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Third Circuit Affirms Finding that Withdrawal Liability Assessment Was Untimely

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When an employer withdraws from a multiemployer pension plan, the plan's trustees must notify the employer of the amount of its withdrawal liability and demand payment. Employers assessed with withdrawal liability often argue that the assessment is untimely because the trustees did not send it to the employer "as soon as practicable," as is required under 29 U.S.C. § 1399(b)(1). On the basis of dicta in the Supreme Court's opinion in *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192 (1997), practitioners have interpreted the defense to require a showing of *laches* – that is, undue delay and undue prejudice resulting from the delay. Historically, the defense seldom succeeded because employers could not establish that they were unduly prejudiced by a delay in the assessment. In *Allied Painting & Decorating Inc. v. International Painters and Allied Trades Industry Pension Fund*, 107 F.4th 190 (3d Cir. 2024), the Third Circuit became the first court to hold that an employer need not show prejudice at all to establish the defense. The decision is likely to be cited by employers in future cases and provides lessons for multiemployer plans that are owed withdrawal liability.

Background

Allied Painting & Decorating, Inc. (“Painting”) contributed to the International Painters and Allied Trades Industry Pension Fund (“the Fund”) on behalf of employees who performed painting services. In 2005, Painting ceased operations. While Painting’s closure would normally constitute a complete withdrawal, Painting was a “building and construction industry” employer that, under 29 U.S.C. § 1383, could only be deemed to have withdrawn if within the next five years it resumed the same type of work for which it previously remitted contributions to the Fund, but did not remit contributions for such work. In 2007, Painting’s owner formed a new company, Allied Construction Management (“Construction”), to perform the same type of work that Painting previously performed. The Fund did not learn of these operations until 2011 because, between 2008 and 2010, the Fund was implementing a new computer system that resulted in a backlog of hundreds of employers the Fund needed to investigate. In 2011, the Fund learned of Construction’s operations and determined that, as Painting’s successor, Construction’s work constituted a resumption of covered work within the statutory five-year period. Nevertheless, the Fund waited until 2017 to send Painting a notice and demand for the resulting withdrawal liability.

Painting subsequently commenced arbitration to challenge the Fund’s determination, asserting that, under the doctrine of *laches*, the Fund waited too long to assess the withdrawal liability, and that as a result of the delay, the employer suffered undue prejudice because documents necessary to defend against the Fund’s claim had been destroyed. The arbitrator agreed that the Fund did not assess the withdrawal liability “as soon as practicable” within the meaning of 29 U.S.C. §1399(b)(1), but rejected Painting’s *laches* defense because the alleged prejudice was not sufficient. The district court vacated the arbitrator’s award, concluding that Allied had in fact established the requisite prejudice because the evidence needed for it to assert any claims and defenses had been destroyed as a result of the Fund’s delay.

Third Circuit Ruling

On July 11, 2024, the Third Circuit affirmed that the Fund waited too long to assess the withdrawal liability and that any subsequent efforts to collect it were therefore untimely, but for a different reason. The Court held that when a multiemployer plan seeks to collect withdrawal liability, it must first show that it has satisfied the requirement in 29 U.S.C. § 1399 to assess the withdrawal liability "as soon as practicable." The Court noted that the Supreme Court's reference to *laches* in *Bay Area Laundry* was dicta, and rejected as contrary to the statutory text the arbitrator's and the district court's conclusion that failure to satisfy this requirement could be excused if the employer was not unduly prejudiced. Because the Fund had conceded that the withdrawal liability was not assessed "as soon as practicable," the Third Circuit concluded that the Fund could not prove an essential element of its claim, and therefore, any subsequent efforts to collect the withdrawal liability were void.

Proskauer's Perspective

The Third Circuit's decision is significant because it reframes the inquiry of whether a withdrawal liability assessment is timely from one that focuses on whether the *employer* suffered undue prejudice to one that focuses on whether the *plan* diligently exercised its rights to calculate the withdrawal liability, notify the employer, and demand payment. Because the Fund had conceded that the liability was not assessed "as soon as practicable," the Third Circuit did not have occasion to provide guidance on what factors the court would consider in future cases. Nevertheless, by holding that timely assessment of withdrawal liability is an element of the plan's claim to collect the liability, the decision underscores the need for multiemployer pension plans to ensure that they have an organized process for identifying, calculating, and notifying employers of their withdrawal liability. Previously, plans that failed to do so risked the liability becoming uncollectible because the employer could become insolvent in the interim. Now, plans also risk that their claim will be dismissed entirely.

The decision is also a reminder for employers to carefully assess their defenses when they are assessed withdrawal liability. The employer in *Allied Painting* was only able to assert the defense because it timely commenced arbitration to challenge the timeliness of the Fund's withdrawal liability assessment. Had it not done so, the defense would have been waived pursuant to 29 U.S.C. 1401.

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