No. 06-923

IN THE

Supreme Court of the United States

METLIFE (METROPOLITAN LIFE INSURANCE COMPANY) AND LONG TERM DISABILITY PLAN FOR ASSOCIATES OF SEARS, ROEBUCK AND COMPANY,

Petitioners,

– v. –

WANDA GLENN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The *amici* are a group of law professors who collectively teach and write about ERISA, trust law, and this Court's decision making. We have closely followed this Court's interpretations of ERISA and believe its view that trust rather than contract law governs claims for benefits due under an ERISA plan seriously strays from both the text and purpose of the statute, as well as from Congress's intent to apply trust law selectively in ERISA. We also believe that federal courts have fundamentally misapplied the law of trusts to ERISA benefit claims with the perverse outcome of *lessening* rather than *increasing* protections for ERISA plan participants, contrary to Congress's intentions.[1]

SUMMARY OF ARGUMENT

1. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court made a foundational assumption that donative trust law

[1] Petitioner has filed a letter giving blanket consent to the filing of *amicus* briefs in this case. Additionally, Respondent has consented to the filing of this brief. We have provided each party with notice of our intent to file this *amicus* brief more than 10 days prior to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than the *amici* and their employer, the University of Oklahoma College of Law, made a monetary contribution to its preparation or submission.

provides the paradigm for evaluating a worker's legal entitlement to contractual benefits under an ERISA plan. That assumption is incorrect and should be repudiated, rather than perpetuated, in this case. While trust law may control certain actions under ERISA, see, e.g., *LaRue v. DeWolff, Boberg & Associates*, 522 U.S. __ (2008) (breach of fiduciary duty under 29 U.S.C. § 1132(a)(2)), contract law should govern claims for benefits due under 29 U.S.C. § 1132(a)(1)(B).

First, the separate and distinct causes of action in ERISA's civil enforcement provision—including a claim "to recover benefits due" under a plan, 29 U.S.C. § 1132(a)(1)(B), a claim for breach of fiduciary duty, 29 U.S.C. § 1132(a)(2), and a claim for "other appropriate equitable relief," 29 U.S.C. § 1132(a)(3)—demonstrate that Congress carefully devised different remedies for the different kinds of injuries that may arise in the administration of an ERISA plan.[2]

Second, the injury arising from the erroneous denial of a benefit due under the terms of an ERISA plan has contractual rather than fiduciary origins. This case demonstrates the difference

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[2] A selected legislative history of ERISA, beginning January 1, 1973, is complied in a three volume committee print. See 1-3 Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislate History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1974) (hereafter, Leg. Hist.).

dramatically. Unlike *LaRue*, there is no claim under § 1132(a)(2) for breach of fiduciary duty due to improper "management, administration, and investment" of plan assets, 522 U.S. at __ (Slip Op. at 5). Nor is there any claim for "other appropriate equitable relief" arising from a breach of trust or breach of other fiduciary responsibilities. In this action, there are no plan assets and there is no trust—only a group disability insurance policy purchased by the employer from Petitioner MetLife to pay promised benefits. Moreover, even where an ERISA plan sponsor chooses to fund plan promises through the establishment of a trust, the trust serves not as the *source* of the parties' legal rights and obligation, but merely as a *security device* to help guarantee that the plan sponsor will fulfill the obligations in its bargained-for employee benefit plan. In short, in cases involving unfunded plans or insured plans, as well as in cases involving funds held in trust, an unvarnished claim "to recover benefits due . . . under the terms of [an ERISA] plan," 29 U.S.C. § 1132(a)(1)(B), is nothing more or less than a legal claim of contractual right.

Third, the key exceptions to ERISA's preemption of state law establish that Congress intended state insurance law, not trust law, to govern benefit claims arising under insured welfare benefit plans. The insurance savings clause, 29 U.S.C. § 1142(b)(2)(A), suggests that claims against an insured ERISA plan will be resolved in the same fashion as any state insurance dispute—that is, under state insurance contract law. See *UNUM v. Ward*, 526 U.S. 358 (1999). ERISA's second savings

provision, 29 U.S.C. § 1144(d), which provides that ERISA does not supersede any other federal law, including the delegation of insurance regulation to the states under the McCarran-Ferguson Act, 15 U.S.C. § 1012, reinforces that conclusion.

Accordingly, as a prelude to applying *Firestone*, this Court should disavow the uncritical assumption in that case that donative trust law principles control straightforward claims for benefits due under an ERISA plan. Instead, this Court should apply contract law to such claims, as recommended by the Solicitor General of the United States in *Firestone*. See Brief of the United States as *Amicus Curiae* Supporting Respondents, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)(87-1054), *available on* LEXIS at 1987 U.S. Briefs 1054 (United States *Firestone Amicus* Brief).

2. Even if Congress had intended the law of trusts to govern claims for benefits due under an ERISA plan, federal courts following *Firestone's dicta* have misapplied basic trust law by treating the ERISA plan administrator as an adjudicator rather than a mere fiduciary subject to plenary court review. Moreover, federal courts have ignored the trust law no-further-inquiry rule. That rule imposes an irrebuttable presumption against a self-dealing fiduciary that a conflict of interest caused biased decision making, and as a result mandates *de novo* review of benefit denials by dual-role plan administrators.

First, as a general matter, proceedings in state court for breach of trust or breach of fiduciary duty are plenary in nature. By contrast, federal district courts typically utilize a summary process to resolve ERISA benefit disputes that discards standard procedural and adjudicative tools designed to assure fair deliberation. These courts routinely prohibit ERISA plan participants from conducting discovery or from presenting or cross-examining witnesses to explore the merits of a benefit denial. Instead, as this case demonstrates, district courts usually conduct a summary review proceeding based entirely upon the mis-labeled "administrative record," which essentially consists of nothing more than the claims adjuster's investigatory file.

Given the lack of opportunity for adversarial development of the record—compounded by the absence of formal adjudication by a neutral decision maker—reliance by district courts on administrative law analogies to deny plan participants basic discovery and trial rights enjoyed by almost every other civil litigant in federal court, and certainly afforded every claimant under a state law-governed group disability insurance policy, finds no warrant in this Court's due process jurisprudence, its ERISA decisions, or the common law of trusts. See *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). Further, such summary proceedings fly in the face of clear congressional intent in establishing an original, plenary action in federal court to protect

plan contract benefits, see 29 U.S.C. § 1001(b), after twice rejecting specific proposals to include an administrative adjudicatory process to resolve benefit claims.

Second, lower courts that fail to recognize that dual-role plan administrators operate under an inherent conflict of interest misapply foundational principles of trust law by confusing the existence of a conflict with the need to prove causation. Under the common law of trusts, a beneficiary challenging the decisions of a self-dealing fiduciary does not have to prove causation. Rather, once a beneficiary establishes a fiduciary's conflict of interest, the common law no-further-inquiry rule presumes that the conflict improperly motivated the fiduciary's decision. In the context of self-dealing ERISA plan insurers, the no-further-inquiry rule dictates that trial courts disregard the initial claims decision of the conflicted plan administrator and examine the claims dispute *de novo*. See Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637, 672-684 (2005); cf. United States *Firestone Amicus* Brief, at *17 ("There is no good reason to defer to an employer's construction of the terms of an employee benefit plan when it is paying benefits out of its own pocket."). Indeed, it would be the height of irony to misapply trust law principles in the ERISA context to accord beneficiaries *less* protection, instead of *more* protection, than they enjoyed prior to ERISA, given Congress's declared policy in enacting the statute "to protect . . . the

interests of participants in employee benefits plans and their beneficiaries." 29 U.S.C. § 1002(b).

ARGUMENT

I. CONGRESS INTENDED CONTRACT RATHER THAN TRUST LAW TO GOVERN WORKER CLAIMS TO RECOVER BENEFITS DUE UNDER A PLAN CONTRACT PURSUANT TO 29 U.S.C. § 1132(a)(1)(B).

A. Firestone *has produced confusion and perverse outcomes.*

1. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that an employee's claim for benefits due under an ERISA welfare benefit plan, filed pursuant to 29 U.S.C. § 1132(a)(1)(B), should be evaluated *de novo* by the trial court. *Id.* at 115. The Court's holding essentially endorsed the same fair and reasonable processes historically applied in state court breach of contract actions. See *id.* at 112. Crucial to the Court's holding was the understanding that Congress intended ERISA to help safeguard plan participant rights that, for various reasons, had not been adequately protected when some courts applied trust law to resolve benefit disputes prior to ERISA. See S. REP. NO. 93-127, at 28-30 (1973), *reprinted in* 1 Leg. Hist. 614-16; H.R. REP. NO. 93-

533, at 11-12 (1973), *reprinted in* 2 Leg Hist. 2358-60.[3] The *Firestone* Court notably remarked that:

> Adopting Firestone's reading of ERISA [mandating deferential review of benefit denials] would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.

Firestone, 489 U.S. at 113-114.

The *Firestone* Court agreed with the United States Solicitor General in holding that workers were entitled to a plenary, *de novo* trial. Nevertheless, despite the Court's express rejection of a trust law paradigm as adapted by lower courts from actions implied under § 302 of the Labor Management Relations Act, 29 U.S.C. § 186, the *Firestone* Court failed to adopt the Solicitor General's rationale and conclusion that contract

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[3] See Donald T. Bogan, *ERISA: Rethinking* Firestone *in Light of* Great-West—*Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 650-654 and 664-668 (2004) (hereafter, Bogan, *Rethinking* Firestone) (summarizing history of employee benefit plans legal status); Jay Conison, *Foundations of the Law of Plans*, 41 DEPAUL L. REV. 575 (1992) (providing detailed history of legal status of plans and noting that courts originally viewed employee benefits as unenforceable gifts).

law, not trust law, offered the proper legal paradigm to evaluate ERISA benefit claims. See *Firestone*, 489 U.S. at 109-10.[4] Instead, the Court stated that "[i]n determining the . . . standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law." *Id*. at 111.

2. Confusion with the trust law paradigm in the lower courts, and the injustice of creating a system where courts defer to the decisions of one party to the contract in a breach of contract dispute, see *Sentinel Acceptance Corp. v. Colgate*, 424 P.2d 380, 382 (Colo. 1967) (contract void where seller was granted sole discretion to interpret terms), counsel that this Court should reject trust law as the paradigm to evaluate ERISA employee benefit claims.

The Solicitor General was correct in 1989 when he urged:

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[4] The LMRA analogy is not entirely off the mark; however, lower courts compared the wrong LMRA remedy to ERISA claims for benefits due under a plan. LMRA § 301, 29 U.S.C. § 185, provides an express breach of contract remedy that is analogous to ERISA's claim for benefits due under 29 U.S.C. § 1132(a)(1)(B). See H.R. CONF. REP. 93-1280, at 327 (1974), *reprinted in* 3 Leg. Hist. 4594. LMRA § 301 claims are resolved under contract law standards, not trust law. See *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990). See also Bogan, *Rethinking* Firestone, *supra* n. 3, at 656-60.

> [T]he objectives of the statute are best served by resolving questions of plan interpretation under established principles of contract interpretation, rather than by affirming decisions of the employer-administrator unless arbitrary and capricious. That approach comports with two of ERISA's primary objectives—insulating benefit decisions from the self-interest of employers and ensuring that employees who qualify for benefits actually receive them.
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> * * *
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> Trust analogies are plainly inapposite here . . . since Firestone established no separate body of trust assets to pay severance benefits, and the common law of trusts does not support application of the arbitrary and capricious standard to administrators' decisions in that instance. ERISA's own reliance on trust principles is selective and in no way suggests Congress intended that a highly deferential standard be applied here. . . . Furthermore, review under the arbitrary and capricious standard in cases involving unfunded plans administered by employers would be ironic in that employees

> would be worse off than they were before ERISA was enacted.

United States *Firestone Amicus* Brief, at *16-17.

The *Firestone* Court's statement that trust law governs ERISA benefit claims, inexplicably following the Court's rejection of the LMRA trust law analysis, has produced a result exactly opposite of what the Court expressly tried to avoid, and contrary to Congress's intentions in enacting ERISA. Due to the application of deferential review, nominally applied under trust law in the lower courts, workers are now presented with significantly greater burdens in their efforts to enforce their rights to promised welfare benefits, including disability insurance benefits, than they were prior to ERISA.

B. Congress intended contract law principles to govern actions under 29 U.S.C. § 1132(a)(1)(B).

1. Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans . . . *and to protect contractually defined benefits*." *Firestone*, 489 U.S. at 112 (internal citations omitted) (emphasis added). As this Court is aware, Congress established a comprehensive civil enforcement scheme in ERISA offering plan participants and their beneficiaries a variety of remedies, including a remedy "to recover benefits due . . . under the terms of [a] plan," 29 U.S.C § 1132(a)(1)(B), a

separate remedy for breach of fiduciary duty, 29 U.S.C § 1132(a)(2), and a separate right to recover "other appropriate equitable relief." 29 U.S.C § 1132(a)(3).

An action to recover benefits due under a plan states a claim to recover money damages for breach of contract. While trust law may inform the ERISA remedy for breach of fiduciary duty under 29 U.S.C § 1132(a)(2), trust law has no connection with ERISA's separate remedy to recover benefits due under a plan contract. The law abounds with circumstances where claimants may select from alternative remedies governed by different legal paradigms.

For example, doctors serve as fiduciaries to their patients. *See* Leslie J. Miller, *Informed Consent: I*, 244 JAMA 2100, 2100 (1980) ("[I]nformed consent doctrine is an outgrowth of the Anglo-American concept of the fiduciary relationship."). If a disgruntled patient decides to sue her doctor, she may assert a negligence claim, or a breach of contract claim, or a breach of fiduciary duty claim. If the patient chooses to pursue a breach of contract claim against the doctor, courts do not apply trust law to the action and courts do not defer to the doctor's decision-making, simply because the doctor owed a fiduciary duty to the patient. See *Dingle v. Belin*, 749 A.2d 157, 164 (Md. 2000) ("Most [suits against doctors] are tort-based . . . and occasionally, in misrepresentation or fraud; some are contract-based. When they are pursued either alternatively

or in combination, care must be taken to keep the actions separate and not to allow the theories, elements, and recoverable damages to become improperly intertwined.").[5]

2. This Court's precedents largely support the view that 29 U.S.C. § 1132(a)(1)(B) creates a contractual remedy. With one exception, every time this Court has explored ERISA's civil enforcement scheme to characterize the nature of the statute's various express remedies, this Court has suggested that a claim for benefits due under a plan pursuant to 29 U.S.C. § 1132(a)(1)(B) seeks legal damages for breach of the plan contract. In the sole instance where the Court characterized that claim as one for breach of fiduciary duty, Justice Thomas, joined by Justices O'Connor and Scalia, discredited that *dictum* in a persuasive dissenting opinion passage.

In *Massachusetts Mutual Life Insurance Co v. Russell*, 473 U.S. 134 (1985), the plan participant received all of her of contract benefits after some significant haggling with her insurer/plan administrator. She ultimately sued the insurer complaining of bad faith during the claims

[5] See also *Rash v. J.V. Intermediate, LTD*, 498 F.3d 1201 (10th Cir. 2007) (fiduciary duty and breach of contract claims arising from employment relationship); *Garrett v. Bryan Cave, LLP*, 2000 U.S. App. LEXIS 7339, *11-16 (10th Cir. 2000) (unpublished) (citing Missouri and Oklahoma cases where both negligence and breach of fiduciary duty claims were separately pursued against lawyers).

adjustment process. Since she had received her full contract benefits, the plan participant had no claim under § 1132(a)(1)(B). Consequently, she sued under 29 U.S.C. § 1132(a)(2), seeking extra-contractual damages for the plan administrator's alleged breach of fiduciary duty. In comparing the various remedies contained in § 1132, the *Russell* Court characterized actions under 29 U.S.C. § 1132(a)(1)(B) as claims to recover "contractually authorized benefits." *Russell*, 473 U.S. at 147. See *Mertens v. Hewitt Associates*, 508 U.S 248, 256-58 (1993) (29 U.S.C. § 1132(a)(3), which authorizes a claim for equitable relief, does not allow a claim for money damages, the classic form of legal relief).

In 2002, this Court examined the interrelation of ERISA's civil enforcement scheme in the context of an insurer's claim to enforce its contractual right to subrogation or reimbursement under the terms of the plan. In *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the insurer had paid medical bills for a plan participant, but then wanted to recoup those payments when the plan beneficiary obtained a third-party tort recovery. Because the ERISA provision authorizing recovery of contractual benefits, 29 U.S.C. § 1132(a)(1)(B), runs only to a plan participant or beneficiary, Great-West could not sue under ERISA to enforce its contract rights. Consequently, Great-West tried to craft its pleading as a claim for equitable relief under 29 U.S.C. § 1132(a)(3).

This Court held that despite Great-West's characterization of the claim as one for equitable restitution, it was really just seeking money damages, which were not available under § 1132(a)(3). See *Great-West*, 534 U.S. at 210. Notably, while evaluating the nature of Great West's § 1132(a)(3) claim, the Court contrasted that claim for equitable relief with ERISA's express remedy under § 1132(a)(1)(B) allowing a plan participant "to enforce his rights under the plan." *Great-West*, 534 U.S. at 220-21. See *LaRue v. DeWolff, Boberg and Assocs., Inc.*, 552 U.S. __ (2008) (Roberts, C.J., concurring) (Slip Op. at 3) (suggesting that the plan participant's characterization of her claim as one for equitable relief may have been a ruse to avoid the limitations of ERISA's breach of contract remedy under 29 U.S.C. § 1132(a)(1)(B)).

In *Varity Corp v. Howe*, 516 U.S. 489 (1996), workers sued their former employer seeking individual relief under 29 U.S.C. § 1132(a)(3) for breach of fiduciary duty. A Varity plan fiduciary allegedly made misrepresentations that caused workers to release Varity from its obligations under an existing plan in exchange for coverage under a new plan with a new spin-off corporation. Since the workers were no longer participants in the old plan or employees of Varity, they could not pursue their contractual claim for benefits due under 29 U.S.C. § 1132(a)(1)(B). Instead, the workers pursued a breach of fiduciary duty claim seeking individual damages (and not damages on behalf of the plan)

against Varity for "other appropriate equitable relief" under 29 U.S.C. § 1132(a)(3).

Varity argued that ERISA only allows a claim for breach of fiduciary duty under 29 U.S.C. § 1132(a)(2), and that to construe the "other appropriate equitable relief" language of 29 U.S.C. § 1132(a)(3) as allowing individual damages for breach of fiduciary duty would be redundant. Rejecting Varity's redundancy argument, the *Varity* majority remarked that § 1132(a)(1)(B) also provides a remedy for breach of fiduciary duty. See *id*. at 512 (citing *Firestone*). Justice Thomas directly challenged that remark. He stated:

> The majority apparently believes that . . . 29 U.S.C. § 1132(a)(1)(B) "provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims." *Ante* at 512 (citing *Russell*, 473 U.S., at 144). Since, in the majority's view, § [1132](a)(1)(B) allows for individual recovery for fiduciary breach outside the framework created by §§ [1109] and [1132](a)(2), the majority wonders "[w]hy should we not conclude that Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligation in another, 'catchall' remedial section?" *Ante*, 516 U.S. at 512.

> The answer is simple. Contrary to the majority's misunderstanding, § [1132](a)(1)(B) does *not* create a cause of action for fiduciary breach, and *Russell* expressly rejected the claim that it does. . . . Section [1132](a)(1)(B) deals exclusively with contractual rights under the plan.

See *id*. at 521 n.2 (Thomas, J., dissenting) (emphasis in original).

3. ERISA's express preemption language reveals that Congress did not intend trust law to govern a claim for benefits due under an insured welfare benefit plan. The insurance savings clause in 29 U.S.C. § 1144(b)(2)(A) indicates that Congress intended employee benefit claims arising under insured plans to be resolved under state insurance contract law. See *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379-380, 385-86 (2002) (state insurance law that creates right to appeal health insurance claim denial to independent reviewer does not provide alternate remedy in conflict with ERISA's civil enforcement scheme and is saved from ERISA preemption, even though the state law provides the rule of decision to govern the outcome of an ERISA benefits claim dispute); *UNUM Life Insurance Co. v. Ward*, 526 U.S. 358 (1999) (state notice/prejudice rule, saved from preemption as a law that regulates insurance, provides the rule of decision to resolve ERISA benefit claim under insured welfare benefit plan).

More specifically, under an insurance contract issued in the state of Ohio (as in most states), an insurer owes its insured a duty of good faith and fair dealing. See *Zoppo v. Homestead Insurance Co.*, 644 N.E.2d 397 (Ohio 1994). Within that duty is the obligation to interpret ambiguous policy terms in favor of the insured.[6] Additionally, the insurer typically owes the insured a duty not to construe all contested evidence in its own favor in order to deny coverage. See *Gruenberg v. Aetna Insurance Co.*, 510 P.2d 1032 (Cal. 1973). These duties supplement the underlying insurance contract obligations owed by the insurer, and they are not preempted by ERISA.

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[6] The insurance law duty of good faith and fair dealing here is different than the doctrine of *contra proferentum*. Under *contra proferentum*, a court interprets ambiguous contract terms against the drafter. The duty of good faith and fair dealing applies to the insurer, not the court, and prevents the insurer from advocating for itself in the claims evaluation process. See STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES § 5A:07 (2nd ed.1997) (referencing the contract law reasonable expectations doctrine to differentiate between *contra proferentum* and the insurance law duty of good faith and fair dealing). The insurance law duty arises from the insurer's separate promise to its insureds that by purchasing insurance, the insured is also buying a certain level of security that the insurer will be there for the insured when an emergency arises that causes the insured to make a claim under the insurance contract. See *Beck v. Farmers Insurance Exchange*, 701 P.2d 795, 802 (Utah 1985); *Crisci v. Security Insurance Co.*, 426 P.2d 173, 179 (Cal. 1967).

In *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court ruled in the context of an insurance bad faith claim that ERISA's civil enforcement provision impliedly preempts all state law remedies arising from the denial of benefits under an ERISA plan. Implied preemption in such circumstances, however, only voids the insured's state law bad faith *remedy*; it does not supersede the insurer's state law *duty* to act in good faith. ERISA's express savings clause exception to preemption for state laws that regulate insurance preserves the insurer's duty of good faith and fair dealing, which can provide the rule of decision that will control a claim for benefits due under an ERISA plan. See Donald T. Bogan, *ERISA: State Regulation of Insured Plans after* Davila, 38 J. MARSHALL L. REV. 693 (2005).

Consequently, in actions like this one for benefits due under a fully insured disability benefits plan, ERISA contemplates that the full panoply of state insurance contract law would continue to govern insurers engaged in the claims adjustment process. See also 29 U.S.C. § 1144(d) (saving McCarran-Ferguson Act, 29 U.S.C. § 1012, which delegates the regulation of insurance to the states, from ERISA preemption).

C. Donative trust law is inapplicable when a trust is utilized merely as a security device to help guarantee performance of contractual obligations.

1. ERISA requires sponsors of pension plans to fund such plans through the establishment of a trust or through the purchase of insurance annuity contracts, 29 U.S.C. § 1103(a). However, the statute's funding rules do not apply to welfare benefit plans. See 29 U.S.C. § 1081(a)(1). Consequently, plan sponsors may choose to fund welfare benefit plans through the establishment of a trust, or through the purchase of insurance, or plan sponsors may pay promised benefits out of operating capital. See Bogan, *Rethinking* Firestone, *supra* n.3, at 670-72. When plan sponsors use a trust to fund plan obligations, the trust merely serves as a security device to help guarantee that the employer's contractual promises to pay specified benefits will be performed.

The ERISA trust, when utilized, serves a similar function as the deed of trust in a secured real estate transaction, where a promissory note is backed by an interest in the real estate subject of the purchase. As in the real estate deed of trust, the ERISA trust does not form the basis of the parties' legal obligations and benefits; rather, it is the underlying contract—the promissory note in the real estate deal and the plan contract in the ERISA context—that contains the operative legal promises that define the parties' obligations and benefits.

2. The authors of the RESTATEMENT OF TRUSTS have recognized that principles of donative trust law do not necessarily apply to commercial

trusts or to trusts used as a security device. They write:

> The law relating to the use of trusts as devices for conducting business and investment activities outside the express private- and charitable-trust context is not within the scope of this Restatement . . . . The law relating to the use of a trust as a security device or as an arrangement for the benefit of creditors also is not within the scope of this Restatement.

See RESTATEMENT (THIRD) OF TRUSTS § 1, *comment b* (2003)[7]

3. Congress also doubted whether donative trust law could provide a proper paradigm to evaluate claims arising under an insured welfare benefit plan. Senate Report No. 93-127 on ERISA recites:

> First, a number of plans are structured in such a way that it is unclear whether the traditional law

[7] Additionally, the Restatement includes new language (added since *Firestone*) that addresses the applicability of the Restatement to federal law governing pension plans, indicating that donative trust law does not necessarily apply to the "fundamentally different considerations" applicable to such plans. See RESTATEMENT (THIRD) OF TRUSTS § 1, *comment a* (2003).

> of trusts is applicable. Predominantly, these are plans, such as insured plans, which do not use the trust form as their mode of funding.

S. REP. NO. 93-127, at 28-30 (1973), *reprinted in* 1 Leg. Hist. 614-16.

Further, Congress recognized the incongruity of applying trust law to an ERISA plan that utilizes a trust as a funding device to secure contractual benefits in the context of a commercial transaction, rather than to accomplish a gift among family members:

> [E]ven where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved

> from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section . . . courts applying trust law to employee benefit plans have allowed the same kind of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.
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> It is expected that courts will interpret [ERISA's] fiduciary standards bearing in mind the special nature and purposes of employee benefit plans . . .

S. REP. NO. 93-127, at 28-30 (1973), *reprinted in* 1 Leg. Hist. 614-16.

Thus, ERISA's legislative history establishes that Congress intended fiduciary

principles to supplement contractual obligations where needed to secure protections for plan beneficiaries, rather than to indiscriminately apply a body of law based upon motivations of gratuitous transfers of property to all ERISA plans and causes of action. Indeed, with respect to unfunded or insured welfare benefit plans, like the one at issue, Congress contemplated straightforward contractual rather than donative law principles to govern benefit disputes:

> [The fiduciary responsibility section] when read in connection with the definition of the term "employee benefit fund" makes it clear that the fiduciary provisions apply only to those funds which leave assets at risk. While [ERISA] has the effect of requiring all retirement plans subject of that Act to be financed through the medium of a segregated fund, there may be welfare funds . . . such as those providing sickness or disability benefits, which may not be funded. Thus an unfunded plan in which the only assets from which benefits are paid are the general assets of the employer is not covered.

S. REP. NO. 93-127, at 28-30 (1973), *reprinted in* 1 Leg. Hist. 614-16.[8]

D. Applying donative trust law to this case makes no trust law sense.

When a settlor uses a trust to make a gift to several family members, a trustee may need to make decisions about the distribution of trust assets that affect all beneficiaries. Where a finite trust *res* provides the only funding source for the trust, a distribution to one beneficiary necessarily limits the assets available to distribute to the other deserving beneficiaries. Due to the limited source of funds under such a donative trust, the trustee often must balance the interests of one beneficiary against the interests of preserving the *res* for the remaining beneficiaries. These considerations,

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[8] See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. L. REV. 1315, 1317 (2007) ("There is . . . a profound difference of purpose between ordinary trust law and ERISA fiduciary law. Because the normal private trust is essentially a gift, trust law exhibits great deference to the wishes of the transferor. In ERISA, by contrast, Congress imposed trust law concepts for regulatory purposes, to restrict rather than to promote the autonomy of the employer over its employee benefit plans. This fundamental difference of purpose should lead the Court to restrict the power of an ERISA plan sponsor to alter the standard of judicial review.").

which form the foundation for court deference under donative trust law, have no relation to a contract of insurance. See United States *Firestone Amicus* Brief at *28.

This case, of course, is even further removed from donative trust law than the circumstance of a deed of trust or a commercial trust because Sears did not fund the subject disability benefits plan through a trust. Instead, Sears purchased a group disability insurance policy from the MetLife to implement the promise to its workers to pay disability benefits. The application of donative trust law principles to govern the relationship between insured plan participants and the payor/insurer MetLife under a group disability insurance policy is simply not analogous to the relationship and motivations of a settlor intent on making a gift to family members that is the foundation for the law of trusts.

Rather, in this action, every plan participant or beneficiary who meets the disability criteria of the insurance contract is legally entitled to full benefits, without concern for the rights or claims of other plan participants. See *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050-1051 (7th Cir. 1987) (Posner, J.) ("In the case of defined-benefit pension plans . . . the company has contractual obligations that it must honor whether or not the pension trust is adequately funded."). In the defined benefit disability insurance plan at issue here, there is no legitimate reason for MetLife to balance one plan participant's rights against any

other plan participant's rights. Further, there is no legal basis for the plan administrator, or the Court, to balance the contract rights of existing and deserving plan participants against the employers' interest in keeping future insurance premiums low.

II. EVEN IF CONGRESS INTENDED TRUST LAW TO GOVERN ERISA BENEFIT CLAIMS, FEDERAL COURTS HAVE MISAPPLIED BASIC TRUST LAW BY (1) TREATING THE ERISA PLAN ADMINISTRATOR AS AN ADJUDICATOR RATHER THAN A MERE FIDUCIARY SUBJECT TO PLENARY COURT REVIEW, AND (2) BY IGNORING THE TRUST LAW NO-FURTHER-INQUIRY RULE, WHICH MANDATES *DE NOVO* REVIEW OF BENEFIT DENIALS BY DUAL-ROLE PLAN ADMINISTRATORS.

A. Lower courts have misapplied trust law by treating the ERISA plan administrator as an adjudicator rather than a mere fiduciary subject to plenary court review.

1. In *dicta* that has proven to define the opinion, the *Firestone* Court suggested that under trust law, the payors of employee benefit claims could obtain deferential review of claim denials by inserting magic language into the plan contract granting broad discretionary powers to the plan administrator. See *Firestone*, 489 U.S. at 111, 115. Unsurprisingly, following *Firestone* most plan sponsors have inserted an express grant of

"discretionary" authority empowering the plan administrator to determine eligibility for benefits and to construe plan terms.[9] Relying on the *Firestone dicta*, lower courts now routinely defer to plan administrator decisions to deny worker benefit claims under an abuse of discretion standard of review.[10]

2. Abuse of discretion deference in ERISA has imposed significantly greater obstacles on ERISA plan participants than the application of deference in traditional trust law actions. In trust

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[9] It is questionable whether these self-serving contractual awards of "discretion" grant anything. The act of construing contract terms is a judicial function, not a discretionary act. Additionally, finding facts from conflicting evidence in order to determine a plan participant's eligibility for benefits under the plan contract is an act of adjudication, not a discretionary decision. Nevertheless, lower courts have followed the *Firestone dicta* and allowed ERISA plan sponsors to contract away the duty of loyalty ERISA expressly imposes on fiduciaries who exercise discretion. This *dicta* is particularly unfortunate because ERISA expressly prohibits plan sponsors from including exculpatory clauses in an ERISA plan that purport to relieve a fiduciary from its exclusive duty of loyalty. 29 U.S.C. § 1110. See United States *Firestone Amicus* Brief, at *27.

[10] Most circuits have found that the "abuse of discretion" review standard and the "arbitrary and capricious" review standard are the same and use the language interchangeably. But see *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335 (4th Cir. 2000) (arbitrary and capricious standard of review is more deferential than the abuse of discretion standard, and applying abuse of discretion standard).

cases, courts conduct plenary trials, even while applying deference to a trustee's discretionary decisions in appropriate cases.[11] In ERISA benefit cases, however, lower federal courts typically deny workers the right to conduct discovery or to present live witness testimony in their civil actions to recover promised benefits. See *Liston v. UNUM Corp. Officer Severance Plan*, 330 F.3d 19, 23-24 (1st Cir. 2003) (citing cases). Instead, as was the case here, deferential review of ERISA claims usually entails summary review of a "record" limited to whatever (unsworn) materials the plan administrator relied upon to the deny the claim. See Joint Appendix; *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 981-82 (7th Cir. 1999) ("There should not have been any inquiry into the thought processes of UNUM's staff."); *Perry v. Simplicity Engineering*, 900 F.2d 963, 966-67 (6th Cir. 1990) (even where review is *de novo* under *Firestone* because the plan did not grant discretionary powers to the administrator, review is based upon the record before the plan administrator—no new evidence may be received in court to support the plan participant's claim for benefits).

3. When federal courts employ the summary "record review" process, they confuse adjudicative

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[11] See, e.g., *Noriega v. Pearce*, 2007 WL 4295798 (Cal 2007) (unpublished) (citing California cases); *Hubbell v. Houston*, 441 P.2d 1010, 1012 (Okla. 1967) (breach of fiduciary duty).

deference common under administrative law, see Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 4-5 (2004), with fiduciary deference under trust law. See *Herzberger v. Standard Insurance Co*., 205 F.3d 327, 332 (7th Cir. 2000) (Posner, J.). See also *Perlman*, 195 F.3d at 983-30 (Wood, J., dissenting); Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004). The summary record review process common in ERISA cases mistakes the underlying insurance claims adjustment process for a formal "adjudication" of the dispute.

This Court's decision in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), dramatically underscores the difference in an analogous ERISA context. In *Concrete Pipe*, an employer seeking to withdraw from a multiemployer ERISA plan appealed from an adverse liability assessment by the plan trustees. Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381-1461, plan trustees issue a liability assessment to withdrawing employers in order to reconcile what would have been the employer's anticipated future contributions to the plan for vested pension plan participants. While an employer can appeal the trustees' withdrawal assessment to binding arbitration, see 29 U.S.C. § 1401(a)(1), the MPPAA requires the arbitrator in such an appeal to presume that the trustees'

assessment is correct. See 29 U.S.C. § 1401(a)(3)(A). Concrete Pipe argued that the plan trustees were conflicted in making their withdrawal liability assessment because the trustees owed a fiduciary duty to increase the assets of the plan for the benefit of the remaining plan participants, and that an adjudication of the assessment by such biased trustees, therefore, violated due process standards. See *Concrete Pipe*, 508 U.S. at 615-18.

The *Concrete Pipe* Court held that the arbitrator provides the initial adjudication under the MPPAA, not the trustees. The trustees did not have to provide due process protections to the withdrawing employer, according to the Court, because the trustees were merely a party to the dispute, like a prosecutor presenting charges. See *id*. at 618-19. As such, the trustees could advocate for their position in aggressively assessing withdrawal liability under the statute.

Notably, the *Concrete Pipe* Court also held that the statutory presumptions in favor of trustees' decisions, 29 U.S.C. § 1401, which are analogous to the deference lower courts give to the discretionary decisions of ERISA plan administrators in § 1132(a)(1)(B) benefit actions, were unconstitutional. See *Concrete Pipe*, 508 U.S. at 626-30. In order to satisfy adjudicative due process standards, this Court ruled that MPPAA arbitrator/adjudicators must disregard the statutory presumption in favor of plan trustees in making withdrawal liability assessments. Rather,

the arbitrator must consider each party's position without any presumptions in a plenary, *de novo* adjudication. See *id.*

Similarly in this case, this Court should find that Congress did not intend ERISA plan administrators to serve as "adjudicators," and that trial courts, therefore, must conduct plenary, *de novo* trials for ERISA benefit claims. A contrary conclusion would present thorny constitutional issues. If Congress had intended to relegate adjudication of employee benefit claims to ERISA plan administrators, the Court would have to evaluate whether such relegation of a private contract dispute violates Article III of the Constitution. Plan administrators, of course, are not salary-protected, life-tenured federal judges.[12] Additionally, viewing private plan administrators, appointed by one contracting party without input from the other party to the dispute, as "adjudicators," and then deferring to such conflicted adjudicators on appeal, would raise serious constitutional concerns.[13]

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[12] See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). See generally, Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L. J. 197.

[13] See Mark D. DeBofsky, *What Process is Due in the Adjudication of ERISA Claims*, 40 J. MARSHALL L. REV. 811 (2004). See also Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975) (administrative hearing must provide an unbiased

(footnote continued...)

4. ERISA's legislative history confirms that Congress intended to create an original, plenary proceeding in 29 U.S.C. § 1132(2)(1)(B), governed by the rules of civil procedure and contract law principles.

ERISA recites that Congress enacted the consumer protection law "to protect . . . the interests of participants in employee benefit plans . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). This vital aspect of ERISA withstood several attempts to weaken plan participants' rights to enforce plan promises in a plenary federal court civil action.

The Senate Finance Committee recommended that administrative adjudicatory authority be granted to the Department of Labor under ERISA. See S. 1179, 93d Cong. § 602, at 209-11 (1973), *reprinted in* 1 Leg. Hist. 780, 988-90; S. REP. NO. 93-383 at 116-17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4999-5000,

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adjudicator, notice, opportunity to challenge the proposed action, right to cross-examine adverse witnesses, right to review evidence, right to evidentiary record, right to counsel, articulated reasons for any decision, right to public hearing, and right to judicial review.).

and *reprinted in* 1 Leg. Hist. 1184-85.[14] After the Senate initially rejected this Finance Committee proposal, a later attempt to reinsert the administrative adjudication provision was also defeated. See 120 CONG. REC. 29,563 (1973), *reprinted in* 1 Leg. Hist. 1245-47; 119 CONG. REC. 30,401 (1973), *reprinted in* 2 Leg. Hist. 1835-38. The delegation of adjudicatory authority did not appear in the final Senate Bill submitted to Congress, and of course, does not appear in ERISA. Congress also rejected a proposal to allow arbitration of employee benefit claims, in favor of establishing the right to pursue an employee benefit claim in federal district court as an original, plenary civil action. See H.R. 2, 93d Cong. § 691, at 566-67 (1974), *reprinted in* 3 Leg. Hist. 3813-14; 120 CONG. REC. 29,941 (1974) (remarks of Sen. Javits), *reprinted in* 3 Leg. Hist. 4769.

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[14] A number of lower courts have cited *Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990) to support application of the summary record review process in ERISA claims, referencing the *Perry* Court's suggestion that Congress intended to create a quick and inexpensive claims process in ERISA. See, e.g., *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805, 815-16 (7th Cir. 2006); *Recupero v. New Eng. Tel. & Tel. Co.*, 118 F.3d 820, 831 (1st Cir. 1997). The *Perry* citation to support that conclusion, however, is misplaced. *Perry* cited the legislative history of this effort to impose an administrative dispute resolution process for employee benefit claims, see *Perry*, 900 F.2d at 967, which, of course, Congress ultimately rejected.

5. In *Firestone*, this Court remarked that Congress left a "gap" in the statute by failing to "set out the appropriate standard of review for actions under § 1132(a)(1)(B)." *Firestone*, 489 U.S. at 109. Rather than Congress leaving a gap in the statute, however, the failure of ERISA to include a designated standard of review demonstrates that Congress intended claims under 29 U.S.C. § 1132(a)(1)(B) to proceed as original, plenary actions in federal district court. This is a classic case of the dog that did not bark.[15]

The phrase "standard of review" is generally a term of appellate procedure, and is typically incorporated at the district court level when the district court sits as a quasi-appellate tribunal—for example in an appeal from the ruling of an administrative law judge under the Administrative Procedure Act.[16] That phrase ordinarily does not come into play at the district court level. The

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[15] See Arthur Conan Doyle, *Silver Blaze*, in THE COMPLETE WORKS OF SHERLOCK HOLMES 383, 400 (1938).

[16] In administrative law, a neutral Administrative Law Judge (ALJ) adjudicates a dispute delegated by the legislature to the administrative law process. The Administrative Procedure Act or some enabling legislation typically authorizes the right to appeal from an administrative adjudication. See, e.g., 5 U.S.C. § 702 (right to judicial review), and see 5 U.S.C. § 706(2)(A) (establishing deferential standard); see also 5 U.S.C. § 556(e) (record consists of transcript of testimony and exhibits together with all papers and requests filed in the proceeding).

Federal Rules of Civil Procedure contemplate a plenary, original trial process as the default rule.

While this Court has approved the use of a summary proceeding outside the ambit of the rules of civil procedure in certain very limited circumstances, the Court has only authorized such summary process where Congress has clearly and expressly established its intention to create such an abbreviated proceeding.

> Summary trial of controversies over property . . . rights is the exception in our method of administering justice. . . . [T]he Federal Rules of Civil Procedure provide the normal course for beginning, conducting, and determining controversies. Rule 1 directs that the Civil Rules shall govern all suits of a civil nature . . . Rule 2 directs that "There shall be one form of action to be known as a 'civil action.'" . . . Rule 56 sets forth an expeditious motion procedure for summary judgment *in an ordinary, plenary civil action*. . . . The very purpose of summary rather than plenary trial is to escape some or most [] trial procedures. . . . [S]ummary trials . . . were practically unknown to the English common law and . . . they have little acceptance in this country. In the absence of express statutory

> authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.

New Hampshire Fire Insurance Co. v. Scanlon, 362 U.S. 404, 406-407 (1960) (emphasis added).

Given that Congress did not indicate any intention in ERISA that courts should resolve ERISA benefit claims in a summary appellate fashion, Congress had *no reason* to contemplate in 1974 that this Court would expect some explicit instruction in ERISA directing trial courts to conduct plenary, *de novo* trials in actions for benefits due filed pursuant to 29 U.S.C. § 1132(a)(1)(B).

B. The trust law no-further-inquiry rule prohibits courts from deferring to the decisions of self-dealing fiduciaries

1. Courts misconstrue foundational principles of trust law when they fail to recognize an inherent conflict of interest where the ERISA plan administrator responsible for determining a worker's eligibility for benefits under a plan also serves as the plan insurer. Trust law does not merely recognize that conflict in such circumstances is a possibility; it appreciates the certainty of conflict in the plan administrator who suffers from self-interested financial incentives antagonistic to the interests of the beneficiaries. See UNIF. TRUST CODE § 802

cmt., 7C U.L.A. 590 (2006) ("[Transactions affected by a self-dealing conflict of interest] are irrebuttably presumed to be affected by [the conflict]. It is immaterial whether the trustee acts in good faith or pays a fair consideration."); RESTATEMENT (THIRD) OF TRUSTS § 170 (2003).[17]

Circuit court opinions that suggest dual-role ERISA fiduciaries do not suffer a conflict of interest confuse the existence of a conflict with the need to prove causation. Compare *Mers v. Marriot Internat'l Group Accid. Death and Dismemberment Plan*, 144 F.3d 1014 (7th Cir.), *cert. denied*, 525 U.S. 947 (1998), with *Perlman*, 195 F.3d at 983-85 (Wood, J., dissenting). Under the trust law no-further-inquiry rule, a beneficiary challenging the decisions of a conflicted fiduciary does not have to prove causation.[18] Once the beneficiary establishes the

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[17] See also GEORGE G. BOGERT, ET AL., THE LAW OF TRUSTS AND TRUSTEES § 543 (rev. 2d ed. 1993) ("[I]t is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction.").

[18] See *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.) ("[W]e are told that the [conflicted fiduciary] acted in good faith . . . This is no sufficient answer by a trustee forgetful of his duty. The law does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relationship is disclosed, and sets aside the transaction . . . without undertaking to deal with the question of abstract justice in the particular case. Only by this uncompromising rigidity has the rule of undivided loyalty

(footnote continued...)

fiduciary's conflict of interest, the law irrebuttably presumes that the conflict improperly motivated the decision. See Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637, 672-684 (2005).

2. Any suggestion that Congress intended to displace the trust law no-further-inquiry rule because ERISA allows the plan sponsor to also serve as plan administrator fails to credit

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been maintained against disintegrating erosion.") (internal quotations omitted). See also *In re Ryan's Will*, 52 N.E.2d 909, 923-34 (N.Y. 1943) ("[T]he [no-further-inquiry] rule is founded in the highest wisdom. It recognizes the infirmity of human nature, and interposes a barrier against the operation of selfishness and greed.") (internal quotation marks and citations omitted); *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in the workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by a disintegrating erosion of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than trodden by the crowd.") (internal quotation marks and citation omitted).

Congress's consumer protection goals in enacting the statute, and fails to comprehend Congress's regulatory purpose of overriding historic trust law rules that may otherwise permit settlors more leniency in expressly allowing a trustee under a gift trust to also receive a benefit under the trust. See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. L. REV. 1315, 1317, 1335-1342 (2007). See also S. REP. NO. 93-127, at 28-30 (1973), 1 Leg. Hist. 614-16.

ERISA's express fiduciary provisions—most notably, 29 U.S.C. § 1104(a)(1)(A) (requiring an ERISA fiduciary to exercise its duty of loyalty for the exclusive purpose of providing benefits), and 29 U.S.C. § 1110 (forbidding exculpatory clauses that purport to relieve a fiduciary from its exclusive duty of loyalty)—demonstrate that Congress did not intend to write the most stringent trust law consumer protection, the no-further-inquiry rule, out of the protections afforded plan participants. See *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 568 (1985) ("[T]rust documents cannot excuse trustees from their duties under ERISA."); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 at n.16 (1981) ("Although § 408 (c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's

fiduciary standards while he is performing his responsibilities as trustee.").

CONCLUSION

If this Court fails to correct the defective processes that have evolved in the lower courts from the application of donative trust law to simple breach of contract claims, ERISA plan participants will continue to suffer the tragic irony that following adoption of the celebrated consumer protection statute, workers are worse off now than they were before ERISA was enacted. See *Firestone*, 489 U.S. at 113-114. This Court should re-invigorate its *Firestone* holding that courts must conduct plenary, *de novo* trials for ERISA benefit claims under 29 U.S.C. § 1132(a)(1)(B). Additionally, as urged by the United States Solicitor General in *Firestone,* this Court should now embrace a contract law framework for evaluating such benefit claims.

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March 31, 2008

WORD COUNT CERTIFICATE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,968 words, excluding parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 2008.

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That on 3/31/2008 deponent caused to be served 3 copy(s) of the within

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Case Name: Metlife (Metropolitan Life Insurance) v. Wanda Glenn_(2)

Docket/Case No.: 06-923