

A Practitioner's Guide to Recovery of Qualified Plan Overpayments

From EPCRS to SECURE 2.0

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Agenda

- The problem
- The solution

“People make mistakes.
Even administrators of ERISA plans.”

Conkright v. Frommert, 559 U.S. 506, 509 (2010)

The Problem

- Common fact pattern:
 - DB plan inadvertently overpays annuity to retiree
 - Tough communication to the retiree: “We made a mistake, so now you owe us money”
 - Retiree is no longer working and has built his or her retirement around the promised benefit
 - Recovery would involve permanently reducing future payments to the correct amount and recovering past overpayments (possibly, plus interest) either in a lump sum or through further reduction to future payments

The Problem

THE WALL STREET JOURNAL

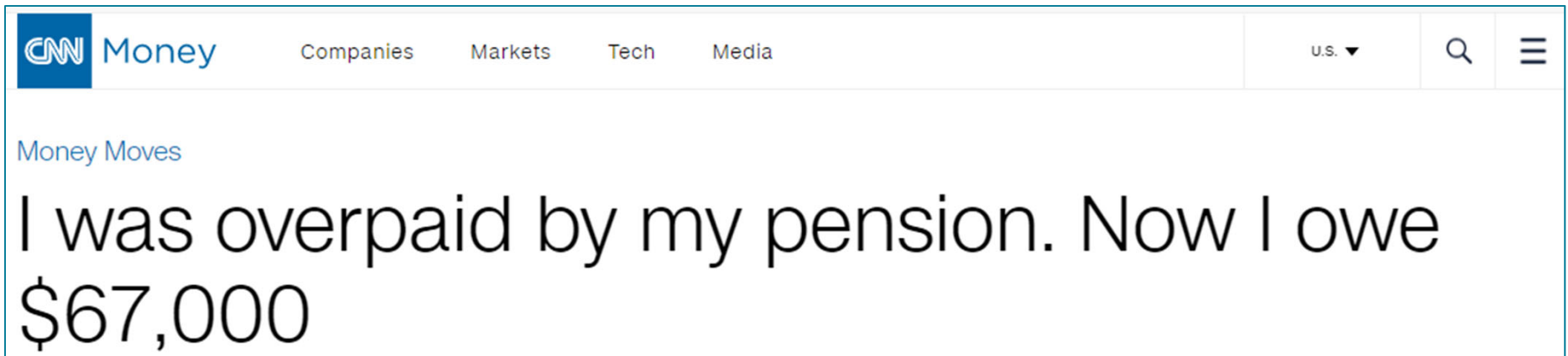
AT&T Overpaid Some Pensioners. Now It Wants the Money Back.

The telecom giant has enlisted a collection agency, a step other companies in similar situations have declined to take



'I could not pay it back,' says James Mizelle, 70, who got a letter demanding he repay \$32,116.05 of his AT&T pension. MATT ROTH FOR THE WALL STREET JOURNAL

The Problem



The image is a screenshot of the top portion of a CNN Money website article. At the top, there is a navigation bar with the CNN Money logo on the left, followed by links for 'Companies', 'Markets', 'Tech', and 'Media'. On the right side of the navigation bar, there is a dropdown menu set to 'U.S.', a search icon, and a hamburger menu icon. Below the navigation bar, the article's category 'Money Moves' is displayed in a smaller blue font. The main headline of the article is 'I was overpaid by my pension. Now I owe \$67,000', written in a large, black, sans-serif font.

CNN Money Companies Markets Tech Media U.S. ▼ 🔍 ☰

Money Moves

I was overpaid by my pension. Now I owe \$67,000

The Problem

Pensions ask retirees to pay back tens of thousands

by Melanie Hicken @melhicken

October 25, 2013: 2:29 PM ET

Recommend 0



Carole Grant, 75, has been told she owes almost \$61,000 for nearly 20 years of pension overpayments.

Some pension plans have overpaid retirees for years -- now they're demanding their money back.

GET UP TO
\$600
PLUS
60 DAYS
COMMISSION-FREE
TRADE

OPEN AN ACCOUNT

E*TRADE

The Problem: EPCRS

- Before 1996, plan fiduciaries had procedures and made nuanced decisions regarding recoupment
- Recoupment decisions based on differing facts and circumstances – not gratuitous make-whole requirement
- Pre-1996, fiduciaries opted not to pursue recoupment in most cases

The Problem: EPCRS

- Premise = keep plan whole
- Recovery from plan participants
 - Primary intent to address overpayments to highly paid execs and owners (recoupment mechanics appear in 415 overpayment provisions)
 - But applied to rank-in-file retirees and workers
- 2015 and 2021 updates insufficient

The Problem: Case Law Embraces Make Whole Theory

- *Zirbel v. Ford Motor Company*, 980 F.3d 520, 523 (6th Cir. 2020) (“The initial request for repayment indeed was *required* . . . by the plan’s fiduciary duty to the *other* beneficiaries of the plan.”) (emphasis in original).
- *Smirk v. Trustees of International Painters and Allied Trades Industry Pension Plan*, No. 19-00650, 2020 WL 668479 at *6 (D. Nev. Nov. 12, 2020) (“This is meant to protect the plan’s actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to them under the express terms of the plan. Further, fiduciaries of a defined benefit pension plan have a duty to protect the pooled funds and distribute benefits only to those who qualify The Trustees acted consistently with the Plan provisions in seeking recoupment of the benefits paid to Smirk.”)
- *Tennessee Valley Operating Engineers Health Fund v. Dennis*, No. 3:17-CV-1369, 2018 WL 3741941, at *2 (M.D. Tenn. Aug. 7, 2018) (“This specific duty to secure repayments arises because ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries.”)
- *In re Radcliffe*, 390 B.R. 881, 896 (N.D. Ind. 2008), *aff’d*, 563 F.3d 627 (7th Cir. 2009) (“[T]he Seventh Circuit determined, there is an important role for ‘reimbursement of overpaid plan benefits in the continuing viability of plans for all other beneficiaries, which is an equally important ERISA goal Therefore, the court allowed the plan to invoke its contractual remedy to recoup the overpayments in order to support ERISA’s goal of insuring that other beneficiaries would receive their benefits.”).

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- *Northcutt v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 467 F.3d 1031, 1038 (7th Cir. 2006) (“Similarly, the plaintiffs’ argument overlooks the important role that reimbursement of overpaid plan benefits plays in the continuing viability of plans for all other beneficiaries, an equally important ERISA goal.”).
- *Gordon v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 1:08-CV-883-SEB-DML, 2010 WL 1381655, at *2 n.4 (S.D. Ind. Mar. 30, 2010) (citing *Northcutt*’s discussion of this issue favorably).
- *Johnson v. Ret. Program Plan for Emps. of Certain Emps. at U.S. Dep’t of Energy Facilities at Oak Ridge, Tennessee*, No. 3:05-CV-588, 2007 WL 649280, at *6 (E.D. Tenn. Feb. 27, 2007) (“But in upholding those fiduciary duties as they relate to the collection of overpayments, a plan fiduciary must balance the impact of overpayments upon plan beneficiaries at large against the equitable treatment of the individuals from whom overpayments are sought.”).

The Problem: Case Law Embraces Make Whole Theory

- *Crossey v. Pennsylvania State Education Association Pension Plan*, No. 19-1468, 2019 WL 4187480 at *8 (E.D. Pa. Sept. 3, 2019) (“I am influenced by the observation in Johnson that principles of trust law compel an ERISA trustee to balance the impact of an overpayment upon the beneficiaries as a whole against its impact against the individual from whom it seeks to recover overpayments.”).
- *Key v. UniCare*, No. 3:15-CV-00851-TBR, 2017 WL 2609043 at *3 (W.D. Ky. June 15, 2017) (“Before pursuing recoupment, however, a plan must balance the impact of overpayments upon plan beneficiaries at large against the equitable treatment of the individuals from whom overpayments are sought.”)
- *Tynan v. Am. Airlines, Inc.*, No. 04-CV-335-SM, 2005 WL 2203172, at *5 (D.N.H. Sept. 9, 2005) (“But, the Program’s decision to recover the overpayments over the course of seven years, rather than in a lump sum and without suspending his monthly benefits under the Fixed Income Plan, exhibits appropriate sensitivity to his current circumstances, and demonstrates a reasonable effort to balance the Plan Administrator’s fiduciary duty to the Program’s members in general (i.e., the obligation to recover the overpayments for the benefit of the trust and all its beneficiaries) with its desire to minimize the economic hardship felt by plaintiff in repaying what he unquestionably owes.”).

The Problem: Case Law Embraces Make Whole Theory

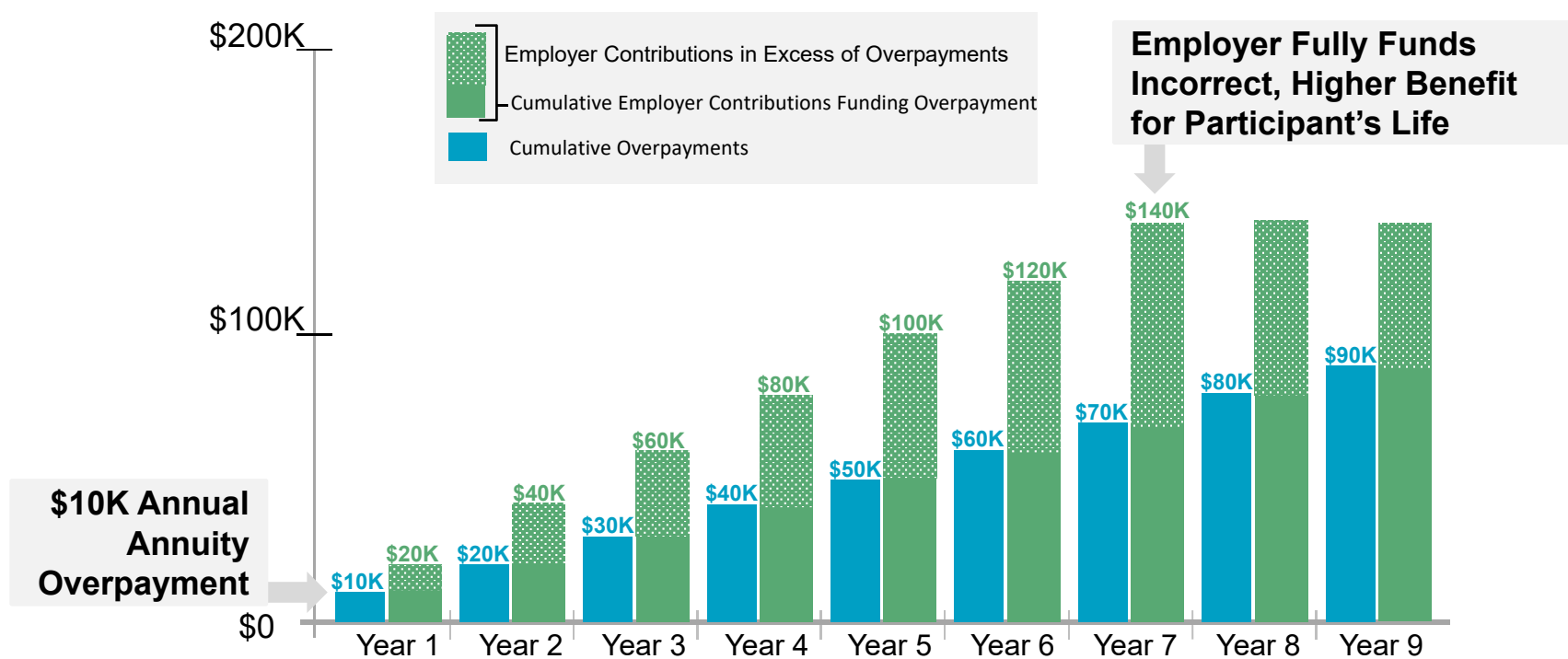
- *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1354 n.27 (D.C. Cir. 1982) (“It thus appears that, in compelling overpaid beneficiaries to restore to the trust res the excess amount, courts are primarily concerned with possible inequity to other beneficiaries.”).
- *Brown v. Trustees of UMWA 1985 Constr. Workers Pension Plan*, No. 2:10-CV-0554-PWG, 2011 WL 13232506, at *12 (N.D. Ala. Apr. 22, 2011) (“Specifically, the Defendants have a fiduciary duty to ensure that the plan receives all funds to which it is entitled.”).
- *Richards v. Arruda*, No. CV 04-234-C-M3, 2005 WL 8155618, at *6 (M.D. La. Dec. 20, 2005) (“As fiduciaries, defendants clearly had a duty to recover all overpayments of plan benefits as part of their role in administering the plan.”).
- *In re Radcliffe*, 390 B.R. 881, 896 (N.D. Ind. 2008), aff’d, 563 F.3d 627 (7th Cir. 2009) (“[T]he Seventh Circuit determined, there is an important role for ‘reimbursement of overpaid plan benefits in the continuing viability of plans for all other beneficiaries, which is an equally important ERISA goal Therefore, the court allowed the plan to invoke its contractual remedy to recoup the overpayments in order to support ERISA’s goal of insuring that other beneficiaries would receive their benefits.”).

The Solution

The Solution: Make Whole Theory Makes No Sense

- Employer may satisfy EPCRS' make-whole requirement simply by meeting its obligations under the funding rules
- And therefore no additional obligation to recover from plan participant, employer, or third party
- Otherwise: double recovery, which clearly is not required under any interpretation of the law

Employers – Not Plans – Suffer a Loss When the DB Plan Overpays an Annuity



Make Whole Theory Is Invalid: Nonforfeiture Rules

- For DC plans, not every overpayment causes a corresponding loss to another participant's account
- Nonforfeiture rules ensure that DC plans are made whole for any loss suffered by a participant as a result of an overpayment
 - E.g., misallocation of contributions or earnings to one participant's account that should have been allocated to another's account
 - Plan must promptly make participant who suffered loss whole

The Solution: Legislation Enacted in SECURE 2.0

- Proposal from Pension Rights Center and working group of advocates for retirees, fiduciaries, and employers
- Vetted by top actuaries
- Proposed regulatory clarification and then legislation

The Solution: Core Components

- Return discretion to fiduciaries
- End mandate to recoup from participants and employers
 - No fiduciary breach if fiduciary does not seek recovery from:
 - Participants or beneficiaries
 - Plan sponsor / contributing employer, subject to limited exceptions
 - Plan fiduciaries, unless fiduciary breach
 - Similar relief under Code

The Solution: Core Components

- Permit retirees and their beneficiaries to retain past benefit overpayments
- Allow plans to recover overpayments, subject to guardrails, with added protections for non-culpable participants and beneficiaries
 - Culpable individuals are ones who bear responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment) or whom knew that the benefit payments were materially in excess of the correct amount.

The Solution: Core Components

- Key protections for non-culpable overpayment recipients
 - No interest or other additional amounts may be sought
 - Limits on amounts that can be recouped
 - The amount recouped each calendar year cannot exceed 10% of the full dollar amount of the overpayment
 - Future benefits can't be reduced below 90% of the amount otherwise payable under the plan
 - Reductions on overpayments cease after plan has recovered full amount
 - No recovery from surviving spouse or other beneficiary
 - No recovery if first overpayment occurred more than 3 years before participant is first notified of error

Our Solution: Core Components

- Eliminate tax penalties resulting from overpayments that have been rolled over to an eligible retirement plan
- Clarify existing law and apply prospectively

Our Solution

Make-whole theory is dead!!!

Questions?

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