Pension Benefit Guaranty Corporation

94-6

September 28, 1994

REFERENCE:
[*1] 4007(a) Payment of Premiums. Due Dates
>4007(e)>
>29 CFR 2610.26(b)>
>29 CFR 2617.28(b)>

OPINION:

You have requested an opinion from the Pension Benefit Guaranty Corporation ("PBGC") on whether an individual who acted as plan administrator is personally liable to PBGC for premiums when the plan sponsor has ceased operations, gone bankrupt, and been liquidated. You also ask that we identify the parties from whom PBGC will seek payment of premiums, penalties, and interest under these circumstances.

According to the hypothetical posed in your letters, in 1984 Company X ceased operations, filed for bankruptcy, and was liquidated. Company X was the plan sponsor of a tax-qualified defined benefit pension plan (the "Plan"). The Plan was substantially overfunded. Company X's bankruptcy trustee did not terminate the Plan. However, an individual appointed by Company X prior to the bankruptcy as plan administrator of the Plan (whom you referred to as "A") terminated the Plan and completed the distribution of the Plan's assets, less a reserve for the Plan's contingent liabilities, by December 31, 1990. You state, and we assume solely for purposes of this opinion, that the Plan was terminated [*2] in a standard termination, pursuant to section 4041(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1341(b) (1988 and Supp. IV 1992).

A dispute arose over whether A continued as plan administrator after Company X was liquidated. You state that at the time Company X ceased operations and at all times thereafter A acted as plan administrator, and that A "assumed . . . responsibility" in 1989 "in order to terminate [the Plan]." For purposes of Title IV of ERISA, the term 'plan administrator' means either the person specifically designated as such by the plan document, or the plan sponsor if no such designation is made. ERISA § § 3(16)(A), 4001(a)(1), 29 U.S.C. § § 1002(16), 1301(a)(1). You do not state whether A was appointed pursuant to the Plan document, or whether the Plan document defines the term "plan administrator." For purposes of this opinion, however, we will assume that A was the plan administrator as that term is defined in ERISA.

For plan years beginning before January 1, 1988, section 4007(a) of ERISA, 29 U.S.C. § 1307(a) (1982), stated that the "plan administrator of each plan shall pay the premiums imposed by the [*3] corporation under this title with respect to the plan as they become due." For plan years beginning on or after January 1, 1988, section 4007(a) of ERISA, 29 U.S.C. § 1307(a) states, "The designated payor of each plan shall pay the premiums imposed by the corporation under this title with respect to that plan when they are due." n1

n1 Section 4007 of ERISA was amended by section 9331(c) of the Omnibus Budget Reconciliation Act of 1987 ("OBRA"), Pub. L. 100-203, 101 Stat. 1330, 1330-368 (1987). The effective date was established by section 9331(f) of OBRA, 101 Stat. 1330, 1330-369 (1987).

For a single-employer pension plan, the term "designated payor" means the contributing sponsor or plan administrator. ERISA § 4007(e)(1)(A), 29 U.S.C. § 1307(e)(1)(A). Moreover, each member of the contributing sponsor's controlled group is jointly and severally liable for premiums. ERISA § 4007(e)(2), 29 U.S.C. § 1307(e)(2); 29 C.F.R. § 2610.26 (1993). Any entity that is liable for required premiums is also liable for any interest and penalties assessed with respect to such premiums. 29 C.F.R. § 2610.26(a).

Although the plan administrator has the duty of ensuring that premiums are [*4] paid, the payments, along with penalties and interest, may generally be paid from plan assets. n2 The conference committee report accompanying ERISA makes this clear. "The plan is to be liable for both the premiums for coverage of benefits and for any penalty assessed for failure to pay premiums. Besides the penalty, the [PBGC] may also charge interest for unpaid premiums that are past due." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 365 (1974), reprinted. in 1974 U.S.C.C.A.N. 5038, 5145.

n2 However, for single-employer post-1987 plan years, premiums (and any related interest and penalties) may not be paid from plan assets for any plan year beginning with the plan year in which a distress or involuntary termination is initiated. 29 C.F.R. § 2610.26(b).

If a plan is terminated in a standard termination, PBGC has advised that "[d]istribution of a plan's benefit liabilities in a standard termination without taking into account the plan's premium obligation may result in the invalidation of the standard termination or a civil action by the PBGC against the plan administrator in his or her personal capacity." 57 Fed. Reg. 59206, 59214 (Dec. 14, 1992). Premiums continue to accrue [*5] until a plan's assets are distributed in a termination procedure or until a trustee is appointed pursuant to section 4042 of ERISA, whichever is earlier. ERISA § 4007(a), 29 U.S.C. § 1307(a). In a standard termination, liability for PBGC premiums for all plan years through and including the plan year in which assets are distributed is a liability that must be taken into account in determining whether plan assets are sufficient to satisfy all benefit liabilities. 29 C.F.R. § 2617.28(b).

Although this regulation was not in effect when the Plan was terminated, the regulation that was then in effect required the plan administrator to determine the plan's sufficiency for benefit liabilities by reducing the estimated value of plan assets "by the amount (estimated, when necessary) of all expenses, fees, and other liabilities (including benefit payments due before the date the plan administrator proposes to distribute the assets) that the plan has incurred or will incur prior to the proposed date of distribution." 29 C.F.R. § 2617.13(a) (1990). The Plan's liability for premiums, penalties, and interest was plainly a liability that must be taken into account under this regulation.

Under [*6] the facts of your hypothetical, if the remaining Plan assets, i.e., the reserve, are sufficient to cover the outstanding liability for premiums, interest and penalties, PBGC will look to those assets. However, if the remaining assets are insufficient and the plan administrator disregarded the premium liability in determining whether the statutory requirements for a standard termination had been met, the administrator would be subject to personal liability.

I hope this has been helpful to you. If you have any further questions, please contact Ralph Landy of my staff at (202) 326-4127.

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