Employee Benefits Update

September 2024

Yellow Is Seeing Red: Bankruptcy Court Invokes *Loper Bright* in Upholding PBGC Regulations

On September 13, the U.S. Bankruptcy Court for the District of Delaware issued a highly anticipated decision in the *In re: Yellow Corporation, et al.* bankruptcy that addressed objections to 11 multiemployer pension funds' withdrawal liability claims totaling $6.5 billion, where those plans received billions in taxpayer-funded Special Financial Assistance (SFA) provided under the American Rescue Plan Act (ARPA) that was not included in plan assets for purposes of the withdrawal liability assessments based upon PBGC regulations. Objectors claim that if the SFA were included in plan assets, the withdrawal liability assessments would have been significantly lower. The decision marks the first time a court has invoked the U.S. Supreme Court's landmark *Loper Bright Enterprises v. Raimondo* decision to **uphold** agency regulation of benefit plans and, if it stands, it may provide a roadmap for courts to defer to agency action notwithstanding the elimination of *Chevron* deference.

Background

Withdrawal Liability

A multiemployer pension plan is a defined benefit plan to which two or more unrelated employers – called "contributing employers" – contribute pursuant to a collective bargaining agreement. When a contributing employer withdraws – either through bargaining out of the obligation to contribute or a cessation of operations – the employer typically will be liable for its allocable share of the plan's "unfunded vested benefits" on the date of the withdrawal, subject to certain exceptions and adjustments. After application of exceptions and adjustments, this liability is referred to as the employer's "withdrawal liability." ERISA provides that a plan's unfunded vested benefits are equal to the value of the nonforfeitable benefits under the plan, *less* the value of the plan assets. A plan's unfunded vested benefits are calculated as of the last day of the plan year before the date of the employer's withdrawal.

Special Financial Assistance

ARPA, signed into law on March 11, 2021, provides for, among other things, funds – SFA – to financially troubled multiemployer pension funds. Generally, certain troubled plans must receive sufficient SFA to permit the plans to continue to pay benefits through 2051. The SFA program is funded by taxpayers and administered by the Pension Benefit Guaranty Corporation (PBGC). It is estimated that PBGC will approve between $74 billion and $91 billion in SFA to multiemployer plans.

ARPA provides that PBGC "may impose, by regulation or other guidance, reasonable conditions on [a plan that receives SFA] relating to … withdrawal liability." ERISA Section 4262(m)(1). PBGC and other constituents pointed out that if plans immediately recognize the SFA as plan assets when calculating unfunded vested benefits, many withdrawing employers would have little to no withdrawal liability. This led to concern that receipt of SFA could encourage employers to voluntarily withdraw, cutting off a source of future dollars for those plans. This concern largely ignores the reality that an employer generally cannot unilaterally chose to withdraw and that considerations regarding whether to withdraw are much broader than the amount of withdrawal liability that may be imposed.

Purportedly pursuant to that "reasonable conditions" authority, and to ensure that SFA received by pension funds is not used to subsidize employer withdrawals, PBGC issued a final rule in July 2022 requiring plans that receive SFA to phase in recognition of SFA as plan assets for withdrawal liability purposes. Specifically, when calculating withdrawal liability, plans must phase in the SFA over the projected life of those funds, not all at once after receipt (Phase-In Regulation). 29 C.F.R. § 4262.16(g)(2)(viii). PBGC's regulations further prohibit plans from including SFA receivables as assets for withdrawal liability purposes (No-Receivables Regulation). 29 C.F.R. § 4262.16(g)(2)(xiii).

Notably, in drafting ARPA, Congress considered including statutory language that would have required SFA to be excluded from plan assets for 15 years for withdrawal liability calculations; however, that provision was stricken from the final bill during reconciliation.

Yellow Bankruptcy

In August 2023, Yellow Corporation and certain affiliates (Yellow) filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware after ceasing operations. Yellow was a contributing employer to nearly two dozen multiemployer pension plans, and the plans contend Yellow withdrew as a result of the bankruptcy.

The pension funds filed claims against Yellow in the aggregate of $7.3 billion. Importantly, 11 of the funds together had recently received more than $41 billion in SFA. The largest of the funds – Central States Pension Fund – received its SFA in 2023; the other funds received SFA in 2022, the year before Yellow withdrew. Had those SFA amounts been included as plan assets in the calculation of Yellow's purported withdrawal liability, such withdrawal liability would be drastically lower. And, in that case, other general unsecured creditors could receive a substantial, even full, recovery.

Unsurprisingly, Yellow, joined by other parties, objected to the $6.5 billion in claims filed by the 11 pension funds that received SFA. As relevant here, Yellow argued that PBGC's Phase-In and No-Receivables Regulations should be set aside as exceeding PBGC's statutory authority and contrary to law, or, alternatively, that they are arbitrary and capricious.

Court's Decision

The bankruptcy court upheld PBGC's regulations, in an ironic twist, relying in large part on *Loper Bright*. The court found that Congress had in two instances expressly delegated authority to PBGC to regulate on the matter: (1) in ERISA Section 4002(b)(3), which grants PBGC the general and broad power to "adopt, amend, and repeal … regulations relating to the conduct of [PBGC's] business … and as may be necessary to carry out the purposes of [Title IV of ERISA], and (2) in ERISA Section 4262(m), which authorizes PBGC to "impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to … withdrawal liability." Because Congress delegated authority to PBGC to regulate under *Loper Bright*, the court should respect such delegation and ensure only that PBGC exercised its discretion consistent with the Administrative Procedure Act, giving "due respect" to PBGC as an agency with relevant specialized experience.

The court first examined whether the regulations were within the boundaries of Congress' express delegations of authority. With respect to the Phase-In Regulation, the court found that the regulation implements ARPA's requirement included in ERISA Section 4262(l) that SFA be used by pension funds to pay benefits and plan expenses. Moreover, the court found that neither the Phase-In Regulation nor the No-Receivables Regulation contravene any other statutory provision, notwithstanding that the regulations explicitly change the preexisting statutory definition of withdrawal liability. With respect to the No-Receivables Regulation in particular, the court asserted the regulation's consistency with the regulatory agency's long-held positions that a contribution to a plan should not be counted as an asset until actually received. The court reasoned that under *Loper Bright*, respect to an agency's long-standing construction of the law is "especially warranted." Somewhat oddly, however, the court pointed to no examples of PBGC's long-standing views in this regard; instead it pointed only to a single example of the Department of Labor's views of treatment of receivables as a plan asset.

The court next considered whether the regulations were arbitrary and capricious and concluded they were not, reasoning that PBGC had gone through a robust and thoughtful notice and comment process, considering various stakeholders' positions before finalizing the rules. Therefore, the court held, PBGC had a satisfactory basis for the regulations.

Takeaways

The validity of PBGC's Phase-In and No-Receivables Regulations is an issue that significantly impacts Yellow and its creditors and any other similarly situated employer or affected party. Opponents of these regulations contend that they change and are inconsistent with the long-standing statutory definitions of withdrawal liability and unfunded vested benefits. Proponents of the regulations argue they merely provide conditions on multiemployer plans that receive SFA, including conditions related to withdrawal liability, address concerns about SFA subsidizing employer withdrawals, and are consistent with the statute.

In upholding the regulations, the *Yellow* court arguably expands the type of delegation of authority the Supreme Court in *Loper Bright* acknowledged calls for policymaking that requires a different, more hands-off role for the courts. Indeed, ERISA Section 4002(b)(3) is a *general* grant of authority to PBGC to regulate with respect to Title IV of ERISA, not dissimilar to Congress' general grant of authority to the DOL or IRS to issue regulations relating to the statutes each agency is charged with implementing. *E.g.*, 26 U.S.C. §7805(a); 29 U.S.C. § 1135. Even the more specific delegation of authority in ERISA Section 4262(m) does not explicitly permit PBGC to change the definition of withdrawal liability; it simply allows PBGC to impose conditions on plans with respect to withdrawal liability. General authority to regulate arguably is entirely different from the examples cited by the Supreme Court in *Loper Bright*, where Congress directed the agencies to promulgate regulations defining particular terms. The *Yellow* decision seems to do away with that distinction and could provide a roadmap for other courts to continue to, in some way, defer to agency determinations when faced with complex legal issues. Arguably, *Loper Bright* gave the *Yellow* court a path to find that PBGC's regulations impermissibly change the statutory definition of withdrawal liability. Instead, the court took an expansive view of congressional delegation to PBGC, characterizing PBGC's regulations as policy, and gave "due respect" to PBGC's determinations. While the court cited *Loper Bright* throughout the decision, the decision may be the start of a "Skidmore plus" doctrine in reviewing regulations of benefit plans.

We expect the decision will be appealed and will monitor the matter. We note that there were other issues addressed in the *Yellow* decision relating to more technical challenges to the calculation of withdrawal liability, such as removal of the 20-year cap in the event of a default by a withdrawn employer, whether the plans' claims should be reduced to their net present value, and whether agreements relating to plan contributions between a pension plan and an employer can supersede actual contribution experience for withdrawal liability purposes. While those aspects of the decision are important and interesting, they are beyond the scope of this bulletin.

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