Seventh Circuit Clarifies ERISA's Sale Of Assets Exception For Employers Participating In Multiemployer Pension Plans

Any employer who participates in a multiemployer pension plan generally understands that it risks a possible withdrawal liability assessment in the event it ceases participation in that in that plan or triggers what is known as a partial withdrawal at a time when the plan is underfunded. The withdrawal liability provisions of Employee Retirement Income Security Act (ERISA) are fairly detailed, with various exceptions for certain industries and safe harbors for certain types of business transactions that might otherwise trigger a withdrawal. Even though these provisions have been in place for over 30 years, several key questions as to how these rules apply have yet to be litigated. With withdrawal liability estimates for some employers easily hitting seven (and higher still for a few), what does and does not constitute a withdrawal is a multi-million dollar question.

In *Central States Pension Fund v. Georgia-Pacific LLC*, 2011 U.S. App. LEXIS 6389 (7th Cir. March 29, 2011), a case of first impression, the Court of Appeals for the Seventh Circuit held that the Central States Pension Fund improperly assessed Georgia-Pacific $5 million in withdrawal liability after the Company sold its remaining operations that participated in the Fund pursuant to the asset sale exemption provision in Section 4204 of ERISA. The 2004 sale ended the Company's obligation to contribute to the Central States Fund. Had the sale not been structured in accordance with Section 4204, the Company would have been assessed withdrawal liability. Under Section 4204, however, a seller of assets need not pay withdrawal liability if "solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party . . ., the seller ceases covered operations or ceases to have an obligation to contribute for such operations" and the purchaser not only assumes liability for the contributions but also posts a bond to ensure payment. The seller is then only secondarily liable for the first five years of the buyer's payments. 29 U.S.C. § 1384.

In years past, however, the Company had ceased other operations that had contributed to the Central States Fund. During 1994-95, the work of the Company's participating employees in its wood pulp division was outsourced. In 1997, the Company closed certain facilities within its building products division , which triggered a partial withdrawal. These events were not tied to the 2004 sale.

Central States initially recognized the transaction as an exempt sale of assets under Section 4204, but later decided that the Company nevertheless triggered a withdrawal. The Fund argued that the asset sale was not the sole cause of the withdrawal because Georgia-Pacific's cessation of contributions was attributable to the closures during the 1990s as well as to the sale in 2004, so that a complete withdrawal did not occur "solely because" of an arm's-length sale of assets to an unrelated party.

The Company timely requested review and ultimately demanded arbitration. The Company argued that the sale was "solely" responsible for withdrawal in the sense that, if it had not sold the division and everything else had remained the same, it would still be a contributing employer and would not owe the Fund anything. As Central States would not have been able to assess withdrawal liability absent the sale, and given compliance with ERISA Section 4204, the Fund was not losing contributions because of the sale, then there should be no reason why the Fund should be entitled to collect a $5 million dollar windfall. The arbitrator, relying in part on various factors set forth in PBGC Opinion Letter 92-1 for considering how to apply ERISA Section 4204 when there were prior events that impacted the employer's contribution obligations, agreed with the Company. Reviewing the arbitrator's decision, the district court found the arbitrator applied the correct legal test to determine whether the Company's withdrawal was "solely because" of the asset sale.

The Seventh Circuit rejected the Fund's argument. Under the Fund's theory, any prior action could be another "cause" that would defeat the ERISA Section 4204 exemption. To demonstrate an extreme example, the Court noted that "[o]ne might as well say that the withdrawal can be traced to the General Agreement on Trade and Tariffs, which facilitates international trade and thus the sort of competitive pressure that led Georgia-Pacific to divest its building-products operations." "But," the Court stated, "if the United States' decision to join the GATT means that a sale is not the 'sole' cause of the withdrawal, then [ERISA Section 4204] is drained of meaning; nothing ever is a 'sole' cause in the sense that it is the only event in the causal chain." In short, "[e]very event has a chain of causes stretching back to the Big Bang."

The Fund's approach errantly treated all potential causes alike, but the Court recognized the term "cause" in law was intended to separate one kind of input from another. The Seventh Circuit held that "the best understanding of this phrase is one that concentrates on the transaction at issue: If the sale had not occurred, everything else had remained the same, and no withdrawal liability would have accrued, then the sale to a buyer that continues the pension contributions does not entail withdrawal liability." The Court considered that to be a working definition of "solely," because "it separates the role of the sale from the role of everything else."

While the Court declined to rule on whether all of the analysis in PBGC Opinion Letter 92-1 is sound, it concurred with the Opinion's recognition that, if an employer crafts a plan to withdraw by stages, and uses an asset sale under Section 4204 only for the last stage, then all transactions may be consolidated and withdrawal liability assessed for the plan as a whole. Thus, the Court concluded, "when a sale transfers an ongoing business to a new firm that is willing and able to make all pension contributions, and when this sale is not part of a plan to withdraw by stages, [ERISA Section 4204] shields the selling employer from withdrawal liability."

Applying its new standard, the Court upheld the arbitrator's award. Here, the arbitrator found that the Company had not formed a plan to withdraw in stages; each of the three closures was independent of the others; and each responded to distinct economic conditions. An arbitrator's factual findings stand on appeal unless a clear preponderance of the evidence undermines them. The Court found no clear error. The Company was entitled to the return of the withdrawal liability payments it had made (plus interest) in accordance with the errant assessment.

The Company was represented by Seyfarth Shaw LLP.

What This Means for Employers

The Seventh Circuit is the first Circuit to interpret the "solely because" language of ERISA's sale of assets exemption to withdrawal liability. The Fund's broad interpretation of "solely because," had it been upheld, would have defeated the Congressional intent to encourage asset sales by exempting those that comply from withdrawal liability. The Court's decision sets a clear standard for sellers to consider when deciding whether structuring a sale of assets in accordance with ERISA Section 4204 will truly exempt them from any withdrawal liability.

In the past few years, some pension funds have taken a much more aggressive approach in determining whether a withdrawal has been triggered. Some are pushing the envelope, not only with regard to the statutory exceptions to withdrawal liability, but in determining whether a partial withdrawal occurred, and also in determining whether a transaction that otherwise would not trigger a withdrawal should be ignored because a principal purpose of the transaction was to evade or avoid withdrawal liability. The Court acknowledged that Central States was "a uniquely aggressive seeker of withdrawal payments." Indeed, as if to prove the point, Central States has just filed a petition for rehearing and petition for rehearing en banc in this matter.

Employers with questions about withdrawal liability should contact their Seyfarth ERISA Litigation or Employee Benefits counsel.

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