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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

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

3 And second --

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

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

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

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

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

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

1 was infected by the conflict.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MS. POSNER: No, it can --

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

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

4 MS. POSNER: No, Your Honor.

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

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

12 JUSTICE BREYER: That's exactly my question.

13 MS. POSNER: Yes --

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

16 MS. POSNER: And I --

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

1 to say other than that?

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

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

16 MS. POSNER: She actually applied herself.

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

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

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

1 MS. POSNER: That's correct.

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

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

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

18 MS. POSNER: The mere --

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

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

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

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

11 MS. POSNER: Justice Scalia --

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

1 MS. POSNER: I think --

2 JUSTICE SCALIA: Is that what you mean by
3 "giving it some weight"?

4 MS. POSNER: Yes, Justice Scalia --

5 JUSTICE SCALIA: You do.

6 MS. POSNER: But --

7 JUSTICE SCALIA: So a perfectly reasonable
8 decision becomes unreasonable simply because you have a
9 conflict?

10 MS. POSNER: It depends on how close that
11 reasonable decision is to the line, and in this case the
12 decision was not one that this mere dual-role conflict,
13 the lowest level of conflict that can exist, can push
14 that reasonable decision over. And I --

15 JUSTICE SOUTER: Okay, let's assume -- let's
16 assume that I'm reviewing it, and I -- I don't find it
17 as clear as you do, and I'm on the fence. Being on the
18 fence, may I take into consideration the fact that there
19 was a conflict of interest?

20 MS. POSNER: You -- I think under Firestone
21 you have to take that into account.

22 JUSTICE SOUTER: And therefore I will say,
23 okay, I wouldn't know for sure how to go in this case,
24 but I see the conflict of interest and that's enough to
25 make me say more probably than not there was a

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

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

9 JUSTICE SOUTER: Well, I just told you.

10 MS. POSNER: Yes.

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

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

19 JUSTICE SOUTER: Okay.

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

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

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

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

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

10 JUSTICE ALITO: -- the standard of review.

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

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

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

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

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

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

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

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

16 MS. POSNER: You're saying that --

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

24 MS. POSNER: I think --

25 JUSTICE SOUTER: And am I right or wrong

1 under Firestone?

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

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

7 MS. POSNER: The answer is --

8 JUSTICE SOUTER: Am I right or wrong?

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

11 JUSTICE SOUTER: That is not going to --

12 MS. POSNER: -- so important --

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

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

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

21 MS. POSNER: Okay, Your Honor.

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

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

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

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

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

24 MS. POSNER: Because --

25 JUSTICE GINSBURG: -- employee -- that the

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

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

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

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

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

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

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

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

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

1 understand about that position.

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

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

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

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

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

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

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

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

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

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

16 And what we are hoping will come out of
17 this, Your Honors, is that in fashioning what should
18 happen in these cases, that the fact that these are
19 claims for benefits under the terms of the plan must
20 really be important, not just minor irregularities and
21 whether this was done right or that was done right.
22 That's -- that's a cause of action under -- under
23 1132(a)(2), and the Respondents are relying very heavily
24 on the replacement of the fiduciary or of the trustee.

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

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

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

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

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

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

4 CHIEF JUSTICE ROBERTS: Mr. Rosenkranz.

5 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

6 ON BEHALF OF THE RESPONDENT

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

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

13 JUSTICE SCALIA: Dictum.

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

16 (Laughter.)

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

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

25 JUSTICE SCALIA: What I don't like about the

1 dictum is I don't know what it means.

2 MR. ROSENKRANZ: Your Honor --

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

6 MR. ROSENKRANZ: Well, Your Honor --

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

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

18 MR. ROSENKRANZ: Your Honor, the answer --

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

21 MR. ROSENKRANZ: Absolutely, Your Honor.

22 The answer is yes in many circumstances. And the beauty
23 of the Court's invocation of trust law is that trust law
24 answers the question. Trust law says that when you have
25 a fiduciary with a conflict, you apply especially

1 careful scrutiny.

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

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

17 MR. ROSENKRANZ: Your Honor, I understand,
18 and this Court considered that in Firestone, the
19 litigation cost and the added administrative costs, and
20 this Court concluded en route to de novo review that the
21 1132(a)(1)(B) remedy is so infused with the interests of
22 ensuring that the beneficiaries get their benefits due,
23 that that is the interest that the courts weigh most in
24 determining the standard of review.

25 CHIEF JUSTICE ROBERTS: Do you -- which

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

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

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

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

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

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

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

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

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

25 How does trust law keep that kind of

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

5 MR. ROSENKRANZ: Absolutely right, Justice --

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

8 MR. ROSENKRANZ: Your Honor --

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

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

18 (Laughter.)

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

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

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

5 JUSTICE BREYER: I overstated.

6 MR. ROSENKRANZ: Okay.

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

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

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

25 MR. ROSENKRANZ: Well, Your Honor --

1 JUSTICE BREYER: You have that kind of
2 conflict.

3 What do you say about that?

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

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

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

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

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

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

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

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

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

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

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

5 Scenario number two --

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

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

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

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

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

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

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

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

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

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

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

25 MR. ROSENKRANZ: To consider it, yes, Your

1 Honor, but you would reach the --

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

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

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

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

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

25 JUSTICE SOUTER: No. But in my hypothetical

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

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

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

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

10 JUSTICE SOUTER: That's right.

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

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

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

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

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

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

18 MR. ROSENKRANZ: Your Honor, I --

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

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

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

1 MR. ROSENKRANZ: I --

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

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

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

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

25 JUSTICE KENNEDY: Suppose that the insurance

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

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

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

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

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

20 JUSTICE KENNEDY: So then all insurance
21 company claims adjusters have less deferential review
22 than independent claims administrators?

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

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

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

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

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

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

19 MR. ROSENKRANZ: Well, Your Honor --

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

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

1 that's authorized. Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 Ms. Saharsky.

4 ORAL ARGUMENT OF NICOLE A. SAHARSKY
5 ON BEHALF OF THE UNITED STATES,
6 AS AMICUS CURIAE,
7 SUPPORTING THE RESPONDENT

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

10 Courts should not turn a blind eye to the
11 conflict of interest that exists when an administrator
12 both evaluates and pays claims. Instead, an
13 administrator's discretionary decisions should be
14 reviewed for reasonableness where the conflict of
15 interest is considered as a factor. And what that means
16 --

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

1 factors, affects that issue of deference.

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

9 JUSTICE SCALIA: And --

10 MS. SAHARSKY: And one fact --

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

14 MS. SAHARSKY: The conflict of interest.

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

17 MS. SAHARSKY: In very close cases.

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

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

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

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

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

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

1 well.

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

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

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

21 JUSTICE GINSBURG: Well --

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

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

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

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

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

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

1 not the less deferential standard of review is invoked?

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

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

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

13 JUSTICE KENNEDY: This --

14 MS. SAHARSKY: But --

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

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

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

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

20 (Laughter.)

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

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

25 MS. SAHARSKY: We think that the answer comes

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

3 CHIEF JUSTICE ROBERTS: But under trust law
4 --

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

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

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

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

1 "reasonableness analysis." All right.

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

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

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

1 close cases, yes.

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

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

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

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

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

24 MS. SAHARSKY: Can I answer the question?

25 CHIEF JUSTICE ROBERTS: Sure.

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

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

9 MS. SAHARSKY: I think that --

10 JUSTICE SCALIA: It's not reasonableness.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MS. SAHARSKY: Thank you.

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

24 REBUTTAL ARGUMENT OF AMY K. POSNER

25 ON BEHALF OF THE PETITIONERS

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

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

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

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

1 JUSTICE SCALIA: Was intended by the --

2 MS. POSNER: -- was absolutely intended on.

3 Question one, we are saying at that point it doesn't
4 change the size of the field; it doesn't change the zone
5 of reasonableness; and, therefore, it should have no
6 effect.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 MS. POSNER: Thank you, Your Honors.

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

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