Plaintiffs Claim Victory in First Ruling Challenging DB Plan Actuarial Assumptions

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AUTHORS: Mark Carolan, Katie Kohn, Mark Lofgren

As detailed in our alert last month, two plaintiffs' law firms have filed a flurry of putative class-action lawsuits challenging the calculation of "optional forms" of benefits (*i.e.*, non-single life annuities) and early retirement benefits under defined benefit pension plans. The firms have now filed nine lawsuits, all generally alleging that the mortality table (although, in some cases, plaintiffs also challenge the plan's interest rate) that is used to calculate participants' early retirement or optional forms of benefits is not reasonable because it is outdated. The use of an outdated mortality table, plaintiffs argue, produces early retirement or optional forms of benefits that are not "actuarially equivalent" to a single life annuity at normal retirement age (the default benefit under ERISA). Plaintiffs seek the difference between their benefits as calculated under the plan and their benefits as calculated using allegedly reasonable actuarial assumptions—generally, the assumptions set forth in the Treasury regulations pursuant to Internal Revenue Code ("Code") section 417(e)(3).

Defendants in many of these lawsuits have filed motions to dismiss, and more motions are expected. The U.S. district court in Minnesota in *Smith v. U.S. Bancorp*, however, is the first to decide on a motion to dismiss.

In *Smith*, the plaintiffs, each of whom retired before normal retirement age of 65, filed an action against U.S. Bancorp, the Employee Benefits Committee, and unnamed fiduciaries (collectively, "U.S. Bancorp") challenging the U.S. Bank Pension Plan's ("Plan") "early commencement factors" ("ECF") used to calculate early retirement benefits. Depending on the age at which a participant retires, the plaintiffs allege that a participant could receive between 38 percent and 90 percent of his or her normal retirement benefit. These ECFs, the plaintiffs argue, unreasonably reduced plaintiffs' benefits such that their early retirement benefits were not actuarially equivalent to their normal retirement benefits in violation of ERISA. As in the other lawsuits, the plaintiffs seek declaratory and equitable relief, as well as benefits under the plan after the plan is reformed. The plaintiffs also bring fiduciary breach claims

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against the defendants for either failing to administer the Plan in accordance with ERISA or, in the case of the company, failing to monitor the fiduciaries administering the Plan.

Below we review the arguments raised in support of and opposing the dismissal of plaintiffs' claims, and the court's ruling denying the motion.

U.S. Bancorp's Motion to Dismiss

In its motion to dismiss, U.S. Bancorp made six principal arguments, many of which are similar to arguments made by other defendants in these lawsuits:

1. No standing to enforce Treasury regulations. There is no private right of action to enforce the Code and related Treasury regulations that are the basis for the plaintiffs' claims that the ECFs must be calculated using "reasonable" actuarial assumptions. Similarly, ERISA section 502(a)(3) does not authorize actions to enforce the Treasury regulations.

2. Nothing in ERISA requires the use of reasonable actuarial assumptions. There is no requirement under ERISA that assumptions used to calculate early retirement benefits be "reasonable," nor did Congress prescribe any particular assumptions that must be used. This is in contrast to elsewhere in ERISA where Congress did impose a reasonableness requirements (*e.g*., in the calculation of withdrawal liability) or specific actuarial assumptions (*e.g.*, in calculating lump sum benefits).

3. Plaintiffs did not sufficiently allege that the ECFs are not reasonable. Even if there is a "reasonableness" requirement under ERISA, the plaintiffs' complaint did not contain sufficient allegations that the Plan's ECFs are outside the range of reasonableness. Comparing the Plan's ECFs to ECFs calculated using other assumptions does not alone establish unreasonableness.

4. Plan reformation is unavailable under ERISA section 502(a)(1)(B). Reformation is an equitable remedy that is unavailable under ERISA section 502(a)(1)(B), which generally only allows a participant to sue for benefits under the terms of the Plan.

5. Plaintiffs failed to plead a failure to monitor claim. Nowhere in the complaint did plaintiffs allege that U.S. Bancorp had a duty to monitor (*e.g*., no allegation that it had the authority to appoint and remove fiduciaries).

6. Plaintiffs' claims are time-barred. Plaintiffs' claims are time-barred by the Plan's 30-month statute of limitations, and, with respect to the plaintiffs' fiduciary breach claims, by ERISA's 6-year statute of limitations. Plaintiffs knew or should have known of the allegedly unreasonable ECFs in 2002 when the ECFs were adopted or, at the latest, in 2003, when the Plan document containing the ECFs was published.

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The Court Denies U.S. Bancorp's Motion to Dismiss

The court issued an opinion in late June denying U.S. Bancorp's motion to dismiss. The court sided with the plaintiffs in finding that the plaintiffs' claims are for actuarially equivalent benefits under ERISA, and are not claims under the Code or Treasury regulations. The court adopted the plaintiffs' argument that, instead, the Code and Treasury regulations provide guidance as to the meaning of ERISA's actuarial equivalence requirement.

The court went on to state that U.S. Bancorp is incorrect that there are no requirements under ERISA for calculating and applying the ECFs to produce actuarially equivalent benefits, and that there is case law to suggest that "two methods of payment are actuarially equivalent when their present values are equal under a given set of actuarial assumptions." The court suggested that "in determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules as set forth in section 417(e)." The plaintiffs allege in the complaint that the ECFs are not calculated in accordance with these requirements; therefore, the court held that the claims cannot be dismissed.

With respect to the fiduciary breach claim against the company, the court cursorily held that plaintiffs sufficiently pled the claim. As to the claims' timeliness, the court noted that a case is generally not dismissed under Federal Rule of Civil Procedure 12(b)(6) on the basis of a potential statute of limitations defense. In any event, the court found that there are factual disputes regarding whether the Plan's limitation period applies and on what date any limitations period began to run.

Groom's Analysis

As noted above, the *Smith* decision denying U.S. Bancorp's motion to dismiss is the first with respect to the motions to dismiss filed by defendants in these lawsuits. Accordingly, although the *Smith* court's decision is a setback for U.S. Bancorp, the decision also was likely a disappointment for the defendants in the other 8 lawsuits, and for plan sponsors that are concerned they could be targeted next. And while it is unclear whether the *Smith* decision will influence courts deciding motions in other of these cases, the plaintiffs in those cases are certainly trying to get as much momentum from the decision as possible. Indeed, the plaintiff in *Herdon v. Huntington Ingalls Industries, Inc. et al.*, in his opposition to the defendants' motion to dismiss, cited *Smith*, stating that the court held that ERISA's actuarial equivalence requirement requires the use of current interest and mortality assumptions.

Additionally, the plaintiffs' apparent win in the *Smith* case could embolden the plaintiffs' law firms to file additional complaints against other plan sponsors and fiduciaries. Not only did the decision likely give plaintiffs a shot of optimism (whether founded or not) that these cases will move to discovery (and, thus, increasing the chances of settlement), but plaintiffs read the *Smith* court's opinion as requiring the use of current interest rate and mortality assumptions. With that view of the law, the plaintiffs' firms will be incentivized to file as many lawsuits as possible challenging plans with assumptions that do not match the current Treasury regulations.

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We continue to monitor these cases and will review each decision on these motions to dismiss as they come down. If you have any questions about these cases or the claims raised by these plaintiffs' firms, please contact the authors or your Groom attorney.