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RESEARCH MEMO

Tenth Circuit Joins Other Circuits Holding Pension Plan's Death Benefit was NOT Protected from Cutback

A Tenth Circuit Court of Appeals opinion issued on July 17, 2009 joins other circuit courts in holding that a "death benefit" in a defined benefit pension plan is not "*accrued benefit*", an "*early retirement benefit*" or a "*retirement-type subsidy*" and, as such, is not a *"protected benefit*" subject to the protections of the "anti-cutback" rule in Code 411(d)(6). The case is *Kerber v. Qwest Pension Plan*, --- F.3d ----, 2009 WL 2096221 (10th Cir. 2009) and is available by "*clicking here*."

It is important to note that the death benefit at issue was a lump sum that was not part of a normal or optional form of benefit. That is, the survivor portion of a Qualified Joint and Survivor Benefit or the remaining payments under a period certain benefit (5 year Certain, 10 year Certain) ARE protected benefits but stand alone lump sum death benefits are not protected.

A Closer Look at *Kerber*

The case has many details and should be read carefully before a pension plan cuts death benefits. As noted above, if a death benefit is part of a specific optional form of benefit and the same death benefit would not be provided if another optional form of benefit were elected, then that death benefit is part of the specific optional form of benefit and is a "protected" benefit.

However, stand-alone death benefits like those in this case and those that exist in many multiemployer defined benefit pension plans do not fall into that "protected" category and can be cutback. **Interested readers should consult Fund Counsel for advice as to whether any death benefits in the pension plan are not protected before making a cutback.**

In *Kerber*, former employees filed putative class action under the *Employee Retirement Income Security Act (ERISA)* against the employer [single employer plan], employee benefit plan and plan administrator, alleging certain amendments to the pension plan that purported to eliminate a pensioner death benefit for plan participants who retired on or after a specified date violated the "anti-cutback" rule.

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The district court granted summary judgment to the defendants and the 10th Circuit affirmed. Even though *Kerber* concerned single employer plan, the principles of the case also apply to multiemployer defined benefit plans.

The plaintiffs made several arguments to support the proposition that the death benefit was protected. Over the years the pension plan's death benefits included a: 1) Sickness Death Benefit; (2) Accidental Death Benefit and (3) Pensioner Death Benefit and later an opportunity for certain employees to receive a lump sum payout of their retirement benefits, and to include in that payout a discounted lump sum (DLS) of the Petitioner Death Benefit. It is the Petitioner Death Benefit and DLS that were the benefits subject to this litigation.

In affirming the District Court, the 10th Circuit accepted the defendant's position that the Pensioner Death Benefit and the DLS Benefit were NOT an *accrued benefit*, a *retirement-type subsidy*, an *early retirement benefit* or a *contractually vested welfare benefit* and, thus, were not subject to the protections of *ERISA's* anti-cutback provision.

The concurring opinion of the 10th Circuit opinion agreed with the result of the majority, but for a technical reason had one disagreement in reasoning. The concurring opinion cited to several cases holding death benefits (even if in a pension plan) are welfare benefits and not protected under the anti-cutback rule applicable to pension benefits. These additional citations are set out below:

- [A death benefit]…cannot be a retirement-type subsidy for the simple reason that a death benefit is a welfare benefit rather than a retirement benefit, regardless of its mechanism of distribution. *See* 29 U.S.C. § 1002(1)(A) (listing death benefits as an aspect of a "welfare" plan rather than a pension plan);
- *In re Lucent Death Benefits ERISA Litigation,* 541 F.3d 250, 255-56 (3rd Cir. 2008) (finding pensioner death benefit to be a welfare benefit);
- *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.,* 847 F.2d 329, 333-34 (6th Cir.1988) (quoting S.Rep. No. 575, 98th Cong., 2d Sess. 30, reprinted in 1984 U.S.Code Cong. & Admin. News 2547, 2576) ("The committee expects, however, that ... a death benefit ... will not be considered a retirement-type subsidy"). ERISA's anti-cutback provision does not apply to welfare benefits. 29 U.S.C. § 1051(1); and
- *Robinson v. Sheet Metal Workers' National Pension Fund, Plan A,* 515 F.3d 93, 98 (2d Cir.2008). Because a death benefit is a welfare benefit, it does not matter whether it is paid in installments or as a lump sum; either way, it is not subject to ERISA's anti-cutback requirement.

As mentioned in the introduction, it is important to note that a death benefit that is part of a "*specific optional form of benefit*" is protected. Within IRS Regulation Section 1.411(d)-3 - *Section 411(d)(6) protected benefits*, Subsection (g)(6)(ii)(B) addresses whether a death benefit is a protected benefit.

> **(B) Death benefits.** If a death benefit is payable after the annuity starting date for a specific optional form of benefit and the same death benefit would not be provided if another optional form of benefit were elected by a participant, then that death benefit is part of the specific optional form of benefit and is thus protected under section 411(d)(6). A death benefit is not treated as part of a specific optional form of benefit merely because the same benefit is not provided to a participant who has received his or her entire accrued benefit prior to death. For example, a $5,000 death benefit that is payable to all participants except any participant who has received his or her accrued benefit in a single-sum distribution is not part of a specific optional form of benefit.

However, in *Kerber*, it is clear that the death benefit(s) at issue are/were not part of a "*specific optional form of benefit*" and were run-of-the-mill death benefits that are actually welfare benefits and not protected.

Multiemployer pension plans are under great pressure to increase plan funding and decrease liabilities. While unpleasant to have to cut back benefits, sometimes it is the only alternative to continue the viability of the pension plan. If funding levels fall too low the pension plan may find itself in endangered (yellow zone) or critical status (red zone). Plans in the red zone that must cut back certain benefits may have to cut "adjustable" benefits. Whether cutting back unprotected death benefits could help a multiemployer defined benefit pension plan remain healthy (green zone) longer, avoid the yellow zone or help a yellow zone plan avoid the red zone is a question for the Plan Actuary. However, as a prelude, interested readers should consult Fund Counsel for advice as to whether any death benefits in the pension plan are not protected and can be cutback.

Side Comment

For a 6th Circuit case involving the similar question of about "protected" benefits", see *Research Memo 2009-41*. That *Research Memo* discussed whether "*post-retirement increases*" were "protected benefits", the issue in the case reported on therein - *Thornton v. Graphic Communications Conference of Intern. Broth. of Teamsters Supplemental Retirement and Disability Fund,* 566 F.3d 597 (6th Cir. 2009). *Thornton* held post-retirement increases were not protected, but noted the IRS had taken a *contrary position* in a 2005 IRS regulation issued after the alleged cutback in *Thornton*. That same IRS regulation is commented on in *Kerber* relative to the impact of court decision (discussed therein) based on the legislative history of *ERISA* and an intervening IRS regulation taking a contrary view and the continued vitality of the earlier court decision in light of the new regulation.

The majority opinion in *Kerber* stated that an IRS regulation cannot undercut the legislative history of *ERISA* in the prior case. The concurring opinion in *Kerber* stated that the IRS regulation called into question the vitality of the earlier case. To the extent that *Thornton* and the cases relied on therein cite to *ERISA's* legislative history, the majority opinion in *Kerber* would be some support for the proposition that the holding of *Thornton* is still viable. Opponents may cite the concurrence for the opposite view. Other cases may be more on point regarding the issue of the effect of intervening regulations; however, since the issue arose in this case we point it out and mention its possible application to *Thornton.*

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