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“The Most Glorious Story of Failure in the Business”: The Studebaker-Packard Corporation and the Origins of ERISA

JAMES A. WOOTEN†

The Studebaker-Packard Corporation occupies a special place in the lore of the Employee Retirement Income Security Act of 1974 (ERISA).¹ No single event is more closely associated with ERISA than the shutdown of the Studebaker plant in South Bend, Indiana.² When Studebaker-Packard closed the facility in December 1963

† Associate Professor of Law, University at Buffalo School of Law. I have benefited from conversations or interviews with a number of participants in the events recounted here. Thanks to Frank Cummings, Lester Fox, Vance Hartke, Ken Morris, Robert Paul, the late Leonard Woodcock, and Howard Young for sharing their recollections with me. Jim Atleson, Richard Bernstein, Guyora Binder, Jonathan Cedarbaum, Frank Cummings, Markus Dubber, Sharon Entress, Bill Nelson, John Langbein, Bill LaPiana, David Moss, Steven Sass, Schlegel, Robert Steinfeld, and Howard Young provided comments, encouragement, and advice. I also benefited from discussions with participants in the Legal History Colloquium at New York University School of Law. I owe a large debt to the staffs of the Studebaker National Museum and the Walter P. Reuther Library at Wayne State University. Their assistance and cooperation were indispensable. My archival research was supported by a grant from the Olin Summer Fellowship Program at Yale Law School. The first draft of this paper was written while I was a Golieb Fellow at New York University School of Law. A grant from TIAA-CREF gave me time for editing and rewriting. I greatly appreciate their assistance. Any mistakes are mine. The quote in the title is from Projection of Pension Fund Activities 3 (Feb. 22, 1971) (Papers of Harrison Williams, Box 127, no folder, Special Collections and Archives, Rutgers University Libraries). Copyright © 2001 James A. Wooten.

1. Pub. L. No. 93-406, 88 Stat. 829 (1974).

2. See, e.g., Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 68 (3d ed. 2000); DENNIS E. LOGUE & JACK S. RADER, *MANAGING PENSION PLANS: A COMPREHENSIVE GUIDE TO IMPROVING PLAN PERFORMANCE* 71 (1998); JAMES H. SMALLHOUT, *THE UNCERTAIN RETIREMENT: SECURING PENSION PROMISES IN A WORLD OF RISK* 8-9 (1996); Thomas Marsh, *20th Anniversary of ERISA: The Journey May Just Be Beginning*, MONEY MGMT. LETTER, Apr. 25, 1994, at 1 (special supp.).

the pension plan for hourly workers did not have enough assets to meet its obligations. Retirees and retirement-eligible employees aged sixty and older received their full pension, but the plan defaulted on its obligations to younger employees. Some received a lump-sum payment worth a fraction of the pension they expected, and others got nothing at all.

We remember the Studebaker shutdown because it was a "focusing event" for the nascent campaign for pension reform. As the political scientist John Kingdon observes, social problems often "need a little push to get the attention of people in and around government. That push is sometimes provided by a focusing event like a crisis or disaster that comes along to call attention to the problem."³ Public officials and private-sector experts were already considering proposals for additional regulation of pension plans when Studebaker-Packard announced that it would leave South Bend. The shutdown helped push debate about pension reform into the legislative arena. The plight of Studebaker employees provided a vivid symbol of the hazards regulation aimed to redress, and reformers invoked Studebaker again and again in the decade before Congress passed ERISA.

Yet it requires a closer look to see how and why the Studebaker shutdown assumed its place in the political history of ERISA. Not every calamitous event becomes a catalyst for legislative reform. A calamity is more likely to draw attention to a social problem when people interested in the problem are prepared to take advantage of the opportunity the calamity presents.⁴ This is what happened in the Studebaker case. By the time the shutdown occurred, the United Auto Workers union (UAW) was well aware that "default risk"—the risk that a pension plan will terminate without enough funds to meet its obligations—threatened union members. In the early 1960s, UAW pension specialists devised a remedy—a proposal for "pension reinsurance" that is a precursor of the termination-insurance program created by Title IV of ERISA. The Studebaker shutdown gave the UAW an opportunity to move default risk and termination insurance onto the

3. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 94-95 (2d ed. 1995).

4. *See id.* at 98, 142-143.

legislative agenda. The success of this effort in agenda-setting indelibly linked the shutdown to the cause of pension reform.

Parts I and II of this article recount the origins and development of collectively bargained retirement plans in the years after World War II. As I explain, the UAW and other industrial unions used pension plans to manage organizational problems that might have emerged from the seniority systems these unions negotiated to ration access to jobs. A pension plan lessened the potential for conflict between older and younger workers because it provided income security to older workers and, in doing so, induced retirements that enhanced job security for younger union members. A retirement plan, however, was an expensive undertaking. To hold down the short-term cost of retirement plans, the UAW agreed to provisions that placed younger employees at risk of not receiving a pension.

One source of risk was underfunding. As was the case at Studebaker, UAW retirement plans almost never had enough assets to pay all of their pension obligations. Part III examines why this was so. Although the newness of UAW retirement plans and the tax laws partly account for underfunding, the union's policy of negotiating retroactive increases in retirement benefits and spreading the cost over many years also reduced funding levels. The existence of underfunding meant that employees ran the risk that their retirement plan would terminate and default on its obligations. This risk materialized in 1958, when Studebaker-Packard terminated the pension plan for hourly employees of the Packard Motor Car Company. Packard workers got even less than their counterparts at Studebaker would receive in 1964. Part IV describes the termination of the Packard pension plan.

The Packard termination convinced UAW president Walter Reuther that the union had to protect members from default risk. One option was for union negotiators to bargain for higher levels of funding. The union rejected this approach because it would require slower growth of pension benefits—which would lead older employees to be less willing to retire—or larger employer contributions—which would result in lower wages for active employees. Instead of addressing default risk through collective bargaining, union pension experts developed a proposal for a government-run insurance program that would guarantee the obligations of

defined-benefit pension plans. As I explain in Part V, the appeal of termination insurance was that it reconfigured the institutional framework of collective bargaining to suit the UAW's funding practices. Termination insurance would shift default risk away from union members and make it unnecessary for the UAW to bargain for full funding. Insuring pension benefits posed troublesome practical problems, however, and union officials struggled with these issues as they worked out the idea.

Part VI describes the Studebaker shutdown and examines its role as the "focusing event" that pushed termination insurance onto the policy-making agenda. UAW officials began promoting termination insurance to public officials and pension experts in 1962, but they had limited success before Studebaker-Packard closed the plant in South Bend. The shutdown provided an ideal opportunity to get policy-makers to seriously consider termination insurance. With assistance from Indiana Senator Vance Hartke, UAW pension experts quickly turned the proposal into legislation. When Hartke introduced "The Federal Reinsurance of Private Pensions Act" in August 1964, termination insurance moved securely onto the reform agenda and Studebaker became, in the words of a Senate staffer, "the most glorious story of failure in the business."⁵

I. "THE GREAT GOLD RUSH OF '49"

Although the number of private pension plans in the United States increased twenty-fold in the decade after Congress passed the Social Security Act of 1935, most plans created in this period concentrated on high-compensation employees for whom public retirement benefits were thought to be inadequate.⁶ At the end of World War II about 20% of private-sector employees participated in a pension plan. Only a fraction participated in a collectively bargained plan.⁷ This state of affairs changed rapidly in the late 1940s

5. Projection of Pension Fund Activities 3 (Feb. 22, 1971) (Papers of Harrison Williams, Box 127, no folder, Special Collections and Archives, Rutgers University Libraries).

6. See Norman D. Cann, *How the Commissioner Handles Pension Plans*, 23 TAXES 918, 918 (1945).

7. For a discussion of the growth of coverage, see ALICIA H. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 10-13 (1982). A study in 1948 by the Bureau of National Affairs "found pension provisions in only 5 percent of collective

when unions affiliated with the Congress of Industrial Organizations (CIO) made retirement benefits their primary demand in collective bargaining. Together the United Auto Workers and United Steelworkers unions led what one cartoonist called "the Great Gold Rush of '49."⁸ This "gold rush" reshaped the private pension system by securing coverage for millions of unionized employees, including production workers at the Studebaker Corporation and the Packard Motor Car Company.

CIO demands for retirement plans and employer acquiescence in those demands grew out of the demographics and organization of postwar labor markets. During World War II many businesses encouraged older workers not to retire, and some firms asked retirees to return to work. As a result, a pension actuary observed in 1944, "[m]ost companies . . . have a greater proportion of men over [age sixty-five] in their service than at any time in their history."⁹ The war also produced major gains in the size and security of labor unions. At war's end, many older workers were in a bargaining unit represented by a union.¹⁰ Finally, wartime inflation substantially diminished the value of Social Security Old-Age and Survivors Insurance.¹¹ With only Social Security benefits to support them, many older workers did not want to leave the workforce. In unionized firms, efforts to dismiss older workers provoked grievances, strike threats, and litigation.¹²

bargaining contracts." Donald F. Farwell, *Bargaining on Pensions*, in PENSIONS & PROFIT SHARING 207 (3d ed. 1964). For discussion of the development of collectively bargained pensions, see Jack Barbash, *The Structure and Evolution of Union Interests in Pensions*, in SUBCOMM. ON FISCAL POLICY OF THE J. ECONOMIC COMM., 90TH CONG., OLD AGE INCOME ASSURANCE PART IV: EMPLOYMENT ASPECTS OF PENSION PLANS 64-65 (Comm. Print 1967), and Leonard Lesser, *Problems in Pension Contributions and Benefits*, in INDUS. REL. RES. ASS'N, PROCEEDINGS OF THE FIFTH ANNUAL MEETING 86 (L. Reed Tripp ed., 1953).

8. See *The Great Gold Rush of '49*, in *Pensions: Less Worry for Boss*, U.S. NEWS & WORLD REP., Dec. 2, 1949, at 39.

9. M.F. Lipton, *Trends in Company Pension Plans*, in NAT'L INDUS. CONF. BOARD, STUDIES IN PERSONNEL POLICY, No. 67, at 8 (1944).

10. See ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985, at 63-69, 92-94, 100-01 (1986).

11. STEVEN A. SASS, PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS 120 (1997); see EUGENE STEUERLE & JOHN M. BAKIJA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM 92-94 (1994).

12. See F. Beatrice Brower, *Postwar Pension Problems*, 8 NAT'L INDUS. CONF. BOARD MGMT. REC. 362-63 (1946) (mentioning actions taken by the Steelworkers, Auto Workers, and Mine Workers when employers attempted to retire union

This combination of circumstances created problems for employers and for unions. As Slichter, Healy, and Livernash explain in their classic study, *The Impact of Collective Bargaining on Management*, "Though unions were not very active in seeking pension plans during the war, they were indirectly magnifying the pension problem for employers."¹³ CIO unions bargained for seniority systems that required an employer to lay off workers in reverse order of seniority. These unions also negotiated contractual provisions that allowed an employer to dismiss workers only for cause. Because age did not constitute an appropriate cause for discharge, "employers were faced with the dilemma of what to do with older employees."¹⁴ But it was not only a dilemma for employers. Layoffs were common in the heavy industries organized by CIO unions.¹⁵ When workers were on layoff, jobs for older, long-service employees came at the expense of unemployment for younger, less senior union members.¹⁶ This trade-off gave union leaders a pragmatic as well as a humanitarian stake in the retirement options available to older workers.¹⁷

In 1946 a Congress controlled by the Democrats took what the CIO's Committee on Social Security called "some slight forward steps with respect to a few aspects of the [Social Security] program, but left the basic and crying needs still to be remedied."¹⁸ When the Republicans took Congress in the November 1946 election, a political environment that was not friendly to public social programs became pronouncedly more hostile. Within days of the

members who wished to remain at work); see also MELVIN K. BERS, *UNION POLICY AND THE OLDER WORKER* 71-74 (1976).

13. SUMNER H. SLICHTER ET AL., *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 374 (1960).

14. *Id.*

15. See Sanford M. Jacoby, *Pacific Ties: Industrial Relations and Employment Systems in Japan and the United States Since 1900*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 226-32 (Nelson Lichtenstein & Howell John Harris eds., 1993).

16. The trade-off shows up most clearly in the fact that CIO unions negotiated pension plans with compulsory retirement despite professed opposition to this policy. See BERS, *supra* note 12, at 74-76; Lane Kirkland, *Discussion*, in *INDUS. REL. RES. ASS'N, PROCEEDINGS OF THE FIFTH ANNUAL MEETING* 106 (L. Reed Tripp ed., 1953); SLICHTER ET AL., *supra* note 13, at 389-90.

17. See BERS, *supra* note 12, at 83.

18. CONGRESS OF INDUSTRIAL ORGANIZATIONS, *FINAL PROCEEDINGS OF THE EIGHTH CONSTITUTIONAL CONVENTION* 82 (1946).

election, UAW president Walter Reuther told local union leaders, "In the immediate future, security will be won for our people only to the extent that the union succeeds in obtaining such security through collective bargaining."¹⁹ As if to endorse Reuther's forecast, on January 8, 1947, five days after the new Republican Congress convened, a trial examiner at the National Labor Relations Board (NLRB) held that the Inland Steel Company had committed unfair labor practices when it refused to negotiate with the Steelworkers union about retirement practices and a pension plan.²⁰ This combination of demographics, congressional politics, and a legal mandate to negotiate pension issues prompted unions to pursue "social security" in the private sector.²¹

The signal event of the immediate post-war period was the creation of the United Mine Workers Health and Retirement Fund.²² Mine Workers president John L. Lewis turned to the idea of a welfare and pension plan because it promised to rationalize the industry and remedy the deficiencies of company-sponsored medical programs. Drawing on models developed by unions in the needle trades, Lewis saw the fund as a way to induce older employees to retire and, thus, smooth the transition to a more mechanized and productive industry. Although Lewis failed to secure such a plan in 1945, when he raised the issue again in 1946 and struck to get it, the federal government seized the mines and negotiated the fund he sought.²³

Lewis's success established a benchmark for other unions, and pensions quickly became a standard demand in

19. Alan Derickson, *Health Security for All? Social Unionism and Universal Health Insurance, 1935-1958*, 80 J. AM. HIST. 1333, 1344 (1994); see also DAVID L. STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 63 (1996).

20. *In re Inland Steel Co.*, 77 N.L.R.B. 1, 35 (7th Cir. 1948); see also F. Beatrice Brower, *A Significant Pension Ruling*, 9 NAT'L INDUS. CONF. BOARD MGMT. REC. 25-26 (1947).

21. See Murray W. Latimer, *Social Security in Collective Bargaining*, in PROCEEDINGS OF NEW YORK UNIVERSITY FIRST ANNUAL CONFERENCE ON LABOR 1, 3-9 (Emanuel Stein ed., 1948); Barbash, *supra* note 7, at 63-67.

22. See SLICHTER ET AL., *supra* note 13, at 374-75; SASS, *supra* note 11, at 127-29.

23. See MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 330-32 (abridged ed. 1986); Richard P. Mulcahy, *Serving the Union: The United Mine Workers Welfare and Retirement Fund, 1946-1978*, at 17 (1988) (unpublished Ph.D. dissertation, West Virginia University) (on file with author).

collective bargaining.²⁴ In September 1948 a federal appeals court agreed with the NLRB that labor law required an employer to bargain pension and retirement issues.²⁵ Soon thereafter the Auto Workers and Steelworkers moved pensions to the top of their collective-bargaining agenda.²⁶ The UAW demanded a retirement plan when negotiations began at Ford in June 1949.²⁷ The Steelworkers did the same in negotiations with major firms in the industry. When the steel negotiations broke down and threatened a nationwide strike, President Harry Truman appointed a fact-finding board to investigate the union's demands. On September 10 the board issued a report that endorsed the Steelworkers' demand for pensions.²⁸ Less than three weeks later, Ford and the UAW reached a path-breaking agreement that committed Ford to establish a pension plan for its hourly employees.²⁹ After a strike, the steel companies also gave in.³⁰ The report and the ensuing bargaining settlements precipitated a "pension stampede,"³¹ as CIO unions at other firms and in other sectors of the economy battled to secure pensions.

The pension plans for production workers of the Studebaker Corporation and the Packard Motor Car Company were part of this "stampede." Officials from the UAW International office and from Local 5 at Studebaker began discussing pensions soon after the announcement that Ford would create a plan. The precedent set at Ford made it clear that Studebaker would establish a retirement plan. The principal issue for collective bargaining was whether the plan would follow the Ford pattern or the pattern set by GM and Chrysler when they settled with the union.³² Bargaining in South Bend dragged on for several

24. See MARTIN HALPERN, *UAW POLITICS IN THE COLD WAR ERA* 187 (1988); SASS, *supra* note 11, at 131-33.

25. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948).

26. See *New Union Demands*, FORTUNE, Jan. 1949, at 150; *Turning Point*, FORTUNE, Apr. 1949, at 189; BENJAMIN M. SELEKMAN ET AL., *PROBLEMS IN LABOR RELATIONS* 324-30 (1950).

27. SELEKMAN ET AL., *supra* note 26, at 339-42.

28. Frederick H. Harbison & Robert C. Spencer, *The Politics of Collective Bargaining: The Post-War Record in Steel*, 44 AM. POL. SCI. REV. 705, 709 (1954); SASS, *supra* note 11, at 133.

29. SASS, *supra* note 11, at 135-36.

30. Harbison & Spencer, *supra* note 28, 709-10.

31. *Pensions Still No. 1 Labor Problem*, STEEL, Jan. 2, 1950, at 102.

32. Minutes, Re: Pension Plan (Jan. 31, 1950) (Collection of the Studebaker

months as the parties waited out negotiations at GM and a long strike at Chrysler, but Studebaker and Local 5 reached agreement in June 1950.³³ Packard took more persuading. Workers at the firm's plant in Detroit struck for eleven days, but in August 1950 Packard too agreed to establish a retirement plan.³⁴

Both Studebaker and Packard adopted a defined-benefit pension plan patterned after GM's.³⁵ The Studebaker plan promised employees pension credit of \$1.50 per month for each year of service up to a maximum of thirty years.³⁶ Normal retirement age was sixty-five, but the plan's early retirement provision allowed an employee with ten years of service to retire at sixty. Retirement at sixty-five was voluntary, but employees were forced to retire at sixty-

National Museum, South Bend, Indiana, Drawer 1834, Pension Plans—Minutes of Meetings with Union folder).

33. *Chrysler's Hundred Days*, FORTUNE, June 1950, at 70-72; *GM Gambles on Peace with Union*, U.S. NEWS & WORLD REP., June 2, 1950, at 38-39; J.D. Hill, *The President's Column*, STUDEBAKER LOCAL NO. 5 WKLY. NEWS, June 14, 1950, at 1.

34. See PACKARD MOTOR CAR CO., 1950 ANNUAL REPORT 5 (1951).

35. "In a defined-benefit plan, benefits are established in advance by a formula, and employer contributions are treated as the variable factor." DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS 201 (7th ed. 1996) [hereinafter FUNDAMENTALS]. The Studebaker plan, for example, promised participants a pension equal to \$1.50 per month per year of service for up to thirty years of service. Studebaker agreed to contribute the amount necessary to pay the benefit provided by the plan. In contrast, in a defined-contribution plan the employer's contribution is fixed and the benefit is variable. A defined-contribution plan "provides an individual account for each participant" and "defines the amount of contribution to be added to each participant's account." The benefit an employee receives at retirement depends "solely on the amount contributed to the participant's account and on any expense, investment, and forfeitures allocated to that account." *Id.* at 247. For the basic terms of the GM pension agreement, see *Wage Chronology No. 9: General Motors Corp.*, 72 MONTHLY LAB. REV. 405, 406 (1951).

36. Studebaker's 1950 collective-bargaining agreement with the UAW also guaranteed a retiring employee a minimum monthly benefit *including* the employee's Social Security Old-Age and Survivor's Insurance benefit (OASI) of \$4 per year of service, up to twenty-five years of service. The minimum retirement benefit was fully integrated with OASI in that the minimum benefit did not increase when the OASI benefit increased. If the OASI benefit rose, the payment obligation of the pension plan decreased by the amount of the increase in the OASI benefit. Pension Agreement between Studebaker Corp. and UAW Local No. 5, at 19, 28-29 (June 23, 1950) [hereinafter 1950 Pension Plan] (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1825, Pension Plan Materials).

eight.³⁷ Studebaker agreed to finance the plan by making contributions to a pension trust. As in the majority of plans, Studebaker did not accept direct contractual liability for paying retirement benefits. The *plan* promised to pay pensions to retirees. Studebaker promised to make regular contributions to the trust. Studebaker's liability was limited to making the trust contributions called for by its collective-bargaining agreement.³⁸

II. BARGAINING RETIREMENT SECURITY AND INSECURITY

In June 1950 the UAW's monthly newsletter claimed that the collective-bargaining victories of 1949 and 1950 "laid the foundation" on which the union would build "a full measure of security and dignity" for older workers.³⁹ But "security and dignity" were not free. When a union negotiates a retirement plan, it has to balance benefits, costs, and risks. To pay retirement benefits, an employer must divert money that might otherwise be paid as wages. The size of the financial commitment depends on, among other factors, the liberality of pension benefits and the requirements employees must satisfy to receive benefits. The UAW negotiated contractual provisions that paid relatively generous pensions to retiring employees. To hold down costs, the union agreed to strict qualifications for benefit entitlement. When independent automakers ran into financial problems in the mid 1950s, it became apparent that this balancing of benefits, costs, and risks left younger employees at risk of losing their pension.

When the UAW won pension plans from Studebaker, Packard, and other independent automakers, these firms appeared to be healthy.⁴⁰ The end of World War II had unleashed a huge consumer demand for automobiles, and most independents responded effectively to the peacetime

37. *Id.* at 17, 18-20, 34-35.

38. *See id.* at 8-9, 45-47. For a discussion of provisions relieving sponsors from direct liability for benefits, see DAN M. MCGILL, FULFILLING PENSION EXPECTATIONS 275 (1962); SASS, *supra* note 11, at 189.

39. *UAW-CIO Leads the Way*, 14 UNITED AUTOMOBILE WORKER, June 1950, at 4.

40. *See* DONALD T. CRITCHLOW, STUDEBAKER: THE LIFE AND DEATH OF AN AMERICAN CORPORATION 123 (1996); William B. Harris, *Last Stand of the Auto Independents?* FORTUNE, Dec. 1954, at 114, 115.

economy.⁴¹ Several even developed new models before the Big Three. For these reasons, independent automakers captured a substantially larger share of passenger car sales than they had held before the war. "The group, manufacturing such familiar makes as Studebaker, Packard, Nash, Hudson, and Willys," a journalist observed, "accounted for about 10 per cent of the passenger-car market before the war, and after Kaiser-Frazer Corp. got into production in 1946 the independents' share of the market was built to a high of 18.5 per cent."⁴² Hudson, Nash, Packard, and Studebaker gradually lost market share after 1946, but "unit production and sales expanded each year to a postwar peak in 1950; and throughout the period, the share of new car registrations held by their makes exceeded the share which they had held in 1941."⁴³

Although it did not become clear for several years, the independents' place in the auto industry was very precarious. During the Korean War, economic controls allowed the independents to maintain relatively stable shares of production and sales, and several profited from defense contracts. But 1953 was a turning point that brought cutbacks in defense production, the end of production controls, and recession. "Car output expanded rapidly to 3.3 million units in the second and third quarters of 1953, compared to 2.1 million units in the same period in 1952."⁴⁴ Then the postwar seller's market came to an end. When Ford and General Motors responded by maintaining high levels of production and cutting prices, smaller competitors could not follow. The independents' share of domestic auto production fell from over 14% in 1952 to 7.1% in the final quarter of 1953.⁴⁵ Sales volume fell as well, and profits shrunk or disappeared. Nash, Hudson, and Packard showed losses over the second half of 1953, and Studebaker showed a much-reduced profit of \$600,000.⁴⁶

The dramatic reversal in the automobile market gave new force to merger initiatives that had circulated among

41. See CHARLES E. EDWARDS, *DYNAMICS OF THE UNITED STATES AUTOMOBILE INDUSTRY* 13 (1965).

42. Harris, *supra* note 40, at 114.

43. EDWARDS, *supra* note 41, at 16.

44. LAWRENCE J. WHITE, *THE AUTOMOBILE INDUSTRY SINCE 1945*, at 13 (1971).

45. *Id.* at 14 tbl. 2.1.

46. *Id.* at 14; see also JAMES A. WARD, *FALL OF PACKARD* 110-11 (1995).

the independents since the late 1940s.⁴⁷ Kaiser-Frazer purchased the assets of Willys-Overland in May 1953, "four months before the collapse of the market."⁴⁸ In the second half of 1953, Packard talked merger with Studebaker, Nash, and Hudson, while Nash and Hudson officials talked with each other.⁴⁹ Nash and Hudson announced a deal in January 1954. In April they merged to create the American Motors Corporation.⁵⁰ The "shotgun wedding" of Packard and Studebaker followed in October 1954.⁵¹

In the wake of these mergers, managers consolidated operations to reduce costs. As they did so, weaknesses in UAW retirement plans became visible. Sales and shutdowns of production facilities demonstrated that there was a critical difference between accruing credit in a pension plan and qualifying for a pension. Corporate restructuring revealed that the lack of vesting in UAW retirement plans exposed workers to substantial levels of "forfeiture risk."⁵²

The plans the UAW negotiated in 1949 and 1950 gave employees pension credit based on a flat-dollar amount and period of service—for example, \$1.50 per month for up to thirty years of service. But accruing credit did not entitle a worker to receive a pension. The Studebaker plan specifically stated that "no employee" would receive a "vested" or contractual right "except such rights, if any, as may accrue to him *upon retirement* as provided in the Plan."⁵³ In other words, an employee did not receive a legally enforceable right to a pension until he qualified to retire under the terms of the plan. If he quit or lost his job before he became eligible to retire, he forfeited his pension credit.⁵⁴

47. See CRITCHLOW, *supra* note 40, at 133-34.

48. Harris, *supra* note 40, at 206.

49. See WARD, *supra* note 46, at 144-48.

50. Harris, *supra* note 40, at 206; see WARD, *supra* note 46, at 148.

51. WARD, *supra* note 46, at 158. When the two firms merged, they became the Studebaker-Packard Corporation. In April 1962, Packard was dropped from the corporate name. *Id.* at 256. For the sake of simplicity, I refer to the firm as the Studebaker-Packard Corporation.

52. I owe this formulation to John Langbein.

53. 1950 Pension Plan, *supra* note 36, at 49 (emphasis added).

54. See Evan K. Rowe & Thomas H. Paine, *Pension Plans Under Collective Bargaining*, 76 MONTHLY LAB. REV. 237 (1953); F. Beatrice Brower, *Pension Plans and Their Administration*, in NAT'L INDUS. CONF. BOARD, STUDIES IN PERSONNEL POLICY, NO. 149, at 32 (1955). For a general discussion of problems

The lack of vesting in UAW plans was not an oversight. Union bargainers appreciated the importance of vesting, but they also understood that it was a significant factor in the cost of a pension plan. A more liberal vesting provision means that more employees will qualify for benefits. If the amount of funds available for pensions is limited, more liberal vesting and lower levels of forfeitures require lower levels of benefits to employees who do qualify.⁵⁵ Conversely, a plan with limited resources can pay higher pensions if fewer employees qualify. Seen in this light, the strict vesting requirements, like other features of UAW pension plans, reflected a conscious choice about budgeting the limited resources available to finance a retirement plan.

UAW pension specialist Leonard Lesser explained the trade-off in 1952. When an employer and union establish a retirement plan, Lesser observed, they have to choose "whether to allocate the bulk of the limited funds to assure maximum retirement security to older workers at the cost of generally foregoing [sic], for the present, such desirable features as vesting of benefits, transfer of rights and other provisions directed to the special needs of younger workers."⁵⁶ Demographics and seniority systems led unions to bargain for relatively liberal benefits for employees who were at or near retirement age. As Lane Kirkland, then an AFL-CIO benefits specialist, observed in 1956, "the immediate pension needs of those workers who were already approaching or had passed the retirement age . . . had to be given priority" over "liberal vesting" provisions that would protect younger employees.⁵⁷ More generous pensions would produce more retirements and, thus, more job security for younger workers. But liberal retirement benefits also came at the expense of greater risk of forfeiture for younger employees.

The Kaiser-Frazer Corporation provided a compelling illustration of forfeiture risk when it sold its principal

created by lack of vesting at this time, see *Will Pension Plans Go Sour?* U.S. NEWS & WORLD REP., Jan. 15, 1954, at 79-81.

55. See WILLIAM W. FELLERS, *Pension Costs and Cost Experience*, in PENSIONS AND PROFIT SHARING 157 (1953); WILLIAM F. MARPLES, ACTUARIAL ASPECTS OF PENSION SECURITY 17, 54-55 (1965).

56. Lesser, *supra* note 7, at 89.

57. Lane Kirkland, *Pensions and the Pensioner*, in PROCEEDINGS OF NEW YORK UNIVERSITY NINTH ANNUAL CONFERENCE ON LABOR 147, 153 (Emanuel Stein ed., 1956).

production facility in November 1953. Kaiser was founded after World War II, so few of its employees had long periods of service.⁵⁸ The Kaiser plan, like the Studebaker plan, gave employees no rights "excepting the right of the employee to retirement benefits or retirement disability benefits as provided [in the plan]."⁵⁹ Under this provision, employees forfeited their benefit accruals when Kaiser closed the plant. Although the plan also said that employees with five years of service could receive benefits if the plan terminated, Kaiser continued to operate the plan for employees at several smaller facilities. The large number of forfeitures and small number of remaining employees caused the plan to be overfunded, that is, to have more assets than were necessary to meet its pension obligations.⁶⁰ Disgruntled former employees sued unsuccessfully to force plan trustees to terminate the pension trust and distribute the assets.⁶¹

Less than a year after the Kaiser shutdown, American Motors announced that it would move its Hudson assembly lines from Detroit to Milwaukee and Kenosha, Wisconsin, where the firm assembled its Nash models.⁶² When these lines shut down in October 1954, AMC allowed some

58. Some employees had retired by 1953, apparently based on service with corporate predecessors. See David A. LaMoreaux, *Kaiser's Terminated Fund—A Case Study*, 8 PENSION & WELFARE NEWS, Sept. 1972, at 72-73.

59. *George v. Haber*, 72 N.W.2d 121, 124 (1955) (quoting Article X of the plan).

60. See Report on Partial Termination of Kaiser Motors UAW-CIO Retirement Plan for Benefit of Employees on Lay-Off From Willow Run and Jackson Plants (June 30, 1953) (Murray W. Latimer Papers, Box 35, Kaiser Motors Corporation Retirement Trust Fund 6/30/53 Valuation, Dissolution folder, Special Collections Department, The Gelman Library, The George Washington University).

61. *George*, 72 N.W.2d 121. Several years after the Willow Run plant closed, the terms of the retirement plan were amended to allow employees with five or more years of service to receive a pension. Even after this expansion of benefit eligibility, only about 40% of the employees covered by the plan met the requirement. See Letter from Murray W. Latimer to Merton Bernstein (Oct. 30, 1961) (Murray W. Latimer Papers, Box 35, Kaiser Motors Corporation Retirement Trust Fund Correspondence 1960 folder, Special Collections Department, The Gelman Library, The George Washington University); Letter from Murray W. Latimer to Professor William Haber (Feb. 29, 1960) (Murray W. Latimer Papers, Box 35, Kaiser Motors Corporation Retirement Trust Fund Correspondence 1960 folder, Special Collections Department, The Gelman Library, The George Washington University).

62. *Hudson Assembly to Leave Detroit*, N.Y. TIMES, May 29, 1954, at 22.

employees to transfer to the Nash plants.⁶³ But about 3000 Hudson workers who did not transfer were dropped from the company seniority lists. The Hudson plan also did not include a vesting provision, and in most UAW plans, including Hudson's, workers forfeited their pension credit when they were dropped from seniority lists.⁶⁴ Thus, many union members who had long periods of service at Hudson were threatened with forfeiture of their pension credit. The UAW avoided this by negotiating an agreement that provided pensions for Hudson workers.⁶⁵

The Kaiser and Hudson shutdowns led the UAW to push for vesting in its next round of collective bargaining. In 1955 the union negotiated plan terms that vested an employee in 100% of his pension accruals when he accumulated ten years of service after age twenty-nine.⁶⁶ The vesting provision provided an additional increment of security for employees who participated in a UAW retirement plan. As the union's newsletter put it, the vesting provision established the "history-making principle" that "inactive, laid-off and displaced workers" would not forfeit their pension credits.⁶⁷ Events at Studebaker-Packard soon demonstrated that vested benefits were less secure than they seemed.

III. THE ECONOMICS OF PENSION FINANCE IN A DECLINING FIRM

More liberal vesting provisions allow more employees to earn a legal right to a pension. But payment of retirement benefits depends on more than the existence of a legal claim. There also must be money to pay the claim. Ideally, an employer should fund pension obligations in advance of payment by setting aside assets as employees earn pension

63. *UAW Wins Preferential Hiring for Unemployed Hudson Workers*, UNITED AUTOMOBILE WORKER, Feb. 1955, at 7.

64. Telephone Interview with Leonard Woodcock, former UAW President (Oct. 25, 1994); *Will Pension Plans Go Sour?*, *supra* note 54, at 80.

65. See *UAW Expected to Offer 'Concessions' to Studebaker, Kaiser in Line with American Motors Agreement*, WALL ST. J., Sept. 6, 1955, at 3; *It's Full Pattern for AMC; Pensions for Hudson Force*, UNITED AUTOMOBILE WORKER, Sept. 1955, at 4.

66. See *The 1955 Ford and General Motors Union Contracts*, 78 MONTHLY LAB. REV. 875, 880 (1955).

67. *It's Full Pattern for AMC*, *supra* note 65, at 4.

credit. In fact, employers and unions usually negotiated a retirement plan under circumstances that made it infeasible for a firm to immediately fund all of a plan's obligations. Virtually all defined-benefit pension plans came into being with benefit obligations that far outstripped the assets set aside to pay those obligations. Furthermore, in collectively-bargained plans, employers and unions created additional unfunded liability each time they increased retirement benefits. Funding these liabilities required a large, long-term financial commitment. If a firm ran into hard times, as Studebaker-Packard did, the expense of an underfunded pension plan could be an onerous and potentially fatal burden.

When Studebaker and Packard merged in 1954, they were in poor financial condition. Packard historian James Ward reports that the "new firm was threatened by bankruptcy even before it was born. The companies were losing money at an unbelievable rate in the third quarter of 1954: Studebaker's loss was \$13,825,000 and Packard . . . failed to meet its expenses by \$11,755,000."⁶⁸ Managers believed operations at Packard's Detroit plant were relatively sound. They saw problems at Studebaker, especially its labor costs, as the main obstacle to the firm's survival.⁶⁹ Management spent much of 1955 negotiating for concessions in South Bend. When Studebaker workers narrowly ratified a new collective-bargaining agreement in January 1956, management won changes in work rules that substantially reduced labor costs.⁷⁰

But just as the company secured gains at Studebaker, Packard collapsed. Packard had moved into a new assembly plant in 1954 but experienced delays getting production underway. Once production started, there were quality control problems. By the time the facility got "up to speed, however, demand for Packard's slackened."⁷¹ It never returned. In the first two months of 1956, sales of Packard models fell 67% from the 1955 level.⁷² Massive losses led the

68. WARD, *supra* note 46, at 157-58.

69. *Id.* at 168.

70. See *id.* at 173; Stephen Amberg, *Triumph of Industrial Orthodoxy: The Collapse of Studebaker-Packard Corporation*, in *ON THE LINE: ESSAYS IN THE HISTORY OF AUTO WORK* 204 (Nelson Lichtenstein & Stephen Meyer eds., 1989).

71. WARD, *supra* note 46, at 177.

72. *Id.* at 212.

firm to cease production at the plant in June.⁷³ Studebaker-Packard teetered on the edge of bankruptcy for much of 1956. It narrowly averted liquidation by selling its defense business and leasing several manufacturing facilities to Curtiss-Wright Corporation for about \$37 million.⁷⁴

Henceforth, Studebaker-Packard's U.S. production would be in South Bend. The plant in South Bend was not healthy, but with \$37 million and a new labor contract, managers believed they could turn the firm around. It would be an uphill battle, though, and the firm soon encountered a financial problem that often struck declining firms with an underfunded pension plan.

An employer has a variety of options for financing the obligations of a defined-benefit pension plan. The simplest is to operate the plan pay-as-you-go. That is, the employer makes payments directly to retirees "in the same manner as payroll."⁷⁵ Accountants and actuaries have long recommended (and federal law now requires) a more prudent approach. As Dan McGill and his collaborators write, "The conventional approach to financing pension benefits is for the employer (and employees, if the plan is contributory) to set aside the necessary funds with a trustee or insurance company before the benefits become payable."⁷⁶ Ideally, an employer should set aside at least enough each year to finance the benefits employees accrue in that year.⁷⁷ This policy protects employees because payment of benefits earned in the past will not depend on the employer's future economic performance.⁷⁸ From the employer's perspective, advance-funding means that costs attributable to service that employees performed in the past will not be a charge against future production.

Newly created defined-benefit plans generally did not fit this ideal. Most businesses did not get around to creating a retirement plan until the firm had elderly employees whom managers or union leaders wished to retire. As a UAW actuary put it, "The primary purpose of a retirement plan is not only to provide pensions, but to provide them

73. *See id.* at 239.

74. *Id.* at 243.

75. FUNDAMENTALS, *supra* note 35, at 589.

76. *Id.* at 590.

77. Under a variety of actuarial funding methods, employer contributions may exceed the value of a plan's legal liability for pension benefits.

78. *See* FUNDAMENTALS, *supra* note 35, at 592.

now."⁷⁹ The appeal of a defined-benefit plan was that it could immediately provide relatively generous benefits to employees who were at or near retirement age. A defined-benefit plan did this by giving employees credit toward a pension for "past service," that is, for service performed before the employer adopted the plan.⁸⁰

Granting credit for past service facilitated retirement of older workers, but it also created default risk. If a firm sets aside resources as employees earn pension credit, there will be little risk that a retirement plan will cease operation without enough assets to meet its obligations. But firms that created a defined-benefit plan usually could not do this because workers received pension credit for years of service before there was a plan to fund. As a result, most defined-benefit plans came into being with a large unfunded liability, sometimes called "past-service liability." One expert likened past-service liability to "the price [the plan sponsor] must pay for neglecting to initiate a pension plan when the first employee, who will ever come up for retirement, was hired."⁸¹

The past-service liability of a new defined-benefit plan was often very large. After U.S. Steel negotiated a retirement plan with the Steelworkers union in 1949, management decided to make pensions available to the firm's other employees as well. In testimony to Congress in 1950, consulting actuary George Buck estimated U.S. Steel's "total past service cost for present employees" to be \$560 million.⁸² Ford's initial liability under the plan it negotiated with the UAW was put at \$200 million.⁸³

79. Memorandum from Max Bloch to James Brindle 4 (June 17, 1958) [hereinafter Memorandum from Bloch to Brindle] (UAW Social Security Department Collection, Unprocessed Materials, Accession date Mar. 23, 1978, Box 4 of 7, Staff Collective Bargaining folder, Archives of Labor and Urban Affairs, Wayne State University) (emphasis in original).

80. Robert Paul emphasized the importance of this point. Telephone Interview with Robert Paul, former President, Segal Company (June 15, 1999); see also Frank L. Griffin, Jr., *The Private Pension Hullabaloo*, PENSION & WELFARE NEWS, Apr. 1967, at 18; M.B. Folsom, *Old Age on the Balance Sheet*, 143 ATLANTIC MONTHLY 399, 403 (1929).

81. A.J. Meuche, *Past Service Benefits*, in PROCEEDINGS OF NEW YORK UNIVERSITY TENTH ANNUAL CONFERENCE ON LABOR 75, (Emanuel Stein ed., 1957); see also FUNDAMENTALS, *supra* note 35, at 520-22.

82. *December 1949 Steel Price Increases: Hearings Before J. Comm. on the Econ. Rep.*, 81st Cong. 27, 44-45 (2d Sess. 1950).

83. See Peter Drucker, *The Mirage of Pensions*, HARPER'S, Mar. 1950, at 33.

Studebaker's past-service liability was smaller—about \$18 million—but Studebaker was a much smaller firm than Ford or U.S. Steel.⁸⁴ Packard also assumed past-service liability when it created its pension plan. And since Packard had an older workforce than Studebaker, it probably had a relatively larger past-service liability.⁸⁵

An employer had to finance past-service liability as well as liability based on future service out of revenue generated after creation of the plan. How these costs were allocated over time depended on the actuarial-cost method a firm adopted. Different actuarial-cost methods produced different patterns of contributions and, thus, gave plan sponsors discretion over the incidence of pension costs. In the steel industry, which had a relatively older workforce and high past-service liability, many firms adopted what came to be known as "interest-only" funding.⁸⁶ Under this approach the employer contributed the expense attributable to retirement benefits earned in the current year plus interest on the plan's past-service liability. This funding schedule, which was the minimum an employer could contribute and receive favorable tax treatment, lightened the initial expense of a pension plan, but a plan financed in this manner would never have enough assets to meet all of its liability.⁸⁷

The demographics in the auto industry were less constraining than in the steel industry, and the UAW placed more emphasis on "sound" funding than did the Steelworkers.⁸⁸ A UAW negotiator told Studebaker

84. Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in LANGBEIN & WOLK, *supra* note 2, at 69.

85. *Private Pension Plans: Hearings Before Subcomm. on Fiscal Policy of J. Econ. Comm.*, 89th Cong. 117 (2d Sess. 1966) [hereinafter 1966 JEC Hearings] (statement of Clifford M. MacMillan); *Chrysler's Hundred Days*, FORTUNE, June 1950, at 71. The pension plans at U.S. Steel, Studebaker, and Ford were integrated with Social Security. For this reason, when Congress increased Social Security benefits in August 1950, the past-service liability of these plans was reduced. See SASS, *supra* note 11, at 136-37.

86. For a discussion of the funding practices in several steel industry plans see George B. Buck, *How Much Do Employee Benefits Cost?*, in NAT'L INDUS. CONFERENCE BD., HANDBOOK ON PENSIONS: STUDIES IN PERSONNEL POLICY, No. 103, at 45-47 (1950). For a discussion of "interest only" funding, see DORRANCE BRONSON, CONCEPTS OF ACTUARIAL SOUNDNESS IN PENSION PLANS 97-101 (1957).

87. FUNDAMENTALS, *supra* note 35, at 533-34.

88. See SASS, *supra* note 11, at 135; see also Willard Weiss, *Funding Practices Under Labor Negotiated Pension Plans*, in 2 PROCEEDINGS: CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE 73-75 (1952).

representatives at a bargaining session in January 1950, "we believe that it's pretty clear in the minds of everybody now that the question of building a *sound* pension plan is just as important as *getting* a pension plan."⁸⁹ In fact, the "main issue" in the UAW's 104-day strike at Chrysler in 1950 was whether Chrysler would establish a trust and fund its pension obligations in advance.⁹⁰

But "sound" funding did not mean "full" funding. Even if it were feasible for an employer to pay the entire past-service liability when it created a retirement plan, the tax laws discouraged this course of action. An employer's annual deduction for pension contributions was limited to the cost attributed to current accruals plus 10% of the past-service liability. In other words, if a firm created a plan with past-service liability of \$1,000,000, it could deduct the cost of current accruals plus \$100,000 in each year until the past-service liability was paid off. If an employer contributed more than this, the excess was "carried forward and deducted in future years."⁹¹ The unpaid balance of a plan's past-service liability accrued interest, so the shortest period over which an employer could pay off past-service liability and deduct its entire contribution each year was about twelve years.⁹²

UAW plans called for an employer to pay off past-service liability over a considerably longer period—commonly thirty years.⁹³ Like the vesting requirements in UAW plans, the funding provisions reflected a decision to budget limited resources in a manner that provided relatively liberal retirement benefits. By lengthening the period for paying off past-service liability, a plan could devote less of the employer's current contribution to past-service liability and more to current retirement benefits.⁹⁴

89. Minutes, Re: Pension Plan, *supra* note 32, at 1 (emphasis in original).

90. BRONSON, *supra* note 86, at 27; see *Federal Reinsurance of Private Pension Plans: Hearing on S. 1575 Before Senate Comm. on Fin.* 48 (2d Sess. 1966) (statement of Walter Reuther); see also SASS, *supra* note 11, at 184.

91. William N. Haddad, *Impact of Tax Policy on Private Pensions*, in PENSIONS: PROBLEMS AND TRENDS 70-71 (Dan M. McGill ed., 1955).

92. See John B. St. John, *Financing a Pension Plan*, in PENSIONS & PROFIT SHARING 107 (3d ed. 1964).

93. See J. Perham Stanley, *Pension Plans Negotiated by the UAW-CIO*, 77 MONTHLY LAB. REV. 13, 14-15 (1954).

94. See George B. Buck, Jr., *Actuarial Solvency of a Pension Plan*, in PENSIONS: PROBLEMS AND TRENDS 130 (Dan M. McGill ed., 1955).

UAW officials later compared the practice to a home mortgage:

[I]n the same way that many persons would not be able to own their own homes except through the creation of mortgage type debt, most private pension plans could not provide an adequate level of benefits if the mechanism of gradually funding the cost of prior service credits were not used.⁹⁵

But higher retirement benefits came at the expense of greater risk. Until the employer paid off the mortgage, employees faced default risk.

The funding schedule in UAW collective-bargaining agreements projected that a pension plan would eventually attain full funding. In practice, this almost never occurred. The reason was that the funding schedule did not take into account that the union would negotiate higher benefits in future rounds of collective bargaining. As noted above, UAW pension plans calculated an employee's pension by multiplying his years of service times a flat-dollar amount. For a retirement plan with a flat-dollar benefit formula, the IRS calculated an employer's maximum deductible contribution based on the current formula. This discouraged employers from contributing enough funds to meet higher benefit levels that were likely to apply in the future.⁹⁶ Yet the UAW negotiated an increase in benefits in each successive round of collective bargaining. The formula in the Studebaker plan went from \$1.50 per month per year of service in 1950 to \$1.75 in 1953 and then to \$2.25 in 1955.⁹⁷

One effect of these benefit improvements was to counteract inflation, but the increases went well beyond the rate of inflation. The union sought higher real benefit levels because more generous pensions induced more workers to

95. Public Reinsurance for Private Pension Plans, attached to Memorandum from Howard Young to Nat Weinberg 2 (Oct. 23, 1962) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Box 12, UAW Social Security Department: Howard Young Correspondence and Reports 1962-1967 folder, Archives of Labor and Urban Affairs, Wayne State University).

96. See RICHARD A. IPPOLITO, *THE ECONOMICS OF PENSION INSURANCE* 56 (1989); see also JOHN TURNER & NORIYASU WATANABE, *PRIVATE PENSION POLICIES IN INDUSTRIALIZED COUNTRIES: A COMPARATIVE ANALYSIS* 98-99 (1995).

97. 1966 *JEC Hearings*, *supra* note 85, at 104 (statement of C.M. MacMillan).

retire voluntarily before reaching the age for mandatory retirement. This meant less reliance on mandatory retirement, which was unpopular with older workers, and more employment security for younger employees.⁹⁸

But benefit improvements also reduced the level of funding in UAW retirement plans. When the union bargained for higher pensions, it commonly demanded an increase in the flat-dollar formula that applied to past service. This created additional unfunded liability that had to be financed out of future revenues.⁹⁹ The tax laws allowed an employer to fund past-service liability created by a plan amendment over the same term—about twelve years—that applied to the initial liability when a plan was created. UAW contracts commonly called for a firm to amortize the liability on a thirty-year schedule from the date of the benefit increase.¹⁰⁰

The decision to amortize past-service liability meant that an employer's contribution to a UAW retirement plan had two parts. One part reflected the expense attributable to the current year; the other reflected the cost of retiring the plan's past-service liability.¹⁰¹ For example, the pension agreement Studebaker and the UAW negotiated in 1950 called for Studebaker to contribute the cost attributable to the current year plus an additional amount that would

98. See Melvin K. Bers, *Equity and Strategy in Union Retirement Policy*, 4 INDUS. REL. 43-45 (1965). For figures on mandatory and normal retirements at GM, Ford, and Chrysler, see Charles E. Odell, *The Case for Early Retirement*, 4 INDUS. REL. 16 tbl.1 (1965).

99. For an early recognition of this problem, see Memorandum from Nat Weinberg to Walter Reuther (Nov. 19, 1951) (United Auto Workers President's Office: Walter Reuther Collection, Box 150, Folder 5, Archives of Labor and Urban Affairs, Wayne State University). For discussion of this issue, see FUNDAMENTALS, *supra* note 35, at 522, and SASS, *supra* note 11, at 185-86.

100. Studebaker-Packard's 1953 agreement required it to fund its new past-service liability over a thirty-year period from the date the liability was created: in other words, by June, 1 1983. The past-service liability under the 1950 pension agreement would continue to be funded on the schedule under the 1950 plan—by 1980. See Supplemental Pension Agreement 1 (June 1, 1953), (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1834, "Pension Plan—Hourly Rated" folder). The pension agreement for 1955 established a new amortization schedule pursuant to which all past-service liability (including liability created in 1950 and 1953) would be funded by 1985. See Exhibit "A," Supplemental Agreement (Pension Plan) (Nov. 9, 1955), (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 3725, Exhibit A—Pension Plan Agreement folder).

101. FUNDAMENTALS, *supra* note 35, at 534-35.

amortize the plan's past-service liability in level annual installments "over a period of not more than 30 years from the effective date of the plan."¹⁰²

Payments to amortize past-service liability were tolerable for a stable or growing firm, but they became increasingly burdensome as a firm declined and its operations contracted.¹⁰³ The shutdown of the Packard plant reduced the scale of Studebaker-Packard's operations, but it did not significantly affect the contributions the firm made to amortize past-service liability. For 1956, Studebaker-Packard contributed \$1,773,397 on behalf of Packard employees. Of this amount, \$1,157,268 was "past service cost" and \$616,129 was for current accruals.¹⁰⁴ For 1957, the first full year that Packard was out of production, the contribution on behalf of Packard workers was \$1,012,610. Only \$36,866 represented liability for current accruals. The remaining \$975,744 funded the Packard past-service liability.¹⁰⁵ With Packard out of production, this cost would be born by the South Bend plant. Of course, South Bend continued to bear the expense of the past-service liability attributable to Studebaker employees.¹⁰⁶

The immediate result of the Packard shutdown, then, was a significant increase in hourly pension costs. "[T]he cost for 1956," an executive told Local 5 at Studebaker, "has been established at 23.4 cents per hour."¹⁰⁷ "You will be interested to know," he continued, "that an estimate of the cost for 1957 is 28.9 cents per hour," an increase of more than 23%.¹⁰⁸ When CIO unions bargained for retirement and insurance plans in 1949 and 1950, the combined cost was

102. 1950 Pension Plan, *supra* note 36, at 8-9.

103. See SASS, *supra* note 11, at 206.

104. Letter from Preston C. Bassett to Robert E. Bryar (Apr. 1, 1957) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 3725, Pension Plans—General Correspondence folder).

105. Actuarial Report by Towers, Perrin, Forster & Crosby, Inc. for Studebaker-Packard Corp., UAW-CIO Pension Plan tbl. 57-4 (June 24, 1958) (UAW Local 5 Collection, Box 28, Pension Plan—1956-1958 folder, Archives of Labor and Urban Affairs, Wayne State University).

106. See Memorandum from W.P. Wray to C.M. MacMillan (Mar. 24, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 710, Fringe Benefits Costs folder).

107. Letter from C.M. MacMillan to J.D. Hill (Aug. 27, 1957) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 3725, Pension Plans—General Correspondence folder).

108. *Id.*

estimated to be about 10¢ an hour.¹⁰⁹ In 1957 the cost of Packard past-service liability alone threatened to exceed 10¢ an hour.¹¹⁰ And this was a long-term obligation. As a company executive noted, it "would be a continuing obligation . . . amounting to approximately \$1,000,000 per year over the next twenty-seven years, even though no employees covered by the Detroit labor contract are still employed by the company."¹¹¹

IV. THE TERMINATION AND DEFAULT OF THE PACKARD PENSION PLAN

Studebaker-Packard's dire financial condition convinced managers that the firm could no longer bear the cost of Packard retirement benefits. Company executives decided to shed the liability by terminating the pension plan as it applied to Packard employees. Federal labor law and collective-bargaining agreements made this a complicated course of action, but company officials perceived a conflict of interest at the UAW that worked to their advantage. With Packard out of production, Studebaker workers paid for Packard retirement benefits. Company executives devised a strategy that trapped the UAW International Union between the conflicting interests of the local unions at Studebaker and Packard. With assistance from Local 5 at Studebaker, the company terminated the plan for Packard employees in September 1958.

Studebaker-Packard lost less money in 1957 than in 1956, but its competitive position continued to deteriorate. In 1957 the firm built 82,000 cars and trucks in the United States. This was a decline from production in South Bend in 1956, not to mention the combined production of the

109. See Frederick H. Harbison, *The General Motors-United Auto Workers Agreement of 1950*, 58 J. POL. ECON. 397, 401 (1950).

110. In 1958, hourly employees in South Bend worked slightly less than eight million hours. If the \$931,000 per year figure calculated by Studebaker's actuaries is used, the cost of amortizing Packard's past-service liability would have exceeded 11.5¢ per hour. See Studebaker-Packard Corp., *Base Wages and Fringe Benefits—Hourly Rated Employees for the Calendar year 1958* (Aug. 11, 1961) (Collection of the Studebaker National Museum, South Bend, Indiana, Negotiations 1961, notebook No. 91.51.188F, Costs tab).

111. Memorandum from M.L. Milligan (Aug. 22, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 42, Pension Plan-Amendment and Partial Termination folder).

Studebaker and Packard divisions.¹¹² In August 1957 executives began investigating ways to “minimize” the liability for Packard retirement benefits.¹¹³ Initially they considered freezing benefits at the current level. In other words, Packard employees would not gain when the firm granted benefit improvements to employees at Studebaker. But while this approach would not increase costs, the firm would remain obligated to pay off the Packard past-service liability.¹¹⁴ Managers abandoned this option when the firm had another brush with bankruptcy.

1958 was a recession year, and Studebaker-Packard’s production fell again. In the fall the firm was to make the first payments on \$55 million of long-term debt, but it could not pay.¹¹⁵ Under an agreement announced in August, Studebaker-Packard avoided liquidation by refinancing its debt.¹¹⁶ This turn of events pushed executives toward a more drastic approach to pension liability. Late in 1957 or early in 1958 they decided to terminate the pension plan as it applied to Packard employees.¹¹⁷ This course of action would completely eliminate the obligation for Packard retirement benefits. It went without saying, however, that the UAW would fight an effort to walk away from union members at Packard. Recognizing this, company officials planned their actions with care.

112. See Memorandum on Studebaker Corporation tbl.II (Oct. 24, 1963), attached to Letter from Emily Rosdolsky to Raymond H. Berndt (Oct. 24, 1963) (UAW President’s Office: Walter Reuther Collection, Box 168, folder 7, Archives of Labor and Urban Affairs, Wayne State University).

113. Memorandum from M.L. Milligan to A.J. Porta (Aug. 27, 1957) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 710, Administration of Studebaker-Packard Corporation UAW-AFL-CIO Pension Plan Agreement folder).

114. Letter from S.B. Feuer to Royall Victor, Jr. (Oct. 22, 1957) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 710, Administration of Studebaker-Packard Corporation UAW-AFL-CIO Pension Plan Agreement folder); Memorandum from C.J. McNerney to C.M. MacMillan, S.B. Feuer, & W.P. Wray (n.d.), (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Minutes tab) (discussing 1957 trip to Detroit).

115. See Richard Hammer, *Welcome, Sherwood Egbert*, FORTUNE, Dec. 1961, at 158.

116. See *New Try for S-P*, BUS. WEEK, Aug. 9, 1958, at 32; *Studebaker-Packard Bets It All*, BUS. WEEK, Sept. 6, 1958, at 148, 150, 152.

117. Memorandum from C.M. MacMillan to H.E. Churchill 2 (Apr. 25, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder).

The termination strategy required management to navigate several legal obstacles. Studebaker-Packard had separate collective-bargaining agreements with Local 190 at Packard and Local 5 at Studebaker. Local 190's contracts ran through June 30, 1958, Local 5's through August 31. The firm had to maintain the retirement plan for the duration of these agreements, so managers could not take action until September 1.¹¹⁸ The company also had duties under federal labor law. As noted above, the NLRB had held that pension and retirement issues were "mandatory" subjects of collective bargaining.¹¹⁹ This meant that if employees were unionized, their employer could not unilaterally modify a retirement plan. The employer had to bargain changes in good faith with the union.¹²⁰

In other words, company executives had to wait until both collective-bargaining agreements expired, then they had to partially terminate the pension plan, all without falling foul of the duty to bargain in good faith. This promised to be difficult. In the normal course of industrial relations, management would begin negotiating a new collective-bargaining agreement months before the old one expired. And 1958 was not normal. Laid-off workers at Packard were anxious about the firm's plans for them and eager to negotiate issues relating to the pension plan.¹²¹

In April 1958, Cliff MacMillan, Studebaker-Packard's Director of Industrial Relations, outlined a strategy for meeting the legal and practical obstacles to a partial termination. MacMillan intended to give notice to the UAW that Studebaker-Packard would not renew its collective-bargaining agreements with Local 190. The firm no longer

118. See Letter from S.B. Feuer to Royall Victor, Jr. (May 14, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab); Memorandum, Local 190 Collective Bargaining Agreement Negotiations 2 (n.d.) [hereinafter CBA Negotiations] (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Minutes tab).

119. See *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

120. More precisely, an employer could not take unilateral action until it had bargained to impasse with the union. See generally J. Gilmer Bowman, Jr., *An Employer's Unilateral Action—An Unfair Labor Practice?* 9 VAND. L. REV. 487, 500-503 (1956).

121. Memorandum from W.P. Wray to C.M. MacMillan (Apr. 23, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab).

had active employees at Packard, MacMillan reasoned, so there was “obviously no reason to continue the working agreements” there.¹²² He recognized, however, that “[t]he union will wish to negotiate with the Company for the continuance of [pension and other benefit] programs.” The company’s in-house lawyers had concluded that Studebaker-Packard had no duty to bargain with Local 190 because there were no longer any active employees at Packard. Management’s position would be that “[we] will only discuss the problems of ex-Packard Division employees in our negotiations in South Bend.”¹²³

It is not hard to understand MacMillan’s wish to negotiate Packard issues in South Bend rather than Detroit. The Packard shutdown created a zero-sum relationship between the company’s former employees at Packard and its current employees at Studebaker. Money spent to finance Packard retirement benefits came out of revenues generated by production in South Bend. If this money were kept in the firm, jobs in South Bend would be more secure. Or the dollars spent on Packard benefits might be paid as wages or benefits to employees at Studebaker. This conflict of interest played an indispensable role in the firm’s plans.

Although company officials believed they had no statutory duty to negotiate with Local 190, they worried that an ambiguous provision in the pension plan might force them to do so. Before Studebaker and Packard merged in 1954, each had used a pension trust to finance its retirement plan. After the two firms merged, the UAW demanded that the company also merge the Studebaker and Packard retirement plans. Management agreed and combined the two pension *plans* in 1955.¹²⁴ The agreement with the UAW was ambiguous, however, about whether the two pension *trusts* must be merged. In fact, company

122. Memorandum from C.M. MacMillan to H.E. Churchill, *supra* note 117.

123. *Id.*

124. See History of Pension Plan and Showing of Business Necessity for Curtailment, attached as Exhibit A to Letter from S.B. Feuer to Director of Internal Revenue, Pension Trust Division, Indianapolis, Ind., at 1-4 (July 7, 1958) [hereinafter History of Pension Plan] (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 42, Pension Plan-Amendment and Partial Termination folder); Supplemental Agreement (Pension Plan) 3-4 (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 3725, Exhibit A—Pension Plan Agreement folder).

officials maintained separate trusts with different banks serving as trustee. The firm's actuaries continued to calculate separate pension liability for the Studebaker and Packard divisions. And the Packard trust paid pensions only to Packard retirees, while the Studebaker trust paid pensions only to Studebaker retirees.¹²⁵

Managers were uncertain about how the contractual provisions that governed termination of the pension plan would apply to the two pension trusts. Like most retirement plans, the Studebaker-Packard plan included a procedure for distributing assets if the plan terminated. The termination clause ranked employees in terms of the relative priority of their claims against the assets of the plan. Assets would be allocated first to pay benefits to retirees; next, to active employees age sixty-five or older (employees eligible to retire under the normal retirement provision of the plan); then, to employees age sixty or older who had not retired (employees eligible under the early retirement provision of the plan); and so on.¹²⁶

An executive described the problem in a memorandum to the firm's outside attorneys at Cravath, Swaine & Moore. If Studebaker-Packard terminated the pension plan with respect to Packard employees, he wondered, would the plan have to use money from the separate Studebaker trust to pay pensions owed to former Packard employees? This was an important question because the Packard trust did not have nearly enough assets to pay the benefits promised to Packard employees. At the end of 1957 the liability for Packard retirement benefits was about \$27 million, while the Packard trust had only \$9.6 million in assets.¹²⁷ If the termination clause allowed Packard employees to "invade the Studebaker Trust Fund," then a partial termination of the plan would divert millions of dollars reserved for Studebaker pensions. Management would have to negotiate with Local 190 to prevent this. "[I]s there any way," the executive inquired, "to prevent Packard employees from

125. History of Pension Plan, *supra* note 124, at 4.

126. See 1950 Pension Plan, *supra* note 36, at 49-51; see also Memorandum from Bloch to Brindle, *supra* note 79, at 1.

127. Memorandum, Studebaker-Packard Corp., UAW-CIO Pension Plan Actuarial Liabilities as of Dec. 31, 1957 (June 20, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab).

being able to secure pensions from money paid by the Corporation into the segregated Studebaker Trust Fund?"¹²⁸

By early June, company officials and attorneys at Cravath devised a way to protect the assets in the Studebaker trust. The safest course was to undo the merger of the Studebaker and Packard retirement plans. On September 2, one day after Local 5's collective-bargaining agreements expired, the firm would create separate retirement plans for Studebaker and Packard employees, each with its own pension trust. With separate plans and trusts, Packard employees could look only to the Packard trust to pay their pensions. The firm would "then terminate the Plan as to [Packard] employees on September 3," a Cravath attorney explained.¹²⁹

This strategy hinged on the conflict of interest between Packard and Studebaker workers. The firm had a statutory duty to bargain pension issues, so managers would need to inform Local 5 of their plans. As the Cravath attorney observed, "The announcement of your intentions to Local 5 prior to the expiration of your contract with that organization would fortify your defense as to any charges that the Corporation refused to bargain in good faith by subsequent unilateral action" affecting the plan.¹³⁰ Plainly, company officials were relying on Local 5 to collaborate, at least implicitly, in the partial termination. The attorney noted, "There appears to be some possibility that Local 5 would be amenable to the proposal."¹³¹

As managers and lawyers worked to resolve these legal issues, the firm moved forward with the termination strategy. At the end of April, Cliff MacMillan gave notice that Studebaker-Packard would not renew its collective-bargaining agreement with Local 190.¹³² In June the UAW asked to negotiate issues relating to the Packard

128. CBA Negotiations, *supra* note 118, at 3.

129. Letter from T.G.S. Christensen to Melvin L. Milligan 2 (June 10, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab).

130. *Id.* at 3.

131. *Id.*

132. Letter from C.M. MacMillan to Ken Morris (Apr. 28, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder).

shutdown.¹³³ MacMillan replied that management would not "bargain" on these issues with Local 190 or with the International Union, but management was willing to meet "for the purpose of discussing them."¹³⁴ There followed a series of meetings in which, according to company records, union representatives claimed the firm was obliged to negotiate and company officials replied that it was not, and union representatives asked what management planned to do about Packard's retirement plan and managers said they had made no decisions.¹³⁵ But the union knew something was up. "There is no doubt in my mind that the International Union is as well targeted in on questions of what can and cannot be done under the pensions . . . as we are," MacMillan reported.¹³⁶ But with no plant and no employees in Detroit, the union had no leverage. Local 190's collective-bargaining agreements lapsed at the end of June.

On July 1, Studebaker-Packard and Local 5 began negotiating a new collective-bargaining agreement for the Studebaker plant in South Bend.¹³⁷ Bargaining proceeded desultorily through July and into August because Local 5 was waiting for negotiations with the Big Three auto manufacturers to establish the industry pattern.¹³⁸ Management did not disclose the company's proposal for

133. Letter from Ken Morris to C.M. MacMillan (June 11, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab).

134. Letter from C.M. MacMillan to Ken Morris (June 17, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder).

135. See Minutes, Meeting with International Union—190 Agreement 1-2 (June 20, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder); Memorandum, Telephone Conversation with Ken Morris (June 23, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder) (between G.T. Gallagher and Ken Morris); Memorandum from C.M. MacMillan to H.E. Churchill (June 26, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder).

136. Memorandum from C.M. MacMillan to H.E. Churchill, *supra* note 135.

137. Letter from C.M. MacMillan to William L. Mariner (July 2, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Correspondence tab).

138. See Letter from C.M. MacMillan to H.E. Churchill (Aug. 13, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Correspondence tab).

separate pension plans until August 20th. Company minutes report that Cliff MacMillan told representatives of Local 5, "The two funds are to be kept separate to avoid the possibility of Packard employees drawing from the Studebaker fund."¹³⁹ The next day, at a meeting in Detroit attended by representatives of the UAW International Union, Local 190, and Local 5, MacMillan described the proposal in more detail. The company would create "two separate plans," he said, "one of which would be immediately terminated."¹⁴⁰ Studebaker-Packard was "in effect, . . . reverting to the set-up as it originally existed several years ago," MacMillan explained.¹⁴¹ And he clearly spelled out that this plan was a "proposal to Local 5."¹⁴²

MacMillan's announcement laid bare the conflict between Local 190 and Local 5 and put the International Union in a difficult position. The Packard trust had \$9.5 million in assets. The pension liability to Packard workers who had already retired was \$13.7 million. The company's proposal threatened to reduce their benefits by 30% and leave nothing for other participants, including over 400 former employees age sixty or older with vested pension rights.¹⁴³ Calling the company's plan "completely unacceptable," the International Union presented a counterproposal several days later. The International Union agreed with the proposal to create separate plans for Studebaker and Packard employees but insisted that the firm transfer enough assets to pay full pensions to Packard retirees and to former employees who had applied for a pension.¹⁴⁴

The International Union's proposal would require Studebaker-Packard to shift about \$3.5 million (of \$14 million) from the Studebaker pension trust to the Packard

139. Minutes, Meeting No. 25: Contract Negotiations (Aug. 20, 1958), (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab).

140. Minutes, Company-Union Meeting—Detroit Phase-Out Problems, Local 190, at 1 (Aug. 21, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 folder).

141. *Id.* at 3.

142. *Id.*

143. *See* Telegram from Ray Berndt and Ken Morris to C.M. McMillan 1 (Aug. 26, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab).

144. *See id.* at 2.

trust.¹⁴⁵ This pushed Local 5 openly into alliance with management. The coalition was cemented on August 27 when company officials presented the International Union's proposal to the Local 5 bargaining committee. Company minutes state that Local 5 representatives were "deeply concerned about the disbursement of the money funded for Studebaker employees under the Studebaker Pension Plan."¹⁴⁶ At the same meeting, the company and Local 5 finalized a contract extension under which Local 5's collective-bargaining agreement would lapse for several days to permit the company to terminate the Packard pension plan.¹⁴⁷ On August 28, Local 5 approved the extension agreement without a dissenting vote.¹⁴⁸

To split the pension plan and terminate the Packard plan, management needed the approval of Studebaker-Packard's board of directors. On August 26 the board passed a resolution, effective September 2, that created two plans. Plan A would cover Studebaker workers; Plan B would cover former Packard employees. The board then passed a second resolution that would terminate Plan B on September 3.¹⁴⁹ The timing of the board's action counted on the conflict of interest between Local 190 and Local 5. By acting before Local 5's collective-bargaining agreement expired, the board arguably violated the statutory duty to bargain in good faith. When a Cravath attorney pointed out

145. Memorandum, UAW-CIO's Claims on Behalf of Packard Pensioners 4 (Oct. 1, 1958) [hereinafter UAW-CIO's Claims] (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 42, Pension Plan—Amendment and Partial Termination folder).

146. Minutes, Meeting No. 28: Contract Negotiations (Aug. 27, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab).

147. *Id.*; see also Memorandum from C.M. MacMillan to P.A. Braner (Aug. 29, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab).

148. Edward Wrobel, Recording Secretary, Minutes, Membership Meeting (Aug. 28, 1958) (UAW Local 5 Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 10, Minutes of Executive Board and Membership Meetings—1958 folder).

149. Amendment to UAW-CIO Pension Plan 2 (Aug. 27, 1958), (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1290, Local 190 notebook, Correspondence tab).

the problem, a company official dismissed it.¹⁵⁰ "It is our feeling," the official wrote, "that there is no reasonable likelihood that Local 5 would seize upon such contingency to seriously pursue such argument."¹⁵¹

By September 4, when representatives of management and Local 5 executed the contract extension, the company had terminated the Packard pension plan. The International Union continued to argue that the termination was invalid while, according to an internal company memorandum, Local 5 "urged the Company to resist 'dilution' of the pension funds available for Studebaker employees in the manner requested by the International Union."¹⁵² Managers and the International Union debated the legality of the termination for several months. In November the International Union filed suit in federal court seeking to annul the company's actions.¹⁵³

The Packard experience led representatives of Local 5 to focus less on the level of benefits and more on the level of funding in the Studebaker pension plan. According to company minutes, they "wanted proof-positive that that money is there, and will be there regardless of the outcome of the Detroit problem."¹⁵⁴ In November Willard Solenberger, a pension specialist from the UAW International Union, told managers "that the Union is not so much concerned about the level of benefits, but they are concerned about the security of the present benefits for the

150. See Letter from William J. Nolan, Jr. to S.B. Feuer 1 (July 23, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 42, Pension Plan—Amendment and Partial Termination folder) (discussing hourly-rated employees' pension plan).

151. Letter from S.B. Feuer to G.S. Christensen (Aug. 1, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 42, Pension Plan—Amendment and Partial Termination folder).

152. UAW-CIO's Claims, *supra* note 145, at 4.

153. Complaint, Int'l Union, United Auto. Workers of Am. v. Studebaker-Packard Corp. (E.D. Mich. Nov. 17, 1958) (No. 18577) (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 41, The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America folder).

154. Minutes, Meeting No. 63: Contract Negotiations (Oct. 22, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab).

present retirees and prospective retirees."¹⁵⁵ The company and Local 5 eventually agreed to maintain the terms of the plan unchanged until September 1, 1959.¹⁵⁶

Packard retirees continued to receive their full pension until January 1959, when Studebaker-Packard and the International Union agreed that benefits should be reduced pending the outcome of the litigation.¹⁵⁷ Actuarial adjustments and investment performance improved the financial position of the Packard trust, but the assets still were not sufficient to pay the full pensions owed to retirees. In October 1959, Studebaker-Packard and the UAW reached a settlement that reduced benefits for retirees to 85% of the level prior to the termination. Employees who were eligible to retire when the plan terminated but who did not submit pension applications until after September 2, 1958 received a lump-sum payment of about \$43 per year of service. Others got nothing.¹⁵⁸

V. "PUBLIC REINSURANCE FOR PRIVATE PENSION PLANS"

Some press reports put a positive spin on the UAW's settlement of the lawsuit. "Packard Pensions Assured," read a headline in the *Detroit News*.¹⁵⁹ But for union leaders the termination powerfully manifested the default risk union members faced. The Packard experience, like the earlier shutdowns at Kaiser-Frazer and Hudson, stirred the UAW

155. Minutes, Meeting No. 67: Contract Negotiations (Nov. 7, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab).

156. Minutes, Meeting No. 79: Contract Negotiations (Nov. 27, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab); Collective Bargaining Agreement Memorandum of Understanding (Nov. 27, 1958) (Collection of the Studebaker National Museum, South Bend, Indiana, 1958 Negotiation Minutes and Proposals (No. 121), notebook No. 91.51.184, Minutes tab).

157. *Studebaker, UAW Slate Pension Cut for Packard Workers Pending Shift*, WALL ST. J., Feb. 2, 1959.

158. See Memorandum, UAW v. Studebaker-Packard Corp., Negotiations for Settlement (Oct. 28, 1959) (Collection of the Studebaker National Museum, South Bend, Indiana, Studebaker-Packard Litigation Papers, Box 41, The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America folder).

159. Asher Lauren, *Packard Pensions Assured*, DETROIT NEWS, Dec. 11, 1959.

to take steps to make employees' expectations more secure. Union officials developed new demands for bargaining with individual employers, but they also concluded that default risk called for a collective solution that would require legislation. UAW pension specialists came up with the idea of an insurance fund akin to the FDIC. By guaranteeing the obligations of retirement plans, the fund would shift default risk away from employees in weak firms. The proposal posed a number of practical problems, however, because pension obligations differ materially from the risks covered by private insurers.

Shortly after the UAW settled its litigation against Studebaker-Packard, union president Walter Reuther asked Nat Weinberg, who directed the Special Projects Department, to begin thinking about ways to protect employees "with respect to pensions . . . if they have the Hudson-Packard experience where the plant goes out of existence."¹⁶⁰ In fact, shutdowns at smaller firms had led the UAW Social Security Department to take a hard look at default risk even before the Packard termination. In June 1958 UAW actuary Max Bloch described the union's experience:

One of the first slogans used in our pension drives was that UAW negotiated plans are 'fully funded'. Without trying to define this nebulous concept, we soon woke up to the sad fact that 'fully funded pension plans' are among the rarest animals, and we have been waiting ever since to see one. . . . When a pension plan is terminated, its funds are never better than inadequate, and in too many cases hopelessly inadequate.¹⁶¹

Bloch devoted much of his discussion to an intractable and revealing problem—how to make vested rights meaningful when a pension plan terminated. His proposed solution is less important than the problem itself, for the problem illustrates another trade-off entailed by the UAW's commitment to protecting older workers and retirees. "Vested rights," Bloch said, "were hailed as a great

160. Nat Weinberg, *WPR Note* (n.d.) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Box 107, Pension Investments folder, Archives of Labor and Urban Affairs, Wayne State University).

161. Memorandum from Bloch to Brindle, *supra* note 79, at 1.

achievement when they were won."¹⁶² But the "sad experience" of employees with vested rights was that "*in the event of plan termination*, the so-called vested right clauses are not worth the paper they are written on."¹⁶³ "To this date," he observed, "they have not been translated into cash for the workers, and that is why they have not been much talked about lately. . . . They must be made to stick, even in the event of a plan termination."¹⁶⁴

One reason "vested rights" did not "stick" in 1958 was the procedure for allocating assets when a pension plan terminated. Most UAW plans included a termination clause like the one in the Studebaker-Packard plan.¹⁶⁵ The clause sorted employees into classes then ranked the classes in terms of the priority of their claim to plan assets. Retirees came first, then active employees who qualified for normal retirement, and so on. Under this provision, all benefit obligations to a class with higher priority had to be paid before any assets were allocated to the next lower class in line.¹⁶⁶ There was an incongruity between this asset-distribution scheme and the contribution formula in UAW plans. The contribution formula required an employer to pay the cost attributed to current accruals plus an amount that would amortize past-service liability. This made it appear that the employer was fully funding benefits earned in the current year and gradually paying off past-service credits.¹⁶⁷ In fact, something very different was going on. The contribution formula only determined how much an employer paid in to a pension plan. The termination clause

162. *Id.* at 4.

163. *Id.* (emphasis in original).

164. *Id.*

165. *See id.* at 2.

166. Richard Ippolito hypothesizes that underfunded pension plans respond to the threat that unionized workers will extract quasi-rents from a firm that invests in durable, specialized assets. *See* Richard A. Ippolito, *The Economic Function of Underfunded Pension Plans*, 28 J. LAW & ECON. 611, 615-616 (1985). It is a premise of Ippolito's model that the default of an underfunded pension plan imposes losses on employees in proportion to the present value of the annuity an employee expects to receive. *Id.* at 622. The model also assumes that the default of an underfunded pension plan imposes proportional losses on active employees and retirees. In Ippolito's words, "in erecting a bonding device to discourage holdups, care must be taken to ensure that [the bond] reaches retirees at the time of firm failure." *Id.* at 621-22. The termination provision in UAW retirement plans—which gave the greatest protection to retirees and retirement-eligible employees—does not accord with these premises.

167. SASS, *supra* note 11, at 185.

determined who got something when a plan shut down. And as UAW actuary Howard Young later observed, the termination clause had the effect “of allocating all contributions to older employees first.”¹⁶⁸

As the Packard termination illustrates, in the recently established plans of the 1950s the liability for pensions owed to the highest ranked class of plan participants—retirees—could consume all of the assets. In such a case, the termination clause made vesting meaningless. Active employees whose labor was the source of an employer’s pension contributions were likely to receive little or nothing if their plan terminated. This result, Bloch argued, did not jibe with employees’ sense of fairness. “All workers covered by a pension plan feel that they are contributing towards its costs by giving up wage increases,” he wrote. “When a fund is liquidated, they feel that *all* should participate.”¹⁶⁹

The most direct means for tackling this problem was collective bargaining. The UAW had negotiated vesting provisions after the Kaiser-Frazer and Hudson shutdowns drew attention to the problem of forfeiture risk. After the Packard termination, union officials took similar steps to address “areas of weakness” in UAW retirement plans. In November 1958, a union official warned union negotiators about the dangers of demanding benefit increases in poorly funded plans. “In some situations,” he said, “it may be necessary to subordinate pension improvements to the safety of the benefits.” The memorandum also included proposed contractual provisions that would prevent an employer from amending a pension plan after a collective-bargaining agreement had expired and limit an employer’s discretion when a pension plan was split as a result of a “plant closing,” “partial transfer of ownership,” or a “termination.”¹⁷⁰

168. Letter from Howard Young to James Brindle (Sept. 15, 1961) (Howard Young Collection, Box 1, 1961 chronological file, Archives of Labor and Urban Affairs, Wayne State University).

169. Memorandum from Bloch to Brindle, *supra* note 79, at 2 (emphasis in original). For discussion of the apparent unfairness of this termination arrangement, see SASS, *supra* note 11, at 184, and LANGBEIN & WOLK, *supra* note 2, at 73.

170. Memorandum from James Brindle to Regional Directors and Department Heads 4 (Nov. 6, 1958) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State University, Box 62, UAW—Pensions 1960-70 (2 of 2) folder).

These contractual provisions would provide some additional security to union members, but they would not eliminate default risk. In the context of collective bargaining with an individual employer, the only way the UAW could eliminate default risk was to negotiate for full funding. To achieve higher levels of funding, the union would have to forgo benefit improvements, demand larger contributions from employers, or both.¹⁷¹ These options had significant costs. If the union postponed benefit increases, retirement plans would be a less effective means of personnel administration. Inflation would erode the purchasing power of pension benefits, and employees would wait longer to retire. If the union demanded larger contributions, weak firms like Studebaker might not be able to pay. If an employer could afford more rapid funding, higher contributions would come at the expense of lower wages for active employees. In sum, if the union relied on collective bargaining alone, it could not eliminate the risk of default in the future without providing less to retirees or active employees in the present.

Dissatisfied with these choices, the UAW formulated a proposal that would alter the institutional framework of collective bargaining to accommodate the union's funding practices.¹⁷² In March 1961, Nat Weinberg informed Walter Reuther that union pension experts were considering "the idea of establishing something like the Federal Deposit Insurance Corporation to backstop private pension plans."¹⁷³ The appeal of a government guaranty was that it would reconfigure the "incentive structure" in which employers and unions bargained for retirement plans.¹⁷⁴ Insurance

171. For a discussion that follows the logic of this paragraph see Letter from Willard E. Solenberger to Leonard Lesser (Feb. 23, 1964) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State University, Box 106, Pension Reinsurance Correspondence—Prior to 1970 folder).

172. See generally Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & ECON. 461 (1974) (arguing that people do not only pursue their self interests within the rules, but they also allocate resources towards changing the rules to their own benefit).

173. Letter from Nat Weinberg to Walter P. Reuther (Mar. 22, 1961) [hereinafter Weinberg letter of Mar. 22, 1961] (UAW President's Office: Walter Reuther Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 164, Folder 13).

174. For "incentive structure," see Douglass North, *Institutions*, 5 J. ECON. PERSP. 97 (1991); see also SASS, *supra* note 11, at 210.

against default risk would make it unnecessary to eliminate underfunding. But insuring pension obligations was not a simple matter. As Weinberg told Reuther, union pension experts had “come up with a number of technical problems that would have to be resolved to implement this idea.”¹⁷⁵

The “technical problems” resulted from the fact that default risk differs markedly from the risks private insurers usually underwrite.¹⁷⁶ Ideally, an insurance program involves entities that face relatively homogeneous levels of a random or fortuitous risk that results in clearly definable losses. The entities transfer their individual risks to an insurer that combines the individual risks into a large pool. Pooling of risks allows the insurer to accurately predict the losses for the group as a whole. The ease or difficulty of insuring a risk depends on how closely the risk corresponds to these ideal conditions. The more a risk diverges from the ideal, the harder it is to insure. At some point, the risk ceases to be insurable.¹⁷⁷ That is, an insurer cannot create a stable pool of voluntary premium-paying policyholders.

Risks that deviate from the ideal are harder to insure because they expose the insurer to “moral hazard” and “adverse selection.” As Carol Heimer observes, insurers face moral hazard because “it is not possible to transfer risk from a policyholder to an insurer without altering the incentives of the policyholder.”¹⁷⁸ In other words, moral hazard refers to the possibility that the existence of insurance coverage will cause changes in conduct that increase the losses that must be paid by the insurer. Adverse selection refers to the fact that insurance buyers are likely “to be a nonrandom selection from the population—more particularly, to be those who expect to

175. Weinberg letter of Mar. 22, 1961, *supra* note 173.

176. My discussion of the problems with a pension guaranty fund generally follows Dan M. McGill, *Guaranty Fund for Private Pension Obligations*, in SUBCOMM. ON FISCAL POLICY OF THE J. ECONOMIC COMM., 90th CONG., REPORT ON OLD AGE INCOME ASSURANCE PART V: FINANCIAL ASPECTS OF PENSION PLANS 199-247 (Comm. Print 1967) [hereinafter McGill, *Guaranty Fund*]. For discussion of the persistent problems with ERISA's termination insurance program, see IPPOLITO, *supra* note 96, and Steven Sass, *Risk at the PBGC: The Public Guarantee of Private Pension Benefits*, REGIONAL REV., Spring 1996, at 19-24.

177. See JAMES L. ATHEARN, RISK AND INSURANCE 35-41 (2d ed. 1969); see also McGill, *Guaranty Fund*, *supra* note 176, at 206-10.

178. CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS 1 (1985).

have the highest expected claims."¹⁷⁹ If an insurer cannot or does not charge premiums that accurately reflect the risks posed by the entities in the insurance pool, then adverse selection may destabilize the pool because high-risk entities will stay in while low-risk entities will opt out.

Default risk deviates from the ideal conditions of insurability in a number of respects that make it difficult to design a viable pension-guaranty program. Union officials wrestled with these complexities as they fleshed out the proposal. One problem was delineating the losses the program would cover. As noted above, an insurance program will be more stable if the insurer can clearly define the event that triggers liability.¹⁸⁰ At first glance, it seemed obvious what event should trigger the pension guaranty. When a firm went out of business, the program would protect employees if the pension plan was not fully funded. But as the Packard case illustrates, a firm did not have to go out of business to terminate a pension plan. UAW pension specialist Willard Solenberger alluded to a variety of possibilities in his notes—for example, cases where a firm partially terminated a plan as a result of a plant closing or where there had been a "Reduction in force making Plan costs 'prohibitive.'"¹⁸¹ Yet broad insurance coverage might create its own problems. Union actuary Howard Young noted the possibility of what later became known as the "follow-on" plan.¹⁸² "[I]f a plan with a large past service liability could be abandoned with a major portion of the liability thrown on the Reinsurance Fund," he observed, "the employer could then adopt a new plan covering only future service at much lower cost."¹⁸³ Concerns of this sort

179. PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 595 (1992).

180. See McGill, *Guaranty Fund*, *supra* note 176, at 207, 218.

181. Willard, E. Solenberger, Notes on Pension Reinsurance Scheme 1 (Mar. 22, 1962) [hereinafter Notes on Pension Reinsurance Scheme] (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State University, Box 106, Pension Reinsurance Correspondence—Prior to 1970 folder).

182. See IPPOLITO, *supra* note 96, at 69-73.

183. Letter from Howard Young to Leonard Lesser 1 (Apr. 16, 1962) [hereinafter Letter from Young to Lesser, Apr. 16, 1962] (Howard Young Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 1, 1962 chronological file).

led Young to "question the feasibility of trying to cover every type of termination."¹⁸⁴

Even if legislators could clearly define the events the program would cover, it would be very difficult to estimate the risk presented by particular plans. For an individual plan the expected loss depended on two factors: (1) the liability or exposure if the sponsor terminated the plan, and (2) the likelihood that the sponsor would terminate the plan.¹⁸⁵ The insurance program would pay the difference between the cost of some or all of the benefits the plan promised and the value of the plan assets available to pay those benefits. Computing the first factor would be difficult because plans used different benefit formulas and different actuarial-cost methods.¹⁸⁶ It would be even harder to estimate the risk that a firm would terminate its plan. "How assess variable risk presented by individual companies?" Solenberger wondered in his notes.¹⁸⁷ Yet these calculations would provide the basis for computing premiums under the program. Solenberger suggested that it might require a "guess with crystal ball" to determine the charge for the first year.¹⁸⁸

Even if administrators could accurately assess expected losses, the insurance program could not charge premiums that reflected the risks posed by particular retirement plans. Many plans would present little or no risk of loss. For example, a plan that was fully funded was not likely to default.¹⁸⁹ Likewise, an underfunded plan sponsored by a large, stable firm—GM, for example—entailed little risk because the firm was unlikely to terminate the plan.¹⁹⁰ In

184. *Id.*

185. See IPPOLITO, *supra* note 96, at 88-89.

186. See Notes on Pension Reinsurance Scheme, *supra* note 181, at 3.

187. *Id.*

188. *Id.*

189. See Enclosure, Public Reinsurance for Private Pension Plans 6, attached to Letter from Howard Young to Leonard Lesser 1 (Apr. 16, 1962) [hereinafter Public Reinsurance for Private Pension Plans] (Howard Young Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 1, 1962 chronological file).

190. See Letter from Howard Young to Leonard Lesser (July 9, 1964) (Howard Young Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 1, 1964 chronological file); cf. Letter from Howard Young to Nat Weinberg 2 (July 15, 1963) [hereinafter Letter from Young to Weinberg, July 15, 1963] (Howard Young Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 1, 1963 chronological file).

contrast, a struggling firm with an underfunded plan posed a much greater risk because there was a much greater likelihood that the plan would terminate and default. Yet a weak firm might not be able to pay a premium that accurately reflected its risk to the insurance program. This meant that if the program was to protect all employees who participated in a defined-benefit plan, there would need to be subsidies for weak employers. "Some of the insurance burden shifted to stronger companies," Solenberger recorded in his notes.¹⁹¹ If premiums did not accurately reflect expected losses, however, the insurance program would be exposed to adverse selection because low-risk firms would have an incentive to opt out.

Finally, the loss covered by termination insurance was not random.¹⁹² An employer had substantial control over whether and when its pension plan terminated. In addition, an employer and often a union possessed control over benefit levels, actuarial assumptions, funding patterns, investments, and other factors that would determine the insurance program's exposure. To the extent that an employer or union could affect the occurrence or amount of a default, the program faced moral hazard.¹⁹³ One danger was that firms would cut back on funding because the insurance program would pay benefits if a plan defaulted. As Solenberger put it, "What safeguard against inadequate funding plus insurance as alternative to adequate funding? Both company and union might connive on this as being cheaper"¹⁹⁴ Staffers debated whether "a reasonable amortization program (30 to 40 years) should be required" to prevent this possibility.¹⁹⁵ Solenberger also made note of other possible examples of moral hazard. "Employer with business failure looming on horizon, sets up plan and takes chance (perhaps under union pressure)," he conjectured.¹⁹⁶

Early in 1962, union officials circulated an outline of a program of "public reinsurance for private pension plans." The draft sketched out a framework for a guaranty fund and attempted to address some of the problems the

191. Notes on Pension Reinsurance Scheme, *supra* note 181, at 6; *see also* Letter from Young to Weinberg, July 15, 1963, *supra* note 190.

192. *See* McGill, *Guaranty Fund*, *supra* note 176, at 208.

193. SASS, *supra* note 11, at 209-10.

194. Notes on Pension Reinsurance Scheme, *supra* note 181, at 4.

195. Letter from Young to Lesser, Apr. 16, 1962, *supra* note 183, at 3.

196. Notes on Pension Reinsurance Scheme, *supra* note 181, at 2.

program would face.¹⁹⁷ The proposal would insure pension benefits in case the sponsoring employer terminated a plan and the plan defaulted. Employers would be required to pay “premiums” that would have two components. Part of the charge would be based on the exposure that resulted from a plan’s level of funding. The higher the level of funding in a plan—that is, the larger the ratio of the plan’s assets to its liability—the lower this component of the premium would be. Thus, pay-as-you-go plans “would be subject to the highest premiums,” while fully-funded plans “would probably not be subject to any premium for insurance against this type of risk at all.”¹⁹⁸ The second part of the premium would be based on the risk that a plan’s assets might depreciate in value. The charge for this risk “would be based on a computation involving the total assets insured and the estimated risk of depreciation.” Because this risk was “very slight,” the charge attributable to it was likely to be “minimal.”¹⁹⁹

The proposal included a number of features addressed to adverse selection and moral hazard. The premium formula took account of a plan’s unfunded liability, but it did not consider the likelihood that a plan would terminate. Consequently, a strong firm and a weak firm that sponsored identical underfunded plans would pay the same premium even though the weak firm’s plan was much more likely to default. This gave strong firms an incentive to stay out of the insurance program. To ensure that they participated, the proposal made participation a requirement for favorable tax treatment.²⁰⁰ Other features of the proposal took aim at moral hazard. The draft recommended limits on the amount of retirement benefits the program would insure because “it is necessary to protect the reinsurance system against a run on its funds which would be precipitated by those one or two plans which provide relatively exorbitant pensions to their members.”²⁰¹ The proposal also included a “suicide clause” that would require plans to “have been in operation a specified, reasonable

197. See Public Reinsurance for Private Pension Plans, *supra* note 189; Letter from Young to Lesser, Apr. 16, 1962, *supra* note 183, at 3.

198. Public Reinsurance for Private Pension Plans, *supra* note 189, at 5. Pay-as-you-go plans were later dropped from the proposal.

199. *Id.* at 6.

200. *Id.* at 1.

201. *Id.* at 4 n.*.

number of years before the insurance will be applicable."²⁰² This provision aimed to prevent a firm from creating a pension plan or increasing benefits shortly before it went out of business or terminated the plan.

The designers of the termination-insurance proposal continued their work through 1962 and 1963, but many difficult and politically sensitive issues remained to be resolved. Indeed, one of the most intractable questions was the problem that, in a sense, had set them to their task: How should the insurance program handle the case of a declining firm that could no longer afford to pay for its pension plan?²⁰³

VI. "THE MOST GLORIOUS STORY OF FAILURE IN THE BUSINESS": STUDEBAKER AS FOCUSING EVENT

While union officials worked on the termination-insurance proposal, Studebaker continued its downward slide. In December 1963, Studebaker-Packard announced that it would close the plant in South Bend. When the plant shut down, the liability of the Studebaker pension plan exceeded its assets by \$15 million. The shortfall made it obvious that the plan would default. The UAW could do little to change the lot of Studebaker employees, but the shutdown provided an opportunity to get policy-makers to seriously consider the pension-guaranty proposal. In the early 1960s government officials and private-sector pension experts were discussing a variety of regulatory initiatives to make pension promises more secure. The shutdown was an ideal vehicle for injecting termination insurance into these policy debates. Working with Indiana Senator Vance Hartke and his staff, union officials prepared legislation to create such a program. When Hartke introduced the bill in August 1964, Studebaker became a "poster child" for the cause of pension reform and, more important from the UAW's perspective, termination insurance moved squarely onto the policy agenda.

202. *Id.* at 7-8. For "suicide clause," see Notes on Pension Reinsurance Scheme, *supra* note 181, at 3.

203. See Memorandum, Nat Weinberg to Leonard Lesser, and Attachment, Possible Method for Applying Pension Re-Insurance to Declining Firm (Feb. 7, 1964) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State University, Box 106, Pension Reinsurance Correspondence—Prior to 1970 folder).

Studebaker-Packard had avoided bankruptcy in 1958 by restructuring its debt. This move passed "real control" of the firm into "the hands of New York bankers."²⁰⁴ They began to diversify by purchasing profitable businesses so that the firm could derive tax benefits from the losses of the automotive division.²⁰⁵ The diversification strategy was briefly interrupted in 1959 when the firm underwent what appeared to be a remarkable reversal of fortune. In the fall of 1958 Studebaker introduced a new model—the Lark. One of only two domestic compact cars, it was a stunning success. "During the 1959 model year," a journalist reported, "more than 138,000 Larks moved into dealer showrooms, against a mere 56,000 S-P cars a year earlier."²⁰⁶ The firm more than doubled its market share, and, for the first time since the Packard merger, both the corporation and the automotive division made a profit.²⁰⁷

In 1958 management and Local 5 had postponed bargaining about the retirement plan because of the controversy surrounding the Packard termination. When they took up pension issues in 1959, the firm was in the midst of its revival. The seemingly rosy circumstances of 1959 made it difficult for management to deny Local 5 benefit increases the UAW had won at other firms.²⁰⁸ Management and Local 5 agreed to increase benefit levels to the industry pattern. The new agreement gave retirees \$2.35 per month per year of service (up from \$2.25). Active employees would receive \$2.40 per month for years before January 1, 1959 and \$2.50 per month for service after January 1, 1959 (both up from \$2.25).²⁰⁹ In return, the company got a new thirty-year funding period. The collective-bargaining agreement negotiated in 1955 required the company to pay off past-service liability by

204. Hammer, *supra* note 115, at 158.

205. See CRITCHLOW, *supra* note 40, at 169-74.

206. Hammer, *supra* note 115, at 160.

207. See Memorandum on Studebaker Corporation, *supra* note 112, at 2-3, tbl.II; see also CRITCHLOW, *supra* note 40, at 168 (noting that "[s]ales of the Lark in the last quarter of 1958 put Studebaker in the black for the first time since 1953").

208. See Memorandum from C.M. MacMillan to H.E. Churchill (Apr. 16, 1959) (Collection of the Studebaker National Museum, South Bend, Indiana, Negotiations 1959 notebook, Correspondence tab).

209. See Memorandum from C.M. MacMillan to H.E. Churchill (Sept. 2, 1959) (Collection of the Studebaker National Museum, South Bend, Indiana, Negotiations 1959 notebook, Correspondence tab).

1985.²¹⁰ The new agreement extended the funding schedule for all past-service liability to 1989.²¹¹ The new schedule reduced Studebaker-Packard's pension contributions by about \$82,000 a year, but it also meant less money and less security for employees if the plan terminated.²¹²

Studebaker's comeback came to an abrupt end in 1960. GM, Ford, and Chrysler introduced their own compacts in the fall of 1959 (when the 1960 model year began). "By the end of 1960, 11 domestically produced 'compact' cars competed for sales."²¹³ In such an environment, Studebaker's poor dealer organization doomed it, and production again went into a slide. In 1959 the company produced 154,000 cars at the South Bend plant. In 1960 production fell to 106,000 units and then to 79,000 in 1961.²¹⁴ The automotive division lost money,²¹⁵ and a "Collective Bargaining Report" prepared in 1960 observed that "profits are problematical for the Automobile Division" again.²¹⁶

Not only was Studebaker weak. The pension plan was as well. As the UAW geared up for negotiations in 1961 UAW actuary Howard Young warned Willard Solenberger about the plan's "inadequate depth of funding." The book value of the assets held by the Studebaker pension trust was about \$19.2 million. The plan's liability to retirees was \$13.1 million, and its liability to active employees who were eligible to retire was \$8.9 million. "[I]f the plan had

210. See 1966 JEC Hearings, *supra* note 85, at 104 (statement of Clifford M. MacMillan).

211. See *id.*

212. In 1958 the cost of the Studebaker's bargained pension plans, of which Local 5 was far and away the largest, was \$2,573,000. If the increased benefits in the 1959 Agreement were funded by 1985, the annual cost would have increased to \$2,825,000. Under the extended amortization schedule, the annual cost would be \$2,743,000. See Annual Pension Plan Costs, attached to Letter from Edwin M. Bush, Jr. to R.C. Rieffel (June 18, 1959) (Collection of the Studebaker National Museum, South Bend, Indiana, Negotiations 1959 notebook, Pensions tab).

213. Memorandum on Studebaker Corporation, *supra* note 112, at 3; see also CRITCHLOW, *supra* note 40, at 172.

214. Memo on Studebaker Corporation, *supra* note 112, at 3.

215. *Id.* at 3-4; Letter from Emily Rosdolsky to Raymond H. Berndt (Oct. 24, 1963) (UAW President's Office: Walter Reuther Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 168, folder 7).

216. Memorandum from C.M. MacMillan 1 (Sept. 28, 1961) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 3693, Negotiations—1961 folder).

terminated as of 12/31/60," Young observed, "we could have purchased only 87.3% of full benefits for those retired, assuming everyone eligible had retired."²¹⁷

Solenberger took this warning to heart. Local 5 initially demanded that pensions be increased to the industry pattern of \$2.80 per month per year of service.²¹⁸ When Solenberger traveled to South Bend, he did not make such a proposal. According to company minutes Solenberger "declared that looking at costs, [the union] had no intention of proposing that [the company] meet pattern at the benefit level."²¹⁹ Under the previous contract, benefits for active employees were \$2.40 per month per year of service for years prior to September 1, 1959 and \$2.50 thereafter. Solenberger asked only that Studebaker level off active workers' benefits at \$2.50 for all years. Studebaker agreed to this smaller benefit increase. Benefits for workers who had retired before September 1959 remained at \$2.35 per month per year of service.²²⁰

Over the next two years the automotive division continued to struggle and the board of directors continued to diversify. In 1962 and the first ten months of 1963, the board added five new acquisitions to the five companies Studebaker-Packard had acquired by the end of 1961.²²¹ Diversification made the corporation much less dependent on automobile production.²²² The acquisitions allowed the firm to show a profit in 1962 despite losses in the automotive division, but diversification foreclosed modernization of the plant in South Bend. In the first half of 1963, "the best automotive model year in history," the automotive division's losses "exceeded the profits made on

217. See Letter from Howard Young to William Solenberger (Oct. 24, 1961) (Howard Young Collection, Archives of Labor and Union Affairs, Box 1, 1961 chronological file).

218. Memorandum, 1961 Contract Negotiations (Oct. 31, 1961) (Collection of the Studebaker National Museum, South Bend, Indiana, 1961-1962 Negotiation Index (No. 43), notebook No. 91.51.165, Special Topics tab).

219. Memorandum, 1961 Contract Negotiations (Nov. 30, 1961) (Collection of the Studebaker National Museum, South Bend, Indiana, 1961-1962 Negotiation Index (No. 43), notebook No. 91.51.165, Special Topics tab).

220. Memorandum, 1961 Contract Negotiations (Dec. 13, 1961) (Collection of the Studebaker National Museum, South Bend, Indiana, 1961-1962 Negotiation Index (No. 43), notebook No. 91.51.165, Special Topics tab); *1966 JEC Hearings* (statement of Clifford M. MacMillan), *supra* note 85, at 104.

221. See Memorandum on Studebaker Corporation, *supra* note 112, at 4.

222. *Id.*, at app.3.

all other operations by \$7.5 million.²²³ Writing in October 1963 a UAW analyst concluded, "The company's inability to break even in the best automotive model year in history raises serious questions concerning its future as an automotive producer."²²⁴ On December 9, Studebaker-Packard announced it would close the South Bend plant.²²⁵

Although Studebaker had been on the rocks for years—one wag called it "the best managed bankruptcy in the world"²²⁶—the shutdown came as a shock to many employees.²²⁷ As wrenching as the plant closing may have been, the fate of the pension plan was a foregone conclusion. It was clear that the plan would default. Two weeks after the company's announcement, UAW Research Director Nat Weinberg told Walter Reuther, "I am advised that the average age of the South Bend Studebaker workers is 54 and that it is unlikely that the pension fund will have sufficient monies to pay pensions to workers under 60 years of age."²²⁸ A month later a revised calculation revealed that retirees and retirement-eligible employees would receive 100% of their pension. But the pension trust was still "at least \$15,000,000 short of being able to fulfill pension promises for the 4,392 present and former employees with vested rights."²²⁹

Shortly after the first of the year, Local 5 called upon Studebaker-Packard to set aside enough money to fund the retirement benefits owed to retirees and vested employees. "The pension plan," union leaders claimed, "represents a private promise by the Studebaker Corporation which socially, morally and as a matter of equity they are

223. *Id.* at 4, 6; see also WHITE, *supra* note 44, at 301.

224. *Id.* at 6.

225. See Frederick Taylor, *Studebaker Corp. Will Stop Making Autos in U.S.; Plans to Import Cars from Canadian Assembly Plant*, WALL ST. J., Dec. 10, 1963, at 3.

226. *Automobiles: Studebaker's Problems*, NEWSWEEK, Nov. 25, 1963, at 93.

227. See CRITCHLOW, *supra* note 40, at 181; *Workers and Dealers Are Stunned by Studebaker Plan*, WALL ST. J., Dec. 10, 1963, at 3.

228. Letter from Nat Weinberg to Walter P. Reuther (Dec. 28, 1963) [hereinafter Letter from Weinberg to Reuther Dec. 28, 1963] (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State University, Box 64, Studebaker, 1963-64 folder).

229. Letter from Willard E. Solenberger to Emil Mazey (Jan. 29, 1964) (UAW President's Office: Walter Reuther Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 168, Folder 8).

obligated to keep.²³⁰ When the company declined, there was little to be done.²³¹ In January 1964 Walter Reuther asked the union's attorney to see if it was possible to complicate Studebaker's taxes "as a leverage to get favorable consideration of [an] additional company contribution to the pension and severance pay fund."²³² Later the UAW filed a grievance contending that the shutdown violated the collective-bargaining agreement with Local 5.²³³ In light of the huge shortfall in the pension fund, these actions, even if successful, would not change the fate of Studebaker employees.

In the spring and summer of 1964, Studebaker-Packard requested bids from life insurance companies to provide annuities to retirees.²³⁴ On October 15, 1964, after several months of negotiations, the company and Local 5 executed an agreement that terminated the plan along the lines set out in the 1961 collective-bargaining agreement. The first three classes of beneficiaries—retirees, retirement-eligible employees over sixty-five, and retirement-eligible employees over sixty—received their full pension. Vested employees less than sixty years of age, a few of whom had forty years of service with the firm, received a lump-sum payment worth about 15% of the value of their pension. Employees whose benefit accruals had not vested—including all employees under age forty—got nothing.²³⁵

230. Letter from W.A. Frick and L.J. Fox (Jan. 7, 1964) (UAW Local 5 Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 28, Pension Plan 1964-65 folder).

231. See Memorandum, Statement Made to Union in Response to Their Request for Additional Pension Funding (Jan. 20, 1964) (UAW Local 5 Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 28, Pension Plan 1964-65 folder).

232. WPR Note (Jan. 27, 1964) (UAW President's Office: Walter Reuther Collection, Archives of Labor and Urban Affairs, Wayne State University, Box 117, Folder 7).

233. See Memorandum, Special Meeting—Company Given General Grievance No. 214 (Oct. 8, 1964) (Collection of the Studebaker National Museum, South Bend, Indiana, 1964 Negotiations, notebook No. 91.51.192, Meeting Minutes tab).

234. See Letter from Willard E. Solenberger to Edwin M. Bush, Jr. (July 22, 1964) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1834, Pension Plan Termination (Local No. 5) folder).

235. Studebaker Corporation Pension Plan Termination Agreement (Oct. 15, 1964) (Collection of the Studebaker National Museum, South Bend, Indiana, Drawer 1834, Pension Plan Termination (Local No. 5) folder); *1966 JEC Hearings*, *supra* note 85, at 108-09 (statement of Clifford M. MacMillan); *id.* at

Although there was little the UAW could do to stop the Studebaker pension plan from defaulting, union officials quickly recognized that the publicity surrounding the shutdown created an opportunity to promote termination insurance. In the late 1950s and early 1960s public officials and private-sector experts had begun to give serious consideration to regulatory initiatives to protect participants in private pension plans. In 1958 Congress passed the Welfare and Pension Plans Disclosure Act, the first federal statute exclusively addressed to private-sector employee-benefit plans.²³⁶ In the same year the Pension Research Council at the University of Pennsylvania began a major research program to examine "the Security of Anticipated Benefit Rights under Private Pension Plans."²³⁷ Concerns about the security of pension promises led the provincial government of Ontario to appoint a Committee on Portable Pensions in 1960. In August 1961 the Committee published a report and draft legislation that would set minimum vesting and funding standards for retirement plans.²³⁸ And in March 1962 John F. Kennedy established the President's Committee on Corporate Pension Funds to study private pension plans in the United States and make legislative recommendations.²³⁹

UAW officials tried several times to get the reinsurance proposal into the evolving debates over pension legislation. In 1962 Nat Weinberg and Leonard Lesser pitched the idea to agency staffers who were preparing the report of the President's Committee on Corporate Pension Funds.²⁴⁰

122-28 (statement of Willard Solenberger).

236. See Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (1958).

237. Dan M. McGill, *Pensions: Current Developments*, 13 TRANSACTIONS: SOC'Y OF ACTUARIES D101 (1961).

238. See Hilary L. Seal, *Ontario's Pension Benefits Bill*, 100 TR. AND EST. 816-17 (1961); Donald MacGregor, *New Pension Approach*, 102 TR. AND EST. 120-21 (1963); Kenneth R. MacGregor, *Panel Discussion: Security of Private Pensions Expectations*, 15 TRANSACTIONS: SOC'Y OF ACTUARIES D269, D296 (1963); see also SASS, *supra* note 11, at 195.

239. Kennedy Memorandum (Mar. 28, 1962), in PRESIDENT'S COMM. ON CORP. PENSION FUNDS & OTHER PRIVATE RETIREMENT & WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PROGRAMS, at app.C (1965).

240. Memorandum from Walter Reuther to Nat Weinberg (Mar. 2, 1963) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State

When the Committee submitted an interim report in November 1962, it did not recommend legislation to create a reinsurance program because of concerns about the feasibility of insuring private pensions. The President's Committee did, however, urge further study of the idea.²⁴¹ In January 1963 Kennedy asked another committee—the President's Labor-Management Advisory Committee—to review the report of the Committee on Corporate Pension Funds.²⁴² Walter Reuther was a member of the Labor-Management Advisory Committee, and Weinberg and Lesser spent much of 1963 acting as Reuther's representatives in a group that reviewed the provisional report.²⁴³ The Labor-Management Advisory Committee also stopped short of endorsing a pension guaranty fund and recommended further study.²⁴⁴

Union officials saw immediately that the Studebaker shutdown was an ideal "focusing event" that would make termination insurance much harder to ignore.²⁴⁵ In a memorandum written two weeks after Studebaker-Packard announced the closing, Nat Weinberg told Walter Reuther, "The Studebaker situation dramatizes the urgent necessity for [pension reinsurance] legislation."²⁴⁶ The union needed to move quickly to link the shutdown and the problem of

University, Box 53, Government-Labor-Management Advisory Committee Correspondence March-June 1963 folder).

241. President's Committee on Corporate Pension Funds, Provisional Report 18 (Nov. 15, 1962) (Papers of Walter W. Heller, John F. Kennedy Library, Box 37, March 25, 1963 folder, Labor Management Advisory Committee).

242. Letter from John F. Kennedy to Luther H. Hodges (Feb. 5, 1963) (White House Central Files, John F. Kennedy Library, EX LA9, Box 466, Welfare-Pensions-Retirement February 11, 1963 Through folder).

243. See James A. Wooten, *Public Policy and Private Pension Programs: A Political History of the President's Committee on Corporate Pension Funds*, 59 N.Y.U. INST. FED. TAX'N: EMP. BEN & EXEC. COMP. (forthcoming 2001).

244. Report to the President from the President's Advisory Committee on Labor-Management Policy on the Recommendations by the Cabinet Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, in PRESIDENT'S COMM. ON CORP. PENSION FUNDS & OTHER PRIVATE RETIREMENT & WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PROGRAMS, at app.D (1965).

245. KINGDON, *supra* note 3, at 94-95.

246. Letter from Weinberg to Reuther, Dec. 28, 1963, *supra* note 228; see also Memorandum on Public Reinsurance of Private Pension Plans (White House Central Files, Lyndon Baines Johnson Library, EX LE/LA6, Railroad June 26, 1967 folder).

default risk to the remedy that union officials were already promoting.

Reuther met with Lyndon Johnson in January 1964 to discuss "matters relating to the shutdown of Studebaker operations in South Bend." At Weinberg's urging, Reuther raised the issue of termination insurance and passed along a description of the union's proposal.²⁴⁷ But Johnson had political reasons for steering clear of termination insurance and other pension reform proposals. Most of the business and labor leaders on the Labor-Management Advisory Committee had been hostile to new regulation.²⁴⁸ Johnson was courting business leaders in 1964 and, thus, unlikely to champion a proposal that was certain to antagonize them.²⁴⁹ Furthermore, 1964 was an election year, and administration support of a pension reform proposal would stir up unwelcome controversy.²⁵⁰

Failing to interest the President, the UAW turned to Congress. In the spring and summer of 1964, union officials worked with Indiana Senator Vance Hartke to turn the proposal into legislation. Although UAW pension experts continued to struggle with the technical complexities of termination insurance, they recognized that the timing and presentation of the bill mattered more than its technical refinement. Thus Willard Solenberger emphasized the need "to retain the already catchy tag of 'reinsurance'" even though the proposal did not technically "reinsure" pension obligations.²⁵¹ The objective was to get policy-makers and pension experts to pay attention. "[A] primary purpose of getting a bill introduced at this time," said Solenberger, "is

247. Letter from Weinberg to Reuther, Dec. 28, 1963, *supra* note 228; Memorandum on Public Reinsurance of Private Pension Plans, *supra* note 246.

248. See Report to the President from the President's Advisory Committee on Labor-Management Policy on the Recommendations by the Cabinet Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, *supra* note 244, at 12-19.

249. See Harold B. Meyers, *L.B.J.'s Romance with Business*, FORTUNE, Sept. 1964, at 131-33, 222, 226, 230.

250. See Memorandum, Stanley Surrey to the Files (June 26, 1964) (The Papers of Stanley Surrey, Harvard Law School Library, Box 107, Pensions—Cabinet Committee (2) 1964-1967 folder).

251. See Letter from Willard E. Solenberger to Leonard Lesser (June 24, 1964) (UAW Research Department Collection, Unprocessed Materials, Accession No. 646, dated June 3, 1974, Archives of Labor and Urban Affairs, Wayne State University, Box 106, Pension Reinsurance Correspondence Prior to 1970 folder).

its public education aspect—a springboard for generating widespread discussion and serious consideration by actuaries, consultants and others with a professional stake in private pensions, as well as employers, unions and organizations.”²⁵²

On August 3, 1964 Hartke introduced “The Federal Reinsurance of Private Pensions Act.”²⁵³ Alluding to the work of the President’s Committee on Corporate Pension Funds and the President’s Labor-Management Advisory Committee, Hartke announced, “Proposals for other legislation in this field may well develop later, but the need [for termination insurance] has been evidenced by recent experience, such as was involved in the closing of the Studebaker plant in South Bend.”²⁵⁴ On the same day Assistant Treasury Secretary Stanley Surrey asked a staffer to review the measure. Several days later the staffer responded, “The Hartke proposal raises most of the questions and problems [of a termination insurance program] and solves few.”²⁵⁵ Notwithstanding the bill’s technical deficiencies, this exchange was the first evidence that the UAW’s exercise in agenda-setting was succeeding.

As union officials hoped, there was a symbiotic relationship between the Studebaker shutdown and Hartke’s bill. Studebaker came up when policy-makers and pension experts discussed termination insurance, and the shutdown made it more likely that policy-makers and pension experts would discuss termination insurance. In this way, the link between Studebaker and termination insurance secured each an important role in the campaign for pension reform.

Studebaker quickly emerged as a “battle cry” for pension reformers.²⁵⁶ In 1970 a House Labor Committee

252. *Id.*

253. S. 3071, 88th Cong. (1964); see 110 CONG. REC. 17,725 (1964).

254. 110 CONG. REC. 17,725 (1964).

255. Memorandum, Stanley Surrey to George Zeitlin (Aug. 3, 1964) (The Papers of Stanley Surrey, Harvard Law School Library, Box 107, Pensions—Cabinet Committee (2) 1964-1967 folder); Memorandum, George Zeitlin to Stanley Surrey (Aug. 6, 1964) (The Papers of Stanley Surrey, Harvard Law School Library, Box 107, Pensions—Cabinet Committee (2) 1964-1967 folder).

256. Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in LANGBEIN & WOLK, *supra* note 2, at 70. Using the search term “Studebaker” in the Arnold & Porter Legislative History of ERISA on Westlaw I retrieved fifty documents, many of which are hearings or congressional floor debates that include multiple references to Studebaker.

staffer compared the shutdown to the mine explosion in Farmington, West Virginia that led Congress to pass the Federal Coal Mine Health and Safety Act of 1969, while AFL-CIO lobbyist Andy Biemiller likened it to "the Triangle fire episode that led to the drive on sweatshops in the garment industry many years ago."²⁵⁷ Termination insurance also moved securely onto the reform agenda. "The question of insurance has a greater degree of immediacy," a Labor Department official observed in August 1965, "since Senator Hartke has introduced a bill to establish an insurance system for private pension funds."²⁵⁸ When the Johnson administration began preparing pension reform legislation in 1966, termination insurance was on the agenda.²⁵⁹ When Senator Jacob Javits introduced comprehensive pension-reform legislation in 1967, his bill contained a termination-insurance proposal that drew many of its provisions from a later version of Hartke's bill.²⁶⁰ And when the Department of Labor introduced its own comprehensive pension-reform measure in 1968, the bill included termination insurance.²⁶¹

CONCLUSION

One policy analyst John Kingdon interviewed for his study of agenda-setting likened policy advocacy to surfing. "As I see it," the analyst stated, "people who are trying to advocate change are like surfers waiting for the big wave. You get out there, you have to be ready to go, you have to be ready to paddle. If you're not ready to paddle when the big wave comes along, you're not going to ride it in."²⁶² In terms of this metaphor, an issue is more likely to make it onto the policy-making agenda if an advocate—the surfer—with a proposal—a surfboard—is ready and waiting when a

257. See *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong. 155 (1970).

258. Questions Raised by Reaction to Report *Public Policy and Private Pension Programs*, attached to Memorandum, William Gibb to the Files (Aug. 12, 1965) (The Papers of Stanley Surrey, Harvard Law School Library, Box 107, Pensions—Cabinet Committee (2) 1964-1967 folder).

259. See Minutes, Meeting No. 8 (Apr. 20, 1966) (Department of Commerce, Accession No. 40-73-035, Box 4 of 9, Pension Plan Data—1966 folder).

260. See S. 1103, 90th Cong. (1967).

261. See S. 3421, 90th Cong. (1968).

262. KINGDON, *supra* note 3, at 165.

focusing event—the wave—comes along. This study of Studebaker-Packard and its pension plans explains why there was a wave—the default of the Studebaker pension plan—and why the UAW was ready to ride that wave when it came along in December 1963.

The first element of the explanation is a particular state of affairs. In the years after World War II the UAW and employers contracted to establish retirement plans. Retirement plans work according to a set of principles. In Dan McGill's phrase, pension plans behave in accordance with certain "fundamentals." In the 1950s, one such fundamental was the trade-off among benefit levels, cost, and risk. All other things equal, higher benefit levels increased the cost of a retirement plan. If a plan sponsor held down the short-term cost by pushing the incidence of pension expense into the future, then participants faced greater risk that the plan would default. For reasons explained in Part III, the UAW and the employers with which it bargained struck a balance that exposed younger workers to default risk.

The second element of the explanation is an actor with a reason to change the status quo. The Packard termination convinced UAW president Walter Reuther that the union needed to protect its members from default risk. Reuther's decision confronted the union with a choice. The UAW could alter its behavior within the constraints of the existing fundamentals of private pensions. This would involve slowing the growth of benefits—so that retirees would receive lower pensions—or demanding more rapid funding—in which case, active workers would receive lower wages. Alternatively, the UAW could attempt to alter the basic relationships among benefit levels, cost, and risk. The union chose the latter course. At Reuther's direction, UAW pension specialists created the third major element in the explanation—a proposal for plan-termination insurance. The "reinsurance" proposal aimed to change the way pension plans worked by shifting default risk from employees in weak firms to the insurance program.

In terms of the surfing metaphor, when Studebaker-Packard terminated the Packard pension plan in 1958, a wave rolled past a surfer who did not have a surfboard. In contrast, when UAW officials pitched termination insurance to the President's Committee on Corporate Pension Funds in 1962 and to the President's Labor-Management Advisory

Committee in 1963, the union was like a surfer with a surfboard but no wave. When Studebaker-Packard announced the plant closing in 1963, UAW officials recognized that this might be the wave they were waiting for. Policy advocacy is generally a probabilistic enterprise.²⁶³ The coexistence of an advocate, a proposal, and a calamity increases the likelihood that an issue will gain entry to the policy-making agenda, but policy advocacy is seldom a sure thing. In the Studebaker case, the elements came together, and Studebaker and termination insurance gained a secure place in the thinking of pension policy-makers.

In closing, it is worth adding two caveats. First, although the Studebaker shutdown occupies a prominent place in the collective consciousness of the employee-benefit community, its role in the political history of pension reform seems highly contingent. The shutdown provided a symbol that rallied reformers and an occasion for the UAW to push termination insurance onto the policy-making agenda. That it had this effect does not mean that termination insurance would not have made it onto the agenda if there had been no Studebaker shutdown. In terms of the surfing metaphor, some other wave might have come along. For example, in April 1964 Merton Bernstein published *The Future of Private Pensions*, a widely noticed and highly critical examination of the private pension system.²⁶⁴ Nine months later, in January 1965, Lyndon Johnson released *Public Policy and Private Pension Programs*, the report of the President's Committee on Corporate Pension Funds.²⁶⁵ The Committee called for expanded regulation of private pension plans to make employees' expectations more secure. Books like Rachel Carson's *Silent Spring* and Ralph Nader's *Unsafe at Any Speed* pushed issues onto the policy-making agenda.²⁶⁶ Bernstein's book and the Committee's report—and pressure from the UAW and the United Steelworkers,

263. *Id.* at 225.

264. MERTON C. BERNSTEIN, *THE FUTURE OF PRIVATE PENSIONS* (1964).

265. PRESIDENT'S COMM. ON CORP. PENSION FUNDS & OTHER PRIVATE RETIREMENT & WELFARE PROGRAMS, *PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PROGRAMS* (1965).

266. On *Silent Spring*, see CHRISTOPHER J. BOSSO, *PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE* 115-120 (1987). On *Unsafe at Any Speed*, see JERRY L. MASHAW AND DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 53-54 (1990).

another union that was very concerned about default risk—might have done the same for termination insurance.

Second, it is important to keep in mind that Gerald Ford did not sign ERISA until September 2, 1974, more than ten years after Vance Hartke introduced his “reinsurance” bill. The Studebaker shutdown gave termination insurance a secure place on the policy-making agenda, but it did not guarantee that Congress would pass such a program or even that the program would come to a vote.²⁶⁷ The shutdown ensured that staffers in Congress and the executive branch would take a hard look at the problem Studebaker came to symbolize.²⁶⁸ The prospect that public officials would seriously consider termination insurance meant that experts in the academic community, interest groups, and professional organizations would do so as well. But pension reform was controversial, and no issue more so than termination insurance. It would require a decade of insistent, creative policy advocacy for supporters of pension reform to overwhelm their opponents. Issues and actors from the story of Studebaker-Packard—default risk, termination insurance, and the UAW—would play major roles in the campaign that produced ERISA. But in 1964 most of the work of passing pension-reform legislation remained to be done.

267. In Kingdon’s terms, Studebaker pushed termination insurance higher on the “governmental agenda,” that is, “the list of subjects to which governmental officials and those around them are paying serious attention.” KINGDON, *supra* note 3, at 3. To pass into law, a proposal must reach the “decision agenda,” defined as “the list of subjects within the governmental agenda that are up for an active decision.” *Id.* at 4. To become law, a matter that reaches the legislative decision agenda generally must secure majority support from both chambers of Congress and support or acquiescence from the President.

268. See text accompanying *supra* notes 257-58.

