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PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY CORPORATION

*William G. Beyer**

With the “baby boomers” beginning to reach retirement age and termination of large pension plans by several well-known companies undergoing restructuring in bankruptcy, the adequacy and security of private pension plans has become a hot topic in the press, among economists, and on Capitol Hill.¹ Whenever the issue comes up, the financial well-being of the Pension Benefit Guaranty Corporation (“PBGC”) and the reliability of the pension safety net the agency provides are part of the discussion. This is not surprising given the spectacular losses experienced by the agency over the last few years. Its recently released FY 2004 Annual Report states that “record breaking claims” together with extraordinarily low interest rates and poor equity returns resulted in a year-end deficit of \$23.541 billion.² The report goes on to state that “PBGC’s best estimate of the total underfunding in plans sponsored by companies with credit ratings below investment grade and classified by PBGC as reasonably possible of termination as of September 30, 2004 was \$96 billion.”³ PBGC’s fortunes are closely tied to the outcomes in major bankruptcy cases. This article will explore the interaction of pension and bankruptcy law⁴ and recent PBGC activities and experience in the bankruptcy arena. As you might expect of a major creditor in bankruptcy cases, particularly chapter 11s, PBGC participates in many negotiated settlements to help facilitate consensual plans of reorganization in order to maximize recoveries. Nonetheless, some matters are litigated every year and this chapter will include discussion of the most important recent decisions. But first some background is in order, especially for the benefit of those who have little experience in the complex world of pension law.⁵

HISTORY AND NATURE OF THE PBGC

In 1964, the country was shocked to learn that upon the demise of the Studebaker Corporation of South Bend, Indiana, some 4,000 Studebaker

*Mr. Beyer is of counsel to the law firm of Keightley & Ashner, Washington, DC. (www.keightlevashner.com). Prior to joining the firm, he was an attorney at PBGC (1976-2004), serving as deputy general counsel from 1991 through 2004. He is also a charter fellow of the ABA American College of Employee Benefits Counsel (2000) and an adjunct professor of law at Georgetown University Law Center (Tax LL.M. Program, 1994-present).

workers had to settle for an average pension payment of about 15 percent of what they were entitled to, while 2,900 others received nothing at all.⁶ Congress took up the issue of pension security and, following 10 years of deliberation, on Labor Day in 1974, President Ford signed the Employee Retirement Income Security Act of 1974 (“ERISA”)⁷ into law. Title IV of ERISA established the nation’s pension plan termination insurance program and created the PBGC, a new federal agency to administer the program and enforce the provisions of title IV. The program insures more than 31,000 private pension plans covering more than 44 million workers and retirees.⁸

The PBGC is organized as a corporation, wholly-owned by the United States. Its board of directors is composed of the Secretaries of Labor, Treasury, and Commerce, with the Secretary of Labor serving as chairman.⁹ ERISA has provided PBGC with broad corporate and governmental powers. Among these powers, PBGC may sue and be sued in its own name and be represented by its own counsel in any court, state or federal;¹⁰ may enter into contracts;¹¹ may issue rules and regulations;¹² and may issue subpoenas in the conduct of agency investigations.¹³ The first of these, independent litigating authority up to and including the Supreme Court, together with comprehensive settlement authority,¹⁴ makes PBGC somewhat unique among government agencies.

PBGC’s headquarters are located in Washington, D.C.,¹⁵ and the plan termination insurance program is administered from that one location.¹⁶ PBGC maintains an extensive presence on the Internet, under the World Wide Web address of <http://www.pbgc.gov/>. The PBGC website contains PBGC regulations (proposed and final), forms, technical bulletins, press releases, and a search mechanism whereby an individual may determine whether an employer, having lost track of the individual, has turned over to PBGC a pension belonging to him or her.¹⁷

PBGC receives no tax revenues and its program is not backed by the full faith and credit of the United States.¹⁸ It receives its revenues exclusively from four sources:

1. Claims: PBGC files claims against an employer and its controlled group¹⁹ for liability arising as a result of termination of an underfunded pension plan²⁰ as described below.
2. Insurance Premiums: every plan administrator of a defined benefit plan, the employer sponsoring the plan or a member of its controlled group, must pay the PBGC an annual premium per participant, the amount of premium varying with the funding status of the plan.²¹

3. Trusteed Plan Assets: upon termination of an underfunded plan, PBGC becomes the plan's statutory trustee and takes over plan assets, including claims for amounts owed the plan.²²
4. Investment Income: return on investment of premiums and trustee plan assets.²³

THE PLAN TERMINATION INSURANCE PROGRAM

The plan termination insurance program established by title IV of ERISA covers most private-sector, tax qualified, defined benefit pension plans, and participation is mandatory for those plans.²⁴ A defined benefit plan, or a so-called traditional pension plan ("DB plan"), is one that promises a specific retirement benefit calculated under a formula in the plan which usually involves multiplying a percent of a participant's final or average salary times years of service with the employer or a fixed dollar amount times the number of years service. By applying the formula and the plan's vesting rules, a participant's earned benefit can be ascertained as of any point in his or her career with the employer. The employer sponsoring a DB plan must provide the funding necessary to meet the payments promised as they become due. (Funding requirements are discussed below.) Those funds are maintained in a federally-regulated spendthrift trust, and those funds do not become property of the estate upon the bankruptcy filing of the employer sponsoring the plan.²⁵

The other type of retirement plan, the defined contribution plan or individual account plan ("DC plan"), is characterized by separate accounts for each participant into which the participant and perhaps the employer deposit funds. Included among these plans are the familiar 401(k) plan and Individual Retirement Account. The participant's account typically has advantageous tax treatment until the participant draws on it on retirement. The principal distinction between DC and DB plans is that there is no benefit promise in a DC plan. The benefit will be whatever the account can provide at retirement. Hence there is no promise to guarantee and the title IV program does not cover them.²⁶ Another major distinction between the two types of plan is that the employer bears the risk that its contributions together with the trust fund's investment and actuarial experience will cover promised benefits, while the participant bears the risk that the funds contributed to his DC account together with his own investment and actuarial experience will provide an adequate retirement benefit.

PBGC covers and pays "guaranteed benefits"—nonforfeitable basic pension benefits promised by the title IV-covered pension plan.²⁷ Nonforfeitable benefits are those benefits for which all conditions for entitlement have been met, generally vested accrued benefits. While the benefit guaranteed is generally that set out in the pension plan, there is a statu-

torily imposed dollar cap on the maximum monthly pension benefit that the PBGC may pay a participant. This cap is adjusted annually; for plans terminating in 2004, the maximum guaranteed benefit for each participant is \$3,698.86 per month, and in 2005, \$3,801.14 per month.²⁸ This maximum insurance limit is adjusted actuarially for retirement earlier or later than age 65 or for form of benefit other than single-life annuity.²⁹ Recent benefit increases and owners' benefits may be subject to a phase-in of the guarantee as well.³⁰

CONTROLLED GROUPS

Congress provided great protection to pension plans in general and the PBGC termination insurance program in particular through application of the ERISA controlled group provisions. All liability provisions with respect to ERISA Title IV covered plans are joint and several among controlled group members. An ERISA controlled group consists of the employer sponsoring the pension plan and all corporations under common control as well as all trades or businesses (whether or not incorporated) under common control with that employer.³¹ Common control is determined by bright line ownership tests set out in IRS regulations.³² The regulations define "parent-subsidiary," "brother-sister," and "combined groups," the last of which are combinations of parent-sub and brother-sister groups. In general, a parent-subsidiary group exists where one entity owns at least 80 percent of another,³³ and a brother-sister group exists where five or fewer individuals, estates, or trusts own 80% of two or more entities.³⁴ The regulations prescribe extensive rules as to interests that are to be excluded from the determination of the extent of ownership and comprehensive rules of ownership attribution.³⁵

The definition of "trade or business" is not found in the statute or regulations but has been interpreted broadly by the courts.³⁶ Whether there is an "economic nexus" between the entities is irrelevant.³⁷ Hence a truck manufacturing company in Michigan, an apartment complex in Mississippi, and a ranch in Nevada can all be members of a controlled group.³⁸

Perhaps the most significant implication of these rules in the reorganization context is that the PBGC (and pension plan fiduciaries in the case of ongoing plans) will file claims for these liabilities in each controlled group member's bankruptcy case and pursue the liabilities directly against any nonfiled members.³⁹ The claims are entitled to be asserted and allowed in the entire amount of each liability in each case, though collection, of course, is limited to 100% of each claim.⁴⁰ Also, having filed a claim in every controlled group member's case, PBGC seemingly would be eligible to vote the claim as to each member's plan of reorganization. However, in a recent case, the bankruptcy court held that PBGC

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

could only vote one set of the claims in the confirmation of the group's joint plan of reorganization, and the district court upheld that ruling.⁴¹

Because of the possible loss of the joint and several effect, PBGC works with debtors to assure its protection in cases where substantive consolidation is appropriate. Because substantive consolidation is an equitable measure, courts have been very conscious of the agency's statutory entitlement to participate in each debtor's separate case and have been unwilling to cancel that entitlement absent agreement.

PBGC PREMIUMS

Premiums payable to PBGC under the termination insurance program are the joint and several liability of the controlled group members and are payable not only while the plan is ongoing but continue to accrue until plan assets are distributed or until a trustee is appointed under a plan termination procedure, whichever is earlier.⁴² The premium consists of two amounts: a flat rate payable by all plans, presently \$19 per participant per year, and a variable rate, presently \$9 per \$1000 of underfunding. Thus the variable rate is based upon PBGC exposure, with those plans having higher levels of underfunding paying higher variable rate amounts.⁴³ Failure to pay the premium results in assessment of interest and penalties.⁴⁴

DB PLAN FUNDING REQUIREMENTS

While the decision to adopt a defined benefit pension plan is entirely voluntary, once a plan is adopted, the DB plan rules and regulations in ERISA and the Internal Revenue Code ("IRC") apply to the plan, the sponsoring employer, and the sponsor's controlled group. Among the requirements applicable to DB plans are the funding rules. In parallel provisions in ERISA and the IRC, statutory formulas prescribe the method for determining the minimum annual employer contribution requirement⁴⁵ (as well as the maximum deductible amount). With some exceptions, the annual contribution is payable in quarterly installments,⁴⁶ with a fifth installment payable if more accurate determination of the annual amount during the plan year finds it necessary.⁴⁷ Minimum funding must be met through the plan year in which the plan is terminated.⁴⁸

The controlled group rules protect ongoing pension plans (and derivatively, the PBGC) by providing that the liability for required minimum funding payments is joint and several among all controlled group members.⁴⁹ If the minimum funding payments are missed, an initial 10% excise tax is assessed jointly and severally against the controlled group and that tax increases to 100% of the missed funding if the plan contribution is not made during the statutory cure period.⁵⁰ This tax is assessed

each tax year until the funding payment is made, so it can balloon greatly over time.⁵¹

If the unpaid contributions to an ongoing plan exceed \$1 million, a tax lien attaches to all property of all members of the controlled group in the amount of the missed payments plus interest.⁵² This lien is for the benefit of the pension plan and is to be perfected and enforced by the PBGC.⁵³ If the lien is perfected prior to a bankruptcy filing (thus beating the automatic stay), the pension plan will be a secured creditor having an enforceable lien. As a statutory lien, it is exempt from avoidance as a preference.⁵⁴ If the plan sponsor first exceeds the \$1 million threshold after it has filed its bankruptcy petition, the automatic stay will preclude perfection, though if there are nonfiled entities in the sponsor's controlled group, PBGC will perfect the lien against those entities' property.

PBGC EARLY WARNING PROGRAM AND REPORTABLE EVENTS

ERISA and PBGC regulations⁵⁵ require employers to notify the agency before or soon after the occurrence of several events that might signal financial changes that could affect the security of a pension plan. In addition, PBGC has established an "early warning program" in which the agency monitors the financial condition of employers maintaining pension plans with significant underfunding. The information so gathered may prompt PBGC to seek from the employer and/or controlled group members protection for the pension plan and the agency itself.

Reportable events include commencement of a bankruptcy or other insolvency proceeding by or against an employer maintaining a pension plan (or a member of the employer's controlled group) and breakup of a controlled group.⁵⁶ The regulations provide rules regarding the information that must be filed and the time within which the filing must be made. Many of the events have reporting waiver provisions for employers with small plans or plans with underfunding below specified amounts.⁵⁷

Upon determining that an event has occurred or is about to occur, PBGC will open an investigation in which it will analyze the financial condition of the covered pension plans and the sponsor and controlled group members before and after the event. If the agency is satisfied that the transaction presents little or no risk to the covered plans or the termination insurance program, the investigation will be closed. However, if the transaction puts future funding of the plans in question or removes valuable entities from among those facing liability in the event of termination of the plans, PBGC will open negotiations to attempt to work out an agreement among the parties that will mitigate the risk posed by the transaction. Among the measures typically negotiated are an immediate

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

cash payment into the plans (usually from proceeds in a sale transaction) or a secured guaranty or letter of credit from one or more of the parties covering termination liability should a plan or plans terminate within some agreed-to future time period.

If an agreement cannot be reached, PBGC might initiate plan termination proceedings to cut its losses. If a transaction that would result in the loss of a potentially liable entity hadn't yet closed, PBGC might initiate plan termination proceedings to cause termination liability to attach to the entity, likely stopping the transaction in its tracks.⁵⁸ If the entity has escaped liability because the transaction closed before PBGC was in a position to terminate, an investigation would be undertaken to determine whether the liability avoidance provisions of title IV could be brought to bear to cause the liability to follow the entity.⁵⁹

PLAN TERMINATION BY THE EMPLOYER

ERISA: Exclusive Means of Termination. With the adoption of amendments to ERISA in 1986 and 1987,⁶⁰ Congress made clear that a pension plan covered by the title IV plan termination insurance program may be terminated voluntarily by an employer only through compliance with the title IV provisions for either a Standard Termination or a Distress Termination.⁶¹ The amendments rewrote the voluntary termination provisions to state:

(1) Exclusive means of plan termination. Except in the case of a termination for which proceedings are otherwise instituted by the corporation [PBGC] as provided in section 4042 of this title [29 U.S.C.A. § 1342], a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.⁶²

Congress was acting to address an issue raised in a 1985 bankruptcy case, *In re Bastian Co., Inc.*, in which the bankruptcy court held that rejection of the debtor's pension plans under the Bankruptcy Code resulted in termination of the plans and that rejection was an alternative to termination under ERISA.⁶³ The amendment to the voluntary termination provision was intended to expressly overrule *Bastian*.⁶⁴ As the Committee on Education and Labor stated:

As under current law, the Committee intends that ERISA provide the sole and exclusive means under which a qualified pension plan may be terminated. The Committee therefore believes that a recent case before the U.S. Bankruptcy Court for the Western District of New York, *In re Bastion* [sic] Company, Inc., (No. 83-2107, Jan. 16, 1985), which held that ERISA does not impair other Federal law, and therefore, a pension plan can be rejected as an executory contract, was incorrectly decided.⁶⁵

This is not to say that rejection may not be necessary or desirable in a particular case. A court can still find that an executory contract exists between the employer and employees or their union. The contract may provide that the pension plan must be maintained for some period of time (such as for the duration of the collective bargaining term) or may require specific funding requirements beyond those set by ERISA and the IRC. Rejection can deal with those extra-statutory contractual obligations. However, rejection of the contract cannot reject or terminate the pension plan itself, which is a separate legal entity apart from the contract.⁶⁶ Rejection can only modify contractual obligations; it cannot be used to modify statutory obligations such as those owed to a pension plan. Termination under ERISA can deal with the statutory requirements.⁶⁷

Also, the amendments noted above added a new provision requiring PBGC to suspend a plan termination proceeding if the terms or conditions of an existing collective bargaining agreement prohibit termination.⁶⁸ In that event, neither a standard nor a distress termination may proceed to completion without union consent, contract expiration, or rejection under Bankruptcy Code § 1113 in a case under chapter 11 (§ 365 in a case under chapter 7).⁶⁹

Since the amendments, a few employers have advanced alternative termination arguments. For example, the trustee of a bankrupt employer attempted to abandon a pension plan under provisions of the Bankruptcy Code because, as underfunded, it presented no value to the estate. In holding that ERISA provides the exclusive means for terminating a pension plan, the Fifth Circuit stated “[i]n enacting SEPPAA, Congress made clear its intention that a pension plan may not be deserted by an employer except through certain defined procedures, even if that employer has filed for protection of federal bankruptcy law.”⁷⁰

In a recent case, a chapter 11 debtor again attempted to use rejection as an alternative to termination. In *In re Philip Services Corp.*⁷¹ The court stated:

. . . ERISA provides a considered and comprehensive set of rules and procedures to deal with the problem of underfunded single-employer pension plans. The statute was enacted to overrule jurisprudence that Congress viewed as inappropriate, and the language of the statute states that it is exclusive. The statute starts with the statement that the ERISA termination provisions are the “Exclusive means of plan termination . . .” “Exclusive” means “exclusive” . . . there are no other means. The statute also states: “. . . a single-employer plan may be terminated only in a standard termination . . . or a distress termination under . . . this section.” [Footnotes omitted.]

* * *

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

Therefore, the Court concludes that a Debtor may not “reject” a pension plan as an executory contract. The specific (“exclusive”) statute trumps the vague (“general”) statute when there is no demonstrated conflict.⁷²

Outside bankruptcy, common law trust theories and facts and circumstances tests have been argued, to no avail. In *Phillips v. Bebbler*,⁷³ the debtor argued that the plan terminated upon occurrence of conditions for termination set out in the plan itself. The Fourth Circuit stated:

We find, however, that strict compliance with the statute is the sole means by which a pension plan subject to the provisions of ERISA may be terminated. This finding squares with the clear language and plain meaning of the statute as drafted and is therefore in accord with the intent of the drafters of the statute.⁷⁴

In 1999, the Supreme Court granted a writ of certiorari in the *Hughes Aircraft Co. v. Jacobson* case⁷⁵ and addressed this question where the issue was whether the common law of trusts could be applied to terminate a pension plan. The Court rejected the argument, saying:

Based on the language of the statute, these means [standard and distress termination] constitute the sole avenues for voluntary termination. See *Germain*, 503 U.S. at 254 (explaining that Congress “says in a statute what it means and means in a statute what it says there”).

* * *

. . . [B]ecause ERISA is a “comprehensive and reticulated statute,” *Nachman*, 446 U.S. at 361, and is “enormously complex and detailed,” *Mertens v. Hewitt Associates*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), it should not be supplemented by extratextual remedies, such as the common-law doctrines advocated by respondents.⁷⁶

Standard Termination: A pension plan may be voluntarily terminated of right by an employer if the plan has assets sufficient to provide participants and beneficiaries all benefits promised by the plan.⁷⁷ Notice is given and plan assets are used to purchase annuities from a state-licensed private insurance company covering each participant’s full accrued benefit.⁷⁸ If the plan provides for forms of payment as alternatives to an annuity (typically payment of a single lump sum equal to the value of a participant’s benefit), payment is made in the form elected by the participant.⁷⁹ If assets remain after all benefits have been distributed and the plan so provides, the excess assets may revert to the plan sponsor.⁸⁰ PBGC’s involvement in a Standard Termination is minimal. It’s role involves assuring that the proper notices are given and, by auditing a sample of terminations and a sample of participants in those terminations, assuring that full benefits have been distributed.⁸¹

If PBGC determines that participants were not paid the benefit to which they were entitled, it can order the sponsoring employer to correct the error. If the employer fails to comply with the order, PBGC may seek enforcement of the order in district court.⁸² A typical example may be found in a recent case in which PBGC successfully obtained court enforcement of its order requiring correction of lump sum payments made to participants in the closeout of a plan. The PBGC determined on an administrative record that the sponsoring employer used an inappropriate interest rate to compute the lump sum equivalent of participants' benefits and therefore owed the participants an additional distribution in order to satisfy the title IV requirement that full benefits be paid. The district court granted PBGC's motion for summary judgment over the employer's argument that the PBGC's determination was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. The Fifth Circuit upheld the district court order on appeal.⁸³

Distress Termination: Since the amendments made by SEPPAA in 1986, further strengthened by the amendments made by PPA in 1987,⁸⁴ an employer can no longer terminate an underfunded pension plan at will. Congress became concerned about "dumping" of pension liabilities on the PBGC and with those amendments set out criteria that must be met before an underfunded plan could be voluntarily terminated. If plan assets are not sufficient to cover all of a plan's benefit liabilities, the employer may only terminate the plan if it demonstrates to the satisfaction of the PBGC that the plan sponsor and each controlled group member meets one of the statutory financial distress tests.⁸⁵ The entities need not all meet the same test. The statutory tests are:

- (1) liquidation in bankruptcy or insolvency proceedings;
- (2) reorganization in bankruptcy or other insolvency proceedings, and the court finds that the reorganization cannot succeed unless the pension plan is terminated;⁸⁶
- (3) PBGC determination that there is an inability to pay debts when due and an inability to continue in business unless the pension plan is terminated; or
- (4) pension costs have become unreasonably burdensome due solely to a declining workforce.

Under tests 2 and 3, the inquiry must go beyond evaluating the currently proposed reorganization plan to determine whether the pension plan is unaffordable under any feasible reorganization plan⁸⁷. In addition, all alternatives to termination, including benefit freezes, IRS funding waivers, borrowing to cover unaffordable funding spikes, etc., must have been explored and found unavailing. Meaningful sacrifices must be

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

made by other stakeholders (e.g., cutbacks in salaries, wages, executive compensation) and all reasonable savings possibilities exhausted (favorable refinancing, onerous contract rejection, capital expense reduction). If there is a controlled group, because of the joint and several liability for pension plan funding, the free cash flow of all members of the group is taken into account to determine affordability of the plan.

In a recent case involving the application of the distress termination provisions, a chapter 11 debtor sought bankruptcy court approval of the distress termination of its four defined benefit pension plans; the court refused to approve. The bankruptcy judge rejected the debtor's argument that because, under its proposed plan of reorganization, all available cash was committed to capital expenditures and service of long-term debt, the pension plans were unaffordable, and that the lender of the long term debt had conditioned the loan on termination of the debtor's defined benefit plans. The court found that the debtor failed to prove that termination was necessary to confirm a plan of reorganization, that simply producing a particular plan that resulted in unaffordable pension plans was not enough.⁸⁸

In another recent case, PBGC received a favorable decision in an unusual factual scenario. The debtor moved for approval for the distress termination of its defined benefit pension plan in the bankruptcy court, and, after the necessary factual presentation, the court approved the determination of distress. PBGC accepted the finding and offered to enter into an agreement finalizing the termination, fixing the termination date, and appointing PBGC as statutory trustee, the typical conclusion in distress termination cases. However, the debtor refused to sign the agreement, demanding that PBGC make determinations as to the application of guarantee phaseins to certain plan amendments improving benefits. When PBGC declined to issue rulings in advance of plan termination, transfer of records and their analysis in the ordinary course, the debtor held fast, forcing PBGC to bring a termination action in the district court. The debtor filed a counterclaim in the action, seeking declaratory judgment that the benefits were fully guaranteed and not subject to phasein. The court granted PBGC summary judgment, terminating the plan, setting the termination date and appointing PBGC trustee, ruling that the debtor was in effect seeking an advisory opinion because no case or controversy yet existed and that the court should not preempt the administrative process by employment of the declaratory judgment mechanism.⁸⁹

TERMINATION LIABILITY AND LIEN

If a pension plan is terminated while underfunded, the entire underfunding is the joint and several liability of each member of the controlled

group.⁹⁰ From 1974 until 1986, the liability was limited to the amount of unfunded guaranteed benefits (“UGB”), and further limited to 30 percent of the net worth of the sponsor and controlled group if less than the UGB. As a result of the net worth limitation, companies were able to off-load their pension liabilities onto the PBGC at little or no cost. The SEP-PAA and PPA amendments increased the employer liability to PBGC upon plan termination so it now is the entire amount of unfunded benefit liabilities (“UBL”).⁹¹

In addition to the liability claim, a statutory tax lien may arise in favor of the PBGC for all or part of that liability, attaching to all controlled group property.⁹² This lien arises on the date of plan termination,⁹³ has the priority of and is perfected as a tax lien under the IRC.⁹⁴ The lien is to be treated as a “tax due and owing to the United States” for purposes of title 11 of the United States Code.⁹⁵ The lien is limited to the lesser of the UBL or 30 percent of the net worth of the sponsor and controlled group, where net worth is the sum of the fair market values of those entities that have value.⁹⁶ Because most pension plans are terminated, voluntarily or involuntarily, after the sponsor files its bankruptcy petition, the automatic stay almost invariably prevents perfection of this lien, and the net worth limit virtually always drastically reduces the amount of the lien in any event. Only in the cases in which valuable controlled group members do not or can not file bankruptcy petitions will the lien be effective, since the automatic stay does not protect them.⁹⁷ In the rare case in which the pension plan is terminated prepetition, net worth is found, and the lien is perfected before the petition is filed, the PBGC will have a secured claim in the case.⁹⁸

PLAN TERMINATION BY PBGC

PBGC may terminate a plan involuntarily if it determines, *inter alia*, that the plan has not met the minimum funding requirements of the Internal Revenue Code and ERISA⁹⁹ or that plan continuation could increase the agency’s long-run loss unreasonably.¹⁰⁰ And PBGC is required to terminate any plan in which plan assets are not available to pay currently due benefits.¹⁰¹

Among the situations that may indicate potential risk increase triggering PBGC’s action to involuntarily terminate a pension plan is the breakup of a controlled group.¹⁰² It is not uncommon for a plan of reorganization to provide for the stock of the debtor/plan sponsor to be extinguished and the stock of the reorganized debtor to be distributed to claimants. Confirmation would almost invariably result in a controlled group breakup. Upon proposal of such a reorganization plan, PBGC will evaluate the agency’s possible recovery of termination liability before

and after the breakup as well as the likelihood of termination of the pension plan while underfunded post-breakup. If the analysis indicates a likelihood of an underfunded termination as well as a significant drop in potential recovery, the agency may move to terminate the pension plan involuntarily before confirmation in order to subject controlled group members to the liability.

The same analysis would be used by PBGC to determine whether to move for involuntary termination where the proposed reorganization plan provides for conversion of unsecured debt to secured. Because the termination liability would likely be unsecured, confirmation of the reorganization plan would place the pension plan termination liability lower in priority to debt that would have been *pari passu* with that liability pre-confirmation. The before and after analysis would inform the decision of the agency.

A similar analysis was applied in a recent case involving a transaction in which the chapter 11 debtor agreed to sell substantially all of its assets as a going concern under section 363 of the Bankruptcy Code to an unrelated company.¹⁰³ The purchaser did not agree to assume the debtor's pension plan, which would be left behind with the debtor sponsor, a shell awaiting only a plan of liquidation. The debtor maintained four pension plans, two of which were negotiated with its union and which contained a category of benefits known generically as "shutdown benefits." These benefits are payable to plan participants who satisfy certain age and years of service requirements and are either permanently laid off or lose their job as a result of a facility shutdown. The benefit payable is the full accrued benefit as if the individual retired at normal retirement age; that is, an unreduced benefit regardless of the age of the individual at the time of his/her retirement. As a result, individuals could retiree on full benefits as early as age 48. Because the full payments are then to be paid for many more years than assumed by the pension plan in its funding, the underfunding in the plans increase substantially.

Pension funding rules do not require prefunding of these "unpredictable contingent event" benefits until they are no longer unpredictable or contingent—usually until the triggering event, shutdown, occurs. And then they require amortization payments to pay for the new liability over several years.¹⁰⁴ As in this case, the typical situation involves a shutdown simultaneous with the demise of the liable employer. As a result, no part of these benefits is ever funded.¹⁰⁵

Eligibility for these benefits must become fixed before termination of the pension plans for these benefits to be "nonforfeitable" and therefore guaranteeable under ERISA title IV. In this case, the debtor entered into an agreement with its union that the sale constituted a shutdown event for purposes of the pension plans. PBGC filed in the district court to ter-

minate the pension plans with a date of plan termination before the closing of the transaction, the purported shutdown date. PBGC's administrative record in support of agency action indicated that the underfunding would increase by some \$95 million if the pension plans were not terminated prior to the closing of the transaction thus almost doubling the UBL. This record resulted in the agency's determination that its long-run loss would unreasonably increase if it didn't terminate the plans before the closing date.¹⁰⁶

PBGC had sent notice of its determination and of the termination action to the plan administrator and its labor organization and had published the notice in newspapers of general circulation in areas where plan participants were likely to see it. Four circuits had stated that notice such as this would serve to end the participants' reasonable expectation of continued participation in a pension plan and therefore that the date of notice would be an appropriate date of plan termination if it suited PBGC's interests.

The district court found that the grounds for termination were satisfied by the agency's administrative record but that the date of plan termination for the plans having shutdown benefits should be set at the day following the close of the transaction.¹⁰⁷ However, the district court also found that participants had a heightened reliance interest in receiving shutdown benefits which was not extinguished by the notices. The court was not persuaded by the argument that such a finding only assured the very loss that the agency action, approved by the court, was meant to avoid.

The issue was one of first impression in the sixth circuit. The court of appeals reversed, following the earlier decisions of the other circuit courts, and the Supreme Court recently denied review.¹⁰⁸

In another recent involuntary termination case, facing the possibility of \$140 million in increased plan underfunding resulting from benefit accruals and guaranty increases about to take effect, PBGC filed its complaint seeking termination of the United Airlines pilots' pension plan on December 29, 2004.¹⁰⁹ By all accounts, as a result of an agreement between the pilots' union and the company, the plan would have been terminated in a distress termination in 2005 in any event, but PBGC acted preemptively to fix its liability before a significant increase took effect on January 1, 2005. PBGC has estimated that its guarantee program will be responsible for \$1.4 billion of the plan's \$2.9 billion in underfunding, representing the third largest claim on the program.¹¹⁰ Participants will suffer reductions in promised benefits to the extent of the remaining nonguaranteed shortfall.

PLAN RESTORATION

PBGC has broad authority to “restore” terminated or terminating pension plans to the employer, a move that could require that employer to greatly alter its financial plans. While a plan is in the process of terminating, if PBGC determines, as a result of circumstances it determines to be relevant, the plan should not terminate, it may cease termination and restore the plan to its pretermination status. Also, after a plan has been terminated, if PBGC determines restoration to be appropriate and consistent with its duties, it may restore the plan to its pretermination status, including transfer to the employer of remaining plan assets and liabilities.¹¹¹ Although this power has only been invoked once by PBGC, debtors whose pension plans are likely to require termination should take note of it, given the potentially devastating effect its exercise could have.

In that one case, PBGC had terminated four pension plans maintained by LTV Corporation covering salaried and hourly workers in its steel subsidiary.¹¹² Following the terminations, LTV established “follow-on” plans, plans which were designed to “wrap around” the terminated plans, replacing benefits lost as a result of the terminations and guarantee limits. PBGC determined that adoption of the follow-on plans were abusive of the title IV termination insurance program because they removed the coinsurance feature, a necessary deterrent to plan termination, and because the result was, in effect, continuation of the pension plans rather than a true termination, continuation where PBGC financed the bulk of the benefit promises.

PBGC issued an administrative order restoring three of the four plans to LTV¹¹³ and moved for enforcement of the order in the U.S. District Court. That court found the PBGC’s actions to be arbitrary and capricious and vacated the PBGC order.¹¹⁴ The Second Circuit affirmed.¹¹⁵ But the Supreme Court, on certiorari, reversed those decisions, finding that PBGC’s determination was “consistent with its duties” under ERISA, the broad standard set out in the statute.¹¹⁶ As a result, responsibility for the \$1 to 2 billion of underfunding was returned to LTV.

The lesson for employers terminating an underfunded pension plan is clear. Before rushing to adopt a new retirement program covering participants in the terminated plan, run the replacement program past PBGC to see if the agency would find it abusive. It may be that a simple 401(k) plan, having no wraparound feature designed to replace benefits lost as a result of termination of the DB plan, will not be seen as a problem.

TERMINATION AND THE BANKRUPT SPONSOR

Title IV provides that an underfunded plan termination, voluntary or involuntary, is effectuated either by agreement with the “plan adminis-

trator”¹¹⁷ or by a PBGC-initiated lawsuit in the district court where the plan administrator is the defendant.¹¹⁸ If agreement can’t be reached and court action is required, then that action may be brought in district court even if the plan sponsor or plan administrator is a debtor in a bankruptcy case. ERISA Title IV provides expressly that the action may be brought “notwithstanding the pendency in the same or any other court of any bankruptcy. . .”¹¹⁹ And, in addition, the termination action is an exercise of police or regulatory power by a governmental unit and thus excepted from the automatic stay.¹²⁰

Upon termination of an underfunded pension plan, PBGC typically becomes a statutory plan trustee,¹²¹ takes over plan assets,¹²² pays guaranteed benefits,¹²³ and pursues collection of liabilities.¹²⁴ In many debtor’s cases, termination liability is the largest claim. Perhaps, as a result, this claim has been the subject of litigation over its measurement and priority. Also, as a result, PBGC is frequently willing to serve on unsecured creditors committees. Prior to the Bankruptcy Reform Act of 1994’s amendment to the definition of “person” to include PBGC, no governmental unit could serve on committees as a voting member.¹²⁵ PBGC nonetheless served as an ex officio, nonvoting member of committees in many of the larger cases and brought legal, financial, and actuarial expertise to those committees and has developed considerable knowledge in house in the steel, airline, retail, and textile industries. Since the amendment, PBGC has been invited to serve and has joined many committees as a full voting member.

CHOICES FACING THE CHAPTER 11 DEBTOR

The debtor sponsoring a pension plan must analyze its options regarding its pension plan and should do so as early in the case as practicable. So long as a pension plan remains ongoing, minimum funding obligations continue to accrue, excise taxes will apply if the payments are not made, benefit liabilities will continue to increase as employees’ credited service continues, and PBGC premiums continue to accrue. In this analysis, several variables must be considered, chief among them is whether a reorganization is possible and, if so, will it be effected by internal reorganization or sale of assets as a going concern. And whether there is a controlled group. Of the easy cases, the most obvious is liquidation of a plan sponsor that is not a member of a controlled group. In such a case, plan termination is inevitable, and ERISA recognizes this situation as a ground for voluntary termination of an underfunded plan.¹²⁶ The other easy case is one in which the pension plan remains ongoing through and after the reorganization,¹²⁷ a situation found in many prepackaged bankruptcy cases. In between these extremes, though, choices must be made.

A rare case involves the debtor with an overfunded pension plan. The choice in this situation involves continuing a pension plan which may have no funding burden for some period in the future, or terminating the plan in a standard termination,¹²⁸ paying an excise tax,¹²⁹ and recovering remaining excess assets for the estate.¹³⁰

In a reorganization by sale of the debtor's assets as a going concern under section 363 of the Bankruptcy Code, the asset purchaser may adopt the seller's pension plan and continue it. This option provides for simple transition for employees and no need to develop a new retirement program. A variation on this option would be to split the seller's plan into two parts¹³¹ with the asset purchaser assuming only the part of the plan that includes employees that will be working for the purchaser while leaving the remaining part with the seller. If the debtor/seller is then left to liquidate, and, there is no controlled group, termination of the remaining portion of the plan is inevitable.

Because the responsibility for funding an ongoing plan is joint and several among controlled group members, liquidation or sale of the debtor/plan sponsor will not of itself permit voluntary termination of an underfunded pension plan if the debtor is a member of a controlled group. As is more fully described above in the discussion of distress terminations, the controlled group must be examined to determine whether, taken together, the plan could be affordably maintained as ongoing by all or part of the group. If so, because distress termination is then unavailable, either a member of the controlled group must adopt the plan or the group must provide the funds needed to terminate the plan in a standard termination.

The same analysis applies in an internal reorganization. If the pension plan is underfunded, it may be continued through and after the reorganization, supplied the funds needed to terminate in a standard termination, or be terminated in a distress termination (but only if the debtor and controlled group members meet the distress requirements).

Recently U.S. Airways, in its first trip through chapter 11, sought to terminate its pilots pension plan in a distress termination. PBGC filed a response to the company's motion,¹³² taking no position on the merits but providing a roadmap through the required statutory findings for the court and parties. The court held a four-day trial during which the parties' counsel and the court repeatedly noted the Distress Termination requirements as set out in the PBGC response and how they each were providing evidence to show satisfaction or nonsatisfaction of those requirements. After hearing testimony from the company, Air Line Pilots Association, and retiree group financial and actuarial fact and expert witnesses, the court issued a detailed, comprehensive opinion and decision approving the plan termination.¹³³ Any debtor considering a Dis-

stress Termination under the second or third distress tests should find the opinion and the cases cited within it extremely helpful.

PBGC AND BANKRUPTCY REORGANIZATION

PBGC typically has three goals in bankruptcy reorganization cases:

- (1) to encourage the employer to continue pension contributions while in bankruptcy;¹³⁴
- (2) to encourage the debtor or whoever will be proposing a plan of reorganization to continue the pension plan; and
- (3) to recover as much as possible in the claims process, if the pension plan terminates.

Toward achieving these goals, PBGC encourages development of feasible reorganization plans, providing the debtor and creditors committee an experienced and knowledgeable source on both pension and financial issues.

PBGC CLAIMS ISSUES

PBGC typically files several different types of claims in a bankruptcy case. Most of these are filed as a result of, or are contingent upon, the termination of an underfunded pension plan and PBGC's appointment as statutory trustee. If the pension plan is not terminated, the contingency never occurs, the claim never arises, and PBGC typically stipulates to withdrawal of certain of those claims.

CONTRIBUTIONS OWED THE PENSION PLAN

So long as an employer continues its pension plan, it must continue to meet the statutory minimum funding payments mandated by ERISA and the Internal Revenue Code.¹³⁵ Annual contributions are required, payable to the pension plan in quarterly installments.¹³⁶ If the debtor cannot afford the minimum funding payments, the debtor may petition the Internal Revenue Service for a waiver of the required minimum funding. It must demonstrate to the satisfaction of the IRS that it is experiencing temporary substantial business hardship and that it wishes to continue its pension plan but cannot afford those payments in the short term.¹³⁷ The funding requirements for as many as three plan years may be waived and amortized over the subsequent five plan years.¹³⁸ The IRS may require collateral satisfactory to it and the PBGC for the amounts waived.¹³⁹ If funding waivers do not provide sufficient relief and all other means of obtaining the cash flow needed to meet funding requirements of the pension plan have been assessed and proven inadequate, the debtor may terminate the plan in a distress termination.¹⁴⁰

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

If a pension plan is terminated while underfunded and PBGC becomes the plan's successor trustee, the PBGC will pursue overdue minimum funding contribution payments (as well as waived funding amounts) in carrying out one of its trustee roles, that of collecting and liquidating all plan assets. Any such overdue payments are receivables, assets of the plan.¹⁴¹

The plan's fiduciaries have an independent duty to pursue these claims, so that in the event the plan is not terminated and PBGC appointed plan trustee, the plan's interests will be represented in the case. Because the debtor is frequently the named plan administrator of its pension plans, it may find itself having conflicting fiduciary duties—its Bankruptcy Code duty to act in the interests of its creditors and its ERISA duty to act “solely in the interests of [pension plan] participants and beneficiaries.”¹⁴² Debtors would be well advised to seek court appointment of an independent counsel to represent the pension plan in its bankruptcy case and to do so early enough in the case so that the plan will not have been prejudiced by other activities in the case while it was unrepresented. Most pension plans provide that expenses of administering the plan may be paid from plan assets, so the court may approve the payment of reasonable expenses of the special counsel and its advisors from plan assets.

Contribution Priority—Administrative: Absent termination or waiver, PBGC has argued that the statutory minimums should be paid as they become due in the ordinary course during the case.¹⁴³ If they are not paid when due, PBGC has argued that they should be accorded priority under Bankruptcy Code sections 503 and 507¹⁴⁴ as postpetition costs ordinarily incident to the operation of a business or costs of complying with the regulatory scheme set out in ERISA and the IRC.¹⁴⁵ The two circuit courts that have addressed this issue have denied priority to all but the postpetition “normal cost” portion of the contribution. Normal cost is the actuarial present value of the benefits earned during a plan year. Those courts reasoned that the remaining part of the contribution, usually amortization of the present value of previous benefit increases and plan gains and losses, must be attributed to service rendered by employees prepetition and thus not entitled to treatment as administrative expenses.¹⁴⁶

A recent case found that payment of pension plan contributions in full when due was authorized by the Bankruptcy Code. However, the decision relied upon the law of the Sixth Circuit which, in the *Unimet* case,¹⁴⁷ held that a debtor was required to comply with a collective bargaining agreement unless modified or rejected in a proceeding under Bankruptcy Code § 1113.¹⁴⁸ Because the collective bargaining agreement called for mainte-

nance of the pension plan, failure to meet the funding requirements would be an unpermitted unilateral alteration of the agreement.¹⁴⁹

Contribution Priority—Tax: ERISA and IRC amendments adopted in 1987 and 1994 further complicate the priority status of the claim for unpaid minimum funding contributions. If the missed payments exceed \$1 million, a tax lien is imposed on all employer and controlled group property in the amount missed and that amount is to be treated as a “tax due and owing to the United States” in cases under title 11.¹⁵⁰ PBGC has argued that this statutory language requires that the contribution claim be accorded tax priority where the requirements for the lien have been met, where the automatic stay prevented the lien from being perfected. The few courts in which this argument has been made have denied tax priority, finding no sufficient link to the Bankruptcy Code in the language. They have rejected the PBGC argument that the claim meets the court-made functional test for tax treatment as well.¹⁵¹

Contribution Priority—180-day: The Bankruptcy Code provides expressly for priority treatment for contributions to employee plans “attributable to services rendered” during the 180-day period prior to the petition.¹⁵² As a result of the “services rendered” language, debtors and committees have been successful in arguing that only normal cost ought to be entitled to priority, and, because normal cost is calculated by the plan actuary as of the first day of a plan year using employment assumptions as of that date, the number must be reduced to reflect any decline in employment during the relevant period. The amount entitled to priority under all employee plans is limited to \$4,925¹⁵³ times the number of employees who were a participants in the plans during the 180-day period, less any amount awarded those participants as priority claims under the wage priority provision.¹⁵⁴ That is, all employee plans must share in the pool remaining for priority payments, if anything remains after wage priority payments.

Less controversy surrounds the application of this provision because the limits frequently reduce its value to zero or a very small sum. And because of the burden of the factual inquiry, a person-by-person and plan-by-plan calculation, settlements are common.

UNFUNDED BENEFIT LIABILITIES

Upon termination of a pension plan covered by the plan termination insurance program, a claim will arise in favor of the PBGC if the plan terminates without funds sufficient to provide all promised benefits. This claim for “unfunded benefit liabilities” is in the amount of the excess of the present value of the plan’s benefit liabilities over the fair market value of its assets, both as of the plan termination date.¹⁵⁵

UBL Claim Amount: Although ERISA provides that a plan's benefit liabilities are to be determined under actuarial assumptions prescribed by PBGC in regulations,¹⁵⁶ courts in a few cases have refused to apply the regulations and substituted other assumptions based upon a "battle of experts" evidentiary hearing.¹⁵⁷ Using so-called "prudent investor" assumptions to select a discount rate for valuing pension plan liabilities rather than the rate developed by the regulation methodology, those courts reduced the PBGC claims significantly.¹⁵⁸

In perhaps the most important court decision in recent times, PBGC successfully argued that its regulations should govern the determination of the UBL claim amount. The *U.S. Airways* court, after a thorough analysis in a lengthy opinion, ruled that, notwithstanding the two circuit decisions to the contrary, the regulation should be followed.¹⁵⁹ The court found that the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*¹⁶⁰ made it clear that the existence and amount of a creditor's claim was to be determined under applicable nonbankruptcy law. In this case, ERISA was that law, and ERISA clearly provided the means for determining the amount of liability through a delegation to PBGC to prescribe the measuring assumptions in regulations. The court rejected a challenge to the regulations, finding that they were a rational means for accomplishing their goal and were not arbitrary, capricious, an abuse of discretion, or not in accordance with law.¹⁶¹ As a result, PBGC's claim for more than \$2 billion was allowed as filed rather than reduced to some \$894 million as sought by the debtors.

UBL Claim Priority: PBGC has argued, unsuccessfully since a Bankruptcy Act chapter X case decided soon after enactment of ERISA,¹⁶² that the language of title IV of ERISA requires tax priority treatment of its UBL claim. Recall that a lien for the UBL arises on the date of plan termination on all controlled group property, though the amount of the lien is limited to 30 percent of the controlled group's net worth if less than the UBL.¹⁶³ The relevant language PBGC relies upon states, under the caption "Priority," that:

In a case under title 11 or in insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of title 11. . . .

Here too the arguments that have prevailed were that there can be no lien because of the automatic stay, that this language grants the lien tax treatment, not the underlying UBL, and that the tax priority provisions of the Bankruptcy Code do not include this alleged "ERISA tax." Once again, because so few cases have meaningful net worth, only a couple of cases have been litigated.

PBGC also argues that the UBL claim meets the requirements for tax treatment established by the courts (“those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purposes of defraying the expenses of government or of undertakings authorized by it”).¹⁶⁴ PBGC asserts tax priority for the claim but, in accordance with its view of Congressional intent, limits the priority sought to 30% of controlled group net worth with any excess unfunded benefit liability assigned general unsecured status. Again, though PBGC has yet to be successful with this argument, it has not found other appropriate test cases in which to make it.¹⁶⁵

MISSED PREMIUMS

PBGC, as guarantor of plan benefits, files its claim for any missed ERISA title IV premiums.¹⁶⁶ For plan years commencing after the bankruptcy petition, PBGC files the claim as an administrative priority while a prepetition plan year premium claim is filed as general unsecured. As these claim amounts are so small relative to the other PBGC claims and relatively straightforward in their proof, they have not been the subject of litigation and are typically wrapped into a settlement of the other claims.

NEXT—LITIGATION AND LEGISLATION

The basis for the amount and priority of PBGC’s claims is embodied in provisions of ERISA and the Internal Revenue Code rather than in the Bankruptcy Code, and, where bankruptcy is referenced, it was not referenced with clarity sufficient to avoid suggestions of ambiguity. While several bankruptcy/ERISA issues have been the subject of litigation, only perhaps the date of plan termination and ERISA/exclusive means of plan termination may be said to now have broad-based uniform precedent. PBGC has made it clear that it is always seeking appropriate cases to litigate as test cases, cases with enough at stake to carry them all the way to the Supreme Court, in order to obtain certainty as to significant open issues. However, those cases are few and far between. So PBGC and the Administration are again following a concurrent, alternate path: legislation. While details are yet to be worked out, it is clear from the public information to date that the Bankruptcy Code will be the subject of several of the proposals. They will likely attempt to overrule those cases finding against PBGC based upon the Bankruptcy Code’s silence on an issue and to avoid that argument as to new issues.

Ordinarily, amendments to ERISA require consideration by four committees: the two tax committees, Senate and House, and the two labor committees, Senate and House. When bankruptcy changes are included, two more committees are added: the judiciary committees of Senate and

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

House. As a result, a great deal of debate and many hearings can be expected, and changes will not be adopted quickly.

While details are not yet available, one of the central features of the proposals involve including the risk posed by a plan sponsor, rather than simply plan underfunding, in the determination of minimum funding, PBGC premiums and guaranteed benefits.¹⁶⁷ For example, minimum funding requirements and PBGC premiums would increase for those plan sponsors having poor ratings from the private ratings agencies.¹⁶⁸ Also, plan amendments increasing benefits and distributions in the form of lump sums would be restricted. If the sponsor is a debtor in a bankruptcy case, further restrictions on benefit accruals and PBGC's guarantee would apply. In a major additional change to a longstanding bankruptcy policy, the proposal would expressly acknowledge the IRC § 412(n) lien for missed minimum funding contributions and permit its perfection postpetition. Additionally of interest though not involving the Bankruptcy Code directly, the proposal would outlaw inclusion of shut-down benefits in pension plans.

Because these proposals will generate a great deal of controversy, we can expect much contentious debate and many congressional hearings over the next several months. While most of the stakeholders agree that PBGC and the plan termination insurance program must be made financially sound, there is no agreement as to how to go about doing it. The progress of the proposal can be found at the Department of Labor website, www.dol.gov.¹⁶⁹

1. See, e.g., Richard Ippolito, Ph.D., "Is Pension Insurance the Next S&L Crisis?," Cato Institute, September 29, 2004 (available at http://www.cato.org/pub_display.php?pub_id=2834).

2. 2004 PBGC Performance and Accountability Report ("2004 Ann. Rpt.") at 1, 2. The 2004 Ann. Rpt. is available at <http://www.pbgc.gov/publications/annrpt/default.htm>.

3. 2004 Ann. Rpt. at 8.

4. This article is necessarily an overview of a very complex subject area and will point up many instances of interaction of bankruptcy law with pension law. For a detailed analysis, see *Norton Bankruptcy Law and Practice 2d*, ch. 156.

5. Following this background section, several bankruptcy-specific issues and recent cases will be discussed.

6. See http://www.studebakerdriversclub.com/sn_brademas.asp.

7. 29 U.S.C.A. §§ 1001-1461 (2000 and Supp. I 2001). This article discusses those provisions relating to single-employer pension plans. Treatment of multiemployer plans is beyond the scope of this paper.

8. 2004 Ann. Rpt. at 1. In 2004, PBGC paid more than \$3 billion in guaranteed benefits to 518,220 persons. 2004 Ann. Rpt. at 2.

9. 29 U.S.C.A. § 1302(d).

10. 29 U.S.C.A. § 1302(b)(1).

11. 29 U.S.C.A. § 1302(b)(8).

12. 29 U.S.C.A. § 1302(b)(3).
13. 29 U.S.C.A. § 1303(a)-(c).
14. 29 U.S.C.A. § 1367.
15. 1200 K Street, N.W. Washington, D.C. 20005.
16. Various contractors are sited around the country to assist with benefit administration functions.
17. See <http://search.pbgc.gov/>; see also 29 U.S.C.A. § 1350.
18. 29 U.S.C.A. § 1302(g)(2).
19. See 29 U.S.C.A. §§ 1305(b)(1)(D); 1362.
20. A pension plan is “underfunded” when plan liabilities exceed plan assets, using statutory and regulatory factors and rules to determine those two values; different factors and rules apply for different purposes under various provisions of ERISA and the Internal Revenue Code of 1986, as amended (“IRC”).
21. 29 U.S.C.A. §§ 1305(b)(1)(B); 1307.
22. See, 29 U.S.C.A. §§ 1305(b)(1)(C); 1342(d)(1)(A), (B).
23. See 29 U.S.C.A. § 1305(b)(1)(E).
24. 29 U.S.C.A. § 1321(a). Certain plans (e.g., government plans; church plans) are excluded from title IV coverage. See 29 U.S.C.A. § 1321(b).
25. 11 U.S.C.A. § 541(c)(2); *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 23 Bankr. Ct. Dec. (CRR) 89, 26 Collier Bankr. Cas. 2d (MB) 1119, 15 Employee Benefits Cas. (BNA) 1481, Bankr. L. Rep. (CCH) P 74621A (1992).
26. See 29 U.S.C.A. § 1341(b)(1).
27. 29 U.S.C.A. § 1322(a).
28. The maximum guarantee applies to workers who retire at age 65. Maximum guarantees are reduced for those who retire at younger ages or who elect survivor benefits.
29. 29 CFR Part 4022.
30. 29 CFR Part 4022; see also 29 U.S.C.A. § 1322(b).
31. 29 U.S.C.A. § 1301(a)(14), (b)(1).
32. 26 CFR 1.414(c)(1)-(5).
33. 26 CFR 1.414(c)-2(b).
34. 26 CFR 1.414(c)-2(c).
35. 26 CFR 1.414(c)-3, -4.
36. See, e.g., *Pension Ben. Guar. Corp. v. Center City Motors, Inc.*, 609 F. Supp. 409, 6 Employee Benefits Cas. (BNA) 2058 (S.D. Cal. 1984).
37. See *Connors v. Incoal, Inc.*, 995 F.2d 245, 16 Employee Benefits Cas. (BNA) 2553 (D.C. Cir. 1993).
38. See, e.g., *Pension Ben. Guar. Corp. v. Diamond Reo Trucks, Inc.*, 509 F. Supp. 1191, 2 Employee Benefits Cas. (BNA) 1065 (W.D. Mich. 1981).
39. Of course, liens triggered postpetition will be subject to the automatic stay as to filed controlled group members, but not as to nonfiled entities. 11 U.S.C.A. § 362.
40. See *In re New York Commercial Co.*, 233 F. 906, 909 (C.C.A. 2d Cir. 1916); *In re Northeast Dairy Co-op. Federation, Inc.*, 88 B.R. 21 (Bankr. N.D. N.Y. 1988).
41. *Pension Ben. Guar. Corp. v. Enron Corp.*, 43 Bankr. Ct. Dec. (CRR) 240, 53 Collier Bankr. Cas. 2d (MB) 261, 33 Employee Benefits Cas. (BNA) 2674, 2004 WL 2434928 (S.D. N.Y. 2004). PBGC had filed three claims—unfunded benefit liabilities, unpaid minimum funding contributions, unpaid PBGC premiums—for each of five pension plans in each of the 180 debtors’ cases, or 2700 claims. The courts’ decisions were based on several factors,

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

including the bankruptcy court's broad discretion to limit claims for voting purposes in order to reflect economic reality.

42. 29 U.S.C.A. § 1307.
43. See 29 CFR pt. 4007.
44. 29 CFR pt. 4007.
45. See 29 U.S.C.A. § 1082 and IRC § 412. Because the ERISA and IRC provisions are parallel, citations will be made to the IRC sections only.
46. IRC § 412(m).
47. IRC § 412(c)(10).
48. Rev. Rul. 79-237, 1979-2 CB 190.
49. IRC § 412(c)(11).
50. IRC § 4971.
51. This "excise tax" is susceptible of subordination as a penalty in bankruptcy cases under certain circumstances. See *U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S. Ct. 2106, 135 L. Ed. 2d 506, 29 Bankr. Ct. Dec. (CRR) 271, 35 Collier Bankr. Cas. 2d (MB) 463, 20 Employee Benefits Cas. (BNA) 1289, Bankr. L. Rep. (CCH) P 76971, 96-1 U.S. Tax Cas. (CCH) P 50322, 77 A.F.T.R.2d 96-2562 (1996).
52. IRC § 412(n).
53. IRC § 412(n)(5); 29 U.S.C.A. § 1303(e).
54. See 11 U.S.C.A. § 547(c)(6); but see 11 U.S.C.A. § 724(d) (in liquidation cases, tax liens become tax priority claims).
55. 29 U.S.C.A. § 1343; 29 CFR pt. 4043.
56. 29 U.S.C.A. § 1343(c)(9), (10); 29 CFR § 4043.35 -68.
57. 29 CFR pt. 4043.
58. See Plan Termination by PBGC.
59. See 29 U.S.C.A. § 1369.
60. The amendments were part of the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 (1986) ("SEPPAA"), followed the following year by refinements made by the Pension Protection Act, Pub. L. No. 100-203, 101 Stat. 1330 (1987) ("PPA").
61. 29 U.S.C.A. § 1341(b) or (c).
62. 29 U.S.C.A. § 1341(a)(1).
63. In re *Bastian Co., Inc.*, 45 B.R. 717, 11 Collier Bankr. Cas. 2d (MB) 1236, 6 Employee Benefits Cas. (BNA) 1282 (Bankr. W.D. N.Y. 1985); the same court issued a like decision some two weeks later in *In re McFarlin's Inc.*, 46 B.R. 88, 6 Employee Benefits Cas. (BNA) 1434, Bankr. L. Rep. (CCH) P 70271 (Bankr. W.D. N.Y. 1985), *aff'd*, 789 F.2d 98, 14 Collier Bankr. Cas. 2d (MB) 1075, 7 Employee Benefits Cas. (BNA) 1426, Bankr. L. Rep. (CCH) P 71096 (2d Cir. 1986).
64. The amendments to 29 U.S.C.A. § 1341 also provide for a much clearer integration of ERISA's plan termination provisions with the bankruptcy process. For example, § 1341 now provides that a debtor in a bankruptcy liquidation case is automatically permitted to terminate an underfunded pension plan, and a debtor reorganizing in a bankruptcy case may proceed in the bankruptcy court to establish the required facts and obtain approval of the plan termination. See 29 U.S.C.A. § 1341(c)(2)(B)(i) and (ii).
65. H.R. Rep. No. 99-300, at 289 (1985), reprinted in 1986 U.S.C.C.A.N. 756, 940.
66. Pension plans are regulated federal entities. They have significant reporting and disclosure requirements and special taxation rules under ERISA and the IRC. See, generally,

ANNUAL SURVEY OF BANKRUPTCY LAW

29 U.S.C.A. §§ 1021-1030; IRC §§ 401-501. In addition, pension plans may sue and be sued in their own name. 29 U.S.C.A. § 1132(d).

67. If a collective bargaining agreement requiring participation in a multiemployer plan is rejected, the employer may have withdrawn from the plan, see 29 U.S.C.A. § 1383, and the plan's joint board of trustees will assess withdrawal liability (the employer's share of plan underfunding, if any), see 29 U.S.C.A. § 1381, as a claim in the case. The plan remains ongoing with the remaining participating employers.

68. See, 29 U.S.C.A. § 1341(a)(3).

69. 29 U.S.C.A. § 1341(a)(3). See also *In re US Airways Group, Inc.*, 296 B.R. 734, 31 Employee Benefits Cas. (BNA) 2777, 173 L.R.R.M. (BNA) 3100 (Bankr. E.D. Va. 2003). This is another instance in which the SEPPAA and PPA amendments coordinate Title IV with the bankruptcy process.

70. *Matter of Esco Mfg., Co.*, 33 F.3d 509, 512-13, 26 Bankr. Ct. Dec. (CRR) 86, 31 Collier Bankr. Cas. 2d (MB) 1706, 18 Employee Benefits Cas. (BNA) 1993, Bankr. L. Rep. (CCH) P 76121 (5th Cir. 1994), opinion withdrawn and superseded on reh'g, 50 F.3d 315, 27 Bankr. Ct. Dec. (CRR) 35, 19 Employee Benefits Cas. (BNA) 1303 (5th Cir. 1995).

71. *In re Philip Services Corp.*, 310 B.R. 802, 32 Employee Benefits Cas. (BNA) 2897 (Bankr. S.D. Tex. 2004) (Bankr. S.D. Tex. 2004).

72. *In re Philip Services Corp.*, 310 B.R. 802, 808-09, 32 Employee Benefits Cas. (BNA) 2897 (Bankr. S.D. Tex. 2004) (citing *Esco*).

73. *Phillips v. Bebbler*, 914 F.2d 31, 12 Employee Benefits Cas. (BNA) 2297 (4th Cir. 1990).

74. *Phillips v. Bebbler*, 914 F.2d 31, 34, 12 Employee Benefits Cas. (BNA) 2297 (4th Cir. 1990). *Accord Pension Ben. Guar. Corp. v. Mize Co., Inc.*, 987 F.2d 1059, 16 Employee Benefits Cas. (BNA) 1693 (4th Cir. 1993).

75. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755, 142 L. Ed. 2d 881, 22 Employee Benefits Cas. (BNA) 2265 (1999).

76. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446-47, 119 S. Ct. 755, 142 L. Ed. 2d 881, 22 Employee Benefits Cas. (BNA) 2265 (1999).

77. A "Standard Termination" under 29 U.S.C.A. § 1341(b).

78. See 29 U.S.C.A. § 1341(b)(3)(A).

79. If assets are not sufficient, the employer can "top up" the plan to cover the shortfall.

80. 29 U.S.C.A. § 1344(d).

81. See 29 U.S.C. §§ 1341(b)(2)(C), 1303(a).

82. See 29 U.S.C.A. § 1303(e).

83. See *Pension Ben. Guar. Corp. v. Wilson N. Jones Memorial Hosp.*, 374 F.3d 362, 32 Employee Benefits Cas. (BNA) 2921, 94 A.F.T.R.2d 2004-5056 (5th Cir. 2004).

84. Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 (1986); Pension Protection Act, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

85. 29 U.S.C.A. § 1342(c)(2)(B).

86. For a detailed application of the PBGC roadmap through the requirements for a distress termination provided by PBGC to the court, see *In re US Airways Group, Inc.*, 296 B.R. 734, 31 Employee Benefits Cas. (BNA) 2777, 173 L.R.R.M. (BNA) 3100 (Bankr. E.D. Va. 2003).

87. See 29 U.S.C.A. § 1341(c)(2)(B)(ii)(IV) ("... will be unable to pay its debts under a plan of reorganization. . .") (emphasis added).

88. See *In re Philip Services Corp.*, 310 B.R. 802, 32 Employee Benefits Cas. (BNA) 2897 (Bankr. S.D. Tex. 2004). The court also held that pension plan termination could not be

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

accomplished by rejection of the pension plans as executory contracts under the Bankruptcy Code.

89. See *Pension Benefit Guaranty Corp. v. Cafeteria Operators, L.P.*, 33 Employee Benefits Cas. (BNA) 1665, 2004 WL 1800850 (N.D. Tex. 2004).

90. 29 U.S.C.A. § 1362(a), (b).

91. See footnote 71.

92. 29 U.S.C.A. § 1368.

93. 29 U.S.C.A. § 1368(b).

94. 29 U.S.C.A. § 1368(c).

95. 29 U.S.C.A. § 1368(c)(2). This language has been the subject of litigation over the priority of the underlying claim. See *Unfunded Benefit Liabilities: Claims Priority*.

96. See, 29 U.S.C.A. § 1362(d); 29 CFR pt. 4062.

97. Examples include controlled group members ineligible for bankruptcy protection, such as financial institutions and insurance companies.

98. As is the case for the lien for unpaid minimum funding contributions, the lien will be preference proof, though, in chapter 7 cases, subject to subordination. See fn. 55.

99. See 29 U.S.C.A. § 1342(a)(1).

100. See 29 U.S.C.A. § 1342(a)(4).

101. 29 U.S.C.A. §§ 1342(a) flush language following paragraph (4). This situation arises when a pension plan runs out of assets or only has illiquid assets and cannot meet its payment obligations.

102. See, e.g., *Pension Ben. Guar. Corp. v. FEL Corp.*, 798 F. Supp. 239, 15 Employee Benefits Cas. (BNA) 2401 (D.N.J. 1992).

103. *Pension Ben. Guar. Corp. v. Republic Technologies Intern., LLC*, 287 F. Supp. 2d 815, 31 Employee Benefits Cas. (BNA) 1225 (N.D. Ohio 2003), rev'd in part, 386 F.3d 659, 33 Employee Benefits Cas. (BNA) 1993, 94 A.F.T.R.2d 2004-6259, 2004 FED App. 0339P (6th Cir. 2004), cert. denied, 125 S. Ct. 1594, 161 L. Ed. 2d 278, 34 Employee Benefits Cas. (BNA) 2984 (U.S. 2005).

104. See IRC § 412(l)(1), (5).

105. PBGC insurance premiums with respect to the underfunding brought about by these potential benefits also do not arise until the event occurs, so that no PBGC premium is paid before the sponsor liquidates in most cases.

106. See 29 U.S.C.A. § 1342(a)(4), (c).

107. *Pension Ben. Guar. Corp. v. Republic Technologies Intern., LLC*, 287 F. Supp. 2d 815, 31 Employee Benefits Cas. (BNA) 1225 (N.D. Ohio 2003), rev'd in part, 386 F.3d 659, 33 Employee Benefits Cas. (BNA) 1993, 94 A.F.T.R.2d 2004-6259, 2004 FED App. 0339P (6th Cir. 2004), cert. denied, 125 S. Ct. 1594, 161 L. Ed. 2d 278, 34 Employee Benefits Cas. (BNA) 2984 (U.S. 2005).

108. *Pension Ben. Guar. Corp. v. Republic Technologies Intern., LLC*, 287 F. Supp. 2d 815, 31 Employee Benefits Cas. (BNA) 1225 (N.D. Ohio 2003), rev'd in part, 386 F.3d 659, 33 Employee Benefits Cas. (BNA) 1993, 94 A.F.T.R.2d 2004-6259, 2004 FED App. 0339P (6th Cir. 2004), cert. denied, 125 S. Ct. 1594, 161 L. Ed. 2d 278, 34 Employee Benefits Cas. (BNA) 2984 (U.S. 2005).

109. See *PBGC Moves to Involuntarily Terminate Pilots' Pension*, BCD News and Comment (LRP), January 18, 2005.

110. See "Pension Agency to Take On United Funds," *Forbes*, December 30, 2004.

111. 29 U.S.C.A. § 1347.

112. See *PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

ANNUAL SURVEY OF BANKRUPTCY LAW

113. The fourth plan had no assets, so restoration would have been futile.

114. *In re Chateaugay Corp.*, 87 B.R. 779, 17 Bankr. Ct. Dec. (CRR) 1089, 9 Employee Benefits Cas. (BNA) 2209 (S.D. N.Y. 1988), judgment aff'd, 875 F.2d 1008, 19 Bankr. Ct. Dec. (CRR) 913, 10 Employee Benefits Cas. (BNA) 2425, 111 Lab. Cas. (CCH) P 11200, 16 Fed. R. Serv. 3d 400 (2d Cir. 1989), judgment rev'd, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579, 20 Bankr. Ct. Dec. (CRR) 1075, 22 Collier Bankr. Cas. 2d (MB) 1237, 12 Employee Benefits Cas. (BNA) 1593, Bankr. L. Rep. (CCH) P 73423 (1990).

115. *Pension Ben. Guar. Corp. v. LTV Corp.*, 875 F.2d 1008, 19 Bankr. Ct. Dec. (CRR) 913, 10 Employee Benefits Cas. (BNA) 2425, 111 Lab. Cas. (CCH) P 11200, 16 Fed. R. Serv. 3d 400 (2d Cir. 1989), judgment rev'd, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579, 20 Bankr. Ct. Dec. (CRR) 1075, 22 Collier Bankr. Cas. 2d (MB) 1237, 12 Employee Benefits Cas. (BNA) 1593, Bankr. L. Rep. (CCH) P 73423 (1990).

116. *Pension Ben. Guar. Corp. v. LTV Corp.*, 875 F.2d 1008, n. 98, 19 Bankr. Ct. Dec. (CRR) 913, 10 Employee Benefits Cas. (BNA) 2425, 111 Lab. Cas. (CCH) P 11200, 16 Fed. R. Serv. 3d 400 (2d Cir. 1989), judgment rev'd, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579, 20 Bankr. Ct. Dec. (CRR) 1075, 22 Collier Bankr. Cas. 2d (MB) 1237, 12 Employee Benefits Cas. (BNA) 1593, Bankr. L. Rep. (CCH) P 73423 (1990).

117. Every pension plan must have a plan administrator identified in the plan document. In most cases the sponsor company is named plan administrator and its fiduciary duties are carried out by company employees.

118. See 29 U.S.C.A. §§ 1341(c)(3)(B)(iii), 1342(c). The vast majority of underfunded plan terminations are effectuated by agreement or by consent or default judgments. Very few terminations are truly involuntary.

119. 29 U.S.C.A. § 1342(e).

120. See 11 U.S.C.A. § 362(b)(4); see *In re Century Brass Products, Inc.*, No. 85 Civ. 585, slip op. at 11 (D. Conn. Nov. 24, 1986); see also *In re Chateaugay Corp.*, 87 B.R. 779, 17 Bankr. Ct. Dec. (CRR) 1089, 9 Employee Benefits Cas. (BNA) 2209 (S.D. N.Y. 1988), judgment aff'd, 875 F.2d 1008, 19 Bankr. Ct. Dec. (CRR) 913, 10 Employee Benefits Cas. (BNA) 2425, 111 Lab. Cas. (CCH) P 11200, 16 Fed. R. Serv. 3d 400 (2d Cir. 1989), judgment rev'd, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579, 20 Bankr. Ct. Dec. (CRR) 1075, 22 Collier Bankr. Cas. 2d (MB) 1237, 12 Employee Benefits Cas. (BNA) 1593, Bankr. L. Rep. (CCH) P 73423 (1990).

121. 29 U.S.C.A. § 1342(c).

122. 29 U.S.C.A. § 1342(d)(1)(A)(ii).

123. 29 U.S.C.A. §§ 1342(d)(1)(A)(iv), (B)(i); 1361.

124. 29 U.S.C.A. §§ 1342(d)(1)(A)(i), (B)(ii); 1362.

125. See 11 U.S.C.A. §§ 101(41); 1102.

126. 29 U.S.C.A. § 1341(c)(2)(B)(i).

127. Some examples include *Continental Airlines*, *Carter-Hawley-Hale Stores*, *Revco*, *Wang Laboratories*, *Piper Aircraft*, *Kmart* and *Worldcom (MCI)*.

128. 29 U.S.C.A. § 1341(b).

129. IRC § 4980. This "excise tax" has been held to be a true tax entitled to tax priority in bankruptcy. See *In re Juvenile Shoe Corp. of America*, 99 F.3d 898, 29 Bankr. Ct. Dec. (CRR) 1246, 20 Employee Benefits Cas. (BNA) 2027, 96-2 U.S. Tax Cas. (CCH) P 50642, 78 A.F.T.R.2d 96-7017 (8th Cir. 1996).

130. All benefits must be provided participants and beneficiaries and the plan must provide for reversion of excess assets to the employer on plan termination. 29 U.S.C.A. § 1344(d).

131. IRC § 414(l) requirements must be met.

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

132. See, Response of the Pension Benefit Guaranty Corporation to Debtor's Motion for Approval of Distress Termination of the Pilots' Defined Benefit Pension Plan, filed Feb. 13, 2003, In re U.S. Airways Group, Inc., No. 02-83984-SSM (Bankr. E.D. Va.).

133. See In re US Airways Group, Inc., 296 B.R. 734, 31 Employee Benefits Cas. (BNA) 2777, 173 L.R.R.M. (BNA) 3100 (Bankr. E.D. Va. 2003).

134. See *PBGC Response to Motion to Allow Minimum Funding Contribution Claims of United Airlines Pension Plans As Administrative Expenses*, filed Dec. 10, 2004, In re UAL Corp., No. 02-48191 (Bankr.N.D. Ill.).

135. IRC § 412; Rev. Rul 79-237, 1979-2 C.B. 190.

136. IRC § 412(m).

137. IRC § 412(d).

138. IRC § 412(d).

139. IRC § 412(d).

140. See Plan Termination by the Employer.

141. 29 U.S.C.A. §§ 1342(d)(1)(B)(2); 1362(c).

142. 29 U.S.C.A. § 1104(a)(1).

143. See *PBGC Response to Motion to Allow Minimum Funding Contribution Claims of United Airlines Pension Plans As Administrative Expenses*, filed Dec. 10, 2004, In re UAL Corp., No. 02-48191 (Bankr.N.D. Ill.).

144. 11 U.S.C.A. §§ 503(b), 507(a)(1).

145. Courts have applied these criteria in allowing administrative priority to claims without need for a showing of "benefit to the estate." See, e.g., *Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968); In re Wall Tube & Metal Products Co., 831 F.2d 118, 17 Collier Bankr. Cas. 2d (MB) 736, 26 Env't. Rep. Cas. (BNA) 1673, Bankr. L. Rep. (CCH) P 72015, 18 Env'tl. L. Rep. 20013 (6th Cir. 1987); *Yorke v. N.L.R.B.*, 709 F.2d 1138, 10 Bankr. Ct. Dec. (CRR) 1160, 8 Collier Bankr. Cas. 2d (MB) 921, 113 L.R.R.M. (BNA) 3087, Bankr. L. Rep. (CCH) P 69300, 97 Lab. Cas. (CCH) P 10193 (7th Cir. 1983).

146. See In re Sunarhauserman, Inc., 126 F.3d 811, 38 Collier Bankr. Cas. 2d (MB) 1300, 21 Employee Benefits Cas. (BNA) 1777, 1997 FED App. 0287P (6th Cir. 1997). Two older cases permitted priority for pension plan contributions. See *Matter of Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983). The *Columbia Packing* court reasoned that normal cost and amortization amounts were just statutory factors to be used in determining the actual current annual cost.

147. In re Unimet Corp., 842 F.2d 879, 17 Bankr. Ct. Dec. (CRR) 726, 18 Collier Bankr. Cas. 2d (MB) 694, 9 Employee Benefits Cas. (BNA) 1689, 127 L.R.R.M. (BNA) 3139, Bankr. L. Rep. (CCH) P 72227, 108 Lab. Cas. (CCH) P 10384 (6th Cir. 1988) (rejected by, In re Ionosphere Clubs, Inc., 22 F.3d 403, 25 Bankr. Ct. Dec. (CRR) 773, 30 Collier Bankr. Cas. 2d (MB) 1627, 146 L.R.R.M. (BNA) 2095, Bankr. L. Rep. (CCH) P 75799 (2d Cir. 1994)).

148. See 11 U.S.C.A. § 1113(f).

149. In re WCI Steel, Inc., 313 B.R. 414, 33 Employee Benefits Cas. (BNA) 1613 (Bankr. N.D. Ohio 2004). The court also noted that the payments made would likely qualify as payments made in the ordinary course.

150. IRC § 412(n).

151. See In re CSC Industries, Inc., 232 F.3d 505, 36 Bankr. Ct. Dec. (CRR) 284, 45 Collier Bankr. Cas. 2d (MB) 181, 25 Employee Benefits Cas. (BNA) 1550, Bankr. L. Rep. (CCH) P 78315, 86 A.F.T.R.2d 2000-7021, 2000 FED App. 0393P (6th Cir. 2000).

152. 11 U.S.C.A. § 507(a)(4).

ANNUAL SURVEY OF BANKRUPTCY LAW

153. For petitions filed on or after April 1, 2004. Indexed to CPI and adjusted every three years. See http://www.usdoj.gov/ust/r18/e_DebtLimit_4_2004.pdf.

154. 11 U.S.C.A. § 507(a)(3).

155. 29 U.S.C.A. § 1362.

156. 29 U.S.C.A. § 1301(a)(18).

157. See, e.g., *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1293, 22 Employee Benefits Cas. (BNA) 1481, Bankr. L. Rep. (CCH) P 77770, 98-2 U.S. Tax Cas. (CCH) P 50607, 82 A.F.T.R.2d 98-5519 (10th Cir. 1998); *In re CSC Industries, Inc.*, 232 F.3d 505, 36 Bankr. Ct. Dec. (CRR) 284, 45 Collier Bankr. Cas. 2d (MB) 181, 25 Employee Benefits Cas. (BNA) 1550, Bankr. L. Rep. (CCH) P 78315, 86 A.F.T.R.2d 2000-7021, 2000 FED App. 0393P (6th Cir. 2000).

158. In *CF&I*, from \$223 million to \$124 million; in *CSC*, from almost \$50 million to \$1.8 million.

159. *In re U.S. Airways Group, Inc.*, 303 B.R. 784, 51 Collier Bankr. Cas. 2d (MB) 1130, 31 Employee Benefits Cas. (BNA) 2788 (Bankr. E.D. Va. 2003).

160. 530 U.S. 15 (2000).

161. The *U.S. Airways* court's opinion provides an excellent analysis of the working of the regulations and the shortcomings of the arguments opposing their application and advocating a "prudent investor" approach.

162. *In re Washington Group, Inc.*, Nos. B-77-695, B-77-698 through 702, slip op. (Bankr. N.D.N.C. June 16, 1986), *aff'd* in relevant part, 8 Employee Benefit Cases. (BNA) 1351 (N.D.N.C. 1987).

163. See 29 U.S.C.A. § 1368(a), (b); see also, Termination Liability and Lien.

164. *City of New York v. Feiring*, 313 U.S. 283, 285, 61 S. Ct. 1028, 85 L. Ed. 1333 (1941) *New York v. Feiring*, (1941). See also *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982); *In re Chateaugay Corp.*, 53 F.3d 478, 19 Employee Benefits Cas. (BNA) 1169, Bankr. L. Rep. (CCH) P 76459 (2d Cir. 1995). This test was endorsed by the Supreme Court in *U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S. Ct. 2106, 135 L. Ed. 2d 506, 29 Bankr. Ct. Dec. (CRR) 271, 35 Collier Bankr. Cas. 2d (MB) 463, 20 Employee Benefits Cas. (BNA) 1289, Bankr. L. Rep. (CCH) P 76971, 96-1 U.S. Tax Cas. (CCH) P 50322, 77 A.F.T.R.2d 96-2562 (1996).

165. See *In re Bayly Corp.*, 163 F.3d 1205, 33 Bankr. Ct. Dec. (CRR) 834, 22 Employee Benefits Cas. (BNA) 2137, Bankr. L. Rep. (CCH) P 77873 (10th Cir. 1998).

166. 29 U.S.C.A. § 1307.

167. For an outline of the proposal, see <http://www.dol.gov/EBSA/pensionreform.html>.

168. For those firms without such ratings, a substitute method would be devised to determine whether the new requirements apply.

169. Some of the proposed changes are set out in a chart included in the Department of Labor website. See www.dol.gov/ebsa/SEPproposal.ppt#10.

PENSIONS, BANKRUPTCY, AND THE PENSION BENEFIT GUARANTY

The Administration proposal requires employers to pay for additional benefits immediately if the sponsor is financially weak or has a significantly underfunded pension plan

Percentage Points Below Required Funding Level (Target)	Bankrupt Sponsor	Junk Grade Sponsor (At-Risk Liability Target)	Investment Grade Sponsor (Ongoing Liability Target)
0 to 19	<ul style="list-style-type: none"> • No benefit increases • No lump sums • No accruals 	<ul style="list-style-type: none"> • No new restrictions 	<ul style="list-style-type: none"> • No new restrictions
20 to 39	<ul style="list-style-type: none"> • No benefit increases • No lump sums • No accruals 	<ul style="list-style-type: none"> • No benefit increases • No lump sums 	<ul style="list-style-type: none"> • No benefit increases
40 or worse	<ul style="list-style-type: none"> • No benefit increases • No lump sums • No accruals 	<ul style="list-style-type: none"> • No benefit increases • No lump sums • No accruals • No preferential funding of executive compensation 	<ul style="list-style-type: none"> • No benefit increases • No lump sums