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Note


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I. INTRODUCTION

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA).\textsuperscript{1} ERISA was designed to regulate employee benefit plans and govern the conduct of fiduciaries in control of such plans.\textsuperscript{2} Fiduciary decisions to deny benefit claims have traditionally been treated with deference by the judiciary.\textsuperscript{3} The question of exactly how much deference should be granted, however, has been answered in

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3. For the purposes of this Note, the term “fiduciary” shall be used interchangeably with the terms “trustee” and “administrator.” These terms refer to individuals who exercise discretion in deciding whether to deny a benefit claim. A thorough discussion of fiduciaries is contained in H. Stennis Little, Jr. & Larry T. Thrailkill, Fiduciaries Under ERISA: A Narrow Path to Tread, 30 VAND. L. REV. 1, 12-13 (1977). For an analysis of the deference granted by courts to benefit claim decisions, see Part III-B.

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various ways. Courts usually have given complete deference to a decision to deny benefits unless the claimant was able to show the fiduciary acted arbitrarily or capriciously. In July 1992, the Fifth Circuit Court of Appeals broke this trend in *Salley v. E.I. DuPont de Nemours & Co.* when it reversed the ERISA plan administrator's decision to deny benefits. In *Salley*, the court held the fiduciary, E.I. DuPont de Nemours & Co. (DuPont), abused its discretion in making its decision because it failed to adequately investigate the circumstances before denying benefits.

The Fifth Circuit's decision reversed the trend of deference courts traditionally had given to fiduciaries. According to the court, DuPont abused its discretion when it relied upon the recommendations of two people who had not obtained enough necessary information about the patient. In its defense, DuPont argued the court's review of its decision should be based only upon the facts DuPont knew at the time it made its decision. The plaintiff, Danielle Salley, contended instead that DuPont had a duty to discover all the relevant facts.

Danielle was a psychiatric patient at DePaul Hospital in Covington, Louisiana. DuPont paid for her treatment under an ERISA plan it had established. On October 11, 1990, DuPont determined that Danielle's treatment was no longer medically necessary and terminated her benefits. Generally, courts would have agreed with Du-

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4. See Jocelyn Hunter, *The Practical Labor Lawyer*, 16 EMPLOYEE REL. L.J. 403 (1991); Jaime R. Ebenstein, *The Judicial Standard of Review Under ERISA, For the Defense*, July 1991, at 9, 9. ("Prior to the United States Supreme Court's landmark decision in *Firestone v. Bruch*, the law was well established that a high level of deference was applicable to decisions made by plan administrators and fiduciaries under ERISA."). See also Counts v. Kissack Water & Oil Serv., Inc., 966 F.2d 1322, 1324 (10th Cir. 1993)(stating arbitrary and capricious standard of review applied to administrator's refusal to pay lump sum benefit and reversing district court); Winchester v. Prudential Life Ins. Co. of Am., 975 F.2d 1479, 1486 (10th Cir. 1992)(stating administrator's decision that heart failure not "bodily injury" within meaning of policy not arbitrary or capricious); Jung v. FMC Corp., 755 F.2d 708, 711 (9th Cir. 1985)(holding refusal to pay was not arbitrary, capricious, or contrary to law in class action by former employees to severance pay under employer's welfare benefit plan); Peckham v. Board of Trustees, 653 F.2d 424, 428 (10th Cir. 1981)(holding the fund's finding as to plaintiff's ineligibility was not arbitrary or capricious as a matter of law in action by union members to recover benefits under pension plan).
5. 966 F.2d 1011 (5th Cir. 1992).
6. *Id.* at 1015-16.
7. *Id.*
8. *Id.* at 1015.
9. *Id.* at 1012. DuPont established its Hospital Medical-Surgery Coverage Policy in accordance with ERISA. At all relevant times Connecticut General administered the Plan, and DuPont reimbursed Connecticut General the full costs of medical claims. DuPont also contracted with Preferred Health Care to manage the individual cases.
10. *Id.* at 1013.
Pont’s contention and reviewed its decision under an abuse of discretion standard based only upon information known to the fiduciary at the time of the decision. The Fifth Circuit instead allowed the district court to review the new information and found that DuPont, in its capacity as fiduciary, abused its discretion by failing to obtain that information before denying benefits.11

The court looked to the Supreme Court’s decision in Firestone Tire & Rubber Co. v. Bruch12 in its examination of DuPont’s decision under the abuse of discretion standard. Relying upon Firestone, the court first determined whether the fiduciary of the plan, DuPont, had the ability to determine eligibility or construe the terms of the plan.13 Next, since DuPont had the power to construe the terms of the plan, the court reviewed DuPont’s disputed benefit claim decision under the typically deferential abuse of discretion standard of review.14 Finally, the Fifth Circuit considered several factors in its analysis of whether DuPont’s decision to deny benefits was an abuse of discretion, including whether DuPont acted arbitrarily or capriciously.15

This Note will critically analyze the Fifth Circuit’s reasons for decreasing the level of deference used to review the decisions of benefit plan fiduciaries. The evolution of the deferential “arbitrary and capricious” or “abuse of discretion” standard of review will be traced from its inception through its less deferential definition in Salley. This Note will first conclude that the current, deferential interpretation of the abuse of discretion standard of review is seriously flawed. Second, this Note will contend that despite the increased time and cost constraints that could accompany de facto ERISA plan administration by the courts, the Fifth Circuit’s decision in Salley is a much-needed check on the power of fiduciaries.

II. BACKGROUND

Jack Salley, a retired employee of DuPont, participated in the hospital medical-surgical coverage plan DuPont had formed in accordance with the terms of ERISA.16 His fifteen-year-old daughter, Danielle,

11. Id. at 1015. The Fifth Circuit contradicted its own precedent with the ruling. In Denton v. First Nat’l Bank, 765 F.2d 1295, 1304 (5th Cir. 1985), the court held that the district court’s decision whether the plan administrator abused his discretion must be based upon the facts known to the administrator at the time the decision was made.
14. Id. at 1014-15.
15. Id. at 1014.
16. Id. at 1012.
was covered under the plan as his dependent. Danielle had a history of emotional disabilities, drug abuse, and depression, which had caused her to be an inpatient three times at DePaul Northshore Hospital in Covington, Louisiana. Each time, Danielle was under the care of Dr. Gordon Blundell, a psychiatrist in charge of the hospital's adolescent unit. DuPont paid for Danielle's treatment during her first two stays in the hospital under the ERISA plan. During her third stay, DuPont concluded that Danielle's treatment was no longer medically necessary and terminated her benefits. Danielle and her father brought suit in the United States District Court for the Eastern District of Louisiana to recover the costs of Danielle's hospitalization during that period.

During her first two visits, Danielle attempted to escape, experienced episodes of head-banging, and displayed suicidal tendencies. She nevertheless improved during each visit. However, as soon as she was released she would "recompensate," or revert back to her old behavior. Dr. Blundell thus determined that Danielle could not live with her parents or attend public schools. Concerned about Danielle's continual admissions and releases from the hospital, Dr. Blundell worked with DuPont's plan administrators to "flex" the benefits, or modify the terms of the coverage. When Danielle was admitted to DePaul hospital for the second time, the Salleys and hospital employees attempted to locate a less restrictive environment for Danielle. They considered several boarding schools, but were unable at that time to find a school that could meet Danielle's needs. As a result, they released Danielle to attend public school, where she subsequently recompensated.

Danielle was readmitted to DePaul Hospital on September 10, 1990, for the third time. Her condition quickly restabilized.

17. Id. at 1012-13.
18. Id. at 1013.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id. "A 'benefits flex' is a health insurance industry practice in which the parties amend or modify the policy's coverage benefits in order to accommodate a contingency that the original contract did not address specifically." Id. Despite the fact that the policy does not allow the treatment provided under its terms, the treatment is mutually beneficial because the insurer reduces its payout expense through less expensive treatment while the insured receives the coverage desired. Id.
26. Id.
27. Id.
28. Id.
29. Id.
Blundell wrote at that time that Danielle was beginning "to function at the highest level she ever has in life." On September 28, 1990, Dr. Blundell talked to Ron Schlegel, a case manager with Preferred Health Care (Preferred). DuPont had contracted with Preferred to manage the individual cases, and Schlegel was the person assigned by Preferred to handle Danielle's case since her first admission. Dr. Blundell told Schlegel about Danielle's marked improvement, but insisted she would regress if released. In accordance with Preferred's procedures, Schlegel sent Danielle to Dr. Satwant Ahluwalia to determine the medical necessity of her treatment. This determination was made because the DuPont plan pays only for expenses that are "medically necessary," although it never defines the phrase.

Dr. Ahluwalia, a psychiatrist and regional director at Preferred, also had been involved with the case since Danielle's first admission. Dr. Ahluwalia had never examined Danielle nor had she reviewed her medical records from the second or third admissions. She had reviewed only the records from Danielle's first admission. Dr. Blundell and Dr. Ahluwalia discussed Danielle's treatment on October 2, 1990. Dr. Blundell told Dr. Ahluwalia that Danielle was stabilizing and would be able to leave the hospital soon. Dr. Blundell also said he wanted to avoid a "revolving door" pattern of admissions. Dr. Ahluwalia said that DuPont planned to terminate Danielle's benefits for inpatient hospitalization on October 11, 1990. Dr. Blundell did not agree with this release date.

The Salleys brought suit challenging DuPont's termination of benefits from October 11, 1990 through January 25, 1991, when Dr. Blun-
dell released Danielle. Danielle subsequently enrolled in the Darrow School in New York, where the environment was more likely to be conducive to her psychological stability. The district court concluded that DuPont abused its discretion when it terminated benefits for Danielle's inpatient hospitalization and found the company liable for her hospital bills from October 11, 1990 through January 25, 1991. DuPont appealed the decision to the United States Court of Appeals for the Fifth Circuit, alleging that the district court erred in holding that DuPont had abused its discretion.

In affirming the district court's ruling, the Fifth Circuit gave DuPont's decision to deny benefits less deference than fiduciary decisions traditionally had been given by other circuits. The court followed the analysis outlined by the Supreme Court in *Firestone* and first determined whether DuPont had discretionary authority as plan administrator to determine eligibility for benefits or construe the terms of the ERISA benefit plan. Under the rule in *Firestone*, if the plan gives the administrator or fiduciary discretionary authority, an abuse of discretion standard is applied. If the plan does not give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, *Firestone* holds that a less deferential de novo standard should be applied.

In applying the abuse of discretion standard, a court must analyze whether the administrator acted arbitrarily or capriciously. Here, the policy stated that the DuPont "Employee Relations Department shall be responsible for development of procedures to implement the policy, for interpretation of policy, and for coordination of administra-

43. Id. “In accordance with an agreement between the parties, DuPont paid Danielle’s hospitalization expenses through November 20, 1990, although DuPont challenged whether the plan required it to make the payments.” Id. n.1.
44. Id. at 1013.
45. Id. at 1014
46. Id.
47. See supra notes 3-11, and accompanying text.
48. A denial of benefits “is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1014 (5th Cir. 1992)(quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).
50. Id.
51. See, e.g., Counts v. Kissack Water and Oil Serv., Inc., 986 F.2d 1322, 1324 (10th Cir. 1993)(applying arbitrary and capricious standard of review to administrator's refusal to pay lump sum benefit); Winchester v. Prudential Life Ins. Co. of Am., 975 F.2d 1479, 1486 (10th Cir. 1992)(reviewing administrator's decision that heart failure is not "bodily injury" within meaning of policy under arbitrary or capricious standard).
tion." The Fifth Circuit has applied the abuse of discretion standard to similar language.

The Salleys contended a de novo review should have been used instead of the abuse of discretion standard. They argued that since DuPont contracted with Preferred Health Care for medical necessity reviews, DuPont was not exercising its discretion under the terms of the plan. The court disagreed, noting that the contract between DuPont and Preferred stated "DuPont reserves final authority to authorize or deny payment for services to beneficiaries of a plan." Furthermore, DuPont had exercised final authority in denying Danielle's benefits. The Salley's argument would ultimately be rendered unnecessary, of course, when the court construed the supposedly deferential abuse of discretion standard of review in a less than deferential manner.

While the Fifth Circuit used the traditionally more deferential abuse of discretion standard, its use of that standard deviated markedly from the universal interpretation given to abuse of discretion by the judiciary. At the heart of the change was the court's decision to require DuPont to obtain all the necessary information regarding Danielle's situation before denying benefits. Previously, the court had followed its own precedent and that of other jurisdictions by basing its review of ERISA plan benefit denials solely upon information known to the administrator at the time he or she made the decision. In Salley, the court considered information about Danielle's second and third admissions that the administrators had not considered. Specifically, neither Schlegel nor Dr. Ahluwalia ever examined Danielle, and neither one obtained the records from Danielle's second or third admissions to DePaul hospital.

53. See Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, 524-25 (5th Cir.) (granting the plan committee the power to "interpret and construe" the plan was sufficient to apply the abuse of discretion standard), cert. denied, 493 U.S. 852 (1989); Batchelor v. International Bhd. of Elec. Workers Local 861 Pension and Retirement Fund, 877 F.2d 441, 443 (5th Cir. 1989) (finding administrator given discretion when plan stated the trustees had "full and exclusive authority to determine all questions of coverage and eligibility ... They ... have full power to construe the provisions of this Agreement, [and] the terms used herein ... "). In a later case, Wildbur v. Arco Chem. Co., 974 F.2d 631, 637 (5th Cir. 1992), the Fifth Circuit also applied the abuse of discretion standard to language which gave the administrator power to "make an independent determination of the applicant's eligibility for benefits under the Plan.
55. Id. See supra note 9 and accompanying text.
57. Id.
58. Id. at 1015.
59. Id.
60. Id.
Courts, then, are faced with difficult decisions when deciding whether to defer to fiduciary decisions. To determine whether granting more or less deference to fiduciary decisions under the abuse of discretion standard of review is based on better reasoning, it is necessary to (1) examine the evolution of the abuse of discretion standard; (2) examine the post-Firestone cases where the circuits have used the abuse of discretion standard and shown great deference to fiduciary decisions; and (3) critically analyze the reasoning behind the Salley court's decision not to follow those holdings, setting forth which level of deference is most strongly supported.

III. ANALYSIS

A. Evolution of the Abuse of Discretion Standard of Review

The provisions of ERISA do not define a standard of review for courts to use in reviewing the decisions of benefit plan fiduciaries. As a result, courts have overwhelmingly turned to an arbitrary and capricious analysis since ERISA's adoption in 1974. Prior to that time the federal government had no comprehensive method of regulating employee pension and benefit plans. The major vehicle for plan regulation was section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA). The terms of the LMRA also failed to provide a judicial mechanism for the review of benefit decisions by plan authorities. Courts responded by developing a "structural defect" analysis to review the decisions of plan fiduciaries. This analysis evolved into the arbitrary and capricious test used by courts today.

Section 302 applies only to union-negotiated pension trusts and prohibits employer payments to labor representatives other than those made to a bona fide pension trust fund. The payments must

61. Not all commentators agree with this assessment. For a different point of view compare Bradley R. Duncan, Note, Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test, 71 CORNELL L. REV. 986 (1986), which contends that ERISA provides express comprehensive standards for the regulation of fiduciary behavior.

62. See supra text accompanying note 50. See also Michael S. Beaver, The Standard of Review in ERISA Benefits Denial Cases After Firestone Tire and Rubber Co. v. Bruch: Revolution or Déjà Vu? 26 TORT & INS. L.J. 1 (1990)(discussing the change from an arbitrary and capricious standard to a de novo standard, as provided in Bruch).


be used "for the sole and exclusive benefit of the employees." Unfortunately, the provision does not specifically allow enforcement against individual plan fiduciaries. Under section 302 the claimant can argue only that the structure of the plan violates the "sole and exclusive benefit" requirement. The statute will not allow direct review of the decisions of the individual fiduciaries who are administering the plan.

The "structural defect" analysis was created by courts to hold individual fiduciaries responsible for their misconduct. Under this analysis, a claimant was required to show that a specific part of the plan denied benefits in an arbitrary and capricious manner. If the showing could be made, a court would conclude the plan was not established for the "sole and exclusive benefit" of its participants and therefore was "structurally" deficient. A court would then review the decision of the fiduciary who enforced the wrongful provision under the same arbitrary and capricious standard.

On balance, the decision of an individual fiduciary may be reviewed under LMRA section 302(c)(5) if a claimant can show benefits have been denied arbitrarily or capriciously. That standard is applied by courts through the "structural defect" analysis to determine if section 302's "sole and exclusive benefit" requirement has been violated. Hence, when Congress defined ERISA's fiduciary obligations with similar language, many courts began using the arbitrary and capricious test to review benefit claim denials under ERISA.

66. Id.
67. See Arroyo v. United States, 359 U.S. 419, 427 (1959) ("The legislative history [of § 302(c)(5)] is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection.").
68. See Burroughs v. Board of Trustees, 542 F.2d 1128, 1130 (9th Cir. 1976) ("Section 302(e) grants district courts jurisdiction to determine whether the provisions of a given retirement fund constitute a structural defect in violation of section 302(c)(5)."), cert. denied, 429 U.S. 1096 (1977); John A. McCreary, Jr., Comment, The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application, 23 Duq. L. Rev. 1033, 1040 (1985) (describing the arbitrary and capricious standard of review in regard to LMRA § 302(c)(5)).
69. See McCreary, supra note 68, at 1040.
70. See Insley v. Joyce, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971) ("[A]rbitrary and capricious eligibility provisions might be violative of the structural requirement that the [LMRA § 302] trust be for the sole and exclusive benefit of the employees.").
71. McCreary, supra note 68. Not all courts, however, have accepted the "structural defect" analysis as a means of acquiring jurisdiction over fiduciary behavior. See, e.g., Fiorelli v. Kelewer, 339 F. Supp. 796, 801 (E.D. Pa. 1972) ("To the extent that plaintiffs argue for the existence of an independent federal remedy to correct trust funds that do not operate to the sole and exclusive benefit of employees they have . . . failed to state a cause of action [under § 302(c)(5)].").
72. Duncan, supra note 61, at 984. Duncan points out that one early writer believed the differences in the language—"exclusive benefit" versus "exclusive purpose of providing benefits"—showed a congressional intention to impose more strict
The arbitrary and capricious standard quickly became the universal standard of review for fiduciary benefit claim denials under ERISA. The test generally has resulted in judicial deference to the decisions of plan fiduciaries in three ways. First, courts usually defer to a fiduciary's interpretation of specific plan language. Second, a fiduciary's decision will be upheld if the decision is rational, even if the claimant offers a similarly reasonable interpretation. Courts are not concerned with whether a fiduciary's decision results in the best or fairest outcome, only whether it is rational and made in good faith. Third, deference frequently is given to the determinations of fiduciaries in matters not covered by plan language and in factual findings.

Recent decisions have begun to attack the universal application of the arbitrary and capricious standard. The Third Circuit in 1987 decided the circuit court version of Bruch v. Firestone Tire & Rubber Co. In Firestone, the company provided a severance pay plan to its employees who were entitled to benefits “if released because of a reduction in work force . . . .” When Firestone sold a manufacturing division to another company, the plaintiffs were rehired by the acquiring company without an interruption in employment. Firestone,
acting as plan fiduciary, denied benefits to the claimants because they had not become unemployed. The trial court held the Firestone plan administrator's interpretation of the plan as requiring actual unemployment was neither arbitrary nor capricious.79

While a number of other courts had used similar rationale to decide cases,80 the appellate court in Firestone reworked the arbitrary and capricious standard of review. The court noted that Firestone could not impartially review claims when it acted as the administrator of its own plan. Thus, the court held Firestone's decisions should be reviewed under a less deferential de novo standard of review.81 In defense of its partial rejection of the arbitrary and capricious standard, the court discussed the applicability of section 182 of the Restatement (Second) of Trusts, which suggests courts should only be deferential if the terms of the plan give discretion to the fiduciary.82

Other circuits also have questioned the wisdom of universally applying the arbitrary and capricious standard of review. In Van Boxel v. Journal Co. Employees' Pension Trust,83 the Seventh Circuit held the standard was "a range, not a point."84 The court in Van Boxel wrote that judicial review should be less taxing in situations in which the plan administrator was not under a conflict of interest and more strict where a conflict was apparent.85 The Ninth Circuit, while failing to question the rationale for the arbitrary and capricious standard of review, has denied judicial deference in similar circumstances.86

The United States Supreme Court's holding in Firestone attempted to solve the conflict over the application of the arbitrary and capricious

82. Id. at 141.
83. 836 F.2d 1048 (7th Cir. 1987).
84. Id. at 1052.
85. Id.
86. See, e.g., Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1152-53 (9th Cir. 1986)(noting "a lesser degree of deference is also due here"); Jung v. FMC Corp., 755 F.2d 708, 711-12 (9th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (9th Cir.)("We hold that the type of plan administration . . . is highly probative of whether a particular decision to deny benefits was infected by its having been made in conformity with the objectionable scheme."); cert. denied, 474 U.S. 865 (1985); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983)("We hold that the burden shifts to the trustees to show a reasonable purpose for the exclusion."). It will be interesting to see how the Ninth Circuit decides Peters v. Life Ins. Co. of North America, 816 F. Supp. 615 (N.D. Cal. 1993), if the case is ever appealed. In Peters, Magistrate Langford was hardly deferential by ruling that the court's review of a denial of disability benefits could not be limited to the administrative record.
standard of review.87 The Court spurned the approaches of the various circuits and instead held that a "denial of benefits . . . is to be reviewed under a de novo standard, unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."88 The Court accepted section 187 of the Restatement (Second) of Trusts when it analogized fiduciary benefit denials to trustee decisions. It noted that an exercise of discretion by a trustee is not subject to control by a court "except to prevent an abuse by the trustee of his discretion."89 The Supreme Court thus held that two standards of review, de novo and abuse of discretion, should replace the previously used "arbitrary and capricious" standard.

Since Firestone, lower federal courts have struggled to define the abuse of discretion standard of review. It is clear the standard should be applied when the fiduciary has the power to construe the terms of the plan. It is also clear the abuse of discretion standard of review is meant to be similar to the arbitrary and capricious standard. It is not yet clear whether it is equivalent to the old standard or slightly more or less deferential. Although several post-Firestone decisions have avoided the issue, most have found the two standards to be analogous, including a recent Fifth Circuit decision.90 The bulk of federal court decisions have only perfunctorily explained the connection between the standards.91 Only a few cases and commentators have provided thorough explanations regarding the interchangeability of the two standards.92

B. Abuse of Discretion as a Deferential Standard

The majority of courts that have used the abuse of discretion standard to review the decisions of ERISA plan fiduciaries have been hesi-
tant to reverse those decisions. Traditionally, the courts justify their deference to the decisions of fiduciaries in a number of ways. First, several courts have contended that the superior knowledge of plan administrators as compared with judges mandates deference to the decisions of the former. Other courts have suggested that plan participants will not be treated similarly if courts continually reverse the decisions of fiduciaries. Perhaps the best defense of judicial deference was advanced by the Third Circuit in Struble v. New Jersey Brewery Employees' Welfare Trust Fund. In Struble, the court contrasted the strict judicial scrutiny of fiduciaries' investment decisions with the deference given to fiduciaries' benefit claim decisions. The court framed the difference in scrutiny by describing the problems each situation creates for fiduciary loyalty:

In actions by individual claimants challenging the trustees' denial of benefits, the issue is not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants. In such circumstances it is appropriate to apply the more deferential "arbitrary and capricious" standard to the trustees' decisions. In the [trustee investment situation], the gravamen of the plaintiff's complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries.

Other circuit courts reviewing fiduciary benefit decisions have followed Struble's deference and only considered evidence that was a part of the administrative record. In Block v. Pitney Bowes Inc., for example, the District of Columbia Circuit affirmed a district court decision upholding an administrator's decision to terminate benefits. The court in Block refused to consider medical records from a Social Security Administration examination because the administrators had not used them at the time of their decision. The Fourth Circuit similarly ruled that ERISA plan benefit decisions may only be reviewed on the evidence presented to plan administrators. In Voliva v.

93. See Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985)("[T]he standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional."); Ponce v. Construction Laborers Pension Trust, 628 F.2d 537, 542 (9th Cir. 1980)("Generally speaking, trustees are knowledgeable of the details of a trust fund . . . and thus they are in a position to make prudent judgments concerning participant eligibility.").

94. See Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1148 (4th Cir. 1985)("To vary the standard of judicial review . . . would only sow confusion in ERISA . . . .")

95. 732 F.2d 325 (3d Cir. 1984).
96. Id.
97. Id. at 333-34.
98. 952 F.2d 1450 (D.C. Cir. 1992).
99. Id. at 1455.
Seafarers Pension Plan, 101 the trial court was reversed because it considered evidence outside of the administrative record to find against the administrator.

The Sixth Circuit has similarly held that review under the abuse of discretion standard must be limited to the record before the administrator at the time of the decision. 102 In Perry v. Simplicity Engineering, Div. of Lukens General Industries Inc., 103 the court reasoned that if the district courts considered evidence not presented to plan administrators they would function as substitute administrators. Since Congress intended for the prompt resolution of claims under ERISA, the court wrote, anything less than judicial deference would frustrate that purpose. 104 The court stated that its goal was to determine only whether the fiduciary made a correct decision, not to function as the fiduciary. 105

The Seventh Circuit chose a different approach in its deference to fiduciaries. In Wolfe v. J.C. Penney Co., 106 the circuit court reversed and remanded a disability claim denial to the district court with instructions to remand the case to the fiduciary to consider the new evidence that had surfaced at trial. The lower court had considered this evidence at trial in contravention of a general rule against de novo hearings. 107 The circuit court showed deference to the decisionmaking power of the fiduciary by instructing that the new evidence be heard by the fiduciary, not the district court. 108

On balance, courts have chosen to extend deference to plan administrators in three ways. First, courts have not permitted de novo review of a plan administrator's discretionary action under the abuse of discretion standard. 109 Courts have limited the review of a plan administrator's decision to the information used to make the decision. 110 When district courts have considered matters outside of the administrative record, appellate courts have reversed. 111 As a result, plan ad-

101. Id.
103. 900 F.2d 963, 967 (6th Cir. 1990). See also Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 986 (6th Cir. 1991)("[A] court may consider only the evidence available to the administrator at the time the final decision was made.").
105. Id.
106. 710 F.2d 388, 394 (7th Cir. 1983).
107. Id.
108. Id.
111. Id. See also Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985)("admitting into evidence matters not before the plan administrator" is error).
ministrators have not had to be concerned with locating additional information that might help the beneficiary because courts will only review the administrator's decision based on the record the administra-

Second, a plan administrator needs only minimal documentation to avoid reversal. Generally, only substantial evidence, or less than a preponderance, is necessary to support an administrator's decision. Third, a plan administrator must only show a rational reason for denying benefits. Consequently, a rational decision will not be reversed, even if the trial court determines that a better decision should have been made. Plan administrators need only show reasonable grounds for their decisions to deny benefits. In addition, the plan administrator has the burden of showing a rational basis for his or her decision only when the beneficiary can make a prima facie showing that the plan administrator's action was unreasonable.

C. The Test in Salley

In Salley, the Fifth Circuit applied the abuse of discretion standard because the benefit plan gave DuPont the power to construe the terms of the plan. To apply the standard, the court analyzed whether the plan administrator acted arbitrarily or capriciously. It is within the framework of this analysis that the court broke new ground. Generally, courts decide whether a fiduciary has abused his or her discretion based on information known to that person at the time the

112. Voliva v. Seafarers Pension Plan, 858 F.2d 195, 196 (4th Cir. 1988). The Tenth Circuit recently joined those courts that refuse to consider evidence which was not before the plan administrator with its decision in Sandoval v. Aetna Life & Casualty Ins. Co., 967 F.2d 377 (10th Cir. 1992).
113. See Stanton v. Gulf Oil Corp., 792 F.2d 432, 434 (4th Cir. 1986); Jestings v. New England Tel. & Tel. Co., 757 F.2d 8, 11 (1st Cir. 1985)(calling medical report considerable evidence); Vorpahl v. Retirement Plan for Employees, 749 F.2d 1266, 1268 (8th Cir. 1984)(finding no substantial evidence that early service years should count in calculating retirement benefits).
114. See Winchester v. Prudential Life Ins. Co. of Am., 975 F.2d 1479, 1483 (10th Cir. 1992)(ruling arbitrary and capricious conduct must be shown by administrator's lack of substantial evidence, mistake of law, bad faith, or conflict of interest)(citing Sandoval v. Aetna Life and Casualty Ins. Co., 967 F.2d 377, 380 n.4 (10th Cir. 1992); Naugle v. O'Connell, 833 F.2d 1391, 1393-94 (10th Cir. 1987)(holding arbitrariness and capriciousness must be shown by administrator's lack of substantial evidence or error of law).
115. See Flint, supra note 109, at 142.
116. Id. at 142-43.
117. Id. at 143.
119. Id.
decision to deny benefits is made.\textsuperscript{120} In \textit{Salley}, the Fifth Circuit ignored this precedent and held DuPont had abused its discretion by failing to obtain all the necessary information before denying Danielle's benefits.\textsuperscript{121} The court justified its break from its own prior decisions and those of other circuits because DuPont, in its capacity as plan administrator, had relied upon the Schlegel and Dr. Ahluwalia recommendations to terminate Danielle's benefits.\textsuperscript{122} Both of those individuals, of course, had never examined Danielle, nor had either one obtained the records from her second or third admissions to DePaul hospital.\textsuperscript{123}

In \textit{Struble}, the court's argument that a fiduciary benefit claim deserves less judicial scrutiny than an investment decision most clearly exposes the flaws of deferentially applying the abuse of discretion standard.\textsuperscript{124} The \textit{Struble} argument is problematic for several reasons. First, ERISA does not limit its fiduciary provisions to investment regulation, as benefit claims are also included.\textsuperscript{125} Second, Congress intended ERISA to protect the rights of individual workers by regulating the way fiduciaries made decisions.\textsuperscript{126} Part of the problem Congress meant to correct was the deference given to these decisions under the arbitrary and capricious test.\textsuperscript{127} Third, some employers have incentives to limit the benefits paid to claimants.\textsuperscript{128} In many cases, employers attempt to limit the amount of benefits paid to present claimants to insure adequate funds for future claimants.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{120} \textit{Denton v. First Natl Bank}, 765 F.2d 1295, 1304 (5th Cir. 1985) (stating that the court must focus on the evidence that was before the Plan Committee when the determination was made).
\item \textsuperscript{121} \textit{Salley v. E.I. DuPont de Nemours & Co.}, 966 F.2d 1011, 1015 (5th Cir. 1992).
\item \textsuperscript{122} \textit{Id}.
\item \textsuperscript{123} \textit{Id}.
\item \textsuperscript{124} See \textit{Struble v. New Jersey Brewery Employees' Welfare Trust Fund}, 732 F.2d 325 (3d Cir. 1984); \textit{Duncan}, supra note 61, at 999.
\item \textsuperscript{125} \textit{E.g.}, \textit{Winpisinger v. Aurora Corp.}, 456 F. Supp. 559, 567 (N.D. Ohio 1978)("This pre-ERISA test of judicial review [the arbitrary and capricious test] is not implicitly approved or rejected by any part of ERISA.").
\item \textsuperscript{126} See \textit{H.R. Rep. No. 533, 93d Cong., 1st Sess. 3 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4641}. \textit{See also Jamie L. Johnson, Comment, Judicial Review of ERISA Plan Administration Under the Arbitrary and Capricious Standard of Review, 10 Indus. Rel. L.J. 400, 403 n.20 (1988)("Section 102 of ERISA requires that the plan be written so as to be 'understood by the average plan participant . . . [and] reasonably apprise such participants and beneficiaries of their rights and obligations.' ") (quoting ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1)(1982)).
\item \textsuperscript{129} \textit{See Duncan}, supra note 61, at 1001 n.76.
\end{itemize}
Similarly, a number of employers receive any surplus in the plan after all qualified beneficiaries have been paid. Once the employer's incentive to deny benefits is considered, it seems irrational to afford great deference to the decisions of the employer in its role as plan fiduciary.

In *Struble*, the court's argument for a deferential interpretation of the abuse of discretion standard of review is centered on the contention that a fiduciary denies one claimant benefits in the interests of future claimants. In contrast, that court argues, investment decisions should be subject to less deference because they benefit unrelated third parties. Contrary to the guiding premise of the *Struble* argument, the rights of individual claimants are at least as important as the possibility of poor investment decisions. In fact, an individual claimant is much more profoundly affected by a denial of benefits than by an investment loss. First, a plan beneficiary often is unable to undertake or continue medical treatment once a fiduciary makes the decision to deny benefits. Second, the total value of the group's investment portfolio and the total amount of benefits may be diminished, but it is unlikely the individual beneficiary will be directly affected by the decision. The effect of a benefit denial on an individual employee or plan beneficiary will ultimately have a much more profound effect on that person.

Justice Brennan's concurrence in a recent Supreme Court case focused on the issue. In *Massachusetts Mutual Life Insurance Co. v. Russell*, Justice Brennan disputed Justice Stevens' statement in dicta that ERISA's fiduciary obligations apply mostly to investment of plan assets. Justice Brennan wrote that "[t]o the extent that the Court suggests that administrators might not be fully subject to strict fiduciary duties to participants and beneficiaries in the processing of their claims... I could not more strongly disagree." Moreover, he noted Congress intended ERISA to incorporate the common law of trusts. Since the law of trust demands that fiduciaries owe strict duties to beneficiaries in the payment of benefits, Justice Brennan argued that fiduciaries who deny benefits should be held to a higher degree of scrutiny. Applied to the abuse of discretion standard,
Justice Brennan's argument demonstrates the inappropriateness of extreme deference to fiduciaries benefit claim decisions.

A closer look at the intent of Congress when it passed ERISA further supports the Fifth Circuit's decision in Salley to force fiduciaries to take more care in their decisions. Congress designed ERISA for the "protection of individual pension rights." This purpose is directly contrary to blind deference to claims denials. In contrast, the holding in Salley that employers must reasonably investigate relevant circumstances when making decisions aids in that purpose. Similarly, it is fair to allow courts to review all the facts surrounding a denial of benefits, not just those the plan administrator was content to use in the decisionmaking process. The current deference of the abuse of discretion test allows fiduciaries to ignore facts that are vital to a claimant's well being while preventing courts from considering those same facts. The purpose of ERISA, to protect the individual worker, is lost in the process.

Plan administrators generally may either rely on the treating physician's advice or independently investigate the treatment's medical necessity. In this case, DuPont's plan administrators apparently relied upon Dr. Blundell's description of Danielle as no longer suicidal or out of control. The court noted that the administrators could not rely on part of Dr. Blundell's advice and ignore his other advice. Dr. Blundell had warned Dr. Ahluwalia that he would release Danielle only if there was an "iron-clad plan in hand that would assure her structure, safety, and well being." Such a plan had not been found. Although the court did not explain its reasoning, it arrived at the only rational decision. It would have been inherently unfair to defer to the DuPont fiduciary's decision when that fiduciary ignored part of Danielle's doctor's advice. By the same token, if the trial court had followed the general rule and refused to look at evidence that was not a part of the administrative record, it would have had to affirm DuPont's decision.

The hospital records from the third admission also would have demonstrated to the administrators the medical necessity of Danielle's inpatient hospitalization. Danielle may have been stable when she

136. See supra text accompanying note 127. See also 29 U.S.C. § 1001(a)(1988)("[I]t is desirable in the interests of employees and their beneficiaries . . . that . . . safeguards be provided with respect to the establishment, operation, and administration of such plans . . . it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans . . . ").
138. Id.
139. Id.
140. Id. See supra text accompanying notes 26-33.
was in the hospital, but as soon as she was released her condition would quickly deteriorate. Dr. Blundell and the other doctors who examined Danielle had valid reasons to believe release into an improper environment would again lead to recompensation. DuPont maintained that a residential care treatment would have satisfied Danielle's needs. Dr. Blundell agreed that a less restrictive environment could have been beneficial to Danielle, but he was against releasing her until a suitable program could be found. At the time in question, such a program could not be found. If Dr. Blundell had released Danielle, she likely would have returned to her former environment. The ERISA plan administrators at DuPont, however, never saw the records. As the rule is generally interpreted, the court therefore would not have been able to consider those records in its review of DuPont's decision. The Fifth Circuit, however, properly ignored the general rule and refused to defer to DuPont's attempt to prevent the records from being admitted into evidence.

It is not difficult to imagine the problems which might occur when courts are unable or unwilling to look at evidence that was not before an ERISA plan administrator. In Salley, for example, the plan administrator was never actually identified. The court referred to Schlegel and Dr. Ahluwalia because DuPont presented no evidence regarding its decision to terminate benefits. The court believed that DuPont made the final determination as to termination or continuance of benefits, but did not hear specific evidence to that effect. In fact, the court never knew who at DuPont made the ultimate decision to deny Danielle's benefits. Similarly, no one testified as to what DuPont did with the information provided by Schlegel and Dr. Ahluwalia. Consequently, the court noted that any support in the record for DuPont's decision had to be found entirely in the recommendations of Schlegel and Dr. Ahluwalia. Since neither person had thoroughly examined Danielle or her records, any decision based on their recommendations could have its accuracy called into question. Seen in this light, the court's decision to grant less deference to DuPont's fiduciary decision was clearly the most rational choice. The court needed the

142. Id. at 1015.
143. Id.
144. Id.
145. Id. Danielle enrolled in the Darrow School in New York shortly after she was released from the hospital by Dr. Blundell.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 1015 n.2.
151. Id. at 1015.
152. Id.
new information from Danielle's second and third admissions to make the best decision with respect to her well-being.

The Fifth Circuit may have foreshadowed its desire not to show deference to ERISA plan administrators. In *Batchelor v. International Brotherhood of Electrical Workers*, the trustees of a union pension plan were found to have miscalculated an employee's past service credit. The plan granted the trustees full and exclusive authority to determine eligibility and coverage questions and the authority to interpret the plan and determine all questions arising in the administration, interpretation, and application of the plan. While the court used the deferential abuse of discretion standard of review, it nevertheless found the trustees' interpretation was in direct conflict with the terms of the plan. The court ultimately determined an amendment to the ERISA plan violated the terms of the statute and illegally allowed the fiduciary to deny benefits.

The Fifth Circuit's decisions since *Salley* have continued along the same path. In *Wildbur v. Arco Chemical Co.*, the court noted that although "we do not appear to have explicitly stated that evidence beyond the administrative record may be considered by a reviewing court... our abuse of discretion analysis and the manner in which we have applied it submits to no other reasonable interpretation." The court went on to specifically hold that district courts were not confined to the administrative record in determining whether a plan administrator abused his discretion in making a benefit determination. Similarly, in *Southern Farm Bureau Life Insurance Co. v. Moore*, the Fifth Circuit held that while it would only consider "evidence that was available to the plan administrator in evaluating whether he abused his discretion in making [factual determinations]," it could consider other evidence which was "unavailable to the plan administrator as it relates to his interpretation of the policy."

IV. CONCLUSION

The current deference granted to ERISA plan fiduciaries under the abuse of discretion standard is inappropriate and contrary to the intent of the law. The current interpretation of the test is inappropriate for three reasons. First, ERISA was designed to protect workers by

153. 877 F.2d 441 (5th Cir. 1989).
154. Id. at 443.
155. Id. at 448.
156. Id.
157. 974 F.2d 631 (5th Cir. 1992).
158. Id. at 639.
159. Id.
160. 993 F.2d 98 (5th Cir. 1993).
161. Id. at 102.
regulating the conduct of fiduciaries who administer benefit plans. Unfortunately, the decisions of these fiduciaries are often granted so much deference that their conduct is barely, if at all, regulated. Second, their decisions only have to be rational, not the best choice. They can base the decisions on minimal evidence. As a result, fiduciaries are granted an enormous amount of latitude when making decisions vital to plan beneficiaries. Third, their rulings can only be reviewed based upon the information they used at the time they made their decision. Other than in the Fifth Circuit, fiduciaries currently are not required to conduct thorough investigations before denying benefits. Similarly, courts are not allowed to consider evidence that is not a part of the administrative record. In both cases, the intent of the law is ignored and the individual worker is being denied fair treatment.

_Salley_ reverses this trend and takes a step in the more rational direction. It stands for the proposition that the decisions of fiduciaries will no longer be granted unconditional deference. If a fiduciary fails to adequately obtain the necessary information before denying benefits, the decision will be overruled. ERISA was designed to protect the individual worker. A less deferential standard of review will hold fiduciaries more accountable and begin to achieve that design. Ultimately, a de novo standard of review for every contested benefit claim decision would create the fairest forum for beneficiaries of ERISA plans. For the present, however, the judiciary would be wise to follow the lead of the court in _Salley_ by granting less deference to the decisions of fiduciaries and reviewing any evidence that was not, but should have been, considered by the fiduciary. Concerns regarding the increased litigation time and costs involved with establishing courts as de facto plan administrators may have some merit. Those concerns are best refuted by the fact that ERISA was created to protect individual workers and can only achieve that end in the future with the aid of the judiciary.

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