

## Corporate & Financial Weekly Digest

Posted at 1:45 PM on September 10, 2010 by [William B. Duff](#)

### Seventh Circuit Permits Retroactive Correction to Benefit Plan

The U.S. Court of Appeals for the Seventh Circuit has recently allowed Verizon Communications, Inc. to correct a mistake in the drafting of its cash balance plan that could save Verizon over \$1 billion in pension benefits.

The decision is one of first impression in the Seventh Circuit. The decision is remarkable because it is reported to conflict with the case law in a number of the other federal circuits dealing with a plan sponsor's ability to unilaterally correct retroactively a drafting error (a so-called "scrivener's error") in qualified retirement plan documents. The decision is also contrary to the IRS's consistently stated opinion that employers may not unilaterally correct retroactively drafting errors in plan documents.

The error in the *Verizon* case involved the operation of a "transition factor" used to determine the opening account balances of plan participants in the Verizon cash balance plan. The transition factor was mistakenly applied twice (rather than once) in the plan formula, resulting in very significant increases in the plan's benefit liabilities. Six drafts of the relevant plan provisions were prepared before the final version was adopted. A plan participant applying for benefits was denied the increased benefit resulting from the drafting error, and brought this action to enforce the explicit terms of the plan.

The IRS's position with respect to scrivener's errors is that qualified retirement plans are definite written programs providing definitely determinable benefits. Essentially, the plan is a contract which is enforceable by both the plan sponsor and the plan's participants and beneficiaries. As such, the plan, once adopted, may not be unilaterally "corrected" by the sponsoring employer.

The Seventh Circuit found that equitable reformation of the plan was indicated in this case where there was objective, clear and convincing evidence that the drafting error did not reflect "participants' reasonable expectations of benefits" and where the correction would avoid an "unfair result."

Even after *Verizon*, employers should take care in drafting and amending their plan documents. In deciding this case, the Seventh Circuit noted in relevant part (and citing cases in the Third and Seventh Circuits): "Only those who can marshal 'clear and convincing' evidence that plan language is contrary to the parties' expectations will have a viable claim... This standard of proof is rigorous, requiring evidence that is 'clear, precise, convincing and of the most satisfactory

character that a mistake has occurred and that the mistake does not reflect the intent of the parties'... The evidence also must be 'objective' and not dependent on the credibility of testimony (oral or written) of an interested party'... These high standards of proof should deter an employer from seeking to reform plan language simply because it has proven unfavorable.”

*(Young v. Verizon Bell Atlantic Cash Balance Plan*, 7th Cir., No. 09-3872, 8/10/10)

Katten Muchin Rosenman LLP

Charlotte Chicago Irving London Los Angeles New York Washington, DC