Insult to Injury—Court Allows Expulsion of Employers from Trust Fund, Resulting in Unfunded Vested Liability

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The United States Court of Appeals for the Eighth Circuit issued an interesting opinion recently allowing a union trust fund to expel employers from the fund for lawfully using subcontractors to perform bargaining unit work. In *Borntrager v. Central States Pension Fund*, the Fund expelled employers for violating the fund's "adverse selection" rule by replacing some of their employees with subcontractors. The Fund had previously issued a memorandum regarding the "adverse selection" rule which attacked employer practices resulting in reduction of employees and, hence, trust contributions. The Fund determined that the employers' gradual shift to the use of independent contractors violated the rule since the amount of trust fund contributions had been falling over a 10-year period.

The employer countered that the use of subcontractors was lawful under the collective bargaining agreement and was not proscribed by the trust fund agreement. What made the expulsion even more damaging was that it triggered unfunded vested liability on the part of the kicked-out employers. This has been a growing problem with many union pension funds based on the shortfall between future benefit accruals by employees versus the amount of contributions coming in, in light of stock market losses on the part of the pension funds.

The courts agreed that the pension fund could implement the sanctions under its adverse selection rule. The court determined that the Fund was not punishing the companies for using independent contractors; it was punishing the companies for "maintaining an actuarially adverse employee group" by shifting work to subcontractors. The decision sends a chilling message to employers participating in union pension plans and also a strong disincentive for non-union employers who are considering joining the union and participating in such plans. Not only were the employers in this case left to scramble to find an alternative pension plan, but they were presented with a substantial bill to cover the unfunded vested liability resulting from the trusts' actions.