

January 2006

CONGRESS

More Bad News for the Nation's Troubled Pension Plans

For several years, the *Watch Report* has reported regularly on the pending collision among ill-advised federal regulatory policy, the troubled financial state of super-regulated sectors like the automotive and airline industries, and the underfunding of both corporate pension plans and the Pension Benefit Guaranty Corporation.

The nation moved several steps closer to that impending calamity over the last month.

General Motors kicked off the parade of news by getting rid of 30,000 North American jobs—announcing its intention to close nine plants in Michigan, Oklahoma, Ohio, and elsewhere during the next three years. This decision apparently came as a surprise to the United Auto Workers (UAW), which had granted \$1 billion worth of pension and benefit concessions in the hope of staving off just such a retrenchment.

The problem is compounded by the fact that GM will remain contractually obligated to pay for a good portion of the salaries of the workers in the shuttered plants—and that GM's more urgent need of forcing its older workforce into premature retirement will be made more difficult because of UAW's wrath.

Furthermore, while draconian moves such as this are a prerequisite to GM's survival, they are, by no means, a guarantee.

ALSO IN THIS ISSUE . . .

| | |
|---------------------------|-----------|
| CONGRESS | Pages 1-3 |
| THE EXECUTIVE BRANCH | |
| Regulation | Pages 3-4 |
| THE COURTS | |
| The Supreme Court | Pages 4-7 |
| The Inferior Courts | Page 7 |

Coming within a few days of the GM announcement was a report by the Pension Benefit Guaranty Corporation (PBGC) that its assets fell \$22.8 billion short of its liabilities. If GM and Ford Motor Company ultimately join major airlines in declaring bankruptcy and thus shifting the burden of their pension plans onto the taxpayer, this situation will get dramatically worse.

All of these problems put new impetus on efforts by Congress and the Bush administration to further jimmy federal pension laws—and highlight what, at least early on, seems to be a bitter feud between the two ends of Pennsylvania Avenue.

In an extraordinary op-ed in the *New York Times*, Treasury Secretary John Snow, Commerce Secretary Carlos Gutierrez, and Labor Secretary Elaine Chao last month blasted Senate Finance Committee Chairman Chuck Grassley (R-Iowa) by name—and lamented the fact that “[t]here hasn’t been an increase in [pension] premiums in 14 years . . .”

© The National Legal Center for the Public Interest
ISBN 1095-8371

The *Judicial/Legislative Watch Report* is published monthly by the National Legal Center for the Public Interest, a nonpartisan, nonprofit law and education foundation.

Address all correspondence to the
**National Legal Center
for the Public Interest**
1600 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 466-9360
Fax: (202) 466-9366
E-mail: info@nlcpi.org
Web site: www.nlcpi.org

The three secretaries specifically attacked the Senate's proposed legislation for "actually relax[ing pension] funding rules" and the House's for "the long transition it allows before funding requirements fully take effect."

The Senate version – passed on November 16 by a 97-to-2 vote, blasted by Snow et al., and facing a veto threat – would require most companies to close shortfalls in their pension funding within seven years. But it would give the major airlines 20 years to close the gaps, thereby triggering the administration's wrath.

In addition, the Senate – like the administration – would impose a substantial tax increase by raising premiums to the PBGC. It would also charge a fee for companies filing for bankruptcy under Chapter 11 and emerging as functioning entities, after having jettisoned their pension plans. This is presumably intended to prevent a situation where the primary effect of the bill is to force large numbers of Chapter 11 filings and a massive increase in PBGC liability.

Ironically, the odd-bedfellows coalition of labor and business has urged caution with respect to what, in effect, is no more than a massive bipartisan tax increase. Business has cautioned that increasing premiums and increasing reserve requirements will effectively result in the termination of large numbers of pension plans – and organized labor has largely bought off on that analysis.

And, if this weren't enough, the PBGC's own study found that the Senate bill "might not work as well as . . . hoped" – a euphemism for the real possibility that the Senate would make things dramatically worse than if it did nothing at all. According to the PBGC,

This is the first time Congress has seriously revisited the pension issue since earlier in the Bush administration, when it eased pension reserve requirements for corporations – in the short term – in a move widely regarded as currying corporate favor prior to the 2004 elections.

In the meantime, Congress enacted a rewrite of the federal bankruptcy code, with hardly a thought to the possibility of addressing the use of bankruptcy as a tool for gaining competitive advantage by unloading an exorbitantly expensive pension plan.

One way or another, the excessive health and pension benefits owed by American auto makers is reaching a crisis level: Last year, GM spent \$1500 per vehicle for health care, while Toyota spent roughly \$200 in the United States and Canada and below \$100 in Japan.

For its part, Ford Motor Company – facing many of the same problems as GM – is working to move more actively into hybrids. Its chairman and CEO, William Clay Ford, Jr., has set forth a package of legislation to encourage more fuel-efficient vehicles, including requirements that all levels of government buy hybrids, plus tax incentives for plant upgrades.

Not coincidentally, since the beginning of the Bush administration, manufacturing jobs have dropped by three million; at the same time that the trade deficit has increased to \$600 trillion.

Congress Trims Sails in Modest Post-Thanksgiving Session

With a 22-man and woman bloc of House Republican moderates having killed the effort to add Alaska National Wildlife Refuge (ANWR) drilling to the non-filibusterable

budget “reconciliation” measure—and with news that the Justice Department’s bribery investigation had expanded to five more top former aides of Congressman Tom DeLay (R-Tex.)—the congressional leadership, in December, trimmed its agenda to the very minimum necessary to close up shop and get out of town.

This decision is particularly significant because the legislative processes are not going to become more efficient in 2006—a sixth-year election cycle in which the party out of power has traditionally picked up congressional seats.

Congressional Democrats will fight vigorously to block even the modest achievements that seemed doable in the First Session. Furthermore, if Democrats pick up seats—or even control of one or both Houses in November—the one-vote margins whereby Republicans passed prescription drug legislation, the Central American Free Trade Agreement (CAFTA), and “fast track” will become unattainable.

The Executive Branch

Regulation

The Environmental Protection Agency: As Temperatures Cool, “Global Warming” Debate Heats Up: With a blizzard blanketing much of the East Coast over the Thanksgiving weekend, it is the time of year when the “global warming” crowd normally slinks back into its den until the summer.

This year may be different. To review the bidding:

- Legislatively, the congressional impasse is not likely to break. The Bush administration supports “cap and trade” legislation that would regulate “greenhouse gases,” but would exempt carbon dioxide. Even though this would be a step forward for environmentalists, they—aided by presidential-candidate-in-waiting John McCain (R-Ariz.)—would block any Clean Air Act reauthorization that failed to regulate CO₂.
- In lieu of congressional action, nine northeastern states agreed to a pact—dubbed the “Regional Greenhouse Gas Initiative”—to regulate emissions at the state level. Among other things, the state agreement would immediately freeze power plant emissions and subsequently reduce them by 10% by 2020—given that exactly one-third of “greenhouse gas” emissions come from “electricity generation,” the single largest source. At press time, Massachusetts Governor Mitt Romney was wavering over his state’s participation in the plan—as was Rhode Island—and the joint announcement had been put off by 15 days, pending further negotiations.
- Already, New York has adopted regulations—expected to be copied in every participating state—which would mandate an approximately 30 percent cut in carbon dioxide and other “greenhouse gases” between 2009 and 2016. Auto makers say the New York rules would severely limit the availability of sport utility vehicles and other “light trucks” favored by suburban families. Environmentalists claim that the new regulations will simply encourage the sales of hybrid vehicles.
- In the meantime, at a Montreal climate change conference hosted the week of November 27, international delegates blasted the United States for refusing to participate in the Kyoto Protocol, which regulates gas emissions in a way that would particularly impact the American economy, but would largely ignore burgeoning competition in Communist China.
- The Bush administration has sought to counter this calumny with the argument that technological progress, rather than government mandates, are the solution to “greenhouse gas” emissions—and, in particular, has pointed to a West Virginia project to determine if carbon dioxide can be

safely injected into deep-salt water-laden rock formations.

- Whether or not the Bush administration can convince environmentalists that it can solve “global warming” through technology – and no one is betting that it can – it is not at all clear that a group of northeastern states can legally agree to clean-air regulation that Congress has refused to pass. The most recent Supreme Court case dealing with a comparable issue was *Engine Manufacturers Association v. South Coast Air Quality Management District*, No. 02-1343 (2004). By an 8-to-1 decision – with only Souter dissenting – the Court held that the Clean Air Act preempts efforts by a California air quality district to prohibit the purchase of any new fleet vehicle with unacceptable levels of emissions.
- The prediction? Foggy, with breaks of sunshine. Congress will continue to sink into an increasingly raucous impasse. Liberal states and the Bush administration will fight it out in the courts until Bush’s term expires in 2009.

Federal Home Loan Mortgage Corporation (Freddie Mac): Freddie Mac Considers Closing Barn Door; Livestock Missing: As Enron executives prepare to go to trial for, *inter alia*, accounting fraud, congressionally chartered Freddie Mac – accused of some of the same “mistakes” – admitted a \$220 million discrepancy in its income projections. The mortgage giant said last month that it would lower its net income numbers for the first half of 2005 because of a “computer error.”

But, contrary to implications, the massive earnings overstatement was not the result of some insidious virus or power failure, but, rather, a “technology program” that overvalued interest income on securities backed by variable-rate home equity loans. The “computer glitch” forced Freddie Mac to “delay” its third-quarter earnings statement – a practice that would, under most circumstances, also be outlawed in the private sector.

And, lest anyone assume that the Freddie Mac-related bad news is over, the corporation has left open the possibility of making more revisions, as it “look[s] at other computer applications to ensure there aren’t other programming functionality issues”

The Courts

The Supreme Court

Senate Prepares for Hearings on Alito Nomination

Within the next two weeks, the Senate will hunker down for hearings on the nomination of Judge Samuel Alito to succeed Sandra Day O’Connor on the Supreme Court.

At press time, Senate Democrats had not yet found an issue that would provide the 41 votes necessary to filibuster the nomination – even if the “nuclear option” were not invoked.

Interestingly, Judiciary Committee Democrat Joseph Biden (D-Del.) seemed to be willing to give Alito a bye on his statements from the 1980s opposing *Roe v. Wade*, 410 U.S. 113 (1973) – focusing, instead, on Alito’s apparent skepticism over the “one-man one-vote” ramifications of *Baker v. Carr*, 369 U.S. 186 (1962). Presumably, Alito will roundly endorse *Baker v. Carr* when he appears before the Senate Judiciary Committee – thereby putting the issue to rest.

The bottom line? It is always possible to make a small but fatal slip in the very public, high-wire tightrope act that Supreme Court nominations have become. But, at press time, that hasn’t happened yet.

Cases Decided

Parents Retain the Burden of Proof in Disability Education Challenge

The first decisions of the 2005-06 Supreme Court Term have now begun to trickle in –

those nearly unanimous, relatively short, quickly delivered opinions that suggest that their outcomes were preordained.

Certainly, the first important civil case to be handed down dealt with the burden of proof in educational disabilities litigation:

Schaffer v. Weast

No. 04-698

from the Fourth Circuit Court of Appeals

argued October 5, 2005

decided November 21, 2005

Background:

The Individuals with Disabilities Education Act (IDEA) entitles every physically, mentally, or emotionally handicapped child to receive “free appropriate public education,” including an individual educational program (IEP) specifically tailored to him or her.

This case deals with the question of whether the parents or the school district bears the burden of proof when a parent requests a “due process hearing,” claiming that an IEP is inadequate.

The district court ordered the administrative law judge to assign the burden of proof to the school district—and then upheld and expanded his judgment against the Board of Education. The Fourth Circuit Court of Appeals—in a divided opinion—noted that Congress had been silent on the issue and therefore placed the burden on the party initiating the action. The majority’s decision was written by J. Michael Luttig—frequently mentioned as a Supreme Court possibility.

This decision created a “circuit split,” and the Schaffers appealed.

Analysis:

By a 7-to-1 vote – with O’Connor writing the opinion of the court – the justices held that the burden of proof was, as with most litigation, on the party bringing the action.

In view of the huge drain of resources that IDEA has placed on school systems, the Court seemed to conclude that “enough is enough” – particularly given the fact that

- the costs of IDEA are huge—with special education eating up 20% of the budget or more in many school districts;
- since the party with the burden of proof presents its case first, placing the burden on the school district would have given the parents the ability to hear the school district’s case and poke holes in it, particularly in cases with parents not represented by counsel; and
- given that a nonprevailing school district is required to pay the parents’ legal fees, this would have meant that, had the Schaffers been successful, any school district that refused to settle on terms favorable to the persistent and well-financed parents would do so at its peril.

Under these circumstances, the massive expenditures currently poured out for special education would seem small by comparison.

Cases Argued

The Civil Rights Community Discovers the “Downside” to Challenging the Solomon Amendment

In a lawsuit challenging a federal law requiring on-campus access by military recruiters—brought at the behest of NYU, Cornell, Harvard, Yale, 34 other law schools and faculties, and the American Association of University Professors—you would have thought *someone* would have stopped to examine the long-range legal consequences of the litigation, wouldn’t you?

But such is the compartmentalization of legal thought that it never seemed to occur to anyone, in advance, that a substantial portion of federal civil rights law was at stake.

The case is:

Rumsfeld v. Forum for Academic and Institutional Rights
No. 04-1152
from the Third Circuit Court of Appeals
argued December 6, 2005

Background:

This is not the first time the Doctrine of Unintended Consequences has come to life in Supreme Court jurisprudence recently: Last year, it was the medical marijuana crowd arguing that the Commerce Clause should be whittled down to a toothpick so that they could “light up.” [*Ashcroft v. Raich*, No. 03-1454 (2005)]

Now come America’s prestige colleges and universities, trying to persuade the Supreme Court to place limits on the exercise of congressional power under the “spending clause” – in a move that could invalidate some of the most significant civil rights laws of the last 45 years.

At stake, immediately, is a challenge to the “Solomon amendment” – an appropriations rider denying certain federal funds to universities that prohibit student access for military recruiters. Bringing the suit is an organization formed by the country’s major law schools, who sued in 2003 to invalidate the amendment – claiming that it violated its members’ prohibitions on granting access to recruiters who discriminate on the basis of sexual preference.

At the lower level, the federal District Court for the District of New Jersey denied a preliminary injunction, but the Third Circuit reversed. And, after granting certiorari, the Supreme Court heard arguments this past month.

Analysis:

Increasingly, virtually all congressionally enacted policy is shunted off to appropriations bills. Even outside the appropriations process, much of the legislation enacted in the late 1960s and early 1970s claimed federal jurisdiction by threatening to withdraw federal funds.

Therefore, this lawsuit implicates virtually everything Congress does. And, in particular, between a third and a half of major civil rights enactments in modern times have been formulated as restrictions on federal funding recipients:

- the Individuals with Disabilities Education Act (IDEA);
- title IX of the Education Amendments of 1972 (prohibiting sex discrimination in federally funded education programs);
- title VI of the Civil Rights Act of 1964;
- the Age Discrimination in Employment Act; and
- the Civil Rights Restoration Act.

The final statute, in particular, which was passed during the 100th Congress, was enacted to ensure that every facet of a college’s activities was regulated by government, even though only the financial aid office actually benefitted from government assistance. And, in fact, this sledgehammer approach – championed with fervor by liberals such as Massachusetts Democrat Edward Kennedy – was the prototype for more recent embellishments of the Solomon amendment that would defund entire universities because their law schools refused to allow military recruiters, rather than just the law schools themselves.

Now, in their efforts to overturn the Solomon amendment, the law schools – relying on New Hampshire’s “Live Free or Die” case [*Wooley v. Maynard*, 430 U.S. 705 (1977)] – seem almost to suggest that any ideologically motivated school policy represents protected “speech” that cannot be limited as a condition of federal funding.

(In addition, the schools make much of the far-from-self-evident policy argument that the Army benefits from being relegated to a Motel 6, rather than interviewing law students on-campus.)

But, once you start to put limits on federal funding restrictions, what about

- Bob Jones University's claim – at least at one time – that its religiously mandated prohibition against inter-racial dating was constitutionally protected?
- Claims that racially or sexually discriminatory policies implicate various First Amendment issues – of speech, or of association, or of religious freedom?

No less than Harvard Professor Laurence Tribe is quoted by journalist Kristin Eliasberg as saying: "There is no guarantee that the Supreme Court would write an opinion with the degree of delicacy required to strike down the Solomon Amendment in a way that does not endanger the vigorous use of Title 6 and Title 9 to enforce antidiscrimination."

The bottom line is that large numbers of federal funding recipients – from Legal Services to Planned Parenthood to the Salvation Army – are subject to appropriations limitations on their ability to engage in constitutionally protected activities. And, because money is "fungible," sometimes these restrictions reach all of the organization's operations, federally funded or not.

So, as much as we might hope to be entertained for the next 20 years as the Supreme Court struggles to dig itself out of the "*Rumsfeld* hole," it is more likely that the Court granted certiorari in order to spank the errant Third Circuit for entertaining the law schools' arguments.

The Inferior Courts

New York Challenges Gun Liability Bill

Last month, we reported at length on the most recent installment of "tort reform" – newly enacted legislation purporting to exempt gun manufacturers from frivolous lawsuit liability.

At a time when many in the media were predicting that this legislation would spell the end of lawsuits against gun manufacturers and dealers, we specifically pointed out some of the gaping loopholes for suits arising out of

"negligent entrustment," suicide-related "design defects," etc., that, we predicted, would lead to court challenges.

A month later, New York City brought a lawsuit in federal district court – challenging the constitutionality of the new law and claiming that the city's suit against the gun industry fell within one of the statute's exemptions. On November 21, Judge Jack Weinstein of the federal District Court for the Eastern District of New York held two hours of oral argument on the issues.

Weinstein seems to have become the anti-gun forum-shoppers judge-of-choice – as evidenced by the fact that New York went to the Eastern District (Brooklyn), rather than the more obvious Southern District (Manhattan), which is only steps away from New York's City Hall.

New York specifically claimed that its lawsuit fell within the Act's exception dealing with suits "in which a manufacturer or seller of a qualified product [i.e., a gun] knowingly violated a State or Federal statute applicable to the sale or marking of the [gun], if the violation was a proximate cause of the harm for which relief is sought."

If this challenge is successful, Congress's efforts will have effectively been nullified – because the tort reform statute would be inapplicable in any case where a city sues on the basis of a state statute, whether specifically tailored to the gun industry or more general in nature.

Even if Judge Weinstein rules against the city, however, its lawsuit also alleges "negligence" and "design defects" – counts that arguably fall within other exceptions to the tort reform legislation.

Given that Congress – as a condition of passage – agreed to a couple of anti-gun riders mandating handgun trigger locks and rethinking the definition of "armor-piercing ammunition," a court finding negating the tort-reform aspects of the legislation would make the powerful gun lobby look particularly foolish.

A RECENT PUBLICATION

The edited proceedings of a major conference, sponsored by the Center in 2005, is now available. *Ensuring the Competitiveness of American Business: Restoring the Proper Regulatory and Enforcement Balance* provides insights and potential solutions to the unintended consequences of post-Enron “reforms.” The following topics were discussed in detail by a faculty of experts and make up the chapters of the book. The program was moderated by R. William (Bill) Ide, partner in the law firm of McKenna Long & Aldridge LLP, former President of the ABA, and former General Counsel of Monsanto. The publication can be purchased by contacting the Center (202) 466-9360.

| | |
|--|-----------------------------------|
| POST-ENRON TRENDS IN CORPORATE REGULATION AND LITIGATION | Jeffrey B. Kindler, Moderator |
| THE REDEFINED ROLE OF DIRECTORS | Charles A. Bowsher, Moderator |
| WHAT IS CRIMINAL BEHAVIOR? THE ROLE OF CRIMINAL LAW AND CORPORATE INTENT IN REGULATING CORPORATE BEHAVIOR | Stanley A. Twardy, Jr., Moderator |
| THE IMPACT OF CIVIL LITIGATION: IT’S TIME TO DRAW THE LINE | Michael D. Fricklas, Moderator |
| SELF-REGULATION AS THE MOST EFFECTIVE DETERRENT TO CORPORATE ABUSE | Stuart M. Gerson, Moderator |

The keynote presentations by the Attorney General of the United States, Alberto R. Gonzales, and the Secretary of the Treasury, John W. Snow, are also included in this publication.

MARK YOUR CALENDAR!

A DAY WITH THE DEPARTMENT OF JUSTICE, March 21 and 22, 2006, Washington, D.C.

A Day With Justice is of professional value to you providing an opportunity to learn firsthand from senior DOJ officials of the priorities, policies, and operations of their respective areas of responsibility – all in one place – at one time. Conversely, it affords the attendees an opportunity to enter into a dialogue with the presenters to express their views and concerns.

Confirmed participants are: Alberto R. Gonzales, Attorney General of the United States; Robert E. McCallum, Jr., Associate Attorney General; Paul D. Clement, Solicitor General of the United States; Wan J. Kim, Assistant Attorney General, Civil Rights Division; Alice Fisher, Assistant Attorney General, Criminal Division; Thomas O. Barnett, Acting Attorney General, Antitrust Division; and Sue Ellen Wooldridge, Assistant Attorney General, Environment & Natural Resources Division. Robert S. Mueller, III, director of the FBI has been invited.

To register, please visit our Web site at www.nlcpi.org, or call the Center at (202) 466-9360