LEGAL

What's All the Fuss About Between DOL and Bankruptcy Trustees?

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Even though a retirement plan is not the property of a bankruptcy estate, Trustees are nevertheless required to perform the duties of plan administrator.

Before 2005, bankruptcy trustees had no interest in debtor-sponsored pension plans other than to make sure that the debtor did not fraudulently transfer funds into the plan. Plan assets were not property of the estate. The Chapter 7 bankruptcy case was administered and the plan ignored by the trustee.

That changed with the enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 (BACPCA), which added a new duty for the trustees in 11 U.S.C. §704(a)(11). Whether the United States Department of Labor considered the change then is no longer relevant. It is clearly on its radar screen now.

The DOL is the enforcement agency that oversees and enforces plans governed by ERISA. Its forum for enforcement is United States District Courts. ERISA plans are administered by a plan administrator, a position usually filled by one of the debtor's corporate officers. The plan administrator engages a third party administrator and record keeper to assist with the administrative responsibilities, but these third parties will not perform any duty without approval from the plan administrator.

Typically, Bankruptcy Trustees are not ERISA experts, but they nevertheless assume the duties of plan administrator because those duties are required to be performed in accordance with §704(a)(11). Trustees are, however, professional fiduciaries, trustworthy and skilled administrators. They are also under the direct supervision of the Office of the United States Trustee (UST), a division of the U.S. Department of Justice, which appoints them to a panel of trustees, and the Bankruptcy Judge to whom the bankruptcy case has been assigned. A Trustee is expected to comply with all laws that effect the administration of the bankruptcy estate, and is not exempt from such compliance or the consequences of noncompliance. This means that when performing the duties of plan administrator the Trustee is expected to comply with ERISA laws and is subject to enforcement proceedings by the DOL.

TRUSTEES REQUIRED TO SERVE AS PLAN ADMINISTRATORS

So what is the issue between Trustees and the DOL? Even though plans are not property of the bankruptcy estate, Trustees are nevertheless required to perform the duties of plan administrator and terminate the plan since the debtor's operations have ceased in Chapter 7 and there are no longer any employees.

Each DOL district has a React Coordinator who is the Trustee's contact person at DOL, but neither the React Coordinator nor anyone else at the DOL will provide any guidance or advice to the Trustee on plan administration. The DOL's function is not to assist but to take action to enforce ERISA compliance or violations.

Plan administrators essentially perform at their own personal risk, and as far as the DOL is concerned, so do Trustees. This is in contrast to Chapter 7 Trustees who are tasked with liquidating debtor assets for distribution to creditors and find comfort relying upon derived judicial immunity for their actions as long as they are performing their Trustee duties in furtherance of liquidation and not operating the debtor's business. Depending on slight differences in jurisdictions, Trustees typically require or seek an order from the Bankruptcy Judge before performing most acts. These include engaging professionals, selling assets, compromising claims, making any distribution from the estate and especially paying the Trustee's professionals or seeking compensation as Trustee.

Whether the Trustee is required to seek orders from the Court or elects to obtain a "comfort order" so that the Trustee's action has the approval of the Court, may vary in different jurisdictions. Either way, Trustees commonly rely upon the supervision of the UST and approval of the Bankruptcy Court. The DOL opposes this supervision and approval for a number of reasons, most importantly because of the impact Bankruptcy Court approval of actions taken by the Trustee in connection with the administration of ERISA plans and the assets of those plans could have on the enforcement powers of the DOL.

The conflict between Bankruptcy Trustees and the DOL which emanate from §704(a)(11) was meticulously addressed by Bankruptcy Judge Robert Grossman in the August 2012 *Robert Plan Corporation* decision. In that decision, Judge Grossman held that Bankruptcy Trustees:

- are creatures of the Bankruptcy Code and are at all time under the jurisdiction and supervision of the Bankruptcy Court;
- Trustees were entitled to be compensated for their professional services; and
- the Bankruptcy Court had the authority to determine the reasonableness of Trustee compensation and direct that payment be made from either the estate or plan

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assets. The decision is currently on appeal to the U.S. district court for the eastern district of New York.

WHAT DOES THE FUTURE HOLD?

The battle between Bankruptcy Trustees and DOL is far from over, and it is disheartening to witness the DOL devoting its resources in its misplaced efforts to protect its perceived turf from interference by the Bankruptcy Court.

In an effort to circumvent the clear logic, rationale and persuasiveness of the holding in *The Robert Plan,* the DOL has now promulgated new rules to entice Trustees to administer plans under the Abandoned Plan Program, permitting the Trustee to terminate the plan under a simplified process using a Qualified Termination Administrator (QTA). Under this new rule, Trustees will have the option of appointing a qualified financial institution as the QTA, or the Trustee may personally carry out the duties of QTA. Either way, the Trustee is entitled to get paid a "reasonable" fee and continues to be responsible for compliance.

Here's the twist. The rule prohibits the Trustee from seeking Bankruptcy Court approval of the Trustee's fees, and it requires the Trustee to waive a "release" of liability at the end of the bankruptcy case, thereby exposing the Trustee to the DOL's enforcement jurisdiction for its six-year statute of limitations.

Curiously, Trustees are entertaining this option. We predict, however, that Trustees will quickly realize that no matter what carrot the DOL holds out, bankruptcy practice does not permit Trustees to fix their own compensation and that providence is reserved exclusively to the Bankruptcy Judge. Trustees will also realize that there is no good reason to waive their judicial immunity and leave themselves exposed to the DOL, which has made its position regarding Trustees administering ERISA plans transparent.

The outcome of this tug of war awaits further judicial or legislative action, and is not likely to be resolved by the DOL on its own.

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