

## CUEd In:

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

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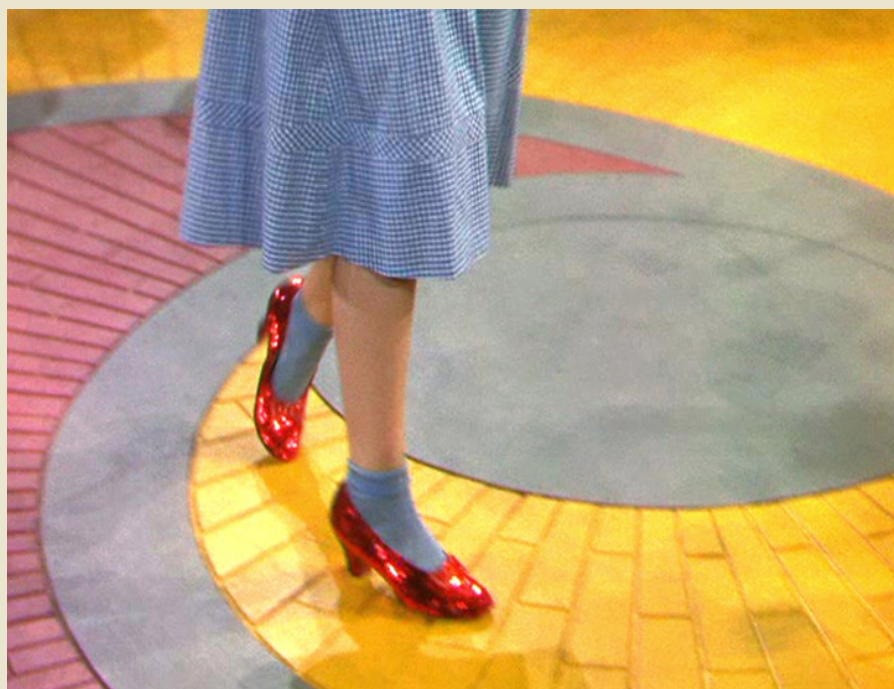
Welcome to the next issue of *CUEd In*, our guide to the law and business of employee benefits for credit union executives.

In this issue, we highlight the importance of understanding the impact that career related decisions—such as accepting a promotion, switching credit unions, or volunteering to partake in a voluntary layoff program—may have on your rights under an employee benefit plan.

To illustrate the concept, we focus on a recent case involving an executive who relied upon a representation from a service provider of the company in connection with the amount of pension benefits the executive was entitled to. Perhaps throughout the years the executive developed a relationship with the service provider, or maybe the executive assumed that because the company hired the service provider it would be competent. Regardless, the executive made a life altering decision, to his/her detriment, based on faulty information provided by the company's service provider rather than seeking out advice from an independent source. We dissect this case and apply it in the context of credit unions.

In addition, please join our *CUEd In* LinkedIn Group by visiting: <http://tiny.cc/ud88kw>. Through our LinkedIn Group, we will be disseminating information and updates for credit union executives.

## Follow the yellow brick road...



Executives of credit unions who participate or seek to participate in a Supplemental Executive Retirement Plan (“SERP”) need to understand the benefit formula of the SERP, the impact that promotions, terminations and career related decisions may have on the calculation of benefits and their rights under the SERP. This is particularly true, as we discussed in our last issue, due to the complex nature of challenging the decisions of SERP plan committees, how courts review SERP plan committee decisions and the standards that apply. In short, it is always better to receive an opinion that you can rely on from an independent employee benefits counsel to

determine the impact that a career related decision may have on your right to receive pension and other benefits. A recent case involving an executive that relied upon a representation from a service provider of the company provides an unfortunate, but realistic, example.<sup>1</sup>

*A hypothetical credit union example based on the facts of Duncan v. Milliman Inc.* Louisiana-Pacific Credit Union (“LP Credit Union”) is the sponsor of a SERP that is offered to its executive employees. F. Jeff Duncan, Jr. (“Duncan”) was a 53-year old Vice President and the Chief Information Officer and Director of Technology with LP Credit Union. Duncan

was a participant in the SERP.

Benefit Consultants Inc. (“BCI”) provides actuarial consulting and other services to LP Credit Union in connection with the SERP, including the preparation of periodic benefit statements to be sent to each participant in the SERP. These statements include information relating to each participant’s status in the SERP, an estimate of the participant’s projected benefits, and a summary of SERP provisions. As a participant, Duncan received these benefit statements. In one such statement, the benefit statement provided by BCI to Duncan provided that Duncan had an “accrued benefit”

<sup>1</sup> Duncan v. Milliman Inc., M.D. Tenn., No. 3:09-cv-00989, March 20, 2012.

of \$1,234,572 as of January 1, 2008.

*Executive makes life altering decision based on benefit statement.* In October of 2008, Duncan learned that LP Credit Union planned a significant reduction in force and thus reevaluated his retirement options, including a review of the most-recent benefit statement provided by BCI, which included the \$1,234,572 accrued benefit. After assessing his options, Duncan told the senior executives of LP Credit Union on October 23, 2008 that he was willing to be included in the anticipated reduction in force.

By letter dated October 29, 2008, BCI informed LP Credit Union that Duncan's estimated retirement benefit would be \$517,103.10, assuming a retirement date of November 15, 2008.

would never have volunteered to be terminated.

On November 19, 2008, BCI provided Duncan with an "Explanation of SERP Benefit" that included the revised, lower amount, and explained that the higher "accrued benefit" amount on the January 1, 2008 benefits statement was based on the normal retirement age of 62 and service through December 31, 2007.

*Executive signs Separation Agreement and attempts to reserve rights but doesn't.* Duncan was then provided with a Separation Agreement drafted by LP Credit Union, which provided Duncan with certain severance pay benefits. In addition, the Separation Agreement provided that "All benefits and rights arising out of [Duncan's participation in LP Credit Union's retirement] plans and programs shall be

***Duncan returned a signed and initialed copy of the Separation Agreement to LP Credit Union. However, he also added a handwritten addendum to the "Release" clause which read: "This shall not preclude the right to pursue actions regarding my SERP Benefit including those provided in the Plan."***

Agreement contained a clause by which Duncan irrevocably and unconditionally released LP Credit Union and any of its agents from any and all future suits of any nature whatsoever.

***On November 3, 2008, Duncan was provided with a letter confirming his termination and notifying him of this estimated benefit. Duncan responded that, had he known this was the actual amount instead of the \$1,234,572 he anticipated, he would never have volunteered to be terminated.***

On November 3, 2008, Duncan was provided with a letter confirming his termination and notifying him of this estimated benefit. Duncan responded that, had he known this was the actual amount instead of the \$1,234,572 he anticipated, he

payable or exercisable upon termination of Duncan's employment on his Separation Date solely in accordance with the terms of those plans, programs and related agreements in effect on that Separation Date." In exchange, the Separation

Duncan returned a signed and initialed copy of the Separation Agreement to LP Credit Union. However, he also added a handwritten addendum to the "Release" clause which read: "This shall not preclude the right to pursue actions regarding my

SERP Benefit including those provided in the Plan.” Duncan was informed that this proposed addendum was not acceptable to LP Credit Union and, in response, he signed the Separation Agreement as originally drafted. Duncan notified a Vice President with LP that he was signing the agreement without the additional language because his lawyer had informed him that claims arising out of, or relating to, the SERP were expressly and unambiguously excepted from the release. In August 2009, Duncan was paid a SERP benefit close to the revised amount that had been computed by BCI in the November benefit explanation.

*Executive files lawsuit alleging additional benefits due under SERP.* In response, Duncan brought suit in Federal District Court against BCI based on the alleged negligent misrepresentation in the January 1, 2008 statement.

Duncan alleged that he was induced to volunteer for retirement or a termination from LP because the benefit statement, as he had understood it, indicated that he was entitled to receive a significantly higher SERP than actually paid.

Duncan argued that the release in the Separation Agreement unambiguously excepted claims pertaining to LP Credit Union’s employee benefit plans and, in the alternative, such a release would violate Sections 410(a) and 510 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Section 410(a) provides that any provision in any agreement which purports to relieve a fiduciary

from responsibility of liability under ERISA is void against public policy. Section 510 generally prevents interference with an employee’s pension rights.

*How does the court see it?* The Court first noted that a release of rights under ERISA must be clear and unmistakable and, therefore, ERISA waivers require closer scrutiny than waivers of general contract claims. However, the Court noted that the provisions of the Separation Agreement relating to the governing nature of the terms of the SERP with respect to Duncan’s employee benefits did not have any effect on a claim for negligent misrepresentation because such a claim is one under state tort law and not a claim for “accrued benefits and rights under LP [Credit Union]’s employee benefit plans” which would have implicated the employee benefits language in the Separation Agreement.

This fact was made clear by the fact that Duncan did not sue BCI seeking benefits in accordance with the written terms of the SERP; rather, the suit dealt with the alleged misrepresentations in the benefit statement.

As a result, the Court found that Duncan’s claim for negligent misrepresentation was waived by the release provision of the Separation Agreement. The Court noted that the obvious intent of this provision was to release any causes of action Duncan may have had against LP Credit Union and its agents, including BCI, except for causes of action for benefits, in exchange for the severance payment. Accordingly, the Court granted BCI’s motion for summary judgment and Duncan’s claim was dismissed.





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*CUEA In* is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content.

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