Tenth Circuit Addresses ERISA Limitations Provision in Class Action Decision

Posted by Renee DeMoss in ERISA / Thursday July 23, 2015

In *Fulghum v. Embarq. Corp.*, 785 F.3d 395 (10th Cir. 2015), the Tenth Circuit Court of Appeals considered the claims of a class of telephone company retirees whose life and health insurance benefits were reduced or eliminated by their former employers after the employees retired. The employer Defendants included Embarq Corporation and companies who became Embarq subsidiaries after its spin-off from Defendant Sprint Nextel. The Plaintiffs claimed they were entitled to vested lifetime benefits pursuant either to the terms of their various ERISA welfare benefit plans, or to fraudulent communications made to them by plan administrators. They filed claims for breach of contract and breach of fiduciary duty under ERISA, as well as claims under the Age Discrimination in Employment Act.

During their employment, the Plaintiffs had received summary plan descriptions ("SPDs") that explained the benefits provided in their plans. The Defendants based motions for summary judgment on the SPDs, organizing 32 different identified SPDs into five separate groups, according to similarities of plan language and coverage. *Fulghum*, 785 F.3d at 402. They contended the class members against whom they sought judgment had retired under one of the identified SPDs, or under an SPD that was not included in one of the five groups, but was identical in all material respects to one of the identified SPDs. *Id.*

The Court first considered whether Defendants breached their contractual duties under ERISA to provide vested benefits because the terms of the plans, as expressed in the SPDs, promised lifetime benefits to the employees. Under ERISA, an employer is generally free to change, modify or terminate its welfare benefit plans for any reason at any time, unless the employer has contractually agreed to provide vested benefits. *Fulghum*, 785 F.3d at 402, *citing Curtiss-Wright Corp. v. Schoonajongen*, 514 U.S. 73, 78 (1995). An employer creates a contractual agreement by incorporating "clear and express language" promising vested benefits into a formal written ERISA plan, which can be done through SPD documents. *Id*. at 403.

After reviewing the SPDs submitted by Defendants and applying general principles of contract construction, the Tenth Circuit found that none of the SPDs in the five groups contained clear and express language promising vested benefits, and affirmed summary judgment on those claims based on the identified SPDs. The plans either contained language that expressly reserved the employers' rights to change or terminate the described benefits, or they contained language that otherwise unambiguously contemplated future plan changes or terminations in a manner that could not reasonably be misinterpreted by the employees.[1]

The Court next considered the Defendants' argument that Plaintiffs' claims for breach of fiduciary duty under 29 U.S.C. §1104(a)(1) were time-barred. The limitations periods that apply to such actions is found at 29 U.S.C. §1113:

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of – (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in case of an omission the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation, ***except*** that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. (emphasis supplied).

The parties' dispute arose from application of the six-year exception, which applies in cases of "fraud or concealment." The Defendants claimed the exception applies only when a plan fiduciary takes steps to fraudulently conceal an alleged breach of duty, thus preventing its discovery, and that the Plaintiffs did not allege the Defendants attempted to conceal their actions.

The Plaintiffs, on the other hand, claimed the exception also applies when a §1104(a)(1) breach of fiduciary duty claim is based on the theory that a plan fiduciary engaged in fraud, *i.e.*, a fiduciary knowingly misrepresented or omitted to tell an employee of a material fact with the intent to deceive. They contended the misrepresentations and omissions Defendants made about lifetime benefits were fraudulent, and that the lawsuits Plaintiffs filed were timely under the exception because they were filed within six years after the plans were amended, which enabled discovery of the alleged breaches.

Prior to *Embarq*, the Tenth Circuit had never addressed the application and scope of the exception provision, and looked to other circuit court cases, finding the First, Third, Eighth, Ninth, and DC circuits hold the exception applies only when a fiduciary has taken concrete steps to conceal an alleged breach. *Fulghum,* 785 F.3d at 414. This approach is based on the belief that Congress intended to incorporate the federal "fraudulent concealment" doctrine into the "fraud or concealment" language of §1113. The fraudulent concealment doctrine tolls the running of a statute of limitations when a defendant acts to prevent a plaintiff from timely discovering its fraud.

The Tenth Circuit then noted a different approach taken by the Second Circuit Court of Appeals, which declined to combine the words "fraud or concealment" into the term "fraudulent concealment." *Fulghum,* 785 F.3d at 414. The Second Circuit court held the exception does not act to *toll* the running of the statute of limitations in §1113(1), but instead is itself another, separate statute of limitations that applies only in certain types of cases, *i.e.*, when a fiduciary acts to conceal a breach of duty, and when an ERISA plaintiff's breach of fiduciary duty claim is based on a fraud theory.

The Tenth Circuit declined to follow either of these approaches. Instead, it decided that §1113(1) is a six year statute of repose rather than a statute of limitations, and that "the better view is that the fraud or concealment provision is a legislatively-created exception" to that statute of repose. It observed that §1113(1)(A) requires an ERISA plaintiff to file a breach of fiduciary duty claim within six years after the date of the last action which constituted a part of the breach, and, in the case of an omission claim under §1113(1)(B), within six years of the last date the fiduciary could have cured the breach. Although it clearly sets forth a limited six year period of time within which an ERISA plaintiff must bring its fiduciary duty claims regardless of time of discovery, and the defendant's liability is extinguished as a matter of right if the claims are not timely brought, it is a statute of repose and, therefore, it can be subject to legislatively-created exceptions that can extend the filing period.

The Court's conclusion was based on principles of statutory construction. The language the Legislature used to create the exception follows §1113 subparagraph 1 and §1113 subparagraph 2, but the exception itself is not contained in a third numbered subparagraph 3. This structure suggested to the Court that the exception provision was not meant to be a separate statute of limitations. Further, the fact that it begins with the word “except” means it must be read with reference to the two preceding subsections, and not as a separate statute of limitations. *Fulghum*, 785 F.3d at 415.

The Court further stated the scope of the exception turned on the meaning of the terms “fraud” and “concealment.” Because the ERISA statute does not contain definitions for these terms, the Court looked to their ordinary meanings at the time the exception was enacted, which could be viewed as separate and distinct meanings. Also, Congress’ use of the disjunctive “or” in the language “fraud or concealment” indicated to the Court that the terms should be given separate meanings.

The Court concluded its analysis by noting that because a statute of repose creates a substantive right in defendants to be liability-free after a specific period of time, it is not subject to the judicial doctrines of equitable tolling or estoppel, but that Congress, by creating the fraud or concealment exception, was restoring these doctrines to selected ERISA breach of fiduciary duty claims. *Fulghum*, 785 F.3d at 416. This lessened the harsh result that could occur in situations where a plan fiduciary has engaged in prohibited conduct that a plan member could not readily discover in time to meet the filing periods of §1113.

Finally, the exception promotes one of the primary purposes of ERISA , which is to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed decisions.

Because the Plaintiffs’ pleadings had included a comprehensive list and fully developed record of allegations and facts concerning fraud, which the Defendants denied, a factual dispute existed as to whether Defendants committed fraud or concealment within the six-year exception period, and Defendants were not entitled to summary judgment on the breach of fiduciary duty claims. *Fulghum*, 785 F.3d at 416.

Finally, the Tenth Circuit affirmed summary judgment for Defendants on all claims based on the Age Discrimination in Employment Act. Existing federal regulations authorized the reductions made in certain of the benefits, and the Court found Defendants had legitimate “non-age reasons” for instituting other reductions and terminations, including a desire to reduce costs and to bring their plan benefits in line with those provided by other companies. *Fulghum*, 785 F.3d at 417-421.

[1] The Court, however, reversed summary judgment as to those class members whose contract claims arose from SPDs other than those 32 specifically identified in the five groups.