IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, *et al.*,	
Plaintiffs,	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub
v.	
PENSION BENEFIT GUARANTY CORPORATION, *et al.*,	
Defendants.	

PENSION BENEFIT GUARANTY CORPORATION'S MOTION AND BRIEF FOR RECONSIDERATION OF THE COURT'S ORDER OF SEPTEMBER 1, 2011, OR, ALTERNATIVELY, TO CERTIFY THE ORDER FOR APPEAL

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DSRA Comment:

This is a motion made by the PBGC regarding the recent ruling from Judge Tarnow. We characterize it as frivolous in nature and so we do not believe this filing has any chance of being approved by the judge. Unless the judge chooses to rule favorably on this motion, it will not encumber or slow down our discovery process.

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Statement of Issues

1. The plain language of 29 U.S.C. § 1342(c) provides that PBGC need not obtain a court decree to terminate a pension plan in cases where the plan administrator agrees to termination. In its September 1 Order, the Court ruled that as a matter of judicial restraint, it would require PBGC to prove its termination case as if a court decree was required so that the Court can avoid deciding the statutory and constitutional issues plaintiffs have raised. The Supreme Court and the Sixth Circuit have ruled that courts may not ignore the plain language of federal statutes in the name of judicial restraint. Did the Court's disregard of the applicable statutory language constitute a palpable defect in its Order such that it should reconsider its ruling?

2. In its answer to plaintiffs' amended complaint, PBGC admitted all relevant, operative facts pled by plaintiffs in Counts 1-3. Neither plaintiffs nor the Court have identified a single disputed fact that would justify discovery with respect to those Counts. Nonetheless, the Court ordered PBGC to submit to discovery on those Counts. Did the Court's Order allowing discovery on matters that are not in dispute constitute a palpable defect in its Order such that it should reconsider its ruling?

3. Alternatively, if the Court does not reconsider its Order, the Court's ruling that PBGC must obtain a court decree terminating the Delphi Salaried Plan where the termination has already been effected by agreement is a controlling issue of law as to which there is substantial ground for difference of opinion, the final resolution of which would materially advance the ultimate termination of this litigation. Since the 28 U.S.C. § 1292(b) standards for interlocutory appeal are met, should the Court certify its Order to the Sixth Circuit?

Controlling Authority

Statute

29 U.S.C. § 1342(c)

United States Supreme Court Cases

Salinas v. U.S., 522 U.S. 52 (1997)

Clinton v. Jones, 520 U.S. 681 (1997)

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985)

Ashwander v. TVA, 297 U.S. 288 (1936)

United States Circuit Court Cases

U.S. v. Ninety-Three Firearms, 330 F.3d 414 (6th Cir. 2003)

U.S. v. Choice, 201 F.3d 837 (6th Cir. 2000)

In re Baker & Getty Fin. Services, Inc., 954 F.2d 1169 (6th Cir. 1999)

In re Jones & Laughlin Hourly Pension Plan, 824 F.2d 197 (2d Cir. 1987)

Preliminary Statement

In its September 1, 2011 Order Sustaining Plaintiffs' Objections to Magistrate Judge's Scheduling Order ("Order"),[1] the Court summarily rejected nearly 40 years of PBGC practice under a critical provision of Title IV of ERISA. Congress expressly authorized PBGC to terminate a pension plan by agreement with the plan administrator. PBGC has taken this course in more than 3,500 cases since 1974. In the only prior challenge, a court of appeals sustained PBGC's practice based on the plain words of the statute.[2] In accord with those decades of administrative practice and judicial authority, PBGC terminated the Delphi Salaried Plan by agreement with Delphi Corp., the plan administrator. Yet the Court has now ordered that this case should proceed as if no such agreement had been reached and PBGC were instead seeking to terminate the Salaried Plan by court decree.

PBGC respectfully submits that there are palpable defects in the Court's Order that disserve judicial restraint and economy. The Order requires the Court and the parties to engage in a burdensome and resource-consuming process instead of the efficient process that Congress expressly authorized. Correction of these defects will result in a different disposition of this case. Reconsideration is therefore justified.

Alternatively, PBGC requests that the Court certify its Order for interlocutory appeal under 28 U.S.C. § 1292(b). The issues decided in the Order are matters of first impression involving controlling questions of law and for which there is substantial ground for differences

[1] The full title of the Order is Order Sustaining Plaintiffs' Objections to Magistrate Judge's Scheduling Order, Granting Plaintiffs' Motion for Adoption of Scheduling Order, Administratively Terminating PBGC's Motion for Protective Order, Administratively Terminating Plaintiffs' Motion to Compel Discovery, and Entering Scheduling Order.

[2] *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 200 (2d Cir. 1987).

of opinion. Further, an immediate appeal will materially advance the ultimate resolution of the litigation and avoid the need for lengthy, costly discovery.[3]

Argument

I. The Court's Order Contains Palpable Defects and Should be Reconsidered and Reversed.

A. The Court Disregarded the Plain Language of the 29 U.S.C. § 1342(c).

In its Order, the Court stated that to avoid constitutional and statutory questions, it planned to review whether the "termination of the Salaried Plan would have been appropriate" *if* PBGC had sought a court decree terminating the Delphi Salaried Plan. The Court acknowledged that the facts differ from this hypothetical: "the PBGC did not move here for a court decree seeking termination; rather, the PBGC and the plan administrator reached an agreement to terminate the plan."[4] Despite this critical fact, the Court effectively held that it would regard the agreement as ineffectual and conduct a *de novo* review under the assumption that a hearing is required before plan termination is effectuated. PBGC submits that the Court's conclusion that this is an "appropriate application of judicial restraint" is in error.[5]

To be sure, under the long-standing principle of judicial restraint, courts exercise great restraint in reviewing the constitutionality of an Act of Congress. A court should first decide what the statute means when a case presents both statutory and constitutional issues,[6] as this case

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[3] PBGC sought concurrence in the relief that is requested in this motion from plaintiffs' counsel on September 15, 2011, and such concurrence was denied.

[4] Order at 5 n.4.

[5] Order at 4.

[6] *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") (citing *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909); *Light v. United States*, 220 U.S. 523, 538 (1911)).

does.[7] The Court asserts that by requiring *de novo* review and a hearing, it can avoid both the statutory and constitutional issues plaintiffs raise by "assuming that a hearing was required before termination."[8] In this case, however, the Court's purported exercise of restraint contravenes that plain meaning and works a re-write of the law as it was enacted by Congress.

In every case involving construction of a statute, the starting point is the statutory language itself.[9] If the meaning of the statutory language is plain, the sole function of a court is to enforce the statute according to its terms.[10] Here, the Court has failed to enforce 29 U.S.C. § 1342(c) according to its terms. When PBGC initiates plan termination under § 1342, the plain language of § 1342(c) permits termination by agreement with the plan administrator in all cases, obviating judicial proceedings. The fourth sentence of § 1342(c)(1) reads:

> If [PBGC] and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3).

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[7] Second Amended Complaint at ¶ 1. Plaintiffs state in the first paragraph of their Second Amended Complaint: "[t]his case arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq., the First and Fifth Amendments to the U.S. Constitution, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706."

[8] Order at 4.

[9] *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *U.S. v. Ninety-Three Firearms*, 330 F.3d 414, 420 (6th Cir. 2003) (citing *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993); and *U.S. v. Choice*, 201 F.3d 837, 840 (6th Cir.), *cert. denied*, 530 U.S. 1209 (2000)).

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[10] *U.S. v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citing *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)).

The referenced "requirements of this subsection (other than this sentence)," specify that PBGC may "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated . . . ."[11] Thus, Congress expressly dispensed with judicial proceedings where the plan administrator and PBGC agree to termination, as in this case.[12]

Throughout its history, PBGC has consistently applied § 1342(c) in this way – pension plans are terminated by agreement with the plan administrator when agreement can be attained, and by court order only when it cannot. In fact, from its creation by Congress in 1974 through November 2009, PBGC terminated 3,579 pension plans (of a total of 3,985) by agreement with the plans' administrators, not by court decree.[13] No court has previously required PBGC to undergo a hearing to determine whether the court would find termination appropriate as if there had been no agreement.

This Court's order disregards the fourth sentence of § 1342(c) and requires a *de novo* review of the Plan's termination, notwithstanding that the Plan has already been terminated by agreement, to avoid the due process issue plaintiffs have raised.[14] But the Supreme Court has repeatedly held that judicial restraint does not permit a court to disregard Congress's intent as

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[11] 29 U.S.C. § 1342(c)(1).

[12] *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 200 (2d Cir. 1987). *Jones & Laughlin* has been the undisputed interpretation of the fourth sentence of § 1342(c) for more than twenty years.

[13] *See* Affidavit of Candace Campbell at ¶ 3, which was attached to PBGC's Motion to Dismiss Counts 1-3 of Plaintiff's Amended Complaint (filed Nov. 24, 2009).

[14] Order at 4.

expressed in the statute to avoid a constitutional question.[15] In *Salinas*, the Supreme Court defined the limits of judicial restraint: "[s]tatutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature . . . . Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution."[16] Moreover, "judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify its disregard of what Congress has plainly and intentionally provided."[17]

Congress plainly and intentionally dispensed with judicial proceedings where the plan administrator agrees to termination. The Court has imposed discovery and a hearing based on a hypothetical state of facts, in the guise of judicial restraint. This disregards Congress's clear intent as expressed in the statute -- in precisely the manner the Supreme Court and the Sixth Circuit have repeatedly warned against. PBGC therefore submits that this is a palpable defect in the Order, which should be corrected by applying the statute as written.

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[15] *Salinas v. U.S.*, 522 U.S. 52, 60 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 (1996); *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *U.S. v. Locke*, 471 U.S. 84, 96 (1985); *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

[16] *Salinas*, 522 U.S. at 59-60.

[17] *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987); *U.S. v. Ninety-Three Firearms*, 330 F.3d at 420.

B. The Court Erroneously Decided to Apply a *De Novo* Standard of Review to a Hypothetical State of Facts.

Article III of the Constitution limits judicial power to "cases" and "controversies."[18] Therefore, a court should not decide abstract, hypothetical or contingent questions, or those not present on the facts of the case before it.[19] To review *de novo* whether PBGC's termination of the Plan would have been appropriate if it had filed for a court decree would be to decide a hypothetical question, rather than to decide the case on its facts. The facts are simple: Delphi moved for a bankruptcy court order authorizing it to terminate its pension plans, including the Plan in question here. The plaintiffs in this case objected and their counsel argued the objection, which the court overruled. The plaintiffs did not appeal. Delphi and PBGC then signed agreements terminating all six of Delphi's pension plans. Because Delphi agreed to the termination, PBGC did not seek, nor did it need, a court decree terminating the Salaried Plan. It is therefore inappropriate for this Court to conduct a review of whether the termination would have been proper if, hypothetically, PBGC had sought a court decree.

The Court cites a Seventh Circuit opinion in *UAL Corp.* to support its decision to conduct a *de novo* review of PBGC's termination of the Plan.[20] But as this Court acknowledged, the *UAL Corp.* decision addressed a factual situation distinct from the facts of this case. Because United Airlines could not agree to termination of its pension plan covering pilots, PBGC was obliged to seek a court decree. In this case, Delphi *did* agree to termination. Thus, as PBGC was not

[18] U.S.C.A. Const, Art III § 2, cl. 1.

[19] *Clinton v. Jones*, 520 U.S. 681, 689 n.11 (1997) (citing *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461(1945)).

[20] Court's decision at 5. *In re UAL Corp. (Pilots' Pension Plan Termination),* 468 F.3d 444 (7th Cir. 2007)

required to obtain a court decree here, *UAL Corp.* is inapposite.[21] It is inappropriate and a palpable defect for the Court to discuss the standard of review that might apply to a hypothetical set of facts not present here.

C. No Facts are in Dispute with Respect to Counts 1-3 of Plaintiffs' Complaint.

By giving effect to the plain language Congress used in the fourth sentence of 29 U.S.C. § 1342(c), the Court would resolve the legal issues in Counts 1-3 of plaintiffs' complaint. PBGC has agreed with plaintiffs that the Plan was terminated by agreement with Delphi Corp. Although the Court delayed ruling on PBGC's motion to dismiss to allow for further factual development, neither plaintiffs nor the Court have identified a single disputed fact relevant to those counts. Indeed, PBGC has admitted all the operative facts. Discovery is neither necessary nor appropriate where there are no facts in dispute. Accordingly, the Court should reconsider its Order and hold, as did the Magistrate Judge, that no discovery should be permitted on counts 1-3 of plaintiffs' complaint.

[21] The Court notes that PBGC has not cited any Supreme Court or Sixth Circuit decisions on the question in *UAL Corp.* In fact, the Supreme Court has not ruled on the question but several other courts, including Second Circuit, have held that PBGC's decision must be reviewed under the APA's arbitrary and capricious standard. *PBGC v. The Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1181-82 (S.D.N.Y. 1991), *aff'd mem.*, 970 F.2d 896 (2d Cir. 1992); *see also Association of Flight Attendants-CWA, AFL-CIO v. PBGC*, 2006 WL 89829, *5 (D.D.C. Jan. 13, 2006) (noting agreement of parties that PBGC's decision is reviewable under the APA's arbitrary and capricious standard); *PBGC v. WHX Corp.*, 2003 WL 21018839, *2 (S.D.N.Y. May 6, 2003) (finding that PBGC-initiated terminations are reviewed on an arbitrary and capricious standard, based on the administrative record at the time the agency made its final decision); *PBGC v. Haberbush*, 2000 WL 33362003, *5 (C.D. Cal. Nov. 3, 2000) (rejecting employer's claim that review under APA does not apply to PBGC's termination decision under § 1342); *PBGC v. FEL Corp.*, 798 F. Supp. 239, 241 (D.N.J. 1992) (same). *See generally Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985).

II. Alternatively, the Court Should Certify its Ruling for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b).

If this Court declines to reconsider its Order, PBGC requests that the Court certify the Order so that PBGC may appeal the ruling under 28 U.S.C. § 1292(b). A court may certify an otherwise nonappealable order if it finds that the order (1) involves a controlling question of law; (2) on which there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. For the reasons that follow, all three requirements are satisfied.

A. The Court's Ruling Raises a Controlling Question of Law.

A question is controlling if interlocutory reversal might save time for the district court and time and expense for the litigants.[22] A question is also controlling if it is serious to the litigation, either practically or legally,[23] or if it "materially affects the outcome of the case."[24] Each of these standards is met here.

Whether Title IV of ERISA allows PBGC to terminate pension plans by agreement with plan administrators without obtaining a court decree is a controlling question of law. If the Court of Appeals reverses the September 1 Order, months of discovery and court proceedings will be avoided, with great savings in cost and time to both the Court and the litigants. The issue is

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[22] *See Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991).

[23] *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974).

[24] *In re Baker & Getty Fin. Services, Inc.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1999); *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 U.S. Dist. LEXIS 107527 at *6-7 (E.D. Mich. Nov. 24, 2008)(citing *In re Baker & Getty Fin. Services, Inc.*, 954 F.2d at 1172; *See also Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) *vacated on other grounds by*, 937 F.2d 44 (1991); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981).

serious and central to this litigation and not only affects the outcome of this case, but may impede PBGC's ability to administer the termination insurance program as Congress intended.

B. There is Substantial Ground for Difference of Opinion About This Court's Interpretation of 29 U.S.C. § 1342.

The ground for difference of opinion is apparent. The September 1 Order is the first time in the 37-year history of ERISA that any court has held that PBGC must undergo discovery and *de novo* review of a plan termination *after* PBGC and the plan administrator agreed to termination. The Second Circuit has addressed this precise issue and reached the opposite conclusion.[25] In the last several years, PBGC has terminated hundreds of pension plans, nearly all by agreement. This Order could impose a crushing burden on PBGC and the federal court system by requiring PBGC to seek scores of plan termination orders each year from federal district courts across the country.

C. Interlocutory Review will Materially Advance the Ultimate Termination of this Litigation.

If the Sixth Circuit rules that § 1342(c) does allow PBGC to terminate pension plans by agreement without the necessity of a hearing and a court decree, there would no longer be any triable issues. The remaining issues involving Delphi's right to sign a termination agreement and any constitutional issues would be ripe for disposition as a matter of law. Months of discovery and related court proceedings would be avoided, materially advancing the final resolution of this case.[26]

[25] *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d at 200.

[26] *See City of Dearborn,* 2008 U.S. Dist. LEXIS 107527 at *6-7.

Conclusion

For these reasons, PBGC respectfully requests that the Court reconsider its Order of September 1, 2011, or, in the alternative, certify the Order for appeal.

Dated: September 15, 2011

Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically filed the foregoing **PBGC's Motion and Brief for Reconsideration of the Court's September 1, 2011 Order or, Alternatively, to Certify the Order for Appeal** via the court's CM/ECF system which will send notification of such filing to all registered users, including the following:

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