Proskauer

newsletter

A report to clients and friends of the firm

Edited by Stacey C.S. Cerrone and Russell L. Hirschhorn

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in this issue

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Editor's Overview

As it is well known, in *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011), the U.S. Supreme Court identified several forms of appropriate equitable relief that may be available under Section 502(a)(3) of ERISA. Many articles have been written about *Amara* and it implications. Our article this month discusses a developing division among the lower courts on whether surcharge is available to plaintiffs seeking monetary recovery for personal loss as opposed to a loss to the plan.

As always, be sure to review the section on Rulings, Filings, and Settlements of Interest including, recent case law on age discrimination claims and venue selection clauses, as well as IRS guidance on flexible spending accounts.

View From Proskauer: The Availability of Surcharge as Relief for Individual ERISA Fiduciary Breach Claims[*]

By Aaron Feuer

Three years ago, the U.S. Supreme Court identified three forms of appropriate equitable relief — reformation, equitable estoppel and surcharge — that are available under Section 502(a)(3) of the Employee Retirement Income Security Act (''ERISA''). *See Cigna Corp. v. Amara*, 131 S. Ct. 1866, 50 EBC 2569, 2011 BL 128629 (2011). This article focuses on the availability of surcharge and, in particular, a division among the lower courts on whether surcharge is available to plaintiffs seeking monetary recovery for personal loss as opposed to a loss to the plan.

The Evolution of Appropriate Equitable Relief

Section 502(a)(3) of ERISA generally authorizes a participant, beneficiary or fiduciary to sue for ''appropriate equitable relief.''[1] Prior to Amara, the lower courts interpreted the Supreme Court's ruling in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 16 EBC 2169 (1993) as precluding the recovery of any monetary relief under Section 502(a)(3) because monetary relief was not considered to be equitable relief. Thus, a participant seeking to recover monetary relief from a plan under ERISA typically had to show he was entitled to

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those benefits under the terms of the plan pursuant to Section 502(a)(1)(B) of ERISA, or was entitled to derivate relief by suing on behalf of the plan pursuant to Section 502(a)(2) of ERISA.

In Amara, the Supreme Court ruled that monetary relief is available under Section 502(a)(3). Since Amara, the lowers courts have determined that a participant can employ at least two theories to recover for personal losses resulting from a fiduciary breach: First, a participant can seek to have a court reform the plan, i.e., rewrite the plan's terms to accord with the parties' understanding in the event of mutual mistake or fraud. The participant could then recover under the terms of the reformed plan. *See Johnson v. Meriter Health Servs. Emp. Ret. Plan*,702 F.3d 364, 369, 54 EBC 1865, 2012 BL 316792 (7th Cir. 2012). Second, a participant can seek to recover under equitable estoppel, which, under certain conditions, ''operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.'' *Amara*, 508 U.S. at 1880. The lower courts do not, however, appear to be in agreement on whether a plaintiff can seek monetary recovery for personal loss via surcharge, which generally allows for monetary recovery for a loss resulting from a fiduciary breach.

A Narrow Reading of Surcharge

While some courts have endorsed a broad view of surcharge and allowed a plaintiff to seek monetary re- covery for personal loss flowing from a fiduciary breach, the Ninth Circuit concluded that surcharge only applies in cases involving loss to, or unjust enrichment at the expense of, the plan. *See Gabriel v. Alaska Elect. Pension Fund*, No. 12-35458, 58 EBC 1633, 2014 BL 158469 (9th Cir. 2014). In that case, participant Gabriel, who had been receiving pension benefits, sued the fund when it discontinued the benefits after realizing that Gabriel had never vested. The fund had sent Gabriel two letters in 1979 informing him that he had failed to fulfill the plan's vesting requirements and was thus in- eligible for a pension benefit. Nevertheless, eighteen years later in 1997, after Gabriel applied for a pension, the fund began paying him a pension benefit. The fund did not realize its mistake until 2004, when it stopped paying benefits to Gabriel. Gabriel claimed that he det- rimentally relied upon the fund's failure in 1997 to in- form him he was ineligible to for a pension benefit by failing to complete the plan's service requirement and, as a result, he was entitled to all three forms of equitable relief under Section 502(a)(3).

The Ninth Circuit concluded in a split decision that not one of these forms of equitable relief was available to Gabriel. Equitable estoppel was unavailable because the fund's alleged misrepresentation that Gabriel was entitled to benefits did not constitute an interpretation of ambiguous plan language. Reformation was unavailable because Gabriel failed to demonstrate any mistake affecting the plan or that the plan was procured through fraud. Finally, the majority concluded that surcharge was unavailable because Amara permitted such relief only in circumstances involving a fiduciary breach re- sulting in either: (i) a loss to the trust estate, or (ii) profit at the expense of the trust. Here, Gabriel sought unpaid benefits to which he was admittedly unentitled under the terms of the plan and that would ''wrongfully deplete'' the trust estate.

In a dissenting opinion, Judge Berzon disagreed that Amara limited the availability of surcharge and stated that, in her view, Gabriel ''may be entitled to an equi- table remedy similar to surcharge.'' In her view, Amara only required that the defendant's role as fiduciary renders it analogous to a trustee and that the relief sought resembles forms of traditional equitable relief, ‘‘not whether the precise requirements for obtaining such relief under the common law of trusts are met.’’

A Broad Reading of Surcharge

The Seventh Circuit, unlike the Ninth Circuit, adopted a broader reading of surcharge in *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 56 EBC 2901, 2013 BL 155855 (7th Cir. 2013). When Kenseth experienced complications from a surgical procedure performed years earlier, her doctor advised her to undergo an additional surgery to remedy the problem. Prior to the surgery, Kenseth contacted the plan and she was advised that the surgery would be covered. One day after she underwent surgery, however, the plan determined that the procedure was not covered and Kenseth was left to pay more than $75,000 in medical bills. The Seventh Circuit held that Kenseth could, upon proof of a breach and causation, recover money damages under Section 502(a)(3).

The Fourth, Fifth, and Eighth Circuits also appear to have at least considered the possibility that surcharge may have a broader application than in cases involving a loss to the trust or unjust enrichment of the fiduciaries at the trust’s expense. The Fifth Circuit remanded for a determination of whether surcharge was available where a plan participant alleged that he commenced early retirement after being assured that he would receive lifetime retiree medical benefits and then the plan subsequently terminated coverage because it determined the participants’ benefits were based upon a mistaken computation of his service. *See Gearlds v. Entergy Servs., Inc.*,709 F.3d 448, 55 EBC 2688 (5th Cir. 2013). The Fourth Circuit similarly remanded for consideration of whether surcharge was appropriate where an employee-participant was denied life insurance benefits payable under a policy covering her daughter because the policy only covered eligible dependents under age 24 and her daughter died at age 25. *See McCravy v. Metropolitan Life Insurance Co.*, 690 F.3d 176, 53 EBC 2605, 2012 BL 166368 (4th Cir. 2012). And the Eighth Circuit remanded for determination whether surcharge was available to a plaintiff denied life insurance benefits based upon the alleged failure to provide required paperwork at the time of enrollment. *See Silva v. Metro. Life Ins. Co.*, 2014 BL 218916 (8th Cir. 2014). In *Gabriel*, the Court found Kenseth, McCravy, and Gearlds unpersuasive because, in its view, they were merely correcting the district courts’ ‘‘erroneous interpretations of Mertens as precluding recovery of any monetary relief, and thus were not specifically opining on the availability of surcharge relief.’’

Proskauer’s Perspective

The question of whether surcharge under Section 502(a)(3) should be limited to when a plan either experiences a loss or a fiduciary is unjustly enriched, or broadly available as a ‘‘make-whole’’ remedy whenever a participant suffers a loss, has large implications. A narrow reading ought to significantly limit the circumstances under which a participant can seek monetary relief. A broad reading very well could open the flood gates to various types of fiduciary breach claims a plaintiff can pursue on his or her own behalf. Only time will tell whether the division in the circuits will deepen on this issue and whether the Supreme Court finds it necessary to resolve it.

Rulings, Filings, and Settlements of Interest

Eighth Circuit Says That Considerations Of Health Care Cost Savings Could Be Proxy For Age In ADEA Suits

> The Eighth Circuit recently concluded that an employer may violate the ADEA by terminating an older employee in order to reduce its health care premiums. *Tramp v. Associated Underwriters, Inc.*, 2014 WL 4977396 (8th Cir. 2014). Plaintiff Marjorie Tramp brought claims of discrimination and retaliation under the ADEA, arguing that Defendant Associated Underwriters, Inc. terminated her to reduce its health care costs and in retaliation for her refusal to rely on Medicare benefits in lieu of employer-sponsored benefits. In support of her claims, Tramp produced evidence showing that: (i) while negotiating insurance premiums, the Defendant repeatedly asked whether having younger employees would reduce its rates; and (ii) Tramp began receiving formal reprimands and was eventually terminated after she declined Defendant's request to rely on Medicare rather than the company's insurance plan. Defendant argued that her firing was part of a reduction-in-force and based on her poor performance.

The district court granted summary judgment in favor of Defendant. Relying on the Supreme Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the court found that, health care costs are not a proxy for age because the two are "analytically distinct," meaning that Defendant could take health care costs into account without considering age. The Eighth Circuit reversed, concluding that considerations of health care costs could be a proxy for age and, regardless of whether age and health care costs *actually are* analytically distinct, there was an issue of fact as to whether Defendant *believed* that they were not analytically distinct and terminated Tramp for age-related reasons. Further, as to the retaliation claim, the Court found that, though a gap between an employee's protected activity and the employer's adverse act usually weakens the presumption of retaliation, Defendant's ongoing reprimands leading up to Tramp's termination fill in that gap, allowing a reasonable jury to find that Tramp was terminated for refusing to decline employer-sponsored health care insurance.

Sixth Circuit Declines Deference to DOL and Enforces Venue Selection Clause

> The Sixth Circuit recently held that a venue selection clause in an ERISA-governed pension plan was enforceable and, in so ruling, refused to give deference to the DOL's contrary position. See Smith v. AEGON Cos. Pension Plan, No. 14-0256, 2014 U.S. App. LEXIS 19668 (6th Cir. Oct. 14, 2014). Plaintiff brought suit against the corporate successor of his former employer, AEGON, in the U.S. District Court for the Western District of Kentucky, alleging that AEGON wrongfully eliminated his enhanced compensation benefits. The district court dismissed Plaintiff's complaint because plaintiff's pension plan contained a venue selection clause that stated that a participant shall only bring an action in the Federal District Court in Cedar Rapids, Iowa.

On appeal, the DOL submitted an amicus brief arguing that venue selection clauses are incompatible with ERISA. A split panel of judges declined to afford deference to (what the majority labeled) the DOL's attempted "regulation by amicus." First, the majority concluded that the DOL had no more expertise than the Court when it came to determining whether federal statutes proscribe venue selection. Second, the majority noted that the DOL had never brought an enforcement action in connection with an ERISA-governed plan's venue selection clause, and it had never promulgated any regulation or interpretive guidance related to such clauses. Because of this, the majority found that the DOL's position in its amicus brief lacked the longevity and consistency necessary to be granted deference. Ultimately, the majority found that the DOL's "amicus brief in this case can only be characterized as . . . an expression of mood."

The majority then (i) noted that most courts faced with this issue found that venue selection clauses in ERISA-governed plans were enforceable and (ii) explained that if Congress wanted to prohibit such clauses, it could have done so. Further, the majority stated that "[i]t is illogical to say that, under ERISA, a plan may preclude venue in federal court entirely [via an arbitration clause], but a plan may not channel venue to one particular federal court."

Judge Clay (dissenting) took issue with the fact that the venue selection clause prevented Plaintiff from bringing suit anywhere but a court 500 miles away with which he had no connection. Judge Clay stated that such restrictions conflict with ERISA's broad venue provisions and "the strong public policy evinced by the statute"—i.e., to eliminate jurisdictional and procedural obstacles that may hamper enforcement of fiduciary responsibilities.

IRS Increases Maximum Employee Contribution to Health Care FSAs for 2015

> The IRS announced yesterday that the maximum annual employee contribution to a health care flexible spending account plan is increasing by $50 to $2,550 for 2015 (up from the $2,500 limit that has applied since 2013).

Employers that sponsor health care FSAs should take this increase into account in preparing for open enrollment, and may need to revise their employee communication materials, depending on whether the employer wishes to adopt the higher limit for 2015. If the open enrollment period has already begun, the employer may need to reach out to employees who have already made their elections.

In addition, the employer's Section 125 Cafeteria Plan document may require an amendment, depending on the language in the document. For example, the Plan document may include language that automatically increases the maximum contribution when the IRS increases the limit (but the employer may not want to increase the maximum contribution at this time), or the language may not include an automatic increase (but the employer may wish to increase it for 2015).

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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