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TOPIC: Court Rules Executive Has No Legal Right to Life Policy Funding SERP

CITES: *Collins v. Frank Rewold & Son, Inc*., 2014 WL 2587581, U.S. District Court, E.D. Mich. (June 10, 2014); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

SUMMARY: The U.S. District Court in *Collins* entered summary judgment in favor of the employer against an executive who claimed breach of fiduciary duty and wrongful denial of benefits. The suit was brought when the employer terminated a nonqualified top hat deferred compensation plan and paid participants only the net present value of their account balance. The employer's promises under the plan were financed with corporate owned life insurance ("COLI") and the amount of the actuarially calculated present value of the future benefit paid to the executive was substantially less than either the plan account balance or the cash value of the underlying life insurance policy.

In reaching its conclusion, the court noted that because the plan specifically gave the plan administer complete and absolute discretion to interpret the plan, despite the fact that the employer had purchased a COLI policy on the life of the executive and referenced the cash value of the policy in the plan statement as the "retirement benefit," the plan was not a "funded" plan and therefore did not fall under ERISA provisions for such plans.

FACTS: Frank Rewold & Son, Inc. (the "Company") sponsored a defined contribution supplemental executive retirement plan ("SERP"), which was financed with whole life COLI policies on the lives of selected key executives.

At some point, the plan administrator decided to terminate the SERP, and paid the Plaintiff executive a lump sum of $92,553—equal to the net present value of his projected SERP benefit at retirement. This amount was substantially less than the executive's account balance under the plan and the $146,282 cash value of the COLI policy owned by the Company on the life of the Plaintiff.

The notice regarding termination of the SERP sent to the Plaintiff revealed that the employer had made annual contributions to finance the plaintiff's SERP benefit which had been paid toward a whole life policy showing a cash value balance labeled "Retirement Benefit" of $146,282.

The SERP document provided that the Company had the right to terminate the plan but not to accelerate distributions or reduce account balances. However the plan clearly provided that:

> The Company, or a committee appointed by the board of directors to administer the Plan, shall have full discretion to interpret and administer the Plan.

The court therefore looked to the holding of a case called *Firestone Tire & Rubber Co.* and concluded that, because the plan vested the administrator with complete discretion to interpret and apply the terms of the plan, "a court must apply Firestone's arbitrary and capricious standard" in reviewing such decisions. In other words, as long as the plan administrator's interpretation was not arbitrary or capricious, his or her reasonable interpretation of the plan provisions should be followed.

The plaintiff contended that the standard of review here should be greater since the employer had a conflict of interest in terminating the plan. While recognizing that a conflict of interest was present, the court concluded this was only one factor to consider in addressing the appropriate standard of review and should prove less important where the administrator had taken the following active steps to reduce potential bias: 1) sheltering committee members from potential adverse employment actions, 2) appointing individuals who were not plan participants, 3) providing claimants with opportunity to appeal to an appeal committee, and 4) having an outside independent actuary review the computations.

The plaintiff also argued that the plan was in fact "funded" by the life insurance policies such that the plan administrator violated its fiduciary duty to the participants under the Employee Retirement Income Security Act ("ERISA"). The ERISA violation was created, according to the plaintiff, when the Company terminated the plan, allowing the Company to retain the policies and refusing to turn over to the Plaintiff the documents relating to the insurance policies during the discovery process.

However, the court looked to the clear language of the plan document that stated that the plan is:

> unfunded and is maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" (i.e. an ERISA top hat plan) which is exempt from all fiduciary requirements under ERISA.

The court cited the following language of the plan to find that the policies were merely general assets of the Company and the plan participants had no right or interest therein.

> A Participant and his Beneficiary, heirs, successors, and assigns shall have no legal or equitable rights, claims or interests in any specific property or assets of the Company. Neither the Participant, nor his Beneficiary, heirs, successors or assigns shall have any rights, claims or interests in any life insurance policies, annuity contracts, or proceeds therefrom that are owed or may be acquired by the Company. Such policies or other assets of the Company shall not be held under any trust for the benefit of the Participant, his beneficiary, heir, successors, or assigns, or held in any way, as collateral security for the performance of the obligations of the Company under this Plan. The Company's assets and polices shall be, and remain, the general, unpledged, unrestricted assets of the Company. The Company's obligation under this Plan shall be merely that of an unfunded and unsecured promise of the Company to pay money in the future.

Based on this language the court concluded that the cash value of the policy was simply a general, unpledged, unrestricted asset of the Company.

RELEVANCE: This case should serve as a reminder of the importance of carefully drafted plan language. The court's conclusions regarding deference to administrative interpretation of the plan, fiduciary duties and the Company's right to terminate the plan all hung upon the clear plan language. In contrast, the lack of clarity in the participant's benefit statement upon termination of the plan which referenced policy cash values, labeling them the "retirement benefit" was a probable cause of the controversy.

As noted above, it significantly strengthens an employer's position if a plan administrator appoints individuals who are not plan participants to an appeals review board, provides claimants with an opportunity and specific process to appeal an action considered adverse to them, and provides an outside independent actuary to review plan computations.

***WRNewswire* #14.07.01 was written by Marla Aspinwall of Loeb & Loeb, LLP.**

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