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The U.S. Supreme Court is set to hear *Conkright v. Frommert*, an important ERISA benefits case, this fall. The *Conkright* decision has the potential to have some of the farthest-reaching consequences on the day-to-day administration of ERISA benefits plans of any case in recent memory. Plan administrators should be holding their collective breath, knowing that the question before the high court is how much deference their reasonable interpretations of plan terms are entitled to when those interpretations arise in any context other than the administrative benefits claims process. Additionally, the Court's acceptance of certiorari on the issue of whether a district court has the discretion to adopt any reasonable interpretation of the plan's terms for calculating those benefits when it has been charged with determining the amount of benefits a participant is owed following an ERISA violation should be equally nail-biting to plan administrators.

***Conkright* History**

Conkright is a case involving a class of employees who had worked for Xerox Corporation for a period of time, left, returned to the company, and then retired. At the heart of the dispute was the method of accounting for the employees' lump sum distributions that they received at their first departure when calculating the amount of benefits due at retirement. Specifically, Xerox sponsored the Retirement Income Guarantee Plan, a “floor-offset” type of plan in which participants have both defined contribution accounts and traditional defined benefit accounts.

The minimum - or floor - that a participant will be entitled to receive upon retirement is determined by the value of his or her pension plan. Accordingly, if the value of the participant's defined contribution account is higher than the value of the pension account, the participant is only entitled to the defined contribution account value. Conversely, if the value of the pension account is higher than the value of the defined contribution account, the participant is entitled to the defined contribution account *plus* the difference between the floor and the defined contribution account. In other words, the defined contribution account acts as an offset against any amounts due the participant under the pension account.

The dispute in the *Conkright* case centered around the plan's terms governing the calculation of the pension floor, which was based on an employee's total years of service to the company. Because a rehired employee had previously received a lump sum distribution from the plan based on his or her period of service prior to rehire, the floor had to be adjusted in order to prevent the employee from receiving a double credit for the initial period of service at retirement. The plan contained two relevant provisions addressing this adjustment. First, the “non-duplication” provision stated that the floor would be offset by the “accrued benefit attributable to such [lump sum] distribution” previously received by a rehired employee.

A second, “phantom account” provision was applied by the plan administrator and further reduced the amount of benefits that this class of rehired employees was entitled to receive at retirement. The employees filed suit in federal district court, challenging the phantom account provision under ERISA, but lost on summary judgment. The Second U.S. Circuit Court of Appeals reversed, finding that the plan was not properly amended under ERISA to include the phantom account provision until 1998 (subsequent to the application of the provision to the employees' benefits calculations). The Second Circuit remanded the case to the district court to determine the correct amount of benefits due the employees without consideration of the phantom account provision.

On remand the district court did just that - it concluded that the non-duplication provision should be construed against the plan administrator and in favor of the employees by holding that the term “accrued benefit” referred to the nominal value of a lump sum distribution. In doing so, the district court rejected the plan administrator's interpretation that rather than nominal value, “accrued benefit” meant the present-day value of the distribution (*i.e.*, the current value of an annuity that could have been purchased with the distribution at the time it was made).

That decision was challenged in a second appeal, on the ground that the district court did not give the plan administrator's interpretation deference when the plan clearly granted the administrator complete discretion to interpret the terms and conditions of the plan. While the plan administrator's interpretation may have been perfectly reasonable, it was not rendered or applied during the claims decision process but rather in the context of the litigation. Thus, according to the Second Circuit, the “interpretation” was not a “decision” that was entitled to deference under long-established ERISA case law, but merely an “opinion” given by a plan administrator.

Similarly, the Second Circuit held that it was only allowed to review the district court's decision - which was a reasonable alternative interpretation of the non-duplication provision according to the court - under an “excess of allowable discretion” standard rather than *de novo*. (When a case is heard *de novo*, the whole case will be retried again, as if there were no previous decision.) The Second Circuit, however, reversed the district court's holding that releases signed by a segment of the employees did not encompass the litigation over the calculation of benefits.

Certiorari was granted by the Supreme Court on June 29, 2009 on two issues:

1. whether the Second Circuit's holding that a district court is not obligated to give deference to a plan administrator's interpretation

of the plan's terms when that interpretation is given outside the context of an actual benefits claim process was erroneous; and

2. whether the Second Circuit's holding that the standard of review for a district court that has construed and interpreted the terms of a plan is “allowable discretion” rather than *de novo*.

Implications for Plans and Plan Administrators

Many criticisms have been leveled at the Second Circuit's *Conkright* opinion. The primary concern is that the Second Circuit's holdings are in contravention of the purposes and goals of ERISA, including a desire to “ensure uniform administrative enforcement” which in turn lowers costs and thereby encourages rather than discourages employers to offer ERISA plans to workers. For example, the Supreme Court long ago established that when a plan grants the administrator the authority to construe the terms and conditions of the plan, a court's review is limited to determining whether the administrator's decision was arbitrary and capricious. In other words, when a plan administrator has the requisite authority, its reasonable interpretation of the plan is entitled to deference.

According to the Second Circuit, however, no such deference should be given by the reviewing court to an interpretation of a plan's terms that was rendered by the plan administrator outside the context of the process for determining a claim for benefits. Not only does the Supreme Court's holding in a previous case (*Firestone Tire & Rubber Co. v. Bruch*) fail to provide the basis for such an exception, but multiple federal circuits have also applied a deferential standard to administrator interpretations in other types of proceedings. Administrators are clearly in a better position to determine the meaning of their plan documents, and allowing them to do so ensures the consistency and fairness of benefits decisions.

Similarly, the Second Circuit's decision that it could only review the district court's interpretation of the Xerox plan for an “excess of allowable discretion” was contrary to the basic rules of appellate review. Not only is the general rule that a de novo standard of review applies to a lower court's legal conclusions, such as the construction of written documents, but appellate courts have specifically declined to accord any deference to district courts' determinations regarding the proper construction of an ERISA plan's terms.

The obvious problem created by affirming any lower court interpretation of a plan's terms that is deemed “reasonable” is that the cost of a plan necessarily increases if the benefits provided are unpredictable. Plan benefits become unpredictable when district courts in the same circuit or in different circuits come to opposing conclusions when construing identical plan language. Perhaps even more troubling is the very real risk that the benefits under a plan would be different depending on the jurisdiction in which they are being paid. This was the situation in *Conkright* itself when, contrary to the Second Circuit, the Ninth Circuit held that the offset for the rehired employees' lump sum distributions was to be calculated using the actuarial equivalent / annuity method advocated by the plan administrator.

Conclusion

Plan administrators of both pension and welfare plans will want to watch for the Supreme Court's ruling on the *Conkright* case. If the case is affirmed, there will be far-reaching consequences to the process of reviewing claims, as well as ERISA litigation strategy.

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