Comments:

Denying the Disability: The Phrase "Regular Occupation" in Long-Term Disability Benefit Plans

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ABSTRACT

Long-term disability benefit plans, which are governed by the Employee Retirement Income Security Act ("ERISA"), pay employees monthly benefits when an accident or illness prevents them from working. Nationwide, insurers market long-term disability policies that purport to protect workers when they can no longer perform their "regular occupation." Nevertheless, as soon as the employee is no longer able to work, insurers routinely deny benefits. In doing so, insurers frequently consider a generic description of a claimant's "regular occupation" rather than the actual work that the claimant performs. Thus, claimants oftentimes find themselves without long-term disability benefits, despite their inability to work.

The circuit courts of appeals have long grappled with the issue of whether an insurer may define a claimant's "regular occupation" generically. This conundrum has resulted in a circuit split. Two circuits initially held that an insurer must consider a claimant's specific duties to

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determine their "regular occupation." However, since then, three circuits have held that an insurer may define a claimant's "regular occupation" in general terms. The Fourth Circuit lies between these two positions, holding that an insurer may define a claimant's "regular occupation" generically, at least where a general description mirrors the work that the claimant actually performs.

Despite long-term disability insurance's purpose of protecting disabled workers, applicable law allows insurers to define a claimant's "regular occupation" generically. Principally, the Supreme Court's ERISA jurisprudence has created a standard of review that is highly deferential to an insurer's denial of long-term disability benefits. Furthermore, when a policy uses a general description of a claimant's job to define "regular occupation," an insurer's decision to ignore a claimant's specific duties is warranted. Notwithstanding applicable law, Congress or the Department of Labor should act to solve the problems that the phrase "regular occupation" presents.

Table of Contents

I. INTRODUCTION

Joseph Hinchey can no longer work; and yet, because of a boilerplate job description that has not been updated since 1991, he cannot obtain long-term disability benefits.[1] Hinchey, formerly the Director of Campus Security at Manhattanville College, underwent an aortic valve replacement[2] in 2010 that left him unable to physically exert himself.[3] Hinchey's occupation, however, required him to restrain people, work as an emergency medical technician, and "sprint up and down stairs to dorm rooms."[4] No longer able to perform these duties, Hinchey applied for long-term disability benefits[5] under the Manhattanville College Employee Benefit Plan,[6] which is governed by the Employee Retirement Income Security Act ("ERISA").[7] Per the plan's terms, Hinchey needed to be disabled to qualify for benefits.[8] The plan defined the word "disabled" as "limited from performing the material and substantial duties of [his] regular occupation due to [his] sickness or injury."[9] First Unum, the insurance company that issued and administered the plan,[10] initially approved Hinchey's request for benefits.[11]

However, First Unum continued to investigate Hinchey's claim.[12] During the investigation, Hinchey stressed to First Unum that he still could not physically exert himself.[13] In fact, Hinchey even had to hire a gardener because he could not cut his own grass.[14] Nevertheless, shortly

1. *See* Hinchey v. First Unum Life Ins. Co., No. 17-cv-08034, 2020 U.S. Dist. LEXIS 49703, at *11, *35 (S.D.N.Y. Mar. 20, 2020), *aff'd*, 848 F. App'x 481 (2d Cir. 2021).

2. *See Aortic Valve Repair and Aortic Valve Replacement*, MAYO CLINIC, https://mayocl.in/3n0m5iq (last visited Oct. 15, 2021) ("Aortic valve repair and aortic valve replacement are procedures to treat a damaged or diseased aortic valve. The aortic valve is one of four valves that control blood flow in the heart.").

3. *See Hinchey*, 2020 U.S. Dist. LEXIS 49703, at *5, *8.

4. *Id.* at *7–8.

5. *See* Margo Jasukaitis & Daniel O'Hara, Note, *Defining "Regular Occupation" in Long-Term Disability Insurance Policies*, 19 YALE J. HEALTH POL'Y L. & ETHICS 210, 214–15 (2020) (stating that long-term disability insurance provides a worker benefits for two to five years and is designed to supplement a worker's income while they search for a new job).

6. *See Hinchey*, 2020 U.S. Dist. LEXIS 49703, at *2, *5.

7. *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461.

8. *See Hinchey*, 2020 U.S. Dist. LEXIS 49703, at *3–4.

9. *Id.* at *3 (emphasis omitted).

10. *See id.* at *2–3.

11. *See id.* at *11.

12. *See id.* at *12.

13. *See id.* at *15.

14. *See id.* at *16.

after its investigation, First Unum discontinued Hinchey's long-term disability benefits.[15]

First Unum based its denial on the fact that the general duties of a security director do not entail crowd control or working as an emergency medical technician.[16] Yet in reality, Hinchey's job required him to perform these very duties.[17] Naturally, Hinchey disputed First Unum's denial of benefits,[18] but First Unum upheld its decision.[19] Hinchey then challenged First Unum's termination of benefits in court, but he fared no better.[20] The Southern District of New York sided with First Unum, finding that "there is nothing amiss about how First Unum determined [Hinchey's] 'regular occupation.'"[21] Thus, despite the fact that Hinchey's surgery rendered him disabled, Hinchey found himself without benefits.[22]

While unfortunate, Joseph Hinchey's story is quite typical for claimants who seek long-term disability benefits.[23] In fact, one in four Americans will become disabled and unable to work before they reach the age of 65.[24] Moreover, one in eight Americans will experience a disability that lasts longer than five years.[25] Nonetheless, in spite of the prevalence of disablement amongst the American workforce, only 34% of private industry workers have access to long-term disability benefit

15. *See id.* at *35.

16. *See id.* at *36.

17. *See id.* at *7–8.

18. When a claimant is denied benefits, ERISA provides for an administrative review process. *See* 29 U.S.C. § 1133(2) ("[E]very employee benefit plan shall . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim."). Subject to "narrow exceptions," a claimant must exhaust their administrative remedies before bringing an action in court. Van Natta v. Sara Lee Corp., 439 F. Supp. 2d 911, 940 (N.D. Iowa 2006) (citing Wert v. Liberty Life Assurance Co. of Bos., 447 F.3d 1060, 1066 (8th Cir. 2006)).

19. *See Hinchey*, 2020 U.S. Dist. LEXIS 49703, at *36, *44.

20. *See id.* at *75.

21. *Id.* at *68.

22. *See id.* at *75.

23. *See, e.g.*, House v. Am. United Life Ins. Co., 499 F.3d 443, 453–54 (5th Cir. 2007) (upholding an insurer's denial of long-term disability benefits); Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006) (same); Darvell v. Life Ins. Co. of N. Am., 597 F.3d 929, 936 (8th Cir. 2010) (same). *See generally* Thomas P. Kelly III, *A Call for the Overhaul of ERISA: How the Employee Retirement Income Security Act of 1974 Rewards Employers for Bad Faith Denials of Legitimate Claims for Employee Disability Benefits: A Multi-Case Study Involving One Philadelphia-Based Insurance Carrier*, 37 SETON HALL LEGIS. J. 283, 296 (2013) (discussing how one insurer routinely denies claimants long-term disability benefits).

24. *See* Jasukaitis & O'Hara, *supra* note 5, at 222.

25. *See How Does a Disability Insurance Policy Work?*, GUARDIAN, https://bit.ly/3aKYtbS (last visited Oct. 15, 2021).

plans as of 2018.[26] And even where a long-term disability benefit plan purports to protect an employee when they can no longer perform their "regular occupation," insurers like First Unum routinely deny benefits by relying on a generic description of a claimant's job rather than looking at the specific obligations of the claimant's occupation.[27]

Over the last two decades, the "regular occupation" conundrum has percolated into the court system, resulting in a circuit split that revolves around whether an insurer may define a claimant's "regular occupation" based solely upon a generic description of the claimant's job.[28] The Second and Third Circuits became the first two circuits to address the proper method of defining a claimant's "regular occupation," holding that an insurer must look to the claimant's specific job duties.[29] The Fifth, Sixth, and Eighth Circuits weighed in next, upholding insurers' decisions to refer to a generic job description in determining a claimant's "regular occupation."[30] The Fourth Circuit, meanwhile, represents a middle ground, holding that an insurer may define "regular occupation" in general terms, at least where the general description matches the actual duties the claimant performs.[31]

Principally, this Comment evaluates the circuit split surrounding the phrase "regular occupation" and takes the position that an insurer's decision to define a claimant's "regular occupation" by reference to a generic description of a job should not be overturned under applicable law.[32] Part II of this Comment explores both ERISA and long-term disability benefit plans before examining the circuit split.[33] Part III of this Comment argues that a court's typical standard of review for evaluating a denial of long-term disability benefits militates against overturning an insurer's decision to deny benefits based on a generic description of a claimant's "regular occupation."[34] Part III further contends that courts should defer to the policy's language when the policy defines "regular

26. *See Employee Access to Disability Insurance Plans*, U.S. BUREAU OF LAB. STAT. (Oct. 26, 2018), https://bit.ly/3nqW4uv.

27. *See, e.g.*, *House*, 499 F.3d at 453–54 (upholding an insurer's generic definition of a claimant's "regular occupation"); *Osborne*, 465 F.3d at 299 (same); *Darvell*, 597 F.3d at 936 (same).

28. *See Darvell*, 597 F.3d at 935 (recognizing that "[t]he circuits are split . . . on this issue").

29. *See* Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 253 (2d Cir. 1999); Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 386 (3d Cir. 2003).

30. *See House*, 499 F.3d at 453–54; *Osborne*, 465 F.3d at 299; *Darvell*, 597 F.3d at 936.

31. *See* Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 272–73 (4th Cir. 2002).

32. *See infra* Part III.

33. *See infra* Part II.

34. *See infra* Section III.A.

occupation."[35] Finally, this Comment concludes by suggesting that Congress amend ERISA or that the Department of Labor update the Dictionary of Occupation Titles ("DOT")[36] to integrate ERISA's legislative intent of protecting employees into long-term disability plans.[37]

II. BACKGROUND

It may seem strange for an insurer to offer long-term disability benefit plans that protect an employee when they can no longer perform their "regular occupation," only for the same insurer to subsequently deny benefits when the employee cannot perform their job.[38] Nonetheless, to fully appreciate why courts should uphold an insurer's decision to deny benefits, one must first understand ERISA,[39] long-term disability benefit plans generally,[40] the standard of review courts apply to a denial of benefits,[41] and the circuit split surrounding the interpretation of the phrase "regular occupation."[42] By providing an overview of these four topics, it becomes evident that a court should not disturb an insurer's decision to deny benefits when the insurer defines "regular occupation" generically.[43]

A. Governing Law: ERISA

Congress enacted ERISA[44] in 1974[45] in response to private pension plans' failure to pay employees their expected benefits.[46] Prior to ERISA's passage, few employees qualified for benefits, and even fewer

35. *See infra* Section III.B.

36. The DOT is a reference manual with a "non-comprehensive list of duties" for over 12,000 jobs. Jasukaitis & O'Hara, *supra* note 5, at 220. Insurers frequently rely on the DOT to determine a claimant's "regular occupation." *See* Maurer v. Reliance Standard Life Ins. Co., No. C 08-04109, 2011 U.S. Dist. LEXIS 38081, at *29 n.14 (N.D. Cal. Mar. 31, 2011).

37. *See infra* Section III.C.

38. *See generally* Kelly, *supra* note 23, at 295–300 (discussing how one insurer routinely denies claimants long-term disability benefits based on a generic interpretation of "regular occupation" despite controlling law that requires the insurer to look to the claimant's specific job duties).

39. *See infra* Section II.A.

40. *See infra* Section II.A.1.

41. *See infra* Section II.A.2.

42. *See infra* Section II.B.

43. *See infra* Part III.

44. *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461.

45. *See History of EBSA and ERISA*, U.S. DEP'T OF LAB., https://bit.ly/3F87FVR (last visited Oct. 1, 2021).

46. *See* Albert Feuer, *When Are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773, 776 (2005).

ever received them.[47] In enacting ERISA, Congress intended for employees to be protected when participating in a pension plan.[48] To achieve that goal, ERISA imposes various requirements—such as participation, vesting, and funding—on those who wish to utilize the plans.[49] Moreover, ERISA "sets various uniform standards" related to fiduciary duties, reporting, and disclosure.[50] Congress intended ERISA's uniformity to standardize the processing of claims and benefits and to "minimize [the] administrative and financial burdens" that inconsistencies among state laws create.[51] To ensure uniformity, ERISA contains "expansive [state law] preemption provisions [so] that employee benefit plan regulation [is] 'exclusively a federal concern.'"[52]

ERISA's uniformity also reaches plan administrators, who may be designated under the Act.[53] The plan may vest the administrator with the ability to evaluate and pay out claims.[54] Moreover, the plan administrator owes a duty of loyalty to the participants and beneficiaries of the plan.[55] An insurer may serve in the role of plan administrator,[56] but the insurer's decision to act as plan administrator does not affect the insurer's fiduciary duties to the plan's participants and beneficiaries.[57]

47. *See id.*

48. *See* 29 U.S.C. § 1001(b) ("It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . .").

49. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983) (citing 29 U.S.C. §§ 1051–86).

50. *See id.* (citing 29 U.S.C. §§ 1021–31).

51. Bank of La. v. Aetna U.S. Healthcare, Inc., 468 F.3d 237, 242 (5th Cir. 2006) (citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)); *see also* Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

52. *Davila*, 542 U.S. at 208 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

53. *See* 29 U.S.C. § 1002(16)(A)(i) ("The term 'administrator' means . . . the person specifically so designated by the terms of the instrument under which the plan is operated.").

54. *See* Gary v. Unum Life Ins. Co. of Am., 831 F. App'x 812, 813 (9th Cir. 2020); Utah Alcoholism Found. v. Battelle Pac. Nw. Lab'ys, 204 F. Supp. 2d 1295, 1302 (D. Utah 2002).

55. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989).

56. *See* Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 298–99 (6th Cir. 2006) (citing Kalish v. Liberty Mut., 419 F.3d 501, 506 (6th Cir. 2005)).

57. *See id.* ("An insurance company that issues an insurance policy under an ERISA plan may serve as the administrator of the plan, . . . which is a fiduciary position." (citing *Kalish*, 419 F.3d at 506; 29 U.S.C. § 1104)); *see also* Jasukaitis & O'Hara, *supra* note 5, at 227–28 (noting a conflict between an insurer's fiduciary duties to the beneficiaries of ERISA-governed plans and the insurer's fiduciary duties to shareholders as a corporation).

Despite the impetus behind it, ERISA does not strictly apply to pension plans.[58] The expansive Act also applies to other employee benefit plans,[59] such as long-term disability benefit plans.[60]

1. Protecting the Policyholder: Long-Term Disability Benefit Plans

Disability insurance, while not intended to be an exclusive source of income,[61] is meant to provide benefits to employees who are unable to work because of an accident or illness.[62] A disabled worker may also be eligible for benefits under federal programs, such as Social Security Disability Insurance and Supplemental Security Income.[63] The benefits received from long-term disability insurance can be used to pay mortgages, utilities, personal loans, and even the cost of dining out.[64] Under the terms of most disability insurance policies, an insurer must pay monthly benefits to an insured when the insured becomes disabled and unable to perform their employment obligations.[65]

Many employers provide their employees with both short-term and long-term disability insurance.[66] Short-term disability insurance typically provides a worker with three to six months of benefits upon the worker manifesting a disability or an inability to work.[67] Once short-term

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58. *See* Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L. REV. 457, 460 (2003).

59. Under ERISA, an "employee welfare benefit plan" means any plan:

> [E]stablished or maintained by an employer or by an employee organization, or by both, to the extent that such plan . . . [has] the purpose of providing . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act . . . .

29 U.S.C. § 1002(1).

60. *See id.*; *see also* Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 41 (3d Cir. 1993) (recognizing that a long-term disability benefit plan is an employee welfare benefit plan and is therefore governed by ERISA).

61. *See Long Term Disability and Its Benefits*, PATIENT ADVOC. FOUND., https://bit.ly/3AQxVQY (last visited Nov. 2, 2021).

62. *See* Julia Kagan, *Disability Income (DI) Insurance: What it is and How it Works*, INVESTOPEDIA, https://bit.ly/3n4K68h (Mar. 14, 2022).

63. *See Long Term Disability and Its Benefits*, *supra* note 61.

64. *See Long Term Disability Insurance*, METLIFE, https://bit.ly/3yNPyl4 (last visited Dec. 21, 2021); *How Does a Disability Insurance Policy Work?*, *supra* note 25.

65. *See, e.g.*, Kearney v. Standard Ins. Co., 175 F.3d 1084, 1089 (9th Cir. 1999) (stating in the policy that the insurer will pay long-term disability benefits "upon receipt of satisfactory written proof" that the insured has become disabled); Renfro v. Unum Life Ins. Co. of Am., 920 F. Supp. 831, 837–38 (E.D. Tenn. 1996) (stating in the policy that the insurer "will pay disability benefits" upon proof of disability).

66. *See* Jasukaitis & O'Hara, *supra* note 5, at 214.

67. *See id.*

disability benefits expire, long-term disability benefits begin.[68] Despite its name, long-term disability insurance is not indefinite and generally only provides benefits for two to five years.[69]

Within the realm of long-term disability insurance, insurers generally offer two types of policies: "any occupation" insurance and "regular occupation" insurance.[70] Whereas "any occupation" insurance provides benefits when an employee cannot work any job, "regular occupation" insurance provides benefits when an employee can no longer perform their specific job.[71] Despite its name, an "any occupation" policy presents greater obstacles for an insured to obtain benefits than a "regular occupation" policy,[72] as an insured must be functionally unable to perform any job whatsoever to receive "any occupation" benefits.[73] Because benefits are easier to obtain with "regular occupation" insurance, a "regular occupation" policy comes at a premium and is more expensive than its "any occupation" counterpart.[74] Yet, despite the greater protection afforded to a claimant under a "regular occupation" policy, insurers routinely deny claimants long-term disability benefits under both types of policies.[75] Still, whatever the type

68. *See id.*

69. *See id.*

70. *See id.* at 215.

71. *See id.*

72. *See* Healy v. Fortis Benefits Ins. Co., No. 14-cv-00832, 2015 U.S. Dist. LEXIS 122330, at *5 (N.D. Cal. Sept. 14, 2015) (recognizing that "any occupation" is "narrower" than "regular occupation"); *cf.* Phillips v. Life Ins. Co. of N. Am., No. 1:10-CV-00064, 2011 U.S. Dist. LEXIS 108761, at *14–15 (W.D. Ky. Sept. 22, 2011) (noting that "any occupation" benefits "would [be] implicitly foreclosed to [the insured]" if he could not obtain "own occupation" benefits).

73. *See* Wilson v. Hartford, 9 F. Supp. 3d 275, 282 (E.D.N.Y. 2014) (upholding an insurer's denial of benefits under an "any occupation" policy because the insured failed to show that he was "precluded from performing any work"); *see also* Outward v. Eaton Corp. Disability Plan, 808 F. App'x 296, 311 (6th Cir. 2020) ("[N]umerous . . . federal courts have concluded that the ability of an employee to perform part-time work means that such an individual is not totally disabled from *any* occupation." (citing McClain v. Eaton Corp. Disability Plan, 740 F.3d 1059, 1067–68 (6th Cir. 2014))).

74. *See* Simon v. Unum Grp., No. 07 Civ. 11426, 2008 U.S. Dist. LEXIS 47719, at *2 (S.D.N.Y. June 18, 2008) ("Because an 'own occupation' policy refers to the insured's regular occupation or specialty, as opposed to any available employment, this type of policy is more expensive than a [broader] 'any occupation' policy."); *see also* Doe v. Standard Ins. Co., 852 F.3d 118, 124 (1st Cir. 2017) (recognizing that the insurer "charged an enhanced premium for the promise of enhanced specialty coverage").

75. *Compare, e.g.*, Davis v. Hartford Life & Accident Ins. Co., 980 F.3d 541, 544 (6th Cir. 2020) (denying a claimant benefits under an "any occupation" policy), *with* Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 247 (2d Cir. 1999) (denying a claimant benefits under a "regular occupation" policy).

of policy, a claimant will naturally dispute an insurer's denial of benefits.[76]

2. Standard of Review: *Firestone Tire and Rubber Company v. Bruch*

ERISA, by way of 29 U.S.C. § 1132(a)(1)(B), provides a mechanism that allows claimants to challenge the legitimacy of an insurer's denial of long-term disability benefits.[77] Section 1132(a)(1)(B) confers standing on a claimant to recover benefits due under a plan, so long as the claimant is a beneficiary or participant of the plan.[78] To succeed under § 1132(a)(1)(B), a claimant generally must show that (1) ERISA governs the plan; (2) the claimant qualifies as either a participant or a beneficiary; and (3) the plan administrator "wrongfully denied" the claimant benefits.[79]

Section 1132(a)(1)(B) is the vehicle by which claimants who are denied long-term disability benefits can bring a cause of action.[80] A claimant's road to establish entitlement to benefits, however, is often not an easy one because of the high deference owed to an insurer when said insurer acts as a plan administrator.[81] In *Firestone Tire and Rubber*

76. *See, e.g.*, *Kinstler*, 181 F.3d at 248 (challenging an insurer's denial of benefits under a "regular occupation" policy); *Davis*, 980 F.3d at 545 (challenging an insurer's denial of benefits under an "any occupation" policy).

77. *See* 29 U.S.C. § 1132(a)(1)(B) ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."). For a further discussion of remedies available under ERISA, see Richard Rouco, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631, 634–38 (1994).

78. *See* 29 U.S.C. § 1132(a)(1)(B); *see also* Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1351 (11th Cir. 1998) ("ERISA's civil enforcement section permits two categories of individuals to sue for benefits under an ERISA plan—plan beneficiaries and plan participants." (citing 29 U.S.C. § 1132(a))).

79. *See* Giordano v. Thomson, 564 F.3d 163, 168 (2d Cir. 2009) (citations omitted); *see also* Fleisher v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012) ("To assert a claim under [29 U.S.C. § 1132(a)(1)(B)], a plan participant must demonstrate that '[h]e or she . . . ha[s] a right to benefits that is legally enforceable against the plan,' and that the plan administrator improperly denied those benefits." (quoting Hooven v. Exxon Mobil Corp., 465 F.3d 566, 574 (3d Cir. 2006))); Singletary v. United Parcel Serv., 828 F.3d 342, 348 (5th Cir. 2016) ("[T]o succeed under [§] 1132(a)(1)(B), the claimant must show that he or she 'qualif[ies] for the benefits provided in that plan.'" (quoting Wilkins v. Mason Tenders Dist. Council Pension Fund, 445 F.3d 572, 583 (2d Cir. 2006))).

80. *See, e.g.*, *Kinstler*, 181 F.3d at 248 (challenging an insurer's denial of long-term disability benefits under § 1132(a)(1)(B)); Hall v. Unum Life Ins. Co., 300 F.3d 1197, 1200 (10th Cir. 2002) (bringing a cause of action under § 1132(a)(1)(B) after a denial of benefits).

81. *See, e.g.*, Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006) (noting that reasonable people may disagree over the correct method for determining a claimant's "regular occupation" but declining to overturn the insurer's decision to deny benefits); Kirk v. Readers Digest Ass'n, 57 F. App'x 20, 23 (2d Cir.

Company v. Bruch, the Supreme Court laid out the proper standard of review under ERISA when a plan administrator denies benefits.[82]

In *Firestone*, the plaintiffs sought severance benefits and information regarding their benefit plans from the defendant plan administrator, which the defendant subsequently denied.[83] After the denial, the plaintiffs filed a class action against the defendant.[84] The Supreme Court granted certiorari in part to determine the proper standard of review under § 1132(a)(1)(B), ERISA's litigation vehicle.[85]

As a threshold matter, the Court noted that ERISA did not set out a standard of review for when a claimant challenges a denial of benefits under § 1132(a)(1)(B).[86] While acknowledging that some courts had adopted an arbitrary and capricious standard of review[87] for suits brought under the Labor Management Relations Act ("LMRA"),[88] the Court concluded that the differences between ERISA and the LMRA "show[ed] that the wholesale importation of the arbitrary and capricious standard into ERISA [was] unwarranted."[89] Reasoning that the law of trustees and beneficiaries is inherent in ERISA, the Court turned to principles of trust law to determine the appropriate standard of review.[90]

Principally, the Court pointed out that a trustee, under trust law, is entitled to deferential review when they are granted discretionary power to act.[91] In contrast, where the trustee possesses no such discretion, de novo[92] review applies to the trustee's decision.[93] Bearing in mind that

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2003) ("Under [the arbitrary and capricious standard], 'we may overturn a decision to deny benefits only if it was without reason, unsupported by substantial evidence, or erroneous as a matter of law.'" (quoting Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995))).

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

83. *See id.* at 105–06.

84. *See id.* at 106.

85. *See id.* at 108.

86. *See id.* at 109.

87. Arbitrary and capricious has been defined as a "characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." Lowe v. Lowndes Cnty. Bldg. Inspection Dep't, 760 So. 2d 711, 713 (Miss. 2000) (emphasis omitted) (quoting BLACK'S LAW DICTIONARY 105 (6th ed. 1990). Within the context of ERISA, a finding that a plan administrator's termination of benefits was arbitrary and capricious is a finding that the termination of benefits was unlawful. *See* Miller v. Am. Airlines, Inc., 632 F.3d 837, 857 (3d Cir. 2011).

88. *See Firestone*, 489 U.S. at 109 (citing Struble v. N.J. Brewery Emps.' Welfare Tr. Fund, 732 F.2d 325, 333 (3d Cir. 1984); Bayles v. Cent. States, Se. & Sw. Areas Pension Fund, 602 F.2d 97, 99–100 (5th Cir. 1979)).

89. *Firestone*, 489 U.S. at 109 (emphasis omitted).

90. *See id.* at 110–11 (citing Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

91. *See id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (AM. L. INST. (1959))).

92. In ERISA cases, de novo review means that the court reviewing a benefits determination "is to make an independent decision about benefits." Yasko v. Reliance

Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans,"[94] the Court concluded that applying high deference to every denial of benefits—as the defendant urged—would substantially weaken ERISA's protections.[95] The Court therefore flatly rejected the defendant's arguments for automatic deferential review.[96] Rather, the Court espoused that a denial of benefits generally must be reviewed de novo.[97] In contrast, when the plan administrator has the discretion to determine eligibility for benefits or interpret the terms of the plan, deferential review governs.[98] Thus, under *Firestone*, when a plan reserves discretion to an insurer acting as plan administrator, the insurer's decision to deny benefits will be subject to high deference.[99] The Court did recognize, however, that a plan administrator's conflict of interest may alter the applicable standard of review,[100] setting the stage for a new dispute that reached the Supreme Court 19 years later.[101]

Standard Life Ins. Co., 53 F. Supp. 3d 1059, 1063 (N.D. Ill. 2014) (citing Krolnik v. Prudential Ins. Co. of Am., 570 F.3d 841, 842 (7th Cir. 2009)). In other words, "the [c]ourt independently considers the evidence, finds facts, and determines how the policy applies, just as it would resolve any other breach of contract claim." McCoy v. Aetna Life Ins. Co., No. 8:19-CV-00575, 2020 U.S. Dist. LEXIS 202032, at *9 (C.D. Cal. Oct. 28, 2020) (citing *Firestone*, 489 U.S. at 112–13).

93. *See Firestone*, 489 U.S. at 112.

94. *Id.* at 113 (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983)).

95. *See id.* at 113–14.

96. *See id.*

97. *See id.* at 115.

98. *See id.*; *see also* Pari-Fasano v. ITT Hartford Life & Accident Ins. Co., 230 F.3d 415, 419 (1st Cir. 2000) (noting that abuse of discretion review and arbitrary and capricious review are "functional[ly] equivalen[t]"). *But see* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1117 (2001) ("[M]ost [courts] are quick to equate the arbitrary and capricious standard with the trust law standard of abuse of discretion, and to use those terms interchangeably. However, there is a lack of agreement as to whether the two standards are really equal in the ERISA context.").

99. *See Firestone*, 489 U.S. at 115. Although *Firestone* never explicitly stated the standard of review to apply to a denial of benefits when a plan administrator possesses discretionary authority under the terms of the plan, *see id.*, courts generally apply an arbitrary and capricious standard in such instances, *see* Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006); Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 384 (3d. Cir. 2003); *see also Pari-Fasano*, 230 F.3d at 419 (stating that an insurer's discretionary denial of benefits will be reviewed for an abuse of discretion but recognizing arbitrary and capricious and abuse of discretion to be synonymous).

100. *See Firestone*, 489 U.S. at 115 (citing RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (AM. L. INST. 1959)).

101. *See* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 111 (2008).

a. Conflicts of Interest: *Metropolitan Life Insurance Company v. Glenn*

In 2008, the Supreme Court expanded on the framework established in *Firestone* when it decided *Metropolitan Life Insurance Company v. Glenn*.[102] In *Glenn*, the Supreme Court considered whether a plan administrator, who possesses discretion to assess eligibility for benefits and pay claims under a plan, has a conflict of interest when evaluating whether a claimant is entitled to benefits.[103] The Court concluded that a conflict of interest indeed exists when a plan vests the administrator with such discretion, reasoning that a plan administrator who evaluates and pays claims has an incentive to deny "borderline" claims in order to save money.[104] Significantly, such a conflict of interest, according to the Court, extended to an insurer acting as a plan administrator as well.[105]

Next, the Supreme Court turned to the question of how much weight to afford a conflict of interest when reviewing a discretionary denial of benefits under ERISA's litigation mechanism, § 1132(a)(1)(B).[106] While declining to overturn *Firestone*'s holding that a plan administrator's discretionary decision to deny benefits is entitled to deferential review, the Court did note that a conflict of interest must at least be taken into consideration when evaluating the appropriateness of a denial of benefits.[107] How much weight a court gives to the conflict depends on the circumstances because no "one-size-fits-all" standard of review exists.[108] Nonetheless, the Court indicated that a conflict should be afforded greater weight in a situation where the insurer "has a history of biased claims administration."[109] On the other hand, the Court stated, where the insurer takes steps to minimize potential bias and ensure accurate claims processing, the conflict should be deemphasized.[110] Thus, post-*Glenn*, a court reviewing a denial of benefits by an insurer possessing discretion to interpret the terms of the plan must take into

102. *See id.* at 115–17.
103. *See id.* at 110.
104. *Id.* at 112.
105. *See id.* at 114.
106. *See id.* at 115.
107. *See id.*
108. *Id.* at 116.
109. *Id.* at 117 (citing John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U.L. REV. 1315, 1317–21 (2007)). For an example of biased claims administration by an insurer, see Murphy v. Deloitte & Touche Grp. Ins. Plan, 619 F.3d 1151, 1161 (10th Cir. 2010) (noting an insurer's "history of biased claims administration" where the insurer instructed its employees "to deny claims without proper analysis yet instructed them to use language that a court would find adequate to support the denial" (citing Langbein, *supra*, at 1317–21)).
110. *See Glenn*, 554 U.S. at 117.

account any potential conflict of interest.[111] However, neither *Firestone* nor *Glenn* addressed the full scope of ERISA-related questions,[112] which resulted in a circuit split pertaining to the interpretation of the phrase "regular occupation" in long-term disability benefit plans.[113]

B. "Regular Occupation" Rodeo: The Circuit Split

Notably, *Firestone* and *Glenn* did not mention the phrase "regular occupation" or delineate how courts and insurers should interpret the term.[114] Yet *Firestone*, and to a lesser extent *Glenn*, have greatly influenced the circuit split regarding the definition of the phrase "regular occupation" in long-term disability benefit plans.[115] Many long-term disability plans expressly reserve discretionary authority to determine eligibility for benefits with the plan administrator, which is often the insurer.[116] Thus, per *Firestone*, it follows that an insurer's decision to deny long-term disability benefits is usually subject to highly deferential review.[117] Therefore, the issue central to the circuit split is the degree of deference owed to an insurer when the insurer defines a claimant's "regular occupation" generically by looking to a standard description of the claimant's job, rather than considering the work the claimant actually performs.[118]

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111. *See id.*

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

113. *See infra* Section II.B.

114. *See generally Firestone*, 489 U.S. at 101 (omitting the phrase "regular occupation"); *Glenn*, 554 U.S. at 105 (same).

115. *See, e.g.*, Ricca v. Prudential Ins. Co. of Am., 747 F. Supp. 2d 438, 443–44 (E.D. Pa. 2010) (relying on both *Firestone* and *Glenn* to decide a dispute over a "regular occupation" policy).

116. *See, e.g.*, Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006) (providing in the policy that the insurer "has full discretion and authority to determine eligibility for benefits and to construe and interpret all [of the plan's] terms and provisions"); Darvell v. Life Ins. Co. of N. Am. 597 F.3d 929, 933 (8th Cir. 2010) (stating in the policy that "the Insurance Company shall have the authority, in its discretion, to interpret the terms of the Plan documents, to decide questions of eligibility for coverage or benefits under the Plan, and to make any related findings of fact").

117. *See, e.g.*, *Osborne*, 465 F.3d at 299 (reviewing an insurer's denial of benefits under an arbitrary and capricious standard); *Darvell*, 597 F.3d at 935 (applying an abuse of discretion standard to an insurer's decision to deny benefits).

118. *See Darvell*, 597 F.3d at 935 (noting that "[t]he circuits are split, under abuse of discretion review," as to whether it is reasonable for an insurer to define a claimant's "regular occupation" generically). *Compare Osborne*, 465 F.3d at 299 (finding it reasonable, under an arbitrary and capricious standard, for an insurer to define a claimant's "regular occupation" generically), *with* Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 386 (3d Cir. 2003) (finding it unreasonable, under an arbitrary and capricious standard, for an insurer not to consider the actual duties of the claimant's job).

To date, six circuits have joined the "regular occupation" debate.[119] The Second and Third Circuits initially held that an insurer must look to a claimant's job-specific requirements to determine the claimant's "regular occupation."[120] However, a majority position subsequently developed, with the Fifth, Sixth, and Eighth Circuits upholding an insurer's decision to define "regular occupation" without reference to the claimant's exact duties.[121] Meanwhile, the Fourth Circuit lies somewhere in the middle of the circuit split, holding that an insurer need not define a claimant's "regular occupation" with specificity, at least where a general description of the claimant's "regular occupation" mirrors the work the claimant performs.[122] To better understand the contours of the circuit split, an analysis of each circuit's position is essential.[123]

1. The Minority Position: An Insurer Must Refer to the Claimant's Specific Job

In *Kinstler v. First Reliance Standard Life Insurance Company*, the Second Circuit became the first circuit court of appeals to confront the "regular occupation" conundrum.[124] Following a car accident that resulted in a severe knee injury, the claimant, Martha Kinstler, applied for and initially received long-term disability benefits.[125] Nonetheless, after just over a year, the insurer stopped paying Kinstler benefits because, as defined in the Department of Labor's Dictionary of Occupational Titles ("DOT"), Kinstler worked a "sedentary" job.[126] However, the insurer's use of the DOT in making the decision to deny benefits did not take into account Kinstler's specific job duties, which included non-sedentary work.[127] Kinstler subsequently challenged the insurer's denial of benefits.[128] Ultimately, the Southern District of New York granted summary judgment in Kinstler's favor and awarded her benefits.[129]

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119. *See* Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 253 (2d Cir. 1999); *Lasser*, 344 F.3d at 386; Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 272–73 (4th Cir. 2002); House v. Am. United Life Ins. Co., 499 F.3d 443, 453–54 (5th Cir. 2007); *Osborne*, 465 F.3d at 299; *Darvell*, 597 F.3d at 935.

120. *See Kinstler*, 181 F.3d at 253; *Lasser*, 344 F.3d at 386.

121. *See House*, 499 F.3d at 453–54; *Osborne*, 465 F.3d at 299; *Darvell*, 597 F.3d at 935.

122. *See Gallagher*, 305 F.3d at 272–73.

123. *See infra* Sections II.B.1–3.

124. *See Kinstler*, 181 F.3d at 249.

125. *See id.* at 246.

126. *See id.* at 246–47.

127. *See id.* ("Kinstler's job [required her] to respond to health crises if the need arose and . . . cardiopulmonary resuscitation certification (which requires kneeling) was required.").

128. *See id.* at 248.

129. *See id.*

On appeal from the district court's decision, the Second Circuit first considered which standard of review to apply to the insurer's decision to deny benefits under *Firestone*.[130] The court found the language of the policy—that the insured must "submit[] satisfactory proof of Total Disability to [the insurer]"—insufficient to confer discretionary authority on the insurer.[131] Therefore, the court reviewed the insurer's denial of benefits de novo rather than under a deferential standard.[132]

After determining that de novo review applied, the court noted that the policy did not define "regular occupation."[133] Without much further analysis, the court relied upon a decision of a lower court within the Second Circuit[134] and held that an insurer must consider the "general character" of a claimant's job to determine their "regular occupation."[135] Thus, in the Second Circuit, an insurer must consider the actual characteristics of a claimant's "regular occupation" rather than defining the claimant's "regular occupation" generically.[136]

Four years later, the Third Circuit engaged in a more thorough analysis in *Lasser v. Reliance Standard Life Insurance Company*.[137] In *Lasser*, the claimant, Stephen Lasser, applied for long-term disability benefits following a heart attack that limited his ability to work.[138] After initially granting approval, the insurer terminated Lasser's benefits.[139] As with *Kinstler*, in denying Lasser benefits, the insurer did not look to Lasser's actual job duties but instead defined Lasser's "regular occupation" generically.[140]

First, the court held that a heightened standard of review applied under *Firestone* because the insurer possessed discretionary authority to interpret the terms of the plan.[141] Nonetheless, because the insurer also acted as the plan administrator, the court recognized a potential conflict of interest.[142] Specifically, the Third Circuit noted that "a financial

130. *See id.* at 249.
131. *Id.* at 251.
132. *See id.* at 252.
133. *See id.*
134. *See* Dawes v. First Unum Life Ins. Co., 851 F. Supp. 118, 122 (S.D.N.Y. 1994).
135. *Kinstler*, 181 F.3d at 252–53.
136. *See id.*
137. Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 385–86 (3d Cir. 2003).
138. *See id.* at 383.
139. *See id.* at 383–84.
140. *See id.* at 384.
141. *See id.* at 384–85.
142. *See id.* at 385. While the Third Circuit's decision in *Lasser* predated the Supreme Court's opinion in *Glenn*, the Third Circuit had previously adopted a "sliding scale" to account for potential conflicts of interest in reviewing a denial of benefits. Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 392 (3d Cir. 2000). Functionally, the

incentive to find [the claimant] not disabled" exists when an insurer determines whether the claimant is disabled, and that same insurer also pays the disability benefits.[143] Thus, the court applied a "moderate degree of deference" when reviewing the insurer's decision.[144]

Next, the Third Circuit recognized that the insurer's decision to deny benefits would be entitled to deference if the phrase "regular occupation" were ambiguous.[145] According to the court, however, no such ambiguity existed.[146] Rather, the purpose of long-term disability insurance,[147] and the fact that "his/her" modified "regular occupation" in the policy, led the court to find that "regular occupation" unambiguously referred to Lasser's specific job.[148] But even if one could construe regular occupation to be ambiguous, the court noted that the insurer's decision to deny benefits must be reasonable.[149] Relying on *Kinstler*, however, the court found that the insurer defining Lasser's "regular occupation" generically was unreasonable, at least when the policy did not provide that the insurer would determine Lasser's "regular occupation" in such a way.[150]

In contrast, the dissent contended that the lower court's decision, which the Third Circuit upheld, "merely gave lip—service" to the deference *Firestone* afforded to an insurer.[151] The dissent also pointed out that Lasser presented no evidence to rebut the insurer's reliance on a generic job description.[152] Finally, and most crucially, the dissent found the majority's reliance on the Second Circuit's *Kinstler* opinion to be misguided because the Second Circuit applied de novo review to the insurer's denial of benefits.[153] Recognizing the high deference to which *Firestone* entitled the insurer when, as here, the plan granted the insurer discretionary authority, the dissent suggested remanding the case so the

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Third Circuit's "sliding scale" methodology is equivalent to the approach mandated by the Supreme Court in *Glenn*. *See* Kelly, *supra* note 23, at 290.

143. *Lasser*, 344 F.3d at 385.

144. *Id.* ("Because the [district court] found no evidence of conflict other than the inherent structural conflict, it held that the correct standard of review was 'at the mild end of the heightened arbitrary and capricious scale' . . . ." (quoting Lasser v. Reliance Standard Life Ins. Co., 146 F. Supp. 2d 619, 623 (D.N.J. 2001))).

145. *See id.* (citing Skretvedt v. E.I. DuPont de Nemours & Co., 268 F.3d 167, 177 (3d Cir. 2001)).

146. *See id.* at 385–86.

147. The *Lasser* court never explicitly stated what the purpose of long-term disability insurance is, but the court at least suggested that the purpose is to "protect[] the insured from inability to 'perform the material duties of his/her regular occupation.'" *Id.* at 386.

148. *Id.*

149. *See id.*

150. *See id.* at 386–87.

151. *Id.* at 394 (Garth, J., dissenting).

152. *See id.* at 395.

153. *See Lasser*, 344 F.3d at 395.

district court could "actually apply the correct standard."[154] Yet, despite the dissent's admonishments, where the policy does not define "regular occupation," an insurer must consider a claimant's job-specific duties to determine their "regular occupation" in the Third Circuit.[155] Even so, the winds of change began to blow with *Lasser*'s dissent.[156]

2. The Majority Position: An Insurer May Define a Claimant's "Regular Occupation" Generically

Every circuit since *Lasser* to confront the issue of how to determine a claimant's "regular occupation" has upheld an insurer's decision to define a claimant's "regular occupation" generically.[157] The Sixth Circuit began this shift in philosophy when it decided *Osborne v. Hartford Life and Accident Company* in 2006.[158]

In *Osborne*, the claimant, Bruce Osborne, resigned from his position as president of an insurance agency because of a massive heart attack.[159] The insurer initially approved Osborne's application for long-term disability benefits but later reversed course and terminated his benefits.[160] In terminating the benefits, the insurer consulted the DOT and determined that Osborne's position amounted to "sedentary" work.[161] Challenging this decision, Osborne claimed his work actually required him to travel extensively and be mobile, thereby rendering him unable to perform his "regular occupation."[162]

Like the Second and Third Circuits, the Sixth Circuit began its examination of the insurer's decision to terminate benefits by deciding what standard of review to apply.[163] Based on the "broad discretion" reserved to the insurer under the policy's language, the court applied an arbitrary and capricious standard of review and ultimately concluded that

154. *Id.* at 399 (emphasis removed) (citing Price v. Vincent, 538 U.S. 634, 639 (2003)).

155. *See id.* at 386 (majority opinion).

156. *See, e.g.*, Vaughan v. Vertex, Inc., No. 04-1742, 2004 U.S. Dist. LEXIS 26061, at *27 (E.D. Pa. Dec. 29, 2004) (holding, one year after *Lasser*, that it was reasonable for an insurer to define a claimant's "regular occupation" generically when the policy defined "regular occupation" as such); Thompson-Harmina v. Reliance Standard Life Ins. Co., No. 04-425, 2004 U.S. Dist. LEXIS 23797, at *14–15 (E.D. Pa. Nov. 23, 2004) (upholding an insurer's decision to use the DOT to determine a claimant's "regular occupation" one year after *Lasser*).

157. *See* House v. Am. United Life Ins. Co., 499 F.3d 443, 453–54 (5th Cir. 2007); Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006); Darvell v. Life Ins. Co. of N. Am., 597 F.3d 929, 936 (8th Cir. 2010).

158. *See Osborne*, 465 F.3d at 299.

159. *See id.* at 297.

160. *See id.* at 297–98.

161. *Id.* at 298.

162. *See id.*

163. *See id.* at 299.

the insurer's decision to deny benefits was proper.[164] In fact, the court found the insurer's decision "reasonable."[165] In concluding that the decision was reasonable, the court pointed out that the word "occupation,"[166] as used in the policy, has a broader connotation than words like "job" or "position."[167] The Sixth Circuit also noted that the insurer's discretion under the policy allowed it wide latitude to determine the appropriate way to define Osborne's occupation.[168] Accordingly, the court found the insurer's decision to terminate benefits "rational in light of the policy's provisions."[169] Thus, the Sixth Circuit became the first circuit to uphold an insurer's decision to define a claimant's "regular occupation" generically without reference to the claimant's specific job duties.[170]

One year later, in 2007, the Fifth Circuit joined the fray when it decided *House v. American United Life Insurance Company*.[171] Like the decisions discussed previously, the song remained the same—the claimant, Walter House, applied for long-term disability benefits, and the insurer denied House benefits by relying on a generic description of House's "regular occupation."[172] Yet, unlike *Osborne*, the Fifth Circuit found no grant of discretionary authority to the insurer in the policy and therefore determined that de novo review applied.[173]

Nonetheless, the different standard of review did not change the final result.[174] The court reasoned that distinguishing between a generic and a specific description of the claimant's job proved to be "too fine [a distinction] under a common sense interpretation of 'regular occupation.'"[175] Thus, "regular occupation" referred to a claimant's job as the claimant performed it "in the general economy," not, like House urged, as restricted to a claimant's actual occupation.[176] Therefore, the

164. *See id.*

165. *Id.*

166. The policy at issue in *Osborne* used the term "own occupation" rather than "regular occupation," but the Sixth Circuit concluded that this "relatively minor difference in language" did not change the final result. *Id.* at 300; *accord* Patterson v. Aetna Life Ins. Co., 763 F. App'x 268, 271 (3d Cir. 2019).

167. *See Osborne*, 465 F.3d at 299.

168. *See id.*

169. *Id.* at 300 (quoting Schmidlkofer v. Directory Distrib., Assocs., 107 F. App'x 631, 633 (6th Cir. 2004)).

170. *See id.*

171. *See* House v. Am. United Life Ins. Co., 499 F.3d 443, 453–54 (5th Cir. 2007).

172. *Id.* at 447.

173. *See id.* at 453.

174. *See id.* at 453–54 ("Although review of [an insurer's generic definition of a claimant's regular occupation] in many cases was deferential, . . . we do not believe that precludes a like interpretation here.").

175. *Id.* at 453.

176. *Id.* at 454 (citing Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006)).

Fifth Circuit, like the Sixth Circuit, held that an insurer need not consider a claimant's actual duties to define the claimant's "regular occupation."[177]

The Eighth Circuit followed the lead of *Osborne* and *House* three years later in *Darvell v. Life Insurance Company of North America*.[178] Unlike the claimants in the decisions discussed previously, who suffered from only physical ailments, Jerry Darvell suffered from both shoulder pain and depression, which prevented him from working.[179] Nonetheless, the insurer once again denied benefits by using the DOT to define Darvell's occupation generically without reference to the actual requirements of Darvell's job.[180]

The Eighth Circuit began its analysis by recognizing that the language of the plan conferred discretion upon the insurer.[181] But the court also noted the existence of a conflict of interest because the insurer served as the plan administrator.[182] Thus, the Eighth Circuit gave the conflict "some weight" in reviewing the insurer's decision for an abuse of discretion.[183]

Under the abuse of discretion standard, the court recognized that the insurer's decision would be upheld—"even if the court would interpret the [policy's] language differently"—so long as the decision was reasonable.[184] The Eighth Circuit then noted that a claimant's "regular occupation" could conceivably be defined generically or specifically.[185] Therefore, because the claimant's "regular occupation" could reasonably be defined either way, the court deferred to the insurer's interpretation of "regular occupation" and upheld the denial of benefits.[186] Thus, the Eighth Circuit created a majority in the circuit split by holding that an insurer may simply refer to a generic description of the claimant's job to determine their "regular occupation."[187] The majority and minority positions, however, are not the only views on the proper methodology to define "regular occupation," as the Fourth Circuit presented a third school of thought in 2002.[188]

177. *See id.*
178. *See* Darvell v. Life Ins. Co. of N. Am., 597 F.3d 929, 936 (8th Cir. 2010).
179. *See id.* at 932.
180. *See id.* at 933–94.
181. *See id.* at 934.
182. *See id.* (citing Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008)).
183. *Id.*
184. *Id.* at 935 (citing King v. Hartford Life & Accident Ins. Co., 414 F.3d 994, 998–99 (8th Cir. 2005) (en banc)).
185. *See id.*
186. *See id.* at 936.
187. *See id.*
188. *See* Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 272–73 (4th Cir. 2002).

3. The Middle Ground: *Gallagher v. Reliance Standard Life Insurance Company*

The Fourth Circuit's decision in *Gallagher v. Reliance Standard Life Insurance Company* represents an approach that lies between the majority and minority positions.[189] Once again, a claimant found himself unable to work.[190] This time, the claimant, Patrick Gallagher, resigned from his job of over 26 years because of chronic back pain.[191] The insurer subsequently relied on the DOT and denied Gallagher benefits.[192] Yet, in this case, the duties of Gallagher's job nearly mirrored the corresponding duties illustrated in the DOT.[193] Applying de novo review, the court held that a generic description of a claimant's "regular occupation" is reasonable where the description involves "comparable duties."[194]

Despite *Gallagher*'s relatively limited holding, courts have read it in different ways.[195] Some courts interpret *Gallagher* to hold that an insurer must define a claimant's "regular occupation" with specific reference to the claimant's duties.[196] Other courts, however, interpret *Gallagher* to mean that an insurer may define a claimant's regular occupation generically.[197] In fact, even lower courts within the Fourth Circuit disagree on how to read *Gallagher*.[198] Thus, the dispute over the

189. *See id.*

190. *See id.* at 267–68.

191. *See id.*

192. *See id.* at 271.

193. *See id.* at 272.

194. *Id.* (citing DeLoatche v. Heckler, 715 F.2d 148, 151 (4th Cir. 1983)); *cf.* Tsoulas v. Liberty Life Assurance Co., 454 F.3d 69, 78 (1st Cir. 2006) (adopting this standard from *Gallagher* for an "own occupation" policy).

195. *See* Kelly, *supra* note 23, at 298 (discussing how insurers and courts disagree on how to read *Gallagher*).

196. *See* Wirries v. Reliance Standard Ins. Co., No. CV 01-565, 2005 U.S. Dist. LEXIS 22152, at *13–14 (D. Idaho Sept. 1, 2005), *aff'd*, 247 F. App'x 870 (9th Cir. 2007); Shahpazian v. Reliance Standard Life Ins. Co., 388 F. Supp. 2d 1368, 1378 (N.D. Ga. 2005); Freling v. Reliance Standard Life Ins. Co., 315 F. Supp. 2d 1277, 1293 (S.D. Fla. 2004).

197. *See* Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006); Dahlka v. Unum Life Ins. Co. of Am., No. 17-cv-245, 2018 U.S. Dist. LEXIS 97900, at *20–21 (W.D. Wis. June 11, 2018); Green v. Reliance Standard Life Ins. Co., No. 408CV068, 2009 U.S. Dist. LEXIS 57340, at *18 (S.D. Ga. July 7, 2009).

198. *Compare* Ransom v. Unum Life Ins. Co., 250 F. Supp. 2d 649, 656 n.12 (E.D. Va. 2003) ("*Gallagher* . . . stands for the sensible proposition that the starting point of the analysis must be a precise definition of the claimant's job duties . . . ." (citing *Gallagher*, 305 F.3d at 271–73)), *with* McCready v. Standard Ins. Co., 417 F. Supp. 2d 684, 698 (D. Md. 2006) ("The United States Court of Appeals for the Fourth Circuit has previously found that it is reasonable for an insurer to consider the DOT descriptions in order to define an applicant's occupation and job duties." (citing *Gallagher*, 305 F.3d at 270–73)).

proper method of defining a claimant's "regular occupation" persists nationwide.[199]

The implication of the disagreement among courts is massive.[200] Two claimants may have the exact same job, disability, and policy, but if courts define "regular occupation" in two different ways, then only one of the claimants may receive long-term disability benefits.[201] Thus, disabled workers may find themselves without significant financial recourse simply because of where they live.[202]

III. ANALYSIS

Whether an insurer may define a claimant's "regular occupation" generically without reference to the claimant's specific job duties is an issue that has divided the circuit courts of appeals for decades.[203] Notwithstanding, upholding an insurer's decision to define a claimant's "regular occupation" generically comports with the deference to which insurers are typically entitled under *Firestone*.[204] In addition, when the policy at issue uses a standard description of a claimant's job to define the claimant's "regular occupation"—as many polices now do—courts should not substitute their own judgment by requiring an insurer to look to a claimant's job-specific duties.[205] However, while applicable law mandates that courts should not disturb an insurer's decision to define a claimant's "regular occupation" generically, it would behoove Congress to amend ERISA or the Department of Labor to update the DOT in order to incorporate ERISA's purpose of protecting employees into long-term disability benefit plans.[206]

A. Deferring to the Disability

Principally, the applicable standard of review under *Firestone* mandates that an insurer's decision to define a claimant's "regular occupation" generically without reference to the claimant's specific job

199. *See* Jasukaitis & O'Hara, *supra* note 5, at 220–21 (noting that "insurers continue to use the DOT to define 'occupation' in general terms").

200. *See id.* at 231 ("[U]ntil the circuits [agree on how to define regular occupation], intolerable differences will remain in how workers are treated state to state.").

201. For an illustration of a hypothetical scenario similar to this, see *id.* at 218 (discussing a situation where two disabled claimants work as large-animal veterinarians, but one claimant does not receive benefits because only one court requires "veterinarian" to be defined with reference to the claimant's actual duties).

202. *See id.* at 218–19.

203. *See supra* Section II.B.

204. *See infra* Section III.A.

205. *See infra* Section III.B.

206. *See infra* Section III.C.

duties is a decision that a court should not disturb.[207] When an insurer acts as plan administrator and determines benefit eligibility or interprets the plan's provisions, a court reviewing a denial of benefits gives the insurer's decision high deference under *Firestone*.[208] Indeed, the vast majority of long-term disability benefit plans now expressly give the insurer discretion to construe the plan's terms and administer benefits.[209] Therefore, when an insurer uses its discretion to interpret the provisions of a long-term disability benefit plan to deny a claimant benefits, courts usually apply either an arbitrary and capricious or abuse of discretion standard of review.[210]

As various courts have noted, the arbitrary and capricious and abuse of discretion thresholds are extremely deferential standards of review.[211] Under these standards, so long as the insurer is able to "offer a reasoned explanation, based on the evidence," for its decision to deny benefits, the insurer's determination will be upheld.[212] Further, as the Sixth Circuit explained in *Osborne*, an insurer's decision to define "regular occupation" generically is not arbitrary and capricious when reasonable people may differ on the proper way to define the term.[213] In point of fact, judges are certainly reasonable people,[214] yet they routinely disagree

207. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) ("[W]e hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.").

208. *See id.*

209. *See, e.g.*, Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006) (stating in the policy that the insurer "has full discretion and authority to determine eligibility for benefits and to construe and interpret all [of the plan's] terms and provisions"); Darvell v. Life Ins. Co. of N. Am., 597 F.3d 929, 933 (8th Cir. 2010) (stating in the policy that "the Insurance Company shall have the authority, in its discretion, to interpret the terms of the Plan documents, to decide questions of eligibility for coverage or benefits under the Plan, and to make any related findings of fact").

210. *See Osborne*, 465 F.3d at 299; *Darvell*, 597 F.3d at 934; *see also* Pari-Fasano v. ITT Hartford Life & Accident Ins. Co., 230 F.3d 415, 419 (1st Cir. 2000) (noting that abuse of discretion review and arbitrary and capricious review are "functional[ly] equivalen[t]"). *But see* Conway v. Reliance Standard Life Ins. Co., 34 F. Supp. 3d 727, 732 (E.D. Mich. 2014) (noting that Michigan has outlawed discretionary clauses in insurance policies, so de novo review always applies to a denial of benefits in Michigan (citing MICH. ADMIN. CODE r. 500.2202(b) (2007))).

211. *See, e.g.*, Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1474 (9th Cir. 1993) ("In the ERISA context, even decisions directly contrary to evidence in the record do not necessarily amount to an abuse of discretion."); Yeager v. Reliance Standard Life Ins. Co., 88 F.3d 376, 380 (6th Cir. 1996) (noting that arbitrary and capricious review is "highly deferential").

212. Kalish v. Liberty Mut., 419 F.3d 501, 506 (6th Cir. 2005) (quoting Davis v. Ky. Fin. Cos. Ret. Plan, 887 F.2d 689, 693 (6th Cir. 1989)).

213. *See Osborne*, 465 F.3d at 299.

214. *See, e.g.*, United States v. Wittig, 528 F.3d 1280, 1289 (10th Cir. 2008) (Hartz, J., concurring) ("[D]istrict judges are reasonable people . . . ."); United States v. Rigas,

on the proper means of determining a claimant's "regular occupation."[215] It follows, then, that reasonable people disagree on how "regular occupation" should be defined.[216] And as the Eighth Circuit in *Darvell* indicated, where reasonable people differ on how to define "regular occupation," a court applying deferential review should allow the insurer's interpretation to stand.[217] Therefore, courts should defer to an insurer's decision to define a claimant's "regular occupation" generically without reference to the claimant's specific job duties because of the high deference typically owed to an insurer in such instances.

Moreover, to the extent that the applicable standard of review is altered by *Glenn*'s holding that the reviewing tribunal must consider an insurer's conflicts of interest in reviewing a denial of benefits, that change has a menial effect.[218] *Glenn*'s negligible impact can be illustrated by the fact that courts generally do not appear to give an insurer's conflict of interest much weight when applying deferential review.[219] For example, the Fifth Circuit, in *Nichols v. Reliance Standard Life Insurance Company*, refused to heavily scrutinize an insurer's conflict of interest[220] despite evidence of over 100 instances of the

583 F.3d 108, 123 n.5 (2d Cir. 2009) ("We may generally assume that federal judges are 'reasonable' people in the commonsense definition of the term.").

215. *Compare Osborne*, 465 F.3d at 299 (holding that an insurer may define a claimant's "regular occupation" generically), *with* Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 385–86 (3d Cir. 2003) (holding that an insurer must define a claimant's "regular occupation" with reference to the claimant's job-specific duties).

216. *See Osborne*, 465 F.3d at 299; *Lasser*, 344 F.3d at 386–86.

217. *See* Darvell v. Life Ins. Co. of N. Am., 597 F.3d 929, 935 (8th Cir. 2010) ("Under the abuse of discretion standard, this court must defer to [the insurer's] interpretation of the plan so long as it is 'reasonable,' even if the court would interpret the language differently as an original matter." (citing King v. Hartford Life & Accident Ins. Co., 414 F.3d 994, 998–99 (8th Cir. 2005) (en banc))); *cf.* Fields v. City of Chi., 981 F.3d 534, 554 (7th Cir. 2020) (noting, in reviewing a trial court's ruling on a Federal Rule 60(b) motion for abuse of discretion, that "there is no abuse of discretion if a reasonable person could disagree as to the propriety of the court's action" (quoting Lee v. Vill. of River Forest, 936 F.2d 976, 979 (7th Cir. 1991))).

218. *See* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008).

219. *See, e.g.*, Hankins v. Standard Ins. Co., 677 F.3d 830, 837 (8th Cir. 2012) (applying abuse of discretion review to affirm an insurer's denial of benefits and not affording a conflict of interest much weight because "the other factors in [the claimant's] case [were] not closely balanced"); Dickinson v. Union Sec. Ins. Co., No. 3:14-cv-00106, 2016 U.S. Dist. LEXIS 180800, at *55 (S.D. Iowa June 7, 2016) (applying abuse of discretion review and declining to consider purported "procedural irregularities" in weighing the conflict of interest); *see also* Beverly Cohen, *Divided Loyalties: How the* MetLife v. Glenn *Standard Discounts ERISA Fiduciaries' Conflicts of Interest*, 2009 UTAH L. REV. 955, 985 (2009) ("Even the post-MetLife cases tend to bear out that in close cases, where the conflict conceivably could be useful to tip the balance, the courts have resisted using the conflict as a tiebreaker.").

220. *See* Nichols v. Reliance Standard Life Ins. Co., 924 F.3d 802, 814–15 (5th Cir. 2019).

insurer's "biased claims administration."[221] In applying abuse of discretion review, the court emphasized that "a structural conflict is not a significant factor where the claimant offers no evidence that the conflict impacted the administrator's decision."[222] Thus, as the Fifth Circuit's decision in *Nichols* demonstrates, courts still tend to give insurers high deference, despite *Glenn*'s command that a court must weigh conflicts of interest in applying deferential review.[223]

Another reason why *Glenn*'s impact on the applicable standard of review is minimal is that insurers have begun to mitigate potential conflicts of interest.[224] For example, Metropolitan Life Insurance Company ("MetLife")—the very company at issue in *Glenn*—has taken steps to separate its financial and claims processing departments.[225] In keeping these departments separate, insurers like MetLife guarantee that judges afford very little weight to any potential conflict of interest because courts deemphasize such conflicts when the insurer "take[s] active steps to reduce potential bias and to promote accuracy."[226] In sum, even after *Glenn*, the applicable standard of review remains largely the same: insurers are entitled to great deference.[227] Therefore, because of this entitlement, courts should uphold an insurer's decision to define a claimant's "regular occupation" generically.

Even if one disregards the generally applicable standard of review, an insurer's decision to ignore the specific duties of a claimant's "regular

221. The lower court undertook a "cumbersome review" to catalogue these examples of biased claims administration. *See* Nichols v. Reliance Standard Life Ins. Co., No. 3:17-cv-42, 2018 U.S. Dist. LEXIS 109526, at *15 (S.D. Miss. June 29, 2018), *rev'd*, 924 F.3d 802. The Fifth Circuit did not specifically respond to these cases, instead stating that "the [lower] court ignored the forty cases upholding [the insurer's] decisions." *Nichols*, 924 F.3d at 814.

222. *Nichols*, 924 F.3d at 814 (citing Anderson v. Cytec Indus., 619 F.3d 505, 512 (5th Cir. 2010); Holland v. Int'l Paper Co. Ret. Plan, 576 F.3d 240, 249 (5th Cir. 2009)).

223. *See id.*; *see also* Cohen, *supra* note 219, at 985.

224. *See* Holcomb v. Unum Life Ins. Co. of Am., 578 F.3d 1187, 1193 (10th Cir. 2009); Scotti v. Prudential Welfare Benefits Plan, No. 08-3339, 2009 U.S. Dist. LEXIS 64559, at *10–11 (D.N.J. July 23, 2009); Bendik v. Hartford Life Ins. Co., No. 03 Civ. 8138, 2010 U.S. Dist. LEXIS 70978, at *13–14 (S.D.N.Y. July 12, 2010), *aff'd*, 432 F. App'x 24 (2d Cir. 2011).

225. *See* Roden-Reynolds v. Metro. Life Ins. Co., No. 1:18-cv-0897, 2019 U.S. Dist. LEXIS 137752, at *18 (M.D. Pa. Aug. 15, 2019); Bolt v. Honeywell Int'l, Inc., 814 F. Supp. 2d 913, 923–24 (D. Ariz. 2011); Parker v. Baker Hughes Inc. Long Term Disability Plan, No. 17-372, 2018 U.S. Dist. LEXIS 97557, at *20–21 (D.N.M. June 11, 2018).

226. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008).

227. *See Nichols*, 924 F.3d at 814; Leffler v. Aetna Life Ins. Co., No. 15-CV-154, 2017 U.S. Dist. LEXIS 130753, at *15 (N.D. Okla. June 13, 2017); *see also* Hagen v. Aetna Ins. Co., 808 F.3d 1022, 1030 (5th Cir. 2015) ("Absent other evidence suggesting procedural unreasonableness or warranting treatment of the conflict as a more significant factor, the mere fact that [the insurer] did not utilize any [steps to reduce potential bias] is not sufficient to justify giving [its] conflict greater weight.").

occupation" does not render the decision unreasonable.[228] For instance, the Fifth Circuit, in *House v. American United Life Insurance Company*, upheld an insurer's decision to define "regular occupation" generically under de novo review, reasoning that the phrase "regular occupation" is broad enough to encompass a general description of a claimant's job.[229] The District of Nevada also encapsulated this reasoning:

> An insurer cannot be expected to anticipate every assignment an employer might place upon an employee outside the usual requirements of his or her occupation. A person may not be able to perform a specific job assignment, but still be able to perform the duties generally understood to be part of his or her "occupation." For example, a secretary is not disabled from his or her "occupation" just because he or she cannot also perform additional tasks assigned by an employer, such as moving furniture or lifting heavy objects.[230]

Furthermore, other courts agree that the word "occupation" is sufficiently pliable to justify a generic definition of a claimant's "regular occupation."[231] Thus, an insurer's decision to refer only to a general description of a claimant's "regular occupation" is, standing alone, reasonable.[232] Even under de novo review, therefore, courts should not disturb an insurer's decision to define a claimant's "regular occupation" without reference to the claimant's specific job duties.[233]

Nevertheless, regardless of whether a court employs de novo or arbitrary and capricious review, the deference courts apply to an insurer's denial of disability benefits can become exponentially less important when policy language explicitly delineates a job's description.[234] Indeed, when a policy expressly defines "regular

228. *See, e.g.*, House v. Am. United Life Ins. Co., 499 F.3d 443, 453–54 (5th Cir. 2007) (applying de novo review and upholding an insurer's decision to define "regular occupation" generically); Conway v. Reliance Standard Life Ins. Co., 34 F. Supp. 3d 727, 733–34 (E.D. Mich. 2014) (same).

229. *See House*, 499 F.3d at 453–54.

230. Ehrensaft v. Dimension Works Inc. Long Term Disability Plan, 120 F. Supp. 2d 1253, 1259 (D. Nev. 2000).

231. *See* Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 299 (6th Cir. 2006); Cross v. Reliance Standard Life Ins. Co., No. 06-3507, 2007 U.S. Dist. LEXIS 29361, at *25 (E.D. La. Apr. 20, 2007), *aff'd*, 261 F. App'x 708 (5th Cir. 2008).

232. *See, e.g.*, *House*, 499 F.3d at 453–54 (finding an insurer's decision to define a claimant's "regular occupation" generically reasonable, even while applying de novo review).

233. *See id.*; *Conway*, 34 F. Supp. 3d at 733–34.

234. *See, e.g.*, Wyant v. Unumprovident Corp., No. 1:04-CV-470, 2006 U.S. Dist. LEXIS 33519, at *16 (N.D.N.Y. May 16, 2006) (allowing an insurer to define a claimant's "regular occupation" generically because the policy provided that the term would be defined in this way); Lewis v. Unum Life Ins. Co. of Am., No. 1:18-cv-127, 2020 U.S. Dist. LEXIS 183165, at *18–19 (E.D. Tenn. Oct. 2, 2020) (denying a claimant benefits because of how the policy defined "regular occupation").

occupation" generically, claimants find themselves facing an incredulous uphill battle to obtain benefits because of how courts interpret long-term disability benefit plans.[235]

B. Defining the Disability

Just one year after the Third Circuit held in *Lasser* that an insurer must consider a claimant's job-specific duties to determine the meaning of "regular occupation,"[236] a district court in the Third Circuit denied benefits by allowing an insurer to define a claimant's "regular occupation" generically.[237] Multiple decisions from lower courts within the Second and Third Circuits have followed suit by upholding an insurer's decision to determine a claimant's "regular occupation" without reference to the claimant's job-specific duties.[238] Moreover, the Second Circuit has even affirmed some of these decisions, albeit in unpublished opinions.[239] So what happened?

After years of prolonged litigation, insurers got smart.[240] Many long-term disability plans now expressly define "regular occupation" generically.[241] Although a full discussion of the principles of insurance policy interpretation is beyond the scope of this Comment,[242] courts look to the plain language of ERISA plans to determine their meaning.[243] Indeed, in *Firestone* itself, the Supreme Court expressed that the plan's

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235. *See infra* Section III.B.

236. *See* Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 385–86 (3d Cir. 2003).

237. *See* Vaughan v. Vertex Inc., No. 04-1742, 2004 U.S. Dist. LEXIS 26061, at *27 (E.D. Pa. Dec. 29, 2004).

238. *See* Simone v. Prudential Ins. Co. of Am., No. 04 CIV.2076, 2005 U.S. Dist. LEXIS 3061, at *20–21 (S.D.N.Y. Feb. 28, 2005), *aff'd*, 164 F. App'x 39 (2d Cir. 2006); Hinchey v. First Unum Life Ins. Co., No. 17-cv-08034, 2020 U.S. Dist. LEXIS 49703, at *67–68 (S.D.N.Y. Mar. 20, 2020), *aff'd*, 848 F. App'x 481 (2d Cir. 2021); Vander-Leeuw v. First Unum Life Ins. Co., No. 11-5685, 2013 U.S. Dist. LEXIS 96454, at *28 (D.N.J. July 8, 2013).

239. *See, e.g.*, *Simone*, 164 F. App'x at 41 (affirming the Southern District of New York's decision to deny benefits); *Hinchey*, 848 F. App'x at 482 (same).

240. *See, e.g.*, Denney v. Unum Life Ins. Co. of Am., No. 16-cv-03052, 2018 U.S. Dist. LEXIS 129795, at *37 (D. Colo. Aug. 2, 2018) (using a generic definition of "regular occupation" in the policy).

241. *See, e.g.*, Kaminski v. UNUM Life Ins. Co. of Am., 517 F. Supp. 3d 825, 831 (D. Minn. 2021) (defining "regular occupation" in the policy "as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location"); *Hinchey*, 2020 U.S. Dist. LEXIS 49703, at *4 (same).

242. For a further discussion on how courts interpret insurance policies, see Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 553–64 (2017).

243. *See* U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 102 (2013) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)).

terms govern when assessing a benefits claim.[244] Thus, when the policy unambiguously defines "regular occupation" as referring to a general description of a claimant's job, courts allow that generic definition to stand.[245]

On the other hand, although courts analyze the plan's plain language to determine its meaning,[246] other general contractual interpretation principles are inapplicable within the ERISA context.[247] Most notably, where the plan vests the administrator with discretionary authority to interpret the plan's terms, the doctrine of *contra proferentem*—which mandates that a contract's ambiguous provisions are construed against the drafter[248]—does not apply.[249] Within the insurance context, courts construe a policy's ambiguous terms against the insurer.[250] ERISA, however, presents an enigma: construing ambiguous terms against an insurer with discretionary authority to interpret those terms would effectively strip the insurer of any discretionary power.[251] This catch-22 is why "every Court of Appeals to have addressed the issue" holds that *contra proferentem* does not apply to a review of a discretionary denial of benefits.[252] Therefore, to the extent that the phrase "regular occupation" could be considered ambiguous,[253] applicable law mandates that the term not be construed against an insurer possessing discretionary authority to interpret the plan's provisions.[254]

Of course, there will be instances where no such discretionary grant exists in the plan, in which case *contra proferentem* becomes relevant.[255]

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244. *See Firestone*, 489 U.S. at 115 ("[T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue.").

245. *See* Vander-Leeuw v. First Unum Life Ins. Co., No. 11-5685, 2013 U.S. Dist. LEXIS 96454, at *28 (D.N.J. July 8, 2013); Lane v. Unum Life Ins. Co. of Am., No. 06-5819, 2008 U.S. Dist. LEXIS 20675, at *33–34 (D.N.J. Mar. 17, 2008).

246. *See McCutchen*, 569 U.S. at 102.

247. *See* Fleisher v. Standard Ins. Co., 679 F.3d 116, 124 (3d Cir. 2012) (noting that the doctrine of *contra proferentem* does not apply when the plan reserves discretionary authority with the insurer); Marrs v. Motorola, Inc., 577 F.3d 783, 787 (7th Cir. 2009) (same); White v. Coca-Cola Co., 542 F.3d 848, 857 (11th Cir. 2008) (same).

248. *See* French, *supra* note 242, at 556.

249. *See Fleisher*, 679 F.3d at 124; *Marrs*, 577 F.3d at 787; *White*, 542 F.3d at 857.

250. *See* French, *supra* note 242, at 556.

251. *See Fleisher*, 679 F.3d at 124 ("[T]he administrator can hardly be said to exercise discretion if her interpretation of the policy's terms is burdened by a presumption against the insurer.").

252. *Id.*

253. *See, e.g.*, Shahpazian v. Reliance Standard Life Ins. Co., 388 F. Supp. 2d 1368, 1377 (N.D. Ga. 2005) (finding the phrase "regular occupation" to be ambiguous absent a specific definition). *But see* Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 385–86 (3d Cir. 2003) (finding the phrase "regular occupation" to be unambiguous).

254. *See Fleisher*, 679 F.3d at 124; *Marrs*, 577 F.3d at 787; *White*, 542 F.3d at 857.

255. *See, e.g.*, *Shahpazian*, 388 F. Supp. 2d at 1377 (applying *contra proferentem* to the term "regular occupation" because the plan did not grant the insurer authority to interpret its terms).

But whether *contra proferentem* even applies to a dispute over how to define "regular occupation" is questionable.[256] Take, for example, the Sixth Circuit's *Osborne* decision, in which the court rejected the claimant's argument for *contra proferentem*'s application because the dispute did not center on ambiguous language.[257] Rather, the court reasoned that the disagreement revolved around the insurer's methodology in defining the claimant's "occupation," so *contra proferentem* was inapposite.[258] In sum, the plain language of many long-term disability benefit policies, combined with *contra proferentem*'s irrelevance as applied to the interpretation of the phrase "regular occupation," necessitates a conclusion that an insurer's decision to define "regular occupation" generically should be upheld.

Nevertheless, even where the policy defines "regular occupation" generically, some courts insist on substituting their own judgment by requiring insurers to look to the claimant's job-specific duties.[259] The prime reason for courts ignoring the policy's plain language in such a way appears to be that many claimants present highly sympathetic cases.[260] For instance, in *Nichols v. Reliance Standard Life Insurance Company*, a 62-year-old claimant worked in a chicken processing plant for her entire life before disability struck.[261] In that case, the policy defined "regular occupation" in accordance with the claimant's duties as they "were normally [performed] in the national economy," instead of "the unique [duties] performed for a specific employer or specific locale."[262] Yet, rather than abide by the policy's definition of "regular occupation," the Southern District of Mississippi indicated that the insurer should have considered the claimant's specific duties.[263] On appeal, the Fifth Circuit reversed the district court's decision, denying

256. *See* Osborne v. Hartford Life & Accident Ins. Co., 465 F.3d 296, 300 (6th Cir. 2006).

257. *See id.*

258. *See id.*

259. *See, e.g.*, Nichols v. Reliance Standard Life Ins. Co., No. 3:17-CV-42, 2018 U.S. Dist. LEXIS 109526, at *8–9 (S.D. Miss. June 29, 2018) (overturning an insurer's decision to define "regular occupation" generically, despite the fact that the policy provided that the term would be defined in such a manner), *rev'd*, 924 F.3d 802 (5th Cir. 2019).

260. *See id.* at *3; Dragus v. Reliance Standard Life Ins. Co., No. 15 C 9135, 2017 U.S. Dist. LEXIS 46917, at *4–5 (N.D. Ill. Mar. 29, 2017), *aff'd*, 882 F.3d 667 (7th Cir. 2018); Hinchey v. First Unum Life Ins. Co., No. 17-cv-08034, 2020 U.S. Dist. LEXIS 49703, at *5 (S.D.N.Y. Mar. 20, 2020), *aff'd*, 848 F. App'x 481 (2d Cir. 2021).

261. *See Nichols*, 2018 U.S. Dist. LEXIS 109526, at *3.

262. *Id.* at *8.

263. *See id.* at *11 ("There is no justification for fitting the square peg of [the claimant's] job into the round hole of 'Sanitarian (Any Industry).'").

the claimant long-term disability benefits and pointing out that the plan's generic definition of "regular occupation" governed.[264]

While the Fifth Circuit in *Nichols* understandably followed applicable law,[265] it also deprived a disabled 62-year-old woman of benefits.[266] Unfortunately, this story repeats itself on a regular basis in courts nationwide.[267] So what can be done?

C. Cracking the "Regular Occupation" Conundrum

When an insurer defines "regular occupation" without reference to a claimant's job-specific duties, ERISA's legislative purpose of protecting employees is undermined because claimants are denied access to long-term disability benefits when they can no longer perform their occupational duties.[268] Additionally, courts subvert ERISA's goal of maintaining "a uniform regulatory regime over employee benefit plans"[269] when they interpret the phrase "regular occupation" in different ways.[270] The Supreme Court, on several occasions, has compounded the problem by declining to opine on the proper method of defining "regular occupation."[271] And, to the extent that *Glenn* can be seen as the Supreme Court's attempt to combat insurer bad faith in the ERISA context,[272] the

264. *See Nichols*, 924 F.3d at 811 (noting that working in cold conditions "is not part of [the claimant's] 'regular occupation' as defined by the plan . . . .").

265. *See* U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 102 (2013) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989)).

266. *See Nichols*, 924 F.3d at 815 (reversing the lower court's judgment that awarded the claimant past and future long-term disability benefits).

267. *See, e.g.*, Hinchey v. First Unum Life Ins. Co., No. 17-cv-08034, 2020 U.S. Dist. LEXIS 49703, at *75 (S.D.N.Y. Mar. 20, 2020) (affirming an insurer's denial of long-term disability benefits), *aff'd*, 848 F. App'x 481 (2d Cir. 2021); Vander-Leeuw v. First Unum Life Ins. Co., No. 11-5685, 2013 U.S. Dist. LEXIS 96454, at *39 (D.N.J. July 8, 2013) (denying a claimant long-term disability benefits).

268. *See* Smith v. Cmta-Iam Pension Tr., 746 F.2d 587, 589 (9th Cir. 1984) ("[One of t]he underlying purposes of ERISA [is] to protect the interests of participants in employee benefit plans."); *see also* Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 386 (3d Cir. 2003) (declining to accept an insurer's generic definition of a claimant's regular occupation in part because of "the purpose of disability insurance").

269. Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004).

270. *See* Jasukaitis & O'Hara, *supra* note 5, at 224.

271. *See, e.g.*, Reliance Standard Life Ins. Co. v. Lasser, 541 U.S. 1063, 1063 (2004) (denying certiorari in *Lasser*); Osborne v. Hartford Life & Accident Ins. Co., 552 U.S. 940, 940 (2007) (denying certiorari in *Osborne*).

272. Although, unlike state law, ERISA "provides little in the way of substantive protections" for insurer bad faith, an insurer's denial of coverage in the ERISA context can still be characterized as "bad faith" in the traditional sense of the term. *See* Beverly Cohen, *Saving the Savings Clause: Advocating a Broader Reading of the* Miller *Test to Enable States to Protect ERISA Health Plan Members by Regulating Insurance*, 18 GEO. MASON L. REV. 125, 131 (2010).

resulting effects on insurers have been negligible.[273] Therefore, any possible solution to the definitional issues that the phrase "regular occupation" presents likely must take the form of legislation or regulation.[274]

On the legislative side, Congress can act by amending ERISA.[275] Doing so would not be unprecedented, as Congress has amended ERISA multiple times since the legislation's enactment in 1974.[276] If Congress takes the legislative route, it could follow Oregon and Michigan's lead by outlawing discretionary clauses in insurance policies.[277] By preventing any grant of discretionary authority in long-term disability benefit plans, an insurer's denial of benefits would necessarily be subject to significantly less deference than it otherwise would enjoy if the insurer had discretion to determine eligibility for benefits.[278] Of course, an insurer's decision to define a claimant's "regular occupation" generically may withstand de novo review because of how broadly courts interpret the word "occupation."[279] Therefore, should Congress find the Oregon and Michigan approach inadequate, it may behoove Congress to take the more drastic step of defining "regular occupation" as referring to a claimant's job-specific duties.[280] By mandating that "regular occupation" be defined as the work a claimant actually performs, Congress would

273. *See* Cohen, *supra* note 219, at 985 ("[T]he post-MetLife cases tend to bear out that in close cases, where the conflict conceivably could be useful to tip the balance, the courts have resisted using the conflict as a tiebreaker."); *see also supra* Section III.A.

274. *See* Jasukaitis & O'Hara, *supra* note 5, at 231–33 (suggesting legislative solutions to help with the interpretation of the phrase "regular occupation"); *cf.* Torres v. Pittson Co., 346 F.3d 1324, 1332 n.10 (11th Cir. 2003) (discussing how the Department of Labor has amended ERISA's claims-procedure regulation).

275. *See* Jasukaitis & O'Hara, *supra* note 5, at 232.

276. *See id.* (discussing several amendments to ERISA, such as the Omnibus Budget Reconciliation Act of 1986); *see also* Schmidt v. AK Steel Corp. Pension Agreement Plan, No. 1:09-cv-464, 2010 U.S. Dist. LEXIS 144792, at *6 (S.D. Ohio Jan. 14, 2010) (noting that "ERISA has been amended several times since 1974").

277. *See* OR. ADMIN. R. 836-010-0026(2) (2015) ("A policy . . . by an insurer to provide, deliver, arrange for, pay for or reimburse claim costs may not contain a discretionary clause or other language purporting to reserve discretion to the insurer to interpret the terms of the contract . . . ."); MICH. ADMIN. CODE r. 500.2202(b) (2007) ("[A]n insurer shall not issue, advertise, or deliver to any person in this state a policy, contract, rider, indorsement, certificate, or similar contract document that contains a discretionary clause.").

278. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); *see also* Conway v. Reliance Standard Life Ins. Co., 34 F. Supp. 3d 727, 732 (E.D. Mich. 2014) (applying de novo review because Michigan outlawed discretionary clauses in insurance policies (citing MICH. ADMIN. CODE r. 500.2202(b))).

279. *See* House v. Am. United Life Ins. Co., 499 F.3d 443, 453–54 (5th Cir. 2007); *Conway*, 34 F. Supp. 3d at 733–34; *see also supra* Section III.A (arguing that an insurer's decision to define a claimant's "regular occupation" generically should withstand de novo review).

280. *See* Jasukaitis & O'Hara, *supra* note 5, at 232 ("Amending ERISA to define 'regular occupation' fits neatly into [ERISA's] legislative history.").

ensure that courts consider the claimant's particular duties to determine their "regular occupation."[281] Thus, to solve the "regular occupation" definitional conundrum, Congress can either proscribe the discretionary authority available to insurers or redefine "regular occupation" to expressly include job-specific duties.

However, Congress is not the only body that could help solve the "regular occupation" enigma.[282] Rather, if insurers continue to insist on using the Dictionary of Occupational Titles ("DOT") to define a claimant's "regular occupation," then the Department of Labor can update the DOT.[283] Several courts have criticized insurers' use of the DOT because of its irrelevance and flaws, and these courts' observations are not without merit.[284] Most significantly, the DOT has not been updated since 1991[285] and wholly fails to account for newly-emerged occupations.[286] In addition, the Department of Labor never intended insurers to use the DOT in determining whether a claimant is disabled.[287] Decentralized data collection at the time of the DOT's drafting created inaccurate job descriptions, and these "definitions were written especially hurriedly, with the likely result that source data [was] not fully explored."[288] Should the Department of Labor update the DOT to accurately describe jobs, an insurer would necessarily consider the claimant's specific duties when consulting this reference manual to

281. Courts routinely consider and enforce the plain language of ERISA's definitions. *See, e.g.*, Bellon v. PPG Emp. Life & Other Benefits Plan, No. 5:18-CV-114, 2021 U.S. Dist. LEXIS 119483, at *21–22 (N.D.W. Va. June 28, 2021) (considering ERISA's definitions of "pension plan" and "welfare plan" in concluding that a surviving spouse benefit is not a pension plan); Winn v. Lassen Canyon Nursery, Inc., No. CIV S-10-1030, 2011 U.S. Dist. LEXIS 144508, at *6–7 (E.D. Cal. Dec. 14, 2011) (using ERISA's definitions of "administrator" and "fiduciary" to decide a motion to dismiss).

282. For a further discussion about the rise of administrative rulemaking and separation of powers issues, see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 524–29 (2015).

283. *See generally* Jasukaitis & O'Hara, *supra* note 5, at 220–22 (discussing various criticisms of the DOT).

284. *See id.*; *see also* Witte v. Conn. Gen. Life Ins. Co., No. 06-2755, 2007 U.S. Dist. LEXIS 89720, at *14–15 (D.N.J. Dec. 6, 2007) (finding that the insurer acted in an arbitrary and capricious manner by relying on "irrelevant evidence" contained in the DOT); Montoya v. Reliance Standard Life Ins. Co., No. 14-cv-02740, 2016 U.S. Dist. LEXIS 132771, at *38–39 (N.D. Cal. Sept. 27, 2016) ("I find that it was unreasonable to rely solely on the DOT definitions (last updated in 1991 or earlier) . . . .").

285. *See* Jasukaitis & O'Hara, *supra* note 5, at 221.

286. *See, e.g.*, Popovich v. Metro. Life Ins. Co., 281 F. Supp. 3d 993, 1006–07 (C.D. Cal. 2017) (criticizing the insurer's use of the DOT because the DOT job description of "news editor" did not "adequately reflect modern news media, where online reporting can be critical to a media outlet's success").

287. *See* Jasukaitis & O'Hara, *supra* note 5, at 220.

288. *Id.* at 221 (alteration in original).

define a claimant's "regular occupation."[289] Nevertheless, until Congress or the Department of Labor act, the phrase "regular occupation" and its interpretation will continue to sharply divide courts and leave countless disabled workers without access to much needed long-term disability benefits.[290]

IV. CONCLUSION

Insurers regularly deny long term-disability benefits to disabled workers across the nation by defining "regular occupation" without reference to the specific work a claimant performs.[291] Nevertheless, under applicable law, an insurer's decision to define a claimant's "regular occupation" generically should be upheld.[292]

Principally, every circuit court of appeals to have addressed the interpretation of "regular occupation" since 2003 has found it proper for an insurer to define "regular occupation" in general terms.[293] Such an approach comports with the deference typically owed to insurers under the Supreme Court's decisions in *Firestone* and *Glenn*.[294] In addition, when a policy defines "regular occupation" generically, ERISA's applicable contractual interpretation principles strongly support allowing an insurer to determine a claimant's "regular occupation" without reference to the claimant's specific duties.[295]

Notwithstanding applicable law, however, defining "regular occupation" generically strips disabled workers of long-term disability benefits and subverts ERISA's legislative purpose.[296] Therefore, Congress should amend ERISA, or the Department of Labor should update the DOT, to integrate ERISA's goal of protecting employees into long-term disability plans.[297] But until such action is taken, insurers are justified in defining a claimant's "regular occupation" without reference to the specific work the claimant performs.[298] In the meantime,

289. *See, e.g.*, Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 273–74 (4th Cir. 2002) (illustrating a situation in which the job description in the DOT mirrored the actual duties the claimant performed).

290. *See, e.g.*, Hinchey v. First Unum Life Ins. Co., No. 17-cv-08034, 2020 U.S. Dist. LEXIS 49703, at *68 (S.D.N.Y. Mar. 20, 2020) (denying a claimant long-term disability benefits because of a generic definition of the claimant's "regular occupation"), *aff'd*, 848 F. App'x 481 (2d Cir. 2021); Nichols v. Reliance Standard Life Ins. Co., 924 F.3d 802, 811 (5th Cir. 2019) (same).

291. *See supra* Part I.

292. *See supra* Part III.

293. *See supra* Section II.B.2.

294. *See supra* Section III.A.

295. *See supra* Section III.B.

296. *See supra* Section III.C.

297. *See supra* Section III.C.

298. *See supra* Part III.

geography will be destiny for many disabled workers: where an employee lives may determine whether they receive long-term disability benefits.[299]

299. *See supra* Section II.B.