

September 10, 2010

MEMORANDUM TO CLIENTS

RE: Court of Appeals Holds that ERISA Imposes Independent Statutory Obligation on Contributing Employers to Remedy Multiemployer Pension Plan Funding Deficiency

The collective bargaining agreement is often viewed as providing the sole and ultimate definition of the relationship between a multiemployer pension plan and its contributing employers. Under a new ruling, though, a contributing employer may have obligations beyond those it agreed to in the collective bargaining agreement. In a recent decision, the U.S. Court of Appeals for the First Circuit recognized an ERISA statutory obligation on the part of an employer contributing to a multiemployer pension plan to make contributions to meet minimum funding requirements beyond those required by the employer's collective bargaining agreement. In *Gastronomical Workers Union Local 610 & Metropolitan Hotel Association Pension Fund v. Dorado Beach Hotel Corp.*, Nos. 08-2561, 08-2563, 2010 U.S. App. LEXIS 16686 (1st Cir. Aug. 11, 2010) ("*Gastro Workers*"), the trustees of that Fund brought suit against a number of contributing employers to obtain additional contributions necessary to eliminate a funding deficiency that had been actuarially determined to exist for the 2005 plan year. The court of appeals interpreted the version of ERISA § 302 that was in effect at times relevant to the case to require that, "[w]hen a plan fails to satisfy the minimum funding requirement for a given year, the plan sponsor -- the employer -- must make additional contributions to bridge the gap. In a multi-employer plan, this responsibility is shared among participating employers." *Gastro Workers*, 2010 U.S. App. Lexis 16686, at *3.

The collective bargaining agreement ("CBA") covering employees participating in the Fund provided that, in the event of a funding deficiency, the parties would "'seek to reach an agreement as to an increase in the contributions stipulated [in the CBA].'" *Id.* at *4. After the plan was determined to have a deficiency for 2005, the trustees notified the employers of the necessary increase in contributions, but the employers failed to make any such increased contributions. *Id.*

As a result of the uncorrected funding deficiency, the IRS imposed excise taxes pursuant to section 4971 of the Internal Revenue Code. In 2006, the Fund requested a minimum funding waiver for the contributions required for 2005, but, as of the date of the court's opinion, the IRS had not acted on the request. Also in the meantime, one of the major employer-defendants, Dorado Beach Hotel Corporation ("DBHC"), had withdrawn from the Fund and settled its withdrawal liability with the Fund by making two lump-sum payments of \$1.9 million each that were necessary to cure deficiencies (or anticipated deficiencies) for the 2006 and 2007 plan years.

Against this backdrop, the district court considered cross-motions for summary judgment, granting the trustees' motion and ruling that the employers were pro rata liable under ERISA § 302 for the amounts necessary to cure the 2005 funding deficiency. *Id.* at *8. The employers appealed.

The First Circuit first dispensed with an argument by the employers that the matter was not ripe because the IRS had not yet acted on the request for a funding waiver. The court explained that all of the events giving rise to the funding deficiency were "matters of historical fact" and that, if those facts were true, the Fund had suffered an injury. *Id.* at *14. Although the occurrence of certain future events (*i.e.*, the IRS' action on the waiver request) could affect the type of remedy available, the court held, the injury was not speculative and so the matter was ripe. *Id.*

The First Circuit then reached its more significant ruling in holding that employers contributing to a multiemployer pension plan have an obligation, imposed by section 302 of ERISA, to cure a funding deficiency, even if to do so requires contributions beyond those set forth in the collective bargaining agreement. *Id.* at *15-19. The employers had argued that the duty to contribute was contractual in nature, and that they had fulfilled their contractual obligations. *Id.* at *15-16. The court explained that, although the duty to contribute generally arises out of the contractual arrangement, "this tenet does not exist in a vacuum. Whatever a private contract may provide, ERISA continues to govern employers' funding obligation with respect to covered pension plans. The statutory mandates operate in tandem with contractually imposed duties. When a plan fails to meet the statutorily imposed minimum funding requirement for a given plan year, the employer must satisfy that requirement by making further payments, regardless of the terms of the CBA. The statutory obligation is independent of whatever arrangements private agreements may contemplate." *Id.* at *16. Otherwise, parties could avoid the requirements of ERISA through careful crafting of their CBAs, and pensions would not be protected in the manner that ERISA envisions. *Id.* at *16-17.

In reaching this decision, the court rejected two ancillary arguments by the employers. First, the employers argued that the trust agreement limits the employers' obligations to those set forth in the CBA, that the trustees lacked authority under the trust agreement to enlarge those obligations, and that the trustees were bringing suit to enforce a CBA. *Id.* at *17. The court held that, to the contrary, this suit was not to enforce the CBA but to obtain the amounts needed to satisfy ERISA's minimum funding requirement. Second, the employers argued that pension benefits are "terms and conditions of employment" and therefore are subject to the collective bargaining process, and that process must be followed to modify the terms of the CBA. The court rejected this argument, explaining that the trustees were not seeking an increase of the contribution rates specified in the CBA, but rather were seeking an order compelling the employers to ameliorate the funding deficiency, and that, in entering such an order, the district court "neither modified the CBA nor intruded into the collective bargaining process." *Id.* at *18-19.

Next, the employers argued that mismanagement on the part of the trustees had caused the funding deficiency, and that the employers should not be liable to cure the deficiency in such circumstances. The court again rejected the employers' argument, explaining that ERISA sets forth factors that are included in the computations for determining whether a funding deficiency exists, and managerial proficiency is not among them. *Id.* at *19. The remedy in the face of mismanagement is not avoidance of contribution obligations under ERISA but a suit for breach of fiduciary duty, the court explained. *Id.* at *20.

In their final argument on the contribution issue, the employers asserted that, by the time the district court entered the judgment requiring them to cure the deficiency, the plan no longer had a funding deficiency because of DBHC's substantial withdrawal liability payments. *Id.* at *20. The First Circuit opined that, if a funding deficiency no longer existed, then the district court's award would constitute "double-dipping" on the part of the trustees, because, under ERISA, which speaks in terms of an "accumulated funding deficiency," "a pension plan's books are kept on a rolling basis, using the accrual method of accounting[;]" therefore, the 2005 funding deficiency is irrelevant if the Fund had no deficiency at the time district court entered its order. *Id.* at *21-22. The court further noted that the Fund's 2006 Form 5500 indicated that there was no funding deficiency at that time. *Id.* at *24. In response to the trustees' assertion that "the withdrawal liability payments in this case were earmarked for the 2006 and 2007 plan years and, thus, had no effect on the funding deficiency for the 2005 plan year[;]" the court observed that "[g]iven the rolling nature of ERISA accounting, this seems counterintuitive; but in any event, the record is tenebrous as to how the additional payments were applied." *Id.* On this basis, the court remanded the case to the district court to determine whether a funding deficiency still existed. *Id.* at *25.

The First Circuit also instructed the district court to consider another issue on remand: whether ERISA § 502(a)(3), under which the trustees brought suit, provides a remedy for the trustees in this situation. Section 502(a)(3) provides, in pertinent part, that a plan fiduciary, such as the trustees of the Fund, may bring a civil action "to obtain other appropriate equitable relief" to redress violations of, or to enforce the provisions of, Title I of ERISA or the terms of the plan. The court of appeals raised the question of whether the relief sought in this case -- payment of contributions -- constitutes equitable relief under section 502(a)(3), noting that the Supreme Court has observed that suits seeking to compel a defendant to pay a sum of money to the plaintiff are generally legal, rather than equitable, suits for money damages because they "'seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" *Id.* at *22 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002)). The court of appeals did not opine on the issue but simply raised it for the district court to consider on remand.

We will continue to monitor this interesting case during its remand to the district court.

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