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THE FORGOTTEN EMPLOYEE BENEFIT CRISIS: HAS THE MOMENT OF TRUTH ARRIVED FOR MULTIEMPLOYER BENEFIT PLANS?

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The Forgotten Employee Benefit Crisis: Has the Moment of Truth Arrived for Multiemployer Benefit Plans?

Paul M. Secunda[*]

INTRODUCTION

Multiemployer (or Taft-Hartley) benefit plans,[1] which provide health, welfare, and pension benefits to certain types of union employees, are increasingly finding themselves mired in financial trouble and therefore, finding it more difficult to continue to provide adequate retirement and health benefit to its members. Although these plans once represented one of the great triumphs in American labor relations in providing employee benefits to workers in itinerant industries,[2] these plans are now under siege because of financial, legislative, and judicial developments.

Although multiemployer plans may seem less relevant today than in the past to many people, there are more than ten million participants nationwide in nearly 1,500 multiemployer plans.[3] Many of these workers are indeed limited to industries such as trucking, entertainment, construction, and retail (i.e., industries where employees frequently move between jobs in the same industry).[4]

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[*] Associate Professor of Law, Marquette University Law School. This article derives from a shorter version of this paper for a non-legal audience which will originally appear in the Trustees Handbook, Chapter 3 (Kordus ed. 7th ed. forthcoming 2011). Many thanks to David Pratt and Colleen Medill for their insightful comments on this complex topic. All errors or omissions are mine alone.

[1] 29 U.S.C. §1002(37)(A) (ERISA definition); 29 U.S.C. §302(c)(5) (Taft-Hartley Act provisions for multiemployer plans). As a general rule, such plans are jointly administered by a board of trustees comprised of both union and employer trustees.

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

[3] United States Government Accountability Office, *Changes Needed to Better Protect Multiemployer Pension Benefits*, GAO HIGHLIGHTS, 1 (Oct. 2010), *available at* http://www.gao.gov/highlights/d1179high.pdf (hereinafter GAO).

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

Nevertheless, the dignity provided for these workers through receiving employee benefits is still very important, as is the workforce stability that is engendered in these industries as a result of the existence of such Taft-Hartley plans.

Three principal challenges face multiemployer plans in the coming years. First, and perhaps most importantly, the financial and economic challenge (which is based in turn on demographic and social factors): these benefit plans are increasingly underfunded and in danger of becoming insolvent.[5] This is in part because there are fewer new union members[6] and more retirees at the same time.[7]

The number of Taft-Hartley plans is at a low point and private-sector unions in the United States are currently struggling to get their density rate over 7% of the workforce (the rate recently fell to 6.9%).[8] The low level of union

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general principle at work is that each employer must make regular contributions to the plan to fund the . . . benefits of those employees who perform services for that employer. As a result, an employee who moves amongst several employers in the same industry will accrue an aggregate . . . benefit which will reflect all of the work performed by that employee in that industry (rather than having to start over at each employer, which would be the case in a single employer pension plan).").

[5] *See* GAO, *supra* note 3 ("Most multiemployer plans report large funding shortfalls and face an uncertain future.").

[6] *See* Bureau of Labor Statistics, *Union Members- 2010*, BLS NEW RELEASE, 1 (Jan. 21, 2011), *available at* www.bls.gov/news.release/pdf/union2.pdf (explaining that the union membership decreased in 2010 by 612,000 workers).

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

[8] Bureau of Labor Statistics, *supra* note 6.; *See* Charles A. Jeszeck, *Private Pensions: Long-standing Challenges Remain for Multiemployer Pension Plans*, GAO, Testimony Before the Committee on Health, Education, Labor and Pensions, U.S. Senate, 9 (May 27, 2010), *available at* http://help.senate.gov/imo/media/doc/Jeszeck.pdf (discussing how the number of plans has decreased steadily since the 1980s).

density is especially problematic in defined benefit plans like multiemployer plans because such plans operate on the assumption that current workers' contributions to the plan will support older workers in their retirement.[9] So, another root of the financial problem is demographic in that both the aging of the workforce and the lack of new union members means that it is increasingly hard to fund these plans on the back of smaller and smaller workforces.

Recent legislation in the form of the Pension Protection Act of 2006 (PPA)[10] did not go far enough in addressing the financial woes of multiemployer plans. For instance, among other provisions, it merely gives incentives to Taft-Hartley plans that find themselves in "endangered, "seriously endangered" or "critical" status to ensure that these underfunded plans address their funding issues.[11] Yet these notice and reporting requirements have not stopped the hemorrhaging, as more Taft-Hartley plans are in danger compared to 2006.[12]

Although the Pension Relief Act of 2010 (PRA),[13] signed by President Obama in June 2010, does provide some funding relief for multiemployer pension plans in response to the current unstable economic environment, it is still unclear what long-term impact it will have. The PRA specifically includes provisions that will reduce required employer contributions and will extend the amortization period for investment losses for multiemployer plans.[14] The impact of this legislation on the financial health of multiemployer pension plans is unknown at

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[9] *See* Jeszeck, *supra* note 8, at 10 (explaining that for multiemployer plans "the proportion of active participants paying into the fund[s] to others who are no longer paying into the fund[s] has decreased, thereby increasing plan liabilities . . . .").

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

[11] Pension Analyst, *supra* note 10, at 3.

[12] *See* discussion *infra* notes 30-32 and accompanying text.

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

[14] *Id.*

this time and unlikely, in any event, to definitively address all that ails these benefit plans.

On the other hand, more recent legislation to provide multiemployer plans some financial help, The Create Jobs and Save Benefits Act of 2010,[15] died in the Senate committee this past year.[16] To make matters worse, the Pension Benefit Guaranty Corporation (PBGC), which provides insurance for multiemployer plans that fail,[17] has insufficient funds currently to cover insured benefits and its multiemployer plan program has run a deficit every year since 2003.[18] In 2010, the current deficit in PBGC funding for these plans was almost $1 billion.[19] In short, and to quote a report to Congress from the General Accountability Office (GAO), Taft-Hartley plans face "ongoing funding and demographic challenges [that have the potential] to place an additional financial burden of the PBGC."[20]

If that were the complete scope of the problems facing multiemployer plans, that would be quite enough. But in addition to these financial woes, legislative and political challenges also exist for these plans. Unfortunately, matters are also near a breaking point on the health insurance side of the equation. Taft-Hartley plan health benefits are perceived as too generous,[21] called "Cadillac" plans,[22] and are in the cross-hairs for a new 40% excise tax in 2018

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

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

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

[18] Kraw, *supra* note 2, at 2.

[19] *Id.*

[20] Jeszeck, *supra* note 8, at 8.

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

under the just-passed, comprehensive health care reform, the federal Patient Protection and Affordable Care Act of 2010 (PPACA).[23] Although PPACA faces numerous constitutional challenges in the courts which might mean the 2018 Cadillac tax and other provisions could be struck down,[24] this Article proceeds with the assumption that at least some parts of health care reform are here to stay for the foreseeable future. That means that in addition to the Cadillac excise tax issue, Taft-Hartley plans also must consider the impact of new PPACA provisions involving "grandfathered plans," "minimum essential benefits," and "health benefit exchanges."

Third, and finally, there are significant judicial challenges: decisions made by courts in the multiemployer plan context have recently made governance of such plans by plan administrators and other fiduciaries even more difficult. A recent case in point, *Durakovic v. Building Services 32 BJ Pension Fund*,[25] concerns the appropriate standard of review when a plan denies a claimed benefit to a participant or beneficiary of the plan.[26] The United States Supreme Court recently decided a case, *Metropolitan Life Ins. v. Glenn*,[27] which was supposed to provide more predictability and uniformity in the processing of benefit claims. Instead, the *Glenn* case, which has now been adopted by some court in the multiemployer context, as will be discussed below, leaves the same confusion basically untouched and might even add to that confusion.[28]

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[22] *See id.*

[23] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (enacted March 20, 2010).

[24] Patricia Donovan, *Tis the Season for Constitutional Challenges to PPACA*, HEALTHCARE INTELLIGENCE NETWORK (Dec. 22, 2010), *available at* http://hin.com/blog/2010/12/22/tis-the-season-for-constitutional-challenges-to-ppaca/ (discussing how federal judge has recently ruled parts of PPACA to be unconstitutional and how twenty states filed suit against key provisions of PPACA in Florida).

[25] 609 F.3d 133 (2d Cir. 2010).

[26] *Id.* at 135.

[27] 554 U.S. 105 (2008).

[28] *See* Posting of Paul M. Secunda, *3rd Cir: Living in a Post-Glenn ERISA World*, WORKPLACE PROF BLOG, (Jan. 26, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/01/3rd-cir-living-in-a-post-glenn-erisa-world.html ("For my two cents, I am still somewhat skeptical that *Glenn* will lead to that many more plaintiffs winning ERISA section

All of this is problematic for plan trustees because they need to know the scope of their fiduciary obligations when dealing with claim issues so as not to inadvertently breach their fiduciary duties to plan participants and beneficiaries in making claim determinations. Of course, the judicial interpretation problems are not limited to denial of benefit issues, but this topic gives some indication of the complexity of the issues that the judiciary continues to wrestle with in the multiemployer plan context, and thus the complexity that Taft-Hartley plan administrators and trustees must face on a daily basis.

In all, the future for multiemployer plans is very precarious, but the hope is that by addressing some of the more pressing financial, legislative, and judicial challenges, the future direction of these historically-important plans can begin to move again in a sustainable direction through new reforms and modifications to the existing plan structure.

I. CHALLENGE #1: THE FINANCIAL/DEMOGRAPHIC CHALLENGE TO MULTIEMPLOYER PENSION PLANS

The principal reason that the outlook for Taft-Hartley plans is so bleak is because of the current dire financial situation that these plans face. Plan underfunding, however, is not a new issue or challenge. Congress amended ERISA in 1980 to try to address the problem of significant underfunding of Taft-Hartley plans. The Multiemployer Pension Plan Amendments of 1980 (MPPAA)[29] attempted to protect the financial stability of these plans, but to little or no avail.

Even the introduction of withdrawal liability – a liability that triggers when an employer partially or completely withdrawals from a multiemployer pension plan[30] – did not keep plans from being woefully underfunded. Although withdrawal liability is supposed to keep employers in the multiemployer arrangement by basing their liability on the employer's share of the plan's unfunded vested benefits,[31] this provision alone has not kept multiemployer pension plans from terminating, especially given current economic and

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502(a)(1)(B) claims.").

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

[30] *See* Jeszeck, *supra* note 8, at 7 (explaining how plan withdrawal liability works).

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

demographic realities.[32] Nor has the MPPAA led to better funding of multiemployer plans.[33]

For instance, Moody's Investor Service estimated the total unfunded liability of 126 of the nation's largest multiemployer pension plans at over $165 billion in 2008.[34] The National Coordinating Committee for Multiemployer Plans found in a 2009 survey that four out of every five of the plans reviewed were "endangered" or in "critical" condition as far as their funding levels.[35] The Government Accountability Office (GAO) reported in 2010 that the proportion of multiemployer plans that are less than 80 percent funded rose from 23 percent of plans in 2008 to 68 percent of plans in 2009.[36] This underfunded status has placed additional regulatory constraints on many plans under the Pension Protection Act and other pension laws.[37]

So, why are so many multiemployer pension plans underfunded? Not surprisingly, the primary culprit is the global recession of 2007-2009.[38] Many investments made by multiemployer trustees have turned out disastrously.[39] Moreover, and as discussed in more detail below, there are fewer new participants in these plans, and there is a larger aging workforce that needs to be paid out of these funds.[40] Finally, the PGBC has been unable to keep up with the rate of

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

[33] *See* Jeszeck, *supra* note 8, at 12 (discussing how the intent of MPPA to limit PBGC's exposure to future losses from underfunded plans has not yet been realized).

[34] Kraw, *supra* note 2, at 2.

[35] *Id.*

[36] GAO, *supra* note 3.

[37] Pension Analyst, *supra* note 10, at 3-4 (noting additional funding and notice requirements for underfunded plans).

[38] Jeszeck, *supra* note 8, at 8.

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

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

newly-terminated multiemployer pension plans.[41] This is so even though the recent PBGC-guaranteed maximum monthly benefit is relatively low at $1,320 per participant (this works out to $12,870 per year for 30 years of employment).[42] Part of the problem is that the PBGC already owes some $2.3 billion in future assistance to distressed plans.[43] This money will be non-recoverable in the future.

So what is to be done to save the sinking Taft-Hartley pension plan ship? George M. Kraw, an attorney who specializes in the representation of multiemployer plans in California and is a former member of the PBGC's Advisory Committee, recently made four suggestions in an article for the BNA Pension & Benefits Daily.[44] Importantly, none of Kraw's suggestions would be mandatory for any Taft-Hartley plan and he stresses the need for flexibility with any of these proposals.[45] In the following paragraphs, I summarize his suggestions and provide some commentary on the likelihood that these suggested reforms could work based on both political and legal considerations.

A. Suggestion #1: Permit Cutting of Vested Benefits if Deemed Necessary

The first suggested reform is to allow plans to cut vested benefits if plan trustees deem it necessary and plan sponsors (i.e., the employer and union) agree.[46] Currently, the Pension Protection Act of 2006 allows multiemployer plans to cut some vested benefits for plan participants if the plans' underfunded status becomes "endangered," "seriously endangered," or "critical."[47] The suggestion would be to extend this power to plans that are not yet critically underfunded, but headed in that direction. The thought is that underfunded plans should have the ability to restructure vested benefits so that individual multiemployer plans, and the industries that sponsor them, can survive.[48] It is also thought to be generally easier for Taft-Hartley plans to act while insolvency

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

[42] GAO, *supra* note 3.

[43] Kraw, *supra* note 2, at 2.

[44] *See generally*, *id.*

[45] *Id.* at 2.

[46] *Id.*

[47] *See* Pension Analyst, *supra* note 10, at 3-4.

[48] Kraw, *supra* note 2, at 2.

is not around the corner. In this vein, Kraw comments that, "the guiding principle here should be that plans must not be forced to adopt contribution rates from active participants that result in uncompetitive and unsustainable labor costs and loss of jobs."[49]

Because of the sanctity of such vested benefits under employee benefits law and the general inalienability of vested benefits under ERISA,[50] such a drastic move would have to be accompanied by the ability of the union to veto any such measures in order to protect the interests of individual union members. That might make this type of action less likely to happen, but it appears to be a step that should only be taken in any event if the long-term prospects for the plan are dubious and immediate and aggressive action is needed to keep the industry in which the plan operates from shedding jobs.

B. Suggestion #2: Cap or Eliminate Withdrawal Liability to Incentivize Employers to Join Plans

A second possibility would be to cap or eliminate withdrawal liability to allow more employers to join multiemployer plans.[51] The idea here is that employers are going it alone or not at all because they are concerned about joining a multiemployer pension plan and then incurring vast withdrawal liability if they leave the plan.[52] Kraw's suggested reform seeks to give Taft-Hartley plans the ability to incentivize more employer members by either capping the possible amount of withdrawal liability or doing away with it altogether. Kraw argues that even though withdrawal liability is supposed to incentivize employers, unions, and participants to find solutions to their funding issues, the reality is that withdrawal liability has interfered with collective bargaining and kept new employers from joining multiemployer arrangements.[53] Indeed, Kraw's arguments ring true with many employee benefit law experts who have long believed that the MPPAA goes way overboard because no rational employer who has any choice would ever agree to join a multiemployer plan since the

[49] *Id.*

[50] 29 U.S.C. § 1056(d) (2006); 29 U.S.C. § 401(a)(11) (2006).

[51] Kraw, *supra* note 2, at 2.

[52] *Executive Alert*, *supra* note 4 ("By participating in a multiemployer pension plan, an employer . . . accepts a risk of loss based on its share of the plan's unfunded pension obligations. For example, negative investment performance inevitably will require each remaining participating employer to contribute more, or face the prospect of a more significant withdrawal liability if and when it chooses (or has to) walk away.").

[53] *See* Kraw, *supra* note 2, at 2.

withdrawal liability is completely out of its control and virtually unlimited in amount.[54]

The problem with this proposal is both one of history and the way in which the MPPAA works. As far as history, it needs to be remembered that the enactment of the MPPAA was required in the first place because multiemployer pension plans were significantly underfunded.[55] Might not increasing plan subscription, without withdrawal liability to keep new employers in the plan, lead to long-term problems with plan underfunding and perhaps, insolvency?

As far as the legal obstacles, multiemployer pension plans would be unable to provide such withdrawal liability options to new employer members because such provisions would be inconsistent with MPPAA requirements, and thus void as a matter of public policy.[56] On the other hand, the problem with amending the MPPAA is that almost all multiemployer pension plans are defined benefit plans,[57] and the PBGC needs the withdrawal liability money for its own funding purposes, so they would likely be against such a plan. Also, even if the MPPAA could be amended in this way, a cap may create a moral hazard problem and further increase the PBGC's potential liabilities.[58] This is because PBGC premiums for insurance coverage are based on actuarial assumptions,[59] and the current ability to assess withdrawal liability is most likely built into these assumptions.

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

[55] *See* Jeszeck, *supra* note 8, at 3 (discussing the purpose of the MPPA).

[56] In other words, Taft-Hartley plans are not free to waive the MPPAA's withdrawal liability requirements for new employer members. Waiver of withdrawal liability is only permitted to be undertaken by the PBGC; and only then where an employer has withdrawn completely from a plan and then subsequently resumes covered operations. *See* Employee Retirement and Income Security Act, *supra* note 1, at § 1387; 29 C.F.R. §§ 4207.1 - 4207.11 (2010).

[57] *See Cent. States, Se. and Sw. Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663, 667 (7th Cir. 2005) (stating that most multiemployer pension plans are defined benefit plans).

[58] I am indebted to Professor Colleen Medill for this insight.

[59] *See Introduction to Multiemployer Plans*, PENSION BENEFIT GUARANTY CORPORATION, *at* http://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans.html (last visited Feb. 14, 2010).

C. *Suggestion #3: Allow Multiemployer Plans Flexibility to Reduce Investment Assumption Rates and Permit Plans to Hedge*

Kraw's third reform suggestion would be to allow plans greater flexibility to reduce investment assumption rates below current levels and to "immunize" or hedge part or all of their assets and liabilities.[60] Currently, most plans assume between 6 and 8 percent rates of return on their investments.[61] Plans are unwilling to reduce these now unrealistic rates because they would increase their plan's liabilities by doing so.[62] Moreover, the lower the assumed rate of investment return, the more assets the plan must have on hand to pay current obligations to retirees.[63] Moreover, the problem is that lowering assumed rates of return may cause regulatory scrutiny.

Kraw argues that plans should be able to reduce their rate of return assumptions freely, while at the same time changing some portion of the plan's vested benefits into contingent benefits.[64] Kraw also says that plans should be able to "immunize" portions of their investment portfolio by investing in pension funds that will increase or decrease in direct correlation with an increase or decrease in pension plan liabilities.[65]

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[60] Kraw, *supra* note 2, at 3.

[61] *Id.*

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

[63] *See id.* ("A big reason why states are so keen to maintain a projected 8% return is that they use their projected returns on assets to discount their future obligations."). *See also* John E. Petersen, *Fairy Tale Pension Projections*, GOVERNING, (Mar. 2010), *available at* http://www.governing.com/columns/public-finance/Fairy-Tale-Pension-Projections.html (discussing how public pensions assumption in a 8% return rate has proven disastrous).

[64] Kraw, *supra* note 2, at 3.

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

Critics argue that such an approach will lead to lower investment returns.[66] But such lower investment returns might be more consistent with the "new normal" at any rate[67] and by balancing these liability-driven investment with fixed-income securities, much of the same risk-return profile on investments can probably be maintained.[68] The larger issue with this idea may be with undermining the vested benefits of workers. Again, it would be necessary to allow the union to veto such measures to protect the employee benefits of its members.

D. Suggestion #4: Creating a Chapter 11-Type Bankruptcy Procedure for Severely Distressed Multiemployer Plans as an Alternative to Plan Partitioning

Finally, the fourth proposed reform would create a Chapter 11-type bankruptcy procedure for severely distressed plans.[69] This reform would be an alternative to the already proposed plans to expand the PBGC's authority to partition plans so that multiemployer plans can save viable parts of their plans.[70] With regard to this partition authority, PBGC has current authority to order the partition of a multiemployer plan.[71] The new proposed law, permitting "qualified

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

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

[68] *See* Raver, *supra* note 66, at 2-3.

[69] Kraw, *supra* note 2, at 3.

[70] *Statement of Phyllis C. Borzi, Assistant Secretary of Labor, Employee Benefit Security Administration Before the Committee on Health, Education, Labor and Pensions, United States Senate*, UNITED STATES DEPARTMENT OF LABOR, (May 27, 2010), *available at* http://www.dol.gov/ebsa/newsroom/ty052710.html ("Representatives of the Central States Pension Fund have met with the Department and other members of the Administration about a proposal that would amend the Employee Retirement Income Security Act (ERISA) to permit some multiemployer plans to elect a 'qualified partition.'").

[71] *Id.* ("ERISA empowers the PBGC to order the partition of a multiemployer plan, either upon its own motion or upon application by the plan

partitions," would "permit a multiemployer plan to spin off into a new plan ('partitioned plan') the liabilities and certain assets attributable to employees of employers who have filed for bankruptcy or who have failed to pay their withdrawal liability."[72] Additionally, this qualified partition proposal "would transfer responsibility to the PBGC for payment of the full plan benefits of participants transferred to the partitioned plan, which in many cases would be well above the amount guaranteed by the PBGC under current law."[73]

Critics of the qualified partition proposal, including the Department of Labor's (DOL's) Employee Benefit Security Administration (EBSA), worry that this proposal will take money away from the single-employer PBGC program and further tax the already underfunded PBGC.[74] Because it is unlikely that the Obama administration will support a qualified partition proposal at this time, Kraw is likely correct that the political opposition to such a measure is unlikely to be overcome in the near future.[75]

Kraw consequently suggests a Chapter 11-type bankruptcy procedure whereby financial issues of plans could be handled more orderly and on a case-by-case basis.[76] Kraw suggests special bankruptcy rules for multiemployer plans whose financial obligations greatly exceed their assets, but still have significant financial holdings, so that a bankruptcy court could "allocate losses by taking into account the interests of all stakeholders."[77] In particular, Kraw likes the fact that

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sponsor. Partition is a statutory mechanism that permits healthy employers to maintain a plan by carving out the plan liabilities attributable to employees of employers who have filed for Chapter 11 bankruptcy. Once partitioned, the PBGC assumes liability for paying benefits to the participants of this newly carved-out but terminated plan.").

[72] *Id.*

[73] *Id.*

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

[75] *See* Kraw, *supra* note 2, at 3 (discussing how this proposal would be seen as a threat to taxpayers and the PBGC's solvency).

[76] *Id.*

[77] *Id.*

bankruptcy courts operate under equitable concepts of law and are therefore more able to fashion a just outcome for all parties concerned.[78]

Although it is probably accurate to say that bankruptcy courts have the ability to fashion equitable outcomes for distressed Taft-Hartley plans, unions might be skeptical given how their labor concerns have been treated by bankruptcy courts in other contexts. For instance, in the collective bargaining agreement context, bankruptcy courts have terminated wage and benefit agreements in order to permit airlines and other companies to restructure.[79] Not surprisingly, therefore, this Chapter 11 bankruptcy idea would have to be an action of last resort, one where the very survival of the employer and/or industry is at stake. Short of that, it is unlikely that unions would sign off on such a proposal given their checkered history in bankruptcy court.

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In all, multiemployer plans need to be restructured to survive the current economic realities in which they find themselves. It is unlikely that a market boom or the increase in union density rates will substantially change multiemployer plans' current dire financial predicament in the short-term. Instead, creative, out-of-the-box thinking is needed and Kraw should be commended for coming up with a number of thoughtful proposals. Whether these proposals will be voluntarily agreed to by employer sponsors, unions, and trustees, probably depends on how severely distressed these plans become and whether such a state of affair negatively impacts the industry and leads to the loss of jobs in that industry. In any event, the current financial state of affairs for multiemployer plans is untenable. Something must be done and soon.

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[78] *See id.*

[79] *See, e.g., In re NW Airlines Corp.*, 346 B.R. 307 (Bankr. S.D. N.Y. 2006) (finding Section 1113 of the Bankruptcy Code permits a debtor to reject a CBA if the rejection is, among other things, "necessary" to the debtor's ability to reorganize.). *See also* Posting of Richard Bales, *Using Bankruptcy to Reject CBAs*, WORKPLACE PROF BLOG, (Apr. 2, 2009), *at* http://lawprofessors.typepad.com/laborprof_blog/2009/04/using-bankruptcy-to-reject-cbas.html (discussing the bankruptcy courts ability to use Section 1113 of the bankruptcy code to reject or modify a collective bargaining agreement as long as the rejection or modification is "necessary to permit the reorganization of the debtor").

II. CHALLENGE #2: THE LEGISLATIVE CHALLENGE TO MULTIEMPLOYER HEALTH PLANS

Although legislation has been introduced to solve the financial issues surrounding multiemployer pension plans,[80] the focus of this section is on multiemployer health plans. This makes sense because Taft-Hartley health plans were at the center of the political storm[81] surrounding passage of the Patient Protection and Affordable Care Act of 2010 (PPACA).[82] Some might remember that it actually took a last-minute compromise - not assessing taxes on expensive, "Cadillac" health care plans until 2018 – that permitted the legislation to finally go through with the support of the labor movement.[83] Well, those Cadillac health care plans are none other than the Taft-Hartley health plans that unions have bargained successfully for on behalf of their members over the years.

Under PPACA, a 40-percent excise tax on the "excess benefit" will be imposed on health care providers starting in 2018 to the extent that the aggregate value of the employer-sponsored health coverage for an employee exceeds a threshold amount.[84] Until now, health coverage itself has not been taxed; indeed, it has been a highly tax-favored employee benefit.[85] Under PPACA, however, the threshold dollar limitation for Taft-Hartley health plans in 2018 will be $10,200,[86]

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[80] *See* Bill Text, *supra* note 15, and accompanying text.

[81] Editorial, *Cadillac Plans*, *supra* note 21. (discussing how multiemployer "Cadillac plan" threatened to derail health care reform).

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

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

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

[85] MEDILL, *supra* note 54, at 19 ("For fiscal year 2011, the tax expenditure for health care and long–term care insurance plans sponsored by employers is estimated at $115.2 billion. This amount represents the second largest tax expenditure in the federal budget.").

[86] *See* I.R.C. § 4980I(b)(3).

although to be clear, these are just starting points for determining the thresholds for taxing excess benefits.[87]

Because of the various ways that adjustments to this threshold will be made under PPACA, an employer or employers with a workforce that is more expensive to insure due to age and gender characteristics should not be put at a disadvantage.[88] Nevertheless, as discussed above, Taft-Hartley health plans tend to be some of the most expensive health care plans out there, and many plans will have to modify their coverage or be forced to pay the 40% excise tax on excess benefits.

Yet, not only are there Taft-Hartley plan-related issues concerning this excise tax, there are also important challenges for these plans revolving around new health plan concepts including: (1) "grandfathered plans," (2) "minimum essential coverage," and (3) "health benefit exchanges."

A. Grandfathered Plans

Under PPACA, individuals may keep their individual and group health plans that were in effect upon enactment of PPACA in March 2010.[89] These "grandfathered" plans are exempt from many, but not all, of the individual and group healthcare market reforms that take place in 2014.[90] For instance, grandfathered plans must comply with provisions relating to: a uniform explanation of coverage, loss-ratio reports and rebate premiums, excessive waiting periods, lifetime limits, annual limits, pre-existing health condition exclusions, and extension of dependent coverage to age 26.[91]

In the collective bargaining agreement context, group health coverage subject to CBAs (i.e., Taft-Hartley Plans) ratified before the enactment of PPACA are not covered by the law's health care market reforms until that CBA terminates.[92] Moreover, if a collective bargaining agreement is modified to

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

[88] *Id.* at 970.

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

[90] *Id.*

[91] *CCH*, *supra* note 87, ¶ 185 at 120-121.

[92] PPACA at § 1255.

conform to the new health care requirements, it will be considered to remain in effect and will not be treated as terminated.[93]

As far as the possibility of Taft-Hartley plans losing grandfathered status under PPACA, multiemployer plans need to be vigilant. For instance, concerns exist in the multiemployer plan community about grandfathered status being lost based on there being a change in the employer contribution rate to the plan.[94] On this issue, however, the Employee Benefit Security Administration (EBSA) has issued a FAQ about the Affordable Care Act Implementation.[95]

Under this guidance, the EBSA addressed concerns that multiemployer plans do not always know whether (or when) a contributing employer changes its contribution rate as a percentage of the cost of coverage.[96] As a result, many plans wanted to know what steps should be taken to communicate with contributing employers regarding employer contributions towards coverage.[97] The EBSA's answer was that, "[i]f multiemployer plans and contributing employers follow steps similar to those outlined in Q&A2, above, the same relief will apply to the multiemployer plan unless or until the multiemployer plan knows that the contribution rate has changed."[98]

Q&A2 in turn provides:

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

- Upon renewal, an issuer requires a plan sponsor to make a representation regarding its contribution rate for the plan year

[93] *CCH*, *supra* note 87, ¶ 185 at 121.

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

[95] *Id.*

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

[97] *Id.*

[98] *Id.*

covered by the renewal, as well as its contribution rate on March 23, 2010 (if the issuer does not already have it); and

- The issuer's policies, certificates, or contracts of insurance disclose in a prominent and effective manner that plan sponsors are required to notify the issuer if the contribution rate changes at any point during the plan year.[99]

So, in short, Taft-Hartley health plans should be able to keep their grandfathered status by following these interim steps until final regulations have been issued.

B. Minimum Essential Coverage

The essential health benefits package offered by qualified health benefit plans, including Taft-Harley health plans, "must include specific categories of benefits, meet certain cost-sharing standards, and provide certain levels of coverage."[100] Beginning in 2014, minimum items and services include: ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance abuse disorder services, prescription drugs, rehabilitative services and devices, laboratory services, preventive and wellness services, and pediatric services (including oral and vision care).[101]

However, and importantly, self-insured plans are not covered "health plans" for this purpose, and thus will not have to comply with the requirements of the essential health benefits package.[102] As a result, there is now even more incentive for Taft-Hartley health benefit plans to go the self-insured route, rather than purchase health insurance coverage from a third-party.[103] In fact, even smaller Taft-Hartley employee benefit plans can go the self-insured route with the help of stop-loss insurance and the use of fairly low attachment points.[104] Stop-

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

[100] *CCH*, *supra* note 87, ¶ 205 at 128.

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

[102] *CCH*, *supra* note 87, ¶205 at 128 (citing PPACA § 1301(b)(1)(B)).

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

loss insurance operates by having the self-insured plan cover up to a certain amount of a claim, say $10,000, and then the stop-loss insurance coverage kicks in at that "attachment point" to pay the rest.[105]

Although at higher claim levels this begins to look a lot like a fully insured health plan, federal appellate courts have treated these plans as self-insured plans for employee benefit law purposes.[106] All this might not matter much in the end, since a large majority of Taft-Hartley health plans are already either wholly or partially self-funded.[107]

C. Health Benefit Exchanges

Effective in 2014, state-based American Health Benefit Exchanges and Small Business Health Options Program (SHOP) Exchanges will be established.[108] Through these programs, individuals and small businesses with up to 100 employees can purchase qualified health coverage.[109] States may also form regional Exchanges or allow more than one Exchange to operate in the state

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

[105] *See* Am. Med. Servs., Inc. v. Bartlett, 111 F.3d 358 (4th Cir.1997).

[106] *Id.* at 364 ("[Maryland]'s regulations fail to recognize that in a self-funded plan, with or without stop-loss insurance and regardless of the attachment point, the provision of benefits depends on the plan's solvency, whereas the provision of benefits in an insured plan depends entirely on the insurer's solvency. It is this fundamental difference that precludes the Maryland Insurance Agency from regulating self-funded plans but permits them to regulate insurance companies that provide health benefits to plans for their participants.").

[107] *See* James Conlon, *Self-Insurance and Small Taft-Hartley Trust Funds*, LABORERS' HEALTH AND SAFETY FUND OF NORTH AMERICA (Jul. 2008), *available at* http://www.lhsfna.org/index.cfm?objectID=CA65B475-D56F-E6FA-9F3DBEDA4D41AEFC ("Self-insurance is increasingly becoming the cost containment strategy of choice among Taft-Hartley Trust Funds providing health and welfare benefits to their participants and their qualified dependents.").

[108] PPACA at § 1311(b).

[109] *Id.* at § 1311(b)(1)(C).

as long as each Exchange serves a distinct geographic area.[110] These exchanges will be administered by a governmental agency or a non-profit organization.[111]

Although health benefit exchanges do not directly impact Taft-Hartley health plans, their presence might exacerbate some of the financial difficulties that these plans are facing. For example, smaller employers might decide that instead of joining a multiemployer plan and worrying about withdrawal liability, they will just provide no health coverage, suffer an excise tax, and let their employees get their health coverage through these exchanges.[112] As pointed out in the discussion of the multiemployer pension plans, employers are already reluctant to become new employer-members of such plans because of this worry about the large amount of withdrawal liability that might weigh down their balance sheets.[113]

However, and importantly, here is where a cap or elimination of withdrawal liability may give incentive to employee members to join Taft-Hartley health plans.[114] Unlike multiemployer pension plans, the MPPAA's withdrawal liability provisions do not apply to multiemployer health and welfare plans.[115] The current practice is to impose withdrawal liability by contractual agreement, if at all.[116] So, the voluntary cap/waiver idea could work in this context if a Taft-

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[110] *CCH*, *supra* note 87, ¶ 215 at 138.

[111] PPACA at § 1311(d).

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

[113] *See* Kraw, *supra* note 2 at 2.

[114] The withdrawal liability cap or waiver was discussed, *supra* notes 30-32 and accompanying text.

[115] Medill, *supra* note 54, at 264 ("ERISA Section 515 concerning delinquent employer contributions applies to multiemployer welfare benefit plans (particularly health care plans) as well as multiemployer pension plans. The employer withdrawal liability provisions of the MPPAA, however, apply only to multiemployer pension plans.").

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

Hartley health benefit plan currently assesses such withdrawal liability as a matter of collective bargaining agreement or trust agreement and wishes to amend these agreements.

Moreover, given that this is a private ordering situation, it probably would not be necessary to do a cap/waiver for existing members, though existing members are also probably not going to like this too much. To assuage current members, the argument could be made that the existing plan members are already on the hook for withdrawal liability and they should benefit overall from the multiemployer plan attracting new employer-members.[117]

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In all, then, the passage of comprehensive health care reform in the form of PPACA will have many divergent impacts on Taft-Hartley health benefit plans. In addition to the coming increase in taxes for high-cost multiemployer health benefit plans in 2018, the discussion above highlights some of the more significant issues that Taft-Hartley plans and their trustees might face in the coming years. Of course, and just to restate what was said initially, all of this new regulation hinges on the legislation being deemed eventually constitutional, most likely by the United States Supreme Court.[118]

III. CHALLENGE #3: THE JUDICIAL CHALLENGE TO MULTIEMPLOYER PENSION AND HEALTH PLANS

All is also not well in the land of judicial interpretation of the Employee Retirement Income Security Act of 1974 (ERISA)[119] and Section 302(c)(5) of the Taft-Hartley Act of 1947 (i.e., the multiemployer provisions of the Taft-Hartley Amendments).[120] The problem stems from the sometime vague and expansive language used in both of these laws. As a result, the U.S. Supreme Court and lower federal courts have struggled over numerous and important issues

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to the assessment of withdrawal liability.”).

[117] I am indebted to Professor David Pratt for this point.

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

[119] 29 U.S.C. §§ 1001-1461 (2006).

[120] 29 U.S.C. §§157-169.

concerning both single and multiemployer health, welfare, and pension plans.[121] The length of this article does not permit one to go into all the details in all the areas where the law continues to shift as successive courts (and even different United States Supreme Courts) interpret employee benefit laws. Nevertheless, some insight can be gained by considering just one complicated area: the standard of review when a Taft-Hartley benefit plan denies a claimed benefit.

A. Denial of Benefit Claims Under Section 502(a)(1)(B) of ERISA

ERISA Section 502(a)(1)(B) claims are instituted to recover benefits, to enforce rights under the plan, or to clarify rights to future benefits.[122] Claims for benefits are by far the most common claims brought under ERISA.[123] Such suits may be brought by a plan participant or beneficiary against the plan for the value of denied benefits or rights.[124] For instance, if a plan participant wishes to receive full hospital bed-rest for a complicated pregnancy, and the plan administrator denies the claim, the participant may file a claim against the plan for recovery of only the value of that bed-rest, not for the damages associated with losing the baby.[125] Significantly, however, other forms of relief, including compensatory and punitive damages, are not available under Section 502(a)(1)(B).[126] Moreover, because of the strong preemptive effect of ERISA, most of the time ERISA participants and beneficiaries cannot find consequential relief under state law.[127]

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

[122] 29 U.S.C. § 1132(a)(1)(B) (2006).

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

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

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

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

[127] *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987) (finding that

To make matters even more difficult for ERISA plaintiffs, before bringing a Section 502(a)(1)(B) claim in state or federal court, a plan participant must exhaust their internal claims procedures.[128] Once a plan administrator has denied a claim, the plan participant must file an appeal with the administrator and wait for a further adverse determination before bringing their benefit claim in state or federal court.[129] Once the internal claims procedures have been exhausted, and the claim has been filed by the participant in state or federal court, the issue becomes which standard of review a court should use to examine a plan administrator's benefit determination.[130]

In 1989, the United States Supreme Court in *Firestone Tire & Rubber Company v. Bruch*[131] directed that the benefit decision be reviewed under a very deferential arbitrary and capricious standard if the plan vests the administrator with discretion to make such decisions.[132] Under *Metropolitan Life v. Glenn*,[133] a conflict of interest may exist, however, where the plan both determines whether a qualified benefit claim exists and is also responsible for paying that claim.[134] If such a conflict of interest exists, that conflict must be given weigh in deciding whether the plan administrator's determination was arbitrary and capricious.[135]

Mississippi common law claims for tort, contract, and bad faith were preempted by ERISA).

[128] 29 U.S.C. § 1133 (2006); 29 C.F.R. § 2560.503-1(2010).

[129] *Id.*

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

[131] *Id.*

[132] *Id.* at 115.

[133] 554 U.S. 105 (2008) ("[A] reviewing court should consider th[e] conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and . . . the significance of the factor will depend upon the circumstances of the particular case.").

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

[135] *Id.* ("[A] reviewing court should consider th[e] conflict as a factor in determining whether the plan administrator has abused its discretion in denying

Because most multiemployer health plans are self-funded,[136] these plans are often found to have a conflict of interest.[137] Under *Metropolitan Life v. Glenn*, that means the multiemployer plan administrator is operating under a conflict of interest in making the claim determination and the court must take that conflict of interest into account in deciding whether to defer to the plan administrator's decision to deny the claim.[138]

Many, including this author, are skeptical whether taking conflict of interests will really make that much of a different to ERISA plaintiffs with court benefit determination.[139] This is especially so in light of the recent United States Supreme Court decision in *Conkright v. Frommert*,[140] where the Court gave the defendant, Xerox, a second bite of the apple to interpret its pension plan in a non-arbitrary manner,[141] even though the evidence suggested that Xerox's actions were anything but "one honest mistake."[142]

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benefits; and . . . the significance of the factor will depend upon the circumstances of the particular case.").

[136] Like single employer plans, multiemployer plans are becoming increasingly self-funded to avoid having to comply with state health insurance regulations. *See* Medill, *supra* note 54, at 305-06. ("In 2009, fifty-seven percent of workers with health insurance were covered by an employer plan that was self-insured.") (citing KAISER FAMILY FOUNDATION, EMPLOYER HEALTH BENEFITS 2009 ANNUAL SURVEY § 10). *See also* Kaiser Family Foundation, *Employer Health Benefits 2010 Annual Survey*, KAISER FAMILY FOUNDATION, 154, *available at http*://ehbs.kff.org/pdf/2010/8085.pdf (last visited Feb. 23, 2011) (noting the percentage of workers in self-funded plans is now 59% and "Eighty percent of covered workers in firms with 1,000 to 4,999 workers and 93% of covered workers in firms with 5,000 or more workers are in self-funded plans in 2010.").

[137] *See, e.g.,* Durakovic v. Bldg. Serv. 32 BJ Pension Fund**,** 609 F.3d 133, 138 (2d Cir. 2010).

[138] *See Glenn*, 554 U.S. at 112.

[139] *See* Secunda, *supra* note 124, at 148.

[140] 130 S. Ct. 1640 (2010).

[141] *Id.* at 1649.

[142] *See* Paul M. Secunda, *Psychological Realism in Labor and Employment Law* 19 (on file with author), *available at* http://ssrn.com=

B. The Durakovic Decision and Inherently Conflicted Multiemployer Plans

This past year, the Second Circuit Court of Appeals, in *Durakovic v. 32 BJ Pension Fund,*[143] decided that Taft-Hartley plans are inherently conflicted when making benefit decisions.[144] This means that going forward federal trial courts, at least in the Second Circuit, deciding denial of benefit cases in the multiemployer plan context will need to more seriously scrutinize conflicts when deciding whether a claim was properly denied.

The *Durakovic* Court reasoned that the structure of Taft-Hartley plans, in which employers also help evaluate claims which they will ultimately have to pay, represents the type of conflict addressed in the Supreme Court's *Glenn* decision.[145] In other words, because Taft-Hartley plans are administered by trustee boards made up of equal numbers of union and employer representatives,[146] they suffer from board members with conflicting loyalties.[147]

Although trustees have fiduciary interests that weigh in favor of participants and beneficiaries of the plan, they also tend to have interests that favor the employer over these employees; most importantly, by rejecting claims they will reduce future employer contributions to the plan.[148] So, the court rejected the Plan's contention that it was not conflicted because it was composed

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(criticizing the holding in *Conkright* "[b]ecause once the conclusion had been reached that Xerox's behavior had been merely mistaken and not a sanctionable violation of ERISA, it was clear that Xerox would be given a second chance to reinterpret their plan in a non-arbitrary and capricious manner.").

[143] 609 F.3d 133 (2d Cir. 2010).

[144] *Id.* at 139.

[145] *Id.*

[146] 29 U.SC. § 186(c)(5) (2006).

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

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

of equal members from management and labor,[149] though it agreed that the presence of union representatives should be considered in deciding how much weigh to give to the conflict of interest some management representatives have.[150]

Now, all of this is not to say that plan trustees cannot deny a claim in good faith because, in fact, the claim at issue is simply not covered by the plan. But given this new inherently conflicted legal standard, plan trustees and their advisors need to do double diligence when denying claims and make sure "substantial evidence" exists for the claim decision.[151] Trustees should have a comprehensive paper trail, complete with the necessary findings and have all their proverbial ducks in a row. This type of thorough action will make it less likely that a federal court finds a plan decision to be arbitrary and capricious and, thereafter, overturns that determination. For instance, if a participant has a report from their own vocational expert, trustees need to make sure that that report is considered, along with any other employer-provided expert reports.[152]

At the same time, it is also important to realize that although the Second Circuit raised the level for benefit denials, individual federal trial courts in that Circuit will still have to decide how much weight such a conflict should be given.[153] *Glenn* did not answer that question clearly. Additionally, the weight properly accorded to any conflict in this context should vary in direct proportion to the likelihood that the conflict affected the benefits decision.[154] Nevertheless, best practices do exist to lessen the potential conflict. These include: (1) walling off claims administrators from those interested in firm finances; and/or (2) imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracies benefit.[155]

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[149] *Id.*

[150] *Id.* at 141.

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

[152] *Id.* at 142 (finding that Taft-Hartley plan improperly ignored the vocational expert report filed by plaintiff).

[153] *Durakovic v. Bldg. Serv. 32 BJ Pension Fund*, 609 F.3d 133, 139-40 (2d Cir. 2010).

[154] *Id.* at 139.

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

Finally, matters are even further complicated in this important area of Taft-Hartley plan governance because the Second Circuit's *Durakovic* decision conflicts with the recent decision of the Ninth Circuit in *Anderson v. Suburban Teamsters of N. Ill. Pension Fund Bd. of Trs.*[156] In the *Anderson* case, the court concluded:

> The various participating employers-not the Trustees-fund the Plan. The Trustees have no personal economic interest in the decision to grant or deny benefits. Additionally, the Board of Trustees consists of both employer and employee representatives, who determine employee eligibility under the Plan. Both sides are at the table.[157]

This line of reasoning appears less persuasive than that in *Durakovic* because the Ninth Circuit did not consider the fact that management trustees can have conflicting loyalties to their employers, especially if denying a claim will lead to lesser employer contributors from their company.[158]

The better approach and the approach dictated by *Glenn* would appear to be that of the *Durakovic* Court: consider the weight to accord a conflict of interest when a self-funded multiemployer plan decided a benefit claim by looking at the "likelihood that [the conflict] affected the benefits decision."[159]

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In all, this discussion of judicial review of claim denials by multiemployer plan trustees shows just how convoluted these Taft-Hartley plan legal issues can become. As far as this particular issue, we may not have a final answer of how to approach these denials of benefit cases until the United States Supreme Court decides whether it needs to settle this circuit court split. In the meantime, discretion will be the better part of valor, and Taft-Hartley plans and their trustees need be on the look-out for claim denials that do not appear to be well supported by the record.

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[156] 588 F.3d 641 (9th Cir.2009).

[157] *Id.* at 648.

[158] *See supra* notes 145-152 and accompanying text.

[159] *Glenn*, 554 U.S. at 117. In other words, a case-by-case approach is necessary when a multiemployer plan finds itself in this conflicted predicament. A bright-line rule like that of the Ninth Circuit in *Anderson* makes little sense given the many different ways that these types of cases present themselves.

CONCLUSION

This article provides a first time look at the numerous challenges that face Taft-Hartley plans in the post-global recession and post-health care reform world in which we now live. It has sought to offer some future internal, legislative, administrative, and judicial reforms with which to overcome the financial, legislative, and judicial challenges that these plans now face.

The outlook today no doubt looks bleak, but this article seeks to shine the light on how various structural and substantive plan reforms may help Taft-Hartley plans survive these difficult times. Although the pain of the present is not pleasant for Taft-Hartley plans nor for the employees whose retirement, health, and other welfare plan interests they represent, the hope is that through this necessary recalibration and restructuring multiemployer benefit plans will become stronger, with more secure participants and beneficiaries in the near future.