

QDRO ISSUE

(2011)

GAF Materials Corporation
Domestic Relation Administration
P.O. Box 1014
Totowa, N.J. 07512

RE: Claim for Benefits for Client

To GAF Materials Corporation:

[Client], by and through his attorney David A. Bonello of the Upper Midwest Pension Rights Project, does hereby file this Claim for Pension Benefits from the *Retirement Plan for Hourly Paid Employees of GAF Corporation*. For the reasons set forth below, the Fund should approve this Claim, and begin payment of [client's] pension benefits.

Background

{Client} was a participant in the *Retirement Plan for Hourly Paid Employees of GAF Corporation* ("The Plan") from approximately October 2000 to June 2010. He is a vested participant and eligible for a pension benefit from the Plan. Earlier in 2011, [client] inquired about receiving his pension benefit. In a letter dated March 15, 2011 from GAF Corporation (attached as Exhibit "1"), and in subsequent conversations with representatives of GAF, [client] was advised that he needed to submit a Qualified Domestic Relations Order in order to receive his pension.

For the reasons set-forth in this Claim, we believe the Plan can start [client's] benefits at this time; and to require that a QDRO be submitted in order to process his application for benefits is in violation of the *Employee Retirement Income Security Act* (ERISA).

Argument

[Client] was divorced in August 2006. In the divorce, [ex-wife] was awarded an interest in [client's] pension benefits from the Plan. A divorced spouse of a participant - such as [ex-wife] - can obtain rights to an employee's benefits under a qualified retirement plan if such rights are embodied in a qualified domestic relations order ("QDRO"). This provision requires plans to establish reasonable written procedures for determining the qualified status of domestic relations orders and for administering distributions under QDRO's. [See 29 U.S.C. §1056(d)(3)(g)(ii)].

ERISA's procedural rules require that the plan:

- 1) Establish reasonable procedures to determine if the order qualifies as a qualified domestic relations order (“QDRO”);
- 2) Administer distributions under qualified orders; and
- 3) Segregate the benefits while a decision is pending.

[See 29 U.S.C. §1056(d)(3)(G)(ii)].

The divorce decree - entitled *Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree* – (which {client} recently provided to the Fund) provided that his ex-wife received a 50% interest in the marital portion of [client’s] pension benefit.

However, five years after this divorce occurred, [ex-wife] has not filed a Qualified Domestic Relations Order pursuant to the divorce decree, and there is no evidence or indication that she is currently in the process of filing a QDRO.¹

I. ERISA Requires that, Upon Receipt of a Domestic Relations Order, the Plan Administrator Segregate and Separately Account For Monies Which May Become Due to An Alternate Payee; ERISA Does Not Require That Funds Otherwise Due A Participant Be Withheld Pending Qualification of a Domestic Relations Order

ERISA’s statutory QDRO requirements expressly contemplate a “qualification process” by which plans, once on notice of a state domestic relations order, will determine whether a state court domestic relations order (“DRO”) is sufficient to alter exiting plan obligations. [See 29 U.S.C. §§1056 (d)(3)(H)(i)-(v)]. This “qualification” process commences with a plan’s notice of the domestic relations order. The statute expressly states that once a plan receives a DRO, within a reasonable period of time, the administrator shall determine whether that order is a QDRO. [See 29 U.S.C. §1056(d)(3)(G)(ii)(I)-(III)]. ERISA sets a period of 18-months – starting from the time benefits would be payable to an alternate payee (and of course after receipt of a domestic relations order) – within which to either approve the domestic relations order as qualified, or reject the order as non-qualified. This is what is meant by the “18-month period.”

ERISA provides that during this “18-month period” in which the issue of whether a domestic relations order (DRO) is a qualified domestic relations order is being determined (by the Plan Administrator, by a court of competent jurisdiction, or otherwise) the Plan Administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the *alternate payee* during such period. 29 U.S.C. §1056(d)(3)(H)(i)[Emphasis added]. The 18-month “qualification” period contemplated that state court action in meeting the rigorous requirement of qualifying a DRO may take some time to perfect. The evident purpose of the 18-month qualification period was to provide time in which any defect in the original domestic relations order could be cured.

However, the time period in which a plan should make a determination on the qualified status of a domestic relations order is *not* the “18-month period” discussed above. Rather, the Department of Labor and the Congress of the United States has stated that the plan administrator shall make a determination on the qualified status of a domestic relations order within a *reasonable* period of time.

¹ GAF Materials did send a letter to [ex-wife] – dated April 8, 2011 – advising [ex-wife] of the procedure for filing a QDRO. That was two-months ago, and [client] has no knowledge if any DRO has since been filed or if a QDRO has been submitted by [ex-wife] to the Plan.

In discussing this issue, Congress issued guidance on this matter. The H.R. Conference Report, 841-99th Congress – provides:

“Determination by plan administrator – Under the bill, the administrator of a plan that receives a domestic relations order is required to promptly notify the participant and any other alternate payee of receipt of the order and the plan’s procedures for determining whether the order is qualified. In addition, within a reasonable period after the order, the plan administrator is to determine whether the order is qualified and notify the participant and alternate payee of the determination.” [Emphasis Added].

Further, Internal Revenue Code §414(p)(7)(C)(ii) provides that if, after the expiration of the 18-month period, it is determined that the DRO is not a qualified domestic relations order, then the plan administrator *shall* pay the segregated amounts (including any interest thereon) to the persons or person who would have been entitled to such amounts as if there had been no order. The “18-month period” is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

As stated above, during this “qualification” process, the plan administrator must therefore separately account for amounts which would otherwise be payable *to an alternate payee*. [29 U.S.C. §1056(d)(3)(H)(v)]. In commenting on this 18-month segregation and qualification period, the court in *Files v. ExxonMobil Pension Plan*, 428 F.3d 478, noted “[i]t is only after this eighteen-month period has expired that the putative alternate payee loses the right to uphold payment of plan proceeds to a *designated beneficiary*” [Emphasis added]. See also 29 U.S.C. §1056(d)(3)(H).

Implicit, therefore, in the court’s reasoning is that the putative alternate payee does not have a right to uphold payment to the *participant* – specifically that portion of the participant’s interest in the pension as awarded him in a domestic relations order – until a proper QDRO is lodged with and approved by the plan. If this were the case, the *Files* court would have noted that fact, by also recognizing that only after the expiration of the 18-month period does a putative alternate payee lose the right to “uphold payments to a designated beneficiary *and the participant*.” *Id.* at 490. [See 29 U.S.C. §1056(d)(3)(H)]. However, the court in *Files* made no such finding. And even if the DRO is later determined to be a QDRO, (after the 18-month period has lapsed) any obligation there under owed to the alternate payee shall apply only prospectively.

What all this statutory language indicates is that nowhere in ERISA is it contemplated that a pending QDRO devising an interest in plan benefits to an alternate payee can prevent the *participant* from obtaining benefits otherwise payable to him under the terms of the plan. The statutory language references separately accounting for - and segregating - those amounts which may become payable to an *alternate payee*. The statute nowhere requires that the entire pension benefit – in particular, the benefit reserved to the participant as set forth in a DRO – can be withheld until a proper QDRO is submitted to the plan on behalf of the alternate payee.

In fact, courts have recognized instances when a participant is already in pay status, then goes through a divorce, the decree from which awards an interest in the participant’s pension benefits to his now ex-spouse. In such a situation, the Plan – once being provided with a DRO – must *segregate* any funds that may be payable to an *alternate payee*, but has no duty to suspend the payment of benefits to the participant. (See *Trustees of the Directors Guild of America-Producer Pension Benefits Plan v. Tise*, 234 F.3d 415, 1t 421 –where the court noted “[t]his benefit segregation requirement obviously assumes that

benefits may already be payable during the period the plan is determining whether the DRO is a QDRO"). Id. at 422. For all the detail of the QDRO requirements, ERISA nowhere specifies that a "hold" must be placed - or even can be placed at the discretion of the Plan - on the participant's interest in *his* pension benefits.

There is also evidence of the intent of Congress in drafting the rules governing Qualified Domestic Relation Orders. The H.R. Conference Report, 841-99th Congress - provides the following guidance:

"If a plan administrator determines that a domestic relations order is defective before the expiration of the 18-month suspension period (or qualification period), the committee intends that the plan administrator may delay payment of a *participant's* benefit until the expiration of the 18-month period ***if the plan administrator has notice that the parties are attempting to rectify any deficiencies in the order*** [Emphasis Added].

In this case, the *Retirement Plan for Hourly Paid Employees of GAF Corporation* has no notice that the parties are attempting to perfect the previously submitted domestic relations order. There is no indication that the alternate payee in this case (ex-wife) is taking any action to cure the previously submitted domestic relations order. Furthermore, [client] has no obligation or duty to file a qualified domestic relations order on behalf of his ex-wife. This is the responsibility of the alternate-payee. The divorce occurred five years ago. If the Plan does not have any notice or indication that the submitted domestic relations order is being "cured" by the alternate payee, the Plan has no authority to uphold payment now to [client].

In further support of [client's] argument that the Plan has no authority to uphold *his* benefits, the H.R. Conference Report, 841-99th Congress (previously cited above), provides:

"In addition, the bill eliminates the requirement that a defined benefit plan establish an escrow account for amounts that would have otherwise been paid during the 18-month period. Instead, the plan administrator is required only to account separately for such amounts. If the deficiency is not cured, or the dispute not resolved within the 18-month period, ***all*** payments ***deferred*** during the 18-month period are to be paid to the person who would have received them if the . . . order had not been issued." [Emphasis Added].

This language again buttresses the argument that - at this time - the Plan only has a duty to segregate those amounts that may eventually become due to an alternate payee; nowhere is it suggested that the failure of the alternate payee to file a proper QDRO can block a participant's distribution from the plan.

The *Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree* that has been submitted in this case does not meet the qualification requirements of the Plan, but it does already include the amount or percentage of the participant's benefits to be paid to the alternate payee or the means by which that amount will be determined. The Plan, therefore, should at this point be able to separately segregate amounts that may become payable in the event a QDRO is ultimately filed with the Plan by [client's] former spouse.

Conclusion

[Client] and his ex-spouse divorced 5 years ago. It is the responsibility of the alternate payee to file a proper QDRO. ERISA's qualified domestic relations order provisions provide that an alternate payee may not enforce his/her right or interest in plan benefits until a qualified domestic relations order is obtained. (See *Files v. ExxonMobil Pension Plan*, 428 F.3d 478). The Plan's obligation is to *segregate and separately account* for any benefits which may become payable to an alternate payee; the Plan has no authority to deny [client] his pension benefits until a QDRO is filed with the Plan. For the foregoing reasons, the Plan should process [client's] application now, and begin paying his pension benefits.

Please contact me if you would like to discuss this matter further, and also if there are other reasons as to why the Plan cannot process [client's] pension application and begin paying out benefits immediately.

Respectfully submitted

David A. Bonello, Esq
Upper Midwest Pension Rights Project