STATEMENT OF NORMAN P. STEIN

ON
"SAFEGUARDING RETIREE HEALTH BENEFITS"

BEFORE THE
COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman, Members of the Committee, I am Norman Stein, a professor at the University of Alabama School of Law, where I am privileged to hold the Douglas Arant Professorship. This semester, I am also working at the Pension Rights Center here in Washington, D.C. The Pension Rights Center is the nation's only consumer organization dedicated solely to promoting and protecting the pension rights of workers, retirees and their families. Today, however, the views expressed in my testimony are mine alone and do not necessarily represent the views of either the Pension Rights Center or the University of Alabama.

My statement this morning focuses on the state of the law with respect to an employer's promise to pay retiree health benefits. I will show that the law is hostile to reasonable employee expectations about retiree health benefits—expectations created by the employer and from which the employer benefited in terms of increased employee loyalty and productivity.

The law begins with the statute. ERISA does not provide for mandatory vesting of health benefits the way it does for retirement benefits, regardless of how long an employee worked. ERISA does, however, hold employers responsible for the contractual promises they make to their employees. In retiree health care plans, then, the relevant statutory question is whether the employer has made a binding promise to its employees to pay them health benefits after they

retire. Federal judges are often called upon to determine whether an employer has made such a promise to its employees. The legal question is one of contract.

As I have suggested, courts have not, for the most part, been sympathetic to employee claims. Indeed, some of the opinions seem to channel the surrealism of a Franz Kafka novel. I want to focus on a case that is generally regarded as the paradigmatic example of judges stretching neutral-sounding concepts to elevate an employer's right to break a promise over an employees' right to rely on a promise. The case is *Sprague v. General Motors*.

Sprague involved over 80,000 former salaried employees who were receiving benefits under a General Motors retiree health plan. General Motors repeatedly told its employees that the retiree health benefits were lifetime benefits and that General Motors would pay their full cost. But eventually, General Motors changed its corporate mind and amended the plan to introduce expensive deductibles and co-pays and to eliminate outright valuable benefits. I think from the vantage point of the retiree, there was a frightening aspect to GM's actions that went beyond the immediate changes to the plan. By amending the plan, GM signaled to the employees that it might make further changes to the plan and could, if it chose, eliminate the plan altogether.

GM's former employees sued to compel GM to keep its promises. About 50,000 of the retirees had retired early and I will focus on their story.

During the 1970s and 1980s, GM offered incentives to many of its older employees to retiree early. The benefits to which the employees were entitled included "lifetime" health benefits. Here is how GM typically described the healthy benefits to people trying to decide whether to take early retirement: "full basic health care coverage for life at no cost to the retirees." Most people would understand that statement to mean what it seemed to say: that if you retire, you can count of GM providing you with lifetime health benefits for your life. The

employees who opted for early retirement, partly on the basis of these lifetime health benefits, waived legal rights that they might have had against GM.

Moreover, over the years, GM had distributed to its employees official plan summaries, other written documents and, in some case, individualized letters to particular employees, that made similar representations to the one I just read, and GM managers often stressed to the employees the value of the lifetime medical benefits they would receive when they retired.

The actual GM retiree health plan, however, was a legal document that included boilerplate language reserving to GM the rights to modify or terminate the plan. It is unlikely that very many, if any, employees actually read the actual formal plan document (and it is likely that few employees ever even received it). Moreover, an employee might well have thought the explicit representations about lifetime benefits—made many times in many forms over many years—would have trumped any reserved employer rights.

Both the trial court and a three-judge panel of the Sixth Circuit Court of Appeals ruled for the employees under these circumstances. The gist of their rulings was that GM promised lifetime benefits to its early retirees and could not unilaterally break that promise.

The entire Sixth Circuit Court of Appeals, however, heard the case and reversed. Here is the essence of what it held: the only document that counted was the formal plan document. None of the other GM communications—not the summary plan descriptions, not the letters, not the other communications—could be consulted unless the formal plan itself was ambiguous about GM's right to modify the plan. But the plan document was not ambiguous, according to the Court, since that document expressly reserved GM's right to modify or terminate the plan. So the employees, including the early retirees who signed away various rights to accept what they thought were actual benefits rather than temporary gifts, were left with what most Americans, with the exception of a handful of judges, might call a broken promise.

Does this mean employees always lose? No. Employees with collective bargaining agreements can sometimes win their cases based on the negotiated agreement, especially if their cases are heard by judges whose world view does not predispose them to favor employer autonomy over worker financial security. In other cases, the plan document might be ambiguous and other employer communications might be considered, although here the Sixth Circuit seemed to say that a plan that includes a reservation of rights clause is crystal-clear evidence that the employer has not made a binding promise. And in some cases, some judges might treat the summary plan description as a plan document and find it significant that the description did not alert employees to the fact that the employer could change the plan, or drop the plan. And in other cases, some judges might hold that the employer violated fiduciary rules if it lied about benefits and employees reasonably relied upon the employer's misrepresentations.

We know that in a real work environment, rather than the imagined work environment conjured up by the judges in *Sprague*, employees tend to believe communications—oral and written—that they receive from their managers. They do not hire sophisticated lawyers to review plan documents and render opinions to them at $500 per hour on whether incomprehensible legalese buried deep within a plan trumps what otherwise appear to be clear promises.

So what should Congress do? Several people have suggested that it do nothing, but doing nothing means that retirees cannot rely on what appear to be clear promises and courts will occasionally rule for employees but more often will not. As Bill Payne, a lawyer who has litigated many retiree health care cases, has suggested, the outcome will often be foreordained by the ideological predisposition of the judges hearing a case rather than by the actual facts of the case.

Congress could try to level the playing field for employees with clear, reasonable, and consistent rules to guide judges who must determine whether the employer has made a promise

to its employees. Or Congress might say that plans can be modified by clear written and oral representations even if not embodied in the actual written formal plan document. Or Congress might consider legislation such as that introduced by Congressman Tierney that would make it difficult or perhaps impossible for an employer to terminate retiree health benefits after an employee has retired. Or Congress might try to help all older Americans have access to decent and affordable health care, not just those who were fortunate enough to have an employer who promised such benefits and fortunate enough to be assigned a federal judge who believes that promises made should be promises kept.