New York Law Journal

NEW YORK, WEDNESDAY, AUGUST 10, 1994

OUTSIDE COUNSEL

By Scott M. Riemer

Jury Trials Under ERISA

IT MAY come as a surprise to learn that a client, or a participant in the client's employee benefit plan, may be entitled to a jury trial of his or her claim under ERISA.[1] It also may come as a surprise to learn that, based on a survey of the relatively few cases nationwide that address the issue, a client can increase the likelihood of being granted a jury trial by forum shopping for the most advantageous venue and by carefully framing his or her ERISA claim.

A plaintiff commencing an action in a district court located within the Second Circuit is more likely to be granted a jury trial than a plaintiff in any other circuit. And within the Second Circuit, a plaintiff has a better chance for a jury trial in the Southern and Western Districts than in the Eastern District or the District of Connecticut.

As for the type of relief requested within the Second Circuit, a plaintiff commencing an action under 29 USC 1132(a)(1)(B) for non-payment of benefits or under 29 USC 1140 for interference with protected benefits has a good chance of being granted a jury trial. By contrast, a plaintiff commencing an action under 29 USC 1132(a)(2) for breach of fiduciary duty or under 29 USC 1132(a)(3) seeking injunctive or other equitable relief has little chance of being granted a jury trial.

Plaintiffs are therefore well advised, other things being equal, to frame their ERISA claims in terms of non-payment of benefits or interference with protected benefits, and to commence their action within the Second Circuit, preferably the Southern or Western Districts. For many large companies and union funds in the tri-state area, this should present little difficulty. Under ERISA, a plan could be sued in any district where employees of a sponsoring employer perform work,[2] where the plan is administered, where the breach took place, or where a defendant resides or may be found.[3]

Continued on page 4, column 3

Scott M. Riemer *is a solo practitioner concentrating in ERISA and employee benefit litigation.*

The debate over jury trials stems from the fact that ERISA and its legislative history are completely silent on the issue. With no place to turn for guidance, the courts have denied or granted jury trials by likening ERISA claims to analogous claims under the common law.

The debate has centered on whether ERISA claims are equitable in nature and thus matters for a judge, or legal in nature and thus matters for a jury. Because the assets of some employee benefit plans are held in trust and ERISA is replete with trust law terminology, an argument could be made that the proper analogy is to trust law. On the other hand, because actions challenging an employer's denial of benefits prior to ERISA's enactment were governed by principles of contract law,[4] an argument could be made that the proper analogy is to contract law. Traditionally, trust law is equitable in nature, while contract law is legal in nature.

To date, every circuit court to have ruled on the issue (with the exception of the Second Circuit, described below) has denied the right to a jury trial by analogizing ERISA cases to equitable claims under trust law.[5]

However, in the last few years, there have been a handful of district court decisions around the country granting jury trials on the theory that ERISA cases are analogous to contract claims.[6] These cases cite to the U.S. Supreme Court's 1989 ruling in *Firestone Tire and Rubber Company v. Bruch*.[7] While *Firestone* did not address the issue of jury trials, the Supreme Court planted a seed because it undercut the trust law analogy by likening ERISA claims to breach of contract actions.

Indeed, *Firestone* marks a turning point in the district courts within the Second Circuit.

To help assess which venue in the tri-state area and which remedy under ERISA would be most beneficial to a client's case, the following is a summary of the relevant court rulings in the various venues.

Second Circuit

While district courts are ruling somewhat consistently, the issue has not been addressed by the Second Circuit. That court has sent conflicting and confusing messages regarding the availability of jury trials in ERISA cases.

In *Pollock v. Castrovinci*,[8] the court affirmed (without opinion) the district court's ruling that the plaintiff's entitlement to additional moneys following a termination of a pension plan was a legal question that should be decided by a jury. However, in *Katsaros v. Cody*,[9] the court affirmed the striking of the plaintiff's jury demand and specifically declined to endorse the district court's ruling in *Pollock* on the ground that the question of a jury trial eventually became moot in that case.

The Second Circuit then confused the issue further by suggesting in dicta that at least some remedies under ERISA are legal in nature. The court stated, without elaboration, that plaintiffs were not entitled to a jury trial because they sought "equitable relief in the form of removal and restitution as distinguished from damages for wrongdoing or non-payment of benefits."[10]

Just what was meant by "restitution" versus "damages for non-payment of benefits" has proved elusive in the lower courts.[11] Indeed, it was not until the advent of *Firestone* that the district courts in at least the Southern and Western Districts applied the ruling in *Katsaros* with a level of consistency.

Southern District

In all but one case[12] (out of approximately eight reported) commenced under 29 USC 1132(a)(1)(B) for non-payment of benefits since *Firestone*, the right to a jury trial was recognized in the Southern District. In fact, one decision went so far as to find that a jury trial is a right protected by the Seventh Amendment.[13]

In just the last few months, a jury trial was granted by Judge Kimba M. Wood in *Dawes v. First Unum Life Insurance Company*,[14] Magistrate Judge Michael H. Dolinger in *Algie v. RCA Global Communications Inc.*, 1944 U.S. Dist. LEXIS 10139, (SDNY July 25, 1994), and Judge Mary Johnson Lowe in *Lugo v. AIG Life Insurance Company*.[15]

A jury trial has now been recognized in all the common permutations of cases commenced under 29 USC 1132(a)(1)(B) for non-payment of benefits. In *Dawes II*, Judge Wood granted a jury trial while applying the de novo standard of review.[16] In *Vicinanzo v. Brunschwig & Fils Inc.*, Judge Charles L. Brieant granted a jury trial while applying the arbitrary and capricious standard of review.[17] *In Lugo* (Lowe, J.),[18] *Dawes I* (Wood, J.),[19] *Adler v. Aztech Chas P. Young Company* (Wood, J.),[20] *Resnick v. Resnick* (Ward, J.)[21] and *Reeves v. Continental Equities Corp.* (Duffy, J.),[22] a jury trial was granted or recognized where the claim was for currently owed benefits.

Lastly, in *Dawes II*,[23] *Smith v. Union Mutual Life Insurance Company* (Sand, J.)[24] and *Paladino v. Taxicab Industry Pension Fund* (Brieant, J.),[25] a jury trial was granted where the claim was for future benefits. Accordingly, absent an adverse ruling by the Second Circuit, a plaintiff commencing an action for non-payment of benefits in the Southern District can reasonably expect that his or her demand for a jury trial will be granted.

A plaintiff's right to a jury trial for an ERISA claim other than one for non-payment of benefits is not as clear. Only one post-*Firestone* case addressed a plaintiff's right to a jury trial in a claim commenced under 29 USC 1140 for interference with protected benefits. In that case, the right to a jury trial was granted.[26] In the one case that addressed a claim commenced under 29 USC 1132(a)(2) for breach of fiduciary duty, the right to a jury trial was denied.[27]

The importance of carefully framing an ERISA cause of action cannot be overstated. This was demonstrated by Judge Wood's decision in *Adler*, in which she struck plaintiff's jury demand because the complaint as drafted appeared to request only equitable relief. Luckily for plaintiff, the demand was struck without prejudice in order to enable plaintiffs to "amend their complaint to make clear whether it is legal or equitable (or both legal and equitable) relief they are seeking."[28]

Eastern District

Unlike the recent spate of cases in the Southern District, there only has been one published decision in the Eastern District since *Firestone*. In *Clay v. ILC Data Device Corporation*,[29] Judge Leonard D. Wexler denied the plaintiff a jury trial on her claim for severance benefits under an unwritten severance plan maintained by defendant. Judge Wexler stated that the action was for restitution of a specific sum of money from the plan administrator and was therefore equitable in nature.

The *Clay* decision is further demonstration of the importance of carefully framing an ERISA cause of action. Judge Wexler denied a jury trial by treating the claim as an action to compel restitution. A different result might have been achieved had the claim been couched as a failure to pay severance benefits in breach of the terms of the severance plan. See *Reeves v. Continental Equities Corp.*[30]

Western District

The Western District has been granting jury trials in non-payment of benefit cases, most recently in a claim for severance benefits in *Sullivan v. LTV Aerospace and Defense Compa-*

ny.[31] In a decision which provides an exhaustive review of the case authorities on the issue, Judge William M. Skretny stated that an action for non-payment of benefits closely resembles a contract dispute and is thus legal in nature.

Most significantly, Judge Skretny specifically held that application of the arbitrary and capricious standard of review (traditionally a trust law standard of review) does not defeat plaintiff's right to a jury trial. The court reasoned that Congress would not have intended that a plaintiff's right to a jury trial would hinge on whether the arbitrary and capricious standard applied given that it is the employer who chooses whether the standard applies when it gives interpretive authority to the plan administrator in the plan document.[32]

The Western District has also granted a jury trial in a claim by a trustee against an employer for delinquent contributions under a pension plan. Such a claim was deemed to be legal in nature as it seeks remedies for breach of a collective bargaining agreement.[33] However, a jury trial was denied for a claim commenced under 29 USC 1132(a)(2) for breach of fiduciary duties.[34] As of this date, the Western District has not addressed whether a claim commenced under 29 USC 1140 for interference with protected benefits is entitled to a jury trial.

There are no reported cases in the Northern District.

District of Connecticut

There are no post-*Firestone* cases in the district for non-payment of benefits that address the issue of jury trials. The only such cases are pre-*Firestone* and a jury trial is denied.[35]

Jury trials, however, have been granted in the district in cases commenced under 29 USC 1140 for interference with protected rights. In *Garcia v. Danbury Hospital Corporation*, Judge Warren W. Eginton granted a jury trial comparing an interference claim to a breach of contract claim.[36] In *Weber v. Jacobs Manufacturing Company*, Judge T. Emmet Clarie granted a jury trial finding that the closest common law analogues to an interference case are wrongful termination or breach of contract suits.[37]

A jury trial was denied in a post-*Firestone* request for injunctive relief. In *Devine v. Combustion Engineering Inc.*, Judge Jose Cabranes found that plaintiffs' claim for breach of fiduciary duty and their request for an injunction preventing defendant from terminating their retiree health coverage, do not look like breach of contract claims entitled to a jury trial.[38]

Query whether Judge Cabranes would have refused a jury trial on this issue if plaintiffs instead of seeking an injunction preventing the termination of their future benefits couched their claim as declaratory relief under 29 USC 1132(a)(1)(B) to clarify their right to future retiree medical benefits. See *Dawes II*.[39]

Third Circuit

The Third Circuit has repeatedly denied the right to a jury trial in cases commenced under 29 USC 1132(a)(1)(B)[40] for non-payment of benefits and under 29 USC 1140[41] for interference with protected benefits. In fact, one district judge sanctioned a plaintiff for refusing to withdraw a demand for a jury, finding the demand was baseless and made in bad faith.[42]

The Third Circuit, however, does recognize the right to a jury trial in cases where a plan fiduciary sues a participating employer for delinquent contributions. It found that 29 USC 1132(g)[43] authorizes, among other things, "such other legal or equitable relief as the court deems appropriate." The court provided that this "choice of terminology reveals that Congress intended to grant the right to a jury trial." [44]

Conclusion

Before commencing an ERISA action, an attorney should closely consider the various options available for framing the complaint and the possible choices of venue given ERISA's liberal venue provisions. The case law shows that at least in the Second Circuit the way an action is framed and the choice of venue can have an impact on the likelihood that a jury trial will be granted.

.....●●●.....

(1) Employee Retirement Income Security Act of 1974, 29 USC 1001, et. seq.

(2) *Corbett v. International Association of Bridge, Structural and Ornamental Iron Workers*, 1991 U.S. Dist. LEXIS 5427, at 4-5 (EDNY April 24, 1991) (Nickerson, J.).

(3) 29 USC 1132(e)(2).

(4) *Firestone Tire and Rubber Co.*, 489 U.S. 101, 112, 109 S.Ct 948, 955 (1989).

(5) *Turner v. CF&I Steel Corp.*, 770 F2d 43 (3d Cir. 1985), cert. denied., 474 U.S. 1058 (1986); *Berry v. Ciba-Geigy Corp.*, 761 F2d 1003 (4th Cir. 1985); *Calamia v. Spivey*, 632 F2d 1235 (5th Cir. 1980); *Daniel v. Eaton Corp.*, 839 F2d 263 (6th Cir. 1988), cert. denied, 488 U.S. 826 (1988); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981); *In re Vorpahl*, 695 F2d 318 (8th Cir. 1982); *Blau v. Del Monte Corp.*, 748 F2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985); *Spinelli v. Gaughan*, 12 F3d 853 (9th Cir. 1993); *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F2d 1525 (11th Cir. 1990).

(6) E.g. Higgenbotham v. Worth Publishers Inc. 820 F. Supp 48 (District of Puerto Rico, 1993), McDonald v. Artcraft Electric Supply Co. 774 F. Supp 29 (District of Columbia, 1991).

(7) 489 U.S. 101, 109 S.Ct 948 (1989).

(8) 476 F.Supp. 606 (SDNY 1979) (Goettel, J.), aff'd mem., 622 F2d 575 (2d Cir. 1980).

(9) 744 F2d 270 (2d Cir. 1984), cert. denied. 469 U.S. 1072 (1984).

(10) 744 F2d at 278.

(11) *In Clay v. ILC Data Device Corporation*, 771 F.Supp. 40 (EDNY 1991) (Wexler, J.) the claim for severance benefits was treated as a claim for "restitution" and a jury trial was denied. Whereas, in *Reeves v. Continental Equities Corp.*, 767 F.Supp. 469 (SDNY 1991) (Duffy, J.) the claim for severance benefits was treated as a claim for non-payment of benefits and a jury trial was granted.

(12) *Blake v. The Bank of New York*, 1992 U.S. Dist. LEXIS 10877 (SDNY 1992) (Keenan, J.) (claims for benefits have traditionally been analyzed under the law of trusts and are thus equitable in nature).

(13) *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F.Supp. 882 (SDNY 1990) (Brieant, J.).

(14) 1994 U.S. Dist. LEXIS 3729 (SDNY March 29, 1994) (Wood, J.).

(15) 1994 U.S. Dist. LEXIS 5709 (SDNY May 2, 1994) (Lowe, J.).

(16) 1994 U.S. Dist. LEXIS 3729 (SDNY March 29, 1994) (Wood, J.).

(17) 739 F.Supp. 882 (SDNY 1990) (Brieant, J.) (The Court stated that beneath this seemingly equitable issue lurks a simple factual question: whether the plaintiff incurred a break in service).

(18) 1994 U.S. Dist. LEXIS 5709 (SDNY May 2, 1994) (Lowe, J.).

(19) *Dawes v. First Unum Life Insurance Co.*, 1992 U.S. Dist. LEXIS 17426 (SDNY Nov. 13, 1992) ("Dawes I") (Wood, J.).

(20) 807 F.Supp. 1068 (SDNY 1992) (Wood, J.).

(21) 763 F.Supp. 760 (SDNY 1991) (Ward, J.).

(22) 767 F.Supp. 469 (SDNY 1991) (Duffy, J.).

(23) 1994 U.S. Dist. LEXIS 3729 (SDNY March 29, 1994) (Wood, J.).

(24) 1990 U.S. Dist. LEXIS 16918 (SDNY Dec. 13, 1990) (Sand, J.).

(25) 588 F.Supp. 37, 39 (SDNY 1984) (Brieant, J.).

(26) *Vicinanzo*, 739 F.Supp. 882 (SDNY 1990) (Brieant, J.).

(27) *Diduck v. Kaszycki & Sons Contractors Inc.*, 737 F.Supp. 808 (SDNY 1990) (Stewart, J.).

(28) 807 F.Supp. 1068, 1073 (SDNY 1992) (Wood, J.).

(29) 771 F.Supp. 40 (EDNY 1991) (Wexler, J.).

(30) 767 F.Supp. 469, 474 (SDNY 1991) (Duffy, J.).

(31) 1994 U.S. Dist. LEXIS 5061 (WDNY April 14, 1994) (Skretny, J.). See also, *Abbarno v. Carborundum Co.*, 682 F.Supp. 179 (WDNY 1988) (Elfvin, J.).

(32) 1994 U.S. Dist. LEXIS 5061, at 24.

(33) *Ches v. Archer*, 827 F.Supp 159, 171 (WDNY 1993) (Elfvin, J.).

(34) Id.

(35) *Gardella v. Mutual Life Ins. Co. of New York*, 707 F.Supp. 627 (D.Conn. 1988) (Daly, J.); *In re Emhart Corp.*, 706 F.Supp. 153 (D.Conn. 1988) (Nevas, J.). But see, *Zotto v. Scovill*, 1987 U.S. Dist LEXIS 14579 (D.Conn. May 27, 1987) (Cabranes, J.).

(36) 1991 U.S. Dist LEXIS 1982, at 4 (Jan. 9, 1991) (Eginton, J.).

(37) 751 F.Supp. 21, 25 (D.Conn. 1990) (Clarie, J).

(38) 760 F.Supp. 989, 994 (D.Conn. 1991) (Cabranes, J.).

(39) 1994 U.S. Dist. LEXIS 3729 (SDNY March 29, 1994) (Wood, J.) (granted jury trial for plaintiff's claim for future disability benefits).

(40) *Cox*, 894 F2d 647, 650 (3d Cir. 1990); *Pane v. RCA Corporation*, 868 F2d 631, 636 (3d Cir. 1989). See also, *Alexander v. Primerica Holding Inc.*, 10 F3d 155, 163 (3d Cir. 1993).

(41) Cox, 894 F2d at 650; *Pane*, 868 F2d at 636.

(42) *Alexander v. Primerica Holdings Inc.*, 819 F.Supp. 1296, 1311 (DNJ 1993) (Lechner, J.).

(43) 29 USC 1132(g).

(44) *Sheet Metal Workers Local 19 v. Keystone Heating and Air Conditioning*, 934 F2d 35, 39 (3d Cir. 1991).