

No. 08-810

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IN THE  
**Supreme Court of The United States**

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SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ,  
LAWRENCE M. BECKER AND XEROX CORPORATION  
RETIREMENT INCOME GUARANTEE PLAN,  
*Petitioners,*

v.

PAUL J. FROMMERT, *et al.*,  
*Respondents.*

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*On Writ of Certiorari to the United States Court  
of Appeals for the Second Circuit*

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**BRIEF AMICUS CURIAE OF AARP  
IN SUPPORT OF RESPONDENTS**

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MARY ELLEN SIGNORILLE  
*\*Counsel of Record*  
AARP FOUNDATION LITIGATION

MELVIN R. RADOWITZ  
AARP

601 E Street, NW  
Washington, DC 20049  
Telephone (202) 434-2060  
msignorille@aarp.org  
Counsel for *Amicus Curiae* AARP

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	v
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. CONGRESS INTENDED ERISA TO PROTECT PROMISES OF PENSION BENEFITS SO EMPLOYEES COULD PLAN FOR THEIR RETIREMENT .....	4
II. IN DETERMINING WHETHER TO RETURN TO WORK FOR A FORMER EMPLOYER, EMPLOYEES CONSIDER THE EMPLOYER'S TOTAL COMPENSATION PACKAGE, INCLUDING BENEFITS.....	6
A. Employers Provide Benefits As Part Of A Total Compensation Package In Order To Remain Competitive In Recruitment And Retention Of Employees In Their Particular Market Segment.....	6

B.	When Employers Rehire Former Employees, There Are Advantages To Both Employers And Employees.....	10
1.	Employers rehire former employees because they possess known skills, fit the company culture and are less risky to hire than new employees .....	10
2.	Individuals generally stay in the work force and return to work after retirement for financial reasons.....	12
III.	BY DISTORTING THE TERMS OF THE BARGAIN BETWEEN EMPLOYER AND EMPLOYEE, XEROX IMPERMISSIBLY RECEIVED A WINDFALL BENEFIT .....	14

A.	Due To Seemingly Favorable Rules In Its Pension Plan, Xerox Possessed A Competitive Advantage Over Rival Employers In The Labor Market With Respect To Attracting Its Former Employees .....	14
B.	A Rational Former Employee Would Not Have Interpreted The Terms Of The Bargain With Xerox To Render Their Additional Benefit Accruals Nugatory.....	16
C.	By Failing To Disclose The Revised “Administrator’s Approach” To Reduce Employee’s Benefits In The Plan, The Bargain Between Employer And Employee Was Distorted And Ultimately Conferred A Windfall On Xerox.....	18
	CONCLUSION .....	21

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<i>Aetna Health Inc. v. Davila</i> , 542 U.S. 200 (2004).....	2
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§ 62(a)(6) .....	7
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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

With nearly 40 million members, AARP is the largest nonpartisan, nonprofit organization representing the interests of people age 50 and older. AARP helps people over age 50 have independence, choice and control in ways that are beneficial and affordable to them and society. Nearly half of the members are employed full or part-time, with many working for employers which provide health, pension and disability benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.<sup>2</sup>

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<sup>1</sup> Counsel for AARP states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

<sup>2</sup> As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving the appropriate standard of judicial review of plan administrators' benefit eligibility determinations under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), ERISA's benefit claims process, and the scope of remedies available under

Given the exclusivity of ERISA's civil enforcement provisions for participants in employee benefit plans, see *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004), it is imperative that participants have meaningful recourse under ERISA to protect and enforce their rights under such plans. The issues in this case directly bear on a court's authority to remedy a violation of ERISA where a plan administrator's denial of a benefit has been found to be an abuse of discretion. Thus, resolution of the issues in this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' abilities to obtain those benefits which will foster their economic security. In light of the significance of the issues presented by this case, AARP respectfully submits this brief *amicus curiae* to facilitate a full consideration by the Court of these issues.

### SUMMARY OF ARGUMENT

Failure to provide individuals complete and accurate information concerning the actual retirement benefit to which they are entitled, regardless of the reasons for the failure, prevents individuals from meaningfully determining their financial needs for retirement as Congress intended. The long-term effect of an employer renegeing on its benefit promise wreaks

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ERISA's civil enforcement provisions. See, e.g., *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

havoc on the individual since retirement occurs at an age where employees do not have time to make up their losses.

Because Xerox had an interest in rehiring former employees and because former employees had a financial interest in returning to work, Xerox had a considerable interest in ensuring that the bargain and exchange over salaries and benefits served to incentivize former employees to return to Xerox. Moreover, because of the importance of pension benefits to this exchange, particularly for employees approaching retirement, Xerox's ability to remain competitive in the labor market regarding former employees who possessed valuable skills rested in large part on the pension benefits that employees perceived they would earn if they returned to work for Xerox. Returning to Xerox was more attractive than working at a rival employer because the employees in this case were already vested in their pensions and would accrue benefits at a higher rate. However, by failing to disclose the revised "administrator's approach" to reduce employee's benefits in the plan, the bargain between employer and employee was distorted and ultimately conferred a windfall on Xerox.

## ARGUMENT

### I. CONGRESS INTENDED ERISA TO PROTECT PROMISES OF PENSION BENEFITS SO EMPLOYEES COULD PLAN FOR THEIR RETIREMENT.

More than a decade after this Court decided that improper disclosures in an employee benefit plan could give rise to a breach of fiduciary duty claim, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and more than five years after this Court recognized a change in plan provisions could not affect pension benefits that were already earned, *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), the Court gets to determine, yet again, the relationship between changes in plan provisions, improper disclosures about those changes, and the impact on an employee's benefits.

One of Congress's primary focuses in enacting ERISA was to hold employers accountable for the benefits they promise to their employees to ensure that employees can safely rely on such promises in their retirement planning. This type of accountability is central to ERISA's primary goal of protecting employees' benefits. See *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374-75 (1980) (purpose of ERISA was to prevent the "great personal tragedy" suffered by employees whose retirement benefits were not paid); see generally ERISA § 2(a), 29 U.S.C. § 1001(a). When an employer fails to pay the pension benefits expected at retirement, it wreaks financial havoc upon employees and their family by destroying a

lifetime of planning for their retirement years. Retirement typically occurs at an age where employees no longer have the option or the time to start all over again in hopes of obtaining a new pension. The long-term effect of an employer reneging on its benefit promise is potentially devastating and emotionally shattering for employees and their families. See generally *Musmeci v. Schwegmann Giant Super Markets*, 159 F.Supp.2d 329 (E.D. La. 2001).

For many people, outside of Social Security, employee benefit plans are the main source of retirement assets.<sup>3</sup> As longevity, and thus the amount of assets needed to live comfortably in retirement, increases,<sup>4</sup> retirement planning becomes even more important. Failure to provide individuals complete and accurate information concerning the actual retirement benefit to which they are entitled, regardless of the reasons for the failure, prevents

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<sup>3</sup> While defined contribution plans have largely replaced traditional pensions for many younger workers in the private sector, traditional pensions are still the more important source of wealth for middle-quintile households near retirement today. Gordon B. T. Mermin, The Urban Institute, *Typical Wealth Held by Those at the Verge of Retirement* (Mar. 2008), available at [http://www.urban.org/UploadedPDF/411618\\_typical\\_wealth.pdf](http://www.urban.org/UploadedPDF/411618_typical_wealth.pdf).

<sup>4</sup> A.H. Munnell, A. Webb & F. Golub-Sass, *The National Retirement Risk Index: After The Crash* 1, 2, 6 (IB # 9-22 Oct. 2009), available at [http://crr.bc.edu/briefs/the\\_national\\_retirement\\_risk\\_index\\_after\\_the\\_crash.html](http://crr.bc.edu/briefs/the_national_retirement_risk_index_after_the_crash.html) (between 2004 to 2009, the percent of households who are at risk of being unable to maintain their standard of living in retirement increased from 43% to 51%).

individuals from meaningfully determining their financial needs for retirement as Congress intended.

**II. IN DETERMINING WHETHER TO RETURN TO WORK FOR A FORMER EMPLOYER, EMPLOYEES CONSIDER THE EMPLOYER'S TOTAL COMPENSATION PACKAGE, INCLUDING BENEFITS.**

**A. Employers Provide Benefits As Part Of A Total Compensation Package In Order To Remain Competitive In Recruitment And Retention Of Employees In Their Particular Market Segment.**

An employer receives the ability to operate its business with the benefit of an employee's labor in exchange for paying that employee a salary and other benefits. *See generally* A. M. Lofaso, *Toward A Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (Fall 2007). The benefits exchanged for the employee's labor may include pension benefits. However, it is impossible to determine definitely what portion of the employee's labor, and hence the value to the employer, is attributable to pension benefits alone. *Cf. Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1978) ("Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole . . .").

Offering and accepting fringe benefits in lieu of additional wages is rational for both parties to the exchange. It is rational for employers to provide fringe benefits in lieu of additional salary because employers receive a greater return on their expenditure due to tax savings. *See Lofaso*, at 1; IRC §§ 401(a) & 404(a) (permitting employer deduction for retirement plan contribution); *see generally* S.J. Sacher, *et al.*, EMPLOYEE BENEFITS LAW at 171 (2d ed. 2000) (explaining tax benefits of qualified pension plans). Similarly, because many fringe benefits receive favorable income tax treatment, IRC § 62(a)(6) (individual does not pay taxes on retirement monies until received), the rational employee may be willing to accept a lower annual salary in exchange for additional fringe benefits with the idea that total compensation will be maximized. *See Lofaso*, at 9.

It is also rational for employers to provide fringe benefits, particularly pension benefits, in lieu of additional salary in order to stay competitive in the labor market. *See J.A.* at 45a (Xerox's recognition of its benefits package making it more competitive). Employees who believe they have competitive benefit packages tend to remain with their employers. *See Society for Human Resource Management, 2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy* at 8, 19-20, 23-242 (June 2009), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/2009EmployeeBenefitsSurveyReport.aspx> (concluding that "[e]mployees consistently rate benefits as one of the key factors in employee job satisfaction. It is important for an employee benefits package to be attractive to both

current and prospective employees . . .”). Moreover, almost three-quarters of employees surveyed believed that retirement benefits were important factors to generate employee loyalty, behind salary and health benefits. MetLife, *Sixth Annual Study of Employee Benefits Trends: Findings from the National Survey of Employers and Employees* at 8, 28 (2008) (hereinafter *Sixth Annual Study*). For employers with over 10,000 employees, like Xerox, the percentage of employees who feel retirement benefits affect their loyalty rises to 84%. *Id.* at 29. As the demographics of this country change, employees are focusing more on retirement issues. MetLife’s survey recognizes the use of retirement benefits as a way “to meet employee needs and also retain workers . . . .” *Id.* at 10. Consequently, in return for offering pension benefits, the employer obtains lower employee turnover, which reduces costs and improves productivity. See Watson Wyatt Worldwide, *Insider, How Do Retirement Plans Affect Employee Behavior?* at 1 (April 2005), available at [http://www.watsonwyatt.com/us/pubs/Insider/show\\_article.asp?ArticleID=14596](http://www.watsonwyatt.com/us/pubs/Insider/show_article.asp?ArticleID=14596).

Of course pension benefits also play a critical role in an employer’s ability to recruit and manage a high quality workforce. Lorraine A. Schmall, *Keeping Employer Promises when Relational Incentives No Longer Pertain: “Right-sizing” and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 290 (2000) (“Because ERISA does not mandate that employers provide pensions to its employees, it must be that employers use pensions as personnel devices that alter quit and hiring decisions.”); see Watson Wyatt, at 1. An employer’s benefit package is an important reason

employees decide to join an employer in the first instance and to stay with that employer. *See Sixth Annual Study, supra*, at 25-28; Watson Wyatt, *supra* at 4-5. Thus, a large majority of employers provide some type of retirement plan, with almost 30% still offering a defined benefit plan in 2009.

Xerox clearly recognizes this paradigm and the importance of benefits as shown by its website where the first link under “Working at Xerox” is a link to a description of the available employee benefits. Xerox, U.S. Careers, <http://xeroxcareers.com/working-xerox/benefits.aspx>. Xerox clearly also recognized the importance of benefits as a recruiting tool for employees in its summary plan descriptions that acknowledged “the 1989 changes in the retirement program . . . have improved the ranking of the Xerox plans” measured against those companies that recruit from the same labor pool such as “Kodak, IBM, Digital Equipment, Hewlett-Packard, and AT&T. . .” J.A. at 45a.

**B. When Employers Rehire Former Employees, There Are Advantages To Both Employers And Employees.**

- 1. Employers rehire former employees because they possess known skills, fit the company culture and are less risky to hire than new employees.**

Attracting and retaining workers possessing critical skills will be one of the most difficult challenges that businesses will face in the coming decades because, as baby boomers begin to approach retirement age, there will be inadequate numbers of educated workers to fill those positions necessary to successfully sustain business operations.<sup>5</sup> In companies where older workers have skill, expertise, and organizational memory, their continued employment can contribute to business success.

Some industries have already started to institute new strategies to deal with the potential labor shortage. Some employers have begun to

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<sup>5</sup> Current labor force participation patterns over the last few decades were the result of increased fertility after World War II resulting in the age cohort known as the “baby boomers” as well as the large number of women who entered, and remained in, the workforce. For numerous reasons, the labor pools in the subsequent age cohorts are substantially smaller than the “baby boom” cohort. *See generally* STEVEN A. NYCE & SYLVESTER J. SCHIEBER, *THE ECONOMIC IMPLICATIONS OF AGING SOCIETIES* 1-7 (2005).

encourage employees to work longer – that is, beyond the traditional retirement age for that company. Others have instituted phased retirement or flexible work programs.<sup>6</sup> Some employers have rehired employees either as consultants, employees, or other professionals.

Employers who rehire former employees do so for numerous reasons. These reasons include the employer's familiarity with the employees' skills; the employees' knowledge of the actual jobs for which they are hired; the employees' knowledge of, and ability to fit within, the company's culture and environment; a shortage of employees who can fill a specialty expertise, are good managers, or generally are qualified; and less cost and risk than hiring new workers.<sup>7</sup> See OI Partners, *40% of Employers Plan to Rehire Some Workers They Laid Off, OI Partners Survey Finds* (Sept. 14, 2009), available at [http://www.oipartners.net/news/pr\\_archived/pr\\_](http://www.oipartners.net/news/pr_archived/pr_)

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<sup>6</sup> For example, it is estimated that approximately 46 percent of all engineering jobs in the electric and gas utility industries could become vacant by 2012, due to retirement and other forms of attrition. Phased retirement of senior engineers could preserve their intellectual capital for the industry and provide support to junior engineers. G. McClure, *ieee-usatoday's engineer online, Phased Retirement — The Time Has Come* (Aug. 2008), available at [http://www.todaysengineer.org/2008/Aug/phased\\_retirement.asp](http://www.todaysengineer.org/2008/Aug/phased_retirement.asp).

<sup>7</sup> For similar reasons, if employees have a choice, they would prefer to work reduced hours for the same company with the same benefits (68%) as full-time workers compared with working reduced hours for another company with benefits (8%). D. Parkinson, The Conference Board, *Voices of Experience: Mature Workers in the Future Workforce* at 22, 37, 45 (2002).

sep142009(2).html; L. Wolgemuth, Many Employers May Rehire Workers They Laid Off (Sept. 16, 2009), available at <http://www.usnews.com/money/blogs/the-inside-job/2009/9/16/many-employers-may-rehire-laid-off-workers.html>; D. Parkinson, The Conference Board, *Voices of Experience: Mature Workers in the Future Workforce* at 4, 8, 30, 57 (2002).

Like the employers in these surveys, Xerox clearly recognized the advantage of rehiring its former employees and frequently did so. See, e.g., Xerox, *Benefits for Salaried Employees: Overview for Employees Who Join the Company As A Result of Merger or Acquisition* (Jan. 2009) (noting special provisions may apply to rehires), available at [www.xerox.com/downloads/usa/en/b/Benefits\\_Overview\\_M\\_A.pdf](http://www.xerox.com/downloads/usa/en/b/Benefits_Overview_M_A.pdf).

## **2. Individuals Generally Stay in the Work Force and Return to Work After Retirement for Financial Reasons.**

As a result of increases in longevity, an individual may spend more than twenty years in retirement. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON AGING, *A PROFILE OF OLDER AMERICANS: 2008* at 1-2 (2008) (persons reaching age 65 have an average life expectancy of an additional 19.0 years), available at [http://www.aoa.gov/AoARoot/Aging\\_Statistics/Profile/2008/docs/2008profile.doc](http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2008/docs/2008profile.doc). This results in individuals who retire at the current average age of retirement –

62 – needing more money to provide an adequate retirement.<sup>8</sup>

Although people stay in the work force or return to work for a variety of reasons, the primary motivating factor has consistently been financial.<sup>9</sup> S. Groeneman, *Staying Ahead Of The Curve 2007: The AARP Work And Career Study* at 8 (2008), available at [http://www.aarp.org/research/surveys/stats/surveys/public/articles/2007\\_Staying\\_Ahead\\_of\\_the\\_Curve.html](http://www.aarp.org/research/surveys/stats/surveys/public/articles/2007_Staying_Ahead_of_the_Curve.html); S. K. Brown, *Attitudes Of Individuals 50 And Older Toward Phased Retirement* at 8 (July 2005), available at [http://assets.aarp.org/rgcenter/post-import/phased\\_ret.pdf](http://assets.aarp.org/rgcenter/post-import/phased_ret.pdf) (hereinafter *Attitudes of Individuals*); S. K. Brown, *Staying Ahead Of The Curve 2003: The AARP Working in Retirement Study* at 4 (2003), available at <http://www.aarp.org/research/surveys/stats/surveys/public/articles/aresearch-import-417.html>; D. Parkinson, at 4, 30 (a majority of employees of 8 major pharmaceutical and service industry companies stated that they were staying in

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<sup>8</sup> The median age for retirement is around age 62 or 63, with almost half of retirees saying they retired sooner than planned. Compare R. Helman, M. Greenwald & Assoc., C. Copeland & J. VanDerhei, Employee Benefits Research Inst., *The 2009 Retirement Confidence Survey: Economy Drives Confidence to Record Lows; Many Looking to Work Longer* at 1, 3, 5 (EBRI ISSUE BRIEF NO. 328 Apr. 2009) (hereinafter *RCS 2009*), with A.H. Munnell, A. Webb & F. Golub-Sass, *The National Retirement Risk Index: After The Crash* at 2 (IB # 9-22 Oct. 2009), available at [http://crr.bc.edu/briefs/the\\_national\\_retirement\\_risk\\_index\\_after\\_the\\_crash.html](http://crr.bc.edu/briefs/the_national_retirement_risk_index_after_the_crash.html).

<sup>9</sup> Since 1999 between one-quarter to one-third of retirees work in retirement, largely for financial reasons. *2009 RCS* at 15, 16.

the workforce for economic reasons). Indeed, in economically uncertain environments, such as the recent downturn, that often result in the declining value of retirement savings accounts and other investments, one of the few things individuals can control is the offering of their labor.<sup>10</sup>

**III. BY DISTORTING THE TERMS OF THE BARGAIN BETWEEN EMPLOYER AND EMPLOYEE, XEROX IMPERMISSIBLY RECEIVED A WINDFALL BENEFIT.**

**A. Due To Seemingly Favorable Rules In Its Pension Plan, Xerox Possessed A Competitive Advantage Over Rival Employers In The Labor Market With Respect To Attracting Its Former Employees.**

Because Xerox had an interest in rehiring former employees and because former employees had a financial interest in returning to work, *see* Section II. B, *supra*, Xerox has a considerable interest in ensuring that the bargain and exchange over salaries and benefits served to incentivize former employees to return to Xerox. *See* R. Korobkin & T. Ulen, *Law and Behavioral Science: Removing the Rationality*

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<sup>10</sup> The recent economic downturn has only heightened employees' intent to delay retirement, to return to work, or work in retirement. More than a quarter of respondents stated that the age at which they expect to retire has changed; of these almost 90% said that they have postponed retirement with the intention of increasing their financial security. *Id.* at 1, 4, 14, 15, 16.

*Assumption From Law and Economics*, 88 CAL. L. REV. 1051, 1054 (July 2000) (“people respond to incentives”). Moreover, because of the importance of pension benefits to this exchange, particularly for employees approaching retirement, *see* Section II. A, *supra*, Xerox’s ability to remain competitive in the labor market regarding former employees who possessed valuable skills rested in large part on the pension benefits that employees perceived they would earn if they returned to work for Xerox.

Xerox had a competitive advantage over rival employers with respect to former employees because, all aspects of the rival compensation packages being equal, employees would be able to return to Xerox having already attained a vested right to the pension benefits. Even after the employees consider that their ultimate pension benefit will be offset by the amount previously distributed when they first left Xerox, returning to Xerox was still more attractive than working at a rival employer because they were vested and would accrue benefits at a higher rate.

Given the heightened importance of compensation generally and retirement savings specifically, it is not surprising that Xerox was able to attract employees who previously had left Xerox and were subsequently reentering the workforce.

**B. A Rational Former Employee Would Not Have Interpreted The Terms Of The Bargain With Xerox To Render Their Additional Benefit Accruals Nugatory.**

Because the plan language was silent that, upon return, the employee's pension benefits would be dramatically reduced by virtue of the revised "Administrator's Approach," the bargain and exchange between employee and employer was distorted. Without accurate and complete disclosures as to an employer's benefit package, employees cannot make an informed decision as to whether to work for an employer. See Korobkin & Ulen, at 1064 ("actors should be able to compare the utility consequences of all alternatives to each other"). In this case, the average rational employee returning to work for Xerox would not have interpreted the plan to include the revised "Administrator's Approach" which resulted in basically eliminating any additional benefit accruals. After the 1989 plan revision, §9.6 of Xerox's plan merely stated that:

In the event any part of or all of Member's accrued benefit is distributed to him prior to his Normal Retirement Date, . . . the accrued benefit of such Member based on all Years of Participation *shall be offset by the accrued benefit attributable to such distribution.*

F1A720. The Xerox plan did not further define

“offset.” Because words of a contract are given their plain meaning unless they are defined in a different way, *see* RESTATEMENT SECOND OF CONTRACTS § 201 (1981) (“Unless a different intention is shown, language is interpreted in accordance with its generally prevailing meaning.”); *id.* § 202(3), a reasonable employee would interpret “offset” according to its plain meaning of “counterbalance.” *See* AMERICAN HERITAGE DICTIONARY at 1221 (4th ed. 2000).

Xerox essentially argues that it would be irrational for an employee not to expect “offset” to take into consideration the time value of money. But this premise is flawed. Although time value of money is a principle generally recognized among economists, it is not commonly understood among lay persons. *See* A. Lusardi, *Financial Literacy: An Essential Tool for Informed Consumer Choice?* at 2 (June 2008) (most individuals lack knowledge of basic financial concepts, such as the working of interest compounding and the difference between nominal and real values), *available at* [www.dartmouth.edu/~alusardi/Papers/Lusardi\\_Informed\\_Consumer.pdf](http://www.dartmouth.edu/~alusardi/Papers/Lusardi_Informed_Consumer.pdf). It would be unfair to judge the rationality of the average Xerox former employee based on knowledge of economic theory. When the average person reads “offset,” they do not think of the time value of money. They merely think that the lump sum they previously received will be subtracted from the future amount to which they are entitled. It would be irrational to expect an employee to read “offset” to automatically infer that this means a process as complicated as the revised “Administrator’s Approach.” Although this revised Approach is one type of possible

offset, absent further explanation, it is far more rational to expect the employee to interpret “offset” as its more basic meaning. The district court recognized this when crafting its remedy upon remand, and applied this “nominal offset” because it “most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD.” *Frommert v. Conkright*, 472 F.Supp.2d 452, 459 (W.D.N.Y. 2007).

Instead, Xerox’s arguments amount to little more than an attempt to deflect from its own error in drafting plan language to blame the employee for not exercising his perfect rationality to assume that the plan means something other than what it in fact says.

**C. By Failing To Disclose The Revised “Administrator’s Approach” To Reduce Employee’s Benefits In The Plan, The Bargain Between Employer And Employee Was Distorted And Ultimately Conferred A Windfall On Xerox.**

Petitioners claim that the district court’s nominal offset remedy “confers a windfall on Plan participants who left Xerox and returned at a later stage in their careers.” (Pet’rs’ Br. 3). However, in reality, imperfect information and an imbalance in bargaining power have conveyed a windfall on Xerox by allowing it to use a false competitive advantage to attract former employees, who only years later learn they will not receive the full benefit of their bargain. *See generally* Lofaso, at 9 (firms attempt to maximize

profits); *Korobkin & Ulen*, at 1064 (individuals must have complete and accurate information in order to make true comparisons and maximize their wealth). By using plan language that leaves potential employees with the perception that their total compensation will be higher than it is, Xerox was able to gain a competitive advantage in the labor market without assuming additional costs that would hurt its bottom line.

One of ERISA's primary functions, however, is to bar plan administrators from deception in order to gain bargaining power with employees who believe they are receiving a benefit that does not in fact exist. *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) (a purpose of ERISA is to ensure "if a worker has been promised a defined benefit upon retirement . . . he actually receives it."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (a purpose of ERISA is "to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits"); *see also Nachman Corp.*, 446 U.S. at 375. Despite the varying uses of benefit plans as personnel devices, plan sponsors do not have a completely unfettered right to amend their employee benefit plans: no substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's procedures for adopting an amendment must be followed including appropriate and complete disclosures. *See* ERISA § 204(h), 29 U.S.C. § 1054(h); *Central Laborers' Pension Fund*, 541 U.S. 739; *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162

(3d Cir. 1990). In enacting these provisions, Congress balanced changes needed for financial reasons and for management of the work force with the impact on the individual.

Contrary to the intent of ERISA, Xerox has impermissibly achieved a windfall in the form of receiving the benefits of highly skilled former employees without having to pay them their true market value. Had these former employees known their pension payments would be gouged by the “Administrator’s Approach” to eliminating accrued benefits, thus reducing the total value of their compensation package, they may not have decided to return to work at Xerox. It is highly likely that in most cases, the comparative advantage achieved by Xerox over rival employers due to crediting former employees with vesting and years of service was more than eroded by the revised “Administrator’s Approach.” Consequently, a rival employer offering an identical compensation package may have been more attractive to former employees, since their, albeit lower, gross pension benefit from the rival employer would result in a greater net pension benefit when considered in combination with the former lump sum payment from Xerox.

Finally, Xerox imposed high opportunity costs on these employees because between 1989 and 1996 – the year in which Mr. Frommert first received a Personal Statement indicating the full impact of Xerox’s reduction scheme – these employees could have been working for another employer. In fact, in that amount of time, they would have worked long enough

to have become vested in an alternative pension plan. However, because the language of Xerox's Plan was silent and because these employees received annual reassurances from Xerox indicating that their retirement benefit would be adequate to ensure security in retirement, most employees did not seek out alternative employment opportunities and lost a significant amount of time in which to earn additional pension benefits at another employer.

### CONCLUSION

For the foregoing reasons, AARP urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

Mary Ellen Signorille  
*\*Counsel of Record*  
AARP Foundation Litigation

Melvin R. Radowitz  
AARP

601 E Street NW  
Washington, DC 20049  
Telephone (202) 434-2060  
Facsimile (202) 434-6424  
msignorille@aarp.org  
Counsel for *Amicus Curiae*  
AARP

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