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The Wage Priority Issue: Formula For Consensus

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NOTES

THE WAGE PRIORITY ISSUE: FORMULA FOR CONSENSUS

Whether certain fringe benefits won through collective bargaining are entitled to the priority granted "wages . . . due to workmen" under the Bankruptcy Act[1] is a question which has provoked considerable disagreement in both the courts and legal literature.[2] In a recent decision, *Joint Industry Board of the Electrical Industry v. United States*,[3] the United States Supreme Court construed the Act restrictively to deny priority to trustees' claims against a bankrupt employer for unpaid contributions to an employees' annuity fund. In rejecting the priority claim, the Court relied exclusively on *United States v. Embassy Restaurant, Inc.*,[4] in which an employer's contributions to a union welfare fund established through collective bargaining similarly were held not entitled to priority.

The legislative history of the priority section offers scant support to those who would construe narrowly the scope of its protection.[5] On the contrary, the trend since the wage priority was first granted in 1841 has been to broaden progressively the class of protected workers.[6] Such

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1. Section 64(a) of the Bankruptcy Act, 11 U.S.C. § 104(a) (1964), provides:
> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term 'traveling or city salesmen' shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract. . . .

2. See Forman, *Priority of Union Welfare Funds as Wages in Bankruptcy*, 62 COM. L.J. 321 (1957); 34 CHI.-KENT L. REV. 235 (1956); 6 DUKE B.J. 121 (1957); 26 FORDHAM L. REV. 561 (1957); 19 GA. B.J. 107 (1956); 57 MICH. L. REV. 403 (1959); 42 MINN. L. REV. 294 (1957); 52 NW. U.L. REV. 681 (1957); 32 TEMP. L.Q. 332 (1959); 20 U. PITT. L. REV. 115 (1958); 44 VA. L. REV. 995 (1958); 13 VAND. L. REV. 376 (1959); 66 YALE L.J. 449 (1957).

3. 391 U.S. 223 (1968).

4. 359 U.S. 29 (1959).

5. For a detailed examination of the history of the Act, see 3 W. COLLIER, COLLIER ON BANKRUPTCY §§ 64.01, 64.201 (14th ed. J. Moore 1967).

6. Priority for debts up to a maximum of twenty-five dollars for labor performed within six months of the bankruptcy was first granted as a third-class claim under the Bankruptcy Act of 1841. Act of August 19, 1841, 5 Stat. 445. The Act of 1867 increased the sum available to fifty dollars for wages due an operative, clerk or house servant. Act of March 2, 1867, 14 Stat. 529. A major revision in 1898 saw two classes of priority claims created. While the first class provided for satisfaction of tax claims, the second

changes often have been necessitated by a failure of the courts to give full effect to the wage priority provision. Thus in recommending an amendment to make explicit the intent of Congress that the wages entitled to priority should include commissions, the House Judiciary Committee noted in 1937:

> When this section of the Bankruptcy Act was enacted into law the general practice in business was to pay traveling salesmen a fixed wage for a definite period of time. Today the general practice is to pay commissions. . . . A few referees have recognized the justice of the commission salesman's claim against the bankrupt estate by interpreting wages to include commissions. This amendment would correct this ambiguity and then no distinction may be made between the city or traveling salesman who earns a fixed wage during the period of employment and those who earn an indefinite wage based upon the amount of merchandise sold, and this part of section 64 will again conform to its original intent and purpose.[7]

Arguably, fringe benefits are analogous inasmuch as they have become an increasingly common *form* which remuneration now assumes. Again in 1955, for example, Congressional action was essential to insure protection of salesmen who were independent contractors. Proposing the change, the House Judiciary Committee evinced concern which has been typical: "[L]anguage in some court cases has been confusing. . . . [T]here is language from which one might infer that a salesman who was a 'separate contractor' could not qualify."[8]

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class included a fourth priority for "wages due to workmen, clerks or servants, which have been earned within three months before the date of the commencement of the proceedings, not to exceed 300 dollars for each claimant." Act of July 1, 1898, 30 Stat. 563. In 1906, the protected category was broadened to include "traveling or city salesmen." Act of June 15, 1906, 34 Stat. 267. The sum available to each claimant was increased to 600 dollars in 1926. Act of May 27, 1926, 44 Stat. 667. The Chandler Act of 1938 saw the priority, now second behind expenses of administration, expanded to cover "workmen, servants, clerks, or traveling or city salesmen on a salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt." Act of June 22, 1938, 52 Stat. 874. The definition of workers covered was clarified further in 1956 by adding to the priority section the words "and for the purpose of this clause, the term 'traveling or city salesmen' shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract." 70 Stat. 725, 11 U.S.C. § 104(a) (1964).

7. H. R. REP. No. 2355, 74th Cong., 2d Sess. 1-2 (1937).

8. H.R. REP. No. 921, 84th Cong., 1st Sess. 2 (1955). More recent judicial construction of the Act has spurred no further changes affecting wage priority, although considerable legislation has been proposed. H.R. 991, 89th Cong., 1st Sess. (1965); H.R. 1784, 88th Cong., 1st Sess. (1963); H.R. 66, 88th Cong., 1st Sess. (1963); H.R. 2274, 87th Cong., 1st Sess. (1961); and H.R. 9831, 86th Cong., 2d Sess. (1960). H.R. 2076, 90th Cong., 1st Sess. (1967), a bill introduced by Rep. Leonard Farbstein of

The history of legislative expansion of the wage priority section in the face of restrictive judicial interpretation clearly supports the admonition of Justice Black, dissenting in *Embassy,* against "niggardly interpretations of the language used in that section."[9] In the spirit of liberal construction, courts long have found vacation pay,[10] back pay[11] and severance pay[12] to be within the scope of "wages . . . due to workmen." Yet certain fringe benefits, which form an increasingly important part of total compensation under collective bargaining agreements, usually have been denied similar treatment.[13]

New York, is representative of these attempts. It provides:

> Be it enacted . . . that clause (2) of section 64a of the Bankruptcy Act . . . is amended by striking out 'wages and commissions, not to exceed $600 to each claimant, which have been earned within three months' and inserting in lieu thereof the following; 'direct and indirect wages and commissions, not to exceed $2,000 with respect to each claimant, which have been earned within three months (or in the case of vacation pay, severance pay, and indirect wages, within twelve months).'
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> . . . .
>
> (1) The term 'indirect wages' means any sum payable by a bankrupt to a trustee, insurance company, or other third party for pension, health insurance, or other benefits for a person to whom direct wages have been paid or are payable by the bankrupt.

The proposition that such proposed amendments reveal a belief that "indirect wages" are not includable under the present language of the Act lends itself to facile acceptance. The proper interpretation, however, may be that these proposals are—like the amendments of 1938 and 1956—merely corrective devices to restore the "original intent and purpose" of the Act thwarted by narrow judicial construction.

9. 359 U.S. at 37.

10. *E.g.,* United States v. Monro-Van Helms Co. 243 F.2d 10 (5th Cir. 1957); Division of Labor Law Enforcement v. Sampsell, 172 F.2d 400 (9th Cir. 1949); Kavanas v. Mead, 171 F.2d 195 (4th Cir. 1948); *In re* Kinney Aluminum, 78 F. Supp. 565 (S.D. Cal. 1948).

11. *E.g.,* Nathanson v. NLRB, 344 U.S. 25 (1952) (dictum); NLRB v. Killoren, 122 F.2d 609 (8th Cir. 1941), *cert. denied,* 314 U.S. 696 (1941).

12. *E.g.,* McCloskey v. Divison of Labor Law Enforcement, 200 F.2d 402 (9th Cir. 1952). *In re* Men's Clothing Code Authority, 71 F. Supp. 469 (S.D.N.Y. 1937).

13. *E.g.,* Embassy Restaurant, Inc. v. United States, 359 U.S. 29 (1959); *In re* Victory Apparel Mfg. Corp., 154 F. Supp. 819 (D.N.J. 1957); *In re* Sleep Products, Inc., 141 F. Supp. 463 (S.D.N.Y. 1956), *aff'd sub nom.* Local 140 Sec. Fund v. Hack, 242 F.2d 375 (2d Cir. 1957), *cert. denied,* 355 U.S. 833 (1957), *reh. denied,* 358 U.S. 860 (1958); *In re* Brassel, 135 F. Supp. 827 (N.D.N.Y. 1955). *Contra,* Sulmeyer v. Southern Cal. Pipe Trades Trust Fund, 301 F.2d 768 (9th Cir. 1962); *In re* Otto, 146 F. Supp. 787 (S.D. Cal. 1956); *In re* Schmidt, 33 L.R.R.M. 2283 (S.D. Cal. 1953); *In re* Ross, 117 F. Supp. 346 (N.D. Cal 1953). The latter is the only relevant case which did not involve employer contributions pursuant to a collective bargaining agreement. The wage deduction by the employer to provide insurance benefits in the *Ross* case, like the vacation pay, back pay and severance pay cases, is not precisely pertinent; for such payments are either (1) directly payable to the employee or (2) deducted from wages. Thus, the question whether they are wages due to workmen is not a difficult one. The question whether an employer's unpaid contributions to an employee's fund under a private plan would be entitled to the priority does not seem to have arisen, but the considerations would appear to be the same as in the cases involving contributions under a collective bargaining pact. Likewise, the question whether profit-sharing dividends and similar compensation devices would be entitled to the priority has not been litigated, apparently rendered moot by the fact of bankruptcy.

Typical of the rationale behind denying priority status to such claims is the Court's opinion in *Embassy*. Embassy was required under collective bargaining agreements to contribute eight dollars per month per full-time employee to trustees of welfare funds organized to provide life insurance, weekly sick benefits, hospital and surgical benefits and other advantages for members of the union. Each fund was administered under a formal trust agreement by trustees who were authorized to establish the conditions of eligibility for benefits, control all the funds received and collect all contributions. Title to all funds, property and income was placed in the trustee exclusively, and no employee or anyone claiming under him was to have any right in the plan.[14]

In denying the trustees a wage priority for the employer's unpaid contributions to the welfare fund, the Court stressed that the payments did not fall within the fundamental purpose of the wage priority provision since they offered no support to the workmen in periods of financial distress. The purpose of the section, wrote Justice Clark, was "to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardships that nonemployment usually brings to workers and their families."[15]

Moreover, the Court found, such contributions do not have the customary attributes of "wages"; nor are they "due . . . to workmen."[16] The Court noted that such payments were flat sums contributed without reference to the employee's hours, wages or productivity.[17] Stress was placed on the contention that the payments were not "due . . . to work-

14. Various theories on which an individual interest in such funds might be established are discussed in 66 YALE L.J. 449, 454-57 (1957). The comment surveys assignment, third-party beneficiary and trust theories, rejecting the first and concluding:

> Whether the employee has the right to sue the employer for nonpayment as a third party beneficiary or whether the employee can sue the trustees for breach of fiduciary duties created by the bargaining agreement, the unpaid contributions are, in a very real sense, 'due to workmen.'

15. 359 U.S. at 32. A collection of various attempts to define the purpose of the wage priority is found in 3 W. COLLIER, *supra* note 5, at § 64.201. See also *In re* Paradise Catering Corp., 36 F. Supp. 975 (S.D.N.Y. 1941) ("Section 64, sub. a (2) was enacted in order that workmen or servants, persons of menial position and low income, should receive a priority in bankruptcy due to the fact that they, as a class, could ill afford to be classified as general creditors"); and 57 MICH. L. REV. 403, 404 (1959) (". . . insuring economic security for workers rather than merely guaranteeing them an emergency fund.").

16. 359 U.S. at 33.

17. *Id.* at 32. But priority has also been denied when the contribution was based on a percentage of the employer's payroll for covered employees. See Annot., 17 A.L.R. 3d 374, 381-82 (1968). Nevertheless,the distinction between flat sum contributions and contributions related to employee productivity was termed the *ratio decidendi* of the *Embassy* decision in Sulmeyer v. Southern Cal. Pipe Trades Trust Fund, 301 F.2d 768 (9th Cir. 1962). See note 40 *infra*.

men" since the employer's obligation was to contribute sums to the trustees, not to its employees.[18]

A further consideration in the Court's reasoning was the fact that, if the claims of the trustees were to be treated on a par with wages, in a case where the employer's assets were insufficient to pay all claims in the wage priority the workman would have to share with the welfare plan, thus reducing his own recovery.[19]

Finally, the Court noted that if Congress wished such fringe benefits included under the wage priority, it could have included them specifically.[20]

The majority view was strongly criticized by Justice Black, who relied on a highly lucid lower court opinion in *In re Otto*.[21] He stressed that "compensation for services rendered" long has been held a valid definition of "wages" both in the priority section of the Bankruptcy Act and in other contexts[22] and that where such treatment has been deemed

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18. 359 U.S. at 34. But see 52 NW. U.L. REV. 681, 683 (1957). "Although payment is not made to the employee, it is intended eventually as a direct benefit to him. By means of welfare fund contributions the employer is paying an earned wage for past services rendered and is attempting to insure future service of high quality and extended duration." For similar views, see 20 U. PITT. L. REV. 115, 119 (1953), 6 DUKE B.J. 121, 125 (1957), and 26 FORDHAM L. REV. 561, 563 (1957).

19. 359 U.S. at 33, 34. But see 13 VAND. L. REV. 376, 379 (1959). "The Court's statement as to the competition which might arise between workmen's claims and the contributions, should the contributions be included as wages, is not a valid reason for not finding them to be wages. Insofar as it is support for strictly limiting the scope of wages, however, a stronger argument could have been made. It is not difficult to pose a situation, had the Court held otherwise, in which a qualified employee would be deprived of a portion of his wage claim should he be independent of the union," and as an added possible consequence of his independence would not be entitled to the negotiated fringe benefits. In any event, such a consideration is inappropriate if a proper interpretation of the Act permits such competition. Moreover, such a presumably undesirable result would obtain only when individual claims approached 600 dollars or whenever the assets of the estate would not permit all wage claims to be paid in full. In all other cases, the effect would be to insure a fuller payment of the agreed compensation. For an opposing view, see 42 MINN. L. REV. 294, 297-98 (1957).

20. 359 U.S. at 32.

21. 146 F. Supp. 787 (S.D. Cal. 1956). The wage priority was allowed for an employer's unpaid contributions to a welfare fund used to purchase insurance benefits. The court noted, "An employer's contributions to a welfare fund for the benefit of employees and others . . . and measured on the basis of a certain amount per hour worked by employees, is but another method of computing and paying compensation for services rendered; and accordingly should be held to be wages. . . ." *Id.* at 789.

22. 359 U.S. at 374 n.10. The cases cited characterized the following forms of compensation as wages: payment for piece-work, rentals of company-owned housing to employees and war bonuses. Only the first case concerned the Bankruptcy Act, however. The problems in attempting to define a term used in one context by its definition in another are noted in 32 TEMP. L.Q. 332 (1959). The author points out that the hazard of interpretation by judicial construction of other statutes is that

> it is more probable that neither Congress nor a State Legislature has in mind a single notion of wages when enacting each statute in which the term appears. If we are to determine the meaning of a term used by Congress by comparing it to interpretations given to the same term as it appears in

undesirable, Congress has expressly excluded fringe benefits from the "wages" category.[23]

Justice Black considered the fact that the payments were used to purchase insurance benefits irrelevant to the question of whether they constituted "wages."[24] Nor, he added, do wages lose their identity simply because the claim is asserted by someone other than the employee.[25] Furthermore, he invoked authority for the proposition that payments to welfare funds are as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.[26]

Despite the decision in *Embassy,* controversy over the scope of the wage priority section has continued. In *Sulmeyer v. Southern California Pipe Trades Trust Fund,* the priority given wages was accorded payments due from a bankrupt employer to an employee's vacation and holiday fund established under a collective bargaining agreement. The court rejected the contention that *Embassy* controlled, distinguishing the cases on the method of contribution and noting that each employee had a vested right in the fund, with only the time of actual enjoyment being post-

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other statutes without first inquiring into the policy of the particular statutes, we are likely to fall into error.

Noting that "by analogy to the same statute diametrically opposite results may be reached," the author advises that interpretation by analogy to other statutes should be employed with caution.

23. 359 U.S. at 38 & n.12. Employer contributions to welfare funds expressly are excluded from wages in the Federal Insurance Contributions Act, 26 U.S.C. § 3121(a)(2) (1964); the Federal Employment Tax Act, 26 U.S.C. § 3306(b)(2) (1964); and the Social Security Act, 42 U.S.C. § 409(b)(1964). Justice Black quotes Chief Justice Marshall in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) at 438 to the effect that, ". . . a rule of interpretation to which all assent [is] that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made. . . ."

24. 359 U.S. at 38 & n.13.

25. *Id.* at 38. The dissent relies on Shropshire, Woodliff & Co. v. Bush, 204 U.S. 186 (1907), which held that payments due an assignee of the worker were entitled to priority as wages. *Accord, In re* Stultz Bros., 226 F. 989 (S.D.N.Y. 1915), *In re* Fuller & Bennett, 152 F. 538 (S.D.W. Va. 1907). The majority's objection that "the debt was never owed the workmen" seems irrelevant to *Shropshire's* authority that payments which would be characterized as wages if paid directly to an employee cannot be denied that status simply because they are paid to another. The possible necessity of finding an assignment makes relevant *In re* Schmidt, 33 L.R.R.M. 2283 (S.D. Cal. 1953) which held the collective bargaining agreement to be "at least an equitable assignment by the employees" to the welfare fund. See also *In re* Ross, 117 F. Supp. 396 (S.D. Cal. 1953). It was found that by entering into a voluntary plan of disability insurance and consenting to wage deductions for payment of disability insurance premiums, employees made an enforceable assignment of a portion of their wages to the insurer. (Under state law, an enforceable assignment could be made of wages under an existing employment.)

26. 359 U.S. at 39, 40. The dissent relied on United States *ex rel* Sherman v. Carter, 353 U.S. 210 (1957), which construed the Miller Act, 40 U.S.C. § 270b(a) (1964) to hold that payments to welfare funds are as much "justly due" to the employees who have earned them as are wages payable directly to them in cash. The majority's objection that *Carter* did not hold the payments to be "wages" fails to offset that case's authority for the proposition that such payments are "due to workmen."

poned. "Here," the court noted, "the contributions were seven and one half percent of the gross pay of each employee, which is not a flat rate in the same sense used in Embassy. . . . To the contrary, the amount here contributed bears a direct relationship to the wages earned, varying with each employee's productivity and . . . responsibility."[27]

A similar attempt to distinguish the *Embassy* decision was found unpersuasive in the *Joint Board* case. Each employer of union represented workers had been required to contribute four dollars for each day's wages paid to each such worker to trustees of an annuity plan established by a collective bargaining pact. Each worker for whom such contributions were made, or his designated beneficiary, was entitled to receive monthly payments of specified amounts, to the full extent of sums credited to his account, upon the following contingencies: death of the employee, retirement from the industry at age sixty or over, permanent disability after working more than ten years for a contributing employer, entry into the armed forces or cessation of participation by leaving the industry or accepting employment with a company not covered by the agreement.

Echoing *Sulmeyer,* Justice Fortas, dissenting in the *Joint Board* case, noted that the basis for contributions, accounting method and the nature of the employee's interest all distinguished this case from *Embassy.*[28] Whereas, in the latter case contributions consisted of flat sums for each workman, without regard to his hours, wages or productivity, in the former the sum due each employee's account was specifically related to and measured by his hours of work.[29] In *Embassy* payments were not

27. 301 F.2d 768, 771 n.3 (1962). The court went on to observe that the facts of the case aligned it more closely with *Shropshire* and *Otto* than with *Embassy.* The attempt of the Court of Appeals in *Joint Board* (*In re* A & S Electric Corp., 379 F.2d 211, 212 n.1 (2d Cir. 1967)) to derogate the authority of *Sulmeyer* by noting that vacation pay has always been considered wages glosses over the point that both cases concerned employer contributions to a fund established for the benefit of employees. In cases where vacation pay traditionally has been accorded the priority, such payments were due the employee directly from the employer as compensation for services rendered. *Sulmeyer* extends the priority to an employer's unpaid contributions to a vacation and holiday fund established pursuant to a collective bargaining agreement. Since it cannot be maintained seriously that the question turns on the use the employee will make of the payments, the fact that the payments were made to a particular type of fund appears unimportant. *Sulmeyer* thus emerges as authority for the proposition that an employer's unpaid contributions to an employee's fund will, under the specified conditions, be entitled to the wage priority. For a state court decision ignoring *Embassy* and relying on *Otto* in construing payments to an employee's welfare fund to constitute "wages," see Tracy v. Contractors State License Bd., 63 Cal. 2d 598, 407 P.2d 865, 47 Cal. Rptr. 561 (1965). The court held that sums due from a contractor to employees' pension, health and welfare, and vacation funds were "wages" within the meaning of the Bankruptcy Act and could receive special attention as a preferred claim in bankruptcy in imposing penalties for violation of the Contractor's License Law.

28. 391 U.S. at 230.

29. See note 40, *infra.*

credited to the individual employee but were used to provide life insurance, sick benefits, hospital and surgical payments, and other benefits for all employees; while in *Joint Board* the sum which each employee earned was accounted for separately and individually, and he was entitled to that sum. Moreover, in the earlier case the employee was not entitled to demand and receive payment of sums earned by him; in the later case, however, on the occurrence of specified events, the employee or his estate was entitled to receive in full the sums remitted to the trustee.

The dissent rejected the majority's proposition that the priority was intended only to alleviate the hardship of unemployment following immediately upon the bankruptcy of an employer by noting that a priority position cannot insure immediate payment but only enhances the prospects for eventual recovery.[30] In any event, the dissent concluded, payments to the annuity fund would qualify even under the majority's definition of the wage priority's purpose since they serve to alleviate the hardship of unattractive employment outside the industry or with an employer not covered by the plan following a discharge caused by bankruptcy.[31]

The Supreme Court's ruling in *Joint Board* will, in the event of bankruptcy proceedings, prejudice considerably an employee's prospects of ever receiving a substantial portion of the total compensation agreed upon through collective bargaining. It threatens to deny the wage priority to every form of compensation except direct cash remuneration at a time when diversified forms of compensation are becoming increasingly popular.[32] Such a result could have been avoided either by repudiating *Embassy*[33] or by finding that the factual distinctions between *Joint Board* and *Embassy* warranted a different result. Inasmuch as *Embassy* is the

30. 359 U.S. at 232, 233.

31. *Id.* at 233 n.2.

32. Expenditures for social and private welfare plans covering nonagricultural employees rose forty-two per cent (from 6.5 per cent to 9.2 per cent of wages and salaries) in the decade since 1955. Recent studies indicate that all forms of indirect compensation account for from twenty to twenty-five per cent of total compensation paid by employers for factory workers. Strasser, *Wages, Wage Supplements and Labor Compensation*, 17 LABOR L.J. 387, 389 (1966).

33. For a view that reversing the "long standing and incontrovertible decisions" preceding the *Embassy* decision would be unjustifiable, see 34 CHI.-KENT L. REV. 235, 238-39 (1956). Discussing *In re* Brassel, 135 F. Supp. 827 (N.D.N.Y. 1955), the author contended that

> the claimant was not a workmen . . . the sum claimed did not represent wages . . . and the amount payable . . . formed no more than a contractual obligation owed to a third person. No degree of liberality . . . could justify the amount of nullification in the language of the Act . . . which would be necessary before a claim of the kind asserted could be upheld. If the fringe benefits now common under modern mass employment contracts are to be protected against the impact of bankruptcy, substantial revision would have to be made both in the statutory language and in the fundamental concepts concerning priorities.

sole authority for the later decision, both would appear to be equally proper targets for the well-founded criticisms levelled by the dissenting justices. To the extent that the facts of the *Joint Board* case afford a less appropriate base upon which to predicate the type of analysis employed by the Court in *Embassy,* the second decision appears correspondingly less well-founded.

As authority for the proposition that employer contributions computed on a flat rate without relation to the employee's work and to which the employee has no immediate or prospective right are not entitled to the wage priority, the *Embassy* decision warrants no further discussion. So construed, that case should not prevent the accomplishment of substantial justice in similar, but factually distinguishable, cases. Conversely, if the principal case indicates a trend toward a broadened application of the *Embassy* rule, the popularity of certain fringe benefits, and employee confidence therein, well may be threatened.

An effort to develop a rationale to avert such consequences might be no more than an academic exercise if the *Joint Board* case were to be considered dispositive of the wage priority issue. However, it is inferrible that the issue is open to further development given the fact that the *Embassy—Joint Board* majority position, considered as a whole, arguably fails to win the approval of a majority of the members of the present Supreme Court.[34] The dissenters in *Embassy* (Chief Justice Warren, Justice Black and Justice Douglas), added to the additional dissenters in *Joint Board* (Justices Fortas and Brennan) constitute a potential majority for a case properly distinguishable from *Embassy* and *Joint Board.* One can only speculate on the reasons why Justices Black and Douglas failed to dissent in *Joint Board,* as they did in *Embassy.* Perhaps they have come to endorse the majority view in the earlier case. More likely, however, they have determined to let the *Embassy* decision—whatever its merits—prevail after nearly a decade of Congressional inattention to corrective legislation. Considering *Joint Board* to be insufficiently distinguishable from the earlier case, they then properly could join the majority in the later case. In a future case with what Justice Douglas terms "a slightly different shade of facts,"[35] these justices could conceiv-

34. The fact that the Court agreed to review *Joint Board* gives additional weight to the inference that *Embassy* does not settle all aspects of the wage priority question. Moreover, rather than disposing of the case in a memorandum decision, the Court found it necessary to explain why the instant case fell under the *Embassy* rule. Such factors perhaps suggest that the Court is sensitive to factual distinctions which might bring a case outside the scope of the *Embassy* decision.

35. W. DOUGLAS, STARE DECISIS 8 (1949):

> It is easy to overemphasize *stare decisis* as a principle in the lives of men. Even for the experts law is only a prediction of what judges will do under a given set of facts—a prediction that makes rules of law on decisions not

ably join the *Joint Board* dissenters to extend the wage priority to claims for certain fringe benefits. It therefore becomes meaningful to explore the types of situations in which the priority could be extended consistent with existing case law.

Criteria which employer contributions must meet in order to qualify for the wage preference are discernible from the *Embassy* decision. They must either have the customary attributes of wages and be due to workmen, or satisfy the purpose for which Congress created the priority. In assuming that the purpose of Congress in enacting the priority was to provide immediate support to workmen during periods of financial distress, the Court has established a criterion which neither fringe benefits nor direct wages can satisfy.[36] Granting a claim priority does not serve the purpose of assuring immediate payment, for such payment must await the interim or final distribution of the estate. To ascribe this broad purpose is to conclude that Congress provided for immediate relief with one hand and took it away with the other by erecting procedural barriers to the immediate settlement of the bankrupt's estate.[37] Such priority status, however, does function to increase the prospects for eventual recovery; it is reasonable to assume that such enhancement is its purpose.[38]

Thus defined, the purpose of the wage priority provision is of no aid in determining what forms of compensation are entitled to the wage priority. The proper inquiry thus becomes what types of fringe benefits comport with *Embassy's* other criterion. If Congress wishes to enhance the chances for payment of wage claims without regard to whether

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logical deductions but functions of human behavior. There are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions. The difficulty is to estimate what effect a slightly different shade of facts will have and to predict the speed of the current in a changing stream of the law.

36. Even if ameliorating the financial shock of unemployment were the original intent of Congress in enacting the wage priority, that function has been pre-empted by unemployment compensation. Failure to limit the wage priority correspondingly suggests Congressional intent that an expanded purpose should now be ascribed to the provision, according to 66 YALE L.J. 449, 461 (1957).

37. Payment of a wage priority claim must await adjudication of bankruptcy, creditor meetings and proof of claims as well as a determination by the trustee that sufficient assets exist to pay the costs of administration.

38. The rationale behind the priority provision was explained in H.R. REP. No. 687, 89th Cong., 1st Sess. 3 (1965) as follows:

> Under the Bankruptcy Act, certain types of unsecured claims are given a statutory advantage in the distribution of the bankrupt's estate. These priority claimants are to be distinguished from the secured creditor who has a property right which entitles him to be paid out of the assets against which the security attaches. The priority claimant, on the other hand is an unsecured creditor who, by law, as a matter of social policy, has been placed in a position superior to that of the unsecured creditors. Thus, administrative expenses, wage claims, taxes and rent claims where State law gives a priority to landlords, are all paid before general creditors may share in the distribution under the Bankruptcy Act.

such payments provide immediate support during a financial crisis, it seems violative of that purpose to distinguish wages payable directly to the employee from those employer contributions which are, in effect, deferred wage payments when determining which payments have the customary attributes of wages and are due to workmen.

The proper approach would appear to be to distinguish such contributions on the basis of whether they: are paid in lieu of present cash remuneration, as opposed to being mere conditions of employment;[39] are computed on the basis of the individual employee's work, as opposed to being mere flat sums for each workman;[40] are credited to each employee's individual account, as opposed to being absorbed into a general fund;[41] and are payable on demand to the employee—to the full extent of funds credited to his individual account—at some specified time, as opposed to merely affording certain benefits to the employee on the occurrence of certain contingent events.[42]

Satisfaction of the first two tests would establish that the forms of indirect compensation have the customary attributes of wages, while fulfilling the latter two requisites would substantiate an averment that the payments are due to workmen. In view of the manifest equivalence of such payments to direct "wages . . . due to workmen," to deny the

39. This criterion would meet the *Embassy* objection that "not all types of obligations due employees from their employers are . . . within the concept of wages, even though having some relation to employment." 359 U.S. at 32. Not all fringe benefits are intended to be in lieu of additional compensation which might otherwise be paid to union members for work performed, although they may represent further consideration for the entire collective bargaining agreement. For a discussion of the subject and examples of employer obligations outside the concept of wages, such as workmen's compensation, see Forman, *supra* note 2, at 322, and a speech by Arthur J. Goldberg, quoted in 32 TEMP. L.Q. 332, 341 (1959). The thoughtful reader will agree with Mr. Goldberg's observations as to the frequent difficulty in distinguishing between wages paid in lieu of cash and wages representing mere conditions of employment.

40. This distinction would preclude *Embassy's* objection that the payment was without relation to hours, wages or productivity. 359 U.S. at 32. That the *Joint Board* case admittedly is not as strong on this point as is *Sulmeyer* could be used to explain the holding. A contribution of four dollars for each day worked by an employee, as in *Joint Board*, seems only slightly more closely related to individual productivity than the eight dollars per month for each full-time employee in *Embassy*.The *Joint Board* formula, however, appears closer to the contribution method in cases which have granted the priority (*In re Otto*—five cents for each hour worked; *In re Schmidt*—6½ cents for each hour worked) than it does to those which have denied it (*In re Victory Apparel Mfg. Corp.*; *Local* 140 *Sec. Fund. v. Hack*; *In re Brassel*—all based on a percentage of the gross reportable payroll of employees in the bargaining unit.). The *Sulmeyer* formula (7½ per cent of the gross pay of each employee) clearly is most closely related to the individual's hours, wages and productivity.

41. Satisfying this criterion eliminates *Embassy's* objection that the employer's obligation "is to contribute sums to the trustees, not to its workmen" (359 U.S. at 33) by clarifying the individual interest held by the trustees for the employee under a fiduciary obligation.

42. Such a distinction further eradicates *Embassy's* objection that the employee has no individual legal interest in the fund. 359 U.S. at 32-33.

wage preference to these forms of compensation would be "[t]o disregard the natural implications of the statute and to imprison our reading of it in the shell of the mere words," an approach which Justice Frankfurter termed "the cardinal sin in statutory construction, 'blind literalness.' "[43]

Should judicial inquiry result in an affirmative finding on each of these four points, the case law could support a recognition of wage priority status for the claim without doing violence to the real import of the *Embassy* and *Joint Board* decisions.[44] Such an approach would preserve judicial flexibility in dealing with the varying cases which arise in this area of public concern. Moreover, express adoption of such criteria in future decisions would have the beneficial effect of providing guidelines meaningful in the drafting or revision of future collective bargaining agreements on fringe benefits.

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43. Pope v. Atlantic Coast Line R.R., 345 U.S. 379, 392 (1953). See also Strasser, *supra* note 32, at 389:

> Whether wage payments, computed on the basis of time worked or units produced, and supplementary compensation payments made by employers are or are not opposite sides of the same coin has been argued for years. Much of the disagreement has been the result of semantic rather than pragmatic problems. Regardless of the semantic confusion prevalent in almost any discussion of wage supplements or fringe benefits, American labor and management have tended, at least in the more recent years, to agree that labor negotiations on economic issues are settled within the framework of the cost of the entire package (that is, wages plus wage supplements).

The *Embassy* protest that "we deal with a statute, not business practice" (359 U.S. at 33) fails to recognize adequately the demonstrable Congressional intention to reconcile interpretations of the Act with current business practice. See text accompanying note 7 *supra*.

Moreover, as noted in 6 DUKE B.J. 121, 127 (1957): "Where fringe benefits are bargained for and received in lieu of cash wages, they should not be subjected to archaic tests but should rather be considered in the light of present-day labor conditions."

44. *Sulmeyer* is the clearest example of a satisfaction of all four criteria. Employee welfare funds could easily be brought within the first three criteria and could satisfy the fourth by such devices as providing for conversion to individual insurance policies when the employee ceases to be a participant under the plan. Compliance with these criteria would appear to remove the major objections noted in cases denying the wage priority.