No. 06-1398

IN THE

Supreme Court of the United States

AT&T PENSION BENEFIT PLAN, AS SUCCESSOR TO THE AMERITECH MANAGEMENT PENSION PLAN,
Petitioner,

v.

LINDA CALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE AMERICAN BENEFITS COUNCIL AND THE ERISA INDUSTRY COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ROBERT H. TILLER *
HELMS MULLISS & WICKER, PLLC
2600 Two Hannover Square
Raleigh, N.C. 27601
(919) 755-6567

* Counsel of Record

Counsel for the American Benefits Council and the ERISA Industry Committee

May 16, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

No. 06-1398

AT&T PENSION BENEFIT PLAN, AS SUCCESSOR TO THE AMERITECH MANAGEMENT PENSION PLAN,
Petitioner,

v.

LINDA CALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the American Benefits Council (the "Council") and the ERISA Industry Committee ("ERIC") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari filed by AT&T Pension Benefit Plan, as successor to the Ameritech Management Pension Plan. Petitioner has consented to the filing of this brief, and a letter from counsel for petitioner is being lodged with the Court. Respondent's consent was requested but refused.

The Council is a non-profit trade association founded in 1967 to protect and foster the growth of privately sponsored employee benefit plans. The Council's approximately 250 members include mostly major employer sponsors of em-

ployee benefit plans, as well as plan service providers such as consulting and actuarial firms, investment firms, law firms, banks, insurers, and other professional benefit organizations. Collectively, the Council's members sponsor and administer both large and small plans that cover more than 100 million participants throughout the United States. These plans include retirement, health, disability, and other employee benefit plans covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").

ERIC is a non-profit association of employers that provide benefits to many tens of millions of active and retired workers and their families through employee benefit plans governed by ERISA. ERIC's members are America's largest employers.

The Council and ERIC have participated as *amici* in the Supreme Court in cases of exceptional importance for employee benefit plan design or administration. They have a vital interest in this case, which affects hundreds of thousands of employee benefit plans. The decision below, and the circuit split that the decision below deepens, undermine the ability of plan administrators to exercise the discretion frequently granted to them to interpret the terms of ERISA plans. If the decision below is allowed to stand, both the public interest in promoting and sustaining ERISA plans and the interest of plan sponsors and participants will be adversely affected. Relying or depending on the courts, rather than plan administrators who have expertise and experience, to undertake the discretionary interpretation of ambiguous terms in ERISA plans would undermine the goal of consistent administration of plans across multiple jurisdictions. If permitted to stand, the decision below would also discourage the establishment or expansion of benefit plans.

In view of the strong interest of the large number of ERISA plan sponsors represented by the Council and ERIC, the *amici curiae* respectfully request that the Court consider the views

set forth in the accompanying brief in connection with the Court's consideration of the petition for a writ of certiorari.

Respectfully submitted,

ROBERT H. TILLER *
HELMS MULLISS & WICKER, PLLC
2600 Two Hannover Square
Raleigh, N.C. 27601
(919) 755-6567

Counsel for the American Benefits Council and the ERISA Industry Committee

* Counsel of Record

May 16, 2007

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the American Benefits Council and the ERISA Industry Committee state the following:

The American Benefits Council and the ERISA Industry Committee have no parent corporations. No publicly held company owns 10% or more of the stock of the American Benefits Council or of the ERISA Industry Committee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

No. 06-1398

AT&T PENSION BENEFIT PLAN, AS SUCCESSOR TO THE AMERITECH MANAGEMENT PENSION PLAN,
Petitioner,

v.

LINDA CALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN BENEFITS COUNCIL AND THE ERISA INDUSTRY COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.[1]

[1] Pursuant to Rule 37.6, the Council and ERIC's counsel of record hereby certifies that this brief was authored in whole by Helms Mulliss & Wicker, PLLC, and that no individual or entity other than *amici curiae* has contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case involves an important question of law that has great practical significance and nationwide impact. The question concerns the requirement of deference to interpretation by plan administrators of ambiguous language in ERISA plans. Such plans, which provide retirement, health, and other benefits to millions of Americans, use complex terminology to deal with highly technical issues. Thus determining the rights of plan participants frequently requires interpretation. This Court found, in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), that plans may vest discretion in plan administrators to interpret ambiguous terms. In challenges to such discretionary decisions, courts should apply the deferential "arbitrary and capricious" standard of review. *Id.* at 113.

The Seventh Circuit, in the decision below, failed to apply this deferential standard. Instead, it invoked the canon of *contra proferentem*, which says that contractual ambiguities are resolved against the drafter. Pet. App. 9a. This approach, which is used in contract interpretation, makes no sense in the ERISA context. This is because ERISA is governed by trust, rather than contract, principles, and trusts are construed to determine the intent of the settlor. The effect of the Seventh Circuit's approach is to eliminate the deference required under *Firestone.* The circuits are widely divided on the application of *contra proferentem.* In view of this circuit split and of the important practical consequences of this split, review by this Court is appropriate.

ARGUMENT

This case both deepens an existing circuit split and raises new obstacles to the administration of employee benefit plans covered by ERISA. ERISA plans are integral to the lives of more than 150 million Americans. These plans are crucial for these citizens' retirement, health care, and financial security.

American employers have created more than 3.2 million employee benefit plans. Of those, approximately 730,000 are retirement plans covering more than 100 million participants and holding roughly $4.9 trillion in assets.[2]

I. GRANTING PLAN ADMINISTRATORS DISCRETION IN MATTERS OF CONSTRUCTION, AS PERMITTED BY *FIRESTONE*, SERVES THE PUBLIC POLICY OBJECTIVES OF ERISA.

ERISA was enacted to establish "a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Employers are not required by ERISA either to establish plans or provide a particular level of benefits, but the Act governs any plans they choose to establish. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Under ERISA, plans must operate in accordance with the plan documents. 29 U.S.C. § 1104(a)(1)(D).

Plan documents are often lengthy and always quite technical. By their nature, such plan documents may contain terms that are ambiguous. This Court has recognized that an ERISA plan may vest discretion in plan administrators "to construe disputed or doubtful terms." *Firestone*, 489 U.S. at 111. Vesting such discretion in plan administrators is a common practice, as the record in this case suggests. Plan sponsors choose such arrangements for practical reasons.

For example, in retirement plans, there may be determinations as to eligibility, vesting, and calculation of benefits in circumstances that were not specifically foreseen by the plan's sponsor. *See, e.g.*, *Wise v. Lucent Technologies Inc. Pension Plan*, 102 F. Supp. 2d 733 (S.D. Tex. 2000). In

---

[2] *See* U.S. Gov't Accountability Office, Employee Benefits Sec. Admin, Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight, GAO-07-22, at 9 (Jan. 2007), *available at* http://www.gao.gov/new.items/d0722.pdf.

health plans, interpretive questions may arise as to whether new medical procedures are covered or whether instead they are deemed experimental. *See, e.g., Ortlieb v. United Healthcare Choice Plans*, 387 F.3d 778 (8th Cir. 2004). In disability plans, it is sometimes unclear whether a particular condition is disabling with respect to a particular job. *See, e.g., Williams v. Unum Life Ins. Co. of Am.*, 250 F. Supp. 2d 641 (E.D. Va. 2003). These and many other issues in ERISA plan administration cannot be addressed in detail in the plan document itself, and therefore require the exercise of some measure of discretion in interpreting the plan.

To serve the interests of plan participants and beneficiaries, plan sponsors seek to have such interpretive issues resolved efficiently and reliably. Granting the plan administrator authority and discretion to resolve such questions in the first instance serves these objectives, by designating as a decision maker a person or persons with specialized knowledge and experience of the plan and its particular terms.[3] This ensures "that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional." *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985). In addition, every plan has finite resources and serves competing interests, such as those of persons retiring now and those who intend to retire later. In interpreting the plan, it is necessary to consider the plan's resources and all the interests served by

[3] ERISA mandates an appeal procedure to protect plan participants in the event of an erroneous benefits decision by a plan administrator. 29 U.S.C. § 1133. *See also* 29 C.F.R. § 2560.503-1(b)(5) (requiring the establishment in every plan of "administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants").

the plan. The plan administrator is well positioned to consider all these factors.

This Court has taken account of the crucial role of plan administrators in interpreting plan ambiguities. In *Firestone*, the Court explained that when a plan administrator is granted power to interpret a plan, the administrator's interpretation "will not be disturbed if reasonable." 489 U.S. at 111. Thus a plan administrator's interpretation must be upheld unless it is "arbitrary and capricious." *See id.* at 113; *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 378 (2002). This standard of review recognizes that courts must give substantial deference to plan administrators in decisions within their discretionary authority. *See Firestone*, 489 U.S. at 111.

II. THE DECISION BELOW IS AT ODDS WITH *FIRESTONE* AND DECISIONS IN OTHER CIRCUITS IN RELYING ON THE CANON OF INTERPRETATION OF *CONTRA PROFERENTEM.*

The Seventh Circuit's decision rests on a canon of contract interpretation that is contrary to the deferential review required under *Firestone.* The appeals court applied the canon of *contra proferentem*. Pet. App. 9a. The court failed to note the significant difference between contract and trust interpretation. In *Firestone*, this Court explained that trust principles apply to ERISA issues. 489 U.S. at 110-11. *See also Cent. States, Southeast and Southwest Areas Pension Fund v. Cent. Transp.*, 472 U.S. 559, 570 (1985). The *contra proferentem* canon is a rule of contract interpretation – not a rule of trust interpretation.

The reason is simple. As *Firestone* noted, trusts are interpreted to determine "the intention of the settlor with respect to the trust." 489 U.S. at 112 (*quoting* Restatement (Second) of Trusts § 4, Comment *d* (1959)). Contract interpretation is quite different, in that the objective is to determine the joint

intent of the parties to the contract. Restatement (Second) of Contracts § 201. In interpreting trusts, only the intent of the settlor is considered; the intent of trust beneficiaries is irrelevant. *See* Restatement (Third) of Trusts § 4. *Contra proferentem*, by requiring interpretation *against* the intent of the settlor, runs directly counter to this basic rule of trust interpretation.

Moreover, as petitioner has noted, applying the *contra proferentem* canon is inconsistent with permitting the exercise of discretion as set out in *Firestone*. Pet. 21. Applying the canon means the plan administrator would have little or no discretion with respect to ambiguous issues, because ambiguities would always be resolved in favor of the plan participant. This would happen even where the result is contrary to the intent of the plan sponsor.

Although it might initially seem that the Seventh Circuit's requirement of favoring ERISA plan participants over sponsors would have no real costs, this is not so. The requirement would substantially raise the costs of offering plans. Employers considering sponsoring or modifying a plan will be discouraged from such actions in the face of the increased costs of attempting to eliminate all ambiguities (which experience suggests is an unattainable goal). Because of the risk that an unintended benefit may be created based on an ambiguity, they will tend to draft language on particular benefits more narrowly, or decide out of an abundance of caution not to offer them at all.

In addition, plans would face an increased risk of litigation. Plaintiffs' attorneys will have greater incentives to challenge benefits decisions based on the argument that plan terms are ambiguous. Plan sponsors would be subject to constant litigation because each participant's interpretation could be tested in the courts. The cost of meritless suits would affect not only the plans that are attacked, but also the courts, which

would find their dockets crowded with new questions of ERISA plan interpretation.

Although the Seventh Circuit mentioned deference, it declined to grant deference in accordance with *Firestone*. The appeals court reasoned, based largely on its mistaken application of *contra proferentem*, that the matter was so clear as to leave no room for discretion. If the matter were clear, however, the appeals court would not have needed to refer to a canon used in contract cases to resolve ambiguities.[4] Its erroneous reliance on *contra proferentem* should not obscure its refusal to apply the "arbitrary and capricious" standard required by *Firestone*.

III. THE EXISTING CIRCUIT SPLIT UNDERMINES ERISA'S OBJECTIVE OF NATIONAL UNIFORMITY IN THE REGULATION AND ADMINISTRATION OF EMPLOYEE BENEFIT PLANS.

As petitioner has explained, the decision below deepens a conflict in the circuits regarding the application of the doctrine of *contra proferentem* to interpret ERISA plans. This circuit split significantly undermines the congressional objective of uniformity. *See Aetna Health Inc. v. Davila*, 542 U.S. at 207. A fundamental policy objective of ERISA is to encourage employers to sponsor retirement, health, and welfare plans by allowing employers to administer on a uniform basis employee benefit plans throughout the country. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995).

---

[4] The Seventh Circuit recognized that *contra proferentem* is used to address "ambiguities." Pet. App. 9a. Moreover, it determined that the terms of the plan were "obscure" and undertook a laborious parsing of the language and history of the plan to address that obscurity. Pet. App. 7a.

Despite the lessons of this Court in *Firestone* regarding deference to plan administrators, the level of discretion afforded varies significantly from circuit to circuit because the courts have applied different rules of interpretation even when purporting to review a plan administrator's decisions for abuse of discretion. As stated in the petition, some circuit courts have applied the doctrine of *contra proferentem* to resolve ambiguities in plan language while other circuits have refused to do so. Pet. 21-23. Yet other decisions have relied on the doctrine of reasonable expectations. *See, e.g., Wheeler v. Dynamic Eng'g, Inc.*, 62 F.3d 634, 638 (4th Cir. 1995).

This conflict among circuits poses a dilemma for plan administrators, who frequently administer the same plan covering participants located throughout the country. As long as the courts employ different rules of plan interpretation when reviewing administrators' discretionary decisions, a plan administrator may be required to treat identical claims differently depending on where the claim originated. For example, a multi-state plan administrator may resolve an ambiguity one way in a circuit that does not require application of *contra proferentem*, then find that the same issue has arisen in the Seventh Circuit, which would require a different interpretation. This would put the plan administrator to a Hobson's choice: address the second case in a manner consistent with the first, as ERISA requires, or address the second case differently, to conform with the Seventh Circuit's rule.

ERISA plans are of "pervasive significance . . . in the national economy." *Boggs v. Boggs*, 520 U.S. 833 (1997) (discussing pension plans). The issue of deference to interpretations of plan administrators is of enormous practical importance for such plans. A split in the circuits on this question is therefore also of enormous importance. For that reason, this Court's guidance on this issue is urgently needed.

CONCLUSION

The petition should be granted, and the decision below should be reversed.

Respectfully submitted,

ROBERT H. TILLER *
HELMS MULLISS & WICKER, PLLC
2600 Two Hannover Square
Raleigh, N.C. 27601
(919) 755-6567

* Counsel of Record

Counsel for the American Benefits Council and the ERISA Industry Committee

May 16, 2007