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Eleventh Circuit Holds Pension Fund Correctly Applied Partial Withdrawal Liability Credit

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In *Perfection Bakeries Inc. v. Retail Wholesale & Dep't Store Int'l Union & Indus. Pension Fund*, No. 23-12533, 147 F.4th 1314 (11th Cir. Aug. 1, 2025), the Eleventh Circuit affirmed that an employer's credit for a prior partial withdrawal from a multiemployer pension plan must be applied at the second step of the four-step statutory process for calculating withdrawal liability. As discussed in our previous post, courts are split on the order in which the credit applies. The PBGC and a district court in Illinois have concluded that the credit should be applied at the last step of the process, while the Ninth and now the Eleventh Circuits have held that it should be applied at the second step.

In the Eleventh Circuit case, the employer partially withdrew from the plan in 2016 and was assessed $2,228,268 in partial withdrawal liability. When the employer completely withdrew two years later, the plan assessed it with $6,318,741 in complete withdrawal liability. In calculating that amount, the plan applied the credit for the prior partial withdrawal liability at the second step of the statutory waterfall. The employer commenced arbitration to challenge the calculation, arguing that the plan should have applied the credit at the end of the statutory waterfall, which would have reduced its complete withdrawal liability by roughly $2 million. The arbitrator rejected the employer's challenge and ruled in the plan's favor, and the district court and Eleventh Circuit affirmed. In a split decision, the Eleventh Circuit held that the statute contains four sequential steps, and thus requires "that the partial-withdrawal credit should be applied at step two, not as its own, tacked-on, extratextual step *five*." The Court rejected the employer's argument that application of the credit at step two undermines the credit's purpose, which the employer argued is to ensure the liability for a subsequent withdrawal properly reflects the employer's share of liability. The Court also rejected the employer's reliance on an opinion by the PBGC supporting its reading of the statute, concluding that it was neither controlling nor persuasive given that it merely echoed the arguments the Court already rejected.

In a short concurring opinion, Judge Adalberto Jordan characterized the case as "difficult," but found the plan's interpretation more persuasive. Judge Andrew Brasher, meanwhile, dissented, agreeing that this is a "hard case" but ultimately siding with the employer. In Judge Brasher's view, the plan's reading cannot be squared with the statute's text because it would adjust "unfunded vested benefits" rather than "withdrawal liability," which is a defined term.

Proskauer's Perspective

As discussed in our prior post on this topic, the order in which the partial withdrawal liability credit is applied can have a significant impact on an employer's withdrawal liability. Two Circuit courts have now held that the credit applies at the second step of the statutory "waterfall," and a third (the Seventh Circuit) will likely opine on the question next year. Because the issue is likely to remain an open question in most jurisdictions, employers and plans should coordinate with their legal counsel to assess the impact of these decisions on existing or forthcoming withdrawal liability assessments.

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