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Paul M. Secunda

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Paul M. Secunda
Associate Professor of Law
Marquette University Law School
Sensenbrenner Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881
paul.secunda@marquette.edu

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ABSTRACT

This article provides a first time look at the numerous challenges facing multiemployer or Taft-Hartley benefit plans in the post-global recession and health care reform world. These plans have provided pension, health, and welfare benefits to union members of smaller employers in itinerant industries for over sixty years and even today, these plans collectively have over ten million participants in over 1500 plans.

Multiemployer plans are increasingly mired in financial trouble and are finding it more difficult to continue to provide adequate retirement and health benefits to their members. Although they once represented one of the great triumphs in American labor relations, these plans are now becoming just another part of the growing employee benefits crisis confronting the United States.

The purpose of this article is to consider, and respond to, the various financial, healthcare, and judicial challenges that threaten the on-going viability of these plans. By addressing these challenges in a systematic manner, this article seeks to provide a more sustainable path forward so that multiemployer benefit plans can continue to provide crucial employee benefits to the next generation of union workers.

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* Associate Professor of Law, Marquette University Law School. This article grew out of a shorter trade publication piece for a non-legal audience of multiemployer plan trustees which will appear in the TRUSTEES HANDBOOK, Chapter 3 (Kordus 7th ed. forthcoming 2011). Many thanks to Marcia McCormick, Colleen Medill, and David Pratt for their insightful comments on this complex topic. I would also like to thank Elisabeth Derango, Marquette University Law School Class of 2012, for her excellence research assistance on this paper. All errors or omissions are mine alone.

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INTRODUCTION

The benefits world was abuzz in 2007 when the "big three" Detroit automakers (General Motors, Chrysler, and Ford) established voluntary employees' beneficiary associations (VEBAs)[1] to deal with the growing amount of debt related to their legacy costs.[2] VEBAs provide payments of life, sick,

[1] "VEBA[s] allows an employer to reach an agreement with the applicable union to fund a stand-alone, tax-exempt trust that assumes full responsibility for all future retiree health benefits." *See* Susan E. Cancelosi, *VEBAs to the Rescue: Evaluating One Alternative for Public Sector Retiree Health Benefits*, 42 J. Marshall L. Rev. 879, 899 (2009) (citing Aaron Bernstein, *Can VEBAs Alleviate Retiree Health Care Problems?*, CAPITAL MATTERS, Apr. 2008, at 7, *available at* http://www.law.harvard.edu/programs/lwp/pensions/publications/occpapers/occasionalpapers_Ap9_fin2.pdf).

[2] *See,* Sholnn Freeman & Frank Ahrens, *GM, Union Agree on Contract to End Strike; Deal Seen as Model Across Industries*, WASH. POST, Sept. 27, 2007, at A1 ("Under the new contract, UAW retiree benefits will be paid out by a voluntary employees' beneficiary association (VEBA)."). Legacy costs refer to "[t]he costs involved with a company paying increased healthcare fees and

accident, or other similar benefits to members or their beneficiaries.[3] These tax-exempt trusts are able to remove immense healthcare obligations from company balance sheets, while at the same time ensuring retirees some level of benefit that might otherwise be lost should the employer file for bankruptcy or renege on previous lifetime healthcare promises.[4] The hope was that these VEBAs would cap legacy costs, especially employer liability for retiree medical benefits.[5]

But the need for VEBAs in the first place to help contain legacy costs also sheds needed light on a related and much more troubling employee benefits issue that has been neglected for far too long. The employee benefit plans that provide retiree, health, and other welfare benefits to unionized workers and retirees are generally struggling to survive the current economic and regulatory environment in the United States. These multiemployer plans (also referred to as "Taft-Hartley" plans) are collectively bargained[6] and maintained by one or more employers, usually within the same or related industries.[7] And although multiemployer plans may seem less relevant today given lower union density

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other benefit-related costs for its current employees and retired pensioners." *See* Legacy Costs, INVESTOPEDIA, http://www.investopedia.com/terms/l/legacycosts .asp (last visited Mar. 4, 2011).

[3] 26 U.S.C. § 501(c)(9).

[4] *See* Daniel Keating, *Automobile Bankruptcies, Retiree Benefits, and the Futility of Springing Priorities in Chapter 11 Reorganizations*, 96 IOWA L. REV. 261, 267 (2010) (citing in part Steven J. Sacher, *Issueman Tackles the New VEBAs*, 35 PENS. & BEN. REP. (BNA) 820 (Apr. 8, 2008)) ("Typically, an employer will seriously consider a VEBA trust for retiree medical benefits when certain conditions are present. The employer must be a company that is financially precarious enough that the possibility of bankruptcy legitimately threatens its employees.").

[5] *See id.* at 265-67.

[6] *See* Pension Benefit Guaranty Corporation, *Introduction to Multiemployer Plans*, http://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans.html (last visited Mar. 4, 2011). *See also* Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 637-38 (1992) ("[T]he nature of multiemployer plans … [is to] operate by pooling contributions and liabilities.").

[7] *See Concrete Pipe*, 508 U.S. at 638.

levels in America, there are in fact more than ten million participants nationwide in over 1,500 multiemployer plans.[8]

Part of the problem is that these plans are increasingly mired in financial trouble and are finding it more difficult to successfully negotiate new legislative and judicially-imposed obstacles. Although these plans once represented one of the great triumphs in American labor relations in providing employee benefits to workers of small employers in itinerant industries (such as in building and construction, trucking, retail, and the entertainment industry),[9] such plans are quickly becoming just another part of the growing employee benefits crisis confronting the United States.[10]

Three principal challenges face multiemployer plans in the coming years. First, benefit plans are increasingly underfunded and in danger of becoming insolvent.[11] This state of affairs has been caused in no small part because there are fewer new union members[12] and more retirees at the same time.[13] Recent

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[8] United States Government Accountability Office, *Changes Needed to Better Protect Multiemployer Pension Benefits*, GAO HIGHLIGHTS, 1 (Oct. 2010), *available at* http://www.gao.gov/highlights/d1179high.pdf (hereinafter GAO). There are also roughly sixteen million retired workers and their families who receive health and other benefits from these plans. *See* National Coordinating Committee for Multiemployer Plans, *Comments on Amendment of Regulations Relating to Definition of "Plan Assets,"* Apr. 29, 2008, http://www.dol.gov/ebsa/pdf/NCCMP042908.pdf.

[9] *See* George M. Kraw, *Four Reforms to Save Multiemployer Plans,* BNA PENSION & BENEFITS DAILY 1, Nov. 17, 2010, *available at* http://www.kraw.com/pdf/kraw-pension-benefits.pdf.

[10] *See, e.g.,* Keating, *supra* note 4, at 294 ("Today, the folly of creating new legacy costs is nothing short of obvious to employers as they watch both the defined-benefit pension crisis and the retiree-medical-benefit crisis play themselves out on Wall Street and on Main Street."); Michael Selmi, *The 2007-2008 Term: The Government Changes Its Tune and the Supreme Court Takes a Pragmatic Turn*, 12 Employee Rts. & Emp. Pol'y J. 161, 168 (2008) (citing to newspaper articles discussing state pension crises).

[11] *See* GAO, *supra* note 8 ("Most multiemployer plans report large funding shortfalls and face an uncertain future.").

[12] *See* Bureau of Labor Statistics, *Union Members- 2010*, BLS NEW RELEASE, 1 (Jan. 21, 2011), *available at* www.bls.gov/news.release/pdf/union2.pdf (explaining that the union membership decreased in 2010 by 612,000 workers). The number of Taft-Hartley plans is at a low point and private-sector unions in the United States are currently struggling to

legislation in the form of the Pension Protection Act of 2006 (PPA)[14] did not go far enough in addressing the financial woes of multiemployer plans.[15] Although the Pension Relief Act of 2010 (PRA),[16] does provide some funding relief for multiemployer pension plans in response to the current unstable economic environment, it is still unclear what long-term impact it will have.[17] Finally, more

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get their density rate over 7% of the workforce (the rate recently fell to 6.9%). *See* Charles A. Jeszeck, *Private Pensions: Long-standing Challenges Remain for Multiemployer Pension Plans*, GAO, Testimony Before the Committee on Health, Education, Labor and Pensions, U.S. Senate, 9 (May 27, 2010), *available at* http://help.senate.gov/imo/media/doc/Jeszeck.pdf (discussing how the number of multiemployer plans has decreased steadily since the 1980s).

[13] *The Future of Retirement in the United States*, CATO INSTITUTE, Testimony of Jagadeesh Gokhale before the Special Committee on Aging, United States Senate (Mar. 16, 2004), *available at* http://www.cato.org/testimony/ct-jg040122.html (hereinafter *Future of Retirement*) (explaining that population projections by the Social Security Administration indicate that between the year 2003 and 2030, the number of working-aged individuals (those aged 20-64) will increase by just 13.3 percent. The number of those aged 65 and older, however, will increase by 93.1 percent. (These rates of population increase were 51.6 percent and 71.1 percent respectively during the previous 30 years).).

[14] Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780; President Bush signed the PPA into law on August 17, 2006. PPA establishes for multiemployer pension plans new funding requirements, additional funding rules for plans that are in endangered or critical status, enhanced disclosure requirements to participants regarding a plan's funding status, and a requirement that defined benefit plans offer a joint and 75% survivor annuity option. *See Pension Protection Act of 2006 Requires Major Changes to Multiemployer Defined Benefit Plans in 2008 and Beyond*, Pension Analyst, 1 (Jun. 2007), *available at* http://www.prudential.com/media/managed/PensAnalyst.PPA06.MultiemployerDB.2008.pdf (hereinafter Pension Analyst).

[15] For instance, among other provisions, it merely gives incentives to Taft-Hartley plans that find themselves in "endangered, "seriously endangered" or "critical" status to ensure that these underfunded plans address their funding issues. Pension Analyst, *supra* note 14, at 3. Yet these notice and reporting requirements have not stopped the hemorrhaging, as more Taft-Hartley plans are in danger compared to 2006. *See infra* note 63 and accompanying text.

[16] Pension Relief Act of 2010, Pub. L. No. 111-192, 124 Stat. 1280.

[17] The PRA specifically includes provisions that will reduce required employer contributions and will extend the amortization period for investment losses for multiemployer plans. *Id.*

recent legislation to provide multiemployer plans some financial help, such as The Create Jobs and Save Benefits Act of 2010,[18] have died in the Senate committee this past year.[19]

In addition to these financial woes facing multiemployer pension plans, a second major issue facing multiemployer plans involves new healthcare regulations. Multiemployer health benefits are perceived as too generous,[20] and starting in 2018, they may face a new 40% excise tax under the federal Patient Protection and Affordable Care Act of 2010 (PPACA).[21] Multiemployer health plans also must consider the impact of new PPACA provisions involving "grandfathered plans," "minimum essential benefits," and "health benefit exchanges." Only by negotiating this new regulatory terrain can these plans hope to continue to provide cost-effective health benefits to their members.

Third, and finally, there are significant judicial challenges to both multiemployer pension and health plans. Decisions made by courts in the multiemployer plan context have recently made governance of such plans by plan administrators and other fiduciaries even more difficult. This is problematic because multiemployer plan administrators need to know the scope of their fiduciary obligations when dealing with claim issues so as not to inadvertently breach their fiduciary duties to plan participants and beneficiaries in making claim

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[18] S. 3157, 111th Congress (2009-2010), THE LIBRARY OF CONGRESS, (Mar. 23, 2010), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:S.3157: (hereinafter *Bill Text*) (permitting multiemployer pension plans to merge or form alliances with other plans, as well as to increase PBGC guarantees for insolvent plans to increase participant benefits).

[19] *See* S. 3157, *Bill Summary & Status*, 111th Congress (2009-2010), THE LIBRARY OF CONGRESS, (Mar. 23, 2010), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.03157:.

[20] *See* Editorial, *Cadillac Plans*, N.Y. TIMES, January 16, 2010, at A20, *available at* http://www.nytimes.com/2010/01/16/opinion/16sat1.html?pagewanted=1&_r=1 (defining employer-sponsored as high-priced health insurance policies).

[21] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (enacted March 20, 2010). Although PPACA faces numerous constitutional challenges in the courts which might mean the 2018 Cadillac tax and other provisions could be struck down, Patricia Donovan, *Tis the Season for Constitutional Challenges to PPACA*, HEALTHCARE INTELLIGENCE NETWORK (Dec. 22, 2010), *available at* http://hin.com/blog/2010/12/22/tis-the-season-for-constitutional-challenges-to-ppaca, this Article proceeds under the assumption that PPACA will eventually be found to be constitutional.

determinations.[22] To illustrate typical interpretation issues in this environment, this article considers recent developments in how benefit denials are handled by reviewing courts. Consideration of these issues will give some indication of the complexity of the issues that the judiciary continues to wrestle with in the multiemployer plan context.

This article proceeds in four parts in order to describe the significant challenges facing multiemployer plans in the current political and legal environment. Part I introduces the basics of multiemployer benefit plans. Part II considers the financial challenges to multiemployer pension plans and possible solutions. Part III explores the potential impact that PPACA may have on the ability of multiemployer health plans to continue to provide health benefits to their members on a cost-effective basis. Part IV concludes by looking at a typical issue of judicial interpretation that threatens to make multiemployer pension and healthcare plan administration even more complicated. The hope is that by addressing financial, healthcare, and judicial challenges, a more sustainable way forward can be plotted so that multiemployer benefit plans can continue to provide crucial employee benefits to the next generation of union workers.

I. MULTIEMPLOYER BENEFIT PLAN PRIMER

Employees receive many different types of compensation for their work. An increasingly large portion of this compensation, as much as 40% of compensation in some cases, is in the form of employee benefits.[23] Employees benefits come in two generic flavors: deferred compensation and in-kind benefits. The primary example of deferred compensation plans are pensions or retirement plans. This type of compensation is earned in the present, but is not available to the employee until later (generally after reaching normal retirement age). On the other hand, compensation that is usable in the short-term, such as health, disability or life insurance benefits, constitutes in-kind payments.

The Employee Retirement Income Security Act of 1974 (ERISA)[24] is the comprehensive federal law that regulates the provision of employer-provided pension benefit and welfare plans. ERISA protects "employee pensions and other

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[22] *See infra* note 32 and accompanying text.

[23] *See* STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN LESTER, EMPLOYMENT LAW: CASES AND MATERIALS 665 (4th ed. 2007).

[24] 29 U.S.C. § 1001 et seq. (West Supp. 2006). Following the practice of other ERISA articles, this Chapter refers to the original section numbers as enacted by ERISA in the "ERISA §" format, rather than to the United State Code section numbers.

benefits by providing insurance . . . , specifying certain plan characteristics in detail . . ., and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans."[25] Although employers are not required to offer employee benefit plans to their employees, once such plans are adopted, ERISA provides the applicable legal framework.

Rather than relying on the distinction between deferred compensation and in-kind benefits, ERISA divides the universe of covered employee benefit plans into employee pension benefit plans and employee welfare benefit plans.[26] ERISA plans can also be categorized by the type and number of employers engaged in their provision. Most employer plans are single employer plans run by individual employers.[27] On the other hand, multiemployer plans are sponsored by more than one employer under provisions of a collective bargaining agreement for the benefit of union members,[28] while multiple employer plans are sponsored by unrelated employers outside of a collective bargaining agreement. Different provisions apply to these benefit plan arrangements under ERISA.[29]

As far as multiemployer plans, in addition to ERISA, these plans are also regulated by Section 302(c)(5) of the Taft Hartley Amendments of 1947.[30] Under Section 302(c)(5), multiemployer benefit plans must be established in trust to provide employee benefits to union employees. The trustees of the plan must be half appointed by the union and half by management.[31] Regardless of who appointed them, trustees have a fiduciary duty to act in the sole and exclusive interest of the plan and its participants.[32]

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[25] Varity Corp. v. Howe, 516 U.S. 489, 496 (1996).

[26] ERISA §§ 3(3), 3(4).

[27] *See generally* JOHN H. LANGBEIN, SUSAN J. STABILE, & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 64-71 (4th ed. 2006).

[28] *See* ERISA § 3(37).

[29] *See generally* COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 240 (3ED 2011).

[30] Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) (2010).

[31] *Id.* (requiring a multiemployer plan to be maintained as a trust fund sponsored by a joint board of trustees, half of whose members are appointed by employer representatives, and half by union representatives.).

[32] *Introduction to Multiemployer Plans*, *supra* note 6.

Because a multiemployer plan involves more than one employer, it is not uncommon for large plans to have hundreds, or even thousands, of contributing employers.[33] Employer contributions are usually made on a per-hour basis, but may also be measured by some other unit of production. Service with all of the employers contributing to the plan is added together to compute a participant's vesting and benefit accrual credit.[34] These features allows an employee to accrue pension and health benefits seamlessly, despite transfers from one contributing employer to another.[35]

Although individual employers make contributions measured by the work performed by their workers, those contributions, once received, are not specifically earmarked for the employees of the employers who make them.[36] Rather, all contributions, and the earnings thereon, are available to pay the benefits of each participant based on that participant's service record. Thus, multiemployer plans "operate by pooling contributions and liabilities. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone."[37]

With regard to pension benefits, most multiemployer pension plans are established and maintained as defined benefit plans (DBPs).[38] Employee pension benefit plans under ERISA generally come in two distinct types: DBPs and

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[33] *See* National Coordinating Committee for Multiemployer Plans, *supra* note 8.

[34] *See Introduction to Multiemployer Plans*, *supra* note 6 ("The bargaining parties negotiate a contribution rate and the trustees translate that rate into a benefit. Decisions to increase benefits or change the plan are also typically made by the board of trustees.").

[35] Indeed, portability of plan benefits between employers is one of the primary advantages of the multiemployer plan framework. *See id*. ("[A]n employee who moves amongst several employers in the same industry will accrue an aggregate . . .benefit which will reflect all of the work performed by that employee in that industry.").

[36] *See* Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 637-38 (1992).

[37] *See id.*

[38] *See* Cent. States, Se. and Sw. Areas Pension Fund v. Schilli Corp., 420 F.3d 663, 667 (7th Cir. 2005).

defined contribution plans (DCPs).[39] Because employers are responsible for providing a defined benefit amount to employees at retirement under DBP arrangements, there is more regulation of these plans so that the promised benefits are available upon retirement and plans do not default on their pension promises. For instance, ERISA provides minimum vesting, benefit accrual, and funding standards for DBPs and sets up an insurance scheme, operated by the Pension Benefit Guaranty Corporation (PBGC), in case of employer terminations.[40] On the other hand, employers are only responsible to contribute money to employee's individual plan accounts under the DCP model and that is where their responsibility ends.

In defined benefit plans, which are the focus of this article, the burden is placed on the employer to contribute funds to the pension plan on an actuarial sound basis so that sufficient funds exist to pay the worker when he or she retires.[41] Under this arrangement, the risk is placed on the employer to invest sufficiently to fund the on-going pension expenses. The required minimum funding of DBP plans is calculated based on a complex actuarial analysis revolving around factors such as age, length of service, projected future salary increases, and rate of return on plan investments.[42]

The current low level of union density in the private-sector in the United States has been especially problematic in multiemployer defined benefit plans because such plans operate on the assumption that current workers' contributions to the plan will support older workers in their retirement.[43] With multiemployer plans, "[t]he general principle at work is that each employer must make regular

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[39] *See* ERISA § 3(4).

[40] *See Introduction to Multiemployer Plans*, *supra* note 6 ("Multiemployer plans are subject to many of the vesting, accrual, and minimum participation rules that apply to single-employer plans.").

[41] *See id.* ("Most multiemployer plans are 'unit benefit' plans that offer a specified dollar-amount benefit per month multiplied by years of credited service.").

[42] Funding of defined benefit plans is highly regulated by ERISA under the complex minimum funding standards of ERISA §§ 301-305.

[43] *See* Jeszeck, *supra* note 12, at 10 (explaining that for multiemployer plans "the proportion of active participants paying into the fund[s] to others who are no longer paying into the fund[s] has decreased, thereby increasing plan liabilities.").

contributions to the plan to fund the . . . benefits of those employees who perform services for that employer."[44]

Benefits from a defined benefit plan are primarily paid in the form of an annuity, which come in many forms, but generally provide a stream of payments to the employee for the rest of his or her life.[45] As a result of the annuity form of payment, not only is the risk of investment return on the employer, but so is the risk of employee longevity.[46] ERISA also requires that DBPs contains payment features which permit a spouse to continue to receive some benefit from the plan after the death of the employee.[47]

Because of the risks associated with employers maintaining defined benefit plans, ERISA establishes a scheme of plan termination insurance. The PBGC has been legislatively created to administer this insurance program and provide some level of retirement income for employees under DBPs if the employer should default on their pension promises.[48] The cost of the PBGC is borne primarily by employers that maintain pension plans through monthly employer contributions.[49] Contribution amounts are calculated both per

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[44] *Executive Alert: Multiemployer Pension Funding Reform: Helpful, but Systemic Problems Persist*, NEWSLETTERS/ALERTS, (May 28, 2010), http://www.bakerlaw.com/alerts/multiemployer-pension-funding-reform-helpful-but-systemic-problems-persist-05-28-2010/ (hereinafter *Executive Alert*).

[45] *See* David Pratt, *Retirement in a Defined Contribution Era*: *Making the Money Last*, 41 J. MARSHALL L. REV. 1091, 1139 (2008).

[46] *See id* at 1140-41.

[47] The qualified joint survivor annuity (QJSA) and qualified preretirement survivor annuity (QPSA) for surviving spouses are the default forms of distribution provided for under defined benefit plans. *See* ERISA §205. For a case concerning the annuity options for surviving spouses and the gender equity issues implicated thereby, *see* Lorenzen v. Employee Retirement Plan of the Sperry & Hutchinson Co., 896 F.2d 228 (7th Cir. 1990).

[48] ERISA § 4022. *See also About PBGC*, PENSION BENEFIT GUARANTY CORPORATION, *at* http://www.pbgc.gov/about/who-we-are.html (last visited Feb. 13, 2010).

[49] *See Introduction to Multiemployer Plans*, *supra* note 6 ("In multiemployer plans, the amount of the employer's contribution is set by a collective bargaining agreement that specifies a contribution formula (such as $3 per hour worked by each employee covered by the agreement) and further provides that contributions must be paid to the plan on a monthly basis.").

participant and based on the amount of unvested vested benefits the plan maintains.[50] Unfortunately, the PBGC currently has insufficient funds to cover many insured benefits and its multiemployer plan program has run a deficit every year since 2003.[51]

Even when the PBGC has a surplus, it only provides a percentage of the normal retirement benefit up to a limit set by statute.[52] Matters are made even more precarious because many employers of multiemployer plans are facing significant financial difficulties and are increasingly defaulting on their required contributions to these plans.[53] Although the trustees of the plan have the statutory authority to collect delinquent contributions under ERISA § 515,[54] this is a time-consuming process and may require expensive litigation.[55]

Terminations of defined benefit plans can be divided into two categories: mass withdrawals or plan amendments.[56] With a mass withdrawal, "employers withdraw or cease to be obligated to contribute to the plan," while "[a] plan amendment termination occurs when the plan adopts an amendment that provides

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[50] The Pension Protection Act of 2006 has recently increased the annual premium amount that employers must contribute to the PBGC, while at the same time increasing minimum funding requirements for such plans. *See* PENSION PROTECTION ACT OF 2006, H.R. 4, 109TH CONG. §§ 101-116, 401-412 (2006).

[51] *See* Kraw, *supra* note 9, at 2 ("In 2010, the current deficit in PBGC funding for these plans was almost $1 billion.").

[52] In 2009 the maximum protected pension was $54,000 for an employee who retired at age 65. Press Release, Pension Benefit Guaranty Corporation, *PBGC Announces Maximum Insurance Benefit for 2009* (Nov. 3, 2008), http://www.pbgc.gov/media/news-archive/news-releases/2008/pr09-03.html. The amount is higher for those who retire at a later age and less for those who retire when younger. *Id.*

[53] *See* J. Mark Poerio et al., *Pension Plan Funding Notices and Delinquent Plan Contributions*, PAUL HASTINGS STAYCURRENT, May 2008, http://www.paulhastings.com/assets/publications/917.pdf ("The current economic downturn is likely to expand the ranks of underfunded multiemployer (union) pension plans, and cause more employers to fall behind in making required contributions to their pension and welfare plans.").

[54] ERISA § 515. *See also* ERISA § 502(g).

[55] *See* Poerio et al., *supra* note 53.

[56] ERISA § 4041A.

that participants will receive no credit for service with any employer after a specified date, or an amendment that makes it no longer a covered plan."[57] Currently, the PBGC already owes some $2.3 billion in future assistance to terminated multiemployer plans and it is unlikely that these funds will be recovered in the future.[58]

Employers in underfunded multiemployer plans find it difficult to leave such plans because of the threat of withdrawal liability. Congress enacted the Multiemployer Pension Plan Amendments of 1980 (MPPAA)[59] in effort to protect the financial stability of multiemployer pension plans[60] and withdrawal liability triggers when an employer partially or completely withdrawals from such a plan.[61]

The goal of withdrawal liability is to keep employers in the multiemployer arrangement by basing their liability on the employer's share of the plan's unfunded vested benefits.[62] Yet, as current PBGC funding deficits make clear,[63]

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[57] *Introduction to Multiemployer Plans*, *supra* note 6 ("Unlike single-employer plans, multiemployer plans continue to pay all vested benefits out of existing plan assets and withdrawal liability payments. PBGC's guarantee of the benefits in a terminated, multiemployer plan – payable as financial assistance to the plan – only starts if and when the plan is unable to make payments at the statutorily guaranteed level.").

[58] Kraw, *supra* note 9, at 2.

[59] Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208.

[60] Multiemployer health plans, as discussed below, are not automatically subject to withdrawal liability. *See infra* notes 136-138 and accompanying notes.

[61] *See* Jeszeck, *supra* note 12, at 7 (explaining how plan withdrawal liability works).

[62] *See id.* at 8 (explaining how "this greater financial risk on employers and lower guaranteed benefit level for participants in multiemployer plans, [is supposed] to create incentives for employers, participants, and their collective bargaining representatives to avoid insolvency and to collaborate in trying to find solutions to the plan's financial difficulties.").

[63] For instance, Moody's Investor Service estimated the total unfunded liability of 126 of the nation's largest multiemployer pension plans at over $165 billion in 2008. *See* GAO Report, *supra* note 8. The National Coordinating Committee for Multiemployer Plans found in a 2009 survey that four out of every five of the plans reviewed were "endangered" or in "critical" condition as far as

this provision alone has not kept multiemployer pension plans from terminating, especially given current economic and demographic realities.[64] Nor has the MPPAA led to better funding of multiemployer plans.[65] This underfunded status has placed additional regulatory constraints on many plans under the Pension Protection Act and other pension laws.[66]

Having reviewed the necessary multiemployer plan framework and terminology, the next section considers proposals for overcoming the financial challenges to multiemployer pension plans.

II. THE FINANCIAL CHALLENGE TO MULTIEMPLOYER PENSION PLANS

Not surprisingly, the reason why so many multiemployer pension plans are underfunded is the global recession of 2007-2009.[67] Many investments made by multiemployer trustees during this time period turned out disastrously.[68] Also, and as already discussed above, there are fewer new participants in these plans, and there is a larger aging workforce that needs to be paid out of these funds.[69] Finally, the PGBC has been unable to keep up with the rate of newly-terminated multiemployer pension plans.[70]

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their funding levels. *See id.* Perhaps most significantly, the GAO reported in 2010 that the proportion of multiemployer plans that are less than 80 percent funded rose from 23 percent of plans in 2008 to 68 percent of plans in 2009. *See id*.

[64] *See* Kraw, *supra* note 9, at 2 (discussing the how the financial reality of withdrawal liability is a disincentive for new employers to join multiemployer plans since withdrawal liability must be put on audited financial statements).

[65] *See* Jeszeck, *supra* note 12, at 12 (discussing how the intent of MPPA to limit PBGC's exposure to future losses from underfunded plans has not yet been realized).

[66] Pension Analyst, *supra* note 14, at 3-4 (noting additional funding and notice requirements for underfunded plans).

[67] Jeszeck, *supra* note 12, at 8.

[68] *See id.* at 13 (discussing the serious short-term financial stresses experienced by multiemployer plans).

[69] *Id.* at page 10 (commenting on the decrease in the proportion of active participants to retirees due to an aging workforce).

[70] *See id.* at 11-12. (discussing how PBGC's liabilities have outplace asset growth since 1998).

Multiemployer pension plan underfunding, however, is not a new issue or challenge. As related in the previous section, Congress amended ERISA in 1980 to try to address the problem of significant underfunding of Taft-Hartley plans. The Multiemployer Pension Plan Amendments of 1980 (MPPAA)[71] attempted to protect the financial stability of these plans through the introduction of withdrawal liability, but to little or no avail.

New ideas and solutions are again needed thirty years later. The rest of this Part considers four proposals advanced by employee benefits attorney George Kraw, a former member of the PBGC's Advisory Committee.[72] Kraw suggests: (1) more readily permitting plans to cut vested benefits; (2) allowing voluntary caps or elimination of withdrawal liability; (3) setting up a Chapter 11-type procedure for permitting multiemployer pension to equitably address concern financial difficulties; and (4) promoting a new fund investment strategy based on the "new normal" of investment return Although none of these proposals might be considered ideal from a worker perspective, unions and their members might be willing to buy into some of these proposals if, like with the institution of VEBAs in 2007 in the retiree healthcare context, little other choice exists in saving their pension benefits.

A. Permit Cutting of Vested Benefits

The first suggested reform is to allow plans to cut vested benefits if plan trustees deem it necessary and plan sponsors (i.e., the employer and union) agree.[73] Currently, the Pension Protection Act of 2006 allows multiemployer plans to cut some vested benefits for plan participants if the plans' underfunded status becomes "endangered" or "critical."[74]

Kraw's proposal would extend this power to plans that are not yet critically underfunded, but are headed in that general direction. The argument goes that it would be generally easier for Taft-Hartley plans to act without at the same time having to battle insolvency. In this vein, Kraw comments that, "the guiding principle here should be that plans must not be forced to adopt

[71] Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208.

[72] *See* Kraw, *supra* note 9.

[73] *Id.*

[74] *See* Pension Analyst, *supra* note 14, at 3-4. Endangered status means that the fund is less than 80 percent funded, while critical status means that the fund is less than 65 percent funded. *See* Jeszeck, *supra* note 12, at 4.

contribution rates from active participants that result in uncompetitive and unsustainable labor costs and loss of jobs."[75]

Vested benefits are sacrosanct under ERISA. Indeed, there is a broad anti-alienation provision that prohibits accrued benefits from being used in most situations for anything but for the benefit of the participants and beneficiaries of the plan.[76] Because of the sanctity of such vested benefits under employee benefits law, the promulgation of such a radical measure would have to be accompanied by the ability of the participating unions to veto any such measure. Of course, that might make the cutting of vested benefits less likely to happen, but it appears to be a step that should only be taken in any event if the long-term prospects for the plan are dubious and immediate and aggressive action is needed to keep the employers in the covered industry from shedding jobs.

B. Cap or Eliminate Withdrawal Liability

A second possible reform would be to cap or eliminate withdrawal liability to allow more employers to join multiemployer plans.[77] The idea here is that employers are not joining multiemployer pension plans because they are concerned about joining such a plan, and then when financial problems occur, being stuck with vast withdrawal liability.[78]

Kraw's suggested reform seeks to give multiemployer pension plans the ability to incentivize more employer members by either capping the possible amount of withdrawal liability or doing away with such liability altogether. In this vein, Kraw argues that even though withdrawal liability is supposed to incentivize employers, unions, and participants to find solutions to their funding

[75] *See* Pension Analyst, *supra* note 14, at 4.

[76] Normally, the anti-alienation rules operate to prevent an employer from assigning or alienating plan benefits. *See* ERISA §206(d). "In-service distributions" from an individual account plan or qualified domestic relations orders (QDROs), which permit a plan administrator to pay a former spouse or other dependent from a participant's pension benefits, represent two important exceptions to the general anti-alienation provisions. *Id.*

[77] Kraw, *supra* note 9, at 2.

[78] *Executive Alert*, *supra* note 44 ("By participating in a multiemployer pension plan, an employer . . . accepts a risk of loss based on its share of the plan's unfunded pension obligations. For example, negative investment performance inevitably will require each remaining participating employer to contribute more, or face the prospect of a more significant withdrawal liability if and when it chooses (or has to) walk away.").

issues, the reality is that withdrawal liability has interfered with collective bargaining and kept new employers from joining multiemployer arrangements.[79]

This proposal fails under principles of statutory preemption.[80] Multiemployer pension plans are simply not able to voluntarily agree with new employer members to cap or eliminate withdrawal liability, as such a provision would be directly inconsistent with MPPAA requirements and consequently, preempted.[81]

Thus, in order to adopt the capping or elimination of withdrawal liability approach, the MPPAA would have to be amended by Congress. Although Congress could conceivably undertake such steps to improve the solvency of multiemployer pension plans, the PBGC would likely be against such a measure because almost all multiemployer pension plans are defined benefit plans, and the PBGC needs the withdrawal liability money for its own funding purposes. Furthermore, even if the MPPAA could be amended in this way, a cap may create a moral hazard problem and further increase the PBGC's potential liabilities. This is because PBGC premiums for insurance coverage are based on actuarial assumptions,[82] and the current ability to assess withdrawal liability is most likely built into these assumptions.

C. Chapter 11-Type Bankruptcy Procedure As Alternative to Plan Partitioning

Kraw's third proposed reform would create a Chapter 11-type bankruptcy procedure for severely distressed plans.[83] This reform would be an alternative to

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[79] *See* Kraw, *supra* note 9, at 2. Indeed, Kraw's arguments ring true with many employee benefit law experts who have long believed that the MPPAA overreaches because no rational employer who has any choice would ever agree to join a multiemployer plan where withdrawal liability is completely out of its control and virtually unlimited in amount. *See* MEDILL, *supra* note 29, at 240.

[80] Under a traditional statutory preemption analysis, conflict or obstacle preemption occurs where [a contractual provision] "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

[81] Waiver of withdrawal liability is only permitted to be undertaken by the PBGC; and then only where an employer has withdrawn completely from a plan and then subsequently resumes covered operations. *See* ERISA § 4207; 29 C.F.R. §§ 4207.1 - 4207.11 (2010).

[82] *See Introduction to Multiemployer Plans*, *supra* note 6.

[83] Kraw, *supra* note 9, at 3.

a proposal that has already been floated as a way to deal with some of the insolvency issues facing multiemployer pension plans.

Under the partition proposal, the PBGC's authority would be expanded to partition plans so that multiemployer pension plans would be able to at least save the viable parts of their plans.[84] Currently, PBGC has the authority to order the partition of a multiemployer pension plan.[85] The new proposed law, permitting "qualified partitions," would "permit a multiemployer plan to spin off into a new plan ('partitioned plan') the liabilities and certain assets attributable to employees of employers who have filed for bankruptcy or who have failed to pay their withdrawal liability."[86] Additionally, this qualified partition proposal "would transfer responsibility to the PBGC for payment of the full plan benefits of participants transferred to the partitioned plan, which in many cases would be well above the amount guaranteed by the PBGC under current law."[87]

Interestingly, critics of the qualified partition proposal, including the Department of Labor's (DOL's) Employee Benefit Security Administration (EBSA), worry that this proposal will take money away from the single-employer PBGC program and further burden the already underfunded PBGC.[88] Consequently, the Obama administration is unlikely to support a qualified partition proposal at this time.

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[84] *Statement of Phyllis C. Borzi, Assistant Secretary of Labor, Employee Benefit Security Administration Before the Committee on Health, Education, Labor and Pensions, United States Senate*, UNITED STATES DEPARTMENT OF LABOR, (May 27, 2010), *available at* http://www.dol.gov/ebsa/newsroom/ty052710.html.

[85] *Id.* ("ERISA empowers the PBGC to order the partition of a multiemployer plan, either upon its own motion or upon application by the plan sponsor. Partition is a statutory mechanism that permits healthy employers to maintain a plan by carving out the plan liabilities attributable to employees of employers who have filed for Chapter 11 bankruptcy. Once partitioned, the PBGC assumes liability for paying benefits to the participants of this newly carved-out but terminated plan.").

[86] *Id.*

[87] *Id.*

[88] *Id.* ("We are concerned about the impact of the proposal on participants in single-employer plans trusteed by the PBGC. As of the end of fiscal year 2009, the single-employer program insured about 33.6 million people covered by more than 27,600 plans, and reported a net deficit of $21.1 billion.").

As an alternative to qualified partitioning, Kraw suggests a Chapter 11-type bankruptcy procedure whereby financial issues of financially-distressed plans could be handled more orderly and on a case-by-case basis.[89] These special bankruptcy rules for multiemployer plans would be particularly appropriate with plans whose financial obligations greatly exceed their assets, but who also still have significant financial holdings. In such cases, a bankruptcy court could "allocate losses by taking into account the interests of all stakeholders."[90] In particular, Kraw likes the fact that bankruptcy courts operate under equitable concepts of law and therefore could fashion a just outcome for all parties concerned.[91]

Although it is accurate to say that bankruptcy courts have the ability to fashion equitable outcomes for distressed multiemployer pension plans, unions might not readily agree to allow the future of their benefit plans to be decided by the bankruptcy courts. Recent history has demonstrated that workers' rights, including rights to retirement health benefits, have been treated shoddily by these courts, all in the name of the allowing companies to emerge from bankruptcy.

One notable example of how retiree benefits are treated in bankruptcy is provided by the case of *In re Horizon Natural Resources Co*.[92] That case demonstrates employers' abilities to circumvent the requirements of bankruptcy code section 1114,[93] even where union members have vested retirement benefits. In *Horizon*, ten unionized coal companies filed for bankruptcy under Chapter 11.[94] All of the companies' collective bargaining agreements contained successorship clauses that required new owners of the companies to assume the

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[89] Kraw, *supra* note 9, at 3.

[90] *Id.*

[91] *See id.*

[92] 316 B.R. 268 (Bank E.D. Ky. 2004).

[93] Section 1114 provides that the bankruptcy trustee "shall timely pay and shall not modify any retiree benefits" unless a modification is approved by the court or the retirees. *See* 11 U.S.C. § 1114(e). The statute further limits such modifications, stating that if the employer causes a modification of retiree benefits within 180 prior to the bankruptcy filing and at a time when the employer is insolvent, the benefits shall be reinstated "unless the court finds that the balance of the equities clearly favors such modification." *Id.* at §1114(l).

[94] *Horizon Natural Resources,* 316 B.R. at 271.

responsibilities of the previous collective bargaining agreement.[95] During the bankruptcy proceedings, however, the debtors decided to liquidate their companies.[96] Citing an inability to find buyers willing to assume the retiree health obligations of the prior collective bargaining agreement, the court allowed the sales to proceed free of the successorship clauses, essentially terminating all retiree health benefits.[97]

Consequently, unions would most likely only consider a Chapter 11-type bankruptcy procedure if there were no other alternatives and the very survival of the employer and/or industry was at stake. It thus seems unlikely that such a strategy would provide the necessary means to overcome the financial problems besieging these pension plans in the current environment.

D. Reduce Investment Assumption Rates and Permit Plans to Hedge

Kraw's final reform suggestion, and perhaps the one with most potential to help turn the financial tide, would give multiemployer pension plans greater flexibility to reduce investment assumption rates below current levels. Currently, most plans assume between six and eight percent rates of return on their investments.[98] Plans are generally unwilling to reduce these unrealistic rates because doing so would thereby increase their plan's liabilities.[99] Moreover, the lower the assumed rate of investment return, the more assets the plan must have on hand to pay current obligations to retirees.[100]

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[95] *Id.*

[96] *Id.*

[97] *Id.* at 282-83. Unfortunately for retirees, *Horizon* was not an aberration. A similar scenario unfolded in *In re Ormet*, 355 B.R. 37 (D. Ohio 2006), where the court enforced a unilateral modification to retiree health benefits over the objection of the union. *Id.* at 43-44. *See also* In re Northwest Airlines Corp., 346 B.R. 307 (Bankr. S.D. N.Y. 2006) (finding Section 1114 of the Bankruptcy Code permits a debtor to reject collective bargaining agreement if the rejection is, among other things, "necessary" to the debtor's ability to reorganize.).

[98] *Id.*

[99] *See Gambling Our Future*, THE ECONOMIST, (Mar. 10, 2010), *available at* http://www.economist.com/blogs/freeexchange/2010/03/pension_crises ("The higher the rate they assume, the smaller the projected liability.").

[100] *See id.* ("A big reason why states are so keen to maintain a projected 8% return is that they use their projected returns on assets to discount their future obligations."). *See also* John E. Petersen, *Fairy Tale Pension Projections*, GOVERNING, (Mar. 2010), *available at*

Kraw also argues that multiemployer pension plans should "immunize" or hedge part or all of their assets and liabilities.[101] "Immunization" of portions of multiemployer pension plan's investment portfolio would be done by investing in securities that would increase or decrease in direct correlation with an increase or decrease in pension plan liabilities.[102] Such "liability-aware investing" or LAI seeks to "reduce a significant portion of the economic risks of a defined benefit plan. In particular, the risk of significant changes in interest rates used to discount pension liabilities."[103]

Some critics argue that this dual-prong investment approach will lead inevitably to lower investment returns.[104] Yet, such lower investment returns might, in fact, be more consistent with the "new normal."[105] Additionally, by balancing these liability-driven investment with fixed-income securities, much of the same risk-return profile on investments likely can be maintained.[106] In short, this investment strategy deserves more careful consideration and could be an

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http://www.governing.com/columns/public-finance/Fairy-Tale-Pension-Projections.html (discussing how public pensions assumption in a 8% return rate has proven disastrous).

[101] Kraw, *supra* note 51, at 3.

[102] This type of investing is so-called "liability-aware investing" or "LAI." *See* Armand Yambao, *Liability Aware Investing For Defined Benefits Pension Funds*, ENNIS, KNUPP & ASSOCIATES, INC., 1 (Feb. 2008), *available at* http://www.nasra.org/resources/MVL/LAI.pdf ("The most common theme in all LAI mandates is the attempt to reduce a significant portion of the economic risks of a defined benefit plan. In particular, the risk of significant changes in interest rates used to discount pension liabilities is addressed by LAI mandates.").

[103] *Id.*

[104] *See* Bill Raver, *Dividend Yield: The Implications of Cash Sitting on Balance Sheets*, THE BRANDES INSTITUTE, 4http://www.brandes.com/Institute/Documents/BI%20Dividend%20Yield%20-%20Bill%20Raver%2001110.pdf (last visited Feb. 26, 2011). This is perhaps why only 20% of 226 defined benefit pension plans in the Netherlands, Canada, UK, and US used this approach in April and May 2007. *See id.*

[105] *See generally* Ernest Werlin, *'The New Normal' Means : Slow Growth and Low Returns*, HERALD-TRIBUNE, December 15, 2010, at D3, *available at* http://www.heraldtribune.com/article/20101230/columnist/12301031.

[106] *See* Raver, *supra* note 104, at 2-3.

important part of an overall strategy for repairing financially-battered multiemployer pension plans.

III. THE LEGISLATIVE CHALLENGE TO MULTIEMPLOYER HEALTH PLANS

Multiemployer pension plans are certainly facing a difficult economic and demographic environment. Yet, the storm clouds are gathering around multiemployer health plans as well. A very fluid situation exists for these plans as a result of multiemployer health plans being at the epicenter of the political storm[107] surrounding passage of the Patient Protection and Affordable Care Act of 2010 (PPACA).[108] In fact, it actually took a last-minute compromise - not assessing taxes on expensive, "Cadillac" health care plans until 2018 – that permitted the legislation to be enacted with the support of the labor movement.[109]

Under this compromise, a 40-percent excise tax on "excess benefits" will be imposed on health care providers starting in 2018 to the extent that the aggregate value of the employer-sponsored health coverage for an employee exceeds a threshold amount.[110] Until now, health coverage itself has not been taxed; indeed, it has been a highly tax-favored employee benefit.[111] Under PPACA, however, the threshold dollar limitation for multiemployer health plans

[107] Editorial, *Cadillac Plans*, *supra* note 20 (discussing how multiemployer "Cadillac plan" threatened to derail health care reform).

[108] Pub. L. 111-148, 124 Stat. 119 (as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029).

[109] *See* Janet Hook and Noam N. Levey, *Unions Agree to Compromise on 'Cadillac Tax' for Healthcare*, LOS ANGELES TIMES, (Jan. 15, 2010), http://articles.latimes.com/2010/jan/15/nation/la-na-health-congress15-2010jan15 (last visited Feb. 14, 2011).

[110] I.R.C. §4980I (2006) (as added by PPACA § 9001(a) (2010)). This section of the I.R.C. was held unconstitutional as "not severable" in *Florida v. U.S. Dept. of Health and Human Services*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

[111] MEDILL, *supra* note 29, at 19 ("For fiscal year 2011, the tax expenditure for health care and long–term care insurance plans sponsored by employers is estimated at $115.2 billion. This amount represents the second largest tax expenditure in the federal budget.").

in 2018 will be $10,200,[112] though that is just a starting point for determining the thresholds for taxing excess benefits.[113]

Because of the various ways that adjustments to this threshold will be made under PPACA, an employer or employers with a workforce that is more expensive to insure due to age and gender characteristics should not be put at a disadvantage.[114] Nevertheless, because multiemployer health plans tend to be some of the more expensive health care plans, many of these plans will have to modify their coverage or be forced to pay the 40% excise tax on excess benefits.

In addition to the 2018 excise tax on multiemployer health plans, there are also important challenges lurking around the corner for these plans. These challenges include issues revolving the following PPACA concepts: (1) "grandfathered plans," (2) "minimum essential coverage," and (3) "health benefit exchanges."

A. Grandfathered Plans

Whether an employer-provided health plan is subject to all, or only some, of the new health care market reforms under PPACA depends on whether the plan is considered to be a "grandfathered plan." A grandfathered plan is a group health plan that was in effect upon enactment of PPACA in March 2010.[115] These "grandfathered" plans are exempt from many, but not all, of the individual and group healthcare market reforms that are scheduled to be implemented in 2014.[116] For instance, grandfathered plans must still comply with provisions relating to: (1) a uniform explanation of coverage, (2) loss-ratio reports and rebate premiums, (3) excessive waiting periods, (4) lifetime limits, (5) annual limits, (6) pre-existing health condition exclusions, and (7) the extension of dependent coverage to age 26.[117]

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[112] *See* I.R.C. § 4980I(b)(3).

[113] CCH'S LAW, EXPLANATION, AND ANALYSIS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT ¶ 2205 at 969 (2010) (hereinafter *CCH*).

[114] *Id.* at 970.

[115] Patient Protection and Affordable Care Act (PPACA), 111-148, §1251(a)(1), 124 Stat. 119 (2010).

[116] *Id.*

[117] CCH, *supra* note 113, ¶ 185 at 120-121.

As far as multiemployer health plans, group health coverage subject to collective bargaining agreements ratified before the enactment of PPACA are not covered all of the laws health care market reforms until that CBA terminates.[118] Moreover, if a collective bargaining agreement is modified to conform to the new health care requirements, it will be considered to remain in effect and will not be treated as a non-grandfathered plan.[119]

One of the questions that still remains is whether grandfathered status under PPACA may be lost because of a change in the employer contribution rate to the plan.[120] On this issue, the DOL's Employee Benefit Security Administration (EBSA) has issued a FAQ about PPACA Implementation.[121] Because multiemployer health plans do not always know whether (or when) a contributing employer changes its contribution rate as a percentage of the cost of coverage,[122] many of multiemployer health plans sought regulatory guidance on what steps should be taken to communicate with contributing employers.[123]

The EBSA indicated that, "[i]f multiemployer plans and contributing employers follow steps similar to those outlined in Q&A2, above, the same relief will apply to the multiemployer plan unless or until the multiemployer plan knows that the contribution rate has changed."[124] Q&A2 in turn provides:

> The Departments have determined that, until the issuance of final regulations, they will not treat an insured group health plan that is a grandfathered plan as having ceased to be a grandfathered health plan immediately based on a change in the employer contribution rate if the employer plan sponsor and issuer take the following steps:

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[118] PPACA § 1255.

[119] CCH, *supra* note 113, ¶ 185 at 121.

[120] *See* United State Department of Labor's Employee Benefit Security Administration (EBSA), *FAQ About the Affordable Care Act Implementation Part I*, UNITED STATE DEPARTMENT OF LABOR, *available at* http://www.dol.gov/ebsa/faqs/faq-aca.html (last visited Feb. 23, 2011).

[121] *Id.*

[122] *Id.* at Q&A3.

[123] *Id.*

[124] *Id.*

- Upon renewal, an issuer requires a plan sponsor to make a representation regarding its contribution rate for the plan year covered by the renewal, as well as its contribution rate on March 23, 2010 (if the issuer does not already have it); and
- The issuer's policies, certificates, or contracts of insurance disclose in a prominent and effective manner that plan sponsors are required to notify the issuer if the contribution rate changes at any point during the plan year.[125]

So, in short, Taft-Hartley health plans should be able to keep their grandfathered status by following these interim steps until final regulations have been issued. Nevertheless, this issue, and others like it, highlight the need for multiemployer health plan administrators to be vigilant about plan changes that could potentially jeopardize their grandfathered status.

B. Minimum Essential Coverage

The essential health benefits package offered by qualified health benefit plans under PPACA, including multiemployer health plans, "must include specific categories of benefits, meet certain cost-sharing standards, and provide certain levels of coverage."[126] Beginning in 2014, minimum items and services include: (1) ambulatory patient services, (2) emergency services, (3) hospitalization, (4) maternity and newborn care, (5) mental health and substance abuse disorder services, (6) prescription drugs, (7) rehabilitative services and devices, (8) laboratory services, (9) preventive and wellness services, and (10) pediatric services (including oral and vision care).[127]

Significantly, however, self-insured plans are not covered "health plans" for this purpose, and thus will not have to comply with the requirements of the essential health benefits package.[128] As a result, incentives exist for multiemployer health benefit plans to go the self-insured route, rather than purchasing health insurance coverage from a third-party.[129]

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[125] *Id.* at Q&A2.

[126] *CCH*, *supra* note 113, ¶ 205 at 128.

[127] PPACA § 1302(a), (b)(1). These benefits are supposed to be consistent with the scope of benefits provided under a "typical" employer-sponsored plan. *Id.* § 1302(b)(2). Plans may, of course, provide more than the minimum essential benefit. *Id.* § 1302(b)(5).

[128] *CCH*, *supra* note 113, ¶205 at 128 (citing PPACA § 1301(b)(1)(B)).

In fact, even smaller Taft-Hartley employee benefit plans may be able to self-insure with the help of stop-loss insurance and the use of fairly low attachment points.[130] Stop-loss insurance operates by having the self-insured plan cover up to a certain amount of a claim, and then the stop-loss insurance coverage kicks in at that "attachment point" to pay the rest.[131] As the attachment point becomes lower and lower, the insurance scheme begins to resemble a fully insured health plan.[132]

Nevertheless, federal appellate courts that have considered this issue continue to treat these plans as self-insured plans for employee benefit law purposes.[133] Given the availability of this strategy even prior to the enactment of PPACA, a large majority of multiemployer health plans are already either wholly or partially self-funded.[134]

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[129] A self-insured plan is one offered by a multiemployer plan that directly assumes the major cost of health insurance for their employees. *See* Bureau of Labor Statistics, *Definitions of Health Insurance Terms* 6, *available at* http://www.bls.gov/ncs/ebs/sp/healthterms.pdf (last visited on Feb. 16, 2011).

[130] Stop-loss insurance is a form of reinsurance for self-insured employers that limits the amount the employers will have to pay for each person's health care (individual limit) or for the total expenses of the employer (group limit). *Id.* The limit at which the stop-loss insurance kicks in is called the "attachment point." *Id.*

[131] *See* Am. Med. Servs., Inc. v. Bartlett, 111 F.3d 358, 360 (4th Cir.1997) (case involving the purchase of Maryland employers of "stop-loss insurance to cover their plans' benefit payments above an annual $25,000-per-employee level, known as the "attachment point.").

[132] *See id.* at 362 (quoting In re: Maryland Stop Loss Insurance Litigation, No. MIA-370-12195 at 4 (Dec. 8, 1995)) ("At very low attachment points . . . a 'stop loss' policy is merely a substitution for health insurance.").

[133] *Id.* at 364 ("[Maryland]'s regulations fail to recognize that in a self-funded plan, with or without stop-loss insurance and regardless of the attachment point, the provision of benefits depends on the plan's solvency, whereas the provision of benefits in an insured plan depends entirely on the insurer's solvency.").

[134] *See* James Conlon, *Self-Insurance and Small Taft-Hartley Trust Funds*, LABORERS' HEALTH AND SAFETY FUND OF NORTH AMERICA (Jul. 2008), *available at* http://www.lhsfna.org/index.cfm?objectID=CA65B475-D56F-E6FA-9F3DBEDA4D41AEFC ("Self-insurance is increasingly becoming the cost

Consequently, the more multiemployer health plans become self-insured plans, the less they will have to worry about providing their members statutorily-required minimum essential benefits. Although the provision of additional benefits may be deemed in the best interest of plan members, such provision may also undermine the ability of these plans to provide cost-effective health care benefits and thus, these impact of these provisions need to be monitored carefully.

C. Health Benefit Exchanges

A more insidious problem that might face multiemployer health plans involves the creation of health benefit exchanges. Effective in 2014, state-based American Health Benefit Exchanges and Small Business Health Options Program (SHOP) Exchanges will be established.[135] Through these programs, individuals and small businesses with up to 100 employees can purchase qualified health coverage.[136] States may also form regional Exchanges or allow more than one Exchange to operate in the state as long as each Exchange serves a distinct geographic area.[137] These exchanges will be administered by a governmental agency or a non-profit organization.[138]

Although health benefit exchanges do not directly impact multiemployer health plans, their presence might exacerbate some of the financial difficulties that these plans are already facing. For example, smaller employers might decide that instead of joining a multiemployer plan and worrying about withdrawal liability, they will just provide no health coverage, suffer an excise tax, and let their employees get their health coverage through these exchanges.[139] As pointed out in the previous discussion of the multiemployer pension plans, employers are

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containment strategy of choice among Taft-Hartley Trust Funds providing health and welfare benefits to their participants and their qualified dependents.").

[135] PPACA § 1311(b).

[136] *Id.* § 1311(b)(1)(C).

[137] *CCH*, *supra* note 113, ¶ 215 at 138.

[138] PPACA § 1311(d).

[139] *See Health Care Reform: Labor Relations Implications for Unionized and Union-Free Employers*, JACKSON LEWIS, 7 (Jan. 2011), *available at* http://www.jacksonlewis.com/media/pnc/2/media.1182.pdf ("The excise tax imposed on employers opting to end all health insurance coverage is substantially less than the cost of the typical health insurance premium for an individual. Consequently, employers may seriously consider terminating health insurance coverage.").

already reluctant to join these plans because of the potential large amount of withdrawal liability if they decide to leave such a plan.[140]

Yet, here a cap or elimination of withdrawal liability may give the proper incentive for additional employers to join multiemployer health plans.[141] Unlike multiemployer pension plans, the MPPAA's withdrawal liability provisions do not apply to multiemployer health plans.[142] Rather, the current practice is to impose withdrawal liability by contractual agreement, if at all.[143] So, the voluntary cap/waiver idea, advanced by Kraw in the multiemployer pension context, could potentially work if a multiemployer health benefit plan currently assesses such withdrawal liability under a collective bargaining agreement or under a trust agreement. The elimination or capping of such liability would then simply be a matter of amending the relevant documents.

Moreover, given that this is a private ordering situation, it probably would not be necessary to do a cap/waiver for existing members, though existing members might object to being subject to withdrawal liability while other plan members are not. To assuage current members, it could pointed out that all members will likely benefit from the multiemployer health plan attracting new employer-members and increased contributions to the plan.

In all, PPACA will likely have many divergent effects upon multiemployer health benefit plans, both predictable and unpredictable. In addition to the excise tax for high-cost multiemployer health benefit plans starting in 2018, other significant issues that multiemployer benefit plans must consider include: how to maintain grandfathered plan status, becoming self-funded to retain discretion over health benefits offered to members, and the use of withdrawal liability agreements to lure new employers to join multiemployer health plans rather than letting these employers direct their employees to the health benefit exchanges for coverage. Assuming PPACA is eventually found to

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[140] *See* Kraw, *supra* note 9, at 2.

[141] The withdrawal liability cap or waiver was discussed, *supra* notes 77-82 and accompanying text.

[142] MEDILL, *supra* note 29, at 264 ("ERISA Section 515 concerning delinquent employer contributions applies to multiemployer welfare benefit plans (particularly health care plans) as well as multiemployer pension plans. The employer withdrawal liability provisions of the MPPAA, however, apply only to multiemployer pension plans.").

[143] *Id.* ("[A] multiemployer welfare benefit plan cannot assess withdrawal liability against a participating employer unless the employer has expressly agreed to the assessment of withdrawal liability.").

be constitutional,[144] multiemployer health plans will need to remain vigilante on all of these issues to ensure that health care benefits can be provided to union members on a cost-effective basis.

IV. THE JUDICIAL CHALLENGE TO MULTIEMPLOYER PENSION AND HEALTH PLANS

All is also not well with the judicial interpretation of ERISA provisions relating to multiemployer benefit plans. Indeed, when Section 302(c)(5) of the Taft-Hartley Act of 1947 is also considered, matters become even more convoluted and difficult for plan administrators and trustees to follow. The basic problem stems from the often vague and expansive language used in both ERISA and Section 302(c)(5). As a result, the United States Supreme Court and lower federal courts have struggled over numerous, significant issues involving multiemployer health and pension plans.[145]

Although this law continues to shift as successive courts (and even different United States Supreme Courts) interpret these laws in diverse ways, a number of important insights can still be garnered by considering just one representative area: the standard of review when a multiemployer benefit plan denies a claim by a participant or beneficiary to certain pension or health benefits. Consideration of this issue provides another cautionary tale to multiemployer plans and their trustees on best practices in avoiding unnecessary litigation and potential liability for fiduciary breaches of conduct.

A. Denial of Benefit Claims Under ERISA

ERISA Section 502(a)(1)(B) claims are instituted to recover benefits, to enforce rights under the plan, or to clarify rights to future benefits.[146] Claims for benefits are by far the most common legal claims brought under ERISA.[147] Such

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[144] Currently, the district courts are divided 3-2 in favor of upholding PPACA as a constitutional exercise of Congressional authority. *Compare* Mead vs. Holder, 2011 WL 611139 (D.D.C Feb. 22, 2011) (declaring PPACA individual mandate constitutional) *with Florida v. U.S. Dept. of Health and Human Services*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (striking down the entire PPACA law as unconstitutional).

[145] *See, e.g., Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring) (arguing that "fresh consideration of the availability of consequential damages under [ERISA] § 502(a)(3) is plainly in order.").

[146] ERISA § 502(a)(1)(B).

[147] *See* RICHARD A. BALES, JEFFREY M. HIRSCH, & PAUL M. SECUNDA, UNDERSTANDING EMPLOYMENT LAW 226 (2007).

suits may be brought by a plan participant or beneficiary against the plan for the value of the denied benefits or rights.[148]

For instance, if a plan participant wishes to receive full hospital bed-rest for a high-risk pregnancy, and the plan administrator denies the claim, the participant may file a claim against the plan for only the value of that bed-rest, not for the damages associated with loss of the baby.[149] Significantly, compensatory and punitive damages are not available under Section 502(a)(1)(B).[150] Moreover, because of the strong preemptive effect of ERISA on contrary state laws,[151] most of the time ERISA participants and beneficiaries will not be awarded consequential relief under state law.[152]

These denial of benefit claims are also difficult to win for ERISA plaintiffs because before bringing a Section 502(a)(1)(B) claim in state or federal court, a plan participant must exhaust their internal claim remedies.[153] Once the plan administrator has denied a claim, the plan participant must file an appeal with the administrator and wait for a further adverse determination before

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[148] *See* Paul M. Secunda, *Sorry No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 146 (2009).

[149] *See* Corcoran v. United Health Ins., Inc., 965 F.2d 1321 (5th Cir. 1992) (holding the plaintiffs who lost their baby could only recover for the difference between the services actually rendered and the services that should have been received, not for the wrongful death of the child).

[150] *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) ("Section 502(a)(1)(B) . . . says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim.").

[151] *See* Secunda, *supra* note 148, at 133 (maintaining that, "[c]ourts broadly interpret the preemption provisions of ERISA under section 514 to invalidate benefits-related state laws and then force employees to depend on an inadequate, "comprehensive and reticulated" remedial scheme under section 502(a)).

[152] *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987) (finding that Mississippi common law claims for tort, contract, and bad faith were preempted by ERISA). *See also* Secunda, *supra* note 148, at 169-70 (recommending that Congress pass an ERISA Civil Rights Act to provide consequential relief in ERISA cases where "reinstatement, back pay, and other equitable 'make-whole relief' is insufficient to provide adequate relief caused by denials of benefits.").

[153] ERISA § 503; 29 C.F.R. § 2560.503-1(2010).

bringing their benefit claim in state or federal court.[154] Only after the internal claims procedures have been exhausted, may the participant or beneficiary file his or her denial of benefit claim in state or federal court. At that point, the issue then becomes the appropriate judicial standard of review to employ to examine the plan administrator's benefit determination.[155]

In 1989, the United States Supreme Court in *Firestone Tire & Rubber Company v. Bruch*[156] directed that the benefit decision be reviewed under a very deferential arbitrary and capricious standard if the plan vests the administrator with discretion to make such decisions.[157] More recently, under *Metropolitan Life v. Glenn*,[158] a conflict of interest may exist where the plan both determines whether a qualified benefit claim exists and is also responsible for paying that claim.[159] If such a conflict of interest exists, that conflict must be given weight in deciding whether the plan administrator's determination was arbitrary or capricious.[160] The question then becomes how much weight such a conflict of interest should be given.

B. Inherently Conflicted Multiemployer Plans

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[154] *Id.*

[155] *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115-16 (1989) (holding provision of plan contract is to be reviewed under de novo standard unless benefit plan gives administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of plan) .

[156] *Id.*

[157] *Id.* at 115.

[158] 554 U.S. 105 (2008) ("[A] reviewing court should consider th[e] conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and . . . the significance of the factor will depend upon the circumstances of the particular case.").

[159] *Id.* at 109 ("We here decide that this dual role [of the plan insurer] creates a conflict of interest.").

[160] *Id.* ("[A] reviewing court should consider th[e] conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and . . . the significance of the factor will depend upon the circumstances of the particular case.").

A recent case by the Second Circuit Court of Appeals, *Durakovic v. Building Services 32 BJ Pension Fund*,[161] explored this exact issue where a self-insured multiemployer plan[162] denied a claimed benefit to a participant or beneficiary of the plan. More specifically, *Durakovic* involved an office cleaner, who suffered chronic pain and weakness following an automobile accident, and applied for, and was denied, disability benefits from her union's multiemployer plan.[163]

In support of her disability claim, Durakovic submitted the report of two of her physicians, the finding of the Social Security Administration that she was disabled, and the report of a vocational expert.[164] The multiemployer plan had her also go to two different "independent" physicians and to their own vocational expert.[165] Significantly, in denying her claim, the plan did not mention any of the evidence submitted by Durakovic, but relied solely on their own experts. [166] After exhausting all of the necessary internal appeal procedures, she filed suit in federal court under Section 502 (a)(1)(B).[167]

The court began its analysis by finding that the arbitrary and capricious standard of review under *Firestone* was the appropriate standard for reviewing the Plan's determination.[168] Moreover, because this case involved a situation where the "ERISA-fund administrator . . . 'both evaluates claims for benefits and pays

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[161] 609 F.3d 133 (2d Cir. 2010).

[162] Most multiemployer health plans are now self-funded. *See supra* note 133 and accompanying text. *See also* Kaiser Family Foundation, *Employer Health Benefits 2010 Annual Survey*, KAISER FAMILY FOUNDATION, 154, *available at http*://ehbs.kff.org/pdf/2010/8085.pdf (last visited Feb. 23, 2011) (noting the percentage of workers in self-funded plans is now 59% and "[e]ighty percent of covered workers in firms with 1,000 to 4,999 workers and 93% of covered workers in firms with 5,000 or more workers are in self-funded plans in 2010.").

[163] *Durakovic*, 609 F.3d at 135.

[164] *Id.* at 135-136.

[165] *Id.*

[166] *Id.* at 136-37.

[167] *Id.* at 137.

[168] *Id.*

benefits claims," the Plan was considered conflicted, and therefore, under *Glenn*, the district court had to "weigh the conflict as a factor in its analysis."[169]

The Second Circuit disagreed with the district court that the presence of the conflict was a "relatively unimportant one."[170] Instead, and emphasizing the multiemployer organization of the fund, the court concluded that multiemployer plans are inherently conflicted under *Glenn* when making benefit decisions.[171] It reasoned that because Taft-Hartley plans are administered by trustee boards made up of equal numbers of union and employer representatives,[172] they suffer from board members with conflicting loyalties.[173] Although trustees have fiduciary interests that weigh in favor of participants and beneficiaries of the plan, they also tend to have interests that favor the employer over these employees. For instance, by rejecting meritorious benefit claims, plan trustees loyal to the company will help to reduce future employer contributions to the plan.[174] To protect against such conflicts infecting the claim determination process, the court, relying on language from *Glenn,* suggested that appropriate procedural safeguard could include: (1) walling off claims administrators from those interested in firm finances; and/or (2) imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracies benefit.[175]

The court therefore rejected the Plan's contention that it was not conflicted because it was composed of equal members from management and labor,[176]

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[169] *Id.* at 138.

[170] *Id.*

[171] *Id.* at 139.

[172] 29 U.SC. § 186(c)(5) (2006).

[173] *Durakovic*, 609 F.3d at 139 ("The employer representatives have fiduciary interests that weigh in favor of the trusts' beneficiaries on the one hand, but representational and other interests that weigh to the contrary . . . . That the board is (by requirement of statute) evenly balanced between union and employer does not negate the conflict.") (citations omitted).

[174] *Id.* ("The rejection of claims will reduce future employer contributions.") (citing *Holland v. Int'l Paper Co. Ret. Plan*, 576 F.3d 240, 249 (5th Cir.2009)).

[175] *See Glenn*, 554 U.S. at 117.

[176] *Id. But see* Anderson v. Suburban Teamsters of N. Ill. Pension Fund Bd. of Trs., 588 F.3d 641, 648 (9th Cir.2009) ("The various participating employers-not the Trustees-fund the Plan. The Trustees have no personal

though it agreed that the presence of union representatives should be considered in deciding how severe the conflict is in any case.[177] In this vein, the court found that the weight accorded to any conflict should vary in direct proportion to the likelihood that the conflict affected the benefits decision.[178] In *Durakovic*, because there were no procedural safeguards in place to protect against the inherent conflict of interest and because the Plan did not consider any of the plaintiff's evidence as far as her ability to continue to work, the decision to find the Plan's determination arbitrary and capricious was pretty straightforward.[179]

All of this is not to say that plan trustees cannot deny a claim in good faith because a claim is simply not meritorious. But given this inherently conflicted legal standard, plan trustees and their advisors will now need to do double diligence when denying claims and make sure "substantial evidence" exists for the claim decision.[180] Plans and their trustees will need to have a comprehensive paper trail, set up procedural safeguards to mitigate against conflicts, and make certain to consider and mention all evidence submitted by the parties.

In fact, in addition to approaching denial of benefit issues with the necessary caution, multiemployer plans and their trustees need to remain heedful of the ever-changing legal landscape in this area of the law. Judicial interpretations will also have significant impact in areas as diverse as: the recovery of delinquent employer contributions,[181] standards for breach of

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economic interest in the decision to grant or deny benefits. Additionally, the Board of Trustees consists of both employer and employee representatives, who determine employee eligibility under the Plan. Both sides are at the table."). This line of reasoning in *Anderson* appears less persuasive than that in *Durakovic* because the Ninth Circuit did not consider the fact that management trustees can have conflicting loyalties to their employers, especially if denying a claim will lead to lesser employer contributors from their company. *See supra* notes 172-174 and accompanying text.

[177] *Durakovic*, 609 F.3d at 141.

[178] *Id.* at 139.

[179] *Id.* at 142 ("Giving appropriate weight to the *Glenn* conflict, any rational trier of fact would conclude that the Funds' decision was unsupported by substantial evidence, and therefore arbitrary and capricious.").

[180] *Id.* at 141 ("Substantial evidence is such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the administrator and requires more than a scintilla but less than a preponderance.").

[181] *See, e.g.,* Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989) (en banc)

fiduciary duty,[182] and the imposition of withdrawal liability.[183] Consequently, in addition to the financial and healthcare challenges facing multiemployer benefit plans, judicial challenges will also play a substantial role in determining the viability of these plans in the future.

CONCLUSION

Multiemployer benefit plans remain as important today as when they were first created by the Taft-Hartley Amendments in 1947. These plans continue to represent one of the great triumphs in American labor relations in providing pension, health, and welfare benefits to union workers in itinerant industries. Because these plans are now under siege as a result of financial, healthcare, and judicial developments, steps need to be immediately taken to secure the dignity of the ten million workers who participate in the 1,500 multiemployer plans throughout the nation. What is at stake is not merely the ability of these employees to receive crucial employee benefits, but also the workforce stability that is engendered in these itinerant industries as a result of the existence of such multiemployer benefit plans.

This article provides a first-time look at the numerous challenges that face these multiemployer pension benefit plans in the post-global recession and health care reform world of the United States. By highlighting potential reform proposals and by underscoring the dangers that continue to threaten the very existence of these plans, the aim of this article is to rejuvenate the discussion of how to make these benefit plans more financially sustainable in the future and how to more effectively address the impending legal issues that these plans will inevitably have to confront.

(interpreting ERISA § 515 to bar employers from raising defenses based on the unenforceability of a contract because of oral promises made by the union).

[182] *See, e.g.,* Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572, 581 (11th Cir. 1987) (in multiemployer plan context, treating plan amendments as fiduciary functions, rather than settlor function, and invalidating amendments not made in furtherance of the participants' and beneficiaries' interests). *But see* Walling v. Brady, 125 F.3d 114 (3d Cir. 1997) (ERISA fiduciary duties do not apply to decisions regarding plan amendments, including those decisions made by trustees of multiemployer plans).

[183] *See, e.g.*, Central States, Southeast & Southwest Areas Pension Fund v. Safeway, Inc., 229 F.3d 605 (7th Cir. 2000) (although employer is generally liable for its proportionate share of unfunded vested benefits determined as of the date of withdrawal from the plan, concluding that multiple instances of withdrawal liability can occur and that a multiemployer plan can recalculate an employer's withdrawal liability every year).