GREGORY S. MAGER NAMED EDITOR IN CHIEF OF WISCONSIN JOURNAL OF FAMILY LAW

Gregory S. Mager, an attorney with the law firm of Ansay OCHD, the Port Washington office of O'Neil Cannon, was recently named the editor in chief of the Wisconsin Journal of Family Law.

The Wisconsin Journal of Family Law is a quarterly publication of the Family Law Section of the State Bar of Wisconsin that provides practitioners with articles from preeminent lawyers, both nationally and locally, who provide innovative ideas and information on new developments in family law, as well as reviews of recent Wisconsin Supreme Court and Court of Appeals decisions.

Gregory is an associate at Ansay OCHD whose practice focuses on divorce, paternity, custody and placement, support, post-judgment matters, and mediation. He has Martindale-Hubbell's highest Peer Review rating of AV and received the 2004-2005 American Bar Association Section of Family Law Chair's Award, "For meritorious service exceeding what is expected of our leadership."

O'Neil Cannon is a full-service legal practice focusing on business law, estate planning, and major complex litigation with offices in Milwaukee and Port Washington. The firm was established in 1973 and is now listed as one of the Milwaukee-area's largest law firms.

BENEFITS UNDER SEVERANCE PLAN DETERMINED ON DATE EMPLOYEE STOPPED WORKING

Fifth Circuit Court of Appeals denies former Sabre, Inc. employee's claim that he was entitled to severance benefits determined on the date he was informed that he was to be terminated and not severance benefits determined on the date he actually stopped working.

Although the severance plan did not define the term "termination of employment" or explain when a termination of employment occurs, the Court found that the plan administrator was proper in its interpretation of the plan when it determined that Chacko's termination occurred when he officially separated from Sabre. Because of this, the severance plan that applied to Chacko was the one in effect on the date he officially separated from Sabre.

Ninan Chacko worked for Sabre, Inc. since 1990. In September 2003, he learned that the company intended to implement a company-wide layoff and on September 29, 2003 Chacko was informed that he would be offered a severance package. Chacko and his superior planned for Chacko's last day to be October 13, 2003. Soon after September 29, 2003, Chacko accepted an offer of employment by one of Sabre's competitors.

On September 29, 2003 Sabre maintained the Sabre, Inc. Severance Plan (the "General Severance Plan" or GSP) which provided for up to twenty-six weeks of salary benefits payable in a lump sum conditioned upon the execution by the terminated employee of an agreement and general release ("Agreement and General Release" or AGR) that released all causes of action and claims against Sabre and related parties. The GSP gave Sabre the right to terminate or amend the GSP at any time and further provided that participants had no vested right to benefits under the severance plan.

On September 30, 2003, Chacko received a separation summary outlining the terms of his severance package which stated that he would be offered thirty-two weeks of salary benefits payable over an eight-month period conditioned upon his signing a general release containing non-compete and non-solicitation provisions (the "Expanded AGR".) Chacko refused to sign the Expanded AGR believing that the non-compete and periodic payment provisions to be contrary to the terms of the GSP, On October 7, 2003, Sabre's Benefits Committee adopted a resolution amending the GSP to grant Sabre the discretion 1) to include non-compete and non-solicitation provisions in the terminated employee's AGR; and 2) to pay severance benefits in periodic installments (the "Amendment".) The resolution provided that the Amendment was effective immediately.

On October 17, 2003, Chacko officially separated from Sabre. On November 3, 2003 he filed a claim for severance benefits in which he indicated he was willing to sign an AGR that was consistent with the pre-amendment GSP (without the non-compete and non-solicitation provisions) and that he demanded payment of his benefits in a lump sum as opposed to periodic payments allowed by the Amendment.

On November 6, 2003, Sabre informed Chacko that the Plan Administrator had denied his claim for benefits based on the fact that on his termination date, the plan as in effect allowed for both the non-compete and non-solicitation provisions as well as payment of benefits in periodic installments. Chacko appealed to an independent appeals committee which denied his appeal on the grounds that 1) he had no vested rights under the plan in effect on September 29, 2003; 2) that the GSP granted Sabre the right to amend or terminate the GSP at any time; 3) that the October 7, 2003 amendment was validly executed; 4) Sabre had complied with ERISA's notice requirements regarding the amendment; and 5) Chacko was not eligible for the GSP in effect on October 17, 2003 because he refused to sign the Expanded AGR.

Chacko sued Sabre, the GSP, the Benefits Committee, the Plan Administrator and others claiming that he was wrongfully denied benefits under the GSP in violation of ERISA Section 502(a)(1)(B) which provides an ERISA plan participant or beneficiary a cause of action to recover benefits due him under the terms of the plan, enforce his rights under the plan or clarify his right to future benefits under the plan.

The district court granted Sabre's motion for summary judgment finding that the Plan Administrator's denial of benefits was not an abuse of discretion. Chacko appealed to the Fifth Circuit court claiming that Sabre et.al. engaged in "inequitable conduct" by offering him a severance package one day before the change adding the non-compete and non-solicitation provisions and changing the benefit payout option to installments. He also alleged that Sabre et al. breached their fiduciary duty of loyalty and engaged in self-dealing by conditioning his receipt of severance benefits upon his execution of a non-compete agreement. Chacko also challenged the Administrator's denial of benefits under the terms of the GSP, claiming that he should receive the benefits in effect as of the date he was told he would be offered a severance package (September 29, 2003) instead of the amended GSP in effect on the date he stopped working for Sabre (October 17, 2003.)

The Fifth Circuit Court affirmed the lower court's decision that the Plan Administrator did not abuse its discretion in amending the plan or in denying benefits to Chacko. The Court explained that in reviewing a plan administrator's plan interpretation for abuse of discretion, the Court must initially determine whether the administrator's interpretation is legally correct. If the interpretation is legally correct then no abuse of discretion could have occurred. Here, the Court found that the Administrator's interpretation of the term "termination" was consistent with the fair reading of the severance plan. Further, the Court indicated that the interpretation of the term "termination" proposed by Chacko would lead to the unintended result that employees could demand severance plan benefits while they were still receiving regular pay.

Chacko v. Sabre Inc., 5th Cir., No. 05-11445, 12/21/2006. The decision is available at http://caselaw.lp.findlaw.com/data2/circs/5th/0511445cv0p.pdf

Practice Pointer—Employers should take the time to review and understand the terms of their benefit plans, including the process and timing requirements for making plan amendments.

WILLIAM RYAN DREW ELECTED PRESIDENT OF CITY OF MILWAUKEE RETIREES ASSOCIATION

William Ryan (Bill) Drew, of Counsel to the law firm of O'Neil Cannon, was recently elected the President of the City of Milwaukee Retirees Association. The Association represents approximately 12,000 retirees of the City. Bill is also the current Executive Director of the Milwaukee County Research Park Corporation, where he is overseeing the high technology development on approximately 150 acres of Milwaukee County Property.

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ERISA PREEMPTS STATE LAW CLAIM FOR BREACH OF CONTRACT OVER ESOP BENEFITS

The Six Circuit Court of Appeals rules that ERISA preempts state law claims against Fifth Third Bank.

In a complicated set of facts, Suburban Bancorp and Fifth Third Bank entered into a merger agreement that contained language covering Suburban's ESOP because the ESOP held shares of Suburban. The merger agreement provided that Suburban obtain determination from IRS that the ESOP satisfied relevant tax regulations and perform several other tasks associated with the ESOP because of a concern of the tax implication of distributing the ESOP shares prematurely. Pending the determination by the IRS, the merger agreement provided that Suburban maintain the ESOP for the benefit of individuals who were ESOP participants on or before the merger (the class members.) The merger agreement also included a contingency plan for the ESOP that provided that if the parties agreed in good faith that allocating the ESOP shares would violate IRS rules, then Suburban would apply to the IRS for approval allowing the ESOP funds to either revert to Fifth Third Bank or be transferred to one of Fifth Third's benefit plans. The merger agreement further provided that if and only if the IRS approved the transaction allowing for the reversion or transfer of shares to Fifth Third, or if Fifth Third proceeded with the reversion or transfer without IRS approval, that Fifth Third would pay class members out of its own corporate assets the amount of money in the ESOP at the time of the merger less administrative costs.

Suburban started the process necessary to distribute ESOP funds to class members, but did

not finish the process or obtain the IRS determination regarding the tax issues. After the merger, Fifth Third, which became the successor ESOP sponsor and trustee, made amendments to the ESOP which effectively ensured that class members would no longer recover benefits from the ESOP. Thereafter Fifth Third terminated the ESOP distributing the proceeds to Fifth Third employees, and not to class members.

Hutchison, on behalf of the class members brought three types of claims—two of which were state-law claims relating to Fifth Third's breach of the merger agreement, misrepresentation and negligent misrepresentation as well as conversion and unjust enrichment relating to the alleged taking by Fifth Third of the ESOP's assets. The third claim was an ERISA claim. The lower federal court held that ERISA preempted the state law claims and dismissed the ERISA claim finding that Fifth Third did not breach any fiduciary duties owed to class members.

The appeal to the Sixth Circuit Court of Appeals only concerns the lower court's decision to dismiss the state law claims not the dismissal of the ERISA claim.

The Six Circuit Court affirmed the lower court ruling finding that the state law claims relating to Fifth Third's alleged breach of the merger agreement were preempted by ERISA because the necessary elements of the state law claims (amending the plan to exclude class members) go to the heart of what Congress intended ERISA to govern. They ruled so even though some of the elements of the state law cause of action came into existence before Fifth Third was an ERISA fiduciary to the ESOP. The court concluded that because the class members sought damages for ERISA-regulated actions of an ERISA fiduciary, based on the merger agreement entered into before Fifth Third became a plan fiduciary, the state law contract claim would bind fiduciaries to particular choices, thereby functioning as a regulation of an ERISA plan.

Hutchison v. Fifth Third Bancorp, 6th Cir., No. 05-4389, 11/30/2006.
http://www.ca6.uscourts.gov/opinions.pdf/06a0448p-06.pdf

This is a reminder that as noted by the court here, ERISA is comprehensive and preempts virtually any state law claim relating to an employee benefit plan.