The American Pension Crisis
Alliance for Retired Americans
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PROTECTING PENSIONS IN BANKRUPTCY

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BANKRUPTCY IS A TIMELY ISSUE

- Murray Coal, last signatory to UMWA contract, filed bankruptcy in October. UMWA 1974 Pension Plan failing and will need Congressional rescue.
- Dean Foods filed bankruptcy last week. Its largest creditor is Central States Pension Fund, also failing.
- White-collar bonuses, major concern for unions and often public stakeholders, were contested in Purdue Pharma.
- Stop Wall St. Looting Act would hold private equity liable for portfolio companies' labor and pension debts.
- Recession is expected, and along with it more bankruptcies large and small.

Pensions Can Survive Bankruptcy

- In 2002 and 2008 recessions, some pensions were terminated in bankruptcy (Delphi) but others rode through with haircuts (e.g., American Airlines: plans frozen; lump sums curtailed).
- The same can be true in municipal bankruptcies (Stockton, Detroit). All eyes are on Puerto Rico.
- Factors include labor, lender, and general creditor demands, affordability, media attention, and strategic use of bankruptcy law and procedure.

PBGC BASICS

- **Single-Employer Plans**
- Minimum funding is main protection for earned benefits.
- PBGC Early Warning Program polices against undue risk tasking.
- PBGC's guaranty is ~$67,000/yr., with reductions for age and payment form.
- PBGC may terminate a plan or accept an employer's distress termination.
- Controlled group (employer and affiliates) is liable to PBGC on plan termination for unfunded benefits, unpaid contributions, and termination premium.

- **Multiemployer Plans**
- Funding standards more lax than for singles.
- Withdrawal liability meant to protect plan's cash flow and balance sheet.
- Benefit adjustments/suspensions permitted.
- PBGC's guaranty more stingy than for singles, and insurance fund failing.
- Plan merger and partition offer some relief.
- Butch Lewis Bill passed the House; Senate has not answered.

BANKRUPTCY BASICS

- Petition, Debtor-in-Possession Financing, Wages/Fringes and Other First-Day Motions, and Formation of the Creditors' Committee.
- Property of the Estate, Avoidance Powers, and Automatic Stay.
- Assertion and Allowance of Claims; Claim Priorities.
- Rejection of Executory Contracts and Modification of CBAs (under Section 1113) and Retiree Medical Benefits (under Section 1114)
- Debtor's Exclusivity Period; Possible Competing Reorganization Plans.
- Plan of Reorganization (POR) and Disclosure Statement
- Objections, Voting, and Confirmation.
- Potential Sources of Exit Financing.
- Discharge; Enforcement or Modification of POR.
- Asset sales (under Section 363); compared to "true reorganization."

PBGC Concerns in Bankruptcy

- Seeks prompt notice, right to be heard on first-day motions, and Creditors' Committee appointment.
- **"PBGC WINS ITS CASE WHEN THE PLAN CONTINUES."**
- Court may permit an unwarranted termination.
- Claims may be misclassified.
- Objections may lead to smaller recovery.
- Substantive consolidation may defeat controlled group liability.
- Non-Debtor releases may defeat controlled group and fiduciary liability.
- Unions and retiree groups will share some of these concerns.

Special Concerns for Public Employees

- State constitutions or statutes protect public-sector plan benefits
- But funding rules inadequate, leading to unsustainable promises.
- In some cases, courts permit accrual reductions, retirement-age increases, or other changes (compare Dallas firefighters with Chicago teachers). \
- Cities and other subdivisions can file bankruptcy with State approval (in 24 States).
- Must be insolvent and have attempted negotiation if practicable.
- Plan of Adjustment process similar to POR process in Chapter 11.
- In Stockton, court held that City could reject contract with CalPERS and need not pay termination lien.
- Stockton agreed to remain in CalPERS when employees agreed to a pay reduction (affecting pension accruals), but at the expense of retirees' health benefits.
- In Detroit's "grand bargain," City's art collection monetized, and pensions cut only 4.5%.
- But beyond headlines, pensions frozen and hybrid plan adopted for future accruals, COLAs reduced or eliminated, and stricter funding rules adopted.

Bankruptcy Strategies

- Object to first-day motions (e.g., Purdue Pharma bonuses).
- Seek Creditors' Committee membership.
- Form alliances with other creditors.
- Know that 1113 and 1114 motions are in the wings, and prepare for negotiations.
- Similarly, prepare for pension termination motion, contingent on 1113 proceedings.
- Know that a 363 motion may control negotiations, and prepare accordingly.

Possible Outcomes

- Pensions ride through bankruptcy.
- Ride-through with concessions, e.g., freeze.
- Assumption by asset purchaser, with or without concessions.
- Spinoff or mirror plan for actives in asset purchase.
- Distress/involuntary termination or withdrawal.
- New pension or retirement arrangement.

Goals

- Union seeks to preserve jobs, wages, work rules, and benefits to the extent possible.
- PBGC wins a case when a DB plan continues, and so do retirees.
- Actives need reasonable accruals, so an inter-generational issue.
- New models emerging for actives, the unpensioned, and gig workers.
- Part of larger issue of income and wealth inequality.

FURTHER READING

- Nathan Bomey, Detroit Resurrected: To Bankruptcy and Back, W. W. Norton Company (2017) (ISBN13: 9780393354430)
- Israel Goldowitz, et al., *The PBGC Wins a Case Whenever the Debtor Keeps its Pension Plan*, 16 Marq. Ben. & Soc. Welfare L. Rev. 257 (2015), https://scholarship.law.marquette.edu/benefits/vol16/iss2/2/
- Israel Goldowitz, *Funding of Public Sector Pension Plans: What Can Be Learned from the Private Sector?,* 23 Connecticut Insurance Law Journal 144 (2017), https://cilj.law.uconn.edu/wp-content/uploads/sites/2520/2019/03/Vol23.1-16.pdf

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