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Lee, et al v. Verizon, et al., – (Retirees Who Were Transferred to Prudential) Judge Rules to Dismiss Claims and Allow an Amended/Corrected Complaint

This update report is about the latest development in the *Lee v. Verizon* case pending in the Dallas federal court. The class action case is being ruled upon by Chief Judge Sidney Fitzwater. Just like in divorce court, there is no jury trial in cases of this nature. We previously reported that Judge Fitzwater ruled that he would not stop the Verizon/Prudential transaction from going forward. Therefore, the transaction was hurriedly completed on or about December 10, 2012. We continued forward with the case, rightfully contending the transaction was not in the best interests of all retirees and is contrary to the entire ERISA statutory and regulatory scheme set up by Congress and the U.S. Department of Labor. We pressed forward with a complaint asserting four separate federal claims. There has been extensive legal briefing/arguments about the four claims.

On June 24, 2013, Judge Fitzwater issued a 24 page decision in which he addressed the four pending claims. The court's ruling is posted at the Association's website:

In the first claim asserted in the *Lee v. Verizon* case, we contend Verizon failed to make an important necessary disclosure in a summary plan description ("SPD") that one of the circumstances that might result in a retired person losing benefits paid under the Verizon Management Pension Plan would be a transfer out of the plan into an insurance company provided annuity. We claim that Verizon should not have been allowed to transfer the selected group of retired persons, unless the entire plan was ended and all retirees were equally treated and transferred out of the pension plan. Verizon transferred 41,000 persons out of the plan and over to Prudential. However, Verizon left behind in the pension plan about 6,000 other retirees and, of course, all active employees. A total of more than 50,000 persons were left in the pension plan with all federal protections left in-tact, almost 41,000 persons removed, losing all federal protections.

We contend that certain Department of Labor regulations don't allow this to occur and, since Verizon hadn't previously disclosed such a situation might occur, the transfer should not have occurred. However, Judge Fitzwater gave a different interpretation to the federal regulation. He ruled there has been no loss of benefits, only a change in the payer (i.e., Prudential in the place of Verizon). However, there has been a loss of *benefits*, even though each person is still receiving the same monthly dollars and cents payment. What we want is for the court to see that there has been a loss of benefits in the fact that all persons transferred no longer receive ERISA protections and rights and that they have lost the pension protection provided by the Pension Benefit Guaranty Corporation ("PBGC").

We want to persuade the court to see our position that "benefits" is not just dollars and cents, but includes the federal protections under ERISA, including the uniform financial guarantee provided by the PBGC. Also, we want the court to recognize that even Verizon has taken the position that it must disclose all circumstances under which a person could lose benefits or be removed from the plan. For instance, Verizon has disclosed that should there be a 'spin-off' or transfer of part to the plan into a different plan sponsored by a different corporation, that situation must be disclosed. So, we contend Judge Fitzwater made an error. Verizon never previously disclosed the possibility that, long after retirement, a person could be involuntarily removed from the pension plan and dumped into the hands of an insurance company.

In the <u>second claim</u> asserted in the *Lee v. Verizon* case, we contend Verizon breached ERISA fiduciary duties to act in the 'best interest' of retirees. However, Judge Fitzwater opined that the decision to transfer the retirees is not subject to ERISA's requirements. Judge Fitzwater ruled that when a company makes a decision to amend a pension plan and, consequently, transfer retirees out of the pension plan, the decision is a 'settlor' decision and is not a 'fiduciary' decision. Only 'fiduciary' duties are subject to scrutiny under ERISA's strict standards. In contrast, 'settlor' duties are not subject to ERISA's protective requirements. For instance, a decision to end a pension plan and send everyone into an insurance annuity is a settlor decision, not challengeable under ERISA. But, that is not what happened here.

Verizon's treatment of retirees is not the same as when GM ended its management pension plan last year and gave everyone a choice: 1) take a lump sum payment of all monies owed; or 2) be transferred to Prudential Insurance Company had have that entity make continued monthly payments. Indeed, what happened to Verizon retirees is entirely unique. Not everyone was treated the same, and the pension plan continues on for at least 50,000 persons, all of whom continue to receive federal protections, including the PBGC's uniform financial guarantee.

We want the federal courts court to see that the second claim we asserted in the *Lee* case involves more than just making an amendment to cause a change to a pension plan. Here, Verizon implemented the amendment by unwisely putting everyone into the hands of a single insurer. Who can seriously say that Prudential is 'too big to fail'? Only a few weeks ago, a federal regulatory agency, the U.S. Treasury's Financial Stability Oversight Council, voted to

designate Prudential as a "systemically important financial institution" because Prudential could trigger massive financial havoc to the whole nation should Prudential's economic fortunes change. Prudential plans to challenge that designation because, if it sticks, it will require Prudential to be subject to potentially onerous new regulatory requirements. Prudential does not want federal oversight put in place.

In addition to our concerns that Verizon may have foolishly put too many eggs in one basket, we want to impress upon the federal courts that Verizon pension plan fiduciaries unwisely used $8.4 billion in pension plan assets to purchase a group insurance annuity, but decided not to keep the group insurance annuity as part of the pension plan. It would have been better to keep all that money under the auspices of the pension plan, just like making a major purchase of downtown buildings and shopping centers with pension monies, something that happens routinely. Had the pension plan maintained ownership of the group insurance annuity, everyone – all 41,000 persons – would maintained all of ERISA's protections, together with the uniform financial guarantee provided by the PBGC. Because the group insurance annuity and all the monies used to make the purchase are no longer part of the pension plan, everyone has lost all federal protections and the uniform PBGC guarantee. Coincidentally, by kicking 41,000 persons out of Verizon's management pension plan, the corporation avoided having to pay this year $1.7 million in premiums to the PBGC. Each following year, Verizon saves even more by avoiding the PBGC's premium charges assessed for each person who is in a pension plan.

The patchwork of loosely regulated and unequal state insurance protections now in affect for the 41,000 transferred persons is woefully inadequate, a discussion which is better explained in the pending complaint filed in the *Lee v. Verizon* case and posted at the Association's website.

In the third claim asserted in the *Lee v. Verizon* case, we contend that Verizon engaged in unlawful discrimination against one group of retirees while giving more favorable treatment to another group of retirees, Judge Fitzwater opined that we haven't pointed out a viable right that Verizon has interfered with. But, we did. And we will re-emphasize that the right to stay in the pension plan and receive all federal protections and the uniform guarantee provided by the PBGC is a viable right. The claim, as well as the whole case, is one of first impression in the country. Unfortunately, conservative federal judges are loathe to make new law and they defer that job to the appellate courts, which is where the *Lee* case may, ultimately, be headed.

Finally, with respect to the fourth and final claim asserted in the *Lee v. Verizon* case, we contend that Verizon wrongfully used over $1 billion of pension monies to pay excessive and improper expenses in order to rush the transaction through completion last December. Judge Fitzwater opined that we did not specify which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable—e.g., that the legal fees exceeded the reasonable rate for similar work or that any commissions exceeded the market rate.

Therefore, we will make a more detailed clarification that, regardless of whether the lawyers were paid a market rate of $1,000 per hour (was that really necessary?), none of those legal fees should have been charged to pension plan funding. When Verizon chooses to, willy-

nilly, pay high dollar rates for lawyers, consultants, actuaries and just about anyone who wants to make a phone call now and then, that expense should be charged to company revenues, not charged to the trust fund that was established so as to make pension payments to retirees.

At the end of his memorandum decision, Judge Fitzwater ordered that he was allowing the plaintiffs and retirees one more opportunity to file a new amended complaint and try to improve the claims and correct some of the problems he perceived and pointed out in his order. We are allowed to file what will be called the "Second Amended Complaint" on or before July 24. Naturally, we will get that work done, as we are not ready to give up the ghost and be forced to take the case to the next level, which is an appeal to the Federal Fifth Circuit Court of Appeals based in New Orleans.

In summary, while the Chief Judge of the Dallas federal court has issued his present order to dismiss all four claims asserted in the *Lee v. Verizon* case, we will use our opportunity and soon submit a Second Amended Complaint. That new court document will be posted at the Association's website. And there will be further news updates.

Curtis L Kennedy