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NOTES

Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits

The Employee Retirement Income Security Act of 1974 ("ERISA")¹ was the first comprehensive federal legislation to regulate private pension plans.² As one part of its extensive regulatory scheme, ERISA permits employers to terminate their pension plans when specified conditions exist.³ Upon termination of a defined benefit pension plan,⁴ ERISA requires the employer to pay certain designated benefits to employees.⁵ However, section 4044(d)(1)⁶ allows the employer to retain any excess assets as a reversion if:

- (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
- (B) the distribution does not contravene any provision of law, and

1. Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 18, 26, 29, 31, and 42 U.S.C.).

2. Prior to ERISA, Congress had passed only three statutes regulating private pensions: The Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-97 (1982) (original version at ch. 120, 61 Stat. 136 (1947)); the Internal Revenue Code of 1954, Pub. L. No. 85-836, 72 Stat. 3 (1954) (codified as amended at 26 U.S.C. §§ 1-9602 (1982)); and the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), *repealed by* ERISA, Pub. L. No. 93-406, § 110(a), 88 Stat. 829, 851 (1974). For the history and coverage of those three statutory schemes, see generally Note, *Reversion of Surplus Pension Assets Upon Plan Termination: Is It Consistent with the Purpose of ERISA?*, 62 IND. L.J. 805, 808 (1987).

3. ERISA §§ 4042, 4044, 29 U.S.C. §§ 1342, 1344 (1982).

4. This Note discusses whether ERISA requires payment of early retirement benefits upon plan termination in the context of defined benefit plans as opposed to defined contribution plans. In a defined benefit plan, the employer must contribute to the plan whatever funds are necessary to pay a certain benefit to the employee. The employer calculates the benefit in a manner established by the plan. 1 G. BOREN, *QUALIFIED DEFERRED COMPENSATION PLANS* at § 1.07 (1983). Therefore, the employer assumes the investment risk.

In the alternative type of plan allowed by ERISA — defined contribution plans — employers contribute fixed amounts to participant accounts and, upon retirement, participants receive the value of the account. *Id.* at § 1.16. Thus in a defined contribution plan, the employee bears the investment risk.

Another difference between defined benefit and defined contribution plans is in how the benefits are paid. Defined benefit plan benefits are usually paid as a lifetime pension. Defined contribution plan benefits are usually paid as a lump sum. Grubbs, *Termination of Pension Plans With Asset Reversion: A Solution*, 10 J. PENSION PLAN. & COMPLIANCE 199, 199-200 (1984).

The recent trend has been toward defined benefit plans. In 1950, 11.6% of all private plan assets were in defined benefit plans. By 1980, this percentage had increased to 27.3%. Ippolito, *Issues Surrounding Pension Terminations for Reversions*, 5 AM. J. TAX POLY. 81, 93 (1986). And in 1986, 58% of employers in all industries had a defined benefit plan while 43% had a defined contribution plan. RESEARCH CENTER, ECONOMIC POLICY DIVISION, U. S. CHAMBER OF COMMERCE, *EMPLOYEE BENEFITS* 1986 21 (1986).

5. ERISA § 4044(a), 29 U.S.C. § 1344(a) (1982) governs distribution of these benefits.

6. ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1) (1982).

(C) the plan provides for such a distribution in these circumstances.⁷

This Note examines whether early retirement benefits are included among the liabilities that an employer must satisfy before that employer can receive a reversion of excess assets.⁸ Part I reviews the background of plan terminations and how they affect early retirement benefits. It also discusses the general structure of ERISA. Part II examines the controversy surrounding whether ERISA's definition of "accrued benefits" includes early retirement benefits. ERISA requires that employees receive all of their accrued benefits before the employers receive any reversions. However, the circuits have disagreed as to whether early retirement benefits are accrued benefits and, therefore, covered by this requirement. Even if early retirement benefits are not accrued benefits, an alternative theory suggests that the distribution requirements of section 4044(a)(6)⁹ require payment of those benefits to employees. Part III analyzes the requirements of ERISA section 4044(a)(6). Section 4044(a) establishes a priority scheme for distribu-

7. ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1) (1982).

8. The Retirement Equity Act of 1984 ("REA"), § 301(a)(2), 98 Stat. 1451, codified at 29 U.S.C. § 1054(g) (Supp. IV 1986), clarified that employers may not reduce early retirement benefits or retirement-type subsidies for plan participants who eventually meet the original requirements for those benefits. However, this does not assist participants who are deprived of the opportunity to gain additional required years of service because, for example, their plan has closed or their employer has gone out of business. Also, REA does not affect any plan amendments or terminations made prior to August 1, 1984 for nonunion plans or January 1, 1985 for union plans. REA § 302(d), 29 U.S.C. § 1001 (Supp. IV 1986). In fact, the Senate Finance Committee's report states that "no inference is to be made on the basis of this clarification as to the scope of the prohibition before the effective date of the provision." S. REP. NO. 575, 98th Cong., 2d Sess. 28, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2547, 2574. The issue remains important even if limited to nonunion plan terminations prior to August 1, 1984 and union plan terminations prior to January 1, 1985. Subsequent to the Fourth Circuit's decision in *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987), cert. granted, 109 S. Ct. 52 (1988), which required payment of early retirement benefits under a plan terminated before the effective date of REA; (see *infra* notes 134-37 and accompanying text), a number of plaintiffs have filed class action suits based on plan terminations that occurred prior to August 1, 1984. See, e.g., *Charleston Natl. Bank v. Hechts Inc.*, No. 87-0173 (Bankr. S.D. W. Va.), cited in Brief of the American Academy of Actuaries as *Amicus Curiae* in support of Petitioner, at 10, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987), cert. granted 109 S. Ct. 52 (Oct. 3, 1988) (No. 87-1868); No. 87-C167-R (W.D. Va. April 24, 1987), cited in Brief of the American Academy of Actuaries as *Amicus Curiae*, at 10, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987), cert. granted, 109 S. Ct. 52 (1988) (No. 87-1868). Furthermore, if adopted, the *Blessitt* approach (*Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987) (requiring employer to pay early retirement benefits for years of service that the employees might have worked if their plan had not terminated) (discussed at notes 138-46, *infra*, and accompanying text) might affect asset allocation in spinoffs and transfers of assets. Coleman, *From Amato to Blessitt: Out of the Frying Pan, into the Fire*, 15 TAX MGMT. COMPENSATION PLAN. J. (BNA) 343 (1987). This Note primarily addresses the problem in the context of plan terminations that occurred prior to the effective date of the relevant REA provisions. The policy implications discussed in Part IV also apply to the current debate over the advisability of continuing to allow reversions. For a general discussion of plan terminations see Note, *Pension Plan Terminations and Asset Reversions: Accommodating the Interests of Employers and Employees*, 19 U. MICH. J.L. REF. 257 (1985).

9. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982). See *infra* text accompanying note 11 for the relevant language of ERISA § 4044(a)(6).

tion of assets upon plan termination. The distribution scheme is composed of six categories,¹⁰ the last of which allocates assets "to all other benefits under the plan."¹¹ The circuits are split as to whether category six of section 4044(a) covers employees' benefit expectations including early retirement benefits. Part IV explores the public policy considerations relevant to the issue of whether ERISA should require employers to pay early retirement benefits prior to receiving a reversion of excess assets.

I. BACKGROUND: THE PROBLEM AND AN OVERVIEW OF ERISA

A. Reversions: The "Problem"

Between 1980 and 1987, employers terminated 1,635 plans with reversions of \$1 million or more.¹² These terminations resulted in distribution of approximately \$22 billion to 1.8 million employees,¹³ yielding on average \$12,222.22 per employee. During the same period of time, employers received more than \$18 billion from plan terminations, or 45% of the total, in residual asset reversions.¹⁴ This works out to an average of \$11,009,174 for each employer per plan terminated. Thus, terminations of benefit plans may greatly enrich the corporation.

Not only do plan terminations allow employers to receive large amounts of employee benefit plan assets, the terminations may result in nonpayment of early retirement benefits. For employees who expected to receive these benefits, this amounts to "chang[ing] the rules

10. Categories one and two require that the distribution first return participant contributions. Category three mandates payment of annuities next. Category four provides for payment of basic benefits, at least up to a statutory maximum. Category five requires distribution of most remaining nonforfeitable benefits. ERISA § 4044(a)(1)-(5), 29 U.S.C. § 1344(a)(1)-(5) (1982). See *infra* note 152 for the relevant text of § 4044(a).

11. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982).

12. Brief for the Pension Benefit Guar. Corp. as *Amicus Curiae* in Support of the Petitioner at 3, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988) (Oct. 3, 1988) (No. 87-1868). Note that the Pension Benefit Guaranty Corporation ("PBGC") does not even attempt to keep statistics on reversions of less than \$1 million. However, the PBGC did estimate that excess assets existed in at least 4,800 of the 6,800 plans terminated during 1986. *Id.* at 3. Nor is there any indication of whether any of the terminated plans were multi-employer plans. My breakdown of the statistics assumes not. While generally the scope of this Note is limited to pre-REA, large reversions remain an issue and I have therefore included post-REA data in this discussion of the problem.

13. *Id.*

14. *Id.* There is a tremendous incentive to plunder these plans. "Overfunded pension plans have become an 'irresist[ible] unguarded bank vault' to employers . . ." *Terminations to Recapture Excess Assets Are Contrary to Spirit of ERISA*, Lantos Says, 15 Pens. Rep. (BNA) 1696 (Oct. 3, 1988) (quoting Rep. Tom Lantos). Retirement plans continue to be overfunded even after Black Monday. See *id.* The large dollar amounts at stake provide a significant incentive for employers to terminate plans. Generally the only way an employer can get access to the excess assets is by terminating the plan. Grubbs, *supra* note 4, at 201. Interestingly, pension plan overfunding is not limited to the United States. A similar issue exists in England. See generally Nobles, *Who is Entitled to the Pension Fund Surplus?*, 16 INDUS. L. J. 164 (1987).

of the game.”¹⁵ Many defined benefit plans offer some type of early retirement option.¹⁶ Typical early retirement plans provide that employees may retire, with favorable benefits, before the plan’s normal retirement age.¹⁷ However, to retire under an early retirement plan, employees usually must meet specified criteria, often a minimum age, a minimum service requirement, or both.¹⁸ When employers terminate plans, employees who do not meet the minimum requirements, but who expect to meet these requirements in the future, often lose the opportunity to receive the early retirement benefits that they anticipated. For example, in many plant closings the workers’ employment terminates and the employer does not offer alternative employment. At the time of the plant closing the employer will often terminate the retirement plan. Whether or not ERISA requires employers to pay early retirement benefits to employees before that employer may receive a reversion of excess plan assets will determine whether the employees receive any of their anticipated early retirement benefits.

B. General Background on ERISA

Congress promulgated ERISA in an attempt to protect employees’ entitlements to benefits under existing retirement plans and to encourage institution of new, expanded plans.¹⁹ ERISA’s provisions apply, with only limited exceptions,²⁰ to any employee benefit plan sponsored by employers, employee organizations, or jointly sponsored plans, where the employer or employees are “engaged in commerce or

15. *Ashenbaugh v. Crucible, Inc.*, 1975 Salaried Retirement Plan, 854 F.2d 1516, 1538 (3d Cir. 1988) (Mansmann, J., concurring and dissenting) (quoting *Pension Asset Raids: Hearings Before the House Select Comm. on Aging*, 98th Cong., 1st Sess. 80 (1983) (comments of Arthur Williams III)).

16. J. GEE, *PENSIONS IN PERSPECTIVE* ¶ 240.1 (2d ed. 1987).

17. Normal retirement age is the age, “as established by a plan, when retirement normally occurs.” *EMPLOYEE BENEFIT PLANS: A GLOSSARY OF TERMS* 90 (J. Lehman 6th ed. 1987) [hereinafter *GLOSSARY*]. ERISA requires that this age be not more than the later of age 65 or ten years of plan participation. ERISA § 3(24), 29 U.S.C. § 1002(24) (1982).

18. J. GEE, *supra* note 16, at ¶ 240.1.

19. The House report states that Congress designed ERISA to:

- (1) establish equitable standards of plan administration;
- (2) mandate minimum standards of plan design with respect to the vesting of plan benefits;
- (3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities;
- (4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and
- (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

H.R. REP. NO. 533, 93d Cong., 1st Sess. 1-2, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4640.

20. The act provides exceptions for governmental plans, church plans, plans maintained solely to comply with workers’ compensation or unemployment compensation statutes, foreign plans primarily benefiting nonresident aliens and unfunded excess benefit plans. ERISA § 4(b), 29 U.S.C. § 1003(b) (1982).

in any industry or activity affecting commerce."²¹ Congress organized ERISA into four titles. Title I provides definitions, scope, and administrative requirements, as well as remedies and penalties. Title II primarily contains Internal Revenue Code amendments. Title III designates agency authority for the implementation and administration of ERISA. Title IV covers the termination of pension plans, creates the Pension Benefit Guaranty Corporation ("PBGC") and outlines the benefit insurance program.²²

Congress divided responsibility for administering ERISA between the Department of Labor, the PBGC, and the Internal Revenue Service ("IRS").²³ The Department of Labor received primary authority over fiduciary standards, including prohibited transactions.²⁴ The PBGC governs administration of plan terminations and the termination insurance program.²⁵ The IRS supervises ERISA's minimum standards for participation,²⁶ vesting,²⁷ and funding.²⁸

II. EARLY RETIREMENT BENEFITS AS ACCRUED BENEFITS

This Part shows that it is unclear whether ERISA requires em-

21. ERISA § 4(a), 29 U.S.C. § 1003(a) (1982).

22. 1 G. BOREN, *supra* note 4, at § 1.04.

23. Reorganization Plan No. 4 modified the original division of agency responsibility. Reorg. Plan No. 4 of 1978, 3 C.F.R. 332 (1978), *reprinted in* 5 U.S.C. app. at 1163 (1982) *and in* 92 Stat. 3790 (1978). This Note refers to the division of authority as it currently exists. Coordination of agency functions remains a problem and some commentators have suggested consolidation of all ERISA responsibility into one agency. *See generally* Klimkowsky & Lanoff, *ERISA Enforcement: Mandate for a Single Agency*, 19 U. MICH. J.L. REF. 89 (1985).

24. Klimkowsky & Lanoff, *supra* note 23, at 95.

25. *Id.* at 89 n.2.

26. "An employee who is getting credit towards the contributions or benefits provided under the plan is called 'participant,' and is said to be 'covered' by the plan." 1 G. BOREN, *supra* note 4, at 3:02.

27. Vesting is the method by which an employee's accrued benefit becomes nonforfeitable. 1 G. BOREN, *supra* note 4, at § 3:09. *See also* GLOSSARY, *supra* note 17, at 140 ("An employee's right to receive a present or future pension benefit vests when it is no longer contingent upon his remaining in the service of the employer."). The entire accrued benefit may become nonforfeitable at the same point in time. Alternatively, the employee's benefit may vest by increasing percentages. 1 G. BOREN, *supra* note 4, at § 3:09.

28. Klimkowsky & Lanoff, *supra* note 23, at 95. In a funded defined benefit plan, the employer contributes enough on a regular basis to meet the projected cost of paying the offered benefits. J. GEE, *supra* note 16, at ¶ 240.2. *See also* GLOSSARY, *supra* note 17, at 58 (A funded retirement plan is a "plan under which funds are set aside in advance to pay expected benefits."). An actuary calculates the amount of the necessary contribution, taking into account plan experience and projections on compensation, turnover and investment income. The employer receives a tax deduction for necessary contributions. J. GEE, *supra* note 16, at ¶ 240.2. These employer contributions result in a funded plan. Ensuring at least a minimal level of funding was one of Congress' goals in passing ERISA. *See supra* note 19 for the statement of congressional purpose contained in the House Report.

By comparison, in unfunded plans employers must pay the benefits out of the general corporate treasury when the benefits become due. Plans offering these kinds of benefits exist only infrequently. Unfunded plans are seldom qualified under ERISA since they do not meet minimum funding requirements.

employers to pay all accrued benefits upon plan termination. The circuits are in conflict on the question of whether early retirement benefits are accrued benefits. The Second Circuit has stated that early retirement benefits are accrued;²⁹ the Third Circuit has held that early retirement benefits are not accrued.³⁰ The Fourth Circuit has held that early retirement benefits may or may not be accrued, depending on two variables: (1) whether the benefits are funded or unfunded; and (2) whether they are contingent or non-contingent.³¹ Both the statute and legislative history contain ambiguous language. Therefore, the courts on each side of the circuit split quote identical provisions in support of their opposite holdings.³²

The regulations of the IRS and PBGC do not clearly resolve this issue either — they arguably conflict both with themselves and with each other. However, the IRS has interpreted accrued benefits as including early retirement benefits that were funded and non-contingent. The PBGC has declined to take a position on the issue.

A. *ERISA's Requirement That All Accrued Benefits Be Paid upon Plan Termination*

Section 4044(d)(1) allows employers to keep reversions only after satisfying all liabilities. Accrued benefits constitute liabilities because I.R.C. section 411(d)(3) provides that when an employer terminates a plan, “the rights of all affected employees to benefits accrued to the date of such termination . . . to the extent funded as of such date . . . are nonforfeitable.”³³ Section 403(d)(1) requires that “[u]pon termination of a pension plan . . . the assets of the plan shall be allocated in accordance with the provisions of section 4044.”³⁴ Section 4044(a) provides for payment of all nonforfeitable benefits.³⁵ I.R.C. section 401(a)(2) provides that plan assets must first be used to satisfy “all liabilities with respect to employees.”³⁶ The key issue in interpreting and administering this language is whether any given benefit is an “accrued benefit.”

29. *Amato v. Western Union Intl., Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).

30. *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574, 580 (3d Cir. 1985).

31. *Sutton v. Weirton Steel Div. of Natl. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (unfunded, contingent benefits are not accrued benefits). *Collins v. Seafarers Pension Trust*, 846 F.2d 936, 938 (4th Cir. 1988) (benefits that were funded and non-contingent are accrued benefits).

32. See *infra* text accompanying notes 94-97 and 99-106.

33. I.R.C. § 411(d)(3) (1982). For a further discussion of relevant statutory provisions see *infra* text accompanying notes 158-63.

34. ERISA § 403(d)(1), 29 U.S.C. § 1103(d)(1) (1982).

35. See *infra* text accompanying notes 158-63.

36. I.R.C. § 401(a)(1) (1982).

B. *The Circuit Court Disagreement*

The Fourth Circuit was the first circuit court of appeals to deal with the issue of payment of early retirement benefits upon plan termination. In *Sutton v. Weirton Steel Division of National Steel Corp.*,³⁷ the court held that unfunded, contingent early retirement benefits are not accrued benefits and therefore did not require the employer to pay them upon plan termination. The Third Circuit followed *Sutton* in *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*,³⁸ and *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*.³⁹ However, in *Amato v. Western Union International, Inc.*,⁴⁰ the Second Circuit stated that non-contingent early retirement benefits are accrued benefits. *Collins v. Seafarers Pension Trust*,⁴¹ decided by a district court in the Fourth Circuit, distinguished *Sutton* and held that where the early retirement benefits are funded and are not contingent, the benefits are accrued. The Fourth Circuit recently affirmed, albeit in dicta, the district court's reasoning regarding accrued benefits.⁴² In *Tilley v. Mead Corp.*,⁴³ another case involving termination of a plan that had offered early retirement benefits, the Fourth Circuit did not reach this argument. The Supreme Court is hearing *Tilley* this term and may address this issue.

In *Sutton v. Weirton Steel Division of National Steel Corp.*,⁴⁴ employees sued to prevent a plan change which eliminated unfunded, contingent early retirement benefits. The plan change was part of an anticipated employee buyout of the Weirton Steel Division of National Steel Corporation ("National"). National agreed to continue the early retirement program for five years from the date of the sale. At that point the early retirement plan would be terminated. The benefits at issue were unusual because they were only to be paid in the event of a plant shutdown or layoff.⁴⁵ For this reason the benefits were contingent. Also, the benefits were unfunded as they would have been payable directly from National's corporate treasury.⁴⁶ The court held that

37. 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

38. 763 F.2d 574, 580 (3d Cir. 1985).

39. 854 F.2d 1516, 1526 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3415 (U.S. Dec. 13, 1988) (No. 88-897).

40. 773 F.2d 1402, 1414 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).

41. 641 F. Supp. 293 (D.Md. 1986), *later opin.*, 660 F. Supp. 386 (1987), *revd. on other grounds*, 846 F.2d 936 (4th Cir. 1988).

42. *Collins*, 846 F.2d 936, 938 (4th Cir. 1988).

43. 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988). For a discussion of *Tilley*, see *infra* text accompanying notes 134-37.

44. 724 F.2d 406 (4th Cir. 1983).

45. 724 F.2d at 409.

46. 724 F.2d at 409.

such unfunded, contingent benefits were ancillary⁴⁷ and therefore not accrued.⁴⁸

In *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*,⁴⁹ an employee challenged the pension plan's right to raise the discount factor applied to equalize the benefits elected by an employee retiring at an early age with those the employee would have received had he waited until normal retirement age. Application of the revised discount factor resulted in Bencivenga receiving a monthly pension benefit of \$319, compared to the \$440 per month which he had expected.⁵⁰ The court relied on the language of ERISA, legislative history, case law, and administrative regulations to reach its holding that early retirement benefits are not accrued benefits and that therefore ERISA does not prohibit this type of modification.⁵¹ The court believed that the plain meaning of ERISA's definition of accrued benefits as those "expressed in the form of an annual benefit commencing at normal retirement age"⁵² was that only normal retirement benefits may be accrued benefits. The court also pointed to legislative history which, it asserted without explanation, supported its view of ERISA's plain meaning.⁵³ The court next relied on *Sutton* without explaining why the *Sutton* court's rationale regarding unfunded, contingent benefits would be applicable to the funded, non-contingent benefits at issue.⁵⁴

Finally, the court reviewed two seemingly contradictory IRS regulations. One regulation, which prohibited decreases of accrued benefits, stated that "[p]lan provisions indirectly affecting accrued benefits include . . . actuarial factors for determining optional or *early retirement benefits*."⁵⁵ The court noted that the IRS had issued a revenue ruling indicating that such a change in the discount factor violated this regulation.⁵⁶ The court decided that this interpretation of early retirement benefits as accrued benefits was not controlling because "unlike authorized regulations, revenue rulings, as interpretive actions, do not have the force of law and we need not accept the full breadth of the

47. The House report on ERISA excluded "certain ancillary benefits." H.R. REP. NO. 807, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4726.

48. 724 F.2d at 410.

49. 763 F.2d 574 (3d Cir. 1985).

50. 763 F.2d at 575.

51. 763 F.2d at 576-80.

52. 763 F.2d at 577 (quoting ERISA § 3(23), 29 U.S.C. § 1002(23) (1982)).

53. 763 F.2d at 577.

54. 763 F.2d at 577-78.

55. Treas. Reg. § 1.411(d)-3(b) (1977) (emphasis added).

56. 763 F.2d at 580. A revenue ruling is "[a]n interpretation by the Service that has been published in the Internal Revenue Bulletin . . . for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned." BITTKER & MCMAHON, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 42.5 (1988) (quoting Rev. Proc. 88-1, § 4.07, 1988-1 IRB 7).

IRS's theory."⁵⁷ The concurrence placed special emphasis on the fact that this regulation included the word "indirectly."⁵⁸

A second, conflicting regulation stated that:

In general, the term 'accrued benefits' refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits For purposes of this paragraph a subsidized early retirement benefit which is provided by a plan is not taken into account, except to the extent of determining the normal retirement benefit under the plan⁵⁹

The court found that the original discount factor resulted in benefits which exceeded the normal early retirement benefit. It held that this excess was a subsidy and clearly unprotected by the second regulation.⁶⁰

In *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*,⁶¹ the employer had closed a plant and terminated the employees. Consequently the workers were prevented not only from gaining additional years of credited service but also from working for the company until they reached a designated minimum retirement age. This, in turn, caused a partial plan termination.⁶² A group of former employees sued, claiming, among other things, entitlement to the early retirement benefits offered under the company's thirty year benefit plan though they had not yet met all of the technical requirements of the plan such as attainment of a minimum age and number of years of service because the employer had made it impossible for them to meet those requirements.⁶³ In making this decision, the majority found it unnecessary to decide the issue of whether the early retirement benefits in dispute were accrued, but stated, in dicta, that the court would continue to follow *Bencivenga* and therefore those benefits were not accrued benefits.⁶⁴

However, in *Amato v. Western Union International, Inc.*,⁶⁵ the Second Circuit stated that the early retirement benefits at issue were ac-

57. 763 F.2d at 580.

58. 763 F.2d at 581.

59. Treas. Reg. § 1.411(a)-7(a)(1)(ii) (1977).

60. 763 F.2d at 580.

61. 854 F.2d 1516 (3d Cir. 1988).

62. 854 F.2d at 1518.

63. 854 F.2d at 1520-21.

64. 854 F.2d at 1525-26.

65. 773 F.2d 1402 (2d Cir. 1985). Although it explicitly stated that the benefits at issue were accrued, the court remanded for a determination of whether MCI or Western Union had actually withdrawn early retirement assets from the plan. The *Amato* court's finding that the early retirement benefits were accrued was in the context of a plan amendment as opposed to a plan termination. 773 F.2d at 1414. In fact, the *Blessit* en banc court distinguished *Amato* on that basis in the context of an alternative line of argument. *Blessit v. Retirement Plan for employees of Dixie Engine Co.*, 848 F.2d 1164, 1174-75 (11th Cir. 1988). See *infra* text accompanying notes 138-46 for a discussion of *Blessit*. However, the *Amato* court's reasoning seems applicable to plan terminations. See *infra* note 137.

crued benefits. In *Amato*, employees challenged their employer's pension plan modification. Microwave Maintenance Corporation and M.C.I. Communications Corporation (collectively "MCI"), had recently acquired their subsidiary, Western Union. Since at least the 1950s, Western Union's pension plan had provided various options which allowed employees to retire with full pension benefits prior to age sixty-five.⁶⁶ In 1982, MCI and Western Union eliminated all of the favorable early retirement options.⁶⁷ Most of the plaintiffs had more than twenty years of service prior to the plan modification and expected to receive the unreduced early retirement benefits upon attainment of the minimum age.⁶⁸

The employees based their claims on section 204(g)⁶⁹ and I.R.C. section 411(d)(6)⁷⁰ which prohibit an employer from reducing accrued benefits by plan amendment. The issue then became whether or not the eliminated benefits were accrued benefits. Relying on "the language, purpose and legislative history of the statute,"⁷¹ the court held that the early retirement benefits were accrued benefits. The court first looked to the statutory language of ERISA section 3(23) which defines accrued benefits as those "expressed in the form of an annual benefit commencing at normal retirement age"⁷² In *Amato* the original plan provided that the same formula be used to calculate both early retirement benefits and age sixty-five retirement benefits. The court stated that a finding that the early retirement benefits were not accrued benefits would be tantamount to reading the words "in the form of" out of the statute. The court also reasoned that allowing too much freedom in defining accrued benefits would permit employers to undermine ERISA's purpose of "assuring employees that they would not be deprived of their reasonably-anticipated pension benefits."⁷³

The court rejected the district court's argument from a House report on ERISA which stated that:

In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for

66. The less preferable early retirement plan alternative would have provided an actuarial reduction for the age differential between the employee's age at early retirement and age 65.

67. 773 F.2d at 1405.

68. One of the eliminated provisions provided for unreduced retirement at age 55 for employees with at least 20 years of service. 773 F.2d at 1405.

69. ERISA § 204(g), 29 U.S.C. § 1054(g) (1982). This plan modification took place prior to the 1984 REA clarification discussed *supra* at note 8.

70. I.R.C. § 411(d)(6) (1982).

71. 773 F.2d at 1408.

72. 773 F.2d at 1408 (quoting ERISA § 3(23), 29 U.S.C. § 1002(23) (1982)) (court's emphasis omitted).

73. 773 F.2d at 1409.

employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. . . . *Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age . . .*⁷⁴

The appeals court said that "the context demonstrates that Congress was not referring to unreduced early retirement benefits (which are not mentioned) but to benefits that are temporary or ancillary in nature."⁷⁵

Instead, the appeals court found persuasive the enactment of more recent legislation, the Retirement Equity Act of 1984⁷⁶ ("REA"). REA explicitly prohibited the elimination of early retirement benefits in circumstances like those in *Amato*. While REA was enacted by a different Congress from the one that enacted ERISA, its legislative history led the court to believe that the Senate viewed REA as simply "a codification of existing law as interpreted by IRS regulations."⁷⁷ The court found this convincing in spite of the fact that the Senate Finance Committee's report on REA indicated that "no inference is to be made on the basis of this clarification as to the scope of the prohibition before the effective date of the provision."⁷⁸ The *Amato* court also noted the existence of an IRS determination letter, entitled to some deference, which stated that the plan amendment "impermissi-

74. 773 F.2d at 1409-10 (quoting H.R. REP. NO. 807, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4726) (emphasis supplied by the court). The full section of the report stated:

In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer. *Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.*

75. 773 F.2d at 1410.

76. The Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 and 29 U.S.C.). See *supra* note 8 for a discussion of how REA affected an employer's duty to pay early retirement benefits.

77. 773 F.2d at 1411.

78. 773 F.2d at 1411 (quoting S. REP. NO. 575, 93th Cong., 2d Sess. 28, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2547, 2574).

bly affects accrued benefits.”⁷⁹ Finally, the court commented that case law did not provide much assistance.⁸⁰

In *Collins v. Seafarers Pension Trust*,⁸¹ employees sued the trustees and the pension fund of a multi-employer plan to prevent elimination of “early normal pension” benefits. A district court in the Fourth Circuit held, on review of the defendants’ motion to dismiss, that a funded and non-contingent “early retirement pension [that] is an integrated part of a retirement plan, would fall within the scope of accrued benefits.”⁸² While the court acknowledged that circuits had split on whether or not early retirement benefits are accrued benefits, the court looked to that part of the legislative history that states that ancillary benefits are not accrued benefits. The district court reasoned that the type of funded, non-contingent early retirement benefits at issue “more closely fits the category of pensions, it is not merely an ancillary benefit.”⁸³ The district court also used the funded, non-contingent nature of the benefits at issue to distinguish the case from *Sutton* where the Fourth Circuit Court of Appeals held that unfunded and contingent benefits were not accrued benefits.⁸⁴ On review, the appeals court agreed that the benefits were accrued benefits.⁸⁵

Other cogent, although admittedly fact-specific, arguments for finding early retirement benefits to be accrued are found in Judge Mansmann’s partial dissent in *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*.⁸⁶ Judge Mansmann argued that the case was distinguishable from *Bencivenga* and that the thirty year benefits at issue in *Ashenbaugh* were accrued benefits in certain circumstances. He believed that where the employee had met the thirty year service requirement, that the employee’s thirty year benefits had accrued even if the employee did not meet the minimum age requirement of sixty-two at the time the plan terminated. He pointed out that, contrary to the facts in *Bencivenga*, the plan in *Ashenbaugh* was not ongoing with respect to the plaintiffs. Also, the thirty year benefit plan at issue in *Ashenbaugh* did not grant greater benefits to the employees than they would have received at normal retirement age. Therefore, Judge Mansmann found inapplicable the *Bencivenga* court’s analysis that early retirement benefits constituted a subsidy.⁸⁷ Instead, at issue was

79. 773 F.2d at 1412 (quoting the Brief for the United States as *Amicus Curiae* at 8 n.4).

80. 773 F.2d at 1413.

81. 641 F. Supp. 293 (D.Md. 1986), *later opin.*, 660 F. Supp. 386 (1987), *revd. on other grounds*, 846 F.2d 936 (4th Cir. 1988).

82. 641 F. Supp. at 297.

83. 641 F. Supp. at 297 (footnote omitted).

84. 641 F. Supp. at 296.

85. *Collins v. Seafarers Pension Trust*, 846 F.2d 936, 938 (4th Cir. 1988).

86. 854 F.2d at 1533 (Mansmann, J., concurring and dissenting).

87. The *Bencivenga* court had decided that such subsidies were ancillary benefits and were precluded from being accrued benefits by the House report, see *supra* text accompanying note 60.

a plan that had been terminated with respect to the plaintiffs and which gave benefits equal to the normal retirement benefits. Also, REA treats early retirement benefits as accrued benefits in some circumstances, and, like the court in *Amato*, Judge Mansmann believed that Congress simply codified existing law when it passed REA. Judge Mansmann also stated that the benefits should be treated as accrued in order to give effect to congressional intent and "as in *Amato*, to give the statutory language force and effect."⁸⁸ Finally, Judge Mansmann pointed out that even if the early retirement benefits at issue were not accrued, the policies underlying ERISA would require their payment. He noted that Congress viewed pensions as deferred wages for work already performed by employees and that, therefore, allowing employers to retain the money that they contributed to fund early retirement benefit plans would result in unjustly enriching employers.⁸⁹

The circuit courts are thus in conflict on the issue of whether early retirement benefits are accrued benefits. The Second Circuit, based on its reading of the statutory language, legislative history, and administrative regulations, held that early retirement benefits are included in ERISA's definition of accrued benefits.⁹⁰ However, the Third Circuit, based on its interpretations of the same statutory language, legislative history, and administrative regulations, held that early retirement benefits are not accrued benefits.⁹¹ The Fourth Circuit has relied on the same information to reach different conclusions depending on whether the benefits at issue are funded and non-contingent versus unfunded and contingent.⁹² Although all courts appear to base their decisions on the statutory language, legislative history, administrative regulations, and agency interpretations, they have reached opposing results. In an attempt to clear up this confusion, the next section analyzes the applicable statutory language and legislative history. That is followed by Section D, which reviews the administrative regulations and the interpretations of the agencies responsible for enforcement.

C. Statutory Language and Legislative History

The definition of accrued benefits appears in ERISA section 3(23):

- (23) The term "accrued benefit" means-
- (A) in the case of a defined benefit plan, the individual's accrued

88. 854 F.2d at 1534-35.

89. 854 F.2d at 1537-38; see also *infra* text accompanying notes 231-36.

90. *Amato v. Western Union Intl., Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).

91. *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574, 580 (3d Cir. 1985).

92. *Collins v. Seafarers Pension Trust*, 846 F.2d 936, 938 (4th Cir. 1988) (benefits that were funded and non-contingent were accrued benefits); *Sutton v. Weirton Steel Div. of Natl. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (unfunded, contingent benefits not accrued benefits).

benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age⁹³

In *Bencivenga*, the court used this language to support its conclusion that the early retirement benefits at issue were not accrued benefits. The court, in part, based its holding on the idea that “in the context of ‘accrued benefits,’ ERISA’s specific reference is to normal, rather than early, retirement.”⁹⁴ In contrast, the *Amato* court and Judge Mansmann in *Ashenbaugh* cited the very same statutory provision as supporting their conclusions that the early retirement benefits at issue in those cases were accrued benefits. The *Amato* court stated that “it is apparent that the ‘form of’ language . . . was designed to require that a plan assure a retiree of at least as much as an actuarially-reduced equivalent but not to permit the employer to deprive him of any more that might be provided by the plan.”⁹⁵ In *Ashenbaugh*, Judge Mansmann cited with approval this portion of the *Amato* opinion.⁹⁶ Also confusing is the statute’s circular reference to the employee’s accrued benefit when the statute allegedly defines “accrued benefit.” Therefore, as the court noted in *Shaw v. International Association of Machinists and Aerospace Workers Pension Plan*,⁹⁷ this statutory definition provides little help in establishing a working definition of accrued benefits.

Neither does the legislative history resolve the issue. A key House report from the time of ERISA’s passage states:

The term “accrued benefit” refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. . . . Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements⁹⁸

93. ERISA § 3(23), 29 U.S.C. § 1002(23) (1982).

94. 763 F.2d at 577.

95. 773 F.2d at 1408.

96. 854 F.2d at 1535.

97. 750 F.2d 1458, 1463 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985) (“The plain language of ERISA provides little help in determining whether the benefit at issue is an accrued benefit or not”).

98. H.R. REP. NO. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4726; *see also* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5054. The Conference Committee adopted similar language, stating that “the accrued benefit does not include the value of the right to receive early retirement benefits.” Petitioner’s Reply Brief at 3-4, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988) (No. 87-1868) (citing H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., 1, 273, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5054).

This passage has been subject to two opposing interpretations. The court in *Amato* believed that this report “sheds no light on the meaning to be given to the term ‘accrued benefit’” in the context of the early retirement benefits at issue in that case.⁹⁹ Supportive of that view is the fact that health care insurance and life insurance are generally viewed differently by ERISA from pension benefits which provide income. For example, ERISA treats benefits like health care and life insurance separately as “welfare” benefits.¹⁰⁰ Early retirement benefits are unlike welfare benefits in at least two respects. First, ERISA requires employers to fund early retirement benefits as part of the employer’s regular retirement plan funding. Employers do not fund welfare benefits on the same tax deferred basis.¹⁰¹ Second, early retirement benefits pay a monthly income to employees, as do regular retirement benefits. Welfare benefits generally do not. These differences seem to be behind the *Collins* court’s finding that “funded, non-contingent early retirement benefit[s] more closely fit[] the category of pensions, [they are] not merely . . . ancillary benefit[s].”¹⁰² Also, the report contrasts two types of benefits. The primary purpose of one type is to provide retirement income while the other provides specialized, ancillary benefits. Again, it seems clear that early retirement benefits are more like the former than the latter.¹⁰³

In contrast, in *Bencivenga* and *Ashenbaugh* the courts relied on the same section of the House report to reach the diametrically opposite conclusion that early retirement benefits are “ancillary” benefits and thus not accrued.¹⁰⁴ In *Bencivenga*, the court merely states that the report “indicates that the Act was not intended to assure the sanctity of early retirement expectations.”¹⁰⁵ In *Ashenbaugh*, the court notes that other courts have relied on this section when deciding claims to early retirement benefits.¹⁰⁶

While the explicit mention of “early retirement benefits” in the Conference Committee report might remove some of the ambiguity associated with the House report, to date courts have focused exclusively on the House report. The petitioners in *Tilley* also noted that the Administration opposed including early retirement benefits among accrued benefits. *Id.* at 3.

99. 773 F.2d at 1410.

100. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982). Welfare benefits typically provide insurance types of coverage to employees and retirees.

101. See Note, *Unfunded Vacation Benefits*, 87 COLUM. L. REV. 1702, 1705 (1987).

102. 641 F. Supp. at 296-7.

103. This argument was made by the Third Circuit in *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977, 982 (3d Cir.), cert. denied, 474 U.S. 845 (1985).

104. 763 F.2d at 580; 854 F.2d at 1526.

105. 763 F.2d at 577.

106. 854 F.2d at 1526, citing *Shaw v. International Assn. of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458, 1463 (9th Cir. 1985), cert. denied, 471 U.S. 1137 (1985) (funded, post retirement pension increases are “accrued” and not “ancillary” but implying that early retirement benefits are “ancillary”) and *Petrella v. NL Indus., Inc.*, 529 F. Supp. 1357 (D.N.J. 1982) (holding that early retirement benefits as well as life insurance and major medical benefits are “ancillary” and not “accrued”).

D. IRS and PBGC Regulations

The IRS has promulgated two seemingly conflicting regulations that deal with accrued benefits and early retirement benefits. Revenue rulings applying these regulations, however, consistently indicate that funded and non-contingent early retirement benefits are accrued benefits. The IRS has interpreted its own regulations as defining early retirement benefits as accrued benefits. The PBGC, on the other hand, has expressly refrained from taking a position on the issue.¹⁰⁷ Although courts should normally accord great deference to the interpretation of the agencies that are responsible for ERISA administration,¹⁰⁸ the particular facts behind this issue make less deference appropriate.

One IRS regulation provides that “[p]lan provisions indirectly affecting accrued benefits include, for example, provisions relating . . . to actuarial factors for determining optional or *early retirement benefits*.”¹⁰⁹ The IRS clarified this regulation in an amicus brief in the *Amato* case¹¹⁰ by stating that “a plan amendment which eliminates unreduced early retirement benefits . . . involves a change in the plan’s actuarial factors that impermissibly affects accrued benefits.”¹¹¹ There is no reason to distinguish in this respect between plan amendments and plan terminations. In fact, in *Tilley* the employer was terminating the plan.¹¹² Plan terminations have at least as disastrous an effect on early retirement benefits as the effect of plan amendments.

However, another IRS regulation appears to be in conflict. It provides, in pertinent part, that:

In general, the term ‘accrued benefits’ refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits. . . . For purposes of this paragraph a subsidized early retirement benefit which is provided by a plan is not taken into account, except to the extent of determining the normal retirement benefit under the plan¹¹³

107. Brief for the Pension Benefit Guar. Corp. as *Amicus Curiae* in Support of the Petition at 8, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988) (No. 87-1868).

108. *See infra* text accompanying notes 195-200.

109. Treas. Reg. § 1.411(d)-3(b) (as amended in 1985) (emphasis added).

110. *Amato v. Western Union Intl.* 773 F.2d 1402 (2d Cir. 1985), *cert. denied per stipulation*, 474 U.S. 1113 (1986).

111. 773 F.2d at 1412 (quoting from the Brief for the United States as *Amicus Curiae* at 8 n.4).

112. 815 F.2d at 991; *see also infra* text accompanying note 136.

113. Treas. Reg. § 1.411(a)-7(a)(1)(ii) (as amended in 1985); *see also* the remarks of Representative William Clay (D-Mo.):

Since 1983, however, the IRS has appeared to soften its position to permit any assets above bare termination liability to revert to the employer, not just those assets that were mistakenly contributed to the plan.

This broader definition of residual assets permits employers to strip out of the plan assets that are only artificially “excess.”

Early retirement benefits have therefore been called "ancillary benefits" based on this regulation.¹¹⁴ As noted earlier, the relevant House report states that accrued benefits do not encompass "ancillary benefits."¹¹⁵

The conflict in the applicable IRS regulations robs them of any determinative significance. However, the IRS seems to believe that, at least in some circumstances, early retirement benefits are accrued benefits. In an *amicus curiae* brief in *Amato*, the IRS argued that early retirement benefits are included in section 411's definition of accrued benefits.¹¹⁶ At issue were funded, non-contingent benefits. In contrast, in an *amicus curiae* brief in *Tilley*, the PBGC declined to take a position on the issue of whether funded, non-contingent benefits were accrued.¹¹⁷ Normally courts should extend to the PBGC, the IRS, and the Department of Labor, the great deference typically accorded to the interpretation of the agencies responsible for administration of the statute being construed.¹¹⁸ However, the courts should accord much less deference in cases where the agencies' interpretations are unclear and the agencies' own regulations are in disarray.¹¹⁹ Courts also arguably owe less than the usual standard of deference to the IRS's interpretations of accrued benefits because the PBGC, not the IRS, is the agency charged specifically with administering plan terminations.¹²⁰ While explicitly recognizing the IRS's interpretation, the PBGC has declined to make any interpretation of its own.¹²¹ Therefore, some controversy remains as to whether early retirement benefits are accrued benefits as that term is used in ERISA.

Before reviewing how public policy considerations affect the determination of this issue, Part III considers an alternative argument offered for requiring employers to pay early retirement benefits prior to

134 CONG. REC. E584 (daily ed. March 9, 1988) (statement of Rep. Clay).

114. *Ashenbaugh*, 854 F.2d at 1527 ("[B]enefits like the [unfunded, conditional early retirement benefits at issue] are a retirement-type subsidy, and are therefore a benefit to which participants are not entitled unless relevant conditions are met."). *But see* *Collins v. Seafarers Pension Trust*, 641 F. Supp. 293 (D.Md. 1986), *later opin.*, 660 F. Supp. 386 (1987), *revd. on other grounds*, 846 F.2d 936 (4th Cir. 1988). Under the description of House Report No. 807, "a funded, noncontingent early retirement benefit more closely fits the category of pensions, it is not merely an ancillary benefit." 660 F. Supp. at 296-97 (footnote deleted). For the relevant text of this report, see *supra* text accompanying note 74.

115. For the relevant text of the House report see *supra* text accompanying note 74.

116. 773 F.2d at 1412 (quoting from the Brief for the United States as *Amicus Curiae* at 8 n.4).

117. Brief for the Pension Benefit Guar. Corp. as *Amicus Curiae* in Support of the Petition at 8, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987) (No. 87-1868), *cert. granted*, 109 S. Ct. 52 (1988).

118. See *infra* notes 195-200 and accompanying text.

119. *Cf.* *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (courts do not owe heightened deference to agency interpretations that are inconsistent over time).

120. See *infra* note 194 and accompanying text.

121. See *supra* note 117 and accompanying text.

receiving any reversion — the terms of section 4044(a)(6). All of Part III rests on the assumption, *arguendo*, that early retirement benefits are *not* accrued benefits.

III. DOES ERISA SECTION 4044(A)(6) REQUIRE PAYMENT OF EARLY RETIREMENT BENEFITS?

The circuit courts are split on whether section 4044(a)(6) requires payment of early retirement benefits upon plan termination. Section 4044(a) establishes a priority scheme for payment of plan assets when an employer terminates its pension plan, but the statutory language and the legislative history are ambiguous on the question of whether section 4044(a)(6) mandates distribution of assets in payment of early retirement benefits. Though the regulations themselves do not clearly resolve the problem, both the IRS and the PBGC believe that section 4044(a)(6) does not mandate payment of early retirement benefits.

A. *The Cases*

The circuit courts are in conflict as to whether section 4044(a)(6) requires payment of early retirement benefits. In *Amato v. Western Union International, Inc.*,¹²² and *Tilley v. Mead Corp.*,¹²³ the courts held that section 4044(a)(6) requires payment of early retirement benefits. However, a unanimous Eleventh Circuit en banc decision in *Blesitt v. Retirement Plan for Employees of Dixie Engine Co.*,¹²⁴ held that section 4044(a)(6) does not require payment of early retirement benefits based on anticipated future years of service. The en banc decision vacated a unanimous panel decision which had held that section 4044(a)(6) *does* require payment of the benefits. And in *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*,¹²⁵ the court held that section 4044(a)(6) does not mandate payment of early retirement benefits.

In *Amato v. Western Union International, Inc.*,¹²⁶ where employees challenged the right of MCI and Western Union to eliminate their pension plan's provisions for early retirement benefits, the court held that a withdrawal of early retirement benefit assets from the plan would have violated ERISA because the benefits had accrued. However, the court also stated, albeit in dicta, that section 4044(a)(6) would entitle the employees to early retirement benefits if MCI or Western Union had terminated the plan.¹²⁷ It began its analysis by

122. 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).

123. 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988).

124. 848 F.2d 1164 (11th Cir. 1988) (*en banc*).

125. 854 F.2d 1516 (3d Cir. 1988).

126. 773 F.2d 1402 (2d Cir. 1985). *See supra* notes 65-80 and accompanying text.

127. 773 F.2d at 1414-16.

interpreting the plain meaning of category six — “all benefits under the plan”¹²⁸ — as applying to *all benefits*, not just accrued benefits. The court found support for its holding in a PBGC regulation which states that “[t]he benefits assigned to priority category [six] with respect to each participant are all of the participant’s benefits under the plan, whether forfeitable or nonforfeitable.”¹²⁹ The court then had to reconcile language of a PBGC comment to the effect that “priority category 6 will contain the value of accrued forfeitable benefits of a participant.”¹³⁰ Obviously not a believer in the maxim *expressio unius est exclusio alterius*,¹³¹ the court did this by saying that the comment only indicates one type of benefit covered by category six but does not preclude the inclusion of other types of benefits. The court also stated its belief that the Conference Committee’s act in changing the House version of the bill from “other accrued benefits” to “all other benefits under the Plan”¹³² was indicative of a congressional intent, “not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants’ benefit expectations based upon the Plan’s full benefit structure.”¹³³

In *Tilley v. Mead Corp.*,¹³⁴ employees challenged the right of their employer, Mead Corporation, to use a “normal retirement” reduction instead of an “early retirement” reduction in calculating benefits upon plan termination.¹³⁵ The normal retirement reduction which Mead used took the normal retirement age of sixty-five as the starting point and then reduced the benefit to a present value based on the employee’s age at the time of plan termination. The early retirement reduction, which the employees requested, would have taken the early retirement age of sixty-two as the base and then reduced to a present value based on the employee’s age at the time of plan termination. The total difference for the six plaintiffs amounted to \$56,476.92. The court reviewed the Second Circuit’s reasoning in *Amato* and relied on the same rationale to hold that section 4044(a)(6) required Mead to pay the additional benefit gained by using the early retirement actuarial reduction before the employer could retain a reversion of excess assets.¹³⁶ The court distinguished its earlier opinion in *Sutton* which

128. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982).

129. 773 F.2d at 1415 (quoting 29 C.F.R. § 2618.16 (1984)).

130. 773 F.2d at 1415 (quoting 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975)).

131. “[T]he expression of one thing is the exclusion of another.” BLACK’S LAW DICTIONARY 521 (5th ed. 1979). See generally W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 641 (1988).

132. 773 F.2d at 1416.

133. 773 F.2d at 1416.

134. 815 F.2d 989 (4th Cir. 1987), cert. granted, 109 S. Ct. 52 (1988).

135. 815 F.2d at 991.

136. 815 F.2d at 992.

held that early retirement benefits were not accrued benefits and therefore no requirement of payment existed, on the basis that the benefits in *Sutton* were unfunded and contingent.¹³⁷

In contrast, other circuits have recently taken the opposite position, holding that section 4044(a)(6) does not require payment of early retirement benefits. In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*,¹³⁸ employees claimed entitlement not to a more favorable calculation of their benefits based on a pro rata share of their expected early retirement benefits, but instead to the full, unreduced pension benefits that they would have received had the plan termination not prevented them from working until normal retirement age.¹³⁹ An Eleventh Circuit Court of Appeals panel followed the *Amato* and *Tilley* courts to hold that the employees were entitled to their unaccrued, forfeitable benefits.¹⁴⁰ It agreed that the proper interpretation of section 4044(a)(6) requires that employers use available plan assets to meet the employees' "benefit expectations based upon the Plan's full benefit structure."¹⁴¹

However, a petition for rehearing was granted, and the en banc court held that the employees were not entitled to any benefits except the vested portion of normal retirement benefits which their employer, Dixie Engine Company, had already paid.¹⁴² The court first stated its understanding of the plain meaning of the statute, emphasizing the words "under the plan." It explained that these words limit employees' entitlement to those benefits for which the employees had met all of the plan criteria. The court noted that the plan did not promise benefits based on expected future years of service.¹⁴³ Because Dixie Engine had paid all benefits for which the employees had met the plan criteria, the court found that both IRS regulations and ERISA allowed Dixie Engine to retain excess plan assets consistently with section 4044(a)(6). The court also deferred to the IRS and PBGC, both of which interpret section 4044(a)(6) as not requiring payment of non-accrued benefits.¹⁴⁴

In reviewing the case law, the court distinguished *Amato* and *Til-*

137. 815 F.2d at 991-92. The court also distinguished *Sutton* because it dealt with a plan modification whereas *Amato* dealt with a plan termination. This does not appear to be a significant difference because even in *Sutton* the employer was eliminating the employees' right to ever receive an early retirement benefit once the five year 'grace period' expired. See *supra* text accompanying notes 44-45.

138. 817 F.2d 1528 (11th Cir. 1987).

139. 848 F.2d at 1166-67.

140. 817 F.2d 1528, 1531 (11th Cir. 1987).

141. 817 F.2d at 1531 (quoting *Amato v. Western Union Intl., Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985)).

142. 848 F.2d at 1165-66, 1179.

143. 848 F.2d at 1169.

144. 848 F.2d at 1169-71.

ley because the employees in *Blessitt* were seeking credit for years not worked whereas the *Amato* and *Tilley* courts awarded only benefits based on the number of years the employees actually worked. And, relying on events which took place subsequent to the plan termination, the Eleventh Circuit en banc court cited REA as limiting an employer's liability to payment for years actually worked.¹⁴⁵ The court also relied on public policy considerations. Finally, the court held that not requiring payment of non-accrued benefits did not leave category six devoid of meaning, and that the Conference Committee change could not plausibly show a congressional intent to require employers to calculate benefits based on years of service not worked.¹⁴⁶

The Third Circuit considered the issue of whether ERISA section 4044(a)(6) requires payment of early retirement benefits in *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*.¹⁴⁷ The employee plaintiffs sought early retirement benefits when the closing of their plant resulted in the partial termination of both their pension plan and their opportunity to meet the requirements for early retirement benefits.¹⁴⁸ The court held that section 4044(a)(6) merely marshals distribution of assets and does not grant substantive rights. It agreed with the *Blessitt* court's view of the plain meaning of section 4044(a)(6) and noted the opposition by both the PBGC and IRS to any interpretation that section 4044(a)(6) requires payment of early retirement benefits.¹⁴⁹

Therefore, these court decisions do not provide a uniform interpretation as to whether section 4044(a)(6) requires payment of early retirement benefits before an employer may receive a reversion of excess assets. The Second and Fourth Circuits have held that section 4044(a)(6) requires use of plan assets to meet employees' benefit expectations, including their expectation for early retirement benefits.¹⁵⁰ However, the Eleventh and Third Circuits have rejected that reasoning and held that section 4044(a)(6) does not mandate payment of early retirement benefits.¹⁵¹ In an attempt to resolve this disagreement, the next section examines the statutory language and the legislative history of section 4044(a)(6).

145. 848 F.2d at 1173-74.

146. 848 F.2d at 1175-79.

147. 854 F.2d 1516 (3d Cir. 1988).

148. 854 F.2d at 1518-19.

149. 854 F.2d at 1529.

150. *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987) *cert. granted*, 109 S. Ct. 52 (1988); *Amato v. Western Union Intl., Inc.* 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).

151. *Ashenbaugh*, 854 F.2d 1516 (3d Cir. 1988); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *vacated, reh. granted*, 836 F.2d 1571 (11th Cir. 1988) (*en banc*), *different results reached on reh.*, 848 F.2d 1164 (11th Cir. 1988) (*en banc*).

B. Section 4044(a)(6) and Its Legislative History

The statutory language of section 4044(a)(6) and the legislative history are ambiguous as to whether early retirement benefits are included in the benefits that an employer must pay upon plan termination. The plain language of the statute does not resolve the question; it is vague and thus supports opposing interpretations. Attempting to interpret the language in an internally consistent manner does not yield a dispositive answer. The legislative history is equally vague; the Conference Committee that wrote the language left no clues as to its intent on whether section 4044(a)(6) encompasses early retirement benefits.

Section 4044(a) prioritizes the order of benefit payments upon plan termination.¹⁵² This prioritization becomes important when the plan does not contain enough assets to pay all of the benefits owed to employees.¹⁵³ Section 4044(d)(1) allows employers to retain only those excess assets remaining after the employer has distributed all plan liabilities in accordance with the distribution requirements of section 4044(a).¹⁵⁴

By stating in category six that employers must pay "all other benefits under the plan,"¹⁵⁵ section 4044(a)(6) appears to indicate that em-

152. § 4044(a) provides in pertinent part:

§ 4044. Allocation of assets

(a) Order of priority of participants and beneficiaries In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued [sic] benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.
 (2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.
 (3) Third, in the case of benefits payable as an annuity —

....
 (4) Fourth —

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322(b)(5) of this title), and
 (B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(6) of this title did not apply.

For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

ERISA § 4044(a), 29 U.S.C. § 1344(a) (1982).

153. The prioritization scheme of § 4044(a) functions in a way similar to § 507 of the Bankruptcy Code. 11 U.S.C. § 507 (1982 & Supp. IV 1986). The Bankruptcy Code ensures that certain classes of claims, thought to be more deserving, are paid in full before other, less deserving, claims receive any payment. See generally 2 COLLIER BANKRUPTCY MANUAL ¶ 507.01 (L. King 3d ed. 1988).

154. For the language of ERISA § 4044(d)(1) see *supra* text accompanying note 7. Even the *Blessitt* en banc court acknowledged that this means an employer must distribute all assets required by categories 1-6. ("Any assets remaining after satisfaction of all liabilities in Categories 1-6 can revert to the employer . . .") 848 F.2d 1164, 1169 (11th Cir. 1988).

155. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982).

employers must pay employees *all* benefits. This would include early retirement benefits when a plan specifically makes provision for such benefits. However, the import of the language "under the plan"¹⁵⁶ is unclear. The en banc court in *Blessitt* held that this language excluded unaccrued benefits for employees who do not meet the plan's eligibility requirements when the plan is terminated.¹⁵⁷ This interprets the section to deny actively benefits to employees who are too young or have too little service, or both, to qualify for early retirement benefits at the time the employer terminates the plan. Alternatively, section 4044(a)(6) may merely be a ranking provision, simply ordering the distribution of those benefits which ERISA guarantees elsewhere.

Interpreting category six as excluding unaccrued benefits could render it meaningless if all accrued benefits are covered by categories one through five and if employers need pay only accrued benefits. Category five requires payment of "all other nonforfeitable benefits . . ."¹⁵⁸ Thus, in termination situations, category five arguably acts as a "clean up" category covering all accrued benefits because I.R.C. section 411(d)(3) requires that upon termination all accrued benefits become nonforfeitable.¹⁵⁹ An interpretation, then, that category six only encompasses accrued benefits violates the canon of statutory construction that statutory provisions should be read with an effort to give them some reasonable content, since it may be presumed that Congress wrote the provision for a purpose.¹⁶⁰ If this interpretation of category five is correct, category six should be read as pertaining to some non-accrued benefits, such as early retirement benefits.

However, categories one through five do not cover accrued, forfeitable benefits that become nonforfeitable as a result of plan termination. Categories one through four clearly exclude these benefits.¹⁶¹ Category five also excludes benefits that become nonforfeitable as a result of plan termination.¹⁶² Therefore, category six must cover accrued, forfeitable benefits that become nonforfeitable by termination of the plan. Category six requires only that the benefits arise under the plan.¹⁶³ Because category six governs payment of accrued, forfeitable

156. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982).

157. 848 F.2d at 1169.

158. ERISA § 4044(a)(5), 29 U.S.C. § 1344(a)(5) (1982).

159. I.R.C. § 411(d)(3) (1988).

160. *Platt v. Union Pac. R.R.*, 99 U.S. 48, 58 (1878) ("Congress is not presumed to have used words for no purpose. . . . [T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute.").

161. See *supra* note 152 for the text of § 4044(a)(1)-(4).

162. 29 C.F.R. § 2618.2 (1987) (stating that "[b]enefits that become nonforfeitable solely as a result of the termination of a plan will be considered forfeitable"). Note, however, that this result is dictated, not by the language of the statute, but by an IRS regulation.

163. These would include any nonvested benefits where the plan provided for 100% vesting of nonvested benefits upon plan termination. See, e.g., *Amicus Curiae* Brief for the National

benefits that become nonforfeitable due to termination, category six would not be rendered a nullity by interpreting it as excluding unaccrued benefits. Thus, no need exists for interpreting category six to include unaccrued benefits. However, as noted earlier, the statutory language does not clearly exclude unaccrued benefits.

The *Amato*¹⁶⁴ and *Tilley*¹⁶⁵ courts placed great emphasis on the ERISA Conference Committee's change in the language of section 4044(a)(6). Those courts interpreted the change as an indication that "all other benefits" truly means *all* benefits. The House version of ERISA included a category (d) which required payment of "other accrued benefits." The Conference Committee retained similar language in what is now category six, but, most significantly, dropped the word "accrued."¹⁶⁶ On the surface, this appears to indicate that the Conference Committee meant the category to encompass unaccrued benefits, such as early retirement benefits, for which the employees had not necessarily met all the plan criteria.

Nonetheless, this interpretation is inconclusive. First, a Conference Committee's unexplained changes in a bill do not always serve as a reliable indicator of congressional intent.¹⁶⁷ Second, it is possible that the Conference Committee's deletion of the word accrued was simply inadvertent.¹⁶⁸ Finally, requiring payment of benefits for which the employees had not met the plan's requirements represents a significant change from the House and Senate versions. The Senate version allowed reversion to the employer after the employer distributed all employee contributions, "benefits in pay status at least 3 years," and "other insured benefits."¹⁶⁹ Under this language, employees would have received only their insured, accrued benefits. The House version, though more liberal than the Senate version, would only have required distribution of the earnings on employee contributions and any special benefits which the plan explicitly offered to pay upon termination of the plan in addition to accrued benefits.¹⁷⁰ There-

Employee Benefits Institute at 20, *Blessit v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (No. 86-8123).

164. 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).

165. 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988).

166. *Tilley*, 815 F.2d at 991-92; *Amato*, 773 F.2d at 1416.

167. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947). The critical issue in that case involved the interpretation of a provision of § 8(c) of the Selective Training & Service Act of 1940 which had apparently been modified in the Conference Committee. The Court indicated that the reasons for the change were indeterminate and that "[t]he interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." 331 U.S. at 61.

168. *Cf.* Justice White's suggestion in his dissent to denial of certiorari in *Watt v. Homes Limestone Co.*, 456 U.S. 995, 996 (1982), that the Conference Committee's omission of the word "only" from the final version may have been inadvertent.

169. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5154.

170. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5154.

fore, reading section 4044(a)(6) as requiring payment of unlimited benefit expectations dramatically expands the coverage of the section over the narrower versions of the section sent to the Conference Committee by both the Senate and the House. In other sections, where the Conference Committee made substantial changes to the House and Senate proposals, they carefully explained the changes.¹⁷¹ It seems likely that they would have done the same thing with section 4044(a)(6) had they meant to cause a change of the significance of adding mandatory payment of large dollar amounts of unaccrued benefits such as early retirement benefits. However, even without interpreting section 4044(a)(6) as covering unaccrued benefits, 4044(a) as a whole covers more than either the House or the Senate version would have.

This examination of the statutory language and legislative history shows that evidence exists for interpreting the statute either way. Those in favor of a broad interpretation, which would require payment of early retirement benefits, can point to the words "all other benefits"¹⁷² and the Conference Committee's deletion of the word accrued from what ultimately became category (6). Those desiring to limit the scope of section 4044(a)(6) so that it does not require payment of early retirement benefits, can rely on the words "under the plan,"¹⁷³ and the lack of any explanation by the Conference Committee for its deletion of the word "accrued." Because the language and legislative history¹⁷⁴ do not provide the basis for a clear interpretation, the next section turns to a review of the administrative regulations that deal with section 4044(a)(6) and the agencies' interpretation of those regulations.

C. IRS and PBGC Regulations

Both the PBGC and the IRS interpret their regulations to mean that section 4044(a)(6) does not require an employer to pay any early retirement benefits. In this situation, the courts should accord great deference to the interpretations of the agencies responsible for administration of statutory programs.

ERISA requires that until employers satisfy all plan liabilities, they

171. See H.R. CONF. REP. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5049-59 (description of conference substitute on vesting provisions); *id.* at 5063-74 (committee states that it basically adopted the House's funding requirements and carefully explains its modifications). Compare the committee's treatment of § 4044(a)'s distribution provisions, where the committee merely summarizes the House and Senate provisions and then states, without explanation, its final version. *Id.* at 5154-55.

172. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982) (emphasis added).

173. ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1982) (emphasis added).

174. Justice Scalia might have us turn directly from the statutory language to the agencies' regulations and their interpretations. See Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 45-46 (1988). A complete discussion of statutory interpretation theories is beyond the scope of this Note.

use plan assets for the “exclusive benefit of [their] employees”¹⁷⁵ However, once the employer satisfies all liabilities, the employer may retain excess assets if the specified conditions of section 4044(d)(1) are met.¹⁷⁶ The regulations promulgated by the IRS and the PBGC that deal with these statutory provisions do not clearly resolve the issue of whether early retirement benefits are among those liabilities that an employer must satisfy before receiving a reversion.

Treasury Regulation 1.401-2(b), interpreting section 401(a)(2), provides that employers may not recover surplus assets unless the surplus results from actuarial error.¹⁷⁷ This regulation has a sensible purpose, well grounded in ERISA’s goals. If the employer truly erred in making contributions, the premise underlying a defined benefit plan, which requires that employers fund only in order to meet the future benefit entitlement of employees, implies that it is logical to allow the employer to recover mistaken contributions. However, if ERISA or the employer’s funding methodology requires the employer to fund benefits such as early retirement benefits prior to accrual, then the surplus that results upon termination from those contributions is not due to actuarial error. Instead, the surplus results from the employer’s termination of the plan, which prevented those early retirement benefits from ever accruing. No premise of an ERISA defined benefit program requires the distribution of such an excess to the employer.

However, an IRS revenue ruling effectively defines all excess assets as resulting from actuarial error by permitting the employer to use the valuation of benefits in “determining whether there is any surplus due to actuarial error.”¹⁷⁸ That ruling means that no restriction exists on an employer’s ability to recover excess assets based on the origin of the excess. The revenue ruling appears inconsistent with the language of the regulation, which states that assets do not result from actuarial error if they are the “result of a change in the benefit provisions or in the eligibility requirements of the plan.”¹⁷⁹ In summary, the regulation attempts, consistent with ERISA’s purposes in regulating defined benefit plans, to prohibit employers from recovering plan assets unless their contributions were made in error. However, the revenue ruling

175. I.R.C. § 401(a)(2) (1982). The pertinent part of that section reads that a pension plan cannot qualify under ERISA unless “it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of his employees” I.R.C. § 401(a)(2) (1982). Similarly, ERISA states that “[e]xcept as provided [in the sections relating to termination], . . . the assets of a plan shall never inure to the benefit of any employer” ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (1982).

176. ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1) (1982).

177. Treas. Reg. § 1.401-2(b) (as amended in 1981).

178. Rev. Rul. 83-52 1983-1 C.B. 87. This replaced earlier, supposedly ambiguous, rulings which also stated that surplus may be considered as resulting from actuarial error: 71-152, 1971-1 C.B. 127. 73-55, 1973-1 C.B. 196.

179. Treas. Reg. § 1.401-2(b)(1) (as amended in 1981).

interpreting that regulation seems to deprive the regulation of any real force. Such an interpretation might suggest that the IRS approves of employers recouping large amounts of excess assets. The IRS, however, effectively limits its definition of excess assets by interpreting early retirement benefits as accrued benefits, thus requiring their payment out of what might otherwise be excess assets.¹⁸⁰

Another ambiguous regulation is 29 C.F.R. 2618.16 which purports to explain the requirements of category six.¹⁸¹ The preamble to the proposed regulation defines category six as containing "the value of accrued forfeitable benefits."¹⁸² It is possible to interpret this, as does the PBGC,¹⁸³ to mean that category six pertains only to accrued benefits. However, this language does not necessarily limit the scope of category six to only accrued benefits.¹⁸⁴ It is logically consistent that category six could also pertain to non-accrued benefits such as early retirement benefits. In contrast, the regulation itself states that "[t]he benefits assigned to priority category 6 . . . are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable."¹⁸⁵ This language is subject to the same conflicting interpretations as the actual language of section 4044(a)(6). Does "all benefits" mean *all* of the benefits that a participant could ever hope to receive? Or does "under the plan" mean that the only benefits covered are those for which the employee has met all of the plan's criteria? Also, what is the effect of including nonforfeitable benefits? Because this regulation and its proposed preamble are hopelessly ambiguous, they are of no significant help in defining the contours of category six coverage.

Yet other regulations and revenue rulings appear to allow the employer to receive a reversion of excess assets without paying early retirement benefits to employees who do not qualify for those benefits under the plan. The jointly issued guidelines on terminations state that employers must protect only participants' accrued benefits against risk.¹⁸⁶ Similarly, revenue rulings have only required employers to

180. See *supra* text accompanying note 116.

181. 29 C.F.R. § 2618.16 (1987).

182. 40 Fed. Reg. 51368, 51370 (1975). Although the PBGC did not include this preamble in the final regulation, the final regulation stated that the changes in the rules pertaining to categories 4 through 6 had been made only for purposes of clarification. 46 Fed. Reg. 9480, 9485 (1981).

183. For a discussion of the positions of the various agencies, see *infra* notes 188-91 and accompanying text.

184. See *Amato v. Western Union Intl., Inc.*, 773 F.2d 1402, 1415-16 (2d Cir. 1985).

185. 29 C.F.R. § 2618.16 (1987).

186. The Guidelines were jointly issued by the IRS, PBGC, and the Department of Labor to clarify an employer's right to receive a reversion upon plan termination. 2 G. BOREN, *supra* note 4, at § 17:15 (1988 Supp). In pertinent part, the Guidelines state:

[W]hen an employer terminates a defined benefit pension plan, it may not recover any surplus assets until it has fully vested all participants' benefits and has purchased and distrib-

distribute accrued benefits.¹⁸⁷

Both the IRS and the PBGC interpret the statutory language and their regulations as not requiring payment of early retirement benefits under category six.¹⁸⁸ The IRS's position is not inconsistent with its interpretation that funded and non-contingent benefits of the type at issue in *Amato* are accrued benefits.¹⁸⁹ Inclusion of all early retirement benefits under section 4044(a)(6) would extend the payment requirement beyond what is required by the IRS's position on accrued benefits. For example, the IRS's interpretation of accrued benefits apparently would not require payment of unfunded, contingent benefits.¹⁹⁰ However, including all early retirement benefits under section 4044(a)(6) might require payment of *Sutton*-type, and possibly even *Blessitt*-type, benefits, a far more inclusive requirement.

The PBGC recently stated in an opinion letter:

Section 4044(a) does not create benefit entitlements not otherwise provided for elsewhere in ERISA or under the plan. . . . Section 4044(a)(6) accordingly does not require the allocation of assets to pay benefits that might have accrued in the future if the Plans had not terminated and the participants had continued performing covered service. Consequently, such "unaccrued benefits" cannot be considered "liabilities of the plan to

uted annuity contracts, to protect participants against the risk that *their accrued benefits* may be jeopardized

PBGC, IRS, and Labor Department Guidelines on Asset Reversions, 11 Pens. Rep. (BNA) 724 (May 28, 1984) (emphasis added).

187. Rev. Rul. 80-229, 1980-2 C.B. 133, 134 ("If the assets as of the date of termination exceed the present value of the accrued benefits (whether or not forfeitable) as of such date, the plan will not be considered discriminatory if such excess reverts to the employer . . ."). See also Rev. Rul. 83-52, 1983-1 C.B. 87.

188. Brief for the Pension Benefit Guarantee Corporation as *Amicus Curie* in Support of the Petition at 2, *Mead Corp. v. Tilley*, 815 F.2d 989 (4th Cir. 1987) (No. 87-1868), *cert. granted*, 109 S. Ct 52 (1988). See *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1171 (11th Cir. 1988) (en banc) ("The three agencies charged with administering ERISA — the PBGC, the IRS, and the Department of Labor — all concur that benefit accrual ceases when a plan terminates."). After the *Tilley* decision, the IRS suspended termination determinations in the Fourth Circuit in order to review the decision. *Plan Terminations on Hold in Fourth, Eleventh Circuits*, 14 Pens. Rep. (BNA) 1107 (August 24, 1987). The IRS later lifted the suspension. *Suspension Lifted on Approvals of Terminations in Two Circuits*, 14 Pens. Rep. (BNA) 1311 (October 5, 1987). It then appeared that the IRS would not follow either the *Tilley* or *Blessitt* reasoning and, therefore, would not require payment of early retirement benefits upon plan terminations. Royster, *How Does the Blessitt Decision Affect Plan Sponsors?*, PENSION WORLD 52, 56 (November, 1987). Finally, the Treasury Department announced that the IRS would not issue, until at least May, determination letters on applications filed after October 24, 1988 to terminate defined benefit plans with excess assets, where the employer planned to recover even a portion of those excess assets. *Suspension of Determination Letters for Terminations Announced by Treasury*, 15 Pens. Rep. (BNA) 1876 (October 31, 1988). Compare the IRS's suspension of termination approvals in the Eleventh Circuit and subsequent refusal to follow the *Blessitt* panel decision.

189. See *supra* text accompanying note 116.

190. For example, the type at issue in *Sutton v. Weirton Steel Div. of Natl. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); see *supra* text accompanying notes 45-48.

participants and their beneficiaries" under Section 4044(d)(1).¹⁹¹ Arguably, courts should not defer to the PBGC's interpretation of category six because the PBGC does not guarantee payment of benefits that become nonforfeitable "solely because of the termination of the plan"¹⁹² and therefore has no special expertise or authority regarding category six. Yet, at the same time that it established the PBGC, Congress explicitly granted it broad administrative and regulatory powers.¹⁹³ In ERISA section 4041, Congress explicitly granted the PBGC power to supervise the termination of pension plans by plan administrators.¹⁹⁴ Consequently, deference to the PBGC is appropriate.

Generally, when the meaning of a statute is unclear, courts should accord great deference to the interpretation of the agency, or agencies, charged with administration of the statute in question.¹⁹⁵ The courts have accorded particular deference to the PBGC in its interpretation of ERISA's provisions.¹⁹⁶ All of the traditional reasons for judicial deference to the responsible agency's interpretation support deference to the PBGC and the IRS. In this regard, judges often have less expertise than do the responsible agencies, particularly in technical and complex statutory schemes like ERISA.¹⁹⁷ Also, judicial deference to federal agencies increases uniformity because the Supreme Court's limited docket restricts the number of cases it can review.¹⁹⁸ Absent

191. PBGC Opinion Letter No. 87-11, 15 PENS. REP. (BNA) 259, (February 1, 1988).

192. 2 G. BOREN, *supra* note 4, at § 17.20.

193. ERISA § 4002, 29 U.S.C. § 1302 (1982).

194. ERISA § 4041, 29 U.S.C. § 1341 (1982).

195. "If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 843 (1984). *See also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) ("The Court has often repeated the general proposition that considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration.'" (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965))).

196. *See, e.g., Belland v. Pension Benefit Guar. Corp.*, 726 F.2d 839, 843 (D.C. Cir. 1984), *cert. denied*, 464 U.S. 880 (1984) ("PBGC's interpretation of ERISA is entitled to great deference."); *Concord Control, Inc. v. International Union, UAW*, 647 F.2d 701, 704 (6th Cir. 1981), *cert. denied*, 454 U.S. 1054 (citing the *Connolly* court's standard of great deference to the PBGC's interpretation); *Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979) ("[T]he determination of the PBGC . . . is entitled to great deference in the construction and application of ERISA.>").

197. *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984). Paul Fassar, the Assistant Secretary of Labor for Labor-Management Relations, stated in May of 1975 that the employees "at the Labor Department, . . . charged with administering a good portion of [ERISA] can indeed substantiate the statement that ERISA is one of the most complex laws ever enacted by Congress." Fassar, *The New Pension Law*, 28 PROC. N.Y.U. CONF. ON LAB. 59 (1975). Based on my informal conversations during interviewing season, it would be an understatement to say that many practitioners agree.

198. *See, e.g., Milhollin*, 444 U.S. at 568 n.12 ("[L]itigation is not always the optimal process by means of which to formulate a coherent and predictable body of technical rules."); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-22 (1987).

Supreme Court review, a single federal agency can better achieve uniform interpretations of federal statutes than can thirteen federal circuits.¹⁹⁹ Uniformity possesses many virtues, including allowing companies to conform their conduct to the law and ensuring that they are not subject to conflicting requirements. The only question that the courts need ask regarding an agency's interpretation is whether that interpretation is "based on a permissible construction of the statute."²⁰⁰ Section 4044(a)(6)'s ambiguity permits reliance on the interpretation given it by the agencies responsible for its enforcement.

Although the regulations do not clearly resolve the issue, both the PBGC and the IRS believe that section 4044(a)(6) does not require payment of early retirement benefits. Their interpretations are entitled to great deference.

In summary, the circuit courts are in conflict and the statutory language and legislative history are ambiguous with regard to the questions of (1) whether ERISA includes early retirement benefits in its definition of accrued benefits and (2) whether section 4044(a)(6) requires payment of early retirement benefits. However, the courts should defer to the unanimous interpretation of the agencies charged with ERISA administration that section 4044(a)(6) does not require payment of non-accrued benefits.

IV. THE PURPOSES OF ERISA AND PUBLIC POLICY CONSIDERATIONS

Although section 4044(a)(6) does not require payment of early retirement benefits, it remains unclear whether early retirement benefits are in fact accrued benefits. The agencies have not yet agreed on that issue, so their interpretations cannot be considered dispositive. In determining whether accrued benefits should be interpreted to include early retirement benefits, thereby requiring payment of those benefits upon plan terminations, it becomes important to assess the public policy issues involved.

This Part examines the policy considerations bearing on whether ERISA should be read to require employers to pay early retirement benefits upon plan termination. The first section analyzes whether such a requirement may cause employers to stop offering early retirement benefits as part of their defined benefit plans or to switch to defined contribution plans. The second section discusses whether employers would decrease funding of their plans to a dangerously low level. The third section reviews the appropriateness of awarding retroactive relief. The fourth section examines whether payment of early retirement benefits will necessarily result in younger, shorter service

199. *Strauss*, *supra* note 198, at 1121-22.

200. *Chevron, U.S.A. Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 843 (1984).

employees receiving a disproportionate share of plan assets at the expense of older, longer service employees. The fifth section explores the debate over who would be unjustly enriched by receiving the dollars that employers contributed to fund early retirement plans: employers or employees. Finally, this Part considers expectations of employees, the contractual nature of early retirement plans, and ERISA's status as remedial legislation.

A. *Availability of Early Retirement and Defined Benefit Plans*

If ERISA requires employers to pay out early retirement benefits upon plan termination, employers may stop offering early retirement benefits. Also, requiring use of otherwise excess assets to pay such benefits might encourage employers to set up defined contribution plans instead of defined benefit plans, or even to offer no pension plan at all.²⁰¹ Either of these employer responses would be bad for employees.

Two reasons might cause an employer to substitute a defined contribution plan for a defined benefit plan. First, if the employer terminates a defined benefit plan, receives a reversion, and institutes a new defined benefit plan, the employer takes a risk that the IRS will find that the termination was just a sham to continue effectively the original plan while depleting it of excess assets.²⁰² When the IRS makes such a finding, the employer is not allowed to keep the reversion.²⁰³ Therefore, it is safer for employers to set up defined contribution plans after terminating a defined benefit plan; such a move makes it clear that the new defined contribution plan is not a continuation of the old defined benefit plan.²⁰⁴

Second, in defined benefit plans employers bear all the investment risk.²⁰⁵ Employers may decide not to bear that risk if they are also effectively precluded from benefiting from any potential investment gain because they always must use excess funds upon termination to pay early retirement benefits. By turning to a defined contribution

201. See *Phillips v. Amoco Oil Co*, 614 F. Supp. 694, 710 (N.D. Ala. 1985), *affid.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) (ERISA does not require private companies to adopt a pension plan for their employees.); S. KAMERMAN & A. KAHN, *THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE* 51 (1987) ("[A]bout half the private labor force is currently covered by a private ERISA-regulated pension plan and fewer than half of this sector now have or believe they will have a vested pension."). See also *Penalizing the Recapture of Surplus Plan Assets Encourages Terminations, Says ASPA to Congress*, EMPLOYEE BENEF. PLAN REV. 32, 34 (July 1984) [hereinafter *ASPA*]. ASPA refers to the American Society of Pension Actuaries.

202. Pepper & Perlmutter, *Accessibility of Surplus Pension Assets*, J. OF PENSION PLANNING & COMPLIANCE 229, 233-34 (1985).

203. *Id.* at 234.

204. *Id.* at 233. Pepper & Perlmutter note that defined contribution plans are sufficiently different from defined benefit plans that one is clearly not the equivalent of the other.

205. See *supra* note 4.

plan the employer can avoid bearing the risk of loss but does not receive any gain because contribution is fixed.

Defined benefit plans are generally better for employees than defined contribution plans. In defined contribution plans, the employees bear all the investment risk.²⁰⁶ This results in uncertainty regarding the amount of the employees' ultimate benefit entitlements and thereby undermines ERISA's goal of increasing employees' certainty in their retirement income.²⁰⁷ Also, a defined benefit plan typically pays benefits on a monthly or annual basis. This is consistent with ERISA's goal of ensuring lifetime incomes, whereas the typical defined contribution plan pays benefits in a lump sum — far less effectively ensuring lifetime income.²⁰⁸ In general, defined benefit plans provide better retirement benefits than any other type of private retirement plan, and any change which decreases their use would ultimately have negative effects on retirees.²⁰⁹

However, employers may have independent reasons for continuing sponsorship of defined benefit plans and including early retirement benefits in those plans. These reasons may offset any of the disincentives that result from requiring payment of early retirement benefits upon plan terminations.²¹⁰ For example, the employer's collective bargaining agreement often requires employer sponsorship of such plans.²¹¹ Also, practically, when negotiated agreements require such plans, few employers will offer less attractive plans to their nonunion employees. Most employers hesitate to give nonunion employees such a clear incentive to unionize.

Strong pension programs also may enhance companies' abilities to "attract and retain younger and more productive workers and to ease older and presumably less productive workers out of the firm."²¹² Another benefit accrues to employers through use of defined benefit plans, according to many compensation experts, because favorable and reliable benefit plans increase employee morale.²¹³ Similarly, attractive

206. See *supra* note 4.

207. See Note, *supra* note 2, at 814.

208. See *supra* note 4.

209. Grubbs, *supra* note 4, at 200.

210. Also, at least one commentator has questioned whether national policy does, or should, favor defined benefit plans over defined contribution plans. Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 AM. J. TAX POLY. 117, 172 (1986).

211. *Id.* This argument is mitigated somewhat by the fact that the typical collective bargaining agreement only lasts two to three years. Conversation with T. J. St. Antoine, James E. and Sarah Degan Professor of Law, University of Michigan (March 6, 1989). Cf. *General Cable Corp.*, 139 N.L.R.B. 1123, 1127 (1962) (changing the NLRB's contract-bar rule from two to three years partially because of the prevalence of three year contracts).

212. Olian, Carroll & Schneier, *Pension Plans: the Human Resource Management Perspective*, 9 KEY ISSUES No. 28 (1985).

213. Stein, *supra* note 210, at 172. See generally S. KAMERMAN & A. KAHN, *supra* note 201, at 49 ("Employees themselves view entitlement to a pension as the second most important benefit

benefit plans may increase employee retention.²¹⁴

Also, the true purpose of some plans might be to give strong benefits to key employees, especially in the case of small businesses. Such benefits are funded with expectations of large benefit payouts, not with the hope of reversion to the contributing employer.²¹⁵ Finally, employers may not put great weight on the potential for future excess asset recovery when deciding whether to establish an employee benefit plan, or which type of plan to choose.²¹⁶ Therefore, it is at least questionable whether requiring payment of early retirement benefits upon plan termination will result in substantial numbers of employers completely eschewing benefit plans or turning to defined contribution plans.

B. *Ensuring Appropriate Plan Funding*

ERISA allows employers significant leeway in funding their plans. If opportunities for employers to receive reversions are limited by requiring employers to pay more benefits upon plan termination, employers may take advantage of ERISA's flexible funding requirements and reduce their plan funding.²¹⁷ Reduced funding could result in plans with insufficient funds to pay even regular retirement benefits. The crux of this argument is that employers who know that they can receive any excess that results from liberal funding will be more willing to put tax-deferred dollars into pension plans than employers who know that they will not receive any resulting excess. Employers may be less likely to make contributions before absolutely necessary if they know that the likelihood of receiving a reversion upon plan termination is limited because they must pay out large amounts in early retirement benefits.

Reduced plan funding would have two negative consequences. First, it would decrease plan security — at least for those benefits not guaranteed by the PBGC.²¹⁸ Second, increasing the number of underfunded plans could increase the amount payable by the PBGC

they receive at work, after health and medical insurance; they also rank it second on their list of benefits they most desire to see improved.”); R. MCCAFFERY, *EMPLOYEE BENEFIT PROGRAMS* 10 (1988) (citing a Hewitt Associates survey showing that 28% of employees rate benefits as more important than pay, another 56% rate benefits and pay equally, while only 16% rate benefits as of less importance than pay.).

214. 1 G. BOREN, *supra* note 4, at § 3.22.

215. Stein, *supra* note 210, at 172. However, ERISA limits the proportion of benefits that key employees may receive as compared to non-key employees. See 1 G. BOREN, *supra* note 4, at § 3.25.

216. Stein, *supra* note 210, at 172.

217. See, e.g., *Holliday v. Xerox Corp.*, 732 F.2d 548, 552 (6th Cir. 1984); *Eager v. Savannah Foods & Indus. Inc.*, 605 F. Supp. 415, 420 (N.D. Ala. 1984); *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1132-33 (E.D. Pa. 1977); *ASPA*, *supra* note 201, at 32.

218. See Note, *supra* note 2, at 820.

through its plan guarantees.²¹⁹ Because the PBGC is already severely in debt,²²⁰ its ability to meet additional liabilities is uncertain.

However, requiring payment of early retirement benefits need not result in underfunded plans. It may be that employers do not choose their funding methods with an eye toward potential reversions. Instead, an employer may genuinely be concerned about providing funded benefits for its employees.²²¹ Or, the employer may realize that making tax credited contributions to a plan early, and allowing those contributions to increase on a tax deferred basis for a longer number of years, reduces the cost to the employer of any given defined benefit.²²² Furthermore, ERISA currently requires that employers at least conform with minimum funding standards to protect employees and the PBGC against inadequate funding. If requiring employers to pay early retirement benefits upon plan termination results in less responsible funding and ERISA's current minimum funding requirements do not fully protect employees and the PBGC, Congress can easily address that problem by setting stricter funding standards.²²³

C. Retroactive Awards in Pension Cases

The Court has sometimes been reluctant to grant retroactive remedies in pension plan cases. In Title VII²²⁴ cases, the Court has formulated a three prong test to determine the appropriateness of retroactive awards. The three criteria that must be met to preclude a retroactive award are:

- [1.] [W]hether the decision established a new principle of law
- [2.] whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance.
- [3.] whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by [the court's] decision.²²⁵

Application of this test in a number of Title VII pension cases prohib-

219. *See id.*

220. In its 1984 annual report, the PBGC reported a deficit of \$462 million. 1984 PENS. BEN. GUAR. CORP. ANN. REP. at 3.

221. For a discussion of why employers desire healthy benefit plans, see *supra* notes 211-16 and accompanying text.

222. Stein, *supra* note 210, at 173.

223. *See* 1 G. BOREN, *supra* note 4 at § 9. *Cf.* Amato v. Western Union Intl., Inc., 773 F.2d 1402, 1414 (2d Cir. 1985) (dismissing the district court's concern that not allowing the employer to receive the surplus at issue would encourage insufficient pension plan funding by stating that "[t]his concern is diminished by ERISA's provisions insuring at least minimum funding.>").

224. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e-2-3 (1982)). These cases involved claimants seeking pension plan amendments. The courts refused to award retroactive relief because of the unique nature of pension plans. *See* cases noted *infra* note 226.

225. Florida v. Long, 108 S. Ct. 2354, 2359 (1988).

iting gender discrimination in actuarial tables has led the court to deny retroactive awards.²²⁶

This three prong test does not restrict requiring retroactive payment of early retirement benefits by employers who terminated plans before the 1984 REA clarification. Admittedly, the situation passes prong one; the issue of law is a difficult one and a reasonable plan administrator could have believed that ERISA did not require payment of early retirement benefits. Applying the second prong, retroactive awards are not necessary for future enforcement; no problems of willful noncompliance are expected. Nonetheless, requiring payment of early retirement benefits upon plan termination fails the third prong of the Court's test. The Court established the third prong primarily to avoid jeopardizing the continuing viability of pension plans and to avoid unduly burdening current contributors by requiring them to pay not only their current share but also that portion of court mandated benefits that was not funded in the past.²²⁷ In contrast, most of the early retirement benefits at issue here were funded. No payments would be made that were not funded. At most, the courts will require companies to turn over to employees those funds that the companies originally voluntarily set aside in pension plans for the purpose of paying benefits to employees. Also, there is no chance of jeopardizing ongoing pension plans because by definition the only plans at issue have been terminated at least with respect to the claimants. Therefore, since there is no inequitable result, retroactive award of early retirement benefits from terminated plans is not precluded by the Court's test.

D. *Guarding the Relative Rights of Employees*

Requiring payment of benefit expectations upon plan termination could lead to younger, shorter service employees receiving a disproportionate share of plan assets at the expense of older, longer service workers. The *Blessitt* en banc court found this persuasive, because if category six covers both accrued, nonvested benefits²²⁸ and nonaccrued, nonvested benefits, then it would appear that employers would allocate equivalent shares to all employees with either type of claim.²²⁹

226. See *Long*, 108 S. Ct. at 2364 (state of Florida not required to pay retroactive benefits where it did not have notice that offering an optional pension plan with sex-based benefits violated Title VII); *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1105-07 (1983) (Powell, J., concurring) (state of Arizona allowed to pay benefits based on the contributions made prior to the decision though the Court required modification of future contributions and benefits); *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718-23 (1978) (pension plan that distinguished on basis of mortality table differentials between men and women found in violation of Title VII, but employer not required to make retroactive adjustments in benefits or contributions).

227. See *Long*, 463 U.S. at 2361.

228. See *supra* text accompanying note 142.

229. 848 F.2d at 1176.

Yet the relative rights of older, longer service employees may be protected by other means, such as establishing subcategories of priority payment. For example, the first level subcategory, within category six, could require that accrued benefits be paid first. The plan could also provide that a lower category of benefits must be paid from funds that remain after payment of the higher level benefits. Section 4044(a) specifically allows for establishment of such subcategories.²³⁰

E. *Excess Assets as Unjustly Enriching Employees or Employers*

Some commentators have argued that permitting employees to receive the excess assets that remain after plan termination would unjustly enrich those employees.²³¹ The proponents of this position argue that monies that would be used to pay early retirement benefits are excess assets. They believe that the excess assets should go to the employers rather than unjustly enriching the employees. The argument relies on the premise that in a defined benefit plan, employees are entitled only to accrued benefits — narrowly defined to exclude early retirement benefits — and anything extra represents a windfall.

This argument ignores the statutory and regulatory requirement that all assets of the plan inure only to the benefit of participants.²³² It also conflicts with Congress' purpose in allowing the employer a tax deduction for plan contributions. Congress provides that deduction as a way of encouraging employers to maintain and fund plans that ultimately result in pension income to retirees.²³³ As the dissent in *Ashenbaugh* stated, "[w]hile Congress intended this government subsidy to assist retirement saving, its purpose is perverted when the assets thus engendered inure to the plan sponsor rather than to a retiring plan participant."²³⁴ Furthermore, the unjust enrichment argument just as easily cuts the other way: reversion of excess assets to the employer unjustly enriches the employer. The *Amato* court in rejecting the theory, held that ERISA preempts any state common law claim of unjust enrichment.²³⁵

230. ERISA § 4044(b)(6), 29 U.S.C. § 1344(b)(6) (1982) ("A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) of this section in accordance with regulations prescribed by the corporation.").

231. Stein, *supra* note 210, at 153 presents this argument.

232. See *supra* text accompanying note 175.

233. *Ashenbaugh v. Crucible Inc.*, 1975 Salaried Retirement Plan, 854 F.2d 1516, 1538 (3d Cir. 1988) (Mansmann, J., concurring and dissenting); *Moore v. Reynolds Metals Co. Retmt. Prog. for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). See also Ioppoloto, *supra* note 4, at 87-88.

234. 854 F.2d at 1538.

235. 773 F.2d at 1419. See also *Van Orman v. American Insurance Co.*, 680 F.2d 301, 311-14 (3d Cir. 1982) (holding that ERISA preempts unjust enrichment claims under federal common law). See generally Irish & Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109 (1985) (regarding the scope of preemption by ERISA). That neither employees nor employers have a formal cause of action has not prevented courts from

Theories of unjust enrichment offer little aid in resolving the issue of payment of early retirement benefits. Both employees and employers make logical but not compelling claims that receipt of assets by the other side would amount to unjust enrichment. In any case, ERISA preemption may moot these arguments.²³⁶

F. *Employees' Expectations, the Contractual Nature of Early Retirement Benefits, and ERISA as Remedial Legislation*

There are compelling independent policy reasons for requiring employers to pay early retirement benefits upon plan termination. Employees legitimately expect to receive the early retirement benefits offered in their pension plans. Employees base their expectations, at least in part, on the fact that the pension benefits represent a form of deferred compensation for services the employees render while actively employed. These employee expectations should be fulfilled before an employer captures excess assets. Moreover, an employer's elective pension benefit plan creates contractual obligations that should be fulfilled upon plan termination.

Employers do not give pension plans to their employees gratuitously.²³⁷ Instead, pension plans are simply a form of deferred compensation. This was clear to the Congress when it passed ERISA. The Senate report recognized that "losses of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received."²³⁸ The remarks of Senator Harrison Williams, "one of the principal architects of ERISA"²³⁹ lend further support. He stated that "pensions are not gratuities They represent savings which the worker has earned in the form of deferred payment for his labors."²⁴⁰ The theory of deferred compensation is further strengthened when combined with Supreme Court recognition of retirement benefits as contractual obligations.²⁴¹

relying on the concept of windfalls. *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1133 (E.D. Pa. 1977) ("[E]mployees . . . will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.").

236. See *supra* note 235 for references that discuss the extent of ERISA's preemption of these arguments.

237. If this was false for publicly held companies, those plans would violate the requirement that a corporation must be run for the benefit of its shareholders. *Cf. Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

238. S. REP. NO. 383, 93d Cong., 2d Sess. 45, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4930.

239. *Ashenbaugh v. Crucible Inc.*, 1975 Salaried Retirement Plan, 854 F.2d 1516, 1537 (3d Cir. 1988) (Mansmann, J., concurring and dissenting).

240. 119 CONG. REC. S29995, 30005 (daily ed. Sept. 18, 1973).

241. *Florida v. Long*, 108 S. Ct. 2354, 2364 (1988) (emphasis added) ("[A] pension plan, funded on an actuarial basis, provides benefits fixed *under a contract* between the employer and retiree based on a past assessment of the employee's *expected* years of service, date of retirement, average final salary, and years of projected benefits.").

The employer has a contractual duty to pay these benefits even if that duty is not explicitly required by ERISA.

Furthermore, Congress passed ERISA as remedial legislation. As in the case of other remedial legislation, the courts should construe ERISA to provide maximum protection to the employees that Congress designed it to protect.²⁴² That means construing ERISA, where its provisions are unclear, to protect employees' expectations regarding early retirement benefits.

In summary, though some public policy concerns suggest that employers should not be required to pay early retirement benefits upon plan termination, many of those concerns are either illusory or may be resolved by congressional or employer action. The only consideration remaining is that requiring such payment might cause employers to favor defined contribution plans or no plan at all over defined benefit plans. While empirical data is not available, this concern is mitigated by the opposing considerations stated above.²⁴³ Furthermore, there are compelling independent policy reasons for requiring payment of early retirement benefits. From a policy perspective then, employers should be required to pay funded, noncontingent early retirement benefits as accrued benefits upon plan terminations before the employer may receive a reversion of excess assets.

CONCLUSION

If early retirement benefits are "accrued benefits," section 4044 when read in conjunction with section 411(d)(3) requires that employers pay them upon plan termination before the employer may receive a reversion of excess assets. However, the circuit courts are split as to whether early retirement benefits are accrued benefits. The split is understandable because the relevant statutory language of ERISA does not clearly resolve the question, and the legislative history is ambiguous. While all of the applicable agencies are not clearly in agreement on the issue, the IRS believes that funded, non-contingent early retirement benefits of the type at issue in *Amato*²⁴⁴ are accrued benefits, and that ERISA therefore requires employers to pay those benefits upon plan termination.

The distribution requirements of ERISA section 4044(a)(6) could be read as requiring payment of early retirement benefits. However, all of the agencies involved interpret section 4044(a)(6) as *not* requiring payment of early retirement benefits. The courts' normal principle of deference to interpretations of the agencies responsible for adminis-

242. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984).

243. *See supra* text accompanying notes 211-16.

244. *Amato v. Western Union Intl., Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986). *See supra* text accompanying note 127.

tration of the statute in question should therefore lead to court enforcement of the agencies' interpretation.

Therefore, while section 4044(a)(6) should not be read as requiring payment of all early retirement benefits, the IRS's position that funded, non-contingent benefits are accrued benefits should be accorded some deference. Also, policy considerations militate in favor of requiring payment of early retirement benefits when a plan is terminated. Although some policy implications seem to preclude requiring payment of early retirement benefits upon plan termination, these implications lack persuasiveness. Employees have legitimate expectations that they will have an opportunity to earn early retirement benefits. Employees trade current income for the opportunity to receive those future early retirement benefits. The employer denies the employee the opportunity of ever meeting the plan criteria for early retirement benefits in many cases where the employer terminates the pension plan. Requiring the employer to pay early retirement benefits to employees with the funds that the employer originally contributed to the plan for that purpose offers a fair solution and certainly lies within ERISA's goals of providing reliable retirement benefits. Such a requirement is also consistent with ERISA's status as remedial legislation which should be construed in favor of the employees that it was designed to protect.

— *Dana M. Muir*