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Issueman Tackles the New VEBAs

BY STEVEN J. SACHER

Almost 15 years had passed since my last encounter with Issueman. Issueman, some may recall, has a unique talent. He can read minds. But not all minds and not all parts of minds. He can't tell, for example, what your doc is really thinking when he says, ''hmmm . . .,'' or what cards the dealer is holding. The minds he can read are those occupied with national policy issues, and the only thoughts he can discern are those having to do with those issues. And he needs physical proximity. His range is no more than 2,500 yards. For example, if Issueman were on the 50-yard line at FedEx Field during a Redskin home game, he might pick up a smattering of thoughts from around the stands but for the most part it would be a telepathic black hole for him. However, if he were parked on a bench in Lafayette Square, he'd have a plethora of incoming thoughts from the White House, the Treasury, and the old and new Executive Office Buildings.

And that is where I found him on an unseasonably warm afternoon in March. I was on my way back to my office from a noon dental appointment. I grabbed a Breadline sandwich and headed down Pennsylvania Avenue to Lafayette Square to eat and enjoy the weather. Issueman was on the same bench where we'd had our last conversation, head cocked slightly to the side. His eyes had the look of one lost in deep thought. I sat down next to him and began to work on my sandwich. After a few bites, I said, ''Hey, Ish.'' He didn't react at first. Then his head straightened and he turned towards me. He gazed at me for a moment, brow furrowed. Then he blinked rapidly and said, ''Sacher!'' And then, as if we'd last seen each other yesterday instead of 15 years ago, he asked, ''still obsessing about retiree health issues?''

''The issues abide,'' I replied. ''But you know that without my telling you, right?''

Issueman nodded. ''Yeah, much of the same old, same old. The tension between the alleged promise and the changed economic circumstances. The last time we discussed this, you walked me through the history of retiree health benefits. How they were originally so cheap that an insurer would throw them in for next to nothing if an employer bought the insurer's health coverage product for the company's active employee population. How back then there were six active employees for every one that was retired, and how they didn't live all that long after retirement, anyway. And how neither unions nor management, in collective bargaining, explicitly addressed whether they intended their agreement to provide retiree health coverage to outlast the term of a labor contract because each knew that the other's position was intolerable. Better to leave it vague than confront it directly and risk a strike or a lockout. And, let's see, there was a split in the Federal Circuit Courts, with some circuits decidedly favorable to retirees and their unions, and others less so—and that's still true today, is it not?''

It took me a moment to respond. I was, as always, astonished at the scope of his knowledge and recall. Yes, I had gone through all of that with him—in 1993! And I thought it unlikely that he had a given a moment's thought to the subject since then. I knew that most of

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the time he was focused on weightier matters, like the national debt, global warming, and immigration.

''Yes, still true. But Ish, how do you remember this stuff?'' It's been a long time since we had that conversation. And It's fairly arcane compared to your usual fare, isn't it?''

He chuckled. ''Sacher, how do you think I eat? I wasn't born rich, you know.''

I began to reply. ''Actually, I thought you were born rich. You have no apparent source of income but you live at the Watergate. You wear expensive, albeit rumpled, clothes. You drive expensive cars and run around with well-tended women. You . . . .''

He cut me off. ''Enough. I see 15 years has not improved your powers of observation and reasoning. Yes, I earn a good income. Officially, I am employed by a think tank affiliate of a big public company. Needless to say, the information I provide on national policy issues has great value, so I am well paid. But I pay taxes like everyone else, and I do not take risks because it is in my interest to remain below the radar, if you know what I mean. In fact, every once in a while I deliver information I know to be just a bit off, so no one will recognize that my information is always accurate and become curious about how that can be. The outfit I work for has a good benefits program, including retiree health coverage. A few months ago, I learned that the CFO is leaning on the HR VP to add deductibles and co-pays. He says the OPEB liability is bad for our balance sheet. The last time you and I discussed retiree health issues, I wouldn't have cared very much if the company wanted to change our program, but then I was younger and now I'm concerned over what it's going to cost me to maintain my lifestyle—including my excellent healthcare coverage—once I retire. So I've been poking around a bit on the subject.''

I stifled the impulse to ask Issueman who he worked for ''unofficially.'' From previous encounters with him, I knew that ''poking around'' meant he'd been actively tuning in on policymakers and others who were thinking about retiree health issues. So, I just waded in.

''And you have learned?''

''Well, let's back up a step, Sacher. The last time we talked about this, you went through the dynamic of the legal dispute. You described the company position that retiree health benefits can vest only by contract, and that every labor contract has a term. When the contract term ends, the benefit ends, just like all of the other rights, powers, benefits, and obligations under the contract. And you explained the union position that retiree health benefits are different than other aspects of the contract—that they vest upon retirement, and by their nature endure beyond the term of the contract even if the parties didn't make that clear in the agreement. I observed that there seemed to be no middle ground. That is, the way the law works, one side or the other wins big. The court decides either that the company has an obligation that outlasts the contract and that benefits must continue unabated in any way, or it decides that the obligation really ended when the contract term ended—and the company is not foreclosed from reducing the benefits or even from ending them entirely. I suggested to you that the law was, as usual, an ass, because it seemed to me that neither of those all-or-nothing alternatives made a lot of sense.''

''Yes, I remember. You thought there might be creative solutions but that judicial dispute resolution did not lend itself to creativity. Since then, it has become clear that the all-or-nothing dynamic of judicial resolution, combined with health care cost hyper-inflation, has led to a massive bail-out by companies. One of the benefits research houses recently reported that in the last 7 years, employer-sponsored health care costs have doubled while the over-all inflation rate has increased only 25 percent, and that in the last 10 years, the percentage of private sector companies that provide retiree health coverage has slid from 21.6 percent to 12.7 percent.''

''Right,'' said Issueman. ''But after all these years of skirmishing back and forth, it looks like there's been a breakthrough of sorts. These so-called 'new VEBAs' have got my attention. But I'm not sure I fully understand what they are and how they work. Do me some 'splainin,' son.''

When Issueman asks me to explain something to him, I always wonder if he already knows exactly what I'm going to say and gets some kind of perverse pleasure out of putting me through the paces, or whether he actually needs some help in fully understanding. In any event, it's fun to spar with him.

''OK. Bear in mind that the only instances of new VEBAs so far involve retirees who were represented by a union when they were active employees. Unions and retirees have concluded in some instances that conditions for some companies—and for all companies in some industries—have become so adverse or are in danger of becoming so adverse that they have only two choices—working cooperatively with a company to reduce its legacy liabilities or risking that company's bankruptcy.''

Issueman arched one eyebrow and said, ''Whoa. Two big concepts there, Sacher. First, 'adverse' conditions; and second, 'legacy' liabilities. What do you mean?''

''Well, the adversity can come in a variety of ways. A big one is labor costs vis-a-vis competitors. The U.S. is a relatively high labor cost environment, especially in industrial settings in which unions historically have been active. Steel, autos, and airlines are good examples. The communications industry is another. Foreign competitors, especially those from nations that provide benefits through government programs rather than through employer-sponsored programs, are often able to produce products and services equal to or better than U.S. companies, with much lower labor costs. Beyond labor costs, other conditions, like technological change, may adversely affect a company or an industry.''

Issueman nodded. ''And legacy costs?''

''C'mon, Ish. Everyone knows what legacy costs are.''

''Well, the term always sounds to me like it was made up by a Madison Avenue pitchman. I'm suspicious. But I'll stipulate that in this context it refers to a particular benefit—retiree health—that was, when it began, relatively inexpensive and has become much more expensive because of hyper-inflation in the health care field, because retirees are living longer than they did years ago, and because, in certain industries, active workforces have shrunk compared to retiree populations.'' He paused, as if listening, and then said, ''oh, and one thing more. The CFOs who most directly have to cope with these liabilities see them as 'legacies' because they relate to individuals who are separated from the ranks of active employees or who, at the time the liabilities were being created, were not company employees but

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for whose retiree benefits the company subsequently became obligated due to acquisitions or other corporate transactions.''

''Gosh, Ish, it's almost as if you were reading my mind.''

Issueman didn't smile, so I hurried on. ''You remember that the specific development that triggered our last discussion was FAS 106, the Financial Accounting Standards Board's 1993 rule that a public company providing retiree health benefits or any 'other post employment benefits'—'OPEB' for short—had to quantify the liability for those benefits on their balance sheets, and you may recall that the OPEB for a large corporation could run into the billions—for really big companies with long-standing retiree benefits and big retiree populations, it could be in the tens or even the scores of billions.

Issueman yawned. ''That may seem like a lot to some, Sacher, but just the Pentagon budget alone runs to about $50 billion every month or so.''

''So, your numbers are larger than mine. Big deal. A retiree health legacy liability of $10 billion or $20 billion on the books of even a huge corporation is a lot. The analysts don't like it. Where a company is struggling against stiff global competition, a liability like that can tip the company's bond rating into junk. Then the company has to offer a higher yield to get the public to buy its bonds. And the liability negatively affects the value of the company's stock, so the company's capitalization suffers. Of course the CFOs don't like it, as you have seen for yourself.''

''And the new VEBAs provide a solution, right? A way to continue the benefits but remove the liability from the company's balance sheet.''

''Right. But not for everyone. Certain conditions have to be present. Most importantly, the company's position must be uncertain enough so that bankruptcy is a real threat. Or, the company needs some other powerful argument to convince the union to go along.'' For example, depending on the facts and the federal judicial circuit, the company may have a strong argument that it can unilaterally adjust the retiree health benefits once a labor contract expires.

''Well, lets just stick with the threat of bankruptcy. Where the two choices are bankruptcy or a new VEBA, the new VEBA is better for the retirees.'' Issueman was looking very self-satisfied. But then he looked perplexed and asked sheepishly, ''and just exactly why is that?''

''The retiree health obligation is contractual. In a bankruptcy, contractual obligations are discharged, retiree health like others. However, if a company maintained retiree health benefits before it filed under Ch. 11, the federal bankruptcy code requires it to bargain with the retirees for replacement benefits. Usually, those benefits are a pale shadow of the former benefits. Of course if the company is in a Chapter 7 liquidation proceeding, all benefits are ended, along with all jobs.''

''OK, bankruptcy is a generally crummy alternative for employees and retirees alike. I see that. But what's better about the new VEBAs?''

''What's better is that if the company has some assets and if the union is willing, then instead of battling to the death in costly litigation that neither side is sure it can win, the company can transfer those assets to a new VEBA trust that can offer a retiree health benefit that, for a substantial period of time—maybe indefinitely—will be the equal of what the company was providing. And, once those assets are in the new VEBA trust, whatever happens to the company will not affect the availability of those assets for providing retiree health benefits.''

Issueman's face was a study in contempt. Lips pursed, eyes squinty—I had seen this look before and knew what to expect. He thought he had me.

''Sacher, there are so many things wrong with that, I can't even begin to count them.''

''Forget about counting,'' I said. ''I don't want to tax you. Just name them.''

''Fine, big shot. First, it looks like the union will have a substantial role in the new VEBA. Doesn't that mean that the transfer of assets from the company to the new VEBA will be deemed a prohibited transfer from the company to the union within the meaning of the Taft-Hartley Act? In other words, won't the transferred assets be deemed a payment in violation of those provisions, which carry criminal penalties? If so, company and union officers can be fined or go to jail.

''No, they won't. First, the new plan that is funded by the new VEBA trust can be designed so that the union is not in control. Control can be in the hands of a committee on which the union has only a minority position. In that scenario, it is not at all clear that payments to the new VEBA trust would be deemed payments to a union or a union representative. Second, even if they are so deemed, the asset transfer is in resolution of a dispute within the meaning of Taft-Hartley section 302(c)(2), one of several exceptions to the general rule.''

''Dispute? What dispute?''

''You yourself mentioned it when we began our discussion a few minutes ago. Throughout bargaining, the company maintains that the retiree health benefit is like all the other aspects of the labor contract. When the contract ends, the benefit ends. If the parties successfully bargain a new contract that includes retiree health benefits, the benefits continue. But if the contract ends and there is no successor contract, or if there is a successor contract that does not include retiree health benefits, those benefits end. The union position is that the end of the labor contract does not end the benefits; that retiree health benefits under a bargaining agreement are vested as of the date of retirement—and remain vested as long as the retirees maintain their retiree status, i.e., until they die, without regard to termination of any particular labor contract.

''Yeah, yeah.'' Issueman was being dismissive. ''That's the dynamic of the legal dispute. But basically, hasn't the union already decided that a new VEBA is better than risking the company's bankruptcy? They're going to take the money while they can get it, so that if the company goes into the tank, at least they have salvaged something for the retirees, and . . .'' Issueman paused as if considering something he had not thought of previously. ''And . . . are the retirees heard from in this scenario?

''Ish, here's what happens. The bargaining parties eventually reach a point where they are in agreement on everything except the extent of the company's obligation to continue to provide retiree health coverage. The forum then shifts to the federal courts. The union and representatives of the class whose benefits are at issue file a class action in a federal court against the company, seeking a ruling that the company is bound to continue the retiree health benefits unabated even after

the term of the contract ends. Separate and independent class counsel represents the retirees, and the union's lawyer represents the active employees who will be eligible for retiree health benefits when they retire. The U.S. district court judge's position is going to be, 'counsel, you can litigate this until the cows come home, but my advice is to sit down and come up with a solution that everyone can live with.' So the parties—the company, the union on behalf of the employees, and the class counsel on behalf of the retirees—fashion the terms of a new retiree health plan that will be funded by a new VEBA trust. The bifurcated representation of the affected class assures that 1) the retirees are separately represented by class counsel, and 2) the employees are represented by the union's lawyer, so there can be no disabling conflict issue for counsel. All parties will be bound by the court's judgment. And any agreement reached by the parties in settlement of the litigation must pass muster in a fairness hearing conducted by the judge.''

Issueman looked at me sharply. He seemed disgruntled that his first objection had been addressed so handily. But he rallied. ''Okay, so nobody gets fined or goes to jail, and the federal judiciary passes on the fairness to the retirees, and representation of the retirees separately from the actives assures that all sides are heard. But I still see a big flaw.''

''I'm waiting with baited breath.''

''OK. The new VEBA trust will be funding health benefits for the existing retirees and for those who are currently active employees when they retire, right?''

''Right.''

''OK. And obviously the company is not going to transfer assets equal to the present value of the OPEB liability. If it had to transfer that much, it would not have agreed to the deal. So it's going to transfer less assets. Is the New VEBA going to be able to perform some kind of alchemy to make those fewer assets—even assuming very good investment earnings—last basically indefinitely? Or isn't it inevitable that after a period of time the new VEBA will not be able to support a level of benefits that is equal to what the retirees currently enjoy?''

''Hold on a minute, Ish. You are confusing the accounting liability with the funding for that liability. First of all, remember that there are no legislated funding standards applicable to welfare plans, including retiree health plans. Plan sponsors may contribute to VEBA trusts in order to segregate assets to offset the FAS 106 liabilities, but as far as the law is concerned a plan sponsor could pay all retiree health and other welfare plan benefits right out of the company till, that is, not pre-funded at all. So don't assume that the retiree health plan that the new plan and new VEBA are replacing was fully funded—it was not, and likely was not more than 25-30 percent funded, if that. So, the assets that will be slugged into the new VEBA trust are likely to be greater than the assets that were in trust before the settlement. Thus, it is not at all certain that the new VEBA won't get enough assets to maintain benefits at the same level they were for a very long time. The new VEBA might do a better-than-expected job managing the assets. The rate of health care inflation might abate. Congress might pass national health care legislation that would provide retiree health benefits, relieving the new plan of some or all of its benefit obligations.'' But the key is that the new VEBA trust offers a far higher level of security of assets because the corporate business risk has been eliminated.

''I see your point, Sacher. Even if one assumes some future cutback in benefits, that still has to be weighed against the possibility that, absent this deal, the company may be forced into Chapter 11, which certainly would bring worse consequences. Of course, it could wind up in Chapter 11 even if the deal goes forward, but if the deal goes forward and then the company goes into the tank, the retirees are way ahead of where they would be absent the deal. So far, so good. But I have some more issues.''

''Fire away, gifted one.''

''You know, when I'm here in Lafayette Square, I'm usually focused on the White House and the Treasury Department and the old and new EOBs.''

''Yeah . . .'' (where was he going with this?).

''But sometimes I pay attention to what's going on a block up on 16th Street.''

''Yeah . . .'' (now I knew exactly where he was going, but I wouldn't give him the satisfaction).

''I told you that I'd been poking around on this, and what better place to poke than the AFL-CIO, which is well within my range when I'm sitting right here on my favorite park bench.''

Issueman paused, as if expecting some kind of reaction from me, but all I said was, ''and you learned . . .?''

''I learned there are a number of legal issues that need to be addressed before these things become routine. For example, will these new plans and VEBAs be subject to ERISA?''

''Sure, why wouldn't they be? ERISA covers an employee benefit plan if it is established or maintained by an employer, or by an employee organization, or by both. Let's assume for the moment that the accountants say that, in order for the OPEB liability to be lifted from the company's books, the company can neither sponsor the new plan nor be part of some Taft-Hartley-type of joint board or committee. That still leaves the employee organization alternative, and . . .''

Issueman pounced. ''But what I learned poking around at the AFL-CIO is that the industrial unions don't want to be the sponsors of these new plans and VEBAs. For the better part of a century, their philosophy has been to bargain hard for good benefits, but not to administer benefits. They always wanted to leave that job to the companies.

''And who could blame them? So what?''

So, it looks to me like these new plans and VEBAs will be outside of ERISA's coverage because they won't be sponsored by a union and they won't be sponsored by a company.''

''Nope, it's very easy to assure that they are covered by ERISA. The definition of employee organization of course includes a union, but it also includes an 'employees beneficiary association' or 'EBA' which, as you readily can see, is the last three-fourths of 'VEBA.' ''

Issueman giggled. ''So, the 'VEBA—the Voluntary Employees Beneficiary Association'—is actually an 'EBA,' and as such can 'establish or maintain' the new plan?''

''Yep, and as your question about ERISA coverage implies, the EBA absolutely wants its new plan and VEBA trust to be covered by ERISA so they get the protections of ERISA's fiduciary standards and the advantages of its preemption of state laws.''

''Cool.'' But I have more legal questions.''

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"Fine. I'm a lawyer. Query me."

"OK. First, can a new VEBA be industry-wide? Can it fund benefits for the current and future retirees of more than one company?"

"Sure. The VEBA trust can fund benefits for retirees who are union members or were when employed, including current employees who will retire in the future, who are or were employed by different companies, but the populations from each separate company should be covered under a separate plan. If you put the populations of multiple companies into the same plan, you might wind up with a 'multiple employer welfare arrangement' or 'MEWA' that is not entitled to the preemptive effect that ERISA bestows on plans— particularly as to state insurance laws that might otherwise affect them—and it would not be good for a health care plan covering retirees in many states to have to cope with the predilections of the insurance commissioner in each of those states. Although this concern may be addressed by the exception in the ERISA MEWA definition for collectively bargained plans, separate plans are desirable because they will tend to alleviate conflicts of interest that the administering fiduciaries might have where numerous companies' retiree populations are funded by the same VEBA trust."

Issueman was looking pained again. Each time he thought he spotted a fatal flaw, it was vanishing into smoke. But he forged ahead. "Well, what about this? If the new plan covers active employees in the sense that when they retire they will receive health care benefits under the new plan, paid for by the VEBA trust, then isn't the company a party in interest to the new plan as an 'employer any of whose employees are covered' by the plan? And doesn't that raise prohibited transaction issues?"

"For the sake of argument, we can assume that the company would be deemed a party in interest if the new plan covers actives who will be eligible for health benefits funded by the new VEBA trust when they retire. It's a matter of small moment because, with the possible exception of some of the assets that are deposited by the company into the new VEBA trust, it should not be difficult for the company to avoid engaging with the new plan in a prohibited transaction. Think about it for a moment. The company has terminated its old retiree health coverage. The retirees, and the actives who were employed by the company as of a certain date, are now covered under the new plan, which is funded by the new VEBA trust. The company's only obligation with respect to the new plan and the new VEBA is to pay what it has agreed to pay into the new VEBA trust and maybe to provide transition assistance to the administrator of the new plan. Then, it walks away. It has to walk away in order for the accountants to be sure that it hasn't merely traded the old liability it had from the coverage it just terminated for a new liability for the coverage provided by the new plan. So, the company has nothing to do with either ongoing administration of the new plan or with management of the assets that are in the new VEBA trust. It is not a fiduciary of any sort to the new plan and it is not the plan sponsor, and it's important that the new plan documents (including the settlement agreement and the trust instrument) clearly describe the company's extremely limited role and limited payment obligation with respect to the new plan and the new VEBA."

Issueman shot me a look of grudging admiration. He swallowed, and then said, "You may have something here." He sounded like Seinfeld greeting Newman.

As much as I wanted to bask in the glory of receiving Issueman's praise, I didn't want to overdo it.

"Well, there are a couple more issues."

Issueman's face brightened. He still might salvage something. "Oh, and what might those be?"

The company is going to deposit assets into the new VEBA trust, but probably not all cash. First, if there were a pre-existing trust, the assets in it were invested and it would be wasteful to liquidate those investments merely because they are going to be transferred to the new VEBA trust, so those assets are going to come over in their invested form. Among those assets may be, for example, securities issued by the company or by an affiliate of the company. Second, assume that the company has proposed—and the union and retirees have agreed—that among the additional assets the company will pay to the new VEBA trust are, let's say, some company stock and a note. Assume further that the value of company stock and the note, added together, exceed 10 percent of the new plan's total assets immediately after that payment. The new plan is not an 'eligible individual account plan' within the meaning of ERISA, so it flunks the 10 percent test. Maybe the company stock is a 'qualifying employer security;' maybe it isn't. The note may or may not be a 'marketable obligation.' In addition to the 10 percent limit issue, one would need to look at the contribution in kind issue, where the Labor Department's guidance under Interpretive Bulletin 94-3 is instructive. Also, maybe the company wants to pay into the new VEBA trust over a period of time rather than all at once . . ."

"Won't that queer the accounting—won't the accountants say that some or all of the liability must remain on the books until the last installment is paid, and won't delayed payment be a prohibited extension of credit?" Issueman was looking very self-satisfied again.

"As to the accounting treatment, you need to ask an accountant. Under FAS 106, there's 'settlement' accounting and there's 'curtailment' accounting, sometimes called 'amendment' accounting, and that's all I know. The extension of credit issue may depend on the nature of the payment terms. For example, there is a difference between an agreement calling for a payment to the new VEBA trust of 4X dollars, in four equal installments of 1X on June 1 of every third year, with interest, and an agreement that calls simply for a payment of 1X dollars on 6/1/08, 1X dollars on 6/1/11, 1X dollars on 6/1/14, and 1X dollars on 6/1/17. In my view, the former is an extension of credit, while the latter is not."

"So, if the Company's payment to the new VEBA trust results in the trust's having employer securities with a value immediately after the payment is made in excess of 10 percent of the new plan's total assets at that moment, that's a prohibited transaction because the new plan is not an eligible individual account plan? So you have to apply for an exemption for that, and these other potential prohibited transactions also can be exempted, if necessary?"

"Yes, and the same rule would apply if the company were contributing 'employer real property.' You need an exemption not only because the new plan is not an eligible individual account plan and therefore is subject to the 10 percent limit, but also because the stock and

the note may not be 'qualifying employer securities' and the real property may not be 'qualifying employer real property.' But exemptions for those transactions should be obtainable. The Department has granted several of that type over the years in connection with retiree health plans. Further, the Department has exempted contributions in kind and extensions of credit where the exemption applicant demonstrates that the exemption is in the interest of the plan and its participants and beneficiaries and is protective of their rights. None of these prohibited transaction issues is necessarily a showstopper.''

''OK, Sacher. You must have hired some smart associates since the last time we talked, because it looks like you've done your homework.''

I let the sarcasm pass, but couldn't help thinking that if lawyers could read minds, we'd have a lot less ''homework'' to do. Issueman looked me square in the eye and said, ''Don't even go there, son. I don't need any competition.'' Then he lowered his gaze and said, ''But I have another question. The class action . . . let's assume the class action is filed as soon as the company and the union finish their bargaining. How much time passes before the fairness hearing is held and the settlement agreement is approved by the federal court?''

''Assume seven to ten months, but if you're asking how long it takes to achieve finality, it may be another year or more after that.''

''Because . . .''

''Because if someone objects to the settlement, there may be an appeal.''

''So, from the time the parties agree in bargaining until appeals have been exhausted could be 20-24 months . . .''

''Or longer.''

''And you really can't start operating the new plan and new VEBA until then, right? Although I guess you would need some of that time so the Department could process your exemption application.''

''A prudent person would not begin operating the new plan until the litigation is over and any exemption issues have been addressed by the Department.''

''So, if I'm the union and the retirees in 2008, I'm going to want some assurances about the availability of assets in 2010 or 2011, or whenever the appeal is decided or the appeal right is exhausted. A lot can happen in the couple or three years between the time of bargaining and the date of implementation. ''

''You betcha, Ish. But if you're the company, you want to be very careful about what assurances you provide. In other, non-ERISA circumstances, for example, the company and the union might use an escrow. The company would put the assets into escrow, and escrow holder would be instructed to deliver the proceeds at a given time. But absent favorable clarification from the government, the company should not agree to an escrow.''

Issueman looked mystified. ''Why not?''

''Because it is too easy to characterize an escrow as 'plan assets' under current ERISA dogma. If the assets are plan assets, the company would be a fiduciary under ERISA, and would be far more subject to the ERISA prohibited transaction restrictions, not to mention the general fiduciary standards, than if it is merely a party in interest by virtue of being an employer of employees covered under the new plan. Also, if the assets are deemed to be plan assets, anti-inurement rules would kick in and it might be difficult for the company to recover the assets if the deal falls apart before the date on which the assets are supposed to be transferred to the new VEBA trust—and remember, for the company the entire deal hinges on its obtaining sufficient assurances from the SEC that it will no longer need to show any OPEB liability for retiree health on its books.''

''So you're saying that there is a plan assets issue even though, for most or all of the preliminary period, the new plan and the new VEBA are nothing but a blueprint?''

''What I'm saying is that absent favorable judicial or regulatory guidance, an escrow might be problematic. But what the company can do is to set up a separate account that is entirely within its control and credit the assets to that account as a gesture of good faith. It needs to be clear that the separate account remains the property of the company, will be controlled solely by the company, and is subject to the reach of the company's creditors until the assets in it are deposited in the new VEBA trust. Clear, in other words, that the participants of the yet-to-be established new plan have no property interest in the assets until they are deposited into the new VEBA trust. It also wouldn't be a bad idea to put language into the settlement agreement stating that, at its option and in its sole discretion, the company may choose to deposit into the new VEBA trust assets other than those in the separate account, in an amount equal to the value of the separate account assets at the time of the deposit. And the documents need to be clear that the company is not guaranteeing the investment performance of the assets credited to the separate account. In other words, when implemented, the new VEBA trust gets the balance in the separate account, which due to investment performance may be more or less than the amount that was credited to the separate account at the outset. Doing it this way should foreclose any argument that the assets that will be turned over to the VEBA trust once the dust from the class action settles somehow are plan assets before the moment when the VEBA trust gets them. Also, if the company is planning on including its note among the assets that will be transferred to the new VEBA, and if the note is to accrue interest for any period before it is deposited into the new VEBA trust, the note needs to be issued to an LLC that is wholly owned by the company, because . . .''

''Because a corporation can't issue a note to itself,'' Issueman finished for me, looking smug.

''Hey, X-Man, I really hate it when you do that to me! Yes, that's why the note can't simply be credited to the separate account and must instead be held in an LLC, but the real point is that the thinking with regard to the plan assets issue is the same for the LLC as it is for the separate account. The note held in the LLC is not plan assets before it is deposited in the new VEBA trust.''

Issueman said nothing for a few moments. Then, an almost inaudible, ''Not bad. Not bad at all.'' He leaned against the back of the bench and closed his eyes. I knew he was finished with me. I picked up my empty lunch bag, rose to my feet, and began to walk towards the trash container. In my ears—or maybe in my head—I heard, ''See you in about 15 years, Sacher.''

''Maybe—if you move your bench to Montana,'' I thought back.

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