

***METROPOLITAN LIFE INSURANCE COMPANY V. GLENN:
WILL THE SUPREME COURT DECISION REDUCE
CONFUSION AFTER FIRESTONE?***

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A recent report to the United States Congress indicated that about 131 million Americans are currently enrolled in employee benefit plans which fall under the jurisdiction of the Employee Retirement Income and Security Act of 1974 (ERISA). Some plans are structured so that the plan administrator will be paying benefits out of the firm's profits. The possibility exists that the administrator may be swayed to decide in favor of the company in an effort to protect the financial health of the company which employs him. Recently, in Metropolitan Life Insurance Company v. Glenn, the Supreme Court addressed the questions of whether a plan administrator that pays benefits out of company profits is acting under a conflict of interest, and if so, how the conflict of interest should be taken into account upon review by a court. Prior to the Supreme Court's decision in Glenn, the circuit courts had been employing a variety of approaches in taking this apparent conflict into account.

This note begins by providing an overview of the areas of trust law impacting the Court's decision and then reviews the case-law prior to the Supreme Court decision. The note then discusses the decision in Glenn and the case law that has developed following the Court's decision. This comment argues that the Supreme Court made the correct decision by holding that this scenario did constitute a conflict of interest, and by allowing the circuit courts to take the conflict into account by weighing it among a variety of other factors.

I. INTRODUCTION

A recent report to the United States Congress indicated that about 131 million Americans¹ are currently enrolled in employee

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benefit plans which fall under the jurisdiction of the Employee Retirement Income and Security Act of 1974 (ERISA).² In some plans, the plan administrator will be paying benefits out of the same pool of money as profits are derived. Recently, in *Metropolitan Life Insurance Company v. Glenn*, an employee enrolled in an employee benefit plan falling under the jurisdiction of ERISA was denied benefits by a plan administrator. The administrator would have paid the benefits out of the same funds as which profits are derived. The employee appealed the denial and the question was presented to the Supreme Court of whether an insurer that pays benefits out of the same funds as its profits are derived is acting under a conflict of interest under ERISA.³ Prior to the Supreme Court's decision in *Glenn*, the circuit courts had been employing a variety of approaches in taking this apparent conflict into account. This paper reviews the law prior the Supreme Court decision and the case law that has developed following the Supreme Court's decision in *Glenn*. This paper argues that the Supreme Court made the correct decision by stating that this scenario did constitute a conflict of interest, and by allowing the circuit courts to take the conflict into account by weighing it among a variety of other factors.

II. HISTORY

A. TRUST LAW AS APPLIED EMPLOYEE BENEFIT PLANS

The U.S. Supreme Court has stated that principles of trust law must guide the courts in determining the appropriate standard of

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¹ CONG. RES. SERVICE, ERISA Regulation of Health Plans: Fact Sheet, *available at* <http://www.allhealth.org/briefingmaterials/erisaregulationofhealthplans-114.pdf>.

² *See generally* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994).

³ *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008).

review of a denial of benefit claims under ERISA.⁴ Therefore, a short discussion of the relevant trust law principles may be helpful. First, a trust as defined by the Restatement (Third) of Trusts is a fiduciary relationship with respect to property, and subjects the trustee to the duty to act in the best interest of the beneficiaries.⁵ As applied in the context of this case, the Supreme Court stated that those administering employee-benefit plans must be guided by principles of trust law.⁶ To begin, trust law generally prohibits a fiduciary from acting under a conflict of interest.⁷ However, an exception exists if the trustee was appointed by a settler who is aware of the trustee's conflict of interest.⁸ The Restatement takes the position that a conflict of interest alone is not enough to remove a trustee, but when "conflict of interest situations exist, the conduct of the trustee in the administration of the trust will be subject to especially carefully scrutiny."⁹ Furthermore, when a conflict of interest situation is approved by the settler, the "trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of partiality."¹⁰ The Restatement also provides guidance to determine when an abuse of discretion may exist and lists several factors including: "the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries."¹¹ A leading treatise concurs stating that the extent of discretion conferred upon the trustee and any conflict of interest with

⁴ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

⁵ RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

⁶ *Firestone*, 489 U.S. at 110-11.

⁷ George Gleason Bogert, *Trusts and Trustees* § 534 (1993).

⁸ AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* §107.1 (4th ed. 1987 & Supp. 2001).

⁹ RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. F, illus. (1) (2003).

¹⁰ *Id.* at § 79 cmt. B, illus. (1).

¹¹ RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).

the beneficiaries must be taken into account in determining an abuse of discretion.¹²

In *Metropolitan Life Insurance Company v. Glenn* (*Glenn*),¹³ the trustee was given discretionary powers in administering the trust. Generally, this means that a court will not interfere with a trustee's exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation.¹⁴ But, what constitutes an abuse of discretion is not a rigid, constant standard. The point at which an abuse of discretion is reached will vary, depending upon the basic fiduciary duties and the terms of the trust, including the amount of discretion given to the trustee.¹⁵ Of course, acting on the basis of an improper motive is a factor that can be considered by a court when determining if a trustee abused his discretion.¹⁶ Also, it is important to note that "abuse of discretion" is a legal conclusion that the trustee has exceeded the amount of discretion given to him in the trust, and not the standard under which a court reviews the trustee's actions.

B. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

The Employee Retirement Income Security Act of 1974 (ERISA) plays a central role in *MetLife v. Glenn*; therefore, a limited discussion of ERISA will be helpful. ERISA was enacted by Congress to protect the interests of employee-benefit plan participants by requiring the disclosure of relevant financial information to beneficiaries, by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee-benefit plans, and by providing for appropriate remedies, sanctions, and

¹² AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* §187 (4th ed. 1987).

¹³ *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).

¹⁴ *RESTATEMENT (THIRD) OF TRUSTS* § 50 cmt. a (2003).

¹⁵ *Id.*

¹⁶ *Id.*

ready access to the federal courts.¹⁷ Also, ERISA preempts virtually all state laws in conflict with it, and no other federal law systematically regulates employee benefit plans.¹⁸

Before ERISA was enacted, employee benefit and pension plans operated with no substantial federal regulation.¹⁹ There were various bodies of state law which would act to protect employees prior to ERISA, but Congress determined this type of piecemeal approach to be insufficient to protect employees' interests and expectations.²⁰ Specifically, Congress found that the minimum standards governing then existing plans to be insufficient; that plan funds were inadequate to pay promised benefits; and that plans terminated before accumulating enough funds to pay employees their expected benefits.²¹ Accordingly, the stated purposes of the law include establishing a uniform source of law to govern the administration of employee-benefit plans, and promoting and protecting employee's interests and expectations in the plans. In addition to those purposes cited by the statute itself, there are numerous judicially-declared purposes to the statute.²² Some of the most relevant include encouraging employers' to adopt employee benefit plans,²³ while also giving employers a degree of flexibility in administering the plans.²⁴ To further encourage plan creation, Congress intended to minimize the administrative burdens imposed

¹⁷ 60A AM. JUR. 2D *Pensions* § 1 (2003).

¹⁸ Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 576 (1992). See also Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1098-1109 (2001) (for an in depth discussion of case-law pre-*Firestone*).

¹⁹ Kevin Walker Beatty, Commentary, *A Decade of Confusion: The Standard of Review for ERISA Benefit Denial Claims as Established by Firestone*, 51 ALA. L. REV. 733, 733 (2000).

²⁰ *Id.*

²¹ 60A AM. JUR. 2d *Pensions* § 1 (2003).

²² *Id.* § 2.

²³ *Siskind v. Sperry Ret. Program*, 47 F.3d 498, 505 (2d Cir. 1995).

²⁴ *Id.* at 501.

on employers by creating a standardized set of procedures.²⁵ The Court in *Glenn* noted that Congress believed that removing the unpredictability that resulted from the application of various state laws would encourage the creation of employee benefit plans, but the unpredictability that results from an opaque standard of review could also impede Congress's goal of encouraging plan creation. Also, the Supreme Court has stated that the principal goal of ERISA is to protect the interests of plan participants and beneficiaries.²⁶ Courts have also stated that ERISA was enacted to protect employees from employers who could pursue their own interests in the management of the retirement plan.²⁷

To ensure the realization of its stated goals, ERISA provides that a fiduciary "shall discharge his duties with respect with respect to a plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries"²⁸ while using the care, skill, diligence, and prudence of prudent man in a similar situation.²⁹ To ensure the statutory goals are enforced, ERISA allows a plan participant or beneficiary to bring a civil suit in Federal Court to recover benefits due to him, enforce his rights under the plan, or clarify his right to future benefits under the plan.³⁰

Despite its length, ERISA leaves many important issues to be interpreted by the courts.³¹ So while Congress intended to provide a statutory grounding to employee-benefit law, the deference to the courts was partly a recognition by Congress that the law surrounding benefit plans had long been part of the common law.³² Also, the gaps

²⁵ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

²⁶ *Boggs v. Boggs*, 520 U.S. 833, 834 (1997).

²⁷ *NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981); *Reich v. Valley Nat'l Bank of Ariz.*, 837 F. Supp. 1259, 1262 (S.D.N.Y. 1993).

²⁸ *See generally* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2006).

²⁹ 29 U.S.C. § 1104(a)(1)B (2006).

³⁰ § 1132 (a)(1)B.

³¹ Conison, *supra* note 18, at 576.

³² *Id.*

in the statute reflect Congress's intent for the courts to experiment and refine the law surrounding benefit plans. There were no models for Congress to draw on when enacting ERISA, so in an effort not to upset settled law, Congress deferred to the courts on some of the more important parts of the law in this regard, including of course, the relevant standard of review.

C. FIRESTONE TIRE & RUBBER CO. V. BRUCH

The Court's decision in *Firestone* plays an important role in shaping the outcome of the *Glenn*. In *Firestone*, the Court addressed the appropriate standard of review of benefit determinations by fiduciaries or plan administrators under ERISA.³³ Firestone acted as the fiduciary of an employee-benefit plan which stated that workers were entitled to receive benefits if the workforce was reduced.³⁴ When Firestone sold three of its plants to another company, the workers brought suit under ERISA claiming that a reduction in workforce occurred entitling them to benefits.³⁵ Firestone denied the claim citing the fact that all of the workers were hired by the new company at the same positions and wages.

The Court in *Firestone* noted that ERISA sets out no standard of review under 1132(a)(1)(b) which allows a participant to challenge benefit determinations.³⁶ The Supreme Court noted that the federal courts had adopted the "arbitrary and capricious" standard to fill the gap left by the statute, mainly by analogizing the ERISA statute to the Labor Management Relations Act and borrowing its standard.³⁷ However, the Supreme Court found the adoption of this standard was inappropriate because of differences in the statutes—mainly the fact that courts used the standard to gain a jurisdictional

³³ *Firestone Tire & Rubber Co. v Bruch*, 489 U.S. 101, 105 (1989).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 109.

³⁷ *Id.*

basis over the LMRA suits was not present because ERISA explicitly authorizes such suits.³⁸

The Court held that when a court reviews a fiduciary's denial of benefits under ERISA, the court should be guided by principles of trust law.³⁹ The Court's conclusion was based upon the fact that the ERISA statute, while not setting forth a standard of review, "abounded" with language borrowed from the body of trust law.⁴⁰ The Court also found support for this conclusion in the legislative history.⁴¹ The Court also noted that Congress wanted the courts to develop a federal common law in regards to the standard of review.⁴²

Having settled that trust law principles should guide courts in the review of a fiduciary's denial of benefits, the Court then stated how these trust law principles should be applied. In *Firestone*, the plan administrator was not vested with any discretion when determining employees' benefits.⁴³ The Court looked to trust law and determined that when a fiduciary is not vested with any discretion, a de novo standard of review should apply.⁴⁴

However, the Court continued at length on the appropriate standard of review when a fiduciary is given discretion, even though this was not essential to the decision. The Court cites the Restatement (Second) of Trusts for the principle that a deferential standard is appropriate if a trustee is given discretion in administering the trust.⁴⁵ The Court also stated in dicta: "Of course,

³⁸ *Id.* at 109-10.

³⁹ *Firestone*, 489 U.S. at 110-11.

⁴⁰ *Id.* at 110.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 112-13.

⁴⁴ *Id.* at 112-15.

⁴⁵ Some courts would regard this deferential approach as a review for abuse of discretion and some courts would review under the arbitrary and capricious standard. The First Circuit stated that "abuse of discretion", "arbitrary and capricious", and "reasonableness" were functionally equivalent in the ERISA context. *Denmark v. Liberty Life Assurance Co. of Boston*, 566 F.3d 1, 7 (1st

if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as ‘factor in determining whether there is an abuse of discretion.’”⁴⁶ The Court’s statement in *Firestone* is dictum because the facts did not present a fiduciary that was given any discretion in administering the trust. It is likely that the Court’s statement regarding fiduciaries with discretion was intended to provide guidance to the federal courts on the appropriate standard of review in those cases.

Given ERISA’s statutory goal of providing increased protection to employees, a *de novo* standard of review seems appropriate. However, under *Firestone* a plan can receive deferential review if it vests the fiduciary with discretion. Because most plans contain such language or can easily be made to contain such language, “the court . . . essentially nullified applying the standard that it deems most appropriate.”⁴⁷ Despite *Firestone*’s efforts to speak on the topic, the Circuit Courts would split on the appropriate way to determine if a conflict of interest constituted an abuse of discretion by a plan administrator.

D. DIFFERING CIRCUIT COURT APPROACHES AFTER FIRESTONE

Because *Firestone* did not clearly state how this conflict should be taken into account, the circuit courts subsequently developed several different approaches for taking a conflict of interest into account under ERISA.

1. The “Presumptively Void” Approach

Cir. 2009). The Seventh Circuit also stated that there is no difference between a review under the “arbitrary and capricious” standard and “abuse of discretion....” *Jenkins v. Price Waterhouse Long Term Disability Plan*, 564 F.3d 856, 861 n.8 (7th Cir. 2009).

⁴⁶ *Firestone*, 489 U.S. at 115.

⁴⁷ *Beatty*, *supra* note 19, at 739.

The presumptively void test has been adopted by the Eleventh Circuit and Ninth, with the Ninth later overruling it as inconsistent with Supreme Court precedent.⁴⁸ In *Brown v. Blue Cross & Blue Shield*, the Eleventh Circuit stated that when a conflict of interest exists, a conflicted fiduciary may favor, perhaps even unconsciously, his own interests over that of the beneficiaries.⁴⁹ The court reasoned that this would leave the beneficiaries unprotected unless the burden of proof shifted to the administrator to demonstrate that the conflict did not affect his decision.⁵⁰ Accordingly, the Eleventh Circuit held that when a “plan beneficiary demonstrates a substantial conflict of interest on the part of the fiduciary responsible for benefits terminations, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest.”⁵¹ If the fiduciary carries that burden, a court should review the fiduciary’s decision with deference and not under a de novo standard of review.⁵²

The Ninth Circuit applied a “presumptively void” approach in *Atwood*⁵³ before overruling *Atwood* in *Abatie v. Aetna Health and Life Ins. Co.* in 2006.⁵⁴ In *Atwood*, the Ninth Circuit applied a traditional abuse of discretion standard to the decision of a conflicted trustee, unless the affected beneficiary produced some evidence that conflicted interest caused the fiduciary to breach a duty.⁵⁵ Under that method, a beneficiary was required to bring forth evidence showing that the conflict of interest affected the decision.⁵⁶ If no evidence

⁴⁸ See *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1995); *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990).

⁴⁹ *Brown*, 898 F.2d at 1565.

⁵⁰ *Id.*

⁵¹ *Id.* at 1566.

⁵² *Id.* at 1568.

⁵³ *Atwood*, 45 F.3d 1317.

⁵⁴ *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 966-69 (9th Cir. 2006)

⁵⁵ *Id.* at 1322-23.

⁵⁶ *Id.* at 1323.

other than the bare existence of the conflict existed, no heightened review was undertaken.⁵⁷ If evidence was brought forth, the court would be “very skeptical” in deferring to the decision of trustee with discretion.⁵⁸ The court deferred to trust law for the principle that an action taken by a fiduciary in violation of his duties is “presumptively void”, and so the trustee had the burden of proving the conflict did not affect his decision.⁵⁹ This approach is interesting because the presence of a conflict is not taken into account without evidence it affected the trustee’s decision and the standard of review remains the same. However, *Firestone* states that the conflict should be taken into account whether or not there is evidence to suggest it affected the trustee’s decision. In *Abatie*, the Ninth Circuit recognized that the approach of *Atwood* was not completely consistent with *Firestone* and overruled that approach⁶⁰.

2. The Sliding Scale Test

The Third, Fourth, Seventh, and Tenth Circuits have adopted the “sliding scale” approach.⁶¹ Under the sliding scale approach, a court will always apply an arbitrary and capricious standard, but a court will decrease the level of deference given to the conflicted

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Abatie*, 458 F.3d at 966-69.

⁶¹ See *Doe v. Group Hosp. & Med. Serv.*, 3 F.3d 80, 87 (4th Cir. 1993); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 638-42 (5th Cir. 1992); *Van Boxel v. Journal Co. Employees’ Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 824-27 (10th Cir. 1996).

administrator's decision in proportion to the seriousness of the conflict.⁶²

In *Van Boxel*, the Seventh Circuit stated that it is necessary to maintain flexibility when reviewing a benefit denial by a plan administrator.⁶³ To this end, a “sliding scale” of review is most appropriate – the review is more searching and extensive the greater the suspicion of partiality.⁶⁴ Also, the court argued that this approach squares with the practice of judges to engage in a more extensive review when they believe there is a greater risk of the fiduciary being partial.⁶⁵ The Tenth Circuit has also that the “sliding scale” approach was more consistent with the flexible standard articulated in *Firestone*.⁶⁶ Implicitly, it seems that the court is arguing the courts have always employed a “sliding scale” approach—the courts would simply adjust the amount of deference they accorded under the “arbitrary and capricious” standard based on the presence of a conflict.

3. “Combination of Factors” Test

The “combination of factors” approach was adopted by the Sixth Circuit in *Calvert*.⁶⁷ In that case, the court stated that a “conflict of interest” was to be considered and weighed by a reviewing court among any other relevant factors that could lead to a finding of an abuse of discretion.⁶⁸ This approach was used to review Glenn's denial of benefits, and was upheld by the Supreme Court in *Glenn*.⁶⁹

4. Eleventh Circuit

⁶² *Chambers*, 100 F.3d at 825.

⁶³ *Van Boxel*, 836 F.2d. at 1052.

⁶⁴ *Id.* at 1052-53.

⁶⁵ *Id.*

⁶⁶ *Chambers*, 100 F.3d. at 826-27.

⁶⁷ *Calvert v. Firststar Fin., Inc.*, 409 F.3d 286, 295 (6th Cir. 2005).

⁶⁸ *Id.*

⁶⁹ *Metro Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008).

Following *Firestone*, the Eleventh Circuit adopted a six-step burden shifting approach in *Williams* to take a conflict of interest into account.⁷⁰ If the plan administrator was vested with discretion, his decision would be upheld if it was not “arbitrary and capricious”.⁷¹ If a conflict of interest existed, then the court would then review under a “heightened arbitrary and capricious” standard.⁷² The court stated this standard fell between “de novo” and a regular “arbitrary and capricious” review, although the court could not define exactly where.⁷³ To deal with this, the court adopted a two-step approach where the burden was on the beneficiary to prove the administrator had a conflict of interest.⁷⁴ If proved that he did, the administrator then had the burden of proving that his decision was not tainted by self- interest.⁷⁵ The case does seem compatible with *Firestone*, but there is some vagueness to the test because the court did not define a precise standard of review. Of course, this vests the judge with great leeway in making a decision.

III. METROPOLITAN LIFE INSURANCE COMPANY V. GLENN

The standard articulated by the Supreme Court in *Firestone* had proved inadequate in providing clear guidance to the circuit courts on how to take a conflict of interest into account when reviewing a plan administrator’s discretionary decision to deny a claimant benefits. This resulted in several different approaches by the circuit courts in apparent contravention of some of ERISA’s main goals—creating uniformity and predictability in the law surrounding

⁷⁰ *Williams v. Bellsouth Telecomm., Inc.*, 373 F.3d 1132, 1137-38 (11th Cir. 2004).

⁷¹ *Williams*, 373 F.3d. at 1137-38.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1138.

⁷⁵ *Id.*

employee benefit plans. When the Supreme Court heard *Glenn*, it was against this background that the case was considered.

A. ISSUE

The Supreme Court decided *Metropolitan Life Insurance Company v. Glenn* on June 19, 2008.⁷⁶ This case presented two questions to the court: (1) whether a plan administrator that both evaluates and pays claims operates under a conflict of interest, and (2) how any such conflict should be taken into account on judicial review of a discretionary benefit determination.⁷⁷ The facts of the case are set forth below.

B. FACTS

In this case, the plaintiff, Wanda Glenn (hereinafter Glenn), was an employee of Sears Roebuck & Company.⁷⁸ Sears provided its employees with the option of enrolling in a Group Long-Term Disability Plan, in which Glenn participated.⁷⁹ The Metropolitan Life Insurance Company (MetLife) acted as the plan's fiduciary, and made decisions regarding which employees were entitled to benefits.⁸⁰ Under the plan, MetLife both reviewed and paid claims. Sears is the plan sponsor and administrator.⁸¹

In April 2000, Glenn was diagnosed with severe dilated cardiomyopathy, the symptoms of which include fatigue and shortness of breath.⁸² Prior to suffering the disease, Glenn had worked as a sales manager from 1994 through 2000.⁸³ The District

⁷⁶ *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 105 (2008).

⁷⁷ *Id.* at 2347.

⁷⁸ *Glenn v. Metro. Life Ins. Co.*, No. 2:2003CV0572, 2005 WL 1364625, at *1 (S.D. Ohio 2005).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Court found that this job involved a considerable amount of standing and walking, as well as some lifting.⁸⁴ Because of the cardiomyopathy, Glenn stopped working in April 2000 and applied for disability benefits in June 2000.⁸⁵ MetLife approved her claim for disability benefits, which were awarded for a twenty-four month period.⁸⁶ These benefits were based on a finding that the employee was “completely and continuously unable to perform the material duties of her regular job.”⁸⁷ After the twenty-four month period ended, the employee would have to meet a considerably stricter standard to continue to maintain unemployment benefits: the employee would have to demonstrate that she was “completely and continuously unable to perform the duties of any gainful work or service for which she is reasonably qualified taking into consideration her training, experience, education, and past earning.”⁸⁸ Glenn filed for social security disability benefits, but this provided her little relief.⁸⁹

In March 2002, MetLife had Dr. Patel meet with Glenn to reevaluate her status as disabled.⁹⁰ After the meeting, the doctor stated that Glenn was capable of performing sedentary work, i.e. work as an office clerk or secretary.⁹¹ Another doctor was consulted

⁸⁴ *Glenn*, 2005 WL 1364625, at *1.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Glenn v. Metro. Life Ins. Co.*, 461 F.3d 660, 662 (6th Cir. 2006).

⁸⁸ *Id.*

⁸⁹ In August 2000, Glenn filed for Social Security disability benefits on the suggestion of the plan administrators. Her request was initially denied but eventually approved by an administrative law judge. She received about \$13,000 from Social Security, but seventy-five percent was recovered by MetLife for “overpayment of benefits” and the other twenty-five percent was recovered by her lawyers. *Id.* at 663.

⁹⁰ *Id.* at 664.

⁹¹ *Id.*

and agreed with the assessment by Dr. Patel.⁹² Based on this finding, MetLife did not grant Glenn's request for benefits after the twenty-four month period because it was determined that she was capable of performing some work, and thus, could not meet the standard under the second test which required: not only that she was not able to perform her previous job, but also that she was not able to perform any job for which she was reasonably qualified.⁹³

Glenn asked MetLife to reconsider its decision.⁹⁴ After meeting again with Dr. Patel, he stated that it was his opinion that Glenn was still having "significant difficulty" returning to any type of work because the emotional stress of the job exacerbated her condition.⁹⁵ MetLife again decided to discontinue benefits as of September 2002.⁹⁶ Interestingly, MetLife seemed to disregard Dr. Patel's findings as of the second meeting and based its opinion on his previous statements that Glenn was able to work. In February 2003, Glenn again appealed submitting a new report from Dr. Patel, dated February 12, 2003, that Glenn was unable to work. MetLife referred Glenn to another doctor who stated that Glenn may be able to work, but if emotional stress exacerbates her condition then permanent disability would be appropriate.⁹⁷ Again, MetLife decided to terminate benefits based upon a finding that there was some work that Glenn would be able to perform.⁹⁸

C. PROCEDURAL HISTORY

The Employee Retirement Income Security Act of 1974 (ERISA) permits a person that is denied benefits to challenge the denial in federal court.⁹⁹ The plan in which Glenn participated fell

⁹² *Id.*

⁹³ *Glenn*, 461 F.3d at 664.

⁹⁴ *Id.* at 665.

⁹⁵ *Id.* at 664-65.

⁹⁶ *Id.* at 664.

⁹⁷ *Id.* at 665.

⁹⁸ *Id.*

⁹⁹ 29 U.S.C. § 1132(a)(1)(B) (2006). *See supra* notes 24-26.

under the jurisdiction of ERISA allowing Glenn to bring suit in a federal court.

After her requests for benefits were denied by MetLife, Glenn brought suit in the United States District Court for the Southern District of Ohio in 2005.¹⁰⁰ Glenn sought reinstatement of her disability benefits under ERISA.¹⁰¹ Both Glenn and MetLife moved for summary judgment and the court entered judgment in favor of MetLife.¹⁰²

In reaching its decision, the court began by establishing the appropriate standard of review when reviewing an administrator's denial of benefits under ERISA.¹⁰³ The court began by applying *Firestone* and determined that the administrator was granted discretionary authority.¹⁰⁴ Under *Firestone*, if the plan grants the administrator deferential authority, the denial of benefits is reviewed under the highly deferential arbitrary and capricious standard.¹⁰⁵ In addition to the standard of review, another issue, one that would eventually be presented to the Supreme Court, was raised in the District Court: how to factor in the "conflict of interest" which is present when administrator is both deciding whether an employee is eligible for benefits and is the one paying the benefits.¹⁰⁶ The district court stated that a conflict of interest is a factor that must be considered under the "arbitrary and capricious" standard.¹⁰⁷ In granting summary judgment for MetLife, the district court stated that the administrator had not acted "arbitrarily or capriciously" in denying benefits because there were doctor's reports that indicated that Glenn was capable of working.¹⁰⁸ Also, the court stated that it

¹⁰⁰ Glenn v. Metro. Life Ins. Co., No. 2:2003CV0572, 2005 WL 1364625, at *1 (S.D. Ohio 2005).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at *3-4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Glenn, 2005 WL 1364625, at *4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *7.

was not arbitrary and capricious to look skeptically on a doctor's report that recanted a previous statement.¹⁰⁹ Based on this finding, the court found that there was a reasoned basis for the administrator's decision and upheld the denial of benefits.

After being denied benefits by the district court, Glenn appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals reversed and remanded the decision of the District Court, stating that the decision of the plan administrator was arbitrary and capricious.¹¹⁰ The Court of Appeals used the "combination of factors" approach in which a conflict of interest is considered among many other factors in determining if there is an abuse of discretion.¹¹¹ The Court first noted that the District Court correctly stated that the plan administrator's conflict of interest was a factor that should be weighed in its decision, but that the District Court seemed to disregard this factor by giving it no weight in its decision.¹¹² The Court of Appeals also noted that the contrary finding by the Social Security administrator that Glenn was totally disabled should have been given more weight by the District Court and plan administrator.¹¹³ The Court of Appeals noted that MetLife used this finding to deduct the benefits it had paid to Glenn, and then demanded a refund from her which was paid out of her Social Security benefits.¹¹⁴ The Court of Appeals stated that it was unfair, and inconsistent for MetLife to then give the Social Security administrator's determination no weight in finding that Glenn was not totally disabled.¹¹⁵ The Court also found that the District Court did not properly consider all of the medical evidence before it and the plan administrator's finding in regard to the medical evidence

¹⁰⁹ *Id.*

¹¹⁰ Glenn v. Metro. Life Ins. Co., 461 F.3d 660, 674-75 (6th Cir. 2006).

¹¹¹ *Id.* at 665-67.

¹¹² *Id.* at 666.

¹¹³ *Id.*

¹¹⁴ *Id.* at 667.

¹¹⁵ *Id.*

was an abuse of discretion.¹¹⁶ Essentially, the Court found that the conflict alone was not determinative.¹¹⁷ It accorded it some weight, but relied on other factors in determining that the plan administrator abused his discretion.¹¹⁸ Therefore, the Court reversed finding the decision of the plan administrator “arbitrary and capricious” under the “combination of factors” test.¹¹⁹

D. SUPREME COURT DECISION

After the Court of Appeals ruled in favor of Glenn, MetLife sought certiorari requesting that the Supreme Court determine if a plan administrator who is responsible for determining benefits and paying claims operates under a conflict of interest.¹²⁰ Upon suggestion of the Solicitor General, the Supreme Court also considered how any conflict of interest should be taken into account upon judicial review of a discretionary benefit determination.¹²¹

The case was decided on June 19, 2008 and the opinion was delivered by Justice Breyer, in which Justices Stevens, Souter, Ginsburg, and Alito joined.¹²² Chief Justice Roberts concurred in part and concurred in the judgment.¹²³ Justice Kennedy also filed an opinion concurring in part and concurring in the judgment.¹²⁴ Justice Scalia filed a dissenting opinion, which was joined by Justice Thomas.¹²⁵

In answering the questions addressed to the Court, the Court first cited to its decision in *Firestone*.¹²⁶ The Court noted that

¹¹⁶ *Glenn*, 461 F.3d at 669.

¹¹⁷ *Id.* at 674.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 674-75.

¹²⁰ *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 110 (2008).

¹²¹ *Id.*

¹²² *Id.* at 107.

¹²³ *Id.* at 119 (Roberts, C.J., concurring).

¹²⁴ *Id.* at 125 (Kennedy, J., concurring).

¹²⁵ *Id.* at 127 (Scalia, J., and Thomas, J., dissenting).

¹²⁶ *Metro. Life Ins. Co.*, 554 U.S. at 110.

Firestone required that the Court analyze the fiduciary's decision in light of trust law principles.¹²⁷ The Court set forth four criteria that a court must consider under *Firestone*.¹²⁸ First, a court should be guided by principles of trust law. As applicable here, that means that a court should draw an analogy between a plan administrator and the trustee of a common-law trust, in which common-law trustees have a fiduciary duty of loyalty to those in the trust.¹²⁹ The plan administrator's actions must be analyzed in light of the duty of loyalty. Second, principles of trust law require a court to review a denial of plan benefits under a de novo standard, unless the plan provides to the contrary.¹³⁰ Third, a plan can provide to the contrary by granting to the administrator a fiduciary discretionary authority to determine benefits.¹³¹ Of course, the administrator is still bound by the duty of loyalty. If the administrator possesses discretion, the denial of benefits will be reviewed under a deferential standard.¹³² Fourth, if a conflict of interest exists, the conflict of interest must be weighed as a factor in considering whether there has been an abuse of discretion.¹³³

E. CONFLICT OF INTEREST

In the lower court decisions, the conflict of interest issue was expressly addressed. First, both the district court and Court of Appeals agreed that there was a conflict of interest in this case based on MetLife's role in both determining and paying benefits. Second, the District Court and Court of Appeals both agreed as to the appropriate standard to apply to the facts. Both courts stated that if there is a conflict of interest, it is to be weighed as a factor in

¹²⁷ *Id.* at 111.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Metro. Life Ins. Co.*, 554 U.S. at 111.

¹³³ *Id.*

determining whether there has been an abuse of discretion.¹³⁴ However, the lower courts differed in their application of the standard. The Court of Appeals stated that the District Court did not apply any weight to MetLife's conflict of interest.¹³⁵ This was an important factor in the Court of Appeals reversal of the district court decision.

In addressing this issue, the Supreme Court first stated that a "conflict of interest" does occur when an administrator is responsible for both determining benefits and paying benefits.¹³⁶ The Court noted that the conflict of interest results from the administrator being torn between fulfilling its fiduciary duty of loyalty to the plan beneficiaries and protecting the company's financial interest.¹³⁷ The administrator has a duty of loyalty to grant all claims to which the beneficiaries are entitled.¹³⁸ But, every dollar paid in benefits comes out of the administrator's profits. Therefore, the court reasoned, in close calls especially, the administrator would be torn between fulfilling both of these interests.¹³⁹ The Court also stated, in keeping with *Firestone's* holding of analogizing to trust law principles, that this was the type of conflict a court would take into account when reviewing the discretionary acts of a trustee.¹⁴⁰

In arguing that the plan administrator was not conflicted, MetLife raised various arguments. First, MetLife argued that an employer who creates a plan where the administrator will act in the dual role of determining and dispensing benefits foresees this potential conflict, and implicitly approves it.¹⁴¹ The Court disposed of this argument rather quickly, by analogizing to trust law, stating

¹³⁴ See *supra* notes 92-109.

¹³⁵ See *supra* notes 102-109.

¹³⁶ *Metro. Life Ins. Co.*, 554 U.S. at 112.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 112-13.

¹⁴¹ *Id.*

that even when the settlor knows the trustee is conflicted, the reviewing court must still take account of the conflict.¹⁴²

Second, MetLife argues that the court is not required to follow principles of trust law if it conflicts with the language, structure, or purpose of the governing statute, in this case ERISA.¹⁴³ MetLife stated that finding a conflict is inconsistent with the statute's objectives because it would result in increased litigation through complex review proceedings, deter employers from creating plans, and interfere with employer's right to administer their own plans in violation of ERISA.¹⁴⁴ Again, the Court dismissed these concerns rather quickly stating that they were not inconsistent with the statute.¹⁴⁵ The Court noted that trust law "functions well with a similar standard", and there was no evidence that the rule adopted by the Court would have a chilling effect on benefit plans.¹⁴⁶ Ultimately, the Court relied on Congress' desire to offer employees increased protection for work-related benefits¹⁴⁷ to offset the factors named by MetLife.

The Court did give considerable attention to MetLife's argument that the conflict was acceptable because any business has to make decisions regarding a trade-off between profit and service, and insurance companies should not be an exception. MetLife argued that the market, as well as regulators, provides sufficient checks on MetLife's handling of discretionary claims.¹⁴⁸ If MetLife were to deny too many claims, it would only be hurting itself as employers and employees would switch to the service of a different company. The Court did not explicitly reject this argument; however, it found that a conflict of interest did exist under ERISA for several reasons. First, the Court noted that the presumption that the market will provide a sufficient check is weakened because the

¹⁴² *Metro. Life. Ins. Co.*, 554 U.S. at 113.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 114.

¹⁴⁸ *Id.*

employer purchases the plan instead of the employee.¹⁴⁹ The Court noted that the employer may have incentives to choose the insurer who provides lower rates by being stingier in granting claims. Thus, the Court reasoned that the marketplace argument does not work perfectly in this situation.¹⁵⁰ However, the Court ignored the fact that the employees could leave a company that provided insufficient benefit plans, so the market argument does still carry some weight (assuming employees are perfectly informed). However, its force is reduced because of the difficulty in finding a new job, especially considering the historically high unemployment rate of 9.6% in late 2010.¹⁵¹ So while the “marketplace argument” is not totally discredited, its force is significantly undermined by the disconnect between the employee and the choice of insurer.

Second, the Court noted that “ERISA imposes higher-than-marketplace quality standards on insurers.”¹⁵² The Court cites to *Firestone*, which stated that, under 1104(a)(1) of ERISA, that the administrator must “discharge his duties. . . solely in the interests of the participants and beneficiaries” of the plan.¹⁵³ The statute also requires that a full and fair review be given to all claim denials.¹⁵⁴ Also, judicial review of claim denials provides an additional check in addition to those provided by the marketplace and regulators.¹⁵⁵ Here, the Court notes the difference in the duties imposed on the insurance company regulated under ERISA from the duties imposed on the normal market participant. Obviously, a normal market participant does not have to act for the sole interest of his customers and is free to balance his own interests with those he serves, subject to the checks placed on his conduct by the market. So while the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ BUREAU OF LABOR STATISTICS, ECONOMIC NEWS RELEASE, UNEMPLOYMENT SITUATION SUMMARY (Sept. 2010) <http://www.bls.gov/news.release/empsit.nr0.htm>

¹⁵² *Glenn*, 554 U.S. Ct. at 115.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

market can provide on check on the discretion of the administrator, under ERISA more is required. The duty to act solely in the interest of one's customers goes far beyond the burden placed on any other unregulated market participant.

Finally, the Court noted that the factors advanced by MetLife as diminishing the unfairness of any conflict of interest can be taken under consideration by any reviewing body or court.¹⁵⁶ So, a court can consider any countervailing influences to the administrator's desire to act in the financial interest of his company.

The issue considered whether a conflict of interest existed was not an area of much controversy in the law prior to the case, and all of the Justices agree that a conflict of interest was present. In fact, in many cases the employer would be willing to submit that a conflict of interest existed and contest the appropriate standard of review. The standard of review was much more unsettled, as evidenced by the circuit split. That point is addressed next.

F. STANDARD OF REVIEW

Next, the Court addressed the question of how the existence of a conflict of interest should be taken into account by a court on review. In answering this question, the Court relied on a statement set forth in *Firestone*: “[A] conflict should be weighed as a ‘factor in determining whether there has been an abuse of discretion.’”¹⁵⁷ The Court stated it did not want to overrule *Firestone*, and Court reaffirmed *Firestone*'s reliance upon trust law principles.¹⁵⁸ The court stated that *Firestone* simply restated established trust law principals in affirming a deferential standard of review to an administrator who is given discretion.¹⁵⁹ The Court stated that under current trust law, a “deferential standard is applied to the discretionary decision-making of a conflicted trustee, while at the same time requiring the reviewing judge to take account of the

¹⁵⁶ *Id.*

¹⁵⁷ *Glenn*, 554 U.S. at 115.

¹⁵⁸ *Id.* at 116.

¹⁵⁹ *Id.*

conflict when determining whether the trustee, substantively or procedurally, has abused his discretion.”¹⁶⁰

The Court declined any invitation to adopt a *de novo* standard of review to any administrator given discretion, stating that it would be inappropriate for several reasons.¹⁶¹ First, the Court noted that many ERISA plans that require the administrator to assess payments and provide payment grant discretionary authority to the administrator.¹⁶² Since most claim denials occur under these types of plans, the court thought it unwise and unmanageable for reviewing courts to look at all of these claims *de novo*.¹⁶³ Second, the Court stated that Congress made no mention of any standard of review in enacting the ERISA legislation.¹⁶⁴ The Court reasoned that if Congress wanted a specific standard of review, it would have specifically stated it in the legislation.¹⁶⁵ Because a *de novo* standard creates a greater burden on any reviewing court, the Court seems to be implying that Congress would have stated its desire for *de novo* review had it wanted one.

Next, the Court appears to reject the “presumptively void” test, stating that there is no need for the creation of “special burden of proof rules, or other special procedural or evidentiary rules”.¹⁶⁶ The Court stated that this is a very fact sensitive inquiry because of the differences likely to be present in most situations, and the

¹⁶⁰ *Id.* at 115.

¹⁶¹ “We do not believe Firestone’s statement implies a change in the standard of review, say, from deferential to *de novo* review.” *Glenn*, 554 U.S. at 115.

¹⁶² *Id.* at 116.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 116. The Court never makes no reference to the “presumptively void” test or cites to any of the cases which hold follow it. But, the Court’s statement that there is no need for any strict rules or rebuttable presumptions leaves little is a strong indication that the “presumptively void” test is no longer valid.

presence of a conflict is just one factor to be weighed.¹⁶⁷ The Court stated that if the insurer had taken steps to prevent the conflict of interest from playing a role in the administrator's decision, then this factor may not play much of a role in the reviewing court's determination.¹⁶⁸ Examples of this would be making sure those determining the validity of claims had no incentives to consider the firm's interest in making a profit.¹⁶⁹

The Court concludes by stating, essentially, that because there are so many factors that play a role in determining whether an administrator's judgment is fair, it is impossible to articulate a precise standard.¹⁷⁰ The Court states that a rigid standard or procedure would improvidently restrict court's discretion in dealing with many different factual scenarios.¹⁷¹ Essentially the Court is acknowledging that no standard can substitute for the process of judgment. Ultimately, the conflict of interest must be considered along with any other relevant factors (i.e. whether the Social Security administrator had a complete record in front of him at the time the decision was made or whether MetLife took steps so that its administrator would not be inclined to consider the firm's profits during his decision making process) to determine if the administrator abused his discretion.¹⁷² The court acknowledged that this standard "did not consist of a detailed set of instructions" in keeping with its position that the creation of such a standard would be unwise.¹⁷³ The Court acknowledges the limits of these standards in that they can

¹⁶⁷ *Glenn*, 554 U.S. at 117.

¹⁶⁸ *Id.*

¹⁶⁹ One solution is to pay the administrator a fixed salary that is not dependent on the firm's profit or the administrator's record in denying or approving claims.

¹⁷⁰ *Id.* at 117. (The Court noted it had not articulated a precise standard and stated that it is not wise to create formulas that will "falsify the actual process of judging." "There are no talismanic words that can avoid the process of a judgment." *Id.* at 119.)

¹⁷¹ *Glenn*, 128 S. Ct. at 116.

¹⁷² *Id.* at 117.

¹⁷³ *Id.* at 119.

restrict a judge's inquiry because they are incapable of allowing a judge to take account of all relevant factors all of the time.¹⁷⁴ Ultimately, the Supreme Court holds that a court should review a denial of benefits by an administrator given discretion under an abuse of discretion standard, and that any conflict of interest must be taken into account, but leaves the amount of weight it carries up to the reviewing court.¹⁷⁵ Additionally, the Court rejected the argument that there is a change in the standard of review from deferential to de novo.¹⁷⁶ The weight the conflict is given will be a fact sensitive inquiry, depending upon how much the court determines that the conflict factored into the decision.

G. CHIEF JUSTICE ROBERTS CONCURRENCE

Chief Justice Roberts agrees that an insurer who both determines benefits and pays claims has a conflict of interest that is "pertinent" in reviewing claims decisions.¹⁷⁷ However, Chief Justice Roberts disagrees with the majority as to how much it should matter. Chief Justice Roberts believes that the presence of a conflict of interest should only be considered if there is evidence suggesting the conflict affected the administrator's decision.¹⁷⁸ Under this standard, the court would be looking to see if an "improper motive" played a role the administrator's denial of benefits, not just to the potential for an improper motive.¹⁷⁹

Chief Justice Roberts is worried that the majority standard will prove to be too unpredictable because of the amount of

¹⁷⁴ *Id.* at 116

¹⁷⁵ *Id.* at 117-18.

¹⁷⁶ *Id.* at 115..

¹⁷⁷ *Glenn*, 554 U.S. at 119-26. (Roberts, C.J. concurring in all but Part IV and concurring in the judgment). Part IV of the Opinion discussed how a conflict of interest should be factored into the review of a claim decision.

¹⁷⁸ *Id.* at 119-20.

¹⁷⁹ *Id.* at 122-23.

discretion it gives to a reviewing court.¹⁸⁰ Chief Justice Roberts worries that the majority standard will simply act to substitute judicial discretion for that of the administrator. This is even more worrisome to him because the judge is removed from the actual proceedings and is given a large amount of discretion.¹⁸¹ He notes that important criteria of ERISA were predictability and certainty and he explains that the Court's indeterminate standard strays from these policy goals.¹⁸² He believes that because the conflict of interest is not given a definitive weight the law is left in an uncertain state. Chief Justice Roberts reasons that this will lead to fewer companies deciding to create employee benefits plans because the companies will be unsure about the law and the potential costs of liability.¹⁸³ For Chief Justice Roberts, the increase in costs (in terms of uncertainty) does not outweigh any benefits that stem from increased judicial flexibility.

Ultimately, Chief Justice Roberts would uphold the decision of the Court of Appeals.¹⁸⁴ Even though he does not believe there is any evidence that the conflict of interest played a role in the administrator's decision, Chief Justice Roberts believes that the plan administrator still abused his discretion.¹⁸⁵ He states that the administrator's inconsistent position in regard to the Social Security determinations and the lack of consideration to doctor's reports stating that Glenn should not work and its failure to provide its own experts with certain doctor's testimony are all evidence of an abuse of discretion—but not evidence that a improper financial interest played a role in the administrator's decision.¹⁸⁶ For this reason, Chief Justice Roberts states that the decision of the Court of Appeals should be affirmed.

¹⁸⁰ *Id.* at 121.

¹⁸¹ *Id.* at 121-22.

¹⁸² *Id.* at 122.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 125.

¹⁸⁵ *Id.* at 124-25.

¹⁸⁶ *Id.* at 123-24.

H. JUSTICE KENNEDY'S CONCURRENCE.

Kennedy believes that the majority has correctly applied the *Firestone* decision and that framework set out by the Court is workable.¹⁸⁷ Kennedy states that the framework set out by the Court will not undermine the control of dual-role administrators over the employee benefit plans because the conflict of interest will not be considered by the court if the insurer takes the appropriate safeguards.¹⁸⁸ Because the administrators retain control, the incentive system for the creation of these plans will not be altered much.

Kennedy believes the case should have been remanded to the Court of Appeals because the Court stated that the conflict of interest can vanish as a factor to be considered if the insurer can show it put in place safeguards so that the administrator would not consider the financial interests of his employer.¹⁸⁹ Because MetLife was unaware of this, it did not present any evidence that it put in place the appropriate safeguards.¹⁹⁰ Kennedy states that it is unfair to MetLife to have expected it to put forth evidence regarding any safeguards because it had no notice of the relevance of those safeguards.¹⁹¹ For those reasons, Justice Kennedy would remand the decision to the Court of Appeals.

I. JUSTICE SCALIA'S DISSENT

Scalia begins by stating that he agrees that a conflict of interest exists because the plan administrator pays benefits out of its

¹⁸⁷ *Glenn*, 554 U.S. at 125-27. (Kennedy, J. concurring in all but Part IV of the Court's opinion and dissenting in part).

¹⁸⁸ *Id.* at 125-26.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 126.

¹⁹¹ *Id.*

own coffers.¹⁹² After that, he parts ways with the majority stating that he is in “fundamental disagreement” with the majority approach.¹⁹³ His dissent, joined by Justice Thomas, addresses several points.

First, he states that the majority approach is too unpredictable.¹⁹⁴ Scalia states that the majority approach makes each case unique because any number of different factors must be considered and weighed, depending upon the circumstances.¹⁹⁵ In addition, each factor can be different weights from case to case, making ruling unpredictable.¹⁹⁶

Second, Scalia believes that the conflict should not be considered unless there is evidence to indicate that the conflict of interest improperly motivated the administrator’s decision.¹⁹⁷ He states that the part of the *Firestone* opinion stating that a conflict must be considered as a factor when an administrator is vested with discretion is “sheer dictum” because the administrator in *Firestone* was not conflicted.¹⁹⁸ Therefore, the court never had the opportunity to consider the standard of review for an administrator with discretion.¹⁹⁹ While he does believe the Court must be guided principles of trust law, Scalia believes that the Court has misapplied trust law in an effort to reconcile the Restatement with the dictum in *Firestone*.²⁰⁰ Accordingly, Scalia would adopt the entirety of the Restatement “and its clear guidelines for judicial review.”²⁰¹ Abuse of discretion, as he interprets it, refers to four *distinct* (emphasis added) failures; the trustee acted dishonestly; he acted with some

¹⁹² *Glenn*, 554 U.S. at 127-134 (Scalia, J., with whom Thomas, J., joins, dissenting).

¹⁹³ *Id.* at 127.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 127-28.

¹⁹⁸ *Glenn*, 554 U.S. at 128.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 129.

²⁰¹ *Id.* at 130.

other improper motive; he failed to use judgment; or he acted beyond the bounds of a reasonable judgment.²⁰² Scalia emphasizes that these are distinct and separate abuses, and so should be considered separately in contrast to the majority opinion which allows all relevant factors to be considered and weighed at once.²⁰³ Scalia takes issue with the majority's approach of simply taking a conflict under consideration with all factors and giving it varying amount of discretion depending upon the facts.²⁰⁴ He believes it to be too unpredictable and "opaque".²⁰⁵ His solution, adoption of the Restatement, requires the four distinct abuses to be weighed separately²⁰⁶—not "chucked into a brown paper bag and shaken up to determine the answer".²⁰⁷ This certainly clarifies how the judge reached his decision—over time this would likely lead to increased predictability. Essentially, Scalia is arguing for limiting the judge's discretion and increased disclosure on how the judge reached his decision.

As a final point, Scalia argues that a conflict should not be considered unless there is evidence that the trustee acted with an improper motive.²⁰⁸ If a trustee makes a reasonable decision, then it should not be overturned because of the presence of a conflict of interest, even if the court believes a better decision could have been made.²⁰⁹ Scalia is worried that a trustee will avoid a decision that he believes to be in the best interests of the beneficiaries because it may appear that the conflict affected his decision, and choose a decision

²⁰² *Id.* at 131. A trustee abuses his discretion by acting on an improper motive when he acts 'from a motive other than to further the purposes of the trust'. Improper motives include 'spite or prejudice or to further some interest of his own other than that of the beneficiary.' RESTATEMENT (THIRD) OF TRUSTS § 50 (2003).

²⁰³ *Glenn*, 554 U.S. at 131-32.

²⁰⁴ *Id.* at 129-30.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 129.

²⁰⁷ *Glenn*, 554 U.S. at 129.

²⁰⁸ *Id.* at 132.

²⁰⁹ *Id.* at 133.

that looks less self-serving.²¹⁰ Accordingly, he states “there are no gradations of reasonableness...[r]easonable is reasonable...[g]radating reasonableness, and making it a ‘factor’ in the improper motive determination will have the precise effect of eliminating the discretion the settler has intentionally conferred upon the trustee.”²¹¹ Scalia is apparently worried that the majority’s standard will restrict the administrator’s discretion to the detriment of the beneficiaries because it gives so much leeway to the reviewing court.²¹²

IV. CIRCUIT COURT APPROACHES FOLLOWING GLENN

Following *MetLife*, almost every Circuit has addressed the question of how to apply the ruling in the *MetLife* case. Overall, it appears the ruling has produced greater uniformity among the Courts than prior to the decision. Still, there is certainly a considerable amount of uncertainty among several of the Circuit as to exactly how the ruling should be applied.

All Circuit Courts to consider the matter have applied a combination-of-factors type of review after *Glenn*, even they do not explicitly call it that in their opinion.²¹³ In this regard, there is little

²¹⁰ *Id.* at 132.

²¹¹ *Id.* at 133.

²¹² *Id.* at 128-30. (Earlier in his dissent, Scalia referred to the majority’s standard as “de novo review in sheep’s clothing.” *Id.* at 130.).

²¹³ See *Crowell v. Shell Oil. Co.*, 541 F. 3d. 295, 312 (5th Cir. 2008) (“...we [must] ‘take account of several different considerations, of which a conflict of interest is one’”); *Estate of Schwing v. The Lilly Health Plan*, 522, 525 (3d Cir. 2009) (holding that a court must “consider a conflict of interest as one of several factors in determining whether an administrator of fiduciary abused his discretion”); *Wakkinen v. UNUM Life Ins. Co. of Am.*, 531 F. 3d 575, 581 (8th Cir. 2008) (“any one factor will be considered as a tie-breaker when the other factors are closely balanced” (*citing Glenn*, 128 S. Ct at 2350). *Holcomb v. UNUM Life Insurance Co. of*

conflict that a conflict of interest is factor that must be weighed among any other relevant factors to determine if there is an abuse of discretion. The main source of controversy is how the conflict is to be weighed by the judge. That matter is addressed next.

While the circuit court approaches in regard to the standard of review are not identical after *Glenn*, there does seem to be much more uniformity. *Glenn* held that when a conflict is present, there is no change in the standard of review from deferential to de novo; rather a conflict should be considered as a relevant factor and given more weight depending upon the circumstances.²¹⁴ From this, almost all circuits have concluded that a heightened review when a conflict is present would be incompatible with *Glenn*.²¹⁵ The sliding scale

Amer., 578 F. 3d. 1187, 1193 (10th Cir. 2009) (“*Glenn* embraces a ‘combination-of-factors method of review’ that allows judges to ‘take account of several different, often case-specific factors.’” (citing *Glenn*, 128 S. Ct. at 2351)); *Carden v. Aetna Life Ins. Co.*, 559 F. 3d 256,260 (4th Cir. 2009). (“a conflict just becomes one of the ‘several different, often case-specific factors’ to be weighed together to determine if the administrator abused his discretion” (citing *Glenn*, 128 S. Ct. at 2351)).

²¹⁴ See *supra* notes 168-74.

²¹⁵ See *Holland v. Int’l Paper Co.* 576 F. 3d. 240, 248 (5th Cir. 2009) (stating that *Glenn* directly repudiated the application of any form of heightened review when a conflict of interest is present). See also *Abatie v. Alta Health & Life Ins. Co.* 458 F. 3d 955, 967 (9th Cir. 2006) (claiming their approach was a “conscious rejection” of the sliding scale approach); *Estate of Schwing v. The Lilly Health Plan*, 522, 525 (3d Cir. 2009) (holding that “in light of *Glenn*, our ‘sliding scale’ approach is no longer valid); *Champion v. Black & Decker Inc.*, 550 F. 3d 353, 358-59 (4th Cir. 2008); (holding that after *Glenn*, “the consequence of this finding [of a conflict of interest] is not to modify the standard of review, but rather to consider the conflict as but one among factors in determining the reasonableness of the plan’s discretionary determination”); *Doyle v. Liberty Life Assurance Co. of Boston*, 542 F. 3d. 1352, 1359-60 (11th Cir. 2008) (holding that *Glenn* implicitly overrules and

approach requires a court to adjust the *level of deference* depending upon how much the conflict factored into the decision, and *Glenn* requires a court to adjust the *amount of weight* given to the conflict while maintaining an abuse of discretion review. Therefore, almost all circuit courts to consider the issue have found the sliding scale approach incompatible with *Glenn*. The Third, Fourth, Fifth, Ninth, and Eleventh Circuits have all found the sliding scale approach incompatible with the standard in *Glenn* because it requires a heightened standard of review.²¹⁶

The Ninth Circuit “consciously rejected” the sliding scale approach in *Abatie*,²¹⁷ which was decided before *Glenn*. In *Montour*, the Ninth Circuit stated that it has employed the *Glenn* standard by using an abuse of discretion review, and including a conflict of interest as a factor to be weighed.²¹⁸ It then adjusts the weight of the conflict depending upon the circumstances.²¹⁹ After stating that it has rejected the sliding scale approach, the court stated that it will adjust the level of skepticism it applies depending upon the facts, including how much a conflict may have tainted an administrator’s decision.²²⁰ The increased level of skepticism sounds very similar to a heightened standard, which most circuits agree is not compatible with *Glenn*. It also sounds similar to a sliding scale approach, which the Ninth Circuit rejected in *Abatie*. Ultimately, it is difficult to reconcile a purported rejection of the sliding scale approach with using varying

conflicts with [their] precedent to the extent that it requires district courts to review benefit determinations by a conflicted administrator under a heightened standard of review); *Wakkinen v. UNUM Life Ins. Co. of Am.*, 531 F. 3d 575, 581 (8th Cir. 2008) (“the existence of a conflict did not lead the court to...a change in the standard of review).

²¹⁶ *See supra* note 214.

²¹⁷ *Abatie*, 458 F. 3d at 967.

²¹⁸ *See Montour v. Hartford Life & Accident Ins. Co.*, 588 F. 3d 623, 632 (9th Cir. 2009).

²¹⁹ *Id.*

²²⁰ *Id.*

amounts of skepticism dependent on the presence of a conflict. It remains to be seen how this will be resolved.

The Tenth Circuit found that the sliding scale approach mirrored the Supreme Court's approach in *Glenn*.²²¹ The Tenth Circuit stated that the conflict of interest must be incorporated as a factor to be weighed upon review.²²² The court found that the best way to incorporate the conflict of interest factor is a sliding scale approach where the court will always review under an arbitrary and capricious standard, but decrease or increase the level of deference in proportion to the seriousness of the conflict.²²³ This is certainly in direct opposition to the approach taken by the other circuits, and seems to contradict with *Glenn's* language of not changing the standard of review.

In *Doyle*, the Eleventh Circuit adopted the Glenn standard by stating that a heightened review was not compatible with Glenn.²²⁴ It then rejected arguments that, after *Glenn*, a court must give greater weight to the existence of a conflict if there is no evidence the administrator put safeguards in place to assure accurate claim assessment.²²⁵ The court also rejected arguments that the burden was on the administrator to bring forth evidence of safeguards—such that if the administrator brought forth no evidence, this would weigh against them in the test.²²⁶ The Court rejected these arguments “as the type burden shifting rule the Glenn court rejects.”²²⁷ The Court stated that if there is no evidence regarding safeguards, then the court should simply focus on other factors—not hold it against the administrator.²²⁸ The court also rejected an argument that the conflict

²²¹ *Weber v. GE Life Assurance Co.*, 541 F. 3d. 1002, 1010-11 (10th Cir. 2008).

²²² *Id.* at 1010.

²²³ *Id.* at 1010-11.

²²⁴ *Doyle v. Liberty Life Assurance Co. of Boston*, 542 F. 3d. 1352, 1359-60 (11th Cir. 2008).

²²⁵ *Id.* at 1362.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

should be given greater weight when an administrator places greater weight on medical evidence denying a disability than those affirming a disability.²²⁹ The court simply stated that an administrator's preference for "objective medical evidence" did not entitle the beneficiary to a higher standard of review.²³⁰ This ruling is consistent with Glenn's holding that there is no need to establish any type of burden shifting rules.

The Seventh Circuit has struggled with the application of the standard of review after *Glenn*. Initially, the Seventh Circuit seemed to adopt the combination of factors test in *Glenn*.²³¹ Then, in *Marrs*, the Court took a step back and noted that "there are two ways to read the majority opinion."²³² One is a combination of factors approach which has been adopted by several of the other circuits, including apparently, the Seventh Circuit. There a conflict is considered and weighed among many other factors, depending upon the circumstances of the case. However, the Judge Posner, in writing the opinion, expressed discomfort with this standard, stating that it "sounds like a balancing test which unweighted factors are mysteriously weighed...[s]uch a test is not conducive to providing guidance to courts or plan administrators."²³³ The Seventh Circuit then stated that this "rudderless balancing test did not have to be the final word" on the standard that should be applied by [courts and plan administrators].²³⁴ Accordingly, the court devised a more "directive" approach in which a reviewing court looks to the "gravity" of the conflict, and the likelihood it influenced the administrator's decision—not just the presence of a conflict as the Supreme Court seemed to require.²³⁵ The "gravity" of the conflict is inferred from the circumstances of the case, including the

²²⁹ *Id.*

²³⁰ *See Doyle*, 542 F. 3d. at 1362.

²³¹ *Jenkins v. Price Waterhouse Long Term Disability Plan*, 564 F.3d 856, 861 (7th Cir. 2009).

²³² *Marrs v. Motorola Inc.*, 577 F.3d 783, 788 (7th Cir. 2009).

²³³ *Marrs*, 577 F. 3d at 788.

²³⁴ *Id.* at 789.

²³⁵ *Id.*

reasonableness of the administrator's procedures and any safeguards set up by an employer.²³⁶ The main modification of the test in this case is the focus on the "gravity" of the conflict instead of its bare existence. The Seventh Circuit is clearly uncomfortable with the *Glenn* test because it does not assign a specific weight to factors or even state what factors must be considered. To remedy this, it focuses on the things that are easier to quantify, like "safeguards" and "administrative procedure" to determine the weight of the conflict. This still gives a lot of discretion to the reviewing court, but the focus on specific factors will seem to force more disclosure remedying some of the "mystery" the Seventh Circuit found unsettling in the *Glenn* test.

The First Circuit stated that a combination-of-factors-test is the appropriate test after *Glenn*, and also slightly modified its approach after *Glenn*.²³⁷ Previously, it had used an approach where a court could disregard a conflict of interest without more based on the market forces approach. If a conflict of interest was present without more, it could be disregarded based on the theory that market forces would restrain the administrator from abusing his power. The court based this on the rationale that an employer would not contract with an insurer with a "reputation for miserliness." If it did, the employer would risk losing employees. After *Glenn*, the First Circuit noted that a conflict must be given some weight regardless of the present of "market forces."²³⁸ Overall, the *Glenn* ruling has resulted in a greater uniformity of approaches by the circuit courts. But, as stated above, differences still persist. The standard in *Glenn* does not provide much guidance as to how exactly a court should consider and weigh the many factors it takes into account upon review, and this is largely the reason why different approaches live on.

V. ANALYSIS

²³⁶ *Id.*

²³⁷ *Denmark v. Liberty Life Assurance Co. of Boston*, 566 F. 3d 1, 8 (1st Cir. 2009). (holding that the combination-of-factors test was the appropriate test after *Glenn*).

²³⁸ *Id.* at 9.

Metropolitan Life v. Glenn represents a battle between two approaches to judicial review: The first approach states that judges should be given a large amount of flexibility in making a decision so that they can take account of all relevant factors in each individual case. Attempting to delineate a precise standard will result in an unnecessary limit on judge's discretion because no standard can possibly account for all possible scenarios. On the other hand, an imprecise and vague standard gives judge's far too much discretion and makes it difficult to understand their decisions. This decreases predictability, which leads the dissent to advocate a more predictable and open standard which makes it easier to understand judge's decisions.

As stated above, one of the central purposes of enacting ERISA was to increase predictability and uniformity²³⁹, and the decision in *Glenn* should be evaluated against this backdrop. In this regard, the decision certainly makes the law more predictable, as the circuit courts approach is more uniform than it was pre-*Glenn*. All circuit courts to consider the matter use a combination-of-factors type of review.²⁴⁰ Almost all circuits, aside from the Tenth, now agree that heightened scrutiny is not compatible with *Glenn*.²⁴¹ So, while some differences remain, it is clear the *Glenn* decision has moved the circuit courts into adopting a more uniform approach, and hence more predictable approach.

While the approach is more predictable, individual outcomes are not. Could the decision-making process could be made more predictable? Probably, and this could be done by adopting a more uniform, albeit less flexible standard as Scalia argues in his dissent.²⁴² Adoption of the Restatement on this matter would provide a more predictable approach because: 1) it provides less flexibility to judges; and 2) a conflict is only considered if there is evidence that the conflict *actually resulted* in the decision being made by an improper

²³⁹ See *supra* notes 8-25.

²⁴⁰ See *supra* note 203

²⁴¹ See *supra* notes 151-68.

²⁴² See *supra* notes 187 -202.

motive, i.e. consideration of the plan administrator's financial interest. This is same point on which the seventh circuit struggled in *Marrs*.²⁴³ It was clearly uncomfortable with factors being given an indeterminate weight and then being "mysteriously weighed." If the Supreme Court had accorded specific weights to a number of factors, in say, a multi-factor balancing test it would likely have increased disclosure by judges, while at the same time limiting their discretion. And this would of course increase predictability because it would be easier to tell how most judges made their decisions.

But another goal of ERISA was to provide increased protection to employees, and on balance, it seems that the Supreme Court's test does comport with this statutory goal. By providing increased flexibility to judges, the Supreme Court allows judges to take account of any factors that may have affected an administrator's determination. Also, because it may be difficult to prove a conflict affected an administrator's decision, allowing a court to take account of the bare existence of a conflict certainly protects employees. Scalia would not overturn any decision that is reasonable²⁴⁴, but as the seventh circuit noted, both a decision in favor of and in denial of benefits, may be reasonable, and so the administrator's unconscious bias may push him to deny the benefits.²⁴⁵ Because evidence that the conflict actually affected the decision may be difficult to obtain, allowing consideration of the conflict increases employee protection. On the other hand, the decreased predictability of this standard may result in the creation of fewer employee benefit plans.

Overall, the majority approach, concurrence by Chief Justice Roberts, and the dissent by Scalia all seem to seek the goal of benefiting plan beneficiaries. They simply disagree on how to do so. The majority opinion would give judge's increased flexibility to take a conflict of interest into account—this helps beneficiaries because any conflict will always be allowed to be taken into account by the judge and any conflict will weigh in favor of the beneficiary. But Chief Justice Roberts worries that the increased uncertainty resulting

²⁴³ *Marrs*, 577 F. 3d 783.

²⁴⁴ *See supra* notes 200-201.

²⁴⁵ *Marrs*, 577 F. 3d at 789.

from the indeterminate weight given to the conflict will lead to the creation of less employee benefit plans. He understands that increased unpredictability is equivalent to increased risk and therefore, increased costs.²⁴⁶ If one assumes that employers are risk averse, this is an economically sensible analysis. If they are risk averse, employers will dislike the possibility of a ruling against them more than they will like the possibility of a ruling for them. Essentially, the argument is that employers would prefer have an exact standard to taking a 50-50 chance where they could end up better or worse off. If employers are risk-averse, and the majority standard leads to increased unpredictability, then Chief Justice Roberts may be correct that less employee benefit plans will be created. Scalia's dissent also seeks increased predictability, which as explained above, would help promote the creation of employee benefit plans or at least maintain the current number of employee benefit plans.

Finally, the prevalence of the benefit plans at issue has grown rapidly. As stated earlier there are currently about 131 million Americans enrolled in employee benefit plans.²⁴⁷ Of course, these leads to a multitude of factual scenarios that must be considered upon review by judges. In this regard, the flexible standard stated by the majority is the better standard. As the majority recognized, no standard can take account of all relevant factors, and so it is better to allow judges flexibility in making this determination.

VI. CONCLUSION

Ultimately, the majority decision was the correct decision. The flexibility it provides to a reviewing court that is forced to take account of a wide range of factual scenarios combined with the protection it provides to employees by allowing a conflict to be taken into account regardless of whether evidence can be produced

²⁴⁶ If one does not accept the proposition that increased uncertainty to employers is equivalent to increased costs, then the analysis is not compelling.

²⁴⁷ See *supra* note 1.

outweigh the increased predictability of a more rigid standard. Because the majority approach seems to better reflect the reality that benefit decisions are very complicated and the reality that evidence proving a conflict provided an improper motive is difficult to obtain, it is on balance the better approach.