Pension Benefit Guaranty Corporation

92-1

March 30, 1992

REFERENCE:
[*1] >4001(b)(1)>
4203 Complete Withdrawal
4204 Sale of Assets
4204(a)(1) Sale of Assets. Conditions for Exemption from Withdrawal
4205 Partial Withdrawals
>4205(b)(1)>
4206 Adjustment for Partial Withdrawal
4211 Withdrawal Liability
4212(c) Obligation to Contribute - Liability
4218 Withdrawal - No occurrence

OPINION:

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") in regard to calculating liability for a complete or partial withdrawal under Sections 4203 and 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § § 1383 and 1385 (1989). Specifically, your question concerns the calculation of withdrawal liability in a situation where several members of a controlled group of corporations have an obligation to contribute to the same rultierployer pension plan and the controlled group members are sold or liquidated in a series of transactions.

As you are aware, Section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal liability are to be resolved first through arbitration, and, if necessary, in the courts. The [*2] 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.

In the hypothetical situation you present in your letter, parent company P has four wholly-owned subsidiaries, A, B, C and D. The four subsidiaries contribute to a multiemployer pension plan (the "plan") in equal periodic amounts under a single collective bargaining agreement.

In a series of transactions, P's controlled group ceases covered operations at each of the subsidiaries. First, P closes subsidiary A and does not continue operations previously performed by A. Second, P sells the assets of subsidiary B to an unrelated purchaser. The purchaser does not assume B's contribution obligation or make contributions to the Plan. Third, P sells the stock of subsidiary C to another unrelated purchaser. C continues in business and makes required contributions to the plan. Finally, P sells the stock of subsidiary D to a third unrelated purchaser. D continues operations and contributes to the plan for several years before [*3] going out of business. You request the PBGC's opinion as to the assessment of liability for a complete or partial withdrawal stemming from this series of transactions.

For purposes of determining whether a complete or partial withdrawal has occurred, all trades or businesses under common control are to be treated as a single employer. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Under Section 4203(a) of ERISA, 29 U.S.C. § 1383(a), a complete withdrawal generally occurs when an employer permanently ceases to have an obligation to contribute under a plan, or permanently ceases all covered operations under a plan. A partial withdrawal generally occurs when an employer has a 70% contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than [*4] all of its facilities, while continuing to perform work at that facility of the type for which the obligation to contribute ceased. ERISA §

4205(a) and (b), 29 U.S.C. § 1385(a) and (b). The methods for computing the amount of liability for a complete or partial withdrawal are set forth in Sections 4211 and 4206 of ERISA, 29 U.S.C. § § 1391 and 1386. In order to determine whether a complete or partial withdrawal has occurred and the amount of the resulting liability, contributions of the entire controlled group must be taken into account. 29 U.S.C. § § 1301(b)(1) and 1391.

As you point out in your letter, when subsidiary A is closed in the first transaction, there is no complete or partial withdrawal by the controlled group. Three members of the controlled group continue to have an obligation to contribute to the plan and continue covered operations. There is no partial withdrawal because, on the facts assumed, there has not been a 70% decline in contributions by the controlled group over a three-year period or a partial cessation of the controlled group's contribution obligation within the meaning of Section 4205(b)(2)(A) of ERISA, 29 U.S.C. § 1385(b)(2)(A). Thus, for purposes [*5] of calculating the amount of liability for a subsequent complete or partial withdrawal under Sections 4211 and 4206 of ERISA, 29 U.S.C. § § 1391 and 1386, A's contribution history remains part of the controlled group's contribution history.

The same holds true on the sale of B's assets to an unrelated purchaser. Even though the asset sale is not structured to meet the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384, there is no complete or partial withdrawal because two other members of the controlled group continue to contribute to the Plan and there has been no 70% decline in contributions over three years or any partial cessation of the controlled group's contribution obligation under 29 U.S.C. § 1385(b)(2)(A). Again, the contribution history of B remains part of the controlled group's contribution history for purposes of calculating amounts of subsequent withdrawal liability.

The sale of the stock of subsidiary C to an unrelated purchaser that continues to make contributions to the plan would ordinarily fall within the ambit of Section 4218 of ERISA, which provides in relevant part:

Notwithstanding any other provision of this part, an employer shall not be considered [*6] to have withdrawn from a plan solely because --

(1) an employer ceases to exist by reason of --

(a) a change in corporate structure described in Section 4069(b) . . .

if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .

* * *

[A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

Among the changes described in Section 4069(b) of ERISA, 29 U.S.C. § 1369(b), are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 82-4 (February 10, 1982), 83-11 (May 16, 1983), and 84-7 (December 20, 1984), the PBGC expressed its opinion that the sale of a subsidiary's stock does not bring about the withdrawal of the parent corporation, if the change causes no interruption in employer contributions or obligations to contribute under the plan.

Under the last sentence of Section 4218 of ERISA, a successor employer resulting from a restructuring described in that Section is considered the "original employer." This provision attributes the contribution history of the original employer [*7] to the successor employer resulting from the restructuring. In the typical case, the contribution history used to determine the withdrawal liability of the successor will be the contribution history that would have formed the basis for withdrawal liability if the restructuring had not occurred.

In your hypothetical, the sale of C's stock causes no interruption in contributions or obligations to the plan. C and its new controlled group, if any, and the P controlled group, continue to contribute to the Plan. Consequently, there is no complete withdrawal by the P controlled group, or by C and its new controlled group, if any. Pursuant to the last sentence of Section 4218, both the P controlled group and C and its new controlled group, if any, are "successor" employers. However, in a situation such as this where multiple entities in the same controlled group contribute to the same plan, and some, but not all, of the controlled group members who contribute to the plan are the subject of a change described by Section 4218 of ERISA, neither of the successors clearly should inherit the entire contribution history of the original employer. In such a case, it is the PBGC's opinion that [*8] the contribution history of the original employer

must be fully apportioned among the successor employers. The plan should make the allocation in a reasonable manner. For example, in the absence of a history of large transfers of operations or covered employees between members of the controlled group, or other unusual factors, the plan may allocate that contribution history in proportion to the contribution histories of the controlled group members that have an obligation to contribute and covered operations immediately before the Section 4218 transaction, or in your hypothetical 50% to C and 50% to the P controlled group.

Consequently, in the event of a subsequent complete withdrawal by the P controlled group, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to C and its new controlled group, if any. Likewise, in the event of a subsequent complete withdrawal by C and its new controlled group, if any, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to the P controlled group.

You also inquired as [*9] to the effect of the sale of C's stock on determining whether a partial withdrawal occurs under Section 4205(a)(1) of ERISA, 29 U.S.C. § 1385(a)(1). Under your hypothetical, once C is sold, the contributions of the P controlled group decline by 75%. Generally, a partial withdrawal occurs whenever there is a 70% contribution decline in each of three consecutive plan years measured against a base year. See 29 U.S.C. 1385(b)(1). Under Section 4218 of ERISA, P's controlled group would not ordinarily incur a partial withdrawal in the third plan year following the sale of C's stock. However, in order to avoid partial withdrawal liability, the decline in contributions must be "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398.

In your hypothetical, it is not clear whether the decline in contributions is solely because of the sale of C's stock. The decline could be due, at least in part, to closing A and selling the assets of B to a purchaser who did not continue making contributions to the Plan. Whether a decline in contributions is solely because of a covered restructuring must be determined on the facts and circumstances of each case and should be [*10] addressed by arbitration subject to review by the courts. Relevant considerations might include the length of time between transactions, whether the transactions were related, and whether each transaction would have been subject to Section 4218 if viewed individually.

If the decline in contributions is determined to be solely because of the sale of C's stock, the contribution history transferred in the Section 4218 transaction is excluded from the base year calculations used to determine whether a 70% decline has occurred under Section 4205(b)(1)(B)(ii) of ERISA. If the decline in contributions is determined not to be solely because of the sale of C's stock, C's contribution history is included in the base year calculations.

In the final transactions D's stock is sold to a third unrelated purchaser who continues making contributions to the Plan on behalf of D's employees. After the stock sale, the P controlled group ceased covered operations and no longer has an obligation to contribute to the Plan. Under Section 4218 of ERISA, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's stock. As stated above, however, in order to avoid [*11] withdrawal liability, the controlled group must cease to have such operations or such obligations "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398. As discussed above, whether an employer's cessation is solely the result of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is not solely because of a covered restructuring, it incurs a complete withdrawal. However, D and its new controlled group, if any, would be a "successor" within the meaning of the last sentence of Section 4218. Consequently, a portion of the P controlled group's remaining contribution history must be allocated to D and its new controlled group, if any, under the principles discussed above. The P controlled group's liability is then determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C or D. C and its new controlled group, if any, remains responsible for the contribution history previously allocated to C.

Alternatively, if the [*12] controlled group's cessation is determined to be solely because of a covered restructuring, the controlled group is not subject to withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. In that event, D and its new controlled group, if any, inherits the contribution history of the P controlled group that was not allocated to C.

You also ask if the result would be different if the assets of D are sold in a transaction that meets the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384. Under Section 4204(a)(1) of ERISA, an employer will not incur liability for a complete or partial withdrawal "solely" because of the sale of all or a portion of its assets to an unrelated purchaser if the following conditions are met. First, the purchaser must have an obligation to contribute to the pension plan for substantially the same number of contribution base units as the seller. Second, the purchaser must provide a cash or

surety bond payable to the pension plan in the five years after the sale if the purchaser withdraws or fails to make required contributions. Third, the contract for sale must provide that [*13] if the purchaser withdraws in the five years after the sale and fails to pay its withdrawal liability, the seller is secondarily liable. 29 U.S.C. § 1384(a)(1).

Under Section 4204(b)(1) of ERISA, 29 U.S.C. § 1384(b)(1), the liability of the purchaser for a subsequent complete or partial withdrawal is determined as if the purchaser was required to contribute to the plan the amount the seller was required to contribute for the operations transferred for the year of the sale and the four previous years. Thus, the purchaser assumes the contribution history of the seller for the year of the sale and the four plan years preceding the sale, but only for the contribution history relating to the assets transferred in the sale.

In your hypothetical, if the assets of D are sold in a sale that meets the requirements of Section 4204 of ERISA, the P controlled group has ceased covered operations and no longer has an obligation to contribute to the Plan. Like the sale of stock situation discussed above, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's assets. However, under Section 4204(a)(1), as under Section 4218, in order to avoid withdrawal [*14] liability, the controlled group's cessation must occur "solely" because of a sale of assets. Again, the question of whether an employer's cessation is solely because of a particular transaction must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is solely because of the asset sale, the controlled group does not incur withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. However, the controlled group is secondarily liable if D and its new controlled group, if any, withdraw from the Plan within 5 years of the asset sale and fail to make withdrawal liability payments. D and its new controlled group, if any, assume the contribution history relating to D's operations for the year of the sale and the previous four years.

If the controlled group's cessation is determined not to be solely because of the sale of D's assets, it incurs a complete withdrawal and its liability is determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original [*15] employer that was not transferred to C.

As a final matter, the opinions in this letter are subject to the special rule in Section 4212(c) of ERISA, which states:

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c). Depending on the facts, some of the same considerations as are relevant in determining whether a cessation is due "solely" to a restructuring or sale of assets may be relevant under Section 4212(c).

I hope this has been of assistance to you. If you have any further questions, please call D. Bruce Campbell of my staff at (202) 778-1918.

Carol Connor Flowe

General Counsel