

Cornell University ILR School Labor and  
Employment Program

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*Bankruptcy, Unions, the PBGC, and  
Multiemployer Plans*

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Richard M. Seltzer, Cohen, Weiss and Simon LLP

# BANKRUPTCY

# Introduction

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- Labor unions and the PBGC have variously been allies and adversaries since the enactment of ERISA
- These varying positions reflect: (1) the tension inherent in PBGC's role as both an insurance entity with concerns about its own finances and a government entity charged with protecting plan participants, and (2) union goals of preserving employers as viable operating (and employing) entities and protecting the pension and health benefits of active employees and retirees

# Participation in the Bankruptcy Process

- Unions and the PBGC often sit together as the only “non-traditional” creditors on creditors’ committees,
  - The PBGC pursuant to specific statutory authority (11 U.S.C. §§ 101(41) (defining “persons” to include governmental units like PBGC that guarantee pension benefits for purposes of Section 1102), 1102(b)(1) (providing that creditors’ committees shall consist of persons))
  - labor unions pursuant to consistent and authoritative precedent interpreting the definition of creditor (*In re Altair Airlines*, 727 F.2d 88, 90 (3d Cir. 1984); *Matter of Enduro Stainless, Inc.*, 59 B.R. 603, 605 (Bankr. N.D. Ohio 1986); *In re Ne. Dairy Coop. Fed’n., Inc.*, 59 B.R. 531 (Bankr. N.D.N.Y. 1986)).

# Participation in the Bankruptcy Process

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- Over time, potential committee professionals have recognized the increasing participation of the PBGC and labor unions on creditors' committees.
- PBGC and unions are often the only members of the committee who have their own financial advisors who participate in committee discussions and deliberations.
- Labor unions and the PBGC may have a common approach to executive compensation issues that is different from other committee members.

# Participation in the Bankruptcy Process

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- In some cases, unions and the PBGC have united to successfully oppose ill-conceived attempts to seek termination of single-employer plans
- Varying views of unions and the PBGC on potential plans of reorganization and Section 363 sales are influenced by the treatment of employees, collective bargaining agreements, pension plans, retiree benefits, and the viability of the surviving or purchasing entity.

# Termination of Single-Employer DB Plans

- Unions and the PBGC have clashed over the termination of plans, what the appropriate termination date should be if the plans are terminated (before enactment of PPA), and the appropriate priority and calculation of the PBGC's termination claim.
  - Termination Decision: *See, e.g., In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197 (2d Cir. 1987) (union unsuccessfully opposed involuntary termination); *In re Pan Am. World Airways, Inc. Co-op Retirement Income Plan*, 777 F. Supp. 1179 (S.D.N.Y. 1991), *aff'd mem*, 970 F.2d 896 (2d Cir. 1992) (involuntary termination upheld against challenge by various unions)

# Termination of Single-Employer DB Plans

- Termination date: *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d444 (7<sup>th</sup> Cir. 2006) (PBGC's proposed termination date upheld against challenge by unions); *PBGC v. Republic Tech. Int'l, LLC*, 386 F.3d 659 (6th Cir. 2004) (termination date chosen by PBGC upheld against challenge by intervenor USW)
- Settlement Agreements Between Employer and PBGC: *Air Line Pilots Ass'n Int'l v. PBGC*, 334 F.3d 93 (D.C. Cir. 2003) (court upheld termination undertaken pursuant to settlement agreement against challenge by union; *Association of Flight Attendants-CWA, AFL-CIO v. PBGC*, 2006 WL 89829 (D.D.C. Jan. 13, 2006) (termination upheld against challenge by union without reference to settlement agreement)



# Termination of Single-Employer DB Plans

- Unions (and/or employers) generally have prevailed in litigation over the priority of the PBGC's plan termination claims (*see e.g., In re CF&I Fabricators of Utah, Inc. et al.*, 150 F. 3d 1293 (10th Cir.1998)), with mixed results in litigation on the calculation of that claim (*Compare C, F & I, supra, with In re US Airways Group, Inc.*, 303 B.R. 784 (Bankr. E.D. Va. 2003))

# Current Litigation of Interest Relating to Termination of Single-Employer Plans

*PBGC v. Saint-Gobain Corporation Benefits Committee*, No. 2:13-cv-02069-MAM (E.D. Pa.)

- PBGC seeks termination of single employer plan with over 12,000 participants based on proposed sale of sponsor's stock in what PBGC regards as "highly leveraged" transaction from "investment-grade" controlled group, thereby "increasing unreasonably the possible long-run loss of PBGC with respect to the Pension Plan."
  - Two unions intervene to oppose termination
  - Court issues decision on preliminary issue holding that determination by court on issue of termination is made *de novo* rather than pursuant to arbitrary and capricious standard. *PBGC v. Saint-Gobain Corp. Benefits Committee*, 2013 WL 5525693 (E.D.Pa. Oct. 4, 2013).

# New PBGC and Multiemployer Plan Claims and Leverage in Relation to Plan Termination/Withdrawal in Bankruptcy

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- 29 U.S.C. §1306(a)(7)(A) provides for an additional premium of \$1,250 per participant in the terminated plan for three years following a termination, effective for a termination occurring during a Chapter 11 at the time of discharge or dismissal
  - In *PBGC v. Oneida Ltd.*, 562 F.3d 154 (2d Cir. 2009), the Second Circuit held that the obligation was not a dischargeable pre-petition claim.
- In *In re Marcal Paper Mills, Inc.*, 650 F.3d 311 (3d Cir. 2011), the Third Circuit held that a multiemployer fund's claim for withdrawal liability based on a withdrawal during a Chapter 11 case is entitled to administrative expense to the extent attributable to the post-petition employee services.

# MULTIEMPLOYER PLANS

# The PBGC's Use of Partition to Save Multi-Employer Plans

- In early 2014, PBGC, for only the third time in its history, used its partition authority pursuant to 29 U.S.C. § 1413 to pay retirement benefits for nearly 350 former Hostess Brands employees who were members of the Bakery and Sales Drivers Local 33 Industry Pension Fund, a distressed multiemployer plan in Baltimore; such action enabled the plan to avoid insolvency and preserve pension benefits for most of the plan's 700 participants.  
[http://www.pbgc.gov/news/press/releases/pr14-02.html?source=govdelivery&utm\\_medium=email&utm\\_source=govdelivery](http://www.pbgc.gov/news/press/releases/pr14-02.html?source=govdelivery&utm_medium=email&utm_source=govdelivery)

# The PBGC's Use of Partition to Save Multi-Employer Plans

- “According to [PBGC Director] Gotbaum, aside from more financial resources, the agency could help more plans if the statute for partition ability was amended. There are three hurdles to meet to be partitioned—one is the liability must be related to an actual bankruptcy. The PBGC can only use its authority if an employer withdrew from the plan because it filed Chapter 11 bankruptcy. ‘If Congress could redefine that into a broader category, we could use our partition authority more effectively,’ he said. ‘If an employer withdraws because it liquidated, we can’t help. If it withdrew due to a geography change, we can’t help.’”<http://www.planadviser.com/NewsArticle.aspx?id=10737422257&p=2>

# The Use of New Employer Pools (Hybrid Withdrawal Liability)

- Earlier in the *Hostess* bankruptcy, the Teamsters Negotiating Committee had proposed in response to Section 1113 proposals that the debtors withdraw from all multiemployer plans (resulting in withdrawal liability being assessed during the bankruptcy), and the reorganized company then participate in new employer pools at those funds, which had already been authorized by many of the relevant major multiemployer funds and approved by the PBGC.

# Potential Legislative Proposals – Is there a Solution Until the Crisis is Upon Us (if then)?

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- Potential race to insolvency between PBGC and certain multiemployer funds like Central States
- Tightened funding obligations under the PPA exacerbate the funding crisis - and possible insolvency - for some plans
- Legislation proposed in 2010 that would have provided for “qualified partitions” (transfer to PBGC of certain plan assets and liabilities related to failed employers) did not advance
- National Coordinating Committee for Multiemployer Plans (NCCMP) Proposal would authorize plan trustees to partially suspend accrued benefit payments (generally to 110 % of PBGC guarantee) generate differing reactions from unions and raise major institutional and policy concerns [http://webiva-downton.s3.amazonaws.com/71/59/b/39/1/Solutions\\_Not\\_Bailouts.pdf](http://webiva-downton.s3.amazonaws.com/71/59/b/39/1/Solutions_Not_Bailouts.pdf)



# Potential Legislative Proposals – Is there a Solution Until the Crisis is Upon Us (if then)?

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- The AARP, with support of some unions, opposes many of the NCCMP proposals, emphasizing that “[i]f ERISA stands for anything, it stands for the proposition that already accrued benefits cannot be reduced” and that “other alternatives should be fully explored and deployed as an alternative to cutting *anyone’s* accrued benefits.”
  - Alternatives suggested include affirming PBGC’s authority to facilitate plan mergers and alliances, increased use of partitions, and increased funding for the Plans and PBGC, including through loans and increased premiums

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101432>