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Ninth Circuit Joins First Circuit in Finding that the Elimination of a Pension Transfer Option does not Violate ERISA's Anti-Cutback Rule

By Darren Nadel and Katherine Hinde

In *Anderson v. DHL Retirement Pension Plan*,[1] the Ninth Circuit followed the First Circuit in finding that the elimination of the right to transfer an account balance from a defined contribution plan to a defined benefit plan does not violate the Employee Retirement Income Security Act of 1974's (ERISA) "anti-cutback" rule. However, the Ninth Circuit reached its conclusion on a different basis than did the First Circuit.

ERISA's "Anti-Cutback" Rule

ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan…"[2] The statute further provides that a plan amendment shall be treated as reducing accrued benefits if it has the effect of "eliminating … an optional form of benefit."[3] However, and important to this recent line of cases, ERISA also explicitly authorizes the Secretary of the Treasury to "provide that this subparagraph shall not apply to [certain] plan amendment[s]."[4]

Acting pursuant to ERISA's grant of statutory authority, the Secretary of the Treasury promulgated the following regulation addressing transfer rights:

> Q-1: To what extent may [anti-cutback rule] protected benefits under a plan be reduced or eliminated?
>
> A-2: . . . A plan may be amended to eliminate provisions permitting the transfer of benefits between and among defined contribution plans and defined benefit plans.[5]

The First Circuit relied on this regulation in finding no violation of the anti-cutback rule in an earlier case. However, the plaintiffs in the *Anderson* case took the position that the regulation does not address the question of whether such an amendment is permissible *if the total benefit* (from the two plans combined) is lower than the benefit would have been if a transfer from the defined contribution plan had been permitted.

1 Case No. 12-36051 (9th Cir. Sept. 15, 2014).

2 29 U.S.C. § 1054(g)(1).

3 29 U.S.C. § 1054(g)(2)(B).

4 *Id.*

5 26 C.F.R. § 1.411 (d)-4, Q&A-2(b)(2)(viii) ("Regulation A-2").

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Litigation Background

In 2003, DHL acquired Airborne Express, Inc. ("Airborne") and sought to combine the various aspects of the formerly separate businesses—including the companies' retirement plans. Following the merger, in 2004, DHL amended the retirement plan to remove the right to transfer assets from an employee's defined contribution plan ("Profit Sharing Plan") to the employee's defined benefit pension plan ("Retirement Income Plan"). The court referred to that amendment throughout the opinion as the "2004 Amendment."

Participants in Airborne's retirement plan could accrue benefits under both the Profit Sharing Plan and the Retirement Income Plan. Benefits under the Retirement Income Plan were then offset by the benefits earned in the Profit Sharing Plan. By transferring the Profit Sharing Plan's balance, participants could reduce the offset contained in the Retirement Income Plan and receive all of their benefits from the Retirement Income Plan. All of the benefits in the Retirement Income Plan would then be calculated using a single set of actuarial assumptions that (in the current interest rate environment) is more favorable than the actuarial assumptions contained in the Profit Sharing Plan. DHL's elimination of the transfer right therefore had the practical effect of reducing the total monthly payments that would otherwise have been available if a transfer had been permitted.

This change first set off litigation in 2009, when a group of former Airborne employees brought suit alleging that the 2004 Amendment violated ERISA's anti-cutback law. The district court dismissed the complaint, and the First Circuit affirmed the dismissal, relying on the plain language of the regulation quoted above, which the court interpreted to permit explicitly the elimination of a transfer right. *Tasker v. DHL Retirement Savings Plan*, 621 F.3d 34 (1st Cir. 2010).

In March 2012, the plaintiffs in *Anderson* brought an action against DHL also alleging that the elimination of the transfer right violated ERISA's anti-cutback rule. As in *Tasker*, and citing the First Circuit's analysis, the district court granted DHL's motion to dismiss. Plaintiff then appealed, arguing that "although the elimination of the transfer option … by itself did not violate the anti-cutback rule under [this] regulatory exception, the fact that the amendment resulted in a reduction of the total monthly annuity amount guaranteed to pensioners did violate the anti-cutback rule."

Ninth Circuit Decision

While noting its agreement with the First Circuit and the district court, the Ninth Circuit relied on a different rationale in finding that the 2004 Amendment did not violate the anti-cutback rule. The Ninth Circuit employed the reasoning found in the U.S. Government's amicus brief, concluding that there was no violation because the 2004 Amendment did not result in a reduction of the plaintiffs' "accrued benefit" in the Profit Sharing Plan.

The 2004 Amendment did not, the Ninth Circuit noted, change the formula to calculate benefits under the Retirement Income Plan. Instead, that formula "[is], and ha[s] always been, calculated on the basis of a participant's final average compensation and years of service, with an offset for an attributed annuity amount based on the participant account balance." In short, the accrued benefit of both the Profit Sharing Plan and the Retirement Income Plan each stayed the same after the 2004 Amendment—and was therefore not reduced in violation of ERISA's anti-cutback rule.

The Ninth Circuit further found that the 2004 Amendment did not eliminate an "optional form of benefit." Although transfer *from* a profit sharing plan is an optional form of benefit, that aspect was not modified by the 2004 Amendment. Following the 2004 Amendment, participants could still transfer the balance of their Profit Sharing Plan account to any eligible retirement plan. Only *acceptance* by the Retirement Income Plan was prohibited.

Despite affirming the district court's dismissal, the Ninth Circuit expressed that it was "deeply troubled" with this "disturbing" result. In the court's view, the "real source of the problem" lay in the different actuarial assumptions applied in the Profit Sharing Plan and the Retirement Income Plan. The different calculations applied in the two plans resulted in the overwhelming favorability of transferring the Profit Sharing Plan's account balance. However, because the plaintiffs did not challenge the actuarial assumptions and the 2004 Amendment did not alter the assumptions, the court ultimately found that "what we see as the inequity occasioned by this procedure is of no legal significance in this case."

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Conclusion

Although the Ninth Circuit ultimately agreed with the First Circuit in finding that the elimination of a transfer right does not violate ERISA's anti-cutback rule, the court's opinion left the door open for possible challenges and further regulation. The court expressly called on the Secretary of the Treasury to correct what the court saw as the inequity of its opinion by regulating the use of different "unrealistic" actuarial assumptions that, in the Ninth Circuit's view, "undermine ERISA's objectives."

We note, however, that the actuarial assumptions used by the Profit Sharing Plan (a defined contribution plan) are generally specified by ERISA and must reflect the current interest environment. Therefore, DHL could not, in the Profit Sharing Plan, have used the more favorable actuarial assumptions contained in the Retirement Income Plan (which is a defined benefit plan) even if it wanted to. However, if interest rates are to rise sufficiently, obtaining an annuity from a defined contribution plan could become more favorable than a transfer to a defined benefit plan. We also note that, under certain circumstances, a rollover to an individual retirement account could well provide a long-term income stream greater than either a transfer or a purchase of an annuity.

It seems unlikely that the Secretary of the Treasury will accept the Ninth Circuit's invitation to change the regulation on transfers. The Treasury leadership is currently considering various options that will encourage sponsors of defined contribution plans to offer more annuity options, including transfer rights to defined benefit plans (and "longevity annuities" that allow participants to use a portion of their lump sums to purchase a right, held by the employer plan, to receive an annuity commencing at an advanced age). If an employer faces the prospect that a transfer option cannot later be eliminated, it then becomes extremely unlikely that such an option would be offered in the first place. Accordingly, a "fix" to the problem identified in this case would undermine the greater objective of encouraging more lifetime income options within employer plans.

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