

Pension Benefit Guaranty Corporation

87-1

January 23, 1987

REFERENCE:

[*1] 4203(e) Date of Complete Withdrawal
4205(b)(1) Partial Withdrawals
70 Percent Decline
4205(b)(2)(A) Partial Withdrawals
Definition of Partial Cessation

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) as to the circumstances under which a bankruptcy proceeding may give rise to withdrawal liability under Sections 4203 and 4205 of the Employee Retirement Income Security Act, as amended (ERISA).

Section 4203 of ERISA defines a complete withdrawal from a multiemployer plan as occurring when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. Section 4205(b)(2) provides that a partial withdrawal occurs in certain circumstances where the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements or permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities. Section 4205(b)(1) provides that a partial withdrawal also may occur as a result of a sustained 70 percent decline in the employer's [*2] contribution base units.

Filing a petition for reorganization under Chapter 11 of the Bankruptcy Code does not constitute a withdrawal. By itself the filing of a reorganization petition does not affect the employer's obligation to contribute, covered operations, or contribution base units.

Section 1113 of the Bankruptcy Code does allow a debtor in possession to reject its collective bargaining agreement, including its obligation to contribute to a multiemployer plan, if specified conditions are met. In specified circumstances, Section 1113 also allows the bankruptcy court to authorize implementation of interim changes in the collective bargaining agreement prior to court approval of rejection. However, this section does not permit unilateral changes in a collective bargaining agreement until the requirements for rejection or for interim changes have been met. Until that time, the obligation to contribute under a collective bargaining agreement continues.

If an employer in a Chapter 11 reorganization stops contributing to a multiemployer plan after being authorized under Section 1113 either to reject its collective bargaining agreement or to implement interim changes in the [*3] collective bargaining agreement, then an inquiry into the facts and circumstances of the situation is needed to determine whether a withdrawal has occurred, including whether the cessation of the obligation to contribute is permanent. If the employer permanently ceases covered operations for any reason, including the conversion of a Chapter 11 reorganization to a Chapter 7 liquidation or the entry of an order of relief in an involuntary Chapter 7 bankruptcy, a withdrawal will have occurred.

Assuming a withdrawal has occurred, the date of the withdrawal is determined under ERISA, not under the Bankruptcy Code. Thus, if the withdrawal is based on a permanent cessation of covered operations, the date of withdrawal is the date when operations ceased. See Section 4203(e) of ERISA. It does not relate back to the date of filing of a Chapter 11 petition or an involuntary Chapter 7 petition if operations continued thereafter. Similarly, if the withdrawal is based on a permanent cessation of the obligation to contribute, the date of withdrawal is the date when the obligation to contribute ceased. See Section 4203(e) of ERISA. It does not relate back to the date of filing of a [*4] Chapter 11 petition even if the obligation to contribute ultimately was rejected under Section 1113. See *Trustees of Amalgamated Insurance Fund v. McFarlin's Inc.*, 789 F.2d 98, 104 n.2 (2d Cir. 1986) (withdrawal liability "does not derive from the collective bargaining agreement but from [ERISA]. . .").

Of course, the initial responsibility for determining whether any particular action constitutes a withdrawal from a

multiemployer plan lies with the plan sponsor. ERISA further provides that a dispute between a plan sponsor and an employer on this issue is to be resolved by arbitration, subject to review in courts.

I hope this response has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster of the Corporate Policy and Regulations Department. His telephone number is 202-778-8850.

John H. Falsey
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