



Distressed Businesses & Their Business Leaders Face Liability Risks When Employee Benefit Obligations Mishandled

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By Cynthia Marcotte Stamer

Businesses leaders struggling to deal with economic setbacks frequently may be tempted to use employee benefit plan contributions or funds for added liquidity or otherwise fail to take appropriate steps to protect and timely deposit plan contributions or other plan assets. A long and ever-mounting series of decisions demonstrates the risks of yielding to these temptations for businesses that sponsor these plans and the business leaders that make these decisions.

The latest wave of recent fiduciary liability settlement orders, judgments and prosecutions of business owners, executives, board members, and other business leaders of distressed companies over the past year document the potential personal businesses and their leaders may face if their health, 401(k) or other employee benefit programs are not appropriately funded and administered as required by the Employee Retirement Income Security Act of 1974, as amended (ERISA).

While the U.S. Department of Labor Employee Benefit Security Administration (EBSA) long has aggressively pursued fiduciary responsibility enforcement actions against distressed or bankrupt companies and their officers, directors and other executives for their alleged involvement in the mishandling of their business' medical, 401(k) or other pension and other employee benefit programs, the ongoing economic downturn has fueled a sharp increase in these EBSA enforcement activities.

EBSA enforcement actions during 2009 continue to highlight the longstanding and ongoing policy of aggressive investigation and enforcement of alleged misconduct by companies, company officials, and service providers in connection with the maintenance; administration and funding of ERISA-regulated employee benefit plans. A review of the Labor Department's enforcement record makes clear that where the Labor Department perceives that a plan sponsor or its management fails to take appropriate steps to protect plan participants, the Labor Department will aggressively pursue enforcement regardless of the size of the plan sponsor or its plan, or the business hardships that the plan sponsor may be facing.

EBSA reports enforcing \$1.3 billion in recoveries related to pension, 401(k), health and other benefits during fiscal year 2009. EBSA has filed numerous lawsuits to compel distressed companies and/or members of their management to pay restitution or other damages for alleged breaches of ERISA fiduciary duties, to appoint independent fiduciaries, or both for plans sponsored by bankrupt or financially distressed companies.

Recent settlements and judgments obtained by the Labor Department and through private litigation document that officers and other members of management participating, or possessing authority to influence, the handling of health, 401(k) and other pension, or other employee benefit plans regulated by ERISA may be exposed to personal liability if these benefit programs are not maintained and administered appropriately. This risk is particularly grave when the sponsoring company becomes financially distressed or goes bankrupt, as the handling of employee benefit and other responsibilities becomes particularly disrupted and the lack of company liquidity often leaves executives and service providers as the only or best source of recovery for government officials and private plaintiffs.

In the December 2, 2009 decision in *Solis v. Struthers Industries Inc.*, for instance, a federal district judge ordered business leader Jomey B. Ethridge liable to pay \$303,084.61 to restore assets belonging to the 401(k) plan of bankrupt Struthers Industries in an ERISA fiduciary responsibility action filed by the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). Filed by the EBSA in the U.S. District Court for the Southern District of Mississippi, the *Struthers Industries* lawsuit alleged that Ethridge and Struthers Industries allowed employee contributions to be used for purposes other than providing benefits resulting in losses of \$310,084.57. According to court documents, Struthers Industries designed and built heat transfer and pressure vessels at its Gulfport facility. In 2001, its 401(k) plan had 278 participants and assets totaling \$8,279,083. The company filed for bankruptcy in 2003, and its assets were auctioned off in 2005. An independent fiduciary was appointed by the court in 2007 to manage the plan's assets. The court ordered Ethridge personally to pay \$303,084.61 in restitution to the plan for his involvement in the mishandling of the plan's assets. The order also bars Ethridge from acting as a benefit plan fiduciary in the future.

The *Struthers Industries* decision comes on the heels of EBSA's success in *Solis v. T.E. Corcoran Co. Inc.* last month in recovering more than \$89,000 from business owners and operators found to have breached fiduciary duties to the participants of the T.E. Corcoran Co. Inc. Profit Sharing Plan by improperly loaning plan assets to the plan sponsor and an affiliated company. The Labor Department sued T.E. Corcoran Co. and its owners, John F. Corcoran and Thomas E. Corcoran Jr., alleging that the company and its owners caused the plan to lend money to the two companies at below market interest rates, without terms of payment and without documentation in violation of ERISA. The suit filed in the U.S. District Court for the District of Massachusetts, also named as a defendant Coran Development Co. Inc., a company co-owned by the Corcorans. T.E. Corcoran Co. Inc. was the sponsor and administrator of the plan, while John and Thomas Corcoran were trustees of the plan, making all three fiduciaries and parties in interest with respect to the plan. ERISA specifically prohibits the use of employee benefit plan funds to benefit parties in interest.

The *Corcoran* judgment requires that the plan account balances of defendants John F. Corcoran and Thomas E. Corcoran Jr. be offset in the amount of \$89,273 plus interest to be allocated to the accounts of the other plan participants. The offset will make whole all of the accounts of the non-trustee participants. In addition, the court order appoints an independent trustee to oversee the final distribution of the plan's assets and the proper termination of the plan, requires the defendants to cooperate fully with the independent trustee in this process, and then prohibits them from serving as fiduciaries to any ERISA-covered plan for 10 years.

A complex maze of ERISA, tax and other rules make the establishment, administration and termination of employee benefit plans a complicated matter. When the company sponsoring a plan goes bankrupt or becomes distressed, the rules, as well as the circumstances can make the administration of these responsibilities a powder keg of liability for all involved. Companies and other individuals that in name or in function possess or exercise discretionary responsibility or authority over the maintenance, administration or funding of employee benefit plans regulated by ERISA frequently are found to be accountable for complying with the high standards required by ERISA for carrying out these duties based on their functional ability to exercise discretion over these matters, whether or not they have been named as fiduciaries formally.

Despite these well-documented fiduciary exposures and a well-established pattern of enforcement by the Labor Department and private plaintiffs, many companies and their business leaders fail to appreciate the responsibilities and liabilities associated with the establishment and administration of employee benefit plans. Frequently, companies sponsoring their employee benefit plans and their executives mistakenly assume that they can rely upon vendors and advisors to ensure that their programs are appropriately established, maintained and administered, and the maintenance of these arrangements with limited review or oversight by the sponsoring company or its management team.

In other instances, businesses and their leaders do not realize that the functional definition that ERISA uses to determine fiduciary status means that individuals participating in discretionary decisions relating to the employee benefit plan, as well as the plan sponsor, may bear liability under many commonly occurring situations if appropriate care is not exercised to protect participants or beneficiaries in these plans.

For this reason, businesses providing employee benefits to employees or dependents, as well as members of management participating in, or having responsibility to oversee or influence decisions concerning the establishment, maintenance, funding, and administration of their organization's employee benefit programs need a clear understanding of their responsibilities with respect to such programs, the steps that they should take to demonstrate their fulfillment of these responsibilities, and their other options for preventing or mitigating their otherwise applicable fiduciary risks.

Curran Tomko Tarski LLP Attorneys Can Help

If your business needs assistance with distressed or bankruptcy company, defined benefit plan funding or other employee benefit, human resources, corporate ethics, and compliance practices, or other related concerns or in responding to restructuring and bankruptcy, employment or employee benefits related charges, audits, investigations or suits, please contact Curran Tomko Tarski LLP Corporate Restructuring & Bankruptcy Chair G. Michael Curran at mcurran@cttlegal.com, (214) 270-1402, Employment Practice Chair Cynthia Marcotte Stamer at cstamer@cttlegal.com, (214) 270-2402, or another Curran Tomko Tarski, LLP attorney of your choice.

Mr. Curran provides legal counsel on all aspects of out-of-court reorganizations and workouts, as well as bankruptcy proceedings. He has represented debtors, debtors' and creditors' committees, and third party purchasers in a variety of complex factual and legal scenarios, and has also acted as special counsel. His experience includes substantial experience addressing labor and employment, employee benefit and compliance issues arising in connection with restructuring, bankruptcy and other significant business events and transactions.

Ms. Stamer is experienced with assisting employers, fiduciaries, bankruptcy creditors and trustees, investors, purchasers and others about employee benefit, labor and employment, compensation and other services related concerns involved with distressed businesses or benefit plans, bankruptcy and restructuring transactions and other corporate or plan related events. Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization and Chair of the American Bar Association RPTE Employee Benefits & Other Compensation Group and a Joint Committee on Employee Benefit Council Member, Ms. Stamer has advised and represented these and other business clients on employee benefit, labor and employment, compensation, employee benefit and other personnel and staffing matters for more than 22 years. Her experience includes significant experience representing and advising clients about the planning, implementation, risk management and defense of reductions in force and other labor and employment, employee benefits, compensation, insurance, compliance and other concerns affecting transactions involving bankrupt or distressed corporations. Ms. Stamer also speaks and writes extensively on these and other related matters. Among her many publications are her recent November, 2009 publication, *Calculation of Minimum Contributions Required For Single Employer Pension Plans: The Final Rules for The Measurement of Assets and Liabilities For Pension Funding Purposes under Final Treasury Regulation Section 1.430(d)*” and *A Proactive Approach To Hr And Benefits Planning For Mergers, Acquisitions, Downsizing, Reengineering And Other Organizational Changes.*” Persons interested in a copy of either of these publications may contact Ms. Stamer. For additional information about Ms. Stamer and her experience or to access other publications by Curran Tomko Tarski attorneys, see [here](#) or contact Ms. Stamer or Mr. Curran directly. For additional information about the experience and services of members of the Curran Tomko Tarski LLP team, see [here](#).

Other Helpful Resources & Other Information

We hope that this information is useful to you. Curran Tomko Tarski LLP offers a variety of updates, publications, training and other resources to assist its business clients and their leaders

meet their legal and operational challenges. If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your Current contact information – including your preferred e-mail- by creating or updating your profile at www.CTTLegal.com and/or register to receive our CTT Corporate Compliance, Risk Management and Internal Controls updates in blog form at [here](#). Some other recent updates that may be of interest include:

- [Certain Workforce Reductions May Trigger Plant Closing Notice Obligations](#)
- [Stamer Speaks To CPAs About “Privacy & Information Security: Managing Your Accounting Practice’s Liabilities & Counseling Your Clients” January 12, 2010](#)
- [Employee Benefit Plan Sponsors & Fiduciaries Urged To Audit Bonding, Staff & Service Providers Under ERISA Requirements](#)
- [Supreme Court: ERISA Participants Can Sue Fiduciaries For Individual Damages](#)
- [Enron Litigation Has Implications For Plan Sponsors And Management](#)
- [IRS Guidance For Correcting Employment Tax Overpayments Released](#)
- [Rising Defined Benefit Plan Underfunding & Changing Rules Create New Obligations & Risks For Business](#)
- [New GINA Genetic Information Based Employment Discrimination & Confidentiality Mandates Require Updated Employment Poster, Policies & Procedures Now](#)
- [Employer H1N1 Risk Management Must Include Management of Employment Liabilities](#)
- [Confirm Credentials of Individuals Dealing With Employee Benefit Plans & Adequacy of ERISA Bonding](#)
- [Department Of Labor Announces Plans To Expand Reporting Employee Benefits, Wage & Hour, OSHA & Other Reporting & Disclosure Requirements & To Implement Other New Employee Benefit Regulations](#)
- [Rising Defined Benefit Plan Underfunding & Changing Rules Create New Obligations & Risks For Business](#)
- [Stericycle Inc.’s Acquisition Of Medserve Inc. Challenged As Anticompetitive](#)
- [House Passes Chemical Facility Anti-Terrorism Bill Requiring “Chemical Facilities” To Implement Complex New HR & Other Safety & Security Mandates](#)
- [Sept 23 Deadline For Employer & Other Health Plans, Health Care Providers & Other HIPAA-Covered Entities & Business Associates To Comply With New HHS Health Information Data Breach Rules](#)
- [Don’t Be a “Rubber Stamp” – Information Concerning the Submission of the Toxic Release Inventory Form](#)
- [Tighten Employment, Ethics & Internal Controls Policies & Practices To Minimize DOJ & Other Antitrust Exposures](#)

Other Information & Resources

We hope that this information is useful to you. If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [here](#) or e-mailing this information [here](#) or registering to participate in the distribution of these Curran Tomko Tarski Compliance, Risk Management & Internal Controls distributions [here](#). For important information concerning this communication click [here](#). If you do not wish to receive these updates in the future, send an e-mail with the word “Remove” in the Subject [here](#).