No. 09-784

In The
Supreme Court of the United States

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CIGNA CORPORATION AND CIGNA PENSION PLAN,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THOMAS G. MOUKAWSHER
MOUKAWSHER & WALSH
21 OAK STREET
HARTFORD, CT 06106
860-405-7240

STEPHEN R. BRUCE
Counsel of Record
ALLISON C. PIENTA
805 15TH ST., NW
WASHINGTON, DC 20005
(202) 371-8013

Counsel for Petitioners

February 16, 2010

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1. Going back to *Marbury v. Madison*, 5 U.S. 137, 163 (1803), the Supreme Court has followed the principle that "for every [statutorily-recognized] wrong, there is a remedy." In *Marbury*, the Court addressed the question: "If he has a right, and that right has been violated, do the laws of the country afford him a remedy?" The Court answered that question by ruling that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The Court cited Blackstone's commentaries for the principle that in one category of cases, the remedy "is afforded by mere operation of law," and that:

> In all other cases, ... it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.

Id. As recently as last term, this Court reiterated in *Horne v. Flores*, 129 S.Ct. 2579, 2594 (2009) that: "It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief."As Professor Dobbs observes in his treatise, a right without a remedy is "exactly equivalent to saying the plaintiff has no right at all." *Law of Remedies,* §2.4(7).

2. This Court's decisions on remedies for violations of federal employment statutes, such as the Fair Labor Standards Act of 1935, the Labor Management Relations Act of 1947, Title VII of the Civil Rights Act of 1964, and the Employee Retirement Income Security Act ("ERISA") of 1974, have all followed this principle. *See, e.g., Albemarle Paper v. Moody*, 422 U.S. 405, 416 (1975) (citing FLSA precedent in Title VII case that "the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement"); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983) ("[i]f a breach of duty by the union and a breach of contract are proven, the court must fashion an appropriate remedy"); *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) ("We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing case law").

3. In this case, the district court issued an extraordinarily strong opinion on liability under ERISA after a seven-day bench trial, but subsequently "hesitate[d] in awarding necessary relief." *Horne*, 129 S.Ct. at 2594. The district court expressed its "considerable uncertainty" about the "particularly troublesome" outcome of "eviscerat[ing]" the statutory purposes by providing no relief and sought "further guidance" from the court of appeals. Pet. App. 5a, 39a-41a, 72a. However, after the petition for certiorari in *Conkright v. Frommert* (No. 08-810) was granted, the court of appeals' panel (which included the judge who wrote the decision on which certiorari was granted) "summarily affirmed" without offering the guidance

that the district court requested.

4. Although CIGNA challenged the district court's authority to provide any of the requested relief below, CIGNA's opposition to the petition does not contest that the district court has "broad remedial discretion under ERISA." BIO at 5. In contending that the district court recognized that it possessed broad remedial discretion to provide the requested relief, CIGNA ignores the positions it took below and all the places where the district court discussed its "considerable uncertainty" with the "particularly troublesome" outcome, saying that it was an "impossibility" to remedy the violation of Section 204(h) and that it "does not have [the] authority" to remedy the SMM violation to enforce the promise of "comparable or larger" benefits with no "cost savings" to CIGNA. Pet. App. 5a, 39a-41a, 49a-51a, 72a.

5. CIGNA's point about the *Amara* petition not describing a conflict between the circuits is misplaced. BIO at 5, 7. The Court's basis for granting the petition in *Conkright* is the conflict between the circuits on a district court's allowable discretion. See No. 08-810 (citing "conflict with decisions of other Circuits" in both questions presented). Petitioners do not need to re-establish the conflict on which *Conkright* is based for a GVR. Instead, the issue is whether the intervening precedent established in *Conkright* will be "sufficiently analogous and, perhaps, decisive to compel reexamination of the case."[1]

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[1] See Eugene Gressman, et al, *Supreme Court Practice*, 9th ed., at 348 (quoting *Henry v. City of Rock Hill*, 376 U.S. 776, 777

6. The district court's decision in *Amara* that it lacked the discretion to remedy two ERISA violations is clearly implicated by the question in *Conkright* of a district court's "allowable discretion" in "calculating additional benefits due under the plan as a result of an ERISA violation." CIGNA's effort to distinguish the issues presented in *Conkright* from those in the *Amara* petition relies less on substance than formulaic adverbs (not "remotely at issue," "absolutely no connection," "equally irrelevant") supported only by chronological and factual differences. BIO at 8-10. The fact that the petitions come at the issue of the district court's "allowable discretion" from both sides, with the *Conkright* petitioners contending that the district court exceeded its "allowable discretion" while the *Amara* petitioners contend that the district court failed to recognize and exercise its discretion, does not alter the point that both petitions concern the district court's allowable discretion in calculating additional benefits due under the plan as a result of ERISA violations. The precedent set by this Court's decision in *Conkright* on the district court's remedial discretion is not likely to be limited to cases that come at that issue from one side. Instead, the resolution of *Conkright* is likely to establish a precedent that applies when either a plaintiff or a defendant challenges a district court's decision on remedies for ERISA violations.

7. CIGNA's opposition tries to cloud the issues by conflating the district court's analysis of the remedy for

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(1964)).

a violation of ERISA §204(h), 29 U.S.C. 1054(h), with its analysis of a remedy for the violation of the summary of material modification ("SMM") requirements in ERISA §102(a), 29 U.S.C. 1022(a). BIO at 6-7. The remedy for an ERISA §204(h) violation is to refuse to enforce the plan terms that effect undisclosed reductions in future benefits. That remedy is built into the statute, thereby falling into the category that *Marbury* describes where the remedy is afforded by "operation of law." ERISA §204(h), as in effect before 2001, provides that a pension plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless" the required notice of the significant reduction is given to participants. As the petition describes, the Second, Seventh and Ninth Circuits have held that an amendment that provides for a significant reduction is "ineffective" unless the required notice is provided. Pet. at 16.

8. Here, the district court recognized that the "leverage" to ensure that companies comply with ERISA §204(h) is the "realistic possibility" of "returning" to the prior formula unless the notice of significant reductions is provided. Pet. App. 41a. The district court even went so far as to recognize that its ruling that CIGNA would not be required to "return" participants to the prior formula–even though the district court had found that CIGNA failed to provide the required notice of a significant reduction–"has permitted CIGNA effectively to eviscerate the notice requirements of §204(h)." *Id.* at 40a. The district court's conclusion that it was an "impossibility" to do more than "effectively to eviscerate the notice

requirements of §204(h)" clearly does not reflect the discretion that a district court must have to "vigilantly enforce federal law."

9. The remedy for the violation of the SMM requirements is to enforce the promise of "comparable" or "larger" benefits as part of "the terms of the plan" under ERISA §502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), or as "appropriate equitable relief ... to redress such violations" and "enforce [the] provisions of this title" under ERISA §502(a)(3), 29 U.S.C. 1132(a)(3). CIGNA incorrectly suggests that petitioners conceded that the district court was powerless to remedy the violation of the SMM requirements. BIO at 7. Petitioners merely conceded that the district court did not have the authority "entirely to rewrite" the plan. As petitioners have shown, the term "comparable" has an established meaning that is sufficiently definite to enforce. The district court's conclusion that providing a remedy for the misleading statements would require it "entirely to rewrite" the plan was plainly incorrect and overstated, but an accurate reflection of the district court's "considerable uncertainty" about its discretionary authority to enforce federal law by awarding the necessary relief.

10. CIGNA's references to the *Amara* petitioners inadequately preserving the arguments made in the petition (BIO at 1, 8, 10) are unsupported and difficult to comprehend. The plaintiffs-appellants' appeal to the Second Circuit focused on the district court's failure to remedy the violations that it found at trial. The issues presented to the Second Circuit were whether the district court correctly determined that a "nominal"

freeze insulated CIGNA from being required to provide any relief for the ERISA §204(h) violation and whether the district court could offer reparative relief for the misleading representations in the SMM without "rewriting" the Plan. Brief of Plaintiffs-Appellants in 08-3388 (filed 10/2/08), at 2, 10-11, 13-52. In their opening brief and reply, the plaintiffs-appellants relied heavily on the Second Circuit rulings in *Conkright* on which certiorari was subsequently granted. *Id.* at 17-18, 22, 27; Reply (filed 12/8/08), at 4, 11.

11. Petitioners do not need to respond to CIGNA's persistent efforts to use its opposition as a means to reargue its own petition. BIO at 1-2, 7-8, 10-11. The opposition filed on February 5, 2010 fully responds to CIGNA's petition, showing that it presents issues: (a) that were not raised or passed upon below, and (b) on which the Second Circuit's standards are consistent with the decisions of this Court and the decisions of other circuits.

Conclusion

For the foregoing reasons, the *Amara* petition should be held pending the Court's decision in *Conkright*, No. 08-810, and disposed of accordingly.

Respectfully submitted,

Stephen R. Bruce
Counsel of Record
Allison C. Pienta
805 15th St., NW, Suite 210
Washington, DC 20005

(202) 289-1117

Thomas G. Moukawsher
Moukawsher & Walsh, LLC
21 Oak Street
Hartford, CT 06106
860-405-7240

Counsel for Petitioners

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