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Fifth Circuit Says ERISA does not Prevent Payment of Pension in Instances of Sham Divorces

July 27, 2011

Brown v. Continental Airlines, Inc., No. 10-20015 (5th Cir. July 18, 2011)

On July 18, 2011, the Fifth Circuit refused to extend the "sham" transaction doctrine into claims involving ERISA. The Court considered whether ERISA allows a retirement plan administrator to seek restitution of benefits that were paid to a plan participant's ex-spouse pursuant to a domestic relations order ("DRO"), if the administrator subsequently determined that the DRO was based on a "sham" divorce.

The Continental Pilots Retirement Plan Administrative Committee was faced with DROs of several recently divorced couples. During divorce proceedings, the couples obtained DROs from state courts, which assigned 100% the pilots' pension benefits to their spouses. After obtaining the lump-sum payment from the pensions the couples remarried. The committee brought suit against the couples for return of the pension benefit.

When determining if the scheme used by the couples to obtain the payment was prohibited by ERISA the Court stated:

> *ERISA contains an anti-alienation provision which requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1)… However, an exception to the anti-alienation provision allows retirement benefits to be assigned to an "alternate payee," such as an ex-spouse, in accordance with a [DRO] issued by a court. See id § 1056(d)(3).*

Continental argued that public policy prevents a DRO from becoming qualified if a "sham" transaction is involved. The Court, however, held that 29 U.S.C. § 1056(d)(3)(D)(i), does not authorize an administrator to consider or investigate the subjective intentions or good faith underlying a divorce. Thus, nothing in the statute prevents the pilots from proceeding with this type of transaction.

A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law. You can reach him by email at srgajewski [at] gmail dot com. Bio: www.sgajewski.com.