No. 04-1971 - 2005

In The

Supreme Court of the United States

LEONARD F. PRESCOTT, *et al.*,

Petitioners,

v.

LITTLE SIX, INC., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal common law developed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, must yield to tribal corporate law to determine the enforceability of employee benefit plans established by an Indian tribal corporation in favor of its employees.

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PETITION FOR A WRIT OF CERTIORARI

Leonard Prescott, F. William Johnson and Peter Riverso respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-10) is reported at 387 F.3d 753 (8th Cir. 2004). The district court opinion (App. 11-25) is reported at 284 F. Supp.2d 1224 (2003).

JURISDICTION

The Eighth Circuit filed its decision on October 21, 2004, and entered an order denying petitioners' timely petition for rehearing on December 8, 2004. App. 26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a) provides in part:

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the

terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1003(a) provides in part:

> Except as provided in subsection (b) of this section and in sections 1051, 1081 and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained –
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce.

29 U.S.C. § 1002(3) provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

STATEMENT OF FACTS

Petitioners Leonard Prescott, F. William Johnson and Peter Riverso are former employees of respondent Little Six, Inc. (LSI). App. 2. LSI is a tribal corporation established by the Shakopee Mdewakanton Sioux (Dakota) Community, a federally recognized Indian tribe, to operate the community's on-reservation gaming activities. *Id.*

After several key employees departed for other jobs, LSI began exploring a variety of employee benefit plans to remain competitive in the marketplace. Working through outside counsel, LSI developed an executive benefits program consisting of five separate plans to provide pension and welfare benefits to eligible employees including

petitioners. During the plan drafting process, LSI's lawyers advised the corporation that ERISA applied in Indian country and would govern the plans. App. 19-20. Consequently, "LSI itself believed that the plans were subject to ERISA." App. 19.

As part of the administration of its benefit program, LSI prepared and distributed summary plan descriptions and individual benefit statements to petitioners and other plan participants. The summary plan descriptions for the LSI Life Insurance Plan, the LSI Separation Pay Plan and the LSI Supplemental Retirement Plan delineated the participants' "ERISA rights" and assured each that:

> 1. If you request materials from the Plan and do not receive them within 30 days, you may file suit in a federal court.
>
> 2. If you have a claim for benefits which is denied or ignored, in whole or part, you may file suit in a state or federal court.
>
> 3. If it should happen that plan fiduciaries misuse the Plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in a federal court.

App. 22-23.

After leaving LSI employment, petitioners requested benefit information and payment of benefits due them under the plans. When LSI refused to comply, petitioners brought suit in United States District Court seeking

benefits and penalties under 29 U.S.C. §§ 1132(a)(1)(B) and (c).[1]

Invoking the tribal exhaustion doctrine, the district court abstained from deciding the matter, dismissed the complaint and directed Petitioners to litigate the validity of the plans in the first instance before the tribal court. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995). The district court informed the parties, however, that after tribal remedies were exhausted the tribal court's determinations of federal law would be subject to *de novo* review by the federal courts. *Id.* at 1224, n.6.

The tribal trial court conducted a three-day hearing and found that all of the plans were validly created and approved as a matter of law by the LSI board of directors. App. 18. In reaching its decision, the tribal trial court made numerous factual findings. It found, *inter alia*, that cash benefits were paid under the plans to other participants, that amounts were credited to deferred accounts for plan participants and that money was transferred by LSI to a trust from which assets were disbursed to satisfy benefit claims made under the plans. *Id.*

Despite acknowledging that the plans existed in some form, LSI appealed to the tribal court of appeals. Significantly, LSI mounted no challenge to the factual findings made by the tribal trial court in its appeal. App. 20.

[1] ERISA federalizes claims to collect benefits due, enforce rights under covered plans and to clarify future rights to plan benefits but confers concurrent jurisdiction on state and federal courts to decide such claims. 29 U.S.C. § 1132(a)(1)(B). Actions against a plan administrator for failure to supply requested information that it is required to provide to plan participants under ERISA remain subject to exclusive federal jurisdiction. 29 U.S.C. § 1132(e)(1).

Instead, LSI argued that its inability to locate an original corporate resolution signed by the LSI board of directors formally adopting the plans rendered its promises of benefits unenforceable. App. 18.

The tribal court of appeals sided with LSI. After adopting the tribal trial court's findings of fact, the tribal appeals court held that to recognize the plans without a formal board resolution would ignore the "carefully crafted body of law" established by the tribal corporate code. App. 19. Focusing on technical formalities ostensibly required by tribal law, the tribal court of appeals reversed the tribal trial court and dismissed all of Petitioners' claims. *Id.*

Petitioners renewed their complaint before the federal district court and sought review of the tribal court's interpretation of federal law. The district court held that federal law rather than tribal law supplies the appropriate standard for determining whether an ERISA plan exists. App. 24-25. Finding both that the plans had been adopted under federal law and that LSI had waived its sovereign immunity from suit in three of the plans, the district court denied, in part, LSI's motion to dismiss the complaint. App. 24-25.

LSI appealed to the Eighth Circuit Court of Appeals. App. 1-10. After concluding that LSI's adoption of a valid and enforceable benefits arrangement is an issue governed by tribal law, the Eighth Circuit reversed the district court's order and dismissed petitioners' complaint in its entirety. App. 8.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT: DOES FEDERAL LAW EXCLUSIVELY GOVERN WHETHER AN EMPLOYER HAS ESTABLISHED OR MAINTAINED A PLAN OR BENEFIT ARRANGEMENT FOR PURPOSES OF ERISA?

Congress enacted ERISA to provide uniform federal standards for establishing and maintaining employee pension and benefit plans. One of ERISA's express goals is to "protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Stated differently, ERISA seeks to "protect working men and women from abuses in the administration of private retirement plans and employee welfare plans," *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), and to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quoting 3 Leg. Hist. 4793, Senator Bentsen). Through the passage of ERISA, Congress sought to insure that when an employer promises an employee a pension benefit upon retirement, and the employee fulfills the required conditions, then the employee will actually receive the promised benefit. *Id.* at 374-75.

To safeguard employee benefit rights and spare employers from the difficulty of having to comply with a variety of conflicting and inconsistent regulations, ERISA

broadly preempts state and local laws that otherwise would affect covered plans. 29 U.S.C. § 1144(a); *Shaw v. Delta Air Lines*, 463 U.S. 85, 90-91 (1983). This Court has recognized that in establishing ERISA Congress intended:

> to ensure that [ERISA] plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government, and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-57 (1995) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

ERISA reaches all employee benefit plans that are established or maintained by an employer engaged in activities affecting interstate commerce and which provide pension or welfare benefits. 29 U.S.C. § 1003(a). No particular formalities or form of writing are required to establish an ERISA plan. *Donovan v. Dillingham*, 688 F.2d at 1372. Accordingly, courts have upheld informal, or *de facto*, plans in order to protect the legitimate expectations of employees who were promised plan benefits and reasonably relied on their employers' assurances that they would receive the same. *See, e.g., Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502-04 (9th Cir. 1985); *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F. Supp. 454 (S.D.N.Y. 1988). At bottom, a plan need only invoke an "ongoing administrative program," *Fort Halifax Packing Co. v. Coyne*, 482

U.S. 1, 12 (1987), and be a "reality." *Donovan v. Dillingham*, 688 F.2d at 1373.

Since the statutory text of ERISA offers no guidance for determining if a plan has been "established or maintained," courts have looked to the facts and circumstances surrounding a benefit arrangement to discern whether an employer's promises are enforceable. *Id.* ("it is the reality of a plan, fund or program and not the decision to extend benefits that is determinative.").

The *Donovan* court was one of the first courts to consider the type of circumstances from which the existence of an ERISA plan may be inferred. In a well-reasoned decision, the Eleventh Circuit Court of Appeals, sitting *en banc*, developed the following test, which has since been consistently followed in ERISA litigation:

> In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, sources of financing and procedures for receiving benefits.

688 F.2d at 1373.

The *Donovan* approach has been adopted by all of the federal circuits. *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990); *Grimo v. Blue Cross/Blue Shield of Vt.*, 34 F.3d 148, 151 (2nd Cir. 1994); *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391, 399 (3rd Cir. 1992); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240-41 (5th Cir. 1990); *Brown v.*

Amco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir. 1989); *James v. National Business Systems, Inc.*, 924 F.2d 718, 720 (7th Cir. 1991); *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *Peckham v. Gem State Mut. Of Utah*, 964 F.2d 1043, 1047-48 (10th Cir. 1992); *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994).

State courts likewise follow the *Donovan* test to determine whether an employer has established an ERISA plan. *See, e.g., Marshall v. Bankers Life & Cas. Co.*, 2 Cal. 4th 1045, 832 P.2d 573, 578 (Cal. 1992) (*en banc*), *cert. denied*, 506 U.S. 1000 (1992); *Matter of Estate of Bickford*, 549 N.W.2d 804, 806 (Iowa 1996); *Vulcan v. United of Omaha Life Ins. Co.*, 715 A.2d 1169, 1176 (Penn. Super. 1998); *Medley v. A.W. Chesterton Co.*, 912 S.W.2d 748, 750-51 (Tenn. App. 1995); *Shaw v. PACC Health Plan, Inc.*, 130 Or. App. 32, 881 P.2d 143, 146 (Or. App. 1994), *aff'd*, 322 Or. 392, 908 P.2d 308 (Or. 1995); *Robertson v. Gem Ins. Co.*, 828 P.2d 496, 502 (Utah App. 1992); *Time Ins. Co. v. Roberts*, 191 Ga. App. 766, 382 S.E.2d 718, 719 (Ga. App. 1989).

Here, the tribal trial court also looked to the *Donovan* test for guidance. The tribal trial court considered evidence presented during a three-day evidentiary hearing at which ten witnesses testified and thousands of pages of documents were admitted. Thereafter, it made factual findings specifically determining that the plans at issue were a reality for both LSI and its employees. App. 18. The tribal trial court further found that LSI had assembled an ongoing administrative program through which it processed and paid actual cash benefits to other participants under the plans. App. 19. LSI has conceded the evidentiary support for the tribal trial court's findings and does

not dispute the soundness of that court's factfinding. App. 20. More importantly, the tribal court of appeals also accepted the validity of the tribal trial court's findings of fact without question. App. 18.

In concluding that the actual reality of the plans, as opposed to any paper formality, is dispositive, the tribal trial court followed firmly entrenched federal law. Its approach was wholly consistent with ERISA's underlying policy of protecting plan participants from employer abuses and prohibiting plan sponsors from shirking their obligations through the conscious or inadvertent failure to formally adopt a written plan. *Donovan v. Dillingham*, 688 F.2d at 1372 ("it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans . . . to circumvent the Act merely because an administrator . . . failed to satisfy reporting or fiduciary standards").

By contrast, the tribal court of appeals, and later the Eighth Circuit, ignored relevant legislative history and overwhelming case authority that seeks to protect plan participants while contemporaneously elevating corporate form over substance to reject the plans and the claims that petitioners' assert thereunder. That technically driven, myopic approach not only pulls the rug out from under benefits promised to Petitioners upon which they reasonably relied, *see Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1409 (2nd Cir. 1985), but also contravenes ERISA's quest for national uniformity in the field of benefit regulation.

No other reported decision has looked to non-federal law to decide whether an ERISA plan was established or maintained. Instead, when state courts have invoked

concurrent jurisdiction to consider ERISA issues, they have uniformly looked to federal law to reach their decisions. *See, e.g., Montner v. Interfaith Medical Center*, 596 N.Y.S.2d 975, 981 (1993) ("in exercising concurrent jurisdiction, state courts are to apply federal law"); *Brown v. Zurich U.S.*, 779 N.E.2d 822, 827 (Ohio. App. 2002) (same).

Unquestionably, a primary purpose of ERISA is to protect individual pension rights. *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (citing H.R.Rep. No. 533, 93rd Cong., 2nd Session 1 (1974)). The primary means of insuring that protection is to permit plan participants and beneficiaries to bring suit to collect unpaid benefits. This court has recognized the "deliberate care with which ERISA's civil enforcement remedies were drafted" while acknowledging that benefit claims arise under federal law. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-55 (1987) (citing H.R. Conf. Rep. No. 93-1280, p. 327 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5107). Indeed, Congress considered the reservation of ERISA plan regulation to federal law to be "the crowning achievement" of the Act. 120 Cong. Rec. 29197 (remarks of Sen. Javits). Only by maintaining a uniform, national approach to resolving ERISA disputes through the application of clearly defined federal common law can this Congressional mandate be fulfilled.

By granting certiorari, this Court can both remedy the error below and provide clear guidance to all other ERISA plan sponsors, beneficiaries, and courts directing that the issue of plan existence is a question of federal law that must be decided using the test set forth in *Donovan*.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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March 7, 2005