Verizon Allowed to Correct $1.6 Billion "Scrivener's Error"

Mistakes happen!

Fortunately, correcting one usually takes no more than the stroke of a pen. However, as illustrated by *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 2009 U.S. Dist. Lexis 102349 (N.D. Ill. 2009), correcting a so-called "scrivener's error" in a qualified retirement plan can be far more difficult and potentially costly. Verizon faced more than $1.6 billion in additional contributions if the court had not permitted correction of a drafting error.

The case involved the conversion of a traditional defined benefit pension plan into a cash balance plan. As part of the conversion, each participant's then-accrued benefit was to be converted into a lump sum and credited to an account under the new plan. Verizon intended to calculate the lump sum by multiplying each participant's then-accrued benefit by a "Transition Factor" set forth in the plan. Because of a drafting error, however, the plan required that the accrued benefit be multiplied by the transition factor twice rather than once. If left unchanged, this would have substantially increased each participant's account balance. For example, the plaintiff's balance would have increased from approximately $200,000 to approximately $600,000.

Once the alleged error was discovered, the plan's administrative committee amended the plan to delete one of the references to the transition factor. The summary plan description and other documents distributed to participants, including the plaintiff, referenced only a single multiplier, and the plaintiff never complained about this. Following her termination, the plaintiff sued, arguing that the committee did not have the authority to reform a "scrivener's error" without court approval, and that reformation is not a form of equitable relief available under Section 502(a)(3) of ERISA. The court rejected the latter argument, finding that reformation was "appropriate equitable relief" within the meaning of that section.

The plaintiff argued that reformation was not appropriate under ERISA in any case because the statute requires fiduciaries to follow the terms of a plan and the plan terms were unambiguous. The court agreed with the general primacy of the "plan documents" rule, but noted that reformation was nevertheless appropriate when a defendant can demonstrate that: the plan term was a drafting error; plan participants received correct information and so did not detrimentally rely on the erroneous term; and participants would receive a windfall if the provision as drafted were allowed to stand. After reviewing these factors, the court found for defendant Verizon and allowed reformation.

The case reinforces once more the need for extreme care in drafting a plan and ancillary documents, as a single error can have disastrous consequences. Of course, sometimes even due care may not be enough to avoid mistakes — here, an outside consulting firm, outside counsel and in-house experts all missed the error that led to the litigation. If an error should happen, the plan sponsor should seek court approval for reformation at the earliest possible moment.

Overfunded Status of Plan Precludes Suit for Fiduciary Breach

In a 2-1 decision, the Eighth Circuit held that a participant in an overfunded defined benefit pension plan lacked standing to proceed with a claim that the plan's fiduciaries breached their duty under ERISA by paying excessive advisory fees to subsidiaries of the plan's sponsor. *McCullough v. AEGON, USA, Inc.*, No. 08-1952 (N.D. Iowa 2009). The majority seemed to agree that the fiduciaries had breached their duty, but found that the plaintiff could not bring suit on behalf of the plan because the surplus precluded a finding that the plaintiff had suffered an injury due to the breach. The court rejected the plaintiff's argument that he was bringing a claim on behalf of the plan, and that ERISA allows a participant to bring such an action.

The decision seems odd in that it has been settled law that a participant may (and, in some circumstances, must) bring an action on behalf of the plan itself. Equally importantly, as recent events have shown, a downturn in the stock market can alter the funding status of a plan virtually overnight. Thus, after such a downturn, a participant theoretically would have standing to bring a claim for the same breach that was previously barred. This result seems at best counterintuitive and, at worst, to permit the very kind of fiduciary misconduct ERISA was designed to prohibit.

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