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The 11th Annual Employee Benefits Symposium: America's Retirement Crisis: What Can be Done, 46 J. Marshall L. Rev. xxiii (2013)

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THE 11TH ANNUAL EMPLOYEE BENEFITS SYMPOSIUM CO-SPONSORED BY THE CENTER FOR TAX LAW & EMPLOYEE BENEFITS AND THE JOHN MARSHALL LAW REVIEW

COMMENTS BY PROFESSOR KATHRYN J. KENNEDY, DIRECTOR OF THE CENTER FOR TAX LAW & EMPLOYEE BENEFITS AND ASSOCIATE DEAN FOR ADVANCED STUDIES & RESEARCH AT THE JOHN MARSHALL LAW SCHOOL

The Center for Tax Law & Employee Benefits was delighted to co-host this year's Annual Employee Benefits Symposium on Monday, April 15, 2013, with THE JOHN MARSHALL LAW REVIEW, who has published the articles presented at that event. Consistent with the Center's mission to foster and develop the advanced studies and research of employee benefits law, our symposia have generated significant scholarship in the area of employee benefits law. This area of law was revolutionized with the passage of the federal Employee Retirement Income Security Act of 1974, known as ERISA, which has been amended over thirty times in the past four decades. The advent of new non-qualified deferred compensation rules contained in Code section 409A, amended in 2004, the passage of the Americans Job Creation Act (AJCA), and new health care reforms imposed by the Patient Protection and Affordable Care Act (PPACA) changed the world of employee benefits. Today's world in employee benefits is substantially different than it was when ERISA was initially passed in 1974.

This year's symposium theme, the "American Retirement Crisis: Where Do We Go From Here?" was several years in the making, as our nation began to turn its attention to the level of savings available to the baby boomer generation in 2009. Traditionally, we have relied on the three-legged stool for retirement savings: (1) Social Security; (2) employer-provided coverage under a defined benefit or defined contribution plan; and (3) individual savings. Social Security extends a guaranteed lifetime benefit to covered workers, but it was never intended to replace the pre-retirement standard of living for the majority of covered retirees. Instead, it was intended as a safety net, providing a larger percentage of replacement income for low and moderate workers at retirement. As noted in one of the articles in this edition, the Trustees' Report on Social Security indicates that

Social Security will be able to sustain the payment of full benefits only until 2035. At that time, the trust fund will be exhausted and incoming payroll taxes will be unable to support benefits at the present level. The second leg of the stool, individual savings, has been negative in recent years, which may be due to the stagnant growth in wages for the majority of workers even though productivity has increased.

The future of Social Security funding and the result of negative individual savings have put more pressure on employer-provided coverage for retirement savings. However, we have seen a real change in employer-provided retirement coverage since the passage of ERISA. In 1974, the typical employer-provided retirement savings was administered as a traditional defined benefit plan, which extended fixed benefits to retirees and their spouses in the form of a lifetime annuity or joint and survivor annuity. During the late 1980s and 1990s, private employers began to move away from defined benefit plans and towards defined contribution plans. This move shifted the burden from the employer to the employee to *save* for retirement. This move also forced employees to be dependent on the *size* of his or her account balance at retirement and the *rate* at which the account balance would draw down in determining whether and when to retire. This shift to defined contribution plans was so influential that section 401(k) is probably the most recognizable section of the Internal Revenue Code to average taxpayers in America today. The shift also resulted in the elimination of annuity options due to their low "take-up" rate by participants and beneficiaries. In addition, for plan sponsors who could not self-insure the annuity risk, selection of an appropriate annuity carrier brought fiduciary concerns. These consequences resulted in a "do it yourself" approach to retirement savings, and this approach bears another set of risks for the employee; for example, risks of not joining, not contributing, investing unwisely, taking advantages to take monies out of the plan for current expenditures (referred to as "leakage"), and the risk of outliving one's account balance.

Early on, President Obama's administration stated its goal was to reduce barriers to annuitization of pension funds and to incentivize guaranteed lifetime income products to reduce risks that retirees would outlive their retirement savings or that their living standards would be reduced due to investment losses or inflation.[1] While there are many impediments to facilitate access

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1. *Treasury Fact Sheet: Helping American Families Achieve Retirement Security By Expanding Lifetime Income Choices*, TREASURY.GOV, http://www.treasury.gov/press-center/press-releases/Documents/020212%20Retirement%20Security%20Factsheet.pdf. (last visited May 23, 2013).

to lifetime income arrangements for defined contribution plan participants and beneficiaries, the real issue is that participants simply have not sufficiently saved for retirement, and therefore retirees will undoubtedly outlive their retirement savings. This puts more pressure on the Social Security system, especially for low and moderate-income participants who rely predominantly on Social Security for retirement benefits. As such, the question arises as to what will the standard of living be for baby boomers as they age, as Social Security was intended as a safety net for retirement, not the predominant source of retirement savings for retirees.

Three of the articles in this symposium edition focus on the Social Security. The article co-authored by Joan Entmacher and Amy Matsui discuss reliance on Social Security benefits in the context of women baby boomers, as their lifetime income is generally lower than men's and their status as divorced, single parents and/or widowhood has a greater impact on their economic security. Thus, they call for improving the Social Security system and Supplemental Security Income (SSI), which provides a means-tested system intended to extend a basic income floor for those most economically vulnerable. The second article, co-authored by Martha Holstein and Kristen Pavle, regards Social Security as a moral and economic necessity, such that there should be no changes to the system to the extent they harm the least vulnerable. If we as a nation expect that a retiree should live with dignity during retirement, an intergenerational approach is necessary. Under this approach, many reforms, such as changing the consumer price index (CPI) adjustment to annual Social Security benefits and raising the normal retirement age, are not viable solutions. The third article, authored by John Turner, focuses on a solution for "old-old workers," whereby longevity insurance should be added as part of Social Security benefits. Individual retirees in their 80s and older are particularly vulnerable in retirement as they cannot no longer work and will likely have unexpected health care costs not fully covered by insurance. Thus, retirees age 80 and older are in need of an alternative source of retiree income, known as longevity insurance, which provides a deferred annuity that begins at an advance age (e.g., age 82). Adding this type of insurance, especially for low and moderate-income workers, would be a cost effective social insurance to assure those individuals have sufficient income during retirement.

The remaining three lead articles focus on the employer-provided retirement market. Rowland Davis, an actuary, presented his article on the "Tracker Plan," a model for a controlled-risk defined contribution model that had been

previously presented by the Society of Actuaries in its 20/20 Retirement Project. His model calls for a mandatory defined contribution plan by private employers, with independent investment management and risk-sharing elements for both employers and employees to combine many of the elements of the traditional defined benefit system. The second article, by Sandy Mackenzie and Jonathan Forman, calls for strengthening the existing private employer system with modest and incremental changes, in lieu of starting with a blank slake for devising an optimal retirement system. They have numerous proposals to enhance the current system. The last article involved consumer disclosure issues in the immediate annuity market that retirees confront. The article is actually co-authored by three authors – two of who articulated the paper at the symposium – Kelli Hueler, Paula Hogan and Anna Rappaport. While offering annuity options to retirees is a laudable goal, giving retirees an "apples to apples" comparison of the various annuity and "lifetime income options" available in the marketplace is essential. Kelli Hueler and Paula Hogan presented a well-structured look at the market place with quotes set through meaningful competition, multiple parties, real time quotes and with standardized terms in hopes that the industry would adopt a similar standard. However, a number of regulatory changes would be required to accomplish such a result.

I am extremely proud of the scholarship advanced by these authors in this special symposium edition, and I am confident that numerous courts will cite it. It is particularly refreshing that such scholarship goes beyond the legal industry and solicits commentary by economists, financial planners, actuaries, and others. It shows this scholarship is holistic in nature as we face these issues as a nation.

For those of you who did not present at the symposium, you missed an outstanding address by our keynote luncheon speaker, Carol Bogosian, ASA. She addressed the overview of risks facing the baby boomer generation of retirees, as researched by the Society of Actuaries (SOA) over the past 15 years. The SOA briefed eleven of these issues in decision drafts, available at http://www.soa.org/research/research-projects/pension/research-post-retirement-needs-and-risk.aspx. Carol summarized the results of those decision drafts, but the results were not up-lifting. Few workers say they are prepared for retirement, and retirees appear to have a low appetite for guaranteed income products. Additionally, the results indicated that widows and the "old-old," or those retirees over eighty continue to be the most vulnerable to the retirement crisis. The wealth of research and analysis in this edition is remarkable and certainly worth reading!