Summary and Analysis
of DOL Amicus Brief Filed in Enron Case
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The Department of Labor ("DOL") filed an amicus brief, at the end of August 2002, in the case brought by Enron plan participants seeking relief for losses to their retirement plan accounts as a result of Enron's collapse, Tittle v. Enron (S.D. Tex.). The amicus brief opposes the defendants' motions to dismiss the case brought by the plan participants. The positions taken by the DOL in this brief are based upon the factual allegations stated in the plaintiffs' complaint.

The DOL has taken several significant positions in this brief, in particular with respect to the fiduciary obligations of the corporation (Enron), the Chief Executive Officer (Ken Lay) and the Compensation Committee of Enron's Board of Directors (collectively referred to in this summary as the "Appointing Fiduciaries"). Initially, the DOL concludes that, because they had the power to appoint, retain and remove the members of the Administrative Committee (the named plan administrator and plan fiduciary), the Appointing Fiduciaries have discretionary authority over the management and administration of the plan and thus are plan fiduciaries under ERISA.

As plan fiduciaries, the DOL argues that the Appointing Fiduciaries do not just have the obligation to monitor the actions of the appointed fiduciaries and remove or replace such fiduciaries if they are acting imprudently, but, in addition, the Appointing Fiduciaries have the broader obligation to insure that the appointed fiduciaries have accurate and critical information that the appointed fiduciaries need to carry out their duties (such as, information about the corporation's financial condition) and to take any necessary action (such as, freezing plan investments) if the appointed fiduciaries do not or cannot take such action because the appointed fiduciaries do not have the necessary information. This position is much broader than the current rule that fiduciaries can only be held liable for conduct that falls within their fiduciary authority and that they cannot be held directly liable for decisions over which they had no control.

The DOL further argues that the Appointing Fiduciaries also have co-fiduciary liability under ERISA § 405 because the Appointing Fiduciaries knowingly concealed critical financial information regarding Enron from the appointed fiduciaries which thus enabled the appointed fiduciaries to breach their duties to serve the interests of the participants and beneficiaries. Again, this position is much broader than the current rule that co-fiduciaries are only liable for bad acts that they know other fiduciaries are intentionally entering into and that the co-fiduciaries do not take action to stop or correct.

Other obligations that the DOL argues the Appointing Fiduciaries, as plan fiduciaries, had to satisfy include: (1) an affirmative duty to protect plan participants from misleading information and to correct inaccurate or misleading information so that participants and beneficiaries will not be injured as a result of such information, pursuant to the holding in Varity v. Howe, 516 U.S. 489 (1996); and (2) perhaps additional disclosure duties beyond correcting misinformation. This latter duty arises if the fiduciaries are aware of particular threats to plan assets (e.g., information that could have an "extreme impact" on the plan assets), in which case they have the duty under ERISA § 404(a) to disclose to participants material information necessary to protect the plan participants and beneficiaries from those threats. See, McDonald v. Provident Indemnity Life Insurance Co., 60 F.3d 234 (5th Cir. 1995).

Further, the DOL takes the position that the 3rd Circuit holding in Confer v. Custom Engineering Co., 952 F. 2d 34 (3rd Cir. 1991), (held that a corporate officer who exercises discretion on behalf of a corporation is not a fiduciary unless he has an individual discretionary role over the employee pension plan) is not correct. The DOL argues that this position would effectively insulate officers from fiduciary liability to the extent that they are acting for the corporation. Instead, DOL argues that the position taken by 5th and 9th Circuits is correct (held that, in any action, a corporate officer may be acting both as a plan fiduciary and as a representative of the employer if the officer has discretionary authority or responsibility in the administration of the plan). See, Bannistor v. Ullman, 287 F.3d 394 (5th Cir. 2002); Kayes v. Pacific Lumber, 51 F.3d 1449 (9th Cir. 1995).

In response to arguments that corporate officers are prohibited from disclosing material nonpublic information under SEC Rule 10b-5 (even to the appointed plan fiduciaries), the DOL argues that the corporate officers could have taken one of the following three actions in the present case and such actions would have satisfied both the SEC requirements and the ERISA fiduciary obligations of the corporate officers: (1) disclose the poor financial condition of Enron to all shareholders (both public and plan participants) at the time questions about Enron's financial condition were initially raised internally; (2) eliminate Enron stock as a participant option and an employer match at the time questions about Enron's financial condition were initially raised internally; or (3) report to the SEC and DOL that potential misinformation is being provided to plan participants and beneficiaries at the time questions about Enron's financial condition were initially raised internally.

The brief further states that plan fiduciaries (both appointing and appointed) have an obligation to monitor the performance of plan investments and, even if the plan directs the manner in which plan assets are to be invested (such as in an ESOP), the plan fiduciaries have a duty to ignore those plan provisions if such investment directions become imprudent under ERISA section 404. See, Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995); Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995).

For participant-directed investments, ERISA section 404(c) does not automatically relieve the plan fiduciaries of responsibility for investment losses. The plan fiduciaries must prove that they satisfied all of the requirements under ERISA section 404(c). In addition, the plan fiduciaries are obligated to prudently select the investment options

made available under the plan and to monitor their on-going performance. In its brief, the DOL takes the position that the plan fiduciaries in Enron had an obligation to remove Enron stock as an option as soon as they had knowledge of Enron's failing financial condition and implies that the plan fiduciaries had an obligation to stop following participant instructions to invest in Enron stock at such time as well.

The DOL argues that, once the plaintiffs prove a breach of fiduciary duty and a prima facie cause of loss to the plan, the burden shifts to the plan fiduciaries to prove that the loss was not caused by the breach of duty. See, McDonald v. Provident Indemnity Life Insurance Co., 60 F.3d 234 (5th Cir. 1995).

Monetary relief against breaching fiduciaries is equitable when it restores the beneficiary to the position he would have been in if the plan fiduciary had not committed the breach of trust. See, Great-West v. Knudsen, 122 S. Ct. 708 (2002). Since the plaintiffs are seeking relief for fiduciary breaches, the DOL takes the position that the plaintiffs have a valid claim for equitable relief under ERISA section 502(a)(3); it is not a cause of action for benefits under ERISA section 502(a)(1)(B). Further, the plaintiffs may seek monetary relief to individual participants as equitable relief under ERISA section 502(a)(3); the equitable relief sought need not be limited to monetary relief that benefits the entire plan trust. See, Varity v. Howe, 516 U.S. 489 (1996).

The DOL concludes that, based on the plaintiffs' allegations, the ministerial trustee (Northern Trust), who was following instructions of the appointed plan fiduciary to begin a "lockdown period" when switching from one plan administrator to another, was a plan fiduciary because it followed directions that it knew at the time were imprudent and, thus, contrary to the interests of the plan participants and beneficiaries. This knowledge was based on public information available at the time regarding Enron's financial condition as well as requests Northern Trust was alleged to have received from plan participants to postpone the lockdown.

The DOL further states that Arthur Andersen LLP may be liable as a nonfiduciary party-in-interest who had actual or constructive knowledge of the circumstances that made the plan fiduciary's actions a breach of duty and who participated in that breach. As such, Andersen can be held liable for appropriate equitable relief under ERISA section 502(a)(3). See, Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000).

Employer's Tip: The obligations cited in the DOL's amicus brief are much broader than the duties employers have traditionally believed applied to plan fiduciaries. In particular, corporate executives and board members who appoint named plan fiduciaries and administrators have relied on the argument that they have only limited fiduciary liability with respect to employee benefit plans. If the DOL is successful in many of its assertions in this amicus brief, corporate officers and board members would be well advised to directly monitor material aspects of the operation of corporate employee benefit plans and to document the review that they undertake.

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