No. 6:00-cv-6311

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, *ET AL.*

Plaintiffs,

v.

SALLY L. CONKRIGHT, *ET AL.*

Defendants.

ON REMAND FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REENTER JUDGMENT

Peter K. Stris, Esq.
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141; ext. 215
peter.stris@strismaher.com

Shaun P. Martin, Esq.
University of San Diego School of Law
5998 Alcala Park, Warren Hall
San Diego, CA 92110
(619) 260-2347
smartin@sandiego.edu

Counsel for Plaintiffs

INTRODUCTION

This brief is submitted as a Reply to Xerox's Opposition to Plaintiffs' Motion to Reenter Judgment. Plaintiffs have filed a separate Opposition to Xerox's Cross Motion for Adoption of the Plan Administrator Approach ("PAA")—Xerox's latest version of an undisclosed, appreciated offset.

ERISA requires notice of material terms.[1] The notice question is separate from whether the administrator acted reasonably in construing the plan—a point the Supreme Court went out of its way to emphasize.[2] It constitutes an independent ground to reenter judgment for plaintiffs.

No employee's pension benefits can be reduced by conditions that were not properly communicated in a summary plan description ("SPD").[3] This Court has already held that Xerox failed to notify plaintiffs of the PAA, or any "appreciated" offset. The United States Government has expressly

[1] *Nachman Corp. v. Pension Ben. Guar. Corp.,* 446 U.S. 359, 374-75 (1980); 29 U.S.C § 1001.

[2] *Conkright et al. v. Frommert et al.,* 130 S.Ct 1640, 1652 n.2 (2010).

[3] *Wilkins v. Mason Tenders District Council Pension Fund,* 455 F.3d 572 (2d Cir 2006) ("If a summary plan 'is inadequate to inform an employee of his rights under the plan, ERISA empowers plan participants and beneficiaries to bring civil actions against plan fiduciaries for any damages that result from the failure to disclose' under 29 U.S.C. § 1132(a)(1)(B)."") (quoting or citing *Layaou v. Xerox Corp.,* 238 F.3d 205, 212 (2d Cir.2001); *Howard v. Gleason Corp.,* 901 F.2d 1154, 1159 (2d Cir. 1990), and *Burke v. Kodak Ret. Income Plan,* 336 F.3d 103, 114 (2d Cir. 2003)).

agreed.[4] Even Xerox's *own expert* conceded that the PAA is "not explicitly communicated in the SPD or otherwise."[5]

For the reasons expressed by both this Court and the United States, plaintiffs win on notice grounds regardless of whether the Plan itself reasonably permits the PAA. This Court's judgment should accordingly be reentered.

ARGUMENT

I. As This Court Has Already Held, Xerox Did Not Notify Plaintiffs Of Any Offset That Included An "Actuarial Adjustment."

Whatever the complexities of its constantly shifting "approaches," at heart, Xerox's position is simple: Xerox wants to offset the (1) money received by plaintiffs (2) plus interest.[6] The interest rate, obviously, is a material term, and binding precedent reflects this reality.[7]

---

[4] *See* Brief for United States as Amicus Curiae in *Conkright et al. v. Frommert et al.*, 130 S.Ct 1640 (2010) at 25-26 (explicitly arguing that the PAA must be rejected because it violates ERISA's notice requirements).

[5] Appendix in *Frommert v. Conkright*, 535 F.3d 11 (2008) at A-586.

[6] Xerox calls the interest rate "an actuarial adjustment." It is an interest rate that "adjusts" plaintiffs' pensions downward, in most cases to zero.

[7] *See Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 9 (2d Cir. 1997) (finding that the possibility of death in the period between the election of retirement and the effective date of retirement was material because it would have a substantial effect on the benefits of any employee who ended up in such circumstances).

Xerox loses on notice grounds because it never specified the interest rate. Indeed, it never even specified there would *be* an interest rate. Instead, it led plaintiffs to believe there would be no interest rate.[8] That patently violates ERISA's notice requirements.[9]

Here is acceptable notice: "Your prior distributions will be offset based on the amount received plus an interest rate of X. Consider this example…" That is it. It is that simple. Xerox failed to do this.

The proof is in the pudding. Based on the documents plaintiffs had, no "average plan participant" could have discerned the interest rate Xerox now claims should be applied to plaintiffs' distributions. There is no line of text, no example, no pointer to another document—*nothing*—that allows a plaintiff in the 1990s to determine that (1) an interest rate would be used to offset their past distributions, or (2) what that interest rate would be. That is precisely why this Court has *already* held that: "If the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanism suggested by witnesses at the remand hearing before me."[10]

[8] Plaintiffs' Motion to Reenter Judgment at 3-5.

[9] *See* 29 U.S.C. §§ 1021, 1022, 1024 & 1025.

[10] *Frommert v. Conkright*, 472 F.Supp.2d 452, 467-68 (W.D.N.Y. 2007) (Larimer, J.).

II. Xerox's Excuses Have No Merit

Xerox's response beggars belief. It argues, in effect, that its disclosures were sufficiently vague so as to justify *any* interest rate and *any* "actuarial adjustment."[11] Consider: Xerox admits that it did not come up with the Plan Administrator Approach until over a decade *after* the disclosures at issue here were made. How could 1990s disclosures have possibly disclosed an offset not conceived of until 2006? The answer: only if the original disclosures were sufficiently vague so as to have infinitely flexible meaning.

That is exactly how Xerox views these SPDs. It alleges that these SPDs permit any level of interest—including a level of interest that entirely destroys many plaintiffs' pensions. An SPD that permits any interest rate forecloses none. That constitutes no notice at all. The whole point of ERISA's notice requirement is to permit beneficiaries to be able to calculate

[11] Here are Xerox's arguments (Opposition at 17-19): First, Xerox asserts that "the SPD did not promise that a Nominal Offset would be applied." According to Xerox, that permits any interest rate which might be read into the plan. Second, Xerox asserts that the SPD identified the possibility that benefits "may be reduced" on account of prior distributions. According to Xerox, that permits any interest rate which might be read into the plan. Third, Xerox asserts that there is no requirement that the SPD includes examples. According to Xerox, that permits any interest rate which might be read into the plan. Finally, Xerox asserts that SPDs need not cover "technical minutiae." According to Xerox, that permits any interest rate which might be read into the plan.

their pension entitlements and plan accordingly.[12] Xerox's disclosures indisputably did not do this.

Xerox also suggests, half-heartedly, that the egregious infirmities in its disclosures may be excused because plaintiffs "should have known" that some level of interest would be applied to their past distributions.[13] That is absurd. People do not normally assume interest rates apply unless those rates are specified—as they are in credit cards, mortgages, and car loans. Even then, the disclosure need occur in a certain way, or people will be confused.[14] The notion that some "general awareness" of entirely undisclosed interest informs the behavior of working people is simply untrue, and runs counter to ERISA's command that fiduciaries specify in plain English any terms that will reduce people's pensions.[15] And it certainly does not relieve Xerox of its duty to specify the rate or give examples of how it will be used.

---

[12] As the Second Circuit has repeatedly stated, the SPD is "an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Burke v. Kodak Retirement Plan*, 336 F.3d 103, 114 (2d Cir. 2003).

[13] Xerox Opposition at 16.

[14] *See, e.g.,* A. Lusardi, *Financial Literacy: An Essential Tool for Informed Consumer Choice?* at 2 (June 2008) (noting most people lack knowledge of basic financial concepts, such as compound interest and the difference between nominal and real rates), *available at* http://www.dartmouth.edu/~alusardi/Papers/Lusardi_Informed_Consumer.pdf.

[15] This is especially true when, as here, Xerox provided plaintiffs with benefits statements telling them the amount of their pensions with *no* interest rate applied. Xerox implies that these statements are irrelevant under ERISA. Opposition at 23-24. This is flatly untrue. *See* 19 U.S. C. § 1025(a)(2) (expressly requiring such statements).

Xerox's other arguments regarding the appropriateness of its "actuarial adjustments" are a clever attempt to avoid clearly-settled law regarding notice.[16] For example, Xerox argues that to enforce ERISA's notice rules in this case would be to "eviscerate" the standards of deference to which administrators are entitled.[17] In essence, Xerox is saying: "We failed to disclose the interest rate, but there is a reading of the Plan that permits imposition of that rate, so ignore the notice failure and defer to our reasonable interpretation of the plan." But that is not the law, as the Second Circuit has made crystal clear.[18] Xerox attempts to conflate the two issues because its position on notice is simply indefensible, as well as in conflict with binding precedent.[19]

---

[16] Because these arguments pertain to plan interpretation (as opposed to notice), they need not be reached by this Court. They have no substantive merit in any event, as explained in more detail in Plaintiffs' Opposition to Xerox's Cross Motion, which is contemporaneously filed herewith as a separate document.

[17] *See, e.g.*, Xerox Opposition at 19.

[18] As the Second Circuit has held: "To allow the Plan to contain different terms that supersede the terms of the Booklet would defeat the purpose of providing the employees with summaries." *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990) (quoting *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566 (11th Cir.1985) ("It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complicated document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.")).

[19] Alternatively, Xerox's argument can be thought of as inviting this Court to apply a deferential standard to the interpretation of the SPDs. That is contrary to the law of the case, the Second Circuit, and the direct statutory command of ERISA, which specifically instructs courts to interpret the SPD based on the view of the "average plan participant." *See, e.g., Wilkins v. Mason Tenders*, 455 F.3d 572, 582 ("[W]e hold that where, as here, a claim turns on whether ERISA requires that a practice not mentioned in the SPD be

Tellingly, Xerox does not even attempt to address the relevant statutory provisions and regulations governing notice that are at issue in this case.[20] For example, Xerox fails to address the complexity of its new-found (post-disclosure) PAA and the effect of such complexity on the disclosures required by 29 C.F.R. § 2520.102-2(a). Similarly, it fails to respond to the fact that its failure to explain or illustrate its interest assumptions was grossly misleading because it served to obscure a $16 million reduction in benefits prohibited by 29 C.F.R. § 2520.102-2(b). By choosing to focus only on 29 C.F.R. § 2520.102-3(l) (requiring disclosure of the circumstances of benefit reductions), Xerox ignores the entire point of ERISA's notice requirements, which hold that an SPD complies with ERISA statutory requirements only if it explains "the full import" of material plan terms.[21]

Finally, Xerox argues that, even if it failed to notify plaintiffs, the appropriate remedy is not the simple "money received" offset this Court ordered, but something different. Xerox is re-litigating the law of the case.

---

included in the SPD, our review of the SPD's compliance with ERISA is *de novo.*")* (citing *Rhorer v. Raytheon Eng'rs & Contractors, Inc.*, 181 F.3d 634, 639 (5th Cir.1999) (treating SPD compliance with ERISA as a legal question to be reviewed *de novo*)).

[20] *See* Plaintiffs' Motion to Reenter Judgment at 11-12 (discussing relevant law).

[21] *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985) (requiring SPD to explain "full import" of provisions affecting employees).

This Court has already determined an unadjusted offset is equitable. This Court was, and is, right.[22]

CONCLUSION

This case is about whether parties have to stick to the bargain struck and the terms they communicate. Xerox *could* have clearly communicated an offset with a high interest rate. In that case, no plaintiff would have worked at Xerox, because a highly appreciated offset—like the PAA or the phantom account—make it extremely difficult, if not impossible, to earn a pension.

For that reason, Xerox did not inform plaintiffs that it intended to use a high interest rate to erode their pensions. To the contrary, Xerox led plaintiffs to believe they were not subject to an appreciated offset. It is grossly unfair to permit Xerox to have benefited from years of plaintiffs' hard work and then, as plaintiffs age, retire, and fall ill, inject an interest rate that vastly reduces their pensions. Neither law nor equity countenances such

[22] Xerox correctly mentions (Opposition at 19-20) that the Second Circuit's "likely prejudice" standard is currently being reviewed by the Supreme Court; however, as Xerox concedes, this Court remains bound by the Second Circuit's holding until and unless the Supreme Court changes the law.

a bait-and-switch. This Court should accordingly reenter its prior judgment. Precedent and basic fairness require no less.

DATED: March 18, 2011 _____/s/_____
Peter Stris

PROOF OF SERVICE

I, Shaun P. Martin, hereby certify under penalty of perjury that on March 18, 2011, I served a copy of PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REENTER JUDGMENT via e-mail and U.S. mail to:

Robert Wick, Esq., Covington & Burling LLP, 1201 Pennsylvania Avenue NW, Washington, DC 20004 (counsel for defendants) at rwick@cov.com.

Margaret Clemens, Esq., Littler Mendelson PC, 400 Linden Oaks #110, Rochester, NY 14625 (counsel for defendants) as mclemens@littler.com.

I further certify that on March 18, 2011, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then notify the above-mentioned participants in the case.

DATED: March 18, 2011 _____/s/_____
Shaun P. Martin