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No. 08-810

In The
Supreme Court of the United States

SALLY L. CONKRIGHT, ET AL., 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 *AMICI CURIAE* JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, ET AL., AND THE PENSION RIGHTS CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The amici, Janice C. Amara, Gisela R. Broderick, and Annette S. Glanz are named Plaintiffs in a class action captioned *Amara, et al. v. CIGNA Corp., et al.,* which is pending in the Second Circuit (08-3388 and 08-3460 (XAP)).[2] The *Amara* case covers a nationwide class of over 27,000 current and former employees of the CIGNA Corporation. Like *Frommert*, *Amara* concerns violations of ERISA's disclosure rules and the district court's authority in crafting remedies for those violations. See 534 F.Supp.2d 288 and 559 F.Supp.2d 192 (D.Conn. 2008). The amici believe that this Court's decision in *Frommert* may affect their rights to retirement benefits and because of *stare decisis* that there may be no other case in which this Court will reconsider those rights. For the amici and other current and former employees covered by this class, the consequences of reductions in retirement benefits that are not understandably and timely disclosed range from making it difficult to pay for items such as food and utilities to making it difficult to pay for medical care, the rent or a mortgage.

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[1] Pursuant to Supreme Court Rule 37.6, the amici curiae state that no person or entity other than the amici and the undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Petitioners and Respondents have consented to the filing of this amicus brief in letters on file with the Clerk of the Court.

[2] The Second Circuit summarily affirmed on October 6, 2009, 2009 WL 3199061, thereby denying both parties' appeals, but CIGNA has filed a motion to stay the mandate pending a petition for certiorari to this Court and the Plaintiffs are considering a petition.

The Pension Rights Center is a Washington, D.C. nonprofit consumer organization, which has as its mission the protection and promotion of retirement security for workers, retirees and their families. For 33 years, the Center has provided information and assistance to thousands of participants and beneficiaries and has represented their interests before the federal administrative agencies and the courts. The Pension Rights Center is frequently invited to testify before Congressional committees and has testified in support of both of the statutory provisions at issue in this case: The "anti-cutback" rule in ERISA §204(g), 29 U.S.C. §1054(g), as amended by the 1984 Retirement Equity Act ("REA"), and the advance notice of reduction requirement in ERISA §204(h), 29 U.S.C. §1054(h), as enacted in 1986 and amended in 2001. The Pension Rights Center believes it is critical to the retirement security of participants and beneficiaries covered by private pension plans that the federal courts are authorized to craft appropriate remedies where it has been shown that plan administrators failed to comply with the statutory requirements that Congress enacted to protect participants and their spouses.

Counsel for the amici have litigated many of the issues that are currently before this Court in the *Amara v. CIGNA* class action. Counsel for the amici have also prepared amicus briefs for this Court in a number of cases, including *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992);*Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432 (1999); and *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), and are thus qualified to submit this brief.

BACKGROUND

The *Frommert* litigation is a multi-plaintiff action involving 104 former Xerox employees. The plaintiffs challenge an offset from their retirement benefits based on lump sum distributions made before Xerox rehired them for second terms of employment. For purposes of effecting the offset from their future pensions, Xerox took the previous distributions and inflated them by imputing interest equal to the investment returns that Xerox enjoyed during the periods between the prior distribution and their subsequent retirement. Internally, Xerox called this a "phantom offset" because the interest that Xerox was imputing was not actually earned by the employees whose pension benefits were reduced.

In a 2006 decision ("*Frommert I*"), the Second Circuit found that the plan administrator's position that this phantom offset had "always" been in Xerox's plan document was "unreasonable" under either a "de novo" or an "arbitrary and capricious" standard of review. 433 F.3d 254, 266. Xerox pointed to a "non-duplication" provision which had always been in the plan. The "nonduplication" provision provided that:

> In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date,...the accrued benefit of such member based on all Years of

> Participation shall be offset by the accrued benefit attributable to such distribution.

The Second Circuit found that this provision and the disclosures in the Summary Plan Descriptions ("SPDs") were insufficient to establish a phantom offset. *Id.* The Second Circuit found that, based on the SPD, the persons who were rehired before 1998 "likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received." *Id.* at 267.

The Second Circuit next turned to the issue of whether Xerox's 1998 amendment to the plan to "clarify" the phantom offset violated ERISA. The Court determined that the amendment violated ERISA § 204(g), the "anti-cutback" rule, to the extent that the amendment was retroactive, and ERISA §204(h), which requires advance notice to employees of any amendment that reduces future pension benefits. *Id.* at 266 and 268.The Second Circuit determined that "sweeping relief" under ERISA §502(a)(3) was not "warranted" in this case because the violations affected the closed group of participants who were rehired before a new SPD was distributed in 1998 which disclosed the phantom offset, and that "the necessary remedies can be fully provided under [ERISA] §502(a)(1)(B)." *Id.* at 269-70.[3] The Second Circuit

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[3] At the same time, the Second Circuit concluded that Plaintiffs' claim for breach of fiduciary duty in the communications about the phantom account could go forward under ERISA §502(a)(3). *Id.* at 270-72.

remanded the case with directions to the District Court that:

> [T]he remedy crafted for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. at 268.

On remand, the District Court conducted a two-day hearing at which representatives of the Plaintiffs and Xerox both testified. The District Court also received pre- and post-hearing memoranda on relief from each side. In the memoranda and at the hearing, Xerox's plan administrator proposed an approach under which an interest rate slightly below the one Xerox previously applied would be used to craft a remedy for the ERISA violations. An actuarial expert testified about financial and actuarial justifications for Xerox's approach. See 535 F.3d 111, 119 (2008). The approach that Xerox advocated did not reflect a past practice and had never been applied in administration of the plan. Respondents' Br. at 54 (citing A940; A1121).

After considering the proposals from all parties, the District Court issued a decision in which it found that "there was no description whatsoever as to the mechanics of this so-called phantom account" in the "non-duplication" provision. 472 F.Supp.2d 452, 457-58 (W.D.N.Y. 2007). The District Court further found that the SPDs distributed before 1998 provided "even less guidance than the Plan," with the only related proviso being that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id.* at 458.

The District Court concluded that in these circumstances the offset should be the "nominal value" of the prior distributions, i.e., the prior distributions without interest, because of the absence of any plan provision or disclosure specifying a rate of interest or a mechanism for a phantom offset. In response to Xerox's proposed approach, the District Court stated that its decision was "based on the language of the Plan and the SPD," not "[w]hat is 'best' from a financial or actuarial point of view." *Id.* at 457.

The Xerox Defendants appealed and in *Frommert II*, the Second Circuit affirmed the District Court's decision "crafting a remedy for the identified ERISA violations." 535 F.3d 111, 123 (2008). The Second Circuit held that:

> The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a

> pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives.

Id. at 119.

In their appeal and petition for certiorari, the Xerox Defendants contend that the District Court was "obligated to defer" to the company-appointed plan administrator's proposal for utilization of an imputed rate of interest in determining the offset.[4]

SUMMARY OF ARGUMENT

This case concerns the judiciary's authority to craft a remedy for an abuse in discretion in interpreting the Plan and violations of two statutory requirements. The statutory requirements protect employees' retirement benefits against reductions by plan amendments and provide for advance notice of any amendment that reduces employees' future retirement benefits. ERISA §§204(g) and (h), 29 U.S.C. §§1054(g) and (h), thus provide that no amendment shall reduce accrued benefits and that an amendment that reduces future retirement benefits without the required advance

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[4] The Second Circuit held that Xerox Defendants had "waived" any argument that the issue of relief should have been "remanded" to the plan administrator, 535 F.3d at 118, and the Defendants-Appellants did not request certiorari on that issue.

notice is ineffective.

In *Central Laborers' Pension Fund v. Heinz,* 541 U.S. 739, 741 (2004),this Court ruled unanimously that ERISA §204(g) "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" *Heinz* held that accrued benefits are reduced not only when the amount is directly decreased, but also when an employer imposes new "conditions" or "materially greater restrictions on the[ir] receipt." 541 U.S. at 744.

In *Frommert I*, the Second Circuit applied *Heinz* in concluding that "although Xerox's phantom account does not directly deplete an employee's pension account, by altering the comparative process, it imposes a condition on the payment of benefits that leads just as surely to a decrease." 433 F.3d at 268.

This Court has also ruled that both the Plan document and the SPD are "documents and instruments governing the plan." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S.Ct. 865, 877 (2009). Plan administrators have a "duty to run the plan in accordance with [these] documents and instruments." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82 (1995). "Under ERISA, both Summary Plan Descriptions and plan amendment summaries 'shall be written in a manner calculated to be understood by the average plan participants.'" *Id.* at 83-84. In terms of "contents," the Department of Labor's regulations follow ERISA §102(b) by requiring SPDs to include "a statement clearly identifying circumstances which may result in ... denial, loss,

forfeiture, suspension, *offset*, reduction or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. 2520.102-3(l) (emph. added).[5] In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989), this Court found that ERISA's disclosure requirements "ensur[e] that the individual participant knows exactly where he stands with respect to the plan."[6]

In *Frommert I*, the Second Circuit determined that Xerox failed to adequately or understandably disclose the "phantom offset" in an SPD before the new SPD was issued in 1998 and that it failed to comply with the advance notice requirement in ERISA §204(h). 433 F.3d at 267-69. The District Court and the Second Circuit found that the only notice about the offset in

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[5] Under ERISA §102(a) and 29 C.F.R. 2520.104b-3(a), summaries of material modifications are required to disclose "any change in the information required" to be disclosed in the SPD, including the "circumstances which may result in loss, forfeiture, ... offset [or] reduction of any benefits that a participant ... might reasonably expect the plan to provide on the basis of the description of benefits."

[6] In *Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 569-70 (1979), this Court also held that "Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA" because "ERISA requires pension plans to disclose specified information to employees in a specified manner, ... in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts."

the prior SPDs was a "proviso that 'the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." 472 F.Supp.2d at 458; 433 F.3d at 265. That led the persons who were rehired before 1998 to "believe[]" that only "the amounts they had actually received" in the past distributions would be "factored into their benefits calculations." 433 F.3d at 267.

The amici respectfully submit that this Court should affirm the District Court's authority to craft relief for these violations without being "obligated to defer" to a remedial proposal by the losing party aimed at lessening the relief. As in this case, private pension plan administrators are not quasi-judicial officers, but are frequently employees of the plan sponsor who carry out their plan-related duties as part of their normal job functions. And as here, they are generally appointed and removable at will by the company's executives, which leaves them with little or no insulation from management influence. The conflicts of interest to which such arrangements lead are well-known and incontestable. See *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2346-50 (2008), ("dual role" as administrator and payor "creates a conflict of interest"; employer's "immediate financial interests" counsel in favor of denying "a borderline claim"; conflict "may extend" to the employer's selection of an administrator).

In spite of these conflicts, or because of them, plan sponsors and their counsel often draft the governing instruments of employee benefit plans to confer broad discretion on plan administrators in interpreting the

plan's terms, to which the courts generally defer. Under ERISA, however, such discretion must always be limited by the "duty to run the plan 'in accordance with the documents and instruments ... *insofar as such documents and instruments are consistent with the provisions of [the statute*].'" *Schoonejongen*, supra, 514 U.S. at 82 (emph. added).[7]

It is critical to the retirement security of participants and beneficiaries covered by the private retirement system that where it has been shown that private plan administrators have failed to comply with the protective provisions of the statute, the federal courts must be authorized to craft appropriate remedies. Under the rubric of an "obligation to defer," Xerox and its amici are blatantly seeking to achieve a quasi-judicial status under which Article III judges will *not* have the authority to impose a remedy for statutory violations unless it is one that a plan administrator recommends. It would be unprecedented for this Court to rule that a federal court is "obligated to defer" to a private party who violates statutory obligations and then proposes to remedy those violations by filling in omitted or statutorily-invalid terms with rules that are financially advantageous to that party's employer, and here, very similar to the ones that caused the violations in the first place.

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[7] Accord *Central States Teamsters v. Central Transp.*, 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA").

As this Court has recognized, the unfortunate truth is that litigants often "seek to evade sanction by predictable 'protestations of repentance and reform.'" *Gwaltney v. Chesapeake Bay Fdn.*, 484 U.S. 49, 67 (1987). The "protestations of ... reform" are frequently couched in proposals that offer less for violations than a strict application of the law may require. In such situations, it is up to the judiciary to make the appropriate decisions on relief based on the violations that have been shown and the statutory objectives, without having to bow to the views of the losing side.

Amici also respectfully submit that there is no conflict with the decisions of other circuits on the issue of the district court's authority to reject "post hoc rationales" or remedial proposals by the losing litigant. As shown below, every circuit has concluded that there is no obligation to defer to post hoc rationales offered for the first time in litigation, much less in crafting relief for violations. A district court may, of course, consider a remedial proposal from either side, but it is not "obligated to defer" to one party's proposal.

ARGUMENT

I. The Second Circuit Properly Determined that the District Court Had Discretion to Craft a Remedy for the Identified Statutory Violations Without Deferring to a Post Hoc Proposal from the Party Who Violated the Law.

As this Court found in *Firestone Tire & Rubber v. Bruch*, supra, 489 U.S. at 109, the arbitrary and

capricious standard of review, also known as an abuse of discretion standard, was "developed" in cases under the Labor Management Relations Act of 1947 (LMRA) and then adopted by some federal courts because "ERISA does not set out the appropriate standard of review for actions under §1132(a)(1)(B) challenging benefit eligibility determinations." The complete expression of this standard is that a denial of benefits will be overturned if it is "arbitrary and capricious, not supported by substantial evidence or erroneous on a question of law." See, e.g., *Thorpe v. Retirement Plan of the Pillsbury Co.*, 80 F.3d 439, 443 (10th Cir. 1996).

In *Bruch,* supra, 489 U.S. at 108, this Court addressed the standard of review for "actions challenging denials of benefits based on plan interpretations." *Bruch* held that "a denial of benefits ... is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." In the latter case, an "abuse of discretion" standard applies, but if the administrator or fiduciary "is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting the *Restatement (Second) of Trusts*, §187, Comment d).

Bruch explicitly "limited" its decision to actions "challenging denials of benefits based on plan interpretations" and stated that "[w]e express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA." 489 U.S. at 108. The Court observed that "Unlike the LMRA,

ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans." *Id.* at 110. As the full expression of the arbitrary and capricious standard shows, when statutory violations are at issue, the standard of review has always been de novo. See, e.g., *Central Laborers' Pension Fund v. Heinz*, supra. Expressed another way, "an erroneous view of the law" is always an abuse of discretion. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

In *Metropolitan Life Ins. Co. v. Glenn*, supra, 128 S.Ct. at 2352, this Court revisited the standard of review for benefit denials in which the fiduciary or administrator is operating under a conflict of interest. *Glenn* held that trust law requires "the reviewing judge to take account of [a] conflict [of interest] when determining whether the trustee, substantively or procedurally, has abused his discretion." This Court found that conflicts of interest are practically endemic in employee benefit plans, but that there is no single prescription for weighing the conflicts. Following *Universal Camera v. NLRB*, 340 U.S. 474 (1951), *Glenn* concluded that there "are no talismanic words that can avoid the process of judging" in weighing conflicts and that "[w]ant of certainty in judicial standards 'partly reflects the intractability of any formula to furnish definiteness of content for all of the impalpable factors involved in judicial review."

Contrary to Petitioners' argument, it is black-letter trust law that "[w]here the court finds that there has been an abuse of a discretionary power," whether it is

abuse of discretion in interpreting a plan due to a conflict of interest or an abuse of discretion by violating a statute, "the decree to be rendered is in [the court's] discretion." G. Bogert & G. Bogert, *The Law of Trusts & Trustees*, §560 at 222 (2d ed.). This Court has never ruled, and no circuit court of appeals has ruled, that instead of having the authority to render an appropriate decree, a district court is "obligated to defer" to a fiduciary's or administrator's financially self-serving proposal for remedying his or her abuses of discretion.

An administrator's discretion also does not extend to determining the effect of statutory requirements on the extent of his or her own discretionary authority and powers. The court must determine the extent of discretionary authority, including the degree to which statutory requirements limit that authority, de novo. 3 W. Fratcher, *Scott on Trusts*, §187.1 (4th ed. 1988). In *Bruch*, this Court quoted *Scott* that:

> The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney.

489 U.S. at 112 (quoting §201).

In this case, following *Bruch*, the Second Circuit's 2006 decision determined that Xerox's position that the

plan had "always" contained a "phantom offset" was "unreasonable" under either a de novo or an arbitrary and capricious standard of review. 433 F.3d at 266. As the District Court stated on remand, upon issuance of that mandate, "[u]tilization of this phantom account or anything similar to it" on a retroactive basis became a violation of law. 472 F.Supp.2d at 456. Given that the phantom offset was not in the plan or disclosed in the SPD before 1998, the Second Circuit further determined that the Xerox defendants violated the law when they attempted to add the phantom offset without complying with the minimum standard against cutbacks in accrued benefits in ERISA §204(g) and the advance notice requirement in ERISA §204(h).

On remand to determine the relief for these abuses of discretion, Xerox's administrator came up with a proposal that was basically a watered-down version of the phantom offset that the Second Circuit had ruled to be unlawful. As in *Glenn*, the proposal was "financially advantageous" to Xerox compared to a remedy which would cost Xerox $20 million and provide "substantially more money in real terms" to the Frommert plaintiffs. Respondents Br. at 25 (citing JA142a-143a) and Petitioners' Br. at 61. The administrator who developed the proposal was a Xerox employee who Xerox's CEO appointed and could replace at any time by simply appointing someone else. See Petitioners' Br. at 7 (citing JA 32a). As the Petitioners concede, the administrator's proposal on the interest rate that could still be imputed under the plan's non-duplication provision was "offered in the context of litigation," Petitioners' Br. at 36, in which the administrator as a defendant had previously taken

a different position. The Second Circuit determined that Xerox's proposal was a "mere opinion" that was never applied in determining the Frommert plaintiffs' benefits. 535 F.3d at 119. Rather it was conditional on the District Court's acceptance of it, with or without deference. The Second Circuit concluded that a "mere opinion" from a litigant who had violated the statute was entitled to consideration, but no deference. 535 F.3d at 119.[8]

There are many sound reasons to affirm the District Court's authority to craft relief without being "obligated to defer" to the interest of the Xerox defendants in lessening the relief after abuses of discretion have been proven. Clearly, the remedial purposes of statutory provisions like ERISA §§204(g) and (h) are undermined if the employees whom those statutory requirements were enacted to protect do not receive full relief even when violations are proven. Similarly, the deterrent effect of the statutory protections and the statutory objective of fostering compliance are undermined if plan sponsors and administrators know they can violate the law but still

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[8] In full, the Second Circuit stated:

> Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review…. However, the District Court here had no decision to review 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….

lessen the remedies (or even eliminate them for many individuals) because the district courts will be "obligated to defer" to their second or even third approaches (here, the Defendants actually tendered a third approach, called the "new hire" approach, which was presented as their "preferred" approach on appeal, 535 F.3d at 117-19, but has since been abandoned).

At its core, this case boils down to the difference between a remedy under which retirement benefits are reduced by an offset calculated in the manner that the District Court determined to be most consistent with the pre-1998 Plan and SPD, or an offset calculated with imputed interest rates that Xerox's administrator devised after its previous positions were ruled to be abuses of discretion. Although Petitioners attempt to conjure up larger calamities, this is not a case about a judge's or a jury's authority to award damages disproportionate to the actual harm caused by the violations, or anything similar to that. Compare *BMW of N. Am. v. Gore*, 517 U.S. 559, 582 (1996) ($2 million punitive damage award to respondent was "500 times the amount of his actual harm as determined by the jury").

The amici respectfully submit that this Court should affirm the Second Circuit's decision for the following reasons:

A. ERISA §§204(g) and (h) and This Court's Precedents Set Lower and Upper Limits on Remedies.

ERISA §§204(g) and (h), 29 U.S.C. §§1054(g) and (h), and this Court's precedents establish lower and upper boundaries on remedies for violations: As this Court held in *Heinz*, ERISA §204(g) "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit.'" This protection is essential to "ERISA's object of protecting employees' justified expectations." 541 U.S. at 743. In enacting ERISA §204(h), Congress likewise mandated that an amendment that reduces future retirement benefits will be ineffective unless advance notice is provided. See, e.g., *Frommert I*, 433 F.3d at 268; *Hurlic v. So. Cal. Gas*, 539 F.3d 1024, 1038 (9th Cir. 2008). Like the anti-cutback rule in ERISA §204(g), the advance notice rule protects "employees' justified expectations" in continuing to earn retirement benefits until the time they are notified that the benefits that they will earn in the future in exchange for their labor are being reduced. The regulations issued under these Sections establish expansive definitions of the "amendments" subject to these employee-friendly protections. Treas. Reg. 1.411(d)-3(a)(2); Treas. Reg. 1.411(d)-6, Q&A-5 (1998); 60 Fed. Reg. 64320, 64322 (Dec. 15, 1995) (temporary 204(h) regulations).

In remedying violations of these statutory rules, a district court is constrained by the statutory text, the statutory objectives, and the regulations to provide remedies that do not effectively allow that which is

prohibited. See, e.g., *Albemarle Paper v. Moody*, 422 U.S. 405, 416-17 (1975) (district court's discretionary decision to fashion relief must "be measured against the purposes which inform" the statute); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) ("discretion is rarely without limits"; even if "the text of the provision does not specify any limits upon the district courts' discretion" limits may be found in "the large objectives" of the Act).

Thus, if ERISA §204(g) is violated, a district court cannot permit the relief to effectively restore the unlawful amendment, or to replace it with new requirements that have the effect of reducing accrued benefits.[9] Similarly, if ERISA §204(h) is violated, the District Court cannot allow the amendment that is "ineffective" due to the absence of understandable advance notice to resurface retroactively, either directly or indirectly.

On the upper end, relief for violations of both statutory provisions is constrained by this Court's longstanding holding in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 , 144 (1985), that extracontractual damages are not allowed.

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[9] In *Swede v. Rochester Carpenters Pension Fund*, 467 F.3d 216, 222 (2d Cir. 2006), the Second Circuit thus rejected the Carpenters Fund's effort to use a limited "reforming amendment" "to avoid the effect of *Heinz*" on a plan provision that violated ERISA §204(g).

B. The Circuits Uniformly Hold that District Courts Are Not "Obligated to Defer" to Positions Advanced for the First Time in Litigation.

A district court is not obligated to defer to a construction of a plan that a party advances for the first time in litigation, and particularly not a remedial approach that is propounded only after liability has been established. The Second Circuit correctly held that:

> Defendants-Appellants have identified no authority in support of 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.

535 F.3d at 119 (emph. in orig.)

Although this Court has not addressed this issue under ERISA, it has often addressed "post hoc rationalizations" in the context of administrative law. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (declining to accept "post hoc rationalizations for agency action"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (this Court has "never applied" deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). In *Miller-El v. Dretke*, 545 U.S. 231, 245 (2004), this Court applied the same principle in the

context of jury selection, determining that "[i]t would be difficult to credit the State's new explanation [for a peremptory strike of a black juror], which reeks of afterthought."

All of the circuit courts that have addressed this issue under ERISA have concluded that a deferential standard of review is *not* applicable to a post hoc rationale. Of course, a district court has the discretion to consider a post hoc rationale, as the District Court did here, but, contrary to Petitioners' position, the circuits have not held that it is "obligated to defer." See *Glista v. UNUM Ins. Co.*, 378 F.3d 113, 131 (1st Cir. 2004); *Frommert*, supra, 535 F.3d at 119; *Lauder v. First UNUM Life Ins. Co.*, 384 F.3d 375, 380-81 (2d Cir. 2002); *Gritzer v. CBS, Inc.*, 275 F.3d 291, 295-96 (3d Cir. 2002); *Bynum v. CIGNA Healthcare of N.C.*, 287 F.3d 305, 313 (4th Cir. 2002); *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991) (waiver by failing to raise known defense at the outset); *University Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 848 n.7 (6th Cir. 2000) (administrator cannot "shore up" a decision after-the-fact); *Matuszak v. Torrington Co.*, 927 F.2d 320, 322-23 (7th Cir. 1991) ("no plan can provide discretion to deny benefits for reasons identified only years after the fact"); *King v. Hartford Life & Accid. Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (refusing to allow employees to "be sandbagged by after-the-fact plan interpretations devised for the purpose of litigation"); *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 987 (9th Cir. 2001) (rejecting a "post hoc [albeit] legally plausible justification"); *Flinders v. Workforce Stabilization Plan*, 491 F.3d 1180, 1191 (10th Cir. 2007) (omitted rationale

cannot be filled in after the fact); *Deak v. Masters Mates & Pilots Pension Plan*, 821 F.2d 572, 577 (11th Cir. 1987), cert. denied, 484 U.S. 1005 (1988) (discounting after the fact explanation).[10]

Here, Petitioners concede that the proposal for the imputation of interest for which it now seeks deference was developed on a post hoc basis "outside" of the claims context and that it has never been applied to the Frommert plaintiffs. Instead, it was an offer to the District Court conditional on acceptance. The contention that district courts should be "obligated to defer" to such proposals finds no support in the cases on post hoc rationales or in *Bruch* or *Glenn*. In fact, any such deference would only serve to encourage aggressive, arbitrary positions because the only consequence of making an arbitrary decision would be the need to have a fallback position should the first one be struck down.

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[10] In cases dealing with the "fiduciary exception" to the attorney-client privilege, the courts likewise stop the exception once the interests of the parties become adversarial–which is no later than when litigation is filed. See *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999). So it is here: Once the *Frommert* lawsuit was filed, the administrator's position vis à vis the plaintiffs and the issues in the lawsuit became adversarial. As a result, any proposal concerning the plan's terms after the litigation was filed cannot be entitled to deference, because the concept of deference is founded on the existence of a fiduciary relationship.

C. In Crafting Remedies, Judges and Juries Often Deal with Omitted Terms or Provisions that Statutory or Common Law Rules Have Invalidated.

In the process of judging, judges and juries often deal with omitted terms or provisions that are invalidated by common law or statutory rules. It is black-letter contract law that when a plaintiff has been injured by a breach of contract, he or she has the right to damages in an amount that will put him in "as good a position as he would have been had the contract been performed." *Restatement (Second) of Contracts*, §347 ct. a (1981). The same principle applies under the law of trusts: The remedy for a breach of trust is to put the beneficiary in the position he would occupy if the breach had not occurred. See, e.g., *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

The process of determining what will put a plaintiff in the position that he or she would occupy if the breach of trust or contract had not occurred is what requires judgment either by a judge or a jury. In these situations, the court cannot avoid its responsibility because there is more than one plausible alternative, nor can it pass its obligations along to a person who is not an officer of the court. Nor can there be any obligation for the judge or jury to defer to the party, including a trustee, who has engaged in the abuse of discretion or illegality.

By their terms, ERISA §§204(g) and (h) invalidate non-compliant plan "amendments." This will often leave at least some gap or ambiguity in the rules that

are to be applied instead. Such gaps or ambiguities are the traditional grist for judicial discretion. Under both contract and trust law, when a part of the contract or trust is determined to be unlawful, the parts that are lawful may be enforced, provided that they can be separated from the part which is bad. See *Rest. (Second) of Contracts,* §184; *Rest. (Second) of Trusts,* §65. It is up to the courts to make this determination and then to figure out how to enforce the lawful parts of the contract or trust. In these situations, the courts obviously must act carefully, independently, and judiciously without delegating their authority to persons or entities outside of the judicial process, much less delegating their authority to the losing litigant.

Petitioners contend that the courts should not engage in this process at least when the governing documents for the plan are drafted, as Xerox did, to afford the plan administrator "broad discretion ... to rectify defects, omissions, inconsistencies in the Plan." Petitioners' Br. at 2; see also *id*. at 7, 21, 33. Xerox's amici go further and maintain that a company-appointed administrator should be given discretionary authority to "'fill in the gaps' in [employee benefit] plan language (much as an administrative agency may interpret and 'fill in the gaps' in statutory language under *Chevron*...). Amici Curiae Br. of ERIC and ABC, at 8.

The position espoused by Xerox and its amici is clearly at odds with the limits on discretionary authority established by ERISA §402, 29 U.S.C. §1102, ERISA §102, 29 U.S.C. §1022, and ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D). ERISA §402

mandates that "every employee benefit plan shall be ... maintained pursuant to a written instrument" that "shall ... specify the basis on which payments are made to and from the plan." As this Court ruled in *Schoonejongen*, supra, any amendments to those rules have to be made by following the procedures "specified" in the plan. 514 U.S. at 84; accord *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997). *Schoonejongen* does not leave room for retroactive, discretionary "gap-filling" by a plan administrator.[11]

Similarly, the ERISA §102 rules on SPDs and the Labor Department regulations issued thereunder specifically require that the contents of the SPD include a "statement clearly identifying circumstances which may result in ... denial, loss, forfeiture, ... *offset* [or] reduction ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. 2520.102-3(l) (emph. added). Again, circumstances that may result in a loss, offset or reduction of benefits that a participant might reasonably expect based on the affirmative description of benefits obviously cannot be added after the fact in a plan administrator's discretion. Finally, ERISA §404(a)(1)(D) codifies the limits on a plan administrator's discretion, by providing that a fiduciary is to act in accordance with the governing documents and instruments of the plan only "insofar as such

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[11] When an amendment is not adopted under the specified procedures, it is "invalid." *Id*.

documents and instruments are consistent with the provisions of this title and title IV [ERISA Titles I and IV]."

Thus, no matter how a plan document is drafted, the extent of the administrator's discretion is limited by the provisions of the statute. Moreover, as this Court held in *Bruch*, the extent to which that discretion is limited by the statute must be determined by the courts de novo; it cannot be left to the discretion of the administrator or counsel. 489 U.S. at 112.

Without tracking the details of this analysis, the reported cases reach the same conclusion, holding that an administrator's discretion does not extend to construing the Plan to "impose a new requirement." *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 460 (9th Cir. 1996); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir.), cert. denied, 514 U.S. 1128 (1995) (administrators do not have discretion to add new requirements "to those enumerated in the plan"); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 443 (3d Cir. 1997).

Thus, in calculating additional benefits due as a result of an ERISA violation, the courts must consider and weigh both parties' positions, but ultimately decide what is required to put people in the same position that they would have occupied but for the breach or breaches. Here, as the District Court stated, its task was to determine the benefits due to rehired plan participants based on the language of the plan

and SPD insofar as they were compliant with the law, not to decide what makes sense or might be considered natural from a financial or actuarial perspective if the rules were being written on a blank slate. 472 F.Supp.2d at 457.

D. Review of the District Court's Exercise of its Discretion in Crafting a Remedy Is Under an Abuse of Discretion Standard.

Review of a district court's exercise of its judicial discretion in fashioning relief is under an abuse of discretion standard. This standard of review applies not only in ERISA cases, but under other statutes and in common law cases. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) ("As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful"); G. Bogert and G. Bogert, *The Law of Trusts & Trustees*, §560 at 22 (if the court finds an abuse of discretion, "the decree to be rendered is in [the court's] discretion"). The district court has discretion regardless of who the remedy tends to favor. Parties who complain that a district judge's exercise of discretion is too cramped or too expansive clearly have a hurdle to overcome on appeal absent an inconsistency with the statute or a manifestation that the district court did not act independently, did not consider the appropriate factors in crafting relief, or erroneously believed it lacked the authority to provide relief.

II. The Second Circuit's Instructions to the District Court on How to Proceed on Remand and Its Review of the District Court's Decision Are Consistent With These Principles.

The Second Circuit properly instructed the District Court on its discretion in remedying the violations identified in the 2006 decision. The District Court followed the Second Circuit's instructions, including by holding a two-day hearing (which the Second Circuit did not require). Xerox presented its proposals to the District Court directly and through an expert witness and submitted pre- and post-trial memoranda. The District Court's decision discussed the positions on relief that the Defendants advanced and articulated the reasons why it did not accept them, emphasizing that "this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions." 472 F.Supp.2d at 457.

The Second Circuit also properly affirmed after reviewing the District Court's decision and Xerox's arguments on appeal. The Second Circuit found that the "Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator" and that the District Court considered the testimony from both sides' experts "regarding which of various proposed remedies was the most fair and equitable." 535 F.3d at 118-19. The Second Circuit found that Xerox's proposal was a "mere opinion" that was not entitled to deference "because the plan

administrator [had] never rendered any decision other than the original benefit determination ... premised on the now-impermissible ‘phantom account’ offset mechanism.” *Id.* at 119. In *Frommert I*, the Second Circuit had previously found that the pre-1998 Plan “did not specify how [it] would account for the prior distributions..., and, more significantly, made no mention of the phantom account offset or the fact that the hypothetical increased value of the prior distribution would be factored into the calculation of a rehired employee's benefits” and that the pre-1998 SPD “led plan participants to believe that [a phantom offset] was not a component of the Plan.” 433 F.3d at 258 and 267. On review of the decision on remand, the Second Circuit concluded that the District Court acted within its “allowable discretion” in “design[ing] a remedy to provide Plaintiffs-Appellees with the proper level of benefits in light of the ERISA violations we identified in our prior decision.” 535 F.3d at 119. As this Court stated in *Glenn*, “[w]e can find nothing improper in the way in which the court conducted its review.” 128 S.Ct. at 2352.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit.

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