No. 05-5445

In the
United States Court of Appeals
for the Third Circuit

SANDRA REGISTER; GRACE B. MERCHANT; SUSAN L. WILSON; KRISTINA BECKMAN; JOHN J. DAGGETT; RICHARD RHOADES, on behalf of themselves and all others similarly situated,

Appellants,

v.

PNC FINANCIAL SERVICES GROUP INC.; PNC BANK NA; PENSION COMMITTEE OF PNC FINANCIAL SERVICES GROUP, INC. PENSION PLAN; PNC FINANCIAL SERVICES GROUP, INC. PENSION PLAN,

Appellees.

On Appeal from the November 21, 2005 Memorandum Opinion and Order of The United States District Court for the Eastern District of Pennsylvania (District Court Case No. 04-CV-6097)

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I. INTRODUCTION

Nothing presented by Appellees in their brief compels affirming the dismissal of Appellants' claims of age discrimination, anti-backloading and insufficient notice brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*.

With respect to Appellants' age discrimination claim, the District Court incorrectly distinguished cash balance plans from defined benefit plans and erroneously concluded that the phrase "rate of benefit accrual" is ambiguous and may be measured in reference to the change in each plan participant's "hypothetical account balance," rather than in terms of an annuity payable at normal retirement age. As demonstrated below, however, the reasoning of the decisions relied upon by the lower court (which are also relied upon by PNC) is fatally flawed. Indeed, in the most recent decision addressing age discrimination resulting from a cash balance conversion, a district court expressly rejected the reasoning of the lower court herein, disagreeing with Judge Davis' treatment of "cash balance plans as if they are defined contribution plans." *Richards v. Fleetboston Fin. Corp.*, 2006 U.S. Dist. LEXIS 15601, *39-40 (D. Conn. Mar 31, 2006) (for a defined benefit plan, "rate of benefit accrual" is unambiguous when read in the context of

the statute and must be measured in reference to the annual benefit payable at normal retirement age).

The lower court also erred in concluding that Appellants failed to state a claim that PNC's cash balance plan violates ERISA's anti-backloading prohibition. While the court correctly acknowledged that under the cash balance plan, some participants' benefits will not accrue any additional value for a period of time, it erroneously concluded that the formulas under the Cash Balance Plan did not have to be aggregated in determining whether the 133⅓ % accrual rule is violated. Since no accrual followed by the resumption of accruals necessarily results in a change in accrual rate that is higher than one third, PNC violated the 133⅓ % benefit accrual rule for certain plan participants.

Finally, the lower court erred in dismissing the claims that PNC's §204(h) notice and SPD failed to meet ERISA's requirements. PNC's notice and SPD were not written in a manner so that the average plan participant could understand that significant reductions to plan benefits would necessarily occur as a result of PNC's conversion to a cash balance plan design, and Appellees have failed to show otherwise. Moreover, these are fact questions that were prematurely decided at this early stage of the litigation.

II. THE DISTICT COURT INCORRECTLY DISMISSED APPELLANTS' AGE DISCRIMINATION CLAIM.

Like the arguments rejected in *Richards* and other decisions, PNC's primary arguments in support of its interpretation of "rate of benefit accrual" focus on the legislative history of ERISA and on the application of this phrase to the subject plan. As discussed in detail below, the statute is unambiguous and none of PNC's arguments permit disregarding the plain meaning of the statutory text.

A. Cash Balance Plans Are Defined Benefit Plans And Must Be Treated As Such.

Despite PNC's assertion that it "has never suggested that a cash balance plan is a defined contribution plan and has never argued that the rules applicable to defined contribution plans apply to cash balance plans," *see* Appellees' Br. at 39, PNC continues to argue that cash balance plans are "functionally identical" to defined contribution plans and should be treated as such. *Id.* at 37. The District Court erroneously adopted PNC's argument:

> Cash balance plans accrue benefits differently than traditional defined benefit plans. *Under a traditional defined benefit plan, the benefits are defined in terms of the age 65 annuity. Therefore, it follows logically that the rate of benefit accrual is the change in the accrued benefit.* Cash balance plans are not defined in terms of an age 65 annuity, rather they are defined in terms of an account balance that grows with pay credits and interest. Therefore, it follows logically that the rate of

> benefit accrual is determined by the change in
> account balance.

(A16) (emphasis added).

The court correctly concluded that, for defined benefit plans, the rate of benefit accrual is the change in accrued benefit. *Id.* However, the court did not apply this measure of rate of benefit accrual to cash balance plans because, in the court's opinion, "[cash balance plans] accrue benefits differently from defined benefit plans." *Id.* The District Court was simply wrong: cash balance plans are defined benefit plans and must be treated as such. *See, e.g., Berger v. Xerox Corp. Ret. Income Guar. Plan,* 338 F.3d 755, 758 (7th Cir. 2003); *Esden v. Bank of Boston,* 224 F.3d 154, 158-59 (2d Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001); *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1237 (11th Cir. 2000); *see also Richards*, 2006 U.S. Dist. LEXIS at *39-40.

As the Second Circuit explained in *Esden*, even though cash balance plans "are designed to imitate some features of defined contribution plans, they are nonetheless defined benefit plans under ERISA." 229 F.3d at 158. "However 'hybrid' in design a cash balance plan may be, it remains subject to a regulatory framework that is in many respects rigidly binary." *Id* at n.6. In *Berger*, the Seventh Circuit echoed the Second Circuit's conclusion, explaining that while a cash balance plan purports to compute an employee's

"accrued benefit" as a hypothetical account balance, "the employee has no actual account, the employer makes no contribution to an employee account, and so there is no account balance to which interest might be added." 338 F.3d at 758.

Because cash balance plans are defined benefit plans, the rate of benefit accrual for both traditional defined benefit plans and cash balance plans is therefore measured by the increase in the annual benefit payable at normal retirement age.

B. Section 204(b)(1)(H)(i) Is Unambiguous And "Rate of Benefit Accrual" Must Be Measured Only By Reference To An Age 65 Annuity.

In direct contrast to its own conclusion that, for a defined benefit plan, the rate of benefit accrual is the change in the accrued benefit payable at normal retirement age, the lower court also mistakenly determined that "[t]he concept of the benefit accrual rate does not have a single self-evident meaning." (A16) The statutory language belies this determination and the arguments made by PNC.

1. PNC's Argument That Congress Intended To Omit The Term "Accrued Benefit" From §204(b)(1)(H)(i) Is Untenable.

PNC argues that because the defined term "accrued benefit" is used no less than fifteen times elsewhere in the statute, but not in

§204(b)(1)(H)(i), Congress intended to omit it in §204(B)(1)(H)(i). Appellees' Br. at 25. PNC's argument has a fatal flaw. If Congress intended to omit the defined term "accrued benefit" in its construction of §204(b)(1)(H)(i), then "rate of benefit accrual" could never be measured in reference to an age 65 annuity.

However, Congress drafted §204(b)(1)(H)(i) with only traditional defined benefit plans in mind. *Esden*, 229 F.2d at 171. Such plans do not have account balances, hypothetical or otherwise. *Berger*, 338 F.3d at 758. PNC concedes, as it must, that "it might make sense to measure benefit accrual rates by reference to an age-65 annuity in the context of a plan that defines its benefits in those terms." Appellees' Br. at 28. Because the only possible measure of "rate of benefit accrual for defined benefit plans is the "accrued benefit," Congress could not have intended to omit that term from §204(b)(1)(H)(i).

2. Appellants' Construction of Section 204(b)(1)(H)(i) Does Not Render Section 204(b)(1)(H)(v) Superfluous.

PNC also argues that reading the term "accrued benefit" into §204(b)(1)(H)(i) would render §204(b)(1)(H)(v) superfluous because the defined term already excludes early retirement subsidies. Section 204(b)(1)(H)(v) states that "the subsidized portion of any *early retirement benefit* is disregarded in determining benefit accruals." 29 U.S.C.

§1054(b)(1)(H)(v) (emphasis added). Contrary to PNC's argument, §204(b)(1)(H)(v) actually confirms that "rate of benefit accrual" should be measured in reference to the "accrued benefit" because it eliminates potential confusion between "normal retirement benefit" and "accrued benefit."

ERISA defines "normal retirement benefit" as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." ERISA §3(22), 29 U.S.C. §1002(22). The accrual standards of §204(b)(1) appearing prior to §204(b)(1)(H)(i) refer to "normal retirement benefit" in defining some of the required accrual rates for accrued benefits. Without §204(b)(1)(H)(v)'s clarification, "rate of benefit accrual" could have been read to refer to subsidized early retirement benefits as well as benefits commencing at early retirement age. In that case, the loss or erosion of the subsidized portion of early retirement benefits by an employee continuing to work beyond early retirement age could have been held to violate §204(b)(1)(H)(i) when compared to the accrual rate of those employees who took the subsidy at the earliest possible age.[1]

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[1] *See* 26 C.F.R. §1.411(a)-7(c)(6), Example (4), which depicts a plan in which the early retirement benefit exceeds the benefit available at normal retirement age (assumed to be 65).

Section 204(b)(1)(H)(v) thus limits §204(b)(1)(H)(i)'s "rate of benefit accrual" to benefits commencing at normal retirement age and protects plans that provide early retirements from violating §204(b)(1)(H)(i) on that basis.[2]

3. PNC Ignores Congress' Omission Of The Term "Employee's Account" In §204(b)(1)(H)(i).

While PNC makes much ado of Congress' omission of "accrued benefit" from §204(b)(1)(H)(i), it ignores the most obvious evidence of Congress' intent through a purposeful omission. Congress used the term "employee's account" in the age discrimination provision applicable to defined contribution plans and yet omitted it in the age discrimination provision applicable to defined benefit plans. *Compare* ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H) with ERISA §204(b)(2)(A), 29 U.S.C. §1054(b)(2)(A). Therefore, Congress intended that defined benefit plans and defined contribution plans be measured differently for purposes of determining whether they are age discriminatory. *See, e.g., DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220, 227 (3d Cir. 2005) (when Congress includes language in one section of ERISA but omits it in a parallel section, the omission is presumed

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[2] Section 204(b)(1)(H)(iii) creates an exception for §204(b)(1)(H)(i)'s required rate of benefit accrual if an employer suspends benefit payments to an employee working after reaching normal retirement age. Following PNC's argument would render §204(b)(1)(H)(iii) superfluous.

intentional), *cert. denied*, __ U.S. __, 126 S. Ct. 1469; 164 L.Ed.2d 265; 2006 U.S. LEXIS 2182 (2006).

In *Richards*, the court seized upon Congress' failure to use the term "employee's account" in the age discrimination provision applicable to defined benefit plans and concluded "rate of an employee's benefit accrual" is defined in relation to an annuity payable at normal retirement age. 2006 U.S. Dist. LEXIS 15601 at *32-33. The court explained:

> ERISA has a binary structure, under which defined benefit plans face significantly different requirements from those applicable to defined contribution plans. 229 F.3d at 158 & n.6, 159. The structure of section 204(b) itself is binary. Whereas section 204(b)(1) states requirement for defined benefit plans, section 204(b)(2) states parallel requirement for defined contribution plans. Section 204(b)(2)(A) contains an age discrimination provision parallel to that of section 204(b)(1)(H). Whereas the latter prohibits a reduction in "the rate of an employee's benefit accrual," the former prohibits a reduction in "the rate at which amounts are allocated to the employee's account." ... The court finds that Congress did not intend that "the rate of an employee's benefit accrual, "as used in section 204(b)(1)(H)(i), to be measured as "the rate at which amounts are allocated to the employee's account." Congress' use of the latter phrase, which explicitly requires measurements involving an increase in account balances, in ERISA §204(b)(2) demonstrates that Congress could have used the same phrase in the age discrimination provision governing defined benefit plans had it intended to apply the same measurement rule to

> defined benefit plans. Instead, it used a completely different phrase, "rate of benefit accrual."

Id.[3]

The court in *Richards* went on to conclude, for the same reasons stated in Appellants' opening brief, that the statute is unambiguous:

> In light of the great similarity that this phrase bears to the statutorily defined term "accrued benefit," and the fact that ERISA requires that accrued benefit to be measured as an annual benefit commencing at normal retirement age for defined benefit plans, but requires accrued benefit to be measured as the balance of an individual's account for defined contribution plans, the term "rate of benefit accrual," as used in section 204(b)(1)(H)(i), refers to rate measured as a change in the annual benefit commencing at normal retirement age. [fn] The statute is unambiguous in this respect, and the court need not inquire further into its meaning.[4]

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[3] The ERISA Industry Committee ("EIC") argues that *Richards*' "binary structure" rationale is unsound. EIC *Amicus* Br. at 19. Like the District Court below, however, EIC ignores the plain language of the statute and argues that the economic effects of a cash balance plan and a defined contribution plan are the same, and therefore they should be judged by the same age discrimination standard. *Id.* As discussed above, cash balance plans are defined benefit plans and must be treated as such.

[4] The court in *Richards* found further support for its conclusion that "rate of benefit accrual" refers to the annual rate of change of an age 65 annuity in other sections of ERISA. *Id.* at n.12. Specifically, the court concluded, as Appellants argued in their opening brief, that §204(b)(1)(G) and the IRS's interpretation of "rate of future benefit accrual" in the notice provision of §204(h) supported its construction of §204(b)(1)(H)(i). *Id.*

Id. at 33-34; *see also Cooper v. The IBM Personal Pension Plan*, 274 F. Supp.2d 1010, 1016 (S.D. Ill. 2003).

Because the statute is unambiguous, the District Court's holding that the phrase "rate of benefit accrual" does not have a single, self-evident meaning is in error and must be reversed.

C. PNC Ignores The Unambiguous Statutory Language And Relies Instead On Contorted Interpretations Of The Legislative History.

Longstanding precedents permit resort to legislative history only when necessary to interpret ambiguous statutory text. *See, e.g., BedRock Ltd. v. United States*, 541 U.S. 176, 186 n.8 (2004); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *DiGiacomo*, 420 F.3d at 228. Because the statutory text at issue is unambiguous, the District Court and PNC improperly consider the legislative history. *Richards*, 2006 U.S. Dist. LEXIS 15601 at *37 (refusing to consider legislative history regarding the meaning of "rate of benefit accrual" because the statutory language is unambiguous). Nevertheless, nothing within the legislative history contradicts the plain meaning of §204(b)(1)(H)(i).

The District Court and PNC cite to the House Conference Report on the Omnibus Budget Reconciliation Act ("OBRA"), which amended ERISA, to buttress the proposition that "rate of benefit accrual" can be determined

by reference to the account balance.[5] (A16) (*citing* H.R. Conf. Rep. No. 99-1012, at 375 (1986)); Appellees' Br. at 29-35. As the *Richards* court recently held, however, the Conference Report "does not clearly address the issue of how the 'rate of benefit accrual' should be measured, and certainly does not create 'rare and exceptional circumstances' to ignore the plain language of the statute by reading in words that are not there."[6] *Richards*, 2006 U.S. Dist. LEXIS 15601 at *37 (disagreeing with the *Register* court's holding with respect to the OBRA 1986 Conference Report language).

Contrary to PNC's argument, the legislative history directly supports Appellants' position. In enacting ERISA §204(b)(1)(H), Congress intended to ensure that older employees accrue additional retirement benefits at least equal to those accrued by younger employees.[7] By way of example, the

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[5] PNC also argues that the legislative history evidences Congressional intent that ERISA's age discrimination provision should not apply to employees before they reach retirement age. Appellees' Br. at 30. However, the District Court rejected this argument and PNC did not cross appeal on this issue. Thus, the issue is not properly before this Court.

[6] Moreover, it is improper to presume that Congress expressed rules in the Conference Report at odds with the unambiguous statutory text approved by both Houses and signed by the President. *BedRock*, 541 U.S. at 186 n.8.

[7] The background leading up to enactment as well as the legislative history of the OBRA are described at length in *American Ass'n Retired Persons v. Equal Employment Opportunity Comm'n*, 655 F. Supp. 228 (D.D.C. 1987) ("*AARP*"), *rev'd*, 823 F.2d 600 (D.C. Cir. 1987) and in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the

Conference Report states that if a plan provides a monthly benefit of $10 per year of services, an older worker must be provided the same additional benefit of $10 per month. H.R. Conf. Rep. 99-1012 at 381. Thus, Congress intended that plans could not reduce those additional benefits because of age. But that is precisely what cash balance formulas do.

Because cash balance plans did not become prominent until after OBRA's 1986 enactment, the legislative history says nothing at all about them. Thus, PNC's omission arguments regarding Congress' intent with respect to cash balance plans, *e.g.*, "Nothing in the legislative history of OBRA 1986 remotely suggests that in enacting Section 204(b)(1)(H) Congress intended to outlaw cash balance plans," (Appellees' Br. at 29; *see also id.* 17, 22, 36, 37, 38), are simply irrelevant.

D. PNC Relies Upon Treasury Department Pronouncements Which Are Not Entitled To Judicial Deference.

Despite the fact that the Treasury Department has maintained an effective moratorium on the approval of cash balance plans since 1999, PNC continues to rely on pronouncements in proposed regulations and non-interpretive regulations, and Revenue Proposals to argue that Appellants' construction of §204(b)(1)(H)(i) has been squarely rejected by the Treasury

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Amended Complaint at 22-26, which Appellants' hereby incorporate by reference.

Department. None of these Treasury Department pronouncements, however, constitutes a "considered agency interpretation" of the statutory language of §204(b)(1)(H)(i), to which judicial deference is owed.[8]

This Court has specifically held that proposed Treasury Department regulations may not be considered in interpreting ERISA provisions because they "do[] not represent an agency's considered interpretation of a statute." *Depenbrock v. CIGNA Corp.*, 389 F.3d 78, 85 (3d Cir. 2004) (*quoting Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986)).[9] For the same reason, this Court should not consider pronouncements in the Treasury Department's Revenue Proposals.[10] Although it appears that no

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[8] Deference is afforded only when an agency construes or interprets a statute it administers. *Knapik v. Ashcroft*, 384 F.3d 84, 87 (3d Cir. 2004) (*citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

[9] PNC ignores this binding authority and simply argues that the proposed regulations were not withdrawn because the views of the Treasury Department had changed, but because Congress had not made available any funds for their implementation.

[10] The Treasury Department's conclusory statement in its Revenue Proposals that "cash balance plans and cash balance conversions are not inherently age discriminatory," offers no interpretation of the statutory phrase "rate of benefit accrual" and is therefore not considered agency interpretation to which this Court must accord any deference. *See, e.g., United States v. Mead Corp.,* 533 U.S. 218, 230 (2002) ("The overwhelming number of our cases applying *Chevron* deference have reviewed the fruit of notice-and-comment rulemaking or formal adjudication."); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpretations contained in policy

court has addressed the interpretive weight that should be afforded such proposals, given that the Treasury Department's proposed regulations must be disregarded in the interpretation of ERISA, *Depenbrock*, 389 F.3d at 85, it seems only logical that the Revenue Proposals, which do not require formal notice and comment like the proposed regulations, should similarly be disregarded.[11]

Similarly, the regulations promulgated by the Treasury Department under Section 401 of the Internal Revenue Code ("IRC") may not be considered to interpret "rate of benefit accrual" in ERISA §204(b)(1)(H)(i).

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statements, agency manuals, opinion letters, and enforcement guidelines do not warrant *Chevron* deference); *see also JSG Trading Corp. v. United States Dept. of Agriculture*, 176 F.3d 536, 546 (D.C. Cir. 1999) (conclusory statements that do not interpret the statutory words are not entitled to *Chevron* deference); *Wise v. Ruffin*, 914 F.2d 570, 580-81 (4th Cir. 1990) (same).

[11] The Revenue Proposals concurrently recognize that "cash balance plans and cash balance conversions are not inherently age discriminatory," but that "[a] conversion can result in lower future accrual rates for some or all participants." U.S. Dept. Treas., *General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals*, at 81 (Feb. 2005); U.S. Dept. Treas., *General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals*, at 103 (Feb. 2004). Thus, despite the Treasury Department's pronouncement to the contrary, such a result is, by definition, age discrimination under ERISA §204(b)(1)(H)(i). Such inconsistent positions lend further support to Appellants' argument that the pronouncements in the Revenue Proposals are not considered agency interpretations. *See, e.g., I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991) (an agency's reasonable, *consistently held interpretation* of its own regulation is entitled to deference).

The §401 regulations pertain solely to the question of whether a plan is tax-qualified. These regulations were promulgated only pursuant to IRC §401, rather than IRC §411 (which is parallel to ERISA §204). Unlike §411, §401 has no counterpart in ERISA and therefore has no bearing on the construction of ERISA provisions. *See Bronk v. Mountain State Telephone & Telegraph, Inc.*, 140 F.3d 1335, 1338-39 & n.6 (10th Cir. 1998) (rejecting the proposition that the IRC and all Treasury regulations inform and amplify the substantive requirements of ERISA); *see also Esden*, 229 F.3d at 158 n.2 (ERISA §3002(c) specifically adopts the regulations promulgated under IRC §§410(a), 411, and 412).[12]

On the other hand, IRS Notice 96-8, which has been afforded deference, *see Esden*, 229 F.3d at 169; *Berger*, 338 F.3d at 762, supports Appellants' construction of §204(b)(1)(H)(i). The Notice makes clear that future interest credits provided by cash balance plans are part of the employee's accrued benefit: "benefits attributable to interest credits are in the nature of accrued benefits ... and thus, once accrued, must become non-

[12] Again, PNC ignores this authority. Instead, PNC merely cites Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47,713, 47,713 (Oct. 17, 1978) for the proposition that the Treasury Department has jurisdiction to adopt regulations under IRC §401 and ERISA §204. Appellants do not dispute that the Treasury Department has such jurisdiction. The Reorganization Plan, however, says nothing about the interpretive effect of IRC regulations that do not have parallel provisions in ERISA.

forfeitable." Notice 96-8; *see also Berger*, 338 F.3d at 762. The notice goes on to explain that cash balance plans are subject to a different benefit and accrual structure than a defined contribution plan: "These provisions limit the extent to which a cash balance plan can mimic the benefit and accrual structure of a defined contribution plan." Notice 96-8.

Thus, contrary to PNC's argument, the only Treasury Department pronouncement entitled to judicial deference supports measuring "rate of benefit accrual" in reference to an age 65 annuity.

E. The Practical Consequences Of Appellants' Interpretation Of §204(b)(1)(H)(i) Are Not Sufficient To Overcome The Plain Language Of The Statute.

This Court has ruled that even sound policy reasons cannot overcome the plain language of the statute. *DiGiacomo*, 420 F.3d at 228. Contrary to PNC's and amicis' assertions, the practical consequences of measuring "rate of benefit accrual" by reference to the defined term "accrued benefit" are not sufficient to overcome the plain language of the statute. *Richards*, 2006 U.S. Dist. LEXIS 15601 at *35.

For example, PNC argues that measuring the rate of benefit accrual by reference to an age 65 annuity would have a perverse effect for those that work beyond age 65. The *Richards* court rejected this argument, concluding that Congress' intent was simply to assure a benefit measured as of normal

retirement age.[13] 2006 U.S. Dist. LEXIS 15601 at *36. The Conference Report also addressed this concern by stating that offering the same additional $10 per month retirement benefit after age 65, without increasing the benefit for decreased longevity, would satisfy the age discrimination requirement. H.R. Conf. Rep. 99-1012 at 381.

Amici Equal Employment Advisory Council ("EEAC") and the Chamber of Commerce of the United States of America ("COC") argue that "serious problems already threaten the nation's defined benefit pension system, and affirmance of the decision below is necessary to preserve employer's flexibility to convert to cash balance pension plans."[14] (EEAC & COC Br. at 15). Employers, however, are simply not entitled to such flexibility when the result is illegal.

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[13] The *Richards* court explained: "[T]he plaintiffs' interpretation of 'rate of benefit accrual,' applied to employees older than 65, does not necessarily lead to results that would contradict the Congressional intent expressed in the statutory text. . . . Congress' intent was to assure a benefit measured as of normal retirement age. The value of that benefit does not change, regardless of whether the employee is younger or older than normal retirement age. What it costs to provide the benefit may change depending on an employee's age. However, that was not Congress' concern when it prohibited the diminution of the rate of accrual of the benefit expressed as an annual benefit commencing at normal retirement age." *Id.* at *36-37.

[14] *Amicus* EIC argues that cash balance plans do not reduce the rate of benefit accrual "because of the attainment of any age" but rather because of the time value of money. (EIC Amicus Br. at §III) The *Richards* and *Cooper* courts both rejected this argument. *Richards*, 2006 U.S. Dist. LEXIS 15601 at *38; *Cooper*, 274 F. Supp.2d at 1016.

Appellants do not deny that there exist some problems facing the nation's pension system. In fact, part of the problem is the direct result of cash balance plans. Under cash balance plans, older workers incur greater losses in future benefit accruals than younger workers. *See, e.g.*, U.S. General Accounting Office, *Private Pensions: Implications of Conversions to Cash Balance Plans*, GAO/HEHS-00-185 (Sept. 2000); U.S. General Accounting Office, *Cash Balance Plans: Implications for Retirement Income*, GAO/HEHS-00-207 (Sept. 2000); *see also* AARP Amicus Brief at §IB. Even in *Eaton*, the court recognized the detrimental effects of cash balance conversions:

> Conversions of plans can affect adversely the expectations of a generation of employees who were too young to derive much benefit from the traditional "final average pay" design, but who are too old to have gotten an early start in their careers on the benefits of a cash balance plan. This generation has essentially been getting the worst of both worlds as a result of the conversions.

117 F. Supp.2d at 818.

The problems with the nation's pension system cited by PNC and its amici, however, cannot legitimize the problems inherent in employers' conversions to illegal pension plans. *Cf. DiGiacomo*, 420 F.3d at 228. At the time employers converted to cash balance plans, they were well-aware of

§204(b)(1)(H)(i)'s plain language.[15] Thus, employers took a calculated risk in enacting cash balance plans and ignoring the plain language of §204(b)(1)(H)(i), in order to generate substantial cost savings from conversions at the expense of older employees and in violation of ERISA. *See, e.g., Depenbrock*, 389 F.3d 78, 79 (3d Cir. 2004) (characterizing cash balance conversions as a "by-product of corporate America's recent effort to curb costs, by *inter alia*, scaling back the benefits provided under pension plans."); U.S. General Accounting Office, *Private Pensions: Information on Cash Balance Pension Plans*, GAO-06-42 (Oct. 2005) at 67 (employers that converted to cash balance plans realized costs saving of 17% to 19%).

As discussed in detail above, a cash balance plan is a defined benefit plan. Employers may not avoid the statutory framework by using language they choose rather than by the construction dictated by law. *Cf. Esden*, 229

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[15] As early as October 1990, before most cash balance conversions took place, a consortium of pension professionals known as the "Cash Balance Practitioners Group" concluded that while "we believe arguments can be made supporting the conclusion that Code § 411(b)(1)(H) is not violated [by a typical cash balance plan], a number of practitioners quite strongly believe that this type of plan does not comply with a literal reading of the provision." H. Forcier & D. Heffernan, *A Practitioner Discussion Memorandum*, Oct. 1990, at 2. Because the IRS might "not be willing to ignore a literal reading of Code § 411(b)(1)(H)," the group concluded that employers with cash balance plans had substantial exposure absent a "legislative fix." *Id.*

F.3d at 164 (if plans were free to determine their own assumptions and methodology, they could effectively eviscerate ERISA protections).

As the Second Circuit acknowledged in *Esden*, "it is undisputed that the governing statutes and regulations were developed with traditional final-pay defined benefit plans in mind; they do not always fit in a clear fashion with cash balance plans and they sometimes require outcomes that are in tension with the objectives of those plans." 229 F.2d at 159. However, "[t]he dispute is not over what a 'better' regulatory regime, more accommodating to the design objectives of cash balance plans might look like; the dispute is over how to apply the existing regulations to this Plan." *Id.* at 171. The fact that Congress may not have foreseen all subsequent defined benefit plan design variations is not a sufficient reason for refusing to give effect to the statutory language's plain meaning. *Lockhart v. United States*, __U.S. __, 126 S. Ct. 699, 702, 163 L. Ed.2d 557, 562 (2005).

III. APPELLANTS' ANTI-BACKLOADING CLAIM PURSUANT TO ERISA §204(b)(1)(B) ALLEGES A VIOLATION OF ERISA AND SHOULD NOT BE DISMISSED.

Appellants claim that PNC's failure to value and include the early-retirement subsidies in determining the initial Cash Balance Plan account balances results in a violation of ERISA's "anti-backloading" rules. In dismissing this claim, the District Court erred in concluding that once a plan

amendment occurs, only the new plan is taken into consideration when performing the applicable 133⅓% test. In so doing, the lower court correctly recognized that some plan participants' benefits will not accrue any additional value for a number of years. (A9) Ultimately, however, Judge Davis concluded that no wearaway of benefits occurred "[s]ince the protected prior benefits under the old plan are disregarded." (A10)

In support of the lower court's dismissal of this claim, PNC argues that the existence of wearaway in no way indicates an ERISA violation. Appellees' Br. at 52-54. This simply is not true. PNC's Cash Balance Plan, as a defined benefit plan, must accrue benefits for each active employee by using at least the minimum annual accrual rate specified by statute. *See generally* ERISA § 204, 29 U.S.C. § 1054. As shown below, the presence of wearaway or periods of "no accruals" makes it clear that the PNC Cash Balance Plan cannot pass ERISA's 133⅓% accrual rule.[16]

A. For the Early Retirement Participants, PNC's Cash Balance Plan Employs More Than One Plan Formula, All of Which Must be Aggregated.

PNC does not dispute that PNC's Cash Balance Plan provides retirement benefits for Early Retirement Participants under more than one

[16] Many cash balance conversions have adopted an approach ensuring that participants always receive no less than the full value of the benefits they accrued before the conversion, including early retirement subsidies, plus future cash balance accruals. Brief *Amicus Curiae* of AARP at 25-26.

formula. PNC's Cash Balance Plan incorporates PNC's Prior Plan's formula and determines the Early Retirement Participant's benefit based on either the continuously accruing Cash Balance benefit or –

> A lump sum amount, equal to the Participant's Account, or if greater, the Accrued Benefit under the Prior Plan determined as of December 31, 1998, reduced if necessary in accordance with paragraph 4.2(b) of the Prior Plan, multiplied by a factor based on the Applicable Interest Rate and Applicable Mortality Table as defined in the Prior Plan.

PNC Cash Balance Plan ¶ 5.2 (A118-119). Unequivocally, then, PNC's Cash Balance Plan, on its face and within itself, employs more than one formula to determine the retirement benefit. This is not the same as though Early Retirement Participants obtain benefits under both the Prior Plan and the Cash Balance Plan. Rather, the Cash Balance Plan alone provides them benefits, but it allows alternative formulas for determining the amount of benefits.

When a defined benefit plan like PNC's provides that accrued benefits are provided under more than one formula "the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan satisfy one of the alternative methods." 26 C.F.R. §1.411(b)-1(a). This Treasury Department Regulation applies to all

defined benefit plans, including PNC's Cash Balance Plan. Aggregation is therefore mandatory.

PNC ignores this mandatory aggregation of the accrued benefits under the multiple formulas in the Cash Balance Plan. Instead PNC asserts, without any underlying support, that §1.411(b)-(1)(a)(1) "does not deal with plan amendments and does not mention Section 204(b)(1)(B)(i)." Appellees' Br. at 55 n.15. PNC further argues that the regulation "does not support appellants' theory that pre-amendment plan benefits must be 'aggregated' with post-amendment benefits to measure backloading." *Id.* This argument misses the point. PNC's Cash Balance Plan by itself utilizes the Prior Plan formula as part of its "if greater" benefit formula for the Early Retirement Participants' benefits. Therefore, because the Cash Balance Plan provides for more than one benefit formula, the formulas must be aggregated in order to determine backloading.[17]

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[17] Based on argument raised for the first time in a reply memorandum, the court in *Richards* concluded otherwise, finding that the decisions in *Allen v. Honeywell Retirement Earnings Plan,* 382 F. Supp.2d 1139, 1160 (D. Ariz. 2005) and *Langman v. Laub*, 328 F.3d 68, 71 (2d Cir. 2003) were applicable, In this same decision, the court invited plaintiffs to request reconsideration and brief the issue (for the first time) in order to best ensure sound decisionmaking. *Richards,* 2006 U.S. Dist. LEXIS 15601, *50-53. While the District Court herein also relied on *Allen*, Appellants (in their opening brief) have already explained how the facts of that case are distinguishable and the holding inapplicable to PNC's Cash Balance Plan. Appellants' Br. at 40-42. Similarly, *Langman*, a case which does not involve a conversion

B. When All Plan Formulas Are Aggregated, PNC's Cash Balance Plan Violates ERISA's 133⅓% Anti-Backloading Accrual Rule.

The District Court recognized that the Early Retirement Participants' accrued benefits were determined by two different formulas: "[PNC's Cash Balance Plan] provides that a participant receives the greater of his cash balance benefit and his frozen accrued benefit, including any applicable early retirement subsidies." (A9) The effect of this arrangement is that "[f]or some participants, the frozen prior plan benefit may be greater than the benefit under the new plan for a few years." *Id.* "When this occurs, the participant's benefit will not accrue any additional value." *Id.* This period of no accruals, which could last for years, is eventually followed by the resumption of benefit accruals. This change in rate of growth of accrued benefits clearly and necessarily violates ERISA's 133⅓% accrual rule against backloading benefit accruals.

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to a cash balance plan, is inapposite. *Langman* involved a plan which was amended to increase the accrual of benefits, across-the-board, for all active employees, regardless of period of service. The increase, that was for all current employees, was greater than 33⅓%, however, the court stated that "it would be a strange rule that would prohibit a fund from making a more than one-third increase in its across-the-board benefit rate ...." *Langman*, 328 F.3d at 71-72. Unlike in the present case, at no time during an accrual period did any of the employees in *Langman* suffer wearaway or periods of "no accrual." Appellants' Br. at 41; *Langman* 328 F.3d at 69-72.

IV. THE COMPLAINT ALLEGES A VIABLE CLAIM THAT PNC VIOLATED ERISA'S § 204(h) NOTICE REQUIREMENTS.

Not surprisingly, Appellees defend the lower court's conclusion that PNC did not need to notify plan participants that their benefit accrual rates would be significantly reduced in the future as a result of PNC's cash balance conversion. Appellees' Br., p. 58; A19-20. The lower court came to this conclusion despite the fact that a significant reduction of the rate of benefit accrual resulting from a plan amendment is what triggers the notice requirements of § 204(h) in the first place. *Romero v. The Allstate Corp.*, 404 F.3d 212, 219 n.4 (3d Cir. 2005) (citing 29 U.S.C. § 1054(h) (West 1999)). *See also* U.S. General Accounting Office, *Private Pensions: Implications of Conversions to cash Balance Plans*, at 36 (2000) ("ERISA specifically requires that plan sponsors notify plan participants about any plan amendment that may significantly reduce the rate of future benefit accruals for some or all employees."). The lower court clearly erred in accepting PNC's vague statement that the amendments to the Plan "may affect the future rate of benefit accruals under the Pension Plan and in some instances may reduce the rate of future Pension Plan benefit accruals" amounts to sufficient notice, in the face of certain reductions in future benefit accruals. Indeed, the regulations in effect from the time PNC converted its plan to a cash balance design until now have been and continue

to be chiefly concerned with fully informing plan participants about their benefit, including significant reductions in their benefits. *Pickering v. USX Corp.*, 809 F. Supp. 1501, 1560-61 (D. Utah 1992) ("Through section 204(h), Congress ensured that if a plan sponsor were to amend the plan prospectively, the plan administrator must inform employees and their representatives of those changed circumstances.").

In this case, Appellants properly state a claim that PNC's notice fails under ERISA §204(h) because it was not written in a manner so that the average plan participant could understand that significant reductions to plan benefits would occur as a result of PNC's conversion to a cash balance plan design. (A52 at ¶65). *See also* 60 Fed. Reg. 64320, 64323 (requiring summary of plan amendment to be written in a manner calculated to be understood by the average plan participant); 26 C.F.R. §1.411(d)-6, at Q-11 & A-11; *Normann v. Amphenol Corp.*, 956 F. Supp. 158, 165 (N.D.N.Y. 1997) (plan amendment ineffective under §204(h) because plan summaries were not stated in a manner reasonably calculated to be understood by the average plan participant); *Scott v. Administrative Committee of the Allstate Agents Pension Plan*, 113 F.3d 1193, 1200 (11th Cir. 1997) (focus should be on whether average plan participant is able to understand information which plan sponsor is required to communicate).

Here, the finding by the district court that PNC's notice was written in a way that could be "understood by the average plan participant" prior to any discovery taking place was premature and, therefore, should be reversed. *See, e.g., Suozzo v. Bergreen*, 2002 WL 1402316, *7 (S.D.N.Y. June 27, 2002) (factual disputes as to nature and circumstances of alleged notice warrant denial of dismissal motion). Without the benefit of discovery, the lower court did not have any indication, and therefore could not know, what employees understood about the conversion of PNC's plan to a cash balance design from reading those disclosures.

V. APPELLANTS' CLAIM REGARDING PNC'S SUMMARY PLAN DESCRIPTION SHOULD BE REINSTATED.

Just as with its claim brought under §204(h), PNC argues that its Summary Plan Description ("SPD") met all of the requirements under ERISA. In so doing, PNC ignores the SPD's failure to adequately advise plan participants of reductions in their plan benefits.

ERISA requires an SPD, like a §204(h) notice, to be written in a manner calculated to be understood by the average plan participant. In addition, an SPD must sufficiently apprise the plan's participants and beneficiaries of their rights and obligations under the plan without minimizing the importance of any reductions in plan benefits. In this case, the SPD failed to disclose: (1) that PNC's Cash Balance Formula does not

include the protected early retirement subsidy, and (2) that PNC plan participants' rate of future benefit accruals was being reduced as a function of getting older. *See generally Burstein v. Retirement Account Plan for Employees of Allegheny Health, Educ. and Research Foundation*, 334 F.3d 365, 378-79 (3d Cir. 2003) (ERISA provision governing SPDs expresses Congress' desire that SPD be transparent, accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under plan).

With respect to Appellants' SPD claims, PNC simply echoes the lower court's reasoning and argues: "Because PNC's SPD accurately described the benefits payable under the Cash Balance Plan, the district court properly concluded appellants' Section 102 claim was meritless." Appellees' Br., p. 61-62.[18] According to the lower court's own cited authority, however, merely describing the benefits payable under the amended plan is not enough. Indeed, in *Layaou v. Xerox*, 238 F.3d 205, 211 (2d Cir. 2001), the only case cited by the lower court, the Second Circuit

[18] Appellees' attempt to distinguish the SPD cases cited by Appellants in their opening brief is to no avail. Appellees' Br. at 61 n.17. For example, PNC describes *Bakens v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986) as a case in which an employer had secretly amended its plan to eliminate special retirement benefits before terminating employees who would have been eligible for such benefits. Similarly, PNC amended its plan, the result of which did not eliminate, but effectively reduced benefits of its employees.

made clear that a more definite statement explaining the full import of how future benefits of employees are affected as a result of the amendment is required. *Cf. Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985) (notice of a plan amendment through an SPD failed to comply with §102).[19] The very same thing is true here, and defendants' SPD falls well short of the mark.

VI. CONCLUSION

For the foregoing reasons, as well as those included in Appellants' opening brief, the District Court's decision dismissing this action should be reversed and remanded for further proceedings.

Dated: April 20, 2006

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[19] Appellees note that *Layaou* and *Chambless* dealt with deficiencies in the description of an existing plan, rather than a failure to describe a prior benefit scheme or to compare benefits pre and post-amendment. PNC conveniently avoids addressing the primary concern expressed by these cases – to explain to plan participants the "full import" of a plan amendment.

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COMBINED CERTIFICATIONS

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Third Circuit, Bryan L. Clobes hereby certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point using Times New Roman style.

3. On this 20th day of April, 2006, I served 10 copies of Appellants' Reply Brief, by overnight courier service to the Clerk of the Court for the Third Circuit, and two copies to counsel listed below. An identical copy in .pdf format was sent to the Clerk of the United States Court of Appeals for the Third Circuit via e-mail.

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4. The text of the electronic brief and the hard copies are identical.

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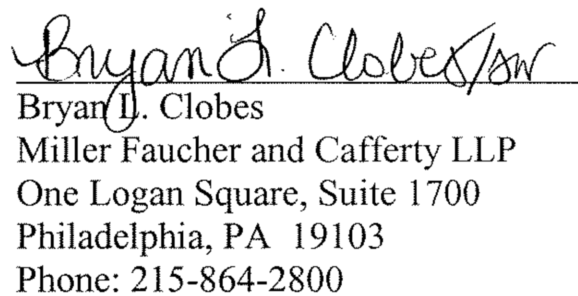
Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.



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