No. _____

In The
Supreme Court of the United States

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner,

v.

MONSANTO COMPANY, INC.,
a corporation, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

WENDELL F. GILLEY
2208 RINGOLD STREET, STE 103
GUNTERSVILLE, AL 35976
(256) 582-3559

Petitioner pro se

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Petitioner, Wendell F. Gilley, as an individual and class representative, filed a civil action against Monsanto Company, Incorporated, Monsanto Company Salaried Employees' Pension Plan, Monsanto Company Employee Benefits Plan Committee, Monsanto Company Employee Executive Committee, and Pharmacia Corporation for breach of fiduciary duty and violation of the Employee Retirement Insurance Security Act "ERISA".

In 2001, Petitioner under the impression he was entitled to a pension for work performed for Respondents from 1972 to 1981 applied for his deferred pension benefit. Respondents denied Petitioner his pension benefit based on an amendment of the Plan that Respondents enacted sometime in 1981 or 1982 while Petitioner and other similarly situated participants were on layoff.

Pursuant to ERISA § 502(a)(3) Petitioner, in his individual and class capacity, sought injunctive relief against the use of the later amendment and equitable restitution of individual and class accrued benefits based on a clear showing of irreparable harm and the inadequacy of legal remedies under ERISA § 502(a)(1)(B). The District Court held a two-day trial on the limited issue of whether Petitioner had enough hours of service in 1972 disregarding the later amendment to qualify for a pension. (App. 26a). Because the trust was not fully funded and because Petitioner proved

irregularities in plan administration the District Court, applying a heightened arbitrary and capricious standard of review, permitted Petitioner to use two permissible equivalencies to estimate hours of service based on working time and Petitioner's reported Social Security earnings. (App. 27a-30a). The District Court using Respondents' own calculation found Petitioner worked at least 887 hours in 1972, the equivalent of 1000 hours of service. (App. 30a, 36a). The District Court, determining Petitioner's accrued benefit vested prior to termination, awarded him his past and future accrued benefit certifying the judgment under Rule 54(b). *Id.* Respondents' appealed.

The Eleventh Circuit Court of Appeals vacated the judgment in *Gilley v. Monsanto*, 490 F.3d 848 (11th Cir. 2007) holding a conflict of interest warranting a heightened arbitrary and capricious standard of review is not justified in situations where plan sponsors pay benefits from a trust, an equivalency adopted by a later amendment which excluded credit for overtime hours did not implicate the "anticutback" rule, and a later adopted amendment could be applied to an employee who had not completed ten years of service when the amendment went into effect without violating ERISA's vesting provisions. The Eleventh Circuit's decision applying the arbitrary and capricious standard to suits for equitable relief under Section 502(a)(3) directly conflicts with holdings in the First, Second, Fifth, Seventh, Eighth and Ninth Circuits applying the *de novo* standard of review to

suits of this nature. The Sixth Circuit is the only other circuit to apply the arbitrary and capricious standard outside the benefit denial context. The Eleventh Circuit's decision directly conflicts with this Court's holdings in *Central Laborers' Pension Fund v. Heinz*, 541 U.S 739 (2004) and *Varity Corporation v. Howe*, 516 U.S. 489 (1996) permitting equitable relief to redress injury suffered by a participant as a result of a new condition being placed on an implicitly bargained-for-benefit that has already accrued.

The questions presented are:

1. Whether the Eleventh Circuit's decision in *Gilley v. Monsanto*, 490 F.3d 848 (11th Cir. 2007) is correct in holding that the arbitrary and capricious standard of review applies to suits brought for "appropriate equitable relief" under ERISA § 502(a)(3), in light of this Court's holdings in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101(1989), or whether the First, Second, Fifth, Seventh, Eighth, and Ninth Circuits are correct in applying a *de novo* standard of review to suits of this nature?

2. Whether, in light of this Court's holdings in *Central Laborers' Pension Fund v. Heinz*, 541 U.S 739 (2004) and *Varity Corporation v. Howe*, 516 U.S. 489 (1996), the Eleventh Circuit's decision is correct in holding that a plan sponsor can add a new condition on an implicitly bargained-for-benefit that has already accrued without violating ERISA § 204(g), ERISA §§ 203(c)(1)(A), or any

other ERISA provisions in light of ERISA's stated policy "to protect the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service" when the new condition caused forfeiture?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of his petition is as follows:

Defendants-Appellants and Respondents: Monsanto Company, Incorporated, Monsanto Company Salaried Employees' Pension Plan, Monsanto Company Employee Benefits Plan Committee, and Pharmacia Corporation.

Defendant- Monsanto Company Employee Benefits Executive Committee.

Plaintiff-Appellee and Petitioner: Wendell F. Gilley, as an individual and class representative.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

CASES *Page*

CASES *Page*

CASES *Page*

CASES *Page*

UNITED STATES CODE *Page*

ERISA SECTIONS *Page*

CODE FEDERAL REGULATIONS *Page*

OTHERS *Page*

PETITION FOR A WRIT OF CERTIORARI

Wendell F. Gilley ("Gilley") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated June 28, 2007, is officially published in the Federal Reporter at 490 F.3d 848 (11th Cir. 2007), and is reproduced at App. A 1a- 22a.

The District Court's Order and Findings of Fact and Conclusions of Law dated January 26, 2006, are unreported and reproduced at App. B & C, 23a-34a.

The District Court's Amended Order dated March 3, 2006, is unreported and reproduced at App. D, 34a-37a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 28, 2007. (App. 1a). A Petition for Rehearing and Petition for Rehearing *En Banc* was timely filed and subsequently denied on August 20, 2007. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of

rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. §§ 1001 *et seq.*[1]

The Employee Retirement Income Security Act ("ERISA"), Section 502(a)(3) provides in pertinent part:

> A civil action may be brought by a participant . . . (A) to enjoin any act or practice which violates any provision of this title . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title. ERISA § 502(a)(3).

Section 204(g)(1) states "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g). Section 203 (c)(1)(A) states:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer

[1] Generally ERISA sections when applicable are cited herein instead of the United States Code sections.

> contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment. ERISA § 203 (c)(1)(A).

STATEMENT OF THE CASE

I. Background Facts and Issues

ERISA was enacted in 1974 to regulate employers who choose to offer employee benefits to ensure that employees actually receive the benefits described in their plans. 29 U.S.C. §§ 1001 *et seq.* ERISA § 2(b) declares that the purpose of the Act is "to establish standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2. While ERISA does not mandate that employers establish employee pension benefit plans, if an employer does establish a qualified pension plan the employer receives a favorable tax advantage for doing so. As an added incentive for employers to establish qualified plans ERISA provides for a uniform federal forum with limited civil remedies to redress participants' claims and no punitive sanctions for the wrongful acts of plan sponsors and fiduciaries. In order to receive the benefits of being a qualified plan under ERISA the

plan must allow a wide range of employees to participate: highly compensated employees "HCEs", management level employees, and working class employees. Top-hat plans, unfunded plans that provided for deferred compensation to upper management and HCEs, are not to be considered qualified plans under ERISA. *See* 26 U.S.C. § 401(a)(4), 26 C.F.R. §§ 1.401(a)(4)-1. In order to qualify under ERISA plans must make benefits available on a nondiscriminatory basis to all participants, participants must be allowed to vest in a nondiscriminatory manner, amendments to the plan must have a nondiscriminatory effect, and service must be credited on a nondiscriminatory basis.[2] *See* 26 C.F.R. §§ 1.401(a)(4)-1(b)(2), (3), (4), (10), (11).

Congress intended participants of defined pension plans to have "ready access to Federal courts." ERISA § 2(b). ERISA's remedial provisions are found in Section 502 of the statute permitting civil enforcement by the courts for claims brought by a participant or beneficiary. ERISA § 502. Section 502(a)(3) provides:

> (a) A civil action may be brought— (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

[2] The Treasury Regulations define nondiscrimination in terms of a participant's level of compensation; in order to qualify defined pension plans must treat HCEs and non-HCEs equally.

> (B) to enforce any provisions of this title or the terms of the plan. *Id.*

What ERISA does not contain, even though it is often quoted as being a well drafted and reticulated statute, is a standard of review to be applied by federal courts in civil actions. This Court adopted a standard of review to be applied by courts for suits brought specifically for the denial of benefits under Section 502(a)(1)(B) in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989). *Firestone,* 489 U.S. at 109. In *Firestone* this Court, recognizing that ERISA "explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with plans", rejected the invitation to incorporate wholesale the Labor Management Relations Act's arbitrary and capricious standard to all claims for benefits brought under Section 502(a)(1)(B). *Firestone,* 489 U.S. at 109. Every circuit has now adopted its own version of the *Firestone* standard for claims for benefits brought under § 502(a)(1)(B), *de novo* if no discretion is retained, the arbitrary and capricious standard if fiduciaries retain discretion, and the heightened arbitrary and capricious standard of review in situations involving conflicts of interest. *Id.* at 114-116. This Court has never addressed the standard of review to be applied by courts in situations involving breach of fiduciary duty and statutory and plan noncompliance under ERISA § 502(a)(3).

II. The District Court Decision

This ERISA action was filed as a class action in 2004 in the Middle Division of the Northern District of Alabama seeking appropriate equitable relief under Section 502 for breach of the fiduciary duties found in Section 404 and for violation of Sections 204(g) and 510 due to Respondents' intentional denial of the class representative's accrued pension benefit through a series of steps involving an amendment to the plan.

The Monsanto Company, Inc. "Monsanto" plant where Gilley worked began production in early 1972. Gilley's first day of employment at the plant was August 30, 1972. (App. 26a fn 1). At that time Monsanto maintained a defined benefit retirement pension plan for its salaried employees, the Monsanto Salaried Employes' (sic) Pension Plan, the 1971 Plan.[3] Gilley as well as other production level workers at this nonunion plant were considered salaried employees and participants in the 1971 Plan. Although Monsanto considered Gilley and other production level employees salaried employees for purposes of participation in the pension plan they were subject to the hourly provisions of the Fair Labor Standard Act of 1938

[3] Monsanto first established a retirement pension plan in 1941 that covered both hourly and salaried employees of the corporation. The plan was amended from time to time *as to certain groups of employees* that were covered under the plan, and amendments were identified as separate plans, the 1951 plan, the 1956 plan, the 1961 plan, the 1966 plan, and the 1971 Plan.

"FLSA" as "nonexempt" employees. 29 U.S.C. § 201 et seq. Pursuant to the FLSA nonexempt employees received overtime pay for both mandatory overtime incorporated into their normal work schedule and for voluntary overtime. The FLSA requires record keeping in regards to nonexempt employees' work time.[4] Nonexempt salaried employees worked a rotating shift of seven days on first shift followed by seven days on second shift followed by seven days on third shift with two days off between each shift. On the rotating shift a normal work schedule for calendar year 1972, included 254 regular eight hour work days, 13 mandatory overtime days (Sundays on first shift), and 6 holidays that were otherwise to be paid holiday leave for a total of 273 work days. (App. 32a-34a). Nonexempt employees were paid on a semi-monthly basis. Because of the extensive overtime worked, both mandatory and voluntary, nonexempt employees worked substantially more hours per year on the rotating shift schedule compared to a usual 40 hour per week 52 week year, the "2080 year". (App. 32a).

The 1971 Plan awarded credited service based on continuous service for Monsanto. An employee was entitled to a pension if he had ten years of continuous service from the first day of employment to the last day of employment. Monsanto amended, restated and continued the 1971 Plan as the 1976 Monsanto Salaried

---

[4] ERISA also requires record retention. *See* 29 U.S.C. § 1027; 29 C.F.R. § 2520.107-1

Employes' (sic) Pension Plan, the first ERISA qualified plan. The 1976 Plan utilized the calendar year to compute a "year of service" as defined by ERISA. ERISA defines a "year of service" as "a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service." ERISA § 203(b)(2)(A). Disregarding some exceptions not applicable here ERISA § 202 (b)(1) provides "all years of service with the employer or employers maintaining the plan shall be taken into account in computing the period of service for purposes of subsection (a)(1) of this section." ERISA § 202(b)(1).

The 1976 Plan was a qualified pension plan only because it covered a wide range of employees, HCEs and non-HCEs. In order to qualify the 1976 Plan as an ERISA plan Monsanto permitted nonexempt "salaried" employees such as Gilley to participate. In accordance with ERISA employees with ten years of service were entitled to 100 percent of their nonforfeitable accrued benefit derived from employer contributions under the 1976 Plan.[5] ERISA § 203(a)(2)(A). A participant was credited with service for both pre-ERISA years of service and years of service under the 1976 Plan according to ERISA's 1000 Hour Rule. ERISA §§ 202(a)(3)(A) and 203(a)(2)(A). An hour of service as

[5] ERISA now requires qualified plans to vest participants with five years of service. ERISA § 203(a)(2)(A).

defined by ERISA and the 1976 Plan included all regular time hours worked, overtime hours, vacation hours, sick leave hours, paid holiday hours, personal hours, and a year of service if the employee was placed on layoff status. *See* 29 C.F.R. § 2530.200b-2.

Monsanto closed the North Alabama plant in February 1981 approximately nine years after production at the plant began. Monsanto placed employees on layoff status for a period of one year with a three year call back period. Gilley, who was on a plant closing team, went on layoff status April 1, 1981.

Gilley, in the event of a layoff, had ten full years of credited service under the 1976 Plan as of December 31, 1980:

> August 30, 1972 to December 31, 1972 (1 year of credited service for 1000 hours of service);
>
> 1973 — December 31, 1980 – (8 years);
>
> 1981 — (1 year of credited service, three months for work performed for Monsanto from January 1, 1981 to March 31, 1981 plus nine months due to layoff);

Total = 10 years of credited service.[6]

Under the 1976 Plan participants with ten years of service were entitled to a reduced deferred vested retirement benefit at age 55 or a full deferred vested retirement benefit at age 65. Monsanto's management promised Gilley and other vested nonexempt employees a pension when the plant closed.[7] At some point the 1976 Plan was amended, restated, and continued as the 1981 Plan. The record does not reflect whether or not the 1981 Plan was approved by the Secretary of Labor nor does it reflect when the amendment was published to participants. ERISA § 204(h)(1). The record does indicate the 1981 Plan was not published to participants before April 1, 1981.[8] *See* ERISA § 302(c)(8)(C). Monsanto reported in its annual Form 5500 that the amendment did not have an effect on *any* participant's accrued benefit. Respondents made the effective date of the amendment, January 1, 1981.

Gilley inquired about his pension benefit in 2001 at the age of 60. The plan administrator reexamining his eligibility for a pension recalculated all of his credited service for Monsanto

---

[6] With a full year of credited service due to layoff, three additional months, Gilley had ten plus years of credited service under the 1976 Plan. *See* ERISA § 202(a)(3)(A).

[7] Records maintained by Defendants reflect that Gilley had ten years of service with an employment date of 8/31/1972 and a termination date of 9/27/1982.

[8] Nonexempt employees did not receive annual benefit reports from Monsanto after the plant closed.

from 1972 to 1981 by applying the 95-Hour Rule, an equivalency incorporated by the amendment. The 95-Hour Rule excluded credit for overtime worked in 1972 by crediting a flat rate of 95 hours of service per semi-monthly pay period.[9] Utilizing the 95-Hour Rule the plan administrator recalculated Gilley's service as follows:

> 1972 – (0.411 years of service);
>
> 1973-1980 – (8 years of service);
>
> 1981 – (1 year of service, 3 months of credited service for work from January 1, 1981 to March 31, 1981, plus 9 months due to layoff);
>
> 1982 – (0.183 years of credited service for 2 months due to layoff);
>
> Total = 9.594 years of service including 11 months due to layoff from March 31, 1981 to February 27, 1982.[10]

The plan administrator by applying the 95-Hour Rule denied Gilley credit for overtime hours he

---

[9] Monsanto's Board approved the amendment at the same meeting in which it decided to close two plants, the North Alabama plant and another plant in Fayetteville, North Carolina.

[10] The 1976 and 1981 Plan both gave credited service for being on layoff, a year of service under the 1976 Plan and *up to a year* of credit service under the 1981 Plan.

worked in 1972 which had been previously credited under the 1976 Plan resulting in a complete forfeiture of his accrued benefit. Gilley did not have notice of the amendment until suit was filed in 2004.

In the District Court, Respondents moved to dismiss Plaintiff's complaint under Rule 12(b)(6) on the grounds, *inter alia*, that ERISA permits the use of equivalencies by plan sponsors. The District Court denied the motion to dismiss in part based on this Court's holding in *Central Laborers' Pension Fund v. Heinz*, 541 U.S 739 (2004) and the Eleventh Circuit's decision in *Jones v. American General Life and Accident Insurance Company,* 370 F.3d 1065 (11th Cir. 2004) applying this Court's holding in *Varity Corporation v. Howe*, 516 U.S. 489 (1996). Thereafter, Gilley amended the complaint bringing his individual and class claims specifically under ERISA § 502(a)(3) for breach of fiduciary duty and violation of ERISA §§ 204(g)(1), 510, and 502(c), and under ERISA § 502(a)(2) for breach on behalf of the plan for the following bad acts: failing to maintain records necessary for the obtainment of rights; failing to provide the actual plan documents requested; closing the plant and simultaneously amending the plan in a discriminatory manner; amending the plan while employees were on layoff status; failing to notify participants of changes to the plan;[11] promising employees a pension only to intentionally deny

[11] The amendment discriminates against nonexempt employees by denying them credit for their actual hours of service because it does not give credit for overtime worked.

benefits twenty plus years later, and; failing to act in the interest of plan participants over company profit.

Plaintiff filed a motion to certify the class pursuant to Federal Rules of Civil Procedure Rule 23. The District Court denied Gilley's motion for class certification. At Respondents' request the District Court set the matter for a two-day bench trial on the limited issue of whether, disregarding the amendment, Gilley had 1000 *hours of service* in 1972 entitling him to a year of credited service for that year as required by ERISA and the 1976 Plan. (App. 26a fn 1; *see also* ERISA § 203(b)(2)(A); 29 C.F.R. § 2530.200b-2).

Gilley asserted that the District Court should apply the *de novo* standard of review to his claims under Section 502(a)(3) for equitable relief due to Respondents' alleged breach of fiduciary duty and violation of ERISA's mandates because plan administrators and fiduciaries cannot reserve discretion to violate ERISA. Respondents disagreed asserting that the proper standard of review to be applied was the arbitrary and capricious standard. The District Court applied a heightened arbitrary and capricious standard of review. (App. 27a).

The District Court determined that ERISA permits the use of equivalencies on a qualified basis. (App. 28a citing 29 C.F.R. § 2530.200b-3(c)). Because the District Court found irregularities in plan administration, a clear conflict of interest, and

because Respondents' did not produce any records for 1972, the District Court accepted Petitioner's proposal to substitute a permissible equivalency based on working time for the 95-Hour Rule because "but for" the amendment "plaintiff's retirement benefits would have vested". (App. 26a fn 1; App. 30a).[12] Unlike the 95-Hour Rule which credited a flat rate of 95 hours per semi-monthly pay period regardless of the actual hours of service, the District Court used two permitted equivalencies that estimate hours of service based on hours worked and regular time hours worked to more accurately credit actual hours of service for nonexempt employees pursuant to 29 C.F.R. § 2530.200b-2. (App. 28a-30a quoting 29 C.F.R. § 2530.200b-3(d)(1) & (d)(2)).

Under § 2530.200b-3(d)(1) hours of service are "credited to an employee on the basis of hours worked . . . if 870 *hours worked* are treated as equivalent to 1,000 *hours of service*. . .". (App. 30a)(emphasis added). "The term "hours worked" shall mean hours of service described in § 2530.200b-2(a)(1)." 29 C.F.R. § 2530.200b-3(d)(3)(i). Under § 2530.200b-3 (d)(2) hours of service are "credited to an employee on the basis of regular time hours, as defined in paragraph (d)(3)(ii) of this section, if *750 regular time hours* are treated as equivalent to 1,000 *hours of service* . . .". (App.

---

[12] Monsanto knew in 1976 when it established the 1976 Plan as an ERISA plan that it was required to keep records to credit pre-ERISA service under the 1000 Hour Rule. (App. 28a; *see also* ERISA § 202(a)(3)(A); 29 U.S.C. § 1027; 29 CFR § 2520.107-1).

30a) (emphasis added). Regular time hours are defined "as hours worked, except it excludes hours for which a premium rate is paid because such hours are in excess of the maximum workweek or workday as described by FLSA. 29 C.F.R. § 2530.200b-3 (d)(3)(ii)." (App. 30a).

Because Gilley *worked* at least 887 hours in 1972 based on Respondents' calculations using Social Security earnings produced by Petitioner, the District Court determined "plaintiff's entitlement to benefits vested prior to this termination". (App. 30a). The District Court held "the 95-Hour Rule is not applicable to a 1972 calculation stating "[i]n general, later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement". (App. 27a). In response to a motion to alter, amend or vacate, the District Court expressed its doubts as to whether the following statement made by Respondents was applicable to defendants with a conflict of interest: "although federal regulations recognize a permitted equivalency that uses 870 *Hours of Service*[13] as the threshold, the regulation is clear that it is for the Plan, and not the individual participants, to elect the equivalency of its choice. *See* 29 C.F.R. § 2530.200b-3(a)." (App. 36a). At Respondents'

[13] The permitted equivalency does not recognize 870 Hours of Service as the threshold, but rather equates 870 *hours worked* to 1000 *hours of service* to compensate for the actual hours of service required to be credited under § 2530.200b-2(a) and the 1976 Plan. *See* 29 C.F.R. § 2530.200b-2(a).

request the District Court certified its ruling pursuant to Rule 54(b).

III. Decision of the Eleventh Circuit

Respondents appealed to the United States Court of Appeals for the Eleventh Circuit challenging the District Court's findings and award of an accrued pension benefit because Respondents contended an award of benefits was legal and not equitable relief allowable under ERISA § 502(a)(3) based on this Court's holding in *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2001).

While the appeal in Gilley was pending a second suit raising essentially the same claims, *Heptinstall et al. v. Monsanto*, CV 06-1564 (N.D. Ala. 2006) was brought in the Northern District of Alabama Middle Division on behalf of seven additional plaintiffs who were similarly situated to Gilley and denied their pensions by Respondents based on the amendment of the plan.[14]

The Eleventh Circuit finding the District Court's award of benefits was injunctive in nature found finality and vacated the judgment. Notwithstanding the fact that Gilley did not bring any claims under Section 502(a)(1)(B), the Eleventh Circuit decision held: 1) the arbitrary and capricious standard applied because the denial of

[14] This suit has been stayed pending the outcome of the appeal in *Gilley* and this petition.

Gilley's pension was within the administrator's discretion; 2) an amendment of an ERISA pension plan to adopt an equivalency which excludes overtime hours did not implicate the "anticutback" rule; 3) the District Court should not have overridden the equivalency specified in the amended plan; 4) there is never a conflict of interest warranting a heightened arbitrary and capricious standard of review in situations where plan sponsors pay benefits out of a non-reversionary trust, and; 5) the plan amendment could be applied to an employee who had still not completed ten years of service when the amended plan went into effect without violating another ERISA provision.

REASONS FOR GRANTING THE PETITION

The questions presented in the petition for writ of certiorari raise important issues concerning ERISA's promised protection against forfeiture of pension benefits. The courts are divided on the proper standard of review to be applied when reviewing claims brought to redress violations of ERISA's mandates involving statutory interpretation and questions of alleged improper acts by unscrupulous plan administrators and fiduciaries pursuant to ERISA § 502(a)(3). Eight Circuit Courts of Appeal, including the Eleventh Circuit in the present case, have addressed the issue of the standard of review to be applied by courts in suits against administrators and fiduciaries for breach of fiduciary duty and statutory and plan noncompliance.

The First, Second, Fifth, Seventh, Eighth, and Ninth Circuit have all applied a *de novo* standard of review reasoning because suits of this nature involve questions of law and statutory interpretation properly resolved by courts. *See e. g. La Rocca v. Borden, Inc.* 276 F.3d 22, 26 (1st Cir. 2002); *Coan v. Kaufman*, No. 04-5173 (2nd Cir. 2006) citing *Burke v. Kodak Retirement Income Plan,* 336 F.3d 103, 111 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004); *Wilkins v. Mason Tenders District Council Pension Fund,* 445 F.3d 572, 581 (2nd Cir. 2006) citing *Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots,* 994 F.2d 692, 694 (9th Cir.1993); *Rhorer v. Raytheon Eng'rs & Contractors Inc.*, 181 F.3d 634, 639 (5th Cir. 1999)(applying *de novo* standard to question of law for breach of fiduciary duty under Section 502(a)(2); *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355 (7th Cir. 2006) citing *Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005); *Calhoon v. Trans World Airlines, Inc.* 400 F.3d 593 (8th Cir. 2005) citing *Parke v. First Reliance Standard Life Insur. Co.*, 368 F.3d 999, 1006 (8th Cir.2004); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004) citing *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003).

Separate panels of the Sixth Circuit applied a *de novo* standard of review and an arbitrary and capricious standard of review to claims brought under Section 502(a)(3). *See Simpson v. Ernst & Young,* 100 F.3d 436 (6th Cir. 1996)(applying *de novo* standard of review) citing *Schwartz v. Gregori*,

45 F.3d 1017, 1021 (6th Cir.), certiorari denied, 116 S. Ct. 77 (1995); *but see Hunter v. Caliber System*, 220 F.3d 702 (6th Cir. 2000)(expressly rejecting the *de novo* standard of review).[15]

Review is necessary to resolve the split in the circuits regarding the proper standard of review to be applied by courts in suits involving statutory interpretation and plan noncompliance brought under Section 502(a)(3). If the Eleventh Circuit's decision in *Gilley v. Monsanto,* 490 F.3d 848 (11th Cir. 2007) is allowed to stand it will establish the arbitrary and capricious standard of review for every ERISA pension case in this circuit. Since ERISA has no punitive provisions, plan sponsors who face obligations to fund underfunded trusts will have every incentive to create innovative ways to deny entire classes of participants their rightful property without fear of meaningful judicial review contrary to the statute's stated commitment "to promote the interests of employees and their beneficiaries in employee benefit plans," and "to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Review is also warranted because the Eleventh Circuit held the amendment, which caused a complete forfeiture of an otherwise nonforfeitable accrued benefit, did not violate ERISA's

---

[15] The third circuit in *Jordan v. Federal Exp. Corp*., 116 F.3d 1005 (3rd Cir. 1997) recognized that the deferential standard "only applies to actions brought under § 502(a)(1)(B) and not those brought under § 502(a)(3)." *Jordan*, 116 F.3d at fn 8.

"anticutback" rule. This Court has never addressed the issue of whether Section 204(g) applies to an amendment which prevents vesting by changing the method of computing credited service under a plan. Petitioner believes the Eleventh Circuit's decision overriding "equitable relief" fashioned by the District Court when the equivalency chosen by the plan failed to credit the actual hours of service required to be credited by ERISA and the 1976 Plan directly conflicts with this Court's holdings in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989), *Central Laborers' Pension Fund v. Heinz*, 541 U.S 739 (2004) and *Varity Corporation v. Howe*, 516 U.S. 489 (1996).

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS CONCERNING THE PROPER STANDARD OF REVIEW TO BE APPLIED IN SUITS BROUGHT UNDER ERISA SECTION 502(a)(3).

A. There Is A Split Between The Circuits On The Application Of The Arbitrary and Capricious Standard Outside The Benefit Denial Context.

The First, Second, Fifth, Seventh, Eighth, and Ninth Circuits, recognizing claims for breach of fiduciary duty involve statutory interpretation, have all applied a *de novo* standard of review. The Sixth Circuit is the only other circuit outside of the Eleventh Circuit to apply the arbitrary and capricious standard outside the benefit denial context. In *Hunter v. Caliber System, Incorporated*

the Sixth Circuit addressed consolidated cases brought against Caliber Systems, Inc. "Caliber", the parent company and others, after a complicated spin-off which ultimately resulted in a decline in value to Plaintiffs' individual retirement accounts. *Hunter v. Caliber System*, *Inc.*, 220 F.3d 702, 708 (6th Cir. 2000). Plaintiffs' who were nonunion employees of Roadway Express, Inc. "REX", the spin-off company, complained of losses suffered when they sold their Caliber stock at a loss because of delays caused by REX and because Caliber denied them lump sum distributions. *Id.*

The Sixth Circuit refused to apply a *de novo* standard of review to Plaintiffs' § 204(g) claims. *Id.* at 709-711. Instead the Sixth Circuit agreed with the District Court and found that Plaintiffs' claims for violation of § 204(g) were claims for benefits brought under § 502(a)(1)(B) requiring application of the *Firestone* standard and interpretation of plan language. *Id.* The Sixth Circuit recognizing this Court in *Firestone* did not address the standard of review to be applied when claims are based on violations of the duties set forth in § 404 expressly rejected Plaintiffs' argument that the District Court erred by not applying the *de novo* standard of review. *Id.* at 711. Contrary to the Sixth's earlier holding in *Simpson* the panel held the arbitrary and capricious standard applied outside of the benefit denial context. *Id.* at 711-12.

B. Wholesale Importation Of The Highly Deferential Standard of Review To All Claims Brought To Redress Violations Of ERISA's Mandates Is Unwarranted.

The Eleventh Circuit, as did the Sixth Circuit in *Hunter*, pigeonholed all Plaintiff's individual and class claims for breach of fiduciary duty and violation of ERISA's mandates into a single *de facto* claim for benefits under § 502(a)(1)(B). After deciding the present case was only a claim for benefits, the Eleventh Circuit relying on *Buckley v. Metropolitan Life*, 115 F.3d 936, 939-40 (11th Cir. 1997) decided Defendants were entitled to complete deference in all benefit decisions overruling the District Court's finding of a clear conflict of interest. (App. 13a). *Buckley* stands for the proposition that the heightened arbitrary and capricious standard of review is not warranted in suits for benefits under § 502(a)(1)(B) when benefits are paid from a non-reversionary trust because there is no immediate expense or gain to the sponsor. *Buckley v. Metropolitan Life*, 115 F.3d 936, 939-40 (11th Cir. 1997). *Buckley,* a welfare benefit case brought under ERISA 502(a)(1)(B), and the present class action pension case brought under ERISA § 502(a)(3) are not comparable. *Id. Buckley's* reasoning is faulty, inapposite, and short sighted as applied to any pension case.

First, a claim for welfare benefits under § 502(a)(1)(B) and a claim for a pension benefit under § 502(a)(3) cannot be treated comparably in light of the type of benefit at issue. Welfare benefits and

pension benefits are different; this difference was recognized and addressed by Congress in the drafting of ERISA's regulatory scheme. While *Buckley* involved a claim for a long term disability benefit that more closely resembles a pension benefit at the point of eligibility, in general employees do not have a "vested interest" or property interest in welfare benefits. Because a non-vested welfare benefit is provided at the sponsor's discretion deference utilizing the arbitrary and capricious standard of review may be warranted under certain circumstances.

This is in stark contrast to the denial of a vested pension benefit. The generally accepted view of a defined benefit pension plan is that a portion of the participant's compensation (part of his paycheck) earned for services rendered to his employer is held in trust until the employee reaches the age of retirement or earlier if the plan allows. LANGBEIN, JOHN H. & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 17 ¶ 4 (3rd ed. 2000). The monies held in trust are the property of participants who have fulfilled their promise under the parties' agreement, not the property of the employer. Because a pension benefit is the property of the employee a denial of a pension benefit raises due process concerns. This concern over due process is reflected in ERISA's statutory framework.[16] *See* ERISA §§ 201, 202, 203, 204.

---

[16] ERISA § 201 excludes welfare benefit plans and "top-hat" plans.

Second, all qualified pension plans covered under ERISA must by statute hold their funds in a non-reversionary trust. *See* 26 U.S.C. § 401(a)(2); 26 C.F.R. §§ 1.401-2. *A fortiori* applying *Buckley's* reasoning in a case for pension benefits, regardless of the remedial statute under which it is brought, would mandate the use of the highly deferential arbitrary and capricious standard of review in every pension case. This would be so even in situations where the plan administrator or fiduciary committed unscrupulous acts such as the ones alleged here or where the plan administrator failed to follow the plan. The rule the Eleventh Circuit has established in *Gilley* relying on *Buckley v. Metropolitan Life* violates basic principles of due process by affording companies complete control over their former employees' property without meaningful judicial review. Moreover, the Eleventh Circuit's decision if left undisturbed will do what this Court refused to do in *Firestone*; establish the arbitrary and capricious standard for every ERISA claim. *Firestone,* 489 U.S. at 109.

Third, notwithstanding that the Eleventh Circuit's reasoning may or may not be correct in regards to a single claim for the denial of welfare benefits under § 502(a)(1)(B), it does not hold in situations where a single decision will affect an entire class of participants. Over the last two decades the number of underfunded pension trusts has been steadily increasing. The latest Pension Benefit Guarantee Corporation "PBGC" report for 2005 identifies a 312,634,000,000 dollar shortfall in funding for PBGC-Insured Single-Employer

Programs for calendar year 2003, up fifteen fold since 1980. *Pension Insurance Data Book 2005*, 10 PBGC 69-70 (Summer 2006).[17] An unscrupulous plan sponsor required to periodically fund an underfunded trust can reduce its financial burden to the trust and thereby increase its profit by simply denying a pension to one carefully selected individual. Then, utilizing a favorable judicial decision such as the Eleventh Circuit's decision here, the sponsor can deny an entire class of bottom tier participants their rightful property through the use of the judicial principle of defensive collateral estoppel.[18] The unscrupulous plan sponsor by revisiting eligibility eliminates its obligation to fund the underfunded trust by denying benefits to a class of bottom tier participants. What was established as a qualified plan covering a wide range of employees is converted to a *de facto* deferred compensation plan for HCEs. The result is a top-hat plan with the perks of being a qualified plan. Plus the plan sponsor's profit margin is increased as a result of being relieved of the burden to fully fund the trust for all eligible participants.

---

[17] The District Court found a clear conflict of interest based on irregularities in plan administration and because the trust was underfunded. (App. 27a). Among the irregularities was the plan administrator's failure to report nonexempt employees with an admitted right to a deferred retirement benefit on Form 5500's when the plant closed and Monsanto's failure to make annual benefit reports to nonexempt employees.

[18] Based on *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) this decision left undisturbed will foreclose judicial review of the denial of pension benefits to an entire class of nonexempt "hourly" workers.

The result is an end-run around the statutory mandates for established qualified plans which were supposedly to provide pension benefits on a nondiscriminatory basis to a wide range of employees.

The non-reversionary trust is nothing more than a minimum balance tax favored bank account; a decrease in liability on one side of the balance sheet equals an increase in assets on the other side. This is simple kitchen table economics. The sponsor gets the tax advantage for establishing an alleged qualified plan for a wide range of employees plus additional benefits such as worker retention and a uniform federal forum, and then simply minimizes and/or eliminates liability to the bottom tier participants by denying them their rightful property even, as the sponsor did here, at retirement age. When entire classes of participants are denied their pensions based on a single judicial ruling the impact on the sponsor's profit margin is real and immediate.

Fourth, Gilley's individual claims under ERISA § 502(a)(3) sought injunctive relief against the use of the 95-Hour Rule and equitable restitution of his accrued benefit based on a clear showing of irreparable harm and the inadequacy of legal remedies. *Sereboff v. Mid Atlantic Medical Serv., Inc.*, 547 U. S. ____ (2006). *Buckley* involved a claim for disability benefits brought under ERISA § 502(a)(1)(B). *Buckley*, 115 F.3d at 939. Claims brought under § 502(a)(1)(B) involve a fiduciary's discretionary denial of benefits under the terms of

the plan. *Id.* In stark contrast, a claim under ERISA § 502(a)(3) for breach of fiduciary duty and statutory violation does not involve a fiduciary's discretion because presumably Congress did not intend to give plan administrators and fiduciaries discretion to violate either ERISA's statutory provisions or the written plan.[19] While there may be discretion to interpret plan terms under § 502(a)(1)(B) courts should not extend this level of deference to statutory issues. Moreover, just because a claim under § 502(a)(3) may require the court to review plan terms to make a judicial determination regarding the alleged statutory violation this should not warrant the application of a highly deferential standard of review.

The arbitrary and capricious standard is essentially an abuse of discretion standard. Generally courts afford this kind of deference only to other courts or administrative agencies of the government but even then on a limited basis. *See e.g. DeBartolo Corp. v. Florida Gulf Coast Trades Council,* 485 U.S. 568 (1988)(affording no deference to administrative agency when constitutional issues exist). There is simply nothing in ERISA's statutory provisions or the federal common law

---

[19] The distinction between claims under 502(a)(1)(B) and 502(a)(3) has been documented by courts of appeal. *See Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999)(discussing circuit split in regards to whether exhaustion is required under ERISA § 502(a)(3)); *see e.g. Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1451 (11th Cir. 1997)(discussing limitation of the court's review to the administrative record in suits brought under ERISA § 502(a)(1)(B)).

authorizing a court to afford this level of deference to a plan administrator or fiduciary's interpretation of statutory issues.

Finally, the often heralded threat of increased litigation cannot trump an employee's constitutional right to due process. These monies held in trust are the property of the employees who have fulfilled the age and service requirements under the plan. An action brought under ERISA 502(a)(3) is founded on the premise that there has been a violation of ERISA's mandates or noncompliance with the plan's terms. If courts are not required to scrutinize these types of claims then ERISA's remedial provisions are nothing more than an illusory promise and ERISA itself a vehicle for the taking of property without due process of law. A claim for a pension benefit brought under ERISA 502(a)(3) is an equitable action for restitution of the employee's property. The proper standard of review to be applied by courts in suits brought under Section 502(a)(3) for breach of fiduciary duty involving statutory interpretation as a matter of course should be *de novo* as the majority of circuits has held.

II. REVIEW IS WARRANTED TO CLARIFY THIS COURT'S HOLDINGS IN *CENTRAL LABORERS* AND *VARITY* REGARDING THE AVAILABILITY OF "EQUITABLE RELIEF" TO REDRESS INJURY SUFFERED BY THE UNSCRUPULOUS ACTS OF PLAN ADMINISTRATORS AND FIDUCIARIES.

A. Review of The Eleventh Circuit's Analysis of ERISA's Vesting and Benefit Accrual Provisions Is Warranted.

This is a case of first impression. Petitioner has been unable to locate any other ERISA case where participants who were promised a pension upon leaving the service of their employer more than twenty years ago were denied their pension from a defined benefit plan upon reaching retirement age. Similarly, Petitioner has been unable to locate any other decision where an amendment which changed the method of calculating credited service under the plan was used to retroactively recalculate all credited service accrued under a prior version of the plan causing a complete forfeiture of an otherwise nonforfeitable pension benefit.

Review is warranted to clarify this Court's holding in *Central Laborers'* and *Varity*. The Eleventh Circuit's decision is contrary to ERISA's stated policy of protecting participants' interest in private plans by requiring them to vest the accrued benefit of employees with significant periods of service. The Eleventh Circuit, relying on this Court's distinction between vesting and accrual in *Central Laborers'*, noted accrual is " 'the rate at which an employee earns benefits to put in his pension account' while benefit vesting refers to the point at which a participant's pension rights become nonforfeitable 'by virtue of his having fulfilled age and length of service requirements'." (App. 18a). Based on its interpretation of this distinction the Eleventh Circuit held the

amendment in question affected vesting therefore by its terms it did not affect benefit accrual implicating ERISA § 204(g). The court of appeals then concluded the amendment "affected Gilley's ability to vest before he had vested, but it did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits." (App. 19a).

Congress purposely intertwined ERISA's participation, benefit accrual and vesting provisions to prevent plan sponsors from subverting the statutory intent to provide meaningful vesting rights to participants. *See* 120 Cong. Rec. S. 15737 (daily ed. Aug. 22, 1974) (statement of Senator Williams), reprinted in 1974 U.S. Code Cong. & Ad. News 5177, 5180. Congresses' concern was that if a plan had too much leeway in benefit accrual ERISA's vesting provisions would be meaningless. The most common problem Congress sought to address was termed "back-loading." *Id.* A plan engaged in back-loading if employees were allowed to vest, but because benefit accrual was not consistent throughout the employee's tenure the employee vested in an accrued benefit with little or no value. *Id.* The situation here presents a somewhat different problem with inconsistent benefit accrual. In the present situation, the sponsor by changing how service was credited under the plan set a "floating target" for vesting.

ERISA allows plans to use credited service time as a means of computing a participant's accrued benefit and vesting benefit. ERISA §§ 203(b)(2)(A)

and 204(b)(1)(A)(ii). "Benefit service" defines a participant's "accrued benefit" while "vesting service" defines a participant's "vesting benefit". Benefit service is distinguishable from vesting service to accommodate ERISA § 203's break-in-service provisions which are not contained in ERISA § 204. *See McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 153 (2d Cir. 2003); *Jones v. UOP*, 16 F.3d 141, 143 (7th Cir. 1994); *Digiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 420 F.3d 220 (3rd Cir. 2005). Because Gilley did not have a break-in-service all his years of service with Monsanto were to be taken into account in computing his vesting and benefit service. ERISA § 202(b)(1). Accordingly, Gilley's credited service for vesting and benefit accrual purposes was equal. The amendment, by redefining how service was credited under the plan, caused a reduction in Gilley's vesting service equal to the reduction in his benefit service.[20] Because the method of crediting service determines benefit accrual and because the method was not consistent a class of nonexempt employees never vested. *See* fn 3 & 9 *supra*.

Congress designed ERISA's reticulated benefit accrual and vesting provisions to prevent these types of forfeiture. ERISA's benefit accrual provisions require benefits to accrue at a consistent rate. *See* ERISA § 203(b)(2)(A) and § 204(b)(1)(A).

---

[20] The SPD for the 1976 Plan stated that a participant's credited service prior to January 1, 1976, would be calculated under the 1000 hours of service rule or under the terms of prior plans, *whichever was more favorable to the participant*.

Under ERISA a participant in a plan has an *accrued benefit* for each computation period i.e. "year of service" both before and after vesting. *See e.g.* 26 C.F.R. § 1.410(a)-3; 26 C.F.R. § 1.411(b)-1; 29 C.F.R. § 4006.6; ERISA § 3(23); ERISA §§ 204(b)(1)(A)(i) and (ii).

Consistent with ERISA § 203(a)(2)(A) under the 1976 Plan an employee who had ten years of vesting service defined by ERISA's 1000 hours of service rule in any calendar year had a nonforfeitable right to 100 percent of his accrued benefit derived from his employer's contributions to the trust. ERISA §§ 203(a)(2)(A) and 203(b)(2)(A). "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional, and which is legally enforceable against the plan . . .* ". ERISA § 3(19)(emphasis added).

Section 204(g)(1) states "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .". ERISA § 204(g)(1). ERISA defines "accrued benefit" in the case of a defined benefit plan, ". . . as an annual benefit commencing at normal retirement age" based on years of participation in the plan. ERISA § 3(23); ERISA § 204(b)(1)(A). The 95-Hour Rule changed how service was credited under the plan thereby altering years of service and years of "participation" for benefit accrual and vesting purposes.

Under the amendment, instead of earning a year of participation for 1972 in eight semi-monthly pay periods under the 1000 hour of service rule which included overtime hours, Gilley had to be a participant for 11 semi-monthly pay periods in 1972 to be entitled to a year of service regardless of his actual hours of service performed on behalf of the employer. (App. 4a). Thus, the amendment by redefining how service was credited under the plan affected the rate at which benefits accrued notwithstanding the fact that it affected vesting. Because Monsanto closed the plant while simultaneously amending the plan the amendment reduced Gilley's accrued benefit at normal retirement age to zero violating § 204(g). *See* ERISA §§ 204(g)(1); 29 C.F.R. §§ 2530.200b-2(a)(1)(2) & (3).

Section 204(b)(1)(G) of ERISA provides "a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. ERISA §§ 204(b)(1)(G). Under the amendment, Gilley would have had to be a participant for an additional month and half in calendar year 1972 for the same year of service he was entitled to under the 1976 Plan due to overtime worked. (App. 26a fn 1). In other words, Gilley's accrued benefit was reduced from 100 percent to zero by an *increase in service* requirements under the plan. The 1981 Plan does not satisfy this subsection. *See* ERISA §§

204(b)(1)(G); 29 C.F.R. §§ 2530.200b-2(a)(1)(2) & (3); *see also* 26 C.F.R. § 1.411(a)-3.

Once the Eleventh Circuit determined the plan amendment affected Gilley's ability to vest and not Gilley's accrued benefit, the Eleventh Circuit then determined Section 203(c)(1)(A) did not apply because this section applied to amendments that have an affect on an employee's percentage of his nonforfeitable accrued benefit. The Circuit Court concluded Gilley did not vest under the amended plan therefore he had no nonforfeitable accrued benefit so this section could not apply by its terms as well. (App. 21a).

ERISA § 203 states:

> (c)(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a *participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.*

ERISA § 203(c)(1)(A)(emphasis added).

Under Section 203(c)(1)(A) Gilley's percentage of his nonforfeitable accrued benefit computed *without regard for the 1981 Plan amendment* is 100 percent. In other words, "but for" the recalculation of his credited service under the 1981 amendment Gilley is vested with ten full years of credited service under the plan and entitled to a pension. ERISA §§ 203(c)(1)(A) (App. 26a fn 1).

ERISA § 203 (c)(1)(B) states:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after adoption of such amendment, *to have his nonforfeitable percentage computed under the plan without regard to such amendment*.[21]

ERISA § 203(c)(1)(B)(emphasis added).

As the District Court properly found disregarding the amendment Gilley was fully vested under the plan with a 100 percent

---

[21] The length of service requiring notice was lowered when ERISA's vesting provisions were amended in the 1980's.

nonforfeitable right to his accrued benefit at his election.[22] ERISA § 203(c)(1)(B) (App. 26a fn 1).

Benefit accrual and vesting while separate concepts are intertwined and complimentary when it comes to ensuring against forfeiture under ERISA's reticulated statutory framework. While the two provisions are separate, an amendment that affects one can and often does affect the other. As this Court pointed out "[t]o be sure, the concepts overlap in practical effect, and a single act by a plan might raise both vesting and accrual concerns." *Central Laborers' Pension Fund*, 541 U.S. at 749.

The 95-Hour Rule increased the service requirements under the plan, affected the rate of benefit accrual, reduced the accrued benefit, and altered vesting simultaneously by redefining how an employees' accrued credited service under the plan was computed thereby violating Section 204(g) as well as several other ERISA provisions.

The most often cited reason for ERISA's enactment was "to promote the interests of employees and their beneficiaries in employee benefit plans," and "to protect contractually defined benefits." *Firestone,* 489 U.S. at 113. If employees' expectations in their benefits are not protected then ERISA's remedial promise is illusory. The court of appeals ruling if allowed to stand will subvert

---

[22] Contrary to the Eleventh's proclamation, the issue of notice was raised at trial and presented to the District Court in Plaintiff's Proposed Findings of Fact And Conclusions of Law.

ERISA's statutory intent of securing pensions as promised by allowing an end-run around the vesting, participation, and accrual provisions as well as the nondiscrimination requirements.

B. Review Of The Eleventh Circuit's Decision Is Warranted In Light Of This Court's Decisions In *Central Laborers Pension Fund v. Heinz* and *Varity Corp. v. Howe* Permitting Equitable Relief.

ERISA demands loyalty on the part of plan administrators and fiduciaries to the participants and beneficiaries and abhors acts taken by them to save the employer money at the beneficiaries' expense. *Varity*, 516 U.S. at 506. In *Varity Corporation v. Howe* this Court expressly authorized suits by plan beneficiaries under § 502(a)(3) to equitability redress injury suffered as a result of a breach of a fiduciary's duty to plan participants. *Id.*

In *Central Laborers'* this Court refused to limit the scope of the anticutback rule to a strict and narrow definition. *Central Laborers'* teaches that although ERISA expressly permits certain provisions up front ERISA does not permit "the imposition of a new condition on (implicitly) bargained-for benefits that have accrued already." *Central Laborers',* 541 U.S. at 750.

The District Court in the present case relying on its reading of *Central Laborers'* realized that Respondents by amending the plan to exclude

overtime for 1972 were imposing a new condition "on the (implicitly) bargained-for benefits that had accrued already." *Id.* As this Court pointed out in *Central Laborers'* just because ERISA sets terms plan sponsors may adopt up front it is not a license to adopt retroactive amendments to intentionally cause forfeiture. *Central Laborers',* 541 U.S. at 740.

While the 95-Hour Rule is a permissible equivalency under ERISA it is not a permissible equivalency under the present set of circumstances. An equivalency must credit "*no less* than the actual number of hours of service required to be credited under § 2530.200b-2(a) to each employee in a computation period even though such method may result in the crediting of hours of service in excess of the number of hours required to be credited under § 2530.200b-2." 29 C.F.R. § 2530.200b-3 (emphasis added). Moreover, "the use of a permissible equivalency for some, but not all, purposes or the use of a permissible equivalency for some, but not all, employees may, under certain circumstances, result in *discrimination* prohibited under section 401a of the Code, even though permitted . . .". 29 C.F.R. § 2530.200b-3(c)(3) (emphasis added).

Nonexempt employees working the rotating shift in 1972 *worked* 91 actual hours per semi-monthly pay period based on a straight eight hour day disregarding premium overtime, holiday, and leave hours. (App. 34a). Consequently the 95-Hour Rule, which credits a flat rate of 95 hours per semi-monthly pay period, does not credit the actual

number of *hours of service* per pay period required to be credited under § 2530.200b-2(a) for these nonexempt employees. (App. 32a-34a; *see also* 29 C.F.R. §§ 2530.200b-2 & 2530.200b-3). Petitioner believes, as the District Court obviously did, that the anticutback rule is to be given broad interpretation to further ERISA's statutory purpose of protecting promised pensions. The question is did the 95-Hour Rule impose additional conditions upon Gilley for his promised benefit? The resounding answer is yes. Respondents shifted the rules after-the-fact requiring additional service for the same accrued benefit intentionally causing forfeiture of an otherwise nonforfeitable retirement pension benefit. ERISA does not permit the employer who received the benefit of the bargain to change the rules after-the-fact to deny employees their rightful property. Gilley fulfilled the service and age requirements under the 1976 Plan, and he is entitled to restitution of his accrued pension benefit held in trust.

CONCLUSION

Petitioner, Wendell F. Gilley, for all the reasons set forth above respectfully submits that the writ of certiorari should be granted.

Respectfully Submitted,

Wendell F. Gilley, *pro se*
2208 Ringold Street, Ste 103
Guntersville, AL 35976
(256) 582-3559

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12117

[Filed June 28, 2007]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff-Appellee,	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)
MONSANTO COMPANY EMPLOYEE BENFITS EXECUTIVE COMMITTEE,	)
Defendant.	)

ORDER

BEFORE: CARNES, PRYOR, and FARRIS, [*]
Circuit Judges.

CARNES, Circuit Judge:

Throughout his judicial career Holmes relished challenging cases. While on Massachusetts' highest court he confessed to a friend that although none of the cases he had handled that year had been of universal interest, "there is always the pleasure of unraveling a difficulty."[1] A decade and a half later, while on the Supreme Court, he told the same friend that he had few cases of general interest that term, but "[t]here is always the fun of untying a knot and trying to do it in good compact form."[2] It is a pity that Holmes did not live to see ERISA cases.

I.

Wendell Gilley was employed by Monsanto Company, Inc. from August 31, 1972 through

---

[*] Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] 1Oliver Wendell Holmes, Jr., *Feb. 23, 1890 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874 – 1932 32, 33 (Mark DeWolfe, ed., Harvard Univ. Press 2d prtg. 1941).

[2] 1 Oliver Wendell Holmes, Jr., *May 25, 1906 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS, *supra* note 1, at 123, 124.

February 16, 1982 at its Sand Mountain textile plant in Northeast Alabama. Monsanto closed the plant in March of 1981, but Gilley remained on the payroll in layoff status until February 1982 when he was finally let go. Although the period of his employment was under nine-and-a-half years, Gilley claims that with the overtime that he worked in 1972, he acquired the necessary ten years of "Vested Service" to merit pension benefits.

Under Monsanto's Salaried Employees' Pension Plan, certain employees are entitled to benefits if they are able to meet the vesting requirements of the plan. Although Monsanto has amended its pension plan several times over the years, all relevant versions of the plan set out the same basic vesting requirements: (1) an eligible employee must reach retirement age, and (2) the employee must acquire at least ten years of "Vested Service." An employee earns a year of Vested Service when he completes 1,000 "Hours of Service," defined as all hours of employment for which an employee is directly or indirectly compensated, during that year. The manner in which Hours of Service are calculated has varied as Monsanto has amended its pension plan.

When Gilley began work at Monsanto, the 1971 Plan was in effect. The pension plan was amended in 1976 to comply with the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.,* which went into effect,

for our purposes, in 1976.[3] According to Monsanto, both the 1971 Plan and the 1976 post-amendment Plan utilized the "Elapsed Time Method" to calculate Vested Service for pension purposes. Under this method, an employee is credited with the hours that result from dividing the total number of calendar days of employment, including weekends and holidays, by 365 and then multiplying that number by 2,080 (the total hours in a "Standard Work Year" based on a forty-hour work week). In other words, an employee's Hours of Service are determined based on the fraction of the year he is employed, multiplied by the Standard Work Year—if an individual is employed for 176 days out of the year, he would be entitled to 1,002 Hours of Service or one year of Vested Service.

Sometime between 1979 and 1981, the Plan Committee decided to change the way Hours of Service are determined, adopting the "95-Hour Rule" and incorporating it into the amendments to the 1981 Plan. Under this calculation method, the provider credits all employees with ninety-five Hours of Service for each two-week period they are employed, regardless of the actual hours worked. The 95-Hour Rule expressly excludes additional credit for overtime hours, embodying the assumption that the fifteen extra Hours of Service

---

[3] The majority of ERISA became effective January 1, 1975, but for all pension plans in existence as of January 1, 1974, of which the Plan here was one, the participation and vesting standards of ERISA became applicable on the first day of the plan year beginning after December 31, 1975, effectively 1976. *See* 29 U.S.C. § 1061(b)(2).

credited on a biweekly basis (assuming a 40-hour week or 80 hours every two weeks) is a fair way to cover any overtime hours worked. In addition to adopting the 95-Hour Rule, the 1981 Plan stated that an employee's benefit rights are to be determined according to the pension plan in effect at the time that the employee separates from Monsanto.

Believing that he had acquired ten years of Vested Service, even though he had only worked for Monsanto for nine full years and part of two other years (1972 and 1982), Gilley applied for pension benefits in 2001. Monsanto denied his request, because it concluded that Gilley's Vested Service fell short of the requisite ten years. Gilley filed an administrative appeal, and the Monsanto Plan Committee denied his petition. It applied the 1981 Plan and the 95-Hour Rule to determine that Gilley was only entitled to 9.594 years of Vested Service.

Gilley filed suit claiming that Monsanto had: (1) arbitrarily and capriciously denied his claim for benefits, in violation of ERISA § 502, 29 U.S.C. § 1132; (2) made oral and written assurances that all employees hired at the Sand Mountain plant after September 1972 were vested and, therefore, is equitably estopped from denying Gilley benefits now under ERISA § 502; (3) intentionally closed the Sand Mountain Plant right before the employees would reach the ten year mark, in violation of ERISA § 510, 29 U.S.C. § 1140; (4) amended the Plan to retroactively reduce or eliminate the amount of accrued Hours of Service in violation of

ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); and (5) breached its fiduciary duty by failing to act in the best interest of plan participants, in violation of ERISA § 404, 29 U.S.C. § 1104. Monsanto filed a motion to dismiss, arguing that the 1981 Plan governed the determination of Gilley's credit, and that under the plan Gilley lacked the requisite ten years of Vested Service. The district court denied the motion to dismiss.

Gilley then filed an amended complaint, specifically restating all of his claims under the "equitable relief" section of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), and adding a claim under § 502(c), 29 U.S.C. § 1132(c), and § 510, 29 U.S.C. § 1140, asserting that Monsanto had interfered with his attempts to attain benefits by refusing to provide him with requested documents. The amended complaint alleged that the 95-Hour Rule should not be applied because, according to Gilley, it is less favorable to him than the 1976 Plan's method of calculating Hours of Service.

Monsanto filed a motion for summary judgment, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), only permits equitable relief and does not apply when a party is seeking purely legal relief, as Monsanto claimed Gilley was doing.[4]

---

[4] Monsanto contends that Gilley cannot properly make out an equitable claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because he is actually seeking legal relief which can only be granted under § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b). Our disposition of this appeal does not require us to decide the nature of the relief Gilley is seeking, and it is

Additionally, Monsanto restated its argument that Gilley cannot prove the ten years of Vesting Service necessary to merit benefits. It put before the court Social Security records indicating that Gilley had earned a total of $2,149.68 in 1972, and other records showing that in 1972 his base salary had been $420 monthly, or $5,040 annually. Gilley argued that the $420 figure actually included overtime pay and that his monthly base salary was really only $390, which would have been $4,680 annually.

Based on all of those records, Monsanto argued that even if the district court calculated Hours of Service based on the actual hours Gilley worked, Gilley still was not entitled to a pension. Using the $2,149.68 figure, a $420 monthly base salary, and the 2,080 hour "Standard Work Year" set out in the 1981 Plan, Monsanto asserted that Gilley could have actually worked only 887.2 hours in 1972 (if all hours were compensated equally), well short of the 1,000 hours needed. Monsanto also pointed out that because the $2,149.68 salary Gilley earned in 1972 included compensation for some overtime and holiday hours, which would have been paid at a

---

not a question that goes to the existence of subject matter jurisdiction. *See Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (noting that subject matter jurisdiction exists even if the remedy sought under § 502(a)(3) is legal in nature, because a finding that the relief sought is legal in nature "'does not negate the existence of federal subject matter jurisdiction, but rather indicates that [the plaintiff] may have failed to state' a claim upon which relief can be granted" (quoting *Health Cost Controls v. Skinner*, 44 F.3d 535, 537–38 (7th Cir. 1995)).

premium rate, Gilley's actual hours worked would be much less. What's more, even if Gilley's claimed $390 monthly salary figure and the resulting $4,680 annual salary figure are accepted, the maximum it appears Gilley could have worked in 1973 based on the Social Security records is 955.41 hours (assuming all hours were compensated at the same hourly wage). Still, the district court denied Monsanto's motion, finding that a trial was warranted based on the "closeness of the vesting issue."

A two-day bench trial was conducted solely to decide the number of Hours of Service credit Gilley was entitled to receive for his employment in 1972. After trial, the district court ordered Gilley to submit an "itemized, succinct list showing exactly how [he] . . . would arrive at a minimum of 1,000 [H]ours of [S]ervice in 1972." In response, Gilley offered three "equivalencies," claiming that each showed he was entitled to benefits. ERISA gives a plan the option of using equivalencies in order to simplify the record keeping and calculation burdens associated with determining Hours of Service, 29 C.F.R. § 2530.200b-3(a). A list of equivalencies from which a plan may choose is contained in the regulation, id. § 2530.200b-3(d), (e).

The district court accepted two of the three equivalencies that Gilley suggested. One of those two calculates Hours of Service based on "Hours Worked" under 29 C.F.R. § 2530.200b–3(d)(1), granting 1,000 Hours of Service if 870 hours are worked. The other calculates Hours of Service

based on "Regular Time Hours" under 29 C.F.R. § 2530.200b–3(d)(2), granting 1,000 Hours of Service if 750 "Regular Time Hours" are worked. The parties dispute whether Gilley would be entitled to a pension under either or both of the two equivalencies the district court adopted. The math involved with both equivalencies is dense, enough so that during oral argument counsel had difficulty answering some of our questions about the numbers and formulas used during the trial.

The more fundamental point that Monsanto stressed, however, is that the Plan never included either of the two equivalencies that the district court used at Gilley's urging. Instead, the 1981 Plan included the 95-Hour Rule, another equivalency permitted by ERISA. *See* 29 C.F.R. § 2530.200b-3(e)(1)(iii). We will spare the reader the details of how the 95-Hour Rule plays out in Gilley's circumstances, except to say that everyone agrees that under it Gilley would not be entitled to a pension.

In its findings of fact and conclusions of law, the district court refused to apply the 95-Hour Rule set out in the 1981 Plan. Its reasoning was that "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement." Even though the two equivalencies that were more favorable to Gilley had never been part of the Plan, the district court justified their use on the grounds that Monsanto had not kept adequate records of the hours Gilley worked in 1972. It said that Gilley was entitled to

the "benefit of the doubt" because Monsanto had failed to keep adequate records from that year. Applying the two equivalencies that Gilley preferred, the court determined that he did have the requisite Hours of Service to receive a full year of credit for 1972, giving him ten years of Vested Service which entitled him to a pension. Throughout its reasoning, the court applied a "heightened arbitrary and capricious" standard of deference, because it concluded that the Plan Committee had a conflict of interest in making benefit decisions.

The court's judgment ordered Monsanto to pay Gilley his past due pension benefits, "plus appropriate interest," and to pay additional retirement benefits as they accrue in the future. Monsanto filed a motion to alter or amend the district court's judgment, asserting multiple mathematical and legal errors in the application of the two equivalencies the district court used. After the court denied that motion, Monsanto filed this appeal.

II.

We initially had some doubt about our jurisdiction to decide this appeal because, while the district court ordered Monsanto to pay "appropriate interest" on the award of past benefits, it did not specify the rate of interest or the date from which the interest would be calculated. We were concerned that the judgment might not be final

under 28 U.S.C. § 1291 for purposes of appellate review.

The district court's failure to set an interest rate for calculating prejudgment interest might have been a problem for the purpose of our jurisdiction if the judgment had no injunctive aspects. *See SEC v. Carrillo*, 325 F.3d 1268, 1272–73 (11th Cir. 2003) (per curiam) (noting that "if the judgment amount, the prejudgment interest rate, or the date from which prejudgment interest accrues is unclear, the calculation of prejudgment interest is no longer a ministerial act and the court's order is not final"); *but see Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89–90 (11th Cir. 1989) (addressing the merits but remanding the case back to the district court for clarification on the questions of whether prejudgment interest was intended and the rate at which any such interest should be calculated). However, the judgment here does include injunctive relief, because it requires Monsanto to continue to pay pension benefits as they accrue in the future. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over orders granting injunctive relief. The district court's judgment here is injunctive enough in nature to give us jurisdiction over the appeal.

III.

On the merits, both sides agree that Gilley must have ten years of credit to be entitled to a pension, and they agree that he earned at least nine years of credit for his work at the plant from 1973 to 1982.

Their disagreement is about whether Gilley gets a full year of credit for 1972, his first year on the job, when he actually worked only four months for Monsanto. If Gilley is credited with a full year for working those four months, he gets a pension.

The district court's conclusion that Gilley should be treated as having worked a full year in 1972 was based on its belief that instead of the 95-Hour Rule in the 1981 Plan, the Hours Worked or Regular Time Hours equivalencies, which Gilley proposed, should be used. The parties disagree about whether Gilley is entitled to a pension even if those two equivalencies are used, but they do agree that he is not entitled to a pension under the 1981 Plan's 95-Hour Rule. The question that determines the issues we address in this appeal is whether the 95-Hour Rule is the equivalency that should be applied.

A.

The parties think that the answer to that question might depend on the standard of deference applicable to the Plan Committee's decision to deny Gilley pension benefits. Monsanto argues that the arbitrary and capricious standard applies, while Gilley thinks the district court was correct to apply a heightened arbitrary and capricious standard. Given the nature of the issue on which this case turns, we doubt that the standard of deference makes any difference. To the extent that it does, however, the proper standard is arbitrary and capricious.

ERISA does not explicitly establish the standard of review to be applied to a plan administrator's decision. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S. Ct. 948, 953 (1989). Following the Supreme Court's direction, however, we have adopted three different standards to guide us: (1) *de novo* review applies where the plan administrator has been given no discretion in deciding claims; (2) arbitrary and capricious review applies where the plan administrator has discretion in deciding claims and does not suffer from a conflict of interest; and (3) heightened arbitrary and capricious review applies where the plan administrator has discretion but suffers from a conflict of interest. *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001). For purposes of that third standard, a conflict of interest exists when a provider has to pay benefit claims out of its own assets, making it directly advantageous to the provider for the claims to be denied. These three standards have been broadly applied to both the administrator's interpretation of plan provisions as well as the administrator's decision to grant or deny benefits. *Williams v. Bellsouth Telecomms., Inc.*, 373 F.3d 1132, 1135 n.3 (11th Cir. 2004); *Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1451 (11th Cir. 1997).

Our circuit law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits. *See Buckley v. Metro. Life*,

115 F.3d 936, 939–40 (11th Cir. 1997). Only when benefits are paid from a provider's assets, so that benefit decisions have a direct and immediate impact on the provider's profit margin, does the heightened standard come into play. *See Williams*, 373 F.3d at 1135.

In this case, the Plan gave the Plan Committee discretion to make benefits decisions. The record clearly establishes that benefits were paid out of a nonreversionary trust instead of from Monsanto's own assets. In *Buckley*, we specifically considered the standard of deference to be applied when benefits are paid out of a trust funded by periodic, non-reversionary contributions. 115 F.3d at 939. We held that where the company neither incurs a direct expense in paying benefits nor directly profits from denying or discontinuing benefits, there is no conflict of interest. *Id.* at 939–40. That holding has been reiterated in subsequent cases. *See, e.g., Turner v. Delta Family-Care Disability & Survivorship Plan,* 291 F.3d 1270, 1273 (11th Cir. 2002) (per curiam) (a non-reversionary, periodic trust "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies"). The fact that the company is responsible for replenishing the funds of the trust is not enough to create a conflict of interest. *Id.*

For these reasons, the district court erred in applying the heightened arbitrary and capricious standard. To the extent that a deference standard applies, the ordinary arbitrary and capricious standard is the one.

B.

The district court also erred in forcing on the Plan two equivalencies that the Plan had never adopted. The court based its substitution of the equivalencies, Gilley favored for the one in the Plan on its view that Monsanto had failed to keep adequate records of the hours Gilley worked in 1972. We have some doubts about whether a court generally can impose on a plan equivalencies that the plan did not choose simply because of the absence of adequate records.

We have no doubt, however, that a plan cannot be forced to use an equivalency that is different from the one the plan chose simply because it or the company did not keep adequate records for ERISA purposes before there was any ERISA. The year we are talking about is 1972, and ERISA was not enacted until September of 1974 (with an effective date, for our purposes, of January 1, 1976, *see* 29 U.S.C. § 1061(b)(2)). Only after the time for doing so had passed did the Plan and the company learn that it would be necessary to make and keep the records. Companies and pension plan managers are not required to be clairvoyant.

Instead, when it comes to pre-enactment years, ERISA requires only that plans do the best they can with the records they have, and it permits plans to choose an equivalency from those set out in the regulations. 29 C.F.R. § 2530.200b-3(b), (d), (e). This is how the relevant regulation reads:

> If accessible records are insufficient to make an approximation of the number of pre-effective date hours of service for a particular employee . . . the plan may make a reasonable estimate of the hours of service completed by such employee . . . . A plan may use any of the equivalencies permitted under this section, or the elapsed time method of crediting service . . . to determine hours of service completed . . . .

Id. § 2530.200b–3(b). That is exactly what the Plan did in this case. It chose the 95-Hour Rule and applied the rule to the vagaries of Gilley's 1972 work history. As the regulation we have quoted shows, ERISA permitted it to do so. The statute and regulations leave the choice of equivalencies to plans, not to courts. The district court should not have overridden the Plan's choice and applied an equivalency that was not in the Plan. *See id.* § 2530.200b–3(c)(1) ("Any equivalency used by a plan must be set forth *in the document* under which the plan is maintained." (emphasis added)).

C.

In addition to substituting its own preferred equivalencies because of the lack of adequate records of Gilley's work hours in 1972, the district court also rejected the 95-Hour Rule because it was adopted after 1972. The record is unclear exactly when the 95-Hour Rule was adopted, but it was

sometime between 1979 and January 1, 1981. The district court thought the fact that the rule was not adopted until sometime during that period foreclosed its use because, in the court's words, "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement."

First, it is important to recognize that there is no way Gilley could have accumulated the requisite ten years of Vested Service, under any calculation method, by the time Monsanto adopted the 95-Hour rule. On January 1, 1981, Gilley could have accumulated, at most, nine years of Vested Service credit. Even if he is given a full year of credit for 1972, he would still only have acquired nine years by the beginning of 1981. All of Gilley's arguments that he earned ten years of Vested Service count hours he worked in 1981 after the Plan was amended to put the 95-Hour Rule in place. This fact is critical to our analysis of whether the adoption of the 95-Hour Rule and its application to Gilley violated ERISA.

Gilley takes the district court's determination that later amendments cannot adversely impact a plaintiff's entitlement and runs with it, casting it in terms of ERISA's "anti-cutback" rule. ERISA § 204(g), 29 U.S.C. § 1054(g)(1). One of the purposes of ERISA is to protect pension rights by ensuring "that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it."

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375, 100 S. Ct. 1723, 1733 (1980). To further that purpose, the "anti-cutback" rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g), 29 U.S.C. § 1054(g)(1). By its own terms, what the rule forbids is cutbacks on "accrued benefits." There is a difference between "accrued benefits" and "vested benefits."

The Supreme Court has explained that benefit accrual is "the rate at which an employee earns benefits to put in his pension account," while benefit vesting refers to the point at which a participant's pension rights become nonforfeitable "by virtue of his having fulfilled age and length of service requirements." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749, 124 S. Ct. 2230, 2238 (2004). A participant is fully vested when he has a nonforfeitable right to his total accrued benefit. In other words, benefit accrual affects the size of the pension, while benefit vesting determines whether a pension will be paid at all. *See Stewart v. Nat'l Shopmen Pension Fund,* 730 F.2d 1552, 1561–62 (D.C. Cir. 1984)(noting that "'vesting' governs when an employee has a right to a pension; 'accrued benefit' is used in calculating the amount of the benefit to which the employee is entitled"); *Silvernail v. Ameritech Pension Plan,* 439 F.3d 355, 359 (7th Cir. 2006) ("Benefit accrual and vesting are related but different concepts. 'Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a

portion of the accrued benefit is nonforfeitable.'" (quoting *Hoover v. Cumberland, Md., Area Teamsters Pension Fund*, 756 F.2d 977, 983–84 (3d Cir. 1985))).

The Plan amendment adopting the 95-Hour Rule affected Gilley's ability to vest before he had vested, but it did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits. Throughout Gilley's employment the Plan provided that an employee had to reach the retirement age and have accumulated the requisite ten years of Vested Service before he was entitled to a pension. The amendment adopting the 95-Hour Rule, which occurred during Gilley's employment, did not affect the rate at which he accrued benefits, although it did alter the method for calculating Vested Service, which in turn determined whether he received a pension. The ERISA § 204(g) anti-cutback provision does not apply to changes in vesting requirements.

There is another provision, however, that does. Section 203 of ERISA provides that a plan amendment changing the vesting schedule shall be treated as not satisfying the requirements of ERISA:

> if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee

> who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment, unless the employee is given the option of electing the pre-amendment plan.

ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). Although Monsanto argues that the amendment introducing the 95-Hour Rule did not change the vesting schedule, some courts have concluded that changes in the way vesting is determined can amount to an alteration of the vesting schedule. *See, e.g., Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund,* 674 F.2d 1300, 1306 (9th Cir. 1982) (noting that the cancellation of past service credits, which diminished the pension credits of otherwise vested participants, was a vesting schedule amendment). We will assume for present purposes that those courts are correct and that the Plan amendment we are discussing did change the Plan's vesting schedule.

Even making that assumption, there still was no violation of ERISA § 203, because the plain language of the provision limits its scope to benefits that are nonforfeitable ("if the nonforfeitable percentage . . . such nonforfeitable percentage") at the time the amendment is adopted or becomes effective ("determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective"). ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). When the 95-Hour Rule amendment became effective on

or before January 1, 1981, and when it was adopted sometime on or before that date, Gilley was not entitled to any benefits, because he could not have earned ten years of Vested Service until after that date. Because Gilley was not vested at the time the amendment was adopted or became effective, ERISA § 203 does not help him. It follows that the district court erred in concluding that the Plan amendment adopting the 95-Hour Rule could not be applied to Gilley because it came after he had started earning credit toward his pension.

D.

To the district court's reasons for not allowing the 95-Hour Rule, Gilley adds some more of his own. Among them is his assertion that he was never properly notified of the amendment. We decline to consider that contention because it was raised for the first time in this appeal. *FDIC v. Verex Assurance, Inc.,* 3 F.3d 391, 395 (11th Cir. 1993) ("By well settled convention, appellate courts generally will not consider an issue or theory that was not raised in the district court."). Gilley also appears to argue that the amendment discriminates against him, an argument which is difficult to follow and unpersuasive in any event.

Finally, Gilley raises a host of arguments, both before us now and in earlier proceedings, about why he is equitably entitled to a pension notwithstanding his inability to satisfy the vesting requirements under the 95-Hour Rule. The district court did not reach any of these arguments and we

decline to take the first swing at them. Some may require factual development, while all of them may benefit from two-tier consideration. All of them the district court should deal with as it deems appropriate on remand.

IV.

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff,	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, MONSANTO COMPANY EMPLOYEE BENEFITS PLAN COMMITTEE, PHARMACIA CORPORATION, a corporation, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE,	)
Defendants.	)

ORDER

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, judgment is entered in favor of the plaintiff. The court adjudges and declares that the plaintiff is entitled to retirement benefits as provided in the defendants' ERISA Plan. The defendants will pay accrued benefits on past due payments plus appropriate interest and continue to pay retirement benefits as they accrue. The court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment as stated above. Costs are assessed against the defendants. The parties may file suggested amendments to this judgment within ten (10) days.

DONE and **ORDERED** this the **26th** day of January, 2006.

/s/_____
ROBERT B. ROPST
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff,	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, MONSANTO COMPANY EMPLOYEE BENEFITS PLAN COMMITTEE, PHARMACIA CORPORATION, a corporation, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE,	)
Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

This cause came on to be heard at trial on the limited issue of whether plaintiff's entitlement to retirement benefits vested before his employment was terminated. In essence the present issue is whether the plaintiff should be credited with 1000 or more hours of vesting service for the year 1972. This court has framed the issues and arguments in its Memorandum Opinion filed on May 3 1, 2005, and will not repeat those issues and arguments here.[1]

---

[1] Since the May 31, 2005 opinion dealt with a motion for summary judgment, it is not entirely relevant to the trial herein addressed. The limited issues of this trial are, however, framed and discussed in that opinion, and, to the extent applicable are adopted here. Some issues addressed in the May 31, 2005 opinion were not tried in the trial now being addressed. See various filings of the parties for further argument and development. While it is doubtful, the respective proposed findings of fact and conclusions of law of the parties may contain some areas of agreement. To the extent they do, they are adopted. The court proposed addressing questions to IRS and/or the Department of Labor. Both sides objected, so the court decided to forego this proposal. The plaintiff's service began on August 30, 1972. Defendant has acknowledged that if that service had begun in late July 1972, plaintiff's retirement benefits would have vested.

While the court has been inundated with verbiage, the task is to determine whether the plaintiff should receive credit for 1000 hours of vesting service for 1972. The issue is close from any perspective.[2]

The court finds and concludes that the defendants' denial of plaintiff's retirement benefits is to be reviewed under a "heightened arbitrary and capricious" standard because of a conflict of interest.

The court further finds and concludes that the defendants' conclusion that plaintiff was not entitled to have overtime considered was arbitrary and capricious and not due to be herein considered. Further, the 95 hour rule is not applicable to a 1972 calculation. In general, later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement.

The court's task is to determine how many hours the plaintiff is entitled to for 1972. Since the defendant does not have adequate records of the plaintiffs overtime hours, the plaintiff should be given some benefit of the doubt in this regard.

---

[2] If plaintiff's testimony that he worked as many overtime hours as regular hours in 1972 is accepted, he would be entitled to 1000 hours of service time. The court has no substantial basis for discrediting this testimony. *See attached* Exhibit **A** filed by the plaintiff on December 19, 2005.

The plaintiff makes two arguments that this court cannot accept. The first is that overtime hours should be counted as one and one-half hours because the plaintiff would have been paid based on one and one-half hours. The court finds no basis for such a calculation of service time. Second, plaintiff argues that the hours that plaintiff accrued for vacation time, sick pay time, etc. are to be counted at the time accrued rather that at the time taken. The court cannot accept this argument. Without the validity of such arguments, it is questionable as to whether the plaintiff had 1000 actual hours of service in 1972. On the other hand, the defendants' failure to keep adequate records leads to another theory of recovery. 29 C.F.R. § 2530.200b-3(a) states:

> Payroll records, for example, may provide sufficiently accurate data to serve as a basis for determining hours of service. If, however, existing records do not accurately reflect the actual number of hours of service with which an employee is entitled to be credited, a plan must either develop and maintain adequate records or use one of the permitted equivalencies.
>
> . . . .

29 C.F.R. § 2530.200b-3(c) states:

Use of equivalencies for determining service to be credited to employees.

> (1) The equivalencies permitted under paragraphs (d), (c) and (f) of this section are methods of determining service to be credited to employees during computation periods which are alternatives to the general rule for determining hours of service set forth in paragraph (a) of this section. The equivalencies are designed to enable a plan to determine the amount of service to be credited to an employee in a computation period on the basis of records which do not accurately reflect the actual number of hours of service required to be credited to the employee under § 2530.200b-2(a). However, the equivalencies may be used even if such records are maintained. Any equivalency used by a plan must set forth in the document under which the plan is maintained.
>
> . . . .

29 C.F.R. § 2530.200b-3(d) states:

> Equivalencies based on working time.
> (1) Hours worked. A plan may determine service to be credited to an

> employee on the basis of hours worked, as defined in paragraph (d)(3)(1) of this section, if 870 hours worked are treated as equivalent to 1,000 hours of service and 435 hours worked are treated as equivalent to 500 hours of service.
>
> (2) Regular time hours. A plan may determine service to be credited to an employee on the basis of regular time hours, as defined in paragraph (d)(3)(ii) of this section, if 750 regular time hours are treated as equivalent to 1,000 hours of service and 375 regular time hours are treated as equivalent to 500 hours of service.

Other parts of 29 C.F.R. § 2530.200b-3 may have application.

The plaintiff makes two arguments of "equivalency" by his attached Exhibits B and C filed by him on December 19, 2005. The court finds and concludes that the plaintiff clearly had at least 870 hours of service (sic) for 1972. On this theory, which the court accepts, the plaintiff's entitlement to benefits vested prior to this termination. Judgment will be entered in favor of the plaintiff.

This the 26th day of January, 2006.

/s/_____
ROBERT B. PROPST
SENIOR UNITED STATES
DISTRICT JUDGE

Hours of Service Based on Total Direct and Indirect Compensation*

Total Compensation $ 2,149 ÷ $ 5,040 Yearly Salary = 0.4263889

0.4263889 X 2524 Hours per Year = 1076 Hours

1076 Hours of Service*

Regular Days = 254
Mandatory Overtime Days = 13
Mandatory Holidays Worked = 6
Paid Holidays = 9
Vacation Days = 10
Sick Leave Days = 5
Personal Days = 3 **EXHIBIT A**

* Hours of Service as defined under 29 C.F.R. § 2530.200b-2(a)(l) and (a)(2) and as defined by Section 18.5 of the 1976 Plan and Section 17.5 of the 198 1 Plan.

Hours of Service Based on Hours Worked
29 C.F.R. § 2530.200b-3(d)(l)*

Total Compensation $2,149 ÷ $5,040 Yearly Salary
= 0.4263889

0.4263889 X 2460 Hours Directly Compensated for
Per Year = 1049 Hours

1049 Hours of Service*

Regular Days = 254
Mandatory Overtime Days = 13
Mandatory Holidays Worked = 6
Paid Holidays = 9
Vacation Days = 10 **EXHIBIT B**

---

* A plan may determine service to be credited to an employee on the basis of hours worked, as defined in paragraph (d)(3)(i) of this section, if 870 hours worked are treated as equivalent to 1,000 hours of service and 435 hours worked are treated as equivalent to 500 hours of service. Under (d)(3)(i) the term "hour worked" shall mean hours of service described in § 2530.200b-2(a)(l). Under 29 C.F.R. § 2530.200b-2(a)(l): An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period. Court noted 29 C.F.R. § 2530.200b-2(d)(1) in original meant § 2530.200b-3(d)(1).

Hours of Service Based on Regular Time Hours
29 C.F.R. § 2530.200b-3(d)(2)*

Total Compensation $2,149 ÷ $5,040 Yearly Salary
= 0.4263889

0.4263889 X 2256 Regular Time Hours Per Year =
962 Hours

1000 Hours of Service*

Days Scheduled Work = 273 * *
Paid Holidays = 9 **EXHIBIT C**

---

* A plan may determine service to be credited to an employee on the basis of regular time hours, as defined in paragraph (d)(3)(ii) of this section, if 750 regular time hours are treated as equivalent to 1,000 hours of service and 375 hours worked are treated as equivalent to 500 hours of service. Under (d)(3)(ii) the term "regular time hours" shall mean hours worked, except hours for which a premium rate is paid because such hours are in excess of the maximum workweek applicable to an employee under section (7)(a) of the Fair Labor Standards Act of 1938, as amended, or because such hours are in excess of a bona fide standard workweek or workday. Court noted 29 C.F.R. § 2530.200b-2(d)(2) in original meant § 2530.200b-3(d)(2).
**Based on Standard Workday.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed March 3, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff,	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, MONSANTO COMPANY EMPLOYEE BENEFITS PLAN COMMITTEE, PHARMACIA CORPORATION, a corporation, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE,	)
Defendants.	)

ORDER

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

This cause comes on to be heard on the Defendants' Motion to Amend Judgment of January 26, 2006 filed on February 8, 2006.

The court's intention is to base its partial final judgment solely on a finding and conclusion that the plaintiff is entitled, for reasons stated, to be credited with 1000 hours of service for 1972. Any other claim not previously dismissed will still be pending.

Any issues with regard to the effect of the judgment on other claims can be resolved by further motion practice.

A significant issue with regard to the partial final judgment may be whether the following statement of the defendants, if correct in some instances, has application to a defendant with a conflict of interest. "Although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the regulation is clear that it is for the Plan, and not individual participants, to elect the equivalency of its choice. *See* C.F.R. § 2530 200b-3(a)."

The motion is **DENIED**.[1]

DONE and **ORDERED** this the 3rd day of March, 2006.

/s/_____
ROBERT B. PROPST
SENIOR UNITED STATES
DISTRICT JUDGE

[1] The court recognizes that ERISA was not in effect in 1972. The court's reference to "benefit of the doubt" was not intended as an exact legal standard, but merely to suggest that the defendants were not able to rebut the plaintiff's evidence because it did not retain payroll records.