Proskauer

The ERISA Litigation Newsletter

October 2009

Editor's Overview

A busy summer on the ERISA litigation front concluded with three interesting decisions. First, the Southern District of New York dismissed class claims against Citigroup for alleged fiduciary breaches related to maintenance of a company stock fund in two of Citigroup's 401(k) plans, concluding that defendants had no discretion over the company stock fund. Second, the Third Circuit approved an indemnification agreement found in a collective bargaining agreement, whereby a union agreed to hold the employer harmless for any withdrawal liability that it may owe, as long as the employer remained primarily liable to the fund for the withdrawal liability. Third, the Third Circuit issued a ruling in *Unisys Corporation Retiree Medical Benefits ERISA Litigation*, which should finally bring to a close the retiree benefits claims of fourteen individuals that had been pending for over sixteen years. As always, be sure to review the Rulings, Filings and Settlements section for other key highlights over the course of September.

District Court Concludes that Defendants Had No Discretion To Eliminate or Liquidate Citigroup Stock Fund

by Brian Neulander & Robert Rachal

In *In re Citigroup ERISA Litig.*, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009), the district court dismissed plaintiffs' claims that defendants breached their fiduciary duties by failing to eliminate or liquidate the Citigroup stock fund as an investment option for two of Citigroup's 401(k) plans. In so ruling, the court rejected plaintiffs' allegations that defendants breached their duties by continuing to offer Citigroup stock when they allegedly knew, or should have known, that Citigroup would sustain heavy losses from subprime loans following the collapse of the housing market. Citing ERISA for the proposition that fiduciary status attaches to discretionary authority over plan assets or management, the court observed that the fiduciary breach claims turned on defendants' authority over the stock funds, which in turn required a close analysis of the plan terms. The court determined that defendants generally were not acting in a fiduciary capacity by maintaining Citigroup stock as an investment option because the plan terms stated, "the Citigroup Common Stock Fund shall be permanently maintained." Thus, the court reasoned, defendants had no discretion to override the plan; indeed, the court concluded that eliminating the stock fund investments would be akin to amending the plan, which was a settlor function to which no fiduciary duties attach. The court also concluded that allegedly misleading statements challenged by plaintiffs were made in a corporate, not ERISA fiduciary, capacity.

As an additional ground for dismissal of the prudence claim, the court analyzed that claim under the *Moench* presumption of prudence (*Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), which held that it is presumptively prudent to offer employer stock as an investment option pursuant to the terms of an ERISA plan. The *Citigroup* court surveyed other opinions, in which stock drops of 40% to 80% were deemed insufficient to overcome this presumption, to conclude that the alleged pattern of risky loan practices and loss of billions of dollars were insufficient to overcome *Moench*, since there was no indication that Citigroup's viability as an ongoing concern was threatened during the putative class period. The court also recognized that defendants could face potential liability for overriding the plan's terms and divesting if the stock price later increased. Based on this reasoning, and the congressional support for employer stock investments codified in ERISA, the
court rejected plaintiffs' attempt to hold defendants liable for following the
plan's mandate.

*****

The *Citigroup* decision is noteworthy because the court focused on the plan terms to determine the appropriate scope of any fiduciary duties regarding investments in employer stock. The decision suggests that, if the terms are sufficiently explicit, they could eliminate the prospects of a viable fiduciary breach claim for failure to discontinue stock fund investments.

Third Circuit Validates Indemnity Agreement in CBA for the Payment of Withdrawal Liability

By Russell L. Hirschhorn

Employers may have found themselves a new means to limit their ERISA plan exposure through the collective bargaining process, thanks to a recent decision from the Third Circuit. In *Pittsburgh Mack Sales & Service, Inc. v. International Union of Operating Engineers, Local Union No. 66*, 2009 WL 2836422 (3d Cir. Sept. 4, 2009), the court ruled that, as long as the employer remains primarily liable for the withdrawal liability, public policy did not prohibit a union from indemnifying an employer for any withdrawal liability that the employer could owe.

Under the collective bargaining agreement at issue, Pittsburgh Mack was required to make specific contributions to a pension fund and the Union would hold Pittsburgh Mack harmless for liability to the fund in excess of its specified contribution (*i.e.*, withdrawal liability). The court's analysis focused on whether there existed "definite indications" under ERISA and the subsequent Multiemployer Pension Plan Amendments Act (MPPAA) to justify invalidation of the indemnity agreement. The court found none since, notwithstanding the indemnity agreement, Pittsburgh Mack remained primary liable for its withdrawal liability.

****

The Third Circuit's decision does not give employers a free pass on withdrawal liability, but it may very well provide employers with an opportunity to significantly reduce their exposure to this type of liability — over which they typically have little control — through the collective bargaining process.

Third Circuit Holds It Was a Fiduciary Breach To Fail To Disclose Reservation of Rights Clause at Retirement Meetings

By Kara Lincoln

In the latest ruling in *Unisys Corporation Retiree Medical Benefits ERISA Litigation*, 2009 WL 2767000 (3d Cir. Sept. 2, 2009), the Third Circuit held that Unisys breached its fiduciary duties by failing to adequately disclose that Unisys could terminate its retiree health plan. The ruling appears to bring to conclusion fourteen retirees' claims that were severed for trial, although hundreds of retirees' claims remain.

After sixteen years of litigation, the claim remaining for trial was the retirees' contention that Unisys breached its fiduciary duties by informing them of their retirement benefits without informing them the plan could be terminated. The claim was tried before a Magistrate Judge, who found that, before the plaintiffs retired from Unisys, they met individually or in groups with human resources representatives to discuss their retirement benefits. At those meetings, they were told their health insurance would cost twenty dollars per month until age 65, after which it would be free. They were not told that the plan or those benefits could be terminated; they also were not given the plan's summary plan description, which would have informed them of that fact via a reservation of rights clause until after they retired. The plaintiffs retired between 1987 and 1989; in 1992, Unisys terminated the plan and replaced it with a new one, under which retirees eventually would pay the full cost of their health insurance premiums.

The Third Circuit affirmed the district court's ruling, which adopted the magistrate judge's findings of fact and conclusions of law that the failure to inform participants of Unisys's right to amend or terminate the plan constituted a breach of fiduciary duty. The Third Circuit explained that Unisys's statements concerning the participants' retiree benefits amounted to material misrepresentations because Unisys's right to terminate the plan was not made known to the participants when they were informed of their retirement benefits. The Third Circuit also found it irrelevant that Unisys was not "seriously considering" terminating the plan when the retiree meetings were made.

The Third Circuit agreed that twelve of the fourteen plaintiffs proved they detrimentally relied on the statements when deciding whether to retire, and that no reliance was shown for one who was involuntarily terminated and another who retired as part of a settlement agreement. The court ordered Unisys to reinstate its former plan for the twelve plaintiffs, and enjoined Unisys from reducing or terminating their benefits going forward. The court refused to award the retirees damages, however, or restitution of profits Unisys gained, due to the termination of the plan, reasoning that this was not appropriate equitable relief under ERISA since the retirees could not point to particular funds that rightfully belonged to them.

* * * *

Although several courts have held that fiduciaries do not have to continuously communicate reservation of rights clauses when discussing retiree health benefits with employees, this case illustrates that courts nonetheless may closely scrutinize retirement communications to determine if retirees were making fully informed decisions to retire.

Rulings, Filings and Settlements of Interest

- In *In re Merck & Co., Inc*., 2009 WL 2834792 (D.N.J. Sept. 1, 2009), plaintiffs alleged that defendants breached their fiduciary duties by continuing to offer Merck stock as a plan investment option after they knew, or should have known, about adverse clinical research regarding a best-selling drug (Vytorin). The court concluded that, at the motion to dismiss stage, these allegations were sufficient to establish a plausible claim to rebut the *Moench* presumption of prudence. Accordingly, the court denied defendants' motion to dismiss.
- In *Page v. Impac Mortgage Holdings Inc.*, No. 07 Civ. 1447 (C.D. Cal.), the district court approved a settlement which requires Impac to pay no less than $300,000 in common stock to approximately 400 employees. Additionally, Impac agreed to provide free investment training classes for all class members and to make certain structural changes to its 401(k) plan, including paying all of the plan's administrative expenses until the end of 2010. The parties reached the settlement several months after plaintiffs' claims survived Impac's motion to dismiss.
- In *Graden v. Conexant Sys. Inc.*, No. 05 Civ. 00695 (D.N.J), the parties reached a settlement mandating that defendant Conexant pay a class of employees $3.25 million, and implement structural changes to its 401(k) plan valued at more than $9

million. The structural changes include eliminating the company stock fund as an investment option and prohibiting Conexant from reinstating the company stock fund as an investment option for the next five years. This settlement was reached after more than two years of negotiations.

- *In re State Street Bank & Trust Co. ERISA Litig.*, No. 07 Civ. 08488 (S.D.N.Y.), is a multidistrict litigation brought by a class of plaintiffs consisting of managers of retirement plans for various insurance and publishing companies. The plaintiffs alleged that State Street lost hundreds of millions of dollars by investing conservative bond funds in high-risk mortgage-backed securities in the face of reports advising against such action. The plaintiffs submitted to the court a proposal for settlement that includes a payment of $89.75 million (58% of plaintiffs' claimed losses) and a stipulation allowing State Street to terminate the settlement if opt-outs surpass a certain threshold. Additionally, under the settlement terms, State Street would increase the settlement payment if it could reach separate agreements with any opt-out plaintiffs.
- In *Grabek v. Northrop Grumman*, 2009 WL 2870075 (9th Cir. Sept. 8, 2009) (unpublished), the Ninth Circuit reversed the district court's denial of class certification in an ERISA fee case. The Ninth Circuit noted the case appeared to meet the class certification requirements of *Fed. R. Civ. P.* 23. Because the district court judge had failed to make any findings regarding these class certification requirements, however, and in order to avoid further delay in the case, the Ninth Circuit stated it was reassigning the case to a different judge on remand.