Nos. 07-56869, 08-55234

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURA A. CYR,
Plaintiff-Appellee,
v.

RELIANCE STANDARD LIFE INSURANCE COMPANY, an Illinois corporation,
Defendant-Appellant.

On Appeal from the United States District Court
For the Central District of California
District Court Case No. CV06-1585 DDP (RCx)
The Honorable Dean D. Pregerson

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLEE'S PETITION FOR HEARING EN BANC

GREGORY F. JACOB
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for
Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

STACEY E. ELIAS
Trial Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5584

TABLE OF CONTENTS

Background and Interest of the Secretary 1

Argument 3

1. The Court should grant en banc review because there is an intra and an inter-Circuit conflict concerning who is a proper defendant in a claim for benefits under ERISA section 502(a)(1)(B) 5

2. Ninth Circuit law is contrary to ERISA and Supreme Court law and is of exceptional importance because of its likely impact on plans and plan participants and beneficiaries 8

Conclusion 15

Certificate of compliance 16

Certificate of service 17

TABLE OF AUTHORITIES

Cases:

Black & Decker Disabililty Plan v. Nord
538 U.S. 822 (2003) 5

Caplan v. CNA Short Term Disability Plan
479 F. Supp. 2d 1108 (N.D. Cal. 2007) 6

Carrington Estate Planning Servs. v. Reliance Standard Life Ins. Co.
289 F.3d 644 (9th Cir. 2002) 6

Cisneros v. UNUM Life Ins. Co. of Am.
134 F.3d 939 (9th Cir. 1998) 6

Curcio v. John Hancock Mut. Life Ins. Co.
33 F.3d 226 (3d Cir. 1994) 8

Daniel v. Eaton Corp.
839 F.2d 263 (6th Cir. 1988) 8

Donovan v. Cunningham
716 F.2d 1455 (5th Cir. 1983) 2

Everhart v. Allamerica Financial Life Insurance
275 F.3d 751 (9th Cir. 2001) 6,7,9

Firestone Tire & Rubber Co. v. Bruch
489 U.S. 101 (1989) 13,14

Ford v. MCI Commc'ns Corp. Health & Welfare Plan
399 F.3d 1076 (9th Cir. 2005)... 6,7

Garren v. John Hancock Life Ins. Co.
114 F.3d 186 (11th Cir. 1997) 8

Cases – continued:

Gelardi v. Pertec Computer Corp.
761 F.2d 1323 (9th Cir. 1985) 5,7,9

Gibson v. Prudential Ins. Co. of Am.
915 F.2d 414 (9th Cir. 1990) 5

Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.
530 U.S. 238 (2000) 8

Leister v. Dovetail, Inc.
2008 WL 4659364 (7th Cir. Oct. 23, 2008)....................... 7

Madden v. ITT Long Term Disability Plan for Salaried Employees
914 F.2d 1279 (9th Cir. 1990) 5

Massachusetts Mut. Life Ins. Co. v. Russell
473 U.S. 134 (1985) 3,13

Metropolitan Life Insurance Co. v. Glenn
128 S. Ct. 2343 (2008) 13,14

Mote v. Aetna Life Ins. Co.
502 F.3d 601 (7th Cir. 2007) 8

Secretary of Labor v. Fitzsimmons
805 F.2d 682 (7th Cir. 1986) (en banc) 2

Taft v. Equitable Life Assurance Soc'y
9 F.3d 1469 (9th Cir. 1993).. 6

Thomas v. Oregon Fruit Products Co.
228 F.3d 991 (9th Cir. 2000).. 6

UNUM Life Ins. Co. of Am. v. Ward
526 U.S. 358 (1999) 6,14

Cases – continued:

U.S. v. Bhatia
2008 WL 43300554 (9th Cir. Sept. 24, 2008) 12

Ward v. Mgmt. Analysis Co. Employee Disabillity Benefits Plan
135 F.3d 1276 (9th Cir. 1998) 6

Statutes and regulations:

Employee Retirement Income Security Act of 1974,
Title I, 29 U.S.C. § 1001 et seq.: 1

Section 1(a), 29 U.S.C. § 1001(a) 3

Section 3(16)(A), 29 U.S.C. § 1002(16)(A) 4,6,7,10

Section 3(21), 29 U.S.C. § 1002(21) 11

Section 101, 29 U.S.C. § 1021 10

Section 402(a), 29 U.S.C. § 1102(a) 11

Section 502, 29 U.S.C. § 1132 2,10

Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) .... 1 & passim

Section 502(a)(3), 29 U.S.C. § 1132(a)(3) 1,8,9

Section 502(d)(2), 29 U.S.C. § 1132(d)(2) 9

Section 505, 29 U.S.C. § 1135 2

Section 514, 29 U.S.C. § 1144 12

BACKGROUND AND INTEREST OF THE SECRETARY

In this case, Plaintiff Laura Cyr applied for and was awarded long-term disability benefits, based on a percentage of her salary, under a plan sponsored by her former employer, Channel Technologies, Inc. (CTI), which is covered under the Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. § 1001 et seq. Excerpts of Record (ER) 271, 273 (First Amended Complaint (Complaint) ¶¶ 5, 16). Not only was the plan funded through an insurance policy purchased from Reliance Standard Life Insurance Company (Reliance), but Reliance was solely responsible for determining entitlement to, and paying benefits under, the plan. ER 15-16, 271 (Complaint ¶ 6).

After CTI settled a gender discrimination suit brought by Cyr and acknowledged that it had underpaid her, Cyr sought additional disability benefit payments under the plan. When Reliance denied her claim, she brought suit against the plan, CTI and Reliance seeking additional benefits pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and additionally alleged breaches of fiduciary duty by Reliance with regard to the handling of her claim, for which she sought equitable relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). ER 285. Although the district court originally held that the claim for benefits against Reliance was foreclosed by precedent of this Court holding that such claims may only be brought against plans or plan administrators, the district court

ultimately reversed itself, rejecting "the anomalous conclusion that even if Cyr is entitled to her benefits, she cannot sue the only entity who is ultimately responsible for providing them." ER 186.

The Secretary of Labor (the Secretary) has primary authority to interpret and enforce the provisions of Title I of ERISA. 29 U.S.C. §§ 1132, 1135. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary's interests include promoting the uniform application of ERISA, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

The plaintiff's petition for hearing en banc raises the question whether an insurance company that both decides and pays claims for benefits under an employer-sponsored disability plan is a proper defendant in a claim for benefits pursuant to ERISA section 502(a)(1)(B). The Ninth Circuit law on this issue is confused and contradictory, and has led to irrational and inconsistent results in the lower courts. One line of cases in the Ninth Circuit holds that only a plan may be sued under section 502(a)(1)(B), while another holds that the plan administrator may also be sued. Under either line of decisions, the limitations placed on section 502(a)(1)(B) benefit suits are extremely troublesome in cases where an insurance company both decides and pays the claims, but is not itself the plan administrator. The Secretary has a strong interest in ensuring that ERISA plan participants and

their beneficiaries have meaningful recourse to the courts in cases where they have been wrongfully denied benefits, a goal that is difficult if not impossible to achieve if the party responsible for deciding and paying claims may not be sued for benefits under ERISA. Because this Court's limiting gloss on section 502(a)(1)(B) is neither what Congress intended, nor what the terms of the statute provide, the Secretary submits this brief as amicus curiae in support of the petition for en banc hearing on the issue of who is a proper defendant in a suit under ERISA section 502(a)(1)(B).[1]

ARGUMENT

In order to further its expressly stated goal to ensure "the continued well-being and security of millions of employees and their dependents" who are participants in or beneficiaries of employee benefit plans, 29 U.S.C. § 1001(a), ERISA imposes stringent duties on plan fiduciaries and provides, in section 502, a number of "carefully integrated enforcement provisions" to enforce those duties. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). The first of these remedial provisions, ERISA section 502(a)(1)(B), is designed "to protect contractually defined benefits," Russell, 473 U.S. at 146, and permits a civil action to be brought "by a participant or beneficiary . . . to recover benefits due to him

[1] Appellant Reliance raises other issues in its opening brief on the merits of its appeal. The Secretary, however, submits this brief solely in connection with appellee's petition for hearing en banc on the limited issue of proper party defendants under ERISA section 502(a)(1)(B).

under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Despite the fact that the terms of this provision place no limitation on the list of possible defendants, this Court originally interpreted section 502(a)(1)(B) only to allow suits against the plan, and, under a later line of cases, additionally interpreted the provision to allow suits for plan benefits to be brought against the plan administrator as that term is defined by ERISA section 3(16)(A), 29 U.S.C. § 1002(16)(A). These limitations have often been ignored by courts in this Circuit in numerous cases involving insured plans, where the courts have allowed the insurer to be sued for benefits with little or no analysis concerning the insurer's status as a plan administrator. Nor can this Court's limiting gloss on section 502(a)(1)(B) be squared with the language of the statute, decisions of the Supreme Court, or the case law and practice in the other circuits.

Moreover, this case provides an example of the irrational and unworkable results that could follow from a strict application of Ninth Circuit precedent. In this case, because Reliance is not the plan administrator under the statutory definition, this Court's precedent would seem to preclude a suit against the only entity that "made benefit payments, interpreted the terms of the plan, and made and administered benefit payments." ER 183. If Reliance cannot be a party to this suit, a determination by the district court that Cyr is in fact entitled to benefits

presumably would not bind Reliance, and it is unclear how Reliance could be held accountable to pay the benefits that are due Cyr under the plan and that the plan funded through the insurance policy purchased from Reliance. This uncertainty is likely to provide a strong disincentive for employers to enter into these kinds of insured arrangements in the Ninth Circuit, thus undermining the statutory purpose to allow plan sponsors, like trust settlors, to make many of the basic decisions about plan design and funding mechanisms. Such a result would also undercut ERISA's goal to ensure that plan participants and beneficiaries are paid the benefits which they have been promised. See ER 186 (refusing to allow an "end run around ERISA's statutory purpose of protecting employee benefits"), citing Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830 (2003).

I. THE COURT SHOULD GRANT EN BANC REVIEW BECAUSE THERE IS AN INTRA AND AN INTER-CIRCUIT CONFLICT CONCERNING WHO IS A PROPER DEFENDANT IN A CLAIM FOR BENEFITS UNDER ERISA SECTION 502(a)(1)(B)

There are numerous, contradictory decisions within the Ninth Circuit concerning the proper defendant in a suit for benefits under section 502(a)(1)(D). Some say that a suit for benefits may be brought only against the plan as an entity. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324-25 (9th Cir. 1985); Gibson v. Prudential Ins. Co. of Am., 915 F.2d 414, 417 (9th Cir. 1990); Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1287 (9th Cir. 1990). Another, more recent line of Ninth Circuit cases allows claimants

to bring suit against plan administrators, as that term is defined in ERISA section 3(16)(A), as well as against plans. See Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1471 (9th Cir. 1993); Ford v. MCI Commc'ns Corp. Health & Welfare Plan, 399 F.3d 1076, 1081 (9th Cir. 2005). Yet at the same time there are numerous cases in the Ninth Circuit and lower courts in this Circuit that have allowed benefit claims to proceed against plan insurers with little or no analysis of whether the insurers were proper party defendants in section 502(a)(1)(B) actions. See, e.g., Thomas v. Oregon Fruit Products Co., 228 F.3d 991 (9th Cir. 2000); Ward v. Mgmt. Analysis Co. Employee Disability Benefits Plan, 135 F.3d 1276 (9th Cir. 1998), aff'd in relevant part, UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999); Cisneros v. UNUM Life Ins. Co. of Am., 134 F.3d 939 (9th Cir. 1998); Caplan v. CNA Short Term Disability Plan, 479 F. Supp. 2d 1108, 1112-13 (N.D. Cal. 2007); Carrington Estate Planning Servs. v. Reliance Standard Life Ins. Co., 289 F.3d 644 (9th Cir. 2002).

In Everhart v. Allamerica Financial Life Insurance, 275 F.3d 751, 754 (9th Cir. 2001), this Court acknowledged the two lines of authority within the Ninth Circuit – one saying that benefit suits may only be brought against plan administrators and the other saying that such suits may also be brought against the statutory plan administrator – but it determined that it did not need to resolve which line was correct because the plaintiff in that case "released all her claims

against the plan and the plan administrator and has limited her claim against [the insurer] to a suit" for benefits under section 502(a)(1)(B).[2] The Court thus concluded that "under either Gelardi or Taft and their respective progeny, [the plaintiff] may not sue the plan's insurer for additional ERISA plan benefits." Id. In this case, the intra-circuit conflict is presented head-on because Cyr sued the plan, her former employer and the insurer.[3] A panel decision will not resolve the intra-circuit confusion concerning the proper party-defendant in a section 502(a)(1)(B) claim for benefits, and it is likely to exacerbate a similar conflict in the circuits between decisions that allow suits against any fiduciary who administers benefit claims under the plan, without limiting suit to either plans themselves or plan administrators that meet the definition set forth in section 3(16),

---

[2] The Seventh Circuit recently noted that there may be "less to the difference than meets the eye" in evaluating similar cases addressing the plan versus the plan administrator as proper party defendants in suits for plan benefits under ERISA section 502(A)(1)(B). Leister v. Dovetail, Inc, 2008 WL 4659364 (7th Cir., Oct. 23, 2008) (describing cases as holding that only the plan "or what is the equivalent, the plan administrator named only in his or her official capacity" may be sued under section 502(a)(1)(B)). However, this Court in Everhart appears to have recognized that there is some difference between the two lines of cases in the Ninth Circuit. Given these contradictory cases and the tension with decisions from other Circuits described below, this case meets the requirements for en banc review.

[3] In Ford, this Court rejected an argument that Cyr is making here – that an insurer that has the exclusive authority to construe the plan terms and make eligibility determinations under the plan was the plan administrator even though the plan sponsor met ERISA's section 3(16) statutory definition of "plan administrator" – but Ford did not revisit the question left open by Everhart, whether the case therefore presented an intra-circuit conflict worthy of en banc consideration. See 399 F.3d at 1081-82.

and those that permit suit only against the plan as an entity or against the plan administrator. Compare Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994); Daniel v. Eaton Corp., 839 F.2d 263, 266 (6th Cir. 1988); Garren v. John Hancock Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997), with Mote v. Aetna Life Ins. Co., 502F.3d 601, 610-611 (7th Cir. 2007) (affirming dismissal of benefit claim against plan insurer and administrator).

II. NINTH CIRCUIT LAW IS CONTRARY TO ERISA AND SUPREME COURT LAW AND IS OF EXCEPTIONAL IMPORTANCE BECAUSE OF ITS LIKELY IMPACT ON PLANS AND PLAN PARTICIPANTS AND BENEFICIARIES

The limiting approach applied by this Court under both lines of decisions finds no support in the statutory language and is inconsistent with the reasoning applied by the Supreme Court in Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000). In Harris Trust, the Supreme Court considered whether another subsection of ERISA's remedial provision, ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), allows a suit against nonfiduciaries who have participated in ERISA violations. 530 U.S. at 253. Noting that Congress demonstrated "care in delineating the universe of plaintiffs who may bring certain civil actions" under section 502(a)(3), but made "no mention at all of which parties may be proper defendants" under that section, the Court concluded that section 502(a)(3) "admits of no limit . . . on the universe of possible defendants." Id. at 246-47. Like section 502(a)(3), section 502(a)(1)(B) specifies the proper plaintiffs

– participants and beneficiaries – in a suit for plan benefits, but is silent concerning the proper defendants in such a suit, and the same result should pertain. As with section 502(a)(3), in construing section 502(a)(1)(B), this Court should "assume that Congress' failure to specify proper defendants . . . was intentional." Harris Trust, 530 U.S. at 247.

Although this Court has pointed to section 502(d)(2), 29 U.S.C. § 1132(d)(2), as supporting its narrow view of the proper defendants in a suit for benefits under section 502(a)(1)(B), see Gelardi, 761 F.2d at 1324-25, that provision does no such thing. See Everhart, 275 F.3d at 757 (Reinhardt, J., dissenting). ERISA section 502(d)(2) simply provides that "[a]ny money judgment under [ERISA Title I] against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under [ERISA Title I]." On its face, this provision simply provides that if a plaintiff obtains a money judgment against a plan, this judgment cannot be enforced against another person, absent a showing that the other person is individually liable. Thus, section 502(d)(2) provides that plans are not like partnerships, for instance, where the individual partners are automatically liable for any judgments against the partnership. If anything, the latter clause of section 502(d)(2), addressing the enforceability of a judgment against individuals found liable in their own capacity,

supports the notion that entities and individuals other than the plan may be sued in some instances for individual liability under section 502(a)(1)(B).

Nor does the definition of plan administrator in section 3(16) of ERISA shed any light on whom a plan participant may sue for benefits under ERISA section 502(a)(1)(B). The term "administrator" is defined in ERISA section 3(16)(A) to mean the person specifically so designated by the terms of the instrument under which the plan is operated or, in the case where an administrator is not designated, the plan sponsor. The definition's primary function is to work with specific statutory provisions that assign specific duties (regarding the operation of a plan and reporting and disclosure obligations) to the section 3(16) administrator. See 29 U.S.C. § 1021 (imposing on plan administrator specified duties of reporting and disclosure, such as summary plan descriptions and annual reports); id. § 1024 (placing related filing duties on plan administrator); id. § 1166 (notice requirements with regard to events such as death and divorce affecting coverage); id. § 1132(c) (imposing on plan administrators penalties for refusal to supply certain requested information or to file complete annual report). See also 29 CFR 2509.75-8, Q&A D-3 (plan administrator is a fiduciary). While the section 3(16) plan administrator is also assigned some specific disclosure and communication obligations under the Department's regulation applicable to benefit claims, 29 C.F.R. 2550.503-1, neither section 3(16) nor any other statutory or regulatory

provision requires that the plan administrator review or decide benefit claims or in any way limits administration of a plan to the single person designated as the plan administrator under 3(16). Indeed, ERISA section 402(a) makes clear that more than one person can be assigned fiduciary responsibilities in connection with the administration and operation of the plan, 29 U.S.C. § 1102(a). Section 3(21) specifies that anybody who has or exercises discretionary authority respecting plan administration is a fiduciary, 29 U.S.C. § 1002(21). And section 503 requires a fiduciary to be responsible for adjudicating benefits without limiting the class of such fiduciaries to the 3(16) plan administrator. Thus, ERISA clearly allows a plan to assign an insurer the role of payor and fiduciary claims administrator.

For this reason, it makes little or no sense to preclude plan participants from suing a person properly assigned responsibility to administer and pay claims under the terms of the plan (the insurer), and instead require plaintiffs to sue the section 3(16) plan administrator, regardless of whether the plan administrator has any responsibility or authority to resolve benefit claims or any ability or responsibility to pay them. Although ordinarily the plan, as the entity with ultimate responsibility under ERISA for the promised benefit, would be a necessary party defendant in a claim for benefits under ERISA section 502(a)(1)(B), this Court's precedent precludes suit against an insurer that decides the benefit claims and pays benefits when another entity is the plan administrator. If the Court follows this

precedent it would lead to the odd result that the participant could not sue the one party that can most directly afford relief. That would not necessarily mean that the participant has no avenue for relief, but it means that there would be significant obstacles to ultimately obtaining that relief.

For instance, if a participant in such a suit is found to be entitled to benefits under a plan that is funded solely through an insurance policy, it is not clear how that participant can obtain those benefits in the absence of the insurer. Even if the participant or the plan or plan administrator is entitled to bring a second suit to enforce rights as a matter of state contract or insurance law, which is not at all clear given ERISA's broad preemption provision, see 29 U.S.C. § 1144, the ruling in the first ERISA action would not necessarily be binding as a matter of res judicata or collateral estoppel on the insurer since it was not and could not, in this Circuit, be part of the first adjudication. See U.S. v. Bhatia, 2008 WL 43300554, at *2 (9th Cir. Sept. 24, 2008) (both res judicata and collateral estoppel only apply to bind parties or their privies).[4] Accordingly, there is a real potential for inconsistent rulings, i.e., the plan being found liable for the benefits in an ERISA suit, but the

---

[4] Even if the insurer were in privity with the plan for purposes of res judicata, however, it would still be appropriate to join the insurer as a defendant under Rule 19 of the Federal Rules of Civil Procedure in light of the insurer's obvious interest in the proceeding and the preclusive effect that any judgment would then have on the insurer's interest. Certainly, as argued in the text, there is no basis in ERISA for excluding the insurer when it is both the plan fiduciary responsible for adjudicating the claims and the entity responsible for paying the claims.

insurer being found not liable, with the result being that either the plan or the plan sponsor is forced to pay for benefits that were thought to be insured, or the ERISA participants or beneficiaries are simply not able to get the benefits to which they are entitled. Such a result is flatly inconsistent with ERISA's goal to provide "a panoply of remedial devices" for participants and beneficiaries of benefit plans. Russell, 473 U.S. at 146.

Precluding a benefit suit against an insurer such as Reliance that is charged with interpreting the plan and making benefit determinations and paying benefits is anomalous for another reason. In deciding benefits cases, particularly cases concerning the standard of review applicable to benefit denials, Supreme Court decisions have long assumed that claims under section 502(a)(1)(B) may be brought against the plan fiduciary that makes the benefit determination, and not just administrators. For instance, in its decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Similarly, just this past term in Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343 (2008), the Supreme Court held that an insurance company that both decides claims and pays benefits under a plan is operating under a conflict of interest that

must be weighed as part of an abuse of discretion review of that decision. Like Reliance, MetLife was the issuer of the insurance policy that funds the plan's benefits, and under the express terms of the plan was the "Claim Fiduciary" with "discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the Plan," but was not the plan administrator. Brief for Petitioners, 2008 WL 512780, at *3. Neither the courts nor the parties questioned MetLife's status as a defendant and, indeed, there would be little point to the Supreme Court's holding if insurers deciding such claims were not subject to suit.

Thus, the Supreme Court in cases like Firestone, Glenn, and UNUM Life Insurance Company of America v. Ward, 526 U.S. 358 (1999), and lower courts in countless others cases across the country, have simply and correctly assumed that a plan participant or beneficiary claiming benefits under an ERISA plan could sue the insurer that was making the benefit determination, without ever questioning whether the insurer was the plan administrator. Indeed, under Firestone and Glenn, courts in this Circuit and others deferentially review the decisions of insurers that are granted discretion to interpret plan terms and decide benefit claims, a practice that would make scant sense if such insurers are not proper parties in a suit for benefits merely because they are not the plan administrator. ER 183 ("this entire case resolves around the fact that [Reliance] is claiming the right to interpret the

plan, and is urging an interpretation of the plan that would preclude Cyr's claim").
Thus, if given effect and adopted generally, this Court's decisions that hold that plan participants may not sue insurers like Reliance when they deny plan benefits would displace the established practice in thousands of cases every year. This potentially disruptive affect is another reason supporting a grant of plaintiff's petition for en banc review.

CONCLUSION

Accordingly, this Court should grant appellant's petition to hear this appeal en banc, and should affirm that Cyr properly sued Reliance for plan benefits under ERISA section 502(a)(1)(B).

November 10, 2008

Respectfully submitted,

GREGORY F. JACOB
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

s/ ______________________________
STACEY E. ELIAS, Trial Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210
Phone: (202) 693-5611
Facsimile: (202) 693-5610

CERTIFICATE OF COMPLIANCE

I certify that the attached brief has been prepared using a proportionately spaced 14-point typeface and that the document contains margins of at least one-inch on all portions required to have such margins under the Circuit Rules.

Dated: November 10, 2008

s/__________________________
STACEY E. ELIAS
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 2008, two copies of the Brief for the Secretary of Labor were served by Federal Express, postage prepaid, on the following counsel of record:

Joseph A. Garofolo, Esq.
Law Office of Joseph A. Garofolo, P.C.
22 Battery Street, Suite 1000
San Francisco, CA 94111

Joseph A. Creitz, Esq.
Law Offices of Joseph Creitz
22 Battery Street, Suite 1000
San Francisco, CA 94111

David L. Nye
Nye, Peabody, Stirling & Hale, LLP
33 W. Mission, Suite 201
Santa Barbara, CA 93101

Michael B. Bernacchi
Burke, Williams & Sorensen, LLP
444 South Flower Street
Suite 2400
Los Angeles, CA 90071-2953

s/______________________________
STACEY E. ELIAS
Trial Attorney