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The Forgotten Promise: Why PBGC Retirement Benefit Guarantees Should Continue After Pension Risk Transfer Transactions

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Abstract

In this paper, nationally recognized Ivins, Phillips & Barker ERISA attorneys Kevin O'Brien and Spencer Walters argue that the PBGC's disavowal of federal protection for retirees after pension risk transfers was never authorized by Congress and conflicts with both the statute and the PBGC's own 1981 position. The authors trace the legal history, legislative intent, and policy implications demonstrating that the law already requires PBGC guarantees to continue even after pension benefits are annuitized. Their analysis calls on regulators and courts to restore this "forgotten promise" to strengthen the integrity of the U.S. pension system.

Background

Employer-sponsored defined benefit pension plans have increasingly engaged in transactions transferring pension liabilities to insurers. Class action lawsuits have challenged some of the larger pension risk transfer (PRT) transactions on fiduciary breach grounds. The Pension Benefit Guaranty Corporation (PBGC) takes the position that its guarantees do not protect against insurer non-payment after a PRT transaction. The potential loss of PBGC guarantees has been a key allegation in recent cases. Plaintiffs have argued that the alleged loss of PBGC guarantees supports both the plaintiffs' claims of legal standing to bring such lawsuits and the plaintiffs' economic losses resulting from PRTs. The lost PBGC guarantee recently was highlighted in *Konya v. Lockheed Martin Corp.*, Civ. No. 24-750-BAH (D. Md. March 28, 2025), where the court cited the "undisputed" loss of PBGC guarantees as a discrete harm for standing purposes. The loss of PBGC guarantees and other ERISA Title I protections also was found to constitute "harm" for standing purposes in *Doherty v. Bristol-Myers-Squibb Co.*, No. 1:24-cv-06628 (S.D.N.Y. Sept. 29, 2025).

The *Konya* case is now before the Fourth Circuit on the question of standing. If it turns out that the annuitized pension benefits continue to be protected by PBGC guarantees after the PRT, this would remove one of the key bases on which courts have allowed participant legal challenges to PRTs to proceed based on standing.

Summary of Legal Conclusions

This paper concludes that the current PBGC position that PBGC guarantees end when a pension plan distributes an annuity contract to participants and beneficiaries is unsupported by the statute and that current law therefore provides for federal guarantees to continue even after the plan benefit is transferred to a private insurer. The paper bases its conclusions on the following:

- **Historical Context** – The PBGC’s current position is that it does not guarantee annuity contract recipients from ERISA pension plans against insurance company insolvency. In a 1981 pronouncement, the PBGC said precisely the opposite:

In the unlikely event that an insurance company should fail and its obligations cannot be satisfied (e.g., through a reinsurance system), the PBGC would provide the necessary benefits.

- **Statutory Grounding** – The PBGC guarantees in Section 4022 cover benefits “under the plan” at plan termination. That language covers benefits paid under an annuity contract and there is no temporal condition in the statute limiting the guarantees only to benefit losses manifested on the plan termination date.
- **Legislative Record** – The PBGC sought legislation in 1983 and 1985 to relieve it of liability for insurance company failures and was unsuccessful in obtaining legislative relief. The PBGC later reversed its own position – aiming to achieve by fiat what it failed to achieve in Congress.
- **Policy Imperative** – The PBGC was created to protect pensions. Returning to the original 1981 position better aligns the PBGC to its statutory purpose. The risk in covering insurance company failures is limited and should not be the basis for increased premiums, assuming that the PBGC coverage applies only after state guaranty fund recoveries and state rehabilitation efforts.

Discussion

1. Statutory Text Supports an Expansive View of PBGC Guarantees

Any argument for the continuation of PBGC guarantees after a PRT must begin with the plain wording of the statute. Section 4022(a) of ERISA states as follows:

SECTION 4022. SINGLE-EMPLOYER PLAN GUARANTEED

(a) Nonforfeitable Benefits. Subject to the limitations contained in subsection (b), the corporation shall guarantee, in accordance with this section, the payment of **all non-forfeitable benefits** (other than benefits becoming nonforfeitable solely on account of the termination of the plan) **under a single-employer plan which terminates** at a time when this title applies to it. *(emphasis added)*

A. Plain Language Interpretation. The reference to benefits “under a single-employer plan” does not exclude benefits paid under a distributed annuity contract. The only question is whether later annuity payments pursuant to the contract are considered benefits “under” the plan. The natural reading of the statute is that they are.

Legal dictionaries and legal instruments support a broad meaning of the term “under.” The word “under” is defined to mean “pursuant to,” “by virtue of,” “arising out of,” “based upon,” “resulting from,” “required by,” “established by,” or “in connection with” – it is not limited to benefits paid directly from or by a pension plan.

The benefits covered under an annuity contract do not fail to be “under a plan” just because the underlying plan is terminated. Said differently, an annuity contract distribution does not constitute the payment of a participant’s benefits; rather, the payments from the annuity contract were, and remain, the plan benefits. The PBGC guarantees benefits under fully insured Code section 412(e)(3) retirement plans, so there is no basis for saying that benefits covered by insurance contracts are somehow not “under” a plan.

The use of the word “under” arguably imports a temporal limitation, but not one requiring that the plan be in continued operation when the annuity payment is made. Although an “object under X” may denote a temporal connection to X, that connection can generally be related to the fact that the occurrence giving rise to the object occurred during

X. For example, a reference to “an increase in Social Security benefits *under* the Biden administration” reasonably refers to benefits that continued to be paid under the Trump administration.

B. PBGC Interpretation of Identical Language. The PBGC was involved in litigation that applied the very words that appear in ERISA Section 4022 in a case involving Section 4044 of ERISA. ERISA allows the PBGC to involuntarily terminate a pension plan and, if it terminates with insufficient assets to cover all liabilities, Section 4044 of ERISA and the PBGC’s so-called Maximum Guarantee Regulation (then codified at 29 C.F.R. § 2621.3(a), updated to 29 C.F.R. § 4022.23(b) in 1996) allows the PBGC to reduce participants’ benefits to specified PBGC guarantee amounts. In *Lami v. Pension Benefit Guaranty Corporation*, two of the higher-paid participants had received distributions of annuity contracts that covered part of their overall pension amounts. The PBGC argued that the annuitized benefits were plan benefits that should be taken into account in applying the Maximum Guarantee Regulation. The court agreed with the PBGC’s position and concluded as follows:

The maximum statutory guarantee applies to “all nonforfeitable benefits . . . *under a single employer plan* which terminates . . . , 29 U.S.C. § 1322(b)(3)(B) (emphasis added), and the Maximum Guarantee Regulation accordingly applies to all “benefits payable with respect to a participant *under a plan*.” 29 C.F.R. § 2621.3(a) (emphasis added). The provisions of the Plan in this case, which the plaintiffs conveniently fail to cite or quote, make clear that the benefits plaintiffs receive under their annuity contracts are a “part of” and a “portion of [their] regular retirement income,” or full benefit under the Plan. (PBGC’s Memorandum, Exhibit A at 14, 21.) Indeed, the insured benefits were earned under and paid for by the Plan. Moreover, the amount of insured benefits the plaintiffs receive is defined by the Plan and based on the plaintiff’s income and years of service under the Plan.

* * * * *

It is equally clear that the “irrevocable commitment” exception to Title IV’s asset allocation rules, which is applicable by its terms only to Section 4044 of ERISA, does not apply to preclude the reduction in plaintiffs’ benefits. (See PBGC Memorandum at 24-27). The fact that the Plan purchased annuity contracts in the form of irrevocable commitments for the plaintiffs does not change the fact that the benefits paid pursuant to those contracts are Plan benefits.

Lami v. Pension Benefit Guar. Corp., Civ. Act. No. 86-1709, 1989 U.S. Dist. LEXIS 19153, at *41-*43 (W.D. Pa. July 18, 1989).

If the benefits covered by a distributed annuity contract are considered to be “under the plan” for maximum guarantee purposes (where it reduces the PBGC’s liability), they must also be considered “under the plan” for guaranteed benefit purposes (even though it increases the PBGC’s liability). The PBGC cannot have it both ways.

C. Other ERISA and Tax Provisions. Support for the breadth of the “under the plan” reference and its application to annuity contracts distributed from a tax-qualified ERISA plan can be found in a variety of other ERISA and tax qualification provisions. There are numerous examples where benefits covered by annuity contracts are treated as benefits “under the plan” or as from the plan itself, even after a PRT or plan termination:

i. **Code Section 415 Benefit Limits**. The “annual benefit” to which the defined benefit limit applies refers to the straight life annuity “under” a plan. Code § 415(b)(2)(A). The regulations provide that the benefit “under the plan” includes benefits paid under an annuity contract following a plan termination. Treas. Reg. § 1.415(b)-1(b)(5)(i).

ii. **Code Section 417 Joint and Survivor Annuities**. A plan must meet certain joint and survivor annuity requirements with respect to distributions, and participants must be given these various election opportunities “under the plan.” IRC § 417(a)(1)(A). The applicable regulations provide that benefits paid from a distributed annuity contract (the type provided through a PRT) must provide the same rights and benefits as if the annuity contract were held by the Plan, noting that the requirements apply to “payments under the annuity contracts.” Treas. Reg. § 1.401(a)-20, Q&A-2.

iii. **Code Section 411(d)(6) Anti-Cutback Rule**. Code Section 411(d)(6) prohibits plan amendments that reduce a plan’s accrued benefits. The regulations make it clear that the prohibition applies to the benefits that are covered by an annuity contract at plan termination. Treas. Reg. § 1.411(d)-4, Q&A-2(a)(3)(ii)(A) & (B). The PBGC is well aware of this prohibition and litigated a case based on this prohibition when a plan close-out annuity failed to include a lump sum payout option which is considered to be part of the “accrued benefit” to purposes of the anti-cutback rule. See *PBGC v. Ky. Bancshares, Inc.*, 7 F. Supp. 3d 689 (E.D. Ky. 2014).

iv. **Code Section 401(a)(9) Minimum Distributions.** The minimum distribution rules require that a “plan ... provide(s) that the entire interest of each employee be paid” over a required time period, and the regulations provide that an annuity contract that is distributed to a participant is treated as part of the plan for this purpose. See Treas. Reg. § 1.401(a)(9)-6(d).

v. **Code Section 401(a)(31) Rollovers.** This section provides that a “plan” must provide for a direct rollover right for eligible rollover distributions, and the regulations provide that payments from distributed annuity contracts are considered to be the same as payments directly from the plan. See Treas. Reg. § 1.401(a)(31)-1, Q&A-17.

vi. **Code Section 402 Taxation.** This section taxes a participant on any distributions from a qualified plan, and the regulations provide that distributions from an annuity contract are treated the same as distributions directly from the trust for this purpose. See Treas. Reg. § 1.402(a)-1(a).

vii. **Code Section 401(h) Medical Benefits.** This section allows retiree medical benefits to be funded under a qualified defined benefit plan, and the regulations provide that the individuals who can be covered by the Section 401(h) account are limited to any “employee [who is] eligible to receive retirement benefits provided *under the pension plan.*” Treas. Reg. 1.401-14(b)(1) (*emphasis added*). The IRS has ruled that retirees who were covered by a plan termination annuity could continue to be covered under the plan’s Section 401(h) account. *E.g.*, PLR 201511044 (March 13, 2015).

It is an established canon that similar language contained in the same part of a statute be accorded consistent meaning. See *National Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 501 (1998).

2. Original PBGC Interpretation

The PBGC’s original interpretation was that benefits payable from a distributed insurance contract continue to constitute benefits “under the plan” and were guaranteed by the PBGC under its termination insurance program. This interpretation was reflected in 1981 regulations and explicitly stated in the preamble to those regulations.

The PBGC issued regulations on January 28, 1981 dealing with the voluntary termination of a pension plan with sufficient assets to cover plan liabilities. *See Determination of Plan Sufficiency and Termination of Sufficient Plans; Final Rule*, 46 Fed. Reg. 9532 (Jan. 28, 1981). These regulations added a requirement that was not found in the statute at the time. They provided that any benefits payable in annuity form under a terminating plan had to be provided to participants in annuity form, either by the PBGC or through the purchase of annuity contracts from an insurer, unless the participants elected another form of distribution provided by the plan, such as a lump sum. The statute has since been amended to require annuity contract distributions in a plan termination (*see* discussion of 1986 Legislation, below).

The 1981 regulation contemplated that a participant could elect a non-annuity alternative form of payment, which could include a lump sum payment or a transfer to another plan. In the case of a lump sum payment or other alternative form, the now obsolete PBGC regulation provided that the plan administrator submit a written statement to the PBGC in which it certified that:

- I. The participant elected, in writing, the alternative form of distribution;
- II. The participant was informed, in writing, before he or she made the election, of the estimated amounts of the annuity and of the alternative form of distribution, with reference to any risks attendant to the alternative form; and
- III. The participant was notified, in writing, before he or she made the election, that his or her election would not be given effect unless the plan should close out under a Notice of Sufficiency, *and that the PBGC does not guarantee the benefit payable in the alternative form.*

29 C.F.R. § 2615.4(b)(3) (*emphasis added*); 46 Fed. Reg. 9532 (Jan. 28, 1981).

The 1981 regulation provides that nonalternative forms of payment, i.e., commercial insurance contracts, continue to be guaranteed by the PBGC. *See also* Veal & Mackiewicz, *Pension Plan Terminations*, 2d edition (1998), at 341-42 (noting the “negative inference” from the regulation is that “annuity contracts[] continue to be guaranteed”).

Had there been any doubt as to the implication of the regulation, the PBGC explicitly stated its position in the preamble to the 1981 regulation. In fact, when this annuity requirement was first floated by the PBGC in its proposed regulations, commentators expressed concern about the consequences of an insurer insolvency. These commentators asked whether the PBGC would guarantee benefits in situations where annuity contracts were purchased from an insurer upon a plan termination and the insurer subsequently became insolvent and was unable to meet its obligations. The PBGC responded to these concerns by noting that there was little risk of insurer insolvency by reassuring the commentators that if this occurred the PBGC would still guarantee the pension benefits.

The preamble to the final regulation stated:

Two comments that addressed the requirement that annuity contracts be purchased from an insurer were concerned about the possibility that the insurer might become insolvent. Specifically, the comments expressed uncertainty as to whether the PBGC would provide benefits to participants or beneficiaries of a terminated plan that closed out under a Notice of Sufficiency if the insurance company from which annuity contracts had been purchased should prove to be unable to meet its obligations. The PBGC does not believe that the concern expressed by the comments is warranted.

Under the regulation, an “insurer” is “a company authorized to do business as an insurance carrier under the laws of a State or the District of Columbia” (§ 2615.2). Such companies are subject to strict statutory requirements and administrative supervision. In fact, the reason insurance companies are so extensively regulated is to ensure that their obligations can be satisfied. *However, in the unlikely event that an insurance company should fail and its obligations cannot be satisfied (e.g., through a reinsurance system) the PBGC would provide the necessary benefits.*

Determination of Plan Sufficiency and Termination of Sufficient Plans; Final Rule, 46 Fed. Reg. 9532 (Jan. 28, 1981) (to be codified at 29 C.F.R. 2615) (emphasis added).

3. Subsequent PBGC Action

After announcing its position on guaranteed coverage in 1981, the PBGC apparently grew concerned that insuring plan participants who were covered by plan termination annuity contracts could expose the PBGC to increased liabilities—without the PBGC being entitled to additional premiums given that insured annuitants are not included in the participant counts for premium payment calculations. See ERISA § 4007. To address this concern, the PBGC and the Reagan administration advanced legislative proposals in 1983 and 1985 to add language to Title IV of ERISA clarifying that the PBGC did not guarantee against insurance company insolvency. See Statement of PBGC Director James B. Lockhart III, Guarantees of Retirement Annuities, Hearing Before the Committee on Finance, United States Senate, 101st Cong. 2d Sess. at 54 (Apr. 5, 1990). Congress did not enact either of the two legislative proposals. Additional history regarding these legislative efforts is described below.

4. 1986 Legislation

The Single-Employer Pension Plan Amendments Act of 1986 (SEPPA), PL 99-272, established streamlined close-out procedures for the termination of plans with sufficient assets to satisfy plan liabilities. This legislation required so-called “sufficient” plans to close out a plan by distributing annuity contracts (so called “irrevocable commitments”) and lump sums and called for the filing of a series of certifications, including one regarding the distribution of the annuity.

To ensure that the streamlined procedures for terminating sufficient plans under a “standard termination” did not leave participants and beneficiaries unprotected, the House Education and Labor Committee proposed a provision, Section 4041(b)(4), which specifically stated (emphasis added):

- (4) *Continuing authority.* – Nothing in this section shall be construed to preclude the continued exercise by the [Pension Benefit Guaranty C]orporation after the termination date of a plan terminated in a standard termination under this subsection, of its authority under Section 4003 with respect to matters relating to the termination. *A certification under paragraph (3)(B) shall not affect the corporation’s obligations under Section 4022.*

The report filed by the Education and Labor Committee described the purpose of this provision as follows (emphasis added):

Under the bill, the PBGC retains its existing authority under Section 4003 of ERISA to conduct audits of plans, both prior to and after the termination of a plan. Even if the plan administrator has certified to the PBGC that the assets of the plan have been distributed so as to provide when due all benefit entitlements and all other benefits to which assets are allocated under Section 4044, *the PBGC is still obligated to guarantee the payment of benefits under Section 4022 if it is subsequently determined that not all guaranteed benefits were in fact distributed under a standard termination* and the contributing sponsors of the plan and the members of their controlled groups do not promptly provide for the payment of such benefits.

H.R. Rep. No. 99-241 (Sept. 11, 1985).

Significantly, the conference report on SEPPA adopted this provision in the Education and Labor Committee bill.

While the wording in the *Education and Labor Report* could, in a vacuum, be read to only apply to the PBGC's ability to address administrative oversights of one kind or another that result in benefits not being fully annuitized, the context makes it clear that the notion also applies to benefits not provided because of an insurance company failure.

During consideration of SEPPA, the PBGC advocated for an amendment which would have expressly exempted benefits provided under annuity contracts from the termination insurance program. The Reagan Administration submitted a detailed package of proposals for amending the termination insurance program to Congress on July 3, 1985, and a bill (H.R. 2995) was introduced that incorporated all the PBGC proposals. Section 112(a) of this bill would have amended Section 4005(b)(2) of ERISA (29 U.S.C. §1305(b)(2)), which deals with how the PBGC's funds can be spent, to specifically provide that:

No amount in such fund shall be available to pay benefits in the event of the insolvency of an insurance company with respect to an insurance contract.

See Section 112(a) of H.R. 2995, 99th Congress, 1st Session (July 15, 1985). This proposed amendment was rejected by Congress (even though other changes were made to Section 4005(b)(2) of ERISA). The fact that the Reagan Administration proposed this amendment demonstrates that it also believed that pre-existing law required the PBGC guaranty of plan termination annuities. Further, the rejection of a proposed legislative amendment indicates that the legislature did not intend the legislation to include the provisions in the rejected amendment. See *Immigration & Naturalization Services v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *United States v. Pfitsch*, 256 U.S. 547 (1921); *Lapina v. Williams*, 232 U.S. 78 (1914); *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534 (CA 9 1985); *Tyler v. U.S.*, 929 F.2d 451 (9th Cir. 1991).

The legislative history thus supports the conclusion that insured retirement annuities are guaranteed by the PBGC under the current statutory regime.

5. 1991 PBGC Reversal of Position

The PBGC eventually decided to act on its own to reverse its position. It did so when it was facing severe financial challenges following multiple bankruptcies and underfunded plan terminations in the airline and steel industries, with the possibility it may also need to guarantee benefits from the failed Executive Life Insurance Company in the early 1990s. In the preamble to its 1991 proposed regulation on standard terminations as well as PBGC Opinion Letter 91-1 (Jan. 14, 1991), the PBGC publicly explained its rationale for changing its 1981 position on benefit guarantees. The PBGC rationale can only be called conclusory and inferential.

The PBGC noted that the ERISA Section 4022 guarantees are based on “benefits . . . under a single-employer plan that terminates,” but the preamble discussion never addresses the wording of the statute or why benefits paid from a plan termination annuity are not considered to be benefits “under a single employer plan.” Further, the preamble made no mention of the position that the PBGC had taken in the *Lami* case. Ignoring this significant negative precedent, the PBGC instead offered two arguments for why it would not guarantee benefits after an insurance company failure.

First, citing the PBGC’s mission statement, the preamble states that the PBGC protects only against plan termination and not insurance failures, and that this insurable event is completed upon the final distribution of plan assets. The statutory wording does not limit the

PBGC guarantee to only those benefit losses that are manifest on the date of plan termination. The preamble thus reads into the statute a temporal condition that is not there.

Second, the PBGC argued that, because the annual premiums on behalf of a plan end under ERISA Section 4007 when a plan terminates (because it has no more participants), it cannot be the case that the PBGC guarantees continue to cover the annuitants. But that also misses the mark as a matter of law and policy. Nothing in ERISA Section 4022 ties the PBGC guarantees to a plan's premium payments. The PBGC's own explanation in the 1981 preamble offers a reasonable policy explanation for this design: the strict regulation and oversight of insurers means that insurer failures are infrequent, such that the PBGC reasonably could absorb guarantees in those "unlikely" scenarios. Moreover, premiums have been paid for years on behalf of the annuitized participants and never used because there was no triggering event. While the absence of continued premium payments explains why the PBGC wished the problem away from a financial perspective given its then precarious financial condition, it is a leap to ascribe any intent to Congress based on PBGC's concern. In any case, it is the wording of the statute that determines its proper application and not some re-imagined Congressional intent.

When the PBGC reversed its position in 1991, it mentioned its original position that was reflected in the 1981 preamble to the regulation, but it ignored that the position was reflected in the regulation itself. Instead, addressing only the 1981 preamble, the PBGC noted that it "searched PBGC records and found no legal memoranda or other document to support this statement [that it would guarantee benefits in the event an insurance company should fail and state reinsurance funds prove inadequate]." However, it strains credulity to suggest the 1981 regulation was proffered without any legal review or analysis. If this statement is accurate, it could only be because the prior statutory interpretation was so clear and incontrovertible to those who were involved in the passage of ERISA and creation of the PBGC that it needed no further agency interpretation.

6. Pro-PBGC Authorities Are Uncompelling

One authority supporting the PBGC position is a passage in the Supreme Court opinion in *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007). The issue in the case was whether a merger of a single employer plan into a multi-employer plan could be construed as a form of a plan termination that should have been considered by the plan fiduciary as an alternative to a "traditional" termination.

When describing how a plan termination differs from a plan merger, the Supreme Court noted the following “point”:

First, terminating a plan through purchase of annuities (like termination through distribution of lump-sum payments) formally severs the applicability of ERISA to plan assets and employer obligations. Upon purchasing annuities, the employer is no longer subject to ERISA’s multitudinous requirements, such as (to name just one) payment of insurance premiums to PBGC, § 1307(a). And the PBGC is likewise no longer liable for the deficiency in the event that the plan becomes insolvent; there *are* no more benefits for it to guarantee. The assets of the plan are wholly removed from the ERISA system, and plan participants and beneficiaries must rely primarily (if not exclusively) on state contract remedies if they do not receive proper payments or are otherwise denied access to their funds. Further, from the standpoint of the participants and beneficiaries, the risk associated with an annuity relates solely to the solvency of an insurance company, and not the performance of the merged plan’s investments.

The foregoing observation by the Court is *dicta* since the question of PBGC guarantees with respect to distributing annuity contracts was not before the court. The passage appears to be drawn from the Justice Department’s amicus brief in the case, which parroted the PBGC’s more recent regulation position on annuity contracts as set law. There was no statutory analysis of ERISA Section 4022 in either the Government’s brief or in the Supreme Court’s observation, so the persuasiveness of the quoted passage is highly questionable.

The Supreme Court has held that it is not bound by its own *dicta*, *Cen. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). The cases generally hold that some level of respect should be accorded to Supreme Court *dicta* depending on the degree of consideration given to the matter. Supreme Court *dictum* has been rejected, however, on the grounds that it is inconsistent with the plain language of an applicable statute. In *In re Bateman*, the Fourth Circuit state that “*dicta* of the U.S. Supreme Court, although non-binding, should have “considerable persuasive value in the inferior Courts.” *In re Bateman*, 515 F.3d 272, 282 (4th Cir. 2008). Nevertheless, the Fourth Circuit declined to follow the Supreme Court’s *dictum* in that case, reasoning that the plain language of the relevant statute directed otherwise.” *Id.*

The PBGC may also point to other cases concluding that various ERISA protections do not apply to a distributed annuity contract. These cases, however, primarily base their holding based on the status of an ERISA “participant.” See, for example, *Blossom v. Bank of N.H.*, Civ. No. 02-573-JD, 2004 U.S. Dist. LEXIS 13446 (D.N.H. 2004), which held that the annuity benefits were not subject to ERISA’s statutory anti-assignment provision because the annuity holder was not a “participant” for purposes of ERISA Title I (setting aside that the plan at issue in the case may have been exempt from Title I as a so-called “top hat” plan).

7. Policy Imperatives

The PBGC is not a private insurance company. It was established by Congress “to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies.” This policy is best served if the PBGC benefit guarantees continue to apply for annuities distributed in a plan termination or PRT.

The PBGC position change in 1991 effectively involved a trade of sorts among the regulatory bodies—PBGC guarantees would be eliminated in exchange for enhanced fiduciary standards that would ensure the soundness of purchased annuities. But there is nothing fair or equitable about this trade, especially in 1991 when it was not even clear that annuitants could sue for fiduciary breach under ERISA. While ERISA eventually was amended in 1994 to allow such lawsuits, the statute of limitations for fiduciary breaches is six years after the annuity purchase under ERISA Section 413. Even under the best fiduciary process for the selection of the insurer, there is no way for any fiduciary to see years into the future, and a close out annuity may be paying benefits 30 or 40 years in the future. Deferring entirely to there being a robust fiduciary process does not even come close to satisfying the PBGC’s stated mission.

One might be concerned that continuing the PBGC guarantees after a plan annuitization would invite or even encourage a shoddy fiduciary selection process that would allow the selection of lower cost, risky annuities. But the Labor Department has in place robust fiduciary standards under Interpretative Bulletin 95-1 and 1994 legislative changes provide annuitants a private right of action against plan fiduciaries making these annuity selections. The backdrop of continued PBGC guarantees therefore does not give acting fiduciaries a free pass from these obligations.

Re-establishing that PBGC guarantees cover unpaid plan benefits following insurance company failures would raise a question as to the coordination of PBGC guarantees with state guaranty coverage of annuity contracts. Presumably, the PBGC would take the position that the state guaranty funds stand by as the first line of defense in the case of an insurance company failure and the PBGC guarantees kick in only after the state guaranty funds as the PBGC implied in 1981. Based on the history of insurance company failures in the last 40 years, this means that the practical risk to the PBGC is likely small. Even in the Executive Life failure in the early 1990s, over 92 percent of the policyholders received full recovery under California's state guaranty fund, and the small group subject to California state limits still received an almost 90% recovery. See California Department of Insurance January 2008 Report 2005-115.2, at Table 8.

8. Skidmore Deference

The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* overturned the *Chevron* deference to agency regulations and reestablishes *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) as the judicial approach with respect to statute of agency interpretations. The *Skidmore* case held that an agency's interpretation may be entitled to some deference and allows a court to consider an agency's regulations and interpretations depending on (1) "the validity of the agency's reasoning," (2) the agency's "consistency with earlier and later pronouncements, and (3) "all those factors which give [the agency] power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

The PBGC's current interpretation of the guarantees after an insurance company failure is susceptible to challenge under the *Skidmore* factors. As discussed, the statutory basis for the position is weak based on the plain wording of the statute, the PBGC's own interpretation of identical language in ERISA § 4044, and the consistent interpretation of similarly worded provision in other parts of ERISA and tax qualification rules. Further, the PBGC's position utterly fails on the consistency test. The PBGC took the opposite position in 1981, and the agency's repeated attempts to modify the statute prove that the 1981 position was not an off-the-cuff interpretation that the agency made hastily. The PBGC's 1991 reversal of its prior position was intended to limit possible financial liability in the wake of the Executive Life Insurance Company failure and other financial challenges the PBGC was facing; this reversal was not predicated on it previously having a flawed reading of the statute. If anything, numerous pre-*Chevron* cases suggest that an earlier interpretation around the time the statute was passed is more indicative of original meaning than later interpretations. See Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 1019-21

(1992) (noting that “the duration of an executive interpretation is the most frequently encountered factor in the pre-*Chevron* case law” and the rationale for “contemporaneous construction” of a statute close in time to its enactment).

Conclusion

Contrary to the statement in the *Konya* opinion that the loss of PBGC guarantees following a PRT is “undisputed,” the loss of the PBGC guarantees in this context is disputable. In fact, there is a compelling case that the PBGC’s current position is based on an incorrect reading of the statute. The PBGC’s position stands in the face of the plain wording of the statute, the PBGC’s own arguments in the *Lami* case, the long list of similarly worded provisions to ERISA and the Code, the PBGC’s unsuccessful attempts to amend the statute, and the legislative history of the 1986 SEPPA legislation. PBGC guarantees of pension plan benefits following insurance company failures better serve the PBGC’s statutory mission and would not jeopardize the PBGC’s financial position.

About the Authors

Kevin O’Brien has concentrated his practice in employee benefits and compensation for over 30 years. He is widely known as a leader in a wide variety of subjects, including innovative defined benefit plan design, flexible benefits, ERISA fiduciary matters and executive compensation. Before joining the firm, Kevin worked in the Pension and Welfare Benefits Administration at the Labor Department soon after ERISA was enacted. Kevin represents corporate clients before the Treasury Department, the Internal Revenue Service, the Labor Department, the Pension Benefit Guaranty Corporation, the Equal Employment Opportunity Commission, and Congress on a variety of employee benefits issues. He was one of the founders of the Employers Council on Flexible Compensation (ECFC) and served as an officer of ECFC for many years. Kevin has been individually recognized by Chambers & Partners for Employee Benefits & Executive Compensation multiple times, most recently in 2025.

Spencer Walters practices all aspects of employee benefits and executive compensation law, including the development and maintenance of qualified and nonqualified plans; plan compliance with the Code, ERISA, and Affordable Care Act; the treatment of employee benefits plans in connection with corporate mergers and acquisitions; and executive employment agreements and compensation arrangements, including Code section 409A. Spencer enjoys working with in-house counsel, tax and payroll personnel, and human

resources professionals to attend to day-to-day administrative challenges and respond to new challenges. Spencer also actively engages in the federal rulemaking process, offering key comments to proposed regulations including under Section 162(m) and Section 7508A. Spencer has been individually recognized by Chambers & Partners for Employee Benefits & Executive Compensation.

About Ivins, Phillips & Barker, Chtd.

Ivins, Phillips & Barker is exclusively engaged in the practice of federal tax, benefits and compensation, and estate and gift tax law. Founded by two of the original judges on the United States Tax Court in 1935, our decades of focus on the intricacies of the Internal Revenue Code and Department of Labor regulations have led numerous Fortune 500 companies, as well as smaller companies, tax-exempt organizations, and high net worth individuals to rely on us for answers to their most complicated and sophisticated tax planning problems as well as for complex tax litigation. Our experience has taught us that while the tax code is ever-evolving, for most taxpayers it remains dauntingly complex; we keep up on the latest developments in tax reform so that we can provide timely advice on how changes to the law will affect our clients and their businesses.

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