Promises Made, Promises Broken: Securing Defined Benefit Pension Plan Income in the Wake of Employer Bankruptcy: Should We Rethink Priority Status for the Pension Benefit Guaranty Corporation?

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As the baby boom generation begins to contemplate retirement, the United States will find an increasing number of elderly Americans depending on sources other than their salary to maintain their standard of living. Sources show that many baby boomers have not saved enough for retirement and therefore will not be able to maintain a comfortable lifestyle without the assistance of employer-provided pensions. However, corporate bankruptcy may result in pension plan underfunding and employees will then need to turn to the Pension Benefit Guaranty Corporation to receive benefits.

Ms. Uylaki proposes that Congress grant the Pension Benefit Guaranty Corporation (PBGC) lien priority status under the federal Bankruptcy Code. This will hold employers more financially accountable to employees and preclude them from shifting the burden of payment of promised benefits to the PBGC. Ms. Uylaki acknowledges the public policy concerns generated by granting priority status, but she asserts that if the priority claim does not exceed thirty percent of the aggregate net worth of the employer, the PBGC will not drastically constrain the employer's ability to reorganize. In addition, Ms. Uylaki argues that priority status will confer a multitude of benefits to both pension plan participants and to society.

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She would like to thank her parents Jack Edward Uylaki and Faith Helen Uylaki for their continued love, guidance, support, and generosity; Trent Murch, who has been a dear friend; and Professor Charles Tabb for teaching her the fundamentals of bankruptcy law.

I. Introduction

Stroll through Tampa, Florida, and you will discern approximately 15,600 workers and retirees pondering the fate of their private pensions after Anchor Glass Company announced that its private pension program was underfunded by $185 million.[1] The 9000 employees and retirees of United Merchants and Manufacturers, Inc. of Teaneck, New Jersey, encountered a similar plight when their corporation's pension plan collapsed due to the financial strain of $93.6 million in pension liabilities.[2] Trenton and Gibraltar, Michigan, now have among their ranks 2500 retirees and workers of the McLouth Steel Products Corporation, a maker of hot-rolled steel products, who have also become victims of a $15 million shortage in pension funding.[3] Finally, the pension security of 1200 residents of Bremen, Georgia, has been endangered since Sewell Manufacturing, Inc. revealed its pension plan was underfunded by $7 million.[4] Anchor Glass, United Merchants, McLouth Steel, and Sewell Manufacturing are only limited examples of the problem of pervasive pension underfunding presently plaguing the United States.

As the 80 million[5] members of the baby boom generation[6] contemplate retirement, the United States will find a burgeoning number of elderly Americans depending upon sources other than annual wages for their sustenance.[7] In fact, employer-provided pensions are rapidly becoming a growing source of retirement income for the baby

1. *See* PENSION BENEFIT GUAR. CORP., PBGC MOVES TO TAKE OVER ANCHOR GLASS PENSIONS, PBGC PUB. NO. 97-12 (1997), *available in* 1997 WL 9622, at *1 [hereinafter PBGC, ANCHOR GLASS].

2. *See* PENSION BENEFIT GUAR. CORP., PBGC PROTECTS ALMOST 9,000 WORKERS IN UMM PENSION PLAN, PBGC PUB. NO. 96-54 (1996), *available in* 1996 WL 342230, at *1 [hereinafter PBGC, UMM].

3. *See* PENSION BENEFIT GUAR. CORP., PBGC TO TAKE OVER MCLOUTH PENSION PLAN, PBGC PUB. NO. 96-62 (1996), *available in* 1996 WL 454141, at *1 [hereinafter PBGC, MCLOUTH].

4. *See* PENSION BENEFIT GUAR. CORP., PBGC PROTECTS PENSIONS OF SEWELL WORKERS AND RETIREES, PBGC PUB. NO. 96-65 (1996), *available in* 1996 WL 465733, at *1 [hereinafter PBGC, SEWELL].

5. *See* COMMUNICATIONS & PUB. AFFAIRS DEP'T, PENSION BENEFIT GUAR. CORP., FACTS: PENSION REVERSION: REMOVING PENSION DOLLARS (visited Feb. 21, 1997) <http://www.pbgc.gov/release.htp> [hereinafter PBGC, PENSION REVERSION].

6. Individuals born between 1946 and 1964 comprise the traditional baby boom generation. *See* EMPLOYEE BENEFIT RESEARCH INST., FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 7 (5th ed. 1997) [hereinafter EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS].

7. *See id.* at 7-8; *see also* EMPLOYEE BENEFIT RESEARCH INST., SPECIAL REPORT NO. SR-23/ISSUE BRIEF NO. 151, BABY BOOMERS IN RETIREMENT: WHAT ARE THEIR PROSPECTS? 1 (July 1994) [hereinafter EBRI, BABY BOOMERS IN RETIREMENT].

boom cohort.[8] In 1994, forty-two percent of individuals aged sixty-five and over reported some form of pension income.[9] Although baby boom employees often indicate a desire to save income for their retirement years, "[e]conomists have warned for years that baby boomers don't save enough."[10] In fact, only thirty-five percent of baby boomers reported that they have begun to save for retirement, while thirty-nine percent have saved for other goals.[11] Moreover, baby boomers are only saving at one-third the rate necessary to sustain their present level of consumption.[12] As a result, many future retirees may be unable to support a comfortable lifestyle without the assistance of employer-provided pensions.[13]

Encouraging employers to furnish generous private pension plans would certainly allay the retirement concerns of an aging populace. However, even years of service and allegiance to a private employer can leave the employee with fewer pension benefits than he or she had previously anticipated.[14] Underfunding of private pension plans caused by employer bankruptcy has become an all too common occurrence,[15] forcing employees to turn to the federally created corpo-

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8. *See* EBRI, BABY BOOMERS IN RETIREMENT, *supra* note 7, at 14.

9. *See* SUSAN GRAD, SOCIAL SEC. ADMIN., INCOME OF THE POPULATION 55 OR OLDER 13 (1996).

10. Brad Edmondson, *Baby Boomers Heed Warnings on Need to Save for Retirement*, WALL ST. J., May 3, 1996, at A7A.

11. *See* EBRI, BABY BOOMERS IN RETIREMENT, *supra* note 7, at 32. *But see* Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 109 (1996) (noting that between 1957 and 1990 the real median incomes of individuals 65 and older more than doubled and that only 12.4% of the elderly fell below the poverty line as opposed to 14.2% for the population as a whole).

12. *See* EBRI, BABY BOOMERS IN RETIREMENT, *supra* note 7, at 34. This study discounted "housing wealth" which several households would likely consider as their most significant financial asset. If housing wealth were included in the total mix of savings, baby boomers would save at 84% of the rate necessary to maintain their level of consumption upon retirement. *See id.* at 35. Although the inclusion of housing wealth substantially narrows the gap between present consumption and savings for retirement, in order to take full opportunity of such housing wealth, retirees would be compelled to sell their homes in order continue their present rate of consumption—an arguably inconvenient and unviable solution to the retirement funding problem.

13. *See, e.g., id.* at 33. Among the individuals who indicated that they saved money for retirement, the average amount saved during the previous year was $6,759. Approximately 11% saved $10,000 or more; 3% saved $8,000 to $9,999; 14% saved $5,000 to $7,999; 12% saved $3,000 to $4,999; 17% saved $2,000 to $2,999; 11% saved $1,000 to $1,999; 13% saved less than $1,000; and 14% could not recall how much they had saved the previous year. *See id.*

14. *See, e.g.,* PBGC, ANCHOR GLASS, *supra* note 1; PBGC, UMM, *supra* note 2; PBGC, MCLOUTH, *supra* note 3; PBGC, SEWELL, *supra* note 4.

15. *See generally* 1995 PENSION BENEFIT GUARANTY CORP. ANN. REP. 1 (in 1995, "PGBC terminated 124 underfunded pension plans, bringing the total number of

ration known as the Pension Benefit Guaranty Corporation (PBGC) to receive promised benefits.[16] An unfortunate by-product, however, of employee reliance upon the PBGC is that the PBGC does not guarantee the full amount of all proffered employee benefits.[17] Instead, the PBGC only insures payment of certain guaranteed benefits.[18] Consequently, the future of retirement income for millions depends heavily upon employers assuming responsibility for the adequate protection of employees' pension benefits even during uncertain and tumultuous times such as employer bankruptcy reorganizations.

This note proposes that Congress must rethink the role of the Pension Benefit Guaranty Corporation in light of massive pension underfunding of defined benefit plans created by employer bankruptcies. By granting the PBGC priority status under § 507 of the federal Bankruptcy Code, employers will be held more financially accountable to their employees and may not intentionally shift the burden of payment of promised benefits to the Pension Benefit Guaranty Corporation. In support of federal bankruptcy priority status, section II explores the history and function of pensions within the United States. In order to clarify the role that the PBGC plays in pension protection, section III delineates the types of pension plans and the types of employers available for PBGC protection and discusses sources of PBGC revenue, limitations placed upon the PBGC guarantee, and the PBGC's future economic viability. Section IV reveals the reasons why the existing controversy has emerged concerning priority status, while section V analyzes the existing tension between the statutory language promulgated by the Bankruptcy Code and the Employee Retirement Income Security Act which has repeatedly resulted in judicial denial of priority status for the PBGC. Section VI considers codifying deference to the PBGC's statutory interpretations under the *Chevron* doctrine, and section VII considers the role of legislative history in accepting priority status for the PBGC. Section VIII outlines recent PBGC attempts to obtain priority status. Finally, section IX evaluates

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terminated plans for which PBGC has or will become trustee to 2094") [hereinafter PBGC ANN. REP.].

16. *See id.* at i.

17. *See generally* COMMUNICATIONS & PUB. AFFAIRS DEP'T, PENSION BENEFIT GUAR. CORP., FACTS: RETIREMENT PROTECTION ACT OF 1994 (rev. Mar. 1996) [hereinafter PBGC, RETIREMENT PROTECTION].

18. A guaranteed benefit is a benefit that is nonforfeitable as determined by 29 C.F.R. § 4022.5; qualifies as a pension benefit under 29 C.F.R. § 4022.2; and is a benefit to which the participant is entitled under 29 C.F.R. § 4022.4. *See* 29 C.F.R. § 4022.3 (1996).

the competing public policy interests at stake including the bankrupt employer's right to a successful reorganization and the right of the employer's creditors to receive an equitable distribution of the employer's assets, while section X proposes a recommendation conferring priority status to the PBGC.

II. History

The existence of employee benefit programs can be traced as far back as 1636 when the Plymouth Colony settlers founded a military retirement program for their veterans.[19] In 1759 the Presbyterian Church also acknowledged the need for income security and assembled an employee benefit program to protect the widows and children of Presbyterian ministers.[20] One-hundred and sixteen years later, the American Express Company pioneered the first formal corporate pension plan by providing its employees with retirement benefits.[21] In the wake of American Express's action, other companies took heed and more than 400 pension plans emerged during the course of the next century.[22] By 1992 the number of private pension plans exceeded 708,400, furnishing benefits to more than 45 million active participants.[23]

Prior to World War II, companies launched early private retirement plans despite the absence of any legislative provisions ensuring actual payment of promised benefits.[24] After World War II and before the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), the federal government continued to adhere to a hands-off approach to pension regulation by allowing only favorable tax

19. *See* EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, *supra* note 6, at 3. Other instances of early benefit programs include the Gallatin Glassworks' profit-sharing plan in 1797; Montgomery Ward's group health, life, and accident insurance program of 1910; and Baylor University Hospital's formalized prepaid group hospitalization plan in 1929. *See id.*

20. *See id.* at 55.

21. *See id.*

22. *See id.* These plans primarily protected employees in the railroad, banking, and public utility industries with the most rapid growth of pensions occurring during the 1940s. *Id.*

23. *See id.* (citing CELIA SILVERMAN ET AL., EBRI DATABOOK ON EMPLOYEE BENEFITS 644 (Carolyn Pemberton & Deborah Holmes eds., 3d ed. 1995)).

24. *See* Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, *in* EMPLOYEE BENEFITS LITIGATION 511, 578 (1996). Prior pension plans were often unregulated and unenforceable. Absent federal legislation, state law viewed pensions as a type of "gratuity" or "thank-you" from the employer to be disbursed only at the employer's discretion. *See id.*

treatment to those employers who offered pensions.[25] Such a passive approach met its death knell in 1974 when Congress enacted ERISA, a comprehensive legislative scheme designed to obligate an employer to provide a regular program of contributions to fund its pension plan.[26] The impetus for congressional action stemmed from a desire to protect individual employees from exploitation created by the inherent bargaining power employers wielded over employees and also from the need to eradicate the incentive for employers to appropriate pension plan funds for other unrelated employer purposes.[27] Despite Congress's specific goal to prevent employer mishandling of pension funds, many companies egregiously tapped into the tax-free pension funds set aside for their employees' retirement as pension assets inflated with the stock market during the 1980s.[28] In fact, firms withdrew more than $20 billion from over 2000 pension plans, covering nearly 2.5 million workers and retirees.[29] For example, Enron Corporation dipped into its pension plan, taking $232 million and leaving its ravaged plan underfunded by $86 million, while ASI Holding Corporation skimmed $119 million from its pension plan only to find its plan currently underfunded by roughly $90 million.[30] Congress recognized this pension debacle and addressed the situation in 1990 by enacting the Omnibus Reconciliation Act of 1990 (OBRA '90) in hopes

25. *See id.* During this time, the promise of a pension hardly could be viewed as a binding contract. Instead, the employer reserved the right to terminate the pension plan before an employee's rights had vested, meaning that an employee who had not yet retired had no enforceable right to collect a pension previously promised to him. Only those who already retired had vested rights and could obtain pension benefits in the event of plan termination. *See id.*; *see also* Ulen, *supra* note 11, at 120-21 (noting that pension agreements were governed by federal law only to the extent that labor and contract law permitted).

26. *See* Cummings, *supra* note 24, at 579.

27. *See* Ulen, *supra* note 11, at 121-22; *see also* 29 U.S.C. § 1001(a) (1996) (finding that federal legislation was needed to ensure adequate funding for promised benefits that may be endangered); Connolly v. Pension Benefit Guar. Corp., 631 F. Supp. 640, 647 (C.D. Cal. 1984) (holding that Congress ultimately decided to require employers withdrawing from a pension plan to bear their share of the burden of funding), *aff'd*, 475 U.S. 211 (1986); *cf. Hearing on Defusing the Retirement Time Bomb: Encouraging Pension Savings: Statement of the American Association of Retired Persons, Testimony Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 105th Cong. 99 (1997) (statement of David Certner, American Association of Retired Persons representative) (not only are employers tapping into pension funds, but employers also are tempted into using pension funds for large expenses including home, education, and medical expenses).

28. *See* PBGC, PENSION REVERSION, *supra* note 5.

29. *See id.*

30. *See id.*

of averting the growing trend of appropriation of pensioners' funds to other corporate needs.[31]

Today ERISA, in conjunction with subsequent legislation, is one of the most laudable pieces of social welfare legislation enacted and has become the centerpiece for securing retirement security for much of the baby boom generation. Although great strides have been made in safeguarding retirement income over the past two decades, pension income is not sufficiently shielded from the difficulties generated by employer bankruptcies. Despite the prominence of private pension plans in the twentieth-century workplace, a disconcerting and recurring trend has materialized. Employees must rely upon employers to scrupulously honor and to effectively manage their pension plans. Yet when corporate bankruptcy strikes, a pension plan frequently becomes underfunded and employees must turn to the Pension Benefit Guaranty Corporation, not the employer, to receive promised benefits.

III. The Pension Benefit Guaranty Corporation

Created by ERISA,[32] the Pension Benefit Guaranty Corporation (PBGC) acts as a governmental insurance company, guaranteeing a panoply of employee benefits in the event a pension plan becomes unfunded or underfunded.[33] The intended function of the PBGC is threefold: "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants; (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under pension plans; and (3) to maintain insurance premiums established by the corporation."[34] These administrative goals have become increasingly more important as the baby boom generation will soon begin to rely more heavily upon pension plans as a substantial source of retirement income.[35]

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31. "Congress made it costly for companies to take assets from their pension plans and the raids on pension plan assets ceased almost entirely." *See id.*

32. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26, 29 U.S.C.) [hereinafter ERISA]. President Gerald Ford appropriately signed ERISA legislation into law on Labor Day. *See id.*

33. *See* 29 U.S.C. § 1305 (1996).

34. *Id.* §§ 1302(a)(1)-(3).

35. In 1993 employees in the 41-50 age group had the highest rate of pension plan sponsorship estimated at 70.6%, while 56.6% of workers between the ages of 21 and 30 were covered by employer provided pension plans. *See* EBRI, BABY BOOMERS IN RETIREMENT, *supra* note 7, at 20.

A. Types of Pension Plans

Under ERISA, two categories of pension plans came into existence: defined contribution plans and defined benefit plans.[36] Defined contribution plans vary from defined benefit plans in a myriad of ways.[37] Although both plans are administered as entirely distinct insurance programs by the PBGC, each exhibits unique attributes tailored to meet the needs of its plan participants.

1. DEFINED CONTRIBUTION PLANS

Unlike its defined benefit counterpart, defined contribution plans do not offer predetermined benefits upon retirement.[38] Instead, the employer pays pension benefits to the employee in a lump sum which has been determined by the amounts contributed by the employee during the course of his or her period of employment and by various returns on investments.[39] Examples of defined contribution plans include 401(k) savings plans, money purchase plans, deferred profit-sharing plans, employee stock ownership plans, thrift plans, and target benefit plans.[40] Such plans do not fall under the ambit of the PBGC because ERISA restricts the plan's funding to the sum of the employee's contributions and returns on investment income.[41] As a result, the employee can only anticipate pension benefits in the amount of contributions made during his or her term of employment supplemented by money earned from investments. In other words, the PBGC does not offer insurance to defined contribution plans, because there exists no prearranged amount that employees will receive, thus making it impossible for the PBGC to ascertain the exact amount of benefits to be insured.

2. DEFINED BENEFIT PLANS

Larger sized employers tend to prefer defined benefit plans, while nonunionized, service employers—the fastest growing employ-

36. *See* 29 U.S.C. §§ 1002(34)-(35).
37. *See infra* Appendix 1.
38. *See* 29 U.S.C. § 1002(34).
39. *See* EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, *supra* note 6, at 57; *see also* COMMUNICATIONS & PUB. AFFAIRS DEP'T, PENSION BENEFIT GUAR. CORP., YOUR PENSION: THINGS YOU SHOULD KNOW ABOUT YOUR PENSION PLAN 3 (1996) [hereinafter PBGC, YOUR PENSION].
40. *See* EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, *supra* note 6, at 57.
41. *See id.* at 76.

ment sector—often initiate defined contribution plans.[42] Because of their prevalence among larger companies, defined benefit plans typically cover a greater number of participants than defined contribution plans.[43] Although defined contribution plans do not necessitate PBGC coverage, defined benefit plans entail an essential need for federal protection. Upon retirement, participants of defined benefit programs receive a fixed amount of benefits determined by calculating the length of the employee's term of employment in conjunction with the rate of the employee's compensation.[44] An employer may utilize a formula based upon an individual's salary and service which, for example, may result in a retirement benefit package of a specified amount per month for every year of the employee's service with the employer.[45] While returns on defined contribution plans vary in proportion to the relative successes or failures of the investment in which the employer places the employee's contribution,[46] participants of defined benefit programs receive a fixed amount which can easily be insured by the PBGC.[47] Moreover, employers sponsoring defined

42. *See Testimony Concerning Employee Retirement Benefits for the Year 2015: U.S. Chamber Proposed Changes to Prepare for Baby Boom Retirements Before the Subcomm. on Aging of the Senate Labor & Human Resource Comm.*, 104th Cong. (1996), *available in* 1996 WL 10165021, at *14 (statement of Peter M. Kelly, Member of the U.S. Chamber of Commerce Health and Employee Benefits Committee) [hereinafter *Employee Benefits for the Year 2015*].

43. *See id.* at *14.

44. *See* 29 U.S.C. § 1002(35) (1996).

45. *See* PBGC, YOUR PENSION, *supra* note 39, at 3.

46. In the past, companies were often viewed as "father figures" who took care of the needs of employers. As employers began to demand more from their pensions, defined contribution plans managed by trustees rapidly emerged. However, the soundness of an employee's pension hinges directly upon the ability of the trustee to effectively manage the employee funds. *See* Scott Robertson, *Pensions Keeping Steel Uneasy: Defining Benefits an Industry Taboo*, 140 AM. METAL MKT. 1 (1996).

47. In defined benefit plans, the employer provides the employee with a nominal benefit amount upon retirement. The formula used to calculate these benefits typically takes one of three forms: a flat-benefit formula, a career-average formula, or a final pay formula. Flat-benefit formulas pay a flat dollar amount for each year of service recognized under the plan. Career-average formulas are slightly more complex and are divided into two types. In the first type, participants earn a percentage of the pay recognized for plan purposes in each year they are plan participants. The second type of career-average formula furnishes the employee with a retirement package equaling a percentage of the career-average pay, multiplied by the participant's number of years of service. The least common private-sector defined benefit plan is the final pay-plan. Final-pay formulas determine benefits by averaging earnings during a specified number of years at the end for a participant's career, the time when earnings are highest. The final-pay formula shields the employee against preretirement inflation but at a higher cost to the employer. *See* EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, *supra* note 6, at 56.

benefit plans are required to fulfill a host of funding requirements to ensure the stability of the plan.[48]

Despite the promise of a PBGC guarantee for defined benefit plans, the number of defined benefit plans continues to dwindle as defined contribution plans gain more popularity with employers.[49] During the fifteen years prior to the enactment of ERISA, the number of newly initiated defined benefit plans dipped to a low of 50.12% in 1960 and climbed to a high of 57.88% in 1972.[50] By 1983 the number of defined benefit plans dropped to 32.7% of all new plans formed.[51] The number of newly created defined benefit programs faltered particularly during the late 1980s and early 1990s, encountering a precipitous drop between 1987 and 1995.[52] In 1994, the most recent year studied, 56% of employers contributed to Section 401(k) plans, 36% to defined benefit plans, 27% to profit sharing plans, and 7% to employee stock ownership plans.[53] In 1985 there were 112,000 single employer defined benefit plans insured by the PBGC.[54] Presently, there are only 53,000 such plans in existence.[55] The demise of defined benefit programs can be attributed to numerous factors including the restructuring of Internal Revenue Code provisions, increased PBGC insurance premiums, and overall escalating employer costs.[56]

This trend has generated much concern among employee advocacy groups who contend that individuals with defined contribution plans such as 401(k) plans must decide themselves how to invest their

48. The employer must annually contribute enough to cover the benefits that participants of the plan have earned that year and must also pay installments on other benefit promises, including retroactive benefit increases for past service of employees before the plan began. Finally, employers must make additional contributions for losses incurred by the pension fund. *See* PBGC, YOUR PENSION, *supra* note 39, at 15; *see also* EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS, *supra* note 6, at 46-47.

49. *See* EBRI, BABY BOOMERS IN RETIREMENT, *supra* note 7, at 21.

50. *See Employee Benefits for the Year 2015*, *supra* note 42, at *12.

51. *See id.* at *13.

52. *See id.* at *14.

53. *See id.* at *5.

54. *See* Martin Slate, Remarks Before the National Employee Benefits Institute, Washington, D.C. (Sept. 17, 1996) (last modified Feb. 21, 1997). <http://www.pbgc.gov/nebi96.htp> [hereinafter Slate, Remarks Before NEBI].

55. *See id.*

56. *See* Robertson, *supra* note 46. The shift to defined contribution plans is especially acute in the metals industry, where companies like Wheeling-Pittsburgh Steel Corp. of Wheeling, Virginia, feared that defined benefit pensions "threatened the permanent elimination of every job here." *Id.* Martin Slate, Executive Director of the PBGC, also attributes the decline to a large number of sufficiently funded terminations by small plans, many of which have been replaced by defined contribution plans. *See* Slate, Remarks Before NEBI, *supra* note 54.

pension money, whereas defined benefit plans limit financially unsophisticated employees' ability to tamper with pension funding.[57] In addition, Martin Slate, Executive Director of the PBGC, asserts that "the value of defined benefit plans in areas of employee motivation, productivity and retention is being overlooked."[58] Yet despite the pessimistic outlook concerning the future of defined benefit plans, the demographic and business trends which initially contributed to the decrease in defined benefit plans will eventually be reversed.[59]

B. Types of Employers

ERISA further delineates the scope of pension coverage by creating two subcategories of defined benefit plans: multiemployer plans and single-employer plans.[60]

1. MULTIEMPLOYER PLANS

Multiemployer plans consist of collectively bargained plans to which more than one employer contributes.[61] Conventional examples of multiemployer plans include the trucking and construction industries, which typically comprise a vast network of interrelated yet separate employers.[62] In 1995, the PBGC covered 8.7 million workers and retirees in roughly 2000 multiemployer plans across the United States and experienced a net loss of $5 million.[63]

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57. *See* Robertson, *supra* note 46. Charles Shilleci, a partner at the Nexus Financial Group, Inc. in Pittsburgh posits, "[Employees] have to decide where to put their investments. They don't understand what is involved, and it is the company's responsibility to educate them." *Id.*; *see also* EBRI, BABY BOOMERS IN RETIREMENT, *supra* note 7, at 21 (contending that increasing the number of defined contribution plans will jeopardize retirement security, because such plans typically involve worker decision making as opposed to a greater reliance upon the expertise of employers found within defined benefit plans).

58. *See* Slate, Remarks Before NEBI, *supra* note 54. Slate's only proffered solution to this dilemma is to encourage mid-sized firms to reconsider defined pension benefits in order to enhance stability in their workforce. *See id.*

59. *See id. But see* Robertson, *supra* note 46. James Wareham, CEO of Wheeling-Pittsburgh Steel Corp. contends that the national trend is, in fact, shifting away from defined benefit programs to defined contribution plans. Wareham noted, "If you were starting a company today, you wouldn't even consider a defined benefit program . . . it carries too many unknowns . . . and it's not even good for employees any more." *Id.*

60. *See* 29 U.S.C. §§ 1002(37), (41) (1996).

61. *See* id. §§ 1301(a)(3)(A)-(B).

62. *See* PBGC ANN. REP., *supra* note 15, at 11.

63. *See id.*

2. SINGLE-EMPLOYER PLANS

The single-employer program is much broader in nature and encompasses any plan not defined as a multiemployer plan.[64] The PBGC single-employer program guaranteed pension benefits to over 33 million Americans in roughly 53,000 plans and sustained substantially greater losses than its multiemployer counterpart, incurring a $315 million net loss in 1995.[65]

C. PBGC Revenue

Unlike the archetypal federal agency, the Pension Benefit Guaranty Corporation receives no funding from general tax revenues.[66] As a result, the taxpayer need not lament that the PBGC will dip into taxpayer coffers in order to resuscitate failed pension plans. Instead, the PBGC derives its revenue solely from insurance premiums established by Congress,[67] assets generated from pension plans trusteed by the PBGC, and recoveries made from companies formerly responsible for PBGC trusteed plans.[68] The present insurance premium for multiemployer plans is $2.60 per participant in the plan per year, while the single employer plan exacts two premiums from employers—a flat rate charge of $19 per participant and an additional annual variable-rate charge of $9 for each $1,000 of underfunded vested benefits.[69] Currently, Congress has capped the variable-rate premium at $53 per participant.[70] However, this cap will be phased out during the course of the next three years as an additional incentive to ensure adequate funding for defined benefit pensions.[71]

D. Limitations on the PBGC Guarantee

Although taxpayers do not find their tax dollars directly implicated by underfunded pension plans, participants in underfunded plans are besieged by a host of more personal and immediate vicissitudes. In 1995 the PBGC insured approximately forty-two million

64. 29 U.S.C. § 1301(15) (1996).
65. *See* PBGC ANN. REP., *supra* note 15, at 9.
66. *See id.* at i.
67. 29 U.S.C. § 1306(a)(1) (1996).
68. *Id.* §§ 1306, 1307, 1362.
69. COMMUNICATIONS & PUB. AFFAIRS DEP'T, PENSION BENEFIT GUAR. CORP., FACTS: THE PENSION BENEFIT GUAR. CORP. (1996) [hereinafter PBGC, THE PBGC].
70. *See* PBGC, RETIREMENT PROTECTION, *supra* note 17.
71. *See id.*

workers involved in over 65,000 private sector pension plans.[72] Last year alone, the PBGC paid $763 million in benefits to over 182,000 individuals in 124 underfunded pension plans.[73] However, PBGC coverage is limited, and approximately thirteen million employees do not fall under the penumbra of the PBGC's protection.[74] While there are presently 834,000 pension plans in existence, the PBGC eliminates countless types of plans including government plans, church and fraternal organization plans and savings plans from its pension guarantee.[75]

In addition to eliminating entire categories of pension plans, ERISA places a litany of additional restrictions upon eligibility for a PBGC guarantee.[76] For example, in order to be eligible for the PBGC guarantee, the plan participant must be "vested."[77] Vesting simply means that an employee has obtained a permanent right to his or her pension benefits by working a minimum period of time specified by the pension plan.[78] If the employee leaves his or her job prior to his or her plan becoming vested, he or she may lose accrued benefits entirely.[79]

Contrary to popular belief, the PBGC does not endeavor to supply employees with the luxuries of a comprehensive pension plan. Approximately eight million individuals discover their future economic well-being compromised when the PBGC assumes control over their financially distressed plans.[80] Robert Reich, former Secretary of Labor and Chairman of the Pension Benefit Guaranty Corporation, noted the danger that the limitations upon the PBGC guarantee create: "Underfunding poses an unnecessary and unacceptable risk for workers and retirees. If their plans should terminate, they may lose bene-

72. The dilemma of pension underfunding is not indigenous to the United States only. At least nine other countries including Canada, Chile, Germany, Japan, and the United Kingdom have established organizations comparable to the PBGC, underscoring the pervasive problems inherent in employee pension programs. *See* James H. Smalhout, *Others' Views: Lessons From PBGC's Global Counterparts*, 14 PENSIONS & INVESTMENTS 1, 4 (1996).

73. *See* PBGC ANN. REP., *supra* note 15, at 1.

74. *See* PBGC, YOUR PENSION, *supra* note 39, at 2.

75. *See id.*; *see also* 29 U.S.C. § 1321(b) (1996).

76. *See* PBGC, YOUR PENSION, *supra* note 39, at 7.

77. *See id.*

78. *See id.*

79. *See id.* However, the employer must allow the employee's plan to vest at least as fast as required by two vesting schedules under 29 U.S.C. § 1053.

80. *See* PBGC, RETIREMENT PROTECTION, *supra* note 17.

fits not covered by the PBGC guarantee."[81] Instead, coverage is restricted to basic benefits such as benefits received at normal retirement age, early retirement benefits, disability benefits for disabilities occurring before the plan was terminated, and benefits for survivors of plan participants.[82] Benefits deemed nonbasic run the entire gamut from health care to vacation pay benefits.[83]

For single employer plans terminated in 1996, the maximum guarantee is $31,704.60 yearly ($2,642.05 monthly) for a single life annuity beginning at age sixty-five.[84] If the benefit commences prior to age sixty-five or is payable in a form other than a single life annuity, the maximum guarantee decreases.[85] Although conceivably an employee or retiree may receive more than the PBGC's maximum guarantee, the likelihood of full recovery is doubtful because few plans have sufficient assets to pay nonguaranteed benefits and because PBGC-trusteed plans have difficulty recouping portions of funds from bankrupt companies.[86] Consequently, employees could be left with substantially less than the benefits originally pledged to them.

E. The PBGC's Future Economic Stability

While underfunding of pension plans jeopardizes the financial stability of both employers and retirees, the PBGC also falls prey to corporate neglect and mishandling of pension plans. Regardless of recent strides in improving the economic viability of employee pen-

81. *H.R. 3396, The Retirement Protection Act of 1993: Hearing Before the Comm. on Ways & Means*, 103d Cong. 10 (1993) (statement of Robert Reich, former Secretary of Labor and Chair of PBGC); *see also Employee Benefits for the Year 2015*, *supra* note 42, at *14-15 (PBGC guarantee does not afford complete protection). *But cf.* Vanessa O'Connell, *Salvaging Your Troubled Pension Plan*, WALL ST. J., Aug. 13, 1996, at A5 (noting that most employees and retirees do not lose any accrued pension benefits when pension plans go bust due to the PBGC guarantee).

82. *See* 29 U.S.C. § 1322 (1996); *see also* COMMUNICATIONS & PUB. AFFAIRS DEP'T, PENSION BENEFIT GUAR. CORP., YOUR GUARANTEED PENSION 6 (1996) [hereinafter PBGC, GUARANTEED PENSION].

83. *See* PBGC, GUARANTEED PENSION, *supra* note 82, at 6.

84. *See id.* For executives with pensions greater than the PBGC guarantee, the consequence of employer bankruptcy can be devastating. *See* O'Connell, *supra* note 81.

85. *See* PBGC, GUARANTEED PENSION, *supra* note 82, at 6.

86. *See id. But cf.* WEST'S LEGAL NEWS 13233, Dec. 12, 1996, *available in* 1996 WL 710188 (over the past four years the PBGC has located 55,000 pensioners and is presently endeavoring to find an additional 2700 individuals in order to pay back more than $10 million in pension benefits recovered from over 500 companies, including various corporations which had previously filed for bankruptcy relief).

sion plans,[87] the PBGC must remain vigilant against the potential for massive underfunding. Current statistics optimistically declare that the total underfunding for PBGC-insured, single-employer plans declined for the first time in a decade and that underfunding dropped from a high of $71 billion in 1993 to $31 billion in 1994.[88] However, these numbers are extremely misleading. The dramatic decrease in underfunding between 1993 and 1994 belies the glowing reports of PBGC vitality and illustrates the inherent instability in pension funding.[89] The PBGC readily acknowledges that underfunding declined primarily because of higher interest rates which reduce liabilities and infuse additional contributions to pension plans.[90]

However, for every influx of capital into the PBGC's pocket, there exists a potential economic downturn which could unforeseeably strike at the core of the PBGC's well-being. In fact, a two percentage point reduction in interest rates decreases a plan's funding level from 125% to 92%.[91] Consequently, much of the PBGC's future success as well as the economic stability of employee pension plans hinge upon the health and vitality of the American economy—an uncertain and often elusive creature.

IV. The Existing Controversy

A. Priority Status

As a corporation committed to the continuation and maintenance of voluntary private pension plans for the benefit of their participants, the PBGC endeavors to insure defined benefit pension plans in the event that an underfunded plan terminates either voluntarily by

87. The PGBC's investments from capital markets produced a record income in excess of $2 billion in 1995, while fixed income investments earned 22.6% for the year and equities earned 30.9%. *See* PBGC ANN. REP., *supra* note 15, at 1. Also, the single-employer insurance program deficit fell to $315 in 1995, its lowest level since 1981, due in large part to the absence of major terminations during the year. *See id.* In fact, the Government Accounting Office has removed the PBGC from its "high-risk" list. However, the GAO noted that the PBGC still has material internal control weaknesses. *See* H.R. REP. NO. 104-861, at 29-30 (1996).

88. *See* PBGC ANN. REP., *supra* note 15, at 1.

89. Martin Slate, Executive Director of the Pension Benefit Guaranty Corp., indicated that the improvement in the health of the PBGC reflects improving economic conditions. Martin Slate, Remarks Before the American Society of Pension Actuaries, Chicago, Ill. (Apr. 22, 1996) (last modified Feb. 21, 1997) <http://www.pbgc.gov/asap96.htp> [hereinafter Slate, Remarks Before Pension Actuaries].

90. *See* PBGC ANN. REP., *supra* note 15, at 6.

91. *See id.* at 7.

the corporation or involuntarily by the PBGC.[92] The PBGC has come under fire for its repeated attempts to secure priority status under the federal Bankruptcy Code for payments made by the PBGC to employees on behalf of the bankrupt employer.[93]

The Bankruptcy Code divides the potential claims of creditors, like the PBGC, into two categories: secured claims and unsecured claims.[94] Secured claims result when the holder of a claim against the debtor not only has a claim for money but also possesses a right to seize particular property of the bankrupt.[95] An unsecured claim, on the other hand, arises when the creditor only has a right to monetary payment and has no interest in the debtor's property.[96] All unsecured claims rank below each and every secured claim.[97] Unsecured claims are further divided into nine priorities,[98] and each claim in each priority class is entitled to payment in full before any payment is made on any claim in a lower priority class.[99] This hierarchy creates a method

92. *See* 29 U.S.C. §§ 1302, 1341(a), 1341(b) (1996). There exist three means by which a plan can be terminated: (1) standard terminations, (2) distress terminations, and (3) involuntary terminations. Standard terminations occur when the employer establishes that the plan has sufficient assets to pay all "benefit liabilities" under the plan. *See* Irwin N. Rubin, *Title IV of ERISA: Employee Pension Benefit Plans, in* UNDERSTANDING ERISA 1996, at 351, 355 (PLI Tax Law & Estate Planning Course Handbook Series No. J4-3686, 1996). Distress terminations arise when the employer (1) filed or had filed against it a petition seeking liquidation in bankruptcy or insolvency proceedings under federal or state law; (2) filed or had filed against it a petition seeking reorganization in bankruptcy or insolvency proceedings and the court determines that unless the plan is terminated, the company will be unable to pay its debts when due and will be unable to continue in businesses; (3) establishes that unless a distress termination occurs, the company cannot continue in business; or (4) shows that pension costs have become unreasonably burdensome solely as a result of the decline of the work force of covered participants. *See id.* at 363. The PBGC may institute involuntary proceedings against the employer in the U.S. district court if it determines that (1) minimum funding standards have not been met; (2) the plan will be unable to pay benefits when due; (3) a reportable event of a distribution to a substantial owner has occurred; or (4) a termination is needed to avoid any unreasonable increase in the liability of the fund. *See id.* at 368.

93. *See generally In re* Suburban Motor Freight, Inc., 998 F.2d 338 (6th Cir. 1993); New Neighborhoods v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989); *In re* Chateaugay Corp., 177 B.R. 176 (S.D.N.Y 1995); *In re* Beaman, 9 B.R. 539 (Bankr. D. Or. 1980).

94. *See* 11 U.S.C. § 506 (1994).

95. *See id.* § 506(a).

96. *See id.*

97. *See id.* §§ 506-507.

98. *See id.* § 507(a)(1)-(9).

99. *See* MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY 171 (1995). Thus, all creditors with a first priority claim would be paid in full before any debtor with a second priority claim, and all second priority debtors would be paid in full before any debtor with a third priority claim, and so on.

of distributing the debtor's assets in an orderly and systematic fashion.[100] Moreover, this list of priorities allows Congress to create substantive debtor-creditor law.[101] Although the 1980s witnessed disparate and conflicting views of the role of the PBGC in the Bankruptcy Code, a growing consensus has proclaimed as late as 1995 that PBGC liens against underfunded single employers should not receive an eighth priority status as a federal tax under § 507(a) of the Bankruptcy Code.[102]

B. PBGC Liens

Under ERISA, the PBGC may obtain liens against the assets of the debtor for: (1) the amount of unfunded benefit liabilities to both plan participants and beneficiaries from the date of plan termination; and (2) any delinquent minimum funding contributions.[103] The first type of lien must be perfected as a tax lien under 25 U.S.C. § 6323(f) and can only arise once the PBGC makes a demand for liability.[104] The lien will be held against "all property and rights to property, whether real or personal" and "may not be in an amount in excess of 30 percent of the collective net worth" of the contributing sponsor's controlled group.[105] The second type of lien addresses the sponsor's failure to make minimum funding contributions to the plan. This contribution deficiency lien arises when the sponsor fails to make the required benefit installments, and the aggregate unpaid balance of all preceding installments for which payment was not made before the due date (including interest) exceeds $1,000,000.[106] The amount of the lien is equal to the aggregate unpaid balance of required installments for plan years beginning after 1987 and for which payment was not made before the due date.[107] Under previous legislation this type of lien automatically arose against a plan sponsor on the sixtieth day after a missed contribution was due.[108] However, on December 8, 1994,

100. This note specifically establishes the need to treat a PBGC lien for unfunded liability as an eighth priority unsecured claim. An eighth priority allows for favored treatment of taxes due to governmental units. *See* 11 U.S.C. § 507(a)(8).
101. *See* HERBERT, *supra* note 99, at 170.
102. *See In re* Kent Plastics Corp., 183 B.R. 841, 847 (Bankr. S.D. Ind. 1995).
103. *See* 29 U.S.C. § 1362(b)(1)-(c).
104. *See id.* § 1368(a).
105. *Id.* The sponsor of a plan is traditionally the employer who "sponsors" the plan.
106. *See* 29 U.S.C. § 1082(f)(1)(A)-(B).
107. *See id.* § 1082(f)(3).
108. *See* Diane E. Burkley & Shari A. Wayne, *The GATT Bill's Provisions' Impact on Corporate Bankruptcies*, 14 AM. BANKR. INST. J. 1, 22 (1995).

the General Agreement on Tariffs and Trade legislation (GATT) enacted extensive PBGC reform legislation and adopted a provision allowing the lien to arise on the due date of the contribution, thereby removing the sixty-day grace period.[109] For the purposes of this proposal, this note will address only the priority status of plan deficiency liens in a single employer context, because GATT reforms remove the previous obstacles to perfecting minimum funding contribution liens.

C. Perfection of a PBGC Lien

A tax lien perfected prior to the bankruptcy filing grants the United States status as a secured creditor with rights governed by § 506 of the Bankruptcy Code.[110] If the PBGC perfects its lien before the employer files for bankruptcy and in the same manner as a tax or statutory lien, then the PBGC would enjoy secured creditor status.[111] However, in order to successfully achieve such status, two critical steps must occur: (1) the employer must terminate the plan prior to filing under Chapter 11 and (2) the PBGC must make a demand against the creditor for payment and file notice of its lien prior to the bankruptcy filing date.[112] In the event that the PBGC does not file notice of the lien before the debtor's filing of a Chapter 11 petition, the PBGC lien would be subject to the automatic stay under the Bankruptcy Code.[113] The automatic stay serves as a significant hurdle in bankruptcy proceedings. Under *In re Parr Meadows Racing Ass'n*,[114] the Court of Appeals for the Second Circuit held that the Bankruptcy Code's automatic stay provision under § 362(a)(4) forbids the postpetition creation of liens for unpaid real property taxes.[115] In the same way, before the PBGC lien can arise under ERISA, the employer must either fail or refuse to pay its debts to the PBGC after the PBGC has made a demand for payment.[116] However, the automatic stay frequently prevents the PBGC from making a demand which, in turn, prevents the lien from arising.[117] The bankruptcy court in *In re*

109. *See id.*
110. *See* 11 U.S.C. § 506.
111. *See id.*
112. *See id.* § 501(d).
113. *See id.* § 362.
114. 880 F.2d 1540 (2d Cir. 1989).
115. *See id.* at 1545.
116. *See* 29 U.S.C. §1368(a).
117. *See* 11 U.S.C. §§ 362(a)(1), (a)(6).

Chateaugay Corp.[118] followed the *Parr Meadows* decision, agreeing that postpetition liens were prevented by the automatic stay.[119]

Although creditors contend that postpetition perfection violates the automatic stay, an important exception exists. The stay may be lifted if the action involves the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."[120] Arguably, the PBGC lien may be classified as a police or regulatory power by the PBGC in its attempt to regulate the security of pension plans. In fact, the District Court of New York held that the PBGC's financial interests serve as surrogates for the pensioners whose rights it insures.[121] However, the classification of a PBGC lien as a police or "regulatory" power is questionable, especially since the Second Circuit expressed its reservations that these actions are not within the ambit of § 362(b)(4).[122]

Regrettably, perfecting the PBGC lien prior to the bankruptcy petition is seldom accomplished and proves to be a rather formidable task, because the single-employer plan typically will not terminate until after the employer has commenced bankruptcy proceedings.[123] The delay of a plan termination, in turn, results in an unperfected lien at the time of bankruptcy proceedings.[124] Thus, the mainspring of controversy inheres in the PBGC's inability to perfect its lien prior to the debtor's bankruptcy petition.

The PBGC has frequently advanced the argument that the failure to perfect its lien should be immaterial for purposes of priority status. If classified as a tax claim for the purposes of § 507(a)(8) of the Bankruptcy Code, it is irrelevant whether or not the lien was perfected postpetition because federal tax claims receive a priority in bankruptcy without regard to lien status.[125] The PBGC's pursuit of priority status has encountered serious setbacks from the myriad of courts that

118. 130 B.R. 690 (Bankr. S.D.N.Y), *vacated by consent of parties*, 17 B.N.A. 1102 (1991).
119. *See id.* at 697.
120. 11 U.S.C. § 362(b)(4).
121. *See In re* Chateaugay Corp., 87 B.R. 779, 806 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990).
122. *See* PBGC v. LTV Corp., 875 F.2d 1008, 1020 (2d Cir. 1989), *rev'd on other grounds*, 406 U.S. 633 (1990).
123. *See* THE NAT'L BANKR. CONFERENCE'S CODE REVIEW PROJECT, REFORMING THE BANKRUPTCY CODE: FINAL REPORT 95 (1994) [hereinafter NAT'L BANKR. CONFERENCE, CODE REVIEW].
124. *See* PBGC v. Washington Group, Inc., No. C-86-665-G, 1987 U.S. Dist. LEXIS 5655, at *22 (M.D.N.C. May 29, 1987).
125. *See id.* at *21.

have unfavorably adjudicated the issue.[126] Despite the numerous reasons cited by opponents of priority status of a PBGC lien,[127] the Pension Benefit Guaranty Corporation's lien should be recognized as an eighth priority claim.

V. The Need for Statutory Consistency

At the heart of the PBGC priority debate lies the obvious disparity between the statutory language promulgated under ERISA and the Bankruptcy Code. ERISA stipulates, "In a case under Title 11 or in insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of Title 11 or section 3713 of Title 21."[128] Such language sparks the fundamental and controversial question of whether ERISA sanctions the treatment of a PBGC lien as a federal tax "lien" or a federal tax "claim" in Chapter 11 reorganization proceedings. If the PBGC lien is categorized as a tax lien, a bankruptcy trustee can exercise his or her avoidance powers when the PBGC fails to perfect its lien. On the other hand, if deemed a federal tax claim, the PBGC lien may be entitled to priority status regardless of the voidability of any lien securing such a claim.

A. The Bankruptcy Act of 1898 and § 1368(c)(2) of ERISA

The first misgiving single employers express is the PBGC's inability to reconcile statutory language adopted by ERISA under 29 U.S.C. § 1368(c)(2) and statutory language proffered by § 507(a)(8) of the Bankruptcy Code. Employers posit that while ERISA purports to act harmoniously with bankruptcy provisions, ERISA language sim-

126. *See id.*

127. *See* James W. Giddens, *Attempting to Protect Employee Retirement Income Within Bankruptcy Reorganization*, 12 ANN. REV. BANKING L. 397, 428 (1993) (stating that imposing priority status for social purposes subverts the integrity of the Bankruptcy Code); *see also* Daniel Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 MINN L. REV. 803, 842 (1993). Keating argues, "[B]ankruptcy is not the place to solve the problems of underfunding, since it was outside of bankruptcy that the PBGC allowed the underfunding to occur." *Id.* Moreover, Keating asserts that priority status would thwart an employer's ability to obtain the requisite credit for successful reorganization. Finally, he posits that the recovery debts owed to other creditors is as important as the recovery of pension funds by the PBGC. *See id.*; *cf.* Leigh Allyson Wolfe, *Is Your Pension Safe? A Call for Reform of the Pension Benefit Guar. Corp. and Protection of Pension Benefits*, 24 SW. U. L. REV. 145, 169-171 (1994) (citing the difficulty the PBGC encounters when attempting to obtain priority status).

128. 29 U.S.C. § 1368(c)(2) (1994).

ply does not fall under the rubric of the Bankruptcy Code. ERISA provides, "In a case under Title 11 or in insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner *as a tax due and owing to the United States* for purposes of Title 11 or Section 3713 of Title 31."[129] ERISA's statutory language echoed that of the Bankruptcy Act of 1898 and furnished a fourth priority to "*taxes which became legally due and owing* by the bankrupt to the United States."[130] Clearly, parity existed between the statutory language of ERISA and the Bankruptcy Act of 1898, because both statutes addressed the treatment of taxes "legally due and owing" to the United States. In fact, the striking similarity between statutory provisions supplies strong evidence that a tax due and owing to the federal government was intended to receive priority treatment under the Bankruptcy Act.

B. The Bankruptcy Code of 1978 and § 1368(c)(2) of ERISA

With the adoption of the Bankruptcy Code in 1978, Congress established a more specific and more extensive list of priorities. The language "taxes legally due and owing" traced by the Bankruptcy Act of 1898 was completely deleted from the Code. As a result, the obvious resemblance between ERISA and the Bankruptcy Act of 1898 was removed by the Bankruptcy Code of 1978 which presently allows an eighth priority for "allowed unsecured claims of governmental units."[131] Certain critics contend that the change in bankruptcy policy for treatment of federal taxes without an analogous change in applicable ERISA provisions evinces congressional intent to deny the PBGC lien priority status.[132] Under *Patterson v. Shumate*,[133] the Supreme Court declared that if Congress had intended to change pertinent bankruptcy provisions, it certainly knew how to do so.[134] By failing to amend ERISA so as to reflect changes made within the Bankruptcy Code, Congress chose not to accord the unperfected ERISA lien priority status.[135] The same argument was also advanced in *In re Chateau-*

129. *Id.* (emphasis added).

130. Act of July 1, 1898, ch. 541, § 64(a)(4), 80 Stat. 271, 307, *repealed by* Pub. L. No. 95-598, §§ 401(a), 402(a), 92 Stat. 2682 (1978) (emphasis added).

131. 11 U.S.C. § 507(a)(8).

132. *See* Giddens, *supra* note 127, at 404-05.

133. 504 U.S. 753 (1992).

134. *See id.* at 758.

135. *See* Giddens, *supra* note 127, at 404-05.

gay Corp.[136] Judge Lifland agreed that Congress could have easily incorporated the language "tax due and owing" into § 507(a)(7) of the Bankruptcy Code—which is now § 507(a)(8)—but instead opted to omit the ERISA claim from the "detailed" list of priorities.[137] Finally, the National Bankruptcy Conference contends that there is "no justification" to enact special provisions in the Bankruptcy Code to deal with PBGC claims.[138] Rather, the Conference prefers that determination of PBGC priority status is best left to developing case law.[139]

Innumerable quandaries emerge when embracing such a stance. First, congressional silence regarding the function of an ERISA lien in the Bankruptcy Code of 1978 does not necessarily indicate that Congress's failure to amend ERISA was deliberate. In fact, the Supreme Court has held that congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction.[140] Moreover, had Congress intended to alter the previous interpretation of 29 U.S.C. § 1368(c)(2), it would have made its intent specific.[141] Finally, simply because Congress did not re-codify 29 U.S.C. § 1368(c)(2) to mirror changes in 11 U.S.C. § 507(a) does not mean that pre-Code practice should be utterly disregarded. In fact, the Supreme Court remains reluctant to overturn pre-Code procedures even in the event that Congress neglected to sanction those policies under the Bankruptcy Code.[142] Under the Bankruptcy Act of 1898, PBGC liens were afforded priority status as taxes legally due and owing to the United States both under ERISA and the Bankruptcy Code.[143] The decisions rendered employing the statutory language of section 64(a) of the Bankruptcy Act of 1898 accorded priority status to PBGC claims.[144] With no conspicuous change in the language of 29 U.S.C. § 1368(c)(2) and no other indication that pre-Code practice had been congressionally overturned, the treatment of a PBGC lien under the Bankruptcy Act of 1898 should still be of great import and should compel the judiciary to resolve a priority dispute in favor of the PBGC

136. 115 B.R. 760 (Bankr. S.D.N.Y. 1990).
137. *See id.* at 779-80.
138. *See* NAT'L BANKR. CONFERENCE, CODE REVIEW, *supra* note 123, at 97.
139. *See id.*
140. United States v. Wise, 370 U.S. 405, 411 (1962).
141. *See, e.g.*, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986).
142. *See* Dewsnup v. Timm, 502 U.S. 410, 419 (1992).
143. *See* PBGC v. Washington Group, Inc., 1987 U.S. Dist. LEXIS 5655, at *21-22 (M.D.N.C. May 29, 1987).
144. *See id.* at *22.

despite the replacement of the Bankruptcy Act of 1898 with the Bankruptcy Code of 1978.

Various adversaries of priority status assert that the plain meaning of ERISA is evident and that the judiciary need not delve into the intricacies of legislative history.[145] However, given the apparent inconsistency between ERISA's pre-Bankruptcy Code reference to Title 11's language of a "tax due and owing to the United States for purposes of Title 11" and present bankruptcy language granting eighth priority to "unsecured claims of governmental entities," an inescapable ambiguity exists. ERISA clearly refers to language no longer extant in the Bankruptcy Code. The parameters defining priority status within the two statutes no longer are consonant. In short, whether the PBGC lien for all practical purposes is a federal tax claim remains debatable. The plethora of litigation generated by such a perplexing issue has created a wide and disparate body of judicial interpretation, intimating that both statutes are far from unambiguous.

VI. Codifying Deference Given to the PBGC's Interpretation of ERISA: The Chevron Doctrine

Under the decision promulgated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[146] the Supreme Court offered a dispositive framework for determining whether an agency's proposed statutory interpretation merits judicial deference.[147] The *Chevron* Court held that federal agencies must first give effect to congressional intent if such intent is unambiguously manifested by the plain meaning of the statute.[148] However, if Congress remains silent or nebulous as to its specific purpose, the federal agency may justifiably impute its own "permissible" statutory construction upon the statute.[149] In ascertaining whether the PBGC's construction is "permissible," the PBGC must interpret the statute in a manner that is both "rational and consistent with the statute."[150] In other words, an agency has fashioned a permissible construction of the statute "if the administrator's reading

145. *See generally* Giddens, *supra* note 127.
146. 467 U.S. 837 (1984).
147. *See id.* at 842-43.
148. *See id.* at 843.
149. *See id.* at 842-43.
150. NLRB v. Food & Commercial Workers, 484 U.S. 112, 123 (1987).

fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design."[151]

In 1990 the Supreme Court applied the *Chevron* paradigm to the PBGC's antifollow policy,[152] holding that the PBGC's failure to confront pertinent bankruptcy law did not render its actions impermissible.[153] In fact, the Supreme Court in *PBGC v. LTV*[154] patently rejected the court of appeals' decision mandating that there must be a showing that the PBGC honored the policies of other areas of law:

> [P]roblems . . . would arise if federal courts routinely were to require each agency to take explicit account of public policies that derive from federal statutes other than the agency's enabling Act. To begin with, there are numerous federal statutes that could be said to embody countless policies. If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation.[155]

As a result of the *LTV* and *Chevron* decisions, the PBGC's failure to address all pertinent public policy considerations embraced by the Bankruptcy Code does not lead one to conclude inexorably that the PBGC has overreached its bounds. Instead, Congress should codify the existing deference granted to the PBGC's interpretation of § 1368(c)(2). Clearly, the PBGC's construction of § 1368(c)(2) is permissible, because it does not contravene pre-Code practice established in the Bankruptcy Act of 1898 and because it gives effect to congressional legislative intent. By codifying the judicial deference given to the PBGC, Congress would dispel any remaining ambiguity extant between ERISA and the Bankruptcy Code.

VII. Legislative History

In the event that the judiciary declares the PBGC's interpretation of ERISA impermissible under *Chevron*, the PBGC can still marshal ample evidence to bolster its argument that PBGC liens are entitled to

151. Nationsbank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 251-52 (1995).
152. The PBGC defines a follow-on plan as "a new benefit arrangement designed to wrap around the insurance benefits provided by the PBGC in such a way as to provide both retirees and active participants substantially the same benefits as they would have received had no termination occurred." PBGC v. LTV Corp., 496 U.S. 633, 642 (1990).
153. *See id.* at 646.
154. 496 U.S. 633 (1990).
155. *Id.* at 646.

priority status. When the plain meaning of a statute is unclear or ambiguous on its face, the judiciary must turn to legislative history to divulge Congress's true intent.[156] In turning to the legislative history for guidance, the PBGC musters an arsenal of evidence to sustain its position. For example, in 1987 Congress passed the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) and amended a variety of ERISA provisions. When debating the enactment of OBRA '87, Congress determined that the treatment of a PBGC lien created under ERISA should be given priority status under the Bankruptcy Code.[157] In fact, the Conference and House Reports clearly agreed that an unperfected PBGC lien is a federal tax claim for the purposes of bankruptcy proceedings stating, "As under [29 U.S.C. § 1368(c)(2)], a perfected lien is treated as a Federal tax lien, and an unperfected lien is treated as a Federal tax claim."[158] Furthermore, hearings presented before subcommittees of both the House of Representatives and the Senate confirm that the Bankruptcy Code accords priority status to an unperfected PBGC lien.[159]

Adversaries of priority status contest the validity of legislative history which surfaced over thirteen years after the birth of ERISA.[160] Yet when coupled with the statutory language of the Bankruptcy Act of 1898, such legislative history only buttresses the PBGC's position. Because the Bankruptcy Act of 1898 furnished priority status to PBGC claims and because Congress continues to indicate priority status though legislative history, mere congressional silence concerning § 1368(c)(2) does not invalidate the PBGC's priority status.

VIII. PBGC Attempts to Secure Priority Status Under the Bankruptcy Code

A. *United States v. CF & I Fabricators of Utah, Inc.*

In 1994 the PBGC, as trustee of CF & I's pension plan, sought priority status for various claims under the Bankruptcy Code against

156. *See* Beiger v. Internal Revenue Serv., 496 U.S. 53 (1990).

157. *See* H.R. CONF. REP. NO. 100-495, at 883-85 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1245, 2313-1629 through -1631.

158. *Id.* at 883-84, *reprinted in* 1987 U.S.C.C.A.N. 2313-1245, 2313-1629 through -1630.

159. *See PBGC's Proposal to Initiate a Variable Rate Premiums System: Hearings before the Subcomm. on Oversight of the Comm. on Ways & Means*, 100th Cong. 36 (1987).

160. *See* Giddens, *supra* note 127, at 409.

the Chapter 11 debtor CF & I.[161] Among the sundry claims for priority status, the PBGC argued that it should receive priority status as an unsecured creditor under § 507(a)(8) of the Bankruptcy Code against CF & I for $3 million in unfunded benefit liabilities, subject to the cap limiting the PBGC's claim to 30% of the debtor's net worth.[162] The district court denied eighth priority status as a tax on the ground that the PBGC did not perfect its lien due to the operation of the automatic stay.[163] The automatic stay in bankruptcy precludes "any act to create, perfect, or enforce any lien against property of the estate" and "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title."[164] The district court further reasoned that "claims for unfunded benefit liabilities are entitled to tax priority only to the extent that a lien for the amount of those claims arises."[165] In other words, a lien may not be perfected if it arises after a debtor institutes bankruptcy proceedings, thereby precluding it from achieving priority status. The PBGC's request to appeal the district court's interlocutory decision was denied,[166] removing the issue of eighth priority status from further consideration on appeal.

Although the court of appeals did not address the eighth priority status issue, this did not deter the Supreme Court from suggesting that a PBGC lien for unfunded pension liabilities could be viewed as a tax under § 507(a)(8).[167] The issue addressed at the Supreme Court level was whether a claim filed by the IRS was a "tax" entitled to priority status in bankruptcy.[168] The IRS claim arose pursuant to 26 U.S.C. § 4971(a) which imposes a 10% tax on any employer that fails to make a legally required contribution to its pension plan. The 10% tax is payable not to the PBGC, but rather to the United States Treasury.[169]

161. *See* PBGC v. Reorganized CF & I Fabricators of Utah, Inc. (*In re* CF & I Fabricators of Utah, Inc.), 179 B.R. 704 (D. Utah 1994).
162. *See id.*
163. *See id.* at 709.
164. 11 U.S.C. § 362(a)(4)-(5) (1994).
165. *CF & I*, 179 B.R. at 709.
166. *See* United States v. CF & I Fabricators of Utah, Inc. (*In re* CF & I Fabricaters of Utah, Inc.), 53 F.3d 1155, 1156 n.1 (10th Cir. 1995), *aff'd in part and vacated and remanded in part*, 518 U.S. 213 (1996).
167. *See* United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996).
168. *See id.*
169. *See* 26 U.S.C. § 4971 (1994).

In holding that the Internal Revenue Service's claim for a 10% "tax" on any "accumulated funding deficiency" was not a "tax" for purposes of § 507(a)(8) of the Bankruptcy Code, the Supreme Court distinguished the punitive nature of the IRS's claim from the nonpenal effect of a PBGC claim.[170] In determining the precise nature of a tax, the Court adopted the analysis promulgated under *City of New York v. Feiring*[171] and *States v. La Franca*.[172] The *Feiring* decision proclaimed that "[tax] priority . . . extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying, the expenses of government or of undertakings authorized by it."[173] In construing the *La Franca* decision, the Court held, "We take *La Franca's* statement of the distinction to be sufficient for the decision of this case; if the concept of penalty means anything, it means punishment for an unlawful act or omission . . . ."[174] The Supreme Court ruled that the IRS's claim cannot be categorized as a tax warranting eighth priority status, because the tax is really not a tax at all but rather is a penalty.[175] The Court, however, went on to note that "[t]he obviously penal character of these [IRS] exactions is underscored by other provisions, including one giving the Pension Benefit Guaranty Corporation (PBGC) an entirely independent claim against the employer for 'the total amount of unfunded benefit liabilities.'"[176] Implicit in the Court's dicta is that the PBGC possesses a valid argument that its lien for unfunded pension liabilities against the debtor should be treated as a tax under § 507(a)(8) of the Bankruptcy Code.

170. *See Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213.

171. 313 U.S. 283 (1994).

172. 282 U.S. 568 (1931).

173. City of New York v. Feiring, 313 U.S. 283, 285 (1941). It is important to note that this decision was rendered under section 64 of the Bankruptcy Act of 1898 which was later replaced by the Bankruptcy Code of 1978. The use of this decision by the Supreme Court in *CF & I* has significant ramifications for the PBGC priority debate primarily because present opponents of priority status contend that while the language of the Bankruptcy Act of 1898 would seem to confer priority status to the PBGC, the legislature did not manifest this intent in the Bankruptcy Code of 1978. Yet, the Supreme Court's decision in *CF & I* applies the paradigm for determining a "tax" not under the Bankruptcy Code of 1978, but rather under the Bankruptcy Act of 1898. This action would seem to suggest that the legislative language and intent of the Bankruptcy Act of 1898 did not simply die in 1978 with the enactment of the Bankruptcy Code.

174. United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996).

175. *See id.* at 2114.

176. *Id.* at 2113-14 (quoting 29 U.S.C. § 1362(b)(1)(a)).

B. Upcoming Litigation: *In re Bayly Corp.*

On April 25, 1995, the PBGC brought before the U.S. district court an appeal of *In re Bayly Corp.*[177] from the United States Bankruptcy Court for the District of Colorado.[178] The bankruptcy court had held that the PBGC lien for defined benefit underfunding against Bayly Corporation, a clothing manufacturer, was not entitled to priority status under the Bankruptcy Code.[179] The court concluded that Bayly's statutory liability to the PBGC was not a "tax."[180]

On appeal the PBGC presently urges that the district court should adopt the view of a tax espoused in *In re Chateaugay Corp.*[181] The *Chateaugay* decision ruled that mandatory payments established by Congress to provide health benefits to retired coal miners are "taxes" entitled to priority in bankruptcy.[182] The PBGC bolstered its claim by citing a string of cases in which an employer that is required by law to participate in state workers' compensation programs must pay a tax which is entitled to priority status in bankruptcy.[183]

By attempting to secure priority status in *In re Bayly Corp.*, the PBGC shifts its previous strategic focus. Rather than arguing that the statutory language of 29 U.S.C. § 1368 of ERISA permits priority treatment of a PBGC lien as a tax, the latest PBGC contention is that under *CF & I*, the PBGC lien meets the judicially created definition of a tax.[184] Section 1368 states, "In a case under title 11 or insolvency proceedings, the lien imposed . . . shall be treated in the same manner as a *tax* due and owing to the United States for purposes of title 11 or section 3713 of title 31."[185] The PBGC remains so confident in its latest argument that it has even abandoned completely the statutory language in 29 U.S.C. § 1368. The PBGC contends, "[The] PBGC would be entitled to a priority tax claim even if section 1368 had never been enacted. It is well-established that the government need not have a valid tax lien in

177. Brief for Appellant at 1, *In re* Bayly Corp. (D. Colo. 1995) (No. 95-N-901).
178. *See id.* at 2-3.
179. *See id.* at 1-2.
180. *See id.* at 2.
181. *See id.* at 7-8.
182. *See In re* Chateaugay Corp., 87 B.R. 779 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990).
183. *See, e.g.*, *In re* Suburban Motor Freight, Inc., 998 F.2d 338 (6th Cir. 1993); New Neighborhoods v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989); *In re* Chateaugay Corp., 177 B.R. 176 (S.D.N.Y 1995); *In re* Beaman, 9 B.R. 539 (Bankr. D. Or. 1980).
184. *See* Brief for Appellant at 7-10, *In re* Bayly Corp. (D. Colo. 1995) (No. 95-N-901).
185. 29 U.S.C. § 1368(c)(2) (1994) (emphasis added).

order to have a priority tax claim in bankruptcy."[186] In other words, the PBGC's claim under 29 U.S.C. § 1362[187] meets the definition of a "tax" under *City of New York v. Feiring* and *United States v. CF & I Fabricators of Utah, Inc.* regardless of how 29 U.S.C. § 1368—the provision conferring priority status—is construed.[188]

IX. Public Policy Considerations

A. Prevention of Employer Abuses

Crucial public policy considerations also underscore the urgency to allot priority status to the PBGC lien. In the absence of stringent liability requirements, nothing deters employers from abusing the federal pension insurance system. In fact, Congress has repeatedly articulated its apprehension over potential abuse of the PBGC's insurance guarantees.[189] For example, employers may extend promises of higher retirement benefits as bargaining leverage, knowing that the PBGC must fulfill employers' unkept promises.[190]

An even more troubling problem arises when a single employer staves off terminating its plan until after it has filed for Chapter 11 bankruptcy. Had the employer terminated its underfunded plan prior to bankruptcy, the PBGC would have had the opportunity to perfect its lien and to obtain a secured lien under § 506 of the Bankruptcy Code.[191] However, if the employer realizes its financial distress, recognizes that Chapter 11 reorganization is imminent, and then terminates its plan after filing for Chapter 11, the PBGC postpetition lien becomes ineligible for priority status. As a result, there exists substantial inducement for employer malfeasance. The District Court for the

186. Brief for Appellant at 10, *In re* Bayly Corp. (D. Colo. 1995) (No. 95-N-901) (citing Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp., 884 F.2d 80 (3d Cir. 1989); *see In re* Parr Meadows Racing Ass'n, 92 B.R. 30, 37 (E.D.N.Y. 1988), *rev'd on other grounds*, 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990); *In re* Bellman Farms, Inc., 86 B.R. 1016, 1021 (Bankr. D.S.D. 1988); *In re* Carlisle Court, 36 B.R. 209, 218 (Bankr. D.D.C. 1983)).

187. Under 29 U.S.C. § 1362, Congress established liability for termination of single employer plans under distress termination or termination by a corporation up to 30% of the debtor's collective net worth. *See* 29 U.S.C. § 1362(b)(2)(B) (1994).

188. *See* Brief for Appellant at 7-10, *In re* Bayly Corp. (D. Colo. 1995) (No. 95-N-901).

189. *See* S. REP. NO. 93-383, at 28 (1973).

190. *See Impact of Underfunded Defined-Benefit Pension Plans on the Federal Deficit, Plan Retirees, and Plan Sponsors: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways & Means*, 103d Cong. 5 (1993) (statement by J.J. Pickle, Rep. Tex.).

191. *See* 11 U.S.C. § 506.

Middle District of North Carolina in *PBGC v. The Washington Group*[192] acknowledged such potential for abuse and held that if the fundamental goals of ERISA are to be met, the PBGC's claim must have priority status in bankruptcy.[193] The district court ruled, "The Pension Benefit Guaranty Corporation steps into the shoes of employees to protect their pension benefits. If the Agency's claim lacks priority, then it would defeat the purpose for which Congress created the Pension Benefit Corporation . . . ."[194]

By allowing the PBGC lien priority status, Congress achieves two integral public policy goals. First, congressional action would dispel the myth that the PBGC was designed to subsidize unsuccessful corporate endeavors or employer mishandlings of pension money. Certainly the PBGC does assist companies experiencing financial distress. However, the Supreme Court noted that employer terminations often take advantage of the PBGC system.[195] Although the PBGC presently enjoys the benefits of a relatively healthy economic climate, a marked decline in interest rates not only decreases the rate of return on PBGC investments, but also increases the likelihood of plan underfunding by those employers who slight their pension fund obligations.[196]

Second, granting priority status would make it unmistakably clear that employers may not unreasonably inflate their pension benefit programs to entice qualified employees. Prioritizing the PBGC's claim would furnish other creditors with the requisite incentive to police the employer's treatment of its pension plan. Creditors would more carefully monitor potential abuse of an employer's pension security plan, because any debt owed to the PBGC would ultimately come out of the hide of the other creditors.

By overextending its benefits package to employees, the single employer performs a grave disservice to its employees, the PBGC, and other creditors. Congress has admitted that "[d]espite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappro-

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192. 1987 U.S. Dist. LEXIS 5655, at *1 (M.D.N.C. May 29, 1987).

193. *See id.* at *22.

194. *Id.* (citing PBGC v. Ouimet Corp., 711 F.2d 1085, 1092 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983)).

195. *See* Nachman Corp. v. PBGC, 446 U.S. 359, 367 n.12 (1980).

196. *See* PBGC ANN. REP., *supra* note 15, at 7.

priation of plan funds."[197] As previously mentioned, 29 U.S.C. § 1322 guarantees only specific benefits and does not cover nonbasic benefits.[198] Members of single-employer plans terminated in 1996 can only anticipate a maximum guarantee that is $31,704.60 yearly ($2,642.05 monthly) for a single life annuity beginning at age sixty-five.[199] By according the PBGC's lien priority status, the PBGC thwarts haphazard treatment of pension plans in an attempt to preserve the pension expectations of employees. Other creditors' direct concern for their own financial well-being would translate into a policing system in which creditors serve as the indirect overseers of the employer's pension plan. In short, creating priority status would compel employers to be accountable for excessive pension plans not only to the PBGC, but to other self-interested creditors whose financial interests would hinge upon adequate payment of pension plans. This type of "accountability" is central to ERISA's primary goal of protecting employees' benefits.[200]

B. Reorganization and Equality of Distribution

While the termination of a plan under Chapter 11 implicates an amalgam of public policy considerations for both the employee and the PBGC, critics of PBGC priority status cite two cornerstones of the Bankruptcy Code: an obligation to provide a successful avenue of rehabilitation to the debtor and a duty to ensure the equitable distribution of assets to creditors.[201] Moreover, the Supreme Court has repeatedly held that "at the core of federal bankruptcy law" are the concepts of equality of distribution and a fresh start.[202] By allowing the PBGC lien an eighth priority status, Congress would look myopically to the needs of the employee while completely eviscerating the notion of reorganization for the employer and the concept of the equi-

197. H.R. CONF. REP. NO. 93-1280, at 34 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038.

198. *See* 29 U.S.C. § 1322(b)(3)(b) (1994).

199. *See* PBGC, THE PBGC, *supra* note 69.

200. *See* PBGC v. Ouimet Corp., 711 F.2d 1085 (1st Cir. 1983) (citing A-T-O, Inc. v. PBGC, 634 F.2d 1013, 1023 (6th Cir. 1980)).

201. *See* Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co., 294 U.S. 648 (1935); Keating, *supra* note 127, at 842.

202. *See* BFP v. Resolution Trust Co., 511 U.S. 531, 563 (1994); *see also* Stellwagen v. Clum, 245 U.S. 605, 617 (1918); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915); CHARLES TABB, THE LAW OF BANKRUPTCY 6-7 (1997) (noting that the Supreme Court has advanced the policy justification that a business "is worth more as a going concern than in a forced sale liquidation").

table distribution of assets to creditors.[203] In fact, there is a growing sentiment that "the proliferation of special interest legislation" would thwart the financial rehabilitation of struggling companies.[204]

Opponents of priority status unduly exaggerate the influence of the PBGC claim in Chapter 11 reorganization cases. Moreover, although the *Chateaugay* case may offer some reasons to deny priority status, its precedential value is questionable. The *Chateaugay* decision was vacated by the parties' consent.[205] The *In re Divco*[206] decision is also inapplicable to the present proposal. The *Divco* case held that it is a "leap of faith" to claim that because both the ERISA claim and the tax claim are "liens of both share on par," they are "identical."[207] The decision went further to analogize the PBGC claim, arguing that applying the PBGC's rationale for priority status is comparable to arguing "that a donkey is the same as an elephant simply because they both have four legs."[208] The impetus for the *Divco* decision results from the innate difference between a PBGC lien and a PBGC claim. The present proposal, however, does not grant the PBGC's claim priority status. Instead, the subtle difference is that the PBGC lien would be treated as a tax due and owing to the United States which, in turn, was previously treated as a tax *claim* under § 64(a) of the Bankruptcy Act of 1898. In addition, the *Divco* analysis was rendered dicta by a subsequent decision, holding that the PBGC claim brought forth was actually a claim under § 1082, not a § 1368 claim which assesses liability for funding deficiencies under 29 U.S.C. §§ 1362, 1363, and 1364.[209]

In confining the PBGC's priority claim to only the lien rather than the underlying claim, Congress would remain true to the plain meaning of 29 U.S.C. § 1368(c)(2), as well as continue to adhere to the

203. In advocating the Pension Protection Act of 1994, former Secretary of Labor Robert Reich also conceded that there exists a delicate balance between employees' needs and the financial stability of companies. Reich supported the view that companies should not be "unduly handicap[ped]." *See The Retirement Protection Act of 1993: Hearing Before the Comm. on Ways & Means*, 103d Cong. 12 (1993).

204. *See* Daniel Keating, *Bankruptcy Code § 1114: Congress' Empty Response to the Retiree Plight*, 67 AM. BANK. L.J. 17, 19 (1993); *see also* NAT'L BANKR. CONFERENCE, CODE REVIEW, *supra* note 123, at 93 (noting the "potential for a clash between the 'fresh start' discharge policies of the Bankruptcy Code and the equally fundamental policies of ERISA mandating full funding of pension plans").

205. *See* LTV Corp. v. PBGC (*In re* Chateaugay Corp.), Nos. 89 Civ. 6012 & 90 Civ. 6048, 1993 WL 388809, at *2 (S.D.N.Y. June 16, 1993).

206. *See In re* Divco Philadelphia Sales Corp., 64 B.R. 232 (Bankr. E.D. Pa. 1986).

207. *Id.* at 235.

208. *Id.*

209. *See In re* Divco Philadelphia Sales Corp., 72 B.R. 199, 200 (Bankr. E.D. Pa. 1986).

Bankruptcy Code's policy of effectuating successful reorganizations. First, the plain language of § 1368 stipulates that the imposed "lien" shall be "treated in the same manner as a tax due and owing to the United States."[210] Clearly, Congress intended for the PBGC lien to receive priority status, rather than the potentially unwieldy and overwhelming PBGC claim.

In order to temper the burdens placed upon employers, Congress specifically enacted net worth limitations on PBGC liens.[211] ERISA mandates that the amount of the lien "upon all property and right to property, whether real or personal" should not be "in excess of 30 percent of the collective net worth of all persons described in 1362(a) of this title."[212] In ascertaining an employer's net worth, the PBGC must heed federal regulations establishing guidelines for determining such worth.[213] Various factors are considered in making the net worth determination, including the value of the equity assumed in a Chapter 11 plan of reorganization.[214] As a result, even a corporation under Chapter 11 reorganization may have "net worth" under ERISA guidelines. Furthermore, the judiciary gives substantial deference to the PBGC's determination of net worth as established under ERISA.[215] Thus, by implementing aggregate net worth limitations, Congress would decrease the likelihood of employer abuse of PBGC insurance, while simultaneously allowing bankruptcy courts to confirm workable plans for reorganization.[216]

The second purported dilemma presented by priority status is that such status is antithetical to the Bankruptcy Code's fundamental tenet of equitable distribution. Although the proposal may appear inimical to bankruptcy goals, the Supreme Court has held that the PBGC is justified in certain instances in advancing the statutory goals of ERISA by encouraging the continuation and maintenance of voluntary private pension plans for the benefit of their participants.[217] More importantly, employees do not wield the leverage that trade creditors might freely exercise. Employees lack the power and authority to ex-

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210. 29 U.S.C. § 1368(c)(2) (1994).
211. *See* Nachman Corp. v. PBGC, 446 U.S. 359, 367 n.12 (1980).
212. 29 U.S.C. § 1368(a).
213. *See* 29 C.F.R. § 4062.4 (1997).
214. *See id.* § 4062.4(c)(8).
215. *See* PBGC v. Washington Group, Inc., No. C-86-665-G, 1987 U.S. Dist. LEXIS 5655, at *13 (M.D.N.C. May 29, 1987).
216. *See* 11 U.S.C. § 1129(a)(9).
217. *See* PBGC v. LTV Corp., 496 U.S. 633 (1990) (citing 29 U.S.C. § 1302(a)).

ert substantial influence over employer practices and policies. In addition, most employees have limited resources to garner information about their employer's ability to fund fully their obligations to employees.[218] In short, the nature of the employer/employee relationship is intrinsically conducive to inequalities:

> Generally, employees are unable to assess the present or future creditworthiness of their employer, and it is often difficult for them to monitor their employer's financial condition during the course of their employment. Even if they happen to learn of an employer's financial troubles in time to act, workers may lack the mobility to change jobs. Indeed, businesses reap important benefits from the fact that many workers suffer constraints in information and mobility.[219]

As a result of the discrepancies between employer and employee rights, the PBGC should be allowed to step in and advance the unprotected interests of employees, especially in light of the increasingly significant role that pensions play in retirement income. In contrast to trade creditors, an employee's threat to terminate his or her relationship with the corporation carries little weight and creates only deleterious economic consequences for the employee. Thus, the complaint of alleged inequitable distribution of assets to creditors fails to consider the relative lack of bargaining power exercised by various types of creditors. Although the PBGC may ultimately stand in the place of employees and may also wield substantial power, the PBGC only provides limited coverage, leaving some employees without various benefits such as health care and vacation packages.[220] A priority claim would alleviate the inequality between trade creditors and the limited bargaining power of both employees and the PBGC.

X. Recommendation

The present proposal recommends that the PBGC's lien against employers with unfunded or underfunded defined benefit pension plans should receive an eighth priority status under § 507(a)(8) of the Bankruptcy Code of 1978. By according the PBGC lien status as a claim of a governmental unit, the PBGC conveys to employers that their promises made to their employees cannot be broken. Pension stability should not take a back seat to other miscellaneous corporate

218. *See* Donald R. Korobkin, *Employee Interests in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 5, 6-7 (1996).
219. *Id.* at 6.
220. *See* PBGC, THE PBGC, *supra* note 69.

endeavors nor should pension plan participants become the unfortunate victims of irresponsible pension management. By the year 2018, seventy-six percent of all individuals aged sixty-five and over will receive some form of pension income.[221] Income security is frequently described as a three-legged stool comprised of Social Security, personal savings, and pensions.[222] Without the third leg of pension security, the once stable stool upon which the baby boom generation rests becomes a teetering foundation destined to collapse.

This proposal also acknowledges the public policy concerns generated by granting priority status. A successful reorganization of the corporate debtor and the equitable distribution of assets are fundamental tenets of the Bankruptcy Code. As a result, the PBGC's priority claim under § 507(a)(8) of the Bankruptcy Code should not exceed thirty percent of the aggregate net worth of the employer as required by 29 U.S.C. § 1368(a). In granting only the lien—rather than the underlying claim—priority status, the PBGC would not drastically constrain the employer's ability to reorganize. Unlike the PBGC debacle in which the agency sought over $2 billion in liability from LTV Steel Corporation for numerous funding insufficiencies, the present proposal would restrict an employer's liability to the amount of the PBGC's lien.[223] Such a strategy creates an effective policing system by other trade creditors whose financial interests would be implicated in the event that the PBGC receives priority status in bankruptcy. Priority status would provide an incentive for creditors to monitor the underfunded employer and would simultaneously bolster the PBGC's enforcement powers. Employers with underfunded plans would feel the market pressures exerted by trade creditors who can effectively terminate their corporate relations with the employer. In short, priority status confers a wealth of benefits to both pension plan participants and to society. Pensioners would no longer fear the fate of their future, and society would no longer have to bear the economic brunt of those whose pension plans have failed them.

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221. *See id.*

222. *See Defusing the Retirement Time Bomb: Encouraging Pension Savings, Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 103d Cong. (1997) (statement of David Certner, representative of the American Association of Retired Persons).

223. *See In re* Chateaugay Corp., 115 B.R. 760 (Bankr. S.D.N.Y. 1990).

XI. Conclusion

Even in the event that the PBGC cannot carve out an exception for priority status under the Bankruptcy Code or judicially created doctrine, power is vested in Congress to make the requisite changes necessary to give the PBGC lien priority status. Although it may be incorrect to assume that whatever furthers a statute's primary objective must be translated into law, "['d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.'"[224] Because there exists unlimited potential for abuse by employers who terminate their plans postpetition as well as the injurious ramifications for employees, Congress must exercise its authority and take active steps to reconcile the apparent incongruity between ERISA and the Bankruptcy Code by creating an exception for single-employer PBGC liens. By enacting these changes, Congress would decrease unnecessary reliance upon the Pension Benefit Guaranty Corporation, as well as improve the pension plan security of millions of American employees who direly need financial certitude as they approach their golden years.

224. PBGC v. LTV Corp., 496 U.S. 633, 646-47 (1990) (quoting Rodriquez v. United States, 480 U.S. 522, 525-26 (1987)).

Appendix 1
Characteristics of Defined Benefit Plans

1. **Late Career Accruals.** Defined benefit plans offer older employees who have not saved enough for retirement an opportunity to accumulate meaningful benefits based upon their past service for their employer.

2. **Benefits Geared to Actual Life Span During Retirement.** Defined benefit plans are cost effective because they target actual benefit payments in the form of annuities to those former employees with the greatest need based upon their actual life span following employment.

3. **Spreads the Economic Risk of a Long Life Over Large Groups of Participants, Including Participants with a Normal or Short Retirement Life Span.** The risk spreading characteristic of defined benefit plans described in (2) is unique and explains the attraction of such plans to large companies and other sponsors attempting to deliver cost effective benefits to large groups of people.

4. **Takes Pressure Off Social Security.** The effectiveness of defined benefit plans in targeting benefits translates into a greater capacity to take pressure off Social Security as the sole or primary provider of retirement income.

5. **Long Term Investment Focus.** Investments are through professional managers in diversified and growth oriented investments with the potential for increased capital available for economic growth.

6. **Expanding Defined Benefit Universe Can Stabilize PBGC Risks and Permit Consideration of Reduction in PBGC Premiums.** Expansion of defined benefit plans by the addition of healthy, well-funded defined benefit plans will take pressure off the termination insurance system and permit a reduction of PBGC premiums.

Appendix 2
Types of Vesting

Cliff Vesting

Multi-Employer	Full vesting must come after no more than 10 years of service. The employee has no vested rights until he has completed this service.
Single Employer	Full vesting occurs no later than 5 years of service. The employee has no vested rights until he has completed this service.

Graded Vesting

Multi-Employer & Single Employer	An employee must be at least 20% vested after 3 years of service and receive an additional 20% vesting for each of the next four years, with full vesting coming no later than at the end of seven years.

YEARS OF SERVICE	NONFORFEITABLE PERCENTAGE
3	20
4	40
5	60
6	80
7 or more	100