SECOND CIRCUIT: LIABILITY FOR PBGC PENSION PLAN TERMINATION PREMIUMS SURVIVES BANKRUPTCY

In a case that will have a significant impact on the bankruptcy reorganization of companies with underfunded defined benefit pension plans, the US Court of Appeals for the Second Circuit recently held that Pension Benefit Guaranty Corporation (PBGC) plan termination premiums payable on account of a pension plan termination during a Chapter 11 bankruptcy case are not discharged in bankruptcy and attach to the reorganized debtor upon emergence from bankruptcy.[1]

BACKGROUND ON PBGC PLAN TERMINATION PREMIUMS

In 2005, Congress imposed liability on plan sponsors for PBGC plan termination premiums in the event of certain "distress" or "involuntary" plan terminations, including during Chapter 11 bankruptcy proceedings.[2] The amount of the PBGC plan termination premium is $1,250 per plan participant (a large plan may have thousands or tens of thousands of participants), payable each year for three years. Significantly, for plan terminations that occur during Chapter 11 bankruptcy proceedings, the statute specifically provides that the three-year period for which the PBGC plan termination premiums are payable begins **after** the plan sponsor emerges from bankruptcy reorganization.

RECENT PLAN TERMINATION PREMIUM LITIGATION

In a case of first impression, the US Bankruptcy Court for the Southern District of New York held last year that PBGC plan termination premiums arising on account of a plan termination during bankruptcy proceedings are pre-petition liabilities and thus discharged upon emergence from bankruptcy despite statutory language purporting to impose this liability after emergence from bankruptcy.[3] Under this decision, a company that terminated a plan during bankruptcy was free of any liability for PBGC plan termination premiums upon emergence from bankruptcy (as well as free of any liability for the plan itself) and the PBGC had only claims in the company's bankruptcy alongside the company's other creditors. On appeal, the Second Circuit recently reversed the Bankruptcy Court, holding that liability for the PBGC termination premiums arising from a plan termination during bankruptcy is not discharged upon emergence from bankruptcy and is payable by the reorganized company post-emergence.

1 *PBGC* v. *Oneida Ltd.* No. 08-2964-bk (2d Cir. Apr. 8, 2009).
2 See ERISA § 4006(a)(7).
3 *In re Oneida Ltd.*, 383 B.R. 29 (Bankr. S.D.N.Y. 2008).

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This decision will have a significant impact on the bankruptcy reorganization of companies that sponsor underfunded defined benefit plans. Rather than having the opportunity to fully shed defined benefit pension liability, a Chapter 11 debtor with an underfunded pension plan will now be faced with the choice of either (i) continuing to maintain the pension plan post-emergence with the obligation to make minimum funding contributions to the plan, or (ii) terminating the plan during bankruptcy and incurring (at least in the Second Circuit) post-emergence liability for the PBGC plan termination premiums.

We hope that you find this brief summary helpful. If you would like more information or assistance in addressing the issues raised in this advisory, please feel free to contact:

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