PANEL 1: SETTING THE STAGE: HISTORY BEFORE THE NINETY-THIRD CONGRESS

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PANELISTS:

Frank Cummings, past Chief of Staff to Senator Jacob Javits

Henry Rose, past General Counsel, Pension Benefit Guaranty Corporation

Daniel Halperin, Stanley S. Surrey Professor of Law, Harvard Law School

Christy Bergstresser[1]: Good morning. I would like to also express my sincere thanks to everyone here today and to kick things off I'm going to start by introducing Steven Sass. Steven is going to be our lead moderator for the first panel. Steven is on staff at the Center for Retirement Research at Boston College, where he is the program director for the Financial Security Project. So, at this point I will give it over to Steve to lead us in our first discussion. Thank you.

Steven Sass: Thank you. We have a lot to do so we're going to try to keep the overhead to a minimum. I'd just like to say that from the conversations last evening I found that there's a significant difference of opinion about what ERISA got right and what it got wrong and I don't know if this conference will change anybody's opinion about what it got right or wrong, but we're hoping that we'll have a better understanding of how we got it. So if you think it got it right, how did ERISA get it right; if you think it got it wrong, how did it get it wrong? And we're trying to understand how various issues arose, how people understood them, the various political forces that

1. Drexel Law Review, Executive Editor of Symposium, Class of 2014.

affected how we, the people of the United States, dealt with those issues.

We have a very distinguished group of presenters. The format will be they'll each briefly explain how they got into the pension business. Then Dan Halperin will give a little sketch of what the regulations and rules were prior to ERISA. Then each of my colleagues and I will start a conversation on one of the three major issues ERISA addressed—fiduciary issues, funding, and vesting—with one of the discussants. Hopefully that will generate a conversation with some of the other discussants as well around that issue. And perhaps even from the general public.

Without further ado, we'll start with each of our discussants explaining how they got into the pension business. Frank, why don't you start.

Frank Cummings: In the late 1950s and early 1960s, I was a labor relations lawyer practicing at Cravath, Swaine & Moore in New York City. And in those days, believe it or not, there was no such thing as either an ERISA lawyer or, for that matter, a pension lawyer. I remember giving a speech to an ABA meeting in 1975, just after ERISA passed and telling everybody that someday there'll be such a thing as an ERISA lawyer.

But in those days what you had—labor was powerful and labor was important and being a labor lawyer was a way to protect your clients. And what I found at the time was that in the process of doing labor negotiations for some pretty big industries—of course it was a big firm, Cravath—Bethlehem Steel, an airline, Southern Pacific Railroad, Studebaker, Packard—almost every industry you could name. And I kept seeing the same thing, which was that you could have a worker work a very long time expecting to get a pension—not just expecting, *reasonably* expecting to get a pension—and he would end up not getting it. And there were about a half a dozen ways that you could work but have a disappointed, reasonable expectation after working a long time.

This was before ERISA—way before ERISA. What you had as applicable law was—if it was negotiated—in theory, labor relations laws. You had the Internal Revenue Code as it existed pre-ERISA. I still have the bound volume of the Internal Revenue Code as it existed one day before ERISA became effective, for old times' sake. I can remember what's in it, which is not much.

I also was doing multi-employer plans, coal, Teamsters, and things like that, which had their own set of separate problems. And then one day the phone rang and guess who? Senator Javits[2] was on the phone. He said, "I want you to come talk with me." He had just been the number two Republican on the Senate Labor Committee. The number one guy was Goldwater, who had just run a disastrous campaign against, as I recall, Lyndon Johnson. [Laughter]

He was not only defeated from the Presidency but lost his Senate seat and Javits stepped up and fired the Goldwater staff and went looking for somebody to replace them. And he had called Bruce Bromley at Cravath and said, "Do you know of a good labor lawyer?" of my type. Because Javits was the head of a large law firm in New York City also. At the time, the conflict of interest laws did not prevent him from doing that. But they prevented him from practicing federal law, so it was a big firm in New York, which never went before a federal agency or never went before a federal court. Weird, but there it was.

He called Bruce Bromley at Cravath and said, "Do you know of anybody?" And he said, "Funny you should ask, because one of our labor lawyers just quit and moved to Washington." And that was me and that's how he got me. It's the kind of thing you dream of. I went up to see him and he said, "How would you like to come and be counsel for the Senate Labor Committee?" You know, you don't get offers like that and then after he hired me he says to me, "Are there any laws you want to write?" [Laughter]

"I would love to prevent the thing I just did."

And he knew all about Studebaker. He had read quite a bit about Studebaker. He said, "Can you write it?" I said, "Sure, I know everything that went wrong in South Bend."[3] Not shy, because no one would ever accuse Javits of being shy. "You write it, I'll pass it." Well, he didn't pass it, and I didn't really write it all, but I did write the first version of it and a couple of later versions.

2. Senator Jacob K. Javits (R-N.Y.) was a member of the Senate Committee on Labor and Public Welfare. In 1967, he introduced the first comprehensive legislation to regulate private pension and welfare plans. He later played critical roles in generating public support for pension reform and in the enactment of ERISA.

3. In December 1963 Studebaker Corporation closed its principal production plant in South Bend, Indiana. The pension plan that covered hourly workers at the plant was significantly underfunded. When Studebaker terminated the plan in 1964, retirees and retirement-eligible employees received their full pension, but vested employees younger than age sixty received a lump-sum payment worth only about 15% of the value of their pension. Employees who had not vested in their pension accruals received nothing. *See* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 76–77 (2004).

That's how I got into it. I left before it was enacted. I left in the middle of 1972, having given up. Besides which, it wasn't my career. I'm a practicing lawyer and I wanted to go back and litigate. So I went back and started practicing again. I watched with envy when my successors got it passed.

I can tell you what I was thinking, but memory is an interesting thing. You combine what happened and what you wish had happened. You combine your intentions with what you wish your intentions were. And then over the course of time they merge and what survives is what you wish had happened, so that there are always rose-colored glasses. I will try very hard to remember it the way it really happened but I am not superhuman either, so you will notice that I sanitize my mistakes and praise the things that I never did. I will do the very, very best I can, but I still have bound volumes of a lot of the stuff that I did, so sometimes I can check myself.

That's how I got into it anyway. I just wanted to say, the five things that I knew at the time on how you could work a long time and get nothing were that even the best plans—even Studebaker's plan, which I think had fifteen-year vesting or something like that at the time[4]—had bad breaks in service rules and the way vesting was computed, the way service was computed, no such thing as service-spanning rules and all the other stuff that we have in ERISA. You could work a long time there, but because it was a dying company and it was unionized with the CIO union clauses, which meant plant-wide seniority, by the time they were in their death throes the average age was sixty. A plant full of automobile workers sixty years old, so of course they were all vested. Of course they had worked a long time. Of course they were all in a defined benefit plan.

But we knew, one, that the promise was a non-recourse promise. And it still is a non-recourse promise. The promise is to provide the plan but the plan provides benefits to the extent of its assets. The employer's assets were not on the line. That wasn't unusual, that's the way it was, that's the way it often still is. There's no law against that. It's the law that makes you liable, there's Title IV of ERISA, or Title I of ERISA, or the Internal Revenue Code.

You can write a plan without recourse. It doesn't protect you from recourse. That was one problem, very weak funding. The funding

4. Under the terms of Studebaker's plan, a participant aged forty or older vested when he had ten years of service. See *Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the J. Econ. Comm.*, 89th Cong., 2d Sess., 104 (1966).

was, at the time, interest on the unfunded liabilities only and the rules on how you calculate the unfunded liabilities were very liberal.

In terms of fiduciary standards? No such thing. Pensions were a gratuity. There was a trustee but everybody knew that the trustee was a directed trustee and so on.

I had been involved in the pre-trial conference in the Studebaker case, which was our client. Stop me if I'm going on too long. Every issue came up in the pre-trial conference. Think about this—the judge walks into the courtroom, looks around, and it's a mob scene—about five times as many people as this in a federal courtroom. You get used to it because unions tend to pack the hall.

He said, "Okay, I'll see counsel in chambers" and everybody in the courtroom got up and went into chambers. They were all lawyers. I remember sitting on the radiator. It was quite a jam session in there. He started asking the kinds of questions that judges and lawyers ask. "Okay, whose law applies?" No federal law of course. The trustee, Manufacturers Hanover—Manny Hanny—said, "I got a trust agreement right here that says it's governed by the law of New York." The guy from the insurance company in Ontario said, "I've got a group annuity contract and it's governed by the laws of the province of Ontario."

The guy from the union said, "We only recognize the National Labor Relations Act." I think I said something like, "We're a Delaware corporation," or something like that. Then he said, "Who are the necessary parties?" Everybody said, "We're all necessary parties—and besides, you can't serve any of us because we don't do business in this state."

Teresa Ghilarducci: Frank, hold it there, we'll get back to you. I promise.

Steven Sass: Why don't the other two discussants, in a couple of minutes, explain how you got into the business. And then we'll get into the discussion. It was really getting very interesting, but I'd like to have quick introductions, then Dan's quick sketch, and then we can get into that interesting stuff.

Henry Rose: How did I get into this? Well, it was a life-changing experience. I left academia. I came to the Department of Labor in 1962, and as you know that was the year that the Welfare and Pension Plans Disclosure Act[5] was amended to have some force. I became what they called at that time, I don't know if they still do, the counsel for welfare and pension plans. We were working with Frank Kleiler, the head of the agency within the Department, in administering that Act.

I had that position for three years and actually from '62 until today I've been working only in Employee Benefits. I didn't know at the time it was going to have that tenure.

In any event, it's been a long haul and a very interesting one for me. Within that time there have only been two periods that I have not been involved in employee benefits administration of some sort or in practice. And that was for a couple of years in the '60s when I was assigned to the counsel for the anti-discrimination in employment responsibilities of the [Labor] Department. Some of you may remember that I think it was President Kennedy who set up the President's Commission on Anti-Discrimination in Employment and that responsibility was transferred by the President in 1965 to the Labor Department. I was counsel to that for a couple of years.

The only other break in my contact with the area was 1971–72 when I got some kind of an award from the Department of Labor that sent me to Europe for a year, which was wonderful. [Laughter]

In any event, my contact when I came back, I was Deputy Associate Solicitor for Labor Management Laws at the Department of Labor and the Associate Solicitor at that time for that position was George Avery and he didn't see that I had any real function with Landrum-Griffin,[6] which was the main function of that division, and so I spent all of my time—and this is about late '67 and all of '68—working on the Welfare and Pension Plans Disclosure Act, and I knew that there was activity going on in the Congress and so I spent most of my time that year working on drafts, drafting what might become legislation.

As a result of the election of 1968, as you well know, Nixon won and I thought, frankly, that was the end of my government career. But to my big surprise a gentleman named Larry Silberman became the Solicitor of Labor and to my surprise he chose to promote me to the position of Associate Solicitor for Legislation. And he was interested in my work in the employee benefits area and he encouraged it and from there on in I spent the bulk of my time on employee

5. Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (1958), *amended by* Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, 76 Stat. 35 (1962).

6. Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

benefits legislation, watching it and drafting and re-drafting for many, many drafts.

The only thing after that is that after it [ERISA] passed it created a new agency called the Pension Benefit Guaranty Corporation[7] and I spent ten years as general counsel to that.

Daniel Halperin: Okay, it's unusual for me to be the youngest person on the panel. [Laughter] In 1962 I was a second-year associate in a New York law firm trying to become a tax lawyer and the one guy in the firm who was doing all the pension plans left and they called me in and they said, "You're the pension guy," and I said, "I don't know anything about pensions. If I have a question who can I ask?" And the partner I talked to said, "You can ask anybody you want but nobody knows anything." So I immediately got on the subway and went down to NYU and enrolled in a pension class and the next semester the guy who was heading the Manhattan office of the IRS in the pension area was giving a course at Pace [University], so I took that one too and that was my education.

It was a fairly simple world. There weren't a lot of rules, a handful of Revenue Rulings. One of the lawyers in the firm said to me once that the law on pension and profit-sharing is down in Washington in Izzy Goodman's head. Isidore Goodman was the head of the pension section at Technical at that point.[8] CCH [Commerce Clearing House] used to print his speeches just like they were revenue rulings. I met Izzy when I got to Treasury, he talks like a Revenue Ruling, too.

Drafting pension plans in a world when there were no paralegals and there were no memory typewriters was hardly the most prestigious thing for a lawyer, but I liked the fact that they left me alone. Unlike most new associates, nobody told me what to do, nobody supervised me and hopefully I knew what I was doing, but we'll find out.

In May of '67, I left New York, left private practice, which I thought was going to be for two years but somehow I never got back, and went to Treasury. At that point there was this, as most of you know I assume, so-called Cabinet Committee Report in January

7. The Pension Benefit Guaranty Corporation was created as a federal non-profit organization, funded through employer contributions, to provide pension insurance. *See generally* GEOFFREY GERHARDT, CONG. BUDGET OFFICE, A GUIDE TO UNDERSTANDING THE PENSION BENEFIT GUARANTY CORPORATION (2005). *See also* 29 U.S.C. §§ 1302-09 (2012).

8. Isidore Goodman was chief of the Pension Trust Branch in the National Office of the Internal Revenue Service.

of '65 recommending changes in the pension area.[9] I brought my copy. I see its torn cover and coffee stains all over it here. And they had reconstituted the inter-agency staff to try to deal with the problems.[10]

The '65 report, as Frank [Cummings] or Norman [Stein] or somebody alluded to, was attacked by pretty much everybody. Unions didn't like it, employers didn't like it, but yet people in the government were going to try to go ahead and see if they could come up with something that could possibly fly. And that inter-agency task force was being chaired by Peter Henle[11] at the Labor Department and Bill Gibb[12] at Treasury.

My second day in the office Bill grabbed me and took me to a meeting and I spent a lot of my time over the next year trying to work on the technical problems of trying to bring the general ideas to fruition. It led to a draft in April of '68, I believe, introduced by the Labor Department.[13]

It was touch and go during that time. We wanted the president to send it up as an administration proposal and he absolutely refused to do it. He finally agreed to allow the Labor Department to send it up as a Labor Department proposal. Of course, in today's world, nobody knows what that means, but apparently you did things like that in those days.

There's some, obviously, criticism ERISA didn't go far enough. We thought we were way out there beyond what anybody would possibly approve. I can't talk much about what went on after 1968. When the new administration came in, I did not work on the pension area (certainly the support for pension change in the Nixon administration was even less than it had been in the Johnson administration). I left Treasury in 1970 and when ERISA passed I was down the street teaching at Penn. I went back to Treasury later and we'll probably talk about some of what went on when I was back in Treasury in '77 to '80.

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9. PRESIDENT'S COMM. ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RET. AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS (1965).

10. The Cabinet Committee report was drafted by a group of staffers drawn from the Labor Department, Treasury Department, and other agencies with expertise relevant to pension plans. In 1965, Labor Secretary Willard Wirtz reconstituted this interagency staff group to prepare legislative recommendations based on the Cabinet Committee report. *See* WOOTEN, *supra* note 3, at 117.

11. Peter Henle was an economist at the Bureau of Labor Statistics.

12. William Gibb was an attorney in Treasury's Office of the Tax Legislative Counsel.

13. *See* S. 3421, 90th Cong. (1968).

I think that's how I got involved. I always tell my students that the area of pension law is the last part of tax law that I forgot. I knew it most recently.

I was asked to talk a little bit about what the vesting and funding regulations were at the IRS prior to ERISA. As to vesting, the only statutory or reg rule was a requirement that if the plan terminated, all benefits must vest. But there were the non-discrimination rules and the IRS did take the position that if you had high turnover among the lower-paid people then the fact that they were eligible to participate in the plan was really not enough, they weren't getting benefits.

They [the IRS] didn't apply that, as far as I know, to big companies. Most of the stuff I worked on was small companies. My clients were doing this for tax shelters. I've said many times when people said ERISA is going to cause plans to terminate, I said if they cause the plans to terminate, 95% of the plans I drafted will not be missed at all because there was no retirement security for anybody in those plans. They were not worried about minimum funding, they were worried about maximum funding. The plan sponsor wanted to put in as much as they possibly could.

So with those plans generally my experience was five-year vesting was required; 20% after the first year, increasing 20% a year, so it was 100% vested after five years. Obviously that provided some protection for rank-and-file workers and to that extent it had a benefit-security approach to it. But clearly that was a byproduct. I think because the IRS was mostly focused on tax avoidance, and I think mostly focused on the most egregious tax avoidance, the rules were very, very loose.

The rules on how much participation you had to have from the lower paid compared to the amount of participation you had from the higher paid were pretty much ridiculous. I mean, they're terrible now but they were worse then. The integration rules are bad now, they were worse then. So things have gotten better in terms of that.

But there was no vesting insisted upon for large companies and, as Frank pointed out, you could work thirty years and have a break of service for two weeks in your twenty-second year and you ended up getting nothing. That kind of stuff did go on. I think ERISA certainly changes that. It becomes, I think, a different view and I think we'll talk about what ERISA was intended to do later.

The funding rules, again, were focused on discrimination. There was no required funding. As I said, there were rules on maximum funding. But the IRS had rules that said it had to be a permanent plan and if it wasn't a permanent plan you couldn't take tax deductions for contributions to something that was only a temporary plan. Declaring something to be permanent but not putting any money in it was not good enough, so there had to be enough funding in order to give the impression that it was a permanent plan.

The so-called minimum funding rule was actually a safe harbor. It said that if the original past-service liability—the unfunded past-service liability at the time the plan was constituted—did not increase, then you were protected against it being not a permanent plan. So what you had to do roughly was contribute the current costs, the cost of the pension for the current period, plus the so-called interest on the past-service costs because if the present value of the liability was, say, $100 when you put the plan in, it's going to be $105 next year because they assumed you were going to put in $100 and you would have earned $5 of interest so you had to put in the $5 so it stayed at $100. But you were able to take credit for actuarial gains against that, so often you had no guaranteed requirement to put anything in.

So in terms of funding it was very, very weak, and in fact no requirement of really ever funding past-service liabilities at all. Of course that was one of the major focuses of ERISA.

Teresa Ghilarducci: Anyone, but maybe Frank, you learned a lot about plans that were unfunded because of your experience in South Bend. What did you see in terms of the companies that had a permanent plan and were on course to fund, if any?

Frank Cummings: The Studebaker plan was not unfunded, it was under-funded. It was doing exactly what you just heard, interest-only funding.[14] The only places that I saw over-funded plans—or I shouldn't say at the time—the best example I can think of is if you look at the steel industry, and Jack [Sheehan] will probably recognize this, the one steel plan that didn't go under, that seemed to be so over well funded, was US Steel, and that was because it owned Marathon Oil. Marathon Oil had these huge oil profits and they needed to stash the money somewhere and they were stashing [money] in the Steelworkers plan and getting favorable tax treatment on that.

14. Studebaker's collective-bargaining agreement with the UAW called for past-service liabilities to be amortized over thirty years. Even with such an amortization provision, collectively bargained pension plans tended to be persistently and seriously underfunded. *See* WOOTEN, *supra* note 3, at 59–60.

But there was very little incentive to fund and I remember having a conversation, I don't know if it was with you, Jack [Sheehan], or who, but I asked—and this was before ERISA—either a bargainer for the Steelworkers or for the Automobile Workers, I can't remember which, "You had all this strength at the bargaining table, why didn't you bargain for funding?"

Judy Mazo [from the gallery]: The Auto Workers did.

Frank Cummings: Sometimes they did, but I remember this one guy saying to me, "We thought this industry was immortal and that it would last forever." These companies weren't going to go out of business. They were part of America. They figured at the bargaining table you pay for everything you get. If you're going to get funding, you have to give up something else, and they didn't want to give up anything else.

Teresa Ghilarducci: What happened when they were confronted with Studebaker?

Frank Cummings: It was such a desperate, desperate situation in Studebaker. To be in South Bend in the last years of Studebaker was like being in the Warsaw Ghetto just before it was destroyed. I remember there was a local union leader who marched into the plant manager's office in South Bend because one of his members had shown up in the parking lot, I think it was with a Chevrolet, and they wanted him fired because it was an act of disloyalty. I mean, this was just life and death, so you got some strange behaviors. But you've got to remember that that was really unusual.

Daniel Halperin: I think part of what they were saying was we need plan termination insurance. We need the PBGC [Pension Benefit Guaranty Corporation], but we don't need funding. That was the feeling I certainly had back in 1968 from the union side.

Peter J. Wiedenbeck: And if I could follow up, there's a question with respect to vesting and funding both in the pre-ERISA code rules, right? Where you had to have vesting on termination to the extent funded, which was reflective of the fact that you didn't have any residual employer liability.[15] Why did that limitation survive in ERISA?

15. The reference is to 26 U.S.C. § 411(d)(3) (2012).

Frank Cummings: Why did it survive? It survived because deletion was unnecessary.

Daniel Halperin: You mean vesting to the extent funded?

Peter J. Wiedenbeck: Yes, that limitation, right, instead of vesting.

Daniel Halperin: Instead of vesting in total on termination?

Peter J. Wiedenbeck: Right.

Daniel Halperin: Well, I think from the IRS perspective it was a discrimination rule. They didn't want the money to go back to the boss, I suspect. I guess ERISA continued the idea that there was no liability beyond what was in the plan, at least except to the PBGC. So if that's going to continue, then you can't have vesting without the money.

Frank Cummings: You didn't want to put the burden on the employee to sue the plan. You wanted PBGC to have the duty to step in and keep the employee in pay status and if the employer is going to be sued, let the government sue them. They're much better equipped to do it than any individual or even a class of individuals.

Steven Sass: I've got a question. This is actually getting closer to the enactment of ERISA, but this is when a lot of these thirty-and-out benefit formulas came in and that put a lot of pressure on funding. Was that something that was aware in the legislative group, that the funding challenges would become really stepped up with the growth of early retirement benefits and thirty-and-out, and how that related to thirty-year funding of past service liabilities? And also that union plans funded the dollar-per-year-of-service benefit that was stated in the plan and in every negotiation that liability was increased, creating a new tranche of unfunded liability. Would that kind of detailed part of the funding discussions occur among the people considering the legislation?

Frank Cummings: I don't remember, maybe Henry remembers it. Do you remember?

Henry Rose: No, I don't think that was a factor in our thinking. The lack of funding obviously was important to the PBGC simply because it measured the liability of the agency. In the earliest years we had a huge number of terminations. In '74–'75 there were an unusual number, but they were terminations of plans that probably should have been terminated. They were individual professionals. In Congress there were committee hearings on the issue at the time that just really went nowhere. But after that—

Daniel Halperin: Those were my clients. [Laughter]

Henry Rose: Your clients. Well, but in any event that piece of business fell through, I guess.

Judy Mazo [from the gallery]: You ought to mention that that was to terminate before 1976 when the minimum standards took effect.

Henry Rose: That's correct.

Daniel Halperin: The only thing I can remember—there was a lot of focus in '67, '68 on an alternative funding rule, which would require funding to the liability at termination and the original administration bill, I believe, had that in as an alternative requirement.[16] I think it goes back to, in a sense, what Frank said: if the plan's going to go on, there was no problem with the funding. The plan was adequate, assuming the industry stayed at the same level and the plan continued.

The problem arose on termination, and therefore, it might make sense to have a funding standard that was aimed at making sure there was enough there for termination. I know we looked at a hell of a lot of numbers. I looked at some of my old memos and I saw all these numbers, but I didn't try to digest them. But eventually I guess, that idea got dropped in the '70s.

Frank Cummings: The notion that an employer is immortal is a pernicious notion. It's the thing that drove Detroit into the ground: "Cities don't die so you don't have to worry about funding their pensions." And it was very destructive of the industries where the CIO was the bargaining agent. It's just an illusion. But of course if you think about the problems that were viewed as problems in the '60s and early '70s, we still had a manufacturing economy. It hadn't gone to Asia and no one thought it was going to Asia.

We still had powerful labor unions. No one thought they were going to become less powerful. That wasn't the problem. We still had

16. *See* S. 3421, *supra* note 13, § 201(a)(2).

predominantly defined benefit plans. Nobody thought they were going to stop being defined benefit plans. We didn't solve the problem because it wasn't a problem. I could go on and on like that. We solved the problems that were the problems at the time. That's what Congress does. You can accuse them of lack of foresight, but that's the way of the world.

Steven Sass: The basic funding standard of ERISA was the Studebaker funding rule.[17] So in some ways you had this big scandal of un-funding at Studebaker, which was very prominent.

Frank Cummings: They were funding.

Steven Sass: And our solution was to require funding as Studebaker funded.

Frank Cummings: Yes, that's exactly right.

Daniel Halperin: The thirty-year funding. Really you're talking about who bears the risk of default, and pre-ERISA, it was the employees. The employer had no liability beyond the assets of the fund and there was no PBGC. And in a sense in that world, there's less of a strain on business, there's less of a moral hazard, you just have a lot of unhappy employees. Some people think that's the way to go. If you are going to say, "Wait a second, that's unacceptable," you've got the problem of allocating the risk between an insurance fund and the employer, and we haven't solved that one yet.

Steven Sass: ERISA did add a portion of the [liability for] employers, what was it? Thirty percent.[18] So it did add that. So the response was not a different funding rule, but including part of the sponsor's assets as part of the plan and PBGC. That's a response.

Judy Mazo [from the gallery]: One of the things that you all didn't mention, but that ERISA did add that was really important that helped trump—or was designed to trump—what happened in

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17. ERISA called for unfunded past-service liabilities of single-employer plans to be amortized over 30 years. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 302(b)(2)(B)(ii) & (iii). This is the same funding schedule that was in the UAW's collective-bargaining agreement with Studebaker.

18. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4062(b)(2), which made an employer liable up to 30% of its net worth for unfunded benefits guaranteed by the PBGC.

Studebaker was the allocation of assets rule in Title IV. As I understood it, there had been a big benefit increase in the Studebaker plan shortly before the company went under and the retirees were paid all of the assets.[19]

Frank Cummings: They got a hundred cents on the dollar.

Judy Mazo [from the gallery]: Right, and nobody got any—

Frank Cummings: Well, the vested got fifteen cents on the dollar, the retirees got a hundred cents on a dollar. If that happened today that's exactly what would happen.

Henry Rose: What happened in Studebaker is that anyone over sixty got full 100% benefits. If they were forty to sixty they got 15% of their benefits. And if you were under forty, even though you've had maybe twenty years of service, you got nothing.

Judy Mazo [from the gallery]: That doesn't happen today, supplemented by PBGC. The allocation of asset rules—

Henry Rose: It's quite different.

Judy Mazo [from the gallery]: If you had a recent benefit increase the assets first go to benefits in effect three years before termination and that was one way of reshuffling the debt.[20]

Frank Cummings: There are themes and variations, but basically the same structure. The retirees go first, the eligible to retire, then the long service but not eligible to retire, and then everybody else. The difference is that if you fall below the guarantee level now, instead of using trust assets, which will pay you the benefits provided in the plan, you use PBGC assets, which would pay you the benefits provided in the statute, which is typically less, sometimes a whole lot less.

19. Studebaker closed its plant in South Bend, Indiana in December 1963, and terminated the pension plan for hourly workers at that plant in November 1964. In 1959, Studebaker increased pension benefits for retirees from $2.25 per month per year of service to $2.35. Benefits for active employees were increased from $2.25 per month per year of service to $2.40 for years of service before 1959 and $2.50 for years after 1958. In 1961, Studebaker increased benefits for active employees to $2.50 per month per year of service for all years of service. *See* WOOTEN, *supra* note 3, 74–75.

20. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4044(a)(3).

Daniel Halperin: Yeah, but what Judy is suggesting is that people who got a recent amendment really didn't have a claim. In a sense to say that the retirees' expectations were not fulfilled, well if the expectations arose twenty minutes ago, there weren't any expectations. I think one of the mistakes we've made is not taking account of that in terms of what we do promise at the time of termination.

I've always thought, though I don't think I thought that in '68, but since '76 at least, it seems to me that we should not guarantee liabilities before they're required to be funded. That is a very strange rule that we have here.

Steven Sass: Let's move on. Believe me, we're going to get into all these in the rest of the day. I just want to get to other issues that generated the impetus for reform. I guess I'll start our conversation with fiduciary malfeasance and, Henry, you're the designated kick-off person. So how did the fiduciary issues appear? What did you see, what did other people see, and what framework did you use to think about fiduciary problems in pension plans prior to ERISA?

Henry Rose: By the time I was working on it, this was already '68, '69, there had already been some consideration on the Hill of those but not much. If you look at those early bills, it really didn't attend to fiduciary issues in any detail. But you'll look at the administration bill and you'll see that more attention was there.[21] Quite frankly, from my viewpoint and the feedback that I saw, there wasn't much problem raised by the parties interested in the bill on the fiduciary issues. My recollection is that the bill that the administration put in pretty much survived the political process without significant change.

Steven Sass: Were these primarily in union plans—

Peter J. Wiedenbeck: Welfare plans in particular.

Steven Sass: —and did the Attorney General's [Robert F. Kennedy] relationship with Jimmy Hoffa[22] add any impetus to the focus on those kinds of issues?

21. The bill referred to is H.R. 16462/S. 3589, 91st Cong. (1970), which President Richard Nixon sent to Congress in March 1970.

22. Jimmy Hoffa was president of the International Brotherhood of Teamsters. For discussion of his role in the lead-up to ERISA's enactment, see STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS 180–84, 192–93 (1997).

Henry Rose: I don't think that was the main focus of the administration's approach. You obviously were aware of what was going on going back to the hearings on what [George] Barasch[23] and some others—

Frank Cummings: The Senate Permanent Investigations Subcommittee.[24]

Henry Rose: I think the fiduciary issues were dealt with, at least on the administration side, not only with regard to multi-employer plans, but to plans generally.

Steven Sass: Were there issues in corporate plans that raised concerns?

Henry Rose: Oh yes, there were some, and I think we dealt with them.

Steven Sass: Do you recall any of those issues?

Henry Rose: I don't recall. The real issues that got the headlines were multi-employer plans, in my recollection.

Frank Cummings: I can add a little context. At the time, those lobbies that wanted to kill pension reform—in terms of killing vesting reform, funding reform, plan termination reform—were supporters of fiduciary reform. Why? Because they thought if you could just catch all the crooks and thieves, all the pension problems would go away. And so my group, we all viewed the push for a fiduciary bill, which was a separate bill—remember that on the House side they had two bills—was not a push for a bill, it was a push against a bill.

The idea was if you could just pass this, we would relent. We viewed the fiduciary bill as a diversion. We were convinced that there were crooks and thieves, and if you find any crooks and thieves, call the cops. But in the meantime we felt that, by and large,

23. On George Barasch, see Remarks of Frank Cummings, *in* Panel Discussion, *ERISA and the Fiduciary*, *in* Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 359, 377 (2014).

24. For discussion of the Senate Permanent Subcommittee on Investigations' hearings involving George Barasch, see WOOTEN, *supra* note 3 at 118.

if you changed the rules under which plans were administered and funded and vested and designed, most—if not overwhelmingly most—sponsors would obey those rules, because that's the kind of people we were.

Sure, there were crooks. But you couldn't fix the system by catching all the crooks, although it would be nice to catch all the crooks. But politically that was a diversion and we were against the diversion. We were quite prepared to take the administration's bill or anybody else's bill on fiduciary standards and just staple it onto ours and say, "That's fine, but that's not what we're talking about."

Henry Rose: The McClellan Bill of 1965[25] was aimed largely at that kind of wrongdoing but he had mostly criminal penalties and I thought that was not appropriate.

Frank Cummings: All the witnesses would take the Fifth Amendment.

Daniel Halperin: But within the administration as well, I think we all felt a fiduciary bill could pass, unlike the other stuff. But we felt that it would reduce the impetus for vesting, funding, and insurance, so we were against moving it forward, at least at the staff level.

Peter J. Wiedenbeck: I was wondering if you could speak to the question of ERISA's original vesting standards and the fact that age was a factor in one of them, where the impetus for that came from.

Frank Cummings: Steelworkers. 70/80 was, I think, the model in the pattern steel agreement, where a combination of age and years of service equals seventy or eighty.

Karin Feldman[26] [from the gallery]: 40/15, Frank. Age forty, fifteen years of service. It comes in before ERISA.

Frank Cummings: I don't know where I got 70/80 but I remember a lot of plans with 70/80.

25. For the text of Senator John McClellan's bill, see S. 2627, 89th Cong. (1965), 111 CONG. REC. 26, 629–38.

26. Karin Feldman is Benefits and Social Insurance Specialist, AFL-CIO.

Karin Feldman [from the gallery]: 70/80 was a type of early retirement benefit, shutdown benefit. It wasn't a vesting rule.

Henry Rose: Looking back at some of the legislative bills, I was surprised that the bill that resulted had something like forty senators on it. Javits was pushing and [Senator] Harrison Williams[27] also had some type of vesting—I think at eight years—and what surprised me was that Senator [Lloyd] Bentsen[28] on the tax side was criticizing it and said it should be five years and of course we all know it ended up at ten.[29] My understanding as to why it ended up at ten is that there was a study done—I think within the Department of Labor, but I'm not sure—that showed that if you had it at ten, it would affect very few plans.

Daniel Halperin: I think the political push for age-related vesting comes from the idea that one of the arguments made against vesting was, at least in the early years of the plan, we should be focusing on the older people, the people closer to retirement. And if benefits vest, then it takes away from our ability to do that.

If you want to approach it from a more theoretical way, I would say that what you want to do is vest benefits that are a significant part of retirement and that people have the right to rely on and that in effect they have paid for by taking lower wages while they were working. You could view ERISA as disclosure. People didn't really understand what the rules were beforehand and the way we could clear that up is to make it clear you're not going to get anything when you retire. But our feeling was that that's not sensible because, if people really did understand that, then the message to them would be, "Save as if you don't have a pension plan," which would make the whole thing really ridiculous. So there should be vesting for what you would have otherwise saved by yourself and in effect paid for by lower wages.

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27. Senator Harrison A. Williams (D-N.J.) was chairman of the Senate Committee on Labor and Public Welfare when Congress passed ERISA. He was an early supporter of legislation to regulate private pension and played a leading role in the enactment of ERISA.

28. Senator Lloyd Bentsen (D-Tex.) was a member of the Senate Committee on Finance.

29. As enacted, ERISA had three vesting standards: (A) a ten-year cliff vesting standard, (B) a graded vesting standard under which an employee would vest in 25% of his accrued benefit after five years of service and reach 100% vesting after fifteen years of service, and (C) a "Rule of 45" standard under which an employee who had completed at least five years of service would vest in 50% of his accrued benefit when the sum of his age and service was forty-five and then an additional 10% each year to reach 100% vesting when the sum of his age and service was fifty-five. *See* Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 203(a)(2), 88 Stat. 829 (1974) (current version at 29 U.S.C. § 1053 (2012)).

Now that does raise the argument: when do you save for retirement? I don't think we know much about that. Certainly, if you look at people who, like in the old days you had kids at twenty-three or twenty-four and you couldn't afford anything and then by the time you were fifty they were out of the house and then you had fifteen years to save for retirement, you could say, "You should save for retirement during that period," and vesting isn't really necessary before that.

And then the question comes: Well, when the employer has a pension plan, whose wages get cut? Is it across the board for everybody or is it only the older workers who are the only ones that are valuing plans? I think probably, "It really depends," is the answer to that question. In the end, I don't think you could develop a vesting rule that tried to figure out what a sensible savings pattern [was], but I think at that time we did have discussions about, in a sense, whether it was important to have vesting for people who were younger. So that's what I think leads to age-related vesting, though in the end the original administration bill in '68 was straight ten years, and but, I guess, ERISA did have a rule of fifty, right? Or a rule of forty-five?

Henry Rose: One thing that surprised me when I looked back at some of the materials is that the Javits's bill of 1967 had a provision in it that says that you didn't have to apply any of the rules if the plan trust had a provision that it would be subject to state law.[30] The only exception to that was for a participant to sue for his own benefits.

Steven Sass: I was very taken with the argument, I guess it was in the Cabinet Committee Report or the people who put it together, that the size of the tax expenditure was so large that the government had to get a significant public benefit out of this expenditure and the only way to do that is to make pensions a broad-based benefit that would benefit the people at large and vesting was the way to achieve that. And then, of course, funding and fiduciary controls would assure that.

So I'm interested how significant was that perspective in the vesting notion as opposed to some of these, you know, "Joe worked for thirty years and he got screwed," or that kind of thing, in terms of the design of the plan.

30. S. 1103, 90th Cong. § 507 (1967).

Frank Cummings: Look, this is a bill that didn't have the support of anybody but the people. It didn't have organized management. They were against it. It sort of had organized labor, but it wasn't the craft unions, it was only the CIO and not even all of them. It had the press, and here's how it got to be the press: In those days Congress was a Tuesday-to-Thursday club, and the guys in the press gallery didn't know what to do on Saturday.

We were running these hearings running around the country and we would get a local witness to say, "This is how I got screwed." And then reporters who were in the gallery with nothing to do on Friday—and says, "I've got to do something for the Saturday and Sunday editions"—would come in and say, "Give me a story," and we would take a file drawer full of correspondence essentially saying, "I read about your hearing in Wichita and that's exactly what happened to me."

I had it organized geographically. I didn't care where you were from. I would find a story from your town and I would give it to the reporter and the reporter would write it for Saturday, then they would read that story somewhere else and some other reporter would come in. The momentum for this bill happened that way. Not the usual way, where the lobbyists generate the bill, this was the people pushing it.

Daniel Halperin: I got a feeling for the power of that. For some reason the person who handled the files at the Treasury was reading all those and she came into my office, the only time it happened in the seven years that I was at Treasury, and says, "Is all this really true?" with a shock on her face, and that said to me, "Boy, that's going to work."

Steven Sass: But that's a different rationale for vesting.

Daniel Halperin: Yeah, but in answer to your question, Steve, I don't know how much impact it had, but I can tell you in every memo that I saw from that period and every testimony we wrote, that was in there. So we thought it was a useful argument.

Steven Sass: But do you think it was the motivation of the government?

Daniel Halperin: Well, I think it makes sense.

Steven Sass: This is a time when we're expanding Social Security. I mean, this is retirement income policy and that looking at private pensions as part of this national system, not as a way to solve, like what you might call a quasi-fraud.

Daniel Halperin: I think you're right. You can say that the old rules were saying, "We have these generous rules and we've got to have a few low-income people benefitting," and if you get a few low-income people benefitting then it's okay. But ERISA is basically saying, "No, no, no, that's not good enough, we're spending a fortune here and this fortune should get us something," and the best way to spend that fortune would be through social security, which would have this widespread impact and if we're going to spend it through the pension plans it should have some of the same effect. I certainly believed that and I hoped that the public could be sold that, so I think it was a driving force. Whether it was for Congress, I have no idea.

Frank Cummings: One corollary to that, which is not quite a corollary: sitting on the subway one day with Danny Rostenkowski, who was then-Chairman of the Ways & Means Committee, I said to him, "Why do you allow people to provide in their plans that if they lose their job, they can cash out? Why don't you force the rollover?" And he said, "We can't afford it. Find the money and I'll do it." So I said, "Wait a minute, I'm missing something here. This is a law designed intending to use the federal fisc to provide a broad-based income and then you're saying, 'But we've got a way for them not to get it and we can't afford to close the loophole because people might actually save for their retirement.' My goodness, can you imagine that? We can't afford it." So it's not quite as straightforward as all that.

Steven Sass: Jim asked me to ask Frank to talk a little bit about Javits's proposal for a pension agency that would try to pull all the stuff together[31]—what was included—as a preliminary for the next panel.

Frank Cummings: I'd start it by saying most of the lobbyists who lobbied so strenuously against it have come to me since then and said, "Oh, if we had to do that over again, we'd go back and get the single agency." There was a political alliance. Labor wanted it in the Labor Committee. They thought they owned the Labor Committee.

31. For the initial formulation of the single-agency proposal, see S. 1103, 90th Cong. (1967), §§ 3–6.

For some reason management thought they had a friend at the IRS. That always befuddled me. Maybe they just—as bad as they were, they weren't as bad as the Department of Labor.

Daniel Halperin: But we did try to draft the bill so it didn't go to [the] tax [committees].

Frank Cummings: Yes, and I remember long discussions with the parliamentarian: How do I get this bill into not so much the Department of Labor as the Labor Committee.

Steven Sass: What was the agency that was sketched out? What would it do?

Frank Cummings: The idea was to take all jurisdiction away from all other agencies, put it in a single commission, an SEC-type commission, have them be the guarantor, have them be the insurance agency, have them be the fiduciary enforcer, have their certificate be conclusive proof of tax qualification and deductibility. Just a single agency. We figured management would like that. It's one stop service. We proposed it, and when we had the bill jointly with Javits and Williams, Williams felt very strongly that it had to be at the Department of Labor, and we simply gave it up.

Henry Rose: I think the one commission was an excellent idea, but what really killed it in my observation was when the committees on the Hill, the particular committees having jurisdiction over the IRS and DOL, didn't want to lose their jurisdiction.

Daniel Halperin: I'm not sure we made the right decision, but we opposed it in Treasury, as well. I think the feeling was that if you're going to use the tax law and say, "You lose tax benefits if you don't comply," that we had to have control. I don't know whether that was right or not, but that's what we said.

Teresa Ghilarducci: Should we open it up to the audience?

Al Lurie [from the gallery]: The dual jurisdiction issue was the major issue that really hit the public. More articles, more concern, two agencies of the government who are working from a different perspective are going to try to administer the law. There was no end to disputes. [Congressman] John Erlenborn,[32] I remember, was very much involved. But I will say that you talked, Dan, about the tax deduction, the tax motivation, the tax benefit of pensions. Thanks to the tax benefit of pensions, we got a pension law. Because during the World War II era, the issue of salary stabilization was a key determinant of the move into qualified plans. That existed before ERISA. The IRS was administering that area at that time. It was a tax motivation that created the pension movement.

Frank Cummings: Al, I just think that you had to combine that with organized labor. The two driving engines were the tax motivations and the power of organized labor. Without either of them, it begins to disintegrate. Oh, and a high marginal tax rate. Tax motivation doesn't do anywhere near as much good with a low marginal tax rate. So that's a third element that's gone.

Teresa Ghilarducci: Anybody else? Karin?

Karin Feldman [from the gallery]: So earlier on there was a discussion about limited liability for the employer in the event of a plan termination. At least at the Steelworkers, before ERISA and they continued it after, negotiated pension agreements—not plans, pension agreements signed by the company and the union—provided that, effectively, the employer was on the hook. So, even post-ERISA, a leading Third Circuit case let the contract claim above and beyond what the company might have to survive.[33]

The union didn't believe in bargaining funding language unlike its CIO colleague the UAW, but they did bargain the employer liability. So if the employer didn't fund, it was still going to be on the hook. You lost to the PBGC—Izzy [Goldowitz], I can't remember if that was your case—in the wake of the 1987 pension plan amendments act when we [the Steelworkers union] tried to, in the Sixth Circuit, continue that contract claim, but the Sixth Circuit said the PBGC now owned the whole claim because the employer liability was for everyone.[34]

Teresa Ghilarducci: Right. Sir?

32. Congressman John N. Erlenborn (R-Ill.) was a member of the House Committee on Education and Labor. He played a leading role in the development of pension reform in the House of Representatives and in the enactment of ERISA.

33. *See* Murphy v. Heppenstall Co., 635 F.2d 233 (3d Cir. 1981).

34. *See* United Steelworkers of Am. v. United Eng'g, Inc., 52 F.3d 1386 (6th Cir. 1995).

Israel Goldowitz[35] [from the gallery]: Other things that I've wondered whether the framers anticipated—one, the bankruptcy revolution and, two, trucking and airline deregulation. To me those are major factors in—at least where I sit at the PBGC—in leading to termination of DB [defined benefit] plans.

Frank Cummings: Well, you remember that the statute, at the time it was enacted, did not have distress termination. You could dump the whole plan. You were feeling just fine, you were just bored with the plan, so, here, PBGC, you take it. And you give them 30% of your net worth and if the debt was considerably more than 30% of your net worth, you make them a present of 30% of your net worth and walk away. So at the time of the original design nobody was thinking of bankruptcy.

Norman Stein: Frank had mentioned discussions with the parliamentarian of the Senate and how they affected your drafting of the original bill.

Frank Cummings: Well, we were on the Labor Committee, so for purely personal reasons we wanted the bill to come to our committee. We also had substantive reasons why we wanted it in our committee. So, you know, my memory will sanitize this to remove the selfish reason and find the public-spirited reason, but in fact we wanted it in our committee. And the way we would do this, he would tell us the words we had to take out before we introduced the bill, and I would say to him, "But I've got to have those words in," and he'd say, "That's fine. We'll refer it to your committee, then you can put them back in in your committee, and then there'll be a motion to re-refer, but by then it will be in the bill and it will be in your committee."

So there was that kind of machination that went on all the time, but the real serious problem was that all previous pension bills—or most of them, except I think for the WPPDA [Welfare and Pension Plans Disclosure Act]—went to the Ways & Means and Finance [Committees]. So we wanted to keep it out of there. Of course, we ended up with a sandwich and Reorganization Plan 4[36] and all that

35. Chief Counsel, Pension Benefit Guaranty Corporation.

36. This refers to Reorganization Plan No. 4 of 1978, an executive order issued by President Carter on August 10, 1978, which is the subject of Panel Discussion, *Negotiating the Agency*

stuff. So we had lots of good ideas and as the saying goes, everybody has at least one good idea which will not pass and that was mine.

Henry Rose: The Welfare and Pension Plan Disclosure Act was considered Labor—

Unidentified Audience Member: They're doing the same thing.

Frank Cummings: You're saying it gets even worse. And with a little effort they could have had Commerce.

Steven Sass: We should close it up now, I thank the panel.

Teresa Ghilarducci: Yes, thank you very much.

[applause]

Peace Treaty: Reorganization Plan No. 4, *in* Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 319 (2014).