No. 12-67-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL J. FROMMERT, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO, JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBON, NANCY A. REVELLA, ANATOLI G.PUSCHKIN,
(*For Continuation of Caption See Inside Cover*)

On Appeal from the United States District Court
for the Western District of New York

BRIEF FOR THE SECRETARY OF LABOR
AS AMICUS CURIAE SUPPORTING APPELLANTS
AND REQUESTING REVERSAL

M. PATRICIA SMITH
Solicitor of Labor
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation
EDWARD D. SIEGER
Senior Appellate Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2007
Washington, D.C. 20210
(202) 693-5771

WILLIAM R. PLUMMER, MICHAEL J. McCOY, ALAN H. CLAIR, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. McMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, IRSHAD QURESHI, RICHARD C. CRATER, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, JANICE ROSS HEILER, JOSEPH McNEIL, THOMAS F. McGEE, VINCENT G. JOHNSON, F. COLT HITCHCOCK, RONNIE TABAK, MARTHA LEE TAYLOR, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG SPENCER, LINDA S. BOURQUE, THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. PIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINES, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. McCONNELL, KATHLEEN A. BOWNE, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCH D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY AANN SERGEANT, MOLLY WHITE KEHOE, DAVID K, YOUNG, LESLIE ANN WUNSCH, RICHARD J. GLIKIN, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINE, JAMES G. WALLS,

Plaintiffs-Appellants

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMENTZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, XEROX CORPORATION, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX

CORPORATION RETIREMENT INCOME GUARANTEE PLAN, LAWRENCE BECKER, XEROX CORPORATION PLAN ADMINISTRATORS,

Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases--continued:

Page

Cases--continued:

Statutes:

Regulations:

Page

Miscellaneous:

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement and interpretive authority for Title I of the Employee Retirement Income Security Act (ERISA). This case, on remand from a Supreme Court decision in 2010, involves the pension entitlement of employees who returned to work at Xerox Corporation after taking a distribution of retirement benefits under a pension plan then in effect. In the most general sense, the remaining issue in this case is how to account for that prior distribution in calculating the pension benefits of these rehired employees. This general question, in turn, presents issues concerning ERISA's summary plan description (SPD) requirement, the proper method for conducting an abuse of discretion review of a plan administrator's interpretation a plan provision requiring an offset of prior benefit distributions, and the remedies available for an SPD violation. The Secretary has an interest in all of these issues and has authority to file this brief under Federal Rule of Civil Procedure 29(a).

STATEMENT OF THE ISSUES

In Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006), this Court concluded that the fiduciary defendants in this case abused their discretion and violated ERISA by interpreting a pension plan to include a "phantom account" offset that was neither specified in the plan document nor disclosed in the SPDs distributed to the returning employees. In Conkright v. Frommert, 130 S. Ct. 1640 (2010), the Supreme Court concluded that the plan administrator's subsequent interpretation of the plan's offset provision should be reviewed for an abuse of discretion rather than de novo. The Supreme Court did not address the Secretary's argument that, because the SPD left out vitally important information about how the employees' pensions would be substantially diminished by the offset, the administrator's subsequent interpretation violates ERISA's notice requirements. Id. at 1652 n.2. Nor did the Court decide whether, under a deferential standard of review, "the plan administrator will prevail on the merits," id. at 1651-52, but instead remanded for further proceedings. The questions now presented following that remand are:

1. Whether the administrators' interpretation of the offset provision would violate ERISA's notice requirements because its use of an appreciated offset and effects on participants were not disclosed in summary plan descriptions (SPDs) given to the plan participants.

2. Whether the district court erred in concluding that the administrator's interpretation was reasonable, notwithstanding the administrator's violation of ERISA's SPD rules and failure to consider the participants' reasonable understanding that they would not be treated worse than newly hired employees as a result of the undisclosed offset.

3. If the administrators' interpretation was not an abuse of discretion, whether the district court erred in failing to consider providing an equitable remedy for the SPD violation under the principles established in CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011).

STATEMENT OF THE CASE

A. The pension plan at issue and its offset provisions

In 1989, Xerox amended its pension plan to provide benefits according to the highest of three different formulas: (1) an amount based on the employee's compensation and total years of service, (2) the balance in a discontinued profit sharing plan account, or (3) a new cash balance account. Frommert, 433 F.3d at 257. The 1989 plan also provided that when an employee receives a distribution before normal retirement age and then returns to work for Xerox, "the accrued benefit of such [employee] based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution." Frommert, 433 F.3d at 258. But, the 1989 plan said nothing about exactly how this provision would apply to the 1989 formulas. See Frommert, 433 F.3d at 268 (noting "ambiguous" plan description of how prior distributions were to be treated); Frommert v. Conkright, 472 F. Supp. 2d 452, 457 (W.D.N.Y. 2007) (term "ambiguous" was "generous" because the plan said "virtually nothing" about this issue), aff'd, 535 F.3d 111 (2d Cir. 2008), rev'd on other grounds, 130 S. Ct. 1640 (2010).

Moreover, until 1998, the Xerox SPDs said even less than the plan about an offset. Although the plan said a prior distribution "shall be offset," the SPD, in contrast, simply said that a prior distribution "may" result in a reduction of benefits. Frommert, 433 F.3d at 265. Nowhere did the SPD explain that benefits would be offset by an appreciated value of a prior lump sum distribution. Id.

B. The Xerox plan administrators' first interpretation of the offset provision

1. Xerox's plan administrators initially interpreted the plan to include what Xerox itself called a "phantom account" method of calculating the offset for prior distributions. Under the "phantom account" method, the administrators increased the value of an employee's discontinued profit sharing account and cash balance account to include not only any lump sum distribution received before these accounts were established but hypothetical investment returns the distributions would have earned if the employees had never taken the distributions. Frommert, 433 F.3d at 260. By including a large amount of hypothetical growth, the phantom account method skewed the comparison between the alternative formulas in favor of selecting either the discontinued profit sharing account or the cash balance account as providing the highest

benefit. Id. at 268. If one of these accounts was selected, however, the phantom account value was then deducted to compute the benefit actually paid to the employee, producing a benefit significantly less than what the defined benefit formula based on compensation and years of service would have provided. Id.

Xerox did not set out the details of the phantom account offset in an SPD until 1998. Frommert, 433 F.3d at 259-60. Employees, like the plaintiffs in this case, who were rehired before 1995 did not receive this information. "Without the benefit of such information, 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. at 262.

The experience of Paul Frommert shows how Xerox attempted to use the phantom account method to reduce its pension liability, despite its failure to disclose the method to those affected. Frommert, 433 F.3d at 261. Frommert worked at Xerox from 1960 until January 1986, when he received a lump-sum payment of $147,780. Id. About three years later, he was approached by Xerox and rehired to establish a Quality organization in a Xerox division. Joint Appendix (JA) A218. After he was rehired, he received benefit statements and an employee booklet that made no mention of the phantom account. Id. at

A205-A209. By 1996, Frommert's benefit statement projected that he would receive a monthly pension using the defined benefit formula based on years of service and compensation of $2842. Frommert, 433 F.3d at 261. Use of the phantom account reduced his monthly pension to $5.31. Id.

Frommert expressed "shock" when he learned of this reduction, which meant that he had been working for seven years and would continue to work without full retirement benefits. JA A218, A219. He explained that he knew many other rehired employees who were very concerned and asked Xerox's Director of Benefits and Human Resources (who is also a plan administrator defendant) to provide normal retirement benefits that all others, including newly hired employees receive. Id.

Alan Clair, the other employee who testified, had a similar experience. He testified that when he returned to work for Xerox in 1987, JA A223, he was promised that he would be credited with all of his 15 years of prior service. Id. at A308. He received a benefit statement and an employee booklet with no mention of the phantom account, id. at A224-A228, and did not see how he could possibly be treated worse than a newly hired employee. Id. at A295-A296. According to Xerox's calculations, use of the phantom account would reduce his pension by hundreds of thousands of dollars. See id. at A198.

C. A Xerox plan administrator's second interpretation of the plan offset provision

After this Court held that use of the phantom account offset violates ERISA for employees rehired before 1998, Frommert, 433 F.3d at 262-68, the Xerox defendants asked the district court to treat those employees as newly hired employees to remedy the violation. Frommert, 535 F.3d at 117-18. Alternatively, the defendants asked the court to adopt a second interpretation of the plan proposed by one of the defendants, the then-current plan administrator. Id. at 118; JA A85. Under this interpretation, the administrator first converted a lump sum distribution to an annuity based on an 8.5% annually compounding interest rate used by the Pension Benefit Guaranty Corporation for converting an annuity to a lump sum. JA A87-A91. The administrator then subtracted from the annuity the amount an employee would receive under the defined benefit formula based on compensation and years of service. Id. at A91. This substantially reduced amount was then compared to the amounts an employee would receive under the discontinued profit sharing account formula and cash balance formula. Id. at A92. The employee would receive the highest of these three formulas.

The plaintiffs' expert criticized the administrator's second interpretation for "effectively using a phantom account, and just applying a different interest rate assumption." JA A603. He explained that rehired employees had received lump sum distributions that exceeded the defined benefit based on their prior years of service and prior compensation. Id.; see Frommert v. Conkright, 328 F. Supp. 2d 420, 433 (W.D.N.Y. 2004) (lump sums came from the pre-1989 profit sharing plan), vacated, 433 F.3d 254 (2d Cir. 2006). By offsetting more than the defined benefit based on prior years of service and prior compensation, the expert concluded, the administrator gives rehired participants lower benefits than they would receive if they were treated as new hires on their rehired date. JA A603. This approach was inequitable, the expert stated, because the participants "are effectively being treated as if they owed the plan benefits upon rehire, and they were not informed of that situation upon rehire." Id.

D. Relevant court decisions

In its 2006 decision holding that the "phantom account" offset violated ERISA, this Court suggested that the district court "may wish to employ equitable principles" in fashioning an appropriate remedy. Frommert, 433 F.3d at 268. The Court also concluded that necessary remedies could be fully provided under section 502(a)(1)(B) of ERISA, which authorizes a participant or beneficiary to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); Frommert, 433 F.3d at 269. The Court also instructed the district court to consider whether the participants could obtain relief for fiduciary misrepresentations in SPDs and benefit statements under section 502(a)(3) of ERISA, which authorizes a suit for "appropriate equitable relief." 29 U.S.C. § 1132(a)(3). Frommert, 433 F.3d at 270-72.

In its 2007 decision, the district court applied these principles in rejecting the plan administrator's second interpretation. The court decided that the appropriate remedy was to offset only the nominal amount of the prior distribution, based on "what a reasonable employee would have understood" and the principle, recognized in Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 113 (2d Cir. 2003), that "[t]he consequences of an inaccurate SPD must be placed on the employer." Frommert, 472 F. Supp. 2d at 457-58. The district court declined to award relief under section 502(a)(3) of ERISA because its award under section 502(a)(1)(B) gave the employees "all of the relief, equitable or otherwise, to which they are entitled." Id. at 466.

This Court affirmed, Frommert, 535 F.3d at 117-120, but the Supreme Court reversed and remanded. Conkright, 130 S. Ct. at 1652. The Supreme Court concluded that in affirming a district court decision that did not review the administrator's second interpretation under an abuse of discretion standard, this Court had impermissibly "crafted an exception" to the principle, recognized in Metropolitan Life Insurance Co. v. Glenn, 554 U.S. 105 (2008), and

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), that when a plan grants discretionary authority to a plan administrator, the plan administrator is entitled to deference in interpreting the plan. 130 S. Ct. at 1646. Reversing on that ground, the Supreme Court specifically noted that it was not addressing the Government's argument "that the District Court should not have deferred to the Plan Administrator's second interpretation of the Plan because that interpretation would have violated ERISA's notice requirements." Id. at 1651-52 & n.2.

While the case was pending before the district court on remand, the Supreme Court addressed the appropriate remedies for a violation of ERISA's notice requirements in CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011). The Court there concluded that, although relief was unavailable under section 502(a)(1)(B) of ERISA in that case, equitable remedies traditionally available against trustees, including injunction, reformation, surcharge, and estoppel, are available under section 502(a)(3). 131 S. Ct. at 1876-80.

In the decision under review, the district court concluded that Amara was inapplicable because the plan administrators complied with ERISA's notice requirements. Special Appendix (SPA) 13-20. The court also concluded that the plan administrator's second interpretation was reasonable and deferred to it. Id. at 6-12.

SUMMARY OF ARGUMENT

I. The district court erroneously concluded that the plan administrator provided sufficient notice to rehired employees of the administrator's current interpretation of the plan's offset provision. If given effect, the administrator's current interpretation would violate ERISA's summary plan description (SPD) requirements because the relevant SPDs failed to tell rehired employees that their future benefits would be reduced by millions of dollars or even to tell them that some offset "would" occur instead of "may" occur. The administrator's current interpretation therefore has the same defects as the administrator's prior, "phantom account" interpretation that this Court identified earlier in this case and in Layaou v. Xerox Corp., 238 F.3d 205 (2d Cir. 2001).

II. The district court's SPD error affected its decision to uphold the plan administrator's current interpretation under an abuse of discretion standard. An administrator, who is bound by a statutorily imposed duty of loyalty, abuses its discretion by failing to consider all relevant factors in construing ambiguous plan terms, including the reasonable expectations of employees. In reviewing the administrator's interpretation, the district court erred in failing to consider the effect of the SPD violation, compounded by misleading benefits statements, on employees' reasonable expectations, the inconsistency of the administrator's interpretation with reasonable expectations, and the existence of alternative interpretations that were consistent with employees' reasonable expectations. Had the court properly considered these factors, it would have concluded that the administrator's interpretation was unreasonable because – contrary to the notice given to returning employees and to their reasonable expectations in light of the notice and the ambiguous plan terms – the newly proposed interpretation treated returning employees worse than newly hired employees. At a minimum, the court erred in concluding that the plaintiffs' request for discovery came too late when there was no need for discovery under the law in this circuit before the Supreme Court's Conkright and Amara decisions.

III. Even if this Court concludes that the administrator's current interpretation of the offset provision is reasonable, the Court should remand for the district court to consider or should itself consider an award of monetary relief to remedy the notice violation under section 502(a)(3) of ERISA. The Supreme Court's Amara decision permits monetary relief against fiduciaries under that section, thereby overruling contrary circuit precedents. And the principles for awarding this relief are drawn from the law of equity. Applying these principles, the district court or this Court could reasonably award monetary relief through the equitable remedy of reformation.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE PLAN ADMINISTRATOR'S CURRENT INTERPRETATION COMPLIES WITH ERISA'S SPD REQUIREMENTS

1. One of ERISA's primary purposes is to protect participants' interests by requiring the disclosure of information about their plans. 29 U.S.C. § 1001(b). To achieve this purpose, ERISA requires a plan administrator to furnish each plan participant a copy of the SPD and modifications to the SPD within specified time limits, free of charge. 29 U.S.C. § 1024(b). The SPD's purpose is to communicate "the essential information about the plan," <u>Curtiss-Wright Corp. v. Schoonejongen</u>, 514 U.S. 73, 83 (1995), and it is "an employee's primary source of information regarding employment benefits." <u>Layaou</u>, 238 F.3d at 209.

The SPD must be "written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). Among other things, the SPD must include "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). An SPD must therefore include:

> a statement <u>clearly</u> <u>identifying</u> circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension

> . . . of any benefits that a participant might otherwise reasonably expect the plan to provide on the basis of the description of benefits.

29 C.F.R. § 2520.102-3(l) (emphasis added). Moreover,

> [t]he format of the [SPD] must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant.

Id. § 2520.102-2(b).

2. This Court correctly held in Layaou, 238 F.3d at 209-12, that Xerox's 1994 SPD violated ERISA's requirements with respect to the "phantom account" offset. See also Frommert, 433 F.3d at 265. The SPD, like the ones at issue here, merely stated that "'[t]he amount you receive may also be reduced if you had previously left the Company and received a distribution at that time.'" 238 F.3d at 210 (quoting SPD). The SPD did not tell the plaintiffs that their benefits, in fact, would (rather than "may") be reduced, nor did it make any "mention of the 'phantom account' offset or the fact that the benefits of rehired employees would be offset by an appreciated amount of prior distributions." Id. Therefore, the SPD violated 29 U.S.C. § 1022 by failing to describe "the 'full import' of the effect of receiving a prior lump-sum distribution on the calculation of future retirement benefits upon rehire." Id. at 211. It also violated 29 C.F.R. § 2520.102-3(l) by failing "to clearly identif[y] the loss . . .

of [ ] benefits caused by a prior lump-sum distribution." Id. (internal quotation marks omitted).

Under Layaou's reasoning, the plan administrator's current interpretation of the plan offset provision also violates ERISA's SPD requirements.[1] Like the phantom account, the current interpretation requires an offset of a participant's current pension by an appreciated amount of prior distributions. The result of the offset is a cumulative reduction of millions of dollars in pension benefits for plan participants that participants were not informed of in the SPD. See JA A198-A199 (defendants' chart, showing reductions from various offset approaches). The SPD says an offset "may" occur, not that it would occur, and makes no mention of "offset by an appreciated amount of prior distributions," Layaou, 238 F.3d at 210, or of the drastic effect that such an offset could have on a participant's pension. It therefore fails to describe the full import of the effect of a prior lump sum distribution, in violation of 29 U.S.C. § 1022, and fails to "clearly identify" the loss of benefits caused by the prior distribution in violation of 29 C.F.R. § 2520.102-3(l). Likewise, the current interpretation would also violate 29 C.F.R. § 2500.102-2(b) by misleading the participants about the existence of an offset, and failing to inform them that an appreciated

---

[1] In 2006, the plan administrator advocated different approaches, one of which reintroduced the prohibited phantom account in 1998. See JA A198-A199 ("Our Offset Approach 98 Cutoff" column). The defendants have abandoned that approach. See JA A771.

value of prior distributions would be offset against future benefits, thereby minimizing the magnitude of the offset or making it seem obscure or unimportant, a perception that the plan administrator further bolstered by distributing individual benefit statements that projected much higher benefits without an offset. See Frommert, 433 F.3d at 267 ("rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received").

3. The district court's reasons for finding no SPD violation are unpersuasive. Without citing Layaou or the requirements of 29 U.S.C. § 1022 and the Department's regulations, the court stated that "[b]efore 1998, the disclosure of an offset may have been provided in an 'ambiguous manner,' but it is precisely in such situations that deference is owed to a plan administrator." SPA 17. In fact, the SPD is not ambiguous but instead says "virtually nothing" about how to provide an offset. Frommert, 472 F. Supp. 2d at 457. This Court also correctly held that in deciding whether an SPD complies with ERISA's requirements, a court owes no deference to the plan administrator. Instead, "where, as here, a claim turns on whether ERISA requires that a practice not mentioned in the SPD be included in the SPD, our review of the SPD's compliance with ERISA is *de novo*." Wilkins v. Mason Tenders Dist. Council Pension Fund, 445 F.3d 572, 582 (2d Cir. 2006).

The district court also relied on McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 196 (2d Cir. 2007), for the proposition that an SPD "need not 'invariably . . . describe or illustrate the method by which a specific retirement benefit is actuarially reduced in a particular circumstance,' so long as it discloses the circumstances under which benefits may be reduced, and does not confuse, mislead, or misinform participants.'" SPA 18-19. That may well be correct, but it is irrelevant here because the problem with Xerox's SPD is not a failure to disclose a specific method of offsetting but minimizing the fact that an offset would occur and failing to inform participants that whatever offset method was used, it would be an appreciated method, i.e., a method that offset substantially more than a prior lump sum distribution. McCarthy itself recognized this distinction. In that case, an SPD stated that early retirement benefits would be reduced actuarially but did not specify the exact method of actuarial reduction. 482 F.3d at 192. In finding no SPD violation, this Court explained that unlike the SPD in Layaou, the SPD in McCarthy "is definite in informing a participant that a reduction will occur" and also "gives some information, albeit limited, about the method of reduction, stating that 'the amount of the benefit will be reduced actuarially, resulting in a lower Plan benefit than if the reduction table in the 'Early Retirement Benefit' section was used.'" Id. at 197 (quoting SPD).

Finally, the district court appears to have assumed that participants should have been on notice that an actuarial reduction would occur because "ERISA itself 'requires actuarial equivalence between the actual distribution and the accrued benefit it replaces,'" SPA 19 (quoting Miller v. Xerox Corp. Ret. Income Guar. Plan, 464 F.3d 871, 874 (9th Cir. 2006)), and "any interpretation of the Plan that does not account for the time value of the prior distribution would, '[i]n the actuarial world,' be 'heresy, and highly unforeseeable.'" Id. (quoting Conkright, 130 S. Ct. at 1650). In fact, as the Government explained in the Supreme Court, ERISA does not require an offset of the full actuarial equivalent of prior distributions from profit sharing plans. Conkright, U.S. Amicus Br. 33, 2009 WL 4030393, at *33 (citing Revenue Ruling 76-259, 1976-2 C.B. at 111). Moreover, ERISA requires SPDs to inform participants of their "rights and obligations under the plan," and "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 U.S.C. § 1022(a), (b). The SPDs in this case did not give the notice required by 29 U.S.C. § 1022(a) to "the average plan participant," and the misleading impression they created that any possible offset was unlikely to have much effect on their benefits was only bolstered by the projected benefits statements, reflecting no offset, that the rehired employees received.

II. THE DISTRICT COURT ERRED BY FAILING TO APPROPRIATELY CONSIDER THE SPD VIOLATION, PARTICIPANTS' REASONABLE EXPECTATIONS, AND THE ADMINISTRATOR'S CONFLICT OF INTEREST IN CONDUCTING ABUSE OF DISCRETION REVIEW

In ERISA benefits cases, the abuse-of-discretion standard of review applicable where the plan grants discretionary authority to an administrator is derived from trust law. Glenn, 554 U.S. at 111. That leads to two relevant considerations. First, the benefit determination is a "fiduciary act" in which the plan administrator "owes a special duty of loyalty to the plan beneficiaries." Id. (citation omitted). Second, the district court was required to do more than simply accept the administrator's interpretation because it accounts for the time value of money, but instead was required to consider all factors relevant to whether the administrator's fiduciary interpretation was reasonable. See id. at 117. A conflict of interest is a relevant factor that must be given weight if there is some evidence that the conflict may have affected the decision. Durakovic v. Building Serv. 32 BJ Pension Fund, 609 F.3d 133, 139-40 (2d Cir. 2010). An administrator's failure to consider all relevant evidence in denying a claim is another factor because a benefit determination is arbitrary and capricious if it is "not based on a consideration of the relevant factors." Miller v. United Welfare

____, 72 F.3d 1066, 1072 (2d Cir. 1995) (citation and internal quotation marks omitted).[2] The district court gave short shrift to these factors.

The district court erred, as an initial matter, by failing to consider the misleading SPDs and the employee's resulting expectations, particularly where, as here, the relevant plan terms "can only be described as ambiguity, contradiction or silence." Frommert, 535 F.3d at 119 (citation omitted). The reasonable expectations of employees is an especially relevant factor because an employee benefit plan, unlike a unilateral trust, is effectively a unilateral contract. Feifer v. Prudential Ins. Co. of Am., 306 F.3d 1202, 1211 (2d Cir. 2002) (citing Taylor v. Continental Grp. Change in Control Severance Pay Plan, 933 F.2d 1227, 1232-33 (3d Cir. 1991) (intent of employer as well as reasonable expectations of employees relevant in determining the terms of a unilateral contract)); Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 82 (2d Cir. 2001). Xerox promised a compensation package that included a pension in exchange for plaintiffs' service. See Devlin, 274 F.3d at 84. After the plaintiffs began performance, pursuant to what they were told in SPDs, Xerox was not free to revoke or rework its promise. See id. at 85.

---

[2] The Department takes no position on appellants' argument (Br. 45-48) that the plan administrator's interpretation conflicts with certain tax-qualification requirements in the Internal Revenue Code because the Department does not administer that statute.

The district court avoided consideration of participants' reasonable expectations by concluding that Xerox's SPDs gave sufficient notice of the plan administrator's current interpretation. This was error because, as discussed above, the SPDs failed to inform participants either that an offset would occur or that it would be an appreciated offset. Given the silence in the SPDs, the ambiguity and contradiction in plan terms, and the misleading benefit statements, the participants could not – even in principle – have arrived at an understanding of the particular method and interest rates that the administrator now wants to use in calculating their offset. To the contrary, it was entirely reasonable that a participant like Frommert would be "shock[ed]" by the administrator's current interpretation, JA A218, an interpretation so out of sync with reasonable expectations that it cannot be considered reasonable even within the bounds of an abuse of discretion standard.

Moreover, the district court ignored other evidence that the plan administrator's current interpretation is inconsistent with the participants' reasonable expectations. The plaintiffs' expert showed that the plan administrator's current approach in most cases treats returning employees worse than new hires, "as if they owed the plan benefits upon rehire, and they were not informed of that situation upon rehire." JA A603. Plaintiffs testified that they did not see how they could be treated worse than new hires. Id. at A218-

A219, A295-A296. The district court also failed to consider that another proffered interpretation of the plan – the method advocated by the plaintiffs' expert – better comported with employees' reasonable expectations. This method takes into account the time value of money but, like the new hire method originally advocated by defendants, does not treat rehired employees as if they owed the plan money.

Nor did the district court give weight to the conflict under which the administrator operated as an employee of Xerox, the entity responsible for paying benefits they awarded. See Glenn, 554 U.S. at 112; Durakovic, 609 F.3d at 138. The district court should have considered whether this conflict affected the plan administrator's current interpretation, contrary to an administrator's fiduciary duty to act solely in the interest of participants. The district court failed to do so. Instead, the court incorrectly concluded that the issue involved "vague speculation" and a request for discovery that should have been presented earlier. Without analysis, the court summarily stated that the administrator's interpretation was reasonable "[e]ven taking this conflict into account." SPA 20-22.

Contrary to the district court's understanding, this case presents more than "vague speculation" that the plan administrator's conflict of interest affected his current interpretation. The administrator adopted the interpretation only after this Court prohibited use of the "phantom account" offset, in the middle of complex, protracted, and expensive litigation directly affecting Xerox's financial interests. The administrator then tried to reinsert the phantom account in computing plaintiffs' benefits after 1998, see supra, note 1, which makes no sense if the administrator really believed in his current interpretation. As discussed above, the administrator also failed to consider the participants' reasonable expectations and adopted an interpretation that treated them as if they owed the plan money contrary to their expectations, and to the administrator's own earlier view that a "rehire" approach was consistent with the plan's terms.

Because the district court took none of this into account, it failed to determine whether the plan administrator based his interpretation "on a consideration of the relevant factors." Miller, 72 F.3d at 1072 (citation omitted). Had the court done so, it would have concluded that the administrator's current interpretation is unreasonable. The plan did not specify any particular offset method and nothing in the plan's offset provision could have given the plaintiffs notice that an 8.5% compounding interest rate would be used to calculate the offset based on their prior pension distributions. Moreover, given the misleading SPDs that entirely minimized the existence of an offset, reinforced by misleading benefits statements, the returning employees could not have expected that they would be treated worse than newly hired employees. The district court should therefore have given considerable weight to the danger that the administrator's conflict of interest led it to adopt an approach that favored Xerox's financial interests and litigation position, rather than adopt (or even consider) the reasonable alternative proposed by the plaintiff's expert that was consistent with the plan, recognized the time value of money, and better comported with the participants' reasonable understandings. As the Government argued in the Supreme Court, "regardless of the standard of review," this appreciated offset method should be rejected because, in most cases, it "would have treated rehired employees 'as if they owed the [P]lan benefits upon rehire' even though 'they were not informed of that situation' when they accepted reemployment." Conkright, U.S. Amicus Br. 33-34, 2009 WL 4030393, at *33-*34 (citation omitted).

At a minimum, the court should have permitted discovery into whether the conflict of interest in fact affected the administrator's determination, as the plaintiffs requested. The district court instead focused on the wrong issue in concluding that the plaintiffs' request for discovery came too late. The court looked at whether pre-Glenn case law allowed discovery into a conflict of interest instead of focusing on the change in the plaintiffs' standard of proof after the Supreme Court's decisions in Conkright and Amara. See SPA 20-22.

Before these decisions, this Court allowed plaintiffs to recover benefits simply by showing that they were "likely harmed" by a faulty SPD, without any evidence of a conflict of interest. Frommert, 433 F.3d at 267 (applying Burke, 336 F.3d at 112-13). The plaintiffs initially prevailed on this theory, and the amount of benefits was determined by equitable principles. Id. at 268; Frommert, 535 F.3d at 117-20. The Supreme Court's decisions in Conkright and Amara, however, made a conflict of interest relevant by, respectively, requiring the plan administrator's decision to be reviewed under a deferential standard and changing "likely harm" as a basis for recovering benefits based on a faulty SPD. See infra.

III. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER POSSIBLE REMEDIES UNDER SECTION 502(a)(3) OF ERISA

If the Court concludes that the plan administrator's interpretation is an abuse of discretion and awards benefits the plaintiffs request under section 502(a)(1)(B) of ERISA, there will be no need to consider an additional remedy under section 502(a)(3). But if the Court accepts the administrator's interpretation and denies relief under section 502(a)(1)(B), then the Court should hold that the district court erred by failing to consider a remedy for the SPD violation under section 502(a)(3). See Frommert, 433 F.3d at 272. As discussed below, the Supreme Court's decision in Amara has broadened the remedies available under section 502(a)(3) and altered this Court's "likely harm" standard for SPD violations. Applying Amara to the facts of this case, the district court could reasonably provide monetary relief under a reformation principle.[3]

A. In Amara, the Supreme Court Broadened the Remedies Available Under section 502(a)(3)

In Amara, the Supreme Court granted certiorari to decide whether this Court's "likely harm" standard, see Frommert, 433 F.3d at 267, provides a basis for awarding relief based on a notice violation. Amara, 131 S. Ct. at 1871. The Court answered that question through a three-step analysis. First, the Court identified section 502(a)(3), not section 502(a)(1)(B), as the source for possible remedies for the misrepresentations in that case. Id. at 1878. Second, the Court identified the remedies available under section 502(a)(3), reasoning that the phrase "appropriate equitable relief" in section 502(a)(3) includes remedies typically available in equity in actions against trustees. Id. at 1879. In particular, the Court identified injunction, reformation, surcharge, and estoppel as remedies available against ERISA fiduciaries, and distinguished its prior decision in Mertens v. Hewitt Associates, 508 U.S. 248 (1993), which had limited the monetary remedies available under section 502(a)(3) in an action

[3] Surcharge may also be appropriate, but because appellants mention surcharge only in discussing reformation, Appellants' Br. 36 n.10, we do not separately address the issue. Moreover, because we view reformation as the most suitable approach in this case, we also do not separately address equitable estoppel.

against a non-fiduciary. Amara, 131 S. Ct. at 1879-80. Only after identifying the relevant section of ERISA and the remedies available under that section could the Court, in the third step of its analysis, decide whether "likely harm" is a proper basis for awarding relief based on an ERISA notice violation. The Court concluded that "any requirement of harm must come from the law of equity." Id. at 1881. Applying that principle, the Court concluded that courts could reform contracts to reflect the mutual understanding of the contracting parties under certain circumstances without discussing harm. Id. For surcharge, the Court required a participant to show actual harm and causation under a preponderance of the evidence standard but not detrimental reliance. Id. at 1881-82. Detrimental reliance is required for estoppel, the Court concluded. Id. at 1881.

Because Amara's discussion of remedies under section 502(a)(3) was a necessary part of the Court's resolution of the question it had granted certiorari to decide, it is a holding and not dicta. But see Amara, 131 S. Ct. at 1884 (Scalia & Thomas, JJ, concurring); Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162, 1165-67 (9th Cir. 2012) (calling Amara's discussion of equitable remedies dictum, without analysis, but nevertheless considering the availability of these remedies). This holding overrules decisions of this Court and other courts of appeals that had construed Mertens to limit the monetary remedies against fiduciaries available under that section. See, e.g., Amschwand v. Spherion Corp., 505 F.3d 342, 346-48 (5th Cir. 2007); Coan v. Kaufman, 457 F.3d 250, 263-64 (2d Cir. 2006); Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103-04 (2d Cir. 2005). Moreover, even if Amara's discussion of section 502(a)(3) remedies were dicta, this Court should follow it because it is recent and considered dicta that has not been enfeebled by later pronouncements. See, e.g., Oyebanji v. Gonzales, 418 F.3d 260, 265 (3d Cir. 2005). Put differently, the reasoning in Amara, however labeled, overrules contrary circuit precedent. See Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist., 71 F.3d 1053, 1055-57 (2d Cir. 1995).

Amara's conclusion that "any requirement of harm must come from the law of equity," 131 S. Ct. at 1881, means that this Court should look at each specific equitable remedy separately rather than applying a "likely harm" standard to all of them as in Burke. Amara continued to recognize the importance of an SPD, however, and concluded that an SPD violation could provide the basis for equitable relief under section 502(a)(3). Amara, 131 S. Ct. at 1878. Thus, this Court may continue to award relief for an SPD violation against a fiduciary, without pre-Amara monetary limitations, so long as any remedy is based on the law of equity. See also Amara, 131 S. Ct. at 1879 ("[e]quity suffers not a right to be without a remedy") (citation and internal quotation marks omitted).

B. Reformation May Provide A Monetary Remedy for the SPD Violation in this Case

Reformation, followed by monetary relief authorized in Amara, may appropriately be based on equity courts' authority to reform a written instrument when there is clear evidence of either a mutual mistake or mistake on one side and fraud or inequitable conduct on the other. Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892); see also Nechis, 421 F.3d at 103 (recognizing "fraud, mutual mistake or terms violative of ERISA" as bases for reformation of ERISA plan). Here, Frommert and Clair stated that, based on the SPDs and benefits statements, they believed that their benefits would only be subject to a nominal offset or, at most, that they would be treated no worse than newly hired employees. JA A218, A295. If the administrator's current interpretation is correct, they were mistaken about a key part of the compensation package that they would receive in exchange for their service. See Devlin, 274 F.3d at 84. Other employees may also have shared this understanding. See JA A218 (Frommert's statement that other employees were very concerned); Frommert, 433 F.3d at 267 ("rehired employees likely believed that their past distributions would only be factored into their benefits calculation by taking into account the amounts they had actually received").

Moreover, at the time plaintiffs began performance, when defendants were not free to revoke their promise, see Devlin, 274 F.3d at 85, defendants also appear to have been mistaken about the offset provision because they insisted, incorrectly, that the plan provided for a phantom account method of offset, not the offset they now advocate. Additionally, defendants may have engaged in "fraud" or "inequitable conduct." In equity, those terms generally mean "obtaining an undue advantage by means of some intentional act or omission which is unconscientious or a violation of good faith." 3 John N. Pomeroy, A Treatise on Equity Jurisprudence § 873 at 421 (5th ed. 1941). Defendants may have acted unconscionably or not in good faith when they said in SPDs that an offset "may" occur without saying that it would occur, failed to tell rehired employees that their pensions would be drastically reduced, and then gave them misleading benefit statements that projected much higher benefits than the benefits plaintiffs will receive under the administrator's current approach. The misleading benefits statements and SPD violations reinforced each other, making it reasonable for participants to conclude that any offset was not going to occur or was going to be fairly insubstantial. In these circumstances, the defendants' misleading information caused the employees' mistaken belief and could support reformation of the plan to treat them like newly hired employees, as they reasonably expected. Cf. Tokio Marine & Fire Ins. Co. v. National Union Fire

_______, 91 F.2d 964, 966-67 (2d Cir. 1937) (reforming insurance contract where innocent and unmalicious representation induced mistake). The discovery that the plaintiffs sought into the extent of the conflict could have shed additional light on these issues by showing whether the administrator was acting for Xerox in making these inadequate and misleading disclosures, and the district court erred in denying the plaintiffs this opportunity.

With or without additional discovery, the district court (or this Court) could reasonably conclude that plaintiffs should be treated at least as well as new hires based on defendants' actions and their reasonable expectations. Therefore, to the extent this Court does not award benefits as the participants request, it should remand the case for consideration of a remedy under section 502(a)(3), or consider that remedy itself.

CONCLUSION

The district court's decision should be reversed.

Respectfully submitted.

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

/s/ Edward D. Sieger
EDWARD D. SIEGER
Senior Appellate Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., N-2007
Washington, D.C. 20210
(202) 693-5771

MAY 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Word 2003.

/s/ Edward D. Sieger
EDWARD D. SIEGER
Senior Appellate Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2012, the Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants and Requesting Reversal was served on the following counsel of record through the Court's CM/ECF system:

Counsel for Appellants

Peter K. Stris
Stris & Maher LLP
19210 S. Vermont Ave.
Building E
Gardena, CA 90248
peter.stris@strismaher.com

Counsel for Appellees

Margaret A. Clemens
Littler Mendelson, P.C.
400 Linden Oaks
Suite 110
Rochester, NY 14625
mclemens@littler.com

/s/ Edward D. Sieger
EDWARD D. SIEGER
Senior Appellate Attorney