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The ERISA Litigation Newsletter

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Editor's Overview

This month our articles focus on the availability of damages in complex ERISA class actions and withdrawal liability actions. Jackie Len first provides Proskauer's perspective on the implications for ERISA litigation arising out of the U.S. Supreme Court's recent ruling in *Comcast Corp. v. Behrend*, 2013 WL 1222646 (U.S. Mar. 27, 2013). There the Supreme Court held that in order to obtain class certification plaintiffs carry the burden of establishing not only that they have proof of class-wide liability, but also that their potential damages are tied to their theory of liability and capable of class-wide proof.

In the second article, Neal Schelberg and Anthony Cacace provide Proskauer's perspective on *Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund*, 2012 WL 5197117 (D. Mass. Oct. 18, 2012), where a federal district court in Massachusetts concluded that a private equity fund was not a "trade or business" subject to the imposition of withdrawal liability and thus was not responsible for paying the withdrawal liability owed by one of its portfolio companies that had completely withdrawn from a multiemployer pension fund.

As always, please be sure to review Rulings, Filings, and Settlements of Interest, which discuss: the U.S. Supreme Court's decision that plan terms trump equitable defenses; the availability of monetary damages for inadequate disclosures; the statute of limitations for claims under ERISA; IRS guidance for 403(b) plans; PBGC's decision to withdraw territorial coverage opinion letters impacting Puerto Rican plans; involuntary plan terminations; and the Affordable Care Act.

View From Proskauer: U.S. Supreme Court Provides Defendants With More Ammunition for Defeating Class Certification by Requiring Classwide Proof of Damages[1]

By Jacklina Len

The U.S. Supreme Court recently ruled in *Comcast Corp. v. Behrend*, 2013 WL 1222646 (U.S. Mar. 27, 2013) that, in order to obtain class certification, plaintiffs carry the burden of establishing not only that they have proof of classwide liability, but also that their potential damages are tied to their theory of liability and capable of classwide proof. The Court's ruling follows on the heels of its ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in which it suggested that the admissibility standard for expert evidence outlined in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), should apply at the class certification stage. Instead of ruling on the Daubert issue, the Court provided what could prove to be an even more effective means for defeating class certification.

The Lower Courts' Opinions

In *Comcast*, a claim was brought on behalf of a group of more than two million current and former Comcast subscribers, alleging that Comcast unfairly eliminated competition and overcharged customers in violation of the Sherman Act. Specifically, plaintiffs alleged that Comcast obtained a monopoly through a series of transactions with competitors pursuant to which regional cable markets were allocated in a manner that excluded and prevented competition. Plaintiffs offered four theories of antitrust violations that they claimed caused cable subscription rates to increase. Plaintiffs' expert calculated plaintiffs' potential damages by comparing the market as it was with Comcast's monopoly power against a market without Comcast's alleged anticompetitive activity, but admitted that he had not isolated the damages resulting from each of plaintiffs' four theories of antitrust injury. Of the four theories of liability alleged, the district court certified a class claim only with respect to one theory: that Comcast's activities reduced the level of competition from "overbuilders" (companies that build competing cable networks in areas where an incumbent cable company
already operates).

Defendants were granted leave, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, to immediately appeal the district court's class certification ruling. A divided panel of the Third Circuit affirmed. The court reasoned that, at the class certification stage, it need not consider Comcast's argument that plaintiff's damages model failed to attribute damages resulting from the overbuilder theory because such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry."

The Supreme Court's Decision

Comcast petitioned for *certiorari* to the U.S. Supreme Court. It asked the Court to rule on the following issue: "Whether a district court may certify a class action without resolving 'merits arguments' that bear on [Rule] 23?s prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)."

The Supreme Court agreed to hear the case, but rephrased the question for the parties to address. The question posed for the parties to brief and to be argued before the Court was: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

The Majority's Opinion

In a 5-4 decision, a majority of Justices (Scalia, Roberts, Kennedy, Thomas, and Alito) reversed the decision of the Third Circuit and held that the class was improperly certified. In light of the way in which the Court rephrased the question presented, the Court appeared poised to address whether plaintiffs' expert testimony must satisfy the *Daubert* standards on a motion for class certification. The Court, however, did not address that issue. Rather, it stated that it would address Comcast's argument that plaintiffs' purported damages could not be measured on a classwide basis.

The Court held that plaintiffs could not satisfy Rule 23(b)(3)'s requirement that common issues predominate because they could not show that their purported damages were capable of classwide proof. The Court elaborated that plaintiffs' damages model must be consistent with plaintiffs' liability model, and that any model proffered as classwide damages evidence must measure damages exclusively attributable to the class-wide theory of harm. Here, plaintiffs' damages model failed to "bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to deterrence of overbuilding," the only damages theory the district court found was capable of classwide proof. The Court found that the failure of plaintiffs' damages model to measure damages exclusively attributable to overbuilding meant that plaintiffs failed to meet Rule 23(b)(3)'s requirements that damages be susceptible to classwide measurement.

The Dissent's Opinion

The four dissenting Justices (Ginsburg, Breyer, Sotomayor, and Kagan) believed that the Court should have dismissed the petition as improvidently granted. The rephrased question, which purported to shift the focus of the dispute to the admissibility of the expert testimony, was "inapt," according to the dissent, because Comcast failed to object to (or move to strike) the admission of the damages model offered by plaintiffs' expert. As a result, the dissent stated that the majority's decision "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'" Instead, the dissent stated that since, in its view, Comcast had never challenged the need to prove damages on a classwide basis through a common methodology, the majority's ruling "is good for this day and case only."

Proskauer's Perspective

Although *Comcast* was an antitrust lawsuit, it is likely to have an impact on class certification proceedings across all disciplines, including claims under the Employee Retirement Income Security Act of 1974 (ERISA). At a minimum, the Supreme Court's ruling should make considerations of damages a component of the class certification analysis. This alone represents a considerable departure from the approaches of many lower court rulings, which have tended to focus exclusively on liability issues when addressing a class certification motion. Furthermore, while not directly addressing the Daubert issue that was originally presented, the Supreme Court's ruling clearly tends to increase the scrutiny accorded to expert testimony at the class certification stage, in order to determine whether, on the strength of the expert testimony, the plaintiff has claims that can be established on a classwide basis.

Comcast may present insurmountable obstacles to certification in certain types of ERISA class actions. For example, for claims based on alleged faulty or misleading ERISA disclosures, unless plaintiffs can prove that all class members relied to their detriment or suffered some other type of class-wide harm in the same way, class certification may be inappropriate. Similarly, in cases alleging that imprudent investments were offered in 401(k) or similar defined contribution plans, the different investment strategies, circumstances, and impact of these investments on individual participants may make class certification inappropriate after *Comcast.*

District Court Limits the Collection of Withdrawal Liability Against Private Equity Funds[1]

By Neal S. Schelberg & Anthony S. Cacace

In *Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund*, 2012 WL 5197117 (D. Mass. Oct. 18, 2012), a federal district court in Massachusetts concluded that a private equity fund was not a "trade or business" subject to the imposition of withdrawal liability and thus was not responsible for paying the withdrawal liability owed by one of its portfolio companies that had completely withdrawn from a multiemployer pension fund.[2] In so holding, the court rejected a Pension Benefit Guaranty Corporation ("PBGC") Appeals Board opinion letter that reached the opposite conclusion, finding the PBGC's analysis "unpersuasive" and "incorrect as a matter of law." If adopted by other courts, this decision could significantly limit a multiemployer pension fund's ability to assess and collect withdrawal liability against companies that are owned and operated by private equity funds.

The Multiemployer Pension Plan Amendments Act of 1980 and Private Equity Funds

Since the enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), employers that withdraw from a multiemployer plan have been required to pay their share of the pension plan's unfunded liabilities, *i.e.*, an employer's withdrawal liability. In the event of a contributing employer's complete or partial withdrawal, a multiemployer pension fund must assess and collect the employer's withdrawal liability. But what if the employer is unable to pay all or a portion of the withdrawal liability demanded by the multiemployer pension fund? For purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the signatory company to the collective bargaining agreement and all "trades or business (whether or not incorporated) that are under common control" with the withdrawing company are treated as the "employer." Each member of the controlled group is jointly and severally liable (*i.e.*, the members of a group are either individually or mutually responsible)to the multiemployer pension plan for the withdrawal liability.

Private equity funds are pools of actively managed capital raised from institutional investors that are used to make investments in public and private companies (known as portfolio companies). These investments are made with the intent of creating value for the investors in the portfolio companies by improving their operations, reducing costs, selling non-core assets and maximizing cash flow. As employers, the portfolio companies contribute to multiemployer pension plans for their employees who are covered under the terms of a collective bargaining agreement with a labor union. As such, these portfolio companies have potential exposure for withdrawal liability. But what about the private equity funds that invested in these companies?

Procedural History

Sun Funds, the private equity funds at issue here, are advised by Sun Capital Advisors, Inc. ("Sun Capital"), which specializes in leveraged buyouts and investing in underperforming companies. Sun Capital recommends investments to the Sun Funds and then negotiates and structures the investments on behalf of the Sun Funds. The Sun Funds are limited partnerships to which investors contribute money for investment purposes. The Sun Funds do not have employees, office space or goods for sale; they are essentially pools of assets managed by Sun Capital. Sun Capital is a general partner to each of the Sun Funds and operates the Sun Funds along with a limited partner committee.

The Sun Funds invested in Scott Brass, Inc., a manufacturer of brass and copper coil for industrial purposes (the "Employer"), through investment vehicles established for the purpose of buying the ownership interests of the Employer. The first vehicle purchased 70% of the ownership interests of the Employer, while the other purchased the remaining 30%.

For two years after the purchase, the Employer regularly made contributions to a pension plan pursuant to a collective bargaining agreement with the New England Teamsters Union. However, in 2008, the Employer was unable to remain in business and closed its doors. As a result, the Employer withdrew from the plan, and shortly thereafter, filed for bankruptcy. The plan demanded approximately $4.5 million in withdrawal liability from the Employer. Upon learning of the Sun Funds' investment in the Employer, the plan determined that the Sun Funds were a "joint venture or partnership in common control with" the Employer and demanded payment of the withdrawal liability from the Sun Funds as well.

The Sun Funds filed a declaratory judgment action seeking an order from the district court that they were not employers under ERISA, and thus not liable for withdrawal liability because they were not a "trade or business" under "common control" with the Employer. The plan filed a counterclaim in the action seeking to hold the Sun Funds jointly and severally liable for the Employer's withdrawal liability. The parties cross-moved for summary judgment.

The District Court's Decision

The district court concluded that the Sun Funds were not a trade or business as a matter of law, and thus, could not be held liable to the plan for the Employer's withdrawal liability. In so ruling, the court relied on the U.S. Supreme Court's decision in *Commissioner v. Groetzinger*, 480 U.S. 23, 25 (1987), which held that a "trade or business" under the federal tax code must have a primary purpose of making "income or profit" and must conduct its activity "with continuity and regularity." It also relied on prior Supreme Court precedent that ruled "investments" are not trades or businesses. *See Whipple v. Comm'r*, 373 U.S. 193, 202 (1963).

The district court rejected a 2007 PBGC Appeals Board Opinion that held that a private equity fund (similar to the Sun Funds) qualified as a "trade or business" for the purposes of ERISA withdrawal liability. In the 2007 opinion, the PBGC applied the *Groetzinger* test and determined that the first prong of the test was satisfied because the purpose of the private equity fund was to make a profit. The PBGC observed that the private equity fund was engaged in "investment services" and the private equity fund's general partner was paid for consulting and management services. The PBGC concluded that the second prong of the test also was satisfied because the size of the profits produced by the private equity fund were considerable, and as such, constituted sufficient evidence of "continuity and regularity."

The district court determined that the PBGC opinion was flawed because: (i) it incorrectly attributed the activity of the general partner of the private equity fund to the fund itself, which was a "misapplication of agency law;" (ii) there was no basis for its reasoning that the prior Supreme Court cases holding that "investments" were not trades or business were limited to individual investors, and did not apply to partnerships as investors; and (iii) the PBGC opinion was in "direct conflict with Supreme Court precedent, not to mention Tax Code interpretations it is bound to follow."

Applying the *Groetzinger* test to the Sun Funds, the district court concluded that the first prong was easily satisfied since there was no dispute that the Sun Funds' primary purpose was to make a profit. Thus, the critical question was whether the Sun Funds were engaged in activity with "continuity and regularity," keeping in mind that "merely holding passive investment interests" was not adequately "continuous or regular" to constitute a trade or business for purposes of the statute. The Sun Funds argued that they made single investments in the Employer and served as "passive pools" yielding only capital gains and dividends. The plan countered that the Sun Funds were active in managing the Employer after the investment, taking control of the board of directors and running the daily operations of the Employer. Furthermore, the plan contended that the Sun Funds received reimbursements and other non-investment income, thus making the Sun Funds' investments active in nature and not passive.

The district court rejected the plan's arguments and ruled that the Sun Funds were not a trade or business for purposes of withdrawal liability. The court observed that the Sun Funds did not have "any employees, own any office space, or make or sell any goods," and their tax returns listed only investment income. Moreover, the evidence suggested that while Sun Capital Advisors may have had a role in managing the Employer's operations, the Sun Funds had no such relationship with the Employer. Also, the fact that the Sun Funds elected individuals to the board of directors of the Employer did not constitute active management of the Employer since those elections were made by the Sun Funds in their role as shareholders of the Employer.

Proskauer's Perspective

If other courts adopt the district court's analysis in the *Sun Capital Partners*' case, then the PBGC Advisory Opinion will cease to serve as a vehicle for holding private equity funds liable for withdrawal liability.[3] However, it bears noting that the district court's decision turned on the role that the Sun Funds played with respect to the operation of the Employer. The funds were found to be acting as passive investors and were not involved in the active management or operation of the company. Implicit in the court's decision is that if a private equity fund's activities cross the threshold from passive investing to active management of an enterprise, then the private equity fund may be engaging in a trade or business for controlled group purposes.

Rulings, Filings, and Settlements of Interest

Monetary Damages Potentially Available For Inadequate Disclosure

By Brian Neulander

- In *Weaver Bros. Ins. Assoc., Inc. v. Braunstein*, No. 11-5407, 2013 WL 1195529 (E.D. Pa. Mar. 25, 2013), a district court denied the plan administrator's motion for judgment on the pleadings, ruling that monetary relief may be available for ERISA violations associated with the plan administrator's failure to properly communicate the participant's benefit rights following conversion from full-time employment to disabled status. The participant, Ms. Braunstein, was covered by a life insurance policy through her employer, but coverage lapsed 12 months after she left "active" employment for disability leave. The court first determined that the plan administrator failed to provide an adequate summary plan description and that this precluded Ms. Braunstein from independently learning of her right to convert to an individual policy. The court also determined that since the plan administrator had

actual knowledge of Ms. Braunstein's prolonged illness, it had an affirmative duty to inform her of "material information that could affect [her] benefits" – such as the policy conversion clause. Finally, relying on *CIGNA Corp v. Amara*, 131 S. Ct. 1866 (2011), the court rejected the plan administrator's argument that damages were limited to non-monetary "equitable" relief, and that under these circumstances, the participant's estate may be entitled to recover the face value of the participant's life insurance policy as a "surcharge" remedy.

U.S. Supreme Court Rules That Plan Terms Trump Equitable Defenses

By Russell Hirschhorn and Myron Rumeld

- ???The U.S. Supreme Court issued its ruling in *U.S. Airways, Inc. v. McCutchen* in which the Court unanimously ruled that a clearly drafted reimbursement clause will trump all equitable defenses. The Supreme Court's ruling will likely be viewed favorably by plan sponsors, as it will allow them to anticipate with more certainty the impact of the plan terms they draft. Although in this particular instance the Court limited the plan's reimbursement right because of a perceived ambiguity in the plan's terms relating to attorney's fees, it would appear that a properly drafted a reimbursement clause will allow a plan to recover the full amount of the medical costs it paid without qualification.

Please watch our Blog and Newsletter for a more comprehensive analysis of the Court's decision.

U.S. Supreme Court Agrees To Hear Case On ERISA Statute of Limitations

By Doughlas Dahl

- ???The U.S. Supreme Court announced on April 15, 2013 that it will take up the question of when the statute of limitations period may begin to run for filing a legal action for long-term disability benefits under an ERISA plan. *Heimeshoff v. Hartford Life & Accident Insurance Co.*, U.S., No. 12-729, *cert. granted* 4/15/13.

Heimeshoff had been a Wal-Mart employee for nearly twenty years. In 2005, she filed a claim for long term disability benefits as a result of various ailments caused by fibromyalgia. Hartford's plan provided that its three-year limitations period ran from the time that proof of loss was due under the plan. Here, even accepting Heimeshoff's arguments, the latest she could have filed a proof of loss was in September 2007, and she did not commence her lawsuit until November 2010.

The Second Circuit concluded that Connecticut law permits parties to an insurance contract to shorten the state-prescribed statute of limitations, and also permits the statute of limitations under an ERISA plan to begin before a claimant can bring a legal action. Accordingly, it held that the district court had properly dismissed Heimeshoff's claim as untimely since she had filed her lawsuit several months after the three year period had expired.

The Supreme Court agreed to address the following question: "When should a statute of limitations accrue for judicial review of an ERISA disability adverse benefit determination?" According to the petition, the Circuits have not uniformly answered this question. As we have previously observed (April 2012 ERISA Litigation Newsletter), the reasoning of the Second Circuit appears to be more consistent with the enforcement of a contractual statute of limitations period since, absent the ability to establish an early accrual date of the claim, any effort to shorten the limitations period would yield little benefit.

IRS Establishes Pre-Approved Plan Program For 403(B) Plans

By Lisa A. Berkowitz Herrnson

- ???On March 28, 2013, the IRS issued Revenue Procedure 2013-22 which establishes a program for the IRS to accept applications for opinion and advisory letters for 403(b) prototype plans and 403(b) volume submitter plans, respectively, starting June 28, 2013. The new program is similar to the pre-approved plan program maintained by the IRS for tax-qualified plans with one significant difference – an employer who adopts a pre-approved 403(b) plan will not be able to apply for an individual determination letter for the 403(b) plan. In addition, the IRS has stated that it is not establishing a determination letter program for individually designed 403(b) plans at this time. Although many large employers will likely continue to use individually-designed 403(b) plans, the program offers employers an alternative to adopting an individually-designed plan to satisfy the written plan requirement under the final regulations issued under Section 403(b) of the Internal Revenue Code.

The IRS has also issued an information package containing samples of 403(b) plan provisions to assist sponsors who are drafting 403(b) prototype plans and 403(b) volume submitter plans with the goal of accelerating the review and approval of these plans. Some of the notes included in the information package reflect requirements that are not included in the final Section 403(b) regulations and have raised questions concerning 403(b) plan administration and compliance. In addition, the information package does not include sample provisions for mandatory employee contributions as a condition of employment, a common feature in many 403(b) plans.

Because there are still a number of unanswered questions and issues that need to be refined, we expect that the IRS will continue to provide guidance concerning the program and the sample provisions.

403(b) Plans – Correction Due To Loss Of Tax-Exempt Status

By Lisa A. Berkowitz Herrnson

- ???What happens if a tax-exempt organization becomes ineligible to sponsor a Section 403(b) Plan because it loses its exempt status under Internal Revenue Code Section 501(c)(3)? As an example, loss of tax-exempt status may occur automatically if the organization fails to file an annual Form 990 information return for three consecutive years. It may also lose its exempt status if the IRS revokes or terminates exempt status for other reasons.

To fix that problem, an organization may apply to the IRS for a reinstatement of its tax-exempt status; however, this only works if tax-exempt status was automatically revoked due to failure to file Forms 990. In that case, the IRS may reinstate tax-exempt status retroactively, or it may only reinstate tax-exempt status prospectively.

If an organization loses its tax-exempt status, it must immediately stop making contributions to its 403(b) Plan because it is no longer considered an eligible employer. If, however, contributions were made to the organization's 403(b) Plan after loss of tax-exempt status and tax–exempt status is not reinstated or is only reinstated prospectively, the 403(b) Plan sponsor may voluntarily correct the eligibility failure through the IRS's Employee Plans Compliance Resolutions System (referred to as EPCRS). The benefit of correcting the employer eligibility failure is that all money that was contributed to the 403(b) Plan while the employer was ineligible to maintain the 403(b) Plan will retain its tax-favored status, all contributions may remain in the applicable annuity contracts and custodial accounts and the organization may avoid potential penalties.

To participate in this voluntary correction program (referred to as VCP), the organization must make a VCP submission to the IRS and pay a compliance fee based on the number of employees that were eligible to participate in the 403(b) Plan. To be eligible to correct an employer eligibility failure under VCP, the organization or the 403(b) Plan cannot be under audit by the IRS, all contributions to the 403(b) Plan must have ceased, the 403(b) Plan must have complied with all applicable requirements under the final Section 403(b) regulations and must continue to comply with the distribution rules applicable to 403(b) Plans.

403(b) Plans – Correction Of Plan Errors

By Lisa A. Berkowitz Herrnson

- ???Final Internal Revenue Code Section 403(b) regulations, which became effective January 1, 2009, require that plan sponsors adopt written 403(b) Plan documents. A 403(b) Plan is a form of defined contribution retirement plan that may only be offered by employers that are tax-exempt entities under Section 501(c)(3) of the Internal Revenue Code or that are public educational organizations and for the benefit of certain clergy members. If a 403(b) Plan sponsor did not adopt a written plan document by December 31, 2009, the sponsor's 403(b) plan is technically no longer considered to be a qualified tax-deferred retirement plan as of January 1, 2009. The benefit of correcting the written document failure is that all money that has been contributed to the 403(b) Plan will remain tax-deferred and that all investments under the 403(b) Plan will retain their tax-favored status.

To help 403(b) Plan sponsors voluntarily correct any plan document errors, the IRS recently updated its Employee Plans Compliance Resolutions System (referred to as EPCRS). Plan document errors are cured through the voluntary correction program (referred to as VCP) by having the 403(b) Plan sponsor adopt a written plan document that complies with the final regulations, make a VCP submission, and pay a compliance fee based on the number of employees eligible to participate in the 403(b) Plan. To simplify this procedure, the IRS has made available a 403(b) VCP Submission Kit, and to encourage 403(b) Plan sponsors to take advantage of this program, the IRS has reduced the compliance fee by 50% if the VCP filing is made by December 31, 2013.

PBGC Withdraws Two Territorial Coverage Opinion Letters Impacting Puerto Rican Plans

By Justin Alex

- ???The status of PBGC coverage for Puerto Rico defined benefit plans is one that has been the subject of review and analysis by the PBGC for quite some time. Most recently, on April 19, 2013, the PBGC withdrew two older opinion letters (Opinion Letters 77-172 and 85-19), which addressed whether defined benefit plans established and maintained in Puerto Rico are covered by Title IV of ERISA. This withdrawal may be an indication that further guidance for Puerto Rico based defined benefit plans is forthcoming.

By way of background, ERISA provides that a defined benefit plan is generally subject to Title IV if either (1) the Secretary of Treasury determines that the plan is described by Internal Revenue Code section 401(a); or (2) the plan otherwise meets the requirements of Code section 401(a) in practice. One key requirement for a defined benefit plan under Code section 401(a), is that the plan's underlying trust must be "created or organized in the United States." United States territories such as Puerto Rico are not considered part of the United States for section 401(a) purposes. However, Title IV does cover Puerto Rico-based plans with non-United States trusts if the plans make a certain election under ERISA section 1022(i). (ERISA section 1022(i) is implemented by Treasury Regulation 1.401(a)-50.) The section 1022(i)(2) election means that a Puerto Rico based plan has made an irrevocable election to be treated as a qualified plan under Code section 401(a), even with no United States trust.

In Opinion Letter 77-172, the PBGC opined that Title IV coverage of a Puerto Rico-based defined benefit plan was not conditioned on a 1022(i)(2) election. In other words, the PBGC seemed to think that a Puerto Rico based plan could be subject to Title IV even without the election. The PBGC reiterated that point in Opinion Letter 85-19, noting that non-United States trusts alone do not exclude territorial plans from Title IV coverage. It is unclear whether PBGC will soon provide additional guidance on Title IV coverage of territorial plans after withdrawing Opinion Letters 77-172 and 85-19. However, it appears that PBGC may now consider a 1022(i)(2) election as a prerequisite for Title IV coverage of Puerto Rican plans with non-United States trusts. Plan sponsors of Puerto Rico plans should continue to monitor these developments because plans that are not covered by Title IV are not subject to PBGC premiums, liabilities under section 4062(e) of ERISA, or PBGC reporting requirements.

PBGC Seeks Involuntary Plan Termination before Plan Sponsor's Proposed Share Sale

By Justin Alex

- ???On April 18, 2013, PBGC filed a complaint (*PBGC v. Saint-Gobain Corp. Benefits Comm.*, E.D. Pa. Case No. 13-02069) to involuntarily terminate a defined benefit plan sponsored by Saint-Gobain Containers, Inc. before Ardagh Group, S.A. acquires Saint-Gobain through a share purchase. PBGC alleges that the plan is underfunded by approximately $523.7 million and that the sale will transfer the plan from Saint-Gobain's "investment-grade" controlled group to Ardagh's controlled group, unreasonably increasing PBGC's potential long-run loss from the plan.

PBGC likely learned of the transaction from its Early Warning Program, through which PBGC attempts to identify corporate transactions that could jeopardize defined benefit plans. This complaint demonstrates PBGC's willingness to seek involuntary plan terminations when it is unable to negotiate additional contributions or other security for underfunded defined benefit plans within the context of corporate transactions, even when the plan sponsor will continue as a going concern after an arms-length transaction.

PBGC particularly monitors the following six types of transactions through its Early Warning Program: 1) controlled group breakups; 2) sales of corporations that will transfer significant underfunded pension liabilities; 3) leveraged buyouts; 4) major divestitures by plan sponsors who will retain significant underfunded pension liabilities; 5) payments of extraordinary dividends; and 6) substitutions of secured debt for significant amounts of previously unsecured debt. When planning such transactions, companies that sponsor underfunded defined benefit plans should prepare for inquiries from PBGC and the risk of involuntary plan termination actions.

Agencies Issue New FAQs Regarding Implementation of ACA

By James Napoli

- ???The US Departments of Labor, Health and Human Services (HHS), and the Treasury (the "Agencies") jointly issued yesterday a document entitled "FAQs about the Affordable Care Act Implementation Part XV" ("FAQs") addressing four issues of concern with respect to implementation of the Affordable Care Act ("ACA") by group health plans and health insurers offering group coverage.

Annual Limit Waiver Expiration Date based on a Change to a Plan or Policy Year

Certain plans, including those referred to as "mini med" plans, by design might otherwise violate the ACA prohibition on annual or lifetime limits on essential health benefits. Many of these plans obtained government waivers from this ACA prohibition. These waivers are due to expire in 2014. The new FAQs clarify that any waiver expiration date cannot be extended by way of plan or policy year amendment. For example, if a waiver approval letter states that a waiver is granted for an April 1, 2013 plan or policy year, the waiver will expire on March 31, 2014, regardless of whether the plan or issuer later amends its plan or policy year.

"Good Faith" is the Standard for Implementation of Two ACA Mandates

The ACA requires that non-grandfathered group health plans and health insurance issuers not discriminate as to participation under a plan or coverage against any health care provider who is acting within the scope of that provider's license or certification under applicable state law. It also requires that non-grandfathered group health plans provide coverage to individuals participating in approved clinical trials. Because the provider nondiscrimination and clinical trial coverage mandates under ACA are self-implementing (i.e., do not require regulations in order to be implemented), the FAQs note that the Agencies are not expected to issue regulations in the near future with respect to those mandates. Therefore, until further guidance is issued, for plan or policy years beginning on or after January 1, 2014, non-grandfathered group health plans and health insurance issuers offering group coverage are expected to implement the provider nondiscrimination and clinical trial coverage requirements using a good faith, reasonable interpretation of the law. For more information on these mandates click here http://www.dol.gov/ebsa/faqs/faq-aca15.html.

Transparency Requirements Effective

The ACA requires that health insurance issuers seeking to offer qualified health plans ("QHPs") (i.e., individual or small group policies that meet various exchange standards) through an exchange, must submit specified information to the exchange and other entities in a timely and accurate manner. The FAQs clarify that issuers need only begin providing that information after a QHP has been certified as a QHP for one benefit year. The FAQs also clarify that certain related reporting requirements will become applicable to non-grandfathered group health plans and health insurance issuers offering group or individual coverage no sooner than when the transparency reporting requirements with respect to QHPs become applicable. For more information on these reporting requirements click here http://www.dol.gov/ebsa/faqs/faq-aca15.html.

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[2] The court also concluded that the Sun Funds did not "evade or avoid" the assessment of withdrawal liability by splitting the ownership of the Employer between two funds so that neither fund would exceed 80% ownership of the Employer because there were business purposes for structuring the investments in that manner.

[3] A district court in a different circuit analyzed the same PBGC opinion and ruled in favor of a pension fund seeking to hold a private equity fund liable for withdrawal liability. *See Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners*, 722 F. Supp. 2d 854 (E.D. Mich. 2010).

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