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Litigator Q&A

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William T. Payne Says Many Court Decisions Over the Past 25 years Have Harmed Participants

WILLIAM T. PAYNE (INTERVIEWED BY ANDREA L. BEN-YOSEF)

BLOOMBERG BNA: How many years have you been an ERISA litigator, and what has been the focus of your practice?

Payne: After brief stints in two different labor law positions in Washington, D.C., I worked with a union-side labor law firm in San Francisco between 1980 and 1982, and among the cases I handled were employee benefits cases. During the following ten years, when I worked as an Assistant General Counsel for the United Steelworkers in Pittsburgh, I really focused on representing large classes of union retirees who challenged cuts in pensions and retiree health care benefits. I continued to do that kind of work as a partner in a Los Angeles labor firm and still later in my firm here in Pittsburgh. I also practice in other areas, such as public employee retiree benefits, Section 510 cases and fiduciary cases involving employer stock.

BLOOMBERG BNA: You have done a lot of work with employee benefits. How has this area changed since you started practicing?

Payne: At the risk of sounding downbeat, I believe many court decisions over the past 25 years have disappointed plan participants and their lawyers, and have left the early promise of ERISA unfulfilled. I'm certainly not alone among plaintiffs' lawyers who feel this way. The first part of the 1980s was an exciting time for us, as we were naïve enough to be optimistic after we became familiar with the wording of the statute, its legislative history, its extraordinary emphasis on protecting plan participants and its intent to borrow protective doctrines from trust law and contract law. From this, we were confident that plan participants would enjoy a full panoply of remedies under a federal common law. Instead, we first saw preemption cases that eliminated these remedies and protective doctrines whenever state law was invoked. Then we saw federal courts refuse to apply most of these remedies and protective doctrines as part of ERISA common law. The courts instead employed ''deferential review'' under which they bent over backwards to support the employer in many situations. The courts also eliminated a longstanding right to jury trial for what should be considered contract actions for employee benefits—the very type of action that should be tried before a jury. Punitive damages and other remedies for misconduct or unjust enrichment were largely banned. Now we see class action requirements being stiffened so that it is becoming more difficult to gain class certification generally, often leaving large groups of claimants without an effective remedy, and we are afraid these decisions will increasingly be used in ERISA cases.

I am happy to report, however, that my major area of practice—lawsuits to recover retiree health benefits for union retirees—remains one in which retirees have a fighting chance. The question in these cases is whether this important type of retirement benefit was meant to last through retirement, or whether it can be eliminated at the employer's whim. Retirees are most often quite shocked to hear that the latter could be true. Fortunately, the deferential standard of review has generally not been used in union-retiree cases, most circuits still allow a jury trial and the courts most often seem to en-

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gage in a good-faith attempt to determine the true intent of the bargaining parties. While some circuits have (in my view) wrongly applied a presumption against finding that the benefit was intended to last for life, the law is by no means hopeless for retirees who have good language in their contracts.

BLOOMBERG BNA: Where is retiree health benefits litigation heading?

Payne: A lot will depend on judicial appointments. After all, individual judges are the ones who construe the statute and decide what kind of protection for retirees Congress intended in 1974.

As to retiree health benefits specifically, the recent trend has been that courts seem to be influenced by the high cost, and specifically that retiree health costs today are much higher than what was anticipated back in the 1970s and 1980s when the unions negotiated the benefits. It seems that some courts are considering these ballooning costs when they apply a ''presumption'' against vesting, or when they allow ''reasonable'' reductions even when benefits are vested. I fear that such concerns about high costs will lead even more courts to let employers off the hook even though it is black letter contract law that ''changed circumstances'' cannot serve as grounds for relieving a party of a contract obligation.

BLOOMBERG BNA: What is the next ''big thing'' in ERISA litigation or retiree benefits litigation?

Payne: If I told you, then the other plaintiffs' class action firms would swoop in and take all the good cases. Just kidding.

In the area of retiree health benefits, I am seeing a number of employers now terminating benefits, with these employers using the Affordable Care Act as a justification. They reason that, since some costs of retiree health can be shifted to the government by forcing retirees to sign up for public exchanges (or, in the case of Medicare retirees, private exchanges), then there is an opportunity to shed liabilities. Of course, if the bargained-for benefits are contractually vested, the employer's obligation should be enforced and the ACA provides no excuse for termination of benefits.

Another area of possible increased litigation concerns the ACA itself—plaintiffs lawyers should be on the lookout for noncompliant plans, and should also watch for employer cuts in hours implemented for the purpose of getting below the threshold so that employees will be ineligible for the employer's ACA-compliant plan. The latter action could amount to a violation of Section 510 of ERISA.

Cuts in public employee retirement benefits might also become more of a hotbed of litigation, particularly if plaintiffs' lawyers can figure out a reliable way to ultimately get paid for their good work. Attorneys' fees under a common fund theory are often not possible, and statutory fees for success under the U.S. Constitution's ''Contract Clause'' are problematic in some courts. Moreover, I believe it is often difficult to convince government entities to settle or actually pay up without the long hard road of obtaining final judgment.

BLOOMBERG BNA: Are there any big decisions pending that could be ''game changers''?

Payne: I like the decision in *Rochow v. Life Insurance Company of North America*, 737 F.3d 415, 57 EBC 1749 (6th Cir. 2013)(235 PBD, 12/9/13)(40 BPR 2828, 12/10/13), in which the Sixth Circuit held the insurer's denial of long-term disability benefits was arbitrary and capricious. The court awarded the plaintiff the benefits, and also awarded him $3.8 million under ERISA Section 502(a)(3) as an equitable remedy of unjust enrichment to disgorge the profits from the benefits not paid as a result of the wrongful denial. It's not a good sign for plaintiffs' lawyers, however, that the full circuit granted a petition for en banc review of the decision on Feb. 19, 2014.

I can see where a disgorgement remedy is needed in retiree health cases—when employers terminate retiree health benefits for large groups, the employer often saves money in the end even it loses the lawsuit several years after termination. This is because, in response to the termination, many of the retirees go out and buy cheap bare-bones coverage or go without coverage altogether. Most often, when you add up the substitute premiums and other costs the retirees endure before final judgment, these total contract damage amounts are less than what the employer would have paid had it simply continued the benefits. In other words, the employer profits from the breach, and, in my view, these profits should be disgorged. This type of remedy seems reasonable to me in a wide range of ERISA cases, and I would hope the full bench of the Sixth Circuit lets the panel's decision stand.

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