



BENEFIT NEWS BRIEFS

10th Circuit Court Holds “Common Control” for Withdrawal Liability For Construction Industry Plans is Determined at the Time a Control Group Resumes Covered Work, Not When It Ceases To Have An Obligation To Contribute

This case concerns an appeal to the 10th Circuit of Appeals asking whether a construction company that stopped contributing to its employees’ multiemployer defined benefit pension plan must pay withdrawal liability under the *Multiemployer Pension Plan Amendment Act (“MPPAA”)*. The case is [Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Trust](#), (case Nos. 15–1021, 15–1190) 2016 WL 1743394 , (10th Cir. May 3, 2016). The 10th Circuit covers the states of CO, KS, NM, WY, OK, and UT.

Background

Ceco Concrete Construction, LLC (“Ceco”) was a party to a collective bargaining agreement (CBA) that required it to contribute to the Centennial State Carpenters Pension Trust (“Trust”), a multiemployer pension plan. Heico Holdings, Inc. has owned Ceco since 1995. Nine companies were part of the Heico Construction Group. In May 2010, Ceco decided to not renew its CBA and to convert to a nonunion company. In October 2010, Heico acquired CFA, nonunion construction company in Colorado that performs the same type of construction work as Ceco. As a nonunion company, CFA does not participate in a CBA or contribute to a pension plan.

Heico purchased CFA on October 1, 2010, and through CFA expanded its construction work in Colorado, performing the same type of work that Ceco did but in greater volume. Heico eventually closed Ceco’s Denver office. The parties stipulate that CFA, Ceco, and Heico have been under “common control” since the acquisition.

The Plan Assesses Withdrawal Liability And Ceco Initiates Arbitration

On March 3, 2011, the Plan assessed withdrawal liability of \$917,904 against Ceco. Ceco initiated arbitration and won, the arbitrator concluding that only parties under common control on the date of cessation could incur withdrawal liability under the

MPPAA. Ceco then sued in federal District Court to affirm the arbitrator's decision. The Trust and its Board of Trustees (jointly, "the Plan") counterclaimed, asking the District Court to vacate the arbitrator's award. The District Court granted summary judgment in Ceco's favor, agreeing with the arbitrator that withdrawal liability applies only to entities under common control *on the date the obligation to contribute ceases*. Since CFA was not under "common control" with Ceco on the date that Ceco no longer had an obligation to contribute to the Plan, the district court held Ceco could not be assessed withdrawal liability and awarded Ceco costs since they were the prevailing party.

The Plan Appeals the District Court's Decision

The Plan appealed the grant of summary judgment to the Tenth Circuit Court of Appeals which reversed the district court's judgment. In reversing the district court, the 10th Circuit Court went into a lengthy and detailed discussion of the *MPPAA*, the definition of "employer" thereunder and the construction industry exception for withdrawal liability. The Court noted that the *MPPAA* imposes "withdrawal liability" on an "employer" that has an "obligation to contribute" to a plan but withdraws from the plan. The term "employer" is used throughout the *MPPAA* and is defined to mean all "trades or businesses" under "common control" (i.e., a common-control group). All businesses under common control are treated as a single employer for purposes of collecting withdrawal liability, and each is liable for the withdrawal liability of another. "Employer" is synonymous with "common-control group."

The Court then explained that for construction employers, a "complete withdrawal" occurs when (1) "an employer ceases to have an obligation to contribute under the plan," and (2) either (a) "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required" or (b) "resumes such work within five years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption."

The 10th Circuit Court continued its analysis explaining that under *MPPAA* "employer" means a common-control group and that the definition of "employer" has been construed broadly to "*extend beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures.*" A common-control group "*continues to perform covered work*" under the statute if it carries on its operation without interruption after the obligation to contribute ceases. A common-control group "*resumes such work*" if it performs covered work after an interruption but within five years after the cessation.

The Court further explained that the *MPPAA*'s plain language indicates common control must be determined at the time the group resumes covered work—not at the time of cessation. However, the court noted a construction-industry complete withdrawal does not occur when the employer ceases its obligation to contribute but only if the employer (i.e., the common-control group) ceases its obligation and either continues or resumes covered work within five years. The Court concluded that if withdrawal occurs for either of these reasons, the employer (i.e., common-control group) must make withdrawal liability payments.

The 10th Circuit Court explained that its decision was in furtherance of the policies of the *MPPAA*:

Determining common control at the time the obligation to contribute ceases would provide an end run around the rules on construction industry employer withdrawal liability. Like the common-control group here, a group could avoid liability by terminating its obligation to contribute and then acquiring a nonunion business that resumes covered work. The common-control group would then escape any liability because the newly acquired entity would not have been under common control on the date of cessation. This would run contrary to the *MPPAA*'s aim of protecting pension funds from the adverse effects of employer withdrawals and of imposing withdrawal liability on common-control groups regardless of corporate form.

In summary, the 10th Circuit Court held that the plain language of the *MPPAA*'s definition of "employer" and definition of a construction-industry "complete withdrawal" allows a multiemployer pension plan to assert withdrawal liability against any entity under *common control* on the day the common-control group triggers a withdrawal by continuing or resuming covered work. The Plan was therefore authorized to assess withdrawal liability against Ceco because CFA became part of the common-control group and resumed the same work as Ceco within the five-year period under the statute.

The 10th Circuit Court reversed the District Court's opinion and remanded the case back to the District Court with instructions to vacate the district court's award of costs to Ceco because Ceco was no longer the prevailing party.

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