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Second Circuit Limits Impact of Employer's Oral Misrepresentation of Benefits Plan

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Ever since the Second Circuit Court of Appeals held more than 15 years ago in *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994), that a fiduciary's material misrepresentation concerning the availability of future voluntary retirement benefits could be considered a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), the Second Circuit has been a relatively hospitable venue for such claims.[1] Larger companies had the impossible task of policing hundreds of potential manager/human resource personnel "fiduciaries" to prevent misrepresentations; a misrepresentation, even in a casual conversation, could be an ERISA violation. This all changed on September 30, 2009, when the Second Circuit decided in *Ladouceur v. Credit Lyonnais*, Case No. 07-4040-cv (2d Cir. September 30, 2009), to limit *Mullins* to *written* misrepresentations. Since many misrepresentation claims are based on oral statements, this should foreclose many ERISA misrepresentation claims.

One common scenario, typified by *Mullins*, involves an employee in the process of considering retirement. The employee approaches a manager or human resources representative and inquires whether there is any truth to rumors that the company soon will be instituting an early retirement plan or benefit enhancement. The manager or representative tells the employee that nothing is imminent, usually because the manager or representative does not know that anything is being considered or does not think it likely that anything will be adopted. The employee, believing that there will be no benefit in delaying retirement, leaves the company. Soon after, the company institutes a benefit enhancement for which the employee is ineligible because he resigned or retired too soon. In *Mullins*, this missed benefit was a "**Voluntary Severance Option**" plan with enhanced benefits for early retirement.

Ladouceur illustrates another common misrepresentation scenario. The plaintiffs claimed that they were assured that, after an upcoming merger with the parent company, they would receive full credit for both pension vesting and pension benefit accrual for their past service. They remained at their positions until after the merger was complete (after which they resigned), and were subsequently informed that pension benefits only would be based on future service, not past service.

In either scenario, the former employee then sues because he or she relied on what turned out to be a material misrepresentation concerning his or her benefits.

The court in *Ladouceur* reaffirmed that oral promises cannot vary the terms of an ERISA plan. In so doing, the court looked to the text of ERISA[2] and to a decision in an earlier case, involving a promissory estoppel claim, where the Second Circuit held that oral promises are unenforceable under ERISA precisely because they cannot vary the terms of a benefit plan.[3] Here, the court applied the same logic to the breach of fiduciary claim; because an oral promise could not change the plan, the

court should not allow a plaintiff to override that rule simply by reasserting the same theory under the different label of fiduciary breach misrepresentation claim.

While the court acknowledged that it had upheld breach of fiduciary duty claims in previous cases (and indeed the district courts within the circuit have followed the *Mullins* reasoning in a number of decisions), it stressed that those cases involved written representations or did not indicate the exact nature of the representations. *Mullins*, in particular, was distinguishable, because the representation in that case was characterized vaguely as an "announcement," and it was not clear in what form it was disseminated to the employees.

In the future, if a Second Circuit plaintiff cannot produce a written document that misrepresents an ERISA plan, he or she will not be able to pursue promissory estoppel or breach of fiduciary duty misrepresentation claims. Regrettably, some other Circuits are friendlier to oral misrepresentation claims. For example, the Third Circuit Court of Appeals recently found that an employer breached its fiduciary duty when it failed to orally remind retirement-eligible employees that the company's benefit plan could be amended or terminated at any time, notwithstanding the clear plan and SPD provisions reserving to the employer the right to amend or terminate the plan.[4] The employer eventually terminated that plan. The Third Circuit held that prospective reinstatement of that plan was an allowable equitable remedy for this failure-to-warn misrepresentation. Some misrepresentation plaintiffs, no doubt, will file suit in circuits such as the Third Circuit, where these cases will find more traction.

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1 *See, e.g., Bilello v. JPMorgan Chase Retirement Plan*, 2009 WL 2461005, at *18 (S.D.N.Y. August 12, 2009); *see also Broga v. Northeast Utilities*, 315 F. Supp. 2d 212, 243 (D. Conn. 2004); *Radley v. Eastman Kodak Co.*, 19 F. Supp. 2d 89, 98 (W.D.N.Y. 1998); *Pocchia v. Nynex Corp.*, 1995 WL 362415, at *3 (E.D.N.Y. 1995), *aff'd*, 81 F.3d 275 (2d Cir. 1996), *cert. denied,* 519 U.S. 931 (1996).

2 29 U.S.C. section 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument.").

3 *Perreca v. Gluck*, 295 F.3d 215 (2d Cir. 2002).

4 *In Re: Unisys Corporation Retiree Medical Benefits ERISA Litigation*, Case Nos. 07-3369, 08-3025, and 08-3545 (3d Cir. September 2, 2009).