

Get Serious

9th Circuit Announces New Doctrine Regarding Plan Amendments

By James P. Baker
and Barry Homer

On Aug. 31, the 9th U.S. Circuit Court of Appeals in *Bins v. Exxon*, 1999 U.S.App.Lexis 20779 (9th Cir. 1999), announced a new "serious-consideration" doctrine. The 9th Circuit shocked the employee-benefit community by announcing that, when employee-benefit plan amendments are under "serious consideration" by senior management, the company must disclose affirmatively material information about the amendments to plan participants and beneficiaries whom the employer should know the amendments will affect.

Ernie Bins was a 15-year Exxon employee. Several months before Ernie retired, he unsuccessfully attempted to confirm rumors that Exxon was planning to offer incentive retirement money to employees like him. In the fall of 1995, Ernie began nosing around to find out if Exxon planned to offer such a retirement-incentive plan.

Ernie asked everyone — his supervisors, his benefits counselor, a human-resources adviser and an Exxon attorney who was conducting a retirement-plan seminar. All of them told Ernie they knew nothing. Exxon was, however, studying this very issue. Fewer than two weeks after Ernie retired, Exxon announced precisely the type of retirement-incentive plan about which Ernie had inquired. On discovering the new plan, Ernie applied and was rejected. He sued.

Although the 9th Circuit confirmed that the "act of amending a pension plan does not trigger ERISA's [the Employee Retirement Income Security Act's] fiduciary provisions" (citing *Hughes Aircraft Co. v. Jacobson*, 119 S.Ct. 755 (1999)), it concluded that "providing information about likely future plan benefits falls within ERISA's statutory definition of a fiduciary act" (citing *Varity Corp. v. Howe*, 516 U.S. 489 (1996)).

The 9th Circuit explained, "Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan. See, e.g., ERISA Sections 102, 104(b)(1), 105(a). And administrators, as part of their administrative responsibilities, frequently offer

beneficiaries more than the minimum information that the statute requires."

The rule adopted by the 9th Circuit in *Bins* is a variation of the serious-consideration doctrine previously announced by the 3rd Circuit in *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533 (3rd Cir. 1996). "Serious consideration" identifies when a plan fiduciary must communicate with plan participants about a proposed plan amendment. Serious consideration takes place when senior management with the authority to implement the change discusses a specific proposal for purposes of implementation.

The 9th Circuit in *Bins* also expanded the serious-consideration doctrine so as to now require ERISA fiduciaries who have material information about a specific plan amendment under review for implementation to publish information about the proposal to plan participants whom the employer should know the amendment will affect.

Other courts of appeal have required a plan participant to ask a question about a proposed plan amendment in order to be protected by the serious-consideration doctrine. The 9th Circuit rejected this notion: "A rule penalizing a person who fails to ask the right question at the right time would have a number of bad consequences, not the least of which would be to penalize employees like Bins who work far from corporate or divisional headquarters and who are unlikely to have access to informal sources of information that may be available to more favorably situated employees."

The court concluded, "We therefore hold that, once an employer-fiduciary seriously considers a proposal to implement a change in ERISA benefits, it has an affirmative duty to disclose information about the proposal to all plan participants and beneficiaries to whom the employer knows, or has reason to know, that the information is material."

The key question for the 9th Circuit in Ernie's case was deciding when senior Exxon managers with authority to implement the change seriously considered the proposal. The 9th Circuit found that serious consideration of the retirement-incentive plan proposal occurred between the time Ernie asked his last question about it on Dec. 27, 1995 (at Ernie's retirement party when Ernie asked his supervisor's supervisor) and Ernie's retirement on Feb. 1, 1996 (finding that on or before Feb. 1, the specific proposal to change the plan went before those members of Exxon's management who could approve or implement the changes in the plan's benefits).

This new rule thus provides that, once a specific proposal is in the hands of senior managers who are responsible for employ-

ee-benefit-plan design issues and who ultimately will make the recommendation to change the plan, the plan's fiduciaries then must disclose the proposed amendment to the plan's participants and beneficiaries.

In a companion case, *Wayne v. Pacific Bell*, 1999 U.S.App.Lexis 20678, (9th Cir. 1999), this same panel of judges held that the serious-consideration doctrine applied with equal force to collectively bargained plans. In *Wayne*, the 9th Circuit ruled that management representatives have an affirmative duty to disclose to all plan participants any employee-benefit-plan proposals as they are made during the collective-bargaining process.

This new rule requiring affirmative disclosure of proposed plan amendments will have a direct impact on an employer's efforts to downsize through the use of severance or early retirement-incentive plans. Strict compliance with this new doctrine will make plan-design considerations transparent to plan participants. Although the 9th Circuit announced this new rule in connection with retirement-incentive plans, the court noted that the serious-consideration doctrine will apply to all employee-benefit plans.

Where do plan sponsors go from here? Are plan-design decisions now transparent? What can plan sponsors do to avoid disclosing all plan-design proposals?

The 9th Circuit in *Bins* warned employers that the new disclosure rule is quite "flexible" and aims to prevent "an employer's deliberate attempt to circumvent ERISA by carefully patterning its conduct so as to evade one of the three [serious-consideration] factors."

Plan sponsors can, however, enact several potential preventive measures:

- The plan amendment procedure should identify the person or entity responsible for making recommendations and the person or entity responsible for approving them. The procedure should also specify that amendment proposals will not receive serious consideration for implementation by the company unless a specific person or entity recommends it.

- Companies should consider limiting the number of alternative-plan-design proposals presented for consideration to senior managers.

- Actual steps taken in the plan-amendment process should be carefully documented (usually in the form of written minutes).

- Companies should consider using outside professionals in investigating or presenting plan-design proposals.

- Under appropriate circumstances, companies should consider the use of non-ERISA plans.

James P. Baker and Barry Homer are partners at Brobeck, Phleger & Harrison in San Francisco.