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The Court and Its Critics

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EVER SINCE it was organized in 1790 there has been an "open season" on criticism of the United States Supreme Court. Perhaps there are more hunters today and more game with fewer applicable game laws. Moreover, ours is an age of dissidence and it is engulfing our whole civilization from Lagos to Auckland. The battle cry is the failure to fulfill man's dreams and the downgrading of his accomplishments. Law, the only dependable force for man's freedoms, is mistrusted and pilloried on all sides. Its world exemplar — the Supreme Court — is suffering its darkest hour at a time when it deserves admiration for its most glorious day. What is the shouting all about? Much of the cause of the criticism has centered around the Court's responsibility in three areas: Section 25 of the Judiciary Act of 1789, the implied power of the Court to pass on the constitutional validity of the actions of the Executive and Congress, and the due process and equal protection clauses of the fourteenth amendment.

Most of the dissatisfaction with the Court is based on section 25 of the Judiciary Act of 1789, which as originally written authorized the Supreme Court to re-examine decisions of state courts where federal constitutional issues were involved. As presently amended, this power has been extended to all federal courts. James Jackson, a Georgia Representative to the Congress, characterized section 25 in present-day language:

It swallows up every shadow of a State Judiciary. . . . In my opinion, and I am convinced experience will prove it, there will not, neither can there be, any suit or action brought in any State Courts but may under this clause be reversed or affirmed by being brought within the cognizance of the Supreme Court.¹

But the Congress sided with Roger Sherman who found section 25 was necessary "to guard the rights of the Union against the invasion of the States."²

¹ Associate Justice of the Supreme Court of the United States (Retired).
² 1 C. Warren, The Supreme Court in United States History 11 (Revised ed. 1937).
As early as *Cohens v. Virginia*, demands were being made for the repeal of section 25. The uproar was so loud in the ears of the Court that Chief Justice Marshall answered them in *Fisher v. Cockerell* in this fashion:

In the argument we have been admonished of the jealousy with which the states of the Union view the revising power intrusted by the constitution and laws of the United States to this tribunal. To observations of this character, the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.

In addition to section 25, another cause of dissatisfaction is the power of the Court to pass on the constitutional validity of actions of the Executive Department and the Congress. There is no specific grant of power in the Constitution as to this but it was established in *Marbury v. Madison* and subsequent cases. However, there is a paucity of cases where federal action was overturned. Indeed, in the first 80 years of the Court only four federal statutes were stricken. By the close of the last term of the Court only 83 acts of Congress had been invalidated. As Mr. Justice Holmes told the Harvard Law School Association in 1913: "[T]he United States would not come to an end if we [the Court] lost our power to declare an Act of Congress void."

As to the laws of the States, however, the Justice had the opposite view: "I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." John C. Calhoun saw the problem differently: It makes "the government of the United States the sole judge, in the last resort, as to the extent of its [the state's] powers... It is the great enforcing power to compel a State to submit to all Acts [of the Federal Government]." Calhoun was right as is proven in a parade of cases from *Dartmouth College* to the *Slaughter-House Cases*. As late as 1969 the number of state acts that had fallen had reached some 750.

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5. *Id.* at 259.
6. 5 U.S. (1 Cranch) 137 (1803).
8. *Id.*
11. 83 U.S. (16 Wall.) 36 (1872).
Having these responsibilities, the Court has been obligated to fulfill them. This has maintained a continuous strained relation between the States, the President, the Congress, and the Court. Indeed, as early as 1792 the State of Georgia had prohibited service of federal process against the State. The next year Chief Justice Rutledge failed of confirmation, and ten years thereafter Justice Chase was impeached but came clear by one vote in the Senate. In 1809, Pennsylvania called out its militia to prevent the enforcement of a federal court judgment. The second Cherokee case, *Worcester v. Georgia*,\textsuperscript{12} found President Jackson and Chief Justice Marshall feuding over a Georgia Indian law. When Marshall decided against the State, Jackson is reputed to have said: "John Marshall has made his decision, now let him enforce it." And it possibly would never have been enforced had not South Carolina's legislature passed the Nullification Ordinance. This aroused Jackson's ire and brought on the Force Bill which put both Georgia and South Carolina to their knees. In this century, both Roosevelts had their troubles with the Court, the latter attempting to pack it and the former barring Mr. Justice Holmes from social functions at the White House!

A third cause for conflict arises from the fourteenth amendment to the Constitution. In addition to the equal protection clause of the amendment upon which the segregation and apportionment cases are based, the due process clause has been held to incorporate most of the provisions of the first eight amendments against state action. Many criminal cases have been overturned in late years on these provisions and libel, slander, and free press litigation has come under federal supervision.

During the decade and a half since *Brown v. Board of Education*\textsuperscript{13} and the segregation cases which followed, the anguish has reached impeachment proportions. The demands arose from four principal areas wherein the Court had acted, namely, segregation, criminal law, legislative apportionment, and school prayer.\textsuperscript{14}

It now appears that the philosophy of *Brown* has won acceptance on its face. True, there is still considerable "dragging of feet" in both

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\textsuperscript{12} 31 U.S. (6 Pet.) 515 (1832).
\textsuperscript{13} 347 U.S. 483 (1954).
\textsuperscript{14} Judge James O. Monroe, Jr., would add state-federal relations and civil liberties to the list of complaints. There can be no doubt that state-federal relations have been strained to the limit by the rash of state prisoner applications filed in federal courts. However, the civil liberties era of *Sacher v. United States*, 356 U.S. 576 (1958); *Bonetti v. Rogers*, 356 U.S. 691 (1958); *Yates v. United States*, 354 U.S. 298 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Service v. Dulles*, 354 U.S. 363 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Cole v. Young*, 351 U.S. 536 (1956), is over, in my view.
official and unofficial life but progress is being made even though it be with less than "deliberate speed." School districts are being integrated and both parents and children are becoming more adaptable to the process. This fact is the most promising sign on the horizon. Morality, human understanding, and compassion cannot be obtained by edict. It can only develop through contact and education. In transportation and other places of public accommodation little evidence of segregation remains. Now and then a southern Governor lets forth a catcall but even those are now being beamed to the shortcomings of the North.

On the other hand, the "crime wave" has placed the advancements made by the Supreme Court in the field of criminal justice in jeopardy. Beginning in 1956 with *Griffin v. Illinois*, which required a record of the trial to be furnished indigent defendants, the Court took broad and effective strides in the improvement of criminal procedures. *Mapp v. Ohio* extended the exclusionary rule to the States; *Gideon v. Wainwright* required counsel to be furnished indigent defendants facing felony prosecution; *Miranda v. Arizona* laid down warnings that must be given suspects before interrogation and *Berger v. New York* restricted eavesdropping to the limits of probable cause. Each of these cases has suffered continual criticism ever since they were announced. In substance the charge is that the restrictions "hamstring" the police, encourage unlawful activity, and tip the scales of justice toward the criminal. I do not subscribe to these conclusions. Rather than "hamstringing" crime detection, I believe that they will improve it. Before this line of cases came down, the police would concentrate on securing a confession from a suspect, and after securing one would make no further investigation. In the event the confession was not admitted in evidence at the trial, the prosecution would fail. Now, however, the police have learned that a confession is "suspect." Even after securing one they continue to investigate, run down leads, etc. Should the confession be denied admission into evidence, the valid evidence is often sufficient to convict. Indeed, in most cases a confession is not needed to secure a conviction. The evidence is usually overwhelming without it. Moreover, the adoption of these enlightened rules is within our concepts of the presumption of innocence, fair trial, and proof of guilt beyond a reasonable doubt. Under Winston Churchill's yardstick a civilized society is measured by its concepts

of criminal justice; ours is the most enlightened in history. Nor do I find that these protections have reduced the percentage of convictions. Indeed, they are at an all-time high in the federal system which has been operating under all of the critical procedures for some six years. Finally, to say that criminality is encouraged is pure nonsense. Criminals do not study Supreme Court decisions before engaging in criminal activity. They are either desperate and are willing to take their chances on "getting caught" or they believe theirs will be the perfect crime and go unsolved. Indeed, statisticians claim that only 20 percent of the offenses committed are uncovered and the offenders arrested. It is this 80 percent that the criminal relies upon, not on decisions of the courts. In fact, over 95 percent of those apprehended in the federal system either plead or are found guilty and are punished.

It is unfortunate that some prosecutors advocate radical changes in our present procedures. Some favor "preventive detention" as a deterrent to crime. This would be a heavy penalty to pay. Would it not be better to advance the date of trial as we are doing in the federal system. The development of modern procedural techniques such as individual calendaring, the use of omnibus discovery practices, etc., would be just as effective. Likewise, the relaxation of the normal protections against wiretapping and eavesdropping is a mistake. We should insist that there be probable cause supporting the use of such devices before they are permitted.

Legislative apportionment was the cause of no little dissatisfaction with the Court. It directly affected the political establishment and the fortunes of many state legislators and some Congressmen, as well. There is little wonder that Senator Dirksen's effort to force a constitutional convention on the question almost bore fruit. However, since Baker v. Carr\21\ the public has become informed on the question and it appears that the effort to amend the Constitution has died on the vine. It is true that the Court did a complete about-face on this issue. The doctrine of Colegrove v. Green\22\ that the question was a political one upon which the courts would not inquire has been overturned by the cry of "one man—one vote." Since that time every State in the Union has been reapportioned and the process is being extended to county and precinct government.\23\ While I did not join in some of the opinions because in my view the federal analogy applied to dual form legislative bodies, there can be no question but that Baker was long overdue. Whether it should have been extended to local government is another question on which I disagree. But even here it will

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do no harm and, indeed, may bring on reform that is badly needed in this area.

The cases affecting the conduct of religious exercises in the public schools is the final controversy that still confronts the Court. When Mr. Justice Black in Engel v. Vitale\(^\text{24}\) struck down New York's prayer in its public schools, there was much gnashing of teeth. Indeed, the press so distorted the opinion that I departed from my policy of no public comment on decided cases to deal with the matter before the Commonwealth Club in San Francisco. Thereafter Abington School District v. Schempp\(^\text{25}\) attempted a clarification of the issue. However, the question remains a most divisive and controversial one. In many parts of the country I find people who are insisting on a change in the first amendment. While I doubt that this will ever occur — and pray that it will not — we should devote our attention to the problem. My solution has been to encourage the teaching of comparative religion and like subjects in the public schools. The State of Florida has taken a decided step in this direction and California is following suit.

The mortification that some have with the Supreme Court will, of course, continue. It will ebb and flow with the character of its decisions. The history of the United States has been written to a large extent in the Chambers of the Supreme Court. As Attorney General Wickersham so well said in his eulogy on Chief Justice Fuller: "In the largest proportion of causes submitted to its judgment every decision becomes a page of history. . . ."\(^\text{26}\) This could not otherwise be when we note that the Constitution itself made its own provisions the supreme law of the land and created the Supreme Court as the final interpreter of them. Daniel Webster, in commenting on these two provisions of the Constitution, characterized the Court as the cutting edge of the National sword. And in another of his eulogistic trilogies reminiscent of his "Liberty and Union, now and forever, one and inseparable," Webster spoke of the Court as "one tribunal established by all, responsible to all, with power to decide for all. . . ."\(^\text{27}\) If we are to have a United States of America we had best continue this safeguard to our liberties as the keystone of our governmental arch.

\(^{24}\) 370 U.S. 421 (1962).
\(^{26}\) Proceedings on the Death of Mr. Chief Justice Fuller, 219 U.S. viii, xv (1911).
PROPOSALS TO ELIMINATE INEQUITABLE LOSS OF PENSION BENEFITS

NOEL ARNOLD LEVIN†

I. INTRODUCTION

There is no guarantee that pensions will be paid as promised. The ability to fulfill the eligibility requirements is highly contingent on a host of situations largely beyond the individual's control.

In all too many cases the pension promise shrinks to this: "if you remain in good health and stay with the same company until you are 65 years old, and if the company is still in business, and if your department has not been abolished, and if you haven't been laid off for too long a period, and if there's enough money in the fund, and that money has been prudently managed, you will get a pension."¹

In our American society, and indeed in almost all civilizations of the world, people are motivated to a great extent by the expectation of a reward based on a certain effort. When individuals are deprived of their expected gains, personal problems may develop. However, when large groups of people lose advantages which they were entitled to expect, problems arise for the social order as a whole. The problem is compounded further when people have worked long and hard for what they do not get and when their penalty occurs through no fault of their own.

Former United States Assistant Secretary of Labor Donahue observed that "[i]t is utterly indefensible in a society as affluent as ours that an individual's economic security in his later years should rest on . . . a flimsy foundation and be so endangered by such an incredible list of 'ifs' and 'maybes'."²

It is the purpose of this Article to consider the ways employees may lose pension benefits to which they should be entitled, to analyze the prevailing case law, and to discuss currently pending legislation. In this commentary of primary concern are situations where groups

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² Id.
of employees lose benefits — as distinguished from the individual’s loss of benefits. The problems, although interrelated, are different. Ultimately suggestions will be proposed to substantially eliminate or alleviate these problems by recommending certain substantive and procedural changes.

II. PRIVATE PENSION PLANS

A recent government survey concluded that: “As a matter of equity and fair treatment, an employee covered by a pension plan is entitled, after a reasonable period of service, to protection of his future retirement benefit against any termination of his employment.”

The private pension system grew up in the United States as a supplement to, not a substitute for, the Social Security system. It developed because the Social Security stipend was not enough to provide economic security and social dignity for retired persons. “In the early days of retirement programs, it was common for the employer merely to have a ‘practice’ of paying benefits to superannuated employees or to have an unfunded ‘plan’ which was expressly terminable at the will of the employer, and the benefits of which were entirely within the discretion of the employer.” Retirement plans were initiated either through collective bargaining or by unilateral company action. The ceilings imposed on direct wages by the United States government during World War II provided an impetus for the growth of pre-existing plans and for the establishment of new plans. Such “fringe” benefits helped to attract and retain a scarce labor supply, and were, in part, a substitute for the “freeze” in pay. After direct wage controls were abolished, interest in private pension plans remained high. The development of these funds was aided by the decision in Inland Steel Co. v. NLRB, in which pension rights were clearly designated as “conditions of employment,” and hence, a mandatory bargaining subject under section 8(d) of the Labor–Management Relations Act of 1947.

3. PRES. COMM. ON CORP. PENSION FUNDS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS, A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS 39 (1965).
6. 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).
7. Id. at 251.
By the end of 1966, over 38.6 million workers (or retirees) were covered by some type of retirement plan outside of Social Security.\(^9\) Approximately 27.9 million participated in private funds,\(^10\) while some 10.7 million were enrolled in plans for government employees.\(^11\) Employee coverage under negotiated plans grew from 5 million workers in 1950 to 11 million in 1960, to an estimated 15.5 million at last estimate.\(^12\) The dollar value of the reserves in private funds has risen to over $115 billion, a recent Securities and Exchange Commission report has revealed.\(^13\)

The workers covered by most plans do not contribute and payments generally are made exclusively by the employers.\(^14\) The major benefit derived by the employee is the assurance of an income upon retirement.\(^15\) Additionally, many plans provide for severance payments,\(^16\) death benefits,\(^17\) early retirement and disability.\(^18\) It is important to note that employers also benefit. When workers retire with guaranteed income based on a plan, the employer need not provide remittances on an ad hoc basis or be forced to see faithful employees leave with insufficient resources on which to live. Employees may be attracted and retained because their pensions grow with years of service and they lose materially if they change jobs.\(^19\) The advantages of pension plans have been summed up as providing "security for retirees and incentives for those presently employed."\(^20\)

Pension plans may be structured and administered in the following ways:

1. An individual company.
2. A group of companies.\(^21\)

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10. Id.
11. Id.
12. Id. at ¶ 15,010.
14. Plans that have employee contributions may receive Internal Revenue Service qualification. Some plans merely allow employee contributions, while others, usually non-negotiated, may require them.
20. Id.
Collectively bargained plans may be designed either in terms of benefits or contributions, may be self-insured or use insurance companies, and may or may not be funded. It is true that few things cannot be improved. But it is important not to jettison the entire private pension plan structure until viable alternatives of equal merit exist. Efforts are now being made to improve the situation without the destruction of the system. At the present time proposed legislation is pending which would attempt to reform and strengthen the entire private pension system. Advocates of reform believe this is necessary to insure fairness and equity for participants. Senator Jacob K. Javits has recently observed:

I believe that all of these problems are so interrelated that they cannot be solved without a comprehensive legislative program dealing not only with malfeasance of administrators, and not only with the consequences of plant shut-downs and plant terminations, but also with the broad spectrum of questions such as adequacy of funding, reasonable minimum standards of vesting, transferability of credits under some circumstances, and, in short, the establishment of certain general minimum standards to which all private pension plans must conform.

Opponents, who have organized to combat some legislation, believe much of it is unnecessary and an unwarranted interference with the private sector. Moreover, in their opinion, such laws would inevitably either lead to eventual government take-over of the private


23. Id.

24. Employers may legally contribute to union-administered trust funds only if such funds were established by collective agreement prior to January 1, 1946. See 29 U.S.C. § 186(g) (1964).


pension system or its continued existence as merely an adjunct to the Social Security system. They argue that the individual fund should be free to regulate its own destiny according to the judgment of its trustees and in the light of its own peculiar industry and problems. Even among some opponents of legislation and many neutrals, there exists a recognition that some key provisions of several proposed bills are meritorious, and if not enacted into law should nevertheless be made part of the funds' mode of operations by private action.

There are major problems in the private pension system today. Loss of pension benefits is one of them. Since there is pending legislation, it is essential now to consider these problems and propose solutions that could be embodied in the new law. Some changes will be made. If they are to be within the framework of the present system, rather than a sweeping away of it, they should be made now and must be responsive to need. A surgeon's scalpel, not a butcher's cleaver, is needed. Some adjustments to the system could rectify this most serious problem of loss of pension benefits without destroying the entire system.

III. CAUSES OF LOSS OF PENSION BENEFITS

A. Individual Actions

Pension benefits may be lost as a result of certain acts occurring or failing to occur to groups or because of individual activity alone. Such acts may be volitional or not. Thus, an individual may forfeit all benefits if he quits his job or if he dies. Individuals acting together, as, for example, a vote for decertification of a bargaining representative, also affect end results. And loss of pension benefits may arise from entirely extrinsic circumstances, as, for instance, when a company takes certain actions, i.e., to close down, move, lay off workers, or to terminate part of its production. The major causes of loss of pension benefits due to individual actions are examined immediately below:

1. Death

The most obvious and irrevocable occurrence which can cause deprivation of pension benefits is death. Under provisions of certain plans death benefits may be payable if the individual has a vested interest in the plan or has attained a required number of years of

service. However, if an individual dies prior to putting in the minimum time required, there is no benefit payable to his family by the fund. Even where the employee has had contributions made for his account and is vested, his death before retirement may deprive his estate of any benefits. There is no universal acceptance of the principle that a pension fund pay out death benefits for participants, whether vested or not, nor is there any legal compulsion to do so.

2. Disability

The employee may lose pension benefits as a result of disabling illness or severe accident. If an individual is unfortunate enough to become ill or to be the victim of an accident prior to vesting, he would lose all benefits unless the plan which covers him provides disability benefits. Even where disability benefits are provided by the trust indenture, many years of service may be required before the individual is eligible. While attainment of full retirement age may not be necessary, some vesting may be required to qualify for benefits.

3. Voluntary Termination

An individual may lose his pension benefits by simply quitting his job. If the individual were not vested, he would forfeit all benefits. If a twenty-year vesting provision exists and the individual has nineteen years of service before leaving, he receives no retirement pay. All of his work performed over the nineteen years would be completely valueless in terms of pension benefits.

32. See G. Hurd, Death & Disability Benefits under Multi-Employer Negotiated Plans, 1968 Textbook, supra note 1, at 178; see also M. Bernstein, supra note 5, at 33; Dickenson, supra note 17.

33. In many plans a Social Security disability award may be required to evidence disability. That criterion is inability to hold any gainful employment. As a result, an individual may not be disabled enough to be qualified for Social Security and consequently he does not get a pension from the private sector. Nevertheless, he may be sufficiently disabled to preclude his continuing in his pre-disability job. If he cannot do so he may cease to be a participant in "covered employment." Thus, no further contributions will be made for him, and he may lose all pension benefits without qualifying for disability.

34. In Burgess v. First Nat'l Bank, 219 App. Div. 361, 367, 220 N.Y.S. 134, 139 (1927), the terms of the "endowment fund" expressly provided that any employee voluntarily leaving the employer's service without his written consent would forfeit his benefit entitlement under the fund. The plaintiff, who had sought but failed to obtain consent, and quit anyway, was held not entitled to benefits.

35. Vesting has been defined as "the attainment by a participant of a benefit right, attributed to employer contributions, that is not contingent upon a participant's continuation in specified employment." D. McGill, Language of Pensions, 1968 Textbook, supra note 1, at 147, 151.

36. The employee may not be entitled to benefits when he leaves his employer, but if vested, his entitlement is converted into payments at a specified age. Vesting is not required by current law. Senator Javits' original bill (S. 1103, 90th Cong., 1st Sess. 1968):

[W]ould have permitted two different types of vesting: full vesting at age 45 after 15 years, or 50 percent vesting after 10 years and 5 percent per year thereafter.
It can be persuasively maintained that forfeiting pension benefits if a job is left after three or four years or less is no great hardship. These very forfeitures, on an actuarial basis, are applied to increase the pension of the individuals who actually retire. But when the period of time lengthens to nineteen or twenty-four years the logic is diluted. In some plans an individual must work a certain number of years and be a particular age to retire with benefits.\textsuperscript{87} Voluntary termination of employment is not always the result of truly free choice. A relative who must move to a different climate for health reasons, family obligations, inability to find adequate housing, etc., all may force an employee to quit.

Pending legislation to require some vesting minimum would partially alleviate this problem. However, as shall be demonstrated, it would not do it in all cases. And the legislation is far from assured of passing.\textsuperscript{38} This country has a volatile, highly mobile labor force which has a high propensity for job-changing.\textsuperscript{89} Relinquishing employment at one company for a job at another is a prime cause of benefit forfeiture under most plans, especially where the employee's rights have not yet vested.

To deal with this, portability\textsuperscript{40} and reciprocity\textsuperscript{41} are crescents in the discussion of new pension plan legislation; but some steps in this direction have already been taken by pension plans privately. Thus, of the approximately 1300 negotiated multiemployer plans, covering about 5 million workers, in operation today,\textsuperscript{42} reciprocity agreements now cover about half the workers enrolled in such funds.\textsuperscript{43} A small number of unions — United Mine Workers, Amalgamated Clothing Workers of America, International Ladies' Garment Workers, and International

\textsuperscript{87} See, e.g., Labor Turnover Rates in Manufacturing 1959 to Date, MONTHLY LAB. REV., June 1969, at 97 (Table).

\textsuperscript{38} Reciprocity refers to agreements among individual union pension funds which permit the exchange of pension credits. See Kolodrubetz, note 21 supra.

\textsuperscript{40} See generally Bernstein, Transferable Credits and Clearing House Devices, 1967 U. ILL. L.F. 765.
Brotherhood of Electrical Workers — have established national, industry-wide plans.\textsuperscript{44} The Laborers International Union has recently created a nationwide multilateral reciprocity agreement, to which forty funds, with over 300,000 members, are signatories.\textsuperscript{45} The Central States, Southeast and Southwest Areas Teamsters pension fund has negotiated bilateral reciprocity agreements with dozens of smaller funds, as well as with the large Western Conference of Teamsters fund.\textsuperscript{46} A multilateral nationwide reciprocity agreement was negotiated in 1967.\textsuperscript{47} This voluntary reciprocity only covers a fraction of individuals covered by pensions today.

4. **Discharge**\textsuperscript{48}

An individual may lose his pension benefits because of discharge. If an employee's discharge is subsequently upheld after arbitration it is presumably justified. But does the punishment fit the crime? Consider for example, an individual who has worked for a company for nine years and has been late eight times in a two-month period. His union may not think it can defend him successfully and consequently may not file a grievance. Or it may go to arbitration and lose.\textsuperscript{49} An observer's concept of justice may not be offended by this, since the man cannot properly perform his work. But is the observer, the arbitrator, or even the employer aware that a discharge can mean a loss of between five and fifteen thousand dollars to the man? This is really a "fine," imposed because of his absenteeism. Nine years of pension contributions may be forfeited as a result of the discharge.\textsuperscript{50} This may be particularly exasperating to the individual and the union leaders since pension contributions and fringe benefits are frequently

\begin{itemize}
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} As the term is used in this section, discharge is "for cause" when predicated upon the actions of the individual employee. Group discharges resulting from sale, dissolution, and merger are discussed later.
  \item \textsuperscript{49} An arbitrator may consider discharge for lateness a proper exercise of management prerogative, provided the company is uniform in its treatment of offenders.
  \item \textsuperscript{50} In effect the employer is often the beneficiary of the de facto "fine" imposed on the dischargee to the extent that under many plans, the employer's liability for future contributions is reduced by the amount of forfeited contributions. See Gorr v. Consolidated Foods, Inc., 253 Minn. 375, 91 N.W.2d 772 (1958).
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bargained for in lieu of wages. Increasingly, legislators, courts and arbitrators have deemed these benefits to be deferred compensation.

5. Promotion

Ironically, an individual may forfeit his entire pension benefit by being promoted into a higher paying position with management or the union. If he ceases to be a production worker and becomes a supervisor he will automatically leave the collective bargaining unit. Contributions will no longer be made in his behalf. If his promotion occurs prior to his being vested or if there are no vesting provisions in the plan, then he loses all old age security as well as any interests in the monies which were paid in for him. In the event that management has a pension plan for its executives there may be some relief for the individual. Many companies, however, do not have a plan for management personnel; only for unionized or production employees. Moreover, if such a plan did exist, the individual probably would not be credited for the years in the collective bargaining unit. He might end up with years of service with the same company and yet not have a pension because frequently there is no reciprocity between executives' and collective bargaining unit pension plans.

total of 18,000 hours. If the contribution rate is 25 cents per hour, $4,500 has been contributed for the individual. If the net interest, dividends, and realized and unrealized capital gain on the contribution is an average of ten percent per year, the value of contributions for the individual is close to $9,000. As a consequence of being late for two months out of 108 months, the individual not only loses his job but $9,000. Had he and his fellow union members elected not to have had a pension he would have received the 25 cent per hour less the taxes thereon for the past nine years, and when he was discharged there would have been no such financial penalty. It is interesting to note that the trend of arbitrators' decisions has been to hold that holiday pay or vacation entitlement is earned on a pro-rated basis. Most precedents indicate that — barring contract wording to the contrary — if a man were fired in June and would have been entitled to two weeks vacation July 1, he would be entitled to the pro-rated share, i.e., 1/26ths of his vacation. "The legislative history of this provision, section 302(c) (5) of the National Labor Relations Act as amended by the Labor-Management Relations Act, 29 U.S.C. § 186(c) (5) (1964), makes it clear that the sponsors regarded pension contributions as employee compensation." Bernstein, supra note 5, at 120. Senator Ball, who sponsored the amendment, stated that: "I have heard of many cases in which unions have even relinquished wage demands in order to secure a welfare fund, with a percentage of the payroll paid into the welfare fund. . . ." NLRB, 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 1305 (1948).

52. The Seventh Circuit stated in the Inland Steel case that: "While, as the Company has demonstrated, a reasonable argument can be made that the benefits flowing from such a plan are not 'wages,' we think the better and more logical argument is on the other side." 170 F.2d at 251.

53. There is a growing awareness among courts and arbitrators that severance and vacation pay are forms of deferred compensation which are earned incrementally during the course of employment. See, e.g., In re Wil-Low Cafeterias, 111 F.2d 429 (2d Cir. 1940); Botany Mills, Inc. v. Textile Workers Union, 50 N.J. Super. 18, 141 A.2d 107 (1958); Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (1956); In re Brooklyn Eagle, Inc., 32 Lab. Arb. 155 (1959).

54. But see A. Cox, Trustee Eligibility for Benefits, 1968 TEXTBOOK, supra note 1, at 343, 344, wherein the author suggests a method of retaining coverage.

55. This is especially true if the employees' plan is negotiated and jointly administered under section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (1964).
6. **Interrupted Employment**

Individuals may terminate or interrupt their employment with the company and lose all accrued pension benefits for several reasons beyond their control. Military service obligation is an example. An employee may leave because he is sent to jail. He may request a leave of absence if he is elected to public office or becomes a union official. In many situations, election to public or union office will prevent the individual from returning to his job. If the plan is a vested one and if the employee has not worked long enough to be vested, he completely forfeits all contributions made in his behalf; and if the plan does not have vesting, then despite the number of years that the employee has worked for the employer he derives no benefit from the contributions made for him.

All of the situations enumerated above concern an individual rather than a group. The loss of benefits results from something that the individual does or something that is done to him. Frequently the external cause of the action is management, as in promotion or discharge. Sometimes it may be a third party’s activity, such as election to public office or victimization in an accident. It may be the result of the individual’s volitional act, like quitting a job; or the result of a force of nature completely beyond his control, for example, a stroke resulting in total permanent disability, or a heart attack causing death.

**B. Employee Collective Action**

In the situations discussed here, the effect of forces is felt by groups, not individuals. In some of the cases, *i.e.*, decertification and disaffiliation, it is the result of decisions made by the particular individuals in concert with others. In later instances, it is primarily the product of management action. And in some situations, *e.g.*, cessation of payments or loss by trustee action, it is a result of the behavior of both parties interacting or of third forces.

In summary, any one of a constellation of contingencies can result in loss of pension benefits. The examples here are not just theoretical. All of these situations actually occur with frequency in the economic life of the country.

1. **Decertification**

If the incumbent union is decertified the employee and his fellow workers may lose all benefits of the pension plan. A basic tenet of prevailing labor law is that employees are free to select their own bargaining representatives.\(^{56}\) To implement this, employees may engage
in free elections to determine which union, if any, shall represent them. 57 Similarly, employees have the right to oust a union they no longer want. 58

If an employee elects to decertify his union he may be thereby voting to forego his pension. The result is the erection of a barrier or counterbalance to the employee's wishes. In some cases an employee must forfeit money if he votes to decertify a union whereas he would keep the money if he did not so opt. If the pension plan were employer-operated a problem might not arise. But if it were a joint labor-management plan covering a single company, its future could be jeopardized. 59 The plan might be terminated upon decertification and the assets distributed to the participants or transferred to a new trust plan. Since the labor trustees would presumably be ousted union officers, litigation is likely to ensue.

If the plan were industry-wide, the employees would have even less chance of recovery because the trustees of an industry-wide plan could contend that the former union members had forfeited rights under the plan. Having legal title, the trustees could retain all funds for the benefit of others in the industry. In fact, their attorneys might advise that to surrender any funds or to partition the trust corpus would be a breach of fiduciary responsibility. 60 It is apparent that this financial reward or deprivation based upon the exercise of choice to select or reject a collective bargaining agent restricts industrial freedom, is contrary to congressional intent, as expressed in section 7 of the National Labor Relations Act, and contravene public policy. 61

2. Disaffiliation

Schism, 62 disaffiliation, 63 or rearrangement of union configurations can result in loss of pension benefits. Political freedom is thus dis-

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58. Id.
59. At least one court has held that it would be contrary to "justice and fairness" to require an employer to continue to make contributions to a jointly-administered pension trust after the employees had voted to decertify the union. Trustees of Western Metal Industry Pension Fund v. United Control Corp., 4 N.B.P.C. 121 (Wash. Super. Ct. 1967); see also In re Ferris Sales and Service, Inc., and Amalgamated Local S, 36 Lab. Arb. 848 (1960).
60. See Levin, supra note 25, at 28.
62. See, e.g., Hershey Chocolate Co., 121 N.L.R.B. 901, enforcement denied on other grounds, 297 F.2d 286 (3d Cir. 1961). The "schism" doctrine provides that the Board's "contract-bar" rule will be waived. A representation election will be held during the contract period where there is a "basic intra-union conflict" over union policy. See Mayer, A House Divided — The Schism Doctrine, 22 Ohio St. L.J. 154 (1961); Rodgers, A Result: Union Division, 45 V.A. L. Rev. 207 (1959); Summers, Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers, 45 V.A. L. Rev. 261 (1959).
63. Employees have "the right to bargain collectively through representatives of their own choosing. They have the right to designate. They have the right to revoke."
couraged. Not only individuals, but groups or entire locals might wish to join another union or to have their local or locals become independent. For example, five local unions in the Boston area are members of an international union. Pension contributions which had been negotiated many years ago are paid into a pension plan which covers the entire eastern coast ranging from Maine to Florida. There are ten trustees on this plan, five representing the union and five representing the contributing companies. Of the five union and management trustees one each may come from the Boston area, but eight trustees come from other areas in the Eastern coast region. The individuals in the five locals in Boston may wish to withdraw from the international union either to be independent or to join another union. If the disaffiliation occurs, all of the members in the disaffiliated locals may lose their pension rights. Even those who voted against disaffiliating will be affected. Litigation would almost certainly result and it is difficult to predict the outcome.

Under terms of the trust indenture it may be clear that the union members who left have no further interest (beyond any vested credit) in the fund. Principals of equity would dictate to the contrary. The ensuing legal action would certainly be costly and prolonged. Equally significant is the fact that the likelihood or threat of such action might deter the disaffiliation which has the effect of negating the votes of a majority of the workers in the locals. Neither the union trustees of the rejected union nor the employers who remain in contract with the established union would be inclined to favor the disaffiliating locals. Consequently, a payment to the withdrawing locals or partition of fund assets to give a proportionate amount to the participants leaving the international is as remote as the possibility of an amicable settlement or reciprocity agreement.

In unions, as elsewhere, control of the purse often determines control of policy. When union configurations change there frequently


66. See Comment, note 63 supra.


68. Trustees have a fiduciary responsibility to safeguard the trust corpus. Absent specific enabling language in the trust indenture, the disbursement of funds to nonparticipants without legal compulsion to do so, invites litigation by contributing employers, employee participants, and beneficiaries for “giving away” the corpus. See, e.g., Ulene v. Jacobsen, 209 Cal. App. 2d 139, 26 Cal. Rptr. 257 (1962), cited in Note, 1 Ga. L. Rev. 78, 94 (1966).
results litigation with respect to rights in the treasury. As the New Jersey Superior Court stated in *Harker v. McKissock*:

The local's representative status over the years has been given substance and vitality through the possession and use of the funds and property contributed by its members for the purposes of the representation. The loss of these funds and property would threaten impairment, if not the throttling, of the local's performance of its representative functions and its organizing and bargaining ability. *The inevitable result may be a deterrent effect on the employees' right of a free choice of representatives.*

Under a "reverter" clause, disaffiliation may divest the union of its assets, and the membership of its benefit expectation under a negotiated pension plan. In a recent New Jersey case, *Judge v. Kortenhaus*, the court refused to order the trustees of the existing fund to transfer part of its assets to a new plan created for a group of members in a new local carved out of the old one. In two New York cases, such transfers were permitted. In *Whelan v. O'Rourke*, approximately 1000 employees were transferred from one local to another while in *Nicolette v. Essenfeld*, a new local was created. It is particularly significant that in both situations the action was taken in response to the mandate of the international union. Consequently, it cannot be generally stated that courts would take similar action absent exactly similar circumstances. National unions possess considerable discretionary latitude in directing their subordinate local bodies. So long as they act within their constitutionally delineated bounds, in a manner which is neither arbitrary nor capricious, they may consolidate and merge locals, alter their jurisdictions, and

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69. 10 N.J. Super. 26, 40-41, 76 A.2d 89, 96 (1950), modified, 7 N.J. 323, 81 A.2d 480 (1951) (emphasis added). See also Comment, supra note 63, at 260.

70. "The reverter clause . . . is a provision appearing in many union constitutions which purports to control the disposition of money and other property of a local union, which, for any reason, has severed its ties with the international. The clause typically has these assets 'revert' to the international upon successful disaffiliation." Comment, supra note 63, at 253 (footnotes omitted).

71. As a general rule, union membership as a condition of eligibility for receipt of benefits from a negotiated pension plan is an interference with the statutory rights of non-members. However, there may be particular situations where such a condition is not violative of the non-members' statutory rights. See Coal Producers' Ass'n, 165 N.L.R.B. No. 31, 65 L.R.R.M. 1304 (June 13, 1967).


73. 5 App. Div. 2d 156, 170 N.Y.S.2d 284 (1958); see also P. THOMSON, 1967 TEXTBOOK, supra note 5, at 441.

74. 11 Misc. 2d 197, 171 N.Y.S.2d 373 (Sup. Ct. 1958).

75. It is upon this point, the assumed involuntariness of the transfer, that the court in *Kortenhaus* based its refusal to order the transfer of funds — noting that it was a voluntary decision by the local membership.


create new locals, councils, or joint boards without judicial intervention. The impact of local union realignment on negotiated joint pension plans may be significant.

In the absence of reciprocity agreements or the existence of an industry-wide fund, trustees usually believe now that even if they want to vote for a pro tanto transfer of funds to another local to "follow" the erstwhile participants, they should first obtain judicial approval. The state of the law is such that this is the only safe path. Barring such advance approval, participants remaining in the plan could start action against the trustees for depleting trust assets and thus breaching their fiduciary duty. And as the law presently stands, it is difficult to predict that judges will approve a liberal and unorthodox view and hard to blame them if they refuse to direct certain equitable but unprecedented and unconventional solutions.

C. Management Action

"Although pension plans are initiated as permanent programs, they are subject to discontinuance, as is the existence of the sponsoring company." A recent joint Internal Revenue Service and Bureau of Labor Statistics study analyzed the causes and effects of termination and the characteristics of 8,069 qualified retirement plans closed out between 1955 and 1965. Of these, 4,259 were pension plans covering 225,000 participants at the date of termination. Although a variety of circumstances might lead to plan termination, the most frequent reasons given were company and plan mergers, financial difficulties, and business dissolution.

1. Sale

The effects of a sale of a business is best presented by example. Company A manufactures electrical appliances in a downtown metropolitan area. It has 1,000 employees. These individuals are unionized and contributions are made on their behalf to a joint labor-management

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79. See notes 42-47 supra and accompanying text.
80. See note 44 supra and accompanying text.
81. See notes 72-75 supra and accompanying text.
83. The remaining 3,810 plans were profit-sharing (3,655), thrift (126), and stock bonus (29). The author notes that this estimate does not account for employees who lost their jobs, and unless vested, also lost their pension rights in a business decline preceding termination.
84. Id.
85. Id. Merger or sale was given as the reason for termination in 1,276 instances (in 511 of which coverage was continued; coverage was not continued in 406 cases, and coverage effect was unknown in 359 instances). Financial difficulties were reported as the reason in 1,087 cases (25.5 percent); and business dissolution was given in 771 cases (18.1 percent). Id. at 27-28.
fund. Company A buys Company B which makes electrical appliances and is also unionized, but by a different union. B has made contributions to an industry-wide joint pension fund for its employees. A having completed the purchase, gives up the lease on B's factory premises and moves operations to A's owned facility. Efficiencies may be effected resulting in the redundancy of some individuals, but essentially all the employees of B — some 300 — who want to go to A will be allowed to move in. The operations of B will be fully assimilated into A. Former employees of both companies did and will do similar jobs — it is impossible and impractical to keep B's operations as a separate department. A has a union shop and all previous B employees will be expected to join A's union. The A pension plan will be continued and contributions will be made for the new people from B. However, all of their past service with B will be to no avail for pension purposes. Obviously, the A pension fund cannot "pick up" past service credit for 300 people without a lump sum payment being made into the pension plan to fund this. To give credit without funding would be actuarially unsound and would jeopardize the entire pension plan. Trustees who permitted this might well be considered in dereliction of duty. Employer A has no legal obligation to make such a lump sum payment to the A pension fund for the new employees. It will treat them as any other newly hired employees and commence pension plan contributions for them when they start work. The B pension monies were paid into an industry-wide trust where vesting was provided after 15 years. The trustees of the B pension fund have no obligation, under the terms of their trust indenture, to deviate from their rules and make special provisions for the people who are moving out. If they were requested to make a lump sum payment either to these people individually or collectively to the A pension fund they would probably demur on the advice of their attorneys and actuaries. Counsel would argue that without provisions in the trust agreement such a "give away" contrary to trust rules, would be a violation of fiduciary obligation and could open the trustees to surcharge and personal liability for misfeasance. The actuary would point out that his figures are calculated on a planned "drop-out-rate" and that while the loss of 300 people was not anticipated, nevertheless, it would result in a major benefit to the fund. The sudden withdrawal of participants for whom thousands of dollars of contributions had been deposited

87. See Kolodrubetz, supra note 21, at 26. Past service credit is a difficult problem even for funds of different locals within the same international union.
88. See note 59 supra and accompanying text.
would mean a windfall for the fund and presumably, more security for the workers who remain covered by it. Moreover, under presently prevailing legal interpretations the B fund would not be deemed to terminate, even partially, as to these employees. Finally, political realities do not suggest any motivation for the union trustees who have just lost the 300 members and no longer represent these people to risk litigation over them. A majority of employer representatives, if not all of them, never knew the people and have no reason to take responsibility for them once they are no longer participants in the plan. The B workers probably do not have even one advocate serving as a trustee. As a consequence the few B workers who have over 15 years of service, would be vested. All of the others would lose all benefits for the pension contributions previously made on their behalf.

This kind of situation may frequently occur. Jurisdiction in certain industries is not confined to a particular international union. If A’s union and B’s union were in the same international, but belonged to separate funds, it is possible that some negotiations between the funds could ensue which would result in reciprocity. But even within one international, different union officials with different constituencies might not come to an agreement. If the unions are not related, the chance of an accommodation is even more remote.

89. Contributing employers also stand to benefit from the forfeitures in terms of reduced future contribution liability, or conversely, an increased employee benefit potential at the equivalent contribution rate.

90. “In its broadest signification ‘termination’ means the ending of the plan. One form is the achievement of the plan’s purpose by retirement of the last eligible employee. As used . . . here, ‘termination’ means the ending of the plan before that point, often substantially before fulfillment of the plan.” Bernstein, Employee Pension Rights When Plants Shut Down: Problems and Some Proposals, 76 Harv. L. Rev. 952 n.1 (1963). If the courts would declare at least a partial termination of the plan, the affected employees would acquire an immediate vested interest in the plan or secure a distribution of its assets.

91. See Kolodrubetz, note 21 supra.

92. Problems such as these are not rare with the union structure in the United States as it is today. Many examples can be given: The Textile Workers Union of America and the United Textile Workers Union compete for essentially the same jurisdiction. The International Brotherhood of Electrical Workers, the International Union of Electrical Workers, The Utility Workers and the United Electrical Workers all may organize in the same fields. The National Maritime Union and the Seafarer’s International Union organize sailors. There is a United Garment Workers Union of America, as well as an International Ladies Garment Workers Union. And the Amalgamated Clothing Workers of America may clash on jurisdiction with both of these. In the paper and packaging industry, there exist three unions that will assert jurisdiction, United Papermakers & Paperworkers; Pulp, Sulphite & Paper Mill Workers and Printing Pressmen and Assistants Union of North America. There is a Retail Clerks International Association and a Retail, Wholesale & Department Store Union. There is Transit Workers Union and an Amalgamated Transit Union. In the hospital field in New York both Local 1199, Drug and Hospital Workers, R.D.W.S.U. and the Building Service Employees represent workers. Even in seemingly dissimilar areas jurisdictional disputes can occur. Thus, theoretically, both a shoe-workers’ union and a union representing salespeople may clash over who represents salesmen in a shoe store. And an office workers union and a garment union may clash over who represents clericals in a dress factory. There
If the $B$ workers pension fund was industry-wide, representing many plants in the region, or the entire industry, the workers might be worse off than if the fund was a single-company one existing for $B'$s workers only. This is ironic since it is usual for industry-wide funds to provide greater security than individual company funds. A single company fund, whether Taft-Hartley or unilateral, would probably have provisions in the trust indenture providing that, upon the termination of the business, the trust is also to be terminated and distribution made, in accordance with its provisions. Thus the $B$ workers would realize something. In an industry-wide fund there would be no termination either in the whole or in part, in all likelihood.

2. Merger

In this situation the effects upon pension plans are similar to a sale. The resulting consequence of a merger on the workers is the same. Consider the following hypothetical case. Company $O$ had 18 workers, a location in Brooklyn, and a contract with a union that called for pension contributions. Company $X$ with 40 employees had its plant in Connecticut and had a contract with a local of an independent union which also called for pension payments. Both unions had union-shop clauses in their contracts with the employees making

are mechanisms for solving jurisdictional disputes among AFL-CIO unions, but procedures would not necessarily solve pension problems under discussion here since no jurisdictional dispute might be involved. Major unions are outside of the AFL-CIO including the International Brotherhood of Teamsters, the United Auto Workers, the United Mine Workers, the United Electrical Workers, etc. Between these and AFL-CIO unions there is hardly any grievance settling mechanism. The Teamsters with about 2,000,000 members will, for practical purposes, assert jurisdiction in many areas. Thus, they may come into conflict with dozens of AFL-CIO unions set up on either a craft or industrial basis. District 50, formerly U.M.W. and District 65, formerly R.D.W.S.U., similarly cut across conventional lines. Finally, there is a host of small independent locals or federations of locals that assert jurisdiction in one or more fields and some that will organize in any. Against this background it is easy to see how a merger of two facilities can lead to job displacement or pension loss. There is no assurance that employees engaged in similar work will be represented by the same union. Accelerated mergers of unions will, to a limited extent, ease the problem. In 1969, the two unions covering bakery and confectionary workers merged. One had been affiliated with the AFL-CIO, the other had not. In recent years the Meat Cutters and Packinghouse Workers merged, and the Mine, Mill and Smelter Union joined the United Steel Workers.

A typical set of priorities in the event of termination would be as follows:
1. Monies be segregated to assure sufficient payments for present pensioners.
2. Those eligible for normal pension be permitted to retire and sufficient monies be put aside for them.
3. Monies be put aside for those eligible for early retirement.
4. Funds be allocated for individuals with a vested interest who not yet have sufficient service for retirement.
5. The balance of funds, if any, be distributed in some equitable fashion among the participants. It is conceivable that workers with less than 15 years of service would get some lump sum payments. The trust might have a provision requiring at least a minimum number of years of service before participation in this class 5 distribution. In an industry-wide plan, if the individual had not vested, and if there was no provision for severance pay, then the individual would get nothing.
each the exclusive bargaining agent. The principal shareholders of Company O took stock in X in return for the assets of O. The union at Company O and the one presently at Company X asserted, based upon their respective collective bargaining agreements, that they were the exclusive representative for bargaining purposes of the entire new unit. Neither union requested an election at the combined unit to determine which was the bargaining agent.\textsuperscript{94} Company O’s management bargained with the O union on the impact of the move\textsuperscript{95} but it was impossible to achieve a mutually agreeable settlement. The O union could now complain, \textit{inter alia}, about its members’ loss of pension benefits. It could file suit in state or federal district court, seek arbitration, or go to the NLRB. Both the O union pension plan and the X union pension plan are multi-employer joint industry-wide plans. Thus, even if it had been agreed that the employees at O could go over to X with their same pay rates, seniority, etc., they could not carry with them credit for pension contributions. If under the O pension plan none of the 18 individuals had vested, their forfeiture of accrued service credits would be complete.

3. Facility Consolidation

Corporation X has two plants, Plant No. 1 and Plant No. 2. Each plant has a separate union. Both are in antiquated, uneconomic facilities. Their operations may be identical or similar. Corporation X arranges for a modern new facility and moves operations of No. 1 and No. 2 into the new building. Workers in Plant No. 1 were covered by an industry-wide pension plan. After the amalgamation, the workers from Plant No. 1 might lose all pension credits paid in for them. This would occur if:

a) After a plant-wide election the voters voted for “no union.”

b) After a plant-wide election the voters selected the union originally representing the workers at Plant No. 2 and this union does not have a pension plan at all.

c) After a plant-wide election the voters selected the union originally representing the workers at Plant No. 2 which does have a pension plan, but for which Plant No. 1 workers are not granted any credited service.\textsuperscript{96}

\textsuperscript{94} See, \textit{e.g.}, Teamsters Local 568, Southern Conf. v. Red Ball Motor Freight, Inc., 374 F.2d 932 (5th Cir. 1967).

\textsuperscript{95} See, \textit{e.g.}, NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); \textit{see also} Ozark Trailers, Inc., 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (Oct. 27, 1966).

\textsuperscript{96} After such an amalgamation of units a new election might be called for by either union or the employer. \textit{See} note 95 \textit{supra.}
Obviously, if factors were reversed and the union representing workers at Plant No. 1 instead of at Plant No. 2 were chosen, then the same problems might exist for workers at Plant No. 2. Consequently, whatever the outcome of the election, one group of employees, which had previously been covered for pensions might lose them. There could be no election outcome which would protect all employees from the viewpoint of preserving all past pension benefits.

4. Plant Removal

Company A which has its facilities in the North decides to move to the South. Many of the workers because of age, family connections, property ownership, personal proclivities, etc., do not wish to move even if they are invited to do so. The result is that all pension benefits earned by these people may be forfeited.

If the plan is a single-company plan, management may choose not to terminate it since several of its plants at other locations may be covered. If the plant is the only one that the company has, it still may choose not to terminate it, but, rather, to keep it in operation for the benefit of those employees who do move along with the company, figuring this will be an incentive to retain key employees.

Finally, it is important to note that if the company’s contribution was to a multi-employer plan then there would be no question of termination. The employees who were employed by the company would forfeit all of the benefits (to the extent that they were not vested) unless they could find employment at another company which was a participant in the same pension plan.

5. Termination of Business

If a company ceases operations entirely the result would be substantially the same as if it had moved, except the worker would have no chance of relocating and keeping his job. If it were a single-company plan it would terminate and individuals might or might not get

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97. It is posited here that this is not a runaway shop situation, and that there is not a “no-moving clause” in either of which events an arbitrator or the NLRB might direct corrective action for those employees injured by the move. See, e.g., Garwin Corp., 153 N.L.R.B. No. 59, 59 L.R.R.M. 1405 (June 28, 1965), enforced in Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967).

98. It is now generally accepted that seniority rights do not survive plant removal. See Charland v. Norge Division, Borg-Warner Corp., 407 F.2d 1062 (6th Cir. 1969); see also Local 1251, UAW v. Robertshaw Controls Co., 405 F.2d 29 (2d Cir. 1968), overruling Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961).

99. Even this proposition is by no means certain. In George v. Haber, 343 Mich. 218, 72 N.W.2d 121 (1955), the employer, Kaiser-Frazer Motors, had closed down its primary production facility at Willow Run and curtailed its business elsewhere preparatory to abandoning the automobile business in the United States. The former employees brought an action in equity for a judicial declaration of termination and vesting of service credits. The court ordered the summary payment of benefits owed to the retirees.
lump sum payments. Assuredly most would get nothing close to the extent of the personal protection which they had anticipated. Under these circumstances, the losses to the employees may be substantial. Pension plans, with few exceptions, limit an employer’s liability to the amount of his pension contributions. Deficits in the plan’s funding are not chargeable against corporate assets, even if the plan defaults. As a result, the plan’s participants will suffer if there is a deficiency upon termination unless their pension credits can be transferred to another plan. Available funds remaining in the plan on termination are allocated among the participants, frequently with long-service personnel receiving a priority.

A case in point is the Studebaker plan termination. When the Studebaker plant in South Bend, Ind., was closed and the pension plan terminated, workers with at least 10 years of service and age 60 or over — i.e., those retired or eligible to retire — lost no benefits. Workers with 10 years of service or more and between ages 40 and 59 — those with vested rights to benefits — received 15 percent of the value of their accrued benefits. The rest of the participants — those without vested rights — received nothing.

Eighty-five hundred employees were affected by the termination of the Studebaker retirement plan; some tragically, as “when one employee who was 59 years old and had worked for Studebaker for 43 years, starting at the age of 16, forfeited 85 percent of his pension rights.” And he was not alone, for there were 20 other Studebaker employees, each with more than 40 years of service, who were in the same boat.

If the company made contributions to an industry-wide or multi-employer plan, the cessation of the company’s business would not have any substantial effect on the operation of the multi-employer pension plan. The individuals would receive coverage only in the

and to distribute, as vested, the remainder of the $6,000,000 fund to the other participants on a pro rata basis (on an hours worked formula). The trial court entered judgment for the defendant and the Michigan Supreme Court affirmed, holding, inter alia, that the purpose of the pension fund was to pay pension and disability benefits; and that it could not be diverted from its purpose. The court emphasized that, under the express provisions of the plan, monies paid into the fund were not to constitute wages, salary, or compensation to any individual employee. This case has been criticized on the factual grounds that: (1) 95 percent of the company's 11,000 employees had been separated; (2) the 450 employees on the payroll at the time of suit were discharged soon thereafter; (3) the plan's actuary stated in an affidavit before the court that no more than one-third of the fund was needed for all of the existing and potential claims of the existing employees; and (4) neither the union nor the company ever declared the plan terminated. See M. BERNSTEIN, supra note 5, at 343; see also notes 13-18 and accompanying text.

100. See Beier, supra note 82, at 29.
101. Id.
102. Id.
event that they could obtain employment with a company that contributed to the same plan as their former employer. As a practical matter this might be difficult, particularly in rural and other non-urban areas. A multi-employer fund may have dozens of contributing employers in New York City or other metropolitan areas. But it frequently has contributing companies who are the only employers of participants in a certain community. Thus, one international union pension plan with over 200 contributing employers has only one single plant in the entire State of Mississippi. An industry-wide plan covering workers in the textile dyeing and printing industry has close to 20,000 participants. About 7,000 of these come from the metropolitan New York-New Jersey area where there are over one hundred contributing employers. However, dotted throughout Connecticut, Massachusetts, downstate New Jersey and upstate New York are contributing firms that are the only businesses in their towns engaging in textile processing which contribute to the industry's pension fund. If mills in Paterson or Brooklyn closed down, displaced employees would have at least some chance of obtaining covered employment. But if a facility were the single plant in a community, workers would be faced with a choice of (a) not obtaining covered employment, (b) moving their homes and families, or (c) long, costly, and impractical commuting every day.

Even where employment is clustered in a particular area, re-employment may prove difficult. Employment opportunities in certain industries may be diminishing on a nationwide basis or in a particular geographical area.

6. Lay-off

Even though a company does not close its entire operations it may terminate the employment of some of its personnel due to a

104. Reciprocity agreements may serve the same purpose as a multi-employer fund. In the construction industry there has been considerable activity toward establishing reciprocity arrangements among independent pension funds of the same union. Most agreements have been restricted to large metropolitan areas. The Carpenters Joint Council of New York City, for example, adopted a reciprocity arrangement covering five neighboring Carpenter plans in 1965, reaching some 50,000 workers. The Carpenter plans in Detroit and Chicago are limited within their vicinity, while the California Carpenters arrangement encompasses all their plans within the state, as well as plans in neighboring states. Kolodrubetz, Reciprocity and Pension Portability, Monthly Lab. Rev., Sept. 1968, at 24.

105. UUE-AFL-CIO Pension Fund.

106. Textile Workers Pension Fund, 130 Clinton Street, Brooklyn, New York.

107. In the textile-finishing industry in New York City in 1954 there were 1,700 people employed and covered by the industry's pension fund. By 1969, the number of employees in the industry had contracted to 1,200. If, as in 1968, a company discontinued operations and terminated 100 covered employees, it is difficult to see how they would be able to obtain employment within the industry in order to protect their pension credits, since job opportunities were increasingly limited.
qualitative or quantitative change in its operations. It may decide to subcontract-out work that was formerly done by members of the bargaining unit. A department store which previously had a housecleaning and maintenance department may decide it is more efficient and economical to hire an outside cleaning contractor to do the job. The present employees who do the work may be laid off and lose benefits. Even if these people are immediately re-employed by the outside contractor, it may not solve the problem of loss of pension benefits. They now have a new employer — the cleaning contractor — not the department store. The building-service concern may have no union, or a union which, in all likelihood, would be different from the department store’s union. These people could not transfer their past service credits from one fund to another even if there were such a pension fund.

A company may lay-off people because it decides to discontinue an entire operation, deeming it uneconomical.\(^{108}\) It may contract-out a particular phase of production or service, such as delivery operations,\(^ {109}\) die-cutting, data processing, etc. But if there is no anti-union animus\(^ {110}\) and if the lay-off is for bona fide economic reasons, there will be no relief for the employees. As a consequence, large groups of workers may have their employment terminated because of decisions affecting the policy of the business.

There are routine lay-offs of employees due to changes in seasonal patterns of work, because business drops off or for other reasons. The laid-off employees may be recalled, but, in the intervening unemployment, time is lost for pension purposes. If lay-offs occur with frequency, the employees, seeing no future in the job, may give it up. Employees who are laid off are generally those most likely to have no vested interest in the pension plan.

D. Other Causes of Loss of Pension Benefits

1. Cessation of Payments

Under certain circumstances a company may cease making contributions to a pension fund. If the company has a collective bargaining agreement with the union, it is possible that at contract negotiating time the parties agree to abandon the pension contributions for a variety of reasons: e.g., most people in the unit might be young and prefer a current wage increase as opposed to pension contributions


\(^{110}\) Not relevant to this discussion is consideration of partial closure motivated by anti-union animus, and with the intent to chill unionism elsewhere in the organization. See Textile Workers of America v. Darlington Mfg. Co., 380 U.S. 263 (1965).
and ask for a conversion of pension contributions into take-home pay; or the company may be undergoing a period of financial hardship and be permitted to forgo pension contributions. Still another reason why contributions may cease arises when a company and union decide, after a short experience in an industry-wide plan, to withdraw from it and set up their own single company plan. While complete cessation of contributions is not very common, it does, nevertheless, occur and must be included in this discussion. The result of this kind of action is to freeze the pension, protecting the vested, but preventing any further vesting.

Payments for contributions will cease in the event of a failure by the employer to sign a new collective bargaining agreement. A strike or lock-out may result in temporary or permanent cessation of contributions being made for certain groups of employees. Where a union has been decertified during the term of a collective bargaining agreement, the employer's obligation to make contributions to the joint pension fund may be deemed to terminate. Although decertification does not necessarily invalidate the labor contract, one court has held that it would be contrary to "justice and fairness" to require the employer to make contributions to a jointly administered pension trust after the relationship between the union, the company and the workers has been severed. The court found that there was no valid reason to require payments, inasmuch as the pension trust was originally established for the benefit of employees whom the union once represented.

Bankruptcy or other forms of financial insolvency which might affect an employer would also result in an end to payments to a pension fund even if a contract required such payments.

2. Loss by Trustee Action

Many plans, at certain given points in time, do not have sufficient funds to fully discharge all of their liabilities. This is particularly true of newer plans which have not had the time to "amortize" this liability. If such a plan were suddenly forced to terminate, a deficit would theoretically exist. A substantial unfunded liability is most usually

111. When a single-employer plan decides to merge into an industry-wide pension plan, there is usually no accompanying loss of benefits to the participants. The fund's assets are generally transferred to the larger industry-wide fund, which in return "picks up" the past service credits of the transferred participants. Where such an arrangement cannot be accomplished, the single-employer plan is declared terminated, thereby vesting or freezing all interests in it. Coverage under the larger plan is then effective as of the date of transfer of the employees.


created when a plan is established and gives participants either full or partial credit for earlier service. Additional unfunded liability is most often undertaken as subsequent, and more liberal, amendments to the plan’s eligibility requirements are made.\(^{115}\) Some plans make no provision for liquidation of unfunded liability, while others provide for unfunded liability to be funded over a 50 year period. Some make provision for shorter funding periods. While the President’s Commission and some legislators have recommended a 30 year funding period, opponents of a fixed and uniform funding life argue that even 30 years may be too long for a small single company plan, even though it is amply safe for a multi-employer industry-wide plan.

The assets of a plan may be inadequate to satisfy all of its obligations in the event of a termination because of investment losses, failure of the employer to make contributions, as in insolvency, or adverse actuarial errors resulting from an overly optimistic projection of a plan’s income or an understatement of its liabilities.\(^{116}\) Many people who grew to financial maturity in the past twenty years have, until recently, regarded the stock market as something which over the long term only rises. Yet, as this article is written, many trust fund portfolios have substantial losses, with market values below cost values. Today, in a rare phase of economic history both stocks and fixed income items, i.e., bonds, are at a lower point than they have been in several years. Traditionally safe U.S. Government bonds are even selling at substantial discounts from their issue prices. If overly optimistic actuaries included unrealized gains in their actuarial assumption, they may now find they were too liberal and that their projections cannot support the benefits.

\(^{115}\) Beier, supra note 82, at 28.

\(^{116}\) Id. at 29.

Aside from well-publicized cases, only the most fragmentary data are available on the extent of participant losses of expected benefits through plan termination. IRS termination records do not contain the information needed to determine the frequency and magnitude of accrued benefit losses. In an effort to obtain some information, reports filed under the Welfare and Pension Plans Disclosure Act were examined for a group of 99 terminated plans, each with 100 participants or more. Due to one deficiency or another, rough estimates of the extent of potential participant losses could be made for only 26 of the plans. By comparing assets to liabilities, it was evident that in 10 of the 26 plans some participant losses were incurred. These 10 plans had slightly over 10,000 members, including 8,500 reported by Studebaker. The assets of these plans, as a group, averaged about one-half of their reported liabilities, but benefit losses probably averaged less than this fraction suggests. Six other plans, with 2,400 members, also reported insufficient assets to fund their accrued liabilities; however, there were no apparent losses since the participants were transferred to other plans. The remaining 10 plans, with 2,300 members, appeared to be fully or almost fully funded; if any losses occurred in these instances they were probably nominal. These 26 plans may have been more thoroughly funded than the typical terminating plan because they were older and, consequently, had a longer opportunity to improve their funding positions.
Misfeasance or mismanagement by trustees, or their outright larceny or misappropriation of funds can bankrupt pension plans. Investment policies, no matter how prudent they seem, in hindsight, may deplete the fund’s assets to the extent that its reserves are insufficient to meet the current and anticipated demands on the fund. Losses on equity or debt investment or poor security for loans may also jeopardize a fund.¹¹⁷

All of the foregoing indicate the tremendous responsibility placed on trustees, who, as fiduciaries, must be prudent and wise. Bonding and the developing use of errors and omissions insurance policies will, to some limited extent, alleviate the risk in these situations. But the utilization of these insurance policies is not yet widespread, nor acceptable as a concept by all trustees and/or their advisors.

“Trustees, in the last analysis, are the judges of what particular person is or is not eligible for benefits. Especially in the case of larger trusts these determinations take the form of policy decisions which apply to many cases and not just a single situation.”¹¹⁸ Benefit eligibility is, under the terms of the trust indenture, generally within the sole discretion of the plan’s trustees. In some industries, shrinking employment, an aging labor force, and shifts in plant location have caused an unanticipated and unforeseen diminution of fund assets. As a consequence, trustees have had to tighten and to restrict eligibility requirements.

Legal decisions indicate that trustees have considerable power in changing eligibility requirements, providing their actions are not arbitrary or capricious.¹¹⁹ Tightening of eligibility requirements may result in deprivation for groups of employees. In Gaydosh v. Lewis,¹²⁰ an employee who retired in 1950 had met all qualifications for retirement except that he was 56 years old and would have to wait until he was 60 to draw a pension. The United Mine Workers Welfare and Retirement Fund had promulgated new rules in 1953, one year prior to the retiree’s 60th birthday. Under these regulations Gaydosh would not be eligible for pension benefits since he was not working in covered employment at a certain date. The administrator of Gaydosh’s estate brought suit against the trustees to compel payment, urging, inter alia, that the trustees’ action was arbitrary and capricious, that the retiree was eligible and that his eligibility under the old requirements afforded

¹¹⁷ See, e.g., R. James & E. James, Hoffa and the Teamsters 213-317 (1965).
¹²⁰ 410 F.2d 262 (D.C. Cir. 1969).
him (or his estate) an equitable right which the court would protect. The district court granted the trustees’ motion for summary judgment. The circuit court indicated its refusal to interfere with trustees’ discretionary activities under the mandate of the trust indenture, so long as they are not “abusive and ‘despotic’ powers which tend to prostitute the spirit of this Fund.”

In *McCostis v. Nashua Pressmen Union*, the Supreme Court of New Hampshire went even further. McCostis could have retired from his work as a pressman on his 60th birthday. He had met all eligibility requirements for a pension, i.e., 20 years in the industry and age 60. He chose to continue working and opted to retire at age 63. His pension was denied him because in the interim the union changed the eligibility qualification to require 25 years in the industry and attainment of age 65. McCostis sued, claiming in effect, that he had been fully vested and that what was, in effect, a retroactive amendment should not deprive him of something which he counted on or could have gotten earlier. Again, the court upheld the right of the trustees to exercise control over trust eligibility.

These cases are discussed here not because individual rights are involved, but because entire classes or groups of individuals could be economically defenestrated by such trustee rulings. In light of *McCostis*, which gives even greater power to trustees than *Gaydosh*, some have started to consider what the courts’ reaction would be to trustees diminishing the amount of pension already being drawn by someone vested, retired and on pension. In one very recent case the Supreme Court of Washington took a more sympathetic view of the pensioner and considered pension rights as vested if an individual is in covered employment and fulfills his part of the bargain. However, the issue before the court was not rearrangement of eligibility, but an error by the plan’s administrator.

In *Miniard v. Lewis*, the trustees were confronted with an eligibility requirement which was susceptible to two readings. One of these would have made the employee eligible for benefits. The

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125. The eligibility regulation in issue required that if an employee retired or ceased to work in the industry prior to May 29, 1946, he would be eligible for a pension only upon the completion of 20 years service in the industry subsequent to May 28, 1946. The applicant urged that the regulation be read to give him credit for 20 years of service, regardless of when that service commenced, as long as the service ended subsequent to May 28, 1946. Part of the applicant’s 20 years of service was earned prior to May 28, 1946. The trustees interpreted the regulation to mean 20 years of continuous service, wholly performed after May 28, 1946.
trustees chose the more restrictive one and their denial of benefits was upheld as being neither arbitrary nor capricious. The court also rejected the applicant's contention that it was the duty of the trustees, where two interpretations were available, to adopt the one which would favor the participants, under a duty of "fair representation." The court acknowledged that it is a union's duty to fairly represent the interests of all of the members of the bargaining unit. However, it said:

Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because as trustees they perform a separate function and do not act as representatives of either the employers or the union."126

In the New York case of Kristt v. Whelan,127 a trust amendment provided for forfeiture of benefits if an employee worked for a competitor. The trustees interpreted this so as to divest an employee who had resigned and went to work for a competitor six years after the amendment. They deprived the employee of all of his interest in the plan — including that portion which accrued prior to adoption of the amendment. This was done despite language in the trust indenture permitting amendment if it did not operate to divest any beneficiary of his interest in the trust fund. The dissent argued for a more restrictive reading of the amendment so as to preserve that portion of the employee's interest in the plan at the date of amendment.128 But the difference of opinion within the court, one commentator suggests, was "only as to how to interpret the language of the amendment clause, not with the principle that the amendment power could be unfettered if plainly stated."129

126. 387 F.2d at 865 n.5. Cf. Smith v. D.C.A. Food Industries, Inc., 269 F. Supp. 863 (D. Md. 1967), in which the court, on the defendant's motion to dismiss, denied the motion and held that it had jurisdiction, and that the complaint stated a cause of motion and held that it had jurisdiction, and that the complaint stated a cause of action which is cognizable under both the Labor-Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (1964), and the Declaratory Judgment Act, 28 U.S.C. § 2201 (1964). The court also noted that in the complaint:

[I]t is alleged that plaintiffs have been discriminated against and arbitrarily, illegally and unfairly deprived of their rights. It would appear that these allegations charge a breach of the Union's duty of fair representation and also allege that DCA has wrongfully deprived plaintiffs of valuable rights to which they are entitled under the pension fund.

The views expressed by the Supreme Court [in Humphrey v. Moore, 375 U.S. 335 (1964)] clearly establish that the action herein involves rights and obligations which may be litigated by the plaintiff-employees under the aegis of section 301. Id. at 869.


128. 4 App. Div. 2d at 199, 164 N.Y.S.2d at 244.

In *Roark v. Lewis*, the trust agreement conferred full authority on the trustees on all questions of eligibility and coverage. The court considered what, if any, limits were placed on the trustees. The case involved the amendment of eligibility requirements and the court refused to rule on the validity of the eligibility requirements on the record before it. The court remanded, stating that:

Basically it is the responsibility of the parties and Congress to determine the appropriateness of the pension plans with the court's participation limited to affirmative action only in those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority governing case or statute law. We suggest therefore that in the remand hearing the record be enlarged with sufficient detail to permit us to measure the trustees' action against existing standards of arbitrary and capricious conduct.

*Kosty v. Lewis* was still another United Mine Workers retirement fund case. There, the District of Columbia Court of Appeals reversed the lower court, allowing the retiree to qualify for his pension, despite an amended eligibility rule which precluded his qualification, on the ground that there is a duty on the part of the trustees to discharge their duties in adherence to a concept of procedural due process — meaning in the instant case, an amendment of the eligibility rules must be made with notice to those affected by it.

IV. PROPOSALS FOR REFORM

It is now apparent that there are many situations where people are unjustly deprived of pension benefits. Action should be taken to rectify this situation. Considerable controversy may arise over the definition of "unjust." Obviously, different people will have differing opinions on this issue. Our purpose is to set forth our suggestions

130. 401 F.2d 425 (D.C. Cir. 1968).
131. Id. at 428-29. In Collins v. U.M.W. Welfare and Retirement Fund, 298 F. Supp. 964 (D.D.C. 1969), Judge Holtzoff held that the court had authority to set aside and declare invalid qualifications for pension eligibility that were arbitrary and capricious. The court concluded that plaintiff was entitled to a pension and so ordered.
133. See also Sturgill v. Lewis, 372 F.2d 400 (D.C. Cir. 1966), in which the court set out the "elemental requirements of fairness" for all proceedings before the trustees in which they determine an applicant's eligibility for benefits under the pension trust fund: (1) in a contested matter there must be a hearing; (2) the applicant must be confronted with the evidence contrary to him; (3) he must be given the opportunity of presenting evidence in his own behalf; (4) he must be given notice of the hearing; and (5) the findings and conclusions of the trustees must be supported by substantial evidence, with a reviewable record.

For cases which develop the due process argument, see Gomez v. Lewis, 414 F.2d 1312 (3d Cir. 1969); Branch v. White, 99 N.J. Super. 295, 239 A.2d 665 (1968); see also Gediman v. Anheuser Busch, 299 F.2d 537 (2d Cir. 1962); Moch v. Durkin, 207 N.J. Super. 216, 509 A.2d 463 (1986).
for reforms. That others agree with these suggestions is not as im-
portant as that they are stimulated to recognize the problem, consider
and debate it, and eventually to solve it.

A. Introduction

It is essential to accept the principle that within the framework of
economic, political, and social realities we often try to achieve what is
possible. The ideal might indeed be better than "the best under the
circumstances." However, it is often not a choice between the latter
and the former, but the latter and nothing at all. The ideal pension
with respect to amount and security is, given today's economic facts,
not probably attainable. The stark reality is that there is not enough
treasure to obtain all goals, nor, indeed, a desire by many to do so.

The ideal pension plan would combine total portability with maxi-
mum benefits for all at retirement, plus provisions for early retirement,
disability retirement, and payments to survivors in the event of the
participant's death. To say that the cost of such a plan would be pro-
hibitive may not be accurate without the addition of the key word,
"today." Fifty years ago if someone had envisaged the private pension
system of 1970 he would have been deemed a visionary, and told that
the economy could not support such largess. Plans in terms of con-
tributions made, assets held, participants covered, and benefits paid
have grown tremendously in the past 20 years. There is no doubt
that they will continue to grow, and indeed, develop at an accelerating
pace. In the future, it is possible that contributions to plans will
provide maximum security. It is also possible, as some wish, some
fear, and still others predict, that the private pension system will be
absorbed by the Social Security program and that this goal will be
achieved. At the present time we are still far from achieving the
aim of the perfect pension. The amount of pension alone, in many
cases, is not adequate to support people in their old age. Some pen-
sions still are in the area of twenty to forty dollars a month and a
great number are under one hundred dollars a month. Obviously, they
are inadequate as total stipends even for subsistence living. Coupled
with Social Security, private savings, and part time work, where neces-
sary, pensions can eliminate the need for support by either family or
the government. Some pension plans are now at levels where, in com-
134. See, e.g., Pension and Retirement Plans in the United States, PENSION &
135. Levin, supra note 25, at 23.
136. See Levin, supra note 23, at 3.

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pendent retirement. The alternates to the private pension system are penury, private charity, public welfare, or governmental take over.\footnote{137} 

Pension plans today are based on the actuarial principle that contributions will be made for all, but only some will ultimately receive benefits. While maximum portability, early vesting and reciprocity on the one hand and high pension payments to retirees on the other hand are both desirable goals, they are in direct conflict in a pension system where the retirement benefit of one person is based on the fact that another will never retire at all. Some plans have no severance benefits and no meaningful vesting. This is by design and not an oversight. It is only through the deprivation of one participant that the plan can afford to pay another.

B. Review of Present Substantive Law:
   Theories of Recovery

Employees who are deprived of their expected pension benefits seek remedies in courts. The litigated cases are generally based on three theories of recovery. First, it is possible for the employees to obtain a judicial declaration that the plan has terminated,\footnote{138} in whole or in part, vesting all credits accrued by the employees. Second, there is the theory that pensions are a form of deferred compensation, and that the forfeiture of accrued credits to the benefit of others constitutes unjust enrichment. This, if accepted, leads to the principle that the employee has a right of recovery based on a quasi-contract or a quantum meruit theory. Third, it is argued that the trustees (of a joint labor-management plan at least) have a duty of fair representa-

\footnote{137} In the health and welfare area of fringe benefits, similar problems of dislocation and loss of benefit do not arise as frequently as in the pension field. This is primarily because health and welfare benefits are "pay-as-you-go" whereas pensions are based on present payments for future benefits. Nevertheless parallel problems may arise. Consider two examples: (1) Company A buys company B and the B employees leave to work in A's facility and join A's union. As a general rule maternity benefits do not become effective until after nine months have passed from the first date of coverage. Thus, any woman workers at company B who were covered under its plan and pregnant at the time of the A-B transaction might not be covered for the delivery of the child when they work at company A. Their hospital and medical protection and years of service at B are, consequently, of little value at a time when they need it. (2) A man who may have worked at B for 20 years moves over to work at company A. He is technically a new employee and, as such, must undergo a waiting period before he is covered. Moreover, under some conditions, his insurance might exempt any previous medical condition from coverage. He may require surgery or hospitalization just when the individual program does not pay for it. Although it is not within the scope of this Article, it is suggested that parallel protection be afforded to groups of employees who, due to change of circumstances, lose their welfare coverage and benefits. The solutions and recommendations set forth in this Article could be applied with mere technical modification to both procedural and substantive problems ensuing from similar situations with respect to other employee benefits.

\footnote{138} See note 90 supra.
tion toward the employees. This duty must be manifested in their actions in the face of sale, dissolution, or merger of the enterprise.

1. Plan Termination: Vesting Credits

Gorr v. Consolidated Foods Corp. amplifies the first approach toward the disposition of retirement benefits when there are large scale employee separations due to business dissolution or plant shutdown. Consolidated Foods purchased the remaining operations of the Griggs Co. in May 1953, and began major lay-offs almost immediately thereafter. By late 1955, there were only seventy-five former Griggs employees left on the Consolidated payroll. (There were 580 at the time of acquisition). Consolidated continued the retirement plan for the forty-two employees of seventy-five on the payroll who were participants.

The appellate court reversed a lower court holding that was in favor of the discharged employees. It declined to rule, as requested by the plaintiffs, that the plan had terminated. Consolidated, said the court, had continued the plan in force for the remaining Griggs employees (who were but seven percent of the original number) who participated, and furthermore none of the conditions for termination expressly set out in the plan had as yet occurred. The court noted the plan's ten-year vesting provision and from this, it inferred that vested rights were not intended for any separated employee with less than the required ten years of service. In fact, none of the plaintiffs had this much service.

The court's decision created a "windfall" of some $170,000 in "returns applied," accruing to the benefit of Consolidated which

<table>
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<th>Year</th>
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<th>Returns Applied</th>
<th>Not Amount Due From Employer</th>
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<td>1951</td>
<td>$23,499.08</td>
<td>$117,185.54</td>
<td>$9,197.89</td>
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<td>1952</td>
<td>23,830.20</td>
<td>106,338.54</td>
<td>2,641.31</td>
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<td>22,504.90</td>
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<td>11,785.40</td>
<td>45,697.98</td>
<td>46,247.78</td>
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<td>1955</td>
<td>5,808.90</td>
<td>23,698.49</td>
<td>19,579.31</td>
</tr>
</tbody>
</table>

Record, at 151–53, Exhibit F, Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N.W.2d 772 (1958). The figures for 1951–1952 are included by way of comparison. See also Bernstein, supra note 90, at 955 n.12.

The transfer of the value of the paid up annuities purchased by Consolidated's predecessor on behalf of the separated employees to Consolidated's premium account for the 42 former Griggs employees continued in service.
had not made any of the contributions; there was no benefit to the
remaining participants, all of whom still had to meet the vesting and
retirement requirements. Had the court declared the plan terminated,
the former employees would have been granted vested rights to the
paid-up units of the annuity plan. As decided they received no relief.

In Bailey v. Rockwell Spring & Axle Co., a New York court
turned back a similar employee challenge based on a termination theory.
The retirement annuity plan provided that discontinuance of contribu-
tions by the employer would terminate the plan. The company
closed down one of its seventeen plants, continuing the operations and
the retirement plan coverage at the other sixteen facilities. The sepa-
rated employees at the closed plant who had been covered by the plan
brought an action for a judicial declaration that, as to them, the plan
was terminated because the employer no longer made contributions on
their behalf. The court rejected the employees’ reading of the plan,
holding that discontinuance meant non-payment of contributions for
all employees. Again, as in Gorr, the practical result of the forfeit-
ure of non-vested interests in the plan was a gain for the employer —
this time in the amount of $256,000 to apply against future premiums.

In still other cases, employees attempted to secure a judicial de-
termination that closing of a plant or discontinuation of a division
constituted, at least with respect to the severed employees, a termina-
tion of a retirement plan but they failed. In the early case of Longhine
v. Bilson, the New York Supreme Court (Niagara County) held
that a provision in the retirement plan calling for forfeiture of all
rights in the plan upon discharge from the employer’s service did not
contemplate mass separations, and hence, was inapplicable in the case
of a plant shutdown. But Longhine was not followed by the New
York courts. One court subsequently held that a plan was not
terminated where discontinuation of a division resulted in a discharge
of 1.6 percent of its employees because the participants’ sole interest
was their contingent right to receive a pension at age sixty-five and
to a share of the trust fund if the plan is terminated. It was later
held that if the plan is continued for other segments of the organi-
zation, the employees of the closed-down division were in no different
position than if they had severed their connection with the employer
for reasons other than the sale. In George v. Haber, a Michigan

144. M. Bernstein, supra note 5, at 342 n.11.
147. Id.
149. 343 Mich. 218, 72 N.W.2d 121 (1955).
case arising out of Kaiser-Frazer's decision to withdraw from auto-
making, the workers attempted to have the court declare an entire plan 
terminated. If successful, there would follow vesting of all interests 
in the plan where the company separated 95 percent of its 11,000 
employees. Again, the court refused to intercede. It noted that the 
express purpose of the fund was to pay pension and disability benefits. 
It found that the monies in the plan could not be diverted from that 
intended use, despite what the plaintiffs (some 1,100 former Kaiser-
Frazer employees) pointed out; namely, that the changed circum-
stances were not within the contemplation of the parties at the time 
they concluded the agreement. The court, declining to order a distri-
bution of the non-vested accrued credits, also noted that the agreement 
specifically stated that the employer's contributions to the fund did not 
constitute wages, salary, or compensation to any individual employee. 
Moreover, 450 employees remained at work with the company, and 
neither the union nor the employer had declared the plan terminated.150

In the face of overwhelming judicial opinion that large-scale dis-
charges as a consequence of plant sale or closing will not terminate 
a retirement plan which continues elsewhere in the organization, the 
plaintiffs in Machinists Local 2040 v. Servel, Inc.,151 did not seek a 
judicial declaration of termination. They had been discharged by the 
company when it shut-down a large plant prior to its sale. Conse-
quently, they claimed that they should be accorded the status of laid-off 
employees. Under provisions of the prevailing collective bargaining 
agreement, this would have permitted them seniority rights for recall 
of up to two years duration during which period they would have 
acquired vested rights in the retirement plan. The court refused to 
adopt the employees' argument that they were still employees, upheld-
ing instead the employer's right to discharge his workers for economic 
reasons.152 A similar argument was made in Massachusetts, in Karcy 
v. Luther Mfg. Co.153 There the employer shut down the plant, dis-
charging the plaintiffs a short time prior to the date they would have 
reached retirement age. The employees argued that they had been dis-
charged without cause, but their argument was unavailing.

150. The company ceased all operations and terminated all of its employees soon 
after the litigation.
151. 268 F.2d 692 (7th Cir.), cert. denied, 361 U.S. 884 (1959).
152. The plaintiffs had argued that they had not been discharged for cause, as 
required by the collective bargaining agreement, and that they must therefore be con-
sidered employees in a lay-off status. The courts have traditionally upheld an em-
ployer's right to discharge his employees for economic reasons regardless of their 
proximity to vesting their pension rights. See Wallace v. Northern Ohio Traction & 
2. Unjust Enrichment: Quasi-Contractual Theories

In *Lucas v. Seagrave Corp.*, the defendant corporation purchased a plant from the Hupp Corp., taking as a part of the transaction an assignment of Hupp's interest in a non-contributory annuity insurance plan. In a very short period of time, Seagrave discharged thirty of the plant's sixty-five employees, many of whom had long service with the predecessor corporation. Seagrave used the forfeited benefits of the separated employees to reduce its contribution liability for the remaining covered employees. In fact, Seagrave paid no further monies into the plan.

The plaintiff-employees alleged that the discharges were not to be considered individual separations for economic reasons, but were mass terminations pursuant to the employer's plan to use fund monies to reduce his future premium liability. The plaintiffs further alleged that they had a right of recovery for the value of that part of their services for which the employer's contributions to the annuity plan were considered compensation. The defendants were unjustly enriched, the employees claimed, by the amount of forfeited contributions which they were able to apply in satisfaction of the liability for future contributions on behalf of the remaining thirty-five employees.

"In other words, the plaintiffs asserted rights arising from law, and not from the annuity contract or from the contract of employment." The court recognized that the pleadings in the instant case clearly distinguished it from earlier cases which had almost universally denied the discharged employees recovery on any "termination of plan" theory and denied the defendants motion for summary judgment. In considering the compensatory nature of pension plans, the court cited the decision in *Inland Steel Co. v. NLRB*, in which it was concluded that pension costs are a part of the wage and fringe package, are calculated as employment costs and are frequently substi-
tuted for direct cash.\textsuperscript{160} Lucas thus adopted the view that the annuity benefits were indeed additional compensation embodied in a formal plan. It is true that the employees assumed the risk of forfeiture as a consequence of discharge prior to retirement.\textsuperscript{161} However, while a normal and actuarially determinable rate of turnover was contemplated, the plan made no provision for mass discharges. Under the circumstances of a group separation a rigid application of trust indenture provisions would defeat the compensatory intent of the plan. The penalty for failure to meet the requirements for receiving benefits would have fallen upon the employees. Moreover, their inability to qualify was involuntary, caused solely, strictly, and unilaterally by the employer's action. It was deemed inequitable for the employees to have to bear this burden, particularly since loss of retirement benefit was equated with deprivation of compensation already earned, \textit{i.e.}, worked for. A further equitable consideration was that such a loss could be caused by an employer's termination of an entire group which would serve to unjustly enrich the company by reducing its future premium liability.\textsuperscript{162}

The court refused to grant summary judgment to plaintiffs, although it recognized that, on the facts, a recovery in quasi-contract

\textsuperscript{160} Even modern courts reiterate this theory. See, e.g., Dorward v. I.L.W.U.-PMA Pension Plan, --- Wash. ---, 452 P.2d 258 (1969). But other courts permit changes in eligibility requirements which deprive participants of benefits. See, e.g., notes 121-27 supra and accompanying text.

\textsuperscript{161} The plan did not provide for the vesting of rights prior to the employees retirement. The first of the plaintiffs' allegations was that a group separation or discharge had taken place, (thirty of sixty-five employees fired within the first year after acquisition by Seagrave) which constituted partial termination of the plan. The plaintiffs ingeniously based their claim on the fact that the plan was qualified under section 401 of the Internal Revenue Code of 1954, which requires for qualification vesting of benefits in the event of termination, that the discharges had in fact been on an individual basis, and that the plan continued in operation for the remaining Hupp employees. The defendants moved for summary judgment for the plaintiffs' failure to state a valid claim. The court stated that the failure of the plan to provide for vesting, even if the plan had in fact been partially terminated by the employee separations, affected only its tax status under the Code. But the Court, absent express language in the plan of an intention to use the provisions of the Code to define or interpret the terms of the contract, would not act to vest employee benefits in the face of unambiguous language that the plan of termination of employment prior to retirement worked a forfeiture of all rights under the plan. See also Dierks v. Thompson, --- F.2d --- (3d Cir. 1969). Textron, Inc., had an employee financed pension trust. In 1963, it sold assets of one of its divisions, Aperotron, and the employees became employees of the purchaser. These employees thereupon sued to have their interests in the pension trust fund segregated from other fund interests and calculated under an article providing that percentage interest in the fund would vary in size depending on market value of the fund's total assets rather than under an article providing for a fixed amount determined at time of termination of employment, where percentage interest provision applied only to employees of company and subsidiaries, not division. The court stated that Textron always construed a "Division" not to be an "employer" and since the plan was freely amendable under its terms, this meant that until the beneficiary's rights became vested by termination of his employment he could be deprived of future increases in benefits by unilateral act of Textron.

\textsuperscript{162} The amounts of such "windfall" reductions in future contribution liability are not insubstantial. In Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N.W.2d 772 (1959), they amounted to over $178,000. See Table supra, note 142. In Bailey v.
was possible. A trial was held necessary to determine whether the discharges had been on a group basis with the specific intent of defeating the employees’ benefit expectations, as the plaintiffs contended, or if the terminations had been made on an individual basis. Furthermore, the court desired additional evidence to determine the extent to which the parties had considered the annuity plan a form of compensation.

The unjust enrichment theory of recovery advanced by the plaintiffs in the *Lucas* case was tested the next year in *Sbrogna v. Worcester Stamped Metal Co.*\(^1\) where a group of employees struck the company, and were replaced. The company’s retirement annuity plan was in many respects similar to the plan in *Lucas*: there was no provision for vested rights prior to retirement, and forfeitures were required to be credited to the employer’s account to reduce its liability for future contributions. When the employees were terminated, the employer informed them that their rights under the plan were also terminated and the plan was continued for their newly hired replacements. The former workers sued and the case was dismissed in the trial court. On appeal, the plaintiffs sought recourse on the theories of breach of fiduciary duty and unjust enrichment. First, plaintiffs claimed that the employer had a fiduciary duty to the workers, and pursuant to it, was bound to terminate the plan prior to separating the employees, thus preserving their paid-up benefits which had accrued to date. The court disallowed this argument, finding that the relationship between the employer and its workers was of a business rather than fiduciary nature. The employer, it concluded, was therefore under no obligation to preserve the benefit rights of the striking employees, whose employment it terminated.

The plaintiffs second argument hinged on the plan’s language, which enabled the employer to use the amount of the plaintiffs’ forfeitures to reduce its future liability for contributions on behalf of the new employees. Such use, plaintiffs argued, constituted unjust enrichment of the employer. The court rejected this contention. Its reasoning was that the employer was not unjustly enriched since it did not retain the forfeited benefits and had merely followed the contractual provision regarding the disposition of forfeitures.

*Sbrogna* thus falls within the scope of traditional judicial analysis of employee pension rights in the face of mass termination. The court did not explore the employees’ rights in terms of the pension being deferred compensation — a payment earned in lieu of wages — nor did it consider that the employees served their employer and, as such, acted in reliance that they would receive a pension after completing such service.

It is submitted that the decision of the court in *Sbrogna* is in line with the weight of precedent, the law as it now exists, and a narrow reading of the contract and trust document. The court opened no new frontiers. The outcome, however, would treat the plaintiffs inequitably. To say that the employer was not unjustly enriched because it did not get back the forfeited money is unrealistic. The forfeited money could be used to reduced future obligations. Money is entirely fungible. There is, consequently, a distinction without a difference. The company gains in the very direct sense that over the years its overall cost for pensions will be less than if no forfeiture occurred.

Moreover, to merely follow the contract or trust provisions is totally inadequate when a group of employees, as opposed to individuals, are terminated. For a court to consider the difference only quantitative rather than qualitative, serves but to perpetuate the inequity. If the courts feel, as this one did, that they cannot blaze new trails and apply equitable remedies based on an unjust enrichment theory, legislation will be necessary to empower them to do this. A key problem, as the law currently exists, is that courts in some jurisdictions may refuse to innovate and will construe strictly the terms of an agreement while others, with a broader view, will fashion equitable remedies. Thus, a pensioner's rights would be affected depending on the forum where the action is brought.

The *Lucas* approach differs from the conventional analysis principally in the court's willingness to look beyond the boundaries of the pension plan, and to investigate the fundamental nature of the plan, the expectations of the parties, and the social and economic context of the problem. The group discharges encountered in *Lucas, Sbrogna, Gorr* and *Servel*, were probably not within the contemplation of the parties when the plan was drawn nor could the actuaries have foreseen these and made provision for this. Under the *Lucas* rationale, when such situations arise the equities should favor the employees for whom the pension plan represented a deferred wage, rather than the employer who received a windfall enrichment. As noted, the distinction between return of forfeitures to employers and application of them against future contribution obligations is a specious one.

It is important to note that *Lucas* involved a benefit plan administered by an employer and not a jointly trusteed plan set up pursuant to Taft–Hartley. The issue of unjust enrichment or employer windfall will not arise under a joint plan where the employers' contributions are set by the collective bargaining agreement and forfeitures remain in the fund for the benefit of those employees who ultimately qualify for retirement. In these situations the forfeitures may be applied to
increase benefit levels. In Taft–Hartley plans where end benefits, rather than contributions are negotiated, and the contributing employers must make payments sufficient to support the benefit, the Lucas situation would apply. Similarly, in plans that are employer financed, whether or not as a consequence of collective bargaining, forfeitures would decrease the employer’s liability to contribute and the Lucas logic would apply.

The court in Lucas relied, to a considerable extent, on the absence of any vesting provisions under the Seagrave plan. Jointly administered funds, in many cases, do provide for vesting as do two major proposed acts for regulation of pension plans, i.e., Senator Javits’ and Representative Dent’s bills. Courts may react differently when there is vesting and some employees will gain indirectly by the loss of fellow workers who were terminated. Another problem in applying the Lucas rationale to Taft–Hartley plans is the section 302 requirement that the monies be held in trust for the exclusive purpose of paying benefits to covered employees and their dependents. This requirement would certainly inhibit trustees who wished to credit non–vested contributions to employees who have not met eligibility requirements and who, because of termination would probably never qualify. A liberal or equitable interpretation by these trustees might violate the trust indenture and consequently the federal law.

3. The Trustees’ Duty of Fair Representation

Much of the litigation involving employee pension rights in the event of plant closures, sale, or discontinuation of an operating division occurred prior to the 1960’s. In that decade the United States Supreme Court enunciated its conviction that an individual employee or group of employees had a right to bring suit under section 301(a) of the Labor–Management Relations Act of 1947,164 against the union which represents them, predicated upon an alleged violation by the union of its duty of fair representation.165 Smith v. DCA Food Indus., Inc.,166 concerns this aspect of the duty of fiduciaries towards employee participants in a negotiated joint pension plan.167 In mid-1966 the employees of the Cereal Division of DCA were advised that the division would be closed during the first half of 1967 and that the employment...
of the workers in that division would be terminated at that time. The union met with the employer in late 1966 and amended the pension trust agreement, providing that the only employees of the discontinued division who would retain eligibility for pension benefits at age sixty-five would be those who met certain criteria of age and years of service. As a corollary, the rest of the employees would lose all rights to a pension. The plaintiffs sought a judicial ruling that the amendments to the plan were null and void and also requested a declaration of their rights in and to the fund. They based their case on the following contentions:

(a) The amendment frustrated the union's reasons and purposes in originally negotiating the plan in 1953.

(b) The amendment discriminated in favor of the personnel of the Mechanical Division (which continued in operation and under plan coverage) as well as in favor of some of the Cereal Division's older employees.

(c) The amendment arbitrarily, illegally, and unfairly deprived the plaintiffs of their rights in and to the fund.

(d) DCA's contributions to the retirement fund constituted a part of the plaintiffs' compensation from the time the plan was established in 1953 and the amendment deprived the plaintiffs of that compensation.

The action was brought under the Declaratory Judgment Act and under section 301(a) of the Taft-Hartley Act. The defendants moved to dismiss for failure to state a cause of action. The court noted:

The Supreme Court has . . . made it clear that a breach of the duty of fair representation which would entitle an employee to maintain suit against a union under section 301 is not limited to cases where the union is alleged to have acted fraudulently. Such a breach occurs whenever a union acts arbitrarily, discriminatorily or in bad faith with regard to a member of the collective bargaining unit. . . . [I]n plaintiffs' complaint . . . it is alleged that plaintiffs have been discriminated against and arbitrarily, illegally and unfairly deprived of their rights. It would appear that these allegations charged a breach of the Union's duty of fair representation and also allege that DCA has wrongfully deprived plaintiffs of valuable rights to which they are entitled under the pension fund.

. . . The shutdown in this case of one division (the Cereal Division) and continuance of another division (the Mechanical Division) and the fact that the employees in both divisions are

169. The defendants joined were DCA Food Industries, Inc.; Local 13128, U.M.W.; the United Mine Workers of America and the National Bank of Washington. By stipulation of all parties the bank did not participate in any of the hearings, conferences or trials.
represented by the same union presents a situation which is analogous in many ways to the situation in *Humphrey [v. Moore]*. Under such circumstances the employer and the Union may well have been prone to act, and indeed might have acted, unfairly towards the employees being laid off and to have discriminatorily favored the employees whose employment continues. The need to permit employees who are being laid off and who level such charges at both the Union and DCA to proceed under section 301 is self-evident.\(^{170}\)

Those who saw the *DCA* case as a break-through to an equitable solution of the problem were soon to be disappointed. On April 23, 1968 the court, having found no genuine issue of material fact, held that no contractual, quasi-contractual, statutory or other rights of the plaintiffs had been violated by the defendants. Accordingly, the defendants' motions for summary judgment were granted.\(^{171}\)

C. Recommendations Regarding Substantive Law

In conclusion, a review of prevailing substantive law indicates that when a large group of employees have their employment terminated, the courts will not favor their claims to an interest in the monies which have been set aside for their ultimate pension. This applies equally to funds provided solely by employers and to those administered jointly by labor and management. The courts strictly interpret the trust indenture, are reluctant to apply concepts of equitable relief and to disregard the technical document wording and base their decisions on such theories as quantum meruit, unjust enrichment or failure of representation. From this we may project with a reasonable degree of certainty, that if employee deprivation of pension benefits comes about through their own actions, *e.g.*, by decertification, schism, disaffiliation, etc., that the courts certainly would not be more sympathetic to their pleas. The prevailing judicial rationale would apply in both kinds of situations, perhaps with even more justification in the latter.

Commentators can easily blame courts for failure to innovate. But we must realize that there are reasons for the hesitation of courts to legislate in this area. First, they are bound by precedent. Second, judges do not wish to invite reversal by appellate courts. Third, the bench is loathe to usurp the legislative prerogative. Fourth, the entire training of judges and lawyers in our legal system is to make decisions based on the facts, particularly those embodied in formal written agree-

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170. 269 F. Supp. at 869-70.
ments and not to overturn such documents simply because they think that to do so would produce a more just result.

As a result, to criticize courts for a failure to meet all the needs of those who are disenfranchised may be fruitless and must predicate an adoption of a judicial philosophy not universally espoused. And to hope they will do this *sua sponte* is probably futile. What the courts must have to enable them to act in this field is direction from the legislative branch of government. Therefore, it is recommended that there be an affirmation by the Congress that equitable principles may be applied in such cases. This would free the courts and permit them to apply equitable remedies. The time for such legislation is now, when this entire field of regulation of pension plans is under scrutiny. The vehicle could be independent legislation or an amendment to currently proposed pension regulation laws. In essence such a provision should read:

In the event of a group leaving a pension or welfare plan enjoying tax-exempt status, if such departure was not actuarially anticipated, provisions may be made to protect the rights of non-vested participants so as to avoid unjust enrichment to others — fellow employees or employers — and so as to preclude unjust deprivations of these people. Such provisions should be in accordance with established principles of equity.

The wording is purposely loose so as to allow judges to fashion a remedy on an *ad hoc* basis and so as to permit the parties the widest latitude in endeavoring to determine, with the aid of actuaries, if the partitioning of assets from a plan, or the ordered termination of part of a plan, would actuarially do damage to the remaining employees who must also be protected.

**D. Alternative Forums for Relief — Recommendations for Legislative and Judicial Change**

Heretofore most litigation concerning the rights of employees in benefit plans has arisen in state courts, although in some cases federal courts have asserted jurisdiction. Most of the plans involved have been non-negotiated or management-run plans. One key question just discussed is *how* to decide pension plan cases. Another, of equal importance, is *where* to decide them.

Before relief may be obtained under substantive law there must be a procedure to enable the grievant to find a forum with jurisdiction to grant redress. Currently, there is some confusion as to what court, agency or arbitrator has jurisdiction to determine a claim. There is
often doubt as to where an aggrieved group of members can claim a hearing. Several alternatives will be discussed here. These are not necessarily mutually exclusive and, as will be developed later, could supplement each other. Let us consider where a grievance could be adjudicated today, discuss the major alternatives and then examine suggestions.

1. Arbitration

First, arbitration could be employed to obtain fair results. It has long been used with considerable success in collective bargaining situations. Its techniques are certainly known to most labor people, frequently including workers as well as leaders, and to management representatives. The key advantages of arbitration — namely speed, informality, and finality — would all apply with particular value here.

The American Arbitration Association recognized the unique problems of joint labor-management pension and welfare funds and realized that the skills needed for an arbitrator in this field are somewhat different from commercial or labor panel arbitrators. In 1966, it established a panel to function exclusively in disputes involving pension and welfare plans. This was done in conjunction with the National Foundation of Health, Welfare and Pension Plans, Inc. This author, formerly Chairman of the Foundation’s Attorneys Committee and one of its directors commented then:

[S]ettlement of disputes of joint fund trustees would, in many cases, require specialized knowledge and particular procedures. Neither the rules pertaining to commercial arbitration nor labor arbitration seemed entirely fitted to solve the problem of disagreements on joint boards. Moreover, it was felt that a special panel of arbitrators was required. It was noted that extremely sophisticated problems involving actuarial determinations, investment policies, etc., could arise and that it would be most advantageous to utilize arbitrators having technical competence in these areas and also knowledge of the workings of joint trust funds.\(^\text{172}\)

The clause recommended by the American Arbitration Association for inclusion in joint trust indentures is as follows:

**Recommended Trust Fund Clause for Impartial Umpire Procedures:**

In the event of a deadlock upon any question coming before the Trustees for decision, the Trustees shall submit such a question to an impartial Umpire who shall be appointed by and in accord-

ance with the Rules of the American Arbitration Association. The decision of said Umpire shall be final, binding and conclusive upon the Trustees and all parties concerned.

Either the Employer or Union Trustees may apply to the American Arbitration Association Regional Office nearest to the area in which the Fund maintains its principal office.

The cost and expense incurred in any proceedings which may ensue, including the fee of the impartial Umpire and the American Arbitration Association, shall be proper charges against the Fund and the Trustees are authorized to pay such charges.\(^{173}\)

Pursuant to section 302(c)(5)(b) of the Taft-Hartley Act all joint labor-management pension and welfare funds must have an impartial party to break deadlocks among the trustees. The Act states that "in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock ... the two groups shall agree on an impartial umpire to decide such dispute. ..."\(^{174}\) However, this provision of the law does not provide for the situations discussed in this article. The trustees may be in complete agreement, and in fact in most cases they are, as, they were in the DCA Foods case, or the Kaiser-Frazier shutdown case.\(^{175}\) The challenge would be mounted by participants in the plan who felt their interests damaged or destroyed by the trustees' decisions. If fewer than one-half of the trustees advocated their cause, under section 302 there would be no deadlock. As a result there would be no opportunity to secure the appointment of an impartial umpire. Even if one less than one-half of the trustees accepted the dissidents' view this avenue of recourse would be defeated.

Assuming, arguendo, that the trustees of the joint fund did reach a stalemate and resort to an impartial umpire to determine the rights of the parties, that selection would not be made with the concurrence or even consultation of the affected participants. Often the very rank and file personnel who face the derogation of their rights under the plan are the people who are not represented — and their claims may be inarticulated and not presented.\(^{176}\) Moreover, the participants' interests may not coincide with those of the trustees, even when these latter nominally represent the membership participants.

To facilitate arbitration of disputes and to open a road of recourse for participants, the italicized provision below should be appended to

\(\text{174. 29 U.S.C. \S 186(c)(5)(b) (1964).}\)
\(\text{175. See notes 149-50 supra and accompanying text.}\)
\(\text{176. See eg, Smith v. DCA Food Indus., Inc. 269 F. Supp. 863 (D. Md. 1967).}\)
section 401 of Senator Javits' proposed "Pension and Employee Benefit Act" as follows:

Sec. 401. Every employees' benefit fund established to provide for the payment of benefits under an employees' benefit plan shall be established pursuant to a duly executed trust agreement which shall set forth the purpose for which such fund is established and the detailed basis on which payments are to be made into and out of such fund, and furthermore, if 10 percent of the participants of the plan, or 25 participants, whichever is less, request an arbitration on a uniform issue or issues, then the trustees must consent to such arbitration, and the trust agreement must provide for same.

The figures chosen are necessarily arbitrary. The point is to provide recourse to arbitration for groups of participants, while safeguarding the trustees from frivolous claims and the threat of unduly vexatious and costly arbitrations. A percentage figure alone is unfair since in a huge plan with 20,000 people even a figure of 5 percent would require 1,000 people with the same problem. Many shops may have less than this number and to impose a figure based on percentage of the total would penalize the participants in large plans. On the other hand, in a small plan with only 50 members, requiring 25 or more would work a hardship and a percent would be more sensible. A flat numerical requirement would penalize the participants in small funds.

The formula presented here is designed to give protection to the greatest number. It is not unlike procedures designed for stockholders' derivative actions in certain states. If subsequent developments demonstrate that arbitration is capriciously resorted to and that the costs prove to be too high to justify their purpose, the number or percentage can be raised. Conversely, if it develops that participants are still unprotected in groups, the requirements for arbitration can be lowered.

The suggested legislation purposely does not detail how each plan must provide for arbitration, preferring to leave this up to the individual plan. It is specifically stated in the proposed statute that the issue or issues must be uniform, thus not opening the door for individual complaints or allowing several pensioners or participants to group different grievances together. The term "participants" as used should be defined as covering (a) those for whom contributions have been made; (b) those for whom contributions are made; (c) those receiving benefits; and (d) dependents of the above three classes.

177. Cf. N.Y. Bus. Corp. Law § 627 (McKinney 1965), which sets out the requirements in terms of a percentage of the outstanding shares (5 percent) or a fixed amount ($50,000) for the maintenance of a shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor.
The purpose of the arbitration clause lies in the need for group representation for participants whose benefit expectations are endangered as a result of displacement of the entire group. The individual participant who believes he is aggrieved may present his case to the trustees. It generally will concern a question of eligibility. The board of trustees' decision will be influenced by the requirement of adherence to the concept of due process laid down in *Kosty v. Lewis.*

The interests of an entire group whose rights may be annihilated, often to the advantage of others, must be protected.

Incorporation of this suggested wording in a federal statute, be it the Javits' bill or other pending legislation, or legislation introduced for this sole purpose, would mean that in the event trustees did not comply with the law, enforcement could be had through federal channels. A model clause for inclusion in trust indentures, if this federal law were passed would be:

If 10 percent or 25 of the participants, as defined herein, of this plan, shall present a written instrument signed by such number to any trustee, that trustee shall so inform the presiding trustee of the plan, who shall arrange a meeting with the signatories, by meeting with the signatory designated, or in default of same, with the first signatory on the list, for purposes of selecting an arbitrator. If the parties cannot agree on the selection of an arbitrator they shall apply to the American Arbitration Association for appointment of the same, (or the Federal District Judge where the main office of the trust is located, or the Federal Mediation and Conciliation Service). If the plan has no presiding trustee the trustee upon whom the petition is served shall call a meeting forthwith, for the purpose of apprising the other trustees of the petition and arranging for the arbitration.

The arbitrator to whom the dispute is presented would then make a determination of the right of the parties, vis-à-vis the trust, and in terms of the substantive criteria discussed above. This decision would be based on principles of equity. Let us consider an earlier example in the light of the recommendations here. Plant A's workers are transferred from union A to union B due to a merger of the plants. There is no possible construction of the rules of the A pension plan which could give them credit. However, that result is unfair. The workers who transferred would petition for an arbitration. The arbitrator would be empowered to apply principles of equity and following

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178. 319 F.2d 744 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 964 (1964); see notes 132-33 *supra* and accompanying text.
179. *See, e.g.,* Smith v. DCA Food Indus., Inc., 269 F. Supp. 863 (D. Md. 1967); *see* notes 166-71 *supra* and accompanying text.
that, might very likely apportion a part of the trust for the benefit of the workers who were moving out from under coverage of the plan.

In addition to pension funds, plans set up to provide welfare benefits, vacations, holidays, apprenticeship training, day-care centers and scholarship funds would also be included. While the hardships discussed would occur with greatest frequency in the pension area, there is no need to limit coverage just to pension plans. The safeguards are palliative in nature and thus might be utilized with value in the case of other plans. Arbitration procedures could be used in connection with unilateral plans as well as joint trusts. The aggrieved parties could call on the trustees for arbitration or demand it through the American Arbitration Association.

2. The NLRB and Fair Representation Suits

A second avenue of relief would be upon application by the participants to the NLRB to issue 8(b)(1) charges against the union on the grounds of failure of proper representation. *Miranda Fuel Co.* and *Local 12, United Rubber Workers* suggest the manner in which allegations of a failure by the collective bargaining representative to represent fairly all members of the bargaining unit may be transformed into unfair labor practice charges by an employee group. This emerging doctrine, which is in a sense the corollary of the *Vaca v. Sipes* ruling, is of some use in the grievance area. In fact it may influence the union's bargaining posture in establishing a joint pension trust fund in the first instance. However, there are questions as to how far these doctrines will be implemented and what the consequences for orderly labor-management relations would be if they were carried to an extreme.

In many of the problem areas under discussion, this theory would not apply. For example, workers who decertify a union and lose pension benefits cannot very persuasively charge the union which they decertified with not properly representing them after decertification. The union would have a substantially controlling defense, to wit: that since it no longer represented the workers it had no duty to represent them. The same analogy is true in the case of disaffiliation and also a merger of plants, where the old union no longer represents the workers.

184. See notes 56-61 supra and accompanying text.
185. See notes 62-83 supra and accompanying text.
186. See note 94 supra and accompanying text.
Resort to the NLRB on a failure of fair representation theory raises the issue of the proper role of union trustees regarding member participants. Joint trusts are unique in the trust field, deriving from the congressional usage in section 302 of the 1947 Labor–Management Relations Act. Nevertheless they are trusts, and the trustees, regardless of their constituency, are bound by the same standards of fiduciary responsibility as trustees elsewhere in the law.

Only in some cases would this theory of recourse to the NLRB be applicable. Where the trusts were not collectively bargained, if union officers were not actively involved in administration or as trustees, the doctrine of failure of representation might not apply. Even where it did, more problems would be created by this theory than would be solved. The NLRB might conceivably issue a directive to the union trustees to act in a certain manner, i.e., do a certain thing. The trustees as fiduciaries — not union officials — might believe that complying would jeopardize their position as prudent men and might refuse. This would engender further litigation. Even if the labor trustees did follow the Board’s directives, the management trustees might refuse to do so. Consequently, a deadlock would be created and the issue would go to an arbitrator in accordance with the trust agreement. However, the arbitrator, after hearing the issue might render a ruling which has the effect of telling one party to ignore an NLRB directive; and if he deemed the NLRB ruling dispositive of the issue or res judicata, he would be deciding without permitting the company trustees any presentation of their view, since they would not have been party to the earlier NLRB proceeding. Furthermore, if the board of trustees followed the NLRB ruling they might expose themselves to lawsuits from other participants, beneficiaries or employers who would complain that their actions ran contrary to the collective bargaining agreement. Acting in accordance with an arbitrator’s decision or even an NLRB ruling might not be an absolute defense to a suit alleging breach of fiduciary obligations which arises in a state court under a state’s trust laws.

In effect a union trustee wears two hats. He is a union officer representing membership and he is also a legal fiduciary. Where trustees were faced with two alternative constructions of an eligibility rule the court in Miniard v. Lewis stated:

Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees’

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188. See Levin, supra note 25, at 23.
189. 387 F.2d 864 (D.C. Cir. 1967).
duties are those of fiduciaries because as trustees they perform a separate function and do not act as representatives of either the employers or the union.\textsuperscript{100}

One might argue that the unique nature of the Taft-Hartley joint trust imposes a correspondingly unique duty on the trustees — that in addition to adhering to the "prudent man" standard, they have an obligation to protect the benefit expectation of all of the beneficiaries as union members. But there is a conflict since generosity towards eligibility requirements may be consistent with fair play, loyalty to membership, effective representation, even political acumen and yet violate the trust rules for preservation of the corpus.

In any event, Board proceedings, particularly in view of the extensive appeals structure, could be lengthy. While NLRB proceedings themselves are generally expeditiously handled, enforcement or appeal proceedings in federal courts can often be delayed for long periods.\textsuperscript{101} During the interim, people might be deprived of welfare or pension benefits. Also, people who were ready to retire might not be able to do so. This would create uncertainty and instability for individuals who would have to wait for a decision. Because of this time gap, which could run several years, these people would be stymied in their own personal planning. Financially, a heavy burden would be imposed on the individual workers. They might not have a union or organization to support, direct or organize them. Funds may have to come from their own pockets. Many would be reluctant to make large outlays of cash and some might seek a free ride. Of course, if the NLRB handled the case the government, not the individuals, would bear the cost of the proceeding. Finally, it is important to note that while delays and expenses could arise under almost any recommended method, the advantage of arbitration is that the arbitrator can apportion costs.

3. \textit{Courts} — Development of Federal Common Law in Regard to Pension Funds.

Either specific legislation or further court decisions might clearly express the right to use the federal court system as the forum for litigating pension problems. It may be presently argued that under section 301 of the Labor-Management Relations Act\textsuperscript{102} actions concerning

\textsuperscript{100} \textit{Id.} at 865 n.5.

\textsuperscript{101} An unfair labor practice charge is normally heard by a trial examiner of the National Labor Relations Board. His decision may be appealed to the Board on exceptions. The Board's ruling may be reviewed by a Circuit Court of Appeals on a petition for review or on a petition for enforcement filed by the Board. \textit{See} N. Levin, \textit{Successful Labor Relations} 192–202 (new rev. ed. 1967).

\textsuperscript{102} 29 U.S.C. \textsection 185 (1964).
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joint Taft–Hartley trusts may be brought in federal courts. However, this leaves out the very important area of non-Taft–Hartley plans and particularly non-negotiated plans.

However, all funds — welfare or pension — really derive their ability to grow from their tax exempt status. Therefore, based on Taft–Hartley and/or applicable sections of the Internal Revenue Code it would be appropriate to clearly state that disputes concerning the rights of the parties under employee benefit trusts, which have been qualified for tax exemption, may be resolved in federal district courts. In fact, there is currently legislation being considered which would impose a federal fiduciary standard on trustees of employee benefit trusts. This legislation would be the logical place to include the provision that litigation be in federal courts. If such a law setting federal fiduciary standards is passed, then, in addition to the rationale for federal court jurisdiction based on Taft–Hartley and/or tax qualification, it could be based on the new federal fiduciary law. One commentator has stated that:

A difficult and unanswered question is whether the substantial improvement in the rights of most beneficiaries is sufficient justification for the impairment of the rights of some beneficiaries. The answer to this question will lie, as will the answers to most questions in this field, in the area of the developing federal law of benefit funds.

Another undefined area is the appropriate forum for determination of trustees' responsibilities or beneficiaries' rights. . . . [T]he better rule clearly is to apply that same evolutionary federal common law sanctioned as to Section 301 of the LMRA in Textile Workers v. Lincoln Mills.193

Two significant assumptions underlie the statement above: first, that there is a developing federal law of benefit funds and second, that the Lincoln Mills rationale should be extended to the joint trust area. As the First Circuit stated with logic in Copra v. Suro:194

The legislative history suggests to some extent that . . . Congress intended in Section 302(e) to create a broad equity jurisdiction that would not only authorize the district courts to forbid the making of payments in violation of Section 302(a) and (b), but that would also authorize them to exercise a more general equity power over the welfare funds whose life in effect depends on the permissive exceptions of Section 302(c) (5).

Unfortunately to date there has really not been development of a body of federal law; nor have "equity" principles been applied. Serious

194. 236 F.2d 107, 115 (1st Cir. 1956) (dictum).

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consideration must be given the idea of a developing federal common law of pension and welfare trust funds. It should not be limited only to those funds which derive their very existence from the federal Labor-Management Relations Act of 1947, although as the law presently stands it could be argued that there is more basis for including these trusts than other non-Taft-Hartley employee benefit trusts.

Section 302 is not preemptive in its scope, and state courts are not precluded from applying state law in their consideration of joint pension and welfare fund cases. The concurrent jurisdiction exercised by the state courts, each interpreting rules or documents differently or applying distinctive standards, precedents or principles of construction, may lead to divergent results. This could occur even with respect to the same fund, where the issue was litigated in several forums simultaneously. With the current trend toward fund consolidation, reciprocity and portability of credits and the accelerated growth of industry and nation-wide funds, it is entirely possible to find the trust office, the trustees, the beneficiaries, and the contributing employers located among several jurisdictions. The conventional arguments in favor of uniformity of treatment, consistent legal application and predictability of result have substantial significance here. The joint fund is a unique statutory creature and it is reasonable to argue that it merits a unique and consistent treatment in the courts to effectuate the underlying congressional intent. Going even a step further it may be recognized that employer contributions to all pension and welfare trusts are substantially aided by tax exemption which is federal rather than state insofar as its major impact is concerned. As a quid pro quo for this preferred treatment Congress can rightfully require that federal courts regulate these institutions which have received favored treatment. Passage of a broadly applicable federal fiduciary statute will lend further support to this position, and might, indeed, preempt the field.

The proposed legislation should specifically preempt the state courts as forums for civil litigation over employee benefit fund problems. To allow concurrent jurisdiction would foment conflict of law problems, serve no useful purpose and result in divergent principles of law.

The only disadvantages of federal proceedings — namely the cost of litigation, the task of organizing plaintiffs and the lengthy delays — would not be mitigated if state jurisdiction was adopted. The new administration bill, as noted later, establishes clearly and unquestionably that federal jurisdiction may apply. It sets forth the conditions under which suits may be commenced in federal court while not specifically exempting state courts from concurrent jurisdiction.

4. Specialized Agency: The Javits Proposal

A fourth alternative is to set up a special agency having particular knowledge of employee benefits to deal with these problems. Such a commission as Senator Javits recommends could handle problems arising in pension funds and other employee benefit trusts. Hearing examiners could be appointed who would preside at hearings which would involve the types of problems set forth here, and additionally other matters which would arise under the proposed law.

Even if the Javits Bill were not passed, a Commission for these problems could be enfranchised. As with the NLRB and other alphabet agencies, investigators would check first to see if, in fact, a bona fide grievance existed under the terms of the law. Should these investigators report that there is such a potential injustice as the law seeks to avoid, then they could certify that a question arose under the Act. Thereupon a hearing would be scheduled. The claimants would have a right to present their case. The trustees would indicate their viewpoint and the hearing examiner would ultimately render a ruling. This decision or interim report would be passed up to the full board. Acting on the facts and record adduced before the examiner the Commission would either accept, reject or modify his report. As with other agencies, provisions of the Administrative Procedure Act would apply. 196 Directives of the Commission would be enforceable if application was made to a district court in the event a party refused to abide by the decision. Appeal from the Commission could be made to a court of appeals and ultimately the United States Supreme Court. Federal appellate courts would acknowledge the particular expertise of this administrative agency as they do with others. To this end the Javits Bill establishes the United States Pension and Employee Benefit Plan Commission. The Senator has stated that:

The Commission . . . would be an independent agency organized on the SEC pattern. The language of section 3(a) is similar to the language establishing the SEC. The general intent of the bill is to centralize all federal regulation relating to employee benefit plans in a single agency, thereby to the maximum feasible extent relieving plan administrators of the burden of multiple-agency regulation and avoiding the necessity of multiple applications, multiple inspections, and overlapping jurisdictions. 197

The Javits Bill extends broad powers to the Commission to regulate virtually all phases of employee benefit plans. 198 Of particular

interest is the fact that the Commission is empowered to sue to enforce benefit standards as well as the administration of funds provisions of title IV. Section 504 of the Act preserves a private remedy in the case of a violation of any provision of a plan. As to forum and applicable law, the Senator states that:

The law applicable in any such case based upon a breach of contract or breach of trust would be State law in any case in which the agreement designates the law of a state as applicable, and in all other cases, federal common law would apply, although, of course, the federal courts would be expected to draw upon the State common law as a source for the development of a federal common law in this area.

Further, sections 502 and 504 of the proposed Act permit either the Commission or an individual participant to bring suit either against the fund to compel the payment of benefits, or in the name of the fund “against any person who shall have transferred or received any of the assets of such fund in violation of any such agreement or of the requirements of title IV.” This remedy is comparable to the familiar stockholders derivative suit in corporation law.

5. Conclusions

In conclusion, it is believed that the arbitration alternative is an excellent one. It permits a speedy conclusion and apportionment of costs. Legislation, as recommended herein, should be passed to encourage use of arbitration for all funds. Specific enabling legislation allowing federal court jurisdiction would seem to be a particularly sensible alternative. However, despite Senator Javits’ view, it is believed that emphasis should be placed on the evolution of federal law rather than on the application of state laws. The use of a specialized agency might also provide an excellent avenue of relief for aggrieved participants particularly when coupled with a right of litigation and appeal within the federal court system.

It is imperative that steps be taken now to provide remedies and a knowledgeable forum for the wronged, potentially wronged and those who fancy they are wronged.

E. Proposed Federal Legislation

There is a wide divergence of opinion as to the necessity for or desirability of federal legislation concerning private pension plans.
One insurance company executive has labelled pending bills in Congress as the "legislative shadow" and concluded one presentation to a pension group with the ominous prediction of envelopment of the private sector unless they act. He said:

I hope this brief survey of the effect of legislation on benefit plan levels has made you aware, if you were not before, of how the legislative shadow over private pensions is lengthening. To the extent we voluntarily undertake to enlarge and strengthen pension commitments to employees, the dimmer that shadow will grow. There may be no light left if we fail.

Another observer, in a presentation before a meeting of the National Foundation of Health, Welfare & Pension Plans, Inc., commenced his remarks with these words:

I thought seriously about pinning a band of black crepe around my sleeve before this session to dramatize a forthcoming death, the imminence of which many of you may still be unaware—the death of the private pension system in the United States of America. . . . I would like to offer some insights into this bill [S. 3421] which may lead you to conclude, as many have, that this is the first bullet to be fired into the now healthy body of the private pension system and which, if fired, will inevitably result in the demise of the private pension system.

The sponsor of a bill viewed pension regulation legislation in a somewhat less dramatic light. He stated that:

I do think there ought to be some minimum standards in this field. And, in my judgment, those minimum standards will no more force all pension plans to be the same than the minimum wage law forces all employees' wages to be the same. The minimum is merely the basic level which decency and order require.

It is becoming increasingly apparent that there will be some legislation considered in the next few sessions of Congress. Such legislation, if enacted, could alleviate or eliminate some of the problems considered in this article. The most significant bills that are presently contemplated would not solve many of the problems discussed here unless amendments or additions are made to them. These could be either those suggested here or others that would be responsive to the problems.
discussed. Key among the present proposals for change are sections dealing with vesting, funding, insurance, portability and fiduciary responsibility. An examination of these proposed bills together with an analysis of their utility in solving the problems discussed previously is in order.

1. Vesting

Vesting provisions in pension plans assume critical importance in many of the instances which we have discussed throughout this article. Professor Bernstein has observed that:

Supposedly vesting is unnecessary when a company goes out of business because the plan terminates, . . . thereby effecting vesting of all credits without regard to length of service or age. However, as substantial separations usually will precede the actual shutdown, only those who achieve the age and service requirements of a vesting provision will obtain benefit eligibility. And usually the employees who can or do hold on to the bitter end are the high seniority employees. If a plant shutdown is but one unit of an enterprise, the plan usually will not terminate, and the vesting eligibility conditions determine whether most or a substantial group of employees achieve or fail to attain eligibility. 208

One approach to the vesting problem, suggested in the Yarborough act, is to reduce the overall age and service requirements, which this bill accomplishes by requiring full vesting of regular retirement benefits after an employee has acquired ten years of continuous service. A second approach is characterized by "deferred graded vesting," which in the Javits proposal means vesting of ten percent of benefits at the conclusion of the sixth year of continuous service, with incremental vesting of an additional ten percent of benefits each year until full vesting occurs after fifteen years of service. The latter approach might ameliorate the harsh results in many of the reported cases in which none but the longest service personnel attained any benefit credit at all.

The proposals are consistent with the steadily accelerating trend toward earlier vesting of benefits. 209 A recent Pension Research Council study of 1,047 plans (in 1966) having some vesting requirements revealed that 27.3 percent of the plans (with 47.3 percent of the participants and 50.6 percent of the dollar value of invested benefits) required ten years or less for full vesting. Plans requiring eleven to twenty years of service were 41.9 percent of the total (with 34.1 percent of the participants and 37.1 percent of the dollar value of vested benefits). The late-vesting funds, those requiring over twenty-

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one years of service, were 30.8 percent of the total number, but only 18.5 percent of the participants and 12.3 percent of the dollar value of invested benefits. The trend, particularly under the impetus of collective bargaining, is unmistakably toward less stringent vesting requirements. It should be noted, however, that total vesting after 10 years or even graded vesting from six to ten years would protect only those who were fully vested and, to a limited extent, those who were partially vested if there was a dislocation. Those not fully vested would still lose out. Even those vested would have certain serious problems. They would have no say as to who managed their money. Furthermore, a man who is vested in less than a maximum pension from his old job may move to a new job where he will not have enough opportunity for future service to attain a maximum pension. This result may give him a lower over-all pension than he had counted on from the first job.

2. Funding

Typically a pension plan may fund twenty percent or more of a plan's accrued benefit obligation by the end of the plan's fifth year of operation; by the end of the tenth year the total will have reached between forty and sixty-five percent. Viewed from the vantage-point of employee benefit losses in plant shutdowns, sale and merger, these funding patterns suggest strongly that unless past service credits are transferred, workers could stand to lose eighty percent of their total accrued benefits if their plan terminates in its fifth year. At ten years the loss could range between thirty-five and sixty percent.

The Yarborough bill required full funding by the end of the twenty-fifth year, while the Javits proposal permits existing plans forty years to amortize their unfunded liabilities, and thirty years for new plans. With the long funding periods provided, neither proposal solves the problem of the immature fund which is dissolved prior to any meaningful degree of funding. Certainly, under the Javits bill, which proposes partial vesting after six years' service, more attention must be given funding arrangements during a plan's initial years of operation. And benefit deprivation can occur without fund insolvency. In the Kaiser-Frazer case (George v. Haber) it was

210. R. Van Deuren, supra note 206, at 237.
211. Beier, Termination of Pension Plans: 11 Years Experience, Monthly Lab. Rev., June 1967, at 30. Of the 4,259 terminated qualified plans (1955-65) upon which the Article is based, 1,966 (46.2 percent) had been in existence 5 years or less at the time of termination. They covered 65,000 employees, 28.9 percent of the 225,000 employees who participated in plans covered by the study.
212. See generally id.
noted that the fund of some $6,000,000 was far in excess of potential liabilities, and yet the participants were denied a distribution of assets or an equitable declaration of vesting.

Rigid funding standards are not essentially necessary in most industry-wide plans. In single company plans they would protect the plan from collapsing and would serve the same purpose as insurance. But losses due to the insolvency of a plan are only a very small part of the problem of denied benefits.

3. Insurance

The Javits Bill, as its author states, "reinsures against only one contingency: termination of the employer's business before the unfunded liabilities of the pension plan are funded. The premium is geared to the amount of such unfunded liabilities, and cannot exceed one percent of that amount." The bill envisions a program similar in nature to the Federal Deposit Insurance Corporation, and insures benefits only up to specified amounts. An alternative legislative approach would be for the plans to purchase insurance to guarantee payment of vested benefits in the event of plan termination due to cessation of operations by the employer or other adverse economic conditions.

Where loss of pension benefits is due to a single company trust going bankrupt, the imposition of an insurance or, as some choose to call it a "reinsurance" plan, would eliminate the problem. Such an insurance scheme need not be imposed on industry-wide or multi-employer plans since the protection is usually unnecessary due to the very nature of these plans. An insurance program would be suitable and worth the cost for single company plans since the expense of premium would be justified by the protection afforded. A situation such as the loss in Studebaker might be avoided. But plan insolvencies precipitate only a minimal percent of benefit losses and while insurance would solve a small part of the problem it does not even touch the more frequent and serious areas where loss of pension is due not to fund insolvency but to lack of eligibility for the pension benefit.

4. Portability

Vesting and funding of benefit credits are crucial to the individual's realization of his retirement security expectations. However, portability has assumed critical importance in recent years. In many cases of plant shutdown, termination and discontinuation, all non-vested

216. See notes 99-103 supra and accompanying text.
benefit credits were deemed forfeit where, as in practically each case, the plan was held not to have terminated. Had the employees the advantage of a reciprocity agreement or some similar portability device, they might have salvaged their accrued, albeit non-vested, benefit credits.

As portability is currently viewed it may be said that "[u]nion pressures have been responsible for the adoption of many reciprocal arrangements. This is particularly true in industries demonstrating a need for extension of the pooled pension fund arrangement without interfering with existing collective bargaining relationships and established pension plans."\textsuperscript{217} The significant reciprocity agreements are found primarily among plans of the same union in industries or areas characterized by job shifts which, were it not for reciprocity, would severely penalize the member-participants. "Most agreements cover only a craft or occupational group in a specific industry, one region, or metropolitan area."\textsuperscript{218}

Although reciprocity may be developing, it is a difficult area owing to the wide diversity of funding practices, benefit levels, contribution amounts, vesting requirements and collective bargaining agreements which underlie negotiated plans. The Yarborough bill does not actually reach the complex portability area, but proposes authorization of further study. The Javits bill does not create specific obligatory machinery to force portability. Rather, the bill specifically provides that:

It is declared to be the policy of the Congress that a system of pension portability should be established by the Federal Government to facilitate the voluntary transfer of credits between registered pension or profit-sharing-retirement plans having similar benefit features and actuarial assumptions. Nothing in this title... shall be construed to require participation in such portability system by a plan as a condition of registration under this Act.\textsuperscript{219}

This idea may derive from Professor Merton Bernstein's chapter entitled "Transferable Credits and Clearing House Devices."\textsuperscript{220} Informal "portability" is encouraged, although not mandated under the Javits bill, by the special and lenient funding arrangements permitted for multi-employer plans. There is a degree of portability built into such plans so long as the employee confines his employment experience to contributing employers within the group. The minimal vesting requirements set out in the Javits bill create a substitute for portability, in that it is conceivable that an employee may change jobs several times during the course of his career, attaining some degree of vested

\textsuperscript{217} Kolodrubetz, \textit{supra} note 21, at 23.
\textsuperscript{218} \textit{Id.} See notes 40-47 \textit{supra} and accompanying text.
\textsuperscript{219} S. 2167, 91st Cong., 1st Sess. § 301 (1969).
\textsuperscript{220} M. Bernstein, \textit{supra} note 5, at 264-96.
interest in several plans. When he retires at age sixty-five he is eligible to receive his vested benefits under each plan, together with Social Security payments. Under the clearing house proposals which have been advanced in this country and in Canada\(^{221}\) the ultimate accrual of multi-plan benefits may be capable of practical implementation.

Total portability of pension credits would materially solve the problems discussed only if all employment had pension plans. When the worker went to employment which did not have any pension plan he would have no where to put his accrued past service credit. In any event, mandatory portability is not included in current bills. The type of portability proposed is in fact a form of government sanctioned reciprocity and would not protect workers unless their trust subscribed to such a concept. Total portability, presumably, is not included in pending legislation because of the disadvantages attached to it and the fact that it would engender considerable opposition.\(^{222}\) Moreover, there are many reasons to resist total and mandatory portability and little likelihood of such enactment into law in the near future.

5. Fiduciary Responsibility

A federal standard of fiduciary responsibility is mandated in several pieces of proposed legislation. Even the most non-controversial proposed bill of all — that prepared by the U.S. Department of Labor and representing the present Administration’s view — provides for a “federal prudent man” rule. It provides that the “employee benefit fund shall be deemed to be a trust and shall be held for the exclusive purpose of 1) providing benefits to participants in the plan and their beneficiaries and 2) defraying reasonable expenses of administering the plan.” The legislation also provides that civil actions “brought by a participant or beneficiary may be brought in any court of competent jurisdiction, State or Federal.”\(^{223}\) The federal standard of fiduciary responsibility might be a higher one — particularly as it evolves — than those presently prevailing in some of the fifty states, although many states already have strict and comprehensive standards of fiduciary liability.

It is important to note that a federal law of fiduciary responsibility will cut two ways and also have scant significance in solving the problems discussed here. On the one hand, it might induce better trustee performance and thus minimize losses from malfeasance, and

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221. Id. at 296.
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negligence. But these occurrences are infrequent now. In many situations they are covered by the bonding which is already legally required; and in other instances the institution of the proposed insurance for funds would make up any losses. On the other hand, stricter fiduciary responsibility would make a trustee even less likely to allocate funds to a mass of members who left if the trust indenture did not specifically allow it. It would likely enforce the trustee's determination to follow to the letter all of the technicalities of law. As a result, trustees would be extremely reluctant to adopt equitable solutions themselves and litigation would actually be encouraged.

V. Conclusion

Thus, in conclusion we can see that more precise and effective safeguards must be afforded than those proposed under the new laws. Adoption of our recommendations is urged both with respect to the substantive treatment of loss of pension benefits and insofar as new procedural methods will permit the aggrieved an appropriate forum for hearing.

Specific provisions should be made in currently pending legislation to right wrongs which have occurred and will inevitably arise again unless antidotes are taken. Since new legislation is pending and some form of law is likely of enactment, now is the time to recommend improvement for such legislation. This article's recommendations are not intended as all inclusive panaceas. The focus has been on groups that are wronged. If groups of people lose coverage under pension plans, then the remaining participants or the contributors are unjustly enriched. And those deprived of their expected benefits are unjustly punished. The test should be that if the defection from the plan of the group is of a nature that would not have been normally foreseeable in an actuarial survey, then the individuals should have their benefit protected. If the losses are of the type usually included in actuarial calculations based on individual actions and company history, i.e., longevity, morbidity, discharge, lay-off, etc., then no adjustment should be made.

If this criterion is followed, no persons are hurt and none unfairly benefit. Thus, if huge groups separate from a plan and if the dollars paid in for them follow them, there is no unfavorable effect on the balance of the participants or employers remaining in the plan and no actuarial reevaluation is required. Using this criterion, trustees can find out from their actuary if calculations have been made for losses of participants such as the particular one in question. There is no in-
congruity in distinguishing between groups and individuals. The difference is qualitative as well as quantitative.

Once it is decided that the earned dollars contributed for a group of individuals really belong to them, then the person hearing the case can best determine how this should be done. For example, if there was a decertification election and the members joined another union, then the money proportionate to their membership in the old plan should be partitioned off. It should either go to establish a new plan for these workers, or be paid in a lump sum to the established pension plan of the new union, so as to purchase maintenance of the same past service credit which these people already had — leaving them no better nor worse off than they were before; and not hurting participants or employer contributors of the plan from which they exited.

The general principle is that the money follows the man. The dollars would be transferred from one fund to another or a new fund would be created or if these options were impossible, proportional lump-sum distribution to the individuals would be made. Tax problems, if any, resulting from this, could easily be handled with appropriate Internal Revenue Service regulations. It might be necessary for the Internal Revenue Service to rule that such a distribution, even if the employee did not terminate his employment, and would not, under current regulation, be eligible for capital gains treatment, would still be taxed in this more favorable way because of the circumstances.

It certainly is fairer that an employee who is deprived of an expected pension, not be doubly penalized by having his lump-sum payment taxed to him as ordinary income. This would occur, if he were under 65, as would generally be the case, while he was still in a relatively high bracket and could conceivably eat up a third or a half of the total monies disbursed.224

Laws are fashioned to prevent chaos and to right wrongs. Here we have compelling examples of injustices which could, and actually do occur under the present private pension system. There are persuasive reasons for endeavoring to right these wrongs. Repeated instances of wrongdoing, unfair deprivation or unjust enrichment may result in a demand for abolition of the entire private pension system. Many do not want this to happen.225 From a moral and social viewpoint to deprive persons who are without fault of the fruits of their labor is wrong. A small premium paid to obviate injustice is insurance against social disorder and chaos. Practically speaking, adoption of the proposals advocated here will, in the long run, avoid litigation

225. See supra, note 25, at 22.
and save money for qualified pensioners and contributors. Pension and welfare funds are increasing at an accelerating rate. The sums invested burgeon, the level of benefits escalate and the number of persons multiplies. The case law to date has not solved the problems which have arisen. The narrow application of old principles of contract or trust law simply cannot be applied with equitable results to employee benefit trusts.

The law can be used as a precision instrument to achieve the ends suggested. Enactment of laws suggested herein, either independently, or as amendments or additions to the presently proposed pension and welfare regulatory bill, will expedite justice.