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Why Fight Fought?: A Missed ERISA Opportunity in the Ninth Circuit

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NOTE

WHY FIGHT *FOUGHT*?:

A MISSED ERISA OPPORTUNITY IN THE NINTH CIRCUIT

INTRODUCTION

In passing the Employment Retirement Income Securities Act (“ERISA”), Congress intended to address defects in the private retirement system.¹ ERISA legislation established procedures to protect private employee pension and welfare plans.² These procedures included allowing plan administrators the discretion to interpret the terms of a plan when deciding whether to grant benefits.³ Under ERISA, if a plan administrator denies benefits, a claimant can obtain review in a federal

¹ See H.R. REP. NO. 93-533 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4639, 4639; see also Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (codified at 29 U.S.C.A. § 1001 et seq. (West 2007)).

² See *id.* at 4640. Welfare plans are plans that provide benefits other than retirement income. JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 117-18 (4th ed. 2006). They typically cover life, accident, occupational disability benefits, severance or termination, and health care plans. *Id.*

³ In *Firestone Tire & Rubber Company v. Bruch*, the United States Supreme Court implied that if a plan administrator is granted discretion to construe the terms of a plan, then the administrator’s decision is given an “abuse of discretion” review by the district court. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Since *Firestone*, a body of law has developed among the circuits to decide whether a plan gives discretion to an administrator. See Alison S. Rozbruch, Note, *Resolving the Conflict Between Two Visions for a Standard of Review in ERISA Denial of Benefit Claims*, 9 J.L. & POL’Y 507, 526-27 (2001) (discussing the circuit split regarding the specific language necessary for invoking a deferential standard of review); Peter A. Meyers, Comment, *Discretionary Language, Conflicts of Interest, and Standard of Review for ERISA Disability Plans*, 28 SEATTLE U. L. REV. 925, 934 (2005) (examining how discretion given to plan fiduciaries is detrimental to disability claimants).

564 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

district court.⁴ While ERISA did not establish a standard of review in those cases, the United States Supreme Court said that an “abuse of discretion” standard applies when the administrator has discretion to interpret the terms of a plan.⁵ A more complicated issue arises when the administrator has a conflict of interest.⁶

Typically, a conflict of interest arises when a plan administrator is responsible for both funding the ERISA benefits and determining who may receive them.⁷ The circuits remain split, however, on the best way to evaluate a denial of benefits when an administrator has a conflict of interest.⁸ The Supreme Court gave some guidance in *Firestone Tire & Rubber Company v. Bruch*,⁹ indicating an “abuse of discretion” standard should be used to review an administrator’s decision when the benefit plan in question gives discretion to the administrator.¹⁰ Yet, in the case of an administrator with a conflict of interest, the circuits have interpreted this in a variety of ways and have created different standards of review depending on the extent to which the conflict influenced the administrator’s decision.¹¹

This Note analyzes the United States Court of Appeals for the Ninth

⁴ 29 U.S.C.A. § 1132 (a)(1)(B) (West 2007) (stating that “[a] civil action may be brought by . . . a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.”).

⁵ See *Firestone*, 489 U.S. at 115.

⁶ See generally 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 (1999); John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 207, 222 (identifying the issue of whether a court should adopt a deferential standard of review or apply a de novo standard when a claimant sues after an administrator has denied his or her claim).

⁷ See *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 965 (9th Cir. 2006) (en banc) (citing *Tremain v. Bell Indus. Inc.*, 196 F.3d 970, 976 (9th Cir. 1999)).

⁸ See *infra* notes 53-116 and accompanying text (describing the standards of review used by the various circuits); see also Rozbruch, *supra* note 3, at 526-28; Kohler *supra* note 6 at 816-817, 827-859.

⁹ *Firestone*, 489 U.S. at 115. For a general review of the history of *Firestone* see Donald T. Bogan & Benjamin Fu, Article, *ERISA: No Further Inquiry Into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637, 644-49 (2005).

¹⁰ See *Firestone*, 489 U.S. at 115.

¹¹ The general steps a district court follows in reviewing a claim under 29 U.S.C. § 1132 (a)(1)(B) are: 1) determine whether discretion is granted to the plan administrator through the terms of the plan, 2) determine that the administrator used his or her discretion in making the decision, 3) determine that a conflict of interest is present, 4) analyze how the conflict of interest influenced the administrator’s decision, 5) determine the standard of review based on the influence of the conflict of interest; and 6) apply the standard to the review of the administrator’s decision. The *Firestone* decision affects the fifth step, but the circuits are split on exactly how that conflict of interest is factored in with an “abuse of discretion” review of the administrator’s decision. See *infra* notes 53-116 and accompanying text (describing the circuit split).

2007] ERISA OPPORTUNITY IN THE NINTH CIRCUIT 565

Circuit's standard of review in cases in which a conflicted administrator has denied benefits. Part I of this Note examines early standards of review prior to ERISA.¹² Part II sets forth the split among the circuits in evaluating a conflicted administrator's denial of benefits and explains the Ninth Circuit's former standard.¹³ Part III compares the Ninth Circuit's prior standard of finding such denials presumptively void with its recent holding in *Abatie v. Alta Health & Life Insurance Company*, in which the court effectively adopted a unique standard similar to a "sliding scale" used by other circuits that considers the extent to which a conflict of interest may alter the "abuse of discretion" standard.¹⁴ Part IV argues that the Ninth Circuit took a positive step in lessening the burden on plaintiffs in such cases, but left the district courts without guidance as to the extent a conflict of interest may alter the "abuse of discretion" standard.¹⁵ Part IV concludes that by adopting the Tenth Circuit's approach, whereby a conflict is categorized in addition to being weighed on a "sliding scale," the Ninth Circuit could provide clearer direction to district courts for balancing a conflict of interest with all the facts in cases in which benefits have been denied.¹⁶

I. BACKGROUND: ERISA AND EARLY STANDARDS OF REVIEW

A. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT ("ERISA") AND EARLY STANDARDS OF REVIEW

Congress passed ERISA in 1974 because it thought employers were not doing enough to protect worker's benefits.¹⁷ ERISA, which governs private employer benefit plans, including pension and retirement plans, also covers disability and medical benefits.¹⁸ The legislation was intended to protect the interests of participants and their beneficiaries by

¹² See *infra* notes 17-52 and accompanying text.

¹³ See *infra* notes 53-116 and accompanying text.

¹⁴ See *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 969 (9th Cir. 2006) (en banc); see also *infra* notes 117-30 and accompanying text.

¹⁵ See *infra* notes 131-64 and accompanying text.

¹⁶ See *infra* notes 165-89 and accompanying text.

¹⁷ See Kirill Y. Abramov, *Woo v. Deluxe Corporation: The Eighth Circuit Adopts the "Sliding Scale" Standard of Review When a Conflicted Plan Administrator Denies ERISA-Protected Benefits*, 77 WASH. U. L.Q. 1369, 1370 (1999); see also H.R. REP. NO. 93-533 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4639, 4641 (quoting a Presidential fact-finding commission stating that "all industry in the absence of adequate Government programs, owes an obligation to workers to provide for maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old age retirement-- in the same way as it now does for plant and machinery.").

¹⁸ See 29 U.S.C.A. § 1002(1) (West 2007); see also LANGBEIN ET AL., *supra* note 2, at 17-18.

566 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

requiring disclosure and reporting of financial information, establishing standards of conduct and responsibilities, and providing remedies and sanctions.¹⁹ The statute specifically preempts state law²⁰ and allows for suit to be brought in federal court.²¹

ERISA established standards for the administration and design of pension and benefit plans covered by the Act.²² ERISA's goal is to regulate benefit plans so beneficiaries get what they expect, but also to provide procedural processes to keep costs down so employers can afford to offer these benefit plans.²³ Plans can be set up in a variety of ways, but the most relevant to this discussion is where an "employer pay[s] an independent insurance company to fund, interpret, and administer a plan."²⁴

Every ERISA plan must have procedures for a full and fair review within the claims process.²⁵ An internal review procedure serves two purposes: first, it "permit[s] a plan's administrators to resolve disputes in an efficient, streamlined, non-adversarial manner"; second, it protects plan participants from "arbitrary or unprincipled decision-making."²⁶ If the administrator is also funding the plan, a conflict of interest arises that a reviewing court must factor into its analysis.²⁷ Most circuits use similar approaches in evaluating a decision made by a conflicted

¹⁹ See 29 U.S.C.A. § 1001(b) (West 2007):

[T]he policy of this chapter [is] to protect interstate commerce and 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.

²⁰ See 29 U.S.C.A. § 1144(a) (West 2007) (establishing that ERISA preempts state law).

²¹ See 29 U.S.C.A. § 1132(a)(1)(B) (West 2007) (allowing individuals to bring suit in federal court to enforce their right to benefits).

²² See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (codified at 29 U.S.C.A. 1001 et seq. (West 2007)). The purpose of the bill was to:

(1) establish equitable standards of plan administration; (2) mandate minimum standards of plan design with respect to the vesting of plan benefits; (3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities; (4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

H.R. Rep. No. 93-533, at 1-2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640.

²³ See Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1087-88 (2001); *see also* Rozbruch, *supra* note 3, at 515.

²⁴ See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 383 (3d Cir. 2000).

²⁵ See 29 U.S.C.A. § 1133 (West 2007); *see also* *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 236 (4th Cir. 1997).

²⁶ See *Ellis*, 126 F.3d at 236 (citing *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 157 (4th Cir. 1993)).

²⁷ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 567

administrator; however, the smaller details of weighing the conflict and the burdens of proof differ among all the circuits, and no two circuits use exactly similar methods for evaluating a conflicted administrator.²⁸

ERISA does not set out a standard of review for district courts reviewing claims for denial of benefits.²⁹ Instead, Congress apparently left it up to federal common law to determine how to review these claims.³⁰ Before the Supreme Court spoke in *Firestone Tire & Rubber Company v. Bruch*,³¹ courts used general contract law to review a denial of benefits.³² Later, courts adopted the “arbitrary and capricious” standard from the Labor Management Relations Act of 1947 (“LMRA”).³³

Under contract principles, if according to the contract between the employer and the employee the benefits were considered a gratuity to the employee, the worker could not enforce those benefits in court.³⁴ After the LMRA was passed, the courts used its standard of review in ERISA cases.³⁵ Though the LMRA allowed unions to set up pension plans jointly with employers, it did not provide a standard of review for claims regarding those pension plans.³⁶ As a result, federal courts adopted the “arbitrary and capricious” standard.³⁷ Because ERISA did not provide a standard of review, the courts began using this “arbitrary and capricious” standard from LMRA cases.³⁸ The courts rationalized the use of this approach because ERISA’s fiduciary-duty provisions were similar to the fiduciary provisions in the LMRA.³⁹ However, the Supreme Court

²⁸ See *infra* notes 53-116 and accompanying text; see also Daniel Feinberg, *Abatie v. Alta Health – A Victory for Plaintiffs on the Standard of Review*, 14 No. 5 ERISA LITIG. REP. (NEWSL.) 7, 11 (2006).

²⁹ See *Firestone*, 489 U.S. at 109. For an excellent overview of the history of post-*Firestone* decisions, see generally Kennedy, *supra* note 23.

³⁰ See Kennedy, *supra* note 23, at 1089-90.

³¹ See generally *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

³² See Kennedy, *supra* note 23, at 1096-1100.

³³ See *Firestone*, 489 U.S. at 109; see also Kennedy, *supra* note 23, at 1097. For an overview of pre-ERISA benefits law, see Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 35-46 (1992).

³⁴ See Kennedy, *supra* note 23, at 1096 & n.54 (citing *Menke v. Thompson*, 140 F.2d 786, 790 (8th Cir. 1944) (“holding the pension awards as mere gratuities and not contractual promises”)); see also, Bogan & Fu, *supra* note 9, at 645-46.

³⁵ See Kennedy, *supra* note 23, at 1101.

³⁶ See Kennedy, *supra* note 23, at 1101; see also *Firestone*, 489 U.S. at 109.

³⁷ See Kennedy, *supra* note 23, at 1101; see also *Firestone*, 489 U.S. at 109.

³⁸ See Kennedy, *supra* note 23, at 1103-04.

³⁹ See *Rozbruch*, *supra* note 3, at 521-22 (quoting *Bayles v. Cent. States, Se. & Sw. Areas Pension Fund*, 602 F.2d 97, 99-100 n.3 (5th Cir. 1979)) (“Federal courts justified this approach on the grounds that ‘because Congress intentionally drafted ERISA’s fiduciary duty provisions to be similar to the fiduciary provisions set forth in the earlier LMRA, the “arbitrary and capricious” or

568 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

explicitly disapproved of this approach in *Firestone* and changed the standard of review.⁴⁰

B. THE SUPREME COURT'S VAGUE PRECEDENT: THE *FIRESTONE* STANDARD

In *Firestone*,⁴¹ the Supreme Court set the standard for use by district courts in reviewing actions under 29 U.S.C. § 1132(a)(1)(B).⁴² The Court used trust principles to hold that a denial of benefits under § 1132(a)(1)(B) would be reviewed de novo unless the plan gave discretionary authority to the administrator or fiduciary to determine eligibility for benefits or construe terms of the plan.⁴³ If an administrator was given discretion to interpret and apply plan terms, the conflict of interest would be “weighed as a ‘facto[r] in determining whether there [was] an abuse of discretion.’”⁴⁴ The Court reasoned that “ERISA abounds with the language and terminology of trust law.”⁴⁵ Trust principles allow for a deferential standard of review when a trustee exercises discretionary powers.⁴⁶

Under ERISA, an administrator is also a fiduciary and “is responsible for managing plan assets, determining eligibility for plan benefits, and construing plan terms.”⁴⁷ ERISA incorporated the use of a fiduciary similar to a trustee in order to protect against the misuse of

abuse of discretion standard used there was appropriate for reviewing benefit denials by ERISA fiduciaries.”).

⁴⁰ See *Firestone*, 489 U.S. at 110; see also Rozbruch, *supra* note 3, at 522-23; Langbein, *supra* note 6, at 216.

⁴¹ See *Firestone*, 489 U.S. at 115. The case involved terminated employees trying to claim benefits under an ERISA plan. *Id.* at 105-06. For a detailed description of the facts of the case and holding see Kohler, *supra* note 6, at 823-829; see also Abramov, *supra* note 17, at 1375-76.

⁴² 29 U.S.C. § 1132(a)(1)(B) specifically provides for suits in federal court: “(a) Persons empowered to bring a civil action. A civil action may be brought—(1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C.A. § 1132(a)(1)(B) (West 2007).

⁴³ See *Firestone*, 489 U.S. at 115. *But see* Langbein, *supra* note 6, at 223 (discussing the Supreme Court’s application in *Firestone* as an inaccurate version of trust law to ERISA decisions).

⁴⁴ See *Firestone*, 489 U.S. at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. d (1959)).

⁴⁵ See *id.* at 110 (citations omitted).

⁴⁶ See *id.* at 111 (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)).

⁴⁷ See Meyers, *supra* note 3, at 932 (citing *Firestone*, 489 U.S. at 115); see also Dana M. Muir, *Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 405 (2000) (explaining that the fiduciary model of ERISA was meant to apply benefits administration (welfare plans) as well as asset administration (pension plans)).

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 569

funds, a problem predating the enactment of ERISA.⁴⁸ When reviewing issues of trust law, a court generally will not substitute its judgment for that of the trustee unless there was an abuse of the trustee's discretion.⁴⁹ The Supreme Court referred to factors from the Restatement (Second) of Trusts section 187 in discussing how to determine whether a trustee had abused his or her discretion.⁵⁰ While the Supreme Court noted that a conflict of interest would be a factor in deciding whether an administrator abused his or her discretion, it declined to provide additional guidance regarding such inquiries.⁵¹ Consequently, the circuits have established their own standards in reviewing a conflicted administrator's denial of ERISA benefits.⁵²

II. THE CIRCUIT SPLIT: STANDARDS USED TO EVALUATE THE IMPACT OF A CONFLICT OF INTEREST

Following *Firestone*, the circuits have used a variety of standards to review the influence of a conflict of interest on an administrator's decision.⁵³ The emergence of common themes among the various standards has led to specific categories of review, yet each circuit's approach has remained different from one another in some aspect.⁵⁴ A majority of circuits follow the "sliding scale" model, which adjusts the level of deference the district court will give to the administrator's decision according to the seriousness of the conflict of interest.⁵⁵ By

⁴⁸ See Muir, *supra* note 46, at 404 (explaining that the various perceived threats of misuse of ERISA funds were primarily "tied to the possibility that plans might terminate with insufficient assets to pay promised benefits").

⁴⁹ See Kennedy, *supra* note 23, at 1105.

⁵⁰ See *Firestone*, 489 U.S. at 111. The factors to determine whether a trustee acted within his or her discretion are: "(1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries." RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959).

⁵¹ See *Firestone*, 489 U.S. at 115.

⁵² See *infra* notes 53-116 and accompanying text.

⁵³ See *infra* notes 61-116 and accompanying text; *cf.* Kohler, *supra* note 6, at 827-863 (describing the various "tests" the circuits used to evaluate a conflict of interest.)

⁵⁴ See *infra* notes 61-116 and accompanying text; see also Kennedy, *supra* note 23, at 1146-63 (explaining the varying standards and continuing disparity between the circuits as to the correct application of an ERISA standard of review in conflict of interest context); *cf.* Kohler, *supra* note 40, at 827-58 (describing three tests: the Restatement test, the "sliding scale" test, (including a "modified sliding scale"), and the "presumptively void" test).

⁵⁵ This is the approach used by the Third, Fourth, Fifth, Sixth, Eighth, and now the Ninth Circuits. See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 392 (3d Cir. 2000); *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233 (4th Cir. 1997) (citing *Bedrick v. Travelers Ins. Co.*, 93 F.3d

570 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

contrast, a “modified sliding scale” incorporates a slight burden on the plaintiff to prove there was a conflict of interest present, while at the same time providing more guidance to the district court regarding the weight it should give the impact of the conflict of interest in each case.⁵⁶ Other approaches look at the “reasonableness” of the plan interpretation⁵⁷ or the “market forces” that some courts believe will remedy any inherent conflict of interest.⁵⁸ Still other circuits approach such conflicts of interest as “presumptively void” or decline to follow any specific standard.⁵⁹ The recent decision in *Abatie v. Alta Health & Life Insurance Company* was a direct attempt by the Ninth Circuit to provide a standard for this issue that more closely follows Supreme Court precedent.⁶⁰

A. THE “SLIDING SCALE”

The “sliding scale” approach developed as the most direct and accurate application of *Firestone* for reviewing a conflicted fiduciary’s decision to deny benefits.⁶¹ Under the “sliding scale,” the greater an administrator’s conflict of interest, the less deference the reviewing court will give the administrator’s decision.⁶² This approach is the most literal

149, 152 (4th Cir. 1996)); *Vega v. Nat’l Life Ins. Servs., Inc.*, 188 F.3d 287, 297 (5th Cir.1999); *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1069 (6th Cir. 1998) (citing *Miller v. Metro. Life Ins. Co.*, 925 F.2d 979, 984 (6th Cir. 1991) ; *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160-61 (8th Cir. 1998); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 969 (9th Cir. 2006) (en banc).

⁵⁶ This “modified sliding scale” is the approach taken by the Tenth Circuit. See *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1004-08 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005) (“In light of this lack of clarity, we capitalize on this opportunity to elaborate more fully what a less deferential standard of review entails.”).

⁵⁷ This is the approach used by the Second Circuit. See *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255 (2d Cir. 1996).

⁵⁸ The “market forces” analysis has been applied in the First and Seventh Circuits. See *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 (1st Cir. 2005) (citing *Pari-Fasano v. ITT Hartford Life & Accident Ins. Co.*, 230 F.3d 415, 418 (1st Cir. 2000) and *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 184 (1st Cir. 1998)); *Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020-21 (7th Cir. 1998).

⁵⁹ The Eleventh Circuit is currently the only circuit that follows the “presumptively void” standard. See *Brown v. Blue Cross Blue Shield of Ala.*, 898 F.2d 1556, 1566-67 (11th Cir. 1990). Previously, the Ninth Circuit used the “presumptively void” standard, until its decision in *Abatie v. Alta Health & Life Insurance Company*. See *Abatie*, 458 F.3d at 969. See also *infra* notes 109-116 and accompanying text. The District of Columbia Circuit has not addressed the issue of how district courts should treat a conflict of interest. See *Wagener v. SBC Pension Benefit Plan-Non Bargained Program*, 407 F.3d 395, 402-03 (D.C. Cir. 2005).

⁶⁰ See *Abatie*, 458 F.3d at 967. See also *infra* notes 134-65 and accompanying text.

⁶¹ See *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 826 (10th Cir.1996); see also Kevin Walker Beatty, Comment, *A Decade of Confusion: The Standard of Review for ERISA Benefit Denial Claims as Established by Firestone*, 51 ALA. L. REV. 733, 745-46 (2000).

⁶² See *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233 (4th Cir. 1997) (citing *Bedrick v.*

2007] ERISA OPPORTUNITY IN THE NINTH CIRCUIT 571

application of the *Firestone* requirement that a “conflict must be weighed as a ‘facto[r]’ in determining whether there is an abuse of discretion.”⁶³ Moreover, every circuit using the “sliding scale” recognizes an inherent conflict of interest.⁶⁴ Such inherent conflict is present when an administrator both funds a plan and decides whether to grant a claim.⁶⁵ An inherent conflict of interest presents serious problems because insurance carriers have an incentive to unfairly deny close claims in order to keep costs down.⁶⁶ By denying close claims, insurers can keep rates competitive and garner more contracts.⁶⁷ This creates the potential for deserving claims to be denied on the basis of financial considerations rather than on the merits.⁶⁸ Moreover, such denials would be contrary to ERISA’s goal of providing expected benefits to participants.⁶⁹

Though all recognize inherent conflicts of interest, the “sliding-scale” circuits differ somewhat in the burdens of proof they place on plaintiffs and plan administrators.⁷⁰ Some circuits first determine whether the administrator’s decision appears reasonable, then adjust the level of deference based on the administrator’s conflict of interest.⁷¹ Other circuits require the plaintiff to show that a conflict of interest was present when the administrator made the claims decision.⁷² One circuit

Travelers Ins. Co., 93 F.3d 149, 152 (4th Cir. 1996)).

⁶³ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); see also Muir, *supra* note 46, at 415.

⁶⁴ See *Abatie*, 458 F.3d at 966-67 (using the term “structural” conflict of interest); *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1004 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005); *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 388 (3d Cir. 2000); *Vega v. Nat’l Life Ins. Servs., Inc.*, 188 F.3d 287, 296 (5th Cir. 1999) (citing *Salley v. E.I. DuPont De Nemours & Co.*, 966 F.2d 1011 (5th Cir. 1992) and using the term “self-interested administrator with discretionary authority”); *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998); *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1069 (6th Cir. 1998) (saying that application of the arbitrary and capricious standard “should be shaped by the circumstances of the inherent conflict of interest; *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 87 (4th Cir. 1993).

⁶⁵ See *Kohler*, *supra* note 6, at 815.

⁶⁶ See *Pinto*, 214 F.3d at 388.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *supra* notes 17-23 and accompanying text.

⁷⁰ See *infra* notes 70-74 and accompanying text.

⁷¹ See *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 341-43 (4th Cir. 2000); see also *Evans v. UnumProvident Corp.*, 434 F.3d 866, 876 (6th Cir. 2006) (quoting *Baker v. United Mine Workers of America Health & Retirement Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991)) (stating that the court will uphold a decision if “it is the result of a deliberate principled reasoning process, [sic] and if it is supported by substantial evidence.”).

⁷² See *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160 (8th Cir. 1998) (holding that the plaintiff has the burden to “present material, probative evidence demonstrating that (1) a palpable conflict of interest or a serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator’s fiduciary duty to [the claimant].” (citations omitted)) The threshold is low to prove

572 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

focuses on the adequacy of the record to encourage both parties to “assemble the evidence that best supports their case at the administrator’s level.”⁷³ In each of these situations there remains an inverse relationship between an administrator’s conflict of interest and the deference granted by the court.⁷⁴ While the plaintiff may benefit under this approach, the problem remains that the level of adjustment courts must make for the conflict of interest is unclear and unpredictable.⁷⁵

B. THE “MODIFIED SLIDING SCALE”

Faced with the ambiguity of the “sliding scale” approach, the Tenth Circuit has adopted a “modified” approach that maintains the balance of deference in relation to the conflict but places a burden on the plaintiff to show that a conflict existed at all.⁷⁶ The Tenth Circuit combines the “sliding scale” standard with a burden on the plaintiff to show there is a conflict of interest.⁷⁷ This approach has the benefit of giving administrators deferential review, while also creating a more predictable system for plaintiffs.⁷⁸

The Tenth Circuit has formulated a clear analytical framework whereby the district court defines the type of conflict of interest and then applies an appropriate standard of review to the particular case.⁷⁹ In *Fought v. UNUM Life Insurance Company of America*, the Tenth Circuit held that in a case of a denial of coverage, if there existed an identified type of conflict of interest (e.g., an “inherent” conflict of interest, a “proven” conflict of interest, or a “serious procedural irregularity”) the court would automatically reduce the deference afforded the plan administrator.⁸⁰ Thus, the administrator bears the burden of proving the reasonableness of its decision pursuant to the court’s “arbitrary and capricious” standard.⁸¹ If a “standard” conflict of interest is present, the

the burden because the plaintiff only has to show the conflict has “some connection to the substantive decision reached.” *Id.* at 1161 (citations omitted).

⁷³ See *Vega v. Nat’l Life Ins. Servs., Inc.*, 188 F.3d 287, 298 (5th Cir. 1999).

⁷⁴ See, e.g., *Pinto*, 214 F.3d at 392-93; *Booth*, 201 F.3d at 343; *Woo*, 144 F.3d at 1160-61; *Vega*, 188 F.3d at 297.

⁷⁵ See *Pinto*, 214 F.3d at 392; *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1004-05 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005). Cf. *Muir*, *supra* note 46, at 417 (arguing that the “sliding scale” creates an unpredictable system for administrators). This unpredictability could lead to overly cautious administrators granting more claims and thus raising rates. See *id.*

⁷⁶ See *Fought*, 379 F.3d 997 at 1004-07.

⁷⁷ See *id.* at 1005; see also *Bogan & Fu*, *supra* note 9, at 657.

⁷⁸ See *infra* notes 78-91 and accompanying text.

⁷⁹ See *Fought*, 379 F.3d at 1004-06.

⁸⁰ See *id.* at 1006.

⁸¹ See *id.*

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 573

conflict would be taken as a factor by the district court when reviewing the administrator's decision.⁸² While there is some question regarding the difference between what has been termed a "standard" and an "inherent" conflict of interest,⁸³ this approach provides a sound framework and the most guidance to district courts.

According to the Tenth Circuit, a "standard" conflict of interest is the default evaluation level if a plaintiff cannot prove a serious conflict of interest.⁸⁴ Yet the difference between an inherent, serious conflict of interest and a standard conflict of interest is not well defined.⁸⁵ The Tenth Circuit recently clarified this difference in *Adamson v. UNUM Life Insurance Company*, stating, "Some proof (supplied by the claimant) must identify a conflict that could plausibly jeopardize the plan administrator's impartiality."⁸⁶ After *Adamson*, the threshold for a plaintiff to show an inherent conflict of interest and receive a less deferential review of the administrator's decision appears to be low.⁸⁷

In cases of "inherent" conflict, the burden shifts to the plan administrator to prove "that its interpretation of the terms of the plan is reasonable and that its application of those terms to the claimant is supported by substantial evidence."⁸⁸ The court will then determine whether "the decision was a reasoned application of the terms of the plan to the particular case, untainted by the conflict of interest."⁸⁹ This burden-shifting model advantages plaintiffs because insurance companies must justify claim denials and district courts treat denials of benefits cautiously.⁹⁰

In cases of "standard" conflict, the conflict of interest is weighed as

⁸² See *id.* at 1005.

⁸³ See Bogan & Fu, *supra* note 9, at 658-61.

⁸⁴ See *Fought*, 379 F.3d at 1005.

⁸⁵ See *id.*; see also Bogan & Fu, *supra* note 9, at 658-61. For example, an inherent conflict of interest exists when both insurer and administrator of the plan are the same. *Fought*, 379 F.3d at 1006. However, merely showing that the administrator is an employee of the company that pays for the benefits is not enough to prove a conflict. *Id.* at 1005. Something more must be proven by the plaintiff to establish the inherent conflict of interest, which the court does not explain in the *Fought* opinion. See Bogan and Fu, *supra* note 9 at 658-661.

⁸⁶ *Adamson v. UNUM Life Ins. Co.*, 455 F.3d 1209, 1213 (10th Cir. 2006). *Accord* *Panther v. Sun Life Assurance Co. of Canada*, 464 F. Supp. 2d 1116, 1121 (D. Kan. 2006) (concluding that "Adamson applies in the rare circumstance when the inherent conflict of interest is merely nominal, and does not involve exercising judgment regarding the grant or denial of benefits").

⁸⁷ See Bogan & Fu, *supra*, note 9, at 672 (advocating the premise that the more deferential the review of an administrator's decision by a district court, the less likely a plaintiff will prevail in overturning the decision). It follows, then, that in a court following the *Fought* standard, the plaintiff will have an easier time prevailing just by showing there was an inherent conflict of interest.

⁸⁸ *Fought*, 379 F.3d at 1006.

⁸⁹ *Id.*

⁹⁰ See Kennedy, *supra* note 22, at 1174.

574 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

one factor in determining whether there was an abuse of discretion.⁹¹ While there remains some question regarding what qualifies as a “standard” or “inherent” conflict, this modified “sliding scale” approach provides more guidance than the normal sliding scale to district courts in evaluating conflict cases.⁹²

C. MARKET FORCES AND REASONABLENESS STANDARDS

Circuits not following the “sliding scale” place a heavier burden on a plaintiff to prove that a conflict of interest affected the administrator’s decision.⁹³ These circuits either do not recognize inherent conflicts of interest,⁹⁴ or do not view them as serious enough to automatically reduce the discretion given to the administrator.⁹⁵ Consequently, a plaintiff must go beyond establishing that a conflict existed by also showing that the conflict affected the administrator’s decision to deny the claim.⁹⁶ Once the plaintiff proves the conflict of interest affected the administrator’s decision, the administrator is given little or no deference.⁹⁷ Such an approach, however, results in an unnecessary burden on plaintiffs⁹⁸ while reducing the discretionary authority of courts.⁹⁹

Under a “market forces” analysis, a court will reason that the market will remedy any negative effect of a conflict of interest on the

⁹¹ *Fought*, 379 F.3d at 1005. The following factors should be considered in light of a standard conflict of interest:

(1) the plan is self-funded; (2) the company funding the plan appointed and compensated the plan administrator; (3) the plan administrator’s performance reviews or level of compensation were linked to the denial of benefits; and (4) the provision of benefits had a significant economic impact on the company administering the plan.

Id.

⁹² See *infra* notes 166-190 and accompanying text.

⁹³ See *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 969 (9th Cir. 2006) (en banc) (identifying that to require plaintiffs to prove that a conflict of interest affected the denial of benefits decision placed an unreasonable burden on plaintiffs).

⁹⁴ See *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255 (2d Cir. 1996) (citing *Pasan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995) (requiring a plaintiff to show that the conflict of interest affected the reasonableness of the administrator’s decision).

⁹⁵ See *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 (1st Cir. 2005) (holding that market forces even out the effect of any inherent conflict of interest); *Mers v. Marriot Int’l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998) (explaining that the mere presence of an inherent conflict of interest is not sufficient to alter the standard of review and the plaintiff must establish an “actual” or “significant” conflict of interest).

⁹⁶ See *Sullivan*, 82 F.3d at 1255; *Wright*, 402 F.3d at 75; *Mers*, 144 F.3d at 1020.

⁹⁷ See *Sullivan*, 82 F.3d at 1256; *Wright* 402 F.3d at 75; *Mers*, 144 F.3d at 1020 (supporting requirement that the plaintiff must prove the conflict of interest.).

⁹⁸ See *Abatie*, 458 F.3d at 966, 969.

⁹⁹ See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 387-88 (3d Cir. 2000).

2007] ERISA OPPORTUNITY IN THE NINTH CIRCUIT 575

administrative process.¹⁰⁰ This is a philosophically different approach from recognizing inherent conflicts of interest and utilizing the “sliding scale” because the plaintiff must show that there was an actual or significant conflict of interest that affected the decision-making process.¹⁰¹ Critics argue that litigation arises only in the close cases and the incentive for insurance companies to deny the claims is too great.¹⁰²

On the other hand, under a “reasonableness” analysis, some courts have interpreted the Supreme Court’s standard of review in conflict-of-interest cases as a requirement to analyze the administrator’s decision for “reasonableness.”¹⁰³ Accordingly, an administrator’s decision must merely have been reasonable, and any conflict of interest is “a ‘facto[r]’ in determining whether there has been an abuse of discretion.”¹⁰⁴ Yet, without clearer guidance to a court regarding how to factor in a conflict of interest, this analysis may be unhelpful.¹⁰⁵ Consequently, both the “market forces” and the “reasonableness” approaches simultaneously increase a plaintiff’s burden and reduce a court’s discretionary authority to correct for conflicts of interest.¹⁰⁶ As the Ninth Circuit recently recognized, the Supreme Court did not intend such a result.¹⁰⁷

¹⁰⁰ See *Wright*, 402 F.3d at 75 (reasoning that “the market presents competing incentives that substantially minimize the apparent conflict of interest. . . . [E]mployers . . . will not want to keep an overly tight-fisted insurer. . . . [A]n insurer could ‘hardly sell policies if it is too severe in administering them.’”) (citations omitted).

¹⁰¹ See *Mers*, 144 F.3d at 1020.

¹⁰² See *Pinto*, 214 F.3d at 388. The Third Circuit also reasons that employees do not have the power to make their employer switch insurance carriers because of too many claim denials. *Id.* In addition, many claims are made after an employee leaves employment, and so the problems are unlikely to be known among the active employee population. *Id.*

¹⁰³ For example, a court following the “reasonableness” approach would use an “arbitrary and capricious” standard of review in conflict cases unless the conflict affected the *reasonable* interpretation of the plan. See *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255 (2d Cir. 1996). At least one circuit fails to recognize conflicts of interest but will evaluate how reasonable the administrator’s decision was. See *Wagener v. SBC Pension Benefit Plan-Non Bargained Program*, 407 F.3d 395, 402 (D.C. Cir. 2005) (“we need not determine . . . whether plaintiffs have plead adequate facts to suggest that the Committee operated under a conflict of interest under *Firestone*.”)

¹⁰⁴ See *Sullivan*, 82 F.3d at 1255 (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)); *Wagener*, 407 F.3d at 402 (quoting *Firestone*, 289 U.S. at 115).

¹⁰⁵ See *infra* notes 166-90 and accompanying text.

¹⁰⁶ See *supra* notes 93-104 and accompanying text.

¹⁰⁷ See *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 966, 969 (9th Cir. 2006) (en banc). In a recent First Circuit decision, Judge Lipez and Judge Howard called for an en banc review of the standard of review the circuit applies to structural conflict of interest cases. See *Denmark v. Liberty Life Assurance Co.*, 2007 WL 914673, at *13, *22 (1st Cir. 2007). Judge Lipez wrote, “I think our standard of review in cases in which an insurer also makes benefits determinations is increasingly difficult to defend. . . . I think it is time to reexamine the standard of review issue in an en banc proceeding. . . . I would be inclined to favor the ‘sliding scale’ approach explicitly adopted by the Third, Fourth, Fifth, Eighth, and Tenth Circuits.” *Id.* at *13.

576 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

D. “PRESUMPTIVELY VOID” STANDARD

The “presumptively void” standard draws the clearest lines for how a court should view a conflict of interest but results in an unnecessary burden of proof on plaintiffs.¹⁰⁸ Generally, if a conflict of interest is present, the court automatically shifts the burden to the administrator to prove that his or her decision was not tainted by the conflict, but the plaintiff bears the burden of first proving the conflict of interest affected the decision-making process.¹⁰⁹

The Ninth Circuit formerly applied the “presumptively void” standard, requiring that the affected beneficiary provide “material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary’s self-interest caused a breach of the administrator’s fiduciary obligations to the beneficiary.”¹¹⁰ If such evidence was presented, and the administrator could not prove that his or her decision was not affected by the conflict of interest, “the court would give no deference to the administrator’s decision to deny benefits, but would instead review the decision *de novo*.”¹¹¹ While this approach had the benefit of being the most straightforward, it placed an unnecessary burden on plaintiffs because plaintiffs would be unlikely to find such information.¹¹²

Unfortunately for plaintiffs, discovery is normally limited to the administrative record, and most circuits do not allow additional discovery in cases being reviewed under an “abuse of discretion” standard.¹¹³ Consequently, the only way a plaintiff can get a reviewing district court to overturn an administrator’s decision is to present

¹⁰⁸ See *Abatie*, 458 F.3d at 966.

¹⁰⁹ See *Brown v. Blue Cross Blue Shield of Ala.*, 898 F.2d 1556, 1566 (11th Cir. 1990). See also *Muir*, *supra* note 46, at 418 (describing the Eleventh Circuit’s “presumptively void” standard).

¹¹⁰ See *Abatie*, 458 F.3d at 966 (quoting *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995)). After *Abatie*, the Eleventh Circuit is currently the only circuit using the “presumptively void” standard. See *HCA Health Servs. of Ga., Inc.*, 240 F.2d at 993.

¹¹¹ See *Abatie*, 458 F.3d at 966 (citing *Atwood*, 45 F.3d 1317 at 1323).

¹¹² See *id.*

¹¹³ See *id.* at 969-70 (citing other circuits that limit discovery to the administrative record, unless the review of the denial of benefits is *de novo*). See also *Urbana v. Cent. States, Se. & Sw. Areas Pension Fund*, 421 F.3d 580, 586 (7th Cir. 2005) (citing *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 981-82 (7th Cir. 1992); *Kosiba v. Merck & Co.*, 384 F.3d 58, 67 n.5 (3d Cir. 2004); *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1003 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 173 (2d Cir. 2001) (citing *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995); *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 609 (4th Cir. 1999) (citations omitted); *Vega v. Nat’l Life Ins. Servs., Inc.*, 188 F.3d 287, 300 (5th Cir. 1999); see also *Kennedy*, *supra* note 23, at 1167..

2007] ERISA OPPORTUNITY IN THE NINTH CIRCUIT 577

conclusive evidence of a conflict of interest.¹¹⁴ If the plaintiff cannot conduct discovery, it is difficult to find the “smoking gun,” or evidence necessary to overturn the decision.¹¹⁵ Reducing this onerous burden was the fundamental reason why the Ninth Circuit changed its standard.¹¹⁶

III. CHANGING TIMES IN THE NINTH CIRCUIT: THE NEW *ABATIE* STANDARD

Recognizing that a “presumptively void” approach to denials in conflict-of-interest cases was not in line with Supreme Court precedent, the Ninth Circuit recently changed its standard of review in such cases.¹¹⁷ Formerly, under *Atwood v. Newmont Gold Company*, a plaintiff was required to prove that a conflict of interest had affected an administrator’s decision.¹¹⁸ Due to limited discovery, this requirement set a high bar for beneficiaries to clear in proving that an administrator had abused his or her discretion.¹¹⁹ In 2006, in *Abatie v. Alta Health & Life Insurance Company*, the Ninth Circuit, sitting en banc, addressed this burden by effectively joining the majority of circuits in following a “sliding scale” standard.¹²⁰ A plaintiff beneficiary can now show an administrator was acting under an inherent conflict of interest and thereby reduce the deference given to the administrator by the district court.¹²¹

In *Abatie*, the Ninth Circuit overturned the *Atwood* decision, holding that the burden on plaintiffs under *Atwood* was a misinterpretation of Supreme Court precedent.¹²² The court rejected the “presumptively void” standard as placing an unnecessary burden on plaintiffs and set forth three reasons why *Atwood* was incorrect: (1) *Atwood*’s burden-shifting scheme did not properly grant judicial abuse-

¹¹⁴ See *Pinto*, 214 F.3d at 389 (saying that when evidence of self-dealing is required, “direct evidence of a conflict is rarely likely to appear in any plan administrator’s decision.”)

¹¹⁵ See *Abatie*, 458 F.3d at 969 (recognizing that because discovery was limited to the administrative record, outside evidence of company incentives to deny claims would not be available to plaintiffs.)

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 966.

¹¹⁸ See *Atwood*, 458 F.3d at 1323.

¹¹⁹ See *Abatie*, 458 F.3d at 969.

¹²⁰ See *Feinberg*, *supra* note 28, at 10.

¹²¹ See *Abatie*, 458 F.3d at 969.

¹²² See *id.* at 959. For a general overview of the holdings of the *Abatie* decision see generally John K. DiMugno, *Structural Conflicts of Interest and Abuse of Discretion Review in ERISA Benefits Litigation: The Ninth Circuit Charts a New Course in Abatie v. Alta Health & Life Insurance Company*, 28 No. 15 INS. LITIG. REP. 537 (2006). See also generally *Feinberg*, *supra* note 28.

578 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

of-discretion review in all cases where the terms of the plan conferred discretion on the administrator; (2) *Atwood* ignored the trust-law requirement that the court weigh a plan administrator's conflict of interest as a factor in an abuse-of-discretion review (thereby creating an additional burden on plaintiffs rather than a judicial evaluation of the motive of the conflicted administrator); and (3) the burden placed on plaintiffs by *Atwood* created an incentive for administrators to suppress evidence of a conflict.¹²³ Thus, *Abatie* directly rejected the "smoking gun" required of plaintiffs under *Atwood*.¹²⁴

The new *Abatie* standard ensures that plaintiffs will have the benefit of an "abuse of discretion" review in all cases in which the court considers the inherent conflict of a plan administrator serving also as the fiduciary.¹²⁵ The Ninth Circuit stated that its approach was similar to that of other circuits but consciously rejected the "sliding scale" metaphor.¹²⁶ The *Abatie* decision instructs each district court to conduct its "abuse of discretion review, tempered by skepticism commensurate with the plan administrator's conflict of interest...."¹²⁷ According to the court, the approach is straightforward and "nothing 'slides.'"¹²⁸ However, despite casting off the label, the Ninth Circuit effectively joined the "sliding scale" majority of circuits.¹²⁹ Though *Abatie* removes the onerous burden on plaintiffs, district courts still need more guidance to evaluate the effect of a conflict of interest.¹³⁰

IV. STRIKING THE PROPER BALANCE: JUDICIAL REVIEW AND CONSTRUCTIVE GUIDANCE

The Ninth Circuit took a positive step in lessening the burden on plaintiffs, but the *Abatie* decision leaves district courts without clear guidance on the extent to which a conflict of interest affects the "abuse of discretion" standard.¹³¹ Instead, the Ninth Circuit should have adopted

¹²³ See *Abatie*, 458 F.3d at 966-67.

¹²⁴ See *id.* at 969.

¹²⁵ *Id.* ("Going forward, plaintiffs will have the benefit of an abuse of discretion review that always considers the inherent conflict when a plan administrator is also the fiduciary, even in the absence of 'smoking gun' evidence of conflict.")

¹²⁶ *Id.* at 967.

¹²⁷ *Id.* at 959.

¹²⁸ *Id.* at 968.

¹²⁹ See *Feinberg*, *supra* note 28, at 11.

¹³⁰ See *infra* notes 165-89 and accompanying text.

¹³¹ See *infra* notes 133-64 and accompanying text. *Abatie* also addresses issues of plan interpretation, opening discovery to discover conflicts of interest, evidence that a court may consider, and procedural irregularities. See *Abatie*, 458 F.3d at 964-65, 969-73. Individual analysis

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 579

a standard similar to that of the Tenth Circuit, rather than creating a new, amorphous standard. The Tenth Circuit's analytical framework guides district courts in determining the amount of deference to give the conflicted administrator based on the type of conflict of interest, which adds clarity and predictability to the ERISA benefits system.¹³²

A. A FAIRER REVIEW PROCESS THAT HEWS TO SUPREME COURT PRECEDENT

The Ninth Circuit's recent *Abatie* decision more closely follows Supreme Court precedent by avoiding the placement of an unnecessary burden of proof on plaintiffs.¹³³ Under the prior *Atwood* decision, a district court might not have considered a conflict of interest if a plaintiff had not met his or her burden of proof.¹³⁴ The *Atwood* approach bypassed the principles of trust law that the Supreme Court found inherent in ERISA cases.¹³⁵ The *Abatie* decision instead follows *Firestone's* guidance: "if a benefit plan gives discretion to an administrator or fiduciary who is acting under a conflict of interest, that conflict must be weighed as a 'facto[r]' in determining whether there is an abuse of discretion."¹³⁶

Moreover, by eliminating the burden to produce a "smoking gun," *Abatie* will make it easier for plaintiffs to receive a searching review of an administrator's decision.¹³⁷ The new standard requires a district court judge to engage in more fact-finding and analysis of benefit denials,¹³⁸

of the Ninth Circuit's standards on these issues compared to other circuits is beyond the scope of this Note. However, the fact that the Ninth Circuit addressed these topics and set out the applicable standards for each indicates the Ninth Circuit's intent to address the entire issue of ERISA claims litigation.

¹³² See *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005). *Accord Kennedy*, *supra* note 23, at 1174.

¹³³ See *Abatie*, 458 F.3d at 966 (expressly overruling the Ninth Circuit's earlier *Atwood* decision because of its failure to follow Supreme Court precedent by placing an unreasonable burden on ERISA plaintiffs).

¹³⁴ See *id.* at 969.

¹³⁵ See *id.* at 967. *But see* Langbein, *supra* note 6, at 208-09 (arguing that the Supreme Court misinterpreted trust law in applying it to ERISA cases).

¹³⁶ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (quoting RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. d (1959)); *Abatie*, 458 F.3d at 967.

¹³⁷ See *Abatie*, 458 F.3d at 969.

¹³⁸ See *Abatie*, 458 F.3d at 973 (finding that the district court erred in failing to decide the factual issue of whether a waiver of premium had been submitted to the administrator; rather the district court "appeared to conclude simply that the administrator did not abuse its discretion because there was evidence on both sides of the issue"). See also *Feinberg*, *supra* note 28, at 10 (quoting *Abatie*, 458 F.3d at 973) (stating that "the district court must make its own 'findings of fact on all contested issues.'").

580 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

which will clarify whether an administrator abused his or her discretion.¹³⁹ Several judicial opinions have stated that the judge would have decided a claim or interpreted an insurance policy differently and awarded benefits, and yet have upheld the denial of benefits because the administrator did not abuse his or her discretion.¹⁴⁰ The Ninth Circuit's fact-finding requirement may diminish such decisions, making these opinions more straightforward and less frustrating for plaintiffs.¹⁴¹

The new *Abatie* standard also provides some tools to plaintiffs to reduce the deference given to the plan administrator.¹⁴² The Ninth Circuit set forth the following factors for a district court to weigh regarding an administrator's discretion:

[E]vidence of malice, of self-dealing, or of a parsimonious claims-granting history. A court may weigh a conflict more heavily if, for example, the administrator provides inconsistent reasons for denial; fails adequately to investigate a claim or ask the plaintiff for necessary evidence; fails to credit a claimant's reliable evidence; or has repeatedly denied benefits to deserving participants by interpreting plan terms incorrectly or by making decisions against the weight of the evidence in the record.¹⁴³

Additionally, plaintiffs can use these factors to conduct discovery concerning the administrator's conflict of interest.¹⁴⁴ A plaintiff must clear a high bar to demonstrate an abuse of discretion, however, and this new standard may not result in a significant increase in overturned denials.¹⁴⁵

¹³⁹ Interview with Daniel Feinberg, Esq., Lewis, Feinberg, Renaker & Jackson, P.C., in Oakland, Cal. (Dec. 7, 2006) [hereinafter *Feinberg Interview*] (on file with author).

¹⁴⁰ See *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 232 (4th Cir. 1997) (citations omitted) (stating that under a deferential review, "[T]he administrator or fiduciary's decision will not be disturbed if it is reasonable, even if this court would have come to a different conclusion independently."); see also *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84, 89 (4th Cir. 1996); *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 85 (4th Cir. 1993).

¹⁴¹ *Feinberg Interview*, *supra* note 139.

¹⁴² See *id.* According to Mr. Feinberg, the *Abatie* case opens up discovery surrounding a conflict of interest rather than merely having the administrative record to rely upon to show a conflict influenced the decision. *Id.* See also Feinberg, *supra* note 28, at 9 (quoting *Abatie*, 458 F.3d at 968-69).

¹⁴³ *Abatie*, 458 F.3d at 968-69 (citations omitted).

¹⁴⁴ *Feinberg Interview*, *supra* note 139.

¹⁴⁵ See DiMugno, *supra* note 122, at 543 (stating that the effects of *Abatie* will be determined by the district courts depending on the evidence permitted regarding a conflict of interest). *But see* Feinberg, *supra* note 28, at 7 (arguing that the new standard was an important victory for plaintiffs because the court listed many examples of how a conflict would lessen judicial deference), and *Feinberg Interview*, *supra* note 139. Mr. Feinberg believes that plaintiffs' cases that would have been successful under *Atwood* will still be so under *Abatie*, but the new *Abatie* standard will likely

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 581

The new *Abatie* standard will also open up to discovery the claims-handling procedures of insurance companies.¹⁴⁶ Plaintiffs can present evidence of an insurance company's unreasonable pattern and practice of claims handling, while insurance companies are encouraged to produce evidence that they have a history of neutral claims handling and that they interpret plan provisions consistently.¹⁴⁷ Insurance companies will want to show that no financial incentives existed for employees to deny claims and that independent medical examiners were used to review files.¹⁴⁸ This will create a more transparent claims-handling procedure and may help claimants receive their due benefits.¹⁴⁹

The Ninth Circuit also kept the most plaintiff-friendly aspects of the former *Atwood* standard by combining them with the new factors in *Abatie*.¹⁵⁰ For example, *Atwood's* "presumptively void" standard was presented as the strongest standard for protecting a beneficiary from an administrator's conflict of interest.¹⁵¹ After the presumption was met, however, the court applied a *de novo* standard of review, which opened up discovery and virtually assured victory for the plaintiff.¹⁵² By contrast, *Abatie* removed this guarantee by rejecting the burden-shifting scheme while at the same time encouraging insurance companies to come forward with information that the conflict of interest did not affect the administrator's decision-making process.¹⁵³ Thus, by retaining some discovery, the Ninth Circuit was both skeptical of insurance companies

aid even more plaintiffs. *Id.*

¹⁴⁶ See DiMugno, *supra* note 122, at 543.

¹⁴⁷ See *id.* at 543 (saying that "Plaintiffs will proffer evidence of the insurer's pattern and practice of unreasonable claims-handling practices"; and see *Abatie*, 458 F.3d at 969 n.7 (giving examples of evidence an administrator can present to show the decision was not affected by a conflict of interest):

[T]he administrator might demonstrate that it used truly independent medical examiners or a neutral, independent review process; that its employees do not have incentives to deny claims; that its interpretations of the plan have been consistent among patients; or that it has minimized any potential financial gain through structure of its business (for example, through a retroactive payment system).

Id.

¹⁴⁸ See DiMugno, *supra* note 122, at 543.

¹⁴⁹ See *id.* at 543.

¹⁵⁰ See *id.* at 537-38 (stating the Ninth Circuit "charted a new, more plaintiff-friendly direction").

¹⁵¹ See Meyers, *supra* note 3, at 947.

¹⁵² See *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995). See also Meyers, *supra* note 3, at 947; *Feinberg Interview*, *supra* note 139. Mr. Feinberg believes that once a plaintiff met the burden under *Atwood*, the insurance company could do very little to defend itself.

Id.

¹⁵³ See *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 969 n.7 (9th Cir. 2006) (en banc).

582 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

with conflicts of interest and protective of plaintiffs.¹⁵⁴ By including the listed factors for a district court to consider when reviewing a conflicted fiduciary's decision to deny benefits, the Ninth Circuit kept some important protections enjoyed by plaintiffs under the *Atwood* standard.¹⁵⁵

Although the Ninth Circuit has declined to specifically adopt the "sliding scale," it has effectively joined the majority of circuits that follow that standard.¹⁵⁶ The court explained that "[a]n egregious conflict may weigh more heavily . . . than a minor, technical conflict might."¹⁵⁷ This is quite similar to a "sliding scale" standard in terms of the lessened deference afforded the administrator.¹⁵⁸ Notably, at least one district court within the Ninth Circuit has tried to turn to another circuit, using the "sliding scale" for guidance in weighing the conflict of interest.¹⁵⁹ Had the Ninth Circuit recognized the "sliding scale" approach and joined the majority of circuits in this standard, district courts would benefit from the experience of the other circuits that have been applying the "sliding scale" for many years.¹⁶⁰

Moreover, the *Abatie* Court faced the same problem that the Tenth Circuit addressed in its *Fought* decision: "[H]ow much less deference ought a reviewing court afford?"¹⁶¹ The factors listed by the Ninth Circuit were meant to guide a district court in adjusting the level of deference given a conflicted administrator,¹⁶² yet *Abatie* seems to mirror *Firestone's* ambiguousness as to how to factor in a conflict of interest. *Firestone* led to a split among the circuits, and *Abatie* may do the same among district courts in the Ninth Circuit.¹⁶³ The Tenth Circuit's

¹⁵⁴ See Feinberg, *supra* note 28, at 9; see also Feinberg Interview, *supra* note 139.

¹⁵⁵ See *supra* notes 141-144 and accompanying text.

¹⁵⁶ See Feinberg, *supra* note 28, at 10; But see Robert N. Eccles & David E. Gordon, *Rehearings*, 14 No. 5 ERISA LITIG. REP. (NEWSL) 1, 2 (2006) (arguing against Mr. Feinberg's premise that the all the circuits are coming around to the "sliding scale"). Eccles and Gordon believe the circuits are still struggling and thus this is a topic for certiorari to the Supreme Court. *Id.*

¹⁵⁷ *Abatie*, 458 F.3d at 968.

¹⁵⁸ See *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233 (4th Cir. 1997); *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 379 (3d Cir. 2000); *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998).

¹⁵⁹ See *Wallace v. Intel Corp.*, 2006 WL 2709839, *7 (D. Ariz. 2006) (stating that the "[c]ourt would be inclined to follow [the] approach" of the Third Circuit because the Third Circuit applies a heightened "abuse of discretion" review). The district court did not use the Third Circuit's reasoning because the court was unsure how the Ninth Circuit would rule on the particular issue of the case. *Id.*

¹⁶⁰ Consensus among ERISA practitioners is that the Ninth Circuit joined the "sliding scale". See, e.g., Feinberg, *supra* note 28, at 10. See also Interview with Joye Blanscett, Esq., Bullivant, Houser Bailey P.C., in San Francisco, Cal. (November 7, 2006) (on file with author).

¹⁶¹ *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1004 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005) (emphasis in original).

¹⁶² See *Abatie*, 458 F.3d at 968-69 (listing the factors for a district court to consider).

¹⁶³ See *supra* notes 53-116 and 161-62 and accompanying text.

approach, on the other hand, gives clearer guidance to district courts in making this determination because it delineates between “inherent” and “standard” conflicts of interest.¹⁶⁴

B. CLEARER GUIDANCE TO DISTRICT COURTS: INCORPORATING THE TENTH CIRCUIT’S *FOUGHT* STANDARD

By adopting the Tenth Circuit’s analytical framework for conflict-of-interest cases, the Ninth Circuit could clarify the “skepticism” it instructs district courts to have of a conflicted administrator.¹⁶⁵ First, the Tenth Circuit’s framework combines the flexibility of the “sliding scale” approach with a burden-shifting scheme designed to protect plaintiffs from arbitrary and capricious decisions by the administrator.¹⁶⁶ Second, a clearer standard may help guide conflicted administrators in making benefits decisions, and may help make benefits decisions more predictable for plaintiffs, and reduce litigation.¹⁶⁷ Third, the Tenth Circuit’s framework is a feasible extension of the Ninth Circuit’s current standard that addresses the concerns the latter court has expressed.¹⁶⁸ Identification of the type of conflict of interest a fiduciary has, as delineated by the Tenth Circuit in *Fought*, will provide greater predictability to administrators, plaintiffs, and courts.

The strength of the Tenth Circuit’s framework is that it combines the flexibility of the “sliding scale” approach with the proper shifting of the burden to the administrator to justify the denial of benefits.¹⁶⁹ The “sliding scale” follows most literally from Supreme Court precedent in *Firestone*, and only limits a district court’s review of an administrator’s decision by the degree of the conflict of interest.¹⁷⁰ The burden-shifting scheme is the standard most protective of ERISA participants and beneficiaries only if the plaintiff can shift the burden.¹⁷¹ By combining

¹⁶⁴ See *Fought*, 379 F.3d at 1005 (stating the new standard “(1) adheres to ERISA common law, (2) promotes sound public policy, and (3) provides clearer guidance to lower courts, lawyers, and potential litigants.”).

¹⁶⁵ See *Id.* at 1005-06. But see Bogan & Fu, *supra* note 9, at 643 (arguing that *Fought* was a “laudable attempt to clarify this . . . area of the law, however, the *Fought* opinion raises more questions than it answers.”).

¹⁶⁶ See *infra* notes 169-72 and accompanying text.

¹⁶⁷ See *infra* notes 173-79 and accompanying text.

¹⁶⁸ See *infra* notes 180-86 and accompanying text.

¹⁶⁹ See *Fought*, 379 F.3d at 1004-05; see also Muir, *supra* note 46, at 420 (highlighting that “[t]he existence and importance of conflicts of interest in determining standards of review highlights the reason for distinguishing among broad categories of conflicts.”).

¹⁷⁰ See Muir, *supra* note 46, at 415, 417.

¹⁷¹ See *id.* at 418.

584 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

both approaches, the Tenth Circuit's framework avoids the unpredictability of the "sliding scale" standard and the nearly impossible burden placed on plaintiffs under the "presumptively void" standard.¹⁷²

In addition, the burden-shifting scheme creates a more predictable system.¹⁷³ Administrators need to know in advance the standard against which conduct will be measured so that they can predict the weight a reviewing court will attach to a conflict as well as the way in which the reviewer will modify the "arbitrary and capricious" standard.¹⁷⁴ On one hand, an overly cautious administrator would more likely interpret plan terms in favor of beneficiaries, which could negatively affect plan rates.¹⁷⁵ On the other hand, an administrator who underestimates the stringency of review might construe plans in favor of the sponsor, and thereby violate the basic goal of ERISA in providing beneficiaries with their expected benefits.¹⁷⁶

To solve this problem, the Tenth Circuit adopted Professor Kathryn Kennedy's recommendations for applying a burden-shifting framework to an administrator acting under a conflict of interest.¹⁷⁷ Professor Kennedy justified this approach by saying the following:

This puts the plan administrator on notice that its decisions will be judged for their reasonableness and provides the courts with a record that must show that the conflict of interest did not taint such decision. Such a result is still consistent with the *Firestone* admonition to consider as a factor any conflict of interest, but provides more direction for the courts in the application of the reasonableness standard.¹⁷⁸

¹⁷² See *id.* at 423-24 (concluding that the flexibility of the "sliding scale" inevitably results in unpredictability); see also *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 969 (9th Cir. 2006) (en banc) (finding the "unreasonable" burden placed on plaintiffs under the "presumptively void" standard was contrary to Supreme Court precedent).

¹⁷³ See Kennedy, *supra* note 23, at 1174.

¹⁷⁴ See Muir, *supra* note 46, at 417.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 417. In addition, denying all close claims in favor of the plan sponsor would be inequitable and an abuse of power. *Id.* at 417-18.

¹⁷⁷ See *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1005-06 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005) (citing and adopting the procedure for decreasing deference in inherent conflict of interest cases proposed by Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1173-74 (2001)).

¹⁷⁸ See Kennedy, *supra* note 23, at 1174. *Contra* Muir, *supra* note 46, at 419-20. Muir criticizes this approach because it

combines a harsh gateway analysis with the ambiguity of the sliding scale "standard." Under this formulation, a participant who simply alleges a lack of impartiality will not avoid application of the arbitrary and capricious standard of review. Instead, as is usual in the multi-step approach, the

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 585

Thus, a burden-shifting scheme proactively informs administrators rather than merely reactively reviewing their decisions.¹⁷⁹

Moreover, incorporation of the burden-shifting framework is a feasible addition to the Ninth Circuit's current *Abatie* analysis. First, the court has articulated its skepticism of conflicted fiduciaries and has recommended that an administrator demonstrate that the conflict of interest did not play a role in the decision-making process.¹⁸⁰ Rather than placing a formal burden on defendant administrators, however, the Ninth Circuit left it up to administrators to voluntarily give the information about the conflict of interest.¹⁸¹ Instead, the Tenth Circuit's burden-shifting framework provides guidelines to an independent judiciary to evaluate the extent of the conflict, which protects plaintiffs from arbitrary and capricious decisions by administrators.¹⁸²

Second, the Ninth Circuit sought to avoid a "smoking gun" requirement for plaintiffs to prevail and highlighted the importance of having a system in which cases are decided according to their individual facts and circumstances yet without placing an extra burden on plaintiffs.¹⁸³ Applying the Tenth Circuit approach, each category of conflict of interest incorporates the conflict as a factor and provides additional guidelines to a district court in its analysis.¹⁸⁴ A company aware of which conflict of interest it operates under will be encouraged to be as open as possible about its decision-making process and give transparency to its operation.¹⁸⁵ A plaintiff will also have greater clarity regarding his or her chances of success in district court.¹⁸⁶

The current Ninth Circuit *Abatie* standard leaves much to the district

claimant must present evidence both of a conflict and that the conflict caused the fiduciary to seriously breach a fiduciary obligation. . . . [B]y meeting this high hurdle all the claimant has achieved is to have the fiduciary's decision reviewed according to a sliding scale adjustment to the arbitrary and capricious standard.

Id. at 419-20 (citations omitted).

¹⁷⁹ See Kennedy, *supra* note 23, at 1174.

¹⁸⁰ See *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 968-69 & n.7 (9th Cir. 2006) (en banc) (directing the district court to adjust its "level of skepticism" according to the facts and circumstances in the specific case); see also Feinberg, *supra* note 28, at 9 (stating the "the [Ninth Circuit] is skeptical of an insurance company's ability to act in a true fiduciary capacity because of its inherent financial conflict of interest.").

¹⁸¹ See *Abatie*, 458 F.3d at 969 & n.7.

¹⁸² See *Fought*, 379 F.3d at 1005-07.

¹⁸³ See *Abatie*, 458 F.3d at 969.

¹⁸⁴ See *Fought*, 379 F.3d at 1005-07.

¹⁸⁵ Cf. DiMugno, *supra* note 122, at 543 (predicting that under *Abatie* "insurers will proffer evidence of their history of using only neutral, independent medical examiners, consistently interpreting plan provisions, and the absence of financial incentives for employees to deny claims.").

¹⁸⁶ See *Fought*, 379 F.3d at 1005.

586 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 37]

judge's discretion, which was the problem the Tenth Circuit sought to remedy in *Fought*.¹⁸⁷ The Tenth Circuit's framework provides more predictability in conflict-of-interest cases and would be a feasible addition to the Ninth Circuit's current standard that addresses the concerns already articulated by the court.¹⁸⁸ Therefore, the Ninth Circuit should adopt the *Fought* model and give more guidance to district courts reviewing an administrator's denials of benefits.¹⁸⁹

V. CONCLUSION

The federal government created ERISA in part to allow beneficiaries who have been denied benefits an avenue of appeal in the federal court system.¹⁹⁰ Additionally, ERISA was meant to provide streamlined processes to keep costs down and plans affordable for employers.¹⁹¹ The Supreme Court was clear in its rule that administrators could be given abuse-of-discretion review if they were granted discretion to interpret the terms of a benefits plan.¹⁹² The *Fought* "sliding scale" standard, in conjunction with the proposed categorizations of conflicted administrators, meets these goals and conforms to Supreme Court precedent.¹⁹³

Categorizing conflicts of interest gives guidance to district courts for weighing the effect of a conflict against the discretion granted to a plan administrator.¹⁹⁴ This guidance will lead to more consistent and predictable rulings and provide clarity for all parties.¹⁹⁵ The number of standards currently in use in the circuits demonstrates that clearer guidelines are needed to improve predictability in the system and fulfill the goals of ERISA.¹⁹⁶

¹⁸⁷ See *id.* at 1004-05.

¹⁸⁸ See *supra* notes 168-85 and accompanying text.

¹⁸⁹ See Muir, *supra* note 46, at 420 (stating "[t]he existence and importance of conflicts of interest in determining standards of review highlights the reason for distinguishing among broad categories of conflicts.").

¹⁹⁰ Employee Retirement Income Security Act of 1974, H.R. REP. NO. 93-533 (1973), 1974 U.S.C.C.A.N. (88 Stat. 832) 4639, 4664).

¹⁹¹ See *id.*; see also Abramov, *supra* note 17, at 1381-82.

¹⁹² See *Firestone*, 489 U.S. at 115; see also *Abatie v. Alta Health & Life Inc. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (en banc).

¹⁹³ See Beatty, *supra* note 60, at 745-46 (stating that "the 'sliding scale' approach more accurately reflects the standard established in *Firestone*." (citing *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1267 (8th Cir. 1997)).

¹⁹⁴ See *supra* notes 173-79 and accompanying text.

¹⁹⁵ See *supra* notes 165-89 and accompanying text.

¹⁹⁶ The Supreme Court has yet to revisit the issues of conflicted fiduciaries since its *Firestone* decision. See Eccles and Gordon, *supra* note 156, at 2. *Fought*, in which the Tenth Circuit modified

2007] *ERISA OPPORTUNITY IN THE NINTH CIRCUIT* 587

Abatie's “abuse of discretion review, tempered by skepticism”¹⁹⁷ is unfortunately a new and unpredictable standard. *Firestone* led to a split among the circuits and *Abatie* may do the same within the Ninth Circuit.¹⁹⁸ Directing district courts to temper their review with “skepticism” is no more instructive than the Supreme Court directing lower courts to “factor” in a conflict of interest.¹⁹⁹ Applying the Tenth Circuit’s *Fought* framework will provide district courts with clearer guidelines for weighing conflicts of interest in denial-of-benefits cases.

JILL V. CARTWRIGHT*

its “sliding scale” standard, was denied certiorari. See *UNUM Life Ins. Co. of Am. v. Fought*, 544 U.S. 1026 (2005). Recently, the Supreme Court deferred to the *Abatie* decision and granted cert on a case involving a conflicted fiduciary. See *Hawkins-Dean v. Metro. Life Ins. Co.*, 161 Fed. Appx. 684 (9th Cir. 2006), cert. granted, 127 S. Ct. 659 (U.S. Nov. 27, 2006) (No. 05-1424). The Court vacated the judgment and remanded to case to the “Ninth Circuit for further consideration in light of *Abatie*.” *Id.* Whether the issue should be certified by the Supreme Court is beyond the scope of this paper.

¹⁹⁷ See *Abatie*, 458 F.3d at 959.

¹⁹⁸ See *supra* notes 53-116 and 161-63 and accompanying text.

¹⁹⁹ See *Abatie*, 458 F.2d at 959, 959; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

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