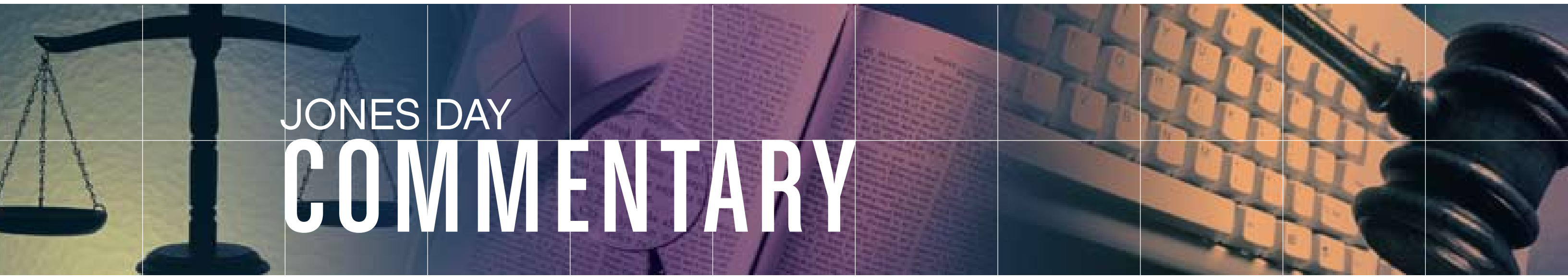
JUNE 2008



METLIFE V. GLENN: HOW MUCH DID THE SUPREME COURT CHANGE THE STANDARD OF REVIEW IN ERISA CASES?

A new MetLife blimp sailed into view last week, and this one is likely to hover over the employee benefit playing field for years to come. In *MetLife v. Glenn*, the Supreme Court ruled that employers and insurers who both administer benefit claims and fund the benefits in question face a conflict of interest and that a reviewing court must take the conflict of interest into account in deciding whether the administrator abused its discretion.[1] How much the Court's decision will impact the standard of review in ERISA cases remains to be seen.

HOW WE GOT HERE

Nearly 20 years ago, the Supreme Court established the standard for judicial review of benefit determinations by plan administrators or other fiduciaries under the Employee Retirement Income Security Act of 1974 ("ERISA"). In *Firestone v. Bruch*, the Court held that principles of trust law make a deferential standard of review appropriate when an ERISA fiduciary exercises discretionary powers.[2] Accordingly, if a plan gives the administrator or other fiduciary discretionary authority to determine eligibility for benefits or interpret the plan, the administrator's decision will not be overturned by a court unless there was an abuse of discretion. On the other hand, if the plan is silent or otherwise does not give discretionary authority to determine eligibility, a court will review the administrator's decision *de novo* (that is, without deference).

---

1. *Metropolitan Life Insurance Company v. Glenn*, 554 U.S. ___, 2008 WL 2444796 (June 19, 2008) (Five-justice majority opinion written by Justice Breyer; Chief Justice Roberts concurred in the judgment but wrote separately to express disagreement with the majority's analysis of how a conflict of interest should be analyzed; Justice Kennedy concurred in part and dissented in part; Justice Scalia wrote a dissenting opinion, in which Justice Thomas joined.).
2. *Firestone v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989).

As a result of the *Firestone* decision, virtually every employee benefit plan now provides that plan administrators have discretionary authority to decide claims, interpret plan documents, resolve ambiguities, and otherwise make eligibility and benefit determinations. This was hardly the end of the story, however. In practice, whether an ERISA case is subject to deferential review or *de novo* review will often determine the outcome. As one might expect under those circumstances, participants and their attorneys have a strong incentive to try to limit the application of *Firestone*, and litigation over the exact contours of the abuse of discretion standard has been a feature of the ERISA landscape ever since. (In fact, those unfamiliar with the ways of litigation would scarcely believe the number of cases each year that address one challenge or another to the abuse of discretion standard.) Questions such as the type of plan language that is necessary or sufficient to confer discretionary authority, the types of issues to which the deferential standard applies, whether deference also affects the evidence that can be introduced in court, and many others have been subject to litigation. Nearly every court has a slightly different version of the abuse of discretion standard, at least around the edges.

CONFLICTS OF INTEREST UNDER *FIRESTONE*

It is common for the entity that administers an employee benefit plan, such as the employer or an insurance company, to both fund the payment of benefits and determine whether an employee is entitled to benefits. The *Firestone* decision stated, in passing, that if a benefit plan gives discretion to an administrator or fiduciary that is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion. Two questions over which courts differed in the years since *Firestone* are: (i) whether a plan administrator that both evaluates and pays claims operates under a conflict of interest for purposes of the *Firestone* standard of review, and (ii) how any such conflict should be taken into account by a reviewing court.

The circuit courts of appeals had split over both the threshold question of whether a conflict exists and the question of how much a "structural" conflict of this type should be taken into account. At least three approaches had developed for weighing the conflict of interest—a "sliding scale" standard of deference, shifting the burden of proof of reasonableness to the administrator once a conflict is shown, or *de novo* review. In *MetLife*, the Supreme Court addressed both questions.

THE *METLIFE* DECISION

MetLife served as both the plan administrator and the insurer under the long-term disability plan for Sears employees. The Sears plan granted MetLife, as administrator, discretionary authority to determine whether an employee's claim for benefits was covered under the plan. If a claim for benefits was approved, MetLife, as insurer, was also obligated to pay the benefits. Wanda Glenn, a Sears employee, filed a claim for long-term disability benefits, and her claim was denied by MetLife. A federal district court held that MetLife did not abuse its discretion in denying the claim. Upon appeal to the Sixth Circuit, the court of appeals applied the *Firestone* abuse of discretion standard but determined that MetLife's dual role as administrator and insurer was a conflict of interest that should be treated as a relevant factor in deciding whether MetLife abused its discretion. The Sixth Circuit Court of Appeals set aside MetLife's denial of Ms. Glenn's claim for permanent disability. It first noted that MetLife was operating under a conflict of interest because it both decided whether to pay benefits and funded the benefits. The Sixth Circuit noted that although MetLife encouraged Ms. Glenn to apply for Social Security disability benefits, it then disregarded the Social Security Administration's conclusion. MetLife's focus upon its own treating physician's report over Ms. Glenn's treating physician's reports indicated that its review was not fair or impartial. The court held that MetLife's decision was an abuse of discretion, and it ordered that Ms. Glenn's benefits be reinstated.

The Supreme Court decided that the dual role of deciding benefit claims and paying the benefits creates the kind of conflict of interest referred to in the *Firestone* decision. Although the case before the Court dealt only with an insurance company that administers an insured plan, the Court went out of its way to state that an employer that administers its own plan also faces a conflict of interest. In fact, according to the Court, the conflict of interest is even more apparent for an employer than for an insurance company. Citing a lower-court opinion in the original *Firestone* case, the Court observed that when an employer administers its own plan, every dollar provided in benefits is a dollar spent by the employer, and a dollar saved is a dollar in the employer's pocket. The Court thought the conflict was less clear where the plan administrator was not the employer itself, but rather a professional insurance company like MetLife. Nevertheless, the Court held that while the severity of an insurance company's conflict may be mitigated by other factors, such as marketplace pressure to provide fair claims assessment to its customers, a conflict of interest still exists.

How then should this conflict be taken into account by a court reviewing an administrator's decision? Declining to adopt any "one size fits all" approach, the Supreme Court said that Firestone means what the word "factor" implies, "namely, that when judges review the lawfulness of benefit denials, they will often consider various matters of which a conflict of interest is one." In contrast to lower courts that had shifted the burden of proof to administrators or attempted to construct a "sliding scale" of deferential review, the Court said it is neither necessary nor desirable for courts to create special burden-of-proof rules or other procedural or evidentiary rules to deal with this type of conflict. In principle, then, the conflict is but one factor among many. The Court acknowledged that its clarification of the *Firestone* standard "does not consist of a detailed set of instructions" (which Chief Justice Roberts described as "a triumph of understatement"), but it was comfortable that the process of weighing all facts and circumstances is a familiar one to federal judges.

Significantly, the Court ruled that the existence of a conflict of interest does not change the *standard* of review from deferential to *de novo*. The Court held that ERISA continues to apply a deferential standard of review to the discretionary decisions of even a conflicted administrator, while at the same time requiring the reviewing judge to take the conflict into account. To the extent critics of the *Firestone* standard of review are disappointed by the *MetLife* decision, this is likely to be the reason. On the other hand, as discussed below, the Court's statement of support for deferential review may turn out to be less influential than its invitation to judges to apply a facts-and-circumstances reasonableness test to administrative decisions.

Although a structural conflict of interest must always be taken into account, the Court did not require that it always be given the same weight. Rather, the importance of the conflict will vary, depending on the facts of each particular case. For example, the conflict of interest will be more important ("perhaps of great importance") where circumstances suggest a higher likelihood that it affected the benefits decision. That end of the spectrum would include, for example, cases "where an insurance company administrator has a history of biased claims administration." On the other hand, the existence of the conflict should be less important ("perhaps to the vanishing point") where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances or by imposing management checks that penalize inaccurate decision-making regardless of whom the inaccuracy benefits.

HOW MUCH WILL THINGS CHANGE?

On the surface, the *MetLife* decision does not represent an earth-shattering change in the standard of review for ERISA cases. After all, the Supreme Court made it clear that a structural conflict of interest does not affect the standard of review, so *Firestone*'s abuse of discretion standard remains the law under ERISA. More circuits than not had already decided that the dual role of plan administrator and source of benefit funding created a conflict of interest for purposes of the *Firestone* standard, and by most measures the Court's "one factor" approach for assessing the importance of the conflict is not all that different from the "sliding scale" analysis that was the most common test in the lower courts, albeit without any pretense of scientific precision. Of course, for employers and insurers in those circuits that had held that this type of structural conflict, without more, did not justify any form of heightened scrutiny (the First, Second, Seventh, and Eighth), the change is more significant.

The Court also expressly disavowed any desire to create a rule that in practice could bring about *de novo* review by judges of a lion's share of all ERISA cases. On the other hand, *MetLife*'s general balancing-of-factors process is likely to lead to more unpredictable results for both employers and plan participants, with outcomes varying on the basis of how much weight an individual judge gives to any conflict of interest. As Chief Justice Roberts observed in a concurring opinion, by saying that courts should consider the mere existence of a conflict in every case, but without focusing that consideration in any way, the Court "invites the substitution of judicial discretion for the discretion of the plan administrator." The end result, according to Justice Roberts, will be "to increase the level of scrutiny in every case in which there is a conflict—that is, in many if not most ERISA cases—thereby undermining the deference owed to plan administrators" under the *Firestone* standard. In dissent, Justice Scalia was more direct. He wrote that, notwithstanding the Court's assurances to the contrary, the majority opinion "is nothing but *de novo* review in sheep's clothing."

Only time will tell which view is closer to the truth, but litigation on the contours of the abuse of discretion standard and the significance of conflicts of interest is certain to increase, not decrease, as a result of *MetLife*. In addition, discovery will likely extend to matters relating to any conflict of interest, such as procedural safeguards (if any), terms of administrator and insurance contracts, and even the history of benefit determinations by the plan administrator. In the meantime, there are steps all employers should take to prepare.

JOB OPENING FOR CAESAR'S WIFE?

Going forward, the most important aspect of *MetLife* may be the Court's suggestion that employers and insurers set up procedures and safeguards to mitigate the effect of any structural conflict of interest between plan administration on the one hand and the financial cost of funding benefits on the other. (General note to employers: Being viewed by the Supreme Court as less reliably evenhanded than an insurance company bodes little good. Nor is it a hopeful sign when a court talks about employers putting money "in their pockets"—think Boss Hogg or the little guy from the Monopoly board game—while at the same time failing to even acknowledge the possibility that an employer that makes a habit of denying every benefit claim would likely face marketplace issues of its own.)

At a minimum, every employer and insurer should assess each situation in which a structural conflict of interest between plan administration and funding exists and consider the steps that can be taken to reduce the significance of any conflict as a "factor" in the abuse of discretion review. Among other things, the review process should include the structure of benefit determinations, the terms of applicable contracts with insurance companies and claims administrators, safeguards (if any) that are in place to wall off claims administrators from the financial process (not only from the financial burden of paying claims, but perhaps from the process of budgeting and plan design as well), any incentives to encourage accurate claims decisions and discourage inaccurate decisions, and historical information regarding the fairness of claims administration.

Employers and insurers should also consider the extent to which the structural conflict of interest should be removed altogether by giving authority for claims and appeals to fiduciaries that play no role in the payment, design, or budgeting of benefits and whose only function is to interpret the terms of the plan and the facts of the individual claim for benefits. Plutarch attributed to Julius Caesar the statement "Caesar's wife must be above suspicion." After *MetLife*, there is at least some reason to think that ERISA plan administrators will need to be as pure as Caesar's wife.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Alan S. Miller
1.212.326.3445
1.214.969.4559
asmiller@jonesday.com

Steven J. Sacher
1.202.879.5402
sjsacher@jonesday.com

James P. Baker
1.415.875.5721
jpbaker@jonesday.com

Evan Miller
1.202.879.3840
emiller@jonesday.com