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LOST PENSION MONEY: WHO IS RESPONSIBLE? WHO BENEFITS?

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I. INTRODUCTION

Pension policy analysts largely take for granted that workers who accrue pension rights can and do claim their pensions when they are eligible. In a dynamic economy where workers change jobs and residences, and employers go out of business, move, or are taken over, workers sometimes have difficulty locating a former employer to claim a pension benefit. For similar reasons, pension plans have trouble finding former plan participants with whom they have lost contact. Many workers have “lost” pensions—pension benefits that they are unable to locate and claim. Workers, or the beneficiaries of deceased workers, may forget, or not know that they are entitled to a benefit and, therefore, never claim it.

Unclaimed pension money creates a problem for some vested terminated pension participants. It also creates a problem for plan sponsors, particularly in defined contribution plans. Pension plans must determine their legal responsibility concerning the disposition of the money. Individuals who could use the money to support their retirement and do not receive it suffer a financial loss.

In this article, we examine what is known about the extent of this problem, the responsibilities of the government agencies that have jurisdiction over regulating the problem, and what is current U.S. policy as found in the laws and regulations governing private pensions. We also explore how U.S. policies could be changed to lessen the amount of unclaimed money, and finally, what the policy options are concerning the disposition of money that

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ultimately never is claimed.

A. Cause of the problem

The increasing mobility of workers and the shorter vesting periods of pensions have raised the likelihood that a worker will suffer the problem of a lost pension. American workers typically switch jobs several times during their employment years. In 2000, workers' median tenure with their current employer ranged from four to ten years depending on the worker's age and sex.¹ Men and older workers have longer tenures than women and younger workers.

While the workforce has become more mobile, the laws governing pension vesting have reduced the maximum years required for vesting. The effect of both changes is that more workers would be expected to have accrued benefit rights with former employers. In 2004, a full-time worker with pension coverage may vest in some benefit as quickly as a year of participation in the plan and for most benefits within five years.² Workers vest in their own contributions immediately. Over one's work life, a person could work for four or five employers and be entitled to a pension from each one. Accumulation of benefits that are not held by the participant, but are held by the employer, and are due twenty to thirty years in the future increases the likelihood that the worker will not claim the benefit or the benefit will be lost.

A former employer may be difficult to locate. Workers who switch jobs may be unable to locate a former employer and its pension plans if the employer moved to a different location, closed a plant or office, was acquired by another company and changed its name, merged with another company and changed its name, split into different parts none of which retained the former name, went bankrupt, or simply ceased operations.³ Thousands of plans

1. U.S. Department of Labor, Bureau of Labor Statistics, June 2001, Monthly Labor Review: The Editor's Desk, *Tenure Down for Men Up for Women*, at <http://www.bls.gov/opub/ted/2001/june/wk4/art05.htm> (last visited Feb. 23, 2004).

2. I.R.C. § 411(a)(2) (2000). In order for a plan to be qualified, it must vest participants in employer contributions completely after five years of employment or gradually starting at 20% of contributions after three years of service and completely after seven years of service. *Id.*

3. The Authors calculate that from October 1, 1996 through September 30, 2002, 253,648 business bankruptcies were filed in U.S. bankruptcy courts. U.S. Courts, *Judicial Business of the United States Courts: Annual Reports of the Director*, available at <http://www.uscourts.gov/judbususc/judbus.html>. Authors' calculate that in the six years from 1996 through 2001, 23,461 mergers and acquisitions were filed with the Federal Trade Commission. Federal Trade Commission's, *HSR Annual Report to Congress for Fiscal Year 2001*, at www.ftc.gov/os/2002/09/hsrarcy2001.pdf (last visited Feb. 23, 2004).

are terminated each year, often due to mergers and acquisitions. For example, in 1997 alone, nearly 3,500 plans terminated.⁴ Often, pension obligations are transferred to a successor company after a merger or reorganization. The more changes that have occurred, the greater the difficulty a worker will have in tracing a former employer. The difficulty also increases if the worker moves to a different city. Multiemployer plans that unions cosponsor with employers may also be difficult to locate. Unions also can merge, change names, and terminate.

Surveys of workers consistently show that some do not know whether they are covered by a plan. For example, in 1979, 7% of men and 10% of women in private wage and salary employment in the U.S. labor force did not know if they were covered by a pension. This compares with 54% of men and 33% of women who responded that they were covered.⁵ Some workers who respond that they are unsure of their coverage are probably not covered by a pension. Surveyed workers who are unaware of their coverage that have subsequently changed jobs—many of whom are nearing or have reached retirement age—often do not know that they are entitled to claim pension benefits.

The lost pensioner/lost pension problem is one of connecting pension plans and former participants. From the national perspective of the whole pension system, the problem is one of managing widely dispersed information. It relates to record-keeping and information management by pension plan sponsors, pension plan participants, and the government. For employees, it may arise in part because they do not keep records, and often do not understand what records are needed. The lack of a central, reliable depository of information means that the burden of record-keeping is on participants.

II. DEFINITION OF THE PROBLEM

Unclaimed pension money is a problem of lost plans and lost pensioners. A pension plan that is holding money for a participant it cannot find is considered a “lost pensioner” problem. For participants looking for pensions from employers who have gone out of business, moved or merged with another company, it is a “lost pension” problem.

The Employee Retirement Income Security Act of 1974 (ERISA) does not define when a participant or a pension should be considered “lost”. In this article, lost pension money is money held by a

4. Randy Myers, *Reunited and it feels so good: PGBC detectives match pensioners with long-lost benefits*, PLANSPONSOR.COM, (Oct. 1999) at <http://www.assetpub.com/psoct99/psoct99010.html>.

5. LAURENCE J. KOTLIKOFF & DANIEL E. SMITH, PENSIONS IN THE AMERICAN ECONOMY (1983).

qualified pension plan⁶ that the party entitled to it has not claimed. The money may be due to either the retiree or the retiree's beneficiary. The money may be from a defined benefit plan⁷ or a defined contribution plan.⁸ Finally, the employer or the employee may have contributed the money. The common elements are that the participant is entitled to a non-forfeitable benefit,⁹ the participant or the participant's beneficiary is eligible to claim an unreduced benefit, and the benefit has not been claimed.

The definition of what pension money is lost has a temporal element. Pension money cannot be considered lost to the participant or the participant's beneficiary until one of them is entitled to collect the money. The point in time that a participant or his/her beneficiary is entitled to receive pension money is regulated by statute,¹⁰ but within the range allowed by statute, it is also governed by the pension plan terms. Each plan can determine, within the parameters of the ERISA and the Internal Revenue Code (IRC), when to allow a participant access to the pension money.¹¹ Generally there is a range of time over which a participant is entitled to the money. For instance, participants generally have an option of retiring early and taking a reduction in their monthly benefits. Often, vested participants who terminate employment with the plan sponsor before the plan's early retirement age generally are required by plan rules to wait until the plan's normal retirement age before they are eligible to collect their benefits. A participant may decide to delay applying for benefits past the normal retirement age.¹² The Treasury Department, however, requires that in most cases pension benefits be paid starting by age 70 1/2 or else penalties apply.¹³ The variability in age that a pension benefit may be claimed complicates the determination that the pension is unclaimed or lost.

A second complication in defining a lost pension arises from the differences between defined benefit plans and defined

6. A qualified plan is a pension plan, profit-sharing plan or stock bonus plan which has been determined by the Internal Revenue Service to be eligible for special tax status. I.R.C. § 401(a) (2000).

7. ERISA § 3 (35), 29 U.S.C. § 1002(35) (2000).

8. ERISA § 3 (34), 29 U.S.C. § 1002(34) (2000).

9. See ERISA § 3(19), 29 U.S.C. § 1002 (19) (2000) (explaining the term "non-forfeitable"). In this paper "non-forfeitable benefit" is used interchangeably with "vested benefit".

10. I.R.C. § 401(a)(9) (2000).

11. Typically, defined benefit plans provide for benefits at normal retirement as defined by the plan and often reduced benefits at an early retirement date. Defined contributions plans, more often than defined benefit plans, allow for distributions upon leaving the employment of the sponsoring employer.

12. KOTLIKOFF & SMITH, *supra* note 5.

13. I.R.C. § 401(a)(9)(A)(2000).

contribution plans. With most defined benefit plans, a benefit is due only during the lifetime of the participant or the beneficiary. If the participant is dead, with no beneficiary, no benefit is due, and therefore no pension can be considered "lost". For this reason, the defined benefit plan sponsor generally will not know if a pension benefit is not claimed because the worker cannot find the plan to claim the benefit, or the worker has died with no beneficiaries. With a defined contribution plan, however, the entitlement typically is not based on the life of the participant or his beneficiary, but passes on to the participant's heirs. Therefore, a defined contribution benefit may be "lost" for more than a lifetime.

III. PREVALENCE OF THE PROBLEM

In 2001, an estimated \$141.5 billion was paid out in retirement benefits to people over the age of 65.¹⁴ That same year, there was an estimated \$10.7 trillion held as retirement assets, of which 78% was in employment-based retirement plans.¹⁵ Retirees received monthly annuities from their defined pension plans, distributions from the 401(k)s, and withdrawals from their Individual Retirement Accounts. Although the majority of people receive the money they are entitled to from their retirement plans, a significant, but unquantified, number of people never claim their money. Although there are no statistics on the number of lost pensioners or the amount of money unclaimed by participants or their beneficiaries, we can draw some inferences about the extent of the problem.

Lost pensions in the United States in the early twenty-first century are primarily a problem with defined benefit plans. These plans were the dominant plan type a decade and more ago when workers who now are of pensionable age were accruing benefits.¹⁶

14. This figure is based on the author's calculations of 33,259,000 people over the age of 65 in the United States. U.S. Census Bureau: Demographic Surveys Division, Continuous Measurement Office, *2001 Supplemental Survey Profile*, (2001). It also based on data from the Employee Benefits Research Institute finding 34.9% of people over the age of 65 received income from an employment-based plan and that the average amount was \$12,187. EBRI Retirement Income Research: 2003 Findings, *Retirement Annuity and Employment-based Pension Income* (Jan. 2003), at http://www.ebri.org/findings/ret_findings.htm (last visited Feb. 14, 2004).

15. *EBRI Research Highlights: Retirement benefits, Special Report SR-42, #258*, EMPLOYEE BENEFIT RESEARCH INSTITUTE, June 2003, at 7. Individual Retirement Accounts made up 22.4% of the assets, defined benefit plans, 17%; defined contribution plans, 20%; private life insurance, 12.6%; federal government plans 7.6% and state and local government plans, 20.4%. *Id.*

16. See Douglas Fore, *Do we have a retirement crisis in America?*, TIAA-CREF INSTITUTE, RESEARCH DIALOGUE #70, 2003, at 4-5; *EBRI Research Highlights: Retirement Benefits, Special Report SR-42, #258*, EMPLOYEE BENEFIT RESEARCH INSTITUTE, June 2003, at 7.

The Pension Benefit Guaranty Corporation alone is holding \$80 million in unclaimed pension benefits from terminated defined benefit plans.¹⁷ These benefits have gone unclaimed presumably in part because the retiree, family members, or other beneficiaries either were unaware that the benefits existed or did not know how to claim them.

For workers with defined contribution plans, often the account balance can be transferred to an IRA or frequently can be cashed out when a participant leaves employment, presumably resulting in less lost pension money if the participant takes the money. As just explained, however, the entitlement for a beneficiary arguably is more likely to occur with a defined contribution plan because the entitlement survives both the death of the participant and the named beneficiary. Often, plans do not collect the Social Security number for beneficiaries, making it difficult to locate them.¹⁸ Also, workers are more likely to know whether they are participating in a defined contribution plan than a defined benefit plan. Frequently a condition of participation is that workers contribute to the plan. Conversely, participation in defined benefit plans is automatic if the worker's job is covered and does not require contributions by the worker; thus the worker may be unaware of his or her participation in the plan. Nonetheless, anecdotal evidence indicates that with the growth of 401(k) plans, finding lost 401(k) benefits is increasingly a problem.¹⁹ When it occurs, the problem of finding a lost pension tends to be more difficult for participants in defined contribution pensions than defined benefit pensions. Defined contribution pension plans do not pay insurance to the Pension Benefit Guaranty Corporation, as do defined benefit plans, and thus one less government agency is likely to have information concerning their location.

Information from the federal pension system and the insurance industry also gives some indication as to the extent of the problem. Between 1989 and 1997, more than \$1 billion in pension checks to retired federal government workers were uncashed, which is presumably a problem of lost pensioners, since federal government pensions are relatively easy to claim.²⁰ According to another

17. Pension Benefit Guaranty Corporation: Jan. 22, 2003 News Release, *PBGC Pension Search Finds 15,000 Owed \$61 million in Benefits*, at http://www.pbgc.gov/news/press_releases/2003/pr03_17.htm (last visited Feb. 23, 2004).

18. Legislation to protect against identity theft, which would reduce the use of Social Security numbers, would make it more difficult to find lost pensioners and their beneficiaries.

19. Clifton Linton, *Finding Lost 401(k) Money May Take Serious Sleuthing*, http://www.mpowercafe.com/retirement/features/features.1.3.1_10162000.html (last visited Feb. 23, 2004).

20. Joan Caplin, *Your Missing Money*, MONEY MAGAZINE, Dec. 1997, at 19,

estimate, \$1 billion is held in approximately 1,800 U.S. life insurance company accounts for unclaimed pension plans, individual annuities and life insurance policies. These benefits have gone unclaimed presumably because family members and beneficiaries were unaware that the policies existed at the time of death of the policy holder.²¹ These figures suggest that the total assets that are part of the lost pensioner lost pension problem are substantial.

Though not part of the pension system, U.S. Savings Bonds can be purchased as a form of retirement savings. Savings Bonds are purchased by individual savers from the government. They currently have maturities of thirty years, though at one time they had maturities of forty years. Savings bond holders in the United States hold more than \$7 billion in savings bonds that have matured and are no longer paying interest. To deal with this problem, the Bureau of Public Debt has undertaken an advertising campaign to inform people that the bonds no longer pay interest once they have reached maturity, and that they should redeem the bonds.²²

Statistics provide some evidence of the number of workers potentially affected. For workers ages forty-five to fifty-nine in 1988, 13% of women and 21% of men indicated they had vested in a pension plan at a previous job. Not all of those workers, however, had deferred vested benefits because 9% of both women and men indicated they had received a lump sum from a prior job, leaving approximately 4% of women workers and 12% of men in the situation of having to find a pension from a former employer.²³

While no accurate statistics exist concerning the total amount of unclaimed assets in U.S. pension funds, some evidence suggests that in the United Kingdom it is between £10 billion and £77 billion.²⁴ This evidence for the United Kingdom, which has a labor force about 20% as large as that of the United States, suggests that the amount of lost pension money in the United States could be substantial. Because formal assistance by the government to people seeking lost pensions is greater in the United Kingdom than in the United States,²⁵ we would expect the lost pension problem in the United States to be proportionally larger, and could exceed \$100 billion.

21, 24.

21. Life Benefits Search Inc., *Money from Unclaimed Benefits* (2001), at <http://www.lifesearch.net/unclaimedbenefits.html>.

22. U.S. Department of the Treasury, Bureau of the Public Debt, *Public Debt Seeks Owners of Matured Savings Bonds*, THE BOND TELLER (November 2000) at <ftp://ftp.publicdebt.treas.gov/forms/sbt1100.pdf>.

23. Sophie M. Korczyk, *Gender and Pension Coverage*, TRENDS IN PENSIONS, (John A. Turner & Daniel J. Beller ed.) (1992).

24. Harriet Maunsell, *A View of the Pension Schemes Registry*, OPRA BULLETIN, Nov. 1998, at 26.

25. David Blake & John Turner, *Lost Pensions and Lost Pensioners: Is a National Registry of Pension Plans the Answer?*, BENEFITS QUARTERLY, July 1, 2001, at 51-64.

However, reliable information as to the size of the problem is simply unavailable, and the figure could be considerably smaller. In any case, there is reason to believe this problem is potentially serious among pension participants who change jobs.

IV. REGULATORY OVERVIEW

The law and regulation governing the disposition of private pensions and retirement money is found in the Employee Retirement Income Security Act (ERISA),²⁶ its amendments, and the Internal Revenue Code(IRC).²⁷ The U.S. Department of Labor and the Internal Revenue Service share jurisdiction over the regulation of private pensions. ERISA preempts states from regulating employee benefit plans, leaving the field of private pension regulation primarily a federal issue.²⁸

Congress set up the Pension Benefit Guaranty Corporation (PBGC) to ensure private defined benefit plans.²⁹ As such, it becomes the plan administrator for terminated defined benefit plans with insufficient funds to pay the plan's vested benefits. In this capacity, the PBGC has initiated an active program to locate lost participants.

In 1992, in part because of the problem of lost pensions and lost pensioners, Congress directed the U.S. Administration on Aging to provide funding for several pension counseling projects around the country. These projects were to "establish . . . programs to provide outreach, information, counseling, referral, and other assistance regarding pension and other retirement benefits, and rights related to such benefits".³⁰ The number of pension counseling projects has varied over time due to fluctuations in funding. In 2003, there were eight pension counseling projects covering fifteen states.³¹ The Department of Labor also has a program under the Employee Benefits Security Administration (EBSA), located in the Office of Participant Assistance, whereby benefit advisors assist individual participants from around the country with problems including finding a lost pension.³²

26. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 - 3058 (2004) [hereinafter ERISA].

27. I.R.C. 26 U.S.C. § 401 (2000).

28. ERISA §514(a), 29 U.S.C. § 1144(a) (2000).

29. 29 U.S.C. § 1301 (2000).

30. 42 U.S.C. § 3020e-1 (b) (2000).

31. Pension Action Center, *Appendix C: Pension Counseling Projects*, (May 27, 2003), at <http://www.pensionaction.org/publications/lostpension/appendixc.htm> (last visited Mar. 22, 2004).

32. U.S. Department of Labor Organizational Chart, *available at* http://www.dol.gov/ebsa/aboutebsa/org_chart.html. (last visited Sept. 17, 2003).

V. GOVERNMENT ASSISTANCE IN FINDING A LOST PENSION

To understand the shortcomings of the current system for assisting participants with lost pensions, and to understand what might be done to improve that system, it is necessary to consider first the current role of the federal government in assisting a former plan participant to try to locate a lost pension. Finding a lost pension is partly a problem of record keeping and tracking a former employer.³³ The problem is aggravated if the former plan participant cannot find records of former employment, records of plan documents, or records of previous plan payments. Several government agencies, including the Department of Labor, have records that are available to the public and may be useful in that search.

Employees can start by contacting the Social Security Administration to get a copy of their Social Security earnings record. This record will provide their former employer's federal ID number, which may help in tracking down the plan.

The Pension Benefit Guaranty Corporation (PBGC), which insures most private sector defined benefit plans, can provide the address of ongoing defined benefit plans paying pension benefit insurance premiums. It also maintains a Pension Search database to assist workers whose lost defined benefit plans have terminated with insufficient funding and have been taken over by the PBGC. Individuals can access this database on the Internet by searching by their names, the company's name or by state.³⁴ However, this Internet site does not provide any assistance for workers looking for a lost defined contribution plan.

The Department of Labor has documents that may help in locating a plan. These include Form 5500 that plans are required to file annually.³⁵ At one time, the Department collected the Summary Plan Description and Summary of Material Modifications, which summarizes significant changes in a plan, but the Department no longer collects these documents. Often, searchers are unable to find a lost pension through the Labor Department if the information they provide is more than a few years old.

Workers who are unsuccessful in locating former employers on their own can receive assistance in their search from several sources. First, the U.S. Department of Labor will assist workers in searches for lost pensions through the Office of Participant Assistance in the Employee Benefits Security Administration

33. Pension Benefit Guaranty Corporation, *Finding A Lost Pension*, (July 1999), at <http://www.pbgc.gov/publications/lostpendl.htm>, at 15.

34. Pension Benefit Guaranty Corporation, *Search for your Pension*, at <http://www.pbgc.gov/search/srchpension.htm>.

35. 29 C.F.R. § 2520.103-1 (b)(2)(i) (2003).

(formerly called the Pension and Welfare Benefits Administration) in Washington, D.C. and in its fifteen field offices. More than 100 people work in the national office to assist workers with their pension and health plan questions. Second, the eight pension counseling projects may provide assistance. Since the projects cover only fifteen of the fifty states, they do not provide complete coverage of the country. The Pension Rights Center in Washington, D.C., a nonprofit organization, also assists in finding lost pensions. Finally, some commercial companies will assist in a pension search for a fee.

Generally, a successful trace of a pension plan will result in finding the pension money in one of several sources. First, it is controlled by the plan administrator of the original or successor plan. Second, PBGC may have assumed responsibility for paying the pension. Third, the funds may have been transferred to an insurance company. A fourth category that poses particular difficulties is "orphan" plans. These plans have been abandoned by the plan sponsor and fiduciaries, sometimes as a result of death, neglect, bankruptcy, or incarceration of the plan sponsor. Since there is no fiduciary to administer the plan, there is no authority to distribute the benefits.

As of 2003, no statistical data exists on the likelihood of success for a worker looking for a lost pension. The PBGC cautions, however, "[n]one of the sources of information described in this section is likely to lead you directly, in one easy step, to the pension fund."³⁶

VI. NOTICE REQUIREMENTS

The obligation to initiate a claim for retirement benefits rests upon the participant.³⁷ The plan has a fiduciary obligation to pay benefits to those participants and beneficiaries entitled to benefits, but its obligation to seek participants or beneficiaries to initiate the payment of benefits is less clear and will be discussed in the next section.

The plan, however, does have a number of explicit reporting and notice requirements designed to ensure that participants know they are entitled to a pension. The plan administrator must give each participant a summary plan description (SPD) within ninety days of becoming a participant in the plan and to a beneficiary upon receiving benefits.³⁸ The plan administrator must also provide an SPD to the participant every ten years or every fifth year after a modification.³⁹ In this way, the law requires that

36. PBGC, *supra* note 33, at 15.

37. 26 C.F.R. § 1.401(a)-14 (2003).

38. 29 U.S.C. § 1024(b)(1)(A) (2000).

39. *Id.* § 1024 (B)(1)(B)(4).

the participant is provided current information regarding rights to a pension. A Summary of Material Modification must be furnished to participants within 210 days after the end of the plan year during which a modification was adopted.⁴⁰ Finally, the plan administrator is also required to furnish an SPD to a participant upon request, thereby giving participants who do not save their documents but who are able to locate the plan sponsor the ability to determine if they are eligible at the time that they want to collect benefits.⁴¹

The SPD must include information on eligibility for benefits and the conditions that must be met in order to collect benefits.⁴² The SPD is the basis for most employees' information about their future rights to a pension. Although the SPD does not ensure that a participant will collect benefits in the future, it is an important information tool that enables participants and their beneficiaries to determine if they are entitled to a benefit. It also includes information such as the plan sponsor, the plan administrator, and the address of the plan administrator that will assist in locating the benefits.⁴³

Compliance with and enforcement of notice requirements placed on plan sponsors is another area of regulatory concern. No information is available on the extent to which plans actually provide workers with the required information. Anecdotal evidence indicates that while large plans generally provide legally required disclosures, many small pension plans do not provide workers with these required documents. One small study of compliance with employee requests for disclosure found that less than 50% of firms provided the required documentation within the required period of thirty days from when the information was requested.⁴⁴

A second important participant notification requirement for plans is the deferred vested pension notice.⁴⁵ This notice is required to be given to each employee who has a vested pension right, terminates his/her employment with the sponsoring company, and is not yet entitled to begin distribution. This notice can be helpful years later in proving the worker's entitlement to a pension benefit. However, the notice is issued at the point the worker terminates employment with the sponsoring company. The benefit may not come due for twenty to thirty years from the

40. *Id.*

41. *Id.* § 1024 (b)(1)(B)(4).

42. ERISA § 102(b), 29 C.F.R. § 2520.102-3(j) (2003).

43. *Id.* § 2520.102-3(f).

44. Mitchell Langbert, *The Costs and Benefits of the Form 5500 Annual Report*, BENEFITS QUARTERLY, First Quarter 2001, at 54-65.

45. 26 C.F.R. § 301.6057-1(e) (2003).

time it is issued,⁴⁶ and many people throw away or lose old papers. In a study of individuals who came to an Administration on Aging pension counseling project, only 17% of the clients unable to locate their pension brought a deferred pension notice with them.⁴⁷

Deferred vested pension participants may also receive a notice from the Social Security Administration when they apply for Social Security benefits, called the Notice of Potential Private Pension Benefit. Administrators of plans covering 100 or more participants are required to file a Form 5500 annually with the Internal Revenue Service.⁴⁸ If the plan had any participants, entitled to a deferred vested pension terminate employment during the preceding year, the plan must also file Schedule SSA that lists participants who left entitled to a deferred vested pension.⁴⁹ The Schedule SSA lists the participant's name, Social Security number, the amount of the deferred vested pension, and the type of pension plan. From the information provided on this form, the Social Security Administration keeps a record for each individual. When the individual applies for Social Security benefits, the Social Security Administration sends the individual a notice indicating that she may be eligible to receive a pension. The Potential Private Pension Benefit Information gives the individual the name of the plan, the plan administrator's name and address, and the estimated amount of the benefit.⁵⁰ In this way, individuals are informed of the possibility that they may be entitled to a pension benefit at the time they are interested in retiring.

The problem with this notice, however, is that it is often inaccurate. Although, plan administrators are required to file information when the employee leaves the company, they are not required to amend the information if the benefit is paid out at a later date, or if the plan changes address, name or any other change that would subsequently make it difficult to find the plan. Amendments to the information provided in the Form SSA are voluntary.⁵¹ Often, if a participant later takes a lump sum distribution or a rollover to another plan or IRA, that information need not be filed with the SSA. The Social Security Administration, therefore, will send a notice to a former participant informing them that they may be entitled to a benefit

46. A person that works from age twenty-five to thirty-five, earning a pension, may not be eligible to collect that pension until the plan's normal retirement age of sixty-five, thirty years from the time the worker left the company.

47. Ellen A. Bruce, John Turner, & Dongsoo Lee, *Lost Pensions: An Empirical Investigation*, AARP, 2003.

48. I.R.C. § 6057(a)(1) (2000).

49. 26 C.F.R. § 301.6057-1(a)(4)-(5) (2003).

50. Soc. Sec. Admin. Form SSA-L99-C1.

51. 26 C.F.R. § 301.6057-1(c)(2) (2003).

that they have already received. This may cause individuals who have already received the benefit to think that they are still due a benefit, especially if they received the benefit many years earlier and forgot they had received it. The employer name and address provided in this form may also be inaccurate and out of date. The back of the form provides some general advice to the retiree about finding a former employer, but the Social Security Administration does not give any specific help in finding the pension.

Although an ongoing plans' proactive obligation to participants is only to provide notices, a terminating plan has a fiduciary obligation to distribute those funds to the vested participants.⁵² At a minimum, the Department of Labor expects plan sponsors of terminating plans to contact either the Social Security Administration or the Internal Revenue Service (IRS) in an effort to determine a current mailing address for the participant, and to send a letter to the participant.⁵³ The Social Security Administration offers a letter forwarding service for a small fee. The IRS also provides a service called the Letter-Forwarding Program, which is open to employers who have Social Security numbers of participants they wish to contact.⁵⁴ There is no information on the extent that employers with ongoing pension plans attempt to find former employees that have not claimed benefits, but the presumption is that many employers make little or no attempt.

VII. BENEFIT DISTRIBUTIONS REQUIREMENTS

The timing of benefit distribution could have a significant impact on whether the participant or beneficiary actually receives the benefits. The longer the time elapsed between the worker's separation from employment and benefit eligibility, the greater the chance that either the plan or the participant will become "lost".

The IRS has complex rules regarding when a benefit distribution may commence and when it must commence.⁵⁵ The distribution rules exist because the government provides preferential tax treatment in order to encourage workers to save for retirement and employers to establish retirement plans for

52. See *Seafood Workers Pension Trust*, Dep't of Labor, Pension & Welfare Benefit Programs, Opinion F-2870 A, 1986 ERISA LEXIS 53, Aug. 25, 1986. (discussing fiduciary responsibilities of plans).

53. *Id.* at 4-5.

54. Rev. Proc. 94-22, 1994-9 I.R.B. 48., See also I.R.S., *The Digital Daily, Retirement Plans: Contacting Missing Participants or Beneficiaries* (Oct. 8, 2003), at <http://www.irs.gov/retirement/article/0,,id+110106,00.html>.

55. See generally Jay A. Soled & Bruce A. Wolk, *The Minimum Distribution Rules and their Critical Role in Controlling the Floodgates of Qualified Plan Wealth*, 2000 BYU L. REV. 587 (explaining the distribution rules).

their workers. Employee contributions into employer-based retirement plans are not counted as income at the time the money is deposited into the plan. If the employer makes the contribution, he may take the contribution as a tax deduction.⁵⁶ These provisions result in substantial lost tax revenue. As such, the government has an interest in ensuring that workers use pension benefits for financing retirement consumption.

The law discourages benefits from being paid when the participant is too young, as the assumption is that benefits paid at an early age are not being used for retirement. Defined benefit plans may provide for distribution prior to normal retirement, but the early retirement date must be the latest of 1) a date set by the plan, 2) ten years before normal retirement date, or 3) the date the participant begins participation.⁵⁷ Practically, this means that age fifty-five is the earliest retirement age allowed. Cash or deferred compensation arrangements may not distribute benefits earlier than 1) separation from service, death, or disability, 2) plan termination, 3) attainment of age 59½, or 4) in some cases hardship.⁵⁸ A 10% penalty tax is levied against the plan participant if a distribution is made prior to age 59½ from a qualified retirement plan as defined in section 4974(c) of the Internal Revenue Code except in certain situations such as early retirement or death of the participant.⁵⁹

The law, however, also requires benefits to be paid by a certain age to prevent tax-deferred income from being rolled over for multiple generations.⁶⁰ The general rule is that a qualified plan must provide for distributions to vested participants upon the latest of three events; a) normal retirement age or age 65, whichever is earlier, b) 10th anniversary of the worker in the plan, or c) termination of employment.⁶¹ The normal retirement date is set by the plan within the parameters of ERISA and the Code.⁶²

The Code requires that benefits begin no later than April 1st of the calendar year after which the employee turns age 70 ½ or

56. I.R.C. § 404(a)(1)(A) (2000).

57. 29 C.F.R. § 1.401(a)-11(b)(4) (2003).

58. I.R.C. § 401(k)(2)(B)(i) (2000).

59. I.R.C. § 72(t)(1)-(2). Distributions prior to normal retirement age can also include payments to beneficiaries upon the death of the participant, separation from service after age fifty-five, and disability of the participant. I.R.C. § 72(t)(2)(A)(ii),(iii),(v) (2000).

60. Patrick J. Purcell, *Retirement Savings Accounts: Early Withdrawals and Required Distributions*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, March 7, 2003.

61. I.R.C. § 401(a)(14) (2000).

62. Normal retirement age is defined as the earlier of 1) the age provided for in the plan or 2) the later of age sixty-five or the fifth anniversary of the participant joining the plan. I.R.C. § 411(a)(8), ERISA's second prong uses the 10th anniversary instead of the 5th. ERISA of 1974, Pub. L. No. 93-406(24), 88 stat. 837 (codified at 29 U.S.C. § 1002(24)).

retires, whichever is later.⁶³ Employees who are also 5% owners must start collecting benefits at age 70 ½ even if they continue to work.⁶⁴ These requirements ensure that the tax deferred money put into retirement plans are paid out in retirement and not continually rolled over, thereby avoiding taxation.

If the benefits are not paid at the required beginning date as described above, there are two consequences, one for the plan and one for the participant. The plan can lose its “qualified” status if it does not pay benefits by the required beginning date.⁶⁵ The participant must pay a 50% penalty on benefits that should have been paid by the required beginning date but were not.⁶⁶ The Internal Revenue Service under certain circumstances may waive this penalty.⁶⁷ The incentives and penalties imposed to ensure that benefits are paid fall disproportionately upon the participant as more fully described below. Since the regulations provide that the plan may require that a participant file a claim for benefits before the plan must pay benefits,⁶⁸ the burden for initiating the claim is also placed upon the participant.

The rise in the prevalence of defined contribution plans, in addition to the increased availability of pre-retirement distributions from defined benefit plans, has led to the increase in distributions prior to normal retirement date.⁶⁹ Defined contribution plans, more commonly than defined benefit plans, often allow a participant to withdraw or roll-over the individual account upon termination of employment. These provisions have led to what is commonly referred to as “leakage,” or the use of retirement funds prior to retirement.⁷⁰ Although the government receives taxes on this money, leakage defeats the purpose of creating retirement plans by diminishing the available money for retirement consumption. Although defined benefit plans do not have as much of a problem with leakage, they are allowed to force a distribution on a participant if the present value of the accrued benefit is less than \$5,000.⁷¹

63. I.R.C. § 401(a)(9) (2000).

64. *Id.* § 401(a)(9)(C)(ii).

65. *Id.* § 401 (a)(9)(A).

66. *Id.* § 4974 (a)(2000).

67. *Id.* § 4974 (d).

68. 26 C.F.R. § 1.401(a)-14(a)(2003).

69. For a discussion of the increase in defined contribution plans see generally Richard P. Hinz & John Turner, *Pension Coverage Initiatives: Why Don't Workers Participate?*, *Living with Defined Contribution Pensions: Remaking Responsibility for Retirement* 17 (Olivia S. Mitchell & Sylvester Schieber eds., 1998).

70. Estimates suggest that annual lump sum distributions have grown from \$65 billion in 1990 to between \$87 and \$130 in 1995. James H. Moore, Jr. & Leslie A. Muller, *An Analysis of Lump-Sum Pension Distribution Recipients*, 125 MONTHLY LABOR REVIEW, May 2002 at 29-46.

71. I.R.C. § 411(a)(11) (2000).

To stem the flow of retirement money out of plans prior to retirement, Congress passed a provision in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), requiring plans to put mandatory distributions for sums between \$1,000 and \$5,000 into an IRA unless the participant gives other instructions.⁷² Advocates for retirees have urged Congress to adopt an automatic rollover provision to ensure that these mandatory distributions remained as tax-deferred retirement savings.⁷³ Congress was also concerned that with shorter tenure on the job and shorter vesting requirements, individuals who leave employment with a plan sponsor, entitled to a benefit, were taking the money, paying the penalty, and not saving the money for retirement. Data from the Census Bureau and other sources has shown that the younger the individual and the smaller the amount of money being distributed, the less likely that the money will be rolled over to another retirement plan.⁷⁴ By requiring a plan to send the check to an IRA unless the participant affirmatively elected to receive the check directly, it was hoped that more money would be retained within the pension system and rolled over.

Although the intention of the new provision is clearly to reduce "leakage", it raises a number of issues that relate to the lost pensioners problem. The financial industry has voiced a number of objections because of its concern as to how the provision can be implemented. The provision's implementation is delayed until the Department of Labor (DoL) issues regulations creating a safe harbor for plans attempting to comply. On January 7, 2003, the DoL issued a Request for Information to solicit input on a number of issues including: what criteria should be required in choosing the initial investment, what costs would be associated with the establishment and maintenance of these IRAs, and what legal impediments are plan administrators likely to encounter in setting up these IRAs.⁷⁵ The responses pointed out numerous problems with implementing the new law.

The financial industry's concerns fall into several categories and are based primarily on the assumption that most of the automatic rollover IRAs will be for lost participants.⁷⁶ First, they

72. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16 § 657(c), 115 Stat. 38 (2001).

73. *A More Secure Retirement for Workers: Proposal for ERISA Reform: Before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 106th Cong.* (2000) (testimony of David Certner).

74. Patrick J. Purcell, CRS Report for Congress, *Pension Issues: Lump-Sum Distributions and Retirement Income Security* (Jun. 30, 2003).

75. Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974; 68 Fed. Reg. 993-94 (Jan. 7, 2003).

76. Letter from Liz Varley, Securities Industry Association to Office of Regulations and Interpretations, Employee Benefits Security Administration,

point out that the Treasury Department and the IRS have a number of requirements for IRA trustees that cannot be met if the owner is not opening the account, including the account owner's signature.⁷⁷ Secondly, there are a number of practical problems for the IRA trustee if the account is not opened by the owner, such as having information about the owner, specifically a current address and a contract with the owner. The industry is also legitimately concerned that the cost involved in setting up and maintaining the accounts will exceed the fees allowed to be charged against the account. Or, if the fees are adequate to cover the administrative costs of small accounts, they will deplete the account if investment returns are small. Finally, if the vast majority of owners of automatic rollover IRAs are missing participants, the IRA trustee will be in no better position to find the missing participant than the former employer was.

The policy of having pension plan money rolled over into an IRA may significantly impact the amount and disposition of lost pension money. First, money deposited in IRAs is no longer governed by ERISA.⁷⁸ Thus, the money is not subject to the ERISA preemption statute. Instead the disposition of the money is governed by state law.

Second, the formation of numerous small IRAs, possibly without the knowledge of the owner of the IRA, could lead to an increase in unclaimed money. This money would be dispersed throughout the financial community and would not be easy to locate if there is no central registry for these funds.

Third, in some low-investment-return years the fees attributed to the maintenance of these small IRAs may be larger than the investment returns and as such deplete them, resulting in the money going to financial institutions rather than to the intended recipients. For example, a small account could be charged a fixed annual fee of \$10 plus one percent of assets. Thus, an account with \$1,000 would be charged \$20 or 2% of assets. If the account earned less than 2% in investment returns, its nominal value would decline. If the inflation rate were 3% and the account earned less than 5%, its real value would decline.

Finally, placing the funds outside the fiduciary responsibility of the plan means that the problem of the lost participant has been

U.S. Department of Labor, (Mar. 10, 2003); Martha Priddy Patterson, *DOL Seeks Input on Automatic Rollovers*, THE 401(K) HANDBOOK (2003).

77. See BNA'S PENSION & BENEFITS REPORTER NEWS, March 18, 2003, (citing Letter from the Securities Industry Association to Office of Regulations and Interpretations, EBSA, dated March 10, 2003, and regarding Automatic Rollover RFD).

78. See Rev. Rul. 2000-36, 2000-2 C.B. 140 (observing that the DoL advised the Treasury and the IRS that upon a roll-over, the participant ceases to be a participant covered under the plan and that the assets cease to be plan assets).

solved for the plan without giving the money to the participant and without making it any easier for the participant to find the money if and when the participant chooses to claim it.

Whether the financial industry is correct in its assumption that the automatic roll-over provision will result primarily in accounts for lost participants is not clear. The provision itself is intended to encourage roll-overs of all participants and may result in less lost pension money because of the required notice provisions to participants. However, for those participants who cannot be found, the automatic roll-over provision does allow plans to shift the burden of holding money for participants they cannot find onto a financial institution and off of the plan.

VIII. INCENTIVES TO FIND LOST PARTICIPANTS OR PLANS

The incentives and the penalties built into the regulation of private pension plans result in the participant having more of an interest in finding lost pension plans in which they are vested than the plan has in finding the participant to distribute benefits. The participant or beneficiary has the obvious interest in receiving money to which he or she is entitled. Beyond that, a delay in applying for and receiving the benefit carries with it a very substantial tax penalty of forfeiting 50% of the amount of the benefit. For these reasons, it is reasonable to say that most individuals who know they are entitled to a benefit and can locate the plan administrator will apply for their benefits before age 70 ½. The incentive to claim the money is greater, the greater the amount of money to be claimed, so some participants may not bother to claim small amounts, especially if the effort to claim the benefit is great. Otherwise, one can assume that participants have no reason not to claim money they are entitled to and that the primary, if not only, reason for not claiming the money is that they are unaware of their right to it or how to claim it.⁷⁹

The plans' incentives are more complex. Plan administrators have a fiduciary duty to use the funds in the plan solely for the benefit of the plan participants and a fiduciary duty to pay benefits to beneficiaries entitled to those benefits.⁸⁰ Plan administrators also risk losing their qualified plan status if they do not pay benefits to participants or their beneficiaries by the required beginning date. The problem for the plan is different, depending on the type of plan. A defined benefit plan risks being over-funded if it is not paying out benefits when due, although that works to the plan sponsor's benefit since the plan sponsor will be required to contribute less to the plan. A defined contribution

79. Prior to age 70 ½, a participant may have an incentive not to claim benefits if the benefit continues to increase in value on a tax deferred basis.

80. ERISA § 404 (a)(1), I.R.C. § 104(a), 29 U.S.C. § 1104(a) (2000).

plan with individual accounts can not benefit from the unclaimed benefits but instead is left with an administrative problem of what to do with the unclaimed money.

IX. CURRENT RULES FOR THE DISPOSITION OF UNCLAIMED PENSION MONEY

The current rules for disposition of unclaimed pension money are unclear, leaving pension administrators in a difficult position. ERISA does not specifically provide for how unclaimed funds should be handled.⁸¹ The rules are the clearest when a pension plan is terminating.⁸² Administrators terminating a fully funded plan must distribute the assets of the plan to the participants and the beneficiaries in a prescribed order.⁸³ The administrator must either fully pay the benefit to the participant or beneficiary or may purchase irrevocable commitments from an insurance company to pay the benefits as they come due under the plan.⁸⁴ If participants are missing under a terminating single-employer defined benefit plan, the administrator may transfer to the PBGC money due these missing participants.⁸⁵ A missing participant for this purpose is defined as "a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search."⁸⁶

Plan administrators of defined contribution plans do not have the PBGC as a depository of last resort when terminating their plans and thus must find other ways of disposing of the money due participants they can not find. Plan administrators have found a number of creative ways of divesting themselves of these funds.⁸⁷ Some pay the full amount of the account to the IRS as withholding tax. Others have sent the money by check to the last known address and then leave the check as unclaimed property. Some have proposed setting up IRAs for the participant, which takes the money out of the plan but creates problems the financial community complained of when commenting on the Department of Labor EGTRRA regulations. This solution, although not yet

81. *The Manufacturers Life Ins. Co v. East Bay Restaurant & Tavern Retirement Plan*, 57 F. Supp. 2d 921, 922 (N.D. Cal. 1999); Re: *Seafood Workers Pension Trust Identification No. F-2870A*, Op. Dept. of Labor F-2879A (1986).

82. ERISA § 5050(a), 29 U.S.C. 1341(a) (2000).

83. ERISA § 4044, 29 U.S.C. 1343(a) (2000)..

84. ERISA § 4041(b)(3)(A), 29 U.S.C. 1341(b)(3)(A) (2000).

85. ERISA § 4041(b)(3)(A)(ii), 29 U.S.C. 1341(b)(3)(A)(ii) (2000).

86. ERISA § 4050(b)(1), 29 U.S.C. 1350(b)(1) (2000).

87. Letter to Carol Gold, Director TE/GE Employee Plans Division, IRS, from the American Society of Pension Actuaries, Jeffery C. Chang, et al. (Dec. 7, 2001) available at http://www.aspa.org/archivepages/gac/2001/missing_participants.htm.

required, is allowed by the IRS.⁸⁸ Defined contribution plan administrators recognize the lost participant as a problem and have advocated for Congress to expand PBGC's powers to enable it to accept and hold funds for lost participants of defined contribution plans as well as defined benefit plans.⁸⁹ This provision would also allow multiemployer plans to deposit lost pensioner money with the PBGC.⁹⁰

The problem of unclaimed funds is less acute for the plan administrator of an ongoing defined benefit plan. A defined benefit plan is enriched from unclaimed pension benefits. A defined benefit plan actuary assumes that a percentage of participants will not claim their benefits because of death. Since a claim in a defined benefit plan does not outlive the death of both the participant and the beneficiary, benefits not claimed because of death revert to the plan, and cannot be considered lost. A plan administrator's general fiduciary duty and the threat of losing status as a qualified plan has not lead to plans generally seeking out all participants at normal retirement age. Moreover, there are no requirements that they do so. Because of their structure, administrators of defined benefit plans have less incentive to resolve the problem of lost participants than administrators of defined contribution plans.

Jurisdiction over the unclaimed funds of lost participants has been the subject of a number of court cases. The dispute has centered on whether the state (i.e., one of the fifty states), under the authority of its unclaimed property law, or the plan has a claim to the funds not claimed by the participant. The Department of Labor has taken the position that the state may not claim the money because of the ERISA preemption clause.⁹¹ ERISA's preemption clause broadly claims the regulation of employee benefits as the exclusive domain of the federal government.⁹² The ERISA preemption clause provides that, not only are state employee benefit laws that conflict with ERISA

88. In 2000, the IRS issued a Revenue Ruling that held that a plan that provided for a direct rollover of a forced distribution to an IRA where a participant had not elected a distribution would not disqualify the plan. Rev. Rul. 2000-36. July 16, 2000.

89. Pension Security Act of 2003, H.R. 1000, 108th Cong. § 209(d) (2003).

90. *Id.* § 209(c).

91. Op. DoL 78-32A (Dec. 22, 1978) (opinion stating that the Illinois Uniform Disposition of Unclaimed Property Act is preempted by ERISA); Op. DoL 79-30A (May 14, 1979) (opinion stating that California's Unclaimed Property Law is preempted); Op. DoL 94-41A (Dec. 7, 1994) (opinion finding Texas Unclaimed Property Statutes preempted); Op. DoL 1994 ERISA LEXIS 53 (Sept. 2, 1994) (opinion reaffirming that the California Unclaimed Property Law as amended is preempted as applied to ESOP).

92. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (holding that the Congressional intent of ERISA is to reserve regulation of pension plans to federal authorities).

preempted but “all State laws insofar as they may now or hereafter *relate* to any employee benefit plan... (emphasis added).”⁹³

A number of states have taken the position that lost pension money becomes unclaimed property and should be handled as required by the unclaimed property statutes of the state where the property resides. Most states have unclaimed property statutes, stipulating that property that is not claimed by the owner or an heir after a certain number of years—ranging from three in New York to fifteen in Idaho—becomes the state’s property.⁹⁴ The states’ position has put them in direct conflict with the Department of Labor’s position and has resulted in several court cases.

The Circuits are divided on the issue, with the Second Circuit finding against preemption and the Seventh and Eleventh Circuits finding the states’ abandoned property law preempted.⁹⁵ In *Aetna Life Insurance Co. v. Borges*,⁹⁶ the Second Circuit found that checks sent to participants in an employee welfare plan, but not cashed, were governed by the abandoned property statute of Connecticut. Consequently, the plan had to turn the money over to the state. The Court noted, “[S]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.”⁹⁷ The Court reasoned that the Connecticut abandoned property law was of general applicability and it was regulating in an area of traditional state authority. Although the Court noted that the Connecticut law would increase the cost of providing benefits, it found this effect indirect and not substantial.

The Seventh Circuit, however, came to a different conclusion when examining Illinois law. In *Commonwealth Edison Co. v. Vega*,⁹⁸ the Court found that ERISA preempted the Illinois Uniform Disposition of Property Act.⁹⁹ The State of Illinois sought to claim pension plan benefits that went unclaimed by the participant for five years pursuant to its Illinois Uniform Disposition of Unclaimed Property Act. The Court reasoned that the Uniform Unclaimed

93. ERISA § 514(a), 29 U.S.C. § 1144 (a) (2000).

94. Elayne Robertson Demby, *Dead Soles: Where do pension benefits go when the beneficiary cannot be found?*, PLAN SPONSOR, July/August 1995.

95. See *Attorney General v. Blue Cross & Blue Shield of Mich.*, 168 Mich. App. 372, 382 (Mich. 1988) (finding that its abandon property law was not preempted by ERISA citing the “too tenuous, remote, or peripheral...” language of *Shaw v. Delta Air Lines*, 463 U.S. 85, 100 (1983)).

96. *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989).

97. *Id.* at 143.

98. *Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999).

99. See Robert Simpson, *Note and Commentary: Another Trip into the Great Swamp: The Seventh Circuit’s Preemption of the Illinois Unclaimed Property Act Under Erisa*, 7 CONN. INS. L.J. 227 (2000/2001) (discussing Commonwealth Edison and the issue of ERISA preemption as it relates to unclaimed property laws).

Property Act depleted the assets of the plan by taking money that would have been held by the plan. Since the plan did not pay interest to the participants on money claimed years later, the interest on the money being held by the state, instead of the plan, would be a reduction in plan assets. The Court further reasoned that the state was in effect taking over part of the administration of the plan by holding benefits due participants and paying them to the participants when, and if, claimed by the participants. The State argued that the length of time before unclaimed money was required to be turned over to the state did not matter. The Court articulated that if the state required that the unclaimed benefits be turned over within two weeks, it would clearly be administering the plan, and since the time did not matter, the State was clearly in the position of administering the plan. Interestingly, the Court distinguished its decision from the Second Circuit's decision on the basis that the Connecticut law was an escheat law where the state took title to the fund as opposed to Illinois where the state merely held custody of the funds—a technical distinction without any obvious practical effect.¹⁰⁰

The Eleventh Circuit examined the issue in *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*.¹⁰¹ The dispute was over drafts issued from the federal employees' health benefit program and therefore governed not by ERISA's general preemption clause but by a specific clause relating to the federal health benefit contract.¹⁰² Although this statute also has the "relate to" language, the Second Circuit distinguished its decision on that basis. The Eleventh Circuit examined the legislative history and finding it inconclusive deferred to the interpretation of the Office of Personnel Management (OPM), the agency that administers the contracts. Finding the position of OPM reasonable, which was that the state law was related to the plan, the Court held the state unclaimed property law preempted.

A recent district court case out of the Ninth Circuit tried to reconcile the separate outcomes. In *Manufacturers Life Insurance Co. v. East Bay Restaurant & Tavern Retirement Plan*,¹⁰³ the Court examined a pension plan whose contract with an insurance company allowed it to claim a refund for any unclaimed benefits after a certain date. The Court held that ERISA preempted the operation of the California unclaimed property law because it called for the state to seize funds to which the ERISA plan had a contractual right. The Court distinguished the Second Circuit Case, *Borges*, where the state, not the plan, positioned itself as the participant in claiming

100. *Commonwealth Edison*, 174 F.3d at 874-75.

101. *Blue Cross & Blue Shield of Fl., Inc. v. Dept. of Banking & Finance*, 791 F.2d 1501 (11th Cir. 1986).

102. 5 U.S.C. § 8902 (m)(1) (2000).

103. *Mfrs. Life Ins. Co. v. East Bay Restaurant and Tavern Retirement Plan*, 57 F. Supp. 2d 921 (D.C. N. Cal. 1999).

the funds. This distinction places the decision of whether the funds will be subject to the state unclaimed property act in the hands of the plan drafters, since if the plan has a specific provision that unclaimed checks revert to the plan, they would be deemed plan assets under this reasoning.

The analysis of these cases rests on the elusive "relates to" language of ERISA preemption law. Clearly the plan loses money if the state is allowed to claim unpaid benefits after a period of time. However, this analysis is circular as it assumes that the plan is entitled to the money, when in fact it is the participant who is entitled to the money. The questions are who is entitled to hold the money until the participant claims it, and who is entitled to benefit from the money never claimed?

The Department of Labor has taken the position that money held by a plan is not within the jurisdiction of the state unclaimed property laws. However, it has also taken the position that the sum of money could be deposited in a bank account in the name of the participant if the plan allowed for that distribution and the plan had taken the appropriate measures to find the participant.¹⁰⁴ If the money is deposited in a separate account and if the account lays dormant for the requisite number of years, the account would be subject to state unclaimed property laws. The Department of Labor seems to recognize this in the Seafood Workers Pension Trust opinion letter when it states that "the bank account would not be subject to the trust requirements in section 403(a) of ERISA."¹⁰⁵ The Department has also taken the position that unclaimed funds under a group insurance policy purchased by an employer welfare plan that were to be paid by an insurance company could be subject to the New York Abandoned Property Law. The Department reasoned that the specific section of the abandoned property law was considered an insurance law and therefore saved from preemption under Section 514(b)(2)(A).¹⁰⁶

The law in this area is unsettled, leaving plans without consistent guidance on how to handle unclaimed pension money. Put another way, the policy area is ripe for a legislative solution. One consideration should involve determining which party is in the best position to ensure that participants receive the money they are entitled to. Participant money held by the state as abandoned property would receive all the protections afforded other property. States require a variety of steps be followed to locate individuals including publishing names in newspapers, hiring professional search firms and using the Internet to publicize names of people whose money is being held.¹⁰⁷ Currently, ERISA plans are not

104. *Seafood Workers Pension Trust*, *supra* note 52 at 1.

105. *Id.* at 6.

106. 83 Op. Dept. of Labor 39 A (July 29, 1983), 1983 ERISA LEXIS 21.

107. Ellen P. April, *Inadvertence and the Internal Revenue Code: Federal tax*

required to take as aggressive or expansive steps.

A disadvantage, however, is the diversity of regulation in the fifty states, making it potentially hard for plans to comply and potentially hard for participants to find where and when to apply for the lost money. While there has been a movement towards uniform escheat laws in the different states, the situation concerning escheat of pension benefits is far from uniform. Depending on the wording of the various state statutes, the locations for escheat could be the pension participant's last known state of domicile, the state where the money is held in trust, or the employer's state of incorporation. Situations may arise where more than one state claims the same lost benefits. Keeping track of the conflicting state laws, the various requisite dormancy periods, and which state has jurisdiction in each case, can be an administrative burden for pension plan administrators

X. PBGC PROGRAM FOR UNCLAIMED BENEFITS

The PBGC has jurisdiction over terminating defined benefit plans both funded and under-funded. When a fully funded single-employer defined benefit plan terminates, the plan sponsor is required to try to find all vested participants to notify them that they are owed a pension. It must make a diligent effort to find the participants, including using a locator service.¹⁰⁸ Some companies specialize in helping pension plans find lost participants.¹⁰⁹ If the plan is unable to find a participant, it is required by the Retirement Protection Act of 1994 to notify the Pension Benefit Guaranty Corporation. The plan sponsor may either purchase an annuity for the missing participant and notify the PBGC of the life insurance company from which it has purchased the annuity, or it may calculate the cost of the benefits owed and transfer that money to the PBGC. In both cases, the plan sponsor provides information to the PBGC about the missing participant and any named beneficiary.¹¹⁰ Plans often have had difficulty finding an insurance company or financial institution willing to accept the pension funds of a missing person. To complicate the matter, the people who have tried to find their missing funds from a terminated plan have had no idea at what financial institution their funds may have been left. Thus, the program at the PBGC for fully funded terminated plans has helped resolve one of the problems in the lost pension area.

consequences of state Unclaimed Property Laws, 62 U. PITT. L. REV. 123, 163 (2000).

108. 29 C.F.R. § 4050.4(a) (2003).

109. See, e.g., APSCREEN, available at www.employeelocator.com (last visited Feb. 12, 2004) (showing one such company specializing in finding lost participants).

110. ERISA § 4050(a)(1), 29 U.S.C. § 1350(a) (2000).

Through the Pension Search Program, the PBGC makes its own effort to find these missing pensioners in fully funded defined benefit plans that have terminated. The PBGC contacts the Social Security Administration and uses person locator services to find missing pensioners. The PBGC also searches for missing pensioners when it takes over an under-funded plan. The PBGC search program, however, does not cover most U.S. plans. Plans for which this search program do not apply include all ongoing plans, all defined contribution plans, all multiemployer plans, all government plans and all church plans. Proposals have been made to expand the Pension Search Program to include terminated defined contribution plans and multiemployer plans, but so far they have not been enacted.

Between 1996 and early 2001, the PBGC located 7,900 people who were owed \$25 million in present value of pension benefits. Among those people found, the average total benefit paid was \$4,200, with a range from \$2 to \$111,000. In 1999, the average annual benefit PBGC paid to beneficiaries of plans which it took over was \$3,700, which was not much less than the total benefit paid to lost pensioners.¹¹¹ Thus, the lost pensioners tend to have considerably smaller benefits than the typical pensioner, presumably because of portability losses workers in defined benefit plans suffer when they change jobs.¹¹² The benefit accrual in defined benefit plans is typically back-loaded, and the worker's final earnings used to calculate benefits are not indexed for inflation that occurs after the worker terminated employment.

The PBGC is currently looking for an additional 22,000 people owed a present value of \$80 million in pension benefits.¹¹³ Their names are posted on its web site *www.pbgc.gov* in its Pension Search Directory. These are people for whom the PBGC and possibly the company originally sponsoring the pension plan have already conducted a search.

More than twenty private sector organizations have pledged to help the PBGC find missing participants through their publications and web sites. These organizations include the AFL-CIO and the U.S. Chamber of Commerce. However, the search process by these organizations apparently remains piecemeal and sporadic, rather than systematic and continuous. The PBGC also sometimes receives help from newspaper and television journalists who will endeavor as part of a news story to locate people in their local area, especially when a major local employer has gone out of business.

111. PENSION BENEFIT GUARANTY CORPORATION, PENSION INSURANCE DATA BOOK 1999 (Washington, DC Summer 2000).

112. John Turner, *Pension Policy for a Mobile Labor Force*, UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH, 1993.

113. *Pension Benefit Guaranty Corporation, News*. Oct. 4, 2000.

The PBGC discovered a variety of reasons why the people it successfully located had not sought their pension. Some people had forgotten that they had earned a pension on a previous job. Some did not realize that they even had pension coverage. Some were too young to be eligible to receive a pension. Some could not be located by their former employer because they had changed their name, had moved address, or had changed jobs. Some had died, and their survivor was the beneficiary of their pension.

XI. PROGRAMS IN OTHER COUNTRIES

While in the United States there is no one source that provides contact information for all pension plans, including terminated plans, the United Kingdom established a national pension plan registry, which allows workers to contact a single source to trace a lost pension. They can make a request by telephone, mail, or the Internet. The Occupational Pensions Regulatory Authority (OPRA) was established under the 1995 Pensions Act to help make sure occupational pension plans were secure for workers. The Pension Schemes Registry (PSR) is now part of OPRA, although it was established in 1991 by the 1990 Social Security Act. The PSR is designed to help workers track down their pensions with former employers.

A. Finding Pensions in the U.K.

Workers in the United Kingdom filing a tracing request form with the PSR are asked information such as the full name and last known address of the former employer. The tracing service then tries to find a current address for the pension fund. It provides this service without fee to anyone requesting it. While the British government maintains the PSR on the grounds that it provides an important social service, the cost of the PSR is covered by a levy collected from each of the registered pension plans in the United Kingdom.

At regular intervals, the Savings Pension and Share Schemes Office (SPSS) sends the PSR details about new plans that have been granted "exempt approved" status. Active plans are required to provide updated information to the registry at the same time that they pay their annual levy. The two functions are interrelated; at the time of collection of the levy, plans are reminded that they should provide updated information to the

The role of the SPSS is to grant exempt approved status to pension schemes, i.e., it approves pension schemes for the purpose of enjoying tax relief on contributions into the schemes and income and capital gains tax exemption on the assets in the pension fund. The SPSS is part of the Inland Revenue, the UK's tax authority.

Registry.

The success rate for people contacting the registry varies from year to year but has been uniformly high. Between fiscal years 1991-92 and 1997-98, the registry had a total of 74,605 requests, an annual average of almost 11,000 or nearly 900 requests a month. A PSR survey indicated that 34% of those who used its tracing service received some financial benefit, and there was an 85% success rate in tracing contact details.

In the year 1999-2000, the service received 18,000 requests and had a 95% success rate in tracing lost pensions. The number of requests increased to 21,000 in 2000-2001 and the success rate was 92 percent.

A disproportionate fraction of tracing requests relates to small plans, suggesting that participants in small plans are more at risk of facing difficulties in tracing a pension from a former employer. All pension plans with two or more members are required by law to register with the PSR. Though plans with eleven or fewer members make up 2% of the participants, they account for 10% of the tracing requests. However, about half of the requests involve large plans with 5,000 or more members. The main users of the registry are older workers; 80% of the tracing requests came from people aged 46 or older.¹¹⁴

In the United Kingdom, there is no statutory time limit by which a member entitled to a benefit must make a claim. However, most trust deeds stipulate a six-year time limit. Pension schemes in the UK do not have to place unclaimed benefits in an "orphan" fund, and if a pension entitlement has not been claimed after six years, the unclaimed funds can be reallocated to help pay for the scheme's administration costs. If a member subsequently makes a claim after six years, the trustees are required to award a pension, but are likely to backdate it only six years. To protect against this possibility, trustees can also take out missing beneficiary insurance. Alternatively, they can choose to have the benefits "bought out" by an insurance company (which would then be able to pay the pensioner's benefits should he or she make a claim for benefit at some point in the future).

B. Finding Pensions in Australia

The Australian Tax Office (ATO) maintains a Lost Members Register. All regulated pension funds are required to provide details of members with whom they have lost contact. Providers of individual retirement savings accounts are required to register the names of account holders they are unable to contact. That information must be provided to the government within four

114. Maunsell, *supra* note 24, at 26.

months of the end of each half-year.¹¹⁵ Workers unable to contact former pension plans can connect through the Lost Members Register.

Government bureaucrats search the Register's database for people who inquire. Thus, Australia maintains a central registry as does the United Kingdom, but the registry contains information about workers as well as about plans. Plans able to contact all members are not required to contact the registry.

XII. POLICY OPTIONS FOR OBLIGATIONS AND PROCEDURES FOR HANDLING UNCLAIMED FUNDS

The current procedures for handling unclaimed pension funds are serving no one well. Plan administrators are left without guidance as to how to carry out their fiduciary obligation to participants they cannot find, and participants have a daunting task in finding the pension plan of a moved, merged or bankrupt former employer.

Creating a central depository for unclaimed pension funds would be a possible policy option, and the PBGC would be a possible entity to take on the task. This increase in PBGC's responsibility would, of course, add to its costs and require it to hire additional personnel. The PBGC currently takes control of under-funded, terminating plans and therefore has the experience and structure to administer ERISA pension plans. It also currently assumes responsibility for unclaimed funds from fully funded terminating plans. Finally, it has in place a program to locate lost pension participants and their beneficiaries. To fully implement such a plan, the PBGC would need to obtain authority to accept defined contribution plan assets for lost participants as well as defined benefit plan assets. It would also need to be able to accept unclaimed funds from multiemployer plans.

A central, national authority would simplify the search process for participants and would clarify the plan administrator's role. It would eliminate the jumble of solutions currently being employed by plan administrators and it would address ERISA's goal of a unified system regulating pension plans and avoiding the diverse regulation of each individual state's unclaimed property law.

Other proposed solutions present significant drawbacks. Setting up individual accounts for lost participants would be difficult to manage and would require massive administrative paperwork. This solution would likely result in the money being held by a financial institution and eventually handed over to the state as unclaimed property. The financial institution would be in

115. Australian Taxation Office, *available at* <http://www.ato.gov.au> (last visited Mar. 30, 2004).

no better a position to find the participant than the plan was originally. It would also make it more difficult for participants looking for the funds, because they would not know which financial entity was holding their benefit. For those participants who may have become mentally incapacitated or otherwise unable to maintain their records, the lack of a central depository of information complicates the ability of others to help locate benefits the participant is entitled to.

At the same time PBGC is given extended authority to hold and distribute unclaimed pension money, Congress could move to reduce the amount of lost participants by requiring plan administrators to notify participants at normal retirement age that the plan is holding a benefit for them. Under current law, plan administrators of defined pension plans have little incentive to ensure that plan beneficiaries are receiving the benefits to which they are entitled. The current requirements that force a search only when the plan is terminating leaves the many participants of ongoing plans without the same protection participants of terminating plans have. Such a requirement would also act to neutralize the incentive of defined benefit plans to assume a former employee had died and was therefore no longer eligible for benefits.

A. Possible Policy Option—Deposit Lost Pension Money with Social Security

If the reforms suggested above are implemented, it can still be assumed that there will be some unclaimed pension money. This leaves the question of who should benefit from those funds. A possible policy option for the disposition of the unclaimed pension money would be for it to ultimately escheat to the Social Security Old Age and Survivors Insurance (OASI) trust fund.¹¹⁶ This resolution first and foremost would result in having unclaimed money support the retirement security of the country. Second, it also would resolve the question of who should benefit from the money that is ultimately unclaimed. Like unclaimed funds held by the state, individuals could still claim the money years later, but the use of the money in the meantime would benefit the retirement system. Plans' responsibility would be clear and they would be relieved of holding money for individuals they could not find. Individuals who suspect that they may be entitled to a benefit from a previous employer they cannot find would have one place to look for their benefits. Third, using the Social Security OASI trust fund as the depository could result in ultimately providing an additional funding source and help resolve in a small

116. John Turner & Ellen Bruce, *Let lost retirement money revert to Social Security*, CONTINGENCIES, May/June 2003, at 27-29.

way the problem of the long-term financial solvency of Social Security. The ongoing plans would lose the use of the money and interest accumulated, but the benefit of this unclaimed money would go to Social Security beneficiaries.

Having the money escheat to the Social Security OASI trust fund has advantages over two other possible solutions. Currently, some of the money unclaimed from defined contribution plans and IRAs end up in state unclaimed property accounts. This money after a period of time goes into the state general funds. Alternatively, the money could revert to the plan from which it came, to be used for administrative expenses or some other general benefit to the plan, and therefore, the other participants in the plan.

This solution is less desirable than having the money escheat to the Social Security trust fund for two reasons. First, it would benefit a select group of people in the plan who had already received a tax benefit for their contributions. Second, it would create an incentive within the plan not to find lost participants. This result is clearly an undesirable incentive, as it is the plan that is in the best position to find the participants and has a fiduciary responsibility to make sure the money is paid to its intended recipient. If the money goes to the Social Security fund, it will benefit the vast majority of retirees and benefit the taxpaying population by reducing the pressure to increase Social Security taxes.¹¹⁷

The implementation of such a proposal would have to consider what agency would be responsible for collecting, tracking and accepting claims for the deposited money. Also, the issues of how long it should be kept before the Social Security Trust fund could use the money, the rights of claimants, and record keeping responsibilities would all have to be worked out. The PBGC would be a possible entity with which to have the funds deposited and administered, for the reasons stated above. The Social Security Administration could also administer the program, but that agency is less familiar with pension law and participant rights than the PBGC and thus would have to develop a new expertise.

XII. CONCLUSION

The problem of unclaimed pension money is an issue rarely examined. It potentially affects billions of dollars. As the baby boom generation prepares to retire, the amount of money at stake could greatly increase. At present, the law is unclear and

117. Nine out of ten aged units receive Social Security benefits. An aged unit is either a married couple living together, with husband or wife aged sixty-five or older, or a person sixty-five or older who does not live with a spouse. Social Security Administration, *Income of the Aged Chartbook*, 2000, 2002.

inconsistent as to the responsibilities of plan administrators in finding the participants and the disposition of the money ultimately unclaimed. A rational policy could be developed to ensure that plans actively seek to pay the benefits as they become due and that unclaimed money is used to ensure the income security of retired individuals.

