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Seventh Circuit Holds Asset Sale Does Not Require Exclusion of Contributions from Withdrawal Liability Calculation

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When an employer withdraws from a multiemployer pension plan, its maximum annual payment is based on all contributions it was required to remit to the plan. In *SuperValu Inc. v. United Food and Commercial Workers Unions and Employers Midwest Pension Fund*, 155 F.4th 913 (7th Cir. Oct. 9, 2025), the Seventh Circuit affirmed that the same rule applies when an employer divests of assets prior to its withdrawal pursuant to ERISA § 4204, and that the statute does not call for excluding any contributions associated with those assets. The decision is significant for employers that rely on the asset sale exemption to reduce, defer, or otherwise eliminate their withdrawal liability, as well as for the plans from which they may withdraw.

Background

SuperValu, Inc. is a national grocery chain that for many years contributed to the United Food and Commercial Workers Unions and Employers Midwest Pension Fund. In September 2018, SuperValu sold a group of those grocery stores. While the sale would normally constitute a partial withdrawal from the plan and thereby trigger the imposition of partial withdrawal liability, SuperValu structured the sale to avail itself of the exemption set forth in ERISA § 4204, which provision permits an employer to sell its assets – here, the group of stores being sold – to a third party without the sale being deemed a complete or partial withdrawal. One of the requirements to qualify for this exemption is that the buyer agrees to succeed to the seller's last five years of contributions associated with the sold assets. The practical impact of this requirement is that if the buyer subsequently withdraws from the plan, its liability will be based on its own contribution history and that of the seller's in the five years preceding the sale.

A few months after the sale, SuperValu closed the remaining stores with respect to which it contributed to the plan, thereby completely withdrawing from the plan. The plan assessed SuperValu with $22.6 million in withdrawal liability, payable in 240 monthly payments of $94,143.29. When calculating the payment schedule, the plan excluded the contributions associated with the sold stores for the five years preceding the sale, but included the contributions remitted in all prior years. The impact was significant. Under the statute, a withdrawing employer must pay its withdrawal liability in a lump sum or in periodic annual payments. The employer's maximum annual payment is limited to the highest three-year average of contributions it remitted to the plan over the ten years preceding the withdrawal. Including the sold stores' contribution history more than doubled the highest three-year average, and thus SuperValu's maximum annual payment and withdrawal liability.

SuperValu commenced arbitration to challenge the calculation, arguing that all contributions for the sold stores should have been excluded because they were effectively transferred to the buyer. According to SuperValu, a contrary result would amount to double-counting, as both the buyer and seller would have their withdrawal liabilities calculated based on the same set of contributions. The arbitrator disagreed and entered an award in favor of the plan, which the district court confirmed. The district court explained that nothing in ERISA § 4204 or elsewhere in the statute called for excluding contributions when calculating the maximum annual payment an employer must make to pay off its withdrawal liability.

The Seventh Circuit affirmed for the same reason. It contrasted the statutory provision governing the calculation of withdrawal liability, which expressly calls for excluding certain contributions associated with sold assets, with the provision governing the calculation of the maximum annual payment, which do not. The Court dismissed as irrelevant SuperValu's reference to the buyer's obligation to succeed to the seller's contribution history, observing that that provision applied to the buyer's withdrawal liability, and did not provide any insight into the seller's liability. While the Court indicated that its ruling meant that the plan was not required to exclude *any* of the contributions associated with the sold stores, it is unclear whether including those years of contributions would have had any impact on the highest three-year average of contributions and thus SuperValu's payment schedule.

Proskauer's Perspective

Section 4204 is a statutory exemption that employers often rely upon when considering transactions that may otherwise result in withdrawal liability. The Seventh Circuit's decision is an important consideration for employers that have already divested a portion of their operations and are anticipating a future withdrawal, as the ruling means that, depending on when an employer ultimately withdraws, the contributions associated with the sold assets may factor into what the employer owes in withdrawal liability. Employers that are considering a potential divestiture may also want to consider whether the decision alters the economics of any contemplated transaction.

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