

# Terminating an ERISA Retirement Plan In Bankruptcy:

Can a Bankruptcy Trustee Serve Two Masters?

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## INTRODUCTION

Many corporate debtors in Chapter 7 cases will have sponsored a retirement plan. Among the most vexing problems for a bankruptcy trustee can be the administration and termination of such a plan. Section 704(a)(11) of the Bankruptcy Code (the “Code”) requires the trustee to perform the obligations of the retirement plan administrator.<sup>1</sup> Those obligations will normally include terminating the plan, because after liquidation there will be no surviving entity to administer it. In so doing, the trustee must balance conflicting duties to plan participants, to creditors, and to the bankruptcy court. Further complicating matters, the Code often conflicts with the Employee Retirement Security Act of 1974 (“ERISA”), the governing statute for retirement plans.<sup>2</sup> As a result, the trustee who is also performing obligations as plan administrator must potentially serve two masters: the bankruptcy court and the United States Department of Labor (the “Department”).

In terminating a plan, the bankruptcy trustee must navigate a minefield of ambiguities and conflicts. Does the trustee actually become a plan administrator, or merely perform the obligations of one? Does the bankruptcy court have jurisdiction to authorize specific actions to terminate a plan? Can the bankruptcy court rule that the trustee has fulfilled all duties under Code § 704(a)(11), or release the trustee from liability under ERISA’s six year statute of limitations? Who will pay plan administration costs if estate or plan funds are insufficient? Precious little legislative history is available to clarify these issues.<sup>3</sup>

The Department is likely to challenge bankruptcy court jurisdiction on the grounds that Code § 704(a)(11) was intended to expand, not undermine, ERISA protections for plan participants, and that normal bankruptcy rules do not apply. The trustee’s bankruptcy-centered focus will naturally lead to arguments that the Department’s concerns for plan participants can be most efficiently addressed in the context of a bankruptcy case, and that ERISA was mostly designed for operational employers, not bankruptcy trustees. These opposing viewpoints have not yet been fully explored by the courts, but recent cases suggest a developing split.

## BACKGROUND

### THE ADDITION OF 11 U.S.C. § 704(a)(11) UNDER THE 2005 ACT

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“the 2005 Act”) added at least eight new duties for Chapter 7 Trustees, including responsibility for certain retirement plans under Code § 704(a)(11).<sup>4</sup> The Code now provides that

“if at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employment benefit plan, [the trustee shall] continue to perform the obligations of the administrator”.<sup>5</sup>

This duty also applies to Chapter 11 trustees, pursuant to Code § 1106(a)(1). “The fundamental duties of estate maximization and diligence require a trustee to pursue these new duties under [the 2005 Act] with all necessary attention and vigilance, and

will likely impose substantial administrative expenses on the estate, thereby reducing the distribution to creditors.”<sup>6</sup>

## ERISA GENERALLY

ERISA exists in part to protect employees from being deprived of benefits due to under-funded plans being terminated by employers.<sup>7</sup> Congress also intended for ERISA to protect participants in employee benefit plans “by establishing standards of conduct, responsibility, and obligations for fiduciaries, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.”<sup>8</sup> Consequently, ERISA sets forth in detail the exclusive procedures for terminating retirement plans, including notice to affected parties, review by the Department, and final distribution.<sup>9</sup>

The Department supervises and regulates retirement plans through two separate agencies. Generally speaking, the Pension Benefit Guaranty Corporation (“PBGC”) insures, supervises, and administers defined *benefit* plans, in which the employer chooses plan investments and pays a fixed pension on retirement.<sup>10</sup> The Secretary of Labor, through the Employee Benefits Security Administration (“EBSA”), develops, communicates, and enforces policies and regulations applicable to defined *contribution* plans, in which each employee has a separate account.<sup>11</sup> Regardless of the agency, it is axiomatic that the assets of a plan are neither property of the debtor nor of the bankruptcy estate. Instead, the assets are held in trust for plan participants.<sup>12</sup>

In a termination of a retirement plan, the assets or benefits of each participant will be moved to new accounts. Nothing in § 704(a)(11) *requires* trustees to terminate a plan, but as a practical matter, Chapter 7 or Chapter 11 liquidating trustees will have little choice when a business is being liquidated. Employers are permitted to voluntarily terminate retirement plans, but a bankruptcy trustee is well advised to seek court permission.<sup>13</sup> Fortunately for the trustee, the decision “to terminate an ERISA plan is a settlor function immune from ERISA’s fiduciary obligations.”<sup>14</sup>

Once the decision has been made to terminate a plan, the trustee, in the capacity of a plan administrator, becomes responsible for supervising the plan termination. Unlike the *decision* to terminate, the trustee *will* be treated as exercising fiduciary responsibility for discretionary actions taken during the termination process.<sup>15</sup> The termination process often requires the bankruptcy trustee to “engage outside legal counsel and pension administration firms to (i) amend the plan to comply with leg-



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islative, case law and regulatory developments; (ii) audit the plan where applicable; (iii) prepare and file annual statements; (iv) prepare benefit statements and calculate accrued benefits; (v) notify participants and beneficiaries of their benefits under the plan; and (vi) seek a determination letter from the Internal Revenue Service (IRS) concerning the status of the plan in connection with its termination.”<sup>16</sup> In the case of a defined benefit plan, the trustee may purchase an annuity but may not merge the plan into another existing plan.<sup>17</sup> The termination process is complete when all assets have been distributed or “rolled over,” and the final forms have been filed with the Department and the Internal Revenue Service.<sup>18</sup>

## CONCURRENT DUTIES AS ERISA FIDUCIARY AND BANKRUPTCY TRUSTEE

ERISA Section 3, as referenced in Code § 704(a)(11), defines a “fiduciary” as a person or entity having “any discretionary authority or discretionary responsibility in the administration of” a plan.<sup>19</sup> The plan sponsor (i.e. the employer or owner of the business) is usually the trustee and “named” administrator. Usually, the employer will also hire a third party administrator to handle the day-to-day operation of the plan. The Department can appoint an administrator where none can be identified.<sup>20</sup> ERISA does not specifically include bankruptcy trustees in its definition of “administrator.”<sup>21</sup> However, the trustee will be considered an ERISA fiduciary to the extent he or she exercises discretion over how the plan is terminated.<sup>22</sup>

An ERISA fiduciary must discharge his or her duties “solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”<sup>23</sup> Any such breach of ERISA fiduciary duties may result in the fiduciary being held personally liable for restoration of funds to the plan resulting from the breach.<sup>24</sup> However, the fiduciary will not normally be liable for a breach committed before or after the fiduciary’s term.<sup>25</sup> After exhausting internal claims procedures under a plan, aggrieved participants can seek relief for breach of fiduciary duty under ERISA.<sup>26</sup>

The Supreme Court has addressed the standard of review for breach of ERISA fiduciary duty in the context of claims adjudication for denial of benefits.<sup>27</sup> The statute of limitations for a breach of an ERISA fiduciary duty is six years from the date of the breach, or from the date of discovery of a breach involving fraud or embezzlement. However, where a plaintiff has actual knowledge of the breach, the limitations period is only three years.<sup>28</sup>

Even without ERISA responsibilities, the fiduciary obligations of a bankruptcy trustee are extensive. They include “duties owed to secured creditors, priority creditors, and the debtor, as well as post closing obligations.” They also include “loyalty, distribution maximization, diligence, due care, accountability, competence, claims review, information disclosure, candor, civility, proper litigation preparation and conduct, impartiality and its appearance, enforcement, supervision, compliance, and good faith and fair dealing.”<sup>29</sup> Bankruptcy trustees practicing in the First,

Second, Ninth, and Eleventh Circuit Courts are held to a simple negligence standard with regard to breach of fiduciary duties; the other circuits apply a “gross negligence or willful misconduct” standard.<sup>30</sup> The Code grants complete immunity for acts undertaken as trustee and authorized by the bankruptcy court.<sup>31</sup> Because the trustee is a court officer, the court “has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties.”<sup>32</sup>

Bankruptcy liquidation requires the trustee to *expeditiously* reduce “the debtor’s property to money, for equitable distribution to creditors.”<sup>33</sup> As a result, the trustee has experience in finalizing a corporation’s affairs, including filing final tax returns and maintaining financial records.

## THE EMERGING CONFLICT TRUSTEES HAVE CONFLICTING DUTIES TO PLAN PARTICIPANTS AND CREDITORS

Even before the 2005 enactment of § 704(a)(11), bankruptcy trustees could be required to comply with retirement plan termination requirements, as their duties to administer the case implicitly included termination of retirement plans.<sup>34</sup> While the Code now expressly imposes upon bankruptcy trustees the responsibility for administering—i.e., terminating—retirement

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The bankruptcy trustee’s fiduciary duty to maximize the bankruptcy estate for the benefit of creditors gives the trustee “an interest conflicting with that of the [plan participants].”<sup>36</sup> For the Chapter 7 trustee, the conflict of interest results not from pressure to pay operating expenses, but rather from the duty to maximize the bankruptcy estate for the benefit of creditors.<sup>37</sup> When there is a plan deficiency, the plan is *potentially* a creditor. However, funds withheld by the debtor from employees’ paychecks are not property of the estate; rather, they belong to the respective employees.<sup>38</sup> While it is true that there is a conflict in the trustee’s duties to the plan and to the estate, there can be no improper preference by the trustee because the priority of plan reimbursements is clearly set out in the Code.<sup>39</sup> Nevertheless, the trustee’s fundamental duty of diligence will result in a reduction

of estate funds available to creditors, in order to pay for at least some plan termination expenses and attorneys' costs for the benefit of plan participants.<sup>40</sup>

### **CODE § 704(a)(11) DOES NOT MAKE THE TRUSTEE THE "PLAN ADMINISTRATOR" OR "TRUSTEE"**

11 U.S.C. § 704(a)(11) does not result in the "appointment" of the trustee as a plan administrator. Both the plain language of the statute and the context of the trustee's responsibility make clear that the true fiduciary responsibility lies with the debtor, not the trustee. Nevertheless, the Department maintains that bankruptcy trustees acting under § 704(a)(11) authority become plan administrators because they exercise discretion over a retirement plan.<sup>41</sup> Congress, the Department asserts, intended trustees to serve as appointed plan administrators.<sup>42</sup>

The Department's arguments notwithstanding, if Congress had intended to appoint bankruptcy trustees as plan administrators, it could have done so. Instead, the plain language of § 704(a)(11) directs trustees to "continue to perform the obligations" of the administrator.<sup>43</sup> This is not an artificial distinction: although a trustee performs some obligations of the debtor, the debtor and trustee remain two separate parties. Examination of § 704(a)(11) in the context of the other new trustee duties in the 2005 Act makes clear that the trustee's liabilities should be limited to actions taken in the bankruptcy case. For example, in § 704(a)(12), the 2005 Act also added language directing trustees to "transfer patients from a health care business that is in the process of being closed."<sup>44</sup> Yet, this provision does not transform the trustee into an ambulance driver - it merely requires the trustee to arrange for transfer of patients.

In fact, the Trustee's situation is similar to a qualified termination administrator ("QTA") for an abandoned individual account plan, where no responsible plan sponsor or plan administrator can be located.<sup>45</sup> A QTA is essentially forced into service to the same extent as a bankruptcy trustee. Exculpation of a QTA is explicitly mandated under ERISA for QTAs: except for monitoring and selection of service providers, and selection of annuity providers, if a QTA follows the regulations for terminating the plan, he or she is deemed to satisfy ERISA's fiduciary responsibilities under 29 USC § 1104. The plan's sponsor (i.e. the debtor or owner) retains fiduciary liability.<sup>46</sup>

### **PAYMENT OF FEES AND DELINQUENT CONTRIBUTIONS**

Code § 704(a)(11) does not say how plan termination expenses are going to be paid for, i.e. from the bankruptcy estate or the plan. "[T]he Bankruptcy Code provides no guidance to the Trustee in how to pay for the costs of administration generated by the performance of his plan administrator duties."<sup>47</sup> Provided the terms of the plan allow it, an ERISA fiduciary may receive reasonable compensation from plan assets for services rendered and for reimbursement of expenses.<sup>48</sup> According to the Department, reasonable expenses incurred in implementing a plan termination would generally be payable by the plan. This would include expenses incurred in auditing the plan, preparing and filing annual reports, preparing benefit statements and calculating accrued benefits, notifying participants and beneficiaries of their benefits under the plan, and, in certain circumstances, amending the plan to effectuate an orderly termination that ben-

efits the participants and beneficiaries.<sup>49</sup>

How does a trustee ensure that he or she and counsel will be compensated for protecting the interests of the participants? From the perspective of bankruptcy case administration, the estate may not have the resources to fund this task. Even if it does, does pursuit of a claim for a single class of non-creditors — i.e., plan participants — benefit the estate as a whole so that it should be compensated from general funds? Under Bankruptcy Code §§ 330(a)(7), part of the 2005 Act, Chapter 7 trustees' fees are paid subject to the commission limits of § 326, regardless of whether the debtor was the administrator of an ERISA plan.<sup>50</sup> And, a trustee has a duty to act as plan administrator regardless of any expectation of payment.<sup>51</sup> Nevertheless, from the perspective of the Department, there are statutory prohibitions against any payment of fees and expenses from *any plan assets*—whatever the source—unless those fees and expenses are permitted under the terms of the plan and consistent with the terms of ERISA.

Separate and apart from the jurisdictional issue, trustees should be aware that, even in cases in which plan documents permit payment of administrative expenses, e.g. trustee fees associated with plan terminations, ERISA requires that those expenses be reasonable pursuant to 29 U.S.C. § 1108(b)(2).<sup>52</sup> The standard of reasonableness under 29 U.S.C. § 1108(b)(2) is *not* identical to the "reasonable" standard typically relied upon by trustees pursuant to Code § 330 when they seek Court approval of their compensation in non-ERISA matters.

The issues involved with payment of expenses and delinquent contributions were addressed in *In re Tom's Foods Inc.*<sup>53</sup> The debtor was a distribution company with 1,400 employees. Counsel for the Chapter 7 Trustee requested final fees of \$151,350.00 from the estate, for administration of the Qualified Pension and Profit Sharing Plan (\$183,000 in fees for the Plan had already been paid to Counsel from the Plan assets). The Plan was substantially under funded when the company was sold as a going concern.<sup>54</sup> Among other contested issues, former employees objected to the fees against the estate for administering the Plan. They argued that counsel had an undisclosed conflict of interest in providing legal services to both debtor and the Plan, because the Plan was a creditor of the estate. Counsel argued that it had merely assisted in administering the Plan.<sup>55</sup>

Applying the reasonableness standard, the bankruptcy court found that counsel was required to provide necessary services to the Debtor in administering the Plan, which was an integral part of the business.<sup>56</sup> The fees were found reasonable, and there was found to be no conflict of interest. Counsel was "entitled to be compensated from the Debtor's bankruptcy estate in the amount of \$151,350 for services provided to the Debtor as the administrator of Debtor's pension plan."<sup>57</sup>

### **CONFLICT BETWEEN THE 2005 ACT AND ERISA AND ITS EFFECT ON BANKRUPTCY COURT JURISDICTION**

The bankruptcy courts are courts of limited jurisdiction; all matters before the court must be linked to a bankruptcy case. That jurisdiction ultimately flows from Article I, § 8, cl. 4 of the Constitution.<sup>58</sup> Although the district courts have original jurisdiction over bankruptcy cases, that jurisdiction is now delegated to the bankruptcy courts.<sup>59</sup> In the Department's view, juris-

diction over ERISA matters was never so delegated, and is held solely by the district courts.<sup>60</sup>

Despite the trustee's authority and duties under Code § 704(a)(11), the Department takes the position that ERISA limits the bankruptcy courts' authority over the trustee. The issue arises when a trustee seeks bankruptcy court approval for terminating a debtor's retirement plan. The trustee may also seek to have the bankruptcy court authorize specific actions to be taken under § 704(a)(11), such as amending the plan. Later, the trustee may seek a bankruptcy court determination that the trustee has fulfilled all duties under § 704(a)(11), ask the court to set deadlines for claims relating to the plan, or ask the court to shield the trustee from lawsuits. At this point, the trustee should expect the Department to step in, and object that the bankruptcy court lacks jurisdiction to bless the trustee's actions or limit the trustee's fiduciary liability in any way.

The Department's objections are the result of an apparent conflict between the Code and ERISA.<sup>61</sup> Under the Code's standard rules for the administration of bankruptcy estates, all aspects of the liquidation, including compensation, are subject to court approval.<sup>62</sup> At the close of a case, the trustee ordinarily receives a discharge stating that all duties to the estate have been fulfilled, and that the trustee is entitled to absolute immunity from claims.<sup>63</sup> In contrast, ERISA's statute of limitations for breach of fiduciary duty ranges from three to six years *after* the fiduciary's last action regarding the plan, and the plan fiduciary remains personally liable until that time.<sup>64</sup>

If ERISA plans are not subject to bankruptcy court jurisdiction, a bankruptcy trustee who "performs the duties" of a plan administrator will be effectively forced into service as an individual, not as a bankruptcy trustee. This result is both illogical and unfair, given that "dealing with a debtor's employee benefit plans, whether the debtor is liquidating or reorganizing, is an integral part of dealing with the debtor's business."<sup>65</sup> Nevertheless, the Department has taken the position that the bankruptcy court may not authorize specific actions to terminate a plan, rule that the trustee has fulfilled all duties under Code § 704(a)(11), release the trustee from ERISA liability, or order payment of administration costs.<sup>66</sup>

For efficiency of administration, Chapter 7 bankruptcy is designed to encompass nearly all matters necessary for liquidation.<sup>67</sup> Accordingly, bankruptcy courts have jurisdiction not only over bankruptcy filings by the debtor and creditors, but also over the many types of "core" and "non-core" proceedings.<sup>68</sup> Core proceedings are those "arising under" the Code or "arising in" a bankruptcy case, while non-core proceedings are those merely "relating to" a case.<sup>69</sup>

### Core Jurisdiction

Bankruptcy courts have jurisdiction over core proceedings under 28 U.S.C. § 157(a) in two circumstances. Proceedings "arising under" title 11 are civil proceedings in which a cause of action is created or determined under the Bankruptcy Code.<sup>70</sup> Proceedings "arising in" title 11 refers to civil proceedings "that, by their very nature, could arise only in bankruptcy cases."<sup>71</sup> For example, a preference claim or an objection to discharge could only "arise in" a bankruptcy case, and so would be subject to core jurisdiction.

In recent cases, the Department has asserted that bankruptcy

courts do not have core jurisdiction to authorize trustees to take specific steps and execute documents in terminating the plan, to determine whether a trustee has fulfilled his or her fiduciary duties under ERISA, or to release trustees from potential ERISA liability.<sup>72</sup> The Department's arguments are as follows. First, there can be no jurisdiction where there is no active case or controversy.<sup>73</sup> Second, the termination process is governed solely by ERISA (not the Code), so does not arise "under" or "in" bankruptcy to confer jurisdiction. Third, the termination process does not involve estate assets, and so cannot have any conceivable effect on the bankruptcy estate or creditors.<sup>74</sup> Finally, exculpation of the plan fiduciary is forbidden by ERISA, and the Code does not permit the creation of new substantive rights, such as release of the trustee, a non-debtor, from ERISA liability.<sup>75</sup>

However, the more compelling reasons weigh in favor of exercising core jurisdiction and allowing exculpation of the Chapter 7 trustee. First, "arising under" jurisdiction applies because the trustee's specific duties occur in bankruptcy cases by means of the 704(a)(11) mandate.<sup>76</sup> Second, the fact that plan funds are not estate funds is irrelevant where a plan is being terminated, as the formal termination process must be completed by the trustee even if there are no plan assets.<sup>77</sup> Third, because bankruptcy trustees are only plan fiduciaries in the limited context of a bankruptcy case, the ERISA prohibition on fiduciary exculpation does not apply.<sup>78</sup> Finally, Code § 105(a) provides jurisdiction to fill gaps related to the new duties of bankruptcy trustees under the 2005 Act, including Code § 704(a)(11), to preserve the integrity of the system.<sup>79</sup>

### Non-Core Jurisdiction

Some proceedings which are not against the debtor or the debtor's property may nonetheless be subject to bankruptcy court jurisdiction. "Related to" jurisdiction exists if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."<sup>80</sup> At a minimum, "related to" jurisdiction should be conferred by the 2005 amendments under § 704(a)(11) as determined by the First Circuit.<sup>81</sup>

## RECENT CASES INVOLVING LIQUIDATION OF ERISA PLANS

### A. *In re AB&C Group, Inc.*

*In re AB&C Group, Inc.* involved a corporate debtor which had maintained a defined contribution plan for its employees, and was the plan administrator.<sup>82</sup> The debtor had in turn entered into a services agreement with a local bank under which the bank performed certain administrative functions.<sup>83</sup> In order to terminate the plan, the Chapter 7 Trustee sought bankruptcy court approval to engage the services of the bank under Code § 327, and to pay the bank's fees from plan assets.<sup>84</sup> The Trustee also sought a declaratory order that his duties under Code § 704(a)(11) had been fulfilled, and exculpation from ERISA liability.<sup>85</sup> The Department objected, arguing that the bankruptcy court did not have jurisdiction to rule upon the reasonableness of any fees to be paid to the bank from plan assets, or to excuse the Trustee from ERISA liability.<sup>86</sup>

As the Court noted, while § 704(a)(11) makes trustees responsible for administering plans, “the Bankruptcy Code provides no guidance to the Trustee in how to pay for the cost of administration generated by the performance of his plan administrator duties”.<sup>87</sup> Unfortunately for the Trustee, the Court nonetheless sustained the Department’s objection. The Court determined that it had no authority to bless the payment of the costs of administration from plan assets, because those assets were not part of the debtor’s estate.<sup>88</sup> Likewise, the court ruled that although the trustee had “succeeded the debtor as plan administrator” by action of Code § 704(a)(11), the trustee’s fiduciary actions relating solely to the plan were beyond the authority of the bankruptcy court.<sup>89</sup> As the Trustee’s duties under the plan, and the reasonableness of administrative fees, were governed by non-bankruptcy law and did not involve estate assets, the Court found that it did not have “related to” jurisdiction and that the administration of the plan did not “arise under” Title 11 or “arise in” the bankruptcy case.<sup>90</sup> Thus, the Court determined that it was without jurisdiction to approve that part of the agreement which attempted to govern plan-paid compensation for the administration of the plan.<sup>91</sup>

#### **B. *In re NSCO, Inc.***

The result was somewhat different in a recent corporate Chapter 7 case from Massachusetts, where the plan in question had already been distributed to participants, but had never been formally terminated.

Unlike *AB&C Group*, there were no plan funds as of the petition date.<sup>92</sup> The Chapter 7 trustee in *In re NSCO, Inc.* sought court approval of termination procedures and payment of administrative fees from plan assets.<sup>93</sup> The trustee asked the court to impose a deadline for claims against the trustee for ERISA fiduciary liability, and a determination that the trustee’s actions in regard to the plan had satisfied Code § 704(a)(11).<sup>94</sup>

Predictably, the Department objected on similar grounds as it had in *AB&C Group*. First, the Department argued that Code § 704(a)(11) did not confer subject matter jurisdiction on the bankruptcy court to set a deadline for claims or to determine whether § 704(a)(11) had been satisfied.<sup>95</sup> Second, there could be no “arising under,” “arising in,” or “related to,” jurisdiction, because the trustee’s ERISA duties (or exculpation therefrom) could have no conceivable effect on the bankruptcy estate.<sup>96</sup> Third, the Department asserted that the court had no jurisdiction to issue a declaratory order under Code § 105, because no current case or controversy existed.<sup>97</sup>

The trustee naturally took the opposite position. First, the trustee argued (and the court agreed) that 11 U.S.C. § 704(a)(11) clearly confers “proceedings arising in” subject matter jurisdiction on the bankruptcy court to enter an order setting deadlines for claims against the trustee, debtor, and estate related to the trustee’s fulfillment of duties thereunder.<sup>98</sup> Second, “proceedings arising under” jurisdiction should apply because the trustee’s duties could only occur in the bankruptcy case by means of the 704(a)(11) mandate.<sup>99</sup> At a minimum, the trustee asserted that “related to” jurisdiction under § 704(a)(11) was conferred by the 2005 Act.<sup>100</sup> Third, Bankruptcy Code § 105(a) specifically provides jurisdiction to fill gaps related to the new duties of Trustees under the 2005 Act, including § 704(a)(11),

to preserve the integrity of the system.<sup>101</sup>

The bankruptcy court engaged in a detailed analysis of the trustee’s duties under the Bankruptcy Code and ERISA, and found a middle ground. First, and maybe most importantly, the Court disagreed with the holding in *AB&C Group* that ERISA provided the source of the Trustee’s duties. Instead, the bankruptcy court determined:

“His duties originate in § 704(a) and only draw in ERISA because of § 704(a)(11). When Congress amended the Bankruptcy Code in 2005, that it chose to place the statutory obligation solely in the Bankruptcy Code, rather than in ERISA or in both statutes, is some indication that *Congress intended ERISA responsibilities to fit within the framework of the Bankruptcy Code, not the other way around.* If the court were convinced that the two statutes are irreconcilable, it is cognizant of the maxim that where two statutes conflict ‘the latter in time prevails over the former’...[t]herefore the Code is controlling.”<sup>102</sup>

Thus, while not explicitly stated, the bankruptcy court held that it had jurisdiction (presumably “core” jurisdiction under 28 U.S.C. § 1334(b)) over the issue of whether the Trustee had complied with his duties.

While the Court determined that it had jurisdiction, it was not willing to grant the Trustee’s request for declaratory relief for two reasons. First, the Court found that neither 28 U.S.C. § 959 nor any other provision of the Code gave the Court authority to shorten the statute of limitations on the Trustee’s duties to administer the case in accordance with applicable non-bankruptcy law. Second, the entry of a discharge for the trustee was, ultimately, premature. Bankruptcy courts ordinarily issue an order discharging a trustee of *all* of his or her duties when the case is fully administered and closed pursuant to 11 U.S.C. § 350(a). Thus, “[t]he duty imposed by § 704(a)(11) should be treated no differently than other § 704(a) duties. The Trustee will receive the same order indicating he has satisfied his statutory obligations as he receives in all Chapter 7 cases.”<sup>103</sup> Again, however, the Court stated that even after discharge, it would retain control over whether ERISA-related claims could be brought against the trustee. If, after the case was closed, the Department wished to assert claims for breach of fiduciary duties against the trustee, it would first have to move to reopen the bankruptcy case. And, as the Court noted, reopening a case is not automatic, but rather is based upon the equitable discretion of the Court.<sup>104</sup> As the trustee was not seeking to pay termination expenses from plan assets, the Court did not address the Department’s argument that the Court had no jurisdiction to rule upon such issues, although it expressed a certain skepticism about that position.<sup>105</sup>

From the point of view of Chapter 7 or liquidating Chapter 11 trustees, the *NSCO* opinion is a decidedly mixed result. On the one hand, the Court declined to provide the trustee with any sort of “comfort order” or release from liability in connection with the termination of the plan. In addition to the jurisdictional issues, the Court adopted the Department’s arguments that there was not yet any “case in controversy that provided a basis for the declaratory relief sought by the trustee. However, there is no question that *NSCO* stands for the proposition that § 704(a)(11) provides bank-

ruptcy courts with jurisdiction to determine whether trustees have complied with their duties to administer retirement plans; at a minimum, the bankruptcy court ruled that it would be the “gatekeeper” through which any party seeking to challenge the trustee’s actions will have to pass. This appears consistent with the structure of § 704(a) generally, as there is little doubt that the other trustee duties enumerated therein<sup>106</sup> are matters over which the bankruptcy courts have core jurisdiction.

### C. *Allard v. Coenan (In re Trans Industries, Inc.)*

In another recent case (discussed in greater detail on page 10 of this issue), the pre-petition fiduciaries of the Debtor’s pension plan in *Allard v. Coenan (In Re Trans Industries)* allegedly liquidated all the \$2.4 million in pension plan assets, and converted them to their own use.<sup>107</sup> The Chapter 7 Trustee, performing the obligations of the plan administrator under Code § 704(a)(11), filed complaints against the fiduciaries for breach of fiduciary duty and breach of contract, in violation of ERISA.<sup>108</sup>

One of the defendants moved to dismiss under F. R. Civ. P. 12(b)(1) and (3) for lack of bankruptcy court jurisdiction.<sup>109</sup> The court denied the motion, finding that the plan and the bankruptcy estate were inextricably linked.<sup>110</sup> That link conferred ‘related to’ jurisdiction for the trustee’s action, because of four “conceivable effects” on bankruptcy estate.<sup>111</sup> First, the trustee had used estate funds to pay litigation costs and plan administration costs. Second, the Trustee used estate funds to pay plan fees to employ professionals to administer the plan. Third, if the lawsuit failed, the estate would be diminished by the costs of litigation. Fourth, if the lawsuit succeeded, any recovery to the plan would be diminished by repayment to the estate.<sup>112</sup>

### D. *In re Mid-States Express, Inc.*

The most recent opinion supports the Department’s position that the bankruptcy courts’ jurisdiction over liquidation of retirement plans is extremely limited. In *In re Mid-States Express, Inc.* \_\_\_ B.R. \_\_\_ (Bankr. N.D. Ill. 2010), 2010 WL 2653376, the trustee sought authority to liquidate the debtor’s plan (which held approximately \$1,260,000), make distributions to plan participants, and pay the administrative expenses from the plan corpus.<sup>113</sup> The Department objected on jurisdictional grounds; as the court noted, “[w]hether this court has jurisdiction over the trustee acting as the plan administrator distributing non-estate assets to non-creditors is the heart of the parties’ disagreement”.<sup>114</sup> The court ruled squarely in the Department’s favor.

As in *AB&C Group*, the court ruled that notwithstanding the duties imposed on trustees by § 704(a)(11), this was insufficient to make the trustee’s motion a core proceeding as either “arising under” or “arising in” the Bankruptcy Code. The court specifically rejected the trustee’s argument that there was at least “arising in” jurisdiction because “but for” § 704(a)(11) he would not be placed in the position of plan administrator, “The mere fact that the trustee is the party asserting or defending a right does not mean that the proceeding could only ‘arise in’ a bankruptcy case... The trustee does not carry around ‘arising in’ jurisdiction with him”.<sup>115</sup> The court recognized that the situation was analogous to the trustee’s duties to object to improper claims imposed by § 704(a)(5), which is clearly a core proceeding. However, the court distinguished between the ministerial filing

of the objection, which is a core matter, and the substantive non-bankruptcy law governing the allowance of the claim, which it found insufficient to establish jurisdiction.<sup>116</sup> Finally, as the trustee was not seeking to expend estate funds to terminate the plan, and as the court found that both the plan and ERISA already authorized the trustee to pay liquidation expenses from plan assets, the court lacked even “related to” jurisdiction.<sup>117</sup> The court thus denied the trustee’s motion.

## CONCLUSIONS AND UNRESOLVED QUESTIONS

In light of the current controversy, what is a bankruptcy trustee to do? Should trustees consider resigning in cases involving Chapter 7 debtors with 401(k) plans, if they know they will be unable to obtain a release of liability from the court, or there are no funds to pay the administration costs? In the alternative, with regard to potential estate assets, the trustee has the power to abandon property if it would burden the estate or be of minimal value or benefit, but can a trustee likewise “abandon” a plan to a QTA?<sup>118</sup> Unfortunately, the plan is not an estate asset; therefore, a trustee probably cannot merely abandon a plan, because that would be a breach of fiduciary duty. Could a trustee request authority to make distributions of all estate funds to creditors, then move to dismiss the case for “cause” under §707(a)? Since the only basis for imposing plan administration duties on trustees is § 704(a)(11), dismissal of the case would presumably terminate those duties.

To date, there do not appear to be any appellate opinions addressing the jurisdictional and procedural conflicts raised by § 704(a)(11). It is hard to reconcile the rulings of *AB&C Group* and *Mid-States Express* with that of *NSCO*, and even harder to predict which will prevail.<sup>119</sup> If the reasoning of *AB&C Group* and *Mid-States Express* prevails, this does not necessarily mean that trustees will have to terminate plans without any compensation at all. It may mean, however, that trustees’ abilities to obtain guidance from—and the protection of—bankruptcy courts will be far more limited than is the case in nearly all other administrative tasks performed by trustees under § 704(a).

In short, while the Bankruptcy Code places the responsibility for administering—i.e., terminating—retirement plans in Chapter 7 and liquidating Chapter 11 cases on trustees, it provides little practical guidance about how to go about the task and get paid for it. There also appears to be an inherent conflict between Title 11’s standard rules for the administration of bankruptcy estates, in which all aspects of the liquidation, including compensation, are subject to bankruptcy court approval, and Title 29, which, according to the Department, are outside of the jurisdiction of the bankruptcy courts.

Until these conflicts have been further resolved by the courts, Chapter 7 and 11 trustees are wise to proceed very cautiously in administering any retirement plans. If there are lessons to learn from these cases, they are as follows: (1) first, get copies of the documents establishing the plan(s); (2) determine whether the plan provides for payment of administrative fees to terminate the plan, and whether the plan needs any amendments; (3) determine if the plan has possession of all funds to which it is entitled; (4) if not, get copies of all insurance policies; (5) get control of all employee payroll records; (6) obtain a copy of any servicing or administration agreement; (7) coordinate with the plan

administrator or servicer; (8) determine the cost to terminate the plan; (9) contact the local offices of the PBGC or USDOL; and (10) prior to actually commencing the termination process, seek court approval for the engagement of any firms or professionals to terminate the plan, including specific provisions concerning how the firms will be compensated and the source of the funds. And finally, hope that you do not get appointed in a Chapter 7 cases with no assets and a big retirement plan. 🏠

#### Footnotes:

- <sup>1</sup> 11 U.S.C. § 704(a)(11) (all references herein to the United States Code are to the 2010 Code). See *infra* Part II.
- <sup>2</sup> 29 U.S.C. §§ 1001-1461. See *infra* Part III.
- <sup>3</sup> See H.R. Rep. No. 109-31, Sec. 446 (2005) (“Duties with Respect to a Debtor Who Is a Plan Administrator of an Employee Benefit Plan. Subsection (a) of section 446 of the Act amends Bankruptcy Code section 521 (a) to require a debtor, unless a trustee is serving in the case, to serve as the administrator (as defined in the Employee Retirement Income Security Act of 1974) of an employee benefit plan if the debtor served in such capacity at the time the case was filed. Section 446(b) amends Bankruptcy Code section 704 to require the Chapter 7 trustee to perform the obligations of such administrator in a case where the debtor or an entity designated by the debtor was required to perform such obligations. Section 446(c) amends Bankruptcy Code section 1106(a) to require a Chapter 11 trustee to perform these obligations.”)
- <sup>4</sup> 11 U.S.C. § 704(a)(11). See Hon. Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 Am. Bankr. L.J. 147, 199-201 (2006) (hereinafter *Rhodes*) (noting that in addition to ERISA duties under 11 U.S.C. § 704(a)(11), the 2005 Act also created trustee duties to domestic support claimants under § 704(a)(10); health care patients under § 704(a)(12); preserve patient records under § 351; dismiss certain cases where the debtor fails to provide information under § 521 (i) (1); seek relief with regards to certain secured property under §§ 362(h)(1) and 521 (a) (6); investigate and act on certain subsequent cases under §§ 362(c)(3),(4); and conduct certain means tests under § 707(b)).
- <sup>5</sup> 11 U.S.C. § 704(a)(11).
- <sup>6</sup> *Rhodes*, *supra* note 4, at 201.
- <sup>7</sup> 29 U.S.C. § 1001(a).
- <sup>8</sup> 29 U.S.C. § 1002(b). See Phyllis Borzi, *A Basic Approach to Key Terms and Concepts under Title I of ERISA*, 3, in *The 23rd Annual Nat’l Inst. on ERISA Basics* (V.1, ABA/JCEB 2009) (hereinafter *Borzi*).
- <sup>9</sup> 29 U.S.C. § 1341; *Beck v. Pace Int’l Union*, 551 U.S. 96, 102-03 (2007).
- <sup>10</sup> 29 U.S.C. §§ 1301-1310 (establishing PBGC).
- <sup>11</sup> 29 U.S.C. §§ 1021-1031 (enabling Department of Labor).
- <sup>12</sup> 29 U.S.C. § 1103(a).
- <sup>13</sup> *Beck v. Pace Int’l Union*, 551 U.S. at 99.
- <sup>14</sup> *Id.* at 101 (emphasis added).
- <sup>15</sup> 29 U.S.C. § 1002(21)(A); *Beddall v. State St. Bk. & Trust Co.*, 137 F.3d. 12, 18 (1st Cir. 1998).
- <sup>16</sup> U.S. Dept. of Labor, Adv. Op. 97-03A (1997).
- <sup>17</sup> *Beck v. Pace Int’l Union*, 551 U.S. 96, 101 (2007) (holding that “merger is not a permissible method of terminating a single-employer defined-benefit pension plan”).
- <sup>18</sup> The Department requires an Internal Revenue Service Form 5500 to be filed each plan year and on termination.
- <sup>19</sup> 29 U.S.C. § 1002(21)(A)(iii) (“Using discretion in administering and

- managing a plan or controlling the plan’s assets makes that person a fiduciary to the extent of that discretion or control.”) See U.S. Dept. of Labor, *Meeting Your Fiduciary Responsibilities*, 4 (Small Business Compliance Guide, Oct. 2008). See also *Beddall*, 137 F.3d at 18 (delimiting “named” versus “functional” fiduciaries).
- <sup>20</sup> 29 U.S.C. § 1002(16)(a).
  - <sup>21</sup> *Id.*
  - <sup>22</sup> 29 U.S.C. § 1002(21)(A); *Beddall v. State St. Bk. & Trust Co.*, 137 F.3d. 12, 18 (1st Cir. 1998).
  - <sup>23</sup> 29 U.S.C. § 1104(a) (numbering omitted). See *Borzi*, *supra* note 8, at 15.
  - <sup>24</sup> 29 U.S.C. § 1132(a)(2); 29 U.S.C. § 1109(a).
  - <sup>25</sup> 29 U.S.C. § 1109(b). See Deborah Davidson, *Fiduciary Responsibility Under ERISA*, in *The 23rd Annual Nat’l Inst. on ERISA Basics*, B11, 15 (V.1, ABA/JCEB 2009) (hereinafter *Davidson*). See also 29 U.S.C. § 1105(a); *Beddall*, 137 F.3d. at 18-19 (noting that one ERISA fiduciary may be liable for the failings of another fiduciary “if a fiduciary knowingly participates in or conceals another fiduciary’s breach, enables such other to commit a breach, or learns about such a breach and fails to make reasonable efforts to remedy it.”)
  - <sup>26</sup> 29 U.S.C. § 1132. See *Borzi*, *supra* note 8, at 17-21.
  - <sup>27</sup> *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct 2343, 2347-48 (2008).
  - <sup>28</sup> 29 U.S.C. § 1113. See *Borzi*, *supra* note 8, at 17.
  - <sup>29</sup> *Rhodes*, *supra* note 4, at 154-55. See, e.g., 11 U.S.C. § 704.
  - <sup>30</sup> *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 7 (1st Cir. 1999), *cert. denied*, 530 U.S. 1230 (2000). See Samuel Crocker & Robert Waldschmidt, *Impact of the 2005 Amendments on Chapter 7 Trustees*, 79 Am. Bankr. L.J. 333, 338 (Spring 2005) (hereinafter *Crocker & Waldschmidt*) (noting that potential liability makes administration of bankruptcy cases involving health care patients unattractive to trustees).
  - <sup>31</sup> *Mailman*, 196 F.3d at 5.
  - <sup>32</sup> *Lebovitz v. Scheffel (In re Lehal Realty Assoc.)*, 101 F.3d 272, 276 (2d Cir. 1996).
  - <sup>33</sup> *Midlantic Nat’l Bk. v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 508 (1986.) See *Rhodes*, *supra* note 4, at 169.
  - <sup>34</sup> See, e.g., *Liebersohn v. Stillman (In re C.F. Foods, L.P.)*, 2004 WL 2166270, 2004 U.S. Dist. LEXIS 19079 (No. 03-6361, *unreported*, E.D. Pa. Sept. 17, 2004) (trustee required to perform plan administrator duties of the debtor imposed by ERISA, because statutory obligations binding the debtor subsequently bound the bankruptcy trustee); *In re New Center Hosp’l*, 200 B.R. 592 (Bankr.E.D.Mich. 1996) (granting motion to compel Chapter 11 trustee to administer debtor’s ERISA plan); *Chambers v. Kaleidescope, Inc. Profit Sharing Plan & Trust*, 650 F.Supp. 359 (N.D. Ga. 1986) (plan administrators of corporate debtor must continue to perform duties despite appointment of Chapter 11 trustee). See also *Rhodes*, *supra* note 4, at 192.
  - <sup>35</sup> *In re NSCO*, 427 B.R. 162, 174 (2010).
  - <sup>36</sup> See *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct 2343, 2348-50 (2008) (holding that plan administrator who both evaluates claims for benefits and pays benefits claims had conflict of interest).
  - <sup>37</sup> For an excellent discussion on the importance of maximizing “distributions” net of administrative and other costs, see *Rhodes*, *supra* note 4, at 164-68, *citing*, e.g., *In re Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 352 (1985).
  - <sup>38</sup> 11 U.S.C. § 541(b)(7). See *Crocker & Waldschmidt*, *supra* note 30, at 340.
  - <sup>39</sup> 11 U.S.C. §§ 327, 330, 328, 331. See *In re Tom’s Foods Inc.*, 341 B.R. 82,



- 86-90 (Bankr. M.D.Ga. 2006).
- <sup>40</sup> Rhodes, *supra* note 4, at 201.
- <sup>41</sup> See, e.g., *In re NSCO*, 427 B.R. at 172. See also 29 U.S.C. § 1002(21)(A)(iii).
- <sup>42</sup> See H.R. Rep. No. 109-31, pt. 1 (2005) as reprinted in 2005 U.S.C.C.A.N. 88, at 105 (under heading “Protections for Employees.”)
- <sup>43</sup> 11 U.S.C. § 704(a)(11).
- <sup>44</sup> 11 U.S.C. § 704(a)(12).
- <sup>45</sup> See 29 C.F.R. § 2578 (2009).
- <sup>46</sup> 29 C.F.R. § 2578(e). “Limited liability. (1) (i) Except as otherwise provided in paragraph (e) (1) (ii) and (iii) of this section, to the extent that the [plan termination] activities enumerated in paragraph (d) (2) of this section involve the exercise of discretionary authority or control that would make the qualified termination administrator a fiduciary within the meaning of section 3(21) of the Act, the qualified termination administrator shall be deemed to satisfy its responsibilities under section 404(a) of the Act with respect to such activities, provided that the qualified termination administrator complies with the requirements of paragraph (d) (2) of this section. (ii) [selection and monitoring of service providers] (iii) [selection of annuity provider]. (2) Nothing herein shall be construed to impose an obligation on the qualified termination administrator to conduct an inquiry or review to determine whether or what breaches of fiduciary responsibility may have occurred with respect to a plan prior to becoming the qualified termination administrator for such plan. . . . (f) Continued liability of plan sponsor. Nothing in this section shall serve to relieve or limit the liability of any person other than the qualified termination administrator due to a violation of ERISA. [i.e. employer, sponsor, or administrator].” 29 C.F.R. § 2578. .
- <sup>47</sup> *In re AB&C Group, Inc.*, 411 B.R. 284, 289 (Bankr.N.D.W.Va. 2009).
- <sup>48</sup> 29 U.S.C. § 1108(C).
- <sup>49</sup> U.S. Dept. of Labor, Adv. Op. 97-03A (1997).
- <sup>50</sup> 11 U.S.C. §§ 330(a)(7), 326. See Crocker & Waldschmidt, *supra* note 30, at 364.
- <sup>51</sup> See *In re Silvus*, 329 B.R. 193, 217 (Bankr. E.D.Va 2005); Rhodes, *supra* note 4, at 164.
- <sup>52</sup> See also 29 C.F.R. 2550.408(c)(2).
- <sup>53</sup> *In re Tom’s Foods Inc.*, 341 B.R. 82 (Bankr. M.D.Ga. 2006).
- <sup>54</sup> *Id.* at 89.
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.* at 90, citing 11 U.S.C. § 704(a)(11) and 7 *Collier on Bankruptcy*, ¶ 1106.03[7] (15th ed. rev. 2005).
- <sup>57</sup> *In re Tom’s Foods Inc.*, 341 B.R. at 90.
- <sup>58</sup> *Central Va. Cmty. College v. Katz (In re Wallace’s Bookstores, Inc.)*, 546 U.S. 356, 359 (2006).
- <sup>59</sup> 28 U.S.C. § 1334(a),(b); 28 U.S.C. § 157(a). “Cases arising under” refers “merely to the bankruptcy petition itself, filed pursuant to 11 U.S.C. §§ 301, 302, or 303.” *Michigan Empl. Sec. Comm’n v. Wolverine Radio Co., Inc.*, 930 F.2d 1132, 1140 (6th Cir. 1991). *Allard v. Coenan (In re Trans Industries, Inc.)*, 419 B.R. 21, 26-27 (Bankr.E.D.Mich. 2009).
- <sup>60</sup> See *infra* Part IV.
- <sup>61</sup> *In re NSCO*, 427 B.R. 162, 174-75 (2010).
- <sup>62</sup> See, e.g., 11 U.S.C. § 704; 28 U.S.C. § 157(b).
- <sup>63</sup> *Mailman Steam Carpet Cleaning Corp. v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 5 (1st Cir. 1999), *cert denied*, 530 U.S. 1230 (2000); *In re NSCO*, 427 B.R. at 181-83
- <sup>64</sup> 29 U.S.C. § 1113. See Borzi, *supra* note 8, at 17.
- <sup>65</sup> *In re Tom’s Foods Inc.*, 341 B.R. 82, 90 (Bankr.M.D.Ga 2006), quoting 7 *Collier on Bankruptcy*, ¶ 1106.03[7] (15th ed. 2005).
- <sup>66</sup> *In re AB&C Group, Inc.*, 411 B.R. 284, 289 (Bankr. N.D.W.Va. 2009).
- <sup>67</sup> *In re NSCO*, 427 B.R. 165, 173-74 (2010).
- <sup>68</sup> 28 U.S.C. § 157(b),(c).
- <sup>69</sup> 28 U.S.C. § 157(b)(2),(c)(1).
- <sup>70</sup> 28 U.S.C. § 157(a)
- <sup>71</sup> *Bliss Technologies, Inc. v. HMI Industries, Inc.*, 307 B.R. 598, 602 (Bankr.E.D.Mich.2004); 28 U.S.C. §§ 1334(b). See *Allard v. Coenan (In re Trans Industries, Inc.)* 419 B.R. 21, 26-27 (Bankr.E.D.Mich. 2009).
- <sup>72</sup> See *infra* Part IV.
- <sup>73</sup> See *In re NSCO*, 427 B.R. 162, 176-77 (2010).
- <sup>74</sup> See *In re AB&C Group, Inc.*, 411 B.R. 284, 292-93 (Bankr. N.D.W.Va. 2009); *Solis v. Plan Benefit Services, Inc.*, 620 F.Supp.2d 131, 142 (1st Cir. 2009); *Beddall v. State St. Bk. & Tr. Co.*, 137 F.3d 12, 18 (1st Cir. 1998).
- <sup>75</sup> See *In re NSCO, Inc.*, 427 B.R. at 172; 29 U.S.C. § 1110(a); 11 U.S.C. § 105(a).
- <sup>76</sup> 11 U.S.C. § 704(a)(11). See *In re NSCO, Inc.*, 427 B.R. at 180.
- <sup>77</sup> See *In re NSCO, Inc.*, 427 B.R. at 169 (plan contained no funds). Cf. *In re AB&C Group, Inc.*, 411 B.R. 284 (plan contained assets).
- <sup>78</sup> See *In re NSCO, Inc.*, 427 B.R. at 181-82.
- <sup>79</sup> See *Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 43-44 (1st Cir. 2008).
- <sup>80</sup> *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984); 28 U.S.C. §§ 1334(b); 157(a). See Paul Daley and George Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DePaul Bus. & Comm. L.J. 383, 395-96 (2004-2005) (identifying ten factors courts have considered in establishing “related to” jurisdiction, including *inter alia*, whether a civil proceeding is “intertwined with the bankruptcy case,” even if the assets at issue are not property of the estate); *Widewaters Roseland Ctr. v. TJC Companies, Inc.*, 135 B.R. 204, 207 (Bankr. N.D.N.Y. 1991).
- <sup>81</sup> *Mailman Steam Carpet Cleaning Corp. v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 5 (1st Cir. 1999), *cert denied*, 530 U.S. 1230 (2000); *Allard v. Coenan (In re Trans Industries, Inc.)* 419 B.R. 21, 33 (Bankr.E.D.Mich. 2009) *But see In re NSCO, Inc.*, 427 B.R. at 180-81 (finding insufficient nexus between bankruptcy case and potential future liability of trustee).
- <sup>82</sup> *In re AB&C Group, Inc.*, 411 B.R. 284, 292-93 (Bankr. N.D.W.Va. 2009).
- <sup>83</sup> The use of third party administrators to handle ERISA compliance is common. Employers typically pay an annual fee to the third party administrator to file the necessary tax forms and notices to participants.
- <sup>84</sup> *In re AB&C Group, Inc.*, 411 B.R. at 284.
- <sup>85</sup> *Id.* at 295.
- <sup>86</sup> *Id.* at 284.
- <sup>87</sup> *Id.* at 289.
- <sup>88</sup> *Id.* at 295. For an analogous provision, see, e.g., 11 U.S.C. § 541(b)(7) (excluding retirement plan assets from the bankruptcy estate).
- <sup>89</sup> *Id.* at 288, 295.
- <sup>90</sup> See *infra* Part III.D.

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pendent third party to verify compliance with the prescribed procedures; and

- Countrywide will no longer impose hidden charges and will provide adequate notice to debtors of its charges and required monthly payments throughout the bankruptcy case. Further, Countrywide is prohibited from collecting fees, i.e., fees or escrow shortages incurred during the bankruptcy case, unless it obtains court approval or provides prior notice as required, so that trustees, debtors and bankruptcy courts can evaluate the legitimacy of the claims.

Importantly, the consent order does not bind non-parties, including debtors and bankruptcy trustees.

In the chapter 7 context, Countrywide's improper practices have an impact on a trustee's ability to properly administer estates because the mortgage company may have claimed more than it is entitled to receive. In addition, trustees may get questions from debtors who have converted from chapter 13 to chapter 7 and whose mortgages were or currently are serviced by Countrywide. Trustees should refer debtors seeking information

about eligibility for a refund to the FTC Web site at [www.ftc.gov/countrywide](http://www.ftc.gov/countrywide). The FTC Web site also contains links to other mortgage-related consumer information such as the cost of defaulting on a mortgage and steps the consumer debtor can take to make sure payments are properly applied.

#### 'Operation Stolen Dreams'

On June 17, 2010, Attorney General Eric Holder announced "Operation Stolen Dreams," a nationwide sweep of mortgage fraud cases coordinated by the Financial Fraud Enforcement Task Force. The sweep featured both civil and criminal cases, and emphasized the strong combined actions taken by federal, state and local law enforcement authorities over a three and one-half month period. More than 1,500 criminal defendants were named in the sweep and nearly 200 civil enforcement actions were taken. The USTP contributed about 20 percent of the civil cases, which addressed a wide range of violations, including actions taken against mortgage servicers, foreclosure rescue operators, loan origination

and loan modification scammers and real estate Ponzi scheme operators. The USTP's settlement with Countrywide was included as one of the highlighted case examples. In addition, more than two dozen of the criminal cases cited in Operation Stolen Dreams were attributable to the Program. We are pleased to have been a partner in this important collaborative effort.

\* \* \* \* \*

The USTP is committed to continuing its fight against mortgage servicer abuse and other consumer-targeted fraud in order to preserve the integrity of the bankruptcy system. Mortgage servicers must be held to the same standard of accuracy and completeness in their filings as are other creditors and debtors. Homeowners who file for bankruptcy protection and obey the rules are entitled to a fresh start. The settlement with Countrywide, as well as the other actions highlighted in this article, help to ensure that debtors will receive that legally protected fresh start. ♣

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#### Terminating an ERISA Retirement Plan In Bankruptcy *continued from page 52*

<sup>91</sup> *In re AB&C Group, Inc.*, 411 B.R. 284, 291 (Bankr. N.D.W.Va. 2009).

<sup>92</sup> *In re NSCO, Inc.*, 427 B.R. 165, 169 (Bankr.D.Mass. 2010). *Cf. In re AB&C Group, Inc.*, 411 B.R. 284 (plan contained assets).

<sup>93</sup> *In re NSCO, Inc.*, 427 B.R. at 169. No funds remained in the plan. However, \$100,000 of plan assets remained in escrow by court order.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 172.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 173 (Department called trustee's motion a request for an "advisory opinion").

<sup>98</sup> *Id.* at 172.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* See *Allard v. Coenan (In re Trans-Industries, Inc.)*, 419 B.R. 21 (Bankr.E.D.Mich. 2009); See *Mailman Steam Carpet Cleaning Corp. v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 5 (1st Cir. 1999), *cert denied*, 530 U.S. 1230 (2000); *Allard v. Coenan (In Re Trans Industries)*, 2009 WL 3861975 (Bankr. E.D. Mich., Nov. 13, 2009).

<sup>101</sup> *In re NSCO, Inc.*, 427 B.R. at 172. See *Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 43-44 (1st Cir. 2008).

<sup>102</sup> *In re NSCO, Inc.*, 427 B.R. at 180 (*emphasis added*).

<sup>103</sup> *In re NSCO, Inc.*, 427 B.R. at 183.

<sup>104</sup> The bankruptcy court did not determine whether it ultimately would have jurisdiction to determine whether the trustee had complied with his duties; the Department has asserted in other cases that subject matter jurisdiction lies solely in the District Courts.

<sup>105</sup> *In re NSCO, Inc.*, 427 B.R. at 171, n.6.

<sup>106</sup> *E.g.*, reducing property of the estate to money, investigating the financial affairs of the debtor, examining and objecting to proofs of claim, and making a final report and account to the court and the United States Trustee.

<sup>107</sup> *Allard v. Coenan (In re Trans Industries, Inc.)*, 419 B.R. 21 (Bankr.E.D.Mich. 2009). See Brian E. Etzel, *The Money's Gone! Prosecuting ERISA Fiduciary Liability Claims: A Road Map for Bankruptcy Trustees*, J.Nat'l.Assoc.Bankr.Trustees ("NABTalk"), Summer 2010 at 10.

<sup>108</sup> *Id.* at 29.

<sup>109</sup> *Id.* at 26.

<sup>110</sup> *Id.* at 33.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *In re Mid-States Express*, — B.R. — (Bankr.N.D.Ill. 2010), 2010 WL 2653376.

<sup>114</sup> *Id.* at \_\_\_.

<sup>115</sup> *Id.* at \_\_\_.

<sup>116</sup> *Id.* at \_\_\_.

<sup>117</sup> *Id.* at \_\_\_.

<sup>118</sup> 11 U.S.C. § 544(a). See Rhodes, *supra* note 4, at 171.

<sup>119</sup> The *Mid-States* opinion was issued approximately ten weeks after *NSCO*, however, it is not mentioned in the opinion.