Pension Benefit Guaranty Corporation

91-3

March 29, 1991

REFERENCE:
[*1] >4001(b)(1)>
4064 Liability of Employers in Multiple Employer & Multiemployer Plans.
>4069(b)>
4204 Sale of Assets.
4218 Withdrawal - No occurrence.
>4221(e)>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on two questions under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and the multiemployer plan provisions added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). You ask whether a company that sold assets to an unrelated company prior to the enactment of MPPAA will be treated as the same "employer" as the purchasing company when determining withdrawal liability upon the purchasing company's complete withdrawal from a multiemployer plan under MPPAA. You also ask whether a purchasing company's failure to object to a plan's treatment of the purchasing and selling companies as the same employer, when estimating potential withdrawal liability, bars the purchasing company from challenging such treatment following a notice and demand for payment of liability for an actual withdrawal. [*2]

As you are aware, section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues of withdrawal and withdrawal liability are to be resolved first through arbitration, and if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions. However, the PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

1) In response to your first question, Title IV of ERISA as originally enacted, and as amended by MPPAA, has never contemplated imposing upon a purchasing company the contribution history of the selling company solely as a result of a bona fide arms' length sale of assets. Under ERISA, each contributing employer is normally responsible for its own contribution history under a plan. See PBGC Opinion Letter 82-40.

Prior to MPPAA, a withdrawal from an ongoing multiemployer plan did not always trigger liability. Liability was triggered only when a multiemployer plan terminated, and then, only those employers who withdrew within the five years immediately preceding the termination were responsible [*3] for that liability. See ERISA § 4064, 29 U.S.C. § 1363 (1976) (no longer applicable to multiemployer plans). n1

n1 However, substantial employers (i.e., 10 percent or greater contributors) that withdrew pre-MPPAA were required to post a bond or escrow as security in case the plan terminated within five years from the date of their withdrawal.

Under section 4064, each employer's liability was based on the ratio of the employer's required contributions during the five-year period preceding termination to all required contributions during that period. For purposes of section 4064, two or more businesses could be treated as the same "employer" under the controlled group provision (section 4001(b)), or the successorship provision (section 4062(d)), neither of which, by its terms, applied to a transaction involving nothing more than a sale of assets between unrelated businesses.

With the enactment of MPPAA, employers withdrawing from ongoing multiemployer plans can now have an immediate liability. ERISA § 4203 generally defines a complete withdrawal as occurring when an employer permanently ceases to have an obligation to contribute under the plan, or permanently ceases all [*4] covered operations under the plan. Under MPPAA, the controlled group provision (since recodified as ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1) (1988)) and the successorship provision (recodified as ERISA § 4069(b)), continue to apply in relevant cases. See ERISA § 4218. However, when a sale of assets results in the selling company no longer having an obligation

to contribute for covered operations under the plan, it is considered to have withdrawn (assuming it has no controlled group members with such an obligation), and is therefore subject to the withdrawal liability imposed under section 4201. That liability, of course, will be calculated with reference to the selling company's contribution history. See ERISA § 4211. In that situation, the purchaser company is plainly not responsible for the selling company's contribution history.

MPPAA, however, also added section 4204 to address sales of assets. Section 4204(b)(1) provides that, for purposes of determining its withdrawal liability in the event of its subsequent withdrawal, the purchaser of covered operations sold in compliance with section 4204 assumes the contribution history of the seller with respect to those [*5] operations for the year of the sale and the preceding four years. In a sale that does not comply with section 4204, the purchaser is normally regarded as having entered the plan with respect to the purchased operations as of the effective date of its obligation to contribute for those operations.

There was no equivalent to section 4204 prior to MPPAA. Thus, there is no statutory basis in Title IV for concluding that a pre-MPPAA sale of assets between unrelated businesses, standing alone, will result in the purchaser and the seller being considered the same employer for withdrawal liability purposes or the purchaser being responsible for the contribution history of the seller for withdrawal liability purposes.

2) You also ask whether the purchasing company's failure to object to the plan's treatment of the purchasing and selling company as one employer when estimating potential withdrawal liability bars the purchasing company from challenging that treatment when an actual withdrawal occurs.

Under ERISA § 4221(e), an employer may request from the plan sponsor an estimate of its potential withdrawal liability with respect to the plan. When the plan provides an employer with an estimate [*6] of its withdrawal liability under section 4221(e), no obligation to pay such liability occurs, nor does the employer waive any objections to the estimate by failing to dispute it. An "estimate" of withdrawal liability provided pursuant to a request under section 4221(e) is not binding upon either party.

Thus, the employer's failure to object to an estimate provided pursuant to section 4221(e) would not bar the employer from later challenging the determinations underlying the estimate when an actual notice and demand for payment of withdrawal liability is issued pursuant to ERISA § 4219(b)(1).

If you have any further questions about this matter, you may call David Kemps of my office at 202-778-8886.

Carol Connor Flowe
General Counsel