Another Federal Court Refuses To Excuse An Employer From Making Interim Withdrawal Liability Payments

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"Case Alert: Court refuses to apply equitable exception to ERISA's "pay now, dispute later" rule."

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Bd. of Trs. of Pacific Coast Pension Plan v. Petersen-Dean, Inc., Civ. Action No. 18–6824, 2020 WL 2404613 (N.D. Cal. May 12, 2020) is the latest court decision to reject an employer's argument in favor of adopting an equitable exception to ERISA's "pay now, dispute later" rule.

Under ERISA, an employer that is assessed with withdrawal liability must begin making payments to the pension fund within 60 days of the assessment. Payments must be made regardless of whether the employer invokes the statutory exhaustion procedures for challenging the pension fund's withdrawal liability assessment (*i.e.,* requesting review and arbitration). The interim payments requirement is designed to protect pension funds from the risk that financially weak employers might become insolvent during withdrawal liability arbitrations, leaving the funds unable to collect in the event of a favorable award.

Some early appellate decisions created a narrow equitable exception to the statute's mandatory interim payments regime. *Robbins v. McNicholas Transp. Co.*, 819 F.2d 682, 685 (7th Cir. 1987); *Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621, 624 (5th Cir. 1994); *T.I.M.E.-DC, Inc. v. New York Teamsters Conf. Pension & Ret. Fund*, 580 F.Supp. 621 (N.D.N.Y. 1984), *aff'd* 735 F.2d 60 (2d Cir. 1984). In those jurisdictions, the courts will excuse an employer from making interim payments upon the employer's showing that: (1) the fund's underlying claim is frivolous, and (2) making the payments would cause the employer irreparable harm.

But later appellate decisions have declined to recognize such an equitable exception. *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137 (3d Cir. 1997); *Findlay Truck Line, Inc. v. Central States Pension Fund,* 726 F.3d 738 (6th Cir. 2013). Instead, they have held that the statute's mandatory language prevents courts from creating a contrary judge-made exception and that the statute must be enforced as written.

In jurisdictions in which the governing appellate courts have not decided the issue, the trend in the district courts has been to hold first that no equitable exception exists and then hold, in the alternative, that the employer could not even satisfy the equitable exception even if it did exist. *See, e.g., Boilermaker-Blacksmith Nat'l Pension Trust v. PSF Industries, Inc.*, 424 F.Supp.3d 1103 (D. Kan. 2019); *Boland v. Wasco, Inc.,* 50 F.Supp.3d 15 (D.D.C. 2014); *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Courtad Const. Sys., Inc.,* 439 F.Supp.2d 574 (E.D. Va. 2006). (Tucker Arensberg successfully litigated the *PSF* case in the District of Kansas, obtaining a judgment of $10.5 million in delinquent interim payments and additional statutory penalties.)

In the recent *Petersen-Dean* case*,* the court did a modified approach, where it declined to predict whether or not its appellate court (the Ninth Circuit) would recognize an equitable exception because the employer could not satisfy it in any event. Either way, the result was the same: the court granted the pension fund's motion for summary judgment and compelled the employer to make interim payments during the arbitration.

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