

# TRUSTEE HELD LIABLE FOR FAILURE TO PURSUE CONTRIBUTIONS NOT PAID BY EMPLOYER – TRUST TERMS NOT A DEFENSE

**Longo v. Trojan Horse Ltd. (E.D. N.C. 2016)**

*Hodgson Russ Newsletter*

October 31, 2016

A North Carolina district court recently ruled that a 401(k) plan’s trustee, Ascensus Trust Company, was jointly and severally liable with the employer-plan sponsor for nearly \$3 million in unpaid contributions to the plan. In that case, the applicable trust agreement expressly required Ascensus to properly manage funds upon receipt, but also stated that Ascensus had no duty or responsibility for collecting or determining the accuracy or sufficiency of contributions. The court concluded that, notwithstanding specific trust or plan terms, under the Employee Retirement Income Security Act of 1974 (“ERISA”), Ascensus had an obligation to ensure contributions were made to the trust so that the plan’s objectives could be met. While the court did not specifically state what steps Ascensus should have taken, it focused on the fact that there was no evidence Ascensus did anything to investigate or analyze contributions it received. The trust agreement’s narrow delineation of Ascensus’ obligations was not a valid excuse for Ascensus to “bury its head in the sand and conduct no investigation and therefore take no action.” The court found that Ascensus’ inaction amounted to nonfeasance, which is a breach of fiduciary duty. The court also noted that co-fiduciary liability is not contingent upon knowledge of what another fiduciary (here, the employer-plan sponsor) is doing, but only that its failure to meet its fiduciary duties enabled another fiduciary to commit a breach. Accordingly, the court found Ascensus was liable along with the employer-plan sponsor for the unpaid contributions. *Longo v. Trojan Horse Ltd.* (E.D. N.C. 2016)

## **Attorneys**

Peter Bradley

Michael Flanagan

Richard Kaiser

Ryan Murphy

## **Practices & Industries**

Employee Benefits