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A report to clients and friends of the firm

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Editor's Overview

This month we discuss the evolving case law on the issue of whether unpaid employer contributions due under a collective bargaining agreement can be viewed as plan assets such that the individuals who decide to withhold such contributions can be held personally liable under ERISA for breach of fiduciary duty.

As always, please be sure to review the Rulings, Filings, and Settlements section for last month's highlights in the areas of severance payments, statute of limitations, health care reform, multiemployer plan relief, tax reform and executive compensation, new IRS regulations, and contractual limitations periods.

Unpaid Employer Contributions as Plan Assets: Expansion Of Liability Under ERISA[*]

By Neal S. Schelberg and Aaron J. Feuer

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), requires trustees of multiemployer pension and benefit funds to collect contributions required to be made by contributing employers under their collective bargaining agreements ("CBAs") with the labor union sponsoring the plans. This is not always an easy task—often, an employer is an incorporated entity with limited assets or financial resources to satisfy its contractual obligations. In some instances, an employer will resort to filing for bankruptcy to obtain a discharge of its debts to the pension or benefit funds.

In a distinct trend, federal courts have found that, depending on the text of the underlying plan documents, unpaid employer contributions due under a CBA may be viewed as plan assets, such that the representatives of an employer who exercise fiduciary control over

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those plan assets can be held individually liable for the unpaid amounts (together with interest and penalties) under ERISA. These cases will no doubt help plan trustees and administrators collect monies owed to the plan. They also should serve as cautionary warnings to contributing employers to ensure that they fully understand the obligations that they are undertaking when they agree to contribute to ERISA funds pursuant to CBAs.

Background

In the typical scenario, an employer will agree under one or more of its CBAs to make specified contributions to fund the pension and health and welfare benefits promised to plan participants under the trust fund's plan of benefits. If an employer fails to timely remit those payments in violation of the CBA and the plan's rules, the trustees of the fund have a legal duty to attempt to recover the unpaid contributions unless, after fully examining the facts and circumstances, the trustees conclude that the likelihood of recovery is outweighed by its costs. What happens if the trustees expend the fund's resources to seek to collect the unpaid obligations and obtain a judgment against the employer, only to find the company's coffers empty? Or what if the company files for bankruptcy?

Unlike employee contributions, which under U.S. Department of Labor regulations are explicitly deemed to be plan assets, employer contributions are typically found to be contractual obligations that do not become plan assets until such amounts are paid by the employer to the trust fund. Hence, while an employer's failure to remit an employee contribution relegates the employer to the status of an ERISA plan fiduciary because it is has authority and control over plan assets, employer contributions have generally been held not to constitute plan assets. As a result, an employer who fails to make its contributions due under the CBA may have committed a contractual violation but has not breached an ERISA fiduciary duty.

The Potential for Individual Fiduciary Liability

Recently, courts have regularly carved out an exception to the general rule that unpaid contributions are not plan assets by finding that employer contributions are plan assets where the CBA explicitly defines them as such. In such cases, these courts will then proceed to consider the next question of whether the officers, directors or other representatives of such employer exercised a level of control over corporate assets sufficient to make them an ERISA plan fiduciary and thus individually liable for the contributions—effectively stripping them of the protections of the corporate form. Furthermore, if elevated to the status of a fiduciary breach, the debt may not be dischargeable in a bankruptcy proceeding. Thus, the plan could proceed to collect the unpaid contributions against the principals of the debtor personally.

For over a decade, some federal district courts in the Second Circuit have applied a two-part test in delinquent employer contribution cases to find that: (i) such contributions are plan assets when so specified by the CBA; and (ii) the principals of the employer are an ERISA plan fiduciary. More recently, the Second Circuit concluded that delinquent contributions were *not* plan assets where there were no provisions in the relevant plan documents that stated that unpaid contributions are assets of the plan. *See In re Halpin*, 566 F.3d 286 (2d Cir. 2009). The Court expressly stated, however, that "the trustees were free to contractually provide for some other result." It further noted that merely

finding that delinquent contributions constitute plan assets does not end the inquiry. A court must also determine whether an individual defendant has exercised sufficient fiduciary conduct over the unpaid contributions to be found to be a plan fiduciary under ERISA.

While the Court's statements were extraneous to the holding of the case, some district courts within the Second Circuit have seized upon this language and have cited *In re Halpin* for the proposition that employer contributions can be plan assets where the plan documents so provide. *See*, *e.g.*, *Trustees of Sheet Metalworkers Int'l Assoc. v. Hopwood*, 09-cv-5088, 2012 WL 4462048 (S.D.N.Y. Sept. 27, 2012); *Sullivan v. Marble Unique Corp.*, 10-cv-3582, 2011 WL 5401987, at *27 (E.D.N.Y. Aug. 30, 2011).

Similarly, the Eleventh Circuit, in *ITPE Pension Fund v. Hall*, 334 F.3d 1011 (11th Cir. 2003), held that delinquent contributions can constitute plan assets when explicitly provided for in the plan documents and corporate officers are plan fiduciaries with respect to those assets. The Court demanded a high level of clarity in the plan documents, however, regarding the delinquent contribution's status as plan assets. It explained that when a corporation is delinquent in its contributions, the fund "has a sufficient priority on the corporation's available resources that individuals controlling corporate resources are controlling fund assets. This in effect places heavy responsibilities on employers, but only to the extent that . . . an employer freely accepts those responsibilities in collective bargaining."

In addition, district courts in the Third, Fourth, and Ninth Circuits have found that employer contributions constitute plan assets when the plan documents so provide. *See*, *e.g.*, *Trustees of Construction Industry and Laborers Health & Welfare Trust v. Archie*, No. 2:12-cv-00225 (D. Nev. Mar. 3, 2014) (holding that unpaid contributions were plan assets based upon the CBA's language and finding that the company principals' acts and responsibilities demonstrated sufficient control and authority over the company's operations and financials to qualify as ERISA fiduciaries); *Galgay v. Gangloff*, 677 F. Supp. 295, 301 (M.D. Penn. 1987) (refusing to dismiss fiduciary breach claims for alleged failure to pay delinquent contributions based upon the "clear and undisputed language [of the agreement] stating that title to all monies 'due and owing' the plaintiff fund is 'vested' in the fund," rendering "any delinquent employer contributions vested assets of the plaintiff fund."; *Connors v. Paybra Mining Co.*, 807 F. Supp. 1242, 1246 (S.D.W.V. 1992) (finding company officers personally liable for delinquent contributions that were plan assets based upon CBA's language since they breached their fiduciary duty by exercising authority over those assets by favoring other creditors over the fund); *see also Secretary of Labor v. Doyle*, 675 F.3d 187 (3d Cir. 2012) (holding that district court erred in failing to determine whether payments collected from various employers were plan assets subject to ERISA).

District courts in the Sixth Circuit have even signaled support for finding that contributions are plan assets as soon as they become due, "regardless of the language of the benefit plan." *See, e.g., Plumbers Local 98 Defined Benefit Funds v. M&P Master Plumbers of Michigan, Inc.*, 608 F. Supp. 2d 873, 879 (E.D. Mich. 2009) (holding company principal personally liable for delinquent contributions since "the CBA and trust agreements . . . treat these unpaid contributions as inalienable plan assets" and signaling support for

holding delinquent contributions plan assets "regardless of the language of the benefit plan.").

In a related context, a federal bankruptcy court recently refused to discharge a debtor's debt for delinquent contributions based upon the Bankruptcy Code's "defalcation in the performance of fiduciary duty" exception. *See In re Fahey*, 494 B.R. 16 (Bankr. D. Mass. 2013). Although the court initially found that the debtor lacked the necessary discretion for fiduciary status under ERISA because the "option to breach a contract does not constitute discretion in the performance of one's duty," the United States Bankruptcy Appellate Panel for the First Circuit reversed. The Panel ruled that "even if an ERISA fiduciary does not per se satisfy the § 523(a)(4) requirement for 'fiduciary capacity,' an analysis of [the Debtor's] control and authority over the plan in functional terms nonetheless yields the conclusion that he acted as a fiduciary of a technical trust imposed by common law." On remand, the bankruptcy court found that the debtor prioritized payments that were personally beneficial over his obligations to the ERISA funds and, consequently, committed defalcation as contemplated by the Bankruptcy Code.

View from Proskauer

Although the general rule that employer contributions do not constitute plan assets until actually received by the trust fund continues, recent decisions indicate an increased willingness by courts to carve out an exception to this rule. Funds looking to protect their ability to collect contributions should explicitly define in the plan documents and agreements with employers that plan assets also include all unpaid contributions in the hands of the employer. Employers should be fully cognizant of these provisions; otherwise its officers, directors and other representatives who choose to pay other creditors rather than the trust fund might be held personally liable for the unpaid amounts and interest and penalties, and possibly be unable to escape this liability through bankruptcy.

Rulings, Filings, and Settlements of Interest

Supreme Court Finds Severance Payments are Subject to FICA

By Nathan Bentley, Robert Projansky and Elizabeth M. Mills

> On March 25, 2014, in a decision highly anticipated by employers, the U.S. Supreme Court held unanimously that certain severance payments paid to employees who were involuntarily terminated were taxable wages for purposes of the Federal Insurance Contributions Act (FICA). *United States v. Quality Stores, Inc., et al.*, No. 12-1408 (U.S. Mar. 25, 2014). The holding reversed a Sixth Circuit Court of Appeals' decision and was a blow to employers' hopes that the Court would exempt severance payments from FICA and open the floodgates for refund claims, the backlog of which was estimated to be in excess of $1 billion. The decision leaves open whether the Internal Revenue Service (IRS) can and will adhere to its long-held position on supplemental unemployment plans that, unlike the plans at issue in the case, are not paid in a lump sum and are tied to eligibility for state unemployment benefits. The IRS position on these plans has been that payments thereunder are not FICA "wages." The decision specifically did not address such plans.

By way of background, Quality Stores, Inc. (“Quality Stores”) made severance payments to employees who were involuntarily terminated as part of Quality Stores' Chapter 11 bankruptcy. The payments were made pursuant to two different plans that did not tie the payments to the receipt of state unemployment insurance. Quality Stores paid and withheld taxes required under FICA, but later sought a refund on behalf of itself and its employees arguing the payments should not have been taxed as wages under FICA. Quality Stores initiated proceedings after the IRS did not respond to the refund request. The District Court and Sixth Circuit found in favor of Quality Stores, holding the severance payments were not wages under FICA, but the Supreme Court disagreed.

FICA payroll taxes apply generally to wages, which is broadly defined under Internal Revenue Code Section 3121(a) as all remuneration for employment. The Court determined that severance payments, although paid after the employment relationship ended, are made in consideration for employment and, therefore, fall within the definition.

In so holding, the Court rejected Quality Stores' argument that that Section 3402(o) of the Internal Revenue Code (which relates to income tax withholding) is a limitation on the meaning of “wages” for purposes of FICA. Quality Stores had generally argued that since Section 3402(o) states that supplemental unemployment benefits (“SUB payments”) should be treated *as if* they were wages, this must mean that they are not, in fact, wages. The Court, however, disagreed, noting that the language of Section 3402(o) is consistent with the government's position that some SUB payments are wages, whereas others are not. The Court cited the regulatory background against which Section 3402(o) was enacted as evidence of Congress' intention to cover both SUB payments tied to state unemployment benefits (which the IRS continues to believe are not wages subject to FICA) and those that are not (such as the severance payments at issue in the case). The Court refused to address whether the IRS's position that SUB payments tied to state unemployment benefits are exempt from income tax withholding and FICA taxation is consistent with the definition of wages.

As noted above, a number of employers had already filed protective claims for prior tax years so that they might recover FICA taxes if the Supreme Court ruled in favor of Quality Stores. In addition, in anticipation of the pending decision, some employers were gearing up to file their protective claims for the 2010 tax year by April 15 of this year. The Supreme Court's decision now effectively bars those claims for severance payments not linked to state unemployment benefits.

Providing A “Full and Fair Review” Does Not Make An ERISA Plan

By Joseph Clark

> A federal district court in Kansas concluded that attaching a statement of ERISA rights, i.e., a two page document listing and explaining the rights and protections provided by ERISA to plan participants, to a life insurance policy did not convert the policy into an ERISA plan. *Wichita Firemen's Relief Ass'n v. Kansas City Life Ins. Co.*, 2014 WL 588064 (D. Kan. Feb. 14, 2014).

Plaintiff Wichita Firemen's Relief Association, an association with the purpose of receiving and disbursing funds for the benefit of its members, entered into an ERISA-exempt group policy insurance contract with Defendant Kansas City Life Insurance. The decedent was a firefighter who died from a heart attack suffered while fighting a fire. The Association filed a claim on his behalf for accidental death and dismemberment benefits. The insurance company denied the claim on the ground that the decedent's death did not result directly and independently from accidental injury, as his underlying heart condition and circumstances surrounding his heart surgery also contributed to his death.

The Association subsequently filed suit and argued that by attaching a statement of ERISA rights to the policy, the insurance company voluntarily incorporated ERISA's legal procedures and principles into the policy. The court granted summary judgment in favor of the insurer, reasoning that parties "may not opt-in to coverage under ERISA, regardless of [their] intentions" and doubted that the parties even intended the statement, a two page document about which the Association was unaware prior to the litigation, to create additional rights and obligations under the policy. Furthermore, even assuming that the statement created ERISA rights, the court observed that the statement only provided that participants were entitled to a "full and fair review" on appeal and the insurance company conducted such a review.

Fiduciary Breach Claims Barred by ERISA's Six-Year Statute of Limitations

By Joseph Clark

> The Eleventh Circuit recently dismissed a participant's fiduciary breach claims against SunTrust's 401(k) plan fiduciary committee members on the ground that the claims for imprudently selecting certain investment options was time barred by ERISA's six-year statute of limitations. *Fuller v. Suntrust Banks, Inc.*, 2014 WL 718309 (11th Cir. Feb. 26, 2014). Plaintiff Barbara Fuller argued that the addition of proprietary mutual funds was imprudent because the funds performed poorly and their high fees served as revenue to SunTrust subsidiaries. The district court dismissed her claim on the ground that she had "actual knowledge" of Defendants' alleged fiduciary breaches over three years before filing her complaint. The Eleventh Circuit disagreed, observing that Fuller could not be said to have "actual knowledge" of the alleged breaches because Defendants did not show that the plan documents were provided to her or that she obtained knowledge of the facts in the documents from a different source. The Eleventh Circuit held, however, that ERISA's six-year statute of limitations barred Fuller's claims. It reasoned that the committee's selection of the challenged investment funds occurred more than six years before Fuller filed her complaint. Moreover, to the extent that she also claimed that the alleged failure to remove the funds in subsequent years was imprudent, the Court determined that the claim was "in all relevant respects identical to the allegations concerning the selection process."

No New Statute of Limitations Each Time An Alleged Miscalculated Disability Benefit Is Paid

By Anthony Cacace

- The First Circuit recently held, in line with other circuits, that the statute of limitations for a claim of underpayment of long-term disability benefits does not accrue with each monthly benefit payment made, but instead accrues at the time the underpayment is made known to the participant when he receives his first "miscalculated" benefit award. *See Riley v. Metro. Life Ins. Co.*, 2014 WL 814742 (1st Cir. Mar. 4, 2014). In so ruling, the Court rejected Plaintiff Robert Riley's argument that the long-term disability plan should be treated as "an installment contract" allowing for a separate causes of action each time an alleged underpayment was made. The Court reasoned that allowing a beneficiary to challenge alleged underpayments each time a payment was made would not serve ERISA's policy of "predictability," among other reasons, because it would undermine the plan's reliance on actuarially calculated benefit payments, which is essential to the administration of the plan.

More Multiemployer Plan Relief – Final Rule Exempts Self-Insured/Self-Administered Plans from Transitional Reinsurance Fee in 2015 and 2016

By Robert Projansky

- On March 5, 2014, the Department of Health and Human Services released a Final Rule addressing, among other things, transitional reinsurance fees payable in the 2014 through 2016 benefit years.

  By way of background, under the Affordable Care Act ("ACA"), a transitional reinsurance fee applies to most group health plans. The transitional reinsurance fee is a temporary per capita fee charged to health insurance issuers and third party administrators of self-insured plans that is to be used to help stabilize premiums for coverage in the individual market. The fee is $63 and $44 per covered life for 2014 and 2015, respectively. (The fee for 2016 has not yet been announced.)

  Of particular note is that the Final Rule exempted self-insured and self-administered plans from the transitional reinsurance fee for the 2015 and 2016 benefit years. This exemption could apply to any self-insured and self-administered plan, but it is generally perceived that larger multiemployer plans are most likely to satisfy these requirements.

  The Final Rule also helped answer the key question that was left open by the Proposed Rule – When is a plan is considered self-administered? Specifically, the Final Rule provides the following guidance:

  - A self-insured plan is not considered self-administered if it uses a third party administrator in connection with its core functions, which are defined to include claims processing or adjudication (including the management of internal appeals) and plan enrollment.

- However, a self-insured plan can still be considered self-administered if it only uses the third party administrator with respect to pharmacy benefits or ACA-excepted benefits.
- A plan is not considered to be using a third party administrator if it outsources a de miminis amount of its non-pharmacy, non-ACA-excepted benefits. Thus, even for its core functions, a plan can maintain its exemption where it uses an unrelated third party for up to 5% of claims processing, claims adjudication, or plan enrollment. The 5% test is measured based on either the number of transactions processed by the third party for non-pharmacy and non-ACA-excepted benefits or the volume of the claims processing and adjudication and plan enrollment services provided by the third party. Based on the preamble to the Final Rule, it appears that the latter test focuses on the cost of the outsourcing compared to the cost of outsourcing plus the fully loaded (including allocated overhead and fixed costs) cost borne by the self-insured plan.

- A plan is also not considered to be using a third party administrator merely because it leases its network and has the network provider reprice its claims.

We expect that the benefits community will likely view the Final Rule as a bit of a mixed blessing.

From the multiemployer plan perspective, self-insured and self-administered plans are no doubt pleased to have relief in 2015 and 2016 and to learn that the use of a pharmacy benefit manager will not impact that relief. However, many of them have questioned HHS's authority to continue to apply the transitional reinsurance fee to self-insured, self-administered plans in 2014 where it appears to have acknowledged that the better reading of the statute is that the fee does not apply. In addition, plans that are otherwise self-administered but outsource their mental health and chemical dependency benefits may be disappointed to learn that they will not be able to take advantage of the exemption if those claims represent more than 5% of the total.

On the other side of the ledger, sponsors of plans that cannot take advantage of the exemption (which is the overwhelming majority of single employer plans as well as self-insured multiemployer plans that are not self-administered) have been critical of any exemption at all, fearing that the costs of transitional reinsurance will be higher for them as a result of this exemption. In response, HHS stated that it anticipates that the exemption will have a small effect in 2015 because few entities will qualify for the exemption. However, it also acknowledged that it did not receive the quantitative information necessary to refine its estimate of the number of plans impacted.

Tax Reform Proposal Takes Aim at Executive Compensation

By Justin Alex and Joshua Miller

- On February 26, 2014, U.S. Congressman Dave Camp released a comprehensive tax reform proposal that includes several provisions intended to limit or restrict executive compensation. Congressman Camp's proposal includes the elimination of tax deductions for commission payments and qualified performance-based compensation under Section 162(m) of the Internal Revenue Code of 1986, as amended (the "Code"); the narrowing of the "substantial risk of forfeiture" concept as

applied to nonqualified deferred compensation under Code Section 409A; the imposition of a penalty excise tax on the payment of "excess" compensation and certain golden parachute payments to service providers of tax-exempt organizations; and the denial of corporate tax deductions for stock transferred pursuant to incentive stock option plans.

New Regulations Regarding Nonqualified Deferred Compensation; Repeal of Code Sections 409A and 457A; Replacement of Code Section 457(b) Rules for Tax-Exempt Organizations

The proposal would repeal Sections 409A and 457A of the Code regarding non-qualified deferred compensation of taxable entities and "nonqualified entities" (e.g., certain foreign corporations and partnerships not subject to comprehensive foreign income tax), respectively, and eliminate the special deferred compensation rules for Code Section 457(b) plans for tax-exempt organizations. In place of these existing deferred compensation rules, Congressman Camp proposes to create a new Code Section 409B to regulate deferred compensation arrangements for all entities, whether taxable, nonqualified or tax-exempt.

Section 409B would require that any compensation deferred under a nonqualified deferred compensation plan be included in gross income when there is no "substantial risk of forfeiture" on that compensation; however, amounts paid within six months of the end of the tax year of the service recipient during which the payment was no longer subject to the substantial risk of forfeiture would not be considered "deferred" under Congressman Camp's proposal.

Under the proposed Code Section 409B, a "substantial risk of forfeiture" would only exist if a person's rights to the compensation are conditioned upon the future performance of substantial services by the individual. As a result, Code Section 409B would essentially limit the ability to defer any compensation not tied to future services, for example, compensation tied to the achievement of future performance and/or satisfaction of a restrictive covenant. By contrast, Code Section 409A provides that compensation may be subject to a "substantial risk of forfeiture" if payment is conditioned upon either performing future services or a condition related to the purpose of the compensation (i.e., a performance-based condition), while Code Section 83 governing transfers of property provides a broader concept of "substantial risk of forfeiture" that could, depending on the facts and circumstances, cover a forfeiture restriction tied to not only performance-based conditions, but also from refraining from future services (e.g., a non-competition clause).

Expansion of Limitation on Deductibility of Executive Compensation

The proposal would significantly expand the scope of Code Section 162(m). In general, Code Section 162(m) limits the deductibility of compensation paid in excess of $1 million to a publicly traded company's chief executive officer and its three other highest compensated officers (other than its chief financial officer) serving as of the end of the prior fiscal year. Under Code Section 162(m), however, commission payments and amounts that meet the requirements for "qualified performance-based compensation" are not subject to these limitations and may be deductible by the paying corporation.

Congressman Camp proposes to:

1. Eliminate the existing Code Section 162(m) exceptions for commission payments and qualified performance-based compensation;
2. Expand the scope of covered employees under Code Section 162(m) to include any employee of the company that was its chief executive officer or chief financial officer at any time during the taxable year, regardless of whether he or she is employed at the end of the prior fiscal year and regardless of his or her compensation levels, and to require that once an employee is a Code Section 162(m) "covered employee" for a tax year beginning after 2013, the individual will always be a Code Section 162(m) "covered employee"; and
3. To clarify that amounts paid to a covered employee's beneficiary fall within the scope of Section 162(m), even after the death of the covered employee.

"Excess" Tax-Exempt Organization Executive Compensation

Congressman Camp's proposal would impose a 25% excise tax on compensation paid by tax-exempt organizations to covered employees (other than excess parachute payments) in excess of $1 million and on any "excess parachute payments" (regardless of the amount) paid by tax-exempt organizations to covered employees.

For these purposes, a tax-exempt corporation's "covered employees" would include its five most-highly compensated employees in any given taxable year, as well as any current or former employee who was a "covered employee" for any tax year beginning after 2013. In addition, "excess parachute payments" for these purposes would generally include payments contingent on an employee's termination that equal or exceed three times the employee's "base amount," as determined in a manner similar to the rules under Code Section 280G(b)(3) relating to "excess golden parachute payments."

This 25% excise tax is higher than the 20% excise tax that applies to "excess parachute payments" under Code Section 280G. In addition, the excise tax on "excess" compensation is much more punitive than the denial of a tax deduction on "excess" compensation paid to covered employees under Code Section 162(m).

Tax Deductions for Stock Transferred Pursuant to Incentive Stock Options

Finally, the proposal would codify the IRS position that employers cannot deduct stock transferred pursuant to incentive stock option plans or employee stock purchase plans as ordinary and necessary business expenses under Code Section 162(m) or otherwise.

* * *

Although it is unlikely that Congressman Camp's proposal will become law, it highlights the increasing scrutiny placed on executive compensation in recent years. Indeed, the portion of the proposal regarding Code Section 162(m) closely mirrors a recent bill introduced in the U.S. Senate last August, as discussed in an earlier blog post available here.

* * *

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Defendants See Success With Limitations Defenses Post Heimeshoff

By Todd Mobley

> Defendants have recently received three favorable decisions involving contractual and statutory limitations defenses. In each case, a federal court held that claims for benefits under ERISA plans were time-barred. *Costa v. Astoria Fed. Sav. and Loan Ass'n*, 2014 U.S. Dist. LEXIS 14292 (E.D.N.Y. Feb. 4, 2014); *Paulus v. Isola USA Corp. Ret. Plan*, 2014 U.S. Dist. LEXIS 14474 (W.D. Wis. Feb. 5, 2014); and *Munro-Kienstra v. Carpenters' Health & Welfare Trust Fund*, 2014 U.S. Dist. LEXIS 18156 (E.D. Mo. Feb. 13, 2014).

In *Costa*, plaintiff claimed that in 2005 defendants refused to provide her with the necessary pension-benefit application forms upon her request and informed her that she was not eligible for pension benefits at that time. In 2012, plaintiff wrote to defendants requesting review of her eligibility for pension benefits. Defendants did not respond to that letter. Plaintiff filed suit later that year, and argued that the limitations period began to run when defendants failed to respond to the 2012 request letter. The court disagreed, explaining that "ERISA claims begin to accrue upon a clear repudiation . . . regardless of whether the plaintiff has filed a formal application for benefits." The court found that defendants' alleged refusal to provide plaintiff with the application forms in 2005 (seven years before the case was commenced) constituted a "clear repudiation," unequivocally notifying plaintiff that any claim for pension benefits would be denied. Thus, plaintiff's claim for pension benefits were time barred, despite the fact that she had not exhausted the claims review procedures.

In *Paulus*, the court found that plaintiff's ERISA claims were time-barred because they were brought more than ten years after plaintiff had received a copy of the worksheet used by defendant to calculate the amount of the pension benefits to which he was entitled. The worksheet was provided to plaintiff in 2001 when his employment with defendant was terminated. Plaintiff, however, did not contest the pension calculation until he began receiving benefits in 2011. The court held that the worksheet constituted a "clear repudiation" of plaintiff's rights because it demonstrated that "defendant had not included what [plaintiff] believed to be compensable pay and credited service" in the benefit calculation.

In *Munro-Kienstra*, the court, relying on the Supreme Court's decision in *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604 (2013), found that a claim for welfare benefits was barred by virtue of a plan provision setting a two-year limit on the filing of lawsuits for benefits thereunder. Plaintiff's claims were initially denied in December 2008 and January 2009. After appealing the denials, plaintiff was informed in July 2009 that the appeals were also denied. Plaintiff commenced the case in January

2012, two and one half years after the final denial. Because plaintiff was informed of the limitation period at the time of the initial denial, the court found that it could not ignore the plan's "clear mandate" that suits be filed within two years of the denial of the appeal.

In combination, the three cases, together with the authorities on which they rely, provide some increased hope to plan administrators and sponsors that, with proper administration, they can limit the risks of defending claims based on dated events.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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