

Finding Goldilocks:

The Retiree Representative Under MPRA

More than ten million Americans are counting on a multiemployer pension plan to provide retirement income.¹ Unfortunately, many multiemployer pension plans face serious financial challenges. In the coming years, some will become insolvent. In theory, this will leave as many as a million pension plan participants with only the benefit payments guaranteed by the government's Pension Benefit Guaranty Corporation (PBGC).² But PBGC itself has financial troubles³ and may soon be unable to make the payments it "guarantees."

On December 16, 2014, with little fanfare and limited media attention, President Obama signed into law the Multiemployer Pension Reform Act of 2014 (MPRA).⁴ In relevant part, MPRA amends Section 305 of the Employee Retirement Income Security Act (ERISA). Under this new law, a financially distressed multiemployer pension plan may reduce benefit payments to plan participants to preserve its long-term financial integrity.⁵ However, the most vulnerable participants—the elderly and the disabled—continue to receive their full benefit payments.⁶ And every participant

benefits

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Under the new Multiemployer Pension Reform Act of 2014, a large multiemployer pension plan that wants to reduce benefits to avoid insolvency must appoint a retiree representative. Attorneys serving as legal counsel to a retiree representative write about how they are interpreting the representative's role.

by | **Peter M. Rosene, Pamela H. Nissen** and **Michael T. Joliat**

remains entitled to benefit payments that are at least 10% greater than PBGC payments.⁷ Yet, at its heart, MPRA dramatically changes the retirement landscape. Promises that were once legally sacred may now be legally broken.

A multiemployer pension plan must apply to the Treasury Department for permission to reduce benefit payments under MPRA.⁸ If a pension plan has 10,000 or more participants, it must appoint a "retiree representative" at least 60 days before submitting an application to the Treasury Department.⁹

This article focuses on retiree representatives. There is

limited legislative history on why MPRA requires a retiree representative for plans with more than 10,000 participants. And there is no guidance as to why the threshold is 10,000. May a plan with less than 10,000 appoint a representative? Nothing in the statute prohibits these plans from doing so, and there are many reasons why any plan considering suspension may want to make such an appointment.

We are serving as legal counsel to a retiree representative. But MPRA provides few answers to questions of what, exactly, a retiree representative is intended or required to do. As this

learn more >>

Multiemployer Pension Reform Act of 2014

Jay K. Egelberg and James K. Estabrook.
On-Demand Presentation from January 20, 2015.

Visit www.ifebp.org/books.asp?15T30DP for more information.

article was being drafted, the Treasury Department was soliciting comments for regulations that MPRA requires be issued by June 14, 2015.¹⁰ These may shed light on the retiree representative's role. In the meantime, and to the extent that regulations leave these questions unanswered, we must supplement the statute with a good-faith interpretation. Below we discuss a few of the important questions and our conclusions.

What Is a Retiree Representative?

MPRA's mandate to retiree representatives is brief. A retiree representative must be a plan participant in pay status.¹¹ A retiree representative "shall advocate for the interests of the retired and deferred vested participants and beneficiaries of the plan throughout the suspension approval process."¹² The pension fund must pay a retiree representative's reasonable expenses, including legal and actuarial support.¹³ And a retiree representative is not subject to ERISA's fiduciary standard of care.¹⁴ That is all MPRA has to say about retiree representatives. Everything else—how a retiree representative should advocate, to whom and when—must be inferred.

For Whom Should a Retiree Representative Advocate?

A retiree representative must "advocate for the interests of the retired and deferred vested participants and ben-

eficiaries of the plan."¹⁵ This grammatically complex clause begs the question: Who, exactly, is under a retiree representative's purview, and who is not?¹⁶

As counsel for a retiree representative, we began by considering why MPRA requires plans to appoint a retiree representative. That, too, is a difficult question. Each multiemployer pension plan has trustees who are fiduciaries of all plan participants. Why should some participants require an additional representative?

MPRA is a zero-sum game, with finite assets being allocated among active participants (i.e., those currently working for a contributing employer) and other participants. Allocating more to one group of participants means allocating less to another group. We believe MPRA drafters created the position of retiree representative because of concerns that participants who have no current and direct connection to the trustees (via employment relationship or union membership) would be disadvantaged in the process of allocating benefit reductions. Accordingly, "retired and deferred vested participants and beneficiaries" should describe every individual with a vested interest who has no current and direct connection to the trustees. As this interpretation comports with the common meaning of the statute's text and we are not aware of any more fitting interpretation, we believe that a retiree representative should ad-

vocate for all vested participants who are not active participants.

To Whom Should a Retiree Representative Advocate?

MPRA requires a retiree representative to advocate, but does not specify to whom. Only a pension plan's trustees, the Treasury Department and the plan participants have the power to determine whether or how the plan will reduce benefits under MPRA.¹⁷ Under the statute, a retiree representative must advocate "throughout the suspension approval process." As the Treasury Department approves or denies a suspension application and the participants vote to accept or reject an approved suspension,¹⁸ it seems fairly clear that a retiree representative's advocacy should, at a minimum, be addressed to the Treasury Department and the plan's participants. This creates a situation where a retiree representative is both advocating to and advocating for the participants.

MPRA also provides that a pension plan must appoint a retiree representative at least 60 days before submitting an application to the Treasury Department.¹⁹ If a retiree representative was intended to advocate only to the Treasury Department and the plan's participants, there would be no need to appoint one before a plan submits an application. Consequently, we believe that a retiree representative should also advocate to the trustees as they prepare the application.

What Are Practical Steps a Retiree Representative Should Take to Advocate Effectively?

To effectively advocate, a retiree representative must understand the plan

and its current circumstances. But a multiemployer pension plan with at least 10,000 participants is legally and financially complex. The first step, therefore, is to secure independent legal and actuarial support.²⁰

The retiree representative's attorneys and actuaries should begin their work by obtaining documents from the plan that will enable them to assist the retiree representative in answering the following questions:

- Given the plan's circumstances, is a reduction of benefits appropriate and permissible under MPRA?
- Is the plan's contemplated allocation of benefit reductions equitable?

These questions and many others that flow from this process require first a thorough understanding of the plan and knowledge of its financial condition. As an advocate, a retiree representative should have accurate and complete information to fully understand the plan's financial situation. While a retiree representative does not have a vote on the suspension plan, a representative is ill-equipped to advocate if he or she does not understand the details of the plan's financial condition and, thus, the facts (if they exist) necessitating the suspension.

In addition to obtaining documents from the pension plan, a retiree representative's role should include discussions with the plan's actuary and consultants, review of the various proposals considered by the board (even if not adopted) and, perhaps most importantly, understanding precisely how the suspension impacts the participants.

Being a plan participant in pay status, the retiree representative is similarly situated to other retirees and beneficiaries. But each retiree or beneficiary is unique, and some may have concerns the retiree representative could not anticipate. And it is likely that the deferred vested participants, who are not in pay status, have concerns different from those of the retiree representative. To inform the retiree representative's analysis of whether benefit reductions are allocated equitably, it may be helpful to establish a direct line of communication between the retiree representative and those on whose behalf he or she is advocating to provide them the opportunity to voice their concerns.

A retiree representative ultimately will need to communicate his or her conclusions regarding a proposed suspension to the plan's trustees, the Treasury Department and plan participants. To substantiate those conclusions, a retiree representative's review of the plan's documentation, the issues

considered and the conclusions drawn should all be documented in writing.

Ultimately, because there is only limited guidance on the retiree representative's role, each plan will need to work with the representative, including any counsel or actuary retained by the representative, to determine the best process to protect the participants' rights and interests while avoiding plan insolvency.

What Are the Focal Points in Considering Whether a Reduction of Benefits Is Permissible Under MPRA?

To be eligible to reduce benefits under MPRA, a pension plan and its proposed benefit reductions must meet many criteria. The most critical for a retiree representative are as follows:

- The plan is actuarially projected to become insolvent (generally, within 14 years).
- The plan has taken all reasonable measures to avoid insolvency.
- The plan is actuarially projected to avoid insolvency if it imposes the proposed benefit reductions.
- The plan's proposed benefit reductions do not materially exceed the level necessary to avoid insolvency.²¹

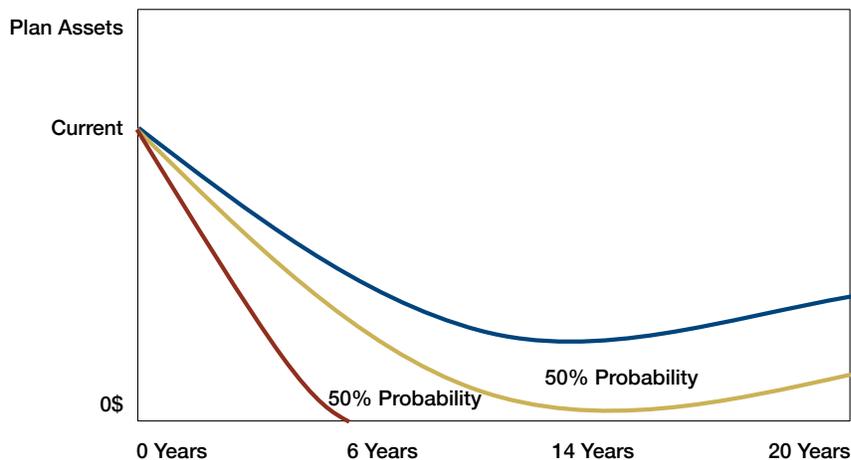
Together, these rules prevent a pension plan from using MPRA to rehabilitate itself. Instead, it must flirt with disaster—not too close, but not too far. Practitioners are calling this the *Goldilocks Rule*.²²

takeaways >>

- Plans with at least 10,000 participants must appoint a retiree representative if they seek to suspend benefits under MPRA, but MPRA offers little guidance about what the representative is intended or required to do.
- The authors believe the representative should advocate for all vested, but not active, participants.
- The representative needs a thorough understanding of the plan and its financial condition.
- A plan's insolvency will affect participants differently, and the representative must balance those effects with the effects of a benefits reduction.
- A retiree representative can bring openness and credibility into a difficult process.

FIGURE

Hypothetical Pension Plan Stochastic Funding Model



Why Is the Goldilocks Rule Important?

MPRA provides a pension plan the flexibility to reduce benefits to different degrees.²³ For instance, a \$4,000 monthly benefit could be reduced by 50% while a \$2,000 monthly benefit is reduced by 25%. But the magnitude of each reduction ultimately is a function of the average reduction a plan must impose to avoid insolvency. The average reduction, in turn, depends on what a plan determines is necessary to avoid insolvency. Accordingly, the Goldilocks Rule is the origin of all benefit reductions, and how a plan applies it will substantially affect individual benefit reductions.

Unfortunately, the Goldilocks Rule is vague. What does it mean to say that a benefit reduction is “reasonably necessary” but “not materially in excess of the level necessary”? Moreover, the Goldilocks Rule implies that a pension plan can determine with some certainty the magnitude of benefit reductions that is actually necessary. But

an actuarial projection of future plan funding relies on many assumptions about the future, including investment income, mortality and contributions. It is impossible to predict precisely any of these variables. As such, a pension plan’s future funding model is not accurately represented by a nice clean line, but a broad probability distribution.

The figure illustrates the probabilistic (or, in actuarial terminology, *stochastic*) funding projection for a hypothetical pension plan under proposed MPRA benefit reductions. The stochastic funding model for any pension plan deterministically projected to experience a near miss with insolvency—i.e., any plan considering MPRA benefit reductions—is likely to look fairly similar to this hypothetical model. Clearly, a pension plan could still become insolvent despite imposing MPRA benefit reductions.

Our hypothetical funding projection illustrates the difficulty of the Goldilocks Rule for a retiree representative. A retiree representative may

believe that a benefit reduction where insolvency is basically a coin flip does not meet the “reasonably necessary to avoid insolvency” test. Yet opposing a benefit reduction on that basis would be tantamount to advocating for greater benefit reductions. Coming from the other direction, a retiree representative could argue that, because there is more than a 50% chance that the plan will remain solvent, the benefit reductions are too great. Of course, that means advocating for a course where the plan has a higher likelihood of becoming insolvent.

We have no clever solution to the Catch-22 of the Goldilocks Rule. We would note, however, that a plan’s insolvency will affect participants differently. All plan participants may benefit if a plan avoids insolvency. But in the case of insolvency, the participants for whom a retiree representative must advocate probably are better off than active participants. Accordingly, a retiree representative should not automatically regard the plan’s insolvency as the worst-case scenario. Instead, the effect of insolvency should be balanced against the effect of the benefit reduction. Viewing the Goldilocks Rule through this lens may assist a retiree representative in determining how to advocate on the all-important issue of average benefit reductions.

Goldilocks?

With broken promises at its heart, the entire MPRA suspension process is painful for everyone involved—the trustees, the participants and their families. It is unlikely that anyone impacted by the suspension, including the trustees, will feel as the fairy tale Goldilocks did when she sat on baby bear’s

chair, that “it is just right.” But a retiree representative has the opportunity to bring openness and credibility into a process that might otherwise appear opaque and suspicious to those on the outside. This will ease the pain—if only a bit. Despite the lack of explicit instructions in MPRA as to what the retiree representative is required to do, it has become evident to us that a retiree representative is able to help both the participants and the trustees in this difficult process. Even if not required by law, a pension plan’s trustees should consider appointing a retiree representative. And those that are required to appoint one should capitalize on the benefits he or she brings to the process. 🗨

Endnotes

1. W. J. Wiatrowski, “An Analysis Of Multiemployer Pension Plans”; Bureau of Labor Statistics *Beyond the Numbers*; October 2014, Volume 3/Number 22. Available at www.bls.gov/opub/btn/volume-3/an-analysis-of-multiemployer-pension-plans.htm.
2. Pension Benefit Guaranty Corporation; Annual Report, Fiscal Year 2014; (“Plans covering over 1 million participants are substantially underfunded and without legislative changes, many of these plans are likely to fail.”). Available at www.pbgc.gov/documents/2014-annual-report.pdf.
3. *Id.* (“The FY 2013 Projections Report found that, at current premium levels, PBGC’s multiemployer program is itself on course to become insolvent with a significant risk of running out of money in as little as five years. The risk of insolvency rises rapidly, exceeding 50% in 2022 and reaching 90% by 2025.”) Available at www.pbgc.gov/documents/2014-annual-report.pdf.
4. Consolidated And Further Continuing Appropriations Act, 2015, PL 113-235, December 16, 2014, 128 Stat. 2130.
5. 29 U.S.C. §1085(e)(9)(A).
6. 29 U.S.C. §1085(e)(9)(D).
7. *Id.*
8. 29 U.S.C. §1085(e)(9)(G).
9. 29 U.S.C. §1085(e)(9)(B)(v).
10. 80 *Fed. Reg.* 8578; MPRA Section 201(b)(7).
11. 29 U.S.C. §1085(e)(9)(B)(v).
12. *Id.*
13. *Id.*
14. *Id.* (If the retiree representative is also a trustee of the pension fund, ERISA’s fiduciary standard of care continues to apply to duties undertaken in a trustee capacity.)
15. *Id.*
16. ERISA provides no easy answers. It does not define a retired participant or a deferred vested participant, and ERISA includes in the definition of *beneficiary* individuals who merely could acquire an interest in the plan, though they have no actual interest. 29 U.S.C. §1002(8).
17. 29 U.S.C. §§1085(e)(9)(A); 1085(e)(9)(G); 1085(e)(9)(H).
18. While the participants vote on any suspension plan, if the plan is determined to be “systemically important,” the Treasury may permit the implementation of the suspension plan as proposed or modify the plan.
19. 29 U.S.C. §1085(e)(9)(B)(v).
20. MPRA does not address whether a retiree representative’s attorney and actuary must be independent. But an attorney or actuary serving both the plan and the retiree representative would face difficult, possibly intractable, conflicts of interest. Consequently, it is at least preferable, if not mandatory, for a retiree representative to secure independent advisors.
21. 29 U.S.C. §§1085(b)(6); 1085(e)(9)(A); 1085(e)(9)(C).
22. We are uncertain as to the origin of the term *Goldilocks Rule*.
23. 29 U.S.C. §1085(e)(9)(D).

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