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Ninth Circuit Allows Pension Fund to Wipe Out Credit for Prior Partial Withdrawal Liability

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An important decision issued by the Ninth Circuit Court of Appeals last month once again illustrates the one-sided nature of many withdrawal liability disputes and will likely have significant ramifications for many employers withdrawing from underfunded pension plans. The decision holds that the plan correctly applied a credit for a prior partial withdrawal against the employer's subsequent complete withdrawal before calculating the twenty-year limitation on annual payments provided by ERISA.

By way of background, withdrawal liability is imposed upon an employer when it withdraws from a multiemployer pension fund, and a withdrawal may be either partial or complete. If an employer incurs a partial withdrawal and subsequently incurs either another partial or a complete withdrawal, ERISA directs that the employer be given a credit for the first partial withdrawal. ERISA also limits an employer's obligation to twenty years of payments.

In GCIU-Employer Retirement Fund v. Quad Graphics, Inc., the employer incurred a partial withdrawal followed by a complete. In calculating the subsequent complete withdrawal liability, the plan applied the 20-year cap only after applying the credit for the prior partial. The employer disputed the sequence of calculations, claiming the 20-year cap on the complete withdrawal should be applied *before* rather than *after* the application of the credit for the prior partial. The difference between the two methods is huge, and often amounts to millions of dollars.

Affirming the district court, and discounting a 33-year old PBGC opinion letter to the contrary, the Ninth Circuit held that the credit for the prior partial withdrawal is applied before the application of the 20-year cap on payments, drastically increasing the amount of payable withdrawal liability. Because the order in which these items are applied can significantly alter the amount of liability, the decision will likely be used by pension funds to decrease or even eliminate the credit for which withdrawn employers would otherwise qualify.

The primary problem with this decision is that it completely overlooks the fundamental difference between *unfunded vested benefits* and *withdrawal liability*. Indeed, some funds are so underfunded that applying the credit against the unfunded vested benefits will completely eliminate the credit.

But as the statute makes clear, an employer's unfunded vested benefits are merely the starting point for the calculation of withdrawal liability. *See* 29 U.S.C. § 1381(b). Importantly, the statute makes clear that the credit is granted against withdrawal liability (as opposed to unfunded vested benefits). 29 U.S.C. § 1386(b)("any *withdrawal liability* of that employer for a partial or complete withdrawal from that plan in a subsequent plan year

shall be reduced by the amount of any partial withdrawal liability … of the employer with respect to the plan for a previous plan year.")(emphasis added).

Accordingly, the credit should not be applied until the withdrawal liability – including the 20-year cap – has been fully calculated. Only after a fund has calculated the subsequent withdrawal liability should the prior partial credit be applied to reduce that subsequent withdrawal liability. And because, properly speaking, there is no withdrawal liability under the statute until the 20-year payment cap has been applied, the credit cannot be applied until this happens. It's like trying to frost a cake before it's been baked – it makes no sense, and all you get is a mess. Once the fundamental difference between unfunded vested benefits and withdrawal liability is grasped, it is easy to see why the Ninth Circuit made such a mess of this decision.

That said, it remains to be seen whether other circuits will follow the Ninth Circuit's misreading of the statute. However, it is likely that most pension funds will, as it is in their interest to do so. Employers faced with a fund relying on the *Quad Graphics* opinion should consider all their options.