

## Delinquent Contributing Employer May Be Fiduciary

Article By:

Anthony S Cacace

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The **Second Circuit** held that the owner of a contributing employer to multiemployer benefit plans breached his fiduciary duties by failing to make required contributions and was thus personally liable for the delinquencies, interest, and attorneys' fees. In so holding, the Court determined that the owner was a plan fiduciary because: (a) the plan's trust document designated required contributions as plan assets, (b) the owner was responsible for determining the order in which the company's creditors would be paid, and (c) the owner had authority and control over management of the contributing employer.

As a fiduciary wrongly in possession of plan assets, the Court held that the owner was "personally liable to make good to such plan any losses to the plan." Notably, the Court also ruled that the owner was not obligated to pay liquidated damages because the owner was liable under a fiduciary breach claim, not a claim for delinquent contributions. The case is ***Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Const., LLC***, No. 14-295, 2015 WL 795290 (2d Cir. Feb. 26, 2015).

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