

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGIONAL EMPLOYERS' ASSURANCE :
LEAGUES VOLUNTARY EMPLOYEES :
BENEFICIARY ASSOCIATION TRUST, :
by PENNMONT BENEFIT SERVICES, INC., :
Plan administrator et al. : CIVIL ACTION
:
:
v. : NO. 01-4693
:
SIDNEY CHARLES MARKETS INC. et al. :
:
v. :
:
PENN PUBLIC TRUST :

MEMORANDUM

Juan R. Sánchez, J.

July 21, 2006

This is an ERISA¹ case in which the law requires this Court to give deference to decisions made by the plan administrator no matter how distasteful I find the result. Employees of a supermarket in New Jersey seek the cash value of or account for money paid into a benefit plan for life insurance premiums. The plan argues it had discretion to use the excess premiums to continue life insurance coverage until the funds ran out. Because I reluctantly agree with the plan administrator, I will grant its motion for summary judgment and deny that of the cross-claimants. A second issue in these multi-count cross claims is the payment of proceeds to the surviving spouse of a bookkeeper who stole more than \$1 million from the supermarket. Again, I am constrained by the law to give effect to the Plan's "bad boy" clause and defer to the Plan's decision to withhold the

¹Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461.

proceeds.

After a tangled procedural history, this case is ripe for decision on cross motions for summary judgment brought by Plaintiffs Regional Employer's Assurance Leagues Voluntary Employees' Beneficiary Association Trust (REAL VEBA)² and Penn-Mont Benefit Services, Inc. (Penn-Mont) on the one hand and counterclaim Defendants/Plaintiffs Sidney Charles Market, Inc. (SCM), Michael and Dorothy Zimmerman, Craig Waitt, Kelvin Burseth, Donna Arvelo, Gerrard Raffa, and Rigaud Destinobles (Employees) on the other.

FACTS

SCM, which owns and operates a supermarket in New Jersey, joined the Delaware Valley League of Merchants (North) on December 31, 1993. The League entered into a trust agreement with Penn Public Trust to create the Delaware Valley League of Merchants (North) Voluntary Employees' Beneficiary Association Trust (League VEBA) on December 15, 1992. Lawrence Koresko signed as vice president for operations of the League and John Koresko signed as general counsel for Penn Public Trust.³

The Trust requires the League to appoint a Plan Administrator with the power to "determine

²The League, as Settlor of the Trust, retains the right to change the Trust at any time. Pl.'s Br. Summ. J., Exhibit D, Ex. F at 10. On July 1, 1996, CoreStates Bank, N.A, became Trustee of REAL VEBA, formed as the successor to League VEBA. Every employer who previously adopted the League VEBA, except SCM, joined REAL VEBA. The plan documents for League VEBA and REAL VEBA are identical except for the names of the organizations.

³The League, the League VEBA, the Plan Trustee and the Plan Administrator are all creatures of John Koresko. John Koresko is the incorporator and president of Penn-Mont Benefit Services Inc. Penn-Mont is identified as the sponsor of the League VEBA on its title page. John Koresko is the incorporating vice president, secretary and treasurer of the Penn Public Trust, Trustee under League VEBA. A person may serve in more than one fiduciary capacity without violating ERISA. 29 U.S.C. § 1102(c)(1).

all questions arising in connection with the administration, interpretation and application of the Plan, including questions of eligibility, and status and rights of Participating Employees and Beneficiaries and any other person hereunder and the payment and/or provision [of] benefits hereunder.” Pl.’s Br. Summ. J., Exhibit D, Ex. F at 7. Penn-Mont was appointed Plan Administrator. The Plan Administrator also determines the amount each employer contributes to the Trust. Pl.’s Br. Summ. J., Exhibit D, Ex. F at 10. A participating employer must “make such contributions to the Trust Fund as may be required by the Administrator to provide benefits under the Plan . . . including amounts necessary to pay premiums for insurance contracts.” Pl.’s Br. Summ. J., Exhibit D, Ex. F at 10. In the event the Trust is terminated, “[a]ny remaining funds shall be used and applied by the Trustee in accordance with the plan . . . To provide additional benefits of the kind and type described in Section 3.01 above [employee welfare benefits] to the Participating Employees then participating . . .” *Id.*

SCM adopted the League’s Voluntary Employees’ Beneficiary Association Health and Welfare Plan (“League VEBA” or “Plan”) to provide life insurance for non-union employees. This Plan is a welfare benefits plan governed by ERISA. The Adoption Agreement between SCM and Penn-Mont included only life insurance and did not require Employees to contribute to the Plan. The Adoption Agreement limits the life insurance to “current protection” with “no economic value (such as paid-up or cash surrender value) . . . The participant shall have no right in the Contract other than death benefit protection.” Pl.’s Br. Summ. J., Exhibit D, Ex. C at 8-9.⁴

⁴ SCM’s Adoption Agreement with League VEBA provides at Section 7, section 3.1:

- (A) Except as provided in paragraph (B), the Life Benefit shall consist only of current protection, containing no economic value (such as paid-up or cash surrender value) extending beyond

SCM and Penn-Mont had numerous disputes regarding Plan administration during their relationship. SCM accused Penn-Mont of failing to properly administer the Plan in several ways, including not purchasing life insurance policies for SCM employees who were to be covered by the Plan. Penn-Mont responded to these allegations by claiming SCM had not filed certain plan documents in a timely fashion.

SCM's bookkeeper, Jean Waitt, died in early 1998. After her death, SCM discovered Waitt had embezzled more than \$1 million from the company. Michael Zimmerman, the president of SCM, informed Penn-Mont of Waitt's death and her illegal activities. Zimmerman requested payment of Waitt's death benefits under the Plan. Penn-Mont told SCM Waitt's death benefits would "probably be denied" because her actions implicated the "bad boy" provision of the Plan, which disqualifies dishonest employees from receiving Plan benefits.⁵ The letter also denied the

one Plan Year, irrespective of whether the provision of such benefit is funded by the Trustee with ordinary variable, universal, or other life Contracts. The participant shall have no rights in the Contract other than death benefit protection. Accordingly, a Participant's life benefit will in no event continue for more than twelve (12) months past the later of:

[x] The date of Participant's Severance (or his related Employee);

...

(B) Paragraph (A) shall not apply to any participant's conversion rights on any Contract, which are subject to the discretion of the Trustee.

Pl.'s Br. Summ. J., Exhibit D, Ex. C at 8-9.

⁵Section 5.10 of the League VEBA Plan Document:

General Limitation on Benefit Payment - Notwithstanding any provision of this Plan and Trust, a Participant who has less than ten (10) years of participation shall forfeit any benefit payable hereunder if it is determined by the Plan Administrator that he has engaged in a disqualifying act with respect to the Employer, Employees, or to the League. A Participant shall be deemed to have engaged in a disqualifying act if he is determined by the Plan Administrator to have: (1) been guilty of committing theft, fraud or embezzlement with respect to the Employer,; or (2) committed any criminal

benefits request on the alternative grounds SCM never joined REAL VEBA.

League VEBA terminated SCM's participation in the VEBA in February, 1999. At the same time, SCM demanded payment of the cash values of its employees' policies under the Plan. Penn-Mont, citing section 10.11 of the VEBA Plan, refused to return any money until SCM and each of its employees signed release forms.⁶ SCM and its employees refused to sign the forms, claiming Penn-Mont refused to provide accountings of the policies cash values and refused to remit to SCM the proceeds of Waitt's life insurance policy.

Litigation followed in May, 2000. After forays into the district court of New Jersey and a state court in Pennsylvania, REAL VEBA, League VEBA and Penn-Mont initiated this case with a twelve-count declaratory judgment action against SCM and the individual employees. SCM and the Employees removed the case to this Court. REAL VEBA asks for a declaratory judgment that:

act or malicious act [not rising to the level of a crime] which damages the person or property of the Employer, Employees or the League. The judgment of the Plan Administrator as to whether a Participant has committed a disqualifying act shall be final, unless made without evidence to support such judgment.

Pl.'s Br. Summ. J., Exhibit D, Ex. D at 10.

⁶Section 10.11 states:

Receipt and Release for Payment - Any payment to a Participating Employee, his legal Representative, beneficiary or other permitted party, shall to the extent thereof, be in full satisfaction of claims hereunder against the Plan, the Trustee, Plan Administrator, and Employer, any of whom may require such Participating Employee, his legal representative, beneficiary, or other payee to execute a receipt and release in such form as shall be required by the Trustee or Plan Administrator, in its sole and absolute discretion. In the event of termination of participation in the Plan, the Trustee or Plan Administrator may require such a receipt and release from the Employer.

Pl.'s Br. Summ. J., Exhibit D, Ex. D at 17.

- I. SCM is not a member of REAL VEBA;
- II. Jean Waitt was not participant in REAL VEBA;
- III. The “bad boy” provision is valid under the Plan;
- IV. The “bad boy” clause applies to Jean Waitt;
- V. Craig Waitt is not automatically a beneficiary under the Plan;
- VI. Payment of Waitt’s benefits to SCM would violate the Plan;
- VII. The Plan requires the execution of releases before payments are made from the Plan;
- VIII. SCM is required under Plan paragraph 10.10 to indemnify the Plan for legal fees and costs;
- IX. The Plan was entitled to terminate SCM;
- X. The Plan administrator has discretion regarding any unused funds;
- XI. SCM has breached its obligations under the Plan; and,
- XII. SCM has breached its fiduciary duty under the Plan.

After exhausting their administrative remedies the Employees filed an Amended Counterclaim alleging:

- I. The cash value of their life benefits was wrongly withheld by the Plan;
- II. The Penn-Mont’s demand for releases violates 29 U.S.C. § 1110(a);
- III. Penn-Mont’s failure to provide an accounting violates section 8.04 of the Plan and ERISA;
- IV. The violations constitute a breach of fiduciary duty;
- V. Craig Waitt is entitled to the proceeds of Jean Waitt’s life policy;
- VI. Craig Waitt’s right to the proceeds vested on Jean Waitt’s death; and,
- VII. Penn-Mont’s failure to account for the proceeds of Waitt’s policy violates ERISA.

I now consider the case on cross-motions for summary judgment.⁷

⁷Koresko’s VEBA schemes are the subject of multiple challenges none of which is relevant here. See *Chao v. Community Trust Co.*, No. 05-18 at *3 (E.D. Pa. Sept. 26, 2005) (fining Community Trust Company, a trustee for REAL VEBA, for violating a court order at Koresko’s direction); *REAL VEBA v. Castellano*, No. 03-6903 (E.D. Pa. Apr. 12, 2005) (denying defendant’s motion to disqualify Koresko as counsel); *Chao v. Koresko*, No. 04-74 (E.D. Pa. Aug. 2, 2004) (denying assertions of privilege to document discovery demands); *Penn-Mont Benefit Servs., Inc. v. Crosswhite*, No. 02-1980 (E.D. Pa. Jan. 29, 2003) (granting defendant’s motion to dismiss).

DISCUSSION

A motion for summary judgment will only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Stephens v. Kerrigan*, 122 F.3d 171, 176-77 (3d Cir. 1997). In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations and must view the facts and inferences in the light most favorable to the party opposing the motion. *Big Apple BMW, Inc. v. BMW of N.A., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993). When considering cross motions for summary judgment, this Court must consider each motion separately, drawing inferences against each movant in turn. *Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir. 1996).

ERISA does not provide a standard of review for the denial of benefits. The Supreme Court, however, addressed the issue in *Firestone Tire and Rubber Co. v. Bruch*, stating:

a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a facto[r] in determining whether there is an abuse of discretion.

489 U.S. 101, 115 (1989). The Third Circuit subsequently held that when the language of a plan gives the administrator discretionary authority, courts must apply the arbitrary and capricious

standard of review. *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993).⁸

“Under the arbitrary and capricious (or abuse of discretion) standard of review, the district court may overturn a decision of the Plan administrator only if it is ‘without reason, unsupported by substantial evidence or erroneous as a matter of law.’” *Abnathya.*, 2 F.3d at 45 (quoting *Adamo v. Anchor-Hocking Corp.*, 720 F. Supp. 491, 500 (W.D. Pa. 1989)). The court may not substitute its own judgment for that of the Plan administrator. *Id.* The discretion required to trigger the deferential arbitrary and capricious standard of review need not be expressly stated in the Plan, but may be inferred from its terms. *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1180 (3d Cir. 1991).

Because the Plan expressly grants the administrator authority to make beneficiary

⁸The Employees argue for a heightened standard based on the intermingling of Koresko’s control of the League, the Trust and the Plan Administrator. A “potential for a conflict arises” in cases where the employer both funds and administers the welfare benefits plan. *Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc. Employee Health and Welfare Plan*, 298 F.3d 191, 197 (3d Cir. 2003). No conflict exists where the “employer makes fixed contributions to the plan’s fund, which is held by a separate trustee, and the plan provides that the monies in the fund may only be used for the exclusive benefit of plan participants or plan expenses.” *Doyle v. Nationwide Ins. Companies & Affiliates Employee Health Care Plan*, 240 F. Supp. 2d 328, 337 (E.D. Pa. 2003); *Abnathya*, 2 F.3d at 45 n.5. See *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999) (no conflict exists where employer’s contributions to plan are fixed, contributions are held by a separate trustee, and funds are exclusively dedicated to benefit participants or to pay plan expenses); *Bunnion v. Consol. Rail Corp.*, 108 F. Supp. 2d 403, 424 (E.D. Pa. 1999) (no conflict exists because plan did not entitle employer to any residual portion of the trust and residual surplus was allocated to individuals’ accounts).

The structure of the Plan did not create a potential for conflict because under the Plan, SCM made fixed contributions to the Plan’s fund and SCM did not make the decisions on disbursement. The Plan required the fund to be used only for the benefit of plan participants or plan expenses. Without a conflict, this Court reviews decisions of the Plan Administrator only on a non-heightened arbitrary and capricious standard.

determinations,⁹ I review the denial of benefits challenged under section 1132(a)(1)(B) under an arbitrary and capricious standard. A claim decision is not arbitrary and capricious where “there was a reasonable basis for [the administrator’s] decision, based upon the facts as known to the administrator at the time the decision was made.” *Smathers v. Multi-Tool, Inc./MultiPlastics, Inc.*, 298 F.3d 191, 199-200 (3d Cir. 2002) (citing *Levinson v. Reliance Std. Life Ins. Co.*, 245 F.3d 1321, 1326 (11th Cir. 2001)). Under this deferential standard, the scope of review is narrow, and the administrator or fiduciary’s determination will not be overturned if it is reasonable, even if the court would have concluded differently. *Abnathya*, 2 F.3d at 45.

The multiplicity of claims in both Complaints boils down to four questions: is SCM a member of REAL VEBA; to whom should the proceeds of Jean Waitt’s life insurance policy be paid, whether the Employees are entitled to the cash value of their policies with League VEBA, and whether either side is entitled to attorney fees.

The first question regarding SCM’s membership in REAL VEBA is undisputed. SCM never executed the documents required for membership in REAL VEBA. The Plan allows Penn-Mont to involuntarily and unilaterally terminate an employer. Penn-Mont terminated because SCM failed to give Penn-Mont participant census information over a number years, failed to execute a the consent to form REAL VEBA and SCM failed to execute or return any of the several releases which

⁹The Plan Administrator retains discretion in several provisions: section 5.02(a), life benefits are payable periodically “in the Administrator’s sole and absolute discretion”; section 5.04, benefits shall be paid from funds “in the discretion of the Trustee”; section 5.07, grievances presented to Plan Administrator; section 5.10, Plan Administrator determines if the “bad boy” provision applies; section 6.03, gives the employer’s committee or the Plan Administrator the discretion and power to determine eligibility and the benefits payable, amend the Plan and “protect the interests of the participants”; and, section 9.02, allows the Plan Administrator “in its discretion” to allocate any unused funds at termination.

were required for benefit distribution to its employees. Penn-Mont had a reasonable basis for its termination of SCM's participation in the Plan. Judgment on that issue will be entered in favor of REAL VEBA.

The Plan argues, in the second issue, Jean Waitt forfeited her life insurance proceeds under the "bad boy" clause when she stole from SCM. Waitt embezzled over \$1 million from SCM and had less than ten years of participation in the Plan, meeting the elements of the "bad boy" clause. The exclusionary clause applies to Waitt, and disqualifies her from receiving any benefit under the Plan.

ERISA disallows "bad boy" clauses for pension benefits. 29 U.S.C. § 1053(a).¹⁰ Section 1053 does not disallow "bad boy" clauses in "employee welfare benefit plans." 29 U.S.C. § 1051(1);¹¹ *Ayers v. The Maple Press Co.*, 168 F. Supp. 2d 349, 355 (M.D. Pa. 2001) (enforcing ERISA plans which exclude all injuries incurred while under the influence of alcohol, or as a result of it). The *Ayers* court stated "ERISA plans may also, by their terms, exclude coverage for injuries incurred because the Covered Person was acting in a requisite criminal manner." *Ayers*, 168 F. Supp. 2d at 356. *Smathers* barred payment of benefits where the claimant's commission of a crime caused or contributed to the injury. *Smathers*, 298 F.3d at 200. The "bad boy" clause allows the Trust to retain the proceeds from Waitt's policy, which, under section 3.03 of the Trust may be used

¹⁰**29 U.S.C. § 1053. Minimum vesting standards**

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . .

¹¹**29 U.S.C. § 1051. Coverage**

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than--

(1) an employee welfare benefit plan; . . .

solely for the beneficiaries of the Trust. Pl.'s Br. Summ. J., Exhibit D, Ex. F at 4. The Plan is entitled to summary judgment on the question of the disposition of Waitt's life insurance proceeds.

The third issue encompasses SCM's and the Employees's claims for an accounting of unused funds and the return of those funds as cash value as well as the Plan's claim it does not owe any return. While the Employees never individually received an accounting of the funds paid into the Trust on their behalf, REAL VEBA gave SCM an accounting and letter outlining termination distribution calculations in October, 1998. Pl.'s Br. Summ. J., Exhibit D, Ex. P. In follow-up letters, Penn-Mont clarified the amounts available for termination distribution and explained termination procedures.¹²

The Plan refused to release the funds until the Employees signed a receipt and a release. In *Lockheed Corp. v. Spink*, 517 U.S. 882, 222 (1996), the Supreme Court upheld a release provision under ERISA, allowing an employer to condition the receipt of benefits on a waiver of employment claims. Without a release, the Penn-Mont opted to exercise its discretion under the plan to use the funds remaining to continue the Employees's life insurance coverage until the funds were exhausted. Section 9.02(a)(1).¹³

¹² Penn-Mont clarified the termination distribution calculations and termination procedures in letters dated: November 9, 1998 and November 17, 1998. Pl.'s Br. Summ. J., Exhibit D, Ex.s Q and R. On December 24, 1998, Penn-Mont sent SCM a Notice of Suspension of Death Benefits and Additional Requirements to Cure Termination of SCM from REAL VEBA. Pl.'s Br. Summ. J., Exhibit D, Ex. T. After a reminder on January 27, 1999, Penn-Mont sent SCM a final Notice of Plan Termination on February 3, 1999. Pl.'s Br. Summ. J., Exhibit D, Ex.s U and V. On February 22, 1999, Penn-Mont sent SCM a letter providing cash surrender policy values and the termination distribution formula. Pl.'s Br. Summ. J., Exhibit D, Ex. Y. On March 1, 1999, Penn-Mont provided SCM with a revised release form which stated SCM's termination from REAL VEBA was involuntary. Pl.'s Br. Summ. J., Exhibit D, Ex. AA.

¹³Section 9.02 of the Plan states: "Fund Recovery - It shall be impossible for any part of the contributions under this Plan to be used for, or diverted to, purposes other than the exclusive Benefit

The Employees argue, without an accounting there is no proof Penn-Mont used the assets to continue providing life insurance for the SCM employees. The Employees, even as the nonmoving party, cannot rest on their allegations without “any significant probative evidence tending to support the complaint.” *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir.1989) (stating a non-moving party must “adduce more than a scintilla of evidence in its favor . . . and cannot simply reassert factually unsupported allegations contained in its pleadings”). The Employees must adduce some evidence Penn-Mont did not continue their life insurance benefits. See *Trap Rock Indus., Inc. v. Local 825*, 982 F.2d 884, 890 (3d Cir. 1992). Because they have not, Penn-Mont is entitled to summary judgment on the third question.

Penn-Mont premises its final question, an award of attorneys’ fees, on the indemnification

of the Participants and their Beneficiaries.

(a) Upon dissolution of the Plan and/or termination of the Employees’ association from the League by virtue of an Employer’s voluntary or involuntary termination of membership in the League, any assets remaining in the Plan after satisfaction of all liabilities to existing Beneficiaries shall be applied in one or a combination of the following, as selected by the Trustee or Plan Administrator in its discretion.

(1) Such remaining assets shall be used to provide (either directly or through the purchase of insurance), life, sick, accident or other benefits within the meaning of Regulation Section 1.501 (c)(9), pursuant to criteria that do not provide for disproportionate benefits to officers, shareholders or highly compensated employees of the Employer, or

(2) Such remaining assets shall be distributed to members pro-rata based on the total benefits payable to which such Member and his beneficiaries would be entitled to pursuant to ARTICLE 5 compared to the total benefits payable to which all Members and their beneficiaries would be entitled pursuant to Article 5; or

(3) Distributions shall be based on objective and reasonable standards which do not result in either unequal payments to similarly situated Participants or in disproportionate payments to officers, shareholders or highly compensated employees of the Employer.

Pl.’s Br. Summ. J., Exhibit D, Ex. D at 15.

clause of the Plan¹⁴ as well as under ERISA. 29 U.S.C. § 1132(g)(1). The Plan is an ERISA plan; the federal common law of ERISA controls the award of attorneys' fees, not Pennsylvania contract law. 29 U.S.C. § 1144(a).

ERISA does not require an award of attorneys' fees, but "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1); *Martorana v. Bd. of Trs. of Steamfitters Local Union 420 Health, Welfare, & Pension Fund*, 404 F.3d 797, 804-05 (3d Cir. 2005). Absent exceptional circumstances, there is no presumption that a prevailing party will receive such fees. *McPherson v. Employees' Pension Plan of Am. Re-Ins. Co.*, 33 F.3d 253, 254 (3d Cir. 1994) (holding a defendant may be culpable without acting in bad faith). This Court considers five factors when determining whether to grant attorneys' fees in ERISA cases: (1) culpability or bad faith; (2) ability to satisfy an award of attorneys' fees; (3) deterrent effect of an award; (4) benefit conferred on pension plan members as a whole; and (5) relative merits of parties' positions. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *see also Fields v. Thompson Printing Co.*, 363 F.3d 259, 275 (3d Cir. 2004). This Court must consider the *Ursic* factors, *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1011 (3d Cir. 1992), in exercising its discretion.

¹⁴ Section 10.10 of the Plan states:

Indemnification of the Administrator by the Employer - The Employer hereby agrees to indemnify the Administrator for and to hold it harmless against any and all liabilities, losses, cost or expenses (including legal fees and expenses) of whatsoever kind and nature which may be imposed on, incurred by or asserted against the administrator at any time by reason of the Administrator's Service under this agreement if the Administrator did not act dishonestly or in willful violation of the law or regulation under which such liability, losses, cost or expense arose. Such amounts may be charged as expenses of the Plan and Trust against assets contributed by the Employer which would otherwise be employed or distributed hereunder.

Pl.'s Br. Summ. J., Exhibit D, Ex. D at 17.

Fields, 363 F.3d 275.

SCM has not engaged in culpable conduct. “[C]ulpable conduct is . . . blameable; censurable; . . . involving the breach of a legal duty or the commission of a fault . . . something more than simple negligence” *McPherson*, 33 F.3d at 256-57. “A party is not culpable merely because it has taken a position that did not prevail in litigation.” *Id.*

The second factor for consideration is SCM’s ability to satisfy an award of attorneys’ fees. Plaintiffs argue that SCM is a multi-million dollar corporation with the ability to pay the legal fees in this case. Because SCM does not dispute this contention, this court finds that SCM could satisfy an award for attorneys’ fees.

The third factor analyzes the deterrent effect of an award of attorneys’ fees against the offending parties. Plaintiffs argue that awarding fees would act as a deterrent by forcing employers to abide by the terms of the plan documents. Because SCM did not engage in bad faith practices or culpable conduct by merely taking a position that did not prevail in litigation, there appears to be no need to deter such conduct.

The fourth factor considers the relative benefit conferred on members of the plan as a whole. Plaintiffs contend that if attorneys’ fees are not awarded, the members of the plan, through plan wide assets, will have to cover the costs of this litigation. This factor weighs against SCM.

The fifth factor takes into account the relative merits of the parties’ position. Even though I found for Penn-Mont, SCM’s position was not without merit. After analyzing the five factors, I will not award attorneys’ fees.

In sum, summary judgment will be entered in favor of Penn-Mont on all counts in its Complaint except Count VIII regarding indemnification and judgment will be entered against SCM and the Employees on their motion for summary judgment. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGIONAL EMPLOYERS' ASSURANCE :
LEAGUES VOLUNTARY EMPLOYEES :
BENEFICIARY ASSOCIATION TRUST, :
by PENNMONT BENEFIT SERVICES, INC., :
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v. : NO. 01-4693
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PENN PUBLIC TRUST :

ORDER

And now this 21st day of July, 2006, Plaintiffs' Motion for Summary Judgment is GRANTED as to Counts I to VII inclusive and Counts IX to XII inclusive. Plaintiffs' Motion for Summary

Judgment is DENIED with respect to Count VIII. Defendants/Counterclaim Plaintiffs' Motion for Summary Judgment is DENIED as to all Counts. Judgment is ENTERED in favor of Plaintiffs Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Trust, Delaware Valley League of Merchants North Voluntary Employees' Beneficiary Association Trust, Penn-Mont Benefit Services Inc. on all counts with the exception of Count VIII. The Clerk shall mark the above-captioned case closed.

BY THE COURT:

\s\ Juan R. Sánchez
Juan R. Sánchez, J.