

## DOL Wins Court Case: Trustees are responsible for collecting delinquent contributions!

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In a decision that is sure to cause much ongoing debate and confusion, on March 20, 2009, a U.S. District Court in Massachusetts upheld the DOL's position (as first stated in Field Assistance Bulletin 2008-01: <http://www.dol.gov/ebsa/regs/fab2008-1.html>) that a claim to contributions is, in and of itself, a plan asset that must be held in trust. In Solis v. Plan Benefit Services, Inc., 2009 WL 799092, 46 Employee Benefit Cases 1691 (D. Mass. 2009), the court ruled that the provision in the plan document stating that the institutional trustee was not responsible for monitoring or collecting delinquent contributions was void as a matter of public policy because it violated ERISA's requirement that plan assets be held in trust. The court did not find, however, that the master plan sponsor had breached its fiduciary duties of care by adopting such a provision, as it found that the sponsor did not act as a fiduciary in drafting the plan provision.

The DOL initially brought this case against a small employer (Linskey Company) that had adopted the Contractors and Employees Retirement Plan and Trust ("the Contractors Plan"). This plan was a master plan and trust sponsored by Plan Benefit Services, Inc. (PBS). (A master plan differs from a prototype in that the funds of the plans that adopt the master plan document must all be invested in a single trust.) In the course of its routine investigation, the Boston

EBSA office discovered that Linskey was delinquent in making its contributions to the plan. FAB 2008-01 was issued while this case was in process.

The Contractors Plan covers more than 1,100 employers subject to prevailing wage and/or Davis-Bacon laws. Each employer establishes a stand-alone 401(k) plan when it signs the adoption agreement. Each employer is the named plan administrator in the Contractors Plan document and, in its plan administrator role, chooses where to invest the assets of its plan among insurance group annuity contract options made available by the master trust trustee. With exceptions not relevant to the case, participants direct the investments of their accounts within the group annuity contracts in the arrangement. The trust company, therefore, acts primarily as a custodian of the funds and has no investment discretion.

The plan language the DOL attacked in this case is common in prototype and master plan documents governing relationships with institutional trustees, and the language has been the industry standard for more than 40 years. Like most, if not all, plans of this type, the Trust Agreement provided:

[t]he Trustee shall be accountable for all contributions received by it, but shall have no duty to require any contributions to be made

to it, or to determine that the amount received comply with the Plan, or to determine that the fund is adequate to provide the benefits payable pursuant to the Plan.

The Contractors Plan document had similar language. The Contractors Plan document also included language attempting to clarify that the individual employers were solely responsible for making plan contributions:

By adopting this Plan, the Employer agrees to have such contributions as may be made hereunder contributed to the [Master Trust]. . . and to be bound by the terms of the trust agreement which governs such Trust.

These provisions outline, essentially, that the trustee has a duty to catch the ball when it is thrown, but not to go to the mound and grab the ball from a pitcher.

In finding that these provisions are contrary to ERISA and, therefore, void, the court found that the right to unpaid contributions is, in and of itself, a property right and, therefore, a plan asset. Because ERISA §403 requires the trustee to retain plan assets in trust, the court determined that the trustee has an obligation to enforce such collection rights. In particular, the court found that §403 affirmatively requires the trustee “to monitor and collect the employer contributions to ERISA funds.”

The lawyers for PBS explained that it is not normal industry standard for the trustee to be required to affirmatively go after the employer for plan contributions, or to even monitor required contributions for sufficiency, and that the IRS’s approval of the plan document with this provision

indicates its acceptance of this common practice. The court did not find this to be persuasive, dismissing these arguments in a footnote as “irrelevant.”

Rather, the court relied on certain cases involving multiemployer plans (which are co-trusted by both management and union appointees and under which the Board of Trustees has a statutory obligation to locate and take control of delinquent contributions) to support the proposition that a similar obligation applies to all trustees. Trustees of plans that are not multiemployer plans have no such statutory obligation. Nonetheless, the court found that the “chose in action” for the contributions (a legalese phrase meaning *a claim*) was a plan asset and part of the trust estate. As a result, the trustee has an obligation to protect the asset (i.e., the claim).

Because the clause exempting the trustee from the obligation to collect contributions was found to be in violation of ERISA §403, the court found that it was against public policy pursuant to ERISA §410. Under this section of ERISA, any plan clause that is considered to exculpate a fiduciary from responsibility or liability under the fiduciary duties of ERISA is void as against public policy. The court then ordered PBS to amend its plan to remove the offending provisions. The court did not, however, advise what language, if any, was required to replace the eliminated provision.

### ***What Effect Does This Decision Have Outside of the PBS Facts?***

A federal district court is a court of persuasion and not precedent. The court's ruling is only controlling in the PBS case, but another court might find it persuasive and follow it. Or, another court might disagree with the Massachusetts district court and rule entirely differently. Nonetheless, there is now a district court ruling that a plan's claim to pursue



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delinquent employer contributions is a plan asset that must be held in trust. Presumably, the DOL would likely take this same position in any type of single employer retirement plan that includes an employer contribution component.

The Secretary of Labor, says the judge, “has sought to do through this litigation what she has been unwilling to do under her rule-making authority: effectively require all ERISA master plans and trust agreements to recognize the trustees’ obligation to collect employer contributions.” One can only wonder why, rather than entertaining costly litigation, the DOL did not simply modify its plan asset regulations to include the right to collect contributions as a plan asset, thus putting this obligation firmly in the trustee’s bailiwick. Such a regulatory change would otherwise have to be made in proposed form and open to public comment before finalization. It is likely that many financial institutions would have numerous comments to make on such a proposal.

However, even the PBS court, in what it refers to as its “coda” to the decision, notes that the decision raises significant administrative issues. “How rapidly,” the court wonders, “must the Trustee move to commence recovery efforts? When may the Trustee exercise discretion to abandon claims presenting the prospect of limited recovery?” The court further notes that, if there is no guidance on these types of issues, institutional trustees will have “powerful incentives” to significantly increase their prices or to withdraw these types of services entirely. “Providing a proper balance through rule-making is now an obligation of the Secretary, lest prevailing on this case be a Pyrrhic victory in the battle to provide serviceable and affordable pension plan

administration for those employed by relatively small employers.”

No kidding. Not to attempt to outdo the court in poetic references, this opens a huge Pandora’s box of questions about what actions must be taken by the trustees of plans, when such actions must be taken, and what level of liability the trustee has with regard to uncollectible contributions. In the worst case scenario, would a trustee have to indemnify the participants against losses due to amounts that could not be collected from the plan sponsor if the trustee has not acted rapidly enough to collect the contributions?

For now, these questions will remain unanswered. ASPPA Govt Affairs Committee is actively monitoring developments from this case – stay tuned.



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