PROSKAUER ROSE LLP

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In this month's issue:

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Editor's Overview

This month we address an eclectic array of cases. Our first article discusses a recent ruling by the Eighth Circuit, which held that "boilerplate" plan language created ambiguity on whether health benefits had vested. Our other article looks at what risks are becoming an all too common claim post-*LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020 (2008). It reviews a decision where, in light of an administrative error, a 401(k) plan participant was awarded his investment losses, even though he had retained the ability to avoid those losses by giving a different instruction.

In the "Rulings, Filings and Settlements of Interest" section, the eclectic theme continues with cases discussing: (i) recent ERISA suits seeking to recover losses from investment in Madoff's funds, (ii) the Third and the Eight Circuit's revision of their standard of review in light of *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); (iii) an ERISA § 510 claim; and (iv) three more of the seemingly never-ending employer stock drop rulings.

Eighth Circuit's Ruling Illustrates How Boilerplate Type Plan Language Can Vest Welfare Benefits

By Robert Rachal

In *Halbach v. Great-West Life & Annuity Ins. Co.*, 2009 WL 973347 (8th Cir. Apr. 13, 2009), a class of former employees claimed that their welfare benefits (health, vision, dental, and life insurance) vested once they started receiving their long-term disability benefits and that Great-West illegally eliminated these benefits while they were on long-term disability leave.

The Eighth Circuit first held that Great-West validly amended the plan to eliminate these benefits. The plan provided it may be amended by a "written instrument signed by an officer of the company," which was done here through a signed letter with an attached summary plan description detailing the changes. The district court had read these documents separately to conclude the amendment was invalid (the letter was too vague and the SPD was unsigned). The Eighth Circuit applied "basic contract principles" to conclude the letter and the summary plan description should be read together to determine the scope of the plan amendment.

On the issue of vesting, the plan contained a reservation of rights clause that permitted the company to amend the plan at any time and manner it deemed advisable. However, this right was qualified by a proviso stating that "no such modification shall divest a participant of benefits under the plan to which he had become entitled prior to the effective date of the amendment." The Eighth Circuit held that this proviso could be read reasonably to preserve some form of contractually vested benefits, and thus was ambiguous. In so holding, the court rejected Great-West's argument that the proviso only applied to "pipeline claims," i.e., to claims incurred before the date of the plan amendment. The court contrasted this with language it had found unambiguously excluded claims to contractually vested benefits, such as language that simply stated "the company fully intends to continue this Plan indefinitely, but reserves the right to change or discontinue it if necessary." Because there was conflicting evidence in the summary plan description and in extrinsic evidence on intent, the court remanded the case to the district court for trial on whether these welfare benefits were vested.

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Halbach illustrates how boilerplate plan language can have unintended consequences. Stating that a plan amendment would not divest someone of vested benefits is making an obvious point; however, if not done carefully, making that point can lead a court to conclude, as happened here, that there is (or may be) some unintended group that has protected claims for contractually vested benefits. *Halbach* also provides support for the proposition that a simple reservation of rights statement can unambiguously preclude the vesting of benefits.

In *LaRue*-Type Claim Handled as Claim for Benefits, District Court Rules Participant Is Entitled to Investment Losses Resulting from the Failure To Follow His Investment Direction

By Robert Rachal & Kara Lincoln

In *Shaffran v. Lucent Techs., Inc.*, 2009 WL 901497 (W.D. Mo. Mar. 31, 2009), an individual plan participant sought to recover investment losses from the failure to implement his investment instruction in a participant-directed plan. By asserting a claim for benefits under ERISA § 502(a)(1)(B), as compared to either ERISA §§ 502(a)(2) or (3) as in *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020 (2008), Shaffran's claim was subject to administrative exhaustion.

The case arose out of an apparent technical snafu in which various participants had been permitted to transfer their plan money into an employer stock fund that was limited to employer matching contributions, rather than to the employer stock fund that accepted employee contributions. In July 2000, Shaffran transferred money from a stable value fund to this employer match fund. The next month Shaffran attempted to make a similar transfer, but was told that he could not do so and that his earlier transaction had been completed in error. Shaffran thus requested that his July 2000 transaction be voided and his

money returned to the stable value fund. He was told that the money would be returned to the stable value fund contingent on the outcome of an investigation, which would take a few days, or he could leave it in the stock fund pending that investigation. For reasons that are not entirely clear, Shaffran was not contacted at the conclusion of the investigation and the funds at issue were transferred to the employer stock fund that permitted employee contributions, not the stable value fund as previously directed by Shaffran.

Shaffran first filed suit without exhausting his administrative remedies. The court remanded the case for exhaustion. After Shaffran's claim was denied by the plan administrator, the court held that the plan administrator's decision was an abuse of discretion, reasoning that the plan terms required the plan to follow Shaffran's direction to return the monies to the stable value fund. On the issue of remedies, the court ordered that Shaffran be paid the value of his investment as of August 2000 when he requested the transaction be voided, less what he ultimately received for that investment. In so holding, the court rejected the plan administrator's argument that Shaffran always retained the right to transfer the assets at issue himself, and thus should have mitigated the damages he suffered due to the subsequent decline in value of the employer stock.

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The breakdown here appeared to be one of communication, i.e., the failure to contact Shaffran after the conclusion of the investigation to find out what he wished to do with his funds. This case illustrates the risk that when there is an administrative snafu in handling a participant's investment instructions, the courts may allow participants to recover for investment losses even when the participant retained the ability to avoid that loss.

Rulings, Filings and Settlements of Interest

- The Bernard Madoff investment scandal has produced several class-action lawsuits asserting violations of ERISA. The first was *Pension Fund for Hospital & Health Care Employees, et al. v. Austin Capital Management, Ltd.*, No. 09-000615 (E.D. Pa.), in which a multiemployer fund sued its investment manager (Austin) for investing plan assets in hedge funds with exposure to Madoff. The Fund asserted, on behalf of a class of employee benefit funds for which Austin served as investment manager and invested plan assets in any Madoff-related investment, that Austin failed to exercise due diligence in making investments and recognize warning signs of Madoff's fraud. Similar ERISA claims are being pressed against Austin, along with securities claims for a larger class of investors, in a more recent case styled *Construction Industry & Laborers Joint Pension Trust v. Austin Capital Management, Ltd.*, No. 09-3614 (S.D.N.Y.) (filed April 17, 2009). A group of Taft-Hartley funds in upstate New York also are pressing ERISA claims against another investment advisor (J.P. Jeanneret) and a fund manager (Beacon) in *Morin, et al. v. J.P. Jeanneret Assocs., Inc.*, No. 09-305 (W.D.N.Y.). These funds assert ERISA claims against Jeanneret and Beacon for their alleged lack of prudence in making and maintaining plan investments in Madoff

strategies. The *Morin* suit seeks to represent a class of trustees of multiemployer funds with Madoff exposure dating as far back as 1991.

- In *Schwing v. Lilly Health Plan*, 2009 WL 989114 (3d Cir. Apr. 14, 2009), the Third Circuit applied *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), to conclude that its use of a sliding scale standard in conducting abuse of discretion review was no longer valid. Rather, the Third Circuit held that abuse of discretion review is used "across the board," with any conflict considered as a factor in determining whether the administrator abused that discretion. Applying this new standard, the Third Circuit reversed the district court's holding that the plan administrator did not abuse his discretion in concluding that an employee failed to qualify for severance benefits because of termination for misconduct. In so ruling, the Third Circuit noted there is no requirement that counsel advising the fiduciaries be independent of the company, and that the fiduciaries were not required to conduct an independent investigation of veracity when there was substantial evidence in the record supporting the termination for misconduct.

- In *Chronister v. Unum Life Insur. Co. of Amer.*, 2009 WL 1150325 (8th Cir. Apr. 30, 2009), the Eighth Circuit, in light of *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), abandoned two principles it had followed in determining the level of review of a plan administrator's decision to deny benefits. Specifically, the court held that a plan administrator's funding of benefits is a conflict, and that a plaintiff did not need to show that the conflict was causally connected to the specific decision at issue to consider that conflict when conducting abuse of discretion review. After evaluating the facts leading to Unum's denial of a claim for long-term disability benefits in light of this new standard, the court concluded that Unum's decision to deny benefits was arbitrary and capricious and remanded the case with instructions to enter judgment in favor of the plaintiff.

- In *Bang v. IBM Corp.*, 600 F. Supp. 2d 430 (E.D.N.Y. 2009), the district court denied defendants' motion for summary judgment on plaintiff's ERISA § 510 claim. In so holding, the court determined that plaintiff raised an inference of ERISA discrimination as a matter of law based solely on: his assertion that he was within one year of vesting in the IBM employee pension plan; the fact that the company had faced litigation in the past for depriving older employees of rights in the pension plan; evidence showing that he was qualified for his position; and sufficient issues of triable fact concerning the defendant's proffered reasons for terminating his employment.

- In *In re Tyco Intl., Ltd. Multidistrict Litig.*, 2009 U.S. Dist. LEXIS 30609 (D.N.H. April 3, 2009) (unpublished), the district court granted plaintiffs' motion for summary judgment with respect to their claim that the plan fiduciaries were not entitled to use ERISA § 404(c) as an affirmative defense in a stock-drop litigation. In so holding, the court agreed with plaintiffs that Section 404(c) does not apply to claims of fiduciary breach involving fiduciary selection of investment options made available to participants of the plan.

- In *In re Avon Products, Inc. ERISA Litig.*, 2009 WL 848083 (S.D.N.Y. Mar. 3, 2009), *adopted by*, 2009 WL 884687 (S.D.N.Y. Mar. 30, 2009), a Magistrate Judge recommended dismissal of plaintiffs' stock-drop claims. The court determined that the plan offered company stock in an ESOP and thus the Plan fiduciaries' decision to offer company stock to participants as an investment option was entitled to the *Moench* presumption of prudence. The court concluded that plaintiffs' allegations were "plainly insufficient" to overcome the ESOP presumption because the complaint did not suggest that Avon was in "such a long-term and serious slide to justify compelling" the fiduciaries to discontinue offering company stock as an investment option. Additionally, the court determined that the plaintiffs' failure to monitor and failure to provide accurate information claims failed because there was no underlying allegation that any plan fiduciary acted improperly. In adopting the report and recommendation, the district court stated: "the sorts of alleged problems upon which plaintiffs rely are insufficient where, as here, the employer company was earning hundreds of millions of dollars in profits and paying dividends for many years before, during and after the class period."

- In *Page v. Impac Mortgage Holdings, Inc.*, 2009 U.S. Dist. LEXIS 26992 (C.D. Cal. Mar. 31, 2009), the district court granted in part, and denied in part, the defendants' motion to dismiss a suit by a former employee of Impac Mortgage Holdings, Inc. claiming that the fiduciaries of Impac's 401(k) Savings Plan acted imprudently by offering company stock to plan participants. Plaintiff alleged that defendant breached its fiduciary duties by making false statements in public documents and by offering mortgages to borrowers who presented a high level of credit risk. The court concluded that the defendant was not entitled to use the ERISA §404(c) affirmative defense. The court also held that Impac had a general duty to disclose "SEC filings, press releases, and investor conference calls" to plan participants, and an evaluation of these documents was appropriate to determine whether Impac gave plaintiff adequate notice of the condition of the company's stock. The court concluded, however, that plaintiffs failed to sufficiently plead facts showing that certain of the individually named defendants were fiduciaries and thus dismissed the claims against them, with leave to amend.

Employee Benefits Litigation

Proskauer Rose's Employee Benefits Litigation Group is a significant component of the Firm's renowned Labor and Employment Law Department, which has nearly 175 attorneys.

The Employee Benefits Litigation Group is led by Howard Shapiro and Myron Rumeld. The Group defends complex and class action employee benefits litigation.

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