In the Supreme Court of Pennsylvania

Nos. 280 & 281 MAL 2013

DALLAS SCHOOL DISTRICT, as Fiduciary and Trustee of Its Employees Who are Members of the Class, FRANK GALICKI, On His Own Behalf and On Behalf Of All Other Persons Similarly Situated Within The Dallas School District, PITTSTON AREA SCHOOL DISTRICT, as Fiduciary and Trustee Of Its Employees Who Are Members of the Class, GEORGE COSGROVE, On His Own Behalf Of All Other Persons Similarly Situated Within The Pittston Area School District,
Petitioners,

v.

NORTHEAST PENNSYLVANIA SCHOOL DISTRICTS (HEALTH) TRUST,
Respondent.

ANSWER OF NORTHEAST PENNSYLVANIA SCHOOL DISTRICTS (HEALTH) TRUST IN OPPOSITION TO PLAINTIFFS' PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Commonwealth Court of Pennsylvania entered April 17, 2013 reversing the Judgment of the Court of Common Pleas of Luzerne County, Pennsylvania, Civil Division, No. 1404–08, entered January 18, 2012

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I. INTRODUCTION

In this case, a unanimous en banc panel of the Commonwealth Court ruled 5 to 0 a mere month and a half after oral argument that the trial court's judgment in this case awarding damages in favor of the plaintiff school districts was erroneous and had to be reversed. The promptness and unanimity of the Commonwealth Court's ruling correctly evidenced that the appeal presented a clear case for reversal. Now, in the aftermath of that reversal, the plaintiff school districts have filed a petition for allowance of appeal asking this Court to grant review of two issues — neither of which satisfies this Court's criteria for review nor is otherwise deserving of this Court's attention.

When defendant/respondent Northeast Pennsylvania School Districts (Health) Trust appealed from the trial court's adverse judgment to the Commonwealth Court, the first question presented in the Trust's opening brief for appellant asked:

> Did the trial court err as a matter of law and rule contrary to the great weight and sufficiency of the evidence in concluding that defendant Heath Trust is not a pooled trust, notwithstanding the language of the Trust Agreement creating a pooled trust, the Health Trust's course–of–performance in operating as a pooled trust, and the uncontradicted testimony of the Health Trust's founders that they knowingly and intentionally created a pooled trust?

Health Trust's Commonwealth Court Brief for Appellant at 5.

The Commonwealth Court's unanimous opinion correctly concluded that the Health Trust was intended to operate and has operated as a multi–employer pooled trust. The Commonwealth Court thus correctly rejected petitioners' unsupported

argument that any particular employer/school district contributing to the Trust possesses any individualized surplus pertaining to that employer that the school district can withdraw from the Trust after the school district itself departs from the Trust. As the en banc panel of the Commonwealth Court has unanimously and correctly agreed, ERISA's "sole and exclusive" benefit rule does not entitle the petitioner school districts to withdraw any portion of the Trust's surplus from the Trust upon their departure because:

> (1) As reflected in the language of the Trust Agreement, the Trust was created as and operates as a pooled trust, without segregated accounts or reporting of results on a separate employer–by–employer basis;
>
> (2) In this Trust, as in all pooled trusts, an individual employer does not have a surplus balance that it can withdraw on its departure from the Trust;
>
> (3) It would not be proper for a Court to rewrite the express terms of the Trust Agreement to give a departing employer the ability to withdraw any portion of the Trust's surplus when no such right to withdraw surplus upon an employer's departure exists in the Trust Agreement;
>
> (4) The employees of the plaintiff school districts received the benefit of the bargain that their employers contracted for them to receive from the Trust, which was health care coverage for the years in which the plaintiff school districts remained in the Trust; and
>
> (5) The plaintiff school districts relinquished any ability to benefit in the future from any surplus that the Trust has experienced when they voluntarily decided to depart from the Trust.

In this case, the courts below were presented with a Trust Agreement whose express language was designed to create and authorize a pooled trust. R.3032a, 3025a, 3020a (Trust Agreement §§6.6, 5.1(b), 4.4(u)). Soon after its creation, the

Trust formally represented to the Internal Revenue Service that it operated as a pooled trust when applying for and obtaining tax–exempt status. R.3057a–58a. The trustees of the Trust, shortly after the Trust's creation, officially adopted a rating methodology (Def. Exh. 6, R.3216a–18a) that provided for pooling contributions and spreading risk and a resolution (Def. Exh. 8, R.3221a–22a) governing the treatment of Trust deficits or surplus, further confirming the Trust's status as a pooled trust, while simultaneously rejecting a competing resolution to operate the Trust as a segregated trust (R.1289a–90a, 1301a). Finally, the Trust presented a massive amount of uncontradicted evidence establishing both that the Trust has in fact operated as a pooled trust and that it was the intention of the Trust's founding trustees to create a pooled trust that shared risk.

This simply was not a case where the trial court confronted conflicting evidence and conflicting inferences and was required to decide which competing view of the evidence was more believable. Rather, as the en banc Commonwealth Court correctly and unanimously recognized, here the applicable law and the evidence permitted only one conclusion: the Health Trust is and at all relevant times operated as a pooled trust.

Not only was the Commonwealth Court's ruling clearly correct, but neither of the two issues that the petitioner school districts ask this Court to agree to review satisfies this Court's criteria for review. Question one asks whether the Commonwealth Court correctly applied a statutory provision known as the "exclusive benefit" rule found in two neighboring subsections of a federal law titled

the Employee Retirement Income Security Act (ERISA). *See* 29 U.S.C. §§1103(c)(1) & 1104(a)(1)(A)(i); *see also* Exhibit 4 to Pet. at 16 n.7 (footnote of Commonwealth Court's en banc opinion, explaining statutory source within ERISA of the "exclusive benefit" rule).

Because the Health Trust is a "governmental plan," it is exempt from ERISA's provisions. *See* 29 U.S.C. §§1002(32) & 1003(b)(1); R.1558a–59a (Section 6.4 of Trust Agreement). The Health Trust's exemption from ERISA explains why the petitioner school districts were able to file and maintain this suit in state court; had ERISA's provisions applied, then jurisdiction over this lawsuit would have been exclusively in federal court. *See Commonwealth, Dep't of Public Welfare* v. *Lubrizol Corp. Employee Benefits Plan*, 737 A.2d 862, 870 (Pa. Commw. Ct. 1999); *Vulcan* v. *United of Omaha Life Ins. Co.*, 715 A.2d 1169, 1178 (Pa. Super. Ct. 1998). Consequently, ERISA's "exclusive benefit" rule only has relevance to this case because, in the Trust Agreement that created the Health Trust, the settlors determined that certain of ERISA's fiduciary standards "shall be incorporated as operating principals [sic] of this Agreement and Declaration of Trust." R.1559a.

ERISA's "exclusive benefit" rule does not directly apply to the Health Trust for two reasons. First, the Health Trust is a government plan, rendering ERISA inapplicable. And second, if ERISA and its "exclusive benefit" rule did directly apply, then this lawsuit could only be heard and decided in federal court. By filing this suit in state court, plaintiffs evidenced their agreement that ERISA's provisions do not directly apply to the Health Trust. Accordingly, the "exclusive benefit" rule

only applies to the Health Trust because the Health Trust voluntarily agreed to incorporate as guiding principles certain of ERISA's fiduciary standards. R.1559a.

The undisputed fact that ERISA does not directly apply to the Health Trust demonstrates the clear unsuitability for this Court's review of the first question presented in the petition for allowance of appeal. The reason this Court has never been called on to decide the meaning of ERISA's "exclusive benefit" rule is that lawsuits directly presenting that question can only be heard and decided in federal court due to the federal courts' exclusive jurisdiction over ERISA actions. *See Smith* v. *Crowder Jr. Co.*, 421 A.2d 1107, 1110–13 (Pa. Super. Ct. 1980). And lawsuits such as this case, which indirectly implicate ERISA's "exclusive benefit" rule, have not previously arisen in Pennsylvania state courts and are unlikely to arise with any greater frequency in the future. Thus, the Court's ruling in this case would give no useful guidance in any other case and would not even qualify as "error correction," because the Commonwealth Court's ruling was plainly correct.

Similarly, the second and final question presented in the petition for allowance of appeal also does not merit this Court's review, because this case does not in fact present that question. The petitioner school districts were not denied the accounting that they sought in this case. Rather, they obtained that accounting, but at their own expense, because the trial court ruled that such actuarial fees had to be paid by the plaintiffs and could not be recovered as litigation expenses under the "American Rule" even when the plaintiffs were prevailing parties. The Commonwealth Court affirmed, correctly recognizing that whatever claim the

plaintiff school districts may have had to recover their actuarial fees as prevailing parties had entirely disappeared once the Commonwealth Court had reversed the trial court's underlying judgment. Because this case does not actually present the question of when a trust's settlor may obtain an accounting, but rather only raises the question of who must pay for actuarial fees incurred in pursuit of litigation, the second and final question presented for review is not deserving of this Court's attention because this case fails to actually present that issue.

II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

In the Commonwealth Court, this appeal was accompanied by a nine–volume Reproduced Record, but one might easily overlook that fact given how infrequently cites to that Reproduced Record appear in the petition for allowance of appeal. Because a basic understanding of the facts of this case will readily enable this Court to recognize that the petition for allowance of appeal lacks merit and should be denied, the Health Trust respectfully sets forth the following summary of the background of this case.

Respondent Northeast Pennsylvania School Districts (Health) Trust came into existence when thirteen public school entities (school districts, vo–tech schools and an intermediate unit) and their respective labor organizations, through the process of collective bargaining, signed an Agreement and Declaration of Trust ("Trust Agreement"). R.3001a–36a.

The Trust is a multi–employer trust administered by an equal number of Trustees appointed by management (the school districts and other public school entities) and labor organizations. R.3013a (Trust Agreement §4.2). Before the Trust was formed, the public school entities that ultimately formed the Trust were experiencing substantial double–digit increases in health insurance premiums that they were being charged for individual, fully–insured insurance plans provided separately to them by Blue Cross. R.1189a–91a. The Trust was formed in order to provide health care benefits to the eligible employees and their eligible dependents of the member public school entities in a manner that reduced the costs and risk exposure of the participating public school entities. R.1192a. The principal goals of the school entities that decided to join the Trust were cost savings, rate stability, and rate certainty. *Id.*

The Trust has operated as a "pooled" multi–employer trust during the last 13 years by pooling the premium contributions of the member public school entities to obtain reduced rates for health care by negotiating as a much larger entity and by spreading the risk of high health care claims and the expenses of running the Trust among all of the member school entities. A brief explanation about the manner in which employers may provide health care benefits to their employees and their dependents is essential to an understanding of the Trust's operation.

An employer may choose to purchase what is known as "fully insured" health care coverage for an employee. In that scenario, the employer pays a premium, in exchange for which the health insurer agrees to offer (and pay for) the coverage

being provided. In the "fully insured" scenario, the risk of unusually expensive claims is transferred to the health insurer, as is the potential benefit that the insured will have lower than expected claims.

Another health insurance alternative that an employer or group of employers may select — which is in fact the alternative that the Trust has itself selected — involves what can best be described as self–insurance. R.1190a. Instead of transferring the risk of high claims or the benefit of lower than expected claims to a health insurer under a "fully insured" policy, the employer or employers can pool their resources into a fund from which the health care claims of employees and their dependents will be paid. *Id.*

The Trust uses Blue Cross as its third–party administrator (commonly known as a TPA) for its medical programs, and thus after the employees of the covered school districts obtain health care services, the Trust receives a bill from Blue Cross that the Trust then pays out of the pooled Trust fund. The Trust has not transferred the risk of higher–than–expected health care claims to an insurer, nor has the Trust given up the potential benefit of lower–than–expected claims. In this self–insured scenario that the Trust operates under, the pool of money that the school entities have contributed represents the "insurance" from which the health care claims of the school employees and their dependents are paid.

As reflected in the Trust Agreement, the Trustees are responsible for the operation of the Trust and have sole responsibility for determining the existence, non–existence, nature, and amount of the rights and interests of all parties in the

Trust Fund. R.3010a (Trust Agreement §2.1). The Trust Fund consists of the assets held by the Trustees in accordance with the Trust Agreement and is made up of the contributions received from the member school districts. R.3008a–09a (Trust Agreement §1.1(b), (c)).

The Trust has always operated as a pooled, irrevocable Trust in which: (1) the premium contributions of all of the member public school entities are irrevocable and pooled together to obtain lower health care rates; (2) the health care claims paid out by the Trust are paid out of the pooled pot of money, thereby spreading the risk of high health care claims across the entire Trust membership; and (3) the expenses of Trust operation and administration are shared among all member public school entities.

The irrevocable and pooled nature of the Trust fund is established by various sections of the Trust Agreement that all member schools and labor organizations have signed. For example, Section 6.6 of the Trust Agreement, titled "Irrevocability of Trust," provides as follows:

> All contributions made by public school entities to the Trust Fund shall be irrevocable, and no part of the corpus of the Trust Fund nor any income therefrom shall revert to any public school entity or be used for or diverted to purposes other than for the exclusive benefit of the Participants and their Beneficiaries, except as provided by law, or as provided in the Plan or this Agreement and Declaration of Trust.

R.3032a (Trust Agreement §6.6).

Section 5.1(b) of the Trust Agreement addresses amendments to the Trust and provides as follows:

> No amendment to this Agreement shall be effective if it authorizes or permits any part of the Trust Fund (other than such part as is required to pay taxes and administration expenses) to be used for or diverted to any purpose other than for the exclusive benefit of the Participants and/or their Beneficiaries or estates; nor shall any amendment be effective if such amendment authorizes or permits or causes any portion of the Trust Fund to revert to or become property of any public school entity.

R.3025a (Trust Agreement §5.1(b)).

In the year 2000, the Trust's board of trustees authorized the trust's attorney to apply to the Internal Revenue Service as a tax exempt entity pursuant to 29 U.S.C. §501(c)(9). R.3037a (Def. Exh. 8). Consistent with the irrevocability of the monies in the Trust fund, in its application to the IRS for tax–exempt status, the Trust affirmatively represented that there would be no distribution of its property or surplus to shareholders or members and obtained Section 501(c)(9) tax exempt status based on that representation. R.3046a, 3058a (Def. Exh. 4); R.3212a–14a (Def. Exh. 5); R.1283a–84a (testimony of Ralph Scoda). The application to the IRS is signed by Dr. Frank Serino, the founding Trustee appointed by the Pittston Area School District, who also served as the Trust's management co–chair from 1999 to 2002. R.3056a.

In the IRS application, the Trust stated that "[t]he organization is a Trust created to pool the resources of 13 school districts to provide health insurance coverage at reduced rates to employees of those districts by leveraging their buying power as a very large purchaser of benefits." R.3057a. Asked in the Application whether the organization had made or planned to make any distribution of its property or surplus funds to shareholders or members, the Trust responded "no."

R.3060a. Dr. Serino understood, when he signed the Application, that the Trust would not be distributing property or surplus funds to the members of the Trust. R.6102a. The Trust's Application to the IRS confirms the intent of the Trustees that this Trust be operated as a pooled Trust in which contributions by the member public school entities, once paid in, would be irrevocable and not subject to refund or return.

In the period immediately before the Trust's formation, the public school entities that ultimately formed the Trust hired Plan3 Incorporated. R.810a. During this transition period, Plan3 administered the separate contracts of insurance that each public school entity had at the time with Blue Cross. R.3539a–92a (Def. Exh. 55).

For the initial years of the Trust's existence, Plan3 administered the Trust's Plan of Benefits. From the Trust's formation to the Plan year ending June 30, 2002, the Trust experienced an increasing Trust–wide deficit. R.1277a. The Trust became dissatisfied with Plan3 and terminated its relationship with Plan3 in 2001. R.1114a. In 2002, the Trust hired an actuarial firm, Conrad M. Siegel, Inc. ("CSA"), to provide actuarial and administrative services to the Trust. R.1115a. During the period June 2002 to October 16, 2002, CSA, in its capacity as actuary to the Trust, developed a methodology to determine premium contribution rates for the public school entities participating in the Trust. R.3216a–18a (Def. Exh. 6).

The rating methodology developed by CSA is a pooled rating methodology. As explained by Robert Glus, the Trust's actuary with CSA, the rating methodology is

a pooled rating methodology primarily because the premium/contribution rates for the member school districts are set on a prospective basis and are fixed, in advance, for the Plan year, and there is then no retrospective settlement process for each member school district. R.1428a, 1434a–35a, 1444a–45a. That is, each member school entity is not responsible for its own specific claims and expenses that occur throughout the Plan year; rather, each member school entity pays the fixed contribution rate for the Plan year, regardless of whether the actual health care claims and expenses for a particular member district are less than or greater than the premium contributions made to the Trust by that district for that Plan year. *Id.*

The Trust implements a self–insured Plan of Benefits through agreements between the Trust and the various service providers, including Blue Cross. The Trust's Plan of Benefits includes three medical programs administered by Blue Cross (as TPA) pursuant to these agreements (R.900a), along with a prescription drug program and a vision and dental program administered by other service providers. Which program or programs a member school district utilizes is determined by collective bargaining with the district's union(s). The rating methodology developed by CSA establishes how a base premium contribution rate is determined for each of these programs to come up with an amount that represents what a member school district must pay for each employee–participant in that program (depending on whether the employee seeks insurance only for himself or herself or also for other family members).

For the Access Care II program (the PPO) and the First Priority Health program (the HMO), the rating methodology provides for an equalized claim rate to be developed based on the claims experience of the entire Health Trust, and there is no consideration of the claims experience of the Trust's member school districts as individual entities. R.905a–06a. This type of rating methodology also applies to the prescription drug program that is included as part of the Trust's Plan of Benefits. R.1420a.

For the Traditional medical program, the rating methodology is likewise based on the claims experience of the entire Trust, but it also takes into account as a much smaller factor the claims experience of the individual member district. R.901a–02a. Under the pooled rating methodology, differences in rates among member school districts for the Traditional program are limited to a differential of plus or minus 5% of the average rate of the whole Trust. R.903a. This limitation reflects the intent of the Trustees that the Trust be operated as a pooled Trust whereby the risk of high claims is spread across the entire Trust membership, and the goal is rate stability versus volatility. R.903a–04a. As part of the rating process, CSA factors into each member school district's rate any co–pays, deductibles, or co–insurance negotiated between that school district and its unions. R.1422a–23a. As a result, each member school district receives the benefit of these negotiated items in the form of a lower premium/contribution rate. *Id.* This accounts for the differences in premium/contribution rates among the districts that sometimes exist for the same program.

At a Board of Trustees meeting held on October 16, 2002, the Trustees voted for and adopted the pooled rating methodology developed by CSA. R.3216a–20a (Def. Exhs. 6, 7). As recorded in the minutes of the October 16, 2002 meeting of the Board of Trustees, both the Trustee appointed by the Dallas School District, Ernest Ashbridge, and the Trustee appointed by the Dallas Educational Association, William Wagner, voted to adopt the pooled rating methodology developed by CSA. R.3219a–20a (Def. Exh. 7). Similarly, the Trustee appointed by the Pittston Area Federation of Teachers, Arthur Clark, voted to adopt the pooled rating methodology developed by CSA, while Pittston Area's management Trustee was not present. *Id.* CSA has used this pooled rating methodology to develop the contribution rates for the member school districts for each Plan year since the July 2003 to June 2004 Plan year. R.907a–08a, 1423a–24a.

Defendant's evidence at trial further established that, in December of 2002, the Board of Trustees voted on a Resolution for the "allocation of deficits (Reduction in Net Assets) and/or surpluses (Addition to Net Assets)" that sets out how the Health Trust would handle Trust–wide deficits and/or surpluses. R.3221a–22a. This Resolution was introduced into evidence at trial as defendant's exhibit 8 and was proposed by Ralph Scoda, the management Trustee for the Wilkes–Barre Area School District. It is undisputed that the Board of Trustees collectively voted on and approved the Scoda Resolution at its regular monthly meeting on December 18, 2002. R.3223a (Def. Exh. 9).

As reflected in the Scoda Resolution, when a Trust–wide deficit exists, participating member school districts are responsible for payment to the Trust for an amount based on the member's contributions to the Trust as compared to the total contributions of all of the members of the Trust. R.3221a. Importantly, this liability is not based on the member's contributions paid in versus its actual claims and expenses paid out.

The Scoda Resolution also addresses the possibility of a Trust–wide surplus and restricts the allowable uses of that surplus consistent with Sections 6.6 and 5.1 of the Trust Agreement. R.322a. Specifically, the Scoda Resolution provides in point 6 as follows:

> In the event that the Trust realizes Unrestricted Net Assets — Surplus, said surplus shall, at the discretion of the Trust, be used for any of the purposes listed below:
>
> (1) Reserved to fund future unanticipated deficits.
>
> (2) Stabilize future member contributions.
>
> (3) Added to required reserve deposits either held by underwriters/carriers or in an escrow investment account held by the Trust solely for this purpose.
>
> (4) Any combination of the above.

R.3222a (Def. Exh. 6).

As recorded in the minutes of the December 18, 2002 meeting of the Board of Trustees, both the Trustee appointed by the Dallas School District, Ernest Ashbridge, and the Trustee appointed by the Dallas Educational Association, William Wagner, voted to adopt the Scoda Resolution. R.3223a (Def. Exh. 9).

Similarly, the Trustee appointed by the Pittston Area Federation of Teachers, Arthur Clark, voted to adopt the Scoda Resolution, while the management Trustee for Pittston Area was not present for the vote. *Id.*

In voting for the December 2002 Scoda Resolution, the Trustees rejected the opposing, alternate approach of Robert Eyet, the Trustee appointed by the Northwest Area School District. R.1289a. Mr. Eyet had proposed an alternative approach to the allocation of the then accumulated Trust–wide deficit that required the calculation of individual school district surpluses or deficits based on the district's individual claims experience and its size as compared to the size of the other members of the Trust. R.4790a (Def. Exh. 107). The evidence establishes, without dispute, that the Trustees voted against Mr. Eyet's "each member pays for its own employees' claims" approach in December of 2002, adopting the Scoda Resolution instead. R.1301a, 3223a.

Consistent with the Scoda Resolution, in years when there has been a Trust–wide surplus, the Trustees have decided, by collective vote, to what extent those monies will be relied on to stabilize contribution rates in the future. The trial evidence establishes that the Trustees have stabilized future rates in three ways — by using a portion of the surplus to avoid any increase in rates, to fund a lower percent increase in the members' annual contribution rates, or to fund a waiver of one month's or a half month's contribution amount for all members. R.1316a, 2161a, 968a–69a.

Dallas School District founding Trustee Ernest Ashbridge testified at trial that Item 6 of the Scoda Resolution, which did not provide for any payment of surplus back to a member school district, was consistent with his understanding of the Trust's intended operation as a pooled trust. R.6038a.

Since being retained by the Trust in 2002, CSA has provided the Trustees with recommendations on the budget and contribution rates for the coming Plan year, and the Trustees have voted on the budget and the contribution rates for the upcoming Plan year. The evidence at trial was undisputed that the Trustees voted on and approved the budget and the contribution rates for the member school districts in advance of every Plan year.

These contribution rates are intended to fund all benefits to be afforded to all eligible employees and beneficiaries under the Trust's Plan of Benefits, as well as all projected expenses of the Trust for the future Plan year. R.3020a (Trust Agreement §4.4(u)); R.1194a–95a (Lane testimony). The trial testimony established, without contradiction, that since inception of the Trust, once the contribution rates are set for the upcoming Plan year, each member public school entity pays no more than that rate for that Plan year, regardless of whether the cost of health care claims and share of expenses for that school exceeds the amount of money it paid into the Trust based on its contribution rate. R.1338a (Kyle testimony), R.1194a–95a (Lane testimony), R.1441a (Glus testimony). Moreover, to the extent that the Trust needed more funding to operate during the initial years when there was an overall Trust deficit, the Trust simply required the member school districts to make

either an extra monthly payment or an advance payment — based on their existing premium contribution rate, and not based in any way on what their employees' actual claims were or had been to that point. R.3221a.

As confirmed by Danielle Savitsky, the Trust Office Manager and Accountant, the Trust has never performed a retrospective settlement or reconciliation of amounts paid in by a member school entity versus amounts paid out for that member in claims and expenses. R.982a. According to Ms. Savitsky, the Trust has never gone to a member school entity after a Plan year and asked the member for more money for that Plan year because the member's cost of claims and share of expenses exceeded what that member paid in contributions. *Id.* Nor has the Trust ever paid money back to a member public school entity because the member's cost of claims and share of expenses was less than what that member paid in contributions. *Id.*

Rather, the Trust pools the contributions from and the liabilities (claims and expenses) of the participating public school entities so that these entities are not at risk for their own claims experience beyond the contribution rate approved in advance and paid by that entity. Operating in this way, the member school districts are able to know, in advance of each Plan year, the maximum amount that they will have to pay for health care, and are thereby able to properly plan and budget for these benefits for their respective school districts.

Moreover, the evidence at trial established that the Trust's financial accounting has always been performed on a pooled, trust–wide basis, without

segregation by member school district. The Trust Agreement, at Sections 4.7 and 4.8 sets forth the financial auditing requirements for this Trust and provides only for Trust–wide accounting. R.3021a–22a (Trust Agreement §§4.7, 4.8). Early on, the Trustees retained an independent auditing firm to audit the Trust's financial records on an annual basis. For every Plan year, starting with the 7/1/99 to 6/30/00 Plan year, that firm, Bonita & Rainey, has conducted an audit of the Trust's financial documents and prepared an audited financial report for the Trust. Those reports were presented to the trial court as defendant's exhibit 56. R.3593a–705a.

Thomas Rainey of Bonita & Rainey testified at trial that his firm has always reported the Trust's finances on a Trust–wide basis and has never included a breakdown of Trust finances by member public school entity. R.1374a–75a. He testified that his firm came to a Board of Trustees meeting every year and presented their final audited financial report for that Plan year to the Trustees. R.1373a. The Trustees then voted on and approved the report. These reports establish that there has never been any auditing or accounting performed that would suggest that any member public school entity in the Trust has an ongoing separate or individual "balance" in the Trust Fund. Mr. Rainey confirmed at trial that that was the case and further confirmed that no Trustee or member school district has ever asked him to perform segregated accounting or auditing by member school district. R.1373a–74a. Mr. Palfey of Dallas admitted at trial that he never objected to the Trust–wide presentation of the Trust's Audited Financial Statements. R.754a–55a.

Trust office manager Danielle Savitsky testified as follows at trial:

> —Each member public school entity makes contribution payments to the Trust monthly, and those payments are deposited into a single bank account. No separate accounts are maintained for each school district or other public school entity. R.978a–80a.
>
> —The Trust pays the bills from the vendors that provide the health care services (as submitted by Blue Cross, United Concordia for dental, Express Scripts for prescription drugs) from the same single account. R.978a–79a.
>
> —She has never tracked or analyzed the cash receipts received by the Trust from a member school entity as compared to the health care claims and expenses paid by the Trust for that entity. R.977a–78a.
>
> —She has never made any analysis as to whether a member school entity has paid into the Trust enough money to cover the health care claims and share of expenses of that entity. R.978a–80a.
>
> —There has never been a circumstance where the Trust has required a particular school entity to pay more money beyond its contribution rate because its claims and share of expenses exceeded what it paid in to the Trust. R.982a.
>
> —The Trustees never asked Ms. Savitsky to perform an analysis or reconciliation of the difference between what a member school entity paid to the Trust in contributions versus the dollar amount of the claims paid and share of expenses paid by the Trust on behalf of that entity. R.979a.

The evidence introduced at trial established that the manner in which the Trust has actually operated was consistent with the manner in which the Trust's founding trustees intended for the Trust to operate. At trial, the Trust presented testimony from many of its founding Trustees. This testimony established overwhelmingly that the originating Trustees of the Trust intended a pooled Trust, in which the members would and did pool their resources to obtain lower health

care rates and shared the liabilities, including the risk of high health care claims, to stabilize those rates.

Defendant's witnesses established that in the period before the formation of the Trust, the public school entities that ultimately formed the Trust were experiencing substantial double–digit increases in the health insurance premiums that each was being charged for individual, fully–insured plans of insurance provided separately to each of them by Blue Cross. R.1189a–91 (Lane testimony). The intent of the founding Trustees, in establishing the Health Trust, was to avoid the dramatic increases in premiums that they were being charged for fully–insured, individual plans of insurance. The founding Trustees were also concerned that a bad claim year for their school district could wipe them out financially. The founding Trustees addressed these concerns by establishing a pooled, self–funded health care plan which stabilized health care costs, pooled their resources, and spread each member public school entity's risk of adverse claims experience over the entire Trust membership. R.1192a (Lane testimony); R.1122a–23a (Marko testimony).

According to the testimony at trial, the Trustees who founded the Trust understood and intended that their premium contributions paid into the Trust would be pooled and also that their risk of adverse claims experience would be pooled and shared by the entire Trust membership. Witness after witness testified at trial that for every Plan year, the contribution rates for the member were set in advance and that that rate was all that that school district paid for the health and

welfare benefits for that Plan year — and furthermore, that there was no comparison or reconciliation done, either by the Trust or anyone else, of a member school district's contributions paid in to the Trust versus the claims and expenses paid out on its behalf. This testimony came from Dallas School District Trustee Ernest Ashbridge (a founding Trustee) (R.6031a), Dallas School District Trustee Karen Kyle (R.1338a–40a), Pittston Area School District Trustee Frank Serino (R.6106a), as well as Trustees Andrew Marko (R.1122a–24a), Ralph Scoda (R.1275a–76a), Joseph Kochuba (R.1309a), Sandra Lane (R.1204a–05a), Trust actuary Rob Glus (R.898a), and the Trust office manager Danielle Savitsky (R.977a–82a). Not a single witness testified otherwise.

These Trustee witnesses further testified that once their school district paid its premium contributions to the Trust, that was all they would pay for that Plan year, regardless of what their school district's employees and their beneficiaries actually incurred in claims, and that this is what they intended. All of the trial evidence confirmed that the Trust never asked a member public school entity for more money because that entity's actual claims were too high and never issued a credit or a refund to an entity because its actual claims were too low. This evidence was also undisputed at trial.

The founding Trustees also understood and intended that the monthly premium contributions paid by the member entities were irrevocable and that if a member school entity decided to leave the Trust, that entity would receive no money upon withdrawal. Specifically, Dallas School District founding Trustee Ernest

Ashbridge testified (by videotape deposition) that he understood that Dallas' contributions to the Trust were irrevocable and that the Trust Agreement would not permit an amendment that would allow money to be returned to a district. R.6033a. Mr. Ashbridge further testified that he was not aware of anything in the Trust Agreement that entitled a district to money back. *Id.* Mr. Ashbridge stated that he understood that there was no effort or attempt by the Trust to determine whose money was being used to pay what bills and that he never asked that there be any kind of reconciliation or comparison made for Dallas School District. R.6038a. He recalled that the Trust financial audits were only Trust–wide, and that there were no separate accounts by member school district. R.6037a. Other Trustees confirmed this testimony.

Indeed, every Trustee who testified acknowledged that all contribution payments by member public school entities were deposited into a single bank account and that the Trust did not maintain separate accounts for each individual school district. This evidence was thus also undisputed at trial.

The trial evidence further established without dispute that, from 1999 to the time in 2007 when the plaintiff schools sought this type of information because they knew that they were leaving the Trust, the Trustees of the Trust never requested or directed that the Trust office staff correlate or track or compare the payment of each member school district's claims and share of Trust expenses with the money that that member school district paid into the Trust in contributions. Multiple witnesses, including the Trust's independent auditor, Thomas Rainey, testified that the

Trustees — who, under the Trust Agreement, controlled the operations of the Trust — never asked that that kind of reconciliation or breakdown by member school district be done. R.1206a (Lane testimony); R.1370a, 1378a (Rainey testimony).

In recent years, the Trust has experienced positive net assets, or a reserve. Plaintiffs refer to this reserve as the surplus. According to Glus, the Trust actuary, the increase in net assets has been due to the Trust's having far better actual claims experience than was expected for recent Plan years. R.1424a. The Trust's auditor, Thomas Rainey, confirmed this by demonstrating that the Trust's Audited Financial Report for the 2006–2007 Plan year reflects a total cost of claims for all Trust participants and beneficiaries approximately $8.65 million below what was projected in the budget for that Plan year. R.1388a–90a. To the extent that the Trust has experienced positive net assets in a given year, the Trustees decide collectively, and in accordance with the Scoda Resolution, to what extent those monies will be relied upon to reduce or stabilize rates in the future.

In November of 2006, Glus presented the Board of Trustees with various scenarios/options for purposes of deciding the rates for the 7/1/07–6/30/08 Plan year. R.3299a (Def. Exh. 32). The Board of Trustees then voted to have a maximum 3% cap on rate increases for future Plan years despite higher than 3% projected increases in claims expenses for those years. R.3308a–14a (Def. Exhs. 35–37). The actual contribution rates for the 2007–2008 Plan year ranged from a –4.5 to +2.1 percent increase for the member districts, at a time when health care cost increases were trending at +8.0 to +15.0 percent. R.3315a–21a (Def. Exh. 38); R.3299a–305a

(Def. Exh. 32). The Trustee for Dallas, Karen Kyle, was chairman of the Trust Rates Committee in November 2006 and voted in favor of the rates proposed for the members of the Trust for the 2007–2008 Plan year. R.3311a–14a (Def. Exh. 37). The Trustee for Pittston, Robert Linskey, also voted in favor of the rates proposed for the members of the Trust for the 2007–2008 Plan year. R.3311a–14a (Def. Exh. 37). In casting these votes on these rates for the 2007–2008 Plan year, the Trustees, including the Trustees for Dallas and Pittston, made a collective decision to use the net assets (or surplus) to stabilize rates in future years — that is, to take advantage of the surplus slowly over time. Had the plaintiff School Districts stayed in the Trust, they would have shared in the benefit of stabilizing their rates in future years, consistent with the collective vote of the Trustees, including their own Trustees (Karen Kyle and Robert Linskey).

On or about June 12, 2006, Pittston Area School District gave notice to the Trust of its intent to withdraw from the Trust as of June 30, 2007. R.2133a. On or about June 26, 2006, Dallas School District gave notice to the Trust of its intent to withdraw from the Trust as of June 30, 2007. R.2134a.

On April 16, 2007, the Dallas school board voted on whether to withdraw from the Trust and, by a vote of 6 to 3, decided to withdraw from the Trust effective July 1, 2007. R.3324a–25a (Def. Exh. 40). Karen Kyle, Dallas' Trustee on the Health Trust at the time, cast a vote as a Dallas school board member not to withdraw from the Trust. *Id.* Kyle testified at her deposition that she knew that the Trust was

sound and that Dallas School District's contribution rates were not increasing. R.6049a (Def. Exh. 142).

On May 29, 2007, the Pittston Area school board voted on whether to withdraw from the Trust and, by a vote of 5 to 4, decided to withdraw from the Trust. R.3344a (Def. Exh. 46). Robert Linskey, Pittston Area's Trustee on the Health Trust, cast a vote as a Pittston Area school board member not to withdraw from the Trust. *Id.*

At a Board of Trustees meeting on May 23, 2007, Grant Palfey, the alternate management Trustee for Dallas School District, made a motion asking the Trust to provide an accounting for the Trust's entire reserve funds, with respect to each of the school districts referenced in the Trust Agreement, from the inception of the Trust to June 30, 2007, and to deposit the "said funds" pertaining to Dallas School District into a separate Trust Account, with those funds to be used for the sole and exclusive purpose of providing health and welfare benefits to the employees of the Dallas School District and their beneficiaries and dependents. R.2009a–14a (Pl. Exh. 204A). This motion by Dallas' alternate Trustee recognized that up to that point, the Trust had not been segregating the money in the Trust Fund by individual school district but, rather, had been pooling the contributions for the benefit of all of the member school districts.

The Trustees, having sole responsibility for determining the existence, non–existence, nature, and rights of all parties in the Trust Fund, voted on the motion and the motion failed. *Id.* In this lawsuit, each plaintiff school district seeks a

return of portions of their contributions made to the Trust Fund for the period from 1999 through June 30, 2007, with the amounts calculated by determining the amounts that each paid in to the Trust in contributions each Plan year, less an amount allocated to each of them for Trust expenses for that Plan year and less the amount of the health care claims actually paid out by the Trust for each school district's employees and their beneficiaries for that Plan year. R.2546a, 2558a (Pl. Exh. 550 (Richard Kipp report)).

Dallas School District voluntarily withdrew from the Trust effective July 1, 2007. Pittston Area School District also voluntarily withdrew from the Trust effective July 1, 2007. In May of 2007, prior to their withdrawal from the Trust, both the Dallas School District and the Pittston Area School District received a letter from Glus, the Trust's actuary, describing the value of having their respective school districts remain in the Trust. R.3332a–36a (Def. Exh. 43). As explained below, approximately six months after withdrawing from the Trust, the Dallas and Pittston Area School Districts commenced this lawsuit against the Trust, contending that the Trust breached the Trust Agreement by not returning monies to them based on a retrospective calculation, for every Plan year from 1999 forward, of premium contributions that they each paid in to the Trust Fund minus the claims and share of expenses paid out on their employees' behalf.

This case was tried as a non–jury matter from May 31, 2011 through June 6, 2011 before former Luzerne County Common Pleas Judge Lewis W. Wetzel, who had been appointed to the bench to fill a vacancy that resulted when former

Common Pleas Court Judge Peter Paul Olszewski, Jr. lost his retention election. On November 28, 2011, Judge Wetzel issued an opinion and order announcing his decision in the case. The Trust filed timely post–trial motions seeking, among other relief, the entry of judgment in the Trust's favor, a new trial, or a reduction in the amount of the award in plaintiffs' favor. R.6943a–7045a. The plaintiffs also filed a post–trial motion. R.7056a.

On December 27, 2011, only days before the expiration of his judicial commission, Judge Wetzel issued an order denying both sides' post–trial motions in their entirety. An appeal to the Commonwealth Court followed. Following briefing and oral argument, the en banc Commonwealth Court ruled unanimously on appeal that because the Health Trust was intended to operate and has operated as a pooled trust, and because pooled trusts do not violate ERISA's "exclusive benefit" rule, the judgment in favor of the plaintiff school districts entitling them to withdraw from the Health Trust their supposed individual surpluses had to be reversed.

Following the Commonwealth Court's ruling, the Health Trust filed an application for reconsideration in the nature of a request for clarification asking the Commonwealth Court to amend its opinion to address the Trust's counterclaims against the plaintiff school districts for so–called IBNR/run–off liability. Separately, the plaintiff school districts filed an application for reargument. By means of two orders issued on March 28, 2013, the Commonwealth Court granted the Health Trust's application for reconsideration and denied, as moot, the plaintiff school districts' application for reargument.

On April 17, 2013, the en banc Commonwealth Court issued a slightly revised opinion retaining the substance of that court's original decision but directing the trial court, on remand, to address the Trust's counterclaims against the plaintiff school districts for IBNR/run–off liability. Although the plaintiff school districts could have again filed an application for reargument following the Commonwealth Court's slightly revised opinion issued April 17, 2013 — because the Commonwealth Court's March 28, 2013 order had merely denied the school districts' application for reargument as moot — the school districts did not renew their request for reargument following the Commonwealth Court's April 17, 2013 opinion. Instead, the plaintiff school districts filed the petition for allowance of appeal that is the subject of this answer in opposition.

III. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE DENIED

A. The Petition For Allowance Of Appeal Fails To Satisfy This Court's Stringent Criteria For Review

Pennsylvania Rule of Appellate Procedure 1114 specifies that review in this Court of a ruling of the Commonwealth Court on allowance of appeal "is not a matter of right" and will only be allowed "when there are special and important reasons therefor." Pa. R. App. P. 1114. Among the examples supplied in the official Note to that rule are cases in which two decisions from Pennsylvania's intermediate appellate courts conflict, the opinion of the Commonwealth Court conflicts with the

opinion of either this Court or the U.S. Supreme Court, the case presents a question of first impression, or the case is of substantial public importance.

None of these criteria for granting allowance of appeal pertains to this case. As explained in more detail below, the Commonwealth Court's opinion in this case carefully and correctly applies both Pennsylvania law and ERISA's "exclusive benefit" rule. The Commonwealth Court's opinion in this case does not, and is not alleged to, conflict with any other ruling from a Pennsylvania state intermediate appellate court, this Court, or the U.S. Supreme Court. Moreover, as explained below, the petition for allowance of appeal is incorrect in maintaining that the Commonwealth Court's ruling conflicts with either the ruling of a Brooklyn, New York–based federal trial court or a ruling of the U.S. Court of Appeals for the Second Circuit.

Even if such a conflict existed, the purported conflict would not satisfy this Court's criteria for review, nor would the conflict be important or present a question of first impression, because federal courts possess exclusive jurisdiction to adjudicate claims involving ERISA's "exclusive benefit" rule. Here, the Commonwealth Court correctly decided that the Health Trust was designed to operate, and has in fact operated, as a pooled trust and that pooled trusts do not violate ERISA's "exclusive benefit" rule. The petitioner school districts have provided no special and important reasons for this Court to grant review to address and decide that issue, which would have no consequence to any other litigant or any other court beyond the specific confines of this case.

Similarly, the second and final question presented for review also does not satisfy this Court's criteria for granting allowance of appeal. In fact, the question as the petitioner school districts have phrased it is not even legitimately presented by the facts and procedural posture of this case. Petitioners were not denied the accounting that they sought in this case; rather, petitioners merely had to hire their own actuary to perform that accounting rather than having it performed at the Health Trust's expense. Both the trial court and the unanimous Commonwealth Court agreed that the petitioner school districts were not entitled to recover litigation costs from the Health Trust under well–established Pennsylvania law.

The petition for allowance of appeal disregards the true nature of the adverse rulings against the plaintiff school districts as to these litigation costs and instead tries to transmogrify the issue into one that this case does not now and never has presented. Because the second and final question set forth in the petition for allowance of appeal is not an issue that this case actually presents, that question provides no basis on which to grant allowance of appeal.

Because this case does not satisfy any of the grounds for allowance of appeal under Pa. R. App. P. 1114, the petition for allowance of appeal should be denied.

B. The Commonwealth Court Correctly Understood And Applied, ERISA's Sole And Exclusive Benefit Rule, And Petitioners' Arguments To The Contrary Fail To Merit This Court's Review

1. As the Commonwealth Court's ruling recognized, the petitioners' "exclusive benefit" argument under ERISA is completely without merit

The Commonwealth Court's unanimous decision correctly recognized that pooled trusts do not violate ERISA's "sole and exclusive benefit" rule. In exchange for the premium contributions that the plaintiff school districts made into the Trust each year, the employees of those school districts and their dependents received the health benefits they were entitled to receive from the Trust for that year. ERISA's sole and exclusive benefit rule does not prohibit the use of multi–employer pooled trusts, nor does the sole and exclusive benefit rule mandate that an employer departing from a pooled trust is entitled to take with it any portion of the pooled trust's surplus.

The Commonwealth Court correctly concluded that the plaintiff school districts' argument that not permitting them to abscond with their supposed "surplus" would violate ERISA's exclusive benefit rule lacks merit. There are no cases holding that public employers such as the school districts who formed the Health Trust violate ERISA by operating as a pooled trust. Here, the Trust Agreement contains its own version of ERISA's exclusive benefit rule, providing in pertinent part that "All contributions made by public school entities to the Trust Fund shall be irrevocable, and no part of the corpus of the Trust Fund nor any income therefrom shall revert to any public school entity or be used for or diverted

to purposes other than for the exclusive benefit of the Participants and their Beneficiaries." R. 3032a (Trust Agreement §6.6).

The capitalized terms "Participants" and "Beneficiaries" refer to the employees and their dependents who work for the school districts that are members of the Trust at the relevant time. Once the plaintiff school districts voluntarily withdrew from the Trust, their employees and their dependents no longer qualified as "Participants" or "Beneficiaries" of the Trust, and therefore the trial court's order mandating the transfer of the Trust's reserves for the benefit of those who then were non–participants and non–beneficiaries of the Trust violated the Trust's own exclusive benefit provision, instead of complying with it. Moreover, the trial court's order violated Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1), which provides that the assets of a plan should be held for the exclusive purpose of providing benefits to the participants *in the plan* and their beneficiaries.

The petition for allowance of appeal is incorrect in arguing that the Commonwealth Court's decision in this case is in any tension with either the ruling of the U.S. Court of Appeals for the Second Circuit in *Trapani* v. *Consolidated Edison Employees' Mut. Aid Soc'y, Inc.*, 891 F.2d 48 (2d Cir. 1989), or the ruling of a federal district court in *L.I. Head Start Child Devel. Servs., Inc.* v. *Kearse*, 86 F. Supp. 2d 143 (E.D.N.Y. 2000).

In their Commonwealth Court briefing, the plaintiff school districts cited the *Trapani* case only once, on page 45 of the Brief for Appellees/Cross–Appellants, and plaintiffs did not discuss the case at length but rather only devoted a single

parenthetical to describing the case. The Second Circuit's opinion in *Trapani*, written by a federal district judge sitting by designation, fails to include the factual background or discussion of legal principles necessary to demonstrate that decision's applicability to the pooled trust scenario involved in this case. Indeed, the federal district court in *L.I. Head Start Child Devel. Servs., Inc.* v. *Kearse*, 86 F. Supp. 2d 143 (E.D.N.Y. 2000) — a case involving a segregated trust, not a pooled trust — relied on *Trapani*, strongly suggesting that the Second Circuit's ruling in *Trapani* is limited to segregated trusts and would have no applicability to the pooled trust scenario presented in this appeal.

The Second Circuit itself later confirmed that *Trapani* has no applicability to pooled trusts, ruling in *Ganton Technologies, Inc.* v. *National Indus. Group Pension Plan*, 76 F.3d 462 (2d Cir. 1996), decided some seven years after *Trapani*, that an employer participating in a multi–employer pension plan did not have any right to withdraw and take with it the surplus supposedly attributable to that employer's contributions to the plan. The Second Circuit explained:

> Ganton also claims that the trustees used the Ganton "surplus" to absolve the deficits of the other participating employers and that this demonstrates the unreasonableness of a decision not to transfer assets for financial reasons. To the contrary, the "surplus" was used for proper purposes. As we stated above, the "surplus" never belonged to Ganton, rather it belonged to the Plan which could use the funds to strengthen any weakness in the plan.

Ganton Technologies, 76 F.3d at 468.

In *Ganton*, the Second Circuit addressed the sole and exclusive benefit rule codified at Section 404 of ERISA, 29 U.S.C. §1104(a)(1), and soundly rejected the very argument that the plaintiffs in this case have advanced. That court explained:

> Ganton also claims that the trustees acted unreasonably in denying Ganton the benefit of the "surplus" payments into the NIGPP fund by Ganton. However, this claim is at odds with the workings of multiemployer plans in general. As then–Chief Judge Breyer stated in *Caterino*, defined–benefit multiemployer plans such as this one do "*not* guarantee any employee that he will receive a pension that *exactly* reflects all the contributions made on behalf of *that particular employee* over the years." *Id.* at 879. This discrepancy results from one purpose of multiemployer plans, which is to "assure that *all* workers (who work a reasonable number of years) will have a decent pension." *Id.* at 880. The pooling aspect of these plans provides security to all participants at the risk of receiving less than maximum possible benefits.

Ganton, 76 F.3d at 467–68.

Although *Ganton* involved a multi–employer pension plan rather than a multi–employer health care plan, the same analysis applies to this Trust's multi–employer health care plan. That is, no participant–employee in this Trust is guaranteed that he will receive a benefit (payment of health care claims) exactly equal to the premium payment made on his behalf. In particular Plan years, depending on the pattern of employee health and sickness, some participants will have health care claims and some will have none, and likewise, some participants will have expensive health care claims and some will have only minor, less costly claims, leading to one employer's payments being used to pay for claims made by a different employer's employees. Yet, as in *Ganton*, the pooling aspect of the Trust's plan ensures security to all of the participants in the Trust that they will have all of

their health care claims paid by the Trust for the period of time that they are covered participants in the Trust.

Moreover, the Commonwealth Court's ruling in favor of the Trust is consistent with more recent federal court decisions holding — in the context of both pension and health care multi–employer pooled trusts — that the fact that one employer's payments might end up covering the claims of another employer's employees does not violate the sole and exclusive benefit rule found in federal law. *See Concrete Pipe and Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 637–38 (1993); *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Indus. Welfare*, 882 F.2d 371, 378 (9th Cir. 1989); *Stinson* v. *Ironworkers Dist. Council of Southern Ohio and Vicinity Ben. Trust*, 869 F.2d 1014, 1022 (7th Cir. 1989); *Local 144 Nursing Home Pension Fund* v. *Demisay*, 508 U.S. 581, 594 (1993) (Stevens, J., concurring in the judgment).

Not only are the plaintiff school districts incorrect that ERISA's sole and exclusive benefit rule would require a transfer of surplus to a withdrawing employer regardless of whether a trust operated as a segregated or pooled trust, but the plaintiff school districts' argument in that respect is obviously meritless simply as a matter of common sense. In a pooled trust, individual employers do not have individual surplus or deficit balances, and thus there can be no individualized surplus for a departing employer to withdraw. And, if a departing employer were entitled to withdraw some part of a pooled trust's surplus, then pooled trusts could never successfully exist on an ongoing basis. Indeed, in a pooled trust, simply

because one employer may have better than expected claims experience does not necessarily dictate that the trust as a whole will have a surplus. In any event, here the plaintiff school districts decided to deprive themselves of any future benefit from the Trust's surplus when they voluntarily withdrew.[*]

Because the plaintiff school districts are incorrect in arguing that either pooled trusts in general or this particular Trust violates ERISA's sole and exclusive benefit rule, the Commonwealth Court's unanimous decision correctly rejected that argument, and plaintiffs' petition for allowance of appeal on that issue should be denied.

[*] In footnote 5 on page 9 of the petition for allowance of appeal, the petitioner school districts improperly rely on an Auditor General report dated January 14, 2013 whose relevance to this case petitioners wholly misrepresent. To begin with, petitioners' citation to the document is improper because the document is outside of the record of this case, and petitioners neither relied on the document nor presented the document to either the trial court or the Commonwealth Court. Next, once the petitioner school districts have made premium payments into the Health Trust to secure coverage for their own employees and dependents, those premium payments no longer constitute the tax dollars of petitioners. Rather, they have become part of the Trust's corpus, consisting of an insurance pool that will be used to pay the claims of the employees and dependents of all participating employers. The petitioner school districts freely and voluntarily agreed to that result when they entered into this Trust. Lastly, the coverage that Northwest School District has obtained from the Trust for its own employees and retirees represents precisely what Northwest School District contracted for and paid to receive from the Trust.

2. Allowance of appeal should also be denied because cases as to which ERISA's "exclusive benefit" rule directly applies can only be heard and decided in federal court, explaining why this issue has never previously arisen and is unlikely to ever arise again in Pennsylvania state court

Beyond the correctness of the Commonwealth Court's ruling, that court's understanding and application of ERISA's "exclusive benefit" rule is undeserving of this Court's review for a separate, even more fundamental reason — the meaning of ERISA's "exclusive benefit" rule is a matter of federal law, ordinarily within the exclusive jurisdiction of the federal courts. That explains why the meaning and application of ERISA's "exclusive benefit" rule has never previously arisen in a Pennsylvania state court and is unlikely to ever again arise in a Pennsylvania state court.

Because the Health Trust is a "governmental plan," the Health Trust is exempt from ERISA's provisions. *See* 29 U.S.C. §§1002(32) & 1003(b)(1); R.1558a–59a (Section 6.4 of Trust Agreement). The petitioner school districts themselves recognized that ERISA does not govern the Health Trust by filing their lawsuit against the Health Trust in Pennsylvania state court. The Health Trust's exemption from ERISA explains why the petitioner school districts were able to file and maintain this suit in state court; had ERISA's provisions applied, then jurisdiction over this lawsuit would have been exclusively in federal court. *See Commonwealth, Dep't of Public Welfare* v. *Lubrizol Corp. Employee Benefits Plan*, 737 A.2d 862, 870 (Pa. Commw. Ct. 1999); *Vulcan* v. *United of Omaha Life Ins. Co.*, 715 A.2d 1169, 1178 (Pa. Super. Ct. 1998).

ERISA's "exclusive benefit" rule only has relevance to this case because, in the Trust Agreement that created the Health Trust, the settlors determined that certain of ERISA's fiduciary standards "shall be incorporated as operating principals [sic] of this Agreement and Declaration of Trust." R.1559a. ERISA's "exclusive benefit" rule does not directly apply to the Health Trust for two reasons. First, the Health Trust is a government plan — a category of plan that the U.S. Congress has expressly exempted from ERISA's coverage. *See* 29 U.S.C. §§1002(32) & 1003(b)(1); R.1558a–59a (Section 6.4 of Trust Agreement). And second, if ERISA and its "exclusive benefit" rule did directly apply, then this lawsuit could only be heard and decided in federal court, which is a jurisdictional proposition that none of the parties to this lawsuit has ever asserted. *See Smith* v. *Crowder Jr. Co.*, 421 A.2d 1107, 1110–13 (Pa. Super. Ct. 1980).

Imagine a hypothetical case in which the Trustees of a Health Trust entered into a written trust agreement providing that the Trustees have agreed to be governed by the fiduciary standards applicable under the laws of a foreign nation, such as Luxembourg. On direct appeal, it would be necessary for the Commonwealth Court to decide if the trial court correctly or incorrectly applied the fiduciary principles of the law of Luxembourg. But this Court, as Pennsylvania's highest court, surely would never agree to review the Commonwealth Court's determination and application of the fiduciary law of Luxembourg, because that is neither an important question, nor a question over which this Court has any

particular expertise, nor a question that arises with any frequency in the Pennsylvania state court system.

In those respects, this case is no different than the hypothetical case involving the law of Luxembourg. The undisputed fact that ERISA does not directly apply to the Health Trust demonstrates the clear unsuitability for this Court's review of the first question presented in the petition for allowance of appeal. The reason this Court has never been called on to decide the meaning of ERISA's "exclusive benefit" rule is that lawsuits directly presenting that question can only be heard and decided in federal court due to the federal courts' exclusive jurisdiction over ERISA actions. *See Smith*, 421 A.2d at 1110–13. And lawsuits, such as this case, that indirectly raise the question of the meaning of ERISA's "exclusive benefit" rule have not previously arisen in Pennsylvania state courts and are unlikely to arise ever again. Thus, this Court's ruling in this case concerning ERISA's "exclusive benefit" rule would provide no useful or authoritative guidance in any other case and would not even qualify as "error correction," because the Commonwealth Court's ruling was plainly correct.

For all of these reasons, this Court should deny review of the first question presented in the petition for allowance of appeal.

C. The Commonwealth Court Correctly Affirmed The Trial Court's Rejection Of The Plaintiff School Districts' Claim For Recovery Of Litigation Costs Consisting Of Actuarial Fees By Means Of A Ruling That Does Not Satisfy This Court's Criteria For Review

To obtain the grant of allowance of appeal from this Court, a lawyer must do more than merely draft a question presented that seems to satisfy this Court's stringent standards. In addition, the lawyer must seek to raise that question in a case that actually presents the issue that this Court is being asked to resolve. Although it is doubtful that the second and final question presented in the plaintiff school districts' petition for allowance of appeal satisfies this Court's stringent criteria for review, what is absolutely clear is that this case does not actually present the second question presented for review.

The Commonwealth Court's ruling did not "dismiss[ ] Petitioners' demand for an accounting," and thus the Commonwealth Court's ruling does not represent "a dangerous precedent contrary to basic principles of trust law." Pet. at 2. In their petition for allowance of appeal, the plaintiff school districts assert that their request for actuarial fees (which the petition for allowance of appeal characterizes as a "demand for an accounting") was improperly denied when the Commonwealth Court rejected the plaintiff school districts' cross–appeal. A cross–appeal was necessary because the trial court had also denied the plaintiff school districts' request for actuarial fees.

On the merits, the trial court correctly viewed the plaintiff school districts' request for an accounting as concerning litigation costs, rather than constituting

merely a trust settlor's request for information, because the plaintiff school districts had already decided on their departures from the Trust before seeking the accounting in aid of their litigation that is the subject of the plaintiffs' actuarial fees request. Accordingly, the Commonwealth Court was absolutely correct when it wrote in footnote 13 of its opinion:

> That accounting request, however, was directly related to the School Districts' contention that they are entitled to a share of the Trust Fund surplus upon withdrawal. Because we have concluded that they are not so entitled, we will not require the Trust to pay for an accounting that the School Districts commissioned to support an unsuccessful claim.

Exhibit 4 to Pet. at 27 n.13.

Pennsylvania adheres to the "American rule" with respect to litigation costs. As this Court recently explained in *In re Nomination Petition of Farnese*, 609 Pa. 543, 564, 17 A.3d 357, 370 (2011), "litigants are responsible for their own litigation costs and may not recover them from an adverse party 'unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.'" (quoting *Trizechahn Gateway LLC* v. *Titus*, 601 Pa. 637, 652, 976 A.2d 474, 482–83 (2009)).

Here, the Trust Agreement governing the relationship of the parties does not provide for the recovery of litigation costs. Nor is there any express statutory authorization or other established exception to the "American rule" that would allow their recovery. Accordingly, the trial court did not err or otherwise abuse its discretion in declining to award as litigation costs the actuarial fees that plaintiffs are now seeking to recover by means of their cross–appeal.

The Trust Agreement in this case sets forth the specific accounting requirements for the defendant Trust at Sections 4.7 and 4.8. Section 4.7 requires the Trustees to "cause to be prepared a written statement of account with respect to the Plan Year for which contributions were made setting forth: (a) the net income, or loss, of the Trust Fund; (b) the gains, or losses, realized by the Trust Fund upon sale or other disposition of its assets; (c) the increase, or decrease, in the value of the Trust Fund; and (d) all payments and distributions made from the Trust Fund." R.3021a–22a. Section 4.8 requires that the Trustees audit the Plan's records no less than once each Plan Year and provides that "the Trustees shall engage on behalf of all participants and their beneficiaries an independent certified public accountant for that purpose." R.3022a.

At trial, the Trust's auditor Thomas Rainey testified, without dispute, that his firm was retained by the Trust to perform the audits of the Trust's financial records, that he and his firm did so based on the instructions from the Trustees and that they prepared those audit reports on the basis of Trust–wide numbers without breakdown of any assets, liabilities, income or expenses by member school district. R.1370a–77a. Mr. Rainey further confirmed that this Trust–wide presentation of the audits was consistent with the internal financial records of the Trust, which did not reflect any district–specific balances or any reconciliation or comparison of amounts paid in by a member district versus the actual claims and share of expenses paid out on that district's behalf. R.1378a–82a.

This Trust–wide accounting is in accordance with Pennsylvania law, which provides that where an instrument is explicit as to the duty owed by the Trustee, those terms should govern because "[t]he nature and extent of the duties of a corporate trustee are primarily to be ascertained from the trust agreement." *In re Estate of Niessen*, 489 Pa. 135, 139, 413 A.2d 1050, 1052 (1980) (citing Restatement (Second) of Trust §164 (1959)); *In re Scheidmantel*, 868 A.2d 464, 483 (Pa. Super. Ct. 2005).

Contrary to the central assumption of the second question presented for review, the petitioner school districts were not denied the accounting that they sought. Rather, they obtained that accounting, but at their own expense, because the trial court recognized that such actuarial fees had to be paid by the plaintiffs and could not be recovered as litigation expenses under the "American Rule" even when the plaintiffs were prevailing parties. The Commonwealth Court affirmed, correctly recognizing that whatever claim the plaintiff school districts may have had to recover their actuarial fees as prevailing parties had entirely disappeared once the Commonwealth Court had reversed the trial court's judgment. Because this case does not actually present the question of when a trust's settlor may obtain an accounting, but rather only raises the question of who must pay for actuarial fees incurred in pursuit of litigation, the second and final question presented for review is not deserving of this Court's attention because this case fails to actually present that issue.

III. CONCLUSION

For all of the foregoing reasons, the petition for allowance of appeal should be denied.

Respectfully submitted,

Dated: May 13, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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