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Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test

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JUDICIAL REVIEW OF FIDUCIARY CLAIM DENIALS UNDER ERISA: AN ALTERNATIVE TO THE ARBITRARY AND CAPRICIOUS TEST

INTRODUCTION

The passage of the Employee Retirement Income Security Act of 1974 (ERISA)[1] marked Congress's first effort at comprehensive control over employee benefit plans. Prior to ERISA, employee benefit plans "constitute[d] the only large private accumulation of funds which ha[d] escaped the imprimatur of effective federal regulation."[2] To this end, ERISA introduced a variety of regulatory innovations. The most striking were ERISA's reporting and disclosure requirements,[3] the establishment of minimum participation and vesting standards for qualified plans,[4] the institution of minimum funding requirements,[5] and the creation of federal standards governing the conduct of fiduciaries in control of such plans.[6]

This Note addresses the last of these major innovations, the regulation of fiduciary behavior. Specifically, it examines how courts review a pivotal area of fiduciary activity: the fiduciary's denial of a benefit claim.[7] Courts currently review claim denial decisions using an "arbitrary and capricious" test. Under this test, "the actions of the trustees in the administration of the pension plan must be sustained as a matter of law unless [the claimant] can prove such activities have been arbitrary or capricious."[8]

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1 Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 and in scattered sections of the I.R.C. (1982)).

2 H.R. REP. No. 533, 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as HOUSE REPORT], *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4641.

3 ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1982).

4 *Id.* §§ 201-211, 29 U.S.C. §§ 1051-1061 (1982).

5 *Id.* §§ 301-306, 29 U.S.C. §§ 1081-1086 (1982).

6 *Id.* §§ 401-414, 29 U.S.C. §§ 1101-1114 (1982).

7 For purposes of this Note, the term "fiduciary" shall be used interchangeably with the terms "trustee" and "administrator." These terms refer to the individuals who exercise discretion in deciding whether to deny a benefit claim.

8 Bayles v. Central States, S.E. & S.W. Areas Pension Fund, 602 F.2d 97, 99 (5th Cir. 1979). Each of the federal circuits has adopted the arbitrary and capricious test for review of benefit claim denials. *See, e.g.*, Palino v. Casey, 664 F.2d 854, 858 (1st Cir. 1981); Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985); *Bayles*, 602 F.2d at 99; Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d 454, 457 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 786 (1985); Pokratz v. Jones Dairy Farm, 771 F.2d 206, 208 (7th Cir. 1985); Morgan v. Mullins, 643 F.2d

This Note traces the origins of the arbitrary and capricious test and evaluates the test's role in judicial enforcement of ERISA's fiduciary provisions. This Note concludes that the test, as now applied to benefit claim denials, is inconsistent with both the fundamental policies of ERISA and the prevailing theory of employee benefit plans, the deferred compensation theory. This Note proposes instead an actuarially based test.[9] This test would sustain an administrator's claim denial under two circumstances: (1) when the denial is based upon an unambiguous, trustee-adopted[10] plan provision and the administrator can show an actuarial need for the provision; or (2) when the denial is based upon ambiguous plan language and the administrator can show that adoption of the claimant's reasonable reading would pose an actuarial threat to the plan's health. This actuarial test accords more directly with ERISA's protective intent by limiting an administrator's power to deny benefit claims. Moreover, by concentrating judicial review of fiduciary claim denials upon actuarial factors, the test reduces the inherent conflict between the sometimes necessary evil of benefit denials and the theory that all employees enjoy an entitlement to benefits as deferred compensation.

1320, 1321 (8th Cir. 1981); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983); Peckham v. Board of Trustees of the Int'l Bhd. of Painters Union, 653 F.2d 424, 426 (10th Cir. 1981); Helms v. Monsanto Co., 728 F.2d 1416, 1420 (11th Cir. 1984); Maggard v. O'Connell, 671 F.2d 568, 571 (D.C. Cir. 1982).

9 The term "actuarial" is used throughout this Note in a broad, nontechnical manner, referring only to a plan's ability to satisfy its long-term benefit obligations with respect to qualified participants. All employee benefit plans are established and funded according to the characteristics of a specific plan population. As used here the term "actuarial" shall refer to the correlation between the level of plan funding and the costs that the plan's intended population is expected to impose. The term does not refer to any specific means of computing a plan's obligations. For a discussion of particular actuarial cost methods, see D. McGILL, FUNDAMENTALS OF PRIVATE PENSIONS 332-62 (3d ed. 1975).

10 The proposed test would only apply when the plan trustees *unilaterally* adopted the provision which generated the denial. It does not apply when the challenged provision is the product of collective bargaining. The Supreme Court held in United Mine Workers Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), that such collectively bargained provisions need not satisfy any standard of reasonableness. Thus, when a trustee denies a claim pursuant to an unambiguous, collectively bargained provision, *Robinson* holds that the trustee has breached no fiduciary duty, despite the provision's possible irrationality. *Id.* at 574. For a discussion of *Robinson,* see *1981-1982 Annual Survey of Labor Relations and Employment Discrimination Law,* 24 B.C.L. REV. 47, 152-61 (1982). The result in *Robinson* seems appropriate, given that trustees who merely implement an unambiguous, collectively bargained provision do not exercise the type of discretion that lies at the heart of ERISA's fiduciary provisions. *See infra* note 11. Such is not the case, however, when trustees interpret an *ambiguous* plan provision. In such instances ERISA's fiduciary provisions are clearly implicated, and the proposed test's second prong would apply regardless of whether the provision was collectively bargained or unilaterally adopted.

I
ERISA'S FIDUCIARY PROVISIONS AND STANDARDS OF JUDICIAL REVIEW

ERISA provides express comprehensive standards for the regulation of fiduciary behavior. In reviewing fiduciary benefit denials, however, courts have departed from these express provisions and have applied an arbitrary and capricious test. Part I describes that departure. Further, it traces the origins of the arbitrary and capricious test and shows, by way of example, the inconsistency with which courts currently apply the test.

A. Regulation of Fiduciaries Under ERISA

ERISA's fiduciary provisions[11] govern the entire range of a trustee's plan-related behavior. A long history of fiduciary misuse of plan resources, coupled with the impotence of prior legislation directed at such fiduciary misconduct,[12] prompted enactment of the standards. The heart of ERISA's fiduciary treatment is section 404(a)(1), which imposes strict duties of care and loyalty upon plan fiduciaries. This section requires that fiduciaries discharge their duties "solely in the interest" of plan participants and beneficiaries; that they act "for the exclusive purpose" of providing benefits to participants and their beneficiaries; and that they act with the care and skill of a "prudent man" in like circumstances.[13] The particular

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11 ERISA defines a fiduciary as follows:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title [establishing the allocation of fiduciary duties].

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1982).

12 *See infra* note 69.

13 Section 404(a)(1), codified at 29 U.S.C. § 1104(a)(1) (1982), provides:

> § 1104. Fiduciary duties
> (a) Prudent man standard of care
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a

language establishing section 404(a)(1)'s fiduciary standards derives from the common law of trusts.[14] Congress incorporated that language in ERISA expressly intending "that courts . . . interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans."[15]

Although the above language is rather cryptic—it is unclear precisely what "special nature and purposes" Congress had in mind—Congress certainly saw ERISA as a mandate to the federal courts to fashion an entirely new body of federal employee benefit law.[16] This new body of law was designed to depart from the pre-ERISA "abuses and unsound practices which jeopardize[d] the security of [plan] assets and threaten[ed] the availability of funds for employees."[17]

The federal courts have followed Congress's mandate and in the last decade have constructed an impressive body of case law relating to a fiduciary's discretionary behavior. Essential to an understanding of this case law is the recognition that courts have

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like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

14 *See* HOUSE REPORT, *supra* note 2, at 11, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts."). Despite applying elements of the common law of trusts, Congress intended ERISA's fiduciary provisions to depart from that field of law. For example, the common law of trusts permits a trust agreement to shield a fiduciary, via an exculpatory clause, from any liability for misuse of trust assets. ERISA's fiduciary provisions, on the other hand, specifically override such exculpatory clauses. *See* ERISA § 410, 29 U.S.C. § 1110 (1982).

15 HOUSE REPORT, *supra* note 2, at 12, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4650.

16 ERISA § 514(a), 29 U.S.C. § 1144(a) (1982), strongly supports this idea. It reads, "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . . ." *Id. See also* Helms v. Monsanto Co., 728 F.2d 1416, 1419 (11th Cir. 1984) ("The language in § 1144 is broad, indicating Congress' intent to preempt the entire field of law involving employee benefit plans subject to ERISA."); Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977) ("The legislative history [of ERISA] manifests that Congress intended to preempt all state laws that *relate* to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA."), *cert. denied*, 435 U.S. 980 (1978).

17 1 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 204 (1976) (remarks of Sen. Javits).

bifurcated the cases challenging a fiduciary's exercise of discretion into two broad categories. The first category includes cases challenging a fiduciary's honesty or skill in managing plan assets. The second category comprises cases which assail a fiduciary's administration of the plan with respect to its participants and beneficiaries. This latter category encompasses challenges to fiduciary actions which have the effect of a benefit denial.[18] Courts have scrutinized the first category, cases which attack a fiduciary's investment behavior, according to the express language of section 404(a)(1).[19] For example, in *Donovan v. Bierwirth*[20] the Second Circuit evaluated the allegations of pension plan participants that the plan's trustees had violated the express language of section 404(a)(1) by investing plan funds in stock of the employer corporation. The court held for the participants, finding that because the investment was primarily intended to thwart a hostile tender offer, and not to further the health of the plan, the trustees had violated section 404(a)(1)'s express loyalty and prudence requirements.[21]

The second category of cases challenging fiduciary behavior, and the focus of this Note, involves plan administration. Typically, these cases challenge a fiduciary's exercise of discretion in denying a benefit claim.[22] Broadly speaking, a fiduciary may exercise his discretion to deny a benefit claim in two ways. The first and most obvious way is by interpreting plan eligibility requirements in close cases so as to exclude a claimant from receiving his benefits. The second, less apparent exercise of discretion involves adopting eligibility provisions which later form the basis for a benefit denial. In both cases the fiduciary's discretionary decision leads to the denial of benefits, although in the former he is *presently* deciding an individual case, and in the latter he has *previously* decided, by adopting the exclusionary

18 *See* Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984) (discussing judicial review of these two broad categories of fiduciary activity).

19 *See, e.g.,* Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir.) (trustees violated § 404(a)(1)'s express prudence requirements in lending plan assets and administering loans), *cert. denied,* 105 S.Ct. 565 (1984); Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) (administrators of ERISA regulated employee stock ownership plan violated § 404(a)(1) by selling stock for inadequate consideration), *cert. denied,* 467 U.S. 1251 (1984).

20 680 F.2d 263 (2d Cir.), *cert. denied,* 459 U.S. 1069 (1982).

21 680 F.2d at 276. The court specifically invoked the "solely in the interest," "exclusive purpose," and "prudence" aspects of § 404(a)(1), and determined that under the circumstances the trustees' behavior violated each of these "overlapping standards." *Id.* at 271.

22 Administering a pension plan includes duties other than deciding benefit claims, such as record keeping and filing annual reports. For purposes of reviewing fiduciary behavior, however, the benefit decision is the most important administrative responsibility, and is the focus of this Note.

provision, that a particular class of claimants should not receive benefits.[23]

In contrast to the analysis applied to fiduciary investment behavior, courts reviewing fiduciary decisions on benefit claim matters have not felt bound by section 404(a)(1)'s express language. Instead, they have reviewed such decisions under the highly deferential "arbitrary and capricious" test. The Sixth Circuit described the scope and source of this test in *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*:

> [O]nce a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits. . . . Such review, however, is limited to a determination of whether the trustees' actions in administering or interpreting a plan's provisions are arbitrary and capricious. Courts may review the trustees' administration of a pension plan because Congress has imposed a fiduciary duty upon trustees to administer such plans for the sole and exclusive benefit of the beneficiaries. 29 U.S.C. Sec. 1104 [ERISA section 404(a)].[24]

The arbitrary and capricious test appears nowhere within ERISA itself;[25] indeed, the statute's fiduciary provisions do not expressly address the benefit denial situation. Courts have nonetheless construed section 404(a)(1)'s broad language[26] to regulate all forms of fiduciary behavior, including a fiduciary's denial of a benefit claim. As the *Moore* case illustrates, most courts rest their authority to review fiduciary benefit denials upon section 404(a)(1)'s "solely in the interest" and "exclusive purpose" language.[27] That Congress intended the courts to review fiduciaries' decisions regarding benefit denials is confirmed by ERISA section 502(a)(1)(B). That section defines the parties empowered to bring a civil action to

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23 The distinction between these two methods of denying benefits underlies the two prongs of the proposed test for judicial review of benefit denials presented *infra* in part III. Moreover, it explains the interaction between the proposed test and the decision in United Mine Workers Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), discussed *supra* note 10.

24 740 F.2d 454, 457 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 786 (1985).

25 *See, e.g.,* 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.").

26 *See supra* note 13.

27 *See, e.g.,* Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 162-63 (3d Cir. 1985) (citing § 404(a)(1), court stated that "a decision of trustees denying benefits to participants or beneficiaries meets the requirements of § [404] unless that decision is arbitrary and capricious"); Palino v. Casey, 664 F.2d 854, 857 (1st Cir. 1981) (Citing § 404(a)(1), the court stated that "ERISA imposes on trustees of funds . . . a fiduciary duty to manage the fund with prudence and in the interest of the fund's participants and beneficiaries." The court then reviewed a trustee's decision to amend the plan in a way that excluded a claimant from benefits.).

enforce ERISA's provisions, and states that a plan participant or beneficiary may bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[28]

ERISA thus permits judicial review of benefit claim denials, and provides substantive standards against which fiduciary behavior might be measured. Nonetheless, courts review a fiduciary's decision to deny a benefit using a standard not found within the statute itself. The question arises: what is the source of the arbitrary and capricious test, and why have courts chosen to apply it instead of section 404(a)(1)'s express provisions?

B. Origins of ERISA's Arbitrary and Capricious Test

ERISA's arbitrary and capricious test finds its immediate roots in the "structural defect" analysis that courts developed to review the benefit decisions of fiduciaries of plans created pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA).[29] Prior to ERISA, LMRA section 302(c)(5) provided the primary vehicle for federal regulation of pension plan structure and administration. Applicable only to union-negotiated pension trusts, section 302 forbids all employer payments to labor representatives other than those to be applied to a bona fide pension trust fund. Once made, these payments must be used for "the sole and exclusive benefit of the employees . . . and their families and dependents."[30]

Despite the imposition of this "sole and exclusive benefit" obligation, section 302(c)(5) does not expressly authorize enforcement against *individual* plan fiduciaries.[31] Under section 302(c)(5) a claimant may allege that the plan itself, *as structured*, violates the "sole and exclusive benefit" requirement.[32] The statute does not authorize,

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28 ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1982). This section contrasts with § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1982), which permits the Secretary of Labor, a plan participant, or a fiduciary to bring an action to recover profits a fiduciary receives from an improper investment or transaction involving plan assets. ERISA thus includes two parallel provisions creating causes of action, one intended to redress fiduciary breaches in the investment context, and the other to recover benefits. Existence of the latter strongly implies Congress intended ERISA's fiduciary provisions to apply to the benefit claim situation.

29 29 U.S.C. § 186(c)(5) (1982).

30 *Id.*

31 *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.").

32 *See* Burroughs v. Board of Trustees of the Pension Trust Fund for Operating Eng'rs, 542 F.2d 1128, 1130 (9th Cir. 1976) ("Section 302(e) grants district courts juris-

however, a direct attack upon the misconduct of individual fiduciaries administering the plan.[33]

To circumvent this flaw in section 302(c)(5), courts developed the "structural defect" theory, a backdoor means of asserting jurisdiction over the alleged misconduct of the fiduciaries themselves.[34] Under the "structural defect" analysis, courts require a claimant to demonstrate that a particular plan provision has denied him benefits in an "arbitrary and capricious" manner.[35] If a claimant can show that a plan provision produces such arbitrary and capricious treatment, courts conclude that the plan has not been established for the "sole and exclusive benefit" of its participants.[36] This failure implies a "structural" deficiency in the plan, which allows courts to review, under the same arbitrary and capricious test, the fiduciaries' conduct in enforcing the offending provision.[37]

The key, therefore, to judicial review of an individual fiduciary's claim decision under LMRA section 302(c)(5) is an initial finding that a claimant's benefits have been denied arbitrarily or capriciously. Application of that standard, via the "structural defect" analysis, is in turu closely linked to section 302(c)(5)'s "sole and exclusive benefit" language. Thus, when Congress subsequently adopted similar language to define ERISA's fiduciary obligations,

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diction to determine whether the provisions of a given retirement fund constitute a structural defect in violation of § 302(c)(5)."), *cert. denied,* 429 U.S. 1096 (1977).

33 542 F.2d at 1130. *See also* Wilson v. Board of Trustees of the Pension Trust Fund for Operating Eng'rs, 564 F.2d 1299, 1300 (9th Cir. 1977) (Section 302(e) jurisdiction "does not extend to day-to-day fiduciary administration of welfare and pension funds."); Beam v. International Org. of Masters, 511 F.2d 975, 978 (2d Cir. 1975) ("we have found no case describing a federal substantive standard for review of fiduciaries' determination of an individual claim brought pursuant to a jointly-administered welfare trust fund created pursuant to Section 302(c)(5) of the [LMRA]").

34 *See* Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application,* 23 DUQ. L. REV. 1033, 1035-41 (1985) (describing evolution of arbitrary and capricious test under LMRA § 302(c)(5)).

35 *Id.*

36 *Id. See also* Insley v. Joyce, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971) ("It seems obvious . . . that arbitrary 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.").

37 *See* Comment, *supra* note 34, at 1040. Several courts never accepted the argument that § 302(c)(5) created a federal cause of action to enforce the "solely in interest" requirement. These courts rejected the circuitous "structural defect" rationale as a means of establishing continuing 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)]. . . . Although this Court is sensitive to the equities of the plaintiff's claim it is of the opinion that they would be better addressed to a state forum."), *aff'd,* 474 F.2d 1340 (3d Cir. 1973). *See also* Haley v. Platnick, 378 F. Supp. 499 (S.D.N.Y. 1974), *rev'd on other grounds sub nom.* Haley v. Palatnik, 509 F.2d 1038 (2d Cir. 1975).

many courts saw therein an intent to perpetuate the arbitrary and capricious test for review of benefit claim denials under ERISA.[38] The Third Circuit described judicial thinking on the point in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*:

> The "arbitrary and capricious" standard derives from section 302(c)(5) of the LMRA. That section imposes a duty of loyalty on section 302 trustees by permitting employer contributions to a welfare trust fund only if the contributions are used "for the sole and exclusive benefit of the employees . . . ." Section 1104 of ERISA imposes a similar duty of loyalty, and not surprisingly the courts have applied the "arbitrary and capricious" standard under ERISA as well.[39]

C. Current Judicial Application of the Arbitrary and Capricious Test

Origins aside,[40] the arbitrary and capricious test is firmly entrenched as the standard of review for fiduciary benefit claim decisions under ERISA.[41] Broad acceptance of the test, however, has

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38 At least one early commentator, however, suggested that the *difference* between the language in ERISA § 404(a)(1) and that in LMRA § 302(c)(5)—"exclusive purpose of providing benefits" versus "exclusive benefit"—demonstrates an effort to impose more rigorous standards upon fiduciaries under ERISA, so as to avoid the failures of LMRA regulation. *See* Note, *Fiduciary Standards Under The Employee Retirement Income Security Act of 1974*, 63 GEO. L.J. 1109, 1116 (1975).

39 732 F.2d 325, 333 (3d Cir. 1984). In a strict sense, it is inaccurate to state that courts do not apply § 404(a)(1)'s express language when reviewing fiduciary benefit denials. As the *Struble* quote shows, courts use § 404(a)(1)'s "solely in the interest" language as a starting point for review of denials, but employ the arbitrary and capricious test to determine whether a claim denial was "solely in the interest." *See also supra* notes 24-27 and accompanying text. Courts, in essence, use the arbitrary and capricious test to provide the *substance* for the "solely in the interest" inquiry. A link thus exists, however attenuated, between § 404(a)(1)'s express language and the arbitrary and capricious test.

40 In adopting § 302(c)(5)'s arbitrary and capricious test to review benefit denials under ERISA, most courts overlook the conditions, outlined above, under which the test originated. The "structural defect" analysis represented an effort by courts to review fiduciary behavior where no clear statutory authority for such review existed. As such, review under § 302(c)(5) was necessarily tentative, for the statute's failings placed an unavoidable restraint upon the level of judicial scrutiny chosen. ERISA, on the other hand, provides both explicit standards and enforcement mechanisms for review of fiduciary behavior. *See supra* note 13. This contrast—between the questionable (if not fictional) basis for review under the LMRA and ERISA's unambiguous grant of review authority—weakens the argument for perpetuating § 302(c)(5)'s arbitrary and capricious test under ERISA. *See also infra* part II. Nonetheless, most courts look only to the two statutes' facial similarities and, after a cursory inquiry, conclude that the arbitrary and capricious test is the proper standard under ERISA. *See, e.g., supra* note 39 and accompanying text.

41 *See* Gilbert, *The Responsibilities and Liabilities of Fiduciaries Under ERISA—A Ten-Year Anniversary Review*, 43 INST. ON FED. TAX'N § 33, at 33-18 (1985) (describing universality of arbitrary and capricious test); *see also supra* note 8 and cases cited therein.

not produced uniformity, either in the way the test is applied or in the results reached thereunder. The nature of the test itself largely causes this failure. In the abstract, the test lacks substance; its language commands only an undefined deference to a fiduciary's decision.[42] To limit that deference and apply the test in a reasoned manner, courts have had to supply the test's substance. Unfortunately, courts have been notably inconsistent in articulating the questions to be asked under an arbitrary and capricious review. Consequently, the test varies by jurisdiction, causing different courts to reach different results in virtually identical cases.[43]

For example, the test's substance often varies according to the nature of the claim denial. Courts reviewing denials based upon a fiduciary's interpretation of plan language frequently consider factors quite different than those they consider when reviewing denials based upon unambiguous, trustee-adopted provisions.[44] Although this difference in focus may itself be unobjectionable,[45] problems arise when courts within these two categories of cases emphasize different factors.

In *Gaines v. Amalgamated Insurance Fund*,[46] for example, the Third Circuit reviewed a fiduciary's interpretation of plan language that served to deny a claimant her benefits. In sustaining the denial, the court concluded that under the arbitrary and capricious test, a "plan interpretation should be upheld even if the court disagrees with it, so long as the interpretation is rationally related to a valid plan purpose and not contrary to the plain language of the plan."[47] The *Gaines* court's simplistic and highly deferential formulation of the test contrasts with the Fifth Circuit's more sophisticated characterization in *Dennard v. Richards Group, Inc.*[48] The *Dennard* court reversed a district court's grant of summary judgment in favor of a pension plan, stating "we are not convinced that the District Court considered all factors possibly indicating arbitrary and capricious action by the [Administrative Retirement] Committee."[49] The court

42 *See* Maggard v. O'Connell, 671 F.2d 568, 571 (D.C. Cir. 1982) (" 'the concept of "arbitrary and capricious" review defies generalized application' and must be contextually tailored") (quoting National Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1050 (D.C. Cir. 1979)); G. BOREN, QUALIFIED DEFERRED COMPENSATION PLANS § 16:07 (1983) ("An arbitrary and capricious standard is not self-explanatory.").

43 *See, e.g., infra* note 60.

44 *See supra* note 23 and accompanying text.

45 Interpretation of plan language offers different opportunities for abuse than does the decision to adopt a restrictive plan provision. A reviewing court must therefore utilize different yardsticks to measure a fiduciary's exercise of discretion. *See supra* note 23 and accompanying text.

46 753 F.2d 288 (3d Cir. 1985).

47 *Id.* at 289.

48 681 F.2d 306 (5th Cir. 1982).

49 *Id.* at 314. The *Dennard* court rejected the district court's apparent formulation

held that review of a fiduciary's interpretation of plan language under the arbitrary and capricious test requires a comprehensive review of all relevant factors. It stated that a court should consider: (1) whether a fiduciary's interpretation had been consistently applied in the past; (2) whether the interpretation was "fair" or reasonably derived from the plan's language; (3) whether an alternative construction would impose "unanticipated costs;" and (4) whether circumstances surrounding the denial indicated bad faith conduct by the fiduciary.[50] The analysis sanctioned by *Dennard* in the plan interpretation context resembles a totality of the circumstances test, with no one factor ensuring or precluding a finding of arbitrary and capricious treatment. The *Dennard* approach thus differs markedly from the sort of review exemplified by *Gaines,* even though each proceeds under the same statute and purports to apply the same standard of review.

Similar difficulties arise in cases where unambiguous, trnstee-adopted plan provisions provide the basis for benefit denials.[51] The courts applying the arbitrary and capricious test in this context have adopted varying formulations as well. The Ninth Circuit has constructed the most stringent and elaborate version of the test. In a series of cases originating under LMRA's "structural defect" analysis,[52] the Ninth Circuit has held that if a plan provision excludes a "disproportionate number" of participants from benefits, "the burden shifts to the trustees to show a reasonable purpose for the exclusion."[53] Absent such a showing, the plan provision is deemed arbitrary and capricious. Each of these Ninth Circuit cases individually shifted the burden of proving reasonableness to the trustees when the disputed provision excluded particularly vulnerable groups.[54] The cases' net effect, however, may be to require that

of the test, which would have required for reversal of the trustees' decision a showing by the plaintiff that the trustees' interpretation was wholly implausible. *Id.*

50 *Id.* The court determined the good faith of the trustee by examining the plan's internal consistency, relevant administrative regulations, and the factual background of the case. *Id.*

51 *See supra* note 10 and accompanying text.

52 Although ERISA covers all qualified employee benefit plans, the LMRA still nominally regulates the structure of union-negotiated plans. The LMRA and ERISA thus concurrently regulate union-negotiated plans. Courts, however, have interpreted ERISA's fiduciary provisions to incorporate the standards developed under the LMRA. *See supra* part I(B). Thus, there is little practical difference whether a case is brought under ERISA or the LMRA, as the standard of review is the same under each statute. *See* Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433, 438 (9th Cir. 1980).

53 Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983).

54 *See, e.g.,* Elser v. I.A.M. Nat'l Pension Fund, 684 F.2d 648 (9th Cir. 1982) (provision denied benefits to employees who had worked significantly longer than employees that received benefits), *cert. denied,* 464 U.S. 813 (1983); Burroughs v. Board of Trustees of the Pension Trust Fund for Operating Eng'rs, 542 F.2d 1128 (9th Cir. 1976) (newly

where a plan provision excludes *any* group of employees, the plan's trustees bear the burden of proving the provision's reasonableness.[55]

In contrast, the Second Circuit follows a less rigorous version of the test. In *Valle v. Joint Plumbing Industry Board,* the court described its standard:

> In determining whether the particular application of a new eligibility requirement was arbitrary and capricious, a number of factors should be considered. They include the extent to which the applicant was an intended beneficiary of the plan, the extent to which the [trustee-adopted provision] retroactively strips the beneficiary of significant service credit, the extent to which the trustees have notified the employee of these and other changes in rules, and the extent to which there is actuarial justification for denying benefits in the particular case.[56]

The vital distinction between the Ninth Circuit test and the *Valle* standard is that the latter does not presume that an exclusive provision is arbitrary and capricious.[57] The Second Circuit instead places the burden upon the claimant to demonstrate, using specific evidence, that the challenged provision operates unfairly.

The *Valle* test is nonetheless more demanding than the unimaginative standard the Tenth Circuit has apparently adopted. In *Mestas v. Huge*[58] the court required only that a challenged provision be "rational" to avoid the arbitrary and capricious label. It

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adopted provision retroactively deprived employees of benefits without offering them opportunity to comply with new provision's requirements), *cert. denied,* 429 U.S. 1096 (1977); Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1972) (provision excluded individuals who had involuntarily experienced break in employment); *see also Harm,* 701 F.2d at 1305 (summarizing prior case law). These Ninth Circuit cases deal with specific types of plan provisions that exclude discrete classes of individuals.

55 The court in Shishido v. SIU-Pac. Dist.-PMA Pension Plan, 587 F. Supp. 112 (N.D. Cal. 1983), presented the most liberal description of Ninth Circuit case law on this issue: "The exclusion of employees from pension benefits without justification creates a presumption that the pension plan is structurally defective" thus shifting the burden of proving the provision's reasonableness to the trustee. *Id.* at 118. The *Shishido* court did not qualify its use of the term "employees," thus apparently extending the doctrine to any group of excluded claimants regardless of its size or characteristics. Indeed, the "group" in *Shishido* consisted only of Mr. Shishido, who had failed to satisfy the plan's service duration requirement because of an unconstitutional revocation of his merchant mariner's certificate. The trustees refused to exercise their discretion to modify the duration requirements for "good cause" and grant Mr. Shishido's benefits. The court found this action an arbitrary and capricious application of the "good cause" provision. *Id.* at 119.

56 623 F.2d 196, 203 (2d Cir. 1980).

57 In discussing the extent to which fiduciaries have traditionally altered the eligibility requirements of plans, the court stated that "[a]ll of these [changes] may be reasonable responses to very real present and anticipated economic problems for the pension fund. They are not presumed to be unreasonable . . . ." *Id.*

58 585 F.2d 450 (10th Cir. 1978).

stated that "[w]here the trustees of a pension fund in setting eligibility standards have several rational alternatives, and select one and reject the others, there is no basis for judicial intervention."[59]

That the arbitrary and capricious test has taken so many forms and been so inconsistently applied[60] indicates that it is no test at all. Other than instilling a sense of deference to a fiduciary's claim denial, the test effectively permits courts to select whatever analysis they deem appropriate. The need to add substance to an otherwise empty test has bred confusion and inconsistency at the federal level under a statute intended, among other things, to "bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state."[61]

II
INAPPROPRIATENESS OF THE CURRENT ARBITRARY AND CAPRICIOUS TEST

Despite its uncertain basis in ERISA[62] and its inconsistent application,[63] the highly deferential arbitrary and capricious test is

59 *Id.* at 453. *See also* Murn v. United Mine Workers, 718 F.2d 359, 361 (10th Cir. 1983) (court sustained benefit denial based on provision excluding strike time in computing eligibility, stating, "[a]s in *Mestas*, the trustees chose one of several rational alternatives and in so doing rendered judicial intervention improper").

60 For example, compare the result in Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) with that in Richardson v. Central States, S.E. & S.W. Areas Pension Fund, 645 F.2d 660 (8th Cir. 1981). In both cases, on virtually identical facts, the district courts applied the arbitrary and capricious test to trustees' determinations that truck drivers were not "employees" within the meaning of the plan's language. In both cases, the drivers were participants in the same pension plan and were challenging the same provision. Several factors in each case, primarily that each driver owned his own truck and was classified on his employer's books as an independent contractor, led the trustees to deny the benefit claims of each on the grounds that both were "self employed."

In *Wardle* the Eighth Circuit upheld the benefit denial, yet in *Richardson* the Seventh Circuit reversed the denial. Both applied the arbitrary and capricious test. The *Richardson* court sought to distinguish *Wardle* on the grounds that the driver in *Wardle* was not subject to restrictions on the personal use of his truck or on the solicitation of business elsewhere, while the company in *Richardson* "exercised almost complete control over Richardson's job-related duties." 645 F.2d at 663. The *Richardson* court, in essence, sought to distinguish *Wardle* because the driver in that case had the power to use his truck outside of his immediate relationship with his employer. The *Richardson* court ignored, however, that the driver in *Wardle* "worked a minimum of 40 hours a week for [his employer] and drove for no one else during that time." *Wardle*, 627 F.2d at 826. In any event, the substantial factual identity of the two cases renders the distinction unpersuasive. *See* G. BOREN, *supra* note 42, § 16:07. Comparing these two cases illustrates the malleability of the arbitrary and capricious test, and how it can lead to close scrutiny or great deference depending on the disposition of the reviewing court.

61 HOUSE REPORT, *supra* note 2, at 12, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4650.

62 *See supra* part I(B).

63 *See supra* part I(C).

firmly entrenched as the standard of review for benefit denials under ERISA.[64] Courts have offered several justifications, under both the LMRA and ERISA, for adoption of the test. These justifications conflict with the fundamental policies and goals of ERISA. Moreover, these justifications, and the broad deference they endorse, conflict with the deferred compensation theory of employee benefit plans. Current application of the test heightens the inherent tension between the deferred compensation theory and the unavoidable necessity of fiduciary benefit denials.

A. Policies of ERISA

Courts adopting the arbitrary and capricious test justify its deference to fiduciary decisions in several ways. Numerous courts have argued that the ultimate responsibility for plan administration must lie with administrators, "whose experience is daily and continual, not with judges whose exposure is episodic and occasional."[65] Other courts have stressed the goal of uniform plan administration, deeming aggressive judicial review an obstacle to the consistent treatment of plan participants.[66] The Third Circuit, however, in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*[67] advanced the most persuasive defense of the arbitrary and capricious test. In contrasting the close judicial scrutiny of fiduciary investment decisions with the deference afforded a fiduciary's benefit claim decision, the court described the divergence in terms of the challenges that each situation poses to 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

64 *See supra* note 41 and accompanying text.

65 Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985). *See also* Ponce v. Construction Laborers Pension Trust, 628 F.2d 537, 542 (9th Cir. 1980) ("trustees are knowledgeable of the details of a trust fund (both its purpose and its operation), and thus they are in a position to make prudent judgments concerning participant eligibility").

66 *See* Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1148 (4th Cir. 1985) (arbitrary and capricious test proper "whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue"), *aff'd sub nom.* Brooks v. Burlington Indus., Inc., 106 S. Ct. 3267 (1986).

67 732 F.2d 325 (3d Cir. 1984).

interests to advance the interests of non-beneficiaries.[68]

These defenses of the arbitrary and capricious test ignore the fundamental principles and goals underlying ERISA's fiduciary provisions. Congress intended that ERISA dramatically alter prior law regulating fiduciary behavior, of which the arbitrary and capricious test for review of fiduciary benefit denials was an integral part.[69] Proponents of the arbitrary and capricious test avoid this problem by arguing that the substantive fiduciary provisions contained in ERISA section 404(a)(1) primarily aim at a plan fiduciary's investment decisions.[70] Under this view, ERISA's stringent[71] express provisions govern investment behavior, while benefit claim decisions enjoy the traditional deference of the arbitrary and capricious test. The *Struble* court's analysis seems grounded in this notion. The court seems of the opinion that Congress sought close regulation of fiduciary investment decisions because they present the possibility of benefit to non-plan participants. Benefit claim decisions, on the other hand, because they involve only the balancing of legitimate competing interests in the plan's resources, did not command Congress's attention when it enacted section 404(a)(1).[72] Like an out-

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68 *Id.* at 333-34.

69 *See supra* note 16 and accompanying text. ERISA's legislative history reveals Congress's dissatisfaction with prior fiduciary law, citing the inadequacies of the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), *repealed by* ERISA § 111, 29 U.S.C. § 1031 (1982), the Labor Management Relations Act, the relevant sections of the Internal Revenue Code, and the common law of trusts. *See* HOUSE REPORT, *supra* note 2, at 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4642. Congress noted:

> The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants . . . . In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed . . . . Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording."

Id. at 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4643. Particularly damaging to judicial perpetuation of the LMRA's arbitrary and capricious test under ERISA was Congress's complaint that the LMRA "is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or *fiduciary conduct.*" *Id.* at 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 4642 (emphasis added).

70 *See infra* notes 78-83 and accompanying text, discussing Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085 (1985).

71 *Struble* demonstrates that courts do interpret § 404(a)(1)'s express language to impose upon investment decisions stricter fiduciary standards than the arbitrary and capricious test. The court recognized that "different fiduciary standards" apply in the investment and benefit claim context. 732 F.2d at 333. The court described how courts have applied § 404(a)(1)'s explicit provisions to investment decisions, and then noted that in the benefit claim scenario, "it is appropriate to apply the more deferential" arbitrary and capricious test. *Id.*

72 *See id.* at 333-34; *see also* Geib v. New York State Teamsters Conference Pension & Retirement Fund, 758 F.2d 973, 978 (3d Cir. 1985) ("[W]e recognize[] the sometimes

sider to a family squabble, the *Struble* court appears to consider itself unauthorized to intervene boldly in the "private," intrafund conflict of the benefit claim denial.

The argument that the fiduciary benefit claim decision poses less of a threat to a claimant's interests than an investment decision, and thus deserves less judicial scrutiny, is flawed. First, ERISA's fiduciary provisions are nowhere explicitly limited to investment behavior.[73] Second, and more important, Congress sought with ERISA "the protection of individual pension rights"[74] such that "the private pension promise [would] become real rather than illusory."[75] In light of this goal, courts reviewing fiduciary behavior should emphasize the rights of individual claimants at least as much as the possibility that improper benefits might flow to third parties. The individual employee seeking benefits cares little whether a fiduciary's improper investment decision, rather than an unfair claim denial, renders those benefits unavailable.[76] In both situations the claimant's pension promise has proven "illusory." Indeed, if any difference exists, it is that the benefit claim decision is *more* vital to a claimant's interests than the investment decision. A challenged claim decision may deny a claimant's benefits completely, while an imprudent investment will probably only diminish the level of benefits available. The benefit decision most directly determines

conflicting obligations of the trustees to preserve the financial security of a pension fund and yet apply the assets to the greatest possible advantage for the beneficiaries. . . . Partly because of these competing interests, trustees are given broad discretion to act, and we reverse their actions only if they are arbitrary and capricious."); Edwards v. Wilkes-Barre Publishing Co. Pension Trust, 757 F.2d 52, 56 (3d Cir.) ("Because the trustees in [deciding a benefit claim] must reconcile competing interests of different beneficiaries, the trustees' choice cannot be said to violate their fiduciary duty unless it is arbitrary and capricious."), *cert. denied,* 106 S. Ct. 103 (1985).

73 *See supra* notes 25-28 and accompanying text.

74 House Report, *supra* note 2, at 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4639.

75 *Id.* at 10, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4648.

76 Indeed, employers contributing to such funds may have an incentive to limit the benefits paid to present claimants beyond their interest in assuring adequate funds to satisfy future claimants. Upon the termination of an overfunded plan (i.e., one which retains a surplus after satisfying the claims of all qualified beneficiaries) the excess amount may revert back to the employer. *See, e.g.,* Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F. Supp 257 (D.D.C. 1983) (surplus of terminated plan may revert to employer where plan funded solely by employer contributions), *aff'd,* 729 F.2d 863 (D.C. Cir. 1984). *Cf.* Van Orman v. American Ins. Co., 680 F.2d 301, 307-08 (3d Cir. 1982) (employer's right to excess contributions limited by ERISA § 4044(d)(2), 29 U.S.C. § 1344(d)(2) (1982), which allows reversion only of employer contributions). A claim denial may therefore benefit a nonparticipant third party, the employer, by increasing the likelihood that the plan may prove overfunded upon termination. Given this potential benefit to the employer, affording great deference to the benefit denial decision on the grounds that the decision involves *solely* a balancing of present and future participants' interests in the plan's assets seems unwarranted.

whether a claimant will receive his expected benefits.[77] Given the actual *effect* of the two types of decisions upon ERISA's intended beneficiaries—individual employees—granting a fiduciary's benefit claim decision significantly greater deference than that accorded his plan asset investment decision seems inappropriate and illogical.

A discussion in a recent Supreme Court case, *Massachusetts Mutual Life Insurance Co. v. Russell,*[78] highlights the issue. Justice Stevens's majority opinion contains dicta that ERISA's fiduciary obligations apply primarily to the management and investment of plan assets.[79] In a separate opinion concurring in the majority's narrow holding only, Justice Brennan[80] rebutted Justice Stevens's characterization of ERISA's fiduciary obligations:

> [S]ome of the Court's remarks are simply incompatible with the structure, legislative history, and purposes of ERISA.
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> . . . .
>
> To the extent 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.[81]

Justice Brennan noted that Congress clearly intended section 404 to incorporate the fiduciary standards of the common law of trusts.[82] Moreover, he stated, "it is blackletter trust law that fiduciaries owe

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77 This is not to propose that no balancing of future and present interests is appropriate. Indeed, one of the arguments of this section is that balancing, although necessary, should be consistent with the underlying rationale of employee benefit plans. The current application of the arbitrary and capricious test fails to account for this underlying rationale. *See infra* sections II(B) and III. The argument above seeks only to demonstrate the illogic, given ERISA's goal of protecting individual pension interests along with the interests of the plan itself, of according greater deference to a fiduciary's benefit claim decision than to his investment decision.

78 105 S.Ct. 3085 (1985). For a discussion of the holding of the case and its implications, see Note, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After* Massachusetts Mutual Life Insurance Co. v. Russell, 71 CORNELL L. REV. 1014 (1986).

79 Justice Stevens wrote:

> It is of course true that the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.

105 S. Ct. at 3091.

80 Justices White, Marshall, and Blackmun joined in Justice Brennan's concurrence. *Id.* at 3094.

81 *Id.* at 3095.

82 *Id.* at 3096. Although Justice Brennan's statements are substantially correct, Congress noted that certain aspects of the common law of trusts were unacceptable under ERISA, and were not to survive under the Act's fiduciary provisions. *See supra* notes 14 & 69.

strict duties running directly to beneficiaries in the administration and payment of trust benefits."[83] Although not speaking directly to the appropriateness of the arbitrary and capricious standard under ERISA, *Massachusetts Mutual* clearly raises the issue by presenting the opposing theories of fiduciary loyalty in the benefit claim context. Congress's goals in enacting ERISA,[84] along with the paramount importance of the benefit decision to employees, justify the position adopted by Justice Brennan, and demonstrate the impropriety of the arbitrary and capricious test's excessive deference to a fiduciary's claim decision.

B. The Deferred Compensation Theory of Employee Benefit Plans

Employee benefits plans, once considered little more than spontaneous gifts from an employer to its employees,[85] are now widely regarded as a form of deferred compensation.[86] Under the

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83 105 S. Ct. at 3096.

84 *See* H.R. REP. No. 1280, 93d Cong., 2d Sess. 303 (conference report) ("each fiduciary of a plan must act solely in the interests of the plan's participants and beneficiaries and exclusively to provide benefits to these participants and beneficiaries"), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5083.

85 *See, e.g.*, Menke v. Thompson, 140 F.2d 786, 790 (8th Cir. 1944) ("The pension plan of appellee railroad company was entirely voluntary, and its benefits were, as declared in the plan, gratuities."); W. GREENOUGH & F. KING, PENSION PLANS AND PUBLIC POLICY 35-38 (1976) (describing early judicial review of benefit claims denials); Rehon, *The Pension Expectation as Constitutional Property*, 8 HASTINGS CONST. L.Q. 153, 168 (1980) ("[M]ost courts in the late nineteenth and early twentieth centuries viewed noncontributory private pensions plans as mere gratuities granted at the sufferance of the employer and revocable at any time for any reason."). For an early recognition of the deferred compensation nature of pension benefits, see deRoode, *Pension as Wages*, 3 AM. ECON. REV. 287 (1913) ("In order to get a full understanding of old-age and service pensions, they should be considered a part of the real wages of a workman. . . . A pension system . . . is really paid by the employee, not perhaps in money, but in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system.").

86 The deferred compensation concept, although not universally or unconditionally accepted, is currently the most popular theory to describe the nature of employee benefits. In terms of "the social and economic function of pensions in the employment relationship," the deferred compensation theory most accurately describes the expectations and understandings of both employers and employees. Rehon, *supra* note 85, at 174-75. In several areas of pension benefit law, the deferred compensation theory now provides the conceptual foundation for determining the rights and obligations of beneficiaries. For example, several states recognize in different contexts that an employee's interest in his pension benefits (both vested and nonvested) is a form of property. *See, e.g.*, *In re* Marriage of Brown, 15 Cal. 3d 838, 845, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637 (1976) (because pension benefits are deferred compensation, they are property divisible upon dissolution of a marriage); Estate of Schley, 100 Cal. App. 3d 161, 166-67, 161 Cal. Rptr. 104, 107 (1979) (for purposes of state inheritance taxes, nonvested pension benefits are property interest under deferred compensation theory).

Several commentators also agree that pension benefits are a form of deferred compensation. *See* M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 118-22 (1964) (describdeferred compensation theory, an employer's establishment of a pension plan is "an integral part of the entire wage structure, and the character of the employee representative's interest in [his deferred benefit], and the terms of its grant, is no different than in any other case where a change in the wage structure is effected."[87] Employer contributions to a plan represent the withholding of current compensation for later payment when the claimant may more sorely need the income or be in a lower tax bracket. The employee enjoys a "right" to these deferred benefits in the same way that he enjoys a "right" to current wages at the time he renders his services.[88] While withheld, the employer invests the "wages" so as to accommodate current and future employee claims.

The seminal case in the development of the deferred compensation theory is *Inland Steel Co. v. NLRB*.[89] In *Inland Steel* the Seventh Circuit sustained a National Labor Relations Board determination that pensions are "wages" within the meaning of the Wagner Act[90] and are therefore subject to compulsory collective bargaining. Accordingly, under *Inland Steel* collectively bargained benefit payments are deemed to be deferred compensation. The reasoning of *Inland Steel*, however, extends beyond the collective bargaining context. The *Inland Steel* court clearly sought to characterize an employer's pension *promise* as employee compensation:

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ing justifications and reasons for adopting deferred compensation theory); W. GREENOUGH & F. KING, *supra* note 85, at 154 ("Statements by employers about pensions today frequently express the thought . . . that benefits are definitely a part of compensation even though . . . dedicated to specific benefit purposes."); Somers & Schwartz, *Pension and Welfare Plans: Gratuities or Compensation?*, 4 INDUS. & LAB. REL. REV. 77, 87 (1950) ("When industry adopts a pension plan, in the hope of keeping its working force intact . . . and advances it as an inducement for workers to take and stay on the job, and . . . even to make concessions as to wages, it is *doing* things which reveal that its true . . . attitude toward such plans is that they are part of the payment in its making to employees for the service rendered to them.").

Commentators that reject the deferred compensation theory do so primarily because of the lack of immediate vesting in most plans and the absence of a strict congruence between current wages foregone and benefits ultimately received. *See* D. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATION PENSION PLANS 18-22 (1979); D. MCGILL, *supra* note 9, at 19-20. Logue offers instead a "contingent claim" theory of pension plans which holds, at the risk of oversimplification, that an employee does not value his potential benefit until he actually becomes vested under the plan's terms. D. LOGUE, *supra*, at 23-25. Logue's theory ignores what many proponents of the deferred compensation theory emphasize: the promise of benefits provides siguificant inducement to the initial acceptance of employment, and an employee's benefits hold value from the outset of the employment relationship. *See* Somers & Schwartz, *supra*.

87 *In re* Inland Steel Co., 77 N.L.R.B. 1, 4, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

88 At least one commentator has proposed that a claimant's interest in his "deferred wages," at the time he makes his claim may be of constitutional stature under the entitlement doctrine. *See generally* Rehon, *supra* note 85.

89 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

90 29 U.S.C. §§ 151-169 (1982).

> It surely cannot be seriously disputed but that such a pledge [to provide pensions] on the part of the company forms a part of the consideration for work performed . . . . In this view, the pension thus promised would appear to be as much a part of [an employee's] "wages" as the money paid him at the time of the rendition of his services.[91]

Thus reasoned, *Inland Steel* supports the proposition that unilaterally established plans, as well as collectively bargained plans, create the promise of deferred compensation.[92]

Finally, Congress itself implicitly endorsed the deferred compensation theory when it adopted ERISA. Although the Act grants employers considerable flexibility when creating eligibility requirements, Congress mandated that employers cannot deny benefits under a plan covered by ERISA to those employees that have completed ten years of service for a particular employer.[93] Noting this development, one commentator has concluded that "ERISA, in short, changes the nature of pensions in fundamental ways. It implicitly regards the deferred wages theory as correct, even though the pension arrangements which many firms and employees have agreed upon cannot be categorized this way."[94]

A fundamental tension exists, however, between the deferred compensation theory and the actual operation of modern employee benefit plans. Most current employee benefits plans have intricate eligibility systems which condition benefits upon a claimant's age, length of service, and job stability.[95] These eligibility requirements directly conflict with the concept of deferred compensation. According to one commentator, "If pensions are paid as compensation for employee service, the concept of a complex eligibility system . . . seems like both a legal and a logical anomaly. It is difficult to imagine . . . any other circumstances where eligibility is necessary to obtain wages rightfully earned."[96] Although a plan operating under a "pure" deferred compensation theory would include full and immediate vesting, with nonforfeitable benefits accruing from the first day

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91 170 F.2d at 253.

92 *See* M. BERNSTEIN, *supra* note 86, at 120-21 ("[N]ot only does Inland Steel stand for the now well accepted proposition that employers must bargain with unions about pensions, but the case equally stands for the frequently ignored proposition that a unilaterally (non-bargained) plan, and the contributions to it, are part of 'wages' and 'part of the consideration for services performed.' ").

93 ERISA §§ 201-211, 29 U.S.C. 1051-1061 (1982).

94 D. LOGUE, *supra* note 86, at 62.

95 Typically a claimant must reach a certain age (usually 65), serve a certain number of years with an employer or union, and spend those years of service without significant interruption. *See* Rehon, *supra* note 85, at 195.

96 *Id.* at 176.

of employment, few, if any, plans adopt such a system.[97]

Given the logical incompatibility of the deferred compensation theory and eligibility requirements, the existence of these requirements can only be justified as a necessary modification of the theory to guarantee a plan's actuarial health.[98] This justification, in turn, rests upon the premise that absent some means of denying benefits to a portion of potential claimants, employers would hesitate to establish benefits plans. Because such plans are socially valuable,[99] it seems necessary to compromise somewhat the conceptual integrity of the deferred compensation theory, and accept the existence of exclusionary eligibility requirements.

The current application of the arbitrary and capricious test,

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97 *See* Note, *Pension Plans and the Rights of the Retired Worker,* 70 COLUM. L. REV. 909, 920 n.54 (1970) ("[T]he deferred wages theory leads to the conclusion that rights vest immediately upon employment and that benefits may not be forfeited even upon dismissal for cause or early termination of employment. This would follow since the benefits have been 'earned' as wages and are the property of the employee irrespective of how long he works.").

Several commentators have called for a requirement of immediate vesting, thereby implicitly endorsing the notion that an employee's claim to benefits are a claim to earned property. *See, e.g.,* M. BERNSTEIN, *supra* note 86, at 173 ("the ultimate objective [of pension reform] should be full and immediate vesting of private pensions for American workers, with no forfeiture of earned benefits"); Osgood, *Qualified Pension and Profit-Sharing Plan Vesting: Revolution Not Reform,* 59 B.U.L. REV. 452, 474 (1979) (calling for full and immediate vesting for several reasons, among them that Congress intended with ERISA to recognize that pension "promises made are to be treated as creating property 'rights' for the participants, and not as a conferral of gratuities by the employer").

98 *See, e.g.,* Rehon, *supra* note 85, at 177 ("Nonetheless, whatever their justification, the present function of eligibility requirements is to guarantee the actuarial soundness of the plan."). Rehon notes that ERISA's minimum vesting and eligibility requirements themselves recognize the tension between the deferred compensation theory and the realities of pension plan operation. By accepting the existence of eligibility requirements, these provisions clearly contemplate such requirements' importance to the actual operation of most plans; nonetheless, by establishing the maximum levels of exclusivity that such requirements may impose, ERISA's participation and vesting provisions just as clearly recognize an employee's *right* to a benefit. According to Rehon, these provisions operate as a compromise "between the interests of employers and the investment community on the one hand, and the pension rights of employees on the other." *Id.* at 187. With certain exceptions, ERISA § 202, 29 U.S.C. § 1052 (1982), requires qualified plans to allow employees to participate in the plan upon completion of one year of service or attainment of age 21, whichever is later. ERISA § 203, 29 U.S.C. § 1053 (1982), establishes three vesting options which qualified plans may employ. The most popular method is the one contained in § 1053(a)(2)(A), which requires that qualified plans recognize a nonforfeitable right to benefits upon an employee's completion of 10 years of service. *See* Rehon, *supra* note 85, at 189.

99 Pension plans benefit society by providing financial security for the aged. One commentator argues that the need to provide such security has grown increasingly poignant in recent years as a result of four basic trends: (1) the growth in the number and proportion of the aged population of the United States; (2) the decrease in employment opportunities for the aged; (3) the decreased capacity of the general public to save for old age as a result of increased taxes and inflation; and (4) a general erosion in society's concern with filial responsibility. D. MCGILL, *supra* note 9, at 3-6.

however, only heightens the tension between eligibility requirements and the deferred compensation theory. First, the test's deference grants fiduciaries an inappropriate amount of discretion in determining a claimant's rights to what are, in essence, earned wages. In an employee's action against his employer for nonpayment of present wages, for example, the employer's decision would certainly not be reviewed under the arbitrary and capricious test. Second and more important, the various formulations of the test now applied by courts bear no necessary relation to the actuarial health of the plan in question.[100] Because concern for the plan's long-term actuarial health offers the sole justification for restrictive eligibility requirements, it is the only legitimate basis for denying benefit claims. Courts nonetheless now consider a broad range of factors under an arbitrary and capricious review.[101] Consideration of these factors obscures the fundamental nature of employee benefit plans: deferred compensation. Moreover, consideration of factors unrelated to a plan's actuarial health heightens the conflict between eligibility requirements and the deferred compensation theory. When nonactuarial factors determine the outcome under arbitrary and capricious review, the fundamental (albeit necessary) injustice of the benefit denial is needlessly magnified.

III
An Alternative to the Current Arbitrary and Capricious Test

The arbitrary and capricious test heightens the inherent tension between the practice of imposing eligibility requirements and the theory that pension benefits are deferred compensation. Practice and theory coexist because most plans cannot supply benefits to all who would otherwise qualify under a "pure" deferred compensation theory.[102] The plan's actuarial health—the ability to ensure that benefits are awarded to "as many intended employees as is economically possible"[103]—may require the use of eligibility provisions to deny some claimants' benefits. When an eligibility requirement denies a claimant's benefit, however, courts currently review the denial

100 *See supra* part I(C). Although courts have considered actuarial factors under the test, they also base their decisions upon nonactuarial factors.

101 *See, e.g., supra* notes 48-50 (discussing Fifth Circuit's broad formulation of test in *Dennard*).

102 *See* Rehon, *supra* note 85, at 177 ("Pension plans are deliberately funded to pay benefits to only a small percentage of employees since it is felt that employers do not have the wherewithal to provide adequate benefits to all covered employees. Plan administrators know that, statistically, only a minority of those workers covered at any given time will comply with all provisions of the plan; it is fully expected that the rest will quit, transfer or die prior to the vesting of their pension interest.").

103 Gaydosh v. Lewis, 410 F.2d 262, 266 (D.C. Cir. 1969).

under a standard that often ignores the plan's actuarial stability. Judicial review of benefit claim denials under the arbitrary and capricious test frequently overlooks this sole legitimate justification for the claim denial itself.

This section proposes an alternative test for review of fiduciary benefit claim denials under ERISA. This proposed test would replace the arbitrary and capricious test as the method for determining whether a fiduciary's decision to deny a claim was made "solely in the interest" of the plan's participants.[104] The proposed test furthers the protective goals of ERISA's fiduciary provisions.[105] It also harmonizes, to the greatest extent possible, judicial review of claim denials based upon eligibility requirements with the deferred compensation theory of employee benefit plans.[106] Under the proposed test, a reviewing court would sustain a fiduciary's claim denial in two situations: (1) when the denial is based upon an unambignous, trustee-adopted provision, and the fiduciary can show an actuarial need for the provision; or (2) when the denial is based upon ambiguous plan language, and the administrator can show that adoption of the claimant's reasonable reading would pose an actuarial threat to the plan's health.[107]

This test would require an analysis different from the current arbitrary and capricious test in two fundamental ways.[108] First, in

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104 *See supra* note 39.

105 *See supra* part II(A).

106 *See supra* part II(B).

107 The two prongs of the proposed test correspond with the two fundamental ways in which a fiduciary's exercise of discretion may produce a benefit denial. *See supra* note 23 and accompanying text.

108 The plaintiff's (the denied claimant's) complaint would likely determine whether a given case falls within the first or second prong of the proposed test. To bring a case within the first prong, the plaintiff might concede (or the parties might stipulate) the validity of the construction that the trustee relied upon in denying the claim, thereby implicitly characterizing the provision as "unambiguous." The plaintiff would then challenge the actuarial necessity of the provision as such, placing the burden upon the trustee to justify the provision by a preponderance of the evidence.

To challenge a provision within the second prong, the plaintiff might allege that the trustee misconstrued the plan's language in denying a claim. If the plaintiff can offer a reasonable alternative reading, the burden would shift to the trustee to justify his or her reading by a preponderance of the evidence. The proposed test would not allow a plaintiff to prevail under both prongs. Under the proposed test, when a trustee meets his burden under one prong, he has met his burden under the test.

Conceivably, the proposed test could offer the plaintiff a means of avoiding *Robinson*'s prohibition against challenges to trustee implementation of collectively bargained provisions. *See supra* note 10. Arguably, a plaintiff could allege that a trustee, rather than applying an unambiguous, collectively bargained provision, misinterpreted the provision and denied the plaintiff's claim on that basis. There is little practical likelihood of this occurring, however. To fall within the second prong, a plaintiff must offer a "reasonable" alternative to the trustee's construction. When a trustee is applying an unambiguous, collectively bargained provision, a plaintiff would be hard pressed to provide a "reasonable" alternative application. On the other hand, where the plaintiff can accordance with ERISA's protective intent, the proposed test would remove the presumption of reasonableness that now cloaks a fiduciary's decision to deny a benefit claim. A fiduciary's reasonable reading of plan language would not automatically prevail over the claimant's reasonable reading.[109] Nor could a fiduciary merely point to the prior application of an unduly restrictive, trustee-adopted provision and assert the need for consistent plan administration in denying a claimant's challenge.[110] Instead, the challenged fiduciary would bear the burden of demonstrating, in *actuarial* terms, the need for the disputed provision or interpretation.[111]

Second, the proposed test would focus the review inquiry upon its proper object—the plan's actuarial health. The test pares the debate over a benefit denial to the only issue permissible under the deferred compensation theory: whether the fiduciary's denial is necessary to protect the plan's health and the interests of present and future claimants.[112]

At first glance, the proposed test seems likely to produce significantly more judicial reversals of fiduciary benefit denials than are now granted.[113] To some extent this would be true. A number of

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provide a "reasonable" application, the trustee has probably exercised discretion in applying the plan's language; hence, analysis under the second prong is proper.

109 *See, e.g.*, Lowenstern v. International Ass'n of Machinists & Aerospace Workers, 479 F.2d 1211, 1213 (D.C. Cir. 1973) ("[A]s between two competing interpretations of the Plan, we are bound by that of the Administrators if it is not arbitrary and capricious."); Miniard v. Lewis, 387 F.2d 864, 865 (D.C. Cir. 1967) (The claimant "calls upon us to decide which of the two competing interpretations is more reasonable . . . . This we may not do. Since the trustees' interpretation is a reasonable one, its application . . . was not arbitrary and capricious."), *cert. denied*, 393 U.S. 873 (1968).

110 *See, e.g.*, Bueneman v. Central States, S.E. & S.W. Areas Pension Fund, 572 F.2d 1208, 1210 (8th Cir. 1978) ("In light of the trustees' policy of consistently refusing retroactive participation coupled with the rather explicit language of the Participation Agreement, we are convinced that the trustees did not act arbitrarily or capriciously in rejecting [the employee's claim].").

111 The basic preponderance of the evidence standard would apply. *See supra* note 108. This Note does not address what types of evidence might be used to support or refute the actuarial justification for a particular claim denial. The evidence should generally relate to the concerus described *supra* note 9. An obvious source of information, however, would be the annual actuarial statement required of most plans by ERISA § 103(d), 29 U.S.C. § 1023(d) (1982). That section requires, as part of a plan's annual report, disclosure of the plan's expected costs in relation to its current plan population, a valuation of the plan's assets, and the actuarial assumptions used to assess the overall health of the plan.

112 *See supra* note 98 and accompanying text.

113 The proposed test also seems likely to foster litigation over trustee benefit denials. This potential problem should be ameliorated, however, when the trustees have succeeded in establishing the actuarial necessity of the challenged provision or interpretation in prior litigation. Summary judgment in favor of the trustees would be appropriate in such cases. Conceivably, after several challenges to a plan's exclusionary provisions or trustees' established interpretations of those provisions, individual plans could become virtually immune from attack. Litigation under the proposed test would

cases, however, have already applied the proposed test in substance, although nominally applying the traditional arbitrary and capricious test. In *Fine v. Semet*,[114] for example, the Eleventh Circuit sustained a trustee's decision to deny a claimant's request for an immediate lump sum payment of his accrued benefits. The trustees relied upon a clause granting them "sole discretion" to deny such requests, despite the fact that the claimant was one hundred percent vested in his benefits.[115] The court purported to apply the conventional arbitrary and capricious test in reviewing the denial.[116] However, both the majority and the dissent in fact limited their review to the actuarial question of whether the trustees' exercise of their "sole discretion" to deny the claim was necessary to protect the plan's financial health. The majority concluded that the trustees had offered sufficient actuarial justification for their decision. The dissent, however, called for a more searching actuarial review, arguing that the evidence had not clearly established that payment of the claim "would have had [an] adverse impact on the fund and on the interests of the plans' other participants and beneficiaries."[117] Whether the majority's decision was correct or not, the importance of *Fine* lies in the court's concentrating its review upon actuarial considerations. Both the majority and the dissent properly shifted the burden

force the trustees to reshape their plan and actuarially justify all of its potentially exclusionary provisions.

114 699 F.2d 1091 (11th Cir. 1983).

115 Cases like *Fine,* in which a denial of the claimed benefit occurs pursuant to a clause granting the fiduciary "sole discretion" to grant or deny the request, do not appear to fit within either prong of the proposed test. On the one hand, a fiduciary is acting pursuant to an unambiguous provision, albeit one directing him to exercise his discretion; hence the fiduciary's power to deny a claim is indisputable. On the other hand, one can argue that the fiduciary is interpreting the "sole discretion" clause to require a denial on the case's particular facts.

Although *Fine*-type denials might fall within either prong, it seems best to classify them under the second interpretation of plan language prong. This avoids immunizing a fiduciary's exercise of "sole discretion" from judicial review in situations where the "sole discretion" clause was collectively bargained. Under United Mine Workers Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), the application of a collectively bargained provision cannot be challenged for reasonableness. *See supra* note 10. Given that a fiduciary's decision under a "sole discretion" clause, whether collectively bargained or not, involves an exercise of the type of discretion that Congress intended ERISA's fiduciary provisions to regulate, courts should review *Fine*-type cases under the second prong of the proposed test. For a case involving a "sole discretion" clause outside the lump sum context, see Shishido v. SIU-Pac. Dist.-PMA Pension Plan, 587 F. Supp. 112 (N.D. Cal. 1983). *Shishido* is particularly intriguing because the court, like the court in *Fine,* used exclusively actuarial considerations in reviewing a fiduciary's decision under a "sole discretion" clause. The court concluded that the claim denial was not actuarially justified and reversed the fiduciary's decision. *See supra* note 55.

116 699 F.2d at 1095 ("[W]e focus on whether the trustees' articulated reasons for their treatment of Semet's request were so insufficient as to make their actions arbitrary and capricious.").

117 *Id.* at 1096 (Clark, J., dissenting).

to the trustees to show an actuarial need for the challenged denial. The majority concluded that they had met that burden, while the dissent believed they had not.

Although cases like *Fine v. Semet* would probably be decided the same way under the proposed test, a number of other cases might not. For example, application of the first prong of the test might have produced a different decision in *Miranda v. Audia.*[118] In *Miranda* the Ninth Circuit considered a challenge to a trustee-adopted fifteen-year minimum service rule. The plaintiffs, representing a class of plan participants employed in the construction industry, proved at trial that under the fifteen-year service requirement "[o]ver 96% of the employees for whom contributions have been made never receive a pension."[119] The plaintiffs advocated instead a ten-year service requirement. In sustaining the fifteen-year requirement adopted by the trustees, the *Miranda* court cited several factors, including the construction industry's highly erratic work patterns, the relaxation of the plan's eligibility requirements in other areas, and the fact that reducing the service requirement to ten years would award benefits to only 445 workers out of the plan's 30,000 total participants.[120] According to the court, these factors rendered the fifteen-year requirement reasonable, rather than arbitrary and capricious.

The *Miranda* court did not discuss actuarial issues. The trustees were not required to justify the fifteen-year service requirement through reference to the long-term financial interests of the plan. Indeed, one of the factors underlying the court's decision—that a ten-year requirement would benefit only 445 out of 30,000 participants—seemingly supports the notion that the fifteen-year requirement was not actuarially justified.[121] To reach such a conclusion, of course, would require elaboration of the actuarial issues at the trial level. *Miranda* is important because the court sustained a highly exclusionary provision without any such elaboration. The proposed test, on the other hand, would require that a court fully explore the actuarial issues, because they would constitute the sole basis for decision.

Similarly, the proposed test's second prong might produce different results in other cases. In *Pokratz v. Jones Dairy Farm*[122] the Seventh Circuit rejected a claimant's contention that his chronic de-

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118 681 F.2d 1124 (9th Cir. 1982).
119 *Id.* at 1125.
120 *Id.* at 1125-26.
121 That a plan with 30,000 contributing participants would be damaged by the inclusion of a mere 445 additional claimants to the plan's benefit rolls seems unlikely. *See supra* note 9.
122 771 F.2d 206 (7th Cir. 1985).

pression rendered him "disabled" as that term was used in the plan, allegedly entitling him to plan benefits. Despite the Social Security Administration's determination that the claimant was disabled, the court upheld the trustees' determination that he was not. Requiring only that the decision be "reasoned," the court held the denial not arbitrary and capricious.[123] The *Pokratz* court did not discuss actuarial issues; nowhere did the court ask whether the claimant's reasonable reading posed a threat to the plan's financial soundness. Under the proposed test, however, actuarial issues would provide the *sole* grounds for decision; the trustees would have to demonstrate that interpreting "disabled" to cover chronic depression would create an actuarial threat to the plan. The result in *Pokratz* is not clearly wrong under the proposed test,[124] given that the court failed to ask the proper questions. The court's analysis would be improper, however, and would give way in this case to a more focused inquiry limited to actuarial issues.

Although the proposed test better protects claimants' interests than does the current arbitrary and capricious test, it does not proceed from the premise that most trustee-adopted eligibility requirements, or trustees' interpretations of eligibility requirements, lack actuarial justification. The proposed test seeks only to distinguish those that are not justified from those that are, and uphold denials based upon the latter. The current arbitrary and capricious test, variously formulated and inconsistently applied, is not so discriminating and should be abandoned as a means of determining whether a fiduciary's claim denial was "solely in the interest" of plan participants.[125] The proposed test recognizes that eligibility requirements exist as a necessary imperfection in the deferred compensation theory. But in reviewing denials based upon trustee-adopted eligibility

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123 *Id.* at 209 ("When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious."). Although the Social Security Administration's determination that Mr. Pokratz was disabled does not prove the trustee's contrary decision was wrong, since each agency may have used different criteria, it does suggest that more aggressive judicial review might have overturned the benefit denial.

124 It appears unlikely, however, that Mr. Pokratz represented a significant class of chronically depressed employees. Characterizing him as "disabled" would probably not have subjected the plan to an actuarially dangerous number of disability claims based upon chronic depression.

125 One suggestion might be to adopt the proposed test in substance, while retaining the "arbitrary and capricious" label. This seems to have been the *Fine* court's approach. To do so, however, would be wholly inconsistent with the typical articulation of the arbitrary and capricious test. In *Pokratz,* the court described the test: "Although it is an overstatement to say that a decision is not arbitrary or capricious whenever a court can review the reasons stated for the decision without a loud guffaw, it is not much of an overstatement." 771 F.2d at 209. The proposed test is more rigorous, in that it rejects a trustee's reasonable decision when that decision is not actuarially justified in favor of a claimant's reasonable challenge.

requirements, or trustees' interpretations of eligibility requirements, the proposed test does something that the arbitrary and capricious test does not. It ensures that a fiduciary will employ such requirements in a manner consistent with the sole justification for their existence—protection of the plan's financial health.

CONCLUSION

Under ERISA's fiduciary provisions, of which section 404(a)(1) is the centerpiece, courts have developed a two-tiered system to review fiduciary behavior. On the one hand, courts review a fiduciary's investment decisions according to the express, stringent language of section 404(a)(1). On the other hand, courts review fiduciary administrative decisions, in particular the decision to deny a benefit claim, under a highly deferential arbitrary and capricious test.

The current arbitrary and capricious test is inappropriate for two reasons. First, it permits a fiduciary far too much discretion in making a decision so vital to a claimant's interests. This broad discretion conflicts with the fundamental goals and policies of ERISA. Second, the test allows a court to sustain a benefit denial on the basis of factors that ignore the conceptual foundation for employee benefit plans, the deferred compensation theory.

This Note advocates an alternative, actuarially based test that significantly limits the deference currently afforded a fiduciary's decision to deny a benefit claim. By forcing fiduciaries to justify benefit denials upon actuarial grounds alone, the proposed test offers claimants greater protection against unjust benefit denials. Furthermore, the test minimizes the inherent tension between plan eligibility requirements and the deferred compensation theory. It recognizes the paramount position actuarial considerations must occupy in the establishment and application of eligibility requirements, given that actuarial concerns alone justify the very existence of the requirements.

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