PBGC Opinion Letter 93-3 , 10/14/1993

Reference(s): ERISA §4225 , **ERISA §4225(a)** , **ERISA §4225(b)** , **ERISA §4225(d)**

We write in response to your inquiry. You ask whether the PBGC adheres to the interpretation of **section 4225 of the Employee Retirement Income Security Act** of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), set forth in its amicus curiae brief in Trustees of the Amalgamated Insurance Fund v. Geltman Industries, 784 F.2nd 926 (9th Cir. 1986). In its brief, PBGC addressed the proper application of **ERISA §§ 4225(a)** and 4225(b) where the withdrawn employer satisfies the prerequisites for the application of both subsections. PBGC expressed the view that an employer meeting the criteria in both subsections (a) and (b) may elect the limitation that yields the lesser of the amounts determined under the two subsections. The Ninth Circuit, however, reached a contrary conclusion. 784 F.2d at 929-930. For the reasons set out below, PBGC continues to believe that its interpretation of **ERISA §§ 4225(a)** and 4225(b) is correct as matter of law.

Under **ERISA § 4225(a)(1)(A)** an employer who withdraws in connection with a "bona fide sale of substantially all of [its] assets in an arm's-length transaction to an unrelated party" will ordinarily be permitted to retain a portion of its dissolution value. The Geltman court, however, citing "the language and ... structure" and "the underlying policies of ERISA and MPPAA," concluded that an "insolvent" employer must be denied relief under subsection (a)(1)(A), because subsection (b) provides a different liability limit that is explicitly directed to "an insolvent employer undergoing liquidation or dissolution."

This analysis overlooks several pertinent points. First, when Congress intended to deny classes of employers relief de section 4225, it did so explicitly. See **ERISA § 4211(d)** (prohibiting application of section 4225 to employers who withdraw from coal- industry pension plans.) Significantly, nothing in the language of section 4225 suggests that subsections (a) and (b) are mutually exclusive. **1**

The two provisions have separate factual prerequisites and provide different types of relief. So long as an employer satisfies the requirements of both subsections, it should qualify for relief under either rule and its liability should not exceed the lesser of the amounts determined under the two subsections.

This conclusion is further supported by the technical definition of "insolvency" included in section 4225. Under section 4225(d)(1) "an employer is insolvent if [its] liabilities, including withdrawal liability under the

plan (determined without regard to subsection (b), exceed [its] assets (determined as of the commencement of the liquidation or dissolution)" (emphasis added). Section 4201(b)(1)(D) defines "withdrawal liability" as including adjustment pursuant to section 4225. Thus, the use of the term "withdrawal liability" in the definition of insolvency incorporates any reductions in withdrawal liability resulting from the application of section 4225 (including subsection (a)) except the reduction set out in section 4225(b), which is specifically excluded. **2**

PBGC believes that its interpretation of section 4225 is fully consistent with the underlying policies of ERISA and MPPAA. Section 4225 is but one of several ERISA provisions that limit the amount of withdrawal liability imposed upon withdrawing employers. **3**

Nothing in the congressional finding and policy declarations that preface MPPAA indicates that the withdrawal liability limitation provisions should be construed to maximize the liability of an employer. See MPPAA § 3, codified at **U.S.C. § 1001a** . The same is true of the legislative history.

Finally, the interpretation offered in Geltman makes little economic sense. Under the rationale of the decision, an employer whose liabilities exceeded its assets by only one dollar is insolvent and would automatically forfeit any relief under section 4225(a)(1)(A). In contrast, if the employer's assets were one dollar greater than liabilities, the full liability limitation would apply. **4**

As discussed above, the application of the plain language of the statute avoids this sort of anomaly.

In conclusion, the plain wording of section 4225 dictates that an employer that meets the requirements of both subsections and is entitled to an assessment of withdrawal liability that does not exceed the lesser of the amounts determined under (a) and (b). Neither the legislative purpose nor principles of statutory construction compel a contrary conclusion. The PBGC therefore continues to adhere to the positions stated in its brief amicus curiae.

I trust this responds to your question. If you have further questions regarding this matter, please contact Karen Morris of my staff at (202) 778-8822.

Sincerely,

Carol Connor Flowe

General Counsel

ADDENDUM

Computation of Withdrawal Liability Under Arbitrator's Interpretation in Geltman Industries and Amalgamated Insurance Fund, of Section 4225 Assumptions:

1. The value of the employer's assets after the sale is $100,000.
2. The employer's liabilities other than withdrawal liability are $90,000
3. The funded vested benefits allocable to the employer prior to the application of section 4225 are

$10,000 in Example 1 and $10,001 in Example 2.

Maximum Withdrawal	Example 1	Example 2
Liability under section 4225(a)		
1. (a)(1)(A): 30% of the liquidation value of the employer = .30 x ($100,000 - $90,000)	$3,000	
2. (a)(1)(B): funded vested benefits attributable to employees of the employer $0 or determined		N/A
3. Greater of (a)(1)(A) or (B) (#1 or #2)	$3,000	
Maximum Withdrawal Liability Under section 4225(b)		
4. (b)(1): 50% of allocable unfunded vested fits = .50 x $10,001 $5,000.50		$5,000.50
5. (b)(2): additional amount due plan (remaining liquidation value after #4)	N/A	$ 4,999
6. Total collectible under (b) (sum of #4 and #5) $3,000 $10,000	$3,000	$10,000
7. Amount Paid to Plan $3,000 $10,000	$3,000	$10,000
8. Amount Paid to creditors other than Plan	$90,000	$90,000
9. Amount retained by employer	$7,000	$0

1

Sections 4225 (a) and (b) both begin with the phrase "in the case of an employer." The Geltman court suggested this phrase was "evidence that the sections are to operate exclusive of each other ..." This suggestion is manifestly incorrect. The phrase "in the case of" is used as an introduction to at least 30 provisions of MPPAA; in each such instance, it is used in its normal statutory sense, as a synonym for "when" or "if". 20A Words and Phrases 75 (1959 & Supp. 1983).

2

The decision is therefore incorrect when it states that whether "an employer is an insolvent employer .... is done by looking to the provisions of [section 4225(d)(1) without regard to [section 4225(a)]. Geltman , 784 F.2d at 929.

3

See, e.g., **ERISA §§ 4203(b)** , (c), (d) and (f), 4204' 4207, 4208, 4209, 4210, 4217, 4218, 4219(c)(1)(B), 4224 and 4225. The Supreme Court has noted with approval Congress's efforts to moderate the impact of withdrawal liability on employers, including Congress's effort in section 4225, Connally v. PBGC, 475 U.S.

211, 225, 226 n.8 (1986)

4

The attached table, drawn from the PBGC's amicus brief, illustrates the dramatic increase in employer liability caused by the single dollar difference.