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A Numbers Game In Congress Stalls Pension Reform and Cash Balance Legislation – Was It Kabuki or Kabala?

By Alvin D. Lurie

For a while last month it seemed like pension reform and cash balance relief were caught in an intractable struggle in Congress from which they would not escape. Not over the substance of the underlying issues, but over the relative numbers of Republicans and Democrats to be appointed to the conference committee convened to resolve the conflicts between the House and Senate legislation. The impasse was not even between the two houses, rather a parochial dust-up between the respective Senate leaders of each party. Only when those two hit upon the magical number was it possible to actually get down to the business of trying to pass this most important piece of legislation. As these lines are being written, the conference committee and its staffs are at work on that task that might spell life or death for the defined benefit scheme and, not so incidentally, for its cash balance variant.

A Numbers Game

Even in a town like Washington that lives or dies by the numbers – the President's fast-slipping approval numbers, the latest 10-year Treasury interest rates, the size of the deficit, the Fed's overnight interbank interest rate, the COLA adjustments, the allowable pension limits – that numbers game playing out in the Senate for a month in February and early March over pension reform legislation got a lot of attention. Asa observed It was the deadlock between the Republican and Democratic leaders in the Senate over the respective numbers of each party's members to sit on the conference committee for the separate pension reform bills approved by both houses of Congress last November and December (S 1783 in the Senate and HR 2830 in the House).

It had started when Senate Majority Leader Frist offered the Minority Leader, Reid, 5 seats to the Republican's 7, but Reid demanded an 8-to-6

division. Other numbers were periodically tossed back and forth in the following weeks – always with a 2-member advantage to the majority party – without result. It had begun to take on the appearance of a formalized Kabuki dance (or you might call it a reach by both sides for divine intervention by invoking the mathematical mysticism of Kabala). Then, when Frist threatened to take the bill entirely off the table for this session, that broke the logjam and the leaders quickly closed the deal at 9-to-7.Six days later the House named its contingent, seven Republicans and four Democrats, and hours later the long-stalled conference at last got down to business, with a call from Senator Enzi, named chairman of the conference committee, for his colleagues to produce a conference report by March 31, with a view to passage of the bill by the full Congress a week later. Lots of luck, Mr. Chairman.

A Tangled Web

The goal is presumably is to get the new funding rules, that are a major component of the new pension legislation, enacted in time for application to the quarterly contributions due in April. But quite apart from the track record of the Senate side in agreeing upon the composition of its delegation, one could be forgiven skepticism that the committee will reach accord in anything like the time frame projected by its chairman. Under the best of circumstances, this promised to be a very difficult conference. It will have to deal with a very large bill, with an enormous range of pension issues at stake, and will have to merge two very different bills, one from each house, neither house having passed the bill of the other. Even the Republicans of each house have widely divergent views on many very fundamental issues, and important subjects contained in the Senate bill do not even have a counterpart in the House bill.

In fact, the respective bills of each house themselves represent a compromise between separate bills voted out by two different committees of each house, so there are really four bills in the mix. Add to that threat of a presidential veto from the Administration, restated at the very eve of the opening meeting of the conference, if the bill sent to the White House doesn’t satisfy some marks thrown down from Pennsylvania Avenue. O what a tangled web....

The prelude to this conference had been a long period of legislative maneuvers concerning matters pension, principally aimed at stiffening the

funding rules for defined benefit plans, limiting the amount of company stock that a sponsor can stuff into a defined contribution plan (a direct post-Enron response), and both tightening and loosening (in different respects obviously) the cash balance rules. The cash balance changes drew much attention, largely because of a startling court decision more than two years ago outlawing the IBM plan, and that set off strenuous efforts, first by cash balance opponents in the Congress and more recently by its supporters, to lay down some new legislative markers. Most significant in the latter respect was a ringing denunciation of the *IBM* decision by the then chairman of the House Education & Workforce Committee, John Boehner (R-OH) (recently annointed as House Majority Leader) -- he called it "flawed" -- and his announced determination to do something about it legislatively, expressed at a hearing of his committee last July. That was pleasant to the ears of cash balance advocates, but instilled little confidence in most circles that anything meaningful would come of it in the near term.

A Summer Flurry

What happened next was quite unexpected. A burst of activity on Capitol Hill in July, August and September produced a flurry of bills to deal with pension reform generally, including, but not predominantly, as affecting cash balance plans. The impetus for the cash balance components of the bills was in part a desire in some influential quarters of Congress to save the cash balance scheme from the effects of the unfavorable decision rendered against the IBM plan, but at the same time to rein in some of the attributes of such plans that have given rise to concerns regarding their fairness to employees who had been participants in plans replaced with a cash balance plan. The principal bills to emerge were the so-called NESTEG bill voted out by the Senate Finance Committee, and the Pension Protection Act approved by the House Education & Workforce Committee. Each of these bills was subsequently merged with a similar bill of another committee of the Senate and House, respectively, the Finance bill with one of the Senate Health, Education, Labor & Pension Committee, to become part of the Pension Security and Transparency Act, approved by the full Senate, and the House Education & Workforce bill with one of the House Ways & Means Committee, to become the Pension Protection Act voted out by the full House.

Adding to the mounting pressure on Congress to do something about the

difficulties faced by cash balance plans was a General Accountability Office report, released in November, observing that cash balance plans are seen as "a means to revitalize the declining (defined benefit pension) system", and noting that the imposition of burdensome requirements in the name of "protecting workers' benefit expectations" could only serve to "exacerbate the exodus of plan sponsors from the DB system." The report called on Congress to protect the benefits provided to millions of workers and eliminate the legal uncertainties surrounding cash balance plans, and concluded by exhorting Congress to "craft balanced reforms that could stabilize and possibly permit the long-term revival of the DB system."

An Uneasy Goal

Easier said than done. The goal of the pending bills is to accomplish just that; but there are many issues concerning the cash balance design that the conferees will have to address, since the bills of the House and Senate are very different in what they say (or don't say), for example, with reference to the conversion of traditional DB plans into cash balance plans, e.g., establishing opening account balances in the CB plan, the interest rate to be used for this and other valuation requirements, the permissibility of delaying the accrual of additional benefits under the cash balance plan where a participant's opening account balance in the CB plan is less than the frozen accrued benefit under the predecessor DB plan (the so-called "wearaway" issue), and a particularly onerous, mandatory five-year maintenance-of-benefit requirement that seriously impinges on the almost universally acknowledged prerogative of plan sponsors to cut off entirely, let alone modify, benefits accruing for future service. The Senate bill has detailed rules on these conversion and transition issues, the House bill none; but there are also Administration proposals relating to conversions that differ from the Senate's, and these will certainly figure in the conferees' deliberations.

Overshadowing these issues, important as they are, is the key issue of age discrimination. What is involved here? The distinctive feature of the CB design is that it builds a participant's projected normal retirement benefit year by year, by the annual addition of a pay credit (say, 5% of compensation in the crediting year) plus an interest credit (viz., 6% of the pay credit, but projected forward and replicated for each year between that pay-crediting year and the year of normal retirement set under the plan). Obviously, the older the participant, the fewer the years to normal

retirement age. So, older participants can never accrue the same number of projected future annual interest credits as their younger co-workers during any given year of plan operation. Well, duh (in today's expressive patois). How could an interest credit specifically designed to take the place of earnings on annual pay credits projected to accrue between the year of benefit credit and the participant's normal retirement age be the same for, say, a 50-year-old with 15 years to retirement and a 35-year-old with 30 years to retirement? Is that age discrimination? Not in this observer's book. More to the point, not in the view of the current majorities in the Senate and House. Again, each house has come up with a different way of assuring such nondiscrimination. Both will work, so anything the conferees agree upon is likely to cure the problem.

A Look Only Forward

More problematically, the pending bills only operate prospectively. That means no relief for the thousands of plan sponsors and their millions of employees presently participating in existing cash balance plans that are vulnerable to attack as practicing age discrimination against older employees and whose plan sponsors are therefor becoming increasingly uneasy. The issue will receive a critical test now that an appeal in the IBM case has been argued; but there is no telling when a decision will come down. It is fair to ask whether a reversal (widely expected by many observers) will come soon enough to stanch the flow of plan sponsors considering exit strategies. A quick, retroactive legislative fix would be the only satisfactory answer.

For Congress at this juncture to legislate only prospectively, without a disclaimer as to inferences to be drawn as to the present state of the law (as in the Senate bill), sends entirely the wrong signal. It is tantamount to issuing a license to bounty hunters to go after as many plans as they can serve with summonses, in hopes of finding one or more courts amenable to the argument that Congress' silence bespeaks, at least, a willingness to allow such litigation to run its course, and, at worst, an indication that the legislation was intended to change the law. That could lead another court to read Congress' failure to speak to the past as an invitation to follow the *IBM* trial court's decision. Another decision like that might be more than the cash balance constituency can withstand.

But there are no signs that the conference committee will be responsive to

such concerns. For one thing, it would go contra to the general design of the pending reform bills, that provide for only prospective treatment of every other change in the law. Majority Leader Boehner, when he was chairman of the House Education & Workforce Committee, spoke forthrightly of the need for remedial retroactive legislation; and he now sits as one of the Republican members of the Conference Committee. But it is improbable that, for all his new powers, he will attempt to push that position during the conference.

I cannot fathom the source of the strength of the anti-retroactivity forces. It's not as if the Congress were changing established law with retroactive effect, unless one attributes to a single trial judge in Illinois more weight than the combined wisdom of at least half a dozen judges in other courts, who alone has concluded that age discrimination is inextricably embedded in the CB design. I'm afraid that the most one can realistically hope for this late in the day is for the conference report to pick up language in the House bill stating explicitly that the new discrimination rules are a "clarification" of current law. It will be a near miracle if the conferees can deal with the considerable inconsistencies in the pending bills – not just as pertain to cash balance plans -- and meet Chairman Enzi's goal, so as to get a bill to the President's desk in time to set the rules governing next month's plan contributions.

An Uncertain Fate

It would appear that the fate of cash balance plans predating the new legislation will have to worked out in a spate of courts where copy-cat suits, patterned on the *IBM* complaint, have now been commenced. But a strong reversal of that Illinois judge by the 7th Circuit, where the *IBM* appeal is now *sub judice*, would take the wind out of the sails of that judge and those who follow in his wake. That decision could come very soon, but not soon enough to have saved the CB plans of many sponsors who have already dropped their plans, ironically IBM itself, that has changed over to a 401(k) for future pension benefit accruals for both its present CB participants and all new hires.

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