No. 12-1403

IN THE

Supreme Court of the United States

BEATRIZ MARTINEZ-CLAIB, M.D.

Petitioner,

v.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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I. Introduction

Under the Employee Retirement Income Security Act, 29 USC § 1001 *et seq.* (ERISA), and its enabling regulations, ERISA insurers must provide basic information to claimants upon claim denial: "the specific reasons" and "the specific plan provisions" on which the denial is based. Pet. 4. When Metropolitan Life Insurance Company denied a disability claim submitted by Beatriz Martinez-Claib, M.D., it provided a reason unsupported by the facts or the pertinent plan terms. Pet. 9-10. After Dr. Martinez-Claib sued MetLife, it abandoned this original reason, and proffered entirely new reasons in court ("post-hoc rationales"). Despite ERISA's denial-explanation requirements, and over Dr. Martinez-Claib's objection, both the district court and the Eleventh Circuit allowed MetLife to defend the action based on its post-hoc rationales. Pet. 11-13. Because the circuits are splintered on the question how (and whether) to enforce ERISA's denial-explanation requirements when an ERISA insurer raises a post-hoc rationale, Pet. 13-20, she asks this Court to review the Eleventh Circuit's decision.

MetLife, in its Brief in Opposition, advances several arguments, but on analysis none of them defeats the petition's essential points:

- the circuits are splintered on whether and how to enforce denial-explanation requirements;

- the circuits are split on whether and how waiver principles apply to an ERISA insurer's failure to timely provide reasons for claim denial; and

- MetLife was also subject to contractual denial-explanation requirements, and the failure to enforce those requirements contravened this Court's recent decision in *U.S. Airways, Inc. v. McCutchen,* 133 S.Ct. 1537 (2013).

II. MetLife has failed to counter the essential point that the circuits are splintered

1. The First Circuit, in *Glista v. UNUM Life Ins. Co. of America,* 378 F.3d 113 (1st Cir. 2004), described many widely disparate approaches among the circuits. *Id.* at 130-131; Pet. 14. Nowhere does MetLife assert *Glista* got it wrong, or that its observations no longer apply.

Indeed MetLife itself describes a circuit split. Taking everything it says at face value, five circuits judicially entertain post-hoc rationales, if only in *de novo* cases, Opp. 18-20, while

three remand to the insurer for a second go-round. Opp. 21-23.

2. MetLife posits a pronounced schism between cases in which judicial analysis is deferential and those in which it is *de novo.* In fact, asserting that "procedure and analysis under a *de novo* standard of review is substantially different from a deferential, arbitrary and capricious review," Opp. 10, it goes so far as to argue that *de novo* cases alone are pertinent here. Opp. 12, n.4. In *de novo* cases, it says, everyone allows post-hoc rationales. And because this is a *de novo* case, it says, there is no circuit split at all.

In order to make this argument MetLife must distinguish Ninth and Tenth Circuit *de novo* cases which disallow post-hoc rationales. Pet. 17. Its attempt to distinguish *Kellogg v. Metropolitan Life Ins. Co.,* 549 F.3d 818 (10th Cir. 2008) and *Hyder v. Kemper Nat'l Services, Inc.,* 302 Fed.Appx. 731 (9th Cir. 2008), however, fails.

MetLife tells us the rule in Ninth and Tenth Circuit *de novo* cases is that a post-hoc rationale is prohibited only if it doesn't matter; if it does (i.e. if it would defeat an otherwise meritorious claim), it is welcome in both circuits. And so, as MetLife reads *Kellogg* and

Hyder, neither actually prohibits post-hoc rationales after all—both courts consider them *sub silentio,* and *say* they are prohibiting them only after concluding they won't defeat the underlying claim anyway.

Thus the Tenth Circuit in *Kellogg,* as MetLife would have it, "believed the claimant was entitled to benefits under the terms of that plan," and since it "determined the claimant was entitled to benefits under its own *de novo* review, … the claim administrator's post-decision rationale was irrelevant." Opp. 14.

And, according to MetLife, in *Hyder,* "medical records established that the claimant was disabled under the terms of the plan and entitled to benefits,"[1] so it was "not a case where the court determined the claimant had no entitlement to benefits under the terms of a plan but awarded them regardless as a remedy for the claim administrator's procedural error." Opp. 17.

We may accept MetLife's account of the analyses in *Kellogg* and *Hyder* only by ignoring what the respective courts themselves said. The

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[1] Here there is no question but that, from a medical perspective, Dr. Martinez-Claib was indeed disabled. MetLife never even suggested otherwise; its various rationales were all quite apart from the medical *bona fides* of her claim (canceled policy; pre-existing condition; untimely notice of claim).

Kellogg panel conducted "its own *de novo* review" and concluded the claimant was entitled to benefits only after *refusing* to consider a post-hoc rationale—not because it was not relevant in that it failed to defeat the claim, but because it was not cognizable in that it was post-hoc. 549 F.3d at 828-829; Pet. 15-16. *Hyder* similarly refused to consider a post-hoc rationale, for precisely the same reason. 302 Fed.Appx. at 733; Pet. 17. Indeed in each case, and contrary to MetLife's confident surmise, we cannot say for sure whether the rejected post-hoc rationale would have defeated the claim, precisely because each court refused to entertain it.

3. Both *de novo* and deferential cases, moreover, are pertinent, as the circuits are also split in their approach to the very deferential-*de novo* dichotomy MetLife takes as a given. As discussed above three circuits do apply the distinction MetLife advocates, but two do not. Pet. 17-18. And as Dr. Martinez-Claib has argued, the distinction is inapt: it takes an explicit, forward-looking statutory command directed at ERISA insurers, and inappropriately alters it based on an inferred, backward-looking standard for judicial scrutiny. Pet. 26-27.

MetLife's emphasis on this dichotomy evokes Ernest Hemingway's apocryphal remark

that the rich are different because they have more money:[2] *de novo* cases are different because they are evaluated *de novo.* Beyond that tautology MetLife fails to explain what difference it makes here, or why a judicially-crafted approach to *de novo* and deferential analysis can trump plain statutory and regulatory language, which nowhere even suggests such a distinction when it commands ERISA plans—all of them—to timely provide "the specific reasons" and "the specific policy provisions" supporting claim denials. *See* Pet. 26. As this court observed in *Conkright v. Frommert,* 559 U.S. 506, 512 (2010), we look to principles of trust law "[b]cause ERISA's text does not directly resolve the matter," but here the text does directly resolve the matter: "every employee benefit plan" must provide timely explanations for claim denials, without regard to whether their decisions will ultimately be subject to *de novo* or deferential analysis. Pet. 26. And after telling us the two types of cases are different, MetLife doesn't explain why that difference means deferential cases don't even count in evaluating whether there is a circuit split.

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[2] *See* Letter to the Editor of the New York Times, November 13, 1988, http://www.nytimes.com/1988/11/13/books/l-the-rich-are-different-907188.html (as visited October 7, 2013).

III. MetLife is incorrect that the circuits all apply waiver principle to ERISA claims in the same way

According to MetLife, Dr. Martinez-Claib "has failed to identify a conflict between the Eleventh Circuit and the other circuits that have addressed waiver in the ERISA coverage context." Opp. 24. MetLife is incorrect.

1. First, a circuit split exists on whether waiver can even be considered in the ERISA-coverage context. The Fourth Circuit says no, Pet. 22; other circuits say yes but disagree on how it is to be applied. Pet. 22-24. With this last point MetLife disagrees, asserting "the Eleventh Circuit's precedent is consistent with the Second, Fourth, Seventh and Eighth Circuits," while acknowledging not a single dissenter. Opp. 24-25.

MetLife's perceived unanimity is nonexistent. Some of the circuits it mentions apply the familiar requirement that an intentional relinquishment of a known right establishes waiver. *See* Pet.App. 5a-6a (this case); *Loyola Univ. of Chicago v. Humana Ins. Co.,* 996 F.2d 895, 901 (7th Cir. 1993); *Farley v. Benefit Trust Life Ins. Co.,* 979 F.2d 653, 659 (8th Cir. 1992), *Midwestern Motor Coach Co. v. General Elec. Co.,* 289 Fed.Appx. 958, 959 (8th Cir. 2008). But the Fourth Circuit rejects waiver altogether in

ERISA benefit cases. Pet. 22. And the Second Circuit, in *Juliano v. Health Main. Org. of N.J., Inc.,* 221 F.3d 279 (2d Cir. 2000), eschewed waiver if it would expand the underlying coverage. Pet. 22.

2. Later, in *Lauder v. First UNUM Life Ins. Co.,* 284 F.3d 375 (2d Cir. 2002)—a case mentioned nowhere in MetLife's brief—the Second Circuit made two decisions establishing both a further circuit split and its potential impact on this case.

First, it noted *Juliano's* principle precluding waiver if it would expand coverage derived from *Albert J. Schiff Assocs., Inc. v. Flack,* 51 N.Y.2d 972 (Ct.App.N.Y. 1980). *Albert J. Schiff* had held an untimely-notice defense was among those that could be waived, because it did not expand the underlying policy's coverage. *Id.* at 974-975. Thus *Lauder's* approach would very likely allow waiver principles to apply to MetLife's untimely-notice defense here.[3]

[3] And that is its only defense following the Eleventh Circuit's opinion. While MetLife takes it as conclusively established that Dr. Martinez-Claib's claim was barred by a pre-existing condition exclusion, *e.g.* Opp. 12, 30, the fact is that was a finding of the district court, appealed by Dr. Martinez-Claib, and not reached by the Eleventh Circuit.

Second, *Lauder* relaxed the "intentional relinquishment" requirement, holding an ERISA insurer would be deemed to have waived a defense "where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense." Pet. 23. As discussed below MetLife was on constructive notice, at the very least, of the circumstances going to its untimely-notice defense, so again *Lauder's* approach would significantly impact the outcome here. More to the point, it also creates a split with circuits which do strictly apply the intentional-relinquishment requirement.

IV. MetLife is incorrect that *McCutchen* has no application here

According to MetLife, *McCutchen's* holding that the terms of an ERISA plan must be honored, *see* Pet. 29-30, has no bearing on MetLife's failure to adhere to its contractual denial-explanation requirements. It is, we are told, "both procedurally and factually inapposite," because it involves a claim under 29 USC § 1132(a)(3) instead of section 1132(a)(1)(B); and because it involves a claim for "equitable reimbursement" instead of disability benefits. Opp. 24. Nothing in *McCutchen,* however, suggests

its holding is limited to that discrete subsection or that discrete claim.

MetLife also advances merits arguments which are irrelevant at the *certiorari* stage: a *tu quoque* argument that Dr. Martinez-Claib breached the contract too, Opp. 24-25; and an argument that denying her benefits was also consistent with contractual terms. Opp. 25. Neither argument overcomes *McCutchen's* impact. The contract contained several provisions which might defeat a benefits claim—and it also required MetLife to identify which ones applied when it denied a claim. Expecting MetLife to fulfill that obligation satisfies *McCutchen's* requirement that the terms of a plan be enforced. Excusing MetLife's obligations, while strictly enforcing Dr. Martinez-Claib's, contravenes *McCutchen.*

V. MetLife is incorrect that this case is so "factually unique" that it is unsuitable for review

MetLife suggests there are facts unique to this case which render it an outlier this Court ought not to review. For example, it asserts the unique circumstances of Dr. Martinez-Claib's claim submission made the claimed date of disability unclear. And it asserts the district court considered the post-hoc rationales at Dr. Martinez-Claib's affirmative invitation.

Not so. Dr. Martinez-Claib's claim plainly described a disability beginning in May 2002, when she became unable to practice medicine. And she consistently maintained that MetLife's proffered post-hoc rationales were not cognizable and should be judicially disregarded, never suggesting otherwise.

In any case, neither the "unclear claim" nor "invited error" point has anything to do with the suitability of this case for review. This case comes to this Court packaged in an Eleventh Circuit opinion clearly delineating the facts and the issues in play. It squarely presents the question whether an ERISA insurer may raise a post-hoc rationale to defend a benefits action. *See* Pet. 10-13, Pet.App. 1a-8a.

1. According to MetLife, Dr. Martinez-Claib's claim was so confusing that it was unable to discern when she became disabled. The claim was quite clear, however, and if MetLife misunderstood it, as discussed below, that was a function of its own gross negligence.

This factual minutiae, in any case, has nothing to do with whether this case is suitable for review. The Eleventh Circuit's decision—the one Dr. Martinez-Claib requests this Court to review—describes the "claim as Martinez-Claib submitted it" as "using the last day worked as a physician as the date of disability." Pet.App.

6a. And indeed that is exactly how it was submitted. The claim, on a MetLife-designed form, explicitly designated May 2002, when Dr. Martinez-Claib had to stop working as a physician, as the disability date. Pet. 9. An accompanying letter stated "I worked until May 2002, when I was released of my duties as a physician due to slow brain syndrome." Pet. 9. MetLife says it was confused because the same letter explained she was thereafter transferred to a different position, Opp. 4, but fails to mention the letter began with as explicit a description as one could ask for: "This letter of explanation accompanies an application for disability that commenced on 5/16/02." C.A. App. Doc. 28-2, pg. 1 (capitalization omitted).

MetLife raises this point as an excuse for its denial-explanation violation, Opp. 8, and says Dr. Martinez-Claib's internal appeal (which MetLife lost track of) provided "new information" and "clarified that Petitioner was claiming to be disabled under the terms of the Plan as of the earlier date…." Opp. 13; *see also* Opp. 8. But the appeal contained no "new information" on this point at all; it simply reiterated, and pointed out MetLife had misread, the abundantly clear information it already had. *See generally* C.A. App. Doc. 23-3, pgs. 13-17.

2. According to MetLife, when the district court was considering cross-motions for summary judgment, it was only at "Petitioner's request" that the district court "addressed for the first time under the terms of the Plan the substance of Petitioner's appeal submission." Opp. 7. MetLife quotes at length from one of Dr. Martinez-Claib's trial-court submissions—an objection to a magistrate judge's recommendation that post-hoc rationales be remanded to MetLife—stating in part "the court 'is clearly capable of deciding the legal questions at issue.'" Opp. 9. MetLife omits that among the "legal questions at issue" described in that same submission was "whether MetLife's failure to invoke the preexisting condition exclusion, or the late notice issue, in its denial letter forecloses it from arguing those issues now before the court." C.A. App. Doc. 47, pg. 16. And this followed Dr. Martinez-Claib's emphatic arguments to that effect in the papers submitted to the magistrate judge. C.A. App. Doc. 31, pgs. 19-22; Doc. 36, pgs. 2-5. Dr. Martinez-Claib has argued all along that MetLife's post-hoc rationales were barred, and has never suggested any court in this matter could appropriately consider them. MetLife's suggestion to the contrary is inaccurate.

3. Nothing in MetLife's factual quibbles is in any case germane to this petition. It maintains its professed confusion about the disability date and subsequent failure to render an internal-appeal decision distinguishes this case from *Kellogg,* because in that case MetLife didn't lose the file, but "had requested additional information from the claimant and took the position that it was waiting for the claimant to perfect her appeal." Opp. 13-14. MetLife fails to note the Tenth Circuit "readily reject[ed]" that position. 549 F.3d at 826. If anything, in fact, MetLife's conduct here is more egregious than its conduct in *Kellogg,* as here it failed to ascertain simple information conveyed on one of its own claim forms, and then *lost the file.* MetLife's attempt to parlay that negligent conduct into a litigation advantage should await review on the merits, should MetLife decide to press the argument; it tells us nothing about whether *certiorari* should issue.

Similarly the "invited error" argument is inapposite to a discretionary-review petition. The point was never raised until now, and the Eleventh Circuit addressed the post-hoc rationale issue on its merits and issued an opinion which, though erroneous in Dr. Martinez-Claib's view, provides an appropriate vehicle for this Court's consideration. Pet. 25.

VI. MetLife mischaracterizes Dr. Martinez-Claib's position

According to MetLife Dr. Martinez-Claib seeks a ruling that an ERISA insurer's procedural violation must always lead to an award of benefits. *E.g.,* Opp. 28-29. No so: she advocates only that ERISA be enforced according to its terms so that the information communicated upon claim denial comprises "the specific reasons" and "the specific policy provisions" to be evaluated by a court. Pet. 26-28. That would in no sense lead to an automatic award of benefits; it might salvage a claimant's case, and it might not. An ERISA insurer may easily avoid an award of benefits as a result of a post-hoc-rationale bar simply by timely communicating a valid reason for claim denial.

VII. Conclusion

This *certiorari* petition should be granted.

Respectfully submitted.

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