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Age Discrimination in Employee Benefit Plans: Are All Betts Off

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AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: ARE ALL *BETTS* OFF?

Public Employees Retirement System v. Betts[1]

Employee benefits comprise a substantial portion of the average employee's compensation.[2] Such benefits are especially important to older employees because of the more immediate nature of retirement and the greater need for health and disability benefits associated with the aging process.

The Age Discrimination in Employment Act of 1967 (ADEA)[3] was enacted to protect employees in all aspects of the employment relationship but it specifically exempts employee benefit plans from that

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1. 109 S. Ct. 2854 (1989).

2. Chen, *The Growth of Fringe Benefits: Implications for Social Security*, 104 MONTHLY LAB. REV. 3, 5 (1981). A report by the United States Department of Labor projects that the percentage of employee benefits of an employee's overall compensation will rise from 15.8 percent in 1980 to 37.8 percent in the year 2055. *Id.*

Actual and Projected Distribution of Total Compensation Between Cash Payroll and Fringe Benefits

	YEAR	CASH PAYROLL	FRINGE BENEFITS
Actual:			
	1950	95.0	5.0
	1960	92.2	7.8
	1970	89.7	15.8
	1980	84.2	15.8
Projected:			
	1990	80.6	19.4
	2000	77.5	22.5
	2020	71.5	28.5
	2035	67.4	32.6
	2055	62.2	37.8

Id. (Source: U.S. Department of Commerce; projections furnished by the Office of the Actuary, Social Security Administration).

3. 29 U.S.C. § 623(f)(2) (1988).

protection if certain requirements are met. The meaning and scope of this exemption is analyzed and redefined in *Public Employees Retirement System v. Betts*.[4]

I. FACTS AND HOLDING

In 1978, June M. Betts was hired by the Hamilton County Board of Mental Health and Retardation and Developmental Disabilities (HCMHRDD) as a speech pathologist.[5] Betts became unable to perform her job satisfactorily in 1984 due to health problems. As a result, she voluntarily accepted a less demanding position with HCBMRDD at a lower salary.[6] A year later, Betts again became unable to perform satisfactorily because of health problems.[7]

Consequently, HCBMRDD gave her the choice between voluntary retirement within ten days or a forced medical leave of absence. The former would provide her with a monthly income of $139.40 and medical benefits, while the latter would leave her without pay or medical benefits.[8] On June 3, 1985, at the age of 61, Betts chose to "voluntarily retire."[9]

Upon her retirement, Betts received $158.50 in age and service retirement benefits.[10] She also filed an application for disability retirement benefits to which she attached a physician's report indicating her permanent physical disability.[11] This application was denied pursuant to Ohio Revised Code section 145.35, which provides in part: "Application for disability retirement may be made by a member . . . provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement program."[12] Thus, Betts was denied disability retirement benefits despite

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4. *Betts*, 109 S. Ct. 2854 (1989).

5. Betts v. Hamilton County Bd., 631 F. Supp. 1198, 1201 (S.D. Ohio 1986), *aff'd*, 848 F.2d 692 (6th Cir. 1988), *rev'd*, 109 S. Ct. 2854 (1989).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1202. Sections 145.33 and 145.34 of the Ohio Revised Code Annotated provide that age and service retirement benefits are paid to those employees who at the time of their retirement (1) have at least 5 years of service credit and are at least 60 years of age; (2) have 30 years of service credit; or (3) have 25 years of service credit and are at least 55 years of age. OHIO REV. CODE ANN. §§ 145.33-.34 (Anderson 1984 & Supp. 1988).

11. *Betts*, 631 F. Supp. at 1201.

12. OHIO REV. CODE ANN. § 145.35 (Anderson Supp. 1988). The require-

her physical disability for the sole reason that she was 61 years old at the time of retirement.

If Betts had been allowed to take disability retirement, her monthly income would have been more than double the amount paid under the age and service retirement benefits.[13] This disparity would have occurred because of a 1976 amendment to the Public Employees Retirement System (PERS) statutory scheme. The amendment dictates that a retiree shall receive disability retirement payments in an annual amount no less than thirty percent of the retirant's final average salary.[14] Betts' final average salary was $14,260.00.[15] Therefore, if she had been eligible for monthly disability retirement payments, she would have received thirty percent of $14,260.00, or $355.02 per month. Betts filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) shortly after her retirement.[16] She also filed a suit for lost benefits and payment of attorney's fees arising out of PERS and HCBMRDD's alleged violation of the ADEA.[17]

The named defendants, HCBMRDD and PERS, made three arguments to the district court. First, they argued that since Betts had "voluntarily" retired she was precluded from bringing an action. She "voluntarily chose to retire instead of undergoing a medical examination to prove the need for placing her on a medical leave of absence and therefore, age was not a factor in the events giving rise to this litigation."[18] Second, the defendants argued that even if the plan was discriminatory, their actions fell under the statutory exemption provided by section 623(f)(2) of the ADEA.[19] Finally, the defendants argued that the disability retirement plan pre-existed the ADEA and therefore, it was lawful.[20]

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ments for disability retirement payments have remained the same since 1959. *Id.*

13. *Betts*, 631 F. Supp. at 1202.

14. OHIO REV. CODE ANN. § 145.36 (Anderson Supp. 1988).

15. *Betts*, 631 F. Supp. at 1202.

16. *Id.* at 1201.

17. *Id.* at 1200. Betts alleged that PERS and HCRMRDD's refusal to grant disability retirement benefits violated 29 U.S.C. §§ 621-631 (1982 & Supp. V 1987). *Id.* More specifically, the violation was of section 623(a)(1) which states that it is unlawful for an employer "to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1) (1982 & Supp. V 1987).

18. *Betts*, 631 F. Supp. at 1200.

19. *Id.* (citing 29 U.S.C. § 623(f)(2) (Supp. V 1988)).

20. *Id.* Defendant PERS independently asserted that it was not an employer for purposes of the Act. The district court rejected this argument and held that PERS was an employer because "it controls some aspects of the

While Betts's primary argument was HCRMRDD and PERS had violated section 623(a) of the ADEA, she also responded to the defendant's arguments. Betts asserted that the retirement plan is not protected by the section 623(f)(2) exemption because the plan does more than just reduce benefits, it precludes them altogether to persons of a certain age.[21] Next, Betts asserted that to be covered by the exemption, the plan must be justified by significant cost considerations. "[I]t [must] cost no more to provide disability benefits to a sixty-one-year-old employee than a twenty-five-year-old employee, provided both [have] the same number of service years and final average salary."[22]

The District Court for the Southern District of Ohio granted Betts's motion for summary judgment. It held that the disability retirement plan was discriminatory on its face and therefore, it violated the ADEA.[23] The district court then addressed the statutory exemption. The court stated that for the defendant's plan to qualify for the exemption, it must meet four criteria: 1) it must be the sort of "plan" covered by the exemption; 2) it must be "bona fide," which means that it exists and pays substantial benefits; 3) defendant's act must be in observance of its plan; and 4) the plan must not be a subterfuge to evade the purposes of the Act.[24] Adopting the EEOC regulations which interpret the section 623(f)(2) exemption, the district court held that an employee benefit plan could qualify for the exemption only if the age-related reductions in benefits were justified by "significant cost considerations."[25] Indeed, the district court stated that "[t]he critical factor in our determination of whether defendant's plan is the type of plan exempted is whether it is based upon age-related cost factors."[26] The court determined the PERS plan was not justified by cost considerations and was not the "type of plan contemplated by the exemption."[27] Thus, it was not entitled to protection under section 623(f)(2).[28]

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plaintiff's compensation, terms, conditions, and privileges of employment." *Id.* at 1206.

21. *Id.* at 1204.

22. *Id. Betts* relies on the EEOC regulation at 29 C.F.R. § 1625.10 (1988).

23. *Betts*, 631 F. Supp at 1203.

24. *Id.*

25. *Id.* at 1204.

26. *Id. See* 29 C.F.R. § 1625.10(a) (1988) (legislative history of this exemption provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations).

27. *Betts*, 631 F. Supp. at 1204.

28. *Id.* The district court did not address the issue of whether the plan was a subterfuge to evade the purposes of the ADEA. *Id.* at 1205.

A divided Sixth Circuit Court of Appeals affirmed the district court and adopted its reasoning as well.[29] The Sixth Circuit agreed that the plan was discriminatory and was not exempt under section 623(f)(2) unless justified by age-related cost considerations.[30] Specifically, the circuit court held that "[u]nder the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose."[31] In so holding, the circuit court rejected a prior Supreme Court decision which had provided that a discriminatory benefit plan need not be justified by any business purpose.[32] Since neither HCBMRDD nor PERS submitted any evidence of cost justifications or business purposes with respect to the plan, the court of appeals affirmed.[33]

Defendant PERS appealed to the United States Supreme Court. The Supreme Court reversed the lower courts and held: A benefit plan is entitled to the protection of the section 623(f)(2) exemption unless its plan is "a subterfuge to evade the purposes of the Act."[34] Subterfuge is defined as a "scheme, plan, stratagem, or artifice of evasion."[35] Therefore, pre-Act plans cannot be subterfuges and post-Act plans cannot be subterfuges unless they discriminate in a manner forbidden by the substantive provisions of the Act. The burden of proof is on the employee to prove intent to discriminate in the non-fringe benefit aspect of the employment relationship.[36]

II. LEGAL BACKGROUND

A. Legislative History

The Age Discrimination in Employment Act (ADEA) was enacted by Congress in 1967.[37] The Act itself sets forth its three primary purposes: 1) promoting employment of older persons based on ability rather than age; 2) prohibiting arbitrary discrimination in employment; and 3) promoting resolution of age-based employment problems.[38] The

29. *Betts*, 848 F.2d at 694-95.
30. *Id.* at 694.
31. *Id.* (emphasis added). The appellate court also relied primarily upon 29 C.F.R. § 1625.10 (1988) in reaching this conclusion. *Id.*
32. *Id.* (citing United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)).
33. *Id.*
34. *Betts*, 109 S. Ct. at 2858 (citing 29 U.S.C. § 623(f)(2) (Supp. V 1987)).
35. *Id.* at 2861 (quoting *McMann*, 434 U.S. at 203).
36. *Id.* at 2860-66.
37. 9 U.S.C. §§ 621-631 (1982 & Supp. V 1987).
38. *Id.* § 621(b).

ADEA has made discrimination in hiring, firing, and compensation on the basis of age unlawful.[39]

Despite the broad scope of the ADEA, Congress did see fit to provide some exemptions to the provisions of the Act. Section 623(f)(2) is the exemption in issue in *Betts* and reads in pertinent part: "It shall not be unlawful for an employer, employment agency, or labor organization to observe the terms of . . . any bona fide employment benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act."[40]

To comply with section 623(f)(2) and qualify for exemption from the anti-discriminatory provisions of the Act, a plan must meet three requirements. First, it must be a bona fide employee benefit plan. Second, the employer must be acting in observance of the terms of the plan. And third, the plan must not be a subterfuge to evade the purposes of the Act.[41] It also has been established that this provision is an affirmative defense, therefore, the burden of proof is "on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met."[42] In other words, the burden of proving these elements is on the employer.

This section has been referred to as the "pension plan exception."[43]

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39. Section 623 specifically provides that it is a violation for an employer:

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

29 U.S.C. § 623 (Supp. V 1987).

40. *Id.* § 623(f)(2); *see also id.* § 623(f)(1), (3) (additional statutory exemptions to the Act).

41. 9 U.S.C. § 623(f)(2) (1988); *see* EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982).

42. 9 C.F.R. § 1625.10(a) (1988); *see Home Ins. Co.*, 672 F.2d at 257; *accord Betts*, 848 F.2d at 692; EEOC v. City of Mt. Lebanon, 842 F.2d 1480, 1488 (3d Cir. 1988); *see also* Potenze v. New York Shipping Ass'n, Inc., 804 F.2d 235, 237 (2d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987); EEOC v. Westinghouse Elec. Corp., 725 F.2d. 211, 223 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). *See generally* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1257-61 (1981).

43. Comment, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 NOTRE DAME L.

A review of the legislative history will reveal the intent behind the exemption.

As initially proposed, the ADEA contained no provision dealing with age discrimination in employee benefit plans. The concern of several senators prompted an amendment to section 623(f)(2) which would allow employers to consider cost differentials when formulating employee benefit programs for older employees.[44] Without such a provision, the senators believed that employers would be discouraged from hiring older workers because of the additional expenses they would incur when older workers were placed in existing retirement plans.[45] Potentially, an older worker would qualify for retirement benefits much sooner than a younger employee. The additional expense would result because an older employee's contribution to the plan might not be as significant as a younger employee simply because of time. Legislators feared that employers "faced with the necessity of paying greatly increased premiums" might "look for excuses not to hire older workers."[46]

Congress designed the final draft of the amendment to alleviate this dilemma. The amendment's sponsor, Senator Jacob Javits, explained that with the provision "an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring workers."[47] The legislators felt the amendment was consistent with the stated purpose of the Act of promoting the hiring of older workers.[48]

The intent of the legislature to allow cost differentials in benefit plans for older workers in order not to discourage employers from hiring them was adopted by the EEOC in their interpretive regulations. "The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such

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REV. 323, 323 (1978).

44. *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967).

45. *See* 113 CONG. REC. 31,254-55 (1967) (remarks by Sen. Javits).

46. *Age Discrimination in Employment, 1967: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (statement of Sen. Javits).

47. 113 CONG. REC. 31,254-55 (1967).

48. H.R. REP. NO. 805, 90th Cong., 1st Sess. 27 (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2217; *cf.* Comment, *Age Discrimination in Private Pension Plans*, 9 SAN FERN. V.L. REV. 67 (1981)(section 4 (f)(2) provision is inconsistent with the primary purpose of the act—ending arbitrary age discrimination).

reductions are justified by significant cost justifications."[49] Specifically, the regulations required age-related cost justifications for a plan not to be considered a "subterfuge to evade the purposes of [the] Act."[50]

For an employer to prove that its benefit plan is justified by cost considerations and therefore not a subterfuge, it must insure that "the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage."[51] The cost data produced by the employer must be "valid and reasonable."[52]

Before 1978, case law resulting from the pension plan exemption almost exclusively focused on the issue of involuntary or mandatory retirement plans and whether they are protected under section 623(f)(2). Circuit courts reached conflicting decisions on this issue[53] and the Supreme Court eventually resolved it in *United Air Lines, Inc. v. McMann*.[54] In *McMann*, the Court held that the defendant's retirement plan, which resulted in involuntary retirement upon the attainment of age sixty, was exempt from the provisions of the Act under section 623(f)(2) because the plan was bona fide and not a subterfuge to evade the purposes of the Act.[55] Congress immediately found displeasure with the *McMann* holding. Thereafter, it soon passed amendments to the exemption which specifically prohibited involuntary retirement plans.[56]

The 1978 amendments ended the long debate over the lawfulness of involuntary retirement programs. Nevertheless, as one commentator noted, "The 1978 amendments . . . [left] an important question of

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49. 9 C.F.R. § 1625.10(a)(1) (1988).

50. *Id.* § 1625.10(d). Section 1625.10(d) states in part: "a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." *Id.*

51. *Id.* § 1625.10 (a)(1).

52. *Id.*

53. Certiorari was granted in *McMann* to expressly resolve the conflict between the holdings of the Fifth Circuit in Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974), and the Fourth Circuit in McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976). The Court also noted a conflicting decision in Zinger v. Blanchett, 549 F.2d 901 (3d Cir. 1977).

54. 34 U.S. 192 (1977).

55. *Id.* at 203.

56. 9 U.S.C. § 623(f)(2) (1978) (amending 29 U.S.C. § 623(f)(2) (1967)). The 1978 amendments added the following phrase to section 623(f)(2): "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual." *Id.*

interpretation . . . unresolved."[57] Employers can still grant unequal benefits to older employees under plans that are not "subterfuges."[58] The unresolved issue which courts faced after *McMann* involved the proper interpretation to give to the subterfuge clause.[59]

B. Pre-Betts Interpretation of Subterfuge

As previously stated, once a pension plan is determined to be "bona fide,"[60] and the employer has acted in "observ[ance] of the terms,"[61] then the plan's final hurdle is whether it is a "subterfuge to evade the purposes of the Act."[62]

The interpretation of the subterfuge clause was addressed first by the Supreme Court in *United Air Lines, Inc. v. McMann.*[63] In *McMann,* the defendant United Air Lines had established a retirement income plan in 1941.[64] In 1964, McMann, an employee of United, voluntarily joined the plan. McMann's application form contained language showing age 60 as the normal retirement age for participants in his category. When McMann reached age 60, he was "retired" over his objection. McMann brought suit under the ADEA.[65] The Court addressed the definition of subterfuge in determining the availability of the involuntary retirement provision. The Court's broad interpretation provided that "subterfuge must be given its ordinary meaning" which is a "scheme, plan, stratagem, or artifice of evasion."[66]

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57. Comment, *supra* note 43, at 327.

58. 9 U.S.C. § 623(f)(2) (1988).

59. The other two components of section 623(f)(2) will not be fully discussed in this Note because they were not issues in the primary case and they are beyond the scope of this Note. For general information concerning these components, see 29 C.F.R. § 1625.8 (1988); *see also* 29 C.F.R. § 1625.10(b)(c) (1988). *See generally* Reinhart, *Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?* 135 U. PA. L. REV. 1055 (1987).

60. Section 1625.10(b) states that a plan is bona fide "if its terms . . . have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan." 29 C.F.R. § 1625.10(b) (1988).

61. Section 1625.10(c) states that this requirement is meant to limit the exemption to "otherwise discriminatory actions which are actually prescribed by the . . . plan." 29 C.F.R. § 1625.10(c) (1988). There must be "express provisions to . . . provide lesser benefits to older workers." *Id.*

62. 9 U.S.C. § 623(f)(2) (1988).

63. 34 U.S. 192 (1977).

64. *Id.* at 194.

65. *Id.*

66. *Id.* at 203.

Using this definition, the Court held that a plan established *prior* to the enactment of the ADEA in 1967 could not be a subterfuge.[67] By requiring a subterfuge to be a plan or scheme, the Court implanted the element of subjective intent which had not been present in the previous definitions. Applying this definition to the facts in *McMann*, the Court reasoned that "[t]o spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer."[68] Henceforth, plans established before 1967 could not be subterfuges even if they set forth blatantly discriminatory practices. The Court also rejected any per se rule requiring an employer to show an economic or business purpose behind the discriminatory practice to qualify for the exemption under the subterfuge test.[69]

After *McMann* and the 1978 amendments overruling it, confusion developed about the proper interpretation for the subterfuge clause. While purporting to overturn *McMann*, the 1978 amendments only contained language pertaining to involuntary retirement with no mention of the subterfuge clause.[70] There was a verbal repudiation of *McMann*'s definition of subterfuge, but the amendments lack any language expressing this congressional intent.[71] Therefore, courts have been uncertain whether the amendments are meant to overrule *McMann* in its entirety, or only as it pertains to involuntary retirement plans. The *McMann* definition was only practical with respect to plans adopted before 1967; it provided little guidance in interpreting post-Act plans. In addition, the EEOC regulations interpreting section 623(f)(2) set forth a system in which a discriminatory plan is a subterfuge unless it can be justified by age-related cost considerations.[72] These aspects of the subterfuge clause are best explained by discussing them in context with the circuit courts' interpretation of the clause since 1978.

Essentially, the five circuit courts addressing the subterfuge issue have followed the interpretation set forth by the EEOC regulations. They have required some type of cost-justification or business purpose test for a plan not to be considered a subterfuge.[73] The Second Circuit

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67. *Id.*

68. *Id.*

69. *Id.*

70. 9 U.S.C. § 623(f)(2) (1988).

71. H.R. CONF. REP. NO. 95-950, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 528, 529.

72. 9 C.F.R. § 1625.10(d) (1988). The only exception to this rule concerns specific types of retirement plans such as employee contributions in support of employee benefit plans. *See* 29 C.F.R. § 1625.10(d)(4)(i)-(iii) (1988).

73. Betts v. Hamilton County Bd., 848 F.2d 692 (6th Cir. 1988), *rev'd*, 109 S. Ct. 2854 (1989); EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988);

was one of the first to address this issue. In *Cipriano v. Board of Education,*[74] the Second Circuit noted the importance of the 1979 regulations in interpreting section 623(f)(2). It noted that "[t]hese regulations, enacted *after* the 1978 amendments went into effect, clearly assume that the 'subterfuge' requirement has continued vitality, and seem to put a fairly heavy burden on the employer to justify any age-based distinctions in employee benefit plans on the basis of 'age-related cost justifications.'"[75] The Second Circuit noted that the 1978 amendments did not reverse *McMann* in its entirety.[76] Despite this finding, the circuit court ultimately held that an employer had to present "some evidence that the plan is not a subterfuge . . . by showing a legitimate business reason for structuring the plan as it did."[77]

The Third Circuit has been more willing to utilize the EEOC regulatory interpretation with respect to benefit plans in existence after the enactment of the ADEA in 1967. In *EEOC v. City of Mt. Lebanon,*[78] the Third Circuit was confronted with a disability retirement plan adopted in 1973. The plan was allegedly discriminatory because:

> 1) it did not provide benefits until age sixty-five for those disabled before age sixty; 2) it failed to provide benefits for five years for those disabled between age sixty and sixty-five; [and] 3) it failed to provide benefits until age seventy for individuals disabled between the ages of sixty-six and sixty-eight.[79]

Because Mt. Lebanon provided a cost justification for these discriminatory provisions derived from insurance schedules, the district court granted its motion for summary judgment.[80]

Karlen v. City Colleges, 837 F.2d 314 (7th Cir.), *cert. denied,* 108 S. Ct. 2038 (1988); Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986); Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982). Justice Marshall also cited EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984), in this list in his dissent in *Betts.* The *Borden's, Inc.* decision, however, turned on the fact that the plan contested there was not a "bona fide" plan. *Id.* at 1396. But the Ninth Circuit recognized the applicability of the regulations to the subterfuge clause in dicta. *Id.*

74. 85 F.2d 51 (2d Cir. 1986).

75. *Id.* at 58.

76. *Id.*

77. *Id.*; *see* EEOC v. Home Ins. Co., 672 F.2d 252, 258 (2d Cir. 1982) (ruling in *McMann* did not relieve all employers of obligations to prove valid business purposes, especially with respect to pertinent parts of the plans adopted after the ADEA).

78. 42 F.2d 1480 (3d Cir. 1988).

79. *Id.* at 1484-85.

80. *Id.* at 1485.

On appeal, the Third Circuit addressed the issue of what constitutes a subterfuge and whether the plan was a subterfuge. First, the circuit court dismissed *McMann's* definition as exceedingly broad.[81] It then turned to the legislative history of the provision. The Third Circuit recited the intent of Congress as providing an incentive for employers to hire older workers by allowing flexibility in benefit plans. "Thus, the [section] 623(f)(2) exception was based upon the principle that employers should be relieved of the obligation of providing older employees with benefits equal to benefits for younger employees when it would be more costly to do so."[82] The Third Circuit believed the federal regulation was consistent with congressional intent because it allowed employers to reduce benefits to older workers when necessary "to achieve approximate equivalency in cost for older and younger workers."[83] The circuit courts gave deference to the regulation because it was a "long-standing and contemporaneous agency interpretation" that did not "lack support in the statutory language or legislative history."[84]

The decision in *Mt. Lebanon,* however, is different from the other circuits because it requires that in addition to cost justifications for the plan, the employer's *subjective intent* must be reviewed as well.[85] Thus, the circuit court held that the lack of cost justifications "may not be conclusive if the employer can establish that it acted in good faith."[86] But the good faith element in no way relieved the employer of the burden of producing cost data to prove a correlation between age and costs.[87]

In *Crosland v. Charlotte Eye, Ear & Throat Hospital,*[88] the Fourth Circuit reached a result similar to the Third Circuit's, but it did not discuss the subjective element. The Fourth Circuit held that because the 1978 amendments had not overruled *McMann's* interpretation of subterfuge, plans predating the ADEA were not subterfuges. The Fourth Circuit cited *McMann* in holding that a plan formed after the ADEA was not a subterfuge if the employer could show a "business or economic purpose" for the plan or its provision.[89]

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81. *Id.* at 1488.

82. *Id.* at 1489.

83. *Id.* at 1493 (citing 29 C.F.R. § 860.120(a)(1) (1988)).

84. *Id.*

85. *Id.* at 1494.

86. *Id.*; *see McMann,* 434 U.S. at 203.

87. *Mt. Lebanon,* 842 F.2d at 1494. Consequently, the Third Circuit vacated the summary judgment. *Id.* On remand, the court required Mt. Lebanon to justify its plan in view of cost considerations and establish that it acted in good faith. *Id.*

88. 86 F.2d 208 (4th Cir. 1982).

89. *Id.* at 213.

The remaining circuits following the EEOC regulations have required the employer to show some type of cost justification for the plan not to be considered a subterfuge.[90] All of these circuits dealt exclusively with post-Act plans or material provisions that had been added to pre-Act plans after 1967. This allowed the circuits to minimize the holding in *McMann* by limiting it to pre-Act plans.

Each circuit court faced with a plan enacted before the ADEA consistently followed *McMann* and ruled that the plan was not a subterfuge to evade the purposes of the Act.[91]

An illustration of the courts' reasoning in these cases is found in *EEOC v. County of Orange*.[92] That case revolved around a benefit plan established in 1951 which limited membership to employees under 35 years of age at the time of employment.[93] The EEOC claimed that the regulations interpreting the statute required the County to demonstrate that the age restrictions were justified by cost considerations. It also claimed that "both *McMann*'s specific holding as to involuntary retirement *and* its conclusion that a benefit plan predating the Act cannot be a subterfuge" were overruled by the 1978 amendments.[94]

The Tenth Circuit rejected both of these arguments. First, the court held that it was not bound by the regulation's interpretation.[95] Second, it held that the 1978 amendments only applied to involuntary retirement plans and that Congress presumptively "adopted *McMann*'s definition of subterfuge when it reenacted 4(f)(2) without amending the subterfuge language."[96] Therefore, the County's plan adopted in 1951 could not be a subterfuge.

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90. *See* Karlen v. City College, 837 F.2d 314, 318 (7th Cir. 1988), *cert. denied*, 108 S. Ct. 2854 (1989) (exemption requires employer "to prove a close correlation between age and cost" and, if not proven, inference of age discrimination strong enough to defeat motion for summary judgment); *see also Betts*, 848 F.2d at 694 (held that 1978 amendments overruled *McMann* entirely, therefore only way to disprove subterfuge was through cost-justification).

91. *See* EEOC v. Cargill, 855 F.2d 682 (10th Cir. 1988); *accord* EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988); EEOC v. Maine, 644 F. Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987); International Bhd. of Elec. Workers Local 1139 v. Union Elec. Co., 585 F. Supp. 261 (E.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985).

92. 37 F.2d 420, 422 (9th Cir. 1988).

93. *Id.* at 421.

94. *Id.* at 422.

95. *Id.* at 422 n.2.

96. *Id.* at 422; *see Cargill*, 855 F.2d at 686 (language of statute must be the primary source of interpretation and the 1978 amendments only specific with respect to involuntary retirement programs); *see also* EEOC v. Maine, 823 F.2d 542, 545 (1st Cir. 1987) (bona fide employee benefit plan whose age-based provision antedate the ADEA are per se exempt under 4(f)(2)).

To recapitulate, prior to 1989, circuit courts addressing post-Act plans or amendments to pre-Act plans left little room for doubt that age-based cost justifications were necessary to avoid the conclusion that such plans were subterfuges to evade the purposes of the Act. Courts recognized the continued validity of the *McMann* definition of subterfuge, but limited its application to plans pre-dating the Act. Courts reasoned that this result was consistent with the purpose of the Act in that one of its primary purposes was to encourage employers to hire older persons. Employers were encouraged to do so still without facing increased costs for benefit plans.[97] At the same time, the other primary purpose of eliminating arbitrary age discrimination was served by forcing employers to justify any discrepancies with specific age-related cost data.[98] The ability of employers to avoid penalties for arbitrary discrimination was made a bit easier by some courts' requirement of a subjective intent in addition to the absence of cost-justifications.[99]

C. Betts' *Impact on the Interpretation of the Subterfuge Clause*

The Supreme Court's decision in *Betts* is significant because it overturns all prior circuit court decisions addressing post-Act plans and invalidates the federal regulation that required a plan to have an age-related cost justification to avoid being a subterfuge under section 623(f)(2).[100] The Court's decision is especially important because it redefines "subterfuge" with respect to post-Act benefit plans.[101] All prior courts examining plans of this type followed the EEOC regulations and required some type of cost-justification or business purpose to disprove subterfuge.[102] The *Betts* court, however, specifically holds

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97. *See supra* notes 70-87 and accompanying text.

98. *See supra* notes 70-87 and accompanying text.

99. *See supra* notes 85-87 and accompanying text.

100. *Betts*, 109 S. Ct. at 2858-69. The Court also held that the phrase "compensation, terms, conditions, or privileges of employment" set forth in section 4(a)(1) does not encompass employee benefit plans. *Id.* at 2866. To conclude otherwise, "would render the § 4(f)(2) exception nugatory with respect to post-Act plans." *Id.*

101. *Id.* at 2862. Betts attacked the Ohio plan on the basis that disability retirees automatically received a minimum of thirty percent of their final average salary while disabled employees retiring after age sixty did not. This provision of the plan was adopted in 1976. *Id.* The Court held that *McMann* did not "insulate" the plan from challenge in that *McMann* applies to acts predating the ADEA. *Id.*

102. *See supra* notes 73-87 and accompanying text.

that the "the interpretative regulation construing § 4(f)(2) to include a cost-justification requirement is . . . invalid."[103]

The Court reached this conclusion by adopting the "plain meaning" interpretation it had used in *McMann*.[104] Despite the ten year acceptance of the EEOC regulations, the Court stated that "this approach . . . cannot be squared with the plain language of the statute."[105] The Court continued by reasoning that the plain definition of subterfuge as a "scheme, plan, stratagem, or artifice of evasion" includes a subjective intent which is not considered in the objective nature of the cost-justification requirement.[106]

Betts and the EEOC asserted that the cost-justification regulation was "contemporaneous and consistent" with the interpretation of the ADEA and was given by the agency responsible for the Act's enforcement.[107] Thus, the regulation should be given "special deference."[108] The Court rejected this argument for the same reason that it rejected the regulation—the agency's interpretation was inconsistent with the plain language of the statute.[109] "[A]gency interpretations must fall to the extent they conflict with statutory language."[110] With regard to this conclusion, the Court noted that although the "cost-justification" first appeared in 1969, subsequent regulations impermissibly narrowed "a nonexclusive objective test for employers" to an exclusive cost based analysis.[111]

Betts tried to rely on the legislative history of the ADEA to show congressional intent expressed during debates on the 1978 amendments. She specifically cited remarks of Senator Javits and Representative Warman that the conferees of the Conference Committee disagreed with *McMann*, "particularly its conclusion that an employee benefit plan which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA."[112] The Court disregarded this reliance by refusing to consider legislative history and conclusively held that the subterfuge exemption could not be limited by the regulation.[113]

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103. *Betts*, 109 S. Ct. at 2865.
104. *McMann*, 434 U.S. at 203.
105. *Betts*, 109 S. Ct. at 2863.
106. *Id.*
107. *Id.*
108. *Id.*; *see* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600, n.17 (1981).
109. *Betts*, 109 S. Ct. at 2863.
110. *Id.*
111. *Id.*
112. *Id.* at 2861 (quoting 124 CONG. REC. 7881 (1978)).
113. *Id.* at 2863-64. The Court also addressed whether a cost-justification

After invalidating the standing interpretation of the subterfuge clause with respect to post-Act plans, the Court determined how an employer claiming the exemption will be afforded protection in the future. The Court held that a bona fide benefit plan is not a subterfuge "so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship."[114] In effect, the Court ruled that in addition to demonstrating disparate employee benefits, a plaintiff employee would have to demonstrate some other form of discrimination in the terms, conditions, or compensation of employment in order to establish a violation. This holding broadens the scope of the exemption and adds a subjective element to the subterfuge clause not required previously with post-Act plans.

The Court reached this conclusion by reasoning that the existence of the exemption is conclusive evidence that "not all age discrimination in employment is 'arbitrary.'"[115] Therefore, Congress must have intended to only eliminate "arbitrary" discrimination, and the pension plan exemption is an area where discrimination is not arbitrary. Thus, the Court looked to the substantive provisions of the Act to determine the types of activities that Congress considers to be arbitrary.[116]

The Court supported its broad interpretation by examining the legislative history of the Act and Congress' intent with respect to the intended scope of the Act. It relied on Senator Javits's statement in committee hearings that "'the age discrimination law is not the proper place to fight the battle of ensuring 'adequate pension benefits for older workers'" to show that "Congress envisioned a broader role" for the exemption.[117] The Court also cited committee reports on the ADEA in 1967 which state that the section 4(f)(2) exemption "serves to emphasize the primary purpose of the bill-hiring of older workers—by

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requirement could be read into the provision of section 623(f)(2) which requires the plan to be "any bona fide employee benefit plan such as a retirement, pension or insurance plan." *Id.* at 2865 (quoting 29 U.S.C. § 623(f)(2) (1988)). Two circuit courts have used this clause to limit the exemption to plans in which all age-based discrepancies in benefits are justified by age-related cost considerations. *See* EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 224 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *see also* EEOC v. Borden's, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984). Since this interpretation was not the prevailing view in prior case law, it is enough to note that the *Betts* Court rejected this interpretation because it is "contrary to the plain language of the statute." *Betts*, 109 S. Ct. at 2864-65.

114. *Betts*, 109 S. Ct. at 2866.

115. *Id.* at 2865 (quoting 29 U.S.C. § 621(b) (1988)).

116. *Id.*; *see* 29 U.S.C. § 623(a) (1988).

117. *Betts*, 109 S. Ct. at 2867 (quoting 113 CONG. REC. 7076 (1967)).

permitting employment without necessarily including such workers in employee benefit plans."[118]

In an effort to show that its new definition does not render the subterfuge clause a "dead letter," the Court gave some examples of the types of employer conduct that are not protected by section 623(f)(2). One example is a situation in which an employer reduces salaries for all employees but substantially increases benefits for younger employees. The Court stated that this "might give rise to an inference that the employer was in fact utilizing its benefits plan as a subterfuge for age-based discrimination in wages, an activity forbidden by § 4(a)(1)."[119]

Additionally, *Betts* shifted the burden of proof from the employer and placed it on the employee plaintiff.[120] No longer is the exemption an affirmative defense as previously established. Instead, the Court interpreted it as a "description of the type of employer conduct that is prohibited in the employee benefit plan context."[121] This holding substantially alters the legal burden of the employee in an age discrimination case concerning benefit plans.

The dissenting opinion, written by Justices Marshall and Brennan, concluded that the majority's opinion "immunizes virtually all employee benefit programs from liability."[122] The employer will not be liable though he is "unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes of them."[123]

The dissent argued that any plan not justified by a business purpose would "contravene the text and history of the [ADEA]."[124] The cost justification or business purpose justification is clearly set forth in the legislative history of the exemption and the long established regulations interpreting it.[125]

The majority's plain meaning approach completely ignored the rules of statutory interpretation which command that legislative history be

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118. *Id.* (quoting S. REP. No. 723, 90th Cong., 1st Sess. 4 (1967)).

119. *Id.* at 2868.

120. *Id.*

121. *Id.*; *see* Robinson v. County of Fresno, 882 F.2d 444, 446 (9th Cir. 1989) (court upheld dismissal of complaint citing *Betts* for proposition that the employee has the burden to show the plan was intended to serve the purpose to discriminate in some non-fringe benefit aspect of employment).

122. *Betts*, 109 S. Ct. at 2869.

123. *Id.*

124. *Id.*

125. *See supra* notes 37-52 and accompanying text; *see also* 29 C.F.R. § 1625.10 (1988).

used to interpret an ambiguous statutory provision.[126] Consequently, the majority "pauses not a moment on the provision's purposes or legislative history."[127] The dissent found this especially ironic because the majority's construction of the new interpretation of subterfuge supposedly was based on legislative history. In the words of Justice Marshall: "the business purpose interpretation fails because the plain language of the statute does not command it, but the majority's interpretation succeeds because the plain language of the statute does not preclude it."[128]

The dissent also articulated three reasons why the legislative history supports a cost-justification interpretation of subterfuge. First, statements made by the sponsors of the exemption demonstrate that it was "intended to protect benefit plans with economic justifications . . . and did not intend categorically to immunize benefit plans from liability for unjustified discrimination."[129] Second, the legislative history cited by the majority to support its broad interpretation were not isolated and not persuasive because they pre-dated the final amendment to the exemption proposed by Senator Javits.[130] Finally, the legislative history lacks any endorsement of the majority's interpretation of the subterfuge clause.[131]

III. ANALYSIS

The decision in *Betts* is faulty for several reasons but the primary flaw is that it is blatantly inconsistent with the expressed statutory purpose of the ADEA. In section 621(b), Congress specifically provided that one of the purposes of the Act is to prohibit arbitrary age discrimination in employment.[132] By invalidating the regulations which

126. *Betts*, 109 S. Ct. at 2870

127. *Id.*

128. *Id.* at 2872.

129. *Id.* at 2873; *see* 113 CONG. REC. 31,254-55 (1967) (statement by Sen. Javits).

130. *Betts*, 109 S. Ct. at 2873.

131. *Id.* It should be noted that even if the legislative history did not support a cost-justification requirement, the dissent would still adopt such an interpretation. The regulations interpreting the provision have adopted a cost-justification interpretation and the dissent indicated that courts should give deference to "enforcement agencies' reasonable interpretations of ambiguous statutory provisions." *Id.* at 2874; *see* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984).

132. 29 U.S.C. § 621(b) (1982). The statute also states that one of the purposes of the Act is to promote the employment of older workers, however, this purpose is arguably subordinate to the purpose of prohibiting arbitrary age discrimination as evidenced by the very name of the Age Discrimination in

require cost-justifications of discriminatory benefit plans, the Court gave employers free rein to arbitrarily discriminate on the basis of age in benefit plans. This essentially completes the immunization process the Court began in *McMann* when it held that pre-Act benefit plans could not be subterfuges because there can be no intent to evade the purposes of the Act.[133] By holding that a post-Act employee benefit plan cannot be a subterfuge unless the employee can show some non-fringe benefit aspect of discrimination, the immunization process is complete.

The majority opinion is flawed also because, as the dissent points out, it completely ignored the wealth of legislative history and interpretations of regulations provided by Congress and the EEOC. Consequently, its "plain meaning" interpretation is inconsistent with the purpose of the exemption.

Legislative history, beginning in 1967, has supported some type of cost justification before a plan will not be considered a subterfuge. The original purpose for the exemption was to spare employers the burden of incurring additional expense in benefit plans when hiring older workers who would not be able to make the same contributions as younger workers. In the words of Senator Javits, "The meaning of this § 4(f)(2) provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers."[134] During the passage of the 1978 amendments, the managers of the amendments and others repeatedly and specifically endorsed the understanding that section 4(f)(2) only protected discrimination in benefit plans that were justified by cost considerations.[135]

By ignoring the legislative history, the Court made a decision contrary to the purpose of the exemption. Instead of relieving the burden of additional expenses associated with hiring older workers, the Court relieved the burden of *all* expenses.

The Court tried to convince itself that the new definition of subterfuge will not render the provision completely useless. It even went so far as to provide examples of situations in which a discriminatory practice in an employee benefit plan would be subterfuge because it would result in discrimination in some other "non-fringe benefit" aspect of employment.[136] The Court stated that the exemption would not

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Employment Act. *Id.*

133. *McMann*, 434 U.S. at 203.

134. 113 CONG. REC. 31,255 (1967) (emphasis added).

135. *See* 124 CONG. REC. 8,218 (1978); *see also* 124 CONG. REC. 7,881 (1978) (remarks by Rep. Hawkins that the "purpose of § 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits when the cost of providing benefits to older workers is substantially higher").

136. *Betts*, 109 S. Ct. at 2867-68.

apply in a situation where the employer decreases benefits to all employees, but then increases benefits to only younger employees.[137] The exemption would not apply because the result of these actions is to discriminate with respect to age in a non-fringe benefit aspect of employment.[138] Using this test, if an employer just increased benefits to younger employees and not to older employees, the exemption would protect the employer because there would be no effect on the non-fringe benefit aspect of employment. Thus, the discriminatory practice would be protected regardless of whether there was cost justification for the increase. It is very difficult to believe that the same Congress who enacted the ADEA to protect older employers would allow the section 4(f)(2) exemption to be wielded by employers to implement discriminatory practices without any sort of justification.

Even accepting the Court's invalidation of the EEOC regulation and its reversal of all the circuit courts addressing the subterfuge issue, the new definition proposed by the Court is completely unacceptable. By shifting the burden of proof to the employee and requiring her to prove discrimination in both benefit plans and the non-fringe benefit aspect of employment, the Court puts an insurmountable road block in front of employees. In his testimony before the Senate Special Committee on Aging, Christopher Mackaronis, former Senior Staff Attorney in the Office of Legal Council at the EEOC, predicted that if the *Betts* standards remain in effect, "Congress should anticipate the elimination of almost all employee benefit litigation under the ADEA."[139] He explained that "[u]nder the Court's 'benefits discrimination *plus*' formulation, prudent counsel will be forced to search for direct evidence of an employer's 'intent' to discriminate in a nonfringe-benefit aspect of employment prior to instituting litigations."[140] Because employers will rarely announce an intention to discriminate in benefit plans as a means of accomplishing some other unlawful objective, this type of evidence will be extremely difficult to uncover.

The Court's interpretation and the EEOC regulation's interpretation of subterfuge are at opposite extremes. As previously discussed, the *Betts* definition broadens the definition to protect even the most discriminatory plans. The EEOC cost justification requirements are arguably too restrictive because they only provide two methods by which employers can justify their benefit plans.[141] A possible compromise

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137. *Id.* at 2868.

138. *Id.*

139. *Testimony of Christopher Mackaronis: Hearings on S. 1511 Before the Senate Special Comm. on Aging and the Labor Subcomm. of the Labor and Education Comm.*, 101th Cong., 1st Sess. 7 (1989).

140. *Id.*

141. *See* 29 C.F.R. § 1625.10(d) (1988) (cost comparisons and adjustments

consistent with the statutory purpose of the Act and the legislative purpose of the exemption might be some type of business justification requirement. Employers who could not justify their discriminatory benefit plan by age-related cost data would be allowed to prove a legitimate business purpose for the practice. If the employer could meet this burden, the plan would not be a subterfuge to evade the purposes of the Act. This definition of subterfuge was adopted by several of the circuit courts addressing the issue.[142]

The best interpretation of subterfuge is the straight cost-justification requirement. It is consistent with the legislative intent for the exemption and does not violate the statutory purpose of the Act by prohibiting arbitrary discrimination. But it is only consistent if the burden of proof is returned to the employer and the provision is treated as an affirmative defense as originally intended. If the burden of proof is left with the employee as the Supreme Court desires, the difficulty associated with proving that a particular plan is not justified by cost considerations would defeat the purposes of the Act.

IV. CONCLUSION

There is presently a movement in Congress to overturn *Betts*.[143] The battle to reverse *Betts* is led by the EEOC and several senior citizens advocacy groups such as the American Association of Retired Persons.[144] The EEOC has particular interest in overturning *Betts* because of thirty pending cases challenging the benefit plans as unlawful under the ADEA. EEOC representatives have stated that "[a]bsent quick remedial legislation, half of these cases would have to be dismissed in light of Betts."[145]

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under section 4(f)(2) must be made on a benefit-by-benefit basis or on a "benefit package" basis).

142. *See* Karlen v. City Colleges, 837 F.2d 314 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988).

143. Almost immediately after the decision was announced, S. 1511, 101st Cong., 1st Sess. (1989), and H.R. 3200, 101st Cong., 1st Sess. (1989), were introduced to overturn the decision. The bills are identical and both seek to restore the pre-*Betts* definition of subterfuge. If enacted, they would overturn *McMann* and apply the cost-justification requirements to pre-Act plans as well.

144. *See The Older Worker's Benefit Protection Act, 1989: Hearings on S. 1511 Before the Subcomm. on Labor of the Senate Special Comm. on Aging*, 101st Cong., 1st Sess. (1989) (statement of Horace B. Deets, Exec. Director, AARP).

145. *EEOC Favors Action to Amend ADEA in Light of Betts Decision*, 16 Pens. Rep. (BNA) 1694, 1994 (Sept. 25, 1989).

Even if legislation does not overturn *Betts*, its impact may be limited in practice by employee relations considerations.[146] Because the previous regulations have been in effect for twenty years, most benefit plans having discriminatory effects are likely justified by age-related cost considerations. If an employer began making changes in benefits plans that discriminate against older workers, serious employee relations problems could develop. A change in employment relations could result in the passage of legislation to overturn *Betts*.

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146. 5 WYATT, THE COMPENSATION AND BENEFITS FILE 7 (1989).