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Berger v. Xerox: Looking for Law in All the Wrong Places

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This article discusses the recently decided Berger v. Xerox Retirement Income Guarantee Plan, *338 F.3d 755 (7th Cir. 2003). The Seventh Circuit became the third federal circuit to uphold the IRS's "whipsaw" rules governing how a cash balance plan must value lump sum distributions. As a result, the plan must distribute lump sums to participants that exceed the "account balances" promised to them by the plan.*

This article explains the technical aspects of the case. But the article's real point is that the implications of Berger *go beyond the specific cash balance issues involved. Despite the widespread and growing adoption of cash balance plans, and despite repeated requests by employers and practitioners for guidance on how basic ERISA rules apply to these plans, the Treasury department has neglected its executive job of writing guidance. The task of writing rules for these plans has thus fallen to the courts.*

As Berger *shows, the courts are a poor forum for answering these questions. In writing an opinion that addressed the specific plan before it, the Berger court raised issues that throw into question the way the accrued benefit may be determined by every defined benefit plan in the county—and not just cash balance plans. These questions are the main point of this article.*

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The cash balance wars heated up this summer, claiming two casualties. The Seventh Circuit upheld the Internal Revenue Service's (IRS's) controversial "whipsaw" rules governing how a cash balance plan values lump sum distributions. *Berger v. Xerox Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003). A federal district court held that the IBM cash balance plan—and so all or nearly all cash balance plans—violate federal age discrimination law. *Cooper v. the IBM Personal Pension Plan*, 2003 WL 21767853 (S.D. Ill. 2003). We write here about *Berger*, as *Cooper* is discussed elsewhere in this issue, and because *Berger* raises significant "sleeper" issues that we think have not been addressed in the quantities of ink already spilled about both cases.

Berger raises no new strictly cash balance issues. What is new about *Berger*—and what we focus on here—is that a federal court stepped into the middle of a contract and rewrote the conditions for earning benefits in an Employee Retirement Income Security Act (ERISA) pension plan—without explaining what was wrong with the old ones or what was right with the new ones. In doing so, it hinted at several theories but never gave one. On its face a case about valuing lump sum distributions, at its heart *Berger* goes to the limits of the employer's ability to set the terms for earning benefits under ERISA pension plans of all kinds.

Stripped of the technicalities that confound cash balance discussions, what happened in *Berger* was this: the case involved employees who left Xerox's employ before the plan's age 65 normal retirement age. Former employees who left money in the plan were granted additional interest earnings at a stated rate. Former employees who took their money out of the plan got a distribution that included an estimate of future interest earnings—but at a lower rate than those who kept their money in the plan. That is, to get the higher interest earnings, ex-employees had to leave their money in the plan. The Seventh Circuit disallowed this arrangement. The court held that for ex-employees who took their money out of the plan, the estimate of future interest earnings had to include interest at the higher rate—even though under the plan's terms the higher rate was given only to participants who left their money in the plan, and even though these ex-employees would no longer satisfy the plan's conditions for earning it. For this class of participants, the court in effect rewrote the accrued benefit to include, as an unconditional right, those additional interest earnings that under the plan's terms were conditional—without explaining why the plan's conditions for earning them were illegal. The court then held that the plan violated ERISA's vesting rules by failing to offer them the higher benefit as so rewritten. In addition, the court held that the amounts paid to these ex-employees should include an estimate of the value of the pre-age 65 death benefit contingently payable had they instead left their money in the plan until age 65 (contingently payable, as by definition it would be paid only to participants who left their money

in the plan until age 65, but died before reaching that age).

At its heart, *Berger* is a case about the employer's ability to write the accrued benefit, and the courts' ability to rewrite it. The real question raised by *Berger* are these:

- What are a plan's limits for setting conditions for when pieces of the accrued benefit accrue?
- Can accrual be, for example, conditioned on events that happen after employment?
- Or, when the participant leaves employment, are all prospective post-employment changes in the benefit "fixed" and subject to estimation as part of the benefit he or she gets at that time?

What is the scope of the court's authority to rewrite the accrued benefit in a defined benefit plan? The *Berger* court rewrote the plan's accrued benefit without ever determining what the accrued benefit was under the plan's original terms, or analyzing why it was illegal, and then held the plan's failure to give the rewritten benefit was a vesting violation. This ignores the structure in place since *Alessi v. Raybestos Manhattan, Inc.*, 451 US 504 (1981), which says the court must first determine what the accrued benefit is, before deciding whether the plan failed to deliver it.

This question is of more than theoretical interest. The *Berger* court's failure to define the plan's accrued benefit—and whether and how it departed from ERISA—in practice meant that the court rewrote the benefit unconstrained by the plan terms or the sponsor's intent. We believe this is wrong as a legal matter and alarming as a cost one. The right answer, we believe, is the court's ability to rewrite the plan bounded by the twin constraints of the plan's intent on the one hand and ERISA's requirements on the other. Under these constraints, a court could rewrite a noncompliant plan only to the minimum extent necessary to comply with ERISA. The implications of the very different *Berger* approach is the conceivable creation of remedies staggeringly out of proportion to participants' reasonable expectations about the employer's side of the benefit "contract."

Is the plan's pre-age 65 death benefit part of the "accrued benefit?" To recast the question as presented to the court: may a plan reduce the pre-age 65 benefit payout to reflect the value to the participant that, without the early payout, death before age 65 might possibly cause the participant to forego it, if the plan provides a death benefit to the survivors of a participant who dies before age 65? (This reduction is typically called the mortality discount.) Berger says no, not if the death benefit equals the amount of the retirement benefit. Death in this case does not cause loss of the benefit, and avoiding the risk of death (mor-

tality risk) has no value. While maybe the most green-eyeshade point in the case, this may have the largest cost implication of any part of the decision. The Berger opinion can be read to say that—to the extent of any pre-age 65 death benefit—receipt of the age 65 retirement benefit is a certainty. To this extent, the retirement benefit paid before age 65 cannot be reduced for mortality. This potentially rewrites the benefit of the pre-age 65 lump sum paid by every plan that provides a pre-age 65 death benefit—which is to say the lump sums paid by every defined benefit plan in the country, becauseby law all must include a death benefit payable to the participant's spouse.

The Treasury Department failed for over ten years to define the accrued benefit in a cash balance plan—how it is defined, measured, or earned. Faced with these questions in the plan before it, the *Berger* court declined to do in its judicial capacity what the Treasury should have done in its executive one. That is, the court answered them for the one plan, but on the basis of no general legal principles the court was willing or able to articulate. But of course the law is general and not specific. The resulting opinion, with its absence of any principled explanation of its conclusions, raises questions about the employer's ability to define the terms of plans of all types—questions with no answers in sight from the courts or regulators.

BRIEF CASH BALANCE REVIEW

Before our discussion of the more general aspects of *Berger*, we want to remind the reader of what a cash balance plan is, and the specific cash balance questions that launched the case.

Generally, a cash balance plan is a defined benefit plan designed to look like a defined contribution plan. For example, the typical cash balance plan might express each participant's benefit as a hypothetical "account balance," which each year is credited with amounts equal to a stated percentage of pay (pay credit) and interest at a stated rate, which may be defined as a fixed rate or linked to an index such as the rate on one-year Treasury bills (interest credit).

Cash balance plans have run into trouble with participants and the courts, because of the way the hypothetical account balance interacts with the "accrued benefit" as defined by ERISA.

The clash arises because the participant's accrued benefit fixes his or her benefit entitlement under the plan.[1] In a defined benefit plan, IRC Section 411(a)(7) generally requires that the accrued benefit be "expressed in the form of an annual benefit commencing at normal retirement age"—a form we refer to by shorthand as the age 65 annuity. In addition, IRC Section 411(c)(3) lets the plan define the "accrued benefit" in other ways, as long as the age 65 annuity—which must be calculated as the measuring

rod for testing compliance with some parts of IRC Section 411—is the "actuarial equivalent" of the accrued benefit so defined.[2] Treasury regulations require that distribution of the participant's accrued benefit before age 65—including pre-age 65 distribution of the entire benefit as a single "lump sum"—be not less than the "present value" of the age 65 annuity calculated using the interest rate and mortality factors specified by IRC Section 417(e).[3] Cash balance plans raise legal disputes when the participant's hypothetical account balance is measured—as IRC Section 411 requires it must be for some purposes—as the "actuarially equivalent" age 65 annuity.

DEFINING THE LUMP SUM

The particular dispute we discuss here arises for participants who terminate employment and take a lump sum distribution of their account balances before age 65 and is most simply expressed this way: is the participant entitled to distribution of a lump sum bigger than his or her account balance?

One important note: to simplify a very complicated topic as much as possible, we discuss valuation issues only as affected by interest rates. The reader should keep in mind that mortality factors are also involved. We will return to the mortality discount issue later in this article.

Distribution to the participant of his or her lump sum benefit before age 65 triggers the Section 411 valuation machinery set forth above. IRC Section 411(a) says that for some purposes the hypothetical account balance must be expressed as an age 65 annuity. To get from the current account balance to the projected age 65 annuity, some going-forward interest rate is needed. Under Treasury regulations, however, the lump sum distribution cannot be less than the age 65 annuity, discounted at the Section 417(e) rate coming back. When the rate used to go forward (to get from the account balance to the age 65 annuity) is greater than the Section 417(e) rate come back (to come back from the age 65 annuity to its present value), participants have argued—and courts have so far agreed—that under the rules governing the accrued benefit, the participant's lump sum distribution must be greater than his or her account balance. This result is shorthanded as the interest rate "whipsaw" problem.

While characterized as a interest rate issue, at its heart the whipsaw issue is the question of how "accrued benefit" may be defined by the plan—and in the *Berger* case, redefined by the court. To best understand how the whipsaw issue is really an accrued benefit issue we will consider a 55-year old employee who has an account balance of $100,000. The plan has a stated interest crediting rate of 6 percent. What is her accrued benefit, and what is the actuarially equivalent age 65 annuity?

There are a number of ways of answering this question. We start with the way favored by the IRS as laid out in Notice 96-8, to date its only guidance on the issue. Under the IRS's approach, the accrued benefit at any time is the account balance, plus future interest credits, which can accrue in only two ways. If unconditionally guaranteed through age 65 at a stated rate without regard to future service, all future interest credits that will be earned on the $100,000 are already accrued at the time the account balance is measured. If not unconditionally guaranteed—that is, if they will be conditioned on future service, or if they will be added only on an ad hoc basis at the employer's discretion—they are not accrued until the year added to the account balance.

While not issued as final guidance, Notice 96-8 has defined the debate because it puts squarely on the table the question: when do the interest credits on the cash balance plan accrue? Having asked the question, Notice 96-8 demands that it be answered in order to determine whether the interest accruals satisfy ERISA's "anti-backloading" accrual rules. These rules outlaw a plan formula that delays too much of the participant's expected benefit earnings too late into his or her working life. While there are three alternative rules, the one used by cash balance plans is the "133 percent rule," which requires that the rate of benefit accrual in any future year, measured as the age 65 benefit stated as a percentage of pay, not exceed the rate in the current year (or any year in between) by more than 33 percent.[4] When we refer to the "anti-backloading" accrual rule, the reader may assume that we mean the 133 percent rule. The anti-backloading rule is forward looking. That is, to determine compliance, one must determine under the plan formula for the current year what the rate of accrual is in that year and all future years. Notice 96-8 demands that the future interest credits be included in this determination—somewhere.

Notice 96-8 states that viewing all future interest credits as unconditionally guaranteed through age 65 is "typically" necessary to avoid violating the anti-backloading rule. The unstated assumptions here are two. First, to the extent future interest credits on the account balance are not unconditionally guaranteed, by definition they must "accrue" in the future year actually added to the account. The second assumption is more subtle. If they are accrued in a future year (because not unconditionally guaranteed), Notice 96-8 assumes they are the kind of future accruals that are tested under the anti-backloading accrual rule calculations, rather than the kind that are not. This second and bedrock assumption of Notice 96-8 has to date been accepted without question or analysis by the courts, even when the future interest credits are based on a variable interest index and are thus incapable of precise estimation.

Applying these two assumptions, a little math shows that, if no future

interest credits are viewed as unconditionally guaranteed, then accruing them only in the future year they are added to the account will violate the anti-backloading rules. (For the persistent we show the math in the next paragraph.) To the extent future interest credits are guaranteed at the outset, however, they are "accrued" up front in the year first promised and do not trigger the anti-backloading accrual rules.

For the reader who wants to work this out for himself or herself, we provide an example to make the IRS's backloading concern clearer. We return to our cash balance plan with a stated interest crediting rate of 6 percent, and our age 55 participant with an account balance of $100,000. If future interest credits are conditioned on future service—that is, if they are not unconditionally guaranteed—then by definition under Notice 96-8 they do not accrue until actually added to the account balance in each year, after all conditions for earning them are met. Ignoring pay-based additions to the account, and focusing only on interest-based additions, we see the following: at age 55, $6,000 of interest earnings are added to her account (6 percent of his $100,000 account balance). At age 65, $10,479 of interest earnings will be added to his account (6 percent of the sum of the $100,000 account balance plus 6 percent interest earnings compounded for the preceding ten years). For purposes of testing backloading, the Tax Code commands that we convert these dollar amounts into the equivalent age 65 annuity.[5] When the two amounts converted to an age 65 annuity (assuming an annuity factor of 8) and expressed as a percentage of pay (assuming pay of $50,000) we see that her age 55 accrual is 1.5 percent of pay, and her age 65 accrual, 2.69 percent of pay. Testing the age 65 accrual against the age 55 accrual under the 133 percent rule, we see the backloading problem. Expressed as an age 65 annuity as a percentage of pay, her age 65 accrual is about 180 percent of his 55 accrual, and so violates the 133 percent rule.[6]

Notice 96-8 terms plans with unconditionally guaranteed interest credits "frontloaded" and those with no unconditionally guaranteed interest credits "backloaded." We find this terminology confusing. We also find it tricky, because it embeds in its language what is only an assumption—that is, that future interest accruals are appropriately subject to anti-backloading calculation. So we stick with our distinction between plans in which interest credits are "unconditionally guaranteed" (that is, they are not contingent on future service or other acts) and those in which they are not unconditionally guaranteed.

Having set forth the underlying accrual issue posed by Notice 96-8, we return to the central question posed by *Berger*. For a participant younger than age 65, with an account balance of any size, what is his or her present value accrued benefit at that time?

When the plan's unconditionally guaranteed interest crediting rate is the Section 417(e) rate, the two are identical. Recall that the

Treasury regulations require that, before age 65, the present value accrued benefit must be expressed as the present value of the age 65 annuity using the interest rate and mortality factors of Section 417(e). If the guaranteed rate going forward is the 417(e) rate, the account balance is grown to age 65 at the Section 417(e) rate going forward, and the resulting age 65 annuity is discounted to its present value using the same rate coming back. The present value accrued benefit and account balance are identical.

Problems arise when the plan's guaranteed interest crediting rate is higher than the Section 417(e) rate.[7] The account balance is grown to age 65 using the higher rate and then discounted back to age 55 at the lower, Section 417(e) rate. Because the going forward rate (to get from the account balance to the age 65 annuity) is higher than the coming back rate (to get from the age 65 annuity to the present value "accrued benefit"), the going back step results in a higher present value accrue benefit than the account balance that we started with. To put this another way, the benefit grows going forward faster than it shrinks coming back—and so ends up bigger than it began. If the plan distributes to the participant only his or her account balance, the participant gets less than the present value accrued benefit, and the plan violates the vesting rules of IRC Section 411(a), which prohibits forfeiture of the vested accrued benefit. In simplified form, this was the holding of two pre-*Berger* whipsaw cases. Finding that the plan's accrued benefit included a promise of interest credits that was higher than the Section 417(e) rate, the Second and Eleventh Circuits both held that the present value of the accrued benefit was bigger than the account balance, and the plan's distribution of only the account balance was a prohibited forfeiture of the accrued benefit in violation of ERISA's vesting rule. *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000); *Lyons v. Georgia Pacific Corporation Salaried Employees Retirement Plan*, 221 F.3d 1235 (11th Cir. 2000).

The *Lyons* and *Esden* plans each attacked a separate prong of the whipsaw problem. The *Esden* plan argued that the right going forward rate was not the higher rate specified by the plan. The *Lyons* plan argued that the right coming back rate was not the lower rate required by IRC Section 417(e). Generally, the defendant plans lost both arguments.[8]

Which brings us to *Berger*. The plan's formula for awarding interest credits was somewhat complicated. Generally, the interest crediting rate stated in the plan was the rate on one-year Treasury bills plus one percent (the "T-bill-plus-1" rate).[9] This rate, however, was promised by the plan only on the condition that the participant kept his or her "money" in his or her "account balance" (more technically, if he or she forbore from making a distribution of the benefit). If a participant terminated service and took a distribution, the interest rate used to proj-

ect the account balance to age 65 was the rate specified by Section 417(e), which at that time was the rate used by the Pension Benefit Guaranty Corporation for determining the present value of a lump sum distribution on plan termination. The 417(e) rate at that time was typically lower than the T-bill-plus-1 rate that the departing participant would have earned had he instead kept his money in the plan.

On brief, the Xerox plan provisionally accepted the IRS's view of the accrued benefit in a cash balance plan—that is, the idea that the present value accrued benefit in any year must include an estimate of those future interest credits that are unconditionally guaranteed through age 65. It also provisionally accepted that the Section 417(e) rate was the appropriate coming back rate (to get from the age 65 annuity to the present value of the accrued benefit.) The plan attempted, however, to split the interest crediting rate (the going forward rate) under the plan into two pieces. The first piece equaled the 417(e) rate, and was unconditionally guaranteed through age 65, without regard to service or other conditions. The second piece, argued the plan, was an incremental accrual for participants who kept their money in the plan, even after termination of employment. This incremental piece was the difference between the higher rate promised for participants who keep their money in plan solution, and the lower, 417(e) rate—that is, the difference between the T-bill-plus-1 rate and the Section 417(e) rate. Unlike the first, unconditionally guaranteed piece, the second or incremental piece was not unconditionally guaranteed and was not part of the accrued benefit upon termination of employment. Rather, it was accrued later, year by year, in each year the participant met the conditions for earning it by having kept his "money" in his "account" under the plan.[10]

For example, return to our example of the hypothetical participant who terminated employment at age 55, with an account balance of $100,000, at a time when the 417(e) rate was 5 percent and the T-Bill-plus-1 rate was 6 percent. Under the Xerox plan's argument, the participant's accrued benefit upon termination was her account balance, with a guaranteed interest rate of 5 percent. Because 5 percent was the 417(e) rate, growing the account balance to age 65 at the guaranteed 417(e) rate, and discounting it back at same rate resulted in an age 55 lump sum accrued benefit equal to her $100,000 account balance. By taking a distribution, the participant never satisfied the conditions for earning the one percent conditional piece; those incremental interest credits never became part of her accrued benefit and an estimate for their future value should thus not be included in the present lump sum.[11]

Disregarding this argument, the Seventh Circuit held that the plan violated ERISA's vesting requirements.

Applying the court's reasoning to our example, the court essentially held that the participant's accrued benefit included the participant's $100,000 account balance, plus future interest credits, at the full 6 percent rate, guaranteed through age 65. Growing the $100,000 account balance to age 65 at the higher 6 percent rate and discounting it back at the lower 5 percent rate produces an age 55 lump sum accrued benefit of $109,943. The plan's failure to give the participant the extra $9,943, held the court, was an impermissible forfeiture of the vested accrued benefit under ERISA's vesting rule.

VIOLATION OF *ALESSI*

Most strikingly, the *Berger* court decided that the plan deprived the participant of his vested accrued benefit—without ever determining what the accrued benefit under the plan was. Rather, it restated the accrued benefit (by adding future interest credits not promised under the plan except conditionally) and held the plan violated ERISA's vesting rules by its failure to give the entire accrued benefit as so restated.

The opinion thus short-circuited the analytical framework of *Alessi v. Raybestos-Manhattan, Inc.* 451 US 504 (1981). *Alessi* requires that vesting decisions be conducted in a two-step process: (1) determine the accrued benefit under the plan and (2) only then decide whether the participant has been deprived of any piece of his accrued benefit. The *Berger* court's failure to follow the *Alessi* two-step analysis has two consequences. First, because it never decided what the accrued benefit was, the *Berger* court never explains how it violates ERISA. The court says

> The plan conditions the employee's right to future interest credits on the form of the distribution that he elects to take (pension at age 65 rather than lump sum now) which is precisely what the law forbids.

But what part of "the law" forbids it—and what is it that "the law" forbids?

BACKLOADING

The plan, as we have noted, essentially argued that an incremental piece of the interest credits accrued after employment, conditioned on keeping money in the plan. The *Berger* court apparently assumed that these post-employment, conditional, accruals violated the anti-backloading accrual rule.

This assumption is suggested by the court's reliance on Notice 96-8 as an "authoritative interpretation." Recall that Notice 96-8 divided the

world of cash balance plans into those in which future interest credits are unconditionally guaranteed through age 65, and those in which they are not. Notice 96-8 described the former as "frontloaded," and the latter as "backloaded." Note the ambiguity here. By defining plans with non-guaranteed interest credits as "backloaded" plans, it implies that such plans are impermissibly "backloaded" under the anti-backloading accrual rules. The Seventh Circuit seems to have fallen into this terminology trap. Citing Notice 96-8, the court held that a cash balance plan must be "frontloaded" (*i.e.*, in our terminology, must unconditionally guarantee all future interest credits to age 65), and that ERISA "outright forbids pension plan terms that tend to lock an employee into his current employment by backloading his pension entitlement excessively."

But Notice 96-8 does not say this. It says that plans in which future interest credits are not unconditionally guaranteed will "typically not satisfy" the anti-backloading accrual rules. The court misread Notice 96-8 to say something it does not say: that once tested under the backloading rules, any future interest credits will flunk. This could not be so, even if Notice 96-8 claimed it (and it did not). Even accepting the premise that future interest credits are always testable under the backloading rule, the rule has a 33 percent margin, and cash balance plans have some intrinsic frontloading (for reasons beyond the scope of this article), leaving room for compliance. Having tossed off its backloading analysis as a "typical" result, Notice 96-8 did not by its terms address the fact pattern at issue in *Berger*—that is, an interest accrual formula under which most of the interest earnings accrue up front, and only a small piece accrues in the future.

By reading "backloaded interest credits" as "impermissibly backloaded accruals" and "typically will not satisfy" as "will invariably violate," the court decided that any future accruals of non-guaranteed interest earnings violates the anti-backloading accrual rules of IRC Section 411(b). In assuming that this small, conditional slice of the plan's interest rate crediting violated the backloading rules, however, the court never identified or analyzed the plan's accrual formula. Thus, the court never decided whether the accrued benefit formula under the plan in fact violated the anti-backloading accrual rules.

POST-EMPLOYMENT AND CONTINGENT ACCRUALS

Given its apparent belief that the plan's accrual formula violated ERISA's accrual rules, the court's failure to identify the plan's accrual formula is an inexplicable hole in its reasoning. But perhaps the court's holding is based on a second underlying, but unarticulated, principle of law.

The court possibly believed that post-employment accruals are prohibited by ERISA. This would presumably stall the Xerox plan's theory at the starting gate. The court did not state this as its reason, however.

Moreover, this belief would be wrong. As we noted in our previous article, ERISA does not prohibit post-employment accruals and recent IRS guidance expressly allows them.[12] For example, regulations under IRC Section 401(a)(4) permit a plan to provide post-employment accruals in the form of additional service credits for former employee who provides services for a new employer.[13] The participant in these examples accrues additional benefits, where accruals are earned after employment termination, and are contingent on events other than employment with the plan sponsor. Under this analysis, the post-employment accruals in *Berger* are no different—they are additional accruals contingent on post-employment events.

Possibly the court believed that ERISA prohibits making post-employment accruals contingent upon keeping money in the plan. This is suggested by the court's remark that participants "are in short being invited to sell their pension entitlement back to the company cheap, and it is this sale that ERISA prohibits."

But all post-employment accruals turn on this condition. For example, return to the plan that provides service credits to former employees who work for an unrelated employer. The additional accruals here are of course available only for the former employee who leaves his or her "money" in the plan. The post employment accruals are contingent on future services but also on not making a distribution.

Moreover, if the court believes that ERISA prohibits conditioning accruals on keeping money in the plan, it is not clear where the court finds the ERISA rule that says this. The Treasury regulations say a plan may not penalize a participant's decision to defer until he or she reaches age 65 a distribution that is made available earlier.[14] They do not expressly forbid rewarding the participant's deferral decision.

The court may have thought its invitation-to-sell-cheap conclusion resides in Treasury's valuation rules. These, as noted, require that any distribution of the accrued benefit be not less than the age 65 annuity discounted using the interest and mortality assumptions of IRC Section 417(e).[15] If applying these rules, the court probably had in the back of its collective mind the "COLA" cases, which we raise here in order to distinguish them.

By way of background, some plans promise an age 65 annuity with payments indexed to inflation. The indexing features are generally referred to as cost of living adjustments (COLAs). If promised before retirement, COLAs are generally part of the "accrued benefit." *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992); *Shaw v. IAM Pension Plan*, 750 F.2d 1458 (9th Cir. 1985). Recent case law has held that, if a COLA is part of the accrued age 65 annuity, any lump sum distribution must include the present value of the COLA. *Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Trust*, 134 F. Supp. 2d 189 (D. Mass. 2001). But see *Kohl v. Association of Trial Lawyers of America* 183

F.R.D. 475) (D. Md. 1998) (Lump sum must include present value of COLA only if plan so provides). The *Berger* court may have had the *Laurenzano* principle in mind.

Laurenzano does not address the question presented in *Berger*, however. *Laurenzano* merely holds that, assuming that the COLA is part of the accrued age 65 annuity, it must also be part of the accrued lump sum. *Berger* by contrast raises the question whether the accrued age 65 annuity, earned by the time the participant terminates employment before age 65, can grow with additional accruals earned after termination of employment.

The reader might ask, however, isn't the higher interest rate a part of the only age 65 annuity in fact available under the plan? That is, the participant who actually gets an age 65 benefit has, by definition, left his money in the plan until age 65, and under the plan's terms will have received the higher interest crediting rate. By characterizing a part of the interest crediting rate as a later accrual, and thus saying it does not have to be included in the pre-age 65 lump sum, is the plan trying an end-run around the 417(e) valuation rules? Part of the court's opinion suggests it had this very thought in mind.

If this was the court's thinking, it was engaged in the circular exercise of question begging. The plan argued that the incremental piece of the interest credit was a later accrual. An addition to the accrued benefit is not protected until the conditions for it have been met. *See, e.g.*, *Bigger v. American Commercial Lines, Inc.*, 862 F.2d 1341 (8th Cir. 1988). For example, consider a 50-year old participant in a plain-vanilla final-average-pay plan has earned an age 65 benefit of $500 per year, based on his high-three-year salary of $10,000 as of age 50. The plan in our example is then frozen. He retires at 65, by which time his high-three-year salary is $20,000. His accrued benefit is still only $500. The plan was frozen before the conditions for further accruals ripened—so he didn't get them even though the conditions for them were later met. This is so even if at age 50, his salary for the next 15 years had been set by contract. Future accruals are not accrued until earned—even if determinable before earned.

And so with the incremental interest credits at issue in *Berger*. If, as the plan argued, the incremental one percent interest was an additional accrual each year, then an amendment at any time could delete them in the future. The future age 65 benefit was based on the higher rate only after all conditions for earning the incremental piece of the rate it were satisfied—and that would not be until the participant reached age 65 with his money still in a plan. Any time before that, the higher piece could be prospectively terminated.

A COLA case illustrates this point. *Labrosse v. Asbesto Workers Local 47 Retirement Trust Plan*, 186 F. Supp. 2d 791 (W.D. Mich. 2001) involved a plan that provided retirees a COLA adjustment, but only con-

tingent on the plan providing active employees a COLA adjustment. The plan held that to the extent not granted, the COLA was not an accrued benefit, and could be eliminated. The *Labrosse* court distinguished *Hicky* in part because the *Hicky* COLA was "automatic guaranteed and somewhat predictable" whereas the *Labrosse* COLA was contingent on further action by trustees. That is, the *Labrosse* COLA was not accrued until all the conditions for it had ripened.

Aside from its absence of legal authority, no apparent policy reason compels the conclusion that the plan may not credit post-termination accruals in the form of extra interest credits. ERISA does not expressly forbid rewarding deferred distributions. The Treasury regulations in fact expressly permit a plan to give subsidies to early retirement benefits taken in annuity form, even if the plan penalizes the instant-gratification-prone participant by denying the subsidy to the same early retirement benefit taken as a lump sum.[16]

In short, the question of whether participants were being asked to sell their entitlements "cheap" boiled down to a single legal issue the court declined to address, namely, whether the plan was permitted offer part of the interest earnings only as additional, contingent accruals that could be earned only by participants that met the plan's conditions for earning it. We can find no ERISA principle that forbids this, and the *Berger* court did not supply one. The only cited authority was the musings of a piece of informal Treasury guidance that styled itself as a proposal to write proposed regulations, that by its terms ("typically") articulated a rule that did not apply to the universe of plans, and that on its face did not apply to the facts of the plan before the court.

REWRITING THE PLAN—ANY LIMITS?

By departing from the *Alessi* analytical structure the *Berger* court set out a remedy that we find troubling. We have noted that the court never determined what the plan's accrued benefit to be. It rather redefined the accrued benefit by adding interest credits that under the terms of the plan were not accrued before certain conditions ripened.

This is a startling assumption by the court of its power to write a plan. Under ERISA, the accrued benefit is the benefit promised under the terms of the plan. Generally, what the plan doesn't give, the participant doesn't get. If, however, the plan violates ERISA, ERISA trumps it.[17] That is, the plan document may be implicitly rewritten to incorporate the provisions required by ERISA. But the court rewrote the accrued benefit to incorporate all the future interest credits—without first finding that ERISA required the plan to guarantee all future interest credits. Even Notice 96-8—which the court cited in support—does not so require.[18]

Contrast the remedy in *Lyons*, an earlier whipsaw case. The Eleventh Circuit held that, for the relevant years, participants' account balance

included a promise of interest credits at the plan's specified rate, while the plan was required to discount the resulting age 65 annuity at the lower Section 417(e) rate. The Eleventh Circuit held that the plan's distribution of the account balance (rather than the higher amount calculated as the present value using the Section 417(e) rate of the age 65 annuity) was a vesting violation and remanded to the district court.

On remand, the *Lyons* district court did something interesting. Among other matters, the parties disputed the discount rate permitted to get from the age 65 annuity to the present value distribution. As drafted, the plan never specified a discount rate. To simplify the dispute before the court, the plan wanted the higher rate permitted by 1986 law, and the participants wanted the lower rate required by pre-1986 law (the higher the rate, the lower the lump sum, and vice versa). The parties' squabble revolved around the question of whether the higher rate was a violation of the anti-cutback rule of IRC Section 411(d)(6), given that Congress expressly permitted plans to amend from the lower rate to the higher rate without violating IRC 411(d)(6) only by meeting a statutory amendment deadline—which the plan did not meet and could not meet, because it had never included the lower rate in the first place.

The *Lyons* remand court decided it could not rule as a matter of law on this tangle of counterfactuals. The plan, it noted, "did not anticipate the application of a project forward discount back lump sun calculation and is quite simply silent as to the proper discount rate." The court declined to pick a discount rate, finding that it "could only arrive at a discount rate by arbitrarily picking one . . . essentially creating a new plan provision out of whole cloth." The court thus remanded to the plan administrator to find a discount rate that did not violate IRC Section 411(d)(6).

Without trying to address all of the *Lyons* remand analysis, we believe it raises a significant issue. When the plan's accrued benefit is illegal in some respect, is the court entitled to write a new plan out of "whole cloth" as the *Lyons* district court said, with no constraint by the plan sponsor's original intent? Or must it allow the sponsor to go back to the drawing board, within the constrains imposed by ERISA. The *Berger* approach says the former, and the *Lyons* approach, the latter.

While the *Berger* opinion is unclear as to its rationale, let us assume, as the opinion most strongly implies, that the court's objection to the Xerox plan formula was that the contingent piece of the interest accrual violated ERISA's anti-backloading rule. If the plan is the plan, subject only to ERISA, then the Court should have demanded the plan (or the district court, for the plan) to rewrite the interest accruals only to the point where they no longer violated backloading. By not following this approach the Seventh Circuit created a "new plan provision out of whole cloth"—which the *Lyons* district court expressly declined to do.

DEFINING THE ACCRUED BENEFIT

Participants' whipsaw claims arise from two key starting points. The first is that future interest credits on the account balance are part of the accrued benefit. The second is that, because they are part of the accrued benefit, they are included in the age 65 annuity. Calculating the present distribution is only the third of three steps and takes place only after the accrued benefit is first defined as the age 65 annuity.

There is another way of viewing the accrued benefit. The accrued benefit in a defined benefit plan is typically expressed as the age 65 annuity. But, as we have noted, IRC Section 411(c)(3) lets the plan define the "accrued benefit" in other ways, as long as the age 65 annuity under the plan is the "actuarial equivalent" of the accrued benefit so defined.[19] As permitted by IRC Section 411(c)(3), the "accrued benefit" in a cash balance plan at any time is simply the account balance as defined by the plan. The age 65 benefit is not the accrued benefit as defined by the plan but is the "accrued benefit" required for certain statutory purposes, specifically for use as the measuring rod for determining compliance with the anti-backloading accrual rules.[20]

This view turns the Notice 96-8 valuation scheme on its head. Like Notice 96-8, the accrued benefit is the starting point for calculating the distribution. But unlike Notice 96-8, and in accordance with IRC Section 411(c)(3), the starting point is the accrued benefit as defined under the plan, which in a cash balance plan is the account balance. The age 65 annuity is only the accrued benefit computed for certain statutory purposes and under IRS guidance equals the account balance grown forward at the 417(e) rate.[21] The lump sum distribution of the accrued benefit by statute is the same age 65 annuity discounted back at the same 417(e) rate. The present value accrued benefit is the account balance.

This is exactly how the accrued benefit and age 65 annuity are computed for employee contributions under IRC Section 411(c)(2). Employee contributions to a defined benefit plan look a lot like a cash balance plan.[22] At any moment, the employee has an amount termed "accumulated contributions," which is the sum of his or her contributions grown at an interest rate required by statute.[23] The "accumulated contributions" amount looks exactly like a hypothetical cash balance account, or for that matter like a real bank savings account, because it equals contributions plus interest compounded at a stated rate. To keep this notion at the fore, we refer to this amount by shorthand as the "employee account balance." By statute, the employee's age 65 accrued benefit is the employee account balance, grown forward at the Section 417(e) rate.[24] Discounting the age 65 accrued benefit at the 417(e) rate, as required by the Treasury regulations to come back from the age 65

annuity to the present value accrued benefit, yields an amount equal to the employee account balance.

We find this articulation of the accrued benefit persuasive as a matter of statutory interpretation. It makes sense of IRC Section 411(c)(3), which expressly allows the plan to defined the "accrued benefit" in ways other than the age 65 account balance.

But, without directly addressing the issue, the *Berger* decision suggests that unless the plan expressly defines the accrued benefit as the account balance, this method of analysis may run into opposition. The court acknowledged the plan's point that the plan "determines the accrued benefits" as the participant's cash balance account upon distribution. The court dismissed this point out of hand, however, saying

> If Xerox believed the argument, it would not got through the motions of first projecting future credits at the PBGC rate and then discounting them at the same rate to present value; it would just say, as it does in its brief, that the employee's entitlement is just to whatever his hypothetical cash balance is when he takes his retirement benefit.

Again, the *Berger* court assumed much of its conclusion in its argument. Most if not all defined benefit plans defined the accrued benefit as the age 65 annuity, if only because the statute requires this be calculated for certain statutory purposes. IRC Section 411(c)(3) distinguishes, however, between the accrued benefit as determined in the plan—which may be any definition the plan chooses—and the age 65 annuity form of the accrued benefit expressed for statutory purposes. Relevant to determining the accrued benefit under the plan, rather than just the actuarial computation required by statute, it would seem, would be such factors as how the benefit was communicated to participants, and not just that it was expressed in the plan document, as required by law for some purposes, as the age 65 annuity.

MORTALITY DISCOUNT

Until now, to keep the math simple, we have ignored the use of a mortality discount in figuring out the plan's accrued benefit. Here we reintroduce it. IRC Section 417(e) requires that the present value of the accrued benefit be determined using not only the "applicable interest rate" but also the "applicable mortality table."

Like many cash balance plans, the *Berger* plan provided that if the participant died before retirement age, the full value of his account balance was paid to the participant's beneficiaries. The court held that the plan's use of a pre-retirement mortality discount to figure the present

value of the lump was inappropriate, because there was no forfeiture of the benefit upon death.

We believe as a legal matter the court was wrong. The plan is required to distribute no more than the accrued benefit. By requiring that an estimate of the death benefit be included in the lump sum distribution, the court essentially held it was part of the accrued benefit. The Treasury regulations, however, say that the "accrued benefit" does not include "incidental" death benefits.[25] Moreover, the Treasury regulations say that only death benefits that are "incidental" may be part of a qualified plan, and that death benefits that are more than "incidental" are disqualifying.[26] The court's opinion on its face puts the plan in a bind. If the death benefit must value as part of the accrued benefit, it is not incidental, and if it is more than incidental, it is disqualifying.

This is not just a problem for cash balance plans. Every defined benefit plan is required by law to a pre-age 65 death benefit—specifically, an annuity payable to the surviving spouse of a participant who dies before retirement age, equal to 50 percent of the age 65 annuity that participant had earned right up to the time of his or her death.[27] This is the qualified pre-retirement spousal annuity (QPSA) or herein the "50 percent spousal death benefit." In essence, *Berger* says that to the extent of the death benefit payable before age 65, the participant's age 65 benefit is not subject to forfeiture. The mortality discount—to reflect the value to the participant of escaping this forfeiture risk by early payout—is to this extent not appropriate.This reasoning would seem to apply to the extent the retirement benefit is made "nonforfeitable" by virtue of the 50 percent spousal death benefit.

There is arguably one difference between the 50 percent spousal death benefit and the typical cash balance plan death benefit at issue in *Berger*. Under the *Berger* plan, a death benefit equal to the cash balance account was paid even to non-spousal beneficiaries, and the cash balance account had zero chance of forfeiture.A spousal death benefit, on the other hand, always has some element of contingency, even for the married participant. He or she might survive the spouse and fail to remarry, in which case upon the participant's death, there would be no death benefit and the retirement benefit would be forfeited.

We wonder if, in light of evolving accrued-benefit law, there is a tenable distinction between the retirement benefit that is a 100 percent "sure thing," and the one that is only a 99.9 percent "sure thing."We return to the COLA cases mentioned earlier in this article. Building on the *Hickey* principle that the COLA is part of the accrued benefit, the *Laurenzano* court held that an estimate of the future value of COLA adjustments must be included in the lump sum.The *Laurenzano* court acknowledged that valuation of these future COLAs was difficult, and held a second trial for the sole purpose of measuring their estimated value.

That is, under *Laurenzano*, once a future contingent event is part of the accrued benefit, an estimate of its value must be included in any lump sum distribution of the accrued value. The problem of measuring it is a separate question. Applied to the mortality discount, we see that to the extent that a retirement benefit has a 50 percent spousal survivor annuity, the chances of forfeiture for that part of the benefit have been reduced. *Berger* tells us that this reduction in the possibility of forfeiture is part of the accrued benefit. And *Laurenzano* tells us it must therefore be estimated—even if hard to value.

There is very little IRS guidance on the question—but what exists tells us that *Berger* is wrong. Perhaps the most straightforward guidance is Revenue Ruling 89-60, which governs valuation of pre-age 65 distributions of any accrued benefit derived from employee contributions. This kind of accrued benefit is significant to this discussion, because it is not forfeitable at death—that is, the retirement benefit equals the death benefit.[28] The accrued benefit based on employee contributions is in this respect identical to the cash balance account at issue in *Berger*. Revenue Ruling 89-60 walks through the appropriate going forward factors to get from the participant's contributions to the accrued benefit expressed as an age 65 annuity, and the factors to "come back" from the age 65 annuity to the accrued benefit expressed as the present value lump sum distribution. Revenue Ruling 89-60 clearly permits the plan to apply a mortality discount for this second step, as it allows the coming-back calculation to be based on Revenue Ruling 76-47, in which the mortality discount is used. That is, the Treasury guidance says that the "accrued benefit" does not include the death benefit attached to the employee's contributions—even though the death benefit equals the retirement benefit.

The only contrary guidance is Notice 96-8 itself, which does not apply a mortality discount in when it discounts the age 65 annuity to illustrate the whipsaw issue in hypothetical plans. We suspect this was an oversight, in a hastily written piece of guidance that styled itself as a proposal to write proposed regulations. The *Berger* district court found the examples in Notice 96—persuasive on this point—although the Seventh Circuit did not mention Notice 96-8 in connection with this part of its opinion.

As for the other accrual questions raised in *Berger*, the question of whether death benefits are part of the accrued benefit is raised—but answered in so slapdash a fashion that future case law may be necessary to thrash it out.

CONCLUSION

The plan at issue in *Berger* instructed participants that to earn high-

er interest credits on their cash balance accounts, they had to leave their money in the plan. The *Berger* court struck down this condition and held that the higher interest earnings were an unconditionally guaranteed part of the accrued benefit through age 65. Having rewritten the age 65 benefit to include these higher earnings, the court held the plan's failure to distribute the present value of this higher age 65 benefit—discounted at the statutory rate—was a violation of ERISA. The court never explained why the lesser age 65 benefit under the plan was the wrong one, or why the higher benefit, the right one. As its sole authority, the court cited a single sentence in an old Notice—a sentence saying speculatively and without foundation, that a plan formula will "typically" violate ERISA when the formula is of a completely different kind from the plan formula in front of the court. With even less explanation, the court threw out decades of practice, in which retirement benefits are discounted without regard to the death benefits paid when the participant dies before reaching retirement age.

Questions are raised by *Berger* which are not addressed by the opinion. These issues affect not just cash balance plans but all defined benefit plans. When can a plan condition accruals on conditions not strictly related to employment? Under what conditions are these potential future accruals appropriately measure in the anti-backloading calculation? When is a mortality discount inappropriate for a plan that provides a death benefit—that is, for every defined benefit plan in the country? If the court finds the plan is non-ERISA compliant, what is the appropriately rewritten plan?

These questions have been answered by plan sponsors struggling to design cash balance plans for over ten years in the absence of Treasury guidance on how the accrued benefit in a cash balance plan is defined, earned, or measured. In the absence of guidance, sponsors are now being told by the courts that their answers, at least in the cash balance context, were wrong. But the federal courts are designed to address specific cases—not to write regulations addressing general issues. Confronted with these questions by the plan in front of it, the *Berger* court would not do what the executive branch did not do. The court faced the case but ducked the issues. In so doing, the *Berger* court threw these same issues into confusion for defined benefit plans of all types. The result is more questions than we started with—and answers even farther away.

NOTES

1. The participant who has satisfied the plan's vesting conditions has a nonforfeitable right to his or her "accrued benefit." IRC § 411(a); ERISA § 203(c). The "accrued benefit" may not be eliminated by plan amendment, even if not vested. IRC § 411(d)(6); ERISA § 203(g).

2. IRC § 411(a)(7) (the accrued benefit is the employee's "accrued benefit determined under the plan and except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age"); IRC § 411(c)(3) (If the accrued benefit is to be determined as an amount other than the age 65 annuity, the accrued benefit "shall be the actuarial equivalent of such benefit.") Treas. Reg. § 1.411(a) ("If the plan does not provide an accrued benefit [as an age 65 annuity], the accrued benefit is the age 65 benefit" which "is the actuarial equivalent (determined under sectin 411(c)(3) and 1.411(c)-5 [sic]) of the accrued benefit determined under the plan").

3. Treas. Reg. §§ 1.417(e)-1(d)(1), 1.411(a)-11(a)(1), and 1.411(a)-11(d).

4. IRC § 411(b)(1)(B).

5. *Id.*

6. We simplified this by ignoring pay credits, but the result is the same using any reasonable estimate of pay credits. For example, assuming annual pay credits of $2,500 (5 percent of compensation) we get an age 55 addition of $8,500 and an age 65 addition of $15,222. Translated to the age 65 annuity as a percent of pay, the age 65 accrual still exceeds the age 55 accrual by about 80 percent.

7. The plan might do this if the employer believed, for example, that the Section 417(e) rate was too low to make the plan's hypothetical account mimic a real investment account.

8. The *Lyons* district court on remand held that the IRC § 417(e) is not the required discount rate after the amendment of IRC § 417(e)(3) by the 1994 GATT legislation. *Lyons v. Georgia Pacific Corp. Salaried Employees Retirement Plan*, 196 F. Supp. 2d 1260 (N.D. Ga. 2003).

9. For the reader who has followed whipsaw closely, ***Berger*** may raise some confusion because the plan's interest crediting rate—the rate on one-year Treasury bills plus one percent—was one of the "safe harbor" rates set forth by Notice 96-8. That is, it was one of the rates that a plan could use as an interest crediting rate and still be deemed, under Notice 96-8, not to raise a whipsaw issue. Notice 96-8, however, was not available to the ***Berger*** plan. Notice 96-8 made its safe-harbor rates available only to plans that had amended their Section 417(e) discount rate to equal the 30-year Treasury bill rate required by the "GATT" legislation of 1994. The ***Berger*** plan, however, had not yet amended its Section 417(e) discounting rate (as also permitted by the 1994 GATT transition rules). The ***Berger*** plan's Section 417(e) rate was thus the pre-GATT rate (the PBGC rate), and the Notice 96-8 safe harbors were not available.

10. Close readers of cash balance literature may recall that Robert Eccles and David Gordon anticipated a version of the ***Berger*** plan argument in their article, "Cash Balance Cavalcade II" 8 ***ERISA Litigation Reporter*** 5, Glasser Legal Works (February 2001). Eccles and Gordon discussed a similar argument suggested by a footnote in the Second Circuit opinion in ***Esden***. Like the ***Berger*** plan, the ***Esden*** plan provided a higher interest crediting rate for participants who kept their "money" in their "accounts" after terminating employment. In a lengthy footnote, the ***Esden*** court provisionally considered the argument that, for former employees who took a distribution, the lower rate alone was part of the "accrued benefit", and the incremental piece was never accrued because the conditions for its accrual (leaving money in the plan) never ripened. Having considered this argument, the ***Esden*** court rejected it. The court noted that plan had demonstrated compliance with anti-backloading rule of IRC § 411(b)(1)(B) by designated all future interest credits as accrued up front ("guaran-

teed" in our terminology, "frontloaded" in the terminology of the court and Notice 96-8)—including the incremental slice earned after termination of employment. The *Esden* court was unwilling to allow the plan to include this portion of the future interest crediting rate as guaranteed ("frontloaded" under 96-8) for purposes of the anti-backloading rule, but as contingent future, accruals ("backloaded" under 96-8) for purposes of determining the lump sum distribution amount. The interested reader will find an analysis of the similar argument as set forth in *Berger* in "Cash Balance Cavalcade—Part III" 11 *ERISA Litigation Reporter* 3, Glasser LegalWorks (August 2003), which also discusses other recent cash balance litigation.

11. The 6 percent and 5 percent rates are hypothetical. There is no evidence these rates were involved in any participant's distribution.

12. Barker and O'Brien, "The Incredible Shrinking Revenue Ruling: Post Employment Accruals under ERISA" 16 *Benefits Law Journal* 3, Autumn 2003, Aspen Publishers, Inc.

13. Treas. Reg. § 1.401(a)(4)-11(d)(3)(ii)(B); 1.401(a)(4)-11(d)(3)(iii)(B)(3), example 1.

14. Treas. Reg. § 1.411(a)-9(c)(2)(i) (consent to pre-age 65 benefit distribution is not valid if "a significant detriment is imposed under the plan on any participant who does not consent to a distribution.")

15. Treas. Reg. §§ 1.417(e)-1(d)(1), 1.411(a)-7(c)(1), and 1.411(a)-11(a)(1).

16. Treas. Reg. § 1.411(a)-7.

17. ERISA § 3(23).

18. *See* Rosina B. Barker, "Scrivener's Error: An Emerging ERISA Doctrine?" 13 *Benefits Law Journal* 1, Spring 2000, Aspen Publishers, Inc.

19. IRC § 411(a)(7) (the accrued benefit is the accrued benefit is the employee's "accrued benefit determined under the plan and except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age"); IRC § 411(c)(3) (If the accrued benefit "is to be determined as an amount other than the age 65 annuity," the accrued benefit "shall be the actuarial equivalent of such benefit.") Treas. Reg. § 1.411(a) ("If the plan does not provide an accrued benefit [as an age 65 annuity]," the accrued benefit is "the age 65 benefit" which "is the actuarial equivalent (determined under sectin 411(c)(3) and 1.411(c)-5 [sic]) of the accrued benefit determined under the plan").

20. This argument is set forth persuasively, for example, by Armco on brief in its own whipsaw litigation. *See West v. AK Steel Corporation (Formerly ARMCO Inc.) Retirement Accumulation Pension Plan*, CS No. C-1-12001 (D. SD Oh 2002) Defendants' Consolidated Memorandum in Support of their Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment. In addition, Armco argued that the Section 417(e) rate is not the statutory discount rate after the amendments of Section 417(e) by the GATT legislation of 1994. The *Berger* plan did not raise this question. *West* had not been decided.

21. Treas. Reg. § 1.411(c)-1(e)(1); IRS Announcement 95-33.

22. *See* Richard C. Shea, "Age Discrimination in Cash Balance Plans, Another View," 19 *Va. Tax. Rev.* 763, 771 (2000).

23. IRC § 411(c)(2)(C).

24. IRC § 411(c)(2)(B).

25. Treas. Reg. § 1.411(a)-7(a)(1)(ii).

26. Treas. Reg. § 1.401-1(b)(1)(i).

27. IRC § 417(c)(1).

28. IRC § 411(a)(3)(A).

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