

# NOTES

## ERISA'S TITLE IV AND THE MULTIEMPLOYER PENSION PLAN

The Employee Retirement Income Security Act<sup>1</sup> has required tremendous changes in many pension plans. For multiemployer plans, typically organized under the Taft-Hartley Act,<sup>2</sup> the most significant changes were ERISA-mandated guarantees of pension benefits under ERISA's Title IV.<sup>3</sup> Title IV created an insurance system designed to protect employees against the loss of their pensions. For the first time, employers were made statutorily liable for pension benefits if the pension fund was unable to pay a full pension benefit to the employees.

Sponsoring employers have found the obligations imposed by Title IV difficult to accept, and some believe that the pension plans are being adversely affected contrary to ERISA's goals. Employers therefore have challenged both the applicability of Title IV's provisions to multiemployer plans and the constitutionality of its liability-imposing features. At the same time, in the wake of predictions that Title IV as written will contribute to plan failure rather than protect employees, a

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### THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 29, 31, 42 U.S.C.) [hereinafter cited by session law sections of ERISA];

S. 1076, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S5309 (daily ed. May 3, 1979) [hereinafter cited as S. 1076];

Brief for Appellees, *Connolly v. PBGC*, 581 F.2d 729 (9th Cir. 1979) [hereinafter cited as Brief for Appellees];

SUBCOMM. ON LABOR OF SENATE COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (1976) (3 vols.) [hereinafter cited as LEG. HIST.];

N. LEVIN, *ERISA AND LABOR MANAGEMENT BENEFIT FUNDS* (rev. 2d ed. 1975) [hereinafter cited as N. LEVIN];

D. MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* (3d ed. 1975) [hereinafter cited as D. MCGILL];

J. MELONE, *COLLECTIVELY BARGAINED MULTI-EMPLOYER PENSION PLANS* (1963) [hereinafter cited as J. MELONE];

PENSION BENEFIT GUARANTY CORP., *MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214* (1978) [hereinafter cited as PBGC STUDY];

Davis, *Multiemployer Pension Plan Provisions in 1973*, MONTHLY LAB. REV., Oct. 1974, at 10 [hereinafter cited as Davis];

Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) [hereinafter cited as Hochman].

1. 29 U.S.C. §§ 1001-1381 (1976).

2. *Id.* §§ 141-188.

3. *Id.* §§ 1301-1381.

debate continues over the wisdom of applying Title IV's provisions to Taft-Hartley plans. This Note examines these challenges.

## I. MULTIEMPLOYER PENSION PLANS: AN INTRODUCTION

### A. *Characteristics of Multiemployer Taft-Hartley Plans.*

In the United States there are approximately 2,000 multiemployer pension plans<sup>4</sup> covering nearly eight million employees, or about twenty-five percent of all workers covered under private pension plans.<sup>5</sup> Of these multiemployer plans, the most significant type is organized pursuant to a collective bargaining agreement in which a group of employers agrees to contribute to a trust fund administered jointly by union and employer representatives.<sup>6</sup> Plans of this kind are known as Taft-Hartley trusts because section 302 of the Taft-Hartley Act governs their operation.<sup>7</sup> Such plans are popular in the construction, mining, apparel and service industries, motor and water transportation, and wholesale and retail trade.<sup>8</sup> In the 1960s and 1970s the number of participants in multiemployer plans increased at twice the rate of single employer plans, resulting in the coverage under multiemployer plans of a progressively larger proportion of all pension plan participants.<sup>9</sup> While some of the largest plans are nationally organized, other plans

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4. The standard definition of a multiemployer plan is a "plan which covers the employees of two or more financially unrelated employers." J. MELONE 1. See also D. MCGILL 78. For ERISA's purposes, a multiemployer plan is one maintained pursuant to a collective bargaining agreement requiring the contributions of more than one employer. If any one employer's contributions for the plan year comprise 50% or more of the aggregate contributions for the year, the plan is not a multiemployer plan under ERISA's definition. 29 U.S.C. § 1002(37)(A) (1976). Once a plan achieves multiemployer status, the percentage contributed by any one employer may rise to 75%. 29 U.S.C. § 1002(37)(B) (1976). See also T.D. 7552, 1978-2 C.B. 158. The PBGC has proposed revisions of this definition. See note 220 *infra*.

5. PBGC STUDY 20.

6. *Id.* 21; see N. LEVIN 16-17, 33-34. Given the dominance of this form of organization, much of the literature treats the term "multiemployer plan" as synonymous with "Taft-Hartley trust." The lack of precision in these terms creates particular difficulty in determining the kind of plans included in various numerical estimates of the participants in "multiemployer plans." To be precise, the plans discussed in this Note must be described as private, collectively bargained, multiemployer, jointly administered pension plans. This Note will employ the terms "Taft-Hartley plan" and "multiemployer plan" to describe these plans.

7. 29 U.S.C. § 186(c)(5) (1976).

8. Davis 10. In construction, for example, about 95% of the 2.5 million pension plan participants are covered by multiemployer plans. Davis, *Pension Plan Provisions in the Construction Industry, 1973*, MONTHLY LAB. REV., Mar. 1975, at 63. The industries in which such plans predominate are commonly ones in which employees move from employer to employer with great frequency, often through hiring hall arrangements. See text accompanying note 31 *infra*.

9. E. ALLEN, J. MELONE & J. ROSENBLUM, PENSION PLANNING 18 (3d ed. 1976); Davis 10. See text accompanying notes 24-33 *infra* for a discussion of the reasons for the rapid growth of these plans.

are locally or regionally based because of union or industry characteristics.<sup>10</sup>

The Taft-Hartley Act prohibits payment of money by employers to labor organizations.<sup>11</sup> This provision stopped the negotiation of pension agreements under which employers agreed to pay money into pension funds run by the union, to avoid "the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."<sup>12</sup> As an alternative, the Act allows pension and welfare plan contributions to a trust fund if the trust: (1) is created for the "sole and exclusive benefit" of the employees; (2) is administered by a joint board with an equal number of employer and employee representatives, plus neutral parties they agree on; (3) is formed for limited purposes (including pension) enumerated in the Act; (4) is governed pursuant to a written agreement specifying in detail the basis upon which the employer shall make payments; (5) is audited annually; and (6) provides for arbitration in case of deadlock.<sup>13</sup>

After the employers and union agree to create a pension plan<sup>14</sup> and complete a trust agreement, a two-step procedure is followed to fund the plan and to fix benefit levels. The first step is to negotiate a fixed rate of employer contribution to the trust fund. This rate is usually an amount per hour of employment or per unit of production, such as per ton of coal mined.<sup>15</sup> In the second step, the trustees meet and set benefit levels, first by estimating the fund's income—consisting of employer contributions and investment income—and the fund's expenses, and then computing the maximum benefit the fund can afford to pay.<sup>16</sup> This computation requires actuarial estimates of the probable demands

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10. D. MCGILL 79. In 1973, 10 large plans with over 100,000 participants accounted for one-third of all multiemployer plan participants, including "[a] few large national plans, such as those in the construction industry, and regional plans, such as the Western Conference of Teamsters plan . . ." Davis 1.. See also PBGC STUDY app. II.

11. 29 U.S.C. § 186(a) (1976).

12. *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). The abuses feared included use of funds "to perpetuate control of union officers, for political purposes, or even for personal gain." *Id.* at 426. Pension funds created prior to January 1, 1946, were unaffected by the Act. 29 U.S.C. § 186(g) (1976).

13. 29 U.S.C. § 186(c)(5) (1976); see N. LEVIN 4-5.

14. Pension benefits are mandatory subjects of collective bargaining. See *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), *aff'd*, 339 U.S. 382 (1950). Thus, during the term of a labor agreement, an employer cannot install, alter or terminate a pension plan for organized workers without the assent of the union. D. MCGILL 27. See, e.g., *Wilson & Sons*, 193 N.L.R.B. 350 (1971). The pension benefits of retirees are not mandatory subjects of collective bargaining. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

15. J. MELONE 97; Davis 10.

16. J. MELONE 49, 91.

on the fund for benefits and a projection of income for the upcoming period.<sup>17</sup> The benefit-setting process can take as long as two years if the trustees cannot agree on the appropriate benefit levels.<sup>18</sup>

Upon retirement, then, the employee does not simply receive the sum total of employer contributions on his or her behalf plus investment income. Instead, the employee receives a benefit determined by the trustees' benefit formula. The formulas are of two basic kinds: the flat benefit, providing a uniform amount for all retirees; or a benefit formula based on length of service in the industry.<sup>19</sup>

The extent to which the plan achieves the desired balance between income and pension payments depends upon the accuracy of the actuarial projections, as compared to the actual experience of the plan.<sup>20</sup> Prior to ERISA, trustees discovering that contributions were too low to support the plan benefits were free to lower the benefits, making termination of multiemployer plans rare.<sup>21</sup> Alternatively, or in conjunction with lowering the benefits, higher contribution rates could be sought at the next contract negotiation.<sup>22</sup> It is, however, important to note that such plans invariably included provisions stating that no employer bore liability for the benefits promised by the trustees; the employer's only obligation was to make the contractual contributions to the trust fund.<sup>23</sup> Thus, if for any reason the trust could not provide benefits at the levels promised, no action could be brought against the employer for the unpaid benefits.

## B. *Advantages to Employers, Employees and Unions.*

The popularity of the multiemployer arrangement<sup>24</sup> is attributable to the advantages it offers employers, employees and unions. First,

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17. Important factors to be considered include the level of contributions, mortality rates, employee turnover, retirement age, salary scales, investment experience and administrative costs. J. MELONE 76-87; F. POMERANZ, G. RAMSEY & R. STEINBERG, PENSIONS 23-24 (1976). Union efforts for high benefit rates, see D. MCGILL 97, may focus on the choice of an actuary with a reputation for recommending high benefits. See J. MELONE 10.

18. See J. MELONE 10-11.

19. See *id.* 20-21; Davis 12. The service-related formulas predominate in construction, printing, motor transport, metalworking and service industries, while flat benefits prevail in apparel, mining and transportation. J. MELONE 12-13. Unions may prefer the service-related formula because of its greater ability to provide some benefit no matter how long an employee has served. See *id.* 21-22. This contrasts with single employer plans, which often base benefits on earnings. In unionized employment there is less variation in earning levels than in nonunion employment; further, the plans can avoid recordkeeping burdens by excluding this factor. Davis 12.

20. J. MELONE 51.

21. See text accompanying note 174 *infra*.

22. J. MELONE 51, 94; Davis 10.

23. J. MELONE 49; PBGC STUDY 2-3.

24. See notes 4-5, 9-10 *supra* and accompanying text.

given the industries involved<sup>25</sup> and the nature of the employment, multiemployer plans are the most desirable, if not the sole means of providing pension benefits.<sup>26</sup> These industries are highly competitive; without the uniform negotiated contribution rate applying equally to all employers in the trade, single employers would be less likely to commit themselves to pensions, fearing costs not faced by competition.<sup>27</sup> Further, these industries often consist of smaller employers for whom the costs of negotiating and administering single employer plans could be excessive.<sup>28</sup> The multiemployer arrangement allows cost-sharing; in addition, the actuarial predictions will be more accurate with a greater number of employees involved.<sup>29</sup> The broader-based multiemployer plan also avoids employee reliance on the ability of these small employers in competitive industries to stay in business.<sup>30</sup> Finally, when the employees move from employer to employer, conventional single employer pensions are impossible.<sup>31</sup> Instead, the multiemployer plans are organized around the employees' common bond of union membership.

In summary, the employer gets a plan that combines desired uniform contribution rates, with liability limited to those contributions,<sup>32</sup> and the advantages of a single-plan administration. The union gets a pension plan with uniform benefit rates for all of its members, and it can use that plan as an attraction for employees in representation efforts.<sup>33</sup> The employee gains a pension arrangement, with the usual advantages of retirement income and deferred income tax advantages, despite the lack of employment by a single employer and without relying on the economic success of any one employer.

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25. See note 8 *supra* and accompanying text.

26. It is assumed here that employees, unions and employers find pension plans desirable if they are feasible. See text accompanying notes 28-33 *infra* for incentives favoring adoption of pension plans.

27. A contractor preparing a competitive bid is an example of an employer who would find these costs disadvantageous if such pension plans were not common among others in the trade.

28. J. MELONE 6-7, 90-91.

29. N. LEVIN 33; J. MELONE 7-8.

30. J. MELONE 8. If, however, the entire industry is in decline, the multiemployer plan will be equally unhealthy. See note 188 *infra*.

31. J. MELONE 8-9.

32. The same contribution rate is required of each employer without reference to the cost factors of his own employee group. As a result, some employers may pay more and others less than their share of the cost of benefits for their own employees. . . .

[T]he union is the cohesive force demanding that employers accept the plan's average experience in lieu of their own costs and offering a limitation of contribution liability as a *quid pro quo*.

*Id.* 95-96.

33. See *id.* 168-75.

C. *ERISA's Provisions Regulating the Operation of Multiemployer Plans.*

ERISA's two principal goals were "[t]he growth and continuance of private pension plans and the security of workers' pension benefits."<sup>34</sup> The Act contains various protective provisions that apply to multiemployer plans: vesting provisions require that benefits vest in the participants after statutorily prescribed periods;<sup>35</sup> funding requirements insure that contributions are made and that the funds accumulated through contributions correspond to plan obligations;<sup>36</sup> fiduciary responsibility standards hold trustees to strict standards of performance;<sup>37</sup> and disclosure requirements provide participants with information about the plan.<sup>38</sup>

In addition, Title IV of ERISA created the Pension Benefit Guaranty Corporation (PBGC), an independent government corporation, to insure employee pension benefits.<sup>39</sup> The PBGC collects insurance pre-

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34. PBGC STUDY 48; see 29 U.S.C. § 1001(a) (1976). See also *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1131 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1273 (3d Cir. 1978).

35. Plans may use one of three options for vesting of benefits. These include ten-year vesting, five-to-fifteen-year vesting, and the "Rule of 45" (a rule under which employees with five or more years of service must be at least 50% vested when the sum of the employee's age and years of service is 45). ERISA § 1012(a), I.R.C. § 411(a). For vesting purposes, all employers within a multiemployer plan are treated as a single employer. ERISA § 1015, I.R.C. § 413(C)(3). The effect is to vest benefits on the basis of combined years of service by employees to any member employer.

Prior to ERISA, about 60% of all multiemployer pension plans provided for vesting of benefits. Thirty percent of these followed the ten-year vesting rule, while others specified longer periods. Half of the vesting plans specified minimum age requirements. Davis 14-15. ERISA, then, forced changes in vesting procedures for the 40% that did not provide for vesting, as well as for those plans with vesting requirements that did not fall within the allowed options.

36. The funding requirements include special provisions for multiemployer plans. An ordinary defined benefit plan must maintain a "funding standard account," in which employer payments equal normal costs of the benefits plus amortized past service costs and experience gains or losses. The Act and regulations require multiemployer plans to follow this procedure but allow longer amortization periods. See ERISA §§ 302, 1013(a). Further, multiemployer plans are allowed to use a "shortfall" accounting method that allows contributions on the basis of the contractually determined rate throughout the contract period even if the contributions prove to be lower than originally projected. At the end of the contract period, the amount actually contributed is compared with the amount normally required under the funding standard account method. Any difference is a shortfall gain or loss, which is to be corrected by increasing or decreasing contributions at contract negotiation or by adjusting the benefit levels. The gain or loss is amortized over a fifteen-year period. 26 C.F.R. § 11.412(c)(1)-(2) (1978). Failure to fund the account properly results either in an excise tax that is allocated among the employers, or in a civil action. I.R.C. §§ 413(b)(6), 4971. The net effect is to enforce collection of the contributions and to insure that the contributions are sufficient to produce the benefit.

37. See 29 U.S.C. §§ 1101-1114 (1976). For a discussion of fiduciary duties under ERISA, see Note, *Fiduciary Standards and the Prudent Man Rule under the Employment [sic] Retirement Income Security Act of 1974*, 88 HARV. L. REV. 960 (1975).

38. See 29 U.S.C. §§ 1021-1031 (1976).

39. Although the funding provisions force sponsors to fund the pensions, the funding is not

miums from the pension plans under Title IV's coverage<sup>40</sup> and provides benefits to participants in those plans in the event the plan terminates with insufficient assets to support guaranteed benefits.<sup>41</sup> Multiemployer plans are required to pay premiums of fifty cents per participant per year, although PBGC benefit insurance for such plans remains discretionary until May 1, 1980. Mandatory coverage of multiemployer plans was delayed to allow the PBGC to ascertain its level of risk in insuring such plans.<sup>42</sup>

Upon plan termination the PBGC will allocate the assets of the plan in the statutorily prescribed manner. If the assets are insufficient to pay the guaranteed benefits, the participating employers are liable to the PBGC for a proportionate segment of the deficit, up to a maximum of thirty percent of the employer's net worth.<sup>43</sup> The focus on *benefits*

full and immediate. Instead, it is amortized over a period of years. Thus, the possibility remains that upon termination, the plan will have insufficient assets to pay the benefits promised. See 120 CONG. REC. 4282 (1974), *reprinted in* 2 LEG. HIST. 3382.

40. See 29 U.S.C. §§ 1301-1307 (1976); D. MCGILL 426-27.

41. Plans terminate in two ways. First, they may terminate voluntarily when plan administrators notify the PBGC of their intention to terminate the plan. See ERISA § 4041. In a Taft-Hartley plan, this requires an agreement between the union and the employers with regard to current employees' benefits. Second, the PBGC may force plan termination upon finding that (1) the plan has not met the minimum funding standard or is deficient in payment of the excise tax imposed for deficiencies in funding; or (2) the plan is unable to pay benefits when due; or (3) the plan has made a contribution of \$10,000 or more to a "substantial owner" for reasons other than death, and immediately after this distribution the plan has unfunded nonforfeitable benefits; or (4) the PBGC feels that the risk of loss to PBGC will increase unreasonably unless the plan is terminated. 29 U.S.C. § 1342(a) (1976). The PBGC will guarantee nonforfeitable pension benefits to which the participant is entitled at the time of termination. 29 C.F.R. § 2605 (1978). The PBGC originally limited its payment to the lesser of \$750 per month or a monthly amount equal to one-twelfth of the average annual income during the five consecutive years when income was highest. 29 U.S.C. § 1322(b)(3) (1976). The \$750 amount has been adjusted for increases in the cost of living and is now at \$1073.86. [1978] 213 PENS. REP. (BNA) A-10. No benefit is paid for recent benefit increases or increases made while the plan was in default. The fact that the PBGC does not guarantee a given benefit does not mean that the participant will not receive any funds, since upon termination, plan assets are allocated to both nonguaranteed benefits and guaranteed benefits, in the order prescribed in 29 U.S.C. § 1344 (1976). If, after all funds have been distributed, some guaranteed benefits are still unpaid, the PBGC will pay them. The PBGC can, however, recover some or all of these funds from the employer. See note 43 *infra* and accompanying text. See generally M. CANAN, QUALIFIED RETIREMENT PLANS §§ 19.6-.10 (1977); D. MCGILL 429-49.

42. See 29 U.S.C. § 1381(c) (1976), *as amended by* Act of Dec. 19, 1977, Pub. L. No. 95-214, 91 Stat. 1501; Act of June 19, 1979, Pub. L. No. 96-24, 93 Stat. 70. This date is an 18-month extension over the original ERISA provisions enacted because of Congress' fears of multiemployer plan terminations far in excess of the PBGC's ability to pay benefits. See PBGC STUDY 19. See text accompanying note 187 *infra*. In the meantime, premium funds are accumulating and have been used to provide discretionary coverage to several multiemployer plans that have terminated since the Act's passage. PBGC STUDY app. XV.

43. See 29 U.S.C. §§ 1362, 1364 (1976). The specific formula for multiemployer plans is as follows: For any employer who made contributions within five years of plan termination, the amount required in contributions from the employer for the past five years is divided by the total contributions required of all participating employers; this figure is multiplied by the excess of

rather than contributions means that the payment by the employer of all contractually required contributions is irrelevant. The capacity of the fund to pay the benefits set by the trustees is controlling. The PBGC is empowered to obtain a lien similar to a tax lien against the employers' assets or to initiate a civil action to obtain the funds.<sup>44</sup>

Employers opposed to potential liability for benefits have attempted to escape Title IV's requirements. They maintain, first, that the typical multiemployer plan is exempt from Title IV coverage. ERISA section 4021(b)(1)<sup>45</sup> exempts "any plan which is an individual account plan"<sup>46</sup> from Title IV's requirements. "Individual account plan" is defined earlier in the Act, along with "defined contribution plan":

The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.<sup>47</sup>

The PBGC maintains that Taft-Hartley pension plans do not fall within the statutory exception quoted above, and that such plans are therefore subject to all Title IV provisions, including imposition of employer liability. Second, even if the plans are covered by Title IV, the plan sponsors contend that a retroactive change in the nature of the participating employers' commitment, obligating them to guarantee benefits, violates fifth amendment prohibitions against deprivation of property without due process of law. Finally, should both of the above arguments fail, plan sponsors argue that Title IV's provisions threaten the continued growth and existence of Taft-Hartley plans by ending or reducing the willingness of employers to participate in such plans or to increase their obligations under the plans.

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guaranteed plan benefits over the assets of the plan at termination. That is, liability is a proportion of the guaranteed benefits not covered by plan assets equal to the employer's percentage of total contributions over the past five years. An employer's liability is limited to 30% of the employer's net worth. 29 U.S.C. § 1323 provides for creation of an insurance program protecting employers against this liability. The PBGC has, however, concluded that such an insurance program is not feasible at this time. See [1978] 195 PENS. REP. (BNA) R-6. See note 221 *infra* and accompanying text.

44. 29 U.S.C. § 1368 (1976). This lien, like a tax lien, enjoys priority over the unsecured claims of creditors. J. TREYNOR, P. REGAN & W. PRIEST, JR., *THE FINANCIAL REALITY OF PENSION FUNDING UNDER ERISA* 1 (1976).

45. 29 U.S.C. § 1321(b)(1) (1976).

46. *Id.*

47. *Id.* § 1002(34).

## II. TITLE IV'S COVERAGE OF THE MULTIEMPLOYER PLAN

### A. *Connolly v. Pension Benefit Guaranty Corp.*

In *Connolly v. Pension Benefit Guaranty Corp.*,<sup>48</sup> the trustees of a Taft-Hartley pension trust<sup>49</sup> sought a declaratory judgment that the Operating Engineers' pension plan supported by the trust was not subject to ERISA's Title IV on the grounds that the plan fell within the exception for "individual account plans."<sup>50</sup> The trustees also requested an injunction to prohibit the collection of insurance premiums by the PBGC and to force the return of \$12,043 in premiums already paid.<sup>51</sup>

The plan in question was a typical multiemployer plan<sup>52</sup> under which the employers contractually agreed to contribute a specified amount<sup>53</sup> to a jointly administered trust fund.<sup>54</sup> Both the trust agreement and the pension plan specified that each employer's liability to the plan and to the employees was limited to the contributions required by the collective bargaining agreement, regardless of the ability of the fund to pay pension benefits to the employees.<sup>55</sup> The benefits paid to retirees were determined by the trustees, who periodically set a "pension factor" reflecting "investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies."<sup>56</sup> Upon retirement, the "pension factor" was multiplied by figures reflecting the retiree's years of service to compute the retiree's monthly benefit.<sup>57</sup>

48. 419 F. Supp. 737 (C.D. Cal. 1976), *rev'd and remanded*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1278 (1979).

49. The trust was created in a 1960 agreement between the International Union of Operating Engineers and various contractors and home builders in southern California. 419 F. Supp. at 737.

50. 29 U.S.C. § 1321(b)(1) (1976). See text accompanying note 46 *supra*.

51. 419 F. Supp. at 738.

52. Tilove, *ERISA—Its Effect on Collective Bargaining*, PROC. N.Y.U. TWENTY-NINTH CONF. LAB. 187, 193 (1976); see [1978] 187 PENS. REP. (BNA) A-36.

53. In this plan the figure was two dollars per hour of employment. Brief for Appellees 4.

54. See text accompanying notes 13-18 *supra*.

55. [The Plan restricted employer liability to] the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. . . . [N]othing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan.

419 F. Supp. at 739. The district court's opinion states that the trustees could force employers to increase their contributions if necessary to support the fund. 419 F. Supp. at 740. This was later identified as harmless error. Brief for Appellees 15.

56. 419 F. Supp. at 740. Actuaries determined the pension factor appropriate for the plan and the trustees adopted it on their advice. See note 17 *supra* and accompanying text.

57. Each employee's years of service in the industry were computed on the basis of "prior service credits" granted for each year of covered service in the industry prior to the establishment

B. *Exemption from Title IV as an Individual Account Plan: The Trustees' Argument.*

In their effort to have the Operating Engineers' pension plan declared exempt from ERISA's Title IV, the trustees in *Connolly* attempted to characterize the plan as an individual account plan exempt from Title IV.<sup>58</sup> The trustees faced two tasks: first, to show that the plan was a "defined contribution plan," which ERISA section 3(34) defines as identical to an individual account plan;<sup>59</sup> and second, to show that the plan was not one "under which a fixed benefit is promised . . . [and] the employer or his representative participated in the determination of that benefit," since any plan having such a benefit-determination system is not an individual account plan for Title IV purposes.<sup>60</sup>

The term "defined contribution plan," although not used in federal statutes or regulations prior to ERISA's passage,<sup>61</sup> was used prior to ERISA as a standard means of distinguishing between two basic patterns of plan organization:

The first is called a *defined contribution* or a *money purchase* formula. Under this type of formula, contribution rates are fixed, and an employee's benefit varies depending upon such factors as the amount of the contributions made, investment earnings or plan assets, and the employee's age, sex and normal retirement age. The second type is called a *defined benefit* or an *annuity purchase* formula. Here, a definite benefit is established for each employee, and contributions are determined to be whatever is necessary to produce the desired benefit results.<sup>62</sup>

In other words, a defined contribution plan provides for a fixed input and allows the output to vary, while the defined benefit plan provides for a fixed output and varies the input.<sup>63</sup>

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of the plan in 1960, and "pension credits" earned whenever the employee worked for a set number of hours. 419 F. Supp. at 741.

58. 29 U.S.C. § 1321(b) (1976). See text accompanying note 46 *supra*.

59. 29 U.S.C. § 1002(34) (1976). See text accompanying note 47 *supra*.

60. 29 U.S.C. § 1321(c)(1) (1976).

61. I. GOODMAN, DEFINED CONTRIBUTION PLANS UNDER ERISA ¶ 1 (PENS. PLAN GUIDE) (CCH) No. 197 (1979).

62. E. ALLEN, *supra* note 9, at 31.

63. See generally M. CANAN, *supra* note 41, § 3.51, at 89-90; D. MCGILL 91-109; J. MELONE 48-51. In *Alabama Power Co. v. Davis*, 431 U.S. 581, 593 n.18 (1977), the Court characterized the pension plan under consideration as a defined benefit plan since "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." The Court contrasted this plan with a defined contribution plan, "[t]he other basic type of pension . . . under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." 431 U.S. at 593 n.18. ERISA's provisions were not at issue here, although the Court cited 29 U.S.C. § 1002(34)-(35) in support of the above statement. See notes 88 & 91 *infra*.

The trustees contended that since their plan used a fixed contribution rate and varied the benefits through use of the pension factor, it met the basic requirements of a defined contribution plan.<sup>64</sup> Aside from this general definitional compliance, the trustees argued that the plan satisfied the "individual account" requirements of section 3(34) because computerized records were kept indicating each employee's hours of employment as well as the contributions that those hours obligated the employer to pay on the employee's behalf.<sup>65</sup> Although the employee did not receive these contributions directly on an individual account basis, each employee was assigned service credits corresponding to the hours worked. The hours worked, in turn, corresponded to the amount contributed by the employer. Before paying benefits, the plan then accounted for plan experience, including investment income, by multiplying the service credits by the "pension factor."<sup>66</sup> The trustees maintained that through this process benefits in effect were based solely on contributions plus gains or losses from plan experience—with no resort to employer funds beyond the contributions. Thus, the plan met the statutory requirement of "benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains or losses . . . ."<sup>67</sup>

From the trustees' viewpoint, any greater "individualization" of accounts would create savings accounts, not pension plans. Since section 3(34) deals only with "pension plans,"<sup>68</sup> the requirement of individual accounts, taken in context, must refer to something similar to the arrangement in the Operating Engineers' plan.

Conceding that the legislative history of ERISA contains no explicit declaration that plans like the Operating Engineers' plan were to be exempt from Title IV's termination insurance, the trustees attempted to shift the burden by insisting that if truly drastic changes in employer obligations<sup>69</sup> were intended, explicit congressional statements would appear in the record. In the absence of such clear intent, the trustees argued that Congress excluded plans like theirs from the benefit insurance program, along with all other plans that promise no fixed benefit but only a fixed contribution.<sup>70</sup> The employee was promised nothing

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64. Brief for Appellees 9.

65. *Id.* 7-8, 27.

66. *Id.* 8-9.

67. 29 U.S.C. § 1002(34) (1976).

68. *Id.*; see Brief for Appellees 26-27.

69. See notes 116-20 *infra* and accompanying text.

70. The legislative history indicates that the plans not requiring insurance protection were "money purchase, stock bonus, or profit sharing plans." S. REP. No. 93-383, 93d Cong., 1st Sess. 26 (1973), reprinted in 1 LEG. HIST. 1063, 1094. Because these plans "do not provide specific

more than his share of the accumulated fund after employer contributions were made and adjustments made for gains and losses; the government, therefore, had no reason to insure the payment of a fixed benefit.<sup>71</sup>

To overcome the language of ERISA section 4021(c)(1),<sup>72</sup> the trustees argued that instead of "fixed benefits," their plan had variable benefits depending upon the "pension factor" adopted by the trustees. Further, even if the benefit were regarded as "fixed," they contended the benefit was set not by an "employer or his representatives," but by trustees who had a fiduciary duty to the trust independent of any responsibility to the union or employers who named them as trustees.<sup>73</sup>

The federal district court accepted the trustees' interpretation of Title IV. Relying particularly on the distinction between defined benefit and defined contribution plans, the court emphasized the employers' fixed contribution obligation and their limited liability, noting that

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previously determined benefits, there is no defined benefit to insure." *Id.* 1094. This is illustrated by examination of the exemption clauses in the earlier versions of Title IV. *See, e.g.*, S. 4, 93d Cong., 1st Sess. § 104(c) (1973), *reprinted in* 1 LEG. HIST. 113; S. 1179, 93d Cong., 1st Sess. § 421(c)(1) (1973), *reprinted in* 1 LEG. HIST. 907; H.R. 12,906, 93d Cong., 2d Sess. §§ 301(c), 409 (1974), *reprinted in* 2 LEG. HIST. 2860, 2885-86.

71. In effect, the employee stands to gain in benefits if the fund performs well and also bears all risk if it does not. *See* Note, *supra* note 37, at 962-63.

72. 29 U.S.C. § 1321(c)(1) (1976). *See* text accompanying note 60 *supra*.

73. Brief for Appellees 32. In *Sheet Metal Workers Local 493, 234 N.L.R.B. No. 162* (1978), the Board held that a strike to compel employer acceptance of certain trustees as employer representatives was not a violation of 29 U.S.C. § 158(b)(1)(B)'s prohibition against coercion in the selection of collective bargaining agents. The Board reasoned that given the independent duties owed by plan trustees to the trust and the separation of the benefit-determining process from collective bargaining, the trustees were not agents of the employers. Cases support the existence of a fiduciary duty toward the trust, and this duty, while not excluding the possibility of union or employer influence or suggestions to the trustees, is superior to any duty toward the union or employer. *See Toensing v. Brown, 528 F.2d 69, 72* (9th Cir. 1975) (trustee duty to exercise independent judgment recognized); *Lamb v. Carey, 498 F.2d 789, 793* (D.C. Cir. 1974) (trustees have high fiduciary responsibility to the fund despite representative relationship); *Miniard v. Lewis, 387 F.2d 864, 865 n.5* (D.C. Cir.), *cert. denied, 393 U.S. 873* (1967) (union trustees free of duty to union but owe duty to trust); *Kosty v. Lewis, 319 F.2d 744* (D.C. Cir. 1963) (superior fiduciary duty to trust recognized); *Blankenship v. Boyle, 329 F. Supp. 1089, 1094-95* (D.D.C. 1971) (section 302 designed to insulate trust from labor-management disputes and strengthen independent duty to trust); *cf. Associated Contractors v. Laborers Int'l Union, 559 F.2d 222, 228* (3d Cir. 1977) (co-existing duty of representation and fiduciary responsibility). *See also Welch & Wilson, Application of Trust Law to Representatives in Taft-Hartley Trust Funds, 28 ARB. J. 81, 93-94* (1973) (supporting the view that the fiduciary duty should be strict, and that any decisions the parties do not want judged on a strict fiduciary standard should be made at the collective bargaining table). *Cf. Goetz, Employee Benefit Trusts Under Section 302 of Labor Management Relations Act, 59 Nw. U.L. REV. 719, 748* (1965) (arguing that inclusion of employer and union representatives in the trust administration indicates Congress' recognition that divergent interests will be represented and not excluded by fiduciary principles); *Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 CORNELL L. REV. 911, 921-25* (1970) (trustee deliberations are extension of collective bargaining process).

"[t]o interpret this carefully constructed agreement as not coming within the exceptions . . . is to force upon the employer a greater obligation and liability than he had agreed to in his contract."<sup>74</sup> On these grounds, the court characterized the plan as a defined contribution plan. The PBGC's arguments to the contrary were dismissed without explanation.<sup>75</sup> As for ERISA section 4021(c)(1),<sup>76</sup> the court held that the benefits had been determined not by an employer or his representatives but by the trustees.<sup>77</sup> Thus, the plan was considered an individual account plan for Title IV purposes, and exempt from the Title's coverage.

C. *Coverage of Multiemployer Plans Under Title IV: Denial of "Individual Account" Status.*

The Ninth Circuit Court of Appeals reversed the district court in *Connolly*, holding that the Operating Engineers' plan did not provide for individual accounts and therefore was not exempt from Title IV.<sup>78</sup> The case was remanded for consideration of the trustees' constitutional challenges to liability for benefits.<sup>79</sup> In two similar disputes, United States district courts read the statute in the same manner as the Ninth Circuit, holding that the plans in question were not individual account plans and were subject to Title IV.<sup>80</sup>

The Ninth Circuit's strict reading of the language of ERISA section 3(34)<sup>81</sup> made it very difficult to come within the "individual account" exception. The court required a showing of both individual accounts for each participant and benefits based solely on the amounts in these accounts in order to escape Title IV.<sup>82</sup> The Operating Engineers' plan pooled its funds and neither recorded the amounts contributed on the behalf of each employee nor recognized the participants' "right, title, or interest"<sup>83</sup> to any amount in an account. Thus, no individual accounts existed. Further, benefits were not determined *solely*

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74. 419 F. Supp. at 740.

75. *Id.* at 741.

76. 29 U.S.C. § 1321(c)(1) (1976). See text accompanying note 60 *supra*.

77. 419 F. Supp. at 741.

78. *Connolly v. PBGC*, 581 F.2d 729, 735 (9th Cir. 1978). Having concluded that the plan did not create individual accounts, the court did not reach the trustees' claim that ERISA § 4021(c)(1) was inapplicable.

79. 581 F.2d at 734-35.

80. *Pierce v. PBGC*, No. 77-C-4194 (E.D. Ill., filed June 18, 1979); *PBGC v. Defoe Shipbuilding Co.*, [1978] 178 PENS. REP. (BNA) D-15 (E.D. Mich.), *appeal docketed*, No. 78-1280 (6th Cir. Aug. 7, 1978).

81. See text accompanying note 47 *supra*.

82. 581 F.2d at 733.

83. *Id.*

by the amounts in the accounts; rather, benefits were computed on the basis of service, past service and the pension factor.<sup>84</sup>

This approach recognized what is clearly true, at least technically: a mere recording of hours employed and consequent employer contribution obligations does not create an individual account similar to a bank savings account. Nevertheless, if the employee's hourly service determines the amount contributed by the employer,<sup>85</sup> in a functional sense the service figure *is* a recording of the amount in the individual's pension account. Then, if the amount paid in benefits simply reflects the amount of money contributed for the hours of work, adjusted to reflect income and costs of the plan as a whole,<sup>86</sup> "individual accounts" exist.

The difficulty with the Operating Engineers' plan and similar plans is that the hours of employment and employer contributions are *not* the sole basis for determining the benefit: the plan allowed participants to obtain benefits on the basis of *past* service for which no employer contributions capable of individual assignment were made.<sup>87</sup> Thus, the relationship between individual service, individual contributions and individual benefits was broken by allowing the payment of benefits for service for which there were no corresponding contributions. The Ninth Circuit's approach recognized this flaw and denied the plan the individual account designation.<sup>88</sup> Since the typical negotiated multiemployer plan determines benefits on the basis of service, without reference to contributions,<sup>89</sup> this holding would apparently have widespread application.

The result reached on the basis of a strict reading of the statutory language could be avoided only by concluding that Congress intended a broader exemption than a technical reading of the statute permits. If, by using the term "defined contribution plan" with its known pre-ER-

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84. *Id.*

85. See note 57 *supra*.

86. This is the function of the pension factor in the Operating Engineers' plan. See note 57 *supra* and accompanying text.

87. See note 57 *supra*. Although it is arguable that employer contributions for past service were made on the grounds that every employer's hourly contribution paid part of the total past service liability, there is no way of knowing whether such amounts were contributed, and on whose behalf the contributions were made.

88. 581 F.2d at 733. In describing the multiemployer pension plan at issue in *International Bhd. of Teamsters v. Daniel*, 99 S. Ct. 790 (1979), as a defined benefit plan, the Supreme Court observed that "[t]he trust agreement used employee manweeks as a convenient way to measure an employer's overall obligation to the Fund, not as a means of measuring the employer's obligation to any particular employee. Indeed, there was no fixed relationship between contributions to the Fund and an employee's potential benefits." *Id.* at 797. See note 91 *infra*. This plan also recognized past service as a factor in determining benefits. 99 S. Ct. at 797 n.13.

89. See *J. MELONE 20*. See note 19 *supra* and accompanying text.

ISA meaning,<sup>90</sup> Congress meant to express a general intent to declare a Title IV exemption for all multiemployer plans similar to the one in *Connolly*, the Ninth Circuit's result was wrong.

This interpretation, however, lacks support in the Act's history and purposes. First, whether plans of this sort were regarded as defined contribution plans before Congress used the term "defined contribution plan" in ERISA is not clear. Although the plan had a fixed contribution rate, it also had a fixed benefit rate. The trustees set a given "pension factor" that was used to compute every retiree's benefit. On the basis of the pension factor and his or her service record, any employee could foresee the potential benefit. That benefit was awarded regardless of whether contributions to support the particular benefit for the particular employee had actually been made.<sup>91</sup> Further, during collective bargaining the required contributions by employers are certainly approached with at least a rough notion of the benefit that will ultimately be paid. Finally, the final benefit amount clearly does not simply "happen" over the years as the fund grows; rather, the final benefit amount is fixed by the affirmative act of the trustees long before the plan's actual contributions and experience are known.<sup>92</sup> It may, then, be most appropriate to characterize these plans as hybrids between defined contribution and defined benefit plans.<sup>93</sup>

If such plans must be characterized, the focus should be upon which factor would be adjusted in the event of a deficiency or surplus—the benefits or the contributions. If the benefits are the usual variable, the plan could be called a defined contribution plan; if contributions are the usual variable, the defined benefit label may be more suitable.<sup>94</sup>

90. See text accompanying notes 62-63 *supra*.

91. 581 F.2d at 733.

Because the Fund made the same payments to each employee who qualified for a pension and retired at the same age, rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service, the plan provided a "defined benefit."

*International Bhd. of Teamsters v. Daniel*, 99 S. Ct. 790, 794 n.3 (1979).

92. Employee reliance thus becomes an issue. If the employee is told only that he or she will receive the sum total of employer contributions plus or minus a figure reflecting overall plan performance, he or she will probably not rely on the promise to the same degree as he or she would rely on a statement that benefits for X years of service are \$Y.

93. "These plans possess the characteristics of both fixed contributions and fixed benefits. The employer is required . . . to contribute a certain amount . . . [and] the plan . . . specifies a definite scale of benefits . . ." J. MELONE 20. See also D. MCGILL 97; F. POMERANZ, *supra* note 17, at 6-7.

94. F. POMERANZ, *supra* note 17, at 96. Some prefer to describe these plans as "target benefit plans." See Brief for Appellees 29-30; *Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 179 (1977). In these plans, a target benefit is set and then contributions are calculated in order to achieve the benefit. The actual benefit paid is the amount the contributions support through earnings, plan

Given this uncertainty, the tenuous argument that the term "defined contribution plan" referred to plans like the Operating Engineers' plan is weakened significantly. An ambiguous nonstatutory meaning should not be sufficient to overcome explicit statutory definition.<sup>95</sup>

Second, if Congress intended that a typical multiemployer plan was to be excluded from the insurance program, one would expect some indication of that intention in the legislative history. In fact, no statements in the legislative history support this conclusion. On the contrary, a Senate committee report on an early version of the Act stated:

A collective bargaining plan where defined benefits are determined under a process in which the employers in the aggregate have a voice (e.g., under . . . the [Taft-Hartley] Act . . .) in the determination of the forms and levels of benefits, is not to be treated as a money purchase plan for these purposes (in the insurance provisions and elsewhere under the committee bill where distinctions are made between defined benefit plans and money purchase or other kinds of defined contributions plans), even though the collective bargaining agreement may specify only the level of employer contributions into the plan. Thus, these collective bargaining plans are covered by the insurance program.<sup>96</sup>

While there are no equally explicit statements later in the record, there are no statements noting any change in this approach. Instead, the general policy apparently was to give multiemployer plan employees the same protection as other employees. Senator Javits, a principal sponsor of ERISA, in explaining the delay in mandatory insurance coverage for multiemployer plans,<sup>97</sup> observed that "[t]he conferees had no intention whatsoever of treating workers in these plans as 'second class citizens' and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved."<sup>98</sup> This approach is also

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experience, etc. See M. CANAN, *supra* note 41, § 3.52, at 94; E. ALLEN, JR., *supra* note 9, at 34 n.4. This does not assist in resolving the Title IV question, however, since there is no reference to such plans in Title IV.

95. The courts must "give effect to the intent of Congress, and in doing so our first reference is . . . to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958).

96. S. REP. NO. 93-383, 93d Cong., 1st Sess. 81 (1973), *reprinted in* 1 LEG. HIST. 1063, 1149 (1976). This report discusses S. 1179, the Senate Finance Committee's version of the bill. This version was several steps removed from the final bill: S. 1179 and S. 4 were combined into H.R. 4200, the Senate's final version; this went to conference with H.R. 2, the House's final version. There was, however, never any repudiation of the statement that Taft-Hartley plans were subject to Title IV. A staff analysis of the differences between the two Senate bills makes no mention of different attitudes about Taft-Hartley plans, 119 CONG. REC. 30,134, 30,136-37 (1973), *reprinted in* 2 LEG. HIST. 1718, 1723-26, and the debate on the two bills contains no discussion on this point. It would seem that if the Finance Committee felt strongly enough about this provision to mention it in its report, some mention would have been made if the provision were changed.

97. See note 42 *supra* and accompanying text.

98. 120 CONG. REC. 29,940-41 (1974), *reprinted in* 3 LEG. HIST. 4767.

supported by the Title IV provisions specifically designed to address the problems of multiemployer plans. These provisions would find little use if the typical multiemployer plan were excluded from Title IV.<sup>99</sup>

Finally, as the Ninth Circuit observed, the inclusion of *Connolly*-type plans under Title IV coverage is consistent with Congress' overall goals in passing ERISA.<sup>100</sup> Congress was extremely concerned about the loss of employee pension benefits as a result of plan termination and enacted Title IV with the purpose of insuring that benefits would be paid even if the plans terminated.<sup>101</sup> Those plans specifically excluded from Title IV coverage<sup>102</sup> cannot fall short of promised benefits since they promise no benefit other than whatever can be paid.<sup>103</sup> Plans like the *Connolly* plan *do* set benefits;<sup>104</sup> in doing so, they run the risk of being unable to provide promised benefits because they have funded benefits for past service, promised overgenerous benefits or experienced unexpected declines in contributions.<sup>105</sup> Liability for benefits, then, is consistent with the treatment afforded all other plans that set a benefit and could conceivably fail to provide it.<sup>106</sup>

Although the Ninth Circuit did not find it necessary to rely on ERISA section 4021(c)(1),<sup>107</sup> that section also supports the result. The district court, holding that the benefits are not set by employer representatives but by trustees, apparently relied on the cases that emphasize the independence of the trustees.<sup>108</sup> However, a degree of independence from the employers' control does not mean that the employer-appointed trustees are not the employers' representatives. The Taft-Hartley Act refers to trustees as "the representatives of the employers and the representatives of employees."<sup>109</sup> Section 4021(c)(1)'s reference

99. *See, e.g.*, 29 U.S.C. §§ 1305(a), 1306, 1363, 1364 (1976).

100. 581 F.2d at 733.

101. Throughout the committee reports and debates repeated reference was made to the loss of \$49 million in pension benefits of 19,400 employees caused by the closing of the Studebaker factory in Indiana, and to similar losses by employees elsewhere. *See, e.g.*, S. REP. NO. 93-383, 93d Cong., 1st Sess. 17 (1973), reprinted in 1 LEG. HIST. 1085; H.R. REP. NO. 93-799, 93d Cong., 2d Sess. 13 (1974), reprinted in 2 LEG. HIST. 2602; 120 CONG. REC. 29,194, 29,208, 29,213, 29,934-35, 29,949-51, 29,952-54 (1974). *See also* *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir.), cert. granted, 99 S. Ct. 2881 (1979).

102. *See* note 70 *supra* and accompanying text.

103. 581 F.2d at 733.

104. Brief for Appellant at 19, *Connolly v. PBGC*, 581 F.2d 729 (9th Cir. 1978). *See* note 91 *supra* and accompanying text.

105. 581 F.2d at 733-34.

106. Single employer defined benefit plans almost always have clauses limiting employer liability, yet the Act guarantees the benefit set in the plan and creates additional liability for the sponsor.

107. *See* note 78 *supra* and accompanying text.

108. *See* note 73 *supra* and accompanying text.

109. 29 U.S.C. § 186(e)(5)(B) (1976). In construing the term "representative" with regard to

to the employer or his representative is a direct parallel clearly referring to the trustees.<sup>110</sup>

Given the language and intent of ERISA, it is necessary to conclude that the typical multiemployer plan such as the one in *Connolly* is subject to Title IV's provisions, including the payment of premiums and possible employer liability for benefits upon termination. While it is true that this "force[s] upon the employer a greater obligation . . . than he had agreed to in his contract,"<sup>111</sup> "this is precisely what the termination insurance provisions of the Act were intended to do."<sup>112</sup>

### III. CONSTITUTIONAL CHALLENGE TO TITLE IV'S RETROACTIVE ALTERATION OF CONTRACT OBLIGATIONS

#### A. *Title IV's Retroactive Effects on Employer Liability.*

ERISA's direct conflict with typical contractual provisions limiting liability for pension obligations to the contribution promised<sup>113</sup> raises the question of ERISA's constitutionality under fifth amendment due process clause standards.<sup>114</sup> Although Title IV converted *all* plans

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employee representatives, the Court held that "Congress intended that it include any person authorized by the employees to act for them in dealings with their employers." *United States v. Ryan*, 350 U.S. 299, 302 (1956).

110. Section 4021(c)(1) was apparently intended to confirm that Taft-Hartley plans would be covered by Title IV even if they had individual accounts. The only exception would be an individual account arrangement in which the employer had no role in determining the benefits. This protects employers from being held liable for the payment of benefits that they had absolutely no voice in setting. *Cf.* S. REP. NO. 93-383, 93d Cong., 1st Sess. 58 (1973), *reprinted in* 1 LEG. HIST. 1126 (sponsors of collectively bargained plans not entitled to the exception from funding requirements granted to money purchase and defined contribution plans; exceptions allowed only where employers had no voice in determining "levels and forms of benefits"). Of course, since the Taft-Hartley Act *requires* that the employers name half of the trustees, this exception would rarely arise. One possible application is to pension trusts that were established prior to the passage of the Taft-Hartley Act, since these trusts were unaffected by the Act and may, therefore, be controlled entirely by the unions. See note 12 *supra*.

111. 419 F. Supp. 737, 740 (C.D. Cal. 1976), *rev'd and remanded*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1278 (1979).

112. 581 F.2d at 732.

113. See text accompanying note 23 *supra* & note 55 *supra* and accompanying text. Single employer plans also invariably included clauses limiting employer liability to the amount in the pension fund. *Nachman Corp. v. PBGC*, 592 F.2d 947, 956 n.14 (7th Cir.), *cert. granted*, 99 S. Ct. 2881 (1979).

114. Constitutional objections to employer liability have been raised in several recent cases. The courts in *Connolly v. PBGC*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1278 (1979), and *PBGC v. Defoe Shipbuilding Co.*, [1978] 178 PENS. REP. (BNA) D-15 (E.D. Mich.), *appeal docketed*, No. 78-1280 (6th Cir. Aug. 7, 1978), did not reach the issue. Several courts have denied constitutional challenges. See *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir.), *cert. granted*, 99 S. Ct. 2881 (1979); *PBGC v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979); *Lear Siegler, Inc. v. PBGC*, [1979] 238 PENS. REP. (BNA) D-3 (E.D. Mich. 1979). See text accompanying notes 149-54 *infra*.

under its coverage—single employer and multiemployer alike—“from gratuities to corporate liabilities enforceable at law,”<sup>115</sup> the change is more drastic for the multiemployer plan sponsor than for the single employer that sponsors a nonnegotiated, defined benefit plan.<sup>116</sup> First, in the standard defined benefit plan, the employer has agreed to provide a set benefit. Any clause limiting liability in some way contradicts that promise. In contrast, under Taft-Hartley agreements the limit on liability reflects, rather than contradicts, the employer’s promise, since the employer merely promises contributions to a separate trust. Second, while the employer sponsoring a plan without union participation actually controls the benefit level and should logically bear responsibility for providing the benefits, the employer who is a party to a multiemployer agreement has no direct control over the benefit levels set by the trustees.<sup>117</sup> Imposition of liability for the benefits in the latter case creates liability without control, or in any case, liability with less control than in the single employer nonnegotiated plan.<sup>118</sup> Third, control over events leading to deficits in multiemployer plans is minimal. A participating employer can be held liable for deficits despite faithful compliance with contribution requirements when another employer’s withdrawal or failure to contribute causes funding deficiencies or plan termination.<sup>119</sup> Finally, by inclusion of the pension contribution level in collective bargaining, the amounts agreed upon become a part of what is likely a carefully balanced package. A change in the nature of

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115. J. TREYNOR, *supra* note 44, at 1.

116. See text accompanying note 62 *supra*. The comparison with single-employer defined benefit plans is used here because such plans are clearly covered by Title IV, while other pension arrangements, such as profit-sharing, are not.

117. See notes 16-18 *supra* and accompanying text. Although the employers collectively appoint half of the trustees, the control available to the employers as a group or individually is limited. The trustees have independent duties to the trust and can ignore employer instructions. See note 73 *supra*. In fact, an employer who agrees to contribute to an already established pension fund may be compelled to accept employer trustees already appointed by the other employers. *See, e.g.*, Sheet Metal Workers Local 493, 234 N.L.R.B. No. 162 (1978).

118. Sponsors of single-employer Taft-Hartley plans could make the same argument. Control may be greater in a single employer plan since one employer appoints half of the trustees, but anything less than total control raises the objection.

119. For example, if some employers failed to contribute or to pay excise taxes, PBGC could seek termination. See note 41 *supra*. Upon termination, liability is assessed on the basis of the required contributions over the past five years—regardless of whether the obligation was actually met. See note 43 *supra*.

A withdrawing employer must pay for an appropriate share of the plan’s obligations only if it is a “substantial employer,” an employer whose contributions are greater than 10% of all employer contributions in either the two preceding plan years or the second and third preceding plan years. 29 U.S.C. § 1301(2) (1976). When any nonsubstantial employer withdraws, there is no evaluation of the effect on the plan, or any assessment of liability. Thus, if it develops that termination is necessary later, other employers who remained in the plan bear the burden of unfunded benefits left by the withdrawing employer. *See* 29 U.S.C. § 1363 (1976).

the obligation increases the total package for which the employer is responsible. In summary, one commentator has described the liability as "retroactive, uncertain, and open-ended."<sup>120</sup>

### B. *Constitutional Standards Governing Retroactive Legislation.*

Constitutional challenges to non-criminal legislation with retroactive effects rest on either the due process clauses of the fifth and fourteenth amendments<sup>121</sup> or on the contracts clause.<sup>122</sup> These provisions have been read to reflect a general constitutional policy against legislation with retroactive effects,<sup>123</sup> based upon concern for the reliance placed on existing law,<sup>124</sup> a desire to promote stability,<sup>125</sup> and fear of abuse of power by legislative bodies, since retroactive statutes can be directed with favor or disfavor toward specific classes with greater ease than can prospective laws.<sup>126</sup>

Consistent with the notion of a single underlying constitutional policy against retroactive legislation, commentators and courts until recently have suggested that a single test determined the constitutionality of all legislative enactments, whether the challenge arose under the due process or contracts clauses.<sup>127</sup> Recent contracts clause cases, however, indicate that a separate and stricter standard of review applies to state

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120. Jett, *The Path to Destruction of Taft-Hartley Pension Trusts: Mandatory "Defined Benefit Plan" Status*, 28 LABOR L.J. 403, 408 (1977).

The liability is *retroactive* because it is based upon acts performed by the employer prior to the passage of ERISA . . . . The amount of liability is *uncertain* because it depends upon pension plan experience . . . . The liability is *open-ended* because it can never be liquidated at one time, unless the plan is terminated, until the last plan participant dies.

*Id.* Mr. Jett was counsel for the plaintiff trustees in *Connolly*.

121. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

122. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. 1, § 10. In recent times, challenges to state statutes with retroactive effects have typically been made on the basis of *both* the contracts clause and the fourteenth amendment. See Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 221 (1960).

123. See generally Hochman 692; Slawson, *supra* note 122.

124. See Hochman 692, 727. This factor is of particular importance when contractual rights are involved. See Slawson, *supra* note 122, at 233.

125. See Hochman 692-93.

126. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 428 (1978); Hochman 693.

127. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 259-60 (1978) (Brennan, J., dissenting); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 61 (1977) (Brennan, J., dissenting); *Nachman Corp. v. PBGC*, 592 F.2d 947, 959 (7th Cir.), cert. granted, 99 S. Ct. 2881 (1979); Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 543 (1956); Hale, *The Supreme Court and the Contracts Clause: III*, 57 HARV. L. REV. 852 *passim* (1944); see Hochman 695. Slawson, *supra* note 122, at 221.

laws alleged to be in conflict with the contracts clause.<sup>128</sup> Since ERISA is, of course, federal legislation, fifth amendment due process clause analysis is appropriate.<sup>129</sup>

The Supreme Court's approach to due process challenges recognizes the "serious objections" to retroactivity, but the Court "has consistently held that not all retrospective statutes are unconstitutional, but

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128. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The *Allied Structural Steel* case is of particular interest here since it involved a pension regulation statute, the Minnesota Private Pension Benefits Protection Act. The Act required pension plan sponsors that terminated plans or closed Minnesota plants or offices to pay a "pension funding charge" if the pension fund had insufficient assets to cover full pensions for employees who had worked at least 10 years. 438 U.S. at 238. The retroactivity objection arose because the 10 years included service prior to passage of the statute. "The Act required the employer to satisfy the deficiency by purchasing deferred annuities, payable to the employees at their normal retirement age." *Id.*

Holding the Minnesota statute unconstitutional, the Court emphasized the importance of contractual stability, particularly with regard to pension funding. *Id.* at 246. See note 157 *infra*. In defending its statute, Minnesota could demonstrate no countervailing employee reliance interest since employees did not know of or rely on a 10-year vesting scheme when they accepted or continued employment with Allied. 438 U.S. at 246 n.18. Further, although the State was not required to show the existence of an emergency in order to justify the impairment of contracts by the law, the Court's insistence that the State show the existence of "a broad, generalized economic or social problem," *id.* at 250, that would justify its entry into "an area never before subject to regulation by the State," *id.*, placed a significant burden on the State to demonstrate the necessity of the law. The Court's observation that the statute was not temporary in effect and did not provide for grace periods that would ameliorate its retroactive effects signaled the Court's willingness to engage in close scrutiny of the means chosen by the state to solve whatever serious problems it could demonstrate. In short, the state had the burden to prove to the Court's satisfaction that the impairment was both necessary and reasonable. This reflects the approach taken in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), where the Court applied the reasonable and necessary test to hold unconstitutional a 1974 New Jersey statute retroactively repealing a covenant with New York that provided security for Port Authority bonds. *Id.* at 25. The Court considered the statute unnecessary since other less drastic means were available, and unreasonable since the legislature could have foreseen the disadvantages of the covenant at the time it was passed. *Id.* at 29-32; *cf. Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934) ("The question is . . . whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end").

129. It is possible for those who wish to retain the concept of a single standard to argue that the stricter test used in the recent contracts clause cases is the new test for all retroactivity cases. *Cf. Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir.), *cert. granted*, 99 S. Ct. 2881 (1979) (recognition of two current standards and the concept of a single standard; no choice of standard made on grounds that the result would be the same under either standard). The likelihood of this result is diminished by the recency of the Court's latest pronouncement of the due process test, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and by the Court's recent references to the existence of two distinguishable tests. In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13 (1977), the Court took care to contrast the due process standard with the contracts clause standard set forth in that opinion. Further, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Court contrasted the due process test with what was described as the "intermediate standard" of review employed in *United States Trust Co.* *Id.* at 82-83. Finally, lower federal courts have applied the due process standard to federal legislation and regulations without attempting to apply the stricter *United States Trust Co.* standards. See note 139 *infra*. See also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 262-64 (1978) (Brennan, J., dissenting).

only those which, upon a balancing of the considerations on both sides, are felt to be unreasonable.”<sup>130</sup> Thus, in *Fleming v. Rhodes*,<sup>131</sup> the Court noted that

[s]o long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by “prophetic discernment.”<sup>132</sup>

Only if the provisions are found to be “arbitrary and oppressive” do they violate the due process standard.<sup>133</sup>

The most recent expression of this view came in *Usery v. Turner Elkhorn Mining Co.*,<sup>134</sup> in which the Court turned back a due process challenge to the Federal Coal Mine Health and Safety Act of 1969,<sup>135</sup> which required payment of benefits on behalf of miners who contracted black lung disease, including miners who had left mine employment prior to the passage of the Act. The mine operators placed principal reliance on *Railroad Retirement Board v. Alton Railroad Co.*,<sup>136</sup> in which the Court held unconstitutional a provision of the Railroad Re-

130. Hochman 694-95. Hochman described three main factors considered by the Court in retroactivity challenges: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modified or abrogated the asserted preenactment right and (3) the nature of the right altered by the statute. *Id.* 697.

131. 331 U.S. 100 (1947).

132. *Id.* at 107 (footnote omitted).

133. *Welch v. Henry*, 305 U.S. 134, 147 (1938). *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (“The Due Process Clause . . . generally does not prohibit retrospective civil legislation, unless the consequences are particularly ‘harsh and oppressive’”). *See also Lichter v. United States*, 334 U.S. 742 (1948) (removal of excess profits from wartime contracts); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945) (alteration of statute of limitations); *Norman v. Baltimore & O. R.R.*, 294 U.S. 240, 307 (1935) (nullification of gold clauses in contracts between private individuals: “Contracts, however express, cannot fetter the constitutional authority of the Congress”); *Calhoun v. Massie*, 235 U.S. 170, 176-77 (1920) (attorney fees for Civil War claims restricted); *Campbell v. Holt*, 115 U.S. 620 (1885) (statute of limitations altered); *Knox v. Lee*, 79 U.S. [12 Wall.] 457, 549-52 (1870) (substitution of “greenbacks” as legal tender).

This principle has been applied to protect the power to regulate interstate commerce from the restrictive effects of contracts made prior to congressional action. *See United States v. Southern Pacific Co.*, 259 U.S. 214, 234-35 (1922) (antitrust); *New York v. United States*, 257 U.S. 591, 600-01 (1922) (I.C.C. ratemaking authority); *Philadelphia, B. & W. R.R. v. Schubert*, 224 U.S. 603 (1912) (employer liability for employee injuries contrary to contract); *Louisville & N. R.R. v. Mottley*, 219 U.S. 467, 482-86 (1911) (railway passes); *Atlantic Coast Line R.R. v. Riverside Mills*, 219 U.S. 186, 201-03 (1911) (railroad liability for damaged goods); *Armour Packing Co. v. United States*, 209 U.S. 56, 81-82 (1908) (railroad shipping rates); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 234-35 (1899) (antitrust).

134. 428 U.S. 1 (1976).

135. 30 U.S.C. §§ 901-941 (1976).

136. 295 U.S. 330 (1935).

tirement Act of 1934<sup>137</sup> that required payment of pensions reflecting pre-Act employment to any former railroad employees who were reemployed after the Act's passage. The provision "plainly . . . alter[ed] contractual rights, [and] impose[d] for the future a burden never contemplated by either party when the earlier relation existed . . . . The provision [was] . . . retroactive in that it resurrect[ed] for new burdens transactions long since past and closed."<sup>138</sup> The Act's provisions requiring pension funding for current employees for service prior to the Act's passage were also found unconstitutional.<sup>139</sup>

In *Turner Elkhorn* the Court insisted that the mine operators demonstrate that the legislation was "arbitrary and irrational."<sup>140</sup> Retroactive effects alone would not meet this burden since "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts."<sup>141</sup> It was recognized, however, that statutes with retroactive effects must meet due process tests that differ from those for prospective statutes.<sup>142</sup> The inquiry here focused on whether the mine owners knew that their employees could develop black lung disease and, if so, whether the employers acted in reliance on their nonliability for the disease's effects. The Court found that the mine owners knew of the dangers of black lung disease but that they could not show reliance on prior law since it was not clear that the mine operators would have proceeded differently even if they had known of their potential liability for employee disabilities caused by the disease.<sup>143</sup> Despite the employers' knowledge of the

137. Pub. L. No. 73-485, 48 Stat. 1283 (1934).

138. 295 U.S. at 349-50.

139. *Id.* at 353-54.

Although completed and compensated in full in conformity with the agreement of the parties . . . work done over a period of 30 years past . . . is to be the basis for further compulsory payment.

[A]rbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible. . . . [T]here can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted.

*Id.* In an alternative holding repudiated by later decisions, *see* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936), the Court held that the Act was beyond the congressional power to regulate interstate commerce. *See* 295 U.S. at 362-74. This holding was of greater significance since it "raise[d] a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce," *id.* at 375 (Hughes, C.J., dissenting), even if due process defects were corrected.

140. 428 U.S. 1, 15 (1976).

141. *Id.* at 16.

142. *Id.* at 16-17.

143. *Id.* at 17.

danger, the Court rejected the use of any deterrence or blameworthiness theory to justify retroactive liability. Rather, the statute was upheld as a "rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor . . . ."144 *Alton* was distinguished on the grounds that the purpose of the Mine Safety Act was "to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business"—while the *Alton* statute simply "increas[ed] or supplement[ed] a former employee's salary to meet his generalized need for funds."<sup>145</sup>

In summary, *Turner Elkhorn* suggests that the proper inquiry in cases involving retroactive liability pursuant to Congress' regulation of commerce is whether the legislation rationally relates to a legitimate government purpose.<sup>146</sup> Factors bearing on the rationality of the legislative scheme include the extent to which the harm sought to be remedied by the statute can be traced to the party bearing the retroactive burden, that party's knowledge of the potential harm and the degree of the party's reliance on nonliability for the harm.<sup>147</sup>

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144. *Id.* at 18. The employers claimed that the Act was arbitrary as it imposed liability on particular employers and not the industry as a whole, thus giving new employers an advantage over longtime operators with black lung liabilities. The Court deferred to Congress' choice of a scheme to spread the costs. *Id.* at 18-19.

145. *Id.* at 19.

146. See J. NOWAK, *supra* note 126, at 433.

147. 428 U.S. at 17-18. Two recent series of cases illustrate further the approach used in evaluating statutes and regulations with retroactive effects. In *Adams Nursing Home, Inc. v. Mathews*, 548 F.2d 1077 (1st Cir. 1977), the nursing home challenged the constitutionality of an HEW decision to alter regulations allowing Medicare providers to use accelerated depreciation of capital assets in determining "reasonable cost" for reimbursement for Medicare services. Providers who left the program were held accountable for any difference between the accelerated depreciation used under the old regulations and the straight line depreciation required under the new regulations. The court found that the providers' conduct would probably have been the same even in the absence of the regulation. Further, the providers' assumption that the regulations would not be changed was inappropriate in a field as heavily regulated as Medicare. See note 167 *infra* and accompanying text. The constitutional challenge was denied. See also *Summit Nursing Home, Inc. v. United States*, 572 F.2d 737 (Ct. Cl. 1978); *Springdale Convalescent Center v. Mathews*, 545 F.2d 943 (5th Cir. 1977); *Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger*, 543 F.2d 703 (9th Cir. 1976). In *Norfolk Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977), the court rejected a due process retroactivity challenge to a 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act that provided death benefits to survivors of employees who died from causes other than work-related injuries. The court relied on the expansive statement of congressional power to enact retroactive legislation in *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947). See text accompanying note 132 *supra*. See also *Nacirema Operating Co. v. Lynn*, 577 F.2d 852 (3d Cir. 1978); *State Ins. Fund v. Pesce*, 548 F.2d 1112 (2d Cir. 1977).

C. *Employers' Retroactive Liability for Benefits: Multiemployer Plan Benefit Insurance Under Due Process Analysis.*

Several recent cases raise the question of the constitutionality of Title IV's retroactive employer liability for benefits.<sup>148</sup> In *Nachman Corp. v. PBGC*,<sup>149</sup> the Seventh Circuit held constitutional the imposition of retroactive liability for benefits on the sponsor of a collectively bargained, single-employer defined benefit plan.<sup>150</sup> The court found that retroactive liability was not an arbitrary or irrational means of achieving the goal of employee benefit protection.<sup>151</sup> The decision emphasized that employee reliance on pension benefits outweighed employer reliance on nonliability,<sup>152</sup> that holding the employer to pay the agreed-upon benefits was equitable<sup>153</sup> and that the ERISA provisions moderated the impact of its retroactive features.<sup>154</sup>

The impact of retroactive liability on multiemployer plan sponsors is, however, arguably more severe than it is on single employer plan sponsors.<sup>155</sup> Employer reliance on nonliability is probably stronger because of the diminished control over the fund and its eventual benefits.<sup>156</sup> Further, the equity of holding employers to pay benefits at the level promised is reduced when the plan is not a true defined benefit plan and when no one employer has made a commitment to provide a benefit.<sup>157</sup> Additionally, the weakness of the legislative history on the

148. See note 114 *supra*.

149. 592 F.2d 947 (7th Cir.), *cert. granted*, 99 S. Ct. 2881 (1979).

150. *Id.*; see *Nachman Corp. v. PBGC*, 436 F. Supp. 1334, 1336 (N.D. Ill. 1977), *rev'd*, 592 F.2d 947 (7th Cir.), *cert. granted*, 99 S. Ct. 2881 (1979). See also *PBGC v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979) (corporate member of control group held liable; constitutional challenge denied); *Lear Siegler, Inc. v. PBGC*, [1979] 238 PENS. REP. (BNA) D-3 (E.D. Mich. 1979).

151. The use of the "arbitrary or irrational" test indicates that the court employed the due process test outlined in text accompanying notes 140-47 *supra*. The court, however, used analysis from the *Allied Structural Steel* case to determine the constitutionality of Title IV's provisions. Although acknowledging that the contracts clause had no bearing on the case, the court observed that other authorities considered contracts clause precedent relevant in fifth amendment due process cases. 592 F.2d at 959. See note 127 *supra* and accompanying text. Because the court was "convinced that ERISA withstands the scrutiny employed under the Contract[s] Clause cases," *id.*, it saw no need to decide "whether the two clauses in fact impose identical restraints on legislative impairments of contracts," *id.* Compare note 129 *supra*.

152. 592 F.2d at 961-62.

153. *Id.* at 962.

154. *Id.* at 962-63. These include the 30% of net worth limitations on an employer's liability, restrictions on the amount of benefits guaranteed and the still unadopted employer insurance program. *Id.* See note 43 *supra*.

155. See notes 113-20 *supra* and accompanying text.

156. See notes 117-18 *supra* and accompanying text.

157. By changing each sponsoring employer's obligation from one to provide contributions to an obligation to provide benefits, ERISA arguably "grossly distort[s] the company's existing contractual relationships with its employees by superimposing retroactive obligations upon the company substantially beyond the terms of its employment contracts." *Allied Structural Steel Co. v.*

specific question of congressional intent to include multiemployer plans in Title IV could be seen as an indication that liability was imposed without adequate proof of or commitment to its necessity.<sup>158</sup>

Under *Turner Elkhorn* analysis these objections would be insufficient grounds for finding Title IV unconstitutional. Congress had plainly identified a problem it intended to solve.<sup>159</sup> The question then is whether the imposition of retroactive liability is an arbitrary and irrational means of achieving this end.<sup>160</sup>

The *Turner Elkhorn* Court first asked if the employers knew of the threat of black lung disease.<sup>161</sup> The purpose of an inquiry of this nature is to determine whether Congress could have chosen the employer as the one to bear the costs of remedying the harm on the grounds that the employer was to blame for the harm. In *Turner Elkhorn* employer knowledge was found, but this was not a sufficiently compelling reason to justify the retroactive liability.<sup>162</sup> Even less "blame" can be found in the case of multiemployer plans. The blame for the harm, underfunded pensions, could not be placed entirely on the employers, since they presumably met their sole obligation by making the required contributions.<sup>163</sup> The fund's management was out of their hands.

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Spannaus, 438 U.S. 234, 249-50 (1978). Retroactive distortion of the contractual commitment is particularly worrisome when it concerns a matter as sensitive as pension funding. *Id.* at 246-47. See also *City of Los Angeles v. Manhart*, 435 U.S. 702, 721 (1978), in which the Court also recognized the sensitivity of pension funds to retroactive change, advising that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result" (footnote omitted). ERISA, the Court noted, "paid careful attention to the problem of retroactivity . . . [by setting] a wide variety of effective dates for different provisions of the new law . . ." *Id.* at 721-22 n.40.

158. See notes 96-99 *supra* and accompanying text. If the *Allied Structural Steel* test were used, the arguments presented here might well be conclusive. With the burden on the Congress to demonstrate necessity in terms of a broad societal interest, one could deem a legislative history like the one here inadequate. Further, one could question the reasonableness of Congress' choice of mechanisms for correcting the problem. Since parties other than the employers—for example, the unions or employees who pushed for high benefits, or the trustees who set unreasonably high benefits—may bear part of the "blame" for termination with inadequate funds, a "reasonable" scheme might distribute the costs among all of these parties. Finally, any retroactive liability whatsoever might be treated as unreasonable per se given the employer's reliance on nonliability and the arguably low level of employee reliance in plans without strictly defined benefits.

159. See note 101 *supra* and accompanying text.

160. See *Nachman Corp. v. PBGC*, 592 F.2d at 958-63.

161. See text accompanying note 143 *supra*.

162. See text accompanying note 143 *supra*.

163. A retroactive statute that operates to hold the parties to the original promises made is not unconstitutional. See *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (Portal-to-Portal Act change in employee compensation scheme of Fair Labor Standards Act held constitutional); *Campbell v. Holt*, 115 U.S. 620, 628-30 (1885) (statute of limitations extension merely allowed enforcement of original contract); *Ewell v. Dags*, 108 U.S. 143 (1883) (reliance on repealed usury defense misplaced because it was an attempt to escape contract obligations); *Randall v. Kreiger*, 90 U.S. [23 Wall.] 137, 149 (1874) (conveyance of land effective

The next step is to ask if the employer placed justifiable reliance on the previous law when he took the actions that now give rise to liability. In *Turner Elkhorn* no such reliance could be shown.<sup>164</sup> In the multiemployer plan situation, employer reliance is quite possible, since employers may well have agreed to sponsor such plans, with their shared management and reduced control, only on the condition that they would bear no liability beyond the obligation to contribute. It is arguable, however, that any such employer reliance should be disregarded. First, as the *Nachman* court observed, employee reliance must be considered.<sup>165</sup> While the employees could not justifiably rely on employer guarantees of benefits when no such guarantees existed, the employees undoubtedly relied on the payment of a pension benefit from the fund.<sup>166</sup> Although employees would not necessarily rely on a set amount, since the benefit levels change, the benefit levels would provide a general idea to employees of the amount they could expect to receive upon retirement and would induce them to forego making other retirement income arrangements. Employees would tend to identify the employers with the fund's promise to pay the benefits because the employers are the fund's principal source of income. This tendency would be encouraged if the employers, in past deficit situations, made virtually automatic contribution increases to support the benefits promised by the trustees. Second, the employers' reliance on nonliability for benefits was misplaced. The plans now subject to Title IV have long been governed by federal laws and regulations, including the Taft-Hartley Act, the Internal Revenue Code and the Welfare and Pension Plan Disclosure Act of 1958. By agreeing to sponsor these plans, employers submitted to this extensive regulation and obtained, in ex-

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by virtue of retroactive recognition of waiver of dower); Hochman 720. While this doctrine speaks clearly to the limit of liability clauses in standard defined benefit plans, it is not dispositive regarding employer liability in the defined contribution situation since there has been, in fact, no employer promise to provide a benefit. But the courts, along equitable principles, may regard an employer's participation in the plan as an implicit recognition of the obligation to provide the benefit. See *Hurd v. Hutnik*, 419 F. Supp. 630, 655-56 (D.N.J. 1976).

164. See text accompanying note 143 *supra*.

165. *Nachman Corp. v. PBGC*, 592 F.2d at 960.

166. Employee reliance in ERISA-covered pension plans is stronger than the reliance in *Allied Structural Steel* or *Alton R.R.* *Nachman Corp. v. PBGC*, 592 F.2d at 961-62. In *Allied Steel* the employees had no 10-year vesting provisions and thus no basis to rely on early vesting until the legislature suddenly created vested rights. In *Alton*, pensions had not been bargained for or contracted for—Congress simply directed that they be created and funded. Obviously, the employees did not rely on this fortuitous act of Congress. Here, a pension obligation has been created, and benefit levels have been set under an agreement to which the employer is a party. The pension is to be drawn from a fund of which the employers are the sole source of contribution income. Thus, employee reliance on the eventual payment of a pension by the employers is far more justifiable than in either *Allied Steel* or *Alton R.R.*

change, substantial tax advantages. It is well established that any entity choosing to enter a field already subject to heavy regulation accepts the possibility of retroactive change in the laws and regulations.<sup>167</sup> At the very least, then, the extensive regulation of pension plans diminishes the strength of any claimed employer reliance so that it fails to overwhelm the employee reliance on full pension benefits.

Since employer blameworthiness is insufficient to compel retroactive employer liability,<sup>168</sup> but employer reliance here is insufficient to forbid it, the special concerns raised by retroactive liability statutes like this one and the *Turner Elkhorn* statute have no effect. The question then becomes the same one raised in any due process challenge to economic regulation: whether the statute is "a rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor . . . . [W]hether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension."<sup>169</sup> It is not at all difficult to conclude that Congress identified the employers—the fund's usual source of income—as the logical source of funds for elimination of underfunding and as the party best able to spread whatever costs that process involved. Although this choice may not have been a wise one, it was not one that violated the due process standard.

#### IV. DESIRABILITY OF TITLE IV COVERAGE FOR MULTIEMPLOYER PLANS AND PROPOSED REFORMS

##### A. *Impact of Title IV on Multiemployer Plan Growth.*

Despite their resistance to statutory construction and constitutional challenges, Title IV's multiemployer plan provisions are not necessarily here to stay. ERISA's framers did not intend to regulate pension plans in a manner that would make plan sponsorship undesirable. On the contrary, Congress hoped to encourage plan growth so that more workers would receive pension coverage.<sup>170</sup> Disruptive regulation should have been avoided particularly in the case of multiem-

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167. The leading case is *Federal Hous. Administration v. Darlington, Inc.*, 358 U.S. 84 (1958), in which the Court said that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative aim." *Id.* at 91. See also *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); *Norman v. Baltimore & O. R.R.*, 294 U.S. 240, 307-08 (1935); *Summit Nursing Home, Inc. v. United States*, 572 F.2d 737 (Ct. Cl. 1978); *Ames v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977); *Adams Nursing Home, Inc. v. Mathews*, 548 F.2d 1077 (1st Cir. 1977); *Hazelwood Chronic & Convalescent Hosp., Inc. v. Weinberger*, 543 F.2d 703 (9th Cir. 1976).

168. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976).

169. *Id.* at 18-19.

170. See text accompanying note 34 *supra*.

ployer Taft-Hartley plans. These plans were popular with employers, unions and employees because of the advantages they offered each group,<sup>171</sup> and because of the absence of any other means of plan organization that met the unique requirements of these groups.<sup>172</sup> Furthermore, these plans rarely terminated because of their broad bases<sup>173</sup> and their ability to use benefit reductions and increased contribution levels to correct deficits.<sup>174</sup>

ERISA altered this system drastically by creating liability for benefits despite contractual provisions to the contrary. Employers are less inclined to join multiemployer plans on this ground alone, given the lack of employer control over benefits<sup>175</sup> and the effect potential liability may have on the employer's ability to obtain credit.<sup>176</sup> In addition, however, the trustees are no longer as free to reduce benefits when the plan cannot support the benefit with the current contributions. ERISA requires vesting of benefits<sup>177</sup> and restricts benefit reductions,<sup>178</sup> thereby making correction of underfunding problems and avoidance of termination more difficult. The only "corrective device" remaining is the request for additional employer contributions, backed up by the threat of employer liability if the plan's problems are not corrected. Thus, the price for stable benefit levels is decreased plan flexibility.

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171. See notes 24-33 *supra* and accompanying text.

172. For workers in industries with highly mobile work forces, a multiemployer arrangement is the best if not the only means of obtaining an employer-funded pension. Some alternative retirement income devices are not well suited to sponsorship by more than one employer. For example, a profit-sharing plan would have no single profit pool to assess for contributions. Employers in these highly competitive industries would be unlikely to agree to an industry- or area-wide computation of profit since this would penalize the more profitable companies to the benefit of their less profitable competitors and their employees. The alternatives are not as advantageous as the current system. For example, individual retirement accounts (IRAs) would provide a benefit, but, if left to employee initiative, broad employee participation is less likely. Further, the employer loses tax deductions, and the union loses its involvement. Even if the employer or the union and employer set up the IRAs, the employer's tax advantage is less than he would have under a qualified retirement plan. See Wangard, *Selecting a Qualified Plan After ERISA: The Alternatives, Problems and Costs*, 43 J. TAX. 145, 145 (1975). Despite these disadvantages, IRAs are increasingly attractive as a result of ERISA's regulations. N. LEVIN 348.

173. See note 30 *supra* and accompanying text.

174. PBGC STUDY 4, 51-52.

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

176. The PBGC's claims on employer assets enjoy a precedence, similar to federal tax liens, over those of other creditors. See 29 U.S.C. § 1368(c) (1976). Unfunded vested liabilities must be recorded on financial statements, however, only if a plan is to be terminated or when there is convincing evidence of impending termination. See F. POMERANZ, *supra* note 17, at 114. Any hint of employer liability would undoubtedly affect the company's ability to receive credit. See Erlenborn, *The Future of Private Pensions*, in PRIVATE AND PUBLIC PENSION PLANS: THE NEW LEGISLATION AND FUTURE PROSPECTS 36, 40 (1975).

177. See PBGC STUDY 53 n.10. See note 35 *supra*.

178. ERISA allows multiemployer plans to reduce benefits retroactively for up to two years, but restricts the other benefit reductions formerly used to avoid termination.

Given these restrictions, multiemployer plans are more likely to have unfunded liabilities. This leads to higher costs to the employer as the plan attempts to reduce the underfunding without lowering benefits. Employers who prefer to avoid these higher costs and the potential liability will take one of several steps. First, if they are not "substantial employers," they may withdraw from the plan without being assessed any liability for underfunding.<sup>179</sup> As a result, employers remaining in the plan are left with even greater burdens, and early withdrawal, even with some liability, in order to avoid being among the last to leave the plan, is encouraged. Second, the employer can terminate the entire plan and let the PBGC take over the payment of benefits.<sup>180</sup> Although the employer will be liable for up to thirty percent of net worth for unfunded benefits, the employer may prefer this liability to continuing under the plan if the costs of supporting the plan in the long run appear to exceed the thirty percent limit.<sup>181</sup>

The employees and the union may accept or even encourage termination. The retired workers' benefits will be paid by the PBGC. Current employees who have been paying a large portion of their total compensation for the pensions of retirees can now seek these same funds either as direct wages or create an "actives only" pension plan, unburdened by obligations to past employees and thus capable of providing the same or higher benefits at a lower cost.<sup>182</sup>

ERISA, then, creates clear incentives for employers to terminate plans completely or to conclude their company's participation through withdrawal. If neither of these actions is possible, employers will use whatever influence they have over trustees to avoid any increased commitments to ongoing plans, such as higher benefits, which increase potential liabilities.<sup>183</sup> In addition, any company not presently a party to a plan will probably resist proposals to join one<sup>184</sup> by pushing instead

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179. See note 119 *supra*.

180. See note 41 *supra*.

181. PBGC STUDY 51.

182. *Id.*

183. See N. LEVIN 347. The risk of liability increases every time benefits are raised since the change in the benefit level increases past service liabilities. See also Hurd, *Defined Benefit Plans—An Endangered Species?*, 114 TRUSTS AND ESTATES 206, 208 (1975). The ability of the employer to influence benefit levels depends on the ability to influence the trustees. Legally, the trustees are independent, see note 73 *supra*, but if the employer faces liability, attempts may be made to increase direct control.

184. S. REP. NO. 95-570, 95th Cong., 1st Sess. 3 (1977) (quoting PBGC, POTENTIAL MULTIEMPLOYER PLAN LIABILITIES UNDER TITLE IV OF ERISA (1977), reprinted in PBGC STUDY app. I, at 7), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4128, 4130; N. LEVIN 348. A variation on this theme involves employers' avoiding work projects in areas of the country that will bring them in the jurisdiction of a different pension plan. If the employer qualifies as a substantial employer, when the job is completed and the employer ceases to contribute to the plan, ERISA treats the

for some other form of compensation for union employees<sup>185</sup> or by avoiding the use of union employees.<sup>186</sup>

The final result is that plan adoption, retention and growth are less likely after ERISA than before ERISA. Correspondingly, as withdrawals and terminations become more common because of ERISA's provisions, the cost to the PBGC will increase, as it must pay benefits to increased numbers of employees whose plans have terminated. A 1977 PBGC report found that multiemployer plans covering 1.3 million workers were experiencing difficulties that could lead to termination over the next ten years. The cost to PBGC's insurance program, after employer liability was collected, would be \$4.8 billion. To cover such costs, PBGC would need to increase its multiemployer premiums from the current fifty cents per participant per year to eighty dollars per participant per year.<sup>187</sup> While the financial difficulties themselves are not necessarily attributable to ERISA,<sup>188</sup> ERISA did impose restrictions on the ability of the plans to respond to economic difficulties, and it created incentives for plan termination.

## B. *Proposed Reforms.*

1. *The Connolly Solution: Multiemployer Plans Exempt from Title IV.* As a solution to these difficulties, the *Connolly* plaintiffs would simply read the multiemployer Taft-Hartley plan out of Title IV by classifying such plans as defined contribution plans. If statutory construction of the existing statute fails to accomplish this, an amendment could easily do so. The prospects for plan continuance and growth would be better than in the current situation, since the employer's contingent liability, and hence the problems caused by the withdrawal of employers, would be eliminated. Not all ERISA burdens would be

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employer's action as a withdrawal and requires the employer to post a bond or place funds in escrow to cover any potential liabilities for five years. This extra cost will make a bid by employers from outside the area prohibitively expensive. See *Oversight of ERISA*, *supra* note 94, at 177-78; N. LEVIN 339; Diamond, *Funding Liability Under Union Pension Plans*, J. ACCOUNTANCY 74-78 (Sept. 1975). The PBGC has proposed changes to deal with this problem. See PBGC STUDY 99-100.

185. Higher wages are an example. Current employees may prefer a higher wage at present rather than diversion of a portion of their total compensation to fund pensions for retirees.

186. There is an incentive to use nonunion shops or "double-breasted" operations in order to avoid the union fund. See *Oversight of ERISA*, *supra* note 94, at 230-31 (testimony of Matthew Lind, PBGC Director); H. REP. NO. 95-706, 95th Cong., 1st Sess. 5 (1977).

187. PBGC STUDY 1-2; see PBGC, POTENTIAL MULTIEMPLOYER PLAN LIABILITIES UNDER TITLE IV OF ERISA (1977), reprinted in PBGC STUDY app. I.

188. Termination has become more likely in certain declining industries, where lower current payrolls and contributions cannot adequately fund the pension commitments made to work forces once larger and now retired or soon to retire. *Oversight of ERISA*, *supra* note 94, at 228-29 (testimony of Matthew Lind); PBGC STUDY 4.

lifted, however; the sponsors would still be subject to the participation, vesting, fiduciary responsibility, reporting, disclosure and funding requirements.<sup>189</sup> But any added costs from these provisions would simply be assessed against the trust fund, so that the same fixed contribution rate would provide a smaller benefit. As long as the employer is not liable for the benefit, the question of higher costs is passed to the trustees in their benefit level determination or is set aside until the next contract comes up for collective bargaining, when deficiencies under the funding standards would be addressed. The employer would not face the impact of the costs *until* there was a contractual agreement for increased contributions.

Clearly, this alternative would reduce employee protection by ending the PBGC's guarantee of benefits. It is arguable, of course, that employees should expect no set pension benefit, since in the typical multiemployer situation mobile workers are accepting the best pension arrangement possible, albeit with uncertain benefits not guaranteed by any one of the employers they work for during their lifetimes. The trustees do, however, set a benefit, and the employees presumably rely on that amount in planning for their retirement. This expectation is what Congress hoped to protect by *including* such plans in Title IV.<sup>190</sup>

The security of benefits even without Title IV would seemingly remain reasonably high. The pre-ERISA Taft-Hartley plan was less prone to failure than a single employer plan,<sup>191</sup> and the ERISA funding requirements should insure stronger plans. Those same funding requirements, however, in combination with ERISA vesting requirements, increase costs and restrict the remedial benefit reductions formerly available under the plan. Exclusion from Title IV would not discourage terminations attributable to these non-Title IV provisions.<sup>192</sup> Further, pension plans in declining industries are exceptions to the general rule that multiemployer plans are economically sound and stable. Elimination of Title IV coverage cannot change the fortunes of the industry or make termination of plans less likely, but it will end PBGC's benefit guarantee. This is a serious disadvantage in direct conflict with Congress' desire to protect employee benefits upon plan termination, and militates for the continuation of some sort of benefit-

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189. The funding provisions enforce the contribution requirements and insure that contributions and benefits are reconciled when the contract period ends. They do not, however, alter liability at termination. See note 36 *supra*.

190. See note 101 *supra* and accompanying text.

191. Unless the entire industry is in decline, the inclusion of many employers makes termination less likely than when the plan is dependent on the fortunes of a single employer. See note 30 *supra* and accompanying text.

192. See notes 177-78 *supra* and accompanying text.

insurance scheme if it can avoid negative effects on plan growth in other industries.

2. *PBGC Proposals*. In response to the 1977 report predicting numerous multiemployer plan terminations at great expense to the PBGC, Congress required the PBGC to prepare proposals for the reform of ERISA's multiemployer plan provisions.<sup>193</sup> The PBGC produced a study that analyzed the problems anticipated under ERISA and offered options for their correction.<sup>194</sup> The study proposed changes in some ERISA provisions outside Title IV.<sup>195</sup> The main focus, however, was on Title IV. The report explored options including the imposition of employer liability upon withdrawal,<sup>196</sup> a program for reorganization of financially troubled plans<sup>197</sup> and revised benefit guarantee levels combined with alterations in the employer liability provisions.<sup>198</sup>

The PBGC study advanced two basic alternative approaches to the problem of employer liability. The first approach, which emphasized reduction of PBGC's exposure to loss, would have increased the employer's potential liability to 100% of net worth,<sup>199</sup> while reducing the

193. Act of Dec. 19, 1977, Pub. L. No. 95-214, 91 Stat. 1501.

194. PBGC STUDY.

195. These include redefining "multiemployer plans" to cover more of the plans with the characteristics usually attributed to such plans, *id.* 26-32; imposing stricter funding requirements by reducing amortization periods, limiting benefit increases during periods of shortfall, and imposing minimum contributions rates, *id.* 40; regulating mergers of plans and transfers of liabilities, *id.* 115-19; and restructuring PBGC's premiums to reflect PBGC's exposure to loss and the risk of termination, *id.* 122-36.

196. *See id.* 94-114.

197. *Id.* 65-69.

198. [T]he report presented five alternative approaches to termination guarantees and employer liability which PBGC considered. They were as follows:

- (1) employer liability for full vested benefits and reduced benefit guarantees,
- (2) employer liability for guaranteed benefits only and reduced benefit guarantees,
- (3) no employer liability and no benefit guarantees,
- (4) employer liability for guaranteed benefits only and reduced benefit guarantees only if the plan imposes withdrawal liability on withdrawing employers, otherwise, no benefit guarantees and no employer liability, and
- (5) employer liability only for the guaranteed benefits of retirees and those within five years of normal retirement, with benefit guarantees only for such participants.

Under these approaches, with the exception of Program 3, employer liability would not be limited to 30 percent of net worth, *i.e.*, the present statutory limit, but instead employers would continue to fund their share of the unfunded termination liability.

*Id.* 73 (footnote omitted).

199. This approach includes proposal 1, *supra* note 198, in which the employer would be liable for up to 100% of his net worth for all vested benefits; and proposals 2 and 4, *supra* note 198, where the employer would be liable only for guaranteed benefits (with reduced guarantees). The rationale for proposal 1 was that "employers would be encouraged to seek sound funding practices and both employers and the union would attempt to prevent termination because high liability could jeopardize the ability of participating employers to continue in business or to compete with nonparticipating employers." PBGC STUDY 74-75. Proposals 2 and 4 reduce guarantee levels in

amount that the PBGC would guarantee. If a plan terminated with a deficit, the employees would receive less from the PBGC than they would under the current scheme, but whatever the PBGC paid out could be recovered from employers until their assets were exhausted. The second approach would have eliminated the PBGC's guarantees entirely and would also have eliminated employer liability.<sup>200</sup> This alternative was acceptable to the PBGC only if adopted in combination with the plan reorganization and financial assistance proposals.<sup>201</sup>

The PBGC study was followed by recommendations<sup>202</sup> that were largely incorporated into legislation submitted to Congress in bills introduced in both houses in May, 1979.<sup>203</sup> Passage of this legislation would significantly alter the treatment of multiemployer plans under ERISA.<sup>204</sup>

The proposed legislation would deal with the problem of employer withdrawal by holding all withdrawing employers liable for their shares of the plan's unfunded vested obligations.<sup>205</sup> This would encourage plan participation by decreasing the chances of termination upon withdrawal of an employer and the subsequent liability of remaining employers for the withdrawing employer's obligations.

The legislation approaches the problem of financially troubled plans by requiring reorganization to avoid termination.<sup>206</sup> Plans that are classified as being under reorganization are subject to special fund-

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the hope that "some of the potentially adverse impact of employer liability . . . [will] be mitigated." *Id.* 83.

200. Proposal 3, *supra* note 198, reflects this approach. *See* PBGC STUDY 85-88. The variation in proposal 5 would retain employer liability (increased to 100% of net worth) and PBGC guarantees for retirees only in order to provide "maximum benefit security to those participants most in need of retirement income security." *Id.* 89.

201. *See id.* 85.

202. The PBGC recommendations were issued in March, 1979. *See* "Recommendations Submitted to Congress by PBGC on Restructuring Multiemployer Plan Termination Insurance Program," [1979] 230 PENS. REP. (BNA) R-2 (Mar. 12, 1979).

203. S. 1076; H.R. 3904, 96th Cong., 1st Sess. (1979).

204. Insofar as the legislation, if passed, eliminates provisions that are particularly objectionable to plan sponsors, the incentive to raise statutory construction arguments similar to those in *Connolly* might be eliminated. The legislation itself, however, would not resolve the definitional questions raised.

205. *See* S. 1076, § 104 (proposing ERISA § 4201). A withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. The withdrawal liability is determined by subtracting the total of plan assets and any outstanding withdrawal liability claims from the present value of all vested benefits, and then multiplying this number by a fraction that reflects the proportion of contributions attributable to the withdrawing employer over the prior five years. If this figure is less than the greater of \$25,000 or .75% of the plan's unfunded vested liabilities, there is no withdrawal liability.

206. Plans qualifying for reorganization would be identified by use of a "reorganization index," computed by subtracting the charges to the funding standard account from the "vested lia-

ing requirements.<sup>207</sup> Plans undergoing reorganization would be eligible for "overburden credits" that assist plans in which the active employees are outnumbered by retirees.<sup>208</sup> A measure of pre-ERISA benefit reduction flexibility would be gained since these plans would be allowed to reduce or eliminate benefits not in effect for at least five years, a step not always possible under ERISA's ordinary vesting rules.<sup>209</sup>

Perhaps the most notable change is the approach to plan termination. Under the new legislation, termination alone does not trigger PBGC payments to participants. PBGC funds become available only when a plan is insolvent.<sup>210</sup> Further, the PBGC funds that are distributed to plans are in the form of loans to the plan rather than benefit payments.<sup>211</sup> Insolvent plans may also reduce certain benefits.<sup>212</sup> The

bilities charge." The vested liabilities charge is the amount necessary to amortize the plan's unfunded vested liabilities. If the result is greater than zero, the plan is in reorganization status.

207. The legislation would add ERISA § 4243, creating a "minimum contribution requirement" (MCR) that would govern funding for plans in reorganization.

[The MCR] would require that the negotiated contribution rate be sufficient to produce contributions equal to the "vested liabilities charge," if current levels of employment under the plan continued. The vested liabilities charge is the sum of: (1) the amount necessary to begin amortizing, over 10 years, the unfunded vested liabilities for benefits in pay status; and (2) the amount necessary to begin amortizing, over 25 years, the remaining unfunded vested liabilities.

Multiemployer Legislative Proposal Explanatory Statement, 125 CONG. REC. S5321, S5322 (daily ed. May 3, 1979) (footnote omitted).

208. The overburden credit is designed to meet the needs of plans overburdened with retirees. The plan is defined as overburdened if:

(A) pay status participants under the plan constitute at least 50 percent of the plan's extended participant group; and (B) the rate of employer contributions under the plan equals or exceeds the greater of the rate for the preceding plan year or the rate for the plan year prior to the first year that the plan was in reorganization.

S. 1076, § 104 (proposing ERISA § 4243(d)(2)). The credit, used for funding purposes, is computed by multiplying one-half of the average covered benefit payment for the plan year times the "overburden factor." The overburden factor is the "excess of pay status participants over all other persons in the extended participant group." *Id.* (proposing ERISA § 4243(d)(4)(F)).

209. A new ERISA section 4244 would allow the plan "to reduce or eliminate accrued benefits, attributable to employer contributions that, under section 4022A(b), are not guaranteeable by the corporation." *Id.* (proposing ERISA § 4244(a)(1)). Section 4022A(b) states that benefits in effect for less than five years are not guaranteeable. *Id.* § 102 (proposing ERISA § 4022A(b)).

210. Explanatory Statement, *supra* note 207, at S5324.

211. Both proposed section 4245, dealing with insolvent plans, and section 4281, dealing with insolvent terminated plans, allow the plan to obtain loans under proposed section 4261 "on such conditions as the corporation determines are equitable and appropriate to prevent unreasonable loss to the corporation with respect to the plan." S. 1076, § 104 (proposing ERISA § 4261(b)(1)). This means that while benefits will be paid at guarantee levels through PBGC funds, the PBGC will regain its funds if the financial health of the plan is restored so the plan can repay its loans.

212. "[B]enefit payments (other than basic benefits) under an insolvent multiemployer plan that exceed the resource benefit level shall be suspended . . . [R]esource benefit level' means the level of monthly benefits determined . . . to be the highest level that can be paid out of the plan's available resources." *Id.* (proposing ERISA §§ 4245(a), (b)(2)).

combination of the withdrawal rules and the reorganization and financial assistance rules means that plans could be maintained through employer withdrawal liability payments, PBGC loans and reorganization. A true termination would occur only in limited instances.<sup>213</sup> Even when termination occurred, employer contribution obligations or withdrawal obligations would continue, reorganization steps would be taken and the assistance available to insolvent plans could be provided if the plan qualified.<sup>214</sup> There would, however, be no direct payment of guaranteed benefits by the PBGC. With no payments by PBGC, there would be no need to make a separate assessment on employers to cover PBGC's losses.<sup>215</sup>

Other important provisions of the PBGC bill include stricter funding requirements, with shorter amortization periods;<sup>216</sup> lower benefit guarantees;<sup>217</sup> increased premiums;<sup>218</sup> provisions regulating mergers and transfers between plans;<sup>219</sup> and a redefinition of multiemployer plans.<sup>220</sup> The bill would also repeal section 4023 of ERISA, eliminating the program for contingent employer liability insurance.<sup>221</sup>

The legislative package offered by the PBGC strikes a balance between the potentially conflicting objectives of an insurance program. The elimination of employer termination liability, the protection of nonwithdrawing employers from the liabilities of withdrawing employers and the refusal to release employers from contribution obligations should decrease the incentives to terminate. The reduced guarantee levels and higher premiums and the use of loans rather than direct benefit payments are designed to protect the PBGC's solvency. Of course, some sacrifice has been made in terms of employee benefit protection, since guarantees are lower and some benefits may be reduced. These

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213. Termination would occur when a plan was amended so participants would receive no credit for service with employers, or when all employers withdrew, or when the plan was amended to become a defined contribution plan. *Id.* § 103 (proposing ERISA § 4041A(a)).

214. Explanatory Statement, *supra* note 207, at S5324.

215. The new legislation makes the employer liability calculations set forth at ERISA § 4064, 29 U.S.C. § 1364 (1976), inapplicable to multiemployer plans. S. 1076, § 402(i). There are no comparable provisions creating an employer obligation to repay the PBGC for funds it provides to insolvent plans. Of course, employer obligations may be greater than agreed to, since a withdrawing or terminating employer remains obliged to contribute amounts necessary to fund vested, guaranteed benefits.

216. S. 1076, § 202.

217. *Id.* § 102.

218. *Id.* § 105. The premiums would increase over a five-year period to \$2.60, the same as for single employer plans. *Id.*

219. *Id.* § 104.

220. *Id.* § 206. Multiemployer plans would be defined as those to which more than one employer is required to contribute pursuant to collective bargaining agreements. *Id.*

221. *Id.* § 107.

losses, however, are not necessarily major ones. First, the pre-ERISA multiemployer plan was stable. When the Title IV provisions blamed for upsetting plan stability are removed, stability should increase,<sup>222</sup> and with increased stability comes greater security for employee benefits. Unlike the *Connolly* solution, however, employees would retain protection. Protective provisions outside of Title IV, including vesting, funding and fiduciary responsibility, would still be in force; additionally, the plan reorganization and loan provisions would be available. The loan and reorganization provisions should be especially useful in the declining industry situation, much in the manner that the PBGC's discretionary authority has been used to protect workers in such industries.<sup>223</sup> Benefit reductions, although permitted, would remain restricted even for plans in deep financial trouble. Of course, if employees desire greater protection, including commitments by employers to assume full liability for promised benefits, they could negotiate agreements of that nature with the employers.

## V. CONCLUSION

Congress' passage of the benefit insurance program of ERISA's Title IV indicated the strong congressional commitment to protection of employees' pension expectations. The emphasis on benefit protection, however, should not obscure an equally important goal: the continued encouragement of employer sponsorship of pension plans. While the loss of benefits through termination of unfunded plans deprives the employee of retirement income in a sudden and dramatic fashion, the loss can be every bit as substantial if employers never establish plans, are unwilling to make financial commitments to the plan for fear of unknown liability, or terminate potentially viable plans to avoid future liability and to take advantage of the insurance program. It is appropriate then, even after concluding that Congress did intend to include multiemployer plans in Title IV and that it could do so without constitutional objection, to ask whether the decision was a wise one. The PBGC's studies indicate that some sort of change is necessary if the collapse of the pension plan insurance system is to be avoided. This offers Congress an opportunity to eliminate those portions of Title IV that unduly discourage plan sponsorship. At the same time, by maintaining supervision and control over plans under a revised Title IV providing for reorganization and loans, employee benefit protection would be superior to the pre-ERISA plan. This compromise between the pre-

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222. PBGC STUDY 86.

223. See *id.* app. IX.

ERISA system that encouraged widespread participation and the ERISA system that attempts to guarantee benefits could better serve the overall goal of providing secure benefits for as many workers as possible.

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