No. 10-1385

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WAYNE TOMLINSON, *et al.*,

Plaintiffs-Appellants,

v.

EL PASO CORPORATION AND EL PASO PENSION PLAN,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges this Court to affirm the decision below, and thus supports the position of Defendants-Appellees El Paso Corp. and El Paso Pension Plan.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 of the nation's largest private sector companies, collectively providing employment to roughly 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct

members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

Amici's members are employers or representatives of employers subject to the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001 *et seq.*, as amended, and the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621 *et seq.*, as amended, as well as other labor and employment statutes and regulations. They have a direct and ongoing interest in the issues presented in this appeal, which concerns the legality of certain cash balance conversions that occurred prior to the passage of the Pension Protection Act (PPA) of 2006, Pub. L. No. 109-280, 120 Stat. 780. The district court below properly held that El Paso's cash balance pension plan did not unlawfully discriminate against Appellants on the basis of age, in contravention of ERISA or the ADEA.

Amici seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters,

amici are well-situated to brief the Court on the relevant concerns of the business community and the substantial significance of this case to the constituencies they represent.

STATEMENT OF THE CASE

This case concerns the legality of Appellee El Paso Corporation's (El Paso) conversion of a traditional defined benefit pension plan to a cash balance pension plan. *Tomlinson v. El Paso Corp.*, 2010 U.S. Dist. LEXIS 74903 (D. Colo. July 26, 2010). On December 12, 1996, El Paso converted to a new cash balance formula called "CBP Select," a hybrid plan that combines the features of a defined benefit plan and a defined contribution plan. *Id.* at *2-*3. Under the old plan, a retiree's monthly pension was calculated based on the individual's years of service and an average of his or her final years of salary. *Id.* at *2. Under CBP Select, the company contributes hypothetical pay credits based on age and years of service (capped at 7% when age and service equal 65) and interest credits based on the yield of a five-year U.S. Treasury Bond at the prevailing rate. *Id.* Both credits represent bookkeeping notations that are used in a formula to calculate the monthly pension benefit. *Id.*

El Paso established a transition period that ran from January 1, 1997 to December 31, 2001, during which time employees continued to accrue benefits under both the old and new plans. *Id.* at *3. Upon retirement, employees received

pension benefits that were calculated using the formula that was most advantageous to them. *Id.* However, after December 31, 2001, the normal retirement benefits under the old plan (payable at age 65) were frozen and increased only under the cash balance formula. *Id.* As of December 31, 1996, each participant's accrued benefits under the old plan were converted to a hypothetical lump sum. *Id.*

Appellants commenced this action in the U.S. District Court for the District of Colorado, alleging that El Paso violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1054(b)(1)(H), by converting to a cash balance formula that included a "wear-away" period, which they claim discriminates against older workers. *Id.* at *4. Under CBP Select, the normal retirement benefit of some plan participants (payable at age 65) did not increase in value until the benefit under the cash balance plan "caught up" with the frozen final average pay benefit payable at age 65. *Id.* at *3. During this so-called "wear-away" period, the cash balance formula continued to credit all employees with pay and interest credits. *Id.* However, retirement benefits payable at age 65 did not gain actual, monetary value until the new benefit "caught up" to the frozen final average pay benefit payable at age 65. *Id.* The district court granted summary judgment in favor of El Paso,

finding that the company did not violate ERISA subsections 203(a) and 204(b)(1)(B) or ADEA subsection 4(i). *Id.* at *6-*7, *19. This appeal followed.

SUMMARY OF ARGUMENT

The courts of appeals to have decided the issue unanimously have concluded that wear-away periods do not violate ERISA subsection 204(b)(1)(H)(i). *See Hurlic v. S. Cal. Gas Opinion Co.*, 539 F.3d 1024 (9th Cir. 2008); *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007); *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56 (3d Cir. 2007); *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636 (7th Cir. 2006). Accordingly, CBP Select's wear-away period cannot violate a nearly identical provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(i)(4). Subsection 204(b)(1)(H)(i) regulates the *rate of benefit accrual*, a well-settled interpretation that the Appellants urge this Court to upset, in favor of regulation of the *accrued benefit, which is the actual benefit payable at age 65*. To the extent that ADEA subsection 4(i)(1)(A) is nearly identical to ERISA subsection 204(b)(1)(H)(i), the former should be interpreted consistent with the latter, as the district court properly concluded. As all plan participants continue to be credited with pay and interest credits, irrespective of age, the CBP Select plan does not unlawfully discriminate because of age.

Regarding Appellants' alternative claim that, barring the application of ADEA subsection 4(i), the Court should analyze the wear-away period under the

statute's general anti-discrimination provision, subsection 4(a), such an interpretation is contrary to established principles, which urge a common sense approach to statutory interpretation. Subsection 4(i) clearly states that "compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan." 29 U.S.C. § 623(i)(4). Indeed, this Court itself has found that compliance with subsection 4(i) obviates the need for further analysis under 4(a). "[Section] 4(i)(4) states broadly that compliance with § 4(i) 'shall constitute compliance with the requirements of this section relating to benefit accrual.' Plantiffs' claim is raised under § 4, and compliance with § 4(i) satisfied § 4, period." *Jensen v. Solvay Chemicals, Inc.*, 625 F.3d 641, 659 (10th Cir. 2010) (citation omitted).

Strong public policy considerations also augur in favor of affirming the district court's decision, which will afford employers much needed flexibility in the administration of voluntary retirement benefits. Employers are not required to offer such benefits; they are simply required to abide by certain rules in their administration. By constraining employer choice, many companies may decide to suspend plans or terminate benefits. Yet Congress has expressly declared that the public policy underlying the enactment of ERISA is "to encourage the maintenance and growth of single-employer defined benefit pension plans." 29 U.S.C.

§ 1001b(c)(2). Given that retirement benefits are unquestionably an important part of a retiring employee's financial security, public policy weighs in favor of affording employers with the certainty that electing to provide voluntary retiree benefits will not subject them to liability for unlawful age discrimination.

Furthermore, many features of traditional defined benefit plans are no longer ideal for employers or employees in the current labor force. As the workforce increasingly is comprised of employees who change jobs more frequently than in the past, it is of increased benefit to both employees and employers to allow for more flexible arrangements that accommodate this reality.

ARGUMENT

I. THE DISTRICT COURT BELOW RULED CORRECTLY THAT CASH BALANCE PENSION PLANS ARE LAWFUL UNDER THE ADEA

A. Courts Of Appeals Unanimously Have Concluded That "Wear-Away" Periods Do Not Violate ERISA And Therefore This Court Should Find Them Lawful Under An Identical Provision Of The ADEA

The federal courts of appeals to have decided the issue unanimously have held that cash balance plans that include "wear-away" periods do not violate the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, as amended, which prohibits, among other things, reduction in the rate of pension benefit accrual because of the attainment of any age. 29 U.S.C. § 1054(b)(1)(H). Subsection 204(b)(1)(H) of ERISA provides, in relevant part:

> It shall be unlawful for an employer [to establish or maintain a plan] which requires or permits in the case of a defined benefit plan, the cessation of an employer's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age.

Id. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, which prohibits employment discrimination because of age, contains a nearly identical provision. If such plans, including CBP Select at issue here, pass muster under ERISA subsection 204(b)(1)(H), they necessarily comply with ADEA subsection 4(i).

"Wear-away" periods refer to periods of time during which employees receive no additional growth in their normal retirement benefits, payable at age 65, while the benefit under the cash balance formula "catches up" with the frozen final average pay benefit under the old plan. At no point during this time does the employer reduce the rate at which it contributes to employee benefit plans. Rather, the employer continues to contribute varying pay credits to each cash balance account and all employees receive identical interest credits. These pay and interest credits are bookkeeping notations that are used in the calculation of the monetary benefit.

Numerous courts of appeals have concluded that the proper inquiry into the rate of benefit accrual lies in the employer's contribution to the account, not the ultimate retirement benefit payable at age 65. In *Hirt v. Equitable Retirement*

Plan, for instance, the U.S. Court of Appeals for the Second Circuit rejected the view that the proper inquiry is based on whether the employee account is actually growing in value. 533 F.3d 102, 108 (2d Cir. 2008). Noting that "Congress could have drafted it to reference the defined term, 'accrued benefit,'" *id.*, the Second Circuit chose to give a common sense interpretation to ERISA and focus the inquiry on employer input, not the output, or ultimate benefit. Other courts of appeals considering the matter have agreed. *See Hurlic v. S. Cal. Gas Opinion Co.*, 539 F.3d 1024, 1032 (9th Cir. 2008) ("[b]ecause the Plan does not reduce a participant's rate of benefit accrual due to the attainment of any age, the Plan does not violate ERISA § 204(b)(1)(H)(i)"); *Drutis v. Rand McNally & Co.*, 499 F.3d 608, 614 (6th Cir. Ky. 2007) ("the 'rate of benefit accrual' refers to the employer's contribution to a plan, and therefore any difference in output as a result of time and compound interest does not violate § 204(b)(1)(H)(i)"); *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 68 (3d Cir. 2007) ("the 'benefit' as used in the phrase 'benefit accrual' refers to the stated account balance . . . [and] the 'accrual' of 'benefit' in section 1054(b)(1)(H)(i) refers to the credits deposited in to the participant's cash balance accounts, *i.e.,* the inputs"); *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 639 (7th Cir. 2006) ("[a]ll sorts of things go wrong unless we treat . . . § 204(b)(1)(H)(i) . . . as addressing the rate at which value is added (or imputed) to an account, rather than the annual pension at retirement age"). Given

the unanimity of opinion regarding the correct analysis under ERISA, the district court was correct in concluding that, "[t]he cash balance plan . . . does not violate the parallel provision of the ADEA." *Tomlinson v. El Paso Corp.*, 2010 U.S. Dist. LEXIS 74903, at *11 (D. Colo. July 26, 2010).

B. CBP Select Complies With ADEA Subsection 4(i), Which Regulates Benefit Accrual Under Employee Pension Benefit Plans And Compliance With Subsection 4(i) Constitutes Compliance With The Entire Act

Appellants alternatively claim that, if subsection 4(i) is "inapplicable," the wear-away periods should be invalidated under subsection 4(a), which is the statute's general anti-discrimination provision. 29 U.S.C. § 623(a).[1] They contend that the ADEA's meaning would be subverted if the district court's decision that neither subsection 4(i) or 4(a) provides relief to Appellants were to be upheld. To the extent that Appellant's contention conflicts with the plain text and intent of the ADEA, it should be rejected. The ADEA expressly provides safe harbor to cash balance pension plans that comply with subsection 4(i), which states that "compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this

[1] Subsection 4(a) of the ADEA, 29 U.S.C. § 623(a), states: "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

section relating to benefit accrual under such plan." 29 U.S.C. § 623(i)(4). Subjecting benefit accrual to the general section 4(a) anti-discrimination provision would obviate the need for 4(i) entirely and introduce a great deal of ambiguity into the law.

Furthermore, this Court already has held that compliance with subsection 4(i) amounts to compliance with the entire section. In *Jensen v. Solvay Chemicals, Inc.*, this Court ruled that "§ 4(i)(4) states broadly that compliance with § 4(i) 'shall constitute compliance with the requirements of this section relating to benefit accrual.' Plantiffs' claim is raised under § 4, and compliance with § 4(i) satisfied § 4, period." 625 F.3d 641, 659 (10th Cir. 2010) (citation omitted). Appellants argue that the issue remains unresolved "where 'the age-65 annuity' does not increase because there is a discriminatory 'wear-away period with respect to that benefit.'" Plaintiffs-Appellants' Opening Brief, at 26. This Court soundly rejected that approach in *Jensen*, where it stated, "[w]e choose to follow the plain language of the statute rather than court opinions that ignore the statute." 625 F.3d at 659.

If this Court agrees that CBP Select complies with subsection (i), it should decline Appellants' invitation to subject the question to further inquiry under 4(a). Contrary to Appellant's assertion that "such an outcome would flagrantly defeat the purposes of the ADEA," Plaintiffs-Appellants' Opening Brief, at 26,

affirmance of the decision below would extend to the ADEA an already settled interpretation of an identical provision of ERISA.

Given that Congress purposefully used the term "rate of benefit accrual," in ERISA, 29 U.S.C. § 1054(b)(5)(B)(iii), and the ADEA, 29 U.S.C. § 623(i)(10)(B)(iii), the emphasis on *input* rather than *output* is crucial. Should ERISA and the ADEA be interpreted to focus on the ultimate benefit, rather than regulation of input, an extreme, unintended burden would be ascribed to these plans. While regulation of input simply requires employers to maintain a level of contributions, regulation of output would necessitate that employers guarantee a certain level of benefits. The move towards defined contribution plans and hybrid plans is a prerogative of employers, a decision that is not itself unlawful. Requiring employers to provide employees with a certain level of benefits would render the decision to convert unviable. Under such a scenario, all plans would essentially be defined benefit plans, an outcome that is certainly not required by the law and is contrary to public policy.[2]

[2] The Pension Protection Act, Pub. L. No. 109-280, 120 Stat. 780, represents a deliberate move by Congress to allow for the establishment of hybrid plans.

II. STRONG PUBLIC POLICY CONSIDERATIONS SUPPORT THE LAWFUL CONTINUATION OF EMPLOYER FLEXIBILITY TO CONVERT TO CASH BALANCE PENSION PLANS

A. Employers Have Converted To Cash Balance Pension Plans For Valid, Nondiscriminatory Reasons

Over the past several years, employers increasingly have converted to cash balance pension plans due to fundamental changes in the U.S. labor force, including an aging workforce, increased mobility of U.S. workers, and continued market volatility. The Census Bureau estimates that between 2010 and 2020, the population between the ages of 25 and 64 will increase by 13 percent while the number of people age 65 or older will grow by 79 percent.[3] By 2030, 23 percent of the U.S. labor force will be age 55 or older – a population that represented only 13 percent of the work force in 2000. *Id.* These statistics demonstrate that fewer younger workers will be funding the retirement of an exploding population of older workers.[4] The continued viability of pension plans will depend largely on the flexibility allowed in the administration of these benefits.

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[3] Impact of Economy on Older Workers: Meeting of Nov. 17, 2010 Before the Equal Employment Opportunity Comm'n (written testimony of William E. Spriggs, Ph.D, Asst. Sec'y for Policy, U.S. Dep't of Labor), *available at* http://www.eeoc.gov/eeoc/meetings/11-17-10/spriggs.cfm

[4] "Most of the concerns about baby boomers relate to their retirement and the ability of the workforce to support them as they grow older." Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, 63 [no. 2] Population Bulletin: A Publication of the Population Reference Bureau 5 (June 2008), *available at* http://www.prb.org/pdf08/63.2uslabor.pdf

U.S. workers are more likely to change jobs over the course of their careers, *see supra* note 3, a trend that favors the establishment of plans with increased portability. As workers are less likely to spend the balance of their careers with one employer, it makes more sense to establish plans that are easily transferable – and that do not overly credit years of service in the benefits calculation.[5] While a great deal of attention has centered on the potential negative effects of cash balance conversions on older workers, the proposed benefit to workers of all ages has been given short shrift, including recent retirees who may be forced to reenter the workforce due to economic worries. As the U.S. transitions to defined contribution and 401(k) type plans, largely due to financial necessity, there are significant benefits that accrue to all workers. First, the benefits calculation in cash balance plans do not overly credit years of service or final average salary. As a result, employees have greater flexibility in changing jobs and more bargaining power with employers. As their retirement benefits do not depend solely on years of service and their final average years of pay, employees can exercise greater discretion in changing jobs – without the fear of absorbing a capital loss by leaving a job prior to retirement. Under the cash balance pension plan, all employees are

[5] "Thus, the simple correlations are consistent with an implicit contract story of firms undertaking cash balance conversions to better compete for younger, more mobile workers in tight labor markets." Julia Lynn Coronado & Phillip C. Copeland, *Cash Balance Pension Plan Conversion and the New Economy*, 3 Journal of Pension Econ. & Fin. 297-314 (Cambridge Univ. Press 2004), *available at* http://www.eric.org/public/resources/researchstudies/tabe.pdf, at 18.

given equal interest credits. While pay credits incorporate years of service, they also weigh employee salary irrespective of how long the employee has been with the company. Instead of viewing cash balance conversions strictly as a move to minimize pension obligations (a benefit that does not necessarily accrue to the employer), it is important to emphasize the value in also attracting and retaining new employees, young and old, to the workforce.

The imbalance in the number of active employees and retirees is the single most important reason for cash balance pension plan conversions. Plans can become dangerously underfunded, particularly under scenarios of extreme market volatility. Today, pension plans have fewer active participants supporting an increasing number of retirees, who are living longer. *See Building a Secure Future for Multiemployer Pension Plans*: Hearing Before the Sen. Comm. on Health, Educ., Labor & Pensions, 111th Cong. (2010) (statement of Charles A. Jeszeck, Acting Dir. of Educ., Workforce & Income Sec. Issues, U.S. Gov't Accountability Office).[6] From 1980 to 2007, the number of active participants in multi-employer plans decreased by 1.6 million. *Id.* at 10. In addition, multi-employer plans have not been funded at the 100 percent level or above since 2000, representing a significant decline in net funding. *Id.* at 1-2.

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[6] *Available at* http://www.gao.gov/new.items/d10708t.pdf

While the worsening conditions of other entitlement programs, including Social Security, Medicare, and Medicaid, have received considerably more attention, pension plans face similar structural misalignments. The level of retirement benefits and number of retiring employees cannot be sustained based on the number of active employees. Grim statistics bear out this reality. In its 2010 Annual Report, the Pension Benefit Guaranty Corporation (PBGC) announced a single-employer deficit of $21.6 billion, a $500 million over the previous year. 2010 PBGC Ann. Rep. iv.[7] The Multiemployer Insurance Program's deficit increased to $1.4 billion. *Id.* While PBGC currently has sufficient reserves to cover its immediate obligations, its increasing exposure is unsustainable.

In addition to structural deficiencies, the economic downturn and rising unemployment have also placed great stress on the funding obligations of pension plans. In times of economic decline, companies delay hiring and increase employee layoffs, which translates into lower pension premiums paid to the PBGC, which insures against plan failures. Ironically, a vicious trend ensues. Companies restrict hiring and increase layoffs in order to improve their financial condition, but the consequences of eliminating jobs include decreased employee contributions and overall plan funding. While companies pay decreased premiums to PBGC due to the lower number of employees, the PBGC safety net is weakened. The United

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[7] *Available at* http://www.pbgc.gov/Documents/2010_annual_report.pdf

States is one of many countries that are facing long-term, structural deficiencies in pension plans. In a study of the Netherlands, Denmark, the United Kingdom, and Canada, the U.S. Government Accountability Office (GAO) compared the ability of these countries to monitor and intervene in the administration of struggling plans. Significantly, the study found that the Netherlands, United Kingdom and Canada all exercised some authority to increase contributions and reduce the benefit accrual rate and accrued benefits. U.S. Gov't Accountability Office, *Private Pensions: Changes Needed To Better Protect Multiemployer Pension Benefits* 33 (Oct. 2010).[8]

Ultimately, the transition to cash balance plans is the result of multivariegated changes in the U.S. labor force and economy. Some employees would undoubtedly benefit from the continuation of defined benefit plans. However, conversions are the result of a number of strategic decisions – all reasonable and nondiscriminatory.

B. Conversion To A Cash Balance Pension Plan Provides More Advantageous Benefits To Employees Than Other Equally Lawful Options, Such As Freezing Or Terminating A Traditional Defined Benefit Plan Or Converting To A Defined Contribution Plan

In recent years, a wave of pension failures has highlighted the financial problems facing pension plans, both in the public and private sector. As recently

[8] *Available at* http://www.gao.gov/new.items/d1179.pdf

as twenty years ago, employers overwhelmingly offered traditional defined benefit plans to their employees. In March 2008, the National Compensation Survey (NCS) on Employee Benefits found that 20 percent of private industry workers in defined benefit plans are facing a "freeze," meaning that the plan is currently closed to new entrants or has ceased accruals. Scott F. Curtin, U.S. Bureau of Labor Statistics, *Alternatives to Frozen Defined Benefit Pension Plans* 1 (Aug. 28, 2009).[9] In a sign of increasing plan terminations and failures, in 2003 PBGC's largest insurance program was placed on GAO's "high-risk" list, "meaning that the program needs urgent Congressional attention and agency action." *No Guaranties: As Pension Plans Crumble, Can PBGC Deliver?*: Hearing Before the Sen. Special Comm. on Aging, 111th Cong. 3 (2009) (statement of Barbara Bovbjerg, Dir. of Educ., Workforce & Income Sec., U.S. Gov't Accountability Office).[10] The single employer pension insurance program remains on the "high risk" list and as of September 2008, was running an $11 billion deficit. *Id.* at 1. Bovbjerg testified "the risk of [the] termination among large, underfunded pension plans" as a reason for PBGC's increasing exposure, whose future deficit is projected to increase by several billion dollars. *Id.* at 4.

Anecdotal accounts bear out these statistics, both in the private and public sectors. According to PBGC, Delta Air Lines, US Airways, United Airways [sic],

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[9] *Available at* http://www.bls.gov/opub/cwc/cm20090826ar01p1.htm
[10] *Available at* http://www.gao.gov/new.items/d09702t.pdf

LTV Steel, and Bethlehem Steel generated 17.5 billion in claims, for an estimated 352,717 participants in terminated pension plans.[11] In 2008, PBGC made regular pension payments to approximately 640,000 individuals and lump sum payments to 17,000 individuals, for a total of $4.3 billion. *Id.* The growing number of plan failures and resultant PBGC liability demonstrates that the upward trend in retirement benefits are economically unsustainable to employers and are ultimately borne by the American taxpayer.

Public pensions face similar financial challenges and are particularly underfunded. As states and counties grapple with rising budget deficits over the next couple of years, government ability to fund massive pension obligations decreases. Given this economic reality, the federal government replaced its defined benefit pension plan with a defined contribution pension. Known as the Thrift Savings Plan (TSP), agencies match up to five percent in employee contributions.[12] This move represented an attempt to bring burgeoning pension costs under control – before the viability of the entire system was undermined. Some local governments have defaulted on pension payments altogether. Prichard, Alabama stopped sending monthly checks to retirees in September 2009, after

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[11] Emily Brandon, *The 10 Biggest Pension Failures*, U.S. News & World Rpt., (Sept. 4, 2009), *available at* http://money.usnews.com/money/blogs/planning-to-retire/2009/09/04/the-10-biggest-pension-failures_print.html

[12] Thrift Savings Plan, *Annual Limits on Elective Deferrals* 2 (Nov. 2010), *available at* https://www.tsp.gov/PDF/formspubs/oc91-13.pdf

having reduced pension benefits by 8.5 percent in 1999.[13] The pension obligations of state governments continue to mount, raising concerns about the stability of these plans.[14]

Another consideration in the evaluation of the effects of plan failures involves the legal limits on guaranteed benefits. When a plan is terminated, participants may receive their same benefit amount for a period of time while PBGC renders a true estimate of the retirement benefit. Given the difficulty in determining the accurate benefit amount, some participants may face recoupment, under which they must repay money to the government. In addition, the retiree

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[13] Michael Cooper & Mary Williams Walsh, *Alabama Town's Failed Pension Is a Warning*, N.Y. Times (Dec. 22, 2010), *available at* http://www.nytimes.com/2010/12/23/business/23prichard.html

[14] Professors Robert Novy-Marx of the University of Chicago and Joshua D. Rauh of Northwestern's Kellog School of Management "calculate benefit costs based on states purchasing a portfolio of risk-free Treasury bonds to supply sufficient cash flows to pay current pension obligations. States invariably use a higher discount rate when calculating their unfunded pension obligations.

The GAO study found that states' cumulative unfunded liabilities were $405 billion, while Novy-Marx and Rauh figure $3.2 trillion is a more accurate number. Even their estimates of future costs, high as they seem, are far lower than can be expected. Pension benefits are based on an employee's final working years, for example, so as state workforces age, the pension obligations rise dramatically. These estimates also don't include any future workers added to the state payroll. Rhode Island has the highest unfunded pension costs per capita, according to Novy-Marx and Rauh, at $20,271, while Nebraska fares the best with a per capita cost of $4,878." Kurt Badenhausen, *The United States of Debt*, Forbes.com (Jan. 20, 2010), *available at* http://www.forbes.com/2010/01/20/united-states-debt-10-business-wall-street-united-states-debt.html

must adjust their cost of living to accommodate the difference between what their original plan promised and the legal guarantee limit.

Conversions typically offer transition periods and provide retiring employees an idea of what their benefits will look like in retirement. Aside from the obvious undesirability of a plan termination or suspension, a great deal of uncertainty occurs when a plan fails. Transition periods in plan conversions are intended to gradually introduce benefit changes and mitigate the impact on those who are nearing retirement age. While some plan participants would accrue higher benefits under a defined benefit plan, voluntary conversions are far preferable to the alternative – a forced takeover of a failing pension plan that ultimately institutes the same reduction in benefits, a voluntary termination of the plan altogether, or a complete freeze of the plan. Under El Paso's plan, all employees retain the benefits that they have accrued under the old defined benefit plan's final average pay formula through the five-year transition period. The wear-away periods are not the result of age discrimination; they are a responsible effort by El Paso to ensure the continued viability of its pension plan. While reductions in future benefits can be unpalatable to employees, a measured transition is far preferable to the potential failure or discontinuance of the entire plan, or the termination or complete freezing of the plan. In its discussion of options for the modification of accrued benefits that would increase the solvency of pension plans,

GAO suggested allowing for incremental benefit cuts, reduction in benefits for retirees, and decreasing accrued benefits – all with the aim of preserving plan assets. U.S. Gov't Accountability Office, *Private Pensions: Changes Needed To Better Protect Multiemployer Pension Benefits* 41 (Oct. 2010). While these measures may appear draconian, the alternative could be a wide-ranging failure of pension obligations in the event of a severe and protracted economic downturn. *Id.* at 43. It is to the benefit of both the employer and the employee to advocate a solid, financially viable plan.

C. Pension Plans Are A Voluntary Benefit That Companies Choose To Provide And Undue Constrictions Placed On The Plan Design May Encourage Total Elimination Of These Benefits

The movement towards defined contribution and other hybrid plans increases as unrealistic restrictions are placed in the administration of pension plans. Employers are not required to provide retirement benefits to their employees; therefore, policymakers have chosen to provide common sense rules for the administration of these plans. Cash balance conversions are intended to increase the longevity and future financial stability of the plans in their entirety. If companies are unreasonably constrained when they seek to create plans that are more financially viable, they may choose to discontinue these offerings. These plans are significant retiring employees and it is incumbent upon courts to uphold Congress' intent to regulate the rate of benefit accrual, and not the benefit itself.

Many employers may choose to discontinue plans in order to avoid the significant market pressure on investments, increasing regulation and litigation, and mounting liability. Given the public policy of providing for retiring employees, employers should be afforded some leeway in the design and implementation of a voluntary benefit. Cash balance plans are increasing for a variety of reasons – strategic and financial. Ultimately, the continued viability of pension plans depends on financial realignment, given the financial strain of an aging population and the specter of continuing market volatility. It is important to incorporate these realities and design benefits that can be delivered – and not just promised.

CONCLUSION

For the foregoing reasons, the district court ruling below should be affirmed.

Respectfully submitted,

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