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*Mead Corp. v. Tilley*: Great Expectations (But No Benefits)

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CASE COMMENTS

MEAD CORP. v. TILLEY: GREAT EXPECTATIONS (BUT NO BENEFITS)

UNDER THE EMPLOYEE Retirement Income Security Act of 1974 (ERISA),¹ when an employer sponsors and then voluntarily terminates a defined benefit pension plan,² all accrued benefits³ automatically vest,⁴ irrespective of the plan’s applicable vesting provisions. Plan assets are then distributed according to the six-tier allocation scheme established in section 4044(a) of ERISA,⁵ which requires first that all non-forfeitable benefits guaranteed by the Pension Benefits Guaranty Corporation (PBGC)⁶ be

2. A defined benefit pension plan, in general terms, offers deferred compensation to employees in the form of a specific benefit upon retirement. The benefit is often an annuity, but may also be paid in other terms, such as a lump sum payment. Stein, Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer, 5 AM. J. TAX POL’Y 117, 117 n.1 (1986). For a description of the requirements for annuities when a plan is terminated see 29 C.F.R. § 2617.4 (1989) (describing the requirements for benefits payable as annuities). The plan is funded through contributions by the employer.
3. An accrued benefit is an individual’s benefit “expressed in the form of an annual benefit commencing at normal retirement age . . . .” 29 U.S.C. § 1002(23)(A) (1982). “An accrued benefit, . . . represents the interest in a retirement benefit that a participant earns each year, and a plan must state a method or formula for determining a participant’s annual accrual rate. This requirement enables a worker to mark his or her progress toward the full pension benefit due at retirement.” Hoover v. Cumberland, Md., Area Teamsters Pension Fund, 756 F.2d 977, 981-82 (3d Cir. 1985), cert. denied, 474 U.S. 845 (1985) (footnote omitted). In other words, “an employee’s accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time.” Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516, 1524 (3d Cir. 1988), cert. denied, 109 S. Ct. 3155 (1989). An accrued benefit, is “the amount of normal retirement benefit which an employee has earned at any given time.” Hoover, 756 F.2d at 984.
4. “A [plan] participant becomes fully vested when he gains a nonforfeitable right to receive his entire accrued benefit.” Hoover, 756 F.2d at 983.
6. The PBGC is a “body corporate” within the Department of Labor which adminis-
distributed to plan participants, and then, that "all other nonforfeitable benefits under the plan" and "all other benefits under the plan" also be distributed. If plan assets remain after all liabilities have been satisfied, the surplus funds revert back to the employer.

In Mead Corp. v. Tilley, the United States Supreme Court

10. Section 4044(a) of ERISA provides: Allocation of assets
(a) Order of priority of participants and beneficiaries
  In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
  (1) First, to that portion of each individual’s accrued [sic] benefit which is derived from the participant’s contributions to the plan which were not mandatory contributions.
  (2) Second, to that portion of each individual’s accrued benefit which is derived from the participant’s mandatory contributions.
  (4) Fourth—
      (A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter . . . .
  (5) Fifth, to all other nonforfeitable benefits under the plan.
  (6) Sixth, to all other benefits under the plan.
The six priorities specified in section 4044(a) range from “Category 1, which has the narrowest scope and highest priority, to Category 6, which has the broadest scope and lowest priority.” Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1168 (11th Cir. 1988).
11. ERISA § 4044(d) provides in relevant part that:
(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets
  (1) Any residual assets of a single-employer plan may be distributed to the employer if—
      (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
      (B) the distribution does not contravene any provision of law, and
      (C) the plan provides for such a distribution in these circumstances.
overruled the Fourth Circuit Court of Appeals,\textsuperscript{13} holding that section 4044(a) does not require employers who terminate defined benefit plans to pay plan participants' "benefit expectancies"\textsuperscript{14} before surplus plan assets can revert to the employer. Plaintiffs were employees of the Lynchburgh Foundry Company, a wholly-owned subsidiary of defendant Mead Corp., and participants in Mead's defined benefit plan. Under the terms of that plan, Mead paid unreduced early retirement benefits to participants who had worked at least thirty years and had reached the age of sixty-two before retiring.\textsuperscript{15} When Mead terminated the plan after selling Lynchburgh Foundry, four of the five plaintiffs had met the service requirement, but had not yet turned sixty-two. Mead, in distributing plan assets, paid the plaintiffs reduced retirement benefits. The plaintiffs protested, claiming that section 4044(a)(6) entitled them to benefit expectancies (such as the unreduced retirement benefits) because, had the plan not terminated, they would have eventually met the age requirement.\textsuperscript{16} Although the

\textsuperscript{13} Tilley v. Mead Corp., 815 F.2d 989 (4th Cir. 1987), rev'd, 109 S. Ct. 2156 (1989). The Fourth Circuit, after examining the language, legislative history, and agency interpretation of section 4044(a) determined that section 4044(a)(6) required payment of unreduced early retirement benefits to plan participants, despite the fact that those benefits might not have been accrued at the time of the plan termination. The court then ordered that plaintiffs be paid damages, and provided a formula for calculating them. Id. at 992.

\textsuperscript{14} Mead, 109 S. Ct. at 2163. "Benefit expectancies" as used in this Comment are those which the employees did not earn under the terms of the plan, but which the employees could reasonably have expected to earn had the plan not been terminated. For example, consider a benefit plan which provides that an employee qualifies for full retirements upon reaching the age of sixty-five. Employee A is fifty-nine when the plan is terminated. The benefit expectancy approach would hold that Employee A could reasonably have expected to be employed by the same company at the age of 65, and therefore the benefits due her are full retirement benefits based in part on six years of anticipated future employment, and not the benefits earned up to the point of the termination. Thus, an employer, before plan assets can revert to him, must satisfy not only an employee's accrued benefits under the plan, but also the benefits that would accrue if the employee continued to work for the company after the plan terminated. In essence, the employee's reasonable expectations that she will work six more years with the company vests in her the right to the full retirement benefits.

\textsuperscript{15} Participants were eligible for early retirement benefits at age 55. These benefits were calculated in the same way as normal retirement benefits, but were reduced by five percent for every year an employee's retirement preceded the normal retirement age. Mead, 109 S. Ct. at 2160. Thus, the unreduced retirement benefits provided the employees the opportunity to receive full retirement payments, rather than the reduced payments, even though they retired prior to the normal retirement age.

\textsuperscript{16} The difference between the unreduced and reduced benefits was, on the average, about $9000 per plaintiff. Id. 109 S. Ct. at 2160-61. Mead recovered almost $11 million dollars that remained in the fund after the plan's liabilities were satisfied. Id. at 2161. Therefore, there was sufficient money left in the plan to pay plaintiffs the unreduced retire-
Court rejected this statutory argument, the case was remanded to determine whether other sections of ERISA might require the employer to pay participants' benefit expectancies prior to reversion of surplus assets.17

The Court's decision in Mead foreclosed the issue of benefit expectancy under section 4044, but its decision to remand the case still left open the benefit expectancy issue. This Comment will examine in detail the Court's decision and the policy considerations which make the result an unfortunate one. It will conclude that the payment of benefit expectancies should not be required under any section of ERISA.

I. HISTORY

Ideally, a defined benefit plan's "assets at any given moment [should] match precisely the plan's liabilities,"18 but in practice, employers usually either under- or overfund the plans they sponsor, often because of actuarial error.19 By terminating overfunded plans, employers can recover surplus assets. The favorable tax provisions governing employer contributions to defined benefit plans give employers who recover the surplus assets a considerable tax advantage. "When a plan sponsor contributes to a plan, the sponsor receives a current deduction. The contribution, with its investment return, is not taxed until it is paid, either as a benefit to a participant or as a reversion to a plan sponsor. It is then taxed to the recipient at the recipient's tax rate in the year of receipt."20 Since the contribution is not taxed until distribution, the recipient stands to gain a "considerable tax savings over the usual alternative of immediate taxation at the time of contribution

17. Id. at 2164.
18. Stein, supra note 2, at 121.
19. How much an employer contributes to a plan is based upon calculations made by actuaries, whose job is to ensure that there is enough money in the plan to meet the demands on it. The inexact nature of this task usually results in under- or overfunded plans. Upon choosing an actuarial method, the actuary must engage in a complex maze of guesswork, including predictions about growth and interest rates and the employee group. It is likely the prediction will not be entirely accurate. Hence, if less growth or less favorable interest rates than anticipated prove the prediction too liberal, the result will be an underfunded plan. If greater growth or more favorable interest rates prove the prediction too conservative, the plan will be overfunded. See id. at 121-22. Currently, more than 80% of the plans are overfunded. Light, The Power of the Pension Funds, BUSINESS WEEK, Nov. 6, 1989, at 154.
20. Stein, supra note 2, at 167.
and subsequent annual taxation of the earnings thereon.\textsuperscript{21} Thus, “allowing employers to recover surplus assets creates the abusive potential for using pension funds as a vehicle for tax-sheltered investments . . . .”\textsuperscript{22} Perhaps because of the financial benefits of recovering surplus plan assets, plan terminations have been on the rise.\textsuperscript{23}

Although employers stand to gain by terminating overfunded plans, employees may lose.\textsuperscript{24} This situation has raised a considerable amount of controversy,\textsuperscript{26} but Congress and federal agencies

\textsuperscript{21} Id.; see Ippolito, Issues Surrounding Pension Terminations For Reversion, 5 Am. J. Tax Pol’y 81, 88 (1986). Mr. Ippolito demonstrates the magnitude of this advantage by contrasting the behavior of two different companies. The corporate tax rate in the hypothetical is fifty percent, the pre-tax interest rate is seven percent, and the post-tax interest rate is three-and-one-half percent. Firm A contributes $100 of profits to a qualified plan. The corporate tax is deferred on the contribution, and the $100 accumulates at the pre-tax interest rate. Twenty years later, the plan is terminated, and that $100 contribution plus interest is left as a reversion. After the corporate tax is applied, Firm A will have $202.50. Firm B, on the other hand, saved the $100 outside the pension plan. The $100 profit is subject to the corporate tax immediately, leaving $50, which accumulates at the post-tax interest rate. After twenty years, Firm B has $100.70, less than half what Firm A has. Id. at 88-89.

\textsuperscript{22} Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1177 n.29 (11th Cir. 1988). Plan sponsors can “look at excess plan assets as a cheap source of capital, which could be used to revive economically strapped enterprises, to expand healthy ones, or to fend off unwelcome takeover attempts.” Stein, supra note 2, at 127. “[A] company can close a fund, pay off its workers and utilize the excess cash for, say, a marketing campaign or plant expansion. As a result, some companies with surplus pension funds become targets for takeovers; others cash out their pension plans and use the profits to raid other companies.” Roberts, Why Washington Is Worried About Your Pension, U.S. News & World Rep., Nov. 13, 1989, at 42. One study indicated that from 1985 to 1988, 86 percent of the companies that received pension revisions “were involved in merger activity.” Garland, Congress has that Lean and Hungry Look, BUSINESS WEEK, Nov. 6, 1989, at 162. United States Senator Howard Metzenbaum of Ohio said, “[w]hen push comes to shove and business needs easy cash for a merger or takeover or any other purpose, the pension plan is one of the first places they look.” \textit{Id.}

\textsuperscript{23} “In the period 1965-1969, only one defined benefit plan participant in 1,000 was affected by a termination in a given year; during the period 1980-84, 7.3 participants per 1,000 were affected each year.” Ippolito, supra note 21, at 91. From 1980-86, 1220 plans were terminated, transforming $12 billion dollars of pension assets into corporate assets. S. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 608 (1988). In one highly publicized case, United Airlines announced plan terminations that would net the company one billion dollars in surplus assets. Stein, supra note 2, at 119. \textit{But see infra} notes 49-59 and accompanying text (showing that the increase in plan terminations cannot realistically be attributed to the desire to recover plan assets).

\textsuperscript{24} When a plan terminates, “the result is lower benefits and less security for the workers.” Roberts, supra note 22. \textit{See infra} note 45 and accompanying text for a complete discussion.

\textsuperscript{25} \textit{See} Stein, supra note 2, at 130, n.55.
have been reluctant to address the perceived problems.\textsuperscript{26} The courts, on the other hand, have been more sensitive to this controversy. Two decisions by federal appellate courts, including the Fourth Circuit opinion in \textit{Mead}, interpreted section 4044(a)(6) to include benefit expectancies, thus forcing employers to pay these speculative benefits before recovering plan assets.\textsuperscript{27} Such a requirement discourages plan terminations, since the mandated payment of benefit expectancies decreases the amount of the employer’s reversion. The employees gain either way: they continue to earn benefits if the employer is deterred from terminating the plan; or, even if the plan is terminated, the employees receive the benefits they would have earned had the plan remained in existence.

Despite the seeming appeal of this judicial solution to the potential problems created by allowing surplus funds to revert upon plan termination, other federal appellate courts rejected the idea.\textsuperscript{28} This conflict among the circuits set the stage for the Su-

\textsuperscript{26} \textit{Id.} at 130. Congressional interest in benefit expectancies has recently been on the rise, however. A bill limiting the reversion of surplus plan assets has been approved by both houses of Congress, and could become law, although probably in watered-down form. \textit{See} Roberts, \textit{supra} note 22. The legislation, sponsored by Senator Metzenbaum and United States Representative William Clay of Missouri, “would require companies that want to take reversions to provide enough money to meet all current and projected obligations — and to provide a one-time inflation adjustment.” Garland, \textit{supra} note 22, at 162.

\textsuperscript{27} The Second Circuit Court of Appeals was the first circuit court to require the payment of benefit expectancies. In \textit{Amato v. Western Union International, Inc.}, 773 F.2d 1402 (2d Cir. 1985), the court was faced with an amendment of a defined benefit plan, which the plaintiffs/employees argued created a partial termination. The court remanded the case to the district court to decide whether a partial termination actually occurred. The appeals court suggested that if the district court found that such a termination occurred, section 4044(a)(6) should be read to entitle the employees to full retirement benefits regardless of whether they had accrued, so long as assets were available to meet the participants’ benefit expectations. \textit{Id.} at 1415-16. The \textit{Amato} plan provided, in part, that an employee was entitled to full retirement benefits if his years of service and age equaled seventy-five. \textit{Id.} at 1405. Under the \textit{Amato} court’s interpretation of section 4044(a)(6), an employee who had worked for twenty-one years, but was only forty-six years old (a total of sixty-seven years), was still eligible to receive full retirement benefits based on his expectations that he would continue to work for the company for the necessary eight more years. The court wanted to prevent an employer from “pulling the rug out from under promised retirement benefits upon which his employees had relied during their long years of service.” \textit{Id.} at 1409.

The Fourth Circuit, in \textit{Mead}, was the next court to face the issue and explicitly endorsed the Second Circuit’s reading of § 4044(a)(6). Tilley v. Mead Corp., 815 F.2d 989, 991 (4th Cir. 1987) (calling \textit{Amato} persuasive), \textit{rev’d}, 109 S. Ct. 2156 (1989).

\textsuperscript{28} Two cases decided subsequent to \textit{Amato} and \textit{Mead} rejected the notion that section 4044(a)(6) required plan sponsors to pay out benefit expectancies before surplus plan assets could revert. In Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848
II. Mead Corp. v. Tilley

A. The Majority Opinion

The issue on appeal to the Supreme Court of the United States was whether, upon termination of a pension plan, section 4044(a)(6) requires benefits not earned under the terms of the plan to be paid to plan participants before surplus plan assets revert to the employer. Writing for the eight-member majority, Justice Marshall answered the inquiry in the negative, holding that section 4044(a)(6) did not create in plaintiffs the right to recover the benefit expectancies they sought.²⁹

Plaintiffs presented two arguments based on section 4044(a)(6). First, they argued that the legislative history behind section 4044(a) indicated that the section entitled them to unaccrued benefits like the unreduced early retirement benefits and other benefit expectancies.³⁰ The House of Representatives version of the bill, in classifying payment priorities, listed one of the priority classes as “other accrued benefits,” but the Conference bill eliminated the word “accrued” and instead substituted “all other benefits under the plan.” The omission of the word “accrued,” claimed the plaintiffs, evidenced Congressional intent not to limit the allocation requirement to accrued benefits but to require that surplus assets be used to meet employees’ benefit expectations.³¹

F.2d 1164 (11th Cir. 1988) (in banc), the court faced “[t]he narrow but important issue [of] whether, when a defined benefit plan terminates, [ERISA] requires that a defined benefit plan pay an employee the full, unreduced pension benefit the employee would have received had he continued to work until normal retirement age.” Id. at 1164-65. The court ultimately decided the question in the negative, noting that employees should not receive “a benefit which is calculated on the basis of anticipated future years of service which have not actually been worked as of the termination date.” Id. at 1165. The Third Circuit, in Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516 (3d Cir. 1988), cert. denied, 109 S. Ct. 3155 (1989), was faced with the termination of a plan almost identical to the one in Mead. Under the plan, “[i]f a Plan participant has 30 years of service and is 62 or over, [the plan] allows that person to retire and receive the full benefits to which he or she would be entitled if he or she were to wait and retire at age 65.” Id. at 1519. The court rejected the plaintiffs’ argument that section 4044(a)(6) created substantive rights to contingent benefits upon plan termination. Rather, the court stated, section 4044(a)(6) is merely an ordering provision. Id. at 1528.

³⁰. Id. at 2162-63. Both the Amato and Tilley circuit courts relied on the legislative history to support their holdings. See, e.g., Amato, 773 F.2d at 1416; Tilley, 815 F.2d at 992.
³¹. Mead, 109 S. Ct. at 2162; H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess.,
The omission of a single word, the Court held, however, did not suggest "that Congress intended § 4044(a) to be a source of benefit entitlements rather than an allocation scheme." Instead, the Court found that the plain language and structure of the provision supported the PBGC's assertion that section 4044(a) "does not create additional benefit entitlements. It merely provides for the orderly distribution of benefits already earned under the terms of a defined benefit plan or otherwise required at termination by other provisions of ERISA."

The plaintiffs' second argument was based on the interplay between sections 4044(a)(5) and 4044(a)(6). They claimed that because all accrued benefits vest upon plan termination, these benefits are included among the nonforfeitable benefits covered by section 4044(a)(5). Therefore, if section 4044(a)(6) did not include unaccrued benefits like benefit expectancies, it would not include anything.

Rejecting this interpretation of the two relevant subsections, the Court agreed with the PBGC that section 4044(a)(6) "provides for the allocation of benefits that are forfeitable before plan termination." The PBGC's views were supported by its practice of characterizing benefits "as forfeitable or nonforfeitable [de-

reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5154-55. The House bill contained the following priorities: (a) employee contributions; (b) vested benefits of employees already receiving benefits; (c) other vested benefits; (d) other accrued benefits; (e) interest on accrued benefits; (f) remaining liabilities in the plan for payment upon termination; and (g) pro-rata to each person entitled to receive a distribution on account of priorities (a) through (f). The Senate bill included: (a) voluntary employee contributions; (b) mandatory employee contributions; (c) benefits in pay status; (d) other insured benefits. Id. at 5154.
32. Mead, 109 S. Ct. at 2162.
33. The Court felt that the plain language of the statute clearly demonstrated that section 4044(a) was an allocation mechanism, and did not confer substantive rights. The language, "'benefits under the plan' can refer only to the allocation of benefits." Id. Additionally, the introductory language of the section talks about allocation. Id. Finally, the title of the section is "Allocation of assets." Id.
34. The structure of the statute was also used by the Court to support its decision. "Title I of ERISA sets forth elaborate provisions to determine an employee's right to benefits. Those provisions describe in detail the accrual of benefits and the vesting of accrued benefits after service of a fixed number of years. Title IV, which contains § section 4044(a), simply provides for insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I." Id.
35. Id. at 2161. The PBGC filed an amicus brief in the case. The Department of Labor and the IRS, the other agencies in charge of administering ERISA, concurred with the PBGC argument. Id. at 2162.
36. See supra text accompanying notes 8-9.
38. Id. at 2163; see 29 C.F.R. § 2618.16 (1989).
Despite overruling the Fourth Circuit's interpretation of section 4044(a), the Court remanded the case, ordering the circuit court to consider first, whether "unreduced early retirement benefits may qualify as 'accrued benefits' under ERISA; and, second, [whether] unreduced early retirement benefits may be 'liabilities' within the meaning of § 4044(d)(1)(A), 29 U.S.C. § 1344(d)(1)(A)." Thus, it remains possible that plaintiffs could recover benefit expectancies like unreduced retirement benefits under ERISA provisions other than section 4044(a). In deciding these questions, the Court advised the Fourth Circuit to "consider the views of the PBGC and the IRS."

B. The Dissenting Opinion

Justice Stevens, dissenting alone, agreed that the Court properly interpreted section 4044(a)(6). However, he took issue with the Court's decision to remand. Instead, Stevens argued that benefit expectancies were contingent liabilities under section 4044(d), and as such, surplus assets could not be recovered by an employer until he had satisfied employees' expectancy claims. Therefore, plaintiffs were entitled to receive the unreduced retirement benefits they sought. Stevens reasoned that plaintiffs had "far more than an expectancy interest in early retirement benefits...[They] have earned them under the Plan by serving over 30 years with Mead, and their right to payment is contingent only upon their election to retire after reaching age 62." Justice Stevens embraced the idea that benefit expectancies should be paid before plan assets can revert.

III. ANALYSIS

The language and construction of the statute, coupled with the views expressed by the agencies in charge of administering ERISA, leave little doubt that the Court correctly interpreted section 4044(a) as denying Tilley any right to benefit expectancies

39. Mead, 109 S. Ct. at 2163; see 29 C.F.R. § 2613.6(b) (1987) ("benefits that become nonforfeitable solely as a result of the termination of a plan [are] considered forfeitable."); id. § 2618.2 (1987) (same).
40. Mead, 109 S. Ct. at 2164.
41. Id.
42. See Mead Corp. v. Tilley, 109 S. Ct. 2156, 2164 (1989) (Stevens, J., dissenting).
43. Id. at 2165 (Stevens, J., dissenting).
upon plan termination. Disturbing, however, is what the Court did not decide; specifically, whether the payment of benefit expectancies might be mandated by other ERISA sections.44 Although the statutory language and legislative history of the alternative ERISA sections is unclear, and agency views on the alternative theories remanded to the Fourth Circuit are somewhat murky, the Supreme Court should have been compelled by policy considerations to put to rest the idea that, upon plan termination, benefit expectancies should be paid before surplus assets can revert to the plan sponsor.45

Initially, it is important to realize that requiring the payment of benefit expectancies is functionally equivalent to reducing the value of the reversion of surplus plan assets to employers upon plan termination, since the employers' recoveries will be decreased by the amount paid out in benefit expectancies.46

In a few situations, limiting plan reversions may be appropriate, but generally, the policy reasons for allowing surplus plan assets to revert outweigh those for requiring the payment of benefit expectancies. Primarily, proponents of benefit expectancies are concerned that employers will purposely terminate plans because of the favorable tax implications of recovering plan assets,47 thus reaping a windfall at the expense of employees, who are denied benefits they expected to earn,48 and the Federal Government,

44. See supra text accompanying notes 40-41.
45. The majority opinion was devoid of any consideration of the policy implications inherent in requiring the payment of benefit expectancies.
46. See supra notes 23-25 and accompanying text.
47. See supra text accompanying notes 21-23.
48. There are several considerations involving the employee's right to get what he has earned. The core argument for benefit expectancies is based on principles of fairness and justice: the employee has been with the firm for a number of years, and under the terms of the plan, would have been entitled to full benefits if the plan had not terminated. It would seem unfair to deny him the right to benefits he could reasonably have expected to earn, while tens of thousands of dollars revert to the employer. Since the reversion money is available, it should be used to fulfill benefit expectancies.

Another argument is that ERISA makes clear the "benefit plans are designed as a precise, although deferred, equivalent of current wages," Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516, 1538 (3d Cir. 1988) (Mansmann, J., dissenting), cert. denied, 109 S. Ct. 3155 (1989), and should be considered the exclusive property of those who earn them. Id.

A final argument concerns the method of payment upon plan termination. The normal procedure when a defined benefit plan is terminated is for the employer to provide the employee with an annuity, which usually commences at normal retirement age. However, the plan may also offer the employee a lump sum payment equal to the benefit's present value. ERISA § 4041(b)(3), 29 U.S.C. § 1341(b)(3) (1982 & Supp. V 1987). The prob-
which loses revenue to this tax shelter. These concerns, seemingly supported by the increasing number of plan terminations, are nevertheless significantly overstated. Moreover, limiting reversions could prove more harmful than helpful to the employees.

The dire warnings that employers will terminate plans to recover surplus assets, enriching themselves while harming the employees, are betrayed by statistics. The available evidence shows that “while reversions have been increasing rapidly in recent years, they are still an anomaly in defined benefit plans: the pension promise seems inviolate for the vast majority of firms and workers.” This assertion is supported by several factors.

First, although defined benefit plan terminations are increasing, so is the number of defined contribution plans. “In 1950, defined contribution plans held 11.6 percent of private plan assets; in 1980 they accounted for 27.8 percent.” Similarly, 12.9 percent of private plan participants in 1965 were solely or primarily covered by defined contribution plans, while in 1980, 18 percent of participants were so covered. Thus, the phenomenon of defined benefit terminations can be viewed as a necessary prerequisite for...
establishing defined contribution plans, rather than an employer's attempt to selfishly recoup plan assets. In fact, one study showed that "over 40 percent of the plans accounting for 82 percent of the reversion total occurred in either so-called spinoffs or termination/reestabishments." Therefore, many defined benefit plans are merely being terminated to create new (and better) plans with the old plan's assets. The creation of more appealing plans with surplus assets is not a windfall to the employer since it funnels the money back into a benefits plan, and may be a windfall for the employee, since he might initially have expected fewer benefits under the old plan.

Second, 1984 statistics show that of the 279 billion dollars of legal excess assets, only 1.2 percent of these revocable assets were taken. The fact "[t]hat the vast majority of revertible assets are not taken by the firms—even though they legally could be—is a testament to the strength of the implicit pension contract." Further, with regard to the few firms that do terminate plans and take excess assets, evidence shows "that potential worker losses do not increase the rate of terminations . . . This [suggests] that terminations may not be driven by schemes designed to take advantage of workers. . . ." These results contradict "the generally accepted notion that economic considerations compel firms to fund fully their pension plan, taking advantage of the plan's tax-exempt status." Simple common sense also suggests that employers will not terminate plans to gain surplus assets because "an employer who continues a plan will realize a greater financial benefit than the sponsor who terminates a plan, recovers the plan assets, and pays tax. This is because the interest on the trust corpus funds future-

53. Id. at 102. "Spinoffs occur when the firm splits the pension plan in two, one for active workers and one for retirees. The firm then switches all the legal excess assets into the retiree-participant plan and terminates only this plan, purchasing annuities for all the then retirees." Id. Reestablishments occur when a plan sponsor terminates the plan for the purpose of setting up another plan. The surplus assets go not to the employer, but to the new plan. Id. at 104. In 1988, of the 230 plans terminated, two-thirds were replaced by other plans. Light, supra note 19, at 155.

54. At most, the employer gains the goodwill of its employees.

55. Ippolito, supra note 21, at 98. Overall, $1.7 trillion dollars are sitting in 870,000 different plans. Roberts, supra note 22, at 42; cf. Light, supra note 19, at 154 ($2.6 trillion are in pension plans in the United States).

56. Ippolito, supra note 21, at 98.

57. Id. at 100.

58. Id. at 82.
accruing benefits on a tax-deferred basis." Hence, employers who are motivated by the tax windfalls inherent in benefit plans would rather continue the plan than terminate it. Additionally, employers who terminate plans to the disadvantage of employees may well be perceived "as dishonest in the labor market. Workers would presumably be reluctant to invest significant portions of their working lives in a firm that in the past has demonstrated a propensity to cheat its workers." This could impose added costs (i.e. higher wages) upon the employer as it attempts to attract workers.

Finally, in a defined benefit plan, "the employer bears the investment risk that the plan assets will be insufficient to meet benefit requirements when employees become eligible to receive pensions. It is not inequitable to permit employers to receive the benefit of the upside investment risk." Allowing a reversion in this situation does not injure the employees at all, and rewards entrepreneurial risk-taking. "[I]f the plan's assets are insufficient to meet the plan's benefit obligations, the employer must make additional contributions to the plan; on the other side . . . the employees only have an interest in receiving the promised benefit—so long as that benefit is paid, the employees have lost nothing."

All these factors suggest that worries about tax windfalls leading to unjust enrichment for employers at the expense of their employees have been blown out of proportion. The findings seem to "contradict the notion that terminations are effected for the purpose of imposing losses on workers and granting gains to stockholders." In fact, it is conceivable that if employers are forced to pay benefit expectancies, employees would get an undeserved windfall, because even though the employee might have earned the claimed benefits if the plan had not been terminated, the fact remains that he did not actually do the work required to earn those benefits. ERISA's purpose was not to provide employees with "something for nothing;" rather, it was to prevent the employee from receiving "nothing for something"—to make sure the accrued benefits equaled the years of service.

59. Stein, supra note 2, at 169.
60. Ippolito, supra note 21, at 97.
62. Stein, supra note 2, at 155.
63. Ippolito, supra note 21, at 82.
64. Blessitt, 848 F.2d at 1176.
Not only is the surplus asset problem largely an illusion, but the proposed solution of limiting plan reversions by requiring the payment of benefit expectancies may actually harm employee interests. Such a result can occur for three reasons.

First, limiting reversions may lead to the underfunding of plans. "Allowing employers to recover plan assets only after meeting the benefit expectancies [of employees] . . . would tend to encourage employers to minimally fund plans, thereby increasing the possibility that plan assets would be insufficient to meet even guaranteed benefits." Minimal funding would turn overfunded plans into underfunded plans, thereby denying employees not only speculative benefit expectancies, but much more basic benefits. This trend, of course, would be detrimental to the employees. Additionally, since ERISA's primary purpose was to correct the problems of underfunded plans, a benefit expectancy rule encouraging employers to underfund plans would be entirely inconsistent with Congressional intent.

65. Id. at 1177. If the payment of benefit expectancies was required, employers would have to pay yet another benefit before recovering surplus assets. The fewer the limits on reversion, the greater the tendency of employers to use conservative actuarial methods in funding their plans because they know that any overfunding caused by the conservative methods will be returned to them upon termination. However, requiring employers to pay benefit expectancies would "lead necessarily to less responsible funding patterns, i.e., that employers will fund plans using less conservative actuarial methods and assumptions, since conservative methods and assumptions will compound any overfunding, providing windfalls to employees." Stein, supra note 2, at 172. For example, employers might tend to backlog contributions, "which will in turn seriously endanger the financial stability of plans in future years when greater numbers of the plan participants approach retirement age." Id. (citing, Memorandum on Pension Plan Terminations and Asset Reversions to Employers 9, reprinted in PLAN TERMINATIONS/ASSET OR LIABILITY 381, 384-86 (Susko, Chairperson, Practicing Law Institute, 1984). One method of backloading is the unit credit method, where the employer totally funds each year's accrual in the year of accrual. Until the year of accrual occurs, then, the employer contributions for non-accrued employees will be minimal. Id. at 172-73 n.199.

Another related problem is that limited reversions might compel an employer to forego establishing a pension plan altogether. See Light, supra note 19, at 156.

66. See Stein, supra note 2, at 135 ("Any change in the way the law now stands would discourage something that should instead be encouraged—continued sponsorship of defined benefit plans—and would encourage something that instead should be discouraged—irresponsible funding practices of any remaining defined benefit plans . . . ").

67. The legislative history of ERISA demonstrates that Congress was concerned primarily with underfunded plans, not those overfunded plans which might lead to employer reversions. Before ERISA was passed, "Congressional and media attention was focused on a more prevalent problem [than overfunded plans]: some employees were receiving nothing from their plans because the plan cupboards were bare, and locked besides. In plainer terms, many plans were seriously underfunded . . . ." Stein, supra note 2, at 123. One Senator noted some ten years after ERISA was born that he did "not believe that when
Second, requiring the payment of benefit expectancies may decrease benefits actually earned by other employees. If benefit expectancies were paid, they would be competing for plan assets along with other benefits. In a situation where the plan assets are not sufficient to cover all claims, the money would be distributed on a pro-rata basis, causing a dilution of the "more legitimate claims based on actual service . . . by the more speculative claims based on future service not actually worked." 68

Third, limiting reversions may lead to the loss of employment. On certain occasions, plans may be terminated to recover surplus assets that are needed to keep a company from going out of business. 69 If benefit expectancies need not be paid as a prerequisite to reversion, "the full reversion [can] . . . be pumped back into the business . . . [to] preserve jobs." 70 However, under a rule requiring payment of benefit expectancies, the reversion would be significantly less after those liabilities are satisfied, thereby decreasing the chance that the reversion would save the ailing company. Given the choice between receiving benefit expectancies but losing their jobs because the company goes out of business, or not receiving benefit expectancies (thereby allowing full reversion to the employer) and keeping their jobs, the employees would probably prefer the latter, viewing it as an investment in the continu-

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68. Blessitt v. Retirement Plan For Employees of Dixie Engine Co., 848 F.2d 1164, 1176 (11th Cir. 1988). It could be argued that the more legitimate benefit claims could be paid first, and benefit expectancies paid only if surplus assets remain. This approach would eliminate the dilution of legitimate benefit claims. However, the applicable allocation scheme is set forth in ERISA, and any distribution of plan assets must be done according to the priority system provided in section 4044(a). Under this scheme, the only possible priority category that benefit expectancies could fit into would be section 4044(a)(6) (contrary to the Mead Court's determination that section 4044(a)(6) did not include benefit expectancies). Were that to occur, and the only way it could occur is if the Court overruled its decision in Mead, section 4044(a)(6) would include not only accrued benefits which at the time of the termination were forfeitable, but would also include the benefit expectancies. Therefore, if plan assets were not sufficient to cover all section 4044(a)(6) claims, the money would have to be distributed pro rata, leading to the dilution of the legitimate claims. The only way to avoid this result, and to avoid overruling Mead, would be for Congress to enact legislation expressly creating a seventh category in section 4044(a) that would include only benefit expectancies.

69. See Ippolito, supra note 21, at 105 (potential business failure is a viable explanation for some voluntary terminations).

70. Stein, supra note 2, at 184.
ance of the business.\textsuperscript{71}

CONCLUSION

Although the Court’s decision in \textit{Mead Corp. v. Tilley} temporarily forced the benefit expectancy argument back into its coffin, the majority opinion regrettably failed to drive a stake through its heart. Upon first glance, the benefit expectancy argument, and its underlying policies, may have some appeal. However, overriding policy considerations clearly indicate that requiring the payment of benefit expectancies does little to serve employee interests, and on the contrary, can be detrimental to those interests. Hence, surplus plan assets should be allowed to revert to employers when they terminate defined benefit plans, irrespective of whether the employers choose to pay employees’ benefit expectancies.

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\textsuperscript{71} Ippolito, \textit{supra} note 21, at 105.