
The *Compass* Box

The Newsletter for Professionals Serving Professionals

***** SUMMER 2007 NEWSLETTER *****

Executive Employment Law Seminar Series

Please join us for a breakfast seminar series presented by Alan G. Crone, Esq. Chair of the Crone & Mason Executive Employment Law Practice Group

All seminars held at The Crescent Club. Breakfast buffet begins at 7:00 AM. Registration is \$25 per person. Space is limited, so call 901.683.1850 to reserve your seat today!

(see seminar details on back panel)

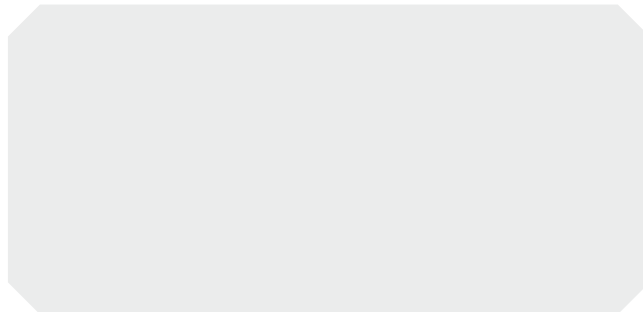
Tuesday, September 18, 2007:
COMPENSATION, BENEFITS, AND COMMISSIONS
(7:30 AM to 9:00 AM)

Thursday, September 20, 2007:
RETALIATION AND WHISTLE-BLOWING
(7:30 AM to 9:00 AM)

Thursday, September 27, 2007:
NON-COMPETES
(7:30 AM to 9:00 AM)

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Commissions and Disputes

By Alan G. Crone

In this edition of the Compass Box we provide you, the reader, with some in-depth information on various legal issues surrounding compensation and benefits. Folks who receive a salary or hourly rate compensation on a W-2 have fairly straightforward compensation arrangements with their employer. Disputes rarely arise in this type of arrangement outside of overtime claims or claims of unfairly or illegally “docking” paychecks for various reasons.

Very often, however, disputes do arise when companies seek to pay commissions, blended-commissions, shares or percentages of profits/fees, piece rates, or other similar schemes. These types of arrangements can come with many pitfalls. To avoid disputes, companies and workers must have a clear understanding of the arrangement and agree on the details and definitions involved. Also, they must take great care to properly classify the status of the worker as an employee or independent contractor for tax purposes. It is very helpful to have a written agreement or policy which clearly spells out the terms, definitions and practices which govern the relationship.

Many companies want to give an incentive to certain employees to work hard to produce by offering to pay them on a commission basis or give cash incentives when they reach

certain production or efficiency goals or targets. This can be a great “win/win.” Costly disputes can arise when the company and the worker have differing expectations concerning how these arrangements will play out.

When the company and the employee do not share the same expectations of how the commission or bonus will be calculated, costly disputes arise. Both parties should have the same answers to the following questions:

- Which sales are covered by the agreement?
- How is the commission calculated?
- What expenses are included as “overhead?”
- Does the percentage change, and if so, when?
- Can the company unilaterally change the structure?
- What happens if more than two sales people are involved?
- Are there “house accounts” which “don’t count” for commission purposes?
- What does the salesperson have to do to earn a commission?
- Does it matter where the customer is located?
- What happens if a customer cancels all or part of a sale?
- When will the commission or bonus be paid?
- Will the commission or bonus be paid if the sales person is no longer working for the company?

There are many more possible issues. Suffice it to say that when a company does not pay a commission or bonus as the worker expects, a claim can arise. How the commission or bonus plan is explained and documented is very important. When a claim arises, it can rise and fall on the documents which pass between the parties.

For example, Sandy Seller is a commission-only salesperson for an insurance agency. She worked hard for several months to open a large account. When it came time to pay her commission, the insurance company paid her less than half of the commission she expected. The company said that she was not listed as “the opener” on the account because another agent had called on the company the year before and it was outside her territory. The company had no written policy on how an opener is defined and her territory was only verbally described to her as all of the Memphis

“Seamen learn to get to know each other during a storm.”

-Corsican Proverb



area. The customer's main office is in West Memphis, Arkansas but it has branches in the city of Memphis and other places.

Sandy will have an excellent claim for the difference between the commission she expected and the one the company paid, but it could be a long and costly lawsuit for both parties. Both sides would have been better served by agreeing on the front end under what circumstances this kind of commission would be paid.

Salespeople are not the only ones who have these types of arrangements. Managers and directors are sometimes compensated on the basis of the production or efficiency of their branches, stores, or departments. Claims arise when payment does not meet expectations.

A department manager complained that every year he "just misses" certain targets to qualify for a larger bonus. Each year he asked to see the accounting backup on the bonus calculation so he could evaluate his own performance and improve the next year. Each year the company provided "very thin" documentation. He began to suspect that the system was stacked against him. He brought a case for unpaid bonuses and fraud and proved that the company changed the criteria each year to avoid paying his and other employees' bonuses. Such cases can result in very large recoveries. It is important to establish and understand the ground rules of these types of compensation plans from the beginning and take steps to verify that they are being administered fairly.

Tips to Avoid Disputes Over Commission or Bonus Plans:

1. Insist on transparency.

At every opportunity insist that all accounting and transactions be transparent to all parties. If everyone can see the numbers as they come in, it helps verify accuracy. The time to discuss a problem or question is before the final numbers are on the table.

2. Head off issues early.

Confront misunderstandings or important issues while they are still hypothetical. People change when money is on the table.

3. Be fair.

See the other side of every issue and try to be fair and reasonable. In the long run, this makes for better relationships.



4. Define terms.

Insist that terms are as precise as you can make them. If geographic territory is important, set out specific counties, cities, and states which are important. Avoid general terms like West Tennessee, Southeastern United States, or major cities unless you go on to define them. For example, the sales territory shall consist of all the states in the Southeastern United States: Tennessee, Mississippi, Georgia, Alabama, and South Carolina.

5. Put the agreement or policy in writing.

As an executive employment lawyer and co-Founder of Crone & Mason, Alan G. Crone's practice focuses on resolving disputes between employer and employee or between business partners. He has also attained national attention in overtime law and class/collective action law. He has been involved with local, regional and national cases. He serves as the Co-Chair of the Employment Law Subcommittee of the American Bar Association's Committee on Class Actions and Derivative Lawsuits. He is also a past Chair of the Memphis Bar Association's Labor and Employment Law Section. A graduate of the University of Memphis Law School, Alan has also served as head of the Shelby County Republican Party (1999 to 2003). He also boasts a wide array of community involvement including serving as a St. Jude Gala Board Member, a special judge in City Court, Catholic Charities Board Member and Treasurer, and former Fire Museum Board Member.

What is a Compass Box?

compass box \ 'kəm-pəs 'bäks \ (n.)

a compass suspended within a box on axles and pivots, so that the compass and its needle remain dry during rains and retain a horizontal position for proper performance even with the rolling of the ship over the waters.



From ancient times, the Compass Box was the navigational nerve center of sea going vessels. Sailors depended on its guidance to survive and arrive at their destination safely. This publication is named The Compass Box because it is also dedicated to providing you, our readers, with prime information to help you assist your clients in navigating their way through the sometimes stormy seas of employment law.

Alan G. Crone Welcomes Compass Box Readers

Thank you for reading the Compass Box. The Compass Box is a production of the Executive Employment Law Practice Group of Crone & Mason, PLC. At the Practice Group, we represent workers, executives, and business people who have disputes with their employers and/or business partners. The area we lawyers call "employment law" is growing in complexity everyday. One practice area often has ramifications into another. For example... the issues around non-compete agreements have ramifications in intellectual property law. Americans with Disabilities Act cases often have Worker's Compensation implications with Family Medical Leave Act elements.

Similarly, our clients are also in need of other professional assistance at the same time they are trying to resolve their legal disputes. They may have mental health or emotional issues after being fired or in turmoil with their business partner. Change in employment or business relationships will raise serious financial issues. These changes also awaken needs and desires to evaluate their career path. We learned long ago that "winning a lawsuit" does not always "solve the problem." Our lawyers are always looking for ways to assist our

clients to resolve these other important issues. Therefore, we have developed this publication to assist professionals who represent, treat, or advise other professionals, executives, and workers to resolve problems that arise out of employment law issues or have employment law related issues attendant with them.

We hope this publication will be beneficial to you and give practical information to better serve your clients. If it is, please let me know that you enjoyed it, and also let me know what other features you would be interested in seeing in future editions. At CRONE & MASON, PLC, we work to solve our clients' legal problems quickly, efficiently, and ethically, whether it's family law, employment law, and/or other business and commercial disputes. However, we also understand the importance of encouraging our clients to address other areas of their lives which will ultimately enable them to enjoy any legal success all the more.

Hopefully this publication will help you do the same for your clients and customers. Again, thank you very much for reading.

Negotiating Compensation

By Kristin Lockhart

Consider the employment process like buying a car: First, we go about seeking out what we want and need, then we take the car for a test drive. Finally we sit down with the sales person to negotiate the price. We go about becoming employed in very much the same way: We search, we interview, we negotiate wages and compensation. Just like the negotiation for the car, our wages and compensation negotiation is the most important and difficult stage of the process. After all, there is more to what you earn than just your paycheck.

Unfortunately, the negotiating process is more than, "Here's the amount we are

willing to pay," and "Thank you." There are steps and methods to be utilized in order to achieve the desired outcome of both parties. Fortunately, there is a plethora of information available to aide your progress through this process.

Start by doing your research before your first interview. Research the prospective company and the salary ranges, including the maximum, for the position. Know your current worth based on your experience and skills, and then calculate your minimum salary requirements. Go into the interview and the negotiation process knowing what your earning requirements are, as well as

your expectations for benefits and perks, so all topics will be covered before you accept the position. It is far more difficult to change compensation after you have started your job. There are several aspects of wages and compensation to consider. All will vary by the company and the level of the position, for example: employee cost of insurance, vehicle allowance, equity/stock options, retirement benefits, flex-time, vacation, and even geographical location.

Once the offer is made, you do not have to accept immediately; ask for some time to think about it. If the offer is less than your bottom line, respond with questions,



not another figure, because there may be other ways to reach your target: Think compensation package. Ask about the employer's benefit package as well as the standard salary range, ranges for raises, and when raises are given. Review the job's responsibilities, working hours, level of authority, and accountability; these questions allow you to re-emphasize your understanding of all that the job entails.



Be confident in what you want, but be prepared to justify your dollar figure – be able to build your case. Show, through prior experience, your track record of exceeding production targets and production quality. Prove your benefit to the company by showing how you could save them money and resources, or attract new clientele. List the special skills, education, or training you would bring to a new job that would contribute to the success of the business. Be firm but flexible. Be forewarned – if you do not accept or if you counter-offer, you should be prepared to walk away from the job. Many employers see it as a lack of enthusiasm for the position and the company.

Last but not least: Show your enthusiasm! Let them know you are excited to work there and that you want to do the job! Demonstrate throughout the negotiation that you already consider yourself part of the team and you should fare well in the negotiation process.

Kristin Lockhart leads the executive recruiting services division of SEACAP Financial, Inc. as Manager of Executive Recruiting. In addition to offering management-level and executive recruiting services, SEACAP Financial provides management advisory services, facilitates the buying and selling of businesses, arranges financing, assists with business ownership transfers, and performs business valuations for family-owned and other privately held businesses.

Crone & Mason EELPG Member Q&A

This Issue's Feature: Jim Webb

Q: What is the most interesting case you have worked on and why?



A: I worked on a major class action suit involving a fluctuating work week method of paying overtime against a major national company. It was exciting to work on because of the complexity of the case and the huge number of people involved– over 50,000 employees. It was hard fought by both sides, and it was legally complex. We earned a major settlement for our clients in this case. It was an incredible and collaborative effort with several different firms from across the nation. For these reasons, it was a very interesting, enjoyable, and rewarding case which led to future joint ventures and relationships with the other attorneys involved.

Q: What is the most challenging thing about employment law?

A: In employment law, there are many elements of cases which must be proven. Many of these elements may be esoteric in nature and can be very specialized. I enjoy the challenge this provides. We have to be extremely well-versed in case law, standards, and particular industries and fields.

Q: What was your proudest moment practicing employment law?

A: My brief played an instrumental role in getting a TILA class action suit in Arkansas Federal Court dismissed. It was unique to represent the defendant for a change and utilize my plaintiff's experience to help defend against a case. I also enjoy doing the firm's appellate work. Since I was at one time a law clerk for a judge on the Tennessee Court of Appeals it is always an exhilarating experience to argue before the Tennessee Court of Appeals and the 6th Circuit Federal Court of Appeals.

Article Submission?

We welcome submissions from our readers. Submissions should be between 500–800 words and should be submitted in MS Word, or similar format to jlokeon@bellsouth.net. All submissions will be considered, and authors of those to be published will be notified in advance.

Tips and Traps in Negotiating Compensation and Benefits Related to Taxation Issues

By Sandy J. Friedman, CPA

In any job transition, one of the primary considerations is, of course, compensation. However, many people do not fully examine how the manner of compensation affects their taxes. Everyone knows that income tax is calculated as a percentage of one's income. Because some benefits offered by employers are not considered taxable income to the employee, one's effective tax bracket can be lower if some of these advantages are pursued.



Salary:

Obviously, the higher the salary, the higher one's taxes. As a CPA, my clients frequently lament that just as they begin to earn more, it seems their higher taxes offset and nearly nullify their pay increase. The antidotes to this are simple:

- Earn less (not good!)
- Offset income with deductions and exemptions (better)
- Accept benefits which offer better tax advantages (best)

The following are examples of some of these benefits.

Insurance:

One of the benefits most commonly offered by employers is health insurance. At a minimum, this usually includes coverage for medical expenses, hospitalization, and prescription expenses, or some percentage thereof. Other types of insurance that might be offered include dental insurance, optical insurance, and disability insurance. The value of these types of insurance and benefits are not taxable to the employee. With the cost of health insurance skyrocketing in recent years, this can be a very valuable benefit. An employer may also provide the employee with up to \$50,000 worth of group-term life insurance tax-free.

Retirement Plans:

Companies that want to provide retirement benefits for employees will establish some type of pension, profit-sharing or stock bonus plan that qualifies for certain tax benefits. The main tax benefit

to the employee of a retirement plan is tax deferral. This means that the employee will not pay tax on this income until the money is withdrawn from the retirement account, ideally when the employee retires. Since the company's retirement plan will most likely already be in place, there is not really any opportunity for negotiation. However, a prospective employee should be sure to inquire as to what is available and when they will be eligible to participate.

Expense Reimbursement:

Most companies cover their employees' business expenses by reimbursing for their actual expenses or by paying a travel or mileage allowance. According to the tax rules, the key distinction between a true expense reimbursement and disguised compensation is whether the employer's payments are made in accordance with what the IRS calls an "accountable plan." The accountable plan requirement stipulates that employees must substantiate all reimbursed expenses and return any advances in excess of expenses incurred. If an employer has an accountable plan in place, expense reimbursements and allowances to employees who properly comply with the terms of the plan are deductible by the company (subject to the 50% limit for most meals and entertainment expenses) and nontaxable to the employees. In addition, the payments are excluded from the employee's gross income and are exempt from income tax withholding and employment taxes.

Employer Provided Child or Dependent Care Services:

Up to \$5,000 of child or dependent care services paid by an employer under a written plan for care of a qualifying child or dependent is not included in the employee's gross taxable income. A qualifying individual must be a dependent of the taxpayer under the age of 13, or a dependent or spouse of the taxpayer who is mentally or physically incapable of caring for themselves and who lives with the employee in their principal residence for more than six months of the year. The most common use of this benefit is to help defray the costs of daycare expenses for employees with children under the age of 13.

Educational Expenses:

Employer assistance payments of up to \$5,250 received by an employee for their personal educational expenses such as tuition, fees, books and supplies are excluded from the employee's gross taxable income. The employee's education does not have to be job-related.

Moving Expenses:

Qualified moving expense reimbursements made by an employer under an accountable plan are not included in an employee's income. Qualified moving expenses include the cost of moving household goods and personal effects from the former home to the new home and the cost of travel (including lodging) from the former home to the new home.

Other Non-Taxable Fringe Benefits:

Some other fringe benefits that are excludable from an employee's gross income include:

- No-additional-cost services, such as free standby flights by airlines to their employees;

- Qualified employee discounts, such as reduced sales prices of products and services sold by the employer;
- De minimus fringe benefits, such as occasional use of office equipment for personal use or occasional sports or theatre tickets;
- Use of certain athletic facilities. They must be located on the employer's premises and the most substantial use of the facilities must be by employees, their spouses, and dependent children. This exclusion does not apply if the facility is available for use to the general public.

This is by no means an all inclusive list. However, there are many non-taxable benefits that may be available from a potential employer. A large salary is always nice, but some knowledge and planning can help one negotiate an overall package which includes compensation that will not significantly affect one's taxes. When possible, prospective employees should take advantage of benefits offered by employers which are not considered taxable income and may possibly even lower the employee's effective tax bracket.

Sandy J. Friedman is a licensed Certified Public Accountant and a partner at Scott and Pohlman, PC. With over 23 years of experience, Sandy boasts expertise in the areas of corporate accounting, small business, and individual tax planning.

*"If my ship sails from sight,
it doesn't mean my journey ends;
it simply means the river bends."*

-John Enoch Powell



Crone & Mason Now in Memphis, Jackson and Brentwood!

Crone & Mason, PLC has recently expanded by opening offices in Jackson, Tennessee and Brentwood, Tennessee to provide a wider geographical range of clients with the same high-quality, hands-on approach they have always given their clientele in the Memphis area.

You may visit Crone & Mason in Jackson at 206 East Main Street, Suite 201, Jackson, TN, 38301. The Jackson, TN offices of Crone & Mason, PLC, can be reached by telephone at 731.225.5010.

The Brentwood offices, which serve Brentwood and Nashville, TN areas, can be reached at 615.371.6139. You may visit the Brentwood office at 750 Old Hickory, Building #2, Suite 150, Brentwood, TN, 37027.

Crone & Mason, PLC is proud to announce this expansion to be able to better serve clients in areas across Tennessee. As always, more information about all of the legal services offered by the Crone & Mason team can be found online at www.CroneMason.com.

Alan Crone, Public Speaker



Alan Crone chose to become a lawyer because he "was always drawn to the courtroom. At first it was because of the drama of it. As I do it more I really enjoy the challenge of putting all the pieces of a case together to tell my client's story. I also enjoy more and more solving my client's problems whether in or out of the courtroom. Complex disputes with both complex legal and factual issues are my favorite because of the challenge in analysis to figure out what is really going on and developing and executing a plan to solve the problem for my client."

An experienced public speaker, Alan Crone is available to speak to any size group on topics ranging from overtime law and wrongful termination to trade secret protection, non-competes and general business disputes. He has been a panelist at the American Society of Industrial Security's Investigation Standing Committee, a speaker at the National Business Institute seminar, and a speaker at the Tennessee Defense Lawyers Association convention. Alan became accustomed to addressing large and small groups when he served as the head of the Shelby County Republican Party. Recently, Alan spoke at Rhodes College on Intellectual Property Law. He will be speaking to the EmergeMemphis companies, a collection of start-up businesses in downtown Memphis, in Spring of 2007. If you are interested in having Alan speak to a group, please contact him today at 901.683.1850 at Crone & Mason, PLC.

Case Law Updates Related to ERISA

By Jim Webb

The following are summaries of recent cases from the Sixth Circuit Court of Appeals (the federal appellate court which governs Tennessee). These are cases dated from May 2007 to the present. The Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., is a federal statute governing the enforcement of employment benefit plans.



Gottermeyer v. Norstan, Inc., No. 06-4115, 2007 WL 2050754 (6th Cir. (Ohio) July 16, 2007): Norstan, Inc., instituted a series of reductions-in-force (RIF's) after a substantial downturn in business. The company offered a severance package in return for a general release. The plaintiff refused to sign the general release and was not provided with severance pay. The plaintiff filed a lawsuit claiming, among other things, that the RIF was a plan subject to ERISA and that, as such, it violated ERISA. The Sixth Circuit Court of Appeals upheld the trial court's grant of summary judgment. The trial court, *Gottermeyer v. Norstan, Inc.*, No. 1:05 CV 1399, 2006 WL 1966613 (N.D. Ohio July 11, 2006) had found that ERISA requires an ongoing administrative plan and that a severance plan falls under ERISA only if it provides for periodic payments. The RIF was a benefit, but because it was a one-time, lump-sum benefit, it was not a "benefit plan" under ERISA. Even if it had been a plan, the plaintiff had refused to sign the release, which was required for the severance payment. Thus, the company's refusal to pay severance was consistent with the plan's terms.

Marzuola v. Continental Tire North America, No. 06-4245, 2007 WL 2016160 (6th Cir. (Ohio) July 9, 2007): The Sixth Circuit Court of Appeals upheld the trial court's grant of summary judgment to the employer. The plaintiff's complaint, which alleged damages under an earlier severance plan offered by the employer and which also argued that the newer, current severance plan was an invalid modification of the earlier one, was not broad enough to put the employer on notice that damages were being sought under the newer severance plan. In addition, the plaintiff had no standing to seek a declaratory judgment on the validity of the release because he had not signed it. To have standing to seek a declaratory judgment, a plaintiff must have suffered an actual or threatened injury fairly traceable to the alleged illegal conduct of the defendant. Furthermore, a substantial likelihood must exist that the requested relief

will redress or prevent the injury. A declaratory judgment finding the release invalid would have not addressed the plaintiff's alleged injuries of being denied severance benefits. Unsigned, the release did not stop the plaintiff from seeking redress in court for his injuries. If the plaintiff had signed the release, he would still have been able to challenge its validity in court. Finally, the plaintiff had made no claim for relief under the statutes he alleged the release violated, so declaring the unsigned release invalid would have had no effect. Thus, plaintiff had had no standing to seek a declaratory judgment.

In re Bucci, --- F.3d ---, No. 06-4164, 2007 WL 1891736 (6th Cir. (Ohio) July 3, 2007): The Sixth Circuit Court of Appeals considered the question of whether or not being a fiduciary under ERISA, by itself, also automatically makes one a fiduciary under 11 U.S.C. § 523(a)(4). Section 523(a)(4) provides that a debtor in bankruptcy cannot discharge a claim which results from the defalcation of the debtor while acting in the capacity of a fiduciary. Some courts, notably the Ninth Circuit Court of Appeals, have ruled that being a fiduciary under ERISA satisfies the fiduciary capacity element of § 523(a)(4). The Sixth Circuit, however, construes the term "fiduciary capacity" under § 523(a)(4) more narrowly than it is used in other circumstances. In the Sixth Circuit, that term applies only in situations where there is "an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." In the instant case, Bucci had only a contractual obligation to pay the employer benefits into the fund, and there was no evidence in the record establishing him as the trustee of the contributions. Therefore, he was not a fiduciary under § 523(a)(4).

"The least movement is of importance to all nature. The entire ocean is affected by a pebble."

-Blaise Pascal

Zbuka v. Marathon Ashland Petroleum, LLC, No. 06-4314, 2007 WL 1837155 (6th Cir. (Ohio) June 25, 2007): Zbuka was employed by Marathon Ashland Petroleum, which gave Zbuka the choice of retiring or being terminated after two costly mishaps in which he was involved. Zbuka took retirement and then sued the company, alleging that it violated § 510 of ERISA by interfering with his right to continue earning benefits under the company's pension plan. The Court of Appeals affirmed the trial court's grant of summary judgment on behalf of the company, relying on the trial court's analysis, which is found in *Zbuka v. Marathon Ashland Petroleum, LLC*, 447 F. Supp. 2d 845 (N.D. Ohio Aug. 23, 2006). The trial court had pointed out that a plaintiff alleging a § 510 violation must establish a prima facie case by showing (1) prohibited employer conduct (2) motivated by an intent to interfere (3) with the employee's attainment of a pension right. The trial court had found that Zbuka failed to meet the second element. For one thing,



Elements of Employment Agreements

Elements to negotiate in an employment agreement:

- Guaranteed term of employment
- Just cause termination provision
- Non-competition agreements
- Trade Secret protection
- Compensation amount
- Benefits
- Confidentiality provision of proprietary information
- Advanced training
- Expense reimbursement
- Disability insurance/leave
- Dependent benefits

The attorneys in the Executive Employment Law Practice Group at Crone & Mason, PLC have represented employees and have helped companies negotiate specific agreements custom-crafted for each situation.

there was no temporal proximity between the adverse employment action (Zbuka's "forced" retirement) and the attainment of ERISA rights (Zbuka's eligibility for full retirement benefits). Zbuka would not have been eligible for full retirement benefits for another thirteen years. In addition, Zbuka had failed to produce facts which were highly probative of intentional discrimination. He had merely made unsubstantiated, self-serving assertions that the recent workplace mishaps were not his fault. Finally, the trial court found that, even if Zbuka had established a prima facie case, he had not presented evidence that his employer's reason for the adverse employment action—his incompetence—was pretextual.

Cooper v. Life Ins. Co. of North America, 486 F.3d 157 (6th Cir. (Tenn.) May 16, 2007): The plaintiff was denied long-term disability insurance benefits by the plan administrator, both initially and after two administrative appeals. The trial court upheld the decision of the plan administrator. The Sixth Circuit Court of Appeals, however, reversed the judgment of the trial court and remanded for entry of an order that long-term disability be paid. The Court found that the trial court had not erred in upholding the plan administrator's initial determination not to pay benefits

because the record at that point in the process lacked sufficient objective medical evidence of the plaintiff's functional capacity. In fact, the record at that time indicated that the plaintiff's condition was slowly improving. The Court found, however, that the administrator acted arbitrarily and capriciously in denying the claim during the plaintiff's first appeal of the decision. By that time, the plaintiff had provided additional medical evidence, but the independent file examiner hired by the administrator failed to interview the plaintiff's treating physicians, despite having been instructed to do so by the administrator. The examiner also misstated aspects of the plaintiff's job requirements and contradicted himself regarding the plaintiff's ability to work full time. The Court also found the denial of benefits during the plaintiff's second administrative review to be arbitrary and capricious. This time, a different independent file examiner ignored certain parts of the file which supported the plaintiff's claim. This examiner also failed to interview the treating physicians. The administrator's reliance on the defective reports of both examiners was arbitrary and capricious. Finally, the Court found it unnecessary to remand the case back to the administrator for further review because there was objective medical evidence in the record to establish that the plaintiff was disabled. Rather, the Court remanded the case back to the trial court to enter an order that disability be paid.

Kloots v. American Express Tax & Bus. Servs., Inc., No. 06-3916, 2007 WL 1451827 (6th Cir. (Ohio) May 15, 2007): The plaintiffs hired the defendants to conduct stock valuations for their company. They then used these evaluations for an Employee Stock Ownership Plan ("ESOP"). The U.S. Department of Labor ("DOL") conducted an investigation of the ESOP to determine compliance with ERISA. The DOL found several violations of ERISA and took issue with the method the defendants had used in valuing the stock. In order to bring the ESOP into compliance, the plaintiffs paid \$500,000 to the plan. They then filed a complaint in federal court against the defendants who had valued the stock. The plaintiffs alleged an ERISA violation, as well as several pendent state claims. The trial court granted summary judgment to the defendants on the ERISA claim but decided that the pendent state law claims for professional negligence, breach of contract, and negligent misrepresentation were not preempted by ERISA. The trial court declined to exercise supplemental jurisdiction over those claims and dismissed them without prejudice. The defendants then appealed, arguing that the state law claims were preempted by ERISA and should therefore have been dismissed with prejudice. The Sixth Circuit Court of Appeals affirmed the trial court.

continued on page 10

The Sixth Circuit first noted that three types of claims are subject to ERISA preemption: (1) those based on state laws which mandate employee benefit structures or their administration; (2) those based on state laws that provide alternative enforcement mechanisms; or (3) those based on state laws that bind employers or plan administrators to particular choices or that preclude uniform administrative practice, thereby operating as a regulation of an ERISA plan itself. The Court found that the first and third categories were inapplicable and thus analyzed whether the state law claims were an attempt to provide an alternative enforcement mechanism. According to the Court, the defendants were not fiduciaries relative to the ESOP or its beneficiaries. The Sixth Circuit does not treat state law claims brought against non-fiduciary professional services providers as impermissible attempts to enforce responsibilities which are governed by federal law. Here, the service agreement between the plaintiffs and the defendants was separate from the ESOP, and it was this separate service agreement which was the basis for the breach of contract claim. In addition, the professional negligence claim was no more than a malpractice claim that the defendants had breached their duties as certified public accountants. Finally, the negligent misrepresentation claim did not require the Court to determine whether the non-fiduciary service provider violated an ERISA-governed plan and thus did not implicate ERISA.

Alexander v. Bosch Auto. Sys., Inc., No. 05-6010, 2007 WL 1424299 (6th Cir. (Tenn.) May 14, 2007): The focus of this case is what damages can be awarded under § 510 of ERISA (29 U.S.C. § 1140). This case involves a plant closure purposely timed to prevent certain employees under an earlier collective bargaining agreement from receiving plant closure benefits. On appeal, the defendant did not dispute liability. Instead, it argued that there was no remedy under the statute. The Court of Appeals started its analysis of the issue by noting that § 510 is enforced through § 502, which allows a plan participant, beneficiary, or fiduciary to enjoin any action which violates an ERISA plan or to obtain appropriate equitable relief. The trial court had ordered that the plaintiffs be included in a list of employees which would receive plant closure benefits pursuant to a 2000 collective bargaining agreement which had not included the plaintiffs (who had previously been laid off). The Court of Appeals rejected the notion that this was equitable reinstatement because the plant was closed and no reinstatement was possible. Instead, the plaintiffs had been “instated” into the 2000 collective bargaining agreement, which the Court found more analogous to contractual reformation. Yet the trial court’s remedy was not equitable refor-

mation because reformation presupposes a valid contract between parties which has not been properly reflected in the written contract. Here, the 2000 collective bargaining agreement accurately reflected the agreement reached between the company and the union. Additionally, the plaintiffs had not been a party to that contract and so could not seek its reformation. The Court then considered equitable restitution. But equitable restitution involves a recovery of specific, identifiable funds or property, whereas the remedy forged by the trial court imposed personal liability on the company by recovering unidentified funds from the company’s general assets. The Court concluded that there was no equitable remedy available in this situation, which it characterized as an “unsettling phenomenon... not unheard of in ERISA cases.” Yet the Court could only award those remedies prescribed by Congress, being powerless to expand them.



Talmon v. Central States, Southeast & Southwest Areas Pension Fund, No. 06-3253, 2007 WL 1376288 (6th Cir. (Ohio) May 11, 2007): The plaintiff sued for breach of fiduciary duty and a denial of benefits pursuant to § 502 of ERISA. The trial court dismissed the breach of fiduciary claim. On the administrative record, the trial court found that the denial of benefits was not arbitrary and capricious. The plaintiff appealed only the second ruling, arguing that the district court used the wrong standard and should have applied a de novo review. The Court of Appeals upheld the trial court, pointing out that a de novo review is used if the plan administrator does not have the discretionary authority to decide benefit eligibility or to interpret the terms of the plan. In those instances where the administrator does have that authority, a reviewing court will apply the arbitrary and capricious standard. Under the arbitrary and capri-





rious standard, the reviewing court will uphold the administrator's decision if it is rational in the light of the benefit plan's provisions. Under both standards, the court can only consider evidence which had been presented during the administrative review. The Court of Appeals noted that the plan administrator in the instant case had the authority to decide benefit eligibility and to interpret the plan's provisions. The plaintiff offered no supported reasoning for his contention that the de novo standard should apply, arguing only that the arbitrary and capricious standard resulted in an unjust result. Under the arbitrary and capricious standard, the administrator's decision to deny benefits was rational and supported by the evidence because, even if the plaintiff were given full credit for certain disputed years of service, he still would not have had the necessary number of years to qualify for a partial pension.

Thurman v. Pfizer, Inc., 484 F.3d 855 (6th Cir. (Mich.) May 8, 2007): This case addresses whether certain state claims were preempted by ERISA. The plaintiff left his job to work for Pfizer after having been told he would be eligible, upon retirement, for a pension of \$3,100 a month. After starting for Pfizer, the plaintiff found out that his expected pension would actually be only \$816 a month. He sued for misrepresentation, seeking expectation damages or, in the alternative, reliance damages. He also sought rescission from the pension plan. The trial court dismissed the complaint on the basis of ERISA preemption. The Court of Appeals agreed that any action seeking expectation damages would be preempted because it would necessitate an interpretation of the pension plan, but the Court held that the misrepresentation claim would not be preempted to the extent it sought reliance damages and rescission.

The Court first considered the threshold issue of whether the claim was preempted by 29 U.S.C. § 1132(a), applying to suits by beneficiaries or plan participants to recover benefits, to enforce their

rights under the plan, or to clarify their rights to future benefits. The Court noted that this section did not preempt the plaintiff's claim because, at the time of the misrepresentation, he was not yet an employee of Pfizer or a participant in the pension plan. Because he was only a prospective employee when the misrepresentation was made, he had no claim for a breach of fiduciary duty, he did not have standing under ERISA to bring a claim based upon that misrepresentation, and his misrepresentation claim was not preempted.

Next, the Court considered whether or not the claim was preempted under 29 U.S.C. § 1144 (see the discussion of Kloots above). This statute preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" which is governed by ERISA. The Court noted that state laws are not preempted which might affect ERISA plans in a manner too "tenuous, remote, or peripheral" to conclude that they "relate to" an ERISA plan. The Court considered whether the plaintiff's claim provided "alternative enforcement mechanisms" to ERISA and decided it did not because the plaintiff was not a plan participant when the misrepresentation was made. Furthermore, the remedy of reliance damages was not preempted as it sought other benefits lost due to the plaintiff's reliance on the misrepresentation. Expenses such as decreased wages, moving expenses, and forfeited stock options have too tenuous an effect on an ERISA plan to be preempted. Finally, the remedy of rescission was in no way dependent upon an interpretation of the pension plan and was not preempted. The Court cautioned, however, that its decision was a narrow one, based on the particular facts of the case at bar, and that the Court was not creating an additional enforcement mechanism for the collection of ERISA plan benefits.

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