



Navigating Pension Plan De-Risking: Significant Implications to Employers and Retirement Policy

Presented By:

THE KNOWLEDGE GROUP
LIVE & RECORDED WEBCASTS | LEGAL | TAX | FINANCE | RISK | COMPLIANCE & HR
Know. Lead. Succeed

Partner Firms:



Speaker Firms and Organization:

Penbridge Advisors
Robert Goldbloom
Principal

Kilpatrick Townsend & Stockton LLP
Sarah N. Lowe
Partner

Millennium Trust Company
Terry Dunne
Managing Director

Felhaber Larson
Ruth S. Marcott
Shareholder


Thank you for logging into today's event. Please note we are in standby mode. All Microphones will be muted until the event starts. We will be back with speaker instructions @ 02:55pm. Any Questions? Please email: info@theknowledgegroup.org

Group Registration Policy

Please note ALL participants must be registered or they will not be able to access the event. If you have more than one person from your company attending, you must fill out the group registration form.

We reserve the right to disconnect any unauthorized users from this event and to deny violators admission to future events.

To obtain a group registration please send a note to info@theknowledgegroup.org or call 646.202.9344.



SEGMENT 4:
Ruth S. Marcott
Shareholder
Felhaber Larson


FELHABER LARSON
ATTORNEYS AT LAW

Introduction


Ruth Marcott, a shareholder at Felhaber Larson in Minneapolis practices commercial law, specializing in employee benefits advice and litigation.

In the area of benefits, she provides advice on compliance with federal and state benefits laws (ACA, IRC, ERISA, MPPAA) governing qualified retirement plans, non-qualified plans, health plans and welfare plans. She advises numerous Taft-Hartley Multiemployer Plans, as well as employer-sponsored plans. She litigates ERISA actions, fiduciary claims, multiemployer pension withdrawal liability arbitrations, and executive compensation claims. She defends audits or investigations by the DOL or the IRS. She has assisted employers and independent fiduciaries in structuring and effectuating de-risking strategies.

Ruth is a graduate of the University of St. Thomas and the University of Minnesota Law School.



SEGMENT 4:
Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  **LARSON**
ATTORNEYS AT LAW

The Risk of De-Risking – Litigation/Regulation

Litigation - the lessons from the Lee v. Verizon series of cases

- Lee v. Verizon is a class action challenging Verizon's decision to purchase a single premium group annuity contracts from Prudential insurance company to settle the pension claims of approximately 41,000 pensioners.
 - 41,000 pensioners transferred out of the Pension Plan. The **Transferee** Class (Lee)
 - 50,000 participants remained in the plan. The **Non-Transferee** Class (Pundt)
- The case was brought in the N.D. of Texas – Dallas Division, federal district court.
- The district court dismissed the plaintiffs' complaint twice and the 5th Circuit Court of Appeals affirmed.
- But, the case is not over – the U.S. Supreme Court vacated the 5th Circuit's recent decision and remanded.
- The story and allegations provide a good outline discussion for litigation in this area. Here is the story:



SEGMENT 4:

Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  LARSON
ATTORNEYS AT LAW

Lee I

Lee v. Verizon Communs., Inc., No. 3:12-CV-4834-D, 2012 U.S. Dist. LEXIS 173559 (N.D. Tex. 2012)

- August 2012 – Verizon hires an Independent Fiduciary (IF) to review annuity purchase.
- September 2012 – IF opines transaction complies with ERISA.
- October 2012 – Plan is amended to allow annuity transaction. Notice to Transferee Class is sent shortly thereafter.
- November 27, 2012 – Plaintiffs file complaint and bring a motion for a TRO and Injunction
- Motion for TRO denied. No probable chance of success on the merits.
- December 2012 – Transaction closes. \$8.4 billion paid to Prudential to settlement \$7.4 billion in Transferee obligation.



SEGMENT 4:

Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  LARSON
ATTORNEYS AT LAW

Lee II

Lee v. Verizon Communs., Inc., 954 F.Supp.2d 486 (N.D. Tex. 2013)

- Court dismisses Plaintiffs complaint, but gives them leave to replead.
- **Transferee Class Claims:**
 - SPD violated ERISA Section 102(b) (circumstances resulting in loss of benefits). No disclosure of possible annuity purchase or transfer to an insurance company.
 - Court dismisses allegation. No “loss of benefits.” Mere change of source of benefits.
 - Breach of Fiduciary Duty (ERISA Section 404(a)).
 - All pensions transferred to one insurance company only.
 - \$7.4 Billion in plan assets transferred when plan was 80% funded.
 - \$1 billion paid to third parties out of plan assets.
 - None of these show a breach of fiduciary duty claim. Amending plan is a Settlor Function. Implementing may be a fiduciary function, but no breach alleged.
 - Discrimination (ERISA Section 510). Retirees taken out of plan, while others stay in.
- **Non-Transferee Class Claims:**
 - Breach of Fiduciary Duty. \$1 Billion fee excessive.
 - Dismissed. No standing. No proof of pension reduction or damage.



SEGMENT 4:


Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  LARSON
ATTORNEYS AT LAW


Lee III

Lee v. Verizon Communs. Inc., 623 Fed. Appx 132, 2015 U.S. App. LEXIS 14588 (5th Cir. 2015), aff'g 2014 U.S. Dist. LEXIS 50083 (N.D. Tex. 2014).

- Plaintiffs restated their complaint. The District Court dismisses it in its entirety and the 5th Circuit affirms. As replead, here were Plaintiffs arguments:
- **Transferee Class Claims**
 - SPD fails to disclose possible transaction or amendment. “Loss of benefits” is not just dollars and cents, it includes ERISA and PBGC protection, which is lost with annuity transaction.
 - Court rules there is no requirement to disclose the possibility of an amendment. Only need to disclose an amendment when it happens, which the company did.
 - Company followed regulatory guidelines on annuitization. PBGC and DOL contemplate in their regulations that benefits may be annuitized and taken out of their protection.
 - Breach of Fiduciary Duty. Transaction is not for the exclusive benefit of participants. Fees were excessive and paid by plan, not sponsor. No opportunity to accept or reject annuity.
 - All of this relates to Settlor functions. “...we consider the decision to transfer pension assets outside ERISA coverage as a sponsor decision immune from fiduciary obligations.”
 - Do not need to keep annuities in the ERISA pension plan.



SEGMENT 4:
Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  **LARSON**
ATTORNEYS AT LAW


Lee III Cont.

Transferee Class Cont.


- Breach of Fiduciary Duty, cont.
 - No need to get participant consent.
 - No requirement of communication with participants, other than Notice which participants received.
 - \$1 Billion expense did not rise to a claim.
 - No allegations as to why the expenses were unreasonable or how.
 - Okay for Plan to pay cost as it was the cost of implementing a settlor decision.
 - Notes that plaintiffs waived argument related to plan funding.
 - No need to pick multiple annuity providers. Rather, must pick an annuity provider who will best meet the obligation.
- No valid discrimination claim under ERISA.

Non-Transferee Class

- No constitutional standing
 - No alleged harm to remaining participants. No direct harm to their benefit.
 - No direct harm to the plan.



SEGMENT 4:
Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  LARSON
ATTORNEYS AT LAW

Lee IV?

Pundt v. Verizon Communs., 2016 U.S. LEXIS 3389 (U.S. May 23, 2016).

- Vacates the 5th Circuit decision. Remands for reconsideration based on its Spokeo decision
 - Must allege a “concrete” harm. Some, including plaintiffs, believe this broadens the ability to allege harm where a plan is underfunded and expenses are high.

5th Circuit again dismissed all claims on remand:

- Lee v. Verizon Communs., 2016 U.S. App. Lexis 16929 (September 15, 2016).



SEGMENT 4:


Ruth S. Marcott
Shareholder
Felhaber Larson




Lessons from Lee?

Avoiding Litigation from De-Risking

- Good Communication – and keep the communication going.
- Consider providing a lump sum? May not be possible for retirees.
- Consider the Plan's Funding status.
- Independent fiduciary - Have them opine on the impact of the de-risking on remaining participants and to the departing participants.
- Consider more than one annuity company????
- Plan Sponsor pay the cost of the de-risking implementation, rather than the plan
- Keep an eye on the de-risking costs



SEGMENT 4:
Ruth S. Marcott
Shareholder
Felhaber Larson

FELHABER  **LARSON**
ATTORNEYS AT LAW

Regulatory Compliance

Regulatory Agencies Weigh In

- PBGC
 - Additional reporting on de-risking in their forms
 - De-risking leads to higher PBGC premiums
 - PBGC has issued reports that 1 million participants are impacted by de-risking. 2012 was the watershed year for de-risking, when transactions affected 621,169 participants. (The Pension Rights Center called for a moratorium on de-risking transactions.)
- IRS
 - Notice 2015-49 – voices concern of using lump sum payouts with retirees.
 - PLRs allowing retiree lump sums to be used only narrowly.
- New DOL fiduciary rules?
- Other DOL involvement?