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RECONCILING THE ERISA FIDUCIARY'S DUAL RESPONSIBILITIES: THE THIRD CIRCUIT ADOPTS A HEIGHTENED STANDARD OF REVIEW IN PINTO v. RELIANCE STANDARD LIFE INSURANCE CO.

I. Introduction

In the United States, employers commonly provide health care benefits for their employees through group insurance plans. Frequently, these employees are insured under a plan governed by the Employment Retirement Income Security Act ("ERISA"). Under many ERISA plans, an employee receives coverage for medical and other benefits through an

1. See BARBARA COLEMAN, PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT 21-24 (1989) (reviewing different types of insurance covered under ERISA).

In 1974, ERISA was signed into law in order to protect the rights of American employees regarding their pension benefits through federal legislation. See MARTIN WALD & DAVID KENTY, ERISA: A COMPREHENSIVE GUIDE 1 (1991) (discussing history of ERISA). Congress enacted ERISA to correct specific defects that previously limited the usefulness of the private retirement system. See Nola A. Kohler, Note, An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit’s Adoption of the Sliding Scale Analysis in Woo v. Deluxe Corporation, 75 N.D. L. REV. 815, 815 (1999) (discussing Congress’ purpose in enacting ERISA). ERISA governs not only retirement plans, but also other employee benefits such as medical, welfare and disability insurance. See id. The statute outlines appropriate procedures for insurance companies to follow in setting up plan participation, vesting and funding. See id. (noting that ERISA was established to remedy previous problems in retirement plan system). Congress’ express purpose in creating ERISA was:

[T]o protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. 29 U.S.C. § 1001(b). The statute also established an insurance system to protect pension plans and provided express statutory fiduciary responsibility and full disclosure requirements to protect against the abuses in private pension plans. See WALD & KENTY, supra, at 1 (discussing fiduciary duties pursuant to ERISA).

Section 1132(a)(1)(B) of ERISA set forth one of the basic remedies provided by Congress for employee-insureds. See 29 U.S.C § 1132 (1994) (explaining remedial nature of ERISA). Pursuant to that section, participants and beneficiaries

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insurance company that both determines benefit eligibility and distributes benefits from its own funds.3 In other words, the administrator in charge of the ERISA plan has two inconsistent and potentially conflicting interests: (1) administering the plan to the benefit of the employees as beneficiaries, and (2) maintaining the plan at a profit.4 A conflict of interest occurs because the administrator is not only a fiduciary for the plan, but also is responsible for sustaining profits for the insurance company.5

have the right to recover, through a civil action, benefits accruing to them under an employee benefit plan. See id. (describing rights under ERISA).

Courts have created a body of federal common law regarding the handling of § 1132 claims. See Jeffrey A. Brauch, The Federal Common Law of ERISA, 21 HARV. J.L. & PUB. POL’Y 541, 549-54 (1998) (discussing creation of common law ERISA rules). ERISA itself does not specify the degree of deference that a court is to give a plan administrator. See WALD & KENT’, supra, at 227. Most often litigated in this area is the scope of review to be applied in actions where the plaintiff challenges a denial of benefits. See id.


4. See Brostron, supra note 3, at 8 (noting that ERISA establishes fiduciary duties for plan administrators). Under ERISA, a person is a fiduciary with respect to a plan to the extent that:

(i) he [or she] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he [or she] renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he [or she] has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21) (A). The legislative history of ERISA shows that Congress intended the term “fiduciary” to be broadly construed. See Blatt v. Marshall & Lassman, 812 F.2d 810, 812 (2d Cir. 1987) (“The definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title.”) (citation omitted)).

5. See H. Brent McKnight, Assessing the Impact of Conflict of Interest on the Decisions of ERISA Fiduciaries, 13 REGENT U. L. REV. 1, 24 (2000) (describing circumstances under which conflict of interest can arise in ERISA context). An administrator of an ERISA plan is a fiduciary for the plan itself; therefore, he or she is a trustee for the plan. See Dees, supra note 3, at 703-04 (describing fiduciary role in ERISA plans). In this position of trust, an administrator is obligated to look out for the best interests of the beneficiaries, not his or her own interests. See id. at 704-07 (outlining issues of trust law). The general duty of a trustee has been described as follows:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions.
ERISA provides that when a fiduciary denies benefits, an employee may bring a civil action and ask the court to review the fiduciary's decision. Specifically, when an employee challenges an ERISA administrator's denial of benefits under § 1132(a)(1)(B) of the ERISA statute, a court must decide whether the decision was influenced by a conflict arising from the inherent structural inconsistency of the fiduciary's role. Under some circumstances, a fiduciary's conflict of interest will prompt application of some form of close judicial review with respect to the ad-

Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (citation omitted). In a trust context, the doctrine of conflict of interest plays an important role in protecting the beneficiary by reducing the fiduciary's discretion. See McKnight, supra, at 25 (discussing role of conflict of interest).


8. See McKnight, supra note 5, at 1 (noting that ERISA permits fiduciary to operate under conflict of interest). A trust is a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for another's benefit. See Restatement (Second) of Trusts § 2 (1959) (defining trusts). American trust law is governed by both statutory and common law, and is guided by the Restatement of Trusts. See id. § 170 (describing governance of trust law and duty of loyalty).

One of the inherent characteristics of a trust is the fiduciary duty of the trustee to the beneficiary. See Joel C. Dobris, Changes in the Role and the Form of the Trust at the New Millennium; or, We Don't Have to Think of England Anymore, 62 ALB. L. Rev. 543, 549 (1998) (noting that loyalty is key part of fiduciary duty). The trustee is under a duty to act in the best interests of the beneficiary of the trust. See George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 543 (rev. 2d ed. 1993) (discussing duty of loyalty).

Self-dealing by the trustee is prohibited as a conflict of interest; instead a trustee owes "fiduciary duties of good faith and reasonable care" in carrying out duties of the trust. See Dardovitch v. Haltzman, 190 F.3d 125, 138 & n. 10 (3d Cir. 1999). The trustee may not claim that, despite a conflict of interests, he or she served the beneficiary's interest equally well or that her primary loyalty was not compromised by a secondary loyalty. See Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 269 (1941) (discussing fiduciary duty). Thus, a trustee who acts for some interest other than that of the beneficiary may breach his or her duty of loyalty. See Seborowski v. Pitt. Press Co., 188 F.3d 163, 170-71 (3d Cir. 1999) (describing fiduciary duty). Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust. See NLRB v. Amax Coal Co., 453 U.S. 322, 336-37 (1981) (discussing duty of loyalty).

The rules governing the standard of review essentially dictate a case's outcome because a highly deferential standard will permit the fiduciary to make a decision even if it is to the detriment of the beneficiary; therefore, the standard used by the court is a critical factor for an employee who is trying to attain benefits. Most courts, including the United States Court of Appeals for the Third Circuit, however, do not have a clear technique under which the standard of review is implemented.

The United States Supreme Court has suggested a method by which courts should evaluate discretionary benefit denials by conflicted ERISA fiduciaries, but has never explicitly declared what standard of review courts should employ in those circumstances. If a plan provides the administrator with discretion to determine eligibility, the Court has recommended that a deferential standard be used, but that the conflict of interest should be considered as a factor in the overall analysis. Some lower courts, including the Third Circuit, have interpreted the Supreme Court's instructions to necessitate that they apply a deferential "arbitrary and capricious" standard, while others have used a stricter de novo standard of review.

At present, the Third Circuit relies upon a heightened arbitrary and capricious standard when reviewing a discretionary decision of a conflicted ERISA fiduciary. Because the standard of review all but decides

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9. See generally WALD & KENT, supra note 2, at 153 (discussing ERISA fiduciary duties); FIDUCIARY RESPONSIBILITIES UNDER ERISA 111 (1997) (examining litigation in ERISA).

10. See STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 1.01-1.04 (92d ed. 1992) (analyzing effect of review standards generally).


13. See id. (reviewing conflict of interest); see also CHILDRESS & DAVIS, supra note 10, at §§ 15.01-15.02, 15.07-15.08 (describing review standards and applicability to facts).


15. See Pinto, 214 F.3d at 393 (holding that heightened arbitrary and capricious standard of review was appropriate and that courts should utilize sliding scale when reviewing conflicted fiduciary's decision). In the Third Circuit, the standard of review in ERISA benefit denial cases has evolved over the years. See id. at 386-87 (reviewing law of Third Circuit).
whether benefits will or will not be distributed, both insurers and insureds should understand the recent analysis undertaken by the Third Circuit.\footnote{16}

This Casebrief examines the legal standard of review that the Third Circuit applies to decisions made by conflicted ERISA fiduciaries.\footnote{17} Part I of this Casebrief briefly describes ERISA's role in insurance law.\footnote{18} Part II examines the historical development of the standard of review in ERISA suits.\footnote{19} Part III describes the Third Circuit's adoption of a heightened arbitrary and capricious standard of review.\footnote{20} Part IV examines whether the Third Circuit's standard of review satisfactorily meets ERISA's goals.\footnote{21} Finally, Part V concludes that the Third Circuit adopted an appropriate standard of review.\footnote{22}

II. HISTORY OF THE STANDARD OF REVIEW APPLIED TO ERISA CASES

A. Trust Law's Relationship to ERISA

Because an ERISA plan administrator is a fiduciary, trust law principles apply to the administration of the plan.\footnote{23} In the past, the trust attributes of ERISA have led courts, including the Third Circuit, to apply a highly deferential standard of review when examining an administrator's discretionary decisions.\footnote{24} At times, however, a conflict of interest arises due to the role of the administrator as a fiduciary, coupled with the admin-

\footnote{16. See Dees, \textit{supra} note 3, at 707 (describing importance of standard of review in ERISA cases); see also \textit{Childress \& Davis, supra} note 10, \S\ 15.01 (discussing review standards generally). The de novo standard requires that no deference be given to an administrator's decision. \textit{See id.} Under the abuse of discretion standard, however, "a plan administrator's decision must be sustained as a matter of law unless proven arbitrary and capricious." \textit{Id.}

17. For a discussion of the legal standard of review used in ERISA, see \textit{infra} notes 26-33 and accompanying text.

18. For a discussion of the purpose of ERISA, see \textit{supra} notes 1-16 and accompanying text.

19. For a discussion of the development of the common law standard of review for ERISA, see \textit{infra} notes 27-82 and accompanying text.

20. For a discussion of the law of the ERISA standard of review in the Third Circuit, see \textit{infra} notes 83-130 and accompanying text.

21. For a discussion of whether the standard of review developed by the Third Circuit meets ERISA's goals, see \textit{infra} notes 131-64 and accompanying text.

22. For a discussion of whether the Third Circuit established an appropriate standard of review, see \textit{infra} notes 165-67 and accompanying text.

23. For further discussion of trust law generally, see \textit{supra} notes 8-9 and accompanying text. Courts have noted that ERISA contains trust law terminology and language. \textit{See} Firestone Tire \& Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law.").

istrator’s need to make a profit for the company. In this conflicted state of affairs, a highly deferential standard of review does not sufficiently reconcile the fiduciary’s dual role.

B. The ERISA Standard of Review

ERISA itself conveys no guidelines concerning the standard under which benefit decisions should be reviewed. The federal courts, however, have developed common law to answer the various questions accompanying review of an ERISA fiduciary’s decisions. Specifically, the Third Circuit has endeavored to reconcile the fiduciary’s dual role by using a heightened standard of review in which the court examines the conflict of interest as a factor. In contrast, other circuits review an administrator’s decision under an extremely deferential standard, in which case an employee has little hope of recovering benefits through an ERISA action.

The administrator of an ERISA plan is often given discretion to decide an employee’s benefit eligibility even when that administrator also

25. See Brostron, supra note 3, at 10’ (discussing development of deferential standard of review for ERISA, even under conflict of interest). The standard of conduct imposed on fiduciaries is that of a prudent person. See Dees, supra note 3, at 703-04 (discussing fiduciaries’ duties under ERISA).

26. See Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995) (affording fiduciary of ERISA plan great discretion in making decision under conflict of interest). But see Brown, 898 F.2d at 1558 (adopting de novo approach to review of conflicted ERISA fiduciary’s decision). The judicial review in such cases has been inconsistent. See McKnight, supra note 5, at 12-17 (discussing various courts’ holdings on question of standard of review to use in conflicted ERISA fiduciary decisions).

27. See McKnight, supra note 5, at 2 (discussing lack of explicit text in ERISA setting forth standard of review for courts to follow; see also Heyl, supra note 6, at 2382 (same).

28. See Brauch, supra note 2, at 543 (discussing generally phenomena of ERISA litigation and creation of federal common law). The doctrine under which courts are authorized to create common law to fill the legislative gaps in ERISA is well settled. See id. (stating that courts create federal common law for ERISA although statute itself does not explicitly allow this).

Federal common law is often developed to effectuate Congress’ intent regarding a statute. See Erwin Chemerinsky, Federal Jurisdiction § 6.3 (3d ed. 1999) (discussing necessity of federal common law to implement intent behind federal statute). Generally, the expression “federal common law” refers to the “development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions.” Id. § 3.1.

29. Compare Pinto, 214 F.3d at 391-92 (requiring decreased deference to fiduciary’s decision in order to protect beneficiary), with Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir. 1998) (presuming that fiduciary acts in best interests of beneficiary even under conflict of interest).

30. Compare Whitney v. Empire Blue Cross & Blue Shield, 106 F.3d 475, 477-78 (2d Cir. 1997) (using deferential standard of review so that employee was unable to recover benefits), and Sullivan v. LTV Aerospace & Def. Co., 82 F.3d 1251, 1255-56 (2d Cir. 1996) (same), with Mitchell v. Eastman Kodak Co., 113 F.3d 433, 438 (3d Cir. 1997) (allowing beneficiary to recover benefits where fiduciary acted in arbitrary and capricious manner).
funds the plan, thereby giving rise to a conflict of interest. Under these circumstances, if an employee goes to court in the Third Circuit to recover benefits due under the plan, the court will be called upon to decide whether the discretion afforded to the fiduciary was abused. The standard of review, which the court uses when reassessing the denial of a request for benefits, is critical because the cause of action often fails or succeeds depending on the degree of deference shown to the administrator's decision.

C. Federal Common Law: Development of the ERISA Standard of Review

ERISA § 502(a)(1)(B) provides that insureds may bring a civil suit to recover benefits, enforce benefits or clarify their rights to future benefits due under an ERISA plan. The statute does not, however, provide a standard of review that courts are to apply to a challenged benefits decision. Thus, the courts have developed a “uniform federal common law” to govern the decisions of a fiduciary administering an ERISA plan.

31. See Brostron, supra note 3, at 8-10 (discussing ERISA plans). In a plan’s language, an administrator can be given discretion for decision-making. See id. at 13 (reviewing grant of discretionary authority). This feature requires that a court reviewing the decision give great deference to the fiduciary, which does not always protect the beneficiary adequately. See John H. Langbein, The Supreme Court Flunks Trusts, 1990 Sup. Ct. Rev. 213 (1990) (discussing ERISA fiduciary). Langbein states that:

Perhaps the feature of ERISA architecture that most clearly manifests the tension within ERISA’s transposed norms of private trust law is ERISA’s authorization of the nonneutral fiduciary . . . . ERISA section 408(c)(3) authorizes the employer or other plan sponsor to have its own ‘officer, employee, agent, or other representative’ serve as the trustee or in other fiduciary capacities for the plan.

Id.


33. See generally 29 U.S.C. § 1132(a)(1)(B) (1994) (describing litigation procedures for ERISA). When a court uses a very deferential standard of review, the decision-maker is afforded great reverence. See Brostron, supra note 3, at 18 (discussing differences between standards of review under ERISA). On the other hand, if a fiduciary’s decision is carefully scrutinized, the beneficiary receives great protection from decisions that are considered an abuse of discretion. See id. (same).


35. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 108-09 (1989) (noting that Court had to define appropriate standard of review for conflict of interest cases under ERISA); cf. Brostron, supra note 3, at 11 (noting that standard of review for ERISA has been inconsistently developed).

36. See Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1440-41 (9th Cir. 1990) (noting that standard of review was developed under common law principles).
Initially, the federal common law set forth an arbitrary and capricious standard, which was derived from the standard used in the Labor Management Relations Act\(^{37}\) ("LMRA").\(^{38}\) The courts’ application of the arbitrary and capricious standard in early ERISA cases showed deference to plan administrators, although the exact standard used varied from extreme deference to more careful scrutiny.\(^{39}\)

1. **Supreme Court Guidance**

In 1989, the United States Supreme Court decided *Firestone Tire & Rubber Co. v. Bruch*,\(^{40}\) and attempted to elucidate the proper standard of review that courts should use when examining a denial of benefits challenged under ERISA.\(^{41}\) In *Firestone*, the Court held that a denial of benefits challenged under 29 U.S.C. \$ 1132(a)(1)(B) should be reviewed de novo regardless of whether the plan was funded or unfunded, and regardless of whether the fiduciary was operating under a potential or actual conflict of interest.\(^{42}\) The Court added an important caveat, however, and stated that the de novo standard would not apply if the benefit plan gave the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.\(^{43}\)

\(^{37}\) Labor Management Relations Act ("LMRA"), 29 U.S.C. \$ 186(c) (1947).

\(^{38}\) See *Firestone*, 489 U.S. at 109 (discussing LMRA). The LMRA governs employee benefit plans established under collective bargaining agreements. See id. The federal courts employ the arbitrary and capricious standard in reviewing all denials in LMRA cases. See id. at 109; see also *Struble v. N.J. Brewery Employee’s Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984) (discussing LMRA).


\(^{41}\) See id. at 115 (arriving at conclusion regarding standard of review under ERISA). Firestone Company acted as an administrator of an ERISA plan that provided termination pay for employees who were laid off due to a reduction in the work force. See id. at 105 (giving facts of case). When Firestone sold its Plastics Division to Occidental Petroleum in 1980, employees sought benefits under the plan, claiming that the sale was a reduction in workforce under the terms of the plan. See id. Firestone denied benefits to the employees on the grounds that Occidental had rehired the employees at identical pay. See id. The employees filed suit, requesting that benefits be granted as promised in the plan. See id. at 106. The Supreme Court granted certiorari to resolve the conflict among the circuits as to the appropriate standard of review for an action under \$ 1132(a)(1)(B). See id. at 108.

\(^{42}\) See id. at 118.

\(^{43}\) See id. at 115 ("Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict may be weighed as a ‘facto[r]’ in determining whether there is an abuse of discretion.”
Therefore, if a plan does not confer discretion on the fiduciary, then the requisite standard of review is de novo. If the plan does confer discretion, however, then the decision will be reviewed under an abuse of discretion, or arbitrary and capricious, standard, even if the fiduciary has a conflict of interest. In the latter case, the occurrence of the conflict is one of many factors in determining whether there is an abuse of discretion, although the Court did not explain the relative weight that the conflict should be afforded.

In establishing the guidelines for the ERISA standard of review, the Firestone Court relied heavily on trust law principles. The Court reasoned that doing so met with ERISA's primary objectives. Pursuant to this framework, the Court effectively suggested that, in certain cases, a conflict of interest does not influence the analysis unless an abuse of discretion is first demonstrated. Thus, if a plan contains language that grants discretion to the plan administrator to interpret the plan and determine eligibility, the standard of review used by the courts should be deferential. In this situation, plaintiffs who have been denied benefits will rarely obtain relief or recover damages.

(Quoting Restatement (Second) of Trusts § 187 (1959)); see also Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995) (noting that Firestone requires courts to use conflict as factor in deciding whether there has been abuse of discretion).

44. See Firestone, 489 U.S. at 115 (noting that de novo standard of review applies regardless of conflict).

45. See id. (noting that if plan grants discretion to administrator, abuse of discretion standard should be used). Generally speaking, the arbitrary and capricious standard is the same as abuse of discretion. See Nazay v. Miller, 949 F.2d 1323, 1336 (3d Cir. 1991) (discussing abuse of discretion standard); Daniels v. Anchor Hocking Corp., 758 F. Supp. 326, 328-30 (W.D. Pa. 1991) (same). But see Booth v. Wal-Mart Stores, Inc., 210 F.3d 335, 341 (4th Cir. 2000) (assuming difference between abuse of discretion and arbitrary and capricious standard). Under the arbitrary and capricious standard, a district court may overturn a decision of a plan administrator only if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law." Abnathya v. Hoffmann-La Roche Inc., 2 F.3d 40, 45 (3d Cir. 1993) (citations omitted).

46. See Firestone, 489 U.S. at 115 (setting forth exception to de novo review for situations in which ERISA fiduciary operates under conflict of interest). For a discussion of the impact of Firestone on the circuit courts, see infra notes 58-82 and accompanying text.

47. See Firestone, 489 U.S. at 110 (noting that ERISA legislative history clearly incorporated trust law principles into statute). For further discussion of trust law principles and ERISA, see supra notes 8-9 and accompanying text.

48. See Firestone, 489 U.S. at 108 (noting that ERISA was enacted to protect and provide remedies for participants and beneficiaries of benefit plans); see also Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 136 (1985) (same).

49. See Beatty, supra note 32, at 739 (describing Supreme Court test for conflict of interest under ERISA).

50. See id. at 740 (noting that questions regarding Firestone standard of review for ERISA fiduciaries still remain).

51. See Brostron, supra note 3, at 11 (stating that remedies under ERISA are equitable in nature). Under ERISA, a beneficiary may recover the monetary bene-
The scope of the holding in *Firestone* has been debated since its inception. The split in authority stems from the language of the opinion itself. *Firestone* required that a conflict of interest be one of many factors used in reviewing the administrator's discretionary decision, but did not distinguish the relative import of the conflict. Unfortunately, the question regarding the precise standard to use when an administrator is given discretion in a plan and acts under a conflict was left unanswered by the Court.

As a result, lower federal courts, including the Third Circuit, have interpreted differently the mandates in *Firestone*. In particular, the Third Circuit has interpreted the ambiguity to require a review of a conflicted fiduciary's decisions that acknowledges the conflict. The uncertainty left in the wake of *Firestone* has encouraged courts to use different approaches fit of the denied coverage, but cannot sue for lost wages, pain and suffering, or wrongful death. See id..

52. See generally id. at 18 (noting that circuits courts have applied different standards of review for ERISA conflict cases).

53. See *Firestone*, 489 U.S. at 105-08 (reviewing ways in which conflicts can be scrutinized). Speaking for the Court, Justice O'Connor explained early in the opinion that "the discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." Id. at 108. Later, however, O'Connor wrote that such a challenged action would be reviewed de novo "unless the benefit plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. at 115.

54. See, e.g., *McKnight*, supra note 5, at 4 (reviewing analysis employed by Court in *Firestone*). In *Firestone*, the Court relied on trust law principles when describing the factors a court should examine to determine whether an ERISA administrator abused his or her discretion. See id. at 7 (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)).


57. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 379 (3d Cir. 2000) (holding that heightened arbitrary and capricious review was required when examining conflicted ERISA fiduciary's decision).
to resolve the same issue, which in turn has generated uncertainty for the litigants involved in some ERISA cases.\textsuperscript{58} 

2. Circuit Courts React to Firestone

The circuit courts have disagreed over how the \textit{Firestone} standard should be applied in cases where an employee is seeking to recover benefits denied by a conflicted fiduciary.\textsuperscript{59} In \textit{Firestone}, the Court noted in dicta that the existence of a fiduciary’s conflict of interest is a factor to consider when deciding whether a denial of benefits is arbitrary and capricious.\textsuperscript{60} Specifically, the Court stated that “if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a ‘factor in determining whether there is an abuse of discretion.’”\textsuperscript{61}

Given the ambiguous language in \textit{Firestone} regarding the manner in which a conflict is reconciled with the administrator’s fiduciary duty, circuit courts, including the Third Circuit, have been inconsistent in deciding the particular way a conflict of interest factors into the review of a fiduciary’s denial of ERISA benefits.\textsuperscript{62} First, as a threshold matter, courts do not agree on the circumstances under which a conflict is found to exist.\textsuperscript{63} Some courts discern a conflict when an administrator both funds and administers a plan; others, however, do not find a conflict unless there is conclusive evidence of self-dealing.\textsuperscript{64}

\textsuperscript{58} See McKnight, \textit{supra} note 5, at 9 (noting differences among circuits in application of \textit{Firestone} analysis).


\textsuperscript{61} Id.

\textsuperscript{62} See, e.g., Booth v. Wal-Mart Stores, Inc., 201 F.3d 335, 341 (4th Cir. 2000) (applying deferential abuse of discretion standard); Mitchell v. Eastman Kodak Co., 113 F.3d 453, 457 (5th Cir. 1997) (using deferential standard of review); Atwood v. Newmont Gold Co., 45 F.3d 1317, 1325 (9th Cir. 1995) (refusing to give deference to administrator’s presumptively void decision); Pierre, 932 F.2d at 1556 (using deferential abuse of discretion standard of review).

\textsuperscript{63} See Brostron, \textit{supra} note 3, at 15-17 (noting different approaches to finding conflict in ERISA plans).

\textsuperscript{64} Compare Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1561 (11th Cir. 1990) (finding inherent conflict where insurance company both funds and administers ERISA plan), and Vega v. Nat’l Life Ins. Serv., Inc., 188 F.3d 287, 287 (5th Cir. 1999) (same), with Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1016 (7th Cir. 1998) (requiring specific evidence to show that insurance company operates under conflict of interest), and Whitney v. Empire Blue Cross & Blue Shield, 106 F.3d 475, 477 (3d Cir. 1997) (same).
Second, and more importantly, if a conflict is discovered, circuit courts differ as to how the conflict should affect the standard of review. Most courts, including the Third Circuit, conclude that the nature of the relationship between the administrator, the funds and the beneficiary encourages self-dealing; therefore, a closer examination, via heightened review of the decision, is required. Other courts accede to heightened review only if there is evidence that the conflict has materially affected the denial of benefits.

The circuit courts have developed two different approaches to deciding how the conflict affects the standard of review: the "sliding scale approach" and the "presumptively void" test. The Fourth, Fifth, Seventh and Tenth Circuits have adopted the sliding scale approach, which requires the reviewing court to apply the arbitrary and capricious standard, but intensifies scrutiny as the conflict increases. Under the sliding scale approach, a court will use different degrees of deference when reviewing a fiduciary's decision, depending upon the seriousness of

65. See McKnight, supra note 5, at 8 (noting that circuits use different standards of review for ERISA fiduciary's decision under conflict of interest).


68. See McKnight, supra note 5, at 8 (noting that courts are divided into "sliding scale" and "presumptively void" jurisdictions that differ in treatment of conflict of interest in ERISA cases). Commentators use varying terms for the tests employed by the circuit courts; this Casebrief employs the terminology "sliding scale" and "presumptively void."

69. See generally Brostron, supra note 3, at 18 (stating that some courts use standard of de novo review to scrutinize ERISA fiduciaries).

70. See Bedrick v. Travelers Ins. Co., 93 F.3d 149, 154 (4th Cir. 1996) (noting that fiduciaries may have conflict of interests when profits are influenced by payment of claims); Doe v. Group Hosp. & Med. Servs., 3 F.3d 80, 80 (4th Cir. 1993) (discussing inherent conflict present when insurance company's profits depend upon denial or acceptance of claims).


72. See Mers v. Marriott Int'l Group Accident Death and Dismemberment Plan, 144 F.3d 1014, 1019-20 (7th Cir. 1998) (using sliding scale to measure abuse of discretion); Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 815-16 (7th Cir. 1997) (finding no conflict); Van Boxel v. Journal Co. Employees Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987) (same).

73. See, e.g., McGraw v. Prudential Ins. Co. of Am., 137 F.3d 1253, 1259 (10th Cir. 1998) (using arbitrary and capricious standard); Sempter v. Group Health Serv., Inc., 129 F.3d 1390, 1393 (10th Cir. 1997) (same); Chambers v. Family Health Plan Corp., 100 F.3d 818, 825 (10th Cir. 1996) (same).

74. See McKnight, supra note 5, at 8 (describing sliding scale test).
the conflict.75 Thus, the arbitrary and capricious standard is given some flexibility.76 Courts that use this standard scrutinize each case on the facts, with the conflict as one of many factors in the analysis.77

The Ninth78 and Eleventh79 Circuits have implemented the presumptively void test, which presumes that an ERISA administrator’s decision to deny benefits is arbitrary and capricious unless the administrator can prove that the conflict of interest had no material effect on the choice.80 Given the inherent structural conflict present in some ERISA plans, an administrator has the burden to prove that the beneficiary’s interests were truly advanced by the decision.81 Courts applying this test are often strict in requiring evidence to demonstrate an actual conflict; however, once a conflict is revealed, they utilize the de novo standard to review the decision itself.82

3. Third Circuit Stance on ERISA Review Standards

Until its recent decision in *Pinto v. Reliance Standard Insurance Co.*,83 the Third Circuit had not addressed the precise issue of what standard of review to use when an insurance company administrator, operating under a conflict of interest, denies benefits under an ERISA plan.84 The court

75. See Buttram v. Cent. States, 76 F.3d 896, 900 n.6 (8th Cir. 1996) (defining sliding scale test); *Chambers*, 100 F.3d at 825 (same).

76. See *Pinto v. Reliance Standard Life Ins. Co*, 214 F.3d 377, 388 (3d Cir. 2000) (analyzing whether heightened review is required for ERISA fiduciary’s decision under conflict of interest). The arbitrary and capricious standard and the abuse of discretion standard are generally considered synonymous. See *Cox v. Mid-Am. Dairyman, Inc.*, 965 F.2d 569, 572 n.3 (8th Cir. 1992) (noting that there is no distinction between arbitrary and capricious standard and abuse of discretion), aff’d, 13 F.3d 272 (8th Cir. 1993); see also CHILDRESS & DAVIS, supra note 10, §§ 15.07-15.08 (comparing review standards).

77. See *Pinto*, 214 F.3d at 393 (describing application of heightened arbitrary and capricious review standard); see also *Vega v. Nat’l Life Ins. Servs.*, Inc., 188 F.3d 287, 296 (5th Cir. 1999) (using sliding scale approach); *Miller v. Metro. Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997) (same); *Chambers*, 100 F.3d at 826-27 (same). Other factors a court may consider when reviewing a fiduciary’s decision include: the sophistication of the parties; the information available to the parties; the financial status of the insurance company; and the current status of the fiduciary. See *Pinto*, 214 F.3d at 392 (discussing factors to be included in sliding scale analysis).

78. See *Atwood v. Newmont Gold*, 45 F.3d 1317, 1322-23 (9th Cir. 1995) (shifting burden to insurance company to prove that denial did not harm beneficiary).


80. See *McKnight*, supra note 5, at 15 (describing presumptively void approach to review ERISA fiduciary’s discretionary decision).

81. See id. at 5-6 (noting factors in structure of insurance company giving rise to conflict of interest).

82. See id. at 9-10 (describing de novo or “presumptively void” review standard).

83. 214 F.3d 377 (3d Cir. 2000).

84. See *Pinto*, 214 F.3d at 386 ("We have not previously addressed the precise issue in this case.").
has, however, discussed the appropriate standard of review for ERISA benefit decisions in other contexts since Firestone was decided.  

In 1991, the Third Circuit first examined the standard of review for ERISA cases in Nazay v. Miller. In Nazay, the Third Circuit applied an unmodified arbitrary and capricious standard in reviewing a denial of hospital benefits for an insured employee. Accordingly, the Third Circuit held that the insurance company, which had no conflict of interest, did not breach its fiduciary duty by instituting a precertification system for benefits. In so holding, the Third Circuit relied on Firestone for the proposition that an arbitrary and capricious standard should be used when an administrator is vested with discretion to waive a precertification requirement.  

The same year, the Third Circuit decided Ketrosits v. GATX Corp. Ketrosits held that the unmodified arbitrary and capricious review was proper in the absence of specific, tangible evidence that a structural conflict influenced the decision process. In doing so, the Third Circuit suggested that the arbitrary and capricious standard outlined by Firestone is shaped by the circumstances in which a decision is made. Thus, the Third Circuit anticipated that a conflict could be a circumstance considered under the arbitrary and capricious review standard.  

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85. See id. at 29-33 (noting evolution of standards of review for ERISA in general). For a discussion of the Third Circuit's examination of ERISA standards of review, see supra notes 82-83 and infra notes 86-103 and accompanying text.

86. 949 F.2d 1323 (3d Cir. 1991).

87. See Nazay, 949 F.2d at 1329-30 (discussing standard of review to apply when examining ERISA administrator fiduciary duties). Nazay was a retired employee of Bethlehem Steel Corporation ("BSC"), which provided insurance benefits under a Comprehensive Medical Program. See id. at 1325-26 (stating facts of case). Nazay did not notify his plan's administrator before he admitted himself to a hospital for heart disease. See id. Because Nazay did not obtain precertification, the plan imposed a thirty percent penalty, effectively denying benefits. See id. at 1326-27. The Third Circuit relied upon the lack of an actual conflict of interest in making its decision. See id. at 1329.

88. See id. at 1326 (stating holding). Failure to acquire precertification from the insurer resulted in a penalty, equal to thirty percent of otherwise covered expenses. See id.

89. See id. at 1334 (reviewing reasoning of holding).

90. 970 F.2d 1165 (3d Cir. 1992).

91. See Ketrosits, 970 F.2d at 1173 (stating rationale of holding). In Ketrosits, the Third Circuit found no bias in the administrator's decision, and therefore did not apply a heightened standard of review. See id. at 1172 n.5 (reviewing facts in case). Plaintiffs claimed that they were entitled to early retirement benefits under an ERISA plan when the company was sold, on the grounds that the sale was not a "layoff." See id. at 1167.

92. See id. at 1171-72 (reconciling rationale of Firestone to specific facts of case).

93. See id. at 1171 (noting that ERISA review should comply with trust law principles depending on facts of case). The party who urges the court that discretion was abused has the burden to offer proof of the harm. See id. at 1173 (reviewing record to find proof of negative impact on beneficiaries of ERISA plan).
In *Abnathya v. Hoffman-LaRoche, Inc.*, the Third Circuit found that an insurance company did not benefit from its decisions to reject claims; therefore, a deferential standard was adequate when reviewing the administrator's decision. Unlike the inquiry in *Pinto*, the analysis assumed that the administrator followed the requirements of the ERISA plan and in doing so, was not conflicted. The court suggested, however, that a company that profited directly from the denial of benefits would be subject to a stricter standard.

The court examined the matter again in *Heasley v. Belden & Blake Corp.* This decision verified the Third Circuit's willingness to use a form of heightened arbitrary and capricious scrutiny when an insurance company both funds and administers a plan. In this case, the court applied a de novo standard of review, but observed that if the plan had given the administrator the discretion to interpret the plan's terms, a examination using close scrutiny of the abuse of discretion would have been appropriate.

Thus, by negative implication, these cases signified that if given the opportunity, the Third Circuit would apply a heightened standard of review in an ERISA case when a fiduciary has a conflict of interest. Such a

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94. 2 F.3d 40 (3d Cir. 1993).
95. See *Abnathya*, 2 F.3d at 48 (stating holding). Aline Abnathya brought a suit against her employer for its decision to discontinue her long-term disability benefits, which were maintained through a self-funded employee benefits plan governed by ERISA. See id. at 42-43. The Third Circuit found no basis in the record that the decision was arbitrary and capricious, and reversed the district court's grant of summary judgment in favor of the insured. See id. at 47.
96. See id. at 46 (discussing possible conflict of interest). Under the arbitrary and capricious standard of review, a court can reverse the administrator's decision only if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law." Id. at 45 (quoting *Adamo v. Anchor Hocking Corp.*, 720 F. Supp. 491, 500 (W.D. Pa. 1989)).
97. See id. at 46 n.5 (discussing requirements of review under *Firestone*). The Abnathya court concluded that the employer had sufficient evidence to deny Abnathya's application for long-term disability benefits; thus, it deferred to the administrator's decision. See id. at 46-48.
98. 2 F.3d 1249 (3d Cir. 1993).
99. See *Heasley*, 2 F.3d at 1260 & n.12 (noting circumstances under which conflict of interest can occur). In 1991, Richard Heasley was diagnosed with a type of neuroendocrine tumor. See id. at 1252-55. After diagnosing the tumor, doctors recommended that Heasley have a liver/pancreas transplant, but the insurance company denied coverage for the transplant because it considered the surgery to be experimental. See id. Heasley sued under ERISA's civil action provision, 29 U.S.C. § 1132(a)(1) (1994). See id. at 1253.
100. See id. at 1254 (discussing deferential standard of review). The Third Circuit noted that the appropriate standard of review "turns on the terms of the plan." Id.
101. See id. at 1251 (finding that fiduciary interest should not be disturbed by court). The Third Circuit has examined this issue in other cases in the last decade. See generally *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir. 2000) (examining ERISA administrator's fiduciary duty); *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153 (3d Cir. 1999) (finding no fiduciary duty where insurer makes pure busi-
conflict would be found if an insurer incurred a direct profit from denying benefits and lacked incentive to balance the conflict on its own. \(^{102}\) Recently, the court accepted the opportunity to clarify the requisite standard of review applied in ERISA cases. \(^{103}\)

III. **Pinto v. Reliance Standard Insurance Co.: The Third Circuit Adopts a Heightened Standard of Review For ERISA Conflict of Interest Cases**

In *Pinto*, the Third Circuit held that a heightened arbitrary and capricious standard of review should be employed when an administrator of an ERISA plan denies benefits while under a conflict of interest. \(^{104}\) In so holding, the court attempted to resolve the uncertainty created by the Supreme Court's decision in *Firestone* concerning this issue. \(^{105}\)

A. **Facts and Procedural History of Pinto**

In June 1992, Maria Pinto applied for long-term disability benefits ("LTD") from Reliance Standard Insurance Company ("Reliance"), which was under contract to administer and pay LTD benefits pursuant to her
Shortly thereafter, Reliance granted Pinto’s application for LTD benefits. In November 1993, Reliance terminated Pinto’s benefits, citing various medical reports that declared that she was able to work. Pinto filed an ERISA action in the United States District Court for the District of New Jersey pursuant to 29 U.S.C. § 1132(a)(1)(B). The statute provides that a beneficiary may sue for “benefits due to him [or her] under the terms of [the] plan.” In January 1997, Reliance moved for summary judgment on the ground that its decision was discretionary, not arbitrary and capricious, and therefore could not be disputed. The district court granted the motion and Pinto appealed.

B. The Third Circuit’s Analysis

1. The Holding of Pinto

The Third Circuit concluded that close scrutiny, in the form of heightened arbitrary and capricious review, is necessary when an insurance company both administers and funds an ERISA plan. In other words, the potential for self-dealing by an insurer requires a court to examine the fiduciary’s pronouncements with close attention, not with deference. The court acknowledged that it had a duty to ensure that a fiduciary complies with the responsibilities Congress intended for fiduciaries.

See Pinto, 214 F.3d at 379-82 (stating facts of case). In July 1991, Maria Pinto stopped working due to health problems, and thereafter received short-term disability benefits from her employer. Her physician stated that “her present condition precludes her from actively working even at a clerical level... [and that] her only viable option at the present time is continued medical therapy, sedentary life style, and avoidance of high stress situations that could precipitate her cardiac asthma.” Id. at 379-80.

Reliance requested that Pinto also apply for Social Security benefits. In May 1993, the Social Security Administration (“SSA”) found that Pinto was not disabled and denied her application for benefits. In November 1993, Reliance terminated Pinto’s benefits, citing the SSA’s decision. In February 1994, the SSA reversed its earlier decision and awarded Pinto benefits. Although a Reliance employee recommended that Pinto’s benefits be reestablished, the insurance company rejected Pinto’s appeals for reversal of its earlier decision.

See Pinto, 214 F.3d at 381. See id. at 380. See id. at 383. See id. at 381. See id. at 380. See id. at 381. See id. at 382 (stating procedural history).

The district court purported to apply the arbitrary and capricious standard “shaped by the circumstances of the inherent conflict of interest,” but instead proceeded to explain that “an administrator’s decision will only be overturned if it is without reason, unsupported by substantial evidence or erroneous as a matter of law.” Id. (quoting Pinto v. Reliance Standard Life Ins. Co., No 96-3508 (D.N.J. Dec. 12, 1998)).

The court did not, however, establish a per se rule requiring that heightened scrutiny be applied in any case where the insurer both funds and administers a plan. See id. at 388 n.6 (recognizing that specific facts could warrant different outcome).
ries when it enacted ERISA. Thus, the Third Circuit reversed the district court's decision and remanded the case, suggesting that the administrator's decision was in fact arbitrary and capricious.

2. The Third Circuit Detects a Conflict of Interest

Prior to Pinto, the Third Circuit had not addressed the precise problem of which standard of review to apply when examining the discretionary decision of an independent insurance company that both funds and administers an ERISA plan. In Pinto, a two-part analysis was employed in determining that a form of heightened review, greater than mere deference, is obligatory in this type of situation. The court analyzed and determined: (1) the circumstances under which a conflict of interest occurs in an ERISA plan, and (2) the standard of review that courts in the Third Circuit should use when a conflict is detected.

First, the court settled that a conflict inherently exists when an insurer, who has discretion to interpret an ERISA plan, both funds and administers the plan. The Third Circuit concluded that the structural biases intrinsic in the configuration of the insurance company as both decision-maker and payment provider obliges the court to confirm that a

115. See ERISA, H.R. REP. NO. 93-533, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.A.A.N. 4639, 4640 (noting defects that concerned Congress regarding failure to protect individual pension rights); see also Heyl, supra note 6, at 2382 (arguing that ERISA should ensure that employees receive benefits promised to them under their employer’s pension and health programs).

116. See Pinto, 214 F.3d at 394 (stating that “a factfinder could conclude that [the insurer’s] decision . . . was the result of self-dealing instead of the result of a trustee carefully exercising its fiduciary duties”).

117. See id. at 386 (noting that Third Circuit had never addressed issue of conflicted ERISA fiduciary).

118. See id. at 378-79 (discussing necessary approach to decide standard of review in case of conflicted ERISA fiduciary).

119. For a description of occasions where a conflict of interest arises for an ERISA fiduciary, see supra notes 31-33 and accompanying text.

120. For a discussion of the standard of review used to scrutinize an ERISA fiduciary's decision, see supra notes 65-82 and accompanying text.

121. See Pinto, 214 F.3d at 383 (analyzing conflict formation in ERISA plan). Other circuits have differing opinions as to the circumstances under which a conflict arises for an ERISA fiduciary. Compare Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech. Inc., 125 F.3d 794, 797-98 (9th Cir. 1997) (applying heightened review because there was evidence that decision was influenced by conflict), and Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1561 (11th Cir. 1990) (finding inherent conflict where insurance company funds and administers plan), with Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir. 1998) (presuming that insurance company is not under conflict when it both funds and adminsters plan).
conflict exists. Once a conflict is recognized, the Third Circuit will apply a standard of review that acknowledges this inconsistency.

Second, and more importantly, the court realized that some kind of heightened standard of review is essential when a conflict is present; however, *Firestone* required the use of an abuse of discretion standard in this situation. Thus, the Third Circuit recognized the need to incorporate the fact and degree of the conflict into the review of the administrator’s decision, while at the same time giving the fiduciary deference. The Third Circuit called its test the heightened arbitrary and capricious standard of review, based on the sliding scale model used in the Fourth, Fifth, Seventh and Tenth Circuits.

3. The Heightened Arbitrary and Capricious Standard

When an ERISA fiduciary operates under a conflict, the Third Circuit uses the heightened arbitrary and capricious standard to review the fiduciary’s decision. The *Pinto* decision determined that conflicts would be integrated as a factor when applying this standard, based on a sliding scale. Essentially, the sliding scale determines the intensity of review, which adjusts according to the strength of the conflict. This standard is very deferential if the conflict is minor; however, the Third Circuit can examine the decision with a “high degree of skepticism” if there is evidence of a substantial conflict.

122. *See Pinto*, 214 F.3d at 388 (“[I]nsurance carriers have an active incentive to deny close claims . . . .”).
123. *See id.* at 390 (defining proper standard of review). Not every court agrees upon the circumstances in which a conflict of interest is found on the part of the plan administrator. *Compare Brown*, 898 F.2d at 1561-62 (holding that plan administrator had inherent conflict of interest because insurance company administered policy and incurred direct expense in determining benefits in favor of plan participants), *with Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 815-16 (7th Cir. 1997) (adopting de minimus test to determine whether plan administrator was acting under conflict of interest).
124. *See Pinto*, 214 F.3d at 390 (stating that court developed its analysis so that *Firestone* is given some real meaning). The court reasoned that *Firestone* would be given further meaning with the decision that a claimant need only show inequity to gain the advantage of close scrutiny. *See id.* at 389 (noting need to “infuse[ ] . . . some meaning into the *Firestone* regime”).
125. *See id.* at 390 (noting need for higher standard of review when ERISA fiduciary is under conflict).
126. For a discussion of other courts’ use of the sliding scale model, see *supra* notes 70-77 and accompanying text.
127. *See Pinto*, 214 F.3d at 392 (describing sliding scale rationale of heightened arbitrary and capricious model). The court noted that it did not like the terminology “heightened arbitrary and capricious” because it could be easily confused with intermediate scrutiny; however, the court decided the term accurately described the requisite process of scrutinizing an ERISA fiduciary’s decision. *See id.* (“The locution is somewhat awkward.”).
128. *See id.* (incorporating status of fiduciary into analysis).
129. *See id.* (explaining use of sliding scale).
130. *See id.* at 393-94 (applying sliding scale analysis).
IV. IMPACT OF THE HEIGHTENED ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW IN THE THIRD CIRCUIT

A. Application of the Standard in the Third Circuit

The Third Circuit currently uses a heightened arbitrary and capricious standard of review in ERISA cases when a fiduciary is conflicted, as demonstrated by the many recent district court decisions employing the Pinto test. Courts in the Third Circuit now examine both the actual result and the process through which the administrator arrived at a benefit denial. Accordingly, the deference given to an administrator’s decision is not absolute.

Summary judgment is inappropriate for a case in the Third Circuit if a fact-finder could ascertain that the conduct of a plan administrator was the result of self-dealing rather than that of a fiduciary protecting the best interests of the plan’s beneficiary. If there is any evidence that tends to show self-dealing, then summary judgment is not appropriate. Accordingly, the standard used by the court is critical for insureds and insurers alike who litigate these ERISA cases.

The decisive importance of this newly developed standard is amply demonstrated in the Third Circuit’s recent decision in Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am., Inc., 222 F.3d 123, 129 (3d Cir. 2000) (discussing summary judgment process of review).


132. See Pinto, 214 F.3d at 393 (requiring that district courts use sliding scale model).

133. See id. at 393-94 (applying heightened arbitrary and capricious standard of review).


135. See Pinto, 214 F.3d at 392 (using conflict as consideration in reviewing administrator’s decision).

Group Insurance for Salaried Employees of Volkswagen of America, Inc.\textsuperscript{137} In Orvosh, the court reversed a grant of summary judgment to an employee, insured pursuant to an ERISA plan, by relying on an unmodified arbitrary and capricious standard of review rather than the heightened arbitrary and capricious review.\textsuperscript{138} In so holding, the court exemplified that the level of scrutiny given to a fiduciary’s decision is the key factor in resolving whether an insured recovers benefits under an ERISA plan, particularly when the fiduciary acts under a conflict of interest.\textsuperscript{139}

B. An ERISA Fiduciary’s Responsibility in the Third Circuit

1. Significance of Pinto to Insurers and Insureds

In the Third Circuit, when a fiduciary both funds and administers a plan, a conflict of interest will customarily be found, which in turn affects the judicial analysis of the fiduciary’s decisions regarding benefit distribution.\textsuperscript{140} The Third Circuit utilizes a sliding scale approach when examining ERISA cases in which review can be “ratcheted upward by . . . suspicious events.”\textsuperscript{141} This standard comports with the historical treatment of ERISA conflicts by the Third Circuit, which has traditionally held fiduciaries to a high standard.\textsuperscript{142}

\begin{itemize}
  \item \textsuperscript{137} 222 F.3d 123 (3d Cir. 2000).
  \item \textsuperscript{138} See Orvosh, 222 F.3d at 131-32 (discussing holding). Orvosh brought suit under facts similar to those in Pinto; however, the parties agreed to use a deferential review standard. See id. at 125-29 (stating facts of case). The court made special note of the fact that the parties stipulated that the standard of review would be unmodified, arbitrary and capricious, even though the insurer both funded and administered the plan. See id. at 129. In doing so, the court reinforced the importance of the standard used to review a fiduciary’s decision. See id.
  \item \textsuperscript{139} Compare Friess v. Reliance Standard Life Ins. Co., 122 F. Supp. 2d 566, 575 (E.D. Pa. 2000) (noting that conflict gives rise to skepticism on part of court), with Orvosh, 222 F.3d at 123 (finding in favor of insurer with conflict).
  \item \textsuperscript{142} For a discussion of the Third Circuit’s treatment of ERISA standard of review cases, see supra notes 131-41 and infra notes 143-57 and accompanying text.
\end{itemize}
Currently, in the Third Circuit, an employee has a way to bring an ERISA action by which the court will not automatically defer to the decision-making process of a conflicted fiduciary. Instead, a fiduciary's decision will be scrutinized, consistent with both the purpose of ERISA and trust law principles in general. In addition, insurance companies in the Third Circuit are forewarned that if they reject a claim under a plan that they both fund and administer, the court will review the decision with a level of scrutiny that depends upon the nature of the conflict.

2. Heightened Review: An Equitable Approach

Trust law requires that if a fiduciary has discretion in administering a plan, the standard of review used by the courts is the deferential abuse of discretion model; however, ERISA requires that a fiduciary act in the best interests of the plan's beneficiary. In the Third Circuit, these two obligations are equitably harmonized by use of the heightened arbitrary and capricious standard. This standard of review defers to the administrator of an ERISA plan, while at the same time it acknowledges that a conflict of interest can be a significant factor in reviewing the decision.

In addition, the heightened arbitrary and capricious standard properly reconciles the administrator's dual role of fiduciary with that of profit-maker for the company. When an ERISA plan grants an administrator discretion in a clear and unequivocal manner, judicial deference to the

143. See Motley, supra note 11, at 20 (noting that Third Circuit uses heightened arbitrary and capricious standard).
144. See Heyl, supra note 6, at 2390-94 (discussing ERISA's legislative background).
145. See Liskow, supra note 136, at 18 (discussing facts under which summary judgment is inappropriate under Pinto standard).

Because an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business. That is, when an insurance company serves as ERISA fiduciary to a plan composed solely of a policy or contract issued by that company, it is exercising discretion over a situation for which it incurs "direct, immediate expense as a result of benefit determinations favorable to [p]lan participants."

Id. (quoting DeNobel v. Vitro Corp., 885 F.2d 1180, 1191 (4th Cir. 1989)).
147. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 393 (3d Cir. 2000) (stating that court will not be "absolutely deferential").
149. See Beatty, supra note 32, at 735 (discussing development of arbitrary and capricious model). For a discussion of the heightened arbitrary and capricious standard in the Third Circuit, see infra notes 146-57 and accompanying text.
decision-maker is appropriate and required. In response to this judicially created rule, many insurance companies have inserted discretionary language into their plans in order to qualify for deference. Surely, however, ERISA was not enacted so that a fiduciary's decisions would receive deference at the expense of the beneficiary. The heightened arbitrary and capricious standard adopted by the Third Circuit suitably scrutinizes an administrator's decision in these circumstances to ensure that the beneficiary is adequately protected, as ERISA requires.

Furthermore, the heightened arbitrary and capricious standard abides by precedent set by the Supreme Court in Firestone, as well as establishes an equitable solution for ERISA beneficiaries. The trend in the other federal circuits validates that affording an administrator some, but not absolute, deference is logical. Accordingly, the heightened arbitrary and capricious standard of review adopted in the Third Circuit appropriately reconciles the incident of a fiduciary's conflict with the responsibility to the beneficiaries of an ERISA plan. In addition, if the Supreme Court one day settles the circuit split regarding this matter, insurers and insureds alike can be reasonably confident that the standard currently used in the Third Circuit will comply with the Court's resolution.

150. See Brostron, supra note 3, at 10 (considering development of deferential review standard).

151. See Heyl, supra note 6, at 2418 (outlining aftermath of Firestone and insurance companies' response to decision).

152. See H.R. REP. No. 93-533 (noting that ERISA does not require deference to fiduciary's decision); see also Langbein, supra note 31, at 217-19 (predicting that insurance companies would change language in plans so that they could qualify for deference from courts).


154. See McKnight, supra note 5, at 25 (discussing role of conflict of interest in ERISA plans).

155. For a description of the analysis employed by other circuit courts, see supra notes 59-82 and accompanying text.


157. See ERISA Administration and Funding, supra note 11, at 4 (noting that Supreme Court may have to resolve question of standard of review for ERISA case of conflicted fiduciary).
3. A Note for the Practitioner in the Third Circuit

The initial relevant question for Third Circuit practitioners, who are preparing for an ERISA case in which a conflicted fiduciary issued a benefit denial, is whether a conflict of interest exists. If a conflict is present, then a court examining the ERISA fiduciary's judgment will not use absolute deference, but instead will factor the conflict into its review of the decision. This method restrains the decision-making process of the plan administrator so that the beneficiary is protected. At the same time, if the administrator acts reasonably to protect the plan and the beneficiaries, the Third Circuit will defer to his or her judgment.

Inevitably, the Third Circuit's application of the heightened arbitrary and capricious standard provides an advantage to plaintiffs. Prior to Pinto, an insurance company would be granted a motion for summary judgment in an ERISA benefits denial claim even if the fiduciary made a decision under a conflict. Now, the Third Circuit will not automatically defer to the decision-making process in an ERISA claim and mechanically grant summary judgment in ERISA cases; instead, the court will examine the decision with closer scrutiny, thus protecting the insured.

V. Conclusion

The Third Circuit has rightly established a heightened arbitrary and capricious standard of review to assess a conflicted administrator's decisions in an ERISA plan. The heightened standard now required in the Third Circuit for ERISA cases is appropriate given the statute's purpose of protecting employees' benefit plans. The standard not only protects

158. For a discussion of factors that determine whether a conflict of interest exists, see supra note 5 and accompanying text.

159. See Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am., Inc., 222 F.3d 123, 129 (3d Cir. 2000) ("[O]ur inquiry turns on whether [the insurer was] arbitrary and capricious in [its] interpretation of the Plan's LTD requirement.").


161. See Brostron, supra note 3, at 32-33 (noting that reasonable decisions will receive court's deference, but that insurance companies are put on notice that their decisions will not be deferred to automatically).


163. See Orvosh, 222 F.3d at 129, 132 (stating that grant of summary judgment for Orvosh would be reversed).

164. See McKnight, supra note 5, at 18 (discussing reasonableness of sliding scale approach). For further discussion of summary judgment in ERISA conflict cases, see supra notes 134-36 and accompanying text.

165. For a discussion of the heightened arbitrary and capricious standard of review for a conflicted administrator's decisions in an ERISA plan, see supra notes 127-30 and accompanying text.

166. See Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (stating that ERISA was designed to protect contractually defined benefits for employees);
employee benefits as mandated by ERISA, but also places insurers on notice as to the appropriate weight a conflict should be given in choices regarding benefits.¹⁶⁷

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¹⁶⁷ Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (stating that ERISA was enacted to protect employees).

For a discussion of Pinto’s effect on insured and insurers, see _supra_ notes 140-61 and accompanying text.