JOHNSON & KROL, LLC

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Court Upholds Arbitration Award Against Chicago Contractor

On September 30, 2009, a Northern District of Illinois judge upheld a $3.3 million dollar arbitration award against a Chicago construction firm. The court believed the contractor was trying to "game the system" by initially endorsing the authority of the arbitration panel to settle the dispute and then it turned around and challenged the panel's authority after the award was rendered.

The case initially arose from a payroll audit dispute between the contractor and a Chicago plumbers union. The funds filed notice of the dispute with the Joint Arbitration Board (JAB). Shortly thereafter, the contract filed its own grievance with the JAB claiming that some of the work listed in the audit was not within the plumber union's trade jurisdiction and was actually under the jurisdiction of various other locals. While the JAB hearing was being scheduled, the contractor invoked the dispute resolution mechanism under the Plan for the Settlement of Jurisdiction Disputes in the Construction Union. This "National Plan" as it is known has been approved by the AFL-CIO and various employer organizations in order to help unions and employers manage jurisdictional disputes over work assignments.

A hearing under the National Plan was held between the parties and the arbitrator ruled that the National Plan held jurisdiction over the JAB and the JAB hearings constituted "an impediment to job progress" and were prohibited under the National Plan. Despite the National Plan arbitrator's decision, the JAB conducted its hearing, which the contractor did not attend, and the JAB issued a decision finding the contractor had violated the CBA by permitting employees other than plumbers to do covered work and ordered the contractor to pay $3.3 million in delinquent contributions, liquidated damages, interest and fines.

The contractor filed suit in federal court attempting to vacate the JAB's ruling. The judge initially noted that courts are reluctant to interfere with arbitration awards in order to protect the integrity of the dispute resolution system. Further, the judge was displeased with the contractor's conduct for two reasons. First, the judge felt that the contractor should have presented its arguments about the proper forum for dispute resolution to the JAB rather than not appearing at all at the JAB hearing. Secondly, she noted that the contractor voluntarily filed a grievance with the JAB to invoke its authority to handle the dispute prior to filing with the National Plan. The contractor used the National Plan to make his arguments and when it got the result it was looking for, it failed to appear to make a similar argument in front of the JAB hearing. The court found that the contractor could not use the federal court to dispute the JAB's authority when the contractor itself did not make such arguments before the JAB. Accordingly, the court dismissed the case.

The contractor is considering an appeal and both parties agree that fundamental questions still remain. The court did not explain why it dismissed the case relating to the enforcement of the National Plan arbitrator's decision.

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Retiree Who Engaged in Disqualifying Employment Required to Repay Pension

A U.S. District Court in New York ruled that an appeals committee for a multiemployer pension fund did not act arbitrarily when it determined that a retiree engaged in disqualifying employment following his retirement rendered him ineligible for his retiree benefits. Further, the court held that the plan was entitled to the more deferential standard of review because there was not a conflict of interest in making its decision.

Disqualifying Employment

The participant applied for early retirement benefits in 2002 and in his pension application he stated that he had not worked in the sheet metal industry since mid-1997 and he had not engaged in disqualifying employment since that time. The fund began making monthly pension payments until 2006 when it conducted an audit and determined that the retiree had engaged in disqualifying employment from 1999-2005.

In the 1980s, the participant started two companies, one of which was a contributing employer to the fund. The participant argued that he did not work while he was the owner of the company and therefore he never engaged in disqualifying employment. The fund's audit revealed Social Security Administration records of the participant receiving earnings from his company from 1999-2005.

The pension fund determined that the participant was not eligible for retiree benefits and demanded reimbursement of the $76,194 it had already paid to him. The participant appealed and the appeals committee denied his appeal, finding that he had engaged in disqualifying employment because he worked for a contributing employer and worked for an employer in the same or related business as the contributing employer.

The court found that the committee's decision was not arbitrary and capricious because the company was a contributing employer to the pension fund and the participant's Social Security earning statements clearly showed that he had received earnings from his company Sheet Metal Master after his early retirement benefits began. Under the plan, this constitutes disqualifying employment. The court also stated that the participant's work with the other sheet metal company was disqualifying employment. Accordingly, the court found that the appeal committee's decision was proper and the participant was required to reimburse the plan for the overpayment.

Conflict of Interest

The court's ruling also reiterated J&K's previous opinion that a dually represented board of trustees creates limited conflict of interest issues. Here, the court stated that a conflict of interest in denying benefits should prove less important if an administrator takes active steps to reduce potential bias and to promote accuracy. The court continued by stating that the establishment of a committee of union and management trustees to make decisions on appeals is an active step to reduce or eliminate any conflict and does moderate any potential conflict.

Obama Administration Rescinds Rule Changing Forms LM-2 and LM-3

In January 2009, the Bush Administration proposed a final rule updating the Form LM-2, the annual financial disclosure report filed by large unions. The changes to the Form required additional disclosure of the compensation amounts received by labor organization offices and employees, further details about parties buying and selling union assets and additional information regarding specified types of receipts.

The rule was to take effect February 20, 2009, and would apply prospectively to unions with fiscal years beginning on or after July 1, 2009. In February 2009, the Office of Labor Management Standards (OLMS) published a final rule delaying the effective date of the new regulations published in January 2009. A number of subsequent final rules continued to extend the effective date. However, on October 13, 2009, OLMS published a final rule rescinding the January rule in its entirety.

The OLMS notice rescinding the final rule stated that after reviewing the rule and comments on the rule, though it fully recognizes and supports the importance of reporting and disclosure, it felt that the rule went too far. The notice states that the Labor-Management Reporting and Disclosure Act requires a balancing of transparency with the need to maintain union autonomy without overburdening unions with reporting requirements and the Form LM-2 under the January rule did not adequately consider that balance.

Court Rules ERISA Does Not Bar Garnishment of Criminal Defendant's Pension

A Michigan district court held that ERISA does not preclude the federal government from garnishing the pension benefits of a man who pleaded guilty to identity theft and other crimes. The court found that Congress created an exception to ERISA's anti-alienation provision when it enacted the Mandatory Victims Restitution Act of 1996 (MVRA). The MVRA requires defendants to pay restitution to their victims without consideration of their financial circumstances.

In this case, Charles Miller pled guilty to fraudulently taking money from an elderly woman. In addition to his prison sentence, the judge ordered the defendant and co-defendants to pay nearly $150,000 in restitution to the victim. The federal government filed a writ of garnishment that required his employer to pay a portion of his pension benefits in order to satisfy the restitution order.

Miller objected to the writ arguing that his pension funds were exempt from garnishment because of ERISA's anti-alienation provisions. Miller cited a U.S. Supreme Court case which held that the anti-alienation provision prohibited any attempt to attach pension benefits to satisfy a judgment, even where the participant engaged in criminal activity.

The Michigan judge rejected this argument and found that Congress provided an exception to the anti-alienation provision when it enacted MVRA, six years after the U.S. Supreme Court decision.

Apprenticeship Loan Not Dischargeable in Bankruptcy

A bankruptcy court ruled that a union apprenticeship program loan was not dischargeable in a bankruptcy proceeding. The former apprentice, Michael Kesler, entered into five apprenticeship loan agreements with the Central Indiana District Council of Carpenters Joint Apprentice and Training Fund (JATF) in exchange for carpentry training from the JATF through both classroom instruction and field work.

The agreements provided that Kesler would have an obligation to repay the cost of the training in one of three ways. He could repay the loan through in-kind credits earned by working for a signatory employer. His second option was to repay the loan in cash if he worked in the carpentry industry for a non-signatory employer. Lastly, he could repay the loan through a combination of in-kind and cash payments. A provision of the agreement stated that employment in the carpentry industry with a non-signatory employer was a breach of the agreement and the acceleration clause in the agreement would be triggered and all amounts owed would be due immediately. Kesler breached the agreement by accepting a job in the carpentry industry with a non-signatory employer. The JATF demanded immediate repayment and filed suit against him in state court seeking repayment of all amounts, including interest, costs and attorneys' fees. A default judgment was entered against Kesler for $29,118.18. Kesler paid approximately $1,800 to the JATC towards the judgment, but a few months later he filed a Chapter 7 bankruptcy petition.

Kesler argued that the apprenticeship loan debt should be discharged in bankruptcy. He first argued that ERISA precluded the JATF from seeking monetary damages. He also argued that bankruptcy law did not prevent discharge of the debt because the amounts owed were not educational loans within the meaning of bankruptcy law. In turn, the JATF argued that case law supported that the loan agreements met the definition of an educational loan under the bankruptcy law.

The bankruptcy court reviewed the case law presented by each party and found that Kesler's case law was misapplied and the case law in support of the JATF was virtually identical to the facts in the Kesler case. The court held that there was no dispute that an agreement existed as there were five signed loan agreements and each agreement contained the same language stating that a loan existed between Kesler and the JATF. Further, the agreements to repay the loans were entered into prior to the educational services Kesler received from the training program.

Accordingly, the court held that an educational loan agreement existed between Kesler and JATF and therefore, Kesler could not discharge the loan in bankruptcy unless he could show that paying the loan would cause "undue hardship." Kesler failed to argue that paying the loan would cause undue hardship to him or his dependents. For these reasons, the court found that Kesler was responsible for repaying the apprenticeship loan.

Union-Owned Resort Involved in Funds Diversion Dispute to Close

The California-based Plumbers and Pipe Fitters Local 38 has been accused by the Department of Labor of diverting millions of dollars from pension plans to union-owned resorts and spas in California. In 2004, the DOL sued the benefit fund trustees of Local 38 alleging ERISA violations for diverting assets from five employee benefit funds towards the upgrading of a hotel-resort complex in Northern California ran by Local 38. The government alleged that the trustees drained $76 million from the pension fund, including $50.5 million transferred to the convalescent fund which endured recurring losses.

In an effort to settle the DOL allegations, Local 38 consented to yield control of the benefit plans to court-appointed fiduciaries, and make a payment of $3.5 million to the pension plan through its insurer. The local was also held liable for a portion of the proceeds from the expected sale of the resort and spa. The DOL alleged that the trustees maintained inadequate financial control, violated plan documents, engaged in self-dealing, illegally diverted funds to build and maintain facilities and profited from interest on a $6 million loan. Most trustees named in the suit have been permanently barred from serving as fiduciaries or service providers to union benefit plans.

An independent fiduciary was appointed to manage the union-owned resort and make decisions regarding the disposition of the property. Now the operator has announced that the resort is bankrupt. The DOL issued a statement that it does not believe the bankruptcy of the resort will affect the Department's settlement with the trustees and that the independent fiduciary will continue to manage the property's business.

The property has been for sale for a few years and once it is sold, Local 38 will receive the first $4 million owed on a loan originated in 2000. The pension plan will receive the next $6 million according to the consent decree.

Court Holds Union's Referral Procedures Did Not Constitute Racial Discrimination

The Court of Appeals for the Eighth Circuit recently upheld a district court's decision that five current and former African American members of a local union in Kansas City, Missouri failed to demonstrate that the union's referral hall process had a discriminatory impact on African American workers.

The plaintiff members alleged that the union intentionally discriminated against African American members based on their race because the union's "first in, first out" referral procedure had a disparate impact on African American members. Additionally, the plaintiffs alleged that the union interfered with their right to contract by referring white members to employers before referring African American members who were higher on the union's out-of-work list.

In support of their claims at trial, the plaintiffs introduced expert testimony and statistical analysis to demonstrate that white members worked significantly more hours than African American members. The district court found the expert's testimony and analysis unreliable because it failed to take into account individual characteristics of the plaintiff members and other race-neutral reasons for the discrepancy in hours worked. Instead, the Court noted there were "significant impediments" to the employability of the plaintiffs.

The district court reasoned that some of the plaintiffs had been deemed "not for re-hire" by several large contractors, had placed self-imposed limits on where and with whom they would work and were inaccessible to receive work referrals. In addition, the Court noted that several plaintiffs created the overall appearance of being unreasonable or lacked initiative. Finally, the district court found that the union had no control over the number of hours worked by members, their conduct or motivation, the number of hours worked by African Americans on the out-of-work list and when or whether members were laid off. Rather, the union's discretion in hiring decisions was limited by its "first in, first out" referral program.

The decision in this case underscores the importance of maintaining a "first in, first out" referral system that limits the union's discretion in hiring decisions and documents employer decisions to terminate.

The Supreme Court Makes Life Easier for Plan Administrators

The U.S. Supreme Court ruled in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*[1] that retirement plans may rely on plan terms and beneficiary designation forms in determining the proper recipient of survivor benefits. This ruling resolves a split among the federal courts. Some federal courts have held that plans had to recognize an ex-spouse's waiver of survivor benefits in the divorce decree, even if she remained the designated beneficiary on the plan's forms after the divorce.

Facts

William Kennedy was a participant in the DuPont Savings and Investment Plan ("SIP"). He named his wife as the designated beneficiary of the SIP benefit on the plan's designated beneficiary form. The couple divorced and the wife explicitly waived her survivorship rights to her husband's SIP plan. However, the participant never changed the designated beneficiary form after the divorce. The participant eventually died and the SIP benefit was claimed by both the estate and the ex-wife. The plan decided that the ex-wife was still the designated beneficiary and paid the benefit to her. In turn, the estate sued the plan.

The district court held that the divorce decree was a valid waiver of the ex-wife's rights to the benefit and ordered the plan to pay the benefit to the estate. The Fifth Circuit Court of Appeals reversed the ruling, holding that the wife's waiver violated ERISA's antialienation provision by indirectly transferring her interest to the estate. The appellate court held that this transfer could only be accomplished through a QDRO, which was never done in this case. Therefore, payment to the ex-wife was proper.

Supreme Court's Ruling

The Supreme Court arrived at the same result as the Fifth Circuit; however, it got there on an entirely different basis. First, the Court looked to basic principles of trust law and held that the ex-wife's waiver was not an assignment or alienation of her right to the benefit. Secondly, the Court held that the plan was correct in ignoring the waiver because the ex-wife remained the designated beneficiary according to the plan document. Lastly, the Court held that a QDRO could not be used to waive a benefit since a QDRO is used to create or recognize an alternate payee's right to a benefit and in this case, the participant has the right to the benefit and clearly does not fall within the definition of "alternate payee."

The Court's overarching theme in its opinion relates to the importance of adhering to the language in the plan document. In its ruling, the Court noted that ERISA requires plan administrators to follow the governing plan document and instruments and here, the plan was correct in refusing to go beyond the four corners of the plan document to determine the correct beneficiary.

[1] *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S.Ct 865 (2009).

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Ohio Contractor Must Pay Prevailing Wages for Installation at Ballpark

An Ohio state appellate court ruled that the installation of lights at a public baseball park constituted an alteration to a public improvement project requiring the payment of prevailing wages. The court held that the installation was an "alteration" rather than a "new construction" project.

Ohio prevailing wage law requires contractors to pay the prevailing wage rate on public improvement projects when the project's estimated cost surpasses a certain financial threshold. The city estimated that the overall cost would fall below the threshold amount for new construction; therefore prevailing wages were not required. Two employees installed the lights and were paid less than the prevailing wage. As a result, the Ohio Department of Commerce filed suit against the contractor for failure to pay the prevailing wage rate.

The contractor argued that the installation of the lights was not a public improvement project because a baseball field is a "patch of dirt" and not a physical structure for purposes of the prevailing wage rate. The court rejected this argument and reviewed the definition of public improvements which expands beyond a mere physical structure, including roads, alleys, ditches, etc. Further, the court reviewed the statutory definition of structure of work and it too includes a broad definition. Accordingly, the court held that given the broad definitions of public improvement and structures of work, the installation of lights on the baseball field fits within those broad definitions as a public improvement.

The court also rejected the contractor's argument that the installation was "new construction" rather than an "alteration." According to the court's opinion, if the project was an "alteration," then the contractor was required to pay prevailing wages because the cost of the project was above the minimum threshold required for the payment of prevailing wages for alterations. However, if it was determined that it was "new construction," payment of prevailing wages was not necessary because the entire cost was below the threshold for the requirement of paying prevailing wage rates.

The court concluded that the lighting installation "fell more comfortably" into the category of alteration of a public improvement than into new construction. Therefore, the court ordered the contractor to pay the employees the prevailing wage rate for hours worked on the project.