Pension Benefit Guaranty Corporation

92-2

April 22, 1992

REFERENCE:
[*1] >4213(b)>
>4219(b)(1)>
>4221(e)>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to the effect, under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), of a multiemployer pension plan's notice to a withdrawing employer of estimated withdrawal liability based on an estimate of the amount of plan assets, followed by a notice of actual withdrawal liability based on a subsequently determined actual amount of plan assets.

Under the multiemployer provisions of ERISA, the initial responsibility for determining whether an employer has withdrawn from a multiemployer pension plan, and for determining and assessing any resulting withdrawal liability, lies with the plan sponsor. ERISA further provides that disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. It would be inappropriate for the PBGC to interject itself into these statutory procedures by issuing an opinion on the application of the law to a particular transaction. However, the PBGC will continue its practice of answering general questions of interpretation [*2] under ERISA.

ERISA treats the estimation of withdrawal liability in two contexts. Under section 4221(e), an employer may obtain from a plan at reasonable cost "an estimate of such employer's potential withdrawal liability with respect to the plan . . . ." And under section 4213(b), --

in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability . . . , the plan actuary may --

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of the Internal Revenue Code of 1954 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

In Opinion Letter 91-3 (March 29, 1991), the PBGC opined that --

[w]hen [a] plan provides an employer with an estimate 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" . . . under section 4221(e) is not binding upon [*3] either party.

No reason appears why this result should change if an estimate is provided after the employer withdraws, or if it is provided by the plan on its own initiative, rather than upon the employer's request.

On the other hand, there is no indication that withdrawal liability determined under section 4213(b) is to be treated differently from withdrawal liability determined in any other manner. None of the other ERISA provisions describing the calculation, assessment and collection of withdrawal liability -- for example, sections 4201(a), 4211, and 4219(b)(1) -- distinguishes between liability determined on the basis of "final" or "actual" data and liability determined on the basis of estimates, samples, or "best available" data pursuant to section 4213(b). Accordingly, the fact that a plan has relied on section 4213(b) in determining and assessing an employer's withdrawal liability does not make the plan's assessment of that liability on the employer any the less effective.

Thus, the effect of a plan's notice to a withdrawing employer of its "estimated" withdrawal liability based on an estimate of the amount of plan assets depends on whether the notice is a valid and [*4] effective assessment of withdrawal liability computed pursuant to section 4213(b) or is a mere informational communication akin to that contemplated by section 4221(e). If the notice is merely informational, and not an assessment of withdrawal liability, the plan's later assessment of "actual" liability is in fact its first assessment against the employer. On the other hand, if the first notice is an assessment -- despite the characterization of the amount assessed as "estimated" -- then its effect is the same as if it were based on "final" figures. Ordinarily, whether a particular notice is an assessment of withdrawal liability, rather than merely informational, depends on whether it effectually --

notif[ies] the employer of . . . the amount of the liability, and . . . the schedule for liability payments, and . . . demand[s] payment in accordance with the schedule.

ERISA section 4219(b)(1). n1 As the PBGC stated in Opinion Letter 83-4 (January 25, 1983), a dispute between an employer and a plan sponsor as to the validity of a withdrawal liability assessment is subject to ERISA's dispute resolution procedures.

n1 In some cases (where, for example, a company is in bankruptcy), a withdrawal liability assessment notice without a payment schedule or a demand for payment may nonetheless be effective. [*5]

Where the first of two notices of withdrawal liability with respect to the same withdrawal is in fact an assessment, the effect of a second assessment would be to amend, supplement, or supersede the first. The validity of such a reassessment would depend on the facts and circumstances of the case. ERISA sections 4219(b) and 4221(d) clearly contemplate changes to withdrawal liability assessments in the context of the statutory review process. As the PBGC stated in Opinion Letter 90-2 (April 20, 1990), a plan's --

right to revise its original assessment or issue a second assessment, . . . like other disputes involving withdrawal liability, must be resolved first through arbitration and then, if necessary, through the courts.

The PBGC also discussed in Opinion Letter 90-2 some of the circumstances in which a second assessment should or should not be given effect and in particular took the position that revisions to a plan's determination of the value of unfunded vested benefits (which would include the value of assets) ordinarily should not be allowed.

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

Carol Connor [*6] Flowe

General Counsel