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Mary Lynn Durham

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TERMINATION LIABILITY UNDER TITLE IV OF ERISA: IMPACT ON COMPANIES UNDER COMMON CONTROL

Ambiguities within section 4062 of the Employee Retirement Income Security Act (ERISA) pose substantial problems of interpretation. A major question arises as to who may be liable for the payment of guaranteed benefits upon the termination of a pension plan. One interpretation would hold all companies within a common control group liable for the termination obligations of any other member of the group. The author analyzes the statute, rejecting such an interpretation as irreconcilable with the intent of ERISA and longstanding policies, and proposes an alternative construction of the liability-imposing language of section 4062.

On one side hung a very large oil-painting so thoroughly be-smoked, and every way defaced, that in the unequal cross-lights by which you viewed it, it was only by diligent study and a series of systematic visits to it, and careful inquiry of the neighbors, that you could any way arrive at an understanding of its purpose. Herman Melville, Moby-Dick.

I. INTRODUCTION

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (ERISA) is the first federal statute to comprehensively regulate private pension plans. While ERISA was pending, a primary concern of Congress was the potential financial impact of the proposed statute upon businesses. Despite the elapse of three years since ERISA's enactment, unresolved questions about how the complex and intricate provisions of the statute will apply leave the extent of its financial impact on businesses uncertain. The scope and extent of the liability that ERISA imposes upon businesses that maintain plans when those plans are subsequently terminated remains to be determined.

Section 4062 of ERISA provides that employers "who maintained a pension plan . . . at the time it was terminated" may be liable under ERISA.

1. Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.) [hereinafter cited as ERISA]. Throughout this Note citations will be to sections of ERISA, as enacted, and to relevant sections of U.S.C.

upon plan termination.\textsuperscript{3} Since the incidence of liability under this provision depends on the meaning of “employer who maintained a pension plan,” a preliminary question in any application of the provision is the nature and degree of the connection between an employer and a plan which constitutes maintaining a plan. A specific, unresolved issue within the broader question is whether companies which did not contribute to or otherwise administer a terminated plan, whose only relation to the plan is that they are under common control with the company which actually maintained the terminated plan, will be liable.\textsuperscript{4}

Following a sketch of ERISA’s structure, this Note analyzes section 4062, related provisions, and legislative history, to determine who should be subject to plan termination liability. Also considered are the constitutionality and policy implications of an interpretation of section 4062 that would impose liability on companies which did not contribute to or otherwise administer a terminated pension plan. The Note concludes that plan termination liability under ERISA section 4062 should be limited to individuals and businesses who, as employers, actually participated in maintaining the terminated plan.

II. STATUTORY FRAMEWORK

A. Structure of ERISA

In drafting ERISA, Congress attempted to design a comprehensive framework to secure a more equitable establishment and administration of private pension plans.\textsuperscript{5} To this end, the Act provides plan participants with a number of new rights and remedies. Title I,\textsuperscript{6} the first of four major parts of ERISA, sets forth a number of specific requirements for reporting and disclosure, participation and vesting, funding, and administration. Title III\textsuperscript{7} revises the requirements for tax qualification of pension plans under the Internal Revenue Code. Noncomplying plans forfeit the special tax treatment which is a major incentive to maintaining private pension plans. Title III\textsuperscript{8}

\begin{itemize}
  \item \textsuperscript{3} ERISA, § 4062, 29 U.S.C. § 1362 (Supp. V 1975). Termination liability attaches only when the terminated plan has insufficient assets to cover guaranteed benefits.
  \item \textsuperscript{4} The Pension Benefit Guaranty Corporation (PBGC), which administers plan termination insurance under Title IV of ERISA, has asserted liability against noncontributing companies under common control. See note 19 infra.
  \item \textsuperscript{5} Subsections 414(b) and (c) of the Internal Revenue Code, and the regulations promulgated thereunder, define corporations as well as trades and businesses under common control. For the purposes of this Note these common control groups are referred to as "companies under common control."
  \item \textsuperscript{6} ERISA, § 2(c), 29 U.S.C. § 1001(c) (Supp. V 1975).
\end{itemize}
establishes procedures to facilitate the coordination of the various agencies involved in enforcing ERISA. Title IV establishes, for the first time, a system of plan termination insurance.

B. Title IV Liability

In response to a finding "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits" under private pension plans, Congress created the system of federal pension plan termination insurance contained in Title IV of ERISA. In Title IV Congress also established the Pension Benefit Guaranty Corporation (PBGC) to administer the insurance system. Subject to certain limitations, the PBGC insures the payment of pension benefits when covered pension plans are terminated.

In the event of the termination of a covered plan the PBGC determines whether the plan has sufficient funds to pay all the benefits which the PBGC is required to guarantee under section 4022 of ERISA. If the plan's funds are insufficient, the PBGC must pay the guaranteed benefits. In order to finance such payments the PBGC collects insurance premiums from employers who maintain covered pension plans. In addition, an employer who maintained a plan which terminates with insufficient funds incurs liability under ERISA section 4062 and must reimburse the PBGC for the benefits paid in an amount up to 30% of the employer's net worth.

14. Id.
19. The employer is liable to the PBGC rather than to the beneficiaries under the plan. The burden of suing is thus on the PBGC rather than on individual beneficiaries. Such an arrangement permits the consolidation of individual claims into a single claim by the PBGC against the employer and expedites an eventual payment of individual pension benefits. The collection of any claims against an employer is further facilitated by the provision for a lien on the employer's property in favor of the PBGC. See ERISA § 4068, 29 U.S.C. § 1368 (Supp. V 1975).

In order to lighten the new burden of termination liability, section 4062 imposes a 30% limitation on liability and section 4023 charges the PBGC with providing contingent liability insurance for employers and assessing the premiums necessary to fund the coverage. ERISA, § 4023, 29 U.S.C. § 1333 (Supp. V 1975). Unfortunately, the PBGC will not make such insurance available until September, 1977, at the earliest. See PENSION BENEFIT GUARANTY CORPORATION, OPINION LETTER NO. 76–27, at 3 (1976). Moreover, coverage under such insurance would begin only after an employer had paid insurance premiums for a five-year period. ERISA, § 4023(d), 29 U.S.C. § 1333(d) (Supp. V 1975). Contingent liability coverage, therefore, will
Although section 4062 imposes liability on an employer who maintains a plan which is terminated, it does not specify what maintaining a plan entails. To determine who may be liable under the statute it is necessary to first determine who is considered under the statute to be an employer who maintains a plan.

A straightforward interpretation of the statutory language would indicate that persons or companies employing individuals on whose behalf they establish, contribute to, or administer pension plans are employers who maintain those plans. This interpretation would limit liability for the obligations of a particular plan to companies participating in that plan by establishing, contributing to, or administering it.

The PBGC, however, construes the language of section 4062 to impose liability on a much larger group of businesses. The PBGC contends that the language "employer who maintained the plan" includes all companies within a common control group, regardless of their participation in a particular terminated plan. The PBGC argues that section 4001(b) of ERISA requires this interpretation of the "employer who maintained the plan" language in section 4062. Section 4001(b) provides:

For purposes of this title, under regulations prescribed by the corporation [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses probably not provide coverage for any employer until 1982, although such insurance could be available in 1979 if the PBGC allows the retroactive payment of premiums. See PENSION BENEFIT GUARANTY CORPORATION, OPINION LETTER NO. 76–27, at 3 (1976). ERISA contains a suggestion that employers may purchase private insurance coverage as an alternative to the contingent liability insurance provided by the PBGC. ERISA, § 4023(c), 29 U.S.C. § 1323(c) (Supp. V 1975). Private insurers have been reluctant to underwrite such policies, however, because the insured event is within the insured's control. Conversation with Staff Attorney, Pension Benefit Guaranty Corporation (Feb. 21, 1977).

18. ERISA section 4062 liability applies to: "[A]ny employer who maintained a plan (other than a multiemployer plan) at the time it was terminated. . . ." ERISA, § 4062(a), 29 U.S.C. 1362(a) (Supp. V 1975); "[A]n employer who withdraws from a plan . . . during a plan year for which he was a substantial employer. . . ." Id., § 4063(b), 29 U.S.C. 1363(b) (Supp. V 1975); "[A]ll employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated or who at any time within the five plan years preceding the date of termination, made contributions under the plan." Id., § 4064(a), 29 U.S.C. 1364(a) (Supp. V 1975).


Trades or businesses under common control are treated as a single employer for purposes of Title IV, Act § 4001(b), 29 U.S.C. § 1301(b). As trades or businesses under common control within the meaning of that Section, Ouimet Corporation, Ouimet Stay and Leather Company, Ouimet Welting Company, Avon Sole Company and Tenn-ERO Corporation . . . are the employer that maintained the Plan at the time it was terminated.
as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with the regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1954.\footnote{20}

The PBGC reasons that the section 4001(b) provision for "single employer" treatment of companies under common control requires all such companies to be treated as the "employer who maintained a plan." By this reasoning, all companies in a control group are jointly and severally responsible for any termination liability which accrues to any company in the group whose pension plan terminates with insufficient funds to pay guaranteed benefits.\footnote{21} To reach this result, the PBGC assumes that the word "employer" in section 4062 incorporates or is equivalent to the term "single employer" in section 4001(b). The PBGC finds apparent support for its assumption in the House-Senate Conference Report on section 4062,\footnote{22} which states:

In determining the employer who may be liable for insurance coverage losses of the corporation [PBGC], all trades and businesses (whether or not incorporated) under common control are to be treated as a single employer.\footnote{23}

The PBGC has relied on this interpretation of section 4062 in a test case to assert liability against a group of corporations under common control with a bankrupt corporation whose pension plan terminated.\footnote{24} The bankrupt corporation, the Avon Sole Company, established the plan for its employees prior to the passage of ERISA.\footnote{25} The group of commonly controlled corporations includes a subsidiary of Avon Sole (Tenn-ERO Corporation), Avon Sole's parent company (Ouimet Corporation), and two of Ouimet's sister corporations (Ouimet Stay and Leather Company and Ouimet Welting Company).\footnote{26} Despite the fact that Avon Sole alone established, adminis-

tered, and contributed to the pension plan,\textsuperscript{27} the PBGC has asserted joint and several liability under section 4062 against Tenn-ERO, Ouimet, Ouimet Leather, and Ouimet Welting.\textsuperscript{28} The defendant companies have challenged the statutory foundation and constitutional validity of the PBGC interpretation of section 4062.\textsuperscript{29} As this Note will demonstrate, the companies' claims are valid and their interpretation is consistent with the plan of ERISA.

III. STATUTORY ANALYSIS

A determination of whether the PBGC construction of section 4062 to impose liability on companies which did not actually maintain a terminated pension plan is consistent with the intent of Title IV requires close examination of the language and legislative history of the statutory provisions which arguably support that construction. These provisions include the definitional section of Title IV (section 4001) as well as the sections imposing termination liability (sections 4062 and 4064).

A. The Function of Section 4001(b)

According to the PBGC, section 4001(b) of ERISA governs section 4062, making an entire control group the "employer who maintained a plan,"


While this Note was in galleys, Harold Lavien, the Bankruptcy Judge and Special Master appointed by the United States District Court for the District of Massachusetts, rendered his opinion in PBGC v. Avon Sole Company, \textit{et al.}, Bankruptcy No. 75–1520–HL (D. Mass. May 13, 1977.), which constitutes the Master's report in PBGC v. Ouimet Corp., \textit{et al.}, C. A. No. 76–1314–T.

After careful examination of the express statutory language of ERISA, its legislative history and the public policies it is intended to advance, the Court is convinced that ERISA § 4062 levies liability for the PBGC's assumption of pension plan payments only against the person or corporation acting directly as an employer in relation to an employee benefit plan, or, as provided in § 4062(d), against certain successor in interest corporations when the direct plan employer attempts to avoid liability.

PBGC v. Avon Sole Company, \textit{et al.}, No. 75–1520–HL, slip op. at D–7 (D. Mass. May 13, 1977). The use of the term "direct plan employer" is synonymous with the concept "actually maintaining the plan" used in this Note. Judge Lavien supports his conclusion with a thorough and insightful analysis of the statutory language, the legislative history of ERISA, and the public policies underpinning ERISA. Holding that to be liable under section 4062 an employer must be "the direct employer and not some stranger to the plan beneficiaries who becomes the employer through control group theory," \textit{id.} at D–9, Judge Lavien decided that only the Avon Sole Company and its wholly owned subsidiary Tenn-ERO corporation would be liable under section 4062 of ERISA. Tenn-ERO was held, not as a control group member, but on the theory that "[a]lthough separate in name, the companies were for all practical purposes one, and have so been treated by all parties throughout these proceedings." \textit{Id.} at D–3.
whether or not more than one individual member of the group actually maintained the plan. Whether the rule of construction in section 4001(b) may be interpreted to govern section 4062 in this manner is questionable. Section 4001 is divided into two sections: 4001(a), which specifically defines seven terms, including "substantial employer" and "multiemployer plan;" and section 4001(b), which contains no definitions. Section 4001(b) consists of two statements explaining how employers and employees are to be "treated" in certain circumstances. The second of these statements specifies that trades and businesses under common control are to be treated as a "single employer." This rule of construction forms the basis of the PBGC's interpretation of section 4062.

The legislative development of section 4001 gives some indication of its meaning and function. Earlier versions of ERISA contained a definitional section corresponding to section 4001(a) but rendering the definitions in slightly different terms. No early references to "single employer" treat-

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30. Sec. 4001. (a) For purposes of this title, the term—

1) "administrator" means the person or persons described in paragraph (16) of section 3 of this Act;

2) "substantial employer" means for any plan year an employer (treating employers who are members of the same affiliated group, within the meaning of section 1563(a) of the Internal Revenue Code of 1954, determined without regard to section 1563(a)(4) and (e)(3)(C) of such Code, as one employer) who has made contributions to or under a plan under which more than one employer makes contributions for each of—

(A) the two immediately preceding plan years, or

(B) the second and third preceding plan years, equaling or exceeding 10 percent of all employer contributions paid to or under that plan for each such year;

3) "multiemployer plan" means a multiemployer plan as defined in section 414(0 of the Internal Revenue Code of 1954 (as added by this Act but without regard to whether such section is in effect on the date of enactment of this Act);

4) "corporation", except where the context clearly requires otherwise, means the Pension Benefit Guaranty Corporation established under section 4002;

5) "fund" means the appropriate fund established under section 4005;

6) "basic benefits" means benefits guaranteed under section 4022 other than under section 4022(c); and

7) "non-basic benefits" means benefits guaranteed under section 4022(c).

Sec. 4001. (b) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954. For purposes of this title, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1954.

31. The definitional provisions under section 401(a) as set out in H.R. 2 were as follows:

2) "substantial employer" means any employer (treating employers which are members of the same affiliated group, within the meaning of section 1504(a) of the Internal Revenue Code of 1954, as one employer . . . . (3) "multiemployer plan" means a
ment of trades and businesses under common control appear. The House-Senate conferees added section 4001(b), with its reference to “single employer” treatment just before the enactment of ERISA. Although the conferees gave no explanation for this last minute change, other changes made in section 4001 at the same time provide a clue to the function of section 4001(b).

The simultaneous changes included rewording of the section 4001(a) definitions of “substantial employer” and “multiemployer plan.” The conferees appear to have changed the definitions to make them consistent with the definitions of “multiemployer plan” which appear in other sections of ERISA unrelated to termination liability. The revised version of section 4001(a)(3) defined “multiemployer plan” by reference to a new section that ERISA had added to the Internal Revenue Code—IRC section 414(f). Section 414(f) sets forth a comprehensive definition of “multiemployer plan,” including a requirement that more than one employer contribute to such a plan. Section 414(f)(2)(B) contains a “special rule” of construction, which provides: “All corporations which are members of a controlled group of corporations (within the meaning of section 1563(a)) . . . shall be deemed to be one employer.” This rule of construction has two significant ramifications: first, pension plans maintained exclusively within a group of commonly controlled corporations cannot be considered multiemployer plans; second, members of a commonly controlled group of corporations participating in a pension plan with companies outside their control group are treated as a single employer for purposes of applying the multiemployer rules.

The incorporation of the section 414(f) definition into section 4001(a) produced a definition of “multiemployer plan” for the purposes of Title IV which treated corporations under common control as “one employer,” so as to exclude plans maintained exclusively by companies in a single common control group from multiemployer treatment, but did not make any provision for plans maintained by unincorporated trades and businesses under

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common control. Taken alone, the section 4001(a) definition of multiemployer plan would have produced an anomalous situation with respect to the determination of multiemployer plan status under Title IV: corporations under common control would be treated as a single employer while unincorporated trades and businesses under common control would not.

In the drafting of sections 414(b) and (c), which ERISA section 1015 also added to the Internal Revenue Code, a similar problem had arisen. Section 414(b) provides that, for the purposes of the Code provisions on qualification of plans, minimum participation standards, minimum vesting standards, and limits on benefits and contributions under qualified plans, employees of corporations under common control within the meaning of section 1563(a) are to be "treated as employed by a single employer." Section 414(c) gives the rule of section 414(b) broader application by extending it to "employees of trades or businesses (whether or not incorporated) which are under common control." Without the addition of section 414(c), section 414(b)—like the definition of "multiemployer plans" in section 414(f) and section 4001(a)—would only extend single employer treatment to corporations under common control. This would leave unspecified whether or not unincorporated trades and businesses under common control should be treated as a single employer.

37. I.R.C. § 414(b)-(c), as amended by ERISA, Pub. L. No. 93-406, § 1015, 88 Stat. 926, reads as follows:

§ 414(b) Employees of controlled group of corporations.

For purposes of sections 401, 410, 411 and 415, all employees of all corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 412, the tax imposed by section 4971, and the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary or his delegate.

§ 414(c) Employees of partnerships, proprietorships, etc. which are under common control.

For purposes of section 401, 410, 411, and 415, under regulations prescribed by the Secretary or his delegate, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection(b).

38. I.R.C. § 414(b).

39. I.R.C. § 414(b). House Report No. 93-807 indicates the relation of section 414(c) to 414(b):

[If two or more corporations were members of a parent-subsidiary, brother-sister, or combined controlled group, all of the employees of all of these corporations would have to be taken into account in applying these tests (§ 414(b)]. A comparable rule is provided in the case of partnerships and proprietorships which are under common control (§ 414(c)] (as determined under regulations), and all employees of such organizations are to be treated for purposes of these rules as though they were employed by a single person.

Section 4001(b) serves the same function with respect to the definitions of "substantial employer" and "multiemployer plan" in section 4001(a) as does Code section 414(c) with respect to Code section 414(b). In fact, ERISA provides that the regulations implementing the single employer provision of section 4001(b) "shall be consistent and coextensive with regulations prescribed for similar purposes . . . under section 414(c)." 40 The definitions of "substantial employer" and "multiemployer plan" in section 4001(a) contain the same provision for single employer treatment of corporations as does Code section 414(b). Just as section 414(c) gives broader application to the rule of single employer treatment in section 414(b), the language of ERISA section 4001(b) gives broader application to the "single employer" provisions in the section 4001(a) definitions of "substantial employer" and "multiemployer plan." The effect of each supplementary provision is the same: to extend the provision for single employer treatment of corporations under common control to unincorporated trades and businesses. Like Code section 414(c), the "single employer" provision of section 4001(b) is a rule of construction which explains how companies under common control "shall be treated." It is therefore apparent that section 4001(b) functions as a rule of construction for the section 4001(a) definitions of "substantial employer" and "multiemployer plan," which took their present form at the same time section 4001(b) with its "single employer" provision was added to ERISA.

To recapitulate, section 4001(a) defines "substantial employer" and "multiemployer plan" by reference to Code sections 414(f) and 1563(a). Code sections 414(f) and 1563(a) provide for single employer treatment of corporations under common control. Section 4001(b) extends the definitions in section 4001(a) by providing single employer treatment for trades and businesses under common control (whether or not incorporated). Together, these rules establish (1) that a pension plan maintained exclusively within a group of commonly controlled companies cannot be a multiemployer plan; and (2) that members of a commonly controlled group of companies participating in a pension plan with companies outside of their control group shall be treated as a single employer for the purposes of applying the substantial employer and multiemployer rules under ERISA sections 4063 and 4064. 41 Against this legislative background, it is inappropriate to view section 4001(b) as an independent definition substantively governing Title IV.

41. This proposition would be consistent with the second part of section 414(b) which states: With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 412, the tax imposed by section 4971, and the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary or his delegate.

I.R.C. § 414(b) (emphasis added).
The inadequacy of section 4001(b) to define the term "employer" to include all companies under common control further supports the conclusion that it was never intended to do so. Like Code section 414(c), section 4001(b) does not apply to "members of a controlled group of corporations (within the meaning of section 1563(a))." Code section 414(b) and ERISA sections 4001(a)(2) and (3) prescribe single employer treatment for groups of corporations under common control. Code section 414(c) and section 4001(b) are parallel, supplementary provisions which extend such treatment to groups including unincorporated trades and businesses.

In applying section 4001(b) as if it were a substantive definition of "employer" in section 4062, the PBGC has ignored the fact that section 4001(b) was intended to supplement section 4001(a) and that section 4001(b) is limited by its terms to groups including unincorporated trades and businesses. Such an interpretation disregards the function of section 4001(b) in relation to the definitions in section 4001(a) and wrenches a supplementary provision entirely out of its meaningful context.

**B. The Effect of Section 4001(b) on Section 4062**

To justify its contention that section 4001(b) governs the meaning of "employer" in section 4062 so as to impose termination liability on companies under common control with the company that actually established and contributed to the plan, the PBGC relies on House-Senate Conference Report comments which indicate that section 4001 was intended to affect the application of sections 4062 and 4064. The foregoing analysis indicates,

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42. Compare I.R.C. § 414(c) with I.R.C. § 414(b).
43. Although both section 4001(b) of ERISA and Code section 414(c) apply to trades and businesses "whether or not incorporated," this language does not make either provision applicable to common control groups consisting solely of corporations, but rather is intended to make such sections applicable to commonly controlled groups comprised of a mix of corporations and unincorporated trades and businesses as well as those groups comprised solely of unincorporated trades and businesses. An interpretation of Code section 414(c) and section 4001(b) to apply to commonly controlled groups consisting exclusively of corporations would bring section 414(c) into conflict with section 401(b) and make the provisions for single employer treatment contained in the section 4001(a) definitions superfluous. I.R.C. § 414(c) and ERISA, § 4001(b), 29 U.S.C. § 1301(b). But see T.D. 7388, Temp. Reg. § 11.414(c)-(2) (e) Ex. (5), 40 Fed. Reg. 51435, 51437 (1975).
44. See notes 24–28 and accompanying text for a discussion of the *Ouimet* case. Since the Ouimet group consisted solely of corporations, the case highlights the PBGC's strained application of section 4001(b).
45. The House-Senate Conference Report on ERISA contains the following statement in reference to section 4062:

In determining the employer who may be liable for the insurance coverage losses of the corporation [PBGC], all trades or businesses (whether or not incorporated) under common control are to be treated as a single employer. Trades or businesses
however, that section 4001(b) functions by reference to section 4001(a) and that to the extent that section 4001(b) affects the application of section 4062 it does so in tandem with section 4001(a). The intended relationship between section 4001 and sections 4062 and 4064 requires examination.

Section 4062 liability is restricted to employers who maintain a plan. The Conferees' comment on section 4062 states that in determining the employer who may be liable under that section, all trades and businesses under common control are to be treated as a single employer. The PBGC relies on this comment to contend that any company treated as a "single employer" under section 4001(b) "maintains a plan" within the meaning of section 4062, whether or not that company establishes or contributes to the plan, if at least one member of the common control group to which that company belongs actually maintains the plan. This interpretation treats companies which do not establish or contribute to a plan as maintaining the plan.

Throughout ERISA, maintaining a plan is associated with establishing and contributing to pension plans—acts which employers who are merely under common control do not undertake to do for their related firms unless they "adopt" a plan. For instance, section 402(a)(1) requires that "[e]very employee benefit plan be established and maintained pursuant to a written instrument." This requirement is inconsistent with the contention that companies under common control which do not adopt such an instrument are maintaining a plan. In addition to establishing or adopting a plan, another requirement of maintaining a plan is contributing to it. In a formal opinion letter, the PBGC stated: "Liability under ERISA Sections 4062 and 4064 applies to employers who 'maintained' a plan at the time such plan was terminated . . . . We conclude that an employer which contributes to a plan 'maintains' it within the meaning of Section 4062 of the Act."
The legislative history of ERISA also indicates that maintaining a plan requires contributing to it. An earlier version of section 4062, for example, imposed liability only on "contributing" employers:

**EMPLOYER LIABILITY**

SEC. 414. (a) Subject to subsection (e), where the employer or employers contributing to the terminating plan or who terminated the plan are not insolvent . . . such employer or employers (or any successor in interest to such employer or employers) shall be liable to reimburse the Corporation [PBGC] for any insurance benefits paid by the Corporation [PBGC] . . . .

This evidence supports a common sense interpretation of the term "maintaining a plan" as used in ERISA to mean establishing, adopting, or contributing to that plan. The legislative history of Title IV gives no indication that the adoption of section 4001(b) was intended to alter this meaning of "maintain a plan" within section 4062. These considerations indicate that companies which do not establish or contribute to a plan cannot "maintain a plan" within the meaning of sections 4062 and 4064.

Since the maintaining-a-plan requirement of section 4062 is not satisfied in the case of a company that fails to participate in a pension plan, the Conference Report comment on section 4062 must have had some purpose other than that which the PBGC suggests. This purpose should be consistent with the idea that maintaining a plan entails establishing and contributing to the plan. When section 4062 is read in conjunction with section 4064, such a purpose readily appears.

Section 4062 imposes liability on employers who maintained non-multiemployer plans. Section 4064 provides for the allocation of termination liability among employers maintaining a plan to which more than one employer has made contributions at the time of termination. In order to


52. Congressman Gaydos offered the most detailed explanation of the conferees' intended changes in Title IV:

Termination Insurance

The conference report, with some minor changes, adopts the House provisions which provide for the creation of a Pension Benefit Guaranty Corporation, whose purpose is to guarantee payments of benefits to participants in the event of termination of the pension plan. There are three new provisions in the conference report, however, which are of interest.

120 CONG. REC. 29207 (1974). The three changes were provisions for (1) an advisory board to the PBGC, (2) contingent liability insurance, and (3) private insurance.

53. Note 45 supra.

54. Section 4064 imposes liability by reference to section 4062: section 4064(b) provides that, with certain exceptions, "the corporation [PBGC] shall determine the liability of each . . . employer in a manner consistent with section 4062." ERISA, § 4064(b), 29 U.S.C. § 1364(b) (Supp. V 1975).
properly apply sections 4062 and 4064 to employers contributing under a plan maintained exclusively by a group of commonly controlled companies, it is necessary to know whether these companies should be treated as a single employer or a multiemployer group. Section 4001 resolves this problem: section 4001(a) excludes corporations under common control from the definition of multiemployer plans, and section 4001(b) extends this exclusion by providing single employer treatment for unincorporated trades and businesses under common control. Thus, by prescribing single employer treatment for common control groups, section 4001 brings contributing members of these groups under section 4062 rather than under section 4064. If a plan were maintained by a group that included noncontrol group contributors as well as control group contributors, liability would attach under section 4064. However, the control group would participate as a single employer. As the legislative history indicates, sections 4001(a) and (b) affect section 4062 by determining whether liability for a terminated plan arises under section 4062 or section 4064.

55. This distinction between the treatment of multiemployer plans and single employer plans applies with respect to a variety of provisions in ERISA, and is maintained with a consistency that is somewhat surprising in light of the Act’s other ambiguities. Compare ERISA, § 3 (37), 29 U.S.C. § 1002(37) (Supp. V 1975), with ERISA § 210, 29 U.S.C. § 1060 (Supp. V 1975) and ERISA, § 303(a), 29 U.S.C. § 1083(a) (Supp. V 1975). The legislative history indicates the drafters’ concern with this distinction.

In formulating the definition of “multi-employer plan” the Committee was guided by the concept that such a plan, if sufficiently comprehensive in size or scope, would be unlikely to terminate because its existence did not depend on the economic fortunes of one employer or employer entity. The Committee recognized that certain single employer plans have characteristics similar to those of the multiemployer type described in the definition, but, on balance, it is believed that experience on plan terminations provides a reasonable basis for the distinction.

H.R. REP. No. 93-533, 93d Cong., 1st Sess. 10, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4639, 4648. One report on ERISA stated that “multiemployer plans represent a different situation from single employer plans in a number of respects.” STAFF OF SUBCOMM. ON LABOR OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93d CONG., 2d Sess., LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 5101 (Comm. Print 1976) (administrative recommendations to House-Senate conferees on ERISA). These manifestations of the legislative attempt to clearly distinguish treatment of the two categories of plans indicate that in interpreting ERISA it is important to distinguish single employer plans from multiemployer plans.

56. S. REP. No. 93–383, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4973–74. The legislative history of section 4064 includes the following comment:

A multiemployer plan is a plan to which more than one employer is required to contribute; is established or maintained pursuant to a collective bargaining agreement between employee representatives and employers; and is a plan where the benefits are payable with respect to each participant without regard to whether the participant’s employer is still making contributions to the fund. All employers who are members of the same affiliated group (sec. 1504(a) ) are to be treated as one employer for the purposes of this definition.

The foregoing passage clarifies the intention of the drafters to use the reference to affiliated employers to indicate that a plan maintained only by affiliated employers would not be subject to liability under section 4064, pertaining to termination of multiemployer plans, but would be subject to liability under section 4062.
The PBGC's alternate interpretation of the effect of section 4001(b) on section 4062 finds support in a fragment of the legislative history of section 4064 which states that the section 4064 liability of one member of a controlled group "is to extend to the entire affiliated group" and that the 30% limit on liability applies "to the net assets of the entire group." While it is not directly applicable to section 4062, this language does appear to be consistent with the PBGC's position that section 4062 liability extends to noncontributing companies under common control—an interpretation which is unsatisfactory because it is inconsistent with the requirement of maintaining a plan and with other provisions of ERISA.

The Conferrees' comment on section 4064 should be interpreted consistently with the proposition that only contributing employers may be liable. When so interpreted, the comment serves a specific function with respect to section 4064(b), which states that the 30% "limitation described in section 4062(b)(2) shall be applied separately to each employer." As applied to commonly controlled companies contributing under a multiemployer plan, the comment would simply direct the PBGC to assess the allocable share of liability for these companies as a lump sum and combine the net worth of the contributing companies under common control. This interpretation of the comment is consistent with the single employer treatment prescribed for such companies in section 4001(b) and the concept of maintaining a plan as used throughout ERISA. Support for this interpretation appears in the other sections of ERISA providing for allocation of obligations among control group members.

Section 414(b) of the Internal Revenue Code, added to the Code by section 1015 of ERISA, permits allocation of minimum funding requirements and employer deductions among only those members of a control group which have adopted a plan.

The most reasonable interpretation of section 4062 would limit the incidence of termination liability to companies that have established, adopted, or contributed to a pension plan. In the context of commonly controlled companies, only companies which adopted or contributed to a plan would be liable. Such an interpretation is consistent with a common sense interpretation of the language of ERISA and its legislative history and avoids many of the inconsistencies and pitfalls of the PBGC interpretation discussed below.

C. Incompatibility of the PBGC Interpretation with Other Provisions of ERISA

Apart from its intrinsic flaws, the PBGC interpretation of ERISA section 4062 (which would impose liability on companies within a common control
group which have not participated in a terminated plan formerly maintained by other members of the group) suffers from incompatibility with other provisions of ERISA. An inconsistency appears between the PBGC interpretation of section 4062 and ERISA section 407(d)(7). Section 407, which describes one of the restrictions which ERISA places on pension fund investment, generally limits the percentage of pension funds which may be invested in the securities or real property of an employer or employer-affiliate whose employees are covered by the particular plan. Specifically, section 407(d)(7) defines an employer-affiliate as "a member of any controlled group of corporations . . . of which the employer who maintains a plan is a member." The distinction which this provision makes between a control group member and an "employer who maintains a plan" is inconsistent with the PBGC's contention that all members of a common control group are "employers who maintain a plan."

The PBGC interpretation of ERISA section 4062 is also inconsistent with section 404 of the Internal Revenue Code (as amended by ERISA). Section 404(g) provides that "any amount paid by an employer under section 4062, 4063, or 4064 of the Employee Retirement Income Security Act of 1974 shall be treated as a contribution to which this section applies by such employer to or under a stock bonus, pension, profit-sharing, or annuity plan." By virtue of this provision an employer satisfying its section 4062 liability may claim a tax deduction under section 404(a) of the Internal Revenue Code. Such a deduction should logically be available to noncontributing companies within a common control group which have incurred termination liability pursuant to the PBGC interpretation of section 4062. However, certain regulations and revenue rulings indicate that companies under common control cannot deduct payments made with respect to a plan which another member of the group maintains for its employees. Therefore, although the question has not been raised specifically with respect to section 404(g), the Internal Revenue Service clearly disallows contributions in behalf of an affiliate. The disallowance of this deduction is inconsistent with the imposition of liability on nonparticipating companies under common control and would impose an additional and inequitable financial burden on any nonparticipating company which would be liable under the PBGC interpretation of section 4062.

61. Id.
63. Revenue Ruling 69-35, 1969-1 C.B. 117, states that "amounts contributed under this plan by the corporation that is not the employer of those benefitting from the contributions are not deductible under section 404 of the Code unless they constitute 'make-up' contributions within the purview of section 404(a)(3)(B), and then only to the extent therein provided."
In addition to its inconsistency with other sections ERISA, the PBGC interpretation generates inconsistencies within section 4062. Subsection (d)(2) of section 4062 provides that “[i]f an employer ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the employer to whom this section applies.” 64 Two corporations related as parent and subsidiary are commonly controlled companies. 65 If, as the PBGC claims, nonparticipating companies under common control are liable for the pension obligations of member corporations, then this provision for the liability of a parent upon liquidation is entirely superfluous. Under the PBGC interpretation the parent corporation would be liable with or without the liquidation of the subsidiary maintaining the plan. This inconsistency indicates that the drafters of Title IV did not envision across-the-board liability for companies under common control.

In addition to generating statutory inconsistencies the PBGC interpretation creates a number of problems with respect to the procedures and policies which Title IV of ERISA establishes. One procedural problem arises because there is no set order in which the members of a group of commonly controlled companies must answer for the liability of another member of the group. Since the liability which the PBGC asserts against an entire group may derive from the pension obligations of a single member, the assets of the company that maintained the plan should be the first to be applied toward that liability. But because the PBGC has taken the position that members of a controlled group are jointly and severally responsible for termination liability, 66 it would be possible for the PBGC to impose liability and satisfy a lien from nonparticipating companies and yet leave assets in the company that actually established and contributed to the plan. Such a procedure seems patently inequitable.

A similar problem arises in attempting to calculate the upper limit of an employer's termination liability. Section 4062 specifically sets the limit at 30% of an employer's net worth. 67 The PBGC's position is that application of the 30% limit to companies under common control fixes the upper limit of liability at 30% of the group's combined net worth. 68 This produces the bizarre result that two companies of equal net worth (where each maintains a pension plan but only one is under common control) might have substantially different termination liabilities.

66. See note 28 supra and accompanying text.
A final but crucial incidence of incompatibility appears between the PBGC interpretation of Section 4062 to extend liability to nonparticipating companies under common control and some of the policies and purposes of ERISA. In the Findings Declaration and Policy at the beginning of ERISA is a legislative finding that "owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." As a legislative response to such termination losses, ERISA establishes a policy of improving the "equitable character and soundness" of private pension plans "by requiring them to invest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." In implementing such a policy, however, the drafters of ERISA were acutely aware that placing unreasonable pension burdens on businesses would discourage the voluntary establishment and maintenance of pension plans. A desire to encourage businesses to voluntarily maintain pension plans produced a careful balancing of burdens in devising the machinery to carry out the policies of ERISA.

The purposes set forth in the beginning of Title IV of ERISA indicate that, in devising a system of plan termination insurance, Congress specifically balanced its desire to insure benefits against the financial burdens that insurance would create. The first objective of ERISA—encouraging

70. Id. § 2(c), 29 U.S.C. § 1001(a) (Supp. V 1975).
71. H.R. REP. No. 93-807, 93d Cong., 2d Sess. 8-9, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4670, 4677, serves as a reminder that ERISA did not make mandatory the establishment or maintenance of employee pension plans:

A fundamental aspect of present law, which the committee bill continues, is reliance on voluntary action by employers (and employees under contributory plans) for the establishment of qualified retirement plans. The committee bill also continues the approach in present law of encouraging the establishment of retirement plans which contain socially desirable provisions through the granting of tax inducements. In other words, under the new legislation as under the present law, no one is compelled to establish a retirement plan.

72. This legislation provides urgently needed reform in the pension area. But, at the same time, it continues the basic governmental policy of encouraging the growth and development of voluntary private pension plans. . . . .

I want to emphasize that these new requirements have been carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to employees for whose benefit this legislation is designed. For this reason, we have been extremely careful to keep the additional costs very moderate.


73. See S. REP. NO. 93-127, 93d Cong., 1st Sess. 26, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4838, 4862, which states that "[t]he Committee had concern that if the degree of
employers to voluntarily maintain and continue pension plans—reflects a continuation of the previous governmental policy. Unfortunately, there is an unavoidable tension between encouraging maintenance of pension plans and the second objective of insuring benefits by imposing liabilities on employers when pension benefits are interrupted. The legislative history of Title IV reflects the concern of the drafters that contingent liability would bring these two objectives into conflict.

This contingent liability would be such as to make the financial structure of any business appear unsound. Such liability would inevitably discourage additional employers from beginning new pension plans and existing plans from increasing benefits and thereby increasing the employer’s liability.

On one level, the third purpose of Title IV—holding down insurance premiums—should encourage plan maintenance. However, employers absorb the cost of unfunded benefits. The resulting threat of large liability, therefore, makes the low-premium policy inconsistent with the goal of encouraging voluntary continuation and maintenance of pension plans.

Since discouraging employers from voluntarily maintaining pension plans is inconsistent with the purposes of Title IV, Title IV should be interpreted in such a way as to avoid this result. Inconsistencies among the purposes of Title IV require the PBGC and the courts to balance conflicting policies just as Congress did. All interpreters of Title IV face the paradox that, while employers must support the insurance system, there will ultimately be no benefits if excessive financial burdens drive them out of the pension business.

It therefore appears that while the PBGC must impose liability upon employers whose pension plans terminate, it should not extend that liability beyond the specific requirements which Congress established to accomplish a balance of obligations which would not discourage plan maintenance. The conflicting purposes of Title IV argue against any interpretation of the Act to assert employer liability which the statute does not clearly and directly impose.

liability was absolute to the extent of the employer’s assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.”

74. See note 71 supra.
Our primary consideration in writing pension reform legislation has been to help assure that workers now covered by pension plans get their expected benefits. At the same time, we have been careful not to inhibit benefit improvements for these covered workers and not to retard the expansion of the pension system in such a way as to deny retirement benefits to workers not now covered.

76. Id. at 42, [1974] U.S. CODE CONG. & AD. NEWS at 4667.
IV. CONSTITUTIONAL PROBLEMS

The power to judicially review the constitutionality of legislation carries with it a corollary requiring some degree of compatibility between a valid statute and fundamental legal principles. An interpretation of ERISA section 4062 to impose liability on a company whose only relation to a terminated plan is that it belongs to the same commonly controlled group as does the company which actually maintained the plan collides with fifth amendment protections. This section of the Note explores the nature of the incompatibility between the PBGC interpretation of ERISA section 4062 and the constitutional guarantees of due process and equal protection which the Supreme Court has held to be applicable to business entities.

A. Due Process: Vicarious Liability of Companies Under Common Control

Liability which accrues to one person or entity as a result of the proscribed behavior of another person or entity is vicarious. When nonparticipating companies within a commonly controlled group have no contractual or other direct ties to a pension plan maintained by another company in the group, the liability for that plan which the PBGC asserts against the nonparticipating company is vicarious.

The constitutional guarantee of due process has led several courts to invalidate statutes imposing vicarious liability for proscribed behavior in which the person subject to liability was not somehow consensually involved.


78. The business entities affected by the PBGC interpretation of section 4062 are corporations and trades and businesses under common control, as defined in sections 414(b) and 414(c) of the Internal Revenue Code. The Court has specifically applied the equal protection and due process guarantees to corporations. Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), invalidated, on equal protection grounds, an Ohio statute which imposed a discriminatory tax on the in-state business of foreign corporations. In an addendum to the majority opinion, Justice Jackson stated:

The writer of the Court's opinion deems it necessary to complete the record by pointing out why, in writing by assignment for the Court, he assumed without discussion that the protections of the Fourteenth Amendment are available to a corporation. It was not questioned by the State in this case, nor was it considered by the courts below. It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws, at least since 1886, and that it entitles them to due process of law, at least since 1889.

Id. at 574 (citations omitted).


80. Brindamour v. Murray, 7 Cal. 2d 73, 59 P.2d 1009 (1936) (vicarious liability for automobile owner when car was used by another person without owner's consent); Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971) (statute imposing vicarious liability upon parent for child's illegal behavior); Frankel v. Cone, 214 Ga. 733, 107 S.E.2d 819 (1959); Seleine v.
These due process objections to vicarious liability appear in several distinguishable types of cases. Recently, in the context of a forfeiture case, the Supreme Court recognized that "it would be difficult to reject the constitutional claim of an owner whose property... had been taken from him without his privity or consent." A particularly explicit analysis of vicarious liability in terms of due process appears in an early 20th-century case. Daugherty v. Thomas invalidated a Michigan statute that had imposed vicarious liability on the innocent owner of an automobile for damages incurred when a garage employee, in the process of testing the repaired car, struck and injured a pedestrian. The trial court rendered judgment against the owner under a statute providing: "The owner of a motor vehicle shall be liable for any injury occasioned by... the negligent operation by any person of such motor vehicle." The owner thereafter attacked the judgment in the Michigan Supreme Court, contending that the statute was "void as... a deprivation of property without due process of law within the fourteenth amendment to the Federal Constitution." Although the enactment of such a law was arguably within the police powers of the state, the court held the statute to be violative of due process:

To hold the statute... constitutional is to hold a party absolutely liable for the negligent conduct of another... We think that the result of such holding would be to take the property of defendant Thomas to pay for the wrongful and negligent act of another person.
not sustaining to him the relation of servant, agent, or employee. Such a doctrine seems unnatural and repugnant to the provisions of the Constitution here invoked.\textsuperscript{86}

The Michigan Supreme Court modeled its due process analysis on an earlier case\textsuperscript{87} that had examined the constitutionality of a statute compelling vehicle owners to indemnify drivers whenever injury resulted from the operation of the innocent owner's vehicle. Justice Loomis had found liability under this statute unsupportable:

Such a result is in itself so absurd as to show either that the statute ought not to be so construed as to produce it, or that, if this be a correct construction, it is so far void, either as manifestly against natural justice, or as violating that article of the Constitution which forbids the taking away of any person's property "without due process of law." If such a law, so construed, were to be held valid, then a law that should by a merely arbitrary rule make one man liable for the debts of another would be valid. Indeed, there is no limit that could be put to the most arbitrary acts of the legislature in making one man liable for the acts of another.\textsuperscript{88}

\textit{Daugherty} viewed due process as providing substantive protection against any "merely arbitrary rule" that makes "one man liable for the debts of another." As this principle has developed, vicarious liability has come to be recognized as a deprivation of due process when such liability can be imposed for acts in which an individual was not causally or consensually involved.\textsuperscript{89} \textit{Daugherty} specifically established that mere ownership is an insufficient basis upon which to impose vicarious liability.\textsuperscript{90}

Under a logical extension of the \textit{Daugherty} principle the constitutionality of the PBGC interpretation of ERISA section 4062 is questionable. In assert-

\begin{footnotes}
\item\textsuperscript{86} Id. at 390, 140 N.W. at 622.
\item\textsuperscript{87} Camp v. Rogers, 44 Conn. 291 (1877).
\item\textsuperscript{88} 174 Mich. 371, 380-81, 140 N.W. 615, 618-19 (1913).
\item\textsuperscript{89} See note 82 supra and accompanying text.
\item\textsuperscript{90} A small group of cases which might appear to undercut this principle subject keepers of dangerous animals to absolute liability. \textit{E.g.,} Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 183 S.E. 289 (1930). These cases are distinguishable from automobile ownership cases because they involve no intervening agency, such as an unauthorized driver, which bears actual responsibility for the liability that accrues.
\end{footnotes}
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ing vicarious liability against companies under common control, the PBGC relies solely upon the ties of ownership that exist among a commonly controlled group of companies. Because nonparticipating companies lack consensual involvement with the pension plan maintained by another company in the control group, the PBGC interpretation of ERISA section 4062 liability operates as an arbitrary rule making "one man liable for the debts of another." 91 and runs counter to the constitutional principles applied in Daugherty and Calero-Toledo v. Pearson Yacht Leasing Co. 92 It is therefore doubtful whether the PBGC interpretation extending termination liability to nonparticipating companies under common control complies with fifth amendment constitutional guarantees. 93

B. Equal Protection: Discriminatory Treatment of Companies Under Common Control

An interpretation of section 4062 of ERISA to impose vicarious liability on nonparticipating companies under common control raises an equal protection problem 94 by treating individual owners differently from owners who are classified as trades and businesses. A simple example will illustrate the difference in treatment which the PBGC interpretation affords businesses as opposed to natural persons. Assume that corporation ABC, a company maintaining a pension plan, has termination liability. If X, an individual, owns 80% of ABC, X is not liable. However, if Y, a corporation or other trade or business, owns 80% of ABC, then (1) it is under common control with ABC, 95 and (2) it is liable under the PBGC interpretation of Title IV.

91. By imposing termination liability on commonly controlled companies irrespective of privity or consent to a pension plan, section 4062 liability is not a burden directly on an ownership interest—as, for instance, a property tax. Individual owners (classified as neither trades and businesses nor corporations) are not liable on the basis of their ownership interest in the stock of a company with plan termination liability. See note 94 infra and accompanying text.


93. Another due process objection may also arise here. Section 4062 liability has a retrospective effect upon companies terminating pension plans which they established prior to ERISA's enactment. Hale, The Supreme Court and the Contract Clause (pt. 3), 57 Harv. L. Rev. 852, 890 (1944), indicates that the due process clause of the fifth amendment prevents Congress from impairing vested contract rights in an unreasonable manner. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960), identifies three factors which are useful in determining the reasonableness of retroactive legislation: (1) the public interest which the statute promotes; (2) the degree to which the statute impairs a preexisting right; and (3) the character of the preexisting right.

Additionally, courts may consider the substantive, as opposed to remedial, nature of the contractual impairment and the direct, as opposed to incidental, interference with contractual obligations. Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 680-81 (1935).

94. See cases cited at note 77 supra.

95. See note 63 supra.
The question posed by this discriminatory treatment resulting from the PBGC interpretation of section 4062 is whether business entities, that is trades and businesses (whether or not incorporated) and corporations, as opposed to natural persons, are denied equal protection of the law. This issue has arisen before in the context of laws treating individuals and corporations differently. One such case, State v. Nashville, Chattanooga & St. Louis Railway Co.,96 involved an equal protection challenge to a statute prohibiting corporations, but not natural persons, from discharging employees for exercising certain civil liberties. The court set forth what has become the standard test of statutory validity:

[T]he classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the [legislative] object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others, should be so preferred or discriminated against.97

The statute failed to meet this standard and was invalidated as a denial of equal protection. The statute had distinguished corporate and noncorporate employers, apparently with the legislative objective of preventing employers from impairing the civil rights of their employees. The court, however, saw no reason for differentiating between types of employers in order to achieve this objective,98 and held that the statutory classification lacked a rational basis.99

When a rational basis for differentiating corporations from other business entities is apparent, however, similar classifications have been upheld. Malinckrodt Chemical Works v. Missouri100 involved an equal protection challenge to a state statute requiring corporations to file certain affidavits on an annual basis. The Court held that corporations could be made to file affidavits from which other business entities were exempt when the particular statute's objective was to aid the prohibition of trusts and other combinations in restraint of trade. Corporations could act only by their agents, and often the agency could be neatly disguised. The Court concluded

96. 124 Tenn. 1, 135 S.W. 773 (1911).
97. Id. at 10, 135 S.W. at 775.
98. Id. at 14, 135 S.W. at 776.
99. "The discriminations, which are open to objection, are those where persons engaged in the same business are subject to different restrictions, or held entitled to different privileges under the same conditions." Soon Hing v. Crowley, 113 U.S. 703, 709 (1885), quoted in State v. Nashville, C. & St. L. Ry., 124 Tenn. 1, 11, 135 S.W. 773, 775 (1911).
100. 238 U.S. 41 (1915).
that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed, that their business affiliations are not so easily discovered and traced as those of individuals, and that there was therefore a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its non-participation in the prohibited practices.\textsuperscript{101}

In a more recent case, \textit{Lehnhausen v. Lake Shore Auto Parts Co.},\textsuperscript{102} the Supreme Court sustained state legislation which prohibited the state from imposing on natural persons a personal property tax levied against corporations. The legislative objective of raising revenue by means of the tax appeared at first glance to afford little reason for distinguishing between corporations and individuals. Nevertheless, the Court found a sufficient rational basis for the discriminatory treatment. Since the tax could only be administered feasibly with respect to corporate personality, administrative convenience gave the statutory classification a rational basis and thus defeated the equal protection challenge.\textsuperscript{103}

The PBGC interpretation of section 4062 as imposing termination liability on nonparticipating companies under common control differentiates between business entities (whether or not incorporated) and natural persons.\textsuperscript{104} To determine whether this statutory classification complies with the fifth amendment's implied guarantee of equal protection,\textsuperscript{105} courts will first have to examine the purposes of section 4062's imposition of termination liability. If the differentiation between business entities and natural persons should fail to reasonably promote any statutory purpose underlying section 4062 of ERISA, then the courts should reject the interpretation as a denial of equal protection.

The legislative history of ERISA suggests at least one purpose for imposing termination liability in section 4062. One function which Title IV of ERISA assigns to the PBGC is guaranteeing payment of all nonforfeitable benefits under pension plans to which ERISA applies.\textsuperscript{106} The PBGC is empowered to collect premiums from employers maintaining pension plans in order to fund the payment of pension benefits.\textsuperscript{107} Because the PBGC guarantees the payment of these benefits, employers might be tempted to

\textsuperscript{101} Id. at 53.
\textsuperscript{102} 410 U.S. 356 (1973).
\textsuperscript{103} See id. at 365.
\textsuperscript{104} See \textit{note 83 supra} and \textit{accompanying text}.
\textsuperscript{105} See \textit{note 77 supra}.
promise benefits which they could not fund, thereby passing on the costs of promised benefits via high insurance premiums to other employers. One purpose of termination liability under section 4062 was, therefore, to prevent employers from promising benefits beyond their means or intentions in reliance upon Title IV's provision of plan termination insurance.\textsuperscript{108} Another reason for imposing liability on employers whose plans terminated was to make them absorb part of the cost of the insured benefits so that the rates for premiums paid by other employers would not be excessive. High premium rates for insuring the payment of pension plan benefits discourage the establishment and continuation of private pension plans.\textsuperscript{109} However, the purpose of maintaining low premium rates for plan termination insurance does not appear to justify a statutory classification that subjects business entities (but not natural persons) to termination liability when both are in exactly the same relation to a company with plan termination liabilities. Since companies owned and controlled directly by natural persons are equally subject to temptations of promising pension benefits in reliance upon plan termination insurance, such a classification scheme lacks a rational basis. Consequently, if the PBGC interpretation of section 4062 is adopted, it may subject those provisions to invalidation for denying equal protection of the law.

V. POLICY OBJECTIONS

Apart from questions regarding its validity, the PBGC interpretation of section 4062 of ERISA to impose liability on nonparticipating companies under common control conflicts with several basic policies which guide the legislative regulation of businesses. Statutes should ordinarily be construed so as to be consistent with long-standing legislative policies.\textsuperscript{110} However, the tendency of the PBGC interpretation of section 4062 of ERISA to undermine free choice among forms of business ownership, limited corporate liability, and the rescue of failing companies, makes it inconsistent with well-established policies.


Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the insurance program, notwithstanding their own financial ability to continue funding the plan, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefits paid by the corporation.\textsuperscript{120} Cong. Rec. 29931 (1974) (remarks of Sen. Williams), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5185.


\textsuperscript{110} See E. CRAWFORD, THE CONSTRUCTION OF STATUTES 371 (1940): "[T]he general policy of the state, or the established policy of the legislature as revealed by its legislation generally, should be considered in the construction of statutes" (footnotes omitted).
A. Impact on Forms of Ownership

It is questionable whether legislation regulating pensions should substantially affect an employer's choice of the form in which he carries on his business. Yet, under the PBGC interpretation of section 4062 to impose across-the-board liability on control group members, the extent to which the owner of an 80% interest in a company may be liable for that company's plan termination obligations may depend on whether the owner is a corporation, an unincorporated trade or business, or an individual investor.

An example may illustrate how under the PBGC interpretation the extent of termination liability depends on the form of business. Assume that $O$, $O_1$, and $O_2$ are individuals. $O$ owns 100% of $B$ corporation. $O_1$ owns 99% of $O-P$ partnership which owns 100% of $B_1$ corporation. $O_2$ owns 100% of $C$ corporation which owns 100% of $B_2$ corporation:

Therefore, $O$, $O_1$, and $O_2$ control $B$, $B_1$, and $B_2$ respectively. Assuming that $B$, $B_1$, and $B_2$ all have terminated qualified pension plans in which guaranteed benefits exceed plan assets, the PBGC would pay those benefits. The liability of $O$, $O_1$, and $O_2$ to the PBGC under Title IV would then be as follows:

1. Respecting $B$ corporation: $O$'s losses are limited to his interest in the stock; $O$ is not personally liable.

2. Respecting $B_1$ corporation: Since $O-P$'s liability is not limited to its interest in the stock of $B_1$ because it is a "trade or business," $O_1$'s assets in $O-P$ are subject to liability. If the PBGC overestimates the net worth of $O-P$, $O_1$'s liability may even extend to his other assets.

3. Respecting $B_2$ corporation: Despite the fact that $C$ has exactly the same ownership interest in $B_2$ as $O$ does in $B$, $C$'s losses are not limited to its interest in the stock of $B_2$, and $O_2$'s assets in $C$ are subject to liability. However, $O_2$ is not personally liable.
As this hypothetical illustrates, under the PBGC interpretation of section 4062 of ERISA the extent of liability imposed on an owner may vary according to the form of ownership in situations where both the obligations and ownership interests are otherwise similar. The PBGC interpretation of section 4062 to extend liability through a controlled group of businesses or corporations makes individual ownership preferable and may discourage ownership through commonly controlled companies. The discouragement of ownership through companies under common control in no way relates to the purpose of legislation which was designed to secure the more equitable administration of pension plans.

B. Limiting Limited Liability

Among the recognized attributes of a corporation are its separate legal identity and the limitation of liability for shareholders to the amount contributed to the corporate enterprise. Nevertheless, in certain exceptional circumstances the corporate entity may be disregarded and shareholders held personally liable for the corporation's obligations. The PBGC interpretation of ERISA section 4062 to impose the termination liability of any member of a control group on all companies within that group disregards the principles of corporate identity and limited liability. The advisability of applying such a scheme to companies under common control depends upon whether ownership by a business entity, as opposed to an individual, is sufficient justification for piercing the corporate veil.

In 1929, Professors William O. Douglas and Carrol Shanks published the seminal article on piercing the corporate veil in situations involving corporations under common control. Within this context the article recognized that the principle of limited shareholder liability is based on the premise that "[i]t is legitimate for a man or a group of men to stake only a part of their fortune on an enterprise." The authors noted further that in the case of parent and subsidiary corporations, "ownership alone does not suffice to destroy the non-conductor of liability." A consensus exists within de-

112 Id. § 41.
113. See note 94 supra and accompanying text.
115. Id. at 193-94.
116. Id. at 196. The authors proceeded to restate this point:"It is tacit in that conclusion that the exercise of the 'control' which stock ownership gives to the stockholders, either by statute, judicial decision, or normal corporation procedure, will not create liability beyond the assets of the subsidiary." Id.
cisional law as to what factors may justify piercing the corporate veil.\textsuperscript{117} \textit{United States v. Milwaukee Refrigerator Transit Co.}\textsuperscript{118} set forth the general rule:

[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.\textsuperscript{119}

By ignoring these factors, the PBGC interpretation of section 4062 destroys the limited liability that would normally exist among corporations under common control. The corporate veil is pierced upon a showing of nothing more than common control; mere ownership triggers the imposition of termination liability on those companies not participating in the plan maintained by another member of the control group.

By enacting a statute that disregards the limited liability of corporations under common control, Congress would have deprived courts of the power to determine when and if equitable considerations required a piercing of the corporate veil. Because the PBGC interpretation of section 4062 strips this remedy of its equitable character, one may question whether Congress actually intended the statutory provision to have this effect. Since the more than 5,000 pages of legislative history on ERISA which Congress has compiled\textsuperscript{120} do not mention this possible effect, the inquiry must be indirectly pursued by examining the way in which the drafters developed the section 4001(b) provision respecting single employer treatment of trades and businesses under common control. A series of cross references between ERISA and the Internal Revenue Code\textsuperscript{121} indicate that section 1563(a) of the Code served as a model for the single employer treatment that section 4001(b) prescribes for companies under common control. The definitions and special rules in section 1563 were devised for use in determining whether certain tax benefits highlighted in section 1561(a) of the Code would be available to corporations within a common control group. Section 1561 of the Internal Revenue Code was added in 1963 to assure that these tax benefits would aid

\begin{itemize}
  \item \textsuperscript{117} 1 W. FLETHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (rev. perm. ed. 1974).
  \item \textsuperscript{118} 142 F. 247 (E.D. Wis. 1905).
  \item \textsuperscript{119} Id. at 255.
  \item \textsuperscript{120} STAFF OF SUBCOMM. ON LABOR OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93d CONG., 2d SESS., LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974 (Comm. Print 1976).
  \item \textsuperscript{121} Compare ERISA, § 4001(b), 29 U.S.C. § 1301(b) (Supp. V 1975) and ERISA, § 4001(a), 29 U.S.C. § 1301(a) (Supp. V 1975) with I.R.C. §§ 414(b)–(c), 1563(a).
\end{itemize}
small business corporations and not "large organizations which operate through multiple corporations and which are not in reality 'small businesses.'" This revision was the beginning of single-corporation tax treatment for corporations under common control. Although it disregarded corporate boundaries, the rule did not pierce the corporate veil because it did not hold shareholders liable for corporate obligations. Since section 1563 of the Internal Revenue Code serves as a model for section 4001(b) of ERISA, it seems unlikely that section 4001(b) was intended to destroy limited shareholder liability.

Although section 4001(b) was a last minute addition, there is no evidence in the legislative history of ERISA to indicate that Congress intended to make any major changes in the final stages prior to the passage of the statute. Those changes made in Title IV were relatively insignificant. No provision of ERISA's Title IV specifically authorizes the piercing of the corporate veil—not even section 4064, which imposes termination liability on employers who maintain multiemployer plans.

C. Saving Failing Companies

A further policy question respecting the desirability of imposing liability on nonparticipating companies under common control arises in the context of a failing company. In this situation, it is often possible (and of benefit to everyone) for a thriving corporation to purchase the stock and assume control of a failing company in order to effect a turnaround. The rescue of a failing company as well as the avoidance of a failing company does not transform into a failing company "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated." The case developed the "failing company doctrine" which serves as a defense to an antitrust violation charged under the Clayton Act. For discussions of the failing company defense see Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 339-47 (1960); Comment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L.J. 1627, 1662-68 (1959).

Justice Stewart gave a perceptive analysis of the failing company doctrine when he stated that "[i]t is, in a sense, a 'lesser of two evils' approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business." United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974). Stewart's analysis applies equally well to a company acquiring a failing company with Title IV termination liability. In this case a nonassertion of liability against the acquiring company may very well be the lesser of two evils.
failing company saves jobs and permits continuation of employee pension plans.

Under ERISA any company contemplating this inherently risky venture must consider contingent pension liabilities in assessing the financial situation of the company to be acquired. Since a stock purchase would bring the purchasing company and the failing company under common control, the PBGC interpretation of section 4062 of ERISA would subject 30% of the acquiring company's net worth to termination liability. The acquiring company might also be subject to a lien against its other assets for the entire liability of the failing company.

The impact of this increase in liability and the assertion of this liability against an acquiring corporation would discourage a potential purchaser from entering into a transaction to save a failing company with potential pension liabilities. By discouraging the acquisition, the imposition of termination liability may well increase the failing corporation's likelihood of bankruptcy. Permanent insufficiency of pension funds could follow from such adjudications of bankruptcy, and eventually create an increase in premiums for contingent liability insurance under ERISA section 4006(a) for all employers maintaining pension plans. Discouraging the rescue of failing companies is inconsistent with the purposes of ERISA Title IV: "to encourage the continuation and maintenance of voluntary private pension plans" and "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries."

VI. CONCLUSION

The PBGC interpretation of ERISA section 4062 to impose termination liability on nonparticipating companies under common control has questionable statutory justification, is inconsistent with the purposes and various specific provisions of ERISA, and is subject to constitutional challenges. Furthermore, the PBGC interpretation has several undesirable impacts.

First, it discourages any common control corporation not currently providing pension benefits from establishing and maintaining a pension plan. Even after contingent liability insurance becomes available, a company under common control would have to insure against termination liabilities of all pension plans maintained among control group members as well as its own. Second, it endangers the financial well-being of common control

groups by imposing a potential liability of 30% of their net worth. This potential liability might cause a group to divest itself of a company with foreseeable pension liabilities. Such forced divestiture could undermine the financial structure of the divested company, causing actual termination of its plan.

 Liability, which if reasonable may merely deter plan termination, if unreasonable may produce total abandonment of pension plans. The drafters of ERISA tried to avoid the problem of unreasonable burdens. Interpreting ERISA so as to impose unnecessary and discriminatory burdens may defeat its legislative intent. Since the advantage of reducing the burdens of plan termination insurance is outweighed by the disadvantages of imposing termination liability on nonparticipating companies under common control, section 4062 of ERISA should be construed to impose termination liability only on those companies which actually participated in the terminated pension plan.

MARY LYNN DURHAM

131. See note 72 supra.