

Hutchison, et al. v. Fifth Third Bancorp.
United States Court of Appeals for the Sixth Circuit

March 13, 2007

The Sixth Circuit Court of Appeals (Sixth Circuit) recently affirmed a lower court's ruling that a state law breach of contract claim against a party that is not, at the time of the contract, an ERISA fiduciary nonetheless still relates to an ERISA covered plan and therefore is preempted under ERISA.

Hutchison, et al. v. Fifth Third Bancorp, 469 F.3d 583 (6th Cir. 2006). In this case, the Sixth Circuit found ERISA preemption of breach of certain contract claims brought by plan participants in the context of a successor plan sponsor's alleged failure to keep commitments it made in its corporate capacity under the contractual terms of a merger agreement. This is the second case in a six-month period to deal with this issue, as the Fifth Circuit Court of Appeals (Fifth Circuit) came to a similar conclusion regarding a contract entered into by a company in a nonfiduciary capacity but which related to a qualified plan in *Halliburton Company Benefits Committee v. Graves*, 38 EBC 2249 (5th Cir. 2006).

Hutchison revolves around certain provisions in the merger agreement governing the acquisition of Suburban Bancorporation (Suburban) by Fifth Third Bancorp (Fifth Third). In 1997, Suburban and Fifth Third negotiated a merger agreement between the two companies. The merger agreement contained language relating to the *unallocated* shares held by the employee stock ownership plan (ESOP) maintained by Suburban. The merger agreement also provided that the ESOP would be maintained for the exclusive benefit of individuals who had become ESOP participants on or before the effective date of the merger (the class members). After reading the representations contained in the merger agreement, class members voted the ESOP's shares in favor of the merger. The two companies merged in 1997.

After the merger, Fifth Third became the successor ESOP sponsor as well as the trustee of the ESOP. IRS approval was never obtained, and, while it is not clear from the opinion, it appears it was not requested. Instead, Fifth Third, as the plan sponsor, amended the ESOP to include 1,633 Fifth Third employees and to exclude retroactively the class members from the ability to recover funds from the ESOP attributable to the unallocated shares held by the ESOP. Fifth Third again amended the ESOP to distribute the ESOP funds attributable to the unallocated shares to the Fifth Third employees.

Plaintiffs brought suit in state court alleging three groups of claims. "The first group of state law claims related to Fifth Third's alleged misrepresentations to class members before they voted in favor of the merger (i.e., claims of breach of contract, intentional misrepresentation, and negligent

misrepresentation). The second group of state law claims related to Fifth Third's alleged taking of class members' assets from the ESOP (i.e., conversion, unjust enrichment, and breach of the covenant of good faith and fair dealing). Finally, [plaintiffs] included an ERISA claim against Fifth Third." 469 F.3d at 586.

Fifth Third removed the case to the district court on the basis that the complaint contained an ERISA claim. The plaintiffs sought to dismiss the ERISA claim, and moved to remand the case to state court. The district court denied the remand request, finding that ERISA preempted the plaintiffs' state law claims. The district court then dismissed the state law claims because of ERISA preemption, a decision that it later reaffirmed. The plaintiffs filed an amended complaint, alleging only an ERISA violation. The district court dismissed the plaintiffs' ERISA claim based upon the court's finding that Fifth Third did not breach any fiduciary duties owed to the class members.

The plaintiffs appealed, challenging all four district court orders. The fundamental disagreement on appeal related to the nature of the merger agreement and Fifth Third's status relative to the plaintiffs and the other proposed class members. The plaintiffs argued that Fifth Third's obligations arose from the merger agreement that existed before class members and Fifth Third had a fiduciary/beneficiary relationship, and, therefore, ERISA does not preempt the breach of contract claim. Fifth Third, on the other hand, argued that class members could only challenge the ESOP's plan amendments under ERISA and that any legal duty it owed the class members arose under the ESOP. As a result, Fifth Third argued that ERISA preempts the plaintiffs' claims.

The Sixth Circuit affirmed all four of the district court's rulings, holding that "[a]ffirmance is required because plaintiffs seek damages for the ERISA-regulated actions of an ERISA fiduciary, based on an alleged contract that the fiduciary entered into before it became a fiduciary with respect to plaintiffs. ERISA preempts in that situation because the state law contract claim would bind fiduciaries to particular choices, thereby functioning as a regulation of the ERISA plan." *Id.* at 587. In reaching this conclusion, the court relied on *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), and differentiated this case from *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692 (6th Cir. 2005), and *Briscoe v. Fine*, 444 F.3d 478, 497 (6th Cir. 2006).

The Sixth Circuit noted that "ERISA limits plaintiffs' ability to challenge a plan administrator's decision regarding benefits . . . and that it does not matter whether plaintiffs cite a different body of law to support their cause of action . . . or that the relief that plaintiffs seek is different from the relief that ERISA affords . . . [so] long as ERISA exclusively regulates the activity . . . ERISA prevents the distinct state law . . . from superimposing an extra layer of regulation on top of the ERISA-regulated plan benefit determination." *Id.* at 588. The Sixth Circuit found it immaterial that Fifth Third entered into the contract that is the basis for the state law claim prior to becoming the ESOP sponsor, and therefore prior to the existence of the beneficiary/fiduciary relationship, due to the fact that a "key element of the state law claim—albeit one that arose later—was the ERISA-governed action of Fifth Third in changing the beneficiary scheme." *Id.*

In other words, the Sixth Circuit found the class members' claims were preempted by ERISA on the grounds that Fifth Third's decision to amend the ESOP is subject to ERISA regulation. The court rejected the plaintiffs' argument that critical elements of their claim arose before Fifth Third and the class members had a fiduciary beneficiary relationship. 469 F.3d at 587. The court found that the plaintiffs' exclusive remedy is under ERISA, as opposed to a state contract law claim, regardless of the

fact that many of the facts giving rise to the claim arose prior to Fifth Third's taking over the affected benefit plan. For reasons not disclosed in this opinion, the ERISA claim had already been dismissed, so the plaintiffs were left without a remedy.

The other significant issue worth noting is found in footnote 7. While the Sixth Circuit did not find it necessary to deal with the district court's finding that the merger agreement constituted a plan amendment (of the ESOP) under ERISA, that is exactly the holding of *Halliburton Company Benefits Committee v. Graves*, 38 EBC 2249 (5th Cir. 2006). The Halliburton case involved retiree medical benefits, but the central issue was similar to *Hutchison*, namely the ability of plan participants to enforce covenants in a merger agreement that directly affect them.

In 1998, Dresser Industries, Inc. (Dresser) merged with Halliburton N.C., Inc. (Halliburton). At the time of the merger, Dresser offered significantly better retiree medical benefits under the Dresser Retiree Medical Program than did Halliburton. As part of the merger agreement, Halliburton agreed to protect benefits for retirees who were considered to be "grandfathered" with respect to benefits offered under the Dresser Retiree Medical Program. Specifically, Halliburton agreed not to amend the Dresser Retiree Medical Program "except to the extent that any modifications are consistent with changes in the medical plans provided by Halliburton for similarly situated active employees." *Id.* at *10. Despite this agreement, Halliburton amended the Dresser Retiree Medical Program to eliminate the various differences between the Dresser plan and the Halliburton retiree medical plan. This amendment occurred more than five years after the merger.

The plaintiffs, who were retirees under the Dresser Retiree Medical Program, sued to enforce the provisions of the merger agreement that limited Halliburton's ability to amend such programs. Unlike the court in *Hutchinson*, which refused to address the ability to amend a benefit plan via a merger agreement, the court in *Halliburton* focused on what would constitute an amendment to a benefit plan. The Fifth Circuit noted that "[i]n order to amend a welfare benefit plan governed by ERISA, the employer must 'provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan.'" *Id.* at *9. The court also indicated that "there is no requirement that a document claimed to be an amendment to a welfare plan be labeled as such." *Id.* Therefore, the court held that it was possible for a merger agreement to constitute a plan amendment.

As discussed by the Fifth Circuit, under the Dresser Retiree Medical Program, the company had the authority to amend the plan that governed such program. By virtue of the *company* adopting the merger agreement, the court determined that "the merger agreement amended the Dresser Retiree Medical Program to provide that Halliburton must maintain the retiree program for eligible participants except to the extent that any modifications are consistent with changes in the medical plans provided by Halliburton for similarly situated active employees." *Id.* at *10. Thus, Halliburton's attempt to later amend the Dresser Retiree Medical Program, in contravention of the merger agreement, impermissibly violated the terms of the Dresser Retiree Medical Program, as amended by such agreement.

Finally, Halliburton also argued that regardless of whether the merger agreement functioned as a plan amendment, the "no-third-party-beneficiary clause" of the merger agreement eliminated the plaintiffs' ability to enforce the terms of the merger agreement. The court, having determined that the merger agreement constituted an amendment of the Dresser Retiree Medical Program, disagreed. "Enforcement of a plan's provisions, including any amendments thereto, falls exclusively in ERISA's remedial scheme . . . To adopt Halliburton's argument that a provision in a contract, or more

specifically a no-third-party-beneficiary clause, can trump rights prescribed by ERISA would fly in the face of the exclusive remedial scheme prescribed by Congress for plan participants and beneficiar[ies] to enforce rights under employee benefit plans.” *Id.* at *13.

Thus, in *Halliburton* the court first determined that a benefit plan could be amended by an outside agreement, i.e., a merger agreement, so long as the amendment procedure prescribed by such plan was followed. The court then determined that once a plan was amended pursuant to this type of agreement, ERISA would trump the no-third-party-beneficiary clause to the extent that litigation relating to enforcement of the merger agreement also constituted enforcement of a plan amendment. This is notable for those transactions involving employee benefit plans, as virtually all merger agreements include a provision explicitly stating that third-party beneficiaries have no enforcement rights. These clauses, together with ERISA preemption, have historically made it impossible in most cases for participants to successfully challenge a failure of the successor company to provide benefits specifically agreed to in the merger agreement. However, in the Fifth Circuit it appears that this is no longer the case in those instances in which the agreement in question gives rise to a plan amendment. Thus, it may be that a no-third-party-beneficiary clause does not provide the same level of protection in the context of plan benefit claims as was previously assumed.

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