Looking Closely at Operational Competence: ERISA Litigation Moves Away from Doctrine and Towards a Careful Review of Plan Performance

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When I started litigating ERISA cases nearly two decades ago, primarily as a defense lawyer, I immediately was taken by the advantages that the statute, along with the judicial gloss applied to it by courts, gave to defendants. Preemption, at that time, was the most obvious and forceful advantage, particularly in my home state of Massachusetts, where bad faith and consumer protection claims normally are potent weapons for plaintiffs, but which case law had already firmly established to be preempted in the ERISA context. More subtly though, and less transparently obvious in the case law, was one other advantage that accrued to the defense, which was the tight circumscription of damages theories and potential remedies allowed to plaintiffs by the courts.

Over the years, almost in the manner of dripping water that, given enough time, will slowly erode concrete, the tightly limited scope of remedies has been giving way, reducing the protection from liability that this aspect of ERISA litigation had subtly and quietly granted to plan sponsors, administrators, and fiduciaries. This quiet shift—far less than a revolution, but more than simply a collection of outlier court decisions—has picked up steam over the past year in particular, raising the stakes for plans both in terms of the need to perform at a high level in administration and operation, and in the potential liability outcomes from litigation. As I discuss below, it is important to understand that the transition means that the factual elements of plan management and performance are now moving towards the forefront in disputes over benefit plans, while complex legal arguments over the statute's doctrinal foundations and other aspects—while still relevant and important—are being pushed into the background.

Conceptually, the United States Supreme Court created the structure for this shift, perhaps inadvertently and perhaps intentionally (at least on the part of some justices), in its 2008 decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, [552 U.S. 248 (U.S. Feb. 20, 2008)], but not for the reason it is often cited, namely the opening up of breach of fiduciary duty claims to instances in which only one plan participant, rather than a plan as a whole, has been harmed. Instead,

what has always caught my fancy in that decision, and which to me opens up a conceptual window for expanding remedies and recovery under ERISA in the modern era, was Justice Stevens' definitive declaration that old rules, applicable to defined benefit plans, should not necessarily be carried forward, in a rote and unthinking manner, by courts and litigants to the brave new world of defined contribution plans. As Justice Stevens wrote to justify departing from prior precedent—specifically, from the Court's 23-year-old decision in *Massachusetts Mutual Life Ins. Co. v. Russell* [473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)]—that would have seemed to bar an individual plan participant from bringing a breach of fiduciary duty action based only on harm to that participant:

> *Russell*'s emphasis on protecting the "entire plan" from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed. Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted, and when *Russell* was decided, "the [defined benefit] plan was the norm of American pension practice." J. Langbein, S. Stabile, & B. Wolk, *Pension and Employee Benefit Law* 58 (4th ed. 2006); *see also* Zelinsky, The Defined Contribution Paradigm, 114 *Yale L.J.* 451, 471 (2004) (discussing the "significant reversal of historic patterns under which the traditional defined benefit plan was the dominant paradigm for the provision of retirement income"). . . . Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. . . . . For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409. Consequently, our references to the "entire plan" in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.

And with that, the door to Narnia in this context opened up once and for all: what ERISA lawyers and courts had assumed to be settled rules, the Court declared, were not necessarily understood any more to be settled rules, if: (1) a case involved defined contribution plans rather than defined benefit plans, and (2) the potentially applicable old rule was founded on a case involving a defined benefit plan.

Now the interesting thing about this seemingly transformative paragraph in *LaRue*—in which the Court effectively declares that the rules may have been one way for defined benefit plans, but that doesn't mean they stay that way for defined contribution plans—is that it does not literally lead to lower courts and judges acknowledging this declaration by the Supreme Court and citing to it as support for the expansion of remedies and liability theories that we are clearly witnessing. What it does instead, it seems to me, in conjunction with a subsequent Supreme Court decision, is create an environment in which arguments in support of an expansion of recovery and remedies can flourish. The subsequent decision that drove this point home was *CIGNA Corp. v. Amara* [131 S. Ct. 1866, 179 L. Ed. 2d 843, 79 USLW 4297 (U.S. May 16, 2011)], the current bête noir of all who represent plan sponsors, fiduciaries, and administrators, in which the Court, seemingly without invitation and certainly unnecessarily, waxed expansively on the range of remedies and theories of liability that participants could press in the form of equitable relief, a form of relief under ERISA that many lower courts and the lawyers arguing before them had long understood to be severely curtailed; the discussion of this relief in *Amara* clearly signaled that this was not, in fact, the case (at least not after the decision in *Amara*, although it was certainly a reasonable assumption before that decision).

In *Amara*, the Court recognized reformation of plan documents as a possible remedy open under the equitable relief prong of ERISA, but of more import, the Court also detailed two other remedies that are equally available under that aspect of the statute, namely equitable estoppel and surcharge claims. The Court explained with regard to estoppel claims that they concern little more than holding the plan administrator "to what it had promised," and that this was "a traditional equitable remedy" that should be available to plan participants under ERISA. The Court then proceeded to sweep in the remedy of surcharge as one available as equitable relief under ERISA, a remarkable expansion of possible remedies available to plan participants, partly because it is likely few ERISA lawyers had ever even heard the term before the Court's decision, given that archaic forms of relief in equity, like surcharge, are to lawyers as dead languages, like Latin, are to the well-educated: discussed

briefly in school, long forgotten, best avoided, and quoted occasionally mostly to demonstrate the speaker's erudition.

In this context, though, the raising of the liability theory of surcharge as a potential avenue for recovery under the equitable relief prong of ERISA was remarkable not only because it was unearthed from the distant legal past, but also because it expressly presented an avenue to collect money damages under the equitable relief prong of the statute. Prior to this pronouncement, it was generally understood that the only monetary relief clearly available under ERISA were denied benefit amounts and losses resulting from a breach of fiduciary duty, which could be expressly recovered elsewhere under the statute's remedial provisions; as a general statement, there were substantial, and in many instances nearly overwhelming, conceptual, precedential, and tactical barriers to obtaining other financial recovery in an ERISA case, in particular under the equitable relief prong of the statute, prior to the express adoption of the surcharge remedy in *Amara*.

Importantly, and again possibly inadvertently but more likely with due awareness that it was doing so, the Court's expansion in *Amara* of the equitable relief available under ERISA bridged an ever growing chasm in ERISA litigation that had developed between the carefully delineated forms of relief expressly allowed under the statute (namely the recovery of benefits and of losses to a plan caused by a fiduciary breach) on the one side, and the more expansive range of remedies that would be needed if one sought to provide, on the other side of that gap, a remedy for various operational, disclosure, and other alleged problems with plans beyond simply the denial of benefits owed under a plan's express terms or the incurring of losses directly linked to a departure from fiduciary prudence. Case law on how to handle management, operational, or performance issues with plans, and the harms caused to participants by them, that reside on the latter side of that gap has long been muddled at best, but it is fair to say that, overall, it has not been friendly to participants seeking relief for problems that reside on that side of the divide.

The divide flows from the fact that there are numerous, frequently recurring events in the operation of ERISA plans that, at least according to plan participants and their lawyers, cause harm to participants, but which do not cost them the exact amounts due under the express terms of the governing plan documents and which also do not, in the view of the courts, constitute a breach of fiduciary duty. These events usually revolve around an informational lapse, such as a summary plan description that is inaccurate or at least unintentionally misleading, or incorrect information about retirement benefits being provided to—and then acted upon by—a plan participant, with the participant only later learning that his or her actual plan benefits were different. In these circumstances, in any other area of the law, participants would be able to construct causes of action based on standard theories of liability normally available under state common law, but such state law remedies cannot be invoked in this scenario because they are preempted under ERISA.

These scenarios, in turn, do not fit the classic rights to monetary relief expressly set forth in ERISA, which are for the recovery of denied benefits and of losses from a fiduciary breach. They do not fit the former right of recovery because, despite the misinformation, the plan participant was still paid the correct, but often less than expected, amount actually due under the plan's express terms, and thus there is no viable action for any further benefits allowed under the plan terms. The second express avenue under the statute for recovery of money damages—losses arising from a breach of fiduciary duty—is typically unavailable in this scenario simply because the operational lapse at issue is not seen by the court as involving a fiduciary function at all or, if it does, as sufficiently egregious to constitute a breach of that obligation, out of a well-placed concern by courts that any other approach would, in essence, risk turning every operational misstep into a potential breach of fiduciary duty claim.

The Supreme Court in *Amara* explicitly rejected the denial of benefits prong of ERISA's remedial provisions as an avenue for remedying these types of problems, but in so doing, simultaneously declared that reformation and other equitable remedies are available under the equitable relief prong of ERISA to address such problems. The Court thereby directly sketched the outlines of a remedial structure for handling such issues, which had previously been essentially absent because such a remedial structure was not explicitly incorporated into the statute's list of enumerated remedies included by Congress when the statute was enacted. The equitable remedies that the Court adopted in *Amara* filled this gap in the statute.

Take, for instance, estoppel and the relatively common problem in the case law (and thus presumably in the actual management of plans) of participants who

are told inaccurate information about their retirement benefits by a human resources department, based upon which they elect to retire. The typical scenario presented in the case law is that the participant only later, after retiring, learns that, under the plan terms themselves, she will receive less than she had been told. This is, in a non-ERISA context, a classic estoppel scenario; an estoppel claim is made out by showing "(1) a definite misrepresentation of fact was made; (2) Plaintiff reasonably relied on said misrepresentation to his detriment, thereby changing his position for the worse; [and] (3) Plaintiff suffered an injury or damage" as a result. [*Guerra-Delgado v. Popular, Inc.*, 2012 WL 1069703 (D. Puerto Rico 2012)] In the ERISA context, however, not all courts have recognized a viable estoppel claim in that context; the First Circuit, for instance, while recognizing that other circuits have acknowledged the viability of such claims under ERISA, had not declared estoppel claims of that nature to be viable under ERISA. As a practical matter, some lower court judges in circuits that had not expressly recognized estoppel claims as viable under ERISA rejected such theories of recovery when pressed by a participant, even while other judges in those and other federal court districts allowed them to proceed. The Supreme Court's clear recognition in *Amara* that estoppel is a proper form of equitable relief under ERISA arguably sweeps the deck clean on this issue, making clear that a participant confronted by this situation—one that cannot technically be remedied as a denied benefits claim and likely not as a fiduciary breach claim either—can try to remedy it as an estoppel claim.

Surcharge, in turn, is of potentially even more value in capturing, within the remedial structure, issues in the operation of benefit plans that did not previously have a comfortable home within the ERISA statutory and remedial structure. Other than denied benefit claims, there may be no more common fact pattern in ERISA litigation than complaints about misleading or inaccurate summary plan descriptions, and the assertion that they did not fairly and accurately state the benefits available under the plan itself. A full discussion of the case law that has developed over this issue would require an entire article unto itself, but it is fair to say that, prior to the Supreme Court's decision in *Amara*, the courts had not created a uniform body of law for handling such problems nor had they crafted for participants a ready road to redress such problems. In the words of one federal judge, prior to the decision in *Amara*, "analyzing terms in the SPD which differed from, or supplemented the Plan documents involved a sometimes complicated factual analysis of the Covered Persons 'reliance' on the conflicting language. . . The Circuits were sharply split in how they evaluated conflicting SPD terms under ERISA." [*Merigan v. Liberty Life Assur. Co. of Boston*, 826 F. Supp. 2d 388 (D. Mass. 2011)] The surcharge theory of recovery under the equitable relief prong of ERISA provides a uniform and consistent manner of handling such problems: a plan participant who is actually harmed financially by a failure to provide a legally sufficient summary plan description can recover that financial loss by means of surcharge.

And thus, like Willy Wonka's everlasting gobstopper, or the gift that keeps on giving, the remedial structure of ERISA was expanded exponentially, to capture a wide range of potential problems that, previously, were not fully capable of being captured within, and resolved under, the statute. With that, the longstanding ability of defendants to defeat claims against them involving many types of problems with plans and their operations based on technical arguments—correct at that time—that the statute did not provide any right of recourse for the problem at issue went by the wayside (at least with regard to a certain subset of previously hard to prosecute claims, predominately involving problems in communication and disclosure).

It is important to recognize, though, that what this shift in the jurisprudence of ERISA remedies did was reduce the legal barriers to recovery in favor of an increased focus on the merits of the claim, specifically whether a participant truly suffered a harm for which she should be compensated. The establishment of estoppel and surcharge as forms of recovery means only that certain types of cases—and judicial determination of them—must now shift away from an overreliance on technical legal defenses related to the argument that certain claims cannot be addressed because the enumerated remedies in the statute do not allow for it, and instead to a laser-like focus on the facts of the claim. The legal standards governing estoppel and surcharge claims are not overly complicated (and are certainly less so than those governing, for instance, a breach of fiduciary duty claim under ERISA), and the case law makes clear that the focus in such disputes must be on whether the participant can make out the factual elements of such a claim. For instance, in *Skinner v. Northrop Grumman Retirement Plan B* [673 F.3d 1162 (9th Cir. 2012)], one of the first key federal circuit court decisions to explicitly adopt and apply

the surcharge remedy as the structure for deciding a case involving a misleading summary plan description, the court found against the participant not on technical legal grounds involving the complexities of the ERISA statute, but instead because the participant could not establish the existence of the factual elements of surcharge. This is, in and of itself, a significant conceptual and jurisprudential shift: disputes over misleading summary plan descriptions had long been more the province of complicated doctrinal arguments than fact-based inquiries. As the court made clear in *Skinner*, the focus of such cases now needs to be on the latter, not the former.

And what does this mean for anyone except those of us who take depositions and stand in courtrooms arguing over whether a participant is entitled to a recovery? It means that now, more than ever, strong performance in managing and operating benefit plans is essential, because the facts of those actions will determine, more now than in the past and more so than legal arguments, whether a participant can recover and whether a plan sponsor, administrator, or fiduciary can be liable for mistakes in the operation of a plan. All good plans strive for high performance, but the shifting of the legal landscape makes it more important than ever that they achieve it. ■