Withdrawal Liability Update

Paul A. Green
Mooney, Green, Saindon, Murphy & Welch, P.C.
Washington, DC

September 12, 2023

Actuarial Assumptions – The Statute

- **ERISA Section 4213, 29 U.S.C. § 1393. Actuarial assumptions**
- (a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer — The ***[PBGC] may prescribe by regulation actuarial assumptions*** which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of—
  - (1) actuarial assumptions and methods which, in the aggregate, are reasonable (***taking into account the experience of the plan and reasonable expectations***) and which, in combination, offer the actuary's ***best estimate*** of anticipated experience under the plan, or
  - (2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

Actuarial Assumptions – The Statute (cont.)

- ERISA Section 4221(a)(3)(B), 29 U.S.C. § 1401(a)(3)(B):
- (B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
  - (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations) . . . .

Actuarial Assumptions – Litigation Backdrop

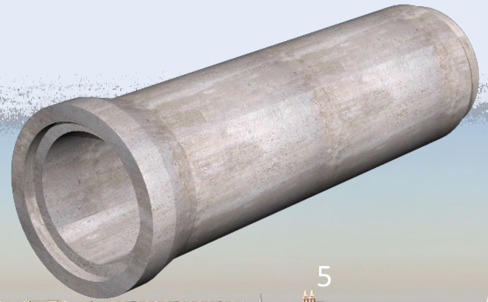
- *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602 (1993).
  - An employer challenged the constitutionality of the presumptions of correctness underlying withdrawal liability assessments, including the actuarial assumptions used by the Plan's Actuary.
  - In a case in which the Actuary used of the "Segal Blend" methodology for selecting the discount rates, the Supreme Court upheld the presumptions, stating:
  - "Section 1401(a)(3)(B) speaks . . . of the ***aggregate reasonableness of the assumptions*** and methods employed by the actuary in calculating the dollar liability figure. . . . [I]t would make sense to judge the reasonableness . . . by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. In practical terms ***it is a burden to show something about standard actuarial practice*** . . . ."

Photograph by Earl Dotter.
Used by permission.

Litigation Backdrop

- *Concrete Pipe* (cont.). -- But the Supreme Court also stated:
    - “The statutory requirement (of ‘actuarial assumptions and methods-which, in the aggregate, are reasonable . . .’) is not unique to the withdrawal liability context, for the statute employs identical language in 29 U. S. C. § 1082(c)(3) to describe the actuarial assumptions and methods to be used in determining whether a plan has satisfied the minimum funding requirements contained in the statute. The use of the ***same language*** to describe the actuarial assumptions and methods to be used in these different contexts tends to check the actuary's discretion in each of them.
    - “‘Using different assumptions [for different purposes] could very well be attacked as ***presumptively unreasonable*** both in arbitration and on judicial review.’”

      Quoting *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F. 2d 128, at 146-147 (Seitz, J., dissenting in part).



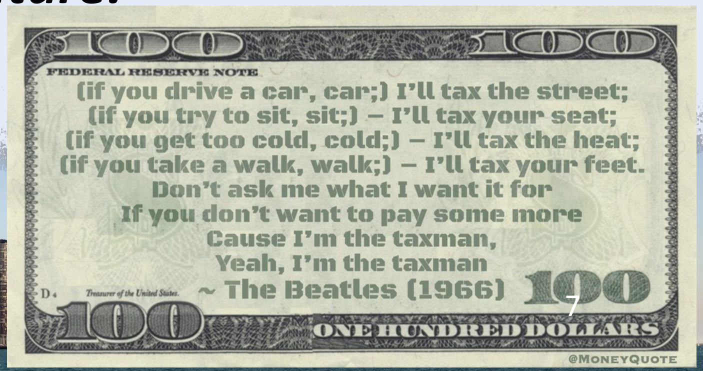
Litigation Backdrop

- *Chicago Truck Drivers (Indep.) Pension Fund v. CPG Logistics*, 698 F.3d 346 (7th Cir. 2012).
  - In the years preceding a withdrawal, the Trustees had instructed the Actuary to use the funding rate rather than his preferred assumption (the Segal Blend), only permitting the Actuary to select the Segal Blend in the year of withdrawal.
  - The Employer challenged the assessment, claiming that the Trustees' interference with the Actuary's choice of assumptions in those prior years had inflated the Plan UVBs in the year of its withdrawal.
- The Court agreed, stating:
  - "[T]he plan's resolution directing Segal to switch from one method of estimating the interest rate to another and back again compounded the damage to CPC, and also violated the "best estimate" requirement, which exists to maintain the actuary's independence. . . . ***An actuarial determination that violates ERISA by not being based on the actuary's best estimate is unreasonable, hence reversible by the arbitrator.***"

Litigation Backdrop

- In rejecting a challenge to funding assumptions the IRS considered to be arbitrarily conservative and not reflective of the Plan's experience, the Court stated:
  - "The Commissioner asserts that the best estimate test imposes a second substantive hurdle for actuarial valuations to clear. . . . However, this substantive approach conflicts with the "best estimate" provision and with the statutory scheme as a whole. The statute refers to the actuary's best estimate, not that of a court or of outside experts. Further, by entrusting actuaries with the task of determining plan contributions, and by granting the latitude inherent in the statutory reasonableness test, Congress intended to give actuaries some leeway and freedom from second-guessing. . . . Within the range of reasonableness, Congress assigned the task of balancing these goals to actuaries. . . . In light of this analysis, ***we find that the best estimate test is procedural, as opposed to substantive, in nature.***"

- Vinson & Elkins v. Comm'r, 7 F.3d 1235 (5th Cir. 1993)



Litigation Backdrop

- *Wachtell, Lipton, Rosen & Katz v. Comm'r*, 26 F.3d 291 (2d Cir. 1994).
  - The IRS challenged the Plan Actuary’s discount rate assumption used for funding purposes, claiming it did not represent the Actuary’s “best estimate of anticipated experience” under the Plan because it was too conservative and not based on the Plan’s actual experience.
  - The Court rejected this argument, stating:

“We believe that the ‘best estimate’ requirement is basically procedural in nature and is ***principally designed to insure that the chosen assumptions actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors***. We perceive no basis for overturning the conclusion that the actuarial assumptions used by Wachtell were the actuary's best estimate of anticipated plan experience.”

The New Cottage Industry – Challenging Discount Rates

- *New York Times Company v. Newspaper and Mail Deliverers'-Publishers' Pension Fund,* 303 F. Supp. 3d 236 (S.D. NY 2018).
  - Following an assessment for a partial withdrawal, the Employer challenged the Plan Actuary's use of the Segal Blend based upon its argument that 1) an actuary cannot have two "best estimates" of the same thing; and 2) that the Supreme Court's *Concrete Pipe* decision mandated the use of a single rate for both purposes.
  - The Court rejected both prongs of that argument. The Court did, however, find that:
    - The Plan had not satisfied its burden of proving why the use of disparate rates was justified, and
    - The Plan Actuary had testified the Segal Blend was *not* his best estimate (this latter point being completely unsupported by the record).
  - Reversing the Arbitrator, the Court then ordered the Plan to recalculate the liability using its funding assumption.
  - Although the case was appealed, fully briefed, and argued, the parties settled, and no decision was issued.

Discount Rate Challenges

- *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund*, 15 F.4th 407 (6th Cir. 2021).
  - Under facts very similar to *NYT,* the employer relied upon the same arguments to challenge the use of the Segal Blend. As in *NYT,* the Court rejected the employer's arguments, but nevertheless concluded:

    "Using the Segal Blend here violates the statute because the resulting interest rate is not 'the actuary's best estimate of anticipated experience under the plan.' Rather, it ***dilutes the actuary's best estimate with rates on investments that the plan is not required to and might never buy, based on a set formula that is not tailored to 'the unique characteristics of the plan.'*** An actuary using the Segal Blend is factoring in an interest rate used for plans that essentially go out of business, even though these plans are neither going out of business nor required to purchase annuities to cover the departing employer's share of vested benefits."

Discount Rate Challenges

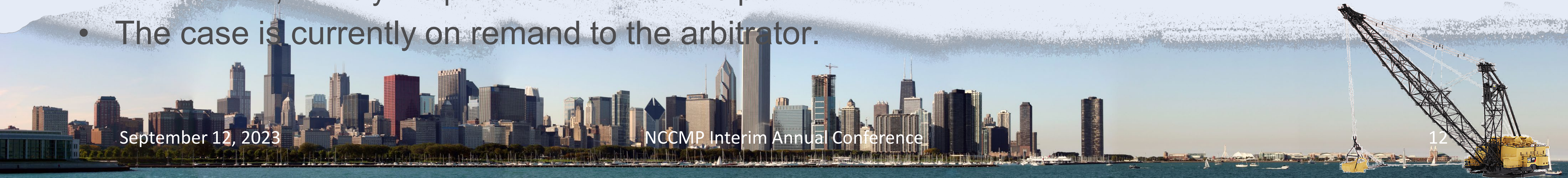
- *UMWA 1974 Pension Fund v. Energy West Mining Co.,* 39 F.4th 730 (DC Cir. 2022), *cert. denied*, 143 S. Ct. 1024 (2023).
  - Following a complete withdrawal, the Employer challenged the assessment based upon the Plan Actuary's use of the PBGC's termination rates.
  - Unlike *New York Times* and *Sofco:*
    - The 1974 Plan was projected to become insolvent within the seven years following the withdrawal and was expected to use a progressively more conservative investment mix as it approached insolvency, at which time it would be wholly invested in cash.
    - In the arbitration, the Employer's expert actuary testified that:
      - Use of PBGC Rates was reasonable and in accordance with the actuarial standards; and
      - That nevertheless a higher discount rate would be more appropriate since the Plan was headed towards insolvency.
    - The 1974 Plan prevailed in arbitration and in the District Court.
  - In both the District Court and Court of Appeals, the Employer raised the arguments made in *New York Times* and *Sofco,* abandoning its position from the arbitration. Both courts rejected them.

Energy West (cont.)

- In a two-pronged ruling, the Court of Appeals concluded:
  - Following the ruling in *Sofco* that the discount rate must reflect the Actuary's "best estimate" of the plan's anticipated *investment* experience, the Court stated:

    "[T]the Pension Plan's actuary chose the risk-free PBGC rates based on the theory that risk-free rates are appropriate for withdrawal liability because the withdrawn employer no longer bears risk. The discount rate assumption was ***not chosen based on the Pension Plan's past or projected investment returns. Therefore, the PBGC rate assumption was not the actuary's 'best estimate of anticipated experience under the plan.***'"
  - Additionally, responding to the Plan's argument that the "best estimate" requirement is not a basis for rejecting the actuarial assumptions under ERISA Section 4221, the Court stated:

    "The Aggregate Reasonableness Requirement, both for dispute resolution [under ERISA Section 4221(a)(3)(B)(i)] and for withdrawal liability in Section [4213(a)(1)], does not just require assumptions that are reasonable in the abstract; ***it requires assumptions that are reasonable relative to the plan, taking the plan's experience into account***. If the actuary is not basing the assumptions on the plan's characteristics, the assumptions will not be reasonable 'taking into account the experience of the plan.' In other words, not only must the actuary's assumptions be reasonable, they must be aimed at the right calculation, namely the predicted future of the plan."
  - The case is currently on remand to the arbitrator.



Discount Rate Litigation

- *GCIU-Employers Ret. Fund v. MNG Enters.,* Inc, 51 F.4th 1092 (9th Cir. 2022), *cert. denied,* ___ U.S. ___ (2023).
  - Following a complete withdrawal, the Employer challenged the Plan Actuary’s use of the PBGC’s termination rates in the assessment.
  - The Court followed the holding in *Sofco* and the first holding in *Energy West*, stating:

    “While actuaries may reasonably disagree as to the exact interest rate that best accounts for the plan's experience and anticipated returns, ‘the discount rate assumption cannot be divorced from the plan's anticipated investment returns.’ GCIU's actuary testified that the PBGC rate ignores the expected returns on the plan's assets. Because that rate overlooks the plan's expected returns, it does not satisfy the ‘best estimate’ standard.’” (Quoting *Energy West.)*

Actuarial Assumptions – The Statute *Redux*

- **ERISA Section 4213, 29 U.S.C. § 1393. Actuarial assumptions**
- (a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer — The ***[PBGC] may prescribe by regulation actuarial assumptions*** which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of—
  - (1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's ***best estimate*** of anticipated experience under the plan, or
  - (2) ***actuarial assumptions and methods set forth in the corporation's regulations*** for purposes of determining an employer's withdrawal liability.

PBGC to the Rescue – The Proposed Regulations

- The proposed regulations would *retain* the "best estimate" standard for *all* assumptions related to withdrawal liability, *but*
- Allow an alternative to the actuary's "best estimate" solely for the discount rate a that is a "single effective interest rate":
  - Equal to the single effective interest rate corresponding to the Section 4044 rates (*aka* mass withdrawal/termination rates),
  - Equal to the rate used for the plan's funding standard account (*i.e.*, for minimum funding purposes), or
  - Anywhere in between.
  - 87 Fed. Reg. 62316 (October 14, 2022).

Comments on the NPRM (1/3)

Commenter	Support?	Notes
AFL-CIO	Yes	Supports proposal in current form.
American Academy of Actuaries	Yes	Support, but suggests possibly lowering the bottom end of the range and asks: · Who decides? · Clarify effective date. · Does this affect the installment amortization? · Clarify treatment of prior pools.
Cheiron	Yes	Requests clarifications: · Who decides whether to use the "Best Estimate" or the regulation? · Should clarify that the Trustees select the rate under the regulation. · Should specify exactly which funding rate defines the upper boundary and suggests the rate use to credit interest in the FSA for the year preceding the withdrawal. · Should reject The *National Retirement Fund, et. al. v. Metz Culinary Management, Inc.,* 946 F.3d 146 (2d Cir. 2020) decision and clarify that rates may be selected after the beginning of the plan year of the withdrawal.
Edward Hammond, Esq.	No	Criticizes the proposal for ignoring a plan's anticipated investment experience. Embraces Sofco's rejection of diluting the plan's anticipated investment experience. Further criticizes the proposal for its implicit criticism of *Sofco* and *Energy West*, and accuses PBGC of seeking to make its rule retroactive.
First Actuarial Consulting Team (Jay K. Edelberg, Richard J. Hudson, William J. McKeon, Jr.)	No	Suggests that a lower rate may be appropriate in some circumstances. Also asks for clarification as to which funding rate the proposal is referring to. Criticizes: · The use of the word "Settlement" in the preamble. · Reliance on the concept of "risk transfer." · Burdening withdrawn employers with increased liability merely because the Trustees continue to make risk-on investments. · The lack of concerns for employers who pay more than their fair share on withdrawal. · Allowing plans to select rates that are not rooted in the plan's actual anticipated investment experience. · Failure to explicitly deal with the treatment of administrative expenses. · Placing the rate decision in the hands of the Trustees, who may disagree and deadlock. · Criticizes the Segal Blend as counter intuitive. · The promotion of "moral hazard" by disassociating withdrawal liability rates from actual investment decisions, thereby encouraging Trustees to take inappropriate investment risk.

Comments

Comments on the NPRM (2/3)

Commenter	Support?	Notes
ERISA Industry Committee	No	Criticizes the proposal for not requiring that the rate assumption be "reasonable" as it relates to the plan's anticipated investment experience. Also raises the Concrete Pipe problem regarding the presumption of correctness if the interest rate is divorced from any reasonableness standard.
FCA International	No	Low discount rates discourage employers from joining plans. It could also affect contractors' ability to get credit, depending on what FASB requires. Finally, the range is too broad.
GCIU-Employer Retirement Fund	Yes.	Generally supportive, but suggests: · The choice of rate be left to the actuary, as leaving it to the Trustees will only increase litigation. · Make the regulations effective for assessments made after the effective date. · Make rates in assessments predating the regulations "presumptively reasonable."
Horizon Actuarial Services	Yes.	Generally supportive. Requests: · Clarification on who makes the choice. · Retroactivity to the MPPAA's effective date. · Widen the permitted range, since it would be impossible to include an administrative load if using the funding rate and PBGC rates are greater than the funding rate.
IAM Dist. 9 Pension Fund	Yes.	Supportive of the rule.
Jason Simpson	Yes?	Seems reasonable but should check assumptions every 5 years or so.
Pentiuk, Couvreur & Kobiljak	No	The contesting employers were doing the Lord's work, and the courts were merely stopping actuaries from continuing their flagrant disregard of the law. The proposal violates the law as well, which prohibits plans from using different discount rates for different purposes.
Milliman		Supports proposal in current form.
National Coordinating Committee for Multiemployer Plans	Yes	Supports proposal in current form. Provides a detailed legal and policy analysis in defense of the proposal.
Segal	Yes	Supportive of proposal. Requests consideration be giving to: · Providing more flexibility as to what constitutes the funding rate (e.g., the current year's rate rather than the prior year's). · Allowing more flexibility regarding the assumption for future administrative expenses and its impact on the discount rate. · Providing a means of countering Metz, so that the regulation can be effective immediately rather than the first day of the following Plan year. Clarification is requested: · Whether a single effective interest rate is required. · Which discount rate should be used to determine the amortization period for installment payments.

Comments on the NPRM (3/3)

Commenter	Support?	Notes
Sheet Metal Workers' Local 104	Yes	
Systems Management & Balancing, Inc.	No	Allowing the use of lower interest rate, such as by use of the Segal Blend, discourages employers from joining plans, unfairly punishes withdrawing employers, and creates windfalls for the plans.
The Benefits Practice	No	Criticizes the breadth of the range of permitted rates. The rates for withdrawal liability should be close to the funding rates, each of which must be based solely on the plan's anticipated investment experience. Alternatively, the PBGC should require use of funding rates or allow the employer to assume direct responsibility for its participants by transferring them to a single employer plan, along with a pro rata share of the plan's assets.
Schulte Roth & Zabel (National Retirement Fund)	Yes	Supports the proposal, but requests that the PBGC make a clearer statement that Sofco, Energy West, New York Times and MNG are incorrectly decided.
United Food and Commercial Workers	Yes	Supportive, but requests that PBGC clarify that no affirmative election is required by the Plan Sponsor to fall under the proposed rule.
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U.S and Canada	Yes	Supports proposal in its current form.
Western Conference of Teamsters Pension Trust	Yes	Supports the proposal but wants to make sure nothing will preclude plans that want to from using the funding rate.
U.S. Chamber of Commerce, Association of Food and Dairy Retailers, Wholesalers, and Manufacturers, and the Associated General Contractors of America.	No	The proposed rules violate ERISA and are potentially unconstitutional. "Congress did not authorize the PBGC to provide blanket approval for any assumptions that an actuary chooses without regard to an individual multiemployer plan's history or reasonable expectations. . . . Congress certainly did not authorize the PBGC to declare sections of ERISA inapplicable thereby usurping Congress's role" The Chamber also notes that Concrete Pipe upheld the constitutionality of the presumption of correctness in part because "plan actuaries did not have unbridled discretion to select discount rate assumptions."
Anonymous 2		Supports PBGC rates plus reasonable asset projections.
Anonymous 3	Unclear	Supports higher rates to increase liability, especially if ESG considerations are involved.
Anonymous 5	No.	Criticizes Segal Blend as counter intuitive. Questions: · What happens when Trustees choose the rate? · What happens should PBGC rates once again exceed funding rates? · PBGC should clarify treatment of administrative load.

Unanswered Questions

- Who decides whether to use the “best estimate” or the PBGC’s permitted range, the actuary or the sponsor (Trustees)?
- If the PBGC’s permitted range is selected, who selects the rate?
- What happens if the permitted range narrows due to a combination of rising interest rates and declining earnings expectations?
- What happens if prevailing rates rise so much that the PBGC rate exceeds the funding rate?

Proposed Regulations – Potential Challenges

- PBGC's express statutory authority to set actuarial assumptions is a substitute for the "Best Estimate" standard under ERISA Section 4213(a).
- Does any rate selected also have to separately satisfy Section 4221(3)(B)(i)'s requirement that "[t]he actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations) . . . "?
  - This challenge is arguably supported by the *Energy West* court's suggestion that the "Reasonableness" requirement of Section 4221 is independent of the "Best Estimate" requirement of Section 4213(a).
  - The Chamber of Commerce and others have already staked out the position that the proposed regulations are unreasonable and exceed the PBGC's authority.

Withstanding the Challenges

- Reasons why the proposed regulations, if adopted, should withstand the challenges:
  - The PBGC's authority to regulate actuarial assumptions is explicit so that any assumption or range of assumptions authorized by the PBGC through the rule-making process should be inherently "reasonable."
  - The proposal seeks to address the Courts' fundamental misunderstanding that the only relevant "experience" that discount rates must be measured against is the Plan's anticipated ***investment*** experience.
    - In actuarial-speak, a discount rate is simply an interest rate used to reduce a stream of payments into a present value, which may or may not be driven by anticipated investment experience.
    - This type of misunderstanding is why *Concrete Pipe,* in upholding an assessment that relied upon the Segal Blend, stated that "reasonableness" must be measured against the actuarial standards.

But What is the PBGC Rate?

- The PBGC rate is based on the implicit discount rate underlying commercial annuity pricing obtained by surveying issuers of annuities, which are considered to be risk-free.
- The “rate” actually consists of two rates, one for liabilities arising before a breakpoint (either 20 or 25 years) and one for liabilities arising after that breakpoint.
- The rate is typically adjusted quarterly.
- The PBGC Rate is primarily used to value the liabilities of single employer pension plans terminated in distress and involuntary terminations.
  - One of the primary reasons for relying on annuity pricing is to avoid “moral hazard.”
  - The goal is to not make it cheaper to terminate an underfunded single employer pension plan in a distress or involuntary termination than to fully fund and annuitize it.

The Proposed New and Improved PBGC Rate

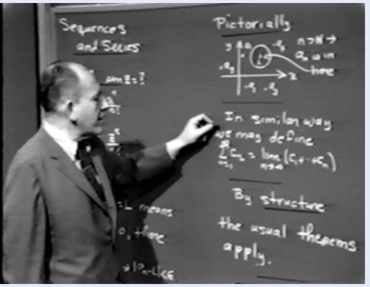
- PBGC has proposed major changes to the assumptions under Section 4044 governing single employer plan terminations and mass withdrawals.

  88 Fed. Reg. 56563 (Aug. 18, 2023);

- The most notable change is to the so-called PBGC rate.
  - The two-tiered rate would be replaced by a 60-tiered rate, beginning with 0.5 years up through and including 30 years, in ½ year increments, creating a ***yield curve***.
  - Liabilities arising beyond 30 years would be discounted at the 30-year rate.
  - The rate would be adjusted monthly rather than quarterly.
    - The rate for a valuation date on the last day of the month would be the rate in effect for that month.
    - The rate for a valuation date on any other day of the month would be the rate for the prior month.
    - *See Derivation of ERISA 4044 Yield Curve White Paper,* https://www.pbgc.gov/sites/default/files/documents/4044-proposed-rule-white-paper.pdf.

The Proposed New and Improved PBGC Rate

- The new rate has three components:
  - It is primarily based on a blend of:



    - 1/3rd of the Treasury Department's Nominal Coupon Issues Spot Rates, End of the Month Yield Curve (https://home.treasury.gov/data/treasury-coupon-issues-and-corporate-bond-yield-curves/treasury-coupon-issues), and
    - 2/3rds of the Treasury Department's High Quality Market Corporate Bond Yield Curve Spot Rates, End of Month Yield Curve (https://home.treasury.gov/data/treasury-coupon-issues-and-corporate-bond-yield-curve/corporate-bond-yield-curve),

    for maturities arising in ½ year increments from ½ year to 30 years.
  - This "curve" is then adjusted by "spreads" at each of its 60 data points based upon the PBGC's annuity market survey for the prior quarter that is used to make the blended curve better fit the implicit market rate curve derived from the survey.
- The comment deadline is October 17, 2023.

Other Cases to Watch – "Involuntary Withdrawals"

- *Central States Pension Fund v. Wingra Redi-Mix, Inc.*, 2023 BL 14190, 2023 US Dist Lexis 7561 (N.D. Ill. Jan. 17, 2023).
  - In ruling that an Employer was entitled to discovery to demonstrate that it was involuntarily expelled from the Plan, the Court stated:

    "The operative word in § 1383 is 'withdrawal.' The ordinary meaning of the term conveys a person's voluntary act to discontinue an activity. Its definition is a "retreat or retirement" or a "removal from a place or position." A "retreat" or "retirement," like a "withdrawal," imply conscious acts made by the actor. . . . .

    "Interpreting 'withdrawal' to mean a voluntary action initiated by the employer accords with the MPPAA's purpose. . . . .

    "So defined, ***§ 1383 applies only when an employer decides to leave a pension plan***, and therefore, ***an employer's expulsion falls outside the statute***. Therefore, Wingra did not need to initiate arbitration within the prescribed statutory period."

Wingra Redi-Mix (cont.)

- Following the transfer to a different judge and a motion for reconsideration, the Court limited the prior ruling to the question whether discovery could proceed, reserving the substantive issues for later.
- The Court also noted that the case involved the interpretation of a prior settlement agreement.
- As for the failure to use the statutory administrative process, the Court concluded that the lawsuit asserting bad faith on the part of the Plan resulted in an "equitable tolling" of the period to request review and demand arbitration.

“Retroactive” Discount Rate Changes in Withdrawal Liability Assessments

- *Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.,* 946 F.3d 146 (2d Cir. 2020), *cert. denied,* 141 S. Ct. 246, 208 L. Ed. 2d 22 (2020).
  - In June 2014, the Plan’s new actuary reduced the withdrawal liability discount rate from 7.25% (the funding rate) to 3.25%, effective as of the last day of the prior plan year (the measurement date for 2014 withdrawals).
  - The 2nd Circuit upheld the arbitrator’s legal conclusion that retroactively changing the assumption was a violation of ERISA, and that failure to change the rate as of the measurement date caused the prior year’s discount rate to “roll over” as the actuary’s “best estimate.”

But . . .

- Two recent cases in the District of Columbia considered the same issues:
  - *Trs. of the IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, 2022 BL 344725, 2022 WL 4534998 (D.D.C. Sept. 28, 2022).
  - *Trs. of the IAM Nat'l Pension Fund v. Ohio Magnetics, Inc.,* 2023 BL 37714 (D.D.C. Feb. 06, 2023).
    - Sometime during 2018, the Plan actuary reduced the discount rate, effective as of the last day of the prior Plan year (the measurement date for 2018 withdrawals).
    - Both cases involved employers that withdrew during 2018.
    - In each case, the arbitrators determined that the retroactive adoption of the discount rate violated ERISA, in accordance with *Metz.*

M&K and *Ohio Magnetics* (cont.)

- In both cases, the Courts noted that the statute was silent on the issue of retroactive assumption changes, only that the assumptions must be determined "as of the measurement date" (*i.e.,* the last day of the plan year preceding the year of withdrawal).
- Based on the statutory language and the actuarial standards, the Courts concluded that assumptions may be selected retroactively provided they are "based on the body of knowledge available up to the measurement date . . . ." *M&K,* 2022 BL 344725, at *22.
- Relying on *Energy West,* the *M&K Court* explicitly rejected the notion that the lack of timely action by the actuary causes assumptions to roll-over, concluding that the actuary must make an actual selection.
- Both cases are fully briefed on appeal and awaiting scheduling for oral argument.

The Construction Industry Exemption

- ERISA Section 4203(b)(1) provides:

  "[A] complete withdrawal occurs only as described in paragraph (2), if—

  "(A) ***substantially all the employees*** with respect to whom the employer has an obligation to contribute under the plan perform ***work in the building and construction industry***, and

  "(B) the plan—

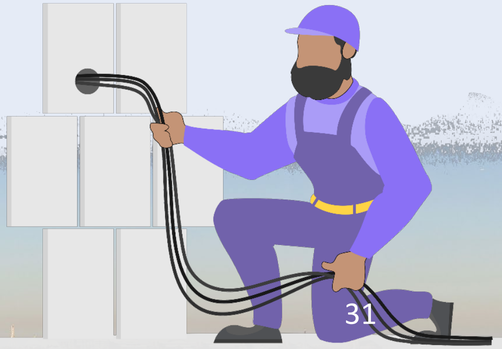
  "(i) primarily covers employees in the building and construction industry, or

  "(ii) is amended to provide that this subsection applies to employers described in this paragraph."

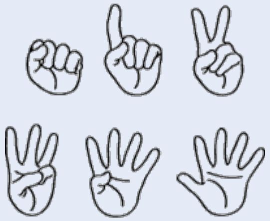
- Recurring Questions:
  1. What is "work in the building and construction industry"?
  2. What does "substantially all" mean?
     a. How do you count the employees?
     b. What is the relevant time period?

Work In the Building and Construction Industry

- *Dycom Indus. v. Pension, Hospitalization & Benefit Plan of the Elec. Indus.*, 2023 BL 98336, 2023 US Dist Lexis 50814 (S.D.N.Y. 2023), *affirming the report in,* 2022 BL 463717, 2022 US Dist Lexis 232804 (S.D.N.Y. 2022).
  - An employer that installed cable in existing structures shut down and was assessed withdrawal liability. The employer argued that as an employer in the building and construction industry, it was entitled to the "construction exception" from withdrawal liability.
  - Relying upon the caselaw arising under the NLRA, the Arbitrator, Magistrate, and District Court rejected that argument and upheld the assessment, concluding that "building and construction" requires either new construction, renovation, or other structural changes.
  - As stated by the Magistrate, "drilling holes and running cable through existing buildings or structures, and then using material and parts to hook up the cable to the necessary equipment in order to provide cable, television, Wi-Fi and home security services . . . is not within the ambit of work performed in the 'building and construction industry.'" *Dycom Indus.*, 2022 BL 463717, at *6 (S.D.N.Y. 2022).
  - Currently on appeal in the Court of Appeals for the 2nd Circuit.



Counting Employees



- *PSF Industries v. Boilermakers-Blacksmith National Pension Trust,* No. 20-CV-6143-FJG (W.D. Mo. Sept. 30, 2021).
  - Both sides agreed that 1) on-site work was in the construction industry and shop work was not; 2) “substantially all” means 85%; and 3) the appropriate time period was (more-or-less) 10 years.
  - The Arbitrator concluded that, based upon an adjusted head count (adjusted to reflect time worked by “field employees” vs. time worked by “shop employees”), the employer did not meet the 85% threshold.
  - The Court found no statutory basis for adjusting the head count, concluding that the count must be cumulative over the relevant period.
  - The Court remanded the case to the arbitrator to apply the appropriate standard.

Questions?