ACTUARIAL EQUIVALENCE LAWSUITS UPDATE: DEFENDANTS EARN A WIN AS PEPSI IS GRANTED MOTION TO DISMISS

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PepsiCo, Inc. (Pepsi) is the sponsor of a defined benefit pension plan. Like several other prominent sponsors of defined benefit pension plans, Pepsi was named as a plaintiff in an actuarial equivalence lawsuit that alleged problems with the actuarial equivalence assumptions and factors used to calculate plan benefit payouts. In this case, a group of plan participants who elected early retirement benefits initiated the lawsuit. For early retirees who are entitled or elect to receive a benefit in a form other than a single life annuity (SLA) – for example, a joint and survivor annuity – the benefit paid by the plan must be an actuarially equivalent benefit to their accrued benefit expressed as an SLA. The plaintiffs alleged that the fixed conversion factors used by Pepsi's plan to convert a participant's benefit expressed as an SLA to an alternative form of benefit left the plaintiffs worse off than if the Pepsi plan had determined actuarial equivalence "using reasonable market rates and mortality tables," thus depriving them of benefits in violation of ERISA's anti-forfeiture provisions.

Pepsi filed a motion to dismiss the various claims contained in the plaintiffs' complaint. While the court rejected Pepsi's argument that the plaintiffs' claims fail as a matter of law because they do not arise under ERISA, the court ultimately granted Pepsi's motion.

As to the plaintiffs' claim that the plan violated ERISA's anti-forfeiture provision, the court sided with Pepsi because the ERISA provision cited by the plaintiffs applies only to normal retirement benefits upon the attainment of normal retirement age. Because no plaintiff is alleged to have attained normal retirement age, and because there is no allegation that defendants deprived plaintiffs of the full amount of pension payments they would achieve at normal retirement age, the court found that the plaintiffs failed to adequately plead that the anti-forfeiture provision applies. The inadequate pleadings with respect to violations of ERISA's anti-forfeiture provision also provided the basis for the court to dismiss the plaintiffs' claims based on a breach of fiduciary duty. Without adequate pleadings as to the forfeiture claim, the breach of fiduciary duty claim also failed as a matter of law.

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Prior to the decision in the *Pepsi* case, plaintiffs had managed to avoid having their cases dismissed in similar lawsuits brought against U.S. Bancorp and American Airlines. Whether the outcome in the *Pepsi* case signals a significant momentum shift in these actuarial equivalence cases is unclear. The issues decided in the *Pepsi* case are somewhat narrow and may not have much application in other similar lawsuits. It is noteworthy that some of the fundamental claims that are backstopping the recent spate of actuarial equivalence lawsuits are not substantively dealt with by the court in the dismissal of the *Pepsi* case, including the issue of whether ERISA affirmatively requires actuarial assumptions to be reasonable. *DuBuske v. PepsiCo, Inc*. (SDNY 2019).

It is also worth noting that new lawsuits alleging violations of ERISA actuarial equivalence requirements continue to be filed. AT&T now joins a growing list of prominent plan sponsors who are being sued, where the fundamental claim in the new AT&T lawsuit alleges that defined benefit plan calculations related to early retirement benefits as well as joint and survivor benefits use outdated assumptions or factors that cause participants to receive benefits that are less than the actuarial equivalent of their vested accrued benefit.

The law in and around the claims made in the actuarial equivalence lawsuits is still far from settled and future court decisions bear careful monitoring. In the meantime, we expect that the list of plan sponsors who could face actuarial equivalence lawsuits will continue to expand.