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

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|--|---|------------------------|
| 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.                     | ) |                        |

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

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**CORPORATE DISCLOSURE STATEMENT**  
**[use 7th Cir. Form]**

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### **STATEMENT OF JURISDICTION**

The district court had jurisdiction over appellee's ERISA benefits claim pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The district court entered final judgment on November 16, 2005. Appellant's notice of appeal was timely filed on December 9, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

### **STATEMENT CONCERNING ORAL ARGUMENT**

Pursuant to Circuit Rule 34(f), Ameritech respectfully requests oral argument. This appeal raises issues of substantial importance that are related to a complex statutory scheme. Oral argument will enable the parties adequately to address these issues and respond to the Court's questions and concerns.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether an amendment to appellant's pension plan violated the terms of the plan by reducing appellee's "accrued benefit" and whether the pension plan administrator acted arbitrarily and capriciously in determining that the amendment did not.

2. Whether any such reduction was "permitted by law and applicable regulation" and thereby authorized by the plan.

3. Whether appellee's claim should have been dismissed for failure to exhaust administrative remedies.

4. Whether the district court's award of damages is inconsistent with the terms of the plan.

## **STATEMENT OF THE CASE**

In October 2001, plaintiff-appellee Linda Call ("Call") filed suit on behalf of a class of similarly situated retirees against defendant-appellant Ameritech Management Pension Plan.<sup>1</sup> Call alleged that Ameritech improperly computed her early retirement benefit and thereby violated the terms of the Plan. SA5. Pursuant to 29 U.S.C. § 1132(a)(1)(B), Call sought recovery of the additional benefits to which she allegedly was entitled under the terms of the Plan. *Ibid.*

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<sup>1</sup> The pension plan is referred to herein as the "Plan" and the Plan administrator as "Ameritech." A\_\_ refers to the Appendix attached hereto. SA\_\_ refers to the separate Appendix submitted herewith. R\_\_ refers to record materials not included in either appendix. "Stip." refers to the parties' Joint Statement of Uncontested Facts Supporting Defendant's Motion for Summary Judgment, which may be found at SA8-13.

In August 2003, the district court certified a class, appointing Call as class representative. R81.

In June 2003, Ameritech filed a motion to dismiss Call's Complaint for failure to exhaust administrative remedies, and the parties filed cross-motions for summary judgment as to liability. R48, 52, 56. In March 2004, the district court granted Call's motion for summary judgment as to liability and denied Ameritech's motions to dismiss and for summary judgment. A1. In July 2004, the district court denied Ameritech's motions for reconsideration and for interlocutory appeal certification. A11. In September 2005, after additional briefing by the parties, the court accepted Call's position on the proper computation of damages. A13. On November 16, 2005, after receiving a damages spreadsheet from class counsel, the court entered final judgment and awarded the class \$31,193,689 in damages, including prejudgment interest. A16. This appeal followed.

## **STATEMENT OF FACTS**

### **1. Call's Employment History**

Call was employed by Ameritech from May 28, 1968 to November 30, 1999 and was a participant in the Plan. SA9 (Stip. ¶ 2). Taking advantage of an early retirement option, she retired at age 50, well before reaching her normal retirement age of 65. Call opted to receive her retirement annuity as a lump sum and received \$219,312. SA10 (Stip. ¶ 4). She contends that she was entitled to receive more under the terms of the Plan. Hence this lawsuit.

## 2. Plan Retirement Options

Under the terms of the Plan, as amended and restated effective May 1, 1995, if a participant retired at her “Normal Retirement Age” of 65, her retirement benefit was her accrued benefit. SA29-30 § 4.1. The Plan defined accrued benefit as “a monthly amount payable to [the retiree] for his life commencing on his Normal Retirement Date.” SA32 § 5.1(b). A participant had the option to receive her retirement benefit in a lump sum, in which case her retirement benefit would be converted to present value using the Plan’s actuarial assumptions. SA37 § 7.3(b). The Plan provided for two actuarial assumptions — an interest rate schedule used by the Pension Benefit Guaranty Corporation (“PBGC”) and a modified version of a mortality table used by PBGC known as Unisex Pension-1984 (“UP84”). SA32 § 5.1(b); SA37 § 7.3(b); SA44 § 7.15.

In addition, Supplement B to the Plan described a class of “Transition Participants,” employees who on May 1, 1995 were within five years of eligibility for a “Service Pension.” SA65; SA67 §§ B-1, B-2(f); see also SA66 § B-2(d) (defining “Service Pension”). Call was one such Transition Participant. SA10 (Stip. ¶ 5). A Transition Participant’s retirement benefit was her “Transition Benefit,” expressed as a single-life annuity payable monthly beginning at age 65, reduced if the participant retired prior to age 65 pursuant to a Plan table and further reduced if the participant retired prior to age 55.

SA67-68 §§ B-3, B-4.<sup>2</sup> A Transition Participant was entitled to the larger of her Transition Benefit or normal retirement benefit. *Id.* § B-3. A Transition Participant could elect to receive her retirement annuity in the form of a lump sum, calculated using the PBGC and UP84 actuarial assumptions. SA68 § B-5.

Accordingly, Call had the option to (i) work until age 65 and begin receiving monthly payments at that time (“Normal Retirement Date annuity”)<sup>3</sup>; (ii) retire prior to age 65 and defer receiving monthly payments until age 65 (“Deferred Transition Benefit annuity”); or (iii) retire prior to age 65 and begin receiving monthly payments immediately (“Immediate Transition Benefit annuity”). SA67-68 §§ B-3, B-4. In each case, she also could have opted to receive the present value equivalent of her retirement annuity in a lump sum.

If Call had elected to retire at age 65, she would have received Normal Retirement Date annuity payments estimated to be \$1,627 per month. SA10-11 (Stip. ¶ 6). If Call had elected to retire early on November 30, 1999 and to defer her annuity until age 65, she would have received Deferred Transition Benefit annuity payments of \$1,319 per month. *Ibid.* Instead, Call elected to retire

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<sup>2</sup> If an under-age-55 participant had completed fewer than 30 years of service, her immediate retirement annuity was reduced by 0.5% per month for the number of months short of age 55. If the participant had completed 30 or more years of service, the reduction percentage was 0.25% per month for the number of months short of age 55. SA68 § B-4. Because these reduction factors did not provide for full actuarial reduction, they resulted in a subsidized retirement benefit. See *Bellas v. CBS, Inc.*, 221 F.3d 517, 525 (3d Cir. 2000) (defining “a retirement-type subsidy to be the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit”); *Arena v. ABB Power T&D Co.*, 2004 WL 826389, at \*8 (S.D. Ind. Mar. 4, 2004) (same).

<sup>3</sup> What is referred to herein as the Normal Retirement Date annuity is referred to in the parties’ Joint Stipulation as the Defined Lump Sum (“DLS”) Benefit.

early on November 30, 1999 and to immediately begin receiving Immediate Transition Benefit annuity payments of \$1,147 per month. SA11 (Stip. ¶ 7). In addition, she opted to receive that Immediate Transition Benefit annuity as a lump sum. SA10 (Stip. ¶ 4). On Call's retirement date, the present value of her Immediate Transition Benefit annuity was higher than the present value of her Deferred Transition Benefit annuity and higher than the present value of her Normal Retirement Date annuity. SA11 (Stip. ¶ 7).

### **3. Eleventh Amendment To The Plan**

In 1994, ERISA was amended through the Retirement Protection Act of 1994 ("1994 Act"), which became effective December 8, 1994.<sup>4</sup> The 1994 Act required defined benefit plans to adopt, by January 1, 2000, specific actuarial assumptions for converting monthly annuities to present value, namely, the 30-year T-Bill interest rate ("GATT") and the 1983 Group Annuity Mortality Table ("83GAM"). See 1994 Act §§ 767(c), (d); I.R.M. § 4.72.10.5 (May 17, 2002) ("the effective date of the [1994 Act] rules (with respect to IRC 417(e)) was delayed until the first day of the first plan year beginning in 2000"). Congress protected plans that timely adopted these assumptions from liability under ERISA's "anti-cutback rule," which generally bars plan amendments from reducing accrued benefits (26 U.S.C. § 411(d)(6)(A)) and from making certain other amendments that affect early benefits, retirement-type subsidies, and

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<sup>4</sup> The 1994 Act is Title VII, Subtitle F, of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

optional forms of payment (*id.* § 411(d)(6)(B)). In particular, § 767(d)(2) of the 1994 Act provided that a plan's adoption of the GATT/83GAM actuarial assumptions would not violate the anti-cutback rule. See also 26 C.F.R. § 1.417(e)-1(d)(10). (Section 767 of the 1994 Act is attached hereto at A18.)

The Eleventh Amendment to the Plan, effective July 1, 1999, brought the Plan into compliance with these 1994 Act requirements. It provided that the existing PBGC/UP84 assumptions would continue to be used to convert retirement benefits to present value for participants retiring before July 1, 1999; the GATT/83GAM assumptions required by the 1994 Act would be used for participants retiring after December 31, 1999; and whichever of the two sets of assumptions provided a larger amount would be used for Transition Participants (such as Call) retiring between July 1, 1999 and December 31, 1999. SA93-95 §§ 1, 4-6.

Pursuant to the Eleventh Amendment, the Plan paid Call \$219,312, representing her Immediate Transition Benefit annuity converted to present value as of her retirement date of November 30, 1999 using the PBGC/UP84 actuarial assumptions. SA11 (Stip. ¶ 8). It is undisputed that, as required by the Eleventh Amendment, she received more than if the GATT/83GAM assumptions set forth in the 1994 Act had been used. *Id.* (Stip. ¶ 9); SA94-95 § 6. It also is undisputed that the \$219,312 received by Call was higher than the present value of her Deferred Transition Benefit annuity and higher than the present value of her Normal Retirement Date annuity as of June 30, 1999, even if the latter two amounts had been calculated using the PBGC/83GAM

combination that — in Call’s view as described below — the Plan should have used. SA12 (Stip. ¶ 10).

#### **4. District Court Proceeding**

Call filed a two-count Complaint in October 2001, alleging that the Plan failed to provide her with the lump-sum retirement benefit to which she was entitled. SA5. The district court certified a class of all similarly situated Transition Participants who received a lump sum Transition Benefit after July 1, 1999, and it appointed Call as class representative. R81.

Call maintained that the Eleventh Amendment was ineffective under the terms of the Plan. She relied on § 12.1 of the Plan, which provided:

[N]o amendment will reduce a Participant’s accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned from the employ of [Ameritech] on the day of the amendment (except to the extent permitted by section 412(c)(8) of the Code) and no amendment will eliminate an optional form of benefit with respect to a Participant or Beneficiary except as otherwise permitted by law and applicable regulation.

SA51-52 § 12.1. Call claimed that the Eleventh Amendment violated § 12.1 of the Plan by reducing her accrued benefit. Specifically, she claimed that the Eleventh Amendment changed the Plan’s mortality table portion of the Plan’s actuarial assumptions and thereby reduced the lump sum she received as of November 30, 1999 from what it would have been on June 30, 1999, the day before the Eleventh Amendment took effect. Call contended that her lump sum should have been calculated using the PBGC/83GAM assumptions, relying on *Malloy v. Ameritech*, 2000 U.S. Dist. LEXIS 20490 (S.D. Ill. Feb. 7, 2000). In

*Malloy*, Judge Murphy found that a prior version of the Ameritech Plan (before it was amended effective May 1, 1995) required use of the PBGC/83GAM assumptions to convert certain participants' annuities to present value. Applying those assumptions to Call's Immediate Transition Benefit annuity would have provided her with a lump sum of \$255,088 as of June 30, 1999. SA12 (Stip. ¶ 11). Call sued to recover the difference between the lump sum amount she received and the lump sum amount to which she claimed entitlement.

On cross-motions for summary judgment as to liability, the district court ruled in favor of Call. Judge Murphy found that the amount Ameritech paid to Call was correct "as a matter of arithmetic" under the terms of the Eleventh Amendment. A2. The court also recognized that there was "no statutory or regulatory impediment" to the actuarial assumptions adopted by the Eleventh Amendment. *Ibid.* To the contrary, Judge Murphy explained, such an amendment was "specifically excepted from the Internal Revenue Code's anti-cutback rules." A7. Therefore, the court concluded, the parties' dispute "turns on the Plan language," and the "only issue is whether Ameritech violated the literal terms of the Plan when it made the lump sum distribution to Ms. Call." A2, 6.

The district court held that the Eleventh Amendment reduced Call's accrued benefit and thereby violated § 12.1 of the Plan. A9-10. Despite his recognition that Call's claim "turns on the Plan language" (A2) and does not implicate the anti-cutback rule, Judge Murphy based his ruling on a Treasury

regulation and a Revenue Ruling issued to implement the anti-cutback rule. A8. The court rejected Ameritech's argument that the Plan administrator's interpretation of "accrued benefit" as that term is used in § 12.1 was discretionary and entitled to deference. A9. According to the court, § 12.1 was "clear and unambiguous" in precluding the Plan administrator from having "the discretion to interpret the term 'accrued benefit' so that it does not carry the actuarial assumptions that it does in the rest of the ERISA world in this type of situation." A10. The court also invalidated the May 1995 amendment to the Plan that adopted the PBGC/UP84 actuarial assumptions. Judge Murphy ordered that Call's lump sum benefit instead be determined using the PBGC/83GAM combination that in *Malloy* he had found required by the pre-May 1995 Plan. A7.

In addition, the district court denied Ameritech's motion to dismiss for Call's admitted failure to exhaust administrative remedies. The court ruled that any administrative resolution would have been "futile," stating that there was "no reason to believe that [Ameritech's] response would be any different if the claims were returned to the administrative level almost two and a half years after the action was filed" and that "Ms. Call has shown that it is certain her claim would be denied." A6.

The court subsequently denied Ameritech's motion for reconsideration of its summary judgment order, now stating that the Plan administrator *did* have discretion to interpret the meaning of the Plan's language but that the administrator's interpretation was "arbitrary and capricious." A11. In Judge

Murphy's words, "Defendant's argument is akin to insisting that a cat is a dog because I am a veterinarian and say it is so." A12.

The parties then briefed their respective positions on damages, and the district court accepted class counsel's submission in full, stating that Ameritech was "wrong on every issue." A14. Judge Murphy later awarded the class \$31,193,689 in damages, including prejudgment interest. A18.

### **SUMMARY OF THE ARGUMENT**

Section 12.1 of the Plan prohibited Ameritech from adopting an amendment that reduced a participant's "accrued benefit" — unless such amendment was "otherwise permitted by law and applicable regulation." SA51-52 § 12.1. There are three independent reasons why adoption of the Eleventh Amendment did not violate § 12.1. First, neither Call's Immediate Transition Benefit annuity nor the lump sum payment option she selected was an accrued benefit. Second, the actuarial assumptions used to reduce Call's retirement benefit to a lump sum pursuant to the Eleventh Amendment were the same assumptions required by the Plan prior to adoption of the Eleventh Amendment. And third, even if Call's accrued benefit had been reduced, any such reduction was permitted by law and applicable regulation. Furthermore, Call's admitted failure to exhaust her administrative remedies should have resulted in dismissal of her complaint. Finally, even if liability were warranted, the district court's calculation of damages was inconsistent with the plain terms of the Plan.

#### I.A

Call's Immediate Transition Benefit was not her accrued benefit. The Plan specifically defined accrued benefit as a monthly payment for life beginning at age 65. Call's Immediate Transition Benefit was a monthly payment for life beginning at age 50, the age at which she chose to take early retirement, and thus was not an accrued benefit within the meaning of the Plan. That conclusion is confirmed by the distinction made throughout ERISA and the Tax Code between accrued benefits and subsidized early retirement benefits such as Call's Immediate Transition Benefit annuity.

Furthermore, Call's subsidized retirement benefit was significantly larger than the normal retirement benefit she had accrued. Thus, the lump sum received by Call was greater than the present value of her accrued benefit.

#### I.B

In addition, the Plan gave the administrator full discretionary authority to construe Plan language. Hence, even if § 12.1 or the Plan's definition of accrued benefit could be deemed ambiguous, the district court should have deferred to the reasonable interpretations of the Plan administrator. It was reasonable for the Plan administrator to construe the meaning of "accrued benefit" in § 12.1 the same as it was defined in § 5.1(b) of the Plan, a definition virtually identical to the definitions of "accrued benefit" in ERISA and the Tax Code. It also was entirely reasonable to distinguish an accrued benefit from the lump sum form of Call's subsidized early retirement benefit. That distinction is well established in the applicable statutes, regulations, and case law.

## I.C

Beyond this, the Eleventh Amendment did not change the actuarial assumptions used to convert Call's retirement benefit to a lump sum. The PBGC/UP84 assumptions used to convert Call's Immediate Transition Benefit annuity to a lump sum were precisely the same assumptions prescribed by the Plan immediately before adoption of the Eleventh Amendment. Hence, use of those assumptions cannot have reduced Call's accrued benefit in violation of § 12.1 of the Plan. The district court erred in holding that the PBGC/83GAM combination, which in *Malloy* it had found required by the Plan before it was amended in May 1995, continued to apply after the Plan was amended in May 1995 to state expressly that the PBGC/UP84 combination would apply thereafter. Ameritech cannot have violated § 12.1 of the Plan by providing Call with the same lump sum to which she would have been entitled had the Eleventh Amendment not been adopted.

## II.

Even if the Eleventh Amendment had reduced Call's accrued benefit, there would be no violation of § 12.1 because any such reduction was "permitted by law and applicable regulation." SA51-52 § 12.1. Section 767(d)(2) of the 1994 Act expressly exempted any reduction resulting from adoption of the actuarial assumptions set forth in the 1994 Act from ERISA's anti-cutback rule. Use of those assumptions (instead of those provided in the Eleventh Amendment) would have caused Call to receive a lower lump sum payment than she actually received. As the district court acknowledged, there was therefore "no statutory or regulatory impediment" to the actuarial assumptions

adopted by the Eleventh Amendment and applied to Call. A2. The district court plainly misread the “permitted by law and applicable regulation” proviso in § 12.1 by holding that it qualified only the bar on eliminating an optional form of benefit and not the bar on reducing an accrued benefit.

### III.

Alternatively, the district court erred by refusing to require Call to exhaust her administrative remedies. Call proceeded straight to court without raising an administrative challenge to the amount of her lump sum retirement benefit. Her claim should have been dismissed for failure to satisfy this threshold requirement.

### IV.

Although there should be no occasion to address damages in this case, the district court also erred in determining damages. Instead of applying the Plan’s early commencement factors to each class member’s retirement annuity as of “the day of the amendment,” as provided in § 12.1, the district court applied them as of the date of actual retirement, inflating the awarded benefits well above what the Plan authorized. Furthermore, prejudgment interest should not have been awarded or, if awardable, should have been limited to the federal statutory rate.

## **STANDARD OF REVIEW**

As the district court and both parties have recognized, resolution of the primary issue in this case — whether Ameritech reduced Call’s accrued benefit — is purely a matter of Plan interpretation. A2, 6; 9/15/03 Tr. at 23-24. Thus,

“[t]his is a contract case and the language of [the] plan controls.” *Loyola Univ. v. Humana Ins. Co.*, 996 F.2d 895, 903 (7th Cir. 1993).

The Plan granted the Plan administrator “full discretionary authority to interpret the terms of the Plan and to remedy any ambiguities, inconsistencies or omissions of whatever kind.” SA48 § 11.1(c). Pursuant to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-112 (1989), when a plan vests such discretion in the plan administrator to “construe disputed or doubtful terms,” the administrator’s “interpretation will not be disturbed if reasonable.”

This Court repeatedly has followed *Firestone*, holding that where a plan grants the administrator “discretion in making benefit determinations, then a reviewing court is limited to asking whether the decision to deny benefits was arbitrary or capricious.” *Herman v. Central States, S.E. & S.W. Areas Pension Fund*, 423 F.3d 684, 692 (7th Cir. 2005); accord *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 409 (7th Cir. 2004); *Carr v. Gates Health Care Plan*, 195 F.3d 292, 294 (7th Cir. 1999). Arbitrary and capricious review “is extremely deferential and has been described as the least demanding form of judicial review.” *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1107 (7th Cir. 1998); accord *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1438 (7th Cir. 1996). Under that standard, this Court will overturn a plan administrator’s decision only “if it is downright unreasonable” (*Herman*, 423 F.3d at 692; *Carr*, 195 F.3d at 294) or “completely unreasonable” (*Hess v. Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 658 (7th Cir. 2005); *Kobs v. United Wis. Ins. Co.*, 400 F.3d 1036, 1039 (7th Cir. 2005)).

Deference does not depend on whether the administrator’s interpretation was “right.” Even if a court disagrees with the interpretation adopted by a plan administrator, it is not free to replace it with its own interpretation. See *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1147 (7th Cir. 1998) (“If the decision made by the administrator was made rationally and in good faith, we will not second-guess whether the decision is right”).<sup>5</sup>

This Court reviews *de novo* a district court decision granting summary judgment. *Mers*, 144 F.3d at 1019; accord *Cozzie*, 140 F.3d at 1107.

### **ARGUMENT**

The district court’s decision awarding the plaintiff class in excess of \$31 million in damages was based on a deeply flawed reading of the applicable Plan language and the court’s failure to give proper deference to the Plan administrator’s reasonable interpretation of the Plan. The class members elected to take a subsidized early retirement benefit in the form of an immediate lump sum payment. The district court’s determination that an amendment to the Plan reduced the class members’ “accrued benefit” within the meaning of the Plan cannot be sustained because neither the subsidized early retirement benefit nor the lump sum payment was an accrued benefit, the

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<sup>5</sup> See also, *e.g.*, *Mathews v. Sears Pension Plan*, 144 F.3d 461, 467-468 (7th Cir. 1998) (upholding administrator’s use of particular interest rate to calculate benefits as “reasonable”); *Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1024 (7th Cir. 1998) (upholding administrator’s decision which construed terms of plan “reasonably”); *O’Reilly v. Hartford Life & Accident Ins. Co.*, 272 F.3d 955, 963 (7th Cir. 2001) (same); *Cozzie*, 140 F.3d at 1109 (same); *Hightshue*, 135 F.3d at 1148 (same); *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 816 (7th Cir. 1997) (same); *Morton v. Smith*, 91 F.3d 867, 872 (7th Cir. 1996) (same).

amendment did not change the actuarial assumptions used to reduce retirement benefits to lump sums, and the amendment was permitted by law and applicable regulation. Accordingly, and for the other reasons set forth below, the district court's decision should be reversed and judgment ordered in favor of Ameritech.

**I. The Eleventh Amendment To The Plan Did Not Reduce Call's Accrued Benefit.**

**A. Call's Immediate Transition Benefit annuity was not her accrued benefit within the meaning of the Plan.**

Call's claim rests on her allegation that the Eleventh Amendment reduced her accrued benefit, a term defined by the Plan. The Plan expressly defined accrued benefit as "a monthly amount payable to [the participant] for his life commencing on his Normal Retirement Date," *i.e.*, age 65. SA32 § 5.1(b) (emphasis added). Based on that unambiguous definition, Call's Normal Retirement Date annuity was an accrued benefit because it provided monthly retirement payments for life beginning at age 65. Her Deferred Transition Benefit annuity also was an accrued benefit because it too provided monthly retirement payments for life beginning at age 65. However, her Immediate Transition Benefit annuity — for which she opted — was not an accrued benefit because it provided monthly retirement benefits for life beginning on the date she retired, a decade-and-a-half before she reached age 65.

The Plan's definition of "accrued benefit" was borrowed from the definition of "accrued benefit" in ERISA and the Tax Code. See 29 U.S.C. § 1002(23)(A) (defining "accrued benefit" as "the individual's accrued benefit

determined under the plan and \* \* \* expressed in the form of an annual benefit commencing at normal retirement age”); 26 U.S.C. § 411(a)(7) (same); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999) (applying statutory definition of “accrued benefit”). The Code treats accrued benefits differently than it treats subsidized early retirement benefits such as Call’s Immediate Transition Benefit annuity.

For example, by law an accrued benefit (the annuity starting at age 65) must vest after five years’ service or on a graded basis from three to seven years. 26 U.S.C. § 411(a)(2). No such requirement applies to a subsidized early retirement annuity such as Call’s Immediate Transition Benefit annuity. Accordingly, the accrued benefit of Plan participants vested after five years’ service (SA27 § 2.5), whereas the right to an Immediate Transition Benefit annuity did not. Nor did the law require or the Plan provide that a right to receive a lump sum vests after five years. In fact, the Plan lawfully could impose any eligibility requirement for receipt of a lump sum so long as it did not discriminate in favor of highly compensated employees. See 26 C.F.R. § 1.401(a)(4)-4(c)(2), Example 3.

In addition, ERISA and the Tax Code require that accrued benefits, unlike Call’s Immediate Transition Benefit annuity, be earned so as to limit backloading. 26 U.S.C. §§ 411(a), (b)(1); 29 U.S.C. § 1054(c)(3). Thus, it would be unlawful to provide that an accrued benefit is earned at the rate of .01% per year until the participant is within five years of a service pension and then at the rate of 1% per year thereafter. See *Berger v. Xerox Corp. Ret. Income Guar.*

*Plan*, 338 F.3d 755, 762 (7th Cir. 2003). But the Plan lawfully could and did condition eligibility in that manner for a subsidized early retirement benefit of the type received by Call. Furthermore, although a lump sum benefit offered by a plan must not be less than the present value of the accrued benefit using the GATT/83GAM assumptions, a plan can provide that the lump sum payment of a subsidized early retirement benefit be the present value of the benefit commencing at age 65 rather than the present value of the subsidized benefit. 26 C.F.R. § 1.411(a)-11(2).<sup>6</sup>

Finally, the \$219,312 received by Call exceeded the actuarially equivalent present value of her accrued benefit. As the parties jointly stipulated, that \$219,312 was higher than the present value of her Deferred Transition Benefit annuity and higher than the present value of her Normal Retirement Date annuity, even if the latter two amounts had been calculated using the PBGC/83GAM assumptions that, in Call's view, the Plan should have used. SA12 (Stip. ¶ 10).

This result follows from the fact that the early commencement reduction percentages applicable to her Immediate Transition Benefit annuity produced

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<sup>6</sup> The IRS continues to underscore the fundamental difference between an accrued benefit and a subsidized early retirement benefit of the type chosen by Call by carefully distinguishing between the anti-cutback rule as applied to accrued benefits and the anti-cutback rule as applied to "411(d)(6)(B) protected benefits." See 70 Fed. Reg. 47109, 47110 (Aug. 12, 2005) ("These final regulations also include general guidance on section 411(d)(6), including the meaning of the terms used therein, the scope of the section 411(d)(6)(A) protection against plan amendments decreasing a participant's accrued benefit, and the scope of section 411(d)(6)(B) protection for early retirement benefits, retirement-type subsidies, and optional forms of benefit" (emphasis added)).

less than a full actuarial reduction. See *supra* p. 5 n.2. In other words, the early commencement reduction percentages provided Transition Participants with subsidized benefits more generous than their accrued benefits. Because Call received more than the present value of her accrued benefit, the district court should have rejected her contention that the Eleventh Amendment reduced her accrued benefit in violation of § 12.1.

At bottom, it was Call's decision to opt for an Immediate Transition Benefit annuity. She instead could have opted to receive her accrued benefit, either by (i) retiring at age 65 or (ii) retiring early and receiving a deferred annuity beginning at age 65. The Plan simply offered her an alternative retirement benefit, which by definition was not an accrued benefit. "A[s] a commonsense matter, offering employees a new alternative does not amount to a decrease in their accrued benefits." *Myers-Garrison v. Johnson & Johnson*, 210 F.3d 425, 431 (5th Cir. 2000).

For all these reasons, Call's Immediate Transition Benefit annuity was not an accrued benefit at all, and the Eleventh Amendment cannot have reduced her accrued benefit in violation of § 12.1 of the Plan.

**B. It was reasonable for the Plan administrator not to deem the lump sum benefit received by Call an accrued benefit.**

Even if the meaning of accrued benefit in § 12.1 could be deemed ambiguous, deference to the Plan administrator's construction would nonetheless be mandated. It cannot have been "downright unreasonable" for the administrator to construe accrued benefit as used in § 12.1 to mean an

annuity beginning at age 65 and not an annuity beginning prior to age 65 in light of both the Plan definition and the virtually identical definitions in ERISA and the Tax Code. See 29 U.S.C. § 1002(23)(A); 26 U.S.C. § 411(a)(7). Significantly, under the statutory definition, an accrued benefit not only must take the form of an annuity beginning at normal retirement age but also must be “determined under the plan.” 29 U.S.C. § 1002(23)(A); 26 U.S.C. § 411(a)(7); see *Board of Trustees of Sheet Metal Workers’ Nat’l Pension Fund v. Comm’r*, 318 F.3d 599, 602-603 (4th Cir. 2003) (statutory definition of “accrued benefit” is “a signpost directing us to look to the terms of the plan at issue”). As explained above, based on the terms of the Plan, it was reasonable for the Plan administrator to conclude that Call’s Immediate Transition Benefit annuity was not an accrued benefit within the meaning of § 12.1 of the Plan.

There is an additional reason why it was reasonable for the Plan administrator to view the Eleventh Amendment as consistent with § 12.1. Under ERISA and the Tax Code, a change in actuarial assumptions used to convert an annuity to a lump sum distribution does not change the accrued benefit, even if that change reduces the amount of the distribution. Rather, as explained below, beginning in 1984 such a change in assumptions was “treated as” reducing the accrued benefit only for purposes of the anti-cutback rule, which the district court and both parties recognized has no application to Call’s retirement benefit because of an exemption in the 1994 Act.

The district court failed to grasp the distinction between reducing an accrued benefit and changing actuarial assumptions for the purpose of

converting retirement benefits to lump sums, a distinction well established in what the court called “the ERISA world.” A10. According to the court, “[a]ctuarial assumptions are part of the ‘accrued benefit,’ and whether the benefit is taken as an annuity or lump sum makes no difference for ERISA purposes.” A9. That ruling conflicts with the statutory definitions of “accrued benefit.” A lump sum by its very nature is not “expressed in the form of an annual benefit commencing at normal retirement age.” 29 U.S.C. § 1002(23)(A); 26 U.S.C. § 411(a)(7). Rather, it is an “optional form of benefit,” which the statutes treat as distinct from an “accrued benefit.” See 29 U.S.C. § 1054(g); 26 U.S.C. § 411(d)(6).

That distinction is confirmed by ERISA’s history. Prior to 1984, the only early retirement benefit protected by ERISA was the accrued benefit as defined in the statutes. See *Bellas v. CBS, Inc.*, 221 F.3d 517, 522 (3d Cir. 2000) (“Before 1984, ERISA did not protect early retirement benefits \* \* \* because they were not considered to be accrued benefits”). Indeed, prior to 1984, plans did not even have to specify their actuarial assumptions used to convert annuities to lump sums. Rev. Rul. 79-90, 1979-1 C.B. 155 (1979 WL 51516). Hence, any change in those assumptions with respect to a lump sum early retirement benefit cannot have unlawfully reduced an accrued benefit.

Congress addressed this situation by amending ERISA and the Tax Code in the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, 1451 (1984) (“1984 Act”). Prior to the 1984 Act, ERISA’s “anti-cutback rule” provided merely that an “accrued benefit” could not be “decreased by an amendment of

the plan.” 29 U.S.C. § 1054(g)(1) (1982); see 26 U.S.C. § 411(d)(6) (1982). The 1984 Act added that, “[f]or purposes of paragraph (1) [*i.e.*, the anti-cutback rule],” a plan amendment “which has the effect of (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy \* \* \* or (B) eliminating an optional form of benefit \* \* \* shall be treated as reducing accrued benefits.” 29 U.S.C. § 1054(g)(2) (emphasis added); see also 26 U.S.C. § 411(d)(6)(B).

The highlighted language made clear that a change in assumptions that reduced an early retirement benefit or eliminated a lump sum option does not reduce an accrued benefit but rather is “treated as” reducing an accrued benefit solely for purposes of the anti-cutback rule. See *Heinz v. Central Laborers’ Pension Fund*, 303 F.3d 802, 811-812 (7th Cir. 2002) (distinguishing between a plan amendment that reduces an accrued benefit and one that “has the effect of” eliminating or reducing early retirement benefits), *aff’d*, 541 U.S. 739 (2004); *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir. 1996) (explaining that the 1984 Act treated early retirement benefits as “accrued benefits” for purposes of the anti-cutback rule); *Costantino v. TRW, Inc.*, 13 F.3d 969, 979-980 (6th Cir. 1994).

Significantly, Congress did not change the definition of “accrued benefit” when it amended ERISA in 1984. If Congress had intended to equate “accrued benefit” with “lump sum” or “actuarial assumptions” or “early retirement benefits” for all purposes, it presumably would have changed the definition instead of merely adding a subsection to § 411(d)(6). Instead, the definition of “accrued benefit” continues to require that an accrued benefit be “expressed in

the form of an annual benefit commencing at normal retirement age.” 29 U.S.C. § 1002(23)(A); 26 U.S.C. § 411(a)(7). See *Bellas*, 221 F.3d at 523 (noting that “the definition of an accrued benefit has not been modified” by the revisions to the anti-cutback rule in the 1984 Act).

Treasury regulations further refute the district court’s view that actuarial assumptions used to produce lump sum early retirement benefits are part of a participant’s accrued benefit. Those regulations carefully distinguish an accrued benefit from a lump sum optional form of benefit. In particular:

A defined benefit plan must provide that the present value of any accrued benefit and the amount (subject to sections 411(c)(3) and 415) of any distribution, including a single sum, must not be less than the amount calculated using the applicable interest rate described in paragraph (d)(3) of this section (determined for the month described in paragraph (d)(4) of this section) and the applicable mortality table described in paragraph (d)(2) of this section. The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with the preceding sentence.

26 C.F.R. § 1.417(e)-1(d)(1) (emphasis added). There would be no need for the final sentence if an optional form of benefit, such as the lump sum at issue here, were the same as an accrued benefit. The regulations also provide this example:

A plan is amended to modify the actuarial factors used in converting an annuity form of distribution to a single sum form of distribution. The use of these modified assumptions results in a lower single sum. Because the amendment does not affect the annual benefit commencing at normal retirement age, it does not change the rate of future benefit accrual for purposes of section 204(h) [of ERISA].

63 Fed. Reg. 68678, 68681 (Dec. 14, 1998) (Example 2); see also 26 C.F.R. § 54.4980F-1 (“The rate of future benefit accrual for purposes of this paragraph (b) is determined without regard to optional forms of benefit”). In this case, any change in actuarial assumptions had no effect on Call’s “annual benefit commencing at normal retirement age” but only on the optional lump sum form of benefit she selected. Consequently, it cannot have reduced her accrued benefit.

Given this background, it is not surprising that the Tenth Circuit concluded that a lump sum retirement benefit is not an accrued benefit within the meaning of ERISA: “It is without a doubt that the lump sum is not an accrued benefit as that term is defined in [ERISA]” but rather an “optional form of benefit.” *Steiner Corp. Retirement Plan v. Johnson & Higgins*, 31 F.3d 935, 939 (10th Cir. 1994); see also *Myers-Garrison v. Johnson & Johnson*, 210 F.3d 425, 430 (5th Cir. 2000) (a lump sum offered as an option is not an accrued benefit); *cf. Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers’ Union*, 980 F.2d 465, 468 (7th Cir. 1992) (ERISA’s legislative history distinguishes between “accrued benefits” and “benefits which are not continued after normal retirement age”).

Because a lump sum is not an accrued benefit, any reduced lump sum received by Call due to a change in actuarial assumptions cannot have constituted a reduced accrued benefit. From the time it enacted ERISA, Congress has required plans to preserve accrued benefits, not to preserve actuarial assumptions (subject to the anti-cutback rule). Such assumptions

must change from time to time to reflect actual conditions, whether rates of return on investments or mortality rates. As one court explained:

If raising the discount rate to reflect the proper present value of normal retirement income is denying an accrued benefit, the result would be that everyone choosing the cash option at the artificially low discount rate would be receiving a windfall compared to all beneficiaries who chose normal retirement income. Plaintiffs are entitled only to an amount equivalent to normal retirement income. The only amount which is “accrued” is that which represents normal retirement income.

*Whitaker v. Texaco, Inc.*, 729 F. Supp. 845, 852 (N.D. Ga. 1989).

In short, there was nothing arbitrary or capricious about the Plan administrator’s interpretation of “accrued benefit” in § 12.1 of the Plan. To the contrary, that interpretation was consistent with the unambiguous definition found in two federal statutes, implemented in federal regulations, and recognized by the courts. The district court had no viable basis for concluding otherwise.<sup>7</sup>

**C. The District Court erred by invalidating the Plan’s adoption of the PBGC/UP84 combination in the May 1995 amendment.**

A further ground for reversal is that the district court erroneously ruled that the Eleventh Amendment changed the Plan’s actuarial assumptions to Call’s detriment. As explained *supra* p. 7, the Eleventh Amendment adopted the GATT/83GAM combination for retirements after 1999 but gave Transition

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<sup>7</sup> As explained below, the district court’s reliance on 26 C.F.R. § 1.411(d)-3(b) (2000) and Rev. Rul. 81-12 was misplaced. They apply only to the anti-cutback rule, from which the 1994 Act indisputably exempted changes to actuarial assumptions of the type allegedly made by the Eleventh Amendment. See Part II.A, *infra*.

Participants like Call the better of GATT/83GAM or PBGC/UP84. The PBGC/UP84 combination used to convert Call's early retirement annuity to present value was the same combination prescribed by the Plan immediately before adoption of the Eleventh Amendment. The district court avoided that conclusion by invalidating the May 1995 Plan amendment which adopted the PBGC/UP84 combination. The court had no viable basis for doing so.

There is no dispute over the interest rate assumption — the district court and both parties agree that the PBGC interest rate assumption was applicable both before and after adoption of the Eleventh Amendment. The dispute concerns only the proper mortality table assumption. In *Malloy v. Ameritech*, 2000 U.S. Dist. LEXIS 20490 (S.D. Ill. Feb. 7, 2000), the parties had disputed whether language in the pre-1995 version of the Plan meant that the mortality table assumption was UP84 (Ameritech's position) or 83GAM (the plaintiffs' position), and the district court ruled in favor of the plaintiffs' construction. *Id.* at \*41-43. That language was clarified when the Plan was amended and restated in May 1995. Section 5.1(b) of the Plan was revised to state expressly that the mortality table assumption for reducing annuities to lump sums was UP84. SA32 § 5.1(b). Thus, the PBGC/UP84 combination was applicable both immediately before and after the Eleventh Amendment, and the Eleventh Amendment cannot have reduced the value of Call's lump sum retirement benefit.

The district court ruled "ineffective" the express adoption of the UP84 assumption in the May 1995 amendment. A7. According to the court, to

change its actuarial assumptions after the 1994 Act, the Plan “had to be amended to embrace the so-called [GATT] assumptions — which did not happen until its adoption of the Eleventh Amendment.” *Ibid.* The court offered no statutory or case law authority for its conclusion that the 1994 Act limited subsequent plan amendments to those adopting the GATT/83GAM combination. In fact, nothing in the 1994 Act barred the use of actuarial assumptions that provided a larger lump sum than the GATT/83GAM combination, as the PBGC/UP84 combination did. To the contrary, § 767(a)(3)(A)(i) of the 1994 Act provided only that “the present value shall not be less than the present value calculated by using [GATT/83GAM]” (emphasis added).

In sum, Judge Murphy had no valid ground for invalidating the May 1995 amendment and instead should have recognized the applicability of the PBGC/UP84 assumptions set forth in the 1995 amendment, irrespective of the validity of the Eleventh Amendment. If the court had done so, it would have had to conclude that the lump sum received by Call was precisely what she would have received had the Eleventh Amendment not been adopted, precluding a violation of § 12.1.

## **II. The Eleventh Amendment To The Plan Was “Permitted By Law And Applicable Regulation.”**

Even if the Eleventh Amendment had reduced Call’s accrued benefit (and it did not as explained above), any such reduction would have been authorized by the “permitted by law and applicable regulation” proviso of § 12.1. As

explained below, under the express terms of the 1994 Act, reduction of an accrued benefit would be deemed lawful if it resulted from use of the actuarial assumptions employed by Ameritech with respect to Call. The district court's attempt to avoid that conclusion by construing the phrase "permitted by law and applicable regulation" to refer only to the elimination of an optional form of benefit and not to the reduction of an accrued benefit cannot be sustained.

**A. The 1994 amendments to ERISA authorized use of the actuarial assumptions applied by Ameritech to convert Call's retirement annuity to present value.**

The assumptions used by Ameritech to convert Call's Immediate Transition Benefit annuity to present value were "permitted by law and applicable regulation." Plaintiffs have admitted this. As the district court explained: "The parties agree there is no statutory or regulatory impediment to what the Plan seeks — diminished lump sum transition benefits payouts" (A2) — and, in particular "[t]he parties agree that the Eleventh Amendment which expressly adopted the GATT assumptions was specifically excepted from the Internal Revenue Code's anti-cutback rules." A7.

As explained above, the 1994 Act required plans to adopt the GATT interest rate as the applicable interest rate and 83GAM as the applicable mortality table by January 1, 2000. See *supra* pp. 6-7. The 1994 Act further provided that adoption of those assumptions was lawful, even if they reduced accrued benefits, by creating an exemption from the "anti-cutback rule." The anti-cutback rule states that an "accrued benefit \* \* \* may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1); 26 U.S.C. § 411(d)(6);

*Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746 (2004). The 1994 Act established an exemption, providing that a participant's accrued benefit would not be considered to be reduced in violation of the "anti-cutback rule" merely because the present value of a retirement benefit was determined using the actuarial assumptions set forth in the 1994 Act:

A participant's accrued benefit shall not be considered to be reduced in violation of section 411(d)(6) of the Internal Revenue Code of 1986 or section 204(g) of the Employee Retirement Income Security Act of 1974 merely because (A) the benefit is determined in accordance with section 417(e)(3)(A) of such Code, as amended by this Act, or section 205(g)(3) of the Employee Retirement Income Security Act of 1974, as amended by this Act \* \* \*.

1994 Act § 767(d)(2) (A21). The referenced sections 417(e)(3)(A) and 205(g) prescribe the GATT/83GAM actuarial assumptions to be used in converting annuities to present value. See 26 U.S.C. § 417(e)(3)(A); 29 U.S.C. § 1055(g)(3). Thus, § 767(d)(2) of the 1994 Act "allows an employer to switch from the PBGC to the GATT rates [and from the UP84 to the 83GAM mortality table] without running afoul of the anti-cutback rule." *Myers-Garrison*, 210 F.3d at 429.

Based on this statutory exemption from the anti-cutback rule, Ameritech could have used the GATT/83GAM actuarial assumptions to convert Call's Immediate Transition Benefit annuity to present value. Pursuant to § 767(d)(2), that would not have been deemed a reduction in Call's accrued benefit, yet it would have resulted in a lower lump sum than Call received based on Ameritech's use of the PBGC/UP84 actuarial assumptions called for in the Eleventh Amendment. See *supra* p. 7. Hence, Ameritech's use of the Plan's

existing PBGC/UP84 assumptions to convert Call's Immediate Transition Benefit annuity to present value gave Call more than she was entitled to under the 1994 Act and thus was "permitted by law and applicable regulation."

This conclusion is confirmed by the text of the 1994 Act, which states that "the present value shall not be less than the present value calculated by using [GATT/83GAM]" (§ 767(a)(3)(A)(i) (emphasis added)), and by the applicable Treasury Regulation, which states:

If a plan provides for use of an interest rate or mortality table other than the applicable interest rate [GATT] or the applicable mortality table [83GAM], 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). In its explanatory manual, the IRS further confirmed the propriety of the assumptions applied by Ameritech to Call's distribution: "Nothing in the statute or regulation prevents a plan from specifying actuarial factors for single-sum distributions that are more generous than those required by the statute." I.R.M. § 4.72.10.3.6 (May 17, 2002). And again: "[T]here is no violation of IRC 411(d)(6) merely because a plan is amended with regard to the interest rate or mortality table used to compute the value of a participant's single-sum distribution, even if such an amendment serves to reduce the single-sum value of a participant's accrued benefit," so long as the interest rate was "based on the PBGC rate" and the resulting present value is not less than derived using the GATT/83GAM combination. *Id.* § 4.72.10.6.1(2)(3).

The district court nevertheless ruled that the Plan could not alter its actuarial assumptions other than by adopting the GATT/83GAM combination. A8-9. The court relied on two IRS regulations, 26 C.F.R. § 1.411(d)-3(b) (2000) and Revenue Ruling 81-12, 1981-1 C.B. 228 (1981 WL 165942). *Ibid.* The court did not explain why those regulations would override the express exemption set forth by Congress in § 767(d)(2) of the 1994 Act. Neither has any bearing in light of that exemption.

26 C.F.R. § 1.411(d)-3(b) (2000) was a gloss on the anti-cutback rule. It stated: “Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to \* \* \* actuarial factors for determining optional or early retirement benefits.” That regulation is not pertinent here because § 767(d)(2) of the 1994 Act specifically provided that the anti-cutback rule would not apply at all in these circumstances. For that reason, it was permissible for the Plan administrator to determine whether Call’s accrued benefit was reduced by application of the Eleventh Amendment without reference to a regulation implementing the anti-cutback rule. See *Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 196 F. Supp. 2d 1260, 1270-1271 (N.D. Ga. 2002) (deferring to plan administrator’s interpretation of proper discount rate and mortality table assumptions).

Revenue Ruling 81-12, which was issued in 1981, long before the 1994 Act, was a gloss on both the anti-cutback rule and 26 C.F.R. § 1.411(d)-3(b) (2000). Accordingly, it has no application to this case, to which the anti-cutback rule and § 1.411(d)-3(b) (2000) do not apply pursuant to § 767(d)(2) of

the 1994 Act. And in any event, “Revenue Rulings, as interpretative actions, do not have the force of law.” *Bencivenga v. W. Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 580 (3d Cir. 1985); accord *American Stores Co. v. American Stores Co. Pension Plan*, 928 F.2d 986, 994 (10th Cir. 1991).

**B. The District Court’s truncated reading of the “permitted by law and applicable regulation” proviso should be rejected.**

The district court found it “abundantly clear that the words ‘otherwise permitted by law’ refer only to the term ‘optional form of benefit’ [and] do not in any way qualify the term ‘accrued benefit.’” A9-10. That reading cannot be reconciled with the plain language of § 12.1.

To reprise, § 12.1 provided:

[N]o amendment will reduce a Participant’s accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned from the employ of [Ameritech] on the day of the amendment (except to the extent permitted by section 412(c)(8) of the Code) and no amendment will eliminate an optional form of benefit with respect to a Participant or Beneficiary except as otherwise permitted by law and applicable regulation.

SA51-52 § 12.1 (emphasis added). Nothing in that sentence indicates that the “except as otherwise permitted by law” proviso applied only to “optional form of benefit” and not to “accrued benefit.”

The district court’s reading is inconsistent with how § 12.1 was structured. Section 12.1 contained two exceptions. The first exception — for reductions permitted by § 412(c)(8) — was set off in parentheses to make clear that it applied only to “accrued benefit.” The second exception — the “except as

otherwise permitted by law” proviso — was not set off by parentheses or commas or dashes or anything else. Thus, the natural reading of that exception is that it applied to the entire sentence, including both “accrued benefit” and “optional form of benefit.” As the Supreme Court has explained, “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Porto Rico Ry. v. Mor*, 253 U.S. 345, 348 (1920); see also *Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000) (where statute excepted from the definition of “destructive device” a “shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes,” “logic and common sense dictate that the qualifying clause modifies both ‘shotgun’ and ‘shotgun shell’”). Thus, the district court’s reading, far from being “abundantly clear” (A9), does violence to the plain language of § 12.1.

Furthermore, the district court’s distorted reading makes no sense. Why would the Plan allow an optional form of benefit to be eliminated if otherwise permitted by law but not permit an accrued benefit to be reduced if otherwise permitted by law? There is no rhyme or reason to such a distinction, and the district court did not even attempt to provide one. On the other hand, it was perfectly sensible for the drafter to exempt both actions from the general bar in § 12.1 where the law otherwise authorized them.

Finally, even if the district court’s restrictive interpretation of the “except as otherwise permitted by law” proviso were otherwise permissible, it should

have deferred to the Administrator’s view that the proviso applied both to “accrued benefit” and to “optional form of benefit.” That interpretation, even if subject to disagreement, was not arbitrary or capricious. See *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1109, 1111 (7th Cir. 1998) (“plain language of the plan” showed that administrator’s interpretation was not “arbitrary and capricious”).

\* \* \* \* \*

In sum, Ameritech’s use of the PBGC/UP84 actuarial assumptions to convert Call’s Immediate Transition Benefit annuity to present value was plainly “permitted by law and applicable regulation.” At a minimum, the district court should have deferred to the Plan administrator’s interpretation of § 12.1, which was not “downright unreasonable” in light of § 767(d)(2) of the 1994 Act.

**III. Alternatively, Call Failed To Exhaust Her Administrative Remedies.**

Call admitted in her Complaint that she “has not exhausted the Plan’s internal administrative remedies.” SA3 (¶ 14). She did not file an administrative objection or otherwise seek to obtain an administrative ruling regarding her retirement benefit. She thereby forfeited her right to file a judicial complaint.

“As a pre-requisite to filing suit, an ERISA plaintiff must exhaust his internal administrative remedies.” *Zhou v. Guardian Life Ins. Co. of Am.*, 295 F.3d 677, 679 (7th Cir. 2002) (emphasis added); accord *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 873 (7th Cir. 1997). Furthermore, the Plan itself specifies that a participant “whose claim for benefits has been denied, in whole or part, may (and must for the purpose of seeking any further review of a

decision or determining any entitlement to a benefit under the Plan) \* \* \* submit a written request for review of the decision denying the claim.” SA51 § 11.12(b) (emphasis added). Thus, both as a matter of law and contract, the district court should have granted Ameritech’s motion to dismiss.

The exhaustion requirement “furthers the goals of minimizing the number of frivolous lawsuits, promoting non-adversarial dispute resolution, and decreasing the cost and time necessary for claim settlement,” as well as “enabl[ing] the compilation of a complete record in preparation for judicial review.” *Gallegos v. Mt. Sinai Med. Ctr.*, 210 F.3d 803, 808 (7th Cir. 2000); accord *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 650 (7th Cir. 1996). By proceeding straight to court, Call prevented the Plan administrator from seeking to resolve her claim without a lawsuit and prevented the district court from having a complete administrative record on which to base its decision. See *Stark v. PPM America, Inc.*, 354 F.3d 666, 671 (7th Cir. 2004); accord *Zhou*, 295 F.3d at 679.

The exhaustion requirement may be excused in only two situations: “(1) if there has been a lack of meaningful access to the review procedures or (2) if exhaustion of internal remedies would be futile.” *Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1236 (7th Cir. 1997); *Stark*, 354 F.3d at 671. Here, the first exception plainly does not apply because the Ameritech Plan specified detailed procedures by which Call could have obtained administrative review of her claim. See SA51 § 11.12.

Call's Complaint invoked the second exception, alleging that exhausting her administrative remedies would have been "futile" because "other participants in the identical situation as Ms. Call have filed administrative claims that have been denied." SA3 (¶ 14). Her Complaint did not identify any such "other participants" or indicate whether, like Call, they challenged the amount of an Immediate Transition Benefit annuity calculated under the terms of the Eleventh Amendment. In her district court briefing on Ameritech's motion to dismiss, Call attached correspondence regarding the rejected claims of other individuals. But that correspondence nowhere mentioned § 12.1 of the Plan, on which Call bases her claim. Hence, she had no basis for alleging that these other individuals were challenging a reduction in their accrued benefits or were otherwise "in the identical situation as Ms. Call." *Ibid.*

The district court held that exhaustion would be futile because there was no evidence that the Administrator's "response would be any different if the claims were returned to the administrative level." A6. That ruling improperly put the burden on Ameritech rather than on the futility proponent. As this Court has explained, for the futility exception to apply "a plaintiff must show that it is certain that her claim will be denied on appeal, not merely that she doubts that an appeal will result in a different decision." *Lindemann*, 79 F.3d at 650, quoting *Smith v. Blue Cross & Blue Shield*, 959 F.2d 655, 659 (7th Cir. 1992); accord *Zhou*, 295 F.3d at 680; *Robyns*, 130 F.3d at 1238. Call did not satisfy that burden. She never gave the Plan administrator an opportunity to consider her position as to the proper construction of § 12.1 of the Plan.

Furthermore, as this Court has explained, the futility exception does not apply merely because the internal reviewer is the same entity as the initial decision-maker. *Robyns*, 130 F.3d at 1238; accord *Springer v. Wal-Mart Assocs.’ Group Health Plan*, 908 F.2d 897, 901 (11th Cir. 1990). Call offered no evidence that the Plan administrator “would not have fairly considered [her] request for benefits,” making the district court’s decision to waive exhaustion an “abuse of discretion.” *Stark*, 354 F.3d at 672. Indeed, all the futility cases cited by the district court (A6) rejected its applicability.

The proper disposition on this issue, if the Court reaches it, is dismissal of Call’s claim, not a remand. *Stark*, 354 F.3d at 672 (dismissing claim). Call “cannot be allowed to skip the administrative procedure, cause the defendants to incur litigation costs, and then, after losing, be allowed to exhaust [her] remedies.” *Ibid.*

#### **IV. The District Court’s Damages Award Is Inconsistent With The Terms Of The Plan.**

Even if the district court’s liability ruling were affirmed — which it should not be for the reasons set forth above — its damages award should nonetheless be rejected. After receiving each side’s damages calculations, the district court accepted the class’s proposed damages. A13. The awarded damages cannot be reconciled with the terms of the Plan.

The plain language of § 12.1 of the Plan provides the starting point for computing the damages to which class members are entitled. If the district court’s judgment on liability is affirmed, this Court will have held that,

pursuant to § 12.1, the Eleventh Amendment impermissibly reduced Call's accrued benefit "to less than the accrued benefit that [s]he would have been entitled to receive if [s]he had resigned from the employ of [Ameritech] on the day of the amendment." SA51-52 § 12.1.

The first step in calculating damages, therefore, would be to determine the baseline retirement benefit to which an under-age-55 Transition Participant (such as Call) would have been entitled if she had retired immediately prior to the Eleventh Amendment becoming effective on July 1, 1999. The Plan entitled her to an immediate retirement annuity subject to an early commencement reduction based on age and service. See SA68 § B-4. The reduced amount is the baseline retirement benefit guaranteed by § 12.1.

The second step would be to calculate the present value of that baseline retirement benefit on the employee's actual retirement date. The third step would be to compare the amount calculated in step two with the lump-sum amount the employee actually received and to award any shortfall to the employee. The final step would be to add prejudgment interest, if lawful and appropriate, from the class member's retirement date to the date of judgment.

The class's proposal, accepted by the district court, failed to give effect to the plain language of § 12.1 with respect to class members who, like Call, were under age 55 on June 30, 1999. Instead of applying the early commencement factors set forth in § B-4 of the Plan to the retirement annuity as of "the day of the amendment" (§ 12.1), the class applied them as of the day of retirement. Class members under age 55 thereby obtained greater retirement benefits than

guaranteed by § 12.1. For that reason, if the district court's liability rulings are affirmed, this matter should be remanded for a proper determination of damages.

Finally, the district court awarded the class prejudgment interest at the prime rate. A13. Ameritech contends that the class is not entitled to prejudgment interest or, alternatively, that any award of prejudgment interest should be at the federal post-judgment rate set forth in 28 U.S.C. § 1961(a).

This Court has held that prejudgment interest may be awarded to a prevailing party in ERISA benefit cases. *Fritcher v. Health Care Serv. Corp.*, 301 F.3d 811, 820 (7th Cir. 2002) (district courts have discretion whether to award prejudgment interest and to determine the amount thereof). Subsequently, however, the Eleventh Circuit held that prejudgment interest is not available where, as here, a plan does not provide for it. *Flint v. ABB, Inc.*, 337 F.3d 1326, 1329-1330 (11th Cir. 2003). Ameritech respectfully requests that, based on the Eleventh Circuit's intervening and well-reasoned opinion, this Court hold that prejudgment interest is not available here because the Plan does not provide for it. See *Russ v. Watts*, 414 F.3d 783, 788-791 (7th Cir. 2005) (overruling prior decision based on intervening decisions of other circuits).

The district court awarded prejudgment interest at the prime rate (A13), again consistent with this Court's ruling in *Fritcher*, 301 F.3d at 820. Even if prejudgment interest is available, Ameritech urges this Court to follow the rulings of other circuits that it should be awarded at the federal statutory rate set forth in 28 U.S.C. § 1961(a). See *Sheehan v. Guardian Life Ins. Co.*, 372

F.3d 962, 969 (8th Cir. 2004); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001); *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 133 (3d Cir. 2000). Federal practice on this issue should be uniform given the multi-state workforces of many companies with plans governed by ERISA.

### **CONCLUSION**

The judgment of the district court should be reversed.

Respectfully submitted.

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Dated: March 6, 2006

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the foregoing opening 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 10,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Jeffrey W. Sarles  
One of appellant's attorneys

**CIRCUIT RULE 31(e)(1) CERTIFICATION**

The undersigned attorney hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), a digital version of the foregoing brief and all of the appendix items that are available in non-scanned PDF format.

/s/ Jeffrey W. Sarles  
One of appellant's attorneys

**REQUIRED SHORT  
APPENDIX**

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**CIRCUIT RULE 30(d) STATEMENT**

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rules 30(a) and (b) are included in the appendices.

/s/ Jeffrey W. Sarles  
One of appellant's attorneys

## **CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on March 6, 2006, I caused two copies of the foregoing opening brief for defendant-appellant Ameritech Management Pension Plan and one copy of the separate appendix to be served by first-class mail, and a digital version to be served by e-mail, upon the following:

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