IN THE SUPREME COURT OF THE UNITED STATES

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SALLY L. CONKRIGHT, ET AL., :

Petitioners :

v. : No. 08-810

PAUL J. FROMMERT, ET AL. :

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Washington, D.C.

Wednesday, January 20, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf of Petitioners.

PETER K. STRIS, ESQ., Costa Mesa, Cal.; on behalf of Respondents.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case Number 08-810, Conkright v. Frommert.

Mr. Long.

ORAL ARGUMENT OF ROBERT A. LONG, JR.

ON BEHALF OF THE PETITIONERS

MR. LONG: Mr. Chief Justice, and may it please the Court:

In this ERISA case, the court of appeals applied a deferential standard of review to the district court's interpretation of the Xerox plan, but not to the plan administrator's interpretation. We think the court of appeals got it backwards.

Under either a deferential standard of review or a de novo standard, the plan administrator's interpretation should prevail. That interpretation, unlike the district court's interpretation, is grounded in the language of the plan. It recognizes the fundamental actuarial principle of the time value of money, and it avoids conferring windfalls.

In Firestone and Glenn, this Court looked to the language of the plan, which reflects the intent of the plan's sponsor.

JUSTICE SCALIA: Right. But -- but when the administrator has interpreted the plan incorrectly and the court finds -- the court of appeals finds that he has interpreted it incorrectly, it doesn't have to send it back and say, you know: Give me another bid; try something else. It says: You did it incorrectly, and we find that what you should have done is this.

Isn't that what normally happens?

MR. LONG: Well, we think under trust law, which the Court has looked to in Glenn and Firestone, where the plan of the settlor of the trust has assigned the responsibility for making the discretionary determinations to the plan administrator or to the trustee, unless there's been a showing of bad faith or some other reason to think that the discretion will not be exercised honestly and fairly, it -- it is really up to the plan administrator to make that discretionary determination.

JUSTICE SCALIA: So all a court can do in those trust cases is to say: You've got it wrong, Sam; go back and do it again. Right?

MR. LONG: Well --

JUSTICE SCALIA: And he gets it wrong again, and he goes back to court; the court says: Sam, it's still wrong; go back and do it again.

MR. LONG: Well, we --
JUSTICE SCALIA: I can't believe that that's what the law is.
MR. LONG: We think these situations of the -- of the multiple bites at the apple will be rare. Trust law has had this rule for decades, and that has not been a problem --
JUSTICE BREYER: Well, the SG says that isn't trust law. The SG says that trust law -- when you make a mistake and you send it back, that the district judge has a choice here, which would make sense. The district judge, if he thinks he's going to get something out of the trust -- the administrator, listens to him.
I mean, it sounds like common sense would be: Listen to the administrator, but you don't have to do it.
MR. LONG: Well, I --
JUSTICE BREYER: Because it's very complicated. He may understand it.
MR. LONG: I'd -- I'd have a two-part answer, Justice Breyer --
JUSTICE BREYER: So, is she wrong? You're saying if I look at those cases, I'll find --
MR. LONG: Well, I think, first, it would

be -- it would be quite unusual to say the standard of review is up to the court, that it can be either --

JUSTICE BREYER: It's not -- it's not a standard of review. It's -- he's trying to figure out what the word "duplicative" means, okay? And the -- and the administrator did his best. He says it means what it meant before, which is, like, 14 pages of who-could-understand-it. Okay.

MR. LONG: Well -- well, but --

JUSTICE BREYER: And then it turns out that that isn't what it means, and the district judge says: That's affirmed. So now he says: Give me another shot.

If it were me, I'd listen, but if I thought this isn't really that great, I would try to figure out something else. And then if I were a court of appeals judge, I'd say it's up to the district court.

MR. LONG: But --

JUSTICE BREYER: Now, luckily, the SG says that is the law.

(Laughter.)

MR. LONG: Well, but Professor Scott, who was the reporter for both the second and the first Restatement --

JUSTICE BREYER: Yes.

MR. LONG: -- and whose treatise correlates with the --

JUSTICE BREYER: Says it isn't the law.

MR. LONG: The section numbers correlate exactly with the sections of the Restatement for which he was reporter. If you look in section 187 of his treatise, which correlates with section 187 of the Restatement Second, the principle is that unless there's been bad faith or some other reason to expect that the trustee will not exercise the discretion fairly and honestly -- I mean, there -- and there are examples, illustrations 11 and 12. If -- if the amount is unreasonably low --

JUSTICE BREYER: What about just that? He came back, the administrator, I think, the second time, with something that very closely resembled the first time.

MR. LONG: Well, I think it’s --

JUSTICE BREYER: And what about that for a reason thinking he’s not in that good of faith?

Go ahead.

MR. LONG: I think it’s quite different, with -- with respect, Justice Breyer. The -- the reconstructed account methodology really looked to the performance of a hypothetical account, but the -- what

we call the plan administrator's interpretation, the interpretation that came up for the first time after the Second Circuit, overruling the district court, said, you know, this plan provision that clearly tells you how to do it is actually invalid --

JUSTICE ALITO: Well, if there's no --

MR. LONG: -- because it wasn't properly disclosed.

JUSTICE ALITO: If there's no bad faith, then how many shots does the plan administrator -- who I don't think is named Sam -- gets to --

(Laughter.)

JUSTICE ALITO: -- to try to answer this question?

MR. LONG: Well, we think the standard is that if -- as long as there is discretion to be exercised within the limits that would be set by the court's opinion, absent a showing of bad faith or other reason to think the discretion won't be exercised honestly and fairly, it ought to be left to the plan administrator, because that's what the plan provides.

Now, I think --

JUSTICE GINSBURG: Mr. Long, we're talking in the abstract --

MR. LONG: Yes.

JUSTICE GINSBURG: -- referring to Scott, but -- that this case -- what I took away from the Second Circuit's opinion was the flaw here was not that the method was no good if you had adequate notice; the flaw was the people affected were not told in what is the language of ERISA, in plain, simple language, what their entitlement was. And that's -- that's the problem, not that this method wasn't perfectly satisfactory if you gave everybody notice. But the Second Circuit said, you didn't give them notice. Either it said nothing or it was totally ambiguous.

MR. LONG: Yes, and that's right at the heart of the case, and you are quite correct. The Second Circuit did say there was not adequate notice of the reconstructed account methodology, but it's an important part of our submission that the plan administrator's interpretation on remand is significantly different.

This is the way these offsets are typically done. There’s nothing hypothetical about it. You take the lump sum that was actually paid to these plan participants. You look to the annuity that could have been purchased with that lump sum, using the annuity rates that are put out by the Federal government, by

the PBGC.

This is the typical way this offset is performed. This is -- falls within the safe harbor, the chief actuaries have filed an amicus brief saying this is quite typical, so this --

JUSTICE GINSBURG: But if -- if there were information, but the -- the ERISA provision says that you are supposed to give the summary description of the plan "in a manner calculated to be understood by the average plan participant."

MR. LONG: Yes, yes.

JUSTICE GINSBURG: And all that the 1989 statement said was the amount the employees received may be reduced, if they previously left the company and received a distribution at that time.

MR. LONG: Yes. And the -- and the Second Circuit did not decide this question of whether the notice of the plan administrator's interpretation was sufficient, and -- but we think there are very strong arguments that it -- that it was.

I mean, first of all, it did describe the circumstances in which there could be an offset, which is what the statute and the regulation requires.

And, second, it is the law in the Second Circuit, as elsewhere, that in a summary plan

description -- which is just that, a summary -- you need not describe in detail every offset and every actuarial adjustment. There are many such adjustments in ERISA plans. They frequently apply to relatively small numbers of participants.

If it were a requirement of the statute that each of these be described in detail in a summary plan description, you would risk defeating the purpose of the summary plan description and invalidating many ERISA plans across the country.

So we would urge the Court, strongly, not to accept this argument that, oh, well, you know, if the -- if the notice of the reconstructed account methodology is inadequate, then it must also be the case that the notice of this different -- I would say "plain vanilla" kind of offset -- typical offset, must also be inadequate. We don't think that is true --

JUSTICE SCALIA: Well, why -- this is important to me, whether the plan administrator was interpreting the same language when this case was remanded back down. Originally, he was simply applying the methodology that had been specified in 1990, right?

MR. LONG: Yes. Yes, Your Honor.

JUSTICE SCALIA: And the court said that was

no good because you didn't give these people notice of it. But that -- he had been applying that test not since 1990, but since 1980. In other words, he had taken that to be a reasonable interpretation of the very summary language in -- in the plan itself, right?

MR. LONG: That is absolutely correct, and at the time that --

JUSTICE SCALIA: So when it went back, why didn't he stick with that and say: Yes, they didn't have adequate notice of that, but that is still a reasonable interpretation of the original plan, even before we specified that.

MR. LONG: When it went back on remand from the Second Circuit the first time, the plan administrator adopted a -- a new interpretation.

JUSTICE SCALIA: Yes.

MR. LONG: That is what I'm calling the "plain vanilla" --

JUSTICE SCALIA: I understand that. Why did he do that? Inasmuch as the first interpretation was not adopted in 1990, but it was adopted under the same language that he is now interpreting in 1980, right? He was applying it between 1980 and 1990. That's what he thought he -- that's what he thought the plan meant in all those years.

MR. LONG: Well -- and there was a provision in the plan that specifically told him to do the offset in this way, and the Second Circuit --

JUSTICE SCALIA: After 1990.

MR. LONG: Well, no. It was also in the plan before 1990. It --

JUSTICE SCALIA: Oh, I didn't understand. I didn't understand it.

MR. LONG: Yes. A lot of this case started because it got dropped out of the 1989 restatement, by accident, for a period of 3 months, and all of these dire consequences are really flowing from that.

JUSTICE SCALIA: Well, your -- your brief says: "The Plan Administrator has consistently applied the reconstructed account methodology since the early '80s."

MR. LONG: Yes, that's correct.

JUSTICE SCALIA: "Effective April '90" -- "1990, the Plan language requiring this methodology provided as follows." So I took that to mean there was no such language before that?

MR. LONG: There -- there was. Yes.

JUSTICE SCALIA: There was plan language requiring it before 1990.

MR. LONG: Yes.

JUSTICE SCALIA: Okay.

MR. LONG: Yes, and that's another important point in this complicated case. I mean, the only period in which this -- what we call the reconstructed account methodology that gave specific instructions about how to do it, so we say it was not at all unreasonable for the plan administrator to follow those specific instructions.

It dropped out in this 1989 restatement for a very short period and then got put back in. And that's -- the Second Circuit said, well, then you get into problems with anti-cutback and different types of things, but --

JUSTICE GINSBURG: But where is it -- what -- what was in the summary plan description on this point between 1980 and 1990, where is that?

MR. LONG: There were a variety of summary plan descriptions, obviously, and I think, in general, Justice Ginsburg, they simply had the statement that your benefit may be reduced, if you have received a prior distribution.

JUSTICE GINSBURG: Right. So there was no description of this in the summary plan description?

MR. LONG: That's -- that is correct, during that period, although, again --

JUSTICE GINSBURG: So is it -- but what period? Between 1980 and 1990 or the 3-month period --

MR. LONG: It was --

JUSTICE GINSBURG: -- you're talking about?

MR. LONG: I think it was really in about 1995. The descriptions got gradually more detailed, as we go into the 1990s, but through the '80s and up into the -- I think until about 1995 or so, there would have been simply a statement that your benefit may be reduced --

JUSTICE SCALIA: Okay. That's -- that's what I thought, and I thought you said no when I asked that question, that this detailed description of the RAM didn't come in until 1990.

MR. LONG: Oh -- well, I'm sorry if I misunderstood you, Justice Scalia. I was talking about the language of the plan, and we are, after all, talking about benefits due under the terms of the plan. And the plan did include this specific reconstructed account methodology, except for the 3-month period.

Now, the summary plan description had a --

JUSTICE SCALIA: Oh -- oh, I see.

MR. LONG: -- had a much -- a much briefer

-- but, again --

JUSTICE SCALIA: I got you.

MR. LONG: An additional point on this, Justice Scalia, is -- I mean, this is a claim for benefits due under the terms of the plan, and, you know, there -- there's actually a circuit split on this. But if the claim is something like, well, a summary plan description wasn't good enough; it didn't contradict the plan, and it told me the circumstances in which the benefits might be reduced, but it didn't tell me how -- and, that's just not good enough.

Often, you have to make some sort of showing of reliance and prejudice, so it's really --

JUSTICE GINSBURG: But you seem to be rearguing the -- I thought that the -- I thought that you had surrendered on -- what is it called? Frommert I. That -- that the Second Circuit said: What you had was no good, because it violated the notice provision and it violated the anti-cutback provision. So that's what they call a phantom --

MR. LONG: Right.

JUSTICE GINSBURG: -- account. It's out.

MR. LONG: They call it phantom accounting. Right.

JUSTICE GINSBURG: It's out. But you seem

to now be telling us that was really a wrong decision on the Second Circuit's part, that there was -- that it was perfectly good, that it was described in the plan itself, although not in the summary plan description.

MR. LONG: Well -- well, no, and I -- I mean, what happened is for the plaintiffs in this case, they were hired after the -- rehired after the 1989 restatement went into effect, and so that's when this -- when this provision that specifically described the reconstructed account methodology was dropped out, and that's when all the trouble started.

The only reason I was mentioning the reconstructed account methodology was trying to address Justice Scalia's question, although I may have confused it further to say that the plan, the terms of the plan, did include this specific provision, so it was not crazy for the plan administrator to be following that.

Now, it was struck down by the Second Circuit, invalidated, and the plan administrator is not seeking to challenge that on remand; obviously, they can't. But coming up with a --

JUSTICE SCALIA: So you claim -- you claim that what he is interpreting when it comes back to him

is not the same text that they invalidated --

MR. LONG: Absolutely. It's the remaining --

JUSTICE SCALIA: -- but rather it's the plan without this text.

MR. LONG: Absolutely. It's the remaining plan terms; there is a new interpretive question here, which is: How do we make sense of the remaining plan terms, now that the Second Circuit -- unlike the plan administrator, unlike the district court -- has held that this provision that specifically addresses this is invalid and can't be used. And that is really a new interpretive question that came up in litigation.

JUSTICE BREYER: It's -- it struck me if -- it's hard. I don't necessarily follow it at all, but the -- you had this original plan where, basically, you were trying to figure out how much money they took away, and you compared it with what it would have made if you had invested it in certain funds. So now we have a new word, which is called "duplicative"; you can't be duplicative, something like that.

And then the Second Circuit says that new word called “duplicative” for new plans doesn't really pick up this old phantom system; at least, it doesn't give notice.

Now he sends it back, and the poor district judge, since he thought that was perfectly sensible to say it did pick that up, says: Well, they told me it didn't, so I'll ask the administrator what do you think we do now? The administrator says: I have a great idea; the plain vanilla system. The plain vanilla system happens to be very much like the old system, except in following your own funds, you're not doing it; you're following the -- the insurance industry's funds.

MR. LONG: Well, --

JUSTICE BREYER: So, I mean, that's -- it's what they'll pay for an annuity.

MR. LONG: Justice --

JUSTICE BREYER: And that's called -- that's called their funds. That's called what they think they'll earn.

MR. LONG: Well, I mean, just a couple of points in response, Justice --

JUSTICE BREYER: Right.

MR. LONG: I mean, first of all, it's not just the word "duplication" or "non-duplication." Section 9.6, which is on page 32a of the Joint Appendix, says that if there has been a prior distribution, the accrued benefit based on all the

years of participation --

JUSTICE BREYER: Right.

MR. LONG: -- shall be offset by the accrued benefit attributable to such distribution.

JUSTICE BREYER: Yes. Correct, and the question is: What is attributable to? And they struck down your phantom system for doing it, and then the administrator comes back with a new system, which new system is going to take the judgment of the insurance companies about what was accrued.

MR. LONG: Well, no, Your Honor, the judgment of the Pension Benefit Guaranty Corporation was what --

JUSTICE BREYER: All right, fine.

And then what he's thinking is that's awfully similar. We just substituted different people here --

MR. LONG: Well, but -- but, I mean, it's similar in a sense that I think is clearly favorable to the plan --

JUSTICE BREYER: It's similar in a sense, and it's different in a sense.

MR. LONG: I mean, if I could -- this is a floor-offset plan, and the basic concept of the floor-offset plan is to give a kind of an insurance policy,

that if the defined contribution plan performs poorly, the defined benefit component of the plan will guarantee that you get a certain minimum benefit. And so the way the thing works, if the defined contribution balance is above the defined benefit, then your defined contribution is your benefit. And that's good. That means you have exceeded the floor.

And what happened here is -- this whole thing -- we are calculating the defined benefit, the floor. That's what we are doing, and we are trying to figure out what sort of offset do you take into account because these people got lump sums; in some cases quite, quite large. Mr. Frommert got almost $145,000 10 or 20 years ago.

So if -- the notion is, if Mr. Frommert had continued working for Xerox throughout his career, this money would have continued to grow; it would have increased his defined contribution benefit; and he would have not needed to use his insurance policy.

JUSTICE BREYER: But the -- the more you hypothetically grow it, the less chance they'll get the floor.

MR. LONG: But -- and the key point --

JUSTICE BREYER: And so they'd like it to get the floor, and so they'd like it to be --

MR. LONG: Well, but --
JUSTICE BREYER: Is that right?
MR. LONG: But the key point, if I -- yes. But the key point is he had the use of this money for all these years.
JUSTICE BREYER: That's true.
MR. LONG: And -- and it is a fundamental principle of pensions, of ERISA, that there is a time value of money. And if you accept this interpretation that the district court adopted, and then the court of appeals said: Well, we will just give it deferential review; we won't even give it de novo review, it's -- it's, you know, one reasonable interpretation among many --
JUSTICE KENNEDY: Are you saying it's -- and these categories don't often help us. Is this a question of law? A mixed question of law and fact?
MR. LONG: Well, I think, in terms of whether this is a reasonable interpretation of the terms of the plan, it is a question of law. And I think it is unreasonable -- I mean, certainly, looking at the plan language, there is plan language that does speak to this, and then also, I mean, this --
JUSTICE SCALIA: The court of appeals said it’s just an application of equitable principles --

MR. LONG: Well, but --

JUSTICE SCALIA: -- not an interpretation of the plan.

MR. LONG: But it's a claim for benefits due under the terms of the plan.

JUSTICE SCALIA: Yes, yes.

MR. LONG: You know, I read you the language. “Accrued benefit” is a defined term in the plan.

JUSTICE KENNEDY: And that's the statutory term? "Benefits due under the terms of the plan" is a statutory term?

MR. LONG: Yes. Yes. So, that -- that's what we’re talking about. The Solicitor General agrees with us that if you’re talking about the terms of the plan, even if you’re trying to fashion a remedy for a violation of ERISA, that is still a de novo review question, and there would be terrible problems with uniformity of plan interpretation if you said, oh, well, you know, it's just a discretionary kind of review; let's let every district court interpret this plan in its own fashion.

But -- but the notion of having -- essentially, what the district court's interpretation does is to say we’re going to have a zero interest

rate, which is -- I mean, the chief actuary's brief says they have never in their entire careers, none of them, have ever seen an ERISA plan that does that.

JUSTICE BREYER: Up until this time?

MR. LONG: Well, until the district court said it was a reasonable interpretation of this plan. And, in fact --

JUSTICE ALITO: If this is not a discretionary decision for the district court -- let's assume it's not a discretionary decision for the -- for the administrator. But if it's -- and if it's also not a discretionary decision for the district court, if what the district court is required to do is to say what the plan means, what would you suggest that the district court should have looked to, when the -- the provision, the -- the plan language that the district court has to look at is very bare bones?

MR. LONG: Well, but you -- absolutely you start with the language, and we don't think it is quite that bare bones. The section 9.6, which says the offset is the accrued benefit attributable to the prior distribution, and then section 1.1, which is the definition of "accrued benefit," and that basically says it is the normal retirement benefit payable at normal retirement date at age 65 in an amount computed

in accordance with section 4.3.

And then 4.3 says the monthly benefit which could be purchased with the member's transitional retirement account -- that's the defined contribution account -- as calculated using -- using annuity rates established by the PBGC.

So it's not quite that bare-bones. But then we would also say -- you would look to this notion that the time value of money is an absolutely central concept to pensions, and the notion of people would have use of money for 10 years or 20 years at a zero interest rate -- and indeed, it's -- it's even worse than that because, I mean, ultimately this has to be expressed in the form of an annuity.

JUSTICE ALITO: Well, Respondents say that this was a -- sure, it's a -- a benefit to them to be -- to have this offset only by the amount that they received and not take into account the time value of money, but this was an incentive that lured them into accepting employment again with Xerox.

MR. LONG: Well, with -- with respect, Justice Alito, that is absolutely ridiculous. I mean, no employer would do that to their current employees. That would treat the current employees like suckers. And it certainly didn't happen here. There’s no

evidence that that happened. I don't know of any case in which that has ever happened.

I mean, you can give people a bonus --

JUSTICE GINSBURG: How does it -- how does it hurt the current employees?

MR. LONG: Well, if you --

JUSTICE GINSBURG: You say they -- they don't get this --

MR. LONG: If you said to the current employees -- I mean, basically, Mr. Frommert, to take him as an example, he's -- I mean, if someone who is otherwise similarly situated to him had just kept working for Xerox, they would not have needed the insurance policy, either. Their defined contribution account would have been above the floor, and so they would get their defined contribution account.

Mr. Frommert had the use of all this money for all these years. We don't know what he invested it in, but presumably it grew in the investments. But under the district court's interpretation, he --

JUSTICE GINSBURG: So some kind of equal protection, that another worker will say: I didn't get that boon that my --

MR. LONG: Exactly. They'd say I've been working --

JUSTICE GINSBURG: But there's no -- no -- nothing -- no deduction from the current workforce. They're getting what the plan said all along is the right calculation of benefits.

MR. LONG: Yes. And -- and that's what the plan administrator's interpretation is trying to achieve as closely as possible for the rehires. It's trying to treat them the same.

If there are no further questions, I'd like to reserve --

JUSTICE SCALIA: One -- well, I thought you said what this affects is just the floor; it doesn't affect the level of the -- of the defined contribution.

MR. LONG: Absolutely, Justice Scalia, the defined contribution. Now, in this case, for Mr. Frommert, for example, was this large lump sum that he got.

I mean, another fact I'll mention is that Xerox stopped making additional contributions to this defined contribution account in 1990, just when Mr. Frommert returned. That's -- that's where this $5 thing comes from. His benefit, his defined contribution benefit, was that large lump sum given many years before a normal retirement date.

I'd like to reserve the balance.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE RESPONDENTS

MR. STRIS: Thank you, Mr. Chief Justice, and may it please the Court:

After hearing Mr. Long, I'd like to address my remarks to two broad areas.

First, I'd like to talk about why the lower courts in this case were not required to defer the legal principle. And then in light of some of the factual claims he has made, which are belied by the record and directly contradict the findings of the lower court in this case, I'd like to explain why they didn't defer.

Because sitting here, the irony to me is the core focus of his position is that courts have episodic involvement with these very complicated plans, and yet, as I'll get to in my second point, most of his position is predicated on things that are directly contrary to the court in this case that was on the ground that looked at these issues.

He wants this Court, which has even less of an -- a typical and constant involvement with the

plan, to second-guess the lower court, but --

JUSTICE ALITO: But even if the -- even if no deference was owed to the administrator, could you explain why the task for the district court was not then simply to interpret what the plan means?

What puzzles me about -- something that puzzles me about the -- the two decisions by the Second Circuit are (a) why this is remedial; why isn't it just a reinterpretation of the plan; (b) where their -- what do equitable principles have to do with this; and why should it be a discretionary decision for the district court? What does the plan mean? That would be the issue. Isn't that the question, if there's no deference due to the administrator?

MR. STRIS: Yes. To me, that's the most difficult question in this case. I'm -- I'm glad we are going straight to it. But then I'm going to go back to deference just to make sure we don't lose on that point, where I think we are squarely right.

Now to your question. Here's what happened: Xerox made two arguments in the first round of litigation. This is very important. Their first argument was that a later plan applied retroactively. They didn't want to apply the '89 plan.

Their second argument -- and this is -- here

are the best places where you can find it: Page 42a of the petition appendix -- that's the Second Circuit; page 75a and 85a of the petition appendix -- this is where the district court said it. Their second argument was that section 9.6 of the 1989 plan permitted an appreciated offset, something more than just a nominal offset. This was rejected as arbitrary and capricious.

Now, the phantom account was rejected, but so was the broad principle that there could be an appreciated offset.

Now, here's the answer to your question, Justice Alito: It would have been totally appropriate at that point in time for the Second Circuit to say there's going to be a nominal offset. We would have been done. We wouldn't be here anymore.

But Xerox essentially made a fairness argument. They said: Well, this is a scrivener's error; we only left this out for 3 months -- which isn't true, by the way. They left it out for 5 years.

But the court said: Well, if that's true and if this is going to be windfall, maybe Xerox has an equitable defense. This is an (a)(1)(B) claim for -- under the terms of the plan, but they remanded this to the lower court out of consideration for

Xerox, so that the lower court could look at equitable principles and say: Well, since the plan doesn't foreclose an appreciation, maybe under equity we should have some appreciation.

And then what happened -- and this is the irony -- is Xerox went back -- and this right out of page 143a of the joint appendix -- they proposed an offset that effectively is an undisclosed $16 million appreciation. Here's why this is important: Their phantom account in the first round, it was an undisclosed $17 million appreciation.

They didn't come in and say -- they made equitable arguments. If you look at their briefs, they said: We're -- we're not saying that this is what the plan means, but the plan has been invalidated; we're going to make equitable arguments of things that might be consistent with the plan.

CHIEF JUSTICE ROBERTS: Counsel, if I could switch to the deference point. Let's say you have an administrator who says I interpret this particular provision to mean A; and he says but, if that's rejected, there are these other provisions that should be read to mean B. That goes up; the court -- the rejects A.

Does the administrator get deference on his

reading of the other provisions B?

MR. STRIS: The position I -- I would take: I think if they did them at the same time -- it's a difficult question -- I think they would, because I think if you give them at the same time and you admit that there is an ambiguity, you're giving the court options. You are saying: Defer to my judgment; I think this is right, but here's the alternative.

What Xerox did here, and this is very important: They made the strategic choice in round one of this litigation to say we think there is one option, it's terrible for -- for Petitioners --

CHIEF JUSTICE ROBERTS: No, but I think it's kind of odd to say to the administrator: Look, if you want discretion, you should make as many rulings as you can possibly think of because then you'll get discretion as to each of them. But if you only do what's efficient and say here's how I read it, then you don't get any discretion at all on the other provisions.

MR. STRIS: No, I -- I don't -- well, I guess I would give two answers to that. The first is, in the first instance, if you seriatim said here are 12 different interpretations of the plan in ranked order, I don't think you would get deference. I think

for efficiency's sake, like you say, we want administrators to say: This is what we think the interpretation of the plan is. I agree with you.

But in a rare case like this one -- where Xerox's main point is: We screwed up; we left out the provision -- I think the appropriate thing for Xerox to do would have said: We think we can rely on it and take this interpretation, even though we left out the provision; but if not, then this is how we interpret the plan. I'm not saying you would -- they would definitely get deference, but at least there would be an argument that there's a presumption of competence, that there's efficiency.

Here, the standard trust law rule, which I'm going to get to in a second, says: You staked your ground, Xerox. You said that this is what you thought the plan meant. We held that you were arbitrary and capricious, not an -- not an honest -- not a small procedural mistake. You -- you picked something that was unreasonable, and now you want a second bite at the apple.

CHIEF JUSTICE ROBERTS: So you're saying it's not just that they abused their discretion; they're discretion abusers? You can't trust them on the next provision?

MR. STRIS: No. Yes, I --

CHIEF JUSTICE ROBERTS: We do that with the district court. We get a district court, and we use all of these pejorative terms -- “abuse of discretion,” “arbitrary and capricious,” “clear error” -- and we send it back for them to do the same -- you know, they make --

MR. STRIS: Right.

CHIEF JUSTICE ROBERTS: They're the fact finder. Here, the plan administrator is the primary interpreter.

MR. STRIS: And -- and this is the core answer to your question: That is why the law, under the common law of trusts, said that once there was a finding by a court of abuse of discretion, it could decide to defer.

I agree with Xerox. Ordinarily, the courts would defer. Under ERISA, ordinarily, if there’s factual issues, they send it back.

Here, the court said, under these specific facts, under this abuse of discretion, for a host of reasons, not the least of which, Your Honor, is that they are trying to take a fallback position on the exact same issue, which the court expressly found in this case.

They exercised their discretion not to defer. The rule -- in order for Xerox to get reversal on the first question, they have to convince this Court that what the rule should be is that, not that -- not -- we don't have to convince you that there should be -- there shouldn't be deference in all of these cases. They have to convince you that a lower court never has the option, unless there's a finding of bad faith, to say, yeah, I'm not going to defer. And that's not the law.

This very Court, in 1888, in the Colton case, which the government cites in their brief, and we -- and we cite, there -- the trustee said: We're not giving a benefit. The Court said: That's arbitrary and capricious. This Court ordered the lower courts to set the benefit. They never made a finding of bad faith.

JUSTICE ALITO: Well, if this is a discretionary decision for the court that finds the initial abuse of discretion by the administrator, what are the factors -- what are the relevant factors in determining whether the administrator should get a second shot and which ones are present in this case?

MR. STRIS: Okay. I'm -- I'm going to tell you the factors that existed at trust law and in ERISA

and that I think they are right. One very important factor is: Is it the exact same question? And here it was. It was the same question. I disagree with Mr. Long's characterization.

They took a position as an alternative on the meaning of section 9.6 under this plan. Now, they want to say, well, now, we're going to rely on different provisions, in addition to the one we did before, but, I mean -- Justice Scalia, to your question earlier -- that would be like saying: Here's a contract; I think that we -- I interpret this provision looking at pages 1 and 2. You hold that I acted in an arbitrary fashion. And I say, okay, I want to interpret it again; I'm going to look at 1 and 2, but this time, I'm going to look at pages 7, 8, 9; it's a new issue because I didn't consider those -- those points before. It's still the same question, so that's one factor.

JUSTICE SCALIA: It's not the same question. When the court has held that 1 and 2 was, in effect, not in the contract because you didn't give enough notice of it. So now you have a contract without 1 and 2 in it.

MR. STRIS: Oh, I -- I --

JUSTICE SCALIA: So it's a different

question. What does this contract mean without 1 and 2? Now, you may have a different point, if -- if you say that what -- and it seems to me you did say this, that the court of appeal -- the court of appeals, not only decided that there was no notice and, therefore, this provision wasn't any good, but you claim that the court of appeals also said that you cannot account for the time value of money.

MR. STRIS: Yes, I -- I wouldn't exactly say that.

JUSTICE SCALIA: That -- now, that would be a totally different case.

MR. STRIS: Yes. What the court of appeal --

JUSTICE SCALIA: But I didn't read it that way.

MR. STRIS: No. What the court of appeals said -- now, actually, there's three things I'd like to respond to, and I want to get back to the factors. The court of appeals said the SPDs did not disclose an appreciation.

The -- the court of appeals said that the relevant provision in this plan, the only one that would have applied time value of money was missing, but I argue that the consequence of these things is

that you can't have a time value of money. So I am going to get to that in a second.

JUSTICE SCALIA: That's a little different.

MR. STRIS: Now, to the last point you made about it's a different issue. I think we're saying the same thing. This is semantic. Yes, Xerox is right, that the task was slightly different. The first time, they interpreted what the offset should be under the '89 plan, looking at a few things, and this time, they said, oh, we were arbitrary, so, now, we would like to resolve the same legal question, looking at a few more things.

So, in one sense --

JUSTICE BREYER: Why -- why -- as I understand it -- which big if -- you and I are both working at Xerox, and in year 1 -- and we each have 500,000 in our contribution account, and you leave, and you take the 500,000. I stay, and I don't. Okay?

Now, my 500,000 over the next 10 years is going to grow somewhat -- as long as it wasn't 2007. But it --

(Laughter.)

MR. STRIS: Or -- or you may spend it.

JUSTICE BREYER: Okay. I might spend it, but if I leave it there, it would grow, okay. But

some -- some people leave it there, they grow.

MR. STRIS: During my time, it --

JUSTICE BREYER: So, when figuring the floor, what Xerox does is look to see how much it grew. They look at the whole thing, now, 10 years later, and they say, you're up above the floor, good-bye, we will give you this, not the floor, okay.

Now, you are in the same position, and you happen to come back to Xerox, and all they want to do is say, you know, we'd like to assume yours grew, too, I mean, not -- a little, anyway, and the first thing they wanted to do is to say it should have grown the same way we treat our own guys, as it having grown.

And the court of appeals says that's wrong because you left the words out, but send it back to see it's fair. So then the expert comes in, and the expert says, well, they didn't want to give us that way to grow it; here is how -- we will assume it grew like an insurance company, the most incredibly conservative people in the world, how -- how they would have treated it as growing, if you bought an annuity right then, and that just gives us even a lower number.

And -- and they want to say, why didn't you at least listen to that, instead of coming to the fact

which is very, very unusual, it didn't grow at all, in which case, you are eligible for the floor.

MR. STRIS: Okay.

JUSTICE BREYER: So I think that's why they think it's either an abuse of discretion or you should have listened more to the -- to the expert -- should have done something else.

MR. STRIS: I -- I understand that entirely. I'd like to say a few things. All of these points would be very important if we were designing a plan in the first place. I'm not suggesting that the result in this case is what parties would bargain to in the first instance, if they had all the information. I'm not going to defend that.

The question here is Xerox left a provision out of the plan, and now we have a problem. What are we going to do? That's how we get to equity.

In fact, I think it would have been appropriate -- if I were litigating the case at that point, I would have argued you can't have an equitable defense, you need to enforce the nominal offset, but that ship has sailed.

So we go back on remand, and to -- to Mr. Long's point about how it's standard to have an actuarial offset -- take isclosure away for a

minute. It's not standard to apply the -- the time value of money to the entire defined contribution balance. I will not accept that characterization.

Under the principle of duplication, we presented an alternative that used the time value of money offset, but it applied it to the relevant principle. Xerox didn't like that, so they -- they advocated something else. Here's why it's relevant to your question --

CHIEF JUSTICE ROBERTS: I'm sorry. What's the relevant principle? Isn't it what the lump sum was that he took out?

MR. STRIS: I don't think so. This is a defined benefits plan, and -- you know, from a regulatory standpoint, as this case comes to this Court, it is a defined benefits plan. Section 9.6 of the plan talks about non-duplication.

With no other information, if -- if you force me to say, well, let's make an argument, what are we going to think about non-duplication, we're trying to say that we're not going to give you money under this floor -- as you put it, Justice Breyer -- of the defined benefits plan, if it duplicates your prior defined benefit payment.

What my clients got was from an entirely

separate plan, and it was a defined contribution plan. They're integrated --

CHIEF JUSTICE ROBERTS: Well, they chose to take it out of that plan, right?

MR. STRIS: I actually think that's not true. It's not clear from the record, but my understanding is that most of my clients didn't -- didn't have that option.

Now, I'd like to get back, just for a second, Justice Alito, to your question, because it goes to the core of deference. Another very important factor is, are there fact questions?

And this is important because you're thinking about broad principle. This comes up in ERISA all the time. I see this all the time. Even after an abuse of discretion, courts regularly say, we are going to send this back, because they're not going to be in the business of holding evidentiary hearings and looking at complicated fact questions.

So that's a factor that -- where you might say, you know what? They abused their discretion, but I'm sending it back. Not only was that not an issue here, the lower courts explicitly held that they waived this, they didn't want it sent back.

Another important factor is whether or not

it's a regulatory infraction --

JUSTICE SCALIA: Excuse me. Are you talking about the court of appeals sending it back to the district court, or are you talking about the district court sending it back to the administrator?

MR. STRIS: I'm saying that, when the court of appeals sent it back to the district court, the district court never even considered sending it to the administrator because there would be no reason to do that. They didn't ask for it. This isn't one of those cases, where there's -- it's a medical case, where you need new evidentiary hearings on whether someone's sick. This goes to Justice Alito's question of in which cases, after an abuse of discretion, are courts likely to defer? That's a factor where they are.

Let me give you another one. If you have a minor procedural infraction -- and this case is anything but -- the disclosures were wrong for 5 years, and contrary to Mr. Long's claim, this wasn't missing from the plan for 3 months. This was missing from the plan for --

CHIEF JUSTICE ROBERTS: Well, since that's a fairly stark disagreement among counsel on a factual matter, where in the record do you see 5 years?

MR. STRIS: Pages -- pages 29a and 30a of

the petition appendix. You have to read it very carefully, and I know this stuff is boring, and I apologize, but this is the first time that the offset was reinserted.

It was in 1993, in section 1.45(f), that Xerox finally put the offset back. Here's the confusion. They keep referring to this 1990 amendment. The 1990 amendment, which is invalid, it didn't put an offset back. It just put in the words "phantom account." It was -- it -- it created a phantom entitlement.

CHIEF JUSTICE ROBERTS: It put in the words "phantom account"?

MR. STRIS: It put in the words "phantom account," but the words "phantom account" were already in the '89 restatement. If you look in -- at section 1.35, and it's in the joint appendix. It's page 19a of the joint appendix.

This is the definition of “retirement account.” This is the account that actually applies to my clients. There’s a phantom account here. There has always been the phantom account in the plan. They removed the offset. So this -- the relevant thing is the offset, and it's been gone for 5 years.

Now, to get back to this deference question

which I -- I think is important because these factors matter. Let's take the Second Circuit. The Second Circuit regularly defers after an abuse of discretion. The U.S. points this out -- where do they point it out -- page 23 of their brief. The Miller v. United Welfare Fund case out of the Second Circuit does precisely what Xerox says the Second Circuit overruled. So, unquestionably, the Second Circuit realized that it could defer, but it chose not to here.

This wasn't a small procedural infraction. This wasn't you have to decide in 30 days, and Xerox took 33 days to decide. This was Xerox sending personal benefit statements to people for 5 years that said you're going to get $2,000, you are going to get $3,000. The -- the summary plan description in this case, it's on page 47a. It says the amount you receive may also be reduced if you have previously left the company and received a distribution at that time.

Mr. Long gets up here -- and I understand what he's saying -- he says, we have to disclose everything in a summary plan description? How's it going to be a summary? No, we suggest that you have to say there is going to be some appreciation. You

have to do something to suggest to average plan participants that there's going to be a 20 percent interest rate, an 8.5 percent interest rate, that it's going to apply to your entire distribution.

And that's what the lower court decided here. They were there; they saw the facts; they found that there was an abuse of discretion. And -- and they said: You know what -- in this rare case -- and it is rare in the Second Circuit -- they said in this rare case, because of this particular abuse of discretion that involves the same issue, that involves statutory disclosure violations, that involved Xerox trying to pay people $5.31 a month when they told them they were paying them $2,300 a month, we're not going to defer. And they went the extra mile.

JUSTICE SCALIA: We can handle those facts --

JUSTICE KENNEDY: They have not had --

JUSTICE SCALIA: We can handle those facts just as easily as the district court.

MR. STRIS: Of course.

JUSTICE SCALIA: We -- we don't have to look at the witness's demeanor.

MR. STRIS: That's true. I wouldn't wish it upon you.

JUSTICE SCALIA: I mean, just because a decision has some factual basis -- every decision has some factual basis. That doesn't mean that -- that an appellate court, including this one, can't decide the questions.

MR. STRIS: I agree with you. It wouldn't -- I wasn't suggesting the contrary.

JUSTICE SCALIA: Why do you keep stressing that -- you know, the district court was there and saw these facts? That's fine --

MR. STRIS: Oh -- ohh -- here's why I think it's -- I was unclear. Here's why I think that is important. The law at trust law was that there is a bright-line rule. The bright-line rule was, once there is an abuse of discretion, the court gets to decide will you continue to defer. Xerox isn't coming before you and saying that the court of appeals here abused its discretion in choosing not to defer. They're advocating a bright-line rule that says a court must defer unless there is a finding of bad faith. And so my point --

CHIEF JUSTICE ROBERTS: But defer doesn't mean uphold in every circumstance, does it?

MR. STRIS: No. Defer means if it was --

CHIEF JUSTICE ROBERTS: Okay, well, then I

don't think it's proper to say they can choose not to defer. They can defer and -- and choose to find it's still an abuse of discretion.

MR. STRIS: Oh, that's true, Your Honor, but that's flatly not happened at trust law. If you look at the cases that the government cites on -- in their brief, it's pages 17 and 18. They cite a host of cases.

If you look at the Colton case, if you look at the quote directly from the leading Bogert treatise, there are many cases like this one where the court said: We're not going to give you a second chance. We're -- not just that we are going to listen to you and not -- and not give you deference -- we're going to listen to you and disagree; we are not going to listen to you.

And that's the rule that we and the government are advocating. It was the law at trust law and out of Fidelity to Glenn and Firestone.

CHIEF JUSTICE ROBERTS: Just so I understand, there are two different views. One is we are going to listen to you, and we may not agree with you. And the other is we're not even going to listen to you. And you are arguing for the second rule. You think the proper way to approach this is saying we

don't care, plan administrator, what you think.

MR. STRIS: May I answer that?

CHIEF JUSTICE ROBERTS: Well, sure.

(Laughter.)

MR. STRIS: Okay. I didn't want to be presumptuous.

I would characterize it slightly differently. I would say that under the first rule, you listen and if you think it's reasonable, you maybe consider as a factor where the line of reasonableness is, but you reject it.

CHIEF JUSTICE ROBERTS: Right.

MR. STRIS: I'm saying that was not the law, that has never been the law. The law is, once there has been an abuse of discretion, the court has the right to say we're going to decide for ourselves, we are going to decide what's reasonable, and if you characterize that as not listening to you --

CHIEF JUSTICE ROBERTS: They don't even need to accept a brief from the plan administrator --

MR. STRIS: I don't think it would ever happen, but that's how it worked at trust law. They wouldn't have to. But I think courts are more reasonable than that.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS,

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING RESPONDENTS

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

When a plan administrator has abused its discretion in construing plan terms, courts are not required to defer to the plan administrator's fallback interpretation of the same terms. That rule follows from trust law, and a contrary rule would undermine ERISA's protections for plan participants. It would reduce incentives for administrators to interpret plans reasonably; it would discourage participants from challenging unreasonable benefit denials; and it would make employers less likely to draft clear plans.

JUSTICE SCALIA: What if I don't think it's the same terms?

MR. ROBERTS: If you don't think it's the same terms, that would present a -- a different question about whether deference was required. But still deference would have been inappropriate here, because the fallback interpretation by the plan administrator presented the same notice problems that

the original phantom account interpretation had provided, because the summary plan description didn't provide notice that there would be an appreciated offset.

But the rule that the court of appeals adopted was that deference was not required when it was the same terms, and the court of appeals found that. I don't think this Court needs to -- in resolving that, to decide whether it was the same terms here. We think it -- it was, because the -- the Petitioners made two argument in defending their initial benefits determination. One was we can apply the post-1998 terms, and the other one was, even applying the 1989 plan, that authorizes use of the phantom account, because of the non-duplication of benefits provision. And now they have come back on remand and they're saying well, no, we're now reading the non-duplication of benefits provision differently. And that's the -- that's the same plan terms.

CHIEF JUSTICE ROBERTS: What about the hypothetical I asked your friend? You know, this is how we read the provision, reading A, and we recognize there's some ambiguity there, and if a court disagrees with it, our -- our second reading is -- is B.

MR. ROBERTS: No. We --
CHIEF JUSTICE ROBERTS: No deference on B?
MR. ROBERTS: We think there would be no difference on B if it was just a second reading of the same -- of the same term. Under that logic --
CHIEF JUSTICE ROBERTS: Does that make sense? I mean, don't you want the administrators to give you their best -- best understanding?
MR. ROBERTS: You want the administrators to give their most reasonable interpretation, but under the logic of letting them be able to put the first interpretation there, they could just put a list of 10 interpretations --
CHIEF JUSTICE ROBERTS: Yes, they can --
MR. ROBERTS: -- starting with the one that’s most favorable.
CHIEF JUSTICE ROBERTS: They can -- they can take it to the extreme. But if it looks like a good faith effort, to say -- you know, it's tough to interpret and administer these plans, and they say, this is what we think it means, but we’re human; maybe we made a mistake. And this is --
MR. ROBERTS: Then a court might choose to defer if it thought there was no reason to think that there was -- that there was a reason to suspect

that they're just trying --

JUSTICE KENNEDY: You're being careful not to not to say "bad faith." There was no bad faith here?

MR. ROBERTS: No, they wouldn't have to find bad faith.

JUSTICE KENNEDY: I'm looking for -- I'm still not sure of the standard.

MR. ROBERTS: The standard would be --

JUSTICE KENNEDY: I'm the district judge, and I want to defer in -- in case A and not in case B. What -- what's the difference?

MR. ROBERTS: Ordinarily, if we are talking about they have put forward an interpretation, now they want to put forward a fallback interpretation, generally, if -- generally, if they have -- haven't put that forward before, we think that deference wouldn't be appropriate, because they had the opportunity to address the issue, and the unreasonableness of the initial interpretation suggests that they may not act reasonably on remand. And --

CHIEF JUSTICE ROBERTS: So one strike and you're out?

MR. ROBERTS: No. According --

CHIEF JUSTICE ROBERTS: I mean, that's

assuming, it seems to me -- it makes sense if there's bad faith.

MR. ROBERTS: According --

CHIEF JUSTICE ROBERTS: I mean, you make fallback arguments. You're here and say this is how we read this, but if you don't agree with it, this is how we read it.

MR. ROBERTS: That's right, and -- but there are -- there are concerns here about undermining ERISA's protections for plan participants that --

JUSTICE GINSBURG: Mr. Roberts, I thought you said in this -- in this case -- and we're only dealing with this case -- there was the same basic problem, the same flaw in the second interpretation. And you said in both cases, they wouldn't satisfy ERISA's notice requirement.

MR. ROBERTS: That's right. Because ERISA requires the summary plan description to identify any circumstances that will result in an offset, to describe the offset in a manner calculated to be understood by the average plan participant, and not to minimize the significance of the offset.

JUSTICE ALITO: Then I don't understand what the purpose of the remand from the Second Circuit to the district court, after the Second Circuit's first

decision, was.

In other words, you're saying that they -- they found that anything other than an offset for the amount of money that was actually received by the beneficiary upon leaving Xerox would be -- would violate the notice requirements.

MR. ROBERTS: Well, I don't --

JUSTICE ALITO: So that interprets the plan. There's nothing left to do, then.

MR. ROBERTS: I don't know that the -- that the court of appeals actually found that the first time around. Our point is that that was the consequence of the lack of notice that was in -- in the summary plan description.

JUSTICE ALITO: I understand you to be saying that the concept of any appreciation of that amount based on the time value of money is invalid, because there wasn't proper notice for that. So there's nothing left to do on remand, it seems to me.

I don't understand what the purpose of the remand was.

MR. ROBERTS: Well, I -- we -- we think in most cases, it would have been an abuse of discretion for the district court in light of the lack of notice in the summary plan description to apply an

appreciated offset. But the district court also did consider the reasonable expectations of the plan -- plan participants, and there might have been other countervailing considerations that could have been advanced by the -- the plan administrator, perhaps, about the financial solvency of the plan or some other matters, but -- but those weren't presented here.

The point is that, once the court -- when the court remanded, the first task for the district court on remand was to look at the plan terms because this was a benefit action, determine whether those plan terms addressed how to calculate the offset, but here, the court couldn't rely on the plan terms, really, for two reasons.

First, as the district court said, the plan said virtually nothing about how to do it; and, second, the point that I was making before, ERISA prohibited the court from adopting an interpretation that provided for more than the -- an offset greater than the face value.

JUSTICE SCALIA: So, in principle, if -- if we accept your argument, if other retirees who are later rehired bring a lawsuit in another court, you might have a different result because it would be up to the -- up to that court to decide what was -- what

was a proper result, right?

MR. ROBERTS: In the --

JUSTICE SCALIA: That's the consequence of not deferring to the plan administrator. You have --

MR. ROBERTS: If the plan -- if the plan terms -- in an ordinary case, if there was an abuse of discretion in interpreting the plan terms, the plan terms would still address the issue. There wouldn't be an additional violation of ERISA's notice requirement.

This is a unique case, in the sense that, here, you've got not just an arbitrary -- an unreasonable interpretation of the plan terms, but you've also got the problem of the lack of notice in the summary plan description, and you've also got the problem that the plan terms are really silent on this issue.

They just don't say anything about how to calculate the offset.

JUSTICE BREYER: It's a pretty big windfall for people. You're working at Xerox, and your plan is about approaching the minimum level -- let's quit and then go invest it, and then come back 3 days before you're bound to retire, and then you're going get whatever the plan grew, and you'll also get your

minimum.

MR. ROBERTS: I don't think it's a windfall, Your Honor, because it depends on what the employees were promised when they were deciding whether to come back.

JUSTICE BREYER: Well, why would anyone promise them that kind of a deal?

MR. ROBERTS: Well -- first of all, when you've got a defined benefit plan and defined contribution plan, there's no requirement in ERISA, and employers frequently -- or at least, sometimes, would not offset the defined contribution benefits from the defined benefit plan, and even in a floor-offset arrangement, where they would, an employer could provide less than the full amount --

JUSTICE BREYER: What about -- a bit more serious question -- I mean, that is a serious question, but the more general question, what about something that is analogous to Skidmore deference?

MR. ROBERTS: Oh, God.

JUSTICE BREYER: So you say --

(Laughter.)

JUSTICE BREYER: You say -- you take the -- the district judge here can take -- takes the administrator's opinion for what it's worth.

MR. ROBERTS: Well --
JUSTICE BREYER: He has to listen to it.
JUSTICE SCALIA: Can we go back to the urns?
(Laughter.)
MR. ROBERTS: Well, that's essentially -- that's essentially the -- the principle that we're -- that we're talking about --
JUSTICE BREYER: That is essentially the principle, I thought.
MR. ROBERTS: The court's not required to apply its use of discretion and --
JUSTICE BREYER: But he does have to read it. He has to read it --
MR. ROBERTS: -- review again.
JUSTICE BREYER: Read it, and take it for what it's worth.
CHIEF JUSTICE ROBERTS: So if --
MR. ROBERTS: Well, it's -- I think any responsible district court would -- would do that.
JUSTICE BREYER: You don't think they would -- you think they would do that?
MR. ROBERTS: They would do that.
JUSTICE BREYER: Yes. Okay.
MR. ROBERTS: Of course.
CHIEF JUSTICE ROBERTS: So you disagree with

Mr. Stris. Do you think the district court should listen to what the plan administrator has to say?

MR. ROBERTS: Well, I think that, in trust law, that -- under the principles of trust law, that Mr. Stris is correct, that the district court has the -- the -- the court would have discretion to formulate the remedy and could direct the trustee --

JUSTICE GINSBURG: Is it -- is it -- Mr. Roberts, is it a remedy? So that's -- one thing is you can view this as the district court as substitute interpreter of the plan, or another way you can look at it is to say, the -- the benefit determination was wrong, we reject it, the court rejects it. So, now, there is a remedy for that wrongful determination. So is this, what's going on in the district court, an interpretation of the plan or a remedy for a wrongful determination?

MR. ROBERTS: In a benefits action, the first question is to interpret the plan, but what you have here is a plan that is silent and a plan that -- where interpreting the plan to provide for a certain kind of offset, there is inadequate notice in the summary plan description, so there's a violation of ERISA.

So, in this circumstance, not ordinarily,

whenever there's a misinterpretation of the plan, but in the circumstances here, it is a remedial decision because the court has to fill the gap in the plan that's the result of the silence of the plan.

JUSTICE SCALIA: Well, we interpret gaps in -- in documents all the time. That's part of interpreting a document, figuring out what it provides for in a lot of situations that it does not explicitly cover. I don't know why that isn't interpreting the plan.

MR. ROBERTS: When -- the analogy here is to the trust law situation, where trusts -- where -- where courts modify the terms of a trust because the terms are illegal or there's a change of circumstances, like the cy pres doctrine.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Thank you.

Mr. Long, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.
ON BEHALF OF THE PETITIONERS

MR. LONG: The remaining plan terms are not silent. Section 9.6 says that the offset should be the accrued benefit attributable to the prior lump-sum distribution, and that's an annuity payable at age 65. So there is plan language.

It's -- it is not completely unambiguous, but the plan is certainly not silent, and the Solicitor General, in its brief on the merits to this Court did -- retracted that suggestion that the plan was silent.

On this question of the 1990 amendment and when the -- the reconstructed account methodology that the Second Circuit said was invalid got put back in, pages 66a and 67a of the appendix to the petition shows that that got put back in, in 1990, and not later.

On trust law and what trust law shows, obviously, the Court will have to sort it out, but we stand with Professor Scott, with his treatise, which is key, to the Restatement Second, which was in effect when ERISA was adopted. Section 187 of his treatise, which correlates with section 187 of the Restatement Second, we think supports our approach that, unless there is bad faith or the trustee is acting outside the bounds of discretion -- and the court will get the trustee within the bounds of discretion, but unless there is some reason to think the trustee can't fairly and honestly exercise the discretion, the terms of the trust assign that responsibility to the trustee, and, therefore, the trustee should exercise that

discretion.

And then, finally, on this question of notice and whether there was adequate notice, not of the reconstructed account methodology, but of the plain vanilla annuity, the ordinary way this is done, we would urge the Court not to accept these representations that, oh, it's just the same question; if the notice for one is inadequate, the notice for the other must also be inadequate.

I mean, there's actually Second Circuit law, the McCarthy against Dun & Bradstreet case, that holds that a summary plan description does not have to completely explain how you do every offset and actuarial adjustment. There are so many of them. Many of them apply just to relatively small groups of people, including this one that we're talking about.

There are 14,000 --

JUSTICE SCALIA: But the court of appeals held that this one was inadequate because it did not say that you were going to take into account the time value of money. If that's the reason it held that this one was bad, the same reason would apply to the plain vanilla.

MR. LONG: Well, if the court had actually held that -- I mean, I would urge you not to read the

court's opinion that way. I mean, I think, if it held that, I think that would be a mistake because there -- there are -- you know, it's just so typical that you have actuarial adjustments in pensions and in -- and in general.

I mean, people don't expect to take out a mortgage on a house for 20 years and pay no interest or buy a bond from the Treasury for 20 years and receive no interest. So I think, if it's going to be the ordinary, plain vanilla way this is done, the PBGC way, the safe harbor way, it may be sufficient -- may very well be sufficient to simply --

JUSTICE GINSBURG: Mr. Long, would you -- would you explain your position on the picture we were given of these people who were rehired and -- and they get, periodically, a statement that says, you are going to get 2,000-some-odd dollars; and then, 5 years later, they get a statement that says, no, it's only $5.18, or something like that.

MR. LONG: Right, and -- and those statements, which are non-plan documents, said there -- there may be an adjustment or there will be an adjustment for prior distributions. And in a case like Mr. Frommert's, that's the $5 case, the reason it's $5 is because his entire defined contribution

benefit virtually came from that large lump sum.

JUSTICE GINSBURG: And not even about why -- why it was $5. It's why did he get notices that gave him the perception he was going to get over 2,000 when it was so much less?

MR. LONG: Well, because those -- those particular forms, which again are not plan documents and he really should show individual reliance and prejudice, didn't do the calculation. He got another document that did do the calculation, and that's when this started.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Counsel.

The case is submitted.

(Whereupon, at 12:18 p.m., the case in the above-entitled matter was submitted.)