

# 20-3791-CV

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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GARY METZGAR, RICHARD MUELLER, KEVIN REAGAN,  
RONALD REAGAN, CHARLES PUGLIA, SHERWOOD NOBLE,  
DANIEL O'CALLAGHAN,

*Plaintiffs-Counter-Defendants-Appellants,*

– v. –

U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION  
FUND, BOARD OF TRUSTEES OF U.A. PLUMBERS AND STEAMFITTERS  
LOCAL NO. 22 PENSION FUND, DEBRA KOROPOLINSKI, in her capacity as  
Plan Administrator, for the U.A. Plumbers & Steamfitters Local 22 Pension Fund,

*Defendants-Counter-Claimants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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**PETITION FOR PANEL REHEARING  
AND REHEARING *EN BANC***

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### **Introductory Statement**

Rehearing and/or en banc review is necessary and justified as this case raises questions of exceptional importance on which there is now a Circuit split: When and how deference plays a role in a court’s handling of an anti-cutback claim where a plan awards benefits and then later denies those same benefits claiming that the denial is based on a reinterpretation, and not an amendment, of the plan. While the Supreme Court has yet to speak on this specific issue, the Panel’s decision is in direct conflict with the Third and Sixth Circuit Court decisions in Cottillion v. United Refining Co., 781 F.3d 47 (2015), *cert. denied* 577 U.S. 871 (2015) (“Cottillion”) and Deschamps v. Bridgestone Americas, Inc. Salaried Employees Ret. Plan, 840 F.3d 267, 279–80 (6th Cir. 2016) (“Deschamps”), the only other Circuits to have squarely addressed this issue.

Review is also necessary as the Panel’s decision permits a plan to retroactively impose conditions on participants’ receipt of benefits beyond those explicitly set forth in the terms of the plan at the time of distribution, in direct conflict with authoritative case law from the Supreme Court, in C. Laborers’ Pension Fund v. Heinz, 541 U.S. 739 (2004) (“Heinz”), this Circuit, in Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006) (“Frommert”), and ERISA regulations codified at 26 C.F.R. §1.411(d)-4.

Ultimately, the Panel’s decision allows plans to circumvent ERISA’s anti-cutback provisions and reduce or eliminate participants’ protected benefits by making the claim, no matter how incredible or self-serving, that the plan was not amended, merely reinterpreted. [The IRS protected against this by enacting regulations prohibiting accrued benefits from being subject to plan discretion, because allowing discretion would “effectively enable an employer to eliminate or reduce a section 411(d)(6) protected benefit”. See preamble 1988 final regulations, T.D. 8212, July 8, 1988; Redd v. Brotherhood of Maintenance of Way Div. of Intern. Brotherhood of Teamsters, 2010 WL 1286653, \*8 (E.D. Mich. 2010) (“a plan administrator should not be able to accomplish through a discretionary ‘reinterpretation’ of the plan what ERISA’s anti-cutback provision prohibits through traditional plan amendment.”).]

### **Factual Summary**

Plan Terms<sup>1</sup>: “Any Employee who retires on or after June 1, 1998, on or after his fifty-fifth (55<sup>th</sup>) birthday and whose combined age and Years of Special Service shall equal eighty-five (85) or more, shall be entitled to a monthly pension equal to his Accrued Benefit on the date he makes application for Special Early Retirement.”

“A Participant’s monthly benefit shall be suspended for any month . . . in which . . . he worked . . . in Disqualifying Employment . . .”

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<sup>1</sup> A324, 327-28.

“However, employment in a managerial position, project manager or estimator for an Employer shall not be deemed ‘Disqualifying Employment.’”

Plaintiffs

2002-2009: We are 55 years old, with 30 years of service and we want to take our Special Early Retirement and work in non-Disqualifying Employment.

Plan Administrator

1999 - 2011: “You’d be stupid not to.”<sup>2</sup> [Approves retirements.]

Plan Administrator

in late 2011: I know that we always interpreted retirement to mean a separation from Covered Employment after meeting age and service requirements, but we attended a conference and heard a guy say that the IRS defines retirement as having a permanent intention to never return to any kind of work for an Employer, so since you intended to return to work in non-Disqualifying Employment, you did not retire under the law. Stop working or we will suspend your pension benefit.

Plan Terms as

Amended 2/10/2012<sup>3</sup>: “A new Section 5.5 is added to the Plan to read as follows:

. . . To be considered retired, a Participant must have separated from service<sup>4</sup> with any and all Contributing Employers with the intent that such separation be permanent.”

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<sup>2</sup> A722, A730.

<sup>3</sup> A380

<sup>4</sup> Service, as used under the plan, always references covered service or employment under a collective bargaining agreement. Non-Disqualifying Employment is neither service, nor employment, as those terms are used in the plan.

Plan Participants: Wait, the previous plan terms never said that we needed to have a permanent intention to never return to any work with an Employer in order to receive a benefit.

Plan Administrator: We decided to reinterpret the term “retire,” as it is used in the plan, to have always required a permanent intention to never return to *any* work with an Employer before a benefit can be paid.

Plan Participants: But, if the plan terms always required a permanent intention to never return to any work with an Employer, then why did you amend the plan to add a new definition of retire and to eliminate the non-Disqualifying Employment plan provisions and issue a Summary of Material Modification?

Plan Administrator: We were just clarifying “when a Participant will be able to receive his monthly pension.”<sup>5</sup>

Plan Participants: But, no one ever thought that’s what the terms of the plan said until you attended a conference in 2011.

Plan Administrator: [Shrugs.]

The Panel: That’s reasonable. Claims dismissed.

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<sup>5</sup> A632.

**POINT I: EN BANC REVIEW IS NECESSARY BECAUSE THE  
PANEL CREATED AND CAME DOWN ON THE  
WRONG SIDE OF A CIRCUIT SPLIT**

The Panel created a Circuit split on anti-cutback claims where a plan, through reinterpretation, retroactively denies a benefit that it previously granted to the same participant.

The Sixth Circuit in Deschamps and the Third Circuit in Cottillion are the only other Circuit Courts to have ruled on this set of facts. Both Courts had to decide which decision to give deference to: The initial determination awarding benefits, or the reinterpretation denying benefits.

Both Courts also considered how to determine what benefits, if any, the plaintiffs accrued prior to the reinterpretation in order to determine if the plan's change in interpretation decreased those benefits. The Sixth Circuit specifically observed that the "issue is whether we look to the text of the Plan or the administrator's interpretation of the Plan in determining if Deschamps accrued a benefit prior to 1993." Id. at 279. Like Heinz, *infra*, but unlike the Panel, both Courts began their analysis with the terms of the plan.

In rejecting the defendant's argument that Deschamps only accrued a benefit under the plan if the plan interpreted the plan to provide such benefits, the Court reasoned:

. . . the Supreme Court in *Cent. Laborers' Pension Fund v. Heinz*, looked to the "terms" of the plan under which the plaintiff accrued

benefits, concluding that the “change of *terms*” reduced his promised benefits and that the plaintiff acted “reasonabl[y] if he relied on those *terms* in planning his retirement.” In the same vein, we postulated that rather than give a comprehensive definition of “accrued benefits,” Congress chose to leave the responsibility of delineating the bounds of the term to “the employer and the employee through the agreed-upon *terms* of the plan document.” We also reasoned that “Congress’s stated motivations for enacting ERISA, particularly the anti-cutback rule, corroborate our conclusion that what amounts to an ‘accrued benefit’ depends strictly on the *terms* of the pension plan(s) in effect while the employee was engaged in covered employment.” Consequently, we must look to the terms of the Plan in ascertaining which, if any, benefits Deschamps accrued prior to the amendment.

Deschamps, 840 F.3d at 279–80 (citations omitted); Morrone v. Pension Fund of Loc. No. One, I.A.T.S.E., 867 F.3d 326, 335 (2d Cir. 2017) (“... the Sixth Circuit reasoned that it should ‘look to the terms of the Plan in ascertaining which, if any, benefits ... accrued prior to the [challenged] amendment.’ Accordingly, we do the same.”).

The Deschamps Court deferred to the initial determination awarding benefits finding that such determination was “plausible” based on the text of the plan, thus the subsequent and contradictory determination violated the anti-cutback rule. Id. at 280.

The Cotillion Court avoided deciding the issue of which interpretation to defer to because it found the reinterpretation to be unreasonable under any level of deference where the plan terms unambiguously afforded plaintiffs retirement

benefits without actuarial reductions and the reinterpretation, in flat contradiction to the plan terms, imposed actuarial reduction on the plaintiffs' benefits.

Despite the foregoing, the Panel, without explanation, disregarded both Cotillion and Deschamps, and instead aligned with the Seventh Circuit's 2009 decision in Wetzler v. Illinois CPA Society & Found. Ret. Income Plan, 586 F.3d 1053 (7<sup>th</sup> Cir. 2009) ("Wetzler"), in holding that "a plan administrator's current determination that a certain benefit was not available before the alleged amendment is evaluated under the arbitrary and capricious standard." Slip op. at 7.

Wetzler involved an anti-cutback claim following the plan's elimination of an optional lump sum benefit. The Wetzler Court found that Wetzler did not have the right to a lump sum benefit before the amendment solely because the plan administrator said he did not have that right and, thus, the amendment eliminating lump sum benefits did not violate the anti-cutback rule because a lump sum benefit was not an accrued benefit.

The Panel adopted Wetzler's circular logic and similarly found that Plaintiffs' accrued benefits were not reduced because the Fund's reasonable interpretation of the plan "is that it never actually allowed for such distributions"

unless a participant separated from all employment with an Employer with the intention that such separation be permanent. Id.<sup>6</sup>

Thus, the Panel not only held that it is the plan's most recent interpretation that is entitled to deference, a holding that directly conflicts with Deschamps, but also that the determination of what benefits accrued under a plan rests not on the plan terms, but on the plan administrator's interpretation of those terms, a holding that not only creates a Circuit conflict with both Cottillion and Deschamps, but also directly conflicts with the Supreme Court's decision in Heinz and controlling ERISA regulations.

Had the Panel employed the careful reasoning of the Cottillion and Deschamps Courts and started its analysis from the plain language of the plan, it would have been obvious that:

1. Plaintiffs accrued benefits, including the right to supplement their benefit with certain post-retirement employment, and were entitled to distribution of those benefits upon satisfying the age, service and application requirements clearly enumerated in the plan;

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<sup>6</sup> Circular reasoning aside, Wetzler is both factually and legally inapposite to the case at hand for myriad reasons: Unlike the Plaintiffs here, Wetzler still received his full unreduced pension, albeit in a monthly annuity; unlike the Plaintiffs here, Wetzler was not awarded benefits and then years later retroactively denied those same benefits; and because the plan's denial to Wetzler was contemporaneous with his application for such benefits it did not result, like here, in his owing millions of dollars to the plan in alleged overpayments occurring during the years between the two contradictory interpretations. Moreover, in what amounts to an erroneous and stand-alone ruling, the 7<sup>th</sup> Circuit also held that even if *Wetzler's right to receive a lump sum was an accrued benefit*, the plan amendment eliminating same could not violate the anti-cutback rule if the amendment was necessary to bring the plan into compliance with Treasury regulations, despite the fact that Treasury regulations make clear that such a situation is *not* an exception to the anti-cutback prohibitions. Certiorari review was not sought in Wetzler and until this Panel's decision, had never been cited by this or any other Circuit.

2. The initial determinations awarding Plaintiffs (and dozens of others) benefits were not wrong, but were plausible based on the text of the plans; and
3. Retroactively requiring a participant to separate from all work with an Employer with the intention that such separation be permanent before a distribution can be made necessarily decreased Plaintiffs' accrued benefits, not only by making Plaintiffs belatedly ineligible for their benefit distributions, but also unable to retire with the expectation of being able to return to work in non-Disqualifying Employment post-retirement.

**POINT II: THE PANEL'S DECISION IMPROPERLY PERMITS  
THE FUND TO RETROACTIVELY IMPOSE  
CONDITIONS ON PLAINTIFFS' RECEIPT OF  
BENEFITS THAT REDUCE THE VALUE OF  
PLAINTIFFS' BENEFITS IN DIRECT  
CONTRAVENTION OF HEINZ AND FROMMERT**

An accrued benefit is not simply the specific dollar amount which a participant is or will be entitled to receive under the terms of plan. It also includes the conditions, as set forth in the plan, under which that benefit will be paid and/or suspended. Heinz, 541 U.S. at 747 (“participant’s benefits cannot be understood without reference to the conditions imposed on receiving those benefits”).

It has been settled law since the Supreme Court’s 2004 decision, in Heinz, that “placing materially greater restrictions on [a participant’s] receipt of [a] benefit ‘reduces’ the benefit just as surely as a decrease in the size of the monthly benefit payment.” Id. at 744.

In finding that the plan violated the anti-cutback rule where it eliminated Heinz's right to work in certain types of post-retirement employment, the Supreme Court explained:

Heinz worked and accrued retirement benefits under a plan with terms allowing him to supplement retirement income by certain employment, and he was being reasonable if he relied on those terms in planning his retirement. The 1998 amendment undercut any such reliance . . . We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits.

Id. at 744–45.

Here, too, Plaintiffs “worked and accrued retirement benefits under a plan with terms allowing” them to begin receiving a benefit after they satisfied age and service requirements, and which allowed them “to supplement [their] retirement income by certain employment, and [they were] being reasonable if [they] relied on those terms in planning [their] retirement.” Id.

Two years later, this Court, in Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006), was tasked with deciding whether a pension plan violated ERISA's anti-cutback rule where it continued to apply “phantom account” provisions to rehired participants' benefit calculations that had appeared in previous plan documents, but, due to a drafting error, were inadvertently omitted from a subsequently restated plan document.

In rejecting the plan’s claim that the provisions were always a part of the plan as both an unreasonable exercise of discretion and an anti-cutback violation, this Court turned to “the centrality of ERISA’s object of protecting employees’ justified expectations of receiving the benefits their employers promise them.” *Id.* at 262, *quoting* Heinz, 541 U.S. at 743. Specifically, this Court found that ERISA’s “objective was thwarted” when the defendants applied terms to the plaintiffs’ previous distributions that did not exist in the plan until the plan was formally amended, holding that “[s]uch belated disclosure of so significant a change cannot be squared with ERISA’s mandate.” *Id.*

Nothing in the instant case justifies a different result.

Here, the plain language of the plan, read as a whole, created justified expectations<sup>7</sup> that a plan participant was entitled to commence his Special Early Retirement pension benefit, and supplement such benefit by working in certain non-Disqualifying Employment as defined in the Plan, after satisfaction of two objective conditions:

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<sup>7</sup> Plan fiduciaries agreed that the plan, as written prior to 2012, allowed a reasonable person to believe he could begin receiving his pension at 55 years of age and supplement same by working for a contributing employer in non-Disqualifying Employment. A600, A608, A704, A879, A882-883. And, of course, it is undisputed that Plaintiffs held the reasonable expectation that they could take their Special Early Retirement benefits and return to work for an Employer in non-Disqualifying Employment, as provided for in the Plan, but also as assured to them by the Plan Administrator. A753-802. *See* Lifson v. INA Life Ins. Co. of New York, 333 F.3d 349, 352–53 (2d Cir. 2003) (“Terms in the Plan must be construed in accordance with the reasonable expectations of the insured.”).

1. Reaching 55 years of age or older with a combined age and Years of Special Service of eighty-five (85) or more; and
2. Applying to begin receiving the benefit.

In addition, the plan terms only conditioned a participant's continued receipt of his pension benefit on his refraining from working in Disqualifying Employment.

*No one could have read the pre-2012 plan and determined that Special Early Retirement benefits were not payable, despite a participant's satisfaction of age, service, and application requirements, until he first separated from all work with an Employer with the intention that such separation be permanent.*

The most compelling evidence of this is the fact that the *no one did read the plan that way*, to wit, the Fund never once in the decades that it administered distribution of Special Early Retirement benefits held that a permanent intention to never return to any kind of work with an Employer was a condition precedent to a participant's receipt of benefits, or that a participant's return to non-Disqualifying Employment would subject his benefits to suspension. Like in Frommert, these conditions were not adequately disclosed in the text of plan documents until the plan was formally amended in February 2012.

In holding that such conditions were always required by the plan, as claimed by the Fund, the Panel has, in conflict with this Circuit's own established precedent

in Frommert, improperly permitted the Fund to condition the availability of Plaintiffs' protected benefits on "material terms . . . omitted from [the] plan for [a] significant period[] only to surface later and be given binding effect for the period prior to their absence"; terms which not only conflicted with each Plaintiff's pre-retirement expectation of being able to supplement his benefit by working in certain post-retirement employment without suspension of his benefits, but which outright eliminated it.<sup>8</sup> Frommert, 433 F.3d at 265.

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<sup>8</sup> The Panel's conclusion that the Fund's "definition would not 'render meaningless' the Plan provision allowing post-retirement employment in 'non-disqualifying employment' [but] would simply require participants to actually retire first and to separate completely from their prior employment before becoming reemployed in non-disqualifying employment" ignores that the Fund was not merely requiring a separation of employment with all Contributing Employers in order to retire, but a separation *with the intention that such separation be permanent*. This begs the question, how could Plaintiffs "retire" under the Fund's definition of retire *and also continue to have the reasonable and justified (and protected) post-retirement expectation of being able to return to work in non-Disqualifying Employment*? How long would the Plaintiffs have to separate from employment before they could return to work? How would the Fund objectively determine whether Plaintiffs permanently intended their separation? If a participant "retired" and then returned to non-Disqualifying Employment, what is stopping the Fund from retroactively depriving that participant of his benefit because the Fund deems his return to work as evidence that he did not "retire"? Where is the line drawn?

**POINT III: REHEARING IS NECESSARY BECAUSE THE PANEL’S  
DECISION PERMITS THE FUND TO  
RETROACTIVELY IMPOSE CONDITIONS ON  
PLAINTIFFS’ RECEIPT OF BENEFITS THAT ARE  
DISCRETIONARY, SUBJECTIVE, AND NOT CLEARLY  
SET FORTH IN THE TERMS OF THE PLAN IN  
VIOLATION OF ERISA REGULATIONS**

ERISA regulations<sup>9</sup> permit a plan to limit “[t]he availability of a section 411(d)(6) protected benefit . . . to employees who satisfy certain objective conditions provided the conditions are ascertainable, clearly set forth in the plan and not subject to the employer's discretion”. Critically, ERISA regulations further protect accrued benefits and a participant’s right to receive those accrued benefits by prohibiting plan administrators from exercising *discretion* as to those objective conditions, “except to the extent reasonably necessary to determine whether [they] have been met.” 26 C.F.R. §1.411(d)-4.

The regulations also confirm that a plan violates the anti-cutback rule where it denies a participant, through the exercise of discretion, a §411(d)(6) protected benefit for which the participant is otherwise eligible or where it adds to or changes the existing objective conditions with respect to a §411(d)(6) protected benefit. *Id.* at Q&A-4, Q&A-7. Subjective conditions are never permissible.<sup>10</sup>

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<sup>9</sup> “Although the pertinent regulations refer only to the Internal Revenue Code version of the anti-cutback rule, they apply with equal force to ERISA §204(g).” *Heinz*, 541 U.S. at 747.

<sup>10</sup> The Panel intimated that the Fund’s latest interpretation can be one of any number of reasonable interpretations of what it means to retire, and the Panel is not completely wrong in that observation – there can be any number of definitions of what it means to retire. This is

So, while the Fund has some discretion to determine if Plaintiffs satisfied the objective conditions required of them in order to receive a benefit, they do not have the discretion to subjectively decide what those conditions are.

The Fund's condition that a participant separate from an Employer with a permanent intention to never return to any work with an Employer in order to begin receiving a benefit does not satisfy ERISA's requirement of being objectively verifiable. Nor does it satisfy the requirement of being ascertainable from and clearly set forth in the terms of the plan. The Fund's own claim that the conditions for retirement had to be "clarified" by amendment confirms as much.

Retroactively imposing this condition on Plaintiffs' receipt of benefits violates ERISA's regulations, denies a participant, through the exercise of discretion, a §411(d)(6) protected benefit for which the participant is otherwise eligible and constitutes an impermissible addition to or change of conditions precedent to a distribution of benefits in violation of the anti-cutback rule.

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precisely why the terms of the plan document must clearly set forth when a pension benefit becomes payable under a particular pension plan. Here, "retire" was simply how the Fund referred to someone who commenced receipt of a pension benefit after satisfying the requisite age and service criteria. Where the Panel errs in its sentiment, however, is that there can be more than one reasonable interpretation of what objective conditions a participant must satisfy before he is entitled to receive his accrued benefits under the terms of any one plan. So, while individual pension funds can (and do) have differing definitions of retirement from one another, ERISA – through its requirements that benefits be definitely determinable, ascertainable, clearly set forth, free from administrator discretion, and protected from reduction or elimination – necessarily precludes any one pension fund from changing its own previously defined version of retirement on anything other than a prospective basis.

**POINT IV: REHEARING AND/OR EN BANC REVIEW IS  
NECESSARY AS THE PANEL IMPROPERLY  
DETERMINED THAT THE PLAN’S SUBSEQUENT  
CONTRADICTIONARY REINTERPRETATION WAS  
REASONABLE**

Even if some level of deference is appropriate in evaluating a reinterpretation, the Panel’s decision cannot be reconciled with this Circuit’s long-settled precedent that “[w]here the trustees of a plan impose a standard not required by the plan’s provisions, or interpret the plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious.” Gallo v. Madera, 136 F.3d 326, 330–31 (2d Cir. 1998); Zervos v. Verizon New York, Inc., 277 F.3d 635, 647 (2d Cir. 2002) (same).

### **Conclusion**

This case arguably would have been decided very differently had it been before this Circuit's panel in Frommert; the Third or Sixth Circuit; or had it only involved an amendment. Such potential divergence and disparity in outcomes among the Courts is undesirable, especially to the extent that plans may be able, in circumvention of the anti-cutback rule, to accomplish under the guise of discretion what they would be prohibited from doing by formal amendment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this Petition contains 3,888 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this Petition has been prepared in proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Orchard Park, New York  
April 15, 2022

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS FOR THE**  
**SECOND CIRCUIT SUMMARY ORDER**

20-3791-cv

Metzgar v. U.A. Plumbers & Steamfitters Loc. No. 22 Pension Fund

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit,  
held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of  
New York, on the 2<sup>nd</sup> day of March, two thousand twenty-two.

**PRESENT:**

**MICHAEL H. PARK,**  
**BETH ROBINSON,**  
*Circuit Judges,*  
**JED S. RAKOFF,\***  
*District Judge.*

**GARY METZGAR, RICHARD MUELLER,**  
**KEVIN REAGAN, RONALD REAGAN,**  
**CHARLES PUGLIA, SHERWOOD NOBLE,**  
**DANIEL O'CALLAGHAN,**

*Plaintiffs-Counter-Defendants-Appellants,*

**v.**

**20-3791**

**U.A. PLUMBERS AND STEAMFITTERS**  
**LOCAL NO. 22 PENSION FUND, BOARD OF**  
**TRUSTEES OF U.A. PLUMBERS AND**  
**STEAMFITTERS LOCAL NO. 22 PENSION**  
**FUND, DEBRA KORPOLINKSI, in her**  
**capacity as PLAN ADMINISTRATOR, FOR**  
**THE U.A. PLUMBERS & STEAMFITTERS**  
**LOCAL 22 PENSION FUND,**

*Defendants-Counter-Claimants-Appellees.*

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\* Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

**FOR PLAINTIFFS-COUNTER-  
DEFENDANTS-APPELLANTS:**

CHRISTEN ARCHER PIERROT, Orchard Park,  
NY.

**FOR DEFENDANTS-COUNTER-  
CLAIMANTS-APPELLEES:**

JULES L. SMITH (Daniel R. Brice, *on the  
brief*), Blitman & King LLP, Rochester, NY.

Appeal from a judgment of the United States District Court for the Western District of New  
York (Sinatra, *J.*; Foschio, *M.J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND  
DECREED** that the judgment of the district court is **AFFIRMED**.

Plaintiffs are participants in the U.A. Plumbers & Steamfitters Local 22 Pension Fund (the  
“Fund”), a defined benefit multi-employer pension plan governed by an Agreement and  
Declaration of Trust (the “Trust”). Pension benefits are provided to participants according to a  
Restated Plan of Benefits (the “Plan”), which is subject to the Employee Retirement Income  
Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001–1461. Under the Trust, the Trustees have  
“full and exclusive discretionary authority to determine all questions of coverage and eligibility”  
and “full discretionary power to interpret the provisions of this Trust Agreement and the Plan of  
Benefits, and the terms used in these documents.” App’x at 192–93.

At all times relevant to this appeal, the Plan set the normal retirement age at 65, but it also  
offered “Special Early Retirement” to “[a]ny Employee who retires . . . after his fifty-fifth (55th)  
birthday and whose combined age and Years of Special Service shall equal eighty-five (85) or  
more.” App’x at 248. The Plan also provided that a participant’s monthly benefit would be  
suspended for any month in which they worked in disqualifying employment, which included “any  
occupation covered by the Plan,” but excluded non-disqualifying employment, such as in “a  
managerial position [or as a] project manager or estimator.” *Id.* at 251. Until the fall of 2011,  
the Plan was administered with the understanding that participants did not have to completely stop

21 working for a covered employer in order to receive special early retirement pension payments—  
22 instead, they could continue working while receiving pension benefits as long as they switched  
23 from disqualifying employment to non-disqualifying employment. Plaintiffs here switched from  
24 disqualifying to non-disqualifying employment upon receiving approval for special early  
25 retirement, thus both earning a salary from their non-disqualifying employment and receiving  
26 pension benefits through the Plan.

27 In the fall of 2011, the Plan Trustees concluded that the Plan could not be interpreted to  
28 allow special early retirement pension payments to participants who had not “retired” under the  
29 terms of the Plan. Relying on their understanding of the Internal Revenue Code requirements  
30 applicable to the Plan, the Trustees interpreted the term “retire” to mean that a participant “must  
31 sever employment [with all employers that contribute to the Plan] with no intent of returning to  
32 employment.” App’x at 494. They sent a letter to Plaintiffs, which stated that Plaintiffs had to  
33 cease their then-current (non-disqualifying) employment in order to continue receiving their  
34 pensions; failure to do so would result in suspension of pension payments. Some Plaintiffs  
35 stopped working for their employers altogether and the Fund continued their pension payments;  
36 others continued working in non-disqualifying positions and the Fund discontinued their pension  
37 payments.

38 On January 25, 2013, Plaintiffs sued the Fund, its Board of Trustees, and Debra  
39 Korpolski in her capacity as Plan Administrator for the Fund (collectively, “Defendants”), in the  
40 United States District Court in the Western District of New York. Plaintiffs claimed that  
41 Defendants’ reinterpretation of the Plan and the subsequent choice they forced Plaintiffs to make  
42 between keeping their pensions or their jobs was (1) a violation of ERISA’s anti-cutback rule,  
43 29 U.S.C. § 1054(g); (2) a wrongful denial of benefits, *id.* § 1132(a)(1)(B); and (3) a breach of

Defendants’ fiduciary duty to Plaintiffs, *id.* § 1104(a)(1). Both parties moved for summary judgment, and Plaintiffs also filed a motion for a preliminary injunction to enjoin Defendants from withholding 25% of Plaintiffs’ monthly pension payments, which Defendants started doing in January 2017 to recoup prior payments to Plaintiffs that Defendants concluded were made in violation of the Internal Revenue Code. The district court granted Defendants’ motion for summary judgment and denied Plaintiffs’ motions for summary judgment and a preliminary injunction. Plaintiffs timely appealed. We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

“We review the district court’s decision to grant summary judgment *de novo*, construing the evidence in the light most favorable to the party against which summary judgment was granted and drawing all reasonable inferences in its favor.” *Halo v. Yale Health Plan, Dir. of Benefits & Recs. Yale Univ.*, 819 F.3d 42, 47 (2d Cir. 2016) (citation omitted). “[W]here the written plan documents confer upon a plan administrator the discretionary authority to determine eligibility, we will not disturb the administrator’s ultimate conclusion unless it is ‘arbitrary and capricious.’” *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995). A plan administrator’s decision is arbitrary and capricious if it is “without reason, unsupported by substantial evidence or erroneous as a matter of law.” *Id.* at 442 (citation omitted).

The Trust gives Defendants full discretionary authority to determine eligibility and to interpret the terms of the Plan. We thus defer to their interpretation of the Plan and conclude that all of Plaintiffs’ claims fail because Defendants’ interpretation was reasonable and not arbitrary and capricious. See *Jordan v. Ret. Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271 (2d Cir. 1995) (“The court may not upset a reasonable interpretation by the [plan] administrator.”).

Specifically, Defendants reasonably interpreted the Plan to require participants to separate from all employment with a contributing employer prior to receiving pension benefits.

The text of the Plan states: “Any Employee who *retires*” and who fulfills other requirements is entitled to a special early retirement pension. App’x at 248 (emphasis added). “In common parlance, retire means to leave employment after a period of service.” *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1358 (7th Cir. 1993), *overruled on other grounds by Ahng v. Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996). The Trustees concluded that to “retire” under the Plan required separation from “employment with all employers that contribute to the Plan.” App’x at 494. Contrary to Plaintiffs’ argument, such a definition would not “render meaningless” the Plan provision allowing post-retirement employment in “non-disqualifying employment”—it would simply require participants actually to retire first and to separate completely from their prior employment before becoming reemployed in non-disqualifying employment. Appellant’s Br. 42. We do not suggest that the Trustees’ interpretation of the meaning of “retire” is the only reasonable interpretation; but we cannot conclude that the interpretation is arbitrary and capricious.

In addition, this *reinterpretation* of the Plan was not arbitrary and capricious because Defendants reasonably understood that it was necessary to avoid violating § 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a), thereby jeopardizing the Fund’s tax-exempt status.<sup>1</sup> Section 401(a)(36)(A) implies that if a plan allowed for distribution to a participant under age 59½ who has not separated from employment, the plan would violate § 401(a). *See id.* § 401(a)(36)(A) (“A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust

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<sup>1</sup> We express no opinion on whether distributing pension benefits to participants who have terminated their disqualifying employment but have not separated from all employment for a contributing employer would *actually* violate § 401(a).

under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 59½ and who is not *separated from employment* at the time of such distribution.” (emphasis added)). Several federal district courts have upheld trustee interpretations of pension plans based on similar concerns about violating § 401(a). *See Meakin v. Cal. Field Ironworkers Pension Trust*, No. 5:16-cv-07195, 2018 WL 405009, at \*6 (N.D. Cal. Jan. 12, 2018), *aff’d*, 774 Fed. App’x 1036 (9th Cir. 2019) (“[I]t was reasonable for the Trustees to conclude that, in order to maintain a tax-exempt status under § 401(a), a plan could not allow pension payments to individuals who had not had a severance from their employment.”); *Maltese v. Nat’l Roofing Indus. Pension Plan*, No. 5:16-cv-11, 2016 WL 7191798, at \*4 (N.D. W. Va. Dec. 12, 2016) (“Based on the applicable regulations and the IRS’s application of § 401(a), the Trustees’ interpretation . . . is reasonably calculated to ensure that beneficiaries intend to actually separate from employment before early retirement benefits are distributed, thus, retaining the Plan’s tax-exempted status.”).

In light of this, Plaintiffs’ challenges to Defendants’ reinterpretation of the Plan terms are unavailing. First, Defendants did not violate ERISA’s anti-cutback rule, which states that “[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan.” 29 U.S.C. § 1054(g)(1). Plaintiffs argue that Defendants’ reinterpretation of the Plan was an amendment and that the accrued benefit they lost was the ability to receive their special early retirement pensions upon terminating their covered employment and commencing non-disqualifying employment with a contributing employer. The Plan has always required that to be entitled to special early retirement a participant must (1) retire (2) on or after reaching the age of fifty-five and (3) have a combined age and years of special service of eighty-five or more. Notably, the Plan did not purport to define “retire” prior to a February 2012 amendment.

Although in practice Defendants previously permitted special early retirement distributions when a participant left disqualifying employment for non-disqualifying employment, the implication of their reasonable interpretation of the Plan is that it never actually allowed for such distributions. In the circumstances of this case, this reinterpretation is not arbitrary and capricious. *See Wetzler v. Ill. CPA Soc’y & Found. Ret. Income Plan*, 586 F.3d 1053, 1057 (7th Cir. 2009) (holding that a plan administrator’s current determination that a certain benefit was not available before the alleged amendment is evaluated under the arbitrary and capricious standard).

Nor was Defendants’ reinterpretation an “amendment” because “[e]ven broadly interpreted, the word ‘amendment’ contemplates that the actual terms of the plan changed in some way, . . . or that the plan improperly reserved discretion to deny benefits,” neither of which occurred here.<sup>2</sup> *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 184 (2d Cir. 2013). We thus conclude that Plaintiffs’ anti-cutback claim fails because, under Defendants’ reinterpretation of the Plan, they were never entitled to the accrued benefit they claim to have lost, and Defendants’ reinterpretation was not an “amendment.”

Second, Defendants did not wrongfully deny Plaintiffs benefits in violation of 29 U.S.C. § 1132(a)(1)(B) by requiring them to choose between continuing to receive pension benefits and continuing to work in non-disqualifying employment for a contributing employer. “[W]here . . . the relevant plan vests its administrator with discretionary authority over benefits decisions . . . the administrator’s decisions may be overturned only if they are arbitrary and capricious.” *Roganti v. Metro. Life Ins. Co.*, 786 F.3d 201, 210 (2d Cir. 2015). As explained above, Defendants’ decision to require Plaintiffs either to stop working or to stop receiving pension benefits was not

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<sup>2</sup> Although Defendants made a formal amendment to the Plan in February 2012 reflecting their reinterpretation, Defendants’ 2011 reinterpretation is the basis for Plaintiffs’ anti-cutback claim.

arbitrary and capricious because it was based on a reasonable interpretation of the Plan. We thus affirm the district court’s conclusion that Defendants did not wrongfully deny benefits to Plaintiffs.

Third, Plaintiffs fail to show that Defendants breached their fiduciary duty under ERISA by failing to act “with the care, skill, prudence, and diligence under the circumstances then prevailing” that a “prudent” person would exercise. 29 U.S.C. § 1104(a)(1). Specifically, Plaintiffs do not show how Defendants’ decision in late 2011 to correct what they reasonably thought was an erroneous interpretation of the Plan in order to protect its tax-exempt status demonstrated a failure to exercise “care, skill, prudence, and diligence.”<sup>3</sup> *Id.*

Finally, we discern no abuse of discretion in the district court’s decision to deny Plaintiffs’ motion for a preliminary injunction. Plaintiffs have failed to demonstrate that they would suffer irreparable harm absent an injunction—the loss of monetary pension benefits alone does not constitute irreparable harm because it can be remedied by money damages.<sup>4</sup> *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (“To establish irreparable harm, the movant must demonstrate an injury . . . that cannot be remedied by an award of money damages.” (cleaned up)); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.”).

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<sup>3</sup> Plaintiffs also argue that if Defendants’ initial interpretation was truly erroneous, then questions of fact exist as to whether that initial approval of Plaintiffs’ early retirement benefits was a breach of fiduciary duty. Plaintiffs did not include this claim in their complaint and failed to raise it either in their motion for summary judgment or in opposition to Defendants’ motion for summary judgment. It was alluded to only briefly in Plaintiffs’ objection to the magistrate judge’s report and recommendation, and the district court never addressed it. The issue was thus not “properly raised below” and we decline to consider it. *Caiola v. Citibank, N.A.*, 295 F.3d 312, 328 (2d Cir. 2002).

<sup>4</sup> Plaintiffs also argue that they do not need to show irreparable harm to be entitled to a preliminary injunction. We do not reach this argument because it was raised for the first time on appeal. *See United States v. Wasylyshyn*, 979 F.3d 165, 172 (2d Cir. 2020) (“As a general rule, we will not consider arguments first raised on appeal to this court.”).

147 We have considered the remainder of Plaintiffs' arguments and find them to be without  
148 merit. Accordingly, we affirm the judgment of the district court.

149 FOR THE COURT:  
150 Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is divided into two horizontal sections: the top half is red and contains the text "UNITED STATES" in white, and the bottom half is blue and contains the text "SECOND CIRCUIT" in white. Two small white stars are positioned on either side of the word "CIRCUIT". The bottom edge of the seal is partially obscured by the signature.

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

**DEBRA ANN LIVINGSTON**  
CHIEF JUDGE

Date: March 02, 2022

Docket #: 20-3791cv

Short Title: Metzgar v. U.A. Plumbers and Steamfitters

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 13-cv-85

DC Court: WDNY (BUFFALO)

DC Judge: Foschio

DC Judge: Sinatra

**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  
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DC Court: WDNY (BUFFALO)

DC Judge: Foschio

DC Judge: Sinatra

**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