No. 19-cv-1701-BC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

JANUARY 2020

ENTERPRISE PERMANENTE
ENTERPRISE PERMANENTE INSURANCE PLAN
and BORG LIFE ASSURANCE CO.,

Defendant-Appellees,

v.

JEAN LUC PICARD,

Plaintiff-Appellant.

On Appeal from the
United States District Court for the District of Columbia

BRIEF FOR APPELLANT

Team 3
Counsel for Appellant

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and ERISA §§ 502(a)(1)(B) and 502(a)(3). This appeal arises from a final judgment of the United States District Court for the District of Columbia. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether the District Court erred in refusing to dismiss the complaint for failure to arbitrate the dispute in accordance with Section 8.2 of the Policy.

II. Whether the District Court erred in finding that the Plan administrator reasonably concluded that Dr. Crusher was engaged in the commission of a crime for purposes of the Plan.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Beverly Crusher, M.D. ("Dr. Crusher") and her spouse, Captain Jean Luc Picard ("Captain Picard"), a Captain of the U.S. Coastal Guard, resided in Chevy Chase, Washington, D.C. together prior to Dr. Crusher's death; Captain Picard continues to reside there. R. 1.

Dr. Crusher graduated from Starfleet Academy School of Medicine in 1992. *Id*. From 2010-2018, Dr. Crusher was employed by Enterprise Permanente ("Enterprise") as its resident cardiologist at Enterprise Permanente Hospital in Bethesda, Maryland. *Id.* Enterprise is headquartered in Bethesda, Maryland and operates clinics, practices, and hospitals throughout the east coast. *Id.* As an employer Enterprise offers its employees a welfare benefit plan called the Enterprise Life Insurance Plan ("Plan"). *Id*. This Plan provides Enterprise participants two benefits: (1) life insurance coverage of 1x the employee's salary, and (2) a death benefit of $1,000,000 upon the employee's accidental death while in the line of duty. *Id*.

Enterprise benefit payments are funded by a group term life insurance policy ("Policy") it purchased from Borg Life Assurance Co. of Baltimore ("Borg"). *Id*. All relevant sections of Borg's policy are listed below:

- Section 2.2 - exempts accidental death and disbursement coverage for any losses cause by, contributed to by, or resulting from actual or attempted commission of a crime. *Id*.
- Section 3.1 - states Borg as Enterprise's agent for the purpose of processing all claims for benefits under the Plan. R. 2.
- Section 3.1(a) - states Borg will make all initial decisions regarding claims under the Plan. *Id*.
- Section 3.1(b) - states Borg will make all final decisions regarding claims under the plan. *Id*.
- Section 8.1 - states that Borg, unless expressly stated in the Policy, is not and shall not be regarded as a fiduciary for purposes of ERISA, however, Borg shall be a fiduciary for purposes of making decisions regarding claims filed under the Plan. *Id*.
- Section 8.2 - states any controversy or claim arising out of or relating to this Policy, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Employment Arbitration Rules. *Id*.
- Section 10.1 - names Enterprise as the Plan Administrator and fiduciary and states that Borg has discretionary authority to interpret and administer the Plan and make factual determinations. *Id*.
- Section 10.2 - grants Enterprise with authority to delegate its fiduciary duties. *Id*.
- Section 10.3 - states anyone Enterprise delegates fiduciary duties to pursuant Section 10.2 shall have discretionary authority to determine eligibility for claims and to construe the terms of the Plan. *Id*.

Borg provided the Claims Guidelines which are used in determining all claims under the Plan. R. 3. One of the Claims Guidelines, which Borg has consistently enforced, requires that Participants must not have been involved in the "commission of a crime." *Id.* However, the Plan has not always regarded violations of traffic laws as constituting the "commission of a crime." *Id.*

Enterprise's employee benefits are payable under Borg's Plan as outlined in the Policy. R. 2. All claims must be resolved pursuant Section 11.1 which states the Plan shall inform all participants and claimants of its claim procedure in a timely manner. R. 3. Lastly, prior to 2019,

the arbitration clause in Section 8.2 was enforced only if all involved parties consented. *Id*. In addition to its Plan, Enterprise, as an integrated care consortium, has a state-of-the-art system call MyHealth, which allows physicians to view and update patient medical records and make billing entries through MyText Portal. R. 1, R. 3. The MyText Portal allows physicians to connect their cell phones to MyHealth for continuous patient monitoring. R. 3.

As a full time, Enterprise employee, Dr. Crusher was a participant of the Plan and intended recipient of both benefits. *Id*. All employees are automatically enrolled in the Plan after completing their 90th consecutive day of service. R. 2. Dr. Crusher named her spouse, Captain Picard, the administrator of her estate and beneficiary of her employer provided life insurance policies. R. 1. Dr. Crusher's salary was $250,000 annually with a $100,000 annual bonus for working as an "on-call" physician in the Cardiology Department for 13 weekends a year. R. 3.

On December 31, 2017, Dr. Crusher served as the on-call resident for the Cardiology Department. *Id*. That night Dr. Crusher received a text from Enterprise via the MyText Portal, at 11:38 PM, stating, "Red Alert. Patient William Riker is experiencing severe chest pains and shortness of breath; Riker has been admitted to Enterprise Hospital in Bethesda, Maryland." *Id*. Dr. Crusher replied to the duty nurse, Christine Chapel: "At Kennedy Center celebrating, will be there for Riker ASAP." *Id*. At 12:09 AM on January 1, 2018, Dr. Crusher received a text message that read: "Patient Riker has stopped breathing; full cardiac arrest; awaiting physician instruction" and a follow up message from Nurse Chapel stating: "Riker in full arrest! Where are you?" R. 4. At 12:10 AM, Dr. Crusher replied with two texts, one to Enterprise that read "Perform CPR" and the other to Nurse Chapel stating, "Approx. 15 minutes out, KEEP UP CPR ON RIKER." *Id*. At 12:11 AM Dr. Crusher crashed into a utility pole and died instantly. *Id*.

Washington, D.C. Metropolitan Police Department ("MPD") determined Dr. Crusher was traveling at an excessive speed and did not have a hands-free accessory for her cell phone. *Id*. MPD concluded this a was violation of D.C. Code § 50 -1731.04:

> Restricted use of mobile telephone and other electronic devices.
>
> (a) No person shall use a mobile telephone or other electronic device while operating a moving motor vehicle in the District of Columbia unless the telephone or device is equipped with a hands-free accessory.
> (b) The provisions of this section shall not apply to the following:
> (1) Emergency use of a mobile telephone, including calls to 911 or 311, a hospital, an ambulance service provider, a fire department, a law enforcement agency, or a first-aid squad;
> (2) Use of a mobile telephone by law enforcement and emergency personnel or by a driver of an authorized emergency vehicle, acting within the scope of official duties; or
> (3) Initiating or terminating a telephone call or turning the telephone on or off.

Additionally, Dr. Crusher received a $100 fine pursuant to D.C. Code § 50-1731.06:

> Enforcement, fines and penalties.
> (a) The penalty for violating §§ 50-1731.03, 50-1731.04, or 50-1731.05 shall be a fine of $100; provided, that the fine shall be suspended for a first time violator who, subsequent to the violation but prior to the imposition of a fine, provides proof of acquisition of a hands-free accessory of the type required by this chapter. The suspension shall not apply to violations related to texting.

R. 5.

Captain Picard claims Dr. Crusher is excused from Code D.C. Code § 50 -1731.04(b) because she was acting as emergency personnel at the time of the incident. *Id*. MPD considered Captain Picard's argument but decided to reject it. *Id*. Captain Picard filed two claims with Enterprise for two benefits, (1) a claim for $350,000 under the life insurance benefit, and (2) a claim for $1,000,000 under Dr. Crusher's accidental death policy while working in the line of duty. R. 5. Borg determined Captain Picard was entitled to $250,000 under the life insurance policy but denied the accidental death benefit of $1,000,000 because of Dr. Crusher's alleged violation of Section 2.2 of the Policy; determining Dr. Crusher's death resulted in a commission

of a crime. *Id*. Captain Picard appealed the denial of the accidental death benefits through the Plan's internal appeal process. *Id*. Borg responded to the appeal stating Captain Picard exhausted the internal appeal process and suggested initiation of an arbitration. *Id*. Captain Picard nor the Defendants initiated an arbitration. *Id*.

II. PROCEDURAL HISTORY

On October 1, 2018, Captain Picard filed suit against all Defendants in the United States District Court for the District of Columbia. R. 5. Defendant Borg filed a Motion for Summary Judgment in which Defendant Plan and Enterprise joined. *Id*. The District Court granted the Defendants' Motion for Summary Judgement ruling the denial for the accidental death benefits claim was reasonable because the Plan administrator reasonably concluded Dr. Crusher committed a crime. R. 6. However, the court also held the arbitration clause was not required under the terms of the Plan. *Id.* Captain Picard and Defendants filled cross appeals to the United States Supreme Court of Appeals of the Thirteen Circuit. *Id*.

SUMMARY OF THE ARGUMENT

The District Court correctly found that arbitration was not required under the terms of the Plan. The general rule is that a nonsignatory is not bound by an arbitration clause. Dr. Crusher was simply a participant in trusts managed by others for her benefit, and she did not have any part in negotiating the Policy, nor did she sign it. Neither Captain Picard nor Dr. Crusher knowingly exploited the agreement and cannot be estopped from avoiding arbitration. Dr. Crusher (and Captain Picard) cannot be bound by the terms of a contract that she did not sign and was not entitled to enforce.

As the Supreme Court has indicated, realistic limits need to be placed on the arbitration process when it is in tension with non-waivable statutory rights. The judicial procedures are

more capable of safeguarding individual statutory rights than are arbitral procedures. The District Court was correct in noting that a "blanket refusal to enforce arbitration clauses" is not the answer, but in this particular case, following the arguments of *Alexander*, *Barrentine*, and *Amaro* was correct. In enacting ERISA, Congress intended "that minimum standards be provided assuring the equitable character of such plans...." Congress did not intend that these minimum standards could be eliminated by contract. If arbitration is enforced in this case, the "ready access to the Federal courts" that ERISA was intended to provide to individuals would be eliminated.

Although the District Court correctly reviewed Borg's decision under the arbitrary and capricious standard, it was overly deferential in its application. The Court provided more reasons for the Administrator's decision than the Borg did. Borg's decision that Dr. Crusher was engaged in the commission of a crime because she was texting was in fact arbitrary and capricious. Borg has a conflict of interest as an insurance company that evaluates and pays claims, subjecting it to a heightened standard of review. Also, "crime" is never defined in the Plan, enabling the Administrator to arbitrarily define it for purposes of the Plan. Borg's capriciousness in this matter is evidenced by how inconsistently it calls moving violations crimes.

Furthermore, the District Court and Borg were wrong to determine that Dr. Crusher was engaged in the commission of a crime by texting while driving. A plain language reading of "crime" should be applied, because the Plan never defines the term. Common usage of "crime" is for serious offenses such as felonies and misdemeanors. Moving infractions are not considered either. They are ordinance violations subject to a minor fine, which D.C. classifies separately from its Criminal Codes. Furthermore, the Court should have found Dr. Crusher qualified for the emergency personnel exception. She was the "on call" cardiologist, needed for a medical

emergency, using the hospital's official communication system to send instructions to hospital staff who would not act without them. Dr. Crusher's actions before her tragic accident were solely to save a life and should not be considered a crime under any standard.

ARGUMENT

I. THE POLICY'S ARBITRATION CLAUSE IS UNENFORCEABLE

The District Court correctly found that arbitration was not required under the terms of the Plan. *See Picard v. Enterprise Permanente, et-al.*, 6-7 (D.D.C. 2019). The District Court was correct because Dr. Crusher was "simply a participant in trusts managed by others for her benefit," *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102, (9th Cir. 2006), and she did not have any part in negotiating the Policy, nor did she sign it.

A. Dr. Crusher was a Nonsignatory to the Plan and is not Bound by the Arbitration Clause in Section 8.2.

The general rule is that a nonsignatory is not bound by an arbitration clause. *Id.* at 1103. But, "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles*." See Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185 (9th Cir. 1986). Among these principles are "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *See Thomson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). In addition, nonsignatories can enforce arbitration agreements as third party beneficiaries. *See E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 195 (3d Cir. 2001).

Equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *See Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004); *see also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014). In the arbitration context, this principle has generated two lines of cases. *See Comer*, 436 F.3d at 1101. The first line of cases involves nonsignatories that have been held to arbitration clauses because they "knowingly exploit the agreement containing the arbitration clause despite having never signed the agreement." *See Dupont*, 269

F.3d at 199 (citing *Thomson–CSF*, 64 F.3d at 778). The second line of cases involves signatories that have been required to arbitrate claims brought by nonsignatories because of the close relationship between the entities involved." *Id.*

For a nonsignatory to enforce an arbitration agreement as a third-party beneficiary, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2000). A plan participant cannot be bound to the terms of a contract he didn't sign and is not even entitled to enforce. *See Comer*, 436 F.3d at 1102. A third-party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be bound to a contract it did not sign or otherwise assent to. *See Motorsport Eng'g, Inc. v. Maserati SPA*, 316 F.3d 26, 29 (1st Cir. 2002); *see also Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985).

Trust law provides a similar answer. Under trust law, the beneficiary of a trust "is not personally liable upon contracts made by the trustee in the course of the administration of the trust." *See* Restatement (Second) of Trusts § 275 (1959). In contrast to agents—who can subject their principals to personal liability— "a trustee cannot subject the beneficiary to such liabilities." *Id.* § 8 cmt. c.

Defendants filed a motion to for summary judgment pursuant to the Policy's mandatory arbitration provision. Section 8.2 provides:

> Any controversy or claim arising out of or relating to this Policy, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Employment Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Policy § 8.2.

Because Dr. Crusher was a nonsignatory, the first line of cases applies here. There are several cases that illustrate that Dr. Crusher was "simply a participant in trusts managed by others for her benefit." First, in *Comer v. Micor, Inc.*, the issue was whether an ERISA-plan participant can be compelled to arbitrate an ERISA claim brought on behalf of the plan where the plan—but not the participant—has signed an arbitration agreement. *See Comer*, 436 F.3d at 1099. The court held that estoppel could not bind a nonsignatory to arbitration where that party did not knowingly exploit the agreement containing the arbitration clause. *Id.* at 1102. The nonsignatory, an ERISA-plan participant, sued the managers of the plan for breach of fiduciary duty. *Id.* at 1100. The managers, who had an agreement with the plan's trustees containing an arbitration provision, argued that the nonsignatory should be precluded from avoiding the burdens of the agreement (arbitration) because he was seeking to enjoy its benefits (a well-managed plan). *Id.* at 1101. The Ninth Circuit disagreed. It held that the nonsignatory, who neither sought to enforce the terms of the management agreement nor sued under its provisions, did not knowingly exploit that agreement and could not be estopped from avoiding arbitration. *Id.* at 1102.

In its decision, the court noted that "Although we agree with [the plan trustees] that the Federal Arbitration Act reflects 'a liberal federal policy favoring arbitration agreements,' that policy is best understood as concerning 'the scope of arbitrable issues.'" *Id.* at n. 11; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). The question here is not whether a particular issue is arbitrable, but whether a particular party is bound by the arbitration agreement. *See Comer*, 436 F.3d at n. 11. Under these circumstances, the liberal federal policy regarding the scope of arbitrable issues is inapposite. *Id.*; *see also Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) ("The federal policy favoring

arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead 'ordinary contract principles determine who is bound.'" (second alteration in original) (quoting *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994))).

Second, in *Langell v. Ideal Homes LLC*, 2016 WL 8711704 (N.D. Cal. November 18, 2016) the plaintiffs alleged that the defendant Ideal Homes, LLC ("Ideal") sold them a defective manufactured home constructed and warranted by defendant CMH Manufacturing West, Inc. ("CMH"). Plaintiffs sued Ideal for breach of contract and both defendants for breach of warranty and negligence. *See* 2016 WL 8711704, at *1. The warranty issued by CMH included an arbitration provision, as did the contract governing the relationship between CMH and Ideal. *Id.* CMH, based on the two arbitration provisions, moved to compel arbitration of each claim against each defendant. *Id.* The Court granted the motion. *Id.*

Here, unlike in *Comer*, Plaintiffs sought to take advantage of the terms of the warranty agreement by requesting warranty services from CMH. Additionally, Plaintiffs sought to recover based on a warranty CMH and Ideal provided to them. *Id.* at 5. Plaintiffs' second claim, for breach of warranty, alleged and sought damages for the breach of an express written warranty. *Id.* The court noted that Plaintiffs' request for warranty services and attempt to sue for breach of an express warranty would be enough to confirm Plaintiffs' knowing exploitation of the warranty agreement (such that they would be estopped from denying its existence) if the court were persuaded of one additional fact: whether Plaintiffs had sufficient notice of the agreement to exploit its terms. *Id.*

The court found that the evidence established that Plaintiffs had notice of the warranty agreement, and that they are thus estopped from avoiding arbitration. *Id.* The addendum to the purchase order, signed by Plaintiffs, showed that Plaintiffs initialed next to the following

statement: “Buyer acknowledges receiving a copy of the One & Ten year Limited Warranty for Karsten Homes.” *Id.* The court found that even if Plaintiffs did not read the warranty (which contains an arbitration provision), this evidence contradicts the statement in Plaintiffs' declaration that they were not aware of the existence of any written warranty. *Id.* Therefore, the court held that the plaintiffs could be compelled to arbitrate their disputes with CMH and Ideal because they were estopped from denying the broad arbitration agreement contained in the warranty document. *Id.* at 9.

Lastly, in *Hofer v. Emley*, 2019 WL 4575389 (N.D. Cal. September 20, 2019), two brothers, Brian and Jonathan (the “Plaintiffs”) rented a car from Getaround to visit family during Thanksgiving. *See* 2019 WL 4575389, at *1. On their way to return the car, Plaintiffs were pulled over by police because the rental car registered as a “hit” against a stolen vehicle “hot list.” *Id.* at 2. Brian drove the car and Jonathan was a passenger. *Id.* Plaintiffs brought a negligence claim against Getaround based on the same facts and alleged a breach of duty that Getaround owed to both Plaintiffs pursuant to the Agreement. *Id.* at 6. Getaround filed a motion to compel arbitration pursuant to the mandatory arbitration provision contained in Getaround’s Terms of Service (the “Agreement”) requiring “the use of arbitration on an individual basis to resolve disputes.” *Id.* at 3.

The court found that the arbitration provision applied to nonsignatory Jonathan Hofer. *Id.* at 5. Jonathan was a passenger in the rental car and the complaint suggests that Jonathan Hofer was an active participant in renting the car, and at the very least aware that his brother rented the car from Getaround. *Id.* at 6. The court found that Jonathan knowingly received a direct benefit as a result of the Agreement—the ability to travel as a passenger in a rental car to visit family for Thanksgiving. *Id.* The benefit conferred on Jonathan is the exact benefit conferred on the

signatory, Brian Hofer; indeed, the ability to travel in a rental car was the only benefit conferred by the Agreement. *Id.* Thus, Jonathan Hofer as a nonsignatory knowingly received benefits flowing directly from the Agreement. *See NORCAL Mut. Ins. Co. v. Newton*, 84 Cal. App. 4th 64, 81-82 (2000) (holding that nonsignatory was equitably estopped from avoiding arbitration where she sought and derived a direct benefit from the agreement).

Plaintiffs brought a negligence claim against Getaround based on the same facts and alleged a breach of duty that Getaround owed to both Plaintiffs pursuant to the Agreement. *See Hofer*, 2019 WL 4575389, at * 6. The court noted that by alleging negligence based on the same duty Getaround owed to Brian as the signatory to the Agreement, Jonathan as a nonsignatory sought to rely upon the Agreement to prosecute his action against Getaround, "but disavowed the applicability of the arbitration provision." *See NORCAL*, 84 Cal.App.4th at 82. Such conduct is impermissible under the doctrine of equitable estoppel. *Id.* ("No person can be permitted to adopt that part of an entire transaction which is beneficial to him/her, and then reject its burdens."). In all, because Jonathan Hofer knowingly received a direct benefit from the Agreement and sought to exploit the benefits of the Agreement by alleging breach of a duty that arose from that Agreement, the doctrine of direct benefits estoppel applied. *See Hofer*, 2019 WL 4575389, at * 7.

The facts in *Comer* are very similar to our case. Dr. Crusher, like the plaintiff in *Comer*, was a nonsignatory, ERISA-plan participant. Captain Picard (as the administrator of Dr. Crusher's estate) neither sought to enforce the terms of the management agreement nor sued under its provisions. Both plaintiffs brought suit under ERISA. Captain Picard also did not knowingly exploit the agreement and therefore cannot be estopped from avoiding arbitration. Dr. Crusher (and therefore Captain Picard) cannot be bound by the terms of a contract that she did not sign and was not entitled to enforce. As third-party beneficiaries, Dr. Crusher and

Captain Picard may be able to sue under the Policy, but they cannot be bound by it because Dr. Crusher did not sign or assent to it. *See Motorsport*, 316 F.3d at 29; *see also Lebow*, 761 F.2d at 103.

The facts in *Langell* are distinguishable from our case and *Comer*. In *Langell*, the plaintiffs took deliberate steps to knowingly exploit the agreement containing the arbitration clause. These deliberate steps were seeking to take advantage of the terms of the warranty agreement by requesting warranty services from CMH and also seeking to recover damages for the breach of the express written warranty. This is in complete contrast from our case where Dr. Crusher was merely a participant in the plan (as in *Comer*) and did not seek to exploit the terms of the Plan by taking advantage of the Plan's terms. In our case, the Policy was only a funding mechanism for benefits that arose under the Plan.

Hofer is also distinguishable from our case and *Comer*. It is very similar to *Langell*. In *Hofer*, the nonsignatory was not merely a "passive participant" to the agreement at issue. The nonsignatory and his brother rented a car <u>together</u> and he had knowledge of the Agreement before receiving the benefit of the agreement. The nonsignatory also knowingly sought to exploit the benefits of the Agreement by alleging that Getaround breached a duty that arose, at least in part, from the Agreement. In our case, Dr. Crusher was a passive participant and did not knowingly exploit the benefits from her agreement. Captain Picard is simply bringing suit under ERISA and not based on the "investment management agreements" containing the arbitration provisions. *See Comer* 436 F.3d at 1102. Neither Dr. Crusher nor Captain Picard took steps to knowingly exploit their benefits under the Plan.

As the District Court correctly noted, it is important to note the facts in the case. The facts are that up until the time of Dr. Crusher's accident, the Policy's arbitration clause was

inconsistently applied, and arbitration was only pursued when all parties consented. *See Picard*, at 7. The court found that "this inconsistent enforcement of the arbitration clause in previous proceedings reveals that Defendants' argument as nothing more than a cynical attempt to use obscure legal forms to delay the fair and efficient resolution of a dispute in a forum conceived for such purposes—a court of law." *Id.*

The District Court correctly found that arbitration was not required under the terms of the Plan. The Policy was only a funding mechanism for benefits that arise under the Plan, which is governed by ERISA. Neither Dr. Crusher nor any other participant in the Plan had a part in negotiating the Policy, nor did Dr. Crusher sign it.

B. Under ERISA, Individuals were Intended to have "Ready Access to the Federal Courts."

As the Supreme Court has indicated, realistic limits need to be placed on the arbitration process when it is in tension with non-waivable statutory rights. *See Amaro v. Cont'l Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984). The judicial procedures are more capable of safeguarding individual statutory rights than are arbitral procedures. *Id.* The District Court was correct in noting that a "blanket refusal to enforce arbitration clauses" is not the answer, but in this particular case, following the arguments of *Alexander*, *Barrentine*, and *Amaro* was correct. *See Picard*, at 6.

In enacting ERISA, Congress intended "that minimum standards be provided assuring the equitable character of such plans...." *See* Section 2 of ERISA, 29 U.S.C. § 1001(a). Congress did not intend that these minimum standards could be eliminated by contract. *See Amaro*, 724 F.2d at 752. ERISA is intended to protect the interests of the pension plan participants "by improving the equitable character ... of such plans by requiring them to [meet certain standards] ...." *See* Section

2 of ERISA, 29 U.S.C. § 1001(c). Congress did not intend section 510 of ERISA to be waivable. *See Amaro*, 724 F.2d at 752.

The United States Supreme Court has indicated through its decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) that realistic limits need to be placed on the arbitration process when it is in tension with non-waivable statutory rights. *See Amaro*, 724 F.2d at 752. The judicial procedures are more capable of safeguarding individual statutory rights than are arbitral procedures. *Id.* The Supreme Court has stated that "the record of the arbitration proceedings is not as complete as judicial proceedings; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." *See Alexander*, 415 U.S. at 57–58.

Arbitrators have no obligation to the court to give their reasons for an award. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 574, 598 (1960). It is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. *See Alexander*, 415 U.S. at 58. This makes arbitration a less appropriate forum for final resolution of ERISA issues than the federal courts. *Id.*

There are a few cases illustrating the Supreme Court's precedent of limiting the arbitration process when the judicial procedures are more capable of safeguarding individual statutory rights. First, in *Barrentine v. Arkansas-Best Freight System, Inc.*, employees sued their employer asserting a minimum wage claim under the Fair Labor Standards Act and alleging breach of the union's duty of fair representation. *See Barrentine*, 450 U.S. at 731. The issue in this case was whether an employee may bring an action in federal district court, alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, 52 Stat. 1060, as

amended, 29 U.S.C. § 201 et seq., after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement. *See Barrentine*, 450 U.S. at 729-730.

The Court found that even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected. *Id.* at 729. Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is harmful to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights. *Id.* The Court also noted that, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, but also arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. *Id.* Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs, whereas an arbitrator can award only that compensation authorized by the wage provisions of the collective-bargaining agreement. *Id.*

In all, the Court held that the FLSA rights that petitioners sought to assert in this action were independent of the collective-bargaining process. *Id.* at 745. They devolved on petitioners as individual workers, not as members of a collective organization. *Id.* They are not waivable. *Id.* Because Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, the court held that petitioners' claim were not barred by the prior submission of their grievances to the contractual dispute-resolution procedures. *Id.*

Second, in *Alexander v. Gardner-Denver Co.*, the petitioner, a black employee, had been discharged by the respondent employer, allegedly for producing too many defective parts. *See*

Alexander, 415 U.S. at 38. Claiming that his discharge was racially motivated, petitioner asked his union to pursue the grievance and arbitration procedure set forth in the collective-bargaining agreement. *Id.* at 39. The union did so, relying on the nondiscrimination clause in the collective-bargaining agreement, but the arbitrator found that petitioner had been discharged for just cause. *Id.* at 42. Petitioner then brought an action under Title VII of the Civil Rights Act of 1964 in Federal District Court based on the same facts that were before the arbitrator. *Id.* at 43. The District Court granted summary judgment for the employer, holding that petitioner was bound by the prior adverse arbitral decision. *Id.* The Court of Appeals affirmed. *Id.*

The Supreme Court reversed, concluding that an employee's statutory right to a trial *de novo* under Title VII is not foreclosed by the prior submission of his discrimination claim to final arbitration under a collective-bargaining agreement. *Id.* at 58-60. The Court found that in enacting Title VII, Congress had granted individual employees a non-waivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the "majoritarian processes" of collective bargaining. *Id.* at 51. Moreover, because Congress had granted aggrieved employees' access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, the Court concluded that Title VII claims should be resolved by the courts *de novo*. *Id.* at 58-60.

The Ninth Circuit has also limited the arbitration process when it found that the judicial procedures were more capable of safeguarding individual statutory rights. In *Amaro v. Continental Can Co.*, the employees' union filed a grievance against the defendant employer for firing employees in violation of the collective bargaining agreement. *See Amaro*, 724 F.2d at 748. That litigation was resolved by an arbitrator in the defendant's favor. Soon after, the employees themselves filed a second action addressed by the court in Amaro alleging violations

under ERISA for laying off employees to prevent them from obtaining the number of years of continued service needed to qualify for the defendant's pension benefit and employee welfare plans. *Id.*

The Ninth Circuit held that the second action was not barred under *res judicata* because the statutory claim was not for benefits under a collective bargaining agreement, but rather a federal cause of action that protected employees from actions which interfered with their attainment of eligibility for protected benefits. *Id.* at 749 ("We are persuaded that in enacting ERISA § 510, Congress created a statutory right independent of any collectively bargained rights."). Furthermore, the Court noted that in resolving a § 510 claim, there is only a statute to interpret; a contract is not involved. Interpreting a statute "is a task for the judiciary, not for an arbitrator. *Id.* at 751-752.

The same reasoning that applied in *Barrentine* applies in our case. If this case were to go to arbitration there is no guarantee that Captain Picard's statutory rights under ERISA would be fairly and fully represented. Instead of enforcing ERISA, the arbitrator's job would be to effectuate the intent of the parties, which may issue a ruling that harms the public policies underlying ERISA. Under ERISA, individuals were intended to have "ready access to the Federal courts." *See* 29 U.S.C. § 1001(b). If arbitration is enforced, that "ready access" would be eliminated.

As the Supreme Court held in *Barrentine*, Captain Picard's rights under ERISA are not waivable. In *Barrentine* the Supreme Court held that the petitioners FLSA rights were independent of the collective-bargaining process and were based on their rights as individual workers. We can draw the same comparison in this case. Captain Picard's rights are independent of the Policy and are based on his ERISA rights as an individual. Just like Congress granted

FLSA rights to individuals, Congress also granted individuals rights under ERISA. Likewise, as the Supreme Court held in *Barrentine* and the District Court held in our case, Captain Picard's rights are best protected in a judicial rather than an arbitral forum.

Our case is also similar to *Alexander*. In that case the Supreme Court found that the arbitration process did not provide an adequate forum in which to enforce the petitioner's statutory Title VII rights. Here, Captain Picard is trying to enforce his statutory ERISA right of accidental death benefits based on Dr. Crusher's employment with Enterprise. Even though there is no collective-bargaining agreement in our case, there is a Policy in which Dr. Crusher was a plan participant and a nonsignatory to. The petitioner in *Alexander* was covered by the collective-bargaining agreement and was also a nonsignatory. This Court should follow the District Court's and the Supreme Court's reasoning which found that enforcing arbitration would be at odds with the values of arbitration because Captain Picard has statutory rights under ERISA, which can be more adequately enforced through the judicial process.

Amaro is also a clear illustration of why arbitration should not be forced in this case. The court in *Amaro* followed the reasoning in *Alexander* and *Barrentine* in which prior arbitration decisions were held not to foreclose actions under Title VII and the Fair Labor Standards Act. The court stated:

> "In enacting ERISA, Congress intended 'that minimum standards be provided assuring the equitable character of such plans....' Section 2 of ERISA, 29 U.S.C. § 1001(a). We do not believe Congress intended that these minimum standards could be eliminated by contract. ERISA is intended to protect the interests of the pension plan participants 'by improving the equitable character ... of such plans by requiring them to [meet certain standards] ....' Section 2 of ERISA, 29 U.S.C. § 1001(c). Congress did not intend section 510 of ERISA to be waivable."

See Amaro, 724 F.2d at 752.

The Ninth Circuit in *Fujikawa v. Gushiken*, 823 F.2d 1341, 1345 (9th Cir. 1987) stated:

> "The fundamental premise of *Amaro* is that plaintiffs suing for violation of an ERISA statutory provision, like plaintiffs in Title VII and FLSA actions, have a direct right to sue in federal court, without regard to any contractual agreement to arbitrate the dispute."

See, e.g., Barrentine, 450 U.S. 728 (1981). This clearly illustrates that the Thirteenth Circuit in our case should expand the reasoning to individuals in ERISA cases as the court did in *Amaro*. The Court in *Barrentine* and *Alexander* expanded such a right to individuals under Title VII and the FLSA. All three statutes are federal statutes, so individuals under ERISA should be afforded the same right to bring their claims in federal courts. Under ERISA individuals have a direct right to sue, and those rights need to be safeguarded. The judiciary is best tasked to interpret a statute, not an arbitrator.

"The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *See Alexander*, 415 U.S. at 57. "Arbitrators very often are powerless to grant as broad a range of relief." *See Barrentine*, 450 U.S. at 729. "There should be "realistic limits on the arbitration process when it is in tension with non-waivable statutory rights." *See Amaro*, 724 F.2d at 752. The arbitration process should be limited to reflect the will of the parties. As noted in *Italian Colors Rest.*, "the overarching principle is that arbitration is a matter of contract." *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 66 (2010). If arbitration is enforced in this case, the "ready access to the Federal courts" that ERISA was intended to provide to individuals would be eliminated.

The District Court was correct in finding that Captain Picard was not required to arbitrate his claim under the terms of the Plan.

II. THE PLAN ADMINISTRATOR'S CONCLUSION THAT DR. CRUSHER WAS ENGAGED IN THE COMMISSION OF A CRIME WAS UNREASONABLE

The District Court erred in finding that the Borg Plan administrator reasonably concluded Dr. Crusher was engaged in the commission of a crime for the purposes of the Plan. *See Picard*, at 11. The District Court was too deferential in its application of the arbitrary and capricious standard, while also wrongly concluding that Dr. Crusher was engaged in the commission of a crime for purposes of the Plan.

A. The District Court Failed to Properly Apply the Arbitrary and Capricious Standard of Review to Borg's Arbitrary Decision

The District court used the correct standard of review, but failed to properly apply it. A denial of benefits is reviewed *de novo* unless the plan gives the administrator fiduciary discretionary authority to determine benefits eligibility or define the plan terms. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). When the plan gives discretionary authority to the administrator, it is reviewed under an arbitrary and capricious standard. *See Doroshow v. Hartford Life & Accident Ins. Co.*, 574 F.3d 230, 233 (3d Cir. 2009). Under this standard, the decision should only be upheld if the administrator used deliberate, principled reasoning that is supported by substantial evidence. *See Caudill v. Sears Transition Pay Plan*, 714 F. Supp. 2d 728, 745 (E.D. Mich. 2010). Although the standard is deferential, it does not mean the administrator's decision will be given a rubber stamp. *Id*.

Furthermore, the Supreme Court also stated that when a benefit plan gives discretion to an administrator with a conflict of interest, that conflict must be weighed as a factor when determining if there is an abuse of discretion. *See Firestone*, 489 U.S. at 115. It further clarified its position by asserting that insurers are subject to "higher-than-marketplace" standards under ERISA due to potential conflicts of interest. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115

(2008). There is a conflict of interest when an administrator both evaluates benefit claims and pays them, putting its fiduciary duties in direct opposition with its financial interests. *Id*. at 112. This places the administrator in direct conflict with the beneficiaries, and is the type of conflict judges must take into account when reviewing discretionary decisions. *Id*. While this does not change the standard of review to *de novo*, it does require the judge to take the conflict into account when determining whether there has been a substantive or procedural abuse of discretion by an administrator. *Id*. at 115. Although a conflict of interest is only one of the case specific factors to be considered when determining an abuse, it can prove more important when circumstances suggest it affected the benefits decision, including cases where the administrator has a history of abuse. *Id*. at 117.

In *Glenn*, the Supreme Court affirmed the Sixth Circuit's finding that MetLife abused its discretion when it denied Glenn's disability claim over her ability to work. *Id*. at 118. The Court considered multiple case specific factors, such as how MetLife ignored Social Security's findings regarding Glenn's ability to work, despite MetLife instructing her to argue her ability to work to the administration. It also favored the medical report that supported denying benefits over a contradictory report, and did not provide all medical experts with all relevant information. *Id*. These factors were then heightened by MetLife's conflict of interest because it held inconsistent positions that were both financially advantageous and procedurally unreasonable. *Id*. The Court found that MetLife had abused its discretion as administrator under the arbitrary and capricious standard of review, and reversed the decision. *Id*.

Following the Supreme Court's rationale, the Michigan Eastern District Court also reversed an administrator's denial of ERISA benefits in *Caudill*, 714 F. Supp. 2d at 742. There, Sears offered its HVAC sales associates Borg cited D.C.'s safety ordinance against texting while

driving as its primary reason for denying the claim, and the Court supplied the rest of the reasoning as to why that ordinance was a crime under the Plan. the option to transition to a new department in a comparable job, or accept a retirement package. *Id*. at 732. Employees who accepted the transition found their new positions did not meet the definition of a "comparable job" as listed in their contracts, and sought the severance benefits they had been offered, which Sears denied. *Id*. The court found that Sears' benefits denial was arbitrary and capricious for three reasons. *Id.* at 742. First, it did not define what formula would be used to determine earnings potential, for which Sears made many assumptions, often to employees' detriment. *Id*. at 742-45. Second, the plan never defined what "current skills" would be transferable to employees' new jobs, enabling Sears to arbitrarily choose what skills were needed for the plan to apply. *Id*. at 745-47. Finally, the plan's commuting provision did not define distance, allowing Sears to set a standard that employees could never meet. *Id*. 747-48. Using these factors, the court found Sears denial to be arbitrary and capricious, and ordered Sears to pay employees their benefits under the plan.

However, the Third Circuit reached an opposite conclusion using *Glenn*'s reasoning in *Doroshow*, 574 F.3d at 236. Doroshow participated in an employee Long Term Disability plan starting in 2006, and was diagnosed with ALS in 2007. *Id*. at 231. The plan administrator denied Doroshow coverage because it determined his ALS was a preexisting condition, making him ineligible for the plan. *Id*. at 232. The rejection was based on Doroshow receiving medical advice in 2006 that the administrator determined was likely due to his ALS, even though it was not officially diagnosed until 2007. *Id*. In applying the arbitrary and capricious standard, the Third Circuit determined that the decision was reasonable given the circumstances. *Id*. at 235. As a progressive disease, it was reasonable to conclude that Doroshow's 2006 doctor visits were for

his ALS, even though it was not officially diagnosed until 2007. *Id*. at 236. Nor did the Third Circuit find an abuse of discretion under *Glenn* when it considered the administrator's conflict of interest as an insurance company. *Id*. at 234.

Another recent application of the arbitrary and capricious standard is *Miller v. Hartford Life & Accident Ins. Co.*, where the Eighth Circuit also found that an insurance plan administrator had again not abused its discretion. *See* 2019 U.S. App. LEXIS 37168, at *12, (8th Cir. 2019). After a year of treatment, Miller was denied further mental health benefits under her employer's long-term disability plan. *Id*. at *2. Although Miller demonstrated several reasons the claim dismissal was erroneous, the Eighth Circuit refused to overturn the decision under the deferential standard. *Id*. at *8, *12. It stated the main reason for the termination was the plan required a physical disability, which the medical record did not show. *Id*. at *8. Miller's arguments failed because they only addressed her mental illness, and not her failure to satisfy the plan's terms. *Id*. So the Eighth Circuit did not find an abuse of discretion, and would not substitute its judgement for the insurer's. *Id*. at 12.

In the present case, the District Court improperly applied the arbitrary and capricious standard of review. Citing *Firestone*, the Court stated it must give "great deference" to the Plan Administrator's decision regarding benefits. *See Picard*, at 8. Using this overly deferential standard, it stated the decision must be without any reason. The Court then proceeded to provide reasons for the Administrator. Rather than requiring Borg to explain why Dr. Crusher's violation of § 50-1731.04 was a crime under the Plan, the Court cited D.C.'s reasons for passing the ordinance. *Id*. at 9. The Court allowed Borg to substitute D.C.'s reasoning for its own, and call the accident a crime simply because a citation was issued. The Court further justified the decision for Borg with MPD's decision that Dr. Crusher did not qualify for the emergency

personnel exception under § 50-1731.04(b)(2). *Id*. at 10. Borg determined Dr. Crusher committed a crime for only one reason: that she was fined for violating § 50-1731.04. The rest comes from the D.C. council and MPD, and is provided by the court.

This application of the arbitrary and capricious standard is overly deferential, and fails to consider the Supreme Court's factor approach for an abuse of discretion laid out in *Glenn*. For starters, as an insurance company, Borg has an inherent conflict of interest that weighs against it. Like MetLife in *Glenn*, Borg both funds the Plan and evaluates claims, with an interest in limiting the number of claims it grants to bolster its profits. While this conflict does not permit a court to review the decision *de novo*, it certainly adds a heightened level of scrutiny to the arbitrary and capricious standard, which the District Court did not apply. As an insurer, Borg's conflict of interest in granting Captain Picard's claim should be taken into account.

Moreover, like the contracts in *Caudill*, the Plan does not define certain key terms. In this case, it does not define "crime," the key reason it denied Captain Picard's claim. Just as Sears undefined key terms allowed it to use an arbitrarily shifting standard, Borg can do the same with a shifting meaning of "crime." Without a definition, the Administrator can arbitrarily decide what is a crime for purposes of the Plan. While Borg has been consistent in its enforcement of the "commission of a crime" provision, it has inconsistent on what it considers to be crimes, particularly when it comes to traffic laws. This indefiniteness creates a shifting standard that can be difficult for participants to meet. Just as the Sears employees could not meet the commuting distance standard, Borg can set a crime standard so low, it could deny most claims due to any minor infraction that occurred leading up to the participants death. Without a set definition in the Plan, Borg can arbitrarily decide what it considers a "crime" for benefit determinations. Participants are left guessing what a crime is without guidelines, and must simply hope that some

minor infraction will not lead to a denial of benefits based on the Administrator's whim.

Unlike *Doroshow*, the connection between texting while driving and whether it is a "crime" is not clear. *Doroshow* involved a clear line between Doroshow's 2006 doctor visits and his 2007 ALS diagnosis, making it a preexisting condition. "Preexisting" was defined by the plan, and the two events fell within that meaning. Here, "crime" is not defined, and there is also no clear connection between the two. Texting while driving is not inherently a crime, and even with a D.C. ordinance fining the conduct, it is unclear it is a crime for the purposes of the Plan. Unless participants have been informed that every minor traffic and city ordinance violation will be considered a crime under the Plan, it is not a reasonable conclusion. A connection between doctor's visits and a diagnosis three months later is reasonable, but labeling a dangerous, yet common, activity a crime is not.

Miller is not applicable in this case, either. Although the Eighth Circuit was highly deferential in its application of the arbitrary and capricious standard, this was due to Miller failing to argue the proper reason her claim was denied. Even though she had reasons showing the denial was erroneous, these did not matter when she made the wrong argument. That is not the case here, and so this Court has no reason to be so deferential in its application of the arbitrary and capricious standard.

This Court should find that the District Court was too deferential in its application of the arbitrary and capricious standard of review, and that Borg's denial of Captain Picard's claim was arbitrary and capricious. The District Court supplied many of the reasons for Borg's denial, based more on the reasoning of the D.C. Council and MPD than any actual reasoning for calling texting while driving a crime. The Plan never defines what is a "crime," enabling Borg to use a shifting definition that it can arbitrarily change to meet the Administrator's needs. Borg is also an

insurance company, and while this does not change the standard of review, it does heighten the level of scrutiny for its denial and enhances the significance of other factors. As an insurance company administering a plan that does not define a key term, but rather uses an inconsistent definition depending on the circumstances, this Court should find the denial of life insurance benefits because Dr. Crusher's accident occurred during the commission of a crime arbitrary and capricious.

B. Dr. Crusher's Texting and Driving Should Not Be Considered A Crime for Purposes of the Plan

Dr. Crusher's texting while driving should not be considered a crime for the purpose of denying accidental death benefits. The Plan does not define "crime" when it says benefits will be denied for deaths that occur during the commission of a crime. The District Court acknowledged it did not believe texting while driving should qualify as a crime for purposes of the plan. *Picard*, at 8." The term is used ambiguously and inconsistently. When a plan is governed by ERISA, federal common law rules of interpretation apply. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998). This means employing the plain meaning of the words while maintaining the effect of the unambiguous terms. *See Caudill*, 714 F. Supp. 2d at 745. The plain meaning of a word is its use in an ordinary and popular sense. *See Perez*, 150 F.3d at 556.

There is no "legal" definition of crime. No federal court has ever ruled there is one, and Congress has never created one. The dictionary defines "crime" as a violation of the law prohibiting it, typically in reference to an "act of a serious nature," the range of which includes felonies and misdemeanors, but not petty violations of local ordinances. *See Crime*, Webster's New World College Dictionary (4th ed. 2000). Meanwhile law dictionaries define it as an act against the public law that forbids or commands it, which can include any offense, including misdemeanors, or be used in a more limited sense to only mean more serious offenses. *See*

Crime, Ballentine's Law Dictionary (2010). It is a flexible term whose meaning can change depending on the circumstances in which it is used and every individual's personal interpretation.

At the same time, moving violations or traffic infractions are typically not considered "crimes" by the ordinary person. Texting and driving is certainly dangerous, and many studies have shown it impairs people's ability to drive and can be a deadly distraction. *See* Catherine Chase, *U.S. State and Federal Laws Targeting Distracted Driving*, 58 Annals of Advances in Auto. Med. 84, 85 (2014). Yet this does not mean that people view texting and driving as a criminal activity comparable to more serious crimes such as robbery and murder. Instead, it is considered a moving violation, or traffic infraction, commonly called a citation, which is considered a much less serious offense. *See* Brian A. Costa, *Traffic Court in Hawai'i*, 16 Hawaii B.J. 16, 17 (2012). Such infractions often include speeding, running a stop sign, failing to signal, etc. *Id*. at 16-17. These infractions tend to be handled informally, where the person pays the fine, may have the state issue points against their license if such a system is in place, and could have their insurance rates affected. *Id*.

D.C. employs such a system for its traffic laws. The D.C. Code Division IV is devoted to criminal laws and their procedures. Traffic violations, including D.C. Code § 50-1731.04 (2019) prohibiting cell phone use while driving, is listed under Division VIII, General Laws. The Code even states that all traffic violations of statutes and regulations are moving infractions, subject to the Traffic subchapter. *See* D.C. Code § 50-2302.01. There are exceptions to this provision under § 50-2302.02, such as reckless driving, which are considered crimes, but § 50-1731.04 is not one of them. So according to the D.C. Code, using a cell phone while driving is considered a moving infraction, not a criminal offense.

The Plan never defines "crime." So, when deciding whether to grant or deny benefits, the Administrator can arbitrarily use whatever definition ensures the desired outcome. Although Borg may consistently enforce the crime provision, participants have no way of knowing what acts will be considered a crime. Any citation or violation of any statute can become a crime under the current version of the Plan. For instance, under the plan a person killed while walking an unlicensed dog would be in violation of D.C. Code § 8-1804. The Plan Administrator could deny any life insurance claims because the person technically died during the commission of a crime. It is easy for people to violate statutes and minor ordinances without realizing it. By allowing Borg to provide a unique definition of "crime" for every claim, it can arbitrarily find a reason to deny any claim for any infraction, and participants have no idea what acts will be considered "crimes" for purposes of the plan.

This court should apply a plain meaning interpretation of "crime" as it is commonly used by everyday citizens. According to conventional and legal dictionaries, this means more serious crimes such as felonies and misdemeanors, and not minor violations of local ordinances. People are not considered criminals for failing to obtain a dog license or receiving a parking ticket. Neither are people who text while driving. It is a dangerous act that too many people commit, and local ordinances that seek to end this practice are a good thing. However, texting while driving should not be transformed into a crime at the same level as robbery or murder. It is a citation, below the level of misdemeanors and felonies people intend when discussing crimes. A plain reading of "crime" is for serious misdemeanors and felonies, which does not include minor traffic violations such as texting while driving.

Furthermore, Borg has been inconsistent in calling moving infractions crimes. Borg even admits it does not have a working definition of crime, but relies on local laws to make that

determination for it. *See Picard*, at 8. Here, Borg claims it does not need to determine whether moving infractions are crimes under the Plan because D.C. has already done so with § 50-1731.04. Yet this is not true. All traffic infractions are violations of local traffic ordinances and statutes. A person does not receive a citation if they do not violate one. Yet whether that violation constitutes a "crime" under the plan is determined by Borg, and it has been inconsistent in doing so. It arbitrarily decides certain traffic violations are crimes because the claims are more than the insurer wants to pay. In this case, Borg cannot simply say that it is following the D.C.'s law. It is interpreting texting while driving as a crime this time because Dr. Crusher had an expensive policy that would cost it a lot of money.

At the same time, Borg misclassifies § 50-1731.04 as a criminal ordinance. It is governed by § 50-2302.01 as part of the Safety and Traffic divisions, not the Criminal one. A violation of these laws only results in a minor fine, with no possibility of jail time, unlike the classified Criminal laws. D.C. Code § 50-2302.02 even classifies certain traffic violations as crimes, such as reckless driving and fleeing the scene, but it does not include texting while driving. Borg and the District Court misrepresent the ordinance as a serious criminal offense that the D.C. Council intended to punish harshly. This misrepresentation disguises Borg's definition of "crime" as the city's, transforming a minor violation into a major offense. This goes against what D.C. intended when it passed § 50-1731.04 as a Safety ordinance, and not a Criminal statute.

Taken a step further, Borg's inconsistent and shifting definition of crime transforms every violation of an ordinance into a criminal act. So long as an act is prohibited by a local code, Borg can use it as crime to deny coverage regardless of its classification or severity. No matter the intended purpose or how inconsequential a violation's punishment, it is a potentially a crime if the Administrator wishes it to be one. It twists every municipal code into a criminal law,

equal to each other in purpose and severity. Borg can then eschew any responsibility by saying the locality classifies the act as a crime, disguising the fact that it is really an arbitrary decision by the company.

Furthermore, Dr. Crusher was using her cell phone to text for emergency purposes that should have qualified for the exception under §50-1731.04(b)(2). Dr. Crusher was texting the hospital staff as the "on call" emergency doctor using the hospital's MyText program to give instructions regarding a medical emergency. When Dr. Crusher responded to a patient's cardiac arrest as the "on call" cardiologist, she was acting as emergency personnel. She was vital to the patient's survival. She was also acting within the scope of her duties by communicating with the nurse to give directions. They were using the hospital's approved communication system to give patient updates and instructions in order to manage the emergency.

Dr. Crusher's texting was critical in this emergency. The nurse was not only sending updates, but urgent requests for instructions as well. The nurse and other hospital staff were unable to act as the situation worsened without directions. If Dr. Crusher did not respond, the patient would have died. She needed to text the hospital through MyText in order to manage the medical emergency and provide instructions to the staff. She was vital emergency personnel acting within the scope of her official duties using the hospital's approved communication system to save a patient's life. As such, MPD should have excused her from complying with § 50-1731.04(a)'s prohibition against texting while driving.

CONCLUSION

WHEREFORE, Jean Luc Picard asks this Court to affirm in part and reverse in part the judgment of the District Court.

Respectfully submitted,

Team 3
Counsel for Appellant

CERTIFICATE OF SERVICE

TEAM NUMBER: 3

The work product contained in all copies of the team's brief is the work product of the members of the team. The team has complied fully with REDACTED the honor code [redacted]. The team has complied with all Rules of the Competition.

REDACTED

DATED: January 17, 2020