PROTECTING
EARNED
BENEFITS

ProtectSeniors.Org

Testimony of

C. William Jones
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Before The

U.S. House of Representatives
Committee on Education & Labor

Hearing on Safeguarding Retiree Health Benefits

Thursday, September 25, 2008

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Mr. Chairman, Ranking Member and members of the Committee, my name is Bill Jones and I serve as Chairman of the Board of ProtectSeniors.Org, a not-for-profit organization formed to tackle the issue of retiree healthcare. Our sole mission is to advocate for passage of H.R. 1322, the Emergency Retiree Health Benefits Protection Act and save millions of Americans from certain poverty because of the loss of their earned healthcare benefits.

I'm here today because we have seen an escalation of retiree healthcare benefits slashed by corporate America. This is why, with your help and leadership Mr. Chairman, legislation in the form of H.R. 1322, the Emergency Retiree Health Benefits Protection Act, was introduced.

Mr. Chairman, as you know, the original ERISA legislation in 1974 included healthcare insurance as a critical part of the Congressional plan to provide retiree income security. In fact, H.R. 1322 is the original healthcare language drafted by Michael Gordon and included in the ERISA legislation.

As we all know, and the reason I am here today representing millions of retirees, the H.R. 1322 healthcare insurance portion of the original ERISA legislation was eliminated from the final bill in order to lighten the load and make it more likely that the legislation would pass. Those close to the plan's design gave up the healthcare portion temporarily to pass the much needed guaranteed defined benefit pension law. They had every intention to amend ERISA at a later date to add protections for healthcare insurance. If Michael Gordon were alive today he would be here telling you the same thing.

If we look back in time when most of the current retirees were in the workforce, we would see that larger American companies universally offered retiree healthcare to their employees and retirees as an incentive to retain trained employees.

The workers accepted the IOU for retirement healthcare and other benefits in exchange for lower wages, and fewer vacations and holidays. Employers deducted the costs of providing the insurance from wages and reminded employees that the retirement healthcare and other benefits were part of their overall compensation package.

Therefore, employers on the one hand acknowledged their implied contract, yet in the mid to late-1980s added a clause to their benefits practice that said they had the right to amend the plan at any time. This clause was called "the Reservation of Rights Clause."

This change was never communicated to the employees during their careers. In the mid-1990s some employers placed the statement of possible health benefits termination in the Reservation of Rights Clause and in employee's termination packages at retirement. Therefore thousands of employees who had signed their retirement agreement papers were then and only then given the fine print, which many never read, on the insurance plan's possible demise as they walked out the door. Since most never read the fine print or never saw it, they were devastated when they were forced to pay more and more for health insurance they had never planned on having to buy.

Mr. Chairman, let me be clear here, employers told their employees annually for 20-30-40 years that their reductions in pay and other perks were in exchange for their retirement healthcare and other benefits. Yet after they were retired these same employers started to charge retirees for health issuance or stopped paying for it altogether.

It is also very important to understand that corporations benefited greatly by providing healthcare benefits in lieu of wages. They did not have to pay Social Security and other payroll taxes on the benefit. They could also defer funding those obligations when earnings were low, unlike payroll that must be paid on time. Further, since the amount of an employee's pension is directly proportional to his or her rate of pay, corporations saved pension costs as well.

Many of the retirees even took an early retirement program because they were offered a 100% paid healthcare insurance by a human resource or higher-level Vice president.

General Motors was the first to renege on this implied contract. GM designed an incentive plan for management employees to retire early. They included free healthcare for the employee and spouse for the rest of their lives as one of the most attractive and beneficial features of the incentive plan. (See Sprague v. GM)

However, in the early1990s GM started charging for retiree health insurance. Several thousand retirees looked at their early retirement guarantee of 100% paid healthcare for life and consulted an attorney. The retirees chose to take GM to court to try and recover what was, in their mind, a clear case of corporate theft. The case was first settled in a lower court and the finding was in favor of the retirees.

GM then appealed the case and the appellate court found in favor of the company. The retirees were shocked to find that a benefits practice none of the retirees were aware of contained some legalese which the Sixth Circuit Court said favored GM and the retirees were not actually guaranteed healthcare for life as the Vice President's retirement incentive letter stated. The benefits practice contained the previously mentioned "reservation of rights clause."

These courageous GM retirees could not believe it so they anted up hundreds of thousands more of their retirement earnings to carry the case to the US Supreme Court. Unfortunately for retirees all over the country, the Supreme Court agreed with the Sixth Circuit and refused to overturn the ruling. That ruling left all retirees who expected to have health insurance in retirement at the mercy of their former employers.

Three judges dissented, stating that GM did create a vested right to lifetime healthcare benefits and criticizing GM's corporate shortsightedness." "When General Motors was flush with cash and health care costs were low," the dissent stated, "it was easy to promise employees and retirees lifetime healthcare.... Rather than pay off those perhaps ill-considered promises, it is easier for the current regime to say those promises were never made. (There is the tricky little matter of the paper trail of written assurances of lifetime healthcare, but General Motors, with the en banc majority's assistance, has managed to escape the ramifications of its now-regretted largesse." According to the dissent, the majority's opinion "is heads, General Motors wins; tails, the employees lose.")

Let us make this situation very clear. General Motors promised to provide lifetime healthcare insurance for no charge to all employees who retired by a certain date. Thousands of dedicated employees agreed to that deal and retired by the deadline. GM later reneged on that commitment and the burden for the healthcare costs fell on the retirees who were living on a fixed income and who upheld their part of the bargain. This unbelievably dishonest act was determined by The Supreme Court to be perfectly legal.

As we have seen in recent years the number of employers dropping health insurance has increased dramatically. With more and more employers claiming to not be able to compete globally, it is only a matter of time before most US corporations who still offer their retirees health insurance stop the practice and force these people who are on fixed incomes to buy expensive health insurance.

The result is that most will become uninsured. They will become only one health problem away from bankruptcy and a ward of the State and Federal Medicaid System. Had they been paid, during their working years, a fair amount instead of a lower amount plus a promise of healthcare coverage in retirement, their pensions would have been significantly higher and they would have been able to afford to pay for their own healthcare insurance.

Instead, GM cashed in on all the benefits of promising the healthcare insurance instead of paying a higher wage only to renege on the obligation and cash in once again by stealing the promised <u>and earned</u> benefits from those who could least afford it. The retirees were presented with a lose-lose outcome while GM benefited with a win-win.

What makes cuts to medical coverage so hard for many retirees to accept is that these cuts are most often perfectly legal. As we have stated above, this is unlike pension plans, which are protected by Federal law. Former employers can cut health coverage at any time for retirees. A few retirees have successfully sued former employers for their benefits in recent years (See Qwest case). But employment lawyers say that can happen only in rare cases where employers didn't specifically reserve the right to change their minds in writing.

"Most company benefits practices contain what we call 'weasel' or Reservation of Rights clauses that protect them from any liability," says Norman Stein, a law professor who specializes in employee benefits at the University of Alabama. Stein says studies show few employees ever read the clauses anyway, which are often in fine print and in language that isn't always easy to understand.

Of course, many working Americans are coping with rising health costs. But seniors often find themselves in a particularly difficult spot when their benefits shrink. The vast majority of retirees live on fixed incomes with nest eggs that have taken big hits during the recent stock market decline. Many don't have a contingency plan because they had no idea they needed one. They entered the workforce in a different time and place — employers were more paternalistic and unions were strong.

Mr. Chairman, this is not a Republican or Democrat issue. Nor is it a union versus management issue. This is a retiree issue that needs to be fixed today. We are facing a healthcare crisis in this country and H.R. 1322 should be a part of the overall solution. The Federal government cannot afford to replace these benefits for millions of retirees. Nor can many of these retirees pay more out of their pockets to get the basic healthcare they need. You noticed I didn't say quality healthcare because this in most cases is too costly for them to afford.

We are not here asking for a handout. What we do want is for companies to live up to the promises they made. A promise made should be a promised kept. With your continued help and support I'm confident we can get H.R. 1322 passed into law.

Mr. Chairman and Ranking Member, we are ready, willing and able to work with all of you on a bi-partisan solution that is good for retirees, corporate America and the pocketbook of the Federal government. With the crisis set-off in the financial markets, we cannot afford to pass additional taxes and burdens onto the American people. A solution to the healthcare crisis will require everyone to pitch in. We believe H.R. 1322 does just that.

Thank you and I would be happy to answer any questions at this time.

HISTORY OF ERISA

The Employee Benefits Security Administration is responsible for administering and enforcing the fiduciary, reporting and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). At the time of its name change in February 2003, EBSA was known as the Pension and Welfare Benefits Administration (PWBA). Prior to January 1986, PWBA was known as the Pension and Welfare Benefits Program. At the time of this name change, the Agency was upgraded to a sub-cabinet position with the establishment of Assistant Secretary and Deputy Assistant Secretary Positions.

The provisions of Title I of ERISA, which are administered by the U.S. Department of Labor, were enacted to address public concern that funds of private pension plans were being mismanaged and abused. ERISA was the culmination of a long line of legislation concerned with the labor and tax aspects of employee benefit plans. Since its enactment in 1974, ERISA has been amended to meet the changing retirement and health care needs of employees and their families. The role of EBSA has also evolved to meet these challenges.

The administration of ERISA is divided among the U.S. Department of Labor, the Internal Revenue Service of the Department of the Treasury (IRS), and the Pension Benefit Guaranty Corporation (PBGC). Title I, which contains rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct, and civil enforcement, is administered by the U.S. Department of Labor. Title II of ERISA, which amended the Internal Revenue Code to parallel many of the Title I rules, is administered by the IRS. Title III is concerned with jurisdictional matters and with coordination of enforcement and regulatory activities by the U.S. Department of Labor and the IRS. Title IV covers the insurance of defined benefit pension plans and is administered by the PBGC.

Prior to a 1978 reorganization, there was overlapping responsibility for administration of the parallel provisions of Title I of ERISA and the tax code by the U.S. Department of Labor and the IRS, respectively. As a result of this reorganization, the U.S. Department of Labor has primary responsibility for reporting, disclosure and fiduciary requirements; and the IRS has primary responsibility for participation, vesting and funding issues. However, the U.S. Department of Labor may intervene in any matters that materially affect the rights of participants, regardless of primary responsibility.

As a result of the enactment of the Federal Employees' Retirement System Act of 1986 (FERSA), EBSA has fiduciary and auditing oversight of the Thrift Savings Plan that was established by this Act.

Pre-ERISA Legislation

Initially, the IRS was the primary regulator of private pension plans. The Revenue Acts of 1921 and 1926 allowed employers to deduct pension contributions from corporate income, and allowed for the income of the pension fund's portfolio to accumulate tax free. The participant in the plan realized no income until monies were distributed to the participant, provided the plan was tax qualified. To qualify for such favorable tax treatment, the plans had to meet certain minimum employee coverage and employer contribution requirements. The Revenue Act of 1942 provided stricter participation requirements and, for the first time, disclosure requirements.

The U.S. Department of Labor became involved in the regulation of employee benefits plans upon passage of the Welfare and Pension Plans Disclosure Act in 1959 (WPPDA). Plan sponsors (e.g., employers and labor unions) were required to file plan descriptions and annual financial reports with the government; these materials were also available to plan participants and beneficiaries. This legislation was intended to provide employees with enough information regarding plans so that they could monitor their plans to prevent mismanagement and abuse of plan funds. The WPPDA was amended in 1962, at which time the Secretary of Labor was given enforcement, interpretative, and investigatory powers over employee benefit plans to prevent mismanagement and abuse of plan funds. Compared to ERISA, the WPPDA had a very limited scope.

ERISA

The goal of Title I of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans. Among other things, ERISA requires that sponsors of private employee benefit plans provide participants and beneficiaries with adequate information regarding their plans. Also, those individuals who manage plans (and other fiduciaries) must meet certain standards of conduct, derived from the common law of trusts and made applicable (with certain modifications) to all fiduciaries. The law also contains detailed provisions for reporting to the government and disclosure to participants. Furthermore, there are civil enforcement provisions aimed at assuring that plan funds are protected and that participants who qualify receive their benefits.

ERISA covers pension plans and welfare benefit plans (e.g., employment based medical and hospitalization benefits, apprenticeship plans, and other plans described in section 3(1) of Title I). Plan sponsors must design and administer their plans in accordance with ERISA. Title II of ERISA contains standards that must be met by employee pension benefit plans in order to qualify for favorable tax treatment. Noncompliance with these tax qualification requirements of ERISA may result in disqualification of a plan and/or other penalties.

Important legislation has amended ERISA and increased the responsibilities of EBSA. For example, the Retirement Equity Act of 1984 reduced the maximum age that an employer may require for participation in a pension plan; lengthened the period of time a participant could be absent from work without losing pension credits; and created spousal rights to pension benefits through qualified domestic relations orders (QDROs) in the event of divorce, and through pre-retirement survivor annuities. The Omnibus Budget Reconciliation Act of 1986 eliminated the ability of employers to limit participation in their retirement plans for new employees who are close to retirement and the ability to freeze benefits for participants over age 65. The Omnibus Budget Reconciliation Act of 1989 requires the Secretary of Labor to assess a civil penalty equal to 20% of any amount recovered for violations of fiduciary responsibility.

The department's responsibilities under ERISA have also been expanded by health care reform. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) added a new part 6 to Title I of ERISA which provides for the continuation of health care coverage for employees and their beneficiaries (for a limited period of time) if certain events would otherwise result in a reduction in benefits. More recently, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) added a new Part 7 to Title I of ERISA aimed at making health care coverage more portable and secure for employees, and gave the department broad additional responsibilities with respect to private health plans.

Impact of the "After the Fact" removal of Corporate Retiree Health Insurance

Shrinking benefits

The following is a sample of large companies who have reduced healthcare benefits of their retirees AFTER they retired. This list represents about 3 million retirees:

Aetna Inc.: Stopped subsidizing health insurance for employees who retire after 2007. In January, they will stop funding all retirees' dental coverage.

Bethlehem Steel Corp.: Filed for bankruptcy protection in 2001. They canceled all health benefits for its 95,000 retirees last year.

Caterpillar Inc.: Starting in January, retirees will pay significantly more of their health insurance premiums, with costs ranging from $180 a month per individual to $370 per family.

DuPont Co.: Now charges pre-Medicare retirees higher health insurance premiums than it charges current employees.

Embarq: The wire line spinoff from Sprint stopped offering Medigap coverage to their Medicare eligible retirees in January 2008

Kodak: Removed healthcare supplemental insurance for Medicare eligible retirees effective 2008

Levi Strauss & Co.: Stopped subsidizing Medigap coverage (private insurance that covers services Medicare does not) for all retirees and raised deductibles on prescription drugs to as much as $50. Company will stop subsidizing benefits for future retirees.

Lucent Technologies: In January, stopped covering dependents of employees who left after May 1990 if they made more than $87,000; level will fall to $65,000 next year.

Sears, Roebuck & Co.: Starting next year, all subsidies for retiree health benefits will be eliminated for new hires and employees younger than 40. Sears is also capping employer contributions to retiree health benefits at 2004 levels.

Tribune Co. (owner of The Times): Has stopped subsidizing retirement health benefits for those hired after March 2003.

Verizon Communications: Stopped all future retiree health benefits for management employees and has dramatically increased the retiree portion of health Insurance from 0 to $800+ per month depending on size of family.

Whirlpool Corp.: Beginning this year, retiring employees are paying 20% of their health insurance costs.