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

REPLY TO BRIEFS IN OPPOSITION

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I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION.

The Second Circuit held that the District Court owed no deference to the Plan Administrator's interpretation of the Plan because his interpretation was offered in litigation rather than in the context of a "benefit determination." (Pet. App 13a.) That holding departed from decisions of this Court and other Circuits requiring deference to a plan administrator's interpretation of an ERISA plan *to the extent provided by the plan documents and the common law of trusts.* (Pet. 12-22.) The Second Circuit's decision to strip away this deference for reasons entirely unrelated to the plan documents or the law of trusts will have disastrous consequences for the nation's ERISA plans and will discourage employers from offering such plans. (Business Roundtable Amicus Br. at 8-12.) Neither the *Frommert* Respondents nor the *Pietrowski* Respondents provide a persuasive reason for denying review of this question.[1]

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[1] "*Frommert* Respondents" refers to the 33 Respondents represented by Robert H. Jaffe & Associates; "*Pietrowski* Respondents" refers to the 69 Respondents represented by Stris & Maher LLP.

A. The *Frommert* Respondents' Arguments On The First Question Lack Merit.

The *Frommert* Respondents assert that the District Court was not interpreting the Plan at all, but instead was "exercis[ing] equitable powers in crafting an appropriate remedy." (*Frommert* BIO at 11.) Respondents are fundamentally mistaken. The Second Circuit expressly recognized that the "relief that the [Respondents] seek[] [is] recalculation of their benefits consistent with the terms of the Plan." (Pet. App. 53a.) Accordingly, after holding that the Plan's so-called "phantom account" offset provision could not be applied to Respondents, the Second Circuit remanded to the District Court to award any additional benefits due under the "pre-amendment terms of the Plan," *i.e.*, the terms of the Plan before the date that the "phantom account" provision was properly disclosed to Plan participants. (*Id.* at 51a.) Respondents' assertion that this case does not present an issue of Plan interpretation thus conflicts with the Second Circuit's express instructions to the District Court.

Respondents also overlook the fact that the Second Circuit directed the District Court to award a remedy under ERISA § 502(a)(1)(B) as opposed to § 502(a)(3). (*Id.* at 53a.) Section 502(a)(1)(B) authorizes district courts to award only those benefits due a participant "under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). The fact that the relief here was afforded under § 502(a)(1)(B) thus eliminates any doubt that the courts below were interpreting Plan terms.

Equally unavailing is Respondents' suggestion that the "law of the case" prevents Petitioners from seeking review of the Second Circuit's 2006 decision in *Frommert I*. (*Frommert* BIO at 11.) The question presented for review – whether deference is due to a plan administrator's interpretation of an ERISA plan rendered outside of an administrative claim for benefits – arises from the Second Circuit's 2008 decision, not its 2006 decision. (Pet. App. 12a-13a.)

Furthermore, even if Respondents were correct that the question presented arises in part from the 2006 decision, this Petition still would be timely. The 2006 decision was interlocutory: it resulted in a remand for a determination of any additional benefits due to Respondents. As the *Pietrowski* Respondents correctly observe, this Court generally prefers to review questions presented by interlocutory decisions of the courts of appeals at the conclusion of the case. (*Pietrowski* BIO at 16.) The discretionary law of the case doctrine does not preclude this Court's review of such interlocutory decisions. *See Hathorn* v. *Lovorn*, 457 U.S. 255, 261-62 (1982); *United States* v. *United States Smelting Refining & Min. Co.*, 339 U.S. 186, 199 (1950).

The *Frommert* Respondents also assert that the Plan Administrator's interpretation of the pre-amendment Plan terms was unreasonable because the Plan does "not provide for *any* offset of Plan benefits for prior distributions." (*Frommert* BIO at 17.) Not so. As originally interpreted by the Plan Administrator, the Plan contained two different offset provisions: a non-duplication of benefits provision and the so-called "phantom account" offset

provision. The decision in *Frommert I* merely held that the "phantom account" provision was not properly added to the Plan until 1998; it did not disturb the non-duplication of benefits provision. (Pet. 7.) To the contrary, the Second Circuit acknowledged that "the Plan . . . *always* contained provisions concerning the offset of prior distributions," including the non-duplication of benefits provision. (Pet. App. 26a-28a (emphasis added).)[2]

On remand from *Frommert I*, the Plan Administrator offered an interpretation of the offset required by the non-duplication of benefits provision, without reference to the "phantom account" offset. Contrary to Respondents' assertion (*Frommert* BIO at 17-18), that interpretation was *not* the same interpretation of the Plan rejected in *Frommert I*. Moreover, although the Second Circuit recognized that there were "several reasonable alternatives" for construing the non-duplication of benefits provision (Pet. App. 13a-14a), it never reached the question of whether the Plan Administrator's interpretation was

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[2] The Summary Plan Description ("SPD") likewise informed Plan participants that their benefits "may . . . be reduced if [they] had previously left the company and received a distribution at that time." (*Frommert* BIO App. 4a.) The *Frommert* Respondents' assertion (at 9) that "in the event of any conflict between the SPD and the . . . plan administrator's interpretation of the plan, the SPD controls" is therefore irrelevant. The Second Circuit held only that the "phantom account" methodology was inadequately disclosed in the SPD until 1998, not that the offset required by the Plan Administrator's interpretation was inadequately disclosed.

among these reasonable alternatives. Instead, the court dismissed this interpretation as the "mere opinion" of the Plan Administrator and refused to accord it any deference. (*Id.*)

Finally, the *Frommert* Respondents argue that no deference was due to the Plan Administrator's interpretation of the non-duplication of benefits provision because the Plan Administrator offered his interpretation in a "litigation context," and thus labored under a conflict of interest. (*Frommert* BIO at 23-24.) This argument is foreclosed by *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008).

Glenn holds that a deferential standard of review applies even when a plan administrator acts under a financial conflict of interest. *See id.* at 2350. Thus, under *Glenn*, the fact that a plan administrator offers an interpretation of a plan in a "litigation context" could be considered as a "factor" in reviewing the interpretation for abuse of discretion, but it provides no basis for engaging in *de novo* review. *See id.* Here, the decisions below did not merely treat the fact that the Plan Administrator's interpretation arose in litigation as a "factor" in reviewing for abuse of discretion. Instead, contrary to *Glenn*, the courts below refused to accord the Plan Administrator any deference whatsoever. (Pet. App. 12a-13a.)

B. The *Pietrowski* Respondents' Arguments On the First Question Lack Merit.

Unlike the *Frommert* Respondents, the *Pietrowski* Respondents do not dispute that the question presented is one of plan interpretation. Nor do they deny that, in reviewing the District Court's interpretation of the Plan, the Second Circuit applied a perceived exception to the general rule requiring *Firestone* deference to the interpretations of plan administrators. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). They argue instead that the Second Circuit was *correct* in applying an exception to *Firestone* deference.[3]

According to the *Pietrowski* Respondents, the Plan Administrator merely offered a different interpretation of the exact same Plan terms following the remand from *Frommert I.* (*Pietrowski* BIO at 8.) Under these circumstances, they argue, no deference was due to the Plan Administrator's interpretation of the Plan because it was a mere "litigation position[]." (*Id.* at 9.) This argument fails for two reasons.

First, the Plan terms interpreted on remand were *not* identical to those upon which the Plan

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[3] The *Pietrowski* Petitioners also assert, without explanation or support, that Petitioners "seek review of an interlocutory order, rather than a final judgment." (*Pietrowski* BIO at 16.) Even if that assertion were true (and it is not), it would compel summary reversal on the ground that the Second Circuit lacked appellate jurisdiction over the appeal in *Frommert II. E.g.*, *Almonte* v. *City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007).

Administrator made its original benefits determination. The Plan Administrator originally construed the Plan in light of the "phantom account" offset provision that the Second Circuit later found was not properly disclosed and added to the Plan until 1998. (Pet. 6; Pet. App. 42a.) On remand, the Plan Administrator therefore offered an interpretation of the meaning of the Plan *without* that provision. (Pet. 8-9.) The Plan Administrator did so based on the Second Circuit's holding that the task on remand was to calculate the benefits due to Respondents in light of "the pre-amendment terms of the Plan" – *i.e.*, the terms of the plan without reference to the "phantom account" offset. (Pet App. 51a.)

To be sure, the text that appears on the printed pages of the Plan document did not change between the Plan Administrator's original interpretation and the interpretation offered on remand from *Frommert I*. In that sense, it is true that the Plan Administrator construed "the same [Plan] terms" on remand that were construed in the original benefits determination. (*Pietrowski* BIO at 8 (quoting Pet. App. 13a).) Only on remand, however, was the Plan Administrator on notice that the "phantom account" offset was null and void as applied to Respondents. Thus, only on remand did the Plan Administrator construe the terms of the Plan without reference to that offset.

Respondents therefore miss the mark in asserting that the Second Circuit opinion stands only for the proposition that a plan administrator cannot offer two different interpretations of precisely the same

plan terms. No district court will read the opinion that way, because those were plainly not the facts of the case. The Second Circuit instead held that no deference was due to the Plan Administrator's interpretation "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." (Pet. App. 13a (emphasis added).)[4]

It is precisely this holding – that no deference is due to an interpretation of a plan that does not rise to the level of an actual "decision" on a benefits claim – that conflicts with Supreme Court and Circuit authority. (Pet. at 12-22.) That holding also subjects the nation's ERISA plans to great uncertainty about how those plans will be interpreted. (*Id.* at 25-26.) For these reasons, the Court should grant plenary review of the first question presented or, at a minimum, should remand for reconsideration in light of the recent decision in *Glenn*.

Second, even as construed by the *Pietrowski* Respondents, the Second Circuit decision is worthy of this Court's review. According to Respondents, the Second Circuit decision stands for the proposition that "once an ERISA plan administrator's original

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[4] The fact that the Second Circuit went on to remark, in a passing statement discussing the extent of other authority on this question, that "the same terms" of the Plan had been construed earlier (Pet. App. 13a), does not obscure the force or scope of the court's actual holding that there was no "decision" of the Plan Administrator that could be accorded *Firestone* deference.

interpretation of plan language is rejected, any 'secondary' interpretation advanced by the administrator is no[t] an exercise of discretion entitled to deference" but "*merely a litigation position.*" (*Pietrowski* Pet. at 10 n.3.) This one-bite-at-the-apple principle itself conflicts with decisions of this Court and other Circuits.

The Seventh Circuit has squarely held that, if an issue of plan interpretation "did not ripen into an 'apple' ready to be bitten" until after an initial court ruling, courts must seek the views of the plan administrator following that ruling. *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008); *accord Gallo* v. *Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996) (Posner, C.J.). Similarly, in *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008), the Eleventh Circuit expressly required a district court to defer to a plan administrator's interpretation of plan terms on remand, notwithstanding its determination that the administrator's denial of benefits under the plan had been arbitrary and capricious. These decisions directly conflict with the one-bite-at-the-apple principle that Respondents attribute both to the Second Circuit in the decision below and to the Ninth Circuit in *Grosz-Salomon* v. *Paul Revere Life Insurance Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001). (*Pietrowski* BIO at 9-10.) Indeed, the *Pietrowski* Respondents do not bother to deny that their reading of the Second Circuit's decision creates a conflict with *Pakovich* and *Oliver*.

Respondents' reading of the Second Circuit decision also places that decision at odds with this

Court's decisions in *Firestone* and *Glenn*. According to Respondents, an interpretation of a plan first offered in litigation deserves no *Firestone* deference, presumably because such an interpretation might be tainted by a conflict of interest. (*Pietrowski* BIO at 9, 10 n.3.) But *Glenn* holds that even a direct conflict of interest on the part of a plan administrator does not justify *de novo* review of the plan administrator's interpretation of an ERISA plan. (Pet. 19-21.)

Moreover, *Firestone* and *Glenn* hold that a plan administrator is entitled to deference *based on the authority provided to the plan administrator in the plan documents*. (*Id.* at 17-19.) Here, the Plan documents do not limit the Plan Administrator's authority to interpretations rendered outside of litigation; nor do they limit the Plan Administrator to a "single bite at the apple." (Pet. App. 142a.) The Second Circuit thus refused to accord *Firestone* deference to the Plan Administrator *for reasons having nothing to do with the grant of authority in the Plan* – in direct contravention of *Firestone* and *Glenn*.

C. Petitioners Did Not Waive The First Question.

Both sets of Respondents assert that Petitioners waived any argument that the District Court should have remanded the case to the Plan Administrator for an interpretation of the pre-amendment terms of the Plan. (*Pietrowski* BIO at 17; *Frommert* BIO at 22.) This argument is a red herring: Petitioners do not argue that there should have been a remand to the Plan Administrator.

In the wake of *Frommert I*, the Plan Administrator provided the District Court with a considered interpretation of the pre-amendment terms of the Plan. (*E.g.*, Pet. App. 144a.) In fact, the Second Circuit was persuaded that the Plan Administrator had placed his views before the District Court so thoroughly that "nothing" would have been gained by remanding to the Plan Administrator for further proceedings. (*Id.* at 11a.) Accordingly, Petitioners are not arguing that there should have been a remand to the Plan Administrator. Petitioners argue instead that the courts below should have deferred to the interpretation of the Plan Administrator that was admittedly presented to the District Court.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION.

The Second Circuit compounded its error of refusing to accord *Firestone* deference to the Plan Administrator by improperly deferring to the District Court's so-called "allowable discretion" to interpret the Plan on remand. (Pet. 29-33.) Under settled law, district courts do not have any "allowable discretion" regarding the interpretation of ERISA plans; they are obliged to read such plans *correctly*. (*Id.*) The Second Circuit's contrary holding exposes plan administrators to the alarming prospect that different district courts will exercise their "allowable discretion" to adopt different interpretations of the very same ERISA plan. (*Id.* at 33-34.)

Respondents counter that an "allowable discretion" standard of review was proper because

the district court was crafting a remedy rather than engaging in an ordinary act of plan interpretation. (*Frommert* BIO at 12; *Pietrowski* BIO at 10.) This argument goes astray by assigning talismanic significance to the Second Circuit's statement that the task of the District Court on remand was to "fashion[] the appropriate remedy." (Pet App. at 51a.) While it is obviously true that the District court had to fashion a remedy on remand, it is equally true that, in order to fashion that remedy, the District Court was required to determine "how prior distributions were to be treated" under "the pre-amendment terms of the Plan." (*Id.*) The fact that the District Court was tasked with awarding a remedy does not insulate from appellate review the interpretation of the Plan that underlies that remedy.

Petitioners acknowledge the authority holding that district courts have discretion to craft equitable remedies under ERISA. None of those decisions, however, holds that an act of *plan interpretation* falls within the scope of that equitable discretion. For example, the First Circuit decision cited by the *Pietrowski* Respondents (at 10-11) did not involve plan interpretation; rather, the district court in that case determined that the plan administrator's factual findings were "without any record evidence supporting the termination" of a participant's benefits. *Cook* v. *Liberty Life Ins. Co.*, 320 F.3d 11, 18 (1st Cir. 2003). Only under those circumstances did the First Circuit review a decision to award retroactive benefits under an abuse of discretion standard. *Id.* at 23-24.

Similarly, in *Grosz-Salomon*, the Ninth Circuit reviewed for abuse of discretion a district court's decision to award retroactive benefits after rejecting a plan administrator's factual findings as arbitrary and capricious. 237 F.3d at 1162-63. That case, too, did not involve a dispute over plan terms. Indeed, the Ninth Circuit expressly acknowledged that the case might have been different had the plan administrator "misconstrue[d]" the plan or "appl[ied] the wrong standard" in evaluating the participant's benefits claim. *Id.* at 1163. Thus, neither case supports the Second Circuit's application of the "allowable discretion" standard of review to a district court's interpretation of plan terms.

The holding of the Second Circuit – that district courts have "allowable discretion" in interpreting plans during the course of remedying an ERISA violation – is inconsistent with settled law. That holding, if allowed to stand, will seriously disrupt the administration of ERISA plans by exposing such plans to conflicting interpretations by different district courts. Plenary review (or summary reversal) of the decision below is therefore warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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