

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 Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit*

---

**BRIEF OF AMICUS CURIAE  
RICHARD C. CAPONE  
IN SUPPORT OF RESPONDENTS**

---

RISHI BHANDARI  
*Counsel of Record*  
EVAN MANDEL  
RUDOLPH DELSON  
MANDEL BHANDARI LLP  
11 Broadway, Suite 615  
New York, NY 10004  
(212) 269.5600  
rb@mandelbhandari.com

November 20, 2009

*Counsel for Amicus Curiae*

**TABLE OF CONTENTS**

	<i>Page</i>
TABLE OF CITED AUTHORITIES . . . . .	ii
INTEREST OF THE AMICUS CURIAE . . . . .	1
INTRODUCTION . . . . .	1
BACKGROUND . . . . .	4
SUMMARY OF ARGUMENT . . . . .	5
ARGUMENT . . . . .	6
1. The Court should affirm the Second Circuit's rubric, which rewards employers who draft clear and transparent retirement plans . . .	6
2. The Court should reject the alternative to the Second Circuit rubric, <i>i.e.</i> serial deference to plan administrators, because it rewards employers who draft plans poorly .	8
3. The Court should reject the alternative to the Second Circuit rubric, because a rubric of serial deference will result in a regulatory backlash, heightening the burden of ERISA compliance on business . . . . .	10
CONCLUSION . . . . .	11

## TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>Cases</b>	
<i>Cent. States Se. &amp; Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559 (1985) . . . . .</i>	6, 7
<i>Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315 (4th Cir. 2008) . . . . .</i>	5, 7
<i>Firestone Tire &amp; Rubber Co. v. Bruch, 489 U.S. 101 (1989) . . . . .</i>	2
<i>Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008) . . . . .</i>	2
<i>Standard Ins. Co. v. Morrison, No. 08-35246, 2009 U.S. App. LEXIS 23598 (9th Cir. Oct. 27, 2009) . . . . .</i>	10
<i>Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987) . . . . .</i>	6

### Statutes & Regulatory Materials

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 <i>et seq.</i> . . . . .	<i>Passim</i>
<i>Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43013 (proposed July 23, 2008) . . . . .</i>	11

## INTEREST OF THE AMICUS CURIAE

Richard C. Capone is the former Chief Executive Officer of UBS AG in the Americas.<sup>1</sup> He is also a former member of UBS AG's Managing Board, and a former Chief Executive Officer of Warburg Dillon Read LLC, the investment banking subsidiary of UBS AG in the Americas.

When he was CEO of UBS AG in the Americas, Mr. Capone had ultimate responsibility for operations that employed thousands of individuals in the United States, many of whom received benefits governed by ERISA.

Mr. Capone submits this Amicus Curiae brief to explain the value to American business of the decision reached by the Second Circuit in this case, and to dispel any impression that the arguments made by Petitioners' Amici represent the uniform opinion of America's chief executive officers.

## INTRODUCTION

What makes this ERISA case important is a practical concern: how best to encourage openness and fairness in the marketplace where employers compete for employees.

---

<sup>1</sup> The parties have consented to the filing of this *amicus curiae* brief, and the letters of consent have been filed with the Court. Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and that no person or entity other than Amicus and his counsel has made a monetary contribution to the preparation or submission of this brief.

In deciding this case, the Second Circuit applied a rubric that encourages employers to be clear and consistent in writing and explaining their retirement benefits plans (by rewarding plan administrators with deference), and that discourages employers from being unclear or inconsistent (by declining to defer to plan administrators serially). Employers compete for employees in a free marketplace, and the Second Circuit's rubric rewards those, and only those, who compete in clear and fair terms.

Although this case involves the Xerox Corporation, similar events could play out almost anywhere. A company offers a package of retirement benefits to its employees; over the years that company makes changes to that plan and to its descriptions of that plan; some of the company's employees, as they approach retirement, learn that their retirement benefits will be lower than they had hoped or believed. If those employees bring lawsuits, a court will quickly find itself in the same position as the district court did in this case, construing the meaning of the company's benefits plan.

In the first instance a court defers to the determinations of the plan administrator, assuming the company's benefits plan provides the plan administrator with discretion. *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2347-48 (2008); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-15 (1989). Such deference makes sense: the plan administrator is not only the person whom the employer most depended upon to manage its benefits packages, but also the person whom the employees most depended upon to explain their benefits to them.

For employers who have clearly written and consistently explained their retirement benefit plans, deference to the plan administrator ensures that ERISA claims can be resolved swiftly and efficiently; deference also ensures, to the company with a well-written and well-explained plan, that the destiny of the fund will be determined by experts on and fiduciaries of that plan, and not by the courts. *See, e.g., Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 320-23 (4th Cir. 2008) (discussing the principles underlying deference to ERISA plan administrators, including "the desire of those who establish ERISA plans to preserve at least some role in their administration.")

But deference must have its limits. For example, courts should not defer to a plan administrator who, trying to avoid the unintended consequences of a poorly drafted plan, makes determinations that violate the terms of that plan. And if the court finds that the determination of a plan administrator actually violates ERISA (for example if enforcing the plan administrator's determination would amount to a retroactive cut-back of benefits owed), then the court need not defer to the plan administrator's approach when remedying the illegality.

This is the rubric that the Second Circuit has applied here. It is a rubric that fosters openness and fairness in the marketplace where employers compete for employees, and it would benefit American business if the Second Circuit's judgment were upheld.

## BACKGROUND

It is worthwhile to summarize, in the broadest terms, what happened after Xerox's employees brought this particular case to court.

The district court initially deferred to the Xerox plan administrator's determinations under the Xerox retirement plan, approving the plan administrator's consistent use of the so-called "phantom accounts" methodology. Petitioners' Appendix ("Pet. App.") at 85a-86a.

The employees appealed that decision, and the Second Circuit found that Xerox "attempted to implement the phantom account offset without properly amending the terms of the Plan or providing adequate notice to rehired employees." Pet. App. at 37a. This meant that "former employees contemplating returning to Xerox were denied the opportunity to make a meaningful decision regarding whether they would accept the terms of Xerox's pension plan." *Id.* Basically, when Xerox entered the marketplace for employees, it did not compete for those employees in clear, fair terms.<sup>2</sup>

---

<sup>2</sup> Xerox, through its Amici, argues that disallowing the phantom offset constitutes a windfall for re-hired employees. This is not the case. There would be nothing unusual about Xerox offering veteran employees an incentive to return to the company. Veteran employees are valuable to a corporation because of their pre-existing familiarity with a corporation and its culture. And, if the aim is to sweeten the deal for any veteran employees who return, there is no difference between offering re-hired veterans a retirement plan that affords a smaller offset value to prior distributions, or offering them compensation packages that are attractive in different ways.

The Second Circuit asked the district court to fashion a remedy, Pet. App. at 51a, and the district court just did that, Pet. App. at 102a-108a, but there was a second appeal, this time filed by Xerox and its plan administrators. They argued that the district court should have deferred to the Xerox plan administrators a second time; in essence they argued that the district court should not only have asked the plan administrator to formulate a second interpretation of the Xerox retirement plan in light of the Second Circuit's rejection of the "phantom accounts," but then should have deferred to that new interpretation. Pet. App. at 12a-14a.

The Second Circuit disagreed, rejecting "the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA." *Id.*

The Second Circuit applied the right rule.

### **SUMMARY OF ARGUMENT**

1. The Court should affirm the decision below, because the rubric applied by the Second Circuit rewards employers who go to the trouble and expense of drafting clear, transparent and unambiguous retirement plans.

2. Under the alternative rubric, in which courts serially defer to plan administrators who have miscommunicated the contents of their plans,

employers who draft unclear, opaque or ambiguous plans will be rewarded.

3. Furthermore, a rubric of serial deference will lead to a regulatory backlash—further legislation, further regulation and thus further administrative burdens on American business.

## ARGUMENT

1. The Court should affirm the Second Circuit's rubric, which rewards employers who draft clear and transparent retirement plans.

When considering the procedures governing ERISA disputes, the Court should consider how to reward companies who take seriously the responsibility of being frank and open with their employees about their retirement benefits. *See Cent. States Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 569-70 (1985) (noting the Court's history of considering the policy concerns underlying ERISA, including the concern of how best to ensure workers receive the benefits they have been contractually promised). The retirement benefits plan that a company offers to its employees is, at the same time, one of that company's most important tools for recruiting outstanding talent, *see Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1051 (7th Cir. 1987) (Posner, J.) ("[T]he less an employee's pension rights are worth, the higher are the wages that he will demand"), and one of that company's largest ongoing financial obligations.

One of the best rewards for companies that invest the necessary time and money to research and design a clear plan is predictability, not least because an employer must be able to know what its plan will cost to maintain. *See Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in the judgment) ("[C]ertainty and predictability are important criteria under ERISA"). And one of the best ways for courts to provide predictability to employers is by deferring, in the first instance, to the determinations of a company's plan administrator.

The reason is simple. A company's executives rely on the plan administrator's expertise about the plan in making their own decisions, so when a court defers to a plan administrator, it is in effect enforcing the expectations of that company's management. *See, e.g., Evans*, 514 F.3d at 323. Employers that have drafted clear and transparent plans—and that have communicated the contents of those plainly and completely to their employees—should be rewarded with deference.

By contrast, employers who draft their retirement plans poorly should not benefit from the same deference; for example, if a plan is so inconsistently presented or so incoherently constructed that to enforce the plan administrator's determinations under that plan would be to retroactively amend the plan and to retroactively reduce benefits, *see, e.g., Pet. App.* at 37a-51a, then deference is inappropriate. After all, just as an employer must be able to know what its plan will cost to maintain, its employees must be able to know that the plan will ultimately provide. *See Cent. States*, 472 U.S. at 569-70. This is not to say that

courts should intercede every time an employee's understanding of a retirement benefits plan diverges from a plan administrator's. But where a plan is so badly written or so badly presented that to enforce the plan administrator's understanding would violate ERISA, courts must be able to fashion a monetary remedy.

The reason, again, is simple: It is the court, and not the plan administrator, who is best positioned to determine what monetary remedy suits the contractual transgression. That is what courts do.

The Second Circuit's rubric encourages diligent and frank employers and discourages lazy or dishonest ones. It is a rubric that encourages fair competition and open exchanges in the marketplace where employers compete for employees—and therefore a rubric that is good for American business. The judgment of the Second Circuit should therefore be upheld.

2. The Court should reject the alternative to the Second Circuit rubric, *i.e.* serial deference to plan administrators, because it rewards employers who draft plans poorly.

To reverse the Second Circuit, by contrast, would be to create a perverse incentive. Honest employers will strive to give their employees a square deal no matter what the law permits, and will carry the necessarily higher costs of drafting good retirement plans. But less honest or less diligent employers, knowing that at every stage of an ERISA lawsuit the courts will defer to the opinions of their plan

administrators, will have an incentive to promulgate unclear benefits plans. Why undertake the expense of drafting a clear and consistent plan, why spend the time to draft ancillary materials that cannot be misconstrued, if a cheaply, quickly and sloppily written plan will get a better result?

And this is exactly what serial deference will permit: employers who write unclear or misleading plans will know that, even if an employee sues and even if a court finds that the plan violates ERISA, it will be the plan administrator who will fashion the remedy for that violation. If a court finds that the plan administrator's remedy is improper, it will be the plan administrator who will fashion the alternative remedy. Under the rule of serial deference, no matter what terms a benefits plan contains, no matter what promises that plan makes, the employer and the employer alone, through its agent the plan administrator, will control the contract.

The potential for abuse, under a rubric of serial deference, is extensive. Dishonest companies can lure promising employees away from honest employers with promises of excellent retirement benefits that they never intend to fulfill. Dishonest companies can deny benefits to aging former workers—essentially depriving their workers of the peace of mind in retirement that a benefits plan is meant to ensure—simply by insisting that their plan administrators always interpret benefits provisions narrowly. The results for the American labor market would be disastrous.

3. The Court should reject the alternative to the Second Circuit rubric, because a rubric of serial deference will result in a regulatory backlash, heightening the burden of ERISA compliance on business.

It is already costly for companies to comply with ERISA. American businesses have no interest in seeing the cost of compliance rise further. And requiring courts to serially defer to plan administrators will only lead to legislation that will raise the costs of ERISA compliance.

After all, the consequences of a rubric of serial deference are predictable: employers will make generous-sounding promises that they may not intend to fulfill; employees will have perfectly justifiable expectations about their income in retirement that will be disappointed with impunity; and employees who contest the determinations of their plan administrators will encounter serial procrastination.

Legislators and regulators, displeased with these consequences, will step in and impose greater disclosure rules on employers who offer plans governed by ERISA. This is all but inevitable: the desire to curb discretion is already driving a rise in state regulation aimed at so-called "discretionary clauses," *i.e.* clauses that give insurance administrators discretion to construe the terms of their own in insurance contracts, *see Standard Ins. Co. v. Morrison*, No. 08-35246, 2009 U.S. App. LEXIS 23598, at \*3 (9th Cir. Oct. 27, 2009) (O'Scannlain, J.) (noting the trend); and the desire to mandate greater clarity in retirement benefits plans is already driving an increase in ERISA

regulation, *see, e.g., Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 73 Fed. Reg. 43013 (proposed July 23, 2008).

Disclosure of retirement benefits is laudable. Honest companies already go to great lengths to achieve it. The rubric that the Second Circuit followed in this case properly aligns incentives and disincentives to encourage companies to be clear, complete and honest in writing and sharing their retirement benefit plans. To reverse the Second Circuit would only result in intercession down the road by legislators and regulators—with all the costs and delays (and costs of delays) that would entail.

## CONCLUSION

For the foregoing reasons, this Court should uphold the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RISHI BHANDARI  
*Counsel of Record*  
EVAN MANDEL  
RUDOLPH DELSON  
MANDEL BHANDARI LLP  
11 Broadway, Suite 615  
New York, New York 10004  
212.269.5600

*Counsel for Amicus Curiae*