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Client Alert

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Second Circuit Rejects Participant Request For *De Novo* Review Of Pension Claim Even Though SPD Did Not Set Forth Administrator's Level Of Discretion

In a decision that is of importance to employee benefit plans and their employer-sponsors, the United States Court of Appeals for the Second Circuit recently held that a district court correctly applied an "arbitrary and capricious" standard of review in evaluating a claim for pension benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), even though the Summary Plan Description ("SPD") did not state that the plan administrator had the discretion to make benefit determinations. *Tocker v. Philip Morris Cos., Inc., et al.*, 2006 WL 3404805, Civ. No. 04-5904 (2d Cir. Nov. 22, 2006).

An arbitrary and capricious standard of review — as opposed to the less deferential *de novo* review — is a valuable weapon for plan administrators that makes it more likely for them to prevail, and to prevail in the early stages of litigation, when their benefit determinations are challenged. Ordinarily, the more favorable standard of review is obtained when the plan reserves to the administrative committee the discretion to interpret the plan and make benefit disbursements. In this case, the plan document had the requisite discretionary language, but no such language appeared in the SPD.

The plaintiff in this case, Edward Tocker, was a tax attorney for General Foods Corporation from September 1967 until March 1, 1990, at which time he accepted a unique, negotiated, package of benefits that allowed him to both: (1) receive an immediate $212,666.74 payment upon termination of his employment; and (2) be placed on long-term disability so that he received 60% of his base salary each month while he remained disabled. Under the company's consistent practices, these benefits were mutually exclusive.

On December 31, 2001, when Mr. Tocker turned age 65, he was no longer eligible to receive long-term disability benefits. He then contacted his former employer and asserted the right to receive credited pension service for the years from 1990-2001. The plan administrative committee denied the claim determining that Mr. Tocker was a terminated employee as of 1990. Mr. Tocker then filed a suit under ERISA challenging this benefit denial.

Finding that the pension plan had reserved discretion to the administrative committee to make benefit decisions, the district court applied an arbitrary and capricious standard of review, and held the committee's denial of benefits to be reasonable. On appeal, Mr. Tocker argued the court should have applied a *de novo* standard of review because the plan language conferring discretionary authority on the administrative committee was missing from the SPD.

The Second Circuit affirmed the district court's refusal to apply a *de novo* standard of review and its holding that the administrative committee's decision to deny benefits was not arbitrary and capricious. In so ruling, the Second Circuit applied a two-step analysis for determining whether terms in a plan document that are not included in the SPD can be enforced. *See Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 584-85 (2d Cir. 2006). First, the Court determined that the provision according discretion to the administrator need not be set forth in the SPD because it is neither a "condition[] which must be met

before a participant will be eligible to receive benefits" under Department of Labor regulations (*see* 29 C.F.R. §2520.102-3(j)(1) (alteration and emphasis in original)) nor a "circumstance which may result in the denial of benefits within the meaning of 29 U.S.C. § 1022(b)." Second, the Court held that, even if the SPD was deficient, Mr. Tocker was not likely prejudiced by the SPD's silence since: (i) a plan participant cannot be harmed by a lack of knowledge about the standard of judicial review, which merely fixes the procedure to be followed after a denial of benefits has already occurred; and (ii) even the SPD stated that the benefits explained therein could be changed, modified or discontinued without notice. The Court did remand the case for further consideration, however, as to whether Mr. Tocker could prevail on a claim of fiduciary misrepresentation as to the effect of termination on his future pension benefits.

The Second Circuit's ruling is consistent with rulings in the Fourth, Eighth, and Ninth Circuits, which have similarly applied the arbitrary and capricious standard even where the discretionary language does not appear in the SPD. *See Martin v. Blue Cross & Blue Shield*, 115 F.3d 1201, 1205 (4th Cir. 1997); *Cagle v. Bruner*, 112 F.3d 1510, 1517 (11th Cir. 1997); *Wald v. Southwestern Bell Corp.*, 83 F.3d 1002, 1006 (8th Cir. 1996); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1321-22 (9th Cir. 1995). While the SPD's silence here as to fiduciary deference was not fatal to language in the plan document that provided fiduciary deference, plan administrators are well-advised to be vigilant in reviewing their SPDs to ensure that all material provisions that can impact participant rights to benefits are set forth unambiguously.

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