NOTE

Early Retirement Benefits and *Gillis v. Hoechst Celanese Corp.*: Same Desk, Same Job, So What?

INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)[1] to regulate private pension plans.[2] Pensions serve to ensure that employees have sufficient income in the period between retirement and death.[3] Many factors motivated Congress to enact ERISA,[4] chief among them the fear

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[1] ERISA §§ 1-4402. ERISA is unusual in that many of its substantive provisions are duplicated within sections of the Internal Revenue Code and the United States Code. *See* I.R.C. §§ 400-425 (duplicating many tax provisions of ERISA); 29 U.S.C. §§ 1001-1461 (1985 & Supp. I 1993) (recodifying the non-tax provisions of ERISA). To avoid confusion, the remainder of this Note will provide ERISA section numbers only. ERISA has four titles. The heading of Title I reads "Protection of Employee Benefit Rights," and contains, in part, provisions concerning participation, vesting, and funding. ERISA §§ 2-608. Titles II and III deal with amendments to the Internal Revenue Code, ERISA §§ 1001-2006, and delegation of agency authority, ERISA §§ 3001-3043, respectively. Title IV contains provisions regulating pension plan termination and insurance. ERISA §§ 4001-4402.

[2] *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 1-28 (1990) (discussing origins, goals, and development of private pension system); *see also* WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 27-49 (1976) (discussing history of private pension funds and limited and highly contingent benefits these plans offered).

[3] LANGBEIN & WOLK, *supra* note 2, at 2.

[4] *See Senate Special Comm. on Aging, The Employee Retirement Income Security Act of 1974: The First Decade,* 98th Cong., 2d Sess., 6-25 (1984) (providing comprehensive analysis of legislative history). In the 1950s, Senate committee investigations revealed that the wide-

that then current law[5] inadequately protected employees in their relationships with employers.[6] Prior to ERISA, employees often had no recourse when they discovered upon retirement that employer promises, and the company till, were empty.[7]

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spread proliferation of private pension plans had led to extensive abuses, ranging from inept management to outright theft and corruption. LANGBEIN & WOLK, *supra* note 2, at 58-69. In response to these problems, Congress passed the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), Pub. L. No. 85-836, 72 Stat. 997, *repealed by* ERISA § 110(a) (1974), in hope that strict pension plan asset disclosure requirements would prevent some of the more flagrant abuse. LANGBEIN & WOLK, *supra* note 2, at 59. Congress soon became aware, however, that disclosure accomplished little beyond increased public awareness of the problems within the private pension system. *Id.* at 59-60. Disgruntled employees flooded Congress with letters in the mistaken belief that WPPDA provided some remedy for their pension complaints. *Id.* at 60-61. A 1962 Studebaker plant closing heightened public awareness, and the subsequent Senate hearings publicized tragic stories of cheated pensioners. *Id.* at 60; *see also infra* notes 74-78 and accompanying text (discussing impact of Studebaker closing on ERISA).

[5] The Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1982) (original version at 61 Stat. 136, ch. 120 (1947)); The Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 730 (current version at 26 U.S.C. §§ 1-722 (1982 & Supp. I 1994)); WPPDA, *supra* note 4. Prior to ERISA, Congress made only limited attempts to regulate private pensions. *See generally* Jennifer L. Pratt, Note, *Reversion of Surplus Pension Assets upon Plan Termination: Is It Consistent with the Purpose of ERISA?*, 62 IND. L.J. 805, 808 (1987) (detailing history and coverage of pre-ERISA statutory efforts); *see also*, JACK L. TREYNOR ET AL., PENSION FUNDING UNDER ERISA 39-47 (1976) (explaining that pre-ERISA pension claims were unlikely to succeed). Pre-ERISA pension beneficiaries had no legal power to prevent their employers from investing pension funds in highly speculative ventures. *Id.* at 45. Once an employer became insolvent, employees had little hope of forcing payment of their pension benefits. *Id.*

[6] *Private Pension Plan Reform, 1973: Hearings Before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance*, 93d Cong., 1st Sess. 451 (1973) (statement of Senator Harke). Senator Harke put it this way:

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

Id.; *see also* SUBCOMMITTEE ON LABOR OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, Vol. 3 at 4750 (Comm. Print 1976) (stating that many employers made assurances to employees, and employees had no recourse when employers ultimately withheld promised benefits). *But see* Emerson H. Beier, *Termination of Pension Plans: Eleven Years Experience*, MONTHLY LABOR REVIEW, June 1967, at 29-30 (finding plan terminations that cause a loss of accrued benefits only affects small percentage of workers with pension coverage).

[7] *See supra* note 4 (discussing congressional findings of abuse within private pension system); *see also infra* notes 76-77 (discussing nature of Studebaker employees' recovery after plan termination).

Through a complicated system of vesting[8] and accrual[9] requirements, Congress designed ERISA to prevent employee forfeiture[10] of promised benefits.[11]

Although Congress enacted ERISA to protect employees, Congress did not specify the types of pension benefits ERISA protects.[12] In *Gillis v. Hoechst Celanese Corp.*,[13] the Third Circuit Court of Appeals considered the extent to which ERISA protects early retirement benefits.[14] In *Gillis*, the defendant corporation Hoechst Celanese sold one of its divisions.[15] This sale amended[16] Hoechst Celanese's ERISA-qualified[17] pension plan, affect-

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[8] "Vesting" is the process by which accrued employee benefits become nonforfeitable. 1 G. BOREN, QUALIFIED DEFERRED COMPENSATION PLANS § 3:09 (1983) (defining vesting); BARBARA J. COLEMAN, PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT [hereafter PRIMER] 158 (2d ed. 1985) (stating that vesting occurs after all service requirements have been met and serves to give employee nonforfeitable right to pension benefits). A thorough discussion of the complicated system of vesting under ERISA is beyond the scope of this Note. *See generally* MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS 307-59 (1989 & Supp. 1992) (analyzing ERISA's vesting provisions in detail).

[9] *See generally infra* text accompanying notes 91-100 (explaining that what constitutes accrued benefit is not always apparent). An "accrued" benefit is a vested benefit. I.R.C. § 411(a)(7) (West Supp. 1993) (defining accrued benefits as accrued benefits determined under plan); *see also* BLACK'S LAW DICTIONARY 21 (6th ed. 1990) (defining "accruing" as that which may at some future time become vested right); *see also* Dana M. Muir, Note, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits*, 87 MICH. L. REV. 1034 (1989) (surveying extensively and inconclusively question of whether sponsors must fund early retirement benefits at plan termination). Muir states that the key issue in deciding whether a sponsor must pay an early retirement benefit at plan termination is whether or not that early retirement benefit is accrued. *Id.* at 1039.

[10] "Forfeitable" benefits are those conditioned on some future event or performance, the non-occurrence of which will lead to the loss of the benefit. JACOB MERTENS, LAW OF FEDERAL INCOME TAXATION § 25B.46 (1986) (defining forfeiture under ERISA). "Nonforfeitable" benefits are those benefits which arise from an employee's service, are unconditional, and legally enforceable against the plan. ERISA § 2(19).

[11] *See* LANGBEIN & WOLK, *supra* note 2, at 83 (suggesting that ERISA might have been more aptly named Pension Benefits Antiforfeiture Act).

[12] *See infra* notes 101-170 and accompanying text (discussing uncertainty in ERISA's treatment of early retirement benefits).

[13] 4 F.3d 1137 (3d Cir. 1993).

[14] *Id.* at 1143-48.

[15] *Id.* at 1140. The defendants in this case were the Hoechst Celanese Corporation and the Hoechst Celanese Retirement Plan. *Id.* at 1139. This Note will refer to them as Hoechst Celanese and the plan, respectively.

[16] *Id.* at 1143 (discussing parties' views of Hoechst Celanese's liability following sale of division). An "amendment" is any change to a pension plan, whether or not significant. MERTENS, *supra* note 10, at § 25B.21 (defining amendment). Termination of employee participation in a plan is a plan amendment. *Id.*

[17] A qualified plan makes a plan sponsor eligible for tax deductibility for sponsor con-

ing the employees who worked for the sold division.[18] In selling the division, Hoechst Celanese also transferred funds sufficient to satisfy what it regarded as its pension obligations to the affected plan participants.[19] However, Hoechst Celanese did not transfer enough money to pay early retirement benefits[20] to those division employees who had not worked for Hoechst Celanese long enough to claim them.[21]

The plaintiffs in *Gillis* were affected participant employees who argued that the early retirement benefits were among those benefits that ERISA protects and guarantees.[22] They argued, therefore, that as the pension plan sponsor,[23] Hoechst Celanese

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tributions up to specified amounts. *See* I.R.C. § 401(a) (West Supp. 1993) (detailing requirements for qualification of pension plans). For a detailed discussion of the procedural requirements for qualification, see EMPLOYEE BENEFITS HANDBOOK 24-1 to 24-13 (Jeffrey D. Mamorsky ed., 1990).

[18] Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805, 807 (E.D. Pa. 1992). Hoechst transferred approximately 80 Hoechst employees to American Mirrex Corporation along with the sold division. *Id.*

[19] *Id.* The plaintiff employee did not suggest that the defendant corporation had intentionally underfunded the early retirement benefits. *Id.* A plan participant is an employee who is working to achieve the benefits a plan provides. 1 BOREN, *supra* note 8, § 3:02 (defining participant). A pension plan "covers" a participant. *Id.*

[20] Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1147 (3d Cir. 1993). ERISA does not specifically define "early retirement benefits" because ERISA does not require plans to offer them to participants. STEPHEN R. BRUCE, PENSION CLAIMS, RIGHTS AND OBLIGATIONS 247 (1988). ERISA sets no minimum age or service requirements for early retirement benefits, so these conditions are generally set forth in each plan. *Id.* Generally, early retirement benefits are those that commence before normal retirement age. *See infra* note 81 (defining normal retirement age). *See generally infra* notes 79-170 and accompanying text (discussing dispute over what constitutes early retirement benefits and to what extent ERISA guarantees funding of these benefits at time of plan termination).

[21] *Gillis*, 4 F.3d at 1137. The Hoechst Celanese Retirement Plan operated under the so-called "rule of 85." *Id.* at 1143. Under this rule, no employee is eligible for early retirement benefits until the sum of the employee's age and years of service for the plan sponsor equals 85. *Id.*

[22] *Id.* at 1137. The employee plaintiffs did not dispute the fact that they did not satisfy the "rule of 85" at the time of plan termination. *Id.* at 1143. ERISA sets forth a priority scheme which governs the distribution of benefits upon plan termination. ERISA § 4044(a). Sponsors must allocate pension plan funds in the following order: (1) repayment of voluntary participant contributions; (2) repayment of mandatory contributions; (3) benefits payable as annuities; (4) additional benefits guaranteed under the plan; (5) all other nonforfeitable benefits; and (6) all other benefits under the plan. *Id.*; *see also infra* notes 88-90 and accompanying text (discussing placement of early retirement benefits within scheme).

[23] A plan sponsor is an employer who establishes and maintains an employee benefit plan. 29 U.S.C. § 1002(16)(b)(i) (1993).

should have transferred funds sufficient to satisfy the early retirement benefits.[24] The district court rejected the plaintiffs' argument,[25] ruling instead that both ERISA[26] and case law[27] barred the plaintiffs' claim for these early retirement benefits.[28] At the time Hoechst Celanese sold the division, the plaintiffs had not worked for Hoechst Celanese long enough to claim the early retirement benefits.[29] After the division's sale, the plaintiffs had no further opportunity to earn these benefits by continuing to work for Hoechst Celanese.[30] The district court therefore held that the early retirement benefits at issue were not accrued benefits,[31] and that ERISA did not protect them.[32]

The Third Circuit disagreed with the district court.[33] The Third Circuit held that ERISA protected the plaintiffs' interests in the early retirement benefits because when the plan terminated[34] there was no "separation from service."[35] There was no

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[24] Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143 (3d Cir. 1993).

[25] Gillis v. Hoechst Celanese, No. 90-5542, 1992 U.S. Dist. LEXIS 4984, at *11-12 (E.D. Pa. Mar. 31, 1992) (certifying class).

[26] *Id.* (interpreting ERISA § 204(g) to allow plan sponsor to eliminate early retirement benefits). *But see infra* notes 195-222 and accompanying text (discussing Third Circuit's contrary analysis of this same statute).

[27] *See Gillis*, LEXIS 4984 at *12-13 (proposing that case law barred plaintiffs from recovery of early retirement benefits (citing Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990))). *But see infra* notes 276-93 and accompanying text (describing Third Circuit's treatment of *Berger* and other authorities).

[28] *See Gillis*, LEXIS 4984 at *13 (holding that settled authority barred plaintiffs' claims for early retirement benefits).

[29] *Gillis*, 4 F.3d at 1143. Plaintiffs did not dispute this point. *Id.*

[30] *See id.* at 1144 (stating that Hoechst Celanese argued it should not be responsible for early retirement benefits because plaintiffs had no further opportunity to earn these benefits by working for Hoechst Celanese).

[31] *See infra* notes 187-91 and accompanying text (presenting district court's logic).

[32] *See supra* notes 25-28 and accompanying text (presenting district court's belief that precedent and statute barred plaintiffs' class action suit on claim of early retirement benefits).

[33] *See Gillis*, 4 F.3d at 1143-48 (presenting entirety of Third Circuit's analysis); *see also infra* notes 192-252 and accompanying text (examining Third Circuit's opinion).

[34] "Termination" of a pension plan can be either total or partial. I.R.C. § 411(d)(3) (West Supp. 1994). Total termination involves the complete dismantling of a plan, whereas partial termination involves something less. *Id.* IRS rules require that affected plan participants vest upon either type of termination. *Id.* For a thorough discussion of recent developments in the area of horizontal and vertical partial terminations, see Seth Tievsky, *In Re: Gulf Poses New Hazards for Pension Plan Sponsors*, 52 TAX NOTES 1071 (1991) (discussing implications of *In re Gulf Pension Litigation*, 13 Employee Benefits Cas. (BNA) 1873 (S.D. Tex. 1991)).

[35] *Gillis*, 4 F.3d at 1147-48. A "separation from service" occurs upon an employee's

separation from service because the sale of the division did not interrupt or change the plaintiffs' jobs or responsibilities in any way.[36] Using this separation-from-service analysis, the Third Circuit held that the plaintiffs' early retirement benefits were accrued benefits under ERISA.[37] According to the court, ERISA required Hoechst Celanese to fund the early retirement benefits of its transferred employees.[38]

Gillis is an important case because of its potential impact on the relationships between American workers and their employers.[39] It involves a common type of pension benefit — early retirement benefits — and sets forth the extent of employer liability for these benefits upon plan termination.[40] The issue of whether ERISA requires that employer-sponsors fund early retirement benefits after amending or terminating a plan has stirred much controversy.[41] *Gillis* stated that this question turns solely on whether a separation from service has occurred.[42] This test is important because the *Gillis* decision is one of the few precedents available to courts considering whether plaintiffs are entitled to early retirement benefits.[43] Against the background of ERISA's history,[44] the *Gillis* decision has sympathetic appeal.[45]

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death, retirement, resignation, or discharge, but not when the employee continues on the same job for a different employer as a result of liquidation, merger or consolidation of the former employer. Rev. Rul. 79-336, 1983-1 C.B. 92. When an employee follows the transfer of his business' assets to a new employer, no separation from service occurs unless the employee immediately takes on either new responsibilities or an entirely different position. Priv. Ltr. Rul. 86-14-048 (Jan. 9, 1986).

[36] Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805, 807 (E.D. Pa. 1992).

[37] *See* Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1147-48 (3d Cir. 1993) (accepting plaintiffs' argument and ruling on their behalf). Plaintiffs had argued that ERISA § 204(g) protected their benefits because they were accrued benefits. *Id.* at 1143-44; *see* ERISA § 204(g) (providing a highly technical and complicated system of determining how benefits accrue under different types of pension plans). For a detailed analysis, see CANAN, *supra* note 8, at 308-32.

[38] *Gillis*, 4 F.3d at 1147. The Third Circuit reversed the district court and certified the plaintiffs as a class on the issue of whether Hoechst Celanese had properly funded these benefits. *Id.* at 1148.

[39] *See infra* notes 294-323 and accompanying text (discussing implications of *Gillis*).

[40] *Gillis*, 4 F.3d at 1147-48 (announcing employer liability for early retirement benefits where there is no separation from service).

[41] *See infra* notes 102-70 and accompanying text (analyzing courts' conflicting approaches to issue of early retirement benefits under ERISA).

[42] *Gillis*, 4 F.3d at 1147-48.

[43] *See infra* notes 102-70 and accompanying text (presenting several of limited number of cases in this area).

[44] *See supra* notes 1-11 and accompanying text (describing congressional intent in en-

The plaintiffs were employees who had worked first for Hoechst, then Hoechst Celanese, and finally for American Mirrex.[46] Their jobs did not change, and they argued that their benefits should not change either.[47] However, the various statutes involved, the cases applying and interpreting these statutes, and the legislative history and social policies behind their enactment suggest that the court wrongly decided *Gillis*.[48]

This Note analyzes the Third Circuit's opinion in *Gillis*.[49] Part I of this Note surveys ERISA's requirements, together with section 301 of the Retirement Equity Act of 1984 (REA),[50] the Internal Revenue Code (IRC),[51] and relevant case law.[52] Part I discusses these authorities as they relate to how companies pay early retirement benefits when an ERISA-qualified plan terminates.[53] Part II examines the factual setting of *Gillis* and the majority's decision.[54] Part III analyzes the holding in *Gillis* and concludes that the Third Circuit wrongly decided the case.[55] Finally, Part III presents the policy implications of *Gillis* and argues that the Third Circuit court was misguided in its attempt to protect employees.[56]

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acting ERISA).

[45] *See infra* notes 243-52 and accompanying text (describing how *Gillis* court reacted to plight of plaintiffs). The *Gillis* court relied on legislative history which presented the participant employee in a sympathetic light. *Gillis*, 4 F.3d at 1147 (quoting Priv. Ltr. Rul. 91-420-27 (Oct. 18, 1991)).

[46] Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805, 807 (E.D. Pa. 1992).

[47] *See Gillis*, 4 F.3d at 1143 (presenting plaintiffs' argument).

[48] *See infra* notes 253-323 and accompanying text (analyzing and critiquing *Gillis*).

[49] *See infra* notes 49-329 and accompanying text (analyzing *Gillis*).

[50] 29 U.S.C. § 1054; *see infra* notes 73-90 and accompanying text (describing state of pension law prior to Retirement Equity Act (REA)).

[51] 26 U.S.C. §§ 351-480; *see infra* notes 125-28 and accompanying text (discussing impact of IRC legislative history on ERISA). ERISA is unusual in that many of its sections have counterparts within the IRC. *See Gillis*, 4 F.3d at 1144-45 (discussing unique assistance IRC provisions offer in interpreting ERISA provisions). Congress offers favorable tax treatment to sponsors whose plans meet the ERISA qualifications. *See id.* at 1144 n.6. Favorable tax treatment encourages employers to establish ERISA qualified pension plans. *Id.* (citing Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1058 (3d Cir. 1989)).

[52] *See infra* notes 276-93 and accompanying text (discussing *Gillis* majority's treatment of cases in area).

[53] *See infra* notes 57-170 and accompanying text (discussing impact of various authorities on early retirement benefits).

[54] *See infra* notes 171-252 and accompanying text (presenting factual and procedural background as well as Third Circuit's holding and rationale).

[55] *See infra* notes 253-93 and accompanying text (analyzing majority's reasoning).

[56] *See infra* notes 294-323 and accompanying text (critiquing *Gillis* and presenting its

I. THE CONTEXT OF *GILLIS*; STATUTE, PRECEDENT, AND POLICY

Several factors influenced the outcome in *Gillis*.[57] Statutory law, policy, and precedent combine to provide a context for understanding this decision.[58] The relevant statute is ERISA, which Congress enacted in 1974 to protect employees' pension interests.[59] Protecting early retirement benefits, however, was not a priority in the original 1974 Act.[60] Congress later enacted REA section 301 to protect early retirement benefits.[61] How far Congress intended REA to extend, however, is unclear,[62] and the cases that have applied and interpreted REA's effect are in conflict.[63]

A. Employee Retirement Income Security Act (ERISA)

Although Congress enacted ERISA to protect employee expectations,[64] it did not intend to protect all possible pension

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policy implications).

[57] *See infra* notes 57-170 and accompanying text (presenting background for later analysis of *Gillis*); *infra* notes 171-252 (relying on that background to present *Gillis* decision).

[58] *See infra* notes 57-170 and accompanying text (discussing *Gillis*' historical context).

[59] *See infra* notes 73-90 and accompanying text (presenting short overview of ERISA prior to REA); *see also supra* notes 1-11 and accompanying text (discussing congressional intent in enacting ERISA).

[60] *See* Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143 (3d Cir. 1993) (stating that prior to 1984, ERISA did not protect early retirement benefits); *see also* Gluck v. Unisys Corp., 960 F.2d 1168, 1185 (3d Cir. 1992) (reaching same conclusion).

[61] *See Gillis*, 4 F.3d at 1143 (stating that Congress enacted REA to protect early retirement benefits).

[62] *Gillis*, 4 F.3d at 1143-48, 1151-52; *see infra* notes 91-100 and accompanying text (discussing impact of REA on ERISA); *see also infra* notes 195-222 and 231-35 and accompanying text (presenting conflict between *Gillis* majority and dissent positions on impact of REA § 301). The *Gillis* majority acknowledged that REA's impact on ERISA was ambiguous. *Gillis*, 4 F.3d at 1144.

[63] *See infra* notes 102-70 and accompanying text (discussing lack of consensus regarding scope of REA); *see also infra* notes 195-242 and accompanying text (discussing conflict between *Gillis* majority and dissent positions). If ERISA does now protect early retirement benefits, it does so through § 204(g). ERISA § 204(g), *amended by* REA § 301. However, the statute arguably does not apply to the *Gillis* situation, wherein terminated plan participants are unable to satisfy the preamendment conditions while working for the plan sponsor. *See* ERISA § 204(g) (containing language that can be construed to mean that employees must satisfy preamendment conditions while working for plan sponsor); *see also infra* notes 231-42 and accompanying text (presenting *Gillis* dissent's position that this is proper reading of statute).

[64] *See supra* notes 1-11 and *infra* notes 73-78 and accompanying text (outlining congressional intent to protect employee expectations and prevent sponsor abuses).

benefits under ERISA.[65] Congress did not make clear, however, which benefits it intended to leave unprotected.[66] The language of the original ERISA provisions[67] suggests that the 1974 Act did not protect early retirement benefits.[68]

In 1984, however, Congress enacted REA,[69] which amends ERISA, to protect some early retirement benefits.[70] The extent to which Congress intended to protect early retirement benefits under REA is also unclear.[71] ERISA now protects some early retirement benefits, but courts differ on the question of when such benefits require protection.[72]

1. Overview of ERISA Prior to the Retirement Equity Act

Congress enacted ERISA in response to the public's fear that the private pension system was riddled with fraud and abuse.[73] The 1963 closing of a Studebaker automobile plant in Indiana[74] galvanized these fears among the American public.[75] Under an

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[65] *See infra* notes 79-90 and accompanying text (discussing fact that ERISA originally did not protect any early retirement benefits).

[66] *See infra* notes 88-90 and accompanying text (discussing possible ambiguity in original ERISA text).

[67] *See infra* notes 79-90 and accompanying text (examining ERISA §§ 204, 208, and 4044).

[68] *See infra* notes 79-90 and accompanying text (stating that no dispute on this issue existed prior to REA).

[69] The Retirement Equity Act of 1984 (REA) § 301(a)(2), 98 Stat. 1451 (codified at 29 U.S.C. § 1054(g) (1993)).

[70] *See infra* notes 91-100 and accompanying text (discussing REA's impact on ERISA).

[71] *See infra* notes 102-70 and accompanying text (revealing lack of consensus in case approaches).

[72] *See infra* notes 102-70 and accompanying text (presenting case analyses which suggest that ERISA does not currently protect all early retirement benefits).

[73] *See supra* notes 2-7 and accompanying text (discussing state of pension law prior to ERISA, rampant abuse within private pension system, and public's frustration at having no forum for complaints).

[74] *See* LANGBEIN & WOLK, *supra* note 2, at 53 (describing Studebaker incident as pivotal event in ERISA's history). The December 1963 closing of Studebaker's South Bend, Indiana manufacturing plant received widespread publicity and is often cited as a watershed event in the push for federal regulation of private pension plans. *Id.* At termination, the Studebaker plan had been in effect for 14 years and had assets worth $25 million, but it also had over 10,500 workers who claimed to be entitled to a share of that money. *Federal Reinsurance of Private Pension Plans: Hearing on S. 1575 Before the Senate Comm. on Finance*, 89th Cong., 2d Sess. 50 (1966) [hereafter *Reinsurance Hearings*] (statement of Walter Reuther, President of the United Auto Workers (UAW)).

[75] *See supra* notes 2-7 and accompanying text (detailing findings of rampant abuse

agreement between Studebaker and the United Auto Workers,[76] many employees who had dedicated their lives to the company received only pennies on the dollar for their promised pensions.[77] Eventually, Congress responded to the public's fear by enacting ERISA to protect American workers' interests and expectations in their pensions.[78]

Section 204(g) of ERISA provides that sponsors cannot amend a plan to reduce a participant's accrued benefits.[79] ERISA de-

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within system and Congress' subsequent passage of ineffectual WPPDA). By 1963, the American public was becoming aware of the problems within the private pension system. LANGBEIN & WOLK, *supra* note 2, at 58-60. Even if the public had not been sensitive to private pension issues before, however, the Studebaker plant closing would have captured the nation's attention and imagination anyway. *Id.* at 56. Both the enormity of the shutdown and its timing served to guarantee that America took notice. *See id.* (describing specter of thousands of workers losing their jobs just before Christmas). At least one commentator has suggested that the sympathetic appeal of the Studebaker employees' plight caused the nation to view the Studebaker incident as more typical than it actually was. *See* DENNIS E. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS 21 n.12 (1979) (suggesting that to condemn all private pension plans on basis of Studebaker failure is analogous to condemning all automakers by pointing to Edsel); *see also* AMERICAN ENTERPRISE INSTITUTE, THE DEBATE ON PRIVATE PENSIONS 42-43 (1968) (suggesting that employees had assumed risk of unfunded pension rights).

[76] *Reinsurance Hearings*, *supra* note 74, at 50 (containing comments of UAW president). Under the final agreement between Studebaker and the UAW, the 10,500 employees split into three groups. *Id.* The first group consisted of 3600 people who had either retired or had reached the age of 60 and were still working. *Id.* These individuals got first priority, and received 100% of their promised benefits. *Id.* The second group consisted of 4000 people between the ages of 40 and 59 who had worked at Studebaker for at least ten years. *Id.* This group received only 15% of what Studebaker had promised them. *Id.* The final group consisted of 2900 people under age 40 who had no vested rights. *Id.* This group received nothing. *Id.*

[77] *Id.* at 50-51. Although the UAW president bemoaned the plight of the workers in the second and third groups, some commentators have questioned the motives of the UAW leadership in reaching this agreement. *See* LANGBEIN & WOLK, *supra* note 2, at 58 (suggesting that UAW did not fairly balance interests of its older and younger workers).

[78] *See supra* notes 1-11 and accompanying text (detailing congressional intent in enacting ERISA). Congress designed ERISA to establish equitable standards of plan administration, to set minimum standards of fiscal responsibility with respect to plan management, and to insure vested rights against premature plan termination. *See* H.R. REP. NO. 533, 93d Cong., 1st Sess. 1-2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640 (listing these goals among others).

[79] ERISA § 204(g). Although this section provides for the payment of all accrued benefits upon plan termination, prior to REA's enactment, it was not apparent that early retirement benefits were ever accrued benefits. *Compare* Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1414 (2d Cir. 1985) (holding that early retirement benefits are accrued), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986) *with* Bencivenga v. Western Pa. Teamsters & Employers Pension Fund, 763 F.2d 574, 580 (3d Cir. 1985) (holding that early retirement benefits are not accrued); *see also* Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d

fines accrued benefits as those benefits that provide for an annual payment commencing at normal retirement age.[80] Before REA, early retirement benefits fell outside of this statutory shelter because they, by definition, commence prior to normal retirement age.[81] Under the original ERISA, therefore, participants had no right to any early retirement benefits until they had satisfied all plan requirements and reached normal retirement age.[82]

Under section 208 of ERISA, a sponsor may engage in a merger, consolidation, or transfer of plan assets only if it can satisfy certain funding conditions.[83] All of these events result in an amendment to the pension plan.[84] After the amendment, the sponsor must provide to each affected participant that funding which each would have received had the sponsor terminated the plan immediately before the amendment.[85] This provision ensures that sponsors, at a minimum, fund all accrued benefits at preamendment levels.[86] Section 208 does not protect benefits that are contingent at the time of the merger, consolidation, or transfer of plan assets, and thus section 208 does not protect early retirement benefits.[87]

ERISA section 4044(a) lists, in order of funding priority, the benefits a sponsor must fund after its plan terminates.[88] Section

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406, 410 (4th Cir. 1983) (determining that issue rests on whether benefits are funded or unfunded and whether benefits are contingent or not), *cert. denied*, 467 U.S. 1205 (1984).

[80] *See* ERISA § 3(23) (defining "accrued benefits"); *supra* note 9 (same). ERISA defines "normal retirement age" as either the retirement age set by the plan, or age 65, whichever is earlier. ERISA § 3(24).

[81] *See supra* note 20 (defining early retirement benefits). Early retirement provisions typically provide that a plan participant may retire before the plan's normal retirement age. JUDITH BOYERS GEE, PENSIONS IN PERSPECTIVE § 240.1 (2d ed. 1987). To do so, employees must meet certain criteria, often including a minimum age and service requirement. *Id.* ERISA does not require that qualified plans offer early retirement benefits. BRUCE, *supra* note 20, at 247. However, most plans offer some kind of early retirement benefit as early retirement becomes the norm for more and more workers. *See generally* LANGBEIN & WOLK, *supra* note 2, at 347-49 (discussing increasing trend toward early retirement).

[82] LANGBEIN & WOLK, *supra* note 2, at 347-49.

[83] ERISA § 208.

[84] *See supra* note 16 (defining amendment).

[85] ERISA § 208; *see also infra* notes 236-42 and accompanying text (analyzing *Gillis* dissent's interpretation of ERISA § 208).

[86] *Id. See infra* notes 236-42 (applying ERISA § 208 to *Gillis* situation).

[87] ERISA § 208.

[88] ERISA § 4044 (governing manner in which sponsors distribute plans). *See supra* note

4044(a)'s final provision states that once a sponsor has funded all listed benefits, the sponsor must fund all other promised plan benefits.[89] Despite this catchall provision, pre-REA courts generally held that early retirement benefits fell completely outside of this scheme.[90]

2. The Retirement Equity Act

Congress enacted REA to protect early retirement benefits that ERISA had not previously protected.[91] Section 301 of REA amended ERISA section 204(g), and prohibits plan sponsors from amending plans if the change would reduce or eliminate early retirement benefits.[92] Under the amended ERISA section 204(g), sponsors must treat early retirement benefits as accrued benefits.[93] ERISA, therefore, protects accrued early retirement benefits when a sponsor amends a plan.[94] An affected plan participant is now entitled to that portion of her early retirement benefits that she has accrued prior to the amending event.[95]

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22 (setting forth priority scheme of ERISA § 4044(a)).

[89] ERISA § 4044(a)(6); *see supra* note 22 (summarizing § 4044(a)'s priority scheme).

[90] *See* Muir, supra note 9, at 1055-58 (concluding that ERISA's explicit language did not demand early retirement benefits fall within ERISA § 4044(a)'s final category of "all other benefits").

[91] *See, e.g.*, Muir, *supra* note 9, at 1035 n.8 (explaining impact of REA on employers' ability to reduce early retirement benefits); *see also* Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143 (3d Cir. 1993) (stating that Congress had enacted REA to protect early retirement benefits under certain circumstances).

[92] REA § 301. REA § 301 amended ERISA § 204(g) so that it now provides in part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.
> (2) For purposes of paragraph (1), a plan amendment which has the effect of
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. . . .

ERISA § 204(g).

[93] ERISA § 204(g).

[94] ERISA § 204(g) (providing that sponsors cannot reduce accrued benefits by amending their plans); *see also supra* notes 79-90 and accompanying text (explaining that before REA, § 204(g) protected accrued benefits, but not early retirement benefits).

[95] ERISA § 204(g); *see supra* notes 79-82 and accompanying text (discussing § 204's role

However, REA section 301 also limits the extent to which ERISA section 204(g) protects early retirement benefits.[96] In the case of retirement-type subsidies,[97] a sponsor can reduce or eliminate these benefits if participants are unable to satisfy the preamendment conditions[98] for them.[99] The amended ERISA section 204(g) makes clear that employees may satisfy preamendment conditions either before or after the amendment.[100]

B. The Cases Before Gillis

Although ERISA now protects some early retirement benefits, Congress did not intend to protect all early retirement benefits.[101] The cases that have considered whether ERISA protects early retirement benefits in particular situations are in conflict.[102] Courts have struggled with the question of which

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before REA). Because § 204 ensures that sponsors pay all accrued benefits when a plan terminates, § 204 now protects accrued early retirement benefits. *Id.*

[96] *See* ERISA § 204(g) (providing that sponsors may reduce early retirement benefits when participants cannot satisfy preamendment conditions for those benefits).

[97] Although Congress intended that regulations define retirement-type subsidies, the regulations do not clearly define the term. *See, e.g.*, Treas. Reg. § 1.411(d)-4 (1988) (appearing to equate retirement-type subsidies with retirement subsidies). At least one commentator has suggested that Congress included the phrase "retirement-type subsidies" in order to guard against possible plan sponsor abuse. MERTENS, *supra* note 10, at § 25B.47. According to Mertens, Congress included the term to prevent the recharacterization of retirement-type subsidies as benefits not protected by the newly amended ERISA § 204(g). *Id.* The phrase allows Congress room to outmaneuver plan sponsors who would circumvent the law. *Id.* The *Gillis* court found that the early retirement benefits at issue were retirement-type subsidies. Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1151 (3d Cir. 1993) (Stapleton, J., dissenting). Another commentator defined early retirement-type subsidies as benefits that a sponsor may not actuarially reduce in distributing prior to normal retirement age. *See* BRUCE, *supra* note 20, at 181 (attempting to define early retirement-type subsidies).

[98] "Preamendment conditions" are all those contingencies which a participant must satisfy under the original plan in order to claim her early retirement benefits. *See, e.g., Gillis*, 4 F.3d at 1143 (describing Hoechst Celanese plan's "rule of 85"); *see also supra* note 21 (explaining rule of 85).

[99] ERISA § 204(g).

[100] *Id.* It is not made clear whether the employee must satisfy the preamendment conditions while working for the sponsor employer. *Gillis*, 4 F.3d at 1143-44 (discussing ambiguity in statute).

[101] *See supra* notes 1-11 and accompanying text (discussing congressional intent in enacting ERISA).

[102] *See infra* notes 103-70 and accompanying text (presenting conflicting cases).

benefits Congress left unprotected, taking conflicting approaches toward the scope of protection for these benefits.[103]

One approach to the question uses a "separation-from-service" analysis.[104] Under this analysis, the funding of benefits turns on whether the amending event disrupts the participants' jobs.[105] Employees who continue in the same job at the same desk[106] are not separated from service.[107] This is true even if the employees continue work for a different employer.[108] By focusing on the nature of the event that amends the plan, this approach is somewhat unusual.[109] If a company merger or sale amends the plan, this analysis protects the employees' interests in early retirement benefits because the amending event does not disrupt the employees' jobs.[110] If, however, the bankruptcy of a sponsor amends the plan, the employees forfeit all interests in those same benefits because the employees' jobs disappear along with the bankrupt company.[111]

The separation-from-service analysis originated in *Hollingshead v. Burford Equipment Co.*[112] In *Hollingshead*, the defendant, Burford Equipment Company (Burford), sold one hundred percent of its assets to Thompson Tractor & Equipment Company (Thompson).[113] The plaintiffs were former Burford employees who now worked for Thompson.[114] Although

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[103] *See infra* notes 104-70 and accompanying text (presenting conflicting analyses of several cases).

[104] *See infra* notes 105-33 and accompanying text (discussing separation-from-service method of analysis).

[105] *See* Hollingshead v. Burford Equip. Co., 809 F. Supp. 906 (M.D. Ala. 1992) (originating separation-from-service approach); *see infra* notes 112-33 and accompanying text (presenting *Hollingshead* analysis); *see also Gillis*, 4 F.3d at 1143-48 (using separation-from-service analysis); *see infra* notes 171-252 (discussing *Gillis* majority's opinion).

[106] *Hollingshead*, 809 F. Supp. at 916 (discussing "same desk" rule).

[107] *See supra* note 35 (defining separation from service).

[108] *See supra* note 35 (defining separation from service).

[109] *See Gillis*, 4 F.3d at 1151-52 (Stapleton, J., dissenting) (discussing fact that majority conceded that its approach accomplished inconsistent results); *see also infra* notes 265-71 and accompanying text (discussing impact of majority's approach).

[110] *Gillis*, 4 F.3d at 1151-52 (Stapleton, J., dissenting).

[111] *Id.*

[112] 809 F. Supp. 906 (M.D. Ala. 1992); *accord Gillis*, 4 F.3d at 1146-47.

[113] *Hollingshead*, 809 F. Supp. at 907. Burford Inc. owned 100% of Burford Equipment's stock. *Id.* Burford Equipment sold only its assets, and not its stock, to Thompson. *Id.* After the sale, Burford Equipment began to close down, but Burford Inc. was still a fully functioning company. *Id.*

[114] *Id.* at 916 (presenting plaintiffs' argument that they should be able to recover their

Burford agreed to fund most of the pension plan,[115] it balked at funding what the plaintiffs claimed were their accrued early retirement benefits.[116] Several other areas of conflict developed,[117] and the district court took up the case.[118]

The district court found that the Burford pension plan required employees to have reached age 55 and to have worked for Burford for at least 15 years before receiving early retirement benefits.[119] The court explained that employees need not satisfy these conditions prior to the sponsor's amending of the plan,[120] but could instead satisfy these conditions while working for Thompson.[121] The court emphasized that the plaintiffs had continued to sit in the "same desk" after the amendment.[122] Although the plaintiffs were technically separated from Burford,[123] the plaintiffs returned to work the day after the sale as though nothing had happened.[124]

In construing ERISA section 204(g), the *Hollingshead* court relied on language within a Senate Finance Committee report issued prior to REA.[125] This report suggests that sponsors may

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early retirement benefits because there had been no separation from service).

[115] Hollingshead v. Burford Equip. Co., 747 F. Supp. 1421 (M.D. Ala. 1990) (memorandum opinion). The Burford plaintiffs originally brought suit to force Burford to comply with ERISA. *Id.* at 1425. After the district court ruled that the Burford Plan was an ERISA-qualified plan, Burford moved for reconsideration. *Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 909 (M.D. Ala. 1992). Both plaintiff and defendant had also moved for summary judgment on the issue of early retirement benefits, so the court examined this issue as well on reconsideration. *Id.* at 913-18.

[116] *Id.* at 914 (presenting Burford's position that it was not responsible for funding early retirement benefits).

[117] *See Hollingshead*, 809 F. Supp at 908-09 (presenting *Hollingshead's* detailed and complicated procedural history). A discussion of the multiple conflicts that arose out of the Burford sale of its assets is not helpful to this discussion and is omitted here.

[118] *Id.* at 909.

[119] *Id.* at 914-16.

[120] *Id.* at 916 (citing language of ERISA § 204(g)); *see supra* note 93 (presenting text of § 204(g)).

[121] *Hollingshead*, 809 F. Supp. at 918.

[122] *Id.* at 917-18.

[123] *Id.* at 916 (discussing "same desk" rule).

[124] *Id.*

[125] *Id.* at 917-18. The report states that "[t]he bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment), has not met the preamendment requirements." S. REP. NO. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted in* 1984

reduce early retirement benefits where the participant is separated from service and has not met the preamendment conditions for the benefits.[126] Although the district court regarded this language as conclusive,[127] the phrase "separated from service" appears nowhere in the text of ERISA section 204(g).[128]

After deciding that the plaintiffs' early retirement benefits turned on whether there was a separation from service, the *Hollingshead* court turned to an IRC revenue ruling[129] that defined "separation from service."[130] Under the revenue ruling, no separation from service occurs where the employee works at the same job for a different employer.[131] Thus the court held the sale of Burford's assets to Thompson had not caused a separation from service,[132] and that Burford was liable for the plaintiffs' early retirement benefits.[133]

Although the separation-from-service analysis is one way courts have resolved early retirement benefits cases, other courts have looked to whether the early retirement benefit is an accrued benefit.[134] If an early retirement benefit is an accrued benefit, then a participant may accumulate the benefit over years of service.[135] If the plan sponsor amends or terminates the plan,

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U.S.C.C.A.N. 2547, 2574.

[126] S. REP. NO. 575; *see supra* note 125 (reproducing pertinent portion of report).

[127] *Hollingshead*, 809 F. Supp. at 918 (stating that because there was no separation from service, plaintiffs could continue to accrue early retirement benefits while working for Thompson).

[128] *See supra* note 92 (presenting text of ERISA § 204(g)).

[129] *Hollingshead*, 809 F. Supp. at 917-18 (quoting Rev. Rul. 79-336, 1979-2 C.B. 187). A revenue ruling is a published interpretation of federal income tax law by the Internal Revenue Service (IRS). Rev. Proc. 88-1, 1988-1 I.R.B. 7.

[130] Rev. Rul. 79-336, 1979-2 C.B. 187. This revenue ruling states that separation from service occurs only after employee death, retirement, resignation, or discharge. *Id.* No separation from service occurs when an employee continues in the same job for a different employer. *Id.*

[131] *Id.*

[132] *Hollingshead*, 809 F. Supp. at 917-18.

[133] *Id.* at 918.

[134] *See, e.g.*, Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990); Lear Siegler Aerospace Prods. Holding Corp. v. Smiths Indus., No. 88 Civ. 1528, 1990 U.S. Dist. LEXIS 2887 (S.D.N.Y. Mar. 16, 1990) (unreported opinion) (using approach different from separation-from-service analysis); *see also infra* notes 140-67 and accompanying text (discussing opinions in these two cases).

[135] *See infra* notes 139-66 and accompanying text (discussing accrued-benefit analysis).

the accumulated early retirement benefit vests in the participant.[136] However, if the benefit is not an accrued benefit, then no portion vests in the employee until the employee has actually taken early retirement.[137] Under this analysis, if a sponsor amends a plan while the early retirement benefits are still contingent and unaccrued, the employees lose the benefits.[138]

The Third Circuit used this accrued-benefit analysis in *Berger v. Edgewater Steel Co.*[139] In *Berger*, John Kirkwood purchased Edgewater Steel Company (Edgewater) and instituted a program of cutbacks and layoffs.[140] These cutbacks included the elimination of certain of Edgewater's early retirement benefits.[141] The new owner sent a letter to its employees dictating the changes and their effective date.[142] The plaintiffs were company employees who retired before the effective date of these changes in an attempt to reap the preamendment benefits.[143] Each plaintiff satisfied all of the Edgewater pension plan requirements except one: Edgewater had not agreed that it was in the company's best interests for any of the employees to retire.[144] Because the plaintiffs could not satisfy this final condi-

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[136] *See infra* notes 139-66 and accompanying text (discussing accrued-benefit analysis); *see also supra* notes 83-87 and accompanying text (discussing ERISA § 208's requirement that sponsors fund all accrued benefits after amending plan).

[137] *See infra* notes 139-66 and accompanying text (analyzing accrued-benefit analysis).

[138] *See infra* notes 139-66 and accompanying text (explaining how *Berger* and *Lear Siegler* courts reached conclusion that plaintiffs forfeited early retirement benefits).

[139] 911 F.2d 911 (3d. Cir. 1990).

[140] *Id.* at 913-14. Edgewater Steel was in serious financial trouble when John Kirkwood purchased it in 1986. *Id.* Although part of Kirkwood's cost-cutting measures included a reduction in workforce, Kirkwood terminated none of the plaintiffs in this case. *Id.*

[141] *Id.* at 914.

[142] *Id.* at 914-15. On January 15, 1987, Edgewater sent the letter dictating changes in early retirement benefits. *Id.* The five employee plaintiffs all announced their retirement prior to February 1, 1987, the stated date of the reductions' effectiveness. *Id.* The letter declared Kirkwood's intention to eliminate "special payments" and the $330 supplement associated with Edgewater's early retirement plan. *Id.* The special payments consisted of a one-time retirement payment equivalent to thirteen weeks of vacation pay. *Id.* The $330 supplement applied to each month's pension payment, but was contingent on the company's agreement that the employee's retirement was in the company's best interests. *Id.* at 914.

[143] *Berger*, 911 F.2d at 915. Edgewater paid the "special payments" to the retiring employees, but refused to pay the $330 supplements, citing the "mutual benefit" provision of the plan. *Id.* The plaintiffs argued that the $330 supplement was an accrued benefit which the sponsor could not arbitrarily deny. *Id.*

[144] *Id.* at 915. Edgewater refused to approve plaintiffs early retirement because they

tion, Edgewater refused to pay certain early retirement benefits.[145] The plaintiffs brought suit alleging multiple ERISA violations.[146] The district court, however, granted summary judgment on all of the plaintiffs' major claims.[147] The district court stated that the plaintiffs had not accrued the early retirement benefits because they had not satisfied the preamendment conditions for those benefits.[148] Because ERISA only protects accrued benefits,[149] the district court held that the plaintiffs forfeited their interest in the unaccrued early retirement benefits.[150]

The Third Circuit agreed with the district court and held that ERISA did not protect the plaintiffs' interests in the early retirement benefits.[151] In so holding, the *Berger* court relied on the same Senate Finance Committee report as did the *Hollingshead* court,[152] but focused on different language in the report.[153] The *Berger* court cited language that suggested that ERISA does not protect the early retirement benefits of participants who cannot meet the preamendment

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claimed that the company cost structure would not stand it. *See id.* at 915 (quoting Edgewater Steel representatives).

[145] *See id.* at 918 (stating that Edgewater had denied plaintiffs early retirement under plan).

[146] *Id.* at 915. Plaintiffs brought eight separate claims against Edgewater. *Id.* The district court dismissed the four state law claims because ERISA preempted them. *Id.* The remaining four claims asserted a variety of ERISA violations, including a claim that Edgewater had wrongfully denied the plaintiffs their early retirement benefits. *Id.*

[147] *Id.* at 915.

[148] *Id.* at 918, 920.

[149] ERISA § 204(g) (providing protection only to accrued benefits); *see supra* note 92 (presenting text of ERISA § 204(g)).

[150] Berger v. Edgewater Steel Co., 911 F.2d 911, 918, 920 (3d Cir. 1990); *see also supra* notes 91-100 and accompanying text (discussing how ERISA § 204(g) protects only accrued benefits). On reconsideration, the district court affirmed its prior decision, but ordered Edgewater to pay early retirement benefits to a few of the plaintiffs. *Berger*, 911 F.2d at 915-16. This order resulted from the court's finding that Edgewater had fraudulently amended the Edgewater plan. *Id.* Nonetheless, the plaintiffs appealed. *Id.* The Third Circuit held that Edgewater had not acted fraudulently in denying these benefits. *Id.* at 920. It therefore reversed the district court's order that Edgewater fund these benefits. *Id.*

[151] *Berger*, 911 F.2d at 918.

[152] *Id.*; *see* Hollingshead v. Burford Equip. Co., 809 F. Supp. 906, 917 (M.D. Ala. 1992) (quoting and relying on S. REP. NO. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574); *see also supra* note 125 (providing pertinent text of S. REP NO. 575).

[153] *Berger*, 911 F.2d at 918 (focusing on fact that employees could not satisfy preamendment condition of continued work for Edgewater).

requirements.[154] The Edgewater plan contained a provision that made early retirement benefits contingent on the company's approval[155] — a condition none of the plaintiffs could satisfy.[156] Therefore, according to the *Berger* court, the plaintiffs had forfeited their interests in the early retirement benefits.[157]

The *Berger* court is not the only court to use an accrued-benefit analysis to determine if plaintiffs are entitled to early retirement benefits.[158] In *Lear Siegler v. Smiths*,[159] the defendant, Smiths, purchased three Lear Siegler subsidiaries.[160] The two companies came to an agreement concerning each company's liability for funding the pension plan of the transferred employees.[161] Under the agreement, Lear Siegler retained liability for all benefits accrued prior to the transfer.[162] The companies later differed over who was responsible, and to what extent, for the early retirement benefits of those employees who qualified for the benefits after the transfer.[163]

The district court decided that under section 204(g), the early retirement benefits were not accrued benefits.[164] None of the plaintiffs had satisfied the Lear Siegler plan's age and service preamendment conditions for the early retirement benefits prior to the sale of the subsidiaries, and they would not be able to

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[154] *Id.* at 918.

[155] *Id.* at 915.

[156] *See Berger*, 911 F.2d at 919 (granting Edgewater almost total discretion to determine whether plaintiffs' retirement is in company's best interests).

[157] *Id.* at 920.

[158] *E.g.*, Lear Siegler Aerospace Prods. Holding Corp. v. Smiths Indus., No. 88 Civ. 1528, 1990 U.S. Dist. LEXIS 2887 (S.D.N.Y. Mar. 16, 1990); *accord* Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988); *see also infra* notes 159-66 and accompanying text (discussing these cases in more detail).

[159] *Lear Siegler*, LEXIS 2887.

[160] *Lear Siegler*, LEXIS 2887 at *1. The purchase price was $350,000,000. *Id.*

[161] *Lear Siegler*, LEXIS 2887 at *21. The parties' agreement stated that Smiths agreed to establish a pension plan that would recognize prior service for Lear Siegler for all purposes other than accrual of benefits. *Id.* Lear Siegler agreed to accept liability for those benefits accrued prior to the closing date of the sale. *Id.* Both Lear Siegler and Smiths thought that the other had accepted full liability for the early retirement benefits of the transferred employees. *Id.* at *8.

[162] *Id.* at *21.

[163] *Id.* at *8 (stating parties' claims).

[164] *Id.* at *38-39; *see also id.* at *29 (stating an accrued benefit under ERISA is that which employee would be entitled to if employment ceased at that moment).

satisfy the conditions in the future.[165] Because the plaintiffs no longer worked for Lear Siegler, it was not responsible for funding those benefits.[166]

Hollingshead, *Berger*, and *Lear Siegler* represent the predominant approaches to the status of early retirement benefits under ERISA.[167] Whether future courts require plan sponsors to fund early retirement benefits will turn on which of these approaches the courts prefer.[168] Each approach represents a different understanding of ERISA's treatment of early retirement benefits, and each has important implications for future employers and employees.[169] The Third Circuit considered these different approaches in *Gillis v. Hoechst Celanese Corp.*[170]

II. THE *GILLIS* DECISION[171]

The dispute in *Gillis* began when the American Hoechst Corporation merged with the Celanese Corporation.[172] The newly formed Hoechst Celanese Corporation sold its PVC[173] division to the American Mirrex Corporation.[174] This sale amended the Hoechst Celanese pension plan as it related to employees of the PVC division.[175] Leonard Gillis and Ross Sargeni were Ameri-

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[165] *Id.* at *1-3.

[166] *Id.* at *38-39.

[167] *See supra* notes 101-66 and accompanying text (presenting two major approaches to early retirement benefits issues).

[168] *See infra* notes 253-323 and accompanying text (describing implications of choosing separation-from-service approach over accrued-benefits approach).

[169] *See infra* notes 253-323 and accompanying text (describing implications of choosing separation-from-service approach over accrued-benefits approach).

[170] *See infra* notes 171-252 and accompanying text (discussing *Gillis* decision).

[171] The discussion in this section is drawn from the following three published opinions: Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3d Cir. 1993); Gillis v. Hoechst Celanese Corp., No. 90-5542, 1992 U.S. Dist. LEXIS 4984 (E.D. Pa. 1992); and Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805 (E.D. Pa. 1992). The statements of facts in these opinions do not contradict one another, but each court emphasized different details. All references within the text to "Gillis" or the *Gillis* court refer to the Court of Appeals' decision.

[172] *Gillis*, 818 F. Supp. at 806-07.

[173] Short for polyvinyl chloride, PVC (as it is more commonly called) is a thermoplastic resin used chiefly in phonograph albums, piping, and fabrics. THE RANDOM HOUSE COLLEGE DICTIONARY 1030 (1984).

[174] *Gillis*, 4 F.3d at 1140. At the time Hoechst Celanese sold the plaintiffs' division, Hoechst Celanese had 24,300 employees and annual sales of $4.6 billion. STANDARD & POOR'S REGISTER OF CORPORATIONS, DIRECTORS AND EXECUTIVES 1300 (1989).

[175] *See Gillis*, 4 F.3d at 1143 (discussing sale's consequences on plan); *see also supra* note

can Hoechst employees who worked for the PVC division before the merger and subsequent sale.[176] They continued to work for the PVC division after American Mirrex acquired it.[177] The acquisition did not disrupt either of the men's employment, and each continued to perform the same job he had performed for Hoechst Celanese.[178]

The plaintiffs claimed that ERISA required Hoechst Celanese to transfer money to the American Mirrex Retirement Plan sufficient to fund their early retirement benefits.[179] Hoechst Celanese had transferred funds to American Mirrex sufficient to satisfy other ERISA guaranteed benefits, but refused to fund the early retirement benefits.[180] Hoechst Celanese argued that it was not responsible for the early retirement benefits of departing employees who had not fulfilled the preamendment conditions for those benefits.[181] The plaintiffs argued that they had accrued the early retirement benefits over their years of employment with Hoechst and Hoechst Celanese.[182] Accordingly, the plaintiffs asked that Hoechst Celanese fund the early retirement benefits at a level commensurate with their years of employment.[183] When Hoechst Celanese refused, the two men filed a class action suit[184] in federal district court against Hoechst Celanese and the Hoechst Celanese Retirement Plan, asserting various claims.[185] Gillis and Sargeni sought to represent all for-

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16 (defining amendment).

[176] *Gillis*, 818 F. Supp. at 806-07.

[177] *Id.* at 806-07.

[178] *Gillis*, 4 F.3d at 1147.

[179] *Id.* at 1143.

[180] *Id.* at 1140.

[181] *Id.* at 1143-44 (presenting Hoechst Celanese's argument).

[182] *Gillis*, 4 F.3d at 1143-44 (presenting plaintiffs' argument).

[183] *Id.* at 1140, 1143.

[184] *Id.* at 1140. The plaintiffs sought to act as class representatives for all former Hoechst Celanese employees then working for American Mirrex. Gillis v. Hoechst Celanese Corp., No. 90-5542, 1992 U.S. Dist. LEXIS 4984 (E.D. Pa. 1992).

[185] *See Gillis*, 4 F.3d at 1140. Plaintiffs originally brought six claims. *Id.* The district court certified the plaintiffs as class representatives in two of these claims: Hoechst Celanese's alleged withholding of severance pay in violation of ERISA; and a state law claim, Hoechst Celanese's wrongful withholding of vacation pay. *Id.* The district court denied class certification on two other ERISA-based claims after ruling that ERISA § 204(g) did not apply: reporting and disclosure violations and wrongful reduction of early retirement benefits. *Id.* The two men pursued two additional claims individually. *Id.* This Note addresses only one claim at issue: plaintiffs' allegation that Hoechst Celanese must fund their early retirement

mer Hoechst Celanese employees then working for American Mirrex.[186]

The district court denied the plaintiffs' class certification on the early retirement benefits claim and later entered summary judgment for the defendants.[187] The district court relied on the Third Circuit's decision in *Berger*,[188] which held that similar early retirement benefits were not accrued benefits.[189] The district court held that because ERISA does not protect unaccrued benefits, the plaintiffs had forfeited the early retirement benefits.[190] The plaintiffs appealed the district court's decision and the Third Circuit reversed.[191]

Rejecting the district court's logic, the Third Circuit held that ERISA protected the plaintiffs' early retirement benefits.[192] According to the Third Circuit, ERISA required Hoechst Celanese to fund the plaintiffs' early retirement benefits even though the plaintiffs no longer worked for Hoechst Celanese.[193] The court based its holding on what it regarded as an emerging congruence of statutory language, legislative intent, case precedent, and wise social policy.[194]

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benefits. The district court denied plaintiffs' request for reconsideration of class certification on this issue. *Id.* at 1140 n.2. The Third Circuit subsequently remanded the issue of class certification after finding that the early retirement benefits were accrued benefits. *Id.* at 1148; *see infra* notes 192-235 and accompanying text (discussing court's analysis of benefits).

[186] *See supra* note 185 (providing details of plaintiffs' attempts to bring class action suit).

[187] *Gillis*, 4 F.3d at 1140 (summarizing procedural history of *Gillis*).

[188] Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805, 810 (E.D. Pa. 1992) (describing district court's reliance on Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990), which barred plaintiffs' claim for early retirement benefits); *see also infra* notes 280-84 and accompanying text (noting irony that *Gillis* court had to overcome another Third Circuit decision).

[189] *Gillis*, 818 F. Supp. at 810-11 (citing *Berger*, 911 F.2d at 917-18).

[190] *Gillis*, 818 F. Supp. at 810-11.

[191] *Gillis*, 4 F.3d at 1140; *see supra* notes 172-90 and *infra* notes 192-252 and accompanying text (describing Third Circuit's holding and rationale).

[192] Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1148 (3d Cir. 1993) (vacating district court's summary judgments and remanding issue of class certification, finding that district court had misinterpreted applicable ERISA provision).

[193] *Gillis*, 4 F.3d at 1147-48.

[194] *Id.* at 1143-48; *see also supra* notes 172-93 and *infra* notes 195-252 and accompanying text (discussing rationale for *Gillis* court's holding).

The Third Circuit's holding in *Gillis* relies in large part on the court's interpretation of ERISA section 204(g).[195] Section 204(g) provides that sponsors must treat early retirement benefits or retirement-type subsidies as accrued benefits.[196] Generally, plan sponsors cannot reduce or eliminate accrued benefits by amending their pension plans.[197] However, plan sponsors can reduce or eliminate a retirement-type subsidy if a participant fails to satisfy the preamendment conditions for the subsidy.[198] Employees may satisfy these preamendment conditions either before or after the sponsor amends the plan.[199] The ambiguity lies in whether a plan sponsor that wants to eliminate a retirement-type subsidy must give the plan participants the opportunity to satisfy preamendment conditions.[200]

The plaintiffs argued that section 204(g) requires that plan sponsors who seek to reduce retirement-type subsidies must afford plan participants the opportunity to satisfy the preamendment conditions.[201] This analysis presupposes an implied mandate in section 204(g) that requires plan sponsors to allow their employees to satisfy preamendment conditions.[202] In *Gillis*, the plaintiffs urged the court to allow them to count their years of service for their current employer, American Mirrex, toward satisfying the preamendment conditions for the early

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[195] *Gillis*, 4 F.3d at 1143-48.

[196] ERISA § 204(g); *see supra* notes 79-82, 91-100 and accompanying text (discussing ERISA § 204(g)'s effect on early retirement benefits).

[197] ERISA § 204(g). This section assures that a sponsor cannot decrease those accrued benefits that a plan participant has already earned. *Id.* However, ERISA § 204(g) does not prevent the sponsor from making prospective reductions. *See* Hoover v. Cumberland Md. Area Teamsters Pension Fund, 756 F.2d 977 (3d Cir.) (allowing prospective reduction), *cert. denied*, 474 U.S. 845 (1985).

[198] ERISA § 204(g).

[199] *Id.* Because § 204(g) only prohibits prospective reductions in benefits, early retirement benefits that do fall under this statute will be frozen at the level accrued at the point of termination. Rev. Rul. 85-6, 1985-1 C.B. 133. Plan participants who later satisfy the preamendment conditions (i.e., by continuing to work for sponsor) receive their early retirement benefits at that frozen level. *Id.*

[200] *Gillis*, 4 F.3d at 1143-44.

[201] *Id.* at 1144.

[202] *See id.* at 1144 (presenting plaintiffs' argument that Hoechst Celanese could not amend its plan unless it gave plaintiffs opportunity to satisfy preamendment conditions). *But see supra* note 92 (presenting text of ERISA § 204(g) and revealing absence of such mandatory language).

retirement benefits.[203] Hoechst Celanese, on the other hand, argued that the preamendment conditions required participants to satisfy age and service requirements while working for the plan sponsor.[204] Because none of the plaintiffs could satisfy the conditions, Hoechst Celanese argued that it was not liable for funding those benefits.[205] The court acknowledged that the statute is ambiguous[206] and admitted that one interpretation supported the defendants' position.[207] Ultimately, however, the court found other authorities prevailed, and favored the plaintiffs' argument.[208]

To interpret ERISA section 204(g), the *Gillis* court looked to a revenue ruling that discusses Internal Revenue Code (IRC) section 411(d)(6), the IRC counterpart to ERISA section 204(g).[209] Revenue Ruling 86-5[210] states that employees may satisfy the preamendment conditions for early retirement benefits after a sponsor has amended a plan.[211] According to the revenue ruling, employees who continue to work for an employer after the employer amends or terminates a plan can "grow into" their early retirement benefits.[212] The participants cannot accrue additional early retirement benefits after the amendment, but the benefits that they have already earned will be waiting for them when they reach early retirement age.[213] The revenue ruling adds that an employee who satisfies the preamendment condition for length of service would receive the early retirement benefits in an amount frozen as of the time of the plan amendment.[214] Although the revenue ruling did not discuss a fact situation similar to *Gillis*,[215] the *Gillis* court stated

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[203] *Gillis*, 4 F.3d at 1143.

[204] *Id.* at 1144. Rev. Rul. 85-6, 1985-1 C.B. 133 does not directly address this circumstance. *Id.*

[205] *Gillis*, 4 F.3d at 1144.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 1144-48; *see infra* notes 209-30 and accompanying text (discussing other extrinsic sources to which *Gillis* court turned).

[209] *Gillis*, 4 F.3d at 1145 (discussing Rev. Rul. 85-6, 1985-1 C.B. 133.); *see supra* note 51 (explaining that ERISA has counterparts within Internal Revenue Code).

[210] Rev. Rul. 85-6, 1985-1 C.B. 133.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *See* Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1145 (3d Cir. 1993) (stating no

that the same reasoning should apply when employees continue the same work for a new employer.[216] The court suggested that section 204(g) required Hoechst Celanese to fund the plaintiffs' early retirement benefits at preamendment levels.[217]

The *Gillis* court next looked to the legislative history of REA section 301, which amended ERISA to protect some early retirement benefits.[218] Section 301's legislative history suggests that an employer can reduce employee benefits when the employee has not met the preamendment conditions for those benefits prior to her "separation from service."[219] The court noted that "separation from service" does not appear in the text of ERISA section 204(g), IRC section 411(d)(6), or even REA section 301 itself, but nevertheless held that this language determined the plaintiffs' case.[220] Applying this separation-from-service concept to the facts before it,[221] the court ruled that the PVC division sale had caused no separation from service.[222]

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problem would exist had facts in *Gillis* been more similar to facts discussed in Rev. Rul. 85-6).

[216] *Id.*

[217] *Id.* at 1147-48.

[218] Retirement Equity Act § 301, 29 U.S.C. § 1054(g) (amending ERISA § 204(g) to protect accrued early retirement benefits). Prior to REA's enactment, ERISA afforded early retirement benefits no protection whatsoever. *See, e.g.*, Gluck v. Unisys Corp., 960 F.2d 1168, 1185 (3d Cir. 1992) (reaching that conclusion). The *Gillis* court focused on the phrase "separated from service" in the Senate Finance Committee's report. *See Gillis*, 4 F.3d at 1145-48 (analyzing S. REP. NO. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574). Ironically, the Hoechst Celanese defendants themselves introduced this language before the court. *See Gillis*, 4 F.3d at 1146 (stating that defendants hoped to convince court that plaintiffs had been separated from service).

[219] *See* S. REP. NO. 575 at 28. The pertinent text of the Senate Finance Committee report reads: "[REA] does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment), has not met the preamendment requirements." *Id.*

[220] *Gillis*, 4 F.3d at 1146-48 (admitting that "separation from service" does not appear in relevant statutes, but using it to decide case).

[221] "Separated from service" is a clearly understood and well defined phrase. *See supra* note 35 (defining separation from service). No separation from service occurs when an employee continues to work at the same job. *See generally*, Rev. Rul. 79-336, 1979-2 C.B. 187 and Rev. Rul. 80-129, 1980-1 C.B. 86; *supra* note 35 (discussing Rev. Rul. 79-336). The issue is not whether "separation from service" is correctly defined, but whether it should play any role in the analysis of the *Gillis* case. This Note concludes that it should not. *See infra* notes 256-93 and accompanying text (analyzing *Gillis* court's reasoning).

[222] *Gillis*, 4 F.3d at 1147 (concluding that plaintiffs were not separated from service and thus could continue to accumulate years of service).

Finally, the *Gillis* majority identified one case in support of its decision: *Hollingshead v. Burford Equipment Co.*[223] In *Hollingshead*, the federal district court had considered facts almost identical to those in *Gillis*.[224] Applying the same logic, and the same "separation-from-service" language from REA section 301, the courts in *Hollingshead* and *Gillis* reached the same result.[225] The *Hollingshead* court held that employees who had not experienced a separation from service had a nonforfeitable right to their early retirement benefits.[226] The majority in *Gillis* held that the plaintiffs could satisfy the preamendment conditions for their early retirement benefits because the division sale had not disrupted their jobs.[227] The affected employees had continued to sit at the "same desk"[228] and had not experienced a separation from service.[229] According to the majority, amended section 204(g) protected plaintiffs' accrued interests in their early retirement benefits.[230]

In dissent, Judge Stapleton interpreted ERISA section 204(g) differently.[231] According to Judge Stapleton, early retirement benefits that have not vested at the point of plan termination are forfeitable unless the participants can satisfy the preamendment conditions during employment for the plan sponsor.[232] Judge Stapleton therefore accepted Hoechst Celanese's contention that its plan required plaintiffs to satisfy age and service requirements while working for Hoechst Celanese.[233] The *Gillis* plaintiffs no longer worked for the plan

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[223] *Id.* at 1146; 809 F. Supp. 906 (M.D. Ala. 1992).

[224] *Gillis*, 4 F.3d at 1146-47 (discussing similarities between two cases).

[225] *Hollinsghead*, 809 F. Supp. at 916-18; *Gillis*, 4 F.3d at 1147 (agreeing explicitly with reasoning of *Hollingshead* court).

[226] *Gillis*, 4 F.3d at 1147; *Hollingshead*, 809 F. Supp. at 917-18.

[227] *Gillis*, 4 F.3d at 1147; *see infra* notes 256-75 and accompanying text (discussing court's finding that *Gillis* plaintiffs had been separated from service).

[228] *See Hollingshead*, 809 F. Supp. at 916 (making reference to "same desk" rule). Under this rule, an employee who returns to work the day after a plan termination as though nothing has happened has experienced no separation from service. *Id.*

[229] *Gillis*, 4 F.3d at 1146-47.

[230] *Id.*

[231] *Id.* at 1152 (Stapleton J., dissenting) (stating that statutory language of §§ 1054, 1058, and 1344 dictates that early retirement benefits at issue are not accrued benefits and thus ERISA does not protect them).

[232] *Id.*

[233] *Id.* at 1151-52 (stating that dissent would apply same rules that court would apply in

sponsor, Hoechst Celanese, and would have no opportunity to do so in the future.[234] Therefore, according to the dissent, the defendants owed the plaintiffs no funding for these forfeitable benefits.[235]

The dissent also pointed to ERISA section 208, which provides that after a plan terminates, all participants are entitled to what they would have been entitled to immediately prior to the amending event.[236] In other words, the plaintiffs in *Gillis* were entitled to what they would have received if the plan had terminated immediately before the sale of the PVC division.[237] Those non-forfeitable benefits, and the money necessary to fund those benefits, marked the "floor of permissibility"[238] on the transfer of funds from Hoechst Celanese to American Mirrex.[239] Because section 208 would not protect early retirement benefits following a sponsor bankruptcy,[240] the dissent did not think that section 208 should protect those same benefits in the *Gillis* case.[241] According to Judge Stapleton, Hoechst

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case of bankruptcy). In a bankruptcy, Hoechst Celanese would be responsible for none of the early retirement benefits at issue here. *Id.*; *see infra* notes 265-71 and accompanying text (discussing implications of these inconsistent results).

[234] *Gillis*, 4 F.3d at 1151-52.

[235] *Id.*

[236] ERISA § 208. Section 208 provides that a plan "may not . . . transfer its assets or liabilities to any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the . . . transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the . . . transfer." *Id.*

[237] *Id.*; *Gillis*, 4 F.3d at 1151-52 (Stapleton, J., dissenting) (arguing that majority's holding leads to inconsistent results).

[238] Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1151 (3d Cir. 1993) (Stapleton, J., dissenting) (using "floor of permissibility" phrase in arguing that Hoechst Celanese had satisfied minimal level of funding). Under ERISA § 208, Hoechst Celanese must transfer to American Mirrex funding sufficient to pay the present value of all benefits plan participants would receive if the plan was terminated immediately prior to the transfer. ERISA § 208. In other words, the plan participants may not be left in a worse position after a transfer than they would have been in if the plan were dissolved. *Gillis*, 4 F.3d at 1151; ERISA § 208; Rev. Rul. 81-212, 1981-2 C.B. 99.

[239] *See Gillis*, 4 F.3d at 1151-52 (Stapleton, J., dissenting) (arguing that Hoechst Celanese owed plaintiffs no further funding of early retirement benefits).

[240] *See Gillis*, 4 F.3d at 1152 (Stapleton, J., dissenting) (stating agreement of majority and dissent that § 208 does not protect early retirement benefits in bankruptcy).

[241] *Id.* (Stapleton, J., dissenting) (stating that majority's separation-from-service analysis turns on immaterial differences between *Gillis* situation and bankruptcy).

Celanese had transferred money sufficient to satisfy section 208's minimal funding requirements.[242]

The *Gillis* majority did not specifically analyze the policies driving its decision, but appeared primarily concerned with employee expectations.[243] The plaintiffs in *Gillis* had worked first for Hoechst, and then later for Hoechst Celanese.[244] After the Hoechst and Celanese corporations merged, the resulting plan amendment affected none of the plaintiffs' pension benefits.[245] The plaintiffs likely believed that the sale of the PVC division to American Mirrex would also not affect their pension benefits.[246] The plaintiffs had worked at their jobs for many years, and presumably intended to continue working at those jobs until they retired.[247] The *Gillis* decision may represent an attempt by the court to enforce what it thought were the employer's promises to the plaintiffs.[248]

In its initial discussion of the plaintiffs' claim, the court provided a short history of ERISA and the interests Congress intended ERISA to protect.[249] The court stated that Congress enacted ERISA to prevent the unexpected loss of benefits.[250] In the same analysis, the court implied that Congress adopted REA to protect employees from the unexpected loss of early retirement benefits.[251] Convinced that Congress intended to protect the plaintiffs' early retirement benefits, the court held that ERISA required Hoechst Celanese to fund these benefits.[252]

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[242] *Id.* (Stapleton, J., dissenting) (stating that benefits were not accrued benefits and thus Hoechst Celanese did not have to provide for them).

[243] *See infra* notes 244-52 and accompanying text (discussing possibility that *Gillis* court attempted to enforce what it viewed as Hoechst Celanese's promises to its employees).

[244] Gillis v. Hoechst Celanese Corp., 818 F. Supp. 805, 807 (E.D. Pa. 1992).

[245] *Id.*

[246] *Id.*

[247] *See Gillis*, 4 F.3d at 1147-48 (stating that Hoechst Celanese had to fund only those benefits which plaintiffs had accumulated prior to PVC division's sale). If the plaintiffs did not continue working for American Mirrex until retirement, a separation from service would occur. *See supra* note 35 (defining "separation from service").

[248] *See Gillis*, 4 F.3d at 1143 (stating that Congress enacted ERISA to address fear that private pension plan participants were losing anticipated retirement benefits).

[249] *Gillis*, 4 F.3d at 1143.

[250] *Id.*

[251] *See id.* (implying that similar policies drove Congress to enact ERISA and REA).

[252] *Gillis*, 4 F.3d at 1147-48.

III. ANALYSIS AND CRITICISM OF *GILLIS*

The *Gillis* majority came to an appealing but misguided conclusion.[253] Although the *Gillis* majority sought to protect the interests of employee plaintiffs, the separation-from-service analysis will do more harm than good.[254] The *Gillis* court provided a standard that will offer little protection to future employees.[255]

A. The Magical Adhesion Process

The *Gillis* holding relies on the interplay between REA section 301 and ERISA section 204(g).[256] The majority's decision presupposed that section 301's legislative history determines the meaning of section 204(g).[257] In doing so, the majority relied on statutory language that is conspicuously missing from any of the statutes applicable to the resolution of this case.[258] The majority excised "separated from service" from the legislative history of section 301 and read it into the statute.[259] Through this judicial adhesion process, the phrase became a part of ERISA section 204(g) and IRC section 411(d)(6) as well.[260] Without a satisfactory explanation for according this bit of legislative history such deferential treatment,[261] the majority proceeded to search for a meaning for the phrase.[262] The court found a

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[253] *See infra* notes 256-323 and accompanying text (detailing majority's misguided policy and faulty reasoning).

[254] *See infra* notes 294-323 and accompanying text (discussing negative effects *Gillis* may engender).

[255] *See infra* notes 294-323 and accompanying text (discussing policy implications of *Gillis*).

[256] *Gillis*, 4 F.3d at 1143-47; *see supra* notes 196-222 and accompanying text (considering whether REA § 301 alters ERISA § 204(g) so as to allow terminated plan participants to satisfy preamendment conditions while working for employer other than plan sponsor).

[257] *See Gillis*, 4 F.3d at 1145; *see supra* notes 172-230, 243-52 and accompanying text (discussing majority's analysis).

[258] *See Gillis*, 4 F.3d at 1146 (admitting absence of "separation-from-service" language from relevant statutes).

[259] *Id.* at 1146-48; *see supra* notes 218-22 and accompanying text (describing how majority made REA § 301's legislative history determinative of REA section 301, ERISA § 204(g), and I.R.C. § 411(d)(6)).

[260] *Gillis*, 4 F.3d at 1146-48; *see supra* notes 218-222 and accompanying text (describing how legislative history of REA § 301 determined meaning of other statutes).

[261] *See Gillis*, 4 F.3d at 1145-48 (providing no explanation whatsoever for why court found such power in legislative history of REA § 301).

[262] *Id.* at 1146 (relying on Rev. Rul. 79-336, 1979-2 C.B. 187 after acknowledging that

definition within revenue rulings that address entirely different issues[263] and applied the definition to the case before it.[264]

The extent of protection the law affords participants in pension plans should not turn on such a questionable analysis.[265] As the dissent points out, the majority focused on portions of section 301's legislative history that are irrelevant in interpreting section 204(g).[266] The dissent argues that rather than searching for a separation from service, courts should apply the same rules applied in the case of a liquidation or bankruptcy.[267] In situations of liquidation or bankruptcy, ERISA protects early retirement benefits only to the extent that employees can satisfy the preamendment conditions while working for the plan sponsor.[268] The *Gillis* approach sacrifices consistency and predictability by making the funding of early retirement benefits turn on the nature of the amending event.[269] For example, the majority's reasoning would not have protected the *Gillis* plaintiffs' interests if Hoechst Celanese had liquidated the PVC division instead of selling it to American Mirrex.[270] In that case, the employees would no longer sit at

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language within it was absent from relevant statutes).

[263] *Id.*

[264] *See id.* at 1147-48 (concluding that ERISA protected plaintiffs' benefits because no separation from service had occurred).

[265] *See infra* notes 266-71 and accompanying text (explaining why separation-from-service standard should not control).

[266] *Gillis*, 4 F.3d at 1152 (pointing out that majority's sources offer no guidance).

[267] ERISA § 204(g). This statute applies to all plan changes. *Id.* However, *Gillis* holds that the statute treats early retirement benefits differently depending on the nature of the event that amends the plan. *Gillis*, 4 F.3d at 1148 (holding that ERISA protected plaintiffs' early retirement benefits because the PVC division sale did not cause separation from service). The majority conceded that this result would not hold if the sponsor liquidated the company or went into bankruptcy. *See id.* at 1152 (Stapleton J., dissenting) (presenting dissent's interpretation of majority's position). An employee who loses her job after her employer goes bankrupt or liquidates cannot satisfy the pre-amendment conditions for early retirement benefits. *Id.* One of the necessary conditions is service to the plan sponsor. *Id.*

[268] *See infra* notes 294-323 and accompanying text (presenting policy implications of *Gillis*).

[269] *See infra* notes 298-308 and accompanying text (explaining inconsistent results that flow from *Gillis* analysis).

[270] *See Gillis*, 4 F.3d at 1151-52 (Stapleton, J., dissenting) (explaining inconsistent results that flow from majority's analysis). If Hoechst Celanese had declared bankruptcy instead of selling the PVC division to American Mirrex, Hoechst Celanese would not be liable for the early retirement benefits at issue in this case. *Id.* Instead, employees in whom the early

any desk, and there would be little question that a separation from service had occurred.[271]

The *Gillis* majority did not appear to appreciate the inconsistencies that its analysis engenders.[272] Instead, the majority appeared to reach the result it preferred and then search for support afterward.[273] In this vein, the *Gillis* court cited a single district court case to support its result.[274] The *Gillis* court then dismissed contrary Third Circuit and district court decisions, stating that the holdings in these cases rested on other grounds or were irrelevant to the case at bar.[275]

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retirement benefits had not yet vested would forfeit all claim to those benefits. *See* ERISA § 204(g) (providing that claimants must be able to satisfy pre-amendment conditions for vesting). Because the plaintiffs in *Gillis* could not have rendered any more service to Hoechst Celanese under the bankruptcy scenario, they would forfeit all claims to their early retirement benefits. *Gillis*, 4 F.3d at 1152 (pointing out that majority must concede that its logic generates inconsistent results).

[271] *See* Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990) (developing separation-from-service line of reasoning).

[272] *See Gillis*, 4 F.3d at 1143-48 (failing to address fact that separation-from-service analysis does not protect employees in case of bankruptcy or liquidation); *see also id.* at 1151-52 (expressing dissent's amazement that majority would allow nature of event that amends plan to determine whether plan participants are entitled to benefits).

[273] *See infra* notes 298-317 and accompanying text (discussing how *Gillis* majority's reasoning may lead to almost complete sponsor control of early retirement benefits). The *Gillis* majority may not have fully understood the implications of its decision. *See supra* note 272 (discussing dissent's disbelief that majority meant what it said).

[274] *Gillis*, 4 F.3d at 1143-48.

[275] *See infra* notes 276-93 and accompanying text (discussing majority's treatment of relevant contrary cases). Additionally, the majority failed to reconcile the conflicting district court cases, summarily finding them unpersuasive. *See Gillis*, 4 F.3d at 1147 (dismissing, for example, Berard v. Royal Electric Inc., 795 F. Supp. 519 (D.R.I. 1992) because it followed analysis of *Lear Siegler* court). Although the *Berard* court added little analysis of its own to the *Lear Siegler* approach, *Gillis*, 4 F.3d at 1147, the *Gillis* court added little to the analysis presented in *Hollingshead*. *See generally Gillis*, 4 F.3d at 1146-48 (accepting explicitly *Hollingshead* approach). Additionally, two recent appellate court cases have suggested that ERISA does not protect early retirement benefits such as those at issue in *Gillis*. *See* Fuller v. FMC Corp., 4 F.3d 255, 260-61 (4th Cir. 1993); Awbrey v. Pennzoil Co., 961 F.2d 928, 932 (10th Cir. 1992) (stating that clear language of plan required retirement before collection of early retirement benefits). Because none of the plaintiffs had retired, none were entitled to early retirement benefits. *Id.* Although these cases do not deal with the application of ERISA § 204(g) per se, the courts' attitudes likely will carry over to their interpretations of the ERISA statute. *See infra* Part III of this Note (discussing policy implications of *Gillis*).

1. The Perils of Relying On Lone Precedents

Of the various cases that have construed section 204(g), the *Gillis* majority relied exclusively on *Hollingshead v. Burford Equipment Co.* to support its holding.[276] The facts in this case were almost identical to the facts presented in *Gillis*.[277] As in *Gillis*, the *Hollingshead* court construed ERISA section 204(g) in light of the "separation-from-service" language it found in the Senate Finance Committee report.[278] To rely exclusively on *Hollingshead*, however, the *Gillis* court had to distance itself from other distinctly unsupportive cases.[279]

The first of these cases is a prior Third Circuit decision.[280] In *Berger v. Edgewater Steel Co.*, the court stated that early retirement benefits virtually identical to those in *Gillis* were not accrued benefits.[281] The *Gillis* majority nonetheless stated that *Berger* did not conflict with its analysis.[282] The *Gillis* majority believed that the *Berger* court had implicitly found a separation from service even though no party had raised that argument in *Berger*.[283] Because the plaintiffs in *Berger* had voluntarily separated themselves from service before satisfying the preamendment conditions, the *Gillis* court reasoned that they had no right to the early retirement benefits.[284]

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[276] *Gillis*, 4 F.3d at 1146-48; *see also supra* notes 223-30 and accompanying text (discussing majority's exclusive reliance on *Hollingshead*).

[277] *Gillis*, 4 F.3d at 1146 (discussing similarities between *Gillis* and *Hollingshead*).

[278] *See* Hollingshead v. Burford Equip. Co., 809 F. Supp. 906, 917-18 (M.D. Ala. 1992) (citing S. REP. NO. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574 and applying separation-from-service language); *see also supra* note 35 (defining separation from service).

[279] *Gillis*, 4 F.3d at 1147 (distinguishing earlier Third Circuit decisions as well as other contrary authority).

[280] *See id.* (citing Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990)); *see also supra* notes 140-51 and accompanying text (presenting detailed analysis of *Berger*).

[281] *Berger*, 911 F.2d at 918.

[282] *Gillis*, 4 F.3d at 1147.

[283] *Id.* (concluding that separation from service existed in *Berger*). Although the majority reconciles *Berger* by finding that a separation from service occurred therein, the plaintiffs in *Berger* would not have been better off without such a separation. *Id.* at 1151-52. Because the *Berger* plaintiffs had to satisfy the pre-amendment conditions to obtain the benefit, and because those conditions included the consent of Edgewater Steel, Edgewater would never be liable for those benefits. *See* ERISA § 204(g) (setting no guidelines for arbitrariness of employer-imposed conditions). The majority's reasoning offers important planning lessons for plan sponsors. *See infra* Part III (discussing policy implications of majority rule in *Gillis*).

[284] *Gillis*, 4 F.3d at 1147.

The second problematic case for the *Gillis* majority to overcome was *Lear Siegler v. Smiths.*[285] Discussing benefits similar to those in *Gillis*, the district court in *Lear Siegler* held that the early retirement benefits were not accrued benefits.[286] The *Gillis* majority downplayed the precedential value of *Lear Siegler* by contending that it too had been implicitly decided on other grounds.[287] After stating that the district court in *Lear Siegler* had implicitly used the separation-from-service analysis, the majority went on to suggest that the court had misapplied the standard.[288] Although the *Lear Siegler* court had not considered the separation-from-service issue, the *Gillis* court suggested the *Lear Siegler* court had incorrectly found a separation from service where there was none.[289]

The *Gillis* court did not recognize that these contrary cases used an analysis entirely different from its own.[290] Instead of considering whether a separation from service had occurred, the *Berger* and *Lear Siegler* courts only considered whether the early retirement benefits were accrued benefits.[291] The *Gillis* majority mischaracterized the basis for these decisions and then dismissed them as unpersuasive.[292] This saved the *Gillis* court the trouble of confronting other contrary cases that relied on the *Berger* and *Lear Siegler* decisions.[293]

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[285] *Id.* at 1147 (citing Lear Siegler Aerospace Prods. Holding Corp. v. Smiths Indus., Inc., No. 88 Civ. 1528, 1990 U.S. Dist. LEXIS 2887, (S.D. N.Y. 1990)); *see supra* notes 160-67 and accompanying text (discussing *Lear Siegler* in detail).

[286] *Lear Siegler*, LEXIS 2887 at *38 (stating that employee cannot "grow into" her right to subsidy when she no longer works for plan sponsor). According to the *Lear Siegler* court, ERISA § 204(g) protects only those benefits for which an employee can meet the preamendment requirements. *Id.*

[287] *Gillis*, 4 F.3d at 1147 (stating that *Lear Siegler* had rested on implied finding of separation from service).

[288] *See id.* at 1147 (stating that *Lear Siegler* court had found separation from service in situation identical to *Gillis*, where according to *Gillis* court no separation from service had occurred). The plaintiffs in *Lear Siegler* moved with the sold subsidiary and performed the same jobs for the new employer. *Lear Siegler*, LEXIS 2887 at *1.

[289] *See Lear Siegler*, LEXIS 2887 (revealing that separation-from-service analysis played no role in court's holding).

[290] *See Gillis*, 4 F.3d at 1147 (dismissing other district court cases that followed reasoning of *Berger* and *Lear Siegler*).

[291] *See supra* notes 139-66 and accompanying text (discussing approach of *Berger* and *Lear Siegler* courts).

[292] *See supra* notes 280-89 and accompanying text (detailing *Gillis* court's failure to understand approach of *Berger* and *Lear Siegler* courts).

[293] *See Gillis*, 4 F.3d at 1147-48 (refusing to address adequately Hlinka v. Bethlehem

B. Impact of Gillis

The *Gillis* decision likely will have far reaching effects.[294] *Gillis*, in essence, holds that the nature of the event that amends a pension plan affects the extent of employer liability for early retirement benefits.[295] In applying the *Gillis* rule, courts may find that the results are as unfair as the outcome the *Gillis* court tried to avert.[296] Employees may find that *Gillis* hurts more than it helps.[297]

Whatever the majority's intent, *Gillis* does not offer much comfort to future employees whose employers deny them promised early retirement benefits.[298] If those employees decide to sue for their benefits, they will first have to establish the nature of the event that amended their pension plan.[299] *Gillis* does not assist employees whose company has declared bankruptcy, or those whom corporate downsizing has victimized.[300] A separation from service preempts all claims for the sort of early retirement benefits found in *Gillis*.[301] *Gillis*' uneven treatment of employees is unfair because early retirement benefits depend on events over which the employees have no control.[302] *Gillis* helps those who need it least: employees

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Steel, 863 F.2d 279 (3d Cir. 1988) and Berard v. Royal Electric, Inc., 795 F. Supp. 519 (D.R.I. 1992) for example).

[294] Gillis v. Hoechst Celanese Corp., LEXIS 26510, *1 (3d Cir. 1993) (denying defendants' petition for rehearing). Only Judge Stapleton and one other judge, Judge Becker, voted to grant a rehearing. *Id.* More recently, the United States Supreme Court denied the defendants' petition for certiorari. Hoechst Celanese Corp. v. Gillis, 114 S. Ct. 1540 (1994). *See also infra* notes 295-323 and accompanying text (discussing likely impact of *Gillis* decision).

[295] Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1151-52 (Stapleton, J., dissenting).

[296] *See supra* notes 265-71 and *infra* notes 297-323 and accompanying text (discussing unfair results that *Gillis* decision engenders).

[297] *See infra* notes 305-17 and accompanying text (discussing how *Gillis* gives sponsors almost unfettered control of early retirement benefits).

[298] *See infra* notes 300-17 and accompanying text (discussing problems employees may face in trying to make *Gillis* decision work for them).

[299] *Gillis*, 4 F.3d at 1152 (Stapleton, J., dissenting) (pointing out that majority itself concedes inconsistent results flow from its reasoning).

[300] *Id.*

[301] *See Id.* at 1147-48 (concluding that ERISA protected plaintiffs' early retirement benefits because there had been a separation from service).

[302] *Id.*

whom the change has left relatively unaffected and who have experienced no separation from service.[303] *Gillis* fully protects these employees' early retirement benefits.[304]

Or does it? *Gillis* may ultimately frustrate employee recovery of early retirement benefits.[305] Plan sponsors will not likely be enthusiastic about a system that requires them to set aside money for benefits that an ex-employee may never collect.[306] A sponsor may have to wait decades to determine if an employee will satisfy the preamendment conditions and claim the benefits.[307] As a result, employers may significantly reduce the amount of early retirement benefits that their plans offer.[308]

Employers may also follow Edgewater Steel's lead and seek to make early retirement benefits contingent on some event within the employer's control.[309] If employers insist on making early retirement benefits contingent on their approval, the separation-from-service standard will become moot.[310] Even if employees

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[303] *Id.*; *see supra* notes 195-230 and accompanying text (discussing court's reliance on separation-from-service standard).

[304] *Gillis*, 4 F.3d at 1147-48. Hoechst Celanese employees who worked for the PVC division may accumulate years of service toward qualifying for early retirement benefits despite the fact they no longer work for Hoechst Celanese, but a successor employer. *Id.*

[305] *See infra* notes 306-17 and accompanying text (discussing ways in which employers may avoid *Gillis* result).

[306] *See, e.g. Gillis*, 4 F.3d at 1147 (holding that Hoechst Celanese must transfer to American Mirrex sufficient money to fund plaintiffs' early retirement benefits at preamendment levels). Because qualification for early retirement benefits generally hinges on a "years of service" requirement, Hoechst Celanese may not know until decades later whether a particular employee will qualify for the benefits. *Id.*

[307] *Id.*

[308] *See Gillis*, 4 F.3d at 1144 (presenting defendant's argument). Because Hoechst Celanese had not anticipated paying for plaintiffs' early retirement benefits, it made less money on the sale of the subsidiaries than it otherwise would have; *id.* at 1147-48 (holding Hoechst Celanese liable for those benefits).

[309] *See* Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 285-86 (3d Cir. 1988) (holding acceptable clause that made early retirement benefits contingent on employee's retirement being in interests of company); Berger v. Edgewater Steel Co., 911 F.2d 911, 918-19 (3d Cir. 1990) (upholding similar clause).

[310] *See Berger*, 911 F.2d at 918-19 (discussing employer's wide discretion in imposing conditions on receipt of benefits). Under *Gillis*, had no separation from service occurred in *Berger*, the *Berger* plaintiffs would be in the same position as if a separation from service had occurred. *See Gillis*, 4 F.3d at 1146 (quoting REA § 301 as protecting only those benefits for which employee can satisfy preamendment conditions). Because Edgewater Steel refused to consent to any early retirements under the plan, the *Berger* plaintiffs would never be able to satisfy the preamendment conditions. *See Berger*, 911 F.2d at 915 (stating that Edgewater decided not to consent to early retirements).

continue to sit at the same desk and perform the same job, they may never be able to satisfy the preamendment conditions.[311]

Alternatively, employers may control the nature of the event that leads to plan termination.[312] The expense of funding early retirement benefits may lead employers to liquidate or declare bankruptcy rather than sell a financially troubled company or division.[313] Employees may not only lose their early retirement benefits but also their jobs.[314] In contrast with the *Gillis* case, employees in this situation forfeit their interest in early retirement benefits for which they have not yet qualified at the point of termination.[315] Because excess pension fund assets revert to the plan sponsor,[316] employers may find this option irresistible.[317]

Finally, under *Gillis*, the burden of paying for early retirement benefits may eventually fall on the taxpayer.[318] Currently, ERISA provides for termination insurance under the auspices of the Pension Benefit Guaranty Corporation (PBGC).[319] The PBGC is self-financed, raising funds by assessing levies against its

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[311] *See supra* note 310 (discussing application of *Gillis* analysis to *Berger*).

[312] *See Gillis*, 4 F.3d at 1147-48 (holding that level of employer liability turns on nature of event that amends plan).

[313] *Id.*

[314] *Id.*

[315] *See supra* notes 265-71 and accompanying text (discussing inconsistent results).

[316] ERISA § 4044(d)(1) (providing for such reversion once sponsor satisfies all plan's liabilities).

[317] *Cf.* LANGBEIN & WOLK, *supra* note 2, at 646-49. The history of the overfunded pension plan offers a comparative model suggesting that employers would likely succumb to the temptation of asset reversion. *Id.* In the 1980's, the steady stock market rise caused pension plan assets to increase dramatically in value. *Id.* at 648. Sponsors began to terminate their plans in order to recover this surplus. *Id.* Over a two year period, 848 such terminations occurred, yielding asset reversions in excess of $10.9 billion. *Id.* at 649. Although a heavy excise tax eventually brought these terminations to an end, *id.* at 648-49, it is not clear that a similar tax would prevent an employer from deciding to liquidate rather than sell. *Id.* at 646-49.

[318] *See infra* notes 319-23 and accompanying text (discussing possibility that taxpayers may eventually be liable for pension debt).

[319] *See* Alicia H. Munnell, *Guaranteeing Private Pension Benefits: A Potentially Expensive Business, in* ERISA AND BANKRUPTCY, at 9, 11-34 (PLI Commercial Law and Practice Course Handbook Series No. 296, 1983) (describing Pension Benefit Guaranty Corporation's (PBGC) guarantee of private pension benefits). If a pension plan terminates without sufficient assets to pay ERISA-guaranteed benefits, the PBGC guarantees the payment of at least a portion of the benefits. *Id.* at 11. The maximum guaranteed benefit level is indexed with Social Security benefits. *Id.* at 13.

member corporations.[320] A point may come, however, when member fees will not cover employee claims.[321] *Gillis* may hasten this day by increasing the number of claims that the PBGC must cover.[322] If Congress ever offers the federal government as the insurer of the nation's private pension system, all American taxpayers may pay for the *Gillis* decision.[323]

CONCLUSION

Congress enacted ERISA to protect employee expectations.[324] Prior to *Gillis*, however, Congress did not specify how it intended ERISA to treat early retirement benefits after a plan sponsor amends a plan.[325] The *Gillis* court sought to protect employee expectations by making the employer live up to its promises.[326] In striving to achieve this goal, however, the *Gillis* court was misguided both in its analysis[327] and in its vision.[328] Although well-intentioned and appealing on its facts, the *Gillis* decision ultimately will cost employees much more than their early retirement benefits.[329]

Kris Wehrmeister

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[320] *See* CANAN, *supra* note 8, at §§ 19.1-19.12 (providing detailed analysis of PBGC's role in realm of private pension insurance).

[321] *See* Munnell, *supra* note 319, at 12 (speculating on whether taxpayers may eventually be liable for pension debt). The PBGC has little power to ensure that private pension plans are adequately funded. *Id.* at 34. It has almost no ability to control the activities of plan sponsors, and often has no reliable information about a pension plan until the plan terminates. *Id.*

[322] *Id.* at 34. Even before *Gillis*, the main threat to the financial viability of the PBGC was the single employer private pension system. *Id.*

[323] *Id.* at 34 (suggesting that without major changes, federal government may well have to step in as insurer).

[324] *See supra* notes 1-56 and accompanying text (describing congressional intent in enacting ERISA and providing preliminary discussion of *Gillis*).

[325] *See supra* notes 57-170 and accompanying text (surveying context against which *Gillis* came before Third Circuit).

[326] *See supra* notes 171-252 and accompanying text (discussing *Gillis* opinion).

[327] *See supra* notes 253-93 and accompanying text (criticizing *Gillis*' analysis).

[328] *See supra* notes 294-323 and accompanying text (describing potential adverse impact of *Gillis*).

[329] *See supra* notes 253-323 and accompanying text (analyzing and criticizing *Gillis*).