

Pension Benefit Guaranty Corporation

79-17

December 17, 1979

REFERENCE:

[*1] 4003(e)(1) Investigatory Authority; Cooperation with other Agencies; Civil Actions Maintainable by PBGC
4021(a) Plans Covered. Requirements of Coverage
4041(b) Termination by Plan Administrator. Notice of Sufficiency
4041(g) Termination by Plan Administrator. Appointment of Trustee
4042 Termination by PBGC
4044 Allocation of Assets

OPINION:

This is in reply to your letter suggesting that the Pension Benefit Guaranty Corporation ("PBGC") is liable for the vested benefit of * * *, a former participant in the * * * Pension Plan ("Plan"). You stated that * * * vested interest was "overlooked" when the Plan assets were distributed upon its termination.

The PBGC was established by Congress to guarantee the payment of certain pension benefits provided by pension plans which terminate when covered by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA, § 4002(a)(2), 29 U.S.C. § 1302(a)(2). Upon the termination of a pension plan described in Section 4021(a) of ERISA, 29 U.S.C. § 1321(a), the PBGC must determine whether "the assets held under the Plan are sufficient to discharge when due all obligations of the plan with respect to basic benefits . . ." ERISA, § [*2] 4041(b), 29 U.S.C. § 1341(b). The PBGC's guarantee arises in the event that a terminating plan has insufficient assets available to pay guaranteed benefits, ERISA, § 4022(a), 29 U.S.C. § 1322(a).

In the instant case, relying upon the Administrator's Certification of Sufficiency ("Certification") executed by your client, * * *, the former President of * * * Company, the PBGC determined that the Plan's assets were sufficient to pay basic benefits when due, and notified him of this determination, in accordance with Section 4041(b) of ERISA, 29 U.S.C. § 1341(b). Also, pursuant to that subsection, the PBGC authorized the Plan administrator to proceed in distributing the Plan's assets in accordance with Section 4044 of ERISA, 29 U.S.C. § 1344. It should be noted in this regard that the PBGC relies on the accuracy of the information supplied by the Plan administrator to make its determination with respect to Section 4041 (b).

Prior to the execution of the Certification, the PBGC case officer handling the Plan's termination advised the Plan administrator's duly authorized representative, * * *, President of * * *, Inc., that "failure to allocate and distribute assets in accordance with [*3] Title IV of ERISA may subject you to personal, civil liability." Subsequently, * * * executed the * * * Certification. In it he declared, among other things, that "Each participant not in pay status with a benefit payable as an annuity will have the opportunity to receive such a benefit through a fully paid-up annuity contract . . ." or in another optional form. * * * further declared that prior to payment being made, "each participant or his or her beneficiary will have been notified in writing of the date of termination, the available forms of payment and the amount of each, and that the determination of sufficiency . . . does not constitute endorsement by PBGC of the manner in which the plan administrator proposes to allocate and distribute the Plan's assets, nor does it constitute a PBGC ruling on the rights of any participant or beneficiary under the Plan or ERISA."

It now appears that the Certification executed by * * * was inaccurate. All participants were not notified of the termination of the Plan and the amount of their benefits, nor were all participants allowed to elect the form of their benefit. You acknowledge in your letter to the PBGC that * * * was "overlooked" [*4] and that assets available to provide * * * benefit were erroneously distributed to other Plan participants.

Since the Plan was a sufficient plan (as certified by your client), responsibility for * * * pension lies with those who caused * * * benefit not to be paid and those participants who were unjustly enriched as a result of that action.

It appears that the actions of the plan administrator, its officers and directors at the time of the termination and distribution, and/or the actions of the plan trustees with respect to the administration of the Plan and the manner of

distribution of Plan assets have resulted in the violation of various provisions of ERISA. Violations of Title IV may be redressed by the PBGC in its corporate capacity. Also, PBGC is authorized to become trustee of the Plan pursuant to § 4041(e), § 4041(g) and § 4042 of Title IV of ERISA, and as trustee PBGC may act to correct breaches of fiduciary duty. Further, the PBGC may proceed to recover plan assets which were erroneously distributed to participants of which * * * and * * * received the substantial share in violation of ERISA § 4044.

PBGC's authority to redress violations in its corporate capacity [*5] is set forth in ERISA § 4003(e)(1). The failure to distribute plan assets in accordance with § 4044 may have resulted in violation of a fiduciary's obligation to discharge his duties solely in the interest of participants under § 404(a)(1) of Title I of ERISA including violations of § 404(a)(1)(A)(i), (B) and (D). In this connection we call your attention to § 409 of Title I which provides for restoration of profits made through use of plan assets by a plan fiduciary. Title I Section 502(a)(3) authorizes PBGC as trustee to take appropriate action with respect to fiduciary violations. The matter might also be referred to the Department of Labor for action.

Further, it is our understanding that * * * requested information from * * * concerning his vested interest in the pension plan. * * * failed to comply with this request. In this regard, we call your attention to ERISA § 502(c) which imposes personal liability of up to \$100 a day for the failure or refusal to comply with a participant's request for information concerning the plan within 30 days after such request.

Accordingly, * * * should arrange for the payment to * * * of the latter's benefit under the Plan, including his [*6] guaranteed benefit of approximately \$2,000 and any non-guaranteed benefit to which he may be entitled together with interest at an appropriate rate. If payment is not made or other suitable arrangements provided, we will feel free to take action appropriate under the circumstances. Please reply to this letter within twenty (20) days after the date hereof.

Should you have any questions, please contact at (202) 254-4895 or at the above address.

Henry Rose
General Counsel