

12-67
Frommert v. Conkright

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2012

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7 (Argued: November 15, 2012 Decided: December 23, 2013)

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9 Docket No. 12-67-cv
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13 PAUL J. FROMMERT, DONALD S. FOOTE, THOMAS I.
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30 MCNEIL, THOMAS F. MCGEE, VINCENT G. JOHNSON, F.
31 COLT HITCHCOCK, RONNIE TABAK, MARTHA LEE
32 TAYLOR, KATHY FAY THOMPSON, MARY BETH ALLEN,
33 CRAIG SPENCER, LINDA S. BOURQUE, THOMAS
34 MICHAEL VASTA, FRANK C. DARLING, CLARK C.
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37 HOBBS, CHARLES ZABINSKI, CHARLES J.
38 MADDALOZZO, JOYCE M. PRUETT, WILLIAM A.
39 CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W.
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KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH
J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A.
BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ,
WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN
BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN,
CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN
SERGEANT, MOLLY WHITE KEHOE, DAVID K. YOUNG,
LESLIE ANN WUNSCH, RICHARD J. GLIKIN, EUGENE H.
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RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L.
BRACKHAHN, BENJAMIN C. ROTH, CARMEN J. SOFIA,
KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL
DEFINA, JAMES G. WALLS,

Plaintiffs-Appellants,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION
PLAN ADMINISTRATOR, PATRICIA M. NAZEMENTZ,
XEROX CORPORATION PENSION PLAN
ADMINISTRATOR, XEROX CORPORATION, LAWRENCE
M. BECKER, XEROX CORPORATION PLAN
ADMINISTRATOR, XEROX CORPORATION RETIREMENT
INCOME GUARANTEE PLAN, LAWRENCE BECKER,
XEROX CORPORATION PLAN ADMINISTRATORS,

Defendants-Appellees.

Before: KEARSE, STRAUB, and POOLER, *Circuit Judges.*

Appeal from the decision and order of the United States District Court for the
Western District of New York (David G. Larimer, *J.*). This is our third decision in this
litigation for the recovery of benefits under Xerox Corporation’s retirement plan. *See*

1 *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008); *Frommert v. Conkright*, 433 F.3d
2 254 (2d Cir. 2006). The Supreme Court reversed our most recent decision, holding that
3 we had erred in holding that, having found the plan administrator's first interpretation of
4 the retirement plan to be invalid, the district court could properly refuse to defer to the
5 plan administrator's subsequent interpretation of the plan. *Conkright v. Frommert*, 559
6 U.S. 506, 130 S. Ct. 1640, 1651-52 (2010). On remand, the district court applied
7 deferential review and held that the plan administrator's proposed offset was a reasonable
8 interpretation of the retirement plan. *Frommert v. Conkright*, 825 F. Supp. 2d 433, 438-
9 43 (W.D.N.Y. 2011). The district court also held that the retirement plan gave adequate
10 notice of the offset to plan participants. *See id.* at 444-47. Plaintiffs argue that the plan
11 administrator's new interpretation (1) violates ERISA's notice provisions and (2) is an
12 unreasonable interpretation of the retirement plan. They further argue (3) that the district
13 court erred in failing to permit plaintiffs to conduct discovery concerning whether the
14 plan administrator was operating under a conflict of interest. We hold that the proposed
15 offset is an unreasonable interpretation of the retirement plan and that it violates ERISA's
16 notice provisions. Although we uphold the challenged discovery order, we VACATE the
17 judgment and REMAND the case to the district court for further proceedings.

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19 _____
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21 *the brief*), Gardena, CA, *for Plaintiffs-Appellants*.

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7 *Labor, in support of Plaintiffs-Appellants.*
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10 Jeffrey A. Lamken, MoloLamken LLP, Washington, D.C.;
11 Robin S. Conrad, Shane B. Kawka, National Chamber
12 Litigation Center, Inc., Washington, D.C.; Janet M. Jacobson,
13 American Benefits Council, Washington, D.C.; Scott J.
14 Macey, Kathryn Ricard, The ERISA Industry Committee,
15 Washington, D.C., *for Amici Curiae Business Roundtable,*
16 *Chamber of Commerce of the United States of America, The*
17 *ERISA Industry Committee, and American Benefits Council,*
18 *in support of Defendants-Appellees.*
19

20 POOLER, *Circuit Judge:*

21 Plaintiffs-Appellants (“Plaintiffs”), who appeal from the December 14, 2011 order
22 of the Western District of New York (David G. Larimer, *J.*), have brought claims under
23 the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et*
24 *seq.*, against the Xerox Corporation (“Xerox”), the Xerox Retirement Income Guarantee
25 Plan (“the Xerox Plan” or “the Plan”), and individually named retirement plan
26 administrators (collectively, the “Plan Administrator”). This is our third decision in this
27 litigation. *See Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) (*Fommert II*);
28 *Fommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) (*Fommert I*). The Supreme Court
29 reversed our most recent decision, holding that we had “erred in holding that the District
30 Court could refuse to defer to the Plan Administrator’s interpretation of the Plan on

1 remand, simply because [we] had found a previous related interpretation by the
2 Administrator to be invalid.” *Conkright v. Frommert*, 559 U.S. 506, 130 S. Ct. 1640,
3 1651 (2010). On remand, the district court applied deferential review and held that the
4 Plan Administrator’s proposed offset was a reasonable interpretation of the retirement
5 plan. *Fommert v. Conkright*, 825 F. Supp. 2d 433, 438-43 (W.D.N.Y. 2011). It also
6 concluded that the retirement plan gave participants adequate notice of the offset. *See id.*
7 at 444-47. Plaintiffs argue that this new interpretation (1) violates ERISA’s notice
8 provisions and (2) is an unreasonable interpretation of the retirement plan. They further
9 argue (3) that the district court erred in failing to permit plaintiffs to conduct discovery
10 concerning whether the Plan Administrator was operating under a conflict of interest. We
11 agree with the first two arguments, hold that the proposed offset is an unreasonable
12 interpretation of the retirement plan, and hold that it violates ERISA’s notice provisions.
13 We therefore VACATE the judgment and REMAND the case to the district court for
14 further proceedings.

15 BACKGROUND

16 We presume familiarity with the facts and procedural history of this case as set out
17 in our prior decisions, *see Frommert II*, 535 F.3d 111; *Fommert I*, 433 F.3d 254, but
18 state them insofar as they are relevant to the issues presented in this appeal.

19 This litigation concerns the 1989 restatement of the Xerox Plan, a floor-offset
20 retirement plan. “A floor-offset plan uses a defined-benefit structure (with pension
21 payments linked to years of work and high salary) to buffer the uncertainty of a

1 defined-contribution system (where pension payments depend on the performance of
2 investments in each employee's account).” *White v. Sundstrand Corp.*, 256 F.3d 580, 581
3 (7th Cir. 2001); *see also* 29 U.S.C. § 1002(34) (providing definition of defined
4 contribution plans under ERISA); 29 U.S.C. § 1002(35) (providing definition of defined
5 benefit plans under ERISA). Xerox's floor-offset plan was described in *Frommert I*, 433
6 F.3d at 257. *See also Miller v. Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 873
7 (9th Cir. 2006); *Layaou v. Xerox Corp.*, 238 F.3d 205, 206 (2d Cir. 2001). It has three
8 components: (1) the Retirement Income Guarantee Plan formula (“RIGP”), which is used
9 to calculate a defined benefit annuity;¹ (2) the Cash Balance Retirement Account
10 (“CBRA”), a defined contribution system consisting of an account with yearly
11 contributions from Xerox, accruing interest at a rate of one percent above the one-year
12 Treasury Bill rate, along with the beneficiary's transferred balance, if any, from Xerox's
13 pre-1990 profit sharing plan; (3) the Transitional Retirement Account (“TRA”), a defined
14 contribution system consisting of an account with the beneficiary's transferred balance
15 from the pre-1990 profit sharing plan, increased based on investment results. The values
16 in the beneficiary's CBRA and TRA are converted into annuities, after which the monthly
17 values of the three accounts are compared, and the beneficiary receives benefits from the
18 account with the greatest monthly value. Because RIGP, unlike CBRA and TRA,

¹ The formula takes 1.4% of the participant's highest average yearly pay, based on the participant's five highest-paying calendar years, and multiplies it by the participant's years of service, up to 30.

1 provides a set amount independent of market performance, it acts as a “floor”: The
2 highest monthly amount will always be at least the amount provided for by RIGP.

3 Plaintiffs are Xerox employees who left the company but were subsequently
4 rehired, having received a lump-sum distribution of their then-accrued pension benefits
5 when they left. At issue in this case is how the prior lump-sum distribution affects the
6 determination of benefits outlined above, both in the comparison of the three accounts
7 and in the calculation of actual benefits. Prior to this litigation, the Xerox Plan used the
8 so-called phantom account offset method to take into account the lump-sum distribution.

9 *See Frommert I*, 433 F.3d at 260. The method involved a three-step calculation:

10 First, the present value of any of the employee’s accounts are calculated as
11 if the lump sum had remained in the account and been invested throughout
12 the period following distribution. Second, the current values of the CBRA
13 and TRA that previously were distributed (i.e., the estimated values) are
14 added to any actual amounts earned since the employee’s rehire date.
15 Using these total amounts, a comparison is made among the three account
16 values—RIGP, total CBRA, and total TRA—to determine which method
17 yields the greatest benefits in a monthly value. Third, the account with the
18 greatest monthly value is reduced by the current value of the employee’s
19 prior distribution in that same account.

20
21 *Id.* (internal footnotes omitted). Because the RIGP benefit is determined by formula,
22 without reference to an underlying account, no estimated value is added to RIGP in step
23 2. *Id.* at 260 n.5. However, if RIGP yields the greatest benefits in monthly value, it is
24 reduced by the estimated increased value of the lump sum under either TRA or CBRA
25 (whichever is higher), in step 3. *Id.* at 260 n.6. The employee received a monthly
26 pension benefit equal to the reduced amount.

1 Plaintiffs brought suit under Section 502(a)(1)(B) of ERISA, which provides that a
2 “civil action may be brought . . . by a participant or beneficiary . . . to recover benefits
3 due to him under the terms of his plan, to enforce his rights under the terms of the plan, or
4 to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C.
5 § 1132(a)(1)(B).² Plaintiffs argued that the use of the phantom account offset method to
6 take into account the prior lump-sum distribution was an improper interpretation of the
7 Plan and that, therefore, they were entitled to greater benefits. In *Frommert I*, we agreed
8 and vacated the district court’s grant of summary judgment. *Frommert I*, 433 F.3d at 268.
9 Our holding rested on our definition of an “amendment” of an ERISA plan “as taking
10 place at the moment when employees are properly *informed* of a change” through
11 provision of a valid summary plan description (“SPD”) that complied with other ERISA
12 provisions.³ *Id.* at 262-63, 266-68; *see also* 29 U.S.C. § 1022 (describing SPD
13 requirements and stating that SPDs must “be sufficiently accurate and comprehensive to

² Plaintiffs also brought suit under Section 502(a)(3), which provides, in part, that a “civil action may be brought . . . by a participant or beneficiary . . . to obtain other appropriate equitable relief (i) to redress [ERISA] violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan.” 29 U.S.C. § 1132(a)(3). We affirmed the district court’s dismissal of this claim with respect to payment of benefits, “[b]ecause adequate relief [was] available under [Section 502(a)(1)(B)].” *Frommert I*, 433 F.3d at 270. However, with respect to Plaintiffs’ claim that the Plan Administrator breached its fiduciary duty by supplying misleading SPDs, we held that “there [was] a triable issue of fact.” *Id.* at 271.

³ Thus, two SPD requirements under our ERISA case law are: (1) plan administrators must provide SPDs to plan participants during the ordinary administration of a plan, as required by the statute, *see* 29 U.S.C. § 1022, and (2) plan administrators must provide SPDs to plan participants in order to validly *amend* the plan.

1 reasonably apprise such participants and beneficiaries of their rights and obligations
2 under the plan”); 29 U.S.C. § 1054(h)(1)-(2) (requiring that notice be given for
3 amendments to pension plans that result in a significant reduction of future benefits); *id.* §
4 1054(h)(3) (“Except as provided in regulations prescribed by the Secretary of the
5 Treasury, the notice required by paragraph (1) shall be provided within a reasonable time
6 before the effective date of the plan amendment.”). We held that the Plan did not contain
7 the phantom account offset at its inception and that it was never validly amended.⁴
8 *Frommert I*, 433 F.3d at 264-68. Consequently, use of the phantom account “constituted
9 a prohibited reduction of justified expectations of rehired employees’ accrued benefits in
10 contravention of § 204(g) [of ERISA].”⁵ *Id.* at 263. Our interpretation of the Xerox Plan
11 required us to determine the appropriate level of deference to grant the Plan
12 Administrator. “We review a plan administrator’s decision de novo unless the plan vests
13 the administrator with ‘discretionary authority to determine eligibility for benefits or to

⁴ Specifically, we held that an SPD, 1995 Xerox Plan Benefits Update, was insufficiently accurate under Section 102 of ERISA, and that the Update violated then-existing Section 204(h) of ERISA, which required plan administrators to provide fifteen days notice of any amendment creating “a significant reduction in the rate of future benefit accrual.” *Frommert I*, 433 F.3d at 266-68 (quoting 29 U.S.C. § 1054(h) (2000)). We also held that the 1998 Benefits Update violated Section 204(h) and therefore was effective only to employees rehired after the issuance of the Update. *Id.* at 268-69. We had previously held that the Xerox Plan SPDs up through 1994 failed to include the phantom account offset. *See Layaou*, 238 F.3d at 210-12.

⁵ Section 204(g) provides “[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.” 29 U.S.C. § 1054(g)(1).

1 construe the terms of the plan,’ in which case we use an ‘abuse of discretion’ standard.”
2 *Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005) (quoting *Firestone*
3 *Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). Under this *Firestone* deference,
4 “[a] court may overturn a plan administrator’s decision to deny benefits only if the
5 decision was without reason, unsupported by substantial evidence or erroneous as a
6 matter of law.” *Celardo v. GNY Auto. Dealers Health & Welfare Trust*, 318 F.3d 142,
7 146 (2d Cir. 2003) (internal quotation marks omitted). Section 10.2(e) of the Xerox Plan
8 provides that the Plan Administrator “may . . . [c]onstrue the Plan and the Trust
9 Agreement thereunder.” The district court held that such language was sufficient to
10 require deferential review, *Frommert v. Conkright*, 328 F. Supp. 2d 420, 430-31
11 (W.D.N.Y. 2004), a determination that the parties have not contested on appeal. In
12 *Frommert I*, we found the Plan Administrator’s use of the phantom account offset
13 unreasonable under both *Firestone* deference and de novo review.⁶ 433 F.3d at 266 n.11.

14 We instructed the district court as follows:

15 On remand, the remedy crafted by the district court for those employees
16 rehired prior to 1998 should utilize an appropriate pre-amendment
17 calculation to determine their benefits. We recognize the difficulty that this
18 task poses because of the ambiguous manner in which the pre-amendment
19 terms of the Plan described how prior distributions were to be treated. As
20 guidance for the district court, we suggest that it may wish to employ
21

⁶ We examined the use of the phantom account offset under both standards because our holding in *Frommert I* required an interpretation of both the Plan and its SPDs, 433 F.3d at 265-66, and it is an open question whether *Firestone* deference is applicable to a plan administrator’s interpretation of SPDs, *Layaou*, 328 F.3d at 211-12.

1 equitable principles when determining the appropriate calculation and
2 fashioning the appropriate remedy.

3
4 *Id.* at 268. On remand, the district court used as an offset the nominal value of the prior
5 lump-sum distribution. *Frommert v. Conkright*, 472 F. Supp. 2d 452, 458-59 (W.D.N.Y.
6 2007).

7 In adopting this *Layaou* offset—so-named because the same offset was used in an
8 earlier decision interpreting the Xerox Plan, *see Layaou*, 238 F.3d at 209-12; *Layaou v.*
9 *Xerox Corp.*, 330 F. Supp. 2d 297 (W.D.N.Y. 2004)—the district court failed to apply a
10 deferential standard of review and rejected alternate methods of calculating the offset
11 proposed by the Plan Administrator. *Frommert*, 472 F. Supp. 2d at 456-59. We affirmed
12 the district court’s interpretation of the Xerox Plan and noted that Defendants had
13 “identified no authority in support of the proposition that a district court must afford
14 deference to the mere *opinion* of the plan administrator in a case, such as this, where the
15 administrator had previously construed the same terms and we found such a construction
16 to have violated ERISA.” *Frommert II*, 535 F.3d at 119. However, the Supreme Court
17 reversed and remanded the case to us, holding that we “erred in holding that the District
18 Court could refuse to defer to the Plan Administrator’s interpretation of the Plan on
19 remand, simply because [we] had found a previous related interpretation by the
20 Administrator to be invalid.” *Conkright*, 130 S. Ct. at 1651. We then remanded back to
21 the district court to consider, applying *Firestone* deference, the appropriate offset.

1 The district court applied *Firestone* deference and adopted the offset method
2 proposed by the Plan Administrator, which converts the prior lump-sum distribution into
3 an annuity using a benchmark interest rate,⁷ decreases RIGP by this converted value, and
4 then compares the monthly values of the three components.⁸ *Frommert*, 825 F. Supp. 2d
5 at 438-40. The district court rejected Plaintiffs' argument that the Plan Administrator's
6 proposed offset violated ERISA's notice provisions and further rejected their request for
7 additional discovery to determine whether the Plan Administrator was operating under a
8 conflict of interest. *Id.* at 444-48. Plaintiffs now appeal, joined by the Secretary of Labor
9 (the "Government") as amicus curiae.⁹

10 DISCUSSION

11 Plaintiffs and the Government make three arguments on appeal. First, they argue
12 that the Plan Administrator's offset method violates ERISA's notice provisions. Second,
13 they argue that the offset method is not a reasonable interpretation of the Plan under
14 *Firestone* deference. Finally, they argue that the district court erred in failing to permit

⁷ The Plan Administrator proposed using discount rates set by the the Pension Benefit Guaranty Corporation ("PBGC") to make the conversion, capped at 8.5% compounded annually.

⁸ This new approach thus differs from the phantom offset method in two ways. First, it uses a benchmark interest rate to convert the value of the prior lump-sum distribution rather than increasing the distribution by the hypothetical gain of the lump sum had it remained in the CBRA or TRA accounts. Second, it decreases the value of RIGP before comparing the three components, rather than first increasing the values of CBRA and TRA.

⁹ The Business Roundtable, Chamber of Commerce of the United States of America, ERISA Industry Committee, and American Benefits Council have filed an amicus brief in favor of Defendants.

1 Plaintiffs to conduct discovery concerning whether the Plan Administrator was operating
2 under a conflict of interest.

3 We pause to note that the posture of this litigation after *Frommert I* requires us to
4 interpret the Xerox Plan anew. As Defendants pointed out before the Supreme Court,
5 “the newly-framed question of how the offset should be applied based on the
6 ‘pre-amendment plan terms’ arose for the first time on remand” out of *Frommert I*. Brief
7 for the Petitioners at 51, *Conkright v. Frommert*, 559 U.S. 506 (2010) (No. 08-810), 2009
8 WL 2954165. The Plan Administrator is now answering this new question. Its
9 interpretation of the Plan, as the Supreme Court held, is entitled to *Firestone* deference.
10 *Conkright*, 130 S. Ct. at 1651. Furthermore, the new interpretation put forth by the Plan
11 Administrator must comply with the other provisions of ERISA, including ERISA’s
12 notice requirements.

13 Upon review, we hold that the proposed offset is an unreasonable interpretation of
14 the retirement plan and further hold that it violates ERISA’s notice provisions, but we
15 affirm the district court’s decision to deny Plaintiffs’ request for additional discovery.

16 **I. Reasonable Interpretation**

17 Plaintiffs argue that the Plan Administrator’s offset approach was an unreasonable
18 interpretation of the Xerox Plan. The district court reviewed the offset under *Firestone*
19 deference and held that it was reasonable. *Frommert*, 825 F. Supp. 2d at 439-41. We
20 review a district court’s interpretation of an employee benefits plan for abuse of
21 discretion. *Frommert II*, 535 F.3d at 118; *but see Conkright*, 130 S. Ct. at 1651-52
22 (declining to “reach the question whether [we] also erred in applying a deferential

1 standard of review to the decision of the District Court on the merits”). “We review a
2 plan administrator’s decision de novo unless the plan vests the administrator with
3 ‘discretionary authority to determine eligibility for benefits or to construe the terms of the
4 plan,’ in which case we use an ‘abuse of discretion’ standard.” *Nichols*, 406 F.3d at 108
5 (quoting *Firestone*, 489 U.S. at 115). Under this *Firestone* deference, “[a] court may
6 overturn a plan administrator’s decision to deny benefits only if the decision was without
7 reason, unsupported by substantial evidence or erroneous as a matter of law.” *Celardo*,
8 318 F.3d at 146 (internal quotation marks omitted). “However, where the trustees of a
9 plan impose a standard not required by the plan’s provisions, or interpret the plan in a
10 manner inconsistent with its plain words, or by their interpretation render some provisions
11 of the plan superfluous, their actions may well be found to be arbitrary and capricious.”
12 *O’Shea v. First Manhattan Co. Thrift Plan & Trust*, 55 F.3d 109, 112 (2d Cir. 1995)
13 (internal quotation marks and alteration omitted). Upon review, we hold that, even with
14 the deferential standard of review afforded to both the district court and the Plan
15 Administrator, the offset is inconsistent with the Plan’s plain terms and is therefore an
16 unreasonable interpretation of the Plan.

17 As discussed above, the offset approach proposed by the Plan Administrator
18 converts the prior lump-sum distribution into an annuity using a chosen interest rate
19 (based on rates set by the PBGC), decreases RIGP by this converted value, and then
20 compares the monthly values of the three components, CBRA, TRA, and RIGP. Section
21 9.6 of the Plan provides, in relevant part:

1 Section 9.6. Nonduplication of Benefits. In the event any part of or all of a
2 Member's accrued benefit is distributed to him prior to his Normal
3 Retirement Date, if . . . such Member at any time thereafter recommences
4 active participation in the Plan, the accrued benefit of such Member based
5 on all Years of Participation shall be offset by the accrued benefit
6 attributable to such distribution.

7 Section 1.1 of the plan defines "accrued benefit" as "[t]he normal retirement benefit
8 which a Member has earned up to any date, and which is payable at Normal Retirement
9 Date in an amount computed in accordance with Section . . . 4.3." Section 4.3 describes
10 the three components of the Xerox Plan. Sections 4.3(e) and (f) provide that the balances
11 in the CBRA and TRA are converted into annuities "using annuity rates established by
12 the PBGC." Defendants argue and the district court held that the proposed offset
13 approach is a reasonable interpretation of these provisions. Specifically, Defendants
14 argue that, because Section 9.6 provides that a beneficiary's benefits must be offset by
15 "accrued benefits," the RIGP benefit must be reduced by the amount of the prior lump-
16 sum distribution. Because RIGP is expressed in the form of an annuity, the lump-sum
17 distribution must be converted into an "actuarially equivalent" annuity before making the
18 offset. Finally, because Section 1.1 defines "accrued benefits" with reference to Section
19 4.3, the appropriate rates for use in making this conversion are those provided in Section
20 4.3.

21 We hold this is unreasonable because it makes the rehired employees worse off
22 under the Plan in terms of actual benefits received. These changes are relative to the
23 treatment of newly hired Xerox employees with benefits determined under Section 4.3 of

1 the Plan. Consider the following example:

2 Employee 1 works at Xerox from 1960 to 1970, leaves the company, is
3 rehired in 1980 and continues working at the company until 2005.
4 Employee 2 is newly hired by Xerox in 1980 and continues working at the
5 company until 2005. The employees have equivalent highest average
6 salaries.

7
8 Under the Plan Administrator's approach, Employee 2's RIGP benefit is determined
9 under the RIGP formula, using the highest average salary and 25 years of service.
10 Employee 1's RIGP benefit is determined under the RIGP formula, using the same
11 highest average salary and 35 years of service, and then reduced by the "actuarially
12 equivalent" annuity value of the prior lump-sum distribution. Employee 1's RIGP benefit
13 will be *less than* Employee 2's benefit. This reduction changes the risk calculus under the
14 plan, as it affects the comparison of the three components. In circumstances where the
15 market has not performed well, the rehired employee is therefore less likely to receive the
16 RIGP benefit and bears more of the market risk inherent in defined contribution accounts.
17 *Cf. CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1873 (2011) (holding that a new plan that
18 "shifted the risk of a fall in interest rates from [employer] to its employees" represented a
19 decrease in benefits). If RIGP is awarded, Employee 1 will also receive *less of a pension*
20 under the Xerox Plan than Employee 2. If, as Defendants maintain, the offset is the
21 equivalent of Employee 1's "accrued benefit" already received, the offset should not
22 place the employee in a less than equivalent position.

23 To be clear, ERISA plans may be constructed to change the risk borne by rehired
24 employees or reduce such employees' benefits in a manner that treats them worse than

1 newly hired employees, provided that such terms exist in the plan. They do not exist
2 here. The newly hired employee's benefits are determined under Section 4.3. We fail to
3 see how an offset that purports to calculate "accrued benefits" under that section would
4 treat rehired employees and newly hired employees differently. Sections 4.3(e) and (f)
5 provide interest rates for use in converting CBRA and TRA into annuities, not for
6 determining the accrued benefit under RIGP. No provision in the Xerox Plan defines the
7 offset in accordance with the method the Plan Administrator advocates, and Section 4.3
8 defines the RIGP "accrued benefit" only with reference to the RIGP formula.
9 Accordingly, we find that the proposed offset produces an absurd and contradictory result
10 and is therefore unreasonable.

11 **II. Notice**

12 We now consider, assuming *arguendo* that the Plan Administrator's offset method
13 was a reasonable interpretation of the Xerox Plan, whether the offset violated ERISA's
14 notice requirements and therefore cannot be applied to the Plaintiffs' benefits. The
15 Supreme Court expressly declined to reach this argument, *Conkright*, 130 S. Ct. at 1652
16 n.2, and, on remand, the district court held that there was no notice violation, *Frommert*,
17 825 F. Supp. 2d at 444-47. It is an open question whether our analysis of a claimed
18 violation of ERISA's notice requirements, which requires an interpretation of the Xerox
19 Plan's SPDs, is subject to review under a de novo or abuse of discretion standard. *See*
20 *Layaou*, 238 F.3d at 211-12. We decline to answer that question here because we hold
21 that, under either standard, the Plan violates ERISA's notice provisions.

1 SPDs are central to ERISA. Section 104(b) of ERISA requires plan administrators
2 to regularly furnish SPDs to plan beneficiaries. 29 U.S.C. § 1024. We have recognized
3 “ERISA’s purpose of ensuring adequate disclosure with respect to pension and welfare
4 plans.” *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 580 (2d
5 Cir. 2006). “Where the SPD is silent on a provision that the plan documents include, and
6 plaintiff contends therefore the term cannot apply to him, . . . [we] rely[] on the statutory
7 language of ERISA and its implementing regulations . . . [and] look to see whether
8 ERISA requires the term to be stated in the SPD.” *Tocker v. Philip Morris Cos.*, 470 F.3d
9 481, 488 (2d Cir. 2006).¹⁰

10 ERISA and its regulations mandate what information administrators must include
11 in an SPD. 29 U.S.C. § 1022 (specifying required information for SPDs); *see also* 29
12 C.F.R. § 2520.102-2 (specifying requirements for SPD style and formatting); 29 C.F.R. §
13 2520.102-3 (specifying requirements for SPD contents). SPDs must detail the
14 “circumstances which may result in disqualification, ineligibility, or denial or loss of
15 benefits,” and “shall be written in a manner calculated to be understood by the average
16 plan participant, and shall be sufficiently accurate and comprehensive to reasonably
17 apprise such participants and beneficiaries of their rights and obligations under the plan.”
18 29 U.S.C. § 1022. “In fulfilling [the statutory notice] requirements, the plan administrator
19 shall exercise considered judgment and discretion by taking into account such factors as

¹⁰ We must also consider whether Plaintiffs meet the applicable standard of harm. *See Tocker*, 470 F.3d at 488 (“Second, we consider whether plaintiff was likely prejudiced by the SPDs’ silence on the term or information at issue”). *See infra* Part III.

1 the level of comprehension and education of typical participants in the plan and the
2 complexity of the terms of the plan.” 29 C.F.R. § 2520.102-2(a). SPDs must include
3 statements “clearly identifying circumstances which may result in . . . *offset* . . . of any
4 benefits that a participant or beneficiary might otherwise reasonably expect the plan to
5 provide.” *Id.* § 2520.102-3(l) (emphasis added). In order to comply with Section 102 of
6 ERISA, an SPD must explain the “full import” of a plan term. *Layaou*, 238 F.3d at 211
7 (emphasis and citation omitted).

8 For purposes of our notice analysis, we assume *arguendo* that the Xerox Plan is
9 reasonably interpreted by the Plan Administrator to include the current proposed offset
10 method. Section 9.6 of the Xerox Plan provides that “the accrued benefit of [a
11 beneficiary] based on all Years of Participation shall be offset by the accrued benefit
12 attributable to [any past] distribution.” The Plan’s SPDs state that “[t]he amount [a
13 beneficiary] receive[s] *may* also be reduced if [the beneficiary] had previously left the
14 Company and received a distribution at that time.” Appendix 694 (emphasis added); *see*
15 *also* Appendix 534. Comparing the Plan and its SPDs, we find that the SPDs fail to
16 clearly identify the circumstances that will result in an offset, are insufficiently accurate
17 and comprehensive, and fail to explain the “full import” of Section 9.6 of the Plan.
18 Accordingly, we hold that the Plan violates ERISA’s notice provisions.

19 We make our holding for several reasons. First and foremost, the SPDs do not
20 state that the amount of the lump-sum distribution *will* reduce the RIGP benefit, stating
21 only that it “may” result in a reduction. This is a critical omission because RIGP is a

1 formula and not an account (like CBRA and TRA). We do not see how a beneficiary
2 would know, given the SPDs' use of the word "may," that a prior distribution from an
3 account would reduce his benefit under a formula unless the SPD made clear the
4 interaction between the two. Thus, *any* interpretation of the Plan that necessarily reduces
5 the RIGP benefit would violate ERISA's notice requirements.

6 Second and relatedly, even assuming that the SPDs prescribe an offset to RIGP,
7 the SPDs fail to describe the mechanics of any offset. Specifically, the SPDs fail to state
8 the interest rate to be used to make the actuarial equivalence. A higher interest rate would
9 lead to a much larger offset than a lower one, leading to a correspondingly greater
10 reduction of benefits. The SPDs are therefore insufficiently accurate and comprehensive.

11 Defendants raise several counter-arguments as to why there is no notice violation,
12 each of which is unavailing. First, Defendants argue that finding a notice violation in this
13 case would conflict with our holding in *McCarthy v. Dun & Bradstreet Corporation*,
14 where we declined to "impose[] a blanket requirement under which a[n SPD] invariably
15 must describe the method of calculating an actuarial reduction or must use a clarifying
16 example to illustrate how a benefit is actuarially reduced when a participant who has
17 vested rights to receive a particular plan benefit chooses to receive payments before
18 reaching normal retirement age." 482 F.3d 184, 197 (2d Cir. 2007). We reject this
19 argument and, likewise, decline to make such a blanket rule here. *McCarthy* is
20 distinguishable from the instant case: It did not involve a floor-offset plan with multiple
21 components, and the relevant SPD, with respect to the deferred vested retirement benefits

1 at issue, stated that “the amount of benefit will be reduced actuarially” by an amount
2 greater than 3% to account for an election to receive early payment of those benefits.
3 *McCarthy*, 482 F.3d at 190, 193-94 & nn.1-2. Our conclusion here is limited to the
4 specific components and mechanics of the Xerox plan. It plainly does not create the
5 “blanket requirement” we previously declined to adopt.¹¹

6 Second, Defendants argue that our holding runs the risk of making future SPDs
7 unreadable. While it may be the case that “[I]arding [an SPD] with minutiae would defeat
8 that document’s function: to provide a capsule guide in simple language for employees,”
9 *Herrmann v. Cencom Cable Assocs.*, 978 F.2d 978, 984 (7th Cir. 1992), we have not
10 demanded the inclusion of such minutiae here. We have not specified *how* to best convey
11 the full import of a retirement plan in an SPD, as ERISA gives the plan administrator
12 discretion in making that judgment. 29 C.F.R. § 2520.102-2(a). That being said, the SPD
13 could have sufficiently explained the Plan Administrator’s proposed offset by including a
14 brief statement that the RIGP benefit would be offset by the appreciated value of any
15 prior distribution or by providing an example calculation of benefits that employed the
16 offset. *Id.*; *Layaou*, 238 F.3d at 211. Furthermore, Xerox’s 1998 SPD adequately

¹¹ Defendants also rely on the Tenth Circuit’s decision in *Stamper v. Total Petroleum, Inc. Retirement Plan*, which held that when an SPD is silent about actuarial assumptions but does not contradict the retirement plan, the plan controls. 188 F.3d 1233, 1243 (10th Cir. 1999). The Tenth Circuit’s holding also rested on the fact that plaintiffs “ma[de] no claim that they actually detrimentally relied on the SPD.” *Id.* This differs from the instant appeal, in which Plaintiffs claim that they meet the applicable harm standard.

1 explained the phantom account offset,¹² *Frommert I*, 433 F.3d at 268-69, an alternative
2 approach that is no less complicated than the Plan Administrator’s approach here. Xerox
3 could have issued an SPD describing the proposed offset without rendering it unreadable.

4 Finally, the district court, in its analysis of ERISA’s notice requirements on our
5 remand following the Supreme Court’s decision in *Conkright*, stated that

6 [i]n contrast to the Administrator’s proposal, then, plaintiffs’ suggestion
7 that this Court should not apply *any* appreciated offset is, in light of the
8 Supreme Court’s decision in this case, *un* reasonable. In effect, plaintiffs
9 would have this Court do exactly what it did before, *i.e.*, to adopt an
10 approach under which plaintiffs’ “present benefits [would be] reduced only
11 by the nominal amount of their past distributions—thereby treating a dollar
12 distributed to [plaintiffs] in the 1980’s as equal in value to a dollar
13 distributed today.” The Supreme Court expressly rejected that approach,
14 and I decline to adopt it again.

15
16 825 F. Supp. 2d at 447 (citation omitted). With due respect to the district court, this
17 discussion is entirely inapposite to the issue of notice.¹³ Determination of the issue of
18 whether statutory notice requirements were violated must look to the terms of the
19 plan—including the Plan Administrator’s proposed interpretation—and its SPDs, not
20 Supreme Court dicta about offset appreciation. Having reviewed the Plan and its SPDs,
21 we find that there was not adequate notice in this case.

¹² We held the 1998 SPD to be inapplicable to the Plaintiffs here because it was untimely, not because it was insufficiently comprehensive. *See supra* note 4.

¹³ The district court implies that the Supreme Court decided the issue of notice on the merits, something that it expressly declined to do. *Conkright*, 130 S. Ct. at 1652 n.2.

1 III. Harm and Remedies

2 We have concluded that the Plan Administrator's offset approach is an
3 unreasonable interpretation of the Xerox Plan and further concluded that the Plan and its
4 related SPDs violate ERISA's notice provisions. We turn now to a consideration of the
5 appropriate remedy. While we remand to the district court to determine the remedy in the
6 first instance, we pause to discuss the parameters that should guide its decisionmaking.

7 Plaintiffs' notice claims fall under Section 502(a)(3), 29 U.S.C. § 1132(a)(3),
8 under which the district court may invoke its equitable powers. *Amara*, 131 S. Ct. at
9 1878-80. Because we hold that in the circumstances of this case *any* offset of the RIGP
10 benefit violated ERISA's notice provisions, the district court should first consider
11 equitable remedies. In order to impose an equitable remedy, the district court must
12 consider two questions: (1) what remedy is appropriate; (2) whether Plaintiffs have
13 established the requisite level of harm as a result of the notice violations.

14 We have previously held that, for claims of ERISA notice violations, plaintiffs
15 need to satisfy a standard of "likely prejudice." *Burke v. Kodak Ret. Income Plan*, 336
16 F.3d 103, 113 (2d Cir. 2003). The Supreme Court has since clarified that the standard of
17 harm that plaintiffs must show depends upon the equitable remedy that plaintiffs seek.
18 *See Amara*, 131 S. Ct. at 1881-82. For example, while "detrimental reliance" is a
19 requirement for the remedy of estoppel, it is not a strict requirement for every equitable
20 remedy. *See id.* at 1881. Thus, in considering whether Plaintiffs have made a sufficient
21 showing of harm, the district court must consider this question in tandem with the
22 equitable remedies it may impose. *Id.* at 1871.

1 If the district court holds that the Plan’s notice violations justify the imposition of
2 an equitable remedy, such a remedy will provide the relief that Plaintiffs seek. However,
3 if it finds that no equitable remedy is available, it should separately consider Plaintiffs’
4 unreasonable-interpretation claim, under which the appropriate remedy is to enforce the
5 terms of the Xerox Plan. 29 U.S.C. § 1132(a)(1)(B); *Amara*, 131 S. Ct. at 1876-77. It
6 should enforce a reasonable interpretation of the Plan, without again considering the issue
7 of notice. In determining what interpretation of the Plan is reasonable, it should apply the
8 appropriate deference to the interpretation of the Plan Administrator under *Firestone*.

9 **IV. Additional Discovery**

10 Finally, Plaintiffs argue that the district court erred in failing to permit them to
11 conduct discovery concerning whether the Plan Administrator is operating under a
12 conflict of interest. *See Frommert*, 825 F. Supp. 2d at 447-48. We review a district
13 court’s discovery rulings for abuse of discretion. *See Miller v. Wolpoff & Abramson*,
14 *L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

15 Plaintiffs argue that, based on *Metropolitan Life Insurance Company v. Glenn*, 554
16 U.S. 105 (2008), the district court should permit them to conduct additional discovery as
17 to whether the Plan Administrator here is operating under a conflict of interest. In *Glenn*,
18 which was issued after discovery in this litigation, the Supreme Court held that “the fact
19 that a plan administrator both evaluates claims for benefits and pays benefits claims
20 creates the kind of ‘conflict of interest’” that “must be weighed as a ‘factor in determining
21 whether there is an abuse of discretion’” under *Firestone*. *Id.* at 111-12 (emphasis

1 omitted) (quoting *Firestone*, 489 U.S. at 115). Plaintiffs’ argument that additional
2 discovery is required in light of *Glenn* fails because “the Plan Administrator has at all
3 relevant times been an employee of Xerox, which is ultimately responsible for funding
4 the Plan” (Defendants’ brief on appeal at 59), and because the principle that, even where
5 a plan gives the administrator discretion, the administrator’s “conflict of interest” would
6 be “a facto[r] in determining whether there is an abuse of discretion,” *Firestone*, 489 U.S.
7 at 115 (internal quotation marks omitted), had been established long before *Glenn*. The
8 district court did not abuse its discretion in declining to reopen discovery.

CONCLUSION

For the foregoing reasons, we VACATE the judgment of the district court and
REMAND the case for further proceedings consistent with this opinion.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: December 23, 2013
Docket #: 12-67cv
Short Title: Frommert v. Conkright

DC Docket #: 00-cv-6311
DC Court: WDNY (ROCHESTER)
DC Judge: Feldman
DC Judge: Larimer

NOTICE OF DECISION

The court has issued a decision in the above-entitled case. It is available on the Court's website <http://www.ca2.uscourts.gov>.

Judgment was entered on December 23, 2013; and a mandate will later issue in accordance with FRAP 41.

If pursuant to FRAP Rule 39 (c) you are required to file an itemized and verified bill of costs you must do so, with proof of service, within 14 days after entry of judgment. The form, with instructions, is also available on Court's website.

Inquiries regarding this case may be directed to 212-857-8560.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
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BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature