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EXECUTIVE MISCONDUCT: RECOVERING AMOUNTS FROM BENEFICIARY FOLLOWING DEATH

by
John L. Utz
Utz, Miller & Kuhn, LLC
jutz@utzmiller.com

A recent trial court decision serves as a reminder that it is easier to refuse to pay an amount than to recover it once it has been paid! The case is *Miniace v. Pacific Maritime Association,* 2007 WL 963160 (N.D. Cal. 2007). In *Miniace*, the court considered payments made to a beneficiary of a deceased executive under a split dollar life insurance arrangement. The payments were in dispute because they were made under an improperly adopted plan amendment. The deceased executive, who was the company's chief financial officer, and the company's chief executive officer had strung together a series of misdeeds, some of which involved the plan. As to the CEO, he had approved substantial compensation and benefits for himself and the CFO without properly informing the company's board of directors. The CEO was subsequently terminated. In an earlier decision, the court concluded that the company had, as a result, terminated the CEO for cause and the CEO was, therefore, not entitled to severance benefits. *Miniace v. Pacific Maritime Association*, 424 F.Supp.2d 1168 (N.D. Cal. 2006).

Among the items of unauthorized compensation were a split dollar insurance program. Under that program, the company was entitled to receive certain amounts (under life insurance policies) upon the death of a covered participant, with the balance of any insurance benefits to be paid to the participant's beneficiary. When the CFO was diagnosed with pancreatic cancer, the CEO signed an amendment to the plan and, along with the CFO, signed documents to amend the CFO's related split dollar agreement, to substantially increase the portion of the death benefits payable to the CFO's surviving spouse. This had the collateral result of substantially reducing the amount to be recovered by the company.

The company made various claims for equitable relief under ERISA Section 502(a)(3), in an attempt to recover the benefit payments made to the surviving spouse. Although the court concluded that the CEO and CFO breached their corporate fiduciary duties when they established the program without fully and accurately disclosing it to the board of directors (or appropriate board committee), they did not breach their *ERISA* fiduciary duties by establishing or funding the program because those acts were settlor, not fiduciary, in nature.

Although the creation and funding of the program did not constitute an ERISA fiduciary breach, the court concluded that the CEO and CFO did breach their ERISA fiduciary duties by amending the plan to increase the death benefit payable to the CFO's surviving spouse. (This conclusion seems questionable since the adoption of a plan design amendment is typically considered a settlor, not fiduciary, act.) Even though the amendment was the result of a fiduciary breach, the company was not able to recover the benefits paid to the CFO's

surviving spouse. That is because the company's claims were for equitable relief under ERISA Section 502(a)(3), and each of those claims failed. The company put forth three arguments in support of its claim for equitable relief. The first was that the surviving spouse received a benefit as a result of fraud or serious wrongdoing, and it would be unjust for her to retain that benefit. The second was that the company was entitled to rescission of the amendment increasing the surviving spouse's benefit. The third was a claim for equitable reformation of the plan, to conform it to the terms and intent of the original plan document.

The court rejected these arguments, in large part because it considered the surviving spouse to be an innocent party. It concluded that it would not be unjust for the surviving spouse to retain the benefit because she was not involved in the creation of the plan nor in the amendment of the plan that resulted in the increased benefit. There was no evidence that she had acted improperly in any way. The court also found it noteworthy that even under the plan as amended, the company recovered more than the principal amount it had paid in premiums and, therefore, suffered no out of pocket loss (disregarding the time value of money). In addition, the court seemed swayed by indications that the company generally intended that upon a participant's retirement, the company would voluntarily reduce or eliminate its interest in the plan's death benefits. The court concluded that it would not, therefore, be inconsistent with the nature of the plan for the company to give up a part or all of the premiums it had paid (or, presumably by extension, other amounts it could be entitled to receive).

Conclusion. *Miniace* is a reminder of the limitations of equitable relief under ERISA following *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). For executive compensation programs subject to ERISA (the *Miniace* plan recited that it was a welfare plan under ERISA), the message of *Great West* and the standard of review cases is primitive: those who hold disputed monies are more likely to win, independent of their virtue.

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Utz Miller & Kuhn, LLC
13200 Metcalf
Suite 230
Overland Park, KS 66213

Phone: 913.685.0970
Fax: 913.685.1281

Gregory B. Kuhn
gkuhn@utzmiller.com
Phone: 913.685.0774
Fax: 913.685.1281

Eric N. Miller
emiller@utzmiller.com
Phone: 913.685.8150
Fax: 913.685.1281

John L. Utz
jutz@utzmiller.com
Phone: 913.685.7978
Fax: 913.685.1281

Matthew J. Eickman
meickman@utzmiller.com
Phone: 913.685.0749
Fax: 913.685.1281

www.utzmiller.com

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