New case illuminates boundary between severance pay and a severance plan to which ERISA would apply

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The U.S. District Court for the Northern District of Texas has provided guidance to determine when a severance agreement will fall within the scope of ERISA. The decision offers a brighter line to distinguish severance plans governed by ERISA from certain severance agreements that are not.

In *Kirkindoll v. Texans Credit Union, et al*., No. 3:11-CV-1921-D (N.D. Tex. Oct. 15, 2012), the district court resolved a suit filed by Gary Kirkindoll, the former president of Texans CUSO Services, LLC, d/b/a Texans Financial, a credit union service organization owned by defendant Texans Credit Union ("TCU"). Kirkindoll was one of a few highly compensated employees participating in TCU's Executive Deferred Compensation Plan ("Plan"), a type of arrangement commonly called a "top hat" plan. Contributions vested when participants attained retirement age or if the participants' employment was terminated for any reason other than certain specified exceptions.

In 2010, TCU experienced severe financial distress and decided to terminate the Plan. As part of this process, TCU proposed that Kirkindoll's benefits be partially vested in return for his agreement to the Plan's immediate termination. As another part of this proposal, Kirkindoll was offered a distribution of $234,068.18. Agreeing to TCU's offer, Kirkindoll acknowledged that he was surrendering his rights under the Plan in exchange for the vesting and distribution.

Before the money was distributed, however, TCU was placed into conservatorship by the National

Credit Union Administration Board ("NCUAB"). NCUAB repudiated the agreement with Kirkindoll on the grounds that it had been outside the authority of the Board of Directors of TCU and "would be burdensome and would hinder the orderly administration of TCU's affairs." Kirkindoll's employment was terminated shortly thereafter as part of a reduction in force.

Kirkindoll filed suit in Texas state court asserting state law claims for breach of contract, promissory estoppel, fraudulent misrepresentation and other grounds. The case subsequently was removed to federal district court, where Kirkindoll amended his complaint to include an alternative claim under ERISA for Plan benefits. Defendants moved for summary judgment on the basis that Kirkindoll's state law claims were preempted by ERISA.

The district court denied the motion for summary judgment, finding no basis for ERISA preemption. Following the U. S. Supreme Court's ruling in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the district court held that the severance benefits under the Plan were based on a vesting provision that did not require an ongoing program of administration to process claims and pay benefits that would be characteristic of an ERISA-governed plan. The vesting provision of the Plan merely provided for the point in time when benefits vest, amounting to a "one-time, lump-sum amount, calculated at the time participant status is granted and funded through two prior company contributions[.]" Such a provision did not constitute a plan governed by ERISA under the principles declared in *Fort Halifax Packing Co.* As a result, Kirkindoll's severance agreement was outside the scope of ERISA, and he was permitted to pursue his state law claims.

Kirkindoll therefore holds that a vesting provision for a one-time, lump-sum payment under a severance agreement does not, without more, constitute an employee benefit plan governed by ERISA. As the federal courts have said many times, ERISA is concerned with the on-going administration of benefit ***plans***, not simply the one-time payment of benefits.

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