No. _____

In The

Supreme Court of the United States

GUARDIAN NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, and THE ESTATE OF J.M., A MINOR
Petitioner

v.

AIG LIFE INSURANCE COMPANY
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

James Kevin Tarrant
Counsel for Petitioner
9742 Railton St.
Houston, Texas 77080
Ph. 713) 205-3176

Blank Page

THE QUESTION PRESENTED

Whether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to *de novo* review by the courts.

This Court, in 1988, granted certiorari to Firestone Tire & Rubber Company in order to resolve a conflict among the circuits regarding the standard of review applicable to the benefits determinations of benefit plan administrators. The Court determined, in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989) that, absent an express reservation of discretion clause in the policy, administrator determinations in ERISA covered plans are to be reviewed by the courts under a *de novo* standard of review. While the issue in that case was the standard to apply to a plan term interpretation, almost immediately courts started struggling with whether to apply the *Firestone* Court's reasoning to an administrator's *factual* determinations as well.

Today, all but one of the Circuit Courts that have considered the issue interpret *Firestone* to apply to factual determinations as well as plan interpretations of the administrator. This Court is being asked to address this conflict between The Fifth Circuit Court of Appeals and the other eleven Circuit Courts with jurisdiction.

PARTIES TO THE PROCEEDINGS

The parties below are included in the caption. They are:

Petitioner:	Nora Dutka as Guardian of the Estate of T.M., a minor, and the Estate of J.M., a minor.
Respondent:	AIG Life Insurance Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nora Dutka is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure statement.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases *Page*

OPINION BELOW

In a published opinion (05cae 08-20515) of the Fifth Circuit Court of Appeals filed on June 24, 2009, the court affirmed the decision of the District Court for the Southern District of Texas, affirming application of a deferential standard of review and upholding an insurance administrator's denial of benefits.

A further description of the opinions below is included in the Statement of the Case. The entire District Court's and the Fifth Circuit Court of Appeals' opinions appear in the appendix.

STATEMENT OF JURISDICTION

The District Court's jurisdiction was invoked under the Employee Retirement Income Security Act, 29 U.S.C. Sec.1132(a)(1)(B). That court denied Petitioners Motion for Summary Judgment, granted Defendant's Cross-Motion and dismissed the case with prejudice. The United States Court of Appeals for the Fifth Circuit affirmed.

Per 28 U.S.C. Sec.1254(1), cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, section 1001 *et seq.,* The Employee Retirement Income Security Act of 1974.

STATEMENT OF THE CASE

This case is governed by the Employment Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* The underlying lawsuit is authorized by section 1132(a)(1)(B) of the Act.

The insured decedent in this case, an employee of Continental Airlines, voluntarily enrolled in an accident insurance plan for employees of Continental Airlines. The plan was insured and administered by AIG Life Insurance Company (USCA5 565) and designated his two minor children as the beneficiaries of the policy. He chose and paid the premium for $500,000 worth of accident insurance from AIG Life Insurance Company.

At the time of the accident, the decedent was flying low and slow to scout deer hunting sites. There was no evidence of any erratic behavior before or during the flight and no witnesses to the accident. There was no evidence that the decedent had ever flown or even driven a car under the influence of any substance. There were no drugs or paraphernalia found anywhere at the scene or on the body of the decedent or anywhere else. As the district court noted in its judgment, there was no proof that indicated the decedent was under the influence or that it contributed to this accident. (App. 15)

There was no cocaine or alcohol in the blood of decedent although a just reportable trace of metabolized cocaine in the urine. There was a half a therapeutic dose of Darvon (Propoxyphene) in the blood . Neither the FAA nor the NTSB attributed

the accident to drugs. AIG denied the claim, and its ERISA Appeals Committee upheld the denial citing a policy exclusion. The exclusion stated: "*[t]his policy does not cover any loss caused in whole or in part by, or resulting in whole or in part from, the following:...5. the Insured being under the influence of drugs or intoxicants, unless taken under the advice of a physician;...*" (USCA5 110). AIG asserted that Mr. Macsai was under the influence at the time of the accident and that no benefits were payable. *Id.*

The insurance policy (USCA5 130) and the Master Application for Group Accident Insurance (USCA5 144), both written by AIG, who was both the insurer and administrator, did not contain an express clause giving AIG discretion to determine eligibility for benefits. The policy contained an integration clause stating that it, the Master Application for Group Accident Insurance and the attached riders were the entire contract between the parties. (USCA5 137).

A document purported to be the Summary Plan Description (SPD), written by Continental Airlines (not AIG) did contain a discretion clause. (USCA5 713). This SPD didn't appear until after Petitioner's Motion for Summary Judgment but prior to Respondent's Cross Motion for Summary Judgment. In spite of being challenged to do so in the District Court, Respondent never proved the authenticity or applicability of the SPD. The SPD said that in case of conflict between it and the plan documents, the plan documents prevail. (USCA5 555). The District Court did not rule on whether the SPD granted any discretion to the administrator.

The District Court found "no proof" but applied a deferential standard of review.

Originally, Ms. Dutka filed her complaint in the United States District Court for the Southern District of Texas (case number 4:07-cv-04316) to challenge the denial of benefits, arguing that a *de novo* standard of review should apply.

The District Court, however, applied a deferential standard of review (arbitrary and capricious) and granted summary judgment to AIG based upon its conclusion that, although there was *no proof* that Mr. Macsai was under the influence or that it caused the accident, the denial of benefits was not unreasonable. (App. 15). The judge cited the Fifth Circuit case of *Pierre v. Connecticut General Life Insurance Company*, 932 F.2d 1552 (5th Cir. 1991) and its progeny (*Meditrust Fin. Servs. Co. v. Sterling Chems.*, 168 F.3d 211 (5th Cir. 1999) as his rational for granting deference to the administrator's factual determination. (App. 13-14). The Judge mentioned but did not rule on Petitioner's arguments against the efficacy of the SPD, again, written by Continental Airlines, to delegate discretion to AIG to determine eligibility for benefits. Nor did the court rule on Petitioner's arguments that AIG did not apply a reasonable interpretation of the term "under the influence."

The Fifth Circuit affirmed despite "weaknesses in the evidence."

On appeal, although the Fifth Circuit stated that there were "weaknesses in the evidence,"

(App.4), it nevertheless affirmed the lower court's judgment, determining that, under application of a arbitrary and capricious standard of review (again, *Pierre*, 932 F.2d 1552), "the plan administrator [AIG] did not abuse its discretion in finding that the crash was caused by the pilot's intoxication." (App. 4).

Therefore, both lower courts refused to rule on the Petitioner's arguments that the policy did not grant deference to AIG's determinations. The Fifth Circuit even called the arguments "inapposite." (App. 6, fn.4). Both courts, applying *Pierre*, instead granted AIG discretion (under the arbitrary and capricious standard of review) to determine factual matters regardless of whether any discretion had been expressly reserved. Both courts allowed their deference for the factual determinations of AIG alone to carry the day. Neither court considered the Petitioner's challenge to the plan interpretations of the administrator.

The Petitioner brings this application because she believes the automatic grant of deference to the administrator's factual determinations has caused the lower courts to decide the case contrary to the evidence and indeed contrary to the stated reservations of these very courts.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit is the only circuit that defers to the factual determinations of an administrator regardless of the absence of an express reservation of discretion in the plan. This Court should grant this petition in order to correct this inconsistency.

In *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), the Supreme Court considered the standard of review regarding ERISA covered plans that is applicable to the benefits determinations of plan administrators. While limiting its review in that case to interpretations of plan terms, because that was the issue before the Court, the Court nevertheless analogized the standard of review to that of a trust trustee. The court plainly stated: "that a denial of benefits challenged under 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of the plan." *Id.* at 115.

The Fifth Circuit, however, grants deferential review to the factual determinations of an administrator even in situations where there is no express reservation of discretion in the policy. *See Pierre v. Conn. Gen. Life Ins. Co.,* 932 F.2d 1552, 1562 (5th Cir.), cert. denied, 502 U.S. 973, 112 S. Ct. 453, 116 L. Ed. 2d 470 (1991), (*see also* Appendix 3 and App. 13, *the lower courts' opinions in this case stating the standard of review they applied*).

This automatic deferential standard affords the citizens within its jurisdiction less protections to themselves and their beneficiaries than that provided to the citizens of the rest of the country. In fact, it affords those citizens less protection against improper benefits denials than existed prior to the enactment of ERISA.

As Justices White and Blackmun noted in their dissent to the denial of certiorari to Mrs. Pierre in *Pierre v. Connecticut Gen. Life Ins. Co.*, 502 U.S. 973 (1991), there was already a split among the circuits regarding the standard of review of the factual determinations of an administrator. Eighteen years later, that split has largely been resolved. Today, only the Fifth Circuit applies an automatic deferential standard of review to the factual determination of an administrator.

Standard of Review of the other United States Federal Courts of Appeals.

The following survey of the Circuit Courts of Appeals illustrates that, overwhelmingly, courts apply a *de novo* standard of review, absent a discretion clause, to both the plan term interpretations and the factual determinations of a plan administrator.

First Circuit

1. Shortly after *Firestone* came out, the First Circuit put it to work. In *Bellino, et al. v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 27-29 (1st Cir. 1991), the court affirmed the district court's

determination that the *de novo* standard of review applied (which was a disputed issue) and affirmed the courts' *de novo* review of both plan interpretations and the facts of the case.

2. In *Ordnorf v. Paul Revere Life Ins. Co.* 404 F.3d 510 (1st Cir. 2005), the First Circuit said that where there is no discretion clause, "*Firestone* makes it clear that in such situations of dispute over the meaning of plan language, no deference is given to the administrator's interpretation of the plan language." *At* 517. The court, in the same paragraph, also wrote: "[b]ut literally read, *Firestone's de novo* review language is broader, and also includes a conclusion to deny benefits based on a set of facts..." *Id.* The court went on to extensively re-examine the facts of the case, further affirming the district court's application of *de novo* review to the facts of the case and affirmed the lower court's judgment. *Id.* at 520-527.

Second Circuit

1. In *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 250-251 (2nd Cir. 1999), the court determined that the language of the Supreme Court in *Firestone* required *de novo* review of both plan interpretations and factual determinations regardless of whether the precise issue of factual determinations was before the *Firestone* Court at that time. Like the Third, Fourth, and Seventh Circuits had, the Court said that the term "eligibility for benefits" in *Firestone* was distinct from "construe[ing] the terms of the plan." *Id.*

2. In 2003, the Second Circuit confirmed the rule that, absent a discretion clause, a court is to review, *de novo*, plan interpretations and factual determinations of the administrator. In *Muller v. First Unum Life Ins. Co.*, 341 F.3d 119, 124-125 (2nd Cir. 2003), the court remanded back to the district court specifically for it to make explicit findings of facts and conclusions of law.

Third Circuit

1. In *Luby v. Teamsters Health, Welfare, And Pension Trust Funds*, 944 F.2d 1176, 1183-1184 (3rd Cir. 1991), the court stated: "[w]e hold that an ERISA plan administrator's decision as to entitlement between beneficiary claimants based solely on factual determinations is to be reviewed *de novo*. We believe this is consistent with *Firestone* and its emphasis on the goals of ERISA: to protect the interests of plan members and their beneficiaries."

The Court discussed that the term "eligibility for benefits" in *Firestone* applied to factual issues. It also said that administrators are not to be afforded the automatic deference usually granted governmental agencies. *Id.*

2. The court reinforced *Luby* in *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 438 (3rd Cir. 1997), when it said that "*Firestone's de novo* standard of review applies to decisions based on plan administrators' factual determinations as well as decisions based on their interpretations of the terms of the plan." The court then went on to agree with

the Seventh Circuit (quoting *Petrilli v. Drechsel*, 910 F.2d 1441, 1446 (7th Cir. 1990)) when it said: "[p]lan administrators are not governmental agencies who are frequently granted deferential review because of their acknowledged expertise. Administrators may be laypersons, appointed under the plan, sometimes without any legal, accounting, or other training ...little knowledge of the rules of evidence or legal procedures to assist them in factfinding." *Mitchell,* 113 F.3d at 438.

Fourth Circuit

1. In *Reinking v. Philadelphia American Life Ins. Co.,* 910 F.2d 1210, 1213-1214 (4th Cir. 1990), the Fourth Circuit, in citing *Firestone* (489 U.S at 115), specifically held that "the standard announced in *Firestone* applies both to interpretation of policy terms and to factual determinations necessary for the administrator to 'determine eligibility for benefits.'" To further clarify, the court next stated: "[c]ourts will review both sets of questions *de novo* unless the policy delegates discretionary authority to one of the parties." *Reinking,* at 1214. "For us to grant the plan administrator such discretion would unnecessarily undermine the protection of the employee afforded by the ERISA statute." *Id.*

2. Later in *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017 (4th Cir. 1993) (en banc), the court affirmed the district court's application of *de novo* review of the facts of the case. In fact, the biggest dispute in this case was not whether factual determinations are to be reviewed *de novo* but whether the court can also review, *de novo,* factual

evidence that was beyond that included in the original administrative record. *Quesinberry*, at 1019. The Circuit Court decided that the lower court properly considered, *de novo,* the factual evidence, even that beyond what was presented prior to the administrator's denial. *Id.* at 1026.

Sixth Circuit

1. Pages 821-825 of *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813 (6th Cir. 1996), vacated for rehearing en banc, 106 F.3d 146 (6th Cir.1997), are a literal treatise on applying *de novo* review to both plan interpretations and factual determinations of an administrator where no discretion clause exists in the contract. In deeply analyzing the Fifth Circuit's rational in *Pierre,* the Sixth Circuit held: "[w]e reject the reasoning of *Pierre.* We join every other circuit that has either explicitly or implicitly addressed this question. *Bruch* [a.k.a. *Firestone*] does not distinguish between fact-finding and plan term interpretation." *Id.*, (*brackets added*). The court then cited *Firestone*, 489 U.S at 115, and added its own interpretation in brackets:

> "Consistent with established principles of trust law, we hold that a denial of benefits challenged under section 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits [fact finding] or to construe the terms of the plan [plan interpretation]."

Perez, at 825 (*brackets added by the court*). On rehearing en banc, the court did not re-visit the issue of deference to factual determinations absent a discretion clause because they determined that discretion had, in fact been reserved. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998).

2. However, in 1997, the court verified its prior *Perez* reasoning regarding the application of *de novo* review of factual determinations in *Rowan v. Unum Life Insu. Co. of America*, 119 F.3d 433 (6th Cir. 1997) when faced with a policy that did not contain a discretion clause. There the court reiterated "[w]e hold that factual determinations of plan administrators in actions brought under 29 U.S.C. sec.1132(a)(1)(B) are subject to *de novo* review." *Id.* at 435.

Seventh Circuit

1. The Seventh Circuit, in *Ramsey v. Hercules Inc. and Provident Life and Accident Ins. Co.*, 77 F.3d 199, 203-205 (7th Cir. 1996), after first determining that the policy at issue did not confer discretion upon the administrator, undertook its own detailed analysis of the case law regarding review of factual determinations of an administrator. The court said: '[u]nder general principles of trust law, courts do not alter the standard under which they review a trustee's decision based on the characterization of that decision as interpretive or factual." *Id.* at 203. The court was very clear in its interpretation that the Supreme Court in *Firestone* (489 U.S. at 113) rejected the argument for deferential standards of

review and said "the court's power to require the trustee to justify decisions has for centuries been an important part of the protection enjoyed by trust beneficiaries in Anglo-American law." *Ramsey*, 77 F.3d at 204.

The *Ramsey* court also discounted other points made in *Pierre*, stating that administrators of insurance policies are not to be given the deference given to administrative law judges, agencies, or federal district courts as they "neither enjoy the acknowledged expertise...nor are they unbiased fact finders...". *Ramsey* at 205.

2. Once determining that *de novo* review was proper in *Patton v. MFS/Sun Life Financial Distributors, Inc.*, 480 F.3d 478, 486 (7th Cir. 2007), the court went on to actually reverse and remand for the lower court to hear factual evidence even beyond that in the administrative record. *Id.* at 493.

This tracks a modern trend whereby courts are not only reviewing, *de novo*, the facts in the administrative record, but even evidence offered after the final denial in order to conduct a thorough *de novo* review of the case.

Eighth Circuit

1. In 2001, the Eighth Circuit wrote "We hold that, absent language in the plan granting discretionary authority to the administrator to determine eligibility for benefits or to construe terms of the plan, fact-based determinations should receive *de novo* review." *Riedl v. General American Life Ins.*

Co., 248 F.3d 753, 756 (8th Cir. 2001). The Court's rationale was that an arbitrary and capricious standard of review absent an express discretion clause did not give full effect to *Firestone*. *Id.*

2. In *Sloan v. Hartford Life & Accident Ins. Co.*, 475 F.3. 999 (8th Cir. 2007), the court affirmed the lower courts findings of fact via application of *de novo* review of the facts in the record as well as the courts *de novo* review of relevant facts beyond those contained in the administrative record. *Id.* at 1005.

Ninth Circuit

1. In *Kearney* v. *Standard Ins. Co.*, 175 F.3d 1084, 1095-1096 (9th Cir 1999), in applying trust law principles, the Ninth Circuit affirmed the District court's determinations that ambiguity in the policy gave cause for *de novo* review of Standard's denial of benefits.

Although reversing due to a genuine issue of material fact, the Ninth Circuit Court confirmed that, absent an effective discretion clause in the underlying insurance policy, *de novo* review of factual determinations of an administrator is proper. The court remanded to the lower court for a bench trial on the administrative record.

Tellingly, the court elaborated: "[t]hus, trial on the record, even if it consists of no more than the trial judge rereading what he has already read, and making findings of fact and conclusions of law instead of a summary judgment decision, may have real significance." *Id.* at 1095.

2. In *Opeta v. Northwest Airlines Pension Plan for Contract Employees*, 484 F.3d 1211 (9th cir 2007), the court affirmed the lower court's application of *de novo* review (a contested issue) to the facts in the adminstrative record. The court said: "Under *de novo* review, the district court should have determined whether Opeta was entitled to benefits based on the evidence in the administrative record and "other evidence as might be admissible under the restrictive rule of *Mongeluzo." Opeta,,* 484 F.3d at 1217 *(discussing the conditions for allowing the lower court to examine evidence even beyond the administrative record)*

Tenth Circuit

1. In an unpublished 1999 opinion affirming the District Court, the Tenth Circuit Court of Appeals said :

> "[t]he District Court found, and the parties do not dispute, that the UNUM policy under review here does not provide the plan administrator or fiduciary with discretion to determine eligibility for benefits or construe the plan's terms. Therefore, we review *de novo* UNUM's decision to deny plaintiff benefits based on his claim of a physical disability. Pursuant to the order in limine, review of the decision to deny further benefits was limited to the evidence before the plan

> administrator at the time the decision was made"

Rock v. Unum Life Ins. Co. of America, 1999 10CIR 1416, 198 F.3d 258 (10th cir. 1999), *available at* https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=153275, paragraph 7.

2. In *Ray v. Unum Life Ins. Co. of America, a Maine Corporation*, 314 F.3d 482 (10th Cir. 2002), the court, after much discussion, determined that the *de novo* standard of review applied. The court reversed and remanded, specifically directing the lower court to not only conduct a *de novo* review of the facts in the administrative record but also to consider "such additional evidence it finds necessary for adequate *de novo* review, including court-appointed expert reports if it determines them helpful." *Id.* at 488.

Eleventh Circuit

1. In *Torres v. Pittston Co.*, 346 F.3d 1324, 1332 (11th Cir. 2003), the court refused to draw a distinction between law and fact in choosing the standard of review for denial of ERISA benefits. In doing so, the court expressly discussed *Pierre v. Conn. Gen. Life Insurance Company*, 932 F.2d 1552 (5th Cir. 1991) and disagreed with the Fifth Circuit's differing treatment of plan interpretations and factual determinations of administrators. *See Torres*, 346 F.3d at 1329. At issue was if factual determinations are to be reviewed under an arbitrary and capricious standard even if the court was applying a heightened arbitrary and capricious (a less deferential standard of review) to plan

interpretations of a conflicted administrator (one who, as in the instant case, is both insurer and administrator). The court said: "we believe we are bound by precedent to apply the heightened arbitrary and capricious standard both to factual determinations and interpretations of the plan document by an ERISA fiduciary operating with discretionary authority but operating under a conflict of interest." *Id.*

The court also indicated that on remand, the lower court might find that *de novo* review was actually proper and vacated the lower court's ruling that denied Torres the opportunity to supplement the record (add new evidence), allowing for the District Court to reconsider that issue and possibly review additional factual evidence outside the administrative record. *Id.* at 1334-1335.

2. Also in 2003, the Eleventh Circuit, in *Shaw v. Conn. Gen. Life Ins. Co.*, 353 F.3d 1276, 1286, agreed with the District Court's determination that the *de novo* standard of review applied. The Circuit Court said that "the question of whether Shaw is "totally disabled" is a mixed one, involving issues of both plan interpretations and fact. *Id* at 1285. The court then cited *Torres v. Pittston Co.*, 346 F.3d 1324 (11th Cir. 2003) (discussed above), in reiterating that it will not draw a distinction between law and fact when choosing the standard of review for denial of ERISA benefits. *Shaw*, at 1285. The court reversed on other grounds.

District of Columbia Circuit

1. In 2001, the United States Court of Appeals for the District of Columbia Circuit, the court disagreed with the argument of Unum (the administrator) that their requirement of proof of disability amounted to a discretion clause. The court said that such a rule would circumvent *Firestone*, eliminating *de novo* review in almost all cases. *Fitts v. Federal National Mort. Ass. and Unum Life Ins. Co. of America*, 236 F.3d 1 (D.C. Cir. 2001) *at* para. 22. The court remanded for *de novo* review of the facts and directed that the parties be free to supplement the record with current evidence.

In our case, Petitioner, in its Appellant's Brief to the Fifth Circuit (*at* p.40) made the argument that automatically granting deference to an administrator's factual determinations circumvents *Firestone* in most if not all cases.

2. The *Fitts* case was still going in 2008 when the Circuit Court once again remanded back to the lower court for a factual determination of the cause of Ms. Fitts' illness, that is, whether it was a physical cause (for which coverage would exist) or a mental cause (which would be excluded). *See Fitts v. Unun Life Ins. Co. Of America*, No. 07-7097 (D.C. Circuit March 28, 2008) *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200803/07-7097-1108107.pdf

CONCLUSION

When this Court, in 1991, denied the writ of certiorary in the case adressing the issue, *Pierre*, 502

U.S. 973, there were only three Circuit Courts to have considered the standard of review applicable to the factual determinations of an administrator. Thus, even though Justices White and Blackmun, in their dissent, *id.*, wrote that they would grant certiorari because the courts were split, the court voted to deny.

Today however, all of the Circuit Courts with jurisdiction to hear such cases (One through Eleven plus the D.C. Circuit) have considered it. Whether their rationale is a regard for trust principles (where the document must contain the deference clause if any deference is to be granted to the trustee's determinations); regard for ERISA's enactment as a statute protective of employee benefits; or the determination that the Supreme Court in *Firestone* meant "factual determinations" when it said "eligibility for benefits", the courts surveyed above have been unanimous in citing *Firestone* in their discussions of the standard of review to apply. Other than the Fifth Circuit Court of Appeals, they have also been unanimous in determining that, under *Firestone,* absent an express discretion clause, an administrator's factual determinations as well as its plan interpretations are to be reviewed *de novo*.

ERISA is a federal statute and should apply equally to all within its coverage. One of the most treasured functions of this Court is to unify federal law across the land. Because the Fifth Circuit is in conflict with the other Circuit Courts in granting deference to the factual determinations of a plan administrator regardless of whether discretion had been reserved, and because this anomaly affords

employees covered by ERISA governed plans less protection than the citizens of the rest of the country against improper insurance claim denials, the Court should grant this Petition and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

J. Kevin Tarrant
9742 Railton St.
Houston, Texas 77080
Ph. 713) 205-3176
Attorney and Counsel of
Record for the Petitioner