

Pension Benefit Guaranty Corporation

89-8

October 19, 1989

REFERENCE:

[\*1] 4211 Withdrawal Liability.

OPINION:

We write in response to your request for an advisory opinion from the Pension Benefit Guaranty Corporation ("PBGC") as to whether a multiemployer pension plan's assessment of withdrawal liability pursuant to a contractual agreement with a contributing employer, without regard to whether the plan has unfunded vested benefits, is consistent with Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").

The plan in question would be formed by the merger of three existing plans, two of which are fully funded for vested benefits, and the third of which has unfunded vested benefits. You estimate that the merged plan's assets would slightly exceed its vested benefits. Under the allocation method proposed for the merged plan, a withdrawing employer's withdrawal liability would be the sum of two amounts, one determined with respect to the pre-merger period and the other with respect to the post-merger period. The pre-merger amount would be what the employer's withdrawal liability would have been under its pre-merger plan. Hence, this allocation method could result in withdrawal liability for employers formerly covered by the [\*2] less well-funded plan even though the merged plan had no unfunded vested benefits.

In a previous letter to you, the PBGC stated its opinion that ERISA does not permit a multiemployer pension plan to assess withdrawal liability against a withdrawing employer when the plan has no unfunded vested benefits as of the end of the preceding plan year, regardless of the allocation method being used by the plan, and whether or not the plan is the result of a merger of other plans. This opinion was based on a Notice of Interpretation that the PBGC published in the Federal Register on December 31, 1986 (51 FR 47342), which has since been adopted by the U.S. Court of Appeals for the First Circuit in *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 10 EBC 2625 (1st Cir. 1989).

You propose, however, that as a condition of the merger, employers previously covered by the less well-funded plan would be required to enter into contracts permitting the merged plan to assess withdrawal liability against them without regard to whether the merged plan has unfunded vested benefits. In support of this proposal, you note that the contracting employers' waiver of the limitation on their potential [\*3] withdrawal liability would be voluntary. You also suggest that the use of such contracts will benefit other employers by "insulating [them] from pre-merger liability of other plans" and will be "in the best interest of the plans' participants and beneficiaries." And you argue that, as a matter of policy, --

[t]rustees and contributing employers of plans with no unfunded vested benefits will be reluctant to merge with plans that have unfunded vested benefits if the merger creates a fully funded plan that is unable to assess withdrawal liability on employers who contributed to the underfunded plan.

You request the PBGC's opinion that the assessment of withdrawal liability pursuant to such contracts, regardless of whether the merged plan has unfunded vested benefits, would not be prohibited under Title IV of ERISA.

Under section 4202 of ERISA, the initial responsibility for determining whether a withdrawal occurs and the amount of any resulting liability lies with the plan sponsor. Section 4221 further provides that any dispute between a plan sponsor and an employer concerning a determination made under sections 4201 through 4219 is to be resolved through arbitration, subject [\*4] to review in the courts. It would be inappropriate for the PBGC to interject itself into these statutory procedures by taking a position regarding the application of the law to the particular facts involved in your request. The PBGC will, however, continue its practice of answering general questions of interpretation under ERISA.

As you note in your request, Rep. Frank Thompson, Jr., during House debate on the Multiemployer Pension Plan Amendments Act of 1980, made the following remarks:

We also wish to make it clear that the statutory imposition of withdrawal liability is not intended to restrict the parties' freedom to agree to additional or supplemental measures to protect a plan from the consequences of an employer's withdrawal. For example, a plan may agree to accept an employee group with past-service credit only if the employer of such group guarantees that the existing liabilities assumed by the plan will be fully funded even if the cost would be greater than the employer's statutory liability. Of course, employers can also agree by contract to waive limitations on their statutory withdrawal liability.

126 Cong. Rec. 23,039 (1980).

The PBGC believes that this statement [\*5] reflects Congress's intent that an employer may, consistent with the requirements of Title IV of ERISA, contractually waive limitations on its withdrawal liability. However, this raises an issue of the effect under ERISA section 4211 of an employer's failure to pay all or part of what might be called its "additional liability" -- that is, the additional amount that it has agreed to pay beyond what would otherwise have been its withdrawal liability. The PBGC notes, for example, that if a plan using the presumptive method of allocating unfunded vested benefits under ERISA section 4211(b) is unable to collect all or part of an employer's withdrawal liability, the withdrawal liability of other employers may be increased under section 4211(b)(1)(C) and (b)(4). The PBGC does not believe that Congress expected one employer's waiver of limitations on its withdrawal liability to increase other employers' potential withdrawal liability under the statute (although other employers might agree to such increases by contract). Accordingly, the PBGC believes that an employer's "additional liability" is not to be taken into account under section 4211 of ERISA in such a way as to increase the withdrawal [\*6] liability of any other employer, except to the extent agreed to by that other employer.

Your request for the PBGC's opinion in this matter does not include a request for approval of the proposed allocation method under section 4211(c)(5) and 29 CFR Part 2642, and we have not treated it as making such a request. This letter, therefore, should not be construed as approving or disapproving your proposed allocation method under section 4211(c)(5) or Part 2642.

The foregoing comments deal only with issues raised under Title IV of ERISA. You should consult with the Department of Labor and the Internal Revenue Service with regard to questions arising under Title I of ERISA and the Internal Revenue Code respectively.

If you have any further questions regarding this matter, you may call Deborah C. Murphy of this office at 202-778-8820.

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