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THE "ELABORATE INTERWEAVING OF JURISDICTION:" LABOR AND TAX ADMINISTRATION AND ENFORCEMENT OF ERISA AND BEYOND

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On Labor Day 1974, President Ford signed into law the Employee Retirement Income Security Act of 1974,[†] commonly known by its acronym ERISA. The genesis of ERISA is found in a study released in 1965 by the President's Committee on Corporate Pension Fund and Other Private Retirement and Welfare Programs, titled "Public Policy and Private Pension Programs—A Report to the President on Private Employee Retirement Plans." The Committee had been established in 1962 by President Kennedy in recognition of the growth of the pension industry and the need for reform. The report made recommendations as to vesting; funding; termination insurance and portability; perceived inequities under tax laws as to coverage, integration with social security, absence of limitations on contributions, and favorable treatment as to lump-sum distributions of employer securities; fiduciary reforms, principally concerning investments in employer securities; and disclosure to plan participants as to investment holdings. This report served as the basis for many of the subsequent legislative proposals in the pension area, principally beginning in 1968 in the labor committees of the House and Senate. By September, 1973, the Senate Committee on Labor and Public Welfare and the Senate Committee on Finance had

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† Pub. L. No. 93-406, 88 Stat. 897 [hereinafter cited as ERISA].

reported out of committee major pension reform bills—S. 4 and S. 1179, respectively. These two labor and tax bills were melded into a single compromise bill and tacked as a rider onto a House revenue bill, H.R. 4200, in September of 1973 when the compromise labor-tax bill was passed by the Senate. This bill contained, among others, provisions as to coverage, vesting, minimum funding, optional forms of benefits, requirements for tax-qualification of plans, limitations on contributions and benefits, portability and termination insurance, reporting and disclosure, and fiduciary standards and enforcement. As discussed below, H.R. 4200 assigned specific functions to the Department of Labor and to the Department of the Treasury, thereby tending to create a dominant role for each of these agencies of the executive branch and minimizing the degree of jurisdictional overlap in the above areas.

After the Senate passed H.R. 4200, the House Committee on Education and Labor reported out of committee a pension reform bill, H.R. 2 on October 2, 1973, and the House Committee on Ways and Means similarly reported out H.R. 12481 on February 5, 1974. Subsequent refinements of the bills of these two committees, H.R. 12906 and H.R. 12855, were introduced to the House and then a compromise, H.R. 2, was passed by the House on February 28, 1974. Unlike the Senate bill, the House bill made a deliberate effort to solidify and to make comparable the labor and tax interests in retirement plans by adopting comparable labor and tax titles to the bill, particularly as to participation, vesting, funding and prohibited transactions.

The conflicting House and Senate bills were sent to a Conference Committee, with conferees appointed from the labor and tax committees of the House and Senate. The issues of jurisdiction and responsibility for enforcement were the most difficult problems confronting the conferees in reaching a compromise between these two bills. The Conference Committee sought to combine the historical expertise of the Internal Revenue Service (IRS) as to qualified pension plans with the traditional concern of the Labor Department (Labor) for the interest of the working man. The Committee decided to overlap the jurisdiction of the two agencies, as in the House bill, and to define clearly the dominant role of each agency, as in the Senate bill. The following discussion will focus on this "elaborate

interweaving of jurisdiction," a jurisdiction that has been further complicated by a recent decision that may lead to involving the Securities and Exchange Commission in the pension area.

I. PRIOR LAW

Under prior law, the IRS was responsible for the qualification of a retirement plan as tax exempt under Code Section 401, disqualification of a plan upon audit for violation of the prior narrow prohibited transaction rules or for failure to comply with the exclusive benefit rule. While the sanction of disqualification was not effective,¹ the larger shortcoming of the Service's administration lay in its failure to find a partial termination of a plan when there was a substantial shrinkage of work force. Indeed, in this context, Representative Dent, Chairman of the General Subcommittee on Labor of the House Committee on Education and Labor, asserted that if the Service had enforced its own rules there would have been no need for pension reform legislation.² On the other hand, Labor was responsible for the administration of the Welfare Pension Plans Disclosure Act (WPPDA). Rather than enforcing the Act, Labor administered the WPPDA principally as an information gathering tool.³ Participants in pension plans did not use the Act to protect their benefits.

On a technical level, there were basically two questions. What should be the appropriate sanctions for violations of the prohibited transaction and exclusive benefit requirements of the new provisions such as the minimum funding requirement? Which agency should be the administrator of such sanctions?⁴ The latter question

1. S. REP. NO. 383, 93d Cong., 1st Sess. 18 (1973) [hereinafter cited as S. REP. NO. 383].

2. *Hearings on H.R. 2 and H.R. 462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 339 (1973) [hereinafter cited as *H.R. 2 Hearings*].

3. See, e.g., *Hearings on S. 4, S. 1179 and S. 1631 before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance*, 93d Cong., 1st Sess., pt. 2, at 636, 771, 988, 1096-97 (1973) [hereinafter cited as *Senate Finance Hearings*]; COMPTROLLER GENERAL OF THE UNITED STATES, REVIEW OF CERTAIN ACTIVITIES RELATED TO ADMINISTRATION AND ENFORCEMENT OF REPORTING AND BONDING PROVISIONS OF THE WELFARE AND PENSION PLANS DISCLOSURE ACT OF 1959, IN THE LABOR-MANAGEMENT SERVICE ADMINISTRATION OF THE DEPARTMENT OF LABOR (March 1967); 119 CONG. REC. 30004 (1973). See generally Sickles, *Introduction: The Significance and Complexity of ERISA*, 17 WM. & MARY L. REV. 205, 207 (1975).

4. *Senate Finance Hearings*, *supra* note 3, at 1064-66.

was clouded by conflicting views concerning the prior performance by Labor and by the IRS in their respective "spheres of influence." Probably the fact that certain Congressmen in the labor committees had been advocating pension reform for six years or so prior to the tax committees of the Congress becoming interested in such reform made resolution of the problem of jurisdiction by the Labor Department or Treasury, or both, even more difficult. This is, perhaps, best epitomized by the following statement by Representative Dent:

I am not about, as I said, to surrender 6 years of work to Johnnie-come-latelies who have not had the experience nor have they . . . in my opinion been exposed as this subcommittee has been exposed, to so many heartbreaking conditions that have come up because there is no protection of a pension system.⁵

The consensus was that disqualification of a plan or immediate vesting of funded plan benefits upon termination were ineffective sanctions. Disagreement, however, arose as to whether an excise tax and in general the "self-enforcing" aspects of taxation were more effective than a court order, either as an injunction or money judgment, to enforce a violation. Those who favored legally mandated rules usually believed that pension protection belonged in Labor because its function was to protect the interests of workers.⁶ This analysis confused the sanction with the enforcer. Professor Halperin pointed out in the Hearings that the question should be first the sanction, rather than the administering agency.⁷ While most witnesses appeared to believe that as an ultimate remedy a court order or a money judgment would be more effective,⁸ several pro-Treasury witnesses argued that the self-enforcing approach (or the excise tax approach) would actually be more effective than court orders.⁹ It was noted, for example, that retirement plans had adopted almost immediately the changes in the "integration" formula in order to maintain tax qualification, whereas the similar problems of age and sex discrimination required a multiplicity of slow court

5. *H.R. 2 Hearings*, *supra* note 2, at 761. See also *id.* at 331, 508, 760-61.

6. *Senate Finance Hearings*, *supra* note 3, at 249.

7. *Id.* at 631.

8. *Id.* at 1096.

9. *Id.* at 635, 808.

suits. Consequently, it was argued that where legislation carries enforcement only through court orders without automatic sanctions, all too frequently the employer or taxpayer only complies when ordered by a court.¹⁰ The strength of this argument was weakened, however, by the tendency of its advocates to ask also that Labor enforcement of such things as fiduciary responsibility through court actions be entirely deleted in favor of, say, an excise tax approach.¹¹ This position, in turn, overlooked the inherent weaknesses in certain aspects of the self-enforcing theory of tax sanctions. Most advocates of the self-enforcement aspects of the Code merely stated that the denial of tax qualification was a highly effective stick, particularly in view of the almost universal practice of obtaining an advance termination letter.¹² This approach did not address, however, the situation in which the employer could not afford to pay the tax in any event.¹³ In addition, especially in the fiduciary area, it would not result in the fiduciary making good any trust fund losses he caused unless other steps were taken.¹⁴

In summary, while the self-enforcement system undoubtedly worked quite well in initial qualification of a plan, neither it nor an excise tax approach would be effective in an area such as mandatory funding if the employer felt that he could not afford it. Of course, picking up a second tier excise tax equal to the amount required to be funded could be quite effective.¹⁵ Particularly in the area of fiduciary standards, an excise tax, on its surface, had the weakness of not making good trust fund losses. If, however, the excise tax were applicable only upon the *failure* to make good such losses, such a tax would be fairly effective since the employer would have the choice of either making restitution to the trust fund prior to paying the excise tax or paying the same amount to Treasury.

Many witnesses, who identified more with organized labor, took the position that the Service was concerned only with whether a retirement plan was a bona fide plan and not just a scheme for the

10. *Id.* at 808.

11. *Id.* at 622, 818.

12. *Id.* at 373, 488.

13. *Id.* at 623.

14. *Id.* at 764.

15. *Cf.* H.R. REP. NO. 807, 93d Cong., 2d Sess. 28 (1974) [hereinafter cited as H.R. REP. No. 807].

avoidance of taxes.¹⁶ A more sophisticated argument held that officials in the Service viewed their job as a mandate to maximize Government revenues and, in giving priority to that objective, they construed narrowly exemptions, exclusions and deductions. On the other hand, the argument continued, a regulatory official believes that he should construe legislation wherever possible for the benefit of the plaintiff who seeks his aid.¹⁷ The Congressmen identified with the labor bills usually favored this analysis.¹⁸ In fact, Representative Dent flatly stated that the Treasury Department was primarily interested in maintaining its revenue base and the question of soundness of the retirement funds was secondary to its main job of raising money.¹⁹ Senator Long, Chairman of the Senate Finance Committee, took sharp issue. He asserted that the revenue law was not used entirely and exclusively to produce revenue but had long been a tool to achieve many social purposes.²⁰ Furthermore, the then current tax subsidy for qualified plans, the tax deductions on 14 billion dollars a year in contributions (which were increasing annually) as well as the absence of taxes on the plans' income,²¹ led Congressmen on the tax committees to believe that they had a responsibility to follow through in tax administration and enforcement to see that the plans were being used to achieve the policy objectives of the law. As Senator Curtis pointed out: "I can't see how they [revenue agents] can do their job in determining if the tax dollar has been overly deducted until they determine that it has gone into a qualified program and has been paid out according to the law that Congress has written."²² Furthermore, tax practitioners asserted that in their experience, particularly in recent years, the Service had indeed been concerned with the rights of individual participants in grant-

16. *Senate Finance Hearings*, *supra* note 3, at 246, 631. It was also asserted (but surely without foundation) that a conflict of interest would arise if the primary enforcement mechanism were imposition of excise taxes for violation of statutory minimum standards, at least in a deduction-generating area such as funding, since it would be in the Treasury's interest not to enforce funding contribution requirements which would create additional current tax deductions. *Id.* at 384.

17. *Id.* at 751.

18. *Id.* at 1091 (remarks of Senator Javits).

19. *H.R. 2 Hearings*, *supra* note 2, at 175, 393.

20. *Senate Finance Hearings*, *supra* note 3, at 627.

21. *Id.* at 629.

22. *Id.* at 627-31.

ing its ruling letters²³—this was perhaps most clearly seen in the areas of vesting in small plans and in the area of salaried-only plans.

It seemed rather generally accepted that the Service had substantial experience and expertise particularly as to coverage, *i.e.*, qualification of plans and vesting, perhaps less so as to funding.²⁴ Some of those in the labor camp suggested that those individuals with expertise be moved from Treasury to the Department of Labor.²⁵ This suggestion overlooked, as discussed below, the continuing functions of review that would have to remain in the IRS. One of the usually unarticulated themes was that Labor was partial toward labor as contrasted with management.²⁶ Senator Javits, ranking minority member of the Senate Committee on Labor and Public Welfare, indirectly corroborated this thought, stating that “it is not the greater effectiveness of the IRS but rather anxiety over administration by the Labor Department of new pension laws which creates the impetus for putting IRS in charge of pension reform legislation.”²⁷ Senator Long suggested in this context that Treasury would be neutral, identifying with neither labor nor management.²⁸ But it was frequently suggested that the Commissioner of Internal Revenue did not really want to have the authority to go into district court and enjoin employers to make deductions, and some even suggested that this could not be done.²⁹

Most tax practitioners maintained that the existing Code requirements for tax qualification of plans and their continued operation in compliance with the tax system ought to be investigated and monitored by the IRS.³⁰ Both Senators Williams and Javits agreed that the enforcement of eligibility and vesting standards as to plan qualification would have to remain in the Service.³¹ Given this premise of retained jurisdiction by the Service, Senator Bentsen was particularly concerned that Labor jurisdiction over registration and

23. *Id.* at 636, 651; *H.R. 2 Hearings*, *supra* note 2, at 51.

24. *Senate Finance Hearings*, *supra* note 3, at 621, 634.

25. *Id.* at 776-77.

26. *Id.* at 627.

27. *Id.* at 1104.

28. *Id.* at 627.

29. *Id.* at 848.

30. *Id.* at 649.

31. *Id.* at 1094-95.

auditing of plans as to minimum funding, vesting, etc., would result in duplication of expense on the part of employers (as well as the government).³² This theme was repeated frequently by witnesses.³³ They contended that additional expenses would be generated by dual staff, coverage and investigations and by conflicting requirements. The primary answer of Senators Javits and Williams to the contentions was that while there would be duality, a duplication of functions would not arise since the purposes of the labor provisions and the tax provisions were not the same.³⁴ However, this analysis failed to resolve the problem of conflicting requirements, particularly as to questions such as minimum vesting, nor did it really answer the problem of duality of registration, initial qualification and continuing compliance with duplicate expenses at each stage.

Perhaps the strongest argument in favor of Labor enforcement of the fiduciary standards was that the underlying theory of the annual reports was that if the participants knew of their rights they could then enforce, or call upon Labor to enforce them. In short, since the annual reports were necessary for the enforcement, they and enforcement should not be separated.³⁵ A solution suggested was initial qualification by Labor and then certification by it to the IRS that the plan was qualified.³⁶ As to audit, it was suggested that Labor would perform audits and notify the Treasury when excise taxes were due.³⁷ Of course, this type of primary responsibility in one agency approach was ultimately adopted, but in mirror image—in effect the IRS qualifies and audits and then notifies Labor, which then can seek judicial enforcement, prior to and in lieu of Service imposition of tax penalties.

32. *Id.* at 370, 1099.

33. *Id.* at 513, 622, 635, 649, 682; *H.R. 2 Hearings*, *supra* note 2, at 179.

34. *Senate Finance Hearings*, *supra* note 3, at 1062-68.

35. *Id.* at 383, 1062. The argument was also raised that between the Department of Labor and the Internal Revenue Service, only Labor was equipped to enforce, and interested in the enforcement of, private rights. *Id.* at 848. While the Service itself had taken the position in published rulings that its function is not to enforce an employee's rights under a qualified plan (but failure to follow plan provisions, for example as to distributions, could result in disqualification as not for the exclusive benefit of employees), Rev. Rul. 70-315, 1970-1 Cum. BULL. 91, in practice employee complaints about failure to follow plan provisions frequently trigger an audit of the plan.

36. *Senate Finance Hearings*, *supra* note 3, at 747, 778.

37. *Id.*

II. ERISA: ADMINISTRATION

A. JURISDICTION: OVERVIEW

By carefully assigning specific functions to Labor and to the IRS, the Senate bill tended to create a dominant role for each agency in a particular area and minimize the degree of overlap.³⁸ The House bill, on the other hand, created extensive overlapping by assigning duplicate functions, particularly in the areas of participation, vesting and funding to both the IRS and Labor.³⁹ Unlike the Senate bill, however, the House bill deliberately attempted to solidify and make comparable labor and tax interests in retirement plans by adopting comparable labor and tax titles to the bill. Although Representatives Dent and Ullman maintained that there was no conflict between Labor and the IRS, because the two agencies were involved in this area for different purposes but with the same criteria, many in the House felt that conflict would arise.⁴⁰

ERISA adopted the framework of the House bill in overlapping jurisdiction and the Senate approach of clearly defining the dominant roles of each agency.⁴¹ Based on the premise that most retirement plans would seek tax qualification or terminate, ERISA grants the initial stage responsibility as to participation, vesting and funding standards to the IRS. On the other hand, the Secretary of Labor has authority to grant certain variances and promulgate certain regulations that are impressed with collective bargaining or labor interest.⁴²

B. INITIAL STAGE JURISDICTION

The administration of qualified retirement plans is separated into two stages: (1) the initial stage when a plan seeks initial determination by the IRS that the plan qualifies for special tax benefits, and (2) the operational stage of continued eligibility of a plan for obtain-

38. 120 CONG. REC. S 15750-51 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

39. *Id.*

40. Compare 120 CONG. REC. H 1129-30 (daily ed. Feb. 26, 1974) (remarks of Representatives Dent and Ullman) with *id.* at H 1167 (daily ed. Feb. 26, 1974) (remarks of Representative Archer).

41. *Id.* at S 15750-51 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

42. *Id.* at S 15741, 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

ing such benefits.⁴³ In exercising its initial stage jurisdiction, the IRS can require any person applying for approval of his plan, in addition to the materials and information generally necessary for administration of the tax laws, to provide such other reasonably available information and complete such forms as the Secretary of Labor may require. Currently only a single set of forms for qualification is required. The Service also requires that each applicant provide evidence that "interested parties" have been notified of the request for determination.⁴⁴ Additionally, the Secretary of the Treasury notifies the Secretary of Labor and the Pension Benefit Guaranty Corporation when the Service receives an application for a determination as to the tax status of a plan.⁴⁵

Once the IRS makes a determination as to the qualified status of a plan or trust, the Secretary of the Treasury then notifies the Secretary of Labor of his determination and furnishes him copies of the forms and information submitted.⁴⁶ Such determination includes an opinion whether the plan is qualified under the Internal Revenue Code.⁴⁷ If a determination request is withdrawn,⁴⁸ the Treasury must notify Labor. Once the Service determines that a plan is qualified, the plan will be treated as meeting the initial requirements of Labor as to participation and vesting.⁴⁹ Thus, the Service plays the dominant role in the initial stage of qualifying a plan.⁵⁰

The Secretary of the Treasury also must afford the Secretary of Labor, when he so requests, an opportunity to comment on the initial determination in any case involving participation or vesting standards under procedures giving him an ample opportunity to comment, but not causing undue delay in the granting of initial determinations.⁵¹ The Secretary of Labor may so comment *only* if

43. H.R. REP. NO. 1280, 93d Cong., 2d Sess. 356-65 (1974) [hereinafter cited as H.R. REP. NO. 1280].

44. ERISA § 3001(a), 29 U.S.C.A. § 1201(a) (1975).

45. H.R. REP. NO. 1280, *supra* note 43, at 357.

46. ERISA § 3001(d), 29 U.S.C.A. § 1201(d) (1975).

47. *Id.*

48. *Id.*; H.R. REP. NO. 1280, *supra* note 43, at 357.

49. H.R. REP. NO. 1280, *supra* note 43, at 358. ERISA § 3001(d) provides: "The Secretary of Labor shall accept the determination of the Secretary of Treasury as prima facie evidence of initial compliance . . ." 29 U.S.C.A. § 1201(d) (1975).

50. 120 CONG. REC. S 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

51. ERISA § 3001(b)(1), 29 U.S.C.A. § 1201(b)(1) (1975); H.R. REP. NO. 1280, *supra* note 43, at 357.

he is requested to do so in writing by the Pension Benefit Guaranty Corporation or 10 employees (or 10% of the employees, if lesser), who would be viewed as "interested parties" under the Tax Court declaratory judgment definition.⁵² The Secretary of Labor transmits a copy of the requests to the Department of the Treasury within five business days after their receipt.⁵³ If the Secretary of Labor does not submit comments on behalf of such groups of employees within 30 days after receiving a petition from the employees, the Secretary of the Treasury must afford the interested parties a reasonable opportunity to comment upon the initial request for determination. Within this 30-day period, the Secretary of Labor must notify the Secretary of the Treasury, the Pension Benefit Guaranty Corporation and the employees in question, as to whether he will comment on the application and as to any matters raised in the requests upon which he is not going to comment.⁵⁴ Congress viewed the Secretary of Labor as taking the dominant role in protecting the interests of participants in this initial stage jurisdiction (as well as in the subsequent operational stage).⁵⁵

The above procedures for enabling employees to comment upon an application for determination are not the exclusive means by which employees may participate in the qualification proceedings, *viz.*, they have available the declaratory judgment provisions of ERISA.⁵⁶ An important question here and in the declaratory judgment provisions is whether an employee who does not qualify under the plan has standing to intervene in the initial qualification process or to initiate a declaratory judgment proceeding. The temporary regulations defining the term "interested parties" answer this question affirmatively—in the initial qualification for a post-ERISA plan and in the first determination request as to continuing qualification after the ERISA-amendments for a pre-September 2, 1974 plan, all present employees qualify as "interested parties."⁵⁷

The above outlined procedures apply not only to the initial quali-

52. ERISA § 3001(b)(2), 29 U.S.C.A. § 1201(b)(2) (1975).

53. *Id.*

54. *Id.* § 3001(b)(4), 29 U.S.C.A. § 1201(b)(4) (1975).

55. 120 CONG. REC. S 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

56. See INT. REV. CODE OF 1954, § 7476. See generally H.R. REP. No. 1280, *supra* note 43, at 357-58.

57. Proposed Treas. Reg. § 11.7476-1(b), 40 Fed. Reg. 24002 (1975).

fication of a plan seeking the special tax benefits under the Code, but also to a request for an IRS determination as to any amendment to the terms of a plan or a trust which seeks a favorable determination from the Service.⁵⁸

C. OPERATIONAL STAGE JURISDICTION

1. *Participation and Vesting*

The IRS in carrying out its auditing function has the duty of examining a plan to determine whether it satisfies the minimum participation and vesting standards of the Code.⁵⁹ Before commencing any proceedings to determine whether the plan or trust complies with the minimum standards, however, the Service must notify Labor.⁶⁰ While this notice need not be made prior to the time the Service begins its audit or review of a plan to verify that the minimum vesting and participation standards have been satisfied, Congress expected that if in the course of the review or audit doubts or questions were raised by the IRS as to whether the plan met the minimum standards, the Secretary of the Treasury would then notify the Secretary of Labor.⁶¹ The notification must be made before the IRS issues its 30-day letter of intent to disqualify the plan or trust.⁶² Except in cases in which the collection of taxes imposed under the Code is in jeopardy,⁶³ the Secretary of the Treasury will not issue a determination of disqualification on the basis of failure to meet the minimum standards until the expiration of a 60-day period after the date of notice to the Secretary of Labor.⁶⁴

This 60-day period is designed to allow the Secretary of Labor to determine whether he should begin to take action in a federal dis-

58. H.R. REP. NO. 1280, *supra* note 43, at 358.

59. *Id.*

60. *Id.*

61. ERISA § 3002(a), 29 U.S.C.A. § 1202(a) (1975); H.R. REP. NO. 1280, *supra* note 43, at 358.

62. *Id.*

63. INT. REV. CODE OF 1954, § 6861 permits an immediate assessment of an income tax deficiency where the Commissioner believes assessment or collection may be jeopardized by delay. The major definition of "jeopardy" is found at section 6851(a)(1): "[A] taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax. . . ."

64. ERISA § 3002(a), 29 U.S.C.A. § 1202(a) (1975).

strict court to compel compliance by the plan with the Title I participation and vesting provisions of ERISA, or to coordinate any action he may be required to take by reason of a complaint from a participant or a beneficiary.⁶⁵ This procedure sets the stage for the "dominant role" which Congress expected the Secretary of Labor to play in protecting the interests of participants in the compliance stage of jurisdiction.⁶⁶ This 60-day period may be extended by the Treasury if it determines that an extension would enable the Secretary of Labor to obtain compliance with the requirements of the law during the extended period.⁶⁷ To this end, the Secretary of the Treasury is to provide the Secretary of Labor with copies of any notices that he issues to the plan administrator as to minimum participation and vesting standards under Title II of ERISA.⁶⁸ The Secretary of Labor generally will not apply the participation and vesting provisions of Title I of ERISA to any plan or trust subject to Code sections 410(a) and 411 (the minimum participation and minimum vesting standards), but will refer alleged general violations of these standards to the Secretary of the Treasury, except as to matters relating to individual benefits.⁶⁹

2. *Minimum Funding*

Essentially the same two-step jurisdiction also applies to the excise taxes imposed upon failure of an employer to meet the minimum funding standards. Thus, the Secretary of the Treasury must notify the Secretary of Labor before imposing any excise tax on an employer for failure to meet the minimum funding standards. And in other than jeopardy situations, the Secretary of the Treasury will give the Secretary of Labor an opportunity to comment on the appropriateness of imposing such tax before doing so.⁷⁰ After consultation with him, the Secretary of the Treasury may in appropriate cases waive or abate the 100% excise tax on the amount of underfunding.⁷¹ Congress expected the agencies would coordinate their

65. H.R. REP. NO. 1280, *supra* note 43, at 358.

66. See 120 CONG. REC. S. 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

67. ERISA § 3001(a), 29 U.S.C.A. § 1201(a) (1975).

68. H.R. REP. NO. 1280, *supra* note 43, at 358.

69. ERISA § 3002(a), 29 U.S.C.A. § 1202(a) (1975).

70. *Id.* § 3002(b), 29 U.S.C.A. § 1202(b) (1975).

71. *Id.*; see H.R. REP. NO. 1280, *supra* note 43, at 359.

respective responsibilities under the funding standard with each other and as part of this coordination,⁷² at the request of the Secretary of Labor or the Pension Benefit Guaranty Corporation, the IRS is to investigate immediately whether any liability for the tax on failure to meet the minimum funding standards is due.⁷³ Conversely, if the Secretary of Labor or the Pension Benefit Guaranty Corporation seeks compliance in any case involving the construction or application of the minimum participation, vesting or funding standards, they will grant a reasonable opportunity to the Secretary of the Treasury to review and comment upon any proposed pleadings or briefs before filing them.⁷⁴

3. *Prohibited Transactions*

Jurisdictional provisions virtually identical to the minimum funding jurisdictional rules apply to prohibited transactions.⁷⁵ Congress anticipated that both Secretaries would consult, whenever necessary, about the prohibited transactions provisions in order to coordinate the rules applicable under these standards.⁷⁶ Congress noted that, in order to best coordinate these rules, the two Secretaries might want to set up a joint board to review and coordinate them.⁷⁷ The two departments have jointly issued class exemptions from the prohibited transactions provisions for certain classes of broker-dealer transactions.⁷⁸ Moreover, pursuant to Revenue Procedure 75-26,⁷⁹ if an applicant seeks an exemption from a prohibited transaction provision under ERISA section 408(a) and Code section 4975, he can file copies of the same application with the Assistant Secretary of Labor for Labor-Management Relations and the Commissioner of Internal Revenue. As yet, however, no joint board, as such, has been established.

72. *Id.*

73. ERISA § 3002(b), 29 U.S.C.A. § 1202(b) (1975).

74. *Id.* § 3002(d), 29 U.S.C.A. § 1202(d) (1975). The Secretary of Labor need not obtain the approval of the Secretary of the Treasury and the latter may intervene and file his own pleadings or briefs in any case. H.R. REP. NO. 1280, *supra* note 43, at 359.

75. ERISA § 3003, 29 U.S.C.A. § 1203 (1975).

76. H.R. REP. NO. 1280, *supra* note 43, at 359.

77. *Id.*

78. Prohibited Transaction Exemption 75-1, 40 Fed. Reg. 50845 (1975).

79. 1975-1 CUM. BULL. 722.

As part of the anticipated coordination, the IRS, at the request of the Secretary of Labor or the Pension Benefit Guaranty Corporation, is to initiate an immediate investigation as to any person's liability for the tax on prohibited transactions.⁸⁰ Congress pointed out that such an "elaborate interweaving of jurisdiction" would require the utmost cooperation and coordination between the two agencies in order to avoid exposing plans to unjustified administrative burdens.⁸¹ This is particularly true in areas such as prohibited transactions, where both agencies have similar responsibilities but different interests:

In order to avoid 'shopping' for opinions by plans as well as to minimize uncoordinated applications of the prohibited transaction rules, both agencies should give careful consideration to the recommendations of the conferees for establishing administratively a joint board which could provide 'one-stop' service in this connection.⁸²

4. *Regulations and Rulings*

ERISA assigned to the Treasury the authority to promulgate the regulations under the general provisions relating to participation, vesting and funding, except where it gave specific authority to the Secretary of Labor to prescribe appropriate regulations, such as the regulations defining what constitutes a "year of service."⁸³ Congress intended that both Treasury and Labor regulations in this area would each be binding upon the other department, unless otherwise provided in ERISA. Congress also expected that the two depart-

80. ERISA § 3003(a), 29 U.S.C.A. § 1203(a) (1975). Conversely under ERISA § 3003(c) whenever the Secretary of Labor obtains information indicating that a party-in-interest or disqualified person is violating the prohibited transaction provisions of Title I (Labor's jurisdiction there extends only to the fiduciaries violating such provisions), he is to transmit such information to the Secretary of the Treasury. 29 U.S.C.A. § 1203(c) (1975).

81. 120 CONG. REC. S. 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams). Some commentators felt that there was a distinct possibility that, absent a joint Labor-Treasury advisory opinion office, one agency might take an opposite view in the area of prohibited transactions from the other. There was little expectation that joint rulings would be issued on the short notice necessary to seize an investment opportunity without delay. Cummings, Casey & Cummings, *Overlap of IRS and Labor in Regulating Compensation Plan Can Create Problems*, 42 J. TAX. 7, 8 (1974). Final review of individual exemption requests has been glacially slow indeed, to the date of the writing of this article.

82. 120 CONG. REC. S. 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

83. ERISA §§ 202(a)(3)(A), 203(b)(2)(A), 29 U.S.C.A. §§ 1052(a)(3)(A), 1053(b)(2)(A) (1975).

ments would consult and coordinate closely with each other in prescribing the regulations that each would issue under the various ERISA provisions.⁸⁴ This had been the case to date. The writer has been informed orally that currently, both labor and tax ERISA regulations are reviewed in joint sessions by representatives from Labor, the Treasury and IRS.

At this date the major area of overlapping application of ERISA regulations by Labor and the IRS has arisen in the latter's approval of post-ERISA amendments to plans and new plans under ERISA. For instance, ERISA assigned to Labor the primary jurisdiction in promulgation of regulations concerning hours and years of service. Hence, the definition of "hour of service" or "year of service" in a post-ERISA retirement plan will be governed by Labor regulations, while the qualification of that provision under ERISA will be judged initially by the IRS. Accordingly, prior to promulgation of proposed and temporary regulations on hours of service and years of service by Labor, the IRS stated⁸⁵ that pending promulgation of Labor regulations defining the term "hour of service" a plan had to provide that an employee would be credited with hours of service under certain specified conditions. The writer understands that the Department of Labor drafted these conditions for the IRS.

Under ERISA section 3004(a) the Secretary of the Treasury and the Secretary of Labor in carrying out provisions relating to the same subject matter are charged with consulting with each other in the development of rules, regulations, practices and forms to the extent possible for the efficient administration of the provisions of ERISA in order to reduce to the maximum extent practical duplication of effort, conflicting requirements and the burden of compliance (including annual reports filed by plan administrators). These statutory "directives" and "grants" for coordination in regulations, rulings and forms to date have been ably and fully heeded by the IRS and Labor. Nowhere is this clearer than in the annual information return report form, where the old tax forms 4848, 4848 Schedule A, 4849 and 990-P and labor form D-1 have been combined in a single form 5500.⁸⁶

84. H.R. REP. NO. 1280, *supra* note 43, at 360.

85. Question and Answer P-9, January 8, 1975.

86. See 40 Fed. Reg. 45134-56 (1975).

Under ERISA section 3004(b), the two Secretaries may make arrangements for cooperation and mutual assistance in the performance of their functions under ERISA to the extent that they find practicable and consistent with the law. Congress expected the maximum coordination in those areas where one agency has the sole authority to prescribe regulations as well as where both agencies share this authority.⁸⁷

D. ADMINISTERING OFFICE IN INTERNAL REVENUE SERVICE

Under prior law the National Office of the IRS was organized on a general activity basis rather than a tax or subject basis. The field offices of the Service were organized similarly. Within each of the broad categories of activities there were service units with jurisdictional breakdown by subject matter. Thus, various aspects of National Office employee benefit plan and tax exempt organization administration were contained in different branches of the National Office. For example, the Miscellaneous and Special Provision Tax Division under the Office of Assistant Commissioner (Technical) contained an Actuarial Branch, a Pension Trust Branch and an Exempt Organizations Branch; other aspects of employee benefit plan and tax exempt organization administration were under the Office of Assistant Commissioner, Accounts Collection and Taxpayer Service and the Office of Assistant Commissioner (Compliance).⁸⁸

The tax committees of Congress acknowledged that concern had been expressed in the context of administration of employee benefit plans that the Service, with its primary concern the collection of revenues, would not give sufficient consideration to the purposes for which such organizations were exempt from income taxation.⁸⁹ Many believed the Service had subordinated concern for the charitable or other interests of plan participants or the educational, charitable or other purposes for which the exemptions were provided, to concern for the collection of revenue. The tax committees recognized that the natural tendency of the Service was to empha-

87. H.R. REP. NO. 1280, *supra* note 43, at 360.

88. H.R. REP. NO. 807, *supra* note 15, at 103; S. REP. NO. 383, 93d Cong., 1st Sess. 107 (1973) [hereinafter cited as S. REP. NO. 383].

89. H.R. REP. NO. 807, *supra* note 15, at 103; S. REP. NO. 383, *supra* note 88, at 107.

size those areas that produce revenue rather than those areas primarily directed to maintaining the integrity of the purposes for which the exemption provisions in question were created by Congress. At the same time the tax committees pointed out that the enormous growth in retirement plans during the last third of a century had proceeded largely under the tax regulations of the IRS, and clearly the greatest single protection for rank-and-file employees during this period had been the Service's administration of the provisions denying any special tax treatment for contributions or benefits discriminating in favor of shareholders, officers and highly-paid employees. The thrust of this anti-discrimination provision was to require broader and more substantial participation in plans than would have been provided without the Service's administration of the statute.⁹⁰

Against this background Congress believed that in the employee benefit plan and tax exempt organization areas it would be easier to emphasize the basic objectives involved, if the activities relating to these plans and exempt organizations were more closely coordinated; if the audit and ruling activities in these areas, whether in the field or in the National Office, were brought together; and if the direction for these activities emanated from a single office.⁹¹ Accordingly, ERISA section 1051 amended Code section 7802 to provide for an office within the IRS—the "Office of Employee Plans and Exempt Organizations"—under the supervision and direction of an Assistant Commissioner of Internal Revenue.⁹²

This office supervises and directs the basic activities of the IRS in connection with pension plans and tax exempt organizations. In connection with qualified plans Congress intended that the Office of Employee Plans and Exempt Organizations would be made responsible for, among other things, the determination of the qualification of the plan and the exemption from taxation of the related trust. Questions as to the deductibility of contributions to a plan, the taxability of a beneficiary of an employees' trust, and the

90. H.R. REP. NO. 807, *supra* note 15, at 103-04; S. REP. NO. 383, *supra* note 88, at 108.

91. H.R. REP. NO. 807, *supra* note 15, at 104; S. REP. NO. 383, *supra* note 88, at 108.

92. See INT. REV. CODE OF 1954 § 7802, *as amended*. Currently the Assistant Commissioner of Employee Plans and Exempt Organizations is Alvin Lurie, a well-known pension and tax practitioner.

taxation of employee annuities are included as well within its jurisdiction. In addition, Congress planned that this Office would have responsibility over the minimum standards relating to funding of a plan and the excise tax for underfunding, as well as the enrollment and reports of actuaries.⁹³ As to tax exempt organizations, the Office of Employee Plans and Exempt Organizations is responsible for an organization's exempt qualification, the taxes on unrelated business income of an organization exempt from tax, and the rules relating to the private foundation provisions of the Internal Revenue Code.⁹⁴ These provisions regarding the new office took effect 90 days after September 2, 1974.⁹⁵

III. ERISA: ENFORCEMENT

A. CIVIL ACTIONS BY PARTICIPANTS AND FIDUCIARIES

A civil action may be brought by a participant to recover benefits due under a plan, to enforce his rights under the terms of a plan or to clarify rights to future benefits under the terms of a plan.⁹⁶ In addition, a participant may bring an action for appropriate relief from failure of a plan administrator to comply with a request to furnish any information which he is required by Title I of ERISA to disclose or furnish to a participant.⁹⁷ If the requested information is not furnished as required under Title I, the court may impose a personal penalty upon the plan administrator.⁹⁸ Under former law, courts were reluctant to impose any penalty upon an administrator for failure to furnish a participant with documents that were required to be disclosed. That trend was changing on the eve of ERISA.⁹⁹

93. H.R. REP. NO. 807, *supra* note 15, at 104.

94. *Id.* at 105.

95. ERISA § 1051(d), 26 U.S.C.A. § 7862 (1975).

96. ERISA § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B) (1975); H.R. REP. NO. 1280, *supra* note 43, at 327. ERISA provides these and the other "participant" remedies discussed in text to a participant or a beneficiary; accordingly references in text to "participant" include "beneficiary." Any money judgment so obtained against an employee benefit plan is enforceable only against the plan as an entity and not against any other person unless his liability is established in his individual capacity. ERISA § 502(d)(2), 29 U.S.C.A. § 1132(d)(2) (1975).

97. ERISA § 502(a)(1)(A), 29 U.S.C.A. § 1132(a)(1)(A) (1975). The required disclosure must be made within 30 days after requested, but no penalty is imposed if the failure results from matters reasonably beyond the control of the administrator.

98. *Id.* 502(c), 29 U.S.C.A. § 1132(c) (1975) (up to \$100 per day).

99. Compare *Harrold v. Coble*, 261 F. Supp. 29, 38 (M.D.N.C. 1966), *aff'd per curiam*, 380

In addition, a participant, as well as a fiduciary, may bring an action for appropriate relief under ERISA section 409, which imposes liability upon a fiduciary for breach of his fiduciary responsibilities under the Act. The relief may include removal of the trustee.¹⁰⁰ Participants and fiduciaries also may bring an action (1) to enjoin any act or practice violating any provision of Title I or of the plan terms, or (2) to obtain other appropriate equitable relief to redress such violations, or (3) to enforce any provision of Title I or the terms of the plan.¹⁰¹ In addition, a participant or the Secretary of Labor may bring an action for appropriate relief in the event of a violation of the plan administrator's duty under the Code to give a terminated employee a statement of any deferred vested benefit he has at the time of termination.¹⁰²

The federal district courts have inclusive jurisdiction over actions involving breaches of fiduciary responsibility and other actions to enforce or clarify benefit rights provided under Title I.¹⁰³ However, suits to enforce benefit rights under the plan, or to recover benefits under the plan which do not involve application of Title I provisions may be brought not only in the federal district courts but also in state courts of competent jurisdiction¹⁰⁴ which thus enjoy concurrent jurisdiction. The federal district courts have jurisdiction, whether exclusive or concurrent, over both classes of actions without regard to the amount in controversy or the citizenship of the parties. The actions in federal or state courts are regarded as arising under the laws of the United States in a similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947 (LMRA).¹⁰⁵ In any action brought by a participant or fiduciary, the

F.2d 18 (4th Cir. 1967) and *Doherty v. Sylvania Pension Plan*, 310 F. Supp. 1331, 1333 (D. Mass. 1970) with *Redman v. Warrenner*, 516 F.2d 766, 768 (1st Cir. 1975) and *Wallace v. Marine Eng. Benevolent Ass'n, AFL-CIO*, 392 F. Supp. 899 (E.D. La. 1975).

100. ERISA § 502(a)(2), 29 U.S.C.A. § 1132(a)(2) (1975).

101. *Id.* § 502(a)(3), 29 U.S.C.A. § 1132(a)(3) (1975).

102. *Id.* § 502(a)(4), 29 U.S.C.A. § 1132(a)(4) (1975).

103. *Id.* § 502(f), 29 U.S.C.A. § 1132(f) (1975). This jurisdiction is without respect to the amount in controversy or the citizenship of the parties.

104. *Id.* § 502(e)(1), 29 U.S.C.A. § 1132(e)(1) (1975). See *Leonardis v. Local 282 Pension Trust Fund*, 391 F. Supp. 554, 557 (E.D.N.Y. 1975).

105. H.R. REP. NO. 1280, *supra* note 43, at 327. For discussion of some labor law principles that may apply under ERISA due to this reference see Donaldson, *The Use of Arbitration to Avoid Litigation under ERISA*, 17 WM. & MARY L. REV. 215, 225 (1975).

court may allow reasonable attorney's fees or costs to either party.¹⁰⁶ The United Mineworkers' pension fund litigation may foreshadow how this provision will be applied.¹⁰⁷ A federal suit in the district court may be brought in the district where the plan is administered or where the breach of fiduciary duty took place, or where a defendant resides or may be found.¹⁰⁸ Process may be served in any other district where a defendant resides or may be found.¹⁰⁹ If a participant or beneficiary brings an action in a federal court to enforce his rights under Title I, he must provide a copy of the complaint to the Secretary of Labor and to the Secretary of the Treasury by certified mail, but a copy is not required in any action which is solely for the purpose of recovering benefits under the plan.¹¹⁰ The Secretary of Labor, the Secretary of the Treasury, or both, have the right to intervene at their discretion in any action.¹¹¹

Considerable discussion arose during the hearings concerning causes of action by the individual participants, and in particular class actions. On the one hand, some witnesses believed that class actions would result in overly conservative plan administration, while labor leaders at the same time were worried over frivolous suits that would cost the trust fund legal fees.¹¹² Labor leaders advocated access to courts under a system that would deter such strike-suits.¹¹³ The House bill would have required that actions by participants, except those to acquire benefits due under the terms of the plan or to clarify rights to future benefits under the terms of the

106. ERISA § 502(g), 29 U.S.C.A. § 1132(g) (1975).

107. *See Kiser v. Hugel*, 517 F.2d 1237, 1253-57 (D.C. Cir. 1974); *accord*, *Morrissey v. Curran*, 386 F. Supp. 167 (S.D.N.Y. 1974).

108. ERISA § 502(e)(2), 29 U.S.C.A. § 1132(e)(2) (1975).

109. *Id.* Subpoena or other legal process of a court upon a trustee or plan administrator constitutes service on a plan. In addition, where a plan has not designated in the summary plan description an individual as agent for service of process, service upon the Secretary of Labor (who no later than 15 days thereafter will notify the administrator or trustee of such service) constitutes such service. *Id.* § 502(d)(1), 29 U.S.C.A. § 1132(d)(1) (1975).

110. *Id.* § 502(h), 29 U.S.C.A. 1132(f) (1975).

111. *Id.* However, the Secretary of the Treasury may not intervene in any action under Part 4 (Fiduciary Responsibility) of Title I. *Id.* If the Secretary of Labor brings an action for civil enforcement under Section 502(a) of the Act, he must notify the Secretary of the Treasury. *Id.* As of February 2, 1976 the Labor Department had intervened in three cases brought under ERISA. *See* Department of Labor News Release 76-71 (February 2, 1976), *reprinted in* 3 P-H PENSION AND PROFIT SHARING ¶¶ 135, 145 (1976).

112. *See, e.g., Senate Finance Hearings*, *supra* note 3, at 549.

113. *H.R. 2 Hearings*, *supra* note 2, at 7.

plan, be brought only "upon leave of the court obtained upon certified application and for good cause shown, which application may be ex parte."¹¹⁴ This provision was not carried over into ERISA.¹¹⁵ Thus, the danger of frivolous suits appears greater under the final ERISA provisions than would have been the case under the House bill.

The Department of Labor further suggested during the hearings on pension reform that it would be desirable in class actions for notice to be given to all concerned parties and that they be given opportunity to be heard wherever reasonably possible. Moreover, to avoid subjecting the fiduciary to a multiplicity of suits involving similar facts and issues, representatives of Labor urged that any pension reform bill also provide for a final judgment binding upon other participants in the plan.¹¹⁶ Part of the problem in this context may have arisen from the fact that under the House bill any action brought by a participant or beneficiary other than to recover benefits due, or to obtain from the plan administrator information required to be disclosed, had to be brought as a class action if the law of the jurisdiction provided for class actions and the court was satisfied that the requirements for a class action were not unduly burdensome as applied in the particular circumstances.¹¹⁷ This mandatory class action provision was also deleted in the final provisions of ERISA.¹¹⁸ This aspect may counterbalance to some degree the danger of frivolous strike-suits. Moreover, the court may award costs and attorney's fees to *either* party.

On the other hand, the individual non-class action remedy was attacked in the hearings as being insufficient on the grounds that (1) frequently the legal fees would exceed the recovery,¹¹⁹ (2) court-awarded attorney's fees might not be adequate,¹²⁰ and (3) difficulty prior to ERISA in finding lawyers to take retirement plan

114. H.R. 2, as passed by the House, 93d Cong., 2d Sess. § 503(i)(2) (1974) [hereinafter cited as H.R. 2].

115. Compare H.R. 2, § 503(i) with ERISA §§ 502(g) and 503(h), 29 U.S.C.A. §§ 1132(g), 1133(h) (1975).

116. H.R. 2 Hearings, *supra* note 2, at 207.

117. H.R. 2, *supra* note 114, at § 503(g)(1).

118. Compare *id.* with ERISA § 502(a), 29 U.S.C.A. § 1132(a) (1975).

119. Senate Finance Hearings, *supra* note 3, at 847.

120. H.R. 2 Hearings, *supra* note 2, at 36.

cases, which could drag on for years and years before recovery.¹²¹ Furthermore, before ERISA, most misdeeds by plan administrators, it was alleged, were brought to light in lawsuits by employees who were not yet vested so that even if the plaintiff won, he might not enjoy a present recovery and might never get a pension.¹²² Therefore, it was suggested that the equivalent of a legal aid office be provided under any pension reform bill for participants with causes of actions against plans.¹²³ These criticisms all seemed to point towards heavy reliance upon the Department of Labor to enforce pension rights under ERISA.

B. CIVIL ACTIONS BY THE DEPARTMENT OF LABOR

The Secretary of Labor may bring an action for breach of a fiduciary duty or to enjoin any action or practice that violates the provisions of Title I of ERISA or to obtain any other appropriate relief to enforce any provisions of that title.¹²⁴ In addition, in the case of a transaction by a party-in-interest as to a plan that is not qualified under the Internal Revenue Code, the Secretary of Labor may assess a civil penalty not to exceed 5% of the amount of the transaction, with a second tier additional penalty of not more than 100% of the transaction if it is not corrected within 90 days after the notice from the Secretary of Labor.¹²⁵ This provision, of course, parallels the excise taxes which the Internal Revenue Service may impose upon violations of prohibited transactions by plans which are qualified under the Internal Revenue Code.

Once the IRS has determined that a plan qualifies under the Code (or if an application for determination is pending), the Secretary of Labor may not bring an action for equitable relief as to a violation of the participation, vesting and funding standards of Title I by that plan unless he is requested to do so by either the Secretary of the Treasury, or in writing by one or more participants or fiduciaries of that plan on their behalf.¹²⁶ Upon such request, the Secretary of

121. *Id.* at 246.

122. *Senate Finance Hearings*, *supra* note 3, at 994.

123. *H.R. 2 Hearings*, *supra* note 2, at 31-32.

124. ERISA §§ 502(a)(2), (4), (5) and (6), 29 U.S.C.A. §§ 1132(a)(2), (4), (5) and (6) (1975).

125. *Id.* § 502(i), 29 U.S.C.A. § 1132 (i) (1975).

126. *Id.* § 502(b), 29 U.S.C.A. § 1132(b) (1975).

Labor may exercise this authority only if he determines that the violation affects, or enforcement is necessary to protect, benefit claims of the plan participants.¹²⁷

Department of Labor attorneys represent the Secretary of Labor in ERISA civil actions, except for litigation before the Supreme Court and the Court of Claims, but all such litigation is subject to the direction and control of the Attorney General.¹²⁸ Congress included this provision in ERISA in order to clarify that even though litigation is conducted by Labor attorneys, the Attorney General has the final authority to resolve any conflicts between the Labor and the IRS on issues in litigation, and in such event, to assure that the Government takes a uniform position before the courts.¹²⁹ In addition, the Attorney General has authority over the presentation of issues of general importance to the courts, such as the constitutionality of federal laws. Thus, Congress intended the Secretary of Labor generally to be represented in civil litigation by the Solicitor of Labor and his attorneys, with appropriate arrangements being made between the Secretary of Labor and the Attorney General as to the active involvement of the Justice Department in the types of situations outlined above.¹³⁰

C. PREEMPTION OF STATE LAW: DEVELOPMENT OF FEDERAL COMMON LAW

The provisions of Title I of ERISA supersede all state laws relating to any employee benefit plan established by an employer engaged in or affecting interstate commerce or by a union that represents employees engaged in or affecting interstate commerce.¹³¹ However, as is the general pattern in Title I, preemption does not apply to government plans, church plans not electing under the vesting provisions, workmen's compensation plans, certain plans maintained primarily for nonresident aliens and "excess benefit plans."¹³² Preemption also does not affect any cause of action, such as for a breach of fiduciary responsibilities, that arose before Janu-

127. *Id.*

128. *Id.* § 502(j), 29 U.S.C.A. § 1132(j) (1975).

129. H.R. REP. No. 1280, *supra* note 43, at 329-30.

130. *Id.* at 330.

131. ERISA § 514(a), 29 U.S.C.A. § 1144 (1975).

132. *See* ERISA § 4(b) and first sentence of § 514(a), 29 U.S.C.A. §§ 1003, 1144(a) (1975).

ary 1, 1975, or any act or omission which occurred before that date.¹³³ In addition, the preemption provision does not apply to any state criminal law of general application; nor does it exempt any person from any state law that regulates insurance, banking or securities.¹³⁴ However, generally no employee benefit plan is to be considered as an insurance company, bank, trust company or investment company, or engaged in the business of insurance or banking for purposes of any state law that regulates insurance companies, insurance contracts, banks, trust companies or investment companies.¹³⁵

With the above few exceptions, the substantive and enforcement provisions of ERISA are intended to preempt the field for federal regulation, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle was intended by Congress to apply in its broadest sense to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law.¹³⁶ Congress also intended that a body of federal substantive law would be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.¹³⁷

It is likely that the federal district courts, or state courts applying federal law, in deciding benefit claims will develop the final answers, perhaps independently of the Departments of Labor and Treasury and of the Pension Benefit Guaranty Corporation, to pre-ERISA issues that plagued state courts—application of the doctrines of quantum meruit and promissory estoppel to “partial terminations” and plant shutdowns. These cases will arise (1) where retirement plans are terminated in plant shutdowns (without full insurance by the Pension Benefit Guaranty Corporation) and (2) where participants are terminated, instead of the plan, in a gradual

133. *Id.* § 514(b)(1), 29 U.S.C.A. § 1144(b)(1) (1975). This provision overrides earlier contrary implications of the floor debate on H.R. 2. See 120 CONG. REC. H.1145 (daily ed. Feb. 26, 1974) (remarks of Representative Dent).

134. ERISA § 514(b)(2)(A), 29 U.S.C.A. § 1144(b)(2)(A) (1975).

135. *Id.* § 514(b)(2)(B), 29 U.S.C.A. § 1144(b)(2)(B) (1975).

136. *Id.* § 514(c)(1), 29 U.S.C.A. § 1144(c)(1) (1975); 120 CONG. REC. S 15742 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

137. 120 CONG. REC. S 15742, S 15758 (daily ed. Aug. 22, 1972) (remarks of Senators Williams and Javits); 120 CONG. REC. H 8701 (daily ed. Aug. 20, 1974) (remarks of Representative Dent).

138. See Proposed Treas. Reg. § 11.411(d)-2(a)(1); 40 Fed. Reg. 51434 (1975).

plant shutdown (and the Pension Benefit Guaranty Corporation does not terminate the plan and the Service does not find a partial termination of the plan, with immediate vesting of *funded* benefits of the terminated participants).¹³⁸

In pre-ERISA case law and commentary the situation in which employees were laid off in a gradual plant shutdown, but their retirement plan itself was not formally terminated, was frequently analyzed.¹³⁹ Under IRS rules where a partial termination occurred, the participants who were affected obtained immediate vesting of their accrued benefits to the extent funded. Similarly where the entire plan was terminated, the funded accrued benefits of all participants were vested.¹⁴⁰ Historically the Service had been reluctant to find a partial termination,¹⁴¹ although on the eve of ERISA a contrary tendency could be seen.¹⁴² Frequently employees with some vested benefit who were terminated in gradual plant shutdowns that did not result in a formal plan termination were left without relief.

The majority view in the state and federal courts (applying state law) was that plan provisions, which universally provided for immediate vesting upon termination, referred to a formal termination of the plan and not termination of the plant.¹⁴³ Employees who were terminated, in whatever numbers and for whatever reasons, could not claim that their termination itself effected such a discontinuance.¹⁴⁴ For instance, in *Gorr v. Consolidated Foods Corp.*,¹⁴⁵ one of the leading "horribles" in the area of plan "terminations", the state appellate court held that where none of the conditions for termina-

139. See, e.g., Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and some Proposals*, 76 HARV. L. REV. 952, 955 (1963) [hereinafter cited as *Bernstein*]; Levin, *Proposals to Eliminate Inequitable Loss of Pension Benefits*, 15 VILL. L. REV. 527, 557 (1970) [hereinafter cited as *Levin*].

140. Treas. Reg. § 1.401-6(a)(2)(i), (ii) (1963). See Proposed Treas. Reg. § 41.411(d)(2)(b) and 2(a)(1), 40 Fed. Reg. 29555 (1975).

141. See *Senate Finance Hearings*, *supra* note 3, at 901-05.

142. See Rev. Rul. 72-510, 1972-2 CUM. BULL. 223.

143. See, e.g., *Lovetri v. Vickers, Inc.*, 397 F. Supp. 293 (D. Conn. 1975); *Rothlein v. Armour & Co.*, 377 F. Supp. 506 (W.D. Pa. 1974). See generally Annot., 42 A.L.R.2d 461 (1955); Annot., 46 A.L.R.3d 464 (1972).

144. *Lovetri v. Vickers, Inc.* 397 F. Supp. 293, 298 (D. Conn. 1975).

145. *Gorr v. Consol. Foods Corp.*, 253 Minn. 375, 379, 91 N.W.2d 772, 775 (1958); accord, *Schneider v. McKesson & Robbins, Inc.*, 254 F.2d 827 (2d Cir. 1958); *Karcz v. Luther Mfg. Co.*, 338 Mass. 313, 155 N.E.2d 441 (1959). But see *Longhine v. Bilson*, 159 Misc. 111, 287 N.Y.S. 281 (Sup. Ct. 1936).

tion expressly set forth in the plan had occurred, the plan continued in force for the remaining employees and was not terminated. In less than two years after acquisition of the employer by another corporation, the work-force had been reduced from 580 employees to 75, only 42 of whom were plan participants. The decision resulted in a windfall of \$170,000 to the acquiring company because contributions were reduced.¹⁴⁶ A similarly rigid approach was taken in *Zeimaitis v. Burlington Mills, Inc.*¹⁴⁷ A plant shutdown and an attendant attrition in work force caused so large an amount of forfeitures from those employees who were terminated without a vested interest in their accrued benefit that future employer contributions were not necessary to keep the plan funded for the greatly reduced number of plan participants. The court held that this did not result in a complete discontinuance of contributions, which would have required 100 percent vesting of the funded benefits. Employees in a closed-down division did not fare any better in arguing that discontinuance of contributions as to their division constituted a termination of the plan as to them, *i.e.*, a partial termination,¹⁴⁸ or that they were entitled to be considered employees under the circumstances despite their discharge.¹⁴⁹

Earlier pre-ERISA cases had long followed a gratuity theory under which the employee had minimal rights, in no event extending beyond those provided in the employer-drafted retirement plan. For instance, the appellate state court in *George v. Haber*¹⁵⁰ found no termination, noting that the plan specifically stated that the employer's contributions did not constitute wages, salary or compensation to any individual employee. Under such an approach the plan would be a mere gratuity and the employer as donor would have an unlimited right to fix the terms and conditions of the gift.¹⁵¹ Similarly, some plans provided that the plan was not a contract of

146. *Bernstein*, *supra* note 139, at 955 n.12.

147. 56 Wis. 2d 449, 202 N.W.2d 244 (1972).

148. *Bailey v. Rockwell Spring & Axle Co.*, 13 Misc. 3d 29, 175 N.Y.S.2d 104 (Sup. Ct. 1958). *Contra Fernekes v. CMP Indus., Inc.*, 15 App. Div. 2d 128, 222 N.Y.S.2d 582 (1961), *rev'd*, 13 N.Y.2d 217, 195 N.E.2d 884, 246 N.Y.S.2d 201 (1963).

149. *Machinists Local 240 v. Servel, Inc.*, 268 F.2d 692 (7th Cir.), *cert. denied*, 361 U.S. 884 (1959). *See Bernstein*, *supra* note 139, at 957-58.

150. 343 Mich. 218, 72 N.W.2d 121 (1955).

151. *See Neuffer v. Bakery Wkrs. Union*, 193 F. Supp. 699 (D.D.C. 1961), *aff'd*, 307 F.2d 671 (D.C. Cir. 1962).

employment or the participant remained subject to discharge at will.¹⁵² In addition, plans commonly stated that the employer retained the full power to terminate the plan, reduce contributions and benefits and amend the plan in any fashion.¹⁵³ Most cases upheld such limitations so that the participants possessed no right to force an employer to continue a retirement plan.¹⁵⁴ However, there was a growing acceptance, even prior to ERISA, of the theory that noncontributory retirement benefits actually constituted a substitute for direct compensation.¹⁵⁵ The majority view required awarding of an individual pension where the participant met all the plan requirements for payment including years of service and vesting under pay-as-you-go plans or where a funded plan itself was not terminated,¹⁵⁶ notwithstanding any plan provisions permitting cancellation by the employer.¹⁵⁷

152. *Hablas v. Armour Co.*, 270 F.2d 71 (8th Cir. 1959).

153. See, e.g., *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 533 n.15 (3d Cir. 1970); *Finnell v. Cramet, Inc.*, 289 F.2d 409 (6th Cir. 1961); *Schneider v. McKesson & Robbins, Inc.*, 254 F.2d 827 (2d Cir. 1958); *Fickling v. Pollard*, 51 Ga. App. 54, 179 S.E. 582 (1935); *Lynch v. Dawson Collieries*, 485 S.W.2d 494 (Ky. 1972); *Vocke v. Third Nat'l Bank & Trust Co.*, 267 N.E.2d 606, 611 (Mun. Ct. Ohio 1971). See generally *Bernstein*, *supra* note 139, at 957.

154. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527 (3d Cir. 1970); *Finnell v. Cramet, Inc.*, 289 F.2d 409 (6th Cir. 1961); *Neuffer v. Bakery Wkrs. Union*, 193 F. Supp. 699 (D.D.C. 1961), *aff'd*, 307 F.2d 671 (D.C. Cir. 1962). *In re Missouri Pac. R.R. Co.*, 49 F. Supp. 405 (D. Mo. 1943); *Hughes v. Encyclopedia Britannica, Inc.*, 1 Ill. App. 2d 514, 117 N.E.2d 880 (1954); *Molumby v. Shapleigh Hardware Co.*, 395 S.W.2d 221 (Mo. Ct. App. 1965); *Dolan v. Heller Bros. Co.*, 30 N.J. Super. 440, 104 A.2d 860 (1954); *Korb v. Brooklyn Edison Co.*, 258 App. Div. 799, 15 N.Y.S.2d 557 (1939).

155. See *Bernstein*, *supra* note 139, at 959-62; *H.R. 2 Hearings*, *supra* note 2, at 508 (remarks of Representative Dent).

156. See *Russell v. Princeton Labs, Inc.*, 50 N.J. 30, 231 A.2d 800 (1967); *Cantor v. Bershire Life Ins. Co.*, 179 Ohio St. 405, 171 N.E.2d 518 (1960).

157. *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *Vocke v. Third Nat'l Bank & Trust Co.*, 267 N.E.2d 606, 612 (Mun. Ct. Ohio 1971) (but still binding only after specified period, such as vesting period). Moreover, a minority approach recommended by commentators was to provide terminated employees, at least where the mass terminations were employer-induced, rights as to vesting beyond those provided in the plan which usually limited "termination" to formal plan terminations decreed by the employer's board of directors, or termination upon the occurrence of a stated event, such as sale of a division. See *Dierks v. Thompson*, 295 F. Supp. 1271 (D.R.I. 1969), *rev'd on other grounds*, 414 F.2d 454 (1st Cir. 1969) (concerning theories such as quasi-contract or unjust enrichment). *Lucas v. Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967). See *Levin*, *supra* note 139, at 560. But see *Lynch v. Dawson Collieries*, 485 S.W.2d 494 (Ky. 1972); *Zeimaitis v. Burlington Mills, Inc.*, 56 Wis. 2d 449, 202 N.W.2d 244 (1972); *Annot.*, 55 A.L.R.3d 767 (1974).

While the majority of cases had abandoned the gratuity concept and held that a contractual obligation to meet the funding requirements under the plan as to accrued benefits arose once the participant had met all plan conditions,¹⁵⁸ these cases still found that a participant who had not yet met the years of service requirement for vesting under the plan was entitled to no pension, even where "termination" rendered such performance impossible.¹⁵⁹ In *Thornberg v. MGS Co.*,¹⁶⁰ the plan contained a standard disclaimer clause as to the employer's obligation to fund fully any past service obligation. The Wisconsin Supreme Court found no contractual or quasi-contractual obligation to fund fully the plan once it was terminated.

A federal district court, in *Lucas v. Seagrave Corp.*,¹⁶¹ recognized in 1967 that only two prior cases had found termination of a plan due to a plant closing (one of them had been reversed and the other effectively eroded by subsequent decisions), but no prior case had ruled directly on the "assertion of a quasi-contractual right of pension benefits on the basis that such benefits are essentially a form of compensation."¹⁶² The *Lucas* opinion would on the proper facts award a retirement benefit, not literally required by the plan, to separated employees who had not met the years of service requirements for a vested pension based on two theories: (1) *quasi-contract*—employees involuntarily separated from employment in a group termination prior to vesting would be entitled to recover a benefit equal to the benefit conferred on the employer (favorable tax treatment, retention of employees),¹⁶³ and (2) *unjust-*

158. *Stopford v. Boonton Molding Co.*, 56 N.J. 169, 265 A.2d 657 (1970); Annot., 46 A.L.R.3d 444 (1972). See also *Delaware Trust Co.*, 222 A.2d 320 (Del. Ch. 1966).

159. *Schneider v. McKesson & Robbins, Inc.*, 254 F.2d 827, 829 (2d Cir. 1958); *Zeimaitis v. Burlington Mills, Inc.*, 56 Wis. 2d 449, 202 N.W.2d 244 (1972); cf. *Hudson v. John Hancock Mut. Life Ins. Co.*, 314 F.2d 16, 22 (8th Cir. 1963); *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942, 946 (7th Cir. 1956).

160. 46 Wis. 2d 592, 176 N.W.2d 355 (1970).

161. 277 F. Supp. 338, 345-46 (D. Minn. 1967).

162. *Id.* at 343.

163. Cf. *Siegel v. First Penn. Banking & Trust Co.*, 201 F. Supp. 664, 667 (E.D. Pa. 1961); *Russell v. Princeton Labs, Inc.*, 50 N.J. 30, 231 A.2d 800 (1967). See generally *Bernstein, supra* note 139, at 962-96. The Fifth Circuit in *Connell v. U.S. Steel Corp.*, 516 F.2d 401, 408 (5th Cir. 1975), noted that a difficulty with quantum meruit arguments is that "pension plans are set up on the basis of actuarial estimates; it is expected that not every employee will ultimately receive a pension. The application of this theory to every employee may result in

enrichment—an “actuarial surplus” that reduces the liability for future contributions (or would be returned to the employer after the benefits for the remaining employees were fully funded) constituted unjust enrichment to the employer where a “group termination” was not anticipated in the actuarial calculations.¹⁶⁴

Although the unjust enrichment theory finds support in a few other decisions,¹⁶⁵ most subsequent decisions refused to find unjust enrichment even in the face of such “actuarial surpluses” because, for example, the employer did not retain the forfeited amounts and only followed the plan provisions in reducing future liabilities.¹⁶⁶ Other holdings rejected the argument that deprivation of compensation (in the form of retirement benefits) after acceptance of the employee’s labor constitutes unjust enrichment, on the basis that the pension was not earned because services were not rendered for the requisite vesting period.¹⁶⁷ Still other decisions viewed *Lucas v. Seagrave* solely as an unjust enrichment decision and then distinguished it when the facts involved employees who had separated from service prior to a formal termination that did not result in an actuarial surplus.¹⁶⁸ In any event, promissory estoppel arguments, similar to those adopted in *Lucas v. Seagrave*, were elsewhere rejected by most courts because there was no detrimental reliance.¹⁶⁹ The few cases finding promissory estoppel usually did so only in the context of eligibility requirements or individual pay-as-you-go retirement benefits rather than plan terminations.¹⁷⁰ A recent signifi-

bankrupting a fund, thus depriving all employees of their pensions.” Cf. *Foley v. Devaney*, 528 F.2d 888, 891 (3d Cir. 1976).

164. *Lucas v. Seagrave Corp.*, 277 F. Supp. 345-46 (D. Minn. 1967). See generally *Bernstein*, *supra* note 139, at 967-72; *Levin*, *supra* note 139, at 560.

165. *Connell v. U.S. Steel Corp.*, 371 F. Supp. 991 (N.D. Ala. 1974), *aff’d*, 516 F.2d 401 (5th Cir. 1975); *International Union U.A.A. & A. Wkrs. v. Textron, Inc.*, 359 F.2d 966, 969 (6th Cir. 1966).

166. *Sbrogna v. Worchester Stamped Metal Co.*, 354 Mass. 17, 234 N.E.2d 749 (1968); *Levin*, *supra* note 139, at 562.

167. *Zeimaitis v. Burlington Mills, Inc.*, 56 Wis. 2d 449, 202 N.W.2d 244 (1972); cf. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527 (3d Cir. 1970).

168. See *Knoll v. Phoenix Steel Corp.*, 325 F. Supp. 666, 670 (E.D. Pa. 1971), *aff’d*, 465 F.2d 1128 (3d Cir. 1972).

169. *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 534 (3d Cir. 1970); *Gallo v. Howard Stores Corp.*, 145 F. Supp. 909 (E.D. Pa. 1956); *Lynch v. Dawson Collieries*, 485 S.W.2d 494 (Ct. App. Ky. 1972); *Vocke v. Third Nat’l. Bank & Trust Co.*, 267 N.E.2d 606 (Mun. Ct. Ohio 1971); *Thornberg v. MGS Co.*, 46 Wis. 2d 592, 176 N.W.2d 355 (1970).

170. *Scheuer v. Central States Pension Fund*, 358 F. Supp. 1332 (E.D. Wis. 1973);

cant exception is *International Association of Machinists & Aerospace Workers v. Garwood Industries, Inc.*,¹⁷¹ involving a plant termination which "received nationwide notoriety as a particularly heinous example." There the district court found that the employer had stated to employee representatives that the term "actuarially sound funding" meant that the trust fund would be maintained by the maximum deductible contributions.¹⁷² In fact, only the minimum contributions necessary to prevent a pre-ERISA tax termination were made.¹⁷³ In reliance on these statements the representatives accepted the employer's economic package in collective bargaining sessions. The employer was required to contribute to the terminated plan the difference between the actual contributions and the maximum deductible contributions, plus 6% interest.

In summary, the frequently recurring pre-ERISA state court issues (and federal court issues in exercise of diversity jurisdiction) of partial termination, quantum meruit, unjust enrichment and quasi-estoppel will reach their final answer (where the ERISA termination insurance provisions do not fulfill completely the employer's promise)¹⁷⁴ in the federal and state courts, applying for the first time federal common law.

The other frequently recurring state court issue, now superseded by ERISA,¹⁷⁵ was the effect of "bad boy" clauses which purported to deny former employees their otherwise nonforfeitable retirement benefits if they were discharged for cause or competed with their former employer after termination of employment. While most state

Wicstrom v. Vern E. Alden Co., 240 N.E.2d 401 (App. Ct. Ill. 1968).

171. 368 F. Supp. 357, 361 (N.D. Ohio 1973), *aff'd sub nom.*, *International Ass'n of Mach's & Aero Wkrs. v. Sargent Indus.*, 522 F.2d 280 (6th Cir. 1975).

172. Under the law at that time the maximum deductible contribution to a defined benefit pension plan in most circumstances was an amount equal to the normal cost and an amount not in excess of 10% of the past service liability. INT. REV. CODE OF 1954, § 404(a)(1)(C) (prior to amendment by Pub. L. No. 93-406). Under this formula past service liabilities usually would be amortized in 12-14 years. See H.R. REP. No. 807, *supra* note 15, at 100 n.11.

173. Under prior regulations a suspension of contributions to a defined benefit plan would not constitute a discontinuance of contributions, triggering immediate vesting of funded accrued benefits, so long as the unfunded past service cost or liability (including unpaid normal cost and interest thereon) did not exceed such unfunded cost as of the establishment of the plan. Treas. Reg. § 1.401-6(a)(2) (1963). This rule no longer applies after ERISA to plans subject to the minimum funding rules. See INT. REV. CODE OF 1954, § 411(d)(3)(B).

174. See ERISA § 4022(b), 29 U.S.C.A. § 1322 (1975).

175. See *id.* § 514(a), 29 U.S.C.A. § 1144(a).

courts upheld such "bad boy" clauses, a minority struck them down on public policy grounds.¹⁷⁶ The committee reports and the floor statements accompanying ERISA unanimously repudiated such "bad boy" clauses.¹⁷⁷ However, the temporary Treasury regulations on minimum vesting standards acknowledge that to the extent that a plan calls for more rapidly vested interest than required under the applicable minimum vesting standard of ERISA, such excess vested interest may be forfeited on account of a violation of a "bad boy" clause contained in the plan without running afoul of the minimum vesting standards of ERISA.¹⁷⁸ This conclusion is supported by a literal reading of the statute. The regulations apparently constitute the Service's reaction to an already existing analysis and practice of some practitioners. It seems that the draftsmen of the temporary regulations felt that what some knew, all should know.

These regulations do not address, however, the question whether such "bad boy" provisions will be enforceable in state or federal courts under the nascent ERISA federal common law. In light of the clear bias of the legislative history,¹⁷⁹ one would expect the judges who fashion the ERISA common law to strike down post-ERISA "bad boy" clauses even where they pass IRS review due to the imprimatur of the temporary regulations. The utilization of a "bad boy" clause after ERISA can arise, if at all, only where the plan grants more liberal vesting than is required under the statutory minimums and then provides for a cutback of such vesting to one of the statutory minimums (e.g., no vesting until ten years of service have been completed),¹⁸⁰ if the participant should violate the plan's "bad boy" clause by competitive behavior or discharge for cause. The federal district courts or state courts applying federal law may take the position that the plan's faster vesting schedule, having once been granted, cannot be taken away because of a violation of a "bad boy" clause on the grounds that the enforcement of such a clause

176. See Koehn & Ptack, *Employer Protection Against Loss of the Key Employee*, 57 IOWA L. REV. 75, 83-88 (1971); Note, *Forfeiture of Pension Benefits for Violations of Covenants Not to Compete*, 61 NW. U.L. REV. 290 (1966).

177. See H.R. REP. NO. 1280, *supra* note 43, at 271; 120 CONG. REC. H. 8701 (daily ed. Aug. 20, 1974) (remarks of Representative Dent).

178. Proposed Treas. Reg. § 11.411(a)-4(c) *Example* (1), 40 Fed. Reg.

179. H.R. REP. NO. 807, *supra* note 15, at 60; S. REP. NO. 383, *supra* note 1, at 50; 120 CONG. REC. H. 8701 (daily ed. Aug. 20, 1974) (remarks of Representative Dent).

180. INT. REV. CODE OF 1954, § 411(a)(2)(A).

would be against federal public policy as articulated in ERISA's legislative history.

In short, despite the exclusion of state common law, we may expect to see a third strand of authority in precisely the pre-ERISA areas of controversy which may conflict with the positions of both Labor and the IRS: the ERISA federal common law.

D. PREEMPTION OF OTHER FEDERAL LAWS

Presumably ERISA was not intended to preempt pre-existing federal statutory policing of private pension plans, even though it is limited by statutory provisions such as section 302 of the Taft-Hartley Act (the Labor Management Relations Act of 1947).¹⁸¹ That provision, in questions other than kickbacks and extortion,¹⁸² has been limited to fundamental, structural defects in the plan¹⁸³ (e.g., exclusion of a sizeable number of union members from the plan without any reasonable purpose)¹⁸⁴ or to arbitrary and capricious application of plan terms.¹⁸⁵ It does not apply to questions involving day-to-day fiduciary administration of pension funds.¹⁸⁶

The more difficult question is whether a pre-ERISA Service qualified plan provision precluding payment of a retirement benefit to an employee could be violative of the antifraud provisions of the federal securities laws. A district court in *Daniel v. International Brotherhood of Teamsters Union*¹⁸⁷ answered this question in the affirmative, with no indication that its answer would change in a post-ERISA plan.

Pre-ERISA union retirement plans frequently denied benefits entirely if the years of service under the section 302 plan were inter-

181. 29 U.S.C. § 186(c)(5) (1970).

182. The dominant legislative purpose of the section 302 Taft-Hartley Act restriction on payments to employee representatives was to prevent employers from tampering with the loyalties of union officials and to prevent the latter from extorting tribute from employers. *United States v. Ryan*, 350 U.S. 299, 304-06 (1956).

183. See, e.g., *Alvares v. Erickson*, 514 F.2d 156, 164-65 (9th Cir. 1975); *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965).

184. See authorities cited in note 189 *infra*.

185. *Beam v. International Org'n of Masters, Mates & Pilots*, 511 F.2d 975 (2d Cir. 1975); *Burroughs v. Board of Trustees*, 398 F. Supp. 168 (N.D. Cal. 1975); *Cuff v. Gleason*, 382 F. Supp. 1144 (E.D.N.Y. 1974), *vacated per curiam*, 515 F.2d 127 (2d Cir. 1975).

186. See authorities cited in *Alvares v. Erickson*, 514 F.2d 156, 165 (9th Cir. 1975).

187. CCH 1976 FED. SEC. L. REP. ¶ 95,453 (N.D. Ill. March 1, 1976).

rupted by a break in service of a certain duration. Apparently this break in service rule was seldom understood by participants; in any event a number of suits were brought under section 302 of the LMRA alleging that such a rule prevented the plan from being "for the exclusive benefit of employees." The results conflicted greatly. The courts early evolved the principle that section 302 of the Taft-Hartley Act only prohibited payments to trust funds that failed to comply with the structural requirements of the Act.¹⁸⁸ As long as the application of the plan rules by the joint board of a section 302 plan (the named fiduciary under ERISA) was not arbitrary and capricious¹⁸⁹ and the plan eligibility or breaks in service rules did not exclude a large number of employees without reason,¹⁹⁰ no violation of section 302 arose in this context, provided that the plan clearly set forth the break-in-service provisions. Against this backdrop the *Daniel* court considered the claim of a Teamster who, but for an absence of several months duration in 1960 resulting from an involuntary lay-off, had worked for employers covered by his local for 22½ years, yet was denied a pension under a non-contribution section 302 plan because twenty years of *continuous* service was required for a pension. The court held that the plaintiff's interest in the pension plan constituted a "security"¹⁹¹ and he ac-

188. See Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911 (1970).

189. *Maness v. Williams*, 513 F.2d 1264 (8th Cir. 1975); *Burroughs v. Board of Trustees*, 398 F. Supp. 168, 175 (N.D. Cal. 1975) (rules on vesting not arbitrary or capricious themselves, but application without notice was).

190. *Compare Lee v. Nesbitt*, 453 F.2d 1309, 1312 (9th Cir. 1971) (rule providing for forfeiture where participant completed minimum service for pension, then loss due to break before normal retirement age is arbitrary); *Roark v. Doyle*, 439 F.2d 497, 503 (D.C. Cir. 1970) (rule requiring one year of covered service prior to retirement is arbitrary); *Lugo v. Employees Retirement Fund*, 366 F. Supp. 99 (E.D.N.Y. 1973) (justiciable issue as to whether rule requiring 90 months of employment in 10 years prior to retirement is arbitrary); *Insley v. Joyce*, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971) (justiciable issue as to whether rule that credited service lost after 3 year break is arbitrary) *with* *Pete v. UMW*, 517 F.2d 1275, 1283 (D.C. Cir. 1975) (1 year of service immediately prior to retirement requirement reasonable); *Brune v. Morse*, 475 F.2d 858, 860 (8th Cir. 1973) (limitation of covered service to service during period when industry covered by union reasonable; sounder funding for other participants); *accord*, *Phillips v. Unity Welfare Ass'n*, 359 F. Supp. 1147 (E.D. Mo. 1973).

191. The Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1935), defined an investment contract, i.e., a security, as a

contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal

quired such interests by a "voluntary purchase" so that a "sale" occurred.¹⁹² Since "the various enactments of pension legislation

certificates or by nominal interests in the physical assets employed in the enterprise. CCH 1976 FED. SEC. L. REP. ¶ 95,453, at 99,295-96.

The *Daniel* court agreed with the plaintiff that the pension fund that received the contributions was a common enterprise, and that the pension plan contributions were uniformly recognized as part of employee wages. Secondly, the court held that the trustees of the pension fund, which of course constitute a third party, had the sole power of control over the common enterprise and investment of all of the assets which it contained. Finally, the court held that profits were expected from the successful management of the funds in the form of retirement benefits.

One would expect there could be no cavil with this conclusion as to a profit sharing or defined contribution plan, in which the risk or success of the investments is said to fall upon participants since their accounts share in the success and failure of the firm. However the court found that the fact that the pension fund was that of a defined benefit plan did not eliminate the element of profit. The court found this on two different levels. First, the total expected payout for any member in excess of the contributions, *i.e.*, the investment return above the contributions which were in lieu of wages constituted a profit. Also on a sophisticated level the court pointed out that there was no warranty that the trust would be able to fund the supposedly fixed benefit due to the participants and they thereby bore an element of risk in the investment of their wages. *Id.* Thus, the court's analysis of the interest in the retirement fund as a security appears correct in view of *Howey*.

192. The term "sale" is defined in the Securities Act of 1933 as "[e]very . . . disposition of a security or interest in a security, for value." 15 U.S.C. § 77b(3) (1970). Substantially the same definition is found in section 3(a)(14) of the 1934 Act. 15 U.S.C. § 78c(a)(14) (1970). The court in *Daniel* acknowledged that the SEC position had been that no registration was required as to noncontributory and "compulsory" plans. CCH 1976 FED. SEC. L. REP. ¶ 95,453 at 99,293. See *Hearings on Proposed Amendments to Securities Act of 1933 and Securities Exchange Act of 1934 Before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess.* 907, 908, 950 (1945) (remarks of Commissioner Purcell). See also Note, *Employee Stock Ownership Plans: A Step Toward Democratic Capitalism*, 55 B.U.L. REV. 195, 210 (1975); Miller, *ESOPs/Stock Bonus Plans: Comments on Their Past, Present and Future*, 1 PENSION & PROFIT-SHARING J. 167, 179-80 (1975). In short, the SEC has historically declined to assume that an employee who participates in a retirement plan which is an incident of his employment, in exchange for which he pays no additional consideration, and to which he makes no contribution, "decides whether or not to work because of the nature in the terms of the plan." Under this rationale the employee in such a situation is not an investor. Historically the SEC has found that in the case of non-contributory plans the employees did not receive their security interest for value, but rather as gifts. Alternatively, in such circumstances the SEC took the position that the employees made no "investment decision" and since the purpose of securities laws was to assure informed investment decisions by prospective purchasers of securities, the Securities Act logically was inapplicable.

The *Daniel* court accepted the argument of the plaintiff that there was a disposition for value. The court was on strong grounds in reasoning that the value element was satisfied by the giving of services, since the majority view both in the cases, commentators and legislative history of ERISA is that contributions to a qualified pension plan or to a profit sharing plan are in lieu of current compensation. See, *e.g.*, *Hunter v. Sparling*, 87 Cal. App. 2d 711, 722, 197 P.2d 807, 814 (1948); Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 917 (1970); S. REP. No. 383, *supra* note 1, at 45. Thus, the district court

. . . were designed to complement the securities laws rather than displace them," if the plaintiff could show "material misrepresentations, omission to state material facts or use of manipulative or fraudulent devices, in connection with" such sale, *i.e.*, that any information about the eligibility rule contained in the plan booklet, letters and plan constituted a violation of the SEC antifraud provisions, he could obtain relief from the sale to the members of the plaintiff's class of interests in the pension fund. Explicit in the decision is the conclusion that ERISA (and prior pension legislation) does not preempt the SEC antifraud provisions in the context of a non-contributory Taft-Hartley pension plan (and possibly a unilaterally established retirement plan as well).

The *Daniel* court's examination of the legislative history of various pieces of pension legislation, including ERISA,¹⁹³ lead it to the

in *Daniel* seems on strong ground in asserting that the "disposition" *i.e.*, accrual of an interest in a retirement plan by a participant, is a disposition of value. However, factually the *Daniel* case involved a negotiated plan. And here the court's reasoning seems almost unassailable.

The employees must vote on the package negotiated by the union which makes a division of increased increment of income between salary and pension benefits. The Court is persuaded that few members would ever vote for an allocation to a pension increase in lieu of a greater salary increase if they knew at the time of the vote that they would have an eight percent or smaller chance of ever realizing any benefit from the increased pension allocation. The final decision of such allocation to pension rather than to salaries is with the employees and they thereby make the contribution from the total wage package.

This decision to accept or reject the package is, furthermore, a voluntary one. The fact that a majority vote may prevail does not negate the fact that this majority provision is but an aggregate of many individual decisions. Moreover, the fact that individuals of a contrary mind may be bound by the majority decision does not mean that such individuals lack voluntary participation in the plan. CCH 1976 FED. SEC. L. REP. ¶ 95,453, at 99,297.

The district court in *Daniel* was very careful to state that it made no finding beyond the narrow holding that the complaint alleged the sale of a security for purposes of application of the antifraud provisions of the Securities Acts and violations of these provisions. "The Court makes no finding with respect to applicability of any other sections of these Acts to employee pension plans such as the one here litigated." *Id.* at 99,298. In short, the court was not speaking to the necessity for registration of the interest in the plans.

193. As was made particularly clear in the Congressional Reports accompanying enactment of the 1974 Act, that Act [ERISA] was concerned with ongoing administration of pension funds, rather than with any sales in connection therewith. Thus, both the Senate and House Reports expressed concern over the absence of effective federal legislation directed at assuring equitable and fair administration of all pension plans. Specifically, the lack of federal controls was seen with respect to protection of the employee's security in his pension rights, rather than prevention of fraud in the sales or acquisition of that interest. Consistent with this view, the 1974 Act imposed criminal

conclusion that this legislation was designed to complement the securities laws rather than displace them. Yet the court's vision of ERISA is clearly astigmatic, as is revealed by the following passage:

It is significant to note that this entire body of pension legislation (including ERISA) is concerned with administration of such funds, so as to protect the interest of its participants, rather than regulation of circumstances of entry into the plan.¹⁹⁴

In fact, "[o]ne of the major objectives of the new legislation . . . [was] to extend coverage under retirement plans more widely."¹⁹⁵ However, coverage is meaningless if a participant later forfeits his rights to pension benefits upon voluntary or involuntary termination of employment.¹⁹⁶ This was a weakness of the section 302 plan in *Daniel*, and ERISA would require full vesting prior to completion of twenty years of participation (at most within 15 years of service after attainment of age 22).¹⁹⁷ More significantly, ERISA contains specific break in service rules under which pre-break and post-break service (with a break in service for this purpose being defined as a plan year in which a participant fails to complete more than five hundred hours of service), are aggregated for vesting purposes if the participant had attained any vested interest prior to his break or if the duration of his break in service did not equal or exceed the length of his pre-break service.¹⁹⁸ Thus, had the plaintiff in *Daniel* incurred a similar post-ERISA break, it would have had no effect upon his vested interest.¹⁹⁹

sanctions for any attempt to interfere with any employee's attainment of rights under the Act. Similarly, as noted in these reports, the 1958 Act criminalized only malfeasance with respect to administration of such plans, including theft, embezzlement, bribery and kickback. See H.R. REP. NO. 533, 3 U.S. CODE CONG. AND ADM. NEWS, 4639 (1974); S. REP. NO. 127, 3 U.S. CODE CONG. AND ADM. NEWS, 4838 (1974).

CCH 1976 FED. SEC. L. REP. ¶ 95,453, at 99,293-94.

194. *Id.*

195. H.R. REP. NO. 807, *supra* note 15, at 15.

196. *Id.* at 18.

197. ERISA §§ 203(a)(2), (b)(1)(A), 29 U.S.C.A. §§ 1053(a)(2), (b)(1)(A) (1975).

198. *Id.* §§ 203(b)(1)(D), (b)(3)(D), 29 U.S.C.A. §§ 1053(b)(1)(D), (b)(3)(D).

199. A pre-ERISA break, as in *Daniel*, under a plan that so provided would, however, cut-off pre-break service under the rule that a plan may disregard years of service before which Part I of Title I of ERISA applies if such service would be regarded under the rules of the plan as to breaks in service as in effect on the applicable date. Similar provisions exist in INT. REV. CODE OF 1954, § 411. Temp. Treas. Reg. § 11.411(a)-5(b)(6) states that years of

In short, ERISA does regulate the circumstances of entry, vesting and break in service. Moreover, no set of ERISA rules works in a vacuum. Participation and vesting are meaningless without adequate funding and in some circumstances plan termination insurance.²⁰⁰ All of these provisions of ERISA are designed to mesh in making the pension promise meaningful. On another level it is true that the fiduciary rules are concerned with the administration of the plan funds to protect the interests of participants. These interests are determined under the participation and vesting rules and protected under the funding rules (and, indirectly, by the termination insurance provisions).²⁰¹

Finally the *Daniel* court made another serious error in its reading

service completed before the first plan year to which section 411 applies are disregarded if such service would be disregarded under the plan rules relating to breaks in service, whether or not such rules were so designated in the plan, and such rules were in effect from time to time under the plan. Generally, rules relating to required minimum hours or other length of service are considered within the meaning of the term "break-in-service" rules.

In *Giler v. Board of Trustees*, 509 F.2d 848 (9th Cir. 1975), a former union member challenged the "break-in-service" provision of a union plan. He had lost credit for seventeen years of service when, after a voluntary termination, he failed to earn one quarter of coverage in two consecutive calendar years. The Ninth Circuit held that the two year break rule was reasonable as applied to him. The court noted that the ERISA "break-in-service" provisions were restrictive. "If the 1974 Act had been in effect during the period of Giler's employment, he would have been entitled to prevail. . . ." 509 F.2d at 849 n.1.

200. See ERISA §§ 301, 4001, 29 U.S.C.A. §§ 1081, 1301 (1975). See generally 120 CONG. REC. S. 15759 (daily ed. Aug. 22, 1974) (remarks of Senator Bentsen).

201. The only way that one can make termination insurance something other than a dumping ground for the obligations of the employer is to put some sort of obligation on the employer. At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made the promise to pay the pension, only to make periodic contributions.

. . . .

With termination insurance we are now going to change the basic legal obligation of the employer, because under the concept of employer liability we are saying to the employer, in essence, as follows: "You no longer make a promise to only make periodic contributions, based upon the actuary's computation of what your obligation is; under this law if there is not sufficient money in that pension trust, for whatever reason whatsoever, your assets will be liable toward payment of the pensions to make up the difference between what is in the pension trust and the total of the pensions that have been earned at the time of termination."

120 CONG. REC. H. 1139-40 (daily ed. Feb. 26, 1974) (remarks of Representative Erlenborn). CCH 1976 FED. SEC. L. REP. ¶ 95,453, at 99,296.

of ERISA. It concluded that the SEC antifraud provisions were necessary (as to participation in a retirement plan) because the Securities Acts placed the burden of disclosure on the seller of a security, *i.e.*, plan or employer, while pension legislation, presumably including ERISA, did not.

Plaintiff argues, and the Court agrees, that there is a great need for the application of the special fraud provisions, protections and remedies of the Securities Acts to plans such as the Local 705 Pension Fund. This need is not met by either qualification under section 401 of the Internal Revenue Code or by filings under the 1958 Act or other pension legislation.²⁰²

Although the court's reading here of the pre-ERISA Internal Revenue Code provisions and of the Welfare Pension Plan Disclosure Act of 1959 can hardly be faulted,²⁰³ the court missed the mark as to ERISA. Having given the participants substantive legal rights (through the participation, vesting and fiduciary provisions) and remedies (through a federal forum and in certain circumstances representation by the Department of Labor), ERISA fashioned its disclosure provisions to give participants the information necessary to perfect those rights.²⁰⁴ Under ERISA the plan administrator must furnish each covered pension plan participant a summary plan description, written in a manner calculated to be understood by the average participant. Among many other things the summary plan description must set forth the circumstances that may result in a participant's disqualification, ineligibility or forfeiture of benefits (and in the latter context the break in service and years of service

202. The court continued:

Disclosure under the Code does not necessarily satisfy Securities Act disclosure standards which require that the facts must be disclosed in a form which is clearly understandable to the ordinary investor. The primary purpose of the Code is not protection of the investor, but rather production of revenue and prevention of tax evasion.

Likewise, under the 1958 Act, the participant must take the initiative in seeking information to which that Act says he is entitled. That is because the Act is designed to regulate misuse of funds and disclosure rather than fraud. The Securities Acts, however, place the burden of disclosure on the seller of a security. This is recognition of the fact that fraud, by its very nature is practiced upon the unknowing. An employee who is unaware of a fraud being perpetrated upon him is not benefited by a provision which requires disclosure only upon his request. *Id.* (citations omitted).

203. See, *e.g.*, *H.R. 2 Hearings*, *supra* note 2, at 26-27, 339.

204. *Id.* at 27.

rules).²⁰⁵ In summary, after ERISA there appears to be *no* "great need for the application of the special fraud provisions, protections and remedies of the Securities Acts to [retirement] plans" ²⁰⁶

The *Daniel* court erred in its conclusions that (1) the *entire* body of pension legislation is concerned only with fund administration and not with regulation of circumstances of entry into a plan (and attainment of retirement benefits), and (2) the burden of disclosure in clearly understandable terms has not been imposed upon plans by any pension legislation. In fact, application of the Securities Act fraud provisions to participation in non-contributory bilateral (and possibly unilateral)²⁰⁷ retirement plans would result in overlap of jurisdiction as to disclosure and the remedies. ERISA and these fraud provisions do not compliment each other; they would duplicate or conflict with each other. The question, therefore, must be asked whether Congress intended or contemplated this result in enacting ERISA. The defendants in *Daniel* argued that the body of pension legislation culminating in ERISA was "indicative of Congress' belief that private pension plans were afforded no protection by the federal securities laws, and that such legislation filled a large gap in the law."²⁰⁸ The court agreed that Congress had been convinced that the securities laws historically had not protected pension plans because of the SEC's position that non-contributory plans did not involve "sales." Nevertheless, it still concluded that none of the pension legislation had been designed to displace the

205. Proposed Lab. Reg. §§ 2520.102-2, .102-3(1), .102-3(1)(m), 40 Fed. Reg. 24653-54 (1975).

206. CCH 1976 FED. SEC. L. REP. ¶ 95,453 at 99,296.

207. Factually the *Daniel* case dealt with a bilateral pension plan that had been an object of collective bargaining, and part of the court's reasoning as to the voluntariness of the plaintiff's acquisition of an interest in that plan derived from the fact of such collective bargaining. "The final decision of such allocation to pension rather than to salaries is with the employees and they thereby make the contribution from the total wage package." *Id.* at 99,297. This element of voluntariness appears directed to the earlier SEC position that in the case of involuntary plans employees make no investment decision and hence the plans are not within the purview of the purpose of the securities law. On the other hand, the court also stated that under existing precedent performance of services by an employee could satisfy the "value requirements" of a sale. See *Collins v. Rukin*, 342 F. Supp. 1282, 1289-90 (D. Mass. 1972). It is well established that contributions to a retirement plan whether unilateral or bilateral are made in lieu of current compensation. See, e.g., S. REP. NO. 383, *supra* note 1, at 45; Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 917 (1970).

208. CCH 1976 FED. SEC. L. REP. ¶ 99,453 at 99,293.

securities laws. Such an application of the fraud provisions of the Securities Acts to disclosure by post-ERISA plans would add another tier of federal regulation and jurisdiction that Congress did not consider in its elaborate interweaving of jurisdiction.

At the same time, it is clear that prior to ERISA there was a serious gap in the protection of pension plans (not only in this area of breaks in service, but also in others, such as plant shutdowns, discharge for cause and inadequately funded plans). The temptation to plug this gap judicially with the SEC antifraud provisions, where all pre-ERISA pension legislative schemes and legal theories have failed, must be very strong. Perhaps one resolution would be that ERISA does preempt the application of the SEC antifraud provisions, but only as to causes of action arising after the effective date of ERISA. Under this approach the plaintiff's antifraud violation action in *Daniel* apparently would not be preempted by ERISA. However, Congress in fact does not appear to have considered explicitly in the enactment of ERISA the question of preemption of SEC provisions in this context.²⁰⁹ Indeed, the District Court for the Southern District of New York had held in *SEC v. Garfinkle*²¹⁰ that "the fact that ERISA gives the Secretary of Labor power to regulate welfare funds in no way affects the SEC's authority over securities transactions." The SEC alleged that one of the defendants, who was engaged in setting up limited partnership tax shelters, borrowed money from a section 302 welfare fund without adequate security and also sold "participations" in the limited partnerships to the fund. Allegedly one of the members of the joint board of trustees controlled a division of the fund and received kickbacks from the promoter-defendant. Under ERISA if the transactions occurred after January 1, 1975,²¹¹ the promoter-defendant and trustee would be classified as disqualified persons and would be subject to imposition of excise taxes by the Service for this violation of the prohibited

209. The legislative history does suggest, however, that Congress believed that only Labor affected the administration of private pension plans. See H.R. REP. NO. 533, 93d Cong., 1st Sess. 3 (1973); *Senate Finance Hearings*, *supra* note 3, at 1055-74 (Memorandum by Senators Williams and Javits). Thus, there is strong support for the position that preemption of the Securities Acts in the context was not expressly provided for because it was not believed that they would apply to regulation of pension plans.

210. CCH 1976 FED. SEC. L. REP. ¶ 95,020 (S.D.N.Y. 1975) [Transfer Binder].

211. ERISA §§ 414(a) (general effective date of fiduciary provisions of Title I) and 2003(c) (effective date of prohibited transaction provisions of Title II), 29 U.S.C.A. § 1114(a) (1975).

transaction rules.²¹² The trustee would be a fiduciary and subject also to Title I liability enforced by the Department of Labor for his alleged breaches of fiduciary responsibility and engaging in prohibited transactions.²¹³ The SEC in *Garfinkle* moved (1) to preliminarily enjoin the defendants (including the promoter and the trustee) from further securities acts violations, (2) to appoint a receiver of the welfare fund for an accounting of certain moneys from the promoter-defendant and for payment by the promoter and trustee into court of the money illegally obtained. The court, reasoning that the receiver and disgorgement relief should go to trial and not be resolved by preliminary injunctions, granted the former injunctive relief sought only.

The trustee argued that the SEC lacked standing to sue because ERISA had vested jurisdiction over welfare funds in the Department of Labor. The court's response squarely addresses the issue of preemption:

While there is legislative intent to avoid duplication of efforts in ERISA, 29 U.S.C. § 1134, regulation of the securities transactions which are part of the investment program of a fund is not equivalent to regulation of the fund itself. The SEC clearly has concurrent, if not exclusive, standing to sue.²¹⁴

An alternative resolution may be the adoption of the view that post-ERISA disclosure is adequate for the SEC antifraud provisions. This should be the case as to most denial of benefit claims, because ERISA requires disclosure of eligibility, vesting and service requirements (with particular emphasis on disclosing the circumstances causing a forfeiture of benefits). This might not be the case with terminations of underfunded plans or involuntary terminations in plant shutdowns. The ERISA disclosure provisions, as interpreted by proposed Labor regulations, do require certain references to termination insurance.²¹⁵ However, they do not appear to require, for example, explicit disclaimers in the summary plan description that, if the plan is terminated prior to full funding, the participants

212. INT. REV. CODE OF 1954, §§ 4975(e)(2)(B), (2)(A), 4975(c)(1)(B), (1)(E) and (1)(F).

213. ERISA §§ 404(a)(1)(B), 406(b)(3), 29 U.S.C.A. §§ 1104(a)(1)(B), 1106(b)(3) (1975).

214. CCH 1976 FED. SEC. L. REP. ¶ 95,020, at 95,579 (S.D.N.Y. 1975) [Transfer Binder].

215. Proposed Lab. Reg. § 2520.102-3(1), 40 Fed. Reg. 24654 and Preamble to 2520.102-2, 40 Fed. Reg. 24644 (June 9, 1975).

will only receive an allocation of funds based on a priority system beginning with pensions in pay status first, and then going down a tier system.²¹⁶ Yet under the *Daniel* analysis it is doubtful that few younger participants would vote for a pension increase in lieu of a salary increase if they knew that they would receive little or nothing if the plan were terminated in the immediate future. In such circumstances if the fact of the employer's undisclosed inability to continue (or begin) adequate funding under ERISA were added, it is likely that an otherwise adequate ERISA disclosure would not be adequate for the antifraud provisions of the Securities Acts. Moreover, remedies for such violation of the Securities Acts might vary substantially from or conflict with the ERISA provisions relating to termination of an underfunded plan.²¹⁷

In summary, although the question of whether the SEC antifraud provisions are preempted in the post-ERISA era is very difficult to answer, it is exceedingly important. A federal common law approach probably would strike a balance between increased plan costs and benefits to participants in area of disclosure (and indirectly the underlying substantive areas of participation, vesting and plan terminations) quite differently than Congress did. The courts responding to pleas to fashion disclosure obligations under the Securities Acts similar to those of ERISA should pay heed to the recent analysis of the Second Circuit in *Lugo v. Employees Retirement Fund of the Illumination Products Industry*.²¹⁸

216. See ERISA § 4044(a) (allocation of assets upon termination of a defined benefit plan covered by ERISA), 29 U.S.C.A. § 1344(a) (1975).

217. Under ERISA § 4062 an employer may be liable for up to thirty percent of its net worth upon termination of a defined benefit pension plan and guaranty by the Pension Benefit Guaranty Corporation of the unfunded accrued liabilities for the excess of the current value of the plan's guaranty benefit over the current value of its assets allocable to such benefits on the date of termination. 29 U.S.C.A. § 1362 (1975). In short, the liabilities of the employer are not for the entire unfunded vested accrued liability for benefit earned by the participants, but only for the insured vested accrued benefit over assets, and even then with a ceiling of thirty percent of net worth. It is likely that the remedy for the violation of the securities act would be the entire vested accrued benefit (less plan assets at that time).

218. 529 F.2d 251, 255 (2d Cir. 1976). (citation omitted). Clearly Congress in each of these areas balanced the benefits to participants of what would be the ideal rules, such as immediate participation, immediate vesting and full portability and guaranty of pension benefit with increased costs to the employer of each aspect, and reached compromises in each area, including funding, weighing increased costs with benefits achieving their own trade offs. See, e.g., H.R. REP. NO. 807, *supra* note 15, at 19, 25, and 87. That courts will be entering into this balancing process if they begin to examine violations of the antifraud provisions of the

The length and detail of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et. seq.*, indicate that the regulation of pension funds with regard to such matters as vesting and procedural rights is a complex task more appropriate for Congress than for the courts. The careful attention paid by Congress in that recently enacted statute to the problem of effective dates and coverage makes us hesitate to conclude that the courts have long been authorized, via . . . [the exclusive benefit of employees requirement of the Taft-Hartley Act], to create obligations similar to those of ERISA.

It seems that any increase at this time in uncertainty as to what is required in disclosure if plan details will outweigh any advantages to particular participants or classes of participants. *Daniel* appears to be a case of just enough, but far too late. Ten years ago it would have made ERISA unnecessary; now ERISA makes it pernicious.

E. INVESTIGATIVE AUTHORITY

The Secretary of Labor has the power to investigate whether there have been or are going to be violations of any provisions of Title I, including but not limited to violations of the disclosure requirements and of the fiduciary standards.²¹⁹ In such investigations he may require the submission of reports, books and records and the filing of supporting data by the plan administrator. He may not, however, require any plan to submit such books and records or supporting data to him more than once a year, without reasonable cause to believe that there has been a violation of Title I of ERISA.²²⁰ The Secretary of Labor may make "spot" or on premise investigations by entering places, inspecting records and accounts, and questioning those he deems necessary to enable him to determine the facts relative to investigation *only if* he has reasonable cause to believe that there has been a violation under Title I, or if the entry is pursuant to an agreement with the plan.²²¹ Senator Javits stated

securities acts with attendant benefit claims being paid to participants may be appreciated by examination of *Brune v. Morse*, 475 F.2d 858, 860-61 (8th Cir. 1973), in which the Court of Appeals reviewed the question of the arbitrariness of a Taft-Hartley joint board's interpretation of its eligibility requirements (the same type issue as involved in *Daniel*) and rested their conclusion as to the correctness of the action of the joint board by looking at the effect of such decision on the funding requirements of the plan.

219. ERISA § 504(a)(1), 29 U.S.C.A. § 1134(a)(1) (1975).

220. *Id.* §§ 504(a)(2), (b), 29 U.S.C.A. §§ 1134(a)(2), (b) (1975).

221. *Id.* § 504(a)(2), 29 U.S.C.A. § 1134(a)(2) (1975).

in the floor debate that a plan administrator's refusal to permit such "spot" investigation (thereby resulting in the greater expense in producing its books and records in Washington, D.C.) would constitute a breach of fiduciary responsibility.²²²

The Secretary of Labor was also given the same subpoena powers as are given to the Federal Trade Commission.²²³ Moreover, the Secretary of Labor may delegate his auditing and investigative functions over insured banks acting as fiduciaries of employee benefit plans to appropriate federal banking agencies.²²⁴

F. INTERFERENCE WITH RIGHTS

ERISA makes it unlawful to interfere with a participant's attainment of any rights to which he may become entitled,²²⁵ or to coercively interfere through the use of fraud, force or violence to any participant for the purpose of preventing him from exercising any right to which he is or may become entitled under the plan or Title I of ERISA.²²⁶ As did Senator Williams in the debate on ERISA itself,²²⁷ Senator Javits in the floor debate on the Senate bill,²²⁸ which contained essentially identical provisions,²²⁹ stated that such interference with rights included firing a participant to prevent vesting. A participant may bring a civil action against any person who interferes with his rights protected under ERISA and in addition against any person who willfully uses fraud, force, violence or threats to restrain, coerce or intimidate any participant for purposes of interfering with the latter's rights under the plan or Title I of ERISA. The defendant will be fined \$10,000 or imprisoned for not more than one year, or both.²³⁰

222. 120 CONG. REC. S. 15750 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

223. ERISA § 504(c), 29 U.S.C.A. § 1134(c) (1975).

224. See 120 CONG. REC. S. 15751 (daily ed. Aug. 22, 1974) (remarks of Senator Williams).

225. ERISA § 510, 29 U.S.C.A. § 1140 (1975). This provision is enforceable through ERISA § 502 and additionally anyone willfully violating any provision of Part I of Title I of ERISA is subject to a fine of not more than \$5,000 (\$100,000 in the case of a person other than an individual) or imprisonment for not more than one year, or both. *Id.* § 501, 29 U.S.C.A. § 1131 (1975).

226. *Id.* § 511, 29 U.S.C.A. § 1141 (1975).

227. 120 CONG. REC. S. 15742 (daily ed. Aug. 27, 1974) (remarks of Senator Williams).

228. 119 CONG. REC. S. 16742-43 (daily ed. Sept. 18, 1973) (remarks of Senator Javits).

229. H.R. 4200 as passed by the Senate, 93d Cong., 1st Sess. § 699A (1973).

230. H.R. REP. NO. 1280, *supra* note 43, at 331.

IV. EFFECTIVE DATES

The initial and operational stage jurisdiction provision applied effective September 2, 1974, the date of enactment of ERISA.²³¹ The provisions regarding the new Office of Employee Plans and Exempt Organizations became effective ninety days thereafter.²³² Causes of action and acts or omissions arising after December 31, 1974, are subject to the ERISA Labor Enforcement rules.²³³ Generally causes of action arising prior to January 1, 1974 (even if discovered thereafter) will continue to be subject to state jurisdiction, such as it is.²³⁴

V. CONCLUSION

A final evaluation of the interweaving by Congress of jurisdiction between the Department of Labor and the Department of the Treasury under ERISA is premature. At this stage we have only the structure devised by Congress, the commencement of qualification by the IRS of plans in the initial stage jurisdiction and some joint rulings and procedures, particularly in the fiduciary area. At this point of development it seems that the structure is workable and that there has been satisfactory, even commendable cooperation and coordination between the IRS and Labor. But the acid test will come when joint exemptions from prohibited transactions are developed and the operational jurisdiction of the IRS becomes active. In all likelihood, cooperation in plan qualification will proceed smoothly. In audits of plans a conflict will probably arise only if the natural tendency of auditing agents to disqualify plans is sustained in higher reviews in the face of an inclination by the Department of Labor to seek compliance with ERISA instead. In exemptions from prohibited transactions the difficulty is less likely to be conflicts between the agencies and more a question of bureaucratic delay because transactions currently must pass review in both depart-

231. This assumes that the plan itself is subject at that time to ERISA. Technically, ERISA § 3001 is inapplicable to an application to a plan received by the Secretary of the Treasury for the date on which Code § 410 applies or would apply if it were qualified. ERISA § 3001(e), the temporary regulations probably properly so, obviate this problem.

232. ERISA § 1051(d), 26 U.S.C.A. § 7802 (1975).

233. *Id.* § 514(a), 29 U.S.C.A. § 1144(a) (1975).

234. *Id.* § 514(b)(1), 29 U.S.C.A. § 1144(b)(1).

ments. In short, to date the interweaving of jurisdiction has worked and in all probability will work as ERISA develops further.

If, however, retirement plans are subject to a third jurisdiction, that of the SEC, or more likely to judicial review based not upon ERISA and the Code but upon the common law development under SEC antifraud provisions, the elaborate interweaving of jurisdiction is likely to become quite tangled.