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Publications

Actuarial Equivalence Lawsuits: Plaintiffs May Defeat Motions to Dismiss, But Can They Win Class Cert?

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Since 2019, plaintiffs' counsel has filed just over a dozen class action lawsuits against plan sponsors and fiduciaries alleging that the plans use "unreasonable" actuarial equivalence factors, primarily "outdated" mortality tables, when calculating the benefits of the class members, the plan participants and beneficiaries. The plaintiffs allege that these older mortality tables (*e.g.*, 1951 GAM, 1971 GAM, 1984 Unisex) result in optional forms of benefits, such as a joint and survivor annuity or a certain and life annuity, or early retirement benefits that are not "actuarially equivalent" to their plans' normal retirement benefits in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"). The plaintiffs allege that using "current" mortality tables—*e.g.*, those set by the Secretary of the Treasury pursuant to Internal Revenue Code ("Code") sections 417(e)(3) and 430(h)(3) ("Treasury Assumptions")—class members would receive greater monthly benefits. The plaintiffs seek the difference between the benefits they are receiving under the plans and the benefits calculated using more current assumptions. We provided background and a more comprehensive overview of the plaintiffs' claim in these cases in a previous alert.

As of the date of this writing, seven actuarial equivalence lawsuits remain. The others have been resolved on a motion to dismiss or have settled. While there was a time when several lawsuits were filed in a single month, it appears that no lawsuit has been filed since December 2020. It could be that plaintiffs' counsel are waiting to see how the remaining lawsuits are resolved before deciding whether to file additional actions.

Based on the decisions and proceedings to date, below are some trends that might give us a clue as to the trajectory of the cases, including any similar cases that may be filed in the future.

1. Plaintiffs' Claims Usually Survive a Motion to Dismiss

Overall, more motions to dismiss the actuarial equivalence lawsuits have been denied than granted. Many courts side with the plaintiffs in holding that an allegation that a plan's actuarial equivalence factors are unreasonable is sufficient to state a claim under ERISA—particularly that unreasonable factors violate ERISA's requirement that early retirement and optional forms of benefits be "actuarially equivalent" to the plan's normal retirement benefit. In so doing, these courts reject the defendants' argument that ERISA does not require plans to use "reasonable" actuarial factors when converting the normal retirement benefit to other forms of payment. Many courts also conclude that, while ERISA does not explicitly contain a reasonableness requirement, the Treasury regulations, which do require reasonable actuarial equivalence assumptions, may inform ERISA's undefined actuarial equivalence requirement.

Because many of the courts have held that ERISA's actuarial equivalence requirement demands the use of reasonable actuarial assumptions, and given the standard applied to motions to dismiss—that each of the plaintiffs' factual allegations in the complaint are accepted as true—many courts have been quick to find that plaintiffs state some claim for potential relief. Specifically, courts that have denied these motions have found that plaintiffs met their pleading burden by alleging that the use of current assumptions would yield a higher benefit than the allegedly outdated, unreasonable assumptions the plans actually used. Notably, the court in *Smith v. Rockwell Automation, Inc.*, denied a motion to dismiss on these grounds, even while recognizing that the allegations in the complaint were not true. Specifically, the defendants contended, and the plaintiff admitted, that no actuarial assumptions at all were used to calculate the plaintiff's 10-year certain and life annuity. Therefore, the plaintiff could not have been harmed by the use of outdated assumptions. The court agreed, but since the plaintiff *alleged* in the complaint that defendants used outdated assumptions to calculate his benefit, the case was not dismissed.

However, the plaintiffs have not always defeated these motions. Courts granted the defendants' motions to dismiss three times, and for three different reasons. The court in *DuBuske v. PepsiCo, Inc.* granted the defendants' motion to dismiss because the complaint did not allege that any of the plaintiffs had reached normal retirement age when they retired, or that they were deprived of their accrued benefits at normal retirement age; therefore, plaintiffs did not state a claim for violation of ERISA's nonforfeitability requirement, which attaches only after the employee reaches normal retirement age. Interestingly, the plaintiffs' claim was limited to the issue of nonforfeitability and they did not bring a claim for violation of ERISA's actuarial equivalence requirement, even though the concept was discussed in the complaint's background. Although the *Pepsi* decision was a win for the defendants, the court agreed with the plaintiffs that their claims arise under ERISA, not the Treasury regulations, notwithstanding that only the Treasury regulations contain an explicit requirement of reasonableness.

The court in *Scott v. AT&T Services* also granted the defendants' motion to dismiss on even more straightforward, albeit perhaps unique, grounds. The court found that the factors used to account for an employee's early retirement (*i.e.*, retirement before reaching normal retirement age) were the Treasury Assumptions—the very assumptions that the plaintiffs alleged should be used to calculate optional and other forms of benefits. As such, the court held the original named plaintiffs suffered no injury (as their benefits would not increase under their theory of the case) and therefore did not have constitutional standing to bring the claims.

Finally, the court in *Brown v. United Parcel Service of America, Inc.* granted the defendants' motion to dismiss because the plaintiffs did not exhaust their administrative remedies by first bringing a benefit claim through the plan's own appeal process. This lawsuit was filed in the Northern District of Georgia, and the court noted that the requirement of exhaustion in the Eleventh Circuit is interpreted more broadly than in other circuits. For example, while other circuits may not require exhaustion where the issue is enforcement of a statutory right under ERISA, rather than interpretation of a plan term, the Eleventh Circuit generally requires exhaustion of administrative remedies in both circumstances, absent narrow exceptions. Because the plaintiffs did not plead exhaustion or an exception to exhaustion, their claims were dismissed. Notably, other courts addressing the defendants' arguments that the plaintiffs did not exhaust administrative remedies have held that this is an affirmative defense and not grounds for dismissal at the motion to dismiss stage.

Given the relatively unique circumstances and narrow holdings in these decisions granting the motions to dismiss, the trend appears to favor plaintiffs' success in defeating defendants' motions although there are certainly a number of potential tools in the defense toolbox at the motion to dismiss stage.

2. Class Certification

Achieving class certification is just as important to plaintiffs as surviving a motion to dismiss. This is because class certification allows the named plaintiffs to act as spokespeople for the entire class, allowing the named plaintiffs to—with certain limitations—

make decisions as to disposition of the class's claims. Additionally, class action defendants are able to resolve an entire class's claims in one proceeding. In short, in order to effectively and efficiently litigate claims where there are numerous of the same types of claims, class certification is necessary.

In order to certify a class, the named plaintiffs must show that they have satisfied the standards set forth in Federal Rule of Civil Procedure ("FRCP") 23 for representing a class. Generally, those requirements are: (1) the class members must be so numerous that joinder of all members is not practical, (2) there must be factual or legal questions that are common to the class, (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and (4) the named plaintiffs must adequately and fairly represent and protect the interests of the class members. Even if those requirements are satisfied, the action must be the type of action that is suitable for class action treatment, such as when prosecuting separate actions would create a risk of inconsistent adjudications or when resolution of an individual class member's claim would be dispositive of, or substantially impair, the interests of other individuals not party to the litigation.

If a court denies a motion for class certification, the class litigation is over (though individual participants could independently bring an action for relief). In the two actuarial equivalence cases where class certification has been litigated (as opposed to agreed to by stipulation, as was the case in *Herndon v. Huntington Ingalls Industries, Inc.*), the court has denied class certification.

In *Torres v. American Airlines, Inc.*, the plaintiffs alleged that defendants paid them less in benefits than what ERISA requires due to use of a 1984 mortality table. The named plaintiffs had elected different forms of benefits: a joint and survivor annuity, a preretirement survivor annuity, and a certain and life annuity. The named plaintiffs sought class certification of participants and beneficiaries who elected one of these forms of benefits.

In its response opposing class certification, American Airlines challenged the ability of the named plaintiffs to adequately and fairly represent the class members due to a conflict of interest among the named plaintiffs and the absent class members they sought to represent. The conflict of interest exists, American Airlines argued, for two reasons. *First*, absent class members who receive "late retirement benefits" (*i.e.*, benefits taken after normal retirement age) under the plans would receive reduced benefits if a "current" mortality table, which plaintiffs alleged was required, were used. This is because the longer life expectancies inherent in a current mortality table generally would result in smaller benefit increases due to late retirement, thereby reducing the late retiree's monthly benefit. *Second*, different interest rates would impact various class members in different directions, which would make it impossible for the plaintiffs to advocate for use of a single interest rate for all class members. For instance, use of a lower interest rate arguably would benefit a participant or beneficiary receiving a certain and life annuity and harm a participant or beneficiary receiving a joint and survivor annuity.

The district court agreed with American Airlines that, for the reasons argued by the defendants, the plaintiffs cannot adequately represent all of the proposed class members. Although the plaintiffs moved to file a second class certification motion, the case settled and was dismissed less than two months later. The settlement terms are not public.

Similar to *American Airlines*, the court in *Smith v. US Bancorp* denied certification of a class of participants who elected "early retirement benefits" (*i.e.*, benefits commencing before normal retirement age), because class members were impacted in different directions by the various possible early retirement factors set forth by the plaintiffs' expert. Early retirement factors serve to decrease a participant's monthly benefit to account for the fact that the participant is receiving the benefit early, and thus for a longer period of time. The plaintiffs' expert created six alternative models using different sets of early retirement factors to calculate the early retirement benefits at issue in the case, and plaintiffs proposed that one of the models should replace the current factors used by the US Bancorp plan. However, the court found that no model would favor all class members, as under each model some members' benefits would increase, while others' benefits would remain the same or decrease. Therefore, the commonality, typicality, and adequacy requirements for class certification were not met. Additionally, the court held that, for the same reasons, the action was not the type of action that is suitable for class treatment. Finally, class members who cannot establish injury when a particular model is applied would also lack standing to bring the claims, another requirement of every member of a proposed class.

In contrast to the class certification litigation in *American Airlines* and *U.S. Bancorp*, the parties in *Herndon v. Huntington Ingalls Industries, Inc.* stipulated to class certification. In that case, the plaintiffs challenge the use of the 1971 GAM table to calculate any type of joint and survivor annuity during the class period. Notably, no other benefit options available under the pension plan, such as certain and life annuities, are included in the class. The defendants agreed with the plaintiffs that, as defined, the proposed class satisfies the requirements under FRCP 23.

Class certification may be a key issue in other cases, such as *Masten v. Metropolitan Life Ins. Co.* and *Belknap v. Partners Healthcare System, Inc.*, where multiple forms of benefits are at issue. For example, in *MetLife*, the mortality tables plaintiffs allege are unreasonable were used to calculate both joint and survivor annuities and certain and life annuities. It could be that, as in *American*

Airlines, the claims of various proposed class members arguably would not satisfy the commonality and typicality requirements, and the named plaintiffs could not adequately represent all class members due to the divergence of interests among participants receiving different forms of benefits.

3. Settlement

As of this writing, the parties have reached settlement agreements in four cases, as well as one tentative settlement in a fifth case. While most of the settlements' terms are not public, the parties in *Cruz v. Raytheon Company* did file the settlement agreement publicly. There, the parties agreed to a payment to the class members equal to 40 percent of the difference in the value of the benefits calculated by plaintiffs versus the benefits actually received by the class members under the plan. The value of this settlement is $59 million. Attorneys' fees of almost $9 million are to be paid out of the settlement. Additionally, Raytheon is required to amend the plan to provide for future benefits as calculated under the agreed upon assumptions.

GROOM INSIGHT: *While many of the actuarial equivalence cases have settled or otherwise been resolved, there are still several open cases that plan sponsors should monitor as the cases continue to be litigated. Given the trends outlined above, the remaining cases may be resolved through denial of a class certification motion or settlement rather than on a motion to dismiss or other dispositive motion. Notably, in the only two cases where summary judgment motions were filed, the court denied the motions.*

We will continue to monitor these cases and provide updates. Please reach out to the authors or your Groom attorney for more information.

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