d 1208, 1209 n.3 (8th Cir. 1978); *Riley v. MEBA Pension Trust*, 570 F.2d 406, 413 (2d Cir. 1977).

13. *Conison*, *supra* note 4, at 579 ("ERISA clearly instructs courts, in developing plan-related law, to treat as paramount the goal of protecting employee rights and expectations relating to benefits from plans.") (citation omitted).

14. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048,

*A. Development of the Current Standard*

Despite the perception that the "arbitrary and capricious" standard runs directly counter to the stated objectives of ERISA,<sup>15</sup> a brief examination of the standard's evolution in the context of ERISA reveals that its application is understandable, if not appropriate. In the pension and benefit fund context, the arbitrary and capricious standard is derived from lawsuits involving denials of benefits by trust funds governed by the Labor Management Relations Act of 1947 ("LMRA"),<sup>16</sup> a precursor to ERISA.<sup>17</sup> Section 302 of the LMRA<sup>18</sup> allows the establishment of trust funds, through collective bargaining between employers and unions, that will ultimately provide pensions and welfare benefits to employees.<sup>19</sup> When ERISA was enacted in 1974, the "arbitrary and capricious" standard was the prevailing standard of review for benefits denials by trustees administering the trusts established under the LMRA.<sup>20</sup> ERISA's silence as to an appropriate standard of review for benefits denial claims prompted the courts to import this standard by analogy from the LMRA frame of reference to ERISA actions.<sup>21</sup> Fundamental differences between the LMRA trusts and ERISA plans reveal, however, that a claim subject to the "arbitrary and capricious"

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1052 (7th Cir. 1987) (indicating that, when transferred to an ERISA setting, "the arbitrary and capricious standard may be inapt, [or] a historical mistake").

15. Heyl, *supra* note 5, at 2392-94.

16. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.). This act is generally referred to as the Taft-Hartley Act, after the names of its congressional sponsors, Robert Taft of Ohio and Fred Hartley, Jr. of New Jersey. John A. McCreary, Jr., Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 DUQ. L. REV. 1033, 1036 n.8 (1985).

17. See McCreary, *supra* note 16, at 1035-36. The roots of ERISA are found in the piecemeal statutes which governed pension and benefit plans prior to ERISA's enactment. *Id.* at 1035. The Taft-Hartley Act was one such piece of legislation, and some of the act's language was actually reenacted by ERISA. *Id.* at 1036.

18. Labor Management Relations Act of 1947 § 302(c)(5), 29 U.S.C. § 186(c)(5) (1994).

19. McCreary, *supra* note 16, at 1037.

20. Michael S. Beaver, *The Standard of Review in ERISA Benefits-Denial Cases after Firestone Tire and Rubber Co. v. Bruch: Revolution or Déjà vu?*, 26 TORT & INS. L.J. 1, 2 (1990). For a full discussion of the standard's history under the LMRA trusts, see McCreary, *supra* note 16, at 1038-41.

21. Beaver, *supra* note 20, at 2.

standard under an LMRA trust would be much better insulated against potential improprieties that might go unpunished by the application of such a lenient standard in an ERISA case.<sup>22</sup>

The LMRA legislation, for example, requires

that the fund be administered jointly by an equal number of employer- and employee-appointed trustees; that, in the event of a deadlock by the trustees on fund administration, the dispute be submitted to an impartial arbitrator for resolution; and, finally, that contributions to the fund be made "for the sole and exclusive benefit of the employees . . . and their families and dependants. . . ."<sup>23</sup>

ERISA, on the other hand, contains none of these "inherent safeguards,"<sup>24</sup> raising at least some doubt as to the wisdom of applying such a lenient form of judicial review to an administrator's conduct.<sup>25</sup>

Regardless of these concerns, the standard gained widespread approval among the circuit courts as the proper standard by which to evaluate the conduct of pension and benefit fund administrators.<sup>26</sup> Practical application of the standard, however, eventually began to reveal some of its shortcomings in the context of ERISA, particularly in situations involving bad faith or conflict of interest on the part of the plan administrator.<sup>27</sup> In

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22. Heyl, *supra* note 5, at 2393.

23. McCreary, *supra* note 16, at 1037 (citation omitted). The author stresses the importance of noting "that the Taft-Hartley Act is applicable only to trusts established by collective bargaining between employers and unions, which are funded by employer contributions, and in which the union retains some administrative authority." *Id.* at n.14 (citing *Shapiro v. Rosenbaum*, 171 F. Supp. 875 (S.D.N.Y. 1959)).

24. Heyl, *supra* note 5, at 2394.

25. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987) ("This [arbitrary and capricious] standard was taken over for use in reviewing benefit denials under ERISA . . . apparently without the courts' noticing that employers often held the whip hand in ERISA trusts as they did not with the joint employer-union trust funds authorized by Taft-Hartley.").

26. See, e.g., *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983); *Elser v. IAM Nat'l Pension Fund*, 684 F.2d 648, 653 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Peckham v. Board of Trustees of the Int'l Bhd. of Painters & Allied Trades Union*, 653 F.2d 424, 426 (10th Cir. 1981).

27. This sentiment had gained momentum through the mid-1980s and is best illustrated in an observation by the Seventh Circuit: "pension rights are too important these days for most employees to want to place them at the mercy of a biased tribunal subject only to a narrow form of 'arbitrary and capricious' review, relying on the company's interest in its reputation to prevent it from acting on its bias." *Van*



an effort to offset possible inequity, several circuits sought subtle ways to alter the standard's application.<sup>28</sup> The Seventh Circuit made perhaps the strongest adjustment to the standard short of rejecting it in *Van Boxel v. Journal Co. Employees' Pension Trust*.<sup>29</sup> In hopes of mitigating the ill effects of a conflict of interest, the court applied the standard in a flexible manner, suggesting that "[t]here may be in effect a sliding scale of judicial review of trustees' decisions—more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is."<sup>30</sup> Faced with a similar conflict of interest scenario in *Bruch v. Firestone Tire and Rubber Co.*,<sup>31</sup> the Third Circuit declined to employ the "flexible standard" reasoning of the *Van Boxel* court.<sup>32</sup> Relying instead on established trust law principles mandating that no deference be given to decisions of a conflicted trustee,<sup>33</sup> the court concluded that de novo review should be applied to conflicting administrative decisions.<sup>34</sup> The Supreme Court then agreed to review *Bruch*<sup>35</sup> "to resolve the conflicts among the Courts of Appeals as to the appropriate stan-

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*Boxel*, 836 F.2d at 1052.

28. *Dockray v. Phelps*, 801 F.2d 1149, 1152 (9th Cir. 1986) (finding that diminishing the level of deference might be appropriate if a case involves a conflict of interest); *Jung v. FMC Group*, 755 F.2d 708, 711-12 (4th Cir. 1985) (holding that less deference may be given in instances where a benefit denial "avoids a very substantial outlay"); *Harm v. Bay Area*, 701 F.2d 1301, 1305 (4th Cir. 1983) (providing for possible shifting of burden if plan excluded a disproportionate number from receiving benefits); *Dennard v. Richards Group*, 681 F.2d 306, 314 (5th Cir. 1982) (finding that a lack of good faith on the part of plan administrators would be considered in addition to the narrow standard).

29. 836 F.2d 1048 (7th Cir. 1987).

30. *Van Boxel*, 836 F.2d at 1052-53 (citation omitted). Application of this sliding scale, however, could potentially result in the regrettable case in which a court grants no deference to an administrative decision under a "highly deferential standard." Although the court did not specifically address this potential semantic absurdity, it did recognize the practical possibility: "[w]hen the members of the tribunal—for example, the trustees of a pension plan—have a serious conflict of interest, the proper deference to give their decisions may be slight, even zero." *Id.* at 1052.

31. 828 F.2d 134 (3d Cir. 1987).

32. *See Bruch*, 828 F.2d at 145.

33. *Id.* (indicating that decisions of a conflicted trustee should be "scrutinized with the greatest possible care").

34. *Id.* at 149. Because the plan at issue in the case resembled a contract, the court decided that the most prudent course of action would be to proceed as if interpreting a contract, beginning with the fundamental principles of construction such as industry practice and past performance. *Id.* at 145.

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

dard of review in actions under § 1132(a)(1)(B)" of ERISA.<sup>36</sup>

*B. Firestone v. Bruch: Implementation of the Current Arbitrary and Capricious Review System*

Firestone acted as plan administrator of an unfunded<sup>37</sup> termination pay plan that promised termination pay to employees who became unable to work or who were "released because of a reduction in work force."<sup>38</sup> When Firestone sold its Plastics Division to Occidental Petroleum in 1980, Plastics Division employees sought benefits under the plan on the grounds that the sale constituted the requisite "reduction in work force," thus implicating the terms of the plan.<sup>39</sup> Because Occidental had rehired the Plastics Division employees at identical pay scales and allowed them to continue working without interruption,<sup>40</sup> Firestone denied the benefit requests, prompting the lawsuit.<sup>41</sup>

In establishing the proper standard of review, the Court relied on trust law principles<sup>42</sup> that were in effect prior to ERISA's enactment.<sup>43</sup> Before ERISA, if a plan instrument did not grant the administrator discretionary authority, a court approached a benefit claim as it would any standard contract dispute, "by looking to the terms of the plan and other manifestations of the parties' intent."<sup>44</sup> Noting that this method more effectively advanced the objectives behind the statute,<sup>45</sup> the

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36. *Firestone*, 489 U.S. at 108.

37. *Id.* at 105 ("Firestone was the sole source of funding for the plans and had not established separate trust funds out of which to pay the benefits from the plans."). It is this aspect of Firestone's plan, coupled with its capacity as plan administrator, that gave rise to the conflict of interest discussed in the Third Circuit's opinion. See *supra* notes 31-34 and accompanying text.

38. *Firestone*, 489 U.S. at 105-06.

39. *Id.* at 105.

40. *Id.*

41. *Id.* at 106.

42. *Id.* at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law.").

43. See *Firestone*, 489 U.S. at 112.

44. *Id.* at 113.

45. See *id.* at 113-14.

ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans". . . Adopting Firestone's reading of ERISA would require us to impose a standard of review [arbitrary and capricious] that would afford less protection to employees and their beneficiaries than

Court held "that 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."<sup>46</sup> The Court specifically pointed out that the conflict of interest issue—the reason the Court granted certiorari—did not figure into its analysis. The Court stated only that a conflict must be considered if an abuse of discretion occurred.<sup>47</sup>

### C. Prudence of the Firestone Holding

Given the Court's apparent desire to protect employee rights,<sup>48</sup> imposition of the de novo review standard is confusing at best. The exception provided in *Firestone* enables a plan to receive deferential review by granting to the administrator express authority to interpret the plan and determine eligibility for benefits, thus providing a fairly simple method by which plans can bypass the statute's intent.<sup>49</sup> Because most plans contain such language,<sup>50</sup> the Court has essentially nullified applying the standard that it deems most appropriate.<sup>51</sup> One can only guess as to the Court's motivation for implementing the standard in this fashion. One plausible explanation is that the Court, anticipating universal adoption of plan language adequate to invoke deferential review, desired a somewhat malleable standard to account for potential impropriety on the part of plan administrators in accordance with the Third Circuit's reading of the standard.<sup>52</sup>

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they enjoyed before ERISA was enacted.

*Id.* (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983)).

46. *Id.* at 115. The standard appears to represent the inverse of section 187 of the *Restatement (Second) of Trusts*, which provides that "[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." *RESTATEMENT (SECOND) OF TRUSTS* § 187 (1959).

47. *Firestone*, 489 U.S. at 115.

48. See *supra* note 45 and accompanying text.

49. Conison, *supra* note 4, at 636.

50. See John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 219-20.

51. *Id.* at 220.

52. *Id.* at 222 ("The Supreme Court appears to invite the use of a conflict-sensi-

Regardless of the impetus behind the standard established in *Firestone*, a review of recent decisions illustrates that even ten years later, numerous questions regarding its application remain.<sup>53</sup> The remainder of this Article will examine some of these questions in hopes of determining the fate of the current standard under ERISA.<sup>54</sup>

## II. OPEN ISSUES UNDER FIRESTONE:

### A. Plan Language

Under the current standard, the critical issue becomes whether the plan vests the administrator with discretionary authority to interpret the plan and determine eligibility for benefits.<sup>55</sup> Unfortunately, the Court provided little guidance as to exactly what language a plan should use to unequivocally grant authority and thus ensure itself deferential review.<sup>56</sup> This failure to establish even elementary guidelines has resulted in the development among the circuit courts of varying criteria for determining what plan language merits application of the arbitrary and capricious standard.<sup>57</sup> In such a system, plan language under one standard could constitute sufficient discretion

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tive standard of the sort that the Third Circuit tried to devise, once plan drafters have inserted the necessary boilerplate to claim deferential review."). Another interesting proposition suggests that the Court deliberately left some play in the standard to accommodate justice for individual cases. Heyl, *supra* note 5, at 2417-18.

53. Beaver, *supra* note 20, at 26 ("Developments in the lower courts since [*Firestone*] make clear that much confusion remains."); Norman Stein, *ERISA and the Limits of Equity*, 56 LAW AND CONTEMP. PROBS. 71, 99 (1993) ("Firestone leaves in its wake considerable doctrinal uncertainty.").

54. See *infra* notes 59-80 and accompanying text.

55. See *infra* notes 58-70 and accompanying text.

56. See *Firestone*, 489 U.S. at 115. At least one court has suggested that the broader the grant of authority, the more likely the plan will be subject to the deferential standard. See *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) ("The Supreme Court directed lower courts to focus on the breadth of the administrators' power.").

57. Compare *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (stating that a plan must contain a clear grant of discretion to trigger arbitrary and capricious review), with *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992) (requiring a plan administrator to unambiguously retain the power to apply at least one important discretionary element whose inclusion in the plan is mandatory).



while similar language under an alternate standard might not merit deferential review.

1. *Comparable Language Subject to Differing Standards.*—The Sixth and Eighth Circuits recently arrived at conflicting opinions as to whether comparable plan language granted discretionary authority sufficient to warrant the arbitrary and capricious standard.<sup>58</sup> In *Perez v. Aetna Life Insurance Co.*,<sup>59</sup> the Sixth Circuit concluded that the following plan language was adequate to support arbitrary and capricious review: “[the plan administrator] shall have the right to require as part of the proof of claim satisfactory evidence . . . that [the claimant] has furnished all required proofs for such benefits.”<sup>60</sup> The Eighth Circuit, on the other hand, held in *Brown v. Seitz Foods, Inc. Disability Benefit Plan*<sup>61</sup> that a plan did not confer adequate discretion where the plan provided that “[w]ritten proof of loss must be furnished to [the plan administrator] . . . [and] [b]enefits will be paid monthly immediately after [the plan administrator] receive[s] due written proof of loss.”<sup>62</sup> Although the Court in *Firestone* gave no indication that any specific language is necessary to confer discretion,<sup>63</sup> the circuit courts have presumably decided that a grant of discretion hinges at least partly on the use of the term “satisfactory” in the plan’s text. The *Perez* plan used the term,<sup>64</sup> while the plan in *Brown* did not.<sup>65</sup> Indeed, a vast number of plans deemed worthy of deferential review contain the word “satisfactory” in describing the required level of proof for claims,<sup>66</sup> seemingly providing at least some

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58. See *infra* notes 59-62 and accompanying text.

59. 150 F.3d 550 (6th Cir. 1998).

60. *Perez*, 150 F.3d at 555.

61. 140 F.3d 1198 (8th Cir. 1998).

62. *Brown*, 140 F.3d at 1200.

63. *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) (“The Court in *Firestone* . . . did not suggest that ‘discretionary authority’ hinges on incantation of the word ‘discretion’ or any other ‘magic word.’”).

64. *Perez*, 150 F.3d at 555.

65. See *Brown*, 140 F.3d at 1200.

66. See, e.g., *Snow v. Standard Ins. Co.*, 87 F.3d 327, 330 (9th Cir. 1996) (company must be presented with what it determines to be satisfactory proof of loss); *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 380-81 (6th Cir. 1996) (claimant must submit “satisfactory proof of Total Disability to us”); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 379 (7th Cir. 1994) (“proof must be satisfactory

degree of certainty upon which administrators and participants can rely when contemplating litigation. The Seventh Circuit, however, has departed from this view on at least one occasion.<sup>67</sup> In *Patterson v. Caterpillar, Inc.*,<sup>68</sup> the Seventh Circuit decided that the following language afforded the plan administrator with discretion sufficient to apply deferential review: "benefits will be payable only upon receipt by the [plan administrator] of such notice and such due proof, as shall be from time to time required, of such disability."<sup>69</sup> This language is virtually indistinguishable from the language used in the *Brown* plan, yet the two plans were subjected to differing levels of review by their respective courts.<sup>70</sup>

2. *Proper Default Reading of Vague Drafting.*—The *Perez* dissent raises another issue with regard to plan language that is open to varying interpretations. Although the plan language in that case did not provide a modifier for the term "satisfactory," the majority concluded that the language was subject to only one reasonable interpretation regarding who must deem the proof satisfactory, stating "it would not be rational to think that proof would be required to be satisfactory to anyone other than" the plan administrator.<sup>71</sup> A dissenting panel of six judges, however, contended that the lack of a referent for the term was sufficient to preclude a grant of clear discretion.<sup>72</sup>

The court errs in deciding that we may simply assume that the plan must mean that the proof is "satisfactory" to the administrator, for that is the only entity which could be the intended decision-maker. To me the difference between these two phrases, especially the difference to a sophisticated drafter, is enormous. When faced with the language "satisfactory proof" (or "written proof" or "due proof" or simply "proof"), the immediate response of any half-trained lawyer is "satisfactory to whom" (or, "proof" in

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to us"); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 983 (6th Cir. 1991) (disability determined "on the basis of medical evidence satisfactory to the Insurance Company") (emphasis added).

67. See *Patterson v. Caterpillar, Inc.*, 70 F.3d 503 (7th Cir. 1995).

68. 70 F.3d 503 (7th Cir. 1995).

69. *Patterson*, 70 F.3d at 505.

70. See *Brown*, 140 F.3d at 1198; *Patterson*, 70 F.3d at 503.

71. *Perez*, 150 F.3d at 558.

72. See *id.* at 560-61.

whose judgment?). In this case, the [plan] drafter did not supply an answer, and it seems much more plausible that the default reading should be an objective standard, satisfactory to a neutral arbiter, or satisfactory in terms of the over-all meaning of the contract, rather than satisfactory to one of the two interested parties.<sup>73</sup>

3. *Model Language for Plan Drafters.*—The problems discussed above could arguably be attributed to judges who have been too lenient in determining what constitutes a clear grant of discretion under *Firestone*.<sup>74</sup> Because a number of courts addressing the issue of standard of review under ERISA have made inferential steps in ruling that a given plan's language has clearly granted discretion to a plan administrator,<sup>75</sup> an objective observer applying no inferential step could reasonably conclude that none of the plan language discussed thus far satisfies the discretionary requirement as contemplated by the Court in *Firestone*.<sup>76</sup> As the cases above illustrate, conscientious drafters would be wise to draft plan language that leaves no doubt as to the plan's intent.<sup>77</sup> The plan language from a recent Fifth Circuit case, *Walker v. Wal-Mart Stores, Inc.*,<sup>78</sup> could serve as a model for drafters hoping to ensure deferential review of their plans. That plan's relevant provision reads as follows:

The PLAN herein expressly gives the ADMINISTRATIVE COMMITTEE discretionary authority to resolve all questions concerning the administration, interpretation or application of the PLAN, including without limitation, discretionary authority to

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73. *Id.* at 559.

74. The Ninth Circuit has conceded that it "[has] not been stingy in [its] determinations that discretion is conferred upon plan administrators." See *Snow v. Standard Ins. Co.*, 87 F.3d 327, 330 (9th Cir. 1996) (emphasis added).

75. See, e.g., *Perez*, 150 F.3d at 557-58 ("The critical requirement in [the present Plan] is that the evidence of disability be satisfactory. A determination that evidence is satisfactory is a subjective judgment that requires a plan administrator to exercise his discretion." (quoting *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir. 1996))); *Bogue*, 976 F.2d at 1325 ("The plan 'grants [the plan administrator] the authority to evaluate and determine facts, including whether an employee's prior and prospective position [sic] are 'similar.' This evaluation necessarily invokes a judgmental function in analyzing the positions." (quoting *Bogue v. Ampex Corp.* 750 F. Supp 424, 428 (N.D. Cal. 1990))).

76. See *supra* notes 42-47 and accompanying text.

77. See *supra* notes 53-70 and accompanying text.

78. 159 F.3d 938 (5th Cir. 1998).

determine eligibility for benefits or to construe the terms of the PLAN in conducting the review of the appeal . . .<sup>79</sup>

This language prudently bears a strong resemblance to the Court's instructions in *Firestone* and undoubtedly represents the clearest grant of discretion encountered thus far.<sup>80</sup> In fact, one might justifiably question the validity of plan language such as that used in *Perez* when viewed against the genuine clarity of the language employed in the *Wal-Mart* plan.<sup>81</sup>

### B. Conflicts of Interest

In *Firestone*, the Court plainly stated that a conflict of interest on the part of a plan administrator is a pertinent factor in deciding whether a denial of benefits is arbitrary and capricious.<sup>82</sup> The relevant passage in the case states that "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 'facto[r]' in determining whether there is an abuse of discretion."<sup>83</sup> Since *Firestone*, however, courts have not been able to provide much consistency regarding the exact way a conflict of interest affects the standard of review.<sup>84</sup> Basically, two different approaches have developed in response to the issue: the "presumptively void" test and the "sliding scale" approach.<sup>85</sup>

1. *Two Approaches for Handling Conflicts of Interest: "Sliding Scale" vs. "Presumptively Void" Test.*—The Fourth, Fifth, Seventh and Tenth Circuits have adopted the "sliding scale" approach,<sup>86</sup> under which the reviewing court always applies the

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79. *Walker*, 159 F.3d at 939.

80. See *supra* notes 42-27 and accompanying text.

81. See *supra* notes 57-60, 77-80.

82. *Firestone*, 489 U.S. at 115. A typical conflict of interest in the ERISA context arises when a company serves as plan administrator for a plan and is also responsible for paying out benefits from its own assets rather than from a trust of assets. *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1561 (11th Cir. 1990).

83. *Firestone*, 489 U.S. at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)).

84. *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1322 (9th Cir. 1995).

85. *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997).

86. See *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 824-27 (10th Cir.



abuse of discretion standard but decreases the amount of discretion given to a conflicted administrator's decision in proportion to the gravity of the conflict.<sup>87</sup> The Ninth and Eleventh Circuits have employed a "presumptively void" test under which a conflicted administrator's decision to deny benefits is presumed to be arbitrary and capricious unless the administrator can prove that the conflict of interest had no effect on his or her decision.<sup>88</sup> In *Atwood v. Newmont Gold Company, Inc.*,<sup>89</sup> the Ninth Circuit explained the test in the following manner:

Under the common law of trusts, any action taken by a trustee in violation of a fiduciary obligation is presumptively void. 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. If the plan cannot carry that burden, we will review the decision *de novo*, without deference to the administrator's tainted exercise of discretion.<sup>90</sup>

The net effect of the "presumptively void" test is that a decision to deny benefits will be reviewed either *de novo* if the plan cannot rebut the presumption or under the unadjusted arbitrary and capricious standard with the highest deference sustained by the rebuttal.<sup>91</sup>

## 2. Sliding Scale More Appropriate Under Firestone.—

Certainly, the "sliding scale" approach more accurately reflects

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1996); *Doe v. Group Hospitalization & Med. Serv.*, 3 F.3d 80, 87 (4th Cir. 1993); *Wilbur v. ARCO Chem. Co.*, 974 F.2d 631, 638-42 (5th Cir. 1992); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987).

87. *Armstrong*, 128 F.3d at 1265.

88. See *Atwood*, 45 F.3d at 1323; *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1566-67 (11th Cir. 1990).

89. 45 F.3d 1317 (9th Cir. 1995).

90. *Atwood*, 45 F.3d at 1323 (citation omitted). One way for a plan to meet this burden is by demonstrating that its decision served the best interests of the plan as a whole. For example, an administrator might show that his decision was intended to prevent unanticipated costs that might deprive other participants from the resources of the plan. See *Brown*, 898 F.2d at 1568.

91. *Atwood*, 45 F.3d at 1323 (indicating that a less deferential standard will be applied only when the beneficiary makes the required showing of a fiduciary violation; otherwise, the traditional abuse of discretion standard is applied).

the standard established in *Firestone*.<sup>92</sup> In fact, the Ninth Circuit's understanding of the "presumptively void" test could arguably be in direct conflict with *Firestone*'s holding.<sup>93</sup> A recent Ninth Circuit case, *Lang v. Long Term Disability Plan of Sponsor Applied Remote Technology, Inc.*,<sup>94</sup> provides a good illustration. In *Lang*, the plan under review was found to vest the administrator with discretion sufficient to support the arbitrary and capricious standard.<sup>95</sup> Under the *Firestone* language, a plan that grants such discretion is reviewed only for abuse of discretion, while any conflict of interest "must be weighed as a 'factor in determining whether there is an abuse of discretion.'"<sup>96</sup> Thus, a conflict of interest has no bearing on whether de novo or arbitrary and capricious review will apply, but only on whether an abuse of discretion occurred under the arbitrary and capricious standard.<sup>97</sup> Despite this relatively clear interpretation, when the *Lang* court found that the plan administrator was operating under a conflict, it applied de novo review, relying on the "presumptively void" test articulated in *Atwood*.<sup>98</sup>

The Eighth Circuit also recently ran afoul of the *Firestone* holding in *Armstrong v. Aetna Life Insurance Co.*<sup>99</sup> In that case, Aetna served as both administrator and insurer of a health benefits plan, creating a conflict of interest.<sup>100</sup> Purporting to

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92. *Armstrong*, 128 F.3d at 1267 (Beam, J., dissenting) (stating that "[i]t is difficult, if not impossible, to read this language from *Firestone Tire* contrary to the 'sliding scale' approach").

93. *Id.* at 1266 (Beam, J., dissenting) (noting that adoption of the de novo standard for plans that give discretion to the administrator is directly contrary to Supreme Court precedent established in *Firestone*).

94. 125 F.3d 794 (9th Cir. 1997).

95. *Lang*, 125 F.3d at 797.

96. *Firestone*, 489 U.S. at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)).

97. See *Firestone*, 489 U.S. at 115; *Lang*, 125 F.3d at 797.

98. *Lang*, 125 F.3d at 799. The insurance company in this case served a dual role as both the funding source and the plan administrator, creating an inherent conflict of interest situation. *Id.* at 797. To further confuse matters in the Ninth Circuit, a separate case also relied on the *Atwood* test but concluded that de novo review was not appropriate even in the event of a conflict of interest. *Snow v. Standard Ins. Co.*, 87 F.3d 327, 331 (9th Cir. 1996).

99. 128 F.3d 1263 (8th Cir. 1997).

100. *Armstrong*, 128 F.3d at 1265. Aetna apparently provided incentives and bonuses to its claim reviewers in order to limit claim payments, although no evidence was produced to indicate that Aetna had directed its reviewers to improperly reject claims. *Id.*

rely on the Eleventh Circuit's holding in *Brown v. Blue Cross & Blue Shield of Alabama*,<sup>101</sup> the court correctly concluded that Aetna's decision to deny benefits was subject to a "higher level of scrutiny" as a result of the conflict.<sup>102</sup> Also in purported reliance on *Brown*, however, the court then decided that this higher level of scrutiny should be de novo review.<sup>103</sup> The dissent properly noted that the majority's reliance on *Brown* was significantly misplaced because the Eleventh Circuit never considered de novo review.<sup>104</sup> Regardless of whether the *Firestone* holding itself has created these problems or whether it is merely the victim of poor interpretation by the circuit courts, there is little doubt that substantial confusion remains.

### C. Plan Considered in Determining Standard of Review

Given the holding of *Firestone*, many plan sponsors undoubtedly amended their plans shortly thereafter to unequivocally "grant the plan administrator the authority to determine eligibility for benefits and to construe the terms of the plan."<sup>105</sup> This amending process would create two versions of any given plan: the previous version that does not grant discretionary authority to the plan administrator and the amended version that does.<sup>106</sup> Obviously, a plan administrator's decision to deny benefits under the original plan would be subject to de novo

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101. 898 F.2d 1556 (11th Cir. 1990); see *supra* notes 82, 88-90 and accompanying text.

102. *Armstrong*, 128 F.3d at 1265.

103. *Id.*

104. *Id.* at 1267 (Beam, J., dissenting). The dissent expressed confusion over the majority's reliance on *Brown* when that case clearly stated:

[W]e therefore hold that the abuse of discretion, or arbitrary and capricious, standard applies to cases such as this one, but the application of the standard is shaped by the circumstances of the inherent conflict of interest. . . . While de novo review is an attractive avenue for controlling the exercise of discretion contrary to the interests of the beneficiaries, the application of this strict standard would deny Blue Cross the benefit of the bargain it made in the insurance contract.

*Id.* (quoting *Brown*, 898 F.2d at 1563).

105. Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Cases and Other Developments*, SC62 ALI-ABA 1, 105 (1998).

106. *Id.* at 105.

review, while the same decision under the amended plan would receive the benefit of highly deferential review.<sup>107</sup> Thus, the issue of which plan to consider in determining the standard of review becomes particularly important.<sup>108</sup>

An Iowa district court recently addressed this very issue in *Blessing v. Deere & Co.*<sup>109</sup> The case involved a denial of surviving spouse benefits under a company pension plan.<sup>110</sup> The plan in effect when Blessing's spouse died did not grant the plan administrator authority to determine benefits eligibility or to interpret the terms of the plan.<sup>111</sup> The amended version of the plan, however, did give the administrator discretionary authority, and this version of the plan was in operation when Blessing applied for the surviving spouse benefits.<sup>112</sup> Not surprisingly, Blessing argued that the original plan in effect when her husband died should control when determining the proper standard of review, de novo review, while Deere contended that the amended plan in effect when benefits were applied for should govern, thus warranting review for abuse of discretion only.<sup>113</sup> In holding that the amended plan in effect when Blessing applied for benefits would control in determining whether the administrator had discretionary authority, the court reasoned that the plan in effect at the time of the reviewable conduct should govern.<sup>114</sup> Because the conduct that was subject to review, i.e., the denial of benefits by the plan administrator, necessarily occurred after Blessing applied for the benefits, the decision was reviewed under the arbitrary and capricious standard.<sup>115</sup>

Despite the precedent set by the Iowa district court, this fairly novel issue could be wide open for future courts faced with different facts. In *Blessing*, for example, the plaintiff was not legally married to the deceased but relied on common law marriage in applying for the surviving spouse benefits.<sup>116</sup> Although

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107. *Id.*

108. *Id.*

109. 985 F. Supp. 899 (S.D. Iowa 1997).

110. *Blessing*, 985 F. Supp. at 901.

111. *Id.* at 902.

112. *Id.*

113. *Id.* at 903.

114. *Id.*

115. *Blessing*, 985 F. Supp. at 903.

116. *Id.* at 901.



the court itself did not attempt to determine if Blessing satisfied the elements of common law marriage under Iowa law,<sup>117</sup> it did express some skepticism as to Blessing's status.<sup>118</sup> It is difficult to tell from the court's opinion if this skepticism influenced its decision to ultimately choose the plan language that was more damaging to Blessing's case,<sup>119</sup> but that possibility leaves the door open to other courts for an alternate outcome if the facts so dictate.

*D. Application of Contra Proferentum Under the Varying Standards of Review*

In deciding ERISA conflicts, the various circuit courts have encountered substantial difficulty in determining whether application of the contract law doctrine of contra proferentum is appropriate under both the de novo standard of review and the highly deferential standard.<sup>120</sup> This contract construction doctrine "provides that ambiguous contract provisions in ERISA-governed insurance contracts should be construed against the drafting party."<sup>121</sup> The Second Circuit has maintained on more than one occasion that the rule of contra proferentum is applicable only in those cases in which the court is conducting a de novo review of an administrator's decision.<sup>122</sup> An examination of

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117. The court merely reviewed the determination made by the plan administrator, who found that Blessing did not satisfy the elements necessary to establish a valid common law marriage. See *id.* at 906.

118. *Id.* at 901 (referring to the deceased as Blessing's "alleged common-law husband").

119. *Id.* at 903.

120. See Siske, *supra* note 105, at 111-12.

121. *Perez*, 150 F.3d at 557 n.7 (citing *Schachner v. Blue Cross & Blue Shield*, 77 F.3d 889, 895 n.6 (6th Cir. 1996)).

122. *I.V. Services of Am. v. Trustees of the Am. Consulting Eng'rs Council Ins. Trust Fund*, 136 F.3d 114, 121 n.9 (2d Cir. 1998) (noting that Second Circuit cases "make clear that the rule of contra proferentum applies to interpretation of Plan terms only under de novo review") (citation omitted); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 443-44 (2d Cir. 1995). The *Pagan* court addressed the issue in the following manner:

[A]pplication of the rule of contra proferentum is limited to those occasions in which this Court reviews an ERISA plan de novo. As we review only the decision of the NYNEX Committee, we do so pursuant to the highly deferential arbitrary and capricious standard of review; the rule of contra proferentum is inapplicable.

*Perez*, however, indicates that some confusion exists among the circuits as to the proper application of this doctrine to ERISA cases.

In *Perez*, a case in which the court determined that arbitrary and capricious review was appropriate, the Sixth Circuit expressed no apparent reservations about applying the rule of contra proferentum but chose not to apply the doctrine *only* because it concluded that the terms of the plan in question were not ambiguous.<sup>123</sup> Although some feel that application of the contra proferentum rule in this context "renders the deference to be paid to an administrator's decision illusory,"<sup>124</sup> the Sixth Circuit is not alone in its disregard of this sentiment. In *Bailey v. Blue Cross & Blue Shield of Virginia*,<sup>125</sup> the Fourth Circuit applied the rule of contra proferentum while reviewing a plan's decision under deferential review that was tempered by conflict of interest.<sup>126</sup> To further confuse matters, the Eighth Circuit has held that ERISA's broad preemption clause<sup>127</sup> prohibits the application of the doctrine altogether, which would make its use under either standard inappropriate.<sup>128</sup> The circuit courts' inconsistent application of this fundamental contract construction principle hardly exemplifies the "uniform source of law" envisioned by the drafters of ERISA.<sup>129</sup>

### III. CONCLUSION

Whether the standard as it currently exists will survive is difficult to determine. Certainly, the confusion among the circuit courts on key issues concerning the *Firestone* standard's application does not bode well for its survival nor does the perception

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*Pagan*, 52 F.3d at 443-44 (citations omitted).

123. 150 F.3d at 557 n.7 (emphasis added). Although the court did not specifically address the application of contra proferentum under the highly deferential standard, it appeared fully prepared to do so, had the plan's provisions been ambiguous. *Perez*, 150 F.3d at 557.

124. Siske, *supra* note 105, at 111.

125. 67 F.3d 53 (4th Cir. 1995).

126. *Bailey*, 67 F.3d at 58 (indicating that the Fourth Circuit has "held repeatedly that ambiguous language must be construed against the drafter").

127. 29 U.S.C. § 1144(a) (1994).

128. *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153 (8th Cir. 1990).

129. See *supra* note 5 and accompanying text.

that the standard chills uniformity of jurisprudence, one of ERISA's primary goals. Perhaps the most serious threat to the existence of the *Firestone* standard concerns an issue not addressed by this Article: whether the current standard, which essentially allows plan administrators to police themselves simply by supplying the proper language, is inherently unfair to plan participants. A standard that allows plan administrators to control the level of deference to be afforded their decisions does not appear to comply with the intent of the statute. For these and other reasons, proposals for reform are already underway,<sup>130</sup> and the *Firestone* standard is likely to be amended in some fashion, if not totally reworked altogether.

*Kevin Walker Beatty*

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130. Employee Retirement Income Security Act of 1974: Rules and Regulations for Administration and Enforcement and Claims Procedure, 63 Fed. Reg. 48,390 (1998) (to be codified at 29 C.F.R. pt. 2560) (proposed Sept. 9, 1998). The proposal requires that adverse benefit determinations be reviewed by "an appropriate named fiduciary." Rules and Regulations for Administration and Enforcement and Claims Procedure, 63 Fed. Reg. at 48,396. This fiduciary cannot be the same party—or a subordinate of the same party—who made the initial ruling. *Id.* Further, the proposal mandates that a subsequent review not afford deference to the initial ruling and that in the second review, all comments, documents, records and other information submitted by the claimant be taken into account, regardless of whether such information was submitted or relied upon in the first determination. *Id.* Although the proposed regulations would have no direct bearing on the standard of review established by *Firestone*, they would ensure that participants and beneficiaries would be afforded a fairer standard of review for denied claims prior to any litigation. *See id.* Remedial efforts such as this might then render the *Firestone* standard more acceptable than in its current form.

