Case No. 04-55582
(and Consolidated Case No. 04-55583)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALDAMAR MILLER, ET AL.,

Plaintiffs-Appellants,

v.

XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Central District of California

BRIEF *AMICI CURIAE* OF AMERICAN BENEFITS COUNCIL, BUSINESS ROUNDTABLE, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The following disclosures are made pursuant to Federal Rule of Appellate Procedure 26.1:

1) Davis and Harman LLP (1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004) is the sole law firm appearing for the *Amici*.

2) The American Benefits Council (the "Council"), the Business Roundtable, and The ERISA Industry Committee ("ERIC") are associations and have no parent corporations.

3) No publicly held corporation owns any part of the Council, the Business Roundtable, or ERIC.

4) *Amici* are unaware of any publicly held corporation that is not a party to the proceeding before this Court having a financial interest in the outcome of the proceeding.

5) This is not a bankruptcy appeal.

_____

Kent A. Mason Date

STATEMENT REGARDING CONSENT TO FILE *AMICI* BRIEF

Counsel for Defendants-Appellees has consented to the filing of this *amici* brief. Counsel for Plaintiffs-Appellants has not consented to the filing of this *amici* brief. A motion for leave to file this *amici* brief is filed herewith.

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Kent A. Mason Date

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STATEMENT OF INTEREST

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 250 members include primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefits plans covering more than 100 million Americans.

The Business Roundtable is an association of chief executive officers of leading U.S. companies with over $4.5 trillion in annual revenues and more than 10 million employees. Member companies comprise nearly a third of the total value of the U.S. stock market and represent nearly a third of all corporate income taxes paid to the federal government. Collectively, they returned more than $110 billion in dividends to shareholders and the economy in 2005. Counting employees and their families, Business Roundtable companies provide health and/or retirement coverage for approximately 34 million Americans.

The ERISA Industry Committee ("ERIC") is a non-profit organization representing America's largest private employers in a broad variety of industries. All of ERIC's members provide benchmark benefits to tens of millions of active

and retired workers and their families through pension, health care, compensation, and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and other Federal law. All of ERIC's members do business in more than one State, and many have employees in all fifty States.

These associations limit their *amicus* participation to significant cases in which they believe their discussion of the issues will advance arguments that will not be presented by the parties or by other *amici*. The panel's decision in this case meets these criteria because of the devastating effects the decision would have on floor-offset arrangements, including the possibility of extremely adverse income tax consequences affecting over 1.7 million plan participants.

ARGUMENT

I. THE PANEL'S DECISION DANGEROUSLY UNDERMINES THE PRIVATE EMPLOYER-PROVIDED RETIREMENT SYSTEM.

The panel's decision concludes that the methodology used by the Xerox floor-offset arrangement to determine accrued benefits for rehired participants results in an impermissible forfeiture under ERISA. In our experience, the methodology used by the Xerox floor-offset arrangement with respect to rehired participants is, in relevant part, the same methodology used by every floor-offset arrangement. This is true because the Xerox methodology complies with the IRS' floor-offset rules as set forth in Revenue Ruling 76-259,[1] which is discussed below. A necessary implication of the panel's decision, therefore, is that all floor-offset plans fail to satisfy the tax-qualification and ERISA requirements[2] with potentially devastating consequences for millions of Americans.

Floor-offset arrangements are not an unusual plan design. There are approximately 1,200 floor-offset arrangements, covering over 1.7 million participants and holding billions of dollars in assets.[3] Floor-offset arrangements

[1] 1976-2 C.B. 111 (1976).

[2] The ERISA anti-forfeiture rule is also a tax-qualification requirement. *See* Code section 411(a). All references to "Code" are to the Internal Revenue Code of 1986.

[3] The figures provided are based on IRS Form 5500 reports (Annual Return/Report of Employee Benefit Plan), which are publicly available through the Department of Labor.

are used because they accommodate a wide range of employment patterns. Traditional defined benefit plans ("DB plans") tend to award significant benefits to longer service employees. In contrast, defined contribution plans ("DC plans") generally provide level contributions to all employees and are often more valuable to shorter service employees. By combining the two accrual patterns, a floor-offset arrangement can meet the needs of a broader range of employees than either plan standing alone.

Floor-offset arrangements represent good retirement policy. They provide employees with the potential for upside market appreciation through a DC plan and protection against downside market risk through a DB plan. DC plans are the fastest growing type of retirement plan[4] and, in a retirement system increasingly dominated by DC plans, it is critical to foster (or at least not hinder) the growth of floor-offset arrangements and the protection provided by their guaranteed benefits.

In addition to the direct adverse effect on floor-offset arrangements, the panel's decision would accelerate the alarming decline in DB plan sponsorship in recent years. Employers are increasingly exiting the defined benefit system. The total number of DB plans insured by the Pension Benefit Guaranty Corporation has

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[4] The most common type of DC plan -- the 401(k) plan -- has grown from a handful in the early 1980s to account in 1997 for 37 percent of tax-qualified retirement plans and 65 percent of new contributions. EBRI Special Report, *Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members* (Jan. 31, 2002).

decreased from more than 114,000 in 1985 to fewer than 32,000 in 2004.[5] Of the remaining plans, approximately 1,200 are DB plans in floor-offset arrangements. The panel's decision, if left standing, would call into question this important component of the DB system, thus accelerating the trend away from DB plans. This is especially true since the decision would undermine employers' reasonable reliance on IRS guidance; in this case, employers have relied on IRS Revenue Ruling 76-259 for 30 years.

II. THE PANEL'S DECISION IS CONTRARY TO BLACK LETTER LAW.

The panel's decision is best understood through an example. Assume a participant's account balance under a DC plan is $100,000 and the minimum retirement benefit guaranteed him under the floor-offset arrangement is worth $75,000. The participant terminates employment and elects payment. The benefit is $100,000, which is paid from the DC plan. No amount is paid from the DB plan because the participant's DC plan account exceeds the value of his guaranteed minimum benefit. The participant then returns to employment with the employer. To our knowledge, every existing floor-offset arrangement would count the benefit attributable to his $100,000 distribution in calculating the offset. Under the panel's decision, however, the maximum offset for the $100,000 distribution would be

[5] Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2004* (2005), at 4, *available at* http://www.pbgc.gov/docs/2004databook.pdf.

based on the prior guaranteed benefit worth only $75,000. The panel reasoned that the prior guarantee under the floor-offset arrangement was an "accrued benefit" under the DB plan and that ERISA's anti-forfeiture rules limit the offset for prior distributions to the amount of the prior accrued benefit.

Our fundamental concern with the panel's analysis is its assumption that the accrued benefit under the DB plan is the minimum guaranteed benefit before applying the offset. It is black letter law that the accrued benefit in a DB plan is the benefit determined *after* applying the offset. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (offsets related to retirement income are not forfeitures but a method of determining the accrued benefit).[6] In the example above, the employee never had an accrued benefit under the DB plan, since the employee's account in the DC plan exceeded the value of his or her guaranteed minimum benefit. It is therefore erroneous to conclude that the offset for prior distributions cannot exceed the participant's prior accrued benefit under the DB plan because there never was such a prior accrued benefit. The offset for prior distributions is simply a permissible part of the benefit formula under the DB plan.

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[6] *See Barney v. Masonite Corp.*, No. 02-15127, 2003 WL 22039783, at *2 n.2 (9th Cir. Aug. 28, 2003) (participants subject to offset "do not have any accrued benefit that is subject to a decrease"); *Brengettsy v. LTV Steel (Republic) Hourly Pension Plan*, 241 F. 3d 609, 610-612 (7th Cir. 2001); *Bonovich v. Knights of Columbus*, 146 F. 3d 57, 61-62 (2nd Cir. 1998); *Williams v. Caterpillar, Inc.*, 944 F. 2d 658 (9th Cir. 1991); *Holliday v. Xerox Corp.*, 732 F. 2d 548, 549-52 (6th Cir. 1984).

The IRS addressed offsets for prior distributions in Revenue Ruling 76-259 - the seminal guidance that approved floor-offset arrangements in 1976.[7] Under the ruling, a floor-offset arrangement is permissible if "the offset to the benefit otherwise payable is equal to the amount deemed provided on the determination date by the vested portion of the account balance in the profit-sharing plan (*plus the additional amount that would have been provided by any prior distribution from the account balance*)" (emphasis added).[8] This ruling has been widely understood to require an offset based on the amount of any prior distribution.[9]

It is unfortunate that the panel decision does not even mention Revenue Ruling 76-259, given that revenue rulings are entitled to deference.[10] The absence of any such reference is all the more remarkable because the revenue ruling has

[7] ERISA Reorganization Plan No. 4 provides Treasury with interpretive authority for the anti-forfeiture provisions.

[8] Rev. Rul. 76-259, 1976-2 C.B. 111 (1976).

[9] A partial offset only for rehired employees would raise a myriad of tax-qualification and ERISA issues. *See, e.g.*, Code § 401(a)(4) (prohibiting discrimination in favor of highly compensated employees).

[10] *See, e.g., Omohundro v. United States.*, 300 F. 3d 1065 (9th Cir. 2002) (deference to a revenue ruling).

been incorporated into Treasury regulations, *see* Treas. Reg. § 1.416-1, Q&A M-16, which are also entitled to deference.[11]

III. THE PANEL'S DECISION CHANGES THE UNDERLYING ECONOMICS OF FLOOR-OFFSET ARRANGEMENTS.

A floor-offset arrangement guarantees that a participant will receive a minimum retirement benefit based on his or her entire service with the employer. The panel's decision, however, effectively mandates that floor-offset arrangements provide a separate guarantee for each period of employment. As illustrated by the instant case, the value of that separate, piecemeal guarantee to a participant is greater than the value of a guarantee that runs to retirement age (and correspondingly more costly for the employer). Thus, participants who have separate periods of employment will, under the panel's decision, receive a more valuable benefit than other participants. ERISA's anti-forfeiture rules do not require such favoring of former employees who return to employment over employees who stay with the employer. *See White v. Sundstrand Corp*., 256 F. 3d 580 (7th Cir. 2001) (rejecting methodology for calculating floor-offset that treated workers who stay to retirement worse than workers who leave early).

Another consequence of the panel's decision is that terminated participants who receive distributions before retirement and are later rehired receive a larger

[11] *See. e.g., Huppeler v. Oscar-Mayer Foods Corp.*, 32 F. 3d 245 (7th Cir. 1994) (deference to IRS regulations approving offset for workers' compensation).

DB benefit than similarly situated participants who do not receive distributions until retirement.[12] The panel's decision thus creates an ill-advised incentive for terminated employees to take their retirement savings prior to retirement.

IV. THE PANEL'S DECISION CALLS INTO QUESTION MANY OTHER COMMON OFFSET ARRANGEMENTS.

The consequences of the panel's analysis for other types of plans are difficult to predict because the panel's analysis is so fundamentally at odds with the law of offset plans. Under one very literal reading of the panel's decision, in situations where a participant commences or recommences participation in a plan, ERISA's anti-forfeiture rules make it impermissible to define accrued benefits as the excess of a stated amount over a pre-established offset amount.

This reading, however, makes little sense. It is abundantly clear that employers can choose not to provide any benefits; correspondingly, it is clear that employers can establish benefit formulas based on offsets for pre-existing benefits. A contrary conclusion would have very significant implications for every plan that offsets for prior accrued benefits under other plans. This arises frequently where an employee transfers between different plans and the employer maintaining the second plan wants to provide all employees in the second plan with the same total benefit, taking into account benefits under the prior plan. This can arise, for

[12] See Code § 411(a)(11) (prohibiting most mandatory distributions before retirement age).

example, where an employee transfers between plans that cover different employment categories, as in *Williams v. Caterpillar, Inc.*, 944 F. 2d 658 (9th Cir. 1991), or between plans that cover different members of a group of related corporations. These offsets are also common in the context of business acquisitions where a buyer's plan may offset for benefits previously accrued under the seller's plan. This type of integration is clearly permitted under the law and serves important business needs in terms of benefit uniformity.

CONCLUSION

For the reasons stated above, *Amici* respectfully submit that this Court should grant Appellees' petition for rehearing or rehearing en banc.

Respectfully submitted,

Dated: _____, 20___

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that pursuant to Circuit Rule 35-4, 40-1, and Fed. R. App. P. 29(d), the attached brief *amici curiae*, supporting Appellees' petition for rehearing/petition for rehearing en banc, is proportionately spaced, has a typeface of 14 points, and contains 2,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (petitions and answers must not exceed 4,200 words, and an *amicus* brief may be no more than one-half the maximum length authorized by the Federal Rules of Appellate Procedure and the Ninth Circuit Rules for a party's principal brief).

Respectfully submitted,

Dated: _____, 20___

_____
Kent A. Mason

CERTIFICATE OF SERVICE

I certify that on June 05, 2006, I caused two (2) copies of this Brief *Amici Curiae* to be served via Federal Express on the following counsel:

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Kent A. Mason Date

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Benefits Council (the "Council"), the Business Roundtable, and The ERISA Industry Committee ("ERIC") respectfully submit this motion for leave to file the accompanying brief *amici curiae* in *Waldamar Miller, et al. v. Xerox Corporation Retirement Income Guarantee Plan, et al.,* No. 04-55582 (and Consolidated Case No. 04-55583).

The Council, the Business Roundtable, and ERIC have contacted the parties to this dispute to obtain permission to file this brief. Defendants-Appellees, Xerox Corporation Retirement Income Guarantee Plan, *et al*., have consented to the filing. Plaintiffs-Appellants, Waldamar Miller, *et al.*, have declined to provide consent.

INTEREST OF THE *AMICI CURIAE*

The Council is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 250 members include primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefits plans covering more than 100 million Americans.

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Floor-offset arrangements are not an unusual plan design. There are approximately 1,200 floor-offset arrangements, covering over 1.7 million participants and holding billions of dollars in assets.[2]

As public policy organizations, the Council, the Business Roundtable, and ERIC have a distinctive perspective that bears directly on the decision for

[1] 1976-2 C.B. 111 (1976).

[2] The figures provided are based on IRS Form 5500 reports (Annual Return/Report of Employee Benefit Plan), which are publicly available through the Department of Labor.

rehearing. In addition to addressing the relevant technical issues, the brief discusses the nature of, and the policy behind, floor-offset arrangements, as well as the benefits that such arrangements provide to employees. The brief also describes the economics of floor plans, and the effect that the panel's decision would have on our nation's private retirement system and American workers and their families. The Council, the Business Roundtable, and ERIC are able to provide a unique perspective on these issues in a manner that is not duplicative in material respects of the Defendants-Appellees' petition.

For these reasons, the American Benefits Council, the Business Roundtable, and The ERISA Industry Committee respectfully request that the Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

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