1   IN THE SUPREME COURT OF THE UNITED STATES

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3   METROPOLITAN LIFE,   :

4   INSURANCE COMPANY, ET AL.,   :

5   Petitioners   :

6   v.   :   No. 06-923

7   WANDA GLENN.   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, April 23, 2008

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12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 10:10 a.m.

15   APPEARANCES:

16   AMY K. POSNER, ESQ., Long Island City, N.Y.; on behalf

17   of the Petitioners.

18   E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on behalf

19   of the Respondent.

20   NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor

21   General, Department of Justice, Washington, D.C.; on

22   behalf of the United States, as amicus curiae,

23   supporting the Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:10 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first today in Case 06-923, Metropolitan Life Insurance

5   versus Glenn.

6   Miss Posner.

7   ORAL ARGUMENT OF AMY K. POSNER

8   ON BEHALF OF THE PETITIONERS

9   MS. POSNER: Thank you. Mr. Chief Justice

10   and may it please the Court:

11   For two reasons, the Sixth Circuit was wrong

12   to hold that a company that is an ERISA claim fiduciary

13   and that separately funds the plan's liabilities must

14   always be deemed to be operating under a conflict of

15   interest that changes the employer's designated

16   arbitrary and capricious standard of review under its

17   plan document. And the first reason is one that we're

18   on common ground with and that is, as this Court

19   recognized in Pegram v. Herdrich, ERISA explicitly

20   authorizes companies like MetLife to fulfill both

21   fiduciary and nonfiduciary functions as long as it does

22   not in actuality commingle those functions. The mere

23   fact that the potentiality of conflict is inherent in

24   all of these commonplace dual arrangements in ERISA

25   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 secondly --

4   JUSTICE SOUTER: No, but neither, neither

5 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.

15   JUSTICE SCALIA: What do you mean by --

16 let's get straight by 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 live 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 interests?

6   MS. POSNER: That's exactly the distinction

7   that we are making by using actual and potential or, as

8   this Court said, possible and actual in Firestone. And

9   where that slip occurs in trust law or in ERISA and it

10   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, A,

22   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: I'm positing. Does the

4   fiduciary at least have the, the burden of production to

5   show that it has established clear lines of demarcation,

6   firewalls, whatever you call them, within the company?

7   Does it have at least that obligation going forward?

8   MS. POSNER: No, Your Honor, it does not,

9   and as the United States --

10   JUSTICE KENNEDY: Well then, I don't know

11   what effect you're giving to the fact, as the earlier

12   questions have indicated, that there is a structural

13   conflict.

14   MS. POSNER: That's a structural conflict

15   that ERISA anticipates and, as the United States said in

16   its brief to this court in Pegram v. Herdrich, that

17   ERISA tolerates this dual role and this level of

18   conflict in order to keep these plans that are so vital

19   in our country's economic interests in underlying the

20   employee's well-being --

21   JUSTICE KENNEDY: You want us to write an

22   opinion to say that it's irrelevant that a company does

23   not have procedures to insulate the profit section from

24   the claims processing section? I'll use those terms.

25   MS. POSNER: No, Justice Kennedy, absolutely

1   not. But what we are saying is that if there were such

2   a fiduciary that factor must be weighed, but it doesn't

3   change the abuse of discretion standard.

4   CHIEF JUSTICE ROBERTS: How does that work?

5   I don't understand. You go through, you've got a

6   decision, whatever, it's a health insurance decision

7   that this procedure -- to determine that this procedure

8   is not covered under the, the plan, that the fiduciary

9   has the discretion to make that determination. But you

10   say, aha, he's got a conflict of interest, so that's a

11   factor we take into account. Well, how does -- what

12   does that mean?

13   MS. POSNER: It means again, remembering

14   that these are claims under 29 U.S.C. 1132(a)(1)(B) for

15   benefits due under the terms of the plan, it's very

16   important that the courts remember to look at the terms

17   of those plans --

18   CHIEF JUSTICE ROBERTS: All right, you've

19   got two cases, one where the person does not have a

20   conflict of interest under a particular plan, the other

21   where he does. It's the same decision: We're not going

22   to cover this procedure. How is the review different in

23   each of those cases as a practical matter?

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

25   you look at the cases in trust law, what the court needs

1   to look at when the settlor, here the employer,

2   designates the discretionary authority under the terms

3   of the trust or the plan is that that conflict comes

4   into play if it seems that it's been breached. But you

5   also have to remember exactly what the purpose of the

6   trust is, and so you need to protect the employer's

7   interest in having benefits paid in meritorious cases

8   and not paid in nonmeritorious cases.

9   CHIEF JUSTICE ROBERTS: I guess I don't see

10 an answer to my question yet. How does the review

11 differ as a functional matter? He says he looks at it

12 and says, well, normally that would be within the

13 discretion, but I've got to remember he's got a

14 conflict, so I'm going to determine that this particular

15 procedure should be covered because of the conflict.

16   MS. POSNER: It remains in the discretion

17 because this Court said that that freedom of contract

18 that's so important to ERISA, to keep the benefits, the

19 employers interested in offering benefits --

20   JUSTICE SCALIA: But you're saying it

21 doesn't make any difference. You say you should take it

22 into account, but if it was a reasoned decision, which

23 is the test whether or not he's a fiduciary, if it's a

24 reasoned decision the fact that he's a fiduciary makes

25 no difference, right? Isn't that what you're saying?

1   MS. POSNER: No, Your Honor.

2   JUSTICE SCALIA: It does make a decision

3   then. What was a reasoned decision for someone who

4   doesn't have a conflict becomes an unreasoned decision

5   simply by reason of the fact that he has a conflict?

6   MS. POSNER: Certainly not. Again, it must

7   be a factor that's weighed with the other factors.

8   JUSTICE BREYER: That's exactly my question.

9   MS. POSNER: Yes --

10   JUSTICE BREYER: I'm going to let you answer

11   this question --

12   MS. POSNER: And I --

13   JUSTICE BREYER: But I want you to work mine

14   in if you can. The problem that I'm having is what to

15   say in the opinion. Now, could I say this? Firestone,

16   yes, that's the way to put it as a standard. You can

17   also teach through example. So I look at this case, I

18   say: You want to know what that means, read the court

19   of appeals opinion; it's perfect. Okay? So I've got

20   Firestone -- my opinion so far is two words:

21   "Firestone, perfect." Okay? Now, what do you want me

22   to say other than that?

23   MS. POSNER: In this case -- and this case I

24   think presents a very narrow question for the Court, and

25   that is where there is the dual role inherent in the

1   plan but no evidence whatsoever that it infected the

2   decision, if it must be given weight in answer to the

3   Court's second question, then --

4   JUSTICE GINSBURG: But then you come to the

5   end of the line. You have to prove that the authority

6   was misused. And as I understand the Sixth Circuit's

7   decision, what those judges were doing, they say we're

8   going to look at this with some skepticism because of

9   the conflict. And let me give you a concrete example.

10   This woman got Social Security disability benefits and

11   she did it at the suggestion of MetLife is; that so?

12   MS. POSNER: She actually applied herself.

13   JUSTICE GINSBURG: But she got a lawyer that

14   they recommended that she have.

15   MS. POSNER: MetLife recommended a lawyer to

16   her and also said she could use her own lawyer, which

17   was consistent with the plan design.

18   JUSTICE GINSBURG: But the point is they

19   came to her and said: Get Social Security disability

20   benefits. Now, to get those she would have to show that

21   she is totally and permanently disabled.

22   MS. POSNER: Correct.

23   JUSTICE GINSBURG: So here is a company that

24   says: Tell the U.S. government that you are totally and

25   permanently disabled, but -- and then we'll recoup all

1   that money that we paid out to you; but then when we get

2   a chance to look, look it over, we'll say you're not

3   disabled. Why isn't it appropriate to regard just that

4   set of circumstances with suspicion?

5   MS. POSNER: Because, Your Honor, at the

6   time that that letter was written to the Respondent here

7   in October of 2000, in fact MetLife had granted her

8   benefits. And the action of helping an employee perfect

9   their entitlement to Social Security is in fact not a

10   conflict at all. It's a fiduciary obligation under the

11   terms of a plan and it helps the employee as well.

12   JUSTICE GINSBURG: Yes, I'm not questioning

13   that at all.

14   MS. POSNER: When --

15   JUSTICE GINSBURG: That sounds fine. It's a

16   question of why, after helping her tell the government

17   that she was totally disabled, they, after the initial

18   two-year period, turned around and said she's not.

19   MS. POSNER: The -- the reason is -- and

20   it's unfortunate that often Social Security makes the

21   same decision that the plan fiduciary has made two years

22   earlier, and the government is looking backwards at

23   certain evidence that may not be before the ERISA plan

24   fiduciary. The ERISA plan fiduciary at that two-year

25   point is looking at that evidence at that time and at a

1   change in the terms of the plan.

2   JUSTICE SCALIA: Ms. Posner, it seems to me

3   that that ought to be looked at with suspicion, whether

4   or not the person making the decision has a conflict. I

5   mean that smells bad or doesn't smell bad, as you say,

6   either way.

7   MS. POSNER: Justice Scalia --

8   JUSTICE SCALIA: And I am still -- listen, I

9   know that we're responsible for this because we said it

10   in Firestone. We said that a conflict of interest

11   should be weighed as a factor. If that means anything,

12   it seems to me it means that sometimes that weight will

13   make the difference. So at least sometimes -- but

14   you're not willing to admit that -- at least sometimes

15   you would say, oh, yes, this is a reasonable decision

16   and had this decision been made by a fiduciary without a

17   conflict, it would be perfectly okay because it's

18   reasonable. That's the test. However, since this

19   fiduciary has a conflict, what was a reasonable

20   decision, whoof, the added weight, it becomes an

21   unreasonable decision.

22   MS. POSNER: I think --

23   JUSTICE SCALIA: Is that what you mean by

24   giving it some weight?

25   MS. POSNER: Yes, Justice Scalia --

1   JUSTICE SCALIA: You do.

2   MS. POSNER: But --

3   JUSTICE SCALIA: So a perfectly reasonable

4 decision becomes unreasonable simply because you have a

5 conflict?

6   MS. POSNER: It depends on how close that

7 reasonable decision is to the line, and in this case the

8 decision was not one that this mere dual-role conflict,

9 the lowest level of conflict that can exist, can push

10 that reasonable decision over. And I --

11   JUSTICE SOUTER: Okay, let's assume -- let's

12 assume that I'm reviewing it, and I -- I don't find it

13 as clear as you do, and I'm on the fence. Being on the

14 fence, may I take into consideration the fact that there

15 was a conflict of interest?

16   MS. POSNER: You -- I think under Firestone

17 you have to take that into account.

18   JUSTICE SOUTER: And therefore I will say,

19 okay, I wouldn't know for sure how to go in this case,

20 but I see the conflict of interest and that's enough to

21 make me say more probably than not there was a

22 reflection of the self-interest of the provider, rather

23 than the interest of the -- of the insured here; and,

24 therefore, I'm going to find that the -- that the

25 conflict did disadvantage the person insured. That

1   would be, I take it on your view, a reasonable

2   application of Firestone.

3   MS. POSNER: Again, depending upon how these

4   things weigh.

5   JUSTICE SOUTER: Well, I just told you.

6   MS. POSNER: Yes.

7   JUSTICE SOUTER: I just told you how it

8   weighed. I'm sitting on the fence. I'm not sure what

9   to do. I take into consideration the fact that there is

10   conflicting interest here; and, therefore, I conclude

11   that the conflicting interest is the reason for the

12   decision and I hold against the company. Is that a

13   misapplication of Firestone?

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

15   JUSTICE SOUTER: Okay.

16   JUSTICE ALITO: But that's not the argument

17   that I understood you to make in your brief. Is that a

18   change from the position you took in your brief?

19   MS. POSNER: No, Your Honor, I don't believe

20   it is. The brief acknowledges that there are various

21   conflicts that exist here. The conflict that ERISA

22   tolerates and recognizes as being everyday, ordinary

23   practice that is absolutely necessary for the employee

24   benefits of this country to remain vital, and that is --

25   JUSTICE ALITO: Could I just get this clear?

1   I thought your position in your brief was that there has

2   to be a demonstration that the conflict had an effect on

3   the decision before there is any departure from the

4   standard abuse of discretion --

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

6   JUSTICE ALITO: -- the standard of review.

7   MS. POSNER: And I took Justice Souter's

8   hypothetical to mean that there had been a conflict that

9   seriously weighed on his view.

10   JUSTICE SOUTER: No. My hypothetical is the

11   hypothetical of the person making the decision. I put

12   myself in that person's position and I'm saying I can

13   think of reasons that might result in concluding that

14   this was a reasonable decision, period. And I can think

15   of reasons that might result in concluding that, in

16   fact, this was a decision that had been made against the

17   interest of the insured because the person making the

18   decision itself had an interest in it.

19   I'm not sure which way to go, but I now take

20   into consideration the fact that there was this

21   conflicting interest in the person or the organization

22   that made the decision, and for that reason, I am going

23   to -- I'm going to break the tie, and I'm going to

24   conclude that the conflict was to the disadvantage of

25   the insured. I'm going to rule against the company. I

16

1   understood that you said that would be a proper

2   application of Firestone. Is that still your answer?

3   MS. POSNER: I think that that could be.

4   The problem with all of these cases and when you look at

5   them --

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

7   MS. POSNER: Well, again, we're looking at

8   conflict as if it's the only factor here, and when we

9   look at these cases --

10   JUSTICE SOUTER: No. In my hypothetical,

11   I've taken into --

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

13   JUSTICE SOUTER: -- factors that say the

14   company was right, factors that say the company is

15   wrong. I'm not sure which. They seem evenly balanced

16   to me, until I take into consideration the fact that

17   there was conflicting interest, and I say that's enough

18   to tip it. And it does tip it, and I rule against the

19   company.

20   MS. POSNER: I think --

21   JUSTICE SOUTER: And am I right or wrong

22   under Firestone?

23   MS. POSNER: Again, I think that it's very

24   important to look at the employer's plan and this

25   employer specifically.

17

1   JUSTICE SOUTER: That may be, but what's the

2   answer to my question?

3   MS. POSNER: The answer is --

4   JUSTICE SOUTER: Am I right or wrong?

5   MS. POSNER: The answer is you could be

6   right or you could be wrong, but it's --

7   JUSTICE SOUTER: That is not going to --

8   MS. POSNER: -- so important --

9   JUSTICE SOUTER: That's not going to help

10   the appellate court, my friends here who have to review

11   my decision. They want to know whether I was right or

12   wrong.

13   MS. POSNER: These matters are so

14   fact-specific.

15   JUSTICE GINSBURG: Well, let's take these

16   facts.

17   MS. POSNER: Okay, Your Honor.

18   JUSTICE GINSBURG: As the trier -- I mean

19   ERISA, yes, it certainly says you can be both the plan

20   administrator and the payor, but all it says is that

21   that's permissible. But it also provides for review of

22   those decisions, judicial review in court. And here is,

23   say, a district court is looking at it and says: I

24   don't understand why the company didn't look at the

25   doctor's explanation and put such heavy weight on a

1   checkmark. And I also don't understand the suggestion

2   that she is totally disabled to the government and then

3   saying, well, she's really not, in this very close time

4   frame. So it might be okay and it might not.

5   I am in equipoise about this case, not the

6   terms of the plan but the decision that was made to deny

7   her benefits. So which way do I call it? That's the

8   question that Justice Souter posed, and you seem not to

9   want to face up to it and answer it.

10   MS. POSNER: Your Honor, the problem with

11   the hypothetical as you just stated is that you've taken

12   the employer's contract out of the calculation, and that

13   the employer has the right to determine its own plan and

14   design those plans as they see fit in order to keep

15   these vital economic safety nets available, affordable

16   and capable of providing a safety net to the --

17   JUSTICE GINSBURG: How does that bear on

18   making a determination that the --

19   MS. POSNER: Because --

20   JUSTICE GINSBURG: -- employee -- that the

21   plan administrator has to make: Is this person disabled

22   and is she not?

23   MS. POSNER: You can't make that

24   determination, Justice Ginsburg, out of the context of

25   the plan design. This plan design says that Social

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1   Security can be -- can be an offset, estimated or -- or

2   received.

3   It says that the plan administrator or the

4   fiduciary not only has discretionary authority to

5   determine eligibility for benefits and to construe the

6   terms of the plan, but that its decision may not be

7   overturned unless arbitrary and capricious.

8   CHIEF JUSTICE ROBERTS: Counsel, Justice

9   Souter's question and Justice Alito's question highlight

10   for me what I think is the central issue. Justice

11   Souter had asked you whether the conflict comes into

12   play, you know, when it's a tie. And you're right on

13   the fence, and you say, well, the conflict's a factor,

14   so it tips over in the employee's favor.

15   Justice Alito's question asked you whether

16   or not the conflict has to play a role in the decision.

17   I don't know how that would be, but let's say, for

18   example, the insurance company is doing well and so they

19   say, well, we allow coverage for this procedure. All of

20   a sudden, the insurance company looks like it's not

21   doing so well, it's not going to meet the quarterly

22   targets or whatever, so it says, well, we're no longer

23   going to allow coverage for that procedure. In other

24   words, it is the conflict itself that affects which way

25   it comes out.

1   Now, which is right: Justice Souter's case

2   in which the conflict tips the scales, no matter what

3   the reason is; or Justice Alito's case where the

4   conflict plays a role in the decision process?

5   MS. POSNER: We believe that it's the

6   Justice Alito hypothetical, where it does play a role.

7   Where it doesn't play a role, it should have -- our

8   first answer -- our answer to the first question is it

9   should have no weight. However, I understand that we've

10 moved beyond that to the second question.

11   JUSTICE ALITO: But the problem with that is

12 the Court needs to know what the standard of review is

13 before it gets to the merits. And how is the Court

14 going to know whether conflicting interests played a

15 role in the outcome of a particular benefits

16 determination without looking at the merits of the case

17 unless there is going to be a lot of discovery about

18 internal processes at MetLife and how you treat the

19 people who -- who gets promoted among the benefits

20 administrators and all of that? And that's what I don't

21 understand about that position.

22   MS. POSNER: No -- yes, Justice Alito, and I

23 think you hit the nail on the head there. The merits of

24 the case must certainly be scrutinized, and they can be

25 scrutinized for an abuse of discretion. And that's the

1   important issue. It's scrutinizing the merits of the

2   case, whether or not the medical and vocational

3   information supports the decision.

4   JUSTICE STEVENS: Yes. But as I understand

5   your brief, you say the conflict of interest is only

6   relevant if it affected the decision. But how does the

7   plaintiff prove that it affected? What sort of evidence

8   would go to that issue?

9   MS. POSNER: There are cases, Your Honor,

10   where can you see that, for instance, when you look at

11   the medical evidence, that the administrator shows in

12   its claim file, which, unlike any other area of the law,

13   the whole process is transparent under ERISA; and there

14   may really not be any evidence that's supporting it, or

15   so little that it's hard to understand how that

16   fiduciary could possibly have reached that decision.

17   JUSTICE STEVENS: Well, you're just saying

18   that the plaintiff has to have an overwhelming case. I

19   don't think you'd need the conflict-of-interest point in

20   that kind of case.

21   MS. POSNER: That's actually the standard,

22   though, Justice Stevens, in trust law also. Because

23   when you read these cases and you look at the examples

24   in the Restatement, when the trustee has an acknowledged

25   conflict and the settlor nevertheless vests in that

22

1 trustee discretionary authority, then in order for a

2 court to displace that trustee's judgment the court must

3 find that the trustee actually acted from conflict and

4 in controverse -- in contraverdia -- oh, my goodness --

5 and did not follow the terms of the plan.

6   JUSTICE STEVENS: Well, I can understand

7 that in normal trust situations, but it's hard for me to

8 understand how you're going to prove an insurance

9 company's particular claim adjustment was really

10 motivated by a conflict of interest rather than thinking

11 the claim wasn't valid.

12   MS. POSNER: That is a problem, but the fact

13 of the matter is that you -- you read the cases and the

14 files, as I'm sure you have, and it's apparent that

15 there are -- let me use Post v. Hartford as an example,

16 if I may. In Post v. Hartford there is a majority

17 opinion that overruled the Hartford's discretion based

18 merely on minor irregularities.

19   JUSTICE GINSBURG: Where, where is this

20 decision from that you're --

21   MS. POSNER: Post v. Hartford, Your Honor,

22 is at 501 Fed. 3d 154. It's the case that -- it's a

23 Third Circuit case from 2007 that the Respondent very

24 heavily relies upon, and it's a glaring example of

25 what's gone wrong in the analysis here, because in Post

23

1   v. Hartford there's a majority opinion that overruled

2   the Hartford's discretion based on minor irregularities,

3   what it called as minor irregularities, merely because

4   they existed.

5   The dissenting judge looked at the medicals

6   and, even under the Third Circuit's heightened scrutiny,

7   which automatically it applies to insurance companies

8   regardless of the situation, that justice said the

9   medical -- that judge, sorry -- said that the medical

10   evidence very clearly supported the Hartford's decision.

11   And what we are hoping will come out of

12   this, Your Honors, is that in fashioning what should

13   happen in these cases, that the fact that these are

14   claims for benefits under the terms of the plan must

15   really be important, not just minor irregularities and

16   whether this was done right or that was done right.

17   That's -- that's a cause of action under -- under

18   1132(a)(2), and the Respondents are relying very heavily

19   on the replacement of the fiduciary, of the trustee.

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

21   claim under 1109 where you could replace the fiduciary.

22   Here we are talking about were these benefits properly

23   denied or not?

24   And if there are no further questions, Your

25   Honor --

1   JUSTICE GINSBURG: There's one feature of

2   this that I don't understand. It was referred to very

3   swiftly in Judge Merritt's separate opinion. He said at

4   one point there was a proposal by MetLife that they give

5   this woman a trial run at a sedentary job to see if she

6   could do it. And he said that that made a lot of sense

7   to him, and it was MetLife's proposal, but then it got

8   withdrawn. Could you clarify what that was?

9   MS. POSNER: Yes. I believe, Justice

10   Ginsburg, that Judge Merritt was looking at a provision

11   of the plan that -- actually, I'll tell you where it is.

12   It's at 170a of the joint appendix. And that provision

13   allows rehabilitative employment for a disabled person.

14   In early 2002, MetLife did refer the file to a

15   vocational rehabilitation specialist to determine

16   whether or not the Respondent was eligible for that.

17   In doing that, a letter was sent to the

18   treating physician, Dr. Patel, asking specifically what

19   she could do in an eight-hour day; could she do

20   full-time sedentary work; and if there were any physical

21   barriers. And that's that March 12th, 2002, letter --

22   it was not a form -- which he filled out and said in an

23   eight-hour day she could sit for eight hours; she could

24   stand for four hours; and she could walk for two hours;

25   that she could do full-time, sedentary work, and that

25

1   there were no physical barriers otherwise blocking her

2   ability to do that.

3   JUSTICE GINSBURG: Then why did MetLife

4   withdraw that proposal?

5   MS. POSNER: Well, there was no proposal,

6   Your Honor, but it was given to a rehabilitation

7   specialist to work that up to see if she was disabled

8   and eligible for rehabilitative employment, because her

9   treating physician responded to that inquiry by saying

10   she could do sedentary work, she retained that physical

11   capacity, which was consistent with what he said in

12   January of '02 and again in June of '02. That provision

13   --

14   JUSTICE GINSBURG: My question was not what

15   Dr. Patel said, but how did that proposal get dropped?

16   MS. POSNER: There was no proposal, Your

17   Honor. There is a provision in the plan -- it's at 170a

18   of the joint appendix -- which allows for rehabilitative

19   employment for disabled people who may have the physical

20   capacity to do work they were not doing before.

21   CHIEF JUSTICE ROBERTS: Thank you, counsel.

22   MS. POSNER: Thank you very much, Your

23   Honor.

24   CHIEF JUSTICE ROBERTS: Mr. Rosenkranz.

25   ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

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1   ON BEHALF OF THE RESPONDENT

2   MR. ROSENKRANZ: Mr. Chief Justice, and may

3   it please the Court:

4   This Court got it right in Firestone when it

5   said, of course a conflict must be weighed. There's no

6   reason for this Court to overrode its well-reasoned and

7   unanimous conclusion which --

8   JUSTICE SCALIA: Dictum.

9   MR. ROSENKRANZ: It was dictum, Your Honor,

10   but it was very well-considered dictum because --

11   (Laughter.)

12   MR. ROSENKRANZ: -- the only issue before

13   the Court so far as the parties thought was what is the

14   effect of this dual role that Firestone had? And this

15   Court did not answer that question, but that's what the

16   parties were arguing about.

17   So this Court correctly discerned the rule

18   from trust law. It correctly discerned and balanced

19   ERISA's policies and, if anything --

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

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

22   MR. ROSENKRANZ: Your Honor --

23   JUSTICE SCALIA: I think it's lovely to say

24   weigh it as a factor, it gets the case off our docket

25   and it's fine. But what does it mean?

1   MR. ROSENKRANZ: Well, Your Honor --

2   JUSTICE SCALIA: Does it mean that a

3 perfectly reasonable decision that is within the

4 discretion -- I mean this plan says that MetLife will

5 have -- knowing that it will have the conflict, that

6 they will make the decisions and so long as they are not

7 arbitrary, they are valid.

8   Now, let's take a perfectly reasonable

9 decision. It is not arbitrary. Does giving weight to

10 the existence of the conflict which the settlor of the

11 plan expected to exist, does giving weight to that mean

12 that what was reasonable becomes unreasonable?

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

14   JUSTICE SCALIA: If it doesn't mean that,

15 then it means nothing.

16   MR. ROSENKRANZ: Absolutely, Your Honor.

17 The answer is yes in many circumstances. And the beauty

18 of the Court's invocation of trust law is that trust law

19 answers the question. Trust law says that when you have

20 a fiduciary with a conflict, you apply especially

21 careful scrutiny.

22   CHIEF JUSTICE ROBERTS: Well, but trust law

23 doesn't take into account what we have said repeatedly

24 in our ERISA decisions, which is we want to encourage

25 people to set up ERISA plans. And that has affected the

1 standards that we've adopted, for example, that we even

2 allow a conflict of interest like this to exist.

3   And it seems to me that your position is

4 going to hurt beneficiaries under ERISA plans because

5 people are going to say, as they're perfectly free to

6 do -- people, the employers, are going to say, as they

7 are perfectly free to do, you know, I'm just not going

8 to do it; if we're going to have judges looking at these

9 claims decisions on a de novo basis, who knows how much

10 it'll end up costing me, so I'm not going to set up

11 these plans.

12   MR. ROSENKRANZ: Your Honor, I understand,

13 and this Court considered that in Firestone, the

14 litigation cost and the added administrative costs, and

15 this Court concluded en route to de novo review that the

16 1132(a)(1)(B) remedy is so infused with the interests of

17 ensuring that the beneficiaries get their benefits due,

18 that that is the interest that the courts weigh most in

19 determining the standard of review.

20   CHIEF JUSTICE ROBERTS: Do you -- which

21 position do you adopt? It was only posed as

22 hypothetical, so I don't mean to attribute the position

23 to you; but the Justice Souter hypothetical or the

24 Justice Alito hypothetical?

25   MR. ROSENKRANZ: Your Honor, the answer is

1   both. They can happen under both circumstances --

2   circumstances. But let me explain why. What trust law

3   does is to say we apply especially careful scrutiny.

4   And the scrutiny has to be consonant with the purpose of

5   the scrutiny, which is to ensure that the conflicted

6   fiduciary does not end up subconsciously or consciously

7   tilting the scale.

8   CHIEF JUSTICE ROBERTS: Well, that sounds

9   like the Justice Alito hypothetical. In other words,

10   the extra scrutiny has to be consonant with the purpose.

11   The purpose is to protect against the conflict. So if

12   the scrutiny doesn't reveal that the conflict played a

13   role, then it's -- then it's not an abuse of discretion.

14   MR. ROSENKRANZ: No, Your Honor, because

15   what trust law says is that you apply especially careful

16   scrutiny, which entails two things. The first thing is

17   what this Court called keeping the judicial eye peeled

18   for conflict of interest in Rush. So that's an

19   examination of the record of the decisionmaking process.

20   You kick the tires, you test the judgments, as the Sixth

21   Circuit did in this case, and you ask yourself, is this

22   the work of an unbiased fiduciary?

23   The second thing is to imagine a zone of

24   reasonableness within which a reasonably prudent trustee

25   might land and then say to yourself at the outer limits

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1   of the zone of reasonableness, we will accept the

2   judgment of an unconflicted fiduciary because there is

3   no reason for us to suspect that he reached that result

4   because of the bias. For a conflicted fiduciary you can

5   contract that zone of reasonableness.

6   JUSTICE SCALIA: Trust law doesn't say.

7   Trust law does not establish a different standard of

8   judicial review for the conflicted trustee.

9   MR. ROSENKRANZ: Your Honor, it absolutely

10   does, and the 26 law professors in the amicus brief that

11   they filed with this Court explain exactly --

12   JUSTICE BREYER: But I don't know what to

13   look to in trust law. I mean, all that's happened here,

14   every life insurance -- every company, every life

15   insurance company has the kind of conflict that you're

16   talking about. Every company has the kind of conflict

17   you're talking about. And an automobile company might

18   make shoddy merchandise so it can make more money in the

19   short run.

20   How does trust law keep that kind of

21   conflict? Now, it can't be and it isn't, because I've

22   looked it up, I think, that trust law says that every

23   distribution by a trustee whose own fee depends on the

24   size of the trust is conflicted.

25   MR. ROSENKRANZ: Absolutely --

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1   JUSTICE BREYER: I doubt, since banks are

2   trustees, I doubt but I'm not sure here -- -

3   MR. ROSENKRANZ: Your Honor --

4   JUSTICE BREYER: -- that banks are

5   trustees -- suppose you were to say, look, the bank has

6   an interest in maximizing the amount of money in its

7   account and therefore every decision of a distribution

8   of such trustee is subject to some special thing.

9   Now, the problem for me in this case is what

10   in trust law do I analogize it to, not -- I don't doubt

11   for a second the 26 law professors, et cetera -- though

12   I do really sometimes, but not in this case.

13   (Laughter.)

14   JUSTICE BREYER: The -- the -- so what do I

15   look to? And where I ended up was I'd like an answer to

16   what I asked the other side. I ended up, I can't do

17   better than Firestone, I ought to write two words in

18   this opinion, and the standard, perfect; from the

19   opinion below, perfect. You want to know what I mean,

20   read the opinion below. Okay?

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

22   MR. ROSENKRANZ: So let me break it down and

23   first turn to the premise. It is simply not correct

24   that every employer is conflicted.

25   JUSTICE BREYER: I overstated.

32

1   MR. ROSENKRANZ: Okay.

2   JUSTICE BREYER: Take the examples that I

3   gave. It's an ordinary insurance policy.

4   MR. ROSENKRANZ: Okay. But the bank

5   example, Your Honor, that is not a pressure, which is

6   kind of a business pressure, that trust law recognizes

7   as a conflict of interest. Trust law acknowledges that

8   trustees are often, almost always, in the business of

9   administering trusts, and they don't -- they make their

10   money by doing the job well. The big difference is we

11   are talking here about a direct impact on the bottom

12   line.

13   JUSTICE BREYER: But that's, you see, their

14   point. Their point is this is just an ordinary

15   insurance company, an ordinary policy, and it's really

16   like a bank that's a trustee that in fact takes money

17   that hasn't been distributed and puts it on its own

18   account. They make money for that, from that. So there

19   is a conflict.

20   MR. ROSENKRANZ: Well, Your Honor --

21   JUSTICE BREYER: You have that kind of

22   conflict.

23   What do you say about that?

24   MR. ROSENKRANZ: Justice Breyer, it's just

25   wrong under trust law and it's wrong under the facts, as

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1   everyone knows them to be in the insurance industry.

2   The insurance industry makes its money on the

3   differential between the premiums that it charges and

4   the payouts in claims.

5   JUSTICE BREYER: The bank makes its money by

6   putting money in an account, paying interest and lending

7   it at more money.

8   MR. ROSENKRANZ: But -- So let me give an

9   example from real life. MetLife, for example, shells

10   out $14 billion a year in ERISA covered claims. If it

11   denies one out of a hundred claims improperly, we are

12   talking about $140 million.

13   JUSTICE BREYER: Yes, and Chase Manhattan

14   bank has $14 trillion in trust accounts, and if they

15   just put in for three days money into an

16   interest-bearing account and lend it out for five

17   minutes, they will make $1 billion. Okay. You see,

18   they are finding these kinds of conflicts everywhere.

19   And that's what I'm asking you.

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

21   say, look at this carefully, judge, look at it

22   carefully; but if all you find is an ordinary insurance

23   company doing ordinary work and there is no ground for

24   suspicion, proceed to step two. What about that?

25   MR. ROSENKRANZ: Well, Your Honor, the first

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 1 thing to say is that -- if that is, in fact, an

 2 authorized transaction, that would fall under the

 3 self-dealing rules of trust law, and trust law

 4 self-dealing rules are situations in which the set law

 5 has actually suspended the duty of loyalty of the

 6 trustee -- that's correct -- of the trustee.

 7   That is absolutely impermissible under

 8 ERISA. You cannot suspend the duty of loyalty under

 9 ERISA. There is a clear provision about that.

10   JUSTICE SOUTER: Mr. -- Mr. Rosenkranz. I

11 think you set up basically three different kinds of

12 scenarios. And I want to set -- I want to put them into

13 my own words and -- and have you tell me whether I

14 understand your -- your point correctly.

15   Scenario number one is the case -- in each

16 of these scenarios, we have the same relationship

17 between the -- in effect, the trustee and -- and the

18 beneficiary that we have here. There -- there is a --

19 there is a built-in conflict. We don't know what its

20 effect is.

21   In scenario number one, the -- the evidence

22 is that the person making the benefits decision says

23 let's let this person suffer so that we can keep the

24 money. That is the easy case.

25   Scenario number two --

1   MR. ROSENKRANZ: I'm sorry, Your Honor, says

2   that explicitly in the claim file?

3   JUSTICE SOUTER: That's right, the -- the

4   e-mail shows up.

5   In -- in case number two, there -- there is

6   what you referred to as a decision within the zone of

7   reasonableness, but instead of being sort of in the core

8   of the center of the zone of reasonableness, it's close

9   to the edge. A decisionmaker could look at that

10   decision and say if there is no reason to be suspicious

11   about it, it's still within the zone of reasonableness,

12   and I don't think there is a conflict.

13   But if the decisionmaker knows that there is

14   this kind of structural conflict, the decisionmaker can

15   say look, I wasn't born yesterday; the reason it's so

16   close to the edge is that they were giving way to their

17   own self-interest in the conflict, and I'm going to

18   decide for the beneficiary and against the company.

19   Case number three is the case of the person

20   right on the fence, the decisionmaker. The

21   decisionmaker says, I've -- I've looked at everything

22   there is to look at and I cannot decide for sure what

23   this is, whether it was a legitimate decision or a

24   conflicted one in the -- in the decisionmaker's favor,

25   unless I take into consideration the fact that there is

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1   this structural conflict.

2   MR. ROSENKRANZ: Your Honor, the

3   decisionmaker here is the court reviewing? Or --

4   JUSTICE SOUTER: No the decisionmaker is the

5   person who made the beneficiary -- the benefits

6   decision. And if I take into consideration the

7   structural conflict, that gives the decision to the

8   beneficiary and against the company.

9   Now, in case number two, it's close but

10 the -- but the fact of the conflict is regarded as,

11 itself, as substantive evidence and it -- it results in

12 a decision for the beneficiary.

13   In case number three, the evidence is in

14 equipoise, and to get off equipoise, the conflict rule

15 is taken as the tiebreaker.

16   My understanding is that your view is the

17 proper way to consider the conflict under Firestone is,

18 as I did in my hypo, in both case number two and case

19 number three. Am I correct?

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

21 Honor, but --

22   JUSTICE SOUTER: In other words, when we

23 take -- it is taken as substantive evidence to -- to get

24 us out of the zone of reasonableness in case number two.

25 It breaks the tie in case number three.

1   MR. ROSENKRANZ: No, Your Honor, absolutely

2   not. In case number two, if you are right at the edge

3   of the zone of reasonableness and there is nothing else

4   in the record to raise suspicions about the process by

5   which the decisionmaker got there --

6   JUSTICE SOUTER: But -- but the record has

7   the structural context.

8   MR. ROSENKRANZ: Yes, Your Honor, except for

9   that what would appear to be at a -- right at the outer

10   bounds of reasonableness for an unconflicted fiduciary

11   could knock you over the fence, to use Your Honor's

12   earlier analogy, for a conflicted fiduciary.

13   Definitely not for scenario two. If the

14   decisionmaker is correct in the judgment of the court,

15   "Gee, I don't know where to go, this is really close,"

16   well, within the zone of reasonableness, in fact, in

17   Your Honor's hypothetical, you're right at the -- the

18   target center of the zone of reasonableness, then no, a

19   court would absolutely not hold --

20   JUSTICE SOUTER: No. But in my hypothetical

21   you weren't at the center of the zone of reasonable; you

22   were close to the edge.

23   MR. ROSENKRANZ: Number three. In number

24   three, Your Honor --

25   JUSTICE SOUTER: Number three Honor we can't

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1   make up our mind.

2   MR. ROSENKRANZ: But the decisionmaker, you

3   said, Your Honor, in number three, could not make up its

4   mind.

5   JUSTICE SOUTER: That's right.

6   MR. ROSENKRANZ: And if the -- and if the

7   court confirms yes; the decisionmaker was right that

8   this was really close; you're right at the target center

9   of the zone of reasonableness and the conflict of

10   interest doesn't push you over. The only thing that the

11   conflict of interest could do there is the judicial eye

12   becomes peeled for other evidence of conflict which

13   would end up --

14   JUSTICE SOUTER: So -- so you -- I guess you

15   are saying it may be considered as substantive evidence

16   but it is not a process tiebreaker?

17   MR. ROSENKRANZ: Your Honor, let me rephrase

18   it. What I'm saying is two things. The first is

19   especially careful scrutiny, just in the abstract,

20   stepping back from the hypothetical, means that you

21   focus really carefully on the process by which the

22   decision was made, as the Sixth Circuit did in this

23   case. "This is strange, they are completely ignoring

24   this evidence. They are cherry picking. They are doing

25   about-faces." That's one.

1   Secondly, if you are at the target center of

2   the zone of reasonableness, and none of those procedural

3   irregularities have arisen, to be sure that the district

4   court reviewing would affirm that judgment --

5   JUSTICE ALITO: How does a reviewing court

6   know how far it can go from the outer boundary of the

7   zone of reasonableness when there is a conflicting

8   interest? Is it always -- and I don't know how thin you

9   can slice these standards of review. Is it always,

10   let's say 90 percent of the way to the outer boundary;

11   or sometimes it would be 80 percent; sometimes it would

12   be 70 percent?

13   MR. ROSENKRANZ: Your Honor, I --

14   JUSTICE ALITO: Does it work like that

15   depending on the facts of the case?

16   MR. ROSENKRANZ: Yes, Your Honor, and that's

17   where the Court can't calibrate. What the Court can do

18   is provide very clear guidance to the lower courts.

19   JUSTICE GINSBURG: And what would -- how

20   would you verbalize it?

21   MR. ROSENKRANZ: I --

22   JUSTICE GINSBURG: Because everybody talks

23   about yes, it's a factor, it's a relevant factor. But

24   if you are writing an opinion to give clear instructions

25   to the district judges who are the first-instance

1 judicial decisionmakers, what do you tell them?

2   MR. ROSENKRANZ: I would say first and

3 foremost -- I would say three things to the district

4 courts. Number one, this is not just some form of

5 arbitrary and capricious agency review with just a

6 little bit more bite. This is reasonableness review

7 under trust law, which is very, very different.

8   Number two, the judicial eye is peeled, as

9 this Court said in Rush, for conflict of interest. Kick

10 the tires. Here are seven, eight, nine illustrations of

11 the sorts of things that lower courts should be on the

12 lookout for as they are trying to discern whether the

13 conflict tainted the result.

14   Number three, if -- if you are at the outer

15 bounds of reasonableness for an unconflicted trustee,

16 you can contract that zone of reasonableness because you

17 don't -- when -- when an unconflicted trustee is right

18 at the outer edge, there is no reason to suspect his

19 motive.

20   JUSTICE KENNEDY: Suppose that the insurance

21 company shows or may be required to show, at least by

22 the burden of production, that it has established

23 firewalls, very careful procedures, written regulations

24 that claims administrators are not to consult with the

25 people that set policy and prices. Does that suffice to

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1   permit, simply, abuse of discretion review?

2   MR. ROSENKRANZ: No, Your Honor. It would

3   be a factor --

4   JUSTICE KENNEDY: So that there is nothing

5   the fiduciary can do in order to avoid intrusive --

6   highly -- a high degree of scrutiny in review of every

7   close case?

8   MR. ROSENKRANZ: Well, Your Honor, first,

9   just to be clear, we are talking about still a

10   deferential standard. It's just not as deferential as

11   it would otherwise be.

12   Absolutely. An insurer can come in and say,

13   look, we've created all these procedures; they have

14   mitigated the conflict, but it can never get --

15   JUSTICE KENNEDY: So that all insurance

16   company claims adjustors have less deferential review

17   than independent claims administrators?

18   MR. ROSENKRANZ: Yes, Your Honor, unless the

19   insurance company comes in and can demonstrate in a case

20   that we've never heard of --

21   JUSTICE KENNEDY: You want us to institute

22   an industrywide rule differentiating insurance companies

23   from other --

24   MR. ROSENKRANZ: Your Honor, one very

25   important thing to say about that is that under trust

1   law, an authorized conflict.

2   JUSTICE BREYER: Well, is there an example

3   in trust law where, say, a bank's a trustee and they

4   self-insure in some area? Is there ever a case in trust

5   law that found that to be a conflict.

6   MR. ROSENKRANZ: I don't understand the

7   hypothetical, Your Honor.

8   JUSTICE BREYER: Well, I mean, you can

9   easily transpose this to other -- trusts are run by

10   banks often that are trustees. They're huge, and they

11   might self-insure in simple -- in certain circumstances,

12   in which case you reproduce something like the conflict

13   that's at issue here. And so --

14   MR. ROSENKRANZ: Well, Your Honor --

15   JUSTICE BREYER: And I think that -- my

16   guess, but I don't know. That's why I'm so nervous. Is

17   there any example where that kind of thing has ever been

18   held to be a conflict of interest?

19   MR. ROSENKRANZ: Only where what the bank is

20   doing is engaging in self-dealing that -- of the sort

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

22   CHIEF JUSTICE ROBERTS: Thank you, counsel.

23   Ms. Saharsky.

24   ORAL ARGUMENT OF NICOLE A. SAHARSKY

25   ON BEHALF OF THE UNITED STATES,

1   AS AMICUS CURIAE,

2   SUPPORTING THE RESPONDENT

3   MS. SAHARSKY: Mr. Chief Justice, and may it

4   please the Court:

5   The Court should not turn a blind eye to the

6   conflict of interest that exists when an administrator

7   both evaluates and pays claims. Instead, an

8   administrator's discretionary decisions should be

9   reviewed for reasonableness where the conflict of

10 interest is considered as a factor. And what that means

11 --

12   CHIEF JUSTICE ROBERTS: We've heard a lot of

13 talk about judicial eyes today, but it doesn't -- it

14 makes it sound as if abuse-of-discretion review is

15 nothing, and with the added factor you want to look more

16 closely. Courts undertaking abuse-of-discretion review

17 don't do it blindly. They look at it. It's just a

18 question of whether they give deference on the judgment

19 calls. And I'm still not -- I still don't understand

20 how the added factor or, in your case, the added seven

21 factors affects that issue of deference.

22   MS. SAHARSKY: Well, we agree with the point

23 you're making, that the question in all of these cases

24 is the reasonableness, where there's a discretionary

25 clause, is the reasonableness of the administrator's

1   determination. That is the ultimate inquiry, and there

2   are any number of other facts and circumstances that

3   could suggest that the decision is unreasonable.

4   JUSTICE SCALIA: And --

5   MS. SAHARSKY: And one fact --

6   JUSTICE SCALIA: But you say that one of the

7   things that can make it unreasonable is the mere fact

8   that there exists this -- this conflict.

9   MS. SAHARSKY: The conflict of interest.

10   JUSTICE SCALIA: That renders what is a

11   perfectly reasonable decision unreasonable. I --

12   MS. SAHARSKY: In very close cases.

13   JUSTICE SCALIA: I don't understand that.

14   In very -- what kind of a standard is that, "in very

15   close cases"? How is -- how are you going to review a

16   court? I mean, give it some weight in very close cases?

17   It slops over. This is not a standard. I don't know --

18   I don't know what you're telling the courts to do.

19   MS. SAHARSKY: Well, this is a standard that

20   comes from trust law, the reasonableness standard, and

21   this Court has recognized similar standards in all

22   different areas of the law where they've talked about --

23   where you've talked about reasonableness and abuse of

24   discretion review --

25   JUSTICE SCALIA: Well, I don't mind

1   reasonableness and I don't mind abuse of discretion.

2   But you're telling me that even when the reasonableness

3   standard is met, if there is this conflict, if it's

4   close -- how close is close? You -- suddenly it flops

5   over the edge. I mean, you know, close to the out --

6   it's -- it's beautiful art, but I don't understand how

7   it turns into law.

8   MS. SAHARSKY: In every case, the court

9   would need to make a decision about reasonableness, and

10   in the cases where there is a conflict of interest that

11   needs to be weighed what the court would do is take a

12   close look at the administrator's rationale --

13   JUSTICE BREYER: Then what analogy? I agree

14   with your basic point. If I encapsulate it, you may or

15   may not agree with my encapsulation. This reminds me a

16   lot of the argument between Learned Hand and Felix

17   Frankfurter under what "substantial evidence" meant.

18   And like Learned Hand, your side, I think, or the first

19   argument, wants to find an absolute standard, a perfect

20   analogy, which Frankfurter said you can't do. Very

21   well.

22   What's worrying me is what is the analogy?

23   Because you're not saying it's just conflict-of-interest

24   law. You are analogizing it to a trustee who himself is

25   a remainderman. And it's at that point that I begin to

1   get off this boat because I'm not sure that's the right

2   analogy.

3   Now, you've looked through lots of cases.

4   Your colleague knows it better than you, and he hasn't

5   come up with something that's a better analogy. But do

6   you see what's bothering me? So, therefore I'm back

7   where I started: Two-sentence, two-word opinion. We

8   did our best in Firestone and this decision below is a

9   good illustration of how to do it. What can you add to

10   what I just said?

11   MS. SAHARSKY: First of all, this Court

12   should say that Firestone correctly set out the

13   framework for the de novo default standard of review and

14   what should happen in the case of a discretionary

15   determination where the plan confers discretion --

16   JUSTICE GINSBURG: Why --

17   MS. SAHARSKY: -- that review should be

18   under the trust law standard.

19   JUSTICE GINSBURG: If we look at Firestone,

20   it's rather laconic. It's just says -- it says,

21   ordinarily, if you don't have this discretionary

22   authority, it's de novo review. And then -- this is on

23   page 115. It says if the fiduciary has discretionary

24   authority to determine eligibility benefits, then it's

25   not de novo. And what more does it say? I don't see

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1   that it says anything more than that.

2   MS. SAHARSKY: Well, both on pages 111 and

3   on 115, this Court was looking to the law of trusts.

4   There's a more extensive discussion on page 111, where

5   it says, for example, "If the trustee is given power to

6   construe disputed or doubtful terms, in such

7   circumstances the trustee's interpretation will not be

8   disturbed if reasonable." And then on page 115, using

9   that abuse of discretion reasonableness standard, the

10   Court said "If there is a benefit plan that gives

11   discretion to an administrator that is operating under a

12   conflict, the conflict must be weighed as a factor."

13   And Firestone told this Court to look to

14   trust law and trust law -- we think the best examples

15   there are the situations of a trustee who is also a

16   beneficiary or a trustee who is also a remainderman.

17   JUSTICE KENNEDY: Suppose an insurance

18   company -- I'll just repeat my earlier question -- has

19   done the best that it can do to have a firewall,

20   independence and so forth. Does that bear on whether or

21   not the less deferential standard of review is invoked?

22   MS. SAHARSKY: The standard of review would

23   be the same, which is review for reasonableness, but --

24   JUSTICE KENNEDY: So it makes no difference

25   what -- it makes no difference what the policies of the

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1   companies are insofar as the standard of review?

2   MS. SAHARSKY: The standard of review is the

3   same, but the outcome could be different in that case

4   because what the insurance company did should be taken

5   into account when the court is making a judgment call,

6   the same kind of judgment call that courts have made in

7   equity cases for years.

8   JUSTICE KENNEDY: This --

9   MS. SAHARSKY: But --

10   JUSTICE KENNEDY: This bears upon the

11   question Justice Breyer asked, which we never could get

12   completely answered. Can you tell me what the Sixth

13   Circuit did wrong here?

14   MS. SAHARSKY: The Sixth Circuit correctly

15   determined that there needed to be greater scrutiny to

16   -- to the claims determination in this case. We would

17   quarrel with the Sixth Circuit's analysis calling that

18   abuse of -- or, I'm sorry, arbitrary and capricious

19   review because we don't think that that analogy to

20   administrative law makes sense. But what the Sixth

21   Circuit did was correct in this. There were a number of

22   factors here, for example the Social Security

23   determination, MetLife's participation in that, that has

24   suggested that this decision was unreasonable and could

25   not be upheld. Conflict of interest was a factor.

1   JUSTICE SCALIA: I don't think you're at all

2   saying that it's the same standard of review. You keep

3   saying that, and your friend said it, but it's not the

4   same standard of review. You say it's still the

5   reasonableness standard of review, but then you say,

6   however, the mere fact of the existence of the conflict

7   does at the edges make unreasonable what used to be

8   reasonable. That is a different standard of review. It

9   means you are not using a single reasonableness standard

10   of review. You're arguing for a second standard of

11   review that is so vague I don't know what it means. Why

12   not just say that the district court, when there is a

13   conflict of this sort, has to spend two more hours

14   considering the case?

15   (Laughter.)

16   MS. SAHARSKY: We think that the answer --

17   JUSTICE SCALIA: There's a clear rule, you

18   know.

19   MS. SAHARSKY: We think that the answer

20   comes from trust law. We think that the answer comes

21   from trust law, and these are judgment calls that courts

22   need to make --

23   CHIEF JUSTICE ROBERTS: But under trust law

24   --

25   MS. SAHARSKY: -- about whether a decision

1   was reasonable.

2   CHIEF JUSTICE ROBERTS: -- we don't have --

3   we don't have an established policy of encouraging

4   people to establish trusts. We do have reflected in our

5   decisions an established policy of encouraging people to

6   set up ERISA plans.

7   MS. SAHARSKY: That's true, but that's

8   balanced against the strict fiduciary duties in ERISA,

9   that in cases of a conflict of interest suggests that

10   the plan administrator's determination needs to get

11   additional scrutiny. I understand that --

12   JUSTICE SOUTER: All right. Here are two

13   ways you could do it. You've spoken of reasonableness

14   analysis. By "reasonableness analysis," I mean and I

15   assume you mean that the person who is judging the

16   action taken says: Here are the good reasons on one

17   side that support the action; and here are the reasons

18   on the other side that in fact are critical of it,

19   suggest that it was wrong. Which one of these sets of

20   reasons is the strongest? That's what I sort of mean by

21   "reasonableness analysis." All right.

22   There are two ways that the structural

23   conflict could be taken into consideration in

24   reasonableness analysis. One is it could be taken into

25   consideration during this -- we'll call it the step one

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1   process. We put the structural conflict on the -- on

2   the side of the scale that weighs against affirming the

3   decision. A second way to do it would be to go through

4   reasonableness analysis leaving the conflict aside for

5   the moment, and say, on regular reasonableness analysis,

6   do the reasons support the decision predominantly or do

7   they go against it, and let it go at that. But when

8   that kind of "reasonableness" analysis results in

9   something close to equipoise, then we take the

10   structural conflict into consideration; and that's what,

11   in effect, sort of breaks the tie.

12   Which of those models do we use? Do we use

13   the structural conflict as a reason in the step one

14   weighing, or do we use the structural conflict as a

15   tiebreaker.

16   MS. SAHARSKY: The structural conflict

17   should be used in the weighing although, for the

18   purposes of your hypothetical, I see the answer as being

19   the same in both situations that you posited. That the

20   conflict of interest would only make a difference in

21   close cases, yes.

22   JUSTICE SOUTER: It's a question of when you

23   use it; and on the first hypothetical, you may not have

24   to use it at all.

25   On the second hypothetical, you have to use

1   it because you can't make a decision any other way. So

2   you're saying: Use it at step one as one of the

3   substantive reasons in your weighing analysis?

4   MS. SAHARSKY: That, we think, would be more

5   consistent with purposes --

6   JUSTICE SCALIA: Well, if you're going to do

7   that, you have to tell me how much it weighs. You see,

8   if you use it in step two when things are in equipoise,

9   it doesn't matter how much it weighs. It's enough if it

10   weighs a feather. In the equipoise case you come out

11   the other way.

12   But if you're going to use it in the first

13   structural system to determine, you know, how much each

14   side -- I have to know its weight. And there is no

15   indication whatever as to what its weight is. It's

16   really up to the district judge, I guess, to decide how

17   much weight he is going to give to the fact that there

18   is this conflict.

19   MS. SAHARSKY: Can I answer the question?

20   CHIEF JUSTICE ROBERTS: Sure.

21   MS. SAHARSKY: I think the problem with this

22   inquiry is that reasonableness does not have

23   mathematical standards. It's a determination that the

24   court needs to make weighing all of the facts and

25   circumstances.

1   JUSTICE SCALIA: I'm not weighing

2 reasonableness. I'm weighing that factor of the

3 conflict. That's what you ask us to weigh.

4   MS. SAHARSKY: I think that --

5   JUSTICE SCALIA: It's not reasonableness.

6   MS. SAHARSKY: The conflict is one of many

7 factors like the Social Security Administration's

8 determination and how it was treated in this case that

9 suggests that the plan administrator's determination was

10 unreasonable. I can't tell you that it weighs 10

11 percent or 20 percent in every case. It is something

12 that the Court has to take into account.

13   JUSTICE SCALIA: Then you should only use it

14 as a tiebreaker, I suggest, if you can tell me.

15   CHIEF JUSTICE ROBERTS: Thank you, counsel.

16   MS. SAHARSKY: Thank you.

17   CHIEF JUSTICE ROBERTS: Miss Posner, you

18 have one minute remaining.

19   REBUTTAL ARGUMENT OF AMY K. POSNER

20   ON BEHALF OF THE PETITIONERS

21   MS. POSNER: Thank you Your Honor. On

22 question one, I think it's important to know that the

23 zone of reasonableness and the size of the field is set

24 forth by the employer when it designates discretionary

25 authority and says that the standard of review is an

1   arbitrary and capricious one in court, which is the same

2   in ERISA as an abuse-of-discretion standard.

3   And the -- and the fact that's common and

4   known to the employer in setting forth that standard,

5   that there is this dual role, shouldn't change that

6   analysis at all, nor should it come into play in any

7   significant way whatsoever in these decisions.   But

8   on question two, if there is a conflict that influence,

9   that's not what the employer was anticipating. And so

10   it -- it changes the size of the permissible field. And

11   to get to Justice Scalia's point, the actual conflict

12   there does matter because it changes the size of the

13   field. It's not what the employer was intending in its

14   plan. Now, if -- also on question two, if you view this

15   as a --

16   JUSTICE SCALIA: What did you just say? I

17   don't understand that. The conflict was intended by the

18   employer. He appointed the --

19   MS. POSNER: Yes. The dual-role conflict

20   that everybody knows exists --

21   JUSTICE SCALIA: Was intended by the --

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

23   Question one, we are saying at that point it doesn't

24   change the size of the field; it doesn't change the zone

25   of reasonableness; and, therefore, it should have no

1   effect.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   The case is submitted.

4   MS. POSNER: Thank you, Your Honors.

5   (Whereupon, at 11:13 a.m., the case in the

6   above-entitled matter was submitted.)

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