Case No. 07-0070-MV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE CITIGROUP PENSION PLAN ERISA LITIGATION

From an Order of the
United States District Court for the Southern District of New York
Entered on December 20, 2006 Granting Class Action Certification in
Civil Action No. 05 Civ. 5296 (SAS/HP)

BRIEF *AMICUS CURIAE* OF
THE AMERICAN BENEFITS COUNCIL
IN SUPPORT OF DEFENDANTS' PETITION
FOR PERMISSION TO APPEAL PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CORPORATE DISCLOSURE STATEMENT

The following disclosures are made pursuant to Federal Rule of Appellate Procedure 26.1:

1) Davis and Harman LLP (1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004) is the sole law firm appearing for the *Amicus*.

2) *Amicus Curiae* American Benefits Council (the "Council") is a non-profit organization described in Section 501(c)(6) of the Internal Revenue Code, and has no parent corporations.

3) Because the Council is a non-profit organization with no shareholders, no publicly held company owns 10 percent or more of the stock of the Council.

4) The Council is unaware of any publicly held corporation which is not a party to the proceeding before this Court having a financial interest in the outcome of the proceeding.

5) This is not a bankruptcy appeal.

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Kent A. Mason Date

STATEMENT REGARDING CONSENT TO FILE *AMICUS* BRIEF

Counsel for Defendants has consented to the filing of this *amicus* brief. Counsel for Plaintiffs has not consented to the filing of this *amicus* brief. A motion for leave to file this *amicus* brief is filed herewith.

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Kent A. Mason   Date

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STATEMENT OF INTEREST

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 250 members include primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefits plans covering more than 100 million Americans.

In cases of exceptional importance, with the potential for far-reaching effects on employee benefit plans, the Council participates as *amicus curiae*.[1] The Council bases its decision to file an *amicus* brief on criteria that limit participation to significant cases in which the Council believes its discussion of the issues will advance arguments that will not be presented by the parties or by other *amici*. This case has been identified as one raising an issue of critical importance because of its potential impact on the employer-provided defined benefit pension system.

[1] *See, e.g.*, *General Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003).

ARGUMENT

I. THE DISTRICT COURT'S DECISION DANGEROUSLY UNDERMINES THE DEFINED BENEFIT PENSION SYSTEM.

The district court's grant of Plaintiffs' motion for class certification is based on its resolution of a legal issue that could have widespread and harmful consequences for defined benefit plans throughout the United States. The district court reasoned that the administrator of the Citibuilder Cash Balance Plan (the "Plan") failed to satisfy the advance notice requirements of section 204(h) of the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to a Plan amendment solely because (i) the Plan, as amended, did not satisfy the anti-backloading requirements of section 204(b) of ERISA[2] and (ii) the administrator failed to disclose the Plan's anti-backloading provisions with specificity.

[2] The district court concluded that the only permitted method for a cash balance plan to satisfy the anti-backloading rules is use of the "133-1/3 percent method." *In re Citigroup Pension Plan ERISA Litigation*, 2006 WL 3613691, at *8 (S.D.N.Y. Dec. 12, 2006). The Council vigorously disputes that conclusion and believes that the "3% method" and the "fractional rule of accrual" may be used by cash balance and other hybrid plans. Further, we note that the "top-up benefit" included in section 4.1(e) of the Plan does not, as the district court concluded, undermine the anti-backloading rules. While the "top-up benefit" is backloaded in the sense that it is credited to accounts at termination of employment, it is not backloaded in the sense that ERISA prohibits backloading because participants receive the benefit without regard to whether they terminate employment shortly after starting or after a long career. In this sense, the "top-up benefit" is accrued at all times; it is merely credited to accounts at a later date.

If affirmed, the district court's decision would call into question the efficacy of amendments to numerous traditional defined benefit pension plans and a huge number of cash balance pension plans in the United States. As discussed further below, the retirement plan legal system contemplates that plans will commonly be designed or amended with technical flaws (such as a backloading violation) and the system provides structured opportunities for correction of those flaws without material sanction. It would be extraordinary for a section 204(h) notice to disclose or otherwise provide adequate information for participants to be on notice of a technical violation and, for this reason, the district court's opinion would undermine the carefully structured correction system in the case of any plan to which section 204(h) applies.

Amendments that reduce the future rate of benefit accrual for which a section 204(h) notice is required have become increasingly common in recent years as numerous employers have frozen their defined benefit plans and many others have otherwise significantly reduced their rates of benefit accrual.[3] The issue is particularly acute for cash balance and other hybrid defined benefit plans. Nearly

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[3] A plan freeze typically means closing the plan to new hires and/or ceasing future accruals for current participants. See Jack Van Derhei, *Defined Benefit Plan Freezes: Who's Affected, How Much, and Replacing Lost Accruals*, EBRI Issue Brief No. 291, March 2006, at 6-7. A plan freeze in the form of an amendment to cease future accruals is subject to the requirements of section 204(h). See Treas. Reg. § 54.4980F-1, Q&A-17, 26 C.F.R. § 54.4980F-1.

one-third of large employers have converted their traditional plans to cash balance or pension equity plans and virtually every conversion necessitates a section 204(h) notice.[4] As of the year 2004 (the most recent year for which official government data is available), almost 30 percent of all private single-employer defined benefit plan participants were covered by hybrid plans.[5] There were nearly 1,800 of these plans providing benefits to more than 10 million Americans as of 2004.[6]

The tax-qualification and ERISA requirements for defined benefit plans are notoriously complicated and, as mentioned above, it is not uncommon for a plan to misstep with respect to one or more requirements. The district court's opinion suggests that if a plan has a technical defect after an amendment requiring a section 204(h) notice, then the plan's section 204(h) notice is per se defective. Even if the opinion is read narrowly to apply only to technical defects that affect the post-amendment benefit formula, the district court's opinion would still have far reaching implications given the numerous difficult (and often unresolved) issues related to benefit formulas.

Apart from the large number of potentially affected plans, the district court's decision would also have a devastating impact on affected plans. The remedy for a

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[4] Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2005*, at 61-62 (2006), *available at* http://www.pbgc.gov/docs/2005databook.pdf.

[5] *Id.*

[6] *Id.*

failure to satisfy section 204(h) is generally to void the amendment to which the notice relates.[7] This would provide affected participants with a substantial windfall by ensuring that they receive the greater of (i) benefits under the pre-amendment formula and (ii) benefits under the post-amendment formula, which is precisely the remedy sought by the Plaintiffs. Depending on the particular benefit formulas, this could mean a massive increase in liabilities for many plans.

These increased liabilities would have far-reaching effects. First, although we are not aware of any hard data on the average difference between formulas where a section 204(h) notice is required, we have little doubt that an increase in liability based on old formulas could mean liability increases of millions or hundreds of millions of dollars for many, many companies. That type of additional liability could preclude companies from investing in their business and, in tandem with other factors, could even drive companies into bankruptcy, including many non-profit organizations whose communities would suffer accordingly.

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[7] *See, e.g.*, *Hirt v. Equitable Ret. Plan for Employees, Managers & Agents*, 441 F. Supp. 2d 516, 538-39 (S.D.N.Y. 2006). *See also Suozzo v. Bergreen*, No. 00 CIV. 9649(JGK), 01 CIV. 7258(JGK) 2002 WL 1402316, at *7 (S.D.N.Y. June 27, 2002). In the Economic Growth and Tax Reconciliation Relief Act of 2001 ("EGTRRA"), Congress clarified that this remedy should apply in only very limited circumstances. *See* Pub. L. No. 107-16, § 659(b), 115 Stat. 38, 140 (codified as amended at 29 U.S.C. § 1054(h)) (clarifying section 204(h) to provide that an amendment should be disregarded only if the notice failure was egregious). Although the district court's opinion addresses two amendments – one under pre-EGTRRA section 204(h) and the other under post-EGTRRA section 204(h) – the district court either assumed that a notice failure attributable to a technical violation is per se egregious or simply failed to consider the issue.

Second, the increased liabilities could have a devastating impact on the Pension Benefit Guaranty Corporation ("PBGC"). The PBGC is a self-funded governmental organization that insures benefits payable under defined benefit plans. If a plan terminates with insufficient assets, the PBGC is required to provide participants with benefits up to a guaranteed level. The PBGC is entitled to recoup its payments from the plan sponsor, but in the case of a bankrupt employer, this right may not have substantial value. The PBGC is already facing a deficit of $18.1 billion and the district court's decision, if left standing, will only exacerbate its exposure.[8]

Finally, it is likely that the district court's decision, if left standing, will accelerate the trend away from defined benefit pension plans. Our nation has seen an alarming decline in defined benefit plan sponsorship and today is a particularly precarious time for the defined benefit system. Employers are increasingly exiting the system.[9] The total number of PBGC-insured defined benefit plans has decreased from a high of more than 112,000 in 1985 to fewer than 29,000 in 2005.[10] This downward trend is even more sobering if you look solely at the past

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[8] Pension Benefit Guaranty Corp., *Annual Management Report Fiscal Year 2006*, at 4 (Nov. 15, 2006), *available at* http://www.pbgc.gov/docs/PBGCAMR.pdf.

[9] The Council previously released a white paper discussing in detail the multiple threats to the defined benefit system. *See Pensions at the Precipice: The Multiple Threats Facing Our Nation's Defined Benefit Pension System* (May 2004).

[10] PBGC *Pension Insurance Data Book 2005*, *supra* note 4, at 58.

several years. Not taking into account pension plan freezes (which are also on the rise but not officially tracked by the government), the PBGC reported that the number of defined benefit plans it insures has decreased by almost 7,000 (or 20%) in just the last five years.[11] There is little doubt that employers will be reluctant to maintain defined benefit plans if they cannot amend their plans with the confidence that these amendments will be respected, and the district court's decision creates a very real possibility that many plan amendments are ineffective.

II. THE DISTRICT COURT'S DECISION MISAPPREHENDS THE PURPOSE AND SCOPE OF SECTION 204(h).

In relevant part, section 204(h) of ERISA provides that:

> A [defined benefit plan] may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date . . . [to all plan participants].

There is no question in the instant case that the Plan Administrator provided timely notices that adequately described the operation of the cash balance plan formula.[12] However, the district court concluded:

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[11] PBGC *Pension Insurance Data Book 2005*, *supra* note 4, at 58.

[12] As mentioned in footnote 2, the Plan included a "top-up benefit," which provided that a participant's benefit would be increased to the extent necessary to ensure that a participant always received a minimum benefit upon termination of employment. In our view, the fact that this "top-up benefit" was not described in the relevant notices is not germane to the district court's decision. By omitting any discussion of the "top-up benefit," the notices made the reduction in future rate of

> Because it was ultimately revealed that the formula included an unlawful application of the [anti-backloading rules], which had the effect of keeping accrual rates below the minimum rate prescribed by statute, defendants' failure to either include or summarize [the Plan's anti-backloading provisions] in the notices violated section 204(h).[13]

The district court thus held that participants were entitled to a description of the Plan's method of satisfying the anti-backloading requirements and because the Plan's method failed, in its view, to satisfy the applicable requirements, the amendment was void.

In our experience, it would be extraordinary for a plan to include a description of its method of satisfying the anti-backloading requirements in a section 204(h) notice or, for that matter, in any communication to participants regarding the plan, including the summary plan description required under section 104(b) of ERISA. The anti-backloading rules are highly complicated and technical provisions, and the relevant information is the formula that describes the benefits to which participants are entitled.

More importantly, the district court's opinion conflates two independent requirements. Section 204(h) requires notice of a plan amendment that significantly reduces benefits. Section 204(b) requires that the plan design satisfy

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accrual appear more, not less, significant. Moreover, under the district court's view, the Plan was even more backloaded without the "top-up benefit" so that the failure to disclose the "top-up benefit" could not have been the source of the district court's conclusion that participants were not fairly put on notice of the Plan's anti-backloading violation.

[13] *In re Citigroup Pension Plan ERISA Litigation*, 2006 WL 3613691, at *9.

the anti-backloading rules. All that is required (or should be required) under section 204(h) is notice of the new plan design. Whether that plan design satisfies all of the technical requirements that a plan must satisfy under Title I of ERISA is relevant to the ongoing status of the plan, not to whether the plan satisfies section 204(h). By confusing these two independent issues, the district court effectively transformed a substantive defect into a section 204(h) notice failure.

The district court's bootstrapping of a substantive backloading failure into a section 204(h) notice failure is also inconsistent with the fabric of the retirement plan system. As mentioned above, it is common for a plan to misstep in terms of one or more technical requirements. In recognition of this fact, section 401(b) of the Internal Revenue Code of 1986 provides that plans may be amended retroactively in certain circumstances, including as part of the IRS determination letter process. Under that process, sponsors submit their plans to the IRS for a determination that the form of the plan, including its method for complying with the anti-backloading requirements, satisfies the applicable rules. If the IRS determines that there is a flaw, the sponsor is entitled to amend the plan on a retroactive basis to maintain its tax-preferenced status.

Similarly, the IRS maintains a program called the Employee Plans Compliance Resolution System ("EPCRS") that allows for correction of technical defects, including anti-backloading problems. Under EPCRS, plan administrators

are entitled to correct defects (with or without IRS involvement depending on the defect) and EPCRS lists specific methods of correction for specific technical defects.[14] It does not simply provide that an amendment is void to the extent it is substantively defective.

As these programs illustrate, technical defects are very common. The district court's decision would impute devastating consequences to such defects in the form of voided amendments. This is entirely inconsistent with Congressional intent and the administration of these provisions by the government agencies, and would set a dangerous precedent.

CONCLUSION

For the reasons stated above, *Amicus Curiae* respectfully submits that this Court should grant Defendants' petition for permission to appeal and should reverse the District Court's Order granting class certification.

Respectfully submitted,

Dated: January __, 2007

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Kent A. Mason

[14] Revenue Procedure 2006-27, 2006-22 I.R.B. 945 (May 15, 2006) (most recent update to EPCRS).

ANTI-VIRUS CERTIFICATION

In accordance with Local Rule 32, I certify that on January 16, 2007, the PDF version of this Brief *Amicus Curiae*, which will be submitted as an email attachment to briefs@ca2.uscourts.gov, was scanned for viruses, using Symantec AntiVirus version 10, and that no viruses were detected.

Dated: January __, 2007

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CERTIFICATE OF SERVICE

I certify that on January 16, 2007, I caused two (2) copies of this Brief *Amicus Curiae* to be served via Federal Express on the following counsel:

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