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ERISA

Is Employee Retirement Income Really Secure?

Richard D. Furlong

> We must realize that the democratic form of government is bound to penetrate our industrial life as well. It cannot be confined merely to our political institutions.
>
> —Sidney Hillman, President Amalgamated Clothing Workers Union, 1924

Approximately six hundred billion dollars are currently invested in private pension plans subject to the Employees' Retirement Income Security Act of 1974 (ERISA). By 1995, the figure is expected to approach three trillion dollars. The assets of these pension funds represent the largest private pool of capital in the world and, as such, a new form of wealth. From this fact is derived the preeminent question facing advanced corporate capitalism: who owns and who will control this new form of economic power? This article will examine various aspects regarding the federal regulation of this spectacular form of wealth through an analysis of the current legal battles and their relationship to past and predicted trends in pension reform.

HISTORICAL EVOLUTION OF PENSION FUND DEVELOPMENT

Assumptions underlying federal regulation of employee pension funds, as well as those dictating current judicial discourse on the subject, are best understood by examining the historical roots which gave rise to the development of such funds.

The concept of providing some degree of retirement aid to employees started to form during the period of huge industrial expansion that followed the Civil War. The American Express Company started a plan in 1875, soon to be followed by plans initiated by the railroads and some of the giant industrial corporations. These early pension funds were usually poorly funded and poorly managed, thus mandating outlandish vesting requirements. Then, as now, the notion of "pension funds" was particularly appealing to employers for a number of reasons. First, it allowed employers to keep employees for long periods of time, thereby insuring a captive audience pool with all the attendant benefits of quasi-bound labor. Second, it permitted the squeezing out of older, less productive employees. Third, in 1926, Congress decreed that employers' contributions to pension plans were tax-deductible, and, as such, not only were employers given a way to avoid tax on excess profits, but the net cost to employers was decidely less than the actual contributions to the plans. Finally, the fact that these sums could be invested in the company by the fund managers made the plans even more desirable.

Labor leaders were acutely aware of these benefits accruing to employers and, by and large, opposed the concept of pension plans as being another means of alienating the worker from the union while increasing his reliance on the company. Samuel Gompers argued that labor unions should shun pension funds in favor of increasing workers' salaries, which in turn would encourage self-management of retirement funds. Labor leadership thus perceived pension funds as a threat to its role within the institutional framework, and its actions were guided accordingly. This lack of organized support rendered the push for pension coverage impotent, and workers were forced to rely on personal savings to carry them through their later years. However, this attitude of stagnation was reversed by the onslaught of the Depression and by judicial legitimization of pension fund bargaining.

The desperation of the working class during the Depression made it clear to the labor leadership, as well as to government officials, that some sort of minimum retirement coverage for workers must exist. The benefits provided by the Social Security Act of 1935 were woefully inadequate, and labor (especially the leadership of the progressive Congress of Industrial Organization) began to apply pressure for pension benefits to act as a supplement to Social Security. The freeze on wages implemented during World War II did not effect increases in benefits from pension plans (fringe benefits were excluded from the freeze), which, when coupled with the tax benefits available to

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employers, made the funds very attractive to both management and labor. Finally, in 1949, the Supreme Court ruled in *Inland Steel* v. *N.L.R.B.*, 336 U.S. 960, that, because pensions were within the structure of wages as defined by the Taft-Hartley Act, pension plans fell within the scope of items upon which management was obligated to bargain. The coinciding of judicial legitimization with economic benefits and necessities led to the huge expansion of pension funds during the 1950s and 1960s.

With this huge growth came the simultaneous abuse of the assets of such funds. Plans were regularly underfunded, trustees blatantly abused their common-law fiduciary responsibility, and, most damaging, underfunded plans were routinely terminated resulting in the immediate cessation of all benefits. Congress responded by enacting the Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. 301, whose main purpose was to curb abuses by plan administrators. This legislation had little practical effect on quelling employer and/or trustee abuse of funds, with the result that at least twenty thousand workers were annually affected by pension plan failures. In response, Congress enacted ERISA in 1974, which stipulated minimum funding and vesting standards, regulated the actions of trustees in administering the fund, and insured all guaranteed benefits by the federal government.

HISTORICAL EVOLUTION OF PENSION BENEFITS AS PROPERTY RIGHTS

Historically (as well as in many instances today), employer "contributions" to pension funds were viewed as a gratuitous bonus which remained the property of the employer until actually paid out. Since the employee had no legal right to this property as it was merely a "gift," he/she could have all or part of the promised benefits taken away at the whim of the employer. As Paul Harbrecht has pointedly asserted in his book, *Pension Funds and Economic Power*:

> The early attitude of employers toward pension plans was that pensions were gifts to their workers in recognition of long and faithful service and that no legal rights were given to employees who became beneficiaries of a plan. Plans at this period were extremely informal, often consisting of mere statements that the employer expected to pay certain benefits to those who performed certain service requirements. In general, the employer did not set up a certain fund to provide pension benefits and the text of the plan was carefully worded to relieve him of all liability.

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The Supreme Court gave legal credibility to this view in *Pennie* v. *Reis*, 132 U.S. 464, holding that monies taken out of a policeman's pay each month and put in a pension fund were not the property of the policeman and thus no legal rights attached. The notion that a pension is the equivalent of a gift is still found in legal decisions today and is partially responsible for the minimum vesting requirements of ERISA.

Gradually, the courts began to concede that employer "contributions" to pension funds actually represented the deferred wages of workers. Legal battles over rights to these deferred wages increasingly were fought in an arena governed by common-law contract rules. As one state court commented:

> The derived benefit to the employer can be summarized as allowing management flexibility by assuring an efficient and faithful source of manpower. The legal consideration flowing towards the employee is the protection of future retirement benefits. The net result is that private pension plans constitute deferred compensation, which, once vested, bestow upon the employee a legal right to fruits of his continued labor. (*Luli* v. *Sun Products Corp*, 60 Ohio 2d 144).

Interestingly, the evolution from conceptualizing pensions as deferred wages rather than gratuities, as a practial matter, did little to improve employee rights to those benefits. Historical notions of master-servant loyalty obligations (see above quote) were merged with the contract notions of collective bargaining and this hybrid was applied to pension payments in the form of vesting requirements. In

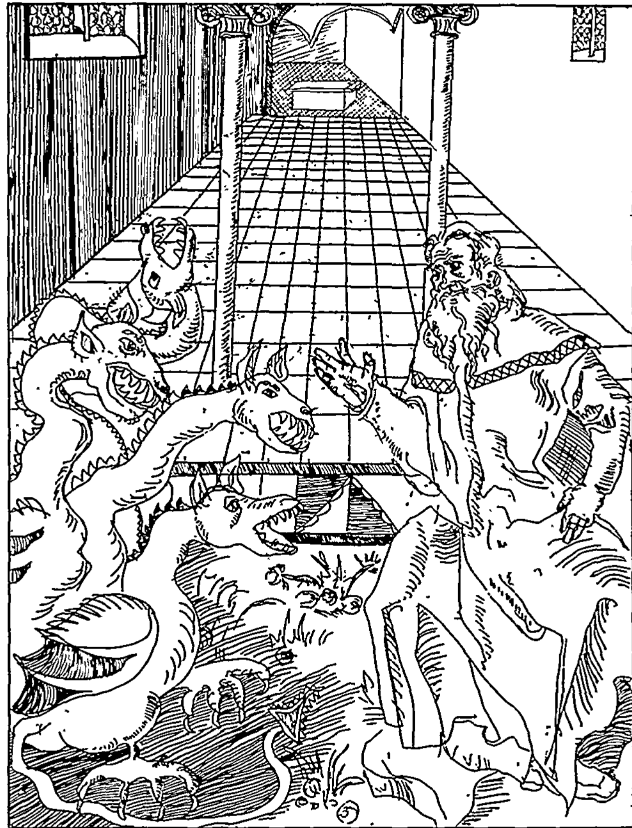
reality, employers retained the legal rights to employees' property until such time in the future as the vesting requirement is fulfilled. This reversionary right to the employee's property could be exercised by simply terminating the plan or the job. An example is a recent case, *Lovetri v. Vickers Inc.*, 397 F. Supp. 293, in which the employees sought partial compensation of paid contributions after their plant closed, thereby terminating employment. The court stated:

> Unless a contract provides otherwise, should it's performance become impossible, the promisee must repay the value of the benefit conferred on him by the partial performance of the promisor. Defendant, however, did not promise that plaintiffs would remain in defendant's employ until retirement thereby becoming entitled to the annuity; it promised the annuity only if they actually remained employed until retirement. Plaintiffs in other words were not paid for their labor with an annuity, but only with the chance of receiving one should certain conditions be fulfilled.

Since private property rights confer the right to withhold from others the enjoyment or use of an object, it is apparent that vesting requirements effectively placed rights over employee property in the hands of employers, "deferred wages" notwithstanding.

OVERVIEW OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA represents a congressional response to years of pension fund abuse. Congress had found that, "owing to the terminations of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." The Act, as amended, is divided into four titles, each containing several subtitles. Title I regulates the protection of employee benefit rights by spelling out the reporting and disclosure requirements for plans, minimum participation and vesting requirements, fiduciary responsibilities of fund trustees, and administration and enforcement of the Act. Title II amends the Internal Revenue Code of 1954 to conform the code to Title I specifications. A Joint Pension Task Force is created by Title III to study the results of the Act and issue periodic reports to various congressional and administrative bodies. Title IV is the heart of ERISA as it establishes the Pension



Benefit Guaranty Corporation (PBGC) which federally insures, within certain statuatorily prescribed limits, the payment of nonforfeitable benefits. PBGC collects premiums from enrolled employers and, in the case of underfunded plans, has the power to claim up to 30 percent of the net worth of an employer to help defray the costs of the guaranteed benefits.

ERISA regulates only private defined-benefit plans and, as such, excludes public as well as defined-contribution plans. A defined-contribution plan is incapable of being underfunded since, by law, a separate account for each participant must exist and a participant's benefits are measured solely by the level of funds in his/her account. Conversely, in a defined-benefit plan, the level of benefits is set, with the level of funding to be determined by the employer subject only to the minimum funding standards set forth in §302.

Minimum standards notwithstanding, plans became underfunded for a number of reasons. First, pension funds are invested heavily in common stocks and thus actual rates of return are subject to market trends while predicted rates of return are subject to hyped-up actuarial assumptions. An

increase of one percentage point (on projected return) can cut the cost of contributions by as much as 25 percent. Second, initial underfunding usually occurs since credit must be given for past services, although ERISA allows this credit to be amortized over thirty years for new plans and forty years for pre-ERISA plans. Third, plans may be amended by negotiated increases which also may not be met by current contributions. Fourth, plans with adequate funding may be merged with a large unfunded plan as a result of a takeover or merger. The termination of the plan itself usually occurs due to the firm's filing for bankruptcy, a total or partial shutdown of the business, or forced termination by the PBGC due to a series of "reportable events" indicating plan insolvency.

Congress was well aware that setting minimum funding and vesting requirements would do little to rectify the harm that would be wrought on workers who would lose their pension in spite of such standards. As stated earlier, the most significant aspect of ERISA was the establishment of the PBGC to insure all nonforfeitable benefits. When a plan terminates, the employer is required to pay all vested benefits from the assets of the fund. In the case of unfunded liabilities, the PBGC is authorized to "provide for the timely and uninterrupted payments of pension benefits to participants and beneficiaries." These payments are underwritten in two ways. First, pursuant to §4006(a), the PBGC is authorized to set and collect premium rates from plan administrators. Failure to pay premiums may result in substantial penalties, however the PBGC must continue to pay guaranteed benefits even if the plan administrator fails to pay the premiums when due. The second method of underwriting the insurance program, and upon which the vast majority of ERISA litigation centers, concerns the right of the PBGC to seek reimbursement from the employer for payments made from PBGC funds to cover nonforfeitable benefits unable to be paid from the pension fund assets. Congress, no doubt aware of the current state of underfunding, limited employer liability to the PBGC to 30 percent of the employer's net worth. The problem lies in the fact that, though the PBGC claim has the "first shot" effect of a tax lien, the 30 percent figure is miniscule compared to the far greater percentages of unfunded liabilities due to be paid in the near future. The overriding concern today is that many companies with huge unfunded liabilities would prefer to pay the 30 percent net asset liability instead of having to fund the much larger pension obligations. This in turn would dump the entire liability in the lap of the federal government and, given the hundreds of billions of dollars invested, it is doubtful the government could make good on its guarantee to insure "deferred wages." Notably, Lloyds of London has refused to underwrite the PBGC since to do so would amount to "insuring the profitability of the American economy." Further, the PBGC has recently requested from Congress permission to hike the premium rates for the third time since 1975. Some analysts project that what initially started out as a dollar per participant may soon escalate to forty or fifty dollars per participant. Tragically, the image of pension fund stability which ERISA sought to bolster is merely a facade diverting attention from current trends and their predictably dire consequences.

CURRENT AREAS OF LITIGATION DEFINING THE NATURE OF PENSIONS AS PROPERTY RIGHTS

Vesting. In current labor law, it is imperative that critique not separate form from substance. Hence case law defining the provisions of ERISA, in particular those relative to vesting, must be analyzed for their results and how these results influence current conceptions of the nature of a pension. Section 203 establishes the minimum vesting standards. In short, a plan must provide for nonforfeitability of an employee's right: (1) to his normal retirement benefit upon attainment of normal retirement age; (2) to his accrued benefit derived from his own contributions; and (3) to his accrued benefits derived from employer contributions under any of three vesting schedules: (*a*) ten year vesting—100 percent upon completion of ten years of service; (*b*) five to fifteen year vesting—25 percent at five years of service, 5 percent for each year five-to-ten, and 10 percent for each year eleven-to-fifteen; (c) rule of forty-five—50 percent for an employee who has not separated from service and who has completed at least five years of service, provided that the sum of his age and years of service equals or exceeds forty-five, and 10 percent for each additional year of service thereafter. Under any of the three schedules for vesting of accrued benefits derived from employer contributions, no vesting is required during the first five years of service, at least 50 percent is required after ten years of service (unless the 100 percent ten year schedule is adopted), and full vesting is required after fifteen years of service (under the five-to-fifteen year schedule), and at age fifty with at least ten years of service (under the rule of forty-five). Of course, any plan may provide for earlier vesting.

The majority of plans providing full vesting after ten years appear fair on their face; however, it is important to realize how this ten year period serves employer interests. First, if the employee remains with the same employer for the full period, the old notion of bound labor is resurrected

to serve the employer. For the employee who has served seven or eight years, the carrot at the end of the stick is a strong inducement to remain with the same employer. Further, the fact is that the majority of workers do not remain with the same employer for the duration of the ten year period and hence, upon changing jobs, lose all of the deferred wages that have been set aside for them. This is particularly true of younger workers, and the state of affairs was summed up by Professor Merton Bernstein when he remarked, "Unless Congress can do better . . . on vesting, the reform bill will constitute as big a fraud as the plans it purports to improve" (letter to the *New York Times*, April 2, 1974). A study appearing in the September 1982 *Monthly Labor Review* indicates that close to 30 percent of all workers have been on their jobs less than one year and that the present median job tenure was only slightly more than three years. In addition, over one-half of the work force covered by pension funds change jobs well before the ten year vesting standard imposed by ERISA. Since few companies vest their employees voluntarily before ten years, the implication is that as a practical matter a pension is not a deferred wage but a defeatable gratuity subject to the high mobility of American society.

In *Nachman Corp.* v. *PBGC*, 446 U.S. 359, the collective bargaining agreement contained a clause limiting benefits upon termination of the plan to the assets in the pension fund. At the time of termination, the pension fund assets were sufficient to pay only about 35 percent of the vested benefits. Section 4022 (a) of Title IV provides that if benefits are "nonforfeitable" they will be insured by the PBGC which in turn can seek partial or total indeminification from the employer. The employer argued that, although such benefits were vested, the clause rendered those benefits forfeitable and thus the PBGC could neither pay out the benefits nor seek the reimbursement from the employer. Justice Stevens affirmed the Circuit Court opinion which had reversed the District Court opinion in holding that the terms *nonforfeitable* and *vested* are synonymous and, in spite of such a clause, the accrued benefits were nonforfeitable as defined within §3 of Title I of ERISA and thus were insured by the PBGC under Title IV of ERISA. The court relied on PBGC regulations in determining that nonforfeitable benefits include all vested benefits and must be thought of in terms of the quality of a participant's right to a pension rather than a limit on the amount he may collect. Although apparently closing the door on employer disclaimer clauses, the court explicitly stated that employer liability disclaimer provisions are contractually effective to limit employee-participant's recourse against the employer when plan assets are insufficient to provide vested benefits.

Nachman *upholds the notion of a vested benefit, yet in a real sense shifts the responsibility for payment of that benefit from the corporations to the American taxpayer.*

Hence, the court provided employers with a simple legal drafting problem wherein direct employer liability to employees can be limited in contractual terms by inserting an appropriate disclaimer clause. With such a clause, employer liability will never exceed the 30 percent payable to the PBGC. Given both the instability of the PBGC, coupled with the huge unfunded liabilities present in many plans, *Nachman* upholds the notion of a "vested" benefit; yet, in a real sense, it shifts the responsibility for payment of that benefit from the corporation to the American taxpayer.

In part, the lower courts are apparently coming to grips with the question of who will pay these huge unfunded liabilities. Clearly, they are bound by common-law notions of contract and disclaimers of direct responsibility as approved in *Nachman*; however, in instances where *Nachman* could have been construed broadly, the courts have chosen to apply narrow construction. For instance, in *In the Matter of M&M Transportation Company*, 288 Pen. Rept. (B.N.A.)d-4, the court was faced with a situation in which a worker who performed service for twenty-one years was going to be totally denied a pension due to the provisions of limitation contained in the five year phase-in formula contained in §4022 of ERISA (one of two instances where PBGC will not insure 100 percent of vested benefits, the other being the ceiling mark of $1,250). Briefly, §4022 (b)(1), (8) provides that benefits which are created or increased within five years of plan termination are insured only to the extent of 20 percent per year in which such benefits were in effect prior to plan termination. The five year phase-in plan was created to protect the reserves of the PBGC by preventing abuses by employers, because otherwise there might be temptation to increase benefits irresponsibly. *M&M* had terminated its plan shortly after amending it, and the PBGC thereafter refused to pay any part of the worker's "deferred wage." *M&M* claimed that a direct suit by the employee against the employer was barred by §4062, which provides for employer liability to the PBGC. The bankruptcy judge held that the employer was beyond the reach of claims arising from its terminated

pension plan, except to the extent of its liability to the PBGC. The court reasoned that to allow direct liability would contravene the desire of Congress not to impose substantial economic hardships on employers. The District Court disagreed, reasoning that, where an employer has substantial assets, he may not substantially underfund the pension plan and then seek to avoid the obligation to the employees by shielding himself behind §4062. The court concluded that, as a matter of policy, ERISA could not have been intended to absolve an employer of its obligations to pension plan participants. Analyzing the situation in terms of contract as well as public policy, the court concluded that,

> it has been held that the creation of a pension plan constitutes an offer of unilateral contract by an employer to his employees. By performing the conditions of the offer, the employees accept the offer, and a unilateral contract is thereby created.

The employer attempted to show that state contract law was preempted by ERISA §514; however, the court noted, "Congress did not intend to render prior law irrelevant where it fairly accommodates the interests of the parties and is not inconsistent with ERISA's purposes." Without stating it explicitly, the court attempted to provide several channels for employee redress to obtain otherwise vested benefits.

In *Murphy* v. *the Heppenstall Company*, 635 F2d 233, the court accomplished the same goal through different means. Retired employees sued to recover directly from the employer the difference between the pension payments guaranteed by PBGC and those negotiated between the employer and the union. The employer claimed that the employees' claim grew out of state contract law and that ERISA pre-empted this, thus negating any claim above and beyond that payable to the PBGC. Citing *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, the court reasoned that, since the employees were seeking to enforce a provision of collectively bargained pension agreement, federal common law applies. Judge Gibbons found in the legislative history of ERISA the intent that a body of federal substantive law will be developed by the Courts to deal with rights and obligations under private pension plans. Then the court acknowledged that *Nachman* allowed employers to place a contractual limit on their direct liability to employees; however, in this instance, the failure of such a contractual limit to be placed rendered the employer liable. By taking this narrow approach to the *Nachman* holding, the court permitted a federal common law contract claim directly against the employer for the difference between the payments due, under the pension plan as guaranteed by the PBGC, and payments due directly from the employer under the collectively bargained pension agreement.

The courts in both *M&M Transportation* and *Heppenstall* reached the same result yet utilized different methods to do so. The former dealt with a situation in which there was no union (that is, collectively bargained agreement) and therefore had to rely upon a merger of state contract law remedies with the public policy underlying ERISA. The latter was dealing with a collectively bargained agreement and could thereby sidestep §514 of ERISA (preemption) by mobilizing §301 (a) of the Taft-Hartley Act (authorizing creation of federal common-law of labor management contracts).

As both these cases are indicative of the lower court reaction to *Nachman*, one wonders why the lower courts are attempting to circumvent *Nachman* by reading it narrowly. This writer asserts that the lower courts are becoming increasingly afraid of the huge amounts of unfunded liabilities that will be coming due shortly and, by allowing direct contractual suits, are attempting to instill some degree of responsibility in employers to make adequate payments to the funds. If there is an unfunded liability, the question is not whether or not someone will take a loss but rather who will take the loss. As stated earlier, pensions are an integral part of the institutional system comprising corporate capitalism and as such can survive only if workers have faith in the viability of the funds. Similar to the FDIC, the PBGC was established to instill some degree of faith in the system; however, it is clear that neither insurance program could make good on its promises in the event of a catastrophic collapse of the economic system. The legitimization of pensions within the institutional framework is decidely dependent upon the confidence of those whose "deferred wages" constitute the system. The lower courts are aware of this and, when possible, have tailored their decisions accordingly.

Deferred wages. If "deferred wages" are to have any meaning, the courts must face the question of who will control the allocation and investment of such funds which rightfully belong to the workers. Perhaps the most significant case to address this issue directly is *Daniel* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 439 U.S. 551. Daniel, a union member, brought an action alleging that the trustees and union had misrepresented and omitted to state material facts with respect to the value of his interest in the pension plan and were therefore guilty of securities fraud. The Cir-

cuit Court of Appeals, 561 F2d 1223 (7th Circuit), agreed with the District Court, 410 F. Supp. 541, that plaintiff Daniel had made an investment decision by agreeing to work for a certain employer who maintained a pension plan. The court held that since the union pension fund was invested for a common enterprise, had its management committed to a third party other than the union members, and was reasonably expected to produce profits and income, the accepting of employment was an "investment contract" and hence a "security" for the purposes of the Security Acts of 1933 and 1934. The court also noted that the employee was the true contributor to the pension fund since there was a disposition for value—namely, that a proportion of the employees overall wages were contributed to the fund (deferred wages).

The decision and its implications had strong reaction throughout Wall Street and union offices across the country. In effect, the 7th Circuit was creating a huge new propertied class based on the notion of deferred wages. If interest in a pension fund was a security, pension beneficiaries could use pension funds as collateral for home mortgages or higher education loans or any number of investments which now are inaccessible to the average worker. Naturally, there are huge implications when fifty million working and retired Americans have the right to exercise control over hundreds of billions of dollars in pension assets. Paul Harbrecht succinctly defines the issues by stating:

> great social advantages may be derived from treating pension funds as property of the pensioners. A property interest in the pension fund would return to the worker some of the economic independence which the pension system has taken from him. As acknowledged owners, employees would be given some share in the direction and control of pension funds. This would mean that they would have some voice in the investment of these assets. A voice in the investment policy would allow the employees to help direct fund investment into channels beneficial to them, such as housing and savings and loan activities. [*Pension Funds and Economic Power*, 1959]

On appeal to the Supreme Court, industry groups—the American Bankers Association, the Department of Labor, and, not surprisingly, labor unions—all filed amicus briefs urging a reversal of the Circuit Court claiming that application of the Security Laws to pension funds would mean that millions of deprived pensions will bring suits demanding billions of dollars in pension funds they never received. In a seven-to-zero decision (Stevens absent), the Supreme Court reversed the lower court by holding that the employees' decision to accept or reject employment had little to do with perceived investment possibilities of the future pension but was instead based on the immediate ability to earn a livelihood. The court concluded that "it ignores the economic realities to equate employer contributions with an investment by the employee."

. . . pensions are an integral part of the institutional system comprising corporate capitalism and as such can only survive if workers have faith in the viability of the funds.

Underlying the Court's holding are the assumptions that (1) employees are too ignorant to realize the investment possibilities of placing payments in a pension fund; (2) control of assets must remain in the hands of third parties—that is, employee rights must still be framed in reference to gratuities and not deferred wages; (3) because employees make no "investment" in the pension fund they can acquire no stake in the direction of their assets nor any interest in the fruits of their labor. The Court's assumptions undermine worker control over this new form of derivative property so that control over their own labor (strike) is still the only recognized power labor manifests. Ironically, most collective bargaining agreements contain "no-strike" clauses thus removing even this weapon from labor's arsenal.

In examining the question of what is the property nature of a pension asset, it is helpful to examine those cases in which there exists an excess of plan assets upon termination of the plan. Naturally, the question in these cases is over distribution of residual assets. Section 403 (c)(1) provides that assets of an employee benefit plan are to be held for the exclusive benefit of the plan participants while Section 403 (c)(A) allows return of employer "contributions" if the contribution was made by reason of mistake of fact. Under §4044 (d)(1), three conditions must exist for residual assets to be distributed to the employer: (1) all liabilities must be satisfied; (2) the distribution is not in contravention of any law; (3) the plan provides for such a distribution in these circumstances. To date, the litigation has centered around the third condition—that is, what constitutes a legally sufficient reversion clause.

Two analytically distinct categories of cases have so far

been litigated. The first involves "impossibility of amendment" restriction, meaning that the plan contains a clause stating that plan assets shall never revert to the employer. The PBGC has taken the position that the plan cannot at any time thereafter be amended to include an otherwise permissible reversion provision. However, in *In Re C. D. Moyer Co. Trust Fund*, 107 F. Supp. 1128, the only fully litigated case on this issue, the court permitted a reversion of excess assets totaling $90,000 to the employer on the premise "that the parties did not contemplate that at the time of termination there would be an excess due to overfunding." The court emphasized that:

> employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the plan on sound financial basis.

Interestingly, the court implicitly views the employer contributions as gratuities because there is no logical reason why employee property which earns more profits than predicted should revert to an employer. The only justification for such a reversion must be that the employer retains a certain property interest in payments. One wonders what rationale exists in a system which allows employers to shift huge unfunded liabilities onto the back of the PBGC while allowing "mistake of fact" overfunding to accrue to the benefit of the employer.

The second type of case in this area is known as "the appropriate time for amendment" case. Since ERISA requires that any reversionary interest be specifically spelled out in the plan, employers often attempt to add amendments at termination or post-termination to provide for the reversion of what appear to be excess assets. In *Audio Fidelity Corp.* v. *PBGC*, 624 F2d 513, there existed a plan which specifically provided for the distribution of excess assets to employees. Seven months after the termination, the employer amended the plan retroactive to the date of termination to provide for a reversion of residual assets to the employer. The District Court (No. 78-0623-R.E.D.Va.) held that the excess profits were made by mistake of fact and, because there was no indication that the amendment upset the benefit expectations of the participants, any distribution of funds to them would be unjust enrichment. The fallacies of the reasoning in *In Re C. D. Moyer Co. Trust Fund* are appliable to this decision. On appeal, the 4th Circuit reversed, holding that the amendment was ineffective since it was post-termination and the rights of all parties became fixed on the date of termination. More importantly, the court rejected the unjust enrichment argument on the basis that the income was derived from payments for services rendered by employees rather than from gratuities.

Courts in different circuits and districts are generally divided in their approach to property claims on excess assets. These cases demonstrate that the concept of a pension as a deferred wage is far from being universally accepted. Although it might be argued that terming and conceptualizing a pension as a deferred wage versus a gratuity is nothing more than a matter of semantics, in actuality the stakes are much higher. The battle to determine who shall control the investment of pension funds and therefore determine the future of the U.S. economy is dependent upon how workers, unions, and jurists frame such property notions.

To reiterate, ERISA is an institutional attempt to add stability to what is readily conceded to be very unstable economic transactions. The roots of pension legislation are derived from prior notions regarding worker loyalty to employers (vesting); however, statistical analysis of present-day worker mobility does not comport with the professed motivation behind the vesting provisions. As a result, fewer than 45 percent of all covered participants will collect a pension, even under ERISA. Also, case law indicates that the right to consider the pension of a worker as earned (deferred wage) and hence an investment growing out of labor is virtually nonexistent. Certain lower courts are coming to grips with the future disastrous consequences of present-day unfunded liabilities and are rendering decisions which they hope will instill responsibility in plan payers. In short, judicial patchwork is attempting to fill the gapping holes permeating ERISA. What is truly needed is comprehensive legislation providing for immediate vesting of all accrued benefits, possibly in the form of liberal portability provision, thereby rendering *Daniel*-type issues and excess asset issues moot. Since there can be no legitimization of form where the substance is unequal, the form must be re-conceptualized and then re-written.

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