Pension Benefit Guaranty Corporation

81-24

August 21, 1981

REFERENCE:
[*1] 4044 Allocation of Assets
4044(d) Allocation of Assets. Distribution of Residual Assets
4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer

OPINION:

This is in response to your request for reconsideration of my letter determination with respect to the * * * Company Pension Plan, dated March 12, 1981, concerning the disposition of plan assets in excess of amounts needed to pay accrued retirement benefits to plan participants.

We have carefully reconsidered the matter and hereby modify our decision. We will not object to a reversion of excess assets attributable to employer contributions based on Section 4044(d) of ERISA, 29 U.S.C. § 1344(d).

To reiterate the facts as we understand them, the Plan is funded pursuant to Group Annuity Contract * * * (the "Group Annuity Contract") issued by the * * * Life Insurance Company ("L.I.C.") to * * * Company * * *. The Group Annuity Contract was effective in 1946 and was most recently amended in 1965. Until December, 1978 the Group Annuity Contract was the only document which evidenced the terms of a pension plan for the employees of * * *.

A separate "Plan" document ("1978 Plan Document") was adopted by * * * for the purpose [*2] of compliance with requirements imposed by ERISA. The 1978 Plan Document was not executed until December 4, 1978 and, as we understand matters, has never been executed or approved by L.I.C. * * *. * * * executed the 1978 Plan Document approximately three months after the cessation of production at the * * * plant and the layoff of all but one Plan participant. On December 21, 1979, a Notice of Intent to Terminate was filed with the PBGC by * * *. Section 15.02 of the 1978 Plan Document provides that "excess assets may be refunded to the Employer if attributable to actuarial error" and Section 16.02(b)(4) also provides for the distribution of residual plan assets to * * * on termination of the plan.

The original determination dated March 12, 1981, concluded that the employer lacked the power unilaterally to amend the terms of the Group Annuity Contract relating to the distribution of excess assets attributable to employer contributions. That determination was based upon an analysis premised on an identity between the pension plan and the Group Annuity Contract derived primarily from a reference in Section 1.14 of the 1978 Plan Document to the Group Annuity Contract as the "most [*3] recent complete restatement of the Plan." On reexamination of that premise, we have determined that for purposes of Title IV of ERISA the amendment of the pension plan by the 1978 Plan Document, to provide for a reversion of excess assets was effective without the consent of L.I.C.

The Group Annuity Cntract in this case embodied two distinct legal relationships for purposes of pension law: an annuity/ insurance contract between * * * and L.I.C. and an "employee pension benefit plan" under ERISA established by * * * for its employees. These are separate legal relationships which may be governed by different legal concepts with respect to their creation, alteration and termination. The annuity/insurance contract relationship is generally a funding or investment vehicle for the pension plan which the employer has established for the benefit of employees. In many instances, the different relationships are underscored through the use of separate documents to formally establish each relationship. Such was not the case here before the adoption of the 1978 Plan Document.

Section 4044(d) of ERISA, 29 U.S.C. § 1344(d), is concerned with "plans" and not with the other types of legal relationships [*4] which inhere in the terms of the Group Annuity Contract. In our view, the employer was not prevented from recognizing and altering, through the 1978 Plan Document, the pension plan terms embodied in Group Annuity Contract without the insurance company's consent. While the Group Annuity Contract provides for the consent of L.I.C. to certain amendments, n1 it generally does not contain any specific procedure or requirements for plan amendments initiated by * * *. We feel that amendments made by the 1978 Plan Document, e.g. participation and vesting requirements, did not require L.I.C. approval. Similarly, the termination distribution provisions in Sections 15.02 and 16.02(d)(4) of the 1978 Plan Document did not require the consent of L.I.C. for purposes of Section 4044(d).

n1 Article II of the Group Annuity Contract requires insurance company consent to the inclusion of affiliated companies.

The 1978 Plan Document in this case, however, expressly incorporates the terms of the Group Annuity Contract. Plan, Sections 1.23, 1.29. The result is ambiguity with respect to the distribution of assets attributable to employer contributions in excess of the present value of the accrued [*5] retirement benefits of plan participants.

The terms of the incorporated Group Annuity Contract provide for the distribution to participants of all funds and credits due to the employer/contractholder upon discontinuance of normal retirement annuity purchases. Group Annuity Contract, Article VII, Section 2 (iv). See also, Group Annuity Contract, Article IX, Section 15. Other provisions of the 1978 Plan Document suggest that, on termination of the plan, assets in excess of the value of accrued retirement benefits and excess assets attributable to employee contributions may revert to the employer. Plan, Sections 15.02, 16.02(b)(4).

Section 4044(d)(1)(C) permits a reversion of excess assets to an employer on plan termination if "the plan provides for such a distribution." Sections 15.02 and 16.02(b)(4) of the 1978 Plan Document make specific provision with respect to the distribution of excess assets attributable to employer contributions on termination of the plan. On the other hand, Group Annuity Contract, Article VII, Section 2(iv) pertains to a discontinuance of the purchase of normal retirement annuity purchases and not specifically to the termination of the plan. Accordingly, [*6] the plan appears to permit a reversion as provided in Section 4044(d)(1)(C).

The plan administrator must still propose a reasonable method of separating excess assets attributable to employee contributions from those attributable to employer contributions.

We express no opinion on the rights of plan participants or L.I.C. Insurance Company beyond the requirements of Section 4044 under ancillary contractual arrangements or other law. In particular, we do not address the rights and obligations of the employer, insurance company and participants under the insurance contract or employment contracts. We also express no opinion whether the terms of the written plan document reflect an appropriate exercise by the employer, as a plan fiduciary and plan administrator, of its duties under Title I of ERISA.

I hope we have been of assistance. Please contact * * * at (202) 254-4873 or the above address if you have any further questions.

Henry Rose
General Counsel