

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	AMY K. POSNER, ESQ.	
4	On behalf of the Petitioners	3
5	E. JOSHUA ROSENKRANZ, ESQ.	
6	On behalf of the Respondent	26
7	NICOLE A. SAHARSKY, ESQ.	
8	On behalf of the United States, as amicus	
9	curiae, supporting the Respondent	43
10	REBUTTAL ARGUMENT OF	
11	AMY K. POSNER, ESQ.	
12	On behalf of the Petitioners	54
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 06-923, Metropolitan Life Insurance
5 versus Glenn.

6 Miss Posner.

7 ORAL ARGUMENT OF AMY K. POSNER

8 ON BEHALF OF THE PETITIONERS

9 MS. POSNER: Thank you. Mr. Chief Justice
10 and may it please the Court:

11 For two reasons, the Sixth Circuit was wrong
12 to hold that a company that is an ERISA claim fiduciary
13 and that separately funds the plan's liabilities must
14 always be deemed to be operating under a conflict of
15 interest that changes the employer's designated
16 arbitrary and capricious standard of review under its
17 plan document. And the first reason is one that we're
18 on common ground with and that is, as this Court
19 recognized in Pegram v. Herdrich, ERISA explicitly
20 authorizes companies like MetLife to fulfill both
21 fiduciary and nonfiduciary functions as long as it does
22 not in actuality commingle those functions. The mere
23 fact that the potentiality of conflict is inherent in
24 all of these commonplace dual arrangements in ERISA
25 welfare benefit plans is not enough on its own to

1 displace the employer's designated abuse of discretion
2 standard of review.

3 And secondly --

4 JUSTICE SOUTER: No, but neither, neither
5 does the fact that there may be dual capacities
6 eliminate the fact that there are contrary tugs on the,
7 the individual or the, or the organization that has the
8 dual responsibilities, and there's no reason that the
9 law should be blind to that.

10 MS. POSNER: No, Your Honor, it should not
11 be blind. And as Firestone recognized, though, if in
12 fact there is a, an entity that is in actuality
13 conflicted, a claim administrator, then that conflict
14 doesn't change the standard of review.

15 JUSTICE SCALIA: What do you mean by --
16 let's get straight by what we mean by "in actuality
17 conflicted." Isn't the fiduciary who has a financial
18 interest in actuality conflicted?

19 MS. POSNER: We're using the words --

20 JUSTICE SCALIA: And aren't we talking in
21 this case always about fiduciaries who are in actuality
22 conflicted.

23 MS. POSNER: No, Your Honor. We are using
24 these terms to designate in actuality a conflicted
25 fiduciary is one that has been infected or the decision

1 was infected by the conflict.

2 JUSTICE SCALIA: No. That's, that's a
3 conflicted fiduciary who allows the conflict to warp its
4 judgment. But the conflict exists whether you, whether
5 you give it effect or not.

6 MS. POSNER: Yes, that's right, Your Honor.
7 There is a conflict that we're saying is a potential
8 conflict.

9 JUSTICE SCALIA: So let's call that a
10 conflicted fiduciary, somebody who has two loyalties,
11 whether or not he allows the one loyalty to distort his
12 judgment.

13 MS. POSNER: Yes. And as this Court
14 recognized in Firestone, Your Honor, when there is an
15 actual conflict, that's --

16 JUSTICE GINSBURG: Let me follow up on
17 Justice Scalia's question because I think your brief
18 really goes astray on that. Think of the many
19 situations like the remainderman who is the trustee. He
20 has to look out for the interests of the live tenant,
21 but he's going to keep all the rest, so maybe he wants
22 to be economical. That's not saying that he is. So
23 I've always understood that the term "conflicting
24 interests" means just that; you have conflicting
25 interests. It doesn't mean that you necessarily slide

1 over into misconduct. And I think that if you would
2 keep that separation in mind, is there a conflicting
3 interest? Yes, there is. Has the trustee in fact
4 slipped and taken unfair advantage because of the
5 conflicting interests?

6 MS. POSNER: That's exactly the distinction
7 that we are making by using actual and potential or, as
8 this Court said, possible and actual in Firestone. And
9 where that slip occurs in trust law or in ERISA and it
10 infects the decision, the Firestone court --

11 JUSTICE KENNEDY: Does it have to be just
12 the specific decisions? Suppose that the company does
13 not have clear rules of, what do you call them,
14 firewalls between the profit side and the claims
15 processing side. Would that be enough to cause a
16 greater, more searching standard of review, say de novo?

17 MS. POSNER: I don't think it would ever
18 result in a de novo review. I think what it is is a
19 factor that should be weighed with all the other factors
20 that go to the actual benefits decision.

21 JUSTICE KENNEDY: So then you're saying, A,
22 the fact that there is a potential conflict is not
23 enough; B, the fact that there are no procedures in the
24 company to ensure that the conflict doesn't affect the
25 judgment, that is not enough either.

1 MS. POSNER: No. I'm not saying that. I'm
2 saying that if --

3 JUSTICE KENNEDY: I'm positing. Does the
4 fiduciary at least have the, the burden of production to
5 show that it has established clear lines of demarcation,
6 firewalls, whatever you call them, within the company?
7 Does it have at least that obligation going forward?

8 MS. POSNER: No, Your Honor, it does not,
9 and as the United States --

10 JUSTICE KENNEDY: Well then, I don't know
11 what effect you're giving to the fact, as the earlier
12 questions have indicated, that there is a structural
13 conflict.

14 MS. POSNER: That's a structural conflict
15 that ERISA anticipates and, as the United States said in
16 its brief to this court in Pegram v. Herdrich, that
17 ERISA tolerates this dual role and this level of
18 conflict in order to keep these plans that are so vital
19 in our country's economic interests in underlying the
20 employee's well-being --

21 JUSTICE KENNEDY: You want us to write an
22 opinion to say that it's irrelevant that a company does
23 not have procedures to insulate the profit section from
24 the claims processing section? I'll use those terms.

25 MS. POSNER: No, Justice Kennedy, absolutely

1 not. But what we are saying is that if there were such
2 a fiduciary that factor must be weighed, but it doesn't
3 change the abuse of discretion standard.

4 CHIEF JUSTICE ROBERTS: How does that work?
5 I don't understand. You go through, you've got a
6 decision, whatever, it's a health insurance decision
7 that this procedure -- to determine that this procedure
8 is not covered under the, the plan, that the fiduciary
9 has the discretion to make that determination. But you
10 say, aha, he's got a conflict of interest, so that's a
11 factor we take into account. Well, how does -- what
12 does that mean?

13 MS. POSNER: It means again, remembering
14 that these are claims under 29 U.S.C. 1132(a)(1)(B) for
15 benefits due under the terms of the plan, it's very
16 important that the courts remember to look at the terms
17 of those plans --

18 CHIEF JUSTICE ROBERTS: All right, you've
19 got two cases, one where the person does not have a
20 conflict of interest under a particular plan, the other
21 where he does. It's the same decision: We're not going
22 to cover this procedure. How is the review different in
23 each of those cases as a practical matter?

24 MS. POSNER: As, as in trust law -- and if
25 you look at the cases in trust law, what the court needs

1 to look at when the settlor, here the employer,
2 designates the discretionary authority under the terms
3 of the trust or the plan is that that conflict comes
4 into play if it seems that it's been breached. But you
5 also have to remember exactly what the purpose of the
6 trust is, and so you need to protect the employer's
7 interest in having benefits paid in meritorious cases
8 and not paid in nonmeritorious cases.

9 CHIEF JUSTICE ROBERTS: I guess I don't see
10 an answer to my question yet. How does the review
11 differ as a functional matter? He says he looks at it
12 and says, well, normally that would be within the
13 discretion, but I've got to remember he's got a
14 conflict, so I'm going to determine that this particular
15 procedure should be covered because of the conflict.

16 MS. POSNER: It remains in the discretion
17 because this Court said that that freedom of contract
18 that's so important to ERISA, to keep the benefits, the
19 employers interested in offering benefits --

20 JUSTICE SCALIA: But you're saying it
21 doesn't make any difference. You say you should take it
22 into account, but if it was a reasoned decision, which
23 is the test whether or not he's a fiduciary, if it's a
24 reasoned decision the fact that he's a fiduciary makes
25 no difference, right? Isn't that what you're saying?

1 MS. POSNER: No, Your Honor.

2 JUSTICE SCALIA: It does make a decision
3 then. What was a reasoned decision for someone who
4 doesn't have a conflict becomes an unreasoned decision
5 simply by reason of the fact that he has a conflict?

6 MS. POSNER: Certainly not. Again, it must
7 be a factor that's weighed with the other factors.

8 JUSTICE BREYER: That's exactly my question.

9 MS. POSNER: Yes --

10 JUSTICE BREYER: I'm going to let you answer
11 this question --

12 MS. POSNER: And I --

13 JUSTICE BREYER: But I want you to work mine
14 in if you can. The problem that I'm having is what to
15 say in the opinion. Now, could I say this? Firestone,
16 yes, that's the way to put it as a standard. You can
17 also teach through example. So I look at this case, I
18 say: You want to know what that means, read the court
19 of appeals opinion; it's perfect. Okay? So I've got
20 Firestone -- my opinion so far is two words:
21 "Firestone, perfect." Okay? Now, what do you want me
22 to say other than that?

23 MS. POSNER: In this case -- and this case I
24 think presents a very narrow question for the Court, and
25 that is where there is the dual role inherent in the

1 plan but no evidence whatsoever that it infected the
2 decision, if it must be given weight in answer to the
3 Court's second question, then --

4 JUSTICE GINSBURG: But then you come to the
5 end of the line. You have to prove that the authority
6 was misused. And as I understand the Sixth Circuit's
7 decision, what those judges were doing, they say we're
8 going to look at this with some skepticism because of
9 the conflict. And let me give you a concrete example.
10 This woman got Social Security disability benefits and
11 she did it at the suggestion of MetLife is; that so?

12 MS. POSNER: She actually applied herself.

13 JUSTICE GINSBURG: But she got a lawyer that
14 they recommended that she have.

15 MS. POSNER: MetLife recommended a lawyer to
16 her and also said she could use her own lawyer, which
17 was consistent with the plan design.

18 JUSTICE GINSBURG: But the point is they
19 came to her and said: Get Social Security disability
20 benefits. Now, to get those she would have to show that
21 she is totally and permanently disabled.

22 MS. POSNER: Correct.

23 JUSTICE GINSBURG: So here is a company that
24 says: Tell the U.S. government that you are totally and
25 permanently disabled, but -- and then we'll recoup all

1 that money that we paid out to you; but then when we get
2 a chance to look, look it over, we'll say you're not
3 disabled. Why isn't it appropriate to regard just that
4 set of circumstances with suspicion?

5 MS. POSNER: Because, Your Honor, at the
6 time that that letter was written to the Respondent here
7 in October of 2000, in fact MetLife had granted her
8 benefits. And the action of helping an employee perfect
9 their entitlement to Social Security is in fact not a
10 conflict at all. It's a fiduciary obligation under the
11 terms of a plan and it helps the employee as well.

12 JUSTICE GINSBURG: Yes, I'm not questioning
13 that at all.

14 MS. POSNER: When --

15 JUSTICE GINSBURG: That sounds fine. It's a
16 question of why, after helping her tell the government
17 that she was totally disabled, they, after the initial
18 two-year period, turned around and said she's not.

19 MS. POSNER: The -- the reason is -- and
20 it's unfortunate that often Social Security makes the
21 same decision that the plan fiduciary has made two years
22 earlier, and the government is looking backwards at
23 certain evidence that may not be before the ERISA plan
24 fiduciary. The ERISA plan fiduciary at that two-year
25 point is looking at that evidence at that time and at a

1 change in the terms of the plan.

2 JUSTICE SCALIA: Ms. Posner, it seems to me
3 that that ought to be looked at with suspicion, whether
4 or not the person making the decision has a conflict. I
5 mean that smells bad or doesn't smell bad, as you say,
6 either way.

7 MS. POSNER: Justice Scalia --

8 JUSTICE SCALIA: And I am still -- listen, I
9 know that we're responsible for this because we said it
10 in Firestone. We said that a conflict of interest
11 should be weighed as a factor. If that means anything,
12 it seems to me it means that sometimes that weight will
13 make the difference. So at least sometimes -- but
14 you're not willing to admit that -- at least sometimes
15 you would say, oh, yes, this is a reasonable decision
16 and had this decision been made by a fiduciary without a
17 conflict, it would be perfectly okay because it's
18 reasonable. That's the test. However, since this
19 fiduciary has a conflict, what was a reasonable
20 decision, whoof, the added weight, it becomes an
21 unreasonable decision.

22 MS. POSNER: I think --

23 JUSTICE SCALIA: Is that what you mean by
24 giving it some weight?

25 MS. POSNER: Yes, Justice Scalia --

1 JUSTICE SCALIA: You do.

2 MS. POSNER: But --

3 JUSTICE SCALIA: So a perfectly reasonable
4 decision becomes unreasonable simply because you have a
5 conflict?

6 MS. POSNER: It depends on how close that
7 reasonable decision is to the line, and in this case the
8 decision was not one that this mere dual-role conflict,
9 the lowest level of conflict that can exist, can push
10 that reasonable decision over. And I --

11 JUSTICE SOUTER: Okay, let's assume -- let's
12 assume that I'm reviewing it, and I -- I don't find it
13 as clear as you do, and I'm on the fence. Being on the
14 fence, may I take into consideration the fact that there
15 was a conflict of interest?

16 MS. POSNER: You -- I think under Firestone
17 you have to take that into account.

18 JUSTICE SOUTER: And therefore I will say,
19 okay, I wouldn't know for sure how to go in this case,
20 but I see the conflict of interest and that's enough to
21 make me say more probably than not there was a
22 reflection of the self-interest of the provider, rather
23 than the interest of the -- of the insured here; and,
24 therefore, I'm going to find that the -- that the
25 conflict did disadvantage the person insured. That

1 would be, I take it on your view, a reasonable
2 application of Firestone.

3 MS. POSNER: Again, depending upon how these
4 things weigh.

5 JUSTICE SOUTER: Well, I just told you.

6 MS. POSNER: Yes.

7 JUSTICE SOUTER: I just told you how it
8 weighed. I'm sitting on the fence. I'm not sure what
9 to do. I take into consideration the fact that there is
10 conflicting interest here; and, therefore, I conclude
11 that the conflicting interest is the reason for the
12 decision and I hold against the company. Is that a
13 misapplication of Firestone?

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

15 JUSTICE SOUTER: Okay.

16 JUSTICE ALITO: But that's not the argument
17 that I understood you to make in your brief. Is that a
18 change from the position you took in your brief?

19 MS. POSNER: No, Your Honor, I don't believe
20 it is. The brief acknowledges that there are various
21 conflicts that exist here. The conflict that ERISA
22 tolerates and recognizes as being everyday, ordinary
23 practice that is absolutely necessary for the employee
24 benefits of this country to remain vital, and that is --

25 JUSTICE ALITO: Could I just get this clear?

1 I thought your position in your brief was that there has
2 to be a demonstration that the conflict had an effect on
3 the decision before there is any departure from the
4 standard abuse of discretion --

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

6 JUSTICE ALITO: -- the standard of review.

7 MS. POSNER: And I took Justice Souter's
8 hypothetical to mean that there had been a conflict that
9 seriously weighed on his view.

10 JUSTICE SOUTER: No. My hypothetical is the
11 hypothetical of the person making the decision. I put
12 myself in that person's position and I'm saying I can
13 think of reasons that might result in concluding that
14 this was a reasonable decision, period. And I can think
15 of reasons that might result in concluding that, in
16 fact, this was a decision that had been made against the
17 interest of the insured because the person making the
18 decision itself had an interest in it.

19 I'm not sure which way to go, but I now take
20 into consideration the fact that there was this
21 conflicting interest in the person or the organization
22 that made the decision, and for that reason, I am going
23 to -- I'm going to break the tie, and I'm going to
24 conclude that the conflict was to the disadvantage of
25 the insured. I'm going to rule against the company. I

1 understood that you said that would be a proper
2 application of Firestone. Is that still your answer?

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

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

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

7 MS. POSNER: Well, again, we're looking at
8 conflict as if it's the only factor here, and when we
9 look at these cases --

10 JUSTICE SOUTER: No. In my hypothetical,
11 I've taken into --

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

13 JUSTICE SOUTER: -- factors that say the
14 company was right, factors that say the company is
15 wrong. I'm not sure which. They seem evenly balanced
16 to me, until I take into consideration the fact that
17 there was conflicting interest, and I say that's enough
18 to tip it. And it does tip it, and I rule against the
19 company.

20 MS. POSNER: I think --

21 JUSTICE SOUTER: And am I right or wrong
22 under Firestone?

23 MS. POSNER: Again, I think that it's very
24 important to look at the employer's plan and this
25 employer specifically.

1 JUSTICE SOUTER: That may be, but what's the
2 answer to my question?

3 MS. POSNER: The answer is --

4 JUSTICE SOUTER: Am I right or wrong?

5 MS. POSNER: The answer is you could be
6 right or you could be wrong, but it's --

7 JUSTICE SOUTER: That is not going to --

8 MS. POSNER: -- so important --

9 JUSTICE SOUTER: That's not going to help
10 the appellate court, my friends here who have to review
11 my decision. They want to know whether I was right or
12 wrong.

13 MS. POSNER: These matters are so
14 fact-specific.

15 JUSTICE GINSBURG: Well, let's take these
16 facts.

17 MS. POSNER: Okay, Your Honor.

18 JUSTICE GINSBURG: As the trier -- I mean
19 ERISA, yes, it certainly says you can be both the plan
20 administrator and the payor, but all it says is that
21 that's permissible. But it also provides for review of
22 those decisions, judicial review in court. And here is,
23 say, a district court is looking at it and says: I
24 don't understand why the company didn't look at the
25 doctor's explanation and put such heavy weight on a

1 checkmark. And I also don't understand the suggestion
2 that she is totally disabled to the government and then
3 saying, well, she's really not, in this very close time
4 frame. So it might be okay and it might not.

5 I am in equipoise about this case, not the
6 terms of the plan but the decision that was made to deny
7 her benefits. So which way do I call it? That's the
8 question that Justice Souter posed, and you seem not to
9 want to face up to it and answer it.

10 MS. POSNER: Your Honor, the problem with
11 the hypothetical as you just stated is that you've taken
12 the employer's contract out of the calculation, and that
13 the employer has the right to determine its own plan and
14 design those plans as they see fit in order to keep
15 these vital economic safety nets available, affordable
16 and capable of providing a safety net to the --

17 JUSTICE GINSBURG: How does that bear on
18 making a determination that the --

19 MS. POSNER: Because --

20 JUSTICE GINSBURG: -- employee -- that the
21 plan administrator has to make: Is this person disabled
22 and is she not?

23 MS. POSNER: You can't make that
24 determination, Justice Ginsburg, out of the context of
25 the plan design. This plan design says that Social

1 Security can be -- can be an offset, estimated or -- or
2 received.

3 It says that the plan administrator or the
4 fiduciary not only has discretionary authority to
5 determine eligibility for benefits and to construe the
6 terms of the plan, but that its decision may not be
7 overturned unless arbitrary and capricious.

8 CHIEF JUSTICE ROBERTS: Counsel, Justice
9 Souter's question and Justice Alito's question highlight
10 for me what I think is the central issue. Justice
11 Souter had asked you whether the conflict comes into
12 play, you know, when it's a tie. And you're right on
13 the fence, and you say, well, the conflict's a factor,
14 so it tips over in the employee's favor.

15 Justice Alito's question asked you whether
16 or not the conflict has to play a role in the decision.
17 I don't know how that would be, but let's say, for
18 example, the insurance company is doing well and so they
19 say, well, we allow coverage for this procedure. All of
20 a sudden, the insurance company looks like it's not
21 doing so well, it's not going to meet the quarterly
22 targets or whatever, so it says, well, we're no longer
23 going to allow coverage for that procedure. In other
24 words, it is the conflict itself that affects which way
25 it comes out.

1 Now, which is right: Justice Souter's case
2 in which the conflict tips the scales, no matter what
3 the reason is; or Justice Alito's case where the
4 conflict plays a role in the decision process?

5 MS. POSNER: We believe that it's the
6 Justice Alito hypothetical, where it does play a role.
7 Where it doesn't play a role, it should have -- our
8 first answer -- our answer to the first question is it
9 should have no weight. However, I understand that we've
10 moved beyond that to the second question.

11 JUSTICE ALITO: But the problem with that is
12 the Court needs to know what the standard of review is
13 before it gets to the merits. And how is the Court
14 going to know whether conflicting interests played a
15 role in the outcome of a particular benefits
16 determination without looking at the merits of the case
17 unless there is going to be a lot of discovery about
18 internal processes at MetLife and how you treat the
19 people who -- who gets promoted among the benefits
20 administrators and all of that? And that's what I don't
21 understand about that position.

22 MS. POSNER: No -- yes, Justice Alito, and I
23 think you hit the nail on the head there. The merits of
24 the case must certainly be scrutinized, and they can be
25 scrutinized for an abuse of discretion. And that's the

1 important issue. It's scrutinizing the merits of the
2 case, whether or not the medical and vocational
3 information supports the decision.

4 JUSTICE STEVENS: Yes. But as I understand
5 your brief, you say the conflict of interest is only
6 relevant if it affected the decision. But how does the
7 plaintiff prove that it affected? What sort of evidence
8 would go to that issue?

9 MS. POSNER: There are cases, Your Honor,
10 where can you see that, for instance, when you look at
11 the medical evidence, that the administrator shows in
12 its claim file, which, unlike any other area of the law,
13 the whole process is transparent under ERISA; and there
14 may really not be any evidence that's supporting it, or
15 so little that it's hard to understand how that
16 fiduciary could possibly have reached that decision.

17 JUSTICE STEVENS: Well, you're just saying
18 that the plaintiff has to have an overwhelming case. I
19 don't think you'd need the conflict-of-interest point in
20 that kind of case.

21 MS. POSNER: That's actually the standard,
22 though, Justice Stevens, in trust law also. Because
23 when you read these cases and you look at the examples
24 in the Restatement, when the trustee has an acknowledged
25 conflict and the settlor nevertheless vests in that

1 trustee discretionary authority, then in order for a
2 court to displace that trustee's judgment the court must
3 find that the trustee actually acted from conflict and
4 in controverse -- in contraverdia -- oh, my goodness --
5 and did not follow the terms of the plan.

6 JUSTICE STEVENS: Well, I can understand
7 that in normal trust situations, but it's hard for me to
8 understand how you're going to prove an insurance
9 company's particular claim adjustment was really
10 motivated by a conflict of interest rather than thinking
11 the claim wasn't valid.

12 MS. POSNER: That is a problem, but the fact
13 of the matter is that you -- you read the cases and the
14 files, as I'm sure you have, and it's apparent that
15 there are -- let me use Post v. Hartford as an example,
16 if I may. In Post v. Hartford there is a majority
17 opinion that overruled the Hartford's discretion based
18 merely on minor irregularities.

19 JUSTICE GINSBURG: Where, where is this
20 decision from that you're --

21 MS. POSNER: Post v. Hartford, Your Honor,
22 is at 501 Fed. 3d 154. It's the case that -- it's a
23 Third Circuit case from 2007 that the Respondent very
24 heavily relies upon, and it's a glaring example of
25 what's gone wrong in the analysis here, because in Post

1 v. Hartford there's a majority opinion that overruled
2 the Hartford's discretion based on minor irregularities,
3 what it called as minor irregularities, merely because
4 they existed.

5 The dissenting judge looked at the medicals
6 and, even under the Third Circuit's heightened scrutiny,
7 which automatically it applies to insurance companies
8 regardless of the situation, that justice said the
9 medical -- that judge, sorry -- said that the medical
10 evidence very clearly supported the Hartford's decision.

11 And what we are hoping will come out of
12 this, Your Honors, is that in fashioning what should
13 happen in these cases, that the fact that these are
14 claims for benefits under the terms of the plan must
15 really be important, not just minor irregularities and
16 whether this was done right or that was done right.
17 That's -- that's a cause of action under -- under
18 1132(a)(2), and the Respondents are relying very heavily
19 on the replacement of the fiduciary, of the trustee.

20 That's not the issue here. That's an (a)(2)
21 claim under 1109 where you could replace the fiduciary.
22 Here we are talking about were these benefits properly
23 denied or not?

24 And if there are no further questions, Your
25 Honor --

1 JUSTICE GINSBURG: There's one feature of
2 this that I don't understand. It was referred to very
3 swiftly in Judge Merritt's separate opinion. He said at
4 one point there was a proposal by MetLife that they give
5 this woman a trial run at a sedentary job to see if she
6 could do it. And he said that that made a lot of sense
7 to him, and it was MetLife's proposal, but then it got
8 withdrawn. Could you clarify what that was?

9 MS. POSNER: Yes. I believe, Justice
10 Ginsburg, that Judge Merritt was looking at a provision
11 of the plan that -- actually, I'll tell you where it is.
12 It's at 170a of the joint appendix. And that provision
13 allows rehabilitative employment for a disabled person.
14 In early 2002, MetLife did refer the file to a
15 vocational rehabilitation specialist to determine
16 whether or not the Respondent was eligible for that.

17 In doing that, a letter was sent to the
18 treating physician, Dr. Patel, asking specifically what
19 she could do in an eight-hour day; could she do
20 full-time sedentary work; and if there were any physical
21 barriers. And that's that March 12th, 2002, letter --
22 it was not a form -- which he filled out and said in an
23 eight-hour day she could sit for eight hours; she could
24 stand for four hours; and she could walk for two hours;
25 that she could do full-time, sedentary work, and that

1 there were no physical barriers otherwise blocking her
2 ability to do that.

3 JUSTICE GINSBURG: Then why did MetLife
4 withdraw that proposal?

5 MS. POSNER: Well, there was no proposal,
6 Your Honor, but it was given to a rehabilitation
7 specialist to work that up to see if she was disabled
8 and eligible for rehabilitative employment, because her
9 treating physician responded to that inquiry by saying
10 she could do sedentary work, she retained that physical
11 capacity, which was consistent with what he said in
12 January of '02 and again in June of '02. That provision
13 --

14 JUSTICE GINSBURG: My question was not what
15 Dr. Patel said, but how did that proposal get dropped?

16 MS. POSNER: There was no proposal, Your
17 Honor. There is a provision in the plan -- it's at 170a
18 of the joint appendix -- which allows for rehabilitative
19 employment for disabled people who may have the physical
20 capacity to do work they were not doing before.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MS. POSNER: Thank you very much, Your
23 Honor.

24 CHIEF JUSTICE ROBERTS: Mr. Rosenkranz.

25 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

1 ON BEHALF OF THE RESPONDENT

2 MR. ROSENKRANZ: Mr. Chief Justice, and may
3 it please the Court:

4 This Court got it right in Firestone when it
5 said, of course a conflict must be weighed. There's no
6 reason for this Court to override its well-reasoned and
7 unanimous conclusion which --

8 JUSTICE SCALIA: Dictum.

9 MR. ROSENKRANZ: It was dictum, Your Honor,
10 but it was very well-considered dictum because --

11 (Laughter.)

12 MR. ROSENKRANZ: -- the only issue before
13 the Court so far as the parties thought was what is the
14 effect of this dual role that Firestone had? And this
15 Court did not answer that question, but that's what the
16 parties were arguing about.

17 So this Court correctly discerned the rule
18 from trust law. It correctly discerned and balanced
19 ERISA's policies and, if anything --

20 JUSTICE SCALIA: What I don't like about the
21 dictum is I don't know what it means.

22 MR. ROSENKRANZ: Your Honor --

23 JUSTICE SCALIA: I think it's lovely to say
24 weigh it as a factor, it gets the case off our docket
25 and it's fine. But what does it mean?

1 MR. ROSENKRANZ: Well, Your Honor --

2 JUSTICE SCALIA: Does it mean that a
3 perfectly reasonable decision that is within the
4 discretion -- I mean this plan says that MetLife will
5 have -- knowing that it will have the conflict, that
6 they will make the decisions and so long as they are not
7 arbitrary, they are valid.

8 Now, let's take a perfectly reasonable
9 decision. It is not arbitrary. Does giving weight to
10 the existence of the conflict which the settlor of the
11 plan expected to exist, does giving weight to that mean
12 that what was reasonable becomes unreasonable?

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

14 JUSTICE SCALIA: If it doesn't mean that,
15 then it means nothing.

16 MR. ROSENKRANZ: Absolutely, Your Honor.
17 The answer is yes in many circumstances. And the beauty
18 of the Court's invocation of trust law is that trust law
19 answers the question. Trust law says that when you have
20 a fiduciary with a conflict, you apply especially
21 careful scrutiny.

22 CHIEF JUSTICE ROBERTS: Well, but trust law
23 doesn't take into account what we have said repeatedly
24 in our ERISA decisions, which is we want to encourage
25 people to set up ERISA plans. And that has affected the

1 standards that we've adopted, for example, that we even
2 allow a conflict of interest like this to exist.

3 And it seems to me that your position is
4 going to hurt beneficiaries under ERISA plans because
5 people are going to say, as they're perfectly free to
6 do -- people, the employers, are going to say, as they
7 are perfectly free to do, you know, I'm just not going
8 to do it; if we're going to have judges looking at these
9 claims decisions on a de novo basis, who knows how much
10 it'll end up costing me, so I'm not going to set up
11 these plans.

12 MR. ROSENKRANZ: Your Honor, I understand,
13 and this Court considered that in Firestone, the
14 litigation cost and the added administrative costs, and
15 this Court concluded en route to de novo review that the
16 1132(a)(1)(B) remedy is so infused with the interests of
17 ensuring that the beneficiaries get their benefits due,
18 that that is the interest that the courts weigh most in
19 determining the standard of review.

20 CHIEF JUSTICE ROBERTS: Do you -- which
21 position do you adopt? It was only posed as
22 hypothetical, so I don't mean to attribute the position
23 to you; but the Justice Souter hypothetical or the
24 Justice Alito hypothetical?

25 MR. ROSENKRANZ: Your Honor, the answer is

1 both. They can happen under both circumstances --
2 circumstances. But let me explain why. What trust law
3 does is to say we apply especially careful scrutiny.
4 And the scrutiny has to be consonant with the purpose of
5 the scrutiny, which is to ensure that the conflicted
6 fiduciary does not end up subconsciously or consciously
7 tilting the scale.

8 CHIEF JUSTICE ROBERTS: Well, that sounds
9 like the Justice Alito hypothetical. In other words,
10 the extra scrutiny has to be consonant with the purpose.
11 The purpose is to protect against the conflict. So if
12 the scrutiny doesn't reveal that the conflict played a
13 role, then it's -- then it's not an abuse of discretion.

14 MR. ROSENKRANZ: No, Your Honor, because
15 what trust law says is that you apply especially careful
16 scrutiny, which entails two things. The first thing is
17 what this Court called keeping the judicial eye peeled
18 for conflict of interest in Rush. So that's an
19 examination of the record of the decisionmaking process.
20 You kick the tires, you test the judgments, as the Sixth
21 Circuit did in this case, and you ask yourself, is this
22 the work of an unbiased fiduciary?

23 The second thing is to imagine a zone of
24 reasonableness within which a reasonably prudent trustee
25 might land and then say to yourself at the outer limits

1 of the zone of reasonableness, we will accept the
2 judgment of an unconflicted fiduciary because there is
3 no reason for us to suspect that he reached that result
4 because of the bias. For a conflicted fiduciary you can
5 contract that zone of reasonableness.

6 JUSTICE SCALIA: Trust law doesn't say.
7 Trust law does not establish a different standard of
8 judicial review for the conflicted trustee.

9 MR. ROSENKRANZ: Your Honor, it absolutely
10 does, and the 26 law professors in the amicus brief that
11 they filed with this Court explain exactly --

12 JUSTICE BREYER: But I don't know what to
13 look to in trust law. I mean, all that's happened here,
14 every life insurance -- every company, every life
15 insurance company has the kind of conflict that you're
16 talking about. Every company has the kind of conflict
17 you're talking about. And an automobile company might
18 make shoddy merchandise so it can make more money in the
19 short run.

20 How does trust law keep that kind of
21 conflict? Now, it can't be and it isn't, because I've
22 looked it up, I think, that trust law says that every
23 distribution by a trustee whose own fee depends on the
24 size of the trust is conflicted.

25 MR. ROSENKRANZ: Absolutely --

1 JUSTICE BREYER: I doubt, since banks are
2 trustees, I doubt but I'm not sure here -- -

3 MR. ROSENKRANZ: Your Honor --

4 JUSTICE BREYER: -- that banks are
5 trustees -- suppose you were to say, look, the bank has
6 an interest in maximizing the amount of money in its
7 account and therefore every decision of a distribution
8 of such trustee is subject to some special thing.

9 Now, the problem for me in this case is what
10 in trust law do I analogize it to, not -- I don't doubt
11 for a second the 26 law professors, et cetera -- though
12 I do really sometimes, but not in this case.

13 (Laughter.)

14 JUSTICE BREYER: The -- the -- so what do I
15 look to? And where I ended up was I'd like an answer to
16 what I asked the other side. I ended up, I can't do
17 better than Firestone, I ought to write two words in
18 this opinion, and the standard, perfect; from the
19 opinion below, perfect. You want to know what I mean,
20 read the opinion below. Okay?

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

22 MR. ROSENKRANZ: So let me break it down and
23 first turn to the premise. It is simply not correct
24 that every employer is conflicted.

25 JUSTICE BREYER: I overstated.

1 MR. ROSENKRANZ: Okay.

2 JUSTICE BREYER: Take the examples that I
3 gave. It's an ordinary insurance policy.

4 MR. ROSENKRANZ: Okay. But the bank
5 example, Your Honor, that is not a pressure, which is
6 kind of a business pressure, that trust law recognizes
7 as a conflict of interest. Trust law acknowledges that
8 trustees are often, almost always, in the business of
9 administering trusts, and they don't -- they make their
10 money by doing the job well. The big difference is we
11 are talking here about a direct impact on the bottom
12 line.

13 JUSTICE BREYER: But that's, you see, their
14 point. Their point is this is just an ordinary
15 insurance company, an ordinary policy, and it's really
16 like a bank that's a trustee that in fact takes money
17 that hasn't been distributed and puts it on its own
18 account. They make money for that, from that. So there
19 is a conflict.

20 MR. ROSENKRANZ: Well, Your Honor --

21 JUSTICE BREYER: You have that kind of
22 conflict.

23 What do you say about that?

24 MR. ROSENKRANZ: Justice Breyer, it's just
25 wrong under trust law and it's wrong under the facts, as

1 everyone knows them to be in the insurance industry.
2 The insurance industry makes its money on the
3 differential between the premiums that it charges and
4 the payouts in claims.

5 JUSTICE BREYER: The bank makes its money by
6 putting money in an account, paying interest and lending
7 it at more money.

8 MR. ROSENKRANZ: But -- So let me give an
9 example from real life. MetLife, for example, shells
10 out \$14 billion a year in ERISA covered claims. If it
11 denies one out of a hundred claims improperly, we are
12 talking about \$140 million.

13 JUSTICE BREYER: Yes, and Chase Manhattan
14 bank has \$14 trillion in trust accounts, and if they
15 just put in for three days money into an
16 interest-bearing account and lend it out for five
17 minutes, they will make \$1 billion. Okay. You see,
18 they are finding these kinds of conflicts everywhere.
19 And that's what I'm asking you.

20 What I think if I were to add something I'd
21 say, look at this carefully, judge, look at it
22 carefully; but if all you find is an ordinary insurance
23 company doing ordinary work and there is no ground for
24 suspicion, proceed to step two. What about that?

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

1 thing to say is that -- if that is, in fact, an
2 authorized transaction, that would fall under the
3 self-dealing rules of trust law, and trust law
4 self-dealing rules are situations in which the set law
5 has actually suspended the duty of loyalty of the
6 trustee -- that's correct -- of the trustee.

7 That is absolutely impermissible under
8 ERISA. You cannot suspend the duty of loyalty under
9 ERISA. There is a clear provision about that.

10 JUSTICE SOUTER: Mr. -- Mr. Rosenkranz. I
11 think you set up basically three different kinds of
12 scenarios. And I want to set -- I want to put them into
13 my own words and -- and have you tell me whether I
14 understand your -- your point correctly.

15 Scenario number one is the case -- in each
16 of these scenarios, we have the same relationship
17 between the -- in effect, the trustee and -- and the
18 beneficiary that we have here. There -- there is a --
19 there is a built-in conflict. We don't know what its
20 effect is.

21 In scenario number one, the -- the evidence
22 is that the person making the benefits decision says
23 let's let this person suffer so that we can keep the
24 money. That is the easy case.

25 Scenario number two --

1 MR. ROSENKRANZ: I'm sorry, Your Honor, says
2 that explicitly in the claim file?

3 JUSTICE SOUTER: That's right, the -- the
4 e-mail shows up.

5 In -- in case number two, there -- there is
6 what you referred to as a decision within the zone of
7 reasonableness, but instead of being sort of in the core
8 of the center of the zone of reasonableness, it's close
9 to the edge. A decisionmaker could look at that
10 decision and say if there is no reason to be suspicious
11 about it, it's still within the zone of reasonableness,
12 and I don't think there is a conflict.

13 But if the decisionmaker knows that there is
14 this kind of structural conflict, the decisionmaker can
15 say look, I wasn't born yesterday; the reason it's so
16 close to the edge is that they were giving way to their
17 own self-interest in the conflict, and I'm going to
18 decide for the beneficiary and against the company.

19 Case number three is the case of the person
20 right on the fence, the decisionmaker. The
21 decisionmaker says, I've -- I've looked at everything
22 there is to look at and I cannot decide for sure what
23 this is, whether it was a legitimate decision or a
24 conflicted one in the -- in the decisionmaker's favor,
25 unless I take into consideration the fact that there is

1 this structural conflict.

2 MR. ROSENKRANZ: Your Honor, the
3 decisionmaker here is the court reviewing? Or --

4 JUSTICE SOUTER: No the decisionmaker is the
5 person who made the beneficiary -- the benefits
6 decision. And if I take into consideration the
7 structural conflict, that gives the decision to the
8 beneficiary and against the company.

9 Now, in case number two, it's close but
10 the -- but the fact of the conflict is regarded as,
11 itself, as substantive evidence and it -- it results in
12 a decision for the beneficiary.

13 In case number three, the evidence is in
14 equipoise, and to get off equipoise, the conflict rule
15 is taken as the tiebreaker.

16 My understanding is that your view is the
17 proper way to consider the conflict under Firestone is,
18 as I did in my hypo, in both case number two and case
19 number three. Am I correct?

20 MR. ROSENKRANZ: To consider it, yes, Your
21 Honor, but --

22 JUSTICE SOUTER: In other words, when we
23 take -- it is taken as substantive evidence to -- to get
24 us out of the zone of reasonableness in case number two.
25 It breaks the tie in case number three.

1 MR. ROSENKRANZ: No, Your Honor, absolutely
2 not. In case number two, if you are right at the edge
3 of the zone of reasonableness and there is nothing else
4 in the record to raise suspicions about the process by
5 which the decisionmaker got there --

6 JUSTICE SOUTER: But -- but the record has
7 the structural context.

8 MR. ROSENKRANZ: Yes, Your Honor, except for
9 that what would appear to be at a -- right at the outer
10 bounds of reasonableness for an unconflicted fiduciary
11 could knock you over the fence, to use Your Honor's
12 earlier analogy, for a conflicted fiduciary.

13 Definitely not for scenario two. If the
14 decisionmaker is correct in the judgment of the court,
15 "Gee, I don't know where to go, this is really close,"
16 well, within the zone of reasonableness, in fact, in
17 Your Honor's hypothetical, you're right at the -- the
18 target center of the zone of reasonableness, then no, a
19 court would absolutely not hold --

20 JUSTICE SOUTER: No. But in my hypothetical
21 you weren't at the center of the zone of reasonable; you
22 were close to the edge.

23 MR. ROSENKRANZ: Number three. In number
24 three, Your Honor --

25 JUSTICE SOUTER: Number three Honor we can't

1 make up our mind.

2 MR. ROSENKRANZ: But the decisionmaker, you
3 said, Your Honor, in number three, could not make up its
4 mind.

5 JUSTICE SOUTER: That's right.

6 MR. ROSENKRANZ: And if the -- and if the
7 court confirms yes; the decisionmaker was right that
8 this was really close; you're right at the target center
9 of the zone of reasonableness and the conflict of
10 interest doesn't push you over. The only thing that the
11 conflict of interest could do there is the judicial eye
12 becomes peeled for other evidence of conflict which
13 would end up --

14 JUSTICE SOUTER: So -- so you -- I guess you
15 are saying it may be considered as substantive evidence
16 but it is not a process tiebreaker?

17 MR. ROSENKRANZ: Your Honor, let me rephrase
18 it. What I'm saying is two things. The first is
19 especially careful scrutiny, just in the abstract,
20 stepping back from the hypothetical, means that you
21 focus really carefully on the process by which the
22 decision was made, as the Sixth Circuit did in this
23 case. "This is strange, they are completely ignoring
24 this evidence. They are cherry picking. They are doing
25 about-faces." That's one.

1 Secondly, if you are at the target center of
2 the zone of reasonableness, and none of those procedural
3 irregularities have arisen, to be sure that the district
4 court reviewing would affirm that judgment --

5 JUSTICE ALITO: How does a reviewing court
6 know how far it can go from the outer boundary of the
7 zone of reasonableness when there is a conflicting
8 interest? Is it always -- and I don't know how thin you
9 can slice these standards of review. Is it always,
10 let's say 90 percent of the way to the outer boundary;
11 or sometimes it would be 80 percent; sometimes it would
12 be 70 percent?

13 MR. ROSENKRANZ: Your Honor, I --

14 JUSTICE ALITO: Does it work like that
15 depending on the facts of the case?

16 MR. ROSENKRANZ: Yes, Your Honor, and that's
17 where the Court can't calibrate. What the Court can do
18 is provide very clear guidance to the lower courts.

19 JUSTICE GINSBURG: And what would -- how
20 would you verbalize it?

21 MR. ROSENKRANZ: I --

22 JUSTICE GINSBURG: Because everybody talks
23 about yes, it's a factor, it's a relevant factor. But
24 if you are writing an opinion to give clear instructions
25 to the district judges who are the first-instance

1 judicial decisionmakers, what do you tell them?

2 MR. ROSENKRANZ: I would say first and
3 foremost -- I would say three things to the district
4 courts. Number one, this is not just some form of
5 arbitrary and capricious agency review with just a
6 little bit more bite. This is reasonableness review
7 under trust law, which is very, very different.

8 Number two, the judicial eye is peeled, as
9 this Court said in Rush, for conflict of interest. Kick
10 the tires. Here are seven, eight, nine illustrations of
11 the sorts of things that lower courts should be on the
12 lookout for as they are trying to discern whether the
13 conflict tainted the result.

14 Number three, if -- if you are at the outer
15 bounds of reasonableness for an unconflicted trustee,
16 you can contract that zone of reasonableness because you
17 don't -- when -- when an unconflicted trustee is right
18 at the outer edge, there is no reason to suspect his
19 motive.

20 JUSTICE KENNEDY: Suppose that the insurance
21 company shows or may be required to show, at least by
22 the burden of production, that it has established
23 firewalls, very careful procedures, written regulations
24 that claims administrators are not to consult with the
25 people that set policy and prices. Does that suffice to

1 permit, simply, abuse of discretion review?

2 MR. ROSENKRANZ: No, Your Honor. It would
3 be a factor --

4 JUSTICE KENNEDY: So that there is nothing
5 the fiduciary can do in order to avoid intrusive --
6 highly -- a high degree of scrutiny in review of every
7 close case?

8 MR. ROSENKRANZ: Well, Your Honor, first,
9 just to be clear, we are talking about still a
10 deferential standard. It's just not as deferential as
11 it would otherwise be.

12 Absolutely. An insurer can come in and say,
13 look, we've created all these procedures; they have
14 mitigated the conflict, but it can never get --

15 JUSTICE KENNEDY: So that all insurance
16 company claims adjustors have less deferential review
17 than independent claims administrators?

18 MR. ROSENKRANZ: Yes, Your Honor, unless the
19 insurance company comes in and can demonstrate in a case
20 that we've never heard of --

21 JUSTICE KENNEDY: You want us to institute
22 an industrywide rule differentiating insurance companies
23 from other --

24 MR. ROSENKRANZ: Your Honor, one very
25 important thing to say about that is that under trust

1 law, an authorized conflict.

2 JUSTICE BREYER: Well, is there an example
3 in trust law where, say, a bank's a trustee and they
4 self-insure in some area? Is there ever a case in trust
5 law that found that to be a conflict.

6 MR. ROSENKRANZ: I don't understand the
7 hypothetical, Your Honor.

8 JUSTICE BREYER: Well, I mean, you can
9 easily transpose this to other -- trusts are run by
10 banks often that are trustees. They're huge, and they
11 might self-insure in simple -- in certain circumstances,
12 in which case you reproduce something like the conflict
13 that's at issue here. And so --

14 MR. ROSENKRANZ: Well, Your Honor --

15 JUSTICE BREYER: And I think that -- my
16 guess, but I don't know. That's why I'm so nervous. Is
17 there any example where that kind of thing has ever been
18 held to be a conflict of interest?

19 MR. ROSENKRANZ: Only where what the bank is
20 doing is engaging in self-dealing that -- of the sort
21 that's authorized. Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Ms. Saharsky.

24 ORAL ARGUMENT OF NICOLE A. SAHARSKY

25 ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE,
2 SUPPORTING THE RESPONDENT

3 MS. SAHARSKY: Mr. Chief Justice, and may it
4 please the Court:

5 The Court should not turn a blind eye to the
6 conflict of interest that exists when an administrator
7 both evaluates and pays claims. Instead, an
8 administrator's discretionary decisions should be
9 reviewed for reasonableness where the conflict of
10 interest is considered as a factor. And what that means
11 --

12 CHIEF JUSTICE ROBERTS: We've heard a lot of
13 talk about judicial eyes today, but it doesn't -- it
14 makes it sound as if abuse-of-discretion review is
15 nothing, and with the added factor you want to look more
16 closely. Courts undertaking abuse-of-discretion review
17 don't do it blindly. They look at it. It's just a
18 question of whether they give deference on the judgment
19 calls. And I'm still not -- I still don't understand
20 how the added factor or, in your case, the added seven
21 factors affects that issue of deference.

22 MS. SAHARSKY: Well, we agree with the point
23 you're making, that the question in all of these cases
24 is the reasonableness, where there's a discretionary
25 clause, is the reasonableness of the administrator's

1 determination. That is the ultimate inquiry, and there
2 are any number of other facts and circumstances that
3 could suggest that the decision is unreasonable.

4 JUSTICE SCALIA: And --

5 MS. SAHARSKY: And one fact --

6 JUSTICE SCALIA: But you say that one of the
7 things that can make it unreasonable is the mere fact
8 that there exists this -- this conflict.

9 MS. SAHARSKY: The conflict of interest.

10 JUSTICE SCALIA: That renders what is a
11 perfectly reasonable decision unreasonable. I --

12 MS. SAHARSKY: In very close cases.

13 JUSTICE SCALIA: I don't understand that.
14 In very -- what kind of a standard is that, "in very
15 close cases"? How is -- how are you going to review a
16 court? I mean, give it some weight in very close cases?
17 It slops over. This is not a standard. I don't know --
18 I don't know what you're telling the courts to do.

19 MS. SAHARSKY: Well, this is a standard that
20 comes from trust law, the reasonableness standard, and
21 this Court has recognized similar standards in all
22 different areas of the law where they've talked about --
23 where you've talked about reasonableness and abuse of
24 discretion review --

25 JUSTICE SCALIA: Well, I don't mind

1 reasonableness and I don't mind abuse of discretion.
2 But you're telling me that even when the reasonableness
3 standard is met, if there is this conflict, if it's
4 close -- how close is close? You -- suddenly it flops
5 over the edge. I mean, you know, close to the out --
6 it's -- it's beautiful art, but I don't understand how
7 it turns into law.

8 MS. SAHARSKY: In every case, the court
9 would need to make a decision about reasonableness, and
10 in the cases where there is a conflict of interest that
11 needs to be weighed what the court would do is take a
12 close look at the administrator's rationale --

13 JUSTICE BREYER: Then what analogy? I agree
14 with your basic point. If I encapsulate it, you may or
15 may not agree with my encapsulation. This reminds me a
16 lot of the argument between Learned Hand and Felix
17 Frankfurter under what "substantial evidence" meant.
18 And like Learned Hand, your side, I think, or the first
19 argument, wants to find an absolute standard, a perfect
20 analogy, which Frankfurter said you can't do. Very
21 well.

22 What's worrying me is what is the analogy?
23 Because you're not saying it's just conflict-of-interest
24 law. You are analogizing it to a trustee who himself is
25 a remainderman. And it's at that point that I begin to

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

3 Now, you've looked through lots of cases.
4 Your colleague knows it better than you, and he hasn't
5 come up with something that's a better analogy. But do
6 you see what's bothering me? So, therefore I'm back
7 where I started: Two-sentence, two-word opinion. We
8 did our best in Firestone and this decision below is a
9 good illustration of how to do it. What can you add to
10 what I just said?

11 MS. SAHARSKY: First of all, this Court
12 should say that Firestone correctly set out the
13 framework for the de novo default standard of review and
14 what should happen in the case of a discretionary
15 determination where the plan confers discretion --

16 JUSTICE GINSBURG: Why --

17 MS. SAHARSKY: -- that review should be
18 under the trust law standard.

19 JUSTICE GINSBURG: If we look at Firestone,
20 it's rather laconic. It's just says -- it says,
21 ordinarily, if you don't have this discretionary
22 authority, it's de novo review. And then -- this is on
23 page 115. It says if the fiduciary has discretionary
24 authority to determine eligibility benefits, then it's
25 not de novo. And what more does it say? I don't see

1 that it says anything more than that.

2 MS. SAHARSKY: Well, both on pages 111 and
3 on 115, this Court was looking to the law of trusts.
4 There's a more extensive discussion on page 111, where
5 it says, for example, "If the trustee is given power to
6 construe disputed or doubtful terms, in such
7 circumstances the trustee's interpretation will not be
8 disturbed if reasonable." And then on page 115, using
9 that abuse of discretion reasonableness standard, the
10 Court said "If there is a benefit plan that gives
11 discretion to an administrator that is operating under a
12 conflict, the conflict must be weighed as a factor."

13 And Firestone told this Court to look to
14 trust law and trust law -- we think the best examples
15 there are the situations of a trustee who is also a
16 beneficiary or a trustee who is also a remainderman.

17 JUSTICE KENNEDY: Suppose an insurance
18 company -- I'll just repeat my earlier question -- has
19 done the best that it can do to have a firewall,
20 independence and so forth. Does that bear on whether or
21 not the less deferential standard of review is invoked?

22 MS. SAHARSKY: The standard of review would
23 be the same, which is review for reasonableness, but --

24 JUSTICE KENNEDY: So it makes no difference
25 what -- it makes no difference what the policies of the

1 companies are insofar as the standard of review?

2 MS. SAHARSKY: The standard of review is the
3 same, but the outcome could be different in that case
4 because what the insurance company did should be taken
5 into account when the court is making a judgment call,
6 the same kind of judgment call that courts have made in
7 equity cases for years.

8 JUSTICE KENNEDY: This --

9 MS. SAHARSKY: But --

10 JUSTICE KENNEDY: This bears upon the
11 question Justice Breyer asked, which we never could get
12 completely answered. Can you tell me what the Sixth
13 Circuit did wrong here?

14 MS. SAHARSKY: The Sixth Circuit correctly
15 determined that there needed to be greater scrutiny to
16 -- to the claims determination in this case. We would
17 quarrel with the Sixth Circuit's analysis calling that
18 abuse of -- or, I'm sorry, arbitrary and capricious
19 review because we don't think that that analogy to
20 administrative law makes sense. But what the Sixth
21 Circuit did was correct in this. There were a number of
22 factors here, for example the Social Security
23 determination, MetLife's participation in that, that has
24 suggested that this decision was unreasonable and could
25 not be upheld. Conflict of interest was a factor.

1 JUSTICE SCALIA: I don't think you're at all
2 saying that it's the same standard of review. You keep
3 saying that, and your friend said it, but it's not the
4 same standard of review. You say it's still the
5 reasonableness standard of review, but then you say,
6 however, the mere fact of the existence of the conflict
7 does at the edges make unreasonable what used to be
8 reasonable. That is a different standard of review. It
9 means you are not using a single reasonableness standard
10 of review. You're arguing for a second standard of
11 review that is so vague I don't know what it means. Why
12 not just say that the district court, when there is a
13 conflict of this sort, has to spend two more hours
14 considering the case?

15 (Laughter.)

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

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

19 MS. SAHARSKY: We think that the answer
20 comes from trust law. We think that the answer comes
21 from trust law, and these are judgment calls that courts
22 need to make --

23 CHIEF JUSTICE ROBERTS: But under trust law
24 --

25 MS. SAHARSKY: -- about whether a decision

1 was reasonable.

2 CHIEF JUSTICE ROBERTS: -- we don't have --
3 we don't have an established policy of encouraging
4 people to establish trusts. We do have reflected in our
5 decisions an established policy of encouraging people to
6 set up ERISA plans.

7 MS. SAHARSKY: That's true, but that's
8 balanced against the strict fiduciary duties in ERISA,
9 that in cases of a conflict of interest suggests that
10 the plan administrator's determination needs to get
11 additional scrutiny. I understand that --

12 JUSTICE SOUTER: All right. Here are two
13 ways you could do it. You've spoken of reasonableness
14 analysis. By "reasonableness analysis," I mean and I
15 assume you mean that the person who is judging the
16 action taken says: Here are the good reasons on one
17 side that support the action; and here are the reasons
18 on the other side that in fact are critical of it,
19 suggest that it was wrong. Which one of these sets of
20 reasons is the strongest? That's what I sort of mean by
21 "reasonableness analysis." All right.

22 There are two ways that the structural
23 conflict could be taken into consideration in
24 reasonableness analysis. One is it could be taken into
25 consideration during this -- we'll call it the step one

1 process. We put the structural conflict on the -- on
2 the side of the scale that weighs against affirming the
3 decision. A second way to do it would be to go through
4 reasonableness analysis leaving the conflict aside for
5 the moment, and say, on regular reasonableness analysis,
6 do the reasons support the decision predominantly or do
7 they go against it, and let it go at that. But when
8 that kind of "reasonableness" analysis results in
9 something close to equipoise, then we take the
10 structural conflict into consideration; and that's what,
11 in effect, sort of breaks the tie.

12 Which of those models do we use? Do we use
13 the structural conflict as a reason in the step one
14 weighing, or do we use the structural conflict as a
15 tiebreaker.

16 MS. SAHARSKY: The structural conflict
17 should be used in the weighing although, for the
18 purposes of your hypothetical, I see the answer as being
19 the same in both situations that you posited. That the
20 conflict of interest would only make a difference in
21 close cases, yes.

22 JUSTICE SOUTER: It's a question of when you
23 use it; and on the first hypothetical, you may not have
24 to use it at all.

25 On the second hypothetical, you have to use

1 it because you can't make a decision any other way. So
2 you're saying: Use it at step one as one of the
3 substantive reasons in your weighing analysis?

4 MS. SAHARSKY: That, we think, would be more
5 consistent with purposes --

6 JUSTICE SCALIA: Well, if you're going to do
7 that, you have to tell me how much it weighs. You see,
8 if you use it in step two when things are in equipoise,
9 it doesn't matter how much it weighs. It's enough if it
10 weighs a feather. In the equipoise case you come out
11 the other way.

12 But if you're going to use it in the first
13 structural system to determine, you know, how much each
14 side -- I have to know its weight. And there is no
15 indication whatever as to what its weight is. It's
16 really up to the district judge, I guess, to decide how
17 much weight he is going to give to the fact that there
18 is this conflict.

19 MS. SAHARSKY: Can I answer the question?

20 CHIEF JUSTICE ROBERTS: Sure.

21 MS. SAHARSKY: I think the problem with this
22 inquiry is that reasonableness does not have
23 mathematical standards. It's a determination that the
24 court needs to make weighing all of the facts and
25 circumstances.

1 JUSTICE SCALIA: I'm not weighing
2 reasonableness. I'm weighing that factor of the
3 conflict. That's what you ask us to weigh.

4 MS. SAHARSKY: I think that --

5 JUSTICE SCALIA: It's not reasonableness.

6 MS. SAHARSKY: The conflict is one of many
7 factors like the Social Security Administration's
8 determination and how it was treated in this case that
9 suggests that the plan administrator's determination was
10 unreasonable. I can't tell you that it weighs 10
11 percent or 20 percent in every case. It is something
12 that the Court has to take into account.

13 JUSTICE SCALIA: Then you should only use it
14 as a tiebreaker, I suggest, if you can tell me.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MS. SAHARSKY: Thank you.

17 CHIEF JUSTICE ROBERTS: Miss Posner, you
18 have one minute remaining.

19 REBUTTAL ARGUMENT OF AMY K. POSNER

20 ON BEHALF OF THE PETITIONERS

21 MS. POSNER: Thank you Your Honor. On
22 question one, I think it's important to know that the
23 zone of reasonableness and the size of the field is set
24 forth by the employer when it designates discretionary
25 authority and says that the standard of review is an

1 arbitrary and capricious one in court, which is the same
2 in ERISA as an abuse-of-discretion standard.

3 And the -- and the fact that's common and
4 known to the employer in setting forth that standard,
5 that there is this dual role, shouldn't change that
6 analysis at all, nor should it come into play in any
7 significant way whatsoever in these decisions. But
8 on question two, if there is a conflict that influence,
9 that's not what the employer was anticipating. And so
10 it -- it changes the size of the permissible field. And
11 to get to Justice Scalia's point, the actual conflict
12 there does matter because it changes the size of the
13 field. It's not what the employer was intending in its
14 plan. Now, if -- also on question two, if you view this
15 as a --

16 JUSTICE SCALIA: What did you just say? I
17 don't understand that. The conflict was intended by the
18 employer. He appointed the --

19 MS. POSNER: Yes. The dual-role conflict
20 that everybody knows exists --

21 JUSTICE SCALIA: Was intended by the --

22 MS. POSNER: -- was absolutely intended on.
23 Question one, we are saying at that point it doesn't
24 change the size of the field; it doesn't change the zone
25 of reasonableness; and, therefore, it should have no

1 effect.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 MS. POSNER: Thank you, Your Honors.

5 (Whereupon, at 11:13 a.m., the case in the
6 above-entitled matter was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A				
ability 26:2	33:9	46:24	50:10	43:10
about-faces	Administratio...	analogy 38:12	argument 1:13	bank's 43:3
39:25	54:7	46:13,20,22	2:2,10 3:3,7	barriers 25:21
above-entitled	administrative	47:2,5 49:19	15:16 26:25	26:1
1:12 56:6	29:14 49:20	analysis 23:25	43:24 46:16,19	based 23:17
absolute 46:19	administrator	49:17 51:14,14	54:19	24:2
absolutely 7:25	4:13 18:20	51:21,24 52:4	arisen 40:3	basic 46:14
15:23 28:16	19:21 20:3	52:5,8 53:3	arrangements	basically 35:11
31:9,25 35:7	22:11 44:6	55:6	3:24	basis 29:9
38:1,19 42:12	48:11	answer 9:10	art 46:6	bear 19:17
55:22	administrators	10:10 11:2	aside 52:4	48:20
abstract 39:19	21:20 41:24	17:2 18:2,3,5	asked 20:11,15	bears 49:10
abuse 4:1 8:3	42:17	19:9 21:8,8	32:16 49:11	beautiful 46:6
16:4 21:25	administrator's	27:15 28:13,17	asking 25:18	beauty 28:17
30:13 42:1	44:8,25 46:12	29:25 32:15	34:19	behalf 1:16,18
45:23 46:1	51:10 54:9	50:16,19,20	Assistant 1:20	1:22 2:4,6,8,12
48:9 49:18	admit 13:14	52:18 53:19	assume 14:11,12	3:8 27:1 43:25
abuse-of-discr...	adopt 29:21	answered 49:12	51:15	54:20
44:14,16 55:2	adopted 29:1	answers 28:19	astray 5:18	believe 15:19
accept 31:1	advantage 6:4	anticipates 7:15	attribute 29:22	21:5 25:9
account 8:11	affect 6:24	anticipating	authority 9:2	beneficiaries
9:22 14:17	affirm 40:4	55:9	11:5 20:4 23:1	29:4,17
28:23 32:7	affirming 52:2	apparent 23:14	47:22,24 54:25	beneficiary
33:18 34:6,16	affordable	appeals 10:19	authorized 35:2	35:18 36:18
49:5 54:12	19:15	appear 38:9	43:1,21	37:5,8,12
accounts 34:14	agency 41:5	APPEARAN...	authorizes 3:20	48:16
acknowledged	agree 44:22	1:15	automatically	benefit 3:25
22:24	46:13,15	appellate 18:10	24:7	48:10
acknowledges	aha 8:10	appendix 25:12	automobile	benefits 6:20
15:20 33:7	AL 1:4	26:18	31:17	8:15 9:7,18,19
acted 23:3	Alito 15:16,25	application 15:2	available 19:15	11:10,20 12:8
action 12:8	16:5,6 21:6,11	17:2	avoid 42:5	15:24 19:7
24:17 51:16,17	21:22 29:24	applied 11:12	a.m 1:14 3:2	20:5 21:15,19
actual 5:15 6:7,8	30:9 40:5,14	applies 24:7	56:5	24:14,22 29:17
6:20 55:11	Alito's 20:9,15	apply 28:20 30:3		35:22 37:5
actuality 3:22	21:3	30:15	B	47:24
4:12,16,18,21	allow 20:19,23	appointed 55:18	B 6:23	best 47:8 48:14
4:24	29:2	appropriate	back 39:20 47:6	48:19
add 34:20 47:9	allows 5:3,11	12:3	backwards	better 32:17
added 13:20	25:13 26:18	April 1:10	12:22	47:4,5
29:14 44:15,20	amicus 1:22 2:8	arbitrary 3:16	bad 13:5,5	beyond 21:10
44:20	31:10 44:1	20:7 28:7,9	balanced 17:15	bias 31:4
additional 51:11	amount 32:6	41:5 49:18	27:18 51:8	big 33:10
adjustment 23:9	AMY 1:16 2:3	55:1	bank 32:5 33:4	billion 34:10,17
adjustors 42:16	2:11 3:7 54:19	area 22:12 43:4	33:16 34:5,14	bit 41:6
administering	analogize 32:10	areas 45:22	43:19	bite 41:6
	analogizing	arguing 27:16	banks 32:1,4	blind 4:9,11

44:5	26:20	13:1 15:18	42:7 45:12,15	8:10,20 9:3,14
blindly 44:17	capricious 3:16	55:5,24,24	45:16 46:4,4,4	9:15 10:4,5
blocking 26:1	20:7 41:5	changes 3:15	46:5,12 52:9	11:9 12:10
boat 47:1	49:18 55:1	55:10,12	52:21	13:4,10,17,19
born 36:15	careful 28:21	charges 34:3	closely 44:16	14:5,8,9,15,20
bothering 47:6	30:3,15 39:19	Chase 34:13	colleague 47:4	14:25 15:21
bottom 33:11	41:23	checkmark 19:1	come 11:4 24:11	16:2,8,24 17:8
boundary 40:6	carefully 34:21	cherry 39:24	42:12 47:5	20:11,16,24
40:10	34:22 39:21	Chief 3:3,9 8:4	53:10 55:6	21:2,4 22:5,25
bounds 38:10	case 3:4 4:21	8:18 9:9 20:8	comes 9:3 20:11	23:3,10 27:5
41:15	10:17,23,23	26:21,24 27:2	20:25 42:19	28:5,10,20
breached 9:4	14:7,19 19:5	28:22 29:20	45:20 50:20,20	29:2 30:11,12
break 16:23	21:1,3,16,24	30:8 43:22	commingle 3:22	30:18 31:15,16
32:22	22:2,18,20	44:3,12 50:23	common 3:18	31:21 33:7,19
breaks 37:25	23:22,23 27:24	51:2 53:20	55:3	33:22 35:19
52:11	30:21 32:9,12	54:15,17 56:2	commonplace	36:12,14,17
Breyer 10:8,10	35:15,24 36:5	Circuit 3:11	3:24	37:1,7,10,14
10:13 31:12	36:19,19 37:9	23:23 30:21	companies 3:20	37:17 39:9,11
32:1,4,14,25	37:13,18,18,24	39:22 49:13,14	24:7 42:22	39:12 41:9,13
33:2,13,21,24	37:25 38:2	49:21	49:1	42:14 43:1,5
34:5,13 43:2,8	39:23 40:15	Circuit's 11:6	company 1:4	43:12,18 44:6
43:15 46:13	42:7,19 43:4	24:6 49:17	3:12 6:12,24	44:9 45:8,9
49:11	43:12 44:20	circumstances	7:6,22 11:23	46:3,10 48:12
brief 5:17 7:16	46:8 47:14	12:4 28:17	15:12 16:25	48:12 49:25
15:17,18,20	49:3,16 50:14	30:1,2 43:11	17:14,14,19	50:6,13 51:9
16:1 22:5	53:10 54:8,11	45:2 48:7	18:24 20:18,20	51:23 52:1,4
31:10	56:3,5	53:25	31:14,15,16,17	52:10,13,14,16
built-in 35:19	cases 8:19,23,25	City 1:16	33:15 34:23	52:20 53:18
burden 7:4	9:7,8 17:4,9	claim 3:12 4:13	36:18 37:8	54:3,6 55:8,11
41:22	22:9,23 23:13	22:12 23:9,11	41:21 42:16,19	55:17,19
business 33:6,8	24:13 44:23	24:21 36:2	48:18 49:4	conflicted 4:13
	45:12,15,16	claims 6:14 7:24	company's 23:9	4:17,18,22,24
C	46:10 47:3	8:14 24:14	completely	5:3,10 30:5
C 2:1 3:1	49:7 51:9	29:9 34:4,10	39:23 49:12	31:4,8,24
calculation	52:21	34:11 41:24	conclude 15:10	32:24 36:24
19:12	cause 6:15 24:17	42:16,17 44:7	16:24	38:12
calibrate 40:17	center 36:8	49:16	concluded 29:15	conflicting 5:23
call 5:9 6:13 7:6	38:18,21 39:8	clarify 25:8	concluding	5:24 6:2,5
19:7 49:5,6	40:1	clause 44:25	16:13,15	15:10,11 16:21
51:25	central 20:10	clear 6:13 7:5	conclusion 27:7	17:17 21:14
called 24:3	certain 12:23	14:13 15:25	concrete 11:9	40:7
30:17	43:11	35:9 40:18,24	confers 47:15	conflicts 15:21
calling 49:17	certainly 10:6	42:9 50:17	confirms 39:7	34:18
calls 44:19 50:21	18:19 21:24	clearly 24:10	conflict 3:14,23	conflict's 20:13
capable 19:16	cetera 32:11	close 14:6 19:3	4:13 5:1,3,4,7	conflict-of-int...
capacities 4:5	chance 12:2	36:8,16 37:9	5:8,15 6:22,24	22:19 46:23
capacity 26:11	change 4:14 8:3	38:15,22 39:8	7:13,14,18	consciously 30:6

consider 37:17 37:20	3:10,18 5:13 6:8,10 7:16	10:2,3,4 11:2,7 12:21 13:4,15	denies 34:11	disabled 11:21
consideration 14:14 15:9	8:25 9:17	13:16,20,21	deny 19:6	11:25 12:3,17
16:20 17:16	10:18,24 18:10	14:4,7,8,10	Department 1:21	19:2,21 25:13
36:25 37:6	18:22,23 21:12	15:12 16:3,11	departure 16:3	26:7,19
51:23,25 52:10	21:13 23:2,2	16:14,16,18,22	depending 15:3	disadvantage 14:25 16:24
considered 29:13 39:15	27:3,4,6,13,15	18:11 19:6	40:15	discern 41:12
44:10	27:17 29:13,15	20:6,16 21:4	depends 14:6	discerned 27:17
considering 50:14	30:17 31:11	22:3,6,16	31:23	27:18
consistent 11:17	37:3 38:14,19	23:20 24:10	design 11:17	discovery 21:17
26:11 53:5	39:7 40:4,5,17	28:3,9 32:7	19:14,25,25	discretion 4:1
consonant 30:4	40:17 41:9	35:22 36:6,10	designate 4:24	8:3,9 9:13,16
30:10	44:4,5 45:16	36:23 37:6,7	designated 3:15	16:4 21:25
construe 20:5	45:21 46:8,11	37:12 39:22	4:1	23:17 24:2
48:6	47:11 48:3,10	45:3,11 46:9	designates 9:2	28:4 30:13
consult 41:24	48:13 49:5	47:8 49:24	54:24	42:1 45:24
context 19:24	50:12 53:24	50:25 52:3,6	determination 8:9 19:18,24	46:1 47:15
38:7	54:12 55:1	53:1	21:16 45:1	48:9,11
contract 9:17	courts 8:16	decisionmaker 36:9,13,14,20	47:15 49:16,23	discretionary 9:2 20:4 23:1
19:12 31:5	41:4,11 44:16	36:21 37:3,4	51:10 53:23	44:8,24 47:14
41:16	45:18 49:6	38:5,14 39:2,7	54:8,9	47:21,23 54:24
contrary 4:6	50:21	decisionmakers 41:1	determine 8:7	discussion 48:4
contraverdia 23:4	Court's 11:3	decisionmake... 36:24	9:14 19:13	displace 4:1
controversy 23:4	28:18	decisionmaking 30:19	20:5 25:15	23:2
core 36:7	cover 8:22	decisions 6:12	47:24 53:13	disputed 48:6
correct 11:22	coverage 20:19	18:22 28:6,24	determined 49:15	dissenting 24:5
16:5 32:23	20:23	29:9 44:8 51:5	determining 29:19	distinction 6:6
35:6 37:19	covered 8:8 9:15	55:7	dictum 27:8,9	distort 5:11
38:14 49:21	34:10	deemed 3:14	27:10,21	distributed 33:17
correctly 27:17	created 42:13	default 47:13	differ 9:11	distribution 31:23 32:7
27:18 35:14	critical 51:18	deference 44:18	difference 9:21	district 18:23
47:12 49:14	curiae 1:22 2:9	44:21	9:25 13:13	40:3,25 41:3
cost 29:14	44:1	deferential 42:10,10,16	33:10 48:24,25	50:12 53:16
costing 29:10	<hr/> D <hr/>	48:21	52:20	disturbed 48:8
costs 29:14	D 3:1	Definitely 38:13	different 8:22	docket 27:24
counsel 20:8	day 25:19,23	degree 42:6	31:7 35:11	doctor's 18:25
26:21 43:22	days 34:15	demarcation 7:5	41:7 45:22	document 3:17
54:15 56:2	de 6:16,18 29:9	demonstrate 42:19	49:3 50:8	doing 11:7 20:18
country 15:24	29:15 47:13,22	demonstration 16:2	differential 34:3	20:21 25:17
country's 7:19	47:25	denied 24:23	differentiating 42:22	26:20 33:10
course 27:5	decide 36:18,22		direct 33:11	34:23 39:24
court 1:1,13	53:16		disability 11:10	43:20
	decision 4:25		11:19	doubt 32:1,2,10
	6:10,20 8:6,6			doubtful 48:6
	8:21 9:22,24			

Dr 25:18 26:15	employer 9:1	estimated 20:1	face 19:9	3:21 4:17,25
dropped 26:15	17:25 19:13	et 1:4 32:11	fact 3:23 4:5,6	5:3,10 7:4 8:2
dual 3:24 4:5,8	32:24 54:24	evaluates 44:7	4:12 6:3,22,23	8:8 9:23,24
7:17 10:25	55:4,9,13,18	evenly 17:15	7:11 9:24 10:5	12:10,21,24,24
27:14 55:5	employers 9:19	everybody	12:7,9 14:14	13:16,19 20:4
dual-role 14:8	29:6	40:22 55:20	15:9 16:16,20	22:16 24:19,21
55:19	employer's 3:15	everyday 15:22	17:16 23:12	28:20 30:6,22
due 8:15 29:17	4:1 9:6 17:24	evidence 11:1	24:13 33:16	31:2,4 38:10
duties 51:8	19:12	12:23,25 22:7	35:1 36:25	38:12 42:5
duty 35:5,8	employment	22:11,14 24:10	37:10 38:16	47:23 51:8
D.C 1:9,21	25:13 26:8,19	35:21 37:11,13	45:5,7 50:6	field 54:23 55:10
	en 29:15	37:23 39:12,15	51:18 53:17	55:13,24
E	encapsulate	39:24 46:17	55:3	file 22:12 25:14
E 1:18 2:1,5 3:1	46:14	exactly 6:6 9:5	factor 6:19 8:2	36:2
3:1 26:25	encapsulation	10:8 31:11	8:11 10:7	filed 31:11
earlier 7:11	46:15	examination	13:11 17:8	files 23:14
12:22 38:12	encourage 28:24	30:19	20:13 27:24	filled 25:22
48:18	encouraging	example 10:17	40:23,23 42:3	financial 4:17
early 25:14	51:3,5	11:9 20:18	44:10,15,20	find 14:12,24
easily 43:9	ended 32:15,16	23:15,24 29:1	48:12 49:25	23:3 34:22
easy 35:24	engaging 43:20	33:5 34:9,9	54:2	46:19
economic 7:19	ensure 6:24 30:5	43:2,17 48:5	factors 6:19	finding 34:18
19:15	ensuring 29:17	49:22	10:7 17:13,14	fine 12:15 27:25
economical 5:22	entails 30:16	examples 22:23	44:21 49:22	Firestone 4:11
edge 36:9,16	entitlement 12:9	33:2 48:14	54:7	5:14 6:8,10
38:2,22 41:18	entity 4:12	exist 14:9 15:21	facts 18:16	10:15,20,21
46:5	equipoise 19:5	28:11 29:2	33:25 40:15	13:10 14:16
edges 50:7	37:14,14 52:9	existed 24:4	45:2 53:24	15:2,13 17:2
effect 5:5 7:11	53:8,10	existence 28:10	fact-specific	17:22 27:4,14
16:2 27:14	equity 49:7	50:6	18:14	29:13 32:17
35:17,20 52:11	ERISA 3:12,19	exists 5:4 44:6	fall 35:2	37:17 47:8,12
56:1	3:24 6:9 7:15	45:8 55:20	far 10:20 27:13	47:19 48:13
eight 25:23	7:17 9:18	expected 28:11	40:6	firewall 48:19
41:10	12:23,24 15:21	explain 30:2	fashioning	firewalls 6:14
eight-hour	18:19 22:13	31:11	24:12	7:6 41:23
25:19,23	28:24,25 29:4	explanation	favor 20:14	first 3:4,17 21:8
either 6:25 13:6	34:10 35:8,9	18:25	36:24	21:8 30:16
eligibility 20:5	51:6,8 55:2	explicitly 3:19	feather 53:10	32:23 34:25
47:24	ERISA's 27:19	36:2	feature 25:1	39:18 41:2
eligible 25:16	especially 28:20	extensive 48:4	Fed 23:22	42:8 46:18
26:8	30:3,15 39:19	extra 30:10	fee 31:23	47:11 52:23
eliminate 4:6	ESQ 1:16,18,20	eye 30:17 39:11	Felix 46:16	53:12
employee 12:8	2:3,5,7,11	41:8 44:5	fence 14:13,14	first-instance
12:11 15:23	establish 31:7	eyes 44:13	15:8 20:13	40:25
19:20	51:4	e-mail 36:4	36:20 38:11	fit 19:14
employee's 7:20	established 7:5		fiduciaries 4:21	five 34:16
20:14	41:22 51:3,5	F	fiduciary 3:12	flops 46:4

focus 39:21	13:24 28:9,11	44:12	17:10 19:11	institute 42:21
follow 5:16 23:5	36:16	heavily 23:24	21:6 29:22,23	instructions
foremost 41:3	glaring 23:24	24:18	29:24 30:9	40:24
form 25:22 41:4	Glenn 1:7 3:5	heavy 18:25	38:17,20 39:20	insulate 7:23
forth 48:20	go 6:20 8:5	heightened 24:6	43:7 52:18,23	insurance 1:4
54:24 55:4	14:19 16:19	held 43:18	52:25	3:4 8:6 20:18
forward 7:7	22:8 38:15	help 18:9		20:20 23:8
found 43:5	40:6 52:3,7,7	helping 12:8,16	I	24:7 31:14,15
four 25:24	goes 5:18	helps 12:11	ignoring 39:23	33:3,15 34:1,2
frame 19:4	going 5:21 7:7	Herdrich 3:19	illustration 47:9	34:22 41:20
framework	8:21 9:14	7:16	illustrations	42:15,19,22
47:13	10:10 11:8	high 42:6	41:10	48:17 49:4
Frankfurter	14:24 16:22,23	highlight 20:9	imagine 30:23	insured 14:23
46:17,20	16:23,25 18:7	highly 42:6	impact 33:11	14:25 16:17,25
free 29:5,7	18:9 20:21,23	hit 21:23	impermissible	insurer 42:12
freedom 9:17	21:14,17 23:8	hold 3:12 15:12	35:7	intended 55:17
friend 50:3	29:4,5,6,7,8,10	38:19	important 8:16	55:21,22
friends 18:10	36:17 45:15	Honor 4:10,23	9:18 17:24	intending 55:13
fulfill 3:20	53:6,12,17	5:6,14 7:8 10:1	18:8 22:1	interest 3:15
full-time 25:20	good 47:9 51:16	12:5 15:19	24:15 42:25	4:18 6:3 8:10
25:25	goodness 23:4	18:17 19:10	54:22	8:20 9:7 13:10
functional 9:11	government	22:9 23:21	improperly	14:15,20,23
functions 3:21	11:24 12:16,22	24:25 26:6,17	34:11	15:10,11 16:17
3:22	19:2	26:23 27:9,22	independence	16:18,21 17:17
funds 3:13	granted 12:7	28:1,13,16	48:20	22:5 23:10
further 24:24	greater 6:16	29:12,25 30:14	independent	29:2,18 30:18
	49:15	31:9 32:3 33:5	42:17	32:6 33:7 34:6
G	ground 3:18	33:20 34:25	indicated 7:12	39:10,11 40:8
G 3:1	34:23	36:1 37:2,21	indication 53:15	41:9 43:18
Gee 38:15	guess 9:9 39:14	38:1,8,24,25	individual 4:7	44:6,10 45:9
General 1:21	43:16 53:16	39:3,17 40:13	industry 34:1,2	46:10 49:25
Ginsburg 5:16	guidance 40:18	40:16 42:2,8	industrywide	51:9 52:20
11:4,13,18,23		42:18,24 43:7	42:22	interested 9:19
12:12,15 18:15	H	43:14,21 54:21	infected 4:25 5:1	interests 5:20,24
18:18 19:17,20	Hand 46:16,18	Honors 24:12	11:1	5:25 6:5 7:19
19:24 23:19	happen 24:13	56:4	infects 6:10	21:14 29:16
25:1,10 26:3	30:1 47:14	Honor's 38:11	influence 55:8	interest-bearing
26:14 40:19,22	happened 31:13	38:17	information	34:16
47:16,19	hard 22:15 23:7	hoping 24:11	22:3	internal 21:18
give 5:5 11:9	Hartford 23:15	hours 25:23,24	infused 29:16	interpretation
25:4 34:8	23:16,21 24:1	25:24 50:13	inherent 3:23	48:7
40:24 44:18	Hartford's	huge 43:10	10:25	intrusive 42:5
45:16 53:17	23:17 24:2,10	hundred 34:11	initial 12:17	invocation
given 11:2 26:6	head 21:23	hurt 29:4	inquiry 26:9	28:18
48:5	health 8:6	hypo 37:18	45:1 53:22	invoked 48:21
gives 37:7 48:10	hear 3:3	hypothetical	insofar 49:1	irregularities
giving 7:11	heard 42:20	16:8,10,11	instance 22:10	23:18 24:2,3

24:15 40:3 irrelevant 7:22 Island 1:16 issue 20:10 22:1 22:8 24:20 27:12 43:13 44:21 it'll 29:10	16:10 17:6,10 17:13,21 18:1 18:4,7,9,15,18 19:8,17,20,24 20:8,8,9,10,15 21:1,3,6,11,22 22:4,17,22 23:6,19 24:8 25:1,9 26:3,14 26:21,24 27:2 27:8,20,23 28:2,14,22 29:20,23,24 30:8,9 31:6,12 32:1,4,14,25 33:2,13,21,24 34:5,13 35:10 36:3 37:4,22 38:6,20,25 39:5,14 40:5 40:14,19,22 41:20 42:4,15 42:21 43:2,8 43:15,22 44:3 44:12 45:4,6 45:10,13,25 46:13 47:16,19 48:17,24 49:8 49:10,11 50:1 50:17,23 51:2 51:12 52:22 53:6,20 54:1,5 54:13,15,17 55:11,16,21 56:2	42:4,15,21 48:17,24 49:8 49:10 kick 30:20 41:9 kind 22:20 31:15,16,20 33:6,21 36:14 43:17 45:14 49:6 52:8 kinds 34:18 35:11 knock 38:11 know 7:10 10:18 13:9 14:19 18:11 20:12,17 21:12,14 27:21 29:7 31:12 32:19 35:19 38:15 40:6,8 43:16 45:17,18 46:5 50:11,18 53:13,14 54:22 knowing 28:5 known 55:4 knows 29:9 34:1 36:13 47:4 55:20	lawyer 11:13,15 11:16 Learned 46:16 46:18 leaving 52:4 legitimate 36:23 lend 34:16 lending 34:6 letter 12:6 25:17 25:21 let's 4:16 5:9 14:11,11 18:15 20:17 28:8 35:23 40:10 level 7:17 14:9 liabilities 3:13 life 1:3 3:4 31:14 31:14 34:9 limits 30:25 line 11:5 14:7 33:12 lines 7:5 listen 13:8 litigation 29:14 little 22:15 41:6 live 5:20 long 1:16 3:21 28:6 longer 20:22 look 5:20 8:16 8:25 9:1 10:17 11:8 12:2,2 17:4,9,24 18:24 22:10,23 31:13 32:5,15 34:21,21 36:9 36:15,22 42:13 44:15,17 46:12 47:19 48:13 looked 13:3 24:5 31:22 36:21 47:3 looking 12:22,25 17:7 18:23 21:16 25:10 29:8 48:3 lookout 41:12	looks 9:11 20:20 lot 21:17 25:6 44:12 46:16 lots 47:3 lovely 27:23 lower 40:18 41:11 lowest 14:9 loyalties 5:10 loyalty 5:11 35:5 35:8
J January 26:12 job 25:5 33:10 joint 25:12 26:18 JOSHUA 1:18 2:5 26:25 judge 24:5,9 25:3,10 34:21 53:16 judges 11:7 29:8 40:25 judging 51:15 judgment 5:4,12 6:25 23:2 31:2 38:14 40:4 44:18 49:5,6 50:21 judgments 30:20 judicial 18:22 30:17 31:8 39:11 41:1,8 44:13 June 26:12 justice 1:21 3:3 3:9 4:4,15,20 5:2,9,16,17 6:11,21 7:3,10 7:21,25 8:4,18 9:9,20 10:2,8 10:10,13 11:4 11:13,18,23 12:12,15 13:2 13:7,8,23,25 14:1,3,11,18 15:5,7,15,16 15:25 16:5,6,7	K K 1:16 2:3,11 3:7 54:19 keep 5:21 6:2 7:18 9:18 19:14 31:20 35:23 50:2 keeping 30:17 Kennedy 6:11 6:21 7:3,10,21 7:25 41:20	L laconic 47:20 land 30:25 Laughter 27:11 32:13 50:15 law 4:9 6:9 8:24 8:25 22:12,22 27:18 28:18,18 28:19,22 30:2 30:15 31:6,7 31:10,13,20,22 32:10,11 33:6 33:7,25 35:3,3 35:4 41:7 43:1 43:3,5 45:20 45:22 46:7,24 47:18 48:3,14 48:14 49:20 50:20,21,23	M majority 23:16 24:1 making 6:7 13:4 16:11,17 19:18 35:22 44:23 49:5 Manhattan 34:13 March 25:21 mathematical 53:23 matter 1:12 8:23 9:11 21:2 23:13 53:9 55:12 56:6 matters 18:13 maximizing 32:6 mean 4:15,16 5:25 8:12 13:5 13:23 16:8 18:18 27:25 28:2,4,11,14 29:22 31:13 32:19 43:8 45:16 46:5 51:14,15,20 means 5:24 8:13 10:18 13:11,12 27:21 28:15 39:20 44:10 50:9,11 meant 46:17 medical 22:2,11	

24:9,9 medicals 24:5 meet 20:21 merchandise 31:18 mere 3:22 14:8 45:7 50:6 merely 23:18 24:3 meritorious 9:7 merits 21:13,16 21:23 22:1 Merritt 25:10 Merritt's 25:3 met 46:3 MetLife 3:20 11:11,15 12:7 21:18 25:4,14 26:3 28:4 34:9 MetLife's 25:7 49:23 Metropolitan 1:3 3:4 million 34:12 mind 6:2 39:1,4 45:25 46:1 mine 10:13 minor 23:18 24:2,3,15 minute 54:18 minutes 34:17 misapplication 15:13 misconduct 6:1 misused 11:6 mitigated 42:14 models 52:12 moment 52:5 money 12:1 31:18 32:6 33:10,16,18 34:2,5,6,7,15 35:24 motivated 23:10 motive 41:19 moved 21:10	<hr/> N N 2:1,1 3:1 nail 21:23 narrow 10:24 necessarily 5:25 necessary 15:23 need 9:6 22:19 46:9 50:22 needed 49:15 needs 8:25 21:12 46:11 51:10 53:24 neither 4:4,4 nervous 43:16 net 19:16 nets 19:15 never 42:14,20 49:11 nevertheless 22:25 New 1:18 NICOLE 1:20 2:7 43:24 nine 41:10 nonfiduciary 3:21 nonmeritorious 9:8 normal 23:7 normally 9:12 novo 6:16,18 29:9,15 47:13 47:22,25 number 35:15 35:21,25 36:5 36:19 37:9,13 37:18,19,24,25 38:2,23,23,25 39:3 41:4,8,14 45:2 49:21 N.Y 1:16,18 <hr/> O O 2:1 3:1 obligation 7:7 12:10 occurs 6:9	October 12:7 offering 9:19 offset 20:1 oh 13:15 23:4 okay 10:19,21 13:17 14:11,19 15:15 18:17 19:4 32:20 33:1,4 34:17 operating 3:14 48:11 opinion 7:22 10:15,19,20 23:17 24:1 25:3 32:18,19 32:20 40:24 47:7 oral 1:12 2:2 3:7 26:25 43:24 order 7:18 19:14 23:1 42:5 ordinarily 47:21 ordinary 15:22 33:3,14,15 34:22,23 organization 4:7 16:21 ought 13:3 32:17 outcome 21:15 49:3 outer 30:25 38:9 40:6,10 41:14 41:18 overrode 27:6 overruled 23:17 24:1 overstated 32:25 overturned 20:7 overwhelming 22:18 <hr/> P P 3:1 page 2:2 47:23 48:4,8	pages 48:2 paid 9:7,8 12:1 participation 49:23 particular 8:20 9:14 21:15 23:9 parties 27:13,16 Patel 25:18 26:15 paying 34:6 payor 18:20 payouts 34:4 pays 44:7 peeled 30:17 39:12 41:8 Pegram 3:19 7:16 people 21:19 26:19 28:25 29:5,6 41:25 51:4,5 percent 40:10 40:11,12 54:11 54:11 perfect 10:19,21 12:8 32:18,19 46:19 perfectly 13:17 14:3 28:3,8 29:5,7 45:11 period 12:18 16:14 permanently 11:21,25 permissible 18:21 55:10 permit 42:1 person 8:19 13:4 14:25 16:11,17 16:21 19:21 25:13 35:22,23 36:19 37:5 51:15 person's 16:12 Petitioners 1:5 1:17 2:4,12 3:8	54:20 physical 25:20 26:1,10,19 physician 25:18 26:9 picking 39:24 plaintiff 22:7,18 plan 3:17 8:8,15 8:20 9:3 11:1 11:17 12:11,21 12:23,24 13:1 17:24 18:19 19:6,13,21,25 19:25 20:3,6 23:5 24:14 25:11 26:17 28:4,11 47:15 48:10 51:10 54:9 55:14 plans 3:25 7:18 8:17 19:14 28:25 29:4,11 51:6 plan's 3:13 play 9:4 20:12 20:16 21:6,7 55:6 played 21:14 30:12 plays 21:4 please 3:10 27:3 44:4 point 11:18 12:25 22:19 25:4 33:14,14 35:14 44:22 46:14,25 55:11 55:23 policies 27:19 48:25 policy 33:3,15 41:25 51:3,5 posed 19:8 29:21 posited 52:19 positing 7:3 position 15:18
---	--	---	---	---

16:1,12 21:21 29:3,21,22 Posner 1:16 2:3 2:11 3:6,7,9 4:10,19,23 5:6 5:13 6:6,17 7:1 7:8,14,25 8:13 8:24 9:16 10:1 10:6,9,12,23 11:12,15,22 12:5,14,19 13:2,7,22,25 14:2,6,16 15:3 15:6,14,19 16:5,7 17:3,7 17:12,20,23 18:3,5,8,13,17 19:10,19,23 21:5,22 22:9 22:21 23:12,21 25:9 26:5,16 26:22 54:17,19 54:21 55:19,22 56:4 possible 6:8 possibly 22:16 Post 23:15,16,21 23:25 potential 5:7 6:7 6:22 potentiality 3:23 power 48:5 practical 8:23 practice 15:23 predominantly 52:6 premise 32:23 premiums 34:3 presents 10:24 pressure 33:5,6 prices 41:25 probably 14:21 problem 10:14 17:4 19:10 21:11 23:12 32:9 53:21 procedural 40:2	procedure 8:7,7 8:22 9:15 20:19,23 procedures 6:23 7:23 41:23 42:13 proceed 34:24 process 21:4 22:13 30:19 38:4 39:16,21 52:1 processes 21:18 processing 6:15 7:24 production 7:4 41:22 professors 31:10 32:11 profit 6:14 7:23 promoted 21:19 proper 17:1 37:17 properly 24:22 proposal 25:4,7 26:4,5,15,16 protect 9:6 30:11 prove 11:5 22:7 23:8 provide 40:18 provider 14:22 provides 18:21 providing 19:16 provision 25:10 25:12 26:12,17 35:9 prudent 30:24 purpose 9:5 30:4,10,11 purposes 52:18 53:5 push 14:9 39:10 put 10:16 16:11 18:25 34:15 35:12 52:1 puts 33:17 putting 34:6	<hr/> Q <hr/> quarrel 49:17 quarterly 20:21 question 5:17 9:10 10:8,11 10:24 11:3 12:16 18:2 19:8 20:9,9,15 21:8,10 26:14 27:15 28:19 44:18,23 48:18 49:11 52:22 53:19 54:22 55:8,14,23 questioning 12:12 questions 7:12 24:24 <hr/> R <hr/> R 3:1 raise 38:4 rationale 46:12 reached 22:16 31:3 read 10:18 22:23 23:13 32:20 real 34:9 really 5:18 19:3 22:14 23:9 24:15 32:12 33:15 38:15 39:8,21 53:16 reason 3:17 4:8 10:5 12:19 15:11 16:22 21:3 27:6 31:3 36:10,15 41:18 52:13 reasonable 13:15,18,19 14:3,7,10 15:1 16:14 28:3,8 28:12 38:21 45:11 48:8 50:8 51:1	reasonableness 30:24 31:1,5 36:7,8,11 37:24 38:3,10 38:16,18 39:9 40:2,7 41:6,15 41:16 44:9,24 44:25 45:20,23 46:1,2,9 48:9 48:23 50:5,9 51:13,14,21,24 52:4,5,8 53:22 54:2,5,23 55:25 reasonably 30:24 reasoned 9:22 9:24 10:3 reasons 3:11 16:13,15 51:16 51:17,20 52:6 53:3 REBUTTAL 2:10 54:19 received 20:2 recognized 3:19 4:11 5:14 45:21 recognizes 15:22 33:6 recommended 11:14,15 record 30:19 38:4,6 recoup 11:25 refer 25:14 referred 25:2 36:6 reflected 51:4 reflection 14:22 regard 12:3 regarded 37:10 regardless 24:8 regular 52:5 regulations 41:23 rehabilitation	25:15 26:6 rehabilitative 25:13 26:8,18 relationship 35:16 relevant 22:6 40:23 relies 23:24 relying 24:18 remain 15:24 remainderman 5:19 46:25 48:16 remaining 54:18 remains 9:16 remedy 29:16 remember 8:16 9:5,13 remembering 8:13 reminds 46:15 renders 45:10 repeat 48:18 repeatedly 28:23 rephrase 39:17 replace 24:21 replacement 24:19 reproduce 43:12 required 41:21 responded 26:9 Respondent 1:19,23 2:6,9 12:6 23:23 25:16 27:1 44:2 Respondents 24:18 responsibilities 4:8 responsible 13:9 rest 5:21 Restatement 22:24 result 6:18 16:13,15 31:3
---	--	--	---	--

41:13	28:13,16 29:12	28:19 30:15	see 9:9 14:20	sitting 15:8
results 37:11	29:25 30:14	31:22 35:22	19:14 22:10	situation 24:8
52:8	31:9,25 32:3	36:1,21 47:20	25:5 26:7	situations 5:19
retained 26:10	32:22 33:1,4	47:20,23 48:1	33:13 34:17	23:7 35:4
reveal 30:12	33:20,24 34:8	48:5 51:16	47:6,25 52:18	48:15 52:19
review 3:16 4:2	34:25 35:10	54:25	53:7	Sixth 3:11 11:6
4:14 6:16,18	36:1 37:2,20	scale 30:7 52:2	self-dealing 35:3	30:20 39:22
8:22 9:10 16:6	38:1,8,23 39:2	scales 21:2	35:4 43:20	49:12,14,17,20
18:10,21,22	39:6,17 40:13	Scalia 4:15,20	self-insure 43:4	size 31:24 54:23
21:12 29:15,19	40:16,21 41:2	5:2,9 9:20 10:2	43:11	55:10,12,24
31:8 40:9 41:5	42:2,8,18,24	13:2,7,8,23,25	self-interest	skepticism 11:8
41:6 42:1,6,16	43:6,14,19	14:1,3 27:8,20	14:22 36:17	slice 40:9
44:14,16 45:15	route 29:15	27:23 28:2,14	sense 25:6 49:20	slide 5:25
45:24 47:13,17	rule 16:25 17:18	31:6 45:4,6,10	sent 25:17	slip 6:9
47:22 48:21,22	27:17 37:14	45:13,25 50:1	separate 25:3	slipped 6:4
48:23 49:1,2	42:22 50:17	50:17 53:6	separately 3:13	slops 45:17
49:19 50:2,4,5	rules 6:13 35:3,4	54:1,5,13	separation 6:2	smell 13:5
50:8,10,11	run 25:5 31:19	55:16,21	seriously 16:9	smells 13:5
54:25	43:9	Scalia's 5:17	set 12:4 28:25	Social 11:10,19
reviewed 44:9	Rush 30:18 41:9	55:11	29:10 35:4,11	12:9,20 19:25
reviewing 14:12		scenario 35:15	35:12 41:25	49:22 54:7
37:3 40:4,5	S	35:21,25 38:13	47:12 51:6	Solicitor 1:20
right 5:6 8:18	S 2:1 3:1	scenarios 35:12	54:23	somebody 5:10
9:25 17:14,21	safety 19:15,16	35:16	sets 51:19	sorry 24:9 36:1
18:4,6,11	Saharsky 1:20	scrutinized	setting 55:4	49:18
19:13 20:12	2:7 43:23,24	21:24,25	settlor 9:1 22:25	sort 22:7 36:7
21:1 24:16,16	44:3,22 45:5,9	scrutinizing	28:10	43:20 50:13
27:4 36:3,20	45:12,19 46:8	22:1	seven 41:10	51:20 52:11
38:2,9,17 39:5	47:11,17 48:2	scrutiny 24:6	44:20	sorts 41:11
39:7,8 41:17	48:22 49:2,9	28:21 30:3,4,5	shells 34:9	sound 44:14
47:1 51:12,21	49:14 50:16,19	30:10,12,16	shoddy 31:18	sounds 12:15
ROBERTS 3:3	50:25 51:7	39:19 42:6	short 31:19	30:8
8:4,18 9:9 20:8	52:16 53:4,19	49:15 51:11	show 7:5 11:20	Souter 4:4 14:11
26:21,24 28:22	53:21 54:4,6	searching 6:16	41:21	14:18 15:5,7
29:20 30:8	54:16	second 11:3	shows 22:11	15:15 16:10
43:22 44:12	saying 5:7,22	21:10 30:23	36:4 41:21	17:6,10,13,21
50:23 51:2	6:21 7:1,2 8:1	32:11 50:10	side 6:14,15	18:1,4,7,9 19:8
53:20 54:15,17	9:20,25 16:12	52:3,25	32:16 46:18	20:11 29:23
56:2	17:12 19:3	secondly 4:3	51:17,18 52:2	35:10 36:3
role 7:17 10:25	22:17 26:9	40:1	53:14	37:4,22 38:6
20:16 21:4,6,7	39:15,18 46:23	section 7:23,24	significant 55:7	38:20,25 39:5
21:15 27:14	50:2,3 53:2	Security 11:10	similar 45:21	39:14 51:12
30:13 55:5	55:23	11:19 12:9,20	simple 43:11	52:22
Rosenkranz	says 9:11,12	20:1 49:22	simply 10:5 14:4	Souter's 16:7
1:18 2:5 26:24	11:24 18:19,20	54:7	32:23 42:1	20:9 21:1
26:25 27:2,9	18:23 19:25	sedentary 25:5	single 50:9	special 32:8
27:12,22 28:1	20:3,22 28:4	25:20,25 26:10	sit 25:23	specialist 25:15

26:7	substantial	15:9 16:19	30:16 39:18	22:13
specific 6:12	46:17	17:16 18:15	41:3,11 45:7	transpose 43:9
specifically	substantive	28:8,23 33:2	53:8	treat 21:18
17:25 25:18	37:11,23 39:15	36:25 37:6,23	think 5:17,18	treated 54:8
spend 50:13	53:3	46:11 52:9	6:1,17,18	treating 25:18
spoken 51:13	sudden 20:20	54:12	10:24 13:22	26:9
stand 25:24	suddenly 46:4	taken 6:4 17:11	14:16 16:13,14	trial 25:5
standard 3:16	suffer 35:23	19:11 37:15,23	17:3,20,23	trier 18:18
4:2,14 6:16 8:3	suffice 41:25	49:4 51:16,23	20:10 21:23	trillion 34:14
10:16 16:4,6	suggest 45:3	51:24	22:19 27:23	true 51:7
21:12 22:21	51:19 54:14	takes 33:16	31:22 34:20	trust 6:9 8:24,25
29:19 31:7	suggested 49:24	talk 44:13	35:11 36:12	9:3,6 22:22
32:18 42:10	suggestion	talked 45:22,23	43:15 46:18	23:7 27:18
45:14,17,19,20	11:11 19:1	talking 4:20	48:14 49:19	28:18,18,19,22
46:3,19 47:13	suggests 51:9	24:22 31:16,17	50:1,16,19,20	30:2,15 31:6,7
47:18 48:9,21	54:9	33:11 34:12	53:4,21 54:4	31:13,20,22,24
48:22 49:1,2	support 51:17	42:9	54:22	32:10 33:6,7
50:2,4,5,8,9,10	52:6	talks 40:22	thinking 23:10	33:25 34:14
54:25 55:2,4	supported 24:10	target 38:18	Third 23:23	35:3,3 41:7
standards 29:1	supporting 1:23	39:8 40:1	24:6	42:25 43:3,4
40:9 45:21	2:9 22:14 44:2	targets 20:22	thought 16:1	45:20 47:18
53:23	supports 22:3	teach 10:17	27:13	48:14,14 50:20
started 47:7	suppose 6:12	tell 11:24 12:16	three 34:15	50:21,23
stated 19:11	32:5 41:20	25:11 35:13	35:11 36:19	trustee 5:19 6:3
States 1:1,13,22	48:17	41:1 49:12	37:13,19,25	22:24 23:1,3
2:8 7:9,15	Supreme 1:1,13	53:7 54:10,14	38:23,24,25	24:19 30:24
43:25	sure 14:19 15:8	telling 45:18	39:3 41:3,14	31:8,23 32:8
step 34:24 51:25	16:19 17:15	46:2	tie 16:23 20:12	33:16 35:6,6
52:13 53:2,8	23:14 32:2	tenant 5:20	37:25 52:11	35:17 41:15,17
stepping 39:20	36:22 40:3	term 5:23	tiebreaker	43:3 46:24
Stevens 22:4,17	47:1 53:20	terms 4:24 7:24	37:15 39:16	48:5,15,16
22:22 23:6	suspect 31:3	8:15,16 9:2	52:15 54:14	trustees 32:2,5
straight 4:16	41:18	12:11 13:1	tilting 30:7	33:8 43:10
strange 39:23	suspend 35:8	19:6 20:6 23:5	time 12:6,25	trustee's 23:2
strict 51:8	suspended 35:5	24:14 48:6	19:3	48:7
strongest 51:20	suspicion 12:4	test 9:23 13:18	tip 17:18,18	trusts 33:9 43:9
structural 7:12	13:3 34:24	30:20	tips 20:14 21:2	48:3 51:4
7:14 36:14	suspensions 38:4	Thank 3:9 26:21	tires 30:20 41:10	trying 41:12
37:1,7 38:7	suspicious 36:10	26:22 43:21,22	today 3:4 44:13	tugs 4:6
51:22 52:1,10	swiftly 25:3	54:15,16,21	told 15:5,7	turn 32:23 44:5
52:13,14,16	system 53:13	56:2,4	48:13	turned 12:18
53:13		thin 40:8	tolerates 7:17	turns 46:7
subconsciously	T	thing 30:16,23	15:22	two 3:11 5:10
30:6	T 2:1,1	32:8 35:1	totally 11:21,24	8:19 10:20
subject 32:8	tainted 41:13	39:10 42:25	12:17 19:2	12:21 25:24
submitted 56:3	take 8:11 9:21	43:17	transaction 35:2	30:16 32:17
56:6	14:14,17 15:1	things 15:4	transparent	34:24 35:25

36:5 37:9,18 37:24 38:2,13 39:18 41:8 50:13 51:12,22 53:8 55:8,14 Two-sentence 47:7 two-word 47:7 two-year 12:18 12:24	upheld 49:25 use 7:24 11:16 23:15 38:11 52:12,12,14,23 52:24,25 53:2 53:8,12 54:13 U.S 11:24 U.S.C 8:14	ways 51:13,22 Wednesday 1:10 weigh 15:4 27:24 29:18 54:3 weighed 6:19 8:2 10:7 13:11 15:8 16:9 27:5 46:11 48:12 weighing 52:14 52:17 53:3,24 54:1,2 weighs 52:2 53:7 53:9,10 54:10 weight 11:2 13:12,20,24 18:25 21:9 28:9,11 45:16 53:14,15,17 welfare 3:25 well-being 7:20 well-considered 27:10 well-reasoned 27:6 weren't 38:21 we'll 3:3 11:25 12:2 51:25 we're 3:17 4:19 5:7 8:21 11:7 13:9 17:7 20:22 29:8 we've 21:9 29:1 42:13,20 44:12 whatsoever 11:1 55:7 whoof 13:20 willing 13:14 withdraw 26:4 withdrawn 25:8 woman 11:10 25:5 words 4:19 10:20 20:24 30:9 32:17 35:13 37:22	work 8:4 10:13 25:20,25 26:7 26:10,20 30:22 34:23 40:14 worrying 46:22 wouldn't 14:19 17:6 write 7:21 32:17 writing 40:24 written 12:6 41:23 wrong 3:11 17:15,21 18:4 18:6,12 23:25 33:25,25 49:13 51:19	111 48:2,4 1132(a)(1)(B) 8:14 29:16 1132(a)(2) 24:18 115 47:23 48:3,8 12th 25:21 154 23:22 170a 25:12 26:17
U	V			2
ultimate 45:1 unanimous 27:7 unbiased 30:22 unconflicted 31:2 38:10 41:15,17 underlying 7:19 understand 8:5 11:6 18:24 19:1 21:9,21 22:4,15 23:6,8 25:2 29:12 35:14 43:6 44:19 45:13 46:6 51:11 55:17 understanding 37:16 understood 5:23 15:17 17:1 undertaking 44:16 unfair 6:4 unfortunate 12:20 United 1:1,13,22 2:8 7:9,15 43:25 unreasonable 13:21 14:4 28:12 45:3,7 45:11 49:24 50:7 54:10 unreasoned 10:4	v 1:6 3:19 7:16 23:15,16,21 24:1 vague 50:11 valid 23:11 28:7 various 15:20 verbalize 40:20 versus 3:5 vests 22:25 view 15:1 16:9 32:21 37:16 55:14 vital 7:18 15:24 19:15 vocational 22:2 25:15			2 24:20 20 54:11 2000 12:7 2002 25:14,21 2007 23:23 2008 1:10 23 1:10 26 2:6 31:10 32:11 29 8:14
	W		X	3
	walk 25:24 WANDA 1:7 want 7:21 10:13 10:18,21 18:11 19:9 28:24 32:19 35:12,12 42:21 44:15 wants 5:21 46:19 warp 5:3 Washington 1:9 1:21 wasn't 23:11 36:15 way 10:16 13:6 16:19 19:7 20:24 36:16 37:17 40:10 52:3 53:1,11 55:7	welfare 3:25 well-being 7:20 well-considered 27:10 well-reasoned 27:6 weren't 38:21 we'll 3:3 11:25 12:2 51:25 we're 3:17 4:19 5:7 8:21 11:7 13:9 17:7 20:22 29:8 we've 21:9 29:1 42:13,20 44:12 whatsoever 11:1 55:7 whoof 13:20 willing 13:14 withdraw 26:4 withdrawn 25:8 woman 11:10 25:5 words 4:19 10:20 20:24 30:9 32:17 35:13 37:22	x 1:2,8	3 2:4 3d 23:22
			Y	4
			year 34:10 years 12:21 49:7 yesterday 36:15 York 1:18	43 2:9
			Z	5
			zone 30:23 31:1 31:5 36:6,8,11 37:24 38:3,16 38:18,21 39:9 40:2,7 41:16 54:23 55:24	501 23:22 54 2:12
			\$	7
			\$1 34:17 \$14 34:10,14 \$140 34:12	70 40:12
			0	8
			02 26:12,12 06-923 1:6 3:4	80 40:11
			1	9
			10 54:10 10:10 1:14 3:2 11:13 56:5 1109 24:21	90 40:10