United States District Court
District of Massachusetts

LAWRENCE MERIGAN,
Plaintiff,

v. CIVIL ACTION NO. 2009-11087-RBC[1]

LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON,
Defendant.

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION (#49)

COLLINGS, U.S.M.J.

On November 30, 2011, the Court issued a Memorandum and Order, Etc. (#47) in the above-styled case. *Merigan v. Liberty Life Assurance Company of Boston,* ___ F. Supp.2d ____, 2011 WL 5974455 (D. Mass., Nov. 30, 2011). Unbeknownst to me, my colleague, Chief Magistrate Judge Dein, was dealing

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[1] On September 22, 2009, with the parties' consent this case was reassigned to the undersigned for all purposes, including trial and the entry of judgment, pursuant to 28 U.S.C. § 636(c).

with a similar issue in the case of *Tetreault v. Reliance Standard Life Insurance Company, et al.,* C.A. 10-11420-JLT and issued a Report and Recommendation in that case on November 28, 2011. On the basis of Judge Dein's opinion, the defendant in the instant case ("Liberty") filed Defendant's Motion for Reconsideration, Etc. (#49) on December 6, 2011. Liberty contends that Judge Dein's opinion is persuasive and that the Court should reconsider its decision in the instant case on the basis of it. The plaintiff ("Merigan") argues that Judge Dein's decision is erroneous and/or distinguishable and that the Court should not alter its decision. Since the plaintiff in each case is represented by the same attorney, the Court heard preliminary argument on Liberty's motion on December 8 with the proviso that if the Court were inclined to change its decision, Merigan would be given the full 14-day period fo file an opposition and a memorandum in support of the opposition.

The Supreme Court's broad language in *CIGNA Corp. v. Amara*, - U.S. -, 131 S. Ct. 1866 (2011) *vis-a-vis* the relationship between an ERISA Plan and an ERISA Summary Plan Description (SPD) is going to be a lightening rod for litigation in the future, especially as to how the holding will be applied to other parts of ERISA Plans and SPDs which were not specifically at issue in the *Amara*

case.[2] In such circumstances, it is not unusual for judges to come to different decisions on the question, and the issues will most probably be sorted out in the circuit courts of appeals, and perhaps ultimately in the Supreme Court.

Be that as it may, the Court declines to alter its November 30th decision in the instant case.

First, the *Tetreault* case is distinguishable. As Judge Dein noted, in *Tetreault*, "the procedures detailed in the SPD [were] expressly incorporated into and made part of the written ERISA Plan." (Civil Action No. 10-11420-JLT, #33 at 2) In the case at hand, no such incorporation by reference of the SPD into the Plan has been made.

Second, in *Tetreault*, the Plan at least referred to "claims procedures," (Civil Action No. 10-11420-JLT, #33 at 5), a reference that Judge Dein found sufficient to meet the statutory requirement in 29 U.S.C. § 1133.[3] (Civil Action No. 10-11420-JLT, #33 at 18) This section provides, in pertinent part:

> In accordance with regulations of the Secretary, every employee benefit plan shall–

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[2] The Court is informed that Judge Barbadero of the United States District Court for the District of New Hampshire has a case *sub judice* which raises the same *Amara* issue. *See Kaufmann v. Prudential Insurance Company of America,* C.A. 11-cv-00119-PB.

[3] Although the statutory cite in Judge Dein's Report is noted to be 29 U.S.C. § 1333, this is plainly a typographical error as the section quoted is 29 U.S.C. § 1133.

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> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Title 29 U.S.C.A. § 1133.

As Liberty conceded at oral argument, the Plan in this case is absolutely silent with respect to whether a participant has a right to appeal an adverse decision terminating benefits in order obtain a "fair review," or the time frame within which such an appeal must be submitted. While it certainly is true that the ERISA statute and regulations require that the SPD contain certain detailed information with respect to claims procedures, *see*, e.g., 29 U.S.C. § 1022, 29 C.F.R. § 2560.503-1(b)(2), that does not mean that provisions respecting appeals need not be in the Plan. Rather, it simply means that as a "summary" (which would not by definition contain all of the provisions of the Plan), the SPD must contain a summary of those portions of the Plan which provide for a "fair review" of decisions adverse to participants.

Lastly, I respectfully disagree with Judge Dein's statement that "...the claims procedures are ministerial and not substantive," (Civil Action No. 10-11420-JLT, #33 at 15), at least to the extent that Judge Dein is referring to a

time within which a participant must submit an appeal to obtain a fair review. I see the time limit as substantive, similar in kind to a statute of limitations. That is not to say that all details of the claims procedure need be in the Plan, but certainly the basic right to appeal to obtain a "fair review" must be spelled out in the Plan together with the time within which the right must be exercised. Neither is contained in the Plan in the instant case.

For all of these reasons, it is ORDERED that Defendant's Motion for Reconsideration, Etc. (#49) be, and the same hereby is, DENIED.

/s/ Robert B. Collings

ROBERT B. COLLINGS
United States Magistrate Judge

Date: December 9, 2011.

Publisher Information

Note* This page is not part of the opinion as entered by the court.

The docket information provided on this page is for the benefit

of publishers of these opinions.

1:09-cv-11087-RBC Merigan v. Liberty Life Assurance Company of Boston

Robert B. Collings, presiding

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