Is Plan Reformation an Available Remedy Under ERISA to Recalculate Participant Benefits? The Second Circuit Says Yes

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Do remedies under the Employee Retirement Income Security Act of 1974 (ERISA) begin and end with the enforcement of plan terms as written? Or does ERISA provide a remedy for plan participants to revise the written terms of the plan to recalculate their retirement benefits allegedly denied to them under ERISA?

These were the questions posed and answered in a recent Second Circuit opinion. The case, *Laurent v. PricewaterhouseCoopers LLP*,[1] analyzed claims brought by plaintiffs Timothy D. Laurent and Smeeta Sharon (the Plaintiffs) against PricewaterhouseCoopers LLP (PwC), the Retirement Accumulation Benefit Plan for PwC (Plan) and Plan fiduciaries—the Administrative Committee to the Plan (collectively "the Defendants"). In general terms, the Plaintiffs alleged that the Plan, an ERISA cash balance defined benefit plan, violated ERISA for failure to comply with ERISA's vesting and accrual requirements that mandated the Plaintiffs receive "whipsaw" benefits denied to them by the Plan.

The terms of the governing Plan documents did not authorize the whipsaw benefits the Plaintiffs sought because of the Plan's definition of "normal retirement age" and the projection rate used to calculate the retirement benefit owed to the Plaintiffs. The Plaintiffs therefore requested Plan reformation as the appropriate relief and specifically set it out as a two-step process: (1) a declaration of the rights that the plan confers under ERISA and an injunction ordering the Defendants to conform the text of the plan to the declaration, and then (2) recalculation of benefits under the revised term.

The Plaintiffs' claim to whipsaw benefits was a vestige of ERISA's vesting and accrual requirements prior to the Pension Protection Act of 2006 (PPA). Prior to the PPA, it was mandatory for cash balance plans to perform "actuarial equivalence" to ensure that participants of a cash balance

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plans electing to receive a lump sum prior to their normal retirement age would be worth at least as much as the stream of income from the annuity they would receive at normal retirement age. This was termed the "whipsaw" calculation for cash balance plan participants—the difference between the hypothetical value of a cash balance plan account at any given time and the value of the account as an annuity payable at normal retirement age. The PPA provided that ERISA plans did not fail to satisfy ERISA solely because they did not provide actuarial equivalence for participants who terminated employment before normal retirement age and took a lump-sum payment. This, in effect, eliminated mandatory whipsaw payments.

The Plaintiffs, participants who elected to receive a lump-sum distribution from the Plan prior to 2006, alleged they were improperly denied whipsaw benefits because the Plan expressly promised to provide them with "actuarial equivalence" but the Plan, in practice, did not, through its definition of normal retirement and projection rate. The Plaintiffs claimed the Defendants violated ERISA §§ 203(a) and 3(24), and ERISA § 204(c)(3) by forcing participants who elected to receive their benefits in the form of a lump sum to forfeit their whipsaw benefits.

In 2015, the Second Circuit denied PwC's motion to dismiss the Plaintiffs' claims and agreed with the Plaintiffs that they plausibly alleged that the Plan did not provide them, and a class of similarly situated participants they represented, their full whipsaw benefits under the Plan. The Second Circuit reasoned that the Plan's definition of "normal retirement age" was designed to make an employee's normal retirement age coincide with the date on which the employee's benefits vest so that PwC could "avoid paying future interest credits" to departing employees who elected to receive their retirement benefit in a lump-sum distribution. What is more, the Second Circuit also found the Plan's projection rate could undervalue the future interest credits associated with the Plaintiffs' lump-sum retirement benefit.

The ruling invited a summary judgment motion from the Defendants that the Plaintiffs did not possess a remedy to recalculate their allegedly forfeited whipsaw benefits. According to the Defendants, neither ERISA § 502(a)(1)(B) nor ERISA § 502(a)(3) could provide a remedy for an improper "whipsaw" benefit calculation that would involve a retrospective alteration of the projection rate to comply with ERISA. The heart of the Defendants' summary judgment motion was that the U.S. Supreme Court's decision in *CIGNA Corp. v. Amara*[2] precluded a remedy for the Plaintiffs because in "*Amara*, the Supreme Court held that § 502(a)(1)(B) cannot be used to enforce terms external to a plan" and *Amara* has been interpreted by courts of appeals to reject Section 502(a)(1)(B) claims seeking, as here, to enforce ERISA by substituting ERISA-compliant terms for plan terms alleged to be illegal.

The U.S. District Court for the Southern District of New York agreed with the Defendants and granted their motion for summary judgment, concluding that the relief requested by the Plaintiffs pursuant to Section 502(a)(1)(B) was "reformation—not interpretation and not gap-filling—and requires more than the simple enforcement of the terms of the Plan as written."[3] The district court also foreclosed the Plaintiffs' claims under Section 502(a)(3) because it interpreted the Plaintiffs' claim as a legal claim for money damages. Significantly, the district court also held that relief under Section 502(a)(3) required a fiduciary breach which could not have occurred because PwC was not acting

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as a fiduciary when calculating and paying benefits.

Armed with the support of the Department of Labor (DOL), the Plaintiffs appealed the district court decision to the Second Circuit. The DOL filed an amicus brief to the Second Circuit in August 2018 that argued: (i) the Plaintiffs had a remedy under ERISA § 502(a)(1)(b) to recover benefits required by ERISA, even though the written terms do not provide those benefits, and (ii) in the alternative, the court may declare plan terms that violate ERISA void and order the Plan enforced in compliance with ERISA's requirements under ERISA § 502(a)(3).

The DOL specifically attacked the Defendants' reliance on *Amara.* The DOL wrote that:

> Unlike this case—where the Plan terms as written violate ERISA—the Amara plan terms as written complied with ERISA. The source of the ERISA violation in Amara was the plan administrator's conduct. The plan administrator provided inaccurate summary plan descriptions, which misled plan participants as to the actual plan terms, in violation of ERISA sections 102(a) and 104(b), 29 U.S.C. §§ 1022(a) and 1024(b). Amara held that the appropriate remedy was to equitably reform the plan to make its terms match what the plan administrator had promised in the summary plan descriptions . . . Unlike Amara—where the court changed the plan's terms to equitably remedy the plan administrator's misrepresentations—in this case, ***ERISA automatically supplants the Plan terms. In effect, ERISA's mandatory terms are the Plan terms***. (emphasis added).

The DOL's position that ERISA's mandatory terms are the Plan terms and therefore, the Plaintiffs are rightfully afforded a reformation claim under ERISA, was opposed by an amicus brief filed by the U.S. Chamber of Commerce, the American Benefits Counsel, the Business Roundtable, and the ERISA Industry Committee. This amicus brief focused on the fact that: (i) the Plan only "used to violate ERISA" and PwC's current plan complies with all statutory and regulatory requirements; (ii) the Plaintiffs' argument misunderstands that private damages are available in every ERISA case and would allow past participants to recover "billions of dollars" in presumed equitable relief; and (iii) the DOL's argument that any "plan-design error" is a breach of a fiduciary duty is unsupported.

In the end, the Second Circuit's December 23, 2019, panel opinion sided with the Plaintiffs and the DOL. But surprisingly, the Second Circuit panel did not provide a detailed explanation as to why. In a results-oriented opinion, the Second Circuit spoke of the Plaintiffs' right to a remedy generally under ERISA—without any precedent to the contrary—and reversed the district court.

In its summary judgment opinion, the Second Circuit began by stating that ERISA authorizes reformation of the Plan because, by its plain language, Section 502(a)(3) authorizes participants and beneficiaries to "obtain . . . equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[4] The court surmised that "because reformation is an equitable remedy and the Plan violated a 'provision[ ] of [the] subchapter'—specifically, ERISA § 3(24)—we conclude that § 502(a)(3) authorizes the district court to reform the Plan."

Also, the Second Circuit focused on the fact that the district court mistakenly applied reformation claims to only apply to allegations of all mistake, fraud, or inequitable conduct, but the reformation remedy is "is indisputably a typical and traditional form of equitable relief, and is thus categorically available to a participant or beneficiary to enforce violated provisions of ERISA." In fact, the Second Circuit stated "fraud, mutual mistake, or

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terms violative of ERISA" are independent bases that justify the equitable remedy of reformation under ERISA § 502(a)(3).

But the heart of the dispute was whether the Plaintiffs possessed a remedy under ERISA § 502(1)(1)(B). To answer this question, the Second Circuit merely stated, "in the absence of controlling authority otherwise, we are inclined to follow the Supreme Court's express preference that violations of ERISA should be remedied."

This open-ended conclusion has the potential to only a enhance the ambiguity on this issue and foster a split among the circuits on a participant's remedies under ERISA § 502(a)(1)(B). The Defendants, for example cited to the Fourth Circuit's decision in *Pender v. Bank of Am. Corp.*[5] and the Sixth Circuit's decision in *Soehnlen v. Fleet Owners Insurance Fund*[6] as supportive of their interpretation of *Amara* and the lack of a right to plan reformation and a recalculation of benefits under ERISA § 502(a)(1)(B).

Not surprisingly, on January 6, 2020, counsel for PwC petitioned to the full Second Circuit for a rehearing for three distinct reasons. First, the petition argued that the *Laurent* panel was the "first anywhere" to hold that reformation of a benefit plan is "categorically available" under ERISA § 502(a)(3) for former plan participants based solely on a claim that the plan violated ERISA, without any showing of fraud or mutual mistake. Second, the petition claimed that the panel's decision conflicts with the Supreme Court's decision in *Amara* because *Amara* only allows enforcement of plan terms "as written." And, third the petition suggested that the panel's decision "combined the § 502(a)(3) reformation provision with § 502(a)(1)(B) enforcement provision which presented a question of exceptional importance: Did Congress authorize courts to fashion relief by combining distinct remedies created by different subsections of § 502(a)? Without discussion, the panel implicitly answered that question in the affirmative, thus creating a new hybrid remedy."

The implications of the *Laurent* decision (if it is not overturned) are consequential. Perhaps the most critical being whether courts can award denied benefits to the Plaintiffs through recalculation of those benefits via plan reformation. In fact, the Defendants were not wrong to argue that the essence of the Plaintiffs' claim for whipsaw benefits was a legal claim for monetary damages based on what the Plaintiffs should have received had the Defendants used the correct projection rate.

Yet, in resolving disputes like this to afford the Plaintiffs appropriate relief under ERISA, courts might want to focus on ERISA's equitable breach of fiduciary duty remedy rather than reformation. In *Laurent,* the Plaintiffs did bring such a claim but it was dismissed by the district court because, according to the district court "as PWC points out, it was not making a discretionary determination about whether class members are entitled to benefits—it was merely adhering to the terms of the Plan and distributing benefits calculated ministerially according to the Plan's terms."[7]

To say the least, this holding is debatable. If the Defendants functioned as fiduciaries and exercised discretion in distributing "whipsaw" benefits to the Plaintiffs, many courts have held that blindly following a plan document is no defense to performing fiduciary responsibilities that violate ERISA. As the Supreme Court explained in *Fifth Third Bancorp v. Dudenhoeffer*, "the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary."[8] Fiduciaries may fol-

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low plan documents only "insofar as such documents . . . are consistent with the provisions of [ERISA]."[9]

The Second Circuit panel did not address whether PwC was acting in a fiduciary or settlor capacity in awarding benefits to the Plaintiffs. But this certainly could provide a reason for a rehearing with the full Second Circuit and avoid the ambiguity and confusion the panel decision may create in the district court and sister circuits concerning the availability of plan reformation as a remedy to plan participants bringing a denial of benefits claim.

Notwithstanding the Second Circuit panel's opinion and the success of the petition for rehearing, this is most likely not the end of these issues as a certiorari petition in this case is likely, and even if the Supreme Court does not accept such a petition in *Laurent,* the circuit split might force them to answer these questions in the near future.

NOTES:

[1]Laurent v. PricewaterhouseCoopers LLP, 945 F.3d 739 (2d Cir. 2019).

[2]CIGNA Corp. v. Amara, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843, 50 Employee Benefits Cas. (BNA) 2569, 161 Lab. Cas. (CCH) P 10380 (2011).

[3]Laurent v. PricewaterhouseCoopers LLP, 2017 WL 3142067 (S.D. N.Y. 2017), vacated and remanded, 945 F.3d 739 (2d Cir. 2019).

[4]29 U.S.C.A. § 1132(a)(3).

[5]Pender v. Bank of America Corp., 788 F.3d 354, 59 Employee Benefits Cas. (BNA) 2585 (4th Cir. 2015).

[6]Soehnlen v. Fleet Owners Insurance Fund, 844 F.3d 576, 63 Employee Benefits Cas. (BNA) 1349 (6th Cir. 2016).

[7]Lauren, 2017 WL 3142067 at *8.

[8]Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 134 S. Ct. 2459, 2468, 189 L. Ed. 2d 457, 58 Employee Benefits Cas. (BNA) 1405 (2014).

[9]Dudenhoeffer, 134 S. Ct. at 2468.

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