Section 4(f)(2) of the Age Discrimination in Employment Act: No Justification for Cost Justification?
Public Employees Retirement System v. Betts

In 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA" or "the Act")[1] to address problems faced by older workers, the "[h]undreds of thousands not yet old, not yet voluntarily retired, [who found] themselves jobless because of arbitrary age discrimination."[2] The ADEA prohibits arbitrary discrimination in the workplace based on age, and makes it unlawful for an employer[3] to discharge or refuse to hire an older worker[4] or otherwise discriminate in providing "compensation, terms, conditions, or privileges of employment" because of age.[5]

Section 4(f) of the ADEA contains statutory exemptions[6] to charges of age discrimination, indicating that Congress contemplated that some

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1. The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987)) [hereinafter ADEA or the Act]. The ADEA purports to "promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

2. H.R. REP. No. 805, 90th Cong., 1st Sess. 2213, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214 (comments of President Johnson, who urged Congress to act swiftly and decisively in dealing with age discrimination).

Congress acted in response to findings that older workers were disadvantaged in retaining and regaining employment because of the common practice among employers of setting arbitrary age limits. *See* 29 U.S.C. § 621(a).

3. The proscription against age discrimination applies with equal force to employers, employment agencies, and labor organizations. 29 U.S.C. § 623(a)-(c).

4. The ADEA extends its protection to all individuals who are at least forty years old. 29 U.S.C. § 631(a). As originally enacted, the ADEA extended its protection to workers between the ages of 40 and 65. ADEA, Pub. L. No. 90-202, § 12, 81 Stat. 602 (1967).

On two occasions congressional amendments raised the upper age limits. In 1978, Congress extended the general protection of the Act to include those between 40 and 70 and abolished the age limit for federal employees. ADEA Amendments of 1978, Pub. L. No. 95-256, §§ 3(a), 5(a), 92 Stat. 189, 889-91 (1978). In 1986, Congress removed the upper age limit entirely. ADEA Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342 (1986).

5. 29 U.S.C. § 623(a)(1).

6. 29 U.S.C. §§ 623(f)(1) - (3) provides in part:

It shall not be unlawful for an employer:

(1) to take any action otherwise prohibited [by the Act] where age is a bona fide occupational qualification reasonably necessary to the normal operation of

types of age-based discriminatory treatment are permissible. One example is the benefit plan defense found in section 4(f)(2).[7] The benefit plan defense allows employers to engage in discriminatory conduct when providing employee benefits to older workers, conduct that would otherwise be a violation of the ADEA, if the employers' actions are taken pursuant to the administration of a bona fide[8] employee benefit plan,[9] such as a retirement, pension, or insurance plan that is not a subterfuge[10] to evade the purposes[11] of the ADEA. Unfortunately, the statutory language of the benefit plan defense[12] gives little guidance regarding the exception's scope or the means of satisfying the defense.

> the particular business, or where the differentiation is based on reasonable factors other than age . . .
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> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual; or
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> (3) to discharge or otherwise discipline an individual for good cause.

See generally Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the 1978 Amendments*, 12 GA. L. REV. 747 (1978).

7. 29 U.S.C. § 623(f)(2). *See generally* Note, *Age Discrimination in Employment and the Benefit Plan Defense: Trends in the Federal and Iowa Courts*, 30 DRAKE L. REV. 617 (1980).

8. A benefit plan is bona fide if it exists and pays benefits. *See, e.g.*, United Air Lines, Inc. v. McMann, 434 U.S. 192, 194 (1977); EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988); EEOC v. Home Ins. Co., 672 F.2d 252, 260 (2d Cir. 1982).

The regulations contain another definition of bona fide: a plan is bona fide if its terms were explained to the employee in writing and the plan provided benefits according to those terms. 29 C.F.R. § 860.120(b) (1989).

9. Some cases have held that § 4(f)(2) applies only to the types of benefit plans in which age is an actuarially significant factor in plan design. Actuarially significant means that the cost of providing benefits pursuant to the plan increases with the age of the participants. *See, e.g.*, EEOC v. Westinghouse Elec. Corp., 869 F.2d 696, 710 (3d Cir. 1989), *vacated and remanded*, 110 S. Ct. 37 (1989); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984); *cf.* Patterson v. Independent School Dist., 742 F.2d 465, 467 (8th Cir. 1984) (plan must be systematic and interrelated structure in which consideration of age is actuarial necessity to attain fairness in computing benefits); EEOC v. Great Atlantic & Pacific Tea Co., 618 F. Supp. 115, 122 (N.D. Ohio 1985) (severance pay plan does not reflect age-related cost factors and is not the type of plan Congress intended to protect in § 4(f)(2)).

10. The Supreme Court defined subterfuge as having its ordinary dictionary meaning of a "scheme, plan, stratagem or artifice of evasion." United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

11. *See supra* note 1 and accompanying text.

12. *See supra* note 6 and accompanying text.

The first two elements of the defense have generated little judicial confusion. The benefit plan in question must be bona fide and the employer's actions must be taken in observation of the plan's terms.[13] It is the last element of the defense — whether the plan is a subterfuge to evade the purposes of the Act — that is a continuing source of controversy.

The United States Supreme Court first addressed the section 4(f)(2) defense in *United Air Lines, Inc. v. McMann*.[14] *McMann* involved a challenge to a benefit plan predating the enactment of the ADEA. An employee, involuntarily retired according to the terms of the benefit plan, argued that the plan was a subterfuge and that the employer should justify its discrimination by proving some economic or business purpose. The Court rejected this argument and held that no plan predating the enactment of the ADEA could be a subterfuge to evade an act passed years later.[15] The word "subterfuge" was given its ordinary meaning of "a scheme, plan, stratagem or artifice of evasion."[16]

The Court in *McMann* also rejected the argument that an employer must show a business or economic purpose in order to prove that a bona fide preexisting benefit plan was not a subterfuge.[17] Thus, after *McMann*, if the plan was bona fide in that it paid substantial benefits, and the employer's action was in observance of the terms of the plan, the employer met its burden simply by showing that the plan pre-dated the ADEA's enactment.[18]

Since *McMann*, administrative regulations[19] and judicial decisions have interpreted section 4(f)(2) as an affirmative defense.[20] In 1969, the

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13. An employer observes the terms of a benefit plan if he provides lower benefits to older workers because the terms of the plan actually mandate it. This requirement is met only when an employer acts pursuant to the specific terms of a plan. If the plan, by its terms, does not require an employer to reduce benefits for older employees, the employer does not observe the terms of the benefit plan. *See, e.g.*, Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198, 1204 (S.D. Ohio 1986), *aff'd*, 848 F.2d 692 (6th Cir. 1988); Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir. 1980); Smart v. Porter Paint Co., 630 F.2d 490, 494 (7th Cir. 1980).

14. 434 U.S. 192 (1977).

15. *Id.* at 203. This approach to disproving subterfuge based on the date of enactment of the benefit plan in question is called the chronological test. *See, e.g.*, EEOC v. Maine, 644 F. Supp. 223, 227 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987). *See also* EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1302 (7th Cir. 1985); Alford v. City of Lubbock, 664 F.2d 1263, 1271 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982); Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980); Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 413 (5th Cir. 1980). *See infra* note 145.

16. *McMann*, 434 U.S. at 192.

17. *Id.*

18. *Id. Accord* EEOC v. County of Orange, 837 F.2d 420, 423 (9th Cir. 1988); EEOC v. Maine, 644 F. Supp. at 227; *Alford*, 664 F.2d at 1271.

19. Congress initially charged the Secretary of Labor, in § 9 of the ADEA, with

Department of Labor issued a regulation incorporating the cost justification principle as a means of disproving subterfuge.[21] Cost justification allows employers to prove that their benefit plans are not arbitrary, even though the plans pay unequal benefits to employees because of age. If the employer proves that the reduced benefits are justified by the increased costs of providing them, the plan is, objectively, not a subterfuge. Without such justification, the variance of benefits because of age would establish a prima facie case of age discrimination.[22] Although *McMann* purported to settle the question of whether an employer had to disprove subterfuge by showing a cost justification, *McMann* did not resolve the issue regarding post-ADEA benefit plans.

Recently, the United States Supreme Court interpreted the meaning of the subterfuge language in the context of post-Act benefit plans in a case that has far reaching effects on the provision of fringe benefits

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issuing rules and regulations necessary to carry out the ADEA. President Carter transferred the administration of the ADEA to the Equal Employment Opportunity Commission (EEOC), effective July 1, 1979. Reorg. Plan No. 1 of 1978, § 2. The EEOC published its proposed interpretations of the ADEA in November, 1979, and adopted the Department of Labor's then-existing interpretations of § 860.120 as published without modification at Employee Benefits Plans, Amendment to Administrative Bulletin, 44 Fed. Reg. 30,648, 30,658-62 (1979). Proposed Interpretations; Age Discrimination in Employment Act, 44 Fed. Reg. 68,858, 68,862 (1979). The ADEA interpretations were also renumbered as 29 C.F.R. §§ 1625-1625:13. The EEOC's final interpretations of the ADEA appeared at 46 Fed. Reg. 47,724-28 (to be codified at 29 C.F.R. § 1625.10). Section 1625.10 incorporated the interpretations promulgated by the Secretary of Labor at 29 C.F.R. § 860.120 (1979); Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,728 (1981).

20. Betts v. Hamilton County Bd. of Mental Retardation, 848 F.2d 692 (6th Cir. 1988), *rev'd sub nom.* PERS v. Betts, 109 S. Ct. 2854 (1989); *accord* EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988), *cert. denied sub nom.* Cook County College Local No. 1600 v. City Colleges of Chicago, 486 U.S. 1044 (1988); Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986); EEOC v. Baltimore & Ohio R.R., 632 F.2d 1107 (1980), *cert. denied*, 454 U.S. 825 (1981); Puckett v. United Air Lines, Inc., 704 F. Supp. 145 (D. Ill. 1989).

21. The Secretary promulgated the cost justification rule in an interpretive bulletin published in Jan., 1969, at 29 C.F.R. § 860.120(a). Section 860.120(a) provided:

> [A]n employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. . . . A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage.

22. *See, e.g., Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988); *Karlen*, 837 F.2d 314, 319 (7th Cir. 1988); *Cipriano*, 785 F.2d 51 (2d Cir. 1986).

to older workers. In *Public Employees Retirement System v. Betts*,[23] Justice Kennedy, writing for the majority, narrowed the scope of the ADEA by employing what dissenting Justices Marshall and Brennan labelled a "draconian interpretation."[24] The decision held that all bona fide employee benefit plans are exempted from the purview of the Act unless they are a subterfuge for discrimination in some other aspect of the employment relationship, such as hiring, discharge, wages, or promotion.[25] The Court also rejected cost justification as a means of disproving subterfuge, regardless of the date of the plan's enactment,[26] and invalidated the EEOC regulations incorporating this requirement.[27]

Lastly, the majority struck "a further blow against the statutory rights of older workers"[28] by characterizing section 4(f)(2) not as an affirmative defense, but as a redefinition of the plaintiff's prima facie case.[29] This holding means that the plaintiff must show that, in offering lower benefits, the employer actually intended to discriminate in hiring, wages, promotions or discharge.[30] One practical effect of *Betts* is that it opens the door for employers to discriminate against older workers with regard to employee fringe benefits, regardless of cost factors or other justifications.[31] The Court remanded the case to the district court upon a finding that its grant of summary judgment was inappropriate because Ms. Betts failed to meet her burden of proving that the reduced benefits she received resulted from her employer's intent to discriminate in a nonbenefit area of employment.[32]

This Note reviews the Supreme Court's decision in *Betts* by focusing on the majority's rejection of the cost justification rule embodied in the interpretive regulations, many lower court decisions, and the legislative

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23. 109 S. Ct. 2854 (1989). The majority consisted of Chief Justice Rehnquist and Justices Kennedy, White, Blackmun, Stevens, O'Connor, and Scalia. Justice Brennan joined the dissent of Justice Marshall.

24. *Id.* at 2871, 2875.

25. *Id.* at 2867.

26. *Id.* at 2865.

27. *Id.*

28. *Id.* at 2871 n.5.

29. *Id.* at 2868.

30. *Id.*

31. As stated by Justice Marshall in his dissent, "[h]enceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes of them." *Id.* at 2869 (Marshall, J., dissenting).

32. *Id.* at 2868-69. On remand, the Sixth Circuit treated the case as one involving involuntary retirement because of age, ignored the Supreme Court's decision, and again held for the plaintiff. Betts v. Hamilton County Bd. of Mental Retardation & Developmental Disabilities, 897 F.2d 1380 (6th Cir. 1990).

history of both the 1967 Act and 1978 amendments to the ADEA. This Note begins with a detailed review of *Betts* in Part I. Part II examines the relevant legislative history as the foundation for the Department of Labor and subsequent EEOC regulations which incorporated an objective, cost justification requirement into the subterfuge analysis. Part III analyzes the *Betts* opinion in light of the previous case law interpreting section 4(f)(2) and the cost justification rule. Finally, Part IV concludes that the majority misconstrued the legislative intent regarding section 4(f)(2) and suggests a congressional overruling of *Betts* in the same way Congress acted to overturn the specific result in *McMann*.[33]

I. The *Betts* Decision

A. Betts *in the District Court and Sixth Circuit*

June Betts was a sixty-one year old speech pathologist who worked for the Hamilton County Board of Mental Retardation and Developmental Disabilities, a member of the Public Employees Retirement System of Ohio[34] ("PERS"), for about six years.[35] The Board reassigned Betts, a diabetic, to various less demanding positions as her job performance deteriorated along with her health.[36] Eventually, Betts became disabled and the Board presented her with two alternatives: an unpaid medical leave or length of service retirement.[37] The Board did not offer disability

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33. Congress subsequently overruled *McMann* with the ADEA Amendments of 1978, which specifically rejected the Court's conclusion that involuntary retirement pursuant to the terms of a bona fide employee benefit plan was permitted by § 4(f)(2). ADEA Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 512-13; *see also* H.R. Cong. Rep. No. 950, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 529. *See* 124 Cong. Rec. 7881 (statement of Rep. Hawkins) (The conferees agree that the purpose of the amendment is to make perfectly clear that § 4(f)(2) does not authorize an employer to permit or require involuntary retirement, regardless of whether an involuntary retirement provision in a benefit plan became effective before or after the ADEA or these amendments. The conferees specifically disagree with the reasoning and holding in *McMann*.); 124 Cong. Rec. 8218 (statement of Sen. Javits). *See infra* note 85.

34. *Betts*, 109 S. Ct. at 2858. Ohio established the Public Employees Retirement System of Ohio to provide retirement benefits for state and local government employees in 1933. Both participating employees and public employers made contributions to the plan.

35. *Id.*

36. *Id.* at 2858-59.

37. *Id.* at 2859. Ohio Rev. Code Ann. § 145.35 (Baldwin 1984 & Supp. 1988) provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and has not attained age sixty and is not receiving disability benefits under any other Ohio state or municipal retirement programs.

retirement, despite Betts's disabled condition, because a provision in the Ohio statute governing pension plans prohibited persons who became disabled at age sixty or older from receiving disability pensions.[38] Thus, employees who became disabled at age fifty-nine would be entitled to disability retirement benefits, although those who became disabled at age sixty or later, like Betts, were ineligible to receive any disability benefits.

After considering her options, Betts accepted length of service retirement, which entitled her to a monthly benefit of $158.50. A similarly situated younger employee who qualified for PERS's disability retirement benefits would receive $355.02 per month.[39] Disability retirement afforded more benefits than age-and-service retirement because the Ohio legislature amended the PERS statutory scheme in 1976 to provide that disability retirement payments would not constitute less than thirty percent of the disabled retiree's final average salary.[40] Betts subsequently filed suit against the Board, alleging that the PERS disability retirement scheme was discriminatory on its face.[41]

The Sixth Circuit agreed with the district court[42] and held that "an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose."[43] This is essentially a statement of the cost justification principle. Despite Betts's argument that there was no economic justification for the different treatment afforded employees over sixty,[44] the defendants made no effort to offer

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38. *Betts*, 109 S. Ct. at 2858-59; *see* OHIO REV. CODE ANN. §§ 145.33, 145.34 (Baldwin 1984 & Supp. 1988) (Age and service retirement benefits are paid to those employees who have at least five years of service and are at least 60 years old or who have 30 years of service or who have 25 years of service and are at least 55 years old).

39. *Betts*, 109 S. Ct. at 2859. Betts subsequently retracted her acceptance of the service retirement and filed suit with the EEOC, alleging she was, in effect, forced to retire involuntarily by the terms of the plan in violation of the post-*McMann* 1978 amendments to the ADEA. The district court found that Betts was forced to retire and, therefore, that § 4(f)(2) was unavailable to PERS because of the 1978 amendments. However, neither the court of appeals nor the Supreme Court addressed this question.

40. OHIO REV. CODE ANN. § 145.36 (Baldwin 1984 & Supp. 1988).

41. *Betts*, 109 S. Ct. at 2859.

42. Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198, 1204 (S.D. Ohio 1986), *aff'd*, 848 F.2d 692 (6th Cir. 1988). The district court concluded that the Board did not act in observance of the terms of the benefit plan when they forced Betts into retirement because of her age. Therefore, the plan did not qualify for the § 4(f)(2) exception.

43. *Betts*, 848 F.2d 692, 694 (6th Cir. 1988), *rev'd*, 109 S. Ct. 2854 (1989).

44. This argument was derived from the EEOC regulations interpreting the subterfuge language in § 4(f)(2). 29 C.F.R. § 860.120(a)(1) (1989) (the legislative history of this provision shows that its purpose is to permit age-based reductions in employee benefits

any evidence on this point. Therefore, the court of appeals affirmed the district court's grant of summary judgment for the plaintiff.[45]

B. The Supreme Court's Decision in Betts

The broad issue presented to the Supreme Court on certiorari concerned the meaning and scope of the section 4(f)(2) exemption. Justice Kennedy, writing for the majority, first noted that the parties conceded that the PERS plan was bona fide because it existed and paid benefits.[46] Because the PERS statutory disability plan distinguished among employees eligible to receive disability retirement solely because of age, it was discriminatory on its face. Therefore, the plan could escape the proscriptions of the ADEA only by qualifying for the section 4(f)(2) exemption.

The Court did not examine the 1959 PERS plan provision which established age fifty-nine as the cut-off age for disability benefits because, based on *McMann*, a plan that predated the enactment of the ADEA could not be a subterfuge to evade the Act.[47] However, *McMann* did not shield the thirty-percent floor provision for disability retirement benefits that was added to the PERS plan in 1976.[48] Post-ADEA modifications of a pre-Act benefit plan may turn the plan into a subterfuge if the modifications are significant or at least relevant to the challenged discriminatory practice.[49] The post-Act PERS modification was both significant and relevant. Betts was restricted to age-and-service retirement benefits, which entitled her to less than one-half of the monthly benefit she would have received if she had been permitted to take disability retirement. Consequently, the Court faced the issue of the exact meaning of the section 4(f)(2) exception in the context of post-Act plans.[50]

The Court rejected the definition of subterfuge contained in the EEOC regulations.[51] The regulations state that "a plan or plan provision which prescribes lower benefits for older employees on account of age is not a subterfuge within the meaning of section 4(f)(2) provided that the lower level of benefits is justified by age-related cost considerations."[52] In the Court's view, this objective requirement of cost justification

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when the reductions are justified by significant cost considerations); *see supra* note 21 and accompanying text.

45. *Betts*, 848 F.2d at 695.

46. *See supra* note 8 and accompanying text.

47. *Betts*, 109 S. Ct. at 2862.

48. *See supra* note 37.

49. *See, e.g.*, EEOC v. County of Orange, 837 F.2d 420, 423 (9th Cir. 1988).

50. *Betts*, 109 S. Ct. at 2862.

51. *Id.* at 2865.

52. *Id.* at 2862 (quoting 29 C.F.R. § 1625.10(d) (1988)). This definition has been adopted by other courts of appeal, *e.g.*, EEOC v. City of Mt. Lebanon, 842 F.2d 1480, 1489 (3d Cir. 1988); Cipriano v. Board of Educ., 785 F.2d 51, 57-58 (2d Cir. 1986).

appeared nowhere in the plain statutory language of the ADEA and was inconsistent with the subjective definition of subterfuge adopted by the *McMann* Court.[53] Nor did the Court agree that the statutory language, "any bona fide employee benefit plan such as a retirement, pension, or insurance plan," limited the exemption to only those benefit plans in which costs rise with age.[54] The Court, therefore, invalidated the interpretive regulations construing section 4(f)(2) to include a cost justification requirement.[55]

Under the majority's interpretation of section 4(f)(2), if an employer adopts a plan provision formulated to retaliate against an employee for filing an age-discrimination complaint or designed to reduce salaries for all employees while raising fringe benefits only for younger workers, the employer would not be entitled to the protection of section 4(f)(2).[56] The majority acknowledged that this result allows employers wide latitude in structuring employee benefit plans,[57] but also conceded that this "construction of the words of the statute [was] not the only plausible one."[58] If there is more than one interpretation of the words of a statute, the meaning of the statute cannot be plain. Because "words are inexact tools at best and . . . there is . . . no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination,"[59] a review of the relevant legislative history is necessary to analyze the majority's opinion in *Betts*.

II. Section 4(f)(2): Legislative History & Interpretive Regulations

The main reason the *Betts* majority rejected the cost justification rule advanced by the plaintiff, the Department of Labor, the EEOC,[60] and the lower courts was that nowhere in the statute was the phrase "cost justification" mentioned as the means of disproving that a plan

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53. *Betts*, 109 S. Ct. at 2862-63.

54. *Id.* at 2864-65. The Court stated that this language "appears on its face to be nothing more than a listing of the general types of plans that fall within the category of employee benefit plans," and are not the types of plans in which the costs of benefits provided to the employee rise with the age of the recipient. *Id. See supra* note 9.

55. *Betts*, 109 S. Ct. at 2865.

56. *Id.* at 2868.

57. *Id.* at 2867.

58. *Id.* at 2866.

59. Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) (quoting United States v. American Trucking Ass'n, 310 U.S. 534, 544 (1940)), *cited in* United Air Lines, Inc. v. McMann, 434 U.S. 192, 210 (1977) (Marshall, J., dissenting).

60. *See* Proposed Interpretations; Age Discrimination in Employment Act, 29 C.F.R. § 1625.10 (1989).

provision was a subterfuge.[61] The majority dismissed Betts's reliance on the legislative history of section 4(f)(2) as "misplaced" in light of what it considered a plain and unambiguous statute.[62] Yet, the Court resorted to the legislative history to support its interpretation that Congress did not intend to include employee benefit plans in the purview of the ADEA[63] unless the plan discriminated in some other nonfringe benefit aspect of the employment relationship,[64] such as hiring, discharge, compensation, or terms of employment. The legislative history does not support the majority's broad reading of the exemption, but instead supports the view that Congress intended to allow discrimination in benefit plans only if the employer proved that age-based distinctions were justified, and therefore not arbitrary.

A. Legislative History of Section 4(f)(2): 1967

The ADEA owes its origins to Title VII of the Civil Rights Act of 1964.[65] When Congress considered Title VII, both the House and the Senate introduced measures to add age to the list of categories to be protected by Title VII.[66] Congress rejected these measures because it did not have sufficient information to judge the nature and extent of age discrimination.[67] Congress, therefore, directed the Secretary of Labor to study the problem and issue a report.[68] Then-Secretary of Labor, Willard Wirtz, issued his report, *The Older American Worker—Age Discrimination in Employment*, in June, 1965, and recommended that the Federal government implement a national policy to eliminate arbitrary age limits in employment.[69]

These recommendations led the Johnson Administration, in January, 1967, to propose the bill that was to become the ADEA. This bill did

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61. *Betts*, 109 S. Ct. at 2862.

62. *Id.* at 2864.

63. *Id.* at 2866-67.

64. *Id.*

65. 42 U.S.C. § 2000e-2000e(17) (1982 & Supp. V 1987). Title VII forbids discrimination because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (It is an unlawful employment practice to fail or refuse to hire or to discharge a person, or otherwise discriminate with respect to terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin.).

66. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214 [hereinafter House Report].

67. *Id. See also* EEOC v. Wyoming, 460 U.S. 226, 229 (1983).

68. The Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 255 (1964); House Report, *supra* note 66, at 2214.

69. House Report, *supra* note 66, at 2214. *See also Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 23 (1967) [hereinafter Senate Hearings].

not contain an exemption corresponding to the current section 4(f)(2). Instead, the administration bill provided that it was not unlawful to "separate involuntarily an employee under a retirement policy . . . where such policy . . . is not merely a subterfuge to evade the purposes of this Act."[70] Thus, this proposed exemption contained no provision for observation of bona fide employee benefit plans. This point is significant because under the proposed administration bill, an employer that continued the common practice of varying benefit levels for older employees, in order to equalize the increased costs of providing those benefits, would be engaged in arbitrary age discrimination in violation of the Act.[71]

Congress recognized the logical weakness of prohibiting employers from varying the levels of fringe benefits among workers hired at ages within the protected age range of forty to sixty-five. As stated by Senator Jacob K. Javits, one of the co-sponsors[72] of the legislation, Congress had to "be sure that the law . . . passed [did] not in practice encourage rather than discourage discrimination against older workers."[73] Senator Javits felt that the administration bill:

> [did] not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus [it might] actually encourage employers faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters.[74]

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70. 113 CONG. REC. 2794 (1967).

71. Many of the witnesses who testified at the Senate Hearings referred to this point. The testimony of Anthony J. Obadal, the Secretary of the Advisory Panel on Older Workers of the U.S. Chamber of Commerce, is representative. He objected to the inadequacy of the administration bill in the area of pension plans. He pointed out that over 75% of the 16,000 pension plans surveyed by the Secretary of Labor in his report had maximum participation ages in effect. Because "the pending legislation prohibits discrimination regarding wages, and terms and conditions of employment based on age, the operation or maintenance of such plans would be made unlawful." Senate Hearings, *supra* note 69, at 106.

72. Senator Javits's counterpart in the House, Representative Hawkins, sponsored H.R. 13054, the House version of the ADEA. Senator Javits introduced S. 788, a bill to prohibit arbitrary discrimination in employment on account of age. Sen. Javits testified at the Senate Hearings conducted on S. 788 and S. 830, the administration bill, in March, 1967, to "reconcile S. 788 with S. 830, the administration bill." Senate Hearings, *supra* note 69, at 25. Congress eventually adopted the Senate bill after substituting the language of the House bill.

73. *Id.* at 27 (statement of Sen. Javits); 113 CONG. REC. 7076 (1967).

74. Senate Hearings, *supra* note 69, at 27 (emphasis added).

Therefore, he proposed the addition of a "fairly broad exemption for bona fide retirement and seniority systems."[75] This addition was intended to allay congressional fears that employers would refuse to hire older workers, and thus thwart the purposes of the ADEA, rather than incur the higher costs associated with providing equal fringe benefits to all workers regardless of age when hired.

The key word in analyzing these remarks, when seeking support for the cost-justification rule jettisoned by the *Betts* majority, is "flexibility." Flexibility implies that Congress intended to allow employers to vary the level of benefits offered to older workers based on their age at date of hire, while complying with the Act's prohibition of arbitrary discrimination. The best way to demonstrate objectively that the lower benefits offered related to the higher cost of providing those benefits, rather than to some subjective motive or intent to discriminate because of age, is to show cost justification. This objective justification ensures that the employer's actions cannot be a "scheme, plan, stratagem or artifice of evasion" to evade the purposes of the ADEA.[76] Allowing employers to cost-justify otherwise discriminatory conduct balances the interests of older workers in maximizing employment possibilities against the employer's interest in avoiding undue hardships caused by the costs of providing "special and costly" benefits to older workers.[77]

The comments of others involved in the enactment of the ADEA lend additional support to the cost-justification interpretation.[78] Senator

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75. The proposed amendment to § 4(f) read as follows:

> (2) to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 CONG. REC. 7077 (1967).

76. United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

77. 113 CONG. REC. 34,746 (1967).

78. For example, Rep. Daniels interpreted § 4(f)(2) to permit employers to hire older workers without necessarily including them in all employee benefit plans. 113 CONG. REC. 34,746 (1967). *See also* Note, *The Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 NOTRE DAME L. REV. 323, 324-25 (1978).

Senator Yarborough, the floor manager of S. 830, stated a similar understanding in a colloquy with Sen. Javits on November 6, 1967: "Section 4(f)(2) . . . means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. . . . This will not deny an individual employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." 113 CONG. REC. 31,255 (1967). This phrase should not be taken to mean that an employer can exclude a newly hired older worker from receiving all benefits. It merely means that he is limited in his right to obtain full consideration. The Senator's use of the phrase "full consideration" thus implies that the employee will receive a reduced, that is, less than full, level of benefits, depending on his age at date of hire.

George Smathers, a cosponsor of the administration bill, considered the bill deficient because it ignored the high costs of providing equal benefits to all workers, regardless of their age when hired. The bill ignored the added expense of providing fringe benefits to older workers[79] and thus could be interpreted as requiring all workers to receive the same pension rights and other fringe benefits. If employers were required to hire older workers and provide them with the same fringe benefits given younger workers, regardless of costs, "they would be given a handy excuse for refusing to hire older workers. [Employers] would be able to argue . . . that their refusal to hire older workers is not due to arbitrary age discrimination based upon age but instead is due to increased fringe benefit costs."[80]

To cure this defect, Senator Smathers recommended amending the bill. The proposed amendment[81] would have explicitly granted an exemption to employers permitting them to vary the benefits offered to older workers, thereby limiting the outlay for fringe benefits. The rationale behind this proposed exemption was that older workers would be competitive with younger workers in the area of fringe benefits to create a "better compliance climate."[82] Although Congress did not adopt this language for the final version of the bill, it was preferable to the language that Congress did incorporate into section 4(f)(2). This language would have obviated the need for resort to the legislative history of the amendment.

B. Legislative History of the 1978 Amendments

Congress amended the ADEA in response to *McMann*'s holding[83] that the ADEA permitted involuntary retirement so long as it was

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79. Senate Hearings, *supra* note 69, at 29-30.

80. *Id.* at 30.

81. *Id.* The text of the proposed amendment follows:

> (g) Nothing in this Act shall be construed to make unlawful the varying of coverage under any pension, retirement, or insurance plan or any plan for providing medical or hospital benefits or benefits for work injuries, where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees.

Id. This language is strikingly similar to the language adopted by the Department of Labor's interpretive regulations which incorporate the cost justification rule. *See* 29 C.F.R. § 860.120 (1989) (A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits.).

82. Senate Hearings, *supra* note 69, at 30.

83. United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977). *See supra* note 33 and accompanying text.

mandated by an employer's observation of a bona fide employee benefit plan that predated the ADEA.[84] The *Betts* majority argued that although Congress changed the specific result in *McMann* by amending section 4(f)(2) to forbid involuntary retirement, Congress did not change *McMann*'s definition of subterfuge.[85] Therefore, Congress must have intended for the ordinary meaning of subterfuge — a scheme, plan, stratagem, or artifice of evasion — to be applied, even to post-Act benefit plans.[86]

By adhering to this definition, the Court avoided deciding whether the PERS disability plan, which limited eligibility to only those workers who became disabled before age sixty, was a subterfuge. As the history of the 1978 amendments showed, however, Congress rejected both *McMann*'s involuntary retirement holding and the notion that a benefit plan could not be a subterfuge to evade the ADEA simply because of the date of its enactment.[87]

The legislative history of the 1978 amendments was more explicit than the history accompanying the Act's original language with respect to the cost justification required of employers to qualify for protection under section 4(f)(2).[88] The majority observed that Congress's 1978 interpretation of section 4(f)(2) was of little assistance in determining the meaning attached to the exemption by the 1967 Congress.[89] However, the statements of Senator Javits, as one of the original cosponsors of the 1967 Act, as well as the 1978 amendments, are especially persuasive in seeking to discern the legislative interpretation of section 4(f)(2).[90]

Senator Javits explained that the purpose of section 4(f)(2) was to allow employers to vary the level of benefits offered to older workers.[91] However, benefits were to be reduced "only to the extent necessary to

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84. The ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978). The amendments added the final clause of § 4(f)(2) so as to exclude from the ADEA benefit plans that "require or permit the involuntary retirement of any individual because of the age of such individual." *Id.* § 2(a).

85. *Betts*, 109 S. Ct. 2854, 2861 (1989).

86. *Id.*

87. *See infra* note 145.

88. *See infra* notes 91-98 and accompanying text.

89. The Court noted that "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Betts*, 109 S. Ct. at 2861 (citing Weinberger v. Rossi, 456 U.S. 25, 35 (1982) (*post hoc* statements of a congressional committee are not entitled to much weight)); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 and n.13 (1980) (views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one).

90. *See, e.g.*, Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976) (statements of legislation's co-sponsors deserve to be accorded substantial weight in interpreting the statute).

91. 124 CONG. REC. 8218 (1978).

achieve approximate equivalency in contributions for older and younger workers.''[92] This would account for the increased cost of providing certain benefits to older workers relative to younger workers.[93] He further explained that a retirement, pension, or insurance plan would comply with the ADEA if the actual amount of payments made or costs incurred in providing benefits to older workers equalled payments made for younger workers.[94] As pointed out by the Senator, this explanation was consistent with remarks he made during floor consideration of the original Act.[95]

Similarly, the explanatory remarks of Representative Hawkins, an original cosponsor in the House, should be accorded special weight in interpreting the legislative intent of the section 4(f)(2) amendments. He addressed renewed concerns that employers would be compelled to bear further increased costs for employee benefit plans for older workers because the amendments raised the upper age limit of the protected group from sixty-five to seventy. Representative Hawkins stated that the purpose of section 4(f)(2) is "to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing the benefits to older workers is substantially higher.''[96]

The legislative history accompanying the 1978 amendments is important for two reasons. First, two of the original cosponsors, Senator Javits and Representative Hawkins, were still in Congress and able to clarify the original intent of the benefit plan exception. Second, because the amendments raised the upper limit of the protected age group, Congress again dealt with the potential problem of employers refusing to hire older workers rather than integrating them into employee benefit plans.[97] It is significant that the legislative history shows that Congress

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92. *Id.* This interpretation was consistent with the Department of Labor's regulations. *See* 29 C.F.R. § 860.120(a) (1989).

93. 124 CONG. REC. 8218 (1978).

94. *Id.* at 7887-88 (statement of Rep. Waxman) (if no evidence of actuarial data which shows that the costs of benefit plans are burdensome for the employer, such a policy is discriminatory and a conscious effort to evade the purposes of the Act).

95. *Id.* at 8218 (1978); *see also* 113 CONG. REC. 31,255 (statement of Sen. Javits); *supra* notes 73-83 and accompanying text.

96. 124 CONG. REC. 7881 (1978). *See also id.* at 8218 (1978) (statement of Sen. Javits) (purpose of § 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers; welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximately equal contributions for older and younger workers).

97. Rep. Waxman discussed the nature of the objections voiced by employers and the role of cost justification in qualifying for the §4(f)(2) defense. He stated,

> [T]here is some concern that employers may seek to evade the restrictions of section 4(f)(2) by reducing or eliminating welfare benefits to employees over 65.

gave section 4(f)(2) the same interpretation in 1978 it was given in 1967 because, in the meantime, the Department of Labor promulgated regulations that incorporated the cost justification requirement, based on the Secretary's understanding of the legislative history.[98] Congress did not reject these regulations. Therefore, the inference is strong that the regulations accurately represented original legislative intent.

C. The Interpretive Regulations

The agencies charged with administering and interpreting the ADEA construed the legislative history to mean that employers would be required to prove that they varied benefit levels for older workers only because of the increased cost of providing them. The Wage and Hour Division of the Department of Labor (the "Labor Department") promulgated the initial interpretations of the ADEA in January, 1969.[99] Section 860.120, entitled costs and benefits under employee benefit plans, explained that "an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan."[100] This regulation incorporated the equal cost approach to cost justification. By eliminating the need for employers to provide equal benefits to older workers, and in effect eliminating the incentive to avoid hiring such employees, the rule promotes one of the purposes of the Act—the hiring of older workers.

Following the 1978 amendments to the Act,[101] the Labor Department published an amendment to the interpretive bulletin concerning employee

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> It is argued that this practice may be justified, as health insurance and other benefits are sufficiently more costly for workers between 65 and 70. In the absence of actuarial data which clearly demonstrates that the costs of [benefit plans] are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the Act.

Id. at 7888.

98. Interpretations of 29 C.F.R. 860.120(a) state the rule that:

> [A] retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

Id.

99. 34 Fed. Reg. 322 (1969).

100. *Id.* at 323.

101. ADEA, Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (1978). *See supra* notes 33 and 84.

benefit plans on May 25, 1979.[102] At Congress's request, the interpretation of costs and benefits under employee benefit plans was expanded to provide more complete guidance concerning section 4(f)(2).[103] The increase in the maximum age level of those protected by the ADEA[104] raised the same concerns as the original enactment of the ADEA.[105] To insure employer compliance with the Act's purposes of encouraging the employment of persons in the protected age group and eliminating arbitrary discrimination in employment, the Labor Department clarified the cost justification approach.

Section 860.120(a)(1) retained the basic cost justification equal cost rule, but cautioned that because section 4(f)(2) was an exception to the general non-discrimination provisions of the ADEA, the exception should be narrowly construed.[106] The burden of proving that every element of the exemption is "clearly and unmistakably met" is on the one seeking to invoke the exception.[107] The regulation identified three key elements of the exception: (1) there must be a bona fide employee benefit plan; (2) the employer's actions must be taken in observation of the terms of the plan; and (3) the provision in question must not be a subterfuge to evade the purposes of the Act.[108] When the employee benefit plan

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102. 29 C.F.R. § 860.120 (1989). The proposed amendments to the interpretive bulletin were published at 43 Fed. Reg. 43,264 (1978). *See generally* Cohen, *Section 4(f)(2) of the Age Discrimination in Employment Act: Age Discrimination in Employee Benefit Plans,* 2 WEST. NEW ENG. L. REV. 379 (1980).

103. 44 Fed. Reg. 30,648 (1979); 124 CONG. REC. 4451 (1978) (remarks of Sen. Javits) (requesting the Secretary of Labor to act as soon as possible to promulgate comprehensive regulations in order to provide guidance for sponsors of employee benefit plans).

104. ADEA Amendments of 1978, Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (1978). These amendments raised the upper age limit of the protected group to 70.

105. Congress again addressed the potential problem of employers who might avoid hiring older workers rather than incur higher benefit costs. *See supra* notes 73-83 and accompanying text.

106. 29 C.F.R. § 860.120(a)(1) (1989). *See also* Cipriano v. Board of Educ., 785 F.2d 51, 54 (2d Cir. 1986); EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1302 (7th Cir. 1985); EEOC v. Maine, 644 F. Supp. 223, 226 (D. Me. 1987), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987).

107. 29 C.F.R. § 860.120(a)(1) (1989). *See also* Karlen v. City Colleges of Chicago, 837 F.2d 314, 318 (7th Cir. 1988), *cert. denied sub nom.* Cook County College Local 1600 v. City Colleges of Chicago, 486 U.S. 1044 (1988); Cipriano v. Board of Educ., 785 F.2d 51, 54 (2d Cir. 1986); EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1302 (7th Cir. 1985); Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208, 212 (4th Cir. 1982); EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982); Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir. 1980); Puckett v. United Air Lines, Inc., 704 F. Supp. 145, 147 (D. Ill. 1989); EEOC v. Maine, 644 F. Supp. 223, 224 (D. Me. 1987), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987).

108. 29 C.F.R. 860.120(b)-(d) (1989).

meets all of these criteria, "benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers."[109]

This version of the cost justification rule required only "approximate," rather than exact, equivalency because the Labor Department decided to permit employers to make adjustments in benefits based on "any reasonable data on benefit costs."[110] Thus, an employer could use cost data related to similar benefit plans to justify reductions in its own plan, so long as those costs were approximately equal to the employer's actual costs.[111] The Labor Department adopted this approach to cost justification in response to criticism that the rule limiting employers to their own actual cost data for providing benefits to employees was unnecessarily restrictive. The regulation's definition of subterfuge required that the cost data used to justify a benefit plan providing lower benefits to older workers because of age be "valid and reasonable."[112]

The interpretive bulletin also discussed the application of section 4(f)(2) to various employee benefit plans, including long-term disability plans.[113] The regulation stated that "[r]eductions on the basis of age before age seventy in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations."[114] Thus, if employees disabled at younger ages are entitled to long-term disability, there is no cost-based justification for totally denying such benefits because of age to employees who become disabled later in life.[115] Specifically, the Labor Department provided that an employer could cut off disability benefits at age sixty-five when the employee became disabled at age sixty or younger.[116] When an employee became disabled after age sixty, the employer could terminate disability benefits five years after the disablement or at age seventy, whichever occurred first.[117]

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109. *Id.*

110. 29 C.F.R. § 860.120(d)(1) (1989).

111. *Id.*

112. *Id.* The regulations also detailed two methods to justify cost differences in employee benefits plans: the benefit-by-benefit approach and the benefit package approach.

Under the benefit-by-benefit approach, the employer is required to justify separately each cost reduction for each benefit offered. This method does not justify substitution of one benefit for another. 29 C.F.R. § 860.120(d)(2)(ii) (1989).

The benefit-package approach provides more flexibility and permits cost comparisons and adjustments to be made in the aggregate. 29 C.F.R. § 860.120(d)(2)(iii) (1989).

A full discussion of these methods is beyond the scope of this Note. For a complete discussion, see generally Cohen, *supra* note 102, at 399-445.

113. 29 C.F.R. § 860.120(f)(1)(iii) (1989).

114. *Id.*

115. *Id.*

116. 29 C.F.R. § 860.120(f)(1)(iii)(A) (1989).

117. 29 C.F.R. § 860.120(f)(1)(iii)(B) (1989).

The EEOC adopted the Labor Department's regulations, with certain modifications, after the Commission assumed responsibility for enforcement and administration of the ADEA in 1979.[118] The EEOC published its proposed interpretations,[119] but it made no changes to the section on costs and benefits under employee benefit plans.[120] Likewise, no changes were made to this section when the EEOC published the final interpretations in 1981.[121] Thus, both administrative agencies responsible for interpreting the ADEA considered the cost justification rule to be the means by which an employer could prove that a benefit plan which varied benefits to older workers was not a subterfuge to evade the purposes of the Act. The cost justification rule was stated in the first interpretive bulletin of the Labor Department in 1969 and has been carried forward to the present day. This long-standing and consistent pronouncement by the agencies charged with the administration of the ADEA was accepted by Congress as accurately incorporating congressional intent. Although the regulations do not control the issue of the proper interpretation of subterfuge, courts may resort to them for guidance.[122]

III. Analysis of the *Betts* Decision

In *Public Employees Retirement System v. Betts*,[123] the Supreme Court addressed the question left open in *McMann* — the meaning and scope of the section 4(f)(2) exemption in the context of post-Act plans.[124]

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118. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807 (1978).

119. Proposed Interpretations; Age Discrimination in Employment Act, 29 C.F.R. 1625 (1979).

120. The EEOC renumbered the interpretations from 29 C.F.R. § 860 to 29 C.F.R. § 1625, effective July 1, 1987.

121. Final Interpretations: Age Discrimination in Employment Act, 29 C.F.R. 1625 (1981). However, the EEOC has published an advance notice of proposed rulemaking relating to the prohibition against age discrimination because of age in employee benefit plans and the § 4(f)(2) exception. 53 Fed. Reg. 26,789 (July 15, 1988). In the advance notice, the EEOC solicited public comment on these specific issues: 1) Which plans should be considered to be employee benefit plans? 2) What factor should be assessed when determining the presence or absence of subterfuge under § 4(f)(2)? 3) Should employee benefit plans which predate the ADEA be considered as meeting the lack of subterfuge requirement? If so, under what circumstances? *Id.*

122. Skidmore v. Swift & Co., 323 U.S. 138, 140 (1944) (long-standing and consistent pronouncements by administrative agencies, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance). *See also* K Mart Corp v. Cartier, 108 S. Ct. 1811, 1828 (1988) (longstanding administrative practice should not be "lightly overturned").

123. 109 S. Ct. 2854 (1989).

124. *Id.* at 2858.

Specifically, *McMann* did not address who bears the burden of proving that a post-Act plan is not a subterfuge and the means by which to do so. The majority of lower courts considering this question concluded that section 4(f)(2) was an affirmative defense[125] that placed the burden of disproving subterfuge on the employer.[126]

The rationale in *Betts* was founded on the Court's characterization of section 4(f)(2) as plain and unambiguous. By maintaining that the statute was unambiguous, the Court avoided referring to the legislative history supporting the cost justification test. Likewise, the Court rejected the administrative regulations, claiming that no deference was due to interpretations that conflicted with the plain meaning of the statute.[127]

Dissenting Justices Marshall and Brennan, however, found the "spare language" of section 4(f)(2) ambiguous and clear only in that it offered "no explicit command as to what heuristic test those applying it should use."[128] Thus, they found it both necessary and appropriate to resort to the legislative history. However, even the majority conceded that its interpretation of section 4(f)(2) was not the only one possible.[129] Thus, the statute was not as plain and unambiguous as the Court initially contended. When a statute is ambiguous, it is appropriate for a court to refer to the legislative history as a means of discerning congressional intent.[130] A court may also defer to an administrative agency's inter-

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125. *E.g.*, EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988), *cert. denied sub nom.* Cook County College Local No. 1600 v. City Colleges of Chicago, 108 S. Ct. 2038 (1988). When an employer invokes § 4(f)(2), it essentially admits that it based its decision to offer lower benefits on the age of the employee, but it asserts that its actions were justified. The employer bears both the burden of production and the burden of persuasion on the elements of § 4(f)(2). *See generally* Player, *supra* note 6.

126. *See, e.g., Mt. Lebanon*, 842 F.2d at 1492 (employer must establish a connection or nexus between general cost savings data and age-based reductions); *Karlen*, 837 F.2d at 319 (employer must show close correlation between age and cost); Cipriano v. Board of Educ., 785 F.2d 51, 54 (2d Cir. 1986) (employer must show a legitimate business reason for structuring the plan as it did); Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208, 215 (4th Cir. 1982) (employer must show legitimate business or economic purpose, which, objectively assessed, reasonably justified it); Puckett v. United Air Lines, Inc., 704 F. Supp. 145, 149 (D. Ill. 1989) (employer bears burden of showing that age-based differences are based on age-related cost considerations). *Cf.* Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980) (employer has burden of showing nondiscriminatory purpose for its actions but showing is not limited to economic or business purpose—may also be legal purpose).

127. *Betts*, 109 S. Ct. at 2863. *See also* Chemical Mfr. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985) (court should not displace an administrative construction which is a sufficiently rational interpretation of a statute).

128. *Betts*, 109 S. Ct. at 2871.

129. *Id.* at 2866.

130. *Id.* at 2870 (citing Blum v. Stenson, 465 U.S. 886, 896 (1984)). *Cf.* Green v.

pretation of an ambiguous statute if it is based on a permissible construction of the statute.[131]

The regulations promulgated by the Department of Labor reflected such a permissible construction of the ADEA. The Labor Department incorporated the equal cost rule into the first interpretations of section 4(f)(2).[132] The adopted language directly reflected legislators' statements made during hearings and floor debates. For example, Senator Javits declared that section 4(f)(2) meant that an employer would not be compelled "to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers."[133] Compare this language with that incorporated in the Labor Department's regulation: "[A]n employer is not required to provide older workers . . . with the same pension, retirement, or insurance benefits as he provides to younger workers, so long as any difference between them is in accordance with the terms of a bona fide benefit plan."[134]

The regulations provided a means for employers to show compliance with the ADEA, even though benefit levels varied depending on the ages of employees. Such plans would comply with the Act if the employer made equal payments or incurred equal costs for all employees, even if an older employee received, for example, $100 of insurance coverage and not the $200 a younger employee received.[135] The cost justification principle recognized the competing interests of employers and older employees that previously concerned Congress.[136] The cost justification rule was an objective means to promote the purposes of the ADEA by "maximiz[ing] employment possibilities without working an undue hardship on employers."[137]

The EEOC subsequently adopted the Labor Department regulations on costs and benefits under benefit plans without substantive change.[138]

Bock Laundry Co., 109 S. Ct. 1981 (1989) (meaning of terms on statute books should be determined on the basis of which meaning is in accord with context and ordinary usage and most compatible with the surrounding body of law into which the terms will be integrated).

131. Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837, 843 (1987). "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

132. 29 C.F.R. § 860.120 (1989).

133. S. Rep. No. 723, 90th Cong., 1st Sess. 14 (1967), *reprinted in* 113 Cong. Rec. 31,254-55 (1967).

134. 29 C.F.R. § 860.120 (1989).

135. *Id.*

136. *See supra* notes 72-82 and accompanying text.

137. 113 Cong. Rec. 34,727 (1967) (statement of Rep. Daniels).

138. Proposed Interpretations; Age Discrimination in Employment Act, 29 C.F.R.

Congress, in effect, affirmed the regulations as an accurate interpretation of congressional intent when it amended the ADEA in 1978. Members of Congress referred to the cost justification principle favorably during the enactment of the amendments. Indeed, Senator Javits adopted the language of section 860.120 as his own in explaining that section 4(f)(2) meant that a plan complied with the ADEA if the actual costs incurred on behalf of older workers equalled the costs incurred for younger workers.[139] Senator Williams, the majority leader, stated that Senator Javits's statement accurately reflected congressional intent.[140] As a long standing and consistent pronouncement by the administrative agencies responsible for enforcing the ADEA, a pronouncement that Congress implicitly ratified, the Court should have accorded the regulations considerable deference instead of disregard. Because the legislative history supported the administrative agencies' construction of the Act, there was "good reason to treat the [regulations] as expressing the will of Congress."[141]

The approach advocated by the dissent in *Betts*, the use of "conventional tools of statutory construction,"[142] also has been followed by the majority of courts considering the scope and meaning of section 4(f)(2) in post-Act benefit plans. The lower courts considered the cost justification rule to be the correct test of subterfuge, a test which placed the burden of proof on the employer who wished to qualify for the defense.

A. The Case Law: Support for Cost Justification

A review of precedent shows that courts have accepted the cost justification rule in determining whether a discriminatory benefit plan is a subterfuge. The trend of the case law is to reject *McMann*'s "ordinary meaning" definition of subterfuge beyond its application to pre-ADEA benefit plans in favor of requiring the employer to prove a business or economic purpose in order to qualify for the exemption of section 4(f)(2).[143] The rationale for the rule is simple: a plan that discriminates

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1625 (1979); Final Interpretations: Age Discrimination in Employment Act, 29 C.F.R. § 1625.10 (1989).

139. 124 CONG. REC. 4450-51 (1978) (welfare benefit levels for older workers may be reduced only so far as necessary to achieve approximate equivalency in contributions for older and younger workers).

140. *Id.* at 4451.

141. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

142. 109 S. Ct. 2854, 2874 (1989) (Marshall, J., dissenting).

143. *E.g.*, Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities, 848 F.2d 692 (6th Cir. 1988); EEOC. v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988), *cert.*

by offering older workers fewer benefits than younger workers is not arbitrary if the employer can prove that it had an economic reason for so differentiating. If the plan is not arbitrary, it does not violate the Act's ban of arbitrary discrimination.

Although *McMann* held that an employer need not disprove subterfuge when a benefit plan predates the ADEA,[144] the Court did not resolve the issue with respect to post-Act plans. Thus, *McMann* should not be read as relieving an employer of all obligation to disprove subterfuge by showing a business or cost justification. If the relevant terms of the benefit plan were adopted after the ADEA's enactment, the employer could not qualify for section 4(f)(2) simply by pointing to the date of the plan's adoption.[145] The employer must prove reasons other than age existed for discriminating.[146]

The Third Circuit addressed the means of disproving subterfuge in the context of a post-ADEA benefit plan in *EEOC v. City of Mt. Lebanon*.[147] In *Mt. Lebanon*, the court considered the validity of a

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denied sub nom. Cook County College Local No. 1600 v. City Colleges of Chicago, 468 U.S. 1044 (1988); Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986); EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984); Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982).

144. 434 U.S. 192, 203 (1977).

145. The trend in the courts is to reject *McMann*'s chronological test of subterfuge. It is inconsistent to allow a plan that arbitrarily discriminates to continue to do so simply because of the date of its enactment. For example, if an employer adopted a plan identical to the PERS disability plan, that plan would be prima facie evidence of discrimination and the employer could only escape liability for the plan by satisfying § 4(f)(2). Yet an overtly discriminatory plan, such as the PERS plan, is permitted to continue to discriminate without any need for justification, simply because the plan predated the ADEA's enactment.

Justice White questioned the validity of this argument in his concurring opinion in *McMann*. 434 U.S. at 204-05 (White, J., concurring) (proper inquiry should examine the employer's decision to continue the discriminatory aspects of the plan after the ADEA took effect).

Congress also recognized the inconsistency of this test. H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 511 (plan provisions in effect prior to the date of enactment are not exempt under § 4(f)(2) by virtue of the fact that they antedate the Act or these amendments). Congress based this view on the legislative history of the 1967 Act. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 4 (1968); S. REP. No. 723, 90th Cong., 1st Sess. 6, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2217 (section 4(f)(2) applied "to new and existing employee benefit plans, and to both the establishment and maintenance of such plans").

The *Betts* Court sidestepped the effect of this legislative history by dismissing the history accompanying the 1978 Amendments as of little assistance in determining Congress's original intent, and by so doing, insulated the PERS disability plan from attack as a subterfuge. 109 S. Ct. at 2861.

146. EEOC v. Home Inc. Co., 672 F.2d 252, 259 (2d Cir. 1982); Puckett v. United Air Lines, Inc., 704 F. Supp. 145, 147 (D. Ill. 1989) (post-ADEA modification means that employer will have to provide proof of non-age-based reasons for discrimination).

147. 842 F.2d 1480 (3d Cir. 1988).

benefit plan, adopted in 1973 and amended in 1984, which provided neither disability benefits until age sixty-five for those disabled before age sixty, nor disability benefits as required by the interpretive regulations.[148]

The district court granted the city's motion for summary judgment and held that by establishing an economic or business purpose or valid reason for the challenged plan, the employer disproved subterfuge, even though it failed to meet every detail of the cost justification requirement of the regulations.[149] By invoking the section 4(f)(2) defense, the defendant bore the burden of proving that it acted in observance of a bona fide plan and that the plan was not a subterfuge.[150] As in *Betts*, the only dispute on appeal concerned whether the plan was a subterfuge to evade the purposes of the ADEA.[151] Because Congress did not define "subterfuge," the court considered reference to the legislative history and governing regulations appropriate.[152]

After reviewing the legislative history and the agency interpretations, the court held that in order to disprove subterfuge an employer had to cost-justify its reduced levels of benefits for older workers by establishing a relationship between the general cost savings data and the reductions of the particular plan.[153] The court recognized that cost justification provided an objective or quantifiable reason for the employer's decision to provide lower benefits to older workers. The legislative explanations of the purpose of the section 4(f)(2) exemption and the federal regulations

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148. *Id. See* 29 C.F.R. § 860.120(f)(iii) (1989) (disability plan does not violate the ADEA if employer provides disability benefits until age 65 where disability occurred at or before age 60; for disabilities occurring after age 60, benefits cease five years after disablement or at age 70, whichever occurs first).

149. *Mt. Lebanon*, 651 F. Supp. 1259, 1263 (W.D. Pa. 1987).

150. *Mt. Lebanon*, 842 F.2d at 1488.

151. In *Betts*, the parties conceded that the plan was bona fide because it existed and paid substantial benefits. 109 S. Ct. at 2860. *Accord McMann*, 434 U.S. at 194; EEOC v. Fox Point-Bayside School Dist., 772 F.2d 1294, 1302 (7th Cir. 1985); EEOC v. Home Ins. Co., 672 F.2d 252, 260 (2d Cir. 1982); EEOC v. Baltimore & Ohio R.R., 632 F.2d 1107, 1111 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); Smart v. Porter Paint Co., 630 F.2d 490, 494 (7th Cir. 1980).

The parties also conceded that the employer's actions were taken in observance of the terms of the plan. *Betts*, 109 S. Ct. at 2860.

152. *Mt. Lebanon*, 842 F.2d at 1484-89.

153. *Id.* at 1492. *Accord* Karlen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir. 1988), *cert. denied sub nom.* Cook County College Local No. 1600 v. City Colleges of Chicago, 108 S. Ct. 2038 (1988) (when employer uses age as basis for varying retirement benefits, he must prove a close correlation between age and cost in order to qualify for § 4(f)(2)); Puckett v. United Air Lines, Inc., 704 F. Supp. 145, 148 (D. Ill. 1989) (clear weight of authority supports position that § 4(f)(2) exempts liability for age-based actions only when employer can justify with age-based cost considerations).

supported this position.[154] Thus, the proper means of disproving subterfuge was to require the employer to produce evidence proving that it reduced benefit levels for older workers only "to the extent necessary to achieve approximate equivalency in cost[s] for older and younger workers."[155]

Unlike the *Betts* majority, the Third Circuit deferred to the regulations and accepted them as an accurate expression of legislative intent.[156] The practical value of the cost justification rule, in the court's view, was that it provided a straightforward method of quantifying a reason other than age for the employer's decision to provide lower benefits to older workers.[157] Failure to require this proof would mean that an employer could institute a bona fide benefit plan, but then evade the ADEA's purpose of eliminating arbitrary age discrimination by reducing benefits for older workers beyond the level necessary to achieve approximate equivalency.[158]

This is precisely the evil that results from *Betts* — by removing benefit plans entirely from the scope of the Act (except in the limited sense that a plan might be a subterfuge to discriminate in the areas of hiring, wages, promotions, or other terms, conditions, and privileges of employment) *Betts* condones arbitrary discrimination in the provision of benefits. The *Betts* majority failed to recognize cost justification as a valuable objective means of disproving the subjective element of subterfuge.

The Seventh Circuit also endorsed the cost justification principle as a valid means of disproving subterfuge. In *Karlen v. City Colleges of Chicago*,[159] three faculty members in their sixties challenged the colleges' early retirement program.[160] The plan paid benefits consisting of a lump sum equal to a percentage of the retiree's accumulated sick pay and provided group insurance coverage to early retirees. The benefits available dropped off dramatically if the employee delayed retirement until age sixty-five or later.[161] The plaintiffs contended that

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154. *Mt. Lebanon*, 842 F.2d at 1492-93.

155. 29 C.F.R. § 860.120(a)(1) (1982) (recodified at 29 C.F.R. § 1625.10(a)(1) (1989)).

156. *Mt. Lebanon*, 842 F.2d at 1492-93 ("An agency's interpretation is especially important where its specialization is a significant factor supporting the issuance of the regulations." The cost-justification requirement is the type of long-standing and contemporaneous interpretation deserving recognition.).

157. *Id.* at 1493.

158. *Id.* at 1492.

159. 837 F.2d 314 (7th Cir. 1988), *cert. denied sub nom.* Cook County College Local No. 1600 v. City Colleges of Chicago, 108 S. Ct. 2038 (1988).

160. *Karlen*, 837 F.2d at 315-16.

161. *Id.* at 316. The early retirement program was open to any faculty member

these provisions constituted a subterfuge to evade the purposes of the ADEA.[162]

The employer asserted that the purpose of these provisions was to realize financial savings by replacing older faculty members who earned high salaries with younger faculty members at the lower end of the salary scale.[163] The court stated that the employer's proffered reasons or motives for the plan provisions were relevant to the subterfuge language of the section 4(f)(2) defense:[164] were these provisions designed to discriminate against faculty members age 65 or older? Although the court acknowledged that the employer might have good reasons to vary benefits, it pointed out that the reasons were relevant only to the section 4(f)(2) defense.[165] The defendant had both the burden of production and persuasion on the elements of the defense.[166]

The court noted that, although the ADEA did not forbid employers to vary employee benefits based on the cost to the employer even if older workers were disadvantaged, the employer was required to cost justify the plan.[167] If the employer varied benefits based on age, rather than cost, salary, or years of service, the employer had to prove a "close correlation between age and cost if he want[ed] to shelter in the safe harbor of section 4(f)(2)."[168] The court relied specifically on the cost justification rule found in the interpretive regulations. If the employer was unable to prove a close correlation between age and costs, it strongly implied that the plan was a subterfuge.[169] The court suggested that the plan was a subterfuge intended to reinstitute, in effect, a mandatory retirement age of sixty-five and held that the defendants had not submitted enough evidence for a reasonable jury to find no subterfuge.[170] *Karlen* thus illustrates the tension between the objective and subjective components of subterfuge. An employer unable to objectively justify its

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between 55 and 69 years of age who had been employed full-time for ten years. Members who retired between the ages of 55 and 58 were entitled to receive a lump sum equal to 50% of accumulated sick pay, in addition to a pension. This lump sum percentage increased up to 60% for 59 year olds, to 80% for ages 60 to 64, then diminished to 45% for those who retired at age 65 or later. The plan also provided group insurance coverage up to age 70 for those who retired between the ages of 55 and 64, but those who retired at 65 or later received no insurance coverage.

162. *Id.* at 319.

163. *Id.* at 316.

164. *Id.* at 319.

165. *Id.* at 318.

166. *Id.*

167. *Id.* at 319 ("[I]f, because older workers cost more, the result of the employer's economizing efforts is disadvantageous to older workers, that is simply how the cookie crumbles.").

168. *Id.* (citing 29 C.F.R. § 1625.10(a)(1), (d)(1)-(3)).

169. *Id.*

170. *Id.* at 320.

disparate treatment of older workers in benefit plans was subjectively more likely to be engaged in arbitrary discrimination.

The *Betts* majority rejected the cost justification rule, in part, because it was an objective requirement the Court considered inconsistent with the subjective definition of subterfuge.[171] Like *Karlen*, *Crosland v. Charlotte Eye, Ear & Throat Hospital*[172] illustrated the interaction of the cost justification rule with the employer's subjective intent. *Crosland* involved a challenge to a defined benefit plan[173] that excluded the fifty-eight year old plaintiff from participation because she was hired after age fifty-three.[174] The defendant employer presented evidence to prove that the costs of covering older employees was so great that the plan would not have been adopted if the hospital had included them.[175] The hospital maintained that it presented proper proof of economic justification and thus was entitled to the protection of section 4(f)(2).[176]

The court agreed that an employer could disprove subterfuge by showing a business or economic purpose for its specifically challenged terms and rejected the plaintiff's argument that section 4(f)(2) was not intended to protect an employer's age-based exclusions of older workers from benefit plans.[177] Although the court relied on a plain reading of the section 4(f)(2) exemption,[178] it acknowledged that perhaps the statute was not so plain. Therefore, the court turned to the legislative history for additional support.

The court found that Congress intended for employers to hire older employees without incurring extraordinary expenses[179] by including them

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171. 109 S. Ct. at 2863.

172. 686 F.2d 208 (4th Cir. 1982).

173. A defined benefit plan is a type of retirement plan which has age-related costs. Under this type of plan, an employee's annual retirement benefit is calculated using a formula that factors in salary and years of service. The employee is entitled to a benefit of a fixed annual amount, calculated at the time of retirement. The older the employee when hired, the less time is available before retirement for accrual of the funds that will supply the benefit. Thus, an employer would be forced to make higher payments into the retirement plan for that employee. This is the type of problem that Congress addressed in the legislative history of the ADEA and its amendments. *See generally* Note, *Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a Plan?*, 135 U. PA. L. REV. 1044, 1076 (1987).

174. *Crosland*, 686 F.2d at 209.

175. *Id.* at 210.

176. *Id.* at 212.

177. *Id.* at 215.

178. Based on its plain reading, the court concluded that "[a]ge based-exclusions from participation in [benefit] plans are not specifically exempted from the conditional protection" of § 4(f)(2). *See id.* at 213-14. *See also* 29 U.S.C. § 623(f)(2) ("[i]t shall not be unlawful . . . to observe the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . . or permit the involuntary retirement of any individual . . . because of the age of such individual").

179. *See supra* notes 73-83 and accompanying text.

in all benefit plans. Unlike the *Betts* holding that exempted all bona fide benefit plans from the Act, the *Crosland* court found that age-based exclusions from benefit plans were to be treated as "any other violation of the ADEA to which a defense might be sought" in the section 4(f)(2) exemption.[180]

An employer could qualify for the defense by proving that cost, rather than age, explained the otherwise discriminatory practice.[181] An employer could escape liability for excluding the plaintiff from the retirement plan by showing that the plan was not a subterfuge because a "legitimate business, or economic purpose . . . objectively assessed, reasonably justified it."[182] The employee would then be permitted to rebut the defendant's affirmative defense by showing the employer's motives were unlawful.[183] Thus, the two components of subterfuge, objective cost justification and subjective intent, interact so that, where there is no objective justification for a discriminatory benefit plan, it will not qualify for the section 4(f)(2) defense.

B. Section 4(f)(2) Does Not Exempt All Benefit Plans

As the section 4(f)(2) case law indicates, no case has interpreted the exemption as anything other than an affirmative defense which places the burden on the defendant to disprove subterfuge. Nor did any case suggest that Congress did not intend to include bona fide employee benefit plans in the purview of the ADEA. Thus, the *Betts* holding which "immunize[d] virtually all employee benefit programs from liability under the ADEA" was all the more surprising.[184] The dissent viewed the majority's selective

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180. *Crosland*, 686 F.2d at 214.

181. *Id.* at 215. *See also* 29 C.F.R. § 860 (1989).

182. *Crosland*, 686 F.2d at 215. The Second Circuit advanced the "legitimate business reason" justification as a general means of disproving subterfuge in EEOC v. Home Ins. Co., 672 F.2d 252, 260-61 (2d Cir. 1982). An employer invoking the § 4(f)(2) defense had to show a reasonable business explanation for the age-based discrimination or the court would be compelled to conclude that the plan was a subterfuge. *Id.* at 260. *Cf.* Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987) (employer must justify discriminatory early retirement program by showing both sound business purpose for structure and absence of subterfuge); Cipriano v. Board of Educ., 785 F.2d 51, 58 (2d Cir. 1986) (employer must show plan is not a subterfuge by showing legitimate business reason for structuring plan as it did, regulations require employer to cost-justify age-based distinctions in employee benefit plans); Smart v. Porter Paint Co., 630 F.2d 490, 496-97 (7th Cir. 1980) (employer must disprove subterfuge by submitting evidence of purpose of post-Act amendment; evidence is not limited to economic or business purpose, may be legal in nature).

Requiring an employer to cost justify its reduced benefit schedule to disprove subterfuge objectifies the legitimate business purpose. *Mt. Lebanon*, 842 F.2d at 1493.

183. *Crosland*, 686 F.2d at 215.

184. 109 S. Ct. at 2869 (Marshall, J., dissenting).

use of the legislative history as "so manipulative as virtually to invite a charge of result-orientation."[185]

In creating a broader exemption for benefit plans, the Court followed this chain of reasoning: The phrase "compensation, terms, conditions, or privileges of employment" in section 4(a)(1) of the Act can be read as encompassing employee benefit plans. If so, given that section 4(a)(1) prohibits arbitrary age-based discrimination, then any benefit plan offering unequal benefits to older and younger workers is arbitrary and prohibited by the ADEA. Section 4(f)(2), which allows such discrimination based on age, is therefore inconsistent with section 4(a)(1) unless section 4(f)(2) is viewed as a complete exemption for bona fide benefit plans. Therefore, Congress must have intended to exclude all benefit plans from the purview of the ADEA so long as the plan was not a means to discriminate in other non-fringe benefit areas of the employment relationship.[186] The Court then engaged in a brief, selective reading of the legislative history, and concluded that this reading confirmed the Court's broad reading of section 4(f)(2).[187]

However, the Court overlooked some important points. First, section 4(f)(2) is *not* inconsistent with the ADEA's general prohibition of arbitrary age discrimination if it is interpreted as requiring some justification for the seemingly arbitrary discrimination. If an employer who discriminates by providing different levels of benefits to employees of different ages but can show a valid, objective reason other than age for the differences in benefits, then its actions cannot be arbitrary. The cost justification rule provides an objective method for assessing a plan in terms of whether, subjectively, the employer intends to discriminate arbitrarily. A plan that is objectively justified is not a subterfuge and is exempt from charges of discrimination. The existence of the section 4(f) defenses reflects a legislative judgment that not all forms of discrimination are arbitrary.

Secondly, Congress *intentionally* amended the administration version of the bill to allow employers flexibility in providing bona fide, non-subterfuge benefit plans. Congress acted specifically to include an exemption for the observation of only bona fide employee benefit plans when it could have just as easily included a specific exemption for *all* employee benefit plans. The legislative history of the 1967 enactment of the ADEA shows that Congress was concerned that the administration version of the ADEA contained no provision for observation of bona fide employee benefit plans. Without such a provision, employers continuing the common practice of varying benefit levels to account for the

185. *Id.*
186. *Id.* at 2866.
187. *Id.* at 2867.

increased costs of providing benefits to older workers would automatically violate the ADEA. This affirmative act of amending the administration bill to provide an exemption only for plans that qualified for the language of section 4(f)(2) demonstrated that Congress did not intend to exempt all bona fide benefit plans.

Lastly, the Court's decision to broaden the exemption, and thus narrow the scope of the ADEA, is directly opposed to the idea that exceptions to remedial social legislation be narrowly construed.[188] Congress intended the section 4(f)(2) exemption to give employers flexibility in providing employee benefits to the older workers they would hire in accordance with the purposes of the Act.[189] The purpose of the exemption was *not* to provide a large area of the employment relationship in which employers were free to discriminate without any reason or justification. Rather, its purpose was to "maximize employment possibilities without working undue hardship on employers in providing special and costly benefits."[190] An unqualified exemption is surely not what Congress meant by a "degree of flexibility."[191]

As a result of *Betts*, employers are free to discriminate in the area of employee benefits if that discrimination does not extend into the forbidden territory of hiring, discharge, terms, conditions, and privileges of employment.[192] To adopt this reading of the statute is to ignore the fact that the ADEA prohibits arbitrary discrimination. The Court, in effect, rewrote section 4(f)(2) to provide an unqualified exemption for discrimination in employee benefit plans and, in the process, intruded on legislative and administrative functions best left to those branches of government.

C. The Burden of Proof

By carving out an exemption for all benefit plans that do not discriminate in the areas of hiring, wages, promotions, or discharge, the Court eliminated the need for the employer to establish a defense to charges of age-based discrimination in benefit plans. If, as decided by the Court, age-based discrimination in providing employee benefits does not violate the Act, no defense is necessary. Thus, in the majority's view, section 4(f)(2), which had been accepted unfailingly as an affirmative

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188. *McMann*, 434 U.S. at 217-18 (Marshall, J., dissenting) (quoting Piedmont & Northern R. Co. v. ICC, 286 U.S. 299, 311-312 (1932)) (exemptions from remedial statutes should be narrowed and limited to effect the remedy intended).

189. Senate Hearings, *supra* note 69, at 27; 113 CONG. REC. 7077 (1967).

190. 113 CONG. REC. 34,746 (1967) (remarks of Rep. Daniels).

191. Senate Hearings, *supra* note 69, at 27 (statement of Sen. Javits).

192. *Betts*, 109 S. Ct. at 2865.

defense before *Betts*, was not an affirmative defense at all.[193] Instead, section 4(f)(2) was merely "a description of the type of employer conduct that is prohibited in the employee benefit plan context."[194]

The Court also placed an additional burden on employees challenging benefit plans as discriminatory. Because the employer is no longer required to disprove subterfuge, the plaintiff now bears the burden of proving that the employer, in reducing benefit levels to older workers, actually intended to discriminate in a nonbenefit area of the employment relationship.[195] This presents a plaintiff with a difficult task because in most cases direct evidence of the employer's subjective motivation is difficult, if not impossible, to acquire.[196] By requiring the plaintiff to prove the additional element of the employer's actual intent, the Court has made it more difficult for plaintiffs to establish a prima facie case of discrimination.[197]

The Court concluded that the plaintiff must prove actual intent to discriminate in a nonbenefit area of employment by looking to Title VII precedent on bona fide seniority systems.[198] Title VII cases may provide guidance in construing the ADEA because "[t]here are important similarities between the two statutes . . . both in their aims — the elimination of discrimination from the workplace — and in their substantive prohibitions."[199]

The Court concluded that because the language of section 703(h) of Title VII[200] and section 4(f)(2) were similar, the interpretation of section 703(h) should control interpretation of section 4(f)(2).[201] The Court has interpreted section 703(h) not as an affirmative defense, but as a definitional

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193. *Id.* at 2868; *see* 29 C.F.R. § 860.120(a)(1) (1989); *see also* Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980); Smart v. Porter, 630 F.2d 490 (7th Cir. 1980).

194. *Betts*, 109 S. Ct. at 2868.

195. *Id.*

196. *Mt. Lebanon*, 842 F.2d at 1482.

197. *See* Note, *Proving Discrimination under the Age Discrimination in Employment Act*, 17 ARIZ. L. REV. 495, 503-04 (1975) (better view is that proof of discriminatory intent not required for ADEA violation; as with Title VII, Congress was concerned with consequences of employment practices, not simply the motivation).

198. *Betts*, 109 S. Ct. at 2868.

199. Lorillard v. Pons, 434 U.S. 575, 584 (1978) (the prohibitions of the ADEA were derived *in haec verba* from Title VII); *accord* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (Title VII and the ADEA are equivalent in language and goal).

200. 42 U.S.C. § 2000e-2(h) (1982 & Supp. V 1987) provides in part:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

201. *Betts*, 109 S. Ct. at 2868.

provision that merely lists the types of illegal and prohibited employer practices.[202] Under Title VII, an employee must prove the employer's discriminatory intent when challenging actions taken pursuant to bona fide seniority systems.[203] Therefore, the plaintiff must prove actual discriminatory intent in challenging a benefit plan as a subterfuge.[204] The Court reached this conclusion despite noting that section 4(f)(2), like section 703(h), appears on first reading to be an affirmative defense.[205] In addressing section 703(h), the Court rejected the affirmative defense interpretation because it considered itself bound by previous case law that did not consider it an affirmative defense.[206]

The *Betts* Court was not bound by any such precedent. In fact, the Court, in characterizing section 4(f)(2) as a definitional provision, like section 703(h), overlooked its own prior interpretations of bona fide seniority systems under the ADEA.[207] Section 4(f)(2) contains exemptions for bona fide benefit plans and bona fide seniority systems. The Court has referred to section 4(f)(2) in cases involving challenges to employment practices under seniority systems as an affirmative defense.[208] Yet it considered the same exemption when applied to bona fide benefit plans as merely a definitional provision. It is inconsistent for the Court to interpret the same language as requiring an employer to mount an affirmative defense in one situation and not the other.

The Court has also referred to the "ADEA's five affirmative defenses,"[209] including the bona fide benefit plan defense. The Court's characterization of section 4(f)(2) as a definitional provision leaves open the question of whether the other heretofore affirmative defenses of section 4(f) are to be treated as merely definitional provisions as well.

An employee challenging a discriminatory benefit plan provision, such as the PERS disability plan, should not bear the burden of proving the employer's actual intent to discriminate in a nonbenefit aspect of employment. Section 4(f)(2) is more properly considered an affirmative defense to charges of age discrimination. After the employee has established a prima facie case, the burden shifts to the employer to establish "clearly

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202. Lorance v. A.T.&T. Technologies, Inc. 109 S. Ct. 2261, 2267 (1989); *accord* Franks v. Bowman Transp. Co., 424 U.S. 747, 758 (1976).

203. *Lorance*, 109 S. Ct. at 2267; *accord* Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982); American Tobacco Co. v. Patterson, 456 U.S. 63, 65 (1982); Trans World Air Lines, Inc. v. Hardison, 432 U.S. 63, 82 (1977); *Franks*, 424 U.S. at 758.

204. *Betts*, 109 S. Ct. at 2868.

205. *Id. See Lorance*, 109 S. Ct. at 2267 (a "plausible, and perhaps the most natural reading of § 703(h)" was as an affirmative defense).

206. *Lorance*, 109 S. Ct. at 2267.

207. Trans World Air Lines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

208. *Id.*

209. *Id.*

and unmistakably" each element of the section 4(f)(2) defense.[210] An employee may establish a prima facie violation of the ADEA in three ways:[211] 1) by direct evidence of discrimination because of age; 2) by circumstantial evidence which establishes an inference that age was a determinative factor in the employer's treatment of the employee;[212] and 3) by statistical proof of a pattern of discrimination.[213]

In *Betts*, the plaintiff had direct evidence of age-based disparate treatment — the PERS statutory benefit plan which allocated disability benefits differently depending on the employee's age. This established a prima facie case of discrimination.[214] The discrimination was intentional

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210. *See supra* note 6 for the text of the five affirmative defenses. 29 C.F.R. § 860.120(a)(1) (1989).

211. Buckley v. Hospital Corp. of Am., Inc., 758 F.2d 1525, 1529 (11th Cir. 1985); *see generally* Smith & Leggette, *Recent Issues in Litigation Under the ADEA*, 41 OHIO ST. L.J. 349, 371-80 (1980).

212. Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). The circumstantial evidence approach to establishing a prima facie case follows the pattern established in Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* dealt with disparate treatment, the type of discrimination in which an employer intentionally treats an employee unfavorably because of an impermissible factor, such as age. Proof of the employer's motive is necessary to establish a disparate treatment claim. *McDonnell Douglas* allows the plaintiff to prove motive by circumstantial evidence. Then the employer must come forward and articulate a legitimate, non-discriminatory reason for the disparate treatment. However, the burden of persuasion remains on the plaintiff at all times. *Accord* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). The *McDonnell Douglas* formula can be used in ADEA cases, but it should not be applied automatically. *See, e.g., Loeb*, 600 F.2d at 1019 (*McDonnell Douglas* should not be viewed as the format into which all cases of discrimination must fit); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (*McDonnell Douglas* may be applied to ADEA cases but not automatically).

In an ADEA case, an employee must establish that age was a determining factor in the employer's decision. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1204 (7th Cir. 1987).

213. This type of discrimination, disparate impact, is also derived from a Title VII analysis. Griggs v. Duke Power Co., 401 U.S. 424 (1971). No showing of intent is needed to establish disparate impact, which occurs when facially-neutral employment policies are discriminatory in application. The *Griggs* Court held that Title VII proscribes overt discrimination as well as practices that are fair in form but discriminatory in practice because Congress, in enacting Title VII, was concerned with the consequences of employment practices, not only the motivation. *See id.* at 431-32. Once the plaintiff, by the use of statistical evidence, proves disparate impact, the employer bears the burden of producing evidence of a business justification for the employment practice. The plaintiff retains the burden of persuasion at all times. The employee may then rebut with a showing of nondiscriminatory alternatives. Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2126 (1989) (Stevens, J., dissenting).

Disparate impact analysis has been applied to ADEA litigation. *See, e.g.,* EEOC v. Borden's, Inc., 724 F.2d 1390, 1394-95 (9th Cir. 1984); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari).

214. *Cf.* Karlen v. City Colleges of Chicago, 837 F.2d 314, 318 (7th Cir.), *cert. denied*

in the sense that the policy was purposefully drafted to deny participation to certain employees.[215] The Supreme Court has held that when there is direct evidence of age discrimination, the burdens of persuasion and production shift to the employer to show why age is a factor in its employment policy.[216] There will always be direct evidence of the terms of a benefit plan because the EEOC regulations require the employer to maintain copies or memos of employee benefit plans.[217] Thus, an employer must prove the elements of section 4(f)(2) as an affirmative defense to escape liability for age discrimination.

An employer may establish the section 4(f)(2) defense by showing that it varied benefit levels pursuant to the terms of a bona fide benefit plan that was not a subterfuge to evade the purposes of the ADEA.[218] In *Betts*, the plaintiff conceded that the PERS plan was both bona fide, in that it existed and paid substantial benefits,[219] and that PERS's refusal to grant plaintiff's application for disability benefits was an action to observe the terms of the plan.[220] The only disputed element was the subterfuge element.

Under the prevailing view of section 4(f)(2) as an affirmative defense, an employer must disprove subterfuge. This can be done by requiring the employer to show cost justification for the discriminatory aspects of the benefit plan. Cost justification provides a straightforward method of ascertaining an employer's motive.[221] The *Betts* majority rejected the objective cost justification requirement, stating that it was inconsistent with the subjective definition of subterfuge.[222] Both the subjective and objective elements of subterfuge can be given effect without rejecting the admin-

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sub nom. Cook County Colleges Local No. 1600 v. City Colleges of Chicago, 108 S. Ct. 2038 (1988) (evidence that persons of a particular age are eligible to participate in a benefit plan, but those over that age are not, is prima facie age discrimination).

215. EEOC v. Borden's, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984) (a severance pay policy that was purposefully drafted to deny benefits to employees older than 55 provided all the intent necessary to support a finding of disparate treatment).

216. Trans World Air Lines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (employer has opportunity to rebut direct evidence by proving an affirmative defense).

217. 29 C.F.R. § 1627.3(b)(2) (1989).

218. 42 U.S.C. § 623(f)(2) (1982 & Supp. V 1987).

219. Some courts have held that a plan that pays substantial benefits cannot be a subterfuge. *Cf.* Patterson v. Independent School Dist., 742 F.2d 465 (8th Cir. 1984) (an unreasonably infinitesimal benefit plan would brand a plan a subterfuge). *But cf.* Cipriano v. Board of Educ., 785 F.2d 51, 57 (2d Cir. 1986) (mere fact that plan is bona fide does not establish that it is not a subterfuge); EEOC v. Home Ins. Co., 672 F.2d 252, 260 (2d Cir. 1982) (to assume bona fide and not a subterfuge mean the same thing is to ignore both the language of statute and stated purpose of Congress).

220. *Betts*, 109 S. Ct. at 2860.

221. *Mt. Lebanon*, 842 F.2d 1480, 1494 (3d Cir. 1988).

222. *Betts*, 109 S. Ct. at 2863.

istrative regulations or altering the nature of section 4(f)(2). The proper role of intent is to rebut the defendant's affirmative defense. If the employer proves that its plan is not arbitrary by showing cost justification, the plaintiff may try to show that "the actual motivation for . . . the plan was an ongoing scheme, plan, stratagem, or artifice of evasion."[223] But to require the plaintiff to prove the employer's intent as an initial matter deprives the ADEA of much of its effectiveness.

IV. Conclusion

By expanding the exemption for bona fide benefit plans to include all plans that do not discriminate in a nonbenefit aspect of employment, the Supreme Court contradicted the principle that exceptions from remedial legislation must be narrowly construed.[224] In rejecting the Department of Labor and EEOC regulations incorporating the cost justification principle as unsupported by the statutory language and the legislative history, the majority misconstrued legislative intent. Although the existence of the section 4(f) exemptions indicates that Congress viewed some types of discrimination in benefit plans as acceptable, "an unqualified exemption contravenes Congress's overarching goal of protecting older workers against arbitrary discrimination."[225] Only employers that can prove that discriminatory plan provisions are objectively justified by the increased costs of providing benefits to older workers should qualify for the section 4(f)(2) defense.

As a result of *Betts*, employers are now free to discriminate in providing employee benefits to older workers for whatever reason, be it the employer's simple desire to cut costs or its "abject hostility based on unfounded stereotypes" of older workers.[226] Indeed, one case has already followed *Betts* and rejected an employee's challenge to a post-ADEA retirement plan modification granting workers retiring at later ages lesser benefits than workers with the same length of service retiring at earlier ages.[227]

Congress should act to overrule the specific holdings of *Betts* in much the same way that it acted in 1978 to overrule the *McMann* decision.

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223. Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208, 216 (4th Cir. 1982); *see also* Player, *supra* note 6, at 773-74 (even a plan that is objectively reasonable can be a subterfuge if the employer uses it for improper reasons or to secure an improper goal).

224. Senate Hearings, *supra* note 69; 113 Cong. Rec. 7077 (1967); 29 C.F.R. § 1625.10(a)(1) (1989).

225. *Betts*, 109 S. Ct. 2854, 2873 (1989).

226. *Id.* at 2869.

227. Robinson v. County of Fresno, 882 F.2d 444, 447 (9th Cir. 1989) (plaintiff was unable to show that the change in benefits formula demonstrated an intent to discriminate in any non-fringe benefits area of employment).

Congress should eliminate the confusion surrounding the subterfuge element of section 4(f)(2) by providing a clear definition, addressing the role of intent in the subterfuge analysis, and specifying how and by whom the presence or absence of subterfuge is to be demonstrated. Placing the burden of disproving subterfuge on the employer would place the burden on the party most likely to have access to evidence of intent. Addition of the cost justification language of the administrative regulations would provide an objective means of proving whether a discriminatory plan is arbitrary.

The *Betts* decision has not gone unnoticed by Congress. Work has already begun on the Older Workers Benefit Protection Act,[228] which would amend the ADEA to clarify the protections given older workers regarding employee benefit plans. Congress must quickly correct the tremendous injustice done to the millions of older workers as as result of the virtual ADEA immunity granted to employers by the *Betts* decision. In the words of Representative Clay, one of the cosponsors of the House bill, "Congress must rescind this gift [to employers] before employers' dreams become older workers' nightmares."[229]

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228. S. 1511, 101st Cong., 1st Sess. (1989) (introduced by Sen. David Pryor on Aug. 3, 1989); H.R. 3200, 101st Cong., 1st Sess. (1989) (introduced by Reps. Roybal, Hawkins, and Clay on Aug. 4, 1989).

229. 135 CONG. REC. H2880 (daily ed. Aug. 4, 1989) (statement of Rep. Clay).

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** After this Note went to press, President Bush signed into law the Older Workers Benefit Protection Act (the "Act"), Pub. L. No. 101-433, on October 16, 1990. Congress found legislative action "necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967, which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost consideration." Pub. L. No. 101-433, § 101. The Act incorporated a new § 4(f)(2), which provides as follows:

> (2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section —
>
> (A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act . . . or
>
> (B) to observe the terms of a bona fide employee benefit plan —
>
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under [29 C.F.R. § 1625.10] (as in effect on June 22, 1989). . . .

A new subsection (k) specifically states that a seniority system of employee benefit plan shall comply with this Act regardless of the date such system or plan was adopted, thus rejecting the *McMann* chronological test of subterfuge.