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Residual Liabilities Following Plan Termination: Is the Plan Really Gone?

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BACKGROUND

Traditional defined benefit pension plans have been on the decline for years, with more and more pension plans closed to new hires and, in many cases, no longer providing future benefit accruals to any participants. Mark-to-market accounting has created volatility for corporate balance sheets and Pension Benefit Guaranty Corporation (PBGC) premiums continue to increase. Pension plan "de-risking" measures have come front and center, including liability-driven investment strategies, lump sum windows and annuity purchases for terminated vested participants and, in some cases, retirees. Some speculate that many plan sponsors may soon wish to eliminate their defined

benefit plans completely. But what may not be apparent is that a plan termination is a complicated process, and exposure to liability may begin early in the process and may not end with the final distribution of benefits. This article addresses potential liabilities associated with plan termination and how long the exposure exists.

WHERE DOES POST-TERMINATION EXPOSURE LIE?

Plan termination involves many steps, and an employer's risk of post-termination liability may arise as a result of actions taken before, during, or after plan termination. As explained below, potential liabilities can arise in connection with an employer's decision to terminate its plan, its adherence to the proper termination procedures (or lack thereof), and satisfaction of plan liabilities.

Employer's Right to Terminate Plan

No rules require an employer to provide its employees with a qualified retirement plan. The decision to establish a qualified plan is completely within the employer's discretion, as is the employer's general right to terminate a plan. The Department of Labor (DOL) and the courts both endorse an employer's termination right and consider the decision to terminate a plan to be a settlor function that is not subject to ERISA's fiduciary requirements.² The DOL first made its position clear in a 1986 information letter, and

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² Lockheed Corp. v. Spink, 517 U.S. 882, 891 (1996); DOL Letter on Fiduciary Responsibility and Plan Termination to John N.

courts have since agreed that plan termination is not plan "administration" or "management" and is thus not a fiduciary function.³ The characterization of plan termination as a settlor function is critical because it reinforces the proposition that employers have largely unchecked decision-making authority over when, and under what circumstances, to terminate a qualified plan. However, several caveats exist that make the termination right less than absolute.

First, an employer must establish a qualified plan with the intent that it exist indefinitely. While an employer may reserve the right to amend or terminate its plan at any time, the termination of a plan for reasons other than business necessity within a few years of inception is viewed as evidence that the plan, from its inception, was not a bona fide program for the exclusive benefit of employees in general.⁵ This permanency requirement, however, is not as unconditional as it sounds. An employer may still exercise its right to terminate, without violating the permanency requirement, as long as the plan has existed for more than a "few years." Second, contractual obligations may require an employer to continue a plan. Third, a plan will not be considered terminated unless the plan administrator properly follows ERISA's termination procedures, as ERISA provides the "exclusive procedures" for plan termination.8 Although it is well established that the overall decision to terminate a plan is a settlor action, the decisions made and actions taken during the implementation phase of the termination process will almost certainly raise fiduciary considerations.

Compliance with Plan Termination Procedures

One of the first issues to address is whether the employer has followed the relevant termination proce-

Erlenborn (3/13/86), reprinted at 13 BNA Pens. Rptr. 472 (DOL Letter on Fiduciary Responsibility). References herein to "ERISA" are references to the Employee Retirement Income Security Act of 1974.

dures. Whether or not a plan has been successfully terminated under ERISA is determined by evaluating all facts and circumstances surrounding the sponsor's attempt to achieve that result. Facts and circumstances that have been considered include whether assets were distributed, whether there were ongoing contributions, and whether the plan is still in full compliance with ERISA. For example, termination likely occurs when an employer concludes a trade or business and discharges the employees associated with that trade or business, but termination does not occur merely when an employer replaces a qualified plan with a comparable but different qualified plan. 11

Additionally, a plan that merely ceases accruals and holds assets in trust until the assets would normally have been distributed under the plan is not considered terminated. 12

The procedural steps required for plan termination are technical but important. In a recent survey by the IRS's Employee Plans Compliance Unit, 75% of plan sponsors did not adequately complete the termination process, and were thus deemed to have an ongoing plan. Common issues that prevent effective plan termination include errors made in filing Form 5500 and mistakes made with respect to asset distribution. Concerning Form 5500, plan sponsors may incorrectly

³ Lockheed Corp., 517 U.S. at 890–91 (extending holding in Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995), which established that terminating a welfare benefit plan is a settlor function, to pension plans); DOL Letter on Fiduciary Responsibility. The DOL has since reiterated its stance in DOL Adv. Op. 2001-01A.

⁴ Treas. Reg. §1.401-1(b)(2).

⁵ Id

⁶ *Id.* In the IRS's view, if a plan is terminated within a few years after its adoption, there will be a presumption that it was not intended to be a permanent program unless business necessity or other extraordinary circumstances necessitate termination of the plan. I.R.M. 7.12.1.6 (07-16-2013).

⁷ Such contractual obligations are more likely relevant for non-qualified plans.

⁸ See Beck v. PACE Int'l Union, 551 U.S. 96, 101 (2007) (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 446 (1999)).

⁹ Treas. Reg. §1.401-6(b)(1). For example, a plan that merely ceases accruals and holds assets in trust until they would have normally been distributed under the plan is not considered terminated. Rev. Rul. 89-97, 1989-2 C.B. 217. The facts and circumstances may also reveal the occurrence of a partial termination, which is an issue separate from termination and is beyond the scope of this article. *See* Treas. Reg. §1.401-6(b)(2) (discussing when facts and circumstances may suggest a partial termination).

¹⁰ Carter v. Pension Plan of A. Finkl & Sons Co., 654 F.3d 719 (7th Cir. 2011) (considering these factors and finding the failure to distribute assets dispositive when company filed intent to terminate and adopted termination amendment but later adopted amendment effectively undoing the termination amendment). Courts stress, however, that facts and circumstances considered should be limited to those relevant to whether the statutory requirements have been met; common law may not supplant a "comprehensive and reticulated statute" such as ERISA. Hughes Aircraft Co., 525 U.S. at 447 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

¹¹ Treas. Reg. §1.401-6(b)(1); *Interco, Inc. v. Pension Benefit Guar. Corp.*, 620 F. Supp. 688, 6 EBC 2433 (E.D. Mo. 1985) (finding that spin-off of company and subsequent transfer of remaining employees into an identical pension plan was not a termination of the original plan). However, conversion of a defined benefit plan to a defined contribution plan is considered a termination because the plan types are not comparable. ERISA §4041(e).

¹² Rev. Rul. 89-97, 1989-2 C.B. 217.

¹³ EPCU Project Finds Plan Sponsors Don't Complete All Steps in Termination Process, IRS Employee Plans News (Issue 2014-3, Mar. 4, 2014). Employers surveyed were those that had indicated on a Form 5500 that they had adopted a resolution to terminate their plan.

complete the Form 5500 or fail to continue filing the form until all assets are distributed. ¹⁴ Sponsors may fail to distribute plan assets for several reasons, ranging from not knowing that assets still remain in the trust to delays caused by difficulty locating missing participants. ¹⁵ Failure to comply with these requirements may nullify the plan's termination and leave employers, unknowingly, with an ongoing taxqualified plan.

Plan termination is a complex process with many legal and technical requirements, some of which extend even beyond termination. Failure to satisfy termination requirements may expose a plan to serious consequences, so prior to embarking on an effort to terminate a plan, a plan sponsor should be aware of the applicable requirements and the liability that may be incurred for failing to meet them.

Satisfaction of Plan Liabilities

Actions Brought by PBGC. One question that frequently arises in the pension termination context is whether the termination can be undone if it is discovered that benefits were not calculated properly or that a participant inadvertently was missed in the distribution process. ERISA §4047 grants the PBGC very broad discretion to restore a terminated plan to ongoing status. Restoring a plan would essentially "undo" all of the work involved in terminating a defined benefit plan and potentially raise other tax-qualification and ERISA issues. Despite this broad authority, the PBGC has exercised its authority to restore a plan only in those situations where it has felt that the employer had established a "follow-on" pension plan after having previously terminated an underfunded pension plan where benefits were being paid by the PBGC. 16 The threat of revocation by the PBGC remains in cases where the PBGC believes that participants have not received full distribution of their benefits. ERISA §4003(e)(1) gives the PBGC the authority to bring an action to enforce the provisions of Title IV. In particular, the PBGC has looked to the requirement under ERISA §4041(b)(3) that a standard termination must provide for "all benefit liabilities under the plan." The PBGC has viewed ERISA §4003(e) as giving the PBGC the authority to bring an action to enforce plan terms even when the PBGC is not asked to pay benefits.

Recent cases brought by the PBGC involving standard terminations have focused on certain issues in particular. A significant number of cases have focused on the calculation of lump sums paid on termination. In Pension Benefit Guar. Corp. v. Wilson N. Jones Mem. Hosp., 17 the PBGC asserted that the lump sum benefits paid on termination did not comply with the requirements of I.R.C. §417(e)(3). 18 Under the terms of the plan, the interest rate used for calculating the lump sum was equal to the annual rate of interest on 30-year Treasury securities for the second calendar month preceding the first day of the plan year during which the "annuity starting date" occurs. During the termination process, the plan sponsor adopted a plan amendment that specified that the "annuity starting date" for purposes of calculating the lump sum to be paid on termination would be December 31, 1995. Under the terms of the plan document, a December 31, 1995 annuity starting date would result in the use of the November 1994 interest rate.¹⁹

The sponsor received a favorable determination letter and the PBGC did not object to the calculation or the payment at the time the sponsor filed a standard termination notice with the PBGC. Lump sums were paid upon plan termination in November 1996 based on the November 1994 interest rate. Following an audit of the plan's termination, the PBGC asserted that the "annuity starting date," as defined in Treas. Reg. §1.417(e)-1, occurred in November 1996 when the lump sums were paid (which would result in the use of the November 1995 rate). The PBGC claimed that the lump sum calculation did not comply with the requirements of I.R.C. §417 and Treas. §1.417(e)-1 defining the term "annuity starting date," and, therefore, the plan did not fully distribute all benefits as required by ERISA §4041(b)(3).

Following the plan sponsor's refusal to comply with the PBGC's determination, the PBGC did not

¹⁴ These errors may be corrected through the amended return process.

¹⁵ Many plan sponsors surveyed were not even aware of the missing participant requirements and procedures.

¹⁶ PBGC Op. Ltr. 81-11 (setting forth the PBGC's views on follow-on plans). In *Becker v. Weinberg Group, Inc.*, 473 F. Supp. 2d 48 (D.D.C. 2007), the participant-claimant brought an action under ERISA for benefits following the termination of the employer's pension plan. The participant in the case also requested that the PBGC suspend the plan's termination. The PBGC refused, and the participant joined the PBGC to the underlying litigation seeking an order that the PBGC audit the terminated pension plan. The court cited the PBGC's broad discretion under federal law with respect to enforcement authority as among the reasons in denying the participant's request.

¹⁷ 374 F.3d 362 (5th Cir. 2004).

¹⁸ "I.R.C. §" refers to sections of the Internal Revenue Code of 1986, as amended.

¹⁹ Other cases concerning lump sum calculations include *Dist.* 65 v. Harper & Row Publishers, Inc., 696 F. Supp. 29 (S.D.N.Y 1988), Flo-Con Sys. v. Pension Benefit Guar. Corp., 39 F. Supp. 2d 995 (C.D. III. 1998); Pension Benefit Guar. Corp. v. Ferfolia Funeral Homes, Inc., 835 F. Supp. 2d 416, 418, 2011 BL 188631 (N.D. Ohio 2011); Powell Valley Nat. Bank v. Pension Benefit Guar. Corp., 56 EBC 2835, 2013 BL 237490 (W.D. Va. Sept. 4, 2013); Pension Benefit Guar. Corp. v. Town & Country Bank and Trust Co., 54 EBC 2508, 2012 BL 260290 (W.D. Ky. Oct. 4, 2012).

seek to revoke the plan termination but instead brought an action against the plan sponsor because the termination did not "fully provide for all benefit liabilities under the plan" as required by ERISA §4041(b). The trial court found in favor of the PBGC. On appeal, the Fifth Circuit ruled in favor of the PBGC and ordered the plan sponsor to recalculate benefit payments.²⁰

Another issue consistently raised by the PBGC concerns whether the amounts distributed reflect the true amount of liabilities on the date of termination. As described above, ERISA §4041(b)(1)(D) provides that a standard termination must provide for all "benefit liabilities (determined as of the termination date)." Further, 29 C.F.R. §4041.8 provides that a participant's benefits "are determined under the plan's provisions in effect on the plan's termination date." Based on this regulation, the PBGC has challenged amendments adopted after the plan's termination date that change the benefit calculation formula, even when made in compliance with IRS guidance.

In Powell Valley Nat'l Bank v. Pension Benefit Guar. Corp., 21 the employer set a proposed termination date of January 31, 2009 and distributed termination notices and other communications using that proposed termination date. Prior to the proposed termination date, the employer prepared — but did not adopt — a termination amendment reflecting various changes including a change in the applicable interest rate. In 2006, Congress enacted the Pension Protection Act, 22 which generally changed the interest rate a pension plan was required to use under I.R.C. §417(e) to establish the minimum legal requirement for lump sum calculations. The change in the interest rate effectively permitted employers to use a higher interest rate (PPA rate) in establishing the minimum lump sum value even though such higher rate would result in a lower lump sum.²³ The plan received a favorable determination letter from the IRS in September 2009 and participants received distributions between October 7 and October 9, 2009. Lump sum distributions were calculated using the PPA rate. The formal plan amendment instituting the PPA rate was not adopted until October 20, 2009.

The PBGC asserted that the distribution was deficient because the lump sum calculations did not reflect the liabilities determined as of the termination date because the lump sum payments were calculated using an interest rate that was not provided under the terms of the plan document on the termination date (January 31, 2009). The plan sponsor argued that the amendment's adoption was a mere formality in light of the statutory change. The court, however, ruled in favor of the PBGC finding that the lower interest rate prescribed in the plan document was permissible under the law as of the termination date (because that lower rate provided for a higher lump sum value) and because the plan document was unambiguous as to its terms.²⁴

In considering post-termination liability of a plan sponsor, it is important to remember that a court will, in many cases, review a PBGC determination under a deferential standard and overturn a PBGC determination only when the court finds that the agency's action is arbitrary and capricious or otherwise not in accordance with the law. 25 For example, in *Powell Valley*, 26 the court's decision was based on its finding that the PBGC's determination that the lump sum valuation violated PBGC regulations was not arbitrary and capricious. At least one court has extended a certain level of deference to the PBGC in its interpretation of an IRS statute and regulation. As described above, the decision in Wilson Jones concerned the definition of "annuity starting date" under I.R.C. §417 and Treas. Reg. §1.417(e)-1 for purposes of calculating a lump sum distribution. During litigation, the plan sponsor asserted that the PBGC should not be entitled to any deference with respect to the PBGC's interpretation of another agency's regulation. The Fifth Circuit stated that the PBGC's interpretation of the term was entitled to a level of deference in proportion to its power

²⁰ Wilson Jones, 374 F.3d at 372.

²¹ 56 EBC 2835, 2013 BL 237490 (W.D. Va. Sept. 4, 2013).

²² Pub. L. No. 109-280.

²³ See Rev. Rul. 2007-67, 2007-2 C.B. 1047; Notice 2008-30, 2008-12 I.R.B. 638 (describing relief under I.R.C. §411(d)(6) for amendments implementing different interest rates for calculating the minimum lump sum value).

²⁴ Two other cases with similar facts are *Pension Benefit Guar. Corp. v. Town & Country Bank and Trust Co.*, 54 EBC 2508, 2012 BL 260290 (W.D. Ky. Oct. 4, 2012), and *Pension Benefit Guar. Corp. v. Ky. Bancshares, Inc.*, 57 EBC 2875, 2014 BL 73361 (E.D. Ky. Mar. 17, 2014), where the district courts upheld PBGC determinations that amendments to reflect the PPA rate used for lump sum valuation purposes were adopted after the applicable termination dates and could not be used in valuing lump sums paid on termination.

²⁵ Section 706 of the Administrative Procedure Act, 5 U.S.C. \$706; *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645 (1990) (discussing deference standard to PBGC determinations and the "arbitrary and capricious" standard applied to PBGC determinations under 5 U.S.C. \$706). In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court stated that, when "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation; rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Note, however, that in other contexts, the PBGC is given no deference. *See In re UAL Corp.*, 468 F.3d 444, 39 EBC 1129 (7th Cir. 2006).

²⁶ 56 EBC 2835, 2013 BL 237490 (W.D. Va. Sept. 4, 2013).

to persuade based on the "specialized experience" of the agency and the value of uniformity in agency rulings. ²⁷ In reviewing the IRS regulations, the court found that the PBGC's interpretation of the IRS regulation was "persuasive" and entitled to "great respect," and therefore, was upheld. ²⁸

Actions Brought by Participants and Beneficiaries. After a plan is terminated, ERISA will continue to govern litigation involving pension plans with respect to actions occurring through the date on which lump sum payments or annuities are distributed upon termination. ERISA §502 generally provides participants and beneficiaries the ability to bring an action to enforce the terms of the plan or to address other claims. Private party ERISA litigation involving active pension plans can involve a number of complex issues such as identifying the proper defendants, identifying the plan fiduciaries, the proper remedies, and determining successor employer and con-

trolled group liability.³⁴ Private party ERISA litigation after a plan has been terminated can involve all of these same issues but with the additional complication that the plan has been terminated and is then defunct. As described below, courts have not been consistent with how termination affects an ERISA action regarding claims for benefits, but have consistently held that fiduciaries have ongoing liability with respect to actions taken prior to distribution of assets, including actions taken with respect to the selection of the annuity provider.

Benefit Claims Brought Against the Plan or Plan **Sponsor Under ERISA** $\S 502(a)(1)(B)$. If a participant believes that he or she was unjustly denied a benefit under the plan or that his or her benefit was not calculated correctly, the most direct route for that participant in court is for the participant to bring an action under ERISA §502(a)(1)(B).35 In several cases involving pension plans, participants were able to bring an action under ERISA §502(a)(1)(B) seeking benefits under the plan even though the plan was terminated. In Erven v. Blandin Paper Co., 36 participants had received lump sum distributions upon termination of their employer's plan. The participants brought an action under ERISA §502(a)(1)(B) against the thenterminated plan (as a named defendant) and the plan sponsor on the grounds that the lump sum benefit was not calculated properly based on various changes in the regulatory requirements. The Eighth Circuit ruled that the calculation of certain lump sums did not comply with the applicable requirements and that the affected participants could recover under ERISA §502(a)(1)(B). The fact that the plan was terminated at that time was not relevant in the court's decision nor did the court discuss whether the requirement to pay additional benefits affected the terminated status of the plan.

Mugnai v. Kirk Corp.³⁷ concerned a terminated employee stock ownership plan (ESOP). While the plan was ongoing, participants receiving distributions of

²⁷ Wilson Jones, 374 F.3d at 369 (referring to the level of deference set forth in *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001)).

²⁸ Wilson Jones, 374 F.3d at 370.

²⁹ Dicta in the Supreme Court's decision in *Beck v. PACE Int'l* Union, 551 U.S. 96, 2007 BL 30718 (2007), has caused certain parties to question whether state law could apply. In making the distinction between a plan merger and a plan termination, the court stated that termination "formally severs the applicability of ERISA to the plan assets and employer obligation" and that, following termination, participants must rely on state law. 551 U.S. at 106. The context indicates that the language was only referring to the application of state law to disputes surrounding the annuities received on termination. In at least two cases, courts have disregarded a broad reading of the language in Beck and applied ERISA in actions after the plan was terminated. Sender v. Franklin Resources, Inc., 931 F. Supp. 2d 959, 2013 BL 69779 (N.D. Cal. 2013); General Produce Distribs. Inc. v. Prof'l Benefit Trust Multiple Emp'r Welfare Benefit Plan & Trust, 48 EBC 1136, 2009 BL 168197 (N.D. Ill. Aug. 7, 2009).

³⁰ ERISA §502(a)(1)(B) allows a participant to recover benefits owed under the terms of a plan, to enforce rights under the plan, or clarify rights to future benefits under the plan; ERISA §502(a)(2) permits a civil action to be brought by the Secretary, a participant, beneficiary, or fiduciary for relief under ERISA §409 (relating to a breach of fiduciary duty); and ERISA §502(a)(3) allows a participant, fiduciary or beneficiary to bring a civil action to enjoin acts that violate a plan, or to obtain equitable relief to redress violations of the plan or enforce terms of the plan.

³¹ See generally Terry v. Bayer Corp., 145 F.3d 28, 36 (1st Cir. 1998) ("[T]he proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan"); *Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 610–11, 2007 BL 99383 (7th Cir. 2007) ("Generally, in a suit for ERISA benefits, the plaintiff is limited to a suit against the Plan.").

³² See generally Varity Corp. v. Howe, 516 U.S. 489 (1996) (stating that an ERISA fiduciary exercises discretionary authority with respect to the plan's management or administration within the meaning of ERISA §3(21)(A)).

³³ LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 256

^{(2008) (&}quot;although [ERISA] §502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account"); CIGNA Corp. v. Amara, 131 S. Ct. 1866, 2011 BL 128629 (2011) (generally expanding the potential for money damages under "appropriate equitable relief" in ERISA §502(a)(3)).

³⁴ See generally Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 2013 BL 197393 (1st Cir. 2013) (concerning controlled group liability with respect to private equity groups).

³⁵ As described below, a participant suit under ERISA §502(a)(2) or §502(a)(3) may not enable a participant to obtain money damages unless certain conditions are met.

³⁶ 473 F.3d 903 (8th Cir. 2007).

³⁷ 843 F. Supp. 2d 858, 2012 BL 206591 (N.D. III. 2012).

company stock from the ESOP were entitled to require the employer to repurchase the stock. The employer could pay for the shares in installments under a note with adequate security provided and interest payable. At some point, the employer stopped increasing the security provided under the notes even though more and more stock was being purchased. The employer entered bankruptcy and participants did not receive the full payment of their notes. A group of employees brought an action against the then-terminated ESOP under ERISA §502(a)(1)(B).³⁸ The defendants argued that former participants could not state a claim for benefits under ERISA §502(a)(1)(B) because the plan was terminated. The court dismissed this argument in finding that the notes provided to participants were to be properly secured and that the participants could proceed with a claim under ERISA §502(a)(1)(B). The concept of providing benefits under a "terminated" plan was addressed by the court. The court stated that "ERISA contains precise mechanisms for terminating a plan and the current record contains no evidence to support Defendants' contention that the plan has been properly terminated as required by ERISA." 39 Although the termination of the ESOP was not revoked or suspended, the court acknowledged that participants can make a claim for benefits under an otherwise terminated plan when the termination was not complete.

A third case dealing with a claim under ERISA §502(a)(1)(B), Preite v. Charles of the Ritz Grp., Ltd. Pension Plan, 40 concerns an employee that filed suit several years after the plan was terminated. In many ways, this case typifies the concern of many plan administrators — the newly discovered participant who shows up after the sponsor has changed hands many times and when records were not well retained. The participant in this case accrued a benefit under a pension plan and terminated employment while the plan was still active. After several years, the successor to the participant's original employer terminated the plan, and the participant testified that he submitted a distribution election form but was told he would not receive payment until reaching age 65. Subsequently, a number of corporate transactions took place leaving YSL Beaute as the successor to the original employer.

When the participant contacted YSL Beaute upon reaching age 65, he was told that the plan was terminated and that YSL Beaute had no records for the plan and could not pay any benefits.

Preite sued the plan and YSL Beaute, as the successor to the original plan sponsor and administrator under ERISA §502(a)(1)(B). Similar to the defendants in *Mugnai* above, the defendants argued that Preite may only recover benefits under ERISA §502(a)(1)(B) from the plan itself and that recovery was barred because the plan was terminated. The court explained that ERISA §502(a)(1)(B) permits participants to seek recovery of benefits from the plan or the party that controls the administration of the plan, which may include the employer or the plan administrator.⁴¹ The fact that YSL Beaute was only the successor to the original plan sponsor and administrator was irrelevant, as the successor to the original administrator "steps into the shoes" of its predecessor.⁴²

With respect to the plan's terminated status, the court stated that the fact that the plan is terminated does not relieve the plan of its obligations. At Rather, the court in *Preite* found that the plan should be viewed as continuing to exist for purposes of distributing benefits that vested prior to the plan's termination. The plan sponsor's obligation (and the obligation of the successor) to provide benefits that are due and owing survives the termination of the plan. Because YSL Beaute's predecessor did not properly complete all required distributions under the plan, YSL Beaute was now obligated to provide those benefits.

Other Equitable Relief Possible If Relief Not Permitted Directly Under ERISA §502(a)(1)(B). In situations where a participant is seeking benefits from a plan, other cases have held that an action under ERISA §502(a)(1)(B) for benefits is not possible after

³⁸ Another group of participants in *Mugnai* brought an action against the trustees under ERISA §502(a)(1)(B), but such action was dismissed. The court held that an action under ERISA §502(a)(1)(B) can be brought against the plan or, in limited circumstances, against the employer/plan administrator.

³⁹ *Id.* at 869. Interestingly, although the case centered on a defined contribution ESOP, the court cited as general support for this statement ERISA §4041 concerning the termination of a single-employer defined benefit plan that, as described above, requires the payment of all benefit liabilities upon termination.

⁴⁰ 471 F. Supp. 2d 1271, 40 EBC 1247 (M.D. Fla. 2006).

⁴¹ *Id.* at 1281 (citing *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 824 (11th Cir. 2001); *Hoover v. Bank of Am. Corp.*, 286 F. Supp. 2d 1326, 1337 (M.D. Fla 2003), *aff'd*, 127 Fed. Appx. 470 (11th Cir. 2005).

⁴² *Id.* at 1281 (citing *Giannone v. Metro. Life Ins. Co.*, 311 F. Supp. 2d 168, 175 (D. Mass. 2004)

⁴³ *Id.* at 1282.

⁴⁴ An additional case where the court permitted an action under ERISA §502(a)(1)(B) after the plan has terminated was *Cooke v. Lynn Sand & Stone Co.*, 875 F. Supp. 880 (D. Mass. 1994), where participants challenged the calculations of the lump sums paid on termination. Outside of the retirement plan context, *Gallagher v. Life Ins. Co. of N. Am.*, No. C07-05224 SBA, 2008 BL 64677 (N.D. Cal. Mar. 18, 2008), concerned long-term disability payments after the sponsoring employer had terminated the arrangement. In holding that the case could proceed under ERISA §502(a)(1)(B), the court in *Gallagher* stated that "the fact that the Plan no longer exists is not an issue, as the Plan benefits have flowed to Gallagher continuously . . . Gallagher may seek to enforce the terms of the Plan that survived to operate beyond Plan termination and to continue their operation into the future."

the plan has terminated and distributed its assets but that participants could seek relief through other means. In Clevenger v. Dillards, Inc., 45 the participants claimed that the lump sum paid upon plan termination was not properly calculated and brought an action against the plan, the plan sponsor, and the fiduciaries to recover additional benefits under ERISA §502(a)(1)(B) and, alternatively, for equitable relief under ERISA §502(a)(3). (As stated above, the calculation of lump sum benefits remains a hotly contested issue.) The plaintiffs alleged that the employer received an improper reversion after the plan terminated due, in part, to the fact that the lump sum benefits were not calculated properly. The court stated that a additional benefits under claim for §502(a)(1)(B) would not be sufficient:

Plaintiff's claims for additional benefits would be utterly futile were she unable to seek equitable relief in the form of disgorgement of the reversion, or a portion thereof, to the Plan. The Plan is penniless. Relief, in the form of additional benefits from the Plan, would be hollow.⁴⁶

The participants were permitted to seek equitable relief against the plan sponsor under ERISA §502(a)(3) in the form of an injunction requiring the plan sponsor and the applicable fiduciaries to return to the trust the portion of the reversion that equaled the amount of additional benefits to which the participants would be entitled if the participants were to establish that they were entitled to additional benefits under the plan. 47

In several cases involving terminated plans, courts have also utilized a constructive trust to hold amounts awarded in a case involving a breach of fiduciary duties when an action cannot be sustained under ERISA §502(a)(1)(B). One of the most cited cases in this context is *Amalgamated Clothing & Textile Workers Union v. Murdock*. ⁴⁸ The participants in *Amalgamated Clothing* alleged that the fiduciaries improperly benefitted from the use of the plan's assets, prior to the plan's termination, by using the assets in various "greenmail" schemes. When the plan was terminated,

all participants received a full distribution of their benefits, and the sponsor at that time received a reversion of the excess assets. Even though all participants had received a distribution of their full benefits, the participants sought to have the employer disgorge any ill-gotten profits. The court looked to the broad power in ERISA §502(a)(3) and ERISA §409(a) (concerning a breach for fiduciary duty) to grant equitable relief in the form of disgorgement and the creation of a constructive trust.

Following Amalgamated Clothing, the court in Jackson v. Truck Drivers' Union Local 42 Health and Welfare Fund⁴⁹ also permitted a constructive trust to hold assets improperly transferred to another plan. The facts in *Jackson* surrounded a participant in a multiple-employer welfare plan maintained by a union who brought an action against the plan for unpaid medical expenses accrued while a participant in the plan. Prior to the plan termination, and facing financial difficulties, the plan agreed to transfer the remaining funds to a different, unrelated plan (Baker's Fund) with the Baker's Fund providing prospective coverage only. The original plan then terminated with the Baker's Fund agreeing only to pay a limited amount of the previously existing claims under the original plan. The Baker's Fund settled at a substantial discount many of the outstanding claims under the original plan from the funds transferred from the original plan but certain claims, including the participant's, remained unpaid. The Baker's Fund put the remainder of the funds transferred from the original plan into escrow. Alleging mismanagement of the plan's assets, the participant sought money damages for the plan under ERISA §409(a) and §502(a)(2) and, following recovery by the plan, restitution of the lost benefits under ERISA §502(a)(3).

The defendants argued that an action for damages under ERISA §502(a)(2) cannot be sustained after a plan is terminated. The court rejected this argument and, citing *Amalgamated Clothing* as precedent, found that fiduciaries can be held responsible for the misuse or mismanagement of plan assets prior to the plan's termination.⁵⁰ The court held that it could create a constructive trust, or equitably revive the original trust, to hold assets surrendered as a result of a fiduciary breach.⁵¹ The court further held that the participant could seek personal restitution on behalf of his own lost benefits under ERISA §502(a)(3).⁵²

Fiduciary Breach Related to Annuity Purchase. As described above, the decision to terminate a plan

⁴⁵ 412 F. Supp. 2d 832, 37 EBC 1580 (S.D. Ohio 2006). After the initial decision, the participants settled. The plan sponsor and fiduciaries in the case also brought suit against certain administrators that provided services in connection with the termination. After the settlement involving the participants, the litigation involving the plan sponsor and fiduciaries continued and the aspects of the initial decision were appealed. *See Clevenger v. Dillard's Dep't Stores, Inc.*, 333 Fed. Appx. 907, 2009 BL 109436 (6th Cir. 2009).

⁴⁶ Clevenger, 412 F. Supp. 2d at 842.

⁴⁷ Id.

⁴⁸ 861 F.2d 1406, 10 EBC 1488 (9th Cir. 1988).

⁴⁹ 933 F. Supp. 1124 (D. Mass. 1996).

⁵⁰ *Id.* at 1137.

⁵¹ *Id.* at 1138.

⁵² Whether restitution for lost benefits is a permissible remedy for an action under ERISA §502(a)(3) remains somewhat unsettled. The district court in *Jackson* cited the Supreme Court's de-

is not a fiduciary decision but a settlor decision and does not constitute a breach of fiduciary duty. Courts have held that the method of implementing the decision to terminate is subject to ERISA's fiduciary standards including the duty to act solely in the interests of participants and beneficiaries under ERISA §404(a)(1)(A) and the duty to act with skill, prudence, and diligence under ERISA §404(a)(1)(B). Among the decisions subject to the fiduciary standards is the selection of the annuity provider. Erischer Generally, the selection of the annuity provider upon termination (or upon a de-risking) is the final, and perhaps the most significant, investment decision that must be undertaken by a fiduciary.

In the late 1980s and early 1990s, Executive Life Insurance Company of California (Executive Life). which had sold annuities to several terminated plans, went into conservatorship. Participants in several of the plans that had purchased annuities from Executive Life upon plan termination brought suit against the fiduciaries who had selected Executive Life. 56 Bussian v. RJR Nabisco, Inc. concerned such a matter in that the participants claimed that the selection of Executive Life as the annuity provider was not prudent.⁵⁷ The court faulted the fiduciary's review of the various annuity providers in general and Executive Life in particular for, among other reasons, having relied too heavily on credit ratings as opposed to an independent review of Executive Life's investment portfolio. In many cases, the fiduciaries did not review the reports or materials that were provided to them. The lack of investigation was heightened by the fact that at least one fiduciary was aware of the concerns surrounding Executive's Life investment strategy and its long-term viability.

From a practical perspective, a fiduciary involved in a plan termination can mitigate potential liability after the termination regarding the selection of the annuity provider by demonstrating a diligent annuity provider review and selection process. In Interpretative Bulletin 95-1 (IB 95-1), the DOL sets forth fidu-

cision in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065 (1996), as authority that restitution, in the form of money damages, is a permissible equitable remedy under ERISA §502(a)(3). The more recent Supreme Court decision in *CIGNA Corp. v. Amara* appears to have further expanded the possibility of money damages, whether in the form of restitution or otherwise, in connection with equitable relief. 131 S. Ct. 1866, 2011 BL 128629 (2011).

ciary standards and criteria to be used by plan fiduciaries of defined benefit plans in selecting annuity providers.⁵⁸ As a general matter, IB 95-1 provides that the duty to act solely in the interests of participants and beneficiaries under ERISA §404(a)(1)(A) requires that, when selecting an annuity provider, fiduciaries take steps calculated to obtain the "safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise."59 In addition, the duty of prudence under ERISA §404(a)(1)(B) requires fiduciaries to conduct a thorough review taking into account such factors as the quality and diversification of the annuity providers investment portfolio, the size of the insurer relative to the proposed contract, the level of the insurer's capital and surplus, and the availability of additional protection through state guaranty associations.⁶⁰

HOW LONG DOES POST-TERMINATION LIABILITY CONTINUE?

After decades of living with the potential liabilities associated with an ongoing qualified plan, one might at first be relieved to see a potential end to the threat of those liabilities. In the case of plan audits from government agencies, those liabilities will sunset with the expiration of the limitations periods for the government to raise issues or impose any kind of penalties or sanctions. And, although similar limitations periods exist with respect to potential claims by participants and beneficiaries, there is an element of uncertainty as to when those limitations periods may begin and end.

Post-Termination Government Audits

Plan administrators should develop a recordkeeping policy that includes a post-termination plan. This,

⁶⁰ With respect to the potential failure of the annuity provider, in a letter dated Jan. 14, 1991, the PBGC explained that it would not insure benefits provided by an annuity (and related to a pension arrangement), if the insurance company were to fail to pay on the annuity contracts. *See* PBGC Letter on PBGC Liability for Payment of Benefits in Case of Annuity Contract Failure, reprinted in 18 *BNA Pens. Rptr.* 850 (1991).

⁵³ Lockheed Corp., 517 U.S. at 891.

⁵⁴ Waller v. Blue Cross of Cal., 32 F.3d 1337, 18 EBC 1513 (9th Cir. 1994).

⁵⁵ Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 25 EBC 1120 (5th Cir. 2000); Waller, 32 F.3d at 1342.

⁵⁶ Id.

⁵⁷ Bussian, 223 F.3d at 288.

⁵⁸ 29 C.F.R. §2509.95-1.

⁵⁹ 29 C.F.R. §2509.95-1(c). It should be noted, however, that the court in *Bussian* rejected the DOL's statement that a fiduciary must purchase the "safest annuity available" to satisfy ERISA's fiduciary obligations: "[W]e are not persuaded that [§404(a)] imposes on fiduciaries the obligation to purchase the 'safest available annuity' in order to fulfill their fiduciary duties. We hold that the proper standard to be applied to this case is the standard applicable in other situations that involve the potential for conflicting interests: fiduciaries act consistently with ERISA's obligations if 'their decisions [are] made with an eye single to the interests of the participants and beneficiaries." "*Bussian*, 233 F.3d at 298.

however, may be challenging because three agencies — IRS, DOL and PBGC — regulate plan record retention requirements, and each agency implements different requirements based on their regulatory objectives. Further, in some instances it is not clear what the agency requires because the requirement is openended or does not address plan termination.

IRS Requirements. Generally, any person required to file an information return must keep records sufficient to establish the amount of gross income, deductions, credit or other matters related to such return as long as the contents may be material in the administration of any tax law. For tax-qualified plans, this means that the employer must keep the records necessary to demonstrate compliance with the qualification requirements under I.R.C. §401 as long as the IRS has the authority to audit, disqualify and assess taxes on a plan.

The IRS has a 3-year statute of limitations to assess additional taxes (or conduct an audit) that begins after the plan administrator or employer files a complete and accurate Form 5500.⁶² A Form 5500 is deemed to be filed on the later of the date the form is filed or the date the form is due.⁶³ The statute of limitations increases to six years to the extent that there is a substantial understatement of taxes (more than 25%) or where the plan has been a party to an abusive tax avoidance transaction, as described in Rev. Proc. 2006-27. There is no limitations period with respect to filing a false or fraudulent return, willfully attempting to evade tax, or failing to file a return.⁶⁴ Consequently, it is important for plans to file their final Form 5500 to initiate this statute of limitations period.

The IRS may contract with the qualified plan to extend the statute of limitations, if, for example, the IRS does not anticipate concluding an audit before the limitations period expires. Although technically a plan would not have to agree to such an extension, it may be in the plan's best interest to agree because an extension not only gives the auditor more time to analyze the information but it also gives the plan more time to produce potentially favorable information and appeal any unfavorable audit results. Further, even without an extension, the auditor will have to come to a decision based on the current facts, and to the extent the auditor has discretion, it may hurt the plan if it plan does not demonstrate a willingness to cooperate.

DOL Requirements. ERISA has two document retention provisions — ERISA §107 and §209. ERISA

§107 requires that persons maintain records relating to the form 5500 annual report for at least six years from the date of filing, in sufficient detail to verify, explain, clarify, and check the Form for accuracy and completeness. For example, if a worksheet was used to prepare the Form 5500 filed for the plan year ending December 31, 2013, the worksheet must be kept until October 15, 2020 (assuming use of the 2½-month extension that is automatically available upon filing a Form 5558).

ERISA §209(a) also requires record retention but, unlike ERISA §107, does not include a specific timeframe. ERISA §209(a) requires the employer to "maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." Further, the 1980 proposed regulations implementing this rule require that these records "be retained as long as a possibility exists that they might be relevant to a determination of the benefit entitlements of a participant or beneficiary."⁶⁷ One interpretation is that records should be retained for at least as long as a participant may assert a claim for benefits. As noted below, an individual may assert a claim for benefits, which is based on the most appropriate state law, or a claim for breach of fiduciary duty, which generally has a limitations period of six years.⁶⁸ Importantly, however, this duty cannot be delegated and to the extent a plan administrator uses electronic records, the recordkeeping systems must have reasonable controls and must be accessible so that records may be readily inspected or examined.69

If a person fails to furnish information or maintain records for any plan year pursuant to ERISA §209, a civil penalty of \$11 (as adjusted for inflation) for each employee with respect to whom such failure occurs may be assessed, unless it is shown that such failure is due to reasonable cause. The however, a person willfully violates ERISA §107 or §209, ERISA imposes criminal penalties including a fine of not more than \$100,000 for an individual (\$500,000 for a non-individual), imprisonment of up to 10 years, or both.

PBGC Requirements. The PBGC requires that each contributing sponsor and the plan administrator

⁶¹ I.R.C. §6001.

⁶² I.R.C. §6501(a); Announcement 2007-63, 2007-30 I.R.B. 236.

⁶³ I.R.C. §6501(b).

⁶⁴ I.R.C. §6501(c).

⁶⁵ I.R.C. §6501(c)(4).

⁶⁶ ERISA §107.

 $^{^{67}\,45}$ Fed. Reg. 52824, 52829 (Aug. 8, 1980). However, as discussed below, the more crucial question is when the limitations period begins.

⁶⁸ Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 465, 13 EBC 2185 (7th Cir. 1991), cert. denied, 502 U.S. 939 (1991); ERISA §409.

⁶⁹ Tomlinson v. El Paso Corp., 42 EBC 1429, 2007 BL 170616 (D. Colo. 2007); 29 C.F.R. §2520.107-1.

⁷⁰ ERISA §209(b); 29 C.F.R. §2575.209b-1.

⁷¹ ERISA §501.

of a terminating plan preserve all records necessary to demonstrate compliance with ERISA §4041 and part 4041 of the PBGC regulations for six years after the post-distribution certification is filed with the PBGC. "If a contributing sponsor or the plan administrator maintains information in accordance with this section, the other(s) need not maintain that information."⁷²

This is important because the PBGC audits all plans with a participant count of at least 300 (and randomly audits plans with lower participant counts) that terminate in standard termination. PBGC may also audit a plan if the plan makes its final distribution of plan assets before or without filing a Standard Termination Notice in accordance with the standard termination regulations, or if it believes there may be a problem (e.g., if PBGC receives a complaint from a plan participant or practitioner). 73 During a standard termination audit, PBGC generally evaluates whether participants received their entitled benefits and whether the plan complied with termination disclosure and reporting requirements.⁷⁴ More recently, it appears that the PBGC is attempting to review disclosure and notices during its 60-day review period following the filing of the Standard Termination Notice (Form 501) instead of waiting until after the termination process, including distribution of assets, has been completed.

Furthermore, the PBGC may bring suit against a plan administrator six years after the date on which the cause of action arose or three years after the earliest date on which the PBGC acquired or should have acquired actual knowledge of the existence of such a cause of action. In the event of a standard termination, a court has found that a "cause of action" accrues when a violation of PBGC regulations occurs rather than on the plan's termination date.

Limitations Periods for Actions by Participants and Beneficiaries

Claims for Benefits. The limitations period applicable to claims brought by participants and beneficiaries depends upon the nature of the claims — claim for benefits or fiduciary breach — and where the lawsuit is brought.

ERISA does not specify a particular limitations period for benefit claims under §502(a)(1)(B). Gener-

ally, courts apply the most analogous state limitations period as "long it is consistent with federal law and policy." This means that the statute of limitations can vary significantly from state to state depending on the state's limitations period, which is usually, but not always, based on a claim for a breach of a written contract. For example, the statute of limitations for a breach of contract claim is six years in New York and 15 years in Ohio. ⁷⁹

A plan sponsor, particularly of a plan that covers participants in multiple states, is well-served by including a contractual (i.e., plan-imposed) provision in the plan document. For example, a plan may contain, and courts generally uphold, a choice of law provision unless it is "unreasonable or fundamentally unfair." Additionally, courts generally allow an employee benefit plan to establish a contractual limitation period as long as the limitations period is reasonable. In determining whether a contractual limitations period is reasonable, courts often look at whether the claimant had sufficient notice of the limitations period, e.g., whether it was disclosed in the plan document or summary plan description.

Also relevant in a claim for benefits under ERISA is when the statute of limitations period for a benefits claim begins to accrue, which, unlike the statute of limitations, is governed by federal common law. Federal common law generally looks to when a plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the litigation and in the context of ERISA after a claim for benefits has been made and has been formally denied. However, a plan sponsor may further specify in the plan document at what point a limitations period begins to run, and based on the Supreme Court's decision in

⁷² 29 C.F.R. §4041.5(a)(1).

⁷³ 74 Fed. Reg. 61074 (11/23/09). For questions and answers on standard terminations, see http://www.pbgc.gov/prac/terminations/standard-terminations.html.

⁷⁴ *Id*.

⁷⁵ ERISA §4003(e)(6)(A)(i).

⁷⁶ Pension Benefit. Guar. Corp. v. Ferfolia Funeral Homes, Inc., 835 F. Supp. 2d 416, 421, 2011 BL 188631 (N.D. Ohio 2011).

⁷⁷ Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449 at 465.

⁷⁸ Koert v. GE Grp. Life Assurance Co., 231 Fed. Appx. 117, 119, 40 EBC 2475 (3d Cir. 2007).

⁷⁹ See Lewis v. John Hancock Mut. Life Ins. Co., 6 F. Supp. 2d 244, 247 (S.D.N.Y. 1998); Meade v. Pension Appeals & Review Comm., 966 F.2d 190, 195, 15 EBC 1755 (6th Cir. 1992); Syed v. Hercules Inc., 214 F.3d 155, 159, 161 (3d Cir. 2000) (applied a more specific 1-year statute of limitations for employment disputes); Adamson v. Armco, Inc., 44 F.3d 650, 652, 18 EBC 2861 (8th Cir. 1995) (applied a 2-year statute of limitations for recovery of wages).

⁸⁰ Wang Labs., Inc. v. Kagan, 990 F.2d 1126, 1128–29, 16 EBC 2108 (9th Cir. 1993); Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1149, 25 EBC 2441 (11th Cir. 2001).

⁸¹ Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 874, 20 EBC 2889 (7th Cir. 1997).

⁸² Manginaro v. Welfare Fund of Local 771, 21 F. Supp. 2d 284, 296–297 (S.D.N.Y. 1998).

⁸³ Guilbert v. Gardner, 480 F.3d 140, 149, 40 EBC 1297 (2d Cir. 2007).

⁸⁴ Union Pac. R.R. v. Beckham, 138 F.3d 325, 330 (8th Cir. 1998); Guilbert v. Gardner, 480 F.3d 140, 149 (2d Cir. 2007).

Heimeshoff v. Hartford Life & Accident Ins. Co.. 85 a plan document can require a claim to start accruing even before the final denial of an administrative claim as long as it's reasonable (e.g., from the date of the written proof of loss). A limitations provision should be viewed as reasonable unless, based on the facts and circumstances, it is unreasonably short.86 Thus, in addition to a plan-imposed limitations period for filing a lawsuit after the final claim denial under ERISA's claims procedures, it may be advisable for the plan to impose a limitations period for bringing the claim to the plan fiduciaries. This type of provision may serve an employer well where a younger participant is provided a deferred annuity. If, as part of the termination process, the participant receives the required Notice of Plan Benefits, which puts the participant on notice about the benefit payable at normal retirement age and the relevant information used to calculate that benefit, the employer may have a good defense if the participant claims 10 or 20 years later that the benefit was not calculated correctly.

Fiduciary Breach. The statute of limitations for a breach of fiduciary duty claim under ERISA §409 is the earlier of six years from the date of the last action that constituted part of the alleged breach or violation (or in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation) and three years from the earliest date on which the plaintiff had actual knowledge of the breach or violation. However, in the case of fraud or concealment, ERISA provides that such action may be commenced not later than six years after the date of discovery of such breach or violation. 88

MISCELLANEOUS ISSUES

Potential Application of State Law. Outside of a breach of fiduciary duty regarding the selection of the annuity provider, once the plan has terminated and annuities have been distributed (or lump sums paid), ERISA will no longer apply, and state law would generally govern. ⁸⁹ The company's liability, as plan sponsor, to plan participants and beneficiaries should be found to have been extinguished upon its termination

of the plan and the purchase of the annuity. 90 Because the termination and the distribution of annuities "severs" the link between ERISA and the benefits provided (as described by the Supreme Court in *Beck*), state law may apply in certain cases. 91

Hallingby v. Hallingby⁹² centered on the application of ERISA to the spousal survivor benefits under an annuity previously provided upon the termination of the plan. Citing *Beck*, the court held that, because of the termination and distribution of the annuities, state law principles, not ERISA, applied to the dispute.⁹³

Controlled Group and Successor Liability. As noted above, after a plan terminates, plan participants and beneficiaries as well as the PBGC can bring an action under ERISA against the plan sponsor or plan fiduciaries. However, it is important to remember that ERISA may also, in certain circumstances, impose liability on members of the employer's controlled group and/or the employer's successor. Generally, under the I.R.C. and ERISA's controlled group rules, 94 an entity may be held liable, jointly and severally, for the pension obligations of each member of its controlled group if the entity engages in a "trade or business."95 Such obligations include withdrawal liability, minimum funding requirements, PBGC premiums, termination liability and unpaid contribution liabilitv.96

Additionally, a successor employer may take on a predecessor's liabilities depending on whether the underlying transaction is a stock or asset purchase. In the event of a stock purchase, the buyer generally assumes all of the seller's employee benefit plan obligations. But in the event of an asset purchase, the buyer generally will not assume the seller's liabilities unless the buyer assumes expressly or implicitly the seller's liabilities or one of the common law excep-

^{85 134} S. Ct. 604, 2013 BL 345916 (2013).

⁸⁶ *Id.* (ruling that a 3-year limitations period is not unreasonably short on its face and a 1-year limitations period commencing at the conclusion of a internal review would be reasonable).

⁸⁷ ERISA §413.

⁸⁸ Id.

⁸⁹ See PBGC Op. Ltr. 91-4 (stating that "Assuming the plan administrator distributes to participants the correct amount, in the proper form, the terminated plan's benefit liabilities are satisfied for purposes of Title IV").

⁹⁰ 29 C.F.R. §2509.95-1(b).

⁹¹ Beck, 127 S. Ct. at 2318.

^{92 574} F.3d 51, 2009 BL 158265 (2d Cir. 2009).

⁹³ Id

⁹⁴ See I.R.C. §412; ERISA §4001(b)(1).

⁹⁵ *Id.* ERISA and the I.R.C. do not define what constitutes a trade or business. *See Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987) (taxpayer must be involved in the activity with continuity and regularity with the primary purpose of income or profit to constitute a trade or business); *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 141, 2013 BL 197393 (1st Cir. 2013), *cert. denied*, 134 S. Ct. 1492 (2014) (applying a fact-specific analysis with no one factor dispositive).

⁹⁶ ERISA §4201 (withdrawal liability), ERISA §302-§305 (minimum funding requirements), ERISA §4007 (PBGC premiums), ERISA §4062(b), §4062(c) (termination liability and unpaid contribution liability).

⁹⁷ See Preite, 471 F. Supp. 2d 1271 (M.D. Fla. 2006).

tions⁹⁸ applies or in certain circuits, if there is "continuity of [business] operations between" the seller and the buyer and the buyer has knowledge of such liabilities.⁹⁹

CONCLUSION

As indicated above, the decision to terminate a plan does not necessarily mean that all potential liabilities will be extinguished soon thereafter. Nonetheless, plan sponsors and fiduciaries alike will be well-served if they consider potential future liabilities and proceed carefully before, during, and after plan termination.

of Pontiac, 920 F.2d 1323, 1327, 13 EBC 1138 (7th Cir. 1990) (holding that successor liability attaches where it vindicates federal policy, the successor has "notice of the liability in question," and there is a "continuity of operations between the predecessor and successor").

⁹⁸ Generally there are three circumstances, during an asset purchase, in which the purchaser becomes responsible for the seller's liabilities: (1) if the asset purchase constitutes a de facto merger; (2) if the purchaser is merely a continuation of the seller; and (3) if the assets are transferred for fraudulent purposes, i.e., to escape liability. *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984).

⁹⁹ Upholsterers' Int'l Union Pension Fund v. Artistic Furniture