Proskauer

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Editor's Overview

The importance of clear and unambiguous plan language cannot be overstated. The Second Circuit recently applied this well-established principle to conclude that a plan's administrative claims process must clearly state all of the types of claims that must be exhausted in order to prevent participants and beneficiaries from proceeding directly to court. Russell Hirschhorn reviews the Court's ruling and discusses its implications for plan sponsors and fiduciaries.

As always, be sure to review rulings, filings and settlements of interest. This month we review recent rulings on retiree medical allowances, indemnification provisions, investment claims, consideration of evidence outside of the administrative record, statute of limitations and availability of monetary damages.

View From Proskauer: Clear the Confusion to Ensure ERISA Plan Exhaustion[1]

Contributed by Russell L. Hirschhorn

Background

The U.S. Court of Appeals for the Second Circuit recently joined the U.S. Courts of Appeals for the Seventh and Eleventh Circuits in concluding that Employee Retirement Income Security Act plan participants are not required to exhaust their administrative remedies when "they reasonably interpret the plan terms not to require exhaustion." Applying this principle, the court, in *Kirkendall v. Halliburton Inc.*, 2013 BL 23838 (2d Cir. Jan. 29, 2013), held that plaintiff Kathy Kirkendall could proceed with her claim for clarification of future pension benefits without first exhausting the plan's administrative claims procedures.

Kirkendall was employed by Dresser-Rand Co. and then Halliburton Inc. As a result of several corporate restructurings, Halliburton informed employees that their last date of employment for pension plan purposes was March 1, 2000. The consequence of this corporate restructuring for Kirkendall was that she would no longer be eligible for an early retirement subsidy and her early retirement benefit would not be as high as previously quoted to her.

Over the course of nearly five years, Kirkendall made several efforts to understand the changes made to the pension plan. Kirkendall wrote to the benefits department on two occasions but received no response on either occasion. She also spoke to someone in the benefits department and was told that she had already received all of the monies due to her.

Kirkendall subsequently filed a complaint in federal court alleging several claims, all stemming from her assertion that Halliburton had incorrectly determined that she and her coworkers had been terminated for pension plan purposes as of March 1, 2000.

The district court, in relevant part, granted Halliburton's motion for judgment on the pleadings because Kirkendall failed to exhaust her administrative remedies.

The Second Circuit's Decision

It is well-established that ERISA plan participants and beneficiaries must exhaust a plan's administrative claims procedures before proceeding with a claim for benefits in federal court.

In this case, Kirkendall contended that she was not required to exhaust her administrative remedies because the plan did not provide a procedure for filing a claim for clarification of future benefits. As applicable here, the plan's claim procedures stated:

To file a benefit claim under the Plan, a Claimant must obtain from the Benefits Administrator the information and benefit claim forms, if any, provided for in the Plan and otherwise follow the procedures established from time to time by the Committee or the Benefits Administrator for claiming Plan benefits.

In the Second Circuit's view, the term "benefit claim" could be read to apply only when a participant seeks to commence her benefits immediately upon filing a claim. Kirkendall did not seek to retire immediately, but rather sought to know what her benefits would be if and when she chose to pursue early retirement.

Finding the plan terms a "bit baffling," the court concluded that it was unclear whether Kirkendall's claim was a "benefit claim" within the meaning of the plan's claims procedures. The court thus concluded, as had the Seventh and Eleventh Circuits, that a plaintiff who "reasonably interprets the plan terms not to require exhaustion and, as a result, does not exhaust her administrative remedies,… may proceed in federal court."

According to the court, this exception to the general exhaustion requirement is grounded in the statutory dictate that a summary plan description "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a).

The court also reasoned that excusing Kirkendall and others similarly situated from exhausting their administrative remedies will encourage employers and plan administrators to clarify their plan terms and ultimately lead more participants and beneficiaries to pursue their benefit claims through the plan's claims procedures in the first instance.

Proskauer's Perspective

The Second Circuit's decision provides an important reminder about the importance of clear and unambiguous plan terms, even as they relate to the procedures for administering claims for benefits.

To eliminate potential ambiguity in a plan's claims procedures concerning the types of claims that the procedures apply to, plan sponsors and fiduciaries should review plan documents and summary plan descriptions to ensure that the documents require exhaustion for all types of claims for benefits.

One method for doing so may be to track the language of ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which authorizes participants and beneficiaries to commence a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

In short, the more embracive the description of the claims procedure, the more likely it will be that the plan's administrative determination will receive deference when reviewed by a federal district court.

Rulings, Filings, and Settlements of Interest

Second Circuit Rules on Retiree Medical Allowances

- In *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. Cookson Am., Inc.*, No. 12-1032-cv, 2013 WL 1092824 (2d Cir. Mar. 18, 2013), the Second Circuit held that a plant closure did not terminate a company's obligation to pay retiree medical allowances (RMA) where the facility closure agreement (FCA) required the company to honor the CBA's RMA provision. In so ruling, the court found that the FCA's independent requirement that the company honor the RMAs extended the parties' arrangement beyond the terms of the CBA and the closure of the facility.

District Court Rejects DOL's Attempt to Invalidate Indemnification Agreement

- In *Harris v. GreatBanc Trust Co.,* No. 5:12-cv-01648-R-DTB (C.D. Cal. Mar. 15, 2013), the court held that an indemnification agreement in favor of an ESOP fiduciary did not violate ERISA Section 410(a), which prohibits exculpatory agreements for fiduciary breaches. The court found that the indemnification agreement was not invalid because it expressly prohibited indemnification if a court entered a final judgment from which no appeal could be taken that the fiduciary breached its duties under ERISA. The court also held that the agreement was not void under ERISA Section 410(a) merely because it provided indemnification in the event of a settlement, even if the fiduciary admitted it breached its fiduciary duties.

No Plausible Fiduciary Breach Claim Arising From "Underperforming" Default Fund

- In *Laboy v. Bd. of Trustees of Bldg. Service 32BJ SRSP*, 2013 WL 811735 (2d Cir. Mar. 6, 2013) (unpublished), the Second Circuit affirmed that there was no fiduciary breach arising from plaintiffs' claims that trustees of a multi-employer pension plan

maintained an underperforming default investment vehicle, with excessive fees, for a 401(k) plan. Plaintiff's excessive fee claim failed because the fees charged by the default fund were within the range of fees charged by similar investment vehicles. Similarly, plaintiffs' claim that the fund should have been replaced due to underperformance was rejected because the complaint acknowledged that the fund performed within the top third of its peer group during the relevant period. Finally, there was no allegation of self-dealing or conflict of interest to form the basis of a plausible fiduciary breach claim.

Fourth Circuit Says District Court Properly Considered Evidence of Administrative Record

- In *Helton v. AT&T Inc*., No. 11–2153, 2013 WL 812118 (4th Cir. Mar. 6, 2013), the Fourth Circuit found that the district court properly considered limited evidence outside of the administrative record; that AT&T breached its statutory and fiduciary duties to Helton, and that the district court did not err in awarding Helton "retroactive" benefits. Relying on principles of agency, the Fourth Circuit reasoned that plan administrators may be deemed to "have knowledge of information acquired by its employees in the scope of their employment and the content of its books and records."

Untimely Claim for Benefits Accrued Upon Payment of Severance Benefit

- In *Fuller v. Owens Corning Fiberglas*, 12-cv-01087 (W.D. Tenn. Mar. 26, 2013), a district court ruled that the statute of limitations for plaintiff's claim for additional severance benefits began to run at the time defendant approved his severance claim and issued him a severance check. In so ruling, the court held that plaintiff's complaint was untimely because it was filed more than six years from the date of his severance payment and he should have filed a claim for additional benefits sooner if he believed that he was not paid the correct amount.

Monetary Damages Potentially Available For Inadequate Disclosure

- In *Weaver Bros. Ins. Assoc., Inc. v. Braunstein*, No. 11-5407, 2013 WL 1195529 (E.D. Pa. Mar. 25, 2013), a district court denied the plan administrator's motion for judgment on the pleadings, ruling that monetary relief may be available for ERISA violations associated with the plan administrator's failure to properly communicate the participant's benefit rights following conversion from full-time employment to disabled status. The participant, Ms. Braunstein, was covered by a life insurance policy through her employer, but coverage lapsed 12 months after she left "active" employment for disability leave. The court first determined that the plan administrator failed to provide an adequate summary plan description and that this

precluded Ms. Braunstein from independently learning of her right to convert to an individual policy. The court also determined that since the plan administrator had actual knowledge of Ms. Braunstein's prolonged illness, it had an affirmative duty to inform her of "material information that could affect [her] benefits" - such as the policy conversion clause. Finally, relying on *CIGNA Corp v. Amara*, 131 S. Ct. 1866 (2011), the court rejected the plan administrator's argument that damages were limited to non-monetary "equitable" relief, and that under these circumstances, the participant's estate may be entitled to recover the face value of the participant's life insurance policy as a "surcharge" remedy.

[1] Originally published by Bloomberg Finance L.P. Reprinted with permission.

Related Professionals

- **Russell L. Hirschhorn**
  Partner