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ERISA's Evade or Avoid Provision: Conflicting Case Law and Strategies for Employers

BY SARAH FASK

Under ERISA, when an employer withdraws from a multiemployer defined benefit pension plan that has unfunded vested benefits, the employer is generally liable to the pension plan for a share of the unfunded vested benefits. Typically, withdrawal liability is triggered when there is a complete or partial withdrawal from the plan. This can happen when the employer ceases to have an obligation to contribute to the plan (because, for example, the employer negotiated a new collective bargaining agreement with the union), permanently ceases covered operations, or significantly reduces its contribution rate because of business events such as layoffs, plant closures, or sales. Depending on the size of the employer and the estimate of yet-unfunded benefits, a pension fund may assess a withdrawing employer hundreds of thousands – if not millions – of dollars in withdrawal liability.

Accordingly, it comes as no surprise that some employers attempt to structure a business transaction to avoid triggering withdrawal liability. Nonetheless, such attempts are often futile.

Under ERISA, ''if a principal purpose of any transaction is to evade or avoid liability [under the provisions governing employer withdrawals from multiemployer plans, those provisions] shall be applied (and liability shall be determined and collected) without regard to such transactions.'' *See* ERISA § 4212(c).

Courts have broadly interpreted this provision permitting pension funds to void transactions that, on their face, appeared to be unmotivated by the avoidance of withdrawal liability.

For example, in *Santa Fe Pacific Corp. v. Central States, Southeast and Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994), the Seventh Circuit considered a case in which the employer sold the stock of a subsidiary to a buyer, and the subsidiary later shut down and was unable to pay its withdrawal liability. The evidence showed that the employer knew that it would incur no withdrawal liability if it sold the subsidiary outright as opposed to simply selling off its assets. While selling the subsidiary's assets would bring in more money, a consultant had advised the company that ''pension fund liability,'' which the consultant estimated was $10.5 million, was ''a major stumbling block in implementing the liquidation'' of the subsidiary's operation. During negotiations about what to do with the subsidiary, the company recognized that selling the subsidiary's stock might be, therefore, more profitable than simply selling the assets because of the withdrawal liability.

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The Seventh Circuit, in reversing the district court, found that the issue was not whether the company had compelling reasons independent of withdrawal liability to divest itself of the subsidiary. Instead, the Seventh Circuit objected to the form the divestiture took – a sale of stock rather than of assets. According to the court, ''The statutory criterion is not whether the transaction is a sham. . . . [but] whether the avoidance of withdrawal liability by the seller is one of the principal purposes of the transaction.'' Consequently, the employer was liable as if the stock sale had never occurred.

The key takeaway of *Santa Fe* is that an employer should make business decisions independent of any information it may have about how those business decisions may impact the amount of potential withdrawal liability. This essentially could strip employers of any ability to minimize their liability by following the numerous other provisions within ERISA that control how withdrawal liability is calculated. Using *Santa Fe* as precedent, a fund could argue that any behavior that denies a fund the largest amount of withdrawal liability possible is a transaction to evade or avoid liability.

Thankfully for employers, not all courts have come to similar conclusions. In *CIC-TOC Pension Plan v. Weyerhaeuser Co.*, 911 F. Supp. 2d 1088 (D. Or. 2002) (226 PBD, 11/27/12), the district court vacated the arbitrator's decision in favor of the Plan. The employer, Weyerhaeuser, admitted that its decision to accelerate the date of the closure of one facility was made in order ''to prevent withdrawal liability.'' The record, however, established that, other than the timing, nothing changed about what Weyerhaeuser proposed, planned, and ultimately did, with regard to its operations at the Albany facility.

The court reasoned:

> Accepting the Plan's interpretation would require an employer to blindly ignore available information in timing any

> legitimate business decision. The essence of the Plan's argument is that Weyerhaeuser's fortuitous acquisition of information regarding its potential withdrawal liability if it did not completely cease all covered operations before the end of the 2008-09 Plan year morphs its otherwise legitimate business decision to restructure its business operations by closing the Albany facility into a transaction to evade or avoid withdrawal liability.

Thus, under *Weyerhaeuser*, legitimately timing a transaction in order to benefit the employer does not constitute the type of conduct that Congress intended to prohibit. Of course, the court also determined that a unilateral decision to close a facility (and to time the closing to minimize liability) is not a ''transaction'' at all, because a ''transaction'' requires two parties.

As the divergent decisions in *Santa Fe* and *Weyerhaeuser*exemplify, in practice, if an employer knows that withdrawal liability may be in the company's future, the employer faces an uphill battle in structuring any business decision in a way that minimizes that liability without triggering ERISA's evade or avoid provision. But, careful planning, and two concrete steps, may assist employers in doing just that.

First and foremost, an employer should be able to articulate legitimate business reasons for its actions – separate from reducing its withdrawal liability. Of course, a court will be more reluctant to apply the evade or avoid provision if the decision was made by individuals who had no knowledge of any impending withdrawal liability. If an employer can convince an arbitrator or the court that avoiding withdrawal liability was not the actively contemplated purpose, but only an incidental effect of the transfer, the employer will be better able to defend itself against an evade or avoid claim.

Second, and depending on the circumstances, it may be worthwhile for an employer to invoke the attorney-client privilege when it comes to the reasoning used in making its business decision. Employers should seek legal advice regarding how different business transactions may impact any withdrawal liability calculations. This approach may also provide alternatives that take advantage of the fact that if an evade or avoid transaction is found, the result is to disregard the transaction – properly structured, it may be possible to develop an approach to a transaction where a disregarded transaction does not necessarily result in withdrawal liability.

Nevertheless, employers should recognize that the current trend in the case law is very favorable to funds. Employers should have a business contingency plan for if and when a court applies the evade or avoid provision of ERISA, disregards the alleged improper transaction, and charges the employer for the withdrawal liability.