

Pension Benefit Guaranty Corporation

82-25

September 20, 1982

REFERENCE:

[*1] 4041(a) Termination by Plan Administrator. Filing of Notice of Intent to Terminate
4042 Termination by PBGC
4044 Allocation of Assets
4048 Date of Termination

OPINION:

On August 20, 1982, the Pension Benefit Guaranty Corporation ("PBGC") received a Notice of Intent to Terminate the * * * Pension Plan ("Plan") from you as plan administrator. The Notice proposed, a termination date of May 12, 1982. The stated reason for termination was that * * * filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 1982.

Section 4041(a) of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1341(a) (1976 and Supp. IV 1980) provides that the plan administrator shall file a notice with PBGC proposing a termination "which may not be earlier than 10 days after the filing of the notice." The notice you submitted did not contain such a proposed date, and accordingly would be voidable by PBGC under the Notice of Intent to Terminate regulation, 29 C.F.R. 2616.4(c). As is our practice with notices of this type, PBGC will not void your Notice but will treat it as proposing, by operation of law, the earliest termination date which is ten days after filing -- here, August [*2] 30, 1982.

Section 4048(a)(1) of ERISA, 29 U.S.C. § 1348(a)(1), provides that the date of termination is set, without more, when PBGC agrees with the proposed date in a termination conducted "in accordance with the provisions of section 4041." Section 4048(a)(3), 29 U.S.C. § 1348(a)(3), provides for court resolution of disagreement on termination date between PBGC and the plan administrator.

In this case the Notice proposed an August 30, 1982 date by operation of law. PBGC accepts that date. Accordingly, this case is governed by section 4048 (a)(1), and August 30 is statutorily fixed as the date of termination.

PBGC has taken into account materials submitted with your Notice, evidence and comments presented to PBGC in written form, and testimony at a PBGC hearing on this matter held September 9, 1982 in Dallas, Texas, as well as information and documents PBGC has secured as part of its investigation. Those materials do not disclose any notification to Plan participants that the Plan was to be terminated for purposes of ERISA prior to the notification which you represent that you made in relation to your August 20, 1982 Notice. The materials do indicate that active participants [*3] received written notification on May 13, 1982, through Mailgrams dated May 12, 1982, that their employment was terminated. On this evidence, there would be some basis for a retroactive termination date of May 13, 1982 on the theory that the overwhelming majority of Plan participants knew on May 13 that there was little likelihood of future employment for them under the Plan, and consequently had no expectation of further benefits from the Plan beyond that date. Even on this theory -- which we discuss below -- PBGC would not find adequate basis to agree to a May 12 date.

Under section 4041(a) of ERISA, 29 U.S.C. § 1341(a), filing a valid Notice of Intent to Terminate permits a plan sponsor to terminate a plan voluntarily, effective ten days after filing. The section 4041(a) filing procedure must include notifying plan participants, under PBGC regulation 29 C.F.R. 2616.3(e). As with other aspects of the ERISA termination procedure in Title IV, these prerequisites to termination override plan terms which may purport to specify when a plan terminates. Thus participants normally can know with certainty whether they are still covered by an ongoing plan for purposes of ERISA.

On occasion, [*4] events involving a plan and its sponsor may be a reasonable basis for belief that the plan cannot continue indefinitely, that participants have no reasonable expectation of accruing additional plan benefits, or both. As would be expected in view of the prior discussion, such events do not automatically constitute an ERISA termination. The statute provides the exclusive means for determining date of termination in sections 4041, 4042 and 4048, 29 U.S.C. § 1341, 1342 and 1348.

Section 4048(a)(1) provides that PBGC may agree to a proposed termination date, which shall then become the statutory date. Where a date is proposed that is earlier than the notice of intent to terminate, PBGC must determine whether the retroactive date, taking into account all the facts and circumstances, would better serve the purposes of Title IV of ERISA than a prospective date. On the basis of six years' experience, PBGC stated its policy on retroactive termination dates in a December 1980 Federal Register Notice, "Date of Plan Termination," 45 Fed. Reg. 80941, 80942:

Despite the clear language of ERISA, plan administrators have filed a significant number of notices proposing that PBGC agree to plan [*5] termination dates that occurred before the notices were filed. Plan administrators are reminded that PBGC regulations provide that late filing of a notice of intent to terminate a plan constitutes a violation of the provisions of Title IV of ERISA, 29 C.F.R. 2604.3(f).

The termination date proposed in a notice that is timely filed in accordance with Section 4041(a) is presumed to be acceptable; PBGC will ordinarily agree to make it the termination date under Section 4048(1). However, a late filing eliminates the presumption in favor of the plan administrator's proposed date. It is the plan administrator's responsibility to anticipate termination and to follow Title IV provisions in effecting the termination. Plan administrators may be liable to PBGC or participants for losses caused by delay in filing a Notice.

It should be noted that on occasion PBGC will agree to a particular date as the appropriate termination date, notwithstanding the fact that a Notice of Intent to Terminate was not filed ten or more days before that date. However, such instances will be limited to highly unusual cases, such as those in which it is necessary to prevent unreasonable loss to the PBGC.

[*6] To illustrate this policy, PBGC would agree to a retroactive date for an insufficient plan if participants had no expectation of continued employment after the proposed date, there had been notification to participants at the proposed date that immediate plan termination was contemplated, there would be no significant loss to participants because of the earlier date, and there would be no significant loss to PBGC. Here, of course, there was no notification of intent to terminate the plan until August 20, 1982. In addition, in a Chapter 11 context pension plans are frequently continued as a means of maintaining a viable entity for purposes of successful reorganization. Termination of a plan in Chapter 11 requires specific actions which were not begun here until August 20. Absent notice to employees of plan termination, the employees may reasonably have expected additional vesting credit and the "phase-in" of additional levels of guaranteed benefits.

The question then is whether, considering employee expectations, the risk of loss placed on the PBGC by the plan administrator's failure to notify PBGC in a timely fashion of its intent to terminate the plan as of a May date, or other [*7] "highly unusual" circumstances, PBGC agreement to a retroactive termination date is justified. The figures available to us establish that PBGC faces increased benefit costs with a present value of approximately \$2,400,000 if August 30 is used as the date of termination rather than a May date. The loss to PBGC is reduced by an increase in the value of plan assets between May and August 30, 1982 and recovery of the additional unpaid employer contribution claims that accrued by the later date. In consideration of all the facts and circumstances, PBGC concludes that a retroactive date of termination is not justified.

The facts available to us indicate that the assets of the Plan are not adequate to provide benefits at the level guaranteed by PBGC. Thus, for purposes of section 4041(c) of ERISA, 29 U.S.C. § 1341(c), we are unable to determine that the assets held under the plan, when allocated according to section 4044 of ERISA, 29 U.S.C. § 1344, are sufficient to discharge when due all obligations of the plan with respect to guaranteed benefits. Therefore, in order to minimize potential overpayments and subsequent need to recoup from participants the amount of overpayments, PBGC [*8] requests that the plan administrator adjust the payment of any monthly benefit to estimated Title IV allocated levels, not below guaranteed levels, for payment due after the date of this letter.

In addition, you should, in your capacity as plan administrator:

1. Not pay any lump sum amount.
2. Not pay amounts under the termination provisions of the plan.
3. Continue making monthly payments (reduced to the levels described above) to participants and beneficiaries who were receiving pension benefits when the notice of termination was filed.

4. Begin making payments of monthly pension benefits (at the levels described above) to those participants and beneficiaries who become eligible for these benefits after the proposed termination date. PBGC requests that the plan administrator not purchase annuities for these payments. If benefits cannot be paid other than through annuities, PBGC should be notified.

Because participants may have received monthly payments after after August 30, 1982 in excess of Title IV levels, you should, in your capacity as plan administrator, notify participants and beneficiaries receiving monthly payments that their benefits may exceed the level that [*9] is guaranteed or funded and, therefore, they are being reduced and overpayments will be recouped.

We enclose an original and three copies of a trusteeship agreement for the Plan. Please sign all copies and return them to * * * Case Officer, PBGC, Division of Case Processing, (Mail Code 523), 2020 K Street, N.W., Washington, D.C. 20006. We will return a copy to you after signature by PBGC. Thank you.

Edwin M. Jones
Executive Director