No. 17-1478

In The
Supreme Court of the United States

SUSAN RENE JONES,

Petitioner,

v.

MERCK SHARP & DOHME, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CONKRIGHT/FIRESTONE DEFERENCE; *AMARA* AND SPDS.

Conkright does not overrule pre-2010 reasonableness cases. This Court established the "reasonable" standard in 1989; *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 111 (1989); and equated it to the abuse of discretion standard. *Id*., 103, 115. Most Circuits developed reasonableness standards that include Federal Common Law contract interpretation rules and consistency with legal requirements. Pet25-32. Five Circuits uphold an interpretation with a conclusory finding of "plain meaning/reasonable" that does not explain the court's conclusion. Pet23-25. This case relied on the latter. Several Circuits have dual lines.

Amara allows consulting the SPD to determine plan meaning. Speaking of 29 U.S.C. 1132(a)(1)(B), *Amara* holds, "The provision allows a court to look outside the plan's written language in deciding what those terms are, *i.e.*, what the language means." *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011). *Amara* does not exclude the SPD from outside consideration or restrict it to interpreting ambiguous plan terms. It states only that the SPD cannot indirectly change plan terms because it explains the plan to beneficiaries rather than constitutes the terms of the plan. *Id*., 436-37. ERISA requires that the SPD accurately and comprehensively explain the Plan Administrator's interpretation of the plan, detail the "circumstances which may result in . . . denial or loss of benefits . . . ", 29

U.S.C. 1022, and clearly identify the "circumstances which may result in . . . offset . . . of any benefits. . . ." 29 C.F.R. 2520.102-3(l). Not consulting such a document to determine the meaning of the Plan's offset clause also would be peculiar.[1]

Post-*Amara*, the Circuits split on SPD treatment in 1132(a)(1)(B) cases. In this case, the lower courts gave the SPD no weight. The Second Circuit prohibits consulting the SPD to determine a reasonable interpretation in 1132(a)(1)(B) cases. *Frommert v. Conkright*, 738 F.3d 522, 534 (2d Cir. 2013). One line in the D.C. Circuit looks first to the SPD, then applies ordinary contract interpretation rules. *Foster v. Sedgwick Claims Service*, 842 F.3d 721, 731, 734 (D.C. Cir. 2016). The Fifth Circuit requires that plan language be given a meaning as close as possible to what is said in the SPD. *Koehler v. Aetna Health, Inc*., 683 F.3d 182, 188-89 (5th Cir. 2012); *Thomason v. Metropolitan Life Insurance Company*, 2017 WL 3049528 *3 (5th Cir. 2017).

Respondents' Arguments. *O'Shea v. First Manhattan Co. Thrift Plan & Trust*, 55 F.3d 109 (2d Cir. 1995) does not require all plan provisions treat every participant the same. Plans draw lines and set

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[1] *Amara* involved notices to employees that misrepresented the effect of upcoming plan amendments. *Id*., 426-29. Its discussion of SPDs arose from the Solicitor General's arguments intended to save Amara's 1132(a)(1)(B) claim. The Solicitor General argued that the notices were putative summaries of material modifications that constituted SPDs, which in turn were terms of the plan. *Id*., 436.

requirements that must be met to receive benefits. The participants on either side of the line are members of different classes because they have different circumstances and dissimilar situations. Sections 3.1 and 3.5 provide benefits for participants disabled 182 days, but not 181 days. They offset Social Security benefits effective on day 182, but not day 183.

O'Shea at 112 defines arbitrary and capricious as imposing "a standard not required by the plan's provisions", interpreting it "inconsistent with its plain words" or rendering "some provisions of the plan superfluous" – contract rules. *O'Shea* explained why relevant plan provisions supported its interpretation. Other contract rules require that interpretations render all provisions consistent, give no provision an anomalous or absurd result, and that the context giving rise to the provision and the parties' post-contract conduct be considered.

Interpreted separately, the Plan and SPD mean the same. The SPD is the best extrinsic evidence of the plan's meaning. There was no evidence of plan merger. Allowing SPDs to replace plans provides opportunities for abuse. If the plans were merged and the SPD replaced the LTD plan, the SPD should be applied to the offset issue as well without deference per *Koehler* and *Thomason*.

Respondents initially depended on the SPD's language because it looked more malleable under deferential review than § 3.5's. After *Koehler* and *Thomason* required *de novo* review of SPDs and *Prichard*

confirmed plan use, Respondents invented the new 3.5 interpretation and its conflict with the SPD in their December 2015 MSJ.

MetLife's 2010 Letter and LINA's 2011 Letter say the SPD is the Plan and the SPD offset clause is actual Plan language. LINA's 2012 Remand Letter says the Plan and SPD have identical meanings making LTD entitlement the offset cutoff date. Respondents claim the LTD Plan was merged into the 2011 Umbrella Plan, which incorporated the SPD by reference, repealing and replacing the Plan.[2] The district court applied the SPD and Umbrella Plan as to discretion but LTD Plan 3.5 to the offset. Pet13-14. The Ninth Circuit declined to determine which plan applied. App2-3.

MetLife did not calculate the offset when asserted in July 2009. At September 2009's Potemkin reinstatement, it said Jones owed the plan money, but could not say how much. In February 2010, after MSJs were filed, MetLife walked back reimbursement demands and partially paid past due benefits. ECFDoc77, pp.4-9. It reinstated her health coverage in March 2010.

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[2] In *Thomason v. Metropolitan Life Insurance Company*, 2017 WL 3049528 *3 (5th Cir. 2017), MetLife incorporated the LTD plan's SPD into the plan, and it constituted the plan. In *Koehler v. Aetna Health, Inc*., 683 F.3d 182, 188-89 (5th Cir. 2012), the health plan and SPD were identical documents. Several Circuits allow health plans to use the same document as the plan and SPD. *Eugene S. v. Horizon Blue Cross Blue Shield of New Jersey*, 663 F.3d 1124, 1131 (10th Cir. 2011). *Prichard v. Metropolitan Life Ins. Co*., 783 F.3d 1166, 1169 (9th Cir. 2015), rejected Respondents' counsel's contention that the SPD and Certificate of Insurance were "one and the same", and the SPD controlled.

MetLife's June 2002 letter offset Ms. Jones' SSDI because it was effective at the time (the day) she became entitled to LTD benefits, not because it was paid after that date: "Your claim has been adjusted to reflect the effective dates and benefit amounts shown above." ECFDoc57, p.11.

Rather than use discretion to apply the offset regardless of Social Security property rights regulations,[3] administrator letters misrepresent the regulations and plan language to avoid them.[4] MetLife's Letter says it applies the regulations, but gives them an opposite meaning. Pet8-9 and fn4. It misrepresents the SPD's ("Plan" per the Letter) "family disability . . . your eligible dependents are entitled to receive when you become eligible for LTD benefits" to say it makes Ms. Jones entitled to receive DSSDI in 2001 rather

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[3] The SPD's, "entitled to receive" refers to and is equivalent to Social Security regulations' "entitled".

DSSDI; 20 C.F.R. 404.350(a): "*General*. You are *entitled to child's benefits* on the earnings of an insured person who is entitled to . . . disability benefits . . . " when "(3) You apply. . . ."

SSDI; 20 C.F.R. 404.315(a): "*General*. You are *entitled to disability benefits* . . . if . . . (2) you apply; . . . (4) You have been disabled for 5 consecutive months. . . ." Benefits begin "the first month following that period." -404.316(a). Disability is "the inability to do any substantial gainful activity by reason of any . . . impairment . . . which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." -404.1505(a). The "period of disability begins on the day your disability begins. . . .", -404.321 (emphasis added).

[4] Respondents refused to toll the administrative process pending the Ninth Circuit appeal. Each letter provided a right to appeal.

than First Child in August 2003. The Plan and SPD refer to a specific point in time. LINA's Remand Letter implicitly admits First Child is entitled to DSSDI in August 2003 by substituting "continues to be" for "becomes" to extend LTD entitlement indefinitely. LINA's 2011 Letter substitutes "such" for "LTD" in "eligible for LTD benefits" and bases the offset on grounds not found in plan language (LTD and SSDI based on the same disability). To have meaning opposite Social Security regulations, the plan and SPD must explicitly say they intend to have an opposite meaning. Otherwise they are interpreted in light of and consistent with the regulations. Cases at Pet27, fn11.

Respondents claim that the Plan offsets "all" Social Security benefits is consistent with their last two interpretation rationales and conclusory statements in their administrative letters. No Plan language says that.

Respondents' MSJ argued 3.5(a)(i)'s "entitled to benefits" referred to the closer of two other terms it used: "3.5 *Benefit Reductions*. (a) Any benefit payable under the Plan shall be reduced by: (i) Social Security Benefits, effective at the time the Participant becomes entitled to benefits;" This renders the clause interpreted superfluous. If all benefits whatsoever are offset, all that is needed is "Social Security Benefits;" The last proviso of 3.5(a)(i) makes the offset effective the first month an application can be made. Since only Social Security Benefits effective when "the Participant becomes entitled to benefits" are offset, dependents' DSSDI is never offset.

The entire plan must be read consistently. "[E]ntitled to benefits" is used twice in the Plan: § 3.1's "A Participant shall be entitled to benefits under the Plan upon . . . " and, 3.5(a)(i)'s "effective at the time the Participant becomes entitled to benefits". Drafters draft plans to conform to contract interpretation rules that require consistent meaning. The SPD and administrative letters say both refer to LTD benefits. Respondents did not contend otherwise until their MSJ.

The Plan's definition is "Social Security benefits shall mean the primary and family benefit under" [U.S. and non-U.S. social security systems] Pet11, fn6; Pet14. Respondents Appellate Answer says the definition means "'Social Security benefits' *that* 'shall' *be offset as* 'the primary and family'. . . ." (emphasis added) This makes 3.5(a)(i)'s last clause superfluous.

All Respondents' interpretations substitute terms not in the plan for plan terms. All read the plan or SPD inconsistently and render some terms superfluous. All have the anomalous result of offsetting COLA. The MSJ interpretation accepted by the district court offsets COLA but does not offset any DSSDI.

Inconsistency suggests choosing a result first rather than reasoned consideration. The plan requires the same treatment for First Child's DSSDI and COLA. Respondents give them opposite treatment – unreasonable under *D.H. Therapy*, 640 F.3d at 38 and cases, Pet25, last paragraph to Pet36.

Consistently using terms not in the plan to deny benefits does not rewrite the plan. *Amara*, 435-36. Even rational justifications are unreasonable unless "based on the language of the Plan." *Shelby County Healthcare*, 203 F.3d at 934. Respondents' letters conclude that all social security benefits are offset whether received before or after plan benefits become payable; whether the child is born before or after the participant becomes or is declared disabled, at the time she is entitled to receive both LTD and DSSDI benefits, or if they tie to the same condition. That language is not in the Plan or SPD.

Neither court decided the determinative discretion issue: whether the administrative agreements grant discretion. App2-3; App216-217. Initially, LTD Plan 7.2 gave duties and powers to the plan administrator, ER319-20; and § 8.2 gave discretion to the claims administrator, ER322-23. Amendment 1994-1 to 7.2 supersedes them, reserving all duties, powers, and discretion to the plan administrator unless the plan administrator expressly delegates them to the claims administrator. ER336; ER400 (1999 SPD referring to Merck I). The umbrella plan authorizes delegation of duties only. § 8.3F, SER992.

The only fully executed agreement was an October 2011 agreement by Merck II[5] signed by its purchasing director and purporting to represent MSD Corp, as

[5] Plan Administrators were pre-2009 merger Merck & Co., Inc. (Merck I) and post-merger Merck Sharp & Dohme Corp (MSD Corp), a subsidiary of Schering Plough Corporation. Schering then changed its name to Merck & Co., Inc. (Merck II).

employer and plan sponsor, not plan administrator. Merck II was neither employer, sponsor, or plan administrator of the LTD Plan. Nothing authorized Merck II to act for MSD Corp. Delegation by the wrong entity is invalid. *Shane v. Albertson's Inc*., 504 F.3d 1166 (9th Cir. 2007).

Circuits' Reasonable Standards. Section 3.5 arises from government/corporate policies then that LTD benefits are not reduced by subsequently effective Social Security benefits. The district court questioned whether offsetting only SSDI/DSSDI effective the day of LTD eligibility makes "common sense", not fairness or windfalls. ER82, LL8-25; ER80, L21 to ER81, L24; App25. That the California statute is preempted or the court did not understand why § 3.5 was drafted does not affect drafting context or plain meaning. That's the way Respondents drafted the Plan. "ERISA forecloses any justification for inquiries into nice expressions of intent. . . ." *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*, 555 U.S. 285, 301 (2009). Courts may not reform plans because they do not like the result. *Amara*, 435-36.

Section 3.5 prohibits increasing offsets after disability. The most efficient (perhaps the only) way to draft a provision doing that prevents offset of COLA and DSSDI effective after the day of LTD entitlement.

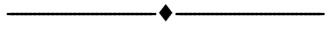
Section 3.1 establishes that "entitled to benefits" refers to LTD benefits "under the Plan" and Participants

become entitled to them "upon completion of the [26 week] Total Disability Eligibility Period". The Plan defines Social Security benefits broadly, but 3.5 offsets only those "effective at the time the Participant becomes entitled to benefits" – *i.e.*, LTD benefits. No provision is rendered nugatory or absurd.

After the 2009 pre-merger plan review by attorneys, expanded SPDs unambiguously confirmed 3.5's entitled to benefits refers to LTD benefits. They say the plan offsets only DSSDI "your eligible dependents are entitled to receive when you become eligible for LTD benefits"; the Social Security offset is computed and LTD benefits begin to accrue the day after completion of the Eligibility Period; and subsequently effective Social Security benefits are not offset.

Respondents contend the 2011 Umbrella Plan applies and incorporates the SPD by reference. The three administrative letters say either that the SPD is the Plan or § 3.5's "entitled to benefits" refers to LTD benefits.

Despite being notified of First Child's birth on November 3, 2003 and 24 other references to the children in the claim file, MetLife did not impose the offset during its 2003 "any occupation" disability review, 2007 disability termination, or 2008 disability appeal denial.



INCONSISTENCY

Conkright v. Frommert, 559 U.S. 506, 510-11, 513 (2010) required deference to a second administrator interpretation after the Second Circuit declared the first unreasonable. *Conkright* states that multiple inconsistent rationales may negate deference, and, by implication, can be abuses of discretion. It leaves open how many or under what circumstances. *Id*., 521. *Conkright* does not overrule prior rulings that two or more erroneous, inconsistent interpretations negate deference or are an abuse of discretion. Post-*Conkright*, the Circuits split on how many inconsistent, erroneous interpretation rationales an administrator is allowed. Pet21-23.

Courts always consider inconsistent plan level rationales in abuse of discretion cases. Respondents leave for consideration only litigation counsel's MSJ and appellate Answer rationales. Most Circuits forbid consideration of them. Pet27, fn11; *Harlick*, 686 F.3d at 720.

The district court did not adjudicate the inconsistent disability termination rationales because Respondents realized in July 2009 that the court would adjudicate them abuses of discretion and withdrew them. They were before the court in Jones's 2009 status statements, ECFDocs157 and 39;[6] and 2010 partial MSJs on Disability, ECFDoc160, and Reinstatement Amount (Offset), ECFDoc161. At 2010 oral argument, it intended to remand, then decide the offset issue.

[6] ECFDoc cites are to *Jones v. MetLife, et al*., Northern District of California No. 5:08-CV-03971.

ER200, LL23-25; ER201, L24 to ER202, L9. But for Respondents' misstatements, it would have done so. App56, fn7. Instead, it dismissed the case. The Ninth Circuit remanded for offset consideration. Pet4.

AMARA AND § 1132(a)(3).

Most 1132(a)(3) cases involve pre-amendment misrepresentations of proposed plan amendments. Pet36-37. A conflict between the Plan and SPD did not exist until Respondents' litigation counsel invented it in the December 2015 MSJ. *Harlick*, 719-20 prohibited its consideration. Ms. Jones raised (a)(3) in her appellate Opening Brief.

Barring an (a)(3) claim based on 2015-16 facts for not pleading it in 2008 or 2014 is unjust. Requiring a disabled individual to start over with an (a)(3) claim after litigating an (a)(1)(B) claim for 10 years is as bad. Consulting the SPD as evidence of plan meaning under (a)(1)(B) avoids both. That is consistent with ERISA's mandated relationship between plans and SPDs and its purpose of protecting participants.

PENALTIES UNDER §§ 1132(c)(1)(B) AND 1133.

Cases contrary to *Sgro* are pre-*National Cable*. Pet37-39. Under 1133's express delegation, the Secretary includes any information or materials relevant to the claim and before the plan administrator in notice

of the reasons for claim denial and designates the plan administrator as the "appropriate named fiduciary" to provide them on behalf of the plan. Section 1132(c)(1)(B) penalties apply to information and materials.

Despite ten 1132(c)(1)(B) administrative record (AR) requests, Respondents withheld information on discretion, whether they relied on the SPD or section 3.5, and their interpretation rationale. [Summarized, ER215-17; discussed, ER213-15; reproduced, ER219-93].

In 2013, MetLife said the AR was sent to LINA; LINA said not received. In 2015, MetLife counsel said the entire offset AR was only a computation. ER192.

Offset MSJs were due December 18, 2015. These items were not in the AR or provided until:

> MetLife offset claims diaries, notes and analysis; Never.
>
> LINA Claims Staff emails regarding decision making/discretion reserved to Employer/Sponsor; July 2015.
>
> LINA Staff Attorney/Claims Staff emails concerning the Remand Letter and still inadequate privilege logs; Never, but December 16, 2015 mailed.
>
> LINA claims diaries blank or redacted under topic/date headings; 2013; July 2015.

LINA/Merck II October 2011 administrative Agreement; Never, but mailed November 18, 2015.

2011 Umbrella Plan and 2010 SPD; Never, but otherwise provided.

ECFDocs226-67 itemize the penalties due as of March 2015.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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