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Murphy, et al. v. Verizon, et al., Case Headed to Appeals Court

Last week, after almost two years, Senior Judge A. Joe Fish of the Dallas federal court issued his long- awaited decision in the class action case brought by 2,750 retirees Verizon surreptitiously transferred to Idearc/SuperMedia during the November 2006 spin-off. Considering that Judge Fish is not one to create new and novel case law, he and his staff of law clerks devised a not-surprisingly conservative ruling in favor of the corporate entities and against the interests of retirees. From the very beginning of the Murphy case, we knew it would most likely be for an appellate court to decide. Indeed, because it is a case of first impression, the novel legal claims were destined for deliberation and decision at the appellate court level.

So, after two years of waiting, we now have a final decision and we are headed to the U.S. Fifth Circuit Court of Appeals based in New Orleans. A copy of Judge Fish's September 16, 2013 Memorandum Decision and Order is posted at the Association's website: <http://www.belltelretirees.org/images/Docket138-MemornadumDecisionforVerizonSuperMedia091613.pdf> You are encouraged to read it (53 pages).

I will briefly explain how Judge Fish dealt with each of the primary claims that comprised the Murphy class action and point out some of the glaring injustices and erroneous attributes of his rulings.

Facts. Within the first 13 pages of his decision and order, Judge Fish and his staff of law clerks do a fairly good job of summarizing some of the important facts and the convoluted procedural history of the case started almost four years ago in November 2009. However, he and his law clerks selectively downplayed material facts adverse to the interests of the corporations, and I will point out a few examples in that regard, as I explain the outcome of the claims.

Breach of Fiduciary Duty Claim. We contend that although the rules of the Verizon pension plans specifically allowed the corporation to transfer surplus "assets" and "liabilities" to another pension plan, "persons" are neither, and there were no rules in place when the spin-off occurred to allow persons to be transferred out of the pension plans. The rules that purport to allow the corporation to transfer retirees did not come into existence until weeks after the fact. Hence, Verizon's conduct violated the well established "plan documents rule." Incredibly, Judge Fish took a position that wasn't even argued by our opponents. Judge Fish avoided

dealing with our argument about improper retroactive application of the new rules. Instead, he seized upon the notion that Verizon always had the ‘implicit’ right to transfer any retirees. But, there is no legal authority for that position, again, one not even argued by Verizon’s counsel. Our breach of fiduciary duty claim will be the center piece of the appeal proceedings.

No Prior Disclosure to Any of the Retirees that a Spin-off Could Cause Loss of Continued Participation in Verizon's Pension Plans. Judge Fish agreed with our position that a spin-off situation was never specifically listed within any summary plan description (SPD) as a disclosed circumstance that could result in any retiree's loss of continued participation in a Verizon sponsored pension plan. However, he went out of his way to rule it was enough for the corporation to simply state within the SPDs that the company reserved the right to make changes in the future. So, he totally dismissed our well-reasoned contention that the SPDs failed to comply with ERISA's mandate and a specific requirement of an important U.S. Department of Labor regulation. Judge Fish erroneously ruled that, since the company said it could make changes to its pension plans, any reasonable retiree would know that would include the possibility of his or her being selected for removal from a Verizon pension plan and transferred to another corporation’s pension plan. Since all of you retirees are reasonable persons, did any of you understand that, after you retired, a possible circumstance whereby you could be removed from a Verizon pension plan would be if the company picked you out to be removed and transferred? Of course, there is no such evidentiary testimony in the convoluted *Murphy* case court record.

Plan Fiduciaries’ Prohibited Involvement On Behalf of the Corporation. We directly asserted an ERISA statutory prohibition against fiduciaries involving themselves in a transaction that benefits the corporation at the expense of the retirees, plan participants and beneficiaries. Members of the Verizon Employee Benefits Committee (VEBC) improperly engaged in conduct favoring the corporation over the interests of retirees. All of this happened even though both an independent fiduciary hired by Idearc and Idearc's soon-to-become leaders urged Verizon's leaders not to transfer the retirees. ERISA Section 406(b)(2) specifically says that a fiduciary acting in his or her individual or any other capacity cannot serve to undermine the best interests of the plan, plan participants and beneficiaries. It is a plainly worded statute. Nevertheless, Judge Fish and his staff of law clerks did not follow plain language. Judge Fish ruled that since VEBC was not acting in a fiduciary capacity when it served to help out Verizon, it did not violate the statute. This may prove to be the most glaring error in Judge Fish’s rulings. And, indeed, appellate courts exist to correct errors made by trial court judges.

Failure to Provide a Full and Fair Review During Administrative Process Before the Lawsuit. Of course, before we filed the *Murphy* class action, we went through a convoluted pre-court administrative claims process to no avail. And we contend that both Verizon and SuperMedia unfairly denied the complaining retirees a full and fair review. But, Judge Fish ruled that a full and fair review is only required when someone makes a claim for payment of benefits. And he refused to characterize our efforts as requiring a full and fair review because we sought removal from the Idearc/SuperMedia benefit plans and reinstatement into Verizon benefit plans and payment of those benefits. Alas, Judge Fish opined that since we were not making a claim for payment of SuperMedia sponsored benefits, neither corporation had any

obligation to give the retirees a full and fair pre-court review of their claims. This, too, is a claim of first impression – there is no other established case law directly on point. The matter will have to be grappled with by the federal appellate court.

Claim for Appropriate Equitable Relief. We contend that, in view of all the misconduct by plan fiduciaries, the retirees ought to be granted appropriate equitable relief and ordered reinstated into Verizon’s benefit plans. Judge Fish did not give any weight to the evidence we presented that both Idearc’s independent fiduciary and Idearc’s soon-to-become leaders urged Verizon leadership not to transfer the retirees. In short, Judge Fish’s ruling wholly favors the corporate switch of retirees from Verizon to Idearc and he offered no analysis as to our request that he enter judgment in favor of the retirees.

Not one time during the four year trial court process did Judge Fish allow for a public hearing whereby the lawyers could present oral arguments and the retirees attend a court proceeding.

What Next? Within the next 30 days we will timely start the appeals process and take the case to the U.S. Fifth Circuit where it will be decided by a panel of three federal appeals judges. The Association will keep you updated as we go through the many months long process.


Curtis L. Kennedy