Two Recent Cases Put ERISA In The Spotlight

by Jeffrey M. Schlossberg

Without much fanfare, the United States Supreme Court and the U.S. Court of Appeals for the Second Circuit each recently rendered a significant decision under the Employee Retirement Income Security Act ("ERISA"). The Supreme Court's decision in *Black & Decker Disability Plan v. Nord* [i] addressed the scope of a disability benefit plan administrator's authority. The Second Circuit's decision in *Gerosa v. Savasta & Co.* [ii] focused on the scope of damages available under ERISA. Kenneth Nord, a participant in the Black & Decker disability plan submitted a claim for disability benefits, which the plan administrator denied. Nord submitted supporting documentation from his treating physician stating that he suffered from a degenerative back disease that made him unable to work. Black & Decker referred Nord to its own physician who concluded that, with pain medication, Nord could perform sedentary work. The administrator recommended that Nord's claim be denied and Black & Decker's accepted the recommendation.

Treating Physician Rule
Nord filed suit claiming that Black & Decker's denial was an abuse of discretion. Although the trial court granted summary judgment to the Plan, the U.S. Court of Appeals for the Ninth Circuit reversed in favor of Nord. The circuit ruled that controlling precedent required the application of the "treating physician rule." The rule requires a plan administrator who rejects the opinion of the claimant's treating physician to offer specific reasons for the rejection. Under the governing rule, the plan administrator had not provided sufficient justification for rejecting Nord's physician's recommendation.

Because of a split among various circuit courts as to whether a "treating physician rule" applied in ERISA cases, the Supreme Court elected to hear the case to resolve the division. The Court reversed and held that ERISA does not require plan administrators to give special deference to the opinion of a treating physician.

The High Court examined the history of the "treating physician rule" and noted that it originated in the context of Social Security disability determinations. The Court then analyzed the differences behind the Social Security and ERISA schemes. It explained that the Social Security Act mandates benefits to millions of eligible individuals and thus there was a need to streamline the process of making disability determinations. Application of a treating physician rule helped to serve that purpose. In addition, in determining entitlement to Social Security benefits, the adjudicator measures the claimant's condition against a uniform set of federally established criteria. On the other hand, ERISA does not mandate the existence of a plan or the nature of the benefits; it only establishes rules should an employer adopt a plan. Thus, the outcome of a claim under ERISA often depends on the specific language of the employer's plan; not a federally established set of criteria.

In addition to the historical development of the treating physician rule, the Court combed ERISA and its regulations searching for some authority to support the application of a treating physician rule. None could be found. The Court stated that there is nothing in ERISA that "suggests that plan administrators must accord special deference to the opinions of treating physicians. Nor does [ERISA] impose a heightened burden of explanation on administrators when they reject a treating physician's opinion." The Court further noted that the Secretary of Labor has not promulgated any regulations instructing plan administrators to give extra weight to the opinion of a treating physician. Indeed, the Court pointed out, the Secretary of Labor's regulations were amended long after the Social Security Administration adopted the rule. Thus, the Court concluded, if the Secretary of Labor intended to adopt such a rule, the agency could have done so.

Because plans are no longer required to extend special deference to a claimant's treating physician, plans are advised to send claimants to an independent physician for examination. A plan is entitled to give equal weight to an independent physician's opinion and is not obligated to give any greater value to the claimant's treating physician.

`Gerosa'

In *Gerosa*, the Second Circuit examined whether there is an implied damages remedy under ERISA. The plaintiffs were a pension fund and its trustees. Plaintiffs alleged that as a result of the negligence of the fund's actuary, the fund became dangerously under-funded. In fact, for several years, the actuary reported that the Plan was over-funded, i.e., the assets were more than sufficient to pay all projected benefits claims. Relying on that information, the fund distributed excess assets to the fund's beneficiaries. Subsequently, the actuary reported that the fund was in fact severely under-funded. The fund sued seeking to recover the anticipated shortfall between its liabilities and assets. The fund asserted claims under ERISA as well as under several state law theories of liability.

The District Court held that the fund could recover the lost monies under ERISA but ruled that the state law claims were preempted. The Second Circuit reversed.

ERISA provides in section 29 U.S.C. § 1132(a)(3) that:

A civil action may be brought…by a participant, beneficiary or fiduciary…(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The question before the Second Circuit was whether the monetary remedy sought by the fund fell within the provision of "other appropriate equitable relief."

Although ERISA permits money awards, the court noted that the remedy is extremely limited. The only monetary remedy available against non-fiduciaries is in the form of restitution, *i.e.*, compelling one in possession of money to return it. In *Gerosa*, however, the actuary was never in possession of the money and thus a claim for restitution could not lie.

Long-standing Precedent

Next, the court examined its own long-standing precedent set forth in *Diduck v. Kaszycki & Sons Contractors, Inc.* [iii] that recognized a federal common law right of action in favor of plan participants against non-fiduciaries. The court in *Gerosa*, however, held that the *Diduck* decision could no longer control as a result of intervening rulings from the U.S.

Supreme Court. For example, in *Mertens v. Hewitt Associates,*[iv] the Supreme Court rejected the holding of *Diduck* and ruled that non-fiduciaries who knowingly participate in a fiduciary breach cannot be liable for ordinary money damages. The *Mertens* Court found that there was "'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" As such, and as a result of several other Supreme Court rulings noting the exclusivity of ERISA's remedies,[v] the Second Circuit rejected the lower court's attempt to distinguish the intervening Supreme Court decisions and concluded that it was not free to "fill in unwritten gaps in ERISA's civil remedies." Accordingly, plaintiffs' claim for damages under ERISA was dismissed.

Professional Negligence

However, the Second Circuit did not leave plaintiffs without a remedy. The court held that plaintiffs' state law claim for professional negligence was not preempted by ERISA. The actuary argued that ERISA set out a code of behavior and thus the plan's remedy was limited to "appropriate equitable relief." The Second Circuit rejected the actuary's contention because the claim asserted by the Plan did not "interfere with central ERISA purposes." The court also noted that holding the actuary liable would ultimately "help ensure that the reporting and disclosure demanded by ERISA are made accurately."

Clearly, the court was not interested in allowing the actuary to escape from its negligent conduct. Indeed, the court appears to have upheld the state law claims at least in part to serve as a deterrent against such professional negligence, stating that: "appropriate equitable relief" authorized by [ERISA] will rarely have any meaningful deterrent effect on negligent actuaries, since such relief cannot compare to a common-law action for damages as a stimulant to adherence to the appropriate level of professional performance. Professionals advising ERISA plans should be guided accordingly.

[i] 123 S.Ct. 1965 (2003).
[ii] 2003 WL 21135687 (2d Cir.).
[iii] 974 F.2d 270 (2d Cir. 1992).
[iv] 508 U.S. 248 (1993).
[v] See, e.g., *Rush Prudential*

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