Scrivener's Errors in Drafting Plans: Issues for Participant Advocates

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Scrivener's Error: Landscape of the Doctrine of Equitable Reformation

- Scrivener's error occurs when the parties reach a valid agreement, but the agreed-upon understanding was not properly conveyed in writing.
- A drafting error in an ERISA plan is only a mutual mistake if the employees were on notice of the plan sponsor's actual intent.
  - Notice provided through clear communications, *i.e.*, SPDs and SMMs
  - Communications allow courts to infer a mutual understanding among the plan and participants
- Because ERISA plans are contractual documents governed by contract and trust law, courts are willing to apply the contract law doctrine of equitable reformation to correct scrivener's errors.
- *"Clear and convincing evidence*" required for reformation.

Policy Considerations *For* Reformation

- A long and consistent course of dealing is evidence of mutually understood agreement. *See Young v. Verizon*, 2010 WL 3122795, at *10.
- Where there is no evidence that participants relied on the plan provision at issue, ERISA's written plan document rule is less pertinent. *See id.* at 897; *Int'l Union of Electronic, Electric, Salaried, Machine and Furniture Workers v. Murata Erie North America, Inc.*, 980 F.2d 889, 906 (3d Cir. 1992).
- Scrivener's errors should not result in unexpected windfalls to plan participants, particularly in the case of funded plans. *See Verizon* at 898; *Murata Erie North America, Inc.*, 980 F.2d at 906.
- Because employers are under no obligation to offer employee benefits plans, they will be discouraged from doing so if not allowed to reform scrivener's errors.

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Policy Considerations *Against* Reformation

- ERISA requires that a plan be established and maintained pursuant to a written instrument. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).
- Plan participants should be completely informed of their rights upon examination of the plan documents. *See Air Line Pilots Assoc.*, 55 F.Supp.2d 47 (D.D.C. July 9, 1999); *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1445 (9th Cir. 1995).

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IUEESM&FW v. Murata Erie N.A, 980 F.2d 889 (3d Cir. 1992)

- Company and union both believed that they were entitled to recoup excess monies remaining after the plan terminated.
- Under then existing law, company could not recoup the excess monies unless the plan explicitly stated that it could do so. The union argued that no such provision existed; the company argued that the absence of the provision was a scrivener's error.
- Third Circuit concluded that the scrivener's error doctrine was applicable because: (i) the error related to what was admittedly a "windfall" for either party; and (ii) there was no reasonable reliance on the documents leading employees to believe they would be entitled to the excess.
- Because there was a genuine issue of material fact as to whether there was an error, remanded for further proceedings.

Cinelli v. Security Pacific Corp., 61 F.3d 1437 (9th Cir. 1995)

- Plaintiff claimed that life insurance plan was improperly terminated and thus deprived him of fully vested life insurance benefits.
- Although a board resolution provided for full vesting at age 60, the plan document reserved the right to terminate at any time.
- The Ninth Circuit concluded that the board resolution was not part of the plan documents, since the resolution was only a recommendation and approval for a plan and stated that the Aetna policy would constitute the plan terms.
- Because the resolution was not a plan document, consideration of that document was precluded in light of the fact that the plan was unambiguous.

Central Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098 (3d Cir. 1996)

- Multiemployer fund sought to recover delinquent contributions from a contributing employer.
- Employer argued that no contributions were due because they were sought pursuant to a clause in the CBA that was the result of a scrivener's error.
- Third Circuit declined to apply the scrivener's error doctrine, reasoning that the multiemployer welfare fund, a third party beneficiary to the CBA, should be able to reasonably rely upon the language in the CBA.

Air Line Pilots Assoc. v. Shuttle, Inc., 55 F. Supp. 2d 47 (D.D.C. July 9, 1999)

- Because disability benefits were intended to be lifetime benefits that did not need to be supplemented, the Eastern plan provided that a pilot's disability benefits would be offset by the actuarial value of a pilot's balance under other Eastern retirement plans.
- Trump purchased Eastern and subsequently changed all of the references in the plan from Eastern to Trump; the consequence being that a former Eastern pilot now at Trump could receive accrued benefits under any Eastern Plan in addition to disability benefits under the new plan.
- The district court denied defendants' motion for summary judgment and set the case for trial on whether there was a mutual mistake entitling defendants to reform the plan due to a scrivener's error.

Wilson v. Moog Automotive, Inc. Pension Plan, 193 F.3d 1004 (8th Cir. 1999)

- As a result of plant closing, union and employer entered into a closing agreement that extended early retirement benefits to employees who would not otherwise be eligible at the time of the plant closing.
- Although the plan was erroneously amended to provide that an employee either be age 55 *or* have 25 years of service prior to January 29, 1994 (the date of the closing agreement), an employee had to be 55 no later than December 31, 1994 to meet the eligibility requirements.
- Plaintiffs had 25 years, but did not reach 55 prior to December 31, 1994.
- The Eighth Circuit affirmed the district court's findings after trial that the plan should be reformed to reflect the parties' true intent.

Blackshear v. Reliance Standard Life Ins. Co., 509 F.3d 634 (4th Cir. 2007)

- Life insurance plan terms allowed non-exempt employees to become immediately eligible for benefits, but required exempt employees to wait six months before becoming eligible for benefits.
- The decedent, a nonexempt employee, died within six months of commencing employment.
- Claim denied because, contrary to the SPD, the policy was intended to cover all employees after a six-month waiting period.
- Fourth Circuit ruled that scrivener's error could not be used to "equitably reform" the policy because there was no indication of an error or mistake.

Cross v. Bragg, 2009 WL 2196887 (4th Cir. Jul. 24, 2009)

- Company restated plan in 1996; changed from a Step Formula to an Integrated Formula for calculating benefits; Integrated Formula provided greater benefits.
- Plaintiffs retired from 1996-2002; received benefits under the Step Formula.
- In 2002, Bragg, the plan administrator, investigated and determined that the 1996 switch to the Integrated Formula was a mistake – a scrivener's error.
- Bragg sought and obtained IRS authorization to retroactively amend the plan to delete the Integrated Formula; plan was formally amended to delete it in 2003.

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Cross v. Bragg, 2009 WL 2196887 (4th Cir. Jul. 24, 2009) (con'd)

- Plaintiffs learned of the mistake and filed claims for benefits under the Integrated Formula. Bragg denied and plaintiffs filed suit.
- 4th Circuit denied company's request for equitable reformation:
  - No Mutual Mistake: Actuary's testimony of mistake and ignorance/no reliance by plaintiffs is not a mutual mistake
  - No Deference to IRS Adjudication: reformation is available only from a court and the IRS compliance statement/determination letter does not alter the contractual rights of the plan participants

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Young v. Verizon's Bell Atlantic Cash Balance Plan, 2010 WL 3122795 (7th Cir. Aug. 10, 2010)

- Bell Atlantic converted its defined benefit plan to a cash balance plan at the end of 1995 (prior to the Bell Atlantic/Verizon merger).
- Because the Bell Atlantic DB plan provided for accelerated accruals closer to retirement, the conversion included a "transition factor," a multiplier used to reduce the impact of the cash balance conversion on longer-serving employees.
- The final version of the plan included an unequivocal, but mistaken, provision requiring that the transition factor be applied *twice* instead of once, resulting in a billion dollar problem.
- The court concluded that reformation was appropriate because:

Young v. Verizon's Bell Atlantic Cash Balance Plan, 2010 WL 3122795 (7th Cir. Aug. 10, 2010) (cont'd)

- *Mutual Mistake:* Numerous communications consistently described a single application of the transition factor; the documents surrounding the plan drafting clearly indicated a drafting error
- *No Reliance:* Plaintiff received plan communications showing the correct construction of the plan; no evidence that any participant had relied on the erroneous plan terms
- *Consistent Course of Dealing:* The plan had consistently paid, and participants had consistently accepted, benefits based on a single multiplier calculation; participants' quarterly statements consistently used the same methodology
- *Unanticipated Windfall:* Enforcement of the erroneous plan terms would lead to unwarranted windfalls that participants did not reasonably expect to receive
- *Policy Considerations:* Opposite ruling could deter employers from offering benefits

Impact on Participant Benefit Claims

- If participants understood and accepted the terms of the plan as communicated to them at and around the time the scrivener's error occurred, equitable reformation to conform the plan to those terms may be permitted.
- If a participant is asserting a scrivener's error, there needs to be clear and convincing proof of the parties' mutual understanding and intent.
- Good news: under the doctrine of equitable reformation, the parties should be getting what they bargained for so neither the company nor the participants should be unjustifiably harmed.

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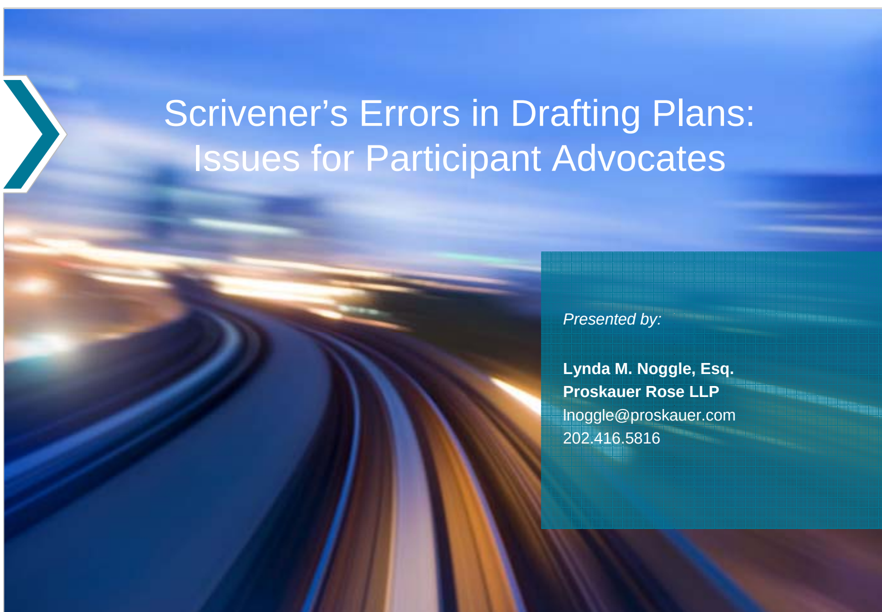

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