No. 07-3234-bk
No. 07-3206-bk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: WILLIAM C. HALPIN, JR. [07-3206-bk (L)], Debtor

Donald RAHM, Lawrence Spraragen, Joseph Gross,
Philip Pacifico, Vincent J. Daley, and Donald Hart,
Plaintiffs-Appellants,

v.

In Re: William C. HALPIN, Jr.,
Debtor-Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING DEBTOR-DEFENDANT-APPELLEE

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Statement of the Issue

This brief is submitted in response to the order of this Court inviting the Department of Labor ("Department") to address the following question:

> Whether an employer's contractual obligations to contribute to benefits plans become "assets" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., when the contributions are due, or whether they become "assets" only when paid.

Statement of the Facts

Halpin Mechanical & Electrical, Inc. ("HM&E") was a New York corporation engaged in electrical contracting, and William C. Halpin, Jr. was the company's President and sole shareholder. Joint Stipulation of Facts ("Jt. Stip.") at A-66. On HM&E's behalf, Mr. Halpin entered into a collective bargaining agreement with Local 236 of the International Brotherhood of Electrical Workers that required the company to remit employer contributions to ERISA-covered funds providing pensions, apprenticeship training, health care, and other employee benefits. Id. at A-66-79.

From July 2002 until January 2003, HM&E failed to fully pay the promised employer contributions to the ERISA plans, and also failed to forward employee contributions which had been specifically withheld from employees' paychecks for the plans. Jt. Stip. at A-69-72. At the same time that HM&E was failing to remit these funds to the plans, the company made payments to other creditors and Halpin made unexplained payments to himself and his mother. Id. at A-72-75. Although

the parties ultimately reached a settlement resolving any claims to the unpaid employee contributions, the employer contributions remain unpaid. Id. at A-68.

In March 2003, HM&E and Halpin instituted bankruptcy proceedings under Chapter 7 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of New York. Jt. Stip. at A-76. In Halpin's bankruptcy, the plans' trustees sought to have the debt for the delinquent contributions deemed non-dischargeable under 11 U.S.C. § 523(a)(4), which prevents the discharge of an individual's debts attributable to "fraud or defalcation while acting in a fiduciary capacity." The trustees argued that the unpaid employer contributions were plan assets, and that Halpin was a fiduciary with respect to the contributions. In the trustees' view, Halpin had exercised authority over plan assets, sufficient to be a fiduciary as defined in ERISA, 29 U.S.C. § 1002(21)(A),[1] and breached his obligations as a plan fiduciary by causing HM&E to use corporate assets for other purposes, while failing to make required plan contributions. The trustees contended that the alleged ERISA-fiduciary status and corresponding breach satisfied the requirements of 11 U.S.C. § 523(a)(4).

Halpin acknowledged that he was a fiduciary with respect to the employee contributions which had been withheld from the paychecks of HM&E employees, but denied any fiduciary responsibility for unpaid employer contributions.

[1] ERISA provides that any person who "exercises any authority or control respecting management or disposition of [a plan's] assets" is a fiduciary. 29 U.S.C. § 1002(21)(A).

Because the parties had settled the claims concerning employee contributions, the controversy centered on whether the employer contributions were properly characterized as plan assets which Halpin had wrongfully diverted from the plans. The Bankruptcy Court ruled in the debtors' favor.

The District Court affirmed the Bankruptcy Court's order finding that the delinquent employer contributions were not plan assets and that Halpin was not a plan fiduciary with respect to those assets. In re Halpin, 370 B.R. 45 (N.D.N.Y. 2007). In reaching its decision, the Court relied, in part, upon the language of the collective bargaining agreement and plan documents. In the Court's view, the governing documents did not "indicate that the unpaid contributions become assets of the plan before being turned over" or give the plans a property interest in funds still held by the company, but rather implied "that the unpaid employer contributions are contractually due payments." Id. at 48-49. Based upon its interpretation of the governing contracts and applicable case law, the court concluded that the debtors' failure to pay a contractual debt did not constitute a breach of a fiduciary duty. Id. at 49-50. Consequently, the debt was dischargeable. Id.

Summary of Argument

ERISA does not define what constitutes the "assets" of employee benefit plans. Although the Department has defined "plan assets" in other contexts, it has not done so for employer contributions. The Department consistently has taken the

view that issues of a plan's ownership interest and plan assets are determined by common law principles. Therefore, the courts should, and typically do, determine whether an asset belongs to a plan by applying the same principles that they normally would apply in resolving property disputes, including principles applicable under the common law of trusts.

The Department has long-standing and consistent views on the issue presented which are entitled to judicial deference. In accordance with published Department guidance, following ordinary notions of property and trust law, employer contributions generally are not plan assets until paid to the plan. Rather, the plan's asset is its contractual right to collect the unpaid contributions, not the assets still held by the employer. Similarly, under general property law, a company's failure to pay its contractual obligations gives its creditor the right to sue on the debt (sometimes called a "chose in action"), but it does not give the creditor a property interest in the company's assets. In this circumstance, under common notions of trust law, absent an agreement between the parties to create a trust for specific property owed, the relationship between the employer and the plan is not a fiduciary relationship, but rather a contractual debtor-creditor relationship. Thus, when an employer misses a contractually required payment, it does not automatically hold assets in trust for the plan, but simply has a contractual debt to the plan.

The Department's treatment of delinquent employer contributions as debt to the plan — but not plan assets — is supported by case law. In In re Luna, 406 F.3d 1192, 1200-05 (10th Cir. 2005), citing the common law of trusts and relevant case law, the court concluded that the employer's failure to pay the contributions created a creditor-debtor contractual relationship rather than any fiduciary duties in the employer. The Tenth Circuit's holding comports with all the circuits that have addressed this issue in the civil context. These cases are also consistent with this Court's decision in United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997), in which the Court sustained a conviction under 18 U.S.C. § 664, the criminal embezzlement statute with regard to ERISA plans. This Circuit held that the contractual obligations to the funds were plan assets and that the defendants, in effect, interfered with the trustees' right to collect on those obligations by actively scheming to conceal the full amount of the unpaid contributions that were due and owing, and to hide the fact that their duty to exercise the right to collect had been triggered. Viewed as a fraudulent concealment case, LaBarbara lends support to the Department's position that delinquent employer contributions are not plan assets until paid, but that the plans' right to collect the contributions owed is a plan asset. Moreover, the government's brief to the Supreme Court (U.S. Br.) (Addendum A, infra) in United States v. Jackson, 524 F.3d 532 (4th Cir. 2008), petition for cert. filed (U.S. Aug. 25, 2008) (No. 08-263), which is also being filed

on this date, is fully aligned with the views expressed in this brief with respect to Title I of ERISA.

Strong policy considerations also support the views expressed in this brief. First, generally treating delinquent employer contributions as plan assets would be a significant, and unnecessary, departure from the common law, contrary to the general rule that undefined statutory terms, here "assets," should be construed in accordance with their common-law meaning. Second, if unpaid contributions were plan assets, ERISA would effectively govern the normal operations of a business whenever it failed to pay contributions timely. Third, if as a general rule the failure to pay debts to a plan causes the debtor to hold plan assets, the rule would presumably apply to all debtors, not just employers with contribution obligations, and would discourage many valuable financial transactions between plans and third parties. These results cannot have been Congress's intent in enacting ERISA.

Finally, because delinquent employer contributions are not plan assets, an employer does not become a fiduciary to the plan by failing to pay contractually owed contributions to the plan. And, while the plan's right to collect delinquent contributions is a plan asset, mere failure to pay on time does not give the employer any authority or control over that asset. Accordingly, Halpin was not an ERISA fiduciary because he did not exercise any authority or control over the plans' assets.

Argument

I. Delinquent employer contributions are not plan assets.

A. In accordance with published Department guidance and ordinary notions of property and trust law, employer contributions generally are not plan assets until paid to the plan; the plan's asset is its contractual right to collect the unpaid contributions, not the assets still held by the employer.

Congress enacted ERISA to ensure the effective administration of employee benefit plans and the payment of promised benefits. See 29 U.S.C. § 1001(b) (stating that Congress enacted ERISA "to protect . . . the interest of participants in employee benefit plans and their beneficiaries"); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employment benefit plans"). The Secretary of Labor has primary authority to administer and enforce Title I of ERISA, including the Act's fiduciary provisions. See 29 U.S.C. § 1132(a)(2) (authority to bring civil enforcement actions); id. § 1134 (investigative authority); id. § 1135 (authority to issue regulations); id. § 1137 (administrative procedure); id. § 1138 (appropriations to carry out "functions and duties" under ERISA); see also Sec'y of Labor v. Fitzimmons, 805 F.2d 682, 691 (7th Cir. 1986) (en banc) (noting that "Congress gave the Secretary of Labor the responsibility and authority to investigate and monitor employee benefit plans").

ERISA defines "fiduciary," in pertinent part, to include any person who "exercises any discretionary authority or control respecting management of such

plan or exercises any authority or control respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A).[2] The Act thus takes a functional approach to determining who is an ERISA fiduciary. Blatt v. Marshall and Lassman, 812 F.2d 810, 812 (2d Cir. 1987). Under this approach, when persons exercise authority over plan assets, they act as ERISA fiduciaries, regardless of whether the governing plan documents specifically name them fiduciaries. Before a court can determine whether an alleged fiduciary has exercised the requisite authority over plan assets, however, the court must first determine whether the assets at issue are "plan assets."

The current controversy — whether employer contributions are plan assets when they become due or only when paid into the plan — arises because ERISA does not separately define "plan assets." John Hancock Mut. Life Ins. Co. v.

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[2] In full, 29 U.S.C. § 1102(21)(A) states:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

There is no indication that the investment advice or administration prongs for fiduciary status apply here.

Harris Trust & Sav. Bank, 510 U.S. 86, 89 (1993). In a number of contexts, however, the Department has promulgated regulations specifically addressing whether particular assets are "plan assets." For example, 29 C.F.R. § 2510.3-101 defines "plan assets" with respect to a plan's investment in other entities. Another regulation, 29 C.F.R. § 2510.3-102, defines "plan assets" with respect to participant contributions and makes clear that the failure to forward the employee contributions to the plan as soon as they can be reasonably segregated from the employer's general assets constitutes a breach of fiduciary duty and a violation of the trust requirement. Id. See generally 44 Fed. Reg. 50,363, 50,365 (Aug. 28, 1979); 53 Fed. Reg. 17,628, 17,629 (May 17, 1988); 61 Fed. Reg. 41,220, 41,227-28 (Aug. 7, 1996). The regulation, however, is limited to employee contributions. There is no similar regulation for employer contributions that would make employers fiduciaries whenever they fail to make their contractually required payments.

In the absence of a specific regulation or statutory provision, the Department has consistently taken the position that "ordinary notions of property rights under non-ERISA law" should be used to identify plan assets. See, e.g., U.S. Dep't of Labor, Advisory Opinion ("AO") 92-22A (Oct. 27, 1992); AO 93-14A (May 5, 1993); AO 94-31A (Sept. 9, 1994); AO 2005-08A (May 11, 2005). Thus, the assets of a plan include any property, tangible or intangible, in which the plan has a "beneficial ownership interest" as determined under ordinarily applicable property

law. AO 93-14A. Rather than create a unique property-law regime for employee benefit plans, the courts typically determine whether an asset belongs to a plan by applying the same concepts and principles that they would normally apply in resolving property disputes. See, e.g., Luna, 406 F.3d at 1200-05. Nothing in ERISA's text suggests that Congress intended that the courts depart from common legal understandings in determining whether a plan has an ownership interest in a particular asset.

Under ordinary notions of property law, a company's failure to pay its contractual obligations gives its creditor the right to sue on the debt, but it does not give the creditor a property interest in the company's assets. The right to sue is also known as a "chose in action." A chose in action is simply an assignable right of action typically arising from a breach of contract — it is the right of a creditor to be paid. 63C Am. Jur. 2d Property § 22-23 (2008); Mexican Nat'l R. Co. v. Davidson, 157 U.S. 201, 204-05 (1895) (noting that action for money due under a contract is a chose in action). The unpaid amounts are simply debt, not assets held in trust for the benefit of the creditor. The creditor's contractual right to payment (i.e., its "chose in action") is an asset of the creditor, but the unpaid amounts do not become the creditor's assets until actually paid. Thus, a general creditor does not have any property interest in the assets of a debtor. See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319-20 (1999).

Under common notions of trust law, absent an agreement between parties to create a trust for specific property owed, the relationship is not a fiduciary relationship, but rather a contractual debtor-creditor relationship.[3] Restatement (Third) of Trusts § 10 cmt. g (2003) (when a person makes a contractually binding promise to establish a trust, "the trustee's fiduciary duties ordinarily come into existence at the time of the settlor's performance and not at the time the binding promise is made"); id. at § 10 cmt. g, illus. 10 ("In consideration of valuable services that have subsequently been performed by B, A promised B that on the first of the next month he (A) will transfer certain securities to T in trust for B. Although no trust arises until A transfers the securities to T in trust, A is liable for breach of contract if he fails to create the trust."); see George T. Bogert, Trusts § 26 (6th ed. 1987) (a person who owes a debt may repay that debt using any funds available to him, but a trustee must pay to the beneficiary the specific property held in trust); Restatement (Second) of Trusts § 12 (1959) (a debt is not a trust, and a debtor is not a fiduciary of the debt owed the creditor). See generally George G.

[3] ERISA relies upon the common law of trusts, and this common law may be used to clarify parts of ERISA. See Varity Corp. v. Howe, 516 U.S. 489, 502 (1996) (acknowledging that courts frequently interpret ERISA's "fiduciary" definition by "referring to the common law of trusts"); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law"); Coan v. Kaufman, 457 F.3d 250, 260 (2d Cir. 2006) (noting that the common law of trusts provides a starting point for analysis of ERISA); N.Y. Teamsters Conference Pension & Ret. Fund v. Boening Bros., Inc., 92 F.3d 127, 131-32 (2d Cir. 1996) (recognizing that the common law of trusts provides guidance for defining the trustee's duties).

Bogert and Amy M. Hess, The Law of Trusts and Trustees § 19 & nn.42-43 (rev. 2d ed. 1992). Trust property may consist of such diverse rights as "contingent future interests [and] choses in action." Restatement (Third) of Trusts § 40 cmt. b.

Similarly, when an employer fails to make contractually required contributions to a plan, the plan has an enforceable right to collect the unpaid contributions, but the funds owed to the plan do not become assets of the plan until actually paid. McKee v. Paradise, 299 U.S. 119, 120-21 (1936) ("The bankrupt was a debtor which had failed to pay its debt. We know of no principle upon which that failure can be treated as a conversion of property held in trust.");[4] In re

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[4] McKee concerned employee payroll deductions that were meant to be set aside and used to pay for employee welfare benefits. The Restatement further clarifies the holding in McKee:

> [A] trust arises as to the amounts deducted as soon as they are either set aside by the employer for the employees' purposes or paid over to another person for those purposes. Until then, the employer's obligation is merely a debt, with the "obligee" (the employer or other person) holding a chose in action (the claim against the employer) in trust. The claim that is held in the trust estate is like the claims of the other general creditors of the employer except to the extent of any preference that may be conferred by statute or other rules of law or equity, preferences that are not peculiar to the trust law.

Restatement (Third) of Trusts § 5 cmt. k. Thus, under McKee and the Restatement, a trust arises only when an employer actually deducts and sets aside amounts from an employee's salary. Exercising the Secretary's authority under 29 U.S.C. § 1135 to "prescribe such regulations as she finds necessary or appropriate to carry out the provisions of this subchapter," the Department's regulations on employee contributions alters the common law by imposing maximum time limits on the transfer of the contributions and deeming them to be plan assets when reasonably segregable. 29 C.F.R. § 2510.3-102. As set forth in the text, however,

Luna, 406 F.3d at 1204-05 (citing the common law of trusts and relevant case law, to conclude that the employer's failure to pay the employer contributions created a creditor-debtor contractual relationship rather than any fiduciary duties in the employer). The plan's asset is its right to collect payment (i.e., its common law chose in action), not the employer's accounts and assets. Luna, 406 F.3d at 1199-1200 & n.4; see LaBarbara, 129 F.3d at 88 (holding that "contractual obligations to the Funds [Plans] . . . constituted 'assets' of the Funds by any common definition"). The mere failure to pay a debt, without more, does not transform a contractual relationship into a fiduciary relationship or turn a breach of contract into a breach of fiduciary duty. See Restatement (Third) of Trusts § 5(i) & cmt. i (a contract to convey property does not give rise to a fiduciary relationship); id. § 5(k) & cmt. k (the relationship of a debtor to a creditor is not fiduciary in nature; rather, the creditor has a personal claim against the debtor).

Thus, when an employer misses a contractually required payment, it does not automatically hold assets in trust for the plan, but rather simply has a contractual debt to the plan. Until the debt is paid, the plan's asset is its chose in action — its contractual right to collect the amount it is owed. Absent an understanding that the employer is holding particular funds in trust for the benefit of the plan, its corporate accounts do not hold plan assets. Cf. AO 92-22A (the

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the Department has not departed from common law principles with respect to employer contributions, but instead looks only to the common law for guidance.

mere segregation of funds to facilitate administration of a plan without intent to create a beneficial interest in those funds does not make those funds plan assets); AO 93-14A (creating a "Premium Trust" solely with the employer's assets to pay premiums on a group policy without any intent to give the plans a beneficial interest in the trust does not make those trust funds plan assets).

Accordingly, the Department has consistently taken the position that employers do not breach fiduciary obligations merely by failing to pay employer contributions. For example, in Employee Benefits Security Admin., U.S. Dep't of Labor, Field Assistance Bulletin No. 2008-1, Fiduciary Responsibility for Collection of Delinquent Contributions (Feb. 1, 2008) ("FAB 2008-1"), the Department addressed the duty of plan fiduciaries to collect delinquent employer contributions, noting that the plan's asset was its contractual claim, not the unpaid amounts held by the employer:

> The Department has taken the position that employer contributions become an asset of the plan only when the contribution has been made. However, when an employer fails to make a required contribution to a plan in accordance with the plan documents, the plan has a claim against the employer for the contribution, and that claim is an asset of the plan.

FAB 2008-1, available at http://www.dol.gov/ebsa/regs/fab2008-1.html (footnote omitted).

In accordance with these principles, when the Secretary of Labor brings civil enforcement actions concerning unpaid employer contributions, she generally files

suit against the plan's fiduciaries for failing to prudently enforce its chose in action against the employer. The Secretary does not sue directly the employer for failing to meet its contractual obligations because the failure does not constitute a fiduciary breach, and the Secretary lacks authority to bring suit directly for breach of a plan's contract rights. In marked contrast, when an employer misappropriates employee contributions, the Secretary directly sues the employer for breach of its fiduciary obligations. The employee contributions are plan assets under the express terms of the Department's regulation, and the employer, therefore, breaches its fiduciary obligations by wrongfully diverting the plan's assets. See, e.g., Chao v. Rufenacht, No. 06-C-309-S, 2006 WL 3474197 (W.D. Wis. Nov. 30, 2006) (unpublished) (Addendum B, infra); cf. Bannistor v. Ullman, 287 F.3d 394, 398 (5th Cir. 2002).[5]

Moreover, the Department has held a consistent view on the proper treatment of employer contributions for at least three decades. Since the earliest

[5] The Department has expressed precisely this view on employer contributions in several court briefs. For example, in its amicus brief for Pfahler v. Nat'l Latex Products Co., 517 F.3d 816 (6th Cir. 2007), the Department stated that delinquent employer contributions were not plan assets until paid into the plan, but that the "right to collect the promised contribution — the Plan's chose in action — [was] a plan asset." Sec'y of Labor Br. at 12. The Department noted that this view was supported by general principles in trust law and the decisions in Luna and LaBarbara. Id. at 9-12. In the brief for the Department's motion for summary judgment in Chao v. Plan Benefits Services, Inc., the Department again presented its considered view that delinquent employer contributions are not plan assets, but the right to collect those contributions was a plan asset. Mem. in Supp. of Mot. for Summ. J. at 3-9 (D. Mass. May 12, 2008) (No. 07-11474).

days of ERISA, the Department has taken the view that the failure to pay employer contributions does not constitute the exercise of authority over plan assets. In a 1976 exemption from ERISA's prohibited transaction provisions, the Department recognized that circumstances may exist when it is advantageous to a plan for the trustee to provide an extension to an employer to pay its contributions, to accept less than the full amount due, or to deem some contributions uncollectable. Prohibited Transaction Exemption ("PTE") 76-1, 41 Fed. Reg. 12,740 (Mar. 26, 1976). Without the exemption, failure to collect the contribution in full could be considered a prohibited transaction under 29 U.S.C. § 1106(a), which prohibits specified transactions, for example, the extension of credit between plans and parties in interest, such as employers of plan participants. In the preamble to the exemption, the Department specifically noted that,

> it is the view of the Department and the [Internal Revenue] Service that generally neither the failure of a participating employer in a multiple employer plan to make a contribution to the plan when the contribution is due nor the failure to collect such a delinquent contribution constitutes a prohibited transaction.

41 Fed. Reg. at 12,741.

This early prohibited-transaction exemption for trustees of multiemployer plans shows that delinquent employer contributions are not considered plan assets because the exemption regulates how the trustee administers the right to collect them, but does not treat as a prohibited transaction the employer's failure to make the contribution to the multiemployer plan when "the contribution is due." 41 Fed.

Reg. at 12,741 (distinguishing between a plan's obligation to make "systematic, reasonable and diligent efforts to collect delinquent contributions" and participating employers, who "have little, if any, control over the contribution collection efforts made by plans"). Indeed, if the failure to pay employer contributions on time constituted the exercise of authority over plan assets, employers would breach the prohibited transaction provision set forth in 29 U.S.C. § 1106(b)(1) which precludes a plan fiduciary from dealing "with the assets of a plan in his own interest or for his own account." Yet PTE 76-1 expressly permits employers to enter into reasonable arrangements to postpone, compromise, or forgive missed contribution payments, without providing any relief for violation of § 1106(b). PTE 76-1(b), 41 Fed. Reg. at 12,741.[6]

The Department's long-standing and consistent position that employer contributions are not generally plan assets until paid, and that plan assets should be identified by reference to ordinary non-ERISA notions of property law, is entitled to judicial deference. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating

[6] 29 U.S.C. § 1145 provides additional inferential support for the Department's view by creating a specific statutory obligation for employers to make contributions in accordance with the terms of the plan or collectively bargained agreement. The statute thereby "creates a federal right of action independent of the contract on which the duty to contribute is based and may be enforced by an action brought in the district court." Bituminous Coal Operators' Ass'n v. Connors, 867 F.2d 625, 633 (D.C. Cir. 1989). If unpaid employer contributions were plan assets, there would be no need for this additional statutory provision because any time an employer failed to pay required contributions it would breach its fiduciary duties, and an action could be brought under 29 U.S.C. § 1132(a)(2) for the resulting losses.

that rulings, interpretations and opinions of the Administrator under the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); see Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007) (finding "the Secretary's reasoning in its rulings regarding 'plan assets' thorough, valid, and particularly consistent"); see also Caremark, Inc. v. Goetz, 480 F.3d 779, 787, 790 (6th Cir. 2007) (holding that "the [Department of Labor's] interpretation of the ERISA statute is highly persuasive [and thus the] advisory opinion warrants deference"); Sommer v. The Vanguard Group, 461 F.3d 397, 400 n.3 (3d Cir. 2006) (noting that, although the Department of Labor's opinion letters are not entitled to controlling Chevron deference, they are still "persuasive in guiding [the Court's] analysis"); In re WorldCom Inc. ERISA Litigation, 354 F. Supp. 2d 423, 445-46 (S.D.N.Y. 2005) (finding that a FAB on ERISA "reflects persuasive authority to which this Court should give at least substantial weight").

B. The Department's treatment of delinquent employer contributions as debt to the plan (but not plan assets) is supported by case law.

The Department's view of employer contributions is fully supported by case law arising in the civil context.[7] In Luna, the Tenth Circuit addressed the specific

[7] The Department's view of employee contributions is also supported by case law. See, e.g., LoPresti v. Terwilliger, 126 F.3d 34, 40-43 (2d Cir. 1997) (holding that

question raised in this case — whether unpaid employer contributions were plan assets, and a bankrupt employer was, therefore, a plan fiduciary whose indebtedness for the unpaid contributions was non-dischargeable under the Bankruptcy Code's "fraud or defalcation" provision, 11 U.S.C. § 523(a)(4). Luna, 406 F.3d at 1196-98. The bankruptcy court and district court each held that "because unpaid contributions do not constitute 'plan assets,' the [employer] had committed no defalcation and the debt cannot be discharged in bankruptcy." Id. at 1198.

The Tenth Circuit affirmed on the ground that the employer "did not exercise authority or control respecting the management or disposition of a plan asset." Id. The court recognized that, although the plan did not possess the unpaid contributions until they were paid into the plan, it did possess "the contractual right to collect them." Id. at 1200 (court's emphasis). The right to collect the money owed was a chose in action. Id. at 1199-1200 & n.4. This chose in action, however, belonged to the plan trustees to exercise in accordance with their fiduciary obligations, not to the employer. Id. at 1202, 1204. The court thus disagreed with the proposition that "an employer automatically becomes a fiduciary of an ERISA plan as soon as it breaches its agreement to make employer contributions." Id. at 1203. Instead, citing the common law of trusts and relevant

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an employer became an ERISA fiduciary when he decided not to pay withheld employee contributions to the Funds).

case law, the court concluded that the employer's failure to pay the contributions created a creditor-debtor contractual relationship rather than any fiduciary duties in the employer. Id. at 1204-05. The court accordingly held that the plan's asset was "only a contractual claim for damages," not the "actual unpaid contributions," and only the trustees, not the employer, were fiduciaries with respect to that intangible asset. Id. at 1205-06.

The Tenth Circuit's holding comports with all the circuits that have addressed this issue in the civil context. In re M & S Grading, Inc., 541 F.3d 859, 865 (8th Cir. 2008) ("unpaid [employer] contributions remained corporate assets and did not become assets of the plan."); Cline v. Indus. Maint. Eng'g & Contracting Co., 200 F.3d 1223, 1234 (9th Cir. 2000) ("[u]ntil the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation"); see also ITPE Pension Fund v. Hall, 334 F.3d 1011, 1013 (11th Cir. 2003) ("the proper rule, developed by caselaw, is that unpaid employer contributions are not assets of a fund," but the participants and the employer may overcome the general rule through contract); accord In re Bucci, 493 F.3d 635, 642 (6th Cir. 2007) (agreeing with ITPE Pension Fund's statement of the traditional rule), cert. denied, 128 S. Ct. 2903 (2008).[8]

[8] As ITPE Pension Fund indicates, some courts have concluded that employers and employees may supersede the general rule through contract. In their view, the

These cases are also consistent with this Circuit's decision in LaBarbara, in which the Court sustained a conviction under 18 U.S.C. § 664 for aiding and abetting theft or embezzlement from an employee benefit plan. That section of the criminal code states:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

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general rule — unpaid employer contributions are not assets until paid into the plan — may be overcome by an agreement between the funds and the employer that "specifically and clearly declares otherwise." 334 F.3d at 1013-14. Thus, courts following that view have found that unpaid contributions become plan assets, regardless of whether they are paid into the fund and even before they are segregated from the employer's general assets, if the parties have agreed to that arrangement. See, e.g., United States v. Panepinto, 818 F. Supp. 48, 51 (E.D.N.Y. 1993) (construing contract language stating: "Employer shall [not] have any legal or equitable right, title or interest in or to any sum paid by or due from the Employer."), aff'd, 28 F.3d 103 (2d Cir. 1994) (Table). Here, however, the District Court agreed with the Bankruptcy Court that the applicable contracts contained no language indicating that "the unpaid contributions became plan assets before being turned over," or giving the plans' a property interest in the employer's property. In re Halpin, 370 B.R. at 48-49. It appears that the contract language is not at issue on appeal. See generally Appellants' Br. This Court therefore need not decide the circumstances under which unpaid employer contributions may become plan assets through contract language.

18 U.S.C. § 664.[9] In LaBarbara, the Court held that "contractual obligations to the Funds [Plans] . . . constituted 'assets' of the Funds by any common definition." 129 F.3d at 88.

The defendant Michael LaBarbara served as the principal officer of his union and was the administrator and trustee of at least one of its ERISA-covered plans. Id. at 83. The plans arose out of a collectively bargained agreement between a union and a concrete company ("Strathmore"), owned by Al Barone. Id. LaBarbara and Barone engaged in a fraudulent "double breasting" scheme, pursuant to which they diverted approximately $100,000 in employer contributions each year from 1986 through 1990 from the plan.[10] In exchange for the cooperation of LaBarbara and the union in various unlawful schemes, Barone agreed to pay LaBarbara $250,000, of which $130,000 was actually paid. Id.

[9] Although Section 664 was originally enacted before ERISA, see Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, § 17(a), 76 Stat. 41 (1962), it was amended by ERISA specifically to apply to ERISA-covered plans, see Pub. L. No. 93-406, § 111(a)(2)(A), 88 Stat. 851. Accordingly, Congress presumably intended plan "assets" to have the same meaning in § 664 that the term has throughout ERISA. See Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).

[10] Under the "double breasting" scheme, Barone created a second company which was not a signatory to the collective bargaining agreement. Strathmore's employees would receive their pay for the first thirty hours of their labor each week from Strathmore and the Funds would receive the corresponding employer contributions as contemplated by the collective bargaining agreements. But for all hours in excess of thirty, the employees would receive their check from the second company, which was not a party to the collective bargaining agreements. LaBarbara, 129 F.3d at 83.

The Court held that the contractual obligations to the funds themselves were plan assets and that LaBarbara's acquiescence to the double-breasting scheme, which "conceal[ed] Strathmore's contractual obligations," aided and abetted a violation of § 664. Id. at 88. On these facts, the "contractual obligations" Strathmore had to make employer contributions was the direct counterpart to the plans' chose in action (contractual right) to collect, and the concealment of the full amounts owed through the double-breasting scheme, to which both Strathmore/Barone and LaBarbara were parties, constituted interference ("conversion") with the chose in action ("credits"), which undoubtedly is a plan asset.[11] This is so because Barone and LaBarbara had actively engaged in a scheme to conceal the full amount of the unpaid contributions that were due and owing from the plans' trustees other than LaBarbara, and to hide the fact that their duty to exercise the right to collect had been triggered. Properly read in light of its facts, therefore, LaBarbara lends support to the Department's position that

[11] In tort and criminal law, "conversion" means "[t]he wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." Black's Law Dictionary 356 (8th ed. 2004); see also Morrissette v. United States, 342 U.S. 246, 272 (1952). As herein relevant, a "credit" means "[t]he correlative of a debt, that is, a debt considered from the creditor's standpoint, or that which is incoming or due to one . . . . Claim or cause of action for specific sum of money." Black's Law Dictionary 367 (6th ed. 1990); see Propper v. Clark, 337 U.S. 472, 480 (1949) (stating that the "ordinary meaning" of "credit" is "the obligation due on accounting between parties to transactions").

delinquent employer contributions do not, without more, constitute plan assets. LaBarbara certainly should not bar this Court in this case from drawing that distinction, in the absence of facts supporting concealment or interference with the plan's right to collect unpaid monetary contributions.

Recently, however, in United States v. Jackson, 524 F.3d 532 (4th Cir. 2008), petition for cert. filed (U.S. Aug. 25, 2008) (No. 08-263), a prosecution under § 664 appears to have strayed from LaBarbara's moorings in fraudulent concealment and mistakenly treated the employer's unpaid contribution itself, rather than the trustee's claim to collect it on behalf of the plan, as the "credits" that were illegally converted. In that case, the Fourth Circuit upheld a conviction for a violation of § 664 based on a finding that employer contributions to ERISA plans "became assets of the ERISA plans when they became due and payable." Id. at 541-42; see United States v. Jackson, No. 6:04-CR-70118, 2006 WL 1587457 at *7 (W.D. Va. June 7, 2006). In upholding the conviction, the Fourth Circuit held that the employer's "unpaid contributions to the Plans constituted the 'moneys, funds, or assets' thereof for purposes of § 664." 524 F.3d at 544. This view of employer contributions is incorrect and directly conflicts with the Department's view, the common law, and all other cases to address this issue. See supra.

Jackson has petitioned the Supreme Court on the § 664-equivalent of the issue that this Court has posed to the Department in this case: Whether employer contributions to a pension plan covered by ERISA become assets of the plan within

the meaning of 18 U.S.C. 664 when they are due to the plan even if they have not yet been paid. In its response to the petition, the United States does not defend the grounds upon which it secured a conviction, but instead has sought to have the Supreme Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further proceedings. See U.S. Br. in Jackson v. United States, supra, No. 08-263 (U.S. filed Jan. 16, 2009) (Addendum A, infra). The United States concludes that the failure to pay employer contributions when due and the use of company funds for other purposes did not constitute conversion of the plans' contractual right to the contributions and that, contrary to the decision below, the unpaid contributions did not constituted the plans' "moneys, funds, or assets" for purposes of § 664. The position of the United States on when an employer contribution becomes a plan asset for purposes of the criminal statute has thus been fully aligned with the views of the Secretary with respect to Title I of ERISA, as expressed most comprehensively in this brief.

C. General policy considerations support the Department's view of delinquent employer contributions as debt.

Adopting the view that delinquent employer contributions are always plan assets would have at least three substantial and detrimental effects on public policy for ERISA-covered plans. First, generally treating delinquent employer contributions as plan assets would be a significant, and unnecessary, departure from the common law, contrary to the general rule that undefined statutory terms,

here "assets," should be construed in accordance with their common-law meaning. See, e.g., Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("we adopt a common-law test for determining who qualifies as an 'employee' under ERISA"). There is no reason to believe that "assets" is intended to have a different meaning than the common law of contracts, property, and trusts ascribes to it. The application of ordinary notions of property law ensures that plans and related parties can rely upon the established framework of rules and principles for determining their rights. Consequently, a departure from this framework would undermine the ability of parties predictably to determine their rights and obligations in financial transactions with plans.

Second, if unpaid contributions were plan assets, ERISA would effectively govern the normal operations of a business whenever it failed to pay contributions on time. If delinquent employer contributions were plan assets, the employer would become a plan fiduciary as soon as the contributions were past due, and an undifferentiated part of the company's assets would be treated as plan assets. The company could thus find itself, immediately upon nonpayment, owing the plan undivided loyalty over any competing interests and needing to comply with ERISA in every aspect of its management of the company's assets. In such a position, a company undoubtedly would commit numerous fiduciary breaches and prohibited transactions under ERISA merely by pursuing its ordinary business interests and obligations to its shareholders. As a plan fiduciary, the employer would have to

manage its assets (and arguably the general accounts in which the "assets" are commingled) with undivided loyalty to plan participants — and not to the company's shareholders (29 U.S.C. § 1104(a)); refrain from self-dealing and transactions with parties-in-interest — including the corporation and its officers (id. §§ 1104(a), 1106); and comply with ERISA's other fiduciary provisions, such as the trust and anti-inurement provisions (id. § 1103). See NYSA-ILA Med. & Clinical Servs. Fund v. Catucci, 60 F. Supp. 2d 194, 201, 203 (S.D.N.Y. 1999) (noting that an agreement whereby delinquent employer contributions are plan assets the moment they are due is a "heavy responsibility" and violations may occur anytime the employer pays another creditor). This all may be avoided by following the Department's view. As stated above, the plan's trustee has a chose in action to seek the promised contribution and a fiduciary obligation to pursue the plan's rights. This obligation to seek payment protects the plan's interest in converting its intangible claims to hard assets and avoids transforming innocent business expenditures into fiduciary breaches.

Third, if as a general rule the failure to pay debts to a plan causes the debtor to hold plan assets, the rule would presumably apply to all debtors (not just employers with contribution obligations) and discourage many valuable financial transactions between plans and third parties. Generally, when a party such as a partnership or corporation enters into a commercial transaction it risks contractual liability for non-performance, but its general assets do not become impressed with

a trust and it remains free to pursue its business interests for the benefit of its partners or shareholders. If, however, unpaid debts resulted in fiduciary status and corresponding fiduciary duties and liabilities, entities would avoid commercial transactions with plans on the same terms offered to less risky counter-parties. Under such a rule, ERISA would harm plans by effectively discouraging businesses from conducting transaction with plans. See Luna, 406 F.3d at 1208 (noting that if every employer who became delinquent on its contributions became an ERISA fiduciary, then every debtor to a plan would be a fiduciary and ERISA itself would serve as a disincentive to contract with plans); Young v. W Coast Indus. Relations Ass'n, Inc., 763 F. Supp. 64, 75-76 (D. Del. 1991) (cautioning against making all delinquent employer contributions plan assets because then "any time one party to a contract failed to remit monies or property in accordance with the terms of that contract, they could be held liable for embezzlement or conversion and, in the case of union funds, be subjected to RICO's harsh sanctions"). Such a result cannot have been Congress's intent in enacting ERISA.

II. Because delinquent employer contributions are not plan assets, Halpin did not become a fiduciary to the plans by failing to pay contractually owed contributions to the plans.

An employer who is obligated to make employer contributions pursuant to a contract with an ERISA plan or its participants does not become an ERISA fiduciary by failing to pay those contributions, without more. Because the plan's chose in action, and not the unpaid contributions, the employer does not exercise

authority over plan assets simply by failing to pay the contributions. In this case, Halpin exercised no authority over the plans' actual asset — the chose in action. The plans retained full authority to enforce the contractual rights, and there is no allegation that Halpin fraudulently concealed the debt from the plans or interfered with the plans' pursuit of their contractual rights as in LaBarbara. Consequently, Halpin did not exercise authority over plan assets within the meaning of ERISA's fiduciary definition, which provides that a person is a fiduciary to the extent he "exercises any authority or control respecting management of [the plan's] assets." 29 U.S.C. § 1002(21)(A)(i).

The Tenth Circuit's observations about the employer in Luna, 406 F. 3d at 1202, apply equally here to Halpin:

> The question of whether the Lunas exercised authority or control over the asset at issue almost answers itself: It is the Trustees, not the Lunas, who control the contractual right to collect unpaid contributions from the Lunas. Whether to enforce their contractual rights is entirely up to the Trustees; the Lunas, meanwhile, have no say over whether this right will be enforced or not.

Because Halpin similarly had no authority over the plans' contractual right to collect the unpaid contributions, he was not a fiduciary with respect to the delinquent employer contributions. Inasmuch as the appellants present no alternative basis for Halpin's fiduciary status, this point decides the issue. See generally Appellants' Br. (arguing that Halpin's fiduciary status is based solely on the theory that unpaid employer contributions are plan assets). Accordingly,

Halpin was not an ERISA fiduciary because he did not exercise any authority or control over the plans' assets.

Conclusion

For the foregoing reasons, this Court should affirm the decisions below that the delinquent employer contributions are not plan assets but are a debt to the plans.

Respectfully submitted.

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