

*Indalex:*

# Good News For Plan Beneficiaries

By: Priscilla H. Healy

**R**ecent developments in insolvency law have given increased recognition to the claims as to underfunded pension plans in corporate insolvencies: the Indalex decision of the Ontario Court of Appeal released April 7, 2011, and the amendments to the federal Pension Benefits Standards Act (the PBSA) effective April 1, 2011.

The Indalex decision clarified that section 57(4), the provision in the Ontario Pension Benefits Act that creates a statutory deemed trust for the obligation to fund a pension plan on plan wind up, applies to the entire unfunded liability of a pension plan, and that the deemed trust must be addressed in CCAA proceedings. The decision also strongly suggests that a company in insolvency proceedings with an underfunded pension plan should relinquish its role as plan administrator to avoid breaching its fiduciary duty to plan members.

The amendments to the federal PBSA, which applies to the pension plans of federally regulated companies, create the obligation to fully fund a pension plan upon plan wind-up, which had not hitherto been a requirement under that act. The deemed trust provisions of the PBSA are also expanded somewhat, although the federal deemed trust does not extend to the entire unfunded liability of the plan. Finally, there is a new provision for distressed pension plan workouts, an opportunity for parties to agree as to the funding of the pension plans before or within CCAA proceedings. The legislation and regulations for distressed plan workouts are based upon the process by which the 2009 agreement among the parties concerned with the Air Canada pension plans was reached.

How those developments will all play out in toughly negotiated and toughly argued CCAA compromises or plans of arrangement remains to be seen. Moreover, there are some uncertainties as to the status of claims of federally regulated pension plans in bankruptcies. What is clear, however, that lenders and borrowers, as well as monitors in CCAA proceedings, are advised to have regard for the existence of the claims arising from underfunded pension plans, and to ensure that they are taken into account in negotiations and presentations to the court. ■

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