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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH HOLLIS; DELPHI SALARIED RETIREE ASSOCIATION, *Plaintiffs-Appellants*, *v.* PENSION BENEFIT GUARANTY CORPORATION, *Defendant-Appellee.*	No. 19-1419

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:09-cv-13616—Arthur J. Tarnow, District Judge.

Argued: January 28, 2020

Decided and Filed: December 28, 2020

Before: SILER, GIBBONS, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Anthony F. Shelley, MILLER & CHEVALIER CHARTERED, Washington, D.C., for

Appellants. John A. Menke, PENSION BENEFIT GUARANTY CORPORATION, Washington, DC, for Appellee. **ON BRIEF:** Anthony F. Shelley, Timothy P. O'Toole, Michael N. Khalil, MILLER & CHEVALIER CHARTERED, Washington, D.C., for Appellants. John A. Menke, C. Wayne Owen, Jr., Craig T. Fessenden, Erin C. Kim, Elisabeth B. Fry, PENSION BENEFIT GUARANTY CORPORATION, Washington, DC, for Appellee.

AMENDED OPINION

SILER, Circuit Judge. Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") creates an insurance program to protect employees' pension benefits. The Pension Benefit Guaranty Corporation ("PBGC")—a wholly-owned corporation of the United States government—is charged with administering the pension-insurance program.

In this case, PBGC terminated the "Salaried Plan," a defined-benefit plan sponsored by Delphi Corporation. The termination was executed through an agreement between PBGC and Delphi pursuant to 29 U.S.C. § 1342(c). The appellants—retirees affected by termination of the Salaried Plan—bring several challenges to the termination. First, the retirees argue that section 1342(c) requires a judicial adjudication before a pension plan may be terminated. Second, the retirees contend that termination of the plan violated their due process rights. Third, the retirees assert that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious.

But the retirees' arguments do not require reversal. First, subsection 1342(c) permits termination of distressed pension plans by agreement between PBGC and the plan administrator without court adjudication. Second, the retirees have not demonstrated that they have a property interest in the full amount of their vested, but unfunded, pension benefits. Third, PBGC's decision to terminate the Salaried Plan was not arbitrary and capricious. We affirm.

I.

Delphi Corporation—an automotive parts supplier and former subsidiary of General Motors Corporation ("GM")—was plan administrator and contributing sponsor of several defined-benefit pension plans. The plan at issue here, the Salaried Plan, covered approximately 20,000 members of Delphi's salaried, non-unionized workforce, including appellants Dennis Black, Chuck Cunningham, and Ken Hollis ("retirees").

In 2005, Delphi filed a voluntary petition for Chapter 11 bankruptcy. As a result, Delphi stopped paying the required contributions to its pension plans, including the Salaried Plan.

In 2008, Delphi's first Plan of Reorganization ("2008 POR") provided that all Delphi sponsored pension plans would be frozen but would continue to be reorganized under Delphi. But the 2008 POR failed when Delphi's post-emergence investors refused to fund their investment agreement with Delphi.

As a result, Delphi asked GM to assume the liabilities of the Salaried Plan. It appears that PBGC was initially in favor of this arrangement.

Even so, GM was facing financial struggles of its own as a result of the financial crisis of 2008. An "Auto Taskforce" was appointed to oversee efforts to support and stabilize the auto industry and an "Auto Team" was created by the United States Department of Treasury to evaluate the restructuring plans of automotive companies and to negotiate the terms of any further assistance. *See* Christy L. Romero, *Treasury's Role in the Decision for GM to Provide Pension Payments to Delphi Employees* 3 (Aug. 15, 2013) (hereinafter "SIGTARP Report"), https://www.sigtarp.gov/Audit%20Reports/SIGTARP_Delphi_Report.pdf. In 2009, Treasury's Auto Team agreed to give GM $30.1 billion in Troubled Asset Relief Program ("TARP") funds conditioned on GM's completing a 40-day, "quick-rinse" bankruptcy. *Id.* at 35.

Eventually, an agreement was made to save the pension plan of the hourly, unionized Delphi employees ("Hourly Plan") but terminate the Salaried Plan. Pursuant to this agreement, GM would assume the Hourly Plan pension liabilities and PBGC would terminate the Salaried Plan and release any remaining liens and claims on Delphi's assets.

In June 2009, Delphi moved to modify its First Amended Plan of Reorganization to reflect the agreement to save the Hourly Plan and terminate the Salaried Plan. *In re Delphi Corp.,* No. 05-44481, Dkt. No. 17030 (Bankr. S.D.N.Y. June 1, 2009). The retirees filed an objection to Delphi's Modified Plan in the bankruptcy proceedings. *Id.* at Dkt. No. 18277 (Bankr. S.D.N.Y. July 15, 2009).

Then, on July 22, 2009, PBGC issued a Notice of Determination to Delphi, notifying Delphi that it had determined that the Salaried Plan must be terminated and that PBGC should be appointed as statutory trustee of the plan. PBGC issued a press release to notify plan participants of its decision. Pension Benefit Guaranty Corporation, *PBGC to Assume Delphi Pension Plans* (July 22, 2009), https://www.pbgc.gov/news/press/releases/pr09-48. That same day, PBGC initiated an action in district court to adjudicate termination of the Salaried Plan. *See Pension Benefit Guar. Corp. v. Delphi Corp.*, No 2:09-cv-12876 (E.D. Mich. filed July 22, 2009).

On July 29, 2009, the retirees argued in support of their objection to the proposed modifications to the First Amended Plan of Reorganization. *See In re Delphi Corp.*, No. 05-44481, Dkt. Nos. 18668, 18707 (Bankr. S.D.N.Y. July 30, 2009).

On July 30, 2009, the bankruptcy court overruled the retirees' objections and confirmed Delphi's Modified Chapter 11 Plan. *In re Delphi Corp.*, No. 05-44481, 2009 WL 2482146 at Dkt. No. 1 (Bankr. S.D.N.Y. July 30, 2009).

On August 6, 2009, the retirees sought PBGC's consent to intervene in the termination proceedings in district court. On August 7, 2009, PBGC voluntarily dismissed the termination suit in district court. Then, on August 10, 2009, PBGC and Delphi executed a termination and trusteeship agreement that terminated the Salaried Plan effective July 31, 2009.

Subsequently, in September 2009, the retirees filed this lawsuit. After protracted litigation, the district court granted summary judgment in favor of PBGC. This appeal followed.

II.

We review a district court's grant of summary judgment de novo, "applying the same standards as the district court." *Morehouse v. Steak N Shake,* 938 F.3d 814, 818 (6th Cir. 2019) (quoting *F.T.C. v. E.M.A. Nationwide, Inc.,* 767 F.3d 611, 629 (6th Cir. 2014)). "Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotations omitted); *see also* Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Generally, we review the evidence in the light most favorable to the nonmoving party. *Morehouse,* 938 F.3d at 818. But, "[w]here, as here, the parties filed cross-motions for summary judgment, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *EMW Women's Surgical Ctr., P.S.C. v. Beshear,* 920 F.3d 421, 425 (6th Cir. 2019) (internal quotations omitted).

III.

The retirees contend that 29 U.S.C. § 1342(c) requires a judicial adjudication prior to termination of a distressed pension plan. They also argue that their due process rights were violated and that PBGC's decision was arbitrary and capricious. We begin with interpretation of section 1342.

A.

Interpretation of 29 U.S.C. § 1342. Section 1342 outlines the procedure for institution of proceedings by PBGC to terminate a distressed pension plan. After reviewing the statutory text comprehensively and applying relevant canons of statutory interpretation, we conclude that subsection 1342(c)(1) provides two alternative mechanisms for terminating a distressed pension plan: (1) by application to a United States district court for a decree that the plan must be terminated, or (2) by agreement between PBGC and the plan administrator.

Here, the parties dispute the appropriate statutory procedure for termination of a pension plan by PBGC. The retirees contend that subsection 1342(c) requires that PBGC obtain a judicial decree before terminating a distressed pension plan. But PBGC correctly argues that the statutory scheme provides two procedural alternatives for terminating a distressed pension plan, including by agreement between PBGC and the plan administrator.

To resolve this dispute, we begin by examining the statutory text. "We endeavor to 'read statutes . . . with an eye to their straightforward and commonsense meanings.'" *Bates v. Dura Auto. Sys., Inc.,* 625 F.3d 283, 285 (6th Cir. 2010) (quoting *Henry Ford Health Sys. v. Shalala,* 233 F.3d 907, 910 (6th Cir. 2000)). And we give "terms the ordinary meaning that they carried when the statute was enacted." *Norfolk S. Ry. v. Perez,* 778 F.3d 507, 512 (6th Cir. 2015). The Supreme Court has called on "judicial interpreter[s] to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Hueso v. Barnhart,* 948 F.3d 324, 333 (6th Cir. 2020) (quoting Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at p. 167 (2012) and citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)). Lastly, before deferring to an administrative agency's statutory interpretation, courts "must first exhaust the 'traditional tools' of statutory interpretation and 'reject administrative constructions' that are contrary to the clear meaning of the statute." *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

Section 1342 has several subsections. Subsection 1342(a) says that PBGC "may institute proceedings under this section to terminate a plan" when PBGC determines that certain specified criteria are met. 29 U.S.C. § 1342(a). But the statute does not specify what type of "proceedings" may be initiated to terminate a pension plan. At the time the statute was written, "proceeding" could have several meanings, including: "action or course of action[,] . . . a particular course of action . . . [or a] legal action." Proceeding, *Webster's New Twentieth Century Dictionary of the English Language* 1434 (2d ed. 1979). Thus, proceedings are not necessarily limited to a judicial adjudication, but may also contemplate an administrative proceeding or some other course of action.

Subsection 1342(b) provides for appointment of a trustee after initiation of termination proceedings. Subsection (b)(1) authorizes PBGC to apply to the United States district court for appointment of a trustee to administer the plan "pending the issuance of a decree under subsection (c) ordering the termination of the plan." 29 U.S.C. § 1342(b)(1). Even so, subsection (b)(3) allows PBGC and the plan administrator to agree "to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs [(b)](1) and [(b)](2)." *Id.* § 1342(b)(3).

Subsection 1342(c) is the primary subsection at issue here. The title of the subsection, "[a]djudication that plan must be terminated," may lend some support to the retirees' assertion that an adjudication must occur before a pension plan is terminated. *Id.* § 1342(c). Still, while subsection titles "are of use [ ] when they shed light on some ambiguous word or phrase . . . they cannot undo or limit what the text makes plain." *Brotherhood of Ry. Trainmen v. Baltimore & Ohio Ry.*, 331 U.S. 519, 529 (1947). Thus, we look to the subsection's substantive text.

The first sentence of subsection 1342(c)(1) says that when PBGC commences proceedings under subsection (a) "it *may* . . . apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated . . . ." 29 U.S.C. § 1342(c)(1) (emphasis added). Similarly, the second sentence states, "If the trustee appointed under subsection (b) disagrees with the determination of the corporation under the preceding sentence he *may* intervene in the proceeding relating to the application for the decree, or make application for such decree himself." *Id.* (emphasis added).

Next, the third sentence says that;

> Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and

> authorize him) to terminate the plan in accordance with the provisions of this subtitle.

Id. This sentence simply states that *if* a judicial decree is granted that "the court shall authorize the trustee . . . to terminate the plan in accordance with the provisions of this subtitle." *Id.*

Now, we turn to the main sentence in dispute. In its entirety, the fourth sentence of subsection (c)(1) says:

> If the corporation 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).

Id. The fourth sentence presents a conditional if-then proposition. If the first two conditions are met—"the [PBGC] and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee"—then "the trustee shall have the power described in subsection (d)(1) and . . . is subject to the duties described in subsection (d)(3)." *Id.*

But the proper interpretation of part of the second clause of the fourth sentence—"without proceeding in accordance with the requirements of this subsection (other than this sentence)"—is in dispute.

The retirees read the language to mean that PBGC and the administrator may *only agree to appoint a trustee* without proceeding in accordance with the requirements of subsection (c)(1). In other words, the only requirements of subsection (c) that are waived are those that deal with appointment of a trustee. Thus, the retirees' position is that the fourth sentence of subsection (c)(1) only provides an additional method of appointing a trustee after a judicial decree is entered but does not eliminate the requirement for an adjudication.

Alternatively, PBGC interprets the disputed text to say that *if* the parties agree to terminate the plan *and* agree to the appointment of a trustee, *then* without proceeding in accordance with the requirements of the subsection, including the requirement of court adjudication, the trustee shall have the authority described in subsection (d). Put differently, an agreement between PBGC and administrator that a plan should be terminated and to appoint a trustee obviates all other requirements found in subsection (c), including any requirement for an adjudication. Under this interpretation, PBGC and a plan administrator may agree to appoint a trustee to terminate a distressed plan without a judicial decree.

To resolve the dispute, we first look to the plain text of the relevant subsection. The repeated use of the permissive verb "may" in subsection (c)(1)—as opposed to mandatory words like shall[1] or must—indicates that a trustee appointed under subsection

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[1] Of course, depending on usage, "shall" may have several permissible meanings. *See* Scalia & Garner, *supra,* § 11, at pp. 112-15. Still, "when the word *shall* can reasonably be read as mandatory, it ought to be so read." *Id.* at 114.

(b) is permitted, but not required, to intervene in a proceeding relating to the application for a decree or to initiate a proceeding if one has not been initiated. *See* Scalia & Garner, *supra,* § 11, at p. 112 ("Mandatory words impose a duty; permissive words grant discretion."). Subsection (c)(1) uses no mandatory language that explicitly requires adjudication by a court. As a result, the plain text of subsection (c)(1) permits—but does not require—court adjudication before termination of a distressed pension plan.

Next, we consider relevant canons of statutory interpretation. PBGC argues that the retirees' interpretation violates the canon against surplusage because it renders subsection 1342(b)(3) meaningless. *See* Scalia & Garner, *supra,* at § 26, p. 174. Subsection (b)(3) authorizes PBGC and the plan administrator to appoint a trustee without proceeding with the requirements of subsections (b)(1) or (b)(2). While the retirees' interpretation of subsection (c)(1) does not necessarily render subsection (b)(3) superfluous, it does expose a flaw in their interpretation.

The retirees argue that sentence 4 of subsection (c)(1) is distinct from subsection (b)(3). As the retirees read the statute, sentence 4 of subsection (c)(1) addresses a unique circumstance where the trustee alone has sought to execute termination and PBGC has not sought a decree under sentence 1 of subsection (c)(1). Thus, as the retirees read sentence 4 of subsection (c)(1), it is only operative if the trustee alone seeks termination under sentence 2 of subsection (c)(1) and the court issues a decree to terminate the plan under sentence 3 of subsection (c)(1). If that happens and the conditions of the if-then clause are met, then the trustee has the powers outlined in subsection (d)(1) and is subject to the duties in (d)(3). In other words, the retirees posit that subsection (b)(3) allows PBGC and the administrator to agree on the appointment of a trustee during the period right after the initiation of termination proceedings under subsection (a) but *before a decree for termination is entered.*

The problem with the retirees' argument, however, is that the plain language of sentence 4 is not limited to a situation in which the PBGC and administrator agree to the appointment of a trustee during the period after initiation of termination proceedings but before a decree for termination is entered. Instead, sentence 4 allows the parties to proceed without complying with the requirements in all other sentences of subsection (c)(1) unequivocally. Thus, by its own language, sentence 4 allows the parties to terminate a plan without a court adjudication so long as the parties agree that a plan should be terminated and agree to appointment of a trustee.

Moreover, we consider the statutory language comprehensively and in context. Under the retirees' interpretation, the second condition of the fourth sentence's if-then proposition is that PBGC and administrator must "agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection." 29 U.S.C. § 1342(c)(1). But that is illogical because subsection (c) only mentions appointment of a trustee once; providing for appointment of a trustee by the court if a trustee was not previously appointed under subsection (b). *See id.* And subsection (b) primarily provides the procedures for appointment of a trustee under the statute, not subsection (c). Thus, it is unclear how the parties can "agree to the appointment of a trustee without proceeding in accordance with the requirements of [subsection (c)]," when subsection (c) contains no requirements dealing with the appointment of a trustee, except for a passing phrase allowing the court to appoint a trustee if one has not already been appointed under subsection (b).

Lastly, our interpretation is also supported by persuasive authority from other circuits. In *Jones & Laughlin Hourly Pension Plan v. LTV Corporation,* the United States Court of Appeals for the Second Circuit held that "[t]he fourth sentence of subsection 1342(c) provides that where, as here, PBGC and the plan administrator agree to terminate a plan, PBGC need not comply with the other requirements of 'this subsection.'" 824 F.2d 197, 200 (2d Cir. 1987). "Congress, therefore, expressly dispensed with the necessity of a court adjudication in these cases." *Id.* Thus, the Second Circuit has held that Congress expressly dispensed with the necessity of a court adjudication where the PBGC and plan administrator agree to terminate a plan.

The retirees' contention that *Jones & Laughlin* conflicts with a Seventh Circuit decision, *In re UAL Corporation,* 468 F.3d 444 (7th Cir. 2006), is unavailing. The Seventh Circuit stated that "[n]othing in 29 U.S.C. § 1342(c), which describes the judicial function after the PBGC files an action seeking termination, suggests that the court must defer to the agency's view." *Id.* at 450. But *Jones & Laughlin* and *In re UAL Corporation* addressed two distinct legal issues. In *Jones & Laughlin,* the Second Circuit addressed whether subsection 1342(c) authorized termination of a pension plan by agreement between PBGC and the plan administrator. 824 F.2d at 200. In contrast, in *In re UAL Corporation,* the Seventh Circuit considered the appropriate standard of review in a suit where a plan administrator disagrees with the termination and PBGC seeks a court order to terminate a plan. *See* 468 F.3d at 447-50. Thus, to the extent that the Seventh Circuit made pronouncements in *In re UAL Corporation* that support the retirees' interpretation, those pronouncements would constitute dicta because the court did not rest its ultimate judgment on interpretation of 29 U.S.C. § 1342(c). *See Wright v. Spaulding,* 939 F.3d 695, 700-02 (6th Cir. 2019) (discussing principles to determine if a court's discussion constitutes a holding); *see also United States v. Swanson,* 341 F.3d 524, 530 (6th Cir. 2003) (explaining that, generally, dictum is anything "not necessary to the determination of the issue on appeal").

Even so, the retirees also argue that *Jones & Laughlin* is unpersuasive because it utilized outdated notions of statutory interpretation and relied on an obsolete understanding of deference to administrative agencies' statutory interpretations.

First, the retirees' assertion that *Jones & Laughlin* should not be followed because the Second Circuit impermissibly added words to subsection 1342(c) is unconvincing. The *Jones & Laughlin* court did not add any words to the statute when interpreting the relevant provision in subsection 1342(c)(1).[2]

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[2] After determining that subsection 1342(c) dispensed with the necessity of court adjudication, the *Jones & Laughlin* court said, "The remainder of the fourth sentence of subsection 1342(c)

The retirees' second argument—that the *Jones & Laughlin* court impermissibly relied on outdated notions of the deference owed to federal agencies—is more persuasive but still misses the mark. The Second Circuit based its interpretation on "the deference owed to the PBGC as [a] federal agency" and the court's own interpretation of the statutory language. *See* 824 F.2d at 200 n.3. Thus, the Second Circuit's statutory *interpretation* is still entitled to consideration as persuasive authority for this court even if notions of deference to administrative agency interpretations have changed since *Jones & Laughlin* was decided.

Lastly, decisions in several federal circuits, including a published opinion in this circuit, have acknowledged terminations of distressed pension plans by agreement between PBGC and the plan administration pursuant to 29 U.S.C. § 1342(c)(1). *See Pension Benefit Guar. Corp. v. Alloytek, Inc.*, 924 F.2d 620, 624 (6th Cir. 1991) (citing 29 U.S.C. § 1342(c)(1) and acknowledging that "the parties agreed to a consent order which incorporated their agreement and terminated the Plan, established a termination date and provided for the appointment of a trustee"); *see also, e.g., Allied Pilots Ass'n v. Pension Benefit Guar. Corp.*, 334 F.3d 93, 97 (D.C. Cir. 2003)

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supports this interpretation. It grants to the trustee (PBGC) 'without proceeding in accordance with the requirements of this subsection . . . the power described in subsection (d)(1) of this section and [subjects the trustee] . . . to the duties described in subsection (d)(3).'" 824 F.2d at 200 (citing 29 U.S.C. § 1342) (alterations in original). Thus, the addition with which the retirees take issue appears to have had no effect on the court's interpretation of whether subsection 1342(c) authorizes termination by agreement without court adjudication.

(recognizing that PBGC may seek termination through district court enforcement or voluntary settlement); *In re Syntex Fabrics, Inc. Pension Plan,* 698 F.2d 199, 201 (3d Cir. 1983) ("Despite the so-called involuntary nature of a section 1342 proceeding, PBGC and the plan administrator can still agree to terminate the plan and appoint a trustee without resort to the court."). Of course, these decisions did not directly consider the proper interpretation of subsection 1342(c). Still, they provide strong persuasive authority that several circuits, including our own, have at least recognized a procedure where distressed pension plans may be terminated by agreement under subsection 1342(c) without court adjudication. Moreover, the retirees have not cited, nor are we aware of, any federal authority accepting their proposed interpretation, that termination of a distressed pension plan must be accomplished through court adjudication.

In sum, the most appropriate interpretation of subsection 1342(c)(1) is that it provides two alternative mechanisms for terminating a distressed pension plan. First, the subsection uses permissive language when discussing an in-court adjudication before terminating a pension plan. Second, subsection (c)(1) is not limited to a situation after initiation of termination proceedings under subsection (a) but before a decree for termination is entered. Third, the retirees' interpretation—that if the parties agree that a plan should be terminated they may appoint a trustee without proceeding in accordance with the requirements of subsection (c)(1)—is illogical because the only provision of subsection (c)(1) that deals with the appointment of a trustee is one that allows for appointment of a trustee by the court if one was not appointed pursuant to the requirements of subsection (b). Lastly, the only circuit to directly interpret the statutory language at issue here reached the same conclusion, and the weight of federal authority acknowledges a procedure where PBGC and the plan administrator may terminate a pension plan by agreement without resort to the courts. As a result, we hold that 29 U.S.C. § 1342(c)(1) allows a plan administrator and the PBGC to terminate a distressed pension plan by agreement, without court adjudication.

B.

Procedural Due Process. The retirees also claim that their due process rights were violated because they were not afforded a hearing prior to plan termination. We conclude, however, that the retirees do not have a property interest in the full amount of their vested pension benefits because the Salaried Plan document provides that only *funded* benefits at the time of plan termination are nonforfeitable. And, since the retirees do not have a protected property interest in their remaining unpaid yet vested pension benefits, no due process violation has occurred.

The due process analysis requires two inquiries. *Leary v. Daeschner,* 228 F.3d 729, 741 (6th Cir. 2000). First, we determine whether the retirees have a protected property interest in their vested—but unfunded—pension benefits. *Id.* Second, if they do, then we consider whether PBGC's termination of the Salaried Plan resulted in a deprivation of property without adequate procedural safeguards. *Id.* at 742.

To have a property interest in their vested pension benefits, the retirees "clearly must have more than an abstract need or desire for [them] . . . more than a unilateral expectation of [them] . . . instead, [they] must instead have a legitimate claim of entitlement to [them]." *See Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972). Still, "[p]roperty interests . . . are not created by the Constitution." *Id.* "Rather [property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

Thus, to determine if the retirees have a legitimate claim of entitlement to the entire amount of their vested pension benefits, we must look to the source that creates the purported property interest. Here, the source of the purported property interest is a private contract between the retirees and Delphi. The Salaried Plan document provides that, in the event of plan termination, the "right of all affected employees to benefits accrued to the date of such termination . . . to the extent funded as of such date, is nonforfeitable." In other words, the document provides that *funded* benefits accrued up to the date of plan termination are nonforfeitable.

What about unfunded benefits? The Salaried Plan document contains a provision that provides that benefits that are *funded* at the time of plan termination are nonforfeitable. By necessary implication, unfunded benefits are forfeitable upon plan termination. And so it would seem that retirees have no legal interest in any unfunded yet vested benefits. Binding precedent and ERISA, however, complicate the matter.

ERISA insurance covers "the difference between [an] employee's vested benefits under the terms of the plan . . . and the amount that could be paid from [a] terminated plan's assets." *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 382 (1980). And Supreme Court and Sixth Circuit case law establishes that clauses limiting recovery to funded benefits, like the one here, do not impact ERISA coverage of vested yet unfunded benefits. *Id.* at 372 ("[A] clause limiting an employer's liability does not make otherwise vested benefits forfeitable within the meaning of the Act."); *Matter of Defoe Shipbuilding Co.*, 639 F.2d 311, 312, 314 (6th Cir. 1981) (holding a plan provision providing that "accrued benefits shall be non-forfeitable to the extent funded" was "overridden by the provisions in ERISA identifying the nonforfeitable benefits guaranteed by PBGC," which meant that "the full amount of benefits vested in participants of [the] plan is nonforfeitable"). The upshot is that ERISA insurance covers the unfunded benefits here. But that does not mean that the retirees are statutorily entitled to the full amount of the unfunded benefits. It simply means that they are entitled to PBGC coverage up to the statutory guarantee, which means that retirees have a statutory right to some payment despite lack of funding. *See* 29 U.S.C. § 1322(b)(3). The payment just comes from PBGC rather than from the plan itself. *See id.* § 1322(a).

PBGC does not "dispute that [the retirees'] vested benefits are insured by PBGC"; in fact, "PBGC has been paying those vested benefits up to the guarantee limit for over ten years." And this case is not about the retirees' right to funded benefits. So the only purported property interest that could have been deprived without adequate process is the retirees' interest in the unpaid benefits beyond the ERISA guarantee limit. And the retirees do not have a legitimate entitlement to this remaining balance under ERISA given the guarantee limits or contract law based on the plain language in the Salaried Plan document.

The retirees' arguments to the contrary are unavailing. First, the retirees contend that this court's decision in *Duncan v. Muzyn,* 833 F.3d 567 (6th Cir. 2016), stands for the proposition that "whether a benefit is constitutionally protected" turns on "whether it has vested." In *Duncan,* we addressed whether the Tennessee Valley Authority Retirement System ("TVARS") board violated the Takings Clause when it eliminated cost-of-living adjustments for TVARS-managed pension plans. 833 F.3d at 570. We concluded that while "plaintiffs' claim [was] framed as a Takings claim, the analysis borrow[ed] principles from the Contract Clause context." *Id.* at 583. Additionally, we recognized that "[w]here a public contract is alleged to have been created by statute, however, a plaintiff may prove a contractual relationship only by showing that the legislature has unmistakably intended to create a binding contract right." *Id.* at 583-84. As a result, we held that the plaintiffs were not deprived of a property right because the COLAs were not vested, and the plaintiffs had failed to show that TVARS unmistakably intended to create a binding contract right. *Id.* at 584.

Contrary to the retirees' assertion, *Duncan* is not controlling here. First, *Duncan* did not explicitly hold that plan beneficiaries always have a property interest in vested pension benefits. *See id.* at 583-84. *Duncan* addressed different legal issues than those raised in this case. And the purported property interest in this case arises from a private contract, not a public contract. *See id.* As such, the retirees' reliance on *Duncan* is misplaced.

Second, the retirees argue that PBGC's interpretation of the Salaried Plan document provision above would violate ERISA's anti-cutback rule. The anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title." 29 U.S.C. § 1054(g)(1). But here, there was a termination of the Salaried Plan, not an amendment. For this reason, it does not appear that the Salaried Plan document provision, which deals only with termination, violates the anti-cutback rule.

Third, the retirees contend that "whether the Retirees have a protected property interest in the full measure of their vested pension benefits cannot turn on the assumed legality of the challenged action (here, the Plan's termination)." But that argument conflates two distinct issues. The retirees contend that the termination of the plan by agreement between the PBGC and plan administrator was illegal because it did not comport with the requirements of 29 U.S.C. § 1342(c). Of course, if the retirees are correct, the action taken by PBGC was illegal and we need not reach the question of whether the retirees have a property interest in the entirety of their vested benefits.

But, if the plan termination by agreement was legal, the relevant question here asks whether, based on the provision in the Salaried Plan document, the retirees have a legitimate claim of entitlement to the entire amount of their vested benefits, no matter how the plan was terminated. The answer to that question is no because the retirees only have a legitimate claim of entitlement to the *funded* benefits pursuant to the Salaried Plan document and ERISA coverage up to the statutory guarantee. Thus, the second question, whether the retirees have a property interest in the entire amount of their vested pension benefits is considered only if the first question, whether PBGC legally terminated the Salaried Plan, is answered in the affirmative.

In sum, neither ERISA nor the Salaried Plan document create a legitimate claim of entitlement to the entire amount of their vested, but unfunded, pension benefits. And because the retirees do not have a legal entitlement to the unpaid balance, their procedural due process claim fails.

C.

Arbitrary and Capricious. The retirees have not demonstrated that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious. The retirees cite evidence to support their position that the plan was not sufficiently underfunded, that GM was willing to consider assuming the Salaried Plan, and that PBGC failed to push back against the Auto Taskforce. Still, there is sufficient countervailing evidence to support PBGC's decision to terminate the Salaried Plan under the criteria found in 29 U.S.C. § 1342(a).

PBGC's final determination is entitled to deference and "will be upheld unless it is shown to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Pension Benefit Guar. Corp. v. Ky. Bancshares, Inc.*, 597 F. App'x 841, 842-43 (6th Cir. 2015) (quoting 5 U.S.C. § 706(2)(A) and citing *Pension Benefit Guar. Corp. v.*

LTV Corp., 496 U.S. 633 (1990)). PBGC's decision will be upheld unless we find that the decision:

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). As a reviewing court, we are not at liberty to substitute our judgment for the judgment of the agency. *Motor Vehicle Mfrs. Ass'n.,* 463 U.S. at 43.

Congress authorized PBGC to initiate termination proceedings when it determines that:

> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26, (2) the plan will be unable to pay benefits when due, (3) the reportable event described in section 1343(c)(7) of this title has occurred, or (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a). And ERISA states three objectives that PBGC must carry out:

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

Id. § 1302(a).

The retirees advance several arguments in support of their contention that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious.

First, the retirees contend that GM was willing to consider reassuming the Salaried Plan during its negotiations with the government. And, they argue that PBGC believed that assumption of the Salaried Plan by GM was a viable option until PBGC folded under pressure by the Treasury Department.

But, even when viewing the evidence in the light most favorable to the retirees and drawing all reasonable inferences in their favor, there is ample countervailing evidence to demonstrate that GM was unwilling to assume the Salaried Plan's liabilities. Even if GM was *willing to consider* assuming the Salaried Plan, and even if PBGC was initially in favor of GM's assumption of the plan, GM never demonstrated an *affirmative willingness* to assume the Salaried Plan. No doubt, GM considered assuming the Salaried Plan as part of the broader negotiations between GM and the government. And PBGC initially listed assumption of the Salaried Plan by GM as an alternative to plan termination. But the retirees acknowledge that GM refused to assume the Salaried Plan and there is no evidence demonstrating that GM's assumption of the plan was a viable alternative to termination. Thus, PBGC's action cannot be found to be arbitrary and capricious based on its failure to convince GM to assume the Salaried Plan when GM never expressed more than willingness to consider accepting the plan's liabilities.

Moreover, the retirees' main contention seems to be that PBGC should have exerted more pressure on the Treasury Department to ensure that GM would assume the Salaried Plan. But that argument is flawed for several reasons.

First, the retirees' main grievance on this point seems to be with Treasury's decision not to bail out the Salaried Plan. And, as PBGC notes, the district court dismissed the claims against the Treasury defendants early in the litigation and the retirees chose not to appeal that dismissal. Still, on this point, it appears that the retirees' main complaint is that Treasury should have bailed out the Salaried Plan, not that PBGC's decision to terminate that plan was arbitrary and capricious. Ultimately, PBGC's action cannot be found to be arbitrary and capricious because of a failure of the Treasury Department.

Second, PBGC's decision making process cannot be viewed in a vacuum. The retirees argue that PBGC's failure to exert pressure on Treasury indicates that the decision to terminate that Salaried Plan was arbitrary and capricious. But there were many competing interests that PBGC had to weigh in deciding to terminate the Salaried Plan. Plus, that decision was made in the context of the government's urgent attempt to save GM and the automotive industry. PBGC was forced to consider other Delphi pension plans, including the Hourly Plan, which was assumed by GM. Additionally, PBGC had to consider that a delayed termination decision might affect the GM negotiations and could endanger PBGC's ability to recover funds from statutory liens that had been put into place. Even if PBGC failed to exert pressure on Treasury to bailout the Salaried Plan, that cannot make their decision to terminate the Salaried Plan arbitrary and capricious under the circumstances.

Third, there was sufficient evidence to justify termination of the Salaried Plan. The retirees contend that evidence demonstrated the Salaried Plan's funding level was 85.62%. But, even if that was true, PBGC points out that percentage of underfunding is not a factor to be considered under 29 U.S.C. § 1342(a). Plus, countervailing evidence demonstrates that the Salaried Plan was severely underfunded. For instance, the record indicates that the Salaried Plan was only funded 46.1% on a termination basis. And, even if the Salaried Plan was not underfunded, it is undisputed that Delphi had missed minimum funding contributions, which justified plan termination under § 1342(a)(1). As a result, section 1342(a)'s criteria for termination were satisfied, justifying PBGC's decision to terminate the Salaried Plan.

Lastly, the retirees note that between 2005 and 2009, PBGC worked with thirteen auto-parts suppliers that emerged from bankruptcy without terminating the pension plans sponsored by those companies. They say that lends support to their arbitrary and capricious theory. Not so. First, the evidence demonstrates that PBGC explored alternatives to plan termination and participated in Delphi's bankruptcy negotiations for years before making its final decision to terminate the Salaried Plan. Second, the fact that PBGC negotiated with other companies to save their pension plans from termination is not evidence that the decision it made in this instance was arbitrary and capricious.

At bottom, it is inappropriate for this court to play armchair administrative agency with the benefit of hindsight. Even if we would have reached a different conclusion in the first instance, PBGC's decision to terminate the Salaried Plan was supported by sufficient evidence. Therefore, we hold that PBGC's action was not arbitrary and capricious.

IV.

In sum, the retirees have not raised any argument warranting reversal. First, 29 U.S.C. § 1342(c)(1) provides two mechanisms for termination of a distressed pension plan—including termination by agreement between a plan administrator and the PBGC. Second, the retirees do not have a property interest in remaining unpaid yet vested benefits. Third, PBGC's decision to terminate the Salaried Plan was not arbitrary and capricious because there is ample evidence to support PBGC's decision. As a result, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH HOLLIS; DELPHI SALARIED RETIREE ASSOCIATION, *Plaintiffs-Appellants*, *v.* PENSION BENEFIT GUARANTY CORPORATION, *Defendant-Appellee.*	No. 19-1419

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:09-cv-13616—Arthur J. Tarnow, District Judge.

Argued: January 28, 2020

Decided and Filed: September 1, 2020

Before: SILER, GIBBONS, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Anthony F. Shelley, MILLER & CHEVALIER CHARTERED, Washington, D.C., for

Appellants. John A. Menke, PENSION BENEFIT GUARANTY CORPORATION, Washington, D.C., for Appellee. **ON BRIEF:** Anthony F. Shelley, Timothy P. O'Toole, Michael N. Khalil, MILLER & CHEVALIER CHARTERED, Washington, D.C., for Appellants. John A. Menke, C. Wayne Owen, Jr., Craig T. Fessenden, Erin C. Kim, Elisabeth B. Fry, PENSION BENEFIT GUARANTY CORPORATION, Washington, D.C., for Appellee.

OPINION

SILER, Circuit Judge. Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") creates an insurance program to protect employees' pension benefits. The Pension Benefit Guaranty Corporation ("PBGC")—a wholly-owned corporation of the United States government—is charged with administering the pension-insurance program.

In this case, PBGC terminated the "Salaried Plan," a defined-benefit plan sponsored by Delphi Corporation. The termination was executed through an agreement between PBGC and Delphi pursuant to 29 U.S.C. § 1342(c). The appellants—retirees affected by termination of the Salaried Plan—bring several challenges to the termination. First, the retirees argue that section 1342(c) requires a judicial adjudication before a pension plan may be terminated. Second, the retirees contend that termination of the plan violated their due process rights. Third, the retirees assert that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious.

But the retirees' arguments do not require reversal. First, subsection 1342(c) permits termination of distressed pension plans by agreement between PBGC and the plan administrator without court adjudication. Second, the retirees have not demonstrated that they have a property interest in the full amount of their vested, but unfunded, pension benefits. Third, PBGC's decision to terminate the Salaried Plan was not arbitrary and capricious. We affirm.

I.

Delphi Corporation—an automotive parts supplier and former subsidiary of General Motors Corporation ("GM")—was plan administrator and contributing sponsor of several defined-benefit pension plans. The plan at issue here, the Salaried Plan, covered approximately 20,000 members of Delphi's salaried, non-unionized workforce, including appellants Dennis Black, Charles Cunningham, and Kenneth Hollis ("retirees").

In 2005, Delphi filed a voluntary petition for Chapter 11 bankruptcy. As a result, Delphi stopped paying the required contributions to its pension plans, including the Salaried Plan.

In 2008, Delphi's first Plan of Reorganization ("2008 POR") provided that all Delphi sponsored pension plans would be frozen but would continue to be reorganized under Delphi. But the 2008 POR failed when Delphi's post-emergence investors refused to fund their investment agreement with Delphi.

As a result, Delphi asked GM to assume the liabilities of the Salaried Plan. It appears that PBGC was initially in favor of this arrangement.

Even so, GM was facing financial struggles of its own as a result of the financial crisis of 2008. An "Auto Taskforce" was appointed to oversee efforts to support and stabilize the auto industry and an "Auto Team" was created by the United States Department of Treasury to evaluate the restructuring plans of automotive companies and to negotiate the terms of any further assistance. *See* Christy L. Romero, *Treasury's Role in the Decision for GM to Provide Pension Payments to Delphi Employees* 3 (Aug. 15, 2013) (hereinafter "SIGTARP Report"), https://www.sigtarp.gov/Audit%20Reports/SIGTARP_Delphi_Report.pdf. In 2009, Treasury's Auto Team agreed to give GM $30.1 billion in Troubled Asset Relief Program ("TARP") funds conditioned on GM's completing a 40-day, "quick-rinse" bankruptcy. *Id.* at 35.

Eventually, an agreement was made to save the pension plan of the hourly, unionized Delphi employees ("Hourly Plan") but terminate the Salaried Plan. Pursuant to this agreement, GM would assume the Hourly Plan pension liabilities and PBGC would terminate the Salaried Plan and release any remaining liens and claims on Delphi's assets.

In June 2009, Delphi moved to modify its First Amended Plan of Reorganization to reflect the agreement to save the Hourly Plan and terminate the Salaried Plan. *In re Delphi Corp.,* No. 05-44481, Dkt. No. 17030 (Bankr. S.D.N.Y. June 1, 2009). The retirees filed an objection to Delphi's Modified Plan in the bankruptcy proceedings. *Id.* at Dkt. No. 18277 (Bankr. S.D.N.Y. July 15, 2009).

Then, on July 22, 2009, PBGC issued a Notice of Determination to Delphi, notifying Delphi that it had determined that the Salaried Plan must be terminated and that PBGC should be appointed as statutory trustee of the plan. PBGC issued a press release to notify plan participants of its decision. Pension Benefit Guaranty Corporation, *PBGC to Assume Delphi Pension Plans* (July 22, 2009), https://www.pbgc.gov/news/press/releases/pr09-48. That same day, PBGC initiated an action in district court to adjudicate termination of the Salaried Plan. *See Pension Benefit Guar. Corp. v. Delphi Corp.,* No 2:09-cv-12876 (E.D. Mich. filed July 22, 2009).

On July 29, 2009, the retirees argued in support of their objection to the proposed modifications to the First Amended Plan of Reorganization. *See In re Delphi Corp.,* No. 05-44481, Dkt. Nos. 18668, 18707 (Bankr. S.D.N.Y. July 30, 2009).

On July 30, 2009, the bankruptcy court overruled the retirees' objections and confirmed Delphi's Modified Chapter 11 Plan. *In re Delphi Corp.,* No. 05-44481, 2009 WL 2482146 at Dkt. No. 1 (Bankr. S.D.N.Y. July 30, 2009).

On August 6, 2009, the retirees sought PBGC's consent to intervene in the termination proceedings in district court. On August 7, 2009, PBGC voluntarily dismissed the termination suit in district court. Then, on August 10, 2009, PBGC and Delphi executed a termination and trusteeship agreement that terminated the Salaried Plan effective July 31, 2009.

Subsequently, in September 2009, the retirees filed this lawsuit. After protracted litigation, the district court granted summary judgment in favor of PBGC. This appeal followed.

II.

We review a district court's grant of summary judgment de novo, "applying the same standards as the district court." *Morehouse v. Steak N Shake,* 938 F.3d 814, 818 (6th Cir. 2019) (quoting *F.T.C. v. E.M.A. Nationwide, Inc.,* 767 F.3d 611, 629 (6th Cir. 2014)). "Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotations omitted); *see also* Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Generally, we review the evidence in the light most favorable to the nonmoving party. *Morehouse,* 938 F.3d at 818. But, "[w]here, as here, the parties filed cross-motions for summary judgment, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *EMW Women's Surgical Ctr., P.S.C. v. Beshear,* 920 F.3d 421, 425 (6th Cir. 2019) (internal quotations omitted).

III.

The retirees contend that 29 U.S.C. § 1342(c) requires a judicial adjudication prior to termination of a distressed pension plan. They also argue that their due process rights were violated and that PBGC's decision was arbitrary and capricious. We begin with interpretation of section 1342.

A.

Interpretation of 29 U.S.C. § 1342. Section 1342 outlines the procedure for institution of proceedings by PBGC to terminate a distressed pension plan. After reviewing the statutory text comprehensively and applying relevant canons of statutory interpretation, we conclude that subsection 1342(c)(1) provides two alternative mechanisms for terminating a distressed pension plan: (1) by application to a United States district court for a decree that the plan must be terminated, or (2) by agreement between PBGC and the plan administrator.

Here, the parties dispute the appropriate statutory procedure for termination of a pension plan by PBGC. The retirees contend that subsection 1342(c) requires that PBGC obtain a judicial decree before terminating a distressed pension plan. But PBGC correctly argues that the statutory scheme provides two procedural alternatives for terminating a distressed pension plan, including by agreement between PBGC and the plan administrator.

To resolve this dispute, we begin by examining the statutory text. "We endeavor to 'read statutes . . . with an eye to their straightforward and commonsense meanings.'" *Bates v. Dura Auto. Sys., Inc.,* 625 F.3d 283, 285 (6th Cir. 2010) (quoting *Henry Ford Health Sys. v. Shalala,* 233 F.3d 907, 910 (6th Cir. 2000)). And we give "terms the ordinary meaning that they carried when the statute was enacted." *Norfolk S. Ry. v. Perez,* 778 F.3d 507, 512 (6th Cir. 2015). The Supreme Court has called on "judicial interpreter[s] to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Hueso v. Barnhart,* 948 F.3d 324, 333 (6th Cir. 2020) (quoting Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at p. 167 (2012) and citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.,* 137 S. Ct. 1002, 1010 (2017)). Lastly, before deferring to an administrative agency's statutory interpretation, courts "must first exhaust the 'traditional tools' of statutory interpretation and 'reject administrative constructions' that are contrary to the clear meaning of the statute." *Arangure v. Whitaker,* 911 F.3d 333, 336 (6th Cir. 2018) (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984)).

Section 1342 has several subsections. Subsection 1342(a) says that PBGC "may institute proceedings under this section to terminate a plan" when PBGC determines that certain specified criteria are met. 29 U.S.C. § 1342(a). But the statute does not specify what type of "proceedings" may be initiated to terminate a pension plan. At the time the statute was written, "proceeding" could have had several meanings, including: "action or course of action[,] . . . a particular course of action . . . [or a] legal action." Proceeding, *Webster's New Twentieth Century Dictionary of the English Language* 1434 (2d ed. 1979). Thus, proceedings are not necessarily limited to a judicial adjudication, but may also contemplate an administrative proceeding or some other course of action.

Subsection 1342(b) provides for appointment of a trustee after initiation of termination proceedings. Subsection (b)(1) authorizes PBGC to apply to the United States district court for appointment of a trustee to administer the plan "pending the issuance of a decree under subsection (c) ordering the termination of the plan." 29 U.S.C. § 1342(b)(1). Even so, subsection (b)(3) allows PBGC and the plan administrator to agree "to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs [(b)](1) and [(b)](2)." *Id.* § 1342(b)(3).

Subsection 1342(c) is the primary subsection at issue here. The title of the subsection, "[a]djudication that plan must be terminated," may lend some support to the retirees' assertion that an adjudication must occur before a pension plan is terminated. *Id.* § 1342(c). Still, while subsection titles "are of use [ ] when they shed light on some ambiguous word or phrase . . . they cannot undo or limit what the text makes plain." *Brotherhood of Ry. Trainmen v. Baltimore & Ohio Ry.*, 331 U.S. 519, 529 (1947). Thus, we look to the subsection's substantive text.

The first sentence of subsection 1342(c)(1) says that when PBGC commences proceedings under subsection (a) "it *may* . . . apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated . . . ." 29 U.S.C. § 1342(c)(1) (emphasis added). Similarly, the second sentence states, "If the trustee appointed under subsection (b) disagrees with the determination of the corporation under the preceding sentence he *may* intervene in the proceeding relating to the application for the decree, or make application for such decree himself." *Id.* (emphasis added).

Next, the third sentence says:

> Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and

> authorize him) to terminate the plan in accordance with the provisions of this subtitle.

Id. This sentence simply states that *if* a judicial decree is granted that "the court shall authorize the trustee . . . to terminate the plan in accordance with the provisions of this subtitle." *Id.*

Now, we turn to the main sentence in dispute. In its entirety, the fourth sentence of subsection (c)(1) says:

> If the corporation 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).

Id. The fourth sentence presents a conditional if-then proposition. If the first two conditions are met—"the [PBGC] and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee"—then "the trustee shall have the power described in subsection (d)(1) and . . . is subject to the duties described in subsection (d)(3)." *Id.*

But the proper interpretation of part of the second clause of the fourth sentence—"without proceeding in accordance with the requirements of this subsection (other than this sentence)"—is in dispute.

The retirees read the language to mean that PBGC and the administrator may *only agree to appoint a trustee* without proceeding in accordance with the requirements of subsection (c)(1). In other words, the only requirements of subsection (c) that are waived are those that deal with appointment of a trustee. Thus, the retirees' position is that the fourth sentence of subsection (c)(1) only provides an additional method of appointing a trustee after a judicial decree is entered but does not eliminate the requirement for an adjudication.

Alternatively, PBGC interprets the disputed text to say that *if* the parties agree to terminate the plan *and* agree to the appointment of a trustee, *then* without proceeding in accordance with the requirements of the subsection, including the requirement of court adjudication, the trustee shall have the authority described in subsection (d). Put differently, an agreement between PBGC and the administrator that a plan should be terminated and to appoint a trustee obviates all other requirements found in subsection (c), including any requirement for an adjudication. Under this interpretation, PBGC and a plan administrator may agree to appoint a trustee to terminate a distressed plan without a judicial decree.

To resolve the dispute, we first look to the plain text of the relevant subsection. The repeated use of the permissive verb "may" in subsection (c)(1)—as opposed to mandatory words like shall[1] or must—

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[1] Of course, depending on usage, "shall" may have several permissible meanings. *See* Scalia & Garner, *supra*, § 11, at pp. 112-15. Still, "when the word shall can reasonably be read as mandatory, it ought to be so read." *Id.* at 114.

indicates that a trustee appointed under subsection (b) is permitted, but not required, to intervene in a proceeding relating to the application for a decree or to initiate a proceeding if one has not been initiated. *See* Scalia & Garner, *supra,* § 11, at p. 112 ("Mandatory words impose a duty; permissive words grant discretion."). Subsection (c)(1) uses no mandatory language that explicitly requires adjudication by a court. As a result, the plain text of subsection (c)(1) permits—but does not require—court adjudication before termination of a distressed pension plan.

Next, we consider relevant canons of statutory interpretation. PBGC argues that the retirees' interpretation violates the canon against surplusage because it renders subsection 1342(b)(3) meaningless. *See* Scalia & Garner, *supra,* at § 26, p. 174. Subsection (b)(3) authorizes PBGC and the plan administrator to appoint a trustee without proceeding with the requirements of subsections (b)(1) or (b)(2). While the retirees' interpretation of subsection (c)(1) does not necessarily render subsection (b)(3) superfluous, it does expose a flaw in their interpretation.

The retirees argue that sentence 4 of subsection (c)(1) is distinct from subsection (b)(3). As the retirees read the statute, sentence 4 of subsection (c)(1) addresses a unique circumstance where the trustee alone has sought to execute termination and PBGC has not sought a decree under sentence 1 of subsection (c)(1). Thus, as the retirees read sentence 4 of subsection (c)(1), it is only operative if the trustee alone seeks termination under sentence 2 of subsection (c)(1) and the court issues a decree to terminate the plan under sentence 3 of subsection (c)(1). If that happens and the conditions of the if-then clause are met, then the trustee has the powers outlined in subsection (d)(1) and is subject to the duties in (d)(3). In other words, the retirees posit that subsection (b)(3) allows PBGC and the administrator to agree on the appointment of a trustee during the period right after the initiation of termination proceedings under subsection (a) but *before a decree for termination is entered.*

The problem with the retirees' argument, however, is that the plain language of sentence 4 is not limited to a situation in which the PBGC and administrator agree to the appointment of a trustee during the period after initiation of termination proceedings but before a decree for termination is entered. Instead, sentence 4 allows the parties to proceed without complying with the requirements in all other sentences of subsection (c)(1) unequivocally. Thus, by its own language, sentence 4 allows the parties to terminate a plan without a court adjudication so long as the parties agree that a plan should be terminated and agree to appointment of a trustee.

Moreover, we consider the statutory language comprehensively and in context. Under the retirees' interpretation, the second condition of the fourth sentence's if-then proposition is that PBGC and the administrator must "agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection." 29 U.S.C. § 1342(c)(1). But that is illogical because subsection (c) only mentions appointment of a trustee once; providing for appointment of a trustee by the court if a trustee was not previously appointed under subsection (b). *See id.* And subsection (b) primarily provides the procedures for appointment of a trustee under the statute, not subsection (c). Thus, it is unclear how the parties can "agree to the appointment of a trustee without proceeding in accordance with the requirements of [subsection (c)]," when subsection (c) contains no requirements dealing with the appointment of a trustee, except for a passing phrase allowing the court to appoint a trustee if one has not already been appointed under subsection (b).

Lastly, our interpretation is also supported by persuasive authority from other circuits. In *Jones & Laughlin Hourly Pension Plan v. LTV Corporation,* the United States Court of Appeals for the Second Circuit held that "[t]he fourth sentence of subsection 1342(c) provides that where, as here, PBGC and the plan administrator agree to terminate a plan, PBGC need not comply with the other requirements of 'this subsection.'" 824 F.2d 197, 200 (2d Cir. 1987). "Congress, therefore, expressly dispensed with the necessity of a court adjudication in these cases." *Id.* Thus, the Second Circuit has held that Congress expressly dispensed with the necessity of a court adjudication where the PBGC and plan administrator agree to terminate a plan.

The retirees' contention that *Jones & Laughlin* conflicts with a Seventh Circuit decision, *In re UAL Corporation,* 468 F.3d 444 (7th Cir. 2006), is unavailing. The Seventh Circuit stated that "[n]othing in 29 U.S.C. § 1342(c), which describes the judicial function after the PBGC files an action seeking termination, suggests that the court must defer to the agency's view." *Id.* at 450. But *Jones & Laughlin* and *In re UAL Corporation* addressed two distinct legal issues. In *Jones & Laughlin,* the Second Circuit addressed whether subsection 1342(c) authorized termination of a pension plan by agreement between PBGC and the plan administrator. 824 F.2d at 200. In contrast, in *In re UAL Corporation,* the Seventh Circuit considered the appropriate standard of review in a suit where a plan administrator disagrees with the termination and PBGC seeks a court order to terminate a plan. *See* 468 F.3d at 447-50. Thus, to the extent that the Seventh Circuit made pronouncements in *In re UAL Corporation* that support the retirees' interpretation, those pronouncements would constitute dicta because the court did not rest its ultimate judgment on interpretation of 29 U.S.C. § 1342(c). *See Wright v. Spaulding,* 939 F.3d 695, 700-02 (6th Cir. 2019) (discussing principles to determine if a court's discussion constitutes a holding); *see also United States v. Swanson,* 341 F.3d 524, 530 (6th Cir. 2003) (explaining that, generally, dictum is anything "not necessary to the determination of the issue on appeal").

Even so, the retirees also argue that *Jones & Laughlin* is unpersuasive because it utilized outdated notions of statutory interpretation and relied on an obsolete understanding of deference to administrative agencies' statutory interpretations.

First, the retirees' assertion that *Jones & Laughlin* should not be followed because the Second Circuit impermissibly added words to subsection 1342(c) is unconvincing. The *Jones & Laughlin* court did not add any words to the statute when interpreting the relevant provision in subsection 1342(c)(1).[2]

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[2] After determining that subsection 1342(c) dispensed with the necessity of court adjudication, the *Jones & Laughlin* court said,

The retirees' second argument—that the *Jones & Laughlin* court impermissibly relied on outdated notions of the deference owed to federal agencies—is more persuasive but still misses the mark. The Second Circuit based its interpretation on "the deference owed to the PBGC as [a] federal agency" and the court's own interpretation of the statutory language. *See* 824 F.2d at 200 n.3. Thus, the Second Circuit's statutory *interpretation* is still entitled to consideration as persuasive authority for this court even if notions of deference to administrative agency interpretations have changed since *Jones & Laughlin* was decided.

Lastly, decisions in several federal circuits, including a published opinion in this circuit, have acknowledged terminations of distressed pension plans by agreement between PBGC and the plan administrator pursuant to 29 U.S.C. § 1342(c)(1). *See Pension Benefit Guar. Corp. v. Alloytek, Inc.*, 924 F.2d 620, 624 (6th Cir. 1991) (citing 29 U.S.C. § 1342(c)(1) and acknowledging that "the parties agreed to a consent order which incorporated their agreement and terminated the Plan, established a termination date and provided for the appointment of a trustee"); *see also, e.g., Allied Pilots Ass'n v. Pension Benefit*

"The remainder of the fourth sentence of subsection 1342(c) supports this interpretation. It grants to the trustee (PBGC) 'without proceeding in accordance with the requirements of this . . . the power described in subsection (d)(1) of this section and [subjects the trustee] . . . to the duties described in subsection (d)(3).'" 824 F.2d at 200 (citing 29 U.S.C. § 1342) (alterations in original). Thus, the addition with which the retirees take issue appears to have had no effect on the court's interpretation of whether subsection 1342(c) authorizes termination by agreement without court adjudication.

Guar. Corp., 334 F.3d 93, 97 (D.C. Cir. 2003) (recognizing that PBGC may seek termination through district court enforcement or voluntary settlement); *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983) ("Despite the so-called involuntary nature of a section 1342 proceeding, PBGC and the plan administrator can still agree to terminate the plan and appoint a trustee without resort to the court."). Of course, these decisions did not directly consider the proper interpretation of subsection 1342(c). Still, they provide strong persuasive authority that several circuits, including our own, have at least recognized a procedure where distressed pension plans may be terminated by agreement under subsection 1342(c) without court adjudication. Moreover, the retirees have not cited, nor are we aware of, any federal authority accepting their proposed interpretation, that termination of a distressed pension plan must be accomplished through court adjudication.

In sum, the most appropriate interpretation of subsection 1342(c)(1) is that it provides two alternative mechanisms for terminating a distressed pension plan. First, the subsection uses permissive language when discussing an in-court adjudication before terminating a pension plan. Second, subsection (c)(1) is not limited to a situation after initiation of termination proceedings under subsection (a) but before a decree for termination is entered. Third, the retirees' interpretation—that if the parties agree that a plan should be terminated they may appoint a trustee without proceeding in accordance with the requirements of subsection (c)(1)—is illogical because the only provision of subsection (c)(1) that deals with the appointment of a trustee is one that allows for appointment of a trustee by the court if one was not appointed pursuant to the requirements of subsection (b). Lastly, the only circuit to directly interpret the statutory language at issue here reached the same conclusion, and the weight of federal authority acknowledges a procedure where PBGC and the plan administrator may terminate a pension plan by agreement without resort to the courts. As a result, we hold that 29 U.S.C. § 1342(c)(1) allows a plan administrator and the PBGC to terminate a distressed pension plan by agreement, without court adjudication.

B.

Procedural Due Process. The retirees also claim that their due process rights were violated because they were not afforded a hearing prior to plan termination. We conclude, however, that the retirees do not have a property interest in the full amount of their vested pension benefits because the Salaried Plan document provides that only *funded* benefits at the time of plan termination are nonforfeitable. And, since the retirees do not have a protected property interest in the full amount of their vested, but unfunded, pension benefits, no due process violation has occurred.

The due process analysis requires two inquiries. *Leary v. Daeschner,* 228 F.3d 729, 741 (6th Cir. 2000). First, we determine whether the retirees have a protected property interest in their vested—but unfunded—pension benefits. *Id.* Second, if they do, then we consider whether PBGC's termination of the Salaried Plan resulted in a deprivation of property without adequate procedural safeguards. *Id.* at 742.

To have a property interest in their vested pension benefits, the retirees "clearly must have more than an abstract need or desire for [them] . . . more than a unilateral expectation of [them] . . . instead, [they] must instead have a legitimate claim of entitlement to [them]." *See Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972). Still, "[p]roperty interests . . . are not created by the Constitution." *Id.* "Rather [property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

Thus, to determine if the retirees have a legitimate claim of entitlement to the entire amount of their vested pension benefits, we must look to the source that creates the purported property interest. Here, the source of the purported property interest is a private contract between the retirees and Delphi. The Salaried Plan document provides that, in the event of plan termination, the "right of all affected employees to benefits accrued to the date of such termination . . . to the extent funded as of such date, is nonforfeitable." In other words, the document provides that *funded* benefits accrued up to the date of plan termination are nonforfeitable.

What about unfunded benefits? The source of the purported property interest—the Salaried Plan document—contains a provision that provides that benefits that are *funded* at the time of plan termination are nonforfeitable. By necessary implication, unfunded benefits, regardless of whether they are vested, are forfeitable if a plan is terminated. As a result, the retirees do not have a legitimate entitlement to their vested pension benefits that were unfunded at the time of plan termination based on the plain language in the Salaried Plan document.

The retirees' arguments to the contrary are unavailing. First, the retirees contend that this court's decision in *Duncan v. Muzyn,* 833 F.3d 567 (6th Cir. 2016), stands for the proposition that "whether a benefit is constitutionally protected" turns on "whether it has vested." In *Duncan,* we addressed whether the Tennessee Valley Authority Retirement System ("TVARS") board violated the Takings Clause when it eliminated cost-of-living adjustments for TVARS-managed pension plans. 833 F.3d at 570. We concluded that while "plaintiffs' claim [was] framed as a Takings claim, the analysis borrow[ed] principles from the Contract Clause context." *Id.* at 583. Additionally, we recognized that "[w]here a public contract is alleged to have been created by statute, however, a plaintiff may prove a contractual relationship only by showing that the legislature has unmistakably intended to create a binding contract right." *Id.* at 583-84. As a result, we held that the plaintiffs were not deprived of a property right because the COLAs were not vested, and the plaintiffs had failed to show that TVARS unmistakably intended to create a binding contract right. *Id.* at 584.

Contrary to the retirees' assertion, *Duncan* is not controlling here. First, *Duncan* did not explicitly hold that plan beneficiaries always have a property interest in vested pension benefits. *See id.* at 583-84. *Duncan* addressed different legal issues than those raised in this case. And the purported property interest in this case arises from a private contract, not a public contract. *See id.* As such, the retirees' reliance on *Duncan* is misplaced.

Second, the retirees argue that PBGC's interpretation of the Salaried Plan document provision above would violate ERISA's anti-cutback rule. The anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title." 29 U.S.C. § 1054(g)(1). But here, there was a termination of the Salaried Plan, not an amendment. For this reason, it does not appear that the Salaried Plan document provision, which deals only with termination, violates the anti-cutback rule.

Third, the retirees contend that "whether the Retirees have a protected property interest in the full measure of their vested pension benefits cannot turn on the assumed legality of the challenged action (here, the Plan's termination)." But that argument conflates two distinct issues. The retirees contend that the termination of the plan by agreement between the PBGC and plan administrator was illegal because it did not comport with the requirements of 29 U.S.C. § 1342(c). Of course, if the retirees are correct, the action taken by PBGC was illegal and we need not reach the question of whether the retirees have a property interest in the entirety of their vested benefits.

But, if the plan termination by agreement was legal, the relevant question here asks whether, based on the provision in the Salaried Plan document, the retirees have a legitimate claim of entitlement to the entire amount of their vested benefits, no matter how the plan was terminated. The answer to that question is no because the retirees only have a legitimate claim of entitlement to their *funded* benefits at the time of termination pursuant to the Salaried Plan document.

Thus, the second question, whether the retirees have a property interest in the entire amount of their vested pension benefits is considered only if the first question, whether PBGC legally terminated the Salaried Plan, is answered in the affirmative.

In sum, the Salaried Plan document—the source of the retirees' purported property interest—provides that only accrued benefits that are funded as of the date of termination are nonforfeitable. For this reason, the retirees only have a legitimate claim of entitlement to accrued benefits funded at the date of termination. Thus, we hold that the retirees do not have a property interest in the entire amount of their vested, but unfunded, pension benefits because the private contract creating entitlement to those benefits provides that unfunded benefits at the time of plan termination are forfeitable.

C.

Arbitrary and Capricious. The retirees have not demonstrated that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious. The retirees cite evidence to support their position that the plan was not sufficiently underfunded, that GM was willing to consider assuming the Salaried Plan, and that PBGC failed to push back against the Auto Taskforce. Still, there is sufficient countervailing evidence to support PBGC's decision to terminate the Salaried Plan under the criteria found in 29 U.S.C. § 1342(a).

PBGC's final determination is entitled to deference and "will be upheld unless it is shown to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Pension Benefit Guar. Corp. v. Ky. Bancshares, Inc.,* 597 F.

App'x 841, 842-43 (6th Cir. 2015) (quoting 5 U.S.C. § 706(2)(A) and citing *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633 (1990)). PBGC's decision will be upheld unless we find that the decision:

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). As a reviewing court, we are not at liberty to substitute our judgment for the judgment of the agency. *Motor Vehicle Mfrs. Ass'n.,* 463 U.S. at 43.

Congress authorized PBGC to initiate termination proceedings when it determines that:

> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26, (2) the plan will be unable to pay benefits when due, (3) the reportable event described in section 1343(c)(7) of this title has occurred, or (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a). And ERISA states three objectives that PBGC must carry out:

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

Id. § 1302(a).

The retirees advance several arguments in support of their contention that PBGC's decision to terminate the Salaried Plan was arbitrary and capricious.

First, the retirees contend that GM was willing to consider reassuming the Salaried Plan during its negotiations with the government. And, they argue that PBGC believed that assumption of the Salaried Plan by GM was a viable option until PBGC folded under pressure by the Treasury Department.

But, even when viewing the evidence in the light most favorable to the retirees and drawing all reasonable inferences in their favor, there is ample countervailing evidence to demonstrate that GM was unwilling to assume the Salaried Plan's liabilities. Even if GM was *willing to consider* assuming the Salaried Plan, and even if PBGC was initially in favor of GM's assumption of the plan, GM never demonstrated an *affirmative willingness* to assume the Salaried Plan. No doubt, GM considered assuming the Salaried Plan as part of the broader negotiations between GM and the government. And PBGC initially listed assumption of the Salaried Plan by GM as an alternative to plan termination. But the retirees acknowledge that GM refused to assume the Salaried Plan and there is no evidence demonstrating that GM's assumption of the plan was a viable alternative to termination. Thus, PBGC's action cannot be found to be arbitrary and capricious based on its failure to convince GM to assume the Salaried Plan when GM never expressed more than willingness to consider accepting the plan's liabilities.

Moreover, the retirees' main contention seems to be that PBGC should have exerted more pressure on the Treasury Department to ensure that GM would assume the Salaried Plan. But that argument is flawed for several reasons.

First, the retirees' main grievance on this point seems to be with Treasury's decision not to bail out the Salaried Plan. And, as PBGC notes, the district court dismissed the claims against the Treasury defendants early in the litigation and the retirees chose not to appeal that dismissal. Still, on this point, it appears that the retirees' main complaint is that Treasury should have bailed out the Salaried Plan, not that PBGC's decision to terminate that plan was arbitrary and capricious. Ultimately, PBGC's action cannot be found to be arbitrary and capricious because of a failure of the Treasury Department.

Second, PBGC's decision making process cannot be viewed in a vacuum. The retirees argue that PBGC's failure to exert pressure on Treasury indicates that the decision to terminate that Salaried Plan was arbitrary and capricious. But there were many competing interests that PBGC had to weigh in deciding to terminate the Salaried Plan. Plus, that decision was made in the context of the government's urgent attempt to save GM and the automotive industry. PBGC was forced to consider other Delphi pension plans, including the Hourly Plan, which was assumed by GM. Additionally, PBGC had to consider that a delayed termination decision might affect the GM negotiations and could endanger PBGC's ability to recover funds from statutory liens that had been put into place. Even if PBGC failed to exert pressure on Treasury to bailout the Salaried Plan, that cannot make their decision to terminate the Salaried Plan arbitrary and capricious under the circumstances.

Third, there was sufficient evidence to justify termination of the Salaried Plan. The retirees contend that evidence demonstrated the Salaried Plan's funding level was 85.62%. But, even if that was true, PBGC points out that percentage of underfunding is not a factor to be considered under 29 U.S.C. § 1342(a). Plus, countervailing evidence demonstrates that the Salaried Plan was severely underfunded. For instance, the record indicates that the Salaried Plan was only funded 46.1% on a termination basis. And, even if the Salaried Plan was not underfunded, it is undisputed that Delphi had missed minimum funding contributions, which justified plan termination under § 1342(a)(1). As a result, subsection 1342(a)'s criteria for termination were satisfied, justifying PBGC's decision to terminate the Salaried Plan.

Lastly, the retirees note that between 2005 and 2009, PBGC worked with thirteen auto-parts suppliers that emerged from bankruptcy without terminating the pension plans sponsored by those companies. They say that lends support to their arbitrary and capricious theory. Not so. First, the evidence demonstrates that PBGC explored alternatives to plan termination and participated in Delphi's bankruptcy negotiations for years before making its final decision to terminate the Salaried Plan. Second, the fact that PBGC negotiated with other companies to save their pension plans from termination is not evidence that the decision it made in this instance was arbitrary and capricious.

At bottom, it is inappropriate for this court to play armchair administrative agency with the benefit of hindsight. Even if we would have reached a different conclusion in the first instance, PBGC's decision to terminate the Salaried Plan was supported by sufficient evidence. Therefore, we hold that PBGC's action was not arbitrary and capricious.

IV.

In sum, the retirees have not raised any argument warranting reversal. First, 29 U.S.C. § 1342(c)(1) provides two mechanisms for termination of a distressed pension plan—including termination by agreement between a plan administrator and the PBGC. Second, the retirees do not have a property interest in their vested, but unfunded, pension benefits because the private contract creating those benefits provides that only funded benefits at the time of termination are nonforfeitable. Third, PBGC's decision to terminate the Salaried Plan was not arbitrary and capricious because there is ample evidence to support PBGC's decision. As a result, the district court's judgment is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, ET AL., Plaintiffs, v. PENSION BENEFIT GUARAN[Y] CORP., Defendant. /	Case No. 09-13616 [**FILED** MAR. 22, 2019] SENIOR U.S. DISTRICT JUDGE ARTHUR J. TARNOW U.S. MAGISTRATE JUDGE MONA K. MAJZOUB

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [305, 308]; AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [304]

Plaintiffs, beneficiaries of Delphi Corporation's Retirement Program for Salaried Employees ("Salaried Plan"), commenced this ERISA action on September 14, 2009 after Defendant Pension Benefit Guarantee Corporation ("PBGC") and Delphi entered into an agreement to terminate the Salaried Plan.

Before the Court are the parties' cross-motions for summary judgment filed on September 21, 2018. For the reasons explained below, the Court DENIES Plaintiffs' Motion for Summary Judgment [305, 308] and GRANTS Defendant's Motion for Summary Judgment [304].

FACTUAL BACKGROUND

I. Delphi Pension Plans

Delphi Corporation ("Delphi"), formerly one of the world's largest automotive parts' suppliers, was originally established as an integrated division of General Motors ("GM"). In 1999, Delphi spun off of GM and was re-established as an independent company. *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 487 (E.D. Mich. 2008).

Delphi had two defined-benefit pension plans: the Retirement Program for Salaried Employees ("Salaried Plan"); and the Hourly-Rate Employees Pension Plan ("Hourly Plan"). The Salaried Plan covered Delphi's non-unionized workforce, while the Hourly Plan covered its unionized workforce.[1] The Salaried Plan—the subject of this litigation—had over 20,000 participants, including Plaintiffs Dennis Black, Chuck Cunningham, and Ken Hollis.

II. PBGC

The PBGC is the agency responsible for administering pension insurance pursuant to Title IV of ERISA. "Before ERISA, lack of oversight and legal standards often left pension plans without enough money, and employees who counted on those funds with nothing for retirement." *Pension Benefit Guar. Corp. v. Findlay Indus., Inc., et al.*, 902 F.3d 597, 601

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[1] At the time of the spin-off, unionized employees, represented primarily by the United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), entered into an agreement with GM according to which GM agreed to "top-up" or increase benefit levels in the event that Delphi was unable to fund its pensions. No similar agreement was entered into on behalf of the Salaried Plan employees.

(6th Cir. 2018) (internal citations omitted). In an effort to solve this problem, Congress established the PBGC to provide insurance for workers promised a defined pension benefit in the event that the sponsor terminated the retirement plan. *Nachman Corp. v. Pension Ben. Guar. Corp.,* 446 U.S. 359, 375 (1980). The very purpose of the PBGC is to ensure that retirees receive their benefits notwithstanding their former employers' financial turmoil.

III. Delphi Bankruptcy

In the years after its spin-off from GM, Delphi struggled to maintain financial independence. In October 2005, Delphi was forced to file for Chapter 11 bankruptcy. *In re Delphi Corp.,* 05-44481 (S.D.N.Y. Oct. 8, 2005) ("Delphi Bankruptcy Action").

PBGC was actively involved in Delphi's bankruptcy proceedings to try to mitigate risk to the insurance program. Early on in the bankruptcy, Delphi remained committed to funding the pension plans. With the state of the economy in 2008, however, upholding this commitment no longer seemed realistic for Delphi. By 2009, after Delphi's first reorganization plan had failed, there appeared to be only two options with respect to the pension plans given their untenable costs to Delphi: either GM would absorb Delphi's pension liabilities; or PBGC would terminate the plans. Both PBGC and Delphi advocated for GM assumption.

IV. GM Bankruptcy

In February 2009, President Obama established an Auto Task Force responsible for restructuring GM. The Auto Task Force and Treasury had "significant leverage and influence on GM's decisions . . . ." SPECIAL INSPECTOR GENERAL FOR THE TROUBLED

ASSET RELIEF PROGRAM, TREASURY'S ROLE IN THE DECISION FOR GM TO PROVIDE PENSION PAYMENTS TO DELPHI EMPLOYEES 3 (Aug. 15, 2013) ("SIGTARP Report"). The Auto Task Force worked "independent of GM to prepare for a GM bankruptcy." *Id.*

In April 2009, the Auto Task Force raised the prospect of an expedited GM bankruptcy. Ultimately, the Treasury agreed to give $30 million in Trouble Asset Relief Program ("TARP") funds to GM, conditioned on a 40-day "quick-rinse bankruptcy." The Auto Task Force believed that this was "the best way to save the American automobile industry, concerned that GM could not survive a lengthy bankruptcy and GM's failure would have broader systemic consequences." *Id.* at 27.

The bankruptcy process allowed New GM to "cherry-pick" the liabilities that a "commercial buyer would want and New GM would need." *Id.* at 28. GM knew that it needed the UAW on board with any bankruptcy plan it would adopt, given that the UAW represented 99% of its unionized workforce and could stop production with a strike. In late May 2009, GM's CEO met with the UAW President and the Auto Task Force to negotiate New GM's assumption of liabilities. The parties reached a collective bargaining agreement which included GM's assumption of the liabilities to top-up the Hourly Plan pensions. *Id.* at 33.

On June 1, 2009, GM filed for bankruptcy. As part of the bankruptcy proceedings, GM sold all of its assets to New GM, an entity formed on July 10, 2009.

V. Negotiations Between Delphi, GM, PBGC, and the Treasury

Although Delphi and PBGC worked together to avoid termination of the pension plans, eventually, Delphi proved incapable of sustaining the financial burdens of plan continuance. On April 21, 2009, PBGC's Trusteeship Working Group ("TWG") determined that both plans should be terminated in order to avoid any unreasonable increase in the liability of the insurance fund. Specifically, TWG authorized termination of the Salaried Plan under § 4042(a)(1) because the Plan had missed at least one required minimum-funding contribution. TWG further authorized termination of both the Salaried and Hourly Plans pursuant to §§ 4042(a)(2) and (a)(4)(c) and appointed PBGC as statutory trustee.

Just weeks after TWG had authorized termination of both the Salaried and Hourly Plans, PBGC and Delphi entered into a facilitated mediation with the Treasury, Auto Task Force, and GM. Through mediation, the parties came to a global resolution which included saving the Hourly Plan, but terminating the Salaried Plan. According to this proposed solution, PBGC would terminate the Salaried Plan and release its remaining liens and claims on Delphi assets in exchange for a negotiated settlement, and GM would assume the Hourly Plan.

On June 1, 2009, Delphi moved to modify its First Amended Plan of Reorganization in the Delphi Bankruptcy Action to reflect the agreement reached during mediation. With respect to the pension plan liabilities, the proposed modification provided:

> Upon consummation of the Modified Plan, the remaining assets and liabilities of Delphi's

> hourly pension plan will no longer be the responsibility of the Debtors and will be addressed by GM. The Debtors expect that the salaried pension and certain subsidiary pension plans may be involuntarily terminated by the PBGC, which will receive a negotiated settlement, including an allowed unsecured prepetition claim.

In re Delphi, Dkt. #16646 at 10.

VI. PBGC's Assumption of the Delphi Pension Plans

On July 22, 2009, PBGC publicly announced its assumption of the Delphi pension plans. The Notice of Determination ("NOD") provided, in part:

> The Pension Benefit Guaranty Corporation today announced it will assume responsibility for the pension plans of 70,000 workers and retirees of Delphi Corp., the nation's largest producer of automotive parts. The PBGC will initiate action to become trustee of the plans, a process that could last up to several months.
>
> The PBGC is stepping in to protect the Delphi pensions because the restructuring Delphi cannot afford to maintain its pension plans and General Motors has stated it will not assume them. Delphi was spun off from GM in 1999.
>
> Since Delphi entered bankruptcy protection in 2005, the PBGC has worked intensively with Delphi, GM and other stakeholders to keep the pension plans ongoing. In September 2008 GM took on approximately $2.5 billion in liabilities of the Delphi Hourly Plan, and

> until its recent restructuring in bankruptcy, GM had been expected to assume the entire obligation for the hourly plan.
>
> Delphi sponsors six defined benefit plans for its workers. The Delphi Hourly Pension Plan covers 47,000 participants and has about $3.7 billion in assets and more than $8 billion in liabilities, according to PBGC estimates. The PBGC expects to be responsible for about $4 billion of the plan's shortfall of nearly $4.4 billion.
>
> The Delphi Salaried Pension Plan covers about 20,000 workers and retirees, and has $2.4 billion in assets and liabilities of $5 billion, according to PBGC estimates. The PBGC expects to be responsible for about $2.2 billion of its estimated $2.6 billion in underfunding . . . .
>
> The PBGC will pay pension benefits up to the limits set by law . . . .

Press Release, PBGC, PBGC to Assume Delphi Pension Plans (Jul. 22, 2009), *available at* https://www.pbgc.gov/news/press/releases/pr09-48.

VII. Bankruptcy Court Approval of Delphi's Modified Plan of Reorganization

On July 30, 2009, following a hearing, the U.S. Bankruptcy Court for the Southern District of New York approved Delphi's Modified Plan of Reorganization over the objections of Plaintiffs Black and Cunningham. *In re Delphi,* Dkt. #18707. With respect to the PBGC settlement, the Court explained:

> The Debtors have demonstrated good, sufficient, and sound business purposes and

> justification for entering into the Delphi-PBGC Settlement Agreement, which was executed by Delphi and the PBGC on July 21, 2009. The PBGC Settlement Agreement was filed with the Bankruptcy Court on July 21, 2009 (Docket No. 18559).
>
> The record reflects that the Debtors would be unable to reorganize under the Modified Plan so long as the Debtors' liability under the Pension Plans covered by the Delphi-PBGC Settlement Agreement exists. The record also reflects, for purposes stated by the Court in its bench ruling at the Final Modification Hearing, that clear grounds exist under Section 4042 of ERISA, 29 U.S.C. § 1342, for the PBGC to initiate involuntary terminations of the Pension Plans, for the Debtors to enter into termination and trusteeship agreements with the PBGC, and that the PBGC has determined to seek involuntary terminations to reduce the PBGC's risk of loss of recovery relating to own exposure under the Pension Plans.
>
> The consideration provided to the Debtors under the Delphi-PBGC Settlement Agreement is fair and reasonable, and is in the best interests of the estate, in light of the potential amount of a PBGC claim arising out of plan termination and the need to obtain releases from the PBGC to effectuate the sale pursuant to this Modified Plan and under the MDA Documents.

Id. at 38-39.

The Court further explained:

> Section 4042 of ERISA, 29 U.S.C. § 1342, authorizes PBGC to seek termination of a pension plan upon making certain findings notwithstanding the provisions of a collective bargaining agreement and further permits the PBGC and the plan administrator to agree to termination of a plan without an adjudication. Section 4041(a)(3) of ERISA, 29 U.S.C. § 1341(a)(3). Upon the effectiveness of the Delphi-PBGC Settlement Agreement, all liabilities relating to unpaid contributions to the Pension Plans shall be released or discharged as set forth therein . . . .
>
> Nothing in this order prohibits employees or unions adversely affected by any plan termination from (a) seeking to intervene in any district court action filed by the PBGC under section 4042 of ERISA, 29 U.S.C. § 1342, to terminate the plans or (b) pursuing any independent action against the PBGC regarding the termination of the plan under section 4003(f) of ERISA, 29 U.S.C. § 1303(f).

Id. at 81-82.

VIII. PBGC Commences an Action in the U.S. District Court for the Eastern District of Michigan

On July 21, 2009, PBGC made the decision to terminate the Salaried Plan. Authorization for this decision, and the reasons supporting it, came from the April 21, 2009 TWG recommendation. Concurrent with its assumption of the pension plans, PBGC commenced an action in this Court pursuant to 29 U.S.C. §§ 1342 and 1348(a), "seeking an order (a) terminating the Delphi Retirement Program for Salaried Employees (the "Delphi Salaried Plan"); (b) appointing PBGC as statutory trustee of the Delphi Salaried Plan; [and] (c) establishing July 22, 2009 as the termination date of the Delphi Salaried Plan . . . ." *PBGC v. Delphi Corp.*, 09-cv-12876 (E.D. Mich. 2009).

On August 6, 2009, Plaintiffs asked PBGC for its consent to intervene in the action. But, before Plaintiffs could file their motion to intervene, PBGC filed a notice of voluntary dismissal. *Id.* at Dkt. #5. The case was closed on August 10, 2009.

IX. Salaried Plan Termination Agreement

On August 10, 2009, PBGC and Delphi executed an Agreement for Appointment of Trustee and Termination of Plan ("Termination Agreement"), effective July 31, 2009. The Termination Agreement set forth the following reasons for termination of the Salaried Plan:

> PBGC has issued to the Company a Notice of Determination under 29 U.S.C. § 1342(a)(l), (2) and (4) that the Plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code, the Plan will be unable to pay benefits when due, PBGC's possible long-run loss with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated, and that the Plan should be terminated under 29 U.S.C. § 1342(c).

Def.'s Mot. Ex. 5. The effective termination of the Salaried Plan prompted the filing of this lawsuit.

PROCEDURAL HISTORY

On September 14, 2009, Plaintiffs Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association commenced this action against PBGC alleging violations of ERISA. On November 5, 2009, Plaintiffs filed an Amended Complaint [10] naming the U.S. Treasury, the Auto Task Force, Timothy Geithner, Steven Rattner, Ron Bloom, Does 1-50 (hereinafter referred to collective as "Treasury Defendants"), and GM[2] as Defendants, and adding due process and equal protection claims.

Plaintiffs filed a Second Amended Complaint ("SAC") [145] on August 26, 2010. The SAC sets forth the following claims against PBGC: Failure to Comply with ERISA's Requirements Regarding the Adjudication of Plan Terminations (Count I); Failure to Comply with ERISA's Requirement that Any Summary Termination Agreement Be with a Plan Administrator Properly Acting in that Capacity (Count II); Violation of Due Process (Count III); and Plan Termination in Violation of ERISA (Count IV). The SAC also alleges an Equal Protection claim (Count V) against Treasury Defendants.

Treasury Defendants filed a Motion to Dismiss Count V [164]. On September 2, 2011, the Court granted the Motion. Dkt. #192. What followed was a seven-year discovery battle between Plaintiffs and remaining Defendant, PBGC.

Before the Court is PBGC's Motion for Summary Judgment [304] and Plaintiffs' Motion for Summary Judgment [305, 308], filed on September 21, 2018.

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[2] Plaintiffs voluntarily dismissed GM from this action on March 4, 2010. Dkt. #125.

The motions are fully briefed. The Court held a hearing on the motions on March 6, 2019.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A genuine issue for trial exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "[T]he standards upon which the court evaluates the motions for summary judgment do not change simply because the parties present cross-motions." *Taft Broad. Co. v. United States,* 929 F.2d 240, 248 (6th Cir. 1991).

ANALYSIS

I. 29 U.S.C. § 1342(c) does not Require Court Adjudication Prior to Termination of a Pension Plan

29 U.S.C. § 1342(a) provides that a corporation may institute proceedings to terminate a plan whenever it determines that: "(1) the plan has not met the minimum funding standard required under section 412 of Title 26, (2) the plan will be unable to pay benefits when due . . . or, (4) the possible long-run loss of the corporation with respect to the plan may

reasonably be expected to increase unreasonably if the plan is not terminated."

Section 1342(c) further provides that where a corporation is required under subsection (a) to commence proceedings, it may,

> apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund . . . .
>
> If [however] the corporation 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).

Plaintiffs argue that § 1342(c) of ERISA required PBGC to obtain a district court adjudication that termination was necessary prior to terminating the Salaried Plan via agreement with Delphi. Plaintiffs further argue that termination of the Salaried Plan was improper in light of PBGC's negotiating leverage with GM. According to Plaintiffs, PBGC could have, and should have, exercised this leverage to negotiate with GM for GM assumption of the Salaried Plan.

Plaintiffs' argument is without merit. Section 1342(c) clearly sets forth two alternative procedures for termination of a pension plan: application to the district court for a decree that the plan must be terminated; or agreement between the corporation and the plan administrator that the plan should be terminated. Nearly every circuit to have considered this issue has found the same. *See, e.g., Allied Pilots Ass'n v. Pension Ben. Guar. Corp.,* 334 F.3d 93, 97 (D.C. Cir. 2003); *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. Pension Ben. Guar. Corp.,* 991 F.2d 1415, 1418 (8th Cir. 1993); *Jones & Laughlin Hourly Pension Plan v. LTV Corp.,* 824 F.2d 197, 200 (2d Cir. 1987) (noting that Congress expressly dispensed with the necessity of a court adjudication); *In re Syntex Fabrics, Inc. Pension Plan,* 698 F.2d 199, 201 (3d Cir. 1983); *see also Pension Ben. Guar. Corp. v. Durango Georgia Paper Co.,* 251 F. App'x 664 (11th Cir. 2007).

Section 1342(c) required neither PBGC nor Delphi to seek an adjudication prior to terminating the Salaried Plan via agreement. Despite Plaintiffs' assertions concerning PBGC's leverage, the record establishes that GM assumption of the Salaried Plan was not a viable option. Whenever offered the opportunity to assume the Salaried Plan, GM repeatedly, and emphatically, declined. In fact, no company offered to sponsor the Salaried Plan. Because funding the Salaried Plan could not continue without a sponsor, PBGC had no choice but to terminate. PBGC acted in accordance with § 1342 when, after determining that the Salaried Plan had not, and could not, meet the minimum funding standard, it executed an agreement with Delphi to terminate the Salaried Plan.

II. PBGC Owed no Fiduciary Duties to Salaried Plan Participants

Section 1342(c)(1) provides that where, as here, "the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee . . . the trustee is subject to the duties described in subsection (d)(3)." Section 1342(d)(3) explains that " . . . a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of Title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of Title 26 . . . ."

Plaintiffs argue that PBGC violated its fiduciary obligations to the Plan participants when it decided to terminate the Salaried Plan.

The problem with Plaintiffs' argument is that PBGC owed no fiduciary obligations to the Salaried Plan participants until after the Plan was terminated and PBGC became the Plan's statutory trustee under the Termination Agreement. Plaintiffs' claim of entitlement to sue PBGC for participating in "Delphi's fiduciary breach" is also without merit. Delphi's decision to terminate the Salaried Plan did not implicate fiduciary duties. *See Beck v. PACE Int'l Union,* 551 U.S. 96, 127 (2007) (holding that "an employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations.").

Plaintiffs' interpretation of § 1342(c)(1) as somehow imposing fiduciary obligations on PBGC is unfounded. Adopting Plaintiffs' position would require this Court to make two unprecedented conclusions: first, that ERISA imposes fiduciary duties on Delphi, which cuts squarely against the Supreme Court's ruling in *Beck;* and second, that PBGC absorbed these duties when it negotiated a Termination Agreement with Delphi, which is unsupported by the plain language of the statute and the case law. Because PBGC owed no fiduciary duties to the Salaried Plan beneficiaries when it made its termination decision, the Court grants summary judgment for PBGC on Plaintiffs' ERISA claims.

III. Termination of the Salaried Plan did not Deprive Plaintiffs of Due Process

Alternatively, Plaintiffs argue that termination of the Salaried Plan violated the Due Process Clause. To determine what procedural process is due prior to terminating pension benefits, the Court considers three factors: the private interest affected by termination; the risk of an erroneous deprivation of that private interest and the value of additional procedural safeguards; and the Government's interest, including the fiscal and administrative burdens additional protections would entail. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

In *Jones & Laughlin Hourly Pension Plan,* the Second Circuit, applying the *Mathews* factors, held that the administrative procedures set forth in § 1342(c) satisfy due process. 824 F.2d at 202. The Court noted that termination of a pension plan without a hearing is a possibility expressly contemplated by ERISA and further noted and that the retirees were free to file claims against the plan administrator in bankruptcy court. *Id.* In addition, the Court explained that the regime's post-deprivation remedies, which included civil actions and restoration to pre-termination status, protected beneficiaries against the risk of erroneous deprivation. *Id.*

The analysis in *Jones & Laughlin Hourly Pension Plan* is wholly applicable here. Plaintiffs aired their grievances concerning termination in the S.D.N.Y. Bankruptcy Court. Furthermore, they fail to acknowledge that as a result of PBGC's assumption of the Salaried Plan, over three-quarters of Plan beneficiaries will receive their full benefits.

By terminating the Salaried Plan via agreement with Delphi, PBGC acted in accordance with § 1342(c). Plaintiffs fail to meet their heavy burden of establishing that PBGC's conduct—which was authorized by statute—deprived them of due process. *See United Steelworkers of Am., AFL-CIO, CLC v. United Eng'g, Inc.*, 839 F. Supp. 1279, 1284 (N.D. Ohio 1993), *aff'd*, 52 F.3d 1386 (6th Cir. 1995) ("In challenging the constitutionality of economic legislation as a violation of due process or equal protection, a plaintiff must overcome a heavy burden.").

IV. Plaintiffs Have Failed to Demonstrate that Termination of the Salaried Plan was Arbitrary and Capricious

Plaintiffs argue that even if PBGC's termination of the Salaried Plan violated neither ERISA nor the Due Process Clause, the Court should nevertheless find that PBGC acted arbitrarily and capriciously in violation of the APA.

Plaintiffs have offered no evidence to support this claim. The record establishes that the Salaried Plan was severely underfunded for guaranteed benefits at the time of termination—approximately 50% funded. There was no entity willing to sponsor the Salaried

Plan upon Delphi's liquidation. As defense counsel explained at the hearing: "That is the paradigm situation where PBGC's guarantee is called upon . . . [t]he money in the plan is taken over by PBGC, added to [PBGC's] funds, and it is used in part to defray the benefits due, supplemented by PBGC's insurance funds to the extent that the plan is underfunded for guaranteed benefits." Hr'g Tr. 35:11-12; 19-22, Mar. 6, 2019.

In this case, PBGC and Delphi agreed to terminate the Salaried Plan because the Plan failed to meet the minimum-funding standard required under the Internal Revenue Code and would be unable to pay benefits when due. In light of Delphi's liquidation, PBGC faced the very real possibility of an unreasonable increase in long-run loss if the Plan was not terminated. Based on the record, this Court cannot conclude that PBGC acted arbitrarily and capriciously in terminating the Salaried Plan.

CONCLUSION

For the reasons explained above,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment [305, 308] is **DENIED.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment [304] is **GRANTED.**

SO ORDERED.

s/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States District Judge

Dated: March 22, 2019

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, ET AL.,

Plaintiffs,

v.

PENSION BENEFIT GUARAN[Y] CORP.,

Defendant. /

Case No. 09-13616
[FILED MAR. 22, 2019]

SENIOR U.S. DISTRICT JUDGE ARTHUR J. TARNOW

U.S. MAGISTRATE JUDGE MONA K. MAJZOUB

JUDGMENT

All issues having been resolved by the Court's Order [322] of March 22, 2019, **THIS CASE IS CLOSED.**

Dated at Detroit, Michigan, this 22nd day of March 2019.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/ Arthur J. Tarnow
Deputy Clerk

Approved:

s/ Arthur J. Tarnow
ARTHUR J. TARNOW
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

No. 19-1419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH HOLLIS; DELPHI SALARIED RETIREE ASSOCIATION,	)	**FILED** Feb 25, 2021 DEBORAH S. HUNT, Clerk
Plaintiffs - Appellants,	)	
v.	)	ORDER
PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendant - Appellee.	)	

Before: SILER, GIBBONS, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-1419

DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH HOLLIS; DELPHI SALARIED RETIREE ASSOCIATION,

Plaintiffs - Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant - Appellee.

FILED
Dec 28, 2020
DEBORAH S. HUNT, Clerk

Before: SILER, GIBBONS, and NALBANDIAN, Circuit Judges.

AMENDED JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-1419

DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH HOLLIS; DELPHI SALARIED RETIREE ASSOCIATION,

Plaintiffs - Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant - Appellee.

FILED
Sep 01, 2020
DEBORAH S. HUNT, Clerk

Before: SILER, GIBBONS, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

DEBORAH S. HUNT
CLERK

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December 29, 2020
[FILED Dec. 29, 2020]

Mr. Anthony F. Shelley
Mr. Timothy P. O'Toole
Mr. John A. Menke
Mr. Craig Fessenden
Ms. Erin Kim
Mr. C. Wayne Owen

RE: Case No. 19-1419
Dennis Black, et al. v. Pension Benefit Guaranty Corp.

Dear Counsel:

Upon consideration of the petition for rehearing en banc filed by the appellants, the hearing panel issued an amended opinion.

In light of the panel's action, we ask counsel for the appellants to determine whether the petition for en banc reconsideration is to be withdrawn. If it is not, the appellants shall have until Tuesday, January 12, 2021, to file a memorandum of law supplementing their original petition. Should the appellee wish to seek en banc reconsideration of the amended opinion, it may do so by filing no later than Tuesday, January 12, 2021, an appropriate petition conforming with the requirements of the Federal Rules of Appellate Procedure and the Rules of the Sixth Circuit. If this office does not hear from the parties by the close of business Tuesday, January 12, 2021, we will render the petition moot and no further action will be taken.

Very truly yours,

/s/ Deborah S. Hunt

Deborah S. Hunt
Clerk

bh

APPENDIX I

29 U.S.C. § 1303. Operation for corporation

(a) Investigatory authority; audit of statistically significant number of terminating plans. The corporation may make such investigations as it deems necessary to enforce any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the corporation shall determine, as to all the facts and circumstances concerning the matter to be investigated. The corporation shall annually audit a statistically significant number of plans terminating under section 4041(b) [29 USCS § 1341(b)] to determine whether participants and beneficiaries have received their benefit commitments and whether section 4050(a) [29 USCS § 1350(a)] has been satisfied. Each audit shall include a statistically significant number of participants and beneficiaries.

(b) Discovery powers vested in board members or officers designated by the chairman. For the purpose of any such investigation, or any other proceeding under this title, the Director, any member of the board of directors of the corporation, or any officer designated by the Director or chairman, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the corporation deems relevant or material to the inquiry.

(c) Contempt. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the corporation may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. The court may issue an order requiring such person to appear before the corporation, or member or officer designated by the corporation, and to produce records or to give testimony related to the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district in which such person is an inhabitant or may be found.

(d) Cooperation with other governmental agencies. In order to avoid unnecessary expense and duplication of functions among government agencies, the corporation may make such arrangements or agreements for cooperation or mutual assistance in the performance of its functions under this title as is practicable and consistent with law. The corporation may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment. The head of each department, agency, or establishment of the United States shall cooperate with the corporation and, to the extent permitted by law, provide such information and facilities as it may request for its assistance in the performance of its functions under this title. The Attorney General or his representative shall receive from the corporation for appropriate action such evidence developed in the performance of its functions under this title as may be found to warrant consideration for criminal prosecution under the provisions of this or any other Federal law.

(e) Civil actions by corporation; jurisdiction; process; expeditious handling of case; costs; limitation on actions.

(1) Civil actions may be brought by the corporation for appropriate relief, legal or equitable or both, to enforce (A) the provisions of this title, and (B) in the case of a plan which is covered under this title (other than a multiemployer plan) and for which the conditions for imposition of a lien described in section 303(k)(1)(A) and (B) or 306(g)(1)(A) and (B) of this Act [29 USCS § 1083(k)(1)(A) and (B) or 29 USCS § 1805a(g)(1)(A)] or section 430(k)(1)(A) and (B) or 433(g)(1)(A) and (B) of the Internal Revenue Code of 1986 [26 USCS § 430(k)(1)(A) and (B) or 26 USCS § 433(g)(1)(A) and (B)] have been met, section 302 of this Act [29 USCS § 1082] and section 412 of such Code [26 USCS § 412].

(2) Except as otherwise provided in this title, where such an action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the violation took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(3) The district courts of the United States shall have jurisdiction of actions brought by the corporation under this title without regard to the amount in controversy in any such action.

(4) [Repealed]

(5) In any action brought under this title, whether to collect premiums, penalties, and interest under section 4007 [29 USCS § 1307] or for any other purpose, the court may award to the corporation all or a portion of the costs of litigation incurred by the corporation in connection with such action.

(6)

(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)

(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the corporation acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) If the corporation brings the action as a trustee, the applicable date specified in this subparagraph is the date on which the corporation became a trustee with respect to the plan if such date is later than the date described in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(f) Civil actions against corporation; appropriate court; award of costs and expenses; limitation on actions; jurisdiction; removal of actions.

(1) Except with respect to withdrawal liability disputes under part 1 of subtitle E [29 USCS §§ 1381 et seq.], any person who is a plan sponsor, fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, and is adversely affected by any action of the corporation with respect to a plan in which such person has an interest, or who is an employee organization representing such a participant or beneficiary so adversely affected for purposes of collective bargaining with respect to such plan, may bring an action against the corporation for appropriate equitable relief in the appropriate court.

(2) For purposes of this subsection, the term "appropriate court" means—

(A) the United States district court before which proceedings under section 4041 or 4042 [29 USCS § 1341 or 1342] are being conducted,

(B) if no such proceedings are being conducted, the United States district court for the judicial district in which the plan has its principal office, or

(C) the United States District Court for the District of Columbia.

(3) In any action brought under this subsection, the court may award all or a portion of the costs and expenses incurred in connection with such action to any party who prevails or substantially prevails in such action.

(4) This subsection shall be the exclusive means for bringing actions against the corporation under this title, including actions against the corporation in its capacity as a trustee under section 4042 [29 USCS § 1342] or 4049.

(5)

(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)

(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) In the case of a plaintiff who is a fiduciary bringing the action in the exercise of fiduciary duties, the applicable date specified in this subparagraph is the date on which the plaintiff became a fiduciary with respect to the plan if such date is later than the date specified in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(6) The district courts of the United States have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(7) In any suit, action, or proceeding in which the corporation is a party, or intervenes under section 4301 [29 USCS § 1451], in any State court, the corporation may, without bond or security, remove such suit, action, or proceeding from the State court to the United States district court for the district or division in which such suit, action, or proceeding is pending by following any procedure for removal now or hereafter in effect.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan. The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code of 1986 [26 USCS § 412], or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of such Code [26 USCS § 6212] has been mailed with respect to the tax imposed under section 4971(a) of such Code [26 USCS § 4971(a)],

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 4043(c)(7) [29 USCS § 1343(c)(7)] has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c)). Notwithstanding any other provision of this title, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this title.

(b) Appointment of trustee.

(1) Whenever the corporation makes a determination under subsection (a) with respect to a plan or is required under subsection (a) to institute proceedings under this section, it may., upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this title—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 4041A(d) [29 USCS § 1341a(d)] applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated.

(1) If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle [29 USCS §§ 1341 et seq.]. If the corporation 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). Whenever a trustee appointed under this title is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(2) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 4041(c)(2)(A) [29 USCS § 1341(c)(2)(A)(ii)–(iv)].

(3) Disclosure of termination information.

(A) In general.

(i) Information from plan sponsor or administrator. A plan sponsor or plan administrator of a single-employer plan that has received a notice from the corporation of a determination that the plan should be terminated under this section shall provide to an affected party any information provided to the corporation in connection with the plan termination.

(ii) Information from corporation. The corporation shall provide a copy of the administrative record, including the trusteeship decision record of a termination of a plan described under clause (i).

(B) Timing of disclosure. The plan sponsor, plan administrator, or the corporation, as applicable, shall provide the information described in subparagraph (A) not later than 15 days after—

(i) receipt of a request from an affected party for such information; or

(ii) in the case of information described under subparagraph (A)(i), the provision of any new information to the corporation relating to a previous request by an affected party.

(C) Confidentiality.

(i) In general. The plan administrator, the plan sponsor, or the corporation shall not provide information under subparagraph (A) in a form which includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(ii) Limitation. A court may limit disclosure under this paragraph of confidential information described in section 552(b) of title 5, United States Code [5 USCS § 552(b)], to authorized representatives (within the meaning of section 4041(c)(2)(D)(iv) [29 USCS § 1341(c)(2)(D)(iv)]) of the participants or beneficiaries that agree to ensure the confidentiality of such information.

(D) Form and manner of information; charges.

(i) Form and manner. The corporation may prescribe the form and manner of the provision of information under this paragraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(ii) Reasonable charges. A plan sponsor may charge a reasonable fee for any information provided under this paragraph in other than electronic form.

(d) Powers of trustee.

(1)

(A) A trustee appointed under subsection (b) shall have the power—

(i) to do any act authorized by the plan or this title to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) [29 USCS §§ 1381 et seq.] to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) within 30 days after the date on which the trustee is appointed under subsection (b), the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of title I of this Act [29 USCS §§ 1101 et seq.] (except as provided in subsection (d)(1)(A)(v)). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this title;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 302 [29 USCS § 1082] or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this title;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 4045(a) [29 USCS § 1345(a)]; and

(viii) to do such other acts as may be necessary to comply with this title or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this title to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 4062 [29 USCS § 1362], 4063 [29 USCS § 1363], or 4064 [29 USCS § 1364],

(D) each employer who is or may be liable to the plan under [section] part 1 of subtitle E [29 USCS §§ 1381 et seq.],

(E) each employer who has an obligation to contribute, within the meaning of section 4212(a) [29 USCS § 1392(a)], under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this Act, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, United States Code [11 USCS § 704], and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 3 of this Act [29 USCS § 1002(21)] and under section 4975(e) of the Internal Revenue Code of 1986 [26 USCS § 4975(e)] (except to the extent that the provisions of this title are inconsistent with the requirements applicable under part 4 of subtitle B of title I of this Act [29 USCS §§ 1101 et seq.] and of such section 4975 [26 USCS § 4975]).

(e) Filing of application notwithstanding pendency of other proceedings. An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings. Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11 of the United States Code [11 USCS §§ 1101 et seq.]. Pending an adjudication under subsection (c) such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue. An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee.

(1) The amount of compensation paid to each trustee appointed under the provisions of this title shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

29 U.S.C. § 1347. Restoration of plans

Whenever the corporation determines that a plan which is to be terminated under section 4041 or 4042 [29 USCS § 1341 or 1342], or which is in the process of being terminated under section 4041 or 4042 [29 USCS § 1341 or 1342], should not be terminated under section 4041 or 4042 [29 USCS §§ 1341, 1342] as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 4041 or 4042 [29 USCS § 1341 or 1342]. In the case of a plan which has been terminated under section 4041 or 4042 [29 USCS § 1341 or 1342] the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.