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BENEFIT NEWS BRIEFS

Dischargeability of Multiemployer Pension Plan Withdrawal Debt and the Bankruptcy Code

The Ninth Circuit Speaks

Two recent court cases dealt with monies owed to multiemployer pension plans and whether or not the debt was dischargeable as a debt under the Bankruptcy Code. One case dealt with the dischargeability of "*withdrawal liability*" and the other "*employer contributions.*" We are going to take a look at the Ninth Circuit opinion in a case involving the dischargeability of withdrawal liability in bankruptcy. We will look at the other case in the next issue. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington.

Although this case is not as high profile as the *$2 Billion Dollar Hostess Bankruptcy*, it does provide a nice overview of the subject. For more on the Hostess bankruptcy see: *Bloomberg Law*, *BNA Pension and Benefits blog*. The National Coordinating Committee for Multiemployer Plans (NCCMP) *amicus brief* filed in the Hostess bankruptcy sets out why allowing dischargeability of withdrawal liability frustrates the purposes of Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) and is available by "*clicking here*."

The Case

The case we will look at is *Carpenters Pension Trust Fund v. Moxley*, (9th Cir., Aug. 20, 2013). In this case, the Ninth Circuit District Court agreed with the bankruptcy court and the District Court that withdrawal liability is a debt that can be discharged in bankruptcy. The Ninth Circuit rejected the pension fund's argument that the debtor was a fiduciary with regard to the unpaid withdrawal liability and therefore could not discharge the debt due to a rule under the Bankruptcy Code preventing debts accrued while acting as a fiduciary from dischargeability. The case is available by "*clicking here.*"

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Moxley was the owner/operator of a carpentry business and a contributing employer to the Carpenters Pension Trust Fund under a collective bargaining agreement. When the agreement expired, Moxley ceased contributions to the Fund but continued to work in the jurisdiction of the Fund. The Fund notified Moxley that because he was still doing work covered by the Agreement, he was subject to withdrawal liability in the amount of $172,045. The Fund filed suit in United States District Court for the Northern District of California, but proceedings there were stayed when Moxley filed for bankruptcy.

The Fund sought to establish that the withdrawal liability debt qualified as one created via "defalcation" by a fiduciary under Bankruptcy Code Section 523(a)(4) which provides that a bankruptcy discharge "*does not discharge an individual debtor from any debt... for fraud or defalcation while acting in a fiduciary capacity*...." i.e. the debt was not dischargeable since the debtor was a fiduciary to the monies owed and spent them elsewhere. A breach of fiduciary duty involving trust assets has been found to a "defalcation" by some courts.

The Fund argued that because it is a trust fund, and those who administer, own, or control assets of a trust fund are fiduciaries, Moxley was a fiduciary for funds in his control representing the amount of withdrawal liability that he should pay to the Fund.

However, in order to prevent the debt from being discharged, the Court stated the Fund therefore had to establish both that Moxley was acting in a fiduciary capacity with respect to the money he had not paid to the Fund, and that the failure to pay constituted "defalcation" within the meaning of the Code.

The Court did not reach the issue of defalcation because it determined that Moxley was <u>not</u> a fiduciary.

The Fund had argued in the bankruptcy court that its "assets" included money that is owed to the Fund, and that Moxley has exercised control over that withdrawal liability money owed to the Fund and so became a fiduciary under *ERISA* with respect to it. However, the Court noted the problem with this simple proposition is that money that is owed to the Fund was not in the Fund, and is therefore not yet a Fund "asset."

While the Court recognized that unpaid contributions, though generally not plan assets, could be made plan assets by contract between the employer and the union, such as through the trust agreement or collective bargaining agreement, that was not the case here as the issue was <u>not</u> "*unpaid contributions*" but unpaid "*withdrawal liability.*" The Ninth Circuit rejected any attempt by the Fund to categorize the unpaid withdrawal liability as unpaid contributions.

In particular, the Court noted:

> Relying on these cases involving the obligation to make contributions, the Fund makes a persuasive case that, given the provisions of this agreement, unpaid

> contributions required by the Agreement can be considered plan assets. Here, however, we do not have to decide the question of whether unpaid contributions are plan assets. This is because we do not deal with unpaid contributions arising from contractual obligations.
>
> This case involves withdrawal liability under ERISA that is imposed because the employer no longer has a contractual obligation to contribute. This obligation is statutory. ERISA recognizes that contributions, on the other hand, are contractual obligations that ERISA enforces, but does not create.
> Because withdrawal liability does not arise until the employer ceases to have an obligation to contribute to the plan, it cannot be considered an unpaid contribution under the collective bargaining agreement.
>
> Accordingly, even if we assume that unpaid contributions can be considered assets of the Fund under the particular provisions of this agreement, and non-dischargeable, the withdrawal liability is not an unpaid contribution. We therefore agree with the conclusion of both the bankruptcy and district court that this withdrawal liability is dischargeable.

The Court dispensed in short order with the Fund's argument that Moxley's failure to arbitrate precluded his bankruptcy filing to discharge the unpaid withdrawal liability, stating:

> The arbitration provision of ERISA expressly applies where an employer contests the existence or the amount of an alleged liability. 29 U.S.C. § 1401. Moxley does not here dispute the amount or existence of the withdrawal liability. He has invoked the provisions of the Bankruptcy Code to discharge existing obligations and receive a "fresh start." *Cent. Va. Cmty. Coll.*, 546 U.S. at 364. The district court correctly held that this case is governed by the dischargeability provisions of the Bankruptcy Code.

Conclusion

This case highlights the increasing problem of contributing employers discharging withdrawal liability via bankruptcy, whether personal or corporate.

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