Legal Update Article

Calculating Withdrawal Liability with 'Segal Blend' Violated Multiemployer Pension Plan Amendments Act, Judge Rules

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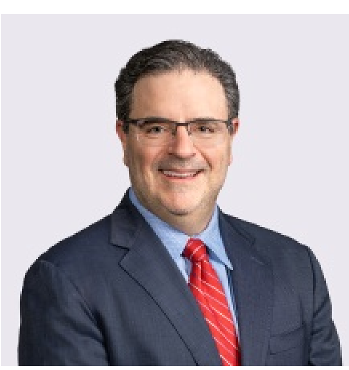

In a decision that could have far-reaching implications for multiemployer pension plans and employers, a federal district court has held that the use of the "Segal Blend" to calculate a company's withdrawal liability when it withdrew from a multiemployer pension plan violated the Employee Retirement Income Security Act (ERISA), as amended by the Multiemployer Pension Plan Amendments Act (MPPAA). *The New York Times Co. v. Newspapers & Mail Deliverers'-Publishers' Pension Fund,* No. 1:17-cv-06178-RWS (S.D.N.Y. Mar. 26, 2018). The decision likely will be appealed to the U.S. Court of Appeals for the Second Circuit in New York.

Segal Blend Calculation

The Segal Company is one of the preeminent actuarial firms servicing multiemployer pension plans. The "Segal Blend" is Segal's proprietary method of valuing a plan's unfunded vested benefits to calculate withdrawal liability by blending the plan's investment-return interest rate assumption with the lower risk-free rates published by the Pension Benefit Guaranty Corporation (PBGC). The Segal Blend has historically been used by many of the largest multiemployer plans in the United States.

A plan may want to use the Segal Blend because it currently results in the plan using a *lower interest rate to calculate withdrawal liability than that typically used for funding purposes; this generally results in greater withdrawal liability to be collected by the plan.*

Background

At issue in the case was a series of alleged partial withdrawals from the Newspapers and Mail Deliverers'-Publishers Pension Fund by The New York Times Company (NYT) resulting from the closure of NYT's distribution subsidiary. The Fund assessed withdrawal liability in excess of $33 million, which was calculated using the Segal Blend.

The Fund's determinations (as to the occurrence of a withdrawal and the amount of the resulting withdrawal liability) were upheld by an arbitrator under MPPAA's mandatory arbitration regime. The Fund and the NYT commenced actions (later consolidated) to enforce and vacate the arbitrator's award, respectively. The parties then cross-moved for summary judgment.

Concrete Pipe Does Not Preclude Use of the Segal Blend as a Matter of Law

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York upheld the arbitrator's finding that a withdrawal had in fact occurred before turning to the arbitrator's findings regarding the use of the Segal Blend.

NYT argued that the use of the Segal Blend violated U.S. Supreme Court precedent in *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust Fund for*

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Southern Cal., 508 U.S. 602 (1993), and the applicable requirements of § 4213(a) of ERISA. This ERISA section requires that the actuarial assumptions and methods used to calculate withdrawal liability be both reasonable in the aggregate and "offer the actuary's best estimate of anticipated experience under the plan."

The NYT argued that *Concrete Pipe* precluded the use of a different interest rate assumption for withdrawal liability purposes than that used for funding purposes — and, therefore, precluded the use of the Segal Blend, which does just that. The arbitrator held that, as a matter of law, while the NYT's reading of *Concrete Pipe* was not "implausible," any reversal of the "dominant case law" should "not come in an arbitration decision, but rather through court review."

Judge Sweet agreed with the arbitrator's findings in this regard. He held that "the use of the Segal Blend uniquely in the context of calculating an employer's withdrawal liability is not prohibited as a matter of law." His finding was based principally on language in *Concrete Pipe* discussing the use of actuarial assumptions (including the interest rate assumption) in two different contexts: withdrawal liability and minimum funding.

In *Concrete Pipe,* the Supreme Court had referred to the "critical interest rate assumption that must be used for other purposes as well." It noted that "using different assumptions [for different purposes] could very well be attacked as presumptively unreasonable."

Judge Sweet found the open-ended "could very well be" language precluded a finding that the use of different interest rates for different purposes was impermissible as a matter of law.

Fund's Use of the Segal Blend Violated § 4213 of ERISA

Under ERISA, the actuarial assumptions and methods used to calculate an employer's withdrawal liability must, "in the aggregate, [be] reasonable (taking into account the experience of the plan and reasonable expectations)" and, "in combination, offer the actuary's best estimate of anticipated experience under the plan." ERISA § 4213(a)(1), 29 U.S.C. § 1393(a)(1).

With respect to the NYT's argument that the use of the Segal Blend to calculate its withdrawal liability violated ERISA § 4213(a), the arbitrator found there was "no evidence that the decision to use the Segal Blend was part of a scheme to take advantage of" the NYT, and that the NYT "could not claim that the use of the Segal Blend caused it to be unfairly penalized" since the Fund had always been used it to calculate withdrawal liability. Therefore, the arbitrator found the Fund's use of the Segal Blend was appropriate.

Judge Sweet found the arbitrator's emphasis on fairness to be misplaced. Instead, he focused on the statute's requirement in ERISA § 4213(a) that the interest rate assumption "offer the actuary's best estimate of anticipated experience under the plan." The Fund actuary had testified that the funding interest rate assumption of 7.5 percent represented "her best estimate of how the Fund's assets … will on average perform over the long term" and that the Segal Blend interest rate of 6.5 percent (resulting from the combination of the 7.5 percent funding rate with lower, no-risk PBGC bond rates) was "lower" than the actuary's best estimate of anticipated plan experience in the long term.

Judge Sweet found that it “strains reason” how the Segal Blend, which the Fund actuary testified did not represent her best estimate, “can be accepted as the anticipated plan experience.” He concluded the arbitrator’s finding that the use of the Segal Blend was appropriate constituted clear error; that is, “a definite and firm conviction that a mistake has been made.” Accordingly, Judge Sweet ordered the NYT’s withdrawal liability be recalculated using the 7.5 percent “best estimate” interest rate.

Potential Ramifications

The Segal Blend is used by many of the largest multiemployer plans in the U.S. Many others use “PBGC Rates” to calculate withdrawal liability. PBGC Rates are published by the Pension Benefit Guaranty Corporation quarterly for the purpose of determining the present value of accrued benefits on a termination basis. Consistent with their intended use in connection with plan termination, PBGC Rates are based upon the rate of return of low- or no-risk assets such as bonds. In the same manner as Judge Sweet attacked the use of the Segal Blend (a combination of the funding interest rate assumption and PBGC Rates) as “including interest rates for assets not included in the Fund’s portfolio” and, therefore, not representative of the “best estimate of anticipated experience under the plan,” plans using PBGC Rates to calculate withdrawal liability also would be susceptible to attack.

Employers who have withdrawn from multiemployer pension plans and whose withdrawal liability has been resolved through MPPAA’s dispute resolution procedure will not be affected by this decision.

However, employers who currently are contesting their withdrawal liability, or who have not yet withdrawn, could be significantly affected. While the decision is not binding on other district courts, it likely will be appealed to the federal appellate court. We will continue to monitor this case.

Please contact the authors or the Jackson Lewis attorney with whom you regularly work if you have any questions regarding withdrawal liability in general or the potential effect of the district court decision.