No. 11-970

In The Supreme Court of the United States

RETIREMENT PLAN FOR EMPLOYEES OF S.C. JOHNSON & SON, INC., *et al.*,

Cross-Petitioners,

v.

JAMES BARBERIS, *et al.*,

Cross-Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

ELI GOTTESDIENER
GOTTESDIENER LAW FIRM, PLLC
498 7th Street
Brooklyn, NY 11215
(718) 788-1500
eli@gottesdienerlaw.com

Attorneys for Cross-Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

I. The Factual Dispute About The Clarity of The Defendants' Disclosures Does Not Warrant Review by This Court

The cross-petition presents two entirely different accounts of the decision of the court of appeals and of the issue that it resolved. In one version cross-petitioners object that the Seventh Circuit, although applying the correct legal standard, just got the facts wrong. In the second version (intermingled with the first), the cross-petitioners presume the court of appeals agreed with their view of the facts, and assert that the court applied the wrong legal standard. The first account is the correct one, and it frames a dispute that clearly does not warrant consideration by this Court.

(1) The Seventh Circuit held – as defendants urged below and contend in this Court – that the statute of limitations began to run when a participant was told the amount of the benefit he or she would receive, regardless of whether the participant had no idea that he or she was being shortchanged and no idea what actuarial techniques (if any) may have been used to arrive at the amount of that benefit. (The Seventh Circuit's reasons for arriving at that conclusion are the subject of the underlying petition).

Applying that standard, the court of appeals concluded that the various materials provided to the S.C. Johnson employees, prior to the actual payment of lump sums, did not make clear that if a worker chose to take benefits in the form of a lump-sum

payment, the payment would be equal to the amount of the employee's so-called "balance." (Pet.App. 10a-13a). In reaching that factual conclusion the appellate court carefully analyzed the official Summary Plan Descriptions provided to employees, as well as various informal newsletters distributed to them. Taken together, the Seventh Circuit concluded, these materials were only "a collection of hints" "distributed over the course of months." (Pet.App. 12a). The information given to plan participants was insufficient, the court held, to make clear (prior to the actual payment of lump-sum benefits) that those lump sums would always equal a worker's "balance,"

> given the relative obscurity of the right at issue, the fact that most of the Plans' references to lump-sum distributions offered only oblique guidance about the crucial flaw at issue here, and the fact that the most illuminating statements were found in informal Plan newsletters as opposed to the more legally weighty SPDs....

(Pet.App. 13a).

The cross-petition disagrees with the lower courts' evaluation of the record. "The information communicated to participants was not, as the Court of Appeals concluded, merely a 'collection of hints.' Pet.App. 12a." (Cross-Petition, pp. 14-15). Contrary to the conclusion of the court below, argue cross-petitioners, "the only reasonable interpretation of the facts" is that the amount of any lump-sum payment was disclosed in advance by the materials circulated by

defendants. (Cross-Petition, p. 12; see *id*. ("the overwhelming factual record")). Defendants point to one sentence in the Summary Plan Descriptions which told workers that if they took a lump-sum payment, "the entire value of your account is paid in one payment." (Cross-Petition, p. 13). The Seventh Circuit, however, had found this explanation insufficient, because it "d[id] not elucidate how that value is decided." (Pet.App. 11a). Similarly, although defendants rely on passages in several company newsletters (Cross-Petition, p. 13), the court of appeals found those references inadequate because they were "incidental" in nature and "obviously meant to be a simplified explanation of a ... complicated plan structure." (Pet.App. 12a).

The cross-petition correctly acknowledges that this issue does not warrant review by this Court. "This dispute, which turns on the lower courts' determination of the meaning ... of particular plan change materials, warrants no further attention from this Court." (Cross-Petition, p. 5). "Although the administrators ... believe that the court of appeals erred in not finding a clear repudiation, ... this fact-bound dispute ... is not remotely certworthy." (*Id.* at 15).

(2) The cross-petition offers a second, quite different account of the decision below. On this version the court of appeals is assumed to have actually agreed with the defendants that the plan materials clearly disclosed in advance the amount of a lump-sum benefit; the Seventh Circuit is described as

having held that a claim would *not* accrue at the point in time when participants were told that any lump-sum benefit would be equal to their "balance." On this alternative explanation of the Seventh Circuit decision, the court below assertedly rejected a rule that a claim would accrue "when the SPDs and other communications put participants on clear notice that they would receive their current balance as a lump-sum distribution" (Cross-Petition, p. 11), and instead held that the claim accrued only "when the Plans made good on the promise of the SPDs and actually distributed a lump-sum equal to the current balances." (*Id.* at 11).[1] Disagreeing with this supposed holding of the court of appeals, the cross-petition asserts that the statute of limitations should "run[ ] upon publication of materials ... making clear that departing employees who elected a lump sum would get only their account balance." (*Id.* at 4).

Proceeding from this premise, the cross-petition argues that if the underlying petition is granted, the cross-petition should also be granted so that the Court can consider "all of the ... options." (*Id.* at 11). Review of the cross-petition is supposedly necessary so

[1] The cross-petition asserts that "the court of appeals thought it 'a very close question' whether the first [option, the accrual-on-disclosure-of-benefit rule] or second option [the accrual-only-on-payment-of-benefit rule] was the accrual event." (Cross-Petition, pp. 11-12). What the court of appeals actually said was that it was a very close question whether the materials relied on by cross-petitioner actually made clear what the amount of the lump-sum benefit would be. (Pet.App. 10a).

that the Court will have before it not only the Seventh Circuit's supposed accrual-only-upon-distribution rule, but also the defendant's proposed accrual-on-disclosure-of-amount-of-benefit rule. (See *id*. at 15 (Court should not review only "half a loaf")).

But the court of appeals neither adopted any such accrual-only-upon-distribution rule, nor rejected the defendants' position that the claims accrued at the point in time when participants were told that a lump-sum benefit would equal their "balance." To the contrary, the court below adopted and applied the very standard advanced in this Court, as it was below, by defendants. The cross-petition does not identify any passage in the court of appeals opinion which contains any accrual-only-upon-distribution standard. The only authority relied on by cross-petitioners for the existence of the supposed accrual-only-upon-distribution rule is, surprisingly, the petition for writ of certiorari. (Cross-Petition, p. 11 ("[p]etitioners contend that the court of appeals erred in adopting the [accrual-only-upon-distribution] option.")). The cross-petition does not, however, explain where in the petition this characterization of the decision below is to be found.

II. There Is No Circuit Conflict Regarding The Role of Plan Administrators In Determining The Remedy for An Unlawful Plan Provision

The court below correctly concluded that when the provisions of a plan violate ERISA, responsibility for determining the remedy for that statutory violation lies with the federal court. The Sixth Circuit does not hold that the private individuals who serve as administrators for the unlawful plan are empowered by ERISA to decide what remedial measures are required by federal law.

Durand v. Hanover Insurance Group, Inc., 560 F.3d 436 (6th Cir. 2008), on which the cross-petition relies, concerned the same type of ERISA violation at issue in the instant case; the terms of the benefit plan in *Durand* directed that the discounted value of future interest credits be calculated in a way that resulted in no such benefit at all, a so-called "wash calculation." The defendants in *Durand* argued that the plaintiffs should be required to exhaust that claim by applying to plan administrators for the legally required additional benefit, even though the plan itself clearly forbad the administrators to pay any such benefit. In rejecting that proposed exhaustion requirement, the Sixth Circuit held that if the district court found the plan was unlawful, it would be permissible for that court – rather than attempting to fashion a remedy on its own – to elicit from the plan administrators their own proposal regarding the appropriate remedy.

> Adjudication of Durand's claim need not put the district court on a path that ends with the court itself trying to estimate what her future interest credits would have been. Rather, if the district court determines that the Plan's methodology violates ERISA, the court could simply award injunctive relief that required [plan administrators], in the first instance, to do what the law requires. That would not only develop the record, as desired by the district court; it would also give [the plan administrators] the "first opportunity" for which it argues at length in its brief.

560 F.3d at 442.

This passage does not, as cross-petitioners suggest, hold that the plan administrators were entitled to propose a method for estimating Durand's future interest credits that the district court would then be required to accept, or defer to, as the correct remedy. To the contrary, the term "deference" never appears in the Sixth Circuit opinion. All the Sixth Circuit held was that, rather than attempt to devise on its own some economic model for calculating an estimate of the amount of the plaintiff's (unlawfully denied) future interest credit, the district court could permit the defendant plan officials to make a proposal of their own. That approach is merely permitted, not mandated; the district court "could" (but does not have to) take that course, and "need not" (but may) do the estimating and calculations itself. If the district court were required to defer to the position of the plan administrators, it would have been obligated to elicit

such a proposal, and could not try to make its own estimate, a course of action the Sixth Circuit clearly allows. The possibility suggested by the court of appeals was only to accord the defendants the "first opportunity" to formulate a proposed method of estimating what Durand's future interest credits should have been, not an opportunity to make the *final* determination of the correct figure.

No federal or state decision has construed the Sixth Circuit decision in *Durand* to establish a deference rule; indeed, the opinion has scarcely been cited at all by other lower courts. The cross-petition suggests that the District Court in the instant case interpreted *Durand* to require federal judges to defer to the remedies proposed by plan administrators.

> [A]s the District Court recognized, it is the approach followed by the Sixth Circuit in *Durand* that is consistent with this Court's precedents addressing the standard for reviewing the decisions of ERISA plan administrators. *See* Cross-Pet.App. 13a-16a; Pet.App. 46a.

The two cited District Court opinions do hold (incorrectly) that plan administrators are entitled to deference in determining the remedy for the unlawful plans, but neither of those opinions refers to *Durand*.[2]

---

[2] The cross-petition appendix contains the District Court opinion of August 19, 2010. The cited District Court opinion in the petition appendix is dated November 18, 2010.

Rather, the district judge relied on *Durand* only in a separate earlier opinion, in which the judge denied the defendants' motion for summary judgment seeking approval of their own proposed methodology, and instead – without yet deciding among the competing proposed rates – directed the defendants to make specific calculations and explore whether the plaintiffs would accept those proposals. (Pet.App. 88a-89a).[3] Under that earlier order, if the parties were "unable to reach an agreement," they were "to resubmit the issue to the court for determination." (Pet.App. 89a). It was only after the dispute was indeed resubmitted several months later that the District Court, in opinions not relying on *Durand*, decided to defer to the proposal of the defendants.

The Seventh Circuit below correctly held that deference is not required by this Court's decisions in *Conkright v. Frommert*, 130 S.Ct. 1640 (2010), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). "[T]his is not [a] case about the fiduciaries' construal of the Plan, and [thus] the Supreme Court's *Firestone* and *Conkright* decisions have little authoritative to say." (Pet.App. 21a).

> [I]n *Conkright* the Supreme Court reiterated the policy, most prominently articulated in *Firestone* ... of deferring to Plan fiduciaries when they are interpreting Plan terms.... The reliance on *Conkright* is inapt because

[3] This earlier opinion was dated March 26, 2010.

> the issue here is not interpretation, and "*Firestone* is limited to question of plan *interpretation*...." *Fletcher v. Kroger Co.,* 942 F.2d 1137, 1139 (7th Cir. 1991).

(Pet.App. 17a) (Emphasis in original). This case does not involve an interpretation of the plans "because the unlawful 'wash' calculation was effectively codified in the Plans." (Pet.App. 18a). "[T]he Plan defendants did not exercise interpretive discretion over the projection rate for calculating future interest credits. Nor did the Plan terms permit such interpretation." (Pet. App 21a). Thus a proposal by the plan administrators to use some other method of estimating future interest credits-even as a remedy for an ERISA violation – "would have been an abandonment, not an interpretation, of the Plans' terms." (Pet.App. 19a).

The cross-petition argues that because the plans themselves provided for an unlawful method of determining future interest credits, the plan administrators should be accorded "discretion" to pick some other method, indeed to do so years after the fact. (Cross-Petition, pp. 16-22). But as the Seventh Circuit correctly recognized, doing so would in two respects violate the controlling IRS Notice. First, IRS Notice 96-8 requires that the method for determining future interest credits must be prescribed by the plan itself; that authority may not be delegated to plan administrators. Second, the Notice provides that the method for making that determination "must preclude employer discretion" (Pet.App. 20a); the method of determining those credits must be "definitely

determinable" from the plan itself. (Pet.App. 21a) (quoting *Esden v. Bank of Boston*, 229 F.3d 154, 166 (2d Cir. 2000)).

> [G]iven the IRS Notice, we are loath to convert this into a matter of Plan discretion.... We think that conferring on the Plan defendants the discretion to devise the entire formula *ex post* would miss the point of the IRS Notice....

(Pet.App. 21a and n.15).

The cross-petition argues that the terms of the plans themselves accord to plan administrators the discretion to determine what remedy should be provided by federal courts if a plan provision violated ERISA. The cross-petition relies on § 11.3, which accords to plan administrators "the exclusive right to interpret the plan and to decide all matters arising thereunder, including without limitation, the power to determine eligibility for benefits under the Plan and the amounts of such benefits." (Cross-Petition, p. 8). The remedies to be awarded by Article III judges for a violation of a federal statute, the cross-petition suggests, is a "matter[ ] arising [ ]under" the plan and thus the responsibility of plan administrators. (Cross-Petition, p. 20). The court of appeals properly rejected this construction of the plan provision in question. "§ 11.3 ... did not give [plan administrators] discretion to amend the Plan terms; the power to amend was reserved by the company.... Moreover, the Plans' generalized grant of interpretive discretion did not authorize the administrators to controvert the

clear terms of the Plan." (Pet.App. 18a). In any event, a dispute about the correct interpretation of one clause in the cross-petitioners' plans is assuredly not an issue that warrants review by this Court.

CONCLUSION

For the above reasons, the conditional cross-petition should be denied.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

ELI GOTTESDIENER
GOTTESDIENER LAW FIRM, PLLC
498 7th Street
Brooklyn, NY 11215
(718) 788-1500
eli@gottesdienerlaw.com

Attorneys for Cross-Respondents