No. 97-1287

In the Supreme Court of the United States

OCTOBER TERM, 1998

HUGHES AIRCRAFT COMPANY, ET AL.,
PETITIONERS

v.

STANLEY I. JACOBSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The pension plan in this case is a single-employer, defined benefit pension plan that is subject to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301-1461. Until 1991, the plan's benefit structure was funded by contributions from both the plan sponsor and plan participants. The plan was amended as of January 1, 1991, to create a second benefit structure without participant contributions. The questions presented are:

1. Whether the plan has been or could be terminated under 29 U.S.C 1341, and plan assets distributed under 29 U.S.C. 1344(d).

2. Whether the plan amendment violates the vesting provisions of 29 U.S.C. 1053 and 1054, or the anti-inurement provision of 29 U.S.C. 1103(c)(1).

3. Whether an employer violates the fiduciary provisions of 29 U.S.C. 1104 and 1106 when it amends a plan funded in part by employee contributions.

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INTEREST OF THE UNITED STATES

The Pension Benefit Guaranty Corporation (PBGC) is responsible for interpreting and enforcing the plan termination provisions of Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301-1461. The Secretary of Labor is responsible for interpreting and enforcing the anti-inurement and fiduciary obligation provisions in Title I of ERISA, 29 U.S.C. 1103-1106. The Secretary of the Treasury is responsible for interpreting the vesting provisions in Title I of ERISA, 29 U.S.C. 1053 and 1054, see Reorg. Plan No. 4 of 1978, § 101(a), 92 Stat. 3790, and for interpreting and enforcing the provisions of Title II of ERISA relating to the qualification of pension plans for favorable tax treatment, see 26 U.S.C. 401-424.

STATEMENT

1. a. Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to provide certain minimum standards to assure the equitable character and financial soundness of employee pension benefit plans, which are generally defined as plans providing retirement income to employees. 29 U.S.C. 1001(c), 1002(2). A "defined benefit" pension plan, "as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment" according to the terms set forth in the plan. *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993); accord *PBGC* v. *LTV Corp.*, 496 U.S. 633, 637 n.1 (1990); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717 (1989); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 363-364 n.5 (1980); 29 U.S.C. 1002(35). "Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases, and the rate of return on invested plan assets." *Mead Corp.*, 490 U.S. at 717.

Defined benefit plans may be funded by employer or employee contributions. 29 U.S.C. 1053, 1054. The employer, however, bears the risk of any funding deficiency in the event the plan's actuarial assumptions prove incorrect. See Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 125 (6th ed. 1989). To increase the likelihood that pension funds are available to pay benefits when due, defined benefit plans are subject to minimum funding requirements. 29 U.S.C. 1081(a), 1082; 26 U.S.C. 412. If a defined benefit plan terminates without sufficient assets to pay its pension obligations, however, Title IV of ERISA, 29 U.S.C. 1301-1461, provides a mandatory termination insurance program under which the Pension Benefit Guaranty Corporation (PBGC) pays nonforfeitable plan benefits, subject to certain statutory limitations. *LTV Corp.*, 496 U.S. at 637-638; *Nachman*, 446 U.S. at 375.

ERISA distinguishes a defined benefit plan from a "defined contribution" or "individual account" plan. 29 U.S.C. 1002(34) and (35); see also *Concrete Pipe and Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 607 (1993). Unlike a defined benefit plan, which provides employees with a defined periodic payment upon retirement regardless of the performance of the plan's assets, a defined contribution or individual account plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. 1002(34); see *Keystone*, 508 U.S. at 154; *LTV Corp.*, 496 U.S. at 637 n.1; *Nachman*, 446 U.S. at 364 n.5. Because employees covered by defined contribution plans "are promised only that they will receive the balances in their individual accounts," Title IV's termination insurance program does not apply to such plans. *LTV Corp.*, 496 U.S. at 637 n.1.

b. ERISA also regulates the accrual and vesting of pension benefits. Accrual refers to the manner in which an employee earns increased benefits over time. 29 U.S.C. 1002(23) and (29). Vesting refers to the method by which benefits become nonforfeitable. 29 U.S.C. 1002(19) and (25). Under Section 203(a) of ERISA, all pension plans must provide that an employee's right to his "normal retirement benefit" is nonforfeitable upon the attainment of "normal retirement age." 29 U.S.C. 1053(a); see also 29 U.S.C. 1002(22) and (24) (defining "normal retirement benefit" and "normal retirement age"). Additionally, all pension plans must provide that an employee's rights in the "accrued benefit" derived from his own contributions are nonforfeitable and that, after a certain number of years of service, an employee has a nonforfeitable right to the "accrued benefit" derived from employer contributions. 29 U.S.C. 1053(a)(1) and (2). Similarly, plan amendments generally may not decrease a participant's accrued benefits. 29 U.S.C. 1054(g)(1).

In a defined contribution plan, an employee's "accrued benefit" means "the balance of the individual's account." 29 U.S.C. 1002(23)(B); see also 29 U.S.C. 1002(34). By contrast, in a defined benefit plan, an employee's nonforfeitable right to his or her accrued benefit does not depend on the plan's actual investment experience. Thus, the term "accrued benefit" in a defined benefit plan means "the individual's accrued benefit *determined under the plan*, * * * expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. 1002(23)(A) (emphasis added). The "accrued benefit" derived from an employee's mandatory contributions, however, must, at a minimum, equal "the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate [specified under 29 U.S.C. 1055(g) (3)]." 29 U.S.C. 1054(c)(2)(B); see also 29 U.S.C. 1002(23), 1054(c)(2)(C). Accordingly, a defined benefit plan participant has a nonforfeitable right to the greater of (1) the benefits provided under the plan or (2) an amount derived from the employee's accumulated contributions, determined using an interest rate fixed by the Act.

c. Pension plan assets must generally be held in trust. 29 U.S.C. 1103(a). Except in limited circumstances (including the distribution of residual plan assets upon plan termination),

> the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. 1103(c)(1); see also 26 U.S.C. 401(a)(2) (plan is qualified for tax purposes only if "under the trust instrument it is impossible * * * for any part of the corpus or income to be * * * used for, or diverted to, purposes other

than for the exclusive benefit of * * * employees or their beneficiaries").

Section 3(21)(A) of ERISA generally provides that a person is a fiduciary with respect to a pension plan

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. 1002(21)(A); see also 29 C.F.R. 2509.75-5, 2509.75-8. ERISA's fiduciary duty provisions require fiduciaries to discharge their duties under a plan solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses. 29 U.S.C. 1104(a)(1)(A). Among other things, fiduciaries are prohibited from engaging in certain transactions, 29 U.S.C. 1106, 1108, and must discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter [establishing minimum standards] and subchapter III of this chapter [governing plan terminations]." 29 U.S.C. 1104(a)(1)(D).

d. Title IV of ERISA sets forth the rules governing termination of defined benefit plans covered by Title IV, 29 U.S.C. 1321, and provides that those rules are the "*[e]xclusive* means of plan termination." 29 U.S.C. 1341(a)(1) (emphasis added); see also 62 Fed. Reg. 60,424, 60,428 (Nov. 7, 1997) (to be codified at 29 C.F.R. 4041.1). Under 29 U.S.C. 1342, the PBGC may initiate an involuntary termination of a covered plan under the specific statutory criteria set forth in 29 U.S.C. 1342(a). Such a plan may be voluntarily terminated "only in a standard termination * * * or a distress termination." 29 U.S.C. 1341(a)(1). See *LTV Corp.*, 496 U.S. at 638-639.

A standard termination applies when a plan has sufficient assets to pay all benefit liabilities, 29 U.S.C. 1341(b), and a distress termination generally applies to underfunded plans and requires the employer to demonstrate to the PBGC severe economic distress, 29 U.S.C. 1341(c). In both instances, the Act sets forth detailed termination procedures, including a requirement that the plan administrator provide to all affected parties at least 60 days' written notice of the administrator's intent to terminate the plan and the proposed date of termination. 29 U.S.C. 1341(a); see also 62 Fed. Reg. at 60,431, 60,436 (to be codified 29 C.F.R. 4041.23, 4041.41(a)(1)) (notice of intent must be issued "at least 60 days and not more than 90 days before the proposed termination date"). The Act also provides that the plan's "termination date" is, in the case of a standard termination, the date proposed in the administrator's notice of intent or, in the case of a distress termination, the date agreed to by the PBGC and the plan administrator. 29 U.S.C. 1348(a)(1) and (2).[1]

Section 4044 of Title IV governs the allocation of plan assets "[i]n the case of the termination of a single-employer plan." 29 U.S.C. 1344(a); 29 C.F.R. 4044.1. Upon termination, the plan administrator must allocate plan assets among plan participants and beneficiaries in a prescribed order that gives priority first to nonforfeitable plan benefits guaranteed by the PBGC, 29 U.S.C. 1344(a)(1)-(4); then "to all other nonforfeitable benefits under the plan," 29 U.S.C. 1344(a)(5); and finally "to all other benefits under the plan," 29 U.S.C. 1344(a)(6). See *Mead Corp.*, 490 U.S. at 717-718.

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[1] The date of plan termination ceases participants' benefit accruals and vesting rights, and fixes the liabilities of the PBGC and employers under Title IV. 29 U.S.C. 1322, 1362(a) and (b); see *LTV Corp.*, 496 U.S. at 638.

Section 4044(d) further provides that, "if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in [29 U.S.C. 1344(a)], such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries." 29 U.S.C. 1344(d)(3)(A); see also 29 U.S.C. 1344(d)(3)(B) (prescribing formula for determining the portion of remaining assets that are attributable to employee contributions). After that equitable distribution, "any residual assets * * * may be distributed to the employer if—(A) all liabilities of the plan to participants and their beneficiaries have been satisfied, (B) the distribution does not contravene any provision of law, and (C) the plan provides for such a distribution." 29 U.S.C. 1344(d)(1).

2. Petitioner Hughes Nonbargaining Retirement Plan (the plan) is a tax-qualified defined benefit plan established by petitioner Hughes Aircraft Company (Hughes), Pet. App. 134a, and is governed by the provisions of Title IV of ERISA, 29 U.S.C. 1321. Respondents are five retiree participants in the plan. Pet. App. 133a. The plan is funded by both mandatory employee contributions and employer contributions. *Id.* at 2a, 135a. By 1986, the plan had generated over a billion dollar funding "surplus," defined as the amount of plan assets that exceeds the actuarial present value of accrued benefits. *Id.* at 2a, 136a. In 1987, Hughes stopped contributing to the plan, but required employees to continue making contributions. *Id.* at 137a. In 1989, Hughes amended the plan to offer an early retirement program to certain active employees. *Id.* at 3a. Hughes again amended the plan in 1990, effective January 1, 1991, to freeze enrollment (but not accruals) in the existing contributory benefit structure. That amendment also provided that new employees, and then-current employees who so elected, would be covered by a new benefit structure that required no employee contributions but offered lower benefits. *Id.* at 3a, 138a.

In January 1992, respondents filed a class action against petitioners, contending that the 1991 amendment unlawfully permitted the use of surplus plan assets attributable to employee contributions to fund the new non-contributory benefit structure, and that the 1991 amendment terminated the plan as of the amendment's effective date. The complaint alleged that the 1991 amendment violated the anti-inurement provision in Section 403(c)(1) of ERISA, 29 U.S.C. 1103(c)(1) (count 1); the exclusive purpose requirement of Section 404(a)(1), 29 U.S.C. 1104(a)(1) (count 2); the vesting and nonforfeitability provisions of Sections 203 and 204, 29 U.S.C. 1053, 1054 (count 3); the rules in Section 4044(d), 29 U.S.C. 1344(d), requiring equitable distribution of residual plan assets upon termination (count 4); and the fiduciary rules in Sections 404 and 406, 29 U.S.C. 1104, 1106 (count 5). Pet. App. 139a-142a. The complaint further alleged that the 1989 amendment violated Section 404(a)(1)(D)'s requirement that a fiduciary follow plan documents, 29 U.S.C. 1104(a)(1)(D) (count 6). Pet. App. 142a-143a; see also Br. in Opp. 5. Respondents sought various forms of relief, including an equitable distribution of surplus plan assets "in the form of improved benefits," and an injunction prohibiting Hughes from using plan assets to pay benefits under the non-contributory benefit structure. Pet. App. 143a.

3. The district court dismissed all counts of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Pet. App. 53a-62a. The court found that respondents had not alleged that the plan failed to provide any benefits due under the plan, or that the plan lacked sufficient assets to pay all accrued benefits. *Id.* at 54a-55a. The court also rejected respondents' claim that the plan was effectively terminated by the January 1, 1991, amendment creating a non-contributory benefit structure. *Id.* at 59a. The court reasoned that "[c]reation of a new benefits schedule or structure does not terminate a plan," and that respondents had failed to allege that Hughes instituted any of the mandatory termi-

nation procedures under 29 U.S.C. 1341. Pet. App. 59a. The court further observed that respondents' termination claim "overlooks the fact that thousands of participants, including thousands of active employees, have elected to remain under the contributory benefits structure and are continuing to receive benefits thereunder." *Ibid.* Finally, the court held that respondents had not stated valid claims under ERISA's anti-inurement, fiduciary duty, and vesting provisions. *Id.* at 55a-61a.

4. A divided panel of the court of appeals reversed. Pet. App. 1a-48a. The court of appeals held that each count of the complaint stated cognizable claims under ERISA by alleging that Hughes used surplus plan assets that were attributable to employee contributions for Hughes' own benefit and for the benefit of employees accruing benefits under the non-contributory benefit structure. *Id.* at 5a, 27a.

The court of appeals recognized that this Court held in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), that an employer does not act as a fiduciary under ERISA when it amends a pension plan to alter benefits, and that using plan assets to fund an early retirement program for plan participants does not constitute a prohibited transaction under 29 U.S.C. 1104(a)(1)(D). Pet. App. 7a. The court of appeals concluded, however, that *Spink* did not govern this case, because the Hughes plan is partly funded by *employee* contributions, whereas the plan at issue in *Spink* was funded solely by *employer* contributions. *Id.* at 7a-8a, 14a, 16a. The court of appeals therefore concluded that, "when an employer amends a plan to use for its own benefit an asset surplus attributable in part to employee contributions, the employer is wearing both its 'fiduciary' and its 'employer' hats." *Id.* at 15a.

The court of appeals also reasoned that whether the January 1, 1991, plan amendment terminated the plan depended on the factual question whether the plan had been converted to a common law "wasting trust" whose purposes have been accomplished. Pet. App. 10a-12a & n.3. If respondents could prove a termination under that common law doctrine, the court of appeals explained, they were entitled to an equitable distribution of the surplus plan assets attributable to their contributions under 29 U.S.C. 1344(d), and Hughes had violated ERISA's anti-inurement and fiduciary duty provisions by using plan assets for purposes other than paying benefits to participants in the allegedly terminated contributory plan. Pet. App. 10a-13a, 17a-18a, 22a-25a. The court of appeals further held that, by using plan assets attributable in part to employee contributions to fund the non-contributory benefit structure, Hughes violated a vested right of the employees to the surplus "income" generated by their contributions. *Id.* at 18a, 21a.

Judge Norris dissented, concluding that the complaint was properly dismissed in its entirety. Pet. App. 27a-48a.

SUMMARY OF ARGUMENT

A. Respondents have not stated a valid claim that Hughes terminated its plan when it amended the plan to create a new non-contributory benefit structure. Respondents have not alleged that Hughes complied with the provisions in Title IV that set forth the exclusive means by which a plan may be terminated. 29 U.S.C. 1341, 1342. Because the plan has not been terminated under Title IV, respondents have no right to an equitable distribution of the plan's surplus assets under 29 U.S.C. 1344.

The 1991 amendment also did not convert the Hughes plan into a common law "wasting trust." Even assuming that theory may form the basis of an action by participants to force an employer to initiate the termination of a defined benefit plan under Title IV of ERISA, the Hughes plan is not a wasting trust because its purposes have not been accomplished. Plan participants continue to accrue benefits under the plan, and the purposes of the trust therefore continue to be served. Similarly, the Hughes plan is a single plan under ERISA, because the 1991 amendment on its face did not create two distinct plans, and it is undisputed that all assets under the plan are available to pay benefits under both the contributory and non-contributory benefit structures.

B. Respondents also have not stated a valid claim that Hughes violated ERISA's vesting provisions, 29 U.S.C. 1053, 1054. Those provisions prohibit forfeiture of the accrued benefits specified in the plan. Respondents are receiving those benefits. They are not entitled under ERISA's vesting provisions to additional benefits on account of the plan's earnings.

Nor have respondents stated a viable claim that Hughes, by using plan assets to provide new non-contributory benefits, violated ERISA's anti-inurement provision, 29 U.S.C. 1103(c)(1). An employer does not unlawfully use plan assets for its own benefit when it merely provides for the payment of benefits to plan participants. That conclusion is not altered by the fact that the plan has surplus assets partly due to employee contributions, or by the fact that the employer incidentally benefits from the payment of pension benefits under its plan.

C. The court of appeals also should have dismissed the claim that Hughes violated ERISA's fiduciary duty provisions, 29 U.S.C. 1104, 1106, when Hughes amended its plan in 1989 to create an early retirement program and in 1991 to create a non-contributory benefit structure. This Court held in *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 891 (1996), that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions," because the employer acts as a settlor, not as a fiduciary, with respect to matters of plan design. That reasoning applies regardless of whether the plan provides for employee contributions.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE COMPLAINT STATES VALID CAUSES OF ACTION UNDER ERISA

The court of appeals seriously misconstrued the provisions of Titles I and IV of the Employee Retirement Income Security Act of 1974 (ERISA) in allowing this case to proceed. The court fundamentally erred in concluding that the 1991 plan amendment adopting a non-contributory benefit structure may amount to a termination of the plan under ERISA, and that respondents are entitled to surplus plan assets in a defined benefit pension plan before the plan has been terminated pursuant to Title IV. Those errors led the court of appeals to conclude that respondents stated a claim for a distribution of assets under 29 U.S.C. 1344, and significantly influenced the court's decision concerning respondents' causes of action under ERISA's anti-inurement and fiduciary duty provisions. See Pet. App. 10a-13a, 16a, 23a. We first discuss the court's errors concerning plan termination; we then turn to why the 1991 plan amendment is consistent with ERISA's vesting and anti-inurement provisions; and finally we address why respondents do not state a valid claim that Hughes violated ERISA's fiduciary provisions.

A. THE 1991 AMENDMENT DID NOT AMOUNT TO A PLAN TERMINATION TRIGGERING A DISTRIBUTION OF PLAN ASSETS

1. Respondents allege that Hughes terminated the plan on January 1, 1991, when it froze new participation in the contributory structure and created a non-contributory structure providing for a different level of benefits. Pet. App. 132a, 134a, 141a. That allegation, however, does not state a valid claim for distribution of assets under Section 4044.

An employer may terminate a single-employer defined benefit pension plan covered by Title IV of ERISA only through the "standard" termination or "distress" termination procedures set forth in Title IV. 29 U.S.C. 1341. Those statutory methods are the "*exclusive* means of [employer-initiated] plan termination." 29 U.S.C. 1341(a)(1) (emphasis added); see also 62 Fed. Reg. at 60,428 (to be codified at 29 C.F.R. 4041.1) (statute's requirements set forth the "exclusive means of voluntarily terminating a plan"); 52 Fed. Reg. 33,318 (1987) (expressing PBGC's view that, "[a]bsent qualifying for [a standard or distress] termination, a single-employer plan cannot voluntarily terminate").[2] It is undisputed that Hughes has never initiated the notification and other requirements to terminate the plan under 29 U.S.C. 1341. See Pet. App. 59a. Therefore, as a matter of law, the plan has not terminated under ERISA.

It ineluctably follows from the above conclusion that respondents have no claim under Section 4044(d) to an equitable distribution of surplus assets attributable to their contributions. Section 4044 permits a distribution to participants and beneficiaries *only* "[i]n the case of the termination of a single-employer plan." 29 U.S.C. 1344(a); see also 29 C.F.R. 4044.1 (Section 4044 "contains rules for allocating a plan's assets when the plan terminates"); Pet. App. 34a (Norris, J., dissenting) ("[i]f the Plan is terminated, then 4044(d) of ERISA * * * kicks in and requires an equitable distribution of the Plan assets"). Accordingly, because the plan has not terminated, the provisions in 29 U.S.C. 1344(d) do not provide for a distribution of plan assets. See *Brillinger* v. *General Elec. Co.*, 130 F.3d 61, 63-64 (2d Cir. 1997), petition for cert. pending, No. 97-1834; *Malia* v. *General Elec. Co.*, 23 F.3d 828, 831-832 (3d Cir.), cert. denied, 513 U.S. 956 (1994); cf. *Mead Corp.*, 490 U.S. at 723 (Section 4044 is a "distribution mechanism and not a source for new entitlements").[3]

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[2] Courts of appeals, other than the court below, have recognized that Title IV's termination provisions set forth the sole means by which a defined benefit plan covered by Title IV may terminate. See, *e.g.*, *American Flint Glass Workers Union* v. *Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995); *PBGC* v. *Pritchard*, 50 F.3d 315, 316 (5th Cir. 1995); *Phillips* v. *Bebber*, 914 F.2d 31, 34 (4th Cir. 1990).

[3] Even if petitioner had initiated a standard termination under 29 U.S.C. 1341(b), Section 4044(d) would not require a distribution of surplus assets until all the plan's liabilities had been satisfied. 29 U.S.C. 1344(d)(3)(A). Moreover, because "pension funding on a termination basis is subject to actuarial assumptions that differ from those used to calculate funding on an on-going basis[,] * * * a pension plan that is adequately funded on an on-going basis can be substantially underfunded on a termination basis." *American Flint Glass Workers Union*, 62

In holding that respondents have stated a valid claim to receive an equitable share of the plan's surplus assets, the court of appeals reasoned that respondents, "after discovery" and possibly through "the help of experts," may be able to prove that the plan "constructive[ly] terminated" in 1991 by becoming a wasting trust under common law principles. Pet. App. 11a n.3. At common law, the court of appeals explained, "once the object of the settlor had been achieved, the trust was deemed to end since its continuation would be useless and might frustrate the intent of the settlor as to a beneficiary or remainder interest." *Ibid.* (internal brackets omitted) (quoting *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1202 (S.D. Tex. 1991), aff'd on other grounds *sub nom. Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995)).

That common law doctrine, however, cannot override Title IV's "[e]xclusive" procedures setting forth the means by which a plan may terminate. 29 U.S.C. 1341(a). See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) ("The authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute.") (citations omitted). Indeed, allowing a common law doctrine to "deem" a plan terminated for purposes of Section 4044(d) would undermine the certainty created by the Act and would jeopardize the orderly administration of plan terminations. The court of appeals therefore erred in concluding that a plan may terminate absent strict compliance with Title IV's termination provisions.[4]

F.3d at 577 n.4. See also PBGC Amicus Br. Supporting Pet. 14-15 n.10 (discussing why court of appeals' approach would be "impossible to administer").

4 The court of appeals also relied (Pet. App. 11a n.3) on 26 C.F.R. 1.401-6(b)(1), which states that "[w]hether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case." That regulation, however, does not apply to plans covered by Title IV of ERISA. Indeed, the Department of Treasury's regulations and rulings expressly recognize that a Title IV plan may not be terminated unless the termination complies with the procedures set forth in 29 U.S.C. 1341 or 1342. 26 C.F.R. 1.411(d)-

2. Respondents also argue (Br. in Opp. 6-7, 25-29) that, under the common law theory of wasting trust, a court should order Hughes to terminate its plan under the procedures set forth in 29 U.S.C. 1341. That contention, however, is inconsistent with respondents' complaint, which alleges that the plan in fact terminated on January 1, 1991. Pet. App. 132a, 134a, 141a; see also J.A. 234-235, 237, 243 (first amended complaint). Moreover, under 29 U.S.C. 1348(a)(1), the plan termination date in a standard termination is the date proposed in the plan administrator's notice of intent, which must be provided to affected parties "[n]ot less than 60 days *before* the proposed termination date." 29 U.S.C. 1341(a)(2) (emphasis added). Thus, a plan may not be retroactively terminated in a standard termination under Title IV.

Nor have respondents alleged a viable claim that a court may order the termination of the Hughes plan on a future date on the ground that the plan is a wasting trust. As an initial matter, Title IV does not grant participants a right of action to force a plan termination. Cf. 29 U.S.C. 1370 (permitting suit to enjoin or redress a "violation" of certain provisions in Title IV). Furthermore, it is unclear whether, in light of Title IV's comprehensive provisions, any other provision of law would permit a plan participant to sue a plan sponsor to terminate a plan under Title IV based on a common law theory of a wasting trust.[5]

2(c)(2); Rev. Rul. 89-87, 1989-2 C.B. 81 ("a single-employer plan to which Title IV [of ERISA] applies that has not been terminated under Title IV, even though its assets have been distributed, will not have terminated for purposes of the Code").

[5] We are aware of no court of appeals decision to consider the issue. Cf. *American Flint Glass Workers Union*, 62 F.3d at 580-581 (reversing summary judgment because union alleged that settlement agreement required employer to supply additional funding needed for plan to terminate under Title IV); *Phillips* v. *Bebber*, 914 F.2d 31, 34 (4th Cir. 1990) (ordering plan termination in conformity with Title IV when plan documents provided for termination upon occurrence of certain events); *In re Gulf Pension*, 764 F. Supp. at 1201-1205 (holding that two defined benefit plans in which enrollments froze and contributions

This Court need not decide, however, whether (and, if so, under what circumstances) a plan participant may force an employer to initiate the procedures under 29 U.S.C. 1341 to terminate a defined benefit pension plan covered by Title IV under a wasting trust theory, because there is no basis for applying such a theory in this case. Under common law, a wasting trust is a trust whose purposes have been accomplished, such that the continuation of the trust would frustrate the settlor's intent. Pet. App. 11a n.3; see generally Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 334, 337, 337.8 (4th ed. 1989); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §§ 1002, 1007 (rev. 2d ed. 1983); Restatement of Trusts (Second) § 337(2) (1959). The Hughes plan does not fall within that definition, because its purposes have not yet been accomplished.

Hughes created its plan to provide deferred compensation to its employees in the form of pension benefits. See J.A. 61 (stating purposes of Plan "[t]o stimulate and maintain among eligible employees of the Companies, a sense of responsibility, cooperative effort and a sincere interest in the progress and success of the Companies," and "[t]o increase the efficiency of such Employees and to encourage them to remain with the Companies until retirement from active service"); see generally 29 U.S.C. 1002(2)(A) (pension plans provide employees with retirement and deferred income). Here, although the 1991 amendment froze new enrollment in the contributory benefit structure, the plan has thousands of active participants who are continuing to accrue benefits under that structure. J.A. 174 (Garrison Supp. Decl. ¶ 3) (in 1991, "more than 39,000 were active

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ceased in 1970 were wasting trusts whose continuation would frustrate settlor's intent, even though 2,900 active employees continued to accrue benefits under plans). Different considerations may apply to defined contribution plans, which are not subject to Title IV. 29 U.S.C. 1321(b)(1). See *Chambers* v. *Kaleidoscope, Inc. Profit Sharing Plan & Trust*, 650 F. Supp. 359, 373-375 (N.D. Ga. 1986) (directing termination of defined contribution plan that had been abandoned by plan sponsor after sponsor filed bankruptcy petition and ceased to conduct business).

employees * * * accruing benefits under the contributory benefits structure of the Plan"); see also Pet. App. 59a, 146a. Furthermore, all eligible employees hired by Hughes after 1991 are accruing benefits under the plan's non-contributory benefit structure. *Id.* at 3a, 146a. Thus, the 1991 amendment had no effect on the plan's purpose to provide pension benefits to eligible employees.

On the other hand, if the plan were to terminate, all benefit accruals under the plan would cease. See *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1172-1173 (11th Cir. 1988) (en banc); note 1, *supra*. Thus, far from effectuating the settlor's intent, a termination would frustrate the plan's express purpose to retain active employees through the accrual of benefits. Accordingly, there is no basis for concluding that a court could order a termination of the Hughes plan under respondents' theory that the 1991 amendment converted the Hughes plan into a wasting trust whose purposes have been accomplished.[6]

Finally, application of a wasting trust theory would be inappropriate in light of Hughes' manifest objection to the termination of its financially solvent, ongoing plan.[7] ERISA generally recognizes that employers have discretion to terminate employee pension or welfare benefit plans. *Spink*, 517 U.S. at 890; *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995); *Inter-Modal Rail Employees Ass'n* v. *Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997). Thus, the decision whether to terminate

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[6] In light of the objection to the termination by many plan participants, see Hughes Aircraft Retirees Ass'n and Hughes Employees Ass'n Amicus Br. Supporting Pet. 2-3, respondents could not meet the additional common law requirement that all beneficiaries of the wasting trust consent to its termination. See Scott & Fratcher, *supra,* §§ 334, 337; Bogert & Bogert, *supra,* §§ 996, 1002, 1007; Restatement of Trusts (Second), *supra,* §§ 337(1), 340(2).

[7] Cf. 29 U.S.C. 1342(a) (authorizing involuntary termination proceedings brought by PBGC when, *inter alia*, "the plan has not met the minimum funding standard under [26 U.S.C. 412]" or "the plan will be unable to pay benefits when due").

a pension plan is not a fiduciary act. *American Glass Workers Union*, 62 F.3d at 579; see also DOL Advisory Op. No. 97-03A, at 3-4 (Jan. 23, 1997) ("'settlor' functions include decisions relating to the establishment, design and termination of plans and, except in the context of multiemployer plans, generally are not fiduciary activities subject to Title I of ERISA"); accord DOL Info. Ltr. No. 03131986 (Mar. 13, 1986). A forced termination in this case would be inconsistent with those principles and would undermine one of ERISA's stated purposes: "to encourage the maintenance and growth of single-employer, defined benefit pension plans" that provide "retirement income security [to] millions of workers." 29 U.S.C. 1001b(a)(2), 1001b(c)(2); see also 29 U.S.C. 1302(a)(1).

3. There also is no basis for respondents' additional contention that the Hughes' plan has become a wasting trust because the 1991 amendment created two separate pension plans, a "Contributory Plan" and a "Non-Contributory Plan" providing different level of benefits. Br. in Opp. 2-6. Both the contributory and non-contributory benefit structures are part of a single plan under ERISA. On its face, the 1991 amendment did not create a new plan. Instead, the amendment altered an existing plan to create a new benefit structure that applies to participants hired after the effective date of the amendment and to previously hired participants who elected to switch from the preexisting contributory benefit structure. J.A. 34 (Verhey Decl. ¶¶ 4-5), 159-172 (amendment to Plan adding non-contributory benefit structure).

Respondents mistakenly contend that the contributory and non-contributory benefit structures constitute different plans because they share "virtually no characteristics." Br. in Opp. 4 (quoting Pet. App. 3a). "Nothing in ERISA prohibits two different benefit structures from being funded from one source." Pet. App. 45a (Norris, J., dissenting). Department of Labor regulations specifically recognize that "an employee benefit plan may provide different benefits for various classes of participants and beneficiaries." 29 C.F.R. 2520.102-4.

A plan amendment that creates a new benefit structure does not create a new plan under ERISA if, after the amendment, all the assets under the plan remain available to pay benefits to all of the participants and beneficiaries under the plan. See, *e.g.*, 26 C.F.R. 1.414(*l*)-1(b)(1) (for purposes of plan mergers, consolidations, and transfers of plan assets, "[a] plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. * * * A plan will not fail to be a single plan merely because * * * [t]he plan has several distinct benefit structures which apply either to the same or different participants."); accord Rev. Rul. 81-137, 1981-1 C.B. 232; DOL Advisory Op. No. 81-41A (Apr. 6, 1981).[8] There is no dispute here that all of the assets of the amended plan are available to pay benefits to participants under both benefit structures. Accordingly, the 1991 amendment did not create two separate plans under ERISA.[9]

B. THE 1991 AMENDMENT DID NOT VIOLATE ERISA'S VESTING OR ANTI-INUREMENT PROVISIONS

1. As retiree participants in a defined benefit pension plan, respondents have vested rights to receive an "accrued benefit," 29 U.S.C. 1053(a), which is defined as the "benefit determined under the plan," generally "expressed

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[8] In certain circumstances, a plan may be tested for compliance with the nondiscrimination requirements in 26 U.S.C. 401(a)(4) and 410(b) as if there were two or more distinct plans. See 26 C.F.R. 1.401(a)(4)-9(c), 1.401(a)(4)-12, 1.410(b)-(7)(c)(1) and (4); see T.D. 8485, 1993-2 C.B. 126, 129; T.D. 8363, 1991-2 C.B. 287, 306; T.D. 8360, 1991-2 C.B. 98, 104. Those testing provisions are not relevant to the issues presented in this case.

[9] Even were respondents correct that there is a distinct contributory "plan," that plan would not be a wasting trust because its purposes plainly continue to be furthered by the accrual of benefits for thousands of participants under that "plan." See p. 16, *supra*.

in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. 1002(23)(A). Respondents do not dispute that they are receiving their accrued benefits determined under the plan. Pet. App. 54a-55a. Nor do respondents allege that they are receiving benefits less than the statutory minimum prescribed by 29 U.S.C. 1054(c)(2)(B) for benefits derived from an employee's accumulated mandatory contributions. See p. 4, *supra*. Respondents therefore have not stated a valid claim that the 1991 amendment violated ERISA's vesting provisions under 29 U.S.C. 1053 and 1054.

The court of appeals' contrary conclusion is based on the view that "if employees' own contributions *and the income their contributions generate* exceed the defined benefit amount under the plan, ERISA requires that employees be paid the larger amount." Pet. App. 18a (emphasis added); see also *id.* at 21a ("[b]y statutory definition, employees are vested in their own contributions *and the income generated therefrom*") (emphasis added). The Act, however, does not support that conclusion.

Unlike a defined contribution plan, see pp. 3-4, *supra*, employees in an ongoing defined benefit plan do not have vested rights in the "income" generated by their own mandatory contributions. Such employees have a nonforfeitable right only in the greater of the benefits determined under the plan or a benefit attributable to their accumulated mandatory contributions plus a statutory rate of interest. 29 U.S.C. 1002(23), 1053(a), 1054(c)(2)(B). Any assets in excess of those needed to provide those nonforfeitable benefits remain assets of the plan to which individual employees have no rights under 29 U.S.C. 1053. See *Brillinger* v. *General Elec. Co.*, 130 F.3d at 64 ("Participants in a defined benefit plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities."); *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994) ("A defined-benefit plan gives current and former employees property interests in their pension benefits but not in the assets held by the trust."); accord *Malia* v. *General Elec. Co.*, 23 F.3d at 830 n.2, 831-832.

2. Respondents also have failed to state a valid cause of action under the anti-inurement provision of Section 403(c)(1). That Section, which is not restricted to fiduciary acts (see Pet. App. 8a), provides in relevant part that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1). When an employer distributes plan assets in the form of benefit payments to eligible participants and beneficiaries, the plan's assets are paid in accordance with the express terms of Section 403(c)(1) and do not unlawfully "inure to the benefit" of the employer.[10] Thus, Hughes' amendment of the plan to provide for the use of its assets to pay benefits under the non-contributory benefit structure does not violate Section 403(c)(1). See Pet. App. 33a (Norris, J., dissenting) ("In essence, [respondents] are * * * claiming that [petitioner] somehow violated § 403(c)(1) when it used Plan funds to pay benefits to Plan participants.").

In ruling to the contrary, the court of appeals relied on the fact that the plan's surplus assets were partly funded by employee contributions. Pet. App. 8a-10a. Section 403(c)(1) prohibits inurement of plan assets, however, without regard to their source. The focus is on the use of plan assets.[11] If assets are used for impermissible pur-

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[10] Courts of appeals have consistently so held. See *Spink* v. *Lockheed Corp.*, 125 F.3d 1257, 1261 (9th Cir. 1997); *Maez* v. *Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995); *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 592 n.6 (11th Cir. 1992), cert. denied, 516 U.S. 1009 (1995); *Fletcher* v. *Kroger Co.*, 942 F.2d 1137, 1140 (7th Cir. 1991); *Hlinka* v. *Bethlehem Steel Corp.*, 863 F.2d 279, 283-284 (3d Cir. 1988).

[11] For example, an employer violates Section 403(c)(1) if it withdraws assets from the plan for non-trust purposes. See, *e.g.*, *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986); DOL Advisory No. Op. 97-03A, at 3-4 (Jan.

poses, it is no defense for an employer to argue that some of the assets were derived from the employer's own contributions. If assets are used for permissible purposes (*i.e.*, to pay benefits to eligible participants), those payments are not transformed into an impermissible inurement to the employer just because some of the underlying contributions were made by employees.

The court of appeals similarly reasoned that, in amending the plan to create a non-contributory benefit structure, "Hughes has taken advantage of the plan's asset surplus for its own benefit" by "reduc[ing] its labor costs while effectively increasing new employees' wages." Pet. App. 6a. That reasoning, however, ignores the fact that "a defined benefit plan containing residual assets by its nature benefits an employer." *Malia*, 23 F.3d at 831 n.2; see also *Brillinger*, 130 F.3d at 62 ("if the investment of plan assets [in a defined benefit plan] is successful and produces a surplus, the employer benefits"). For instance, "any excess in assets resulting from superior plan asset performance typically accrues to the employer's benefit by reducing the out-of-pocket contribution the employer must make to maintain required funding levels for the present value of the defined benefits." *Malia*, 23 F.3d at 831 n.2. Indeed, even the decision below acknowledges that an employer does not violate Section 403(c)(1) by suspending contributions to an overfunded plan. Pet. App. 6a; cf. 26 U.S.C. 404(a)(1)(A) (generally limiting tax deduction to the amount of employer's contribution not in excess of the full funding limit) and 4972 (imposing 10% tax on excess employer contributions).[12]

23, 1997). Similarly, an unlawful inurement may occur if an employer uses plan assets for purposes other than the payment of benefits, such as pledging plan assets as collateral for a loan.

[12] Moreover, subject to the vesting and accrual requirements in 29 U.S.C. 1053 and 1054, the amount of benefits an employee ultimately receives under a defined benefit plan will not correlate exactly with the amount of the employee's contributions. For example, when a plan is established, it may give credit for "past service" of employees, that is, years of service for which no contributions were made. Such

If an employer permissibly may benefit from an overfunded plan by ceasing contributions and leaving benefit levels constant, there is no reason why an employer may not similarly benefit by amending the plan to provide for the use of surplus assets to create a new benefit structure for current and new employees. See *Johnson*, 19 F.3d at 1190 ("Pensions are deferred compensation; just as the employer may raise the wages of current employees without owing anything to retirees, so it may raise the pensions of current employees without owing anything to persons who found satisfactory the combination of current and deferred pay offered during their years of service."). For those reasons, the existence of a surplus has no bearing on whether an employer violates Section 403(c)(1) by using plan assets to pay benefits. See also Pet. App. 32a-33a (Norris, J., dissenting) ("It is inconceivable that Congress intended the lawfulness of a plan amendment to turn on whether a 'surplus' existed at the time of the amendment. Whether or not a surplus existed is logically irrelevant to the question whether the 1991 amendment adding a non-contributory benefit structure violated ERISA's anti-inurement provision.").[13]

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unfunded liabilities have to be amortized and may be paid through contributions made by the employer or by employees working in future years. See 29 U.S.C. 1082(b)(2). Additionally, where benefits are based on an employee's final salary, an employer may "use" a plan surplus to give current employees a benefit increase simply by increasing their wages. Furthermore, an employer's current funding obligations may be reduced if employees leave work before they obtain vested rights in accrued benefits under Section 1053.

[13] The fact that an employer benefits when a defined benefit plan is overfunded, however, does not mean that defined benefit plans are invariably advantageous to employers. Because benefit levels are fixed by the plan, employers must compensate for any funding deficiency whenever the investment performance of plan assets does not meet actuarial assumptions. Pet. App. 32a (Norris, J., dissenting) ("The existence of a 'surplus' in a pension fund is nothing more than an actuarial artifact. * * * At all times, whether the fund's investment portfolio is prospering or heading south, Hughes' obligation to assure the financial

The above conclusion is strongly supported by this Court's decision in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). In addition to holding that ERISA's fiduciary provisions do not apply to the act of amending a plan to create early retirement programs, see pp. 25-26, *infra*, *Spink* also concluded that implementation of such a plan amendment does not violate Section 406(a)(1)(D) of ERISA. 517 U.S. at 892-895. Section 406(a)(1)(D) is similar to Section 403(c)(1)'s anti-inurement provision in that it prohibits a fiduciary from engaging in any transaction that is a direct or indirect "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. 1106(a)(1)(D). Despite Section 406(a)(1)(D)'s broad language, the Court held "that the payment of benefits pursuant to an amended plan, regardless of what the plan requires of the employee in return for those benefits, does not constitute a prohibited transaction." 517 U.S. at 895.

The Court in *Spink* reasoned that Section 406(a)(1)(D) "does not in direct terms include the payment of benefits by a plan administrator," and that the payment of benefits is not the kind of "transaction" that Congress sought to prohibit in Section 406(a). 517 U.S. at 892, 893. The Court further explained that obtaining an employee's release of claims against the employer in exchange for the payment of early retirement benefits is functionally equivalent to many " 'incidental' and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan," such as "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily." *Id.* at 893-894.[14]

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health of the Plan remains constant."); see also *Brillinger*, 130 F.3d at 62; *Malia*, 23 F.3d at 831 n.2; *Johnson*, 19 F.3d at 1186.

[14] This Court recognized that a "different question" might be presented if benefit payments "were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in

As in *Spink*, there is no way to differentiate the incidental gains that Hughes receives from the payment of benefits from other legitimate advantages realized by employers when they make benefit payments.

C. HUGHES WAS NOT ACTING AS A FIDUCIARY WHEN IT AMENDED ITS PLAN

1. In *Spink*, this Court held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 517 U.S. at 890. The Court therefore rejected the contention that an employer violates the fiduciary provisions in Sections 404(a) and 406(a) when the employer amends its defined benefit pension plan to create early retirement programs that are payable out of surplus assets of the plan. The Court observed that ERISA defines a "fiduciary" to include a person who engages in specified activities with respect to the plan, including "any discretionary authority or * * * control respecting management of such plan or * * * authority or control respecting management or disposition of its assets * * * or * * * any discretionary authority or * * * responsibility in the administration of such plan." 517 U.S. at 889 n.2 (quoting 29 U.S.C. 1002(21)(A)). Because those defined functions do not include matters of plan design, the Court reasoned, "the act of amending a pension plan does not trigger ERISA's fiduciary provisions." *Id.* at 891. The Court's decision in *Spink* accordingly forecloses respondents' contention that Hughes violated the fiduciary pro-

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interest, or involved a kickback scheme." 517 U.S. at 895 n.8. The allegations in this case, however, do not fall within that exception. The 1991 amendment does not disguise any illegal payment. Instead, it provides real benefits to real participants and does not reduce respondents' non-forfeitable benefits. Respondents' contrary contention (Br. in Opp. 7-8, 12-13; Pet. App. 24a-25a) simply restates the fatally flawed claim that the 1991 amendment terminated the Hughes plan and thereby violated ERISA's vesting, termination, and fiduciary provisions. See pp. 12-14, 19-21, *supra*, and pp. 25-29, *infra*.

visions of 29 U.S.C. 1104 and 1106 when it adopted the 1989 and 1991 amendments.[15]

The court of appeals attempted to distinguish *Spink* on the ground that *Spink* sanctioned the use of surplus plan assets to pay new benefits when the plan is funded solely by the employer, but did not address a plan in which the surplus was funded in part by *employee* contributions. Pet. App. 14a-15a. That distinction, however, is irrelevant.

Although the plan in *Spink* was non-contributory, see *Spink* v. *Lockheed Corp.*, 125 F.3d 1257, 1261 (9th Cir. 1997), that fact played no part in the Court's analysis. Instead, the Court reasoned that ERISA defines a fiduciary in terms of the nature of the function performed, and that an employer functions as a plan sponsor or settlor, not as a fiduciary, when it amends a plan. See 517 U.S. at 890-891. The nature of that action does not depend on whether a plan is funded by employee or employer contributions, or whether the plan contains an actuarial surplus at any given time. See, *e.g.*, *Johnson*, 19 F.3d at 1188; *Malia*, 23 F.3d at 832. Thus, an employer does not act as a fiduciary simply because it amends a plan containing surplus assets that are partly attributable to employee contributions.[16]

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[15] *Spink* did not involve a multiemployer plan. Amendments of multiemployer plans may be subject to ERISA's fiduciary duty provisions to the extent such plans delegate the authority to amend the plan to fiduciaries that have authority to control and manage the operation and administration of the plan. *Siskind* v. *Sperry Retirement Program*, 47 F.3d 498, 506 (2d Cir. 1995); *Mahoney* v. *Board of Trustees*, 973 F.2d 968 (1st Cir. 1992) (Breyer, J.); but see *Walling* v. *Brady*, 125 F.3d 114, 118 (3d Cir. 1997). Contrary to respondents' suggestion (Br. in Opp. 18), the plan in this case does not resemble a multiemployer plan in the above respect, because Hughes specifically reserved for itself the authority to make plan amendments. Verhey Decl., Exh. 1 (Hughes Non-Bargaining Retirement Plan §§ 1.13 and 6.5(a) (Oct. 30, 1985)).

[16] Nor does *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), cited by the court of appeals (Pet. App. 15a-16a), support the conclusion that Hughes was acting as both a fiduciary and a plan sponsor when it amended the plan. In *Varity*, this Court held that an employer exercised the fiduciary function of plan administration when it made certain

There are good reasons not to impose fiduciary duties on employers when they amend a contributory plan to alter plan benefits. Congress generally left to employers such decisions as whether to establish a plan, what level of benefits to provide, and the source of the plan's funding. See *Spink*, 517 U.S. at 890; *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). Employers make those decisions for their own business interests, and, accordingly, such decisions "are not governed by fiduciary standards." *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992). For instance, employers may decide to require employee contributions in order to provide for greater benefits, to lower costs to the employer, or to instill greater employee interest in the plan. Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 181 (6th ed. 1989). Any attempt to impose on employers a fiduciary duty to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. 1104(a)(1), would be both unworkable and inconsistent with Congress's policy decision to separate fiduciary from settlor functions under ERISA.

2. The other grounds respondents advance for distinguishing *Spink* are equally unpersuasive. Respondents cite 29 U.S.C. 1344 and 1053 to support the notion that ERISA treats contributory defined benefit plans differently from non-contributory plans. Br. in Opp. 19-20; see also Pet. App. 8a-9a. Section 1344 differentiates between employee and employer contributions, however, *only upon plan termination*. 29 U.S.C. 1344(a)(1), (d)(3)(A); see also pp. 6-7, 13, *supra*. Moreover, Section 1053's vesting provisions protect against forfeiture of *accrued benefits* and do not grant participants in an on-

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representations to employees regarding employee benefits. 516 U.S. at 498-503. The Court did not suggest in *Varity*, however, that an employer performs both fiduciary and settlor functions when it amends a plan. In any event, *Spink*'s subsequent holding makes clear that an employer does not act as a fiduciary in amending the plan that it sponsors.

going defined benefit plan property rights in plan *assets*. See pp. 19-20, *supra*. Thus, neither of those provisions supports imposing fiduciary duties on employers when they amend a contributory plan that is partly funded by employee contributions.[17]

Respondents also argue that amendments to a contributory plan, unlike amendments to a non-contributory plan, involve the "disposition" of plan assets within ERISA's definition of a fiduciary under 29 U.S.C. 1002(21)(A). Br. in Opp. 14-15, 17; see also Pet. App. 16a ("Hughes was disposing of the plan's assets when it amended the plan"). According to respondents, "Hughes, while ostensibly 'amending' the Plan, * * * actually disposed of its assets by closing it and making it a wasting trust." Br. in Opp. 17 n.8. Those contentions are without merit. *Spink* squarely held that a plan amendment to alter benefits—a matter of plan design—does not fall within ERISA's definition of a fiduciary. 517 U.S. at 890. Moreover, the source of the plan's assets does not dictate when an employer "disposes" of plan assets through plan management or administration. 29 U.S.C. 1002(21)(A). And, for the reasons previously stated, pp. 12-19, *supra*, respondents have no basis for claiming that the 1991 amendment terminated the plan or created a separate plan.

Finally, respondents assert that, because employees are "co-settlors" of a plan when they contribute to it, the employer is subject to fiduciary duties when it amends a plan funded by employee contributions. Br. in Opp. 17-18, 20; see also Pet. App. 14a. That is not correct. ERISA does not consider employees to be "co-settlors" of a plan just because they are required to contribute to it. See 29 U.S.C. 1002(16)(B)(i) ("[t]he term 'plan sponsor' means

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[17] Respondents similarly contend that *Spink* is not controlling in this case because their complaint "alleges breach of accrual, vesting and termination provisions of ERISA." Br. in Opp. 7, 10-12; see also Pet. App. 7a-8a. Those allegations, however, have no relevance to whether Hughes acted as a fiduciary within the meaning of 29 U.S.C. 1002(21)(A) when the company amended its plan.

* * * the *employer* in the case of an employee benefit plan established or maintained by a single employer") (emphasis added). True "co-settlors"—*e.g.*, an employer and a union that jointly establish a plan and are therefore defined as plan sponsors under 29 U.S.C. 1002(16)(B)(iii)—have no fiduciary duty to represent each other's interests in arriving at the terms of such a plan. See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 336 (1981) (atmosphere in which ERISA fiduciary must operate is "wholly inconsistent with [the collective bargaining] process of compromise and economic pressure"); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953) (employer and union "owe[] complete loyalty to * * * the interests of [the parties] [they] represent[]"). Accordingly, respondents have not stated a valid claim that Hughes violated ERISA's fiduciary duty provisions when it adopted the 1989 and 1991 amendments to its plan.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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