UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA C. RICHARDS, individually, and On behalf of others similarly situated, : No. 3:04CV1638 (JCH)

Plaintiff, :

v. :

FLEETBOSTON FINANCIAL CORP. and the FLEETBOSTON FINANCIAL PENSION PLAN, :

Defendants. : APRIL 17, 2006

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF MOTION TO DISMISS

1. Introduction

The Court has held that ERISA §204 (b)(1)(B)(i) requires it to treat the Amended Plan as having been in effect for all plan years, and that doing so requires it to ignore the benefits accrued under the Tr aditional Plan in favor of considering only the accrual of the cash balance benefits under the Amended Plan. But, while the original Co mplaint didn't say so, here as pleaded in the proposed Amended Complaint, the language of the Amended Plan itself explicitly provides a new role for the ol d benefits. The old benef its are one of two sets of be nefits that are the "accrued benefits" under the Ame nded Plan: (1) the cash balance benefit s typically go to participants with little or no prior servic e, and (2) for some

participants, for all or some of the time, they get the Traditional Plan benefits as their accrued benefits under the new plan language. Thus to apply ERISA §204 (b)(1)(B)(i), the Court must also treat the Traditional Plan Terms as being in existence for all plan years. They are integral to the FleetBoston benefit formula and not mere vestiges of a superannuated plan.

2. *Register* is Wrong: The Traditional Benefits can't be Ignored When Measuring Accrual Rates Because They are a Living Part of Calculating Newly Accruing Benefits Under the Amended Plan.

The accrual rate holding in *Register v. PNC Financial Service Group, Inc.* [1] is based on two mistaken assumptions. The *Register* Court says that the PNC plan mentions the frozen accrued benefits under the prior plan "to comply with ERISA's anti-cutback provisions".[2] This assumes, however, that the inclusion of the language is largely superfluous.

Like the Amended Plan here, the Amended Plan in *Register* didn't have to mention the frozen benefits at all to give plan participants a right to them -- ERISA §204(g) gives them that right when it prohibits cutbacks of accrued benefits. Indeed, had PNC or FleetBoston terminated their traditional plans and started new cash balance plans, it is unlikely either of them would have mentioned the old benefits in their new plans; similarly there is no actual need to mention them here

[1] 2005 U.S. Dist. LEXIS 29678 (D. Pa. 2005)(Exhibit A).
[2] Id. at *10-*11.

if the only reason is to promise participants that their legally protected benefits won't be cut.[3]

But things here aren't as the *Register* Court suggested. Neither PNC nor FleetBoston were merely being punctilious when they incorporated the benefits accrued under the old formula into their new formulas: the two companies incorporated the traditional plan terms into their amended plans for a reason far more important to them – they incorporated them so they could save money by creating a wear-away effect. After all, the FleetBoston plan doesn't merely guarantee Richards her previously accrued benefits. Instead, Richards's accrued benefit under the FleetBoston plan is a "greater of benefit," creating a critical current role for the previously accrued benefits in calculating the new benefit accruals under the Amended Plan:

> **"Accrued Benefit"** means, as of any determination date,
>
> (a) for a Cash Balance Participant for whom an Opening Account Balance is calculated based on his accrued benefit under the Plan and/or a predecessor plan, **the greater of** (1) the monthly benefit, payable in the form of a Single Life Annuity, commencing on the Participant's Normal Retirement Date, or, as applicable, any later determination date, which is the Actuarial Equivalent of the Participant's Cash Balance Account, and (2) the Participant's accrued benefit under the Plan and/or, as of the date the Participant's Opening Account was determined.[4]

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[3] Not to suggest that plans don't frequently do so just to make clear that the plans will protect accrued benefits.
[4] Excerpt of FleetBoston Plan (Exhibit B)(emphasis added).

Had FleetBoston wanted merely to be conscientious and confine itself to protecting Richards's previously accrued benefits, it could have used the words "the sum of" where it used the words "the greater of". Instead it used the words "the greater of" to achieve savings from the wear-away effect, making the impact of the Traditional Benefit Terms integral to understanding Richards's *new* benefit accruals.

3. If She Ever Gets Them, Richards's New Benefits Will Be Severely Backloaded.

Having chosen to include the "greater of" formula for its own purposes, FleetBoston can't now demand that Richards's December 31, 1996 accrued benefit be disregarded when it comes to judging compliance with the 133 1/3% Rule. As the Seventh Circuit noted in 1994 in *Jones v. UOP*, Congress enacted ERISA's anti-backloading rules to prevent employers from saving money at the expense of the employees who terminate their employment long before the backloaded benefits accrue.[5] The wear-away effect FleetBoston built into the Amended Plan, sets in motion the very backloaded benefit accruals the rules were meant to prevent. Richards's new benefits are badly backloaded. In the nine years she has participated in the Amended Plan, Richards hasn't earned a nickel of new benefits.[6] After 33 years of service, she is 58 years old, and has just seven more years until

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[5] 16 F.3d 141, 143 (7th Cir. 1994) (citing Jeffrey D. Mamorsky, Employee Benefits Handbook § 18.16 (3d ed. 1992)). See H.R. Rep. No. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4688.

[6] Complaint at ¶37.

she reaches normal retirement age. If Richards ever earns benefits under the cash balance formula, they will be loaded as far back in her career as FleetBoston can make them. If she stays and gets any new benefits, doubtless she will be one of a small minority -- many otherwise similarly situated employees will have left their jobs voluntarily or involuntarily long before Richards. The result will be financial savings for the FleetBoston Plan achieved entirely by backloading benefits through the wear-away effect.

4. Backloaded Accruals Like Richards's Have Been Struck Down Before.

Most important for purposes of the 133 1/3% Rule, if Richards earns these backloaded cash balance benefits, the "greater of" formula means that those years in which she will finally accrue new benefits will be preceded by at least nine years where she accrued zero new benefits. Here, the "greater of" formula works something like the "greater of" formula struck down in 1997 by the Southern District of New York in *Devito v. Pension Plan of Local 819 I.B.T Pension Fund*.[7] In *Devito* the accrued benefit provided under the plan was the greater of a formula using social security payments as an offset and $2.00 x years of service up to 20 years.[8] The social security offset left the plan participant accruing very small benefits for eight years under the $2.00 formula until the other factors in the social

[7] 975 F. Supp. 258 (S.D.N.Y. 1997).
[8] *Id.* at 262.

security offset formula finally exceeded the offset. Once this happened, the plan participant got a significant bump in her benefit accrual -- a bump making the benefit accrued in one year more than 133 1/3% of the accrual in the prior year.[9] Rejecting, the plan sponsor's description of the violation as "purely academic", the *Devito* Court declared the plan violated the 133 1/3% rule and ultimately ordered the plan sponsor to retroactively reform the plan.[10]

The backloading at issue here is caused by FleetBoston's decision to write the "greater of" formula into the plan, not by an amendment increasing plan benefits "across the board" which under ERISA §204 (B)(1)(b)(i) must be deemed to apply to all plan years. Indeed, this case is no more like the "across the board" benefit changes covered by ERISA §204 (B)(1)(b)(i) than was the benefit increase formula struck down by the Eastern District of New York in 1997 in *Carollo v. Cement and Concrete Workers District Council Pension Plan.*[11] The plan in *Carollo* set accrued benefits at 2% of career average pay for participants' first 24 years of service and then, in the 25th year of service, switched to a more generous formula using 2% of final average earnings.[12] Arguably, these pension increases were caused by across the board salary increases and the plan sponsor could claim that the accrual rate never rose over 2%. But instead of allowing permissible

[9] *Id.* at 268-9.
[10] *Id.* at 269, 273.
[11] 964 F. Supp. 677 (E.D.N.Y. 1997).
[12] *Id.* at 682.

increases in benefits attributable to normal salary increases, the *Carollo* plan sponsor wrote a salary base shift into the plan. The *Carollo* Court declared this plan language invalid because it violated the 133 1/3% Rule, dramatically increasing pension benefits late in participants' careers based on one extra year of service, thus backloading and reserving special benefits for the "favored few" who worked at the company more than 25 years.[13]

Because FleetBoston wrote the "greater of" formula into the Amended Plan, the circumstances here are also similar to those discussed in IRS Revenue Ruling 78-252.[14] In this Ruling, the IRS considered a scenario where a plan participant who entered the plan prior to age 40 will accrue a benefit each year of the first 25 years of participation equal to 2.4% of average compensation *minus* two percent of the participants' social security benefit. For each year of participation after 24 years, the participant will accrue a benefit equal to 2.4 percent of average compensation. The IRS ruled that such a formula would violate the 133 1/3% Rule because it would produce years of zero benefit accruals for low paid participants followed by significant accruals in participants' 26th year of service.[15]

FleetBoston uses Richards's frozen benefit much like other plans use offsets. Social security payments, workers compensation payments, and even other pension

[13] *Id.* at 683.
[14] Rev. Rul. 78-252 (Exhibit C).
[15] Rev. Rul. 78-252 (Exhibit C).

incomes are sometimes used as offsets, and offsets are perfectly legal so long as they comply with the accrual rules in ERISA §204. The problem here is that FleetBoston's use of the frozen benefits as an offset against any cash balance benefits she might receive results in impermissible backloading, and there is no reason to treat FleetBoston's backloading violation any different than other backloading violations merely because it chose Richards's frozen benefit as the instrumentality rather than something else.

5. *Esden* Says FleetBoston Can't Avoid Legal Implications Caused by the Mechanics of the Plan.

As alleged in the Complaint, Richards will suffer years of zero benefit accrual until her cash balance benefits are greater than her frozen benefits. The Court in its opinion on the motion to dismiss appears to agree: "Thus, the Amended Plan terms give Richards no claim to benefit accrual during the years in which her hypothetical account balance is below the value of her frozen Traditional Plan benefit."[16]

As the Second Circuit pointed out in *Esden v. Bank of Boston*,[17] cash balance sponsors can't avoid a violation from this accrual pattern by trying to have it both ways: Here FleetBoston can't include the Traditional Plan Terms as part of the new pension formula to reap the savings of including a wear- away effect, but

[16] Slip Op. at 30-31.
[17] 229 F.3d 154, 167 (2d Cir. 2000).

then ignore the impact of the Traditional Plan Terms when it comes time to test rates of benefit accrual under ERISA §204 (B)(1)(b). The FleetBoston Traditional Benefits are part of what *Esden* called, the "mechanics of the plan".[18] They can't be ignored, nor can FleetBoston disregard the years of zero benefit accruals Richards has suffered and the backloading of benefits that occurs if she hangs on to her job until she is almost 65 and at last earns some new money for the retirement she has worked 33 years to earn.

The *Esden* Court didn't ignore the potential accrual rate problems in the Bank of Boston plan. The Bank of Boston plan had backloaded pay credits and frontloaded interest credits based on a variable rate. As a consequence, in order for the overall rate of accrual to comply with the 133 1/3% rule, the plan provided a minimum interest guarantee of 5%.[19] The Court noted that with interest credits at a lesser rate, the overall formula (pay plus interest credits projected to NRA) would have been impermissibly backloaded.[20]

The problem in *Esden* was that, if a participant took his money before normal retirement age, the plan calculated interest credits to normal retirement using the plan's 4% projection rate, rather than the 5% minimum interest guarantee. The Court noted that the plan could not have it both ways. Since 5%

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[18] *Id.*
[19] *Id.*
[20] *Id.*

was the minimum interest guarantee used to show compliance with the 133 1/3% formula to normal retirement age, that same rate had to be used to calculate the pre-normal retirement age benefit.[21] FleetBoston can't pretend that cash balance credits are accruing to demonstrate the cash balance formula's compliance with the 133 1/3% Rule and then use the "greater of" language to take the benefits away. As this Court pointed out, benefits aren't accruing while the frozen benefit is greater than the cash balance benefit. FleetBoston can't have it both ways.

6. Conclusion.

In light of FleetBoston's decision to give a living and vital role to the frozen benefits when calculating new benefit accruals under the Amended Plan, the Court should allow Richards to pursue her claim against the benefit backloading this new role produces.

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[21] *Id.*.

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2006, the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF MOTION TO DISMISS was filed electronically with the Court and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

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Dated this 17th day of April, 2006.

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