

ERISA OPINION 160

(Same letter as P/O 76-99)

December 30, 1976

Re: Employees Retirement Plan

Dear :

The Department of Labor has responsibility for administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). We have received a complaint that (Name), since deceased, a former employee of the (City) State Bank and a participant in the Employees Retirement Plan for (State) Banks, was denied benefits to which he was entitled under the terms of the Plan. His allegations have been investigated by this Department and we have reached the conclusion that (Name) was, in fact, denied benefits to which he was entitled and to which his estate is now entitled.

ERISA provides, in section 3(21), that persons and organizations exercising discretionary authority or control respecting a covered employee benefit plan are fiduciaries within the meaning of the Act. Section 404 provides:

. . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

- (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
- (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * *

- (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

Subject to the exceptions of ERISA S408, which are not here relevant, ERISA S406(a)(1)(D) provides:

A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect --

* * *

- (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

We have concluded that (Named) Bank and Trust is a fiduciary as defined in ERISA 3(21) and (City) State Bank is, pursuant to ERISA 3(14)(C), a party in interest by virtue of its status as an employer whose employees are covered by the plan. Please be advised that in our judgment your withholding of benefits from a plan participant and your transfer of those benefits to a party in interest in satisfaction of a debt owed by the participant to that party in interest is a violation of the above quoted provisions of ERISA. Please be further advised that, pursuant to ERISA S502, the Secretary of Labor may bring a civil action to enforce the provisions of the statute.

We are aware that litigation commenced in the state court by (City) State Bank resulted in the entry of an order requiring you to pay certain sums to (City) State Bank in satisfaction of a debt owed that bank by the participant. We are also aware, however, that although named as a defendant in that case, you did not appear or defend; thus a default judgment was entered, despite the fact that the provisions of the plan provide apparent defenses to that action.

It is our view that the plan is presently indebted to the estate of (Name) for the amount originally credited to his account and not timely paid him, with interest, and that (Named) Bank and Trust is personally liable, pursuant to ERISA S409, to the plan for reimbursement of all sums lost by it because of its breach of fiduciary obligations.

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My purpose in sending this letter is to advise you of the requirements of the law, so that you will have the opportunity to comply with its terms voluntarily without the need for legal action on our part. We are aware that the Internal Revenue Service has also expressed some concern over this matter. Our enforcement responsibilities under Title I of ERISA are distinct from those of the Service and any decision reached by them will not affect the position of the Department of Labor.

If you are prepared to settle this matter along the lines indicated above, please advise us in writing within twenty days of your receipt of this letter of the corrective action you have taken or propose to take. Any communications should be addressed to:

Plan Benefits Security Division
Office of the Solicitor
Room C4508,
Department of Labor
Washington, D. C. 20210
(202) 523-7923

Sincerely,