Court Requires Strict Adherence To Plan Amendment Provisions: Tatum v. R.J. Reynolds Tobacco Co., No. 1:02-CV-373 (M.D.N.C. June 1, 2011)

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The U. S. District Court for the Middle District of North Carolina has decided a significant issue in the long-pending “plan mismanagement” action against R.J. Reynolds Tobacco Company (“RJR Tobacco”) for alleged ERISA violations concerning the elimination of certain investments in its retirement plan (the “RJR Tobacco Plan”). In *Tatum v. R.J. Reynolds Tobacco Co.*, No. 1:02-CV-373 (M.D.N.C. June 1, 2011), the court ruled that an amendment to the RJR Tobacco Plan to eliminate fund investments in the stock of a former subsidiary, Nabisco Holdings Corp., was not effective. This ruling emphasizes the vital importance of following plan procedures specified in ERISA-governed benefit plans.

Prior to 1999, RJR Tobacco and Nabisco Holdings Corp. were operating subsidiaries of RJR Nabisco, Inc. In the spring of 1999, RJR Nabisco, Inc. decided to spin off RJR Tobacco. In connection with that spinoff, the retirement plan formerly available to the participants of both subsidiaries was amended to form the RJR Tobacco Plan, solely for employees of RJR Tobacco. The RJR Tobacco Plan included Nabisco stock (i.e., stock in that former RJR Nabisco, Inc. subsidiary) in its asset portfolio. In connection with the spinoff, the company decided that Nabisco stock should no longer be an investment option for RJR Tobacco Plan participants. Plan participants were given written notices in 1999 that the Nabisco stock would be frozen and “eventually” divested, but the notices did not say when the Nabisco stock would be eliminated.

In June 1999, the RJR Tobacco Plan duly voted to freeze all of the Nabisco stock held in the plan, but did not divest the plan of the stock at that time. Pursuant to later action by the acting secretary of the amended plan’s administrator, the Employee Benefits Committee, investments in the Nabisco stock were eliminated from the RJR Tobacco Plan effective February 1, 2000. The Employee Benefits

Committee itself did not discuss or hold any formal vote to take that action or sign any written decision for the stock divestiture.

Because the price of the Nabisco stock had declined significantly during the previous six months, the divestiture of the Nabisco stock came at a substantial loss to participants. The next month, however, a bidding war for the Nabisco stock resulted in dramatic increases in price. These circumstances gave rise to the claim of fiduciary breach alleged in this lawsuit.

The *Tatum* court found that the RJR Tobacco Plan's Employee Benefits Committee never authorized a resolution or other written approval to transfer funds held in Nabisco stock to other investments in the RJR Tobacco Plan portfolio. This failure was contrary to a term of the RJR Tobacco Plan that required such action either by a duly convened meeting of the committee or "by an instrument in writing signed by a majority of the members of the Committee."

This procedural defect apparently went unnoticed by the *Tatum* plaintiffs from the time the action began in May 2002 through an appeal to the Fourth Circuit in 2004, and up to a point before or during a bench trial held from January 13 through February 9, 2010. When the defect was finally raised and argued, RJR Tobacco contended that the amendment, even if initially ineffective, was later ratified by the Employee Benefits Committee, that there was no showing of detrimental reliance or fraud, and that the plaintiff should be estopped from arguing that the amendment was invalid almost a decade after the lawsuit began. None of those arguments succeeded. The court noted "the longstanding view in this Circuit that plans may not be informally amended and that amendments must be in writing," and ruled that the purported plan amendment was ineffective. Because the purported amendment was invalid, the RJR Tobacco Plan was left with the June 1999 action that froze the Nabisco stock but left the stock in the plan.

Therefore, the court, over a year after trial, permitted the plaintiff to conform his complaint to the evidence presented at trial showing the failure of the plan amendment. The court continues to weigh the evidence admitted at the trial, and will subsequently issue its decision on the merits of the case.

Tatum is a serious cautionary lesson to plan administrators that the procedural requirements in ERISA-governed plans must be strictly adhered to, and that amendments must be in writing. Plan governance should be scrutinized carefully to ensure that proper safeguards are in place to assure effective amendments, and all procedural defects should be rectified promptly according to the terms of the plan document.

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