



Retiree VEBA's in the Economic Crisis

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Retiree VEBAs

- Background on VEBAs
- Modifying Retiree Benefits
- Negotiated VEBAs
- Prohibited Transaction Exemptions
- VEBA Litigation Settlements

Background on VEBA's



Retiree Benefits

- Defined benefit plans
 - Vesting of benefits required
 - Minimum funding required
 - PBGC guarantee, employer liability on termination
- Retiree medical (OPEB)
 - No vesting required
 - Funding for existing retirees limited by tax penalties (except for collectively bargained benefits)
 - No government guarantee

VEBAs

- Voluntary Employees' Beneficiary Association (VEBA)
 - Tax exempt under IRC § 501(c)(9)
 - Usually set up as trust because ERISA requires plan assets to be held in trust
 - May provide life, sickness, accident, or other permissible benefits (no deferred compensation)
 - No private inurement or reversion to contributing employer
 - Funding comes from contributions or transfers from overfunded pension plans under IRC §420



Funding Retiree VEBAs

- Employer contributions deductible when contributed, subject to IRC 419/419A limitations
- Investment income of a VEBA may be subject to unrelated business income tax (UBIT)
- Deduction limits and UBIT *don't apply to collectively-bargained VEBAs*
- Employee contributions allowed on after-tax basis



Reporting and Disclosure

- Form 1024 must be filed with IRS for determination of tax-exempt status
- VEBA must file an annual information return on Form 990
- Related benefit plan is subject to ERISA's reporting and disclosure requirements, as well as fiduciary and other ERISA rules that apply to health and welfare plans

VEBA Governance

- Labor-Management Relations Act (aka Taft-Hartley Act) prohibits payments by employers to unions or entities controlled by unions
- Exceptions relevant to VEBAs
 - Jointly-trusted benefit plans
LMRA § 302(c)(5)
 - Settlement funds — LMRA § 302(c)(2)

Modifying Retiree Benefits

Right to Modify

- Most courts have held that retiree obligations can be modified or terminated if employer has reserved the right to do so
 - Unlike pensions, no vesting required - *e.g.*, *Sprague v. GM*, 133 F.3d 388 (6th Cir. 1998)
 - But, can't modify if no reservation of rights - *e.g.*, *Bland v. Fiatallis North America* (7th Cir. 2005)



Collectively Bargained Retiree Benefits

- Collectively-bargained benefits often have no reservation of rights - *e.g.*, *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)
- When retiree medical benefits tied to pension entitlement, 6th Cir. has held lifetime benefits for retirees - *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008)



Modifying in Bankruptcy

- Section 1114 of the Bankruptcy Code provides procedure for negotiating modifications to retiree benefits
 - Retiree committee appointed
 - Debtor proposes modifications “necessary to permit reorganization”
 - Debtor negotiates with retiree committee
 - Court orders modification if no agreement
 - Retirees get claim for benefits eliminated



Retiree Benefit Bankruptcy Settlements

- Delphi
 - GM to fund \$450 million in VEBA for Delphi retirees
- Dana
 - Non-union - \$78 million
 - Union - \$700 million cash plus \$80 million stock
- Tower Automotive
 - Cash during bankruptcy, claim equal to 20% of retiree benefits in bankruptcy
 - VEBAs will hold more than 50% of unsecured claims

Negotiated VEBAs



Collective Bargaining for New VEBA's

- Auto VEBA (2005-2009)
 - GM-UAW Agreements
 - Chrysler-UAW Agreements
 - Ford-UAW
- Goodyear-USW (2006)
- GM Agreement with IUE-CWA



GM/Ford OPEB Modifications 2005

- Negotiated with UAW
 - Premiums, deductibles and caps for retirees set through 2011
 - VEBA's to fund retiree out of pocket
 - GM - \$3 billion cash plus appreciation on 8M GM shares
 - Ford - \$108 million cash plus appreciation on 8.75M Ford shares
 - Additional cash if dividends raised
- Class action litigation involving retirees
 - Modifications approved by court based on financial necessity - 2006 WL 891151 (E.D.Mich. March 31, 2006)
 - Upheld by 6th Circuit – *UAW v. GM*, 497 F.3d 615 (6th Cir. 2007)

Goodyear VEBA

- Goodyear and USW negotiated in 2006
 - Goodyear OPEB obligation was \$1.2 billion
 - \$1 billion contribution to VEBA (up to \$300 million could have been in Goodyear stock)
 - VEBA will pay all retiree benefits, Goodyear will have no future responsibility
- Settlement approved in Aug. 2008 -
Redington v. Goodyear Tire and Rubber Co.,
44 EBC 2057 (N.D. Ohio 2008)
 - Court found settlement complies with LMRA §302(c)(2)



GM/Ford

Retiree Obligations 2006

- GM
 - 432,000 US retirees
 - \$64.3 billion in US retiree liabilities (assets \$16.9)
 - \$46.7 million UAW retiree benefits
 - Health care inflation 5-9%
- Ford
 - 170,000 US retirees
 - \$30.9 billion in retiree liabilities (assets \$4.9)
 - \$23 billion UAW retiree benefits
 - Health care inflation 5-6%



GM – UAW 2007 Agreement

- VEBA Funding
 - \$24.1 billion cash (\$16 billion from existing VEBA)
 - Up to 20 payments of \$165 million (PV \$1.6 billion)
 - \$4.3725 billion convertible note
 - \$2.8 million from 2005 VEBA
- GM pays benefits until 2010
- \$15 million to fund National Institute for Health Care Reform
- No future bargaining for retiree benefits
- SEC approval of accounting treatment required
- Retiree costs - 3% maximum increase through 2015; 4% thereafter (but trustees may adjust based on future experience)



Chrysler - UAW 2007 Agreement

- VEBA Funding
 - \$7.1 billion cash to VEBA by 1/1/08
 - Up to 20 payments of \$50 million (PV \$487 million)
 - \$1.2 debenture
 - Warrant (potential \$605 million)
- Five \$2 million payments to fund National Institute for Health Care Reform
- Other term similar to GM-UAW



Chrysler and GM Bankruptcies

- Chrysler assets sold to “New Chrysler”
 - 55% owned by Auto VEBA
 - 8% owned by US
 - 2% owned by Canada
 - Fiat got 3 Board seats and up to 15%
- Under proposed restructuring, the Auto VEBA will own 18% of “New GM”
- VEBA trustees have the right to name a director to each Board, with UAW consent



Ford - UAW

2007 Agreement

- VEBA Funding
 - \$2.7 billion cash
 - \$3.8 billion from existing VEBA
 - \$2.4 billion cash in 2008-9 (PV)
 - Up to 20 payments of \$52 million (PV \$450 million)
 - \$3.3 billion convertible note
 - \$3 billion second lien term note
- Five annual \$1 million payments to fund National Institute for Health Care Reform
- Other term similar to GM-UAW
- No bankruptcy so still in force



GM Agreement with IUE-CWA

- GM reached settlement with IUE-CWA in October 2008
- GM to contribute \$1.6 billion to VEBA
 - Never implemented
- IUE-CWA estimates its claims against “old” GM will exceed \$5 billion
- Objecting to disparate treatment of UAW retirees

Prohibited Transaction Exemptions



DOL Exemption to Fund VEBA with Stock

- 10% limit on employer stock in VEBA (same as DB plan limit)
- Department of Labor exemption required if stock represents more than 10% of VEBA assets,
 - Navistar PTE 93-69
 - Kinder Morgan PTE 2004-08
 - Wheeling-Pittsburgh PTE 2005-04*
 - Kaiser Aluminum PTE 2006-19*

*Bankruptcy reorganization



GM VEBA Exemption

PTE 2009-03

- 2005 GM VEBA provides
 - Dental benefits
 - Supplement to offset retiree co-pays and deductibles (the “mitigation payments”)
- PTE 2009-03 (74 Fed. Reg. 3645 (Jan. 21, 2009)) permits
 - Monthly cash advances to GM by the VEBA
 - Annual “true up” of the advances against the actual expenses incurred

VEBA Litigation Settlements



Recent VEBAs in Litigation Settlements

- *Bailey v. AK Steel Corp.*, 43 EBC. 2593 (S.D. Ohio 2008)
- *Pringle v. Continental Tire North America, Inc.*, Case No. 3:06 CV 2985 (N.D. Ohio Sept. 24, 2008)
- *Leonhardt v. ArvinMeritor, Inc.*, 44 EBC 2921 (E.D. Mich. 2008)



AK Steel

Retiree Settlement

- AK Steel - class action settlement
 - \$663 million cash over 4 years
 - 468 million on approval of settlement
 - Three \$65 million payments thereafter
 - Covers both hourly and salaried retirees covered related to Middletown Works
 - Middletown Works represents half of AK's \$2.1 billion OPEB liability
 - Settlement approved Feb. 28, 2008



Continental Tire **Retiree Settlement**

- Continental Tire sought to impose caps on retiree medical liabilities
- Continental lost Summary judgment motion in *Pringle v. Continental Tire North America*, Case No. 3:06 CV 2985 (N.D Ohio July 31, 2007)
- Settlement approved Sept. 24, 2008 provides for \$158 million in payments to VEBA over next 20 years



ArvinMeritor Retiree Settlement

- ArvinMeritor shifted costs to retirees and cancelled benefits after 65
- \$28.39 million to be paid to VEBA, with VEBA to assume obligations for retiree health benefits
- Committee consists of 3 USW representatives – court found that complies with LMRA §302(c)(2)
- Settlement approved Oct. 7, 2008



QUESTIONS???

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