Life Insurer Prevails in First Circuit Appeal in ERISA Class Action Challenging Retained Asset Accounts

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In a unanimous panel decision, the U.S. Court of Appeals for the First Circuit reversed a trial court's ruling that the defendant, Unum Life Insurance Company of America (Unum), had breached fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA) by using so-called retained asset accounts ("RAAs") to disburse death benefits under employer-sponsored benefit plans funded by group life insurance policies that Unum issued to the plans. *Merrimon v. Unum Life Ins. Co. of Am.*, No. 13-2128 (1st Cir. July 2, 2014). In reversing the trial court's liability ruling, the First Circuit also vacated the lower court's $12 million judgment in favor of the plaintiff class. By way of background, RAAs operate similarly to interest-bearing checking accounts. Upon approval of a life insurance beneficiary's claim, the insurance company provides the beneficiary with a draft book issued by an intermediary bank from which the beneficiary can choose to write a single draft in the entire amount of the benefit, draw the account down via multiple drafts over time, or do nothing, in which case the account continues to accrue interest at or above a guaranteed rate.

In *Merrimon*, the named plaintiffs were life insurance beneficiaries who received RAAs under the terms of ERISA-governed benefit plans funded by Unum group life insurance policies. The named plaintiffs brought a putative class action lawsuit in the U.S. District Court for the District of Maine. They alleged that Unum earned more on the "retained assets" backing the RAAs than the 1 percent guaranteed rate Unum credited to the plaintiffs and other class members through their RAAs, and that by retaining the alleged difference, Unum violated ERISA in two ways: (1) the practice constituted self-dealing in plan assets in violation of ERISA Section 406(b); and (2) the practice violated Unum's duty of loyalty owed to plan beneficiaries under ERISA Section 404(a). On the parties' cross-motions for summary judgment, the district court rejected the plaintiffs' first theory. However, the court granted partial summary judgment in favor of the plaintiffs on the second theory, certified the class, and set a trial to determine the appropriate measure and amount of monetary relief. Following the bench trial, the district court awarded the plaintiff class $12 million based on a formula the court adopted to calculate the additional interest that the court determined should have been credited to the beneficiaries' accounts. The plaintiffs and Unum cross-appealed to the First Circuit, with plaintiffs challenging the summary judgment ruling on the ERISA Section 406(b) "self-dealing" claim, and Unum challenging the $12 million judgment against it based on the district court's liability finding under ERISA Section 404(a). The First Circuit panel affirmed the trial court's summary judgment ruling in favor of Unum on the Section 406(b) claim, finding that the insurer's underlying general account funds, which backed the RAAs, were not plan assets. In doing so, the panel noted that "[t]here is no basis, either in the case law or in common sense, for the proposition that funds held in an insurer's general account are somehow transmogrified into plan assets when they are credited to a beneficiary's account." The appellate court reversed the trial court's ruling on plaintiffs' second theory for breach of fiduciary duty under ERISA Section 404(a), finding that the district judge erroneously concluded that Unum was acting as a fiduciary by retaining discretion to determine the interest rate and other features associated with the RAAs and "award[ing] itself the business" of administering the RAAs while retaining the assets backing the accounts. The First Circuit rejected this reasoning, citing the U.S. Department of Labor's (DOL) stated position that a life insurer discharges its fiduciary duties associated with the disposition of benefit claims when it provides a death benefit through the establishment of an RAA, where this method of payment is called for under the plan's terms. The DOL had stated its position in an *amicus* letter brief which it filed at the court's request in an earlier appeal involving similar issues before the U.S. Court of Appeals for the Second Circuit. *See Faber v. Metropolitan Life Ins. Co.*, 648 F.3d 98 (2d Cir. 2011). The DOL's letter brief stated that the defendant insurer in that case, MetLife, and the ERISA benefit plans at issue "effectively discharge their ERISA obligations when they furnish beneficiaries a [retained asset account] in accordance with plan terms" and that, therefore, "MetLife does not retain plan benefits by holding and managing the assets that back the [RAA]." The Second Circuit followed the DOL's guidance, affirming dismissal of the putative ERISA class action in MetLife's favor, and notably distinguishing the First Circuit's earlier decision based on somewhat different facts than *Faber and Merrimon*. In the previous First Circuit case, *Mogel v. Unum Life Insurance Co. of America*, 547 F.3d 23, 26 (1st Cir. 2008), the First Circuit held that the use of RAAs violated ERISA fiduciary duties where the terms of the benefit plan at issue required "lump sum" payment of death benefits. However, as the Second Circuit did in *Faber*, the First Circuit in *Merrimon* distinguished *Mogel*, limiting it to its facts, because the plan documents in *Merrimon* specifically called for payment of death benefits through RAAs. In the only other decision at the federal appellate level to touch on similar issues, *Edmonson v. Lincoln National Life Insurance Co.*, 725 F.3d 406 (3d Cir. 2013), the Third Circuit confronted plan documents which did not specify the manner in which the death benefit should be provided. Nevertheless, the Third Circuit held that the defendant insurer did not breach ERISA fiduciary duties by providing the plan benefit in the form of an RAA. In sum, the *Merrimon* decision is in harmony with the approaches taken by the Second and Third Circuits and reinforces the view that, unless an insurer utilizes a different form of payment than the form specified under the terms of the plan, the insurer does not breach ERISA fiduciary duties by providing the benefit in the form of an RAA. **Republished with**

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