IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KATHI COOPER, ET AL.	)	
	)	
Plaintiffs,	)	
	)	**Civil Action No. 99-829**
v.	)	
	)	
THE IBM PERSONAL PENSION PLAN AND IBM CORPORATION	)	**CLASS ACTION**
	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

AND

BRIEF OF *AMICI CURIAE*
THE AMERICAN BENEFITS COUNCIL AND
THE ERISA INDUSTRY COMMITTEE

IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF REMEDIAL RELIEF
AND IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT DENYING
RETROACTIVE RELIEF

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Date: December 19, 2003

MOTION FOR LEAVE TO FILE BRIEF

AMICI CURIAE

This Court has held that both the Pension Credit Formula and the Cash Balance Formula in IBM's Personal Pension Plan violated section 204(b)(1)(H) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(b)(1)(H). At this time, the issue before the Court is to determine the appropriate remedy for that violation.

The American Benefits Council and The ERISA Industry Committee respectfully submit this motion for leave to file the accompanying brief *amici curiae*. Although neither the Federal Rules of Civil Procedure ("FRCP") nor the Local Rules of the United States District Court for the Southern District of Illinois provide procedures for filing an *amicus curiae* brief, neither the FRCP nor the Rules prohibit acceptance of an *amicus curiae* brief by the Court. This is evidenced by previous cases in which the United States District Court for the Southern District of Illinois has accepted such briefs. *See, e.g., Illinois v. Huckaba & Sons Constr. Co.*, 442 F. Supp. 56 (S.D. Ill. 1977) (*amicus curiae* brief filed on behalf of Orr Construction Co.); *McPherson v. School Dist. #186,* 426 F. Supp. 173 (S.D. Ill. 1976) (*amicus curiae* brief filed on behalf of the Illinois Office of Education); *Norfolk and Western Ry. Co. v. Beatty*, 400 F. Supp. 234 (S.D. Ill. 1975) (*amicus curiae* briefs filed by Illinois State Bar Association and Madison County Bar Association); *Glass Bottle Blowers Ass'n v. Owens-Illinois, Inc.*, No. 75-55, 1975 U.S. Dist. LEXIS 11836 (S.D. Ill. 1975) (*amicus curiae* brief filed by the Equal Employment Opportunity Commission). Other district courts within the Seventh Circuit also have accepted such briefs.[1]

[1] *See, e.g., Thomas v. United States*, 141 F. Supp. 2d 1185 (W.D. Wis. 2001); *In re Mexico Money Transfer Litigation*, 164 F. Supp. 2d 1002 (N.D. Ill. 2000); *AT&T Corp. v. Ameritech Corp.*, 1998 U.S. Dist. LEXIS 9175 (N.D. Ill. 1998).

INTEREST OF THE *AMICI CURIAE*

Amici have experience and technical expertise with respect to the issues faced by the Court during the remedies phase of the proceedings.

The American Benefits Council ("ABC"), formerly known as the Association of Private Pension and Welfare Plans, is a broad-based, non-profit trade association founded to protect and foster the growth of privately sponsored employee benefit plans. The members of ABC include both small and large employer sponsors of employee benefit plans, as well as plan service providers, such as consulting and actuarial firms, investment firms, banks, insurers, and other professional benefit organizations. Collectively, ABC has approximately 250 members that sponsor and administer plans covering more than 100 million plan participants.

The ERISA Industry Committee ("ERIC") is a non-profit association committed to the advancement of employee retirement, health, and welfare benefit plans of America's largest employers. ERIC represents exclusively the employee benefits interests of major employers who, collectively, provide comprehensive retirement, health care coverage and other economic security benefits directly to some 25 million active and retired workers and their families in all 50 states. The association has a strong interest in proposals affecting its members' ability to deliver those benefits, their cost and their effectiveness, as well as the role of those benefits in the American economy.

A large number of ABC and ERIC's members are employers that provide retirement benefits to employees and their families under plans similar to the plan in this case. As employers, and as potential respondents to similar ERISA claims, the members have a strong interest in the type of remedy the Court may award. In particular, any type of retroactive relief awarded by this Court will not only impact the parties to this case, but also will send a shock wave through other pension plans by disrupting the reasonable actuarial assumptions and funding expectations on which those plans are based. This disruption would cause plans across the country to be severely underfunded, leading to massive restrictions of future benefits. Thus, retroactive relief would have an adverse effect of staggering proportions on millions of individuals.

Under clear Supreme Court precedent cited in our brief, the test for determining whether retroactive relief is appropriate in this case turns on the following factors: (1) the reasonableness of past practices, (2) the likelihood of prospective compliance, and (3) the disruptive effect of a retroactive remedy. The Supreme Court has clearly stated that those factors must be evaluated on a national basis, not with respect to the litigants in the case at hand. ABC and ERIC are the leading national trade associations representing the employers that maintain retirement plans that would be impacted by a retroactive remedy. As such, ABC and ERIC are uniquely qualified to evaluate the Supreme Court's factors on a national basis, including the disruptive effect of any retroactive remedy on plans across the country. In that regard, as discussed in our brief, it is our view that even the intermediate form of retroactive relief set forth in the Defendants' brief would be catastrophic if applied to all plans. Because ABC and ERIC's unique national perspective is expressly relevant under Supreme Court precedent, ABC and ERIC respectfully request that the Court grant them leave to file the accompanying brief *amici curiae*.

On December 10, 2003, the *amici* contacted the parties to obtain consent to file this brief. Defendants, IBM Pension Plan and IBM Corporation, have consented to the filing. Plaintiffs, Kathi Cooper *et al.*, have stated that they do not consent to the filing.

Attached as Exhibit A to this Motion is Defendants' e-mail response to our request for their consent to the filing of the accompanying brief. Attached as Exhibit B to this Motion is Plaintiffs' e-mail response to our request for their consent to the filing of the accompanying brief. Plaintiffs' e-mail indicates that they may expend great effort to prevent this Court from having the views of ABC and ERIC. As discussed above, under clear Supreme Court precedent, the national perspective that ABC and ERIC have is directly relevant to the issue before this Court.

In their e-mail, Plaintiffs appear to consider, for example, the general cash balance plan lobbying efforts of ABC and ERIC's other members to be relevant to whether the accompanying brief should be accepted. It goes without saying that ABC, ERIC, and their members strongly and fervently represent the employer perspective with respect to cash balance plans. In fact, that is why it is important that their views be presented to this Court. Correspondingly, we would see no reason why this Court could not also be provided the views of national organizations representing other perspectives.

Because of the objections raised by Plaintiffs, we want this Court to be aware of IBM Corporation's relationship to ABC and ERIC. While IBM Corporation is a member of ABC and ERIC and serves on the boards of directors of both organizations, IBM Corporation did not participate in either organization's decision-making process for determining whether to file this brief. (For ABC, IBM is one of 18 members on the board's executive committee; for ERIC, IBM is one of 25 on the board.) No part of this brief has been or will be funded by IBM Corporation.

During 2003, ABC conducted a special solicitation of a number of its members to support a wide range of legislative, regulatory, research, and public relations efforts designed to bolster the defined benefit pension plan system. These activities concern several defined benefit pension plan public policy issues including: legislative reform of the statutorily required interest rate used for determining pension plan liabilities, legislative and regulatory threats to hybrid pension plans, and potential changes to pension accounting standards. IBM Corporation has responded to the solicitation with a contribution of $50,000, which is the largest donation received to date. No portion of the funds raised from any of the companies contributing have been nor will be used for any litigation whatsoever. ABC will raise separate funds for the preparation of this brief from several of its members, other than IBM Corporation.

IBM is, as noted, a member of ERIC's board of directors and participates in ERIC's retirement security committee. Funding for this brief was provided by a special solicitation among ERIC's members which specifically excluded IBM. IBM did not participate in ERIC's decision to file this brief. Counsel for IBM, Covington & Burling, is also counsel to ERIC but was not retained by ERIC to advise on this brief.

ABC and ERIC are broad-based organizations of longstanding. Their members have a close familiarity with, and a very strong interest in, the issues and concerns before the Court in this case. Those issues have an enormous bearing upon the design and operations of their pension plans. There is no way to characterize ABC and ERIC as anything other than independent voices for their entire respective memberships.

Respectfully submitted.

____
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Date: December 19, 2003

Exhibit A [Reformatted]

-----Original Message-----
From: Huvelle, Jeffrey [mailto:jhuvelle@cov.com]
Sent: Tuesday, December 16, 2003 9:05 PM
To: Kent A. Mason
Cc: Wick, Robert; Remes, David; Sonnenschein, Eric
Subject: RE: Cooper v. IBM Personal Pension Plan and IBM Corp.

IBM consents to the filing of an amicus brief by your clients.

Jeffrey G. Huvelle
Covington & Burling
1201 Pennsylvania Ave. NW
Washington, DC 20004
202 662 5526

-----Original Message-----
From: Kent A. Mason [mailto:kamason@davis-harman.com]
Sent: Wednesday, December 10, 2003 11:41 AM
To: skatz@koreintillery.com; dsprong@koreintillery.com; Roberthill@hillrobbins.com; johnevans@hillrobbins.com; bill@pension-law.com; Huvelle, Jeffrey; Wick, Robert; Remes, David; Sonnenschein, Eric
Subject: FW: Cooper v. IBM Personal Pension Plan and IBM Corp.

Our firm represents the American Benefits Council ("ABC") and The ERISA Industry Committee "ERIC") with respect to the case of Cooper v. IBM Personal Pension Plan and IBM Corp. ABC and ERIC are trade associations that represent employers that voluntarily sponsor traditional defined benefit plans, hybrid pension plans, and other comprehensive employee benefit plans; ABC and ERIC also represent organizations that provide employee benefit services to the plans and employers. The members of ABC and ERIC have a strong and compelling interest in this case, as well as expertise with respect to the issues being addressed. For that reason, ABC and ERIC intend to file a motion for leave to file a brief amici curiae in the case, accompanied by a brief of amici curiae in opposition to plaintiffs's motion for entry of remedial relief and in support of defendants' cross-motion for summary judgment denying retroactive relief.

We are respectfully requesting the consent of the parties to the filing of the brief amici curiae. Thank you in advance for your consideration of our request. If any further information would be helpful, please contact me.

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BRIEF AMICI CURIAE OF THE AMERICAN BENEFITS COUNCIL AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF THE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT DENYING RETROACTIVE RELIEF AND IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR ENTRY OF REMEDIAL RELIEF.

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I. Introduction

In *Cooper v. IBM Personal Pension Plan and IBM Corp*., CIVIL NO. 99-829 (S.D. Ill. July 31, 2003), this Court held that both the Pension Credit Formula and the Cash Balance Formula in IBM's Personal Pension Plan violated section 204(b)(1)(H) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(b)(1)(H). The Court instructed the parties to "promptly proceed to develop the issue of what relief the Court should order." Opinion at 21. On October 15, 2003, the Plaintiffs filed "The Class's Submission for Entry of Remedial Relief". Then, on December 5, 2003, the Defendants filed a memorandum opposing the Plaintiffs' submission and supporting the Defendants' cross-motion for summary judgment on retroactive relief.

Thus, the issue is the proper relief for a violation of section 204(b)(1)(H). A defined benefit plan violates this section if "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), provides the remedy for a violation of this rule:

> A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. (emphasis added)

As explained below, section 502(a)(3) does not require the award of retroactive relief, which is the remedy requested by the Plaintiffs. Moreover, also as discussed below, under criteria established by the Supreme Court for determining whether retroactive relief is appropriate in a pension case, it is very clear that the relief in this case should be prospective only.

II. The Supreme Court Has Denied Retroactive Relief In The Pension Context

The issue of whether retroactive relief should be awarded in the pension plan context was addressed by the Supreme Court in three cases under Title VII of the Civil Rights Act of 1964.[2] The issue in these cases related to pension plans' use of gender as a factor to determine contributions or benefits. The Court set forth a three-part test, which provides that retroactive relief should not be awarded in a pension case where (1) employers could reasonably have assumed that the plan design at issue satisfied the pertinent statutory requirement; (2) retroactive relief is unnecessary to ensure future compliance; and (3) retroactive relief would create significant disruption and inequity with respect to retirement plans, plan participants, and/or the economy.[3] Based on the three-part test, the Court denied retroactive relief in each of the cases.

A. *Manhart, Norris,* and *Long*

In *Manhart*, the Court held that the plan at issue violated Title VII, which prohibits discrimination on the basis of sex. 435 U.S. at 717; 42 U.S.C. § 2000e-2(a)(1). Under Title VII, a court that finds unlawful discrimination:

> *may* enjoin [the discrimination] . . . and order such affirmative action as may be *appropriate*, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any *other equitable relief* as the court deems appropriate. 42 U.S.C. § 2000e-5(g) (emphasis added) .

Under this language, retroactive relief should only be awarded if appropriate. 435 U.S. at 718.

Reasonableness of past practices. In making its determination as to the appropriateness of retroactive relief, the Court observed that "conscientious and intelligent administrators of pension funds . . . may well have assumed that a program like [the one at issue] was entirely

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[2] *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983); *Florida v. Long*, 487 U.S. 223 (1988).
[3] *See Manhart*, 435 U.S. at 718-723; *Norris*, 463 U.S. at 1105-1107; *Long*, 487 U.S. at 230-240.

lawful." 435 U.S. at 720. The Court found that there was no clear guidance in the area as the courts were silent on the issue and the administrative agencies had conflicting views. *Id.*

Unnecessary for future compliance. Next, the Court found that there was no reason to believe that the threat of retroactive relief was needed to cause other plan administrators to amend their practices. *Id.* at 721.

Disruptive effects. Finally, the Court considered the effect that retroactive changes would have on insurance and pension plans. The Court found that retroactive liability could be devastating for pension funds since unforeseen contingencies could jeopardize the plans' solvency and ultimately the benefits of innocent plan participants. *Id.* at 722-723. Based on the foregoing analysis, the Court denied retroactive relief.

Norris and *Long* applied the same three-part test. Moreover, both cases addressed what prospectivity meant. In *Norris*, the district court had provided relief that affected "only benefit payments made after the date of the District Court's judgment". 463 U.S. at 1092. The Court rejected this relief as "fundamentally retroactive in nature" because it would have required the defendant "to fund retroactively the deficiency in past contributions". *Id.* at 1105 n.10. The only way to avoid creating retroactive funding deficiencies is to apply the remedy solely to future benefit accruals. *Id.* at 1107 n.12.

Long rejected the notion that the three-part test should be governed by the defendant's situation. In *Long*, the defendant's possible awareness of the issues addressed by the Court was irrelevant, as was the argument that retroactive liability would not have been disruptive given the particular plan's financial state. 487 U.S. at 236-37. The three-part test serves "important national goals" that cannot turn on the situation of the particular litigant. *Id*.

B. The *Manhart* Standard Is Applicable To Cases Brought Under ERISA

The Title VII principles discussed above -- both the rule that retroactivity is not required and the applicability of the *Manhart* three-part test in determining whether retroactivity is appropriate -- apply to claims brought under ERISA section 502(a)(3). Specifically, courts have interpreted the language of section 502(a)(3), which permits "appropriate equitable relief" for ERISA violations, to have a meaning similar to the "nearly identical language in Title VII" discussed above.[4] Moreover, the courts have shown acute sensitivity to the real harm that retroactive awards would have in the pension field. [5]

III. Under The *Manhart* Standard, Retroactive Relief Is Inappropriate

A. *Manhart* Standard Part 1: Reasonableness of Past Practices

As noted above, under the first prong of the test, the question is whether "conscientious and intelligent administrators of pension funds . . . may well have assumed that [the plan design at issue] was entirely lawful". *Manhart,* 435 U.S. at 720. This first prong is clearly satisfied.

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[4] *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (interpreting the term "appropriate equitable relief" in ERISA § 502(a)(3) by consulting the interpretation of "any other equitable relief as the court deems appropriate" in Title VII). This interpretation of § 502(a)(3) has been recognized by other courts; *Griggs v. E.I. Dupont De Nemours & Co*., 237 F.3d 371, 385 (4th Cir. 2001) ("for the limited purpose of deciding what constitutes 'appropriate equitable relief' under ERISA, we are satisfied that the use of nearly identical language in Title VII sheds light on the subject."); *Hemelt v. United States*, 122 F.3d 204, 208 (4th Cir. 1997) ("*Mertens* simply confirmed the plain meaning of the statutory reference to "other appropriate equitable relief" in section 502(a)(3) of ERISA."); s*ee also Rogers v. Hartford Life & Accident Ins. Co*., 167 F.3d 933, 944 (5th Cir. 1999) (noting that the Supreme Court interpreted the language "appropriate equitable relief" for ERISA violations to have a meaning similar to the remedial provision of Title VII); *Heimann v. National Elevator Indus. Pension Fund*, 187 F.3d 493, 505 (5th Cir. 1999) (noting the Supreme Court's interpretation in *Mertens*); *Gerbec v. United States*, 164 F.3d 1015, 1019 (6th Cir. 1999) (noting the Supreme Court's interpretation in *Mertens*); *Sprague v. General Motors Corp*., 823 F. Supp. 442, 443 (E.D. Mich. 1993) (the district court noted the Supreme Court's interpretation of the language "appropriate equitable relief" in *Mertens* to deny the plaintiff class's motion for a jury trial) (subsequent trial history has been omitted as it is not relevant to the proposition for which this case is cited).

[5] *See, e.g., Nachman Corp. v. PBGC,* 446 U.S. 359, 368-369 (1980) ("new rules applying to pension funds 'should not be applied retroactively unless the legislature plainly commanded the result'", quoting *Manhart*, 446 U.S. at 721); *Manhart*, 435 U.S. at 720, n.40 (the Court noted that in enacting ERISA, Congress "underlined the importance of making only gradual and prospective changes in the rules that govern pension plans" and "paid careful attention to the problem of retroactivity" by setting effective dates for some of its provisions to be as late as 10 years after its enactment); *see also Retired Pub. Employees' Ass'n v. California,* 759 F.2d 511, 514 (9th Cir. 1986) (characterizing *Manhart* as reflecting "clear Supreme Court disapproval of retroactive relief in pension cases"); *Laffey v. Norwest Airlines, Inc.,* 740 F.2d 1071, 1089 (D.C. Cir. 1984) (noting the Supreme Court's concern in *Manhart* for "the grave consequences to pension funds flowing from a retroactive finding of liability"); *EEOC v. Texas Indus. Inc.*, 782 F.2d 547, 550 (5th Cir. 1986) (noting the Supreme Court's concern in *Manhart* "that the potential economic impact [of retroactive relief] 'could be devastating for a pension fund'" (quoting *Manhart,* 435 U.S. at 1382)).

Since the first cash balance plan was established in 1985,[6] they have become widespread. Even the short list of easily documented cash balance plans compiled in the *Amoroso Report* includes 365 plans covering 3.53 million active participants.[7]

History of guidance recognizing the validity of cash balance plans. In the past 18 years, until the decision in this case, there has never been any decision or statement by any court or federal agency that cash balance plan formulas are age discriminatory and thus inherently defective.[8] On the contrary, there have been repeated confirmations that cash balance plans are valid arrangements; several of these confirmations have referred expressly to the age discrimination issue in a favorable manner.

Most significantly, the only other courts that have addressed the age discrimination issue prior to the decision by this Court have been very clear: the inherent design of a cash balance plan does not violate ERISA section 204(b)(1)(H).[9]

There also were much earlier indications from the Treasury Department and Internal Revenue Service ("IRS") that cash balance plans were valid plans. To be tax-qualified, a plan must satisfy section 411(b)(1)(H) of the Internal Revenue Code of 1986 (the "Code"), which is the substantially identical counterpart to ERISA section 204(b)(1)(H). Moreover, under Reorganization Plan No. 4 of 1978 (Aug. 10, 1978), the Treasury Department has been given

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[6] *See, e.g.*, Leonard Sloane, *Your Money; Cash Balance Pension Plans,* N.Y. Times, section 1, page 36, column 1 (Aug. 17, 1985)*;* Report of C. Eugene Steuerle at 4 (July 3, 2002), Defendant's Brief of Dec. 5, 2003, App. Tab C.
[7] *See Report of Vincent Amoroso*, Defendant's Brief of Dec. 5, 2003, App. Tab HH ("*Amoroso Report*") at 12.
[8] A cash balance plan typically provides the same deemed allocation to all participants (as a percentage of pay) or alternatively a deemed allocation that rises to some extent (as a percentage of pay) based on the participant's age and/or service. We are not aware of any cash balance plan that would even come to close to satisfying the age discrimination standard established by this court. Thus, it is abundantly clear that the decision in this case is tantamount to a holding that cash balance plans are inherently defective.
[9] *See Eaton v. Onan*, 117 F. Supp. 2d 812, 822-834 (S.D. Ind. 2000); *see also Engers v. AT&T Corp.*, No. 98-3660 (D. N.J. June 6, 2001) (ERISA section 204(b)(1)(H) does not apply to accruals prior to normal retirement age); *Campbell v. BankBoston, N.A.,*327 F.3d 1, 23 (1st Cir. 2003) (in dictum, court states "it is by no means clear that the annuity method is the only permitted method" of testing for age discrimination under ERISA). (Treatment of the annuity method as the exclusive testing method is the basis of this Court's opinion.). If interpreted literally, this Court's opinion is also inconsistent with *Lunn v. Montgomery Ward*, 166 F. 3d 880 (7th Cir. 1999) (holding that post-65 benefit accruals do not have to be tested based on the actuarially equivalent age 65 annuity).

exclusive jurisdiction with respect to the two provisions. Accordingly, the views of the Treasury Department and the Internal Revenue Service ("IRS") are directly on point.

In 1991, the Treasury Department issued final regulations that contained a safe harbor for cash balance plans under Code section 401(a)(4).[10] Although those regulations were withdrawn, new regulations issued in 1993 also contained the safe harbor, which remains in place today.[11] It would be almost unthinkable for an employer to conclude that the Treasury Department had steadfastly maintained detailed regulations regarding a type of plan that was inherently invalid..

Moreover, the preamble to the 1991 regulations expressly addresses the age discrimination issue. One of the requirements to be within the safe harbor was, and is, that "interest adjustments through normal retirement age must be accrued under the plan in the year the hypothetical allocation to which they relate is accrued"; *i.e.*, the safe harbor effectively requires the type of benefit accrual pattern found to be discriminatory in this case. 56 Fed. Reg. 47524, 47528 (Sept. 19, 1991). The preamble then states:

> The fact that interest adjustments through normal retirement age are accrued in the year of the related hypothetical allocation will not cause a cash balance plan to fail to satisfy the requirements of section 411(b)(1)(H), relating to age-based reductions in the rate at which benefits accrue under a plan. [*Id.*]

In 1996, the IRS issued IRS Notice 96-8,[12] which addresses how cash balance plans must be structured to satisfy various Code requirements. Again, it would be bizarre for any employer to question the validity of a type of plan that the IRS has so clearly recognized as valid.

In addition, until 1999, the IRS consistently granted determination letters with respect to cash balance plans, approving them as satisfying the tax-qualification requirements (including

[10] *See* former Treasury Regulation § 1.401(a)(4)-8(c)(3) at 56 Fed. Reg. 47,583-86.
[11] *See* Treas. Reg. § 1.401(a)(4)-8(c)(3); *see also* Treas. Reg. § 1.401(a)(4)-13(f) (providing special rules for the cash balance plan safe harbor).
[12] 1996-1 C.B. 359.

Code section 411(b)(1)(H)).[13] In fact, the changes made by the IRS in 1999 provide further support for the inherent validity of cash balance plans. Beginning September 15, 1999, all determination letter applications to the IRS and all IRS examination cases with respect to conversions to a cash balance plan were required to be submitted by the IRS field office to the IRS National Office for technical advice.[14] Significantly, this change in IRS procedure is exclusively focused on the conversion issue, not the inherent design of cash balance plans. For example, a new defined benefit plan that is a cash balance plan would not be subject to this new procedure. Thus, an employer could only conclude that the IRS was concerned about conversion methodologies, not about the inherent structure of a cash balance plan.[15]

Congress has also recognized cash balance plans. In the Economic Growth and Tax Relief Reconciliation Act of 2001,[16] the conference report directs Treasury "to prepare a report on the effects of conversions of traditional defined benefit plans to cash balance or hybrid formula plans."[17] It would be anomalous for Congress to require a study of conversions to a type of plan that is inherently defective.

In addition, in December of 2002, the Treasury Department issued proposed regulations under which the cash balance plan design does not violate Code section 411(b)(1)(H). Prop. Treas. Reg. § 1.411(b)-2. These are clearly only proposed regulations with no precedential

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[13] *See also* Rev. Proc. 93-39, 1993-2 C.B. 513, 527 (in describing procedures for obtaining favorable determination letters, IRS specifically refers to cash balance plan safe harbor described above).

[14] Carol Gold, IRS Internal Memorandum on Pension Plan Conversions to Cash Balance Plans (Sept. 15, 1999).

[15] This focus on the conversion issue continued when the IRS sought "public comments . . . with respect to retirement plans known as cash balance pension plans ('cash balance plans'), particularly with respect to conversions of other types of defined benefit pension plans into cash balance plans" (emphasis added). *See* 64 Fed. Reg. 5,6578 (Oct. 20, 1999). Similarly, the Equal Employment Opportunity Commission's ("EEOC") September 20, 1999 announcement of its "national cash balance team" was clearly focused on conversions. According to the EEOC, "[t]he crux of the debate is whether older workers those closer to retirement [sic] are unlawfully discriminated against when employers convert from traditional pension plans to cash-balance pension plans …."

[16] Pub. L. No. 107-16, 115 Stat. 38 (2001).

[17] H.R. CONF. REP. NO. 107-84, at 266 (2001) (describing House bill, which the conference agreement follows with respect to this provision).

effect, but they are nevertheless another in a long line of actions by government agencies with relevant expertise that interpret the law to permit cash balance plan formulas.

It is certainly true that some critics have argued that cash balance plans are age discriminatory. However, in the face of consistent guidance to the contrary from the government, there was absolutely no reason for employers to believe that these plans were anything but completely legal.

Support in the statute and legislative history. Moreover, even if none of the guidance described above existed, the statute and legislative history provided employers with a very sound basis for concluding that cash balance plans did not violate the age discrimination rules.[18] First, the legislative history strongly indicates that the age discrimination provisions only apply after a participant attains normal retirement age.[19] The only other courts that have looked at the issue have followed this interpretation.[20]

Even if section 204(b)(1)(H) is interpreted to apply to accruals prior to normal retirement age, the "rate of an employee's benefit accrual" (the phrase used therein) should not be determined by reference to the employee's annual benefit commencing at normal retirement age. If Congress had meant for section 204(b)(1)(H) to be interpreted in that manner, Congress could easily have used any of several defined terms that appear elsewhere in section 204(b).[21]

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[18] We submit this discussion not to re-argue an issue that has already been decided by this Court, but rather to explain further the basis on which it was completely reasonable to view cash balance plans as legal.

[19] *See* H.R. CONF. REP. NO. 99-1012, at 376 (1986) (hereinafter "Conference Report") ("The Senate Amendment [which the Conference Report generally follows] amends ADEA, ERISA, and the Code to require a plan to provide for benefit accruals and contributions with respect to an employee's years of plan participation after normal retirement age."); *see also* heading of Code section 411(b)(1)(H): "Continued Accrual Beyond Normal Retirement Age."

[20] *See Eaton v. Onan Corp.*; *Engers v. AT&T Corp*; *see also Campbell v. BankBoston, N.A*. at 327 (in dictum, court states that "the ERISA age discrimination provision may not even apply to workers younger than the age of normal retirement"); 53 Fed. Reg. 11,876 (Apr. 11, 1988) (preamble to first proposed regulations under section 411(b)(1)(H) states: "This document contains proposed regulations relating to the requirement for continued accruals beyond normal retirement age under employee pension benefit plans.")

[21] For example, Congress could have referred to an employee's "accrued benefit" (used, *inter alia*, in section 204(b)(1)(G)), an employee's "normal retirement benefit" (used, for instance, in section 204(b)(1)(A)), the "annual

By purposely not using such other terms and instead using a phrase not defined in the statute or regulations, Congress was leaving but one place to look for the meaning of the phrase, *i.e.,* the plan documents themselves. Indeed, section 204(b)(1)(H) specifically states that a defined benefit plan fails to satisfy section 204 only "if, *under the plan*, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age" (emphasis added). Cash balance plans would clearly satisfy section 204 (b)(1)(H) based on the benefit formulas as set forth in the plan documents.

Any other interpretation of section 204(b)(1)(H) would lead to strange and unintended results. For example, if the "rate of an employee's benefit accrual" were to be based on the annual benefit payable at normal retirement age, all or substantially all contributory defined benefit plans would be disqualified. This is true because the employee contribution required under such a plan and the earnings required to be accrued thereon under section 204(c) closely resemble a cash balance plan in their benefit accrual pattern. Thus, interpreting section 204(b)(1)(H) to be based on the annual benefit payable at normal retirement age requires the conclusion that, in 1986, Congress intended to prohibit contributory defined benefit plans, a common type of arrangement particularly among State and local governments (which are subject to section 4(i) of the Age Discrimination in Employment Act of 1967 ("ADEA"), the ADEA counterpart to ERISA section 204(b)(1)(H)).

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rate at which any individual . . . can accrue the retirement benefits payable at normal retirement age" (the words in section 204(b)(1)(B)), or the "annual benefit commencing at normal retirement age" (used in section 204(b)(1)(C)). For example, section 204(b)(1)(H)(i) could have been drafted in a manner consistent with section 204(b)(1)(B) to read as follows:

> Notwithstanding the preceding paragraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, the rate at which an employee accrues the retirement benefit payable at normal retirement age (or the employee's age if later) is ceased, or such rate is reduced, because of the attainment of any age.

Summary. An extensive review of the law and the unanimous view expressed repeatedly by the government provided a very firm basis for any employer to conclude that cash balance plans were completely legal.

Pension equity plans. The January 1, 1995 amendment to the IBM plan created a "pension equity plan." Like a cash balance plan, a pension equity plan is a type of "hybrid" defined benefit plan. Under a pension equity plan, participants generally accrue benefit credits that are expressed as a percentage of final average pay. Like a cash balance plan, the benefits under a pension equity plan are generally expressed as a lump sum amount. Accordingly, from an age discrimination perspective, pension equity plans are virtually identical to cash balance plans. Thus, although most of the authorities discussed above technically referred only to cash balance plans, an employer adopting a pension equity plan could very appropriately rely on the same long list of authorities that support the validity of cash balance plans. Accordingly, as with cash balance plans, it is abundantly clear that the first prong of the test is satisfied with respect to pension equity plans.

B. *Manhart* Standard Part 2: Retroactive Relief Is Unnecessary For Future Compliance

The second prong of the test is "whether retroactive awards are necessary … to ensure compliance …" with the decision of the court. *Long,* 487 U.S. at 235. This prong of the test is clearly satisfied. Pension plan sponsors are very conservative with respect to compliance with the pension rules because of the enormous risks of noncompliance. Employers almost universally submit their plans and plan amendments to the IRS voluntarily for an advance approval in the form of a favorable determination letter.[22] In addition, an employer that did not

[22] *See* Internal Revenue Service, Employee Plans Rulings & Agreements Overview (Sept. 11, 2003) (presented by the IRS at its Central Mountain Employee Benefits Conference) (275,000 determination letter applications expected in 2002-03; 150,000 received by that time).

comply would face staggering liabilities. Employers' clear interest in avoiding such liabilities led the Supreme Court to conclude without analysis in all three cases that the second prong of the test is satisfied "[i]n the pension context". *Long,* 487 U.S. at 235.

C. *Manhart* Standard Part 3: The Disruptive Effects Of Awarding Retroactive Relief

The third prong of the test requires consideration of the extent to which retroactivity would be "disruptive" or "inequitable".[23] Very generally, the Plaintiffs have argued in their brief that all participants should have their benefits increased for all years so that, based on the annual benefit payable at normal retirement age, they receive as much as the youngest participants would.[24] If that standard were to apply, there is no way to overstate the devastating effect on the private pension system. In IBM's case, the Plaintiffs' remedy would increase the plan's liability by approximately $5.7 billion, and would increase the total liability for all active participants by 40.9%. *See Amoroso Report* at 12. Moreover, Mr. Amoroso states: "it is my opinion that the immediate increase in pension liabilities that would result from applying Plaintiffs' Proposed 'Cumulative' Remedy to other cash balance plans will be well over $100 billion, and perhaps far in excess of that sum". *Id* at 13.

With respect to pension equity plans, the *Amoroso Report* states that "the immediate increase in pension liability for the 17 [pension equity plans identified in the report]… would be multiple billions of dollars." *Id*. at 14. The *Amoroso Report* indicates that the precise number would depend on a variety of factors, "and would be further increased by other, unidentified, [pension equity plans]." *Id*. The combined effect on cash balance and pension equity plans -- an

[23] *Manhart,* 435 U.S. at 722; *Norris*, 463 U.S. at 1106; *Long*, 487 U.S. at 230.
[24] Plaintiffs present two basic variations on this theme: an annual approach and a cumulative approach. For purposes of this brief, we have relied on the *Amoroso Report*, which assumes application of the cumulative approach. That approach produces a <u>smaller</u> increase in liabilities.

increase in pension liabilities of much more than $100 billion -- would far surpass the potential liability in the Supreme Court cases.[25]

These increased liabilities would have far-reaching effects. First, almost any employer with a cash balance or pension equity plan would have little choice but to "freeze" its plan (*i.e.,* prospectively, no employees would earn any additional benefits), so as to avoid increasing an unmanageable liability any further. Few employers could afford to continue to provide benefits after absorbing anything remotely close to a 40.9% increase in liabilities. This could mean that well over 3.8 million participants (*id*. at 12-13) would lose all further benefits. This may not be meaningful for the 64-year old who would receive an enormous windfall. But it would be devastating for all younger generations who would see their benefit program collapse.

Moreover, an increase in active participant liability of anything close to 40.9% would mean total liability increases of at least hundreds of millions of dollars (and billions in many cases) for many, many companies. That type of additional liability would preclude companies from investing in their business. The additional liability could drive numerous companies into bankruptcy, including many non-profit organizations whose communities would suffer accordingly.

As companies are driven into bankruptcy, their plans are often transferred to the Pension Benefit Guaranty Corporation ("PBGC"). The PBGC is a self-funded governmental organization that insures benefits payable under defined benefit plans. If a plan terminates with insufficient

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[25] *See Amoroso Report* at 16 ("it is my opinion that the impact of requiring retroactive compliance with the age discrimination rules articulated in the Court's opinion of July 31, 2003, would exceed the impact of requiring retroactive compliance with the sex discrimination rules articulated in the *Manhart, Norris,* and *Long* cases by several orders of magnitude."); U.S. Dept. of Labor, *Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits*, at 33 (1983) (total liability attributable to retroactivity of *Manhart* decision would have been $1.2 - $1.7 billion per year for approximately 15 years and would decline after that); *Norris,* 463 U.S. at 1106 ("the cost of complying with the District Court's award of retroactive relief would range from $817 to $1,260 million annually for the next 15 to 30 years. Department of Labor Cost Study 32.") The *Amoroso Report* calculated the present value of retroactive relief in the *Norris* case as between $7 and $14.2 billion for all plans. *Amoroso Report* at 16.

assets, the PBGC is required to provide participants with benefits up to a guaranteed level. The PBGC is entitled to recoup its payments from the plan sponsor, but in the case of a bankrupt employer, this right may not have substantial value. The PBGC is already facing a large deficit.[26] If the PBGC were to inherit a large number of additional plans with enormous unfunded liabilities, a taxpayer bailout of the PBGC could well become necessary.

In brief, retroactive liability would likely be the single most adverse development for the pension system in its history, and would harm innocent plan participants across the country. The disruption and inequity would be far greater than in any of the Supreme Court cases.

<u>A more tailored retroactive remedy would not solve the problem.</u> The Plaintiffs' Proposed Remedy is extreme. There are more tailored versions of retroactive liability that would not create enormous windfalls (as the Plaintiffs' version would), but rather are intended to put the parties in the position that they would have been in if this Court's opinion had been originally articulated as the law and employers had at all times been aware of it. In such a case, the total plan liabilities would theoretically be the same as those incurred under the hybrid plan adopted, but those liabilities would have been allocated differently among the participants. However, because benefits cannot be retroactively reduced, those tailored remedies are still extremely expensive. In other words, participants who would have received less <u>do not</u> receive less while participants who would have received more <u>do</u> receive more.

<u>We strongly urge this Court not to make the decision retroactive at all.</u> The effect of a tailored remedy would still be extreme beyond anything ever seen in the pension area. The cost to the IBM plan of the tailored remedy it has calculated would be approximately $700 million. *See* Defendents' Brief of December 5, 2003 at 41. If every hybrid plan in the country

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[26] Pension Benefit Guaranty Corporation, *2002 Annual Report, PBGC A Lifetime of Support*, at 2-3 (2003) ("2002 PBGC Report").

experienced a comparable increase in liability, almost all of the catastrophic effects described above would occur.

Under the tailored remedy, the IBM plan's liability would increase by $700 million, which is 10.6% of $6.58 billion (the *Amoroso Report's* estimate (at 12) of the accounting cost of the Plaintiffs' Proposed Remedy). If the effect on all hybrid plans nationally would be approximately proportional, as seems quite likely, a tailored remedy would increase liabilities for all hybrid plans by well over $10.6 billion (10.6% of the *Amoroso Report's* well over $100 billion estimate of the effect on all plans). Even assuming unrealistically that the increase would be no more than $10.6 billion, that is a staggering figure that is consistent with the retroactive liabilities at issue in the *Norris* case, where the Supreme Court rejected retroactive liability.

In addition, all hybrid plans would be forced to develop their own potentially different tailored remedy; each remedy would likely produce controversies and lawsuits. When all that is settled, the hybrid benefits of every participant would have to be recalculated. And this tailored retroactive liability would be in the form of unjustifiable windfalls.

The defined benefit plan system is in decline.[27] It could not survive the nightmare of even the tailored remedy, which would set an extremely costly precedent for all hybrid plans. Hybrid plans across the country would be frozen, so that millions of participants would earn no future benefits. <u>A tailored remedy is not an appropriate middle ground. It is simply an alternative road to a catastrophe for the private pension system.</u>

<u>Effect on other types of plans.</u> Finally, we have limited our discussion to hybrid plans; such a limited discussion only begins to describe the disruptive effect of a retroactive remedy. As noted above, the Court's opinion would clearly invalidate contributory defined benefit plans maintained by State and local governments across the country. The *Amoroso Report* estimates

[27] *See, e.g.,* 2002 PBGC Report at 13.

that the Plaintiffs' Proposed Remedy would increase pension liabilities for State and local government plans "on the order of multiple hundreds of billions of dollars." *Id*. at 15.

Prospectivity. The Supreme Court cases clearly hold that a prospective remedy is a remedy that applies to benefits that are accrued in the future. In this case, that is the only remedy that would protect plans from the disastrous effects described above.

Summary. In summary, this case clearly satisfies the three-part test to a far greater degree than even the *Manhart* trilogy of cases. Prior to this Court's opinion, there was a long line of authority all of which supports the validity of cash balance and pension equity plans. Moreover, the adverse effect of a retroactive remedy on plans, companies, participants, and the economy cannot be overstated. Any effect on benefits accrued prior to the decision would be strikingly unfair and enormously disruptive for innocent parties across the country.

IV. Conclusion

For the reasons set forth above, the Defendants' cross-motion for summary judgment denying retroactive relief should be granted and the Plaintiffs' proposal for remedial relief should be denied.

Respectfully submitted.

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Date: December 19, 2003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the *amici curiae* brief—In Opposition To Plaintiffs' Motion For Entry Of Remedial Relief And In Support Of Defendants' Cross-Motion For Summary Judgment Denying Retroactive Relief—upon counsel of record by placing copies of the same in the United States mail with adequate first-class postage affixed thereto, properly addressed as follows:

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Kent A. Mason

December 19, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KATHI COOPER, ET AL.	)	
	)	
Plaintiffs,	)	
	)	**Civil Action No. 99-829**
v.	)	
	)	
THE IBM PERSONAL PENSION PLAN AND IBM CORPORATION	)	**CLASS ACTION**
	)	
	)	
Defendants.	)	

ORDER

Having fully considered the motion of the American Benefits Council and The ERISA Industry Committee for leave to file an *amici curiae* brief

In Opposition To Plaintiffs' Motion For Entry Of Remedial Relief And In Support Of Defendants' Cross-Motion For Summary Judgment Denying Retroactive Relief,

it is hereby

ORDERED that the motion be and is GRANTED.

____
The HONORABLE G. PATRICK MURPHY
United States District Court Judge

____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KATHI COOPER, ET AL. Plaintiffs, v. IBM PERSONAL PENSION PLAN AND IBM CORPORATION Defendants.	)))))))))))	CIVIL NO. 99-829

MOTION TO APPEAR PRO HAC VICE
(For This Case Only)

Comes now KENT A. MASON, pursuant to Local Rule 83.1(b) of the United States District Court for the Southern District of Illinois, and moves this Court to allow said movant to appear of record in the above-entitled case and participate *pro hac vice* (for this case only) in an *amici curiae* brief on behalf of AMERICAN BENEFITS COUNCIL and THE ERISA INDUSTRY COMMITTEE, and in support thereof states and certifies to the Court:

1. That movant is an attorney licensed to practice law in the DISTRICT OF COLUMBIA and the State of GEORGIA (inactive status, attorney in good standing).
2. That movant is a member in good standing in the Bars as set forth above.
3. That movant does not wish to be admitted generally, but for the purpose of this case only.
4. That movant is familiar with the law, facts, and procedures relating to the subject matter of this litigation.

THEREFORE, movant respectfully requests permission to appear of record and participate *pro hac vice* before the United States District Court for the Southern District of Illinois.

____
Signature of Movant

AA-03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KATHI COOPER, ET AL. Plaintiffs, v. IBM PERSONAL PENSION PLAN AND IBM CORPORATION Defendants.	)))))))))))	CIVIL NO. 99-829

O R D E R

IT IS ORDERED that, the fee having been paid,

(Movant) Kent A. Mason

(Address) Davis & Harman LLP, 1455 Pennsylvania Ave., NW, Washington, DC 20004

(Telephone #) 202-347-2230 (Fax #) 202-393-3310

is admitted to practice *pro hac vice* (for this case only) before the United States District Court for the Southern District of Illinois, as attorney for: AMERICAN BENEFITS COUNCIL and THE ERISA INDUSTRY COMMITTEE.

DATED: ____________________

BY ORDER OF COURT:

Norbert G. Jaworski, Clerk

By: ________________________________
Deputy Clerk

AA-03