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# Reappraisal of the Private Pension System

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# A REAPPRAISAL OF THE PRIVATE PENSION SYSTEM

In recent years an alarming gap has developed between employee expectations and the actual performance of private pension plans.[1] Statistics indicate that although twenty-eight million workers[2] are ostensibly covered by some form of private pension plan,[3] few will ever

1 Although private pension plans vary greatly in detail, they fall into two general categories. The first is the insured plan, in which an employer purchases a pension policy from an insurance company. The insurer undertakes to provide the employees with an annual income when they retire. The employer usually assumes no continuing obligation to pay the premiums for the policy. In return the insurance company must pay benefits only if the insurance contract is still in force at the time of a claim and only to employees who meet the eligibility requirements of the policy. There are approximately 9 million workers covered under insured private pension plans. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 285 (1971).

The second category of private pension plans is the noninsured plan, of which the pension trust is most prevalent. Under this arrangement an employer pays contributions into a trust fund. The fund is generally administered by either a corporate trustee, a board of trustees appointed by the employer, or an employer and a union jointly. When an employee retires, the trust fund will purchase an annuity for the employee or will pay benefits directly from the fund. There are approximately 20.3 million employees under noninsured private pension plans. *Id. See* M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 16-18 (1964).

Approximately one-half of all private pension plans is collectively bargained. The other half is the result of unilateral employer action. *Id.* at 19. Although employee contributory plans originally predominated, pensions funded solely by employers constitute the bulk of such plans today. D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS 100 (2d ed. 1964).

2 The growth in both coverage and reserve assets of private pensions in the past 30 years has been phenomenal, and the rate of development is expected to proceed even more rapidly in the future.

GROWTH OF PRIVATE INDUSTRIAL PENSION PLANS

| | 1940 | 1950 | 1960 | 1965 | 1970 | 1980 (est.) |
|---|---|---|---|---|---|---|
| Covered Employees (millions) | 4.1 | 9.8 | 21.2 | 25.4 | 28.2 | 42.0 |
| Fund Assets ($ billions) | 2.4 | 12.0 | 52.0 | 85.4 | 125.1 | 214.0 |

D. HOLLAND, PRIVATE PENSION FUNDS: PROJECTED GROWTH 2, 29, 67 (1966); BUREAU OF THE CENSUS, *supra* note 1; 1971 CONG. Q. REP. 975.

3 The lengthening of a worker's life span has been accompanied by a significant decrease in the employment of the elderly. Only 4.3% of the population in 1910 was age 65 or over, but almost 10% fell within that category in 1970. Such persons, however, comprised only 3.7% of the labor force. D. MCGILL, *supra* note 1, at 1; BUREAU OF THE CENSUS, *supra* note 1, at 23, 212. As a result, more retired workers are dependent upon old age assistance for a longer period of time. Although Social Security payments have risen at a rate of 5% over the last two years, the cost of living has increased at the even higher rate of 6.5%. The minimum monthly Social Security benefits of $70.40 per worker or $105.60 per couple thus are still inadequate to ensure a decent standard of living. *See* Act of March 17, 1971, Pub. L. No. 92-5, § 201(a); *see also*, CONF. REP. No. 92-42, 92d Cong.,

receive retirement benefits. Figures recently released by a Senate Labor Subcommittee reveal that only between five percent and sixteen percent of those covered by private pension plans have ever received benefits.[4] Such figures underscore the need to reexamine the purposes and operation of the private pension system.[5]

## I

## VESTING REQUIREMENTS

The primary reason why so few retired workers receive pension benefits is that they fail to meet the vesting requirements of their plans.[6] Private pension plans usually specify conditions which an employee must satisfy before he can claim a pension as of right. Typical

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1st Sess. (1971); MONTHLY LAB. REV., Aug. 1971, at 106. These figures emphasize the importance of private pensions to the elderly.

4 The subcommittee surveyed a random cross-section of 1,500 private pension plans representing diverse segments of the pension industry. To make the sample as homogenous as possible only plans established prior to 1950 were analyzed. One group of plans in a prelimiuary sample had either no vesting provisions or allowed vesting after 11 or more years of service. The survey revealed that only 5% of the workers eventually received pension payments under such plans. The second category of plans in this prelimiuary sample demanded 10 or fewer years of service for pension rights to vest. The survey showed that only 16% of employees covered under these plans subsequently became entitled to pension benefits. The subcommittee surveyed 51 plans with total assets of more than $10 billion in the first category, and 36 plans with over $6 billion in assets in the second. 117 CONG. REC. S 4662-68 (daily ed. April 5, 1971).

In regard to the study findings, Senator Javits recently testified before the Senate Labor Subcommittee:

> While these results are "preliminary"—in the sense of not being statistically all-encompassing—they are sufficiently sobering to alert all of us to the dangerously inequitable provisions in private pension plans and the hardship and privation that has been worked on thousands upon thousands of employees.

*Hearings on Examination of Private Welfare and Pension Plans Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 92d Cong., 1st Sess. 87 (1971).

5 *See* N.Y. Times, April 17, 1971, at 28, col. 1 (editorial); TIME, Aug. 23, 1971, at 48; U.S. NEWS & WORLD REP., April 12, 1971, at 46.

6 Vesting is the attainment by a participant in a pension plan of a right to benefits that is not contingent upon his continuing employment or fulfilling other conditions. McGill, *Language of Pensions,* 10 TEXTBOOK FOR WELFARE, PENSION TRUSTEES AND ADMINISTRATORS 147 (1968). There are three types of vesting requirements. "Deferred full vesting" gives an eligible worker a right to all accrued benefits when he meets the requirements specified in the plan. An example would be to allow an employee who has worked 25 years and until he was age 60 a full pension beginning at age 65. "Deferred graded vesting" allows an employee to take a percentage of accrued benefits upon meeting minimum requirements. This percentage increases as further requirements are met. *See* notes 69-70 and accompanying text *infra.* The final type is "immediate full vesting" under which benefits fully vest as they accrue. *See* Norman, *Private Pensions: A Study of Vesting, Funding, and Integration,* 21 FLA. L. REV. 141, 151 (1968).

vesting requirements of most plans include some combination of age and continuous service. The overwhelming majority of workers is unable to satisfy these eligibility standards.

### A. *Voluntary Termination of Employment*

The American labor force is characterized by a high degree of mobility. Almost four million workers left their jobs in 1970.[7] A substantial number of all job changes results from employee choice rather than involuntary separation.[8] Employers purposely set age and service requirements for vesting to take advantage of such job turnover probabilities. Hence, workers who leave their jobs generally forfeit their pension rights.[9]

### B. *Involuntary Termination*

Often, through no fault of their own, employees lose their jobs. Since few plans distinguish between voluntary and involuntary termina-

[7] These figures are based upon a separation rate of 4.8% of the total 1970 civilian labor force of over 82 million workers. This separation rate is slightly above the average annual separation rate of 4.7% from 1968 through 1970. MONTHLY LAB. REV., Aug. 1971, at 91 (Table 4), at 98 (Table 15).

[8] The most recent Bureau of Labor Statistics survey on job mobility found the following to be the main reasons for employees over age 25 leaving their jobs:

REASONS FOR LEAVING BY SEX, 1961

| Reasons for Leaving | Men | Women |
|---|---|---|
| Number (thousands) | 5,783 | 2,335 |
| Percent distribution | 100.0% | 100.0% |
| Improvement in status | 35.2 | 31.2 |
| Job loss | 42.3 | 23.1 |
| Termination of temporary job | 8.6 | 15.6 |
| Illness or disability | 2.6 | 6.4 |
| Household responsibilities | .6 | 6.0 |
| School responsibilities | .7 | .8 |
| Other reasons | 8.6 | 15.7 |
| Not reported | 1.5 | 1.1 |

*Hearings on S. 3421, S. 1024, S. 1103, and S. 1255 Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong., 2d Sess. 253 (1968) [hereinafter cited as *Hearings*].

[9] Senator Javits summarized this problem as follows:

> Contrary to the assumption on which most private pension plans are built, in today's modern industrial society, labor mobility is the *rule* rather than the exception. Very few employees work for one employer all their working lives. In fact, very few work for one employer as long as 30 years or even 20 years. Despite undeniable evidence of the enormous velocity in job changes among the Nation's work force, private pension plans continue to be structured in a manner which can only result in an abnormally high loss of pension benefits.

117 CONG. REC. S 8291 (daily ed. June 4, 1971) (emphasis in original).

tion, the latter occurrence also results in loss of pension eligibility.[10] Thus layoffs,[11] discharges (often without cause),[12] business failures,[13] moves,[14] and sales or mergers[15] can deprive an employee of his pension.

C. *Death and Disability*

Death prior to the vesting of benefits usually precludes a claim by an employee's estate or his family to pension plan benefits.[16] Unless the plan includes a death benefit clause, the employer is also under no legal obligation to pay benefits to the survivors of a vested participant.[17] Likewise, an employee disability, even one which is job related, may prevent an employee from meeting vesting requirements and disqualify him from pension participation unless the plan provides otherwise.[18]

All of these occurrences may result in disqualification of employees from pension benefits for failure to satisfy vesting requirements. Liber-

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10 M. BERNSTEIN, *supra* note 1, at 26.

11 Over 1.8 million workers were laid off in 1970. MONTHLY LAB. REV., Aug. 1971, at 98 (Table 15). Such layoffs often break a continuous service record and disqualify employees from pension benefits. *See, e.g.*, Finnell v. Cramet, Inc., 289 F.2d 409 (6th Cir. 1961); Machinists Local 2040 v. Servel, Inc., 268 F.2d 692 (7th Cir.), *cert. denied*, 361 U.S. 884 (1959); Alexander Smith, Inc., 24 Lab. Arb. 165 (1955).

12 Unless the pension plan provides to the contrary, an employee who ceases work for any reason is disqualified from pension eligibility. Schneider v. McKesson & Robbins, Inc., 254 F.2d 827 (2d Cir. 1958); Bos v. United States Rubber Co., 100 Cal. App. 2d 565, 224 P.2d 386 (1950); Gitelson v. Du Pont, 17 N.Y.2d 46, 215 N.E.2d 336, 268 N.Y.S.2d 11 (1966); Stanley v. Caltex Petroleum Corp., 63 Misc. 2d 780, 313 N.Y.S.2d 836 (Sup. Ct. 1970).

13 Over 10,000 businesses failed in 1970. BUREAU OF THE CENSUS, *supra* note 1, at 475. As a result many employees whose pensions had already vested lost all pension credits. Employees are also apt to lose benefits which have accrued under the plan of a bankrupt employer. No priority is accorded to employee pension benefits or lost contributions in bankruptcy procedures. United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959); Los Angeles Hotel-Restaurant Employer-Union Welfare Fund v. Bowie, 283 F.2d 516 (9th Cir. 1960), *cert. denied*, 365 U.S. 817 (1961).

14 *See, e.g.*, Rankin v. Kellam, 388 S.W.2d 306 (Tex. Civ. App. 1965).

15 There were over 2,300 mergers or sales of businesses in 1969. BUREAU OF THE CENSUS, *supra* note 1, at 474. Such acquisitions often result in the termination of a business entity; the assuming or new entity often has no duty to pensioned employees. Even if the new entity assumes pension liabilities, it may institute mass layoffs of participants in such plans. Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N.W.2d 772 (1958); Fernekes v. CMP Indus., Inc., 13 N.Y.2d 217, 195 N.E.2d 884, 246 N.Y.S.2d 201 (1963).

16 Frietzsche v. First W. Bank & Trust Co., 168 Cal. App. 2d 705, 336 P.2d 589 (1959); Grossman v. Precision Castings Co., 36 Misc. 2d 561, 233 N.Y.S.2d 166 (Sup. Ct.), *aff'd*, 19 App. Div. 2d 921, 245 N.Y.S.2d 329 (3d Dep't 1962).

17 Webb v. Warren Co., 113 Ga. App. 850, 149 S.E.2d 867 (1966).

18 Smith v. Union Carbide Corp., 350 F.2d 258 (6th Cir. 1965), *rev'g* 231 F.Supp. 980 (E.D. Tenn. 1964); Bogda v. Chevrolet-Bloomfield Div., Gen. Motors Corp., 8 N.J. Super. 172, 73 A.2d 735 (1950); Going v. Southern Mill Employees' Trust, 281 P.2d 762 (Okla. 1955).

alization of these stringent vesting conditions has been the principal goal of pension reformers in both the judicial and legislative arenas.

## II

## Treatment of Pension Plans in the Courts

To a large extent, common law theories still control the judicial attitude towards pension plans.[19] However, pension plans have not received consistent treatment in the courts.

### A. *Pensions as Gratuities*

Early judicial thinking viewed pension plans as mere gratuities.[20] As gifts, pensions created no enforceable rights in the grantee-employee. This theory corresponded to the terms of most early pension plans, which included express provisions limiting the liability of the employer[21] and allowing for alteration or termination at the discretion of management.[22]

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> 19 Although there is a trend toward increased regulation of private plans by state and federal legislation, the large body of common law, developed and expounded in countless judicial decisions, still exercises a profound influence over the establishment and administration of mauy pension plans, and determines the rights of covered employees under those arrangements.

B. Aaron, Legal Status of Employee Benefit Rights Under Private Pension Plans 5 (1961).

> 20 Industrial pensions appeared on the American scene during the last quarter of the nineteenth century, but only within the last twenty-five years have they assumed any significance in the old-age financial picture. In the beginning, private pension benefits were universally regarded as gratuities from a grateful employer in recognition of long and faithful service.

D. McGill, *supra* note 1, at 16. *See* Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944); Neuffer v. Bakery & Confectionery Workers Union, 193 F. Supp. 699 (D.D.C. 1961), *aff'd*, 307 F.2d 671 (D.C. Cir. 1962); Fickling v. Pollard, 51 Ga. App. 54, 179 S.E. 582 (1935); Hughes v. Encyclopaedia Britannica, Inc., 1 Ill. App. 2d 514, 117 N.E.2d 880 (1954); Umshler v. Umshler, 332 Ill. App. 494, 76 N.E.2d 231 (1947); Dolan v. Heller Bros. Co., 30 N.J. Super. 440, 104 A.2d 860 (1954); McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N.Y.S. 98 (4th Dep't 1898), *aff'd*, 167 N.Y. 530, 60 N.E. 1115 (1901); Kravitz v. Twentieth Century-Fox Film Corp., 5 Misc. 2d 368, 160 N.Y.S.2d 716 (Sup. Ct. 1957); Magnolia Petroleum Co. v. Butler, 86 S.W.2d 258 (Tex. Civ. App. 1935).

21 *See, e.g.*, Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944).

22 Under the gratuity theory employers could reduce or terminate benefits even after a person had retired. *In re* Missouri P.R.R., 49 F. Supp. 405 (E.D. Mo. 1943); Fickling v. Pollard, 51 Ga. App. 54, 179 S.E. 582 (1935); Umshler v. Umshler, 332 Ill. App. 494, 76 N.E.2d 231 (1947); *cf.*, Gott v. Prudential Ins. Co., 212 N.C. 830, 192 S.E. 905 (1937).

Despite its often harsh results, the gratuity theory has proved a durable concept, especially in New York. *See* Fernekes v. CMP Indus., Inc., 13 N.Y.2d 217, 195 N.E.2d 884, 246 N.Y.S.2d 201 (1963); Silfen v. United Whelan Corp., 30 App. Div. 2d 523, 290 N.Y.S.2d 417 (1st Dep't 1968), *aff'd per curiam*, 26 N.Y.2d 712, 257 N.E. 2d 53, 308 N.Y.S.2d 874 (1970); Barca v. Stein, 44 Misc. 2d 68, 252 N.Y.S.2d 938 (Sup. Ct. 1964), *aff'd per curiam*, 265 N.Y.S.2d 606 (1st Dep't 1965).

B. *Pensions as Unilateral Contracts*

A majority of courts has turned away from the gratuity theory and has held that pension plans give rise to contractual liabilities on the part of the employer.[23] Under the unilateral contract theory, an employer offers a pension to an employee who signifies his acceptance by remaining at his job for the requisite period of time.[24]

Under the contractual theory, the employee must not only meet all of the conditions prescribed by his employer before benefits vest,[25] but he may also be forced to satisfy the eligibility requirements contained in the insurance or trust agreement which covers the pension plan, even though he is not a party to the agreement.[26] In addition, the employee may also be bound by conditions in his collective bargaining agreement.[27] Such labor contracts, which most employees think liberalize eligibility requirements, often incorporate stringent vesting standards.[28]

Should an employee survive the hazards of job changes, layoffs, mergers, or business failures, and in addition should he meet all of the conditions of the employer's pension plan, the insurance contract or trust indenture, or the collective bargaining agreement, he may still be denied his pension. Private pension plans commonly contain provisions

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23 B. AARON, *supra* note 19, at 9. *See* Bird v. Connecticut Power Co., 144 Conn. 456, 133 A.2d 894 (1957); Stopford v. Boonton Molding Co., 56 N.J. 169, 265 A.2d 657 (1970); Sheehy v. Seilon, Inc., 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); Dailey v. Seattle, 54 Wash. 2d 733, 344 P.2d 718 (1959); Thornbery v. MGS Co., 46 Wis. 2d 592, 176 N.W.2d 355 (1970).

24 Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 99-100 (1955). Some courts also require knowledge of the pension plan on the part of the employee before a unilateral contract can come into existence. West v. Hunt Foods, Inc., 101 Cal. App. 2d 597, 225 P.2d 978 (1951); Hindle v. Morrison Steel Co., 92 N.J. Super. 75, 223 A.2d 193 (1966); Parsley v. Wyoming Automotive Co., 395 P.2d 291 (Wyo. 1964).

25 *See, e.g.*, Schneider v. McKesson & Robbins, Inc., 254 F.2d 827 (2d Cir. 1958) (employees have no interest in pension fund until all vesting conditions are satisfied).

26 In Gallo v. Howard Stores Corp., 145 F. Supp. 909 (E.D. Pa. 1956), *aff'd per curiam*, 250 F.2d 37 (3d Cir. 1957), an employee was denied all pension benefits for failing to seek his employer's approval of an early retirement as required by the underlying insurance contract. This denial was upheld despite the absence in the employer's plan (as embodied in a pamphlet sent by the employer to his employees) of such a requirement (*id.* at 911), and despite a jury finding that the employee was justified in regarding the pamphlet as the embodiment of the pension plan (*id.* at 912). The employee was never given an opportunity to read the underlying contract. *Id.* at 911.

27 Smith v. Union Carbide Corp., 350 F.2d 258 (6th Cir. 1965), *rev'g*, 231 F. Supp. 980 (E.D. Tenn. 1964); Beaty v. Maritime Ass'ns-I.L.A. Pension, Welfare & Vacation Funds, 442 S.W.2d 823 (Tex. Civ. App. 1969) (application for writ of error refused).

28 *See, e.g.*, 442 S.W.2d at 824 (25 years continuous service in the industry a prerequisite for receiving benefits).

whereby boards are set up to administer the funds.[29] These boards are usually made up of company and union officials. They can determine in their discretion whether a retiring employee has fully complied with the eligibility requirements of the plan. As long as board decisions are not arbitrary or motivated by fraud or bad faith, they are not reviewable by the courts. For example, boards have been allowed to disqualify employees whom they concluded did not meet physical disability requirements in a pension plan, despite medical evidence to the contrary.[30] The burden is on the employee to establish that such decisions are arbitrary, based on fraud, or made in bad faith.[31]

In light of the stringent effect which courts give to vesting requirements in private pension plans under the unilateral contract theory, employees fair no better under this theory than they did under the gratuity theory.[32]

C. *Pensions as Deferred Wages*

It has been established that pensions are part of wages for collective bargaining purposes.[33] This doctrine was first enunciated in *Inland Steel Co. v. NLRB*[34] and has been uniformly followed and expanded in subsequent cases.[35]

Classifying pensions as wages corresponds to the way employers and unions act regarding pensions. Unions often bargain for increased pensions in lieu of wage raises,[36] and deadlocks over pensions have led to long and bitter strikes.[37] As a result, unions justifiably argue that pen-

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29 *See, e.g.*, Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944).

30 Smith v. New England Tel. & Tel. Co., 109 N.H. 172, 246 A.2d 697 (1968). *See* Lano v. Rochester Germicide Co., 261 Minn. 556, 113 N.W.2d 460 (1962); Gitelson v. Du Pont, 17 N.Y.2d 46, 215 N.E.2d 336, 268 N.Y.S.2d 11 (1966); Weber v. Bell Tel. Co., 415 Pa. 292, 203 A.2d 554 (1964).

31 Gitelson v. Du Pont, 17 N.Y.2d 46, 215 N.E.2d 336, 268 N.Y.S.2d 11 (1966).

32 *See* notes 20-22 and accompanying text *supra*; *see also* 117 CONG. REC. S 8293-96 (daily ed. June 4, 1971).

33 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1964).

34 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, *aff'd on other grounds sub nom.* American Communications Ass'n v. Douds, 339 U.S. 382 (1949). Although the Supreme Court has never ruled directly on the duty to bargain over pensions as wages, it has cited *Inland Steel* with approval. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222 n.10 (1964); United States v. Embassy Restaurant, Inc., 359 U.S. 29, 33, 38 (1959); *cf.* United States v. UMW, 330 U.S. 258, 286-87 (1947).

35 Pittsburgh Plate Glass Co. v. NLRB, 427 F.2d 936 (6th Cir. 1970), *aff'd*, 40 U.S.L.W. 4043 (U.S. Dec. 7, 1971); Sylvania Elec. Prods. Inc. v. NLRB, 291 F.2d 128 (1st Cir. 1961); General Elec. Co., 80 N.L.R.B. 510 (1948).

36 R. SHOEMAKER, PENSION PLANS UNDER COLLECTIVE BARGAINING 1 (AFL-CIO 1954).

37 In 1950 the United Auto Workers struck Chrysler for 99 days over the issue of pensions. N.Y. Times, May 5, 1950, at 1, col. 2. Undoubtedly, these Chrysler employees had no idea that, despite winning the issue of the establishment of a pension fund, only a small minority wonld ever receive the pension benefits. Note 4 *supra*.

sion funds are made up of employees' wages and not of gratuitous or contingent employer contributions.[38] Employers also consider pension benefits as part of their overall wage costs. They respond to union demands for increased pension contributions in terms of package wage costs and require unions to forego immediate wage increases in return for increased pension payments.[39]

## III

## A Proposed Alternative: Quantum Meruit

It should not be the role of the law to frustrate the expectations of employees by sanctioning pension plan restrictions which disqualify the majority of retired workers from the receipt of pension benefits. Despite the logic and reality[40] of the deferred wage theory, most courts still literally apply narrow, contractual vesting conditions to deny pension income benefits. This is true even though the law generally rejects contractual conditions which result in forfeiture of an employee's money wages.[41] Even if courts consider such contractual conditions in pension plans to be valid, however, this should not rule out the possibility of a recovery on the theory of quantum meruit.

### A. *Recovery When Employment Is Involuntarily Terminated*

A quantum meruit basis for allowing employees to recover pension benefits is strongest and has most support when employees are forced to

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38 D. Allen, Fringe Benefits: Wages or Social Obligation? 255-56 (1964). The notion that pension benefits are wages applies equally to nonbargained plans. The Senate Subcommittee on Welfare and Pension Funds found this to be true:

> These employer-employee plans, whether or not collectively bargained, or whether contributed solely by management, or on a joint management-employee basis, actually, and under existing law, proceed on the basis that the contributions to them by management are in the nature of employees' compensation for employment or, stated in another way, . . . that the cost of an employee's service is greater than the amount currently paid him as wages.

S. Rep. No. 1734, 84th Cong., 2d Sess. 3 (1956). *See also* Lucas v. Seagrave Corp., 277 F. Supp. 338, 344 (D. Minn. 1967).

39 Somers & Schwartz, *Pension and Welfare Plans: Gratuities or Compensation?*, 4 Ind. & Lab. Rel. Rev. 77, 82 (1950). This fact was also recognized by the Senate Committee on Labor and Public Welfare which stated: "Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation." S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958).

40 The fact is that employers and unions, in increasing numbers, are negotiating pension plans *as if* they represented wages deferred. The growth of this practice, rather than its inherent logic or lack of it, is what may be counted upon to win additional judicial acceptance of the theory.

B. Aaron, *supra* note 27, at 13 (emphasis in original).

41 Seidenberg v. Duboff & Davies, Inc., 143 Misc. 167, 256 N.Y.S. 17 (New York City Ct. 1932); Cato v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203 (1925); Burdette v. Broadview Dairy Co., 123 Wash. 158, 212 P. 181 (1923).

give up their jobs for reasons beyond their control.[42] Section 357 of the *Restatement of Contracts* sustains a recovery on a quantum meruit theory:

> (1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment . . . for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if
> (a) the plaintiff's breach or non-performance is not wilful and deliberate . . . .[43]

An employee who is unable to meet pension requirements owing to the actions of his employer has a strong case under section 357 since the employer's failure to pay his pension is not "justified . . . by the plaintiff's own breach of duty or non-performance of a condition." Such an employee is willing and able to perform his end of the agreement. It is the employer who has deprived him of an opportunity to satisfy the conditions of pension plan benefits.

An employer presently receives substantial benefits when he terminates a worker's employment without paying retirement benefits. Contributions he makes to employee pension funds are tax deductible.[44]

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42 Ball v. Victor Adding Mach., 236 F.2d 170 (5th Cir. 1956); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967). *See also* Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 HARV. L. REV. 952 (1963).

43 RESTATEMENT OF CONTRACTS § 357 (1932). Comment *c* to section 357 points out that this rule applies equally to conditions in unilateral contracts.

44 At the present time a pension plan must meet the requirements of section 401(a) of the Internal Revenue Code (26 U.S.C. § 401(a) (1970)), as implemented by TREAS. REG. § 1.401 (1956), for an employer to be able to deduct his payments into a pension fund. In general these requirements are as follows:

> 1. There must be a trust, contract, or other legally binding arrangement. The plan must be in writing and communicated to the employees.
> 2. The plan must be for the exclusive benefit of the employees or their beneficiaries. Neither the corpus nor income of the plan can be used for any other purpose than the payment of such benefits prior to the satisfaction of all liabilities.
> 3. The benefits of the plan cannot discriminate in favor of officers, shareholders, supervisors, or highly compensated employees.
> 4. The plan must cover a certain percentage of all employees, again so as not to discriminate.
> 5. If the plan terminates or is discontinued, the benefits which have accrued to employees up to that date must be credited to such employees.

The principal tax advantages which arise from qualification under section 401(a) are (*1*) that employer contributions are deductible as ordinary and necessary business expenses (INT. REV. CODE OF 1954 §§ 162, 404); (2) that contributions are not taxed to the individual employee until he receives the income (*id.* §§ 37(c), 402); and (*3*) that the investment earnings of the plan are not taxed until the benefits are distributed (*id.* § 501).

The employer also profits from the services the employee has rendered, partially in hopes of pension benefits, without paying additional compensation. Moreover, the employer can apply the forfeited credits of the discharged employee to his pension liability to other employees.[45] To allow these advantages to the employer, while depriving a worker of a means of support in his retired years, is patently unjust.

Such inequity was recognized by a Minnesota federal district court in *Lucas v. Seagrave Corp.*[46] In *Lucas,* the employees brought an action against Seagrave for earned pension benefits. Seagrave claimed that the employees had no right to such benefits since they did not fully meet the vesting requirements of the plan. In denying Seagrave's contention, the district court recognized the compensatory nature of pension plans and adopted a quantum meruit approach. The court held that since all of the elements of unjust enrichment were present in this case,

> [t]he employer must . . . return benefits conferred by the employee as a result of his service. . . .
> [I]t does not seem just or logical to say that employees' involuntary failure to perform the conditions for pension eligibility should erase all credits accrued under a plan when the performance is unwanted and, indeed, prevented by the employer.[47]

The court in *Lucas* adopted the compensatory theory that pension benefits represent deferred wages. On this ground the court was able to look beyond the four corners of the pension plan and to take into account the expectations of the parties and the realities of the situation.

## B. *Recovery When Employment Is Voluntarily Terminated*

There is support for the view that employees who voluntarily leave their jobs cannot recover pension benefits under the quantum meruit theory.[48] The rationale for the forfeiture is that employees assume the risk of their own voluntary terminations, and employers depend on such terminations in figuring the costs of their plans.[49] Support for this view also stems from section 357 of the *Restatement of Contracts,* which dis-

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45 The amounts involved in such forfeitures are usually considerable: Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N.W.2d 772 (1958) ($170,000); Lucas v. Seagrave Corp., 277 F. Supp. 338, 346 n.10 (D. Minn. 1967) ($50,000). *See* Bailey v. Rockwell Spring & Axle Co., 13 Misc. 2d 29, 175 N.Y.S.2d 104 (Sup. Ct. 1958), where the employer realized almost $256,000 in pension forfeitures when he closed down one of his plants. M. BERNSTEIN, *supra* note 1, at 342 n.11.

46 277 F. Supp. 338 (D. Minn. 1967).

47 *Id.* at 345.

48 *Id.* at 346; Bernstein, *supra* note 42, at 963.

49 277 F. Supp. at 346; Bernstein, *supra* note 42, at 972.

allows a restitutionary recovery to plaintiffs who are guilty of willful breaches of contractual conditions.[50]

Such a view, however, is inconsistent with the theory that pensions are compensatory in nature. There is no doubt that even if an employee intentionally breaches his employment contract, the employer must pay net wages due him less any harm caused the employer by the breach. This doctrine was recognized in *Britton v. Turner*[51] in 1834 and has become the accepted and settled law in an overwhelming number of jurisdictions.[52] There is no reason to treat pension contracts differently from other forms of wages. To hold otherwise imposes a penalty on workers to the extent that their forfeited benefits exceed the harm caused the employer by their voluntary termination of the employment relationship.

Unlike the employee who is forced to give up his job, the worker who voluntarily leaves his employment should have his benefits reduced in proportion to the harm resulting to his employer.[53] Undoubtedly, the value of the harm in voluntary terminations would be difficult to determine. However, the additional costs of the administration of a proportionate pension to the separated employee should be included.[54] That amount of the employer's contribution which is attributable to the longevity of the worker should also be deductible. One possible method of determining the value of the loss to the employer could be through a liquidated damages provision in the pension plan.[55] In this way the

50 Note 43 *supra.*

51 6 N.H. 481, 26 Am. Dec. 713 (1834).

52 Humphrey v. Johnson, 73 Ind. App. 551, 127 N.E. 819 (1920); Porter v. Whitlock, 142 Iowa 66, 120 N.W. 649 (1909); Duncan v. Baker, 21 Kan. 84 (1878); Williams v. Crane, 153 Mich. 89, 116 N.W. 554 (1908); Peters v. Halligan, 182 Neb. 51, 152 N.W.2d 103 (1967); Lynn v. Seby, 29 N.D. 420, 151 N.W. 31 (1915); Kirkland v. Archibold, 68 Ohio L. Abs. 481, 113 N.E.2d 496 (Ct. App. 1953); Burke v. McKee, 304 P.2d 306 (Okla. 1956); San Augustine Indep. School Dist. v. Freelove, 195 S.W.2d 175 (Tex. 1946). *Cf.* Fritts v. Quinton, 118 Kan. 111, 233 P. 1036 (1925). *See also* 5A A. CORBIN, CONTRACTS § 1127 (1963); 12 S. WILLISTON, CONTRACTS § 1477 (3d ed. 1957). Professor Corbin comments upon these cases as follows:

> It is believed that modern labor legislation and the attitude displayed by the courts . . . are now strongly in support of allowing recovery [by a defaulting employee] as was done more than a century ago in Britton v. Turner. The dearth of modern cases on either side is eloquent evidence that the mores of today would not countenance decisions denying a restitutionary remedy.

A. CORBIN, *supra* § 1127, at 31-32.

53 This arrangement would still be consistent with a quantum meruit measure of recovery which is the net benefit unjustly retained. RESTATEMENT OF CONTRACTS §§ 357(1), (3) (1932).

54 Since administrative costs may be greater than the peusion benefits owed, the very short term employee could likely claim no benefits.

55 A liquidated damages provision would be especially appropriate in this situation since the harm caused by the breach is uncertain and difficult to estimate in monetary

parties to the plan could determine an average amount of harm and deduct such an amount in individual circumstances.[56]

The requirement of section 357 of the *Restatement of Contracts* that plaintiff's breach be not "wilful or deliberate"[57] would not necessarily bar pension recovery by an employee who voluntarily left his job. Comment *f* to section 357 states that, despite a willful breach by a plaintiff, the defendant must return to him the excess of benefit over harm "if, with knowledge that the breach has occurred or is impending, he [defendant] assents to the part performance, or retains it or accepts the benefit of it unreasonably."[58] Although an employer usually would have no actual notice of an impending breach in individual cases, he could not deny knowledge that a certain number of employees might terminate their employment within a given time period. Employers rely on such turnover estimates in order to calculate their pension contributions and future liabilities.

As the *Restatement* itself concludes: "Doubts in cases of this kind are resolved in favor of the plaintiff, in order to avoid a forfeiture in excess of harm suffered."[59] Employers should therefore be liable to voluntarily separated employees for excess pension benefits under the *Restatement.*

The quantum meruit theory would be a logical and realistic approach to curing many of the ills in the private pension system. Pension plans could retain their individuality and flexibility without widespread federal regulation. Besides making pensions fully vesting, the quantum meruit theory might also have the effect of making them fully transferable.[60] In addition, quantum meruit would protect the legitimate interests of the employer in cases where his workers voluntarily terminate their employment. Most importantly, this theory would allow the retired worker to receive the benefits which he has earned.

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terms. RESTATEMENT OF CONTRACTS § 339(1) (1932). One method of setting up such a provision could be through an accelerated vesting standard. *See* notes 69-70 and accompanying text *infra.*

56 The parties would be in a better position to determine the loss in such circumstances than a judge or a jury. RESTATEMENT OF CONTRACTS § 339, comment *c* (1932). The employer and the union could thus set the limits on benefits payable to employees who quit their jobs or the employer could do this himself in nonbargained plans. If the employer sets the value of the harm caused by the employee's breach too high, the clause will not be a reasonable estimate of the damages and will be void as a penalty.

57 *See* Laube, *The Defaulting Employee—No Retraction,* 84 U. PA. L. REV. 69 (1936); Laube, *The Defaulting Employee—Britton v. Turner Re-Viewed,* 83 U. PA. L. REV. 825 (1935); Williston, *The Defaulting Employee—A Correction,* 84 U. PA. L. REV. 68 (1936).

58 RESTATEMENT OF CONTRACTS § 357, comment *f* at 626 (1932).

59 *Id.* at 627.

60 *See* notes 71-72 and accompanying text *infra.*

Disappointingly few courts have granted a quantum meruit recovery of pension benefits to employees.[61] This fact underscores the difficulty of achieving any uniform solution to the private pension problem through the courts. Even if the quantum meruit theory were widely adopted, it is doubtful whether many retired employees could afford the expense of litigation to enforce their rights.

## IV
## Legislative Proposals for Reform

Many reformers have turned to Congress in hopes of attaining some measure of pension reform.[62] In response to these demands, a number of legislative solutions have been proposed in the past few years to remedy the evils in today's system.[63]

The principal aim of these bills has been to liberalize vesting requirements. Two basic methods are represented by bills introduced by former Senator Ralph Yarborough[64] and by Senator Jacob Javits.[65] The Yarborough proposal would reduce age and service requirements by making pension benefits nonforfeitable after ten consecutive years of service.[66] His bill would thus create a compulsory minimum vesting standard. On the other hand, Senator Javits has proposed a deferred graded vesting standard. Under this approach an employee would have a nonforfeitable right to at least ten percent of any pension benefits earned after six years of employment. Each year thereafter an additional ten percent would vest so that after fifteen years all benefits would be fully vested.[67]

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61 To date, Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967) is the only case in which such recovery has been allowed. *See* notes 46-47 and accompanying text *supra*. The quantum meruit theory appears not to have been widely argued by counsel. 277 F. Supp. at 343.

62 The only substantial regulation of private pension plans, besides that found in the Internal Revenue Code (note 30 *supra*), is the Welfare and Pension Plan Disclosure Act of 1959, 29 U.S.C. §§ 301-09 (1970). This statute applies only to collectively bargained pension plans. Its main thrust, similar to that of the federal securities laws, is to require disclosures and filings of pension fund agreements. Since there is nothing illegal or unusual about restrictive vesting requirements, employers and employer organizations have no hesitation in publishing such provisions. This law therefore involves nó real, substantive regnlation of the vesting problem.

63 *See, e.g.*, S. 2, S. 1993, H.R. 9311, H.R. 2150, H.R. 7925, H.R. 10,050, 92d Cong., 1st Sess. (1971); S. 2348, S. 4326, S. 4327, H.R. 16,462, 91st Cong., 2d Sess. (1970); S. 2167, S. 2736, H.R. 2080, H.R. 10,978, H.R. 11,884, H.R. 13,536, 91st Cong., 1st Sess. (1969); S. 3421, H.R. 14,851, H.R. 15,244, H.R. 17,046, 90th Cong., 2d Sess. (1968); S. 1024, S. 1103, S. 1255, S. 1635, H.R. 686, H.R. 6697, H.R. 9304, H.R. 13,544, 90th Cong., 1st Sess. (1967). *See also* N.Y. Times, Dec. 9, 1971, at 1, col. 1.

64 S. 3421, 90th Cong., 2d Sess. (1968).

65 S. 2, 92d Cong., 1st Sess. (1971).

66 S. 3421, 90th Cong., 2d Sess. § 102 (1968).

67 S. 2, 92d Cong., 1st Sess. § 107(a)(1) (1971).

One problem with either the ten-year minimum compulsory vesting standard or the deferred graded vesting standard is that they fail to distinguish between employer initiated terminations and voluntary terminations. It is inequitable to deny employees who have been forced to leave their jobs prior to ten years of service all pension benefits or to compel them to accept reduced benefits if they are forced to leave prior to fifteen years of service. However, the Javits recommendation of a percentage receipt of pension benefits, if only applied to employees who voluntarily terminated their employment, would be a better method than the Yarborough proposal to take into account both the employer's and the employee's interests.

A more serious difficulty with both the Yarborough and the Javits proposals is that neither would protect workers who change jobs in the early years of employment. Since turnovers are highest in this category of employees, the preclusion of these workers from legislative protection would continue to disqualify a great number of employees from any pension benefits.[68]

One possible way to remedy this deficiency would be to grant employees who voluntarily leave their jobs pension benefits on an accelerated percentage basis from the outset of their employment.[69] In

68 M. BERNSTEIN, *supra* note 1, at 57-58 (table III).

69 Under this form of vesting a worker would start with a low level of benefits which would increase at an accelerating rate the longer he stayed with his employer. A schedule of benefits could be worked out by the parties through collective bargaining or by the employer himself. To ensure fairness, approval by a government regulatory agency, such as the proposed Pension and Employee Benefit Plan Commission could be required. Note 75 *infra*.

An example of an accelerated vesting schedule would be as follows:

SUGGESTED EMPLOYEE SCHEDULE OF PENSION BENEFITS UNDER A TWENTY-YEAR PENSION PLAN

| Number of Years Worked | Percent of Benefits Payable |
|---|---|
| 0-1 | 0 |
| 1-2 | 5 |
| 2-5 | 10 |
| 5-7 | 15 |
| 7-10 | 25 |
| 10-13 | 35 |
| 13-15 | 50 |
| 15-17 | 60 |
| 17-18 | 70 |
| 18-19 | 80 |
| 19-20 | 100 |

It should be kept in mind that the accelerated vesting standard would apply only to employees who quit their jobs. Employees who leave as a result of involuntary terminathis way an employee's pension would vest in proportion to the work he performs. This accelerated vesting would also take into account an employer's legitimate interest in promoting longevity.[70] Such a method of vesting would not only protect the employer's interest in retaining experienced employees, but it would also avoid an all or nothing approach to pensions in a worker's early years of employment.

Another provision in many reform proposals provides for free transferability of pension benefits.[71] This would enable employees to transfer pension credits from one employer to another without a loss of vested interest. Perhaps the best method would be through a federally-funded clearing house.[72] Such an agency could keep records on employees who change jobs, could transfer vested pension benefits, and could administer the payment of benefits when they came due.

However, one problem with some of the bills proposing such an agency is that they unfairly place the onus of joining such a plan on the employee.[73] This device would in all probability be little used by employees, who are often not even given an opportunity to read their pension plan contracts.[74] Rather the burden should be placed on the employer. Since a federally-funded clearing house could transfer pension credits more efficiently and economically than could individual employers, the employers would have an incentive to take advantage of such an agency. In this way employees' pensions would be fully portable.

Also meriting serious consideration is the proposal to establish a Pension and Employee Benefit Plan Commission.[75] Such a regulatory agency could enforce the substantive regulations of any new pension

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tions should be given the full proportionate percentage of the pension they earn (*e.g.*, a worker who is permanently laid off after 10 years would be eligible for half of his pension benefits under a 20-year plan).

70 *See* notes 79-83 and accompanying text *infra.*

71 *See, e.g.*, S. 2, 92d Cong., 1st Sess. §§ 301-07 (1971). *See* Levin, *Proposals to Eliminate Inequitable Loss of Pension Benefits*, 15 VILL. L. REV. 527, 533 n.40 (1970).

72 For a detailed analysis of the proposed clearing house arrangement, see Bernstein, *Transferable Credits and Clearing House Devices*, 1967 U. ILL. L.F. 765.

73 S. 2, 92d Cong., 1st Sess. § 301 (1971).

74 Although the Internal Revenue Service requires that employers communicate their plan to employees in order for their pension contributions to be tax deductible (note 44 *supra*), this does not mean that the plans will he fully and properly communicated (*see, e.g.*, note 26 *supra*). Moreover, failure by an employer to comply with these Internal Revenue Service requirements cannot be used by an employee as a basis for recovery. *See* Hudson v. John Hancock Mut. Life Ins. Co., 314 F.2d 16, 21 (8th Cir. 1963); Lucas v. Seagrave Corp., 277 F. Supp. 338, 341-42 (D. Minn. 1967).

75 *See, e.g.*, S. 2, 92d Cong., 1st Sess. § 3 (1971); H.R. 11,884, 91st Cong., 1st Sess. (1969).

measure. It could also consolidate and efficiently enforce existing federal rules and regulations concerning private pensions.[76]

## V

## Objections to Reform

Despite widespread support for pension reform, powerful employer and insurance lobbies have strongly opposed federal regulation of private pension plans.[77] The two major objections to a pension system requiring full or graded vesting standards and portable benefits are that the basic pension plan policy to promote long service from faithful employees would be undermined, and that the costs involved would be too great for the average private employer to bear.[78]

### A. *Longevity*

One of the employers' most persistent claims is that pensions are a means to retain more experienced and hence more valuable employees.[79] Despite this contention, pension plans in actual practice often produce quite a different result. Employees who have worked many years for one employer will have sizable credits in their pension accounts. When business prospects are dim, to the extent an employer can lay off these older employees he can realize great savings on forfeited pension credits. An employer thus gains a double benefit: he may avoid the payment of a pension to a worker who is near retirement and may apply the forfeited pension benefits to future pension liabilities.[80]

To the extent that employers can use pensions to deter employees from changing jobs, such plans lessen overall labor mobility. In an

76 For example, the Commission could pass on the eligibility of pension plans for income tax deductions. Note 44 *supra*.

77 *Hearings* 289, 301, 307; 1970 Cong. Q. Almanac 770-72.

78 M. Bernstein, *supra* note 1, at 244.

79 By cutting down on job changes, an employer can also reduce expensive tnrnover costs. It is estimated that turnover costs average $500 for one employee. For some clerical, machine production, and maintenance workers the costs can run as high as $6,000 per worker. F. Gaudet, Labor Turnover: Calculation and Cost 37, 60 (1960).

80 By the same token, pension benefits often tend to discourage employers from hiring older workers. Since such employees have a tendency to remain at a job for a longer period than younger workers (note 68 *supra*), they are more likely to qualify for pension benefits. As a result employers must contribute a larger amount to the accounts of these older workers to maintain a given level of benefits. The reason for this is that the period of contributions and the level of investment earnings for older employees is appreciably less than for younger workers. However, under a full vesting transferable pension system these deterrents would be eliminated. Since an older employee would arrive at his new job with pension credits, his employer would not have to contribute additional funds in order to maintain a given level of pension benefits.

economy where rapid changes in technology and consumer demand for goods and services create a changing demand for labor, a substantial degree of job mobility is needed to achieve full utilization of the labor force and to enable the economy to operate at full capacity.[81] On the whole, labor mobility is an asset to employers rather than a liability. When employers derive benefits from a mobile labor force, the risk of pension forfeiture in job turnovers should not be borne by the employee who is often the victim rather than the cause of such changes.

Insofar as part of an employer's contribution to a pension plan is designed to induce employee longevity, employers' criticisms of vesting reforms which do not take such a goal into account are valid. This objection, however, must be balanced with the interests of employees in private pension benefits. The longevity argument should not be used to deprive the majority of employees of all pension benefits. Employers do not merely give pension benefits to their life-long workers. Such rights are earned.[82]

A possible solution which would take into account these competing interests would again be an accelerated vesting standard.[83] Since an employee would receive a greater percentage of pension benefits the longer he worked for an employer, an accelerated vesting provision would satisfy the interest of the employer in retaining employees while also taking into account the interest of an employee in his pension.

## B. *Cost*

An even greater objection of employers to liberalized vesting standards is that the additional expense involved would bankrupt the private pension system. They argue that the payment of pension benefits which are now avoided by rapid job turnovers would increase costs significantly.[84] Opponents also claim that under a fully vested and port-

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> 81 The effective functioning of the Nation's labor market system rests on the individual worker's freedom to change jobs to parts of the economy where his services can be better utilized . . . . Although the lack of vesting in private pension plans may not currently constitute a major impediment to labor mobility, it clearly is a deterrent to mobility for important segments of the labor force including highly skilled professional, technical, other white collar, and some manual workers. Moreover, such a deterrent to mobility may well become more serious in the future as technological progress continues and as participants in relatively new pension plans acquire a greater stake in the plans' benefits.

PRESIDENT'S COMM'N ON CORP. PENSION FUNDS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS 40 (1965).

82 R. SHOEMAKER, *supra* note 36, at 3.

83 Note 69 *supra*.

84 *See* Remarks of Herbert Ferster, Representative of the Clothing Mfrs. Ass'n, to the House Educ. and Labor Committee:

able pension system many employees would qualify under more than one plan. This double qualification would lead to duplicate administrative expenditures. Such a system would also require the maintenance of extensive employee records.

Calculating the potential costs of improved vesting standards is an enormously difficult task owing to the many variables involved.[85] The single most important factor is turnover rates. High turnover rates would create additional pension expenses which employers now avoid through stringent vesting requirements. Differences in the financing methods of employer pension plans also influence the amount of employer contributions needed to secure a given level of benefits. Finally, the individual circumstances of each employer would determine the impact that liberal vesting standards would have on his costs. An employer whose pension eligibility requirements were already low would face little in the way of increased expenditures.

As a result of so many variables, there are conflicting data as to the costs of full or accelerated vesting standards.[86] Most experts estimate that the cost would amount to approximately twenty percent more than the cost necessary to cover workers under present pension plans.[87]

The claim that a fully vested pension plan system would entail overwhelming administrative costs would be without basis if a federally-funded clearing house were established. Such an organization would be able to reduce expenses by eliminating duplicate records on employees who qualify under more than one pension plan. This agency would also serve as a medium through which retired employees could be conveniently located and paid benefits. Costs would thus be reduced and more employer funds could be channeled towards increased investment earnings. Such higher earnings in turn would offset some of the additional costs of lower vesting standards.

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> Multi-employer-union pension plans should not be required to vest, fully fund or insure past-service liability . . . . If these requirements were imposed on the clothing workers' plan, benefits would have to be reduced by 80 per cent or employer contributions increased by 80 per cent, which employers could not afford.

1970 Cong. Q. Almanac 770.

85 M. Bernstein, *supra* note 1, at 250.

86 Some manufacturers have claimed that full vesting pensions would almost double the costs of their contributions. Note 84 *supra.* The President's Commission on Pension Plans estimated the increase in cost of a 15-year graded pension system as between 5% and 10%. President's Comm'n on Corp. Pension Funds, *supra* note 81, at 46. The Department of Labor, however, calculated the additional expenditures for a similar minimum graded vesting standard at between 3% and 6%. *Hearings* 271.

87 M. Bernstein, *supra* note 1, at 251.

## CONCLUSION

Even if the monetary costs of a fully vested pension plan system were extremely high, the social and individual costs of the present system are much higher.[88] When only one in six workers covered by private pension plans ever receives benefits,[89] there is need for a drastic reappraisal of the system. Unless adequate measures are taken to correct the basic flaws in private pensions, enormous pressures will continue to grow and might well result in the undermining of the entire private pension system.[90]

Pensions are not gratuitous fringe benefits. Employees earn the right to retirement income through the work they perform. Pension benefits must be extended to reach all workers who participate in pension plans. Even if retired employees must accept a lower level of benefits, pension plans should discard the widespread disqualifications in the current system. Judicial adoption of the quantum meruit theory and compulsory legislative vesting standards are methods by which pension benefits can be extended to all who earn them. No matter what the method, however, the gap between promise and performance in today's private pension system must be closed.

*Timothy J. Heinsz*

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88 A significant portion of the elderly spend their declining years in relative poverty. Senator Javits has stated:

> The Senate Special Committee on Aging has reported just last year that 1 out of every 4 persons over age 65 lives in poverty and the number is steadily increasing. In New York City alone, over 12 per cent of the city's population—one million persons—consists of senior citizens over age 65. Substantial numbers of these persons are living from hand-to-mouth in the most deplorable conditions, with inadequate sources of income to maintain a decent and dignified standard of living.
>
> How many of these persons are retired workers who were covered by private pension plans, but who left empty-handed, nobody really knows. Judging from the complaints my office has received, the number is quite significant.

117 CONG. REC. S 8293 (daily ed. June 4, 1971).

89 Note 4 *supra.*

90 Many critics of private pension plans are seeking the complete absorption of the private pension system by the Social Security system. *See* 1970 CONG. Q. ALMANAC 770, 771 (remarks of D. Allen and N. McClung). However, this absorption would not only destroy the flexibility of negotiated or employer established pension plans, but would also eliminate a large source of private investment capital.