No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Petitioners

June 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TREATISES

SUPPLEMENTAL BRIEF

Petitioners submit this brief in response to the brief of the United States as *amicus curiae.*

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION.

The Second Circuit held that it had no obligation to defer to the Plan Administrator's interpretation of the Plan on remand from *Frommert I* because there was no Plan Administrator "decision" to which deference could be accorded. Pet. App. 13a. This holding carves out a broad and unwarranted exception to the rule of *Firestone* deference and conflicts with decisions of this Court and other Circuits. *See* Pet. 11-22.

The Government reaches a different conclusion based on an incorrect framing of the decisions below. According to the Government, no deference was due to the Plan Administrator's Plan interpretation on remand because the task on remand was simply to "craft[] a remedy for the administrator's ERISA violations." Br. U.S. 11. In fact, the task on remand was to interpret the remaining Plan provisions that were unaffected by the Second Circuit's finding of a technical ERISA disclosure violation.

In *Frommert I,* the Second Circuit held that the Plan did not properly disclose, and so could not apply, its "phantom account" methodology to participants until 1998. Pet. App. 51a. It then remanded for a determination of the correct offset to Respondents' benefits in light of the "ambiguous manner in which the pre-[1998] terms of the Plan"

addressed this offset question. *Id.* Furthermore, the Second Circuit rejected Respondents' claim for equitable relief because the relief Respondents sought – "recalculation of their benefits consistent with [Plan] terms" – fell "comfortably within the scope of § 502(a)(1)(B)," which allows a plan participant to sue for benefits due "under the terms of [the] plan." *Id.* 53a. Thus, the task on remand was to interpret, for the first time, the pre-1998 Plan terms – *not*, as the Government suggests, to craft an equitable remedy for an ERISA violation.

The Government makes three specific arguments that the decision below was correct, but each is undermined by the Government's erroneous characterization of the task presented on remand. First, the Government argues that trust law authorizes courts to strip plan administrators of *Firestone* deference if they make a mistake in determining the benefits due to plan participants. Second, the Government argues that no deference was due to the Plan Administrator because the Plan Administrator had previously interpreted the same Plan terms in a manner that violated ERISA. Third, the Government argues that no deference was due because the Plan terms were "silent" regarding the proper method for calculating Respondents' benefits. As demonstrated below, each of these contentions is without merit. Because this question is of great practical and precedential significance, the Court should grant the Petition.

A. Trust Law Mandates Deference To The Plan Administrator.

1. Under this Court's decisions in *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), and *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a deferential standard of review applies to a plan administrator's interpretation of plan terms to the extent provided by the plan documents and the common law of trusts. *See Glenn*, 128 S. Ct. at 2347-48. The Second Circuit's holding that no deference was due the Plan Administrator's interpretation of Plan terms conflicts with these decisions.

The Government responds that trust law permits a court to override a trustee's discretion to interpret the terms of a trust and "make its own judgment about the benefits due" to a trust beneficiary if the trustee has previously made an "[un]reasonable" or "arbitrary" decision regarding the distribution of trust assets. Br. U.S. 11-12. In the Government's view, this rationale for stripping away *Firestone* deference applies even to cases in which the plan administrator's "arbitrary" or "unreasonable" decision consists of a failure to recognize a technical ERISA disclosure violation that affects the distribution of benefits. *See supra* 1-2. The Government's reasoning likewise authorizes stripping away deference whenever a plan administrator makes an arbitrary finding of fact or unreasonably interprets plan terms. Contrary to the Government's assertion, however, trust law generally allows courts to disregard a trustee's discretionary authority only where the trustee's

conduct is marred by fraud, bad faith, or the like – circumstances that no one contends are present here.

The Government is correct that in reviewing a trustee's distribution of assets, a "court may, *in appropriate circumstances*, itself fix the amount that the trustee shall pay rather than defer to the trustee to determine a reasonable amount." Br. U.S. 11. (internal quotation marks omitted) (emphasis added). However, trust law distinguishes between merely erroneous exercises of discretion, on the one hand, and more troubling conduct, such as fraud or dishonesty, on the other. *See, e.g.*, III William F. Fratcher, Scott on Trusts § 187.1, at 27-31 (4th ed. 1988). In the former case, courts continue to defer to the trustee's judgment; only in the latter case may courts step into the shoes of the trustee. *Id.* Indeed, this Court itself has recognized that courts should not ordinarily control a trustee's discretion where "there is no *mala fides*." *Colton* v. *Colton*, 127 U.S. 300, 320-21 (1888).

Numerous other decisions likewise hold that trustees who erroneously but in good faith interpret the terms of trust instruments may not be stripped of discretion. For example, in *Eaton* v. *Eaton*, the New Hampshire Supreme Court reversed a lower court's decision fixing the amount to be paid for child support. *See* 132 A. 10, 11 (N.H. 1926). Although the court agreed that the trustee had erroneously denied support for the child *entirely*, it held that the trustee – not the court – was entitled to determine the *amount* of support due to the child. *Id.* Deference

was given to the trustee notwithstanding the trustee's earlier abuse of discretion.[1]

Here, the Second Circuit did not find that the Plan Administrator acted dishonestly or in bad faith in applying the "phantom account" offset. Rather, it held that the Plan had not properly disclosed, and so could not apply, the phantom account offset methodology until 1998. Pet. App. 50a-51a. Under these circumstances, both trust law and this Court's decisions in *Firestone* and *Glenn* require deference to the Plan Administrator's determination of the benefits due under the pre-1998 Plan terms.

The Government's contrary view presents an issue of great importance. According to the Government, once a plan administrator makes a mistake of law or unreasonably interprets an ERISA plan, a reviewing court may disregard *Firestone* deference and "make its own judgment about the

---

[1] *Accord Sullivan* v. *Sullivan*, 12 N.W.2d 148, 151 (Neb. 1943) (upholding lower court's decision that trustee had improperly denied support, but reversing its decision to fix the amount of support because "the court cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act"); *Finch* v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 309-10 (N.C. Ct. App. 2003) (affirming lower court's finding that trustee had "abused its discretion" but vacating order to distribute funds because the trustee still had "discretion whether to disburse any funds").

benefits due." Br. U.S. 11. Such a hair-trigger rule for withdrawing deference would conflict with this Court's decisions in *Firestone* and *Glenn*, would thrust courts into the role of administering pension plans with alarming frequency, and would discourage employers from offering employee benefit plans in the first place. *See* Business Roundtable Amicus Br. 8-12.

2. In arguing that the Second Circuit's decision was correct because *Firestone* deference is no longer required after a plan administrator initially abuses its discretion, the Government underscores the conflict between the Second Circuit's decision and decisions of the Seventh and Eleventh Circuits. The latter Circuits have held that a plan administrator must be given deference in calculating benefits even after the administrator has been found to have arbitrarily and capriciously denied benefits entirely. *See Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008); *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 605-06 (7th Cir. 2008). The rule espoused by the Government – under which deference would be a matter of judicial choice in such circumstances – cannot be reconciled with these decisions.

The Government cites decisions from the First and Ninth Circuits for the proposition that courts have discretion to calculate benefits after finding that a plan administrator arbitrarily and capriciously denied benefits. Br. U.S. 11-12. The cited decisions, however, do not involve plan

interpretation, and thus are inapposite. *See* Pets. Reply Br. 12-13.[2]

The Ninth Circuit decisions, moreover, themselves recognize that, in cases in which a plan administrator "has construe[d] a plan provision erroneously and therefore has not yet had the opportunity of applying the [p]lan, properly construed," the administrator's interpretation of the "properly construed" plan is entitled to deference. *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996) (internal quotation marks omitted) (alterations in original); *see* Br. U.S. 12. Contrary to this Ninth Circuit rule, the Second Circuit here declined to defer to the Plan Administrator's interpretation of the pre-1998 Plan terms after the Second Circuit held that the phantom account offset methodology was inadequately disclosed and therefore void before 1998.

Finally, even if the Government were correct that the First and Ninth Circuit decisions are consistent with the decision below, this would only demonstrate the need for this Court to resolve a split among the First, Second and Ninth Circuits, on the one hand, and the Seventh and Eleventh Circuits, on the other.

---

[2] The Government also cites a Seventh Circuit decision that is particularly off-point. *See Halpin* v. *W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992) (affirming reinstatement of disability benefits because plan's claims procedure failed to comply with ERISA's "full and fair review" requirement).

B. The Decision Below Was Not Premised On The Fact That The Plan Administrator Interpreted The "Same Terms" On Remand.

The Government also argues that the decision below is correct because this case involves a "second attempt" to interpret the "same" Plan terms. Br. U.S. 14-15. The Government is mistaken.

First, the Second Circuit did not withdraw *Firestone* deference on the ground that the Plan Administrator was giving his second-best interpretation of the same Plan terms. Pet. App. 13a. Rather, it held that no deference was due "because the plan administrator never rendered any *decision* other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom-account' offset mechanism." *Id.* (emphasis added). The court rejected the Plan Administrator's interpretation of the pre-1998 Plan terms as a "mere *opinion*" offered in litigation. *Id.*

Second, it is at most rhetorically true that the Plan Administrator construed the same Plan provisions on remand as it did in its original benefits determination. Since the early 1980s, the Plan Administrator has calculated benefits of rehired employees pursuant to the phantom account methodology. *Id.* 83a-84a. The Plan Administrator, moreover, believed that this approach was supported by Plan provisions other than the non-duplication of benefits provision. *See id.* 66a-67a; 86a. In *Frommert I*, however, the Second Circuit held that the phantom account methodology was inadequately disclosed,

and was therefore void, until 1998. *Id.* 51a-52a. Accordingly, the interpretive question at issue here – *i.e.*, how the offset should be applied based on the non-duplication of benefits provision alone – arose for the first time on remand.

Third, the Second Circuit's decision cannot be meaningfully distinguished from *Oliver* and *Pakovich* on the ground that the Plan Administrator interpreted the "same terms" on remand. In those cases, the courts of appeals mandated deference to the plan administrator's benefits determination *after* the plan administrator's arbitrary and capricious denial of benefits. It cannot be right that a plan administrator who denies benefits entirely is owed continuing deference, whereas an administrator who grants benefits but miscalculates the amount is not. Thus, for purposes of applying *Firestone* deference, there is no principled way to distinguish the errors in *Oliver* and *Pakovich* from the initial error here.

C. The Plan Is Not "Silent" Regarding The Offset.

The Government – unlike Respondents – also contends that the pre-1998 Plan was "silent" regarding the proper calculation of the offset. Br. U.S. 3-4, 9, 13, 14, 16-17. This is incorrect and not what the Second Circuit held.

1. As the Second Circuit recognized in *Frommert I*, the Xerox Plan has "always contained provisions concerning the offset of prior distributions," including the non-duplication of benefits provision. Pet. App. 26a-28a. Accordingly, as the Second Circuit explained, the task on remand was to determine

under the "pre-amendment terms of the Plan" – *i.e.*, pursuant to the non-duplication of benefits provision and without reference to so-called phantom accounting – "how prior distributions were to be treated." *Id.* at 51a.

The Government asserts that the Plan is "silent" on this question and that the Second Circuit therefore "concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision), did not address how to calculate" the offset for prior distributions. Br. U.S. 9. But the Second Circuit did not hold that the pre-1998 Plan terms were "silent" regarding the calculation of the offset; it held that those Plan terms were "ambiguous." Pet. App. 51a. The court also rejected Respondents' claim for equitable relief because "adequate relief" was available from a determination of the benefits due under the terms of the pre-amendment plan. *Id.* 53a-54a.

To be sure, the Second Circuit stated in passing that the pre-1998 Plan "did not *specify* how the Plan would account for the prior distributions," *id.* 28a-29a (emphasis added), but to "specify" means "[t]o state explicitly," Webster's II New College Dictionary (3rd ed. 2005). Failure to state something *explicitly* is entirely consistent with ambiguity. And ambiguity is not a grounds to deny deference but a predicate for deference.

On remand from *Frommert I*, moreover, the District Court plainly understood its task to be interpreting the pre-1998 Plan. *See* Pet. App. 104a ("The Court's task, as directed by the Court of

Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due...."). The Government is therefore mistaken in suggesting that the courts below held that the pre-1998 Plan was "silent" with respect to the calculation of the offset.

2. There is good reason why the courts below stopped short of holding that the Plan was silent regarding the calculation of the offset. On remand from *Frommert I*, the Plan Administrator submitted a considered interpretation of the pre-1998 Plan terms. *See id.* 144a-54a. This submission makes clear that the pre-1998 Plan was *not* silent regarding the offset.

The Plan calculates benefits for re-hired employees by taking account of *all* of the employees' service to Xerox, including service rendered before their re-hire date. *Id.* 25a-26a. Thus, in the absence of an appropriate offset to take account of the distributions that rehired employees received upon their initial departures, such employees would receive double credit for their initial service. *See* Pet. 5. The Plan's non-duplication of benefits provision is what prevents such double payments.

That provision states that the final retirement benefit of a rehired employee "shall be offset by the *accrued benefit* attributable to such distribution." Pet. App. 141a (emphasis added). The term "accrued benefit" is defined by the Plan, in pertinent part, as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" – *i.e.*, as an age

65 annuity – "computed in accordance with ... Section 4.3." *Id.* 134a; 148a. Section 4.3, in turn, specifies that the annuity benefit attributable to a retirement account balance must be calculated "using annuity rates established by the PBGC." *Id.* 141a; 150a.

Based upon these provisions, the Plan Administrator interpreted the Plan to require an offset in an amount equal to the annuity that could have been purchased with the participant's prior lump sum distribution using interest rates specified by the PBGC. *Id.* 148a-50a. This interpretation is amply supported by the terms of the pre-1998 Plan, especially when *Firestone* deference is accorded to the Plan Administrator.

3. Even were the Government correct that the Plan was "silent" regarding the offset calculation, this would not justify withholding deference from the Plan Administrator. As the Seventh Circuit has recognized, it "is implicit in the idea of deferential review" that where "the plan document does not furnish the answer to [a] question, the answer given by the plan administrator ... will ordinarily bind the court." *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996). Thus, as *Gallo* recognizes, silence is not a reason to deny deference but a circumstance requiring it.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION.

The Second Circuit compounded its error of refusing to accord deference to the Plan Administrator by deferring to the District Court's so-called "allowable discretion" to interpret the Plan on remand. Pet. 29-33. This was a fundamental error: the District Court was obliged to interpret the Plan *correctly* – not just "reasonably" – on remand. The Government's only response is that "allowable discretion" was warranted because "the district court *was not interpreting plan terms* when it fashioned the remedy here, because the plan was *silent* about how to calculate the offset." Br. U.S. 13 (emphasis added). As discussed above (at 1-2, 9-12), that is not correct and is not what the Second Circuit held.

The novel standard of review that the Second Circuit applied to the District Court's interpretation of plan terms exposes employers to the troubling prospect that district courts may adopt any interpretation of a plan that is not "unreasonable" in the course of awarding a remedy in an ERISA case. If this were the law, different district courts could adopt conflicting interpretations of the very same plan, and ERISA's goal of promoting uniform and consistent administration of benefit plans would be thwarted. Pet. 33-34. The Petition should be granted to correct this important error. In the alternative, because the Second Circuit's failure to apply the proper standard of review clearly departed from settled law, summary reversal is warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL D. RYAN
XEROX CORPORATION
45 Glover Avenue
Norwalk, CT 06856

MARGARET A. CLEMENS
NIXON PEABODY LLP
Clinton Square
P.O. Box 31051
Rochester, NY 14603

ROBERT D. WICK
Counsel of Record
RICHARD C. SHEA
JONATHAN L. MARCUS
CHRISTIAN J. PISTILLI
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Petitioners

June 2009