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Why The 3rd Circ.'s Unisys Decision Defies ERISA

Law360, New York (January 29, 2010) -- Until recently, the federal courts of appeals have generally agreed that employers who unambiguously reserve the right to make changes to health benefits by including "reservation of rights" clauses in the plan documents may modify or amend the benefits without facing liability under the Employee Retirement Income Security Act.

In In re Unisys Corporation Retiree Medical Benefits ERISA Litigation, 579 F.3d 220 (3d Cir. 2009), petition for cert. filed, __ U.S.L.W. __ (U.S. Dec. 31, 2009) (No. 09-789), however, the Third Circuit turned its back on these principles when it held a plan sponsor liable for breach of fiduciary duty for failing to remind employees that their retiree medical benefits could be reduced, despite explicit reservation of rights language in the governing plan documents, including the summary plan description ("SPD").

In doing so, the Unisys court set down a rule that is both unworkable and inconsistent with ERISA's disclosure scheme.

Under the Unisys decision, a plan sponsor must qualify every oral representation regarding the cost and duration of medical benefits with an additional warning that those benefits may be subject to change, even though the SPD already makes clear the employer's ability to amend or terminate benefits at any time.

The decision is by no means limited to retiree medical benefits but potentially applies to any non-vested welfare benefit under ERISA.

By elevating oral representations to the status of plan documents, the Unisys decision undermines ERISA's writing requirement, trivializes the materiality and reliance components of breach of fiduciary duty claims, and creates an incentive for employers to stop discussing health care benefits with participants — or even eliminate such benefits altogether.

The Third Circuit's Decision

In Unisys, the Third Circuit affirmed the trial court's ruling that Unisys Corp. misrepresented and failed to disclose to 12 former employees that their retiree medical benefits were subject to change, and that this conduct breached Unisys' fiduciary duties under ERISA. In re Unisys Corp., 579 F.3d at 234.

ERISA's duty of loyalty is generally regarded as embodying a duty to disclose material information to participants and beneficiaries. The courts agree that a fiduciary has an obligation not to misinform participants and beneficiaries. Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) ("As other courts have held, '[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.'") (quoting Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983)). See also Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997).

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Beyond that, the courts are divided over whether, and to what extent, a fiduciary has an affirmative duty to disclose information to plan participants. Some courts hold that ERISA's duty to inform entails not only a negative duty not to misinform, but an affirmative duty to information when the trustee knows that silence may be harmful. Krohn v. Huron Mem. Hosp., 173 F.3d 542, 547 (6th Cir. 1999); Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993).

Other courts have ruled that fiduciaries do not have a duty to inform beyond ERISA's specific disclosure requirements and are not required to provide individualized information about plan provisions. See, e.g., Ames v. Am. Nat'l. Can Co., 170 F.3d 751, 759 (7th Cir. 1999); Auto Workers v. Skinner Engine Co., 188 F.3d 130,149-51 (3d Cir. 1999); Sprague v. Gen. Motors Corp., 133 F.3d 388, 404-07 (6th Cir. 1998).

In Unisys, the Third Circuit agreed with the district court that plaintiffs had proven a breach of fiduciary duty under both an "affirmative misrepresentation" and "failure to disclose" theory because, according to the court, Unisys representatives who were counseling employees about their retiree benefits did not qualify their oral statements regarding the cost and duration of medical benefits with an additional warning that benefits could be modified and subject to change. In re Unisys Corp., 579 F.3d at 231-32.

The court found that the statement "benefits would cost a retiree $20 per month until age sixty-five, after which there would be no cost to the retiree," was not in it of itself false, but "nevertheless created the impression that the retirees would enjoy these benefits for the remainder of their lives without the possibility of change." Id. at 231.

From there, the court reasoned that such a statement was material and that reliance upon such statement was justified because there was "substantial likelihood" that such misrepresentations would mislead a reasonable employee in making a decision regarding his or her retiree medical benefits irrespective of an unambiguous reservation of rights clause found in the summary plan description. Id. at 232.

Agreeing with the lower court that a fiduciary breach had occurred, the court of appeals also affirmed the district court's decision to require Unisys to resurrect its previously terminated retiree medical plan and to enjoin Unisys from terminating the Plan in the future or from amending the Plan to require the plaintiffs to pay premiums for their medical coverage. See Id. at 234.

Issues and Implications

What is most troubling about Unisys is that the Third Circuit reached its conclusion despite making the following findings of fact:

- Unisys repeatedly advised plaintiffs in writing of its right to change or terminate retiree medical benefits;

- The reservation of rights ("ROR") language was communicated in SPDs sent to plaintiffs at home and work upon request, as well as in Benefit Portfolios, annual benefit statements, a Summary of Material Modifications, retiree medical forms, and COBRA forms reviewed and signed by plaintiffs immediately prior to the time that they retired;

- Unisys had regularly exercised its right to modify retiree medical benefits by shifting costs to retirees;

- There was no evidence that Unisys promised plaintiffs "vested" or guaranteed retiree medical benefits, or assured them their benefits could not change; and

- There was no evidence that Unisys deliberately intended to deceive its employees when the statements regarding the cost and duration of medical benefits were made.

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In re Unisys Corp. Retiree Medical Benefits ERISA Litig., No. 03-3924, 2006 WL 2822261 (E.D. Pa. Sept. 29, 2006) (Report and Recommendation of Mag. Judge).

Not only do the district court's findings fail to support the ultimate conclusion, Unisys directly conflicts with decisions of other courts of appeals.

These courts have properly confined a fiduciary's duty to inform to ERISA-specific disclosure requirements, holding that a fiduciary is not liable for its failure to orally information participants of information — namely the reservation of rights — that was already disclosed in the SPD. E.g., Sprague v. General Motors Corp., 133 F.3d 388, 405 (6th Cir. 1998) (en banc); see also Barnes v. A.S. Lacy, 927 F.2d 539 (11th Cir. 1991); Vallone v. CNA Finan. Corp., 375 F.3d 623, 641-42 (7th Cir. 2004).

These cases reaffirm that there is no need for an employer to reassert its ROR in every conversation. Further, this prevailing opinion is consistent with ERISA's requirement that (1) all covered plans be maintained in writing and available upon request to participants; and (2) SPDs be issued to all participants describing all of the materials substantive terms of the plans. 29 U.S.C. §§ 1021-1031, Title I, B, Part I.

Indeed, ERISA has an "elaborate scheme that is built around reliance on the face of written plan documents" to ensure that employers can protect themselves against the very claims that were asserted — and should have failed — in Unisys. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 74, 78 (U.S. 1995).

The outcome in Unisys cannot be squared with ERISA's disclosure scheme. The decision improperly examines the materiality and reliance components of a breach of fiduciary duty claim without reference to the language of the governing plan documents and places memory and parole evidence above the written word.

In so doing, Unisys undermines bedrock ERISA principles that give primacy to written documents in communicating material information to participants. As the Seventh Circuit noted in Frahm v. The Equitable Life Ins. Soc'y of the U.S., 137 F.3d 955 (7th Cir. 1998):

"Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position.

"Employers could do little to protect themselves against such claim — which is why ERISA calls for writings, and why we concluded above that a rule akin to the statute of frauds applies to all claims based on bilateral contracts. If it is hard now to administer plans that apply to all participants, it is impossible to see how any employer could administer a plan that meant something different for each participant, where the difference was not committed to writing." 137 F.3d at 960.

Thus, by validating fiduciary breach claims based on oral statements, without a simultaneous requirement that the plaintiff prove an intent to deceive, Unisys devalues the role of written plan documents and encourages courts to find that medical benefits are vested based on oral understandings and alleged parole evidence; a result that is patently inconsistent with ERISA's written disclosure scheme. The Seventh Circuit has commented on how such reasoning could ultimately be unfavorable to plan participants:

"binding the plan's sponsor to the oral advice of its benefits staff might lead the employer to discontinue giving advice, telling participants to read the documents, and draw their own conclusions. That step would protect employers, but it very likely would increase the level of misunderstanding among participants." Id. at 960 (citing Sprague, 133 F.3d at 405).

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Finally, Unisys places an impractical burden on employers to anticipate participant confusion and issue verbal disclaimers regarding any reservation of rights — or other exceptions that would preclude future medical benefits — when it speaks to participants regarding the cost and duration of medical benefits. This would likely serve only to confuse participants, not make their benefits clearer.

Lessons Learned from Unisys, Practice Pointers

In the wake of Unisys, plan sponsors should consider precautionary measures to bolster their defenses to potential breach of fiduciary duty claims and avoid the fate of Unisys:

- The ROR should explicitly state: medical benefits do not vest and/or clearly provide for the exceptions, if any, in which they do; the company at all times reserves the right to amend, modify, suspend, or terminate medical benefits in any respect; medical benefits can change in retirement.

- RORs trump any representation to the contrary: any representation made by the company is subject to the company's right to amend, modify, or terminate medical benefits at any time.

- Insert RORs repeatedly and predominately throughout SPDs and other governing plan documents.

- Consider including RORs on key communications to participants regarding retiree medical benefits.

- HR representatives charged with describing medical benefits should be very careful about what they say and always refer participants to the written plan documents.

- Distribute an SPD before retirees enroll for benefits.

- Consider distributing SPDs more frequently to ensure wide circulation.

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