Actuarial adjustment, lump sum or nothing?

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Delays in benefit payments

- Two questions to discuss
  1. Does a plan owe additional benefits due to a delay?
  2. If a plan pays additional benefits, should the payment be in the form of a lump sum or actuarial increase in monthly benefits?

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Different outcomes in different situations

- Non-forfeitable v. forfeitable benefits
- Suspension of benefits due to continued work v. delayed benefit application
- Pre-normal retirement age v. normal retirement age v. post age 70½
- See handout for the relevant rules applied to the different situations
- This issue should be looked at in every case where there is a delay in benefit commencement.

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Lump sum v. adjustment to monthly payments

- If we conclude that a client is entitled to compensation for a delayed benefit payment, should it be in the form of a lump sum or an annuity?
- Underlying policy for giving the increase is the risk of windfall to the plan
  - If a benefit is not paid at NRA (or other required beginning date) plan has additional earnings on the benefits not paid.
  - If benefit is paid out in the form of an annuity, it will be paid out over a shorter period of time.

Argument for lump sum

- These benefits should have already been paid.
- If the client dies tomorrow, the plan will still have incurred a windfall.
- The only way to avoid this possibility is to compensate in the form of a lump sum.
- Actuarial adjustment to the monthly benefit still results in a forfeiture.
- Conclusion
  - This argument has not been settled by regulations or the courts. I recommend asking for a lump sum in your claims and appeals to preserve the issue for litigation.

Contilli v. Teamsters, 559 F.3d 720

- Facts:
  - Plaintiff left work in October 1997
  - Applied for benefits in January 1998
  - Benefits began February 1998 at $2,623.50 per month which is what he would have received if he had began collecting benefits in November 1997.
  - Plaintiff sued arguing that an actuarial adjustment to his monthly benefit was necessary to avoid a forfeiture under:
    - ERISA §204(c)(3)
    - IRC §411(c)(3)
    - Treas. Reg. §1.411(a)-7(a)(1)(ii)

Contilli continued

- District Court holding:
  - Found that the plan had a rule requiring participants to first submit a claim for benefits before benefits would commence.
  - Such a rule is permissible under IRC §401(a)(14) and Treas. Reg. §1.401(a)-14(a)
  - Concluded there was no forfeiture because the application rule is an exception to the forfeiture rule.

Contilli continued

- 7th Circuit Court of Appeals Holding:
  - An actuarial adjustment of benefits is essential to avoid an unlawful forfeiture when benefit payments do not begin immediately after retirement.
- Rejects District court holding:
  - Requiring a claim for benefits in order to receive all vested accrued benefits places a condition on an unconditional right.

Contilli continued

- Lump sum or actuarial increase?
  - In *Contilli* the plaintiff specifically requested the actuarial increase so this question was not directly addressed.
  - But the court implies that either a lump sum or an actuarial adjustment is permissible to prevent a forefiture
    - “the payments skipped as a result of the deferral must be made up, ***either*** by payment (with interest) once the deferral ends, or by a suitable actuarial adjustment to the ongoing benefits”

Contilli a final caveat

- The plan increased pension benefits for participants retiring in January 1998 or later.
- Mr. Contilli appears to have strategically timed his benefit application to get the higher benefit amount.
- Conclusion: He can't get both. The anti-forfeiture rule in ERISA §203(a) only applies to benefits available on a person's normal retirement date. Therefore if Mr. Contilli wants the actuarial adjustment for the missed payments from November 1997-January 1998, he must accept the pension schedule in force in October 1997 when he left work plus any increases paid to people already in retirement status in January 1998.

Pender v. Bank of America (756 F. Supp.2d 694, Dec. 7, 2010)

- Cash balance plan
- Normal Retirement Age (NRA) under the plan was defined as date when participant is fully vested (5 years of service).
- Plan's definition of NRA was designed to avoid Whipsaw
  - Whipsaw is caused by pre-retirement distributions out of cash balance plans. Fixed in the Pension Protection Act of 2006.

Pender v. Bank of America- continued

- Holding beyond the actuarial adjustment issue
  - Plaintiff argued that plan's NRA definition violated ERISA §206(a) and IRC §401(a)(14), but the court ignored since the remedy would be loss of tax exempt status which no one wanted.
  - Court finds that the plan's definition of NRA is permissible under the statute.
  - Note that this case deals with benefits paid prior to May 22, 2007 when Treas. Reg. §1.401(a)-1(b)(2) was issued saying NRA can't be earlier than typical retirement age in the industry/ workforce covered by plan.

Pender v. Bank of America- plaintiff's argument

- Participants had a right to earn additional interest credits past NRA under the plan.
- Plan's calculation method places zero value on the participant's right to leave benefits with the plan.
- Actuarial adjustment argument
  - Plaintiffs argued that they incurred a benefit forfeiture because the plan failed to pay them an actuarial adjustment to account for post-NRA periods.

Pender v. Bank of America- holding

- A lump sum distribution need only include pre-NRA interest credits
- A participant's decision to defer distribution of a cash balance account beyond NRA is not a "benefit" that must be actuarially accounted for.
- Distinguishes *Contilli* because the actuarial adjustment accounted for the missed payments <u>after</u> Contilli stopped working.

Pender- take away

- The court implies that if the participants had left work, and deferred retirement, they could have been entitled to actuarial adjustments.
- Court essentially draws a distinction between working for sponsoring employer post-NRA and not working for plan sponsor post-NRA.
- The court is just trying to give this cash balance plan a way out. Which is probably why the case is unpublished.

Actuarial Increase

Mr. Barrington has argued that he is entitled to an actuarial adjustment on all accrued benefits for lost earnings starting at his 65th birthday through January 1, 2007 when he retired from employment. The statute divides the period after age 65 into two periods; the time after age 65, and the time after the April 1 following the calendar year in which the worker reaches age 70 ½. Different rules apply depending on the age of the worker, and therefore discussion of both periods of time is warranted.

Age 65 to April 1 following attainment of age 70 ½

ERISA allows qualified plans to permit forfeiture of benefits in certain circumstances. Specifically it provides that the right to accrued benefits derived from employer contributions shall not be treated as forfeitable solely because the plan provides that those benefits are "suspended" for a period where the participant remains employed by the employer sponsoring the plan.[1] The Plan contains a suspension of benefits provision providing that so long as the employee works for the company beyond age 65, benefits will be suspended and the plan will *notify* the participant of the suspension.[2] If Mr. Barrington was properly notified that his benefits were suspended, then the Plan was not required to actuarially adjust any benefits not paid during the suspension period which started at age 65 and continued to the April 1 of the calendar year following the calendar year in which Mr. Barrington attained age 70 ½.[3] Mr. Barrington was working for the sponsoring employer and therefore his work was covered by the suspension rule of the plan and ERISA. Provided he was properly notified of the suspension, the Plan was permitted to suspend his benefit payments until he actually retired, and the Plan was not required to provide an actuarial adjustment for benefits not paid during the suspension period

A suspension of benefits is a permissible action, but because it can significantly affect a participant's expected benefits; the labor regulations require that plans properly notify participants of the suspension. Plans must notify employees by either personal delivery or first class mail during the calendar month or payroll period in which the plan withholds payments of the suspension. The Plan must also notify participants of the procedures for seeking a review of the plan's decision. If the Plan's Summary Plan Description (SPD) contains the required information, then the plan must still notify the participant of the suspension, but may refer the participant to the SPD for additional information provided the employee is informed of how to obtain a copy of the SPD.[4] Mr. Barrington turned 65 on July 10, 1999 and so the Plan should have notified him in approximately August of 1999 in order to avoid crediting him with an actuarial adjustment for any benefits not paid during the suspension period. If the Plan did not properly notify Mr. Barrington that his benefits were suspended, then he would have suffered an unlawful forfeiture and the Plan would be required to remedy the forfeiture by crediting Mr.

[1] ERISA §203(a)(3)(B)(i), *See Also* 29 CFR §2530.203-3(c)(1) definition of 203(a)(3)(B) service
[2] Art. II Sec. 1, p. 4 ("Any employee who elects to continue to work full time for the corporation beyond age 65 will be notified that, while such employee has entitlement to a normal retirement benefit at age 65, such benefit is suspended and will not be paid while such employee works for the Corporation beyond age 65.")
[3] Treas. Reg. §1.401(a)(9)-6 (A-9), ("no actuarial adjustment is required to reflect the period during which a benefit is suspended as permitted under section 203(a)(3)(B) of ERISA.")
[4] 29 CFR §2530.203-3(a)(4)

Barrington with an actuarial adjustment for all benefits not paid after he attained age 65 until he actually retired and began collecting benefits.

April 1 following the attainment of age 70 ½ until actual retirement

Without regard to the suspension of benefits rules, the IRC requires that for participants who retire after the calendar year in which they attain age 70 ½, the accrued benefit shall be actuarially increased to take into account the period after age 70 ½ in which the employee was not receiving any benefits.[5] The allowance for plans to disregard any actuarial adjustment for delay in collecting retirement if the worker works past normal retirement age stops when the employee reaches the April 1 of the calendar year following the calendar year in which the employee reaches age 70 ½. The reason for this is that the IRC requires that pension benefits must be paid no later than a certain date to ensure that these benefits are paid out to the pension earner and not sheltered from taxes in perpetuity. However there is an exception to the rule for people still working in order to ease the administrative burdens associated with paying a pension to a worker while that worker continues to earn a benefit. And so all plans regardless of suspension of benefits rules and notifications sent to plan participants, must actuarially adjust to account for any benefits not paid after the April 1 following the calendar year in which the participant reaches age 70 ½. Mr. Barrington attained age 70 ½ on January 10, 2005 and so any benefits he would have received after April 1, 2006, had he not been employed must be actuarially adjusted.[6]

Amount of the actuarial increase

Treasury regulations require that the actuarial increase must be no less than
(1) the actuarial equivalent of the employee's retirement benefits that would have been payable as of the date the actuarial increase must commence;
(2) plus the actuarial equivalent of any additional benefits accrued after that date;
(3) reduced by the actuarial equivalent of any distributions made with respect to the employee's retirement benefits after that date.[7]

As established above the date that the actuarial increase must have commenced for Mr. Barrington was April 1, 2006 at which time his accrued benefit was $2,059.42 ($50.6 basic benefit rate * 40.7 credited service), and the actuarial equivalent of the benefit on December 31, 2006 was **$2,235.09** ($2,059.42 * 1.0853 actuarial factor). Mr. Barrington's accrued benefits as of December 31, 2006 was $2,138.31 ($51.65 basic benefit rate * 41.4 credited service). The difference between his accrued benefit on December 31, 2006 and April 1, 2006 is $78.89

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[5] IRC §401(a)(9)(C)(iii), ("In the case of an employee to whom clause (i)(II) applies who retires in a calendar year after the calendar year in which the employee attains age 70 ½, the employee's accrued benefit shall be actuarially increased to take into account the period after age 70 ½ in which the employee was not receiving any benefits under the plan.")
[6] Art. VII 1(e)(ii), p. 61 says that an employee attaining age 70 ½ on or after January 1, 1999 will not commence monthly receipt of accrued benefits under this plan until such employee actually retires. At the time of such employee's retirement under the plan, the employee's accrued benefit at age 70 ½ under the plan will be actuarially increased to take into account the period after age 70 ½ in which such employee was not receiving benefits under the plan.
[7] 26 CFR §1.401(a)(9)-6 (A-8)

($2,138.31 - $2,059.42) which amounts to the additional benefits accrued after April 1, 2006. The actuarial equivalent of the post-April 1, 2006 accrued benefits is **$85.62** ($78.89 * 1.0853 actuarial factor). There were no distributions made to Mr. Barrington before he retired on December 31, 2006. Therefore Mr. Barrington's final actuarially adjusted monthly retirement benefit should be **$2,320.71** ($2,235.09 + $85.62), rather than the $2,235.09 he currently receives.

The current benefit the Plan pays violates the IRC and ERISA because it fails to credit Mr. Barrington with all his benefit accruals up to the day he retired as well as proper actuarial adjustment of those benefits.

Actuarial adjustments and other calculation considerations for delayed payment of benefits

Big question: Does the plan owe additional benefits due to a delay is benefit payment?

Different rules apply to several different scenarios, but here are the basic questions you should ask:

1. When are benefits being paid?
    a. Pre-Normal retirement Age
    b. Normal Retirement age
    c. Post age 70 ½
2. Within each time period different rules apply depending on whether or not the participant is working.
    a. If the participant is working:
        i. Look at suspension of benefits rules. Different rules apply depending on the type of work, the type of plan, and the employer.
    b. If the participant is not working:
        i. Look at the date and age of the participant when he or she applied for benefits and began taking distributions.
3. Is the client entitled to any compensation for loss of benefit payments?
    a. No- valid suspension w/o any required adjustments
    b. Yes- plan must make an adjustment
        i. What form of compensation/ adjustment?
            1. Lump sum
            2. Actuarial adjustment
4. Another way to look at these situations, is to ask whether all or a portion of a benefit is forfeitable. Statutory language describes these scenarios by spelling out when a benefit is and is not forfeitable.

1. Suspension of benefits due to work

a. Pre-Normal Retirement Age-
    i. *Factual situation (ERISA §203(a)(3)(B) work):* Participant takes early retirement and then returns to work pre-NRA. In the case of a single employer plan, working for the sponsoring employer, in the case of a multiemployer plan, working in the same industry, trade or craft, and in the same geographical area covered by the plan.as defined by IRC§411(a)(3)(B) and ERISA §203(a)(3)(B) .
        1. *Basic rule:* Benefits suspended during periods of work pre-NRA falling under the ERISA §203(a)(3)(B) definition do not have to be actuarially adjusted and are therefore permanently suspended and forfeited.
            a. If you have a client whose benefits are suspended under this plan rule, s/he is NOT entitled to an actuarial adjustment for pre-NRA missed benefit payments if his or her service fell under the definition of ERISA §203(a)(3)(B) service.

            b. See Gail Webb's presentation on PC.net for more on suspension of benefits rules. (Find it in the materials for the Pensions Basics, June 2001)

    ii. *__Factual situation(non-ERISA §203(a)(3)(B) work):__* Participant takes early retirement and then begins to work pre-NRA in a job that does NOT fall under the ERISA §203(a)(3)(B) definition.
        1. *__Basic Rule:__* A plan may provide for the suspension of benefits which commence before NRA for any reemployment without regard to ERISA §203(a)(3)(B), however the suspension may not affect the retiree's entitlement to normal retirement benefits payable after attainment of NRA or the actuarial equivalent thereof. 29 CFR §2530.203-3(a)

b. __Working past Normal Retirement Age__
    i. *__Factual situation:__* Participant reaches NRA under the plan's definition but continues working.
    ii. *__Basic rule:__* ERISA §203(a) states that an employee's right to his normal retirement benefit is non-forfeitable once he has reached retirement age. And, if the benefit will be determined as an amount other than an annual benefit commencing at normal retirement age, such benefit shall be the actuarial equivalent of such benefit. Treas. Reg. §1.411(c)-(e)(1)
        1. That means that a benefit may be suspended for certain activities, but it will be actuarially increased one the benefit payments begin again to ensure the retiree has not lost an earned benefit.
    iii. BUT ask; Are the benefits being suspended because of ERISA§203(a)(3)(B) work?
        1. *__Rule:__* If the employee has engaged in ERISA §203(a)(3)(B) service, then the benefits derived from employer contributions are forfeitable and there is no actuarial increased once the benefits later commence.
        2. Regs on the issue: See also Rev. Rul. 81-140
            a. Treas. Reg. §1.411(c)-1(f)(1)- "No adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section §203(a)(3)(b) of ERISA"
            b. Treas. Reg. §1.411(c)-1(f)(2)- *Employment after retirement* "No actuarial adjustment to an accrued benefit is required on account of employment after normal retirement age. For example, if a plan with a normal retirement age of 65 provides a benefit of $400 a month payable at age 65, the same $400 benefit (with no upward adjustment) could be paid to an employee who retires at age 68."
            c. 29 CFR §2530.203-3(b)(1), "A plan may provide for the *permanent withholding*…"

c. <u>Working past age 70 ½,</u> *(or more specifically, Working past the April 1 of the calendar year following the calendar year in which the employee attains age 70 ½- (IRC §401(a)(9)(C))*
   i. *<u>Factual scenario:</u>* Participant continues working past the April 1 of the calendar year following the calendar year in which the employee attained age 71½.
   ii. *<u>Current rule:</u>* January 1, 1997- present: The required beginning date for benefits is the later of the April 1 of the calendar year following the calendar year in which the employee attains age 70 ½ or retires. (IRC §401(a)(9)(C)(i)(II)) (as amended by P.L. 104-188, §1404(a) effective for years beginning after December 31, 1996)
      1. "In the case of an employee… who retires in a calendar year after the calendar year in which the employee attains age 70 ½, the employee's accrued benefit shall be actuarially increased to take into account the period after age 70 ½ in which the employee was not receiving any benefits under the plan." (IRC §401(a)(9)(C)(iii))
         a. So when does the actuarial increase begin? On the day the employee reached age 70 ½, or the April 1 of the calendar year following the year in which the employee reached age 70 ½?
            i. It appears from the statutory language that the rule only applies once the participant hits the April 1 of the calendar year following the year he or she attained age 70 ½ but once the participant hits that marker, he or she is entitled to an actuarial adjustment back to age 70½ rather than the April 1 date.
      2. See IRS general information letter and 2008 memo on interaction between ongoing benefit accruals and actuarial adjustments to suspended benefits.
   iii. *<u>Old rule:</u>* December 31, 1996-earlier- Plans were not allow to suspend benefits for workers continuing to work past age 70 ½: The required beginning date is the April 1 of the calendar year following the calendar year in which the employee attains age 70 ½. (IRC §401(a)(9)(C))
      1. This means employees working past this required beginning date must begin receiving benefits even if they keep working.
      2. Can these plans suspend benefits for employees working past this date who failed to apply for benefits before the amendments took effect?
         a. Arguably no because the right to receive the benefit accrued under the old law, however there is no clear transition rule on point.

2. **<u>Delay in applying for benefits where participant's work is not causing a suspension.</u>**
   a. <u>Question:</u> If an employee does not apply for benefits before or at the date of eligibility must the plan pay a retroactive lump sum, or actuarially increase the benefit going forward?

b. Early retirement benefit:
    i. *Situation:* Deferred vested participant is eligible for an early retirement benefit at age 55 but does not apply until age 57. (plan's NRA is 65) Does s/he get an actuarial adjustment for the two years where/he was entitled to benefits but did not apply?
    ii. *Basic rule:* A plan may provide that a participant must file a claim for benefits before payment of benefits will commence. (IRC §401(a)(14), and Treas. Reg. §1.401(a)-14(a), AND a plan must provide that a participant's normal retirement benefit upon the attainment of normal retirement age is non-forfeitable, (ERISA §203(a)(1)), FURTHERMORE if a participant leaves work before satisfying the age requirement for the early retirement benefit, s/he is entitled upon attainment of the age requirement to the benefit s/he would receive at NRA, actuarially reduced. (ERISA §206(a))
        1. This means, the plan does not have to give an actuarial adjustment provided the benefit is at least equivalent to the benefit payable at normal retirement age.

c. Post-NRA benefit:
    i. *Factual Situation:* Participant delays retirement (i.e. applying for benefits) past NRA, but is not working
    ii. *Basic rule*: IRC§411(c)(3), *Contill*i case
        a. If an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, such benefit shall be the actuarial equivalent of the benefit commencing at normal retirement age.
            i. Normal retirement benefit must be the actuarial equivalent of the benefit at normal retirement age. Treas. Reg. §1.411(c)-1(e)(1)

d. Post age 70 ½
    i. *Factual Situation:* Participant does not apply for benefits until 80 years old. (This can happen in a lost plan situation)
    ii. *Basic Rule:* (stated above in suspension discussion) The required beginning date for benefits is the later of the April 1 of the calendar year following the calendar year in which the employee attains age 70 ½ or retires. (IRC §401(a)(9)(C)(i)(II)) (as amended by P.L. 104-188, §1404(a) effective for years beginning after December 31, 1996)
        1. This is the same outcome as the above situation where the participant delayed past NRA, however the required beginning date is a tax qualification rule, the plan MUST give an actuarial adjustment per IRC §411(c)(3).

3. Other things that will change the above conclusions. (This list is not exhaustive)
    a. If you have a plan with permitted disparity/ social security integration, there are special rules under IRC §401(l) and 26 CFR §1.401(l)

b. If the plan did not properly notify participant of a suspension of benefits, an actuarial adjustment may be owed even if ERISA §203(a)(3)(B) service. 29 CFR §2530.203-3(b)(4)
c. If participant is a 5% owner benefits must commence at the April 1 of the calendar year following the calendar year in which s/he attained age 70½ regardless of whether s/he continues to work. IRC §401(a)(9)(C)(ii)

4. Relevant cases
    a. Pender v. Bank of America Corp., 756 F. Supp. 2d 694 (Dec. 7, 2010) (W.D. North Carolina)
    b. Contilli v. Local 705 International Brotherhood of Teamsters Pension Fund, 559 F. 3d 720 (Mar. 23, 2009)(Ct. of Appeals 7th Cir.)
5. Other key citations
    a. Revenue Ruling: Suspension of Benefits Due to Reemployment, May 11, 1981 (Rev. Rul. 81-140, 1981-19 I.R.B. 6, 1981-1 C.B. 180)

United States Court of Appeals,
Seventh Circuit.
Vito CONTILLI, Plaintiff-Appellant,
v.
LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS PENSION FUND and Local 705 International Brotherhood of Teamsters Health and Welfare Fund, Defendants-Appellees.

No. 07-2673.
Argued Feb. 12, 2008.
Decided March 23, 2009.

Background: Pension plan participant sued labor union, alleging that failure either to start his pension one month after his retirement or to increase monthly benefit so that his pension had same value as if payment had begun one month after retirement violated non-forfeiture rule of Employee Retirement Income Security Act (ERISA) provision. The United States District Court for the Northern District of Illinois, James B. Zagel, J., 2007 WL 1834363, ruled in favor of union. Participant appealed.

Holding: The Court of Appeals, Easterbrook, Chief Judge, held that actuarial adjustment of benefits was essential to avoid forfeiture.

Vacated and remanded.

West Headnotes

[1] Labor and Employment 231H 553(1)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk550 Forfeiture; Loss of Eligibility or Coverage
231Hk553 By Former Employees or Retirees
231Hk553(1) k. In General. Most Cited Cases

Labor and Employment 231H 558

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk558 k. In General. Most Cited Cases

Pension plan's payment of benefits upon participant's attainment of normal retirement age but only after his application was approved, refusing either to start pension one month after his retirement or to increase monthly benefit so that his pension had same value as if payment had begun one month after retirement, constituted “forfeiture” of benefits, in violation of non-forfeiture rule of ERISA provision, since actuarial adjustment of deferred benefits was essential to avoid forfeiture. Employee Retirement Income Security Act of 1974, § 203(a), 29 U.S.C.A. § 1053(a); 26 C.F.R. § 1.411(a) et seq.

[2] Labor and Employment 231H 551

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk550 Forfeiture; Loss of Eligibility or Coverage
231Hk551 k. In General. Most Cited Cases

Requiring an application for benefits under plan governed by ERISA is a condition on the receipt of payment, and thus works a “forfeiture” of the pre-application benefits unless an actuarial adjustment is made for months that have been lost. Employee Retirement Income Security Act of 1974, § 203(a), 29 U.S.C.A. § 1053(a); 26 C.F.R. § 1.411(a) et seq.

[3] Labor and Employment 231H 553(1)

231H Labor and Employment
231HVII Pension and Benefit Plans

231HVII(G) Eligibility, Participation, and Coverage
231Hk550 Forfeiture; Loss of Eligibility or Coverage
231Hk553 By Former Employees or Retirees
231Hk553(1) k. In General. Most Cited Cases

Labor and Employment 231H 558

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk558 k. In General. Most Cited Cases

ERISA retirement plan payments skipped as a result of deferral must be made up, either by payment with interest once the deferral ends, or by a suitable actuarial adjustment to the ongoing benefits; otherwise the value of the pension is lower than one that begins on the normal retirement date, and a reduction in the total value of all monthly benefits is a kind of "forfeiture." Employee Retirement Income Security Act of 1974, § 203(a), 29 U.S.C.A. § 1053(a); 26 C.F.R. § 1.411(a) et seq.

[4] Labor and Employment 231H 554

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk554 k. Retroactive Change of Eligibility or Coverage Rules or Reduction in Benefits. Most Cited Cases

ERISA's anti-cutback rule provides that, once a participant's right to a benefit has vested, the terms of a pension plan cannot be changed to reduce the amount of that benefit. Employee Retirement Income Security Act of 1974, § 204(g), 29 U.S.C.A. § 1054(g).

[5] Labor and Employment 231H 554

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk554 k. Retroactive Change of Eligibility or Coverage Rules or Reduction in Benefits. Most Cited Cases

Anti-forfeiture rule of ERISA provision applies only to benefits available on a person's normal retirement date, according to the pension schedule in force on date of retirement. Employee Retirement Income Security Act of 1974, § 204(g), 29 U.S.C.A. § 1054(g).

[6] Labor and Employment 231H 635

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)1 In General
231Hk635 k. Exhaustion of Remedies. Most Cited Cases

Exhaustion of administrative remedies is one of ERISA's requirements. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

***721** Charles D. Boutwell (argued), Northbrook, IL, for Plaintiff-Appellant.

Catherine M. Chapman, Patrick N. Ryan (argued), Baum, Sigman, Auerbach, Neuman & Katsaros, Chicago, IL, for Defendants-Appellees.

Before EASTERBROOK, Chief Judge, and RIPPLE and ROVNER, Circuit Judges.

EASTERBROOK, Chief Judge.

"Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age". 29 U.S.C. § 1053(a). Vito Contilli turned 65, the "normal retirement age" of the Teamsters Local 705 Pension Fund, on August 30, 1995. He retired in October 1997 and applied for retirement benefits in January 1998. The Fund approved his application and in February 1998 started paying him a monthly pension of $2,623.50. It did not ***722** pay Contilli anything for the post-retirement months of November and December 1997 and January 1998, nor did it increase his monthly benefit so that the actuarial value of the pension starting in February 1998 was equivalent to that of a pension starting in November 1997.

Contilli contends in this suit under 29 U.S.C. § 1132(a)(1) that the Fund's failure either to start his pension in November 1997, or to increase the monthly benefit so that his pension has the same value as if payment had begun in November 1997, violates the non-forfeiture rule of § 1053(a), a part of the Employee Retirement Income Security Act (ERISA). The district court held, however, that a plan is entitled to adopt and enforce a rule requiring retirees to apply for their pensions. As the Fund simply applied to Contilli a generally applicable rule, no forfeiture occurred.

[1] Because a rule about the way in which pension benefits are calculated when an application is deferred affects many thousands of workers, we asked the United States to file a brief as That brief tells us that an actuarial adjustment of benefits is essential to avoid a forfeiture, when payment does not begin immediately after retirement. See 29 U.S.C. § 1054(c)(3); 26 U.S.C. § 411(c)(3); 26 C.F.R. § 1.411(a)-7(a)(1)(ii), 1.411(c)-1(e)(1). (These regulations, though issued under a tax statute, also apply to the cognate portions of ERISA as a result of a delegation from the Department of Labor to the Department of the Treasury. See 29 U.S.C. § 1202(c); 29 C.F.R. § 2530.200a-2; Reorganization Plan No. 4 of 1978, § 101, 43 Fed.Reg. 47713.) We agree with this conclusion and therefore reverse the district court's decision.

[2][3] A right is non-forfeitable under § 1053(a) if "it is an unconditional right." 26 C.F.R. § 1.411(a)-4(a). Requiring an application for benefits is a condition on the receipt of payment, and so it works a forfeiture of the pre-application benefits unless an actuarial adjustment is made for months that have been lost. See *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 428 (4th Cir.1990). ERISA and the implementing regulations recognize that payment of benefits often will be deferred; there is no problem with an application requirement. But the payments skipped as a result of the deferral must be made up, either by payment (with interest) once the deferral ends, or by a suitable actuarial adjustment to the ongoing benefits; otherwise the value of the pension is lower than one that begins on the normal retirement date, and a reduction in the total value of all monthly benefits is a kind of forfeiture. See *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir.2003); *Esden v. Bank of Boston*, 229 F.3d 154, 163 (2d Cir.2000).

There is an exception to the actuarial-adjustment requirement for a participant who puts off retirement while continuing to work. See 29 U.S.C. § 1053(a)(3)(B). So the Fund was entitled to start Contilli's pension in November 1997, when he retired, rather than in September 1995, the month after his 65th birthday; it did not need to send him catch-up checks for those two years or make any adjustment other than what the plan itself required. (The Fund is a standard defined-benefit plan. A pension depends on the number of years of credited service, so extra months of work automatically yield a higher monthly pension.) But once Contilli retired his entitlement was fixed, and the Fund's failure to pay any month's benefit worked a forfeiture of that amount.

[4] The Fund does not have an answer to this point. Instead it seems to have confused the anti-forfeiture rule in § 1053(a) with the anti-cutback rule in ***723**29 U.S.C. § 1054(g). The anti-cutback rule provides that, once a participant's right to a benefit has vested, the terms of a pension plan cannot be changed to reduce the amount of that benefit. See *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 124 S.Ct. 2230, 159 L.Ed.2d 46 (2004). The Fund observes that its rule requiring an application for pension benefits, and starting benefits only after an application has been approved, was in place before Contilli reached normal retirement age and has been applied consistently. This shows that a cutback has not occurred. But it does not address § 1053(a), which deals with entitlement to benefits under a plan's terms. The problem with this plan's terms is not that benefits have been reduced generally (they haven't) but that the application rule causes a forfeiture unless the participant applies before his "normal retirement age". The Local 705 Fund does not make that actuarial adjustment and so is out of compliance with § 1053(a).

[5] There is one potential complication. Some statements in the briefs suggest that pension benefits were increased in January 1998, but only for participants who retired in that month or later. Contilli may have timed his application strategically to take ad-

vantage of this increase. The anti-forfeiture rule in § 1053(a) applies, however, only to the benefits available on a person's normal retirement date. Thus if Contilli wants his pension benefits for November and December 1997 and January 1998 (or their actuarial equivalent in higher future pension checks), he must accept the pension schedule that was in force in October 1997, when he retired, plus any increases paid to persons who were in retirement status on January 1, 1998. He cannot have the higher pension for persons who retired in January 1998 and later, plus the extra months' benefits that he could have received by submitting his application in October 1997. If the Fund is paying Contilli at a higher monthly rate reflecting an increase in January 1998, he may already have received the actuarial equivalent (and then some) of the three missing months' benefits calculated at the rate applicable to someone who retired in 1997. The parties (and if necessary the district judge) must work this subject out on remand.

There remains a dispute about how many months' service the Fund should credit Contilli for during 1996 and 1997, when he worked sporadically. Contilli's appellate brief is hard to follow, but as best we can make out he concedes that the Fund gave him credit for all months in which, according to his employers' returns, he worked the minimum number of hours required for pension credit. The dispute concerns months in which he was on sick leave-or would have been on sick leave, had he paid the health-insurance premiums required by the Local 705 Health and Welfare Fund for those participants who are not working enough hours to receive health benefits as part of their fringe-benefits package. Time on sick leave qualifies as time on the job for pension purposes, but the Health and Welfare Fund did not certify to the Pension Fund that Contilli was on sick leave for particular hours that would (he says) have produced enough work and sick hours combined to support additional pension credit. And the reason the Health and Welfare Fund did not certify Contilli's sick-leave status is that he did not pay the premium for health coverage that the Health and Welfare Fund demanded.

Contilli concedes that he did not pay, but he says that the Health and Welfare Fund asked for more money than the legal limit for what is conventionally called “COBRA continuation coverage.” 29 U.S.C. §§ 1161-69. He now contends that, if the Health and Welfare Fund had named the right premium, he would have paid it, and the Pension Fund then would have given ***724** him additional work credits that would have increased his monthly pension.

There are two problems with this line of argument (if we have divined what Contilli is arguing). One is that an error by the Health and Welfare Fund does not support relief against the Pension Fund, a distinct entity. When the Health and Welfare Fund certifies sick leave as eligibility for work credits, it also makes to the Pension Fund a payment in lieu of the contribution that an employer would have made had the participant still been working. (We say “an” employer because this is a multi-employer fund, and the Pension Fund may collect from several employers, plus the Health and Welfare Fund, for covered hours of any given participant.) The other problem is that Contilli did not present his contention to the Health and Welfare Fund, which therefore never has had a chance to (a) collect the appropriate premium, and (b) determine if Contilli really would have paid the correct premium in 1996 and 1997, as he now says. The district court found that Contilli had not made the appropriate requests and thus had failed to exhaust his administrative remedies.

[6] Contilli's opening brief ignored this adverse ruling and argued as if both the Health and Welfare Fund and the district court had resolved the merits. His reply brief does discuss forfeiture-but too late, and that brief misses the point. The reply brief asserts that a proper notice of COBRA continuation coverage “is mandatory and cannot be waived” (Reply Br. 16). But the district court did not find that Contilli had waived the receipt of a notice specifying his right to health coverage. The court concluded that Contilli had failed to alert the Health and Welfare Fund to the supposed error in the premium and give it an opportunity to make any appropriate findings and adjust benefits accordingly. Exhaustion of administrative remedies is one of ERISA's requirements. See, e.g., *Gallegos v. Mt. Sinai Medical Center*, 210 F.3d 803 (7th Cir.2000).

The coverage argument that Contilli did preserve-by presenting it to the plans and raising it in the district court-was that some of the employers for which he worked in 1996 and 1997 did not make proper contributions to the Pension Fund, which therefore did not credit him with all of his service. To the extent that Contilli addresses exhaustion, he maintains that the plans' failure to provide him with a history of his employer contributions justified his failure to exhaust these matters with the Trustees. But a shortcoming on the matter of employer contributions does not justify the omission of a COBRA argument from the submissions to the two Funds. Arguments about employers' contributions to the Pension Fund have not been advanced on appeal. So the coverage-related arguments in the appellate brief were not preserved, and the preserved arguments have not been renewed.

Now it may be that we have not grasped all of Contilli's arguments, but we have done the best we could with a scattershot presentation. “Judges are not like pigs, hunting for truffles buried in briefs.” *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991). If there is some argument that we have missed, but that was preserved both in the administrative process and the district court, Contilli may present it on remand. If there is another appeal, each distinct argument should be highlighted and the basis for thinking it preserved for appellate resolution must be explained in detail.

The judgment is vacated, and the case is remanded for proceedings consistent with this opinion.

C.A.7 (Ill.),2009.
Contilli v. Local 705 Intern. Broth. of Teamsters Pension Fund
559 F.3d 720, 46 Employee Benefits Cas. 1590, Pens. Plan Guide (CCH) P 24004Q

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H

United States District Court,
W.D. North Carolina,
Charlotte Division.
William L. PENDER, et al., Plaintiffs,
v.
BANK OF AMERICA CORP., et al., Defendants.

No. 3:05–CV–238–MU.
Dec. 7, 2010.

Background: Plan participants brought action under Employee Retirement Income Security Act (ERISA), challenging calculation of lump sum distributions and transfers of assets from 401(k) plan to defined benefit plan. Defendants moved to dismiss.

Holdings: The District Court, Graham C. Mullen, J., held that:
(1) as a matter of first impression, "5 years of vesting service" was valid normal retirement age;
(2) complaint stated claim for elimination of protected benefits.

Motion granted in part and denied in part.

See also, 269 F.R.D. 589.

West Headnotes

[1] Labor and Employment 231H 422

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(B) Plans in General
231Hk419 Pension Plans
231Hk422 k. Defined benefit plans. Most Cited Cases

Labor and Employment 231H 423

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(B) Plans in General
231Hk419 Pension Plans
231Hk423 k. Defined contribution plans. Most Cited Cases

Under ERISA, "defined benefit plans" use preset formula to provide specific monthly benefit upon retirement and generally do not allow for increase in participant benefits beyond amount guaranteed under formula, whereas "defined contribution plans" do not guarantee specific amount upon retirement and instead give employees individual accounts to which both employer and employee can contribute, with employee's retirement benefit the account balance upon retirement. Employee Retirement Income Security Act of 1974, § 3(34, 35), 29 U.S.C.A. § 1002(34, 35).

[2] Federal Civil Procedure 170A 1829

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1829 k. Construction of pleadings. Most Cited Cases

Federal Civil Procedure 170A 1835

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1835 k. Matters deemed admitted; acceptance as true of allegations in complaint. Most Cited Cases

When court rules on motion to dismiss for failure to state a claim, all well-pleaded allegations are accepted as true, and reasonable inferences are drawn in favor of plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure
170AXI Dismissal

170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1772 k. Insufficiency in general. Most Cited Cases

To survive motion to dismiss for failure to state a claim, plaintiff must allege facts in his complaint that raise a right to relief above the speculative level. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1772 k. Insufficiency in general. Most Cited Cases

Federal Civil Procedure 170A 1835

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1835 k. Matters deemed admitted; acceptance as true of allegations in complaint. Most Cited Cases

To survive motion to dismiss for failure to state a claim, complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; claim is plausible on its face when plaintiff pleads sufficient factual content that allows court to draw reasonable inference that defendant is liable for misconduct alleged. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1772 k. Insufficiency in general. Most Cited Cases

When allegations in complaint do not raise claim of entitlement to relief, court will dismiss complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] Labor and Employment 231H 548

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk546 Vesting
231Hk548 k. Pension plans. Most Cited Cases

Defined benefit plan lawfully calculated participants' lump sum distributions by defining “normal retirement date” to include five years of vesting service; five years of vesting service was an “age” under ERISA and a valid normal retirement age (NRA) under Treasury Department regulations and rulings. 26 U.S.C.A. § 411(a)(8); Employee Retirement Income Security Act of 1974, § 3(24), 29 U.S.C.A. § 1002(24).

[7] Evidence 157 43(4)

157 Evidence
157I Judicial Notice
157k43 Judicial Proceedings and Records
157k43(4) k. Proceedings in other courts. Most Cited Cases

District court, in matter of first impression under ERISA in Fourth Circuit, would take judicial notice of filings in Seventh Circuit case presenting nearly identical facts. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[8] Internal Revenue 220 3049

220 Internal Revenue
220I Nature and Extent of Taxing Power in General
220I(F) Administrative Rules, Regulations and Decisions
220I(F)2 Construction and Operation
220k3047 Operation and Effect
220k3049 k. Revenue rulings and letter rulings. Most Cited Cases

Revenue rulings are not binding upon courts.

[9] Labor and Employment 231H ⚿560

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk560 k. Necessity of retirement; normal retirement age. Most Cited Cases

Phrase "normal retirement date" in ERISA plan was functionally equivalent to "normal retirement age" as defined by ERISA. 26 U.S.C.A. § 411(a)(8); Employee Retirement Income Security Act of 1974, § 3(24), 29 U.S.C.A. § 1002(24).

[10] Labor and Employment 231H ⚿483(2)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk479 Notice and Disclosure Requirements
231Hk483 Summary Plan Description
231Hk483(2) k. Inconsistency with plan document. Most Cited Cases

If there is conflict between complexities of ERISA plan's language and simple language of Summary Plan Description (SPD), latter will control if participant relied on SPD or was prejudiced by it. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[11] Labor and Employment 231H ⚿563(3)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk563 Amount of Benefit and Form of Distribution
231Hk563(3) k. Lump sum distribution. Most Cited Cases

ERISA plan participant's lump sum distribution need only include interest credits earned before normal retirement age (NRA). Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[12] Labor and Employment 231H ⚿563(3)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk563 Amount of Benefit and Form of Distribution
231Hk563(3) k. Lump sum distribution. Most Cited Cases

ERISA plan participant's option to keep his money in cash balance account beyond normal retirement age (NRA) is not a "benefit" that must be actuarially accounted for when calculating lump sum benefit. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[13] Labor and Employment 231H ⚿563(1)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(H) Coverage and Benefits of Particular Types of Plans
231Hk557 Pension and Retirement Plans
231Hk563 Amount of Benefit and Form of Distribution
231Hk563(1) k. In general. Most Cited Cases

Failure of defined benefit plan to actuarially adjust benefits of participants who continued to work after reaching normal retirement age (NRA) did not work a forfeiture, in violation of ERISA, since those participants continued to earn compensation and/or investment credits after reaching NRA. 26 U.S.C.A. § 411(a)(2); Employee Retirement Income Security Act of 1974, §§ 3(24), 203(a)(2), 29 U.S.C.A. §§ 1002(24), 1053(a)(2).

[14] Labor and Employment 231H ⚿423

231H Labor and Employment
231HVII Pension and Benefit Plans

231HVII(B) Plans in General
231Hk419 Pension Plans
231Hk423 k. Defined contribution plans. Most Cited Cases

Transfer of assets from 401(k) plan to defined benefit plan resulted in commingling of plans' assets, and denied plan participants their protected benefit of separate account feature for 401(k) accounts. Employee Retirement Income Security Act of 1974, § 204(g)(1), 29 U.S.C.A. § 1054(g)(1); 26 U.S.C.A. § 411(d)(6)(A); 26 C.F.R. § 1.411(d)–4.

[15] Labor and Employment 231H 493

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk487 Investments and Expenditures
231Hk493 k. Prohibited transactions; parties in interest. Most Cited Cases

Plan participants stated ERISA claim by alleging that plan fiduciaries should have ignored plan amendments transferring assets from 401(k) plan to defined benefit plan, resulting in commingling of plans' assets, and denial of plan participants' protected benefit of separate account feature for 401(k) accounts. Employee Retirement Income Security Act of 1974, § 406(a)(1)(D), (b), 29 U.S.C.A. § 1106(a)(1)(D), (b).

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AMENDED ORDER

GRAHAM C. MULLEN, District Judge.

INTRODUCTION

THIS MATTER is before the Court on Bank of America ("BoA") Defendants' Motion to Dismiss. For reasons given below, Defendants' Motion is **GRANTED** as to Count I and Count III, and **DENIED** as to Count IV.

***697 BACKGROUND**

This action arises from the organization and administration of the BAC Plan, and transactions between that plan and the BoA 401(k) Plan ("the 401(k) Plan").

I. **Retirement Plans in General**

[1] This case deals with some of the most complicated aspects of employee pension plans, which warrants a brief overview of how these plans function. The plans at issue are (I) the BAC Plan, which is a type of defined benefit plan called a cash balance plan; and (2) the BoA 401(k) Plan, which is a defined contribution plan, ERISA covers both defined benefit plans and defined contribution plans, Defined benefit plans use a preset formula to provide a specific monthly benefit upon retirement. These plans generally do not allow for an increase in participant benefits beyond the amount guaranteed under the formula. Defined contribution plans, on the other hand, do not guarantee a specific amount upon retirement. Instead employees are given individual accounts to which both the employer and employee can contribute. Under this plan, an employee's retirement benefit is the account balance upon retirement. A 401(k) plan is a species of a defined contribution plan.

In most 401(k) plans, each participant can invest his individual account in investment options provided under the plan. The participant typically bears all the investment risk: if the participant invests poorly, the full account balance can be lost. Although a 401(k) carries this risk, each individual account holder is afforded an important protection: the money in a participant's 401(k) account is his own money, and unlike a defined benefit "account," cannot be squandered by the plan administrators.

Defined benefit plans come in various forms including, cash balance plans—often referred to as a hybrid plan because it has aspects of defined-benefit and defined contribution plans. Like a defined-contribution plan, a cash balance participant has an individual account to which the employer contributes funds. The participant earns interest on that account, or in some cases, the participant can invest the funds in a limited number of financial instruments. But there is a key difference: the participant's account is virtual. In reality, the employer pools the contributed money and invests that pool as it sees fit, while crediting the accounts based on the participant's virtual-investment choices or some preset interest formula. As noted above, because a participant's account is virtual, there is no separate account protection. On the other hand, the employer shelters any investments risk; thus, no matter the poverty of the participant's virtual-investment choices, the participant's account balance can never drop below the amount contributed by the employer. A cash balance plan must comply with ERISA's standards for defined benefit plans. Upon retirement, the benefit is paid as a lump-sum distribution or an annuity.

II. **The BoA Plans**

The BAC Plan is a successor in interest to the NationsBank Pension Plan and the BankAmerica Pension Cash Balance Plan, which merged in 1998. The BAC Plan is a cash balance plan that was originally formulated in 1998 by NationsBank, under the guidance of Defendant PwC. The BAC Plan, and its predecessors, were or are "defined benefit plan[s]" under ERISA §§ 3(2)(A), 3(3), and 3(35) (29 U.S.C. §§ 1002(2)(A), 1002(3), 1002(35)). For the sake of convenience, the separate plans will generally be described as "the Plan" or the "BAC Plan."

Under the BAC Plan, a participant is given a virtual account, which is credited ***698** monthly with compensation and investment credits. The compensation credits are based on a percentage of the employee's salary, and the investment credits are based on a limited number of investment options, which are identical to the options available under the Bank's 401(k) plan. Like all cash balance plans, the account balance can never be less than the sum of the opening balance and all compensation credits. The accounts are not however protected from inflation; the actual value of the accounts can decrease.

In addition to the BAC Plan, both NationsBank and Bank of America have or had 401(k) Plans. These 401(k) plans will be referred to as "the 401(k) Plan(s)" or "the 401(k)." Participants in these 401(k)s were given the option of transferring their accounts to the NationsBank Cash Balance Plan and the Bank of America Pension Plan; and thousands of participants elected to do so. On July 1, 1998, $1.4 billion was transferred from the NationsBank 401(k) Plan to the NationsBank Cash Balance Plan; and on August 4, 2000, $1.3 billion was transferred from the Bank of America 401(k) Plan to the Bank of America Pension Plan. Both Plaintiffs and the IRS claim that these transfers violated ERISA.

III. **The Complaint**

The Third Amended Complaint contains seventeen pages of extensive factual allegations and then asserts four counts as the bases for relief.

a. *Count I: Unlawful Lump Sum Benefit Calculation*

Count I challenges the Plan's definition of "normal retirement date" FN1 and the Plan's subsequent avoidance of the "whipsaw effect" when calculating a participant's lump-sum benefit. Under ERISA, a vested plan participant "has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." ERISA § 203(a)(2) (29 U.S.C. § 1053(a)(2), 26 U.S.C. § 411(a)(2)). If a defined benefit plan participant seeks his accrued benefit before reaching normal retirement age, the participant can receive a lump-sum payment that is calculated by "projecting the participant's hypothetical account balance to normal retirement age using the plan's interest or investment crediting rate, then converting the projected account balance to a life annuity using reasonable actuarial factors expressed under the terms of the plan," and finally, discounting the value of the annuity back to the time when the lump-sum payment is received, (3d Am. Comp., Doc. 145 at ¶ 60) (citing ERISA § 204(c)(3)) (29 U.S.C. § 1054(c)(3), 26 U.S.C. § 411(c)(3)); ERISA § 205(g) (29 U.S.C. § 1055(g), 26 U.S.C. § 417(e)). This calculation can lead to a "whipsaw effect" whereby the lump-sum is greater than the current account balance because the projected growth rate under the plan outpaces the discount rate used to express the accrued benefit in today's dollars.

FN1. The Plan uses the phrase "normal retirement date" to ostensibly denote a "normal retirement age." (Def. Mem., Doc. 222, Ex. 2 at 12.)

Plaintiffs argue that the Plan unlawfully avoided the whipsaw effect by attempting to set a normal retirement age that coincided with a participant vesting under the Plan—generally occurring before age 65—rather than using age 65, which *should* be the Plan's normal retirement age under ERISA.FN2

FN2. The Plan defines "normal retirement date" as "the first day of the calendar month following the earlier of (i) the date the Participant attains age sixty-five (65) or (ii) the date the Participant completes sixty (60) months of Vesting Service." (3d Am. Comp., Doc. 145, Ex. 2 at 12.)

699 b.** ***Count Two: Age Discrimination

Count Two alleges age discrimination and has already been dismissed.

c. ***Count Three: Violation of Anti–Backloading Rules***

Count Three alleges that the Plan violates ERISA's anti-backloading rules. ERISA requires that "benefits accrue roughly pro rata over the course of an employee's career, rather than being heavily back weighted." (3d Am. Comp., Doc. 145 at ¶ 80) (citing ERISA § 204(b)(1)(A)–(C) (29 U.S.C. § 1054(b)(1)(A)–(C), 26 U.S.C. § 411(b)(1)(A)–(C))). The anti-backloading rules, however, no longer apply once a participant reaches normal retirement age. Plaintiffs argue that the Plan often results in an unlawfully premature retirement age for its participants, and then the Plan provides outsized benefits after reaching retirement age.

d. ***Count Four: Elimination of Protected Benefit***

Count Four alleges that the transfer of assets from the 401(k) Plans to the BAC Plan, and its precursors, unlawfully eliminated the 401(k) Plans' separate account benefit. ERISA provides that a participant's accrued benefit "may not be decreased by an amendment of the plan except as otherwise specifically provided in ERISA or regulations." (3d Am. Comp., Doc. 145 at ¶ 85) (citing ERISA § 204(g)(1) (29 U.S.C. § 1054(g)(1), 26 U.S.C. § 411(d)(6)(A))). Plaintiffs allege that there are no statutes or regulations that allow the separate account benefit to be eliminated. (3d Am. Comp., Doc. 145 at ¶ 85 (citing § 204(g)(1) (29 U.S.C. § 1054(g)(1), 26 U.S.C. § 411(d)(6)(1)); 26 C.F.R. § 1.411(d)–4)). Plaintiffs further allege the 401(k) Plans' fiduciaries breached their fiduciary duty by implementing the transfers. Finally, Plaintiffs allege that the transfers by the Plans fiduciaries were a "prohibited transaction" under ERISA §§ 406(a)(1)(D) and 406(b) (29 U.S.C. §§ 1106(a)(1)(D) and 1106(b)).

IV. **BoA's Motion to Dismiss**

Defendant BoA filed an initial Motion to Dismiss or Strike the Third Amended Complaint. BoA's initial Motion focused on Counts II and IV, but also sought dismissal of all counts for lack of exhaustion or remedy. Defendant BoA's subsequent Motion to Dismiss directly addressed the merits of Counts I and III. The Court has already dismissed Count II and Defendant's exhaustion argument has already been disposed of.

DISCUSSION

I. **Legal Standards**

[2][3][4][5] When a court rules on a motion to dismiss for failure to state a claim, all well-pleaded allegations are accepted as true, and reasonable inferences are drawn in favor of the plaintiff. *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999). A plaintiff must allege facts in his complaint that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In *Ashcroft v. Iqbal,* ––– U.S. ––––, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), the Court held that "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (citing *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955). A claim is plausible on its face "when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft,* 129 S.Ct. at 1949 ***700** When the allegations in a complaint do not "raise a claim of entitlement to relief," the court will dismiss the complaint. *Twombly,* 550 U.S. at 554–56, 127 S.Ct. 1955.

Under Federal Rule of Civil Procedure 12(f), "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

II. **Count I: The Plan Lawfully Calculated Participants' Lump Sum Distributions**

This Court is faced either with a labyrinthian case—hinging upon countless statutes, regulations, and revenue rulings—or a simple matter of textual, statutory interpretation. Despite Plaintiffs' strong arguments that tap into what might be considered ER-

ISA's maze, the crux of this count is a simple question: under ERISA § 3(24), is "5 years of vesting service" a normal retirement age? The answer is, yes. The Plan—using its valid NRA—lawfully calculated the participants' lump sum distributions.

a. ***5 Years of Vesting Service is a Valid Normal Retirement Age***

[6] Under ERISA, 5 years of vesting service is a valid normal retirement age. ERISA § 3(24) defines "normal retirement age":

The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

ERISA § 3(24) (29 U.S.C. § 1002(24), 26 U.S.C. § 411(a)(8)). Bank of America argues that § 3(24) allows a plan to set an NRA as it chooses; or to paraphrase § 3(24)(A), a plan's NRA is whatever the plan says it is. Plaintiffs besiege this simple proposition with a multi-prong attack: (1) five years of vesting service is not an "age," (2) five years of vesting service is not the age at which banking employees normally retire, and (3) five years of vesting service is not a valid NRA under Treasury Department regulations and rulings.

[7] First, five years of vesting service is an "age." *Fry v. Exelon,* 571 F.3d 644, 647 (7th Cir.2009). The meaning of "age" in § 3(24) is a matter of first impression in the Fourth Circuit, but this Court is guided by the Seventh Circuit's decision in *Fry v. Exelon*—a case presenting nearly identical facts to the matter at hand.[FN3] The Exelon plan defined NRA, in part, as "5 years of vesting service." The court in *Fry* held that a participant's age when beginning work, combined with an additional unit of time, is a valid "age." BoA's Plan—like the Exelon plan—defines age, ***701** in part, as "5 years of vesting service." This is a valid "age" for the purposes of ERISA § 3(24). *See* *Fry,* 571 F.3d at 647.

FN3. The Court takes judicial notice of the filings in *Exelon,* which contain the Exelon plan provisions. *See* *Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec.,* 510 F.3d 1, 8 n. 1 (1st Cir.2007) (taking judicial notice of records of immigration proceedings); *Levy v. Ohl,* 477 F.3d 988, 991 (8th Cir.2007) (taking judicial notice of records of Missouri court). Exelon's plan set NRA as "the earlier of (a) the date the Participant completes five years of Vesting Service and (b) the later of (i) the Participant's 65th birthday, and (ii) the fifth anniversary of the date the Participant commenced participation in the Plan." By way of comparison, BoA's sets its NRA as "the first day of the calendar month following the earlier of (i) the date the Participants attains age sixty-five (65) or (ii) the date the Participant completes sixty (60) months of Vesting Service." The Court takes judicial notice of the terms of the plan.

Second, NRA is not based on the age upon which employees normally retire. ERISA does not require "a pension plan's retirement age to track the actuarial tables." *Id.* Plaintiffs' argument to the contrary relies on broad proclamations about the policy behind ERISA and the relationships between various ERISA provisions. Plaintiffs cannot, however, cite a statute, regulation, or revenue ruling that tethered NRA to the time that employees normally retire.

Third, "5 years of vesting service" is a valid NRA under Treasury Department regulations and rulings. *Id.* Plaintiffs' main arguments are that 72 Fed. Reg. 28604 retroactively invalidated the Plan's NRA, and that Treasury regulations and revenue rulings required the Plan to specify an age. This Court disagrees.

Treasury Regulation 72 Fed. Reg. 28604 has no retroactive effect and therefore is not applicable here. The regulation provides that "the normal retirement age under a plan be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed" and it was explicitly made effective as of May 22, 2007. 72 Fed. Reg.

28604, 28605–06; *see also* *Fry*, 571 F.3d at 648. The relevant period in this matter pre-dates May 22, 2007; 72 Fed. Reg. 28604 cannot apply.

Plaintiffs then argue that the Treasury Department "interpreted the governing statutory provisions as prohibiting a pension plan sponsor from defining 'normal retirement age under a plan' as anything other than ***a specified 'age.'*** " (Pl. Resp. Doc. 224 at 14) (citing 26 C.F.R. § 1.411(a)–7(b)(1)(i)) (emphasis in original.) Section 1.411(a)–7(b)(1)(i) does not define "specified age." Plaintiffs assume a specified age must be a number, rather than a method for arriving at a number. Yet neither the regulation *nor the statute* supports this leap. Section § 3(24) itself defines NRA in terms of "age," "time," or "anniversary"; nothing in the statute suggests that these three units of time are exhaustive. If § 1.411(a)–7(b)(1)(i) truly does mandate that all NRAs must be a defined, specific number, the regulation stands in stark contradistinction to the statute—a result that *Chevron* could not bear. *See* *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (holding that when Congress's statutory intent is clear, a court shall not look to regulations; however, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

[8] Plaintiffs also turn to IRS Revenue Ruling 78–120, which uses the "*specified age* " language in 26 C.F.R. § 1.411(a)–7(b)(1)(i). "Although revenue rulings are not binding upon courts," Plaintiffs argument will be addressed. *See* *Disabled Am. Veterans v. Commissioner*, 942 F.2d 309, 317 (6th Cir.1991). The gloss added by this revenue ruling does not favor the Plaintiff; quite the opposite, the ruling states that "a plan may specify any age that is less than 65 as the normal retirement age." Rev. Rul. 78–120. Plaintiffs argue that 78–120 should be limited to its facts, which do not present a plan using an NRA of 5 years of vesting service. Plaintiffs further contend that if 78–120 truly allowed a plan to specify *any* age as an NRA, 72 Fed. Reg. 28604 would have needed to explicitly revoke 78–120 rather than mention 78–120 as background. This is not a reasonable assertion. The preamble to the 2007 amendments briefly referenced***702** 78–120 in a passage that could best summed up as "that was then, this is now." *See* 72 Fed. Reg. 28604 ("Rev. Rul. 71–147 was modified by Rev. Rul. 78–120 (1978–1 CB 117).... Under Rev. Rul. 78–120, for purposes of section 411, a pension plan is permitted to have a normal retirement age lower than age 65, regardless of the age at which employees customarily retire in the particular company or industry.").

Finally, a number of courts have recognized that an NRA can be an age less than 65. *See* *Janowski v. Int'l Bhd. of Teamsters, Local No. 710 Pension Fund*, 673 F.2d 931, 937 (7th Cir.1982) (noting that "the statute authorized any normal retirement age," subject to a ceiling of age 65), *vacated on other grounds*, 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983); *Geib v. N.Y. State Teamsters Conference Pension and Ret. Fund*, 758 F.2d 973, 976 (3d Cir.1985) ("The statute clearly permits the use of a normal retirement age less than 65.").

b. ***The Plan's NRA is the Earlier of the Date a Participant Turns 65 or Attains 5 Years of Vesting Service***

Section § 2.1(c)(35) of the Plan sets "Normal Retirement Date" as the earlier of the date a participant turns 65 or attains 5 years of vesting service; this is indeed the Plan's NRA. Plaintiffs argue that the Plan failed to set an NRA because (1) section § 2.1(c)(35) of the Plan defines a "normal retirement date" rather than an "age"; (2) the Plan would violate numerous statutes and regulations if 5 years of vesting service is used as an NRA; and (3) BoA's Summary Plan Description ("SPD") failed to inform participants that the NRA was based, in part, on 5 years of vesting service.

[9] First, although the Plan uses the term "normal retirement date" rather than "age," both this Court and Plaintiffs clearly understand that BoA defined a "normal retirement age." In *Adams v. La.-Pac. Corp.*, 177 Fed.Appx. 335 (4th Cir.2006), the court of appeals recognized that a "normal retirement date" is functionally equivalent to a "normal retirement age," *see* *id.* at 338–39. Plaintiffs merely identify a distinction without a difference, and this case will not hinge on magic words.

Second, Plaintiffs argue the Plan's NRA puts the Plan on a collision course with ERISA § 206(a), 26 U.S.C. § 401(a)(14), and 29 C.F.R. § 2530.203–3, which might cause the Plan to lose its tax exempt status. Plaintiffs assume that BoA must have intended an NRA of 65 lest the Plan invite drastic consequences. BoA might very well compromise its tax status by using 5 years of vesting service as it NRA, but that is an issue for another court and another plaintiff at another time.

[10] Third, Plaintiffs' SPD argument fails because they have not alleged actual prejudice. In the Fourth Circuit, " 'if there [is] a conflict between the complexities of the plan's language and the simple language of the [SPD], the latter [will] control if the participant relied on the SPD or was prejudiced by it.' " *Martin v. Blue Cross & Blue Shield of Virginia, Inc.*, 115 F.3d 1201, 1204 (4th Cir.1997) (quoting *Hendricks v. Cent. Reserve Life Ins. Co.*, 39 F.3d 507, 511 (4th Cir., 1994)) *abrogated on other grounds by Williams v. Metropolitan Life Ins. Co.*, 609 F.3d 622 (4th Cir.2010). Here, Plaintiffs fail to allege they read the SPD and subsequently relied on it to their prejudice.

c. ***The Plan Accurately Calculates Participants' Lump Sum Distributions***

The Plan accurately calculates its participants' lump sum distributions. Plaintiffs, however, argue the Plan erroneously calculated distributions because they failed to ***703** include (1) a participant's right to interest credits that could have been earned until age 65, and (2) "the value of [a participant's] right to leave his account balance in the Plan even after attaining normal retirement age and continue to receive investment credits indefinitely." (Am. Comp. ¶ 61.) Plaintiffs, during oral arguments, also put forth an incipient theory based on *Contilli v. Local 705 Intern. Broth. of Teamsters Pension Fund*, 559 F.3d 720 (7th Cir.2009): they appear to argue their benefits were forfeited because the Plan failed to actuarially account for post-NRA periods when participants were not receiving benefit payments.

[11] First, a participant's lump sum distribution need only include pre-NRA interest credits—which the Plan does. *Fry*, 571 F.3d at 646.

[12] Second, a participant's option to keep his money in a cash balance account beyond NRA is not a "benefit" that must be actuarially accounted for when calculating a lump sum benefit. *Laurent v. PriceWaterhouseCoopers LLP*, 448 F.Supp.2d 537, 549–50 (S.D.N.Y.2006).

[13] Finally, BoA did not breach ERISA's anti-forfeiture rules by failing to actuarially adjust participants' benefits to account for post-NRA periods when benefits were not being paid. Regardless of whether this is a new claim that has not been sufficiently pleaded, Plaintiffs misapprehend *Contilli*—the case on which they rely. In *Contilli*, the plaintiff reached his normal retirement age (65) and then sought retirement payments *after* working two more years; those payments were made several months after he stopped working and the plan failed to actuarially adjust the plaintiffs benefits to account for that gap *after he stopped working. Contilli*, 559 F.3d at 721–22. This resulted in a forfeiture. *Id.* at 722. Here, Plan participants continue to earn compensation and/or investment credits after reaching NRA; this provided for the actuarial adjustments that *Contilli* would seem to require.

III. **Count III: The Plan Does not Violate ERISA's Anti-backloading Provisions**

Plaintiffs concede that Count III fails if the Plan's NRA is valid; this contingency has come to pass. (Hr'g Tr. Doc. 238 at 3 ("On count three, however, I did want to say that if the normal retirement age is valid on count three, we—as far as I'm aware—we do not have a theory on count three that withstands their theory of NRA validity."); *Pothier, et al. v. Bank of America Corp., et al*, No. 04–458–GPM, Doc. 100 at 11 n. 15.)

IV. **Count IV: Plaintiffs State a Claim for Elimination of Protected Benefits**

In Count Four, Plaintiffs state a claim when they allege (1) BoA unlawfully eliminated ("cutback") the separate account benefit afforded by the 401(k) Plans by transferring approximately $3 billion in assets from the 401(k) Plan to the BAC Plan, (2) BoA breached its fiduciary duties by failing to ignore the Plan amendments that effected the transfer, and (3) the asset transfers were "prohibited transactions in which the Plans' fiduciaries and the Bank unlawfully participated." (Pl. Mem. Doc. 157 at 23). Before discussing the validity of Plaintiffs' claim, the Court notes that the IRS found that the 401(k) transfers violated ERISA. (Def. Mem., Doc. 157, Ex. 1 at 2.) The IRS's actions support the Plaintiffs' claims under Count Four.

[14] Turning to Plaintiffs' first argument, ERISA, as implemented by Treasury Regulation § 1.411(d)–

4, Q & A–3(a)(2), provides that the 401(k) separate account feature is a protected benefit that cannot be eliminated. ERISA § 204(g)(1) ***704** (29 U.S.C. § 1054(g)(1), 26 U.S.C. § 411(d)(6)(A)); 26 C.F.R. § 1.411(d)–4, Q & A–3(a)(2). Here, BoA and the Plan fiduciaries implemented a $3 billion asset transfer from the 401(k) Plan to the BAC Plan whereby the Plans' assets were commingled. As the IRS has found, participants thus lost their separate accounts—a protected benefit under ERISA.

[15] Second, ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants" and in a manner consistent with ERISA's provisions. ERISA §§ 404(a)(1)(A), (a)(1)(B) and (a)(1)(D) (29 U.S.C. §§ 1104(a)(1)(A), (a)(1)(B), and (a)(1)(D)). A fiduciary has a duty to ignore a plan term that is inconsistent with ERISA if implementing that term is contrary to a participant's interest. ERISA § 404(a)(1)(D) (29 U.S.C. § 1104(a)(1)(A)(D)); *Cement & Concrete Workers Council Pension Fund v. Ulico Cas. Co.,* 387 F.Supp.2d 175, 185 (E.D.N.Y.2005) ("Of course, a trustee may not hide behind the terms of the trust documents to protect himself from liability where there is an 'inherent inconsistency' between a provision in a plan document and a fiduciary duty expressed elsewhere in ERISA.' ") (quoting *Dardaganis v. Grace Capital Inc.,* 889 F.2d 1237, 1242 (2d Cir.1989)); *accord* *Cent. States, Se. and Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 568, 105 S.Ct. 2833, 86 L.Ed.2d 447 ("[T]rust documents cannot excuse trustees from their duties under ERISA."); *Agway, Inc. Emps.' 401(k) Thrift Inv. Plan v. Magnuson,* 2006 U.S. Dist. LEXIS 74670 (N.D.N.Y. July 13, 2006) ("Nothing in ERISA, including section 404(a)(1)(D), requires blind compliance with plan terms which would require a fiduciary to engage in imprudent conduct.").

Here, Plaintiffs state a valid claim by alleging that Plan fiduciaries failed to ignore the terms of the Plans that effected an unlawful cutback. It is also alleged that the Plans' fiduciaries "had a duty to communicate with the Trustee and other Defendant fiduciaries honestly, and to otherwise act with the best interests of participants in mind, which they failed to do." The Plans' fiduciaries thereby knowingly participated in, enabled, and/or failed to make reasonable efforts to remedy the Trustee's and other Defendant fiduciaries' breach (the asset transfer). Again, the IRS's findings buttress this claim.

BoA argues that because the 401(k) transfers were made pursuant to amendments to the Plan, they are not fiduciary acts, but "settlor" acts that cannot form the basis of a breach of fiduciary duty claim. As BoA states, "the Supreme Court and the Fourth Circuit have consistently held that the design, amendment, and termination of a benefit plan are 'settlor' functions that cannot form the basis of a breach of fiduciary duty claim." (Def. Mem. Doc. 151 at 15) (citing *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 444–45, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *Lockheed Corp. v. Spink,* 517 U.S. 882, 890, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996)). Plaintiffs do not, however, take issue with the acts of designing and amending the Plans—Defendants' implementation of the transfers is the seat of potential liability.

BoA also counters that a fiduciary does not breach his duty by implementing Plan provisions that violate ERISA. BoA stretches *Ulico* beyond its scope when making this argument. *Ulico* simply states that a Plan fiduciary does not *necessarily* breach his duty by complying with a plan provision that he knows violates ERISA. *Ulico,* 387 F.Supp.2d at 185. Here, however, the Plans' fiduciaries might have breached their duties because implementing the transfers deprived participants of an important protection under ERISA—the separate account feature.

***705** Third, Plaintiffs state a valid claim that BoA—as Plan fiduciary—and other Plan fiduciaries engaged in a "prohibited transaction" when assets were transferred from the 401(k) Plans to the BAC Plan. Under ERISA §§ 406(a)(1)(D) and 406(b) (29 U.S.C. §§ 1106(a)(1)(D) and 1106(b)), a plan fiduciary engages in a "prohibited transaction" when, at the expense of plan participants, he uses 401(k) assets for his own or a third party's gain. Here, BoA commingled the 401(k) assets with the BAC Plan assets and then invested those assets with the hope of offsetting the Bank's obligation to fund the BAC Plan. In turn, when the 401(k) assets were transferred and commingled, 401(k) Plan participants lost their separate account protections. The Plan fiduciaries thus allowed 401(k) Plan assets to be used for the Bank's benefit and the expense of the 401(k) participants. Plaintiffs support their argument with ERISA's language and not with case law. Given the relatively novel nature of the Plans and the transfers, the absence of case law is not surprising. Based on the language of ERISA §§ 406(a)(1)(D) and 406(b), Plaintiffs' claim is at. least plausible on its face.

V. **Defendant's Arguments Concerning Remedies Will Not Be Heard at This Time**

BoA argues that portions of the remedies section of the Third Amended Complaint should be dismissed or stricken. The Court will not address remedies at this point.

CONCLUSION

Defendants' Motion to Dismiss is hereby **GRANTED** as to Count I and Count III, and **DENIED** as to Count IV.

SO ORDERED.

W.D.N.C.,2010.
Pender v. Bank of America Corp.
756 F.Supp.2d 694

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C

Rev. Rul. 81-140, 1981-19 I.R.B. 6, 1981-1 C.B. 180, 1981 WL 165910 (IRS RRU)

Internal Revenue Service (I.R.S.)

Revenue Ruling
SUSPENSION OF BENEFITS DUE TO REEMPLOYMENT

Published: May 11, 1981

26 CFR 1.401(a)-14: Commencement of benefits under qualified trusts

(Also Section 411; 1.411(a)-4.)

Suspension of benefits due to reemployment. Four examples illustrate whether the requirements of sections 401(a)(14) and 411(a)(3)(B) of the Code are satisfied under defined benefit plan provisions that suspend benefits due to reemployment of the participant.

Advice has been requested as to whether a defined benefit plan in each of the situations described below satisfies sections 401(a)(14) and 411(a) of the Internal Revenue Code. In the absence of special circumstances, these sections require the commencement and uninterrupted continuation of payment of pension benefits to a participant of a pension plan who has attained normal retirement age and terminated service with the employer. This ruling clarifies the circumstances under which these sections would permit a plan to withhold pension payments from such a participant due to the participant's employment.

Situation 1:
Employer M maintains a defined benefit pension plan with a normal retirement age of 65. The plan provides for a life annuity benefit of $*x* per month payable at attainment of age 65, except in the case of a participant who continues in or returns to employment with M. During any month that a participant works for M after normal retirement age, regardless of whether there is section 203(a)(3)(B) service during that month, the $*x* will not be paid. When employment ceases, benefits of $*x* per month will resume without any actuarial adjustment for either the unpaid amounts or later payments. For purposes of this ruling, the term 'section 203(a)(3)(B) service' has the same meaning as that term is defined in section 2530.203-3(c) of the Department of Labor regulations, promulgated under section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 1974-3 C.B. 1. In general, the term is used to describe an employee's service on account of which an employee benefit plan may suspend the payment of pension benefits without resulting in a prohibited forfeiture under the minimum vesting standards.

Situation 2:
Employer N maintains a defined benefit pension plan with a normal retirement age of 65. The plan provides for a life annuity benefit of $*y* per month payable at attainment of age 65, but also provides for a five-year suspension of benefit payments in the event that a participant is employed for one month in section 203(a)(3)(B) service regardless of the period for which such service continues. The plan also provides that all missed payments will be returned to the participant with interest (or to the participant's beneficiaries in the event of death of the participant) at the end of the five-year period, and that benefits of $*y* per month will resume at that time.

Situation 3:
Assume the same facts as in Situation 2, except that benefit payments are only suspended during months when the participant is employed in section 203(a)(3)(B) service (whether or not such service is with an employer who maintains the plan).

Situation 4:

Employer O maintains a defined benefit pension plan with a normal retirement age of 65. The plan provides for a life annuity benefit of $*z* per month payable at attainment of age 65, but also provides for the suspension of benefit payments for any month that a participant is employed with an employer not maintaining the plan, regardless of whether there is section

203(a)(3)(B) service during that month.

Section 401(a)(14) of the Code and section 1.401(a)-14(a) of the Income Tax Regulations provide that, unless the participant otherwise elects, the payment of benefits under a plan to the participant must begin not later than the 60th day after the latest of the close of the plan year in which-

(A) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan;

(B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan; or

(C) the participant terminates his service with the employer.

Although section 401(a)(14) authorizes, in some cases, a delay in the commencement of benefits beyond the time a participant attains normal retirement age, that section does not authorize the forfeiture of such delayed benefits.

Section 411(a) of the Code and sections 1.411(a)-1 and 1.411(a)-4(a) of the regulations require that certain rights in an employee's accrued benefit be nonforfeitable. Once such an employee's right becomes nonforfeitable (i.e., it is an unconditional right), then, generally, it may not be forfeited.

Section 411(a)(3) of the Code provides for limited exceptions to the requirement of nonforfeitability. One such exception is provided for under section 411(a)(3)(B) (section 203(a)(3)(B) is the comparable Department of Labor provision under Title 1 of ERISA) and section 1.411(a)-4(b)(2) of the regulations. The exception in section 411(a)(3)(B) provides that, even though benefits that must otherwise be nonforfeitable are not paid to an employee, this failure to pay will not violate section 411(a) if it occurs during a period that the employee is employed as described in section 411(a)(3)(B).

Section 1.411(a)-4(b)(2) of the regulations provides that the regulations prescribed by the Secretary of Labor under 29 CFR Part 2530 apply to section 411(a)(3)(B). That Department of Labor regulation is found at 29 CFR section 2530.203-3. In general, these Department of Labor regulations provide that a participant's benefit may be forfeited during any month of section 203(a)(3)(B) service.

Section 1.411(a)-4(a) of the regulations provides that certain adjustments to plan benefits, such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable in violation of the minimum vesting requirements of section 411(a) of the Code.

Section 411(c)(3) of the Code and section 1.411(c)-1(e) of the regulations provide that if an employee's accrued benefit in a defined benefit plan is to be determined as an amount other than an annual benefit commencing at normal retirement age, such benefit shall be the actuarial equivalent of the annual benefit at normal retirement age.

Section 1.411(c)-1(f)(1) of the regulations provides that no actuarial adjustment of an employee's accrued benefit is required on account of a suspension of benefits permissible under section 203(a)(3)(B) of ERISA. Section 1.411(c)-1(f)(2) of the regulations provides that no actuarial adjustment of an employee's accrued benefit is required on account of an employee's working after normal retirement age. The effect of these two provisions is that, when an individual is employed after retirement age in section 203(a)(3)(B) service, the nonforfeitability requirements are not violated even though actuarial adjustments to the employee's accrued benefit in a defined benefit plan are not made.

The statutory requirement of section 401(a)(14) of the Code that payments commence includes an implicit requirement that such payment, once begun, must continue (absent receipt by the participant of a total distribution of accrued benefits) unless the individual is reemployed with an employer maintaining the plan. Thus, except where the individual is reemployed with such an employer, the suspension of a benefit required to be nonforfeitable violates section 401(a)(14). This is true regardless of whether a forfeiture occurs under section 411(a) because of such suspension. However, a suspension of benefits will not violate section 401(a)(14) to the extent a benefit could be forfeited in accordance with section 411(a)(3)(B) of the Code (203(a)(3)(B) of ERISA) (even though the suspension occurs while the individual is not employed by an employer maintaining the plan).

In Situation 1 above, the benefit of $*x* is not paid during any month when a participant is employed with M, an employer maintaining the plan, after normal retirement age. Accordingly, this provision does not violate section 401(a)(14). However, because the benefit that commence after separation are not adjusted to reflect the value of the unpaid benefits, there is a forfeiture of benefits. Because the forfeited benefit must be nonforfeitable in order to satisfy section 411(a) of the Code, and the forfeiture is not permitted by section 411(a)(3)(B), this plan does not satisfy section 411(a). To the extent that a forfeiture is not permitted under section 411(a)(3)(B) with respect to section 203(a)(3)(B) service, the provisions of section 1.411(c)-1(f) of the regulations permitting a plan not to make actuarial adjustments in certain situations without violating the nonforfeitability rules do not apply.

In Situation 2, the benefits not paid during continued employment or reemployment are used to provide an extra single sum payment at the end of the suspension period. This amount reflects the value of the unpaid benefits. Thus, the benefits are not forfeited, and this plan provision does not cause a violation of section 411(a) of the Code.

However, when a participant has been reemployed after age 65 and later terminates service with the employer, benefit payments will not recommence until the 5-year suspension period has ended. This time of resumption of benefits may be later than the time required by section 401(a)(14) of the Code. Therefore, because the suspended benefits cannot be forfeited under section 411(a)(3)(B) (that is, such suspension occurs regardless of whether the individual is actually employed in section 203(a)(3)(B) service), this plan provision fails to satisfy section 401(a)(14).

In Situation 3, as in Situation 2, there is no forfeiture of benefits. Also, the plan does provide for the commencement of and continuation of benefits as required by section 401(a)(14) of the Code except for the instances where the participant is employed with an employer (whether or not that employer maintains the plan), but where the service is still considered section 203(a)(3)(B) service. However, because the suspended benefits could be forfeited under section 411(a)(3)(B), the mere suspension of these benefits will not cause a violation of section 401(a)(14).

In Situation 4, the plan provides that benefits will be suspended during any month of employment with an employer which does not maintain the plan, whether or not that service is section 203(a)(3)(B) service. This provision fails to satisfy section 401(a)(14) of the Code because it permits benefits which would have commenced (or continued) to cease during a period of service which is neither service with an employer maintaining the plan nor section 203(a)(3)(B) service. If a forfeiture of benefits may occur during this period of suspension, the provision also fails to satisfy section 411(a).

Rev. Rul. 81-140, 1981-19 I.R.B. 6, 1981-1 C.B. 180, 1981 WL 165910 (IRS RRU)

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January 22, 2009

Mr. James Holland
Assistant Director
Employee Plans Rulings and Agreements
Internal Revenue Service
P.O. Box 27063
McPherson Station
Washington, DC 20038

Re: Request for General Information

Mr. Holland:

I am writing to request a general information letter regarding the calculation methodology required of qualified defined benefit pension plans for participants working past age 70 ½. The following hypothetical will be used to set up my specific inquiry:

A qualified defined benefit pension plan uses a flat-rate benefit formula and contains language requiring that all benefits shall be determined and made in accordance with Income Tax Regulations under IRC Section 401(a)(9). Normal retirement age under the plan is age 65. For participants working past age 65, the plan timely issues a proper suspension of benefits notice per Labor Regulation 29 CFR §2530.203-3(a)(4), and pays accrued benefits to participants when they ultimately retire.

The Plan provides that for individuals retiring (terminating service) after normal retirement age but prior to April 1st of the calendar year following the year in which they turned age 70½, the plan pays a benefit equal to a participant's accrued benefits on the last date of employment with no actuarial adjustment to account for post-normal retirement age distribution.

For individuals retiring on or after April 1 of the calendar year following the year in which they reached age 70½, the plan makes two alternative calculations and pays the participant the greater of the two:

(a) Plan calculates the participant's benefit accrued as of the April 1st following the attainment of age 70 ½, and then actuarially adjusts that amount upward to cover the period from April 1st to the date of actual retirement; or

(b) Plan calculates the participant's benefit accrued as of the last date of service, and provides no actuarial adjustment.

In our interpretation of Treasury Regulation 26 CFR §1.401(a)(9)-6 (A-8), it requires that for participants working past April 1st of the calendar year in which they turn 70½, an actuarial adjustment from the April first date to the actual date of retirement must be applied both to benefits accrued up to the April first date, and to benefits accrued from the April first date to the date of actual retirement.

It has, however, come to our attention that many plans operate in the manner outlined by our hypothetical above. So we now come to the Internal Revenue Service for clarification. Please provide your views as to whether a qualified plan incorporating the above benefit calculation method, is in compliance with Treasury Regulation 26 CFR §1.401(a)(9)-6 (A-8).

On the assumption that Treasury Regulation 26 CFR §1.401(a)(9)-6 (A-8) requires the actuarial adjustment as suggested in our interpretation of the reg., I would also appreciate your views on whether there is any amount of benefit accrual earned after the April 1st date that would be so small as to not necessitate an actuarial adjustment? For example, if a participant were to work only 3 months after April 1st, would the post-April 1 benefit accruals require an actuarial adjustment regardless of how small the benefit or how short the time elapsed?

As always, I thank you for your assistance and I look forward to your views on these matters.

Best regards,

Rebecca Davis
Staff Attorney

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION

JUN 01 2009

Rebecca Davis
Staff Attorney
Pension Rights Center
1350 Connecticut Ave. NW
Suite 206
Washington, DC 20036-1739

Dear Ms. Davis:

I am responding to your inquiry of January 22, 2009, regarding the calculation methodology required of qualified defined benefit pension plans for participants who work past age 70 ½.

Internal Revenue Code ("Code") section 401(a)(9)(c)(iii) provides, in relevant part, that for employees who retire after attaining age 70 ½, their "accrued benefit shall be actuarially increased to take into account the period after age 70 ½, in which the employee was not receiving benefits under the plan." Section 1.401(a)(9)-6 (Q&A-8) of the Income Tax Regulations ("Regulations") state, in relevant part, that increases required for employees retiring after attaining age 70 ½, described in section 401(a)(9)(C)(iii) of the Code, must be no less than the actuarial equivalent of the employee's retirement benefits under the plan that would have been payable as of the date the increase must commence, if the benefits had commenced on that date, plus the actuarial equivalent of any benefits accrued after that date, reduced by the actuarial equivalent of any distributions made after that date. Regulations section 1.401(a)(9)-6(Q&A-7) states that the start date for any increases for (Q&A-8) must be on April 1 following the employee's attaining of 70 ½, and the plan must take into account any period after attaining age 70 ½ in which the employee was not receiving benefits under the plan.

The plan provision hypothetical you provided in your letter lays out two alternative calculations for employees retiring on or after April 1 of the calendar year following the attainment of age 70 ½, and pays the employee the greater of the two alternatives:

(a) Plan calculates the participant's benefit accrued as of the April 1st following the attainment of age 70 ½, and then actuarially adjusts that amount upward to cover the period from April 1st to the date of actual retirement; or
(b) Plan calculates the participant's benefit accrued as of the last date of service, and provides no actuarial adjustment.

The hypothetical alternative (a) mirrors Regulation 1.401(a)(9)-6 (Q&A-8) with respect to what has accrued as of April 1st, following the attainment of 70 ½ . By taking the accrued benefit of the employee earned up until April 1st following the attainment of age 70 ½, and increasing that amount actuarially by the benefits accrued from that date until the date of actual retirement. However, alternative (a) does not comply with the Regulations because some provision must exist to increase benefits that accrued after April 1st, following the attainment of 70 ½ to reflect the period from the date of accrual to the date benefits commenced. Also, the resulting benefit may be reduced by the actuarial equivalent of distributions made after April 1st, following the attainment of 70 1/2.

With regard to alternative (b), the provision explicitly provides for no actuarial adjustment of benefits to reflect the delayed commencement after April 1st, following the attainment of 70 ½. Accordingly, this does not meet the regulations above because it is not an actuarial equivalent. The fact that the employer receives the greater of the two options does not change the fact that the option fails to comply with Regulation section 1.401(a)(9)-6(Q&A-8) because each of the alternatives fails to comply with the Regulations individually or jointly.

You also ask whether or not, under section 1.401(a)(9)-6(Q&A-8) of the Regulations, there is an amount of time or a benefit accrued that would be so small as to negate the requirement for an actuarial adjustment. Under section 1.401(a)(9)-6(Q&A-7) of the Regulations, an employee's accrued benefit under a defined benefit plan must be actuarially increased to take into account ANY period after age 70 ½, in which the employee was not receiving benefits under the plan [emphasis added]. Given the language of the regulations, it does not appear that any type of *de minimus* exception exists. Thus, all time periods and all benefits earned after the April 1st following the employee's attaining of age 70 ½ would be required to be actuarially adjusted under the regulations.

I hope this information is helpful. Please contact me at (202) 283-9699 or Eric Slack, Identification Number 0091186, at (202) 283-9576 if you have any questions.

Sincerely

James E. Holland, Jr.

James E. Holland, Jr., Assistant Director
EP Rulings and Agreements