

# Client Alert

A report  
for clients  
and friends  
of the firm     **October 2003**

## The Second Circuit Court Of Appeals Sets Forth New Standard For Deficient SPD Cases

While we have always urged that employee benefit plan documents be reviewed by our clients extremely carefully before they are disseminated to plan participants (and their beneficiaries), the U.S. Court of Appeals for the Second Circuit recently underscored the importance of this practice, in a decision clarifying the standard to be used for determining whether a plaintiff can succeed against a plan sponsor in an action based upon faulty or ambiguous language in a summary plan description ("SPD"). In its ruling, the court rejected the "detrimental reliance" standard in favor of the more lenient "prejudice" standard, which undoubtedly will make it easier in the future for plaintiff-participants to succeed in actions against plans and plan sponsors based on deficient SPD language. The decision also reinforced the importance of having clear and explicit instructions incorporated into claim denial letters.

### Background

In *Burke v. Kodak Retirement Income Plan*, 2003 U.S. App. Lexis 14523, issued on July 17, 2003, the Second Circuit affirmed in part, and reversed in part, a decision of the Federal District Court for the Western District of New York. The plaintiff, Sally Burke, was married for six months to Kenneth Burke, a 27-year Kodak employee, when he died. Prior to their marriage, Mr. and Mrs. Burke lived together as domestic partners for eight years. Among his employee benefits, Mr. Burke was a participant in Kodak's pre-retirement survivor income benefits plan. While Kodak's SPD mentioned in sixteen different sections that domestic partners needed to file affidavits to receive certain benefits, it did not contain this requirement in the section on the pre-retirement survivor income benefit. Following the participant's death, Ms. Burke made a formal claim to the plan for the pre-retirement survivor income benefit. The plan denied her claim, stating in its denial letter that, in

order to be eligible for the benefit, they needed to have been married for at least one year. The letter then referred to the SPD for the plan's appeal procedures, but the page cited in the denial letter was not the section on appeals, but rather the section on "spousal eligibility". Elsewhere in the SPD, the relevant appeals section stated that a claimant "should" file an appeal of a benefit claim denial within ninety days. On appeal, Ms. Burke maintained that she was eligible for the spousal benefit, as she was a domestic partner of the participant for years prior to their marriage. Her appeal, filed after the ninety-day period had expired, was denied as untimely. Furthermore, the denial letter stated that, had the appeal been timely, it nonetheless would have been denied because the Burkes never filed the domestic partner affidavit that was required by the plan in order to receive benefits.

### Deficient Appeal Language

The court first held that Ms. Burke was denied a full and fair review of her claim because the denial letter did not refer her to the specific appeals procedures; rather the page reference was to the section on eligibility. The U.S. Department of Labor regulations on claims procedures require that denial letters incorporate the proper appeal procedures (or a reference to the procedures). The court further found that, even if the page reference was to the proper section of the SPD, the use of the word "should" cannot be construed to mandatorily require that she file within 90 days. Since the Court found that in at least sixteen other portions of the SPD, the plan used the word "must", it determined that, as drafted in the SPD, the ninety-day rule was not mandatory. Finding that the denial of Ms. Burke's appeal was inappropriate, the Court proceeded to consider the merits of the appeal.

### New "Prejudice" Standard

The court held that, since the relevant section of the SPD failed to mention the affidavit requirement, then the SPD must be in conflict with the plan's affidavit requirement that was relied upon in denying Mrs. Burke the benefit. The court relied on the well established law of the Second Circuit that, when the formal plan document and an SPD conflict, the SPD controls. Since the SPD controls, the court looked solely to that document to determine whether the

affidavit requirement should be upheld. Although the SPD contained the affidavit requirement in many other sections, it held that Ms. Burke should not have been expected to infer that the requirement also applied to the section on pre-retirement survivor income benefits. Therefore, it held that the SPD was deficient.

The district court originally held that, even if the SPD was deficient, the plaintiff failed to demonstrate that she relied on the deficient language to her detriment. The Second Circuit reversed the district court's ruling. Rejecting the "detrimental reliance" standard, in favor of a more lenient "prejudice" standard, the court established a new standard to be used when determining whether a plaintiff should recover in a deficient SPD case. In order to succeed under a prejudice standard, a plaintiff must only show that he or she was likely to have been harmed because of the deficient SPD. The defendant would then have the opportunity to rebut this by offering evidence that the deficiency was nothing more than a harmless error. Applying the prejudice standard, the court held that Ms. Burke likely was harmed by the fact that the affidavit requirement was not included in the relevant SPD section and, therefore, granted her motion for summary judgment on her claim for the pre-retirement survivor benefits.

### Lessons To Be Learned

This case highlights the importance of providing plan participants with an accurate, comprehensive SPD. Under the more liberal prejudice standard, a plaintiff no longer needs to provide actual evidence of reliance on the faulty SPD language; rather he or she only needs to demonstrate the likelihood of harm. It will be much more difficult for a defendant plan sponsor to overcome this more lenient standard.

Additionally, it should be noted that the Second Circuit is not alone in moving away from a detrimental reliance standard in these situations. In its opinion, the Court mentioned that the First, Fourth, Eighth and Tenth Circuits have each allowed recovery upon a showing of either reliance or prejudice. Indeed, two weeks before the release of the Kodak opinion, the Third Circuit, in *Burstein v. Allegheny Health Education Retirement Account Plan*, 334 F.3d 365 (3rd Cir. 2003), also ruled that detrimental reliance need not be proven by a plaintiff in order to succeed in an SPD language case.

It is critical that plan sponsors carefully review their SPDs for accuracy and thoroughness. If the plan has both a plan document and an SPD, the two documents must be reviewed congruently to ensure that they are consistent with each other. The Kodak case also highlights the importance of having the accurate instructions contained in the benefit denial letter. If Kodak's denial letter had specifically limited the appeal window to ninety days, than the court would never have gotten to the question of whether the plaintiff was prejudiced by the deficient affidavit language (at least under this

factual scenario). This is clearly a situation where an ounce of prevention is worth a ton of liability.

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#### Client Alert

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