

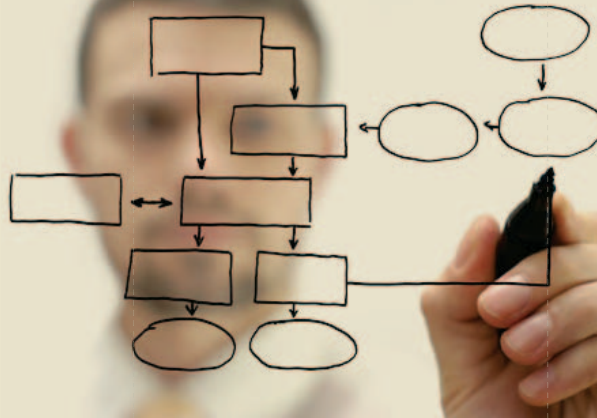
## CUEd In:

### The Law and Business of Employee Benefits for Credit Union Executives

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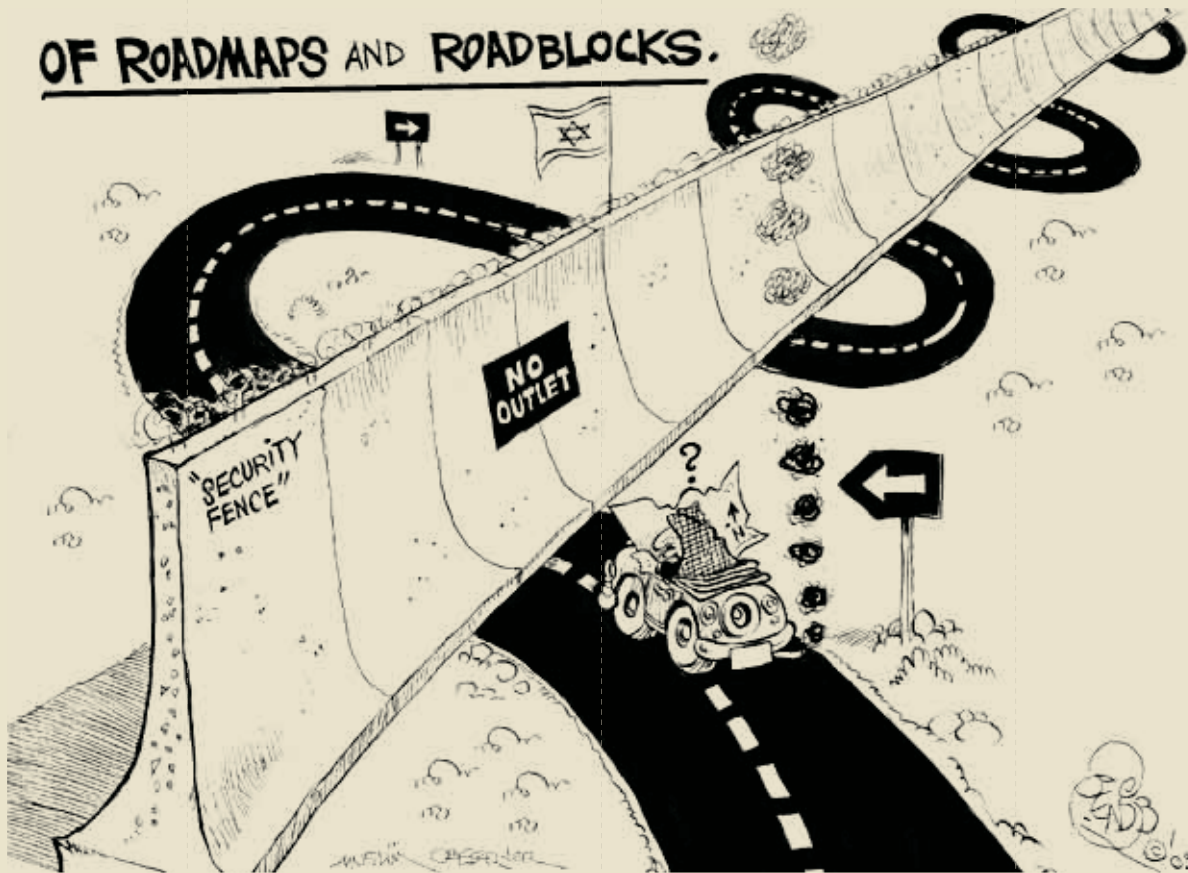


Welcome to the next issue of *CUEd In*, our guide to the law and business of employee benefits for credit union executives.

In this issue, we highlight the importance of one theme: process. We spotlight the keys to understanding the procedures of challenging a denial of executive benefits. To demonstrate the procedural principles at issue, we use a recent case involving a handful of executives that challenged a plan committee's determination that the executives forfeited all rights to deferred compensation benefits based on their subsequent work for a competing company. The case embodies the interaction between state and federal court jurisdiction and, importantly, the relationship between a plan committee's determination and court review. We dissect this case and apply it in the context of credit unions.

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## ***Understanding the road map to challenging a denial of executive benefits***



Executives of credit unions challenging the decisions of plan committees need to understand the role of the plan committee, how courts review plan committee decisions and the standards that apply. A recent case involving a group of executives that challenged the plan committee's determination provides a good road map to understanding the process.<sup>1</sup>

*A hypothetical credit union example based on the facts of Draft v. Advest Inc.* In 1992, Advest Credit Union establishes an Account Executive Nonqualified Defined Benefit Plan ("Plan") for a "select group of highly compensated account executives." Pursuant to the Plan, any executive employed by the Advest Credit Union is automatically enrolled as a participant after earning

compensation above a specified threshold in a given year. After enrollment, participants accrued benefits under the Plan based on compensation earned, which would be paid out to participants after being enrolled in the Plan for ten years and having reached a specified age.

<sup>1</sup> Daft v. Advest Inc., 6th Cir., No. 08-3212, September 23, 2011.

*Executives of Advest Credit Union become disqualified after working for another credit union.* However, the Plan contains multiple provisions outlining events that cause the discontinuance and forfeiture of Plan benefit payments regardless of how long the participant had been employed by Advest Credit Union. One such provision calls for the automatic forfeiture of Plan benefits if the executive works for a competing credit union after terminating employment with the Advest Credit Union.<sup>2</sup>

Several executives resigned from Advest Credit Union and commenced employment with other credit unions. Despite having participated in the Plan for at least seven years, the Plan Committee of Advest Credit Union determines that the executives forfeited their Plan benefits based on their disqualifying employment.

*Executives file suit contesting Plan Committee's determination.* The executives initially filed suit for breach of contract in state court, but the case was removed by Advest Credit Union to U.S. federal district court. The court then granted both parties' request for a stay to allow them to pursue administrative remedies.

*Executives seek administrative remedies with the Plan Committee.* In their application for benefits filed with the Plan Committee, the executives claim entitlement to accrued benefits under the terms of the Plan. In addition, they argued that a denial of accrued benefits resulted in numerous violations of the Employee Retirement Income

Security Act of 1974, as amended ("ERISA"), including a violation of the minimum vesting rules, which require that participants in a defined benefit plan acquire a non-forfeitable right to 100% of accrued benefits after no more than seven years of service.<sup>3</sup>

***Despite having participated in the Plan for at least seven years, the Plan Committee of Advest Credit Union determines that the executives forfeited their Plan benefits based on their disqualifying employment.***

The Committee denied the application, concluding that plaintiffs forfeited their accrued benefits under the Plan and that the Plan did not violate ERISA because it is a top-hat, deferred-compensation plan as defined by ERISA section 201(2).

*Back to court we go.* In response, plaintiffs filed an amended complaint in U.S. federal district court, alleging that the denial of benefits constituted a breach of contract and violated ERISA. The district court rules that, as a matter of law, the Plan was not a top-hat plan and that the Plan failed to comply with ERISA's vesting requirements.

*Advest Credit Union argues that the U.S. federal court has no authority to hear the case.* Nearly two years after this judgment, Advest Credit Union argued for the first time in a submission on post-judgment remedies filed in district court that the federal court lacked subject matter jurisdiction because the Plan did not fit the definition of an "employee

pension benefit plan" covered under ERISA. The court rejected this argument and held that the Plan was an ERISA pension plan, and that it therefore had jurisdiction. Advest appealed this ruling along with the court's monetary judgment awarded to

the plaintiffs. [Let's keep it in mind ladies and gentlemen that the case was originally filed in state court and it was Advest Credit Union that removed it to federal court.]

*Up the ladder we go.* On appeal, the Sixth Circuit first addressed Advest's argument that the court did not have subject matter jurisdiction to hear the case because the Plan is not an ERISA plan. The court noted the split of judicial authority among circuits as to whether the existence of an ERISA plan is a prerequisite for federal subject-matter jurisdiction, pointing out that most circuits have adopted the position that where federal subject matter jurisdiction is predicated on ERISA, but the evidence fails to establish an ERISA plan, the claim must be dismissed for lack of subject matter jurisdiction.<sup>4</sup>

The court concluded, however, that the decision was controlled the U.S. Supreme Court's analysis in *Arbaugh v. Y & H Corp.*,<sup>5</sup> in which it held that Congress

<sup>2</sup> Any termination of employment, unless it occurred after the participant turned 65 or was due to disability, would also result in forfeiture.

<sup>3</sup> See 29 U.S.C. § 1053(a)(2).

<sup>4</sup> Federal courts have subject matter jurisdiction over all civil actions arising under the laws of the United States, including ERISA.

<sup>5</sup> 546 U.S. 500 (2006).

must clearly state that a threshold limitation on a statute's scope shall count as jurisdictional in order for it to be so. Under the same analysis, because the relevant sections of ERISA do not reveal a clear statement from Congress that the existence of an ERISA plan constitutes a jurisdictional requirement, the court held that the existence of a "plan" under ERISA is merely an element of a plaintiff's claim under ERISA Section 502(a)(1)(B)

plan as one which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.<sup>8</sup> The court noted that, although the Plan Committee determined that the Plan was a top-hat plan, the court reviews such questions de novo, with no deference given to the Plan Committee's decision, because it is a question of law.

Committee for a new determination in light of the appropriate standard. Remand, the court noted, is the proper remedy when the problem is with the integrity of a plan committee's decision-making process, rather than a situation in which a claimant was denied benefits to which he was clearly entitled. Therefore, the case was sent back to the district court with instructions to remand to the Plan Committee to fill in the administrative record and determine the top hat issue under the appropriate legal standard.

***The court noted that, although the Plan Committee determined that the Plan was a top-hat plan, the court reviews such questions de novo, with no deference given to the Plan Committee's decision, because it is a question of law.***

*The saga won't end here: this case will go back-up the ladder after the Plan Committee makes a determination.* The court's standard of review in such matters is dependent upon the Plan Committee's determination and creation of an administrative record. Generally speaking, you get to court only after having gone through the administrative (plan committee) process. From there, the standard of review will depend largely on the language contained in the plan and the particular issue involved.

and not a prerequisite for federal jurisdiction. As a result, the court concluded, federal subject matter jurisdiction lies over an ERISA claim so long as it is colorable.<sup>6</sup>

*Back down the ladder on the dispositive issue for the Plan Committee to make a determination.* The court then ruled that the district court correctly rejected the decision of the Plan Committee on the top-hat

The court then held that the plaintiffs in this case had clearly met the colorable claim requirement. Further, the court determined that Advest Credit Union lost its opportunity to argue that the Plan is not an ERISA plan because the argument was not raised earlier.

***Remand, the court noted, is the proper remedy when the problem is with the integrity of a plan committee's decision-making process, rather than a situation in which a claimant was denied benefits to which he was clearly entitled.***

*The dispositive issue in the case, let's get to the merits.* As a result, the dispositive issue in deciding the case was whether the Plan qualifies as a top-hat, deferred-compensation plan under section 201(2) of ERISA.<sup>7</sup> The statute defines a top-hat

issue because the Plan Committee did not use the correct standard.<sup>9</sup> However, the court found that the district court improperly decided the issue by itself without first remanding back to the Plan

<sup>6</sup> The court noted that an ERISA claim is colorable unless it appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous.

<sup>7</sup> ERISA does not require a top hat plan to comply with the substantive provisions otherwise applicable to ERISA pension plans, including the vesting requirements.

<sup>8</sup> 29 U.S.C. § 1051(2).

<sup>9</sup> The court cited a previous Sixth Circuit case, *Bakri v. Venture Mfg. Co.*, 473 F.3d 677 (2007), for a four factor test to be used in determining whether a plan is a top-hat plan, which looks at: (1) the percentage of the total workforce invited to join the plan, (2) the nature of their employment duties, (3) the compensation disparity between top hat plan members and non-members, and (4) the actual language of the plan agreement.

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