

# FBA Labor & Employment Law Section

## Monthly 3<sup>rd</sup> Circuit Updates

### July 2011

In *In re Marcal Paper Mills, Inc.*, the Third Circuit addressed the question whether “withdrawal liability” payments under the federal Employee Retirement Income Security Act (ERISA), owed by a bankrupt employer but attributable to the post-petition time period, constitute “administrative expenses” entitled to priority under the federal bankruptcy code, or should instead be classified as general unsecured claims. The Third Circuit concluded that post-petition withdrawal liability payments constitute “administrative expenses” and should receive priority.

Under the federal bankruptcy code, administrative expenses are defined as the actual, necessary costs and expenses of preserving the bankrupt estate, including “wages, salaries, and commissions for services rendered” to the estate after the filing of the bankruptcy petition. Administrative expenses are entitled to priority over the claims of unsecured creditors. The burden of demonstrating that an expense deserves priority as an administrative expense lies with the party asserting the priority.

“Withdrawal liability” was created under the Multiemployer Pension Plan Amendments Act (MPPAA), which amended ERISA to address potential underfunding of multiemployer defined benefit pension plans. If an employer withdraws from such a plan for any reason, the employer is liable for its proportionate share of the plan’s unfunded vested benefits, *i.e.*, the difference between the present value of the plan’s vested benefits and the current value of the plan’s assets, generally based on the employer’s contribution share over the prior five years.

In *Marcal*, the employer continued to function and to employ union employees after filing its bankruptcy petition. The union employees worked under a labor contract calling for contributions to a multiemployer defined benefit pension fund. “[I]t is clear that the covered employees were required to perform work post-petition in order to keep {the bankrupt employer} in operation, unquestionably conferring a benefit to the estate. Pursuant to the continued {labor contract} and pension plan, {the bankrupt employer} promised to provide pension benefits in exchange for that post-petition work.” Therefore, the “portion of the withdrawal liability which corresponds to that post-petition work is owed ... in fulfillment of the promise ... to provide pension benefits in consideration for that necessary post-petition work.” In so holding, “we harmonize the purposes of the Bankruptcy Code and ERISA, as amended by the MPPAA, as we are required to do.”

The Third Circuit appears to be the first Circuit Court to address this issue directly.

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