MEMORANDUM REQUESTING ERIC FILE AN AMICUS BRIEF IN COOPER V. IBM

To: Mark Ugoretz
From: David Remes and Robert Wick, Covington & Burling
Re: Possible ERIC Amicus Brief in Cooper v. IBM.
Date: October 9, 2003

[1] As you know, the District Court in Cooper v. IBM has ruled that cash balance plans and other hybrid plans are inherently age-discriminatory in violation of ERISA section 204(b)(1)(H). The District Court is now considering what remedy would be appropriate. On behalf of IBM we invite ERIC to submit an amicus brief to the District Court arguing that any remedy for such violations by a cash balance plan or other hybrid plan should operate prospectively only -- i.e., plan sponsors should not be forced to alter their plans retroactively for periods of service prior to the date of the ruling (or the date it is affirmed on appeal, if it is ultimately affirmed). Although it is somewhat unusual to submit an amicus brief at the District Court level, this case merits an exception both because of its broad importance and because the Seventh Circuit almost always rejects amicus briefs from private parties. If ERIC is to be heard in this important case, now is the time for it to present its views.

[2] There is a strong argument that the Court's ruling should be applied prospectively only. In three cases decided in the late 1970s and early 1980s, the U.S. Supreme Court set out a three-part test for determining whether court rulings in pension cases that break new legal ground should be applied retroactively. The Court held that such rulings should not be applied retroactively if (1) reasonable minds could have disagreed about the proper interpretation of law; (2) the threat of retroactive liability is not necessary to assure prospective compliance with the groundbreaking ruling, and (3) requiring retroactive compliance would have a disruptive effect on a large number of pension plans. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. v. Norris, 463 U.S. 1073 (1983); Florida v. Long, 487 U.S. 223 (1988). The Court held in these cases that the lower courts should not require retroactive compliance with the groundbreaking rulings holding that the use of sex-distinct mortality tables in defined benefit plans is a form of illegal sex discrimination.

[3] ERIC is well-positioned to add force and credibility to the arguments that (1) as a historical matter employers widely believed cash balance plans were lawful, thus demonstrating that reasonable minds could have disagreed with the District Court's view of the law, and (2) a retroactive application of the Court's ruling would have a significant disruptive effect on a large number of pension plans. ERIC would lend great credibility to these positions. An amicus brief and supporting affidavit could make the points that one of ERIC's missions is to stay abreast of which plan designs are considered legal by the government and by its membership; that ERIC did not (and does not) believe that cash balance plans and hybrid plans were age discriminatory; and that based on its communications with its members and the government, ERIC believes that its members

and the government shared (and share) the view that cash balance plans and other hybrids were (and are) legal.

[4] Similarly, ERIC is well-positioned to make the point that requiring retroactive compliance with the Court's ruling would have a disruptive impact on a large number of pension plans. We expect the plaintiffs to argue that older participants in cash balance plans and hybrid plans should receive just as much compound interest by the time they reach age 65 as the youngest participant in the plan. Thus, in the plaintiffs' view, the compound interest that a cash balance plan would provide to an 18 year-old over the forty-seven years that will elapse before the employee reaches age 65 must be provided to a 64 year-old over the single year that elapses by the time the 64 year old reaches age 65. The financial implications of imposing such a retroactive remedy on sponsors of cash balance plans are enormous. The benefits earned by older employees for a single year of service could increase ten-fold.

[5] We propose that an amicus brief focus on the remedies issues noted above and not on the legality of cash balance plans, because the Court has already ruled on the legality of these plans. In our view, there is no realistic prospect that the Court will reconsider that ruling based on an amicus brief. Please feel free to contact either of us with any questions.

[By:]
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