

# EXHIBIT B

Not Reported in F.Supp., 1992 WL 200853 (S.D.W.Va.), 15 Employee Benefits Cas. 1342  
(Cite as: 1992 WL 200853 (S.D.W.Va.))

C

United States District Court, S.D. West Virginia.  
Joseph P. CONNORS, Sr., Donald E. Pierce, Jr.  
William Miller, Thomas H. Saggau and Paul Dean,  
Trustees of the United Mine Workers of America  
1974 Pension Trust, Plaintiffs,  
v.  
George B. VICK and Gerda Vick, Defendants.

Civ. A. No. 5:91-0289.  
March 13, 1992.

*MEMORANDUM OPINION*

HALLANAN, District Judge.

\*1 This matter is before the Court via Plaintiffs' Motion for Summary Judgment. The Court has received Defendants' memorandum in response and Plaintiffs' reply brief. Having carefully considered the papers presented, the Court is prepared to issue its ruling herein.

The Trustees of the United Mine Workers of America 1974 Pension Trust ("Trust") bring this action against the Defendants to have this Court declare certain conveyances of real estate null and void. The Trustees contend that the conveyances described below were made to evade or avoid collection of withdrawal liability pursuant to Section 4212(c) of the Employee Retirement Income and Security Act of 1974 ("ERISA"), 29 U.S.C. § 1392(c). The Trustees also contend that the conveyances violate federal common law governing fraudulent transfers. Jurisdiction is proper under 28 U.S.C. § 1331. As there are no material facts in dispute, this matter is ripe for summary judgment. Fed.R.Civ.P. 56(c).<sup>FN1</sup>

*Statement of the Case*<sup>FN2</sup>

The Plaintiffs administer the Trust out of their offices in the District of Columbia. As trustees, they are fiduciaries with respect to the Trust within the meaning of 29 U.S.C. § 1002(21) and are collectively the plan sponsor of the Trust within the

meaning of 29 U.S.C. § 1002(16)(B)(iii). The Plaintiffs are authorized to bring this action under 29 U.S.C. § 1132(a)(3) as the Trust is an employee benefit plan within the meaning of 29 U.S.C. § 1002(37).

The Defendants, husband and wife, are residents of West Virginia. Defendant George B. Vick formerly engaged in the business of transporting coal to and from coal mines under the name of HC Trucking. Mr. Vick was a signatory party to the National Bituminous Coal Wage Agreements of 1974 and 1978 ("Wage Agreements"). Pursuant to the Wage Agreements, George Vick d/b/a HC Trucking was a participating employer in the Trust and made contributions to the Trust on behalf of HC Trucking employees. Mr. Vick ceased covered operations under the Trust and stopped making contributions to the Trust in or about March 1981. Through ceasing covered operations, Mr. Vick effected a complete withdrawal from the Trust within the meaning of 29 U.S.C. § 1383(a)(2) and thereby incurred withdrawal liability to the Trust in an amount determined by the Trust. 29 U.S.C. § 1391(d)(1).

By letter dated April 14, 1982, the Trust advised Mr. Vick of his withdrawal liability to the Trust in the amount of \$8,029.80. The same letter further advised Vick of an option to discharge his liability by making monthly payments of \$104.31. This Defendant admits to receiving such notice. Thereafter, Mr. Vick failed to make any payments to the Trust and did not seek further review of the determination of withdrawal liability or arbitration under 29 U.S.C. §§ 1399(b)(2)(A) and 1401(a)(1). Later on December 9, 1982, the Plaintiffs demanded payment of all past due withdrawal liability payments plus interest (\$548.07) no later than February 11, 1983. The December 9 letter also advised the Defendant that failure to pay by February 11, 1983 would result in the \$8,029.80 of withdrawal liability becoming immediately due and owing without further demand. Despite the warning, Mr. Vick failed to make any payments and was there-

fore in default on his obligation under 29 U.S.C. § 1399(c)(5).

\*2 In May 1985 the Trust filed a withdrawal liability action against Mr. Vick in the Federal District Court for the District of Columbia, styled *Joseph P. Connors, et al. v. George B. Vick, trading as HC Trucking*, Civil Action No. 85-1549. Mr. Vick accepted service of the summons and complaint in said action on or about May 23, 1985 and answered the complaint on or about May 31, 1985. Later on August 7, 1985, the Trust moved for summary judgment in the withdrawal liability action. By Order entered October 10, 1985, the district court granted the motion and entered judgment in favor of the Trust for \$8,029.80, the withdrawal liability amount, plus accrued interest. The judgment has been registered in this district (Miscellaneous 5:86-00004) but has not been satisfied in full or in part.

Prior to the entry of judgment in the withdrawal liability action and shortly after accepting service of the pertinent summons and complaint, Mr. Vick conveyed his interest in two parcels of real property to his wife, Defendant Gerda Vick. In a deed executed on June 26, 1985, Mr. Vick conveyed to his wife his one-sixth interest in property described as

“the surface of that portion of Tracts Nos. 2 and 3 (marked “James Vick”) on the southern side of a hard surfaced road as shown on a map entitled “Map Showing Partition of the Land \* \* \* J.E. Larew, C.E., Beckley, W.Va.” attached to a deed from G.W. Boyer, et al, to James Vick dated April 1, 1929, and of record in the Office of the Clerk of the County Commission of Raleigh County, West Virginia, in Deed Book 103, at page 94, and which said tracts or parcels of land are shown and designated upon the Raleigh County Assessor's Tax Map for Town Tax District Numbered 4, as Parcel No. 76.”

See Exhibit A—Memorandum in Support of Plaintiffs' Motion for Summary Judgment. The deed was recorded on July 1, 1985 in the Office of

the Clerk of the County Commission of Raleigh County, West Virginia in Deed Book 698 at pages 413-414.

The second conveyance was also by deed on June 26, 1985 in which Mr. Vick conveyed to his wife his interest in property described as

“BEGINNING at a steel pin in the eastern boundary line of the tract heretofore owned by Byrace R. Skeens and Rodney A. Skeens, as described in Deed Book 615, at Page 28, which said steel pin is N. 3° 13' E. 350 feet from a line in the northern right-of-way line of the Old Crow Road—WV Route 19-15; thence S. 85° 37' W. 250.06 feet to a steel pin on the western side of the gravel roadway leading to the Old Crow Road; thence N. 2° > 56' E. 165 feet to a set hub; thence N. 85° 37' E. 250.88 feet to a tack in lead plug in rock; thence S. 3° 13' W. 165.11 feet to the point and place of BEGINNING, and containing 40,991.30 square feet; and which said tract or parcel of land is shown and designated upon the Raleigh County Assessor's Tax Map for Shady Springs Tax District numbered 14, as Parcel No. 58.”

See Exhibit C—Memorandum in Support of Plaintiffs' Motion for Summary Judgment. This property is the residence of the Defendants. FN3  
 The deed effecting this second conveyance was recorded on July 1, 1985 in the Office of the Clerk of the County Commission of Raleigh County, West Virginia in Deed Book 698 at pages 372-373.

#### Discussion

\*3 The Trustees assert that Mr. Vick conveyed his ownership interests in the two parcels in an effort to escape the Trust's collection of withdrawal liability in violation of 29 U.S.C. § 1392(c). This section provides:

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

This ERISA provision came into existence in 1980 as part of the Multiemployer Pension Plan Amendments Act (“MPPAA”), 29 U.S.C. §§ 1381–1461. The MPPAA was intended, in part, to discourage employers from withdrawing from multiemployer pension plans and leaving plans with inadequately funded liabilities. *Local 478 Trucking and Allied Industries Pension Fund v. Jayne*, 778 F.Supp. 1289, 1302 (D.N.J.1991) (citations omitted). The legislative history of 29 U.S.C. § 1392(c) reveals that federal courts are to look to the substance of transactions rather than the form of such transactions in determining, assessing and collecting withdrawal liability.<sup>FN4</sup> Moreover, legislative intent calls for federal courts not to permit “employers to evade or avoid withdrawal liability through changes in identity, form or control, or through transactions which are less than bona fide and arm's length.” *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491, 499 (9th Cir.1987), cert. den. 485 U.S. 1008 (1988) (quoting legislative history).

The Defendants deny that the conveyances were made to escape or avoid withdrawal liability and that the transfers are legitimate. Mr. Vick goes as far to claim that he was not aware of his withdrawal liability in June 1985 when he conveyed his interests to his wife. However, the evidence is to the contrary. Mr. Vick admits that the Trust assessed him with withdrawal liability in the amount of \$8,029.80 by letter dated April 14, 1982. In addition, Plaintiffs' December 9, 1982 letter demanded payment from Mr. Vick for all past due withdrawal liability payments plus interest by February 11, 1983. Furthermore, Mr. Vick concedes that he accepted service of the summons and complaint for the withdrawal liability action initiated by the Trust in May 1985—over a year before the conveyances. Clearly, Mr. Vick was well aware of his withdrawal liability.

Mrs. Vick also asserts the defense that she was unaware of the withdrawal liability of her husband,

trading as HC Trucking, in June 1985 when she received her husband's property interests. Yet her knowledge or lack of knowledge regarding withdrawal liability is irrelevant. Knowledge is not required as a precondition for imposition of withdrawal liability. See *Central States, Southeast and Southwest Areas Pension Fund v. Minneapolis Van & Warehouse Co.*, 764 F.Supp. 1289, 1296 (N.D.Ill.1991) (shareholder's lack of knowledge could not be used as a defense to pension fund's claim for withdrawal liability payments owed to pension fund under MPPAA against dissolved corporation whose assets were distributed to shareholder). To allow Mrs. Vick to claim ignorance of the law so as to permit Mr. Vick to convey his property interests would, as the Plaintiffs assert, thwart the policy of the MPPAA. Mr. Vick's withdrawal liability arose as a matter of law when he ceased covered operations under the Trust in or about March 1981, thereby effecting a complete withdrawal. 29 U.S.C. § 1383(a)(2). The liability persisted during June 1985 when he conveyed his property interests to his wife. The conveyances alone, we believe, ripened Plaintiffs' § 1392(c) claim. Accord *Minneapolis Van*, 764 F.Supp. at 1296 (“Distribution alone, and not an affirmative intent to defraud, establishes *this* type of “fraud on the creditor”) (emphasis in original). In this connection, the Court finds that the Trustees brought this action within the applicable statute of limitations. 29 U.S.C. § 1451(f)(1).

\*4 The Defendants submit that the conveyances are supported by adequate consideration in the form of love and affection for one another and Gerda Vick's assistance to her mother-in-law, Mae Vick. Deposition testimony of the Defendants reveals that Mae Vick did not reside with the Defendants and that Mrs. Vick was not the primary caretaker but one of several relatives who cared for Mae Vick. Moreover, there does not exist a written agreement between the Defendants or a provision in the subject deeds whereby Mr. Vick agreed to convey his interests in return for the love, affection and assistance of his wife. This argument necessarily fails.

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In evaluating Plaintiffs' claim that Mr. Vick sought to avoid his withdrawal liability through the above conveyances, we consider the totality of the circumstances. *Retirement Benefit Plan of Graphic Arts International Union Local 20-B v. Standard Bindery Company*, 654 F.Supp. 770, 772 (E.D.Mich.1986). Mr. Vick conveyed his interests to Mrs. Vick within four to five weeks after accepting service of the summons and complaint in the withdrawal liability action. The Court believes this fact alone renders the conveyances inherently suspect. The timing of the conveyances strongly suggest that the purpose was to evade or avoid withdrawal liability. In addition, the conveyances did not lead to a change in the Defendants' actual circumstances. Furthermore, the conveyances are without economic substance as the Defendants continue to live in their home as they did before the June 1985 conveyance. Overall, we conclude that the principal purpose of the conveyances was to avoid the Trust's collection of withdrawal liability and, therefore, the conveyances are void transactions pursuant to 29 U.S.C. § 1392(c) and the Court imposes a constructive trust on the conveyed property for the benefit of the Plaintiffs. Having determined liability under the MPPAA, the Court need not consider Plaintiffs' alternative ground for liability under federal common law governing fraudulent transfers.

Accordingly, for reasons heretofore stated, Plaintiff's Motion for Summary Judgment will be granted. An appropriate judgment order shall issue.

The Clerk is directed to send copies of this Memorandum Opinion to all counsel of record.

IT IS SO ORDERED.

**FN1.** The Court notes that the Defendants' memorandum in opposition contains a factual summary that mirrors the factual summary contained in Plaintiffs' summary judgment brief.

**FN2.** Hereafter, the Court will discuss the

pertinent provisions of ERISA by referring to the section numbers provided in Title 29 of the United States Code rather than the section numbers contained in the legislative text.

**FN3.** The Defendants previously took title to the property as joint tenants with rights of survivorship by deed recorded on May 30, 1980 in the Office of the Clerk of the County Commission of Raleigh County, West Virginia, found in Deed Book 628 at pages 595–596. See Exhibit B—Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

**FN4.** [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability. This rule is to apply when evasion of liability is a principal purpose of a transaction, whether or not the transaction has other purposes as well. 126 Cong.Rec. 23038 (1980).

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