The Treatment of Underfunded Pension Plans In and Out of Bankruptcy

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Dealing with Underfunded Pension Plans In and Out of Bankruptcy

- Freezing Pension Plan
- Request for Minimum Funding Waiver
- Termination of Single-Employer Pension Plan
  - Involuntary Termination by PBGC
  - Distress Termination by Plan Sponsor
- Consequences and Claims Arising Out of Plan Termination
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The Pension Benefit Guaranty Corporation (PBGC)

PBGC Purpose

- PBGC was created under ERISA as a corporation wholly owned by the U.S. government to insure defined benefit plans.
- PBGC does not guarantee all benefits.
  - For plans with 2015 termination dates, the guarantee is approximately $60,000 for benefits commencing at age 65, with actuarial reductions for benefits commencing at earlier ages.
- PBGC does not pay lump sum benefits. All benefits are in annuity form.

PBGC Powers

- PBGC collects premiums.
- PBGC may terminate a pension plan if the employer fails to make minimum required contributions and in certain other limited circumstances. To avoid termination, PBGC may negotiate a settlement with plan sponsor.
- Post-termination, PBGC takes over pension plan and provides participants with benefits, subject to the guarantee cap.
- Post-bankruptcy filing, PBGC may assert claims against the estate, seek to serve on the creditors' committee and/or oversee the bankruptcy proceeding.
- PBGC can assert a termination premium following the termination of an underfunded plan ($1,250 per plan participant per year for 3 years).

Freezing a Pension Plan

Methods of Freezing a Pension Plan

A pension plan can be frozen in any one of the following ways, or using a combination of these types of freezes.

Soft Freeze

Closed to new entrants while those participants already in the plan continue to accrue benefits; OR

stop benefit accruals for all active participants, but allow benefits to increase with the growth in participants' wages.

Partial Freeze

Stop benefit accruals for some but not all participants, based on age, tenure, job classification or plant location.

Hard Freeze

Stop service accruals for all active participants and stop benefit accruals for all participants. Assets remain in the plan and are paid out when participants retire or leave, but the participants' benefits do not grow with additional years of service.

Freezing a Pension Plan (cont'd)

How to Freeze a Pension Plan

1. **<u>Amend the Pension Plan</u>:** The plan must be amended to provide for the freeze (i.e., whichever type of freeze the plan sponsor has selected).

2. **<u>Notice to Plan Participants</u>**: Plan sponsor must provide written notice of an amendment providing for a significant reduction or cessation of future benefit accruals to participants at least 45 days (15 days for plans with fewer than 100 participants) before the effective date of the amendment freezing the plan.

3. **<u>Adjust Actuarial Assumptions</u>**: The plan sponsor must adjust the actuarial assumptions used to determine the plan's funding requirements to reflect the freeze.

4. **<u>Evaluate Long-Term Strategy</u>**: The plan sponsor must evaluate and adjust the plan's asset investment strategy to reflect the sponsor's long-term strategy for the frozen plan. A freeze is generally a short-term solution only.

Freezing a Pension Plan (cont'd)

Implications of Freezing a Pension Plan

- No change in legal and administrative requirements
- Plan sponsor still has fiduciary duty to operate and administer plan according to its terms
- Plan sponsor must continue to satisfy minimum funding requirements
- Plan sponsor must continue to pay PBGC premiums
- Reporting and disclosure obligations

Long-Term Options Following a Plan Freeze

- Standard termination (fully fund and terminate plan)
- Distress termination (in bankruptcy generally)

Minimum Funding Waiver

Legal Requirements

Under Internal Revenue Code section 412, the IRS has discretionary authority to "waive" the required contributions to a pension plan for a plan year if the employer demonstrates that it cannot make the contributions due to "temporary substantial business hardship."

Factors the IRS must consider include, but are not limited to:

- whether the employer is operating at an economic loss
- whether there is unemployment in the trade or business and in the industry concerned
- whether the sales and profits of the industry are depressed or declining
- whether it is reasonable to expect that the plan will be continued only if the waiver is granted

No one factor is determinative, and the absence of one or more factors is not necessarily fatal to the application.

As a practical matter, the IRS will grant the waiver *only* if the employer demonstrates that (a) it is unlikely to survive if it has to make the pension contributions and (b) if the waiver is granted, the employer is likely to be able to continue the plan and make all required contributions indefinitely.

Minimum Funding Waiver (cont'd)

Likelihood of Obtaining a Waiver

- Very few waivers are granted (typically no more than 2 to 3 per year). There is no data on how many applications are made, so it is impossible to evaluate the success rate.
- The IRS will not grant the waiver if the plan sponsor files for bankruptcy before the waiver is finalized because of the uncertainty as to what impact the reorganization will have on the plan and the plan sponsor's ability to fund it going forward.

Consequences of a Waiver

- The statutory term "waiver" is a misnomer. The "waived" amount is amortized (with interest) over the next 5 plan years. Amortized amount is added to the contributions otherwise due for those years.
  - For a 2014 waiver, the "waived" contributions would be amortized over 2015 through 2019.
- If the IRS grants a waiver for the 2014 Plan contributions, then those contributions can instead be treated as if made for the 2015 plan year. This should result in a contribution "holiday" for the remainder of the 2015 plan year.
  - Contributions made on April 15 and July 15, 2015, and intended for the 2015 plan year, could be designated as made for 2016, which likely would extend the "holiday" into at least mid-2016. Plan actuary should review the specific impact of a waiver before it is sought.
- All quarterly contributions must continue to be made pending the waiver determination.

Minimum Funding Waiver (cont'd)

Requesting a Waiver

- Deadline for filing a waiver request with the IRS is March 15 of the year following the year to which the requested waiver relates.
  - For a 2014 waiver, the application was due by March 15, 2015.
- It typically takes 5-6 months to obtain a waiver.
  - In practice, the IRS may not provide its decision until September 15 (deadline for final contribution for the prior year).

Notification of Waiver Request

- Plan participants must be notified of the waiver request within 14 days before it is filed with the IRS.
- The request may also need to be described in a Form 8-K filed with the SEC.
- Waiver request should be expected to quickly become public knowledge.

Minimum Funding Waiver (cont’d)

Security Interest for PBGC in Exchange for Waiver

- The granting of a minimum funding waiver normally is conditioned on granting the PBGC a second or third lien to secure the waived contributions.
  - This usually requires consent from the plan sponsor’s lenders.

- The PBGC may insist on other conditions.
  - The PBGC knows it has substantial leverage in these negotiations, and the process often drags on to just before the September 15 contribution deadline.
    - For example, the PBGC could demand that the first two quarterly contributions for 2015 made while the waiver request is pending could not be used toward 2016 required contributions.

Process to Effect Minimum Funding Waiver

1. **Notice**: Plan administrator provides notice to all plan participants 14 days before requesting a waiver with the IRS of the minimum contribution payment due for 2014.

2. **Request Waiver**: Plan administrator files a request with the IRS for a waiver of the minimum contribution payment due for the previous calendar year.

3. **IRS Determination**: IRS determines whether the Plan sponsor satisfies the necessary criteria for a minimum contribution waiver.

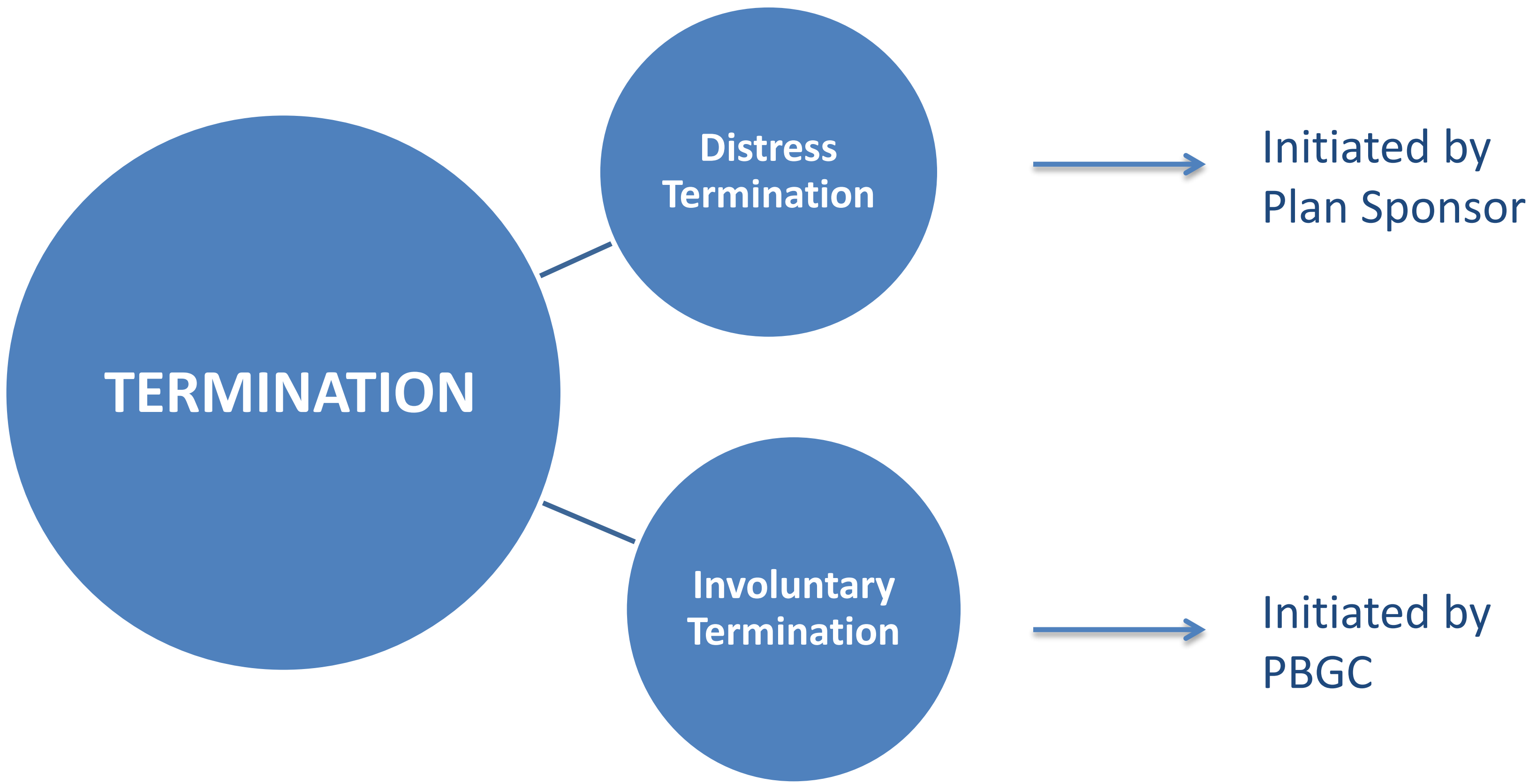
Process to Effect Minimum Funding Waiver (cont'd)

4. **Negotiation**: Plan administrator negotiates with the PBGC for the requested waiver. The PBGC may demand a lien and/or other concessions in exchange for the requested waiver.

5. **SEC Disclosure**: Plan administrator may need to file a Form 8-K with the SEC describing the request for the minimum contribution waiver.

6. **Waiver Defers Contributions**: If the IRS grants a waiver for 2014 contributions, then such contributions would be amortized over 2015 through 2019. Contributions already made for 2014 would be treated as if made for 2015. All quarterly contributions must continue to be made pending the waiver determination, but contributions made in 2015 could be designated for 2016.

Terminating an Underfunded Pension Plan



Involuntary Termination by PBGC

Initiating Involuntary Termination

- The PBGC **must** initiate an involuntary termination **if** it determines that a pension plan does **not** have assets available to pay benefits currently due under the plan.
- The PBGC **may** initiate an involuntary termination, *in its discretion*, if it makes one of the following 3 statutory findings:
    1. The plan has not met the minimum funding requirements (funding deficiency).
    2. The PBGC's possible "long run loss" for the plan may increase unreasonably if the plan is not terminated (comparison of PBGC's liability risk before and after a contemplated transaction).
    3. A distribution to a substantial owner occurred that caused the plan to become underfunded.

If PBGC Determines that Involuntary Termination is Warranted

- PBGC enters into an agreement with the plan administrator to:
    1. Terminate the plan on a proposed termination date
    2. Appoint PBGC as trustee of the plan
    3. Avoid litigation over termination

Involuntary Termination by PBGC (cont'd)

If Plan Administrator Objects to Involuntary Termination

- PBGC can ask court order for termination if court finds that termination is necessary to:
    - Protect the interest of plan participants.
    - Avoid any unreasonable deterioration of the financial condition of the plan.
    - Avoid any unreasonable increase in the PBGC's liability.
- Involuntary termination can proceed <u>even if</u> the plan sponsor has an obligation to continue the plan under a collective bargaining agreement.

PBGC's Early Warning Screening of Underfunded Plans

- Plans with bond rating below investment grade and current liability exceeding $25 million.
- Plans with current liability exceeding $25 million and unfunded current liability exceeding $5 million.

Involuntary Termination by PBGC (cont'd)

Transactions that May Increases PBGC's Risk of Loss

- Breaking up a controlled group (e.g., spin-off of a subsidiary)
- Leveraged buyout
- Transfer of significantly underfunded pension liabilities in a sale of a business

PBGC's Negotiating Leverage

- PBGC could negotiate with plan sponsor to secure payment protection (e.g., letters of credit, guarantees) instead of terminating plan.

Proceeding with Involuntary Termination

- PBGC and plan sponsor can set a termination date by agreement
- If parties do not agree, PBGC moves for a termination date to be set by court (following actual or constructive notice to plan participants via publication)

Distress Termination by Plan Sponsor

- ERISA permits a pension plan sponsor (employer) to voluntarily terminate an underfunded tax-qualified pension plan pursuant to the requirements set forth in 29 U.S.C. § 1341(c) for "distress termination" of the pension plan.
- "If an employer wishes to terminate a plan whose assets are insufficient to pay all benefits, the employer must demonstrate that it is in financial 'distress' as defined in 29 U.S.C. § 1341(c)." *PBGC v. LTV Corp.*, 496 U.S. 633, 639 (1990).
- A plan sponsor can terminate a pension plan if it (and each of its controlled group members) can satisfy one of the following 4 distress termination tests:

Reorganization Test

There is a petition seeking entity's reorganization and court determines absent plan termination, entity will be unable to (i) pay its debts via a plan and (ii) continue its business outside bankruptcy.

Liquidation Test

Entity had filed or filed against it a petition seeking liquidation and the case has not been dismissed.

Business Continuation Test

The entity demonstrates to the satisfaction of the PBGC that, unless a distress termination occurs, such entity will be unable to pay its debts when due and will be unable to operate.

Pension Costs Test

The entity demonstrates to the satisfaction of the PBGC that the costs of providing pension coverage have become unreasonable burdensome.

Distress Termination by Plan Sponsor (cont'd)

Reorganization Test

- Plan sponsor must be reorganizing in a bankruptcy or other insolvency proceeding.
- Court must find that, absent plan termination, plan sponsor will be unable to (i) pay its debts under a plan of reorganization and (ii) continue its business outside chapter 11 (i.e., successfully emerge from bankruptcy).
- The reorganization distress test has generally been construed as a "but for" test: after all constituencies have made meaningful sacrifices and the debtor has explored all reasonable alternatives, the debtor would be able to reorganize ***but for*** pension funding requirements. *In re US Airways Group, Inc.*, 296 B.R. 734 (Bankr. E.D. Va. 2003).
  - Under this standard, the court must go beyond evaluating the proposed reorganization plan to determine whether the pension plan is unaffordable under any feasible reorganization plan. *In re Resol Mfg. Co., Inc.*, 110 B.R. 858 (Bankr. N.D. Ill. 1990).
- Among the factors taken into account are whether the debtor has considered funding waivers, benefit freezes and other measures to reduce pension costs, trimmed other fixed costs, and properly identified discretionary spending.
  - As part of the analysis, the court will consider the treatment of the pension plan vis-à-vis other obligations of the plan sponsor.

Distress Termination by Plan Sponsor (cont'd)

Reorganization Test (cont'd)

- Court is unlikely to allow a plan termination if there is no "sharing of the pain" with other creditors.
  - Consistent with this standard, courts have focused on whether the debtor could secure exit financing and submit a confirmable plan of reorganization without termination. It is very helpful in achieving a plan termination if the debtor's funding requires such termination.
    - *In Re US Airways Group, Inc.*, 303 B.R. 784 (E.D. Va. 2003) (court found that unless the pilots' pension plan was terminated, the debtors would be unable to pay all of their debts pursuant to a plan of reorganization and would be unable to continue their business outside the chapter 11 reorganization process).
    - *PBGC v. Falcon Prods., Inc.*, 497 F.3d 838 (8th Cir. 2007) (affirming termination where exit investor was unwilling to fund emergence with pensions intact).
    - *Harry & David Holdings, Inc.*, Case No. 11-10884 (Bankr. D. Del. 2011) (commitment from unsecured note holders to provide financing and equitize claims contingent on pension termination).
- Pension plan termination standard is governed by ERISA (not Bankruptcy Code section 365)
  - Standard for rejection under section 365 (business judgment) does not apply to pension plan termination.

Distress Termination by Plan Sponsor (cont'd)

Liquidation Test

- Debtor can seek liquidation under the Bankruptcy Code in one of the following two ways:
  - Debtor can file a petition for Chapter 7 liquidation, or
  - Debtor can file a petition for Chapter 11 liquidation as follows:
    - Debtor seeks to sell all or substantially all of its assets pursuant to a Section 363 Sale, and then
    - Debtor proposes a liquidating plan to resolve all claims and dispose of all remaining assets.
    - No further findings are required by the court.
- Debtor can also seek liquidation under applicable state law.

Distress Termination by Plan Sponsor (cont'd)

Business Continuation Test

- The plan sponsor must demonstrate to the PBGC that, unless a distress termination occurs, the company cannot:
  1. Pay its debts when due, and
  2. Continue in business outside of bankruptcy.
- Analogous to Reorganization Distress Test, except that determination is made by PBGC, not bankruptcy court.

Pension Cost Test

- The plan sponsor must demonstrate to the PBGC's satisfaction that the cost of providing pension benefits has become unreasonably burdensome solely as a result of declining covered employment.

Process to Effect Distress Termination

1. **Notice of Intent to Terminate**: Plan administrator provides a Notice of Intent to Terminate to each affected party, including the PBGC on PBGC Form 600 and a separate notice to all plan participants (and unions, if applicable) at least 60 days and no more than 90 days before the proposed termination date. No further distributions of assets can be made.

2. **Termination Notice** : Plan administrator files a distress termination notice with the PBGC on PBGC Form 601 on or before the 120th day after the proposed termination date.

3. **PBGC Assesses Whether Criteria Have Been Met**: PBGC (or bankruptcy court, if applicable) determines whether the contributing sponsor satisfies the necessary criteria for distress termination.

Process to Effect Distress Termination (cont'd)

4. **PBGC Compliance Determination**: PBGC issues a tentative determination of compliance.

5. **Distribution Notice by PBGC**: PBGC issues a distribution notice indicating whether, upon review of all information submitted, the plan is sufficient for at least all PBGC-guaranteed benefits.

6. **Plan Wind-Up**: A few administrative steps relating to wind-up of the plan, including providing notices to participants and to the PBGC. PBGC and plan sponsor enter into agreement setting proposed termination date and appointing PBGC as trustee.

** PBGC cannot proceed with distress termination if the termination is challenged under an existing collective bargaining agreement, until such challenge is resolved.*

Consequences of a Distress Termination: PBGC Guarantee

- PBGC only guarantees benefits up to specified levels.
- The guarantee applies only to the extent the terminated plan's assets are insufficient to pay the guaranteed level of benefits (which would almost certainly be the case for the Plan because of the PBGC's conservative actuarial assumptions).
  - The current guarantee for a participant in a plan terminated in 2015 and who commences benefits at age 65 is a monthly annuity payment of $5,011.36.
  - The guarantee is reduced to a monthly benefit of $2,255.11 for a participant who commences benefits at age 55.
- The guarantee is not adjusted for inflation in future years.
- Lump sum distributions generally are not available after plan termination (except for benefits of $5,000 or less).
- Distress termination of the Plan may significantly reduce benefits to some participants, most typically higher-paid current and former employees.
  - The benefits of lower-paid employees are often unaffected.

PBGC Claims: Source and Priority*

Source of PBGC Claims

- Missed minimum required contributions
- PBGC premiums
- Unfunded benefit plan liabilities

Secured Claims

- Lien arises when missed required contributions exceed $1 million or upon plan termination.
- Most courts have held that the PBGC's lien must be perfected prepetition.
- After the bankruptcy petition is filed, the automatic stay prevents the PBGC from obtaining a lien.

Unsecured Claims

- Administrative Expense Claims: For portion of claims attributable to post-petition services.
- Priority Unsecured Claims: For portion attributable to services performed within 180 days of petition date, subject to $12,475 cap per participant.
- General Unsecured Claims ("GUCs"): Remainder of claim.

** Priority depends on multiple factors (e.g., claim type, when the claim arose, lien perfection). If the PGBC claim is not secured, as a general rule, pension benefits earned prepetition are GUCs while those earned postpetition are entitled to administrative expense priority.*

Amount of PBGC Post-Termination Claims

Calculating the PBGC Claim

- Subtract value of plan assets from present value (PV) of total benefit liabilities. All unfunded benefit liabilities are included in the PBGC's claim (not just benefits guaranteed by the PBGC).
- Discount rate used to calculate PV of claim is not based on reported GAAP liability, but by administrative proceeding (essentially U.S. Treasury rate).
- Most cases decided in the last decade have applied the lower, more conservative discount rate used by the PBGC in its calculations, which has the effect of inflating the PBGC's claim. Some less recent cases used the "prudent investor rate," which is a higher discount rate and results in a reduced claim for the PBGC.
- Dilutive effect of plan termination is highly sensitive to assumptions regarding discount and investment rates.

Calculating the PBGC Lien

- Lien upon termination equal to lesser of: (i) the unfunded benefit liabilities or (ii) 30% of the net worth of plan sponsor and controlled group members.
- Lien unlikely if company files for bankruptcy and automatic stay precludes fixing lien.

** The bulk of the underfunding owed to the PBGC generally is a general unsecured claim in bankruptcy (subject to the controlled group issue noted below). Thus, the PBGC usually is the largest unsecured creditor by a wide margin when there is a distress termination of a pension plan.*

Termination Premium

Pension Protection Act of 2006

- The Pension Protection Act of 2006 established the termination premium payable by companies that terminate their underfunded pension plans in or out of bankruptcy.

Premium Amount

- Premium is $1,250 per plan participant per year for 3 consecutive years.

Premium Payment

- Where the plan sponsor is a reorganizing debtor under Chapter 11 of the Bankruptcy Code and terminates the pension plan during the pendency of its bankruptcy case, the termination premium does not become due and payable until 1 month after dismissal or emergence from bankruptcy and discharge. 29 U.S.C. § 1306(a)(7)(B), (C).
- Termination premium is not a "claim" in the debtor's bankruptcy case and is therefore not discharged by operation of the debtor's plan.
  - The Second Circuit held that the termination premium is a post-emergence obligation which gets paid dollar for dollar. *PBGC v. Oneida, Ltd.*, 562 F.3d 154 (2d Cir. 2009).
  - A bankruptcy court in Nevada held that the termination premium does not arise unless there is a discharge or dismissal (i.e., no plan of liquidation). *In re USA Commercial Mortgage Co.*, Case No. BK-S-06-1-725 (Bankr. D. Nev. July 18, 2008).

Controlled Group Liability

“Controlled Group”

- Under ERISA, all members of a “controlled group” are jointly and severally liable for minimum funding and for termination liability.

  → any parent or subsidiary that is a “trade or business” and that sits in an 80% or greater ownership chain.

- As a result, parent and subsidiary companies (debtor or nondebtor, foreign or domestic) often are required to accept responsibility for pension costs in the context of a Chapter 11 case.

- If a plan is terminated, the entire underfunding (determined using conservative PBGC actuarial assumptions that inflate the figure) is a joint and several liability of the plan sponsor and its “controlled group” (in general, 80%-related entities).
  - If any controlled group members are not part of the bankruptcy filing, the PBGC can seek to collect from those non-bankrupt controlled group members.
  - The controlled group rules apply even to non-U.S. entities.
    - PBGC often threatens to go after the assets of those entities, but we are not aware of any situation where it has succeeded.

Controlled Group Liability (cont’d)

PBGC Advisory Letter – 2007

- On September 26, 2007, the PBGC Appeals Board issued an opinion that a private equity fund was a member of the “controlled group” of a portfolio company plan sponsor.
- It also ruled that certain “brother-sister” companies with a private equity fund as the common parent are members of the controlled group.
- The PBGC ruling has not been tested in court.

Controlled Group Liability (cont’d)

Palladium – 2010

- Two multiemployer pension plans sought to impose ERISA liabilities against a family of private equity funds and their related management company.
- Plaintiffs relied on PBGC’s 2007 Advisory Letter and its determination that a private equity fund could be held liable for underfunded liabilities of a pension plan sponsored by one of its portfolio companies.
- District Court denied the motion for summary judgment and did not rule on the merits.

Sheet Metal Workers’ National Pension Fund v. Palladium Equity Partners, LLC,
722 F. Supp. 2d 854 (E.D. Mich. 2010)

Controlled Group Liability (cont'd)

Sun Capital – 2012 (District Court)

- Two different Sun Capital Advisors, Inc. funds acquired Scott Brass, Inc. (brass and copper coil manufacturer).
- Scott Brass withdrew from a multi-employer pension plan and filed for bankruptcy.
- The pension plan pursued the Sun funds as jointly and severally liable for the withdrawal liability, asserting that the Sun funds split their investment in Scott Brass to "evade and avoid" withdrawal liability.
- District Court held:
  - Sun funds were not a "trade or business" but passive investors
  - Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") "evade and avoid" provision meant for employers, not investors

Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund, 903 F. Supp. 2d 107 (D. Mass. 2012)

Controlled Group Liability (cont'd)

Sun Capital – 2013 (First Circuit)

- First Circuit applied "investment plus" test to determine whether a private equity fund or investor is a "trade or business"
  - One of the Sun Funds was a "trade or business" because it was actively involved in the management and operation of the companies in which it invests and derived a direct economic benefit.
- First appellate court to address whether an equity sponsor is a "trade or business" to assess ERISA withdrawal liability.
- Reversed summary judgment in favor of Sun funds and remanded to district court to decide "common control" issue.

Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund, 724 F.3d 129 (1st Cir. 2013)

Director and Officer Liability for Plan Termination

- ERISA generally provides that the pension plan termination liability is limited to the employer and the members of its controlled group.
- Courts have allowed claims against officers and directors in the employee benefit plan context only in situations where "piercing the corporate veil" is appropriate (*e.g.*, the corporation did not follow corporate formalities and the corporation essentially was the alter ego of an individual). *Sasso v. Cervoni*, 985 F.2d 49 (2d Cir. 1993); *Scarbrough v. Perez*, 870 F.2d 1079 (6th Cir. 1989).
- Because plan termination is a "settlor" function, it is not subject to ERISA's fiduciary rules that require plan fiduciaries to act solely in the interests of plan participants. Department of Labor Advisory Opinion 2001-01A; *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988).
- In bankruptcy:
  - The automatic stay can shield the debtor's key employees, officers, and directors from an ERISA suit.
  - Debtors often seek releases and other exculpatory provisions in a plan of reorganization that would protect the debtor's key employees, officers, and directors from an ERISA suit.

Successor Liability for Buyer in Section 363 Sale

- Section 363 of the Bankruptcy Code authorizes a company to sell its assets free and clear of most liens, claims, and interests.
- Section 363 sales may be completed free and clear of liabilities for underfunded pension plans, so that a buyer can acquire assets without assuming any claims asserted by participants or the PBGC.

- The Delaware bankruptcy courts have approved numerous sales free and clear of pension plan claims.
  - The Third Circuit in *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003), affirmed a 363 sale free and clear of successor liability for employment and sex discrimination claims.
  - The Delaware bankruptcy court recently followed *Trans World Airlines* and approved a 363 sale free and clear of the debtor's withdrawal liability for withdrawing from a multiemployer pension plan. *In re Ormet Corp.*, 2014 WL 3542133 (Bankr. D. Del. July 17, 2014).

Successor Liability for Buyer in Section 363 Sale (cont'd)

- In *Ormet*, the Steelworks Pension Trust (the "Trust") objected to the debtor's attempt, pursuant to Section 363 of the Bankruptcy Code, to sell its assets free and clear of the Trust's successor liability claims for underfunding of the pension plan, claiming that successor liability claims under ERISA and MPPAA should not be vitiated by Section 363 of the Bankruptcy Code.

- Relying upon *In re Trans World Airlines*, 322 F. 3d 283 (3d Cir. 2003), *In re Leckie Smokeless Coal Co.*, 99 F. 3d 573 (4th Cir. 1996), and certain other precedent from the Third Circuit Court of Appeals, the Bankruptcy Court overruled the Trust's objection and approved the Section 363 sale free and clear of the pension claims.

Successor Liability for Buyer in Section 363 Sale (cont'd)

- Thus, if a debtor's assets are sold pursuant to Section 363 of the Bankruptcy Code, the buyer almost certainly will not be bound by the pension obligations following the closing of the Section 363 sale.
  - Following the sale, the Plan would be terminated as part of the liquidation of the estate and its obligations would be assumed by the PBGC.
  - A buyer in a Section 363 sale should not have successor liability for any PBGC claims against the debtor, including the termination premium.

- In a liquidating bankruptcy, the standard for a distress termination is deemed to be automatically met and the termination premium would not become due.

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