

Pension Benefit Guaranty Corporation

81-5

March 26, 1981

REFERENCE:

4001(b) Definitions. Employer and Controlled Group

4048 Date of Termination

4062(a) Liability of Employer in Single Employer Plans. Applicability

4062(b) Liability of Employer in Single Employer Plans. Amount of Employer Liability

4068(c)(1) Lien for Employer Liability. Priority of Lien

OPINION:

This is in response to your letter in which you requested PBGC to rule on the consequence to A Inc. under Title IV of the Employee Retirement Income Security Act of 1974 as amended by The Multiemployer Pension Plan Amendments Act of 1980 ("ERISA") in connection with the transactions described below.

The facts as we understand them are as follows. * * * Inc. ("Seller") sponsored and maintained the * * * Retirement Plan (the "Plan"). Seller is wholly-owned by B Corporation * * *. The Plan was terminated and the date of termination of December 1, 1979 was set pursuant to § 4048 of ERISA by agreement between PBGC, the Seller and the Committee of the * * * Retirement Plan.

On or about July 8, 1980, Seller entered into a contract to sell the assets of the Seller's * * * division to Inc. ("Buyer") a party unrelated to the Seller. The Buyer's rights pursuant to the contract [*2] were assigned to A Inc. ("Buyer Sub"), a subsidiary of Buyer, which is also unrelated to the Seller. The sale closed on December 18, 1980.

On June 6, 1980, the PBGC notified the Seller that the PBGC was unable to determine that the assets held under the Plan were sufficient on the date of plan termination to pay all benefits guaranteed by PBGC.

Section 4602(a) of ERISA provides that "any employer who maintained a plan . . . at the time it was terminated . . ." shall be liable to the PBGC for an amount determined under § 4062(b) of ERISA. Under § 4001(b) of ERISA and 29 CFR 2612, trades or businesses under common control are treated as a single employer for purposes of Title IV liability ("controlled group"). Accordingly, the controlled group consisting of B and Seller and any other business under common control are liable to the PBGC under § 4062 of ERISA in connection with the termination of the Plan. Assuming the sale was for fair market value, Buyer Sub would not be subject to liability resulting from the termination of the Plan.

You have indicated that Buyer Sub intends to obtain additional financing and to pledge the purchased property as security for the loan. We note [*3] that § 4068(c)(1) of ERISA adopts the lien priority rules of § 6323 of the Internal Revenue Code. Generally, these rules provide protection against the PBGC's lien, if any, for a holder of a security interest if such secured party's interest is perfected before notice of the PBGC lien is filed. Since no notice of PBGC's lien has been filed to date, or is expected to be filed by March 31, 1981, a security interest in the assets filed on that date would take priority over a subsequently filed PBGC lien.

I hope this response is helpful. If you have any further questions, please contact me or * * * of my staff at 202-254-3010 who is handling the matter.

Henry Rose
General Counsel