IN THE SUPREME COURT OF THE UNITED STATES

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METROPOLITAN LIFE, :

INSURANCE COMPANY, ET AL., :

Petitioners :

v. : No. 06-923

WANDA GLENN. :

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Washington, D.C.

Wednesday, April 23, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

AMY K. POSNER, ESQ., Long Island City, N.Y.; on behalf of the Petitioners.

E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on behalf of the Respondent.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-923, Metropolitan Life Insurance versus Glenn.

Miss Posner.

ORAL ARGUMENT OF AMY K. POSNER

ON BEHALF OF THE PETITIONERS

MS. POSNER: Thank you. Mr. Chief Justice, and may it please the Court:

For two reasons, the Sixth Circuit was wrong to hold that a company that is an ERISA claim fiduciary and that separately funds the plan's liabilities must always be deemed to be operating under a conflict of interest that changes the employer's designated arbitrary-and-capricious standard of review under its plan document. And the first reason is one that we're on common ground with and that is, as this Court recognized in Pegram v. Herdrich, ERISA explicitly authorizes companies like MetLife to fulfill both fiduciary and nonfiduciary functions as long as it does not in actuality commingle those functions. The mere fact that the potentiality of conflict is inherent in all of these commonplace dual arrangements in ERISA welfare benefit plans is not enough on its own to

displace the employer's designated abuse-of-discretion standard of review.

And second --

JUSTICE SOUTER: No, but it -- neither -- neither does the fact that there may be dual capacities eliminate the fact that there are contrary tugs on the -- the individual or the -- or the organization that has the dual responsibilities, and there's no reason that the law should be blind to that.

MS. POSNER: No, Your Honor, it should not be blind. And as Firestone recognized, though, if in fact there is a -- an entity that is in actuality conflicted, a claim administrator, then that conflict doesn't change the standard of review that the --

JUSTICE SCALIA: What do you mean by -- let's get straight what we mean by "in actuality conflicted." Isn't the fiduciary who has a financial interest in actuality conflicted?

MS. POSNER: We're using the words --

JUSTICE SCALIA: And aren't we talking in this case always about fiduciaries who are in actuality conflicted?

MS. POSNER: No, Your Honor. We are using these terms to designate in actuality a conflicted fiduciary is one that has been infected or the decision

was infected by the conflict.

JUSTICE SCALIA: No. That's -- that's a conflicted fiduciary who allows the conflict to warp its judgment. But the conflict exists whether you -- whether you give it effect or not.

MS. POSNER: Yes, that's right, Your Honor. There is a conflict that we're saying is a potential conflict.

JUSTICE SCALIA: So let's call that a conflicted fiduciary, somebody who has two loyalties, whether or not he allows the one loyalty to distort his judgment.

MS. POSNER: Yes. And as this Court recognized in Firestone, Your Honor, when there is an actual conflict, that's --

JUSTICE GINSBURG: Let me follow up on Justice Scalia's question because I think your brief really goes astray on that. Think of the many situations like the remainderman who is the trustee. He has to look out for the interests of the life tenant, but he's going to keep all the rest, so maybe he wants to be economical. That's not saying that he is. So I've always understood that the term "conflicting interests" means just that; you have conflicting interests. It doesn't mean that you necessarily slide

over into misconduct. And I think that if you would keep that separation in mind, is there a conflicting interest? Yes, there is. Has the trustee in fact slipped and taken unfair advantage because of the conflicting interest?

MS. POSNER: That's exactly the distinction that we are making by using "actual" and "potential" or, as this Court said, "possible" and "actual" in Firestone. And where that slip occurs in trust law or in ERISA and it infects the decision, the Firestone Court --

JUSTICE KENNEDY: Does it have to be just the specific decisions? Suppose that the company does not have clear rules of -- what do you call them, firewalls -- between the profit side and the claims processing side. Would that be enough to cause a greater, more searching standard of review, say de novo?

MS. POSNER: I don't think it would ever result in a de novo review. I think what it is is a factor that should be weighed with all the other factors that go to the actual benefits decision.

JUSTICE KENNEDY: So then you're saying that A, the fact that there is a potential conflict is not enough; B, the fact that there are no procedures in the company to ensure that the conflict doesn't affect the judgment, that is not enough either.

MS. POSNER: No. I'm not saying that. I'm saying that if --

JUSTICE KENNEDY: Well, I'm -- does the fiduciary at least have the -- the burden of production to show that it has established clear lines of demarcation, firewalls, whatever you call them, within the company? Does it have at least that obligation going forward?

MS. POSNER: No, Your Honor, it does not, and as the United States --

JUSTICE KENNEDY: Well then, I don't know what effect you're giving to the fact that, as the earlier questions have indicated, that there is a structural conflict.

MS. POSNER: That's a structural conflict that ERISA anticipates and, as the United States said in its brief to this Court in Pegram v. Herdrich, that ERISA tolerates this dual role and this level of conflict in order to keep these plans that are so vital in our country's economic interests in underlying the employee's well-being --

JUSTICE KENNEDY: You want us to write an opinion to say that it's irrelevant that a company does not have procedures to insulate the profit section from the claims processing section? I'll use those terms.

MS. POSNER: No, Justice Kennedy, absolutely not. But what we are saying is that if there were such a fiduciary that factor must be weighed, but it doesn't change the abuse-of-discretion standard.

CHIEF JUSTICE ROBERTS: Well, how does that work? I don't understand. You go through, you've got a decision, whatever, it's a health insurance decision that this procedure determined -- this procedure is not covered under the -- the plan, that the fiduciary has the discretion to make that determination. But you say, aha, he's got a conflict of interest, so that's a factor we take into account. Well, how's a judge -- what does that mean?

MS. POSNER: It means again, remembering that these are claims under 29 U.S.C. 1132(a)(1)(B) for benefits due under the terms of the plan, it's very important that the courts remember to look at the terms of those plans --

CHIEF JUSTICE ROBERTS: All right, you've got two cases, one where the person does not have a conflict of interest under a particular plan, the other where he does. It's the same decision: We're not going to cover this procedure. How is the review different in each of those cases as a practical matter?

MS. POSNER: As -- as in trust law -- and if

you look at the cases in trust law, what the court needs to look at when the settlor, here the employer, designates the discretionary authority under the terms of the trust or the plan is that that conflict comes into play if it seems that it's been breached. But you also have to remember exactly what the purpose of the trust is, and so you need to protect the employer's interest in having benefits paid in meritorious cases and not paid in nonmeritorious cases.

CHIEF JUSTICE ROBERTS: I guess I don't see an answer to my question yet. How does the review differ as a functional matter? He says -- he looks at it and says, well, normally that would be within the discretion, but I've got to remember he's got a conflict, so I'm going to determine that this particular procedure should be covered because of the conflict.

MS. POSNER: It remains in the discretion because this Court said that that freedom of contract that's so important to ERISA, to keep the benefit -- the employers interested in offering benefits --

JUSTICE SCALIA: But you're saying it doesn't make any difference.

MS. POSNER: No, it can --

JUSTICE SCALIA: You say you should take it into account, but if it was a reasoned decision, which

is the test whether or not he's a fiduciary, if it's a reasoned decision the fact that he's a fiduciary makes no difference, right? Isn't that what you're saying?

MS. POSNER: No, Your Honor.

JUSTICE SCALIA: It does make a decision then. What was a reasoned decision for someone that doesn't have a conflict becomes an unreasoned decision simply by reason of the fact that he has a conflict?

MS. POSNER: Certainly not. Again, it must be a factor that's weighed with the other factors. And what's going on --

JUSTICE BREYER: That's exactly my question.

MS. POSNER: Yes --

JUSTICE BREYER: I'm going to let you answer this question --

MS. POSNER: And I --

JUSTICE BREYER: But I want you to work mine in if you can. The problem that I'm having is what to say in the opinion. Now, could I say this? Firestone, yes, that's the way to put it as a standard. You can also teach through example. So I look at this case, I say: You want to know what that means, read the court of appeals' opinion; perfect. Okay? So I've got Firestone -- my opinion so far is two words: "Firestone, perfect." Okay? Now, what do you want me

to say other than that?

MS. POSNER: In this case -- and this case I think presents a very narrow question for the Court, and that is where there is the dual role inherent in the plan but no evidence whatsoever that it infected the decision, if it must be given weight in answer to the Court's second question, then --

JUSTICE GINSBURG: But then you come to the end of the line. You have to prove that the authority was misused. And as I understand the Sixth Circuit's decision, what those judges were doing, they say we're going to look at this with some skepticism because of the conflict. And let me give you a concrete example. This woman got Social Security disability benefits and she did it at the suggestion of MetLife; is that so?

MS. POSNER: She actually applied herself.

JUSTICE GINSBURG: But she got a lawyer that they recommended that she have.

MS. POSNER: MetLife recommended a lawyer to her and also said she could use her own lawyer, which was consistent with the plan design.

JUSTICE GINSBURG: But the point is they came to her and said: Get Social Security disability benefits. Now, to get those she would have to show that she is totally and permanently disabled.

MS. POSNER: That's correct.

JUSTICE GINSBURG: So here is a company that says: Tell the U.S. Government that you are totally and permanently disabled, but -- and then we'll recoup all that money that we paid out to you; but then when we get a chance to look -- look it over, we'll say you're not disabled. Why isn't it appropriate to regard just that set of circumstances with suspicion?

MS. POSNER: Because, Your Honor, at the time that that letter was written to the Respondent here in October of 2000, in fact MetLife had granted her benefits. And the action of helping an employee perfect their entitlement to Social Security is in fact not a conflict at all. It's a fiduciary obligation under the terms of a plan and it helps the employee as well.

JUSTICE GINSBURG: Yes, I'm not questioning that at all.

MS. POSNER: The mere --

JUSTICE GINSBURG: That sounds fine. It's a question of why, after helping her tell the government that she was totally disabled, did they, after the initial two-year period, turn around and say she's not?

MS. POSNER: The -- the reason is -- and it's unfortunate that often Social Security makes the same decision that the plan fiduciary has made two years

earlier, and the government is looking backwards at certain evidence that may not be before the ERISA plan fiduciary. The ERISA plan fiduciary at that two-year point is looking at that evidence at that time and at a change in the terms of the plan.

JUSTICE SCALIA: Ms. Posner, it seems to me that that ought to be looked at with suspicion, whether or not the person making the decision has a conflict. I mean that smells bad or doesn't smell bad, as you say, either way.

MS. POSNER: Justice Scalia --

JUSTICE SCALIA: And I am still -- listen, I know that we're responsible for this because we said it in Firestone. We said that a conflict of interest should be weighed as a factor. If that means anything, it seems to me it means that sometimes that weight will make the difference. So at least sometimes -- but you're not willing to admit that -- at least sometimes you would say, oh, yes, this is a reasonable decision and had this decision been made by a fiduciary without a conflict, it would be perfectly okay because it's reasonable. That's the test. However, since this fiduciary has a conflict, what was a reasonable decision, whoop, the added weight, it becomes an unreasonable decision.

MS. POSNER: I think --
JUSTICE SCALIA: Is that what you mean by "giving it some weight"?
MS. POSNER: Yes, Justice Scalia --
JUSTICE SCALIA: You do.
MS. POSNER: But --
JUSTICE SCALIA: So a perfectly reasonable decision becomes unreasonable simply because you have a conflict?
MS. POSNER: It depends on how close that reasonable decision is to the line, and in this case the decision was not one that this mere dual-role conflict, the lowest level of conflict that can exist, can push that reasonable decision over. And I --
JUSTICE SOUTER: Okay, let's assume -- let's assume that I'm reviewing it, and I -- I don't find it as clear as you do, and I'm on the fence. Being on the fence, may I take into consideration the fact that there was a conflict of interest?
MS. POSNER: You -- I think under Firestone you have to take that into account.
JUSTICE SOUTER: And therefore I will say, okay, I wouldn't know for sure how to go in this case, but I see the conflict of interest and that's enough to make me say more probably than not there was a

reflection of the self-interest of the provider, rather than the interest of the -- of the insured here; and, therefore, I'm going to find that the -- that the conflict did disadvantage the person insured. That would be, I take it on your view, a reasonable application of Firestone.

MS. POSNER: Again, depending upon how these things weigh, we think it's --

JUSTICE SOUTER: Well, I just told you.

MS. POSNER: Yes.

JUSTICE SOUTER: I just told you how it weighed. I'm sitting on the fence. I'm not sure what to do. I take into consideration the fact that there is conflicting interest here; and, therefore, I conclude that the conflicting interest is the reason for the decision and I hold against the company. Is that a misapplication of Firestone?

MS. POSNER: No, it would not be. But --

JUSTICE SOUTER: Okay.

JUSTICE ALITO: But that's not the argument that I understood you to make in your brief. Is that a change from the position you took in your brief?

MS. POSNER: No, Your Honor, I don't believe it is. The brief acknowledges that there are various conflicts that exist here. The conflict that ERISA

tolerates and recognizes as being everyday, ordinary practice that is absolutely necessary for the employee benefits of this country to remain vital, and that is --

JUSTICE ALITO: Could I just get this clear? I thought your position in your brief was that there has to be a demonstration that the conflict had an effect on the decision before there is any departure from the standard abuse of discretion --

MS. POSNER: That's correct, Justice Alito.

JUSTICE ALITO: -- the standard of review.

MS. POSNER: And I took Justice Souter's hypothetical to mean that there had been a conflict that seriously weighed on his view.

JUSTICE SOUTER: No. My hypothetical is the hypothetical of the person making the decision. I put myself in that person's position and I'm saying I can think of reasons that might result in concluding that this was a reasonable decision, period. And I can think of reasons that might result in concluding that, in fact, this was a decision that had been made against the interest of the insured because the person making the decision itself had an interest in it.

I'm not sure which way to go, but I now take into consideration the fact that there was this conflicting interest in the person or the organization

that made the decision, and for that reason, I am going to -- I'm going to break the tie, and I'm going to conclude that the conflict was to the disadvantage of the insured. I'm going to rule against the company. I understood that you said that would be a proper application of Firestone. Is that still your answer?

MS. POSNER: I think that that could be. The problem with all of these cases and when you look at them --

JUSTICE SOUTER: Well, why wouldn't it be?

MS. POSNER: Well, again, we're looking at conflict as if it's the only factor here, and when we look at these cases --

JUSTICE SOUTER: No. In my hypothetical, I've taken into --

MS. POSNER: You're saying that --

JUSTICE SOUTER: -- factors that say the company was right, factors that say the company is wrong. I'm not sure which. They seem evenly balanced to me, until I take into consideration the fact that there was conflicting interest, and I say that's enough to tip it. And it does tip it, and I rule against the company.

MS. POSNER: I think --

JUSTICE SOUTER: And am I right or wrong

under Firestone?

MS. POSNER: Again, I think that it's very important to look at the employer's plan and this employer specifically --

JUSTICE SOUTER: That may be, but what's the answer to my question?

MS. POSNER: The answer is --

JUSTICE SOUTER: Am I right or wrong?

MS. POSNER: The answer is you could be right or you could be wrong, but it's --

JUSTICE SOUTER: That is not going to --

MS. POSNER: -- so important --

JUSTICE SOUTER: That's not going to help the appellate court, my friends here who have to review my decision. They want to know whether I was right or wrong.

MS. POSNER: These matters are so fact-specific.

JUSTICE GINSBURG: Well, let's take these facts.

MS. POSNER: Okay, Your Honor.

JUSTICE GINSBURG: The trier -- I mean, ERISA, yes, it certainly says you can be both the plan administrator and the payer, but all it says is that's permissible. But it also provides for review of

those decisions, judicial review in court. And here is, say, a district court is looking at it and says: I don't understand why the company didn't look at the doctor's explanation and put such heavy weight on a checkmark. And I also don't understand the suggestion that she is totally disabled to the government and then saying, well, she's really not, in a very close time frame. So it might be okay and it might not.

I am in equipoise about this case, not the terms of the plan but the decision that was made to deny her benefits. So which way do I call it? That's the question that Justice Souter posed, and you seem not to want to face up to it and answer it.

MS. POSNER: Your Honor, the problem with the hypothetical as you just stated is that you've taken the employer's contract out of the calculation, and that the employer has the right to determine its own plan and design those plans as they see fit in order to keep these vital economic safety nets available, affordable and capable of providing a safety net to the -- those most in need --

JUSTICE GINSBURG: How does that bear on making a determination that the --

MS. POSNER: Because --

JUSTICE GINSBURG: -- employee -- that the

plan administrator has to make: Is this person disabled and is she not?

MS. POSNER: You can't make that determination, Justice Ginsburg, out of the context of the plan design. This plan design says that Social Security can be -- can be an offset, estimated or -- or received.

It says that the plan administrator or the fiduciary not only has discretionary authority to determine eligibility for benefits and to construe the terms of the plan, but that its decision may not be overturned unless arbitrary and capricious.

CHIEF JUSTICE ROBERTS: Counsel, Justice Souter's question and Justice Alito's question highlight for me what I think is the central issue. Justice Souter had asked you whether the conflict comes into play, you know, when it's a tie. And you're right on the fence, and you say, well, the conflict's a factor, so it tips over in the employee's favor.

Justice Alito's question asked you whether or not the conflict has to play a role in the decision. I don't know how that would be, but let's say, for example, the insurance company is doing well and so they say, well, we allow coverage for this procedure. All of a sudden, the insurance company looks like it's not

doing so well, it's not going to meet the quarterly targets or whatever, so it says, well, we're no longer going to allow coverage for that procedure. In other words, it is the conflict itself that affects which way it comes out.

Now, which is right: Justice Souter's case in which the conflict tips the scales, no matter what the reason is; or Justice Alito's case where the conflict plays a role in the decision process?

MS. POSNER: We believe that it's the Justice Alito hypothetical, where it does play a role. Where it doesn't play a role, it should have -- our first answer -- our answer to the first question is it should have no weight. However, I understand that we've moved beyond that to the second question.

JUSTICE ALITO: But the problem with that is the court needs to know what the standard of review is before it gets to the merits. And how is the court going to know whether conflicting interests played a role in the outcome of a particular benefits determination without looking at the merits of the case unless there is going to be a lot of discovery about internal processes at MetLife and how you treat the people who -- who gets promoted among the benefits administrators and all of that? And that's what I don't

understand about that position.

MS. POSNER: No -- yes, Justice Alito, and I think you hit the nail on the head there. The merits of the case must certainly be scrutinized, and they can be scrutinized for an abuse of discretion. And that's the important issue. It's scrutinizing the merits of the case, whether or not the medical and vocational information supports the decision.

JUSTICE STEVENS: But as I understand your brief, you say the conflict of interest is only relevant if it affected the decision. But how does the plaintiff prove that it affected? What sort of evidence would go to that issue?

MS. POSNER: There are cases, Your Honor, where you can see that, for instance, when you look at the medical evidence that the administrator shows in its claim file, which, unlike any other area of the law, the whole process is transparent under ERISA; and there may really not be any evidence that's supporting it, or so little that it's hard to understand how that fiduciary could possibly have reached that decision.

JUSTICE STEVENS: Well, you're just saying that the plaintiff has to have an overwhelming case. I don't think you'd need the conflict-of-interest point in that kind of case.

MS. POSNER: That's actually the standard, though, Justice Stevens, in trust law also. Because when you read these cases and you look at the examples in the Restatement, when the trustee is -- has an acknowledged conflict and the settlor nevertheless vests in that trustee discretionary authority, then in order for a court to displace that trustee's judgment, the court must find that the trustee actually acted from conflict and in controverse -- in contraverdia -- oh, my goodness -- and did not follow the terms of the plan.

JUSTICE STEVENS: Well, I can understand that in normal trust situations, but it's hard for me to understand how you're going to prove an insurance company, in a particular claim adjustment, was really motivated by a conflict of interest rather than thinking the claim wasn't valid.

MS. POSNER: That is a problem, but the fact of the matter is that you -- you read the cases and the files, as I'm sure you have, and it's apparent that there are -- let me use Post v. Hartford as an example, if I may. In Post v. Hartford there is a majority opinion that overruled the Hartford's discretion based merely on minor irregularities.

JUSTICE GINSBURG: Where, where is this decision from that you're --

MS. POSNER: Post v. Hartford, Your Honor, is at 501 F. 3d 154. It's the case that -- it's a Third Circuit case from 2007 that the Respondent very heavily relies upon, and it's a glaring example of what's gone wrong in the analysis here, because in Post v. Hartford there's a majority opinion that overruled the Hartford's discretion based on minor irregularities, what it called as minor irregularities, merely because they existed.

The dissenting judge looked at the medicals and, even under the Third Circuit's heightened scrutiny, which automatically it applies to insurance companies regardless of the situation, that justice said the medical -- that judge, sorry -- said that the medical evidence very clearly supported the Hartford's decision.

And what we are hoping will come out of this, Your Honors, is that in fashioning what should happen in these cases, that the fact that these are claims for benefits under the terms of the plan must really be important, not just minor irregularities and whether this was done right or that was done right. That's -- that's a cause of action under -- under 1132(a)(2), and the Respondents are relying very heavily on the replacement of the fiduciary or of the trustee.

That's not the issue here. That's an (a)(2)

claim under 1109 where you could replace a fiduciary. Here we are talking about were these benefits properly denied or not.

And if there are no further questions, Your Honor --

JUSTICE GINSBURG: There's one feature of this that I don't understand. It was referred to very swiftly in Judge Merritt's separate opinion. He said at one point there was a proposal by MetLife that they give this woman a trial run at a sedentary job to see if she could do it. And he said that that made a lot of sense to him, and it was MetLife's proposal, but then it got withdrawn. Could you clarify what that was?

MS. POSNER: Yes. I believe, Justice Ginsburg, that Judge Merritt was looking at a provision of the plan that -- actually, I'll tell you where it is. It's at 170a of the joint appendix. And that provision allows rehabilitative employment for a disabled person. In early 2002, MetLife did refer the file to a vocational rehabilitation specialist to determine whether or not the Respondent was eligible for that.

In doing that, a letter was sent to the treating physician, Dr. Patel, asking specifically what she could do in an eight-hour day, could she do full-time sedentary work, and if there were any physical

barriers. And that's that March 12th, 2002, letter -- it was not a form -- which he filled out and said in an eight-hour day she could sit for eight hours; she could stand for four hours; and she could walk for two hours; that she could do full-time, sedentary work, and that there were no physical barriers otherwise blocking her ability to do that.

JUSTICE GINSBURG: Then why did MetLife withdraw that proposal? That's the thing that --

MS. POSNER: Well, there was no proposal, Your Honor, but it was given to a vocational rehabilitation specialist to work that up to see if she was disabled and eligible for rehabilitative employment, because her treating physician responded to that inquiry by saying she could do sedentary work, she retained that physical capacity, which was consistent with what he said in January of '02 and again in June of '02. That provision --

JUSTICE GINSBURG: My question was not what Dr. Patel said, but how did that proposal get dropped?

MS. POSNER: There was no proposal, Your Honor. There is a provision in the plan -- it's at 170a of the joint appendix -- which allows for rehabilitative employment for disabled people who may have the physical capacity to do work they were not doing before.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. POSNER: Thank you very much, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE RESPONDENT

MR. ROSENKRANZ: Mr. Chief Justice, and may it please the Court:

This Court got it right in Firestone when it said, of course a conflict must be weighed. There's no reason for this Court to override its well-reasoned and unanimous conclusion which --

JUSTICE SCALIA: Dictum.

MR. ROSENKRANZ: It was dictum, Your Honor, but it was very well-considered dictum because --

(Laughter.)

MR. ROSENKRANZ: -- the only issue before the Court so far as the parties thought was what is the effect of this dual role that Firestone had? And this Court did not answer that question, but that's what the parties were arguing about.

So this Court correctly discerned the rule from trust law. It correctly discerned and balanced ERISA's policies and, if anything --

JUSTICE SCALIA: What I don't like about the

dictum is I don't know what it means.

MR. ROSENKRANZ: Your Honor --

JUSTICE SCALIA: I think it's lovely to say weigh it as a factor, it gets the case off our docket and it's fine. But what does it mean?

MR. ROSENKRANZ: Well, Your Honor --

JUSTICE SCALIA: Does it mean that a perfectly reasonable decision that is within the discretion -- I mean this plan says that MetLife will have -- knowing that it will have the conflict, that they will make the decisions and so long as they are not arbitrary, they are valid.

Now, let's take a perfectly reasonable decision. It is not arbitrary. Does giving weight to the existence of the conflict which the settlor of the plan expected to exist, does giving weight to that mean that what was reasonable becomes unreasonable?

MR. ROSENKRANZ: Your Honor, the answer --

JUSTICE SCALIA: If it doesn't mean that, then it means nothing.

MR. ROSENKRANZ: Absolutely, Your Honor. The answer is yes in many circumstances. And the beauty of the Court's invocation of trust law is that trust law answers the question. Trust law says that when you have a fiduciary with a conflict, you apply especially

careful scrutiny.

CHIEF JUSTICE ROBERTS: Well, but trust law doesn't take into account what we have said repeatedly in our ERISA decisions, which is we want to encourage people to set up ERISA plans. And that has affected the standards that we've adopted, for example, that we even allow a conflict of interest like this to exist.

And it seems to me that your position is going to hurt beneficiaries under ERISA plans because people are going to say, as they're perfectly free to do -- people, the employers, are going to say, as they are perfectly free to do, you know, I'm just not going to do it; if we're going to have judges looking at these claims decisions on a de novo basis, who knows how much it'll end up costing me, so I'm not going to set up these plans.

MR. ROSENKRANZ: Your Honor, I understand, and this Court considered that in Firestone, the litigation cost and the added administrative costs, and this Court concluded en route to de novo review that the 1132(a)(1)(B) remedy is so infused with the interests of ensuring that the beneficiaries get their benefits due, that that is the interest that the courts weigh most in determining the standard of review.

CHIEF JUSTICE ROBERTS: Do you -- which

position do you adopt? It was only posed as hypothetical, so I don't mean to attribute the position to you; but the Justice Souter hypothetical or the Justice Alito hypothetical?

MR. ROSENKRANZ: Your Honor, the answer is both. They can happen under both circumstances -- circumstances. But let me explain why. What trust law does is to say we apply especially careful scrutiny. And the scrutiny has to be consonant with the purpose of the scrutiny, which is to ensure that the conflicted fiduciary does not end up subconsciously or consciously tilting the scale.

CHIEF JUSTICE ROBERTS: Well, that sounds like the Justice Alito hypothetical. In other words, the extra scrutiny has to be consonant with the purpose. The purpose is to protect against the conflict. So if the scrutiny doesn't reveal that the conflict played a role, then it's -- then it's not an abuse of discretion.

MR. ROSENKRANZ: No, Your Honor, because what trust law says is that you apply especially careful scrutiny, which entails two things. The first thing is what this Court called keeping the judicial eye peeled for conflict of interest in Rush. So that's an examination of the record of the decisionmaking process. You kick the tires, you test the judgments, as the Sixth

Circuit did in this case, and you ask yourself, is this the work of an unbiased fiduciary?

The second thing is to imagine a zone of reasonableness within which a reasonably prudent trustee might land and then say to yourself at the outer limits of the zone of reasonableness, we will accept the judgment of an unconflicted fiduciary because there is no reason for us to suspect that he reached that result because of the bias. For a conflicted fiduciary you can contract that zone of reasonableness.

JUSTICE SCALIA: Trust law doesn't say. Trust law does not establish a different standard of judicial review for the conflicted trustee.

MR. ROSENKRANZ: Your Honor, it absolutely does, and the 26 law professors in the amicus brief that they filed with this Court explain exactly --

JUSTICE BREYER: But I don't know what to look to in trust law. I mean, all that's happened here, every life insurance -- every company, every life insurance company has the kind of conflict that you're talking about. Every company has the kind of conflict you're talking about. And an automobile company might make shoddy merchandise so it can make more money in the short run.

How does trust law keep that kind of

conflict? Now, it can't be and it isn't, because I've looked it up, I think, that trust law says that every distribution by a trustee whose own fee depends on the size of the trust is conflicted.

MR. ROSENKRANZ: Absolutely right, Justice --

JUSTICE BREYER: I doubt, since banks are trustees, I doubt but I'm not sure here -- -

MR. ROSENKRANZ: Your Honor --

JUSTICE BREYER: -- that banks are trustees. Suppose you were to say, look, the bank has an interest in maximizing the amount of money in its account and therefore every decision of a distribution of such trustee is subject to some special thing.

Now, the problem for me in this case is what in trust law do I analogize it to, not -- I don't doubt for a second the 26 law professors, et cetera -- though I do really sometimes, but not in this case.

(Laughter.)

JUSTICE BREYER: The -- the -- so what do I look to? And where I ended up was I'd like an answer to what I asked the other side. I ended up, I can't do better than Firestone, I ought to write two words in this opinion, and the standard, perfect; from the opinion below, perfect. You want to know what I mean, read the opinion below. Okay?

Now, what's your view on all of that?

MR. ROSENKRANZ: So let me break it down and first turn to the premise. It is simply not correct that every employer is conflicted. There are certain --

JUSTICE BREYER: I overstated.

MR. ROSENKRANZ: Okay.

JUSTICE BREYER: Take the examples that I gave. It's an ordinary insurance policy.

MR. ROSENKRANZ: Okay. But the bank example, Your Honor, that is not a pressure, which is kind of a business pressure, that trust law recognizes as a conflict of interest. Trust law acknowledges that trustees are often, almost always, in the business of administering trusts, and they don't -- they make their money by doing the job well. The big difference is we are talking here about a direct impact on the bottom line.

JUSTICE BREYER: But that's, you see, their point. Their point is this is just an ordinary insurance company, an ordinary policy, and it's really like a bank that's a trustee that in fact takes money that hasn't been distributed and puts it on its own account. They make money for that, from that. So there is a conflict.

MR. ROSENKRANZ: Well, Your Honor --

JUSTICE BREYER: You have that kind of conflict.

What do you say about that?

MR. ROSENKRANZ: Justice Breyer, it's just wrong under trust law and it's wrong under the facts, as everyone knows them to be in the insurance industry. The insurance industry makes its money on the differential between the premiums that it charges and the payouts in claims.

JUSTICE BREYER: The bank makes its money by putting money in an account, paying interest and lending it at more money.

MR. ROSENKRANZ: But -- so let me give an example from real life. MetLife, for example, shells out $14 billion a year in ERISA covered claims. If it denies one out of a hundred claims improperly, we are talking about $140 million.

JUSTICE BREYER: Yes, and Chase Manhattan bank has $14 trillion in trust accounts, and if they just put in for three days money into an interest-bearing account and lend it out for five minutes, they will make $1 billion. Okay. You see, they are finding these kinds of conflicts everywhere. And that's what I'm asking you.

What I think if I were to add something I'd

say, look at this carefully, judge, look at it carefully; but if all you find is an ordinary insurance company doing ordinary work and there is no ground for suspicion, proceed to step two. What about that?

MR. ROSENKRANZ: Well, Your Honor, the first thing to say is that -- if that is, in fact, an authorized transaction, that would fall under the self-dealing rules of trust law, and trust law self-dealing rules are situations in which the settlor has actually suspended the duty of loyalty of the trustee -- that's correct -- of the trustee.

That is absolutely impermissible under ERISA. You cannot suspend the duty of loyalty under ERISA. There is a clear provision about that.

JUSTICE SOUTER: Mr. -- Mr. Rosenkranz. I think you've set out basically three different kinds of scenarios. And I want to set -- I want to try to put them into my own words and -- and have you tell me whether I understand your -- your point correctly.

Scenario number one is the case -- in each of these scenarios, we have the same relationship between the -- in effect, the trustee and -- and the beneficiary that we have here. There -- there is a -- there is a built-in conflict. We don't know what its effect is.

In scenario number one, the -- the evidence is that the person making the benefits decision says let's let this person suffer so that we can keep the money. That is the easy case.

Scenario number two --

MR. ROSENKRANZ: I'm sorry, Your Honor, says that explicitly in the claim file?

JUSTICE SOUTER: That's right, the -- the e-mail shows up.

In -- in case number two, there -- there is what you referred to as a decision within the zone of reasonableness, but instead of being sort of in the core or the center of the zone of reasonableness, it's close to the edge. A decisionmaker could look at that decision and say if there is no reason to be suspicious about it, it's still within the zone of reasonableness, and I don't think there is a conflict.

But if the decisionmaker knows that there is this kind of structural conflict, the decisionmaker can say look, I wasn't born yesterday; the reason it's so close to the edge is that they were giving way to their own self-interest in the conflict, and I'm going to decide for the beneficiary and against the company.

Case number three is the case of the person right on the fence, the decisionmaker. The

decisionmaker says, I've -- I've looked at everything there is to look at and I cannot decide for sure what this is, whether it was a legitimate decision or a conflicted one in the -- in the decisionmaker's favor, unless I take into consideration the fact that there is this structural conflict.

MR. ROSENKRANZ: Your Honor, the decisionmaker here is the court reviewing? Or --

JUSTICE SOUTER: No the decisionmaker is the person who made the beneficiary -- the benefits decision. And if I take into consideration the structural conflict, that gives the decision to the beneficiary and against the company.

Now, in case number two, it's close but the -- but the fact of the conflict is regarded as, itself, as substantive evidence and it -- it results in a decision for the beneficiary.

In case number three, the evidence is in equipoise, and to get off equipoise, the conflict rule is taken as the tiebreaker.

My understanding is that your view is the proper way to consider the conflict under Firestone is, as I did in my hypo, in both case number two and case number three. Am I correct?

MR. ROSENKRANZ: To consider it, yes, Your

Honor, but you would reach the --

JUSTICE SOUTER: In other words, it is taken -- it is taken as substantive evidence to -- to get us out of the zone of reasonableness in case number two. It breaks the tie in case number three.

MR. ROSENKRANZ: No, Your Honor, absolutely not. In case number two, if you are right at the edge of the zone of reasonableness and there is nothing else in the record to raise suspicions about the process by which the decisionmaker got there --

JUSTICE SOUTER: But -- but the record has the structural conflict.

MR. ROSENKRANZ: Yes, Your Honor, except for that what would appear to be at a -- right at the outer bounds of reasonableness for an unconflicted fiduciary could knock you over the fence, to use Your Honor's earlier analogy, for a conflicted fiduciary.

Definitely not for scenario two. If the decisionmaker is correct in the judgment of the court, "Gee, I don't know where to go, this is really close," where, within the zone of reasonableness, in fact, in Your Honor's hypothetical, you're right at the -- the target center of the zone of reasonableness, then no, a court would absolutely not hold --

JUSTICE SOUTER: No. But in my hypothetical

you weren't at the center of the zone of reasonable; you were close to the edge.

MR. ROSENKRANZ: Number three. In number three, Your Honor --

JUSTICE SOUTER: Number three, we can't make up our mind.

MR. ROSENKRANZ: But the decisionmaker, you said, Your Honor, in number three, could not make up its mind.

JUSTICE SOUTER: That's right.

MR. ROSENKRANZ: And if the -- and if the court confirms yes, the decisionmaker was right that this was really close, you're right at the target center of the zone of reasonableness and the conflict of interest doesn't push you over. The only thing that the conflict of interest could do there is the judicial eye becomes peeled for other evidence of conflict which would end up --

JUSTICE SOUTER: So -- so you -- I guess you are saying it may be considered as substantive evidence but it is not a process tiebreaker?

MR. ROSENKRANZ: Your Honor, let me rephrase it. What I'm saying is two things. The first is especially careful scrutiny, just in the abstract, stepping back from the hypothetical, means that you

focus really carefully on the process by which the decision was made, as the Sixth Circuit did in this case. "This is strange, they are completely ignoring this evidence. They are cherry picking. They are doing about-faces." That's one.

Secondly, if you are at the target center of the zone of reasonableness, and none of those procedural irregularities have arisen, to be sure that the district court reviewing would affirm that judgment --

JUSTICE ALITO: How does a reviewing court know how far it can go from the outer boundary of the zone of reasonableness when there is a conflicting interest? Is it always -- and I don't know how thin you can slice these standards of review. Is it always, let's say 90 percent of the way to the outer boundary; or sometimes it would be 80 percent; sometimes it would be 70 percent?

MR. ROSENKRANZ: Your Honor, I --

JUSTICE ALITO: Does it work like that depending on the facts of the case?

MR. ROSENKRANZ: Yes, Your Honor, and that's where the Court can't calibrate. What the Court can do is provide very clear guidance to the lower courts.

JUSTICE GINSBURG: And what would -- how would you verbalize it?

MR. ROSENKRANZ: I --

JUSTICE GINSBURG: Because everybody talks about yes, it's a factor, it's a relevant factor. But if you are writing an opinion to give clear instructions to the district judges who are the first-instance judicial decisionmakers, what do you tell them?

MR. ROSENKRANZ: I would say first and foremost -- I would say three things to the district courts. Number one, this is not just some form of arbitrary-and-capricious agency review with just a little bit more bite. This is reasonableness review under trust law, which is very, very different.

Number two, the judicial eye is peeled, as this Court said in Rush, for conflict of interest. Kick the tires. Here are seven, eight, nine illustrations of the sorts of things that lower courts should be on the lookout for as they are trying to discern whether the conflict tainted the result.

Number three, if -- if you are at the outer bounds of reasonableness for an unconflicted trustee, you can contract that zone of reasonableness because you don't -- when -- when an unconflicted trustee is right at the outer edge, there is no reason to suspect his motive.

JUSTICE KENNEDY: Suppose that the insurance

company shows or may be required to show, at least by the burden of production, that it has established firewalls, very careful procedures, written regulations that claims administrators are not to consult with the people that set policy and prices. Does that suffice to permit, simply, abuse-of-discretion review?

MR. ROSENKRANZ: No, Your Honor. It would be a factor --

JUSTICE KENNEDY: So that there is nothing the fiduciary can do in order to avoid intrusive -- highly -- a high degree of scrutiny in review of every close case?

MR. ROSENKRANZ: Well, Your Honor, first, just to be clear, we are talking about still a deferential standard. It's just not as deferential as it would otherwise be.

But absolutely. An insurer can come in and say, look, we've created all these procedures; they have mitigated the conflict, but it can never get --

JUSTICE KENNEDY: So then all insurance company claims adjustors have less deferential review than independent claims administrators?

MR. ROSENKRANZ: Yes, Your Honor, unless the insurance company comes in and can demonstrate in a case that we've never heard of --

JUSTICE KENNEDY: You want us to institute an industry-wide rule differentiating insurance companies from other --

MR. ROSENKRANZ: Your Honor, one very important thing to say about that is that under trust law, an authorized conflict is not a pejorative term.

JUSTICE BREYER: Well, is there an example in trust law where, say, a bank's a trustee and they self-insure in some area? Is there ever a case in trust law that found that to be a conflict?

MR. ROSENKRANZ: I don't understand the hypothetical, Your Honor.

JUSTICE BREYER: Well, I mean, you can easily transpose this to other -- trusts are run by banks often that are trustees. They're huge, and they might self-insure in simple -- in certain circumstances, in which case you reproduce something like the conflict that's at issue here. And so --

MR. ROSENKRANZ: Well, Your Honor --

JUSTICE BREYER: And I think that -- my guess, but I don't know. That's why I'm so nervous. Is there any example where that kind of thing has ever been held to be a conflict of interest?

MR. ROSENKRANZ: Only where what the bank is doing is engaging in self-dealing that -- of the sort

that's authorized. Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Saharsky.

ORAL ARGUMENT OF NICOLE A. SAHARSKY

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

MS. SAHARSKY: Mr. Chief Justice, and may it please the Court:

Courts should not turn a blind eye to the conflict of interest that exists when an administrator both evaluates and pays claims. Instead, an administrator's discretionary decisions should be reviewed for reasonableness where the conflict of interest is considered as a factor. And what that means --

CHIEF JUSTICE ROBERTS: We've heard a lot of talk about judicial eyes today, but it doesn't -- it makes it sound as if abuse-of-discretion review is nothing, and with the added factor you want to look more closely. Courts undertaking abuse-of-discretion review don't do it blindly. They look at it. It's just a question of whether they give deference on the judgment calls. And I'm still not -- I still don't understand how the added factor or, in your case, the added seven

factors, affects that issue of deference.

MS. SAHARSKY: Well, we agree with the point you're making, that the question in all of these cases is the reasonableness -- where there is a discretionary clause -- the reasonableness of the administrator's determination. That is the ultimate inquiry, and there are any number of other facts and circumstances that could suggest that the decision is unreasonable.

JUSTICE SCALIA: And --

MS. SAHARSKY: And one fact --

JUSTICE SCALIA: But you say that one of the things that can make it unreasonable is the mere fact that there exists this -- this conflict.

MS. SAHARSKY: The conflict of interest.

JUSTICE SCALIA: That renders what is a perfectly reasonable decision unreasonable. I --

MS. SAHARSKY: In very close cases.

JUSTICE SCALIA: I don't understand that. In very -- what kind of a standard is that, "in very close cases"? How is -- how are you going to review a court? I mean, give it some weight. In very close cases it slops over. This is not a standard. I don't know -- I don't know what you're telling the courts to do.

MS. SAHARSKY: Well, this is a standard that comes from trust law, the reasonableness standard, and

this Court has recognized similar standards in all different areas of the law where they've talked about -- where you've talked about reasonableness and abuse-of-discretion review --

JUSTICE SCALIA: I don't mind reasonableness and I don't mind abuse of discretion. But you're telling me that even when the reasonableness standard is met, if there is this conflict, if it's close -- how close is close? You -- suddenly it flops over the edge. I mean, you know, close to the out -- it's -- it's beautiful art, but I don't understand how it turns into law.

MS. SAHARSKY: In every case, the court would need to make a decision about reasonableness, and in the cases where there is a conflict of interest that needs to be weighed what the court would do is take a close look at the administrator's rationale --

JUSTICE BREYER: Now what -- I agree with your basic point. If I encapsulate it, you may or may not agree with my encapsulation. This reminds me a lot of the argument between Learned Hand and Felix Frankfurter under what "substantial evidence" meant. And like Learned Hand, your side, I think, or the first argument, wants to find an absolute standard, a perfect analogy, which Frankfurter said you can't do. Very

well.

What's worrying me is what is the analogy? Because you're not saying it's just conflict-of-interest law. You are analogizing it to a trustee who himself is a remainderman. And it's at that point that I begin to get off this boat because I'm not sure that's the right analogy.

Now, you've looked through lots of cases. Your colleague knows it better than you, and he hasn't come up with something that's a better analogy. But do you see what's bothering me? So, therefore I'm back where I started: Two-sentence, two-word opinion. We did our best in Firestone and this decision below is a good illustration of how to do it. What can you add to what I just said?

MS. SAHARSKY: First of all, this Court should say that Firestone correctly set out the framework for the de novo default standard of review and what should happen in the case of a discretionary determination where the plan confers discretion --

JUSTICE GINSBURG: Well --

MS. SAHARSKY: -- that review should be under the trust law standard.

JUSTICE GINSBURG: If we look at Firestone, it's rather laconic. It's just that it says,

ordinarily, if you don't have this discretionary authority, it's de novo review. And then -- this is on page 115. It says if the fiduciary has discretionary authority to determine eligibility benefits, then it's not de novo. And what more does it say? I don't see that it says anything more than that.

MS. SAHARSKY: Well, both on pages 111 and on 115, this Court was looking to the law of trusts. There's a more extensive discussion on page 111, where it says, for example, "If a trustee is given power to construe disputed or doubtful terms, in such circumstances the trustee's interpretation will not be disturbed if reasonable." And then on page 115, using that abuse-of-discretion reasonableness standard, the Court said: "If there is a benefit plan that gives discretion to an administrator that is operating under a conflict, the conflict must be weighed as a factor."

And Firestone told this Court to look to trust law and trust law -- we think the best examples there are the situations of a trustee who is also a beneficiary or a trustee who is also a remainderman.

JUSTICE KENNEDY: Suppose an insurance company -- I'll just repeat my earlier question -- has done the best that it can do to have a firewall, independence and so forth. Does that bear on whether or

not the less deferential standard of review is invoked?

MS. SAHARSKY: The standard of review would be the same, which is review for reasonableness, but --

JUSTICE KENNEDY: So it makes no difference what -- it makes no difference what the policies of the companies are insofar as the standard of review?

MS. SAHARSKY: The standard of review is the same, but the outcome could be different in that case because what the insurance company did should be taken into account when the court is making a judgment call, the same kind of judgment call that courts have made in equity cases for years.

JUSTICE KENNEDY: This --

MS. SAHARSKY: But --

JUSTICE KENNEDY: This bears upon the question Justice Breyer asked, which we can never get completely answered. Can you tell me what the Sixth Circuit did wrong here?

MS. SAHARSKY: The Sixth Circuit correctly determined that there needed to be greater scrutiny to -- to the claims determination in this case. We would quarrel with the Sixth Circuit's analysis calling that abuse of -- or, I'm sorry, arbitrary-and-capricious review because we don't think that that analogy to administrative law makes sense. But what the Sixth

Circuit did was correct in that there were a number of factors here, for example the Social Security determination, MetLife's participation in that, that suggested that this decision was unreasonable and could not be upheld. Conflict of interest was a factor.

JUSTICE SCALIA: I don't think you're at all saying that it's the same standard of review. You keep saying that, and your friend said it, but it's not the same standard of review. You say it's still the reasonableness standard of review, but then you say, however, the mere fact of the existence of the conflict does at the edges make unreasonable what used to be reasonable. That is a different standard of review. It means you are not using a single reasonableness standard of review. You're arguing for a second standard of review that is so vague I don't know what it means. Why not just say that the district court, when there is a conflict of this sort, has to spend two more hours considering the case?

(Laughter.)

MS. SAHARSKY: We think that the answer comes from trust law.

JUSTICE SCALIA: There's a clear rule, you know.

MS. SAHARSKY: We think that the answer comes

from trust law, and these are judgment calls that courts need to make --

CHIEF JUSTICE ROBERTS: But under trust law --

MS. SAHARSKY: -- about whether a decision was reasonable.

CHIEF JUSTICE ROBERTS: -- we don't have -- we don't have an established policy of encouraging people to establish trusts. We do have reflected in our decisions an established policy of encouraging people to set up ERISA plans.

MS. SAHARSKY: That's true, but that's balanced against the strict fiduciary duties in ERISA, that in cases of a conflict of interest suggests that the plan administrator's determination needs to get additional scrutiny. I understand that --

JUSTICE SOUTER: All right. Here are two ways you could do it. You've spoken of reasonableness analysis. By "reasonableness analysis," I mean and I assume you mean that the person who is judging the action taken says: Here are the good reasons on one side that support the action; and here are the reasons on the other side that in fact are critical of it, suggest that it was wrong. Which one of these sets of reasons is the strongest? That's what I sort of mean by

"reasonableness analysis." All right.

There are two ways that the structural conflict could be taken into consideration in reasonableness analysis. One is it could be taken into consideration during this -- we'll call it the step one process. We put the structural conflict on the -- on the side of the scale that weighs against affirming the decision. A second way to do it would be to go through reasonableness analysis leaving the conflict aside for the moment, and say, on regular reasonableness analysis, do the reasons support the decision predominantly or do they go against it, and let it go at that. But when that kind of "reasonableness" analysis results in something close to equipoise, then we take the structural conflict into consideration; and that's what, in effect, sort of breaks the tie.

Which of those models do we use? Do we use the structural conflict as a reason in the step one weighing, or do we use the structural conflict as a tiebreaker?

MS. SAHARSKY: The structural conflict should be used in the weighing although, for the purposes of your hypothetical, I see the answer as being the same in both situations that you've posited. That the conflict of interest would only make a difference in

close cases, yes.

JUSTICE SOUTER: It's a question of when you use it; and on the first hypothetical, you may not have to use it at all.

On the second hypothetical, you have to use it because you can't make a decision any other way. So you're saying: Use it at step one as one of the substantive reasons in your weighing analysis?

MS. SAHARSKY: That, we think, would be more consistent with purposes --

JUSTICE SCALIA: Well, if you're going to do that, you have to tell me how much it weighs. You see, if you use it in step two when things are in equipoise, it doesn't matter how much it weighs; it's enough if it weighs a feather. In the equipoise case you come out the other way.

But if you're going to use it in the first structural system to determine, you know, how much each side -- I have to know its weight. And there is no indication whatever as to what its weight is. It's really up to the district judge, I guess, to decide how much weight he is going to give to the fact that there is this conflict.

MS. SAHARSKY: Can I answer the question?

CHIEF JUSTICE ROBERTS: Sure.

MS. SAHARSKY: I think the problem with this inquiry is that reasonableness does not have mathematical standards. It's a determination that the court needs to make weighing all of the facts and circumstances in the case --

JUSTICE SCALIA: I'm not weighing reasonableness. I'm weighing that factor of the conflict. That's what you ask us to weigh.

MS. SAHARSKY: I think that --

JUSTICE SCALIA: It's not reasonableness.

MS. SAHARSKY: The conflict is one of many factors like the Social Security Administration determination and how it was treated in this case that suggests that the plan administrator's determination was unreasonable. I can't tell you that it weighs 10 percent or 20 percent in every case. It is something that the court has to take into account.

JUSTICE SCALIA: Then you should only use it as a tiebreaker, I suggest, if you can't tell me.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. SAHARSKY: Thank you.

CHIEF JUSTICE ROBERTS: Miss Posner, you have one minute remaining.

REBUTTAL ARGUMENT OF AMY K. POSNER

ON BEHALF OF THE PETITIONERS

MS. POSNER: Thank you, Your Honor. On question one, I think it's important to realize that the zone of reasonableness and the size of the field is set forth by the employer when it designates discretionary authority and says that the standard of review is an arbitrary and capricious one in court, which is the same in ERISA as an abuse-of-discretion standard.

And the -- and a fact that's common and known to the employer in setting forth that standard, that there is this dual role, shouldn't change that analysis at all, nor should it come into play in any significant way whatsoever in these decisions. But on question two, if there is a conflict that influence, that's not what the employer was anticipating. And so it -- it changes the size of the permissible field. And to get to Justice Scalia's point, the actual conflict there does matter because it changes the size of the field. It's not what the employer was intending in its plan. Now, if -- also on question two, if you view this as a --

JUSTICE SCALIA: Wait -- what did you just say? I don't understand that. The conflict was intended by the employer. He appointed the --

MS. POSNER: Yes. The dual-role conflict that everybody knows exists --

JUSTICE SCALIA: Was intended by the --

MS. POSNER: -- was absolutely intended on. Question one, we are saying at that point it doesn't change the size of the field; it doesn't change the zone of reasonableness; and, therefore, it should have no effect.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

MS. POSNER: Thank you, Your Honors.

(Whereupon, at 11:13 a.m., the case in the above-entitled matter was submitted.)

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