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No. 07-636

IN THE

Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND

The Western Conference of Teamsters Pension Trust Fund (the "WCT Fund" or "Fund")[1] is a jointly administered trust maintained pursuant to Section 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). The WCT Fund administers the Western Conference of Teamsters Pension Plan (the "WCT Plan" or "Plan"), an employee pension benefit plan under Section 3(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1002(2), and a "multiemployer plan" as defined in Section 3(37) of ERISA, 29 U.S.C. § 1002(37). With more than $30 billion in assets, more than 5,000 contributing employers, and more than 600,000 participants and beneficiaries spread amongst all fifty states,[2] the District of Columbia, several U.S. territories, and foreign countries, the WCT Fund is the largest multiemployer pension fund in the country.[3]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2. The WCT Plan's participating employers and active participants are located in thirteen western states: Alaska, Arizona, California, Colorado, Idaho, Hawaii, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming.

3. The WCT Fund participated as amicus curiae in another ERISA case that presented related issues to this Court. See *Egelhoff v. Egelhoff*, No. 99-1529.

The WCT Fund processes more than 20,000 benefit claims each year, about one-third of which involve claims payable as a result of the death of a participant. In such cases, the terms of the WCT Plan provide that the WCT Fund will pay such benefits in accordance with a beneficiary designation card on file, a designation contained in an application for retirement benefits, or, if neither exists, pursuant to the beneficiary preference provisions of the WCT Plan. Thus, the WCT Plan administrators have a clear method for paying benefits and complying with ERISA's mandate that a plan be administered according to the terms of its governing documents and instruments.

Because a number of courts have held that ERISA plans must give credence to an ex-spouse's waiver of benefit entitlement under certain conditions, however, the WCT Plan administrators have frequently been confronted with the dilemma of whether to adhere to the Plan's governing documents and instruments or follow the reasoning of those courts that have embraced the waiver doctrine. Both choices expose the Fund to possible liability if a court ultimately determines that the Fund chose wrongly (as the District Court determined the Respondent plan did in this case). As a result, the WCT Fund on such occasions has been forced to engage outside counsel and initiate the process of interpleading the benefit amounts. Interpleader, however, is not an effective solution, because the WCT Fund (as well as the competing claimants) must incur litigation costs that are often not recoverable. Moreover, the WCT Fund may often not even be aware of the existence of a beneficiary's purported waiver lurking in a non-qualified domestic relations order, because the

parties never presented it to the Fund for approval, and, being a multiemployer fund, the WCT Fund lacks the detailed personnel records and familiarity with participants that might at least give a single-employer plan sponsor knowledge of a participant's marital history. As a result, under a common-law waiver regime, the WCT Fund risks paying benefits to the "wrong" beneficiary every time it pays death benefits to an ex-spouse beneficiary.

Thus, the WCT Fund has a great stake in the outcome of *Kennedy v. Dupont*, and, as the administrator of the country's largest multiemployer plan, it is in a unique position to highlight for the Court the administrative burdens and added costs that the waiver doctrine would impose on pension plans. Accordingly, the WCT Fund submits this brief amicus curiae in support of Respondents and urges that this Court affirm the decision of the Fifth Circuit.

II. SUMMARY OF ARGUMENT

The WCT Fund endorses, and will not restate, Respondents' thoroughly-briefed arguments that (1) the Fifth Circuit was correct in concluding that a waiver is an impermissible assignment or alienation of benefits; (2) an ERISA plan may not recognize a non-qualified domestic relations order (a "DRO"), and, in the divorce context, a qualified DRO (a "QDRO") is the only valid way that a divorcing spouse-beneficiary can relinquish her rights; and (3) even assuming that a waiver is not a prohibited assignment or alienation, an ERISA plan administrator is not required to give effect to a waiver that conflicts with governing plan documents.

In ultimately resolving these issues, the WCT Fund urges the Court to give due consideration to the significant burdens that would be imposed on plan administrators by a federal common law regime requiring the recognition of purported waivers contained in non-qualified DROs – issued by courts of the fifty states – over unrevoked spousal beneficiary designations. These burdens are markedly different in kind and degree from the burdens of administering QDROs – a fact that has been overlooked by those courts that have all too readily embraced the waiver doctrine while dismissing any such administrative concerns.

Unlike a QDRO, which a plan administrator measures against a well-understood list of criteria and which is created with the participation of the affected parties as well as the plan, a non-qualified DRO containing a purported waiver requires the administrator to measure the waiver's validity against an evolving set of subjective standards. This requires an increased role from plan counsel, adding to the costs of plan administration and clogging the federal courts with ever more frequent interpleader actions. There are only two methods of paying these additional costs: either employers absorb them (through increased contributions) as the price of electing to provide benefit plans or participants bear them in the form of reduced benefits and plan reserves. These added costs can easily be avoided if courts do not expand the obligations of plan administrators beyond those intended by Congress, which plan administrators are well-equipped to perform: namely, administer plans in accordance with their governing documents and instruments.

Such a circumscribed role for plan administrators would benefit participants and their beneficiaries not only by preserving plan assets for their intended use, but also by providing the greatest possible degree of predictability. Divorcing participants can, and will, change beneficiary designations, or obtain QDROs, if this Court makes clear that they must do so to effectuate their intent. Congress has already provided a fully adequate legal structure, and there is, therefore, no need for courts to fashion federal common law addressing the validity of waivers in the face of an unrevoked beneficiary designation.

III. ARGUMENT

A. A Rule Requiring Benefit Plans To Look Beyond Their Governing Instruments and Documents In Administering Benefit Claims Is Impracticable.

To appreciate why a common-law waiver regime is unworkable, it is helpful to understand how the Fund currently processes benefit claims and QDROs, and how a common-law waiver doctrine would affect the Fund's practices.[4]

4. The authors of this brief, who serve as the WCT Fund's regular outside counsel, advise many plan sponsors of employee pension benefit plans, both multiemployer and single employer, in connection with their administration of benefit claims and QDROs. Although the WCT Fund, as the largest multiemployer pension plan in the United States, has by far the largest volume of QDROs of any of these plans, the administrative procedures all of these plans use to handle benefit claims and QDROs are similar in all material respects, and a decision by this Court validating the waiver doctrine would have a similarly adverse impact on those plans and their practices.

The WCT Plan makes clear that benefits payable upon the death of a participant must be paid to the participant's validly designated beneficiary, or, if no validly designated beneficiary survives the participant, then according to the WCT Plan's preference scheme.

Following the mandate of the Plan document is a relatively straightforward exercise in plan administration. For cases in which the WCT Fund has a beneficiary designation card on file, death benefits are processed in the following three simple steps:

- One or more claimants send the WCT Fund an application for the benefits.

- The WCT Fund determines which claimant is the participant's designated beneficiary by referencing the participant's most recent beneficiary designation on file with the Fund and then requiring the claimant(s) to produce birth certificates or other records establishing their identity as the person(s) named on that beneficiary designation.

- The WCT Fund pays benefits to the designated beneficiary.

If this Court condones the creation of a federal common-law waiver doctrine, the processing of many death benefits claims will become significantly more complex. The administrators will need to undertake several additional steps to determine the proper recipient of the participant's death benefits. The

distribution process would then entail each of the following steps:

- One or more claimants would send the WCT Fund an application for the death benefits.

- The WCT Fund would determine which claimant is the participant's designated beneficiary by referencing the participant's most recent beneficiary designation on file with the Fund and then requiring the claimant(s) to produce birth certificates or other records establishing their identity as the person(s) named on that beneficiary designation.

- The WCT Fund would evaluate any proffered evidence of waiver of benefits under the evolving common law standards. The WCT Fund might also independently investigate the marital history of the participant in an effort to determine whether any evidence of waiver exists. This would likely require the assistance of WCT Fund's counsel.

- The WCT Fund, with the assistance of counsel, would attempt to determine whether the beneficiary designation remains effective or is nullified by a waiver under federal common law. If the validity of the waiver is contested, the WCT Fund would in all likelihood advise the parties that it intends to file an interpleader action.

- Only if the WCT Fund is able to identify with certainty the correct recipient of the benefits, and the validity of any waiver under federal common law is uncontested, would the WCT Fund pay the benefits.

In the process outlined above, plan administrators would be forced to make determinations, entirely divorced from the plan documents, of such factors as the "voluntariness" and "good faith" of the purported waiver, *e.g.*, *Brandon v. Travelers Inc. Co.*, 18 F.3d 1321, 1327 (5th Cir. 1994), (elements of common-law waiver satisfied), *cert. denied*, 513 U.S. 1081 (1995), and whether the waiver specifically terminated the particular rights in question, *e.g.*, *Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003) (elements of common-law waiver *not* satisfied). ERISA plan administrators, however, have no particular ability to determine voluntariness or good faith, and they lack the legal expertise to determine confidently in every case whether a waiver terminates the rights at issue with sufficient specificity. Congress cannot have intended for them to be charged with such responsibilities.

Some courts favoring a common law regime (and Petitioner as well) have contended that, because plan administrators already go beyond the plan documents when they determine whether domestic relations orders meet the requirements of a QDRO, determining the validity of a waiver cannot be all that burdensome. *See, e.g., Fox Valley & Vicinity Construction Workers Pension Fund v. Brown,* 897 F.2d 275, 282 (7th Cir.) (en banc), *cert. denied,* 498 U.S. 820 (1990); *Keen v. Weaver,* 121 S.W.3d 721, 724-5 (Tex.), *cert. denied*, 540 U.S. 1047

(2003). Such reasoning ignores the critical distinctions between QDROs and waivers, however, and their significantly differing impact on plan administration.

When a DRO is submitted to an ERISA plan, the plan administrator may look to a single, uniform set of requirements to determine whether the order may be a QDRO. ERISA Section 206(d)(3), 29 U.S.C. § 1056(d)(3), enumerates these requirements, and the plan administrator generally has little difficulty determining if they have been met: the DRO must "clearly specify" (1) the name and last known mailing addresses of the participant and each alternate payee covered by the order; (2) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (3) the number of payments or period to which such order applies, and (4) each plan to which such order applies. In addition, the DRO may not require a plan to provide (1) any type or form of benefit, or any option, not otherwise provided under the plan; (2) increased benefits (on an actuarial basis); or (3) benefit payments to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a QDRO. Making each of these determinations generally requires the plan administrator to examine only two documents – the plan and the DRO – and implicates the plan administrator's particularized knowledge of plan provisions.

Moreover, ERISA places the onus of crafting a DRO worthy of QDRO status, and of modifying a DRO found not to be worthy, on the *participant and his or her*

spouse – not on the plan administrator. Once the plan administrator has notified the parties that their DRO is deficient, the plan need not take any further action – it is the *parties'* responsibility to seek and obtain a modified order from the court that ultimately satisfies the QDRO requirements. Finally, the genesis of a QDRO takes place in the context of ordinary plan administration, rather than in the benefit claim process – if there is any doubt about the meaning of the language of the DRO, the parties have the opportunity to clarify the DRO with the plan administrator's input, and, except in extremely rare circumstances, the plan administrator's determination of whether the DRO meets the QDRO requirements will not result in litigation.[5]

The relatively limited demands and noncontroversial decision making that the QDRO process requires of the

5. Since the Retirement Equity Act of 1984 introduced the concept of a QDRO, the WCT Fund has been presented with and reviewed several thousand domestic relations orders. In many of those instances, the WCT Fund initially determined that the order did not satisfy the QDRO requirements and the parties went back to court to obtain a revised order. In that entire time, the WCT Fund has had to become actively involved in court proceedings to resolve a dispute over a domestic relations order's status as a QDRO only a handful of times. By contract, of the dozen or so cases that the WCT Fund has seen in the past few years in which a preference beneficiary has raised a defense of waiver to a claim to death benefits by a former spouse designated as beneficiary by the participant, the WCT Fund has been required to initiate interpleader proceedings or at least retain counsel to communicate with the disputing claimants in an attempt to resolve their claims in virtually every case.

plan administrator contrast sharply with the investigative, and ultimately determinative, roles a plan administrator must assume in evaluating the validity of a waiver under a federal common law regime. Unlike the QDRO situation, determining the validity of a waiver takes place in the context of the benefit claims process, and, since the participant has died, the plan administrator has no opportunity to work with the parties to modify language or otherwise clarify the parties' intent in light of evolving federal common law standards.[6] Once the plan makes a decision about the validity of the waiver and pays benefits to one claimant rather than another, then it is at risk of being ordered by a court to pay the same benefits to the competing claimant in the future. No comparable risk accompanies the plan administrator's decision making in QDRO processing.[7]

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6. It is hardly inconceivable to think that a deceased participant in some cases might have intentionally maintained his ex-spouse as his designated beneficiary; once he is deceased, however, conclusive determination of such intent is impossible and should be beyond the province of a plan administrator for this very reason.

7. If the Court nevertheless believes that federal common law is necessary to determine the validity and enforceability of waivers, then the doctrine should follow the congressionally-endorsed QDRO model, which is familiar and workable for plan administrators, rather than drawing upon state law waiver doctrines. A plan administrator could, with relative ease, determine that a DRO purporting to waive spousal benefits was sufficiently clear and consistent with QDRO requirements so as to be granted QDRO status. For example, the court order encompassing the purported waiver would include: (1) the (Cont'd)

Indeed, in a common law regime, the only sure (and most prudent) way that the plan has to avoid the risk of having to pay the benefit to more than one person is to interplead the funds as soon as any question arises about a possible waiver and let a court resolve the issue. Filing interpleader lawsuits, however, is not a panacea. While attorneys' fees are ostensibly available to a plaintiff

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name and last known mailing addresses of the participant and the spouse or ex-spouse; (2) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee – i.e., zero; (3) the number of payments or period to which such order applies – i.e., all payments, and (4) the specific plan or plans to which the order applies.

A federal common law regime based on the QDRO model would be consistent with the principle that, in developing a body of federal common law under ERISA-regulated plans, courts must look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985). *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (holding that in allowing courts to develop a federal common law of rights and obligations under ERISA-regulated plans, Congress "expected that the courts will . . . bear[] in mind the special nature and purpose of employee benefit plans"). *Cf. American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (holding that federal common lawmaking in admiralty "is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field"); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) ("[t]he substantive law to apply in suits under § 301(a) [of the LMRA] is federal law, which the courts must fashion from the policy of our national labor laws").

initiating an interpleader suit,[8] in cases involving a relatively small benefit, the recovery of attorneys' fees from the stake could consume the entire benefit. The Fund's experience is that, while courts may often view the filing of an interpleader as almost ministerial in nature, with little in the way of attorneys fees required, the reality is often quite different. *See, e.g., First Trust Corp. v. Bryant*, 410 F.3d 842, 843-57 (6th Cir. 2005) (reversing district court award of $53,000 in attorney fees to interpleader plaintiff and ordering fee award for claimant).[9] In bringing an interpleader action concerning relatively small sums, the claimants are often not represented by counsel, and the plan's counsel must locate and serve all of the individual claimants (often numerous and difficult to serve), as well as bring the action through the pretrial process that federal courts generally require (including mandatory nonbinding alternative dispute resolution) before a plan can even file a motion for discharge. A plan's legal fees in initiating and bringing an interpleader action to the point at which the plan may be discharged frequently can substantially exceed the amount of legal fees a court is willing to allow as a claim against the interpleaded funds. *See, e.g., Metropolitan Life Ins. Co. v. Billini*, No. Civ S-06-02918

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8. Courts have discretion to award attorney fees to a disinterested stakeholder in an interpleader action under their inherent equitable powers. *See, e.g., Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984); *Bank One, Texas, N.A. v. Taylor,* 970 F.2d 16, 22 (5th Cir. 1992), *cert. denied,* 508 U.S. 906 (1993).

9. *See also First Trust Corp. v. Bryant: Interpleader as Villainy,* [Aug./Sept. 2005] 13 ERISA Lit. Rep. (Glasser) No. 3, pp. 8-13.

WBS KJM, 2007 WL 4209405 at *3 (E.D. Cal. Nov. 27, 2007) (noting that fee awards in interpleader actions by insurance company stakeholder are "typically modest."). As a practical matter, the plan administrator may be required to charge the expenses to the plan or the plan sponsor rather than recover them from the interpleaded benefits. While claimants are not required to retain counsel, those who do incur additional expense, which also may drastically diminish or even eclipse the benefit at issue. In the end, filing an interpleader lawsuit can, in effect, sacrifice some or all of the contested benefit.[10]

B. In Many Instances, Plan Administrators Will Be Unable to Determine the Correct Beneficiary Under Federal Common Law

Forcing plan administrators to become knowledgeable about federal common law will entail determinations that can often be difficult, if not impossible, for a plan administrator to make with certainty. For example, some courts employing federal common law consider the parties' underlying relationship in assessing the pivotal issues. Courts that have engaged in such subjective analyses make clear that a plan administrator cannot reliably predict who is entitled to receive plan benefits.

For example, in *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995), the Eighth Circuit explained that a property settlement agreement may effectively revoke a beneficiary designation, provided

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10. *See* Brief for Respondents, at 44, n.14.

the agreement specifically divests the former spouse's rights as a plan beneficiary. However, having announced that rule, *Mohamed* examines not only the terms of the divorce agreement, but also the facts surrounding the divorce, finding the facts "especially compelling." *Id.* at 916. *Mohamed* notes that the former wife (and designated beneficiary) left her husband as a result of his being diagnosed with Alzheimer's disease. "Once [the husband] was diagnosed with the disease, [the wife] could not get away fast enough, and she never looked back. We do not believe it is putting too fine a point on it to say that she abandoned him to his illness." *Id. Mohamed* then holds that the wife had waived any claim she might have had to plan benefits. *Id.*

In contrast to *Mohamed* is *National Automobile Dealers and Associates Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). *Arbeitman* acknowledged that the language in the divorce agreement before it was similar to that in *Mohamed*. *Arbeitman*, 89 F.3d at 501. However, equitable considerations led to a different result. In particular, *Arbeitman* noted that the husband and his former wife "maintained an amicable relationship" and that the husband paid more spousal and child support than he was legally obligated to provide. *Id.* The Eighth Circuit describes this as a "vastly different situation than we faced in *Mohamed*," and held that the divorce agreement did not waive the wife's rights as the designated plan beneficiary. *Id.*

As *Mohamed* and *Arbeitman* demonstrate, regardless of whether one believes the respective decisions correctly balanced the equities and

circumstances in the two cases, such a subjective approach requires that a plan administrator do more than simply research the law. The administrator must also conduct an investigation of the facts and circumstances surrounding a divorce and then attempt to determine intent and "balance the equities" based on those facts and circumstances. This makes efficient plan administration impossible. See *Egelhoff v. Egelhoff*, 532 U.S. 141, 149 n.3 (2001) (noting that "cost of delay and uncertainty" can "thwart[] ERISA's objective of efficient plan administration").

C. Complying with Federal Common Law Is Costly

As the discussion above reflects, if ERISA plan administrators are put to the task of having to determine the validity of a waiver when making a distribution, they will routinely need to hire legal counsel to attempt to determine the validity of the waiver, and to file interpleader suits.

Only two choices exist to fund these increased fees: either employers bear the brunt of the increased costs of administering benefit plans, or the additional expenses will be borne by the plan's participants and beneficiaries in the form of reduced benefits and/or lowered plan reserves. Neither prospect should be particularly appealing to plan participants and beneficiaries: To the extent that the employers are saddled with the additional costs, those increases may well "lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Estate of Altobelli v. International*

Business Machines Corp., 77 F.3d 78, 83 (4th Cir. 1996) (Wilkinson, C.J., dissenting) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). For a multiemployer plan, increased administrative costs necessarily means fewer dollars available to provide benefits – unless the collective bargaining parties agree to increase plan contributions (and, possibly, reduce wages as a result) to cover the increased costs.

In addition to the financial costs, the common-law waiver doctrine reduces participants' and beneficiaries' certainty about their rights under the plan. As this Court held in *Boggs v. Boggs*, the "assets of a plan, again with certain exceptions, are 'held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.'" 520 U.S. 833, 845 (1997) (quoting ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1)). If participants and beneficiaries know that their rights will be determined strictly in accordance with the governing plan documents, they will easily be able to determine their respective rights, without having to resort to case law.

In light of ERISA's mandate that benefit plans be administered according to their terms, a concern about equitable results is not properly addressed by different courts in different jurisdictions fashioning different rules.[11] Rather, it is the province of Congress to effect

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11. The WCT Fund and other large, multi-state plans would be particularly burdened by a common law regime. ERISA plans are subject to national jurisdiction, and venue is also wide-reaching. *See* 29 U.S.C. § 1132(e)(2) (permitting

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any changes to ERISA in conformance with what Congress finds is appropriate national policy. That is precisely what happened when Congress passed the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, creating a specific and narrow set of uniform rules governing ERISA plans' ability to recognize domestic relations orders.

Unless and until Congress amends ERISA with legislation which specifically addresses the effect of divorce on beneficiary designations, this Court should hold that plan administrators are to administer ERISA plans and distribute benefits in accordance with the terms of the plans and their governing instruments. Such a rule furthers ERISA's goal of establishing an efficient means of administering plans, will preserve plan assets for participant and beneficiaries, and will still enable any participant to be the master of who is to receive benefits upon that participant's death.

(Cont'd)
nationwide service of process and venue where plan is administered, where breach took place, or where a defendant resides or may be found). Thus, a regime in which different federal courts applied inconsistent standards to waivers contained in non-qualified DROs emanating from fifty different states would pose enormous problems for a large plan attempting to administer benefit claims, as well as undermine ERISA's purpose of "provid[ing] a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208 (2004).

IV. CONCLUSION

For the reasons stated above, the WCT Fund respectfully urges this Court to affirm the decision of the Fifth Circuit Court of Appeals in the matter of *Kennedy v. DuPont.*

Respectfully submitted,

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