No. 06-1398

IN THE
Supreme Court of the United States

AT&T PENSION BENEFIT PLAN, AS SUCCESSOR TO THE AMERITECH MANAGEMENT PENSION PLAN,
Petitioner,

v.

LINDA CALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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May 20, 2008

CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The Solicitor General does not dispute that a court of appeals decision applying canons of interpretation that invariably deprive an ERISA plan administrator of his or her discretion to interpret ambiguous plan language would be contrary to this Court's direction and deepen several existing circuit splits. He asserts, however, that the Seventh Circuit did not follow that course. As explained below, that assertion ignores the reasoning of the Seventh Circuit, as evident on the face of its opinion. Once that argument is put to one side, it is clear that this Court's review is warranted to obtain national uniformity as to these recurring interpretative issues—issues that are relevant not just to this case, but also to *all* interpretations of ambiguous language in the 730,000 ERISA plans with $4.9 trillion in assets. The Court should also grant review to provide clarity as to the frequently arising prejudgment interest issue under ERISA, where the circuit courts are in disarray.

I. THE SEVENTH CIRCUIT'S ANALYSIS OF THE PLAN TERMS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS INDEPENDENTLY SIGNIFICANT

a. The government contends that this case does not warrant plenary review because the Seventh Circuit properly applied the deferential review standard required by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). According to the Solicitor General, the circuit court applied that standard, but simply concluded that the Plan administrator's decision was "contrary to [the] plan's plain language." SG Br. 12. With respect, that conclusion disregards the reasoning that the Seventh Circuit actually employed, as revealed on the face of the court of appeals' opinion. The circuit court's circui-

tous analysis went far beyond the plain language of the Plan and led the court to second-guess the Plan administrator as to matters that are, at the least, ambiguous.

The Seventh Circuit first concluded that a lump-sum early retirement benefit is an "accrued benefit" under the relevant provision of the Ameritech Plan, Section 12.1. The court reached that result, even though, as all parties (including the Solicitor General) agree, the benefits at issue here are *not* "accrued benefits" under ERISA, the agency regulations implementing that statute, or prior case law. *See* SG Br. 13 n.1.

The Seventh Circuit thus could not rely on the plain text of this key term. Instead, it decided that a lump-sum early retirement benefit must be an "accrued benefit" under Section 12.1 because that benefit did not fit in the *other* category of benefits enumerated in Section 12.1—"optional form[s] of benefit." Pet. App. 7a. Again, on that point, the Seventh Circuit could not and did not rely on the text of the Plan. To the contrary, the court conceded that the meaning of the term "optional form of benefit" is "*obscure*." *Id.* (emphasis added). Faced with that concededly unclear language, the court looked beyond the text of the Plan to yet a third term—"early-retirement benefit"—that is not even referenced in Section 12.1, but which the Seventh Circuit thought properly described the benefit at issue here. *See id.* The court then concluded, for reasons left unexplained in the decision, that, because "early-retirement benefits" are "*treated as* accrued benefits" (*id.* at 8a (emphasis added)) under the same statutory anti-cutback provision (29 U.S.C. § 1054(g)) that all parties agree does not assist Respondent here, it

is an "accrued benefit" under the terms of the Plan. Pet. App. 8a. The Seventh Circuit further believed that "the separate treatment" of "optional form of benefit" under Section 12.1 "implie[d]" that the Plan intended to treat lump-sum early retirement benefits "as accrued benefits within the meaning of the first clause" of that provision. *Id.*

Even that roundabout reasoning was not sufficient to get the circuit court to its conclusion that the benefit at issue here was covered by the Plan's anti-cutback rule. The court still needed to explain why an "accrued benefit" was not included within the clause at the end of Section 12.1 exempting Plan changes "permitted by law and applicable regulation" from that anti-cutback rule. *Id.*; *see* Pet. 15-16 (explaining that the most natural way to read the provision is that the savings clause applies to both an "accrued benefit" and "optional form of benefit" as the clause is not set off by any punctuation). On that point, the court never discussed the full text or punctuation of Section 12.1, but instead suggested that it could have been written differently if the Plan wanted to include "accrued benefits" within that exemption. *See* Pet. App. 9a.

The circuit court supported its inference from that potential alternative formulation by explicit reference to the principle that any other construction would not give Section 12.1 "any force" because it would not go beyond the statutory anti-cutback rule. *Id.* The court was equally clear in stating that there was a "practical reason" in cases such as this one for applying *contra proferentem* because Respondent might not have retired had she known the Plan's interpretation of Section 12.1. *Id.*

Whatever the merit of this analysis (and it is wrong), it assuredly is not grounded in the "plain text" of the Plan. Even a cursory review of the Seventh Circuit's ruling shows that the court relied on the meaning of provisions that the court conceded were "obscure," as well as a series of interpretative principles that would be relevant only where the text is ambiguous. It is that substantive analysis, not the label the Seventh Circuit gave to it, that is relevant to this Court.[1]

b. Once it is acknowledged that the Seventh Circuit's decision on its face goes beyond adherence to clear language, the Solicitor General's arguments against certiorari lose persuasive force.

The Solicitor General claims that this case does not create a circuit conflict regarding whether ERISA plan provisions should be interpreted to accord with

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[1] *See*, *e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (reversing for district court's failure to grant appropriate level of deference, despite "[t]he District Court['s] purported [recognition of] the appropriateness of deference to Congress when that body was exercising its constitutionally delegated authority over military affairs," explaining that, "[a]lthough the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization"); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985) (reversing as abuse of discretion district court's purported application of Supreme Court precedent that, in substance, district court did not apply); *California v. Roy*, 519 U.S. 2, 7-8 (1996) (Scalia, J., concurring) (explaining that reversal of Ninth Circuit was proper because, although "the Ninth Circuit purported to be applying the *O'Neal* [*v. McAninch*, 513 U.S. 432 (1995)] standard [of harmless error in jury instructions]," the court impermissibly "impart[ed] to the determination a black-and-white character which it does not possess").

relevant statutory provisions because the Seventh Circuit's decision allegedly rested on the "'literal'" terms of Section 12.1. SG Br. 15 (quoting Pet. App. 8a); *see id.* at 16 (relying on that same argument to distinguish contrary circuit court precedent). As demonstrated above, that conclusion ignores the actual analysis conducted by the court of appeals.

It is likewise no answer that Section 12.1 does not "track ERISA" word-for-word. *Id.* at 15. The issue here is important precisely so that plans can elucidate the benefits they are providing in a manner they determine will be most helpful to plan participants. Under the Seventh Circuit's decision, any attempt to use language not precisely the same as the often-obscure text of ERISA or the Internal Revenue Code of 1986, as applicable, risks imposing extra-statutory burdens on the plan. *See* Pet. 20-21. That ruling creates an enormous practical problem, given the wide variation of terms across pension plans. *See* Pet. 25 (noting that the approximately one dozen plans that AT&T sponsors all contain an anti-cutback provision, but the language differs across plans and none simply recites the language of the relevant ERISA section). The Seventh Circuit's decision thus undermines ERISA plans' function as a comprehensible source for beneficiaries' rights, and the circuit court's ruling provides a strong incentive simply to incorporate complex statutory language in the text of a plan to avoid inadvertently granting rights to some plan participants to the potential detriment of others.

In this regard, the Seventh Circuit's decision cannot be squared with, *inter alia*, the Fifth Circuit's holding that "[e]xtra-ERISA commitments . . . must be stated in clear and express language." *Spacek v.*

Maritime Ass'n – I.L.A. Pension Plan, 134 F.3d 283, 293 (5th Cir. 1998), *abrogated on other grounds by Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004) (internal quotation marks omitted); *see* Pet. 19-20 (collecting additional conflicting circuit court decisions). And the consequence of that split is particularly important in this context, because, given the multi-state nature of many plans, plaintiffs can engage in forum shopping to find the circuit with the most favorable rules. *See* Pet. 24.

Contrary to the government's argument, the fact that *Steiner Corp. Retirement Plan v. Johnson & Higgins*, 31 F.3d 935 (10th Cir. 1995), concluded that lump-sum benefits were an "optional form of benefit" under ERISA, and not a particular plan, does not diminish its significance in showing that this case would have been resolved differently in other circuits. *See* SG Br. 14. As discussed, the Seventh Circuit, in conflict with the Tenth Circuit and other courts, went through interpretive contortions to read the terms of the Plan in a manner inconsistent with the statute, and thus reached a result that would not have been reached in the Tenth Circuit. *See*, *e.g.*, *Welch v. UNUM Life Ins. Co.*, 382 F.3d 1078, 1086 (10th Cir. 2004) ("[A]n extra-ERISA commitment . . . must be stated in clear and express language."). Moreover, the fact that *Steiner* holds that a lump-sum benefit is an "optional form of benefit" even at normal retirement age (*see* SG Br. 14) simply demonstrates how far the Seventh Circuit has departed from prior understandings in concluding that, when an employee both chooses early retirement and selects a lump-sum payment instead of an annuity, she is not exercising an "optional form of benefit." *See also* Pet. 16 (citing precedent establishing that

whether a benefit qualifies as "optional" in this context depends on whether the plan participant has a choice).

The Solicitor General concedes (at 16) that reliance on *contra proferentem* would be contrary to the holdings of multiple other circuits. *See* Pet. 21-23 (citing cases establishing the deep and well-established circuit split on this issue). And the government likewise does not dispute that, as demonstrated in the petition, application of *contra proferentem* is a recurring issue of general importance that affects the 730,000 ERISA plans and their 100 million participants. *See* Pet. 24. Thus, as the America Benefits Counsel and the ERISA Industry Association have made clear in their brief as *amici curiae* (at 2), there are "important practical consequences" to the Seventh Circuit's decision to depart from the rule adopted by other courts of appeals.

The government again suggests that the Seventh Circuit's decision rests on "'unambiguous'" language, SG Br. 17 (quoting Pet. App. 11a), an argument that, as shown above, ignores the substance of the analysis actually undertaken by the circuit court. And it is incorrect to suggest that the Seventh Circuit did not indicate "that *contra proferentem* actually *applied* in this case." *Id.* In fact, as the Solicitor General acknowledges, the circuit court made clear that there was a "practical reason" to apply that principle here, as this specific Respondent might have taken different action had she known of the Plan administrator's interpretation. *See* Pet. App. 9a. And, whether or not the parties anticipated in their briefing that the Seventh Circuit would invoke this interpretative canon, the fact that the Seventh Circuit employed this principle, and thus passed on this issue, provides

a wholly sufficient basis for the Court to review this recurring question of general importance as to which the circuits are deeply divided. *See*, *e.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992).

II. THE COURT SHOULD ALSO GRANT REVIEW AS TO THE RECURRING ISSUE OF WHETHER PREJUDGMENT INTEREST IS AVAILABLE

As the petition in this case explains, Respondent is not entitled to prejudgment interest under either Section 502(a)(1)(B) of ERISA, which authorizes a plan participant or beneficiary to bring an action "to recover benefits due to him *under the terms of his plan*," 29 U.S.C. § 1132(a)(1)(B) (emphasis added), or Section 502(a)(3), which authorizes actions by participants, beneficiaries, or fiduciaries to obtain "appropriate *equitable* relief" to redress violations of ERISA or enforce plan provisions," *see id.* § 1132(a)(3)(B) (emphases added).

Section 502(a)(1)(B) does not apply here, because the Plan does not provide for prejudgment interest. And the Seventh Circuit's conclusion that prejudgment interest is equitable relief, *see Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990), is in tension with this Court's conclusion in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), that, where "petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity," recovery is unavailable under Section 502(a)(3). *Id.* at 210; *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) ("[ERISA's] carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did

not intend to authorize other remedies that it simply forgot to incorporate expressly'") (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).[2]

The Solicitor General does not dispute (at 19-20) that the Seventh Circuit and other circuit courts have authorized prejudgment interest as equitable relief under Section 502(a)(3), nor does he attempt to square that result with *Great-West*. The Solicitor General does suggest (at 20) that the Seventh Circuit may have acted under Section 502(a)(1)(B) here, but that would be contrary to both the Plan language and Seventh Circuit precedent. *See Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999) ("They want the interest they could have earned had they been paid the money in a timely fashion and invested it, but interest is not a benefit specified anywhere in the plan, and only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B).").

Finally, the Solicitor General does not dispute the wide variety of standards used in computing prejudgment interest in the different circuits, nor does he contest that this issue has significant practical importance in determining the size of awards in cases like this one. *See* Pet. 28-29. And, although the Solicitor General suggests that some variation among different district courts is unobjectionable in this context, the Fifth Circuit requires a specific standard based on state law that differs from the standard mandated here. *See Hansen v. Continental*

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[2] Nothing in the Seventh Circuit's decision suggests that the prejudgment interest issue was waived in the briefing below, and in fact Petitioner argued that ERISA does not authorize prejudgment interest. *See* Pet. Reply 3-4; *compare* SG Br. 18.

Ins. Co., 940 F.2d 971, 984 (5th Cir. 1991). And, as detailed in the petition (at 28-29) and reply (at 8-9 & n.5), the Seventh Circuit has specifically rejected the appropriateness of the federal statutory rate that has been affirmed in at least five other circuits.

The disarray in the circuits on this point thus involves much more than "modest differences" (SG Br. 21), and the Court should grant review so that prejudgment interest awards in ERISA cases will result from a consistent legal standard, regardless of where a plaintiff files suit. Indeed, in this case alone, use of the statutory rate of interest adopted in other circuits but rejected in the Seventh Circuit would have reduced the prejudgment interest award by approximately one-third (about $2 million). *See* Pet. 28.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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