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Illusory Rights Under the Arbitrary and Capricious Standard: Adding Remedial Safeguards to the Judicial Standard of Review Beyond ERISA Denial of Benefits Claims

By: Javier J. Diaz

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Introduction

The Employee Retirement Income Security Act (ERISA) impacts millions of American during their working lives and at retirement.¹ Indeed, ERISA has profound implications for health care, as an “estimate[ed] . . . 1.9 million beneficiaries of ERISA plans have [their] health care claims denied each year[.]”² Approximately 45% of private workers in America are plan participants in defined contribution plans.³ Defined benefit plans cover approximately 35 million private and public workers.⁴ In 2011, 30 million employees were covered by multi-employer plans.⁵ An excess of 150 billion in assets are held in reserve for beneficiaries and private plan participants, that have escaped the scrutiny of effective federal regulation.⁶

Since ERISA’s enactment, federal circuit courts have continuously disagreed on ERISA provisions. One such disagreement concerns the standard of judicial review as applied to claims arising out of ERISA plan interpretation.⁷ Specifically, numerous federal circuits have divided on the issue of whether the arbitrary and capricious standard of judicial review applies to all or some practices of fiduciary plan interpretation in ERISA plans that grant discretionary

¹ See UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html (last visited Mar. 6, 2014).

² CAROLE ROAN GRESENZ, DEBORAH R. HENSLER, DAVID M. STUDDERT, BONNIE DOMBEY-MOORE & NICHOLAS M. PACE, *A Flood of Litigation?: Predicting the Consequence of Changing Legal Remedies Available to ERISA Beneficiaries*, IP 184, RAND HEALTH LAW, (2006), http://www.rand.org/content/dam/rand/pubs/issue_papers/2006/IP184.pdf.

³ PENSION BENEFIT GUARANTY CORPORATION ANNUAL REPORT, <http://www.pbgc.gov/res/reports/ar2013.html> (last visited Mar. 6, 2014). See also PENSION BENEFIT GUARANTY CORPORATION ANNUAL, <http://www.pbgc.gov/documents/pension-insurance-data-tables-2011.pdf> (last visited Mar. 6, 2014) (Pension Insurance Data).

⁴ *Id.*

⁵ COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE § 8 (3rd ed. 2011).

⁶ *Id.*

⁷ See generally *Tibble v. Edison Int’l*, 711 F.3d 1061 (9th Cir. 2013); and see *John Blair Commc’n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994).

interpretative authority upon the plan administrator.⁸ Plan interpretation encompasses several practices within ERISA, such as, among others, benefit determinations, determining the scope of fiduciary responsibility, implementing administrative rules to a plan, or determining formula for benefits calculation.⁹

In ERISA civil cases, the standard of judicial review results in evidentiary implications that are highly outcome determinative.¹⁰ The Supreme Court's *Firestone Tire and Rubber Co. v. Bruch*, 489 US 101 (1989), decision dealt with the issue of the standard of judicial review for denial of benefits claims.¹¹ *Firestone* held that the de novo standard of judicial review controlled review of denial of benefits claims unless the plan granted discretionary authority upon the administrator, which would result in the application of an arbitrary and capricious standard of review.¹²

The Ninth, Third, Sixth, and Second Circuits have weighed in on when the arbitrary and capricious standard applies to interpretative powers outside the denial of benefits context when a plan grants interpretative power upon the plan administrator. The Ninth Circuit has recently joined the inconsistency among the circuits.¹³ The Ninth Circuit has interpreted *Firestone* and its progeny to mean that plan language providing fiduciaries discretion grants uninhibited discretionary authority over all matters concerning plan interpretation, including and beyond denial of benefit claims, thus cloaking fiduciaries with the arbitrary and capricious standard on

⁸ See *Hunter v. Caliber Sys. Inc.*, 220 F.3d at 702 (6th Cir. 2000), *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995), *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013), and *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994).

⁹ *Id.*

¹⁰ See *Firestone Tire and Rubber Co. v. Bruch*, 489 US 101 (1989).

¹¹ *Firestone*, 489 US 101, 111 (1989).

¹² *Firestone*, 489 US 101, 111 (1989); See *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); and see *Conkright v. Frommert*, 559 U.S. 506 (2010).

¹³ See *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013).

any plan interpretation decision.¹⁴ The Second Circuit has refused to expand the arbitrary and capricious standard in *Firestone* beyond the denial of benefits context.¹⁵ The Third and Sixth Circuits justify the application of the arbitrary and capricious standard outside of the denial of benefits context, but do not state how far the arbitrary and capricious standard should apply to plan interpretation.¹⁶

Considering most workers do not save enough for retirement, creating remedial safeguards to protect what little monies these workers have is critical to our nation's financial future. Even though ERISA has been amended to include criminal provisions, "the protection accomplished by statute has not been sufficient to accomplish Congressional intent."¹⁷ Equally important are the promotion and creation of ERISA plans by employers. This comment proposes that the arbitrary and capricious standard should be applied to all plan interpretation practices, and as a result reviewing courts should adopt broader remedial safeguards to protect plan participants and beneficiaries. For example, a court should adopt broader remedial safeguards by considering any and all relevant factors that may help the court determine whether a plan administrator's acts are arbitrary and capricious.

¹⁴ *Tibble v. Edison Int'l*, 711 F.3d 1061, 1077 (9th Cir. 2013).

¹⁵ *See John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994), *and see* *Frommert v. Conkright*, 738 F.3d 522, (2nd Cir. 2013) (A claim that is outside of the denial of benefits context, if not already held to adopt an arbitrary and capricious standard, requires review from a higher court to determine the appropriate standard of review.); *See generally* *Hammer v. First UNUM Life Ins. Co.*, 2005 U.S. Dist. LEXIS 3414 (S.D.N.Y. Mar. 7, 2005) (Discretion is conferred upon the administrator when the plan grants such discretion. An exception has not been carved out to revert to de novo review if the claim is not a denial of benefits claim. *Hammer* involved a denial of benefits claim and a claim for untimely decision rendered from the plan's appeals process.); *See, e.g.,* *Asbestos Workers Syracuse Pension Fund by Collins v. M.G. Indus. Insulation Co.*, 875 F. Supp. 132 (N.D.N.Y. 1995) (The arbitrary and capricious standard of review applies to denial of benefits claims when the plan grants discretion upon the trustee. After *John Blair* a distinction between claims arising from denial of benefits and claims not arising from denial of benefits arose. The arbitrary and capricious standard was not applied to administrative determinations balancing the interest of plan beneficiaries because the claim was not a denial of benefits claim. Instead, a strict prudent person standard was applied to the administrator's interest determination.).

¹⁶ *Hunter v. Caliber Sys. Inc.*, 220 F.3d 702, 711 (6th Cir. 2000). *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995).

¹⁷ *MEDILL*, *supra* note 5, at §8.

This comment reviews the origin of, and hence the policy behind, the arbitrary and capricious standard of review, while identifying the extent to which deference is granted upon fiduciaries on plan interpretation among several circuits. Part I of this comment provides a background to Congress's intent in enacting ERISA and the subsequent adoption of trust law to fill in gaps in ERISA's remedial provisions. Part II further investigates the meaning of the modern arbitrary and capricious standard as applied to ERISA. Part II sets forth the Supreme Court *Firestone* decision and its progeny, which create the contours for ERISA judicial review analysis. Part III identifies and captures the split between the Ninth, Sixth, Third, and Second Circuits. In part IV, this comment proposes a resolution to the imbalance between promotion of plan creation and legal simplicity, and the safeguards afforded to plan participants and beneficiaries in the administrative appeals process and judicial arena. Specifically, this article posits that the arbitrary and capricious standard should continue to control the review of all plan administrators' discretionary interpretation while simultaneously recommending a broad review of any and all relevant factors in reviewing an administrator's decision, which would increase remedial safeguards for plan participants and increase the likelihood of a court finding an arbitrary and capricious act.

I. Background

1. ERISA: Legislative Intent at the Time of Creation - 1974

Congress enacted ERISA to protect plan participants and plan beneficiaries who were due benefits but never paid because either the employer had inadequate funding or the employer

determined that benefits would not disburse because of some obscure language in the plan.¹⁸ Congress's intent is clear. ERISA is "designed to remedy certain defects in the private retirement system which limit the effectiveness of the system in providing retirement income security."¹⁹ In ERISA's Congressional findings and policy declaration, Congress states: "[o]wing to the lack of . . . adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that safeguards be provided with respect to the establishment, operation, and administration of such plans . . ." ²⁰ "[T]he policy of [ERISA is] to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . . providing for appropriate remedies, sanctions, and ready access to the Federal courts."²¹ ERISA's intent, in part, is to remedy pre-ERISA obstacles that hindered effective enforcement of fiduciary duties and to provide legal and equitable remedies to recover due benefits.²²

Congress is also concerned with the careful balance of setting equitable standards and promoting the expansion of ERISA plans.²³ Congress implemented its objective by erecting preemption provisions,²⁴ replacing state laws,²⁵ and providing state and federal venue for claim adjudication. Ultimately, ERISA codifies efforts to protect participants' and beneficiaries' rights under qualified²⁶ ERISA plans.²⁷

¹⁸ Carlton R. Sickles, *Introduction: The Significance and Complexity of ERISA*, 17 WM. & MARY L. REV. 205 (1975), <http://scholarship.law.wm.edu/wmlr/vol17/iss2/2>.

¹⁹ MEDILL, *supra* note 5, at §6 (quoting House of Representative Report No. 93-533 (1973)).

²⁰ 29 U.S.C. § 1001(a) (2013).

²¹ MEDILL, *supra* note 5, at §6 (quoting House of Representative Report No. 93-533 (1973)).

²² H.R. REP. NO. 533, 93d Cong., 2d Sess. 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; *See* S. REP. NO. 127, 93d Cong., 2d Sess. 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871.

²³ MEDILL, *supra* note 5, § 7.

²⁴ 29 U.S.C. § 1144(a); MEDILL, *supra* note 5, at § 7.

²⁵ 29 U.S.C. §§ 1051-1061, 1081-1086, 1101-1114 (1988). H.R. REP. NO. 533, at 5-8, *reprinted in* 1974 U.S.C.C.A.N. at 4643-46.

²⁶ Qualified status is unique to the I.R.C., which labels a plan as securing preferential tax benefits after satisfying numerous requirements specified by ERISA. (26 U.S.C. § 401). The Internal Revenue Code of 1986 set specific requirements for employers to qualify for favorable tax treatment to the employer and plan participants. *See* I.R.C. §§ 1-9833 (2013).

Throughout ERISA's general provisions, Congress states clearly that ERISA's overall theme controls future enactments and guides interpreting courts.²⁸ ERISA's overall theme prescribes the careful balance of protecting plan participants and beneficiaries and the promotion of plan creation.²⁹ Thus, any extension or interpretation of ERISA must carry out its purpose, which fundamentally includes providing adequate remedial protections to plan participants and beneficiaries.³⁰

2. ERISA's Place in Employee Benefits: Statutory Background

The need to protect employees through legislative enactments dates back to the early twentieth century.³¹ At the heel of industrialism, employers were managing revenue without regard to its employees' future taking advantage of the fact that the common laborers were generally unaware of retirement planning.³² As a result, Congress fashioned numerous legislative enactments throughout the twentieth century to promote the enactment of retirement plans and to protect employees and their beneficiaries.

In the 1920's, Congress created incentives for companies who established retirement plans by providing tax deductions.³³ In the 1930's, employers disproportionately contributed to the retirement funds of highly compensated employees.³⁴ In 1935, the Social Security Act was enacted and served as our nation's main and often sole retirement income.³⁵ In 1958, the Welfare and Pension Plans Disclosure Act was enacted to increase protection to plan participants

²⁷ See S. REP. NO. 93-127, at 35 (1973) *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871; See also H.R. REP. NO. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639.

²⁸ P.L. No. 93-406, 88 Stat 829 (1974).

²⁹ *Id.*

³⁰ *Id.*

³¹ Christopher Carosa, 7 DEADLY SINS EVERY ERISA FIDUCIARY MUST AVOID: THE 1ST DEADLY SIN – “INCOME MATTERS,” <http://fiduciarynews.com> (last visited Feb. 17, 2014).

³² *Id.*

³³ MEDILL, *supra* note 5, at § 3.

³⁴ *Id.*

³⁵ *Id.*

and beneficiaries.³⁶ In the 1960's, long vesting requirements and harsh break in service rules negated much needed retirement funds to plan participants.³⁷

Finally, Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974.³⁸ ERISA, as a body of employee benefits law, arises from two distinct federal statutes: 1) Employee Retirement Income Security Act of 1974;³⁹ and 2) the Internal Revenue Code of 1986.⁴⁰ ERISA primarily regulates employer-sponsored retirement, health care, disability, and other welfare benefit plans.⁴¹ ERISA covers Defined Contribution Plans, Defined Benefit Plans, and Welfare Plans.⁴² Define Contribution Plans include 401(k) plans, 403 (b) plans, Employee Stock Ownership Plans (ESOP), Stock Bonus Plans, Simple IRA Plans, Profit-Sharing Plans, and Simplified Employee Pension Plans.⁴³ Defined Benefit Plans are generally referred to as Pension Plans, which include Cash Balance Plans.⁴⁴

A qualified ERISA retirement plan is comprised of several working components. Generally, a qualified plan will involve the participation of the employer, the plan administrator, the trustee, and the plan participant or beneficiary.⁴⁵ The employer is the only one with the right to create the plan and who, generally, contributes to it.⁴⁶ The plan administrator manages the

³⁶ *Id.* at 5.

³⁷ *Id.*

³⁸ Pub. L. No. 93-406, 88 Stat. 829 (1974), codified as amended in various sections of 26 and 29 United States Code. available at http://www.house.gov/legcoun/Comps/ERISA_CMD.pdf.

³⁹ 29 U.S.C. §§ 1001-1461 (2013).

⁴⁰ See I.R.C. §§ 1-9833 (2013).

⁴¹ See 29 U.S.C. §§ 1001-1461 (2013).

⁴² See UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/dol/topic/retirement/typesofplans.htm> (last visited Jan. 3, 2014); and see 29 U.S.C. § 1002(1) - (3) (West 2013).

⁴³ *Id.*

⁴⁴ See UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/ebsa/publications/wyskapr.html#CashBalancePlan> (last visited Jan. 3, 2014) (The cash balance plan includes some elements of a Defined Contribution Plan but is categorized as a Defined Benefit Plan).

⁴⁵ Chad Baruch, *The Widening Gyre: The Illusory Promise of Meaningful Judicial Review of ERISA Benefit Denials in the Fifth Circuit*, 25 S.U. L. REV. 99, 100 (1997).

⁴⁶ *Id.*

plan benefits, and the trustee invests the plan's funds.⁴⁷ The plan participant or beneficiary is the eligible individual who can assert rights to benefits under the plan.⁴⁸

Moreover, three different federal statutes, vested within three different federal departments are bestowed with enforcement responsibilities. Namely, the Welfare and Pension Plans Disclosure Act (WPPDA),⁴⁹ the Labor Management Relations Act (LMRA),⁵⁰ and Internal Revenue Code of 1954 (IRC)⁵¹ serve an enforcement function. The judiciary, however, serves as the only institution, currently, able to engage all aspects of ERISA's labyrinth-like provisions.

The WPPDA regulates private pension systems for purposes of protecting plan participants' rights and benefits.⁵² Unfortunately, the WPPDA's scope is limited to disclosure requirements and lacks substantive fiduciary standards.⁵³ The WPPDA's main inadequacy is found in its reliance upon the employee's initiative to police and manage his own plan.⁵⁴ Moreover, the LMRA provides guidelines to establish and administer jointly operated employer and union plans.⁵⁵ But, the LMRA does not establish nor provide standards for preserving vested benefits, funding adequacy, investment security, or fiduciary conduct.⁵⁶ Further, the IRC sets rules for a plan to attain "qualified status."⁵⁷ Such qualified status grants deductions to the

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See 29 U.S.C.S. § 1031 (2013).

⁵⁰ See 29 U.S.C.S. §§ 141-187 (2013).

⁵¹ See I.R.C. § 401 (2013).

⁵² See 29 U.S.C.S. § 1031 (2013).

⁵³ See *History of EBSA and ERISA*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/ebsa/aboutebsa/history.html> (last visited Jan. 3, 2014).

⁵⁴ Robert G. Blakey, *Welfare and Pension Plans Disclosure Act Amendments of 1962*, PAPER 173 SCHOLARLY WORKS (1963). available at. http://scholarship.law.nd.edu/law_faculty_scholarship/173.

⁵⁵ 29 U.S.C.S. §§ 185, 141-197 (2013).

⁵⁶ MEDILL, *supra* note 5, at § 9.

⁵⁷ I.R.C. § 401 (2013).

employer when the employer accrues a benefit for the employee.⁵⁸ As the IRC's essential function is to prevent evasion of tax obligations and generate revenue, the safeguards set by IRC to protect pension are limited.⁵⁹ Therefore, the IRC's limited power includes granting or disallowing qualified status; i.e. the availability of a tax advantage and subsequent tax consequence.⁶⁰

Lastly, ERISA allows civil enforcements of its provisions.⁶¹ ERISA sets forth several claims from which civil litigation and civil enforcement actions may arise.⁶² A plan participant or beneficiary may bring a claim to recover benefits due under the terms of the plan or to clarify rights for future benefits under the plan.⁶³ Typically, in a denial of benefits claim, a civil action is brought after the plan's administrator has denied a claim for benefits and the participant or beneficiary has exhausted the plan's administrative appeal procedure.⁶⁴

3. Trust Law in ERISA

At ERISA's inception, ERISA's complex scheme required adoption of other areas of law to fill in gaps. Congress referred to trust law for guidance in forming remedial provisions and the standards by which courts now review such provisions. Referring to trust law as a guide to inform ERISA, courts have created remedial regimes by utilizing trust law as the default structure.⁶⁵ Consequently, courts have continuously resorted to a presumptive dependence on

⁵⁸ *Id.*

⁵⁹ MEDILL, *supra* note 5, at §9.

⁶⁰ *Id.*

⁶¹ 29 U.S.C.S. § 1132(a) (2013).

⁶² *Id.*

⁶³ 29 U.S.C.S. § 1132(a)(1)(B) (2013).

⁶⁴ *See* 29 U.S.C.S. § 1132(a)(1)(B) (2013).

⁶⁵ *See* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008), Hunter v. Caliber Sys. Inc., 220 F.3d at 702 (6th Cir. 2000), Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995), Tibble v. Edison Int'l, 711 F.3d 1061 (9th Cir. 2013), and John Blair Commc'n Profit Sharing Plan v. Telemundo Group, 26 F.3d 360 (2nd Cir. 1994).

trust principles even though Congress used trust principles as a temporary guide.⁶⁶ Namely, several courts have recognized that “[c]ommon law trust principles animate [, but do not control,] the fiduciary responsibility provisions of ERISA.”⁶⁷ Congress, in enacting ERISA, referred to trust law for regulatory purposes, to inhibit employer autonomy over employee benefit plans, thus restricting plan fiduciary and trustee’s powers to alter the standard of review with self-serving language.⁶⁸ Altogether, while trust principles continue to influence courts, ERISA’s remedial scheme ultimately controls an ERISA analysis and not trust law.

Often, common law trust principles have been the starting point for courts when analyzing ERISA plan interpretation claims.⁶⁹ Many ERISA fiduciary duty provisions import fiduciary trust principles.⁷⁰ Congress, while forming a foundation from which courts could look to, did not propound an exact transposition of common law trust principles into ERISA.⁷¹ Furthermore, the Supreme Court has recognized that “trust law does not tell the entire story. After all, ERISA’s standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.”⁷² While “ERISA abounds with language and terminology of trust law,” a proliferation of trust law

⁶⁶ *Id.*

⁶⁷ *Acosta v. Pacific Enter.*, 950 F.2d 611, 618 (9th Cir. 1991). *See Cent. States v. Cent. Transp.*, 472 U.S. 559, 570-71 (1985).

⁶⁸ John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U.L. REV. 1315, 1317 (2007).

⁶⁹ *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *and see* S.REP. NO. 127, 93d Cong., 2d Sess., at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4865; H.R.REP. NO. 533, 93d Cong., 2d Sess., at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

⁷⁰ 29 U.S.C. § 1104(a)(1)(B) (2000); S.REP. NO. 127, 93d Cong., 2d Sess., at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4865; H.R.REP. NO. 533, 93d Cong., 2d Sess., at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

⁷¹ *See* John H. Langbein, *The Conundrum of Fiduciary Investing Under ERISA, in Proxy Voting of Pension Plan Equity Securities*, in WHARTON SCHOOL OF THE U. OF PENNSYLVANIA: PENSION RESEARCH COUNCIL 128 (Dan M. McGill ed., 1989); *See also* Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988).

⁷² *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

terminology does not mean that trust law is the only or best solution whenever a court tackles an ERISA plan interpretation question.⁷³ Hence, ERISA was enacted as a regulatory regime while absorbing common law trust principles to guide and not to dominate ERISA's purpose.⁷⁴ ERISA may and should alter adopted trust principles when necessary.⁷⁵

ERISA fiduciary laws are uniquely premised on ERISA's purpose to protect plan participants and promote plan creation, which are different from conventional trust law.⁷⁶ ERISA fiduciary duties govern plan administration as well as plan interpretation.⁷⁷ Trust law presumes that trustees are disinterested and generally are without a personal stake in trust assets, while ERISA fiduciaries are employed and sometimes aligned with the employer or insurance company supplying the insurance benefit.⁷⁸ The legislative safeguard arises from ERISA's language, which demands plan fiduciaries to act "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries" ⁷⁹ But, as a cost-effectiveness measure to promote the creation of plans, ERISA authorizes employers to use "an officer, employee, agent or other representative" as fiduciaries, thus creating an inherent conflict between trust law principles and the practical dynamics of fiduciary plan interpretation.⁸⁰

⁷³ *Firestone*, 489 U.S. at 110 (1989).

⁷⁴ See H.R. REP. NO. 93-1280, at 302 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083 (Conference Committee Report explaining that when interpreting fiduciary standards the purpose of ERISA must control).

⁷⁵ *Id.*

⁷⁶ LANGBEIN, *supra* note 68, 101 NW. U.L. REV. 1315 at §1326.

⁷⁷ See 29 U.S.C. § 1002(21)(A) (2000) (Plan administration – administration of plan assets and plan interpretation may include interpretation of benefits claim. Granting or denying claimed plan benefits entails the exercise of "discretionary authority" within the meaning of ERISA § 3(21)(A) or 29 U.S.C. § 1002(21)(A) (2000)).

⁷⁸ LANGBEIN, *supra* note 68, 101 NW. U.L. REV. 1315 at §1326.

⁷⁹ 29 U.S.C. § 1104(a)(1)(A)(i) (2000).

⁸⁰ 29 U.S.C. § 1108 (2000). See ERISA §§3(16), 402(a), or 29 U.S.C. §§1002(16), 1102(a) (2000) (which make the employer the default plan administrator); and see ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (2000) (which makes plan administration a fiduciary function).

A plan administrator is bound by ERISA to act in the sole benefit of the plan participants and beneficiary, but the plan administrator is paid, hired, or fired by the employer. The conflict is apparent. Trust scholars have noted that an employer or insurance company cannot act unbiasedly on behalf of himself and in the interest of the trust beneficiary.⁸¹ The Supreme Court has distinguished the inherent conflict between a plan administrator's duty to act in the sole benefit of plan participants while being paid by the employer by citing to ERISA's special nature and the careful balance needed to promote plan creation.⁸² Specifically, the Supreme Court has stated that an "[e]mployer[], for example, can be [an] ERISA fiduciary[] and still take actions to the disadvantage of employee beneficiaries, when they act as employers"⁸³ Thus, Supreme Court reduces liability under one conflict, where the plan participant is paid by the employer and acting in the sole interest of the plan and its participants, in order to promote the creation of plans.⁸⁴

Furthermore, trust law principles have been adopted for regulatory purposes in other fields aside from ERISA.⁸⁵ Congress has not fully transplanted trust law principles into other fields without regard to the purpose of such area of law.⁸⁶ Accordingly, trust law principles naturally are modified, when applicable, to conform to ERISA's purpose. It follows, then, that

⁸¹ GEORGE G. BOGERT & GEORGE T. BOGERT, *Bogert's Trust and Trustees*, in *The Law of Trusts and Trustees* § 543, at 227 (rev. 2d ed. 1993).

⁸² LANGBEIN, *supra* note 68, 101 NW. U.L. REV. 1315 at §1326; *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) (internal quotation marks omitted).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See John H. Langbein, *The Secret Life of the Trust: The Trust As an Instrument of Commerce*, 107 YALE L.J. 165, 174-77 (1997) (A discussion on a variety of regulatory compliance trusts in federal and state law).

⁸⁶ *Id.*

trust principles should be modified to determine when the arbitrary and capricious standard should apply, as identified by the Supreme Court.⁸⁷

4. Arbitrary and Capricious: As Applied to ERISA

The arbitrary and capricious standard derives from pre-ERISA denial of benefits claims under LMRA.⁸⁸ Arbitrary and capricious was the prevailing standard of review of trustee responsibility when ERISA was enacted.⁸⁹ Prior to ERISA's enactment, the LMRA served as a regulator of union-negotiated pension trust administration.⁹⁰ The LMRA did not expressly authorize suits brought against individual trustees and fiduciaries.⁹¹ For instance, the arbitrary and capricious standard was applied to review whether a plan provision was structurally defective, which lead to a denial of benefits, and not the misconduct of the individual administrator.⁹²

The arbitrary and capricious standard has evolved from its original adoption.⁹³ ERISA, while a comprehensive statute, does not specify a standard of review for a court to adopt when analyzing a plan administrator or trustee's actions.⁹⁴ As a result, federal common law has evolved numerous legal principles to resolve ambiguities in ERISA's provisions.⁹⁵ Thus, federal courts by analogy imported the LMRA arbitrary and capricious standard of review into ERISA's

⁸⁷ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and see *Conkright v. Frommert*, 559 U.S. 506 (2010).

⁸⁸ Kevin W. Beatty, *A Decade Confusion: The Standard of Review for Erisa Benefit Denial Claims as Established by Firestone*, 51 ALA. L. REV. 733, 734-36 (2000).

⁸⁹ *Id.*

⁹⁰ Bradley R. Duncan, *Litigation Under ERISA: Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986, 992 (1986).

⁹¹ *Id.*

⁹² *Id.* at 993.

⁹³ See *Rud v. Liberty Life Assur. Co.*, 438 F.3d 772 (7th Cir. 2006) (sliding scale approach); and see *Van Boxel v. Journal Co. Emps.' Pension Trust.*, 836 F.2d 1048 (7th Cir. 1987).

⁹⁴ 29 U.S.C. 1132(a) (2012).

⁹⁵ See *Firestone Tire and Rubber Co. v. Bruch*, 489 US 101 (1989), *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), and see *Conkright v. Frommert*, 559 U.S. 506 (2010).

standards.⁹⁶ With the adoption of ERISA, Congress included provisions that imposed similar fiduciary duties to those under the LMRA. At the time of ERISA's adoption, however, one key difference set ERISA and LMRA duties and subsequent standard of review apart.⁹⁷ While LMRA focuses on the structural defect of plan provisions in union-negotiated plan, ERISA focuses on securing plans "for the sole and exclusive benefit of employees," and thus allow individual review of plan administrators' actions.⁹⁸

As a result of filling ERISA gaps with trust principles, the arbitrary and capricious standard broadens the protective scope of plan administrator acting under a conflict of interest.⁹⁹ For example, trust principles under a traditional trust operate in the interest of the trust, generally without a conflict. Conversely, under an ERISA plan, the employer usually employs the trust administrator, who gets paid by the employer but must act in the interest of the plan participants and beneficiaries, creating an inherent conflict of interest. While such conflict is inherent, the Supreme Court, in *Firestone Tire and Rubber Co. v. Bruch*, 489 US 101 (1989), instead of finding that a conflict of interest automatically amounts to an arbitrary and capricious act,¹⁰⁰ accorded great deference to plan administrators based on trust principles, if the plan accorded

⁹⁶ Michael S. Beaver, *The Standard of Review in ERISA Benefits-Denial Cases after Firestone Tire and Rubber Co. v. Bruch: Revolution or Deja vu?*, 26 TORT & INS. L.J. 1, 2 (1990). *E.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-09 (1989) ("ERISA does not set out the appropriate standard of review for action under § 1132(a)(1)(B) challenging benefit eligibility determinations. To fill this gap, federal courts have adopted the arbitrary and capricious standard developed under . . . 29 USC § 186(c), a provision of the Labor Management Relations Act, 1947 (LMRA).").

⁹⁷ DUNCAN, *supra* note 88, § 994.

⁹⁸ *Id.*

⁹⁹ *E.g.* *Van Boxel v. Journal Co. Emps.' Pension Trust.*, 836 F.2d 1048, 1052 (7th Cir. 1987) (Adopting a sliding scale approach that "may be in effect a sliding scale of judicial review of [a] trustees' decisions [-] more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.").

¹⁰⁰ *Firestone*, 489 U.S. at 145; *See* Kevin W. Beatty, *A Decade Confusion: The Standard of Review for Erisa Benefit Denial Claims as Established by Firestone*, 51 ALA. L. REV. 733, 733-36 (2000) (*Firestone* did not follow the sliding scale approach in *Van Boxel*. *Van Boxel's* sliding scale approach created an analysis that "may be in effect a sliding scale of judicial review of [a] trustees' decisions [-] more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is." While a conflicted trustee may receive deference under a *Firestone* approach, a de novo review is the recommended standard for conflicting administrative decisions.).

such deference upon the plan administrator.¹⁰¹ Specifically, *Firestone* referred to the Restatement (Second) of Trusts to confer discretion upon a trustee and his exercise of power.¹⁰² Trust principles provide that a trustee's exercise of power is not subject to a court's control, unless to prevent an abuse of discretion.¹⁰³ Thus, fusing trust principles and the arbitrary and capricious standard protects a conflict of interest from automatically amounting to an abuse of discretion; the arbitrary and capricious standard, however, does not protect conflict that amount to an abuse of discretion.¹⁰⁴

Scholars have criticized the importation of the LMRA arbitrary and capricious standard of review as applied to ERISA.¹⁰⁵ The LMRA legislation provides safeguards that, for example, require submission of dispute in plan interpretation to an independent arbiter, which ERISA does not have.¹⁰⁶ Thus, scholars have questioned the rationale behind applying a lenient standard of review to an administrator's actions when no inherent safeguards are in place.¹⁰⁷

With its origins in trust law, the arbitrary and capricious standard has left many unsettled issues for courts to address. Even though the Supreme Court has already resolved some of the issues concerning the application of this standard as applied to plan interpretation by trustees, it has created even more questions, which scholars have identified as critical to resolving the practical implications upon promoting plan creation and protecting plan participants.

¹⁰¹ *Firestone*, 489 U.S. at 111-13.

¹⁰² *Firestone*, 489 U.S. at 112-13. RESTATEMENT (SECOND) OF TRUSTS § 187 (2013).

¹⁰³ RESTATEMENT (SECOND) OF TRUSTS § 187 (2013); *See generally* Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556 (11th Cir. 1990) (Scholars and the courts alike have used abuse of discretion and arbitrary and capricious interchangeably when referring to a deferential standard of review in ERISA cases.).

¹⁰⁴ A conflict that arises solely from having an employee trustee administrate the plan does not amount to an abuse of discretion.

¹⁰⁵ BEATTY, *supra* note 86, §§734-36.

¹⁰⁶ *Id.* at 736.

¹⁰⁷ *Id.* at 734-36.

II. ERISA's Federal Common Law: The Supreme Court Sets Contours for Judicial Review

ERISA, as interpreted by the courts, has imposed several limitations on plan participants and beneficiaries by finding justification in creating uniform sets of laws that encourage employers to establish or sponsor employee benefit plans.¹⁰⁸ The Supreme Court has followed a simplistic approach in fixing an employer-favoring standard of review. In the past twenty years, the Supreme Court has addressed the issue of judicial review in the ERISA context.¹⁰⁹ The following section highlights each Supreme Court case and its analysis in fashioning an employer-favoring standard of review.

1. Firestone Tire and Rubber Co. v. Bruch (1989)

Before 1989, ERISA failed to establish standard of review for denial of benefits claims.¹¹⁰ In 1989, the Supreme Court addressed, for the first time, the issue of ERISA plan interpretation and established the *de novo* standard of review as the default standard of judicial review in denial of benefit claims.¹¹¹ The Supreme Court decided the following two issues in *Firestone*: 1) the standard of judicial review warranted in appraising ERISA denial of benefits claims and 2) the meaning of the word “participant” in order to determine who can request plan information.¹¹² Focusing on the first of two issues, *Firestone* held that “[c]onsistent with established principles of trust law, . . . 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

¹⁰⁸ *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004).

¹⁰⁹ See *Firestone Tire and Rubber Co. v. Bruch*, 489 US 101 (1989), *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), and see *Conkright v. Frommert*, 559 U.S. 506 (2010).

¹¹⁰ *Firestone*, 489 US at 111.

¹¹¹ *Id.* at 108 (*Firestone* involved a denial of severance benefits under a termination pay plan governed by ERISA.).

¹¹² *Id.* at 105, 108.

plan.”¹¹³ Thus, *Firestone* is the starting point whenever analyzing an ERISA plan interpretation or judicial standard of review issue.

The *Firestone* case was a class action by employees who sought severance benefits under one of Firestone Tire and Rubber Company’s ERISA qualified plans.¹¹⁴ The class action ensued because Firestone Tire and Rubber Company interpreted the plan language to deny the benefit claims, explaining that the reason for the claim did not in fact fall within the meaning of the plan, as they interpreted it.¹¹⁵

The Court’s holding was expressly “*limited* to the appropriate standard of review in § 1132(a)(1)(B) actions *challenging denials of benefits* based on plan interpretations. *Firestone* expressed no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.”¹¹⁶ The Court did not transplant principles of trust law, but was simply guided by trust law principles to decide a reviewing standard for a remedial provision of ERISA, not all remedial provisions of ERISA.¹¹⁷ Thus, applying an arbitrary and capricious standard did not mean that the plan administrator will prevail on the merits, but only that the plan administrator’s interpretation of the plan “will not be disturbed if reasonable.”¹¹⁸

Thus, *Firestone* was not primarily concerned with the possibility of reducing protections to plan participants and beneficiaries. The Court’s pronouncement provided employers and trustees a means of defeating the heightened de novo standard of review.¹¹⁹ The Court justified the adoption of the arbitrary and capricious standard of review to trustees who act under the provisions of plan terms granting discretion by resting its analysis on general principles of trust

¹¹³ *Id.* at 111 (emphasis added).

¹¹⁴ *Id.* at 108.

¹¹⁵ *Firestone*, 489 U.S. at 106.

¹¹⁶ *Firestone*, 489 U.S. at 108 (emphasis added).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 108-09.

¹¹⁹ *Id.* at 113-14.

law.¹²⁰ The Court's adoption of the arbitrary and capricious standard of review was based on the premise that ERISA was like any other contract, where deference is given to either party's interpretation unless the contract itself redirects such deference to one party.¹²¹

2. Metro. Life Ins. Co. v. Glenn (2008)

In 2008, the Supreme Court in *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), followed *Firestone's* adoption of a highly deferential standard of review - arbitrary and capricious standard, where a plan grants discretionary authority upon the plan administrator.¹²² *Glenn* also added to *Firestone's* framework by requiring the consideration of external factors, such as the severity of a conflict of interest, when deciding whether an administrator's acts were arbitrary and capricious.¹²³ The *Glenn* Court stated that some factors merits consideration even under a deferential standard of review.¹²⁴ *Glenn* was not a broader application of *Firestone's* judicial review principles, but an application of *Firestone's* underlying trust law principles in an effort to promote plan participants and beneficiaries' rights under a deferential standard of review in benefit denial cases.

In *Glenn*, the petitioner served as an administrator and insurer of an ERISA-governed long-term disability insurance plan.¹²⁵ The petitioner as administrator had discretionary authority to determine employee's benefit claims and, as an insurer, funded payments for approved benefit claims.¹²⁶ An employee and plan participant, with a governmentally approved

¹²⁰ *Id.* at 115.

¹²¹ BARUCH, *supra* note 45, at §112.

¹²² *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 109 (2008).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 108.

¹²⁶ *Id.*

disability, was denied plan disability benefits.¹²⁷ Even though the Social Security Administration granted her permanent disability, the administrator denied her claim for plan disability payments because the standard enumerated by the plan was stricter than the Social Security Administration's definition.¹²⁸

The Court determined two issues: 1) whether a conflict of interest exists when a plan administrator both evaluates a benefits claim and pays for such claim; and 2) whether any such conflict of interest influences the "judicial review of a discretionary benefit determination."¹²⁹ *Glenn* held that a conflict of interest may exist when the plan is responsible for both determining whether a valid benefit claims exist and paying the claim.¹³⁰ The Court identified "that this dual role creates a conflict of interest. . . [and that] conflicts are but one factor among many that a reviewing judge must take into account."¹³¹

The Court did not want to forsake *Firestone*.¹³² No change, but an addition, to the deferential standard of review was made.¹³³ Trust law was, again, the fundamental premise for keeping to high deference.¹³⁴ *Glenn*, while citing to the Restatement of Trusts, reasoned that a conflicted trustee's claim determination does not switch the standard back to de novo review, but required that a reviewing judge take "account of the conflict when evaluating [] whether [a] trustee, subjectively or procedurally, has abused his discretion."¹³⁵ Specifically, a conflict may exist, but a court will consider the extent of that conflict as one factor in determining whether the trustee abused his discretion. While dependent of the facts, a conflict of interest, generally,

¹²⁷ *Id.* at 109.

¹²⁸ *Glenn*, 554 U.S. at 109.

¹²⁹ *Id.* at 110.

¹³⁰ *Id.* at 108, 116.

¹³¹ *Id.*

¹³² *Id.* at 116.

¹³³ *Id.* at 115.

¹³⁴ *Glenn*, 554 U.S. at 115.

¹³⁵ *Id.*

alone, does not automatically revert judicial scrutiny back to the de novo standard of review.¹³⁶ Even when a conflict of interest is present, a deferential standard is warranted when the plan grants discretion upon the trustee.

In addition, other factors may be considered to determine whether a trustee has abused his discretion.¹³⁷ While a conflict of interest was considered one factor, it was not the only one the court would consider.¹³⁸ Analogizing to administrative law judges, who take account of case-specific factors to determine liability, *Glenn* appoints judges with the ultimate task of weighing all factors together.¹³⁹

Adding procedural rules to combat inadequacies in internal plan review of benefits denials was not an option for the Court due to a concern of added complexity, time, and expense on the court system and plan participants.¹⁴⁰ The Court emphasized that “[b]enefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts . . . for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review.”¹⁴¹ The Court further reasoned that Congress did not intend for the court to review the “lion’s share of ERISA plan claims denials . . . [for if] Congress intended such a system of review, . . . it would not have left to the courts the development of review standards but would have said more on the subject.”¹⁴²

Thus, *Glenn* creates a method for courts to decide, after considering external factors, whether a judicial standard of review should revert back to de novo when the plan enumerates discretionary authority upon the trustee. Altogether, after *Glenn*, a court is navigated into

¹³⁶ *Id.* at 116-117 (internal quotation marks omitted).

¹³⁷ *Id.* at 117.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Glenn*, 554 U.S. at 117.

¹⁴¹ *Id.* at 116.

¹⁴² *Id.*

considering numerous factors, such as a conflict of interest, when deciding whether a plan administrator's actions are arbitrary and capricious. *Glenn* did not, however, enumerate the other numerous factors it approves for consideration. Nonetheless, the implications of such judicial navigation results in an amplified investigation of the facts in any given ERISA case that grants discretion upon the plan administrator. Therefore, instead of narrowly focusing on the four corners of the document, a court may widen its evidentiary horizon, which increases the possibility of finding that a plan administrator's actions were arbitrary and capricious.

3. *Conkright v. Frommert* (2010)

In 2010, the Supreme Court, in *Conkright v. Frommert*, 559 U.S. 506 (2010), addressed two issues: 1) whether a plan administrator's second decision warranted deference after the first decision was considered unreasonable in the denial of benefits context; and 2) how to account for respondent's past distribution in calculating current benefits to avoid paying the same benefit twice.¹⁴³ *Conkright* held that a single honest mistake in ERISA plan administration did not warrant a stricter standard of review.¹⁴⁴ In other words, a single honest mistake, alone, does not warrant a de novo review when the plan grants discretionary authority up the plan administrator.¹⁴⁵

Conkright follows *Firestone*'s pronouncement of trust law as a guide to answer the ERISA standard of review questions.¹⁴⁶ The Court announced, from integrating *Firestone* and *Glenn*, four elements to determine the proper standard of review in future ERISA judicial review

¹⁴³ *Conkright v. Frommert*, 559 U.S. 506, 510-11 (2010).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 512.

cases.¹⁴⁷ Namely, future courts would consider trust law, the plan’s terms at issue, ERISA’s purposes and principles, and the *Firestone* precedent.¹⁴⁸

The facts of *Conkright* entailed a corporation’s employees who left the corporation and received a lump-sum retirement benefit distribution, and then were later rehired.¹⁴⁹ The plan administrators used a “phantom accounting” method to eliminate double retirement payments.¹⁵⁰ The plan administrator then proposed another accounting method that did not calculate the present value of past distributions but used a fixed interest rate from the time of the distribution that accounted for the time value of money.¹⁵¹ A class of employees filed suit after being denied benefits arising from the change in calculating methods.¹⁵² The *Conkright* Court recognized that the plan administrator’s initial choice in an inherently restrictive accounting method to the detriment of the plan participants was unreasonable.¹⁵³ But the administrator’s decision was nonetheless labeled as an “honest mistake.”¹⁵⁴ The *Conkright* Court reasoned, referring to its pronouncement in *Glenn*, that ERISA disfavors rules that create further complexity.¹⁵⁵ The Court ultimately held that if a conflict of interest would “not strip a plan administrator of deference, it is difficult to see why a single honest mistake would require a different result.”¹⁵⁶

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Conkright*, 559 U.S. at 512.

¹⁵⁰ *Id.* at 510.

¹⁵¹ *Id.* at 510-11.

¹⁵² *Id.*

¹⁵³ *Id.* at 513.

¹⁵⁴ *Id.*

¹⁵⁵ *Conkright*, 559 U.S. at 518.

¹⁵⁶ *Id.* at 513 (internal quotation marks omitted).

On remand from the Supreme Court, the Second Circuit District Court held that the plan administrator's honest mistake was reasonable and thus not arbitrary and capricious.¹⁵⁷ The Second Circuit Court of Appeals reversed the District Court's decision after applying *Firestone* deference and explained that the plan administrator's plan interpretation, while labeled an honest mistake was unreasonable and thus arbitrary and capricious because the administrator's plan interpretation was inconsistent with the plan language.¹⁵⁸ The Second Circuit Court of Appeals further noted that even under a de novo review the plan administrator's honest mistake was unreasonable and thus arbitrary and capricious because it violated another ERISA provision.¹⁵⁹ Therefore, while an honest mistake does not strip an administrator of his *Firestone* deference, if such mistake is unreasonable, either through violating another ERISA provision or an irrational plan interpretation, the administrator's act will be considered arbitrary and capricious.

i. Breyer's Dissent and Accompanying Scholars

Justice Breyer, dissenting in *Conkright*, accepted *Firestone*'s validity but was concerned with the majorities' unprecedented and erroneous conclusion of interpreting trust law in such an inflexible manner.¹⁶⁰ Justice Breyer highlighted that the majority recognized trust law did "not resolve the specific issue before the Court."¹⁶¹ Nonetheless, while having the opportunity to reference another body of law or to interpret trust law in such a manner to promote plan

¹⁵⁷ Paul Mollica, *Frommert v. Conkright*, No. 12-67 (2d Cir. Dec. 23, 2013), DAILY DEVELOPMENTS IN EEO LAW, (Mar. 6, 2014), <http://www.employmentlawblog.info/2013/12/frommert-v-conkright-no-12-67-2d-cir-dec-23-2013.shtml>.

¹⁵⁸ *Frommert v. Conkright*, 738 F.3d 522, 531 (2d Cir. 2013).

¹⁵⁹ *Id.* at 531.

¹⁶⁰ *Id.* at 528-29.

¹⁶¹ *Conkright*, 559 U.S. at 529.

participants' and beneficiaries' interest, the Court fashioned a rule that required deference to a plan administrator's second attempt at interpreting plan documents when he was found to have abused his discretion the first time he interpreted plan documents.¹⁶²

Consistent with Justice Breyer's intuition and reasoning, scholars have noted that *Conkright*, while claiming to base its decision on trust principles, failed to consider fundamental trust principles inconsistent with the *Conkright* holding.¹⁶³ Trust law requires the divestment of deference to a trustee when discretion is not exercised honestly and without bias.¹⁶⁴ A trustee may exercise his discretion with bias by making multiple erroneous interpretations, even if in good faith.¹⁶⁵ Not only bad faith, but also a plan administrator's incompetence, can serve as sufficient reason to divest him of deference under trust principles.¹⁶⁶

Conkright reasons that ERISA's purpose far outweighs the addition of further complexity to protect plan participants because a careful balance must be maintained to protect and preserve the reasons on which ERISA is based – in part, the enlargement and protection of plan participants' and beneficiaries' rights.¹⁶⁷ Building on principles to promote the interest of efficiency, uniformity, and reduced litigation cost, while noting the careful balance courts have striven to strike between ensuring unbiased and prompt enforcement of rights and the

¹⁶² *Id.* at 528-29.

¹⁶³ See *Conkright v. Frommert*, 559 U.S. at 528-29 (Justice Breyer in dissent).; and see John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U.L. REV. 1315 (2007).

¹⁶⁴ JESSICA M. STANDISH, MICHAEL D. REILLY & JEFFREY L. GINGOLD, CONFRONTING BANS ON DISCRETIONARY CLAUSES IN ERISA PLANS 199 available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&ved=0CGMQFjAF&url=http%3A%2F%2Fwww.dri.org%2FDRI%2Fcourse-materials%2F2013-ERISA%2Fpdfs%2F12_Standish.pdf&ei=uwfcUpiOCtDFsASuqYCQCQ&usg=AFQjCNGRQFVoV_JwowJ_eCRmDRHIRpT-3g&sig2=ZTMkpSJp9D9ecUL6hjL6UA&bvm=bv.59568121,d.cWc.

¹⁶⁵ *Id.*

¹⁶⁶ See generally John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U.L. REV. 1315, 1317 (2007).

¹⁶⁷ *Conkright*, 559 U.S. at 518.

encouragement of creating plans, the Court, however, justifies its pronouncement of broad deference to administrators on one side of the balance – promoting efficiency, predictability, and uniformity.¹⁶⁸

ii. The Split

Since *Firestone*, the Ninth, Third, Sixth, and Second Circuits have disagreed on the extent to which the arbitrary and capricious standard applies to plan interpretation outside of the denial of benefits context.¹⁶⁹ On opposite sides of the *Firestone* spectrum sits *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013), of the Ninth Circuit and *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994), of the Second Circuit. *John Blair* adopts a strict reading of *Firestone* and applies the arbitrary and capricious standard to denial of benefits claims only.¹⁷⁰ At the opposite end, *Tibble* proposes an arbitrary and capricious standard of review for all remedial ERISA provisions and any other plan interpretation provisions.¹⁷¹ The Third and Sixth Circuits have agreed that an arbitrary and capricious standard should apply outside of the denial of benefits context, but have not taken either the Ninth Circuit nor Second Circuit's extreme position.¹⁷² The Third and Sixth Circuits do not define how far the arbitrary and capricious standard should apply outside of the denial of benefits context.¹⁷³ Thus, broadly categorized, the Ninth and Second Circuits sit at opposite sides while the Sixth and Third Circuits sit somewhere in between the Ninth and Second Circuits.

¹⁶⁸ *Frommert*, 559 U.S. at 518.

¹⁶⁹ See *Hunter v. Caliber Sys. Inc.*, 220 F.3d at 702 (6th Cir. 2000), *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995), *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013), and *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994).

¹⁷⁰ *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360, 369-70 (2nd Cir. 1994).

¹⁷¹ *Tibble*, 711 F.3d at 1077.

¹⁷² *Hunter v. Caliber Sys. Inc.*, 220 F.3d 702, 711 (6th Cir. 2000). *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995).

¹⁷³ *Id.*

1. One Side of the Split is Strict Construction: The Arbitrary and Capricious Standard does not Apply to All Plan Interpretation Claims Outside of the Denial of Benefits Context.

i. Second Circuit - John Blair Commc'n Profit Sharing Plan v. Telemundo Group (1994) and Frommert v. Conkright (2nd Cir. 2013).

The Second Circuit, in *John Blair*, decided whether the arbitrary and capricious standard applies outside of the denial of benefits context.¹⁷⁴ The court held that the arbitrary and capricious standard *does not* apply outside the benefits denial context.¹⁷⁵ It is important to note, however, that *John Blair* was the first case decided after *Firestone* that faithfully followed *Firestone*'s limited standing. Since *Firestone*, the Second Circuit has continued to uphold *John Blair*'s legacy, while the Supreme Court has decided two cases speaking, in part, to judicial standard of review in ERISA claims on plan interpretation.¹⁷⁶

John Blair involved a suit by the John Blair company plan (JBCP) and its members against another plan, the Telemundo plan (TP), as a committee and individual members of the committee.¹⁷⁷ The JBCP was reorganized to include new members and funds from another plan.¹⁷⁸ The process entailed transferring assets from a plan that was reorganized into the JBCP.¹⁷⁹ During the re-organization of the JBCP, TP transferred assets from the reorganized plan into JBCP but failed to transfer the appreciation of those assets.¹⁸⁰ As a result, JBCP claimed that TP violated its fiduciary duty.

¹⁷⁴ *John Blair*, 26 F.3d at 369-70.

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ *Conkright* arose from the 2nd Circuit. The Supreme Court held that the 2nd Circuit's carving exception to ERISA's remedial provisions would not be affirmed in that instance. But, the Supreme Court did not repudiate *John Blair* in *Conkright*.

¹⁷⁷ *John Blair*, 26 F.3d at 362.

¹⁷⁸ *Id.* at 362-63.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

In declining to apply the arbitrary and capricious standard outside of the denial of benefits context, *John Blair* kept to *Firestone*'s pronouncement – the arbitrary and capricious standard, in *Firestone*, only applied to the denial of benefits context.¹⁸¹ The Second Circuit strictly construed *Firestone*'s holding.¹⁸² *John Blair* justified its narrow interpretation of *Firestone* on the same idea identified by the *Moench* court – that all ERISA remedial actions are not the same and as such all ERISA remedial actions should not utilize the same standard of judicial review.¹⁸³ In addition, *John Blair* justifies its holding by identifying that *Firestone* concerned a denial of benefits case and did not speak to other ERISA remedial actions where the plan grants interpretative powers upon the plan administrator.¹⁸⁴

Moreover, the Second Circuit, on remand from the Supreme Court, in *Frommert v. Conkright*, 738 F.3d 522 (2nd Cir. 2013), continues to uphold the *John Blair* legacy.¹⁸⁵ In *Frommert*, on appeal, the plaintiffs brought two claims: that the plan administrator plan interpretation 1) was an unreasonable interpretation under a denial of benefits claim, and 2) violated an ERISA notice provision.¹⁸⁶ *Frommert* explicitly declined to address what standard of review applied outside the denial of benefits context. Specifically, the court stated that determining whether an ERISA notice violation stemming from an “interpretation of the [plan] . . . , is subject to review under a de novo or abuse of discretion standard. We decline to answer that question here”¹⁸⁷ The *Frommert* decision recaptures the Second Circuit's stance on determining the standard of review for plan interpretation that are beyond the denial of benefits context. In conclusion, *John Blair* and *Frommert* stand for the proposition that *Firestone*

¹⁸¹ *Firestone*, 489 US at 111; *John Blair*, 26 F.3d at 369.

¹⁸² *John Blair*, 26 F.3d at 369.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Frommert*, 738 F.3d at 531 (2nd Cir. 2013).

¹⁸⁶ *Id.* at 525.

¹⁸⁷ *Id.* at 531.

deference applies to denial of benefit claims and any other claim outside of the denial of benefits context requires review from another court to determine the appropriate standard of review.¹⁸⁸

2. The Other Side of the Split is Liberal Construction: The Arbitrary and Capricious Standard Applies Outside of the Denial of Benefits Context.

i. Ninth Circuit - *Tibble v. Edison Int'l* (2013)

The Ninth Circuit, in *Tibble*, decided whether the arbitrary and capricious standard should apply to a plan administrator or trustee's plan interpretation outside of the benefit claims context.¹⁸⁹ Broadly interpreting *Firestone* and its progeny, *Tibble* held that a high deferential standard of review applied to all plan interpretations beyond denial of benefit claims.¹⁹⁰ Under such analysis, the *Tibble* court applied *Firestone* deference in evaluating a plan administrator's alleged breach of fiduciary duty.¹⁹¹

The facts of *Tibble* entailed a suit by beneficiaries against the employer's benefit plan administrator for allegedly managing the plan imprudently in a self-interested fashion.¹⁹² The employer provided six investment options in the defined contribution plan,¹⁹³ which entitled retirees only to the value of their own investment accounts.¹⁹⁴ Among the other financial options to choose from, the company had retail-class mutual funds, which had higher administrative fees than alternatives available only to institutional investors.¹⁹⁵ Further, the addition of a wider array of mutual funds also introduced a practice known as revenue sharing into the mix.¹⁹⁶ Under this

¹⁸⁸ See *John Blair Comm'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994), and see *Frommert v. Conkright*, 738 F.3d 522, (2nd Cir. 2013).

¹⁸⁹ *Tibble*, 711 F.3d at 1077.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 1066.

¹⁹³ See 29 U.S.C. § 1002(34) (2013).

¹⁹⁴ *Tibble*, 711 F.3d at 1066.

¹⁹⁵ *Id.* at 1066.

¹⁹⁶ *Id.*

dynamic, certain mutual funds collected fees out of fund assets and disbursed them to the plan's service provider.¹⁹⁷ The employer, Edison, in turn received a credit on its invoices from that provider.¹⁹⁸ Beneficiaries objected to the inclusion of retail-class mutual funds, specifically claiming that their inclusion had been imprudent, and that the practice of revenue sharing had violated both the plan document and conflict of interest provision.¹⁹⁹ The beneficiaries also claimed that offering unitized stock funds, money market-style investments, and mutual funds had been imprudent.²⁰⁰

The plan document stated that the administrative cost would be paid by the company.²⁰¹ By providing more investment options to the beneficiaries, the plan became more expensive to administer and Edison availed itself of revenue sharing with the third party administrator of investment options for the plan.²⁰² Under the agreement, the mutual fund would transfer a portion of their fees to the plan's third party service provider's account.²⁰³ The revenue would reimburse the third party service provider, thus Edison would receive a credit on its bill from the third party servicer.²⁰⁴ The plan was later amended to include discretionary authority to interpret the plan's language, and the *Tibble* court addressed the interpretive issues of whether the pre-amendment version of the plan allowed offsets or revenue sharing.²⁰⁵

Tibble found three main reasons for holding that *Firestone* deference applies beyond plan interpretation in benefit denial claims and to fiduciary duties.²⁰⁶ In identifying and distinguishing

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1065, 1076.

²⁰⁰ *Tibble*, 711 F.3d at 1065.

²⁰¹ *Id.* at 1065.

²⁰² *Id.* at 1076.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Tibble*, 711 F.3d at 1077.

the current split on the scope of deferential review, first, the *Tibble* court distinguished *John Blair*, which holds that *Firestone* deference is generally limited to denial of benefit claims.²⁰⁷ Next, *Tibble* reasoned that trust law dictates the appropriate standard of review.²⁰⁸ Lastly, *Tibble* reasons that its “across-the-board” deference derives from *Conkright*’s emphasis on promoting plan creation.²⁰⁹

Tibble identified strong parallels between *Conkright* and *John Blair*.²¹⁰ The *Conkright* decision arose from the Second Circuit, from which the decision in *John Blair* originated. While the *Conkright* court did not expressly repudiate *John Blair*’s holding, it nonetheless reasoned that exceptions to ERISA were disfavored. *Conkright* repudiated the Second Circuit’s exception to *Firestone* deference by forgiving a first-time good-faith mistake by a plan administrator or trustee. Therefore, *Tibble* reasoned that anything resembling a carved-out exception to ERISA deferential review is unwarranted.²¹¹

Second, *Tibble* reasoned that trust law controls the analysis in deciding the standard of judicial review.²¹² While acknowledging that *Firestone*’s holding was limited to denial of benefit claims and no other ERISA remedial provisions, the Court noted trust law was a founding principle in *Firestone*.²¹³ Thus, using trust principles, which *Firestone* found appropriate solely for its denial of benefit claims analysis, *Tibble* presumed that trust law is the appropriate body of law to control the standard of review for any and all plan interpretation concerning ERISA.²¹⁴

²⁰⁷ *Tibble*, 711 F.3d at 1077; *John Blair*, 26 F.3d at 369-70.

²⁰⁸ *Tibble*, 711 F.3d at 1076.

²⁰⁹ *Id.* at 1078.

²¹⁰ *Id.* at 1077.

²¹¹ *Id.*

²¹² *Id.* at 1076.

²¹³ *Id.* at 1076-77.

²¹⁴ *Tibble*, 711 F.3d at 1076-77.

Lastly, *Tibble* justified its “across-the-board” deference by identifying *Conkright*’s emphasis on the careful balance between promoting plan creation and protecting plan participant’s rights.²¹⁵ Following the spirit of *Conkright*, *Tibble* was likewise more concerned with one side of the balance - promoting efficiency, predictability, and uniformity to encourage the creation of ERISA plans.²¹⁶ Like *Conkright*, therefore, *Tibble* completely disregarded the equitable standards that ensure unbiased and prompt enforcement of plan participants’ and beneficiary rights – the other side of the balance.²¹⁷

ii. Sixth Circuit - *Hunter v. Caliber Sys. Inc.* (2000)

The Sixth Circuit, in *Hunter v. Caliber Sys. Inc.*, 220 F.3d 702 (6th Cir. 2000), decided whether the lower court erred by applying the arbitrary and capricious standard to a plan administrator plan interpretation outside of the denial of benefit claims context.²¹⁸ Similar to *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995), *Hunter* held that the application of the arbitrary and capricious standard applied beyond the typical review of denial of benefits claims.²¹⁹ In holding that the district court did not err in using the arbitrary and capricious standard of review, *Hunter* based its decision on *Firestone* and trust law principles.²²⁰

Hunter involved a suit by plan participants who claimed that the plan administrator failed to perform several fiduciary duties.²²¹ Plan participants were denied lump sum distributions and delayed the opportunity to sell company stock after a spin-off from defendant’s parent company

²¹⁵ *Id.* at 1078.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Hunter*, 220 F.3d 702, 711 (6th Cir. 2000).

²¹⁹ *Id.* at 710.

²²⁰ *Id.* at 709-710.

²²¹ *Id.* at 706.

occurred.²²² An amendment to the plan was made. Such amendment created a fiction that plan participants' employment was continues during the spin-off of the parent and subsidiary company, when in-fact they were not.²²³ Summary judgment was affirmed in favor of the plan administrators under an arbitrary and capricious standard of review.²²⁴

While acknowledging that the wholesale importation of trust principles into ERISA is unwarranted, *Hunter* announced that the arbitrary and capricious standard is appropriate outside the denial of benefits context.²²⁵ The Sixth Circuit added that its circuit precedent, as consistent with *Firestone*, required an inquiry of whether the plan administrator's interpretation was arbitrary and capricious, made in bad faith, or otherwise contrary to law.²²⁶ *Hunter* recognized that *Firestone* stood for the limited premise that the standard of review for denial of benefit claims, and not any other remedial ERISA provision, is arbitrary and capricious when the plan grants discretion upon the trustee or plan administrator.²²⁷ Nonetheless, the *Hunter* court modeled its analysis after *Firestone* and *Moench* and based its decision to apply the arbitrary and capricious standard outside the benefits claims context on language and principles of trust law.²²⁸ *Hunter* is different from *Tibble*'s expansive position because *Hunter* did not state the extent to which the arbitrary and capricious standard should apply outside the denial of benefits context.²²⁹ Thus, *Hunter* stands for the proposition that the arbitrary and capricious standard should apply

²²² *Id.*

²²³ *Id.* at 707.

²²⁴ *Hunter*, 220 F.3d at 707.

²²⁵ *Id.* at 710.

²²⁶ *Id.*

²²⁷ *Id.* at 711.

²²⁸ *Id.* at 711-12.

²²⁹ *Id.*

outside of the denial of benefits context but exactly how far from the denial of benefits context is unclear.²³⁰

iii. Third Circuit - *Moench v. Robertson* (1995)

The Third Circuit, in *Moench*, considered to what extent fiduciaries of an Employee Stock Option Plan (ESOP) may be liable when investing solely in the employer's common stock and when the plan terms provide that the primary purpose of the ESOP is to invest in employer's stock.²³¹ The subsidiary and accompanying issue was whether a breach of fiduciary duty claim warranted an arbitrary and capricious standard of review.²³² *Moench* held that while the arbitrary and capricious standard should not be mechanically applied to all ERISA claims, *Firestone's* mode of analysis and reference to trust law warrants the application of the arbitrary and capricious standard in breach of fiduciary claims.²³³

Moench involved a bank holding company that established an ESOP for its employees.²³⁴ Throughout a three-year period, the bank's common stock fell approximately 95%.²³⁵ Federal regulatory agencies expressed their concern at the bank's financial stability, but the plan administrator continued to invest in the ESOP.²³⁶ The bank ultimately filed for bankruptcy.²³⁷ Former bank employees who participated in the ESOP brought suit against the bank committee, while not suing the plan trustee nor the plan sponsor, who was the bank.²³⁸

²³⁰ *Id.*

²³¹ *Moench*, 62 F.3d at 556-57.

²³² *Id.*

²³³ *Id.* at 565.

²³⁴ *Id.* at 559.

²³⁵ *Id.* at 557.

²³⁶ *Id.* at 559-560.

²³⁷ *Moench*, 62 F.3d at 559-560.

²³⁸ *Id.* at 559.

Moench, as in *Hunter* and *Tibble*, recognized that *Firestone*'s holding was limited to the applicable standard of review under denial of benefits claims and not other remedial measures under ERISA.²³⁹ The *Moench* court justified its holding on *Firestone*'s dependence on trust principles.²⁴⁰ *Firestone*'s analysis, while limited to benefit claims, was pertinent to all claims challenging a fiduciaries performance under ERISA.²⁴¹ *Moench* further explained that Congress's intent to invoke trust law as a guide to ERISA is consistent with its decision because they do not pronounce that every remedial ERISA provision warrants an arbitrary and capricious review.²⁴²

Therefore, the *Moench* court's perspective was that denial of benefit claims, breach of fiduciary duty claims, and possibly other remedial claims, but not all ERISA remedial claims, warranted a deferential standard of review.²⁴³ While *Tibble* holds that the arbitrary and capricious standard applies without limits to any and all plan interpretation where the plan grants discretion, *Moench* hold that some but not all plan interpretation warrants an arbitrary and capricious standard.²⁴⁴ *Moench* suggests that certain facts, but not all facts, warrant an arbitrary and capricious standard of review where a plan grants discretion.²⁴⁵ The *Moench* court reasons that the arbitrary and capricious standard of review cannot simply apply to all ERISA remedial claims because each are comprised of dissimilar facts and circumstances that may require another standard of review.²⁴⁶ Thus, by inference, one can interpret *Moench* to mean that all ERISA remedial claims are not the same and those claims that are similar in fact and

²³⁹ *Id.* at 565-67.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 565-66.

²⁴³ *Moench*, 62 F.3d at 565-66.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

circumstance, like a denial of benefit claim, warrant one type of standard for judicial review, but not one standard should apply to all ERISA remedial claims.

iii. Analysis

The inconsistency among the circuits create serious practical implications upon ERISA civil cases. The retirement pensions system, and how court's interpret ERSIA, has an impact on 1) how we save; 2) the fluctuation of our capital markets; and, among others 3) governmental responsibility through social security – fundamental elements of our nation's financial security. The standard of judicial review and how courts evaluate whether a violation of an ERISA remedial provision has occurred implicates outcome determinative analysis. The Ninth Circuit has decided that any and all plan interpretation, beyond denial of benefits claims, should be accorded *Firestone* deference if the plan grants such.

Plan interpretation includes a myriad of plan administrative duties with varying degrees of implications on the plan participant and beneficiary. For example, the area of plan interpretation includes: 1) denial of benefits claim; 2) the implementation of administrative rules to the plan and what can and cannot be added by the administrator; 3) determining what is adequate notice to plan participants;²⁴⁷ 4) the scope of plan administrators' fact determination in any such claim under the plan; 5) the scope of medical determinations; 6) determining who is a plan beneficiary when a state does not legally recognize same-sex marriage; 7) setting the scope

²⁴⁷ See *Frommert v. Conkright*, 738 F.3d 522 (2nd Cir. 2013).

of fiduciary liability; 8) interpreting what formula will control the benefit calculation;²⁴⁸ and 9) interpreting benefit waivers.²⁴⁹

ERISA explains that a court's interpretation must carry out its purpose – to protect plan participants and beneficiaries and promote plan creation. This comment posits a possible solution to keep the careful balance between participant protection and plan promotion. While this comment agrees with one aspect of the Ninth Circuit - that all plan interpretation should be accorded *Firestone* deference if the plan provides discretion, this comment does not adopt the Second Circuit's restrictive reading of *Firestone*. Instead, reflecting the current judicial trend in upholding deference for plan administrators when the plan grants discretion, this comment recommends that a court be required to adopt broader remedial safeguards by analyzing any and all relevant factors that may capture and demonstrate an arbitrary and capricious act.

1. Weighing in on the Split

The Sixth and Third Circuits' holding reflects the model for added remedial safeguards that heighten the likelihood of finding an arbitrary and capricious act while sustaining the careful balance between plan creation and plan participant protection. The Second Circuit takes a strict constructionist approach refusing to expand the arbitrary and capricious standard reducing judicial economy. Lastly, the Ninth Circuit covers plan administrators with a protective veil

²⁴⁸ Ogletree Deakins, *High Court Rules ERISA Plan Administrator's Interpretation is Entitled to Deference*, NATIONAL EAUTHORITY <http://www.ogletreedeakins.com/publications/2010-04-21/high-court-rules-erisa-plan-administrators-interpretation-entitled-deference> (last visited Mar. 5, 2014).

²⁴⁹ Jeffrey M. Gorris, *Waivers of ERISA Plan Benefits: Preventing Judicial Interpretations Of A Complex Statute From Frustrating The Statute's Simple Purpose*, 155 U. PA. L. REV. 717, 734-35 (2007).

concerning any and all plan interpretation, so long the plan grants discretion, without regard to the rights and interest of plan participants and beneficiaries.²⁵⁰

The Second Circuit has failed to recognize that an analytical skeleton is necessary to encompass other remedial provisions.²⁵¹ By rigidly construing *Firestone*'s language to apply to the denial of benefits context only, the Second Circuit suggest that each and every plan interpretation provision in ERISA, if not already considered by the court, should be considered individually to determine what standard of review should apply.²⁵² The court would be burdened if it had to consider all cases of plan interpretation individually and delineate a rule for each in deciding what standard of review applies. Such result would contradict ERISA's purpose which seeks to add simplicity to the judicial avenues created by ERISA in an effort to promote plan creation. Thus, under the Second Circuit's approach, courts would be flooded with the responsibility of deciding what standard of judicial review applies to each and every ERISA plan interpretation provision, thus increasing litigation and adding complexity to the administration of ERISA plans.

The Second Circuit, however, does take a slightly practical approach to its analysis. In both *John Blair* and *Formmert*, the court found unsettling the idea that one standard of review would apply to any and all areas of plan interpretation within ERISA simply because the plan grants discretionary authority upon the plan administrator. *John Blair* and *Formmert* were concerned about the implications that approach would have upon plan participants and beneficiaries.

²⁵⁰ See *Hunter v. Caliber Sys. Inc.*, 220 F.3d at 702 (6th Cir. 2000), *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995), *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013), and *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994).

²⁵¹ See *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360 (2nd Cir. 1994), and see *Frommert v. Conkright*, 738 F.3d 522, 531 (2nd Cir. 2013).

²⁵² *Id.*

Additionally, the Second Circuit was concerned that discretionary language will covertly cover plan administrators' action with the arbitrary and capricious standard from a court's radar.²⁵³ Thus, the Second Circuit identifies a critical aspect of plan interpretation – that all areas of plan interpretation within ERISA are not the same, and thus should not implicate a default standard of review without a court's approval.²⁵⁴ *John Blair* explained that several acts of plan interpretation implicates different fiduciary standards, thus warranting different levels of deference.²⁵⁵ Specifically, *John Blair* stated that in challenging a trustee in a denial of benefit context “the issue is not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants[,]” thus the circumstance dictates the appropriate level of discretion.²⁵⁶

The Ninth Circuit, however, has taken a simplistic but dangerous approach.²⁵⁷ The Ninth Circuit suggest that the arbitrary and capricious standard should apply to all ERISA plan interpretation provisions. The Ninth Circuit, in *Tibble*, reasons that the arbitrary and capricious standard derives from trust principles, which has continuously served as the gap filler for ERISA, and hence justify its application to all ERISA plan interpretation provisions.²⁵⁸ But, maybe the Ninth Circuit should not kill the proverbial birds with one stone.

Tibble's across-the-board discretion to plan administrators and trustees leaves a number of new issues unanswered. *Tibble* grants deference to plan administrator and trustees on issues concerning plan interpretation. But, *Tibble* does not set out rules, standards, or parameters for

²⁵³ See *John Blair Commc'n Profit Sharing Plan v. Telemundo Group*, 26 F.3d 360, 369 (2nd Cir. 1994).

²⁵⁴ *Id.*

²⁵⁵ *John Blair*, 26 F.3d at 369 (internal quotation marks omitted).

²⁵⁶

²⁵⁷ See *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013).

²⁵⁸ *Id.*

such fiduciaries' interpretation. One is left with the proposition that a plan administrator has uninhibited interpretative discretion, if the plan grants some discretion, so long as such interpretation does not amount to an abuse of discretion. Given the expansive powers granted upon plan administrators interpreting the plan, *Tibble* did not adopt remedial safeguards in light of increasing trustees' powers nor define what would amount to an abuse of discretion. *Tibble*'s blanket discretion would now include issues that historically received a heightened standard of review.²⁵⁹ *Tibble* proposes that all plan interpretation claims must receive an arbitrary and capricious standard of review.²⁶⁰ The deferential standard of review would apply to health care plans, disability plans, accidental death plans, and certain provisions of the Patient Protection and Affordable Care Act.²⁶¹

While *Tibble* takes an across-the-board deference or a one-size-fits-all approach, ERISA does not. ERISA has different rules for different plans. For example, ERISA's strict participation, vesting, and funding requirements apply to defined contribution and defined benefit plans, but does not apply to welfare benefit plans.²⁶² *Tibble*, thus, has provided plan administrators with an unfettered powerful tool to pursue the unannounced but realistic practicalities of trust administration, like insurance – a dedicated unwillingness to payout claims.

As a result, *Tibble* increases the strain between other limiting ERISA provisions and its across-the-board deference standard. Several ERISA provisions, as the enumeration of

²⁵⁹ See generally COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 519 (3rd ed. 2011), and John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U.L. REV. 1315, 1339 (2007).

²⁶⁰ *Tibble*, 711 F.3d at 1077.

²⁶¹ Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 43, 329. Available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-07-23/pdf/2010-18043.pdf>. (Explaining regulations on new claim procedures under the Patient Protection and Affordable Care Act).

²⁶² ERISA §§ 201(1), 301(a)(1) (2014).

Congress's intent, limit plan sponsors or drafters from creating self-serving clauses.²⁶³ Thus, self-serving clauses that defeat *Firestone's* nondifferential review, a prerequisite to obtaining deferential review, arguably come in conflict with fiduciaries' duties and ERISA's purpose of promoting plan participant's and beneficiaries' interest. Hence, across-the-board deference fails to account for necessary remedial safeguards necessary to effectuate the balance sought by Congress.

Moreover, the Sixth and Third Circuits hold that neither an across-the-board approach, as in the Ninth Circuit, or a strict reading of *Firestone*, as in the Second Circuit, controls the analysis to determine the standard of review when a plan grants discretion upon a trustee.²⁶⁴ The Sixth and Third Circuits fall in middle ground.²⁶⁵ They suggest that external factors warrant consideration, like the nature of the conflict of interest or whether a trustee's act was in bad faith. The Sixth and Third Circuits do not identify a laundry list of factors, suggesting that the responsibility of identifying those factors are left to the reviewing court. They are simply silent on the issue of what factors warrant consideration but suggest that the consideration of external factors may be liberalized. The Sixth and Third Circuits chose to consider whether a trustee's actions were in bad faith or otherwise contrary to law in examining whether the trustee's actions were arbitrary and capricious.

The Sixth Circuit proscribed the wholesale importation of trust principles to all ERISA plan interpretation claims but accept that the arbitrary and capricious standard should be applied

²⁶³ See ERISA § 410(a) (2014). (ERISA § 410(a) provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA fiduciary law] shall be void as against public policy.").

²⁶⁴ See *Hunter v. Caliber Sys. Inc.*, 220 F.3d at 702 (6th Cir. 2000), *Moench v. Robertson*, 62 F.3d 553 (3rd Cir. 1995).

²⁶⁵ *Id.*

outside the denial of benefits context.²⁶⁶ The Third Circuit followed, in *Moench*, by recognizing that "the arbitrary and capricious standard of review allowed in *Firestone* should not be applied mechanically to all ERISA claims."²⁶⁷ Essentially, the Third and Sixth Circuit's concern was the issue of increased deference for plan administrators who were granted discretion by the plan and the lack of similar increased protections for plan participants and beneficiaries. Thus, the *Moench* and *Hunter* holdings hinted to remedial safeguards in reviewing a plan administrator's actions; both courts considered factors such as bad faith or otherwise contrary to law to determine whether the administrator's acts were arbitrary and capricious.

Ultimately, The Second Circuit is well behind its time, while the Ninth Circuit is well ahead of its time without regard to beneficiary and plan participant rights and without adopting parallel remedial safeguard in light of aggrandizing administrator interpretative powers. The Sixth and Third Circuits have taken a step in the correct direction by considering external factors when determining whether a trustee's actions were arbitrary and capricious. Thus, the Sixth and Third Circuits come closer to reaching a healthy balance – the promotion of employer sponsored ERISA plans and the protection of plan participants and beneficiaries.

Therefore, the next step is to create an analytical framework that fit within the structure of *Firestone*'s progeny and that reflects the healthy balance of promoting plan creation and protecting plan participants through added remedial provision and factors. In order to resolve this problem and recalibrate the balance between plan creation and participant protection, if a court is to adopt an across-the-board deference approach, as propounded in *Tibble*, the adoption of remedial safeguards, in the form of accepting any and all factors that assist the court in finding an arbitrary and capricious act, are warranted. Specifically, in reviewing whether plan

²⁶⁶ *Hunter*, 220 F.3d at 710.

²⁶⁷ *Moench*, 62 F.3d at 565.

interpretation was arbitrary and capricious, the court could, among others, consider 1) whether the plan administrator failed to account for factors necessary for an objective interpretation; 2) whether the plan administrator's explanation for the denial is legitimate and founded upon a reasonable interpretation of the plan; 3) whether the interpretation has a rational connection with the facts influencing such interpretation; 4) whether previous interpretation of same provision under the same circumstance are consistent; or 5) whether external factors, like an employer's business plan, influenced the administrator to interpret the plan differently, albeit objectively.

2. Where the Supreme Court Missed its Mark

ERISA was enacted to remedy defects in the private retirement system. Specifically, Congress explicitly sought to create and initiate the creation of adequate remedial safeguards with respect to administration and operation of ERISA plans.²⁶⁸ To fully comply with Congress' intent, ERISA's multifaceted and complex composition requires more than an across-the-board deference approach, as found in *Tibble*. While courts have recently landed on the side of simplicity,²⁶⁹ the imbalance between protecting individual pension rights and promoting the creation of private employer-sponsored retirement plans is not justified. The benefit of cloaking fiduciaries with across-the-board deference, without increasing procedural safeguards, is unfitting in light of Congressional intent and does not outweigh the anticipated cost.

ERISA depends on the delicate balance between maintaining and promoting the creation of such plans through incentives and safeguards for plan sponsors and the protections afforded to plan participants and beneficiaries. Through enactments and amendments, Congress intended an equal balance to protect plan participants' and beneficiaries' interest. Yet, the Supreme Court's

²⁶⁸ See 29 U.S.C. 1001(a) (West 2013).

²⁶⁹ See *Metro. Life Ins. Co. v. Glenn*, 554 U.S. at 117. (*Glenn*, concerned with the consequence of adding complexity to ERISA's already complex statute, belittled Congressional concerns of creating safety laches to protect plan participants and beneficiaries for sake of simplicity and judicial economy.).

decisions add to the imbalance by continuing to make ERISA an employer-favoring statute.²⁷⁰

The arbitrary and capricious standard of review has solidified an illusion of adequate remedial safeguards. In reality, the arbitrary and capricious standard cloaks fiduciaries and trustees with a delicate, though resilient, veil of indemnity creating a culture of lacking consequences for fiduciaries and trustees to the impactful detriment of plan participants and beneficiaries.

First, the *Firestone* Court, failed to consider whether ERISA's purpose would be better served by allowing plan drafters the ability to bypass the de novo standard.²⁷¹ Scholars have noted that granting a plan drafter the ability to mold the plan to his sole interest contradicts Congress' purpose to restrict private autonomy.²⁷² Congress imposed trust principles to inhibit plan administrator's unilateral decision making and to promote the plan participants' and beneficiaries' interest.²⁷³ *Firestone* made de novo review the default standard for reviewing a plan interpretation issue but did not consider whether plan construction that defeats de novo review is consistent with ERISA's purpose and provisions.

The practical consequence of *Firestone* and its progeny is evident in *Tibble*. In order to fall within the arbitrary and capricious standard, plan administrators or trustees simply need to amend plan language to prescribe discretion.²⁷⁴ Now, at least in the Ninth Circuit, plan administrators will be cloaked by the arbitrary and capricious standard without added checks and balances.²⁷⁵ The Ninth Circuit's across-the-board approach, coupled with *Conkright*, may further encourage plan administrators to adopt unreasonable interpretations of plans initially, in anticipation that a second bite at the apple will ensue if their first interpretation is questioned or

²⁷⁰ See *Conkright v. Frommert*, 559 U.S. 506 (2010).; See also *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008).

²⁷¹ See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U.L. REV. 1315 (2007).

²⁷² *Id.*

²⁷³ H.R. REP. NO. 533, at 5-8, reprinted in 1974 U.S.C.C.A.N. at 4643-46.

²⁷⁴ See *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013).

²⁷⁵ *Id.*

held unreasonable.²⁷⁶ This, among other concerns, undermines the prompt resolution of disputes over benefits, driving up litigation cost or discourages employees from challenging a plan administrators' decision all together.

Next, *Glenn* did not want to forsake *Firestone*.²⁷⁷ No change, but an addition, to the deferential standard of review was made.²⁷⁸ Trust law was, again, the fundamental premise for keeping to high deference.²⁷⁹ *Glenn*, while citing to the Restatement of Trusts, reasoned that a conflicted trustee's claim determination does not switch the standard back to de novo review.²⁸⁰ The Court, however, required that a reviewing judge take "account of the conflict when evaluating determining whether the trustee, subjectively or procedurally, has abused his discretion."²⁸¹ Specifically, a conflict is but one factor in determining whether the trustee abused his discretion and does not automatically raise judicial scrutiny above the arbitrary and capricious standard.²⁸²

Glenn failed to explicitly state what other factors may be considered to determine whether a trustee has abused his discretion.²⁸³ *Glenn* emphasized that "[b]enefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts . . . for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review."²⁸⁴ While the Court promoted the weighing of all the factors in examining a possible arbitrary and capricious act, it failed to require or structure what "all the factors" meant in for concerns of making adopting a bright line rule. Hence, one is left with the

²⁷⁶ See *Conkright v. Frommert*, 559 U.S. 506 (2010).; See also *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013).

²⁷⁷ *Id.* at 116.

²⁷⁸ *Id.* at 115.

²⁷⁹ *Id.*

²⁸⁰ *Glenn*, 554 U.S. at 115.

²⁸¹ *Id.*

²⁸² *Id.* at 116-117 (internal quotation marks omitted).

²⁸³ *Id.* at 117.

²⁸⁴ *Glenn*, 554 U.S. at 116.

following questions: 1) does “all of the factors” mean any and all factors that can help a court determine whether an arbitrary and capricious act exist; 2) should the court afford more weight to some factors over others; 3) does “all of the factors” mean that the judge can only consider those factors presented by counsel or can a judge consider other factors sua sponte; or 4) does “all of the factors” only mean the factors establishing the conflict of interest? Therefore, further clarity is needed to determine the breath of factors that may be considered by a reviewing judge.

Furthermore, the *Conkright* Court continued to recognize the unclear state of trust law with regard to the question of trustee deference, but nonetheless faithfully followed the spirit of trust principles.²⁸⁵ The *Conkright* court solidified its faithfulness to trust law even when it recognized that the trust law was originally intended to serve only as a starting point, from which the court would then determine whether sufficient evidence supports departure from common trust law requirements.²⁸⁶ The Court explained that trust law warrants departure from common-law trust deference “when reason indicates that the trustee will not exercise their discretion *fairly*, by showing, for example, that the trustee previously acted in *bad faith*.”²⁸⁷ One good-faith mistake does not divest the trustee of discretion.²⁸⁸ In effect, a good-faith mistake, like the conflict addressed in *Glenn*, must now be weighed as one factor in determining whether the trustee or plan administrator abused his discretion.

Conkright explains that a conflict of interest alone does not amount to an arbitrary and capricious finding and neither does a single honest mistake alone. *Conkright*, however does not answer whether those two factors coupled together amount to an arbitrary and capricious finding; nor does *Conkright* explain what factors together or alone amount to an arbitrary and capricious

²⁸⁵ *Conkright*, 559 U.S. at 516.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 514.

²⁸⁸ *Id.* at 518.

finding. While contrary and valid view is that most ERISA plan interpretation claims are fact-sensitive, *Conkright* nonetheless fails to guide other courts in deciding what factors, beyond an honest mistake or conflict, should be afforded weight and considered.

For these reasons, *Firestone* and its progeny leave many questions unanswered in light of the recent Ninth Circuit pronouncement in *Tibble*. In order to carry out ERISA's purpose to protect plan participants and beneficiaries and promote plan creation, a solution must adopt ERISA's overall purpose. The ideal solution keeps the balance at a horizontal equilibrium.

3. A Proposed Solution

This article asserts that the ideal arbitrary and capricious analysis identifies ERISA's complexity to allow the consideration of any and all factors that may assist a judge in deciding whether an administrator's plan interpretation is arbitrary and capricious. The consideration of any and all factors to assist an arbitrary and capricious determination does not contradict *Firestone* and its progeny's standard. This essential approach warrants a method of review that will impose adequate remedial safeguards upon plan administrators and plan participants to uphold the careful balance Congress envisioned. As the judicial pendulum swings on the side of increased discretion for plan administrators, this article asserts that remedial safeguards for plan participants and beneficiaries have not likewise been increased by courts.

This note proposes staying within the high-threshold arbitrary and capricious standard, as applied to all plan interpretation claims when the plan grants discretionary authority upon the administrator, while including remedial safeguards. Analogous to the analysis in *Firestone*, *Glenn*, and *Conkright*, an adapted importation of trust principles to the arbitrary and capricious standard would include the use of factors to increase the possibility of determining that an

administrator's acts are arbitrary and capricious.²⁸⁹ The more factors one considers, the likelier an administrator's acts could be found to be arbitrary and capricious. For example, in *Glenn*, in evaluating whether an abuse of discretion existed, the Court required the consideration of external factors, such as a conflict of interest, thus inferring that other factors merit consideration.²⁹⁰ In, *Conkright*, the Court, in determining whether the plan administrator abused his discretion, considered the factor of acting in bad faith.

In light of the lack of uniformity on the judicial standard of review in plan interpretation cases, the Supreme Court of the United States should fashion a rule with remedial safeguards that require judges to consider any and all factors that assist a court in determining whether a plan administrator's act is arbitrary and capricious. Requiring the court to consider any and all factors decreases the judiciary's discretion, but also decreases appellate review as the judge would leave no stone unturned. Thus, to cure the current imbalance and assist courts in finding what type of interpretative discretion is too much discretion or arbitrary and capricious, the factors should include, among others, incompetence, conflict of interest, ulterior motives or surrounding circumstances independent from a conflict of interest, and bad faith.

Moreover, another remedial safeguard may include the help of an independent arbiter in the appeals process.²⁹¹ The independent arbiter can interpret plan language and determine whether the administrator's act was arbitrary and capricious. If the arbiter finds in favor of the plan participant or beneficiary, the decision can create a presumption in favor of the plan

²⁸⁹ An example of six enumerated factors used to evaluate an abuse of discretion can be found in Restatement of Trust §187.

²⁹⁰ See *Conkright v. Frommert*, 559 U.S. 506 (2010).

²⁹¹ An appeals process exist in the denial of benefits context. The summary plan description controls the claim's procedure. To bring a suit under a denial of benefits claim, usually, the claimant must exhaust all administrative appeals enumerated in the plan before filing suit. An independent arbiter could be included in the claims procedure. Including an unbiased independent arbiter adds to the administrative record built in case a plan appeal is denied. An example of independent arbiters in the appeals process can be seen in the LMRA requirement that disputes go before an independent arbiter.

participant or beneficiary, thus shifting the burden onto the plan administrator to demonstrate that his act was not arbitrary and capricious. If the independent arbiter does not find an abuse of discretion, the plan participant or beneficiary is squarely where he would be had an independent arbiter not been commissioned. The independent arbiter could be paid by the plan participant individually, if he so elects to avail himself of that procedure, so as to reduce wasteful spending of plan assets for individual participant's or beneficiary's benefit.

Conclusion

An across-the-board deference approach, alone, is unwarranted in light of Congressional intent and *Firestone* and its progeny. As proposed by *Tibble*, so long deference is granted somewhere in the plan, interpretative deference would include defining health conditions and benefit determinations. *Tibble*, in failing to add procedural safeguards to its across-the-board deference approach, falls short of reaching a healthy balance so fruitfully sought by Congress and clearly identified by courts. The reasoning behind adopting across-the-board deference derives from precedent that adopts the spirit of trust principles into ERISA. Trust principles, however, are not constant under all scenarios and circumstances. Thus, a change in circumstance warrants a change in analysis.

Trust principles promote discretion when the plan document grants discretion to a plan administrator's interpretation under a certain circumstance; the circumstance in *Firestone* being a denial of benefits claims. The legal ramifications and policy implication of across-the-board deference requires the adoption of additional safeguards. A court would be injudicious to simply point to trust law as the be all and end all of interpretative discretion, if the plan says so and for the sake of simplicity. Each circumstance or plan provision where interpretative discretion is granted calls for a consideration of external factors that may outweigh the deference suggested

by trust law principles. For example, *Tibble*'s across-the-board deference would allow plan administrators, usually non-medical professional, to interpret medical conditions under a high threshold standard to determine whether such condition falls within the plan's language. And, while such practice is exercised today, a compromise must result from increase deference and lacking safeguards. Increasing safeguards, in a time where the courts are leaning toward increased interpretative deference, is only natural.

The resulting policy implication would likely avail plan participants and beneficiaries to the full receipt of retirement benefits, which results in less retirees depending on the United States' Social Security or other governmental benefits. Plan participants continue to fulfill plan vesting requirements to later suffer a deprivation of anticipated benefits because the plan administrator interpreted a provision ever so slightly in the sponsor's favor. Considering the preferential tax treatment and judicial stance on heightened deference, inadequate safeguards continue to stagnate. The continued well-being and security of millions of employees and their dependents are directly affected by these plans and plan administrator's interpretation. A national public interest is at stake. Ultimately, implementing and adopting safeguards will equalize the balance between plan participants and beneficiaries, and plan administrators.