

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SALLY L. CONKRIGHT, ET AL., :

4 Petitioners :

5 v. : No. 08-810

6 PAUL J. FROMMERT, ET AL. :

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8 Washington, D.C.

9 Wednesday, January 20, 2010

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:16 a.m.

14 APPEARANCES:

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

16 of Petitioners.

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

18 Respondents.

19 MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.;

21 on behalf of the United States, as amicus

22 curiae, supporting the Respondents.

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1 P R O C E E D I N G S

2 (11:16 a.m.)

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

6 Mr. Long.

7 ORAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

8 Isn't that what normally happens?

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

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

22 MR. LONG: Well --

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

1 MR. LONG: Well, we --

2 JUSTICE SCALIA: I can't believe that that's
3 what the law is.

4 MR. LONG: We think these situations of
5 the -- of the multiple bites at the apple will be
6 rare. Trust law has had this rule for decades, and
7 that has not been a problem --

8 JUSTICE BREYER: Well, the SG says that
9 isn't trust law. The SG says that trust law -- when
10 you make a mistake and you send it back, that the
11 district judge has a choice here, which would make
12 sense. The district judge, if he thinks he's going to
13 get something out of the trust -- the administrator,
14 listens to him.

15 I mean, it sounds like common sense would
16 be: Listen to the administrator, but you don't have
17 to do it.

18 MR. LONG: Well, I --

19 JUSTICE BREYER: Because it's very
20 complicated. He may understand it.

21 MR. LONG: I'd -- I'd have a two-part
22 answer, Justice Breyer --

23 JUSTICE BREYER: So, is she wrong? You're
24 saying if I look at those cases, I'll find --

25 MR. LONG: Well, I think, first, it would

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

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

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

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

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

18 MR. LONG: But --

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

21 (Laughter.)

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

25 JUSTICE BREYER: Yes.

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

3 JUSTICE BREYER: Says it isn't the law.

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

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

18 MR. LONG: Well, I think it's --

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

21 Go ahead.

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

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

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

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

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

12 (Laughter.)

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

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

23 Now, I think --

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

1 MR. LONG: Yes.

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

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

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

1 the PBGC.

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

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

11 MR. LONG: Yes, yes.

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

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

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

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

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

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

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

18 JUSTICE SCALIA: Well, why -- this is
19 important to me, whether the plan administrator was
20 interpreting the same language when this case was
21 remanded back down. Originally, he was simply
22 applying the methodology that had been specified in
23 1990, right?

24 MR. LONG: Yes. Yes, Your Honor.

25 JUSTICE SCALIA: And the court said that was

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

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

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

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

16 JUSTICE SCALIA: Yes.

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

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

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

4 JUSTICE SCALIA: After 1990.

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

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

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

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

17 MR. LONG: Yes, that's correct.

18 JUSTICE SCALIA: "Effective April '90"
19 -- "1990, the Plan language requiring this methodology
20 provided as follows." So I took that to mean there
21 was no such language before that?

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

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

25 MR. LONG: Yes.

1 JUSTICE SCALIA: Okay.

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

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

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

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

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

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

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

4 MR. LONG: It was --

5 JUSTICE GINSBURG: -- you're talking about?

6 MR. LONG: I think it was really in about
7 1995. The descriptions got gradually more detailed,
8 as we go into the 1990s, but through the '80s and up
9 into the -- I think until about 1995 or so, there
10 would have been simply a statement that your benefit
11 may be reduced --

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

16 MR. LONG: Oh -- well, I'm sorry if I
17 misunderstood you, Justice Scalia. I was talking
18 about the language of the plan, and we are, after all,
19 talking about benefits due under the terms of the
20 plan. And the plan did include this specific
21 reconstructed account methodology, except for the
22 3-month period.

23 Now, the summary plan description had a --

24 JUSTICE SCALIA: Oh -- oh, I see.

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

1 -- but, again --

2 JUSTICE SCALIA: I got you.

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

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

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

21 MR. LONG: Right.

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

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

25 JUSTICE GINSBURG: It's out. But you seem

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

6 MR. LONG: Well -- well, no, and I -- I
7 mean, what happened is for the plaintiffs in this
8 case, they were hired after the -- rehired after the
9 1989 restatement went into effect, and so that's when
10 this -- when this provision that specifically
11 described the reconstructed account methodology was
12 dropped out, and that's when all the trouble started.

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

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

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

1 is not the same text that they invalidated --

2 MR. LONG: Absolutely. It's the remaining
3 --

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

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

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

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

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

11 MR. LONG: Well, --

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

14 MR. LONG: Justice --

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

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

20 JUSTICE BREYER: Right.

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

1 years of participation --

2 JUSTICE BREYER: Right.

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

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

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

14 JUSTICE BREYER: All right, fine.

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

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

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

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

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

8 And what happened here is -- this whole
9 thing -- we are calculating the defined benefit, the
10 floor. That's what we are doing, and we are trying to
11 figure out what sort of offset do you take into
12 account because these people got lump sums; in some
13 cases quite, quite large. Mr. Frommert got almost
14 \$145,000 10 or 20 years ago.

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

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

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

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

1 MR. LONG: Well, but --

2 JUSTICE BREYER: Is that right?

3 MR. LONG: But the key point, if I -- yes.

4 But the key point is he had the use of this money for
5 all these years.

6 JUSTICE BREYER: That's true.

7 MR. LONG: And -- and it is a fundamental
8 principle of pensions, of ERISA, that there is a time
9 value of money. And if you accept this interpretation
10 that the district court adopted, and then the court of
11 appeals said: Well, we will just give it deferential
12 review; we won't even give it de novo review, it's --
13 it's, you know, one reasonable interpretation among
14 many --

15 JUSTICE KENNEDY: Are you saying it's -- and
16 these categories don't often help us. Is this a
17 question of law? A mixed question of law and fact?

18 MR. LONG: Well, I think, in terms of
19 whether this is a reasonable interpretation of the
20 terms of the plan, it is a question of law. And I
21 think it is unreasonable -- I mean, certainly, looking
22 at the plan language, there is plan language that does
23 speak to this, and then also, I mean, this --

24 JUSTICE SCALIA: The court of appeals said
25 it's just an application of equitable principles --

1 MR. LONG: Well, but --

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

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

6 JUSTICE SCALIA: Yes, yes.

7 MR. LONG: You know, I read you the
8 language. "Accrued benefit" is a defined term in the
9 plan.

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

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

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

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

4 JUSTICE BREYER: Up until this time?

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

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

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

1 in accordance with section 4.3.

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

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

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

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

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

3 I mean, you can give people a bonus --

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

6 MR. LONG: Well, if you --

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

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

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

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

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

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

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

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

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

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

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

1 I'd like to reserve the balance.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr. Long.
3 Mr. Stris.

4 ORAL ARGUMENT OF PETER K. STRIS
5 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

25 Their second argument -- and this is -- here

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

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

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

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

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

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

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

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

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

25 Does the administrator get deference on his

1 reading of the other provisions B?

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

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

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

21 MR. STRIS: No, I -- I don't -- well, I
22 guess I would give two answers to that. The first is,
23 in the first instance, if you seriatim said here are
24 12 different interpretations of the plan in ranked
25 order, I don't think you would get deference. I think

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

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

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

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

1 MR. STRIS: No. Yes, I --

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

8 MR. STRIS: Right.

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

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

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

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

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

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

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

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

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

5 They took a position as an alternative on
6 the meaning of section 9.6 under this plan. Now, they
7 want to say, well, now, we're going to rely on
8 different provisions, in addition to the one we did
9 before, but, I mean -- Justice Scalia, to your
10 question earlier -- that would be like saying: Here's
11 a contract; I think that we -- I interpret this
12 provision looking at pages 1 and 2. You hold that I
13 acted in an arbitrary fashion. And I say, okay, I
14 want to interpret it again; I'm going to look at 1 and
15 2, but this time, I'm going to look at pages 7, 8, 9;
16 it's a new issue because I didn't consider those --
17 those points before. It's still the same question, so
18 that's one factor.

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

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

25 JUSTICE SCALIA: So it's a different

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

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

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

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

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

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

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

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

3 JUSTICE SCALIA: That's a little different.

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

13 So, in one sense --

14 JUSTICE BREYER: Why -- why -- as I
15 understand it -- which big if -- you and I are both
16 working at Xerox, and in year 1 -- and we each have
17 500,000 in our contribution account, and you leave,
18 and you take the 500,000. I stay, and I don't. Okay?

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

22 (Laughter.)

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

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

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

2 MR. STRIS: During my time, it --

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

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

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

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

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

3 MR. STRIS: Okay.

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

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

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

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

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

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

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

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

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

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

25 What my clients got was from an entirely

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

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

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

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

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

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

25 Another important factor is whether or not

1 it's a regulatory infraction --

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

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

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

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

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

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

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

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

14 MR. STRIS: It put in the words "phantom
15 account," but the words "phantom account" were already
16 in the '89 restatement. If you look in -- at section
17 1.35, and it's in the joint appendix. It's page 19a
18 of the joint appendix.

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

25 Now, to get back to this deference question

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

11 This wasn't a small procedural infraction.
12 This wasn't you have to decide in 30 days, and Xerox
13 took 33 days to decide. This was Xerox sending
14 personal benefit statements to people for 5 years that
15 said you're going to get \$2,000, you are going to get
16 \$3,000. The -- the summary plan description in this
17 case, it's on page 47a. It says the amount you
18 receive may also be reduced if you have previously
19 left the company and received a distribution at that
20 time.

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

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

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

16 JUSTICE SCALIA: We can handle those
17 facts --

18 JUSTICE KENNEDY: They have not had --

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

21 MR. STRIS: Of course.

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Okay, well, then I

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

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

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

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

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

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

2 MR. STRIS: May I answer that?

3 CHIEF JUSTICE ROBERTS: Well, sure.

4 (Laughter.)

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

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

12 CHIEF JUSTICE ROBERTS: Right.

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

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

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

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Roberts.

3 ORAL ARGUMENT OF MATTHEW D. ROBERTS,
4 FOR THE UNITED STATES, AS AMICUS CURIAE,
5 SUPPORTING RESPONDENTS

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

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

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

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

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

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

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

1 MR. ROBERTS: No. We --

2 CHIEF JUSTICE ROBERTS: No deference on B?

3 MR. ROBERTS: We think there would be no
4 difference on B if it was just a second reading of the
5 same -- of the same term. Under that logic --

6 CHIEF JUSTICE ROBERTS: Does that make
7 sense? I mean, don't you want the administrators to
8 give you their best -- best understanding?

9 MR. ROBERTS: You want the administrators to
10 give their most reasonable interpretation, but under
11 the logic of letting them be able to put the first
12 interpretation there, they could just put a list of 10
13 interpretations --

14 CHIEF JUSTICE ROBERTS: Yes, they can --

15 MR. ROBERTS: -- starting with the one
16 that's most favorable.

17 CHIEF JUSTICE ROBERTS: They can -- they can
18 take it to the extreme. But if it looks like a good
19 faith effort, to say -- you know, it's tough to
20 interpret and administer these plans, and they say,
21 this is what we think it means, but we're human; maybe
22 we made a mistake. And this is --

23 MR. ROBERTS: Then a court might choose to
24 defer if it thought there was no reason to think
25 that there was -- that there was a reason to suspect

1 that they're just trying --

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

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

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

8 MR. ROBERTS: The standard would be --

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

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

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

24 MR. ROBERTS: No. According --

25 CHIEF JUSTICE ROBERTS: I mean, that's

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

3 MR. ROBERTS: According --

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

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

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

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

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

1 decision, was.

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

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

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

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

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

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

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

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

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

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

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

1 was a proper result, right?

2 MR. ROBERTS: In the --

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

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

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

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

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

1 minimum.

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

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

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

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

20 MR. ROBERTS: Oh, God.

21 JUSTICE BREYER: So you say --

22 (Laughter.)

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

1 MR. ROBERTS: Well --

2 JUSTICE BREYER: He has to listen to it.

3 JUSTICE SCALIA: Can we go back to the urns?

4 (Laughter.)

5 MR. ROBERTS: Well, that's essentially --

6 that's essentially the -- the principle that we're --

7 that we're talking about --

8 JUSTICE BREYER: That is essentially the

9 principle, I thought.

10 MR. ROBERTS: The court's not required to

11 apply its use of discretion and --

12 JUSTICE BREYER: But he does have to read

13 it. He has to read it --

14 MR. ROBERTS: -- review again.

15 JUSTICE BREYER: Read it, and take it for

16 what it's worth.

17 CHIEF JUSTICE ROBERTS: So if --

18 MR. ROBERTS: Well, it's -- I think any

19 responsible district court would -- would do that.

20 JUSTICE BREYER: You don't think they

21 would -- you think they would do that?

22 MR. ROBERTS: They would do that.

23 JUSTICE BREYER: Yes. Okay.

24 MR. ROBERTS: Of course.

25 CHIEF JUSTICE ROBERTS: So you disagree with

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

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

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

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

25 So, in this circumstance, not ordinarily,

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

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

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

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

18 Mr. Long, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.

20 ON BEHALF OF THE PETITIONERS

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

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

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

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

1 discretion.

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

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

17 There are 14,000 --

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

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

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

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

13 JUSTICE GINSBURG: Mr. Long, would you --
14 would you explain your position on the picture we were
15 given of these people who were rehired and -- and they
16 get, periodically, a statement that says, you are
17 going to get 2,000-some-odd dollars; and then, 5 years
18 later, they get a statement that says, no, it's only
19 \$5.18, or something like that.

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

1 benefit virtually came from that large lump sum.

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

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

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Counsel.

15 The case is submitted.

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

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