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BENEFIT NEWS BRIEFS

Supreme Court Lets Decision Stand that Holds Union Liable for Employers EWL Based on CBA

An arbitrator and the District Court of Western District of Kentucky held that a local union had to indemnify (reimburse) a withdrawing employer's employer withdrawal liability (EWL) based upon language in the collective bargaining agreement (CBA). The Sixth Circuit upheld the District Court and in early October 2012, the United States Supreme Court denied certiorari, letting the decision stand. The obvious lesson is "*be careful what you put in your CBA.*"

The case is *Shelter Distribution, Inc. v. General Drivers, Warehousemen & Helpers Local Union*, 674 F.3d 608 (6th Cir 2012), *cert. den*. U.S. S. Ct., 2012 WL 2340882, (Oct. 1, 2012), available by "*clicking here.*" The arbitration decision is available by "*clicking here.*"

The Sixth Circuit joins the Third Circuit in holding that *ERISA* and the *Multiemployer Pension Plan Amendments Act* did not establish a public policy preventing enforcement of a collectively bargained indemnity provision between a union and an employer. See, *Pittsburgh Mack Sales & Services, Inc. v. International Union of Operating Engineers, Local Union No. 66*, 580 F.3d 185 (3d Cir. 2009).

Briefly, what happened in the Sixth Circuit case is the CBA between the employer and the Union was scheduled to expire on a certain date, negotiations collapsed, the Union disclaimed representation of the employer's employees and the collective bargaining process was terminated. Accordingly, the employer withdrew from the multiemployer pension plan at issue and was assessed $57,291.50 in EWL.

The employer demanded indemnification from the Union pursuant to Section 8(m) of the CBA. The Union refused but the employer prevailed in court. Section 8(m) of the agreement provides:

> The Employer shall continue to contribute to the Central States, Southeast and Southwest Areas Teamsters Pension Fund, the sum of $49.00 per week per covered employee for the year beginning December 1, 1998, $55.00 per week

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> for the year beginning December 1, 1999, and $61.00 per week for the year beginning December 1, 2000. The Union and the members of the Bargaining Unit have agreed that only the liability of the Company to the Pension Benefit Plan of the Central States, Southeast and Southwest Areas Pension Fund are, have been and shall be limited to the actual contributions it makes during the course of the past, present and future Contracts, and the Company shall not be liable for any other obligation or contingent obligation of any kind or nature whatsoever. *The Union shall indemnify the Company for any contingent liability which may be imposed under the Multiemployer Pension Plan Amendments Act of 1980*. (emphasis added).

This last underlined sentence in Section 8(m) means the Union agrees to pay for the employer's EWL, contrary to the normal practice of the employer paying for its own EWL, not the Union.

One wonders why such a clause was added to the CBA anyway, unless as an inducement for the employer to enter the CBA and participate in the pension plan. Fortunately for the Union, the EWL was small. Had the employer's EWL been in the millions, the result would have been catastrophic for the Union.

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