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Now You See It, Now You Don't; ERISA to ERIDA in Just Three Decades

Everywhere we look these days, people are losing some of their pension benefits. The high profile instances like the one involving employees of United Airlines are just the tip of the proverbial iceberg. Many people who retired years ago are also experiencing pension benefit reductions even when their benefits are "guaranteed" by the Pension Benefit Guaranty Corporation (PBGC), a federal agency! There seems to be an endless number of ways that employees can have their pension benefits curtailed or cancelled. In this Forum, we'll review some of the ways non-executives can suffer a loss of pension benefits.

Unfortunately, ERISA--the Employee Retirement Income Security Act of 1974--is providing only limited security for the pension plans the PBGC takes over these days. If Congress were to recognize what's been happening to pensions lately, it would have to enact legislation entitled the Employee Retirement Income *Deprivation* Act--ERIDA.

Consider Case #1. If you read the Wall Street Journal regularly, you probably noticed the recent front page article about a retired mine supervisor named Charlie Craven. Mr. Craven, it seems, had been getting a monthly pension of $348.48 for the past 18 years. That's a pitifully small benefit by any standards. But last December, he received a letter claiming that his pension payments were made in error...and demanding that he repay the allegedly unearned benefits within 12 months.

As the Journal pointed out, Mr. Craven is one of millions of pensioners whose benefits have been shuffled around in corporate deal-making over the past two decades. Now 79 years old and nearly blind, he was threatened with legal action if he didn't comply with the demand for repayment.

Mr. Craven's story has a happy ending, but only because a reporter stepped in and started asking hard questions about the matter. The oil company that had denied any liability for his pension eventually admitted that he had been wrongfully denied his benefits, and agreed to put him back on its list of pension recipients.

Few other retirees who have had similar problems with their pensions have been as fortunate as Mr. Craven. In many cases, clerical errors have been made in determining whether and how much of a pension workers should be paid, with catastrophic results for retirees.

Now let's turn to Case #2, a case we observed some time ago. Except that is was similar to case #1, the employer was correct in asserting that it had paid a worker more than he had earned in retirement benefits. And this employer told the retiree that, until he repaid the overage, he would get no more checks.

This treatment certainly doesn't seem fair," we said. "If a person has been relying on his or her checks for years, how can you tell him or her to go without pension benefits for several years? Hasn't the trust waived its rights to collect?"

My view was certainly not shared by the employer's attorney who strongly disagreed, and he prevailed. This treatment seemed to us to be a miscarriage of justice. We were pleased to see---many years later--that the Department of Labor seemed to agree with us on this 'fairness' issue. The Journal article about Mr. Craven quoted an opinion letter from the department as saying that if recovery of unearned pension amounts leads to hardship, "it would be prudent...not to seek recovery [of the overpayment]."

But as far as the courts are concerned, there's no give in such situations. And this is the same court system that grants billionaire Ron Perelman a $1.45 billion award for being defrauded by an investment banker. We realize there's no connection between that case and many pensioners' plights. But it just galls us to see the courts let average people suffer while the big money guys collect billions.

Now, for Case #3. Recently the howls of protest from the employees of United Airlines have been heard nation-wide. They've made a big fuss about being denied 100 percent of their earned pensions when the PBGC takes control of their plan, and rightly so. The PBGC, in general, will pay United employees only a portion of the pensions they were promised.

The United pension problem is like that faced by many large corporations. The problem is big, and it's going to get bigger. Not far behind United is Delta, with Northwest and others sharing the hot seat. The attitude of these airlines is, understandably, "If United can get away with foisting its pension obligations on the PBGC, why can't we?"

It is this author's opinion that many, if not most, of the problems are linked to inadequate funding of corporate pensions and much of the blame is linked to the adoption by the Financial Accounting Standards Board (FASB) of Rule 87 (FAS '87).

Before FAS '87, employers that sponsored 'defined benefit' pension plans looked to their actuary to advise them regarding both recommended plan contributions and maximum tax-deductible plan contributions. Employers would ask their actuary "How much can we or should we contribute to fund the plan this year? And how much do you think we should assume our fund's assets will earn?" We made the calculations, the company cut a check for the amount they decided to contribute and that was the end of it.

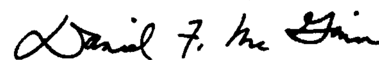
But the accounting profession decided to require employers to implement a unique set of computations for financial accounting purposes and ignore statutory practices linked to an actuary's required certification of a defined benefit plan's funded condition. This standard had the effect of advising corporate executives that proper financial statements must use 'defined benefit' pension plan values designed to comply solely with procedures established by the FASB. There would not need to be any correlation of such values with values developed by the plan actuary and required to be reported by the Federal statute, ERISA. For financial statement purposes, under FAS '87, decisions on matters such as the assumed rate of return on a pension fund's assets would be made by a corporate executive while the asset valuation and funding method would be set by accountants under the FASB Rule '87.

The origin of many companies' pension problems, in this author's opinion, can be traced to this ill-conceived FAS '87 accounting rule. Soon after its adoption by the FASB, many companies started using unrealistically high assumed rates of return on invested funds, because those rates reduced the liability amounts and pension expense shown in financial statements---automatically increasing apparent corporate profits. (Companies involved in scandals a la Enron and WorldCom took even harder hits to their pension plans. But that's another story entirely.)

The net of it all is that, in our view, the Financial Accounting Standards Board must bear the brunt of the blame for the underfunding of so many corporate pension funds. Even though FAS '87 technically affected financial statement information, not corporate funding practices, the pervasive effects of the standard influenced many corporate funding practices. And the situation isn't likely to get any better until FAS 87 is replaced with a coherent standard that correctly reflects sound actuarial practices and principles.

The Securities and Exchange Commission might be able to precipitate change, and Congress could (theoretically) apply some heat to the SEC. If, as expected, neither takes any action, the Employee Retirement Income Deprivation Act of 2005 will remain in force as thousands of plan members witness the continual, gradual erosion of their expected pension benefits.

Sincerely,



Daniel F. McGinn

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