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Defined Benefit Plans

Eleventh Circuit Rules Bankruptcy Trustee Has No ERISA Claim for Pension Liability

The liquidation trustee of a contributing sponsor to a terminated pension plan can't bring an action under Section 4069 of the Employee Retirement Income Security Act for the benefit of the bankruptcy estate and its unsecured creditors to impose liability on the previous owner of the corporation or that owner's controlled group members, according to the U.S. Court of Appeals for the Eleventh Circuit (*Durango-Ga. Paper Co. v. H.G. Estate, LLC*, 11th Cir., No. 11-15079, 1/7/14).

Judge Gerald Bard Tjoflat, writing for the court, found that the action brought by the trustee was for the benefit of the protection of the estate's unsecured creditors, not the plan beneficiaries as required by ERISA's funding provisions. As a result, the court affirmed a ruling of the U.S. District Court for the Southern District of Georgia dismissing the trustee's action against the corporation's previous owner for failure to state a claim.

The appellate court, although affirming the district court's decision, decided the appeal on the basis of "an issue that the District Court didn't decide—whether the Trustee has a cause of action under" ERISA Section 4069 against the former owners of the corporation. The court, finding that the question presented a case of first impression, found that no such cause of action exists in the statute.

Paper Company Sold. As part of the administration of the estate of Howard Gilman, H.G. Estate, a Delaware limited liability company, in January 1999 organized the Gilman Paper Co. under Georgia law and became the sole shareholder of it.

The company acquired a paper mill in St. Mary's, Ga., from Howard Gilman's family business—also known as the Gilman Paper Co.—and created a pension plan for the mill's employees and former employees. The mill employees previously had a pension plan under Gilman's family company that was established in 1965. That plan was merged into the plan set up by the H.G. Estate-controlled company.

H.G. Estate formed a controlled group of companies with the Howard Gilman Foundation, Gilman Converting Corporation and Gilman Converting LLC. As a result of this corporate structure, all four entities were jointly and severally liable for funding the mill's pension plan and for paying insurance premiums to the Pension Benefit Guaranty Corporation under ERISA funding provisions.

In December 1999, H.G. Estate sold its shares of Gilman Paper and the two converting entities to Durango Paper Co. As a result, Durango Paper and its parent company, Corporación Durango, assumed the controlled group positions of H.G. Estate and the Howard Gilman Foundation. Along with those positions, they also assumed the liability for funding the pension plan and paying premiums to the PBGC.

Bankruptcy Proceeding. In July 2002, Durango-Gorgia Paper Co., the new, post-sale name of the company, decided to close the mill and in September of that year the mill ceased production. By the end of October 2002, the mill was closed and nearly all of the employees had been laid off. On Oct. 29, 2002, the paper company's creditors successfully forced the company into a Chapter 7 bankruptcy proceeding. In November, the paper company was able to convert that case into a Chapter 11 reorganization proceeding.

In June 2004, the U.S. Bankruptcy Court for the Southern District of Georgia approved a liquidation plan for all controlled group entities. The court appointed a liquidation trustee who began to administer the estate.

While this action was pending, in June 2005, the PBGC filed an action against the paper company to terminate the pension plan under ERISA Section 4042. All parties agreed to the termination and, on Oct. 31, 2006, the plan was terminated as of March 1, 2004, and the PBGC was named as its trustee. As a result, the controlled group members became liable to the PBGC for the unpaid benefit liabilities of the pension plan under ERISA Section 4062.

The PBGC filed a claim in the Chapter 11 case for termination liability of \$55 million dollars, the full amount of pension liability, both insured and uninsured.

District Court Action. The trustee then filed suit against the prior owners of the company, including H.G. Estate, in district court in August 2010, alleging that those entities were jointly and severally liable as members of the former controlled group with the bankruptcy estate under ERISA Section 4069.

The trustee claimed that H.G. Estate had sold the paper company to Durango "with a principal purpose of evading the liability that would have been imposed against it and the members of the former controlled group" by the PBGC terminating the pension plan. The trustee requested "judgment in equity for indemnification, exoneration, or contribution" for the amount claimed by PBGC in the bankruptcy case.

H.G. Estate filed a motion to dismiss the claims as not stating a claim for relief. The district court granted that motion, finding that the trustee's claim was for a money

judgment and not an equitable claim as required by Section 4069. The trustee filed an appeal to the Eleventh Circuit.

Appellate Decision. For the purposes of deciding the appeal, the appellate court accepted the trustee's contention that H.G. Estate used the sale as a method to evade its pension liabilities. However, the court found that the joint and several liability contained in 4069 doesn't run to Durango and its bankruptcy estate, but instead to "the pension plan's beneficiaries and the PBGC."

The court acknowledged that the trustee during oral argument claimed that it brought the case for the benefit of the PBGC. Additionally, the court said that on appeal the trustee "attempt[ed] to reframe its complaint" as either a request for a declaratory judgment "that would presumably enable the PBGC to collect the termination liability from H.G. Estate directly" or a judgment that "would designate the Trustee, on behalf of and for the benefit of the PBGC, as the judgment creditor."

However, the court found that the original complaint before the district court sought to hold H.G. Estate liable to the bankruptcy estate "for their own protection benefit" and specifically not for the benefit of the PBGC.

The PBGC filed an amicus curiae brief with the appellate court in which it agreed with the trustee that Section 4069 of ERISA allowed an action for equitable relief brought by the trustee. However, the agency insisted in the brief that any monetary recovery as a result of such an action was directly payable only to the PBGC.

The appellate court looked at the legislative history of ERISA and found that the duty of a former owner or controlled group member under Section 4069 was owed to the plan beneficiaries and not to the employer as contributing sponsor. The court found that the PBGC had six years after the termination of the plan to bring an action against H.G. Estate for evasion and that it declined to do so. The court ruled that the trustee can't now bring a complaint against H.G. Estate for money damages to protect the bankruptcy estate against the PBGC's claim.

Reaction. "Pension evasion cases are notoriously difficult to pursue" Harold Ashner, former PBGC assistant general counsel for legislation and regulations and a partner in Keightley & Ashner LLP, a firm that focuses on PBGC matters but which was not involved in the litigation, told Bloomberg BNA on Jan. 8.

"They are very fact-specific and ultimately focus on intent, with evidence of intent hard to find in many cases."

Ashner's firm partner, Jim Keightley, former PBGC general counsel, agreed.

"Throughout its history," he said, "PBGC has brought relatively few pension evasion cases. A bankruptcy trustee would have to think twice before bringing such an action."

Ward Stone Jr., a partner at Stone & Baxter LLP and counsel for the trustee, told Bloomberg BNA on Jan. 8,

"The court recognized the potential for recovery of a termination liability from a former control group of a company which is sold where 'a principal purpose' of the former control group's sale of the business, including its pension plan, is to evade a potential termination liability, and the pension plan subsequently terminates within two years of the transfer. However, the Court seems to restrict the right to bring the action to plan beneficiaries and the PBGC."

Stone said that "The court failed to address whether a trustee in bankruptcy can bring an action under the statute for the benefit of the PBGC (an ex rel or qui tam type standing) as argued by the trustee. Therefore, the appellants will be seeking clarification of this issue. In this case, the trustee was asserting standing as the former plan sponsor under Section 4069, and not by virtue of its status as a trustee in bankruptcy."

Jeffrey B. Cohen, a partner in the Washington office of Bailey & Ehrenberg PLLC, which wasn't involved in the litigation of the case, told Bloomberg BNA on Jan. 7 that he was also concerned about one aspect of the court's decision.

"I'm a little troubled by the suggestion that such liability flows to the participants or to PBGC, as I think the correct answer is that the liability is only to PBGC. Section 4069 says that the liable party under that section is liable under Title IV 'as if' they were a member of the sponsor's controlled group as of the termination date. That's a reference to what is now ERISA Section 4062(b), which liability is only to PBGC."

Cohen continued, "Because Section 4069 was added to ERISA before the amendments of 1986 and 1987 changed the amount of the liability to PBGC from something less than all the unfunded liability (unfunded guaranteed benefits) to the total amount of the underfunding the legislative history that the court quoted about liability to the participants and to PBGC is outdated."

Counsel for H.G. Estate didn't respond to requests by Bloomberg BNA for comment.

Senior Judge Emmett Ripley Cox and District Judge J. Frederick Motz, of the U.S. District Court for the District of Maryland, sitting by designation, joined in the decision.

The trustee was represented by Stone, David L. Bury Jr. and Benjamin W. Wallace of Stone & Baxter LLP in Macon, Ga.

H.G. Estate and its controlled group partners were represented by Mark Maloney and Merritt Ellen McAlister of King & Spalding LLP in Atlanta, Jonathan Franklin Isbell of Thompson Hine in Atlanta and C. James McCallar Jr. of McCallar Law Firm in Savannah, Ga.

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