No. 07-663

IN THE

Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE

Petitioners,

v.

JOHN D. WEST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. LONG
ROBERT D. WICK
Counsel of Record
DAVID H. REMES
THEODORE P. METZLER
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-5487

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Sixth Circuit, in accord with the Seventh Circuit but in conflict with two other circuits and numerous state courts, was correct in holding that a pension plan participant may seek relief for a statutory violation of ERISA under ERISA § 502(a)(1)(B), even though that provision authorizes relief only for violations of "the terms of the plan."

2. Whether the Sixth Circuit, in accord with the Fourth Circuit but in conflict with four other circuits, was correct in holding that a court may apply the rule of *contra proferentem* to override a plan administrator's reasonable interpretation of a pension plan.

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JURISDICTION

The judgment of the court of appeals was entered on April 20, 2007. App., *infra*, 1a. The court of appeals denied a petition for rehearing on August 8, 2007. *Id.* at 34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 502(a) and 502(e) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a) and (e), are reprinted in the appendix.

STATEMENT

Certiorari should be granted to resolve two important and recurring issues on which the circuits are divided. *First*, the Sixth Circuit, in accord with the Seventh Circuit, held that a participant in a pension plan may assert a claim for an alleged *statutory* violation of ERISA under ERISA § 502(a)(1)(B). By contrast, the Fifth Circuit, the Eighth Circuit, and numerous state courts have held that § 502(a)(1)(B) does *not* permit the assertion of statutory claims because the text of that provision refers explicitly to claims arising under "the terms of the plan." Under the approach adopted by the Sixth

and Seventh Circuits, state courts are authorized to interpret the provisions of ERISA, contrary to a deliberate Congressional decision to grant federal courts exclusive jurisdiction over such claims.

Second, the Sixth Circuit's decision, in accord with a decision of the Fourth Circuit, relies on the proposition that an ambiguity in a pension plan should be construed against its drafter. Four other circuits have held that where, as here, a pension plan grants its administrator discretionary authority to interpret the terms of the plan, ambiguities may *not* be resolved against the drafter. This Court recently called for the views of the Solicitor General on whether to grant a pending petition for certiorari presenting the same issue. *See AT&T Pension Benefit Plan* v. *Call*, 128 S. Ct. 350 (2007). Here, the issue is presented more squarely than in *Call*.

A. ERISA and Cash Balance Plans.

ERISA classifies pension plans as either defined contribution plans or defined benefit plans. A defined contribution plan is a plan under which an employee's benefit is based on an allocation of plan assets to an account that the plan maintains for the employee. ERISA § 3(34), 29 U.S.C. § 1002(34). All other pension plans are classified as defined benefit plans. ERISA § 3(35), 29 U.S.C. § 1002(35).

A cash balance plan is a type of defined benefit plan. *See* 26 C.F.R. § 1.401(a)(4)-8(c)(3)(i). Although a cash balance plan expresses an employee's benefit in the form of an account balance, the account balance does not represent an allocation of plan assets to an individual employee, as it would in a defined contribution plan. Instead, an account

balance in a cash balance plan reflects the amount of the pension benefit that the employee has earned under the plan's benefit formula. App., *infra*, 3a.

In a typical cash balance plan, an employee's account balance consists of two types of credits to the employee's account: pay credits and interest credits. *Id.* Pay credits typically are equal to a percentage of the employee's pay. *Id.* Interest credits are calculated by applying an interest rate to the employee's accumulated account balance. *Id.* Participants in cash balance plans usually may choose to receive their benefits in the form of either a lump sum payment or an annuity. *Id.* at 4a.

B. The AK Steel Plan.

Petitioners are the AK Steel Corporation Retirement Accumulation Pension Plan ("Plan") and its administrator, the AK Steel Benefit Plans Administrative Committee ("Plan Administrator").

The Plan is a typical cash balance plan. It provides a participating employee with a cash balance account made up of pay credits and interest credits. App., *infra*, 88a-89a. Upon retirement, a participant in the Plan may elect to receive his or her benefit in any of three forms: (1) a lump sum payment equal to the participant's account balance, (2) an annuity of equivalent value, or (3) a partial lump sum and partial annuity. *Id.* at 90a.

The Plan vests the Plan Administrator with "full discretionary authority and the power to administer and construe the provisions of the Plan, to determine in its discretion any questions of law or fact arising under the Plan . . . and to authorize the

payment of benefits properly due under the terms of the Plan . . . ." App., *infra*, 92a.

C. West's Whipsaw Claim.

Respondent John D. West was employed by a predecessor of AK Steel Corporation until 1997, when he took early retirement at the age of 57. Upon his retirement, West elected to receive his pension benefit in a lump sum. West acknowledged in writing "that he understood his payment options and was making a fully informed decision to receive his benefits in the form of a lump sum distribution equal to his account balance." App., *infra*, 9a-10a.

On August 1, 1997, West received a lump sum payment equal to his account balance. C.A. App. 173-75. Three years later, West filed a claim with the Plan Administrator asking for a payment *greater* than his account balance. *Id.* West asserted that he was entitled to an additional payment on the ground that ERISA required the Plan to determine his lump sum payment using a "whipsaw" calculation. *Id.*

Whipsaw calculations are sometimes used to calculate lump sum payments to participants in cash balance plans who elect to receive their pension benefits before reaching the "normal retirement age" specified by the plan. The calculation has two steps:

- In the first step – known as the "project-forward" step – the employee's account balance is projected forward in time to the employee's normal retirement age (typically age 65) and converted into a retirement annuity. App., *infra*, 7a.

- In the second step – known as the "discount-back" step – the life annuity is converted into a lump sum payment by discounting the annuity back to its present value at the time of the lump sum payment. *Id.*

According to the whipsaw theory, the interest rate used in the project-forward step is the interest rate that the plan would use to calculate an annuity for an employee who elected to receive benefits in the form of an annuity beginning at normal retirement age. App., *infra*, 18a. The discount-back step, in contrast, uses the interest rate specified by § 417(e)(3) of the Internal Revenue Code ("IRC"). *Id.* When the interest rate used in the project-forward step exceeds the interest rate used in the discount-back step, the whipsaw calculation produces a lump sum payment that is *greater* than the employee's account balance. *Id.* at 7a.

The following table illustrates this effect for certain of the accounts in the AK Steel Plan. As shown in the table, the whipsaw calculation can produce a dramatic increase in an employee's lump sum payment. The size of the increase varies inversely with an employee's age.

Age of employee upon termination of employment	Lump sum payment ***without*** whipsaw calculation	Lump sum payment ***with*** whipsaw calculation
25	$10,000	$29,578
35	$10,000	$23,756
45	$10,000	$19,175
55	$10,000	$15,749
60	$10,000	$14,451

C.A. App. 422, 429.[1]

In April 2001, the Plan Administrator denied West's whipsaw claim on the ground that, under section 4.1(a) of the Plan, all West was entitled to receive was his account balance. C.A. App. 315. Following the denial of his administrative claim, West filed a class action in the Southern District of Ohio seeking whipsaw payments for himself and the class.[2]

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[1] The table illustrates the whipsaw calculation using the interest rates that applied to "Opening Accounts" in the Plan as of 2002, when the table was prepared.

[2] The Pension Protection Act of 2006 abolished the whipsaw calculation for all "distributions" from a pension plan made after the date of the Act's enactment. *See* App., *infra*, 9a, 31a; Pension Protection Act of 2006 § 701(e)(2), Pub. L. No. 109-280, 120 Stat. 780, 991 (2006). Here, although the whipsaw distribution sought by West had *not* been made by the date of enactment, the Sixth Circuit declined to apply the Act to West's claim, citing concerns about retroactivity. App., *infra*, 32a. The court thus frustrated the Act's goal of preventing further use of

(footnote cont'd)

D. Proceedings Below.

This petition presents two recurring and important issues that have divided the courts of appeals – one concerning the proper construction of ERISA § 502(a)(1)(B), and the other concerning whether ambiguities in pension plans should be construed against the drafter.

1. West's claim that ERISA overrides the terms of the Plan.

West's claim is rooted in the ERISA concept of an "accrued benefit." ERISA defines an "accrued benefit" as the benefit that an employee will receive if he elects to receive his benefit in the form of an annuity beginning at "normal retirement age." *See* ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). The Plan, like many other ERISA plans, defines "normal retirement age" as age 65. App., *infra*, 81a. West argued that, under ERISA, he was entitled to a lump sum payment that was the "actuarial equivalent" of his "accrued benefit," *i.e.*, of the annuity he could have elected to receive at age 65. *Id.* at 10a, 42a-43a. He claimed that the lump sum payment he received from the Plan was worth significantly *less* than the actuarial equivalent of such an annuity. *Id.* He sued to recover the difference.

As West acknowledged in the district court (C.A. App. 160-61), his claim is a statutory claim, not a plan terms claim. The terms of the Plan do not

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a calculation that Congress deemed harmful. *See* 152 Cong. Rec. S8747, S8756 (Aug. 3, 2006). While Petitioners disagree with the court's interpretation of the Act, that is not the basis of this petition.

require an employee's lump sum payment to be the actuarial equivalent of the employee's age-65 annuity. To the contrary, the Plan expressly states that lump sum payments shall *not* be calculated as the actuarial equivalent of an employee's age-65 annuity. App., *infra*, 94a (Plan Ex. I-C). The Plan instead provides that lump sum payments shall be equal to an employee's account balance. *Id.* at 90a. According to West, ERISA overrides the Plan's terms and requires an employee's lump sum payment to be the actuarial equivalent of the employee's age-65 annuity. App., *infra*, 8a.

The district court agreed. The district court recognized that, under the Plan, "[t]he amount of the lump sum disbursement is equal to the amount of a participant's hypothetical account balance." App., *infra*, 38a. The court nonetheless held that, under ERISA, the lump sum disbursement "must be the actuarial equivalent of the annual benefit the participants would have received at normal retirement age." *Id.* at 41a. The court ordered the Plan to pay class members the difference between the lump sum payments they received under the Plan and the lump sum payments the court found to be due under ERISA – a total of $37 million, plus interest. *Id.* at 70a. The Sixth Circuit affirmed. *Id.* at 1a.

2. The Sixth Circuit's interpretation of § 502(a)(1)(B).

West asserted his claim under two ERISA remedial provisions: §§ 502(a)(1)(B) and 502(a)(3). Section 502(a)(1)(B) authorizes relief only for a violation of plan terms. Specifically, it authorizes a plan participant to bring a civil action:

> to recover benefits due to him *under the terms of his plan*, to enforce his rights *under the terms of his plan*, or to clarify his rights to future benefits *under the terms of the plan*.

29 U.S.C. § 1132(a)(1)(B) (emphasis added).

Section 502(a)(3) authorizes a participant to seek relief under *either* plan terms *or* ERISA provisions, but it permits only equitable relief, not money damages. The provision states that a participant may bring a civil action:

> (A) to enjoin any act or practice which violates *any provision of this title or the terms of the plan*, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce *any provision of this title or the terms of the plan*.

29 U.S.C. § 1132(a)(3) (emphasis added).

The Sixth Circuit correctly held that West could not proceed under § 502(a)(3) because he failed to seek equitable relief in the Complaint. *See* App., *infra*, 12a-13a. The court stated:

> The prayer for relief . . . centers on money damages for the alleged underpayment of a benefit. Although the plaintiffs also request unspecified "other relief as may be deemed just and equitable," that phrase is found in the portion of the complaint requesting costs and attorney fees. This is insufficient to assert a proper equitable claim under § 502(a)(3) where the "heart of the plaintiff's

> prayer for relief was a request for recovery of additional lump sum benefits."

Id. at 13a (citation omitted).

Having failed properly to invoke § 502(a)(3), West's only remaining recourse was to characterize his claim as a plan terms claim that may be asserted under § 502(a)(1)(B). In addressing that argument, the Sixth Circuit acknowledged that West's claim is a statutory claim and not a claim based on plan terms. *See* App., *infra*, 8a, 10a, 26a-27a. The court also recognized that § 502(a)(1)(B) "offers redress only for the recovery of benefits . . . under the terms of the Plan." *Id.* at 17a. The court was concerned, however, that if West were *not* permitted to proceed under § 502(a)(1)(B), he would have no remedy at all. *Id.* at 16a.[3] The court thus concluded that West's statutory claim could be characterized as a plan terms claim and asserted under § 502(a)(1)(B) on the theory that "the terms of the plan must . . . comply with ERISA." *Id.* at 17a.

3. The Sixth Circuit's reliance on *contra proferentem*.

In addition to holding that West could proceed under § 502(a)(1)(B), the Sixth Circuit rejected an interpretation of the Plan under which the Plan could have paid out lump sums equal to participant account balances without violating ERISA. The court rejected that interpretation of the Plan by

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[3] The Sixth Circuit's concern in this regard was unfounded. Although West did not avail himself of it, a potential avenue of relief was available to him. *See infra* at n. 7.

relying on *contra proferentem* – the canon of construction holding that ambiguities in a contract are construed against the drafter.

A Treasury Regulation divides defined benefit plans into two categories: those that express an employee's benefit "in the form of an [annuity] commencing at normal retirement age," and those that express benefits in any other form. *See* 26 C.F.R. § 1.411(a)-7(a)(1)(i) & (ii). Significantly, for plans that express benefits in a form *other* than an annuity beginning at normal retirement age, ERISA provides that the project-forward step of the whipsaw calculation must be done using the *same* interest rate as is used in the discount-back step.[4]

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[4] The Treasury Regulation interprets parallel definitions of "accrued benefit" in the Internal Revenue Code and ERISA. *See* 26 U.S.C. § 411(a)(11); 29 U.S.C. § 1002(23)(A); *see also* 29 U.S.C. § 1202(c). The regulation provides that, for plans that express a benefit in a form *other* than an annuity beginning at normal retirement age, a participant's "accrued benefit" for statutory purposes is "an annual benefit commencing at normal retirement age which is the *actuarial equivalent* (determined under Section 411(c)(3) . . . *of the accrued benefit determined under the plan.*" 26 C.F.R. § 1.411(a)-7(a)(1)(ii) (emphasis added). In other words, when the plan does not express a benefit in the form of an age-65 annuity, the benefit expressed by the plan is projected forward into an actuarially equivalent age 65-annuity. Actuarial equivalence is "determined under section 411(c)(3)," *id.*, and the latter provision adopts the interest rate specified by IRC § 417(e)(3) for actuarial equivalence calculations. *See* 26 C.F.R. § 1.411(c)-1(e)(1) (actuarial equivalence shall be as "determined by the Commissioner"); IRS Announcement 95-33 ¶ 362.1(1)(a), 1995 WL 223244 (IRS Ann. May 8, 1995) (actuarial

(footnote cont'd)

When the interest rates used in the project-forward and the discount-back steps are the same, the two steps cancel each other out, and the whipsaw calculation becomes "a complete wash." App., *infra*, 25a-26a. In these circumstances, a cash balance plan may pay out lump sums equal to a participant's account balance without violating ERISA. *See id.*

Here, the Plan Administrator construed the Plan as one that expresses a participant's benefit in the form of an account balance, not in the form of an annuity beginning at normal retirement age. C.A. App. 348-49, 389-90, 435-36. So interpreted, the Plan is one for which ERISA provides that the forwards and backwards steps of the whipsaw calculation use the same interest rate.

The Sixth Circuit acknowledged Petitioner's argument that under the Plan Administrator's interpretation of the Plan, the Plan would not violate ERISA. App., *infra*, 25a-26a. The court rejected the Plan Administrator's interpretation, however, observing that any ambiguity between Plan terms that support this interpretation and Plan terms that contradict it "must be resolved in the plaintiffs' favor" under the doctrine of *contra proferentem*. *Id.* at 26a (citation omitted).

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equivalence is determined using § 417(e)(3) interest rate). The § 417(e)(3) interest rate is the same interest rate as is used in the discount-back step of the whipsaw calculation.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision Exacerbates A Circuit Split On The Scope Of § 502(a)(1)(B).

This Court should grant certiorari to resolve a circuit split on the scope of § 502(a)(1)(B). The text of that provision authorizes relief only for violations of "the terms of a plan." 29 U.S.C. § 1132(a)(1)(B). The Fifth Circuit, the Eighth Circuit, and the courts of several states have therefore held that § 502(a)(1)(B) applies only to claims based on plan language and does *not* apply to statutory claims. In the decision below, by contrast, the Sixth Circuit aligned itself with the Seventh Circuit and held that § 502(a)(1)(B) *does* apply to statutory claims.

Resolution of this circuit split is exceptionally important because the erroneous approach of the Sixth and Seventh Circuits allows state courts to interpret and apply the provisions of ERISA, thus frustrating a deliberate Congressional decision to restrict the interpretation of ERISA exclusively to the federal courts.

A. The circuits are divided on whether statutory claims may be asserted under § 502(a)(1)(B).

The remedial provisions of ERISA § 502(a) draw an explicit distinction between claims based on "the terms of the plan" and claims based on the "provisions of [ERISA]." Section 502(a)(1)(B) authorizes relief only for violations of "the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3), in contrast, authorizes relief for violations of *either* "any provision of this title *or* the terms of

the plan." 29 U.S.C. § 1132(a)(3) (emphasis added). Section 502(a)(5) authorizes relief only for violations of "any provision of this title." 29 U.S.C. § 1132(a)(5).

Most courts hold that this statutory language distinguishes claims based on plan language from claims based on ERISA provisions. These courts, which include the Fifth Circuit, the Eighth Circuit, and numerous state courts, have therefore held that only claims based on plan language may be asserted under § 502(a)(1)(B). *See Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 740, 742 (8th Cir. 2002); *Carrabba* v. *Randalls Food Mkts. Inc.*, 252 F.3d 721 (5th Cir. 2001). *See also Todisco* v. *Verizon Commc'ns, Inc.*, 497 F.3d 95, 101 (1st Cir. 2007) (rejecting § 502(a)(1)(B) claim because plaintiff's "claim for benefits is plainly not a suit for benefits *under the terms of the plan.* Instead, she expressly seeks benefits *not* authorized by the plan's terms") (emphasis in original).

State courts that have reached the same conclusion include *Bodine* v. *Webb*, 992 S.W.2d 672, 675, 677 (Tex. App. 1999), *review denied* (Tex. Sept. 9, 1999) (§ 502(a)(1)(B) does not authorize action seeking recalculation of benefits based on alleged statutory violations of ERISA.); *Oddino* v. *Oddino*, 939 P.2d 1266, 1273 (Cal. 1997) ("Congress clearly intended that actions to enforce rights created by ERISA's title I would be limited to federal courts.") (emphasis omitted)); *Richland Hosp., Inc.* v. *Ralyon*, 516 N.E.2d 1236, 1241 (Ohio 1987) (§ 502(a)(1)(B) does not grant state courts jurisdiction over actions for violations of ERISA statutory duties.); *Duffy* v. *Brannen*, 529 A.2d 643, 650 (Vt. 1987) (§ 502(a)(1)(B) does not extend to claim requiring "construction and

implementation of standards of conduct established by ERISA."); *Summers* v. *United States Tobacco Co.*, 574 N.E.2d 206, 210-11 (Ill. App. Ct. 1991) (§ 502(a)(1)(B) does not authorize actions based on "violations of ERISA."); *Young* v. *Sheet Metal Workers' Int'l Ass'n Prod. Workers Welfare Fund*, 447 N.Y.S.2d 798, 803 (N.Y. Sup. Ct. 1981) (§ 502(a)(1)(B) does not apply to "any action wherein the participant or beneficiary seeks to challenge the validity of a portion of a plan itself; or [that] seeks a construction of the ERISA statute itself.").

Ross is illustrative of these cases. There, the plaintiff sought additional benefits on the ground that a plan amendment curtailing his benefits had been adopted in violation of the statutory requirements for amending a pension plan. 285 F.3d at 739-741. The plaintiff argued that this was a claim under § 502(a)(1)(B) for "benefits due under the terms of the plan." The Eighth Circuit disagreed, reasoning that the claim was a statutory claim and not a plan terms claim:

> Although [the plaintiff's] ultimate goal is to continue receiving disability income benefits from Canada Life, section 502(a)(1)(B) authorizes a participant to bring an action to recover benefits, enforce rights, or clarify rights to future benefits *under the terms of the plan.* Ross is not seeking to obtain benefits under the terms of the Plan. Rather, he is seeking to reform the Plan by obtaining a declaration that the purported 1990 and 1991 amendments are void. Section 502(a)(1)(B) does not authorize such a claim.

Id. at 740 (emphasis added). The plaintiff was therefore limited to seeking relief under the separate provisions of § 502(a)(3). *Id.* at 741 & n.7.

Similarly, in *Carraba*, the plaintiff class contended that the plan had failed to pay benefits in accordance with ERISA's accrual and vesting provisions. *Carraba*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000), *aff'd*, 252 F.3d 721 (5th Cir. 2001). The court held that § 502(a)(1)(B) did not provide a remedy because plaintiffs had already received "basically everything to which they were entitled under the provisions of the [plan]." *Id.* Since plaintiffs were seeking relief under ERISA provisions, not plan language, their recourse was to seek relief under ERISA § 502(a)(3). *See id.* The Fifth Circuit affirmed, adopting the district court's opinion. 252 F.3d at 722.

The holdings in *Ross*, *Carraba*, and the state court decisions cited at pp. 14-15, *supra*, squarely conflict with the decision of the Sixth Circuit in this case. Here, West is asserting a statutory claim, not a plan terms claim. West argues "that ERISA mandates the whipsaw calculation . . . and that AK Steel's failure to calculate lump-sum distributions in this manner constitutes a statutory violation of ERISA." App., *infra*, 8a.[5] The Sixth Circuit

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[5] West argued in the district court that:

> The claim in this case does not seek an interpretation of the plan. Rather, plaintiffs' claim is that the Plan itself violates ERISA and the Internal Revenue Code – specifically, that the method provided in the Plan for lump sum

(footnote cont'd)

nonetheless characterized West's claim as a plan terms claim that may be asserted under § 502(a)(1)(B). *Id.* at 17a. The only explanation that the court offered for this conclusion is the terse observation that "the terms of the plan must comply with ERISA." *Id.*

In accord with the decision in this case, the Seventh Circuit likewise holds that statutory claims may be asserted under § 502(a)(1)(B). *See Berger* v. *Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 763 (7th Cir. 2003) (permitting ERISA statutory claim to be asserted under § 502(a)(1)(B)); *May Dep't Stores Co.* v. *Fed. Ins. Co.*, 305 F.3d 597, 601, 602 (7th Cir. 2002) (characterizing ERISA statutory claim as a plan terms claim on the theory that a pension plan contains terms "implied by law" under ERISA).[6] The interpretation of § 502(a)(1)(B) adopted by the Sixth and Seventh Circuits effectively eliminates § 502(a)'s explicit distinction between claims arising under "the terms of the plan" and claims arising under the "provisions of [ERISA]." Under that interpretation, statutory claims may be re-cast as plan terms claims and asserted under

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distributions violates ERISA § 204(c)(3) and I.R.C. § 417(e).

C.A. App. 160-61.

[6] The Sixth Circuit's decision states that the Second Circuit held that statutory claims may be asserted under § 502(a)(1)(B) in *Esden* v. *Bank of Boston*, 229 F.3d 154 (2d Cir. 2000). App., *infra*, 17a. Actually, *Esden* does not explicitly address whether the plaintiff was permitted to proceed under § 502(a)(1)(B) or § 502(a)(3). *See* 229 F.3d at 161-62.

§ 502(a)(1)(B) simply by positing that the terms of the plan "implicitly" incorporate the provisions of ERISA.

The Sixth and Seventh Circuit decisions also depart from this Court's precedent governing the interpretation of ERISA § 502(a). "The six carefully integrated civil enforcement provisions found in § 502(a)" are part of ERISA's "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated' statute." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). This Court has cautioned against "tamper[ing] with an enforcement scheme crafted with such evident care as the one in ERISA." *Id.* at 147. The Court has likewise warned against expansive interpretations of § 502(a) that attempt to "adjust the balance" struck by Congress in the text of ERISA. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 263 (1993). The Sixth and Seventh Circuits disregarded these principles in holding that statutory claims may be re-cast as plan terms claims and asserted under § 502(a)(1)(B).[7]

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[7] The Sixth Circuit appears to have been concerned that there is no remedy for a claim like West's if the claim cannot be asserted under § 502(a)(1)(B). App., *infra*, 16a. In reality, although West elected not to pursue it, a potential avenue of relief was available to him. He could have (1) sought an equitable reformation of the Plan under § 502(a)(3) to conform the Plan to the provisions of ERISA, and then (2) invoked § 502(a)(1)(B) to seek benefits due under the terms of the Plan as reformed. Equitable reformation of a plan that violates ERISA is available under § 502(a)(3) to a plaintiff who demonstrates that such relief is "equitable" and

(footnote cont'd)

The writ should be granted to resolve the conflict between the Sixth and Seventh Circuits' interpretation of § 502(a)(1)(B) and the contrary interpretation adopted by the Fifth Circuit, the Eighth Circuit, and numerous state courts.

B. The Sixth Circuit's decision presents a recurring issue of exceptional importance.

The Sixth Circuit's decision that statutory claims may be asserted under § 502(a)(1)(B) allows state courts to interpret and apply ERISA's statutory requirements. The decision thus violates one of the core tenets of ERISA: that federal courts have exclusive jurisdiction to interpret the ERISA statutory scheme.

In enacting ERISA, Congress sought to create "a uniform regulatory regime over employee benefit plans" and to ensure that "employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004) (citation omitted). Accordingly, rather than allowing the courts of fifty different states to interpret ERISA's statutory requirements, Congress provided that federal courts will ordinarily have exclusive

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"appropriate." *See* 29 U.S.C. § 1132(a)(3); *Nechis* v. *Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005); *see also City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam). Here, West bypassed any attempt to reform the Plan and instead sought to assert his statutory claim *directly* under § 502(a)(1)(B).

jurisdiction over ERISA claims. *See* ERISA § 502(e)(1).

Congress created a limited exception to the general rule of exclusive federal jurisdiction: it vested state and federal courts with concurrent jurisdiction over claims asserted under § 502(a)(1)(B). *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).[8] Congress created this exception because it understood that § 502(a)(1)(B) claims would be limited to the interpretation of plan language and would not involve construction of the ERISA statutory scheme. As the Conference Report on ERISA explains:

> The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights

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[8] ERISA § 502(e)(1) provides:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1). ERISA § 502(a)(7) authorizes state governments to enforce certain child support orders. 29 U.S.C. § 1132(a)(7).

> provided under [ERISA]. However, with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan *which do not involve application of [ERISA] provisions*, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction . . . .

H.R. Conf. Rep. No. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5107 (emphasis added).

The decisions of the Sixth and Seventh Circuits disrupt this carefully crafted allocation of jurisdiction. According to those courts, statutory claims can be asserted under § 502(a)(1)(B), which means that such claims may be heard and decided in state court. The Sixth and Seventh Circuits appear to have given no consideration to the fact that their interpretation of § 502(a)(1)(B) opens up state courts for the adjudication of the ERISA statutory scheme.

Consistent with the text of § 502(a)(1)(B), state courts have until now interpreted their jurisdiction under ERISA to be limited to cases involving "the terms of a plan." The decisions of the Sixth and Seventh Circuits, however, instruct state courts to ignore that restriction and to decide disputes about the meaning of ERISA provisions. Allowing the courts of fifty different states to interpret and apply the complex provisions of ERISA would thwart the Congressional goal of creating a uniform *federal* scheme of pension regulation. It would also place a heavy burden on this Court to police the interpretation of ERISA by the courts of the fifty states.

Whether statutory claims may be asserted under § 502(a)(1)(B) is an issue that will continue to

arise in disputes about a wide variety of ERISA provisions.[9] In the absence of corrective action by this Court, ERISA's fundamental goal of creating a uniform national scheme of pension regulation will be frustrated.

II. The Sixth Circuit's Decision Exacerbates A Circuit Split On The Applicability Of *Contra Proferentem* In Interpreting A Pension Plan.

In *Firestone Tire & Rubber Co.* v. *Bruch*, this Court held that "a deferential standard of review" is appropriate when "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. 101, 111, 115 (1989). Following *Firestone*, courts have deferred to the interpretation of a plan administrator who is given discretion to interpret the plan. *E.g., McElroy* v. *SmithKline Beecham Health & Welfare Benefits Trust Plan*, 340 F.3d 139, 143 (3d Cir. 2003) ("[T]he plan administrator was authorized to interpret it, and we must defer to this interpretation unless it is arbitrary or capricious.").

Here, notwithstanding *Firestone*, the Sixth Circuit rejected a reasonable interpretation of the Plan by the Plan Administrator that would have avoided the alleged violation of ERISA. The court

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[9] A survey on Lexis or Westlaw confirms that disputes arising under ERISA's vesting, age discrimination, anti-backloading, anti-cutback, and plan amendment provisions, among others, are arising with increasing frequency in the lower courts.

rejected the administrator's interpretation by applying *contra proferentem* to resolve an alleged ambiguity in the Plan against the Plan's drafter. App., *infra*, 27a (holding that "the ambiguity must be resolved in the plaintiffs' favor").

By applying *contra proferentem* to a plan that vests its administrator with discretion to interpret the terms of the plan, the Sixth Circuit exacerbated an acknowledged split among the circuits. *See ERISA Fiduciary Law* 177 (Susan P. Serota & Frederic A. Brodie eds., 2d ed. 2006) ("Controversy has arisen [among the circuits] from application of the doctrine of *contra proferentem*."). This Court has already called for the views of the Solicitor General on whether to grant certiorari in another case that presents the same issue less squarely than this case.[10]

Four circuits hold that the doctrine of *contra proferentem* cannot be applied where, as here, the plan vests the plan administrator with discretion to construe the plan's terms. Two other circuits, including the Sixth Circuit in this case, hold that the doctrine *can* be applied in those circumstances. Finally, two circuits have adopted a hybrid approach under which *contra proferentem* may be applied to

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[10] *See AT&T Pension Benefit Plan* v. *Call*, No. 06-1398, 128 S. Ct. 350 (2007). In *Call*, the Seventh Circuit invoked "the principle that ambiguities in a contract that remain after extrinsic evidence has been presented are resolved against the party who drafted the contract." *Call* v. *Ameritech Mgmt. Pension Plan*, 475 F.3d 816, 822 (7th Cir. 2007). *Cf. Hess* v. *Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 662 (7th Cir. 2005).

arrive at a "correct" interpretation of the plan to be used in evaluating whether the plan administrator abused its discretion in interpreting the plan. The Court should grant certiorari to settle this division among the circuits.

A. The circuits are divided on the *contra proferentem* issue.

The Second, Eighth, Ninth, and Tenth Circuits hold that *contra proferentem* does not apply to an ERISA plan that the administrator is given discretion to interpret. The holdings of these circuits conflict with the Sixth Circuit's reliance on *contra proferentem* in this case and with a similar holding of the Fourth Circuit.

1. In *Kimber* v. *Thiokol Corp. Disability Benefit Plan*, the Tenth Circuit rejected the use of *contra proferentem* in cases in which the plan administrator is given discretion to interpret the plan. 196 F.3d 1092, 1100 (10th Cir. 1999). The court observed that, "when a plan administrator has discretion to interpret the plan and the standard of review is arbitrary and capricious, the doctrine of *contra proferentem* is inapplicable." *Id.*

The Second Circuit is in accord, holding that "application of the rule of *contra proferentem* is limited to those occasions in which this Court reviews an ERISA plan *de novo*." *Pagan* v. *NYNEX Pension Plan*, 52 F.3d 438, 443-44 (2d Cir. 1995). When applying "the highly deferential arbitrary and capricious standard . . . the rule of *contra proferentem* is inapplicable." *Id.*

The Ninth Circuit's opinion in *Winters* v. *Costco Wholesale Corp.* is also in accord, holding

"that the rule of *contra proferentem* is not applicable to self-funded ERISA plans that bestow explicit discretionary authority upon an administrator to determine eligibility for benefits or to construe the terms of the plan." 49 F.3d 550, 554 (9th Cir. 1995). The Ninth Circuit noted that "*contra proferentem* 'is based upon the principle of contract construction that when one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against the drafter.'" *Id.* (citation omitted and emphasis supplied). But where a plan vests its administrator with discretion to construe disputed terms, the plan itself "states how Plan terms are to be interpreted, and the general rule of *contra proferentem* does not apply." *Id.*

The Eighth Circuit too has held, in *Wallace* v. *Firestone Tire & Rubber Co.*, that "unless the plan language specifies otherwise, courts should construe any disputed language without deferring to either party's interpretation." 882 F.2d 1327, 1329 (8th Cir. 1989) (quotation omitted).

2. In contrast to these circuits, the Sixth and Fourth Circuits apply *contra proferentem* even when the plan grants the plan administrator discretion to interpret the plan.

The Sixth Circuit here concluded that the definition of "accrued benefit" in section 1.2 of the AK Steel Plan is "clear" if that section is considered in isolation. App., *infra*, 26a. The court acknowledged, however, that Petitioner had argued that other provisions of the Plan, considered together with section 1.2, support Petitioner's interpretation of the Plan. *Id.* Rather than determining whether

Petitioner's interpretation of all of the Plan's provisions was an abuse of discretion, the court of appeals dismissed Petitioner's argument by applying the principle of *contra proferentem*:

> To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of "accrued benefit" in another section of the Plan, the ambiguity must be resolved in the plaintiff's favor. *See Regents of the Univ. of Mich.* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (6th Cir. 1997) ("[A]ny ambiguities in the language of the [ERISA] plan [are to] be construed strictly against the drafter of the plan.").

App., *infra*, 26a.

The Fourth Circuit has similarly held that a plan administrator's interpretation may be an abuse of discretion if the administrator has not applied *contra proferentem*: "[A] reasonable administrator-insurer would look to an important external standard for interpreting an ambiguous contractual provision – that it be construed against the drafting party." *Carolina Care Plan, Inc.* v. *McKenzie*, 467 F.3d 383, 388 (4th Cir. 2006); *see also McKeldin* v. *Reliance Std. Life Ins. Co.*, No. 06-1743, 2007 U.S. App. LEXIS 24289, at *8 (4th Cir. Oct. 17, 2007) (unpublished) ("[W]hen, as here, an ERISA plan vests discretion in the decision-maker, who also insures the plan, reasonable exercise of that discretion requires that the decision-maker/insurer 'construe plan ambiguities against the party who drafted the plan.'").

3. Further exacerbating the split among the circuits, the Fifth and Eleventh Circuits have adopted a hybrid approach. These courts apply *contra proferentem* to determine the "correct" interpretation of the plan, and may invalidate a contrary but reasonable interpretation of a plan administrator if the interpretation favors the plan and the administrator has a conflict of interest. *See HCA Health Servs. of Ga., Inc.* v. *Employers Health Ins. Co.*, 240 F.3d 982, 993-94 (11th Cir. 2001); *Rhorer* v. *Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999).

B. The issue is recurring and important.

Whether ambiguities in a pension plan must be construed against the drafter is a question that can arise in virtually any case involving a claim for benefits alleged to be due under the terms of a plan. The answer to that question, moreover, could determine the outcome of many such cases. The writ should be granted to resolve the conflict among the circuits on this recurring and important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. LONG
ROBERT D. WICK
Counsel of Record
DAVID H. REMES
THEODORE P. METZLER
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-5487