

# The “Gaming” of Pension Plan Actuarial Assumptions

A Lexis Practice Advisor® Article by Jeffrey D. Mamorsky, Greenberg Traurig, LLP



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This article discusses the use of actuarial assumptions in calculating benefits under defined benefit pension plans. It was nearly 20 years ago, amidst an operational compliance review of a Fortune 25 company’s defined benefit pension plans, that the plan sponsor’s CFO alerted me to a front-page [New York Times](#) article on the “gaming” of pension plan actuarial assumptions. He asked that I expand my review to ensure that the selection of actuarial assumptions for his company’s defined benefit plans were conducted in a prudent, objective manner. The *New York Times* article detailed the collapse of pension plans as the result of the selection of improper actuarial assumptions that saved companies millions of dollars in pension contributions. According to the article, companies had been caught gaming pension assumptions based on ERISA only requiring the use of “reasonable” assumptions and “actuarial equivalence.” These terms are not defined in ERISA and could mean different things to different people, particularly different actuaries. Fast forward to 2020 and not much has changed.

For over a year, there have been challenges to the use of pension plan mortality assumptions and, in particular, claims alleging that the use of older mortality tables in connection with the calculation of joint and survivor benefits violate ERISA’s anti-cutback rule. See ERISA § 204(g) (29 U.S.C.

§ 1054(g)); I.R.C. § 411(d)(6). To date, 11 cases have been filed and all defendants have moved to dismiss the claims on various grounds. One case was settled. *DuBuske v. PepsiCo, Inc.*, 2019 U.S. Dist. LEXIS 164383 (S.D.N.Y. 2019); [Stipulation of Dismissal](#). Two other courts denied motions to dismiss and concluded that discovery was necessary before ruling on the merits of the claims. *Smith v. U.S. Bancorp*, 2019 U.S. Dist. LEXIS 107481 (D. Minn. 2019); *Torres v. Am. Airlines, Inc.*, 2019 U.S. Dist. LEXIS 225978 (N.D. Tex., 2019). Another court granted a motion to dismiss for all counts to the extent they are based on ERISA’s anti-forfeiture provision but denied for those that are based on violations of ERISA’s early retirement and joint and survivor provisions which depend on the meaning of the term “actuarial equivalent” and the definition of that term is “far from clear.” *Belknap v. Partners Healthcare Sys.*, 2020 U.S. Dist. LEXIS 139187, \*3 (D. Mass. 2020). There are other motions to dismiss pending or decided throughout several district courts. See, e.g., *Smith v. Rockwell Automation, Inc.*, 438 F. Supp. 3d 912 (E.D. Wis. 2020); *Herndon v. Huntington Ingalls Indus.*, 2020 U.S. Dist. LEXIS 102338 (E.D. Va. 2020).

## Reasonableness of Actuarial Factors for Calculating Joint and Survivor Annuities

Retirees brought an action in a New York federal district court claiming that their former employer’s pension plan did not use reasonable mortality or interest rates in determining “actuarial equivalence” for a joint and survivor annuity.

The court granted the employer's motion to dismiss, emphasizing two points:

- ERISA does not require "reasonable" actuarial factors for calculating joint and survivor annuities.
- The reference in ERISA's anti-forfeiture provision to accrued benefits only protects participants when they reach normal retirement age and, in this instance, the participants bringing the action chose to retire early.

ERISA § 303(h) (29 U.S.C. § 1083(h)); DuBuske, 2019 U.S. Dist. LEXIS 164383.

## Early Retirement Pensions Not "Actuarially Equivalent"

A Minnesota district court has ruled that retirees can move forward with claims that their early retirement pensions were not "actuarially equivalent" because they were calculated using out-of-date interest rates and life expectancy data which caused their benefits to be lower.

In so ruling, the court rejected the employer's argument that the retirees are trying to impose a reasonableness requirement into ERISA's pension calculation rules. The retirees are not seeking reasonableness, said the court, but actuarial equivalence, which is required by ERISA. U.S. Bancorp, 2019 U.S. Dist. LEXIS 107481.

## Another Motion to Dismiss Denied

A Texas district court also denied an employer's motion to dismiss. According to the court, the retirees adequately claimed that the employer's use of a 1984 mortality table and 5% interest rate assumption resulted in benefits that are not the "actuarial equivalent" of what they would have received had they taken the single life annuity, as required by ERISA. Torres, 2019 U.S. Dist. LEXIS 225978.

In so holding, the court said it was not convinced by the employer's argument that its use of the 1984 mortality table was reasonable, according to IRS regulations, because the regulations relate to whether benefits are discriminatory under Internal Revenue Code rulings and do not concern the actuarial equivalence requirements at issue.

Also, the retirees argued that the employer had used updated mortality assumptions when calculating the amounts the employer must contribute to fund the plans but used 1984 mortality data when determining the amount of those benefits. Torres, 2019 U.S. Dist. LEXIS 225978, \*6.

### Mixed Order on Motion to Dismiss

A Massachusetts district court granted an employer's motion to dismiss a lawsuit by retirees alleging the use of outdated actuarial information for the calculation of early retirement joint and survivor benefit payments to the extent the counts are based on a violation of the ERISA § 203(a) anti- forfeiture provision which applies only to normal retirement benefits. Belknap, 2020 U.S. Dist. LEXIS 139187.

On the other hand, the court denied the motion to dismiss counts relating to alleged violations of ERISA §§ 204(c)(3) or 205 which require that early retirement benefits be the "actuarial equivalent" of a benefit commencing at normal retirement age. ERISA §§ 204(c)(3), 205 (29 U.S.C. §§ 1054(c)(3), 1055).

The court also emphasized that, according to the complaint, the employer used "typical and up-to-date actuarial assumptions" when calculating the value of all benefit forms for its financial statements **and** used the old 1950s-era inputs (an inflated interest rate of 7.5% and a 1951 Group Annuity Mortality Table) to calculate actuarial equivalence for joint and survivor benefits which is a clear violation of the actuarial equivalence standard.

## Best Line of Defense

Whether actuarial equivalence assumptions for converting a single life annuity to a joint and survivor annuity are unreasonable, result in lower benefits, and therefore violate ERISA generally may not survive a motion to dismiss. Like excessive fee cases, companies may be inclined to settle rather than incur hefty legal fees. Implementation of an independent, robust, and prudent process to ascertain the reasonableness of actuarial assumptions, as performed for the CFO nearly 20 years ago, may be considered the best line of defense.

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