06-4757 (L)

06-5190 (xap)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEFANIE HIRT, BARBARA SEAY, ANN NUSSBAUM, SUSAN CHWAST and LORETTA RONZCA

Plaintiffs-Appellants-Cross Appellees,

v.

THE EQUITABLE RETIREMENT PLAN FOR EMPLOYEES, MANAGERS AND AGENTS, and THE OFFICERS COMMITTEE ON BENEFIT PLANS, as Plan Administrator,

Defendants-Appellees-Cross Appellants.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SEEKING AFFIRMANCE OF THE DISTRICT COURT

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INTEREST OF THE AMICI[1]

This case concerns the validity, under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq*. ("ERISA"), of a type of retirement plan known as a "cash balance plan." The issue before the Court – whether the cash balance plan sponsored by Equitable Life Assurance Society of America ("Equitable") violates the age discrimination prohibition in ERISA § 204(b)(1)(H) – affects every cash balance plan in the nation. Although this is an issue of first impression in this Circuit, two other courts of appeals, the Third and Seventh Circuits, have held that cash balance plans are *not* inherently age discriminatory. *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), *cert. denied*, 127 S. Ct. 1143 (2007).[2]

This case also raises two additional, but equally important issues that the Chamber of Commerce of the United States of America (the "Chamber") wishes to address: first, whether a summary plan description ("SPD") can satisfy the notice requirements of ERISA § 204(h), and second, when the statute of limitations

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[1] The parties have consented to the filing of this brief *amicus curiae*.

[2] This same issue is also currently pending in cases before the Courts of Appeals for the Sixth and Ninth Circuits. *See Drutis v. Rand McNally et al.*, Case No. 06-6380 (6th Cir.) (fully briefed); *Hurlic v. Southern Cal. Gas. Co.*, 05-5027 (C.D. Cal. Oct. 18, 2005), Case No. 06-55599 (9th Cir. Apr. 21, 2006) (fully briefed).

accrues on a claim challenging the legality of a plan amendment. These issues affect not only cash balance plans but all retirement plans subject to ERISA.

The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. Hundreds of the Chamber's members sponsor cash balance plans and will, therefore, be affected by the Court's decision on the age discrimination claim. These members, as well as the Chamber's thousands of members who sponsor other types of retirement plans, will also be affected by the Court's decision on the notice and statute of limitations issues.

The reasons why the district court's decision is correct are explained in detail in Equitable's brief to this Court. The Chamber files this brief *amicus curiae* to aid the Court in its understanding of the framework surrounding these issues and the devastating impact that a reversal would have on all retirement plans.

ARGUMENT

A. The District Court Correctly Held That the Equitable Plan Does Not Violate ERISA §204(b)(1)(H).

The issue below was how the age discrimination provision applicable to defined benefit plans, ERISA § 204(b)(1)(H), should be applied to a cash balance plan. Section 204(b)(1)(H) provides that a plan is illegal if "the rate of an employee's benefit accrual is reduced, because of the attainment of any age."

ERISA does not define "rate of benefit accrual," as used in § 204(b)(1)(H); however, the district court, like the Third Circuit in *Register* and the Seventh Circuit in *Cooper*, held that the rate of benefit accrual in a cash balance plan is measured by reference to what the employer puts in the plan. Under this interpretation, it is undisputed that cash balance plans do not violate ERISA's prohibition on age discrimination.

The Plaintiffs contend, however, that the phrase must be interpreted as if it incorporated the defined term "accrued benefit." Plaintiffs' contention is wrong. It has been rejected by both of the appellate courts and the vast majority of district courts that have addressed this issue, ignores economic reality and improperly treats the time value of money as age discrimination, and, if accepted, would render entire categories of retirement plans illegal.

1. Background on Cash Balance Plans.

The Equitable cash balance plan is typical of some 1,800 cash balance plans offered by companies throughout the country.[3] A cash balance plan establishes an "account" for each participant to which credits (a percentage of compensation) are added on a monthly basis. The "account" is a mechanism that allows participants to track their benefits, but it is only hypothetical, *i.e.*, an individual account is not

[3] *See generally Esden v. Bank of Boston*, 229 F.3d 154, 158-59 (2d Cir. 2000), which contains a detailed description of cash balance plans. *See also Register*, 477 F.3d at 61-63.

actually created for each participant. Because the benefits are described in terms of an account, a cash balance plan looks like a defined contribution plan, where contributions are allocated to actual individual accounts. However, because the participant in a cash balance plan is promised a benefit without regard to the investment performance of the plan's assets, cash balance plans are classified as defined benefit plans. *Esden*, 229 F.3d at 158, Internal Revenue Service Notice 96-8, 1996-1 C.B. 359 ("Notice 96-8").

The classification of cash balance plans as defined benefit plans "triggers a host of regulatory provisions applicable to defined benefit plans but not to defined contribution plans," many of which do not "address the unique features and hybrid nature of cash balance plans." *Register*, 477 F.3d at 63. For example, in a defined benefit plan, a participant's "accrued benefit," which is used as the measuring stick for determining compliance with certain plan rules and may not generally be reduced, *see* ERISA § 204(g)(1), means the "individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A). Because cash balance plans typically express a participant's benefit as his accumulated account balance, a methodology had to be developed for determining the participant's "accrued benefit." In Notice 96-8, the Treasury Department, through the IRS, officially set

forth a methodology that would, in its view, comply with the law.[4] Under this methodology, a participant's account balance must be projected forward, with interest, to the plan's normal retirement age (usually age 65), and then converted to a single life annuity. *See* Notice 96-8 at 4; *see also Register*, 477 F.3d at 63 ("when a participant receives a pay or earnings credit for a year of service, he also receives the right to future interest credits projected out until normal retirement age").

If, however, an employee terminates employment prior to age 65 and takes an immediate distribution of his benefit, the amount he receives is not his full "accrued benefit," *i.e.*, his account balance projected forward with interest to the plan's normal retirement age, but rather the present value of the projected age 65 benefit at the time of termination. *Esden*, 229 F.3d at 165. And significantly, assuming the same interest rate is used both in projecting the account balance to age 65 and discounting the accrued benefit to present value, the benefits of otherwise similarly-situated employees are identical, regardless of their age.[5]

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[4] In *Esden*, this Court held that Notice 96-8 represents a "fair and considered" interpretation of the applicable statute and regulations. 229 F.3d at 168-69; *see also Berger v. Xerox Corp. Ret. Income Guar. Plan,* 338 F.3d 755, 762 (7th Cir. 2003) (Notice 96-8 is an "authoritative" interpretation of the law). The IRS's interpretation of the accrual rules in the Internal Revenue Code ("IRC") is also applicable to the parallel accrual rules in ERISA. Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47,313 (1978).

[5] Under the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006), cash balance plans will no longer be required to engage in this "whipsaw"

Cash balance plans afford employees a number of advantages over traditional defined benefit plans and defined contribution plans. *See generally Id.* at 158 n.5 (citing Carol Quick, Overview of Cash Balance Plans, EBRI Notes 1 (July 1999)); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 818 (S.D. Ind. 2000). In a cash balance plan, like a traditional defined benefit plan, the employee is entitled to a specific benefit amount, and the employer makes contributions, manages the plan's investments, and bears the risk of adverse investment performance. *See generally* Employee Benefits Security Administration, United States Department of Labor, Frequently Asked Questions About Cash Balance Pension Plans, *available at* http://www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html. If the assets in the plan are insufficient to pay the promised benefit amount, the employer is obligated to make additional contributions. And cash balance plans offer employees the security of benefits that are insured by a federal agency, the Pension Benefit Guaranty Corporation ("PBGC"). *Id.* In contrast, in a defined contribution plan, the employee typically makes contributions (alone, or in addition to the employer), manages his own investments, and bears the risk of adverse investment performance. *Id.* The benefits are not insured by the PBGC;

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calculation in any event. Rather, on and after June 29, 2005, if certain minimal requirements are met, a participant's cash balance account can be defined as his "accrued benefit" and can be distributed in a lump sum upon termination of employment without calculating his age 65 annuity. PPA 2006 § 701.

consequently, if an employee's investments perform poorly, he may arrive at age 65 with little or no retirement income.

Because benefits in a cash balance plan, like those in a defined contribution plan, are identified by reference to an employee's account balance, they are easier to understand than the benefits in a traditional defined benefit plan, in which, prior to retirement, employees can envision benefits only by reference to an annuity payable sometime in the future. *See Esden*, 229 F.3d at 158 n.5. Use of such accounts therefore helps provide participants with a better understanding of the current value of the retirement benefits they are earning. In addition, lump sum distributions are typically available under a cash balance plan upon termination of employment, as they are in a defined contribution plan, making the benefits "portable." In a traditional defined benefit plan, by contrast, a participant is typically not entitled to receive any distribution until retirement, at which time he receives an annuity based on the benefits he accrued during the period of time he was employed. *Id.*; *see also Register*, 477 F.3d at 62. Moreover, many traditional defined benefit plans calculate the employee's benefits using his final average compensation, and an employee who works for two or more employers with such plans will suffer a "portability loss," *i.e.*, his aggregate retirement benefits will be smaller than those of an employee who spends his entire career at the same job, even if all of the later employers offer a traditional defined benefit plan identical to

the first. *See* United States Government Accounting Office, *Cash Balance Plans: Implications for Retirement Income*, GAO/HEHS-00-207 (Sept. 2000), at 27-28 & Table 2 (describing and illustrating loss).

Employers benefit from cash balance plans as well. *Esden*, 229 F. 3d at 158 n.5. Because employees better appreciate the value of their benefit rights, “the employer’s fringe benefit dollar has greater impact.” *Id*. Benefits in a cash balance plan grow more evenly throughout an employee’s career, including after retirement age, and accordingly, a cash balance plan, unlike a traditional defined benefit plan, does not penalize workers who remain with the employer past the plan’s retirement age, and is more attractive to younger workers than a traditional defined benefit plan. Richard W. Johnson and Eugene Steuerle, *Promoting Work at Older Ages: The Role of Hybrid Pension Plans in an Aging Population*, at 2, 16 (Pension Research Council, The Wharton School, University of Pennsylvania, 2003).

For all of these reasons, large employers have converted traditional defined benefit plans into cash balance plans in increasing numbers. Robert L. Clark, *Pension Plan Options: Preferences, Choices, and the Distribution of Benefits*, at 9 (Pension Research Council, The Wharton School, University of Pennsylvania, 2003); *see also* Julia Lynn Coronado & Phillip C. Copeland, *Cash Balance Plan*

Conversions and the New Economy, at 3 (The Federal Reserve Board, Nov. 2003), *available at* http://www.federalreserve.gov/pubs/feds/2003/200363/200363pap.pdf (concluding that "these conversions have generally been undertaken in competitive industries that are characterized by tight and highly mobile labor markets"). Indeed, cash balance plans have been described as "the best hope for saving the pension industry." Roger Lowenstein, *The End of Pensions?*, N.Y. Times, Oct. 30, 2005 (Magazine) at 82.

2. Plaintiffs' Age Discrimination Theory Ignores Economic Reality and Improperly Treats the Time Value of Money as Age Discrimination.

In comparing the age 65 accrued benefits of otherwise similarly-situated employees of different ages in an effort to establish age discrimination, Plaintiffs completely ignore the fact that the *value* of their *actual* benefits at any point in time is identical. The actual benefit an employee is entitled to receive at any point in time prior to age 65 is the *present value* of his projected age 65 benefit. *See Esden*, 229 F. 3d at 165; *Cooper*, 457 F.3d at 640.[6] Thus, the *real value* of the

[6] Plaintiffs concede that distributions from a cash balance plan must be the actuarial equivalent of the accrued benefit at normal retirement age, rather than the age 65 normal retirement benefit itself, but argue, inconceivably, that "[i]t follows" from this "that interest credits must be valued as of normal retirement age for purposes of complying with ERISA's age-based accrual standards." (Appellants' Brief p. 19-20.) On the contrary, what "follows" is that the age discrimination provision should be applied by reference to the *actual value* of the benefit that has accrued at any point in time, *i.e.*, the amount to which the employee would be

benefits of otherwise similarly-situated employees of different ages is *identical*, as the following example illustrates:

> - Employee A is 25 and Employee B is 65. Each earns $40,000 and is in his first year of participation in the plan. The plan provides pay credits of 4% and interest credits at the interest rate on 30-year Treasury bills (assumed for purposes of this example to be a constant 6%). Benefits under the plan vest immediately.
>
> - In their first year of participation in the plan, Employees A and B would each receive a pay credit of $1,600 (4% of $40,000), *i.e.*, each employee's account shows exactly the same balance.
>
> - If both participants were to terminate their employment after that first year, each would be entitled to a distribution of the same amount, $1,600 (*i.e.*, adding projected interest to age 65 and then discounting back to present value at the same interest rate would yield the same amount as shown in their accounts).
>
> - While the participants' benefit entitlement as of the date of their termination would be precisely the same, their projected benefit at age 65 (their "accrued benefit") would be very different:
>
> > - Employee B, who is already age 65, would have an age 65 account balance of $1,600, or 4% of his compensation.
> >
> > - Employee A, who will not be age 65 for 40 years, would have a projected age 65 account balance of $ 16,457.15 ($1,600 plus 40 years of interest at 6% per year), or 41% of his compensation.

The projected age 65 benefits of the two employees in the above hypothetical may look deceivingly different, but that is due solely to the accumulation of interest over time. A younger employee will always have a larger

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entitled if he were to terminate employment. Under this test, cash balance plans are indisputably not discriminatory.

projected age 65 benefit than an otherwise similarly-situated older employee, because the younger employee has more years to wait before reaching age 65, and therefore will naturally have more years of projected interest added to his account balance. But as the Third Circuit in *Register* explained, the "circumstance that the same contribution in the form of interest credits may result in a more valuable annuity for a younger employee is not discrimination in whole or in part based on age; rather it is the completely appropriate consequence of the application of an age-neutral principle to an accumulating account of the time value of money." *Register*, 477 F.3d at 70. In the words of the Seventh Circuit in *Cooper*:

> Nothing in the language or background of § 204(b)(1)(H)(i) suggests that Congress set out to legislate against the fact that younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings. Treating the time value of money as a form of discrimination is not sensible.

Cooper, 457 F.3d at 639; *see also Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 553-54 (S.D.N.Y. 2006) ("The effect of a younger employee's pay credits being worth more than those paid to older workers is caused not by discrimination but by the time value of money.").

Any apparent reduction in the rate of benefit accrual under a cash balance plan is thus not on account of age, but is due instead to the time value of money and the passage of time. And reductions in the rate of benefit accrual based on factors that merely correlate with age, but that are not caused by age, do not violate

ERISA § 204(b)(1)(H). *See*, *e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("an employee's age is analytically distinct from his years of service"); *Cooper*, 457 F.3d at 642 ("[A] plaintiff alleging age discrimination must demonstrate that the complained-of effect is *actually* on account of age. One need only look at IBM's formula to rule out a violation. It is age-neutral.") (emphasis in original). By focusing solely on the projected age 65 accrued benefit, Plaintiffs have ignored this economic reality.

3. The Plaintiffs' Theory of Age Discrimination Is Directly at Odds with this Court's Ruling in *Esden*.

As noted previously, the Plaintiffs' theory of age discrimination hinges on their argument that the phrase "rate of an employee's benefit accrual" as used in ERISA § 204(b)(1)(H) means the same thing as "accrued benefit." In a cash balance plan, a participant's accrued benefit is required to include interest projected forward to normal retirement age. *See Esden*, 229 F.3d at 168-69. It is this required feature, however – the requirement to project and accumulate interest to age 65 in calculating a participant's accrued benefit – that, according to the Plaintiffs, renders Equitable's cash balance plan age-discriminatory. The Plaintiffs' theory of age discrimination is thus directly at odds with this Court's ruling in *Esden*.

If the Plaintiffs have properly interpreted § 204(b)(1)(H), the Equitable plan is illegal by virtue of the very feature that this Court, by approving IRS Notice 96-

8, has required be included in the benefits provided under cash balance plans. And because all cash balance plans must contain this interest projection feature that Plaintiffs challenge as discriminatory, adopting Plaintiffs' interpretation of ERISA § 204(b)(1)(H) would render not only the Equitable cash balance plan illegal but also "any other conceivable cash balance plan." *Register*, 477 F.3d at 64. It simply defies logic that this Court would have mandated the crediting of future interest credits on participants' cash balance accounts in order to comply with the law if, at the same time, those very same interest credits caused cash balance plans to be age discriminatory. The Plaintiffs' interpretation is, therefore, not compatible with existing law. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (a provision that may otherwise appear ambiguous may be clarified by the remainder of the statutory scheme "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").

4. The Plaintiffs' Interpretation of § 204(b)(1)(H) Would Also Render Illegal Other Retirement Plans with Similar Interest Projection Features.

Cash balance plans are not the only type of retirement plans that include interest accumulation in the benefit formula and that would, therefore, be illegal under the Plaintiffs' construction of § 204(b)(1)(H). Numerous commentators have noted that contributory defined benefit plans and indexed career average pay

plans would also be rendered discriminatory under the Plaintiffs' interpretation because they share the exact same feature that Plaintiffs allege causes the Equitable cash balance plan, and all other cash balance plans, to violate ERISA. *See, e.g.*, Richard C. Shea, et al., *Age Discrimination in Cash Balance Plans: Another View*, 19 Va. Tax Rev. 763, 771-72, 777-79 (2000); *Eaton*, 117 F. Supp. at 831. Both of these types of plans, however, have long been recognized as legal.[7] The Plaintiffs' interpretation is, accordingly, incompatible with the existence of these other forms of retirement plans, which have long been acknowledged and blessed by the governmental ERISA agencies and the courts.

A contributory defined benefit plan is, as its name implies, a defined benefit plan to which employees contribute. Joint Committee on Taxation, *Present Law and Background Relating to Employer-Sponsored Defined Benefit Pension Plans and the Pension Benefit Guaranty Corporation ("PBGC")* (JCX-03-04), Feb. 28, 2005, at 13. Employee contributions are mandatory under this type of plan, which is common among state and local governments. *Id.*; John W. Thompson, Bureau of Labor Statistics, *Defined Benefit Plans at the Dawn of ERISA*, Mar. 30, 2005, at 2. And while governmental plans are not covered by ERISA § 204(b)(1)(H), they

[7] Although cash balance plans were a relatively new phenomenon at the time § 204(b)(1)(H) was enacted in 1986, these plans were not. *See, e.g.*, Rev. Rul. 53-185, 1953-2 C.B. 202 (discussing indexed plans); Rev. Rul. 65-178, 1965-2 C.B. 94 (discussing contributory defined benefit plans).

are required to comply with section 4(i) of the ADEA, which is, in substance if not language, identical.[8]

Under IRC § 411(c)(2)(B), an employee's accrued benefit derived from contributions made by him as of any applicable date is:

> the amount equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under § 417(e)(3) (as of the determination date).

Thus, just like a cash balance plan, the determination of an employee's accrued benefit under a contributory defined benefit plan with mandatory employee contributions requires the projection of interest to normal retirement age. *See* Treas. Reg. § 1.411(c)-1(c); *see also* Rev. Rul. 89-60, 1989-1 C.B. 113; Rev. Rul. 78-202, 1978-1 C.B. 124. Also just like a cash balance plan, the rate of an employee's benefit accrual, if expressed in the form of his projected age 65 benefit, will grow smaller with each year he progresses toward his normal retirement age. Thus, the Plaintiffs' erroneous interpretation of ERISA § 204(b)(1)(H) would apply equally to this type of plan, and render these plans illegal as well.

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[8] *See* H.R. Rep. No. 99-1012, at 378, 382 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 3868 ("The conferees . . . do not intend any difference in language in the provisions to create an inference that a difference exists among such provisions . . . . The Secretary of Labor, Secretary of Treasury, and the Equal Employment Opportunity Commission are to issue rulings and regulations that are consistent and are to consult and coordinate with one another in issuing such rulings and regulations.").

Similarly, the Plaintiffs' reasoning would invalidate indexed career average pay pension plans. In an indexed career average pay plan, a participant's benefit is indexed to retirement, even if he does not continue working until retirement. *See* Ron Gebhardtsbauer, *Cash Balance Equivalencies*, 2 (American Academy of Actuaries, Aug. 2005), *available at* www.actuary.org/pdf/pension/cash_august05.pdf. An indexed career average plan can be indexed to inflation or wages, but in either case, each year's incremental addition to a participant's benefit includes an indexing of that increment to normal retirement age, *see id.* at 2-3, just as each year's accrued benefit in a cash balance plan includes interest to normal retirement age and, thus, increases the accrued benefit of younger employees the most. Consequently, these plans, too, will be illegal if the district court's decision is reversed.

B. The District Court Correctly Held That an SPD Can Constitute Adequate Notice Under ERISA § 204(h).

In order "to safeguard benefits that have been promised to employees," *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006), ERISA requires advance written notice to participants of a plan amendment that would significantly reduce the rate of future benefit accrual. *See* ERISA § 204(h). At all times relevant to this dispute, ERISA § 204(h) provided that a 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." *Id.*

ERISA does not prescribe any particular format for the 204(h) notice. *See*, *e.g.*, *Frommert*, 433 F.3d 254, 268 (timely benefits update can serve as adequate 204(h) notice); *see also Register*, 477 F.3d at 72 (20 page brochure summarizing the changes from a traditional defined benefit plan to a cash balance plan constituted adequate 204(h) notice). Consequently, employers have used a wide variety of means of communicating plan changes to participants. Some employers provide the 204(h) notice as a separate stand-alone document or in a company mailing, while others include the 204(h) notice with other benefits related documents, such as benefits updates, employee brochures or, as in this case, in a summary plan description ("SPD").

An SPD is a written summary of the contents of a plan that is required to be distributed to all participants when they first become eligible to participate in the plan and periodically thereafter. *See* ERISA § 102. It must be "written in a manner calculated to be understood by the average plan participant" and "be sufficiently accurate and comprehensive to reasonably apprise" participants of their rights and obligations under the plan. *Id.* The district court held that "although the SPD serves other important functions under ERISA, it also can qualify as notice of a plan amendment pursuant to ERISA section 204(h)." *Hirt v. Equitable Ret. Plan*

for Employees, Managers and Agents, 441 F. Supp. 2d 516, 539 (S.D.N.Y. 2006).[9] The district court was clearly correct.

The SPD is intended to be the "primary means of informing participants" of the terms of the plan and its benefits. *Mario v. P&C Food Mkts., Inc.*, 313 F.3d 758, 764 (2d Cir. 2002); *see also Layaou v. Xerox Corp.*, 238 F.3d 205, 209 (2d Cir. 2001) (same); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990) (same). As such, SPDs are expected to "explain[] the full import" of the plan provisions affecting participants. *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985). Given its importance as the "primary" source of information for plan participants, the SPD is not only an adequate vehicle for providing the 204(h) notice, it is the very best vehicle for such purpose.

The SPD must, among other things, include:

- The plan's requirements respecting eligibility for participation and benefits;
- A description of the provisions providing for nonforfeitable pension benefits;
- Circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; and

[9] Although this Court has not yet addressed the issue, other district courts in this Circuit have agreed with the court below that an SPD can constitute adequate notice under ERISA § 204(h). *See*, *e.g.*, *Kagen v. Flushing Hosp. Med. Ctr.*, No. 96-CV-5795, 2000 WL 1678015, *4 (E.D.N.Y. Nov. 3, 2000) ("written [ERISA § 204(h)] notice is sufficient pursuant to a number of methods, including the distribution of an SPD"); *Normann v. Amphenol Corp.*, 956 F. Supp. 158, 166 (N.D.N.Y. 1997) (same).

- The procedures to be followed in presenting claims for benefits under the plan.

ERISA § 102(b).

At the time of the amendments to Equitable's pension plan, notice was sufficient under ERISA § 204(h) if it included a summary of the amendment and its effective date. *See* Treas. Reg. 1.411(d)-6, Q&A 10.[10] Far more information was required to be included in an SPD. *See*, *e.g.*, ERISA § 102(b) (SPD must include the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits"). Unlike the 204(h) notice, an SPD need not be distributed to participants prior to the effective date of a plan amendment, *see* ERISA § 104, but there is nothing in ERISA or the implementing regulations to prevent an employer from providing an updated SPD within the time limits prescribed for distributing the 204(h) notice, and that is precisely what Equitable did here.

Plaintiffs and their supporting *amici* contend, however, that an SPD cannot constitute a 204(h) notice because the statutory requirement to provide an SPD is in addition to and independent of the requirement to provide a section 204(h)

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[10] The notice did not need to explain how the individual benefit of each participant would be affected by the amendment. *Id.*; *see also Register*, 477 F.3d at 73. Although ERISA was subsequently amended to require the inclusion of additional information in the 204(h) notice, the revised provision was applicable only to plan amendments adopted on and after June 7, 2001. *See* Treas. Reg. § 54.4980F-1 Q&A 11, 18.

notice. To be sure, the duty to provide an SPD and a 204(h) notice arise under different sections of ERISA. But that does not mean that the 204(h) notice must be provided separately from an SPD. On the contrary, regulations issued by the Treasury Department, the federal agency responsible for interpreting ERISA section 204(h), *see* Reorganization Plan No. 4 of 1978 § 101, 43 Fed. Reg. 47,313 (1978), expressly permit the 204(h) notice to be "enclosed with or combined with" any other notice provided by the employer or plan administrator. Treas. Reg. § 1.411(d)-6 Q&A 11. It simply makes no sense to permit a 204(h) notice to be included with any other notice except for the one document that is intended to be the "primary means" of communicating plan information to participants.

Moreover, a decision that an SPD can constitute adequate 204(h) notice is consistent with the purpose of ERISA § 204(h). Section 204(h) is intended to give plan participants "the opportunity to take advantage of an existing benefit before it is lost," *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir. 1992), such as seeking injunctive relief, altering retirement investment strategies, or considering other employment. *Frommert*, 433 F.3d at 266. Permitting an SPD to serve as a 204(h) notice will not deprive plan participants of any opportunity to take timely action in response to a plan amendment; instead, participants who receive the 204(h) notice and SPD together in one document are better able to make an informed decision as to how to secure their pension benefits because the combined

document places in participants' hands all of the relevant information relating to their plan in a single package, thereby allowing them to evaluate the entire plan, not just the plan amendment. At the same time, permitting the two notices to be combined will reduce the already onerous administrative burdens on employers and retirement plan administrators, making it easier for them to comply with ERISA's reporting and disclosure requirements.

C. The District Court's Ruling on the Statute of Limitations Should be Affirmed.

The court below held that the Plaintiffs' claims in this case, filed more than eight years after the latest to occur of the events on which those claims were based, were barred by the statute of limitations. Equitable has explained in detail why the district court's decision was correct on the facts of this case; the Chamber writes separately to address the important policies that will be served by an affirmance of that decision.

Statutes of limitations serve several important policies, including rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses. *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 47 (2d Cir. 1999) (citing *Wilson v. Garcia*, 471 U.S. 261 (1985)). The length of a limitations period for instituting suit in federal court "inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed

by the interests in prohibiting the prosecution of stale ones." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975). For these reasons, statutes of limitations "are not to be disregarded by courts out of a vague sympathy for particular litigants," *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), and strict adherence to such limitations periods "is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). Indeed, the Supreme Court has declared:

> [s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Bd. of Regents of Univ. of State of N. Y. v. Tomanio, 446 U.S. 478, 487 (1980).

ERISA does not provide a statute of limitations for non-fiduciary breach claims. In the absence of a statutory limitations period, the courts apply the most analogous state statute of limitations. *Miles v. New York State Teamsters Conference Pension and Ret. Fund Employee Pension Benefit Plan*, 698 F.2d 593,

598 (2d Cir. 1983).[11] Federal law, however, determines the date of accrual of an ERISA claim. *Admin. Comm. of Wal-Mart Stores, Inc. v. Soles ex rel. Hollander*, 336 F.3d 780, 785 (8th Cir. 2003).

The underlying goals of statutes of limitations are best served when the accrual date of a cause of action ties the limitations period to a plaintiff's reasonable notice of actionable harm. Thus, "a plaintiff's cause of action accrues when he discovers, or *with due diligence should have discovered*, the injury that is the basis of the litigation." *Yablon v. Stroock & Stroock & Lavan Ret. Plan & Trust*, No. 01 CIV. 452, 2002 WL 1300256, *8 (S.D.N.Y. June 11, 2002) (emphasis in original) (quoting *Carey*, 201 F.3d at 48), *aff'd*, 98 F. App'x 55 (2d Cir. 2004). This ensures that evidence is preserved and disputes are promptly resolved.

In contrast, a limitations period based on any other accrual date is effectively no limitation at all. *See*, *e.g.*, *Yablon*, 2002 WL 1300256, at *8 (rejecting argument that statute of limitations did not begin to run until plaintiff had exhausted his administrative remedies as "no limitation at all" because "under plaintiff's theory, he could have initiated this litigation in the year 2050"); *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 214 (3d Cir. 2001) (noting that "[a] current claim

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[11] The parties agree that this case is governed by New York's six-year limitations period.

for an ERISA violation affecting the retirement benefit of a hypothetical twenty year-old employee . . . might accrue at age 65" and "'we are unwilling to open the door to a 48-year limitations period'") (quoting *Gluck v.Unisys Corp.*, 960 F.2d 1168, 1179-82 (3d Cir. 1992)).

This case illustrates vividly the need for clarity in the application of the test for determining when the limitations period begins. Equitable adopted the cash balance formula effective January 1, 1989 for employees and managers, "de-grandfathered" certain employees effective January 1, 1991, and made the formula applicable to agents effective January 1, 1993. And it provided advance written notice of each of these plan amendments to all participants. Nonetheless, Plaintiffs did not file suit to challenge these amendments until 2001. With greater clarity in the test, the district court could have promptly dismissed the case as barred by the statute of limitations. Instead, the district court did not determine that Plaintiffs' claims were untimely until 2006, five years after the Plaintiffs initiated this action. By that time, the court had already ruled on the merits of the Plaintiffs' claims, and the parties had spent countless hours and resources engaging in extensive discovery, briefing and even holding a trial on certain issues. Thus, even though the district court was ultimately able to conclude that the Plaintiffs' claims were untimely, Equitable was forced in the meantime to expend considerable time, effort

and money to defend itself against a suit brought long after the alleged wrongdoing.

The important policies underlying statutes of limitation fully support the decision of the court below, and make it essential that this Court affirm that decision in order to provide additional clarification as to when an ERISA claim accrues.

CONCLUSION

For the reasons stated herein, *amicus* respectfully requests that this Court affirm the judgment of the district court.

Dated: May 30, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this Brief of Amicus Curiae Chamber of Commerce of the United States of America Seeking Affirmance of the District Court complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,225 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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ANTI-VIRUS CERTIFICATION

In accordance with Local Rule 32, I certify that I have scanned for viruses the PDF version of this brief amicus curiae which was submitted in this case as an email attachment to briefs@ca2.uscourts.gov, using Norton AntiVirus, and no viruses were detected.

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May 30, 2007

CERTIFICATE OF SERVICE

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