ERISA FAILURES AND THE EROSION OF WORKERS' RIGHTS: THE URGENT NEED TO PROTECT PRIVATE & PUBLIC WORKERS' PENSIONS AND BENEFITS

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ABSTRACT

On March 11, 2011, Governor Scott Walker of Wisconsin signed into law a bill that eliminated most collective bargaining rights for the state's public-sector workers. Many other cash-strapped states followed Wisconsin's lead and introduced or enacted similar restraints on the rights of their workers. Thousands of public workers, whose only means of protecting their rights rested in their ability to collectively bargain, suddenly found their retirement benefits in jeopardy. This truth highlighted the lack of protections for public worker benefits similar to those of the private sector. However, the Employee Retirement Income Security Act, enacted for that purpose, has failed to secure these benefits. This article seeks to provide a broad overview of the crisis facing the pension and benefits system in the United States and offers some possible solutions. More importantly, the goal is to spur discourse on the urgent need to protect the benefits of all workers, public and private.

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I. INTRODUCTION

Through the years, many workers have considered public-sector jobs, accompanied by the axioms of great pay, job-security, excellent health insurance, and generous retirement and other benefits, the most desirable and stable of employments. On March 11, 2011, a stroke of a pen forever removed these axioms from the public-sector employment universe.[1] That date marks the day that Wisconsin Governor Scott Walker signed into law sweeping legislation eliminating most collective bargaining rights for the state's public-sector workers.[2] On June 14, 2011, the Wisconsin Supreme Court upheld the constitutionality of the legislation, which was challenged on procedural grounds.[3]

Following Wisconsin's lead, other cash-strapped states began looking to balance ailing state budgets on the backs of their public workers.[4] At the time of this writing, twelve states had enacted or introduced legislation curbing the rights of their public workers to collectively bargain.[5] Virginia and North Carolina do not allow collective bargaining by public-sector unions.[6] The dangers inherent in this movement are grave. If recent lessons from the private sector hold true, public retirement benefits will be among the most vulnerable to attack as governments search for cost savings.[7] Unionized workers, in pursuit of self-preservation, often feel compelled to acquiesce to employer demands targeting reductions of legacy costs.[8] Employers pressure union leadership for concessions on retirement benefits in exchange for maintenance of benefits for the current workforce.[9] During uncertain economic times and nearly double-digit unemployment,[10] making a stand to

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[1] *See* Ryan Haggerty & Michael Muskal, *Wisconsin Gov. Scott Walker Signs Measure Limiting Collective Bargaining for Public Workers*, L.A. TIMES, Mar. 11, 2011, http://articles.latimes.com/print/2011/mar/11/news/la-pn-0312-wisconsin-unions-scott-wal20110312.

[2] *Id.*

[3] *See* State *ex rel.* Ozanne v. Fitzgerald, 798 N.W.2d 436, 441 (2011).

[4] *Talk of the Nation: More Cash-Strapped States Take on Public Unions* (NPR radio broadcast Feb. 21, 2011), http://www.npr.org/2011/02/21/133941164/More-Cash-Strapped-States-Take-On-Public-Unions?ps=rs.

[5] David Schaper, *Collective Bargaining Curbs Spread Across the U.S.*, NAT'L PUB. RADIO May 24, 2011, http://www.npr.org/2011/05/24/136610879/collective-bargaining-curbs-spread-across-the-u-s.

[6] Craig Jarvis, *Protesters Want Collective Bargaining Restored in N.C.*, CHARLOTTE OBSERVER Feb. 22, 2011, http://www.charlotteobserver.com/2011/02/22/v-print/2081948/protesters-want-collective-bargaining.html.

[7] The airline industry is a prime example. A common solution for the individual airlines was the termination of their pension plans. *See* CAROLINA BRIONES & HOLLY MYERS, SHORTCHANGED: HOW AIRLINES CAN REPAY TAXPAYERS FOR BILLIONS IN SUBSIDIES BY IMPROVING JOBS, SECURITY AND SERVICES 12 (2008), http://www.laane.org/downloads/ShortchangedStudy.pdf.

[8] *See, e.g.*, Letter from Ron Gettelfinger, President, United Auto. Workers, & Cal Rapson, Vice President and Director, United Auto. Workers, to United Auto. Workers Members at Gen. Motors (May 2009), http://online.wsj.com/public/resources/documents/gmuaw.pdf [hereinafter UAW Letter] (warning union members that their failure to ratify an agreement cutting legacy costs may jeopardize their employer's viability).

[9] *See id.*

[10] *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT.,

protect the rights of retirees is a bitter pill most current workers cannot stomach. When the government that created the retirement system is also the entity possessing the power of regulation, there is little recourse for the public worker.

Unfortunately, as many private-sector retirees can attest, the existence of an independent regulatory system is not a silver bullet solution. Private-sector workers, since 1974, have benefited from sweeping regulation in the form of the Employee Retirement Income Security Act ("ERISA").[11] Signed into law in 1974,[12] and amended many times,[13] the legislation purports to "give the American worker solid protection in his pension plan."[14] Despite such a noble intent, private pensions in America are nearing critical levels of underfunding,[15] and many attempts to strengthen the legislation have not stopped the bleeding.[16]

This article will highlight the precarious condition and multiple problems faced by the pension and retirement benefit systems in both the private and public sectors. The issues are varied and the solutions complex. An in-depth exploration of the issues would fill volumes, but the intention of this work is to provide a broad overview of the severity and urgency of the problem and to spur acutely needed discourse. An immediate call for action must go out to protect the rights of all workers. The problems have developed over many decades, long before Scott Walker became the Governor of Wisconsin. Those concerned with preserving workers' rights must make the signing of the Wisconsin bill the pen stroke heard around the world that begins the reform necessary to ensure the protection of America's workforce.

http://data.bls.gov/timeseries/LNU04000000?years_option=all_years&periods_option=specific_periods&periods=Annual+Data (last visited Nov. 8, 2011) (noting an unemployment rate of 9.6% for 2010).

[11] *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2011).

[12] *President Ford Signing ERISA of 1974*, Pension Benefit Guar. Corp., http://www.pbgc.gov/about/who-we-are/pg/president-ford-signing-erisa-of-1974.html (last visited Nov. 8, 2011) [hereinafter *Ford Signing ERISA*].

[13] *See, e.g.*, Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 U.S.C.).

[14] *Ford Signing ERISA*, *supra* note 12.

[15] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-708T, PRIVATE PENSIONS: LONG-STANDING CHALLENGES REMAIN FOR MULTIEMPLOYER PENSION PLANS 8 (2010) [hereinafter GAO, MULTIEMPLOYER PENSION PLANS].

[16] *See id.* at 3–4 (discussing the Multiemployer Pension Plan Amendments Act and the Pension Protection Act of 2006).

II. BACKGROUND: THE STATE OF AMERICA'S PENSION SYSTEMS AND HOW IT GOT THERE

Salacious headlines hearkening the doom of severely underfunded pensions in the United States have become routine.[17] Numbers ending in "billions," tossed about with ease and largely ignored by the public at large, have become commonplace. For many Americans, an accumulation of wealth and benefits that allows for the carefree enjoyment of the golden years of retirement is the truest measure of the realization of the American dream[18] and priority number one.

Wages and benefits soared over the last seventy years to levels unimaginable by previous generations of workers, fueled by the economic steamroller that was the American economy in the post-World War II years.[19] Prior to the war, the Wagner Act of 1935, also known as the National Labor Relations Act, guaranteed workers the right to organize and bargain collectively.[20] The windfall of effective collective bargaining spilled over into nonunion industries[21] and elevated the average income of American workers from just over $10,000 a year in 1934 to over $20,000 by the end of World War II.[22] The tremendous growth in wages over that eleven-year period and the end of the war presented employers a number of huge challenges. Chief among these was the creation of a compensation scheme lucrative enough to attract the best and brightest from the enormous influx of service members discharged and returning from the war.[23] Meeting this challenge was vital to

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[17] *See, e.g.*, Mary Williams Walsh & Michael Cooper, *Faltering Rhode Island City Tests Vows to Pensioners*, N.Y. TIMES, Aug. 13, 2011, http://www.nytimes.com/2011/08/13/us/13bankruptcy.html (describing how a bankrupt city cut existing pensions in order to pay bondholders).

[18] *See* JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 374 (1959) (coining the term "American Dream").

[19] *See* Catherine Mulbrandon, *Average Income in the United States (1913-2006)*, VISUALIZING ECON. (May 4, 2008), http://visualizingeconomics.com/2008/05/04/average-income-in-the-united-states-1913-2006.

[20] Robert VanGiezen & Albert E. Schwenk, *Compensation from Before World War I Through the Great Depression*, COMPENSATION & WORKING CONDITIONS, Fall 2001, at 17, 20.

[21] *Id.*

[22] Mulbrandon, *supra* note 19.

[23] *See* Robert I. Field, *Government as the Crucible for Free Market Health Care: Regulation, Reimbursement, and Reform*, 159 U. PA. L. REV. 1669, 1711 (2011) (discussing how the War Labor Board "exempted fringe benefits" from a wage freeze, allowing employers to attract workers through alternative forms of compensation, such as health insurance); *see also* U.S. DEP'T. OF LABOR, REP. ON THE AM. WORKFORCE 59 (2001), http://www.bls.gov/opub/rtaw/pdf/rtaw2001.pdf [hereinafter REPORT ON THE AMERICAN WORKFORCE] (discussing how employers offered nonwage benefits to attract workers).

facilitate and ensure a successful transition to postwar production.

The first American corporation to offer a defined benefit pension program was American Express in 1875,[24] but by 1929 benefits still only accounted for slightly more than one percent of total worker compensation.[25] Although many companies had created pension programs as a reward for loyal service, postwar employers viewed fringe benefits as a way to recruit employees and increase compensation without inflating wages.[26] The labor market was truly a seller's market with a mere 1.9% unemployment rate at the war's end.[27] Organized labor seized upon this opportunity and secured health care benefit packages, generous vacation allotments, sick pay, and myriad additional nonwage benefits.[28] At the close of the twentieth century, these *fringe* benefits constituted more than twenty-five percent of the average employee's compensation,[29] making the benefits anything but fringe.

Union leaders also began to seek a secure future for the rank-and-file worker that extended beyond the productive working years and beyond traditional pension income.[30] Health insurance benefits increasingly joined defined-benefit plans in providing pension income and health care for retirees.[31] Health care combined with pension income became the expectation for an entire generation of post-World War II workers upon retirement.[32] The economy roared and despite the bump in unemployment as war production ceased, the rate stayed historically low until the mid-1970s when it finally surpassed the seven percent mark.[33] Workers, unionized and nonunionized, made demands, and management, in an effort to maintain the growth boom in full swing, acquiesced with increased

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[24] *History of PBGC*, Pension Benefit Guar. Corp., http://www.pbgc.gov/about/who-we-are/pg/history-of-pbgc.html (last visited Nov. 8, 2011).

[25] Donald M. Fisk, *American Labor in the 20th Century*, COMPENSATION & WORKING CONDITIONS, Fall 2001, at 3–4.

[26] REP. ON THE AM. WORKFORCE, *supra* note 23, at 59.

[27] BUREAU OF LABOR STAT., U.S. DEP'T OF LABOR, 58 EMPLOYMENT & EARNINGS 194 (Jan. 2011), http://www.bls.gov/opub/ee/empearn201101.pdf [hereinafter BUREAU OF LABOR STAT.].

[28] REP. ON THE AM. WORKFORCE, *supra* note 23, at 59.

[29] *Id.* at 57.

[30] *Id.* at 59.

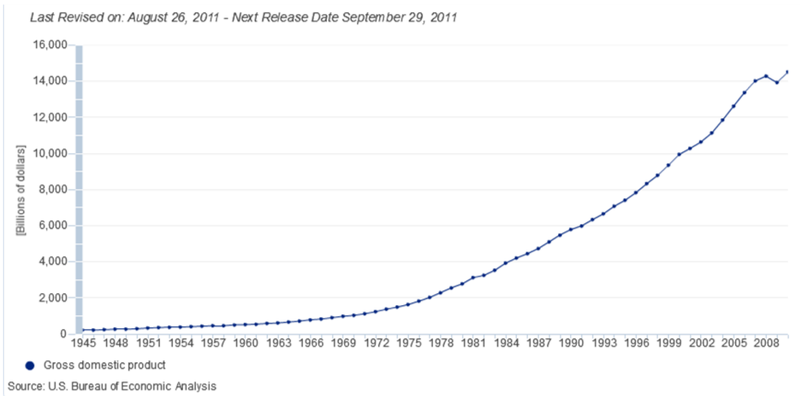
[31] *Retirement Security for the American Worker: Opportunities and Challenges: Hearing Before the Subcomm. on Employer-Employee Relations of the Comm. on Educ. & the Workforce*, 107th Cong. 23 (2002) (statement of William J. Scanlon, Director, Health Care Services, General Accounting Office).

[32] *See* Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 166 (1995) (discussing congressional acknowledgment of retirees' expectations of benefits and the need to protect those expectations through ERISA).

[33] BUREAU OF LABOR STAT., *supra* note 27, at 194.

promises of future benefits.[34] The baby boomers hailed FDR for his vision and fulfilled campaign promise to their parents in 1932: "*Happy Days Are Here Again*."[35]

Figure 1



The first sign of a chink in the economic armor of the juggernaut that was the postwar American economy came in 1973 when the Arab members of the Organization of the Petroleum Exporting Countries ("OPEC") instituted an oil embargo against the United States.[36] For the first time since 1934, the United States experienced a significant decline in average household income.[37] Despite this decline, the OPEC embargo did not interrupt the American economy's steady growth, as indicated by Figure 1. As unemployment rose, workers' futures became uncertain in spite of the continued economic growth.[38] More workers began to shift their focus toward the benefits and entitlements that companies had promised them, and what they discovered were benefit plans decimated by corruption, mismanagement, and complete disregard

[34] *See* REP. ON THE AM. WORKFORCE, *supra* note 23, at 76 (discussing the increase in benefits as a percentage of total compensation).

[35] Roosevelt used the song "*Happy Days Are Here Again*," written by Milton Ager and Jack Yellen as a campaign song in his 1932 campaign for the presidency. *Jack Yellen Detailed Song List*, SONGWRITERS HALL OF FAME, http://songwritershalloffame.org/index.php/songs/detailed/C317/P40/ (last visited Nov. 8, 2011); Claire Suddath, *A Brief History of Campaign Songs*, TIME, http://www.time.com/time/specials/packages/article/0,28804,1840981_1840998_1840901,00.html (last visited Nov. 8, 2011).

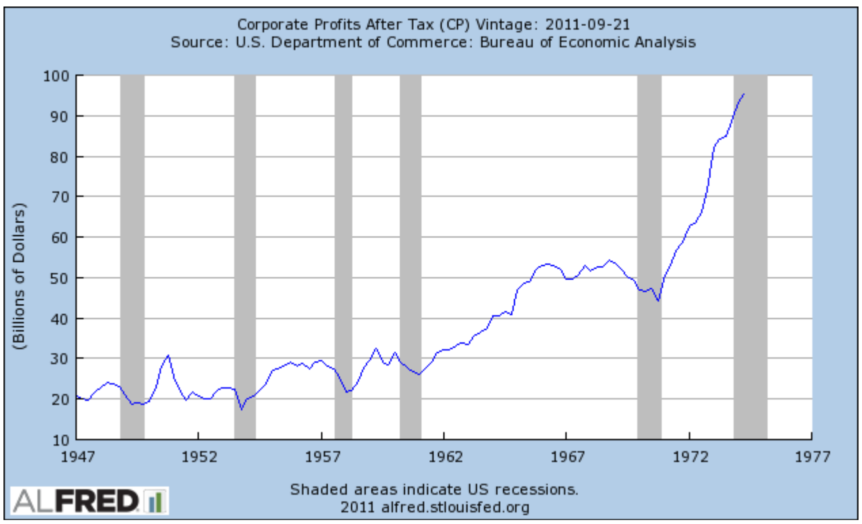
[36] *See* REP. ON THE AM. WORKFORCE, *supra* note 23, at 76.

[37] *See* Mulbrandon, *supra* note 19.

[38] BUREAU OF LABOR STAT., *supra* note 27, at 194.

by employers and fiduciaries.[39] Most troubling was that benefits were in jeopardy even as plan sponsors continued to post consistent growth and profit numbers, as shown by Figure 2. President Kennedy's Committee on Corporate Pension Funds began investigating the debacle in 1962[40] and those early efforts culminated in the passage of the Employee Retirement Income Security Act ("ERISA") in 1974.[41]

Figure 2



Congress enacted ERISA to govern and regulate funding, vesting, and fiduciary requirements for the employee benefit plans of private corporations.[42] As an integral part of ERISA, Congress also created the Pension Benefit Guaranty Corporation ("PBGC"), an insurance "safety net" to secure workers' benefits from failed or terminated plans.[43] Congress divided enforcement and administrative duties of the legislation between the Department of Labor, the Internal

[39] Prior to ERISA's passage in 1974, more than 40,000 plans had been terminated with nearly half of the plans lacking the proper funding to prevent a loss of benefits to the participants. *See* DEP'T. OF TREASURY & DEP'T. OF LABOR, STUDY OF PENSION PLAN TERMINATIONS, 1974 10 tbl.III-2 (1976).

[40] PRESIDENT'S COMM. ON CORP. PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS iii (1965) [hereinafter PUBLIC POLICY & PRIVATE PENSION PROGRAMS].

[41] *Ford Signing ERISA*, *supra* note 12.

[42] 29 U.S.C. § 1001(b)–(c) (2011).

[43] *See* 29 U.S.C. § 1302(a) (2011); BRIONES & MYERS, *supra* note 7, at 12.

Revenue Service, and the PBGC.[44] Recent additions to ERISA through the Patient Protection and Affordable Care Act ("PPACA") restrict health plans covered by ERISA,[45] and the Department of Health and Human Services, charged with implementing the PPACA, may have a role in ERISA enforcement moving forward.[46] The Department of Labor created the Employee Benefits Security Administration ("EBSA") to administer ERISA oversight and enforcement.[47]

Congress amended ERISA repeatedly in the thirty-seven years since its initial passage.[48] The most recent substantial amendment was the Pension Protection Act of 2006, sponsored by Representative John Boehner, which garnered strong bipartisan support.[49] Despite the intention of Congress that ERISA secure the retirement assets for millions of pension plan beneficiaries, chronic underfunding of plans,[50] declining participation,[51] the continued erosion of previously promised benefits,[52] and increasing numbers of plan terminations in recent years,[53] threaten a significant number of America's private-sector retirees.[54] Unlike the relentless growth experienced in the sixty years that followed World War II, current uncertain political and economic forces in the global economy provide no assurance that pension benefits will "grow" out of their underfunded state.[55]

The outlook for America's public-sector pension plan participants is even more onerous. In September 2010, data on the funding

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[44] *See Health Benefits, Retirement Standards, and Workers' Compensation: Employee Benefit Plans*, U.S. DEP'T OF LABOR, http://www.dol.gov/compliance/guide/erisa.htm (last visited Nov. 8, 2011).

[45] *See* T.D. 9489, 2010-29 I.R.B. 56.

[46] *See id.* at 56–57.

[47] *History of EBSA and ERISA*, U.S. DEP'T OF LABOR, http://www.dol.gov/ebsa/aboutebsa/history.html (last visited Nov.8, 2011).

[48] *See Health Plans & Benefits: Employee Retirement Income Security Act—ERISA*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/health-plans/erisa.htm (last visited Nov. 8, 2011).

[49] H.R. 4, 109th Cong. (2006) (enacted).

[50] *See* PRIVATE PENSIONS, *supra* note 15, at 9 fig.1.

[51] *See id.* at 10 fig.2.

[52] *See, e.g.*, UAW Letter, *supra* note 8.

[53] *See, e.g.*, BRIONES & MYERS, *supra* note 7, at 12 (discussing plan terminations in the airline industry).

[54] *See* PRIVATE PENSIONS, *supra* note 15, at 10 fig.2.

[55] *See* Chris Isidore, *The Great Recession*, CNNMONEY (March 25, 2009), http://money.cnn.com/2009/03/25/news/economy/depression_comparisons (discussing current economic uncertainties); Dunstan McNichol, '*Death Spiral' Besets State Pensions as Benefits Grow*, BLOOMBERG (Sept. 15, 2010), http://www.bloomberg.com/news/2010-09-15/-death-spiral-awaits-state-worker-pensions-as-illinois-leads-underfunding.html (noting that pensions are currently underfunded).

levels of all fifty states, Puerto Rico, and Washington, D.C., revealed that less than half the states had sufficient assets to pay eighty percent of promised benefits in 2009.[56] Two years prior, only nineteen states missed the eighty percent funding threshold touted by actuaries as the minimum required level for a pension plan to remain solvent in the long term.[57] The public sector faces all of the economic realities of the private sector without the statutory protections and insurance program guaranteeing workers' benefits should the system fail.[58] Public-sector pensions will have to look to the overburdened and beleaguered taxpayers for assistance, a plight unlikely to turn out favorably for either the plan participants or taxpayers.

Private pension underfunding grew to $504 billion dollars in 2009.[59] By comparison, the budget for the Department of Defense that same year was only $515.4 billion dollars.[60] In 2001, private pension underfunding reached $150 billion dollars for the first time in history.[61] The 2009 figure represents a 336% increase in pension underfunding.[62] The budget for the Department of Defense, including newly initiated wars in Iraq and Afghanistan, increased a relatively mere seventy-five percent over the same period.[63]

The 2009 figures for public-sector pensions are even more daunting. That year, underfunding in the public-sector pension system was over $600 billion.[64] The combined deficit of over $1

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[56] Dunstan McNichol, '*Death Spiral' Besets State Pensions as Benefits Grow*, BLOOMBERG (Sept. 15, 2010), http://www.bloomberg.com/news/2010-09-15/-death-spiral-awaits-state-worker-pensions-as-illinois-leads-underfunding.html.

[57] *Id.*

[58] *See* 29 U.S.C. § 1003(b)(1) (2011) (stating that ERISA protections do not cover governmental plans).

[59] *See Underfunded Private-Sector Pension Plans Threaten the Retirement Security of Millions of Americans; Milken Institute Report Provides Solutions for Addressing the Funding Gap*, Milken Inst. (May 3, 2011), http://www.milkeninstitute.org/newsroom/newsroom.taf (follow "Press Releases" hyperlink; then follow "May 3, 2011").

[60] Press Release, Dep't of Def., Fiscal Year 2009 Department of Defense Budget Released (Feb. 4, 2008), http://www.defense.gov/releases/release.aspx?releaseid=11663.

[61] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-176T, PRIVATE PENSIONS: CHANGING FUNDING RULES AND ENHANCING INCENTIVES CAN IMPROVE PLAN FUNDING 6 fig.2 (2003), http://www.gao.gov/new.items/d04176t.pdf.

[62] Comparing $504 billion in 2009 with $150 billion in 2001.

[63] *Compare* Press Release, Dep't of Def., Department of Defense Budget for FY 2001 (Feb. 7, 2000), http://www.defense.gov/releases/release.aspx?releaseid=2306, *with* Press Release, Dep't of Def., Fiscal Year 2009 Department of Defense Budget Released (Feb. 4, 2008), http://www.defense.gov/releases/release.aspx?releaseid=11663.

[64] THE PEW CTR. ON THE STATES, THE WIDENING GAP: THE GREAT RECESSION'S IMPACT ON STATE PENSION AND RETIREE HEALTH CARE COSTS 1 (2011), http://www.pewcenteronthestates.org/uploadedFiles/Pew_pensions_retiree_benefits.pdf.

trillion[65] represents the 500-pound gorilla in the room everyone is talking about, but no one wants to tackle. One does not have to be a renowned economist to conclude the deficits created by underfunding have placed the entire pension system in a crisis. For millions of American workers the time for talk has passed and reform and revival of this system through concerted, remedial action by governmental regulators and legislators to ensure its viability for those who will soon be dependent upon it for their survival must occur.

In the past, many companies' underfunding issues corrected themselves through the growth of their workforce as business expanded.[66] Today, however, technological advances and an overall decline in collective bargaining left plans unable to attract new workers,[67] and an aging participant base that no longer contributes to the funds has become disproportionately large compared to active participants who are contributing,[68] making it highly unlikely that plans will grow out of the crisis.

Enforcement failings by the Department of Labor through ill-advised exemptions to ERISA funding requirements and bankruptcy code provisions have thwarted Congress' goal of protecting pension benefits.[69] Overreaching (perhaps insincere) collective bargaining by unions, public and private, combined with administrative and statutory failings, has created a perfect storm in which the entire pension and welfare benefit system has been caught. Government, big labor, and employers share culpability for the current crisis and all must commit to the challenge of working together to devise a solution. Each party must place the good of present and future plan beneficiaries above short-term gain.

III. REGULATION OF DEFINED BENEFIT PLANS AND WELFARE BENEFIT PLANS

A. *ERISA: Regulation of Private Pensions and Benefits*

On Labor Day in 1974, President Gerald Ford signed into law the

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[65] *Id.*

[66] *Contra* GAO, MULTIEMPLOYER PENSION PLANS, *supra* note 15, at 2 (noting that a decrease in workforce size limits the number of plan contributions and may result in underfunding).

[67] *See id.* at 2.

[68] *See id.* at 11 fig.3.

[69] *See* discussion *infra* Part B.1.b (discussing how exemptions have led to pension underfunding).

Employee Retirement Income Security Act.[70] At the signing ceremony "President Ford remarked, 'the men and women of our labor force will have much more clearly defined rights to pension funds and greater assurances that retirement dollars will be there when they are needed.'"[71] Three hallmark events paved the way for the sweeping reforms of ERISA.

The first event was President John F. Kennedy's creation, in 1962, of the President's Committee on Corporate Pension Funds.[72] The Committee's report, submitted to President Johnson in January 1965, recommended several changes to existing public policy concerning private pensions,[73] all of which Congress eventually incorporated as fundamental principles in ERISA. The recommendations included: (1) requiring that funds be vested to receive favorable tax treatment,[74] (2) strengthening funding requirements,[75] and (3) regulating investment policy to protect the interests of employees.[76]

The second major event leading to the passage of ERISA was the termination of the employee pension plan of the automobile manufacturer Studebaker in 1963.[77] "More than 4,000 autoworkers" in the company's South Bend, Indiana plant "lost some or all of their promised pension plan benefits."[78] In response to the Studebaker incident, Senator Jacob Javits of New York introduced pension reform legislation in 1967 to protect the benefits of millions of workers enrolled in private pension plans.[79]

The third event that led to ERISA's passage occurred in 1972 when the National Broadcasting Company aired an hour-long exposé of the nation's private pension system entitled "*Pensions: The Broken Promise*."[80] The program highlighted the shortcomings of the private pension system and the resulting risks to American workers.[81] The public outcry that followed the airing of the program resulted in a series of congressional hearings on pension reform

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[70] *See History of PBGC*, *supra* note 24.

[71] *Id.*

[72] PUBLIC POLICY & PRIVATE PENSION PROGRAMS, *supra* note 41, at iii.

[73] *See id.* at xii–xvi.

[74] *Id.* at 42.

[75] *Id.* at 51.

[76] *Id.* at 73.

[77] *History of PBGC*, *supra* note 24.

[78] *Id.*

[79] *Id.*

[80] *Pensions: The Broken Promise* (NBC television broadcast Sept. 12, 1972).

[81] *See* Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses under ERISA*, 76 IOWA L. REV. 431, 433 (1991).

over the next five years.[82]

1. Overview of ERISA's Regulatory Scheme

ERISA coverage is broad and extends "to any employee benefit plan," including welfare benefit plans,[83] created "by any employer engaged in commerce or in any industry or activity affecting commerce."[84] The Act also covers plans maintained "by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce."[85] The legislation does not cover governmental plans, church plans, plans organized outside the United States for the benefit of nonresident aliens, or excess benefit plans.[86]

ERISA is a lengthy and complex piece of legislation codified primarily in chapter eighteen of title twenty-nine of the United States Code.[87] Congress divided enforcement of the legislation among the Department of Labor, the Department of Treasury,[88] and the newly created Pension Benefit Guaranty Corporation.[89] The Department of Labor created the Employee Benefits Security Administration to enforce the provisions of title one of the Act[90] and ERISA made existing Department of Treasury regulations related to "minimum participation standards, minimum vesting standards, and minimum funding standards" applicable under the Act.[91]

The Department of Labor is charged with administering subchapter one of the Act,[92] which contains rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct, and civil enforcement.[93] Recent years have shown a great deal of activity in litigation[94] and regulatory activity, such as exemption

[82] *Id.* at 433–34.
[83] 29 U.S.C. § 1003(a) (2011).
[84] *Id.* § 1003(a)(1).
[85] *Id.* § 1003(a)(2).
[86] *Id.* § 1003(b)(1)–(2), (4)–(5).
[87] *Id*. §§ 1001–1461 (2011).
[88] *Id.* § 1204(a).
[89] *Id.* § 1302(a) (within Department of Labor).
[90] *See* Delegation of Authority and Assignment of Responsibilities to the Employee Benefits Security Administration, 68 Fed. Reg. 5374, 5374 (Feb. 3, 2003); *see also* 29 C.F.R. §§ 2509–2590 (2011) [hereinafter Delegation of Authority] (Employee Benefits Security Administration regulations).
[91] § 1202(c).
[92] *Id.* § 1135.
[93] *See id.* §§ 1021–1151.
[94] Pension Governance, Inc. & The Michel-Shaked Grp., *ERISA Litigation Study*, PENSIONLITIGATIONDATA.COM, 9 fig.5 (Apr. 15, 2009), http://www.pensionlitigationdata.com/contentfiles/PLD%20ERISA%20Litigation%20Study%20041509.pdf.

rulings from the Department.[95]

2. Pension Benefit Guaranty Corporation

Congress created an insurance program, the Pension Benefit Guaranty Corporation ("PBGC"), to protect employee benefits when companies terminate a pension plan either voluntarily or because of bankruptcy or dissolution.[96] The PBGC is a part of the Department of Labor and administers the insurance provisions of Title IV of the Act.[97] The President appoints and the Senate confirms the PBGC Director.[98] The Board of Directors consists of the Secretaries of Labor, Commerce, and Treasury, with the Labor Secretary designated as the chair.[99] Finally, ERISA mandates an Advisory Committee appointed by the president to represent the interests of labor, employers, and the public.[100] Currently 1.3 million people receive their pensions through the PBGC, though, for many of them, the companies they worked for no longer exist.[101]

3. Pension Protection Act of 2006

ERISA has been amended and revised repeatedly since its enactment. The most recent overhaul of ERISA regulation was the Pension Protection Act of 2006 ("PPA").[102] President Bush signed the PPA into law on August 17, 2006,[103] calling it "the most sweeping reform of America's pension [regulation] in over 30 years."[104]

The PPA sought to improve the current ERISA regulation scheme by making several significant changes in its substantive provisions.[105] In addition to a number of significant tax incentives

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[95] *See Index of Granted Individual Exemptions*, U.S. DEP'T OF LABOR, www.dol.gov/ebsa/regs/masterindex.html (last visited Nov. 8, 2011) [hereinafter *Index*] (listing hundreds of ERISA exemptions granted by the Department of Labor).

[96] *See* § 1302(a).

[97] *Id.*

[98] *Id.*

[99] *Id.* § 1302(d).

[100] *Id.* § 1302(h)(1)–(2).

[101] *History of PBGC*, *supra* note 24.

[102] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified at scattered sections of Titles 26 and 29 of the U.S.C.).

[103] Pension Protection Act of 2006, Pub. L. No. 109-280, 2006 U.S.C.C.A.N. (120 Stat. 780) S39 (Statement by President George W. Bush Upon Signing).

[104] *Id.*

[105] *See* Craig C. Martin & Joshua Rafsky, *The Pension Protection Act of 2006: An Overview of Sweeping Changes in the Law Governing Retirement Plans*, 40 J. MARSHALL L. REV. 843, 852 (2007).

to ensure the retirement savings of Americans,[106] the legislation also:

> [(1) r]equires companies that under-fund their pension plans to pay additional premiums; [(2) e]xtends a requirement that companies that terminate their pensions provide extra funding for the pension insurance system; [(3) r]equires that companies measure the obligations of their pension plans more accurately; [(4) c]loses loopholes that allow under-funded plans to skip pension payments; [(5) r]aises caps on the amount that employers can put into their pension plans, so they can add more money during good times and build a cushion that can keep their pensions solvent in lean times; and [(6) p]revents companies with under-funded pension plans from digging the hole deeper by promising extra benefits to their workers without paying for those promises up front.[107]

B. Government Accounting Standards Board

Public pensions, while sharing all of the problems now facing private pensions, have virtually no statutory protections.[108] Yet, prior to the recent developments in Wisconsin and Ohio, many believed that the benefits of a public employee were as sure as "death and taxes."[109] It is growing increasingly apparent, however, that public employees must rely upon the solvency and good will of the governmental entities that employ them.[110] Even the Federal Employee Retirement System ("FERS") is not immune from funding problems, as evidenced by the introduction of a Senate bill aimed at

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[106] *See id.* at 854.

[107] *Fact Sheet: The Pension Protection Act of 2006: Ensuring Greater Retirement Security for American Workers*, The White House (Aug. 17, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060817.html [hereinafter *Fact Sheet: The Pension Protection Act of 2006*].

[108] *See* Shawna Grosskopf et al., *Supply and Demand Effects of Underfunding of Pensions on Public Employee Wages*, 51 S. ECON. J. 745, 745 (1985) (discussing the lack of federal and state regulation of public pension plans).

[109] *See, e.g.*, Arthur J. Lynch, Comment, American Federation of Government Employees v. Federal Labor Relations Authority: *Cushioning the Impact of the Federal Service Impasses Panel on Collective Bargaining in the Federal Sector*, 60 ST. JOHN'S L. REV. 786, 786 n.2 (1986) (noting that governmental employees enjoyed "good pensions"); Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789), *in* XII THE WORKS OF BENJAMIN FRANKLIN 160, 161 (John Bigelow ed., The Knickerbocker Press 1904) ("[I]n this world nothing can be said to be certain, except death and taxes.").

[110] *See* Grosskopf et al., *supra* note 109, at 745 (discussing how state and local officials and their constituents may view the deliberate underfunding of pension plans as a "cost-saving policy").

eliminating all FERS pensions.[111]

Absent legislation providing oversight and regulation of public sector pensions, "the Financial Accounting Foundation ("FAF") and ten national associations of state and local government[s]" created the Governmental Accounting Standards Board ("GASB") in 1984.[112] "The GASB is not a government entity[, but operates as a] component of the FAF," a nonprofit organization.[113] As a result, its standards do not carry the force of legislation and it has no enforcement authority.[114] More importantly, unlike ERISA, GASB does not promulgate rules for fiduciary conduct, cannot provide assured civil remedies for breaches, and must rely on forces in the capital markets or the electorate to create an expectation that compels government compliance.[115]

IV. WEAKNESSES IN REGULATION

A. State and Local Government Accountability to Public-Sector Workers

As discussed earlier, there is no system of mandated regulation for public-sector pension programs.[116] The GASB prescribes standards of accounting and reporting and a large majority of the state and local governments have adopted the standards.[117] The motivation is hardly one of altruistic concern for the plight of the workers, but is rather indicative of the political subdivision's desire to maintain a favorable rating in the capital markets.[118] Maintaining a favorable rating is vital to an entity's ability to sell the bonds that finance an ever-increasing portion of its budget.[119] Of greatest concern is the fact that GASB standards address only funding and accounting.[120] GASB standards do not address plan participant rights or plan fiduciary responsibilities and

[111] Public-Private Employee Retirement Parity Act, S. 644, 112th Cong. § 2 (2011).

[112] *Facts About GASB*, GOVERNMENTAL ACCOUNTING STANDARDS BD., 1 (2010–2011), http://gasb.org (Follow "About Gasb" hyperlink; then follow "Facts About GASB" hyperlink).

[113] *Id.*

[114] *Id.*

[115] *See id.*

[116] Grosskopf, *supra* note 109, at 745.

[117] *See* GOVERNMENTAL ACCOUNTING STANDARDS BD., *supra* note 113, at 1.

[118] *See id.* ("[T]he GASB is recognized by . . . the capital markets as the official source of generally accepted accounting principles (GAAP) for state and local governments.").

[119] *See* Linda J. Martin et al., *Pension Obligations and Municipal Bond Ratings*, 18 ST. & LOC. GOV'T REV. 26, 26 (1986).

[120] *See* GOVERNMENTAL ACCOUNTING STANDARDS BD., *supra* note 113, at 1.

limitations.[121]

State pension plan underfunding reached $660 billion dollars in 2009 and retiree health care and other benefits realized a shortfall of $607 billion dollars that same year.[122] The $1.26 trillion represents a twenty-six percent increase from the previous year.[123] New York was the only state in the Union to report a surplus with a funding level of 101%.[124] Illinois and West Virginia were on the opposite end of the spectrum with funding levels at slightly more than half of liabilities.[125]

Retiree health care and other benefits in nearly every state are in jeopardy of complete collapse.[126] A mere three states, Alaska, Arizona, and North Dakota, met all of their funding obligations for these benefits.[127] The data becomes even more sobering because two states, Alaska and Ohio, accounted for sixty-two percent of all the money set aside to fund retiree health care as of fiscal year 2009.[128] Nineteen states have laid aside *nothing* to pay the benefits promised their workers.[129] This pay-as-you-go approach is unsustainable in an economic environment that includes an expanding number of retirees, declining tax revenues from all sources, and burdensome public welfare and entitlement programs that consume an ever-increasing share of governmental budgets.[130]

The post-Wisconsin debate over the collective bargaining rights of public-sector workers is of no import if the states simply ignore promises made to workers without penalty. This fact reinforces one of the main tenets of the anti-public-sector union camp—that public unions wield their power to garner concessions from managers (politicians) with no personal stake in the long-term consequences of the deals they strike.[131] The real issue is not governmental accountability and breach of the contracts (written or implied) to which they agree; it is the lack of accountability to the constituents

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121 *See id.*
122 THE PEW CTR. ON THE STATES, *supra* note 65, at 1.
123 *Id.*
124 *Id.* at 2.
125 *Id.*
126 *See id.* at 5.
127 *Id.*
128 *Id.*
129 *Id.*
130 Entitlements, also known as mandatory spending, account for fifty-six percent of the 2011 federal budget. *See* OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2011 149 tbl.S-3 (2010), http://www.gpoaccess.gov/usbudget/fy11/pdf/budget.pdf.
131 THE FREE ENTER. NATION, PUBLIC SECTOR UNIONS AND COERCION OF PRIVATE SECTOR UNIONIZATION 4 (2010), http://www.championnews.net/wp-content/uploads/2011/08/Public-Sector-Unions-and-Coercion-of-Private-Sector-Unionization.pdf.

who are effectively the "owners."[132]

Finally, the problem becomes more convoluted when viewed against the backdrop of how states handle the retirement benefits of their "management" level workers. Many states have created systems to make sure legislative pensions are lucrative and protected from the ills facing other public workers under their rule.[133] Contrived pension multiplier formulae, artificial inflation of salaries for purposes of determining pension benefits, early retirement without penalty, and double-dipping schemes designed to inflate lawmakers' pensions have become the norm.[134]

No one is looking out for public employees' pay and benefits. The inherent autonomy of government creates an environment where promises to workers are simply budgetary items subject to the same vulnerability and discretionary treatment as recreation centers, parks, and other public works projects. The complete lack of regulation (and therefore accountability to public-sector workers) is not a weakness, but rather a complete atrophy of effective government concerning public pension and benefit rights.

B. Department of Labor Enforcement of ERISA

Subchapter one of ERISA regulates fiduciary responsibilities and prescribes funding requirements, vesting, participation, and many reporting functions of pension and welfare plans.[135] The employer has exclusive control over these aspects of the benefits plans and it is the Department of Labor's responsibility to ensure plan administrators do what they say and say what they do.[136] In practical terms, the employees rely as heavily on the Department of Labor as on their employer to ensure their benefits are secure.

Congress gave the Secretary of Labor significant discretion in enforcing ERISA.[137] ERISA provides both criminal[138] and civil remedies[139] and allows the Secretary free reign to use either.[140] The criminal penalties include a fine of up to $100,000 and

[132] *See id.*

[133] *See* Thomas Frank, *State Lawmakers Pump Up Pensions in Ways You Can't*, USA TODAY, http://www.usatoday.com/news/nation/state-legislators-pensions/index.html (last visited Nov. 8, 2011).

[134] *Id.*

[135] 29 U.S.C. §§ 1021–1114 (2011).

[136] *See id.* § 1134(a)(1)–(2).

[137] *See id.*

[138] *Id.* § 1131.

[139] *Id.* § 1132(a).

[140] *See id.* § 1136(b).

imprisonment for up to ten years for willful violations.[141] The civil enforcement provisions allow for injunctive and equitable remedies for fiduciary breach against a plan,[142] recovery of wrongfully denied benefits,[143] and for a beneficiary or participant to clarify rights under a plan.[144]

1. Civil Enforcement as Means of Achieving the Purpose of the Act

All breaches of fiduciary duty by plan administrators are considered breaches against the plan and not against individual participants.[145] Fiduciaries found in violation of their duties under ERISA must reimburse the plan for any losses and must forfeit any profit made through the breach to the plan.[146] However, the Supreme Court allowed for individual relief for fiduciary breaches[147] through narrow, fact-specific judicial interpretation of the language "to obtain other appropriate equitable relief."[148] The Court has construed such equitable relief narrowly,[149] substantially limiting the availability of monetary relief under ERISA.[150]

Companies not meeting the minimum funding requirements of ERISA are subject to fines and must make additional contributions to bring the assets of the plan into compliance with the requirements of the Act.[151] The Omnibus Budget Reconciliation Act of 1987 ("OBRA")[152] amended ERISA and created an Additional Funding Charge ("AFC"), a remedial mechanism by which companies can rectify underfunding deficits.[153] Later legislation dictated that plans must maintain assets at ninety percent of

[141] *Id.* § 1131.
[142] *Id.* § 1132(a).
[143] *Id.* § 1132(a)(1)(B).
[144] *Id.*
[145] *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (holding that the plan fiduciary cannot be held liable to individual plan participants for extracontractual compensatory or punitive damages).
[146] 29 U.S.C. § 1109(a).
[147] Varity Corp. v. Howe, 516 U.S. 489, 515 (1996).
[148] *Id.* at 507 (quoting Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 502, 88 Stat. 829, 891 (1974)).
[149] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 219–20 (2002) (construing ERISA to authorize only traditional forms of equitable relief).
[150] *See id.* at 221 (holding that a claim for money relief under ERISA sounds in law and not in equity).
[151] 29 U.S.C. § 1082(a)(1).
[152] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) (codified as amended in scattered sections of U.S.C).
[153] Omnibus Budget Reconciliation Act of 1987 § 9303(a)(1) (codified as amended at 26 U.S.C. § 412 (2011)).

liabilities.[154] A plan that fell below the ninety percent threshold was assessed an AFC to raise its asset levels to that threshold.[155] The statute allowed an exception to an AFC if the plan was funded at eighty percent or more of its current liabilities and at ninety percent or more for two consecutive years of the three previous plan years.[156] This provision allowed for the normal fluctuation of the market and provided a grace period for a plan to bring its funding up to the prescribed level. However, a number of loopholes in the statute allowed many plans that were assessed an AFC to use credits from previously overfunded years to satisfy its AFC.[157] As a result, many sponsors of underfunded plans were able to forgo any cash contributions in a year when they were assessed an AFC.[158]

A review of a couple of plans terminated after OBRA's enactment highlights the weakness in the statute's ability to ensure the health of plans through the AFC. Bethlehem Steel used a credit for past overfunding and generated a great discrepancy between actual funding and reported funding of its plan.[159] In early 2002, Bethlehem reported that its plan's funding stood at 85.2% of current liabilities.[160] The plan terminated later that year with assets of less than half of the promised benefits resulting in a $3.7 billion liability for the PBGC.[161] Similarly, another steel company, LTV Steel, reported its plan funding level at more than eighty percent of liabilities in 2001.[162] LTV terminated its plan in 2002 with plan assets equal to fifty-two percent of liabilities, "a shortfall of $1.6 billion."[163] The company made no cash contributions to its plan in 2000, 2001, or 2002.[164] Both Bethlehem and LTV were able to satisfy ERISA minimum funding requirements using existing credits instead of cash, and the resulting glitch in accounting created an incorrect assessment of the plans' funding level.[165]

The loopholes in ERISA's funding provisions proved to be the tip

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[154] Retirement Protection Act of 1994, Pub. L. No. 103-465, § 751(a)(1)(B), 108 Stat. 5012, 5012 (1994).

[155] Omnibus Budget Reconciliation Act of 1987 § 9303(a)(1).

[156] Retirement Protection Act of 1994 § 751(a)(1)(B).

[157] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-294, PRIVATE PENSIONS: RECENT EXPERIENCES OF LARGE DEFINED BENEFIT PLANS ILLUSTRATE WEAKNESSES IN FUNDING RULES 28–29 (2005).

[158] *See id.* at 17–18.

[159] *Id.* at 16.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 28.

[165] *Id.* at 22.

of an iceberg that was corporate accounting at the turn of the millennium, and that iceberg was about to collide with America's "unsinkable" economy. In 2001, Enron became a household word[166] quickly joined by WorldCom,[167] Arthur Anderson,[168] and a host of others. These companies and their accounting practices brought the extent of "fuzzy" math and loophole abuses to the attention of every American. Many Enron employees lost nearly all of their pension savings.[169] WorldCom followed Enron into collapse in the ensuing months,[170] and Enron's accounting firm, Arthur Anderson, sold off many of its practices and laid off 7,000 employees amidst the scandal of loophole abuse, poor accounting, and concealment of debts and obligations.[171]

Following the collapse of Enron and WorldCom, the need for truth in accounting and reporting quickly rose to the top of the congressional priority list.[172] The first congressional response to the scandals was the Sarbanes-Oxley Act of 2002, which criminalized the unethical accounting procedures that allowed the collapse.[173] Still, others in Congress saw beyond the immediate cause and effect of these scandals and realized that the legislation designed to protect pensions and benefits had failed the Enron employees.

Representative John Boehner (now Speaker of the House) of

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[166] *See, e.g*, Alex Berenson & Richard A. Oppel, Jr., *Once-Mighty Enron Strains Under Scrutiny*, N.Y. TIMES, Oct. 28, 2001, http://www.nytimes.com/2001/10/28/business/once-mighty-enron-strains-under-scrutiny.html?src=pm (discussing accounting practices used by Enron to conceal financial losses).

[167] *See* Simon Romero & Alex Berenson, *WorldCom Says it Hid Expenses, Inflating Cash Flow $3.8 Billion*, N.Y. TIMES, June 26, 2002, http://www.nytimes.com/2002/06/26/business/worldcom-says-it-hid-expenses-inflating-cash-flow-3.8-billion.html?pagewanted=all&src=pm (discussing how WorldCom used an accounting "gimmick" to "hide expenses, inflate its cash flow, and report profits instead of losses").

[168] Floyd Norris, *Arthur Andersen Needs Help to Survive*, N.Y. TIMES, Mar. 8, 2002, http://www.nytimes.com/2002/03/08/business/arthur-andersen-needs-help-to-survive.html?src=pm (discussing Arthur Anderson's role in the Enron scandal).

[169] *See Retirement Insecurity: 401(k) Crisis at Enron: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 3 (2002) (statement of Sen. Lieberman). Following a class action suit, each employee eventually received $3,100. James Doran, *Enron Staff Win $85m*, THE TIMES, May 14, 2004, http://business.timesonline.co.uk/tol/business/article423518.ece.

[170] *See* Simon Romero & Riva D. Atlas, *Worldcom's Collapse: The Overview; Worldcom Files For Bankruptcy; Largest U.S. Case*, N.Y. TIMES, July 22, 2002, http://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html?pagewanted=all&src=pm.

[171] Luisa Beltran et al., *Andersen Guilty: Once Grand Accounting Firm Now Faces Five Years Probation, $500,000 Fine and Possibly its Own End*, CNN MONEY (June 16, 2002), http://money.cnn.com/2002/06/13/news/andersen_verdict.

[172] *See, e.g.*, 107 CONG. REC. E1462–63 (daily ed. July 29, 2002) (statement of Rep. Tom Udall) (discussing the impact of the Enron and Worldcom accounting scandals and the need to pass oversight legislation).

[173] *See* 18 U.S.C. § 1350(c) (2011).

Ohio's 8th District sponsored The Pension Protection Act of 2006,[174] which tightened ERISA's funding requirements by forcing employers to make more cash contributions to their worker pension funds.[175] The legislation also penalized employers who failed to make required contributions.[176] With the specter of Enron and WorldCom fresh in the minds of a public eager to hold companies accountable, the bill easily garnered strong bipartisan support.[177] In a rare example of effortless and efficient Jeffersonian democratic principles in action, the public cried out, Congress acted, and the President signed the law to protect the funding of private pensions in short order.[178] President Bush, in a statement regarding the new law, sent a message to businesses across America, stating that "[b]usinesses that offer a private pension plan to their employees have a duty to set aside enough money now, so their workers get what they have been promised when they retire."[179]

2. Lessons Not Learned: Loopholes and Excuses Continue to Threaten Systems Already Facing Economic Pressures

a. Airlines

In the wake of the tragic events of September 11, 2001, the airline industry struggled to regain its footing.[180] The legacy airlines, in particular, faced sharp reductions in revenue from decreased air travel, increased fuel and security costs, and sharp competition from well-capitalized discount airlines.[181] Delta and Northwest Airlines each filed for Chapter 11 bankruptcy on the same day in 2005.[182] With those filings, four of the top six carriers in the United States were in bankruptcy simultaneously.[183] The disposition of the

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174 *Retirement Security*, *supra* note 50; Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified at scattered sections of Titles 26 and 29 of the U.S.C.).

175 *See* I.R.C. § 430(a) (establishing a minimum required contribution).

176 *See id.* § 430(j)(3)(A).

177 *See H.R. 4: Pension Protection Act of 2006*, GOVTRACK, http://www.govtrack.us/congress/bill.xpd?bill=h109-4 (last visited Nov. 8, 2011) (showing that the bill received 279 votes in favor of passage in the House and 93 votes in favor of passage in the Senate).

178 *Fact Sheet: The Pension Protection Act of 2006*, *supra* note 108.

179 *Id.*

180 *See* Chris Isidore, *Delta, Northwest File for Bankruptcy*, CNN MONEY (Sept. 15, 2005), http://money.cnn.com/2005/09/14/news/fortune500/bankruptcy_airlines/index.htm.

181 *See* Chris Isidore, *More Airline Turbulence Ahead*, CNN MONEY (Sept. 14, 2005), http://money.cnn.com/2005/09/13/news/fortune500/airlines_future/index.htm.

182 Isidore, *supra* note 181.

183 *Id.*

airline bankruptcy proceedings soon highlighted another weakness in the pension regulatory system.

The airline industry has experienced many pension and benefit plan terminations in the last thirty years.[184] The PBGC has taken over badly underfunded plans including Pan American, Eastern, Braniff, TWA, and U.S. Airways.[185] Appearing before Congress in 2004, the Comptroller General of the United States, David M. Walker, testified that the airlines underfunded their pensions by $31 billion.[186] Just three years prior, the PBGC reported that the airline industry as a whole "had more than enough assets to cover the liabilities in its pension plans."[187]

Legacy airlines, unable or unwilling to make the necessary cost-cutting changes to survive in the competitive environment that existed after 9/11, began to seek bankruptcy protection. U.S. Airways was the first major carrier to seek protection in August 2002.[188] U.S. Airways perhaps suffered the most following the terrorist attacks due to the extended closure of Reagan National Airport.[189] Reagan was a major hub of operation for U.S. Airways and the loss of revenue during the closure devastated the company.[190] United Airlines sought reorganization in December 2002,[191] and Delta Airlines and Northwest Airlines followed in 2005.[192] All four terminated some, or all, of their defined-benefit pension plans during bankruptcy.[193] In December 2010, American Airlines filed for bankruptcy, a move that could saddle the PBGC with AA's $9 billion pension deficit.[194]

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[184] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-108T, PRIVATE PENSIONS: AIRLINE PLANS' UNDERFUNDING ILLUSTRATES BROADER PROBLEMS WITH THE DEFINED BENEFIT PENSION SYSTEM 4 (2004).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *See US Air Files for Bankruptcy*, CNN MONEY (Aug. 12, 2002), http://money.cnn.com/2002/08/11/news/companies/usair/.

[189] *See id.*

[190] *Id.*

[191] *Timeline of United Airlines' Bankruptcy*, USA TODAY (Feb. 1, 2006), http://www.usatoday.com/travel/flights/2006-02-01-united-timeline_x.htm.

[192] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-945, COMMERCIAL AVIATION: BANKRUPTCY AND PENSION PROBLEMS ARE SYMPTOMS OF UNDERLYING STRUCTURAL ISSUES 4 (2005) [hereinafter GAO, COMMERCIAL AVIATION].

[193] BRIONES & MYERS, *supra* note 7, at 12, 14.

[194] *See Government Pension Agency Braces for American Airlines Bankruptcy*, WASH. POST (Dec. 2, 2010), http://www.washingtonpost.com/business/economy/government-pension-agency-braces-for-american-airlines-bankruptcy/2011/12/02/gIQA4LYEMO_story.html.

ERISA provides for voluntary distress termination of single-employer plans provided the sponsor satisfies four requirements: (1) the sponsor must file, or have filed against it, a petition seeking reorganization in a case under Title 11 or under any similar law of a state or political subdivision of a state; (2) as of the proposed termination date, the case cannot have been dismissed; (3) the sponsor must timely submit to the PBGC any request for the approval of the bankruptcy court of the plan termination; and (4) the bankruptcy court must determine that, unless the plan is terminated, the sponsor will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter eleven reorganization process and therefore approves the termination.[195] This process provided a convenient mechanism for the airline companies to shed obligations and promises to their workers.

U.S. Airways demonstrated this premise by having filed for chapter eleven bankruptcy protection twice in nearly two years.[196] PBGC assumed trusteeship for the company's pilot pension plan in 2003 after its first bankruptcy.[197] Realizing the strategic benefit to shedding its burdensome legacy costs as a way to increase viability and competitive edge, the company filed for chapter eleven protection again in 2004.[198] PBGC became the recipient of three more pension plans terminated by U.S. Airways following that filing.[199] Not surprisingly, the company posted a profit in its very first quarter after its first bankruptcy.[200] A mere two quarters after emerging from its second chapter eleven reorganization, which saw the termination of three pension plans, U.S. Airways was one of the most profitable airlines in the country.[201]

United Airlines' termination of its pension plans saddled the PBGC with a $5 billion obligation.[202] The agreement reached with

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[195] 29 U.S.C. § 1341(c)(2)(B)(ii) (2011).

[196] *See* GAO, COMMERCIAL AVIATION, *supra* note 192, at 13 tbl.1.

[197] *US Airways Inc. – Plan Overview*, Pension Benefit Guar. Corp., http://www.pbgc.gov/wr/large/usairways/index.html (last visited Nov. 8, 2011) [hereinafter *US Airways Inc.*].

[198] GAO, COMMERCIAL AVIATION, *supra* note 192, at 13 tbl.1.

[199] *US Airways Inc.*, *supra* note 197.

[200] *US Airways Posts Profit in First Quarter Since Bankruptcy Exit*, USA TODAY (July 28, 2003), http://www.usatoday.com/travel/news/2003/07/28-usair-profit.htm.

[201] *See* Dawn Gilbertson, *U.S. Airways' Profit Soars,* THE ARIZONA REPUBLIC (July 28, 2006), http://www.azcentral.com/arizonarepublic/business/articles/0728biz-usairwaysearns0728.html?&wired.

[202] *United Gets Approval to Shift Pension Plans*, MSNBC (May 11, 2005), http://www.msnbc.msn.com/id/7804770/ns/business-us_business/t/united-gets-approvalto-

United provided "the PBGC $1.5 billion in notes and convertible stock in the reorganized" company, but no cash.[203] United continued operation under the reorganization and just one year later posted a profit.[204] The company's return to profitability was likely of little comfort to its retirees whose benefits United slashed when it terminated its pension plans.

Delta, which jettisoned its pension plan for pilots, also followed the trend. Delta filed for bankruptcy in 2005[205] and terminated its pension plan for pilots in 2006.[206] The company emerged from bankruptcy in April 2007 and announced an annual profit for 2007 on January 23, 2008.[207] One commentator questioned whether bankruptcy had "become a deliberate management strategy for the airline industry."[208]

It is troubling to observe the generosity of the severance agreements management created for top-level executives, even as they steered their companies toward chapter eleven bankruptcies and employee pension defaults. Delta's CEO, Leo Mullin, retired in 2005 and became the beneficiary of a $16 million retirement created before the filing.[209] Northwest's CEO, Richard Anderson, reportedly received more than $3 million upon his exit.[210] U.S. Airways paid out $35 million in lump sum retirement payments to its top three executives just prior to its 2002 chapter eleven filing.[211] Finally, United placed $4.5 million in a bankruptcy-proof retirement trust for its CEO Glenn Tilton.[212] The companies argue that these

shift-pension-plans/.

[203] *See id.*

[204] *United Airlines Sees Profit Above Expectations*, AIRWISE.COM, (July 24, 2006), http://news.airwise.com/story/view/1153745462.html.

[205] *See* Isidore, *supra* note 182.

[206] Press Release, Delta Air Lines, Delta, PBGC Reach Agreement on Delta Pilot Pension Plan (Dec. 4, 2006), http://news.delta.com/index.php?s=43&item=659.

[207] *Delta Records Post-Bankruptcy Profit for 2007*, TRIANGLE BUS. J. (Jan. 24, 2008), http://www.bizjournals.com/triangle/stories/2008/01/21/daily34.html?t=printable.

[208] Charles Leocha, Op-Ed., *Airlines in Bankruptcy Land*, MSNBC (Mar. 30, 2007), http://www.msnbc.msn.com/id/17858408/ns/business-us_business/t/airlines-bankruptcy-land/.

[209] *See The Broken Promise*, TIME, Oct. 23, 2005, http://www.time.com/time/magazine/article/0,9171,1122017,00.html.

[210] *See* Jerry Isaacs, *Northwest and Delta Executives to Make Millions from Bankruptcies*, WORLD SOCIALIST WEB SITE (Sept. 19, 2005), http://www.wsws.org/articles/2005/sep2005/nwa-s19.shtml.

[211] Frank Reeves, *US Airways Gave $35 Million in Pension Payments to Top 3 Former Executives*, POST-GAZETTE, Feb. 26, 2003, http://www.post-gazette.com/businessnews/20030226usair0226p1.asp.

[212] *Preventing the Next Pension Collapse: Lessons from the United Airlines Case: Hearing Before the S. Comm. on Finance*, 109th Cong. 28 (2005) (statement of Patricia A. Friend, International President, Ass'n of Flight Attendants).

severance agreements are necessary to attract the best executive talent.[213] Similarly, airlines tout employee pension and benefit programs as a means of attracting the most talented workers.[214] The airlines' assertions are mutually inconsistent.

The inference of bad faith and unfair dealing of the airlines is made in the context of unprecedented federal assistance, which the industry received in the wake of the 9/11 attacks. The federal government provided an estimated $8 billion in assistance to the airlines in the years following the attacks.[215] They, and many companies in other industries, manipulated ERISA's generous protections and insurance provisions for America's workers.

The PBGC, created as an insurance program for individual plan participants, has become a "fallback" option for companies looking to shed expensive legacy costs.[216] This fact creates "perverse incentives that represent a moral hazard."[217] The airlines placed other financial priorities above properly funding their pensions and then discarded those pensions. They fell victim to the moral hazard and disregarded promises to nearly 240,000 workers[218] and left the PBGC holding the bag. The net result is that the true cost of defined benefit plans in the United States, under the current bankruptcy code, amounts to the cost of PBGC premiums paid by a company to insure its fallback provision.

b. UAW VEBA Trust[219]

In the early 2000s, facing extreme mounting financial pressures, the Detroit "Big Three" desperately sought a solution to their mounting retiree health care costs.[220] Fearing bankruptcy filings by

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[213] *See, e.g.*, James B. Stewart, *Rewarding C.E.O.'s*[sic] *Who Fail*, N.Y. TIMES, Oct. 1, 2011, at B1.

[214] *See, e.g.*, *Strengthening Our Workforce – Serving the People Who Serve You*, AM. AIRLINES, http://www.aa.com/i18n/aboutUs/corporateResponsibility/employees/strengthening-our-workforce.jsp (last visited Nov. 8, 2011).

[215] BRIONES & MYERS, *supra* note 7, at 6

[216] *Protecting Pensions and Ensuring the Solvency of PBGC: Hearing Before the Subcomm. on Gov't. Mgmt., Fin., & Accountability of the H. Comm. on Gov't. Reform*, 109th Cong. 16 (2005) (statement of David M. Walker, Comptroller Gen. of the United States).

[217] *Id.*

[218] BRIONES & MYERS, *supra* note 7, at 6.

[219] Special thanks to Colleen Medill for drawing our attention to this issue. *See* Richard A. Bales, *Worklaw, Pedagogy, and Verbas*, Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2009/06/work-law-pedagogy-and-vebas.html.

[220] *See* Ellen O'Brien, *What Do the New Auto Industry VEBAs Mean for Current and Future Retirees?*, AARP PUB. POLICY INST., 1 (2008), http://assets.aarp.org/rgcenter/econ/i4_veba.pdf (General Motors, Chrysler, and Ford).

the companies and the threat that the companies could shed health care insurance obligations as an unsecured debt, the United Automobile Workers ("UAW") took an active role in negotiating with the companies.[221] These negotiations and two separate class action suits by retirees against the automakers resulted in an agreement to create three stand-alone trusts to administer future health care obligations for UAW retirees.[222] The agreement created three Voluntary Employee Benefit Associations ("VEBA"), one for each of the automakers, which began administering retiree health benefits on January 1, 2010.[223]

While the new VEBAs were not a "silver bullet," they provided much needed hope to the faltering auto industry.[224] The UAW accepted liability for the health care of nearly 500,000 retirees through its administration of the VEBAs, thereby eliminating billions of dollars of liabilities from the automakers' balance sheets.[225] Despite the overly ambitious claims of the VEBAs' saving power, Chrysler and GM filed for bankruptcy in 2009.[226] The UAW and then-President, Ron Gettelfinger, in advising the rank-and-file to accept the VEBA, argued that a bankruptcy by any of the Big Three would likely mean the cancellation of retiree benefits.[227] When GM followed Chrysler into bankruptcy in 2009 the UAW secured agreements to keep the health care plans intact by transferring assets to the VEBA early and accepted a stake in the ownership of the postbankruptcy entities in lieu of cash contributions.[228] The VEBAs did not become effective until January 1, 2010.[229] Therefore, at the time of the bankruptcy filings, retiree healthcare benefits had the same legal status—a welfare benefit program administered solely by the automakers—that Gettelfinger

[221] *See id.* at 5.
[222] *See id.* at 1.
[223] *See id.* at 6.
[224] *See* Todd Spangler, *Health Goals May Benefit Detroit 3; Obama's Reform Ideas Could Let Automakers Compete Again*, DETROIT FREE PRESS, Mar. 8, 2009, at 1.
[225] George Gutowski, *UAW VEBA Enters the Healthcare Ring*, SEEKING ALPHA (Oct. 1, 2007), http://seekingalpha.com/article/48617-uaw-veba-enters-the-healthcare-ring.
[226] *See* Patrice Hill, *GM Tailgating Chrysler Bankruptcy*, THE WASHINGTON TIMES, May 30, 2009, http://www.washingtontimes.com/news/2009/may/30/gm-tailgating-chrysler-bankruptcy/?page=all.
[227] *See* Carleen Hawn & Susan Kelly, *New GM Slogan? Viva the VEBA: Automaker Dumps Benefits Burden on UAW in $51 Billion Shift Some Fear May Fall Short*, FIN. WEEK (Oct. 8, 2007), http://www.financialweek.com/article/20071008/REG/71004021/1001/TOC.
[228] *Morning Edition: UAW's Gettelfinger on Chrysler's Future* (NPR radio broadcast May 1, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=103700673 (interview with Ron Gettelfinger, President, United Auto Workers).
[229] O'Brien, *supra* note 220, at 6.

warned could lead to cancellation as an unsecured debt.[230]

The continued viability of the Big Three is obviously beneficial to the UAW and its interest in saving thousands of union jobs. At first blush, it appeared that the union's concession to the VEBA was in the best interest of the retirees as well, but union concessions made before the VEBAs assumed administration of retiree health care benefits tell a different story. The UAW negotiated changes to VEBA funding, accepting equities in lieu of cash, which greatly weakened the trust's ability to cover potential claims.[231] The counterargument is that the receipt of equities to fund the VEBA is preferable to the potential alternative of receiving nothing through bankruptcy. The same agreement, however, slashed a number of benefits from the retirees' health plan still under the auspice of company control.[232] These changes, negotiated in 2009 prior to the VEBAs' effective date, also relieved the UAW from providing the eliminated benefits when it took over responsibility for retirees' health care the following year.[233]

The UAW does not bear the full responsibility for the slippery slope of funding exemptions that have placed the health benefits of a half million of its retirees in peril. The Treasury Department's Auto Task Force, as part of the government's involvement in GM's bankruptcy, negotiated the 2009 agreement mentioned in the preceding paragraph.[234] ERISA prohibits transactions between a plan and a party in interest.[235] As the majority owner in the postbankruptcy GM, the federal government certainly qualifies as a party in interest.[236] ERISA also prohibits the "acquisition, on behalf of the plan, of any employer security"[237] greater than that which is allowed by section 1107(a), currently ten percent.[238] The agreement reached with Treasury allowed GM to fund more than half of the VEBA with preferred and common stock.[239] Treasury, and through

[230] *See* Hawn & Kelly, *supra* note 227; *Protecting Employees and Retirees in Business Bankruptcies Act of 2010: Hearing on H.R. 4677 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 354 (2010) (statement of the Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am.) (describing how benefit obligations are unsecured claims in bankruptcy).

[231] *See* Gettelfinger & Rapson, *supra* note 8, add. at 11.

[232] *Id.* add. at 12.

[233] *See id.*

[234] *See id.*

[235] 29 U.S.C. § 1106(a)(1) (2011).

[236] *See id.* § 1002(14)(E)(i).

[237] *Id.* § 1106(a)(1)(E).

[238] *Id.* § 1107(a).

[239] *See* Gettelfinger & Rapson, *supra* note 8, add. at 11.

the principles of agency the federal government, negotiated an exemption.[240] Labor, again an agent of the now "owner" of an emerged GM, blessed the exemption, short-changing the VEBA of the cash it needed to fund its liabilities.[241] All of this, approved through a negotiated settlement with the union, ignored the needs of the one party who had no voice in the deal: the 500,000 UAW retirees who have the most to lose should things go awry.[242] This is the type of deal, fraught with conflicts of interest and self-dealing, that Congress enacted ERISA to prevent.

The Secretary of Labor is empowered to grant exemptions to ERISA funding requirements.[243] The legislation forbids an exemption unless it is "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan."[244] Ownership stake in a company with questionable postbankruptcy viability should fail to satisfy elements (1) and (2). Exemptions that reduce cash funding to less than half of what a fund needs to remain viable certainly would not satisfy (3). A search of EBSA's index of granted exemptions shows the exemption for the GM deal and reveals similar exemptions awarded to Ford and Chrysler.[245] Exemptions that result in the underfunding of the health care benefit of 500,000 retirees by more than fifty percent are unlikely to meet the statutory threshold. The net result leaves all three VEBA trusts dependent upon the financial well-being and viability of the Big Three, essentially the same position retirees were in prior to the VEBA agreement. The main difference is that the companies have transferred all the long-term risk from

[240] *See id.*

[241] *See id.*

[242] The Supreme Court clarified the relationship of a retiree and the union to which they belonged prior to retirement in *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* 404 U.S. 157 (1971). The court held that retiree benefits are not a mandatory subject of bargaining and that the collective bargaining obligation extends only to the terms and conditions of employment of an employer's "employees" and that the term "employee" has its ordinary meaning. *Id.* at 182, 172. As a result, retirees are not members of the bargaining unit because they are no longer working and they lack a substantial community of interests with active employees and, while retirees' benefits are not a mandatory subject of bargaining for active employees, their own future retirement plans are. *Id.* at 172–73, 180. The ruling effectively severed a union's obligation to its retirees. This fact, well known to the UAW, Gettelfinger, and the automakers during the negotiations surrounding the VEBA trusts, creates an inference of disingenuous behavior, if not blatant bad faith dealing, regarding the benefits of the half million UAW retirees.

[243] 29 U.S.C. § 1108(a).

[244] *Id.*

[245] *Index*, supra note 96.

themselves to the union, which now controls a multibillion dollar fund.[246] Coincidently, in the process of negotiating the terms and conditions of the VEBA, the UAW managed to maintain much of the status quo of its current workforce while granting large concessions on retiree benefits.[247] The companies, the union, and the current rank-and-file all benefit, while the retirees' future remains, at best, uncertain.

V. RECOMMENDATIONS

The problems facing the pension and benefit system of America's retirees are extremely complex and any solutions will likely be equally complex. This article examines neither all the issues, nor all the possible solutions. However the key to minimizing the risk to workers' benefits should involve at least three changes. First, Congress must insist on strict, unwavering adherence to the funding reforms of the Pension Protection Act of 2006 ("PPA") and may need to amend the legislation to facilitate compliance. Second, Congress should amend ERISA to extend coverage to public-sector workers, or alternatively, pass new legislation that provides the same comprehensive federal protection and regulation to retirement benefits of the public-sector workforce. Third, to curb abuses of Chapter 11 bankruptcy protections, Congress should attach secured-creditor status to pension and benefit plans in the bankruptcy code.

A. Strict Unwavering Adherence to the Funding Reforms of the PPA

The scandals that prompted the congressional action culminating in the Pension Protection Act of 2006[248] were the result of greed and manipulation of statutory funding rules.[249] Congress thoughtfully and carefully addressed how to limit corporate greed regarding the large trusts created for the benefit of their workers when it initially

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[246] Katie Merx, *GM Union Ratifies Agreement that May Ease Bankruptcy*, BLOOMBERG (May 29, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aQhuTwvOK_hU&refer=home.

[247] *See* Gettelfinger & Rapson, *supra* note 8.

[248] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended in scattered sections of 26 and 29 U.S.C.).

[249] *See* discussion *infra* Part IV; *see also* Press Release, Sen. Chuck Grassley, Chairman, U.S. Senate Comm. on Fin., Grassley Praises President's Signing of Pension Reforms, Savings Incentives, Charitable Package (Aug. 17, 2006), http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=6455 (discussing how the PPA will fix the broken pension system).

enacted ERISA in 1974.[250] The PPA closed loopholes in ERISA that allowed companies to use smoke and mirror tactics to claim credits in lieu of properly funding promises to their workers.[251] The Act also eliminated the anomaly that allowed companies with underfunded plans to forgo cash contributions in years of underfunding.[252] Finally, the Act created a minimum funding level of 100% for pension plans.[253]

Yet, private pension plans subject to the provisions of the PPA were underfunded by more than a half trillion dollars three years after the Act's passage.[254] This highlights an obvious breakdown in enforcement, which must focus on strict compliance with the funding standards established by the PPA. The Employee Benefit Security Administration, which is charged with enforcing ERISA,[255] must be allocated the resources and authority necessary to compel compliance.

To grant EBSA the resources and authority it needs, Congress should amend the PPA and specifically define equitable remedies and penalties for noncompliance. Congress should include tougher penalties for noncompliance and incentives to encourage proper funding of benefit plans. Incentives such as favorable treatment in the tax code or access to low interest, government-subsidized loans for capital projects could interact with penalties such as the loss of tax benefits for sponsors of underfunded plans or steep fines. Specific statutory provisions with both severe penalties and strong incentives will provide plan sponsors the motivation to comply with the law and retirees assurances that their benefits are protected.

B. Provide Federal Protections to Public-Sector Retirement Benefits

Congress must intervene on behalf of public-sector workers and hold state and local governments accountable for their promises to

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[250] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 502, 88 Stat. 829, 891 (1974).

[251] Pension Protection Act of 2006, Pub. L. No. 109-280, § 103, 120 Stat. 780, 809 (2006) (codified as amended at 29 U.S.C. § 1056(g)(5)(B) (2010)).

[252] *See id.* § 102, 120 Stat. at 789 (codified as amended at 29 U.S.C. § 1083 (2011)); *id.* § 112, 120 Stat at 826 (codified as amended at 26 U.S.C. § 430 (2010)); *see also* Martin & Rafsky, *supra* note 106, at 853–58 (discussing how the PPA addresses pension underfunding).

[253] *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 102, 120 Stat. at 791 (codified as amended at 29 U.S.C. § 1083(d)(1) (2011)) ("[T]he funding target of a plan for a plan year is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.").

[254] *See* Milken Inst., *supra* note 60.

[255] Delegation of Authority, *supra* note 91, at 5374.

workers. The recent events in Wisconsin shook the foundation of granite-like confidence held by most public-sector employees in their future. One stroke of a governor's pen, mayor's pen, or other minor government executive can abrogate the rights of the employees that serve them. This is an untenable thought.

Congress must legislate to protect the benefits of all public-sector workers, including those who work for the federal government. Ideally, ERISA should be amended to cover all workers, including those in the public sector, thus providing the same broad protections to all. The sheer complexity and scope of the legislation required to properly protect and regulate employee benefits suggests incorporation is preferable to starting from scratch. Workers, employers, plan administrators, regulatory agencies, and the courts would benefit from the uniformity of applying the same regulation and expectation to all workers regardless of who employs them. Finally, the inclusion of all private and public workers, including federal employees, eliminates the hypocrisy inherent in a system that places a high value on the benefits of private-sector workers, but provides no protection for their public counterparts.

State and local governments would certainly resist the notion of federal regulation. The tremendous effect of massive pension defaults on interstate commerce provides the constitutional mandate for congressional action. Governments have a unique moral hazard. Elected officials who create, fund, alter, or terminate benefits for public workers have no personal accountability for their actions. Underfunding a public pension to divert money to an earmarked program carries no penalty aside from adverse public opinion. A comprehensive law providing protection to public workers that prescribes remedies for violations brings accountability to a system that has none.

Congress also wields a large weapon with its power of the purse. Absent sweeping federal legislation through the exercise of its commerce power, Congress could encourage state and local government submission to pension regulation by offering conditional bailouts. Similar tactics have been extremely effective over the years with regard to clean air standards, highway speed limits, and drinking-age laws.[256] Using this approach, the federal government could assume a percentage of current underfunded

[256] *See, e.g.*, William J. Klein, Note, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act Amendments of 1990*, 26 RUTGERS L.J. 855, 862 (1995) (discussing how Congress's authority under the Spending Clause allows it to further federal policy within the states).

liabilities on the condition that plans maintain the funding level required of private sector plans. State and local governments would have to submit to auditing and oversight by the EBSA or the IRS to ensure compliance. The deal should have penalties for noncompliance that include diversion of federal funding allocated to other projects equal to an amount necessary to fully fund the retirement benefits. The proposal could also have incentives for excess funding in boom years to increase long-term viability. This "bail out" approach, however, runs a substantial risk of manipulation through political influence, so any such program must be administered to all governmental subdivisions equally through an enabling statutory framework. This ensures the establishment of a uniform public policy concerning pensions and benefits rights.

C. Pension and Health Benefit Plans of Retirees Should be Given Secured-Creditor Status Under the Bankruptcy Code

Pension and health benefit plans should be secured benefits. The benefits are contractual obligations that should not be retroactively cancelled. These benefits are a promise—a contract—secured with the consideration of a worker's performance of his tasks for the company. Companies, fully aware that benefits are currently unsecured, valuate them accordingly and do not consider themselves bound. Employees, on the other hand, accept that promise as the company's commitment to them in return for their service. The company has received the full benefit of the retiree's promise and equity demands that the retiree receive the full benefit of his bargain with the company.

According benefits "secured" status under the bankruptcy code will prevent the tactic of using Chapter 11 as a means to shed pensions. Critics will contend that a grant of secured status to benefits will prevent companies from acquiring the capital needed to allow emergence from bankruptcy because secured benefits must be fully funded before discharge, greatly increasing the amount of capital required. This is retroactive thinking and the issue is more properly viewed proactively. Benefit plans remain underfunded because companies give them low priority compared to other obligations due to their unsecured status. If retiree benefits are made secured, then management will ensure plans are properly funded so the company has the ability to obtain a lifeline loan of operating capital should bankruptcy become necessary.

V. CONCLUSION

The erosion of workers' rights and the role this erosion plays in the crisis facing the pension and benefit systems in America cannot be ignored. The toil of the American worker blessed the United States with unprecedented growth and prosperity in the decades following World War II. Countless workers made the American economy (even in times like the current world recession) the crown jewel it remains. As those workers retire they deserve to receive the benefits they were promised.

Abuses and lack of accountability on the part of industry, big labor, and government threaten the pension and benefits of these workers. Industry, big labor, and government all have reaped the benefits generated by American workers. Through manipulation of the system, mismanagement of business, fraud, and deceit, they have broken their promises. Companies must not be permitted to shed their obligations in quest of more profit. Governments must not be permitted to strip workers of their rights as a quick fix for fiscal irresponsibility. Congress must stop the erosion of workers' rights by enacting legislation to protect public-sector workers, and by amending ERISA and the bankruptcy code to protect private-sector workers. Industry, big labor, and government must fulfill their promises and do what they must to protect the rights of the workers upon whom each of them rely.