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WHAT'S INSIDE

TAFT-HARTLEY REPORT

DOL Guidance on State-Based Savings Programs

On November 16, 2015, the Department of Labor "DOL" issued guidance regarding state-based savings programs (SSPs) for private sector employers. Such programs were favored by the Obama Administration at the federal level. However, when federal legislation stalled, several states took action to establish such programs at the state level.

State regulation of benefits is generally preempted by ERISA, thereby, calling into question whether the SSPs would survive a challenge in court. To address these concerns, President Obama urged the DOL to issue guidance to accommodate the SSPs. As a result, the DOL issued guidance clarifying the preemption issues, thus paving the way for states to adopt SSPs for private sector employers.

Regulations regarding State-Administered IRAs

The proposed regulations provide a safe harbor exemption from ERISA coverage for state-mandated IRA arrangements for employers that do not offer a workplace savings arrangement. Illinois, California, and Oregon established SSPs for private sector employers contingent on such programs being exempted from ERISA. The DOL proposed regulations provide such guidance.

The Illinois Secure Choice Savings Program (Secure Choice Program) is expected to be implemented July 1, 2017. Under the Secure Choice Program, for profit and nonprofit employers with 25 or more employees that do not offer a workplace savings arrangement are required to enroll employees in the program unless the employee opts out. The default deduction is 3% of wages, which is applied to a Roth IRA administered by the State.

Employer involvement will be limited to ministerial functions such as collecting and remitting payroll deductions, providing notices and program information to employees, keeping records that are provided to the state, and permitting the state to publicize the program to employees.

The Secure Choice Program is directed at employers that do not provide retirement savings programs for their employees and thus will not apply to bargained employees who are covered by a multiemployer retirement plan. However, an employer that generally covers its employees through bargained and/or non-bargained plans may be required to enroll any non-covered employees, including seasonal or part-time employees, in the Secure Choice Program.

The Illinois Secure Choice Board will have to clarify these and many other issues before the July 1, 2017 implementation date.

Interpretive Bulletin for SSPs Applicable to State-Coordinated ERISA Plans

The DOL also issued Interpretative Bulletin 2015-02, which sanctions three types of state-coordinated ERISA plans. Thus, a state can establish a prototype plan, a multiple employer plan (MEP), and/or a marketplace for private sector employers.

Accordingly, a state can sponsor a prototype plan for private sector employers. An employer adopting the prototype is then the sponsor of an ERISA plan for its employees. Massachusetts is in the process of establishing a state run voluntary program for small nonprofit employers.

Similarly, a state can establish an open MEP that is subject to ERISA. The state is the plan sponsor, named fiduciary, and plan administrator. The arrangement can be structured to limit employer fiduciary responsibilities to prudently selecting and monitoring the arrangement. Employers will have the option to participate by completing a participation agreement. Only a single Form 5500 would be filed for the whole arrangement.

Under previous guidance, the DOL has required that employers participating in a MEP have a common nexus such as being in the same industry. According to the Interpretive Bulletin, a state can run an open MEP because of the state's special representational interest in the health and welfare of its citizens, which creates the necessary nexus. Private sector plan vendors are protesting that a state-sponsored open MEP or a state-sponsored prototype plan will have a competitive advantage.

Under the Interpretive Bulletin, a state can also establish a marketplace to connect eligible employers to savings plans available in the private sector. The marketplace itself would not be an ERISA covered plan and the arrangements offered to employers could include ERISA covered plans or non-ERISA savings programs. Washington State is in the process of establishing such a marketplace.

These state-coordinated plans may provide low cost options for bargaining units that do not have a vehicle for employer contributions and/or employee elective deferrals.

Supreme Court Says Plans Must Move Fast to Enforce Subrogation Rights

In January of this year, the Supreme Court has once again delved into the issue of what is meant by the term "appropriate equitable relief" contained in Section 502(a) of ERISA.[1] This time, however, the Supreme Court addressed a new set of facts: What happens to a Plan's subrogation rights when a Participant spends all of the money he received from a third-party lawsuit?

Section 502 of ERISA authorizes a civil action to be brought "by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[2] The Supreme Court's recent ruling limits the ability of ERISA plans to seek equitable relief or reimbursement of payments from a third-party recovery by a Participant.

In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Fund*, the Supreme Court addressed a common fact pattern where a health benefit plan sought reimbursement of the expenses it paid on behalf of a Participant after the Participant recovered damages from a third party.[3] In *Montanile*, the Participant was injured in a car accident caused by a drunk driver. The Plan paid medical expenses of more than $120,000 on his behalf. As required by the Plan's subrogation provision, the Participant executed an agreement under which he promised to reimburse the Plan if he recovered money from a third party. The Participant filed a lawsuit against the drunk driver, which led to a settlement of $240,000 after attorney's fees and expenses were paid. The Participant's attorneys initially held the $240,000 in a client trust account while they attempted to negotiate with the Plan regarding its subrogation rights. After the negotiations failed, the attorneys notified the Plan that they intended to release the trust account to the Participant unless the Plan objected within two weeks. After the Plan did not object within the two weeks, the attorneys released the money to the Participant and the Participant began to spend the money.

Nearly six months after the Participant received the money from the trust account, the Plan sued the Participant under Section 502(a)(3) of ERISA. This section allows plan fiduciaries to bring actions for "appropriate equitable relief," which many years of case

[1] 29 U.S.C. § 1132(a)(3).

[2] Id.

[3] Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Fund, No. 14-723 (January 20, 2016).

law say includes only "those categories of relief that were typically available in equity"[4] before the courts of law and equity were merged. Courts of equity historically were concerned primarily with wrongs that could not be righted through the law courts' standard remedy of monetary damages. The well-established rule, then, is that a lawsuit under section 502(a)(3) cannot amount to a simple claim for compensation for an injury.[5] Instead, the plaintiff must show that he is entitled to a nonmonetary remedy, even though handing over money may be among the remedy's consequences.[6]

In the *Montanile* case, the Plan argued that the money the Participant received from his settlement was subject to an "equitable lien by agreement," which essentially means that the recovery was a piece of property belonging to the Plan that the Participant was wrongfully withholding.[7] The Plan argued that an equity court would have ordered the Participant to give up the money, and so an ERISA court should do the same.[8] The Participant argued that he had spent the money on non-traceable items (like food and travel) and that the Plan could not recover from his other assets. The Supreme Court agreed with the Participant.

In the 8-1 decision, the Court ruled that when a Participant dissipated the whole settlement on nontraceable items, the Plan cannot bring a suit to attach the Participant's general assets under Section 502(a)(3) because the suit is not one for "appropriate equitable relief."[9] The Court found that while the basis of the Plan's claim was equitable, and an equitable remedy would have been available had the plan sued to enforce its lien prior to distribution of the funds, because the funds had been disbursed, the Court held the lien was not enforceable against the Participant's general assets - once "the defendant dissipated the entire fund on non-traceable items, that complete dissipation eliminated the lien."

This ruling has a significant impact on the future of claims brought by ERISA Plans. Perhaps the most pertinent takeaway from *Montanile* is the importance of vigilance and swift action by Plan fiduciaries. The best way to ensure that a Plan receives reimbursement pursuant to its subrogation provisions is to actively follow the litigation and settlement proceedings between the Participant and third-party. Plan administrators should maintain regular contact with the parties, know when the parties settle and where the money is located.[10] Plans should also consider creating and enforcing a subrogation procedure policy to address situations like the *Montanile* case, and to ensure that the Plan has the best opportunity to obtain recovery. If you have any questions, please contact our office.

Another ERISA Reimbursement Case May Make Its Way to the Supreme Court

The Supreme Court's decision in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Fund* is not the only recent federal court decision that has negatively impacted an ERISA plan's right to reimbursement. The Ninth Circuit added its interpretation to ERISA-related reimbursements when it upheld judgment for an employer where an ERISA plan attempted to recover health care benefits for two ineligible employees based on both breach of contract and restitution/specific performance claims because it determined 1) that ERISA preempted the plan's breach of contract claims; and 2) that the Plan's restitution and specific performance claims were not permitted under ERISA because they sought legal, and not equitable, relief.[11] On January 18, 2016, the Welfare Fund filed a petition with the Supreme Court, requesting the Court's review of the Ninth Circuit's ruling.

In this case, the Oregon Teamster Employers Trust ("Welfare Fund") provided health and welfare benefits to workers pursuant to a collective bargaining agreement between the union and the employer, Hillsboro Garbage Disposal, Inc. ("Hillsboro").[12] Non-bargaining unit workers were eligible to participate in the Plan pursuant to special written agreements if they were bona fide employees of Hillsboro. In 2006, a payroll compliance audit revealed that Hillsboro made unauthorized contributions in the amount of $70,000 on behalf of two workers who were actually employed by a separate company that shared common ownership with Hillsboro. The Welfare Fund sent

[4] Steptoe & Johnson, LLP, "Supreme Court Says Plan Must Move Quickly to Enforce Subrogation Rights." January 26, 2016; quoting *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993),

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Fund, No. 14-723 (January 20, 2016).

[10] Spencer Fane. "You've (Still) Got to Be Kidding: Supreme Court Holds ERISA Plan Participants May Ignore Provisions If They Spend the Money Fast Enough." Spencerfane.com.

[11] Dewitt, Michael. Ninth Circuit Upholds Denial of Plan's Attempt to Recover Medical Payments. LinkedIn.com. September 15, 2015.

[12] 800 F.3d 1151 (9th Cir. 2015).

Hillsboro a copy of the audit report and informed the company that it had six months to make a written refund request.

Despite the audit findings, the Welfare Fund continued to accept contributions from Hillsboro on behalf of the two employees in question and to pay medical claims on their behalf. In 2011, after another audit revealed unauthorized contributions, the Welfare Fund removed the two men from the plan and filed a lawsuit against Hillsboro and the two employees in the U.S. District Court for the District of Oregon, seeking recovery of benefits paid in excess of the contributions received from Hillsboro on their behalf. The Welfare Fund's lawsuit sought four claims: (Count I) restitution from the Hillsboro and the two employees; (Count II) specific performance against Hillsboro to repay the benefits wrongly paid; and (Count III) and (Count IV) common law breach of contract claims against Hillsboro.

The District Court granted summary judgment in favor of the Defendants, finding that the common law breach of contract claims were preempted by ERISA and the claims for legal restitution and specific performance were not cognizable under ERISA. The Welfare Fund appealed to the Ninth Circuit Court of Appeals.

Counts III and IV: Common Law Breach of Contract Claims

The Ninth Circuit held that the District Court properly dismissed the common law breach of contract claims contained in Counts III and IV. Under 29 U.S.C. § 1144(a), ERISA provisions "supersede any and all State laws insofar as they … relate to any employee benefit plan."[13] A common law claim "relates" to an ERISA plan "if it has a connection with or reference to such a plan."[14] To determine whether a claim has a "connection" with an ERISA plan, courts will use a "relationship test" that focuses whether the "claim bears on an ERISA-regulated relationship, e.g., the relationship between plan and plan member, between plan and employer, between employer and employee.[15]

In denying the Welfare Fund's claims, the District Court found that the state law claims were preempted because they are "premised on the existence of an ERISA Plan, and the existence of the plan is essential to the claims' survival" and that they have a "genuine impact on a relationship governed by ERISA – that between the plan and the employer." The Ninth Circuit agreed with the District Court, finding that adjudication of the state common law claims requires an interpretation of the Plan – namely, the eligibility of the two workers to participate in the Plan.

Counts I and II: Restitution and Specific Performance

The Ninth Circuit held that the District Court properly denied the restitution and specific performance claims contained in Counts I and II. Section 502(a)(3) of ERISA authorizes civil suits by participants, beneficiaries or fiduciaries "to (A) enjoin any act or practice which violates … the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of … the terms of the Plan."[16] A claim for specific performance is a request for the court to order performance of a contractual duty in cases where money damages would be insufficient. Specific performance is classified as an equitable remedy. A claim for restitution, on the other hand, is a request for the court to order the defendants to give up their gains to the plaintiff, and can be both a legal and an equitable remedy.

In support of its claim for specific performance claim of the reimbursement provisions of the plan, the Welfare Plan relied on past Supreme Court decisions, namely (1) the *Sereboff v. Mid Atlantic Medical Services, Inc*. ruling, which found that ERISA provides for equitable remedies to enforce plan terms, so the fact that the action involves a breach of contract is not enough to prove relief is not equitable,[17] and (2) the Supreme Court's past decisions outside the ERISA context, which hold that specific performance of reimbursement obligations "attempts to give the plaintiff the very thing to which he was entitled" and is therefore equitable relief.[18] The Ninth Circuit rejected this position and cited its holding in the 2002 case of *Great-West Life & Annuity Insurance Co. v. Knudson*, where it found that specific performance is typically a legal remedy unless it is sought "to prevent future losses that either were incalculable or would be greater than the sum awarded," noting that the *Sereboff* decision carved out an exception for restitution sought from a particular fund, not specific performance.[19] Although the Court did not spell out why this principle prevented the Welfare Fund from succeeding, likely it was because the Welfare Fund sought a definite amount of benefits that were not "incalculable" or "greater than the sum" awarded by a judgment in the Welfare Fund's favor. As a result,

[13] *Id.* at 1155.

[14] Id.

[15] *Id.* citing *Paulsen v.CNF, Inc.*, 559 F.3d 1061, 1082 (9th Cir. 2009).

[16] 29 U.S.C. § 1132(a)(3).

[17] 547 U.S. 356 (2006).

[18] *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

[19] 534 U.S. 204 (2002).

the Ninth Circuit agreed with the District Court's decision to deny the Welfare Fund's claim for specific performance.

In support of its claim for restitution, the Welfare Fund characterized the reimbursement provision of the plan as an "equitable lien by agreement." In order to establish an equitable lien by agreement, the Welfare Fund needed to satisfy three requirements: (1) there must be a promise by the beneficiary to reimburse benefits paid under the plan in the event of recovery from a third party; (2) the reimbursement agreement must specifically identify a particular fund, distinct from the beneficiary's general assets, from which the fiduciary will be reimbursed; and (3) the funds specifically identified by the fiduciary must be within the possession and control of the beneficiary.[20] The Ninth Circuit found that the Welfare Fund failed this test because, although the Plan contained a promise to reimburse, it did not specifically identify a fund from which to be reimbursed. Here, the Welfare Fund is seeking funds paid directly to medical providers. Therefore, the amounts the Welfare Fund paid for the two workers' medical expenses were not in the workers' possession and control. As a result, the Ninth Circuit agreed with the District Court's decision to deny the Welfare Fund's claim for restitution.

This case, along with the *Montanile* case, emphasizes the importance of specifically identifying monies to impose an equitable lien or constructive trust. Without identifying specific funds, a plan has little recourse under ERISA. While this case only governs entities falling within the Ninth Circuit's jurisdiction, *Montanile* – which focuses more on subrogation than overpayment – affects all plans throughout the federal court system. Furthermore, the timing indicates a shift in ERISA case law that will no doubt give rise to similar decisions in all areas of the country. As such, plan fiduciaries must maintain vigilance when it comes to reimbursement and seek immediate advice of fund counsel. If you have any questions, please contact our office.

Sixth Circuit Holds that Signed CBA is not Necessary to Bind Employer

In a recent appellate case briefed and argued by J&K in 2015, the U.S. Court of Appeals for the Sixth Circuit reversed a district court's decision that an employer was not bound to make fringe benefit fund contributions because it never signed the collective bargaining agreement with the union.[21] In a 2-1 decision, the panel held that Section 302(c)(5)(B) of the Labor Management Relations Act (LMRA) merely requires a "written agreement" that sets forth the employer's obligation to contribute, not a *signed* written agreement. In addition, the written agreement does not have to be a collective bargaining agreement.

In finding the employer was bound as a matter of law, the Court reasoned that the employer had signed multiple other documents that incorporated and referenced the collective bargaining agreement, such as a bond agreement, ten years-worth of contribution reports and an agreement to participate in the union's equality and stabilization program. The Court also found it significant that the employer was a member of the employer association that negotiated the collective bargaining agreement with the union, despite never having provided the association with written authorization to bargain on its behalf.

While the Court declined to hold the employer bound to the collective bargaining agreement solely based upon its conduct, it noted that in addition to signing multiple documents incorporating the collective bargaining agreement, the employer also acted in manner consistent with being bound to the agreement for a period of ten years. Such conduct included the submission of contributions at the collectively bargained rates, employing union members through the union's hiring hall and allowing the funds' auditor access to conduct a payroll examination.

The best practice is still for the union and funds to ensure that all contributing employers have signed a subscription agreement clearly binding them to the applicable collective bargaining agreement. However, in the absence of a signed agreement, this decision clarifies the law in the Sixth Circuit and makes it easier for ERISA funds to collect contributions in Michigan, Ohio, Kentucky and Tennessee.

Ohio Court Finds Successor Employer Liable for Predecessor's Obligation

In July 2015, an Ohio District Court granted Summary Judgment in favor of J&K's clients, the Plumbers, Pipefitters & MES, Local Union No. 392 Trust Funds ("Funds"), and held that a successor company was liable for the original signatory's obligation to contribute to the Funds.[22] Recently, the Court entered Judgment in the amount of $196,947.94 against the original signatory and Successor Company.[23]

[20] Sereboff, 547 U.S. at 1092.

[21] Board of Trustees of the Plumbers, Pipe Fitters & Mechanical Equipment Service, Local Union No. 392 Pension Fund v. B&B Mechanical Services, Inc., No. 14-4017 (6th Cir. Dec. 29, 2015).

[22] Pipefitters & Mechanical Equipment Service, Local Union No. 392 Pension Fund et al v. R. and T. Schneider Plumbing Co. et al., S.D. Ohio, No. 13-cv-858, 7/10/15.

[23] *Id.*, S.D. Ohio, No. 13-cv-858, 11/19/15.

For many years, the original signatory, R&T Schneider Plumbing Co. (the "Predecessor"), contributed to the Trust Funds and was solely owned by Tom Schneider. In June 2013, the Predecessor sold its assets to Schneider Plumbing, Co. (the "Successor"), a company owned by Tom Schneider's wife and his two sons. To determine whether the Successor was the alter-ego of the Predecessor, the Court reviewed "whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." The Court further stated that "the analysis is flexible and no one element should become a prerequisite to imposition of alter-ego status; rather, all the relevant factors must be considered together."

The Court held that the Successor was the alter-ego of the Predecessor because: (1) they shared the same business purpose (commercial and residential plumbing), (2) they operated in the same marketplace (Cincinnati), (3) all of the employees of the Predecessor were immediately hired by the Successor after the Predecessor ceased operations, (4) the Successor continued without any interruption to operate out of the same garage as the Predecessor, (5) the Successor continued to use the same mailing address and office space, (6) the Predecessor transferred $11,000.00 to the Successor to begin its operations, (7) the Successor continued to serve over 30% of the Predecessor's customers, and (8) the Predecessor transferred all of its vehicles, tools and equipment to the Successor without paying anything.

The Court also rejected the One-Employee Unit Rule defense asserted by the Successor. According to the Court, the One-Employee Unit Rule permits employers to repudiate a collective bargaining agreement after only a few months of maintaining a one-or zero-employee unit. The Court held that the One-Employee Unit Rule defense was inapplicable for a number of reasons. First, the Court held that the defense may not be available in ERISA actions. Second, the Court held that the Predecessor did not maintain a one-employee unit for an adequate amount of time. Third, the Court held that repudiation of collective bargaining agreement is effective when the signatory notifies the bargaining-parties, which did not occur until the Successor filed its Motion for Summary Judgment.

In addition, the Court rejected the Successor's two principal objections to the auditor's calculation of contributions. First, the Successor argued that the auditor failed to take into account the Successor's owner-operator's non-bargaining-unit time in calculating the damages. However, the Court held that the Successor's failure to produce evidence identifying which hours were worked within the bargaining-unit and which hours were not was fatal. Specifically, the Court held that the Successor failed to sufficiently rebut the auditor's conclusions because "if an employer fails to keep adequate records, ERISA shifts the burden to the employer to produce evidence of the amount of work performed and to rebut reasonable inferences that can be drawn from the [Funds'] evidence." Second, the Court rejected the Successor's defense that an owner could not be considered an employee for purposes of ERISA. The Court held that "a working owner may also qualify as a participant and/or employee."

Proposed Changes to the Claims and Appeals Procedures for Disability Benefit Claims

On November 18, 2015, the Department of Labor ("DOL") published proposed amendments to the claims procedures regulations for adjudicating disability benefits. The proposed regulations would extend the procedural rules that apply to health care claims under the Affordable Care Act ("ACA") to disability claims adjudicated under welfare and retirement plans. The proposed amendments are summarized as follows:

Independence and Impartiality of Adjudicators – Avoiding Conflicts of Interest.

Plans would need to ensure that the procedures for adjudicating disability benefit claims and appeals are designed to safeguard the independence and impartiality of the persons involved in making the decisions. Decisions regarding hiring, compensation, termination, promotion, or other similar matters must not be made based on the likelihood that an individual (e.g., claims adjudicators or medical experts) will support the denial of disability benefits. For example, a plan could not pay bonuses based on the number of benefit denials made by a claims adjudicator.

Disclosure Requirements.

Denial notices would be required to provide a full discussion of the basis for denial.To the extent that any benefit determination disagrees with a claimant's disability determination by the Social Security Administration, a treating physician, or other third party payor, the notice must contain the plan's specific basis for the disagreement. The denial notice must also contain the plan's internal rules, guidelines, protocols, or standards that were used in denying the claim (or a statement that they do not exist).

Right to Review and Respond to New Information.

The proposed regulations would require a plan that provides disability benefits to allow a claimant to review his or her entire claim file and

to present evidence and written testimony during the review process. The regulations would also require a disability plan to provide any new evidence considered, relied upon, or generated by the plan to the claimant. This information would need to be provided to the claimant prior to the plan's decision on appeal to give the claimant an opportunity to respond.

Exhaustion of Claims and Appeals Processes.

Under the proposed rules, if a plan does not strictly adhere to the claims processing rules, the claimant will be deemed to have exhausted the plan's administrative remedies, thereby allowing the claimant to file suit. The proposed rules provide that when a claimant is deemed to have exhausted the plan's administrative remedies, the reviewing court would not give special deference to the plan's decision, but would review the dispute de novo.

However, the proposed rules contain a minor errors exception. Under this exception, a claimant is not deemed to have exhausted the plan's administrative remedies if the plan's violation was (i) *de minimis*, (ii) non-prejudicial, (iii) attributable to good cause or matters beyond the plan's control, (iv) in the context of an ongoing good-faith exchange of information, and (v) not reflective of a pattern or practice of noncompliance.

Definition of Adverse Benefit Determinations and Recessions.

The proposed regulations would expand the definition of an adverse benefit determination to include a retroactive rescission of disability benefit coverage, whether or not there is an adverse effect on any particular benefit at the time.

Culturally and Linguistically Appropriate Notices.

If a claimant lives in a county where 10 percent or more of the population are literate only in the same non-English language, the proposed regulations would require adverse benefit determinations to be provided in a culturally and linguistically appropriate manner. This means that a plan issuing an adverse benefit determination to one of these participants must provide a prominent, one-sentence statement in an appropriate non-English language about the availability of language services. The plan would also be required to provide a customer assistance process (e.g., a telephone hotline) with oral language services in the non-English language and provide written notices in the non-English language upon request.

The proposed regulations would significantly increase the duties of plan administrators and fiduciaries. Accordingly, retirement and welfare plans that provide disability benefits should follow the development of these proposed regulations carefully. For further information, please contact our office.

Resilient Floor Covering Pension Trust Fund Board of Trustees v. Michael's Floor Covering, Inc.

In September 2015, the Ninth Circuit Court of Appeals joined the Seventh Circuit in holding that an asset purchaser can be liable as a successor for withdrawal liability. Prior to the Ninth Circuit's decision in *Resilient Floor Covering Pension Trust Fund Board of Trustees v. Michael's Floor Covering, Inc*., the only Court that had made a similar decision was the Seventh Circuit in *Tsareff v. ManWeb Services*.[24] These decisions will have enormous impact as they are the first of their kind in the development of the successor liability doctrine for withdrawal cases.

The successor liability doctrine holds purchasers of a company's assets responsible for the company's liabilities if two elements are met (1) substantial continuity between the predecessor and successor entity and (2) the successor entity had notice of the liability prior to purchasing the predecessor's assets.[25] Historically, a Pension Fund could not prove successor liability against the purchaser of a withdrawing employer because the courts held that a purchasing employer didn't have notice of a company's withdrawal liability since withdrawal liability is not assessed until the company ceases to exist. As was discussed in a previous Newsletter, the Seventh Circuit in *ManWeb* recently held that a purchaser could have notice of a contingent liability, and that notice was sufficient to satisfy the successor liability doctrine.[26] Thus, the Seventh Circuit affirmatively held successor liability could apply against a withdrawing employer's purchaser.[27]

While the Sixth Circuit in *Resilient* didn't focus on the notice requirement of the successorship doctrine, the Court provided further insight on how they will handle imposing withdrawal liability on successor entities. In *Resilient*, a flooring company terminated its

[24] Resilient Floor Covering Pension Trust Fund Bd. Of Trs. v. Michael's Floor Covering, Inc., 801 F.3d 1079 (9th Cir. 2015); Tsareff v. ManWeb Services 794. F.3d 841 (7th Cir. 2015).

[25] *ManWeb*, 794 F.3d at 845.

[26] *Id.* at 847.

[27] *Id.*

business and sold its tools and equipment at a public auction.[28] The flooring company was a party to a Collective Bargaining Agreement with the Linoleum, Carpet and Soft Tile Applicators, Local Union No. 1236 pursuant to which it made contributions to the Resilient Floor Covering Pension Trust Fund.[29] An employee who worked for the flooring company as a salesman prior to its termination bought the assets, leased the store and warehouse where the company had previously operated out of, and used the same phone numbers as the previous business.[30] The employee also used the company's contacts to acquire the same customers as the prior company.[31]

The Court first held that successor liability can be used to impose withdrawal liability on the purchaser of a withdrawing employer holding that there is no reason a purchasing employer could be liable for a predecessor's delinquent contributions, but not a predecessor's withdrawal liability.[32] The Court next reviewed whether successor liability could be imposed in a case where the construction industry exception applied under the Multiemployer Pension Plan Amendments Act (MPPAA). The construction industry exception states that employers in the construction industry who entirely cease operations are not subject to withdrawal liability unless they resume work within five years without renewing their obligation to contribute. After analyzing the policy behind the MPPAA, the Court held that a successor can be subject to MPPAA withdrawal liability, even in the construction industry, principally because the Court held that the withdrawal of a construction employer from the plan decreases the funding base of the Fund if a successor employer picks up work that a predecessor would have performed, but goes non-union and ceases making payments to the plan.[33]

Finally, the Court established a test by which it will weigh successor factors for withdrawal liability.[34] The Court first held that the substantial continuity factor of the successorship test is the most important successorship consideration.[35] This is interesting in light of the fact that courts have often relied on the notice requirement as the most important consideration. In order to determine whether there was substantial continuity between the successor and its predecessor, the Court held that special consideration should be given to the analysis of whether the two companies had the same body of customers.[36]

After holding successor liability could be used to impose withdrawal liability on the purchaser of a withdrawing employer, the Ninth Circuit remanded the case to the District Court for further proceeding. It will be very important to watch both whether other circuits adopt the decisions of the Seventh and Ninth Circuits and also if the District Court holds that the successor employer had notice of its predecessor's withdrawal liability.

DOL Offers New Guidance to ERISA Plan Fiduciaries on Environmental and Social Investments

In October 2015, the Employee Benefits Security Administration (EBSA) released Interpretive Bulletin 2015-01 to clarify and revise its previously issued guidance to ERISA plan fiduciaries regarding their investment duties when considering economically targeted investments (ETIs) and strategies that take into account environmental, social, and governance (ESG) factors. In an investment context, ESG factors are sometimes referred to as "socially responsible investing," or "sustainable and responsible investing."

Prior to Interpretive Bulletin 2015-01, the EBSA most recently addressed environmentally targeted investments in its October 2008 Interpretive Bulletin, which left plan fiduciaries discouraged from pursing investment strategies that consider ESG factors and from investing in ETIs, even where such investments were economically equivalent.

Interpretive Bulletin 2015-01 rescinds its predecessor, aiming to dispel the confusion the old language invited, which discouraged plan fiduciaries from considering ETIs among their potential opportunities for investment. Instead, Interpretive Bulletin 2015-01 "confirms the Department's longstanding view that plan fiduciaries may invest in ETIs based, in part, on their collateral benefits so long as the investment is appropriate for the plan and economically and financially equivalent with respect to the plan's investment objectives, return, risk, and other financial attributes as competing

[28] *Resilient*, 801 F.3d at 1085-86.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1093.

[33] *Id.* at 1095.

[34] *Id.* at 1096

[35] *Id.* at 1097.

[36] *Id.*

investment choices."[37] In effect, plan fiduciaries are now able to consider ESG factors when they stand to reasonably impact an investment's potential financial return and risk profile. The most recent Bulletin also reaffirms that plan fiduciaries may consider ESGs and ETIs as "tie breakers" when deciding between investment alternatives that otherwise present as equal in terms of their projected risk and return.

In light of the clarification, the newly instated standard also reemphasizes the DOL's view that ERISA fiduciaries may not subordinate the economic interests of their plan's participants or beneficiaries to ESG objectives. Accordingly, plan fiduciaries may appropriately consider ESG and ETI factors in their analysis in two scenarios: first, when the factors stand to wield a direct impact the risk and return profile of an investment, and second, when the ESG factors are used as "tie-breakers" in selecting between investment opportunities that are otherwise equal.

In such instances, plan fiduciaries are held to the same fiduciary standards applicable to plan investments generally. Interpretive Bulletin 2015-01 also offers guidance regarding a plan investor's fiduciary duty in selecting investment managers, stating that plan fiduciaries "must reasonably conclude that the investment managers' practices in selecting investments are consistent with the principles articulated" in the Bulletin, thus requiring plan fiduciaries to know how investment managers consider ESGs in their investment recommendations.

The clarification set forth in Interpretive Bulletin 2015-01 expands the breadth of factors that plan fiduciaries may properly consider by recognizing that ESG factors often play determinative roles in an investment's long-term returns.

Illinois Unions Challenge Town's Right-to-Work Law

In February 2016, four Illinois labor unions brought suit against the city of Lincolnshire and several of its key officials over the town's implementation of a local right-to-work ordinance, which many critics claim is contrary to existing federal labor law. The suit centers on whether the local municipality has the power under federal labor law to create a local right-to-work zone, or whether such power lies solely with the state.

The unions filing the lawsuit include the Operating Engineers Locals 150 and 399, the Laborers District Council of Chicago and Vicinity, and the Chicago Regional Council of Carpenters. The unions allege that the ordinance violates the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA), which limit the authority to pass right-to-work laws to just the state.

The unions appear to have the support of Illinois Attorney General Lisa Madigan. In 2015, Attorney General Madigan issued a formal opinion saying existing federal law only allows right-to-work policies to be enacted on a statewide basis. However, Lincolnshire officials disagreed with Madigan's opinion and adopted the local ordinance in December 2015. The village, Mayor Elizabeth Brandt, Police Chief Peter Kinsey, and Village Clerk Barbara Mastandrea are all named as defendants in the lawsuit.

The unions hope their lawsuit will have a similar outcome as a recent lawsuit in Kentucky, where a federal judge ruled that a right-to-work law established by a Kentucky county was illegal under federal law. In *United Auto Workers v. Hardin County*,[38] the United States District Court for the Western District of Kentucky ruled that the NLRA preempted the county government from enacting the local right-to-work ordinance. In invalidating the local ordinance, Judge David H. Hale found that the county's interpretation of "any State or Territory" to include political subdivisions of the state, such as a county or municipal government, was "not a logical reading" of the NLRA.

The city of Lincolnshire has argued that the local right-to-work law is necessary to remain competitive with other Midwest states which have recently passed state-wide right-to-work laws.

Twenty-five states currently have right-to-work laws on the books, including several states throughout the Midwest such as Iowa, Indiana, Michigan and Wisconsin. Many labor unions throughout the state have argued that the local right-to-work zone is just another attempt to weaken labor unions and would result in a lower standard of living and less safe working conditions for Illinois families.

[37] Department of Labor Fact Sheet, October 22, 2015. http://www.dol.gov/ebsa/pdf/fsetis.pdf

[38] 2016 U.S. Dist. LEXIS 12737 (W.D. Ky. Feb. 3, 2016).

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During law school, Katelin gained extensive experience in appellate litigation briefing and arguing Escobedo v. Apple American Group before the Ninth Circuit. In attaining total victory for her client, Katelin guided the Ninth Circuit in creating new law to govern in forma pauperis petitions.

Since 2014, Katelin has published the following articles: Alimony for Your Eggs: Fertility Compensation in Divorce Proceedings, 42 Pepp. L. Rev. 293 (2015), and Restoring Confidence in the Financial Services Industry: Advocating for a Uniform, Rules-Based Fiduciary Standard, 2014 Pepp. L. Rev. 1 (2014).

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Prior to joining the firm, Mindy successfully represented other Taft-Hartley benefit funds in ERISA actions in federal court and in bankruptcy proceedings. She also successfully negotiated and monitored settlements that ensured that the funds' interests were protected.

During law school, Mindy served as Vice President of DePaul's Appellate Moot Court Society. She won the distinctions of Best Oralist and Best Brief at Fordham University's Kaufman Securities Law Competition in 2012 and Best Speaker, Second Runner-Up at the 2013 Moot Court National Championship hosted by the University of Houston. She also served as a research assistant and teacher's assistant while studying at DePaul, gaining valuable legal research and writing experience, and as President of DePaul's 2013 National Cultural Heritage Law Moot Court Competition.

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