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A Troubling Expansion of Successor Liability

By Robert R. Perry (PerryR@jacksonlewis.com)

Under the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), an employer that has assumed an obligation to contribute to and subsequently withdraws from a collectively-bargained and jointly-administered defined benefit pension plan (a "multiemployer plan") is liable for its allocable share of any underfunding. This "withdrawal liability" has become a significant issue since 2008, due to the economic and investment impact of the recession, historically low interest rates, declining plan participation, and an increase in the number of retirees, among other things.

Two recent opinions from the U.S. Courts of Appeals forecast a troubling expansion of the imposition of withdrawal liability of non-signatory entities under the successor liability doctrine. While the imposition of such liability is not new, recent case law extends the doctrine beyond the reach of the Seventh Circuit federal appeals court (located in Chicago and covering Illinois, Indiana and Wisconsin) to which it had previously been confined, and appears to ease the requirements for a claim against a putative successor. These cases also illustrate the effect of successor liability on the "building and construction industry exception" to withdrawal liability. The exception is a set of special rules that apply to certain multiemployer plans and employers in the building and construction industry.

Withdrawal Liability Generally

Withdrawal liability is triggered when a contributing employer withdraws from a multiemployer plan. This generally occurs when: (i) the employer permanently ceases to have an obligation to contribute to the multiemployer plan; or (ii) the employer permanently ceases all covered operations under the plan.[1] As discussed below, this rule is modified for certain multiemployer plans and employers in the building and construction industry.

Under a "sale of assets" exception, a withdrawal does not occur solely as a result of a sale of assets, provided that certain requirements are met at the time of the transaction. One of these requirements is that the buyer assumes an obligation to contribute to the multiemployer plan.[2]

An employer incurring a complete withdrawal from a multiemployer pension plan is liable for its allocable share of the plan's unfunded vested benefits, determined using one of several statutory formulas. The gross amount so allocated is then payable by the employer in annual or more frequent payments; absent a default, a plan cannot require payment in a lump sum or other accelerated basis. Each annual payment is determined with reference to the employer's contributions in the 10 years preceding the withdrawal.[3] An employer's withdrawal liability is payable for a maximum of 20 years.[4] This "20-year cap" does not apply in the event of a "mass withdrawal."[5]

Disputes over an employer's withdrawal liability are subject to mandatory arbitration.[6] Failure to timely initiate arbitration results in the amount of withdrawal liability demanded becoming due, payable, and thereafter not subject to challenge.[7]

Building and Construction Industry Exception

Special rules apply when both of the following conditions are met:

- The plan primarily covers employees in the building and construction industry; and
- Substantially all of the employees for whom the employer is obligated to contribute to the plan perform work in the building and construction industry.[8]

Under the "Building and Construction Industry Exception," a Building and Construction Industry Employer that ceases to have an obligation to contribute to a Building and Construction Industry Plan will not incur a complete withdrawal from such plan unless the employer:

- Continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required; or
- Resumes such work within five years of the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.[9]

Contrary to the general rule (*i.e.*, the cessation of the contribution obligation alone triggers a withdrawal), withdrawal liability is imposed on an employer under the Building and Construction Industry Exception only when the employer's "obligation to the fund ceased," but the employer "continued doing covered work."[10]

Successor Liability for ERISA Obligations

The common law rule is that an asset purchaser does not assume an asset seller's liabilities, including ERISA obligations.[11] Beginning with the U.S. Supreme Court's *Golden State Bottling Co. v. NLRB*,[12] however, federal courts have formulated a successor liability exception for certain labor- and employment-related liabilities, founded on a judicial determination that certain policies based on federal labor relations law prevail over the competing interest of fluidity of corporate assets reflected in the common law rule.[13]

Federal district courts first applied the successor liability doctrine to impose liability for delinquent fund contributions upon a successor[14] and subsequently extended the doctrine to withdrawal liability.[15] Until recently, the Seventh Circuit was the only federal circuit to impose withdrawal liability on a successor.[16]

Test for Successorship

Courts recognizing the successor liability doctrine have almost universally adopted a two-pronged test. To hold a successor liable, a court must find both: (1) "sufficient indicia of continuity between the two companies" (generally called *substantial continuity*); and (2) "the successor had *notice* of its predecessor's liability."[17]

- *Substantial Continuity*: Courts have looked to a variety of factors, including, among others, the continuity of the workforce, management, equipment, and location; completion of work orders begun by the predecessor; and constancy of customers.[18]
- *Notice:* Courts have held that notice can be proven not only by actual knowledge, but also by evidence that allows the factfinder to infer constructive knowledge from the circumstances.[19] In the withdrawal liability context, courts have expressly rejected the argument that notice cannot exist because the obligation for withdrawal liability does not arise until assessed by the fund, which assessment cannot by definition occur until after the event causing the withdrawal, *i.e.*, the sale of assets.[20]

Tsareff v. ManWeb

In *Tsareff v. ManWeb Services, Inc.*,[21] the Seventh Circuit expanded upon its prior application of the successor liability doctrine in the withdrawal liability context[22] by holding that a buyer's notice of a seller's contingent withdrawal liability satisfied the notice requirement.

Tsareff involved the sale of assets by a unionized electrical contractor (Tiernan & Hoover) to a non-union engineering company (ManWeb). As a result of the transaction, Tiernan & Hoover (the asset seller) no longer had any unionized employees; the pension fund asserted that this resulted in a complete withdrawal and assessed withdrawal liability. Tiernan & Hoover failed to contest the fund's assessment by initiating arbitration; thereafter, the fund filed suit against both Tiernan & Hoover (as a withdrawing employer) and ManWeb (as a successor).

The District Court granted ManWeb's motion for summary judgment and dismissed all claims against them.[23] First, the court found the requisite notice was lacking because "Tiernan & Hoover did not withdraw or incur withdrawal liability until after the asset purchase," making it impossible for ManWeb "to have had notice of an existing liability in advance of the closing on the asset purchase."[24]

Then, considering the Building and Construction Industry Exception, the District Court said:

> All of the parties agree that Tiernan & Hoover is an employer in the construction industry, [] and thus subject to [§ 4203(b)]. Further, all agree that Tiernan & Hoover ceased to have an obligation to contribute to the Plan when the asset sale occurred and once it ceased operations. However, the parties do not agree on the issue of whether a complete withdrawal occurred pursuant to [§ 4203(b)(2)(B)]. The Plan argues that ManWeb's continued performance of work of the type for which contributions were previously required of Tiernan & Hoover serves to impose withdrawal liability on Tiernan & Hoover. We disagree.[25]

Finding that the "plain language of the statute does not support the Plan's argument that ManWeb's continuation of certain work must or should be imputed to Tiernan & Hoover in determining whether Tiernan & Hoover effectuated a complete withdrawal,"[26] the court concluded "that Tiernan & Hoover did not effectuate a complete withdrawal pursuant to [§4203(b)] and thus, apart from its waiver of the defenses available to it, it would not be subject to withdrawal liability. Accordingly, prior to the transaction, ManWeb had no notice of Tiernan & Hoover's eventual failure to challenge the assessment or the resulting liability. There being no genuine issue of material fact that ManWeb lacked notice of Tiernan & Hoover's withdrawal liability, it is not liable under the doctrine of successor liability."[27]

The Seventh Circuit reversed the lower court decision,[28] finding that notice of *contingent* withdrawal liability is sufficient for purposes of the successor liability doctrine. To find otherwise, the Seventh Circuit stated, would create a "liability loophole" whereby multiemployer plans "would be foreclosed in some situations (but not others) from seeking withdrawal liability from asset purchasers who would otherwise qualify as successors, and the plans would be left 'holding the bag.'"[29] The Court then held that "ManWeb's notice of Tiernan & Hoover's contingent withdrawal liability can be both reasonably inferred and directly proven by evidence in the record," based on both testimony evidencing a general knowledge of the seller's withdrawal liability and provisions in the asset purchase agreement providing that ManWeb was not obligated to assume and did not agree to assume any liability or obligation "arising out of or related to union related activities, including without limitation pension obligations."[30]

The Seventh Circuit did not address the District Court's holding that ManWeb's continuation of certain work should not be imputed to Tiernan & Hoover in determining whether Tiernan & Hoover effectuated a complete withdrawal under the Building and Construction Industry Exception, concluding that "[a]rbitration reigns supreme under the MPPAA" and that Tiernan & Hoover's failure to arbitrate "should have ended the inquiry."[31]

Lastly, with respect to the District Court's finding that the imposition of successor liability on ManWeb would be inequitable, the Seventh Circuit found the District Court committed reversible error "by ignoring the fact that ManWeb could and did protect itself against liability" and, further, "could have required Tiernan & Hoover to obtain an estimate of their withdrawal liability...in order to negotiate a lower purchase price."[32]

Resilient v. Michael's Floor Covering

Shortly after the Seventh Circuit's ruling in *Tsareff*, the Ninth Circuit reached a similar result. In *Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering, Inc.*,[33] the Ninth Circuit imposed liability on an alleged successor to a Building and Construction Industry Employer. The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

In *Resilient*, the owner (Michael) of the alleged successor (Michael's Floor Covering) was a former salesman of the predecessor (Studer's Floor Covering). Michael ultimately started his own floor covering business. There were several similarities between Michael's and Studer's: Michael's leased the same premises, obtained the same phone numbers, used similar signage, bought 30 percent of Studer's tools, equipment, and inventory at a public auction, and hired several of Studer's employees. Studer's did not sell, give, or otherwise assign its customer lists or any portion of its customer information to Michael's; indeed, the parties appeared to have no contractual relationship. Michael's, however, ended up retaining many of Studer's customers, in large part through the prior personal and business relationships developed by Michael while employed by Studer as a salesman.

The Ninth Circuit first stated that there were two discrete questions:

- Whether a successor employer, both generally and within the construction industry, can be subject to withdrawal liability?
- If so, what factors are most relevant to determining whether a construction industry employer is a successor for purposes of imposing withdrawal liability?[34]

With respect to the first question, the Ninth Circuit found "no reason why the successorship doctrine should not apply to MPPAA withdrawal liability" generally.[35] With respect to construction industry employers, the Court found that "the narrow construction industry exception to MPPAA withdrawal liability is fully consistent with the generally applicable successorship doctrine."[36] Accordingly, the Court concluded that "a bona fide successor can be liable for its predecessor's MPPAA withdrawal liability, both in general and with regard to the special building and construction trade provisions in particular, so long as the successor had notice of the liability."[37]

Much of *Resilient* is devoted to discussing the proper test for successorship in the MPPAA withdrawal liability context. The Ninth Circuit concluded that the district court had erred in this regard by failing "to weigh market share capture as a prime consideration, and therefore did not make any finding as to whether Michael's had retained a significant portion of Studer's business or body of customers."[38] The Court remanded the case to the district court for the proper consideration of these factors.

Implications

Read together, *Tsareff* and *Resilient* present a troubling expansion of the successor liability doctrine in the withdrawal liability context. Several aspects merit mention:

- *Tsareff* establishes that a buyer's mere "general awareness" that a seller contributes to a multiemployer plan, coupled with other facts indicative of such awareness (such as standard exculpatory or indemnification provisions in an asset purchase agreement) can be sufficient notice.
- *Resilient* represents a significant expansion of the application of successorship law to withdrawal liability beyond the Seventh Circuit.
- The Ninth Circuit in *Resilient* seemingly gave no consideration to the lack of a contract between the parties or the fact that the customer list or other customer information was not sold or otherwise transferred (especially troubling given the significance the Court ascribed to Michael's retention of Studer's customers). This represents a significant expansion of the context in which the successor doctrine had previously been applied.
- Both decisions resulted in liability imposed on a successor where none arguably would have been imposed on the predecessor under the Building and Construction Industry Exception. This seems particularly harsh (and troubling) where ERISA's mandatory arbitration regime could result (as it did in these cases) in the successor being foreclosed from contesting the existence of the liability based upon the predecessor's failure to do so.

The expansion of the successor liability doctrine in *Tsareff* and *Resilient* should concern employers who have purchased or are contemplating purchasing the assets of a unionized business. Given the potential exposure, those contemplating purchasing the assets or otherwise continuing the operations of a business that historically has contributed to a multiemployer plan should engage counsel experienced in withdrawal liability to review potential exposure and consider measures to protect against withdrawal liability successor claims. Such measures could include securitization of potential exposure as a successor by the use of indemnification or escrow. The parties also may consider structuring a transaction to comply with the "sale of assets exception" in ERISA Section 4204, thus avoiding a withdrawal by the seller as a result of the asset sale. Finally, a buyer may insert a provision in the contract requiring the seller to take all actions needed to preserve their right to contest the existence of withdrawal liability. Each situation, however, is distinct, further highlighting the need for knowledgeable counsel in this regard.

As evidenced by *Tsareff* and *Resilient*, the law is evolving. Future cases may offer additional guidance on several open and unresolved issues, including the application of the Building and Construction Industry Exception to the imposition of withdrawal liability on alleged successors.

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ENDNOTES:

1. ERISA § 4203. The statute also has a concept of "partial withdrawal" (ERISA § 4205), a discussion of which is beyond the scope of this article.
2. ERISA § 4204(a)(1).
3. ERISA § 4219(c)(1)(C)(i).
4. ERISA § 4219(c)(1)(B).
5. ERISA § 4219(c)(1)(D). A mass withdrawal may occur when substantially all employers withdraw by arrangement or agreement or when the plan is terminated due to the withdrawal of all employers.
6. ERISA § 4221(a)(1).
7. *See, e.g., Nat'l Fund Pension Plan of the UNITE HERE Workers Pension Fund v. Westchester Lace & Textiles, Inc.*, 2006 U.S. Dist. LEXIS 49845 at*14 (S.D.N.Y. 2006).
8. ERISA § 4203(b)(1). A covered plan is generally referred to as a "Building and Construction Industry Plan," while a covered employer is generally referred to as a "Building and Construction Industry Employer".
9. ERISA § 4203(b)(2)(B).
10. *Elliott v. Carpenters Pension Trust Fund for N. Cal.*, 859 F.2d 808, 811 (9th Cir. 1988).
11. *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977).
12. 414 U.S. 168 (1973).
13. In *Upholsterers Int'l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1329 (7th Cir. 1990), the Seventh Circuit noted that successor liability is appropriate "in those cases where the vindication of an important federal statutory policy has necessitated the creation of an exception to the common law rule, where the successor has had prior notice of the liability in question, and where there has existed sufficient evidence of continuity of operations between the predecessor and successor."
14. See *Artistic Furniture, supra; Einhorn v. M.L. Ruberton Construction*, 632 F.3d 89 (3d Cir. 2011); *Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998); *Stotter Div. of Graduate Plastics Co., Inc. v. Dist. 65, United Auto Workers*, 991 F.2d 997, 1002 (2d Cir. 1993); *Haw. Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987).
15. *See, e.g., Automotive Industries Pension Trust Fund v. South City Ford*, 2012 WL 1232109 (N.D. Cal. 2012); *RP Baking LLC v. Bakery Drivers and Salesmen Local 194 Industry Pension Fund*, 52 EBC 1628 (D. N.J. 2011); *Trustees of the Utah Carpenters & Cement Masons Pension Trust v. Daw, Inc.*, 2009 WL 77856, at *3 (D. Utah 2009); *Central Pennsylvania Teamsters Pension Fund v. Bear Distrib. Co.*, 2009 U.S. Dist. LEXIS 26481 (E.D. Pa. 2009); *Central States Pension Fund v. Hayes*, 789 F. Supp. 1430 (N.D. Ill. 1992).
16. *Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995).
17. *Artistic Furniture, supra*, 920 F.3d at 1329.
18. *See Einhorn, supra*, 632 F.3d at 99; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); *Artistic Furniture, supra*, 920 F.2d at 1329; *3750 Orange Place Ltd. P'ship v. Nat'l Labor Relations Bd.*, 333 F.3d 646, 655 (6th Cir. 2003) (to determine whether there is a continuity of business identity, the Court must find the following: (1) whether there has been a substantial continuity of the same business operation; (2) the new employer uses the same plant; (3) a majority of the new workforce is made up of the predecessor's employees; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment and methods of production are used; and (7) the same products are manufactured or the same services are offered); *Bd. of Trustees of Unite Here Local 25 v. MR Watergate LLC*, 677 F. Supp.2d 229, 231 (D.D.C. 2010) (applying nine-part test to determine whether purchaser of assets is a successor, subject to successor liability analysis to determine withdrawal liability).
19. *Artistic Furniture, supra*, 920 F.2d at 1329.
20. *See Tsareff, infra; see also Automotive Industries Pension Fund, supra*, 2012 WL 1232109 at p.3 (denying motion to dismiss where fund's assessment for withdrawal liability occurred five years after sale and plaintiffs alleged actual and constructive knowledge of seller's unfunded pension liabilities).
21. 794 F.3d 841 (7th Cir. July 27, 2015).
22. *See Tasemkin, supra*.
23. *Haltom v. Tiernan & Hoover, et al.*, 976 F. Supp. 2d 1007 (S.D. Ind. 2013).
24. 976 F. Supp. 2d at 1017.
25. 976 F. Supp. 2d at 1018. As noted above, a finding of substantial continuity requires that a Building and Construction Industry Employer continue (or resume within five years) work that is within the scope of the collective bargaining agreement on a non-contributory basis in order to incur a complete withdrawal.
26. *Id.*
27. *Id.* at 1019.
28. 794 F.3d 841 (7th Cir. July 27, 2015).
29. *Id.* at 846.
30. *Id.* at 848.
31. *Id.* at 850.
32. *Id.* at 849.
33. 801 F.3d 1079, 2015 U.S. App. LEXIS 16160 (9th Cir. Sept. 11, 2015).
34. 2015 U.S. App. LEXIS 16160 at *2-3.
35. *Id.* at *27.
36. *Id.* at *30.
37. *Id.* at *32.
38. *Id.* at *37.

Insight...

More on Health Care Reform in U.S. Supreme Court Expected: Just How Far Does ERISA's Preemption Reach?

By Jewell Lim Esposito (Jewell.Esposito@jacksonlewis.com)

Some states are mandating that public and private health care providers, insurers, plans and third party administrators (TPAs) submit claims data and related information to their health care database, purportedly to help analyze and control health care cost and effectiveness.

A case now before the U.S. Supreme Court challenges one of these state mandates. The question for the Justices is whether Vermont's statute requiring specific data to be provided to the state for plans governed by the federal Employee Retirement Income Security Act of 1974 (ERISA) violates that law's preemption provision, which generally displaces state regulation of ERISA-covered subject matter.

The U.S. Supreme Court heard argument on December 2, 2015, in *Gobeille v. Liberty Mutual Ins. Co.*, No. 14-181. Vermont law specifically requires all health payers to submit requested data (including member eligibility, claims, and payment) to a repository for the claimed reasons of cost control, research, and policy purposes. By definition, a TPA to an ERISA self-funded (self-insured) health plan is a health payer within the scope of the Vermont statute.

Liberty Mutual is a nationwide employer which operates a self-funded ERISA health plan for all employees, including its Vermont employees. Liberty Mutual's TPA is Blue Cross Blue Shield of Massachusetts. Vermont subpoenaed the TPA, mandating the release of Liberty Mutual's data under risk of penalty. Liberty Mutual refused the release of that data and, instead, sued Vermont, arguing that ERISA preempted the state statute.

ERISA prescribes a set of stringent rules for private employer-sponsored employee benefit plans. Group health plans are included in these plans. To ensure uniform regulation across the nation, ERISA preempts a multiplicity of state laws and regulations that "relate to" such plans. Under a "savings clause," however, ERISA permits a state to regulate health insurance (and, thus, health insurers and payers), but the state does not have direct authority over self-funded, employer-sponsored health plans.

The district court agreed with Vermont. 2012 U.S. Dist. LEXIS 161069, 54 Employee Benefits Cas. (BNA) 1518 (D. Vt. Nov. 9, 2012) (unreported).

On appeal to the U.S. Court of Appeals for the Second Circuit, in New York, the U.S. Department of Labor filed an *amicus* brief supporting Vermont's position to compel Liberty Mutual's TPA to submit claims, eligibility, cost, and resource data. Other states also filed "friend-of-the-court" briefs in support. Nonetheless, the Second Circuit panel, in a 2-1 decision, sided instead with Liberty Mutual and held that ERISA preempted the Vermont statute. The Second Circuit concluded the statute had the effect of interfering with — and even adding to — the reporting and administrative requirements that are already at the core of ERISA plan operation. 746 F.3d 497 (2d Cir. 2014).

Vermont sought review by the Supreme Court, which granted *certiorari* in June 2015.

Again, the U.S. Department of Labor, now joined by 18 states, and many nationwide and regional public health organizations and researchers, filed briefs that support Vermont, arguing the data derived therefrom will help improve health care across each of the states and, thus, across the country. In its *amicus* brief to the Supreme Court, the federal government contends "ERISA does not preempt Vermont's reporting requirements," with related collection efforts "designed to improve the quality . . . of healthcare in Vermont . . . with comprehensive data about the healthcare-delivery system."

Liberty Mutual has its share of supporters, too. They urge the Supreme Court to alter course from a decade ago in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), where the Court limited ERISA's preemptive reach. If the Court does not tweak *Travelers*, they say, it will "tip[ ] the balance in favor of the states and against federal interests," and if the Court upholds Vermont's law, it will impose heavy mandates on current ERISA plan administration. (For more, see the separate *amicus* briefs filed by Blue Cross and Blue Shield Association and the National Coordinating Committee for Multiemployer Plans, filed October 20, 2015.)

Gobeille v. Liberty Mutual Ins. Co. may indicate how far the Court is willing to take ERISA preemption when it comes to state health care data collection.

Featured Lawyer: Melissa Ostrower

By William H. Payne (William.Payne@jacksonlewis.com)

Melissa Ostrower is a shareholder in Jackson Lewis' New York City office. She has extensive experience with executive compensation and all aspects of employee benefits planning.

Like many ERISA practitioners, Ms. Ostrower started her legal career with an interest in tax law, earning an L.L.M. from New York University. Within weeks of entering the workforce, however, she made the move to employee benefits law, where she has been practicing ever since.

Ms. Ostrower came to Jackson Lewis because she wanted to work with a diverse array of clients. Presently, she represents clients of all sizes, from a small doctor's office to multinational companies. Ms. Ostrower finds clients appreciate the firm's broad reach, because they can quickly learn how other clients are dealing with a new issue.

Ms. Ostrower said she has learned more at Jackson Lewis than anywhere else, so now it's time to learn about her.

What is your favorite section of the tax code?

The deferred compensation section, 409A, Congress' gift to lawyers: I've spent so much time on it. I saw its birth. I saw it develop. It really helps you understand something when you know how it came about. I know about the legislative history, the notice requirements, and the changes in interpretation. It completely changed the world of executive compensation.

If you were not a benefits lawyer, what would you be doing?

I think it would be cool to work in the fashion industry. It's really huge here in New York City, and I think it would be exciting to be part of that community and pick out all the new designs.

You have kids – what are some kids' activities in the city that everyone should know about?

We go to shows, museums, the Highline, Central Park – there's great exposure to the arts for kids. For all age groups, I'd recommend the Natural History Museum. It's hands-on with planets, dinosaurs, and it's across the street from the park. The New York Historical Society and the Metropolitan Museum of Art also have some good exhibits for kids.

In our job, we read all day. What kinds of books do you read outside work?

I love reading fiction. I read a lot on vacation, and I have the Kindle app on my phone so I can always read a few pages when I get a chance. I like reading authors from other countries to get another perspective on how people view the U.S.

Based on your reading, where would you like to visit?

I would like to go back to England and learn more about drinking tea. Every book I read involves having a cup of tea. We don't do it, but I like tea. They always spend a couple of lines describing the tea and offering the tea. It's an essential interaction, and it seems to transcend class and time. Here, it's all coffee, but it's not such a social thing. It's a more solitary experience.

If Congress repeals chunks of the ACA, will you feel like you've lost the part of your life you spent learning it?

It would make me very sad: not because I had to learn it, but because there are some really good parts to the law. It was passed in response to some real problems with our system, and I think people are happy that it abolished things like lifetime maximums and preexisting condition exceptions. Of course, some things need to be adjusted, such as the "Cadillac tax" and the employer mandate, but I don't think people want to go back to the old days.

Recent Developments...

Supreme Court to Hear Contraceptive-Coverage Appeal

The U.S. Supreme Court has agreed to review *Zubik v. Burwell* (14-1418), a consolidated appeal addressing the contraceptive-coverage "accommodation" for religious organizations under the Affordable Care Act (ACA). This accommodation essentially allows religious organizations to opt out of ACA's mandate for contraceptive coverage by applying for an exemption, which petitioners argue violates the Religious Freedom Restoration Act. The religious organizations argue that the accommodation process "substantially burdens" religious belief by forcing them to notify their insurance companies, plan administrators, or the government of their intent to seek the exemption.

Plan-Imposed Limitations Period for Benefits Claim Rejected

Vacating a summary judgment for the defendants in a benefits claim, the Third Circuit found that a one-year limitations period provided in the plan documents was unenforceable. *Mirza v. Insurance Adm'r of Am., Inc.*, 800 F.3d 129 (3d Cir. 2015). The plaintiff, a physician, filed suit for benefits almost 19 months after receiving a final denial letter. He alleged, among other things, that the plan administrator improperly denied benefits when it failed to disclose the plan's one-year time limit for seeking judicial review in its denial letter. In remanding the case for further proceedings, the Court noted Department of Labor (DOL) regulations that require plan administrators to provide claimants with a "description of the plan's review procedures and the time limits applicable to such procedures." The Court concluded the defendants violated the DOL regulations by failing to specify the plan's one-year deadline for bringing suit in its denial letter. The Third Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

Repealed: ACA's Auto-Enrollment Feature

The auto-enrollment provision of the Affordable Care Act (ACA) has been repealed with President Barack Obama's signing of the Bipartisan Budget Act of 2015. The auto-enrollment provision would have required employers that are subject to the Fair Labor Standards Act, and that employ more than 200 full-time employees, to automatically enroll new full-time employees in one of the employer's health plans. The ACA's controversial "Cadillac Tax" – a 40 percent excise tax on high-cost health plans – was not modified or repealed by the Act. Further details regarding auto-enrollment plan features may be found here.

Fiduciary Status and Unpaid Contributions: Ninth Circuit Joins Circuit Split

In *Bos v. Bd. of Trustees*, 795 F.3d 1006 (9th Cir. 2015), the Ninth Circuit opined on an issue that has split other federal circuits – whether unpaid employer contributions to a benefits plan constitute plan assets, such that an employer failing to pay those contributions to the plan may be deemed an ERISA fiduciary. At issue in *Bos* was whether liability for unpaid contributions was excepted from discharge in bankruptcy, under the Bankruptcy Code's exception for fraud by fiduciaries. The bankruptcy court concluded the owner and president of the employer company was a plan fiduciary because he exercised control over money that was contractually required to be paid into the plan trust. Based on this finding of fiduciary status, the bankruptcy court found his liability for unpaid contributions to be nondischargeable, a result the district court affirmed. The Ninth Circuit reversed, noting that a typical employer could never have sufficient control over a plan asset to make it a fiduciary. In doing so, the Ninth Circuit also observed that the designated fund administrator, not the employer, had authority over the management of the plan and could enforce a contractual right to collect payments once they became due to the plan, or to collect delinquent payments if the payments were never made. The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Periodic Review of Employer Stock Defeats Imprudent-Investment Claims, Sixth Circuit Rules

The Sixth Circuit has addressed ERISA claims arising out of long-standing plan investments in employer stock in its first foray into employer-stock litigation since the U.S. Supreme Court's *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The federal appeals court in Cincinnati Circuit affirmed dismissal of class imprudent-investment claims on defendant's motion for summary judgment in *Pfeil v. State Street Bank & Trust Co.*, No. 14-1491 (6th Cir. Nov. 10, 2015). The Court emphasized that plan fiduciaries made a regular practice of reviewing the plan's employer-stock investments, which established an adequate degree of prudence. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

IRS Proposes Regulations Regarding Same-Sex Spouses

The IRS has proposed regulations regarding spouses in same-sex marriages intended to implement the recent Supreme Court decisions in *United States v. Windsor*, which found certain portions of the Federal Defense of Marriage Act to be unconstitutional, and *Obergefell v. Hodges*, which provided a right to same-sex marriage in all states. The proposed regulations confirm that terms in the Federal tax code relating to marriage (including "husband" and "wife") should be interpreted to include both same-sex spouses and opposite-sex spouses.

Labor Department Proposes Changes to ERISA Disability Claims Procedures

The Department of Labor has published proposed amendments to claims procedures for plans providing disability benefits. If adopted, the amendments will make disability-benefit claims subject to the new procedural protections and safeguards for group health plans set forth in the Affordable Care Act. Interested parties must submit comments to these proposed amendments no later than January 19, 2016. Further details regarding the changes may be found here.

Media...

- **Charles Seemann** discusses potential implications of the U.S. Supreme Court's *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan* in *Bloomberg BNA Pension & Benefits Daily*'s "Justices Consider Clawbacks of Health Benefits."

- **Joseph Lazzarotti** discusses the Equal Employment Opportunity Commission's proposed health assessment incentive rule in SHRM's "EEOC: Incentives for Health Assessments of Spouses Permitted."

- ***Patty Diulus-Myers*** was quoted (and Bethany Wagner mentioned) in *Law 360*'s "3rd Circ. Won't Rethink Patent Atty's ERISA Suit"

Honors...

Jackson Lewis Receives Top Rankings

The firm has again been recognized for excellence and ranked in the *First Tier* nationally in Employment Law – Management; Labor Law – Management; and Litigation – Labor & Employment in the *U.S. News – Best Lawyers® 2016 "Best Law Firms" report*. In addition, 80 percent of the firm's 57 regional locations were recognized for excellence in Tiers 1 and 2 of the Metropolitan Rankings in various labor and employment categories. These rankings follow the 2016 *Best Lawyers in America©* list in which almost 140 Jackson Lewis attorneys were recognized.

Achieving a tiered ranking in the "Best Law Firms" report, which includes rankings in 74 national practice areas and 122 metropolitan-based practice areas, reflects the high level of respect a firm has earned among other leading lawyers and clients in the same communities and practice areas for their abilities, their professionalism and their integrity.

In addition, for the fifth consecutive year, the firm has been designated a *Powerhouse* in both Complex and Routine Litigation in the BTI Litigation Outlook 2016: Changes, Trends and Opportunities for Law Firms. The results of this in-depth analysis of today's litigation market are based on extensive one-on-one interviews with more than 300 corporate counsel from Fortune 1000 companies.

BTI President Michael B. Rynowecer said the Powerhouse firms are "noteworthy not only for their investments over the years but also for being willing to be flexible and utilize firm-wide resources to pursue and service clients" and are "making huge investments in understanding clients and the kinds of litigation they're facing — in some cases designing specific systems and specific protocols to meet the larger needs of larger clients."

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UPCOMING SEMINARS

DECEMBER

- **Employee Benefits**, Attorney Keith Dropkin at Employee Benefit Plans Executive Roundtable Discussion Group, New York
- **Interactive Benefits Challenge**, Attorney René Thorne at Benefits Administration Group 2015 Executive Workplace Law Luncheon Series
- **Understanding the Dilemma, an Introduction to Withdrawal Liability**, Attorney Paul Friedman at Jackson Lewis, Online

JANUARY

- **The Affordable Care Act**, Attorney Jewell Lim Esposito for HR Professionals, Virginia and Washington, D.C.
- **Employee Benefits**, Attorney Keith Dropkin at Employee Benefit Plans Executive Roundtable Discussion Group, New York
- **MPPAA, Withdrawal Liability, and the impact upon unionized companies in all aspects including collective bargaining**, Attorney Paul Friedman at Jackson Lewis, Maryland and Washington, D.C.
- **Tackling the Latest Discovery Issues in Disability Claim Actions**, Attorney Ashley Abel at American Conference Institute (ACI), Pennsylvania

FEBRUARY

- **The Affordable Care Act – The Intersection with the Service Contract Act and Davis Bacon**, Attorney Jewell Lim Esposito for Financial Advisors and Brokers, Nevada
- **Employee Benefits**, Attorney Keith Dropkin at Employee Benefit Plans Executive Roundtable Discussion Group, New York
- **Fiduciary duties arising under the ACA**, Attorney Paul Friedman, Maryland

MARCH

- **The Affordable Care Act**, Attorney Jewell Lim Esposito for HR Professionals, Virginia and Washington, D.C.
- **Employee Benefits**, Attorney Keith Dropkin at Employee Benefit Plans Executive Roundtable Discussion Group, New York
- **Wellness Programs**, Attorney Joseph Lazzarotti at America's Health Insurance Plans, Washington, D.C.