
**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

LINDA CALL, Individually and on)	
behalf of all others similarly situated,)	Appeal from the United
)	States District Court
Plaintiff-Appellee,)	for the Southern
)	District of Illinois
v.)	
)	No. 01-717-GPM
AMERITECH MANAGEMENT)	
PENSION PLAN,)	Hon. G. Patrick Murphy
)	
Defendant-Appellant.)	

**REPLY BRIEF FOR DEFENDANT-APPELLANT
AMERITECH MANAGEMENT PENSION PLAN**

Richard J. Pautler
Lewis R. Mills
Thompson Coburn LLP
One Firststar Plaza
St. Louis, Missouri 63101
(314) 552-6470

James D. Holzhauer
Jeffrey W. Sarles
Karen F. Grotberg
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

ARGUMENT 3

I. Call’s Immediate Transition Benefit Was Not Her Accrued Benefit 3

 A. Call’s retirement benefit does not fit within the Plan definition of accrued benefit 3

 B. Call’s retirement benefit does not fit within the statutory definition of accrued benefit. 4

 C. The Plan administrator’s interpretation of “accrued benefit” in § 12.1 of the Plan must be upheld unless arbitrary or capricious. 11

II. The May 1995 Amendment To The Plan Properly Adopted The PBGC/UP84 Actuarial Assumptions. 12

 A. Call has no viable basis for seeking invalidation of the May 1995 amendment. 12

 B. Call cannot invalidate the May 1995 amendment based on collateral estoppel. 14

III. The Eleventh Amendment To The Plan Was “Permitted By Law And Applicable Regulation.” 17

 A. Call’s interpretation cannot lawfully displace the Plan administrator’s reasonable construction of “permitted by law and applicable regulation.” 18

 B. Call’s contention that § 12.1 guarantees larger retirement benefits than are statutorily authorized conflicts with the plain language of that provision..... 20

IV. Alternatively, Call Failed To Exhaust Her Administrative Remedies. 22

V. The District Court’s Damages Award Is Inconsistent With The Terms Of The Plan. 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

<i>Ahng v. Allsteel, Inc.</i> , 96 F.3d 1033 (7th Cir. 1996)	6
<i>Associates Capital Servs. Corp. v. Loftin’s Transfer & Storage Co.</i> , 554 F.2d 188 (5th Cir. 1977).....	16
<i>Barnhart v. Thomas</i> , 540 U.S. 20 (2003).....	19
<i>Bellas v. CBS, Inc.</i> , 221 F.3d 517 (3d Cir. 2000)	6
<i>Buzzetta Constr. Corp. v. Comm’r</i> , 92 T.C. 641 (1989)	21
<i>Central Laborers’ Pension Fund v. Heinz</i> , 541 U.S. 739 (2004)	5
<i>Clair v. Harris Trust & Sav. Bank</i> , 190 F.3d 495 (7th Cir. 1999).....	24
<i>Costantino v. TRW, Inc.</i> , 13 F.3d 969 (6th Cir. 1994).....	9
<i>Dougherty v. Indiana Bell Tel. Co.</i> , 440 F.3d 910 (7th Cir. 2006)	11
<i>Fields v. Apfel</i> , 234 F.3d 379 (8th Cir. 2000).....	15
<i>Firestone Tire & Rubber Co. v. Bruch</i> , 489 U.S. 101 (1989)	2, 11
<i>Flint v. ABB, Inc.</i> , 337 F.3d 1326 (11th Cir. 2003).....	24
<i>Herman v. Central States, S.E. & S.W. Pension Fund</i> , 423 F.3d 684 (7th Cir. 2005)	6
<i>Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers</i> , 980 F.2d 465 (7th Cir. 1992).....	12
<i>Hughes Aircraft Co. v. Jacobson</i> , 525 U.S. 432 (1999).....	5
<i>La Preferida, Inc. v. Cerveceria Modelo, S.A.</i> , 914 F.2d 900 (7th Cir. 1990)	16
<i>Lunn v. Montgomery Ward & Co.</i> , 166 F.3d 880 (7th Cir. 1999).....	21
<i>Lyons v. Georgia-Pac. Corp. Salaried Employees Retirement Plan</i> , 196 F. Supp. 2d 1260 (N.D. Ga. 2002)	8, 14
<i>Miniat v. Ed Miniat, Inc.</i> , 315 F.3d 712 (7th Cir. 2002)	19

<i>Myers-Garrison v. Johnson & Johnson</i> , 210 F.3d 425 (5th Cir. 2000)	5, 6, 10
<i>O’Kane v. Apfel</i> , 224 F.3d 686 (7th Cir. 2000)	19
<i>People Who Care v. Rockford Bd. of Educ.</i> , 68 F.3d 172 (7th Cir. 1995)	15
<i>Premier Elec. Constr. Co. v. National Elec. Contractors Ass’n</i> , 814 F.2d 358 (7th Cir. 1987).....	16
<i>Rybarczyk v. TRW, Inc.</i> , 235 F.3d 975 (6th Cir. 2000)	9, 15, 17
<i>Shelby County State Bank v. Van Diest Supply Co.</i> , 303 F.3d 832 (7th Cir. 2002)	18, 19
<i>Silvernail v. Ameritech Pension Plan</i> , 439 F.3d 355 (7th Cir. 2006)	4
<i>Steiner Corp. Retirement Plan v. Johnson & Higgins</i> , 31 F.3d 935 (10th Cir. 1994)	10
<i>Steiner Corp. v. Johnson & Higgins</i> , 135 F.3d 684 (10th Cir. 1998)	10

Statutes and Regulations

26 U.S.C. § 401(a)(7)	21
26 U.S.C. § 411(a)(7)	1, 4, 12
26 U.S.C. § 411(a)(11)	8
26 U.S.C. § 411(d)(6)	7, 8
26 U.S.C. § 411(d)(6)(A)	21
26 U.S.C. § 417(e)	14
26 U.S.C. § 417(e)(3)	8, 23
29 U.S.C. § 1002(23)	6
29 U.S.C. § 1002(23)(A)	1, 4
29 U.S.C. § 1054(c)(3)	12

29 U.S.C. § 1054(g)(2)	6
29 U.S.C. § 1054(h).....	9
Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VII, Subtitle F, 108 Stat. 4809 (1994)	
§ 767(a)(2).....	14
§ 767(d)(2)	18
26 C.F.R. § 1.411(a)-11	8
26 C.F.R. § 1.417(e)-1(d)	13, 14, 18
26 C.F.R. § 1.417(e)-1(d)(5).....	14, 18
26 C.F.R. § 54-4980F-1.....	9
<i>Valuation of Plan Distributions</i> , 63 Fed. Reg. 16895 (Apr. 7, 1998)	13, 14
Rev. Rul. 81-12, 1981-1 C.B. 228 (1981 WL 165942)	7, 8

INTRODUCTION

Linda Call retired at age 50, taking advantage of a special subsidized early retirement package that offered enhanced benefits to eligible employees. She contends that actuarial assumptions used to convert her Immediate Transition Benefit annuity to a lump sum violated § 12.1 of the Plan by reducing her “accrued benefit” and doing so in a manner not “permitted by law or applicable regulation.” Ameritech’s opening brief showed that Call’s claim fails on several fundamental grounds. Her brief in response fails to overcome the defects in her position.¹

Call contends (at 21) that her subsidized lump sum early retirement benefit is an “accrued benefit.” Yet, she admits (*ibid.*) that it does not fit within the Plan definition of that term. She contends (*ibid.*) that the Plan definition must give way to the statutory definition of “accrued benefit,” yet she points to no meaningful difference between the Plan definition and the statutory definition, and she ignores the fact that the governing statutes mandate that an accrued benefit be “determined under the plan.” 29 U.S.C. § 1002(23)(A); 26 U.S.C. § 411(a)(7). Call then argues (at 22) that the statutory definition does not mean what it says and that “accrued benefit” comprises all early retirement benefits. Yet she offers no support for that proposition other than cases and regulations recognizing that early retirement benefits are “treated as” accrued benefits solely for purposes of the anti-cutback rule. Call offers no reason why the Court should not defer to the Plan administrator’s reasonable construction

¹ References to “Call” comprise the other members of the certified class as well.

of “accrued benefit” in § 12.1 of the Plan other than that she has a different construction, a reason insufficient under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-112 (1989), and its progeny.

Call recognizes (at 24) that the Retirement Protection Act of 1994 (“1994 Act”) authorized plans to modify actuarial assumptions without running afoul of the anti-cutback rule, yet she seeks to invalidate two Plan amendments falling within the scope of that authorization. Call claims that the Eleventh Amendment reduced her accrued benefit, yet she admits (SA11) that the lump sum she received was larger than the present value of her age-65 annuity and that the Eleventh Amendment assumptions used to calculate her lump sum benefit were the same assumptions already adopted by the May 1995 amendment. Call therefore seeks (at 14) to invalidate the May 1995 amendment as well, on the ground that it did not adopt the GATT assumptions, yet she admits (at 6 n.1) that the assumptions it did adopt provided greater benefits than the GATT assumptions would have provided. Call insists that § 12.1 of the Plan guaranteed her still greater benefits. Yet § 12.1 simply recites the requirements of the Internal Revenue Code (“Code”), thereby manifesting the Plan’s compliance with the Code, a requirement for tax-qualified status.

In short, Ameritech’s special subsidized early retirement package enabled Call to retire at age 50 and obtain an early retirement benefit that was determined precisely according to validly adopted Plan terms and was larger

than her accrued benefit. Call has no viable ground for demanding a still larger benefit.

ARGUMENT

I. Call's Immediate Transition Benefit Was Not Her Accrued Benefit.

A. Call's retirement benefit does not fit within the Plan definition of accrued benefit.

As explained in Ameritech's opening brief (at 17), Call chose to forgo her accrued benefit, which the Plan defined as an annuity beginning at age 65. Nothing in the Eleventh Amendment prevented her from receiving her accrued benefit either by retiring at age 65 or retiring early and deferring commencement of her annuity payments to age 65. Instead, she opted for a special subsidized early retirement benefit offered in the May 1995 Plan to employees who qualified as Transition Participants.

That Immediate Transition Benefit was not an accrued benefit as defined in the Plan. It was reasonable for the Plan administrator to distinguish between the lump sum subsidized early retirement benefit selected by Call and the accrued benefit referenced in Plan § 12.1 because ERISA and the Code recognize that same distinction. See Ameritech Opening Br. 18-19, 21-25. Since 1984, such subsidized early retirement and optional forms of benefit have been "treated as" accrued benefits solely for purposes of the anti-cutback rule, which the district court and all parties agree has no application to this case pursuant to an exemption in the 1994 Act. See *id.* at 22-24, 29-30.

Call responds that the Plan definition of "Accrued Benefit" is not controlling because the term is not capitalized in § 12.1. Appellee Br. 21. But

whatever the reason (if any) for the lack of capitalization in § 12.1, it makes no difference. Call suggests that “accrued benefit” in lower case refers to the ERISA definition. Appellee Br. 21. Even if that were so, the ERISA definition, like the Plan definition, confines accrued benefits to annuities “commencing at normal retirement age,” and in any event ERISA provides that an accrued benefit must be “determined under the plan.” 29 U.S.C. § 1002(23)(A); accord 26 U.S.C. § 411(a)(7). Thus, even if the lower case form of “accrued benefit” in § 12.1 refers to the statutory meaning, the statute refers the reader straight back to the plan definition.

Furthermore, Supplement B to the Plan provides better evidence than speculation about capitalization that the retirement benefit received by Call was not an accrued benefit. Supplement B, which sets forth the early retirement option chosen by Call, never uses the term “accrued benefits” but rather only “Transition Benefits” to describe the “special benefits to which they are entitled.” SA65.

B. Call’s retirement benefit does not fit within the statutory definition of accrued benefit.

Call’s early retirement benefit did not commence “at normal retirement age” and thus was not an accrued benefit within the meaning of ERISA and the Code. See 29 U.S.C. § 1002(23)(A). Call asserts that the ERISA definition of “accrued benefit” should not be taken literally. Appellee Br. 22. That assertion conflicts with this Court’s recent caution that “courts should take care to

interpret ERISA strictly according to its plain language.” *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 358 (7th Cir. 2006).

Call’s contention that the courts have rejected a “literalist view” of the meaning of accrued benefit and have deemed all early retirement benefits to be accrued benefits is not borne out by the cases she cites. Appellee Br. 22. She claims that in *Central Laborers’ Pension Fund v. Heinz*, 541 U.S. 739 (2004), the Supreme Court stated that an accrued benefit is only “ordinarily” expressed as an age-65 annuity. Appellee Br. 22. In fact, the Court was simply paraphrasing a statement by one of the parties to that case, noting “the Plan’s observation that accrued benefits are ordinarily ‘expressed in the form of an annual benefit commencing at normal retirement age.’” *Id.* at 745.

Another case cited by Call (at 22), *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), undermines her argument. In *Hughes*, the Court rejected the contention of company retirees that a plan amendment reduced the accrued benefit of existing retirees. The amendment in *Hughes* provided that the plan’s surplus assets would be used to create a noncontributory benefit structure for new retirees. As the Court explained, existing retirees had no interest in the plan surplus or the new structure, which did not affect their retirement annuities. *Id.* at 440-441. That holding, while not bearing directly on this appeal, does show that the Court equated “accrued benefit” with the normal retirement annuity being received by the existing retirees.

The Fifth Circuit’s decision in *Myers-Garrison v. Johnson & Johnson*, 210 F.3d 425 (5th Cir. 2000), also provides no support for Call’s attempt to avoid

the statutory definition of accrued benefit. According to Call, the *Myers-Garrison* court stated that the ERISA definition of accrued benefit is “a yardstick for measuring the benefit, not an independent requirement for anti-cutback protection.” Appellee Br. 22. In fact, the court limited its “yardstick” analogy to “the ‘annual benefit’ language” in the ERISA definition, explaining that a retirement benefit not provided as an annual benefit may be treated as an accrued benefit to determine whether it is “protected by the anti-cutback rule.” 210 F.3d at 430. Again, it is common ground that the anti-cutback rule does not apply to this case.

Call nonetheless sweepingly asserts that “early retirement benefits are protected accrued benefits under ERISA.” Appellee Br. 22 (emphasis added). But the additional cases she cites make clear that early retirement benefits of the type received by Call are simply treated as accrued benefits for purposes of anti-cutback rule protection. In *Herman v. Central States, S.E. & S.W. Pension Fund*, 423 F.3d 684 (7th Cir. 2005) (Appellee Br. 22-23), this Court stated expressly that an accrued benefit is an age-65 annuity: “Accrued benefit” means, ‘in the case of a defined benefit plan, the individual’s accrued benefit determined under the plan and * * * expressed in the form of an annual benefit commencing at normal retirement age.’” *Id.* at 691 (ellipsis in original), quoting 29 U.S.C. § 1002(23). The Court explained, as it had previously in *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1035-1037 (7th Cir. 1996), that a plan amendment that has the effect of reducing an early retirement benefit is “treated as reducing accrued benefits” for purposes of the anti-cutback rule. 423 F.3d at

691, quoting 29 U.S.C. § 1054(g)(2). Call’s quotation from *Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000) (Appellee Br. 23), makes clear that the Third Circuit too was addressing only whether early retirement benefits are “protected by section 204(g)” of ERISA, that is, the anti-cutback rule. None of these cases suggests that Call’s Immediate Transition Benefit was an accrued benefit or should be treated as such in the non-anti-cutback rule context of this case.²

Call’s contention that actuarial assumptions used to convert annuities to lump sums are accrued benefits (Appellee Br. 24) also is wrong. See *Ameritech* Opening Br. 22. Call responds with a mélange of IRS regulations and court opinions, none of which provides her any support.

Call first cites a 1981 Revenue Ruling providing that the anti-cutback rule did “not preclude a change in the actuarial basis” but did “preclude a change from decreasing a participant’s accrued benefit.” Appellee Br. 24, quoting Rev. Rul. 81-12, 1981-1 C.B. 228 (1981 WL 165942). That quotation clearly distinguishes between “actuarial basis” and “accrued benefit” and does not suggest that actuarial assumptions are accrued benefits. Moreover, as explained in *Ameritech*’s Opening brief (at 32-33), Revenue Ruling 81-12

² Call makes a bewildering assertion that *Ameritech* waived an argument regarding this point. Appellee Br. 28 n.11. Call cannot mean that *Ameritech* failed to argue below that Call’s Immediate Transition Benefit was not an accrued benefit. That issue was one of the primary points of contention below and occupied a large portion of both sides’ briefing. *Ameritech*’s citation on appeal of additional regulatory provisions showing that ERISA and the Code distinguish between accrued benefits and subsidized/optional forms of early retirement benefits does not raise a new argument but simply offers additional authority in support of an argument it has made from the onset of this litigation.

purported only to interpret 26 U.S.C. § 411(d)(6), i.e., the anti-cutback rule, and thus is not germane to this non-anti-cutback rule case. The example Call cites from Revenue Ruling 81-12 (Appellee Br. 25), which by its terms sought only to help determine whether an amendment was “subject to section 411(d)(6) of the Code,” simply highlights the irrelevance of Revenue Ruling 81-12 to Call’s claim. Furthermore, in the 1984 Act (enacted three years after Revenue Ruling 81-12 was issued), Congress added subsection (B) to 26 U.S.C. § 411(d)(6), establishing that early retirement benefits and optional forms of benefit are not accrued benefits but rather are “treated as” accrued benefits solely for purposes of the anti-cutback rule.

Call also cites provisions from the Internal Revenue Manual (Appellee Br. 25-26), all of which address the treatment of early retirement benefits only for purposes of the anti-cutback rule. These citations are therefore not germane to whether her benefit was an accrued benefit or should be treated as such in a context where the anti-cutback rule does not apply.

Call’s citation to 26 C.F.R. § 1.411(a)-11 (Appellee Br. 26-27) is also off-point. That regulation purports to implement 26 U.S.C. § 411(a)(11), which provides only that a plan must obtain the consent of the participant before distributing an accrued benefit and that the present value of such a benefit is to be determined using the GATT actuarial assumptions set forth in 26 U.S.C. § 417(e)(3). Nothing in that statutory provision suggests that a subsidized early retirement benefit of the type received by Call is an accrued benefit. Insofar as the regulation reaches more broadly, it has been held invalid as “an

unreasonable construction” of ERISA and the Code. See *Lyons v. Georgia-Pac. Corp. Salaried Employees Retirement Plan*, 196 F. Supp. 2d 1260, 1273 (N.D. Ga. 2002). Call’s citation of 26 C.F.R. § 54-4980F-1, Q&A-7(a) (Appellee Br. 28), also is unavailing. It addresses only the notice requirements in § 204(h) of ERISA, 29 U.S.C. § 1054(h), which the statute makes applicable only to amendments effecting “a significant reduction in the rate of future benefit accrual” (emphasis added), an issue not presented by this case.

The cases cited by Call on this point also fail to support her contentions. She states that the court in *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 984 (6th Cir. 2000), held that “the discount rate used in valuing the lump sum distribution of subsidized early retirement benefits ‘must be treated as “accrued” * * *.” Appellee Br. 26. But she omits the critical clause introducing that sentence: “Under the anti-cutback rule, * * *.” 235 F.3d at 984. Similarly, *Costantino v. TRW, Inc.*, 13 F.3d 969, 978 (6th Cir. 1994) (Appellee Br. 27), holds that the challenged measures “would be contrary to the express language of the anti-cutback rules as revised by the REA [the 1984 Act].” Indeed, the district court in *Costantino* had “expressly held that early retirement subsidies are not accrued benefits,” and the Sixth Circuit noted that “we express no opinion as to the correctness of this holding.” *Id.* at 979 n.10. Thus, the Sixth Circuit did not even reach the issue on which Call claims support from its opinion. These cases simply reiterate that subsidized early retirement benefits are treated as accrued benefits solely for purposes of the anti-cutback rule,

which Call has admitted does not apply pursuant to the exemption in the 1994 Act.

Finally, Call contends that two cases cited by Ameritech “do not hold that the actuarial assumptions used in valuing early retirement lump sum distributions are not an ‘accrued benefit.’” Appellee Br. 28-29, citing *Steiner Corp. Retirement Plan v. Johnson & Higgins*, 31 F.3d 935 (10th Cir. 1994) (“*Steiner I*”), and *Myers-Garrison v. Johnson & Johnson*, 210 F.3d 425 (5th Cir. 2000). But *Steiner I*, 31 F.3d at 939-941, did hold that a lump sum “is not an accrued benefit” and that a lump sum may be treated as an accrued benefit for purposes of the anti-cutback rule only if it is “eliminated” as opposed to “reduced.” Call’s assertion that the Tenth Circuit later “significantly narrowed” its holding would be news to the Tenth Circuit. Appellee Br. 29, citing *Steiner Corp. v. Johnson & Higgins*, 135 F.3d 684 (10th Cir. 1998) (“*Steiner II*”). The Tenth Circuit never suggested in *Steiner II* that it was narrowing *Steiner I* at all, much less significantly, and in fact it relied heavily on *Steiner I* in rejecting an alternative ground for affirmance. 135 F.3d at 692. In *Myers-Garrison*, 210 F.3d at 429-431, the Fifth Circuit similarly ruled that choosing an optional lump sum retirement benefit does not reduce an accrued benefit and that the 1994 Act allowed a plan to change actuarial assumptions “without running afoul of the anti-cutback rule.”

In sum, Call raises no reason why the Immediate Transition Benefit for which she opted was an accrued benefit within the meaning of § 12.1 of the Plan or should be treated as an accrued benefit in this non-anti-cutback rule

case. Call's benefit was not an accrued benefit and was greater than the actuarial equivalent of her accrued benefit.

C. The Plan administrator's interpretation of "accrued benefit" in § 12.1 of the Plan must be upheld unless arbitrary or capricious.

As explained above, the lump sum subsidized retirement benefit for which Call opted was not an accrued benefit, which is defined in the Plan, ERISA, and the Code as an annuity beginning at normal retirement age. Call's attempts to impose a non-literal meaning of "accrued benefit" on the Plan fail — not only because her reading has no support in the statutes, regulations, or cases as shown above — but also because the Plan gave the administrator "full discretionary authority to interpret the terms of the Plan." SA48 § 11.1(c).

Under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-112 (1989), and its progeny, a plan administrator's interpretation of plan terms must be upheld unless arbitrary or capricious. See *Ameritech* Opening Br. 15-16. Indeed, this Court recently emphasized that review of a discretionary interpretation by a plan administrator receives the "most-deferential level of arbitrary-and-capricious review." *Dougherty v. Indiana Bell Tel. Co.*, 440 F.3d 910, 915 (7th Cir. 2006) (emphasis added). Under that standard, interpreting a term defined by the Plan and the statutes as an annuity beginning at normal retirement age to mean an annuity beginning at normal retirement age cannot possibly have been arbitrary or capricious.

Call responds that the Plan administrator's interpretation of accrued benefit is entitled to no deference because it alters the meaning of the term in

ERISA, which purportedly “does not limit ‘accrued benefit’ to an annuity beginning at normal retirement age.” Appellee Br. 38-39. But she cannot erase the words “an annual benefit commencing at normal retirement age” from 29 U.S.C. § 1054(c)(3) or from 26 U.S.C. § 411(a)(7). And, as shown above, the fact that non-accrued benefits are “treated as” accrued benefits solely for purposes of the anti-cutback rule offers her no support in this non-anti-cutback rule case. In these circumstances, the Plan administrator’s refusal to accept Call’s counter-textual interpretation cannot be deemed arbitrary or capricious.

Call cites *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers*, 980 F.2d 465 (7th Cir. 1992) (Appellee Br. 38), which held that eliminating a cost-of-living adjustment (“COLA”) affected the accrued benefit of retirees in violation of the anti-cutback rule. Unlike Call and her fellow class members, the retirees in *Hickey* received a normal retirement-age annuity, of which the COLA formed “an essential element.” *Id.* at 468 (reciting the statutory definition of “accrued benefit” as “an annual benefit commencing at normal retirement age”). Thus, *Hickey* undermines rather than supports her position.

II. The May 1995 Amendment To The Plan Properly Adopted The PBGC/UP84 Actuarial Assumptions.

A. Call has no viable basis for seeking invalidation of the May 1995 amendment.

Ameritech’s opening brief (at 27-28) demonstrated that the PBGC/UP84 actuarial assumptions used to convert Call’s retirement annuity to a lump sum pursuant to the Eleventh Amendment were the same assumptions prescribed by the Plan immediately prior to adoption of the Eleventh Amendment. Thus,

the Eleventh Amendment cannot have violated Section 12.1 of the Plan. The district court opined, and Call now contends, that the May 1995 Plan amendment that adopted the PBGC/UP84 combination was invalid. Appellee Br. 12-17. Call has no viable ground for challenging the 1995 amendment.

Call contends that the May 1995 amendment was invalid because the 1994 Act required that any Plan amendment adopt the GATT amendments. Appellee Br. 14. Call's argument makes no sense. She says that Ameritech would have complied with the 1994 Act if it had adopted the GATT assumptions but violated the Act by adopting the PBGC/UP84 assumptions. Yet she does not dispute that use of the PBGC/UP84 combination resulted in greater lump sum benefits than use of the GATT assumptions would have produced. In effect, she complains that the assumptions adopted by the 1995 Amendment were more generous to participants than the 1994 Act required. She justifies that complaint on the ground that the pre-May 1995 *Malloy* assumptions were even more generous. In other words, assuming the *Malloy* assumptions produced a lump sum of 8, the GATT assumptions set forth in the 1994 Act produced a lump sum of 6, and the May 1995 amendment assumptions produced a lump sum of 7, Call would invalidate the May 1995 amendment even though it exceeded the statutory requirements.

The only authority cited by Call, *Valuation of Plan Distributions*, 63 Fed. Reg. 16895, 16897 (Apr. 7, 1998), actually refutes her position. That document commented on final regulations codified at 26 C.F.R. § 1.417(e)-1(d). Call recites an out-of-context extract that she interprets to require that post-1994

Act amendments adopt the GATT assumptions and no other. Appellee Br. 17. But the actual regulation expressly authorizes amendments adopting other assumptions so long as they provided more generous benefits than the GATT amendments:

Use of alternative interest rate and mortality table. If a plan provides for use of an interest rate or mortality table other than the applicable interest rate or the applicable mortality table, the plan must provide that a participant's benefit must be at least as great as the benefit produced by using the applicable interest rate and the applicable mortality table.

26 C.F.R. § 1.417(e)-1(d)(5) (emphasis added), quoted in *Valuation of Plan Distributions*, 63 Fed. Reg. at 16899. Because it is undisputed that the PBGC/UP84 assumptions adopted in the May 1995 amendment provided more generous benefits than the GATT assumptions, Call has no basis for her contention that the amendment was invalid.³

B. Call cannot invalidate the May 1995 amendment based on collateral estoppel.

Call contends that the summary judgment decision in *Malloy* collaterally estops Ameritech from contending that it validly adopted the UP84 mortality table in the May 1995 amendment. Appellee Br. 17-20. But collateral estoppel cannot possibly apply where the issues differed in the two proceedings. The *Malloy* decision addressed the propriety of actuarial assumptions under superseded plan language not at issue in this case.

³ Furthermore, the statutory provision on which Call relies expressly states that it applies solely “for purposes of paragraphs (1) and (2)” of 26 U.S.C. § 417(e). See § 767(a)(2) (A19). Paragraphs (1) and (2) of § 417(e) address only requirements for spousal consent to certain “cash-out” distributions, an issue not raised in this litigation. See *Lyons*, 196 F. Supp. 2d at 1272-1273.

For collateral estoppel to apply,

1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

People Who Care v. Rockford Bd. of Educ., 68 F.3d 172, 178 (7th Cir. 1995). The first three elements are not satisfied here.

The issue Call raises here — the validity of the UP84 mortality assumption adopted in the May 1995 amendment — was not at issue in *Malloy*. *Malloy* instead addressed the proper mortality table under the very different language in the Plan prior to that amendment. See Supp. App. 7-8. In fact, Call admits that in *Malloy* “[t]he parties’ arguments focused solely on the 1994 Plan language.” Appellee Br. 18 (emphasis added). And the court in *Malloy* expressly recognized that, due to the 1995 amendment, the Plan “no longer contain[s] the contested language” at issue in *Malloy*, rendering some claims “moot.” Supp. App. 7 n.1. The *Malloy* court’s interpretation of superseded mortality table language cannot have decided the meaning of very different mortality table language in the amended Plan. See *Rybarczyk*, 235 F.3d at 982 (rejecting collateral estoppel because issue in subsequent case involved early retirement benefits after plan was amended); *Fields v. Apfel*, 234 F.3d 379, 383 (8th Cir. 2000) (rejecting collateral estoppel because proper method for computing disability benefits was not at issue in prior case).

For these reasons, the validity of the May 1995 amendment was not the “same issue” involved in *Malloy*, much less an issue “actually litigated” or

“essential to the final judgment” in that case. In addition, the “final judgment” on which Call relies (Appellee Br. 18, citing Supp. App. 34-40) was not the culmination of litigation on the merits but rather approval of a settlement that did not address any merits issues other than to note that “continued litigation” would present “inherent risks and uncertainties for both sides.” Supp. App. 37. “[C]onsent judgments, while settling the issue definitively between the parties, normally do not support an invocation of collateral estoppel.” *La Preferida, Inc. v. Cervceria Modelo, S.A.*, 914 F.2d 900, 906 (7th Cir. 1990); see *Associates Capital Servs. Corp. v. Loftin’s Transfer & Storage Co.*, 554 F.2d 188, 189 (5th Cir. 1977) (settlement “renders nugatory the question of collateral estoppel” based on prior ruling).

Furthermore, the “final judgment” on which Call relies proved not to be “final” after all. It was subsequently modified to remove from the *Malloy* class Call and all other Transition Participants who received a distribution after adoption of the Eleventh Amendment. Supp. App. 57. Thus, as the district court ruled (and as the plaintiff class in *Malloy* had argued), Call and the other class members in this proceeding “are not bound by [the] July 21, 2000, Order and Final Judgment” in *Malloy*. *Ibid.* Call did not appeal that ruling and may not challenge it now. See *Premier Elec. Constr. Co. v. National Elec. Contractors Ass’n*, 814 F.2d 358, 364 (7th Cir. 1987) (class members cannot invoke issue preclusion where they were not bound by prior ruling).

Finally, there is nothing “anomalous and inequitable” (Appellee Br. 20) about the fact that the lump sum benefits of the *Malloy* class members, but not

the lump sum benefits of the *Call* class members, were computed using the 83GAM table. The two groups were not similarly situated. The *Malloy* class was subject to the Plan language as it existed prior to the May 1995 amendment. Call and her fellows are subject to the very different language adopted in the May 1995 amendment and applied to them via the Eleventh Amendment. See *Rybarczyk*, 235 F.3d at 980-982 (rejecting collateral estoppel where class members in two cases retired at different times and were subject to different plan language).

* * * * *

For the above reasons, Call has no viable basis for seeking invalidation of the May 1995 amendment, without which she cannot show that the Eleventh Amendment adversely affected her and the other class members. But even apart from the validity of the 1995 amendment, Call's claim must be rejected because, as shown in Part I, her retirement benefit was not an accrued benefit within the meaning of § 12.1 of the Plan. Furthermore, even if there were an accrued benefit at issue here, any reduction was "permitted by law and applicable regulation" and thus cannot have violated § 12.1, as set forth below in Part III.

III. The Eleventh Amendment To The Plan Was "Permitted By Law And Applicable Regulation."

Even if Call's retirement benefit were an accrued benefit and even if application of the UP84 mortality table had reduced her benefit (neither is true as shown above), any such reduction was "permitted by law and applicable

regulation.” SA51-52 § 12.1. The 1994 Act provided that an accrued benefit “shall not be considered to be reduced” in violation of the anti-cutback rule due to adoption of the GATT assumptions. § 767(d)(2) (A21). The applicable regulation authorizes use of assumptions other than the GATT assumptions so long as they produce a benefit “at least as great as the benefit produced by using the [GATT assumptions].” 26 C.F.R. § 1.417(e)-1(d)(5). Ameritech’s use of the PBGC/UP84 assumptions was “permitted by law and applicable regulation” because it provided Call with a lump sum greater than she would have received through use of the GATT assumptions. See Ameritech Opening Br. 29-31.

Call responds that (1) the “permitted by law and applicable regulation” proviso does not apply to a reduction of an accrued benefit, and (2) § 12.1 trumps the statutory exemption. She is wrong on both counts.

A. Call’s interpretation cannot lawfully displace the Plan administrator’s reasonable construction of “permitted by law and applicable regulation.”

Call insists that the phrase “permitted by law and applicable regulation” in § 12.1 applies only to the bar on eliminating an optional form of benefit and not to the bar on reducing an accrued benefit. She finds her interpretation so clear and unambiguous as to override any deference to the Plan administrator’s view that the proviso applies to both bars. Appellee Br. 37-39. But if her interpretation were so clear, it is hard to fathom why she had to spend seven pages examining “syntax and applicable contract construction principles” to coax out her desired meaning. See *id.* at 31.

Call relies heavily on the “last antecedent” rule. But all three of the Seventh Circuit cases she cites rejected the applicability of that rule. In *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832, 836 (7th Cir. 2002), the Court held that the modifying phrase “sold to Debtor by [creditor]” modified both the immediately preceding terms and the antecedent term “all inventory.” The Court explained that the “last antecedent” rule may be helpful in determining whether a contract provision is ambiguous but not in resolving any ambiguity “when both readings are plausible.” *Ibid.* In *Miniat v. Ed Miniat, Inc.*, 315 F.3d 712, 715 (7th Cir. 2002), the Court held that the phrase “which shall include the President” modified only the antecedent term “majority,” not the immediately preceding term “involved directors,” in part to avoid a construction “inconsistent with the contract as a whole.” And in *O’Kane v. Apfel*, 224 F.3d 686, 690 (7th Cir. 2000), the Court rejected application of the last antecedent rule because it would produce a “nonsensical” result.

Call also cites *Barnhart v. Thomas*, 540 U.S. 20 (2003) (Appellee Br. 36-37), as supposedly supporting her invocation of the last antecedent rule. Call fails to note that the holding in *Barnhart* rested entirely on *Chevron* deference to a federal agency’s reasonable interpretation of an ambiguous regulatory provision. 540 U.S. at 26. Here, in contrast, Call rejects well-established principles that also require deference, in this context to the Plan administrator’s reasonable interpretation of Plan language.

Call’s resort to additional “syntax” arguments, involving the content of the parenthetical in § 12.1 (Appellee Br. 35) and the double appearance of “no

amendment” in that provision, simply underscores that § 12.1 does not clearly say what Call would like it to say. In these circumstances, the Plan administrator’s interpretation must be accepted so long as it was not “downright unreasonable.” See Ameritech Opening Br. 15, 33-35.

The only unreasonable interpretation of this provision is Call’s. As noted above, courts have rejected contract constructions that produce an absurd result or conflict with the purpose of the contract as a whole. As explained in Ameritech’s opening brief (at 34), Call’s reading would produce the absurd result that a reduction in an accrued benefit, but not an elimination of an optional form of benefit, would violate the terms of the Plan even though both fully complied with the law. Call responds that ERISA treats accrued benefits as more important than optional forms of benefit. Appellee Br. 35. But that would not explain why the Plan would provide greater protection to accrued benefits than ERISA provides. That was not the purpose of § 12.1, as demonstrated in the next section.

B. Call’s contention that § 12.1 guarantees larger retirement benefits than are statutorily authorized conflicts with the plain language of that provision.

As explained in Ameritech’s opening brief (at 29-33), the 1994 Act expressly authorized any cutback in retirement benefits resulting from the adoption of actuarial assumptions that produced benefits equal to or larger than those resulting from use of the GATT assumptions. Call responds that this “exception to the anti-cutback rule * * * does not apply to Section 12.1.” Appellee Br. 24. Call argues that the purpose of § 12.1 is to provide more

protection to accrued benefits than ERISA does (*ibid.*), but she offers no support for that assertion other than her *ipse dixit*.

Ascertaining the purpose of § 12.1 requires no such divergence from ERISA or the Code. To obtain tax-qualified status, a plan must comply in form and operation with the requirements of the Code. *Lunn v. Montgomery Ward & Co.*, 166 F.3d 880, 881 (7th Cir. 1999) (noting “the favorable tax treatment accorded pension plans that comply with the relevant requirements of the Internal Revenue Code”); *Buzzetta Constr. Corp. v. Comm’r*, 92 T.C. 641, 645 (1989). 26 U.S.C. § 401(a)(7) obligates a plan to “satisf[y] the requirements of section 411,” which in turn provides (in language that tracks § 12.1 of the Plan) that a plan shall be treated as not satisfying its requirements if “the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8).” 26 U.S.C. § 411(d)(6)(A). Further, as demonstrated above (p. 4), the statutory definition of “accrued benefit” tracks and incorporates the Plan definition. Thus, § 12.1 mirrors the Code provisions and simply assures compliance with those provisions so as to secure and maintain the Plan’s tax-qualified status. Call’s contention that § 12.1 would be “meaningless” unless it exceeded the statutory requirements is therefore not the case. Its manifest meaning is that the Plan complies with the Code. Accepting Call’s argument would mean that all plan provisions that mirror the Code requirements must be intended to confer rights beyond those provided by the Code even though the Code requires a plan to comply in form with those very requirements.

In sum, interpreting “permitted by law and applicable regulation” to apply both to reduction of accrued benefits and elimination of optional forms of benefit is fully consistent with the purpose of § 12.1 and a reasonable exercise of the Plan administrator’s discretion. The 1994 Act exemption for actuarial assumption changes authorized the assumption changes in both the 1995 and 1999 Plan amendments, providing an independent ground for rejecting Call’s claim that the Eleventh Amendment reduced her accrued benefit in violation of § 12.1.

IV. Alternatively, Call Failed To Exhaust Her Administrative Remedies.

As an alternative ground for reversal, Ameritech raised Call’s admitted failure to exhaust or even invoke the Plan’s administrative remedies before she filed suit. See Ameritech Opening Br. 35-38. There is no need for the Court to reach this ground because Call’s claim fails as a matter of law, especially in light of the deference properly accorded the Plan administrator’s construction of Plan terms. But if the Court were not to defer to the Plan administrator’s construction due to the lack of an administrative proceeding, it would be appropriate to dismiss Call’s complaint based on her failure even to seek an administrative resolution.

Hence, Call’s statement in support of her futility position that “[t]he Plan has contended throughout that it properly calculated Plaintiffs’ lump sums” (Appellee Br. 40), while correct, is beside the point. Ameritech agrees that no additional administrative inquiry is needed to reject Call’s claim. But if the Court were to conclude otherwise, it should recognize that Call had the

obligation to initiate such an administrative inquiry, she and her fellow class members failed to do so, and therefore her complaint should be dismissed for failure to exhaust.

V. The District Court's Damages Award Is Inconsistent With The Terms Of The Plan.

Ameritech's opening brief (at 38-39) raised a fundamental defect in the district court's damages calculation (which of course would come into play only if the district court's liability rulings were affirmed). Specifically, the court failed to determine Call's baseline retirement benefit as of "the day of the amendment," as § 12.1 of the Plan requires. SA51-52. The court should have determined Call's baseline benefit as of that date, then determined the present value of that amount on the date she retired, and awarded her the difference between the latter value and the amount she received. The same procedure would apply to each class member.

Call disregards the "day of the amendment" language in the Plan. Instead, she argues at length that "the same date must be used" both for determining the baseline retirement benefit to which she was entitled and the present value calculation of that amount. Appellee Br. 45. She bases that argument on ERISA's anti-forfeiture rule. But she would not forfeit anything under Ameritech's calculation because on her retirement date she would receive the present value of the retirement benefit to which § 12.1 entitles her. And that present value would be determined "on the date as of which present value is being determined," precisely as provided in 26 U.S.C.

§ 417(e)(3)(A)(ii)(I), the statutory provision on which Call relies. Appellee Br. 43. Call is wrong to assert (at 41) that there is “an indefensible incongruity” in using two different dates in this calculation. The very purpose of present value calculations is to determine at one date the value of a stream of benefits over time. In short, if Call were entitled to damages at all, she would be entitled only to damages determined consistent with the terms of the Plan, not to a windfall obtained by collapsing two calculations into one.

Moreover, even if Call were right that the distributions she and other class members received in 1999 were subject to the *Malloy* assumptions, the provision of the 1994 Act on which she relies for that contention (see Appellee Br. 14) by its terms did not apply to distributions made “after December 31, 1999.” See A19. Hence, class members who received distributions after that date cannot have been damaged because they indisputably received larger distributions than they would have received if the GATT assumptions had been used. See Appellee Br. 6 n.1. At a minimum, then, a remand would be required to determine damages with the year 2000 distribution recipients excluded from the class.

Finally, Call contends that the Eleventh Circuit’s decision in *Flint v. ABB, Inc.*, 337 F.3d 1326 (11th Cir. 2003), does not pertain to her request for prejudgment interest. Appellee Br. 45-46. But *Flint* held that “only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B)” (337 F.3d at 1329, quoting *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999)), the very statutory provision on which Call’s damages claim is

based. See SA5 ¶ 21 (requesting relief “[p]ursuant to ERISA §502(a)(1)(B)”). Because the Plan indisputably does not authorize prejudgment interest, it should not be awarded here.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

Richard J. Pautler
Lewis R. Mills
Thompson Coburn LLP
One Firststar Plaza
St. Louis, Missouri 63101
(314) 552-6470

James D. Holzhauer
Jeffrey W. Sarles
Karen F. Grotberg
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Attorneys for Defendant-Appellant

Dated: May 3, 2006

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the foregoing reply brief of appellant Ameritech Management Pension Plan complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,308 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

One of appellant's attorneys

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 3, 2006, I caused two copies of the foregoing reply brief for defendant-appellant Ameritech Management Pension Plan to be served as follows, and a digital version thereof to be served by e-mail, upon each of the following:

By Messenger

Lee A. Freeman, Jr.
James T. Malysiak
Freeman, Freeman & Salzman, P.C.
401 N. Michigan Avenue Suite 3200
Chicago, IL 60611-4207

By U.S. Mail

Douglas R. Sprong
Korein Tillery, LLC
701 Market Street, Suite 300
St. Louis, MO 63101

Allen C. Engerman
Law Offices of Allen C. Engerman
4800 N. Federal Highway Suite 100-D
Boca Raton, FL 33431

Joseph A. Ahern
Stark Regan, P.C.
1111 West Long Road Suite 202
Troy, MI 48098.
