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 *AMICI CURIAE* OF TRUST LAW AND ERISA LAW PROFESSORS IN SUPPORT OF RESPONDENT

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Dated: March 31, 2008

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STATEMENT OF INTEREST

Amici and counsel are a group of law professors who teach, study, and write about trust law and/or ERISA law, and who have closely followed this Court's application of trust law to ERISA.[1] Among the group are law professors who are co-authors of leading casebooks and treatises in the field of Trusts and Estates and ERISA. Amici include:

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[1] The parties have consented to the filing of this brief. 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 or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

I. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court, relying on trust law principles, stated that when a benefit plan "gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion." MetLife's primary argument is that a plan administrator who also pays benefits has no conflict of interest unless the claimant can establish that the plan administrator "was motivated by its own self-interest" in reaching its decision. (Petr.'s Br. 16). This argument misunderstands trust law, which sharply distinguishes between conflict of interest and trustee misconduct.

In trust law, a conflict of interest exists when a trustee is in a position to benefit personally from decisions he is authorized to make by the terms of the trust. Trust law recognizes that a trustee will be tempted, consciously or unconsciously, to act unfairly when the interests of the trust beneficiaries conflict with the trustee's personal financial interests. Metlife, the plan administrator, faces a conflict of interest because under its arrangement with the employer, Metlife gets to keep each dollar saved when Metlife concludes that a plan beneficiary is not entitled to benefits.

Moreover, if MetLife's theory were adopted, a conflict of interest would never be "weighed as a 'facto[r] in determining whether there is an abuse of discretion,'" directly violating this Court's command that it "must be weighed." *Firestone*, 489 U.S. at 115 (citation omitted). If a claimant can prove that the plan administrator was actually motivated by self-interest when terminating benefits (the standard articulated by Metlife), there is nothing to weigh; the plan administrator's decision would automatically be vacated. Metlife's theory, then, is inconsistent with the opinion in *Firestone*, as well as with basic principles of trust law.

II. When a plan administrator has a conflict of interest and discretion to distribute plan benefits, the situation is directly analogous to the trustee who is also a remainder beneficiary of the trust, but has discretion to make distributions to one or more income beneficiaries. Both the plan administrator and the trustee are residual claimants who benefit when they deny a claim for distribution. Just as an ERISA plan administrator must exercise discretion to determine whether an employee is "permanently disabled" or "ill", trustees are required to make distributions of trust property pursuant to an objective standard, such as "support," "health" or "education."

When a trust beneficiary challenges the distribution decision of a self-interested trustee, courts focus not on language conferring discretion on that self-interested trustee, but on the standard set out in the trust instrument. Courts carefully scrutinize the trustee's decision to ensure that the self-interested trustee did not exercise its discretion in a way that undermines the trust's objectives.

When they do conclude that the trustee has acted on its conflict of interest to frustrate the trust's purposes, courts hold that the trustee has abused its discretion. Thus, in trust law, the term "abuse of discretion" does not refer to a standard of judicial review, but rather reflects a legal conclusion, most often reached after discovery and trial, that the trustee exercised its discretion in a manner inconsistent with the terms of the trust instrument or the purpose of the trust.

III. ERISA is a regulatory statute designed to protect the beneficiaries of employee benefit plans. Although the common law of trusts serves as the foundation for ERISA's fiduciary duty rules, ERISA's purpose is primarily regulatory rather than enabling. Therefore, ERISA permits even less modification of fiduciary duties than would be permitted under the common law of trusts.

ARGUMENT

I. WHEN THE TRUSTEE'S EXERCISE OF DISCRETION HAS THE POTENTIAL TO BENEFIT THE TRUSTEE PERSONALLY, THE TRUSTEE OPERATES UNDER A CONFLICT OF INTEREST, EVEN IF THE TRUSTEE ENGAGES IN NO MISCONDUCT.

The duty of loyalty, which is fundamental to the law of trusts, generally requires trustees to "administer the trust solely in the interest of the beneficiaries" and prohibits trustees from "engaging in transactions that involve self-dealing." RESTATEMENT (THIRD) OF TRUSTS § 78 (1) and § 78 (2) (2003). ERISA is built on the trust law model; tracking trust law language, ERISA provides, subject to exceptions not applicable in this case, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. §1104(a)(1).

In its opinion in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), this Court recognized that ERISA benefit determinations can present conflict of interest problems, and indicated that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)). This focus on conflicts of interest limited the power of employers to immunize benefit denials from meaningful judicial review by inserting "magic words" into the relevant plan documents.

MetLife has argued that there is no conflict, and hence no occasion for careful scrutiny of the plan administrator's determination, unless "a plaintiff is able to make a showing that the fiduciary was actually infected by self-dealing when making the challenged decision." (Petr.'s Br. at 25). This argument is inconsistent with both language and logic. If a plaintiff could show that the fiduciary was "infected by self-dealing" in making a concrete benefits decision, no heightened scrutiny would be necessary; the demonstration that the plan administrator acted out of an improper motive in denying a beneficiary's claim would, by itself, require that the decision be annulled. The Court's conclusion that a conflict "must be weighed" in determining whether there has been an abuse of discretion necessarily contemplates that a "conflict" can exist without proof that the plan administrator's decision was "infected by self-dealing."

In reaching a result consistent with the logic of this Court's opinion in *Firestone*, the Sixth Circuit has concluded in this case that a claim administrator of an ERISA plan who also funds the plan benefits operates under a conflict of interest, and thus triggers more searching judicial review. That conclusion, consistent with the common law of trusts, has been endorsed by the majority of other Courts of Appeals to address the issue. *See, e.g., Post v. Hartford Ins. Co.,* 501 F.3d 154, 161-164 (3d Cir. 2007); *Carolina Care Plan Inc. v. McKenzie,* 467 F.3d 383, 386-387 (4th Cir. 2006), *cert. dismissed*, Nos. 06-1182 & 06-1436 (July 30, 2007); *Vega v. National Life Ins. Servs., Inc.,* 188 F.3d 287, 295-296 (5th Cir. 1999) (en banc); *Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955, 965-966 (9th Cir. 2006) (en banc); *Fought v. UNUM Life Ins. Co. of Am.,* 379 F.3d 997, 1003 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005); *Brown v. Blue Cross & Blue Shield of Ala., Inc.,* 898 F.2d 1556, 1561, 1566-1567 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991). These courts recognize that proof of misconduct is not necessary to establish the existence of a conflict of interest. By contrast, if a trust beneficiary establishes that self-interest improperly affected the trustee's decision, the beneficiary has established a breach of trust; the existence of a conflict of interest becomes entirely irrelevant.

Trust law generally prohibits a trustee from engaging in transactions with the trust, even if the trustee's actions do not harm the trust beneficiaries. The prohibition on unauthorized trustee self-dealing is designed to ensure that the trustee does not place its personal interests ahead of the interests of the trust beneficiaries:

> [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. Consciously or unconsciously he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is personal to the trustee, selfishness is apt to lead him to give himself an advantage.

GEORGE GLEASON BOGERT ET. AL, TRUSTS & TRUSTEES §543 (rev. 2d ed. 1993). As a result, unless the trust settlor authorized the trustee to act despite his conflict of interest, courts conclusively presume that the conflict affected the trustee's decision. It is "immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee." RESTATEMENT (THIRD) OF TRUSTS §78 cmt. b (2003).

A trust instrument may, expressly or implicitly, authorize a trustee to engage in transactions with the trust, despite the inherent conflict of interest. But express authorization does not make the conflict of interest disappear. It merely relieves the trustee from the absolute prohibition on self-dealing. *See In re Flagg's Estate*, 73 A.2d 411 (Pa. 1950) (holding that when settlor names trustee with knowledge that the trustee has a conflict, the settlor's authorization "necessarily modified or displaced the otherwise absolute limitation against self-dealing"). Instead of conclusively presuming that the conflict affected the trustee's decision, a court will scrutinize the transaction to ensure that it furthers the settlor's objective in creating the trust and authorizing the conflict. *See* RESTATEMENT (THIRD) OF TRUSTS §37, cmt. f(1) (2003)("when a beneficiary serves as trustee or when other conflict-of-interest situations exist, the conduct of the trustee in the administration of the trust will be subject to especially careful scrutiny"); 3 SCOTT AND ASCHER ON TRUSTS SEC. 18.2 (5TH ED. 2007) (recognizing that court reviewing whether trustee has abused discretion should take account of "the existence or nonexistence of an interest of the trustee that conflicts with an interest of any of the beneficiaries," among other factors).

Trust law recognizes that settlor-authorized conflicts are conflicts nevertheless, even if the conflict does not lead to breach of fiduciary duty. *See, e.g., Clement v. Larkey*, 863 S.W.2d 580, 582 (Ark. 1993)(recognizing that when trust settlor names trustee as beneficiary "conflicts of interest and coincidental benefits to that trustee-beneficiary inevitably result")(quoting RESTATEMENT (SECOND) OF TRUSTS §99 (1957)). Courts have often distinguished between conflict of interest and fiduciary misconduct, concluding that when the dispositive instrument confers on the fiduciary discretion to act in ways that might benefit the fiduciary personally, the fiduciary's actions are subject to close judicial scrutiny, but do not constitute misconduct if they advance the purpose of the dispositive instrument. For example, in *Goldman v. Rubin*, 441 A.2d 713 (Md. 1982), the Maryland Court of Appeals distinguished between conflict of interest and misconduct: "the personal representatives have not breached their trust simply from the fact that one or more of them had conflicting personal interests." *Id.* at 724.

Trust law also distinguishes between conflict of interest and trustee misconduct in cases where trust beneficiaries seek removal of a trustee who has a conflict. For instance, in *In re Foss' Will*, 125 N.Y.S.2d 105, 109 (N.Y. App. Div. 1953), the court refused to remove a co-executor, despite an apparent conflict of interest, because "[m]isconduct, not conflict in interest, merits removal of a fiduciary." Testator had named his lawyer, who was officer, director, and house counsel of a firm against whom testator's estate had a contract claim, as a co-executor of his will. Legatees under the will objected to the lawyer's appointment, citing the conflict of interest. In rejecting their claim, the court noted that if the conflict of interest ripened into misconduct, the "objectants will not be left without remedy." *Id. See also Lovett v. Peavy*, 316 S.E.2d 754, 757 (Ga. 1984)(trustees who were also remaindermen not removed, despite their temptation to "favor themselves unduly in the administration of the trust"); *Whan v. Whan*, 542 S.W.2d 7, 11 (Mo. Ct. App. 1976) ("conflict of interest alone need not compel a court to remove trustees," but breach of duty justified removal).

The Restatement (Third) of Trusts also makes it clear that the trustee's potential to benefit from its fiduciary position creates a conflict of interest, even if settlor's knowledge of the conflict does not justify removal of the trustee. A comment to Section 37 (Removal of Trustees) provides:

> [T]he fact that the trustee named by the settlor is one of the beneficiaries of the trust, or *would otherwise have conflicting interests,* is not a sufficient ground for removing the trustee . . . .

RESTATEMENT (THIRD) OF TRUSTS §37 cmt f(1) (2003)(emphasis added). The comment goes on to provide that "when a beneficiary serves as trustee or when other conflict-of-interest situations exist, the conduct of the trustee in the administration of the trust will be subject to especially careful scrutiny." *Id.*

Hence, the common law of trusts, both in doctrines relating to judicial review of trustee decisions, and in doctrines concerned with removal of trustees, has established that a conflict of interest can exist without fiduciary misconduct -- the common sense conclusion reached by the Sixth Circuit in this case.

II. WHEN A TRUST INSTRUMENT CONFERS DISCRETION ON A TRUSTEE WHO IS ALSO A BENEFICIARY, COURTS CAREFULLY SCRUTINIZE TRUSTEE DECISIONS DENYING PAYMENT TO OTHER BENEFICIARIES TO ENSURE THAT THE PAYMENT DENIAL IS CONSISTENT WITH THE STANDARD ARTICULATED IN THE INSTRUMENT.

In *Firestone,* this Court, after holding that benefit determinations by ERISA plan administrators should generally be subject to *de novo* judicial review, suggested that the holding would apply "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). The Court identified trust law as the source for this exception: "Neither general principles of trust law nor a concern for impartial decision making, however, forecloses parties from agreeing upon a narrower standard of review." *Id.* But the Court also recognized that even when the employer confers discretion on a plan administrator, courts must consider an administrator's conflict of interest in reviewing the administrator's exercise of discretion. *Id.*

These two conclusions accurately restate established principles of trust law, but do not fully capture the limits on a trust settlor's power to insulate a trustee from judicial review. First, "abuse of discretion" is a conclusion of law, not a standard of review. A court determining whether a trustee has abused its discretion never simply refers to the language of the trust or applies any other simple formula. Instead, the beneficiary is entitled to whatever discovery state law allows, followed by a trial on the merits. Second, whenever a trust instrument confers discretion on a trustee with a conflict of interest, and imposes standards on the trustee's exercise of discretion, a court will scrutinize the trustee's decision to ensure that it is consistent with the standard and the trust's objectives.

A. In the Law of Trusts, "Abuse Of Discretion" is not a Standard of Review, but a Legal Conclusion that the Trustee's Exercise of Discretion Constituted Breach of Fiduciary Duty

MetLife relies on the law of trusts to argue that the determination of an ERISA plan administrator with a pecuniary interest in denying benefits should be subject to judicial scrutiny for "abuse of discretion." MetLife then takes the argument one step further by contending that the "abuse of discretion" standard "closely resembles" the "arbitrary and capricious" standard applied to review of many administrative determinations. (Petr.'s Br. at 34). These contentions misunderstand the law of trusts.

In trust law, "abuse of discretion" is not a standard of review at all, but a legal conclusion, most often reached after discovery and a trial, that the trustee exercised its discretion in a manner inconsistent with the terms of the trust instrument or the purpose of the trust. Whenever a trust instrument confers discretion on a trustee, and the court concludes that the trustee's exercise of that discretion breached a duty to a trust beneficiary, a court is apt to conclude that the trustee "abused its discretion." This conclusion, however, says nothing about the level of scrutiny the court applied to the trustee's determination. Thus, in discussing abuse of discretion, the Restatement (Third) of Trusts provides, "judicial intervention on the ground of abuse is called for … because the trustee's decision is one that would not be accepted as reasonable by persons of prudence. Thus, a court may properly interpose if it finds that the trustee's conduct, in exercising a discretionary power, fails to satisfy the applicable standard of care and skill." RESTATEMENT (THIRD) OF TRUSTS §87 cmt. c (2003).

This focus on "reasonableness," "prudence, "care," and "skill" bears no relationship to the "arbitrary and capricious" standard familiar to administrative law. Moreover, the language of the trust instrument may constrain or expand the trustee's discretion in countless ways, making it impossible to treat "abuse of discretion" as a coherent standard of review. As Bogert observes:

> In addition to the commonly recognized factors used to determine whether there had been an abuse of discretion, a standard of reasonableness has been applied by the courts in judging the exercise of a discretionary power (whether simple or absolute), a standard

> implied from the settlor's intent and the purposes expressed in the trust instrument. With respect to court review of discretionary powers, this standard is consistent with the standard of care and skill of a prudent man and is based upon established fiduciary standards and principles.

GEORGE GLEASON BOGERT ET. AL, TRUSTS & TRUSTEES §560 (rev. 2d ed. 1993)(footnotes omitted). *See also* RESTATEMENT (THIRD) OF TRUSTS § 87, cmt. b (2003) (stating that "[w]hat constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty. Also relevant is the extent of the discretion conferred upon the trustee." (citation omitted)).

What constitutes an abuse of discretion in trust law cannot therefore be reduced to a simple formula, but necessarily involves an evaluation of many factors. The language of the trust instrument is not dispositive. *See id.* §78 cmt. c(2) (explaining that "no matter how broad the provisions of a trust may be in conferring power to engage in self-dealing or other transactions involving a conflict of fiduciary and personal interests, a trustee violates the duty of loyalty to the beneficiaries by acting in bad faith or unfairly").

In determining whether a trustee has abused its discretion, some courts have held explicitly that when a settlor confers discretion on a trustee who might exercise that discretion in a self-interested fashion, the trustee bears the burden of justifying or explaining self-interested exercises of discretion. See *Estate of Ahrens,* 71 N.Y.S.2d 462, 465 (N.Y. App. Div. 1947). Other courts have not expressed their decisions in burden of proof terms, but have independently weighed the evidence before the trustee, or examined the basis of the trustee's determination with greater care and skepticism.

Courts, therefore, have overturned the discretionary determinations by trustee-beneficiaries on facts that suggest that the trustee's action was inconsistent with the purpose of the trust. Thus, in *Waits v. Hamlin,* 776 P.2d 1003, 1006 (Wash. Ct. App. 1989), the court reversed a trial court determination upholding the trustee-widow's decision to allocate umbrella trust proceeds to her own trust, rather than funding trusts designed for the settlor's first wife and children. The court emphasized that "[t]he intent and purpose of the settlor must be derived from the terms of the instrument, construing all of its provisions together," even though the trust instrument provided that trustee's "decision, in the allocation of funds to the three (3) Trusts, shall be in her sole discretion and final." *See also Carter v. Young*, 137 S.E. 875, 878 (N.C. 1927) (emphasizing that the settlor's conferral of broad discretionary powers on an interested trustee does not relieve courts of the obligation "to effectuate the purpose and intent of a testator"); *Garvey v. Garvey*, 22 N.E. 889, 890 (Mass. 1889) (substituting its discretion for trustee's where trustee refused to make payments to trust beneficiary when the "purpose and legal effect" of the trust instrument is to give beneficiary the right to payments "if he is thus in need," despite trust language leaving the decision to make payments "entirely to the good judgment of the said trustee").

Of course, sometimes courts sustain an exercise of discretion by a trustee with a conflict of interest. MetLife erroneously suggests that these cases stand for the proposition that "courts do not weigh [the] conflict in reviewing trustees' decisions" (Petr.'s Br. 24) but instead "presume" that a fiduciary with dual loyalties is acting "in accordance with [its] fiduciary obligation" to the trust. (Petr.'s Br. 32). But a careful reading of the cases on which MetLife relies reveals that in each case, the reviewing appellate court engaged in a searching analysis of the evidence to ensure that the trustee had not benefited from his position in a way that undermined the trust's objectives. [2] In no

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[2] Indeed, in most cases, the decision whether a trustee had abused discretion was made only at the conclusion of a trial on the merits. See *Estate of Gilliand*, 140 Cal. Rptr. 795, 797, 801-02 (Cal. Ct. App. 1977)(holding, "after a lengthy trial," that trustees did not abuse discretion because they relied on an independent evaluation by an accounting firm, and declining to remove trustee with a conflict of interest because the trustee's decision furthered the settlor's objectives); *Delaware v. Belin*, 456 So. 2d 1237, 1240--42 (Fla. Dist. Ct. App. 1984) (holding , after "an extended [trial] with conflicting expert testimonies offered by both sides,"that trustees operating pursuant to a settlor-authorized conflict of interest did not abuse discretion because they did not benefit personally and reasonably relied on independent advice); *Estate of Alexander*, 171 S.W.3d 794, 794-95(Mo. Ct. App.

(footnote continued...)

case did the court treat the trustee's conflict as irrelevant or the trustee's decision as presumptively valid.

For example, MetLife relies on *Gregory v. Moose*, 590 S.W.2d 665 (Ark. Ct. App. 1979) for the proposition that courts "presume" that trustees operating under a conflict of interest have acted in good faith and in accordance with fiduciary

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2005)(declining, after a bench trial, to remove trustee operating under a settlor-authorized conflict because trustee reasonably relied on the advice of counsel in making decisions as trustee); *Rosencrans v. Fry*, 95 A.2d 905, 909, 913 (N.J. 1953)(finding, after trial, that trustee's acts furthered the settlor's objectives in creating the trust); *Bank of Nev. v. Speirs,* 603 P.2d 1074, 1076 (Nev. 1979)(finding that trustee did not abuse discretion in failing to purchase additional stock of family corporation for trust because he relied on expert opinion that he should diversify trust assets); *Huntington Nat'l Bank v. Wolfe*, 651 N.E.2d 458, 462 (Ohio Ct. App. 1994)(holding, after trial, that trustees who were officers of family corporation in which trust held stock did not breach their fiduciary duty because the settlor must have intended that the trustee "would take into consideration the interest of the corporation as well as the interest of the beneficiary in making any decisions concerning the family corporations' stock"); *In re Pincus' Estate*, 105 A.2d 82, 86--87 (Pa. 1954)(holding that attorney who operated pursuant to a settlor authorized conflict had not breached his duty to the trust because "[t]here is not a scintilla of evidence in the instant case which could possibly by construed as establishing bad faith"). The other cases MetLife cites for this proposition do not involve trustees operating under a conflict of interest. See *Jarvis v. Boatmen's Nat'l Bank*, 478 S.W. 2d 266 (Mo. 1972); *Rice v. People's Savs. Bank*, 247 P. 1009 (Wash. 1926).

obligations. (Petr.'s Br. 25, 32 & 43). MetLife's reliance on *Gregory* for this point is problematic, for two reasons. First, the trustee's act did not appear to implicate the duty of loyalty. The trustee sold real property held by the trust to disinterested third parties. The only way in which trustee benefited from the sale was by virtue of his status as one of the trust beneficiaries. Trustee could not have benefited disproportionately, either directly or indirectly, from the sale. As a result, the court properly rejected the beneficiary's argument that the trustee was guilty of self-dealing, distinguishing cases where the trustee acquired property in his own name, or "in the name of another to his own benefit, or profiting in an improper way in the handling of trust assets." *Id.* at 670.

Second, the court justified its conclusion that the trustee did not abuse its discretion by emphasizing that the trustee had obtained a thorough and detailed appraisal prior to deciding on the sale price. This evidence, produced during discovery and introduced at trial, established that the trustee had exercised "that degree of skill and care as a man of ordinary prudence would exercise in selling his own property." *Gregory*, 590 S.W.2d at 669. In coming to this conclusion, the court considered and rejected plaintiff's expert testimony that the land was worth more, dismissing it as unpersuasive because the expert formed his opinion more than three years after the sale. Therefore, although the court concludes in the last paragraph of its opinion that a trustee is "presumed" to have acted in good faith, *id.*, the court's analysis belies that statement. Because the court closely scrutinized the trustee's decision- making process, and took pains to establish that trustee did not improperly benefit from the sale, *Gregory* simply does not establish the proposition that courts defer to the decisions of trustees operating under a conflict of interest.

B. When a Trust Instrument Confers Discretion on a Trustee who is also a Remainder Beneficiary, and Constrains that Discretion by Reference to a Standard, Courts Review the Trustee's Discretion to Ensure Consistency with the Standard.

Although ERISA benefit plans, including the plan at issue in this case, may confer broad discretion on the plan administrator, the administrator's discretion is nonetheless limited by a standard. For example, the administrator may be required to determine whether the employee is "disabled", or whether certain medical fees are reasonable and customary. Even if benefit plans confer discretion on plan administrators to interpret and apply a standard, they do not authorize fiduciaries to ignore those standards in making distribution decisions. Especially when the plan administrator is a residual beneficiary who gains whenever it denies an employee-benefit claim, there is a danger that the plan administrator will improperly consider its own best interests in interpreting the standard.

An identical situation arises in trust law when a settlor names the remainder beneficiary as trustee, and confers on the trustee discretion to make payments to income beneficiaries in accordance with an ascertainable standard. The less the trustee pays to the income beneficiaries, the more will remain in the trust for distribution to the trustee at the trust's termination. As in the instant case, the trustee may, consciously or unconsciously, interpret the standard unreasonably to increase the amount available to the trustee.

When the trust document sets out a standard to guide the trustee-remainderman in exercising discretion, courts do not defer to the trustee's determination; instead, they carefully scrutinize the trustee's decision to ensure that the decision constitutes a reasonable interpretation and application of that standard. The inference that the settlor has reposed confidence in the trustee must be balanced against the "general recognition that a trustee-beneficiary's conduct is to be closely scrutinized for abuse, including abuse by less than appropriate regard for the duty of impartiality." RESTATEMENT (THIRD) OF TRUSTS §79 cmt. b(1) (2003). Courts have not hesitated to scrutinize carefully the trustee's decision to ensure that the trustee was not motivated by a desire to preserve or increase the trust principal at the income beneficiary's expense.

For example, in *Briggs v. Crowley,* 224 N.E.2d 417, 421 (Mass. 1967), the court held that the probate court had improperly sustained the demurrer of a trustee-remainderman who had discontinued payments to life beneficiaries, despite trust language making "the necessaries and comfort" of the life beneficiaries the "principal purpose" of the trust. *Id.* at 419, 421-22. The trustee had relied on language in the same paragraph providing that the "trustees, at their discretion, may permanently withhold all money, materials, provisions, benefits, or otherwise of every name and nature from any one or more of the beneficiaries." *Id.* at 419. Despite that language, the court credited the income beneficiaries' contention that "such power and discretion must be exercised by the trustees in conformity with the stated purposes of the trust," and held that the income beneficiaries had adequately alleged that the trustee had "not exercised their discretion in accordance with this standard." *Id.* at 421-22. See also RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. b (2003) ("What constitutes an abuse of discretion depends on the terms and purposes of the trust, and . . . any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty"); RESTATEMENT (THIRD) OF TRUSTS § 50(2) (whether a trustee has abused her discretion "depend[s] on the terms of the discretion, including the proper construction of any accompanying standards").

Similarly, in *Pollok v. Phillips*, 411 S.E.2d 242 (W. Va. 1991), the West Virginia Supreme Court reversed the lower court's determination that the trust document's broad grant of discretion limited the court's power to review the decision of a trustee/remainderman. Although the trust document provided that the trustee had "sole" discretion to distribute income to trustee's husband and son, the court focused on language directing that if either the husband or son became incapacitated, the trustee "may use so much of such income for his … support, maintenance and welfare as the Trustee determines to be required for those purposes." *Id.* at 243. In holding that the trustee had abused her discretion in failing to make more substantial payments for the son's support after he became incompetent, the court emphasized that even when settlor uses words of discretion, "a trustee is required to act within the bounds of reasonable judgment so as to carry out the settlor's overall intent." *Id.* at 244. The court emphasized that the trustee's conflict of interest was "an additional fact which compels this Court . . . to conclude that it should not be held that the trustee has unbridled discretionary powers." *Id.* at 245.

Further, in *Estate of McCart*, 847 P.2d 184, 186 (Colo. Ct. App. 1992), the court held that when the trust instrument required the trustee-remainderman to provide settlor's spouse with the standard of living to which he was accustomed, even language conferring "sole" and "absolute" discretion did not insulate the trustee's determinations from close judicial scrutiny. The court upheld the trial court's determination to fix both past and future distributions to the spouse, noting that the language of the trust instrument "directs the trustee to maintain, not ascertain, a standard of living calculated upon a *non-variable* factor, settlor's and McCart's years together." *Id.* at 187 (emphasis in original). In other words, because the trustee's discretion was limited by an ascertainable standard, the court was in a particularly strong position to scrutinize the decision of a self-interested trustee.

Other cases take the same approach: when a settlor confers discretion on an interested trustee, but limits that discretion by an ascertainable standard, courts carefully scrutinize the trustee's decisions, evaluating the determinations against the standard set out in the trust instrument. *See, e.g., In re Manahan's Estate*, 125 N.W.2d 135, 138 (Iowa 1963)(overturning determination of trustee-remainderman denying tuition to settlor's grandchildren, concluding that even if trustees had discretion, the discretion "was limited to a determination of whether applicant qualified" under the trust's terms providing for educational assistance); *Garvey v. Garvey*, 22 N.E. 889, 890 (Mass. 1889) (overturning trustee-remaindermen's refusal to make payments to brother, despite illnesses and deaths of family members, because trust instrument required payments in the event of "sickness or other misfortune").

The temptations that faced the trustee-remaindermen in each of these cases are precisely the same temptations that face the ERISA plan administrator in cases where the administrator also funds the plan. In each case, denying benefits preserves assets for the benefit of the remainderman/plan administrator. In this situation, trust law honors the settlor's wishes by permitting the trustee to make the benefits decision, but casts a watchful eye over the decisionmaking process to ensure that the trustee's decision is faithful to the standard set forth in the trust instrument.

Moreover, even when the trust instrument confers absolute discretion on the trustee, rather than constraining that discretion by a standard, courts carefully scrutinize the trustee's determination. Such cases, of course, are rare, because "[a] fair reading of the whole of most trust instruments will reveal a 'judicially enforceable, external, and ascertainable standard' for the exercise of even broadly expressed fiduciary powers." *Briggs v. Crowley*, 224 N.E.2d 417, 421 (Mass. 1967) (quoting *United States v. Powell*, 307 F.2d 812, 826 (10th Cir. 1962)). And certainly, ERISA benefit plans furnish courts with an ascertainable standard against which to measure the plan administrator's determinations.

Nevertheless, in the few cases in which the settlor provides no express standard against which to measure the self-interested trustee's discretionary determinations, courts have been unwilling to defer to determinations that favor the trustee over other beneficiaries. For example, in *Waits v. Hamlin,* 776 P.2d 1003 (Wash. Ct. App. 1989), the court overturned a widow's decision to allocate moneys to trusts for her own benefit, but not for benefit of settlor's ex-wife, even though the trust instrument provided that the widow's allocation decisions "shall be in her sole discretion and final." And in *Carter v. Young*, 137 S.E. 875 (N.C. 1927), the court overturned a widow's decision not to allocate funds to settlor's grandson even though the trust instrument gave the widow power to allocate "in such proportions and in such manner as she herself may decide." It is critical to note that in *Waits* and *Carter,* the court did more than overturn a decision by a trustee who had been granted sweeping discretion. In each case, the court overturned a discretionary determination by a trustee whose personal well-being was a prime focus of the trust instrument. A conflicted claim administrator should be accorded even less judicial deference, as the administrator has no comparable right to benefit from an employee-benefit plan.

Indeed, judicial suspicion of the decisions of self-interested trustees is apparent in all areas of trust law. *See Mesler v. Holly,* 318 So. 2d 530, 533 (Fla. Dist. Ct. App. 1975) (indicating that a trustee who is also the life beneficiary of a trust bears the burden of explaining how allegedly excessive distributions made to herself are consistent with the standard set forth in the trust instrument). In some situations, courts have held that an interested trustee has no power to act in his own interest, despite the language of the trust instrument. For instance, a number of cases have held that a trustee who is also a life beneficiary may not exercise discretion in favor of himself without prior judicial authorization. *See, e.g., Rogers v. Rogers,* 18 N.E. 636, 638 (N.Y. 1888); *Armington v. Meyer*, 236 A.2d 450 (R.I. 1967).

The concern reflected in these cases is the same concern that mandates closer scrutiny of the decisions of the trustee-remainderman than of the decisions made by a disinterested trustee: self-interest is a powerful force that requires application of judicial checks and balances, whatever the language of the trust instrument. *Compare* RESTATEMENT (THIRD) OF TRUSTS §50 cmt b (2003), illus. 1, *with id.*, illus. 2 (noting that courts will review a disinterested trustee's exercise of discretion only for abuse, but will carefully scrutinize for reasonableness the exercise of discretion by an interested trustee).

C. Cases Involving Trusts That Hold Stock in Family Businesses are not Analogous to the ERISA Context, and do not Establish that Courts Defer to Discretionary Decisions made by a Trustee with a Conflict of Interest.

Many of the cases on which Met Life relies for the proposition that courts apply a deferential standard of review involve trustees who are also officers and directors of family businesses in which the trust holds stock. In these cases, the trust settlor does not intend for the trustee to have undivided loyalty to the trust beneficiaries. Instead, the settlor has dual objectives -- she wants to benefit both the trust beneficiaries and the family business – and she expects the trustee, who is also a fiduciary for the family business, to balance those objectives.[3]

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[3] *See Huntington Nat'l Bank v. Wolfe*, 651 N.E.2d 458, 467-68 (Ohio Ct. App. 1994) (holding, after trial, that trustees who were officers of family corporation in which trust held stock did not breach their fiduciary duty because the settlor must have intended that the trustee "would take into consideration the interest of the corporation as well as the interest of the beneficiary in making any decisions concerning the family corporations' stock"); *Rosencrans v. Fry*, 95 A.2d 905, 909, 913 (N.J. 1953); *Bank of Nev. v. Speirs,* 603 P.2d 1074, 1076 (Nev. 1979); *Estate of Halas*, 568 N.E.2d 170 (Ill. App. Ct. 1991); *cf. Goldman v. Rubin*, 441 A.2d 713 (Md. 1982)(remanding

(footnote continued...)

For at least two reasons, these cases do not support deferential review of ERISA benefit denials. First, ERISA does not allow benefit providers to take their own self-interest into account when making benefit determinations. Second, in these family business cases, courts have not deferred to trustee decisions concerning trust property. They have scrutinized trustee determinations through a broader lens than usual, because the trust instrument does not contemplate that the trustee will display undivided loyalty to the trust beneficiaries. But it is erroneous to conclude, as MetLife does, that courts presume that trustee decisions are made in good faith; instead, courts scrutinize those decisions to ensure that they constitute a good faith attempt to effectuate settlor's intent.[4]

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for a determination of whether trustee who was an officer of family corporation had abused his discretion).

[4] Consider *Estate of Halas*, 568 N.E.2d 170 (Ill. App. Ct. 1991), on which MetLife relies. (Petr.'s Br. 43) In that case, the court partially reversed the trial court's determination that George Halas, trustee of a trust created by his son and funded by the son's 20% interest in the Chicago Bears, had breached his fiduciary duties. Halas was the majority shareholder of the Bears, and he reorganized the club after his son's death. The trust beneficiaries claimed that the trustee's reorganization plan failed to maximize the value of the trust, but the appellate court sustained the trustee's action. In doing so, the court painstakingly reviewed the evidence, including expert testimony, that both parties had presented at trial. It also emphasized the trust instrument's broad grant of discretion to the trustee, which included the

(footnote continued...)

III. ERISA DOES NOT ENTITLE PLAN SPONSORS, ESPECIALLY THOSE WHO FACE A CONFLICT OF INTEREST, TO ELIMINATE MEANINGFUL JUDICIAL REVIEW OF BREACH OF FIDUCIARY DUTY CLAIMS BY INSERTING BROAD CONTRACT LANGUAGE INTO PLAN DOCUMENTS.

In looking to the common law of trusts as a foundation for the responsibilities of ERISA plan fiduciaries, this Court emphasized that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.'" *Firestone,* 489 U.S. at 113 (1989). The Court noted that "[a]dopting Firestone's reading of ERISA 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." *Id.* at 113-14. That is, before ERISA, an employee had a contract claim against

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power to participate in "reorganizations" of the club "*as though no . . . conflict of interest existed.*" *Id.* at 173 (emphasis in original). The appellate court did not hold that the trial court erred in failing to defer to the trustee's exercise of discretion. Rather, it reversed the lower court because its decision frustrated the settlor's purpose in creating the trust and naming his father as trustee. Because the trustee conferred broad self-dealing powers on Halas to ensure the well-being of the ball club, as well as to take adequate care of the trust beneficiaries, and the trustee's entire family, Halas' reorganization plan was not a breach of trust. *Id.* at 178--79.

its employer or the employer's insurance company if benefits were wrongfully denied. *Id.* at 112-113. Pre-ERISA, however, contract principles did not permit a court to defer to determinations made by the drafting party to a contract of adhesion; instead, the court would construe the contract in accordance with its terms.

At its core, ERISA is a regulatory statute. As the preceding section demonstrates, the common law of trusts constrains the discretion of self-interested trustees, regardless of the language of the trust instrument, because courts understand that trust settlors do not generally anticipate that the chosen trustee will exalt his own interests over those of the beneficiaries. The case for constraining a fiduciary's discretion is even stronger when the fiduciary relationship is defined by a regulatory statute such as ERISA and not merely by private contract. As Professor Langbein has observed, "[w]hen a legislature absorbs a private-law regime such as trust law for regulatory purposes, as did Congress in ERISA, the regulatory purposes should be understood to dominate, and, where necessary, to alter the application of the borrowed principles." John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1336 (2007).

Congress, in enacting ERISA, borrowed the default rules of trust law but did not confer on sponsors the same rights to modify those default rules that would typically be available to the settlor of a private express trust. For instance, trust law's duty of loyalty is a default rule, subject to modification (though not complete abrogation) by the terms of the trust instrument. By contrast, ERISA's duty of loyalty requires an ERISA fiduciary to interpret and apply plan terms "solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of …providing benefits to participants and their beneficiaries...." 29 U.S.C. § 1104(a)(1)(A)(2000). The statute makes no provision for contract modification of that duty. *See also* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1330 (2007).

Similarly, despite the importance of the duty of care, trust law gives settlors considerable power to adjust the level of care a trustee must take in evaluating the claims of beneficiaries, and even permits settlors to exculpate trustees from all liability for breaches of the duty of care. ERISA, by contrast, requires a plan's procedures to ensure "full and fair review by the appropriate named fiduciary" of any benefits denial (29 U.S.C. § 1133(2) (2000)) and declares exculpatory clauses "void as against public policy." (§1110(a)). The statutory requirement of "full and fair review" would be rendered meaningless if a self-interested fiduciary could escape careful judicial scrutiny of its determinations simply by conferring on its administrators broad discretion in evaluating claims.

Indeed, the very word "fiduciary"—used in the statute to define the duties of plan administrators and others—reflects Congressional concern with assuring that plan administrators remain faithful to the interests of plan participants and beneficiaries. *Firestone*, 489 U.S. at 110 ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§1101-1114, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.' H.R. Rep. No. 93-533, p.11 (1973), U.S. Code Cong. & Admin. News 1974, pp.4639, 4649.") [5]

Congress had good reasons to model ERISA's fiduciary obligations on trust law, and equally good reasons to limit the power of plan sponsors to adjust those obligations. When a settlor creates a private express trust, the settlor is selecting a mechanism for management and disposition of his own money, making it appropriate for courts to defer to his wishes. By contrast, an ERISA plan does not result from the beneficence of the plan sponsor; the plan constitutes part of the employee's compensation package. From the employee's standpoint, ERISA benefit plans "are characteristic contracts of adhesion, offered on a take-the-plan-or-leave-the-job basis." Langbein, *supra* at 1323. Because the plan's terms reflect the preferences of only one of the parties whose interests are at stake, principles of contractual autonomy do not justify the same judicial deference to the language of the plan. *See Burroughs v. Bellsouth Telecom-*

[5] *See also* John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens *and* Great-West*,* 103 COLUM. L. REV. 1317 (2003).

munications, Inc., 446 F. Supp. 2d 1294, 1298 (N.D. Ala. 2006)(stating that "Although, in theory, the plan document is thought of as a contract between the employer (the plan sponsor) and the employee (the plan participant or beneficiary), it never is truly the product of arms-length negotiation.... The employee plays no part in fashioning the coverage or the claims procedure").

Although ERISA limits the power of plan sponsors to contract out of trust law's default rules even when the plan administrator is not in a position of conflict of interest, MetLife in this case does face a conflict of interest. To the extent ERISA's embrace of trust principles was designed to protect the expectations of plan beneficiaries whose employment decisions are based in part on their employee benefit plans, the statutory purpose is not advanced by permitting a plan sponsor (1) to confer decision-making power on an administrator who benefits from each claim denial, and (2) to insulate that administrator from meaningful judicial review of those denials. Yet that is precisely what MetLife has asked this Court to sanction.

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