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ERISA Litigation Continues a Plaintiff-Friendly Trend

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An unmistakable trend in the world of employee benefit plan litigation is underway, and that trend is decidedly in favor of plaintiffs. The trend has manifested itself in several ways. For example, several years ago, courts routinely entered early dismissals of cases alleging that very large companies breached their fiduciary duties toward their 401(k) plans by allowing them to pay unreasonably high fees. Now, those cases most often survive dismissal, and in most cases, result in seven- and eight-figure settlements. Plaintiffs' success in those cases has caused the number of plaintiffs' law firms taking ERISA cases to grow significantly, and the list of target defendants to expand beyond just billion-dollar companies to smaller, closely held companies and their owners.

The law is evolving in a way that makes ERISA benefit claim cases — which were traditionally fairly streamlined — more complex, expensive and time-consuming. In years past, when presented with claims that participants had been denied a benefit due to them, or that the benefit should be greater than what the plan was paying, courts often limited the scope of the cases to a single claim for plan benefits, and dismissed "alternative" claims for equitable relief that appeared duplicative of the underlying benefit claim. This approach was driven, at least in part, by one of Congress's initial incentives in passing ERISA: the desire to ease the administrative burden of employers who chose to sponsor benefit plans. The earlier law tended to emphasize that goal to a greater extent, and courts emphasized limits on the amount of discovery that could take place in benefits claim cases, since the primary issue was whether benefits were owed (or should be increased) or not.

Since the U.S. Supreme Court's 2011 decision in *Cigna Corp. v. Amara*, that has changed, with the clear trend now to be to allow plaintiffs to pursue various alternative forms of equitable relief side-by-side with a claim for plan benefits. A recent example is the Ninth Circuit Court of Appeals decision in *Moyle v. Liberty Mutual Retirement Benefit Plan*, -- F.3d --, 2016 WL 2946271 (9th Cir. May 2, 2016). Moyle involved Liberty Mutual Insurance Company's acquisition of Golden Eagle Insurance Company. At the time of the acquisition, Golden Eagle was in conservatorship, and the plaintiffs — who had been Golden Eagle employees — claimed that they were concerned about their job prospects.

Liberty Mutual engaged in a bidding war to acquire Golden Eagle. One advantage Liberty Mutual had was that it offered participation in its defined benefit plan, which Golden Eagle had not offered. This made it more likely that Liberty Mutual would retain Golden Eagle's employees, and enhanced Liberty Mutual's position in the bidding war. Before the acquisition was approved, Liberty

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Mutual made representations suggesting that, in determining their Liberty Mutual plan benefit, Golden Eagle employees would receive service participation credit for their years of Golden Eagle employment. After the acquisition was approved, however, it was clearer (but, perhaps, far from "crystal clear") that years of Golden Eagle employment would only count for determining employees' eligibility, vesting and early retirement subsidies, but would not count for benefit accrual purposes. Four years after the acquisition, the plan was amended to provide that Golden Eagle employees would receive credit for eligibility, vesting, early retirement and spouse's benefits, and a subsequent amendment added the word "solely" to this provision.

The Court initially dispensed with the plaintiffs' claim — a claim for benefits under ERISA §502(a)(1)(B) — that the plan provided service credit for years that employees worked for Golden Eagle before the acquisition. In years past, that might have been the end of the story, because a 1996 Supreme Court case (*Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)) had held that the only other type of claim that a plaintiff in these circumstances might bring (a claim for "other appropriate equitable relief" under ERISA §502(a)(3)) was not available if ERISA §502(a)(1)(B) provided an adequate remedy.

But that was before the Supreme Court's decision in *Amara*. In *Moyle,* the Ninth Circuit concluded that in dismissing the plaintiffs' equitable claims, the district court "insisted on applying *Varity* and gave *Amara* short shrift," even though *Amara* is controlling authority. It concluded that if plaintiffs were unable to recover benefits based on an interpretation of the plan itself under ERISA §502(a)(1)(B), "…they can, however, receive reformation of the Retirement Plan as an equitable remedy under ERISA §502(a)(3)." The Ninth Circuit agreed with an earlier decision from the Eighth Circuit (*Silva v. Metro. Life Ins. Co*., 762 F.3d 711 (8th Cir. 2014)), which had reviewed earlier cases prohibiting plaintiffs from seeking relief under both §§502(a)(1)(B) and 502(a)(3), and concluded that those cases do not limit plaintiffs to pleading only one claim, but rather "…prohibit duplicate *recoveries* when a more specific section of the statute, such as §502(a)(1)(B), provides a remedy similar to what the plaintiff seeks under the equitable catchall provision, §502(a)(3)."

Cases like *Moyle* and *Silva* have a significant impact on the course of ERISA litigation. While the scope and extent of the discovery that may be conducted in benefits claims litigation under §502(a)(1)(B) is strictly limited, that is often not so in cases involving claims under §502(a)(3). Discovery and depositions are frequently one of the most, if not the most, time-consuming and costly aspects of litigation. Thus, the evolution in the law has a real world impact on the parties to ERISA litigation. Cases are, on the whole, taking longer to resolve and becoming more expensive to defend. ERISA cases are being prosecuted by a constantly growing roster of plaintiffs' attorneys, fueled in part by the fact that ERISA generally allows prevailing plaintiffs to recover their attorneys' fees.

Employee benefit plan sponsors, their owners and risk managers, should take note of these trends, which show no signs of reversing. The likelihood of being sued in an ERISA action is growing, as is the list of potential targets. Generally speaking, standard commercial general liability insurance policies will not cover the costs of defending against an ERISA lawsuit, or any part of a settlement or judgment in an ERISA case. Either a separate fiduciary liability insurance policy, or a fiduciary liability rider, is likely a necessity to coverage in that circumstance.

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