WRNewswire
An AALU Washington Report

Monday, 2 March 2015 **WRN# 15.03.02**

The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. *WRNewswire* #15.03.02 was written by Marla Aspinwall of Loeb & Loeb, LLP.

TOPIC: Attorney Who Set Up and Administered VEBA and Welfare Benefit Plans Found Liable Under ERISA

CITES: *Perez v. Koresko*, No. 09-988 (U.S.D.C. E.D. PA, 2015); *Solis v. Koresko*, 884 F. Supp. 2d 261 (E.D. Pa. 2012); *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1184 (3d Cir. 1996); 29 C.F.R § 2520.104-23(d)(2); ERISA Sections 404 and 406.

SUMMARY: Defendants set up over 500 multiple-employer death benefit plans with entities they controlled acting as the trustees. The Department of Labor ("DOL") brought a civil action alleging breach of fiduciary duty and mishandling of funds through a complex network of entities and accounts established and controlled by the defendants. Based on very egregious facts, the court made some harsh rulings. Finding numerous acts of fraud and self-dealing, the court imposed a lifetime ban prohibiting defendants from serving in any capacity with authority over an employment benefit plan; and required defendants to repay $19,852,115.

RELEVANCE: This case provides a reminder that courts will look through corporate and legal structures to hold individuals *personally* liable for egregious breaches of fiduciary duty. Be very conscious of ERISA's (1) fiduciary duty of undivided loyalty, (2) the "prudent man" standard, (3) prohibition against self-dealing, and (4) prohibition against transactions "likely to injure a plan" including transactions benefitting a "party in interest."

Finally, the case reminds us that ERISA's rules and potential penalties could apply to anyone who deals with retirement plans.

FACTS: Defendant John Koresko was an attorney and founder of two law firms. He and Jeanne Bonney, another lawyer from Koresko's law office, established the Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association and Single Employer Welfare Benefit Plan which hosted more than 500 employee death benefit plans and set up multiple trusts to hold life insurance policies and other plan assets, as well as other entities to act as plan trustees. All of these entities were controlled by Koresko.

The court found that over more than 12 years Koresko and his entities withdrew approximately $5 million in plan funds and borrowed another $35 million against plan life insurance policies. These misappropriated funds were:

(1) deposited into accounts controlled by Koresko,

(2) used to purchase real estate in Koresko's name in South Carolina and the Caribbean island of Nevis,

(3) paid to outside attorneys and lobbyists,

(4) used to fund operational expenses of Koresko's law firms and other entities, and

(5) used to pay Koresko's personal expenses, including boat rentals.

To achieve this, the defendants used a web of more than 18 different entities and 21 accounts at eight different banks.

This lawsuit brought by the DOL was just one of more than 20 law suits involving Koresko and his entities.

Korosko apparently resisted and delayed the investigation at every possible juncture. At one point, the court came close to throwing Korosko in jail for contempt of court because of his refusal to provide documents. During the course of the trial, the court froze bank accounts holding trust assets, appointed an independent fiduciary to oversee the trusts and trust assets, and removed the defendants from any position of authority regarding the trusts. Ultimately, the court held a bench trial, at which Koresko failed to appear.

RESULT: The court found that the defendants had used a complex web of entities and bank accounts to divert almost $40 million of plan assets. Roughly $5 million was withdrawn from plan accounts and about $35 million was borrowed against plan life insurance policies. Since $19,987,362 remained in the frozen accounts, Koresko and his entities were found liable for the missing balance of $19,852,115.

Koresko argued that many of the plans included in the trusts were exempt from ERISA coverage because they included only owner-employees. Thus, Koresko argued, the DOL was required to prove that the ERISA-covered plans owned more than 25% of the equity interest in the trusts.

The court acknowledged that the term "employee benefit plan" would not include a plan in which the only participants are 100% owners (or a married couple together owning 100% of the company) and that at least 25% of the total value of each class of equity interest in the entity must be held by ERISA benefit plan investors in order for assets to be considered "plan assets" subject to ERISA.

However, the court reasoned,

> [o]ne who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception.

Since Koresko offered no proof that 75% or more of plan assets came from plans covering only owners, the court rejected this argument.

Koresko also argued that plans were exempt from ERISA fiduciary responsibility provisions because they were unfunded "top hat" plans, as defined in 29 C.F.R § 2520.104-23(d)(2).

While the court acknowledged that a top hat plan, though covered by ERISA, can be exempt from ERISA's fiduciary obligations, the court found that the top hat exemption from fiduciary obligations is only applicable to pension benefit plans and not the welfare benefit plans that were at issue in this case.

The court went on to find that all of the Koresko entities and the individual defendants were ERISA fiduciaries, whether or not they were named in the plan documents as trustees. Citing *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1184 (3d Cir. 1996), the court reasoned that anyone who, in fact, exercises discretionary authority or control over a plan or its assets is a fiduciary—whether or not named as trustee in the plan documents. The fact that this control was exercised by means of various shell corporations and entities did not alter the reality of their control; nor was their individual liability limited by the "general principle of limited shareholder liability." On this basis, the court applied a very broad brush to reach all of the various parties facilitating Koresko's fraudulent acts, including all of the Koresko entities, the individual defendants, and many of the law firms and consulting firms providing services or advice to the trusts.

The court found that the misappropriation of plan assets and defendants' setting and paying their own fees from plan assets breached: the fiduciary duty of undivided loyalty established by ERISA § 404(a)(1)(A); the "prudent man" standard established by ERISA § 404(a)(1)(B); the prohibition against self-dealing in ERISA § 406(b)(1); and the prohibition against transactions "likely to injure a plan" set forth in ERISA § 406(a)(1)(D), specifically including transactions benefitting a "party in interest".

The court found that the bulk of outside legal fees, lobbying fees and consulting fees paid from plan assets were not "necessary for the establishment or operation of the plan." (Most of the fees related to defense of Koresko, individually, or entities controlled by him. Only those cases involving the trusts could properly be funded from plan assets.) The payment by the defendants of these amounts from the plans' money therefore constituted a breach of fiduciary duty.

The AALU *WRNewswire* and *WRMarketplace* are published by the Association for Advanced Life Underwriting® as part of the *Essential Wisdom Series*, the trusted source of actionable technical and marketplace knowledge for AALU members—the nation's most advanced life insurance professionals.