Q&A

Litigating an employee benefit claim

Part 1 of a 2-Part Series

From an interview with Richard A. Naegele, Esq. and Thomas R. Theado, Esq.

Anyone involved with benefit plans—employers, plan fiduciaries, trustees, custodians, and third party administrators (TPAs)—may become involved in retirement plan litigation arising from a participant's claim of mismanagement or a claim for unpaid benefits. While the employer's and plan fiduciary's potential exposure in a participant's lawsuit could be quite large, there have been relatively few such lawsuits in relation to the one million tax-qualified retirement plans in the U.S. This month we have asked Richard Naegele of Wickens, Herzer, Panza, Cook & Batista in Avon, Ohio, an ERISA attorney, and Thomas Theado of Gary, Naegele and Theado, LLC, in Lorain, Ohio, an ERISA Class Action litigator, to discuss the implications of initiating, or defending against, a participant's claim under ERISA. Mr. Naegele may be reached at *RNaegele@wickenslaw.com* and Mr. Theado may be reached at *TTheado@GNTLaw.com*.

Mr. Theado's comments are noted with "T," and Mr. Naegele's comments are noted with "D."

Q Why don't we see more participant lawsuits?

D. There are several reasons for the limited number of participant lawsuits against retirement plans. For the most part, it's just difficult for plan participants to recognize that they may have a claim for additional benefits. Then, if a participant does suspect that he or she may have a claim, it is difficult to find an attorney who has the pension knowledge and experience to pursue the claim. Probably 99-plus-percent of ERISA attorneys represent plans and employers, although more and more are starting to pick up some complainant's work. It can also be difficult to articulate a pension claim in a manner that the claim can be recognized by the court and successfully pursued. Basically, you've got to explain the claim in a way that a judge can understand. The pension area is complicated if you do not deal with it every day. And finally, even if the claim can be recognized and successfully pursued by a pension litigator, the plan participant's potential recovery is often too small to warrant the time and expense involved in pursuing the claim.

These claims take a lot of time to pursue, so the amounts need to be large to make the pursuit worthwhile.

T. I would like to add an example from a litigator's viewpoint to demonstrate the effect of Dick's comments. We see miscalculated benefits under a defined benefit pension plan as one of the most common types of ERISA lawsuits. In realty, a participant is more likely to get his retirement's gold watch appraised than he is to have the amount of his lump sum pension check reviewed. Then, if the retiree does realize that there may have been an error in the calculation of her or his benefits, the retiree will have to find an attorney who regularly practices in this field—and for claimants—to properly bring a lawsuit. And finally, you've got to make it worth the attorney's while to take on a pension plan in what may prove to be a massive piece of lengthy litigation.

Q If participant claims are that difficult to pursue, how do participants pursue them at all?

T. That's a good practical question, and you need to look at the way most participant lawsuits are developed. It is difficult to pursue a claim for one individual, and our practice has been representing thousands of individuals in a class action context. On an individual basis, a participant will be hard pressed to find a competent attorney who's willing to take on a pension plan for six to eight years, even if that claim is in the six figures. As a consequence, you have to aggregate the claims of similarly situated retirees or beneficiaries and seek to bring the claim in the name of a few on behalf of many. Here, I am primarily talking about proceeding with claims in the federal system, because ERISA preempts state law in this area. In the federal system, you'd be proceeding in the class action setting under Federal Rule of Civil Procedure 23.

Q Are there many litigation firms that focus on ERISA benefit claims?

T. There are probably no more than a few dozen law firms in the U.S. that focus on participants' claims under ERISA.

Q Are there certain characteristics of a benefit claim that make it suitable for a class action?

T. Yes, but understand the criteria for certification of a class action in the federal system would apply irrespective of the subject matter involved. That is, it doesn't matter if I'm bringing a consumer action or an environmental action or a pension action, the criteria is the same. I will review those criteria for your readers. First, the class of claimants must be identifiable—which is not to say it is identified at the time of the lawsuit's filing or identified at the time the trial court determines to certify the class—but

the definition of the class must work so that a group of claimants is capable of identification. In the second place, the participants bringing the lawsuit must belong to the class as defined.

Next, there are the "numerosity" and "commonality" requirements. The class of claimants must be numerous—generally at least 40 to 60 participants—and those claims must share a common question or law or fact. With ERISA actions, these thresholds have a fairly straightforward analysis. Was the benefit computation correct and legal? Was the interpretation of the plan appropriate or inappropriate?

Then, the group of plan participants bringing the suit—that is, the "named plaintiffs" who will be the parties representing the class's interest—must have claims typical of the other class members. This group must fairly and adequately protect the interests of the entire class. The role of class counsel (that is, the attorneys representing the class of claimants), as well as the role of the named plaintiff, is something of a fiduciary. That requires an obligation to work for the whole benefit of the class and not for themselves alone. A plan participant mustn't be allowed to wield the class action as a threat just to improve his or her own personal position.

After satisfying all of these requirements, the action must satisfy one of three additional "alternative elements" in order to be certified as a class action.

The first additional alternative element is met when the issues of law or fact common to the participants predominate over individual issues. For example, while participants may have suffered different amounts of damages, to satisfy this element the mechanism of the damage must be the same. In this way the group claim predominates over individual issues of damage.

The second alternative additional element is referred to as "incompatible standards of conduct." This element is satisfied if you demonstrate that the separate prosecution of plan participants' claims would present the defendants in such separate suits (for example, the pension plan, its administrators, etc.) with a risk of facing incompatible results. For example, a pension plan would face incompatible standards of conduct if individual participants were allowed to bring individual suits and inconsistent decisions were rendered in those suits.

The third additional alternative element is met when the defendants' actions are shown to be generally applicable to all class members so as to make an injunction appropriate. For example, if you litigate in an annuity context you may wish to obtain injunctive relief in the form of a court order proscribing conduct in the future or forbidding conduct in the future. In the case of an annuity calculation the action would be to require the plan to modify the annuity calculation.

Q What is a typical participant claim that could be brought in a class action?

D. Tom mentioned, at the start of this interview, a typical class action claim may arise in the miscalculation of a lump sum benefit under a defined benefit pension plan. These claims work so well as class actions because they tend to satisfy the criteria Tom discussed above in a straightforward manner. That is, the error is typically the result of an error in the calculation of all lump sums—a processing error. So many participants are affected by the same error. That is, every participant is similarly situated. They all have, more or less, the same claim or to a large extent the same claim. If the computer screwed up one participant's lump sum calculation, there's a good chance that it screwed up all lump sums. This assumes the error is systemic and not merely due to entering the wrong demographic information for one participant. A similar error can arise if the plan document specifies using 4 percent to calculate the lump sum benefit, but the calculation used 4 1/2 percent. This type of systemic error could be the type of thing that is the basis of a class action.

Q Are you saying that employers intentionally err in these calculations?

D. No. This type of error is usually not intentional, although there have been claims based on an employer, or some other plan processor, intentionally misleading the plan participants. Those are referred to as "Varity"-type claims which arose from *Varity Corporation vs. Howe*, a 1996 U.S. Supreme Court case. There, the High Court held that a fiduciary breached its duties by making false representations regarding the plan's benefits. In the *Varity* case, the employer made false representations to the employees about the security of future health and welfare benefits at a new company the employer was establishing. Those representations were made for the purpose of inducing the employees to transfer employment to that new company and eliminate a liability with the former employer. The new company didn't remotely have the kind of funding that the employer said it did, and individuals lost benefits.

The Supreme Court held in that case that the employer breached its duty of loyalty under ERISA Section 404. The breach arose under ERISA because the plan fiduciary did not act solely in the interests of plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries. Basically, the employer in *Varity* lied to the participants. So often a participant claim can fit into one of those categories. A variety of claims fall

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under a breach of fiduciary duty under Section 404 of ERISA.

Q Are there common plan errors in processing a benefit claim that may lead to a class action?

T. At the risk of over simplifying, a handy way for a litigator to look at a claim and its application to a class action is to consider three common operational errors. One arises if the plan is pluperfectly administered according to its terms, but participants allege the plan's terms conflict with the law. A second arises if plans are pluperfectly in compliance with law, but it is alleged that the administrator has misinterpreted the plan's provisions. Last, look for claims where it is alleged that the assets of the funds were mismanaged by whomever has that responsibility. These are claims for failure to preserve assets. We are also seeing class action claims arising from conversions of a classic defined benefit to a cash balance plan because of alleged errors in calculating accrued benefits. Keep in mind that some misrepresentations with respect to the terms of the plan may arguably arise inadvertently. For example, the terms of a plan's Summary Plan Description may vary materially from the plan's terms. It is not an infrequent result that the SPD's beneficial terms applicable to the retiree's claims are sustained over those of the plan itself.

Next month we will discuss___ in part two of this two-part series. ❖