IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAWRENCE G. RUPPERT and
THOMAS A. LARSON,
on behalf of themselves and on behalf
of all others similarly situated,

OPINION AND ORDER

Plaintiffs,

08-cv-127-bbc

v.

ALLIANT ENERGY CASH
BALANCE PENSION PLAN,

Defendant.

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This order addresses two pending motions: (1) defendant Alliant Energy Cash Balance Pension Plan's motion for reconsideration of its statute of limitations defense, dkt. #470; and (2) plaintiffs Lawrence Ruppert's and Thomas Larson's motion for leave to file a supplemental complaint. Dkt. #478. In the first motion, defendant argues that Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc., 651 F.3d 600 (7th Cir. 2011), requires a reconsideration of the June 3, 2010 decision that all the class members in this case have a timely claim under the Employee Retirement Income Security Act to challenge the calculation of their lump sum retirement benefit under a 1998 plan. Dkt.

#316. In the second motion, plaintiffs ask to file a supplemental complaint under Fed. R. Civ. P. 15(d) to include a claim challenging a May 10, 2011 amendment to the plan that changes the definition of "Accrued Benefit" to comply with a ruling of the Internal Revenue Service.

The two motions are related because the second motion has the potential to moot the first. The May 2011 amendment is effective retroactively to January 1, 1998, which means it applies to every class member in this case. If the May 2011 amendment superseded the 1998 plan with respect to the provisions in dispute in this case, then this raises questions whether the claims challenging the 1998 plan are mooted by the May 2011 amendment and whether the amendment started a new limitations period. Having reviewed the parties' submissions, I conclude that the answer to both of these question is "yes."

Initially, neither side addressed the question whether the May 2011 amendment mooted plaintiffs' claims. Plaintiffs hinted at it when they said they were seeking to file a supplemental complaint "to make clear that they are no longer suing exclusively or even at all" under the 1998 plan, Plts.' Br., dkt. #478, at 2, but they did not explain further. Because of the importance of the issue and its potential to significantly alter the proceedings in this case, I asked the parties to file supplemental briefs.

In their supplemental briefs, the parties agree that the May 2011 amendment mooted the original claims. Dft.'s Br., dkt. #500, at 2 ("This action became moot on May 10, 2011

when the Plan formally amended the interest credit projection rate."); Plts.' Br., dkt. #501, at 12 ("Plaintiffs' 1998 Plan claims are now moot."). To put it more specifically, the parties agree that the May 2011 amendment changed the way benefits are calculated for plan members, which is the key dispute in this case. Dft.'s Br., dkt. #500, at 3 ("The May 10, 2011 Amendment . . . replaced the former projection rate with a completely new rate."); Plts.' Br., dkt. #501 (2011 amendment "amended out of existence the 1998 Plan's 30-year Treasury bond projection rate, the gravamen of Plaintiffs' 1998 Plan claims."). Instead of using the 30-year Treasury rate to calculate future interest credits, defendant now uses a five-year rolling average. Neither side suggests that there is any chance that defendant will revert to the previous rate. In fact, defendant has made payments to class members under the new rate. Accordingly, I agree with the parties that plaintiffs' claims challenging the rate in the 1998 plan are moot. Plaintiffs cannot challenge a provision that no longer exists.

Defendant goes a step further to say that the entire case is moot because the May 2011 amendment "makes whole all members of the class." Dft.'s Br., dkt. #500, at 3. However, it is undisputed that the amendment still fails to give class members all the relief ordered by this court because I awarded damages using an 8.2% rate rather than a five-year rolling average. The rate defendant chose in the amendment still leaves class members with less than what they would receive under a rate of 8.2%. Thus, the class members have been made whole only if it is assumed that this court erred in choosing the appropriate rate. I

have considered this issue multiple times and decline to do so again. Accordingly, I conclude that any claims challenging the May 2011 amendment are not moot.

The next question is whether claims challenging the May 2011 amendment are barred by the statute of limitations. I agree with plaintiffs that they are not, even if Thompson would require reconsideration of the determination that the statute of limitations did not bar the class members' claims under the 1998 plan.

Under Thompson, 651 F.3d at 604, "a claim to recover benefits under § 502(a) accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." The 2011 amendment allegedly does this by rejecting what this court determined to be the required rate.

Defendant does not deny that a new agreement may trigger a new statute of limitations under some circumstances, but it says that the 2011 amendment does not because it is a modification of the 1998 plan rather than a novation, in which one contract is substituted for another. Defendant cites In re Barrett, 417 B.R. 471, 477 (Bankr. N.D. Ohio 2009), for the proposition that "a novation, as opposed to a contract's modification, will start anew any temporal reference point—for example, a statute of limitations." However, the only authority the bankruptcy court cited for this proposition is a section from a legal encyclopedia that defines the term "modification"; it does not address issues related to the statute of limitations. 17A Am. Jur. 2d Contracts § 507. Further, the distinction

between modifications and novations had no bearing on the decision of the bankruptcy court, which concluded that a student's debt "arose" for the purpose of 11 U.S.C. § 727(b) when she consolidated her loans. The case did not require the court to determine when a new agreement triggers a new limitations period.

I see no reason to distinguish between a "modification" and a "novation" for the purpose of this case. Although defendant did not repeal the 1998 plan in full, the parties agree that the provisions in dispute in this case have changed. Whether those changes are a modification or a novation, defendant does not deny that the amendment is binding and enforceable on all interested parties. Thus, it is irrelevant whether other provisions in the plan remained the same.

Alternatively, defendant argues that the statute of limitations for challenging the 2011 amendment should be the same as for the original 1998 plan because the 2011 amendment inflicted the same type of injury as the original plan, that is, an interest credit projection rate that is too low. Dft.'s Br., dkt. #500, at 6 ("This action has been about whether the Plan's interest credit projection rate is too low, which *still* is the issue posed by the purported supplemental complaint."). Certainly, if the policy had been amended to further decrease the plan members' benefits, defendant could not argue plausibly that the amendment had not created a new limitations period. Defendant's argument seems to be that resetting the statute of limitations is inappropriate because the amendment did not create any new

injuries for plaintiffs, but actually lessened them.

Defendant's argument has some surface appeal, but defendant fails to cite a single case to support its position, while plaintiffs cite a number of cases to support their view that the 2011 amendment created a new statute of limitations. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 635-36 (2007) ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations."); The Committee Concerning Community Improvement v. City of Modesto, 583 F.3d 690, 702 (9th Cir. 2009) (re-enactment of same policy triggered new limitations period); Martin v. Bartow, 628 F.3d 871, 874 (7th Cir. 2010) (in habeas case, 2005 commitment order triggered new limitations period even though "reasons for challenging that judgment could have been the basis for challenging an earlier judgment" from 1996); Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1087 (7th Cir. 1992) (awarding new contract to same party created new limitations period even though challenged procedures "did not materially change" from one contract to another); MHC Financing, Ltd. v. City of San Rafael, 2008 WL 440282, *32 (N.D. Cal. 2008) (amendments to ordinance triggered new statute of limitations with respect to those amendments). See also McElwee v. Estate of Joham, 15 S.W.3d 557, 559 (Tex. Ct. App. 2000) (new statute of limitations created when debtor and creditor modified agreement to change amount of monthly payment and interest rate). Although none of these cases are directly on point, some of them suggest a general rule

that a new contract, rule or decision creates a new injury for the purpose of the statute of limitations, even if the new action does not put the plaintiffs in a worse position than they were before.

In their supplemental complaint, plaintiffs contend that the 2011 amendment violates their rights under ERISA, regardless of any previous version of the plan. Whether the amendment is "better" for plaintiffs than the previous version, I see no basis for holding that plaintiffs are barred by the statute of limitations from challenging an alleged violation occurring in 2011. Accordingly, I am granting plaintiffs' motion to file a supplemental complaint to include claims challenging the 2011 amendment.

As requested by the court, the parties have submitted proposed schedules for the remainder of the case. Not surprisingly, the parties do not agree about what needs to be done to bring the case to resolution. For example, defendant says that plaintiffs will need to file a new motion for class certification, but plaintiffs say nothing about this. Because plaintiffs' claims under the 1998 plan are moot, my initial impression is that defendant is correct about the need to certify a new class. However, I am hesitant to rule on this issue when neither side justified its position. Further, both sides assume that defendant will file a motion to dismiss and a motion for summary judgment, but it is not clear to me why more than one dispositive motion is needed. I will direct the clerk of court to set a telephone conference before United States Magistrate Judge Stephen Crocker to resolve these issues

and any other scheduling matters that remain disputed. The parties should be prepared to defend their proposals at the conference.

## ORDER

IT IS ORDERED that

1. Defendant Alliant Energy Cash Balance Pension Plan's motion for reconsideration, dkt. #470, is DENIED as moot.

2. Plaintiffs Lawrence Ruppert's and Thomas Larson's motion for leave to file a supplemental complaint, dkt. #478, is GRANTED. Plaintiffs may have until November 30, 2011, to file their new complaint.

3. The clerk of court is directed to set a telephone conference before the magistrate judge to determine a schedule for the remainder of the case.

Entered this 23d day of November, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge