NEW DEVELOPMENTS REGARDING SETTLOR/FIDUCIARY DISTINCTIONS IN MULTIEMPLOYER PLANS

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Background

Under ERISA, the plan sponsor is the person who establishes or maintains the plan. In a single-employer plan, the plan sponsor will be the employer; however, in the case of a multiemployer plan, the plan sponsor is generally the Board of Trustees.

Typically, the plan sponsor serves in more than one capacity with respect to the plan: it is the entity that decides to adopt a plan in the first place and determines what benefits will be provided (the “settlor”) and, once the plan is established, it will direct the plan activities as the named fiduciary and/or serve as the plan administrator. However, when the plan sponsor wears multiple hats, it may be difficult to determine the capacity in which it is functioning when it performs certain activities (i.e., whether it is acting as the plan sponsor or a fiduciary at the time).

This is particularly true since not all decisions that affect a plan are fiduciary actions. Some courts have described some of them as “settlor” or “plan sponsor” functions and have refused to hold the plan sponsor responsible as a fiduciary for those actions and their consequences. A number of cases involving single-employer plans under ERISA have focused on where one draws the line between settlor and fiduciary functions. For instance, the courts have concluded that the acts of establishing or amending an employee benefit plan or deciding to modify or terminate a plan are considered to be settlor functions. However, the implementation of a settlor decision may involve fiduciary functions.

Although this is clearly the rule for single-employer plans covered by ERISA, the courts are divided as to whether actions taken by a joint Board of Trustees of a multiemployer plan fall neatly into the same settlor/fiduciary categories. A fuller discussion of these cases appears later in the paper.

On November 4, 2002, however, the U.S. Department of Labor released a Field Assistance Bulletin (FAB 2002-2) that discusses the extent to which multiemployer plan trustees may use plan assets to pay expenses relating to various decisions regarding the operation and management of ERISA plans. Representatives of the Department have stated that given the conflicting case law, they
consider this FAB to be important guidance for multiemployer plans regarding the steps that can be taken to clarify the status of trustee activity, at least for purposes of the Department’s enforcement actions.

**Field Assistance Bulletin 2002-2 (FAB 2002-2)**

The issue presented in this Bulletin was whether trustees of two related multiemployer plans were subject to ERISA’s fiduciary requirements when they amended the plans’ trust agreement to reallocate contributions from the defined contribution (DC) plan to the defined benefit (DB) plan. Although some of the DC plan participants also participate in the DB plan, most do not. Contributions to both plans are made through a single Fund. The DB plan was established in 1955 and frozen in 1989. The DC plan was established in 1987. When the DB plan was frozen, all future contributions were allocated to the DC plan because, at the time the DB plan was adequately funded.

The collective bargaining agreement, as is typically the case, only specifies the formula for employer contributions to the plans. However, the allocation of those contributions between plans is specified in the trust agreement. Under the trust agreement, the power to amend the trust agreement may be exercised either by (1) the employer association and the labor union acting collectively, or (2) the Fund’s Board of Trustees.

Because the funding status of the DB plan had apparently deteriorated, in 1999, the employer association and the labor organization amended the trust agreement to allocate employer contributions to the DB plan in an amount equal to the forfeitures in the DC plan. In 2002, the trustees amended the trust agreement to divert an additional 20% of the new employer contributions to the DB plan. At the time, the amendment resolution indicated that the trustees were acting in their “settlor” capacity in amending the plan.

When the Department’s field staff audited the Fund, they examined these transactions and sought guidance from the National Office regarding the nature of the trustees’ activities, whether plan assets should have been used to support these activities and whether, in amending the trust agreement, the trustees had violated ERISA §406(b)(2).

In analyzing the facts presented, the Department first reviewed its prior approaches to distinguishing settlor from fiduciary functions and noted that to the extent that fiduciary actions were involved, expenses in connection with these actions may be paid using plan assets. In contrast, plan assets may not be used to pay for settlor activities.

The Department acknowledged that it had generally recognized that certain activities that would be settlor activities for single-employer plans might be fiduciary activities for multiemployer plans. For instance, in Advisory Opinion 80-8A, the issue was whether trustees of multiemployer plans engage in fiduciary conduct when they allocate employer contributions to related multiemployer plans as provided under collective bargaining agreements. The Department concluded that if the bargaining agreement contained a binding fixed formula for allocation, the trustees were not engaged in a prohibited transaction when they followed those allocation directions. However, the opinion noted that to the extent the trustees exercise discretion in allocating the contributions among related
plans, these transactions could violate ERISA §406(b)(2). However, the Department specifically reserved the question of whether, if the bargaining agreement gave trustees discretion to amend the allocation formula among related plans prospectively, the exercise of that discretion was a fiduciary act.

The Department also discussed in some detail a few recent cases in which the circuit courts have concluded that that boards of trustees of multiemployer plans act as settlers when they amend plans.

Ultimately the Department concluded that if the relevant documents, including the collective bargaining agreement, the trust agreement and the plan document, indicate that the board of trustees of a multiemployer is acting in a fiduciary capacity when it undertakes activities that might otherwise be settlor in nature, the board will be treated as a fiduciary. If however, the relevant documents are silent (as was the case in the situation posed in the FAB), activities of the board that are settlor in nature will be treated as settlor activities and may not be paid for from plan assets.

**Practice Pointers**

Many boards of trustees of multiemployer plans currently assume that all of the activities they undertake on behalf of the plan are fiduciary activities and that they will be held to a fiduciary standard of care when they carry out these activities. On the other hand, some multiemployer plans have relied on the settlor/fiduciary distinction to defend certain plan design activities.

The lesson of FAB 2002-2, however, is that if multiemployer plan trustees want their actions to be treated as fiduciary in nature, even when they are engaged in what might otherwise be viewed as settlor acts, the plan documents must explicitly describe those activities (either as a whole or on a function-by-function basis) as fiduciary acts. If the plan is silent and the activities undertaken by the trustees are settlor acts, they will be so characterized (at least by the Department for purposes of ERISA enforcement). Most importantly, expenses in connection with those settlor activities may not be paid from plan assets. As a practical matter, in most cases neither the employer association nor the labor union (which have collectively been viewed as the settlors with respect to multiemployer plans) will be in a position to assume responsibility for the professional and administrative expenses necessary to support a settlor decision.

In light of the Department’s position as expressed in FAB 2002-2, multiemployer boards of trustees may want to adopt plan amendments expressly listing the specific functions that will be considered fiduciary in nature. One possible approach is to adopt a straightforward statement that unless otherwise indicated, all actions taken by the board of trustees will be considered fiduciary actions. A word of caution, however, is in order. Although this approach of stating in the plan document that certain trustee acts in connection with a multiemployer plan (even those that might under the case law be characterized as settlor activity) are fiduciary acts comports with the Department of Labor’s view of the matter for enforcement purposes, it may not deter a plaintiff or the plan’s auditor from reaching a different conclusion.

Other multiemployer plans may conclude that they will continue to rely on a case-by-case
basis on the judicially-developed distinction between settlor and fiduciary activities if their actions are challenged. These plans must recognize, however, that the Department’s long-standing position is that settlor activities may not be funded using plan assets, so they may not be able to continue to assert settlor status to insulate their decisions while simultaneously using plan assets to provide administrative support for that decision-making activity. Although it is possible that the bargaining parties may be able to negotiate a separate funding stream to support settlor activities, it is unclear whether this would be legally permissible under the Internal Revenue Code, ERISA and the Taft-Hartley Act.

Still other plans may decide to ignore the Department’s FAB for now, relying on applicable case law in their circuit if more favorable.

Summary of Applicable Case Law

As previously noted, the case law is conflicting regarding whether the settlor/fiduciary distinction developed in connection with single-employer plans is equally applicable to multiemployer plans. The following is a summary of key cases involving settlor versus fiduciary conduct.

1. Supreme Court Cases Involving the Question of Settlor v. Fiduciary Conduct


The Supreme Court addressed a case involving a single-employer pension plan. The employer adopted two amendments to the plan: (1) an early retirement program that provided additional retirement benefits to certain active employees and (2) a provision that stated new participants could not contribute to the plan and would receive fewer benefits while existing members could continue to contribute or opt to be treated as new members. Participants filed a class action claiming that the amendments violated ERISA’s fiduciary obligations. The Court held that the participants’ fiduciary duty claims fail because the acts of amending the plan were not subject to the fiduciary duty provisions of ERISA based upon *Lockheed* (discussed below). The Court reiterated its conclusion that this principle applies to both pension benefit and welfare benefit plans because the definition of fiduciary does not make any distinction between the plans. The conclusion also applies with equal force to contributory and non-contributory plans or any other type of plan. The Court further elaborated that “an employer’s decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer’s fiduciary duties which consist of such actions as the administration of the plan’s assets.” In addition, “[a] settlor’s powers include the ability to add a new benefit structure to an existing plan.” The exercise of those powers does not implicate ERISA’s fiduciary duty provisions.


In the non-multiemployer plan case on the issue of fiduciary v. settlor function, the Supreme Court stated that an employer or plan sponsor does not act as a fiduciary when amending a plan, since plan adoption, termination and amendment are trust settlor functions. The Court reasoned that fiduciary functions, under ERISA, are only those involving the exercise of discretionary authority or