UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP **601 E Street, N.W.** **Washington, D.C. 20049** **And** **JACK W. MACMILLAN** **474 E. Fairmont Avenue** **State College, Pa 16801** **And** **FRANK H. SMITH, JR.** **9 Hilltop Lane West** **Columbus, NJ 08022** **And** **FRANK A. WHEELER** **5417 Claridge Street** **Philadelphia, Pa 19124-2321** **And** **FRED DOCHAT** **2314 Chestnut View Drive** **Lancaster, Pa 17603** **And** **GERALD FOWLER** **6420 Nittany Valley Drive** **Mill Hall, Pa 17751-9196** **And** **M. ELAINE CLAY** **5311 Twin Silo Drive** **Blue Bell, Pa 19422-3294** **Plaintiffs,**	**CASE NO.** **COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT**

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1801 L Street, N.W.
Washington, D.C. 20036

Defendant.

JURISDICTION

1. This is an action for declaratory judgment, temporary and permanent injunctive relief and other appropriate relief under the Administrative Procedure Act, as amended ("APA"), 5 U.S.C. § 551 et seq., the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 621 et seq., Article V of the United States Constitution, and the doctrine of separation of powers embodied in the United States Constitution seeking to invalidate the Equal Employment Opportunity Commission's (EEOC) recently approved regulatory exemption from the ADEA that allows employers to reduce or terminate retiree health benefits at age 65. The Court has jurisdiction pursuant to 5 U.S.C. §§ 702, 703, 705, 706 and 28 U.S.C. §§ 1331, 1343 and 1361. Venue is proper in this district pursuant to 28 U.S.C. §§1391.

THE PARTIES

2. AARP is a nonprofit, nonpartisan membership organization that helps people 50 and older have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP, which has over 35 million members, is incorporated in the District of Columbia where its headquarters are located. AARP has a state office in Harrisburg, Pennsylvania. AARP members reside in all fifty

states, and thousands of AARP members reside in this judicial district. Approximately 1.8 million AARP members reside in Pennsylvania.

3. One of AARP's primary objectives is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes and their arbitrary discriminatory effects, encourage employers to hire and retain older workers, help older workers overcome the obstacles they encounter because of age, and insure that the terms, conditions and benefits of employment are fair and equitable. AARP supports the rights of older workers and the public policies designed to protect those rights and actively strives to preserve the legal means to enforce them.

4. Approximately one half of AARP's members are working, most of whom are protected by the federal Age Discrimination in Employment Act of 1967, as amended, "ADEA." 29 U.S.C. § 621 *et seq.* The proper interpretation and vigorous enforcement of the ADEA is of paramount importance to the millions of older workers who rely on the ADEA to deter and remedy both overt and invidious age bias in the work place. Employees who through years of dedicated service have earned the right to receive or who otherwise have been promised health care benefits in retirement should not be deprived of that financial security arbitrarily because of their age.

5. Millions of AARP members nationwide, both working and retired, participate in health care benefit plans that are made available to them by current or former employers. Numerous AARP members that participate in employer-sponsored health care plans reside in this district, many of whom are age 65 and older. As a result

of the decision by the Court of Appeals in *Erie County Retirees Assoc.* v. *County of Erie, PA, et al*., 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001), employers in the Third Circuit who are governed by the ADEA may not arbitrarily reduce or discontinue health care benefits for individuals upon the attainment of age of 65.

6. Plaintiff Jack W. MacMillan, an AARP member, is a 78-year old citizen and resident of State College, Pennsylvania. For twenty-three (23) years, plaintiff MacMillan was employed by Pennsylvania State University. Plaintiff MacMillan is a veteran of World War II. By virtue of his employment with Penn State University, plaintiff MacMillan and his spouse have been receiving health care benefits during the course of his retirement. Some of these benefits supplement benefits available to him under Medicare, while other benefits (such as prescription drugs) cover items not covered by Medicare at all, and which are partially covered by the Veteran's Administration. Benefit reductions, or the outright elimination of health care benefits, by his former employer will leave plaintiff MacMillan and his spouse without coverage for many of their health care expenses.

7. Plaintiff MacMillan submitted written comments to the EEOC during the notice and comment period urging the defendant not to issue the proposed exemption.

8. Plaintiff Frank A. Wheeler, an AARP member, is a 79-year old citizen and resident of Philadelphia, Pennsylvania. For forty (40) years, plaintiff Wheeler was employed by Ford Electronics and Refrigeration, a subsidiary of Ford Motor Company. Plaintiff Wheeler is a veteran of both World War II and the Korean War. By virtue of his employment with Ford, plaintiff Wheeler and his spouse have been receiving health care benefits during the course of his retirement. Some of these benefits supplement

benefits available to him under Medicare, while other benefits (such as prescription drugs) cover items not covered by Medicare at all. During the period of plaintiff Wheeler's retirement, his former employer has made various reductions in his health care benefits, either by increasing costs to plaintiff Wheeler or by reducing or eliminating available coverage. Further reductions or the outright elimination of health care benefits by his former employer will leave plaintiff Wheeler and his spouse without coverage for many of their health care expenses.

9. Plaintiff Wheeler submitted written comments to the EEOC during the notice and comment period urging the defendant not to issue the proposed exemption.

10. Plaintiff Wheeler's former employer, Ford Motor Company, is a member of the Chamber of Commerce, the ERISA Industry Committee and the Equal Employment Advisory Council. As part of the rulemaking proceeding, each of these employer organizations urged the defendant EEOC to adopt an exemption that would permit all their members, including Ford Motor, to arbitrarily discontinue health care benefits for retirees upon the attainment of age 65. In light of the escalation of health care costs nationwide, the representations of these employer organizations during the rulemaking process, and particularly in light of the conclusions by the EEOC regarding the desire of employers to reduce or eliminate health care benefits for retirees, the issuance of the challenged exemption will inevitably result in the reduction or cessation of health care benefits for individuals resident in this district, including but not limited to, plaintiff Wheeler.

11. Plaintiff Fred G. Dochat, an AARP member, is a 76-year old citizen and resident of Lancaster, Pennsylvania. For forty-six (46) years, plaintiff Dochat was

employed by Armstrong World Industries. By virtue of his employment with Armstrong World Industries, plaintiff Dochat and his spouse have been receiving health care benefits during the course of his retirement. As recently as January 2004, plaintiff Dochat's former employer has implemented benefit reductions that doubled plaintiff Dochat's premium contribution while at the same time reducing certain benefit coverage. In January 2005, plaintiff Dochat's benefits were again reduced. Further reductions or the outright elimination of health care benefits because of his age by his former employer will leave plaintiff Dochat and his spouse without coverage for many of their health care expenses.

12. Plaintiff Dochat submitted written comments to the EEOC during the notice and comment period urging the defendant not to issue the proposed exemption.

13. Plaintiff M. Elaine Clay, an AARP member, is a 77-year old citizen and resident of Blue Bell, Pennsylvania. For thirty-four (34) years, plaintiff Clay's spouse was employed by the Budd Company. By virtue of her spouse's employment with the Budd Company, plaintiff Clay has been receiving health care benefits since 1981. In January 2004, plaintiff Clay's health care premium contribution doubled. In January 2005, her premium contributions were further increased. Further reductions or the outright elimination of health care benefits by her deceased spouse's employer will leave plaintiff Clay without coverage for many of her health care expenses.

14. Plaintiff Clay submitted written comments to the EEOC during the notice and comment period urging the defendant not to issue the proposed exemption.

15. Plaintiff Gerald Fowler, an AARP member, is an 80 -year old citizen and resident of Mill Hall, Pennsylvania. For nineteen (19) years, plaintiff Fowler was

employed by Sandia National Laboratories. By virtue of his employment with Sandia, plaintiff Fowler has been receiving health care benefits during the course of his retirement. These benefits include, but are not limited to, prescription drugs, hospitalization, and dental and vision care. Reductions or the outright elimination of health care benefits by his former employer will leave plaintiff Fowler and his spouse without coverage for many of their health care expenses.

16. Plaintiff Fowler submitted written comments to the EEOC during the notice and comment period urging the defendant not to issue the proposed exemption.

17. Plaintiff Frank H. Smith, an AARP member, is an 82-year old citizen and resident of Columbus, New Jersey. For thirty-seven (37) years, plaintiff Smith was employed by American Cyanamid, now operating as Wyeth. By virtue of his employment with American Cyanamid, plaintiff Smith and his spouse have been receiving health care benefits during the course of his retirement. These benefits generally cover amounts not covered by Medicare and include, but are not limited to, prescription drugs. Between the two of them, plaintiff Smith and his spouse require almost $10,000 in prescription drugs annually. Reductions or the outright elimination of health care benefits by his former employer will leave plaintiff Smith and his spouse without coverage for many of their health care expenses.

18. Plaintiff Smith submitted written comments to the EEOC during the notice and comment period urging the defendant not to issue the proposed exemption.

19. The defendant Equal Employment Opportunity Commission ("EEOC") is the agency of the United States charged with responsibility for administration and enforcement of the ADEA. Defendant has had this responsibility since July 1, 1979,

when the authority was transferred to defendant from the United States Secretary of Labor by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781.

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

20. From the date of enactment of the ADEA, the federal agencies with enforcement authority over the statute – first the Department of Labor and now the EEOC – have consistently construed the statutory text to prohibit age discrimination in employee benefits, including health care benefits.

21. From the date of its passage in 1967, Section 4(a) of the ADEA, 29 U.S.C. § 623(a) has made it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;…."

22. As early as 1969, the Department of Labor concluded that the phrase "compensation, terms, conditions, or privileges of employment" included not only wages, but all non-wage forms of compensation and employee benefits. Virtually contemporaneous with the passage of the ADEA, the Department of Labor issued an interpretive regulation entitled "Costs and Benefits Under Employee Benefit Plans." 29 C.F.R. § 860.120 (1969); 34 Fed. Reg. 9709, June 21, 1969. The regulation announced what has since become known as the "equal benefit or equal cost" rule, which provided that "[A] retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." 29 C.F.R. § 860.120(a).

23. The "equal benefit or equal cost" rule remained unchanged until Congress amended the ADEA in 1978 to raise the upper age of coverage for the ADEA from 65 to 70 years of age, while at the same time amending § 4(f)(2) with an express provision outlawing the common practice of mandatory retirement.

24. During congressional passage of the 1978 amendments, Congress emphatically made clear that age discrimination in employee benefits was unlawful, and "reaffirmed unequivocally that the employer's burden of proving 'equal benefit or equal cost' under section 4(f)(2) was consistent with congressional intent when enacting section 4(f)(2) in 1967." S. Rep. No. 101-263 at 9 (1990). As Congress subsequently observed during the 1990 passage of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), "[t]he 'equal benefit or equal cost' principle under section 4(f)(2)was repeatedly, and specifically, recited by managers of the amendments and other members of Congress as an employer's exclusive means of proving compliance with the ADEA." *Id.*

25. As the Department of Labor acknowledged, "[t]he increase in the maximum age level of those covered [by the ADEA]… raised questions about many common benefit practices affecting employees at age 65." 44 Fed. Reg. 30648 (May 25, 1979). According to the Department of Labor, "[i]n amending section 4(f)(2) Congress also made clear that the Department [of Labor] should issue more comprehensive guidance with respect to section 4(f)(2), particularly because of the increase in the maximum age level of those covered by the Act." *Id.*

26. The Department of Labor complied with congressional direction by issuing a comprehensive Interpretive Bulletin explaining in detail the manner in which

employers could conform to the “equal benefit or equal cost” rule endorsed by Congress. Relevant to the EEOC’s proposed exemption, the Interpretive Bulletin contained comprehensive guidance regarding an employer’s health care obligations for employees eligible for Medicare. The regulation, for example, permitted an employer to “’carve out’ from its own health insurance plan those benefits actually paid for by Medicare.” 29 C.F.R. § 860.120(f)(1)((ii)(A). And the regulation also approved the “supplemental” approach, where an employer will “place employees eligible for Medicare in a separate health insurance plan which supplements Medicare.” *Id.* Under the supplemental approach however, the regulation specified that (1) the cost of the supplemental plan is no less than the cost for including the same individual in the regular plan with a Medicare “carve out,” and (2) “the supplemental plan provides benefits which are no less favorable than an employee eligible for Medicare benefits would receive under the employer’s regular health insurance plan.” *Id.*

27. The regulation made clear that because an employer can take advantage of Medicare by reducing its own health care costs, the cessation of health care at Medicare age would not be justified under the statute. *See* 29 C.F.R. §860.120 (f)((1)(ii)(C) (1979).

28. Contrary to the longstanding administrative regulations, however, in *Public Employees Retirement Sys .of Ohio v. Betts*, 492 U.S. 158 (1989), the Supreme Court ruled that “the general prohibitions of section 4(a)(1) of the ADEA …do not apply to employee benefit plans.” S. Rep. No. 101-263, at 14. The Court further ruled that the objective “equal benefit or equal cost” rule in effect from the ADEA’s enactment could not be reconciled with the “subterfuge” language of the § 4(f)(2) exception for employee

benefit plans The practical effect of the Court's ruling was to permit arbitrary age discrimination in all types of benefit plans except when "intended to serve the purpose of discriminating in some non-fringe benefit aspects of the employment relationship." *Id.*

29. Through prompt enactment of the OWBPA, Congress acted to overturn the *Betts* decision. As the Congress indicated: "The Congress finds that, as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) *which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.*" Pub. L. 101-433, Title I, § 101 (Oct. 16, 1990; 104 Stat. 978) (emphasis added).

30. In order to give effect to its intent, Congress enacted several changes. First, Congress added Section 11(l) to make it unmistakably clear that "[t]he term 'compensation, terms conditions or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to bona fide employee benefit plans." 29 U.S.C. § 630(l). Second, Congress deleted the "subterfuge" provision in § 4(f)(2) and replaced it with the literal language of the "equal benefit or equal cost" rule, making it lawful for an employer to "observe the terms of a bona fide employee benefit plan (I) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)…." 29 U.S.C.

§623(f)(2)(B). As Congress noted, "Employers invoking this defense [§ 4(f)(2)] are required to provide equal benefits to, or to incur equal cost for benefits on behalf of, all employees. The bill tracks the requirements set forth in ADEA regulations for over twenty years, requirements that had been approved by every federal court of appeals to consider the defense in the 12 years preceding the decision in *Betts*." S. Rep. 101-263, at 5. As Congress stated emphatically otherwise, "the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals. *Id.* at 18 (emphasis in original).

31. Subsequent to the passage of the OWBPA, the EEOC adopted an enforcement position consistent with congressional intent to prohibit age discrimination in all employee benefit plans, including health care. Notably, in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the EEOC argued to the Court of Appeals that Congress plainly intended to prohibit discrimination on the basis of age in the provision of health care benefits to former employees. The issue in *Erie County* was whether the County's decision to place Medicare-eligible (age 65 and older) retirees into an admittedly inferior health care plan violated the ADEA. The district court held that the ADEA did not apply to age-based changes in "retirement health benefits." 91 F. Supp. 2d 860 (W.D. Pa. 1999).

32. In its brief to the Third Circuit, the EEOC disagreed with the conclusion of the lower court, stating "we believe that the ADEA covers retirees who are subjected to discriminatory modifications in employment-related health benefits." The Commission announced that "[n]othing in the text of the statute supports the view that retirement health benefits, as a category of benefits, fall outside the reach of the statute."

33. The Commission's position in *Erie County* was grounded on its view that "[s]o long as the discriminatory act touches upon a benefit for which the individual is eligible by virtue of his or her status as a current or former employee of the employer, the protections of the ADEA are implicated." As the EEOC noted, "any other view of the statute would lead to *irrational gaps in coverage that Congress could not have intended.*" (emphasis added). Invoking congressional intent in support of its view that post-retirement health care benefits were covered by the ADEA, the Commission argued: "It is 'inconceivable' that Congress 'would in the same breath expressly prohibit discrimination in [employee] benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees … at or after their retirement, although they had earned those [employee] benefits through years of service [with the employer].'"

34. Finally, the EEOC's brief in *Erie County* also addressed the lower court's mistaken view that the legislative history of the OWBPA suggested that Congress intended to exempt retiree health benefits from the ADEA's coverage. The lower court had premised its view, at least in part, on the narrow "offset" provisions in the OWBPA that allowed an employer to offset severance pay with certain retiree health insurance benefits. *See* 29 U.S.C. § 623(l)(2)(D). As the EEOC observed, however, 'if anything, the fact that Congress addressed the issue of retiree health benefits and did so only in the context of a statutory offset for severance benefits strongly supports the view that Congress did not intend, in general, to exempt discrimination in retiree health benefits from the reach of the statute." As the EEOC concluded, "it is clear from the legislative

record that the political will for adopting an explicit limitation on [health care] coverage did not exist."

35. The Third Circuit adopted the EEOC's position and ruled that reduction of retiree health benefits based on age was illegal under the plain language of the ADEA and counter to the clear congressional intent of the statute.

36. Based on the Third Circuit's decision in *Erie County*, which agreed with the EEOC's position in its *amicus* brief, the EEOC formally amended its Compliance Manual to include a section explaining employers' obligations to provide health care benefits for employees and retirees who reach Medicare eligibility age (age 65). EEOC Compliance Manual, Chapter 3: Benefits, Section IV B. The Compliance Manual provisions cited to the decision in *Erie County*, and explained that an employer cannot eliminate health coverage for retirees upon the attainment of Medicare eligibility (age 65). The Compliance Manual provisions were entirely consistent with the positions articulated by the Commission in *Erie County.* However, by notice published in the Federal Register on August 20, 2001, the Commission abruptly rescinded the *Erie County* section of the Compliance Manual. No notice and comment rulemaking was observed.

<u>THE EEOC RULEMAKING.</u>

37. Section 9 of the ADEA, 29 U.S.C. § 628, permits the EEOC to "…issues such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest."

38. The EEOC has issued regulations that circumscribe the regulatory activity that the EEOC may engage in under the ADEA. Those regulations state that: "[t]he authority conferred on the Commission by section 9 …will be exercised with caution and due regard for the remedial purpose of the statute to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. *Administrative action consistent with this statutory purpose may be taken*…when found necessary and proper in the public interest in accordance with the statutory standards." 29 C.F.R. § 1627.15(b) (emphasis added). According to the Commission, "a reasonable exemption from the Act's provisions will be granted only if…*a strong and affirmative showing* has been made that such exemption is in fact necessary and proper in the public interest." *Id.* (emphasis added). .

39. On July 14, 2003, the EEOC published a Notice Of Proposed Rulemaking in the Federal Register (68 Fed. Reg. 41542). The proposed rule would "exempt from the prohibitions of the Age Discrimination in Employment Act of 1967 the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program."

40. The EEOC proposal announced that "concern about the potential application of the ADEA to employer-sponsored retiree health benefits is adversely affecting the continued provision of this important retirement benefit." According to the EEOC, because of "increased costs and accounting changes, employers have actively examined ways to reduce health care costs, including by reducing, altering or eliminating retiree health coverage." The EEOC noted in its proposal that "[o]f those

employers offering retiree health benefits, most are more likely to offer such benefits to early retirees and not to Medicare-eligible retirees." Moreover, the EEOC further claimed that the rate by which employers offer health care benefits to Medicare-age retirees declined by ten percentage points in a recent three year period.

41. Relying on the result in the *Erie County* litigation, the EEOC expressed in the proposal its concern "that many employers will respond to this outcome [in *Erie County*], given the dramatic cost increases for retiree health benefits, not by incurring additional costs for retiree benefits that supplement Medicare, but rather by reducing or eliminating health coverage for retirees who are not yet eligible for Medicare."

42. The EEOC's proposal was prompted, at least in part, by communications that occurred in meetings with "a wide range of Commission stakeholders, including employers, employee groups, labor unions, human resource consultants, benefit consultants, actuaries and state and local government representatives." Few, if any, of these communications were made part of the rulemaking record or were otherwise available to the plaintiffs and other interested parties during the notice and comment period.

43. In the *Erie County* litigation, the EEOC directly addressed the intersection of rising health care costs and the potential reduction or elimination of health care benefits for retirees. As the EEOC stated,"Health insurance benefits can be a costly employee benefit. Employers should not have their hands tied in their efforts to maximize the benefits for all employees, current and former. *The answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute.* The answer is for the employer either to rely upon distinctions

that are not age-based or to structure any age-based distinctions in a manner that comports with the ADEA" This was the EEOC's long-standing and consistent interpretation of the ADEA with regard to retiree health benefits.

44. Notwithstanding the views it expressed in the *Erie County* litigation, in promulgating the challenged exemption the EEOC has failed to consider and assess the various options by which employers may address concerns regarding escalating health care costs while at the same time comply with their obligations under the ADEA.

45. Moreover, both the underlying rationale and the expressed purpose of the challenged exemption implicate in a direct and significant way the manner in which health care is provided and utilized throughout the nation. Congress has not delegated to the EEOC any rulemaking authority in the substantive field of health care policy, nor does the EEOC possess any expertise to weigh factors relevant to the challenged exemption, or to accurately predict the consequences of the exemption itself.

46. Even assuming that the EEOC possessed both the expertise and the authority to promulgate rules intended to influence health care policy, the EEOC has failed to adequately assess, consider or address the following relevant facts prior to issuance of the challenged exemption:

a. The harm that would be suffered by older retirees who will lose or be denied access to employer provided retiree health benefits;

b. The availability, accessibility and costs of alternative policies to complement Medicare for older (age 65+) retirees;

c. The impact the proposal may have on the Medicare system;

d. The impact of its proposal on practices by insurers and their willingness to provide affordable health care policies to Medicare beneficiaries;

e. The common availability of mechanisms by which to value and expense retiree health benefits, such as those described within ADEA § 4(l)(2)(D) (for purposes of offsetting severance payment by the value of retiree health benefits); and

f. The absence of any data or information – other than anecdotal evidence in the form of employer statements – that indicates that employers will provide and/or maintain retiree health benefits at high levels for younger retirees if permitted to discriminate against retirees age 65 and older.

g. The impact of the passage of the Medicare Prescription Drug Improvement and Modernization Act of 2004 on employer practices with regard to supplemental retiree health benefits for persons eligible for Medicare.

47. Plaintiffs AARP, Wheeler, Dochat, Clay, Fowler, MacMillan and Smith participated in the rulemaking proceeding by submitting written comments to the EEOC, as did approximately 59,000 other AARP members. On April 22, 2004, in a public meeting, the EEOC approved publication of the challenged exemption, to become effective upon the date of publication in the Federal Register. The approved exemption was then circulated to other federal agencies and to the Office of Management and Budget, the same agencies that had a previous opportunity to comment on the

exemption in its “proposed” form. Since the time of the circulation of the final exemption to other agencies in the summer of 2004, the EEOC has made minor, non-substantive revisions to the exemption which remains, in all material respects, identical to the final exemption approved by the EEOC for publication in April 2004. The final exemption was identified by the EEOC in its Semi-Annual Regulatory Agenda published in the Federal Register on December 13, 2004 (69 Fed. Reg. 73944). On information and belief, the coordination process with other federal agencies has been completed and the publication of the challenged exemption in the Federal Register is imminent.

48. During the rulemaking, written comments were submitted by the Chamber of Commerce, the ERISA Industry Committee, the Equal Employment Advisory Council, and the American Benefits Council. The Equal Employment Advisory Council (EEAC) “comprises more than 330 of the national’s largest and most progressive companies, collectively employing more than 20 million workers in the U.S. alone.” The Chamber of Commerce “is the world’s largest business federation, representing more than three million business and organizations of every size, and in every industry sector and geographical region.” The ERISA Industry Committee consists of “America’ s largest employers” who collectively “ “provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families.” The American Benefits Council represents principally “Fortune 500 companies and other organizations that assist companies of all sizes in providing retirement, health, and other benefits to employees.” Collectively, the American Benefits Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.” On behalf of

their members, each of these organizations urged the EEOC to promulgate the exemption in final form, thereby allowing employers to discontinue health care for individuals age 65 and older without fear of litigation under the ADEA. Consistent with the advocacy of these organizations, it is inevitable that millions of age-65 and older Americans will have their health care benefits reduced or eliminated altogether should the exemption become effective.

49. Upon publication, the plaintiffs and innumerable other AARP members and other affected individuals will suffer irreparable harm. In reliance on the exemption, employers in this Circuit and elsewhere throughout the country will reduce or eliminate health care coverage currently provided to former employees age 65 and older. Many individuals affected by these health care cuts, including the plaintiffs and other AARP members, will be unable to secure alternative coverage on such short notice, if at all. Individuals with pre-existing medical conditions, including the plaintiffs and other AARP members, will likely be unable to secure any comparable replacement coverage, regardless of price. And even if replacement health care coverage is available, the plaintiffs and other affected individuals will in all likelihood be unable to replace their existing coverage at a comparable expense. The inevitable result will be that age 65 and older individuals affected by the exemption, including the plaintiffs and other AARP members, will be unable either to locate or to afford replacement health care coverage. Still other individuals fortunate enough to locate and qualify for replacement coverage will likely face significant cost increases, either in terms of the premiums or the benefit coverage. As a result, countless individuals age 65 and older on fixed incomes,

including the plaintiffs and other AARP members, will face the harsh choice of foregoing either necessary health care or other of life's necessities.

50. An additional harm that will occur if the exemption becomes effective is that the plaintiffs and others will never be able to recover any lost benefits or any other meaningful damages or compensation, even if the exemption is ultimately ruled invalid. This result would flow from § 7(e)(1) of the ADEA, 29 U.S.C. § 626(e)(1), which incorporates the "good faith" defense contained in § 10 of the Portal-to-Portal Act, 29 U.S.C. § 259(a). Under that defense, an employer who pleads and proves it acted in reliance on, and in conformity with, the exemption would be immune from liability in any litigation filed under the ADEA. Once good faith reliance on an EEOC regulation is established, the employer is not vulnerable to liability even if the interpretation is modified or rescinded, or is determined by a court to be invalid or of no legal effect. 29 U.S.C. § 259(a).

51. Moreover, as a result of the exemption becoming effective, AARP will suffer specific and immediate harm. Among other things, AARP will be forced to redirect scarce internal resources to lobbying and other advocacy efforts designed to overturn the exemption, either administratively or legislatively, or both. In addition, AARP will need to redirect resources to educating its members about finding and financing alternative sources of health care coverage.

52. The individual plaintiffs, and AARP, and AARP's members are within the zone of interests to be protected by the ADEA.

COUNT I

53. The actions of defendant alleged here in promulgating an exemption under the ADEA are (a) arbitrary, capricious and not in accordance with law, (b) contrary to the EEOC's constitutional right, power, privilege, and/or (c) in excess of the agency's statutory jurisdiction, authority or limitations and short of the agency's statutory right, in violation of 5 U.S.C. § 706(2).

COUNT II

54. The actions of defendant alleged here in promulgating an exemption under the ADEA based upon comments, input and information that were not available to plaintiffs and others during the notice and comment rulemaking violate 5 U.S.C. § 553 and are otherwise arbitrary, capricious and an abuse of discretion and otherwise not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Adjudge and decree that defendant's actions alleged herein regarding the issuance of an exemption under the ADEA violate the provisions of the APA and the ADEA;

B. Adjudge and decree that defendant's issuance of an exemption permitting employers to arbitrarily discriminate against individuals age 65 and older in the provision of health care benefits is contrary to the ADEA and for that reason violates the doctrine of separation of powers embodied in the United States Constitution.

C. Adjudge and decree that defendant's private, ex parte communications that motivated the defendant to issue the exemption but which were nevertheless not

part of the rulemaking record , violate plaintiffs' rights to constitutional due process and to lawful notice-and-comment rulemaking under the APA.

D. Issue a temporary, preliminary and permanent injunction, a writ of mandamus under 28 U.S.C. § 1361, and an order under 5 U.S.C. § 705, enjoining the exemption from becoming effective and requiring the defendant to withdraw the exemption from publication in the Federal Register;

E. Award to plaintiffs, and require defendant to pay, plaintiffs' attorneys' fees and costs.

F. Grant such other and further relief as the Court deems appropriate.

Dated: February 4, 2005

Respectfully submitted,

s/ Stephen G. Console, Esquire
Stephen G. Console
PA ID No. 36656
CONSOLE LAW OFFICES, LLC
1528 Walnut Street
Suite 1200
Philadelphia, PA 19102
(215) 545-7676

Christopher G. Mackaronis
Michael J. Schrier
BELL, BOYD & LLOYD PLLC
1615 L Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 955-6838

Laurie McCann
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Attorneys for Plaintiffs AARP, Jack W. MacMillan, Frank H. Smith, Jr., Fran A. Wheeler, Fred Dochat, Gerald Fowler and M. Elaine Clay

CERTIFICATE OF SERVICE

I, Stephen G. Console, hereby certify that on this 4th day of February, 2004, I caused copies of a Complaint For Preliminary And Permanent Injunctive Relief to be served in the following manner:

VIA HAND DELIVERY

Patrick L. Meehan, Esq.
US Attorney for the
Eastern District of Pennsylvania
615 Chestnut St.
Suite 1250
Philadelphia, PA 19106

_s/ Stephen G. Console, Esquire__
Stephen G. Console