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## ERISA FOR DUMMIES: DOES *METLIFE* SIMPLIFY AND CLARIFY?

Rosanne Marie Cross\*

### INTRODUCTION

After reviewing the Employee Retirement Income Security Act (ERISA), one might dream of a *Dummies* reference<sup>1</sup> with clear guidelines to simplify application of this befuddling set of rules. Despite nearly twenty years of requests for simplification and clarification,<sup>2</sup> Justice Scalia described the recent Court case *Metropolitan Life Insurance Co. v. Glenn* as “painfully opaque, despite its promise of elucidation,” failing to simplify or clarify ERISA denial of benefits appeals involving an insurer caught in a conflict of interest.<sup>3</sup>

*Metropolitan Life Insurance Co. v. Glenn* was not the Supreme Court’s first encounter with an insurer’s conflict of interest created by ERISA. In *Firestone Tire & Rubber Co. v. Bruch*, the Court recognized the possibility of a conflict of interest created by an insurer acting as both the administrator and the payer of a benefit plan.<sup>4</sup> According to *Firestone*, circuit courts should apply a

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1. One can find a *Dummies* resource for almost any topic. *Dummies.com*, Making Everything Easier, <http://dummies.com> (last visited Apr. 12, 2010).

2. See Reply Brief for Petitioners at 1, *Metro. Life Ins. Co. v. Glenn* (*Metlife*), 128 S. Ct. 2343 (2008) (No. 06-923), 2007 WL 858651 (stating that the conflict amongst the circuits is “wide, deep and mature”). See generally *Court Stays the Course on ERISA*, HEALTH CARE COLLECTOR, Sept. 2008, at 6, adapted from Foley & Lardner LLP, *Supreme Court Stays the ERISA Course in MetLife v. Glenn*, LEGAL NEWS ALERT, July 15, 2008, <http://www.foley.com/abc.aspx?Publication=5169> [hereinafter *Court Stays ERISA Course*] (emphasizing the “long-awaited opinion in *Metropolitan Life Ins. v. Glenn*”).

3. *Metlife*, 128 S. Ct. at 2358 (Scalia, J., dissenting).

4. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). A fiduciary’s conflict of interest “is a common feature of ERISA plans.” *Metlife*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in judgment). The *Metlife* “majority acknowledges that the ‘lion’s share of ERISA plan claims denials’ are made by administrators that both evaluate and pay claims.” *Id.* (quoting majority opinion).

deferential standard of review instead of de novo review when a “benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”<sup>5</sup> However, *Firestone* failed to specify a standard of review for cases involving a fiduciary conflict of interest by stating only that “[the] conflict must be weighed as a ‘facto[r]’ in determining whether there is an abuse of discretion.”<sup>6</sup> Unsurprisingly, the federal circuit courts have struggled to adjust<sup>7</sup> the seemingly straightforward deferential standard of review to denial of benefits claims involving a conflict of interest and a grant of discretionary authority.<sup>8</sup> Since the 1989 *Firestone* decision,<sup>9</sup> the circuit courts have established three adjustments<sup>10</sup> to the deferential standard of review dictated by *Firestone* in cases involving a fiduciary’s possible or actual<sup>11</sup> conflict of interest and a grant of discretionary authority.<sup>12</sup>

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5. *Firestone*, 489 U.S. at 115. After *Firestone*, nearly every ERISA plan was amended to “grant full discretion to determine eligibility and/or to interpret plan provisions.” Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1131 (2001). Assuming such language was present in the plan, the reviewing court should affirm the administrator’s decision unless the decision was “arbitrary, capricious, or made in bad faith,” a highly deferential standard of review. *Id.* The confusion surrounding *Firestone* and *Metlife* arises from a plan that grants discretionary authority and also involves an administrator conflict of interest, thus placing the plan under a highly deferential standard of review. *See generally Metlife*, 128 S. Ct. 2343. Uncomfortable with granting deference to an administrator who is operating under a conflict of interest, the courts have adjusted the deferential standard. *See discussion infra* Part I.

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

7. Kennedy, *supra* note 5, at 1146 (“As a result of Justice O’Connor’s admonishment in *Firestone* to consider conflict of interest as a factor in the application of a more deferential trust law type of standard of review, all the circuits have attempted to adjust or modify ERISA’s deferential standard of review in conflict of interest contexts.”).

8. *See generally* Ann K. Wooster, Annotation, *Judicial Review of Denial of Disability Benefits Under Employee Benefit Plan Governed by Employee Retirement Income Security Act (ERISA)*, 29 U.S.C.A. § 1132(a)(1)(B)—*Fiduciary Conflict of Interest—Post-Firestone Cases*, 18 A.L.R. FED. 2D 607 (2006) [hereinafter *Fiduciary Conflict of Interest—Post-Firestone Cases*] (elaborating on the circuits’ standards of review and decisions applying the consideration of a fiduciary’s conflict of interest).

9. *Id.*

10. Kennedy, *supra* note 5, at 1153–62 (noting three adjustments to the standard of review).

11. Although the Court established that conflict of interest is a factor in determining whether there was an abuse of discretion, the Court failed to specify if it was necessary that the conflict was actual or if it was sufficient that the conflict was possible. *Firestone*, 489 U.S. at 115. The Court also declined to explain how the circuits must determine the existence of a conflict of interest. *Id.*

12. The confusion about the number of adjustments made to the *Firestone* standard by the circuits differs even for those compiling in secondary sources the options that circuits may take when faced with a conflict of interest. *See generally* Kevin Walker Beatty, Commentary, *A Decade of Confusion: The Standard of Review for ERISA Benefit Denial Claims as Established by Firestone*, 51 ALA. L. REV. 733, 744–47 (2000) (noting only two adjustments to the standard of review, the “sliding scale” and the

Resolution of the circuit split has long been desired.<sup>13</sup> This Note ultimately concludes that *Metlife*, at its best, did not provide resolution to the circuit split and, at its worst, aggravated the already apparent division amongst the circuit courts.<sup>14</sup> Part I discusses the three interpretations of the *Firestone* standard adopted by the circuit courts.<sup>15</sup> Also addressed will be what *Metlife* says and, more importantly, does not say by declining to deliver a “detailed set of instructions”<sup>16</sup> in an effort to clarify the confusion.<sup>17</sup> Part II then analyzes whether the Court’s holding in *Metlife* invalidates any of those adjustments.<sup>18</sup> Finally, Part III concludes with the recommendation that the circuit courts go beyond the application of the *Metlife* decision by relying on the principles of trust law, even to the extent that they are not specifically incorporated into the *Metlife* holding, in an effort to save time, preserve judicial resources, and establish clarification for ERISA claimants and administrators.<sup>19</sup>

## I. BACKGROUND

### A. ERISA: Finding Protection for the Employee Under Federal Law

With ERISA,<sup>20</sup> Congress intended to protect beneficiaries of employer-provided insurance policies by implementing standards of

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“presumptively void” tests); *Fiduciary Conflict of Interest—Post-Firestone Cases*, *supra* note 8, at 607 (2006) (dividing the adjustment of the *Firestone* standard in conflict of interest cases into six categories). This Note addresses the three general adjustments to the *Firestone* standard noted in Kennedy, *supra* note 5, at 1153–62.

13. Brief for the United States as Amicus Curiae at 12, *Metro. Life Ins. Co. v. Glenn (Metlife)*, 128 S. Ct. 2343 (2008) (No. 06-923), 2007 WL 4613628 (stating that the question of how a conflict of interest affects judicial review of ERISA denial of benefits claims is one that has “bedeviled the federal courts” and has “salience in every circuit”). One commentator predicted eight years before *Metlife* that the confusion would lead to substantial change. Beatty, *supra* note 12, at 750–51 (predicting that the *Firestone* standard “is likely to be amended in some fashion, if not totally reworked altogether” because of the “confusion among the circuit courts” and “the perception that the standard chills uniformity of jurisprudence, one of ERISA’s primary goals”).

14. See discussion *infra* Part III.

15. See discussion *infra* Part I.A.

16. *Metlife*, 128 S. Ct. at 2352.

17. See discussion *infra* Part I.

18. See discussion *infra* Part II.

19. See discussion *infra* Part III.

20. 29 U.S.C. §§ 1001–1461 (2000 & Supp. V 2005).

disclosure, reporting, and conduct for fiduciaries,<sup>21</sup> and by creating predictable standards to encourage employers to provide benefit plans to their employees.<sup>22</sup> ERISA allows a “person denied benefits under an employee benefit plan to challenge that denial in federal court.”<sup>23</sup> Despite congressional plans to protect the employee under federal law,<sup>24</sup> the text of ERISA did not account for the creation of a conflict of interest when an insurance company exercises the dual role of determining the employee’s eligibility for benefits and paying the employee’s benefits.<sup>25</sup> Because of this omission, Congress unintentionally created a loophole through which an insurer could deny benefits and avoid payment, whether or not the employee was eligible for benefits.

In *Firestone*, the Court established that “generally . . . courts are to review denials of benefits under a de novo standard of review, unless the plan grants discretionary authority to the plan administrator to make decisions concerning eligibility and benefits,” in which case a deferential standard of review should be employed.<sup>26</sup> The *Firestone* Court stated that a fiduciary’s conflict of interest “must be weighed as a ‘facto[r]’ in determining whether there is an abuse of discretion.”<sup>27</sup> Following *Firestone*, the circuit courts developed three different approaches in applying the deferential standard of review to cases where a plan grants discretionary authority to account for a

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21. *Id.* § 1001(b).

22. *Id.* § 1001(a).

23. *Metro. Life Ins. Co. v. Glenn (Metlife)*, 128 S. Ct. 2343, 2346 (2008) (citing 29 U.S.C. § 1132(a)(1)(B) (Supp. V 2005)).

24. 29 U.S.C. § 1001(b) (2000).

25. Ann K. Wooster, Annotation, *Judicial Review of Denial of Disability Benefits Under Employee Benefit Plan Governed by Employee Retirement Income Security Act (ERISA)*, 29 U.S.C.A. § 1132(a)(1)(B)—*Selection and Scope of Particular Standards of Review—Post-Firestone Cases*, 12 A.L.R. FED. 2D 1, § 2 (2006) [hereinafter *Selection and Scope of Particular Standards of Review*] (“Although a cause of action for the recovery of disability benefits under employee welfare benefit plans is provided for in 29 U.S.C.A. § 1132(a)(1)(B), ERISA is silent as to any of the elements of judicial review of the denial of such benefits.”).

26. *Id.* at introductory cmt. (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

27. *Firestone*, 489 U.S. at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)). Although the circuits have treated the conflict of interest factor as part of *Firestone*’s holding, Justice Scalia notes in his *Metlife* dissent that the statement was merely dictum, which the *Metlife* majority has taken and “built[t] a castle upon.” *Metlife*, 128 S. Ct. at 2357 (Scalia, J., dissenting).

fiduciary's conflict of interest: the de novo review adjustment, the sliding scale adjustment, and the presumptively void adjustment.<sup>28</sup>

### 1. *De Novo Review Adjustment*

The Second Circuit, unlike every other circuit, applies a two-step test instead of the deferential *Firestone* standard once a claimant alleges a conflict of interest.<sup>29</sup> First, the claimant must provide “evidence that a potential conflict of interest exists,”<sup>30</sup> and second, the claimant must prove that the conflict of interest actually affected the fiduciary's decision.<sup>31</sup> Once “the court determines the administrator's decision was affected by the conflict of interest,”<sup>32</sup> the court exercises de novo review.<sup>33</sup> Under this approach, the reviewing court “essentially stands in the shoes of the ERISA fiduciary/administrator” by substituting its judgment for that of the administrator; accordingly, the court must “construe the plan primarily based upon the plan language.”<sup>34</sup> Although the Second Circuit questioned this approach in 1998 as possibly inconsistent with *Firestone*,<sup>35</sup> the circuit continued to apply this approach until the Supreme Court granted certiorari in *Metlife*.<sup>36</sup>

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28. For an extended explanation of the three adjustments to the ERISA deferential standard of review and the case law which developed each standard, a topic which is beyond the scope of this note, see Kennedy, *supra* note 5, at 1153–62. For an explanation of factors affecting the selection of a standard of review, see *Selection and Scope of Particular Standards of Review*, *supra* note 25.

29. Kennedy, *supra* note 5, at 1153–54 (citing *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1255–56 (2d Cir. 1996)) (explaining the development of the two-step test through the Second Circuit case law).

30. Brief for the United States as Amicus Curiae, *supra* note 13, at 10.

31. *Id.*

32. Kennedy, *supra* note 5, at 1154.

33. Brief for the United States as Amicus Curiae, *supra* note 13, at 10.

34. *Selection and Scope of Particular Standards of Review*, *supra* note 25, § 23.

35. Kennedy, *supra* note 5, at 1154 (citing *DeFelice v. Am. Int'l Life Assurance Co.*, 112 F.3d 61, 66 (2d Cir. 1997)).

36. See Brief for the United States as Amicus Curiae, *supra* note 13, at 10. Following the *Metlife* decision, the Second Circuit has acknowledged that the two-step test included in *Sullivan v. LTV Aerospace & Defense Co.* “is inconsistent with the Supreme Court's instructions in *Glenn* and [has] abandon[ed] it.” *McCauley v. First UNUM Life Ins. Co.*, 551 F.3d 126, 128 (2d Cir. 2008).

## 2. *The Sliding Scale Adjustment*

The majority of the circuit courts that have weighed in on this issue apply an abuse-of-discretion sliding scale standard. That is, once a claimant has produced evidence of an actual or potential conflict, the standard “allows the courts to lessen and to adjust the deference afforded to the plan administrator’s decision.”<sup>37</sup> Although the First, Seventh, and Eighth Circuits do not “view an administrator’s dual roles alone as a conflict of interest, in circumstances where they do identify a conflict of interest,” they essentially apply a sliding scale standard by increasing the “degree of scrutiny of a benefit denial.”<sup>38</sup> In the interest of fairness, those circuit courts review the administrator’s decision on a standard of reasonableness<sup>39</sup> and adjust the level of deference given to the conflicted fiduciary’s decision in proportion to the severity of the conflict.<sup>40</sup> Because it weighs the conflict of interest with other factors surrounding the denial of benefits, the sliding scale standard most closely mirrors the directions given in *Firestone*.<sup>41</sup>

## 3. *The Presumptively Void Adjustment*

In contrast, the Tenth and Eleventh Circuits apply a presumptively void standard, also known as “burden shifting,”<sup>42</sup> when reviewing benefit claim denials where a conflict of interest is alleged. Once a conflict has been alleged or presumed, the presumptively void adjustment shifts the burden to the administrator to prove that “its

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37. Kennedy, *supra* note 5, at 1155.

38. Brief for the United States as Amicus Curiae, *supra* note 13, at 9.

39. *Id.*

40. Beatty, *supra* note 12, at 744–45 (“The Fourth, Fifth, Seventh and Tenth Circuits have adopted the ‘sliding scale’ approach, under which the reviewing court always applies the abuse of discretion standard but decreases the amount of discretion given to a conflicted administrator’s decision in proportion to the gravity of the conflict.”).

41. *Id.* at 746 n.92 (citing *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1267 (8th Cir. 1997)) (“It is difficult, if not impossible, to read this language from *Firestone Tire* contrary to the ‘sliding scale’ approach.”).

42. Brief for the United States as Amicus Curiae, *supra* note 13, at 10. There has long been confusion about what test or standard each circuit applies. According to certain authors, the Tenth Circuit applies the sliding scale approach. *See supra* note 40.

interpretation [of the plan] . . . was not tainted by self-interest.”<sup>43</sup> The Tenth Circuit presumes that the conflicted fiduciary’s decision is void unless the “administrator [has] demonstrate[d] 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.”<sup>44</sup> Similarly, the Eleventh Circuit first determines, *de novo*, if the administrator’s decision was “wrong,” then “the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest.”<sup>45</sup> Arguably, the presumptively void standard directly conflicts with the *Firestone* holding;<sup>46</sup> nevertheless, the Ninth, Tenth, and Eleventh Circuits continued to apply the presumptively void standard until *Metlife*.<sup>47</sup>

#### *B. Metlife v. Glenn: What It Says and What It Doesn’t Say*

The Court first determined in *Metlife* that the dual functions of an entity—administration of a benefit plan (determining the employee’s eligibility for benefits) and payment of those benefits—create a conflict of interest.<sup>48</sup> According to the majority, circuit courts should consider this conflict as a factor in reviewing the denial of benefits and should weigh this factor according to the circumstances of the particular case.<sup>49</sup> Justice Breyer, writing for the majority, addressed the circuit split by stating that *Firestone*’s explanation “that a conflict should ‘be weighed as a factor in determining whether there is an abuse of discretion’”<sup>50</sup> does not imply “a change in the *standard* of

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43. Kennedy, *supra* note 5, at 1159 (citing *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1566 (11th Cir. 1990)).

44. Brief for the United States as Amicus Curiae, *supra* note 13, at 10 (quoting *Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004)).

45. *Id.* (quoting *Brown*, 898 F.2d at 1566).

46. Beatty, *supra* note 12, at 746 (citing *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1267 (8th Cir. 1997) (noting that adoption of the *de novo* standard for plans that give discretion to the administrator is directly contrary to Court precedent established in *Firestone*)).

47. See Brief for the United States as Amicus Curiae, *supra* note 13, at 10; Kennedy, *supra* note 5, at 1160.

48. *Metro. Life Ins. Co. v. Glenn (Metlife)*, 128 S. Ct. 2343, 2346 (2008) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

49. *Id.*

50. *Id.* at 2350 (quoting *Firestone*, 489 U.S. at 115).



review, say, from deferential to *de novo* review.”<sup>51</sup> However, the majority also failed to give any boundaries to the consideration of the conflict of interest,<sup>52</sup> declining to give the circuit courts “a detailed set of instructions.”<sup>53</sup>

Despite requests for clarification on the circuit split,<sup>54</sup> the majority did not limit the consideration of a conflict of interest in the *Firestone* test to conflicts that actually affected the benefit denial.<sup>55</sup> This allowed the circuits to continue weighing actual and inherent conflicts in denial of benefit reviews.<sup>56</sup> The majority also failed to clarify how the reviewing court should treat the existence of a conflict, inviting continued “substitution of judicial discretion for the discretion of the plan administrator.”<sup>57</sup> Justice Scalia in his dissent rejected the majority’s “totality-of-the-circumstances (so-called) ‘test,’ in which the existence of a conflict is to be put into the mix and given some (unspecified) ‘weight,’” because it ultimately “makes each case unique, and hence the outcome of each case unpredictable.”<sup>58</sup>

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51. *Id.*

52. *Id.* at 2355 (Roberts, C.J., concurring in part and concurring in judgment) (“The majority’s application of its approach [to the consideration of a conflict as a factor in benefit denial review] confirms its overbroad reach and indeterminate nature.”).

53. *Id.* at 2352.

54. Brief for the United States as Amicus Curiae, *supra* note 13, at 12 (explaining that *Mellife* is a “suitable vehicle to address both” the question of “whether a dual-role administrator has a conflict of interest, [and] also how a conflict of interest is to be weighed on judicial review of a benefit denial under a plan that grants the administrator discretionary authority to interpret plan terms or decide benefit claims”).

55. *Mellife*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in judgment) (“Judicial review under the majority’s opinion is less constrained, because courts can look to the bare presence of a conflict as authorizing more exacting scrutiny.”).

56. *Id.* (describing the majority opinion as “so imprecise about how the existence of a conflict should be treated in a reviewing court’s analysis”); *see also id.* at 2357 (Scalia, J., dissenting) (explaining that according to the law of trusts, which control ERISA denial of benefits claims, “a fiduciary with a conflict does not abuse its discretion unless the conflict *actually* and *improperly* motivates the decision,” which the majority does not address and of which there is “no evidence”).

57. *Id.* at 2353 (Roberts, C.J., concurring in part and concurring in judgment).

58. *Id.* at 2357 (Scalia, J., dissenting); *see also id.* at 2354 (Roberts, C.J., concurring in part and concurring in judgment) (describing the majority test as a “kitchen-sink approach”).

### C. More Questions Than Answers: Life After Metlife

In *Metlife*, the Court left “the law more uncertain, more unpredictable than it found it,”<sup>59</sup> thus evading the important criteria of “certainty and predictability”<sup>60</sup> under ERISA and leaving employers to ponder what it means that the conflict of interest will be “one of the ‘impalpable factors involved in judicial review’ of benefits decisions.”<sup>61</sup> The circuit courts will likely wrestle with this “kitchen-sink,” totality-of-the-circumstances factor test established in *Metlife* for years to come.<sup>62</sup> According to Justice Scalia, the uncertainty and unpredictability of the *Metlife* majority test leaves the administrator of the benefit plan, “[who] has been explicitly given discretion by the creator of the plan,” in an unreasonable position.<sup>63</sup> Not only does the *Metlife* decision leave the administrator in a precarious position, the decision also leaves the beneficiary in a similar position of uncertainty.<sup>64</sup> Ultimately, the *Metlife* decision leaves the circuit courts with more questions than answers by establishing conflict of interest as a factor for consideration, but failing to rectify the split amongst the circuit courts.<sup>65</sup> One discovers the possible pitfalls the circuit courts may encounter when applying *Metlife*<sup>66</sup> by exploring the validity of the adjustments to the deferential *Firestone* standard of review, without expanding into the factors that lead a circuit to a particular standard of review<sup>67</sup> or the history of how the circuit courts have established such adjustments.<sup>68</sup>

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59. *Id.* at 2354 (Roberts, C.J., concurring in part and concurring in judgment).

60. *Id.*

61. *Metlife*, 128 S. Ct. at 2354 (citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (noting “ERISA’s policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct”)).

62. *Court Stays ERISA Course*, *supra* note 2, at 7.

63. *Metlife*, 128 S. Ct. at 2357 (Scalia, J., dissenting).

64. *See Court Stays ERISA Course*, *supra* note 2, at 7 (explaining that beneficiaries hoped for a *de novo* standard of review before *Metlife*, an option made invalid by the opinion); *see also* Beatty, *supra* note 12, at 751 (noting that *Firestone* presents a standard, “which essentially allows plan administrators to police themselves simply by supplying the proper language, is inherently unfair to plan participants” and that a “standard that allows plan administrators to control the level of deference to be afforded their decisions does not appear to comply with the intent of the statute”).

65. *See generally Metlife*, 128 S. Ct. 2343.

66. *See* discussion *infra* Part III.

67. *See generally Fiduciary Conflict of Interest—Post-Firestone Cases*, *supra* note 8.

68. *See generally Kennedy*, *supra* note 5.

## II. ANALYSIS

As unpredictable and uncertain<sup>69</sup> as *Metlife* may seem, circuit courts will eventually be forced to decipher the majority's test.<sup>70</sup> Exploring the decision's effect on the current adjustments to the *Firestone* standard taken by the circuit courts<sup>71</sup> is a logical starting point. The adjustments taken to the *Firestone* standard have developed for nearly twenty years;<sup>72</sup> the alterations of the adjustments following *Metlife* are certain to prove just as time consuming.<sup>73</sup>

A. *Metlife and the De Novo Review Adjustment*

*Metlife* may have invalidated the Second Circuit's two-step process in which the claimant establishes that a potential conflict of interest exists and then proves that the conflict of interest actually affected the decision.<sup>74</sup> Although *Metlife* establishes that a fiduciary acting as both the administrator and the payer of the plan is acting in a conflict of interest,<sup>75</sup> the decision does not specify whether the conflict must have actually affected the decision or only possibly affected the decision.<sup>76</sup> Assuming, *arguendo*, that the plan provides "the administrator or fiduciary discretionary authority to determine eligibility for benefits,"<sup>77</sup> the Second Circuit only adjusts the

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69. *Metlife*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in judgment) ("Certainty and predictability are important criteria under ERISA, and employers considering whether to establish ERISA plans can have no notion of what it means to say that a standard feature of such plans will be one of the 'impalpable factors involved in judicial review' of benefits decisions.").

70. *Id.* at 2353.

71. See discussion *supra* Part II (explaining the adjustments to the *Firestone* standard made by circuit courts prior to *Metlife*).

72. *Firestone* was argued in front of the Court on November 30, 1988 and decided on February 21, 1989, nearly twenty years prior to the writing of this Note. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

73. See generally *Metlife*, 128 S. Ct. at 2352–56 (Roberts, C.J., concurring in part and concurring in judgment).

74. Brief for the United States as Amicus Curiae, *supra* note 13, at 10 (citing *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 92 (2d Cir. 2000)); see discussion *supra* Part II.A.1.

75. *Metlife*, 128 S. Ct. at 2346 (citing *Firestone*, 489 U.S. at 115).

76. *Id.* at 2353–54 (Roberts, C.J., concurring in part and concurring in judgment) (explaining that the majority does not specify if the conflict of interest must be actual or only possible).

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

deferential standard if the claimant is not successful in proving that the conflict actually affected the decision.<sup>78</sup> Even though *Firestone* specified that conflict of interest is one factor within the judicial standard of review to determine an abuse of discretion,<sup>79</sup> neither *Firestone* nor *Metlife* establish conflict of interest as an issue of proof resting on the claimant.<sup>80</sup>

In *Pulvers v. First UNUM Life Insurance Co.*, the Second Circuit directly rejected the claimant's argument that de novo review was appropriate because the administrator was acting in an "inherent conflict of interest" based on its dual status as plan administrator and plan insurer."<sup>81</sup> Instead of accepting the inherent conflict, the Second Circuit required the claimant to prove that the conflict in fact influenced the decision, a contention that was unsupported by any evidence.<sup>82</sup> If the claimant fails to satisfy the burden of proof regarding the actual influence of the conflict of interest, then "any conflict [that] the administrator has is simply one more factor in determining whether the challenged decision was arbitrary and capricious."<sup>83</sup> Because *Metlife* establishes that acting as both administrator and payer is an inherent conflict of interest,<sup>84</sup> the *Pulvers* claimant's argument would now likely have to be accepted by the court—the administrator was operating with an inherent conflict of interest.<sup>85</sup> However, because *Metlife* does not limit the application of conflict of interest as a factor in determining an abuse of discretion to when the conflict "actually and improperly motivates

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78. Kennedy, *supra* note 5, at 1154. The deferential, arbitrary, and capricious standard of review is triggered by the inclusion of a grant of discretionary authority to the plan administrator. *Firestone*, 489 U.S. at 115. Because the conflict of interest at issue in *Metlife* is commonplace and extant in a "lion's share of ERISA plan claims denials" the majority declined to "overturn *Firestone* by adopting a rule that in practice would bring about near universal review by judges *de novo* . . ." *Metlife*, 128 S. Ct. at 2350. It remains to be seen if *Metlife*, in an effort to avoid substitution of judicial discretion for that of the ERISA administrator, has created "nothing but *de novo* review in sheep's clothing." *Id.* at 2358 (Scalia, J., dissenting).

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

80. See generally *Metlife*, 128 S. Ct. 2343; *Firestone*, 489 U.S. 101; Kennedy, *supra* note 5, at 1154.

81. *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 92 (2d Cir. 2000).

82. *Id.* (citing *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1256 (2d Cir. 1996)).

83. *Owen v. Wade Lupe Constr. Co.*, 325 F. Supp. 2d 146, 152 (N.D.N.Y. 2004) (citing *Pulvers*, 210 F.3d at 92).

84. *Metlife*, 128 S. Ct. at 2346 (citing *Firestone*, 489 U.S. at 115).

85. See *Pulvers*, 210 F.3d at 92.

the decision,”<sup>86</sup> the Court instructed the circuit courts to follow principles of trust law as specified in the Restatement.<sup>87</sup> The Second Circuit approach, like the principles of trust law, requires actual improper influence by the conflict of interest to trigger de novo review.<sup>88</sup> By requiring that the administrator was in fact influenced by the conflict of interest, the Second Circuit falls closer to the standards of trust law than the *Metlife* majority.<sup>89</sup>

### B. *Metlife and the Sliding Scale Adjustment*

By establishing a multi-factor test with each factor weighed accordingly on a case-by-case basis,<sup>90</sup> *Metlife* affirmed the majority of the circuit courts who have established a sliding scale adjustment for when a conflict of interest is inferred or proven.<sup>91</sup> By establishing that judges ought to “take account of several different considerations of which a conflict of interest is one,”<sup>92</sup> and suggesting that even though the conflict of interest in *Metlife* was of “great importance,”<sup>93</sup> the Court condoned adjustment of the deferential standard of review

86. *Metlife*, 128 S. Ct. at 2357 (Scalia, J., dissenting).

87. *Id.* at 2357 (Scalia, J., dissenting) (specifying that *Firestone* ought to direct the Court to the answer in this case because it held that “federal courts hearing 29 U.S.C. § 1132(a)(1)(B) claims should review the decisions of ERISA-plan administrators the same way that courts have traditionally reviewed decisions of trustees” and stating that the Court bases its decision on dictum and the “Justices’ fondness for a judge-liberating totality-of-the-circumstances ‘test’”).

88. *Owen*, 325 F. Supp. 2d at 152 (citing *Whitney v. Empire Blue Cross & Blue Shield*, 106 F.3d 475, 477 (2d Cir. 1997)) (“An exception to applying the arbitrary and capricious standard of review in this situation can be invoked, however, when it is demonstrated that the administrator had an actual conflict of interest, and that such conflict in fact ‘affected the reasonableness of the administrator’s decision.’”).

89. *See Metlife*, 128 S. Ct. at 2352–53 (Roberts, C.J., concurring in part and concurring in judgment) (stating that the conflict of interest should be considered “on review only when there is evidence that the benefits denial was motivated or affected by the administrator’s conflict” even though the majority “would accord weight, of varying and indeterminate amount, to the existence of such a conflict in every case where it is present”).

90. *Id.* at 2351 (majority opinion).

91. *Id.* (explaining that there was nothing improper about the “Court of Appeals’ opinion [that] illustrates the combination-of-factors method of review”); *see Kennedy*, *supra* note 5, at 1155 (“Once a conflict of interest is inferred for the majority of [the] circuits or proven for the minority, most courts agree the arbitrary and capricious standard should be reformulated and adjusted as a sliding scale standard of review.”).

92. *Metlife*, 128 S. Ct. at 2351 (expanding on what the term “factor,” as used in *Firestone*, implies).

93. *Id.* (listing other circumstances that “suggest a higher likelihood that [the conflict] affected the benefits decision”).

depending on the seriousness of the conflict.<sup>94</sup> The Court stayed the course on ERISA claims by maintaining the *Firestone* multiple factor test<sup>95</sup> and acknowledging “[b]enefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways” to culminate in the creation of a “one-size-fits-all procedural system that is likely to produce fair and accurate review.”<sup>96</sup> The majority, although acknowledging the existence of several factors, failed to provide guidance to the circuit courts as to the “*modus operandi* of ‘weighing’ all of these factors together.”<sup>97</sup> By neglecting to mention any process for applying the totality-of-the-circumstances test, the Court left the majority of the circuit courts applying the sliding scale adjustment to manipulate the test as they see fit on a case-by-case basis.<sup>98</sup>

Before *Metlife*, the First and Seventh Circuits did not view the dual role of an ERISA administrator alone as a conflict of interest “that must be taken into account on review of a discretionary benefit determination.”<sup>99</sup> Although those two circuits recognized the potential of a conflict of interest, they reasoned that “there is no need to adjust the level of scrutiny because market forces will counter-balance that potential.”<sup>100</sup> The clash of the First and Seventh Circuits’ approach with the *Metlife* holding establishing a dual role as a conflict of interest is as close to direct guidance from the Court as the decision comes.<sup>101</sup> The First and Seventh Circuits must now

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94. Brief for the United States as Amicus Curiae, *supra* note 13, at 9.

95. *Metlife*, 128 S. Ct. at 2351.

96. *Id.* (“Special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress.”). Despite an effort to maintain simplicity and keep costs down, the multiple factor test “makes each case unique, and hence the outcome of each case unpredictable.” *Id.* at 2357 (Scalia, J., dissenting). “[B]ecause the standard is one for the courts to determine and adjust, litigation will necessarily increase as plaintiffs have been afforded a second chance to challenge the bias in a plan administrator’s decision.” Kennedy, *supra* note 5, at 1156. Consequently, the *Metlife* holding may act to increase costs through added litigation because the “ERISA’s arbitrary and capricious standard is simply ‘a range, not a point.’” *Id.* (citing *Van Boxel v. Journal Co. Employee’s Pension Trust*, 836 F.2d 1048, 1052–53 (7th Cir. 1988)).

97. *Metlife*, 128 S. Ct. at 2357 (Scalia, J., dissenting).

98. *Id.* (describing the majority test as “judge-liberating”).

99. Brief for the United States as Amicus Curiae, *supra* note 13, at 8.

100. *Id.*

101. See *Metlife*, 128 S. Ct. at 2348.

acknowledge that the dual role alone is sufficient to establish a conflict of interest.<sup>102</sup>

The Eighth Circuit, though acknowledging that it applies the sliding scale adjustment, requires that claimants satisfy a test that it calls the “two-part gateway requirement.”<sup>103</sup> Under the first part of this test the claimant must establish, in excess of the mere existence of a conflict of interest, the existence of a bias through “material, probative evidence.”<sup>104</sup> To satisfy the second requirement the claimant must prove a connection between the conflict and the denial of benefits decision.<sup>105</sup> A “considerable hurdle for plaintiffs,”<sup>106</sup> the evidence “must demonstrate that the plan administrator’s decision was arbitrary or a product of whim.”<sup>107</sup> Even though *Metlife* acknowledges that conflict of interest must be weighed in proportion to the severity of the conflict,<sup>108</sup> thereby validating the sliding scale concept, the decision does not specify that the claimant must prove the existence of bias in excess of establishing a conflict of interest.<sup>109</sup> Nor does *Metlife* require that the claimant prove a connection between the conflict and the denial of benefits.<sup>110</sup> If the Court had strictly applied the law of trusts to the conflict of interest conundrum, then the majority would have specified that the claimant must produce evidence that the conflict “actually and improperly motivate[d]” the decision.<sup>111</sup> However, because the majority failed to specify any evidentiary requirements<sup>112</sup> and required the application

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102. See generally *Metlife*, 128 S. Ct. 2343. Justice Scalia comments in his dissent that the majority’s reliance on *Firestone*’s statement that a conflict of interest as a factor in determining an abuse of discretion is faulty because that statement in *Firestone* was merely dictum. *Id.* at 2357 (Scalia, J., dissenting). According to Justice Scalia, the “dictum cannot bear [the] weight” placed on it by the majority opinion. *Id.*

103. Kennedy, *supra* note 5, at 1157 (citing *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998)).

104. *Id.*

105. *Id.* at 1157–58.

106. *Id.* at 1158 (internal quotations omitted).

107. *Id.* (citing *Buttram v. Cent. States, Se. & Sw. Areas Health & Welfare Fund*, 76 F.3d 896, 900 (8th Cir. 1996)).

108. *Metro. Life Ins. Co. v. Glenn (Metlife)*, 128 S. Ct. 2343, 2351 (2008).

109. See generally *Metlife*, 128 S. Ct. 2343.

110. See generally *id.*

111. *Id.* at 2357 (Scalia, J., dissenting) (emphasis omitted).

112. See generally *Metlife*, 128 S. Ct. 2343.

of the law of trusts to the situation, the Eighth Circuit approach may still be valid under *Metlife*.<sup>113</sup>

### C. Metlife and the Presumptively Void Adjustment

Because they presume that the conflicted administrator's decision is void, the Tenth and Eleventh Circuits may be forced to change their adjustment of the *Firestone* deferential standard following *Metlife*.<sup>114</sup> Although the Court solidified the *Firestone* holding by establishing a conflict of interest as a factor in determination of an abuse of discretion,<sup>115</sup> it did not establish the conflict of interest factor as determinative of invalidity.<sup>116</sup> In circuits applying the presumptively void adjustment, the claimant must prove either a substantial conflict or an inherent conflict; otherwise the conflict of interest is not appropriate for consideration.<sup>117</sup> Once the conflict is established, "the Tenth Circuit shifts the burden of proof to the plan administrator to establish 'the reasonableness of its decision pursuant to [the] court's traditional arbitrary and capricious standard.'"<sup>118</sup> If the plan administrator fails to satisfy the burden, the decision is presumed void.<sup>119</sup> By placing the burden of proof on the plan administrator, the Tenth Circuit adjustment to the *Firestone* standard runs contrary to the main goal of reviewing courts, which is to

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113. *Id.* at 2350 ("Trust law continues to apply a deferential standard of review to the discretionary decisionmaking [sic] of a conflicted trustee, while at the same time requiring the reviewing judge to take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion.").

114. Brief for the United States as Amicus Curiae, *supra* note 13, at 10 (noting that the Sixth Circuit's decision in *Metlife* was in direct conflict "with decisions of the Second, Tenth, and Eleventh Circuits, thereby exacerbating an existing circuit split").

115. *See infra* note 148.

116. *Metlife*, 128 S. Ct. at 2346.

117. Kennedy, *supra* note 5, at 1159.

118. Brief for the United States as Amicus Curiae, *supra* note 13, at 10 (citing *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004)); *see also Metlife*, 128 S. Ct. at 2359–60 (Scalia, J., dissenting) (describing the difficulty with a reasonableness standard and stating that "[c]ommon sense confirms that a trustee's conflict of interest is irrelevant to determining the substantive reasonableness of his decision").

119. Kennedy, *supra* note 5, at 1160. The plan "administrator must demonstrate 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." Brief for the United States as Amicus Curiae, *supra* note 13, at 10 (citing *Fought*, 379 F.3d at 1006).



“respect the discretionary authority conferred on ERISA fiduciaries [in order to] encourage[] employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do.”<sup>120</sup> However, *Metlife* declined to address the procedural issue of burden-shifting raised by the Tenth Circuit’s burden-shifting adjustment to the standard of review.<sup>121</sup> Even though *Metlife* classified the dual role of an administrator as a conflict of interest,<sup>122</sup> the circuit courts, like the Tenth Circuit, that employ burden-shifting may still require that the claimant prove the conflict after *Metlife*<sup>123</sup> because the decision failed to specify whether the conflict must have affected the benefit denial to be weighed in the court’s *Firestone* standard. Only time will tell if the Tenth and Eleventh Circuits, like the Second Circuit,<sup>124</sup> will continue placing the burden of establishing a conflict of interest on the claimant.<sup>125</sup>

The Eleventh Circuit, in an effort to apply trust law to ERISA denial of benefit review—as required by *Firestone*<sup>126</sup> and reinforced by *Metlife*,<sup>127</sup>—reasoned that “under trust law . . . any self-interested action taken by a trustee could trigger a violation of fiduciary obligations, which rendered such action presumptively void.”<sup>128</sup> After a conflict of interest has been established, the court determines if the

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120. *Metlife*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in judgment).

121. *Id.* at 2351 (majority opinion).

122. *Id.* at 2348.

123. *See generally Metlife*, 128 S. Ct. 2343. Even though the circuits may be able to apply the *Metlife* decision to situations involving an administrator’s conflict of interest that is merely inherent and not actual, application of trust law would lead the courts to consider only actual abuses of discretion resulting from a conflict of interest in benefit denial review. *Id.* at 2354 (Roberts, C.J., concurring in part and concurring in judgment) (“It is the actual motivation that matters in reviewing benefits decisions for an abuse of discretion, not the bare presence of the conflict itself.”).

124. Kennedy, *supra* note 5, at 1154.

125. *See generally Metlife*, 128 S. Ct. 2343.

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

127. *Metlife*, 128 S. Ct. at 2351.

128. Kennedy, *supra* note 5, at 1161 (citing *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 798 (9th Cir. 1997)). Even though the Ninth and Eleventh Circuits attempt to apply the principles of trust law to ERISA denial of benefit cases “religiously,” this has been an uphill battle because “ERISA . . . does not follow all the dictates of trust law.” *Id.* After noting that ERISA allows for a conflict of interest, Kennedy explains that “interjecting any conflict of interest as merely a factor in the adjustment of the judicial standard of review” fails to afford the administrators “advance knowledge of the standard that will be applied to their decisions.” *Id.*

administrator's decision was "wrong"<sup>129</sup>—that is, whether the "fiduciaries or trustees failed to act in the sole interests of the beneficiaries by acting to advance the interests of [themselves]."<sup>130</sup> *Metlife* espoused a multi-factor test for purposes of fairness,<sup>131</sup> requiring circuit courts to consider the conflict, but did not provide any guidance as to the weight each factor should be given.<sup>132</sup> Despite the majority's attempt to base their denial of "near universal review by judges de novo"<sup>133</sup> on congressional intent,<sup>134</sup> in practice the Tenth and Eleventh Circuits' adjustment to the *Firestone* standard creates a de novo standard of review.<sup>135</sup> Though disguising the burden-shifting, presumptively void approach as an adjustment of the *Firestone* deferential standard of review, these circuits effectively provide the claimant with a presumption that the decision was arbitrary and capricious.<sup>136</sup> Additionally, the presumptively void adjustment is in conflict with the "initial purpose of ERISA to continue the growth and development of privately-sponsored employee benefit plans"<sup>137</sup> because it allows the claimant to successfully challenge a denial of benefits with proof of an actual or inherent conflict.<sup>138</sup> *Metlife* condones a "combination-of-factors" test to review a denial of benefits claim,<sup>139</sup> but it does not condone a

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129. Brief for the United States as Amicus Curiae, *supra* note 13, at 10.

130. *Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1566 (11th Cir. 1990).

131. *Metlife*, 128 S. Ct. at 2351 (stating "a one-size-fits-all procedural system" is unlikely to "promote fair and accurate review").

132. *Id.* at 2352 (Roberts, C.J., concurring in part and concurring in judgment) ("The majority would accord weight, of varying and indeterminate amount, to the existence of such a conflict in every case where [a conflict] is present.").

133. *Id.* at 2353 (internal quotations omitted) (reiterating the importance of deference to the "lion's share of ERISA plan claims denials" (internal quotations omitted)).

134. *Id.* at 2351 (majority opinion) ("Had Congress intended such a system of review, we believe it would not have left to the courts the development of review standards but would have said more on the subject.").

135. *Id.* at 2359 (Scalia, J., dissenting).

136. Kennedy, *supra* note 5, at 1160 ("[The] sliding standard of review weighs heavily on the fiduciary to disprove that its benefit denial was not tainted by a conflict of interest.").

137. *Id.* at 1162.

138. *Id.* ("If all that is needed is proof of a potential or actual conflict of interest, there is little to lose in challenging a benefits denial case . . .").

139. *Metlife*, 128 S. Ct. at 2351.

presumption of invalidity if the administrator fails to prove that it was not influenced by a conflict of interest.<sup>140</sup>

Even though alterations of the adjustments taken by the circuits to the *Firestone* test after *Metlife* will take time, something should be done to rectify this confusion.<sup>141</sup> There were hopes that *Metlife* would provide clarity to the division among the circuits;<sup>142</sup> although it failed to do so directly,<sup>143</sup> the circuits may still glean insight from the recent Supreme Court case.<sup>144</sup>

### III. PREDICTION

Only time will determine the overall impact of the *Metlife* decision.<sup>145</sup> The circuit courts have a difficult task ahead of them<sup>146</sup>— “[i]n the words of Judge Becker of the Third Circuit, ‘only the Supreme Court can undo the legacy of *Firestone*.’”<sup>147</sup> Although it has done so in the past, the Court took no notice of the circuit split and declined to address it in the *Metlife* decision entirely.<sup>148</sup> Contrary to Justice Becker’s hope for clarification of the *Firestone* legacy, the *Metlife* decision failed to put an end to the confusion among the circuit courts.<sup>149</sup> After struggling to alter the *Firestone* test,<sup>150</sup> the

140. See generally *Metlife*, 128 S. Ct. 2343.

141. See generally *id.* at 2352–56 (Roberts, C.J., concurring in part and concurring in judgment).

142. *Court Stays ERISA Course*, *supra* note 2, at 6 (calling the *Metlife* opinion “long-awaited”).

143. See generally *Metlife*, 128 S. Ct. 2343.

144. See discussion *infra* Part III.

145. Given the twenty year development of the current adjustments taken to the *Firestone* standard, it will likely take some time for the circuits to accommodate the *Metlife* holding. See *Metlife*, 128 S. Ct. at 2355 (Roberts, C.J., concurring in part and concurring in judgment) (“The majority’s application of its approach confirms [the holding’s] overbroad reach and indeterminate nature.”). See generally *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

146. *Metlife*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in judgment) (“Saying that courts should consider the mere existence of a conflict in every case, without focusing that consideration in any way, invites the substitution of judicial discretion for the discretion of the plan administrator.”).

147. Kennedy, *supra* note 5, at 1168 (citing *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 393 (3d Cir. 2000)) (arguing that *Firestone* is not easily reconciled with the basic principles of trust law).

148. See generally *Metlife*, 128 S. Ct. 2343. It is not unusual for the Court to directly address a circuit split. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“We granted certiorari to resolve the [c]ircuit split and now reverse.” (citation omitted)); *Cent. Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (“We granted certiorari in order to resolve the resulting [c]ircuit split . . .”).

149. See *Court Stays ERISA Course*, *supra* note 2, at 6–7.

imprecise, “kitchen-sink”<sup>151</sup> “combination-of-factors method of review”<sup>152</sup> established by *Metlife* may prove just as difficult to decipher.<sup>153</sup> However, the circuit courts may find some clarification by looking past the *Metlife* requirements and referencing instead the source of law originally prescribed by *Firestone*—the principles of trust law as outlined in the Restatement.<sup>154</sup>

#### A. *The Future of the De Novo Review Adjustment*

The Second Circuit’s two-step adjustment to de novo review, in which the claimant establishes that a potential conflict of interest exists and that the conflict actually affected the decision,<sup>155</sup> faces two challenges in light of *Metlife*. First, the adjustment places the burden of proof on the claimant to show that the administrator is actually acting in a conflict of interest; once established, the court shifts to de novo review.<sup>156</sup> *Metlife* does not establish that the conflict must be actual instead of inherent,<sup>157</sup> and in applying the de novo review adjustment the Second Circuit is likely to experience an increase in litigation over its actual conflict requirement.<sup>158</sup> No matter which

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150. Beatty, *supra* note 12, at 744 (citing *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995)) (“Since *Firestone*, however, courts have not been able to provide much consistency regarding the exact way a conflict of interest affects the standard of review.”).

151. *Metlife*, 128 S. Ct. at 2353–54 (Roberts, C.J., concurring in part and concurring in judgment) (stating that the majority is “so imprecise about how the existence of a conflict should be treated in a reviewing court’s analysis” and that “[n]othing in *Firestone* compels the majority’s kitchen-sink approach”).

152. *Id.* at 2351 (majority opinion). According to Justice Scalia, the reasonableness standard promulgated by the majority is “nothing but *de novo* review in sheep’s clothing.” *Id.* at 2358 (Scalia, J., dissenting).

153. *Id.* at 2358 (Scalia, J., dissenting) (“How a court should go about conducting this review is unclear.”).

154. Justice Scalia outlines this approach that he believes reconciles itself with *Firestone* more readily than the majority opinion. *Id.* at 2359. Justice Scalia states that he “would adopt the entirety of the Restatement’s clear guidelines for judicial review” as outlined in the Restatement (Second) of Trusts section 187. *Id.* One of the positives to this approach is that the Restatement defines “[a]buse of discretion” as referring to “four distinct failures: the trustee acted dishonestly; he acted with some other improper motive; he failed to use judgment; or he acted beyond the bounds of a reasonable judgment.” *Id.* (internal quotations omitted) (citing RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. e (1959)). This definition alone would clarify some of the confusion among the circuits.

155. Brief for the United States as Amicus Curiae, *supra* note 13, at 10.

156. Kennedy, *supra* note 5, at 1153.

157. See *Metlife*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in judgment).

158. *Court Stays ERISA Course*, *supra* note 2, at 7.

approach the Second Circuit takes, the *Metlife* majority sways the existence of an ERISA administrator's conflict of interest in a benefits denial claim in favor of the claimant, who desires the conflict of interest be held against the insurer so that he can recover previously denied benefits.<sup>159</sup> Second, the lack of specificity regarding the requirement of an actual conflict of interest in *Metlife* is sure to be challenged by claimants who want to use an inherent conflict of interest to their advantage.<sup>160</sup> Even though *Metlife* does not distinguish between an inherent and an actual conflict of interest, the Second Circuit may find refuge in the application of trust law principles, as established foundationally by *Firestone*,<sup>161</sup> that require an actual conflict of interest. By continuing to require an actual conflict, the Second Circuit will be able to maintain the actual conflict of interest standard.

### *B. The Future of the Sliding Scale Adjustment*

In practice, the *Metlife* totality-of-the-circumstances test combines the sliding scale test and the *Firestone* holding.<sup>162</sup> However, despite its validity under *Metlife*, the sliding scale adjustment creates problems for the circuit courts attempting to apply the *Metlife* test. First, *Metlife* did not specify how the circuit courts are to weigh the factors,<sup>163</sup> nor did it give a comprehensive list of factors that should be considered.<sup>164</sup> Contrary to Justice Scalia's assertion that he "would adopt the entirety of the Restatement's clear guidelines for judicial review,"<sup>165</sup> the majority declined to give a set of detailed

159. See generally *Metlife*, 128 S. Ct. 2343.

160. See generally *Court Stays ERISA Course*, *supra* note 2.

161. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111–13 (1989).

162. *Metlife*, 128 S. Ct. at 2351.

163. *Id.* at 2358 (Scalia, J., dissenting).

164. *Id.* at 2351 (majority opinion) (stating that the *Metlife* test, like other legal standards, "ask[s] judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by weighing all together"). Justice Scalia, joined by Justice Thomas, points out that some of the factors given in the Restatement can be "alone determinative, without the necessity of 'weighing' other factors." *Id.* at 2358 (Scalia, J., dissenting) (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)).

165. *Id.* at 2359 (Scalia, J., dissenting). "Looking to the common law of trusts . . . , a court reviewing a trustee's decision would substitute its own de novo judgment for a trustee's only if it found either that the trustee had no discretion in making the decision, . . . or that the trustee had discretion but abused it.

instructions<sup>166</sup> and, in doing so, created a “judge-liberating totality-of-the-circumstances ‘test.’”<sup>167</sup> Even though the majority claimed to follow the principles of trust law,<sup>168</sup> it failed to include the principles within the *Metlife* holding,<sup>169</sup> thus leaving the circuit courts up to their own devices to determine how to weigh the factors in each case. Reviewing circuit courts have been granted more discretion under *Metlife* than they were under *Firestone*. The circuit courts will teeter on the balance between the application of the combination-of-factors test and the tendency of such a test to become de novo review in disguise, as warned of by the dissent.<sup>170</sup> The lack of predictability and certainty with each ERISA denial of benefits claim is sure to prove troublesome and time consuming.<sup>171</sup>

A second problem created by the collision between the sliding scale standard and *Metlife* is that *Metlife* fails to answer whether the conflict of interest must be actual instead of merely inherent.<sup>172</sup> Even though, as Justice Scalia points out in his dissent, the principles of trust law require that the conflict of interest be actual,<sup>173</sup> not merely possible or inherent, the majority fails to make a determination between the two. The ability of the reviewing court to consider both actual and inherent conflicts of interest in the *Metlife* multi-factor test may lead the circuit courts away from general deference for the administrator’s decision. This would directly conflict with the goal of the *Metlife* majority to promote deference to the “lion’s share of

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Otherwise, the court would defer to the trustee.” *Id.* (emphasis omitted) (citing *Firestone*, 489 U.S. at 111–12; RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)).

166. *Id.* at 2353 (Roberts, C.J., concurring in part and concurring in judgment) (“In a triumph of understatement, the Court acknowledges that its approach ‘does not consist of a detailed set of instructions.’”).

167. *Id.* at 2358 (Scalia, J., dissenting).

168. *Metlife*, 128 S. Ct. at 2347 (majority opinion) (“In ‘determining the appropriate standard of review’ a court should be ‘guided by principles of trust law.’” (quoting *Firestone*, 489 U.S. at 111)).

169. *Id.* at 2358 (Scalia, J., dissenting) (“[T]he Court’s ‘elucidation’ of the [*Firestone* dictum] does not reveal trust-law practice as much as it reveals the Justices’ fondness for a judge-liberating totality-of-the-circumstances ‘test.’”).

170. *Id.*

171. See generally *Court Stays ERISA Course*, *supra* note 2.

172. See generally *Metlife*, 128 S. Ct. 2343.

173. *Id.* at 2357 (Scalia, J., dissenting).

ERISA plan claims denials.”<sup>174</sup> Unless the circuit courts go out of their way to apply trust law principles, it is likely that the circuit courts applying the sliding scale standard will continue to consider both an actual and an inherent conflict as a factor in determining an abuse of discretion.<sup>175</sup> The circuit courts would be wise, however, to look past the requirements stated by *Metlife* and go directly to the source of law originally prescribed by *Firestone* by relying on the principles of trust law as outlined in the Restatement.<sup>176</sup>

The third conflict created by *Metlife* and the sliding scale adjustment is the clearest: the First and Seventh Circuits must now acknowledge that the dual role of an ERISA administrator is a conflict of interest that must be taken into account when determining an abuse of discretion.<sup>177</sup>

The final problem created by the sliding scale adjustment affects the two-prong test applied by the Eighth Circuit. Like the other circuits, the best approach for the Eighth Circuit is to apply the principles of trust law beyond those specifically written into *Metlife*. The first prong of the test establishes that the claimant must prove by “material probative evidence” the existence of a bias.<sup>178</sup> This evidentiary standard creates a considerable burden for claimants,<sup>179</sup> a burden that is unlikely to be supported by the largely pro-claimant *Metlife* majority.<sup>180</sup> Even though the *Metlife* majority did not establish specific evidentiary rules, it did indicate that it does not “believe it necessary or desirable for [circuit] courts to create”<sup>181</sup> such rules. Because of this statement by the Court, the Eighth Circuit may chose to question its special evidentiary requirement. Insofar as

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174. *Id.* at 2353 (Roberts, C.J., concurring in part and concurring in judgment) (internal quotations omitted).

175. *Id.* at 2352–53 (“The majority’s approach would allow the bare existence of a conflict to enhance the significance of other factors already considered by reviewing courts, even if the conflict is not shown to have played any role in the denial of benefits.”).

176. *Id.* at 2359 (Scalia, J., dissenting) (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)).

177. *Id.* at 2350 (majority opinion).

178. Kennedy, *supra* note 5, at 1157 (internal quotations omitted) (citing *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 (8th Cir. 1998)).

179. *Id.* at 1158.

180. See generally *Metlife*, 128 S. Ct. 2343.

181. *Id.* at 2351.

*Metlife* does not establish to what level the claimant must prove the conflict of interest, whether actual or inherent, the Eighth Circuit will need clarification by the Court before it can comfortably continue to require the claimant prove bias, a requirement of proof in excess of both an inherent or actual conflict.<sup>182</sup> The safest option for the Eighth Circuit, like other circuits applying the sliding scale standard, would be to fall back on the principles of trust law and require that the claimant prove that the conflict “actually and improperly motivate[d] the decision.”<sup>183</sup> Although this approach is easier on the claimant than the current Eighth Circuit two-prong test, it is not as forgiving as the *Metlife* majority, which allows for the consideration of both inherent and actual conflicts.<sup>184</sup>

### C. *The Future of the Presumptively Void Adjustment*

The presumptively void adjustment will likely be invalidated soon after the circuit courts begin applying the standard given in *Metlife*. Even though *Metlife* establishes the conflict of interest as a factor to be used in an abuse of discretion determination, it does not make the conflict determinative of invalidity.<sup>185</sup> The majority also specifically declines “to create special burden-of-proof rules [and] other special procedural or evidentiary rules [that are] focused narrowly upon the evaluator/payor conflict.”<sup>186</sup> These broad categories, described as unnecessary and undesirable by the majority,<sup>187</sup> include shifting the presumptively void adjustment’s burden from the claimant to the administrator once the claimant proves an actual or an inherent conflict. *Metlife* does not call for an escape route for the administrator if it can prove that the conflict did not affect the decision.<sup>188</sup> *Metlife* only demands that once a conflict has been established, that conflict, whether actual or inherent, must be considered as a “factor in

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182. *See id.*

183. *Id.* at 2357 (Scalia, J., dissenting) (emphasis omitted).

184. *Id.* at 2352–53 (Roberts, C.J., concurring in part and concurring in judgment).

185. *Id.* at 2351 (majority opinion) (stating that “conflicts are but one factor among many” to consider).

186. *Metlife*, 128 S. Ct. at 2351.

187. *Id.*

188. *See generally Metlife*, 128 S. Ct. 2343.



determining whether there is an abuse of discretion.”<sup>189</sup> *Metlife* thus invalidates the Tenth Circuit’s burden-shifting approach.

*Metlife* also invalidates the Eleventh Circuit’s presumption of invalidity in cases where the administrator cannot prove that its decision was free from influence by the conflict of interest. In the application of the *Metlife* holding, the circuit courts that previously adopted the presumptively void adjustment to the *Firestone* standard will return to the principles of trust law and apply the basic “combination-of-factors” test created by *Metlife*.<sup>190</sup>

### CONCLUSION

After having applied the *Firestone* standard to ERISA denial of benefits claims involving a conflict of interest for the past twenty years, the circuit courts now have a new<sup>191</sup> standard to apply.<sup>192</sup> However, the *Metlife* holding, focusing generally on “instruction [of] what a court should *not* do,”<sup>193</sup> fails to give circuit courts any details on what they *should* do while applying the *Metlife* standard. The Court’s “totality-of-the-circumstances”<sup>194</sup> test “in which the existence of a conflict is to be put into the mix and given some (unspecified) ‘weight’”<sup>195</sup> is likely to make each case unique and each outcome unpredictable.<sup>196</sup> ERISA claimants had hoped to achieve a heightened

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189. *Id.* at 2350 (internal quotations omitted) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

190. See generally *Metlife*, 128 S. Ct. 2343.

191. Notice that the majority characterizes the *Metlife* standard as a further application of trust law consistent with the *Firestone* standard. *Id.* at 2350 (citing *Firestone*, 489 U.S. at 115) (“We do not believe that *Firestone*’s statement [that a conflict should be weighed as a factor in determining abuse of discretion] implies a change in *standard* of review, say, from deferential to *de novo* review.”). In contrast, Chief Justice Roberts, Justice Scalia, and Justice Thomas view the majority standard as a deviation away from trust law. *Id.* at 2354 (Roberts, C.J., concurring in part and concurring in judgment); *id.* at 2357 (Scalia, J., dissenting).

192. See generally *Metlife*, 128 S. Ct. 2343; *Firestone*, 489 U.S. 101.

193. *Metlife*, 128 S. Ct. at 2358 (Scalia, J., dissenting) (“The opinion is rife with instruction on what a court should *not* do. In the final analysis, the Court seems to advance a gestalt reasonableness standard . . . by which a reviewing court, mindful of being deferential, should nonetheless consider all the circumstances, weigh them as it thinks best, then divine whether a fiduciary’s discretionary decision should be overturned.” (citation omitted)).

194. *Id.* at 2357.

195. *Id.*

196. *Id.*; *id.* at 2354 (Roberts, C.J., concurring in part and concurring in judgment).

scrutiny de novo review for their benefit denial claims.<sup>197</sup> But following *Metlife*, claimants will flow into litigation regarding the weight of the administrator's conflict of interest.<sup>198</sup> *Metlife*'s lack of specificity will create difficulties for courts tasked with applying its holding, as well as potential plaintiffs deciding whether to bring a claim and administrators defending benefit denials.<sup>199</sup> Despite twenty years of requests for simplification and clarification,<sup>200</sup> the Court in *Metlife* has left "the law more uncertain, more unpredictable than it found it."<sup>201</sup> Even though the ERISA law may remain in flux after *Metlife*, by applying the principles of trust law the circuit courts will be able to save time, preserve judicial resources, and establish clarification for ERISA claimants and administrators.

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197. *Court Stays ERISA Course*, *supra* note 2, at 7.

198. *Id.* ("Courts will probably wrestle with the combination-of-factors method of review set forth by the Supreme Court for years to come. While it is unclear exactly where this will lead lower courts, the number of lawsuits related to the importance of an administrator's conflict of interest is sure to rise . . . .").

199. *Metlife*, 128 S. Ct. at 2353 (Scalia, J., dissenting).

200. *See* Reply Brief for Petitioners, *supra* note 2, at 1; *Court Stays ERISA Course*, *supra* note 2, at 6.

201. *Metlife*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in judgment).

