Divorce, Pensions and Retirement Benefits

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REVISITING THE PROBLEMS CREATED FOR FAMILY LAW ATTORNEYS BY TROUBLED DEFINED BENEFIT PLANS

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Practice Tip of the Month:

Many attorneys are of the impression that if a judge signs a Qualified Domestic Relations Order the plan will have to comply with the provisions of the order. That is not the case.

For all of its ambiguity, and less than helpful guidelines, the Retirement Equity Act of 1984 (REACT), the bill that created Qualified Domestic Relations Orders, was very clear in one area. It specifically gave the plan administrators the right to be the final arbiter as to whether a Qualified Domestic Relations Order was in compliance with the Act as it applied to their particular plan's provisions. (Of course, their decision could be appealed in a Federal Court but few divorcing clients could afford taking that action.) This means that all interpretations as to compliance rest in their hands, and not in the hands of the judge who signed the order. This does not usually present a problem if the attorney drafting the order familiarizes him or herself with the "summary plan description" of the plan being addressed and has a good working knowledge of REACT. But problems can arise when the parties agree to distribution provisions that are unacceptable to the plan and these provisions are then incorporated into a Qualified Domestic Relations Order.

The first rule, when negotiating a settlement involving a QDRO, or drafting an order, is to avoid requiring the plan to actuarially pay out more than they would have paid out if there was no QDRO on file. As an example, many plans have supplemented early retirement benefits. That means that if the participant reaches a certain number of years of service and/ or attains a certain age (i.e., 30 years of service and age 55) he or she can retire with unreduced benefits instead of being penalized for commencing retirement prior to the normal retirement age (usually age 65). The QDRO can require the plan to allow the non-participant spouse to participate in theses early, supplemented benefits but only if the participant elects to retire early and commence receiving them. The QDRO can not require the plan to commence paying the alternate payee on the date the participant is eligible to these increased, early benefits, whether or not the participant retires. In that case, the order would be requiring the plan to pay out a benefit to which it has no obligation to pay unless the participant elected early, unreduced benefits. The order would be rejected for requiring the plan to actuarially pay out more than they would have paid out if there was no QDRO on file. The fact that a judge signed the order carries no weight.

REVISITING THE PROBLEMS CREATED FOR FAMILY LAW ATTORNEYS BY TROUBLED DEFINED BENEFIT PLANS

In the past couple of months, something that was once limited to the business pages of newspapers or to business magazines, is being written about everywhere in newspapers and general circulation magazines. What I am referring to is the dismal future of the up-coming baby boomer retirees counting on defined benefit plans to fund a comfortable retirement. Even news discussion TV shows devote a lot of time to this arcane subject. Company after company is abandoning defined benefit pension plans and replacing them with some form of retirement savings plan because they can no longer afford these expensive benefits as the working population ages. These savings plan retirement funds (401(k), ESOP, defined benefit savings plans, etc.) will neither provide the income level or the security that previous retirees enjoyed with regular company pensions. For many people this means that retirement will have to be postponed or post-retirement employment will become a necessity.

As a general rule public employee defined benefit pensions, which are usually much more generous than private plans, are not facing the same fate in the immediate future because their investment shortages can be covered by increased taxes. But eventually they will also have to bite the bullet and redesign their retirement packages as taxpayers start to rebel when seeing their taxes rise to fund very generous lifetime pensions for public employees (many with Cost of Living Allowances built in) while private sector employees no longer have access to anything that comes close for their own retirements.

Most companies in the industrial sector are carrying huge deficits in their defined benefit pension funding accounts and are being forced to face this problem if they hope to remain viable. In the past couple of months, General Motors has become the poster child for this monstrous problem with the bankruptcy of Delphi, one of its former subsidiaries for which GM still has pension obligations.

What does this all mean for you, the Family Law Attorney? For one thing, it means that you will have to develop more creative ways to deal with marital property retirement assets. to assure that your client gets at least part of the benefits that were expected. Because a crisis is developing, and everyone is (or should be) aware of it, you will have to start **today** in changing how you address retirement assets. Pension participants in private plans are going to become more reluctant to do an immediate offset if they start to think that the value of their pension, based on its availability at retirement, has become a more speculative asset.

If you intend to use a QDRO to distribute the marital portion of a defined benefit pension, you are going to have to include language that addresses various unknowns. This is not going to be easy. We have found that plan reviewers do not like contingency language. But like it or not they have to be convinced that:

1. It does not cost the plan any more money nor does it violate the intent of the Retirement Equity Act of 1984.

2. What you are trying to do is address real world problems that every company or Union managed plan will probably face in the near or distant future.

3. Your obligation to your client requires you do everything possible to address these contingencies or you could be facing malpractice.

Eventually, the plans will come around to accepting the very real changes that are coming but you will be encountering a lot of new challenges in the immediate future if your goal is to protect your client and yourself. Just having documentation that you fought to include these contingencies in the order, even if you are not successful, will go a long way in protecting yourself. Remember, anything you want to put into a QDRO has to be in the settlement agreement first. I have written a number of paragraphs for settlement agreements that address these contingencies and I have found you have to be very creative in trying to anticipate all of the possible "what if's" that may occur if a pension plan is terminated or converted into some kind of retirement savings account.

Model Property Settlement Language

Download our settlement language form and let the experts at LawDATA, Inc. **draft model property settlement language** (http://www.lawdatainc.com/SetLanForm.pdf) that deals specifically with the pension plan to which the order is addressed and the facts of your case.

Mr. Commerford has been active in the valuation of pensions and the preparation of Domestic Relations Orders for his attorney clients since the founding of LawDATA, Inc. in 1984. He has presented Continuing Legal Education programs, dealing with the valuation and distribution of retirement assets incident to divorce cases, for State Bar Associations throughout the country and written many articles on the subject for legal publications.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

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