LEXSEE 1996 U.S. S. CT. BRIEFS LEXIS 137

Go to Supreme Court Opinion Go to Oral Argument Transcript

LOCKHEED CORPORATION, et al., Petitioners, v. PAUL L. SPINK, Respondent.

No. 95-809

SUPREME COURT OF THE UNITED STATES

1995 U.S. Briefs 809; 1996 U.S. S. Ct. Briefs LEXIS 137

October Term, 1995

February 29, 1996

[*1]

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether a pension plan sponsor and plan fiduciaries may be held liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when the plan sponsor amends its pension plan to create new benefits for a voluntary retirement program made subject to specified eligibility criteria and plan benefits are then paid to eligible participants pursuant to the terms of the amended plan.

2. Whether the Omnibus Budget Reconciliation Act of 1986, which amended ERISA and the Age Discrimination in Employment Act, applies retroactively [*2] to require pension benefit accruals for years an employee lawfully was excluded from plan participation.

PARTIES

The parties are Lockheed Corporation; Daniel M. Tellep; Robert A. Furman; Vincent N. Marafino; K.H. Anderson; L. Bernard; R.W. Berry; P.N. Braun-Agel; D.L. Bronco; R.H. Northcutt; W.E. Skowronski; A.G. Van Schaick; and W.T. Vincent, Petitioners; and Paul L. Spink, Respondent (on behalf of himself and similarly situated individuals).

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioners state that Lockheed Corporation has previously listed its parent and nonwholly owned subsidiary corporations in the Petition for a Writ of Certiorari. Since the filing of the Petition, Lockheed Corporation's parent, Lockheed Martin Corporation, has publicly announced the proposed acquisition of Loral Corporation. Upon completion of this acquisition, which is expected to conclude in Spring 1996, Lockheed Martin Corporation is anticipated to have the following additional subsidiaries (other than wholly owned subsidiaries): Loral Space Communications, Ltd.; Canada Continental Satellite Corporation; Servicios Tecnicos Loral de Mexico, S.A. de C.V.; WITG, Inc.; Space [*3] Systems/Loral, Inc.; International Space Technology, Inc.; Cosmotech; SS/L Export Corporation; Be MI AG; L/E Systems Corporation; Mikrodalga Elektronik Sistemler Sanayi Ve Tacaret Anonim Sirketi; MLRS International Corporation; Valley Association Corporation.

View Table of Authorities

OPINIONS BELOW

The opinion of the court of appeals is reported at *60 F.3d 616,* and is reprinted in the Joint Appendix ("J.A.") at 76. The court's denial of rehearing, J.A. at 95, is unreported. The district court's opinion is unofficially reported at *15 Employee Benefits Cas. (BNA) 2242* and *61 Empl. Prac. Dec. (CCH) P 42,094,* and is reprinted in the Joint Appendix at 62.

JURISDICTION [*8]

The court of appeals' opinion was filed on July 18, 1995. J.A. at 76. A timely petition for rehearing was denied on September 1, 1995. J.A. at 95. The petition for a writ of certiorari was timely filed on November 24, 1995, and was granted on January 19, 1996. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254*(1).

STATUTES INVOLVED: STATUTORY PROVISIONS INVOLVED

The following statutes are involved in this case: the Employee Retirement Income Security Act ("ERISA") § 3(21)(A), *29 U.S.C. § 1002(21)(A)*; ERISA § 406(a)(1), *29 U.S.C. § 1106(a)(1)*; § 9201 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), *29 U.S.C. § 623(i)(1)*; § 9202(a)(2) of OBRA 1986, *29 U.S.C. § 1054(b)(1)(H)(i)*; § 9203 of OBRA 1986, *100 Stat. 1979 (1986);* and § 9204 of OBRA 1986, *100 Stat. 1979-80 (1986),* codified at *29 U.S.C. § 623* note. The pertinent text of these statutes is set forth in the Appendix to the Petition for a Writ of Certiorari at 36a-39a.

STATEMENT OF THE CASE

Factual background. Petitioner Lockheed Corporation [*9] ("Lockheed") sponsors a noncontributory defined benefit pension plan, the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan"). Prior to 1986, Lockheed was permitted, by the express terms of the Employee Retirement Income Security Act, *29 U.S.C. §§ 1001* et seq. ("ERISA") and the Age Discrimination in Employment Act, *29 U.S.C. §§ 621* et seq. ("ADEA"), to lawfully exclude from Plan participation those employees who were hired within five years of normal retirement age. Lockheed's Plan contained such a provision, which stated that an employee who was more than 60 years old when hired was not eligible to participate in the Plan. n1 J.A. at 58. Congress eliminated this exclusion from pension plan participation when it enacted the Omnibus Budget Reconciliation Act of 1986, *100 Stat. 1973 (1986)* ("OBRA 1986"), with the proviso that the new rule would not take effect until 1988. Lockheed subsequently amended § 2.01(C) of its Plan to reflect this change in the law. J.A. at 42.

n1 The Plan refers to a participant as a "Member," as defined in Plan § 1.16. J.A. at 41. Lockheed will use the term "participant" throughout this Brief.

[*10]

Respondent Paul L. Spink was first employed by Lockheed in 1939, and then intermittently through 1950. J.A. at 11. After an interim of nearly 30 years, during which he worked for other employers in the defense industry, Lockheed again hired respondent in 1979, at age 61. J.A. at 14. Respondent did not become a Plan participant at this time, because he was over 60 years old. Instead, respondent first became a Plan participant on December 25, 1988, when OBRA 1986 took effect with respect to Lockheed's Plan. n2 J.A. at 42.

n2 The pertinent provisions of OBRA 1986 apply to plan years beginning on or after January 1, 1988. Lockheed's first Plan year following January 1, 1988, commenced on December 25, 1988. Plan § 1.20, J.A. at 41.

In 1990, Lockheed offered a voluntary retirement window program for the purpose of reducing the size of its workforce in connection with a drastic reduction in Lockheed's business operations in Southern California. In order to implement this decision, Lockheed's Board of Directors amended the terms of the Plan to create the 1990 Special Retirement Opportunity ("SRO"). n3 J.A. at 59. This program was designed to provide eligible employees with an additional [*11] three years of service credit, so that they would receive pension benefits beyond those to which they would otherwise be entitled, if they voluntarily retired from their Lockheed employment. J.A. at 51-52, 56-57. Eligibility for these enhanced early retirement benefits was made subject to certain conditions specified in the Plan amendment. These conditions included (1) being eligible for early or normal retirement under § 5.01 or § 5.02 of the Plan; (2) electing to retire by the date specified in the SRO; (3) executing a release of employment-related claims stating that the employment would accept benefits under the SRO in lieu of pursuing such claims; n4 and (4) actually terminating employment by the specified date. J.A. at 49-51, 54-56.

n3 The SRO consisted of two programs which were incorporated in the Plan amendment: a Special Retirement Program which was made available to certain employees who had already received layoff notices and would agree to convert their layoff into a voluntary retirement, and a Voluntary Retirement Program which was available to certain employees who had not been notified of layoff but were nonetheless willing to elect voluntary retirement. J.A. at 61.

[*12]

n4 The Plan amendment required a waiver by the eligible participant of claims against the employer "arising from termination of employment or otherwise." Plan § 15.02(B)(4), J.A. at 50; Plan § 15.03(B)(4), J.A. at 55. The complaint alleged that an eligible participant was required to release "almost all claims arising out of, or in any way related to, her/his employment with defendant Lockheed or the termination of that employment. . . ." J.A. at 22. The release itself is not in the record. The lower courts did not decide any issue as to the scope or enforceability of the release.

Respondent was not willing to release Lockheed from his employment-related claims, i.e., his claim that the ADEA as amended by OBRA 1986 required retroactive pension benefit accrual; thus he decided not to participate in the voluntary retirement program and never signed any release. Instead, respondent worked until June 30, 1990, when he voluntarily retired from Lockheed. J.A. at 11. Respondent concedes that Lockheed has complied with the written terms of the Plan in calculating his pension benefits at all times since his retirement. J.A. at 63 n.1.

The complaint. The district court complaint, [*13] filed by respondent on behalf of himself and as representative of a class of persons similarly situated, challenged both the release requirement of the 1990 SRO, as well as Lockheed's decision not to retroactively credit respondent and the putative class members for pension benefit accruals prior to the time they became Plan participants, i.e., December 25, 1988. On the challenge to the design of the 1990 early retirement program, the complaint alleged that Lockheed, and individual members of its Board of Directors, breached the fiduciary duty provisions of ERISA by amending the Plan to require a release as a condition of receipt of the newly created pension benefits. J.A. at 21-24. This claim was premised on the allegation that Lockheed acted not only as the Plan sponsor, but also as a "fiduciary" within the meaning of § 3(21)(A) of ERISA, *29 U.S.C. § 1002*(21)(A), when it amended the Plan to create the 1990 SRO. J.A. at 7, 22. Respondent alleged in the complaint that Lockheed breached a fiduciary duty under either § 404 or § 406 of ERISA because the Plan was overfunded, J.A. at 10, and because "the Plan's assets were used at least in part by defendant Lockheed [*14] to relieve itself of various liabilities or potential liabilities to thousands of its employees." J.A. at 22. n5

n5 Although the complaint did not allege that Lockheed violated ERISA § 403(c)(1), *29 U.S.C. § 1103*(c)(1), respondent argued below in support of his claim that a further fiduciary breach resulted because the Plan amendment caused a benefit to "inure" to Lockheed in violation of § 403(c)(1). The district court found this argument inapposite because the alleged breach of fiduciary duty arose from the nonfiduciary conduct of plan amendment. J.A. at 69. The court of appeals noted, but did not rule uponrespondents' "anti-inurement" argument. J.A. at 88 n.5.

On the second point -- whether OBRA 1986 requires retroactive pension benefit accruals -- the complaint alleged that Lockheed's decision not to retroactively accrue pension benefits for pre-1988 employment service violated the ADEA and ERISA. J.A. at 16-17. Respondent did not dispute the proposition that, under the law that applied to Lockheed prior to December 25, 1988, the Plan lawfully excluded from participation individuals such as himself who were hired within five years of normal retirement [*15] age and who had not accrued any pension benefits under the Plan prior to that date. Nonetheless, respondent alleged that OBRA 1986 required Lockheed to provide retroactive benefit accrual for his pre-1988 employment upon his becoming a Plan participant in 1988. J.A. at 17.

Respondent also alleged an individual claim for benefits due him under the terms of the Plan. J.A. at 24-27. Respondent, however, expressly abandoned this claim in the district court in response to petitioners' motion to dismiss. J.A. at 63 n.1. Thus no issue of Plan interpretation nor any claim for benefits under the Plan is presented to this Court.

The district court's decision. The district court, in a decision by Judge Stephen V. Wilson, granted Lockheed's Rule 12(b)(6) motion to dismiss the complaint prior to any decision as to whether a class should be certified. The district court's jurisdiction was based upon § 502(e) of ERISA, *29 U.S.C. § 1132*(e) and *28 U.S.C. § 1331.* The court rejected respondent's argument that Lockheed had breached a fiduciary duty or engaged in a prohibited transaction under ERISA by amending the Plan to condition eligibility [*16] for the enhanced early retirement benefits upon a release of employment-related claims. The court noted that "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." J.A. at 67, quoting *Amato v. Western Union Int'l Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985),* cert. dismissed, *474 U.S. 1113 (1986).* The court concluded that "the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan . . ." J.A. at 68. Because Lockheed had acted in a corporate, rather than fiduciary, capacity when amending the Plan, the court concluded that "[Lockheed's] actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed." J.A. at 68-69.

The district court also held that the "plain language of OBRA 1986 . . . defeats Plaintiff's claim" for retroactive benefit accrual. J.A. at 65. In finding that OBRA 1986 had prospective effect [*17] only, the court observed that OBRA 1986 expressly provided that eligibility for pension plan participation for employees hired within five years of normal retirement age (and thus lawfully excluded from a plan) was to begin only with plan fiscal years commencing on or after January 1, 1988, which in Lockheed's case was December 25, 1988. J.A. at 65. The court then concluded that "because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual." Id. The court also noted that "the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion," since § 9204(a) of OBRA 1986 expressly limited application of these amendments to plan years beginning on or after January 1, 1988. J.A. at 66. Given this "unambiguous statutory language," the court concluded that "Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation." Id.

The court of appeals decision. The court of appeals, in a decision authored by Judge Melvin Brunetti and joined by Judges Stephen Reinhardt and Dorothy W. Nelson, [*18] reversed the decision of the district court on both of respondent's claims. n6 First, it held that OBRA 1986 applies retroactively. Thus, the court determined that OBRA 1986 requires employers not only to permit employees who had been hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively "include pre-enactment service years in calculating accrued benefits." J.A. at 82 n.1. In reaching this conclusion, the court expressly disagreed with the administrative interpretation of the Internal Revenue Service ("IRS") that there is no requirement for retroactive pension benefit accruals in the case of individuals who had not previously been Plan participants. J.A. at 86-87 n.3.

n6 The court of appeals acknowledged that respondent had abandoned his individual claim for benefits under the Plan in the district court by expressly withdrawing Count IV of the complaint. J.A. at 79. Thus any claim for benefits under the terms of the Plan has been waived. The court of appeals also concluded that it was not necessary to address the district court's dismissal of the promissory estoppel claim in Count V of the complaint. J.A. at 87 n.4.

[*19]

The court of appeals also held that Lockheed breached its fiduciary duty under ERISA § 406 by amending the Plan to require a release of claims as a precondition to receipt of the additional retirement benefits created by the 1990 SRO. J.A. at 87-91. Although the court acknowledged the abundant case law holding that Lockheed has "extensive" freedom to amend its Plan, it held that Lockheed was "not free to disregard the prohibitions of ERISA." J.A. at 89. Specifically, the court concluded that, by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under § 406(a)(1)(D) of ERISA, *29 U.S.C. § 1106*(a)(1)(D), because the Plan amendment "provided for use of Plan assets to purchase a significant benefit for Lockheed." J.A. at 91. The court of appeals did not decide whether Lockheed had violated § 404 of ERISA as alleged in the complaint, nor did it address respondent's argument -- not alleged in the complaint -- that the Plan amendment violated the "anti-inurement" provision of ERISA § 403(c)(1). J.A. at 88 n.5.

TITLE: BRIEF FOR PETITIONERS

SUMMARY [*20] **OF ARGUMENT**

As this Court has recognized, a plan sponsor's decision to amend an ERISA plan to create new benefits or expand existing benefits is not regulated by fiduciary standards. This flows both from the statutory definition of a "fiduciary" under ERISA, as well as the recognition that a plan sponsor's decision to establish or change benefit levels and eligibility criteria inevitably reflects the plan sponsor's self-interest and cannot logically be subjected to review under ERISA's demanding fiduciary standards. Indeed, subjecting plan amendment decisions to fiduciary review would severely deter employers from creating pension plans in the first instance as well as enhancing existing plans to create new benefits.

The Ninth Circuit's decision that Lockheed is liable under the "prohibited transaction" rule of ERISA § 406 improperly imposed fiduciary obligations upon Lockheed for non-fiduciary conduct. Both the text and placement of § 406 make it clear that the prohibited transaction rule is designed to regulate fiduciary conduct. The Plan amendment to create a new pension benefit for employees willing to elect voluntary retirement cannot therefore constitute a prohibited [*21] transaction since it is not a fiduciary act under ERISA, and for the further reason that an amendment to the Plan is not a "transaction" within the meaning of ERISA § 406.

The fact that Lockheed received something in return from the eligibility conditions adopted along with the new pension benefits does not change this result, because plan sponsors generally do not amend their plans to adopt new benefits, or to increase existing benefits, unless they perceive some self-interest in so doing. Moreover, the benefit Lockheed derived from its Plan amendment, though less certain, valuable, or significant than other benefits (such as wage reductions, strike settlements, and work force reductions) that plan sponsors routinely insist upon when amending their plans to increase benefits, is legally indistinguishable from these common practices. Congress never intended that ERISA put these common practices and the resulting plan benefits increases in jeopardy. To the contrary, an employer's ability to provide increased ERISA plan benefits in exchange for a release of claims was approved by Congress in its 1990 amendments to the ADEA.

The Ninth Circuit also erred in holding that the pension [*22] benefit accrual requirements of OBRA 1986 apply retroactively. Under this Court's decision in *Landgraf v. USI Film Products, U.S. , 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994),* statutes are presumed to have prospective application only and will not be applied retroactively in the absence of "clear congressional intent favoring such a result." *114 S. Ct. at 1505.* In this case, there is no statutory language in § 9204(a)(1) of OBRA 1986 which expressly commands retroactive application of §§ 9201 and 9202. The Ninth Circuit's reliance upon "negative inferences" drawn from the inclusion of slightly different effective date language in § 9204(b) does not survive scrutiny, because Landgraf expressly rejected a similar argument and because the Ninth Circuit's analysis fails to recognize that Congress had other reasons for using different statutory language in § 9204(a)(1) and § 9204(b). In addition, even before Landgraf, the IRS interpreted OBRA 1986 as having prospective application only with respect to employees such as respondent, and this authoritative administrative interpretation is entitled to deference when interpreting the statute. Finally, [*23] the Ninth Circuit's decision misreads the legislative history of OBRA 1986 and fails to take into account those portions of the legislative history which expressly reflect an intent that the statute not apply retroactively.

ARGUMENT

I. LOCKHEED'S AMENDMENT OF THE PLAN TO CREATE THE VOLUNTARY RETIREMENT PROGRAM IS NEITHER A BREACH OF FIDUCIARY DUTY NOR A PROHIBITED TRANSACTION.

A. Plan Sponsor Such As Lockheed Is Not Subject To Fiduciary Standards When Adopting Eligibility Requirements For A New Plan Benefit.

Under ERISA, a plan sponsor such as Lockheed can be a fiduciary for one purpose but not another. This principle is expressly incorporated in the statutory definition of a "fiduciary," as set forth in ERISA § 3(21)(A):

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or [*24] responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A) (emphasis added).

In this case, Lockheed is the Plan sponsor and undeniably a fiduciary for certain purposes. But Lockheed did not act in a fiduciary capacity when it amended the Plan to create new pension benefits for employees willing to accept voluntary retirement. This is because amending the Plan to create a new retirement benefit is a settlor function, which was undertaken by Lockheed in its corporate capacity. n7

n7 Section 13.01(B) of the Plan identifies "Lockheed Corporation, as Plan Sponsor" as a named fiduciary under the Plan and provides that, as Plan Sponsor "any authority assigned or reserved to the Corporation under the Plan and Trust Agreement shall be exercised by resolution of the Board of Directors." J.A. at 45. Section 13.02(B) of the Plan expressly provides that "Lockheed Corporation shall have the authority and responsibility for (1) the design of the Plan and Trust Agreement, including amendment of the Plan and Trust Agreement . . ." J.A. at 46. Section 14.01 provides in pertinent part that "the Corporation reserves the right to amend, modify, suspend or terminate the Plan by action of the Board of Directors." J.A. at 48.

[*25]

The Court has recently recognized the principle that amending a welfare benefits plan is not a fiduciary function. *Curtiss-Wright Corp. v. Schoonejongen, U.S. , 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995)* ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"), quoting *Adams v. Avondale Industries, Inc., 905 F. 2d 943, 947* (6th Cir.), cert. denied, *498 U.S. 984 (1990).* The same rule applies with equal force when an employer amends a pension plan since the fiduciary standards of ERISA are identical with respect to both pension and welfare benefit plans. See *29 U.S.C. § 1101*; *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983)* ("[ERISA] sets various uniform standards, including rules concerning . . . fiduciary responsibility, for both pension and welfare plans").

Defined benefit pension plans are, of course, subject to certain provisions of ERISA which do not apply to welfare plans, most notably the minimum participation, funding, and vesting requirements set out in Parts 2 and 3 of Subchapter I, Subtitle B, of ERISA. n8 *Shaw, 463 U.S. at 91.* [*26] There has never been any claim in this litigation, however, that the 1990 amendment to Lockheed's Plan violates any of these substantive requirements: the Plan amendment did not deny respondent the right to continued participation in the Plan, nor did it diminish any of his vested pension benefits, nor did it cause the Plan to become underfunded. Instead, the Plan amendment provided additional pension benefits to eligible participants who voluntarily elected retirement and met the eligibility requirements established at the same time the additional benefits were created. The amendment therefore falls within the broad latitude accorded to plan sponsors to freely amend their plans, since ERISA's minimum standards were fully satisfied and because amending a plan to increase benefits is not regulated by fiduciary standards. *Curtiss-Wright Corp., 115 S. Ct. at 1228.*

n8 ERISA's participation and vesting requirements are set forth in Part 2, *29 U.S.C. §§ 1051*-61, and expressly exclude welfare plans from coverage. *29 U.S.C. § 1051(1)*. Funding requirements are set forth in Part 3, *29 U.S.C. §§ 1081*-86, and similarly exclude welfare plans. *29 U.S.C. § 1081(a)(1)*. By contrast, the fiduciary responsibility provisions contained in Part 4, *29 U.S.C. §§ 1101-14*, apply equally to both pension and welfare plans. *29 U.S.C. § 1101*.

[*27]

This principle is basic given the purpose of defined benefit pension plans. When amending a defined benefit plan to provide increased benefits, the plan sponsor is changing the benefit promise it has made to participants which the plan is designed ultimately to deliver to them. Changing the benefit promise is not plan administration. Neither is it using nor dealing with the assets of the plan. While the benefit promise and the administration of plan assets are related because plan assets must be prudently managed by fiduciaries to fulfill the sponsor's benefit promise, the creation and modification of that benefit promise and the management and control of plan assets are entirely distinct.

Consistent with this principle, the courts of appeals have uniformly held that amending a pension plan to create a new retirement program is not a fiduciary act. For example, in *Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991),* the Seventh Circuit held that amending a pension plan to create an early retirement program available only to selected employees "was a design decision that did not implicate [the employer's] fiduciary duties under ERISA." *Id. at 1139.* [*28] As in the instant case, the new retirement program in Fletcher was limited to a specified "window" period, and was created to benefit the plan sponsor by "encouraging voluntary early retirement in an effort to eliminate a work force surplus at several plants." *Id. at 1138.* Because the creation of the voluntary retirement program as well as the determination of its eligibility criteria were not fiduciary decisions, the Seventh Circuit rejected plaintiffs' argument that the plan amendment violated either § 403(c)(1) or § 404 of ERISA, *29 U.S.C. §§ 1103(c)(1)*, *1104*. *942 F.2d at 1139.*

Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995), reflects the same rule. There, the court held that "an employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary." *Id. at 505.* The voluntary retirement program in Siskind was funded by the pension plan's existing surplus of over $ 300 million, and was offered to specified employees who were selected for business reasons. *Id. at 501.* The design of the program admittedly reflected [*29] corporate rather than fiduciary interests: "which employees to offer these benefits, and which to exclude, were decisions made solely to advance the business goals of [the employer]." *Id. at 502.* As in Fletcher, the court of appeals found no breach of fiduciary duty because the decision to create the voluntary retirement program, as well as the determination of eligibility criteria for the program, were outside the scope of fiduciary review. n9 *Id. at 505.*

n9 Accord, *Averhart v. U S West Management Pension Plan, 46 F.3d 1480, 1488 (10th Cir. 1994)* ("the selective provision of benefits under the [pension plan] amendment was a matter of plan design not subject to ERISA's fiduciary standards and judicial review"); *Izzarelli v. Rexene Prods. Co., 24 F.3d 1506, 1524 (5th Cir. 1994)* ("an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan"); *Trenton v. Scott Paper Co., 832 F.2d 806, 809 (3d Cir. 1987)* (pension plan amendment which adopted early retirement program was not a fiduciary act), cert. denied, *485 U.S. 1022 (1988); Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454, 456 (6th Cir. 1984)* ("neither Congress nor the courts are involved in either the decision to establish a [pension] plan or in the decision concerning which benefits a plan should provide"), cert. denied, *469 U.S. 1109 (1985).*

[*30]

The decision to exclude plan amendment and design decisions from the scope of fiduciary review under ERISA is fully consistent with Congress' desire to encourage employers to create new pension plans and expand existing plans. "One of Congress' purposes in adopting ERISA was to further the formation of retirement benefit plans." *Siskind, supra, 47 F.3d at 505.* "Had ERISA subjected employer's amendments to stringent review, employers would have been less willing to create retirement plans." Id. The instant case illustrates quite well the quandary for a plan sponsor if its decision to create a new benefit program is subject to fiduciary review. The holding below that a plan sponsor can be held liable for creating new pension benefits would provide a powerful deterrent to creating new pension plans and new benefits within existing plans, since it would subject the plan's benefit eligibility criteria to a stringent fiduciary review rather than simply permitting the plan sponsor to determine these conditions, consistent with ERISA's minimum requirements, when establishing new benefits. Such a deterrent is wholly inconsistent with the legislative purpose behind ERISA. Alessi [*31] v. Raybestos - *Manhattan, Inc., 451 U.S., 504, 511 (1981)* ("That the private parties, not the Government, control the level of benefits is clear from the statutory language . . . of ERISA.").

To be sure, the Ninth Circuit purported to hold a plan sponsor liable as a fiduciary only if the plan amendment provides the sponsor with a "significant benefit." J.A. at 91. But this rationale finds no support in the text of ERISA and ignores the basic purposes of creating and amending plans in the first place. Employers generally do not increase pension benefits out of charitable benevolence. Indeed, to do so would arguably violate other fiduciary duties owed by a corporate employer to its shareholders. An employer will increase plan benefits, which are a form of employee compensation, precisely because it serves the employer's interests. What is a "significant benefit" to one employer may not be to another. A rule of decision that requires the significance of the benefit to the employer to be determined and quantified, on a case by case basis in advance of adopting plan amendments, assures that few employers would venture forth to increase pension benefits except in the rare [*32] case when the employer could show the benefit increase produced no value to the employer. It is more likely, of course, that benefit increases would simply not occur. See Renaud, Spink v. Lockheed Corporation: The Ninth Circuit Outlaws Pension Plan Window Waivers, 73 Taxes - The Tax Magazine (CCH), 603, 608 (Nov. 1995) (herein referred to as "Taxes"); Brief of Amicus Curiae Chamber of Commerce of the United States of America at 18-19.

The correct approach was set forth by Judge Easterbrook, in a recent decision from the *Seventh Circuit. Johnson v. Georgia-Pacific Corp., 19 F.3d 1184 (7th Cir. 1994).* There, a company that maintained an overfunded pension plan found itself the target of a hostile takeover bid. Seeking to make itself an unattractive target and thus retain corporate control in its current management, the corporation amended its pension plan to provide that, if a takeover occurred, the surplus plan assets would be fully used to pay benefits to active employees only. Certain retirees sued, contending among other things that the corporation had breached a fiduciary duty by "using" plan assets to serve its own interests.

The court assumed for purposes of its [*33] decision that the corporation's "managers were up to no good -- that they amended the pension plan to serve their own interests." *19 F.3d at 1186.* Even with the assumption that the plan was amended for reasons of "managerial self-protection," id., the court affirmed the dismissal of the plaintiffs' claim on the ground that the company had "dealt with the plan as settlor, not as trustee," *id. at 1188,* and that "when amending the plan . . . the defendants did not act as fiduciaries under ERISA." id. If the same reasoning is applied in this case, and to be consistent with ERISA's regulatory scheme it should, Lockheed could not be held liable for breach of fiduciary duty merely because it amended the Plan to create new pension benefits as part of a voluntary retirement window program adopted to ameliorate the effects on long-term employees of a business relocation and which had as one of the criteria for eligibility a waiver of employment-related claims.

Johnson correctly emphasized that ERISA's regulation of fiduciary conduct focuses on the management of plan assets -- not decisions which expand or reduce plan liabilities to participants. *19 F.3d at 1189.* [*34] Understanding both the economics of pension plan funding and the benefit promise to participants that a plan is designed to deliver, the court pointed out that "Section 1002(21)(A)(i), in conjunction with [*29 U.S.C.] §§ 1104* and *1106*, requires trustees and other persons to deal with the assets of the plan in circumspect and prudent ways. It has nothing at all to say about the debit column of the balance sheet -- yet the amendments [defendant] made to the plan affected only the plan's liabilities." Id. (emphasis in original). The court went on to hold that because the plan's assets were used only to make payments to participants and beneficiaries, the plan amendment at issue did not represent the "'management or disposition of [a plan's] assets' within the meaning of ERISA." Id., quoting ERISA § 3(21)(A)(i), *29 U.S.C. § 1002(21)(A)(i)*.

In contrast to Johnson, the court below erred by holding that Lockheed's amendment of the Plan to provide additional pension benefits was a fiduciary act. J.A. at 91. This holding improperly imposed fiduciary responsibilities upon an employer when it amends a plan. The fallacy of this reasoning is that amending a pension [*35] plan to increase the benefits paid to participants is not prohibited by ERISA, so long as the statutory minimum standards are satisfied, and is not under any circumstances a fiduciary act within the meaning of ERISA. As a result, Lockheed's decision to amend the Plan to create new benefits does not violate any type of fiduciary duty, regardless of whether the issue is analyzed under § 403(c)(1), n10 § 404, or § 406 of ERISA. The decision below severely curtails a plan sponsor's freedom to amend a plan under ERISA, because it holds for the first time that a plan sponsor can be liable when it creates new plan benefits in a manner consistent with ERISA's minimum requirements. The judgment below should be reversed because amending a plan in this fashion does not constitute fiduciary conduct regulated by ERISA. n11

n10 Respondent argued below in support of his claims that, in addition to §§ 404 and 406, the Plan amendment also violated § 403(c)(1), which states that "the assets of a plan shall never insure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries . . ." There is no violation of § 403(c)(1) in this case, because the Plan amendment simply increased the level of pension benefits paid to specified participants and beneficiaries. See, e.g., *Fletcher, 942 F.2d at 1139-40* (rejecting a similar argument based upon § 403(c)(1)); *Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 283 (3d Cir. 1988)* (early retirement program does not violate § 403(c)(1)). Moreover, respondent's argument would, if accepted, render unlawful any plan amendment which increases benefits where the employer perceives a self interest in doing so. Thus, the assets of the plan do not "inure" to the employer's benefit if they are paid out to participants in the form of benefits even if those payments to participants also provide a benefit to the employer.

[*36]

n11 No issue is presented in this case as to whether a fiduciary breach would occur if the Plan amendment purported to direct the fiduciaries to engage in conduct that violated some other provision of ERISA. For example, a plan provision which directed the fiduciaries to invest plan assets in an imprudent fashion or which failed to satisfy the minimum vesting or participation requirements could arguably lead to a breach of fiduciary duty if the fiduciaries followed the terms of the plan. There is no provision in ERISA, however, which prohibits fiduciaries from paying pension benefits to eligible participants as required by the plan. Alessi v. Raybestos - *Manhattan, Inc., 451 U.S. 504, 511 (1981)* ("That the private parties, not the Government, control the level of benefits is clear from the statutory language . . . of ERISA."); *Foltz v. U.S. News & World Report, Inc., 865 F.2d 364, 371* (D.C. Cir.) ("rights under ERISA are largely defined by the plan document"), cert. denied, *490 U.S. 1108 (1989).* Indeed, ERISA expressly exempts the payment of plan benefits to a fiduciary (who is also a participant or beneficiary) from the prohibited transaction rule. *29 U.S.C. § 1108(c)(1)*.

[*37]

B. Lockheed Did Not Engage In A Prohibited Transaction In Violation Of ERISA § 406 By Amending The Plan to Create New Benefits.

Despite the abundant case law holding that plan amendment is not a fiduciary function, the court of appeals erroneously imposed fiduciary obligations upon Lockheed by holding that Lockheed engaged in a prohibited transaction, made unlawful by ERISA § 406, when it amended the Plan to create the 1990 voluntary retirement window program. This result is erroneous because § 406 does not apply to non-fiduciary activities such as Lockheed's decision to amend the Plan.

The statutory language of § 406 confirms that it is intended to regulate specifically defined fiduciary conduct: "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction [that] constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . ." *29 U.S.C. § 1106(a)(1)(D)* (emphasis added). In *Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 143 n.10 (1985),* this Court acknowledged that § 406 regulates fiduciary conduct: "ERISA establishes [*38] duties of loyalty and care for fiduciaries. With regard to loyalty, the principal provision is § 406 . . . ." The courts of appeals, with the single exception of the decision below, have similarly recognized that § 406 only regulates fiduciary conduct. See, e.g., *Akers v. Palmer, 71 F.3d 226, 230 (6th Cir. 1995)* ("The scope of ERISA's fiduciary duties is outlined in [*29 U.S.C.] sections 1104* and *1106*. . . ."); *Johnson, 19 F.3d 1184* (plan amendment which increased pension benefits does not constitute prohibited transaction); *Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986)* (rejecting plaintiffs' prohibited transaction argument as "patently inapplicable to the facts of this case"), cert. denied, *481 U.S. 1016 (1987); Amato, 773 F.2d at 1417* (plan amendment which decreased pension benefits does not constitute prohibited transaction).

The structure of ERISA also demonstrates that § 406 was intended to regulate fiduciary conduct, rather than restrict the plan sponsor's ability to amend the plan to create new benefits. Section 406 is contained in Part 4 of Subchapter I, Subtitle B, of ERISA. Part 4 is [*39] entitled "Fiduciary Responsibility," and sets forth the standards governing fiduciary conduct for both pension and welfare plans. It would make little sense to include § 406 in Part 4 unless it were intended to regulate fiduciary conduct. Non-fiduciary conduct, such as amending a plan to increase benefits, cannot therefore constitute a prohibited transaction under § 406.

Notwithstanding the language and placement of § 406, and contrary to the decisions of the other circuits, the court below held that Lockheed engaged in a prohibited transaction when it amended the Plan to provide additional retirement benefits conditioned upon various eligibility criteria including the execution of a release of claims. Significantly, the Ninth Circuit did not identify any fiduciary who breached a duty, nor did it identify any fiduciary conduct within the scope of ERISA § 3(21)(A). Instead, the court of appeals attempted to sidestep this issue by stating in a footnote that it did not need to decide the issue of whether "an employer acts as a fiduciary when it amends the plan in a way that affects plan assets." J.A. at 88 n.5. This issue cannot be sidestepped, however, since both the language and [*40] placement of § 406 confirm that it regulates fiduciary conduct. Unless Lockheed acted as a fiduciary when it amended the Plan, Lockheed and the Plan's trustees (who are fiduciaries) could not engage in a prohibited transaction, or otherwise breach their fiduciary duties, when they administered the amended Plan in accordance with its terms and paid increased benefits to participants. The district court, by contrast, directly addressed the issue of whether amending the Plan was a fiduciary act and held that it was not. J.A. at 68-69.

The Seventh Circuit in Johnson rejected a "prohibited transaction" argument virtually identical to the one accepted in the decision below, holding that no prohibited transaction could occur because none of the actions in question, including both the plan amendment and administration of the plan in conformity with that amendment, "transferred, sold, exchanged, or otherwise affected any asset of the plan." *19 F.3d at 1189.* Contrary to the decision below, the Seventh Circuit correctly held that the plan sponsor's decision to amend the plan to create additional pension benefits cannot be a prohibited transaction as a matter of law, because amending [*41] the plan is a settlor function rather than a fiduciary act. n12 See also H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5097 ("It is not a prohibited transaction for a plan to distribute its assets in accordance with the provisions of the plan. . . .")

n12 The Ninth Circuit's misreading of the applicable law is exemplified by its citation to its prior decision in *M&R Investment Co. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982),* as "holding that a plan amendment" violated a different prohibition in ERISA § 406. J.A. at 90. In fact, M&R Investment Co. involved a loan (which clearly is a "transaction"), and not a plan amendment.

In addition, it strains the language of § 406 to characterize a plan amendment as a "transaction" of any type, much less one that is prohibited. Rather, § 406 prohibits the plan fiduciaries from transferring money from the plan to the plan sponsor, whether through purchases, sales, loans, or other "transactions." Amending the plan to provide new pension benefits simply does not fall within the ambit of a "transaction" under § 406, in addition to being outside the scope of fiduciary conduct [*42] as defined in ERISA § 3(21)(A). See, e.g., *Amato, 773 F.2d at 1417* (§ 406 does not apply to plan amendments, but instead regulates "a transaction between the plan and a party having an adverse interest").

In attempting to rationalize its prohibited transaction holding, the decision below characterized one of the eligibility requirements for the voluntary retirement window program -- that a release be signed by the retiree as a condition of receiving additional benefits -- as a "purchase" of releases with the use of Plan assets. J.A. at 87. This "purchase" analogy, however, only emphasizes the absence of any unlawful fiduciary conduct. If the Plan fiduciaries had paid money from the Plan to persons who were not Plan participants or beneficiaries to settle lawsuits against Lockheed, they would, as the opinion below suggests, have violated ERISA § 406(a)(1)(D). But that is not what happened. The fiduciaries of Lockheed's Plan did not transfer assets to Lockheed, nor did they use Plan assets to pay third parties who had asserted claims against Lockheed. Instead, Plan assets were used solely to pay additional benefits to participants who satisfied the conditions of the [*43] voluntary retirement window, pursuant to the amended terms of the Plan. This cannot be a prohibited transaction within the meaning of ERISA. If Congress had intended to outlaw certain payments of plan assets to participants as pension benefits in the prohibited transaction rules set out in § 406, it certainly could have done so. But it did not.

The Ninth Circuit's holding that § 406 applies to plan amendments is also inconsistent with Congress' purpose in enacting § 406. As recognized by this Court, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 113 S. Ct. 2006, 2012 (1993)* (emphasis added). To further this goal, Congress created a "bright-line" test which flatly prohibits certain transactions without permitting any examination of the "reasonableness" of a particular transaction to the plan. This was a substantive change in the law, since prior to ERISA an "arm's-length" transaction between the plan and plan sponsor was lawful. *Keystone, 113 S. Ct. at 2012.* The rule adopted in the decision below is the antithesis of the bright-line [*44] test which Congress adopted in ERISA: it would prohibit pension plan amendments only if they create a "significant benefit" for the plan sponsor, J.A. at 91, thus creating the potential for virtually endless litigation as to whether a particular amendment produces any benefit for the plan sponsor and, if so, whether the benefit is "significant." This is directly contrary to Congress' goal of drafting § 406 to avoid the need for such an inquiry. Expanding § 406 to apply to plan amendments would, therefore, run contrary to the legislative purpose that underlies § 406. n13

n13 Expanding § 406 liability in this fashion also deviates from the approach taken in this Court's prior decisions which have "emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Associates, 508 U.S. 248, 113 S. Ct. 2063, 2066-67 (1993),* quoting *Massachusetts Mutual Life Ins. Co., 473 U.S. at 146-47* (emphasis in original).

C. Conditioning [*45] **The Payment Of Increased Pension Benefits Upon The Execution Of A Release Was Expressly Approved By Congress In Its 1990 Amendments To The ADEA And Is Consistent With Common, Well-Established Business Practices.**

The holding of the decision below -- invalidation as a prohibited transaction under ERISA of the waiver agreements used in connection with window programs providing enhanced retirement benefits -- declares illegal a longstanding and widespread practice. Numerous employers throughout the nation have in the past offered exit incentive programs, which in many cases condition benefits upon a release of claims. n14 The Ninth Circuit's invalidation of this common practice is not only an incorrect interpretation of ERISA, but also impossible to reconcile with the ADEA, the federal law that most directly speaks to waivers in the context of voluntary retirement incentive programs.

n14 A 1989 report prepared by the General Accounting Office ("GAO") showed that 80 percent of the companies listed in the Fortune 100 had offered some sort of exit incentive program (such as a "window" program) in the prior ten years, and that 55 percent of a sample of employers of 25,000 or more employees had sponsored such a program between 1981 and 1985. See General Accounting Office, Use of Waivers by Large Companies Offering Exit Incentives to Employees, GAO/HRD 89-87 at 2 (1989). Of employers that sponsored exit incentive programs, over 70 percent offered enhanced early retirement benefits under the company's pension plan, either alone or in combination with non-plan benefits. Id. at 4-5. This trend in usage of early retirement programs has continued into the 1990's. See General Accounting Office, Downsizing Strategies Used in Selected Organizations, GAO/GGD 95-54 (1995) (reporting that 17 of 25 large organizations that had undergone downsizing efforts (including 17 major corporations, 5 state governments, and 3 foreign governments) had provided early retirement programs); see also Hewitt Associates, Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans (1992) (reporting that 186 companies from a survey of approximately 700 companies had offered early retirement window programs between 1988 and 1992 and that 56 of these companies had offered more than one such program).

[*46]

In 1990, Congress amended the ADEA by enacting the Older Workers' Benefit Protection Act ("OWBPA"), Pub. L.

No. 101-433, *104 Stat. 978 (1990),* which expressly contemplates the use of employee waivers in conjunction with voluntary retirement window programs like that implemented by Lockheed. See S. Rep. No. 101-79, 101st Cong., 1st Sess. 3-17 (1989). Indeed, the ADEA sets forth criteria that apply when the waiver is sought in connection "with an exit incentive or other employment termination program," which encompasses programs like the one sponsored by Lockheed. *29 U.S.C. § 626(f)(1)(H)*. See also S. Rep. No. 101-263, 101st Cong., 2d Sess. 32 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1538 (the "trademark of voluntary reduction programs is a standardized formula or package of benefits designed to induce employees voluntarily to sever their employment"). It would be most peculiar if Congress's efforts in 1990 to define the scope of permissible ADEA waivers were rendered meaningless because such waivers are flatly banned by ERISA, yet that is the effect of the decision below.

If the Ninth Circuit's decision is affirmed, it would not only invalidate this practice, [*47] which was expressly authorized by Congress, but would also logically apply to a wide range of ordinary business practices heretofore never thought to constitute unlawful prohibited transactions or breaches of fiduciary duty. Employers routinely create or amend their pension plans (as opposed to raiding and using a plan's assets) to add new benefits or increase present benefits for express corporate purposes such as attracting and retaining employees, deferring employee compensation from immediate taxation, settling collective bargaining disputes, avoiding strikes, and providing compensation increases without using immediate cash or in lieu of wage increases. Indeed, Treasury regulations expressly recognize that employers may require employees to agree to reduced wage compensation in exchange for the right to participate in a pension plan. E.g., *Treas. Reg. § 1.401(k)-1(a)(3)(iv)*. Substantial wage reductions for a cash-strapped employer can hardly be viewed as an insignificant or incidental benefit, yet it would be unlawful under the Ninth Circuit's analysis. All of these practices and many others provide substantial benefits to the employer. Of course, that is their very purpose. [*48] Until the decision below, however, no court ever suggested that these common employer practices were illegal "purchases" made with plan assets. See Taxes, supra, at 605.

Enticing employees voluntarily to retire for additional retirement benefits conditioned upon a release of employment-related claims against their employer obviously serves a corporate purpose. But just as an employer may amend its pension plan to increase retirement benefits to end a strike, substitute as a wage increase, or partially offset a wage reduction, the employer is not taking and using plan assets in a prohibited transaction or engaging in any other fiduciary breach when it amends its plan to increase benefits to encourage voluntary retirement. Voluntary retirement windows serve a useful social purpose -- retirement with income is preferable to layoff without income -- as recognized by Congress when it enacted the OWBPA. See S. Rep. No. 101-263, 101st Cong., 2d Sess. 52 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1557 ("Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need [*49] for involuntary layoffs . . ."); *Siskand, supra, 47 F.3d at 500-01* ("Providing early retirement incentives rather than full-scale layoffs is less costly to the employer and also less traumatic to employees facing the loss of their jobs."). For this reason, the Ninth Circuit's decision would be disruptive to both employers and employees alike if permitted to stand.

Decisions of several circuit courts have either not questioned under ERISA, or upheld the validity of, releases given in exchange for enhanced retirement and other benefits under employee benefit plans. n15 In addition, the Treasury Department has adopted regulations which expressly recognize that pension plans may condition the receipt of benefits upon covenants not to compete and on waivers so long as nondiscrimination and vesting requirements are satisfied. See *Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii)(B)* (nondiscrimination rules are not violated if pension benefits are conditioned upon various eligibility criteria, including the "execution of a waiver of rights under the Age Discrimination in Employment Act or other federal or state law . . ."); *Treas. Reg. § 1.411(a)-4(c)*, Example (1) (certain pension benefits [*50] may be conditioned upon the participant's agreement not to accept employment with competitors of the plan sponsor); *Temp. Treas. Reg. § 1.411(a)-4T(c)*, Example (1) (same); see also *Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A)* & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan). n16 By applying fiduciary standards to a plan amendment which promises greater benefits, and characterizing the release requirement upon which the promise is conditioned as a "prohibited transaction," the decision below has achieved a result that jeopardizes plan amendments which increase benefits. This creates great uncertainty for plan sponsors and fiduciaries, and is inconsistent with both Treasury regulations and the law of every other circuit to consider the issue. The decision should therefore be reversed, and the district court's dismissal of Count III of the Complaint should be reinstated.

n15 See, e.g., *Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173 (1st Cir. 1995)* (enforcing release in exchange for severance pay and extended participation in various ERISA plans); *Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993)* (enforcing release in exchange for ability to participate in enhanced benefits severance plan); *Cirillo v. ARCO Chemical Co., 862 F.2d 448 (3d Cir. 1988)* (enforcing release in exchange for an enhanced retirement package and special payment allowance). See also *Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021, 1025 (N.D. Cal. 1988)* (participation in severance plan conditioned upon execution of a release of claims does not violate ERISA).

[*51]

n16 The IRS has also ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. See T.A.M. 9516005 (Dec. 22, 1994) (although employer "derives an incidental benefit from the use of Plan . . . assets to pay the obligation," no prohibited transaction occurs because "the direct beneficiaries of this use of plan assets are certain Plan . . . participants and their beneficiaries . . .").

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN LANDGRAF V. USI FILM PRODUCTS BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT.

The decision below also held that the substantive change in the law contained in OBRA 1986 must be given retroactive effect so that employers would be compelled to grant benefit accrual for service before employees became participants in their employers' pension plans. J.A. at 80. In respondent's individual case, this means that Lockheed is required retroactively to grant him pension benefit credit for all years since he was hired in 1979, even though [*52] he did not become a Plan participant until 1988. As acknowledged by the Ninth Circuit, its holding retroactively imposes additional obligations upon pension plan sponsors by requiring benefits to be calculated on the basis of employment service which predates the enactment of OBRA 1986. J.A. at 82 n.1.

In *Landgraf v. USI Film Products, U.S. , 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994),* this Court held that when deciding whether a statute applies retroactively, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *114 S. Ct. at 1505.* In the absence of an "express command" from Congress concerning retroactivity, the proper default rule is that a statute is presumed to apply prospectively, and the statute will not be applied retroactively "absent clear congressional intent favoring such a result." Id.

Langraf emphasizes that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *114 S.Ct. at 1497.* [*53] This stems from the closely related notions that "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." Id. The principle against retroactive application of statutes is reflected in several Constitutional provisions, including the Due Process and Takings Clauses of the Fifth Amendment. Id. Although these constitutional provisions do not rise to the level of creating a per se rule against retroactive civil legislation, they do support "a requirement that Congress first make its intention clear," which in turn "helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id. at 1498.*

In this case, the "settled expectations" of plan sponsors throughout the nation would be radically disrupted if the

Ninth Circuit's holding of retroactivity is permitted to stand. One amicus curiae estimates that the retroactive application of OBRA 1986 would result in additional pension liabilities of $ 1.7 billion on a nationwide basis. Brief of Amicus [*54] Curiae Chamber of Commerce of the United States of America at 29. There is nothing in either OBRA 1986 or its legislative history, however, to justify a conclusion that Congress intended to impose this substantial obligation upon plan sponsors. The Ninth Circuit's contrary conclusion is unsupported for the reasons described below.

A. The Changes In The Pension Benefit Accrual Rule Which Were Made By OBRA 1986 Show That Congress Addressed Two Distinct Issues: Exclusion Of Employees Over Age 60 When Hired, And Pension Benefit Accrual For Employees Who Worked Past Normal Retirement Age.

By holding OBRA 1986 to apply retroactively, the court of appeals erroneously imposed substantial additional pension liabilities upon Lockheed as well as numerous other employers without any statutory language that compels such a result. Indeed, as the district court observed, the relevant effective date provisions of OBRA 1986 are "prospective and thus do not provide [respondent] the grounds to participate retroactively for periods of service prior to joining the Plan . . . nor to receive retroactive benefit accrual." J.A. at 65 (emphasis in original). The error of retroactive application [*55] is apparent when the substantive changes made by OBRA 1986 are considered alongside the effective date language.

Prior to OBRA 1986, both ERISA and the ADEA recognized two different rules that permitted pension plans to distinguish between older and younger employees. For convenience, petitioners will refer to one rule as the "Age 60 Exclusion Rule" and the other rule as the "Post-NRA Accrual Cessation Rule," where "NRA" refers to normal retirement age.

The Age 60 Exclusion Rule refers to the fact that prior to OBRA 1986 both ERISA § 202(a)(2), *29 U.S.C. § 1052(a)(2)*, and § 410(a)(2) of the Internal Revenue Code, *26 U.S.C. § 410(a)(2)*, allowed employees hired within five years of the age specified by the plan as the "normal retirement age" to be excluded from participating in a pension plan. n17 Because most plans defined normal retirement age as 65, this brief refers to this rule as the Age 60 Exclusion Rule. The Age 60 Exclusion Rule was eliminated by § 9203 of OBRA 1986.

n17 In Lockheed's case, this meant that employees hired at age 60 or older could lawfully be excluded from the Plan. Such a provision was in fact included within Lockheed's Plan at § 2.01(C) and operated to exclude respondent from participation prior to 1988. J.A. at 58.

[*56]

The second rule, referred to above as the Post-NRA Accrual Cessation Rule, permitted plans to cease accruals of pension benefits for years of participation after a participant attained normal retirement age. Thus, even if an older employee had become a participant in a pension plan, it was still lawful for the plan to provide that no further benefit accrual would be made on his or her behalf under the plan after attainment of normal retirement age.

Unlike the statutory basis for the Age 60 Exclusion Rule, the basis for the Post-NRA Accrual Cessation Rule rested in the legislative history of the 1978 amendments to the ADEA. n18 This legislative history caused the Department of Labor to promulgate an interpretation of the ADEA that allowed the Post-NRA Accrual Cessation Rule. *43 Fed. Reg. 43,264 (1978).* From the time of its promulgation the Post-NRA Accrual Cessation Rule was attacked as an incorrect administrative interpretation of the ADEA. n19 The EEOC's failure to repeal the rule eventually led to litigation challenging the rule, which was ongoing at the time Congress considered and passed OBRA 1986.

n18 This legislative history is summarized in the initial district court decision in *Bell v. Trustees of Purdue University, 658 F. Supp. 184, 187-189 (N.D. Ind. 1987),* remanded, *845 F.2d 1023 (7th Cir. 1988),* on remand, *761 F. Supp. 1360 (N.D. Ind. 1991),* aff'd, *975 F.2d 422 (7th Cir. 1992).*

[*57]

n19 As recounted in *AARP v. EEOC, 655 F. Supp. 228* (D.D.C.), rev'd, *823 F.2d 600 (D.C. Cir. 1987),* the EEOC (which succeeded the DOL as the agency with enforcement authority over the ADEA) went through a series of gyrations beginning in 1980 with respect to whether the DOL's interpretation should be repealed. *655 F.Supp. at 233-34.*

Sections 9201 and 9202 of OBRA 1986 eliminated the Post-NRA Accrual Cessation Rule. Section 9201 of OBRA 1986 amended the ADEA to make it unlawful for an employer to maintain a pension plan "which requires or permits -- (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, ..." *29 U.S.C. § 623(i)(1)*. Section 9202 of OBRA 1986 made parallel amendments to ERISA, *29 U.S.C. § 1054(b)(1)(H)(i)* (1988), and the Internal Revenue Code, *26 U.S.C. § 411(b)(1)(H)(i)*.

B. The Plain Language Of OBRA 1986 Provides That The New Benefit Accrual Rules Apply Prospectively.

The key change effected by OBRA 1986 for respondent is that he [*58] first became a participant in Lockheed's Plan on December 25, 1988. This was required by § 9203 of OBRA 1986, which abolished the Age 60 Exclusion Rule and which was effective "only with respect to plan years beginning on or after January 1, 1988 and only with respect to service performed on or after such date." OBRA 1986 § 9204(b). The Ninth Circuit acknowledged both that this change in the law had prospective application only, i.e., it does not require retroactive participation, and that ERISA requires pension benefit accruals to be based upon years of participation. J.A. at 85-86; see also *29 U.S.C. § 1054(b)(1)(C)*. Based upon these principles, it would seem relatively straightforward to conclude that Lockheed satisfied OBRA 1986 by making respondent a Plan participant on December 25, 1988, at which point he began to accrue pension benefits at the same rate as any other participant as required by §§ 9201 and 9202.

Rather than simply acknowledge that the repeal of the Age 60 Exclusion Rule, on a prospective basis, controls the outcome of the lawsuit, the Ninth Circuit instead based its decision upon a retroactive application of §§ 9201 and 9202 which abolished [*59] the Post-NRA Accrual Cessation Rule. Even if the repeal of the Post-NRA Accrual Cessation Rule were retroactively applied, however, it is of no benefit to respondent because he was not a Plan participant. Moreover, §§ 9201 and 9202 do not provide any basis for concluding that respondent is entitled to retroactive pension benefit accrual for years prior to 1988. This is because OBRA 1986 expressly provided that the abolition of the Post-NRA Accrual Cessation Rule was not to take effect until on or after January 1, 1988. There is no hint of retroactivity in this statutory language:

> The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); *100 Stat. 1979 (1986),* codified at *29 U.S.C. § 623* note. The district court concluded that the "plain language" of this statute compelled the conclusion that sections 9201 and 9202 did not apply retroactively. J.A. at 65. The district court's decision preceded Landgraf but its conclusion is fully consistent [*60] with it, *114 S. Ct. at 1493* ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date. "). The district court further held that because respondent was not a Plan participant prior to December 25, 1988, he did not accrue any pension benefit credit prior to that date. J.A. at 65.

By contrast, the court of appeals held that the "most natural reading" of the same statutory language compelled the conclusion that "pre-enactment service years must be included in benefit accrual calculation;" i.e., that the statute "applies retroactively." J.A. at 81 & 82 n.1. This reasoning seriously misreads the plain language of the statute, however, because it confuses the concepts of (1) the "rate of an employee's benefit accrual" (as used in sections 9201 and 9202) with (2) the total benefit accrued.

The court of appeals' error is best illustrated by the deceptively simple, yet illogical, syllogism used in its opinion. After correctly noting that the OBRA 1986 amendments forbid age-based reductions in "the rate of benefit accrual," J.A. at 81-82, the court stated:

> Denying [*61] credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.

J.A. at 82.

It is true, of course, that respondent's entirely lawful exclusion from the Plan for nine years meant that he had no accrued benefits as of December 25, 1988, since no benefit is provided for employees who were never participants. But § 9202 does not refer to an individual's total accrued benefits. Instead, § 9202 forbids age-based distinctions in the rate at which employees accrue benefits; i.e., the plan must accrue benefits at the same rate for all participants regardless of age. A "rate of benefit accrual" differs from the concept of total accrued benefits in the same way that a vehicle's speed in miles per hour differs from the total miles traveled. n20

> n20 This is illustrated as follows: Assume that respondent's final compensation were $ 50,000 a year, that the Plan had a 1.5% of final compensation times years of participation formula, and that respondent would have had nine years of participation on December 25, 1988, if Lockheed had never adopted the Age 60 Exclusion Rule. (This is basically the Lockheed Plan's formula without certain calculations not relevant here.) Using these assumptions, it may be seen that the controversy between respondent (and the putative class he seeks to represent) and Lockheed concerns the amount of his accrued benefit under the Plan on December 25, 1988, when he commenced participation. Respondent asserts that this accrued benefit is $ 6,750 (nine years times .015 times $ 50,000). Lockheed asserts that the accrued benefit is $ 0 (zero years times .015 times $ 50,000). Neither party disputes, however, that respondent's rate of benefit accrual became 1.5% with respect to future service, i.e., service from December 25, 1988, onward. The dispute relates only to the amount of accrued benefits that should be credited to respondent (and similarly situated employees) as of his first day of participation in the Plan, for years of service when he was not a participant in the Plan. To be sure, years of participation is also part of the benefit formula and if years of participation for older workers were not counted or weighed equally as years of participation for younger workers, an ADEA and ERISA violation would occur. But there is no such distinction in Lockheed's Plan. All years of participation of participants of any age are treated equally for calculating each participant's accrued benefit. Respondent's argument below that the calculation of his accrued benefit is less favorable because of his age is simply incorrect.

[*62]

If OBRA 1986 is applied prospectively, then once respondent became a participant he would commence accruing benefits at exactly the same rate as the other participants upon its effective date, with neither a cessation of benefit accruals nor a reduction in the rate of his accrual. This would completely satisfy both sections 9201 and 9202. The decision below nonetheless found this interpretation of OBRA 1986 to be untenable because it would lead to "discriminatory effects," since respondent would receive no pension credit for his pre-1988 employment with Lockheed and thus would receive a smaller pension than if he were given such credit. J.A. at 83. This, however, is circular reasoning. The so-called "discriminatory effects" are simply the result of prospectively applying a new statute that expanded the concept of age discrimination. The Ninth Circuit's rationale runs directly contrary to Landgraf, because under the Ninth Circuit's reasoning any expansion in the scope of the employment discrimination laws would have to be applied retroactively in order to avoid similar "discriminatory effects." This not only contradicts the holding of Landgraf, but also the pre-Landgraf decisions [*63] which held that previous amendments to the ADEA and Title VII of the Civil Rights Act of 1964 were to have prospective application only. *114 S. Ct. at 1493 n.10.*

The decision below fails to acknowledge that the statutory language does not state that the new benefit accrual rule should be applied retroactively; instead, § 9204(a)(1) states that the new rule is to be applied "only with respect to plan years beginning on or after January 1, 1988,..." This language plainly contemplates prospective application of the new benefit accrual rule. The court of appeals' contrary interpretation simply is not supported by the statutory language, and no part of the statute states that OBRA 1986 is to be applied retroactively.

An additional flaw in the decision is that it deprives the companion effective date provision of OBRA 1986 -- § 9204(b) -- of any rational meaning, thus violating a basic canon of statutory interpretation. 2A Singer, Sutherland Statutes and Statutory Construction § 46.06 (5th ed. 1992) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."). Section 9204(b) contains the effective [*64] date for § 9203 of OBRA 1986, which repealed the Age 60 Exclusion Rule. Although the Ninth Circuit acknowledged § 9204(b) provides for prospective application of § 9203, J.A. at 85, its holding that § 9202 applies retroactively leaves § 9204(b)'s prospective effective date with no rational meaning, because years of participation are significant essentially only when calculating benefit accrual. The Ninth Circuit's inability to advance any meaning for § 9204(b)'s prospective effective date in light of its interpretation of § 9204(a) is further proof of the error of its analysis. If Congress had intended to provide retroactive benefit accrual for employees for the periods prior to the date they became plan participants, it could have expressly done so and would certainly not have included § 9204(b) as part of OBRA 1986.

C. The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Applies Retroactively.

The court of appeals also incorrectly concluded that because the effective date language in § 9204(a)(1) differed slightly from that of § 9204(b), § 9204(a)(1) should be read to [*65] require retroactivity. This reasoning also fails to survive scrutiny.

Landgraf holds that "negative inferences" made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute clear legislative intent of retroactivity. *Landgraf, 114 S. Ct. at 1493.* The issue arose in Landgraf because Congress had expressly declared that two discrete sections of the Civil Rights Act of 1991 were to be given prospective effect. From that, the petitioner argued that the rest of the 1991 Act should be applied retroactively, since otherwise the express language commanding prospective application of the two specific sections would be "superfluous." Id. This Court rejected that argument, since it placed "extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." Id. Given the serious consequences that would result from retroactivity, the Court declared that "it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect." *Id. at 1493-94.*

The decision below erred on this point because it failed to recognize [*66] that Congress had other reasons for using slightly different effective date language in § 9204(a)(1) and § 9204(b). While no one had suggested that the Age 60 Exclusion Rule violated the ADEA at the time OBRA 1986 was enacted, pending litigation sought to overturn the Post-NRA Accrual Cessation Rule. Supra at 33. Congress was well aware of this controversy, and responded by attempting to leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) in the then-ongoing litigation by using slightly different effective date language in § 9204(a). n21

n21 The Conference Report for OBRA 1986 acknowledged this controversy by stating that "disagreement exists as to whether and to what extent benefit accruals ... are required under ADEA, as currently in effect." H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), reprinted in 1986 U.S.C.C.A.N. 4023.

There was absolutely no controversy, however, with respect to the legality of excluding from pension plans the thousands of employees (such as respondent) who were hired within five years of normal retirement age, because ERISA and the Internal Revenue Code expressly permitted this practice. [*67] Since no dispute existed on this issue, Congress adopted slightly different prospective date language in § 9204(b), stating that the abolition of the Age 60 Exclusion Rule would apply "only with respect to service performed on or after [the effective] date." *100 Stat. 1980 (1986).* Had Congress used the same language in § 9204(a)(1), it could have been viewed by courts as evidence that the Post-NRA Accrual Cessation Rule was the correct interpretation of the ADEA under pre-OBRA 1986 law. Because Congress decided to leave this issue unresolved, 132 Cong. Rec. 32,975 (October 17, 1986) (remarks of Representative Clay), it used different effective date language in § 9204(a)(1).

The Ninth Circuit's reading of this slightly different language as evidence of an unspoken intent to require retroactive pension benefit accrual for non-participants' pre-1988 employment is incorrect, because Congress could have mandated retroactivity through express statutory language had it sought to do so. *Landgraf, 114 S. Ct. at 1495* (rejecting petitioner's "negative inferences" argument because it "would require us to assume that Congress chose a surprisingly indirect route to convey an [*68] important and easily expressed message concerning the Act's effect on pending cases"). n22 Imposition of such retroactive liability exceeding $ 1 billion on plans and plan sponsors throughout the nation, who for years lawfully excluded many thousands of employees from plan participation, cannot fairly be implied from congressional silence.

> n22 The same reasoning also demonstrates why the Ninth Circuit's reliance upon the maximum that "when Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply," J.A. at 84, was misplaced. See also *Landgraf, 114 S. Ct. at 1494* (rejecting petitioner's expressio unius argument on the ground that if Congress had intended to mandate retroactivity, it would have used language expressly requiring that result).

D. The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only With Respect To Individuals Such As The Respondent Who Were Not Plan Participants Before OBRA 1986.

The Ninth Circuit's decision is wrong for the additional reason that it conflicts with the interpretation [*69] of the IRS, the agency charged with enforcement of OBRA 1986. The IRS announced, in 1988, that it would interpret OBRA 1986 as having only prospective effect with regard to benefit accruals for the thousands of employees who first became eligible to participate in a plan following enactment of OBRA 1986:

> In the case of an employee who was ineligible to participate in a plan before the effective date of amended Code section 410(a)(2) because of a maximum age condition and who is eligible to participate in the plan on or after the effective date of such section, ... hours of service and years of service credited to the employee before the first plan year beginning on or after January 1, 1988, are not required to be taken into account for purposes of determining the employee's accrued benefit under the plan for plan years beginning on or after January 1, 1988.

Preamble to *Prop. Treas. Reg. § 1.411(b)-2*, *53 Fed. Reg. 11876, 11877 (1988)* (emphasis added). n23 The same rule is stated in the text of the Proposed Regulation itself:

> A defined benefit plan is not required under [*I.R.C.] section 411(b)(1)(H)* [which corresponds to *29 U.S.C. §§ 623* [*70] (i)(1) and 1054(b)(1)(H)(i)] and paragraph (b) of this section to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan.

Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii), *53 Fed. Reg. 11876, 11884 (1988).* Respondent has conceded in this Court that the Proposed Regulation supports Lockheed's position as to his circumstances. Respondent's Brief In Opposition To Petition For A Writ Of Certiorari at 27.

n23 Section 9204(e) of OBRA 1986 required the Secretary of the Treasury to adopt final regulations no later than February 1, 1988. *100 Stat. 1980 (1986).*

As the agency charged with administeringOBRA 1986, the IRS interpretation of the statute is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).* The court of appeals refused to defer to these expert administrative views, however, because the IRS's proposed regulation has not yet been finalized, declaring that "we need not accord deference to [the IRS's] proposed interpretations." J.A. at 87 n.3. This ignores the special fact present here, however, that the IRS had previously [*71] announced that its final regulations implementing OBRA 1986 will follow the Proposed Regulation on this point. The IRS stated, in relevant part:

> The final regulations to be issued by the IRS under section 411(b)(1)(H) of the Code will adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits under noncontributory defined benefit plans. Thus, the final regulations to be issued by the IRS will provide that the OBRA 1986 benefit accrual rules apply to all years of service (including years of service before January 1, 1988) completed by a participant in a noncontributory defined benefit plan who has at least 1 hour of service with the plan sponsor in a plan year beginning on or after January 1, 1988.

IRS *Notice 88-126, 1988-2 C.B. 538 (1988)* (emphasis added). n24 The IRS also stated that the proposed regulation constitutes an "administrative pronouncement" which "may be relied upon to the same extent as a revenue ruling or revenue procedure" and that "taxpayers may rely on this notice until the final regulations are published." Id. Thousands of taxpayers, [*72] including Lockheed, have in fact relied upon this IRS pronouncement since 1988. Indeed, Lockheed specifically relied upon the Proposed Regulation in determining respondent's pension benefit and its chairman so advised respondent in writing. J.A. at 34-35. Because IRS revenue rulings are generally accorded deference in interpreting a statute that the IRS is charged with administering, *Bob Jones University v. United States, 461 U.S. 574, 596 (1983),* the IRS's interpretation of OBRA 1986 as having prospective application only should be considered and given weight. See *Mead Corp. v. Tilley, 490 U.S. 714, 726 (1989)* (directing the court of appeals to consider the views of the IRS, because "for a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embark upon a voyage without a compass'") (quoting *Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).*

n24 Respondent has incorrectly argued that *IRS Notice 88-126* represented a substantive change in the IRS interpretation of OBRA 1986, claiming that it adopts a rule that persons such as respondent, who were not pension plan participants prior to OBRA 1986, were entitled to retroactive benefit accrual. Respondent's Brief In Opposition To Petition For A Writ Of Certiorari at 28. This plainly misreads the initial sentence in the portion of *Notice 88-126* which is quoted above.

[*73]

E. The Legislative History Provides No Evidence That Congress Intended Sections 9201 And 9202 To Apply Retroactively.

The court of appeals also relied upon the legislative history of OBRA 1986 for its conclusion that the statute should apply retroactively. Specifically, the court observed that the pre-conference Senate version of the bill that became OBRA 1986 provided that the new accrual rule would be "effective with respect to employees who are employed after

December 31, 1988, with respect to accrual computation periods beginning after December 31, 1986." H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 377 (1986), reprinted in 1986 U.S.C.C.A.N. 4022. This language, which would have imposed retroactive benefit accrual for a limited time period not to exceed two years, was changed in conference, and the conference report gives the following explanation for adopting the language currently found in § 9204(a)(1):

> Effective date. -- The conference agreement clarifies that the amendments apply to plan years beginning on or after January 1, 1988. Such amendments do not apply with respect to any employee who does not have an hour of service in any plan year to which the [*74] amendments apply.

...

H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 4027.

The court of appeals characterized the conference committee change as a "rejection" of the original Senate language, and interpreted this as a desire by Congress to make the new pension benefit accrual requirement fully retroactive. J.A. at 84- 85. This reasoning is unsound, because the House bill that became OBRA 1986 did not propose to repeal either the Post-NRA Accrual Cessation Rule or the Age 60 Exclusion Rule. The Senate initially proposed only that repeal take effect for accrual computation periods beginning after December 31, 1988, at which time participants could receive retroactive benefit accrual for a limited period of up to two years. It would be astounding for the conference committee to intend this "clarification" of the effective date language to radically change the Senate amendment and impose upon employers an unlimited obligation to retroactively accrue pension benefits for pre-1988 employment, when such an obligation had never been contemplated by either the House or the Senate prior to conference. See *Landgraf, 114 S. Ct. at 1492* [*75] ("the omission of the elaborate retroactivity provision of [a prior version of the] bill . . . is not dispositive because it does not tell us precisely where the compromise was struck in the [final legislation]"). Instead, a far more reasonable interpretation is that Congress decided to eliminate the limited two-year period of retroactivity provided in the pre-conference Senate bill and instead replace it with a provision for prospective application only.

The Ninth Circuit's analysis of the legislative history is also defective because it fails to acknowledge other portions of the legislative history which expressly disavow the theory that OBRA 1986 compelled retroactive benefit accrual. For example, Representative Clay, the Chairman of the House Subcommittee on Labor-Management Relations of the Committee on Education and Labor, confirmed that OBRA 1986 should not be applied retroactively:

> My subcommittee heard testimony last year on this subject and was convinced that congressional action was needed to provide prospective guidance to employers. Despite the fact we are amending the law today, Congress does not intend any inference to be drawn as to whether and to what [*76] extent additional accruals and allocations might be required under current law. Regardless of what current law requires, [OBRA 1986] requires such accruals and allocations in the future in most instances.

132 Cong. Rec. 32,975 (October 17, 1986) (emphasis added).

Under Landgraf, statutes are not to be applied retroactively absent clear evidence in the statute itself that Congress so intended. There is no such evidence here; instead, both the text of the statute and the legislative history are to the contrary. In the absence of any evidence to support retroactive application, and because retroactive benefit accrual would result in an unanticipated retroactive liability to pension plans nationwide exceeding $ 1 billion, the decision below should be reversed, and the district court's dismissal of Counts I and II of the Complaint should be reinstated.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to reverse the decision of the Ninth Circuit, and remand the case with instructions to affirm in all respects the decision of the district court.

DATED: February 28, 1996.

Respectfully submitted,

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