Team 6

ORAL ARGUMENT SCHEDULED FEBRUARY 22, 2020
No. 19-cv-1701-BC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Jean Luc PICARD,

Plaintiff-Appellant,

v.

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

Defendant-Appellees.

On Appeal from the
United States District Court for the District of Columbia
(Hon. Brian Cooper)

BRIEF FOR APPELLEES

Team 6
Counsel for Appellees

JANUARY 17, 2020

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The Court's federal question jurisdiction was based on the alleged violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132. The District Court's decision, entered November 9, 2019, is final and appealable. The Notice of Appeal was properly filed.

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 when there is a valid agreement to arbitrate, the dispute is of a statutory nature, arising out of the Plan, and absent a contrary congressional command.

II. Whether the District Court properly found that the Plan Administrator reasonably concluded Dr. Crusher was engaged in the commission of a crime for the purposes of the Plan when the Administrator exercised appropriate discretion to reach a reasonable interpretation of Plan Language in good faith.

STATEMENT OF THE CASE

Plaintiff Jean Luc Picard ("Captain Picard") is the administrator of the Estate of Dr. Beverly Crusher ("Dr. Crusher"), his late wife. Captain Picard is also the beneficiary under Dr. Crusher's employer-provided life insurance policy. On September 1, 2018 Borg Life Assurance Co. of Baltimore ("Borg"), on behalf of itself and Enterprise Life Insurance Plan (the "Plan") issued a final determination upholding the initial determination denying accidental death benefits under the terms of the Plan. (R. at 5.) Section 10.1 of the Plan provides that the Employer is the Plan Administrator and named fiduciary and further states that Borg has discretionary authority to

interpret and administer the plan and make all factual determinations, including entitlement to benefits under the terms of the Plan. (R. at 2.) Under section 10.2 of the Plan, Enterprise is authorized to delegate its fiduciary duties. (R. at 2.) The final determination concluded by stating that the Plaintiff had exhausted the internal appeals process and that the Plaintiff may initiate arbitration in accordance with the rules of the American Arbitration Association. (R. at 5.) Rather than initiating arbitration, Captain Picard, on October 1, 2018, filed suit in the United States District Court for the District of Columbia seeking accidental death benefits based on Dr. Crushers employment with Enterprise Permanente ("Enterprise"). (R. at 5.) Defendant Borg filed a motion for summary judgment in which each of the other Defendants joined. (R. at 5.) Defendants argued the complaint should be dismissed for failure to initiate arbitration in accordance with section 8.2 of the Borg Life Insurance Policy (the "Policy"). (R. at 5.) Defendants further argued regardless of whether arbitration was required, the decision to deny the claim for accidental death benefits should be upheld as a reasonable interpretation of the crime exclusion contained in section 2.2 of the Policy. (R. at 5.) The District Court judge agreed with Defendants that the interpretation of the crime exclusion was reasonable and in good faith and granted Defendant's motion for summary judgement, upholding the denial of accident death benefits under section 2.2 of the Policy. (R. at 6.) The Court agreed with the Plaintiff that arbitration was not required under the terms of the Plan. (R. at 6.) Both sides have filed cross appeals in the United States Court of Appeals for the Thirteenth Circuit. (R. at 6.)

STATEMENT OF THE FACTS

Dr. Crusher, like all employees of Enterprise who are scheduled to work on a full-time basis, was automatically enrolled in the Plan after completing her 90th day of service with the company. (R. at 2.) Benefits are payable under the Plan in accordance with the terms of the Policy.

(R. at 2.) On December 31, 2017, Dr. Crusher was driving her 1969 Volkswagen Beatle in Washington D.C., she was the on-call cardiologist for Enterprise for that weekend. (R. at 3.) At 11:38 PM that night Dr. Crusher received a text message from the MyText Portal, a text communication service Enterprise used to contact on-call physicians, 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." (R. at 3.) Dr. Crusher immediately sent a text message to the duty nurse, Christine Chapel, from her 2007 Nokia 6102 flip phone that read "At Kennedy Center celebrating, will be there for Riker ASAP." (R. at 3.) On January 1, 2018 at 12:09 AM Dr. Crusher's received a text message from the MyText Portal stating, "Patient Riker has stopped breathing; full cardiac arrest, awaiting physician instruction."; simultaneously, Dr. Crusher received a text message from Nurse Chapel which read, "Riker in full arrest! Where are you?" (R. at 4.) At 12:10 AM, while en route to Enterprise Hospital, Dr. Crusher sent a text message to Enterprise stating, "Perform CPR.", at the same time she also responded to Nurse Chapel saying, "Approx. 15 minutes out, KEEP UP CPR ON RIKER." (R. at 4.) At 12:11 AM Dr. Crusher's vehicle suddenly veered off the roadway in the 1200 block of Wisconsin Avenue, N.W., in Washington D.C. and crashed into a utility pole. (R. at 4.) Dr. Crusher was instantly killed in the single-vehicle crash. (R. at 4.)

The Washington D.C. Metropolitan Police Department ("MPD") determined that Dr. Crusher had been texting while driving in violation of D.C. Code § 50-1731.04, that Dr. Crusher was traveling at an excessive rate of speed, and that she did not have a handsfree accessory. (R. at 4.) The MPD considered and rejected Captain Picard's argument that Dr. Crusher met the exclusion from complying with the above D.C. Code. (R. at 4.) Captain Picard filed two claims for benefits under the Plan, one claim for $350,000 under the life insurance benefit, and a second

claim for $1,000,000 for Dr. Crusher's "accidental death in the line of duty". (R. at 5.) Borg determined that Captain Picard was entitled to $250,000 under the life insurance Policy and denied the accidental death benefits based on the exclusion contained in section 2.2 of the Policy. (R. at 5.)

SUMMARY OF THE ARGUMENT

The arbitration provision contained in section 8.2 of the Policy is valid and enforceable. Further, the fact that the claims arising out of the Policy are statutory in nature does not preclude arbitration. There is no evidence that the contract is invalid by reason of fraud, undue influence, or any other cause of action which would normally invalidate a contract. Dr. Crusher was a participant in the Plan and therefore availed herself of the provisions of the Plan's Policy. The Plan reserves the right to change the way it enforces this Policy as long as there is not any change to the vested benefits of the parties. The Plan has not waived the arbitration clause. Further, the fact that the claims arising out of the Plan are statutory in nature does not preclude arbitration because there is no contrary congressional command.

However, even if the Court finds this dispute is not subject to arbitration, the Plan Administrator reasonably concluded the crime exclusion contained in section 2.2 of the Policy prevented Captain Picard from recovering accidental death benefits under the Plan. Thus, accidental death benefits are not payable to Captain Picard because Dr. Crusher's death was "caused by, contributed to by, or resulting from" the actual or attempted "commission of a crime." This conclusion is supported by the findings of the MPD that Dr. Crusher violated D.C.'s distracted driving code when she sent and read text messages while driving.

ARGUMENT

I. *The Policy's Arbitration Agreement is Valid and Enforceable. The District Court Erred in Determining that the Arbitration Provision is Not Enforceable as to Statutory Claims when there is no Contrary Congressional Command*

A. Standard of Review

The Court reviews any decision by the District Court to deny a motion to compel arbitration *de novo*. *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016). The Court also reviews all interpretation and meaning of contract provisions *de novo*. *Id*.

B. The Arbitration Agreement is Enforceable as a Contract

A District Court judge must uphold an agreement to arbitrate unless it is "found invalid upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It is the burden of the party opposing arbitration to show that the claims are not arbitrable. *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987). Arbitration is a matter of contract. *Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228, 233 (2013). This contract does not require both parties to sign, participation in the Plan acts as an individual's acceptance of the terms of the Plan. *Pratt v. Petroleum Prod. Mgmt., Inc. Emp. Sav. Plan & Tr*., 920 F.2d 651, 661 (10th Cir. 1990). The Plan may also at any time change the terms of the Policy as long as vested benefits are not reduced, an individual's continued participation in the Plan is considered acceptance of these changes. *Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922, 930 (6th Cir. 2014). Further, a party seeking to prove a waiver of a right to arbitrate must prove (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Van Ness Townhouses v. Mar Indus. Corp*., 862 F.2d 754, 758 (9th Cir. 1988) (noting that "any party arguing waiver of arbitration bears a heavy burden of proof.")

The arbitration clause contained within section 8.2 the Plan agreement makes it mandatory that all claims or controversies arising out of or in relation to this policy, or the breach thereof, are settled in arbitration. The lower court issued no finding that the clause itself was unenforceable upon any grounds that exist in law or equity for the revocation of any contract. There has been no finding of unconscionability, fraud, or undue influence. The District Court admits that the Policy is a contract but decides without citing any authority that this matter specifically would "be at odds with the values of arbitration." These values are not defined by the District Court.

The District Court then incorrectly cites *Comer v. Micor Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006). *Comer* is very distinct from the case at hand. *Comer* was bringing a suit against a firm hired by the trustees. *Id.* at 1100. The trustees and the firm had an arbitration agreement. *Id*. As a third party, *Comer* was not bound the agreement to arbitrate between the trustees and the firm they hired. *Id*. at 1104. The situation in *Comer* is entirely different than the case at hand. Rather the suit in this case is against the plan in which Dr. Crusher participated. As mentioned above, a participant in an ERISA plan does not have to sign anything to accept the terms of the plan. *Pratt*. 920 F.2d at 661. Dr. Crusher's participation alone acted as her acceptance of the terms of the Plan. *Id*.

The Court concludes its opinion on the enforceability of the arbitration provision by finding that the Plan's prior actions in other cases acted as a waiver of the arbitration provision. Again, the court fails to cite any authority supporting its decision. While it is true that until this year the Plan only enforced arbitration in situations where both parties consented, this does not constitute a waiver. The Plan has broad discretion to make changes to the terms of the policy *AEGON*. 769 F.3d at 930. The manner of enforcement of the arbitration provision is no different. It is important to note, "any party arguing waiver of arbitration bears a heavy burden of proof." *Van Ness*. 862 F.2d at 758. In order for a waiver of a right to arbitrate to exist, three factors must be present. *Id*.

The first is knowledge of a right to arbitrate. *Id*. This knowledge was certainly held by the Plan. Second, it must be proved that the waiving party acted inconsistently with this right. *Id*. The Plan did not act inconsistently with this right in this case, nor has it acted inconsistently with this right since it began submitting all claims to arbitration in 2019. Finally, even if this Court were to find that the Plan acted inconsistently, the party opposing arbitration must prove that they have been prejudiced by the inconsistent acts. *Id*. There is no evidence that the Plaintiff has been prejudiced. The Plan has decided that all cases from 2019 on will be subject to arbitration. This application is uniform and not specific to the Dr. Crusher.

The agreement to arbitrate "any controversy or claim arising out of or relating to this Policy, or the breach thereof" is valid and enforceable. Dr. Crusher's participation in the Plan acted as her acceptance of the Policy as a whole. It was not necessary for Dr. Crusher to sign any Policy agreement. *Pratt*. 920 F.2d at 661. There is no indication or accusation that the agreement to arbitrate was unconscionable, fraudulent, or procured by undue influence. Finally, there is no waiver of enforceability on behalf of the Plan. The Plan has broad discretion to shift its Policy *AEGON*. 769 F.3d at 930. The Plan has not applied the arbitration provision inconsistently. Even if this Court were to determine there was inconsistency, the inconsistency has not prejudiced Dr. Crusher in any way.

C. The Fact That the Claims are Statutory in Nature Does Not Preclude Arbitration

If the court finds, "that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." 9 U.S.C. § 4. The 9th Circuit has held that the Federal Arbitration Act ("FAA") limits Courts' involvement to "determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses

the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (2008) (citing *Chiron Corp. v. Ortho Diagnostic Sys.*, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)). The Supreme Court determined that absent a contrary congressional command, courts must rigorously enforce arbitration agreements according to their terms, including when the claims at issue are statutory. *Italian Colors*. 570 U.S. at 233. There is no congressional command that would prevent arbitration provisions from being enforced because the relief sought is through statutory claims.

The District Court has cited *Amaro v. Cont'l Can Co.*, 724 F.2d 747 (9th Cir. 1984) as its main case justifying its opinion that statutory claims are inappropriate for arbitration. This puts significant weight to a distinction of statutory claims. However, in 2019, the 9th Circuit decided that *Amaro* is, "no longer good law." *Dorman v. Charles Schwab Corporation*, 934 F.3d 1107, 1109 (9th Cir. 2019). The District Court also uses questionably sound Supreme Court cases including *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Ark.-Best Freight Sys., Inc*., 450 U.S. 728 (1981). While neither of these Supreme Court cases have been expressly overruled, the Court has stated specifically that these cases, "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 (2009). The Supreme Court stated that, "those decisions instead 'involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims.'" *Pyett*, 556 U.S. 247, 264 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)). In the present case, the Plaintiff agreed to the arbitration provision by participating in the Plan as stated above. Therefore, the District Court relies improperly on these *Gardner-Denver* and *Barrentine* while entirely ignoring the proper precedent outlined in *Italian Colors*.

The FAA states that if a valid agreement is found, the court shall direct the parties to arbitration. The 9th Circuit has restated this provision well by holding that the FAA limits courts involvement to determining whether a valid agreement to arbitrate exists and if so, whether the agreement encompasses the dispute at issue. *Cox*. 533 F.3d at 1119. In the case of Dr. Crusher, the agreement is valid for the reasons stated in the above argument. The only other determination granted to the court is whether the agreement encompasses the dispute at issue. According to the plain language of the Plan, "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." There is no debate that Dr. Crusher's claim falls within the "any controversy or claim arising out of or relating to this Policy, or the breach thereof." There is also nothing within the arbitration provision that suggests the parties intended to treat statutory claims arising out of or relating to the Policy any differently.

While the District Court acknowledges the existence of *Italian colors*, the court ignores it by over-generalizing the ruling. *Italian colors* states that unless there is a contrary congressional demand, a court should rigorously enforce arbitration provisions according to their terms, including when the claims are statutory. 570 U.S. at 233. In the case of Dr. Crusher, there is no constitutional demand contrary to enforcement. On the contrary, the FAA and recent judicial authority appear to mandate that the arbitration provision be enforced.

The District Court erred in ruling that statutory claims are not proper for arbitration. The District Court relied improperly on *Amaro* as it has been explicitly overturned by the recent 9th Circuit case of *Dorman v. Charles Schwab Corporation*. The District Court also erred by relying

heavily on the cases of *Gardner- Denver* and *Barrentine* because the Supreme Court has ruled clearly that these cases do not preclude arbitration to enforce statutory claims. *Pyett*. 556 U.S. at 264. These cases are narrow exceptions to the general rule of enforceability. The exceptions were neither acknowledged by the District court, nor do they apply here.

D. Conclusion

In conclusion, the arbitration clause is valid and enforceable. In addition, the fact that the claims are statutory does not preclude arbitration. The District Court erred in determining that the arbitration provision was not a valid contract because Dr. Crusher did not sign the Policy. An ERISA policy contract does not require both parties to sign, participation in the Plan acts as an individual's acceptance of the terms of the Plan. *Pratt*, at 661. Further the District Court erred in deciding that the Plan's prior decision to arbitrate only in cases where the parties consented was a waiver of the arbitration provision. The Plan may change policy at any time as long as this change does not result in a reduction of vested benefits in the Plan. *AEGON* at 930. In addition, only one of the three factors to determine whether a waiver was made is satisfied.

Because there is a valid agreement, the arbitration provision must be upheld unless there is a contrary congressional command. *Italian Colors Rest*., at 233. No such command is in place here. The District Court relied improperly on *Amaro* as it has been explicitly overturned by the recent 9th Circuit case of *Dorman v. Charles Schwab Corporation*. The Court also erred by relying on the cases of *Gardner* and *Barrentine*. These cases create a narrow exception to the general rule of arbitrability that is not applicable here. For these reasons, the arbitration provision should be upheld and an order to arbitrate entered.

II. The District Court Properly Found that the Plan Administrator Reasonably Concluded Dr. Crusher was Engaged in the Commission of a Crime for the Purposes of the Plan when the Administrator Exercised Appropriate

Discretion to Reach a Reasonable Interpretation of Plan Language in Good Faith

A. Standard of Review

Summary judgement orders are reviewed by this court *de novo*, applying the same standards as the District Court. *LaAsmar v. Phelps Dodge Corp. Life, AD&D & Dependent Life Ins. Plan*, 605 F.3d 789, 796 (10th Cir. 2010).

B. The Plan Administrator's Interpretations are Afforded Great Deference and are Reviewable Under an Arbitrary and Capricious Standard

Great deference is afforded to the Plan Administrator's decisions when the Plan documents grant the Plan Administrator "discretionary authority to interpret and administer the Plan and to make all factual determinations, including whether the claimant is entitled to benefits under the Plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Accordingly, the Court must grant substantial deference to the Plan Administrator's interpretation of the crime exclusion in Section 2.2 of the Plan. If the Plan grants the Plan Administrator the authority to use their discretion in making findings of fact, the standard of review for those factual determinations is arbitrary and capricious. *Shaw v. AT&T Umbrella Benefit Plan No.1*, 795 F.3d 538, 547 (6th Cir. 2015). "Assuming full and expansive discretion has been conferred, then the plan administrator's interpretation of ambiguous plan provision should be judged as follows: (a) as a result of reasoned and principled process (b) consistent with any prior interpretations by the plan administrator (c) reasonable in light of any external standards and (d) consistent with the purposes of the plan." *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1003 (10th Cir. 2004) (quoting Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083, 1135, 1172 (2001)). Though, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in

determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187, Comment d (1959)). In determining whether the Plan Administrator's decision based on the interpretation of the Plan survives a review under the arbitrary and capricious standard, the Court must determine if the "interpretation was reasonable and made in good faith". *Fought*, 379 F.3d at 1003 (quoting *Hickman v. GEM Ins. Co.*, 299 F.3d 1208, 1213 (10th Cir. 2002)).

C. Defendant-Appellant Borg Life Assurance Co. of Baltimore Was Granted Discretionary Authority to Interpret the Terms of the Enterprise Life Insurance Plan

Defendant-Appellant Borg Life Assurance Co. of Baltimore ("Borg") qualifies as the Plan Administrator due to the language of the Plan documents. Section 3.1 of the Plan provides that Borg agrees to act as Enterprise Life Insurance Plan's ("Plan") agents for processing and paying claims, Section 3.3(a) provides that Borg will make all initial decisions about claims, Section 3.3(b) provides that Borg will make all final claims decisions under the terms of the Plan, and Section 8.1 makes Borg a fiduciary for all claims decisions it makes under the terms of the Plan. ERISA Plans of this nature are not uncommon and constructing a Plan in this manner is specifically allowed by 29 U.S.C. § 1108. The District Court also correctly found that Borg was the Plan Administrator. Therefore, Borg's decision to deny benefits must be afforded *Firestone* deference and is reviewable by the Court on an arbitrary and capricious standard. *Shaw*, 795 F.3d at 547; *Dorowshow v. Hartford Life & Acc. Ins. Co.*, 574 F.3d 230, 233 (3rd Cir. 2009).

D. The Plan's Determination was Reasonable and in Good Faith

As stated in *Firestone*, the court is limited to a review of whether the Plan Administrator's interpretation of Section 2.2 was reasonable and made in good faith. *McGraw v. Prudential Ins. Co. of. America*, 137 F.3d 1253, 1259 (10th Cir. 1998). The Plan's determination that Section 2.2

of the Plan language prevented Captain Picard from recovering accidental death benefits was reasonable and in good faith. The District Court found that the Plan Administrator's decision was not arbitrary and capricious given the circumstances. The District Court's opinion is supported by the findings of the Metropolitan Police Department ("MPD"), which found Dr. Crusher's offense was severe enough to warrant a citation under D.C. Code § 50-1731.04. The Plan Administrator's reliance on the MPD's determination also satisfies the first and third components of the test endorsed by *Fought*. 379 F.3d at 1003. The fact that the Plan Administrator deferred to the judgement of the MPD in interpreting whether or not Dr. Crusher was in the commission of a crime at the time of the accident certainly proves that this decision was "as a result of reasoned and principled process" and "reasonable in light of any external standards". *Id.*

In fact, in a strikingly similar unreported case from the Tenth Circuit, the Court held that a Plan Administrator's reliance on the police department's determination that speeding was a contributing factor in a deadly automobile was reasonable. *Caldwell v. Unum Life Ins. Co. of Am*., 786 F. App'x 816 (10th Cir. 2019). In *Caldwell,* the trooper estimated in the crash report that the Plan Participant was traveling at approximately 74 miles per hour on a road that had a 35-mile-per-hour posted limit and a 55-mile-per-hour default limit by statute. *Id.* The Plan Administrator relied on this determination in denying the accidental death benefits due to a policy exclusion very similar to the one in the Enterprise Plan that stated "accidental losses caused by, contributed to by, or resulting from[] . . . an attempt to commit or commission of a crime" were excluded from coverage. *Id.* In accordance with the reasoning in *Caldwell*, the Plan Administrator's reliance on the MPD's decision that Dr. Crusher violated the distracted driving statute was reasonable. The denial of the accidental death benefits was reasonable and in good faith. While the record shows the Plan has not always considered all traffic violations to be a "crime", there is not sufficient

evidence to prove the interpretation in this case is inconsistent with any prior interpretation. The Plaintiff offers no proof that the Plan Administrator interpreted the crime exclusion in an inconsistent manner with regard to distracted driving.

Also important is the fact that Dr. Crusher showed a pattern of distracted driving, the record reflects that she not only sent the text to Nurse Chapel stating she was "15 minutes out", but she also texted Enterprise advising "Perform CPR". These messages were sent at 12:10AM on January 1, 2018 mere seconds before the fatal crash which occurred at 12:11AM. While Enterprise concedes that Dr. Crusher received text messages on the night of the accident in question in the scope of her employment through the MyText Portal, Defendant denies any claim that Dr. Crusher was expected to use this tool to violate the law. MyText Portal is indented to allow continuous monitoring of the physician's patients and accurate, up-to-date billing records. The decision of Dr. Crusher to violate the law in order to read and respond to messages while driving was a decision out of the scope of her employment. The MyText Portal did its job in effectively alerting Dr. Crusher of the situation which required her attention as the on-call physician. The message from MyText stating "awaiting physician instruction" should never have been viewed by Dr. Crusher while she was driving. Further, Dr. Crusher's conscious decision to read and reply to this message advising the staff to "Perform CPR" had no effect on the course of treatment for the patient. CPR would have been performed regardless of physician instruction in an instance of cardiac arrest. Richard O. Cummins, Arthur Sanders, Elizabeth Mancini, & Mary Fran Hazinski, *Circulation*, 95 American Heart Association, 2211, 2211-12 (1997) ("CPR is one of the few interventions that requires an order to *not* be administered.")

The Plaintiff asserts that the distracted driving laws in D.C. are "a very recent and still developing awareness of the potential dangers of using a phone that the majority of the population

has only begun to appreciate" and that "no reasonable person would call Dr. Crusher a criminal." (Pl. Br. at 4.) In stating this, the Plaintiff attempts to decide what is and what is not a "crime" based on inapplicable principals. It is not important whether a "reasonable person" would refer to Dr. Crusher as a "criminal". What matters is that Dr. Crusher was found to be in violation of a statute and was charged by the MPD for said violation. This evidence alone is sufficient to prove that Dr. Crusher was involved in the commission of a crime which resulted in her fatal car accident.

Further, the Plaintiff claims that since the word "crime" is not defined in the Plan Language that the Plan must be bound to the "common meaning" of the word as "an act with the intent to violate the rights of another." (Pl. Br. at 2.) No support or citation was provided for this definition of "crime" offered by the Plaintiff. This conclusion is contrary to well-established case law. Courts have consistently held that *Firestone* deference is afforded to any Plan Administrator which is granted the right in the Plan Documents to construe and interpret the terms of the plan. 489 U.S. at 115. (*See, e.g. Conkright v. Frommert*, 559 U.S. 506, 509 (2010)). Were this Court to agree with the Plaintiff's assertion that a "common meaning" can overcome the Plan Administrator's right to construe the terms of the plan it would essentially hold that the doctrine of *contra proferentem* applies in cases alongside *Firestone* deference. *Contra proferentem* is defined as "The doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter" *Contra Proferentem*, BLACK'S LAW DICTIONARY (11th ed. 2019). The result of the doctrine is that any reasonable interpretation that is in favor of the non-drafting party (here, the Plan participant or beneficiary) will be accepted over a reasonable interpretation made by the Plan Administrator. However, courts have held that the doctrine of *contra proferentem* is incompatible with *Firestone* deference. *See Clemons v. Norton Healthcare Inc.*, 890 F.3d 254, 267 (6th Cir. 2018) ("we do not think a court can apply *Firestone* deference and *contra proferentum* [sic] to the same case without

contradiction"). The Supreme Court made it clear in *Firestone* that a Plan Administrator which is granted the power to interpret the terms of the plan under in the Plan Documents may exercise their discretion to find a reasonable definition. If this Court were to hold that *Firestone* deference and the doctrine of *contra proferentem* apply in the same circumstances, it would only allow a Plan Administrator to interpret an unambiguous term. Thus, *contra proferentem* and *Firestone* deference cannot apply equally to an issue of Plan Language interpretation because to do so would deprive the Plan Administrator of any deference they were granted in the Plan Documents.

E. The Conflict of Interest Was Not Sufficient to Show an Abuse of Discretion

The Plan concedes that some sort of conflict of interest was created by virtue of Borg being the Plan Administrator for the purposes of making benefit eligibility determinations and also being the source of funding for payment of benefits. The Plan denies that this conflict is sufficient evidence that the Plan Administrator acted in an arbitrary and capricious manner when making the decision to deny benefits to Captain Picard. The Supreme Court addressed a similar conflict of interest in *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). In *Glenn* the conflict of interest was created when a disability insurance company acted as the Plan Administrator for benefits decision and was also the payor of the benefits. *Id* at 108. The Court elaborated on the holding from *Firestone* that conflict of interest should "be weighed as a 'factor in determining whether there is an abuse of discretion.'" stating explicitly that the Court's holding in *Firestone* did not change the deferential standard of review to *de novo*. *Id* at 115 ("We do not believe that Firestone's statement implies a change in the standard of review, say, from deferential to de novo review.") The Court merely reiterated the fact that while the conflict of interest is to be considered as a "factor", the conflict alone is not determinative of the issue. *Id* at 117.

In *Conkright v. Frommert*, the Supreme Court reaffirmed the holding in *Glenn* and further held "that a plan administrator operating under a systemic conflict of interest is nonetheless still entitled to deferential review." 559 U.S. at 507. Thus, any conflict of interest does not destroy the Plan Administrator's deferential treatment in reviewing Plan Language interpretation. There are no other factors apart from the conflict of interest showing the Plan Administrator acted in an arbitrary and capricious manner. The Plan Administrator deferred to the sound judgement of the MPD in determining that the crime exclusion applied. Therefore, the conflict of interest alone is not sufficient to overcome the deferential treatment the Plan Administrator is afforded by *Firestone*, *Glenn*, and affirmed in *Conkright*.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court reverse the District Court decision in respect to the arbitrability of the dispute and remand with instructions to compel arbitration and uphold the District Court decision finding the Plan Administrator correctly applied the crime exclusion in section 2.2 of the Policy.

Dated: January 17, 2020

Respectfully submitted,

Team 6

/s/ Redacted

/s/ Redacted
Team 6, Attorneys for Appellees

CERTIFICATE OF SERVICE

All work product contained in all copies of TEAM 6's brief is, in fact, the work product of the members of TEAM 6, [redacted]. This team has complied fully with the honor code [redacted]. This team has also complied with all rules of the Nell Hennessey Moot Court Competition.

Dated: January 17, 2020

Respectfully submitted,

Team 6

[redacted]

Team 6, Attorneys for Appellees