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ERISA REFORM IN A POST-ENRON WORLD

JUSTIN CUMMINS* & MEG LUGER NIKOLAI**

Washington has a rich history of catering to special and corporate interests at the expense of ordinary citizens. Nowhere is this more evident than in legislation dealing with company pensions.[1]

I. INTRODUCTION

Pensions have existed since at least the zenith of the Roman Empire, and have benefited an array of societies around the world since then.[2] The United States government introduced the first large-scale pension plan in the wake of the Civil War to benefit veterans and widows.[3] Through legislation enacted in 1890, Congress extended these benefits to all veterans over 65, thereby codifying the social-welfare function of pensions.[4] In the following decades, and through the leadership of labor unions, many state and local governments as well as private corporations created pension plans for their employees.[5] By the 1970s, approximately

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1. Donald L. Barlett & James B. Steele, *The Broken Promise*, TIME, Oct. 31, 2005, at 42.

2. Dana M. Muir, *Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains*, 54 WASH. & LEE L. REV. 1351, 1357-62 (1997) (offering a history of pensions in the United States and elsewhere). *See also* Kathleen H. Czarney, *The Future of Americans' Pensions: Revamping Pension Plan Asset Allocation to Combat the Pension Benefit Guaranty Corporation's Deficit*, 51 CLEV. ST. L. REV. 153, 158-59 (2004) (providing a historical overview of pension plans); H.J. Cummins, *No More Guarantees*, MINNEAPOLIS STAR-TRIBUNE A1, A22 (Sept. 25, 2005) (taking an in-depth look into the pension crisis).

3. Muir, *supra* note 2, at 1358. *See also* Roger Lowenstein, *The End of Pensions?*, N.Y. TIMES MAG. 56, 64 (Oct. 30, 2005).

4. Muir, *supra* note 2, at 1358.

5. Lowenstein, *supra* note 3, at 64; Cummins, *supra* note 2, at A22.

one of two workers had a pension plan.[6]

For much of the Twentieth Century, in furtherance of the New Deal's vision of collective responsibility, pensions enhanced financial equity and security among the populace.[7] At the dawn of the Twenty-First Century, however, the United States' pension system faces grave challenges.[8] The worsening problem harkens back to recent financial fiascos that decimated the livelihoods of millions. In particular, the accounting scandals of the 1990s as well as the savings-and-loan disaster of the 1980s bear a striking resemblance to the corporate misdeeds underlying the unfolding pension crisis.[9] In short, the lack of transparency and accountability that drove the corporate-governance and savings-and-loan scandals also underlies the emerging pension debacle.[10]

The disintegration of the United States' pension system could be even more devastating in its economic and social impact than that of the financial scandals of the go-go 1980s and 1990s. As both Congress and the courts have recognized, pensions play a pivotal role in securing the economic and social well-being of tens of millions of retirees and their families.[11] It would be hard to overstate the effect of thwarting the reasonable expectations and rebuffing the concrete needs of such a large percentage of the population. Yet, that is where we, as a nation, appear to be headed should immediate legislative and related judicial action not occur.[12]

Part I of this article describes in more detail the increasing peril faced by the United States' pension system. Part I also

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6. *See generally* Christian E. Weller & Laura Singleton, *The Scandal Beyond Enron: Pension coverage is shaky and dwindling. Will Congress Act?*, 13 AM. PROSPECT 1, Sept. 23, 2002.

7. *See, e.g.*, Muir, *supra* note 2, at 1357-62 (stating that private pension plans grew rapidly between 1940 and 1970).

8. *See infra* Part I.

9. *See infra* Parts I, III.

10. *See infra* Part III.

11. ERISA expressly recites the widespread and public value of pensions. 29 U.S.C. § 1001(a) (2000). The statute states, in pertinent part, as follows:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations. . . .

Id. The Supreme Court has so recognized as well. *See, e.g.*, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 515 (1981).

12. *See infra* Part I.

explores the ramifications of allowing the status quo to continue without appropriate corrective action.

Part II explains why much of the crisis in retirement equity and security flows from procedural and substantive flaws codified by the Employee Retirement Income Security Act ("ERISA").[13] Part II also contextualizes the critique of ERISA by highlighting the historical significance and underlying policy objectives of the statute.

Part III draws parallels between the expanding pension problem with the corporate-governance debacle of the 1990s and early 2000s. In so doing, Part III outlines what we should expect from retirement equity and security going forward in the absence of radical ERISA reform.

Part IV analyzes pending legislation to amend ERISA that purportedly would forestall the imminent pension disaster. Part IV also identifies the material deficiencies of the proposed amendments and then sets forth key elements of meaningful ERISA reform in light of the recently implemented Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").[14] The article concludes with concrete legislative proposals that, if adopted, should ensure greater retirement equity and security in the future.

For simplicity and clarity, this article focuses on the trajectory of traditional private pensions in the United States. Although common parlance frequently uses "pension" to refer to 401(k) and similar retirement savings accounts (often known as defined-contribution plans), cash-balance plans, and annuities, these savings instruments are actually distinct from traditional pensions (typically referred to as defined-benefit plans) and were not originally intended to replace traditional pensions.[15]

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13. 29 U.S.C. § 1001.

14. Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in Sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and other chapters).

15. Traditional pension plans usually entail monthly payments by a company to its retired employees until they die, and the amount of the payments are based on a formula involving the salary and years of service of a given retiree. Cummins, *supra* note 2, at A23. *See also* Barlett, *supra* note 1, at 44 (distinguishing traditional pension plans from 401(k) accounts and similar savings vehicles). In contrast, 401(k), 403(b), Keogh, profit-sharing, and other savings plans are individualized accounts to which employers may or may not contribute and, in any event, the employer does not guarantee any payments following retirement. Cummins, *supra* note 2, at A23. Cash-balance plans appear to be a cross between a defined-benefit plan and a defined-contribution plan in that employees receive a lump sum payment from their employers upon separation. *Id.* Annuities are purchased from insurance companies to guarantee a regular stream of income for the life of the beneficiary, so it is akin to a privatized defined-benefit pension. *Id.*

Accordingly, the ensuing analysis addresses these other financial devices only to the extent necessary to explicate the operation and limitations of the existing traditional pension system under ERISA. In addition, although this article focuses on single-employer pension plans, the analysis set forth below should apply to multi-employer pension plans with equal force.

II. THE GROWING PENSION CRISIS: AN ECONOMIC AND SOCIAL DISASTER IN THE MAKING

Although increasing numbers of legal commentators, investigative journalists, and financial analysts have begun to document the catastrophic direction in which the pension system is spiraling, policy makers have taken few meaningful steps to avoid the looming pension catastrophe.[16] Consequently, the courts continue to be unnecessarily constrained in taking sufficient declaratory, injunctive, compensatory, and punitive action.[17]

The apparent Congressional paralysis seems to result, in part, from internal inconsistencies that have afflicted the administration of ERISA itself.[18] Indeed, ERISA embodies the

16. Nicholas J. Brannick, *At the Crossroads of Three Codes: How Employers are Using ERISA, the Tax Code, and Bankruptcy to Evade their Pension Obligations*, 65 OHIO ST. L.J. 1577 (2004); David Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65 (1991). *See also* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 444 (2000) (advocating extension of ERISA's principle of ensuring benefits to issues of benefit administration); Barlett, *supra* note 1, at 38 (suggesting that the PBGC is "on the brink of financial ruin").

17. *See generally* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) (holding that material, ex-post-facto alterations of the pension plan structure did not implicate any fiduciary duty or violate ERISA); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 107 (1989) (imposing great deference to the broad discretion of pension plan administrators). Leading scholars have observed that the courts construe ERISA's provisions in narrow terms that fail to recognize the realities of funding and administering pension plans. *See, e.g.*, Muir, *supra* note 2, at 1417-18 (recognizing that this highly conservative approach may be due, in part, to the perception that courts are drowning in ERISA claims).

18. Congress embraced two conflicting goals when adopting ERISA: first, protecting the interests of pension plan beneficiaries and second, encouraging plan sponsorship by containing costs. Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 63-66 (2000); Muir, *supra* note 2, at 1415. *See also* Barlett, *supra* note 1, at 42 (reporting the ethically compromised nature of Congress in adopting and, subsequently, amending ERISA). The Supreme Court has specifically recognized the competing interests vis-à-vis pension plans under ERISA. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996). *See also* Mertens v. Hewitt Assocs., 508 U.S. 248, 262-63 (1993) (recognizing that

tension between the New Deal legacy of collective responsibility and the New Right's opposition to "big government regulation" that purportedly raises the cost of doing business.[19] Regardless of the reasons, Congressional inaction and the related judicial disengagement are worrisome. Given the magnitude of the assets involved and the millions of families affected by the fate of the United States' pension system, the stakes are high.[20]

A. *The Gathering Threat to Pensions in the United States*

A growing number of companies face stark financial circumstances given the condition of their pension plans.[21] Indeed, many were not surprised when, in October 2005, Delphi sought protection under the bankruptcy code via the largest filing ever in the auto industry.[22] On the heels of this troubling development, Delta Airlines and Northwest Airlines filed for bankruptcy virtually simultaneously.[23] The pension obligations likely discharged via bankruptcy by Delta and Northwest alone amount

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ERISA "resolved innumerable disputes between powerful competing interests"); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 515 (1981) (noting the tension between benefiting employees and "containing pension costs").

19. On the one hand, ERISA seeks to promote a more equitable and secure future via pension plans; on the other hand, ERISA does not require that pension plans be provided. *Alessi*, 451 U.S. at 515. For further discussion in this regard *see infra* Part II.

20. *See* Jane D. Bailey, *Tenth Circuit Survey: ERISA Preemption*, 74 DENV. U. L. REV. 473, 473 (1997); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. 431, 433 n.12 (1991) (emphasizing the "escalating importance" of private retirement).

21. *See* Cummins, *supra* note 2, at A22-23 (documenting the expanding pension crisis). *See also* Adam Geller, *Accounting Change May Squeeze Some Pensions*, S.F. EXAMINER, Jan. 18, 2006, available at http://www.sfexaminer.com/articles/2006/01/19/ business/20060119_bu03_acct.txt (discussing the freezing of pensions by Sears Holding Co., Hewlett-Packard Co., and other large corporations); Michael Brush, *40 companies sitting on pension time bombs*, MONEY, Aug. 25, 2004 (identifying the 20 corporations with the greatest disparity between their unfunded pension obligations and their market capitalization as well as the 20 companies that obtain the largest portion of their net income on assumed returns on their pension investments); Bernard Condon, *The Coming Pension Crisis*, FORBES, Aug. 12, 2004 (illustrating the growing problem of pension obligations exceeding the liquidated value of pension providers).

22. Barlett, *supra* note 1, at 32 (discussing the reasons for, and impact of, bankruptcy filings by Delphi and other large corporations).

23. Lowenstein, *supra* note 3, at 56. *See also* Peter G. Gosselin, *How Bedrock Promises of Security Have Fractured Across America*, L.A. TIMES A1, Dec. 30, 2005, at A1 (describing the demise of Delphi's pension plan and its social impact).

to nearly $20 billion.[24]

In theory, the Pension Benefit Guaranty Corporation ("PBGC")[25] safeguards private pension benefits even in cases of such large-scale bankruptcies.[26] In practice, the PBGC labors under a deficit of approximately $30 billion.[27] Moreover, the Congressional Budget Office forecasts that, without corrective action, the PBGC deficit will explode to a mind-numbing $100 billion by 2025, if not sooner.[28] Even if the PBGC were fully funded, the agency would not necessarily insure 100 percent of private pension benefits. The PBGC caps disbursements to beneficiaries at approximately $47,000 annually, and the PBGC has even cancelled an array of benefits that it supposedly guarantees under the governing statutory scheme.[29]

The systematic erosion of private pensions does not end, however, with bankruptcy.[30] The PBGC has cut deals with companies, such as United Airlines, to terminate long-standing

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24. Significantly, companies like Northwest have devoted substantial resources, including aggressive lobbying muscle, to reduce their pension obligations beyond the bankruptcy context. Greg Gordon, *Pension aid bill offers playbook of lobbying muscle by NWA*, A1, A14 (Dec. 30, 2005). *See also* Lowenstein, *supra* note 3, at 56.

25. The PBGC is a creature of statute, regulating private pension providers and insuring pension benefits pursuant to ERISA. *See* 29 U.S.C. § 1302; Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 636-37 (1990) ("PBGC is a wholly owned United States Government corporation . . . modeled after the Federal Deposit Insurance Corporation. The Board of Directors of the PBGC consists of the Secretaries of the Treasury, Labor, and Commerce."). Technically, the PBGC has legal authority to commence enforcement actions and otherwise ensure full compliance with ERISA. *Id.* In an increasingly conservative pro-corporate environment with declining resources, the PBGC has not been an active regulator as of late. *See, e.g.*, Lowenstein, *supra* note 3, at 56 (indicating that the PBGC is now in a $23 billion deficit).

26. 29 U.S.C. § 1341(c)(3)(B)(iii) (2000); 29 U.S.C. § 1342 (2000).

27. Lowenstein, *supra* note 3, at 56. *See also* Cummins, *supra* note 3, at A22-23 (noting recent airline and steel company bankruptcies). For an excellent illustration of the limited protection afforded by the PBGC, *see generally*, Keating, *supra* note 16, at 65 (adopting a moral hazard analysis in the PBGC scheme).

28. Lowenstein, *supra* note 3, at 56.

29. *See Pension Benefit Guar. Corp.*, 496 U.S. at 637-38 (reaffirming the validity of the limitations of insurance protection provided by the PBGC); Barlett, *supra* note 1, at 40 (noting that the PBGC unilaterally voided substantial benefits, including employee stock-ownership plans and retirement health care coverage).

30. *See* Cummins, *supra* note 2, at A22-23 (illustrating the broad scope of the threat to pension plans). *See also* Stephanie Armour, et al., *Even Healthy Firms Freeze or Cut Loose Traditional Pensions*, USA TODAY, Dec. 6, 2005, at B1 (outlining the growing abandonment of traditional pension plans by United States corporations).

pension plans in the name of averting bankruptcy in the first place.[31] In addition, healthy companies like IBM have recently announced they are unilaterally freezing or otherwise denying pension benefits.[32] The move by IBM and Verizon Communications, Inc., standing alone, has resulted in frozen benefits for nearly 200,000 employees.[33] That IBM, among other corporations, has taken such drastic action is noteworthy as it has perhaps the largest pension plan in the nation and is "widely considered a bellwether on benefits issues, as many companies tend to follow its lead."[34]

The deleterious direction of public pensions mirrors the pernicious trajectory of private plans. Essentially underwritten by taxpayers, public pensions basically enjoy insurance coverage by state and local governments.[35] Notably, the swelling public pension obligations have, in effect, bankrupted the City of San Diego and put numerous other state and local governments on that path in Illinois, New York, Ohio, West Virginia, and elsewhere.[36]

The chronic and deepening underfunding of both private and public pensions has precipitated much of the pending and

31. *See In re UAL Corp.*, 428 F.3d 677 (7th Cir. 2005) (upholding the legality of the agreement between the PBGC and United to terminate the pension plan without consent from pension beneficiaries). *See also* Allied Pilots Ass'n v. PBGC, 334 F.3d 93 (D.C. Cir. 2003) (approving a similar agreement between the PBGC and TWA Airlines); Pamela A. MacLean, *A Savvy Way to Trim Pensions: United Gets Around Bankruptcy Laws*, THE NAT'L L.J., Nov. 7, 2005 (explaining how United used existing laws to minimize its pension responsibilities).

32. Stephanie Armour, *IBM to Freeze Pension Program: Company Considered Pacesetter on Benefits*, USA TODAY, Jan. 6, 2006, at A1. *See also* Barlett, *supra* note 1, at 38 (observing that approximately one-third of the Fortune 1000 companies froze or ended their pension plans between 2001 and 2004 and that IBM, Hewlett-Packard, Sears, Motorola, and other large corporations stopped offering defined-benefit pensions to new employees).

33. *See generally*, Mary Williams Walsh, *More Companies Ending Promises for Retirement*, N.Y. TIMES, January 9, 2006, at A1 (discussing the disturbing trend among corporations regarding pensions); Albert B. Crenshaw, *IBM Adds its Name to List of Firms Freezing Pensions*, WASH. POST, Jan. 6, 2006, at A1 (reporting that some surveys indicate that approximately twenty percent of employers with pension plans are considering freezing or terminating those plans). *See also*, Armour, *supra* note 32, at 1A (indicating IBM has one of the nation's largest pension plans).

34. Armour, *supra* note 32, at 1A. *See also* Crenshaw, *supra* note 33, at A1 (adding that IBM joins a growing list of U.S. employers that have frozen or terminated pension plans).

35. Lowenstein, *supra* note 3, at 60.

36. Barlett, *supra* note 1, at 34-35; Lowenstein, *supra* note 3, at 60. *See also* Armour, *supra* note 30, at B1 (discussing pension management programs in today's economy).

threatened defaults on plan obligations. Private pensions are $450 billion in the red, while public pensions may be as much as $700 billion in the hole.[37] The rapid decline in companies that even provide pensions has aggravated the impact of this widespread under funding. Only one in five companies now provide pensions; a fifty percent drop since 1980.[38]

As discussed more fully below in Parts II and III, the near abandonment of pension obligations essentially has been endorsed by the federal government and effectively concealed from the public by pension administrators. For instance, the PBGC allowed Bethlehem Steel to forego funding its pension plan during the three-year run up to the unloading of Bethlehem's pension obligations onto the federal government in 2001.[39] Similarly, the PBGC permitted United Airlines to stop contributing to its plans during the three years leading up to its bankruptcy filing in 2003.[40] Pension administrators have hidden this structural underfunding by employing a number of accounting gimmicks, including using improperly high discount rates to "calculate" future pension obligations[41] and misleadingly using "credit-balances."[42]

In short, the pension system seems fundamentally broken and headed over a cliff. To confirm this, one need look no further than the Director of the PBGC – the very same person who served as counsel to the Senate Banking Committee that responded too little and too late to the savings-and-loan debacle of the 1980s. In June 2005, PBGC Director Bradley Belt acknowledged structural problems with the pension regime when testifying before Congress about recent defaults on obligations: "United, US Airways, Bethlehem Steel, LTV, and National Steel would not have

37. Barlett, *supra* note 1, at 38; Lowenstein, *supra* note 3, at 58, 74.

38. Armour, *supra* note 32, at 1A. *See also* Crenshaw, *supra* note 33, at A1 (indicating that most of the decline has come from small employers); Lowenstein, *supra* note 3, at 56 (describing the shrinking pension system).

39. Lowenstein, *supra* note 3, at 72. Many commentators have argued that the systematic underfunding of pension plans is the inevitable outcome of the moral hazard embodied in ERISA. *See, e.g.*, Keating, *supra* note 14, at 69-78 (exploring the roles of pension plans, ERISA, and the PBGC).

40. Lowenstein, *supra* note 3, at 72.

41. The unprincipled use of discounting rates can transform corporate liabilities into purported assets. See *infra*, Part II.C. *See also*, Barlett, *supra* note 1, at 44 (outlining how ERISA and PBGC regulations allow corporations to manipulate the calculation of pension assets and obligations in ways that obscure actual financial circumstances).

42. The cynical manipulation of balance sheets in this way can distort the reporting of actual financial standing. See *infra*, Part II.C. *See also*, Cummins, *supra* note 2, at A22 (describing the frequently used practice of "wearing away" pension obligations by altering the formula for determining employee's monthly payments upon retirement).

presented claims in excess of $1 billion each – and with funded ratios of less than 50 percent – if the rules worked."[43]

B. The Likely Economic and Social Consequences of a Collapsed Pension System

The recent defaults by several high-profile companies raise the specter of a chain-reaction that would create a grim future. The demise of large corporations like Bethlehem and Northwest has intensified the demand on PBGC's resources to bailout troubled funds.[44] Given its grossly underfunded condition, the PBGC will be unable to insure pension benefits to the extent required, especially as more corporations default going forward.[45]

In addition to frustrating the reasonable expectations of tens of millions of beneficiaries, this situation will likely undermine consumer confidence. This will, in turn, materially impede economic growth.[46] Many beneficiaries, deprived of resources they need to live, will suffer and probably become more dependent on social security and other public programs at a time when such programs will already be under substantial stress.[47]

In other words, the currently poor financial health of pension plans will ultimately translate into millions more families struggling simply to meet their basic needs in the context of a stagnant economy. A recent investigation on the state of pensions put it bluntly: "decisions by Congress favoring corporate and

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43. Lowenstein, *supra* note 3, at 72. *See also* Barlett, *supra* note 1, at 44 (noting that the PBGC currently faces a record 350 active bankruptcy cases).

44. *See* Barlett, *supra* note 1, at 44 (outlining the increasing financial demands on the PBGC); Cummins, *supra* note 2, at A22 (reporting the underfunded nature of the PBGC and its related inability to address the growing pension crisis).

45. *Id.* *See also* Keating, *supra* note 16, at 76-78 (highlighting the limitations of the PBGC).

46. It is axiomatic that sharp declines in consumer confidence undermine economic growth. *See, e.g.*, WILLIAM J. BAUMOL & ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY 96-99 (5th ed., 1991) (observing that market demand drops when individual consumer demand decreases). Although on a smaller scale, the economic fallout from the savings-and-loan and accounting scandals of the 1980s and 1990s, respectively, gives some idea of the likely impact of a pension collapse. *See, e.g.*, Barlett, *supra* note 1, at 47 (describing the savings-and-loan bailout and explaining why a bailout of pensions would be much more costly).

47. Cummins, *supra* note 2, at A22-23 (describing the abandonment of pension by corporations and its adverse impact on families). *See also* Gosselin, *supra* note 23, at A1 (highlighting the hardships imposed on employees of companies that do not honor their pension obligations); Armour, *supra* note 30, at B1 (describing the vulnerable position of employees in the face of pension-benefits cuts).

special interests over workers will drive millions of older Americans – a majority of them women – into poverty, push millions more to the brink and turn retirement years into a time of need for everyone but the affluent."[48]

Likewise, the impact of public pension obligations portends a bleak future. Recent developments in the City of San Diego offer a glimpse of what lies in store for state and local governments if the pension regime continues on its current path. San Diego, much like many other jurisdictions around the country, has soaring pension obligations. These financial commitments have induced the slashing of municipal services such as needed water, library, sewer, and parks projects.[49] Quite obviously, such radical shifts in public-resource allocation will have a negative impact on the local economy and quality of life for all residents – whether or not they are public-pension beneficiaries. Given the sizable and expanding magnitude of public-pension commitments, the restriction or outright elimination of key services may not prevent ultimate default. In other words, state and local jurisdictions may experience the worst of both worlds: simultaneously eviscerating public services as they head toward eventual pension default.

Whether pensions are public or private, their sharp decline will surely exacerbate the socio-economic inequality that exists in the United States.[50] At the time of this aggressive reduction in pension benefits and stagnant pay for regular employees, the compensation for chief executive officers has risen on average from approximately $3 million to nearly $12 million; a compensation ratio of more than 400 to 1 in favor of executives.[51] Indeed, the United States has the unfortunate distinction of being the most stratified nation in the industrialized world.[52] Further

48. Barlett, *supra* note 1, at 38.

49. *Id.* at 34-35; Lowenstein, *supra* note 3, at 58-60.

50. *See generally* TAMARA DRAUT, ET AL., INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES (2005) (analyzing the ramifications of the deepening inequity in the United States); EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 51-57 (1995); Clifford Cobb, et al., *If the GDP is Up, Why is America Down?*, ATL. MONTHLY, Oct. 1995, at 59, 72; Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1. *See also* Barlett, *supra* note 1, at 44 (arguing that millions of Americans will be forced into poverty during retirement).

51. *See generally* Stephen Labaton, *S.E.C. to Require More Disclosure on Executive Pay*, N.Y. TIMES, Jan. 18, 2006, at A1 (explaining how the increase in disclosure required by the SEC is not likely to affect executive compensation); Draut, *supra* note 50 (providing an incisive exposition and critique of the intensifying inequality in the United States).

52. *See generally* Draut, *supra* note 50; Wolff, *supra* note 50, at 51-57; Cobb, *supra* note 50, at 72; Keith Bradsher, *Gap in Wealth in U.S. Called Widest in*

intensifying this inequality will only invite greater economic and social instability, and will inflict unnecessary harm on tens of millions in this country.[53]

Importantly, 401(k) accounts and other individualized savings vehicles do not appear to offer the needed salvation in the prevailing environment. Aside from being much riskier for beneficiaries, these alternative financial instruments have not prompted significant savings.[54] In truth, the median value of 401(k) accounts in the United States is less than $18,000, and approximately 25 percent of these alternative savings vehicles have a balance of less than $5,000.[55]

III. ERISA'S DREAM DEFERRED

Although the political establishment had been moving increasingly toward an "individualized" conception of responsibility and welfare by the 1970s, Congress nonetheless embraced, at least in part, core New Deal values when it enacted ERISA in 1974.[56] Indeed, specific New Deal initiatives, such as the Social Security Act,[57] appear to have paved the way for ERISA by more broadly codifying retirement insurance in response to the Great Depression.[58]

The New Deal Era, over which Franklin D. Roosevelt presided in the 1930s and 1940s, included an unprecedented wave of legislation and other governmental initiatives aimed at improving the general economic and social welfare in the nation.[59] New Deal

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West, N.Y. TIMES, Apr. 17, 1995, at A1. *See also* Barlett, *supra* note 1, at 44 (discussing the lack of adequate funding of most state public employee pension plans).

53. The threat to pension benefits recently induced the shutdown of New York City's massive public-transportation system during the economically and socially critical holiday season. Adam Geller, *Friction over pension plans won't be likely to go away soon*, MINNEAPOLIS STAR-TRIB., Dec. 29, 2005, at D7. *See also* Joshua B. Freeman, *A Fight for the Future*, THE NATION, Dec. 22, 2005 (describing the impetus and impact of the New York City transit system workers' strike).

54. Barlett, *supra* note 1, at 47.

55. *Id.* Although 401(k) plans are a comparatively newer mechanism for retirement savings, the median value of those accounts is still appallingly low.

56. Jennifer Klein, *The Politics of Economic Security: Employee Benefits and the Privatization of New Deal Liberalism*, 16 J. POL'Y HIST. 34, 58 (2004).

57. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

58. *See* Barry Cushman, *The Great Depression and the New Deal*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA (Christopher Tomlins & Michael Grossberg, eds.) (forthcoming), *available at* http://www.law.bepress.com/uvalwps/uva_publiclaw/art23 (providing an up to date discussion of the legal developments during this era).

59. *Id.* *See* Martha McCluskey, *Efficiency and Social Citizenship:*

legislation typically turned on a notion of mutual responsibility and well-being as well as the conviction that the government plays a vital role in protecting workers and constructively regulating economic relationships.[60] As set forth more fully below, this more progressive view of responsibility, general welfare, and governmental action informed the fashioning of ERISA. Yet, the promise of ERISA has not been fully realized due to structural limitations embedded in the statute.

A. *The Compelling Purposes of ERISA*

ERISA's statutory scheme embodies several key and interrelated goals. First, Congress sought to promote equity for employees as they planned for and lived out their retirement. Second, ERISA purports to ensure transparency and accountability in the operation of pension plans. These objectives also provide the means for achieving the first and third goals of ERISA. Third, Congress intended to maximize financial security for retirees and their families.

1. *Promotion of Equity*

Enacted more than forty years after the inception of the New Deal, ERISA represents one of the last pieces of comprehensive legislation founded on principles of collective responsibility among workers and their employers. Quite obviously, ERISA has enhanced fairness by expanding the availability of pension benefits to ordinary employees.[61]

The statute has also secured greater equity by enabling employees to order their affairs based on the reasonable expectation that retirement savings, in the form of employer-sponsored pension plans, will be a source of income in their later years.[62] As a corollary, ERISA seems directed at minimizing

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Challenging the Neoliberal Attack on the Welfare State, 78 IND. L.J. 783, 817 (2003) (observing that the New Deal sprung from a broad-based movement that demanded public- and private-sector support of workers and their families as well as a measure of economic autonomy and democracy in the United States).

60. McCluskey, *supra* note 59, 817-22.

61. *See generally* Weller, *supra* note 6, at 1 (observing that approximately half of employees in the United States had a pension by the late 1970s). *See also* H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641 ("In 1940, an estimated four million employees were covered by private pensions plans; in 1950, the figure had increased to almost 10 million and in 1960 over 21 million were covered. Currently [in 1974], over 30 million employees . . . are covered by these plans.").

62. 29 U.S.C. § 1001(a) states:

[O]wing to the inadequacy of current minimum standards, the

demands on the government for retirement income.[63] Indeed, the collective value of ERISA plans is enormous.[64] Thus, frustrating pension beneficiaries' reasonable expectations would adversely affect not only beneficiaries and their families, but the country as a whole.[65]

2. *Promotion of Transparency and Accountability*

According to its terms, ERISA increases the clarity and integrity with which employers administer their pension plans. In this regard, ERISA supposedly represents a substantial improvement over its predecessor legislation, the Welfare and Pension Plans Disclosure Act ("WPPDA").[66] Like ERISA, the WPPDA focused on improving the disclosure of data to plan participants.[67] As critics of this legislation noted, however, the

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> soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

See also Frank Cummings, *ERISA: The Reasonable Expectations Bill*, 65 TAX NOTES 880, 881 (1994) ("[ERISA] was, at its core, a 'reasonable expectations' bill. It gave an ordinary employee the assured right to receive what a reasonable person in his boots would have expected in the circumstances. Primarily, it was a consumer protection bill").

63. 29 U.S.C. § 1001(a) ("[I]t is . . . desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness").

64. *See* Watson, *supra* note 20, at 433 n.12 (estimating the total value of all pension plans at approximately $2.5 trillion dollars and noting that "[t]his represents more than one-half of the investment capital in [the United States]"); *see also* Bailey, *supra* note 20, at 473 (reporting that employee benefits account for more than one quarter of private employers' compensation costs).

65. *See* H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640 ("The dynamic asset growth necessary to meet its responsibilities has placed the private pension system in a position to influence the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security.").

66. Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974).

67. H.R. REP. NO. 85-2283 (1958) ("[The WPPDA] is designed to place the primary responsibility for the policing and improved operations of these plans upon the participants and beneficiaries themselves, with a minimum of interference in the natural development and operation of such plans, reserving

WPPDA contained virtually no guidance concerning what participants could do with the information.[68]

Significantly, ERISA added enforcement mechanisms for private parties to the already-existing disclosure requirements of the WPPDA. In other words, ERISA technically mandates both transparency and accountability.[69] The statute requires pension plans to be written and available to beneficiaries, and ERISA mandates that participants receive notice of events that would have a material impact on benefits.[70] These disclosures, in theory, should enable aggrieved pension beneficiaries to pursue enforcement actions and, therefore, to ensure accountability for any wrongdoing.[71]

3. Promotion of Security

As the name of the statute itself confirms, Congress intended to protect the financial well-being of retirees through its adoption

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to the States the detailed regulations relating to insurance and trusts, and other phases of their operations, and to place the least possible burden by way of cost and otherwise upon the plans and the taxpayers in general"). For an in-depth analysis of the legislation see Anthony Abato, Jr., *The Welfare and Pension Plan Disclosure Act – Its History, Operation, and Amendment*, 30 GEO. WASH. L. REV. 682 (1962) (analyzing investigations and legislation leading up to the WPPDA).

68. *See, e.g.*, Nola A. Kohler, *An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis in* Woo v. Deluxe Corporation, 75 N. DAK. L. REV. 815, 819 (1999) (outlining the weaknesses inherent in the WPPDA's structure).

69. 29 U.S.C. § 1082(b)(7)(F)(vi)(2000) (requiring the provision of notice to plan participants regarding the deferral of funding liabilities); 29 U.S.C. § 1132 (2000) (creating a private right of action to enforce pension rights).

70. Duggan v. Hobbs, 99 F.3d 307, 309-10 (9th Cir. 1996) (finding that a primary purpose of ERISA is to ensure the integrity and primacy of the written plans); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1170 (3rd Cir. 1990) (observing that the ERISA's reporting and disclosure requirements are designed "to ensure that the individual participant knows exactly where he stands with respect to the plan and to enable employees to police their plans"); Rucker v. Pacific FM, Inc., 806 F. Supp. 1453, 1459 (N.D. Cal 1992) (stating that "Congress enacted ERISA 'to safeguard the well-being and security of working men and women and apprise them of their rights and obligations under any employee benefit plan'"); *see also* James E. Holloway, *The Practical Entry and Utility of a Legal-Managerial Framework Without the Economic Analysis of Law*, 24 CAMPBELL L. REV. 131, 185 (2002) (noting that the "two . . . purposes behind ERISA's reporting and disclosure provisions . . . ensure that the individual participant knows exactly where he stands with respect to the plan and . . . enable employees to police their plans").

71. Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992).

of ERISA. Congress included several items in the statutory scheme to further pension security. For example, ERISA establishes fixed vesting rights for plan participants, eliminating confusion about when and to what extent pension benefits will be protected.[72] In addition, the statute creates minimum funding requirements for pension plans and maintains an insurance program for those plans to ensure that pension obligations will be honored.[73] Moreover, ERISA imposes fiduciary responsibilities on plan administrators.[74]

B. *The Procedural Deficiencies of the Statutory Scheme*

Security and equity have not been fully realized under the ERISA regime. Much of this flows from structural shortcomings of the statute that have thwarted the project of achieving real transparency and accountability. Although the distinction between procedural and substantive flaws is frequently dubious,[75] particularly with respect to ERISA, the analysis below considers these two categories separately to highlight significant deficiencies of the legal framework governing pensions.

Notably, conflicts of interest underlie the flaws set forth below because, at bottom, employers have primary control over the disclosure of pension rights, the interpretation of those rights, and the review of those interpretations.

1. *Flawed Disclosure Procedures*

The Summary Plan Description ("SPD") constitutes perhaps the most important tool under ERISA for promoting transparency of pension administration.[76] The SPD supposedly describes plans in a way that is "sufficiently accurate and comprehensive to reasonably apprise beneficiaries of their rights under the plan."[77] Accordingly, employees rely on SPDs to understand what benefits they will receive and when they will receive them.[78]

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72. 29 U.S.C. § 1053(a) (2000).

73. 29 U.S.C. § 1082(b) (2000). The PBGC guarantees benefits up to approximately $47,000 per year for plans that terminate in distress. Pension Benefit Guaranty Corporation, *PBGC Announces Maximum Insurance Benefit for 2006,* Dec. 12, 2005, http://www.pbgc.gov/media/news-archive/2005/pr06-09.html. The cap is lower for employees who retire before the age of 65. *Id.*

74. 29 U.S.C. § 1101.

75. *See* Martha Minow, *Politics and Procedure, in* THE POLITICS OF LAW: PROGRESSIVE CRITIQUE 79 (David Kairys ed., 1998) (providing a cogent analysis of the substantial overlap between substance and procedure in the context of civil litigation).

76. 29 U.S.C. § 1022.

77. *Id.*

78. *See* Michael A. Valenza, *Accuracy is Not a Lot to Ask: Decisions in the*

Unfortunately, SPDs are neither models of simplicity nor accessibility, and they are not particularly useful to beneficiaries.[79] In fact, SPDs and other pension-disclosure documents appear to be nearly as opaque and Byzantine as the provisions of ERISA itself.[80] The lack of clarity around the meaning of SPDs and related disclosures mandated by ERISA has had a substantive impact on pension rights. For example, plan participants may be denied benefits if the SPD's language could be read as conflicting with the plan's lengthy and more technical terms.[81] In any event, some courts hold that ERISA plans have no affirmative duty to disclose benefits changes to pension beneficiaries.[82]

2, Flawed Administrative Procedures

ERISA creates an administrative review process that dramatically reduces accountability concerning pension obligations.[83] For instance, pension plans can reserve for

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Second and Third Circuits Set the Tone for Litigation Over Conflicts Between ERISA Plan Documents and Summaries, 6 TRANSACTIONS 361, 362 (Spring 2005) (recognizing that SPDs are the only materials available for employees to consult when making decisions regarding benefits).

79. *See, e.g.*, Peter Weidenbeck, *Implementing ERISA: Of Policies and "Plans"*, 72 WASH. U. L.Q. 559, 574 (1994) (noting the tension between the purpose of SPDs and the implementation of actual plan terms such that information is often disclosed when it is no longer useful for decision-making).

80. *See* Ann C. Bertino, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases*, 41 CATH. U. L. REV. 871, 904 n. 253 (1992) ("ERISA is so complex that many attorney's hesitate to learn the statute. It is unrealistic to expect that the average lay person could enforce his or her rights under ERISA without assistance."). *See also* Pamela Perun & C. Eugene Steuerle, *ERISA at 50: A New Model for the Private Pension System, the Retirement Project*, Occasional Paper No. 4 (2000), *available at* http://ssrn.com/abstract=236838 (discussing the complexity of ERISA and Internal Revenue Code provisions governing pensions).

81. Courts have required beneficiaries to meet a very high evidentiary standard – "actual" reliance on SPD language – before they can seek legal relief for the denial of benefits. *See, e.g.*, Branch v. G. Bernd Co., 955 F.2d 1574, 1579 (11th Cir. 1992) (holding that a beneficiary must prove reliance on a plan summary in order to prevent an employer from enforcing inconsistent terms). *See also*, Michael Joyce *Setting a Standard to Rely On: ERISA Benefit Claims Where the Summary Plan Description and Plan Document Conflict*, 90 IOWA L. REV. 765, 769 (2005) (proposing that courts should adopt a prejudice standard requiring the beneficiary to prove "likely" harm and giving the sponsor the opportunity to rebut).

82. Pocchia v. Nynex Corp., 81 F.3d 275, 279 (2d Cir. 1996). *See also* Joseph Czerniawski, Bins v. Exxon: *Affirmative Duties to Disclose Proposed Benefits Changes in the Absence of Employee Inquiry*, 76 NOTRE DAME L. REV. 783 (2001) (examining the scope of duties owed by an ERISA fiduciary).

83. *See, e.g.*, 29 U.S.C. § 1102 (providing for an establishment of a plan with optional features that, if employed, would reduce accountability).

themselves largely unfettered discretion in making benefits determinations pursuant to ERISA.[84] By the same token, beneficiaries must exhaust an appeals process that ordinarily reaffirms the initial decision.[85] In other words, even if an employer or plan administrator violated certain pension rights, there may be no meaningful recourse unless a beneficiary commences a costly and difficult private action in court.

3. *Flawed Enforcement Procedures*

ERISA authorizes individual civil actions for beneficiaries to sue for damages and injunctive relief to recover benefits, to clarify rights to future benefits, and to enforce rights under pension plans.[86] The courts' application of ERISA, however, has not necessarily provided more rigorous scrutiny of pension administration than the review process addressed above. Given the Supreme Court's wooden interpretation of ERISA in *Firestone Tire & Rubber Co. v. Bruch*, most companies now use plan language that confers on administrators broad discretion in construing and applying pension rights.[87] This precedent effectively precludes courts from reviewing plan decisions under anything but a highly deferential "abuse of discretion" standard.[88] In short, the denial of benefits and alleged pension mismanagement will essentially only be scrutinized when a palpable conflict of interest can be established.[89] Thus, ERISA's

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84. *See, e.g.*, Paul O'Neil, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 OHIO ST. L.J. 723, 762 n. 230 (1994) (identifying "the absence of any impartial administrative review process applicable to ERISA benefits claims").

85. *See* Kathryn J. Kennedy, *The Perilous and Ever-Changing Procedural Rules of Pursuing an ERISA Claims Case*, 70 UMKC L. REV. 329, 361 (2001) (noting that "all the circuits require the claimant to exhaust administrative procedures prior to litigating an ERISA benefits claim"); Lorraine Schmall, *Toward Full Participation and Protection of the Worker with Illness: The Failure of Federal Health Law After* McGann v. H & H Music Co., 29 WAKE FOREST L. REV. 781, 829 (1994) (highlighting the perfunctory nature of the ERISA appeals procedures).

86. 29 U.S.C. § 1132(a)(1)(A-B).

87. *See Firestone*, 489 U.S. at 115 (holding that a denial of benefits under ERISA is reviewed under a de novo standard unless the employer's pension plan gave the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms).

88. *Id.* at 112-13.

89. *See, e.g.*, Fought v. UNUM Life Ins. Co. of Am., 379 F.3d 997, 1006-07 (10th Cir. 2004) (applying a heightened standard of scrutiny to an employer's denial of employee's benefits because there was an inherent conflict of interest); Woo v. Deluxe Corp., 144 F.3d 1157, 1161-62 (8th Cir. 1998).

fiduciary obligations have been largely eviscerated in practice,[90] rendering the substantive accountability provisions virtually impotent at the outset.[91]

The demonstrated judicial deference to plan administrators under ERISA takes on greater significance given the statute does not explicitly guarantee a right to a jury trial.[92] Even if the courts that have concluded ERISA confers such a right ultimately win the day,[93] judges will continue to play an important role in evaluating the merits of ERISA claims, absent Congressional reform, for the foreseeable future.

ERISA's approach to attorney fees is also problematic. Unlike most other employment-related statutes – such as Title VII,[94] the Fair Labor Standards Act,[95] the Age Discrimination in Employment Act,[96] the Family and Medical Leave Act,[97] and Section 1981[98] – the award of attorney's fees to a prevailing plaintiff is not necessarily available under ERISA.[99] The Tenth

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90. *See generally* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083 (2001) (analyzing the limited protection afforded by the fiduciary obligation under ERISA). *See also* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 412 (2000) (discussing the *Firestone* decision and noting that "the effect of drafting plan documents explicitly to grant interpretive discretion to decision makers has come to be a complex amalgam of shield and sword").

91. *See* John H. Langbein, *What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1319 (2003) (characterizing ERISA's importation of fiduciary and loyalty principles from trust law as substantive concerning "all aspects of plan administration"); H. Brent McKnight, *Assessing the Impact of Conflict of Interest on the Decisions of ERISA Fiduciaries*, 13 REGENT U.L. REV. 1, 3 (2001) (noting that, under *Firestone*, a conflict of interest is only a factor to be considered in reviewing for an abuse of discretion).

92. *See, e.g.*, Mathews v. Sears Pension Plan, 144 F.3d 461, 468 (7th Cir. 1998); Sofo v. Pan-American Life Ins. Co., 13 F.3d 239, 241-42 (7th Cir. 1994).

93. Donald T. Bogan, *ERISA: Re-thinking Firestone in Light of Great-West – Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 694 (2004) (concluding that courts have erroneously found that pension claims are equitable and, consequently, not subject to a jury trial and observing, further, that several courts have ruled ERISA claims are legal and nature such that they warrant jury trials).

94. 42 U.S.C. §§ 2000e-17.

95. 29 U.S.C. §§ 201-219.

96. 29 U.S.C. §§ 621-634.

97. 29 U.S.C. §§ 2601-2654.

98. 42 U.S.C. §1981.

99. 29 U.S.C. § 1132(g)(1). Technically, the standard for awarding fees under ERISA resembles that of the Equal Access to Justice Act, 28 U.S.C. § 2412, so that the prevailing party is entitled to attorney's fees unless the

Circuit has set forth the governing formula for determining whether a prevailing party can receive a fees award.[100] The factors that a court must consider are as follows: (1) the degree of the offending parties' "culpability"; (2) the degree of the offending parties' ability to satisfy personally an award of attorney's fees; (3) whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions.[101] In effect, courts apply the heightened standard for the award of punitive damages to the award of attorney's fees, which traditionally have been automatic for prevailing plaintiffs in employment-related cases.[102]

Exacerbating matters, some courts have read ERISA to authorize the award of attorney's fees to defendants if a plan participant does not prevail.[103] This is virtually unprecedented in the nation's jurisprudence and amounts to the adoption of the "English Rule" in the ERISA context.[104] The remarkable legal exposure created for plaintiffs by ERISA's approach to attorney's fees will likely continue to have a chilling effect on enforcement

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position of losing party was substantially justified or special circumstances make the award unjust. Hooper v Demco, Inc., 37 F.3d 287, 293-94 (7th Cir. 1994); *but see* Stanton v. Larry Fowler Trucking., 52 F.3d 723 (8th Cir. 1995) (finding that the losing defendant bears burden of showing special circumstances that would preclude award of attorney's fees to a prevailing plaintiff).

100. Eaves v. Penn, 587 F.2d 453, 464-65 (10th Cir. 1978). Each Circuit has applied a version of the *Eaves* test. *See, e.g.*, Gray v. New England Tel. & Telegraph Co, 792 F.2d 251, 257-58 (1st Cir. 1986) (applying a version of the *Eaves* test); Int'l Bhd. of Teamsters v. New York State Teamsters Council Health & Hosp. Fund, 903 F.2d 919, 923-24 (2nd Cir. 1990); Ellison v. Shenango Inc. Pension Board, 956 F.2d 1268, 1273 (3rd Cir. 1992); Quesinberry v. Life Ins. Co. of North Am., 987 F.2d 1017, 1028-29 (4th Cir. 1993); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980); Tiemeyer v. Cmty. Mutual Ins. Co., 8 F.3d 1094, 1101 (6th Cir. 1993); Leigh v. Engle, 858 F.2d 361, 369-70 (7th Cir. 1988); Lawrence v. Westerhaus, 749 F.2d 494, 495-96 (8th Cir. 1984); Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980); Nachwalter v. Christie, 805 F.2d 956, 961-62 (11th Cir. 1986); Eddy v. Colonial Life Ins. Co. of Am., 59 F.3d 201, 206 (D.C. Cir. 1995).

101. *Eaves*, 587 F.2d at 464-65.

102. For an analysis of the comparatively higher threshold for obtaining punitive damages, *see* State Farm v. Campbell, 538 U.S. 408 (2003); Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).

103. Helfrich v. Carle Ass'n, P.S., 328 F.3d 915, 919 (7th Cir. 2003); Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 25 F.3d 743, 747 (9th Cir. 1994).

104. *See* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 269-70 (1975) (rejecting the "English Rule" of awarding attorney's fees to defendants).

activity.[105]

Paralleling the restriction on the award of attorney's fees, courts have construed ERISA not to provide punitive damages, especially for breach-of-fiduciary-duty claims.[106] The basic rationale for this narrow approach holds that ERISA claims are essentially contractual in nature, and courts prefer not to award "extra-contractual" remedies.[107] The Sixth Circuit has gone further, proclaiming that even compensatory damages are not available as a remedy for breach-of-fiduciary-duty claims.[108]

Class-action litigation could help mitigate the adverse impact of the preceding flaws with ERISA's enforcement procedure. Courts do not appear disposed, however, to make ERISA class actions readily available.[109] In addition, the litigation around class certification can be cost-prohibitive and time-consuming.

C. The Substantive Deficiencies of the Statutory Scheme

As some scholars have observed, ERISA does not mandate a minimum level of benefits.[110] Nor does it require employers to actually sponsor a pension plan.[111] However, ERISA does contain

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105. For analysis of the chilling effect, *see* Ann C. Bertino, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits cases*, 41 CATH. U. L. REV. 871, 905 n. 253 (1992).

106. *See* Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (holding that individual plan participants have no right of action for extra-contractual compensatory or punitive damages regarding breach-of-fiduciary-duty claims); *but see* Muir, *supra* note 90, at 445 (discussing the *Russell* decision and concluding that its comments about damages are merely dicta); William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285, 295 (1999).

107. *Russell*, 473 U.S. at 144.

108. *See* Adcox v. Teledyne, Inc., 21 F.3d 1381, 1390 (6th Cir. 1994) (finding that Section 1132(a)(2) permits recovery "to inure only to the ERISA plan, not to individual beneficiaries").

109. *See, e.g.*, In re Allstate Ins. Co., 400 F.3d 505, 507-08 (7th Cir. 2005) (denying class certification because the plaintiffs' claims involved different circumstances surrounding termination); Spann v. AOL Time Warner, 219 F.R.D. 307, 311 (S.D.N.Y. 2003) (denying class certification where employer had issued different types of releases to employees and where potential plaintiffs were at different stages of administrative review).

110. *See* Ann Nevers, *ERISA Right to Sue: An RX for Health Care that Places Forum over Substantive Consumer Rights*, 31 N.M. L. REV. 493, 501 n.78 (2001) ("ERISA does not require a minimum amount of benefits, but does regulate the administration of the benefits.").

111. *See* Albert Feuer, *When are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773, 777 (2005) ("ERISA does not require employers to establish any ERISA plans, but it does impose minimum standards on the establishment and operation of any covered employee benefit plans that employers choose to adopt.").

vesting schedules and other substantive protections.[112] Moreover, certain provisions of the statute seek to enforce an employer's promise of retirement income.[113] As with the procedural dimensions of ERISA, the substantive aspects of the statute suffer from fundamental defects.

1. *Flawed Funding Provisions*

ERISA purportedly ensures that employers adequately fund their pensions.[114] The airline industry provides the most recent illustration of the abject failure of the statute to achieve its substantive goals. The existence of the PBGC does not offer much comfort because that agency, itself, is underfunded by nearly $30 billion.[115]

The current crisis is tragically predictable because the legal regime does not, in fact, require timely and adequate funding of pension plans. Even as amended in 1994, ERISA only raises PBGC premiums by a few percentage points for employers that do not timely or fully fund their pensions.[116] In addition, ERISA does not substantively regulate accounting and actuarial assumptions used by pension plans.[117] Among other deceitful practices, ERISA allows employers to use problematic interest rates to "discount" their pension obligations, sharply understating, if not concealing outright large-scale underfunding.[118] At any rate, ERISA's legal

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112. 29 U.S.C. § 1053(a).

113. 29 U.S.C. § 1104 (a-d).

114. 29 U.S.C. § 1082 (a-d). The standards are intended to ensure that plans maintain sufficient assets to pay eligible workers as they retire. Most plans may begin with a deficit, which is to say that the plans beginning when the employer has a full complement of employees may not contain sufficient assets to meet potential liabilities from employees with past service credits. ERISA accounts for this by allowing employers to amortize funding liabilities for past service credits over periods of time determined by actuarial assumptions. These periods may be extended at the discretion of the Department of Labor. 29 U.S.C. § 1084 (a).

115. Albert B. Crenshaw, *Big Pension Plans Fall Further Behind*, WASH. POST, Jun. 7, 2005, at A3.

116. The Retirement Protection Act of 1994, Pub. L. No. 103-465 (1994).

117. Geller, *supra* note 21 (discussing proposed FASB rules changes that would require companies to more accurately characterize pension liabilities and to "more accurately measure and report their retirement benefits"); Howard Silverblatt, *America's Other Pension Problem; Shortfalls in funding post-retirement health plans could hit Corporate America—and investors—hard when new accounting rules go into effect*, BUSINESS WEEK ONLINE, Dec. 20, 2005 (discussing the negative outgrowths of ERISA's defective regulatory regime).

118. *See, e.g.*, Steven A. Kandarian, *Better pension plan: tougher rules to keep underfunding at bay*, CRAIN'S CHICAGO BUSINESS, Oct. 18, 2004 (discussing the radical change in the health of United Airline's pension

framework permits the Department of Labor to waive funding requirements if an employer can show "substantial business hardship."[119]

2. *Flawed Incentive Structure*

The availability of the PBGC and the concomitant assumption of liability transfers have created a moral hazard under ERISA.[120] As discussed above, the governing legal regime allows corporations to delay payments to their pension plans and even permits outright waivers.[121] Increasingly, companies are also using the threat of bankruptcy, and the status of the PBGC's lien, to extort economic concessions from pension beneficiaries.[122]

Moral hazard also rears its ugly head in the context of the stock valuation of companies that provide pensions.[123]

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following a decrease in interest rates); Benno Groeneveld, *Interest rates blamed for General Mills' pension plans underfunding,* MINNEAPOLIS/ST. PAUL BUSINESS JOURNAL, Aug. 3, 2003, *available at* http://www.bizjournals.com/twincities/stories/2003/08/04/daily25.html (describing how General Mills' pension fund, billed as overfunded, was determined to be underfunded when the federal interest rate was lowered).

119. 29 U.S.C. § 1083. Indeed, underfunding occurred when investments were growing steadily throughout the mid to late nineties, as well. *See generally* Jonathan Elsberg, *Underfunded Pensions and Perverse Incentives*, CENTER FOR POPULAR ECONOMICS, Aug. 17, 2005.

120. Keating, *supra* note 16, at 67-68 (defining the moral hazard problem as when "those insured against certain risks have an incentive to use less than optimal care to avoid those risks"). Significantly, employers are "direct beneficiaries" of the existence of PBGC insurance because offering insured pension benefits means that they are able to pay their employees less in terms of present compensation. *Id.* at 72.

121. Robin Blackburn, *The Enron Debacle and the Pension Crisis*, 14 NEW LEFT REVIEW 26, 41 (2002); Keating, *supra* note 16, at 73-74 (stating that in addition to waivers, the "flexibility of actuarial assumptions" allows companies to avoid providing sufficient funding). On November 16, 2005, the U.S. Senate approved legislation that would push ERISA's leniency to even more absurd levels, giving the airlines a lengthy grace period and a seven-year window in which to address underfunding. Marilyn Geewax, *Senate OKs special help for airlines*, ATLANTA JOURNAL CONSTITUTION, Nov. 17, 2005, at 1A.

122. *See* Christine Matott, *Airlines in Distress: Can the Pension Benefit Guaranty Corporation Weather This Crisis?*, 55 DEPAUL L. REV. 169, 204-05 (2005) (discussing employers' efforts to leverage employees in bargaining by threatening to declare bankruptcy and to terminate pensions); Lou Whiteman, *Delta, US Air Face Key Stretch*, THE DEAL, Aug. 23, 2004 (noting that airline officials ominously told employees that bankruptcy protection may be "a useful tool").

123. *See, e.g.*, Norman H. Godwin and Kimberly Galligan Key, *Market Reaction to Firm Inclusion on the Pension Benefit Guaranty Corporation Underfunding List*, WORKING PAPER SERIES 4-5, Mar. 1998, *available at* http://ssrn.com/abstract=115500; Jerry Geisel, *PBGC to Drop Annual List of Worst-Funded Plans*, BUSINESS INSURANCE 2, Sept. 8, 1997.

Remarkably, employers listed on the PBGC's most-underfunded-pension list actually experienced increased rates of return.[124] Although the PBGC stopped publishing this list in 1997, many corporations evidently still believe that they can attract investment by moving toward the discharge of their pension liabilities.[125] In sum, ERISA's statutory scheme has fostered perverse incentives such that companies are now sacrificing pension integrity at the altar of corporate profits.

IV. DÉJÀ VU ALL OVER AGAIN: CONFLICTS OF INTEREST GONE WILD

The deficiencies of ERISA analyzed above in Part II provide an eerie echo of the rumblings about problems with corporate accounting practices prior to the stock-devaluation crisis of the early Twenty-First Century. That the devastating devaluation flowed from the lack of transparency and accountability regarding corporate accounting should give reason for pause to reflect on where the pension system in the United States seems to be headed.

A. *The Parallels between the Legal Regime Governing Pension Practices and that Covering Accounting Conduct*

Like the legal framework applicable to corporate governance before the enactment of Sarbanes-Oxley, the legal landscape for pensions provides inadequate transparency and accountability mechanisms. These shortcomings of the ERISA statutory scheme, much like the securities regime in the 1990s, manifest themselves both in the internal operations of companies as well as in the external oversight of those operations.

1. *Through a Glass Darkly: The Lack of Transparency in Corporate Financial Practices*

The legal regime applicable to corporate financial reporting in the United States has conferred significant discretion to companies in how they account for revenues and expenses.[126] The lack of rigorous regulation opened the way, beginning in the 1980s and accelerating in the 1990s, for corporations to "manage"

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124. *Id.*

125. *Id.*

126. *See* Roberta S. Karmel, *Mutual Funds, Pension Funds, Hedge Funds and Stock Market Volatility – What Regulation by the Securities and Exchange Commission is Appropriate?*, 80 NOTRE DAME L. REV. 909, 914-29, 935-47 (2005) (analyzing the relationship between corporate financial practices and governmental regulation over the last century); Barlett, *supra* note 1, at 44 (comparing accounting practices in the 1990s to pension practices in the 2000s).

earnings via an array of practices that materially obscured market performance and actual company value.[127] Premature revenue recognition quickly became one of the most common and deleteriously deceptive of such practices.[128]

This premature-revenue-recognition tactic represents a cynical perversion of the well settled practice of moderating earnings fluctuations through minor tweaking of financial statements; in particular, corporate managers were now advancing the moment of revenue recognition and, frequently, concealing from shareholders poor market standing and other negative data.[129] Notably, the very executives with the ability to manipulate the timing of revenue recognition also stood to benefit markedly from inflated earnings statements because stock options had become such a significant portion of executive compensation packages.[130] Not surprisingly, "accounting scandals rose commensurate with this shift toward premature recognition."[131]

As if the opportunistic and self-dealing behavior of key executives was not bad enough, the accounting firms auditing these financially compromised companies had evidently tolerated and even participated in the obfuscation. The Big Five firms, so called before the dissolution of Arthur Andersen, L.L.P., all appear to have been involved in accounting irregularities to one degree or another in the 1990s.[132]

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127. *Id. See* John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 276-77 (2004) (discussing corporate accounting and governance practices that have been prevalent in the last quarter century).

128. The General Accounting Office found that nearly forty percent of financial restatements from 1997 to 2002 resulted from revenue recognition errors. *See* U.S. Gen. Accounting Office, Pub. No. 03-138, Financial Statement Restatements. *See* Coffee, *supra* note 127, at 276-77 (discussing corporate accounting and governance practices that have been prevalent in the last quarter century).

129. Indeed, more than half of the litigation over corporate accounting practices evidently concerned premature revenue recognition. Holman W. Jenkins, Jr., *Accounting For When Dreams Become Reality*, WALL STREET J., June 13, 2001, at A21. In view of the revenue recognition abuses, even the fairly corporate-friendly Securities and Exchange Commission issued regulations in this regard - ultimately to little avail as the subsequent accounting and corporate-governance scandals tragically confirmed. 64 FED. REG. 68, 936 (Dec. 9, 1999).

130. Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1244-47 (2002); Daniel V. Dooley, *Financial Fraud: Accounting Theory and Practice*, 8 FORDHAM J. CORP. & FIN. L. 53, 58-66 (2002).

131. Coffee, *supra* note 127, at 276.

132. *See* Jonathan Weil, *SEC Sanctions 2 at Ernst & Young: Partners Aided Violations at Cendant, Agency Says; A Suspension from Audits*, WALL STREET

Auditors, much like corporate managers, have had a financial incentive to play hide-the-ball with company revenues and expenses. As the 1990s progressed, auditing firms' revenues from consulting services began to dwarf monies received for conducting audits.[133] By satisfying a corporate client's auditing needs, whether those needs were legitimate or not, accounting firms typically also captured enormous sums from subsequent consulting services for the "audited" clients.[134] In other words, accounting firms were increasingly using audits as a marketing tool to attract the more lucrative consulting business.

The scholarship and related data on corporate misdeeds regarding pension practices remains much less well developed, to date, for obvious reasons. We have yet to witness pension scandals on the order that precipitated the collapse of high-profile corporations, including Enron, and well established accounting firms, such as Andersen.

Nonetheless, emerging dynamics in the pension environment reflect a pernicious lack of transparency that parallels that which has plagued corporate accounting practices.[135] Although ERISA purports to mandate clarity of pension rights and plan obligations, the reality is often unfortunately different.[136]

J., Apr. 25, 2003, at C7 (outlining misconduct by accounting firms); Sloan, *Periscope: How Arthur Andersen Begs for Business*, NEWSWEEK, Mar. 18, 2002, at 6 (outlining statistical analysis of accounting practices by the major firms). *See also* Coffee, *supra* note 127, at 281-82 (reviewing the performance of the Big Five accounting firms).

133. Coffee, *supra* note 127, at 291 ("[A]ccording to one recent survey, the typical large public corporation now pays its auditor for consulting services three times what it pays for auditing services.").

134. In fact, accounting firms reportedly used their auditing services to reel in the much more lucrative consulting business. Lee Berton, *Audit Fees Fall as CPA Firms Jockey for Bids*, WALL STREET J., Jan. 28, 1985, at A33. *See also* Coffee, *supra* note 127, at 291-92 (rebutting the argument that the proliferation of consulting services does not create improper conflicts-of-interest which materially affect financial reporting).

135. Cummins, *supra* note 2, at A22 (outlining the practice of manipulating plan terms to "wear away" pension obligations without officially changing pension benefits); *see also* Geller, *supra* note 19 (reporting that ERISA does not require companies to disclose shortfalls in light of actual earnings returns and using General Motors to illustrate—its stated book value in 2004 was approximately $30 billion while its actual book value appeared to be nearly $20 billion in the negative); Brush *supra* note 21 (describing the deceitful practice of using pensions' anticipated assets to balance company books); *supra* Part II.A (discussing the gathering threat to pensions in the U.S.).

136. For an explanation of these circumstances, *see supra* Part III.

2. *"Hear" No Evil / "See" No Evil: The Lack of Accountability Regarding Corporate Misconduct*

The relationship between the lack of transparency and the lack of accountability recalls the proverbial chicken-and-egg conundrum. On the one hand, the lack of transparency in accounting certainly has thwarted efforts to hold parties accountable for financial transgressions.[137] On the other hand, the relatively toothless enforcement mechanisms existing before the enactment of Sarbanes-Oxley have fostered a corporate-accounting environment characterized more by manipulation and evasion than clarity.[138] As set forth at greater length below, the destructively symbiotic relationship between the dearth of transparency and accountability flowed from a flawed legal framework that Congress sought to remedy through legislative reforms embodied in Sarbanes-Oxley.

Particularly in the 1990s, the legal exposure for accounting malfeasance decreased dramatically. Both Congressional enactments and Supreme Court rulings insulated auditors from liability for accounting irregularities.[139] This altered legal framework sharply curtailed private litigation concerning securities fraud.[140] At the same time, and perhaps not coincidentally, the threat of enforcement actions by governmental

137. As the tactic of premature revenue recognition exemplifies, regulators and aggrieved parties have often faced a moving target when exploring whether to challenge certain accounting practices. *See, e.g.*, Karmel, *supra* note 126, at 914-19, 934-47 (illustrating the challenges in regulating financial practices); Jennifer O'Hare, *Misleading Employer Communications and the Securities Fraud Implications of the Employee as Investor*, 48 VILL. L. REV. 1217, 1230-33 (2003) (demonstrating the inability of federal law and regulators in preventing fraudulent practices). Under such circumstances, identifying – let alone proving – a legal violation can be a challenge. *Id.*

138. *See supra* Part III.A.1 (discussing ERISA's promotion of equity).

139. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67 § 101, 109 Stat. at 737-49 (elevating the pleadings standards for class actions in the securities context and narrowed the liability of auditors in several respects); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 186-88 (1994) (rescinding aiding-and-abetting liability in securities-fraud cases); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 359-61 (1991) (narrowing the statute of limitations for securities-fraud claims).

140. Not only did private actions drop, but cases against accountants and counsel also virtually evaporated. *See* OFFICE OF THE GEN. COUNSEL, U.S. SEC. & EXCH. COMM'N, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE SECURITIES LITIGATION REFORM ACT OF 1995 4, 21-22 (1997) (illustrating the drop in private actions as well as actions against accountants and counsel). For additional analysis of this point, *see* Coffee, *supra* note 127, at 289-90.

agencies also diminished significantly.[141] Consequently, the major accounting firms had less motivation to root out improper business practices of their client companies – especially when the firms stood to lose tremendous sums in consulting business with these same companies should they give their clients negative feedback.[142]

As it did for auditors, the securities legal framework afforded corporate executives perniciously wide latitude in the 1980s and especially in the 1990s.[143] Prior to the adoption of Sarbanes-Oxley, the regulated essentially became the regulator. The boards of directors monitoring major companies and, by implication, their top executives, relied heavily on data generated and presented by those same executives being evaluated.[144] Given the increasing "management" of earnings by corporate executives and the acquiescence by outside auditing firms to potentially fraudulent practices, a clear moral hazard surfaced. In sum, corporate managers have had undue control over the availability of the information on which any enforcement action against their companies would turn.[145]

The conflicts of interest in the pension setting may be even worse than with respect to the securities arena. ERISA requires corporations to designate an administrator of pension plans and creates fiduciary responsibilities for the administrator.[146] In theory, such a structure should ensure equity and security of pension plans. In practice, however, the pension-plan administrator may actually be the company employing the plan beneficiaries and/or one of the company's high-ranking executives.[147] As described in more detail above in Parts I-II, this

141. According to SEC officials, that agency shifted its focus away from challenging the auditing practices of the major accounting firms. Coffee, *supra* note 127, at 290.

142. For an explication of this dynamic with respect to Andersen in particular, *see* Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917, 921-24 (2003).

143. Many analysts attribute the corporate governance scandals of the 1990s to the lack of meaningful oversight over company executives. Karmel, *supra* note 126, at 914-19, 934-47; O'Hare, *supra* note 135, at 1230-33.

144. Given board members' material dependence on executives for financial data and in light of the corporate accounting scandals of the 1990s, the SEC has required boards to maintain a majority of plainly independent members. Karmel, *supra* note 126, at 930.

145. Coffee, *supra* note 127, at 297-98; O'Hare, *supra* note 137, at 1224-33.

146. ERISA, at 29 U.S.C. § 1104(a)(1), codifies several duties originally recognized at common law. *Howe*, 516 U.S. at 496 (1996). These legal obligations include the duties of care, loyalty, and prudence. *Id.*

147. *See* 29 U.S.C. § 1108(c)(3) (expressly allowing employers to administer pension plans); Adams v. LTV Steel Min. Co., 936 F.2d 368, 370 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992) (reaffirming that a corporation can be

structure has created the sometimes realized opportunity for the plan fiduciary to act more in the interest of the corporation than the beneficiaries.[148]

Moreover, unlike company boards of directors, ordinary employees with a stake in a pension plan do not necessarily have the technical knowledge to fully understand the legal requirements and the consequences of various corporate actions.[149] Exacerbating matters further, ERISA's scheme gives the impression of rigorous monitoring and enforcement – creating a false sense of security among many beneficiaries, especially those who are less sophisticated in financial matters.[150]

Therefore, ERISA paradoxically creates the impression of greater protection while actually affording less. Indeed, the statutory scheme – by its express terms and how it has been subsequently interpreted by federal courts – invites the opportunistic behavior that eventually took down the likes of Enron and Andersen.[151]

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both the employer and plan fiduciary for purposes of ERISA). Exacerbating matters, the Supreme Court accorded employers great deference in the discharge of their fiduciary duties. *See generally* Firestone Tire & Rubber Co. v. Bruch., 489 U.S. 101 (1989); *see also* John H. Langbein, *The Supreme Court Flunks Trusts*, 6 SUP. CT. REV. 207, 220 (1990) (illustrating the great deference the Court accords employers).

148. Self-interested fiduciaries have posed an ongoing threat to the integrity of pension plans. *See* Muir, *supra* note 14, at 415-22 (discussing the problem of self-interested fiduciaries).

149. For an incisive critique of ERISA's assumption that pension beneficiaries are knowledgeable and informed decision-makers, *see generally* Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 63-73 (2000); *see also* O'Hare, *supra* note 137, at 1224-28 (underscoring the vulnerability of ordinary employees to manipulation by corporate executives regarding financial matters). In fact, Department of Labor policy has encouraged employers not to provide beneficiaries with needed information to exercise sound judgment. 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(2), 2550.404c-1(c)(4).

150. In truth, Congress and the PBGC have given corporations wide latitude to adjust formulas for calculating pension assets and obligations in a way that can transform "a drastically underfunded system into a financially healthy one, even inflate a company's profits and push up its stock price." Barlett, *supra* note 1, at 44. Moreover, Congress and the PBGC largely looked the other way as corporate raiders and Wall Street buy-out firms extracted approximately $21 billion – during the 1980s alone – that had been earmarked for pensions. *Id.* at 42. In this context, it is especially troubling that pension plans are now pouring billions into hedge funds, which historically have been secretive and lightly regulated investment vehicles for the very rich. Riva D. Atlas & Mary Williams Walsh, *Pension Officers Putting Billions Into Hedge Funds*, N.Y. TIMES, Nov. 27, 2005, at A1.

151. *See supra* Part III.B-C.; *see also* Adam Geller, *Accounting Change May Squeeze Some Pensions*, S. F. EXAM'R, Jan. 18, 2006, *available at*

As with accounting practices before adoption of Sarbanes-Oxley, the current approach to pensions is plagued by internally and externally driven impediments to transparency and accountability. These shortcomings combine to make more likely, if not induce outright, the proliferation of deleterious conflicts of interest, as discussed in more detail above in Parts I and II.

B. The Recent Accounting Scandals as a Preview of the Perilous Future for the Pension System

If the corporate-governance crisis of the early Twenty-First Century is any indication, the dearth of transparency and accountability discussed above will accelerate the erosion of the systemic equity and pension security ERISA supposedly promotes. Otherwise stated, the fundamental shortcomings of the ERISA statutory scheme make it unlikely that the pension system can be saved from eventual ruin without the implementation of radical reforms.

Importantly, the links between the accounting scandals and the emerging pension crisis exist at multiple levels. As a threshold matter, the literal and figurative fortunes of many pensions have been wrapped up in the very corporations implicated in the recent securities-fraud scandals. Companies that took substantial economic hits because of accounting malfeasance have been part of the portfolios of several large pensions.[152] Accordingly, when the stock of fraudulently governed corporations has gone south, so has the integrity of those pension plans.[153]

In addition, the path that has led to the demise of corporations, such as Enron, and accounting firms, like Andersen,

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http://www.sfexaminer.com/articles/2006/01/19/business/20060119_bu03_acct.txt (confirming that many companies "engage in a shell game and mislead investors about the value of stocks, bonds and other assets held by pension plans").

152. *See* Justin R. Kaufman, *Halting the Enron Train Wreck: Using the Bankruptcy Code to Rescue Retirement Plans*, 76 TEMP. L. REV. 595, 596 (2003) (noting that many large American companies have established retirement savings plans funded in part by company stock); Blackburn, *supra* note 121, at 40 (discussing the culture of pension fund investment that contributed to the Enron debacle and the series of cases that followed which highlighted the contribution of lax auditing to failures at Sunbeam, Waste Management, and Global Crossing); Ethan G. Zelizer, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption?*, 15 LOY. CONSUMER L. REV. 27, 30 (2002) (discussing the accounting misstatements and the concomitant losses of WorldCom, Global Crossing, and Rite Aid).

153. See Blackburn, *supra* note 121, at 46-47 (recounting that when big companies such as Global Crossing, K-Mart, and LTV go bankrupt, their employees' retirement plans are hurt as well).

seems to be the same path now traveled by key pension plans. Just as the lack of transparency and accountability in the accounting context encouraged the malfeasance that prompted economic setbacks and even bankruptcy, so too has the obfuscation and evasion afflicting pension practices undermined pension security and even caused outright default.[154] Viewing pensions administered by Delphi, Delta, and Bethlehem as a harbinger for the future, the reasonable expectations and concrete needs of millions of employees will be thwarted – unless decisive and meaningful ERISA reform occurs soon.[155]

Indeed, what may be more worrisome about pension practices, as opposed to securities conduct, is that pensions are ostensibly monitored by PBGC. Especially in the existing political environment, the PBGC has given the imprimatur of governmental approval of questionable pension practices.[156]

In its present state, the PBGC may also be counterproductive in that it creates the false impression that, even if ERISA violations occur, beneficiaries holdings are fully insured in instances of default.[157] This could not be further from the truth,

154. *See* O'Hare, *supra* note 137, at 1222-29 (discussing the significance of employer communications on employee investment decision and the danger associated with misleading information which can lead ultimately to disproportionate suffering on the part of employees); Kaufman, *supra* note 152, at 596-97, 604-05 (highlighting the prevalence of company stock in employee pension plans and the devastating impact employer bankruptcy can have on such pension plans); Blackburn, *supra* note 121, at 36-44 (noting the lack of control employees as shareholders through pension plans have over the management of pension funds and the conflict of interest possessed by those in control of the funds); Zelizer, *supra* note 152, at 36-43.

155. *See generally* Brush, *supra* note 21 (reporting the looming pension fund crisis is ultimately the consequence of underfunded pension plans and the pension guaranty system near bankruptcy); Condon, *supra* note 21 (documenting the vulnerability of companies that have yet to recover from the stock market fall of 2000 and those companies who owe workers more in pension payments than the whole company would be worth in liquidation). *See also* Barlett, *supra* note 1, at 44 (noting the recent acceleration in the undermining of policies); Lowenstein, *supra* note 3, at 72 (discussing the pension fund problems of Bethlehem Steel leading up to its bankruptcy filing and the role Delphi C.E.O., Robert Miller, played in guiding Bethlehem through bankruptcy).

156. For instance, the PBGC has ceased compiling and publishing the annual list of the 50 most underfunded pension plans. Barlett, *supra* note 1, at 38.

157. As the savings-and-loan debacle of the 1980s and the subsequent accounting problems demonstrate, the illusion of government protection is perhaps more harmful than no protection at all. Coffee, *supra* note 127, at 278 ("Because the government guaranteed banks' financial obligations to depositors, these depositors had little reason to monitor management, and accordingly bank promoters were able to leverage their firms excessively. In

most obviously because ERISA caps the amount insured for pension beneficiaries.[158] In addition, as exemplified by beneficiaries of Northwest's pension plan, many retirees will likely receive markedly less via a PBGC bailout than they should under the plan's terms.[159] Notably, this fleecing of beneficiaries has occurred at a time when the demand on the PBGC's resources has not been as large as it will soon be.[160]

The inequity of the situation becomes even more evident with the recognition that, while corporations deny ordinary employees retirement benefits for a lifetime of actual work, companies pay executives retirement dollars for years they never worked.[161] Moreover, many companies that deny pension benefits to their regular workers simultaneously provide special pension plans that guarantee those managers set benefits.[162]

V. LEGAL REFORM NEEDED

At the risk of stating the obvious, ERISA's goals of equity and security are under attack in the current political climate. The brusque, unforgiving rhetoric of "individualism" and "personal responsibility" - often euphemisms for social Darwinism - has become a virtual mantra for the Bush administration. As the unfolding discourse about the pension system exemplifies, the shrill proclamations about the superiority of an "ownership society" have obscured the reality and value of interdependency and mutual support.[163] Indeed, allies of the existing political regime have dubbed pensions a "relic of the past."[164] Accordingly,

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the case of the Enron-era scandals, the impact of executive stock compensation may have played a similar explanatory role").

158. *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 637-38 (1990) (recognizing the limitations ERISA places on the PBGC's insurance coverage).

159. Cummins, *supra* note 2, at A22 (noting that PBGC does not cover ever-increasing health benefits and will not necessarily cover interim pension raises).

160. Lowenstein, *supra* note 3, at 58. *See also* Cummins, *supra* note 2, at A22-23.

161. Barlett, *supra* note 1, at 40. In addition, high-profile companies with ties to the Bush Administration have improperly diverted money from the workers' pension fund to executive and bonus plans. Mary Williams Walsh, *U.S. Inquiry Found Halliburton Mishandled Some Pension Funds*, N.Y. TIMES, Nov. 11, 2005, at C3.

162. Weller & Singleton, *supra* note 6, at 1.

163. *See* Paul Glastris, *Bush's Ownership Society: Why No One's Buying*, WASH. MONTHLY, Dec. 1, 2005, at 14 (noting that the movement to shift responsibility for benefits to individuals often draws on tropes of personal responsibility and individual choice).

164. Alex Pagon, *The Next Bailout? How Underfunded Pensions Put*

it should not be surprising that the proposals to amend ERISA fall far short of the mark. Not only would the pending legislation fail to salvage the integrity of the pension system, it could actually aggravate the crisis in some instances.

A. *The Structural and Practical Limitations of Pending Legislation*

As set forth more fully above in Part I, the worsening pension situation has received considerable attention by commentators and politicians alike. Nonetheless, the proposed reforms before the 109th Congress do little to correct ERISA's structural defects.[165] The ensuing discussion analyzes the most significant initiatives currently being debated in Congress.

1. *Intensification of ERISA's Perverse Incentive Structure*

The Employee Pension Preservation Act of 2005[166] may lead the pack as the most Orwellian because it actually permits airline industry pensions to restructure their underfunded liabilities over a twenty-five year period. This "reform" would, if enacted, add substantially to the uncertainty surrounding the viability of pension plans for individual employees. In short, the incentive to underfund would continue largely unimpeded for the foreseeable future.

Taxpayers at Risk, NAT'L TAXPAYERS UNION FOUND. POLICY PAPER (Aug. 18, 2003), *available at* http://www.ntu.org/main/press.php?PressID=166&org_name=NTUF.

165. *See* Pension Protection Act of 2005, H.R. 2830, 109th Cong. (2005) (locking plans into vesting and accrual schedules that bar lump-sum distributions to divest liabilities, setting a fifteen-year amortization schedule (subject to exceptions), creating requirements for multiemployer plans that are in financial trouble, and establishing standard interest-rate and mortality assumptions for lump-sum plans); Employee's Pension Security Act of 2005, H.R. 4055, 109th Cong. (2005), (restructuring plans to require the assets to be held in trust by a joint board, requiring clear information-dissemination that includes investment data, and placing limits on distress terminations, and giving participants the right to intervene and challenge bankruptcy plans); Employee Benefits Protection Act of 2005, H.R. 1058, 109th Cong. (2005) (extending pension benefits to independent contractors and contingent workers); Preservation of Defined Benefit Plans Act of 2005, H.R. 4274, 109th Cong. (2005)(creating supplemental notice provisions and clarifying the application of age-discrimination principles to benefit reductions); Pension Preservation and Savings Expansion Act of 2005, H.R. 1961, 109th Cong. (2005) (creating additional notice requirements concerning defined-benefit-plan beneficiaries); Employee Pension Preservation and Taxpayer Protection Act of 2005, H.R. 2106, 109th Cong. (2005) (setting forth transition rules for plans that are about to terminate).

166. S. 861, 109th Cong. (2005).

Another troubling initiative, the Pension Protection Act of 2005, has already been approved by the House[167] and the Senate.[168] The House version includes a provision that would create, under Section 502 of ERISA, a new cause of action for pension plans to, in effect, sue plan beneficiaries for damages. In other words, ERISA would allow plans to recover from pension beneficiaries if those beneficiaries successfully litigated their ERISA claims, further reducing the incentive for beneficiaries to enforce pension rights. The companion bill in the Senate does not currently contain this language, but the product of the House/Senate Conference Committee may very well incorporate this counterproductive element.

2. *Perfunctory Treatment of ERISA's Fundamental Defects*

Several other bills would merely make minor changes in the name of achieving meaningful reform. Some potential amendments to ERISA include additional requirements concerning the disclosure of information about the status of participants' benefits and fund investments.[169] These initiatives offer some promise, but they do not address the fundamental flaws of ERISA regarding malfeasance in pension administration. Other legislation would increase PBGC premiums and create risk-based premium increases.[170] These are similarly useful but not sufficient, in and of themselves, to effect substantial reform because they fail to adequately reward plaintiffs who seek to reform plan administration. Another proposal, entitled the Pension Fairness and Full Disclosure Act of 2005, would limit the availability of benefits under an employer's nonqualified deferred-compensation plans if traditional pension plans undergo a distress termination.[171] Although this might decrease the incentive to short-change traditional pensions in favor of executives' top-hat plans, the pending legislation would do little to stave off pension-plan distress.

The bill that would create an "advocate" position and a clearinghouse of pension data for beneficiaries could be the most helpful initiative currently under consideration.[172] At a minimum, the proposal highlights the current opacity of ERISA regulations and pension plans; however, it also would add layers of bureaucracy to an already Byzantine system. The newly created

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167. H.R 2830 (2005).
168. S. 1783 (2005).
169. H.R. 4055 (2005); H.R. REP. NO. 2830 (2005).
170. H.R. 2830 (2005); S. NO. 1783 (2005).
171. S. 991 (2005).
172. S. 608 (2005).

"advocate" position would exist within the Department of Labor, and it would be vulnerable to the political pulls of that agency.[173] In addition, creating a mammoth depository of ERISA plan information could paradoxically obscure the critical information most needed by plan beneficiaries. In other words, a library of sorts with respect to ERISA information may be as unhelpful in explicating pension rights as many SPDs have been.

B. The Requisite Components of True Reform

To avoid a complete pension fiasco, ERISA's legal framework must fully vindicate the original purposes of that statute: to improve transparency and accountability with respect to plan administration and, consequently, to increase retirement security as well as equity among workers.[174]

Procedural reform must therefore address the lack of useful information available to participants. In particular, any amendments must enable plaintiffs to formulate reasonable expectations about their livelihoods in retirement based on clear and reliable pension information.[175] In addition, decisive action must be taken to ensure there is meaningful review of pension practices.[176] In this regard, private enforcement actions must be accorded the efficacy and importance they deserve.[177]

ERISA reforms must also remedy the substantive shortcomings of the statute. The loopholes that permit systematic underfunding must be closed.[178] Moreover, insurance under the PBGC should not be used to leverage unfair economic concessions in the context of threatened bankruptcy and otherwise.[179]

C. No Time Like The Present: Proposed Statutory Amendments To Achieve Actual Equity and Pension Security

ERISA, as currently administered and interpreted, affords little protection to plan beneficiaries. While the legislation pending before Congress offer certain piecemeal changes, the

173. *Id.*
174. For further discussion of the propriety of this approach, *see supra* Part II.A.
175. For further discussion of the propriety of this approach, *see* Cummings, *supra* note 62, at 880-81; *see also supra*, Part III.B.1.
176. For further discussion of the propriety of this approach, *see supra* Part III.B.2.
177. *See supra*, Part III.B.3. (discussing the propriety of this approach).
178. *See supra*, Part II.B. (discussing the propriety of this approach).
179. *See supra*, Part II.B. (discussing the propriety of this approach).

proposals below constitute a more comprehensive approach to reorienting ERISA to its original intent.[180]

1. Provision of Tools Better Enabling PensionBeneficiaries to be Active Stewards of Their Plans

A number of pension administrators evidently have assumed, much like some corporate executives and accountants in the 1990s, that employees and shareholders can be kept in the dark about improper financial practices – at least until the damage has been done. The following reforms should enhance transparency and, therefore, accountability concerning the pension system. Greater transparency and accountability will also spawn improved equity and security.[181]

a. Complete and Accurate Disclosures

Plan beneficiaries must receive clear, truthful, and current information about the status of their pensions. ERISA must be amended to make explicit that corporations shall affirmatively and regularly produce information about pension status in simple terms – that is, the "plain language" is, in fact, plain language.[182] Thus, employers must provide semi-annual notices that concisely report pension assets and liabilities as well as the risk levels of pension investments. ERISA should also require companies to disclose in writing immediately and succinctly any proposed and actual changes to plan provisions.[183]

b. Complete and Accurate Funding Calculations

This category of reforms relates to the first because many companies currently use a number of actuarial estimates and discounting methods that misleadingly alter the outlook for their pension funds.[184] This creates shifting sands on which pension

180. Even the Bush Administration, which has close ties to big business, has recognized that the status quo must be addressed. Deb Reichman, *Bush Urges Congress to Pass Stricter Rules on Pensions*, MINNEAPOLIS STAR-TRIBUNE, Dec. 6, 2005, at D3.

181. *See supra*, Part III. (analyzing the symbiotic relationship between transparency and accountability - and lack thereof - as well as the connection to pension equity and security).

182. *See supra*, Part III.B.1. (discussing how ERISA's existing disclosure provisions often do more to obscure than to inform).

183. The current legal regime plainly does not provide for this. *See, e.g.*, Holloway, *supra* note 70 at 185. "ERISA looks as though it justifies prompt notice, but ERISA analysis and information is in the gray areas of prompt notice; therefore, any decision eventually raising a prompt notice issue may be ripe with managerial uncertainty for plan administrators and managers." *Id.*

184. Albert B. Crenshaw, *Rule Would Put Pension Deficits on the Books*,

beneficiaries have built their expectations for retirement. Corporations must be required to adopt standardized actuarial calculations and accounting procedures, including the use of a discount rate that is anchored by an independent and verifiable methodology – and to adhere to those standards.[185] This will ensure that pension liabilities can be viewed in more absolute terms and that underfunding liabilities will not disappear by accounting fiat.

c. Independent Auditing

In response to the accounting scandals of the 1990s, Congress required the creation of independent auditing committees by companies pursuant to Sarbanes-Oxley.[186] A similar approach should be incorporated into ERISA's scheme. Importantly, pension auditing committees should consist of trustees, plan administrators, and plan beneficiaries in equal numbers.[187] These committees would review and evaluate pension investments, assets and liabilities as well as administrative expenditures and other items that have a material impact on financial standing. The diversity of membership, especially the inclusion of well-informed plan beneficiaries, should provide a powerful check on any potential corporate malfeasance.

2. Meaningful Consequences for Pension Underfunding and Mismanagement

Given the interrelationship between accountability and pension equity, as well as security, the following reforms would enhance the value of ERISA for ordinary beneficiaries. In short,

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WASHINGTON POST, Nov. 11, 2005, at D3 (discussing possible rule changes that would affect pension accounting practices); *see also* Lowenstein, *supra* note 3, at 56 (noting that employer's can hide actual future liabilities by applying a speculative discount rate).

185. *See, e.g.*, PENSION BENEFIT GUARANTY CORPORATION, 2004 ACTUARIAL REPORT, 15-17, *available at* http://www.pbgc.gov/docs/2004_actuarial_report.pdf (setting forth detailed actuarial assumptions that should underlie benefit projections).

186. *See* 17 C.F.R. § 240.10a-2 (implementing Sarbanes-Oxley requirements).

187. For analysis with respect to the importance of transforming board membership, *see generally* Clara Jeffery, *Sink or Swim*, MOTHER JONES, Sept./Oct., 2005 ("According to the SEC, more than half of consulting firms that advise pension plans also work with money managers – conflicts of interest that cost pension funds between 10% and 15% of their assets."); Gretchen Morgenson, *Merrill Unit Subpoenaed On Pensions*, N.Y. TIMES, Dec. 2, 2005, at C2 (describing the SEC investigation into possible conflicts of interest for pension advisers).

these provisions should minimize the likelihood that employers will not be able to balance their books on the backs of beneficiaries.

a. Expanded Causes of Action

Following the lead of Sarbanes-Oxley, ERISA should feature a robust whistleblower provision.[188] Currently, ERISA fails to protect employees from retaliation for good faith reports of suspected ERISA violations and for internal complaints about apparent violations.[189] Nor can plaintiffs maintain whistleblower actions under more frequently favorable state laws because of the breadth of ERISA preemption.[190]

As Congress recognized in enacting Sarbanes-Oxley, employees are often the best situated to learn about and report evident illegalities by companies. To encourage vigorous monitoring and reporting activity by employees, ERISA must be amended to create a cause of action for employees who experience retaliation for doing the following: making internal or external reports, whether formal or informal,[191] when those reports – even if ultimately proven incorrect – were based upon a good faith belief that a suspected violation of law, rule, or professional or ethical standard occurred.[192]

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188. Although ERISA does provide a claim for retaliation, it is circumscribed and, in any event, the remedies for retaliation are limited. 29 U.S.C. § 1140; McBride v. PLM Int'l, Inc., 179 F.3d 737 (9th Cir. 1999).

189. King v. Marriott Int'l, Inc., 337 F.3d 421, 428 (4th Cir. 2003) (determining that whistleblower actions under § 1140 do not apply to internal complaints); *but see* Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (finding internal complaints may be sufficient to satisfy Section 1140).

190. *Hashimoto*, 999 F.2d at 408 (ruling that an employee's state-law claim for retaliation was preempted because it would require interpretation of ERISA plans about which she had complained); McLean v. Carlson Co., Inc., 777 F. Supp. 1480, 1483 (D. Minn. 1991) (holding that an employee's whistleblower lawsuit under state law was preempted by ERISA).

191. Other employment-related statutes provide similar protection. *See, e.g.*, 42 U.S.C. § 2000e-3 (providing protection from retaliation for individuals who "opposed any practice" that violates Title VII). To ensure that ERISA rights are fully protected, employee's reports to coworkers should be adequate to trigger whistleblower protection so long as the employer has actual or constructive knowledge of the reports.

192. This expansive protection will encourage the requisite reporting activity as Congress evidently recognized when enacting Sarbanes-Oxley. Larry Cata Backer, *Enron and its Aftermath: The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 ST. JOHN'S L. REV. 897, 942 n.171 (2002) (citing 148 CONG. REC., S. 6759 (2002)) (confirming that Sarbanes-Oxley "protects whistleblowers who reveal unethical acts by the companies for which they work").

Congress should also amend ERISA to give employees a private right of action to address chronic underfunding of pensions.[193] In a nutshell, pension beneficiaries would have a legal claim for companies' failure to make timely and/or adequate contributions to their funds. The efficacy of this amendment necessarily turns on the elimination of the corporate loopholes discussed more fully below in Part IV.C.2.c. The contours of underfunding suits would track those of existing claims under ERISA, except that they would include the enhancements outlined in the next subsection.

b. Enhanced Enforcement Activity

Especially since the Supreme Court's decision in *Firestone*, companies have been accorded a high degree of deference in their decision-making regarding pension management.[194] Potential plaintiffs have little reason to go to the time and expense of trying to enforce pension rights in a framework wherein the judiciary, by law, does not rigorously scrutinize pension administration and, further, wherein plaintiffs could be punished financially for not prevailing in a highly complex and technical area.[195]

Therefore, true reform must include a number of non-monetary items related to litigation of ERISA claims. First and foremost, Congress should abrogate *Firestone* to ensure that substantive judicial review of plan decisions occur. In addition, the statute must eliminate the requirement that ERISA plaintiffs exhaust administrative remedies prior to pursuing court actions.[196] This amendment should minimize the expense of protecting pension benefits going forward.[197] Likewise, the statute of limitations for filing suit should be extended to six years. Pension beneficiaries often do not have access to key information that would alert them to ERISA violations, so ordinary employees need ample time to investigate potentially unlawful conduct. The statute must also create a right to class relief to eliminate costly class-certification litigation, especially in breach-of-fiduciary duty

193. *See supra*, Part I. (explaining how the widespread and seemingly expanding practice of underfunding necessitates this cause of action).

194. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112-13 (1989).

195. Jessica Westbrook, *Resolving the Dispute Over When Attorney's Fees Should Be Awarded Under ERISA in Two Words: Plaintiff Prevails*, 53 ALA. L. REV. 1311, 1319 (2002) (illustrating the crucial role of attorney's fees awards).

196. Kennedy, *supra*, note 85 at 361 (analyzing ERISA's exhaustion requirement).

197. 29 U.S.C. §1132(g)(1) does not permit parties to recover attorney's fees incurred during the administrative phase of the dispute; rather, ERISA limits awards to fees incurred after the start of formal judicial proceedings. Parke v. First Reliance Std. Life Ins. Co., 368 F.3d 999, 1011 (8th Cir. 2004).

cases. Finally, Congress should amend ERISA expressly to authorize courts to fashion broad equitable relief, such as placing pension plans in receivership in cases of egregious underfunding or mismanagement.

In terms of monetary awards, ERISA must explicitly grant the attorney's fees and costs incurred by prevailing plaintiffs and preclude the award of attorney's fees and costs to defendants. Moreover, the right to a jury trial as well as punitive damages and a treble damages provision must be unequivocal under ERISA.[198] These amendments will substantially increase the legal exposure for companies that underfund or mismanage their pensions, so ERISA compliance should improve markedly.

c. Closed Corporate Escape Hatches

Lately, the preferred means for companies to evade their mounting pension obligations seems to be bankruptcy proceedings. As discussed more fully above in Part I, several high-profile corporations terminated, via the bankruptcy process, their pension plans as part of their overall reorganization scheme. In so doing, these companies have dumped their pension obligations onto the PBGC.[199] Corporations also have terminated their pension plans in connection with the companies' outright liquidation, requiring the PBGC to stand in line with all other creditors for what will likely be a fraction of the obligation it assumed when the pension plan terminated in distress. Given that the PBGC itself does not have sufficient assets to cover the liabilities of underfunded pensions at the present time, bankruptcy represents a large escape hatch indeed.[200]

ERISA must bestow on the PBGC a "superpriority" status in bankruptcy proceedings, so "no assets of a company with a terminated pension program [would] be transferred until the reimbursement claim of PBGC is satisfied fully."[201] This would

198. Other employment related statutes provide for the right to a jury trial, punitive damages, and even the multiplication of damages. *See, e.g.*, 29 U.S.C. §§ 201, *et seq.* (permitting a trial by jury and the award of double damages to prevailing plaintiffs). As anti-trust jurisprudence demonstrates, the damages multiplier is particularly important in encouraging the private bar to litigate cases in a highly technical and costly area of law. 15 U.S.C. §§ 1, *et seq.*; *see also* Minn. Stat. § 363A.29, Subd. 4 (authorizing the award of treble damages to plaintiffs in employment cases).

199. *See, e.g.*, Edward Zelinsky, *The Defined-Contribution Paradigm*, 114 YALE L.J. 451, 465-66 (2004) (noting that the PBGC bears the risk of loss in a catastrophic default by a pension plan).

200. For further discussion of the impact of bankruptcy proceedings and the PBGC's underfunding on pensions, *see, supra,* Part I.

201. Keating, *supra* note 16, at 100.

give creditors an incentive to police the pensions of companies with which they conduct business because the status of those plans would have a material impact on the creditors' recovery in bankruptcy.[202] This amendment also should circumscribe the moral hazard for companies intending to reorganize.

In any case, ERISA and the Bankruptcy code should be amended to require employers to decapitalize before declaring bankruptcy. This prerequisite would motivate employers to search for solutions other than bankruptcy and plan termination in difficult times.[203] In addition, it would avert competition between employees and creditors for promised retirement benefits.

Even before a company reaches the point of potential bankruptcy, however, ERISA should mandate accountability. In particular, Department-of-Labor waivers must be eliminated completely.[204] Even when underfunding has been amortized and, presumably, corrected over time,[205] the underfunding has harmed pension funds by reducing the availability of interest-generating capital. Moreover, ERISA should require PBGC premium rates to be tied to the actual risk posed by an underfunded plan.[206] In short, this means that the size of a PBGC premium assessed against an employer should be directly proportionate to the likelihood of default, especially if a plan is chronically underfunded or reliant upon accounting "adjustments" to appear appropriately funded.

VI. CONCLUSION

Congress adopted ERISA at a time when the retreat from the principles animating the New Deal began to accelerate. Nonetheless, ERISA embraces core values that informed the New Deal era – most notably a notion of mutual responsibility and interdependent welfare. Accordingly, ERISA labors under an internal tension that has impeded the achievement of actual transparency and accountability concerning pension

202. *Id.*; Christine Matott, *Airlines in Distress: Can the Pension Benefit Guaranty Corporation Weather This Crisis?*, 55 DEPAUL L. REV. 169, 192 (2005) (asserting that moving the PBGC's lien to priority status in bankruptcy could eliminate the practice of foregoing pension payments to pay other creditors).

203. Alternatives to bankruptcy could include private restructuring of creditor debt or seeking other sources of capital investment.

204. 29 U.S.C. § 1083.

205. 29 U.S.C. § 1084.

206. Absent this reform, the PBGC will soon be overwhelmed beyond remediation with debt. Lowenstein, *supra* note 3, at 58. *See also* Cummins, *supra* note 2, at A22-23. For an excellent illustration of the limited protection afforded by the PBGC, *see generally* Keating, *supra* note 16, at 65.

administration. Equity and security, two of ERISA's most important objectives, have suffered as a result.

Opportunistic behavior by unscrupulous corporate executives and administrators, aided and abetted by ERISA's procedural and substantive defects, has put the integrity of the pension system in grave jeopardy. Unfortunately, the nation has been down this road before with respect to lending practices in the 1980s and securities practices in the 1990s. The economic and social fallout from those debacles should be a wake up call for the country as the pension crisis expands.

To avert a disaster akin to, or even worse than, the savings-and-loan and corporate-governance fiascos of the 1980s and 1990s, respectively, Congress and courts must act swiftly and decisively. The reforms set forth in this article would go a long way toward compelling full transparency and accountability. Sarbanes-Oxley is instructive on this point. As people with first-hand knowledge of corporate practices, employees must be empowered to identify and report suspected violations without fear of retribution. Similarly, beneficiaries – whether current employees of the companies at issue or not – need meaningful recourse via private enforcement actions to address any ERISA violations. The efficacy of this approach would obviously depend on fortified disclosure, funding, and auditing requirements as well as the closure of corporate loopholes.

In some sense, the proposed reforms could be viewed as costly. Even if that were true, continuing to tinker at ERISA's margins will be far more costly in the long run – both in economic and in social terms. We cannot afford, both literally and figuratively, to delay true reform any further.