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Ninth Circuit Uncharacteristically Takes the Lead in Limiting Plaintiffs' Rights to Recover for Breach of Fiduciary Duty under ERISA

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In 2011, the U.S. Supreme Court recognized, for the first time, that some forms of equitable relief could lead to an award of a monetary payment for breach of fiduciary duty under section 502(a)(3) of ERISA, 29 U.S.C. section 1132(a)(3).[1] Although the Supreme Court did not define the elements of each form of relief in detail, it listed three types of equitable relief: surcharge, estoppel and reformation.[2] Since then, courts have struggled with the showing necessary to obtain them.

The U.S. Court of Appeals for the Ninth Circuit recently ruled in *Gabriel v. Alaska Elec. Pension Fund*,[3] that none of these theories was available to a retiree who was incorrectly informed that he was eligible for an annuity. The court was unanimous concerning the remedies of estoppel and reformation, but divided concerning the antiquated remedy of surcharge.

Factual and Procedural Background

The plaintiff in *Gabriel* was a retiree who from 1968 to 1975 had worked for various electric companies that participated in the Alaska Electrical Pension Plan (the Plan) under the terms of a collective bargaining agreement. Thereafter he became the owner of Twin Cities Electric. Although he was not subject to the collective bargaining agreement as an owner, Twin Cities continued making contributions on his behalf from 1975 to 1978. He had not vested in the Plan, and he was not entitled to an annuity benefit.

Pursuant to the Plan, benefits vested after individuals completed 10 years of eligible service. Because the plaintiff was an employee for eight years, and was credited with another three years of service as owner of Twin Cities, he was initially considered a vested Participant in the Plan.

The Plan discovered its error in 1979. It sent the plaintiff notices in 1979 that it was refunding a portion of Twin Cities' contributions made on his behalf, but also offsetting other delinquent contributions that Twin Cities had failed to make for other employees. In 1980, the plaintiff signed a release agreement that memorialized this arrangement. The agreement detailed "the improper

1 *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

2 *Id.* at 1879-80.

3 2014 U.S. App. LEXIS 10553 (9th Cir. June 6, 2014).

employer contributions paid from the year 1975 through 1978."[4] The plaintiff never accrued any additional service credit, and, therefore, his benefits never vested.

Sixteen years later, in 1996, the plaintiff contacted the Plan to inquire about his benefits in the event he decided to retire. In 1997 a representative of the Plan sent him a letter, *incorrectly* informing him that his benefits *had* vested, based upon his service from 1968 to 1978 (thus incorrectly granting him service credit for his time as an owner). The plaintiff subsequently retired, applied for benefits, and began receiving benefits under the Plan.

In 2000, the plaintiff took a job as safety inspector to supplement his retirement income. The Plan contended that his work constituted prohibited post-retirement employment in the industry, and suspended his benefits under the Plan. The plaintiff challenged his suspension before the Plan's Appeals Committee. The Committee denied the appeal. He then appealed to an arbitrator under the terms of the Plan, who reversed and remanded the issue for further fact-finding.

Before the Appeals Committee ruled on the dispute, the plaintiff left his job as a safety instructor, and the Plan reinstated his benefits. But the plaintiff pressed further. He demanded his benefits from the period that the defendants had suspended them while he was employed as a safety inspector. In a settlement offer, the defendants agreed to pay the plaintiff's costs, his attorney's fees, and his back-benefits, with interest.[5]

Before the plaintiff could respond to the offer, however, it was revoked. The Fund *rediscovered* its earlier error and its determination that the plaintiff's benefits never vested. The plaintiff brought suit in the U.S. District Court for the District of Alaska, alleging claims for benefits under section 502(a)(1)(B) of ERISA and for breach of fiduciary duty under section 502(a)(3).[6]

On appeal, a divided panel of the Ninth Circuit ruled that, under the facts of this case, no monetary relief was available for breach of fiduciary duty under section 502(a)(3) of ERISA. In a dissenting opinion, Judge Berzon argued that the decision created a circuit split as to the required showing for the remedy of "surcharge."

Estoppel And Reformation Under Section 502(a)(3) Of ERISA

The Ninth Circuit first addressed the plaintiff's argument that the defendants were estopped from contradicting earlier statements that he was entitled to benefits under the Plan. It noted that in the ERISA context, a plaintiff seeking relief for estoppel may not rely on statements that are inconsistent with the written Plan, or would otherwise result in an amendment or modification of the Plan.[7] If the rule were otherwise, noted the court, plan administrators could endanger the actuarial soundness of the Plan for other participants who were genuinely eligible for benefits. To avoid such a result, "oral agreements or modifications cannot supersede the written terms of an ERISA Plan."[8]

Although claims for estoppel based on oral statements may be pleaded where the terms of the Plan are ambiguous, the court found no ambiguity. The plaintiff conceded that his eligible service lasted only eight years, and that his benefits therefore did not vest under the terms of the Plan. And the court rejected the plaintiff's best argument—that he received statements pursuant to the Plan that detailed his benefits and the number of hours credited to his participant account—because the plaintiff had not averred that he relied on these statements when making his decision to retire.[9]

In any event, the court noted also that the plaintiff failed to satisfy one of the basic elements of any estoppel claim—lack of knowledge of the true facts surrounding a defendant's incorrect statement of facts. Because the plaintiff had received correspondence in 1979 clearly stating that his benefits had not vested and that he was ineligible to receive pension benefits, he could not claim ignorance of the true facts.[10]

4 *Id.* at *8.

5 *Id.* at *10.

6 *Id.* at *11. While the district court actually ruled in favor of the plaintiff on summary judgment with respect to the § 502(a)(1)(B) claim, and remanded to the Appeals Committee for further proceedings, the plaintiff eventually stopped pursuing this argument. Id. at *12.

7 *Id.* at *21 (citing 29 U.S.C. § 1102(a)(1), ERISA § 402(a)(1), with respect to the fact that an "employee benefit plan shall be established and maintained pursuant to a written instrument").

8 *Id.* at *21 (internal quotation marks omitted).

9 *Id.* at *37-38

10 *Id.* at *40.

With respect to reformation, the plaintiff alleged that either a mistake in the Plan documents or fraud on the part of the Plan should have triggered his eligibility for benefits. The court rejected both arguments.

As to the plaintiff's theory of mistake, the court noted that the plaintiff did not allege either that the plain terms of the Plan contained an error, or that the trust settlor intended for the Plan to contain alternate terms. Both showings are necessary for reformation under the doctrine of mistake. As to the plaintiff's theory of fraud, the court distinguished a Ninth Circuit case involving employees who would have been eligible for enhanced benefits under a retirement benefit plan, but who were not told of the opportunity. Instead, the plaintiff was never eligible for benefits, and the court could not deem him eligible under the theory of reformation when the plain terms of the Plan precluded him from being eligible.[11]

Surcharge Applies Only to Improper Losses or Gains *To The Trust*

Finally, the court addressed the plaintiff's claim for surcharge. A claim for surcharge, noted the court, may "provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment."[12] Viewing the Supreme Court decision narrowly, the court held that in order to bring a claim for surcharge against a fiduciary, the breach alleged must have resulted in either "a loss to the trust estate" or must have allowed "the fiduciary to profit at the expense of the trust."[13] The court expressly stopped short of holding that the Supreme Court decision required courts to impose "make-whole" relief under the doctrine of surcharge, which would provide relief for damages suffered personally by beneficiaries. Instead, it focused exclusively on trust principles involving suits against fiduciaries. It cited an earlier opinion[14] in which a Ninth Circuit panel rejected a claim for surcharge as lacking a connection to either a loss to the trust estate or unjust enrichment to the trustee. The *Gabriel* court noted: "We are bound by our own precedent, which correctly identifies surcharge as including only unjust enrichment and losses to the trust estate."[15]

In affirming dismissal of the plaintiff's claims, the court distinguished decisions from other circuits as merely recognizing the <u>availability</u> of surcharge claims after the 2011 Supreme Court decision, but not stating that surcharge <u>was</u> available for make-whole relief for personal losses. The plaintiff made no allegation that the *fiduciary* benefited or that the *trust fund* suffered because of the incorrect representations to the plaintiff. Indeed, the court noted, the denial of benefits aided the trust fund by preserving funds for participants who were eligible for benefits. The plaintiff, therefore, could obtain monetary relief by way of the equitable remedy of surcharge.[16]

Dissent and Potential Circuit Split

In her dissent, Judge Berzon strongly took issue with the court's decision to narrowly interpret the 2011 Supreme Court case and elements of surcharge. The dissent contended that the court disregarded the Supreme Court case and created a circuit split with the Fourth, Fifth, and Seventh circuits. Rather than confine surcharge claims to situations where a breach of fiduciary duty has led to a loss for the trust or to the unjust enrichment of the trustee, the dissent would have allowed "make-whole" relief.

The dissent noted that in the Supreme Court case, for instance, the plaintiffs had not alleged that the breach of fiduciary duty had resulted either in a loss to the trust fund or the unjust enrichment of the fiduciary defendants. And indeed, on remand from the Supreme Court, the district court awarded relief to the plaintiffs on both an unjust enrichment theory *and* a make-whole basis.[17]

11 *Id.* at *41-42.

12 *Id.* at *25 (internal quotation marks omitted).

13 *Id.* at *27.

14 *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162 (9th Cir. 2012).

15 Supra note 3 at *32. The *Skinner* case was previously analyzed by Mr. Nadel here. That piece noted that "*Skinner* is a welcome decision for plan fiduciaries."

16 The court addressed one final argument from the plaintiff. The plaintiff alleged that the defendants waived their ability to deny him benefits on the basis that the original decision suspending his benefits cited only his work as a safety inspector, and not the fact that he had not accrued sufficient years of eligible service. The court rejected this argument as well, noting that the Appeals Committee informed the plaintiff of its rediscovery of his ineligibility before its final decision, and offered him a chance to litigate the issue during the administrative process. *Id.* at *47-50. In any event, the remedy for failing to give the plaintiff an opportunity to litigate the issue—if the process had failed the plaintiff—would have been to introduce evidence to the district court on the issue, which he did. *Id.* at *50.

17 *See Amara v. Cigna Corp.*, 925 F. Supp. 2d 242, 255 (D. Conn. 2012) ("[T]he Court finds that CIGNA may be surcharged on the basis of either a make-whole or unjust-enrichment theory."); *see id.* at 256-57 ("It is challenging to even imagine a scenario where a violation of ERISA §§ 102(a) or 104(b) would by itself lead to the type of harm to trust assets that CIGNA asserts is a necessary prerequisite to surcharge.").

Similarly, although the majority opinion in *Gabriel* had distinguished decisions from other circuits as merely recognizing the availability of the surcharge cause of action, the dissent disagreed. In one case, noted the dissent, the plaintiff sought surcharge where the defendant improperly accepted life-insurance premiums, and then sought only to refund the premiums upon the submission a claim.[18] In another, the plaintiff sought surcharge on the basis that he waived coverage under his wife's health insurance because his employer informed him he was eligible for coverage under his own plan.[19] And in a third, a plaintiff underwent surgery on the basis that a plan representative incorrectly informed her that that the procedure would be covered.[20] In each of these cases, the circuit courts remanded to the district courts to allow these claims to proceed. Thus, if the plaintiffs in those cases had been ineligible for make-whole relief for personal damages, the dissent argued, there would have been no need for those courts to remand to the district courts for a decision on the issue of surcharge—such claims would have been barred as a matter of law.[21]

The dissent also made an effort to distinguish the earlier Ninth Circuit decision as merely mentioning two possible avenues for finding in favor of a plaintiff seeking surcharge. The case did not, according to the dissent, stand for the proposition that these were the only possible avenues.[22]

Practical Considerations

In light of the Ninth Circuit's ruling, plan administrators—even those whose representatives have misstated an individual's eligibility for participation in a health or retirement plan—have a much stronger argument to avoid legal liability under ERISA.

However, plan administrators and employers should:

- Train and monitor representatives on the importance of informing participants or individuals inquiring about their benefits status, since these statements can lead to litigation if incorrect.
- Confirm that plan documents clearly spell out eligibility requirements to avoid opening the plan up, through ambiguities, to non-eligible individuals on the basis of estoppel.
- Keep complete and accurate files, since individuals may not apply for benefits until decades after performing service that may trigger eligibility.
- Understand that the state of the law with respect to ERISA § 502(a)(3) claims is in flux.
- Continue monitoring legal developments as they proceed and potentially reach the U.S. Supreme Court.

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18 *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012). The *McCravy* case was previously analyzed here.

19 *Gearlds v. Entergy Servs.*, 709 F.3d 448 (5th Cir. 2013).

20 *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013).

21 Supra note 3 at *57-58.

22 *Id.* at *60-61; *see also* supra note 14.