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MINIMIZING THE IMPACT OF WITHDRAWAL LIABILITY UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

BRUCE GABLER*

INTRODUCTION

The Multiemployer Pension Plan Amendments Act of 19801 ("MPPAA") has caused considerable alarm to employers participating in multiemployer plans due to the extent of potential withdrawal liabilities. Although MPPAA was signed into law on September 26, 1980, it is generally applicable to employers who withdrew (or withdraw) from multiemployer plans on or after April 28, 1980. Each employer participating in a multiemployer plan should assess its exposure to both real and contingent withdrawal liabilities under MPPAA. The Act should be of particular concern to employers in the coal industry since events such as a mine closure or a drop in production can trigger a withdrawal liability.

I. I.R.C. SECTION 404(c) STATUS OF UMWA PENSION PLANS

MPPAA specifically provides that certain sections of the Act regarding the generation, calculation and limitation of withdrawal liability will not apply to plans covered by section 404(c) of the Internal Revenue Code unless the plans have been amended to adopt such sections.2 I.R.C. section 404(c) was enacted by Congress to permit contributions to the United Mine Workers Association Welfare and Retirement Fund of 1950 (the "1950 Fund") to be deductible. In 1974, the 1950 Fund was restructured and four trusts were established: the United Mine Workers Association 1950 Pension Plan and Trust (the "1950 UMWA Pension Plan"), the United Mine Workers Association 1974 Pension Plan and Trust (the "1974 UMWA Pension Plan"), the United Mine Workers Association 1950 Benefit Trust and the United Mine Workers Association 1974 Benefit Trust.

An Internal Revenue Service private letter ruling, issued June 9, 1975, in response to a request from the Board of Trustees of the United Mine Workers Association Welfare and Retirement Fund, held that both the 1950 UMWA Pension Plan and 1974 Pension Plan are continuations of the 1950 Fund and are, therefore, covered by I.R.C. section 404(c). Because the 1950 and 1974 UMWA Pension Plans are treated as section 404(c) plans by the Internal Revenue Service, the section 404(c) limitations set forth in MPPAA are considered applicable to both UMWA Plans.3

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3 See generally Foster, Acquisitions and Dispositions in the Coal Industry, 1983 E. Min. Law
II. Withdrawal Liability

Withdrawal liability is incurred when the employer makes either a complete or partial withdrawal from a multiemployer plan.\(^4\) A complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute to a multiemployer plan or permanently ceases all covered operations under the plan.\(^5\) For all practical purposes, this means that a complete withdrawal occurs when an employer terminates its business, sells all of its assets, withdraws from the union or takes other action which terminates its obligation to contribute to the plan.

Partial liability is incurred when the employer partially withdraws from a plan. A partial withdrawal may be triggered in three ways: (a) when a 70% decline in contribution base units occurs; (b) when the employer's obligation to contribute under at least one but not all of the collective bargaining agreements ceases, but the employer continues to work in the jurisdiction of the bargaining agreement of the type for which contributions were required; (c) when the employer's obligation to contribute to the plan for work performed at one or more but not all of its facilities ceases and the employer continues to perform work at the type of facility for which the obligation to contribute ceased.\(^6\)

Therefore, the withdrawal liability obligation to contribute to a multiemployer plan can arise when an employer completely or partially withdraws from a union, partially shuts down a plant or permanently ceases its business. Consequently, when making business decisions, an employer should guard against unnecessary liabilities by being aware of actions which trigger a complete or partial withdrawal. This is particularly important in the area of partial withdrawal liability which can occur unintentionally - by error or default.

III. Determination of Withdrawal Liability

A. Calculating Liability

Upon determination that a complete or partial withdrawal has occurred, a calculation of withdrawal liability will be made by the trustees of the multiemployer pension plan.\(^7\) MPPAA prescribes one presumptive method and three alternative methods for computing withdrawal liability.

MPPAA specifically states that plans described in I.R.C. section 404(c) must use the second alternative method, unless they are amended to provide otherwise.\(^8\) The legislative history does not indicate why section 404(c) plans must use this method, but merely states:

\[\text{Found. Spec. Inst. 6.01 (discussing the historical development of the 1950 and 1974 UMWA Pension Plans).}\]

\(^4\) ERISA § 4201(a), 29 U.S.C. § 1381(a) (Supp. IV 1980).
\(^5\) ERISA § 4203(a), 29 U.S.C. § 1383(a) (Supp. IV 1980).
In the case of certain plans established prior to January 1, 1954, as a result of an agreement between employee representatives and the Government of the United States during a period of government operation, under seizure powers, of a major part of the productive facilities of an industry, the presumptive method for determining withdrawal liabilities is the second alternative method for computing such liability. In addition, the exception for new employers, and other relief provisions do not apply to such a plan unless the plan is amended to provide for their application.\(^9\)

Both the 1950 and 1974 UMWA Pension Plans adopted amendments effective for plan years beginning on or after July 1, 1981, specifically adopting the second alternative method set forth in section 4211(c)(3) of ERISA. For plan years prior to July 1, 1981, the second alternative method would be presumptively required under MPPAA since neither Plan was amended to require otherwise.

The second alternative method is applied in three steps. First, the amount of the multiemployer pension plan's unfunded vested benefits as of the end of the plan year preceding withdrawal is determined by the multiemployer plan's actuary. Second, the value of the unfunded vested benefits are subtracted from all outstanding claims. Third, the amount in the second step is multiplied by a fraction. The numerator is the amount the employer was required to contribute during the five plan years preceding the withdrawal. The denominator is the total amount contributed by all employers during those five plan years.\(^10\) (The 1950 and 1974 UMWA Pension Plans define "total amount contributed" as including contributions actually received during the plan year.) When computing withdrawal liability, one should note that the Pension Benefit Guaranty Corporation ("PBGC") is authorized to prescribe regulations providing acceptable alternatives for methods of computing withdrawal liability which may be adopted by a plan.\(^11\)

B. De Minimis Rules

MPPAA sets forth two *de minimis* rules to be applied after the determination of withdrawal liability. These rules could result in a reduction or elimination of withdrawal liability.\(^12\) However, under ERISA section 4211(d)(1), the *de minimus* rules are inapplicable to I.R.C. section 404(c) plans which do not specifically provide for their application\(^13\) Since neither the 1950 or 1974 UMWA Pension Plan has been amended to provide for the application of these rules, both the mandatory and discretionary *de minimis* rules are inapplicable.

C. Notice and Payment of Withdrawal Liability

A multiemployer pension plan sponsor (the trustees) may request addi-

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\(^12\) ERISA § 4208, 29 U.S.C. § 1389 (Supp. IV 1980).

tional information from the employer in order to determine whether a complete or partial withdrawal has occurred and to calculate withdrawal liability. The employer has thirty days in which to respond.\textsuperscript{14} After an employer’s withdrawal, the plan sponsor must then notify the employer “as soon as practicable” of its liability amount, the schedule of payments and make demand for payment.\textsuperscript{15} No other time requirement is imposed upon the trustees. An employer who has incurred a complete or partial withdrawal should require strict compliance with this section by the trustees.

Liability payments are to be made in level annual payments. The amounts are based on the average annual number of contribution base units for the three highest consecutive plan years during the ten consecutive plan years ending before the plan year of the withdrawal, multiplied by the highest contribution rate within the ten years.\textsuperscript{16} The annual liability payment is based on a special amortization rate.\textsuperscript{17} However, section 4219(c)(1)(B) of the Employee Retirement Income Security Act of the 1974 (“ERISA”),\textsuperscript{18} which provides that the amortization period shall not exceed 20 years, is inapplicable to the 1950 and 1974 UMWA Plans because they are I.R.C. section 404(c) plans.\textsuperscript{19}

D. Employer Requested Review by Trustees

The notice to the employer commences a complicated appeals procedure. It is imperative that the employer comply with the time schedule specified in the appeals procedures in order to preserve its appeal of each of the factors involved in the calculation of withdrawal liability.

The employer may request a review of any specific matter in the determination.\textsuperscript{20} It also may identify any inaccuracy in the determination of the amount of the plan’s unfunded vested benefits allocated to it, and furnish any additional relevant information within 90 days of receiving the notice and demand.\textsuperscript{21} It is difficult for an employer to comply with this requirement, because it does not have access to the information necessary to request a review of any specific matter in the determination of the payments. The only information actually available to the employer at this time is the dollar amount of withdrawal liability and the schedule of payments. Therefore, in order to reserve all appeal rights, it is imperative that the employer make an all encompassing request for a review.

The trustees are then obligated to notify the employer of their decision, the basis for that decision and the reason for any change they have made in the withdrawal liability amount or payment schedule. The trustees are under

\textsuperscript{14} ERISA § 4219(a), 29 U.S.C. § 1399(a) (Supp. IV 1980).
\textsuperscript{15} ERISA § 4219(b), 20 U.S.C. § 1399(b) (Supp. IV 1980).
\textsuperscript{21} Id.
no time constraint other than the requirement that they make the decision within sufficient time for a "reasonable review."22

Compliance with time requirements for employer payments cannot, however, be postponed by a request for review.23 Regardless of the review procedures implemented, withdrawal liability payments must begin within sixty days of notice and demand.24 If the employer fails to make an installment payment when due and does not cure the failure within sixty days after receipt of written notice from the trustees, the trustees may ignore the schedule of payments and require immediate payment of the total amount of the employer's outstanding withdrawal liability, plus accrued interest on the total outstanding liability from the delinquent payment due date.25 Furthermore, the trustees may initiate a civil action which may expose an employer to severe mandatory penalties.26

E. Resolution of Disputes

The notice and payment requirements respecting withdrawal liability are found in section 4219 of ERISA,27 which was added by section 104 of MPPAA. That section must be read in conjunction with section 4221 of ERISA,28 "Resolution of Disputes," which provides that, "any dispute between an employer and the plan sponsor of a multiemployer plan covering a determination made under sections 4201 through 4219 shall be resolved through arbitration." Either party is given a right to initiate arbitration proceedings within a sixty day period after the earlier of: (a) the date of the plan sponsor's notification to the employer of the sponsor's decision concerning the employer requested review under section 4219(b)(2)(B); or, (b) 120 days after the date of the employer's request for review under section 4219(b)(2)(A).29 To insure that administrative remedies are properly exhausted, it is imperative that the date restrictions be followed. The parties may also jointly initiate arbitration within the 180 day period after the date of the plan sponsor's demand for payment.30

1. Arbitration Procedures

Arbitration proceedings shall be conducted, under the provisions of section 4221(a)(2), in accordance with fair and equitable procedures to be promulgated by the PBGC.31 The PBGC expected to issue proposed regulations pre-

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27 Id.
28 Id. The demand for payment is made under ERISA § 4219(b)(1), 29 U.S.C. § 1399(b)(1) (Supp. IV 1980).
scribing the procedures for arbitrating under section 4221(a)(2) of ERISA by December 31, 1982.33 However, as of March 4, 1983, these procedures had not been issued. For the interim period, the PBGC has endorsed the arbitration proceedings of the American Arbitration Association.35

MPPAA section 405,34 which should be read in conjunction with section 4221 of ERISA, indicates that any reasonable action taken during the period before regulations take effect shall be treated as complying with the regulations. Prior to promulgation of final regulations, section 405 of MPPAA must be interpreted as entitling arbitrators to rely upon their own judgment when finding actions to be reasonable.

2. Burden of Proof

The burden of proof demanded by section 4221 is difficult for the contesting party to satisfy. Determinations by the plan sponsor under sections 4201 through 4219 and section 4225 are presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.36 The determination of a plan’s unfunded vested benefits for a plan year is presumed correct unless a party contesting the determination can meet the required burden. That burden is to show by a preponderance of the evidence that either: (a) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations); or, (b) the plan’s actuary made a significant error in applying the actuarial assumptions or methods.38

These presumptions are generally very difficult to overcome. However, the applicable interest rate in the actuarial assumption was successfully challenged in Woodward Sand Company, Inc. v. Operating Engineers Pension Trust.37 In that case, the arbitrator found the rate of return on investment assumption of 6.5 percent was unreasonable and held that a rate of 7.9 percent should have been applied.

3. Other Considerations

There are two other provisions of section 4221 which must be considered in the resolution of disputes. The first provision is incorporated in section 4221(d) which requires that payments be made by an employer in accordance

33 PBGC Agenda of Regulations published October 28, 1982, sec. 6. The regulations are to be codified at 29 C.F.R., Part 2641.
35 MPPAA § 405, 29 U.S.C. § 1461 (Supp. IV 1980). Section 405 of MPPAA does not specifically amend the 1954 Internal Revenue Code or ERISA.
38 No. 269, slip op. at 1 (unpublished arbitration decision, April 27, 1982) (Kaufman, Arb.).
with the determination submitted for arbitration until the arbitrator issues a final decision. Any necessary adjustments for overpayments or underpayments arising out of the arbitrator’s decision are made in subsequent payments.\footnote{ERISA § 4221(d), 29 U.S.C. § 1401(d) (Supp. IV 1980).} However, this section further provides that “if the employer fails to make timely payments in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan.”\footnote{Id.} Thus, the first sentence of section (d) requires that the payment shall be made in accordance with the determination until the arbitrator issues a final decision, while the second sentence indicates that the employer will be treated as being delinquent upon failure to make payments in accordance with such final decision.

A recent case indicated that an employer must make interim withdrawal liability payments while the amount of liability is being arbitrated.\footnote{Republic Industries, Inc., v. Central Pa. Teamsters Pension Fund, 534 F. Supp. 1340 (E. D. Pa.) (order denying preliminary injunction), rev’d on other grounds, 693 F.2d 290 (3d Cir. 1982).} However, the PBGC indicated in a recent Opinion Letter\footnote{PBGC Adv. Op. No. 82-27.} and in proposed regulations\footnote{49 Fed. Reg. 6559 (1983) (to be codified at 29 C.F.R. § 2644).} that if an employer arbitrates in good faith, it will not be subject to a demand for payment of the entire amount of its withdrawal liability due to its failure to make withdrawal liability payments during arbitration. Interest, however, will accrue on late payments.\footnote{Id.}

The remaining consideration is in section 4221(e) which entitles the employer to request in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability under the plan.\footnote{ERISA § 4221(e), 29 U.S.C. § 1401(e) (Supp. IV 1980).} It is interesting to note that this provision is apparently not applicable until the employer has instituted arbitration. It would seem that this authorization should be contained in section 4219 so that the employer could have this information during the administrative appeal period.

4. Court Appeal

Upon completion of the arbitration proceedings, either party may bring an action in an appropriate district court to enforce, vacate or modify the arbitrator's award.\footnote{ERISA § 4221(b), 29 U.S.C. § 1401(b)(2) (Supp. IV 1980).} Such action must be brought no later than thirty days after the issuance of the arbitrator’s award.\footnote{Id.} Again, in this appeal, the arbitrator’s findings of fact will be presumed correct, rebuttable only by a clear preponderance of the evidence.\footnote{ERISA § 4221(c), 29 U.S.C. § 1401(c) (Supp. IV 1980).}
F. Civil-Actions - Penalties

Section 4301 of ERISA provides that:

A plan fiduciary, employer, plan participant or beneficiary, who is adversely affected by the act or omission of any party under th[e] subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.48

Federal district courts have exclusive jurisdiction over actions under this section without regard to the amount in controversy.49 An exception provides that state courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.50 Actions against the Secretary of the Treasury, the Secretary of Labor or the PBGC are excluded by section 4301(a)(2).51 However, section 4301(g) requires that a copy of the complaint in any action under this section must be served upon the PBGC by certified mail,52 and provides that the PBGC may then intervene in any action in which it so desires.53

In civil penalty actions, a court may award all or part of the costs plus reasonable attorney fees to the prevailing party.54 However, when an action is brought for delinquent contributions, the court must award costs and reasonable attorney’s fees plus a penalty.55 The penalty is equal to the greater of: (a) interest on the unpaid contributions; or, (b) liquidated damages as may be provided in the plan, of up to twenty percent of the amount of delinquency (or any higher percentage permitted by Federal or state law).56 Once an action is brought for a delinquent contribution by the trustees, the court has no discretion in awarding the penalty amount described if the trustees are successful.57

G. Exceptions and Limitations to Withdrawal Liability

1. New Employers-Free Look Break

New employers are entitled to escape withdrawal liability under the “free look” break provided by the MPPAA section 104 addition to ERISA section 4210.58 An employer who qualifies under the “free look” break would completely escape liability for partial or complete withdrawal. However, in order to qualify, the employer first must have had an obligation to contribute to the plan after enactment of MPPAA, and also must have contributed to the plan.

49 ERISA § 4301(e), 29 U.S.C. § 1451(e) (Supp. IV 1980).
50 Id.
52 ERISA § 4301(g), 29 U.S.C. § 1451(e) (Supp. IV 1980).
53 Id.
54 Id.
58 Id.
for the lesser of six consecutive plan years preceding the date of withdrawal or
the number of years required for vesting under the plan.69

There are exceptions to this rule. The “free look” rule does not apply in
the case of mass withdrawal by employers from a multiemployer plan; nor does
the “free look” rule apply to I.R.C. section 404(c) plans.60 Therefore, the 1950
and 1974 UMWA Pension Plans are not subject to the “free look” rule.

2. Sale of Employers’ Assets

Generally, the sale of an employer’s assets will create a withdrawal liabil-
ity. However, ERISA section 4204,61 which was added by section 104 of MP-
PAA, provides that upon an arm’s length sale of assets to an unrelated party, a
complete or partial withdrawal will not be triggered if three conditions are satis-
ified. First, the purchaser must contribute substantially the same number of
contribution base units as the seller had contributed. Second, the purchaser
must agree to provide a bond for a five year period to be paid to the plan if the
purchaser withdraws or fails to make a contribution when due. Finally, the
agreement between the seller and the purchaser must provide that if the pur-
chaser withdraws completely or partially during the five plan years following
the year of the sale, the seller will continue to be secondarily liable if the pur-
chaser fails to pay its withdrawal liability.

In the event of an asset sale, the provisions of section 4204 must be fol-
lowed. If the provisions are not followed, the seller will receive a letter of with-
drawal liability and have sixty days to commence payment.62

Pursuant to section 4211(c)(5)(D)(1) of ERISA,63 section 4204 does not ap-
tly to plans described under I.R.C. section 404(c), unless they have been spe-
cifically amended to provide that they apply. Effective June 7, 1981, the 1950
and 1974 UMWA Pension Plans were so amended. Accordingly, section 4204 of
MPPAA applies to the UMWA Pension Plans.

3. Limitations on Withdrawal Liability

Under MPPAA, there are limitations on the amount of withdrawal liabil-
ity that can be imposed on an employer.64 However, these limitations are not
applicable to an I.R.C. section 404(c) plan unless the plan has adopted them.
Since the 1950 and 1974 UMWA Pension Plans have not adopted the limita-
tions, they do not apply to them. In the case of plans other than I.R.C. section
404(c) plans, the limitations are only applicable in two situations: a sale of all,
or substantially all, of an employer’s assets, and the liquidation or dissolution
of an insolvent employer. Under the sale of assets rule, upon the arm’s length

60 ERISA § 4210(a), 29 U.S.C. § 1390(a) (Supp. IV 1980).
63 Id. See generally McDowell, The Sale of Assets Exemption to Multiemployer Pension
Plan Withdrawal Liability (with forms), PRRT. LEGAL J., December 1, 1982, at 3.
sale to an unrelated party, the unfunded vested benefits allocated to an employer cannot exceed the greater of either: (a) the unfunded vested benefits attributable to employees of such employer; or, (b) the portion of the employer's liability or dissolution value after the sale of such assets as determined under the following table.

If the liquidation or dissolution value of the employer after the sale or exchange is —

<table>
<thead>
<tr>
<th></th>
<th>The portion is —</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not more than $2,000,000.</td>
<td>30 percent of the amount.</td>
</tr>
<tr>
<td>More than $2,000,000 but not more than $4,000,000.</td>
<td>$600,000, plus 35 percent of the amount in excess of $2,000,000.</td>
</tr>
<tr>
<td>More than $4,000,000, but not more than $6,000,000.</td>
<td>$1,300,000, plus 40 percent of the amount in excess of $4,000,000.</td>
</tr>
<tr>
<td>More than $6,000,000, but not more than $7,000,000.</td>
<td>$2,100,000, plus 45 percent of the amount in excess of $6,000,000.</td>
</tr>
<tr>
<td>More than $7,000,000, but not more than $8,000,000.</td>
<td>$2,550,000, plus 50 percent of the amount in excess of $7,000,000.</td>
</tr>
<tr>
<td>More than $8,000,000, but not more than $9,000,000.</td>
<td>$3,050,000, plus 60 percent of the amount in excess of $8,000,000.</td>
</tr>
<tr>
<td>More than $9,000,000, but not more than $10,000,000.</td>
<td>$3,650,000, plus 70 percent of the amount in excess of $9,000,000.</td>
</tr>
<tr>
<td>More than $10,000,000.</td>
<td>$4,350,000, plus 80 percent of the amount in excess of $10,000,000.</td>
</tr>
</tbody>
</table>

The sale of assets limitations do not apply to an employer undergoing reorganization under the Bankruptcy Act or similar provisions of state law. An insolvent employer who has been subject to a liquidation or dissolution is automatically liable for the first fifty percent of normal withdrawal liability. The employer's liability with respect to the second fifty percent is limited to the employer's value as of the beginning of the liquidation or dissolution, reduced by the previous fifty percent required normal withdrawal liability. The personal residence and certain other assets of insolvent employers who are members of a partnership or a sole proprietorship are protected by MPPAA. An "insolvent" employer is defined in MPPAA as one whose liabilities, including any withdrawal liability under the plan, exceed its assets as of the commencement of the liquidation or dissolution. The Act also defines "liquidation

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61 ERISA § 4225(c), 29 U.S.C. § 1405(c) (Supp. IV 1980).
63 ERISA § 4225(c), 29 U.S.C. § 1405(c) (Supp. IV 1980).
value” as the employer’s value determined without regard to any withdrawal liability.70 However, further definition of “liquidation or dissolution value” must be provided by the PBGC when it issues regulations.

When the same event (either sale of assets or bankruptcy) causes more than one withdrawal by an employer, the withdrawals are grouped and the employer’s liability is apportioned among the plans.71

IV. Withdrawal Liability Under the 1950 and 1975 UMWA Pension Plans

A. Present Status

Although benefits under the 1950 and 1974 UMWA Pension Plans increased in the 1981 plan year, the total amount of withdrawal liability of the Plans was reduced. This may have been primarily caused by a change in the actuarial interest rate assumption from 5½% as of June 30, 1980, to 6½% as of June 30, 1981. The total unfunded vested benefits of the 1950 and 1974 UMWA Pension Plans as of 1980, 1981 and 1982 were as follows:

<table>
<thead>
<tr>
<th>Plan</th>
<th>As of June 30, 1980</th>
<th>As of June 30, 1981</th>
<th>As of June 30, 1982</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950 Plan</td>
<td>$1,670,000,000</td>
<td>$1,390,000,000</td>
<td>$1,770,000,000</td>
</tr>
<tr>
<td>1974 Plan</td>
<td>$1,720,000,000</td>
<td>$1,510,000,000</td>
<td>$1,540,000,000</td>
</tr>
</tbody>
</table>

It is evident that many employers who made contributions during this same period assumed that they had fully funded all benefits for their employees. However, as previously noted, under MPPAA the census of an employer’s particular employees is not relevant in the calculation of withdrawal liability.72 Because withdrawal liability is based upon the total unfunded vested benefits of the multiemployer pension plan and the employer’s contributions,73 many coal companies presently in operation will bear the burden of funding the pension obligations of those companies which went out of business prior to MPPAA.

With respect to the 1950 and 1974 UMWA Pension Plans, the provisions regarding partial withdrawals are particularly relevant. One of the abuses of a partial withdrawal is a seventy percent decline in contribution base units.74 This occurs if the employer’s contribution base units for each of three years during a three-year testing period do not exceed thirty percent of its contribution base units for its high base year.75 The three-year testing period includes the plan year involved in the determination and the two plan years immediately preceding it. The number of contribution base units for the high base

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71 ERISA § 4225(e), 29 U.S.C. § 1405(e) (Supp. IV 1980).
73 Id.
74 ERISA § 4205(a), 29 U.S.C. § 1385(a) (Supp. IV 1980).
75 ERISA § 4205(b), 29 U.S.C. § 1385(b) (Supp. IV 1980).
year is the average number of such units for the two plan years in which the employer’s contribution base units were the highest within the five plan years immediately preceding the three-year testing period.76

B. Example of Partial Withdrawal Calculation77

The following is an example of how partial withdrawal liability may be incurred without the employer intending to withdraw from a multiemployer pension plan.

Assume the following contribution base units under the 1950 UMWA Pension Plan:

<table>
<thead>
<tr>
<th>Plan Year (ending June 30)</th>
<th>Contribution Base Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977 - 235,000 tons78</td>
<td></td>
</tr>
<tr>
<td>1978 - 235,000 tons</td>
<td></td>
</tr>
<tr>
<td>1979 - 235,000 tons</td>
<td></td>
</tr>
<tr>
<td>1980 - 150,000 tons</td>
<td></td>
</tr>
<tr>
<td>1981 - 255,000 tons</td>
<td></td>
</tr>
<tr>
<td>1982 - 50,000 tons</td>
<td></td>
</tr>
<tr>
<td>1983 - 60,000 tons</td>
<td></td>
</tr>
<tr>
<td>1984 - 60,000 tons</td>
<td></td>
</tr>
<tr>
<td>1985 - 50,000 tons</td>
<td></td>
</tr>
</tbody>
</table>

High Base Year: The average of 1979 and 1981 = 245,000. Three-year testing period:
1982: 50,000 divided by 245,000 = 20%
1983: 60,000 divided by 245,000 = 25%
1984: 60,000 divided by 245,000 = 25%
1984 is a partial termination year.
Assuming complete withdrawal liability of $400,000 as of 1982, partial with-

76 Id.
77 29 U.S.C. § 1385(d) (Supp. IV 1980). Section 4205(d) of ERISA provides that the 1950 UMWA Pension Plan may be amended to provide rules setting forth other conditions consistent with the purposes of MPPAA under which an employer has liability for partial withdrawal.
78 29 U.S.C. § 1385 (Supp. IV 1980). For purposes of section 4205 of ERISA, the employer’s contribution base units for any plan year ending before April 29, 1980 shall be deemed to be equal to the employer’s contribution base units for the last plan year ending before such date.
withdrawal liability for 1984 would be calculated as follows:79

\[ \$400,000 \times 1 - \frac{(\text{Contribution})}{(\text{base units for})} \times \frac{(\text{plan year 1985})}{(\text{Average of 5})} \times \frac{(\text{plan years})}{(\text{preceding 1982})} \]

\[ \$400,000 \times 1 - \frac{(50,000)}{(222,000)} \]

\[ \$400,000 \times 0.225 \]

\[ \$400,000 \times 0.775 = \$310,000 \]

When calculating partial liability under the 1950 and 1974 UMWA Pension Plans, two items have particular impact. Contributions which fund benefits under the 1950 UMWA Pension Plan are based on tons of coal produced by the employer for use or sale, while contributions which fund the 1974 UMWA Pension Plan are based on tons of coal produced by the employer for use or sale and on hours worked by each of the employer's employees who perform classified work under the National Bituminous Coal Wage Agreement of 1981.81 Since contribution units are not determined by the total amount of contributions, recent negotiations which provided for higher benefits and contributions are not relevant in determining the contribution base units when determining whether there has been a partial withdrawal. Liabilities assessed against employers under both the 1950 and 1974 UMWA Pension Plans with respect to plan years 1980 and 1981 have been in excess of each employer's contributions under the Plans for the five year period preceding the partial termination year.

Second, pursuant to section 4205 of ERISA, an employer's contribution base units for any plan year ending before April 29, 1980, will be deemed equal to the employer's contribution base units for the last plan year ending before such date.82 Under the 1974 Pension Plan such a plan year would end June 30, 1979. If 1979 was a high production year for the coal company, it may have incurred partial withdrawal liability solely due to a decrease in production, caused for example by either a decline in coal sales or the sale of mines during subsequent years. Therefore, it is very important that employers review partial withdrawal determinations before reducing production. Based upon the calculations in the example above, it may be necessary for a company to continue production and make contributions to the 1950 and 1974 UMWA Pension Plans in order to avoid a partial withdrawal. To avoid this additional liability

an employer may decide to operate a mine at a net loss.

Finally, if the employer is a member of a controlled group of corporations, the entire controlled group may be obligated under MPPAA for a complete or partial withdrawal incurred by any member of the controlled group. When determining whether a withdrawal has occurred and, if so, who is liable therefor, all controlled group members apparently will be aggregated. Section 4001(b) of ERISA, which was enacted prior to MPPAA, provides that all trades and businesses under common control shall be treated as a single employer. Thus, if there is a non-operating parent company and a wholly owned operating subsidiary company, the control group concept would permit termination liability to be assessed against the assets of the non-operating parent company in the event of a plan termination by an insolvent subsidiary company.

V. JUDICIAL INTERPRETATIONS OF MPPAA
A. Constitutional Challenges

Many questions regarding the constitutionality of MPPAA have been raised in recent litigation. Employers who have withdrawn from multiemployer plans have challenged the constitutionality of the MPPAA withdrawal liability provisions on the following grounds: (1) prospective application of MPPAA is a denial of due process, equal protection and the right to a jury trial; and (2) retroactive application of MPPAA is a denial of due process and equal protection. Each issue must be resolved with respect to both its prospective (on or after September 26, 1980) and retroactive (from April 28, 1980, through September 25, 1980) effect.

Although much of the litigation is still at a preliminary stage, federal courts have consistently upheld the constitutionality of MPPAA with regard to its prospective application. However, due to conflicting decisions by Judge Getzendanner of the Northern District of Illinois and Judge Hill of the Central District of California, the constitutionality of retroactive application of the Act is still uncertain.

In Shelter Framing Corp. v. Carpenters Pension Trust, Shelter (the employer) moved for summary judgment on the ground that MPPAA was unconstitutional as prospectively applied. The employer challenged the constitutionality of the Act on several grounds: (1) that because the plan trustees determined the amount of liability due from the employer without being re-

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67 Shelter Framing Corp. v. Carpenters Pension Trust, 543 F. Supp. 1234 (C.D. Cal. 1982).
68 Id.
required to notify the employer of his possible liability, MPPAA denied the employer due process by depriving him of property without prior notice and an opportunity to be heard; (2) that MPPAA violated equal protection by discriminating against "substantial" withdrawing employers; (3) that MPPAA denied the employer a hearing before an impartial tribunal by providing that the trustees, who have duty to act in the interest of plan participants and beneficiaries, assess the amount of withdrawal liability; (4) that the Act denied the employer access to court by requiring that disputes first be arbitrated; and, (5) that the Act denied the employer its seventh amendment right to a jury trial. Judge Hill dismissed all of the employer's challenges regarding the constitutionality of MPPAA's prospective application.88

In Republic Industries, Inc., v. Central Pennsylvania Pension Fund,90 the employer raised the additional constitutional challenge that the statute as prospectively applied was a taking of property without just compensation. As with the challenge raised in Shelter, Judge Troutman found this challenge to be without merit.91

Constitutional challenges to MPPAA's retroactive operation have been made by employers who withdrew prior to September 26, 1980. The challenges asserted are that retroactive application of the Act: (1) contravenes the "fair warning" requirement of due process under the fifth amendment which prohibits Congress from imposing severe civil penalties or liabilities on a party who has been given no opportunity or warning to alter his liability creating behavior; and, (2) impairs the contractual limitations of liability on which employers have the right to rely.

When considering the merits of the challenges to the Act as retroactively applied, conflicting opinions have been rendered. Relying on Nachman Corp. v. PBGC,92 Judge Getzendanner held in Peick v. PBGC93 that retroactive withdrawal liability provisions are constitutional even through MPPAA retroactively impairs contractual rights by imposing liability on employers that withdrew from multiemployer plans prior to the passage of MPPAA, but after its effective date.94 The Judge found that retroactive application of the Act was necessary so as to prevent "opportunistic" employers from withdrawing from multiemployer plans during the Congressional debate of MPPAA.95 The more recent case of Coronet Dodge v. Speckmann96 also upheld the constitutionality of retroactive withdrawal liability. However, in the case of Shelter Framing Corp. v. Carpenters Pension Trust,97 Judge Hill also considered the Nachman

88 Id. at 1254. However, Judge Hill granted the employer's motion for summary judgment on the ground that retroactive application of MPPAA is a violation of due process.
91 534 F. Supp. at 1350.
92 446 U.S. 359 (1980).
93 539 F. Supp. 1025 (N.D. Ill. 1982).
94 Peick at 1052-56.
95 Peick at 1055.
factors, but held the statute was unconstitutional as retroactively applied because it violates due process. The final constitutional determination on the retroactive application of MPPAA is, therefore, still uncertain.

B. Procedural Interpretations

Many procedural issues have arisen with regard to the interpretation of MPPAA when determining the rights and obligations of the parties. One issue is whether arbitration is the exclusive forum for resolving disputes regarding withdrawal liability. Section 4221 of ERISA requires that any dispute between a plan sponsor and employer concerning the amount or collection of withdrawal liability shall be resolved through arbitration.88 In Woodward Sand Co. v. Operating Engineers Pension Trust,89 Judge Neilson interpreted this section as requiring such a dispute to be resolved exclusively by arbitration.

Second, if the parties initiate arbitration proceedings, the issue of whether the arbitrator will be considered a fiduciary arises. A person is a fiduciary, under section 3(21)(a) of ERISA,100 to the extent that he exercises discretionary authority or control over management of the plan or management or disposition of its assets, or has discretionary authority or responsibility in administering the plan. When addressing the question of whether an arbitrator would be a fiduciary under ERISA, and if so under what circumstances, the Department of Labor has taken the position that an arbitrator would be a plan fiduciary if he performs any of the functions set forth in section 3(21)(a) of ERISA.101

Pursuant to section 404(a) of ERISA, a fiduciary is obligated to discharge his duties solely in the interest of plan participants and their beneficiaries.102 Therefore, if the arbitrator is a fiduciary under ERISA, he apparently will be faced with a direct conflict between his duty to act impartially and his duty to act solely in the plan participants' interest.

In a recent decision, the sixth circuit held that arbitrators are not subject to ERISA's fiduciary requirements.103 The court concluded that ERISA was not designed to abrogate arbitral immunity. The court apparently reached this conclusion by distinguishing the application of the fiduciary bonding requirements of ERISA and the duties of the arbitrator.104 The case may resolve at least a few of the uncertainties surrounding the arbitrator's capacity and duties.

104 Id.
VI. LEGISLATION EFFORTS TO ADDRESS THE PROBLEMS OF MPPAA

In an attempt to address the concerns raised in litigation and public discourse regarding MPPAA, the Multiemployer Pension Plan Stabilization Act\(^{105}\) (MPPSA) and the Multiemployer Retirement Income Protection Act of 1982\(^{106}\) (MRIPA) were introduced in Congress in 1982. Both bills generated some support from industry and opposition from the National Coordinating Committee for Multiemployer Plans.

MPPSA was introduced in the Senate by Senators Orrin G. Hatch and Dan Quayle on October 19, 1981. It would have exempted employers that negotiated contribution levels in collective bargaining agreements prior to April 29, 1980, from the ERISA withdrawal and termination insurance provisions.\(^{107}\) An identical bill was introduced in the House of Representatives by Representative John James Duncan.\(^{108}\) However, neither bill was acted on by the end of the Session; nor were they reintroduced as of March 4, 1983.

MRIPA was introduced in the House of Representatives by Representative Kenneth L. Holland on September 30, 1982. If enacted, it would have repealed the retroactive provisions of MPPAA,\(^{109}\) and established a system of risk-related premiums for PBGC termination insurance.\(^{110}\) As with the other bills, it had not moved from committee by December 31, 1982, and had not been reintroduced as of March 4, 1983.

Due to the complexity of the issues raised by MPPAA, it seems likely that additional legislation will be proposed or reintroduced in 1983. An employer should attempt to be aware of any pending legislation regarding MPPAA since it could directly affect its withdrawal liability exposure.

CONCLUSION

The current condition of the coal industry mandates that each employer in the industry be aware of the events which could trigger withdrawal liability under MPPAA. An obligation to contribute can arise under circumstances involving a termination of the employer’s business, a sale of its assets, a partial or complete withdrawal by the employer from the union or a partial shutdown of a plant.

There are several steps which each employer can take in order to minimize its potential withdrawal liability. First, it should annually request a calculation of its withdrawal liability under the 1950 and 1974 UMWA Pension Plans from the trustees. Second, the employer’s potential withdrawal liability should be considered when making business decisions such as negotiating a long term contract, considering an arm’s length sale of assets or closing a mine.

When negotiating a long term sales contract, the employer's withdrawal liability should be included as a potential factor in the employer's operating costs. An employer considering closing a mine should review its potential withdrawal liability to determine if it would be less costly to operate the mine at a loss than to close it. When considering an arm's length sale of assets to an unrelated party, an employer should review section 4204 of ERISA and the 1950 and 1974 UMWA Plans to ascertain whether it can meet the criteria set forth to enable the new employer to assume the withdrawal liability.

Third, a coal operator beginning in a new venture may wish to consider the possibility of structuring a separate corporation outside the controlled group requirements as a possible means of minimizing exposure to withdrawal liability.

If an employer is notified by the trustees that it has incurred a withdrawal liability, it should be certain to comply with the procedures prescribed in sections 4219 and 4221 of ERISA. These sections set forth a specified time schedule which must be followed for the employer to preserve its appeal of each of the factors involved in the calculation of withdrawal liability and the timing requirements for employer payments. Regardless of review procedures which may be implemented under section 4221 of ERISA, an employer should be certain to make any installment payments due so that it does not trigger an escalation of the outstanding withdrawal liability payments.

Finally, each employer should be cognizant of the status of pending legislation in Congress. Unless MPPAA is amended, each employer participating in the 1950 and 1974 UMWA Pension Plans faces the possibility of a significant contingent withdrawal liability under the Act. As a result, each employer must consider the ramifications of incurring either complete or partial withdrawal liability when making present and future business decisions.