



ERISA plan can be sued for hindering benefits election

Suit claims Raytheon tardy in power-of-attorney processing

By Pat Murphy

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A U.S. District Court judge has ruled that a widow can pursue an ERISA action based on allegations that a Raytheon pension plan frustrated her husband's efforts to execute a benefits election from his death bed.

The plaintiff, Dr. Deborah McCoy, sued Raytheon Co. as sponsor of its salaried employee pension plan after the plan refused to honor her husband's election of a 100 percent joint and survivor annuity option.

Raytheon took the position that, before his death, the plaintiff's husband failed to execute his benefit election in accordance with the terms of the plan. Accordingly, Raytheon contended that the plaintiff was entitled only to the plan's standard annuity both as her husband's beneficiary and in her capacity as executor of his estate.



The full text of the ruling in *Estate of Smith, et al. v. Raytheon Company, et al.* can be found at masslawyersweekly.com.

Addressing Raytheon's motion to dismiss the plaintiff's ERISA claims, Judge Douglas P. Woodlock agreed that Ralph E. Smith III had not made his benefits election in accordance with the terms of the plan. On that basis, Woodlock concluded that the plaintiff could not proceed with a claim under ERISA §502(a)(1)(B) for denial of benefits.

However, Woodlock denied the defendant's motion to dismiss the plaintiff's claim for breach of fiduciary duty under ERISA's "catchall" provision, §502(a)(3). The judge found the plaintiff had stated a viable §502(a)(3) claim based on allegations that plan administrators had dithered in processing Smith's power of attorney and made other miscues.

In addition, Woodlock rejected Raytheon's contention that only equitable remedies

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were available under §502(a)(3).

While noting that the question had not been decided by the 1st U.S. Circuit Court of Appeals, the judge concluded that the U.S. Supreme Court's 2011 decision in *CIGNA Corp. v. Amara* provided an avenue for the plaintiff to obtain a remedy.

"In *Amara*, the Supreme Court acknowledged surcharge as an equitable remedy responsive to 'a breach of trust committed by a fiduciary encompassing any violation of duty imposed on that fiduciary,' that allows courts 'to provide monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment,'" Woodlock wrote.

The 47-page decision is *Estate of Smith, et al. v. Raytheon Company, et al.*, Lawyers Weekly No. 02-322-21. The full text of the ruling can be found at masslawyersweekly.com.

Operational barriers

A plan fiduciary has an obligation to operate in the best interests of the participants, said Boston attorney Stephen D. Rosenberg, who represents the plaintiff.

"Running a system like this where you provide inaccurate information through a benefits center and create a multi-week process for approving powers of attorney simply does not live up to that [fiduciary standard]," Rosenberg said.

Defense attorney Johanna L. Matloff of Boston did not respond to a request for comment.

The case highlights a common issue in ERISA litigation in terms of whether the statute provides a remedy to a plan participant who suffers injury due to fraud or malfeasance, according to Alden J. Bianchi, who handles employee benefits cases.

"Over the years, there have been many instances where there has been clear damage to a participant, and there's no remedy, no way to recover," the Boston lawyer said.

Bianchi said the Supreme Court's *Amara* ruling has been beneficial on that score.

"Before *Amara*, if the remedy was anything other than an injunction or something like that, you couldn't get a remedy that looked like a legal remedy; you couldn't get cash," Bianchi said.

Boston ERISA litigator Jonathan M. Feigenbaum said he had no quarrel with Woodlock's decision to allow the plaintiff's breach-of-fiduciary-duty claim to proceed.

"ERISA administrators 'act as fiduciaries when they communicate with plan members and beneficiaries about plan benefits,'" Feigenbaum wrote in an email. "Making materially misleading [statements] are grounds to impose liability. Arguably there may be a cause of action against the plan fiduciaries for failure to monitor the benefits center, too."

Feigenbaum added that the judge was "100 percent correct" on the issue of the plaintiff's available remedies.

"Surcharge under ERISA is probably the best and easiest avenue for the

Estate of Smith, et al. v. Raytheon Company, et al.

THE ISSUE	Can a widow pursue an ERISA action based on allegations that a Raytheon pension plan frustrated her husband's efforts to execute a benefits election from his death bed?
DECISION	Yes (U.S. District Court)
LAWYERS	Stephen D. Rosenberg of The Wagner Law Group, Boston (plaintiffs) James F. Kavanaugh Jr. and Johanna L. Matloff, of Conn, Kavanaugh, Rosenthal, Peisch & Ford, Boston (defense)

plaintiff to secure the relief she seeks," Feigenbaum wrote.

Death-bed election

According to court records, Ralph Smith worked for Raytheon for 36 years. In 2016, he was diagnosed with ALS, at which point he executed a power of attorney granting the plaintiff "full power and authority" regarding his retirement plans.

Due to his deteriorating health, Ralph decided to retire on Oct. 6, 2017. Three days later, the plaintiff called the Raytheon benefits center to discuss her husband's retirement options. The benefits center required Ralph's verbal confirmation that the plaintiff had authority to speak on his behalf. He complied with that request.

Meanwhile, Ralph had reviewed his options under the Raytheon pension plan and

that her husband would not live that long.

Smith passed away on Oct. 27.

The Raytheon plan refused to give effect to Ralph's election because it was not in writing as called for in the plan. As a result, the plan determined that the plaintiff was only entitled to a 50 percent surviving spouse benefit.

The plan later denied the plaintiff's written claim for the 100 percent joint and survivor annuity. The plaintiff sued in federal court, seeking to recover the full value of the 100 percent annuity benefit that her husband had intended to select for her before his death.

ERISA §502(a)(3) claim proceeds

Addressing Raytheon's motion to dismiss, Woodlock first looked at whether the plaintiff's complaint stated a viable claim



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— Stephen D. Rosenberg, Boston

decided to select the 100 percent joint and survivor annuity.

On Oct. 23, the plaintiff called the benefits center to execute her husband's choice of annuities.

The benefits center once again requested Ralph's verbal consent. By that point, however, he was unable to speak due to being placed on around-the-clock external ventilation as a result of the progression of his ALS and end-stage respiratory failure.

Without Ralph's verbal confirmation, the benefits center refused to speak with the plaintiff about her husband's benefits election.

The plaintiff immediately responded by faxing a copy of her power of attorney to the benefits center. On Oct. 24, the benefits center informed the plaintiff that it would take four to five days to process the POA. The plaintiff advised the benefits center

under §502(a)(1)(B). That section of ERISA's civil remedy provision authorizes a plan participant or beneficiary to bring an action "to recover benefits due to him under the terms of his plan."

The judge found the plaintiff could not proceed on that claim because it was undisputed that Ralph's non-standard election of benefits had not "formally" occurred under the terms of the Raytheon plan.

"Because the Power of Attorney was processed by Raytheon after Mr. Smith's death, it no longer functioned as a mechanism by which Dr. McCoy could act for him," Woodlock wrote. "Therefore, she could not have made a different election on his behalf."

However, the judge concluded that the plaintiff could proceed with her claim for breach of fiduciary duty under ERISA §502(a)(3). The statute authorizes a

participant, beneficiary or fiduciary "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief."

Woodlock recognized that a fact issue existed as to whether the alleged "misdeeds" by the Raytheon benefits center involved the exercise of fiduciary duties.

"A reasonable factfinder could conclude that at least one of the actions alleged to have been undertaken by Raytheon was more than purely administrative or ministerial," Woodlock wrote. "It appears the Benefits Center exercised functional authority over Mr. Smith's access to benefits, such that Raytheon had a fiduciary duty in that respect."

Next, the judge found three alleged actions by the benefits center that could relate to breaches of fiduciary duties. First, the judge cited the benefits center's alleged failure to process the power of attorney in an expeditious manner.

"If the Benefits Center was a purely administrative body performing a ministerial task (i.e., inputting the Power of Attorney without further review) I find it unlikely that Mr. Smith's Power of Attorney could not have been approved more expeditiously under these circumstances," Woodlock wrote.

As to the second ground, the judge found problematic a benefits center representative allegedly telling the plaintiff that Ralph could make his retirement elections over the phone, notwithstanding plan language requiring such non-standard elections to be made in writing.

"From the Plaintiffs' Complaint, it could plausibly be inferred that Mr. Smith and Dr. McCoy never received the Plan documents, and Raytheon bears responsibility for not providing those documents or properly training the Benefits Center to communicate the terms of the Plan correctly," Woodlock wrote.

As a third plausible ground for breach of fiduciary duty, the judge cited the benefits center's alleged overall failure to advise, fully and accurately, the plaintiff and Ralph of the necessary steps to effectuate Ralph's benefits election.

Raytheon argued that even if the plaintiff adequately pleaded breach of fiduciary duty, she was foreclosed from obtaining the monetary relief she sought because §502(a)(3) authorizes only equitable remedies.

Woodlock recognized that judges in the 1st Circuit were divided on whether the Supreme Court's discussion of surcharge in *Amara* was dicta or binding precedent. And while the 1st Circuit had not adopted *Amara*'s surcharge approach, the judge noted that three other circuits had concluded monetary damages are recoverable under the theory of surcharge when a fiduciary violates its duty under §502(a)(3).

Woodlock was persuaded by those courts that had adopted an expansive reading of *Amara* and, on that basis, denied Raytheon's motion to dismiss the plaintiff's §502(a)(3) claim. **MLW**