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Counsel

Buchanan Ingersoll & Rooney PC *PricewaterhouseCoopers*
Gerald H. Sherman William Archer
Stuart M. Lewis Donald Carlson
Deborah M. Beers

Keith A. Mong *Ricchetti, Inc.*
Steve Ricchetti
Jeff Ricchetti

Federal Policy Group *Arnold & Porter LLP*
Ken Kies Martha L. Cochran
Matthew Dolan David F. Freeman, Jr.

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101 Constitution Avenue NW, Suite 703 East
Washington, DC 20001
Toll Free: 1-888-275-0092 Fax: 202-742-4479
www.aalu.org

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Subject **Court Allows Reformation Of Scrivener's Error In Qualified Retirement Plan Document**

Major References: [*Young v. Verizon's Bell Atlantic Cash Balance Plan \(7th Cir. 2010\)*](#)

Prior AALU Washington Reports: 09-131

MDRT Information Retrieval Index Nos.: 5400.00 and 5900.00

SEE THE CIRCULAR 230 DISCLAIMERS APPENDED TO THE CONCLUSION OF THIS WASHINGTON REPORT.

The U.S. Court of Appeals for the Seventh Circuit, in Young v. Verizon's Bell Atlantic Cash Balance Plan (7th Cir. 2010), rejected a participants' class action for benefits under Verizon's Bell Atlantic Cash Balance Plan (the "Plan"), even though the claimed benefits were based upon unambiguous language contained in the Plan document. The Court found that a scrivener's error had occurred and that the language cited by the class action plaintiffs was inconsistent with plan participants' expected benefits.

In *Young*, the language in question was contained in the portion of a cash balance plan document that addressed opening balances for participants that had participated in a prior defined benefit plan. The relevant language specified that the Plan's opening balance for a participant from the prior plan was the product of an (1) applicable transition factor and (2) the lump-sum cashout value of the accrued benefit under the prior plan "multiplied by the applicable transition factor". The Administrator, in calculating the opening balances, ignored the second reference (in quotation marks above) to the applicable transition factor and determined that each affected participant's opening balance was the product of the lump-sum cashout value and a single transition factor.

The second reference to the applicable transition factor was not included in the first three drafts of the Plan document created by an outside consulting firm hired by Bell Atlantic (which was succeeded by Verizon by the time of the lawsuit). The problematic language was inserted into the fourth draft of the Plan document by Bell Atlantic's in-house attorney who revised the Plan document to be more "readable." In revising the Plan document, the in-house attorney testified that he had neglected to remove the second reference to the applicable transition factor after moving the "applicable transition factor" clause to an earlier point in the paragraph. No one noticed the error before the adoption of the Plan document in 1996. The error was discovered by Bell Atlantic in 1997 and the Plan was amended in 1998 to remove the unintended language.

The lawsuit was brought by Cynthia Young in 2005 in the Northern Federal District Court of Illinois which certified a class of approximately 14,000 Bell Atlantic/Verizon pensioners similarly situated to Ms. Young. If plaintiffs prevailed in this case, their opening balances in 1996 would have been approximately \$1.67 billion higher than what was indicated in their statements.

The district court initially concluded, among other things, that the Administrative Committee had abused its discretion in disregarding the second reference to the transition factor as a drafting mistake. The Court noted that if Verizon wished to avoid that mistake, it would have to seek a court order for equitable reformation of the Plan document. Taking the district court's cue, Verizon counterclaimed for equitable reformation of the Plan to remove the second transition factor as "scrivener's error." The district court found in a subsequent decision that overwhelming evidence existed that a scrivener's error occurred and granted Verizon's claim for equitable reformation. (For more information on the district court's decision, see our Bulletin No. 09-131.)

Seventh Circuit's Ruling

The Seventh Circuit determined that ERISA section 502(a)(3) authorizes equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error which does not reflect participants' reasonable expectation of benefits. The evidence supporting such a claim must be objective and not dependent on the credibility of the oral or written testimony of an interested party.

The Court found that all correspondence between Bell Atlantic/Verizon and the participants supported the conclusion that the applicable transition factor should be considered only once when determining opening balances. Prior to the Plan conversion, participants were sent a brochure which clearly depicted opening cash balances as the product of an employee's lump-sum value under the prior plan and a single transition factor. Also prior to conversion, Bell Atlantic sent participants personalized statements of their estimated opening account balances, which illustrated the use of a single transition factor. Following the conversion, all personalized statements reflected the use of only one transition factor.

Additionally, the course of dealing between Bell Atlantic/Verizon and Plan participants was consistent with the use of a single transition factor in calculating the opening balances. Ms. Young's benefit statements showing the estimated opening balance and the actual opening balance applied the same single transition factor. Prior to the lawsuit, no employees complained that the opening balances should have been increased by the additional transition factor. Furthermore, Ms. Young admitted that she never relied on the transition factor language prior to the lawsuit.

The Court acknowledged that many of the documents upon which it relied include disclaimers indicating that Plan language overrides contrary language in those documents. However, the Court stated that the disclaimer language does not preclude Bell Atlantic/Verizon from reforming the Plan document consistent with the other documents if Bell Atlantic/Verizon establishes by clear and convincing evidence that the intended meaning of the Plan language was to apply only a single transition factor to calculate opening cash balances.

In addition, although Verizon discovered the error in 1997, no participants had complained about the language until Ms. Young's lawsuit in 2005 in which she put the transition factor language at issue. It is at that time that Verizon became aware that the drafting error gave rise to a controversy requiring it to raise an equitable reformation claim. Thus, the Court determined that Verizon's claim for reformation accrued at the time of Ms. Young's lawsuit.

The Court determined that Bell Atlantic/Verizon committed "profound" negligence by charging "a single in-house attorney with revising a critical provision of a multi-billion-dollar pension plan" without critical review by another ERISA expert. However, it held that Bell Atlantic/Verizon's failure did not show a lack of good faith since it never misrepresented the intended meaning of the Plan document and it made great efforts to accurately communicate how participants' benefits would be calculated.

IRS Reaction

It is our understanding that the Revenue Service has considered whether its Employee Plans Compliance Resolution System ("EPCRS") may be an appropriate means for allowing plan sponsors to correct scrivener's errors and for assisting in the avoidance of potentially complex and expensive litigation such as *Young*. Alternatively, the IRS is also considering whether the courts should be the sole avenue for correcting drafting errors, particularly since participants' rights are affected by such corrections. To our knowledge, no definitive determination has yet been reached.

Any AALU member who wishes to obtain a copy of *Young v. Verizon's Bell Atlantic Cash Balance Plan* may do so through the following means: (1) use hyperlink above next to "Major References," (2) log onto the AALU website at www.aalu.org and enter the *Member Portal* with your last name and birth date and select *Current Washington Report* for linkage to source material or (3) email Anthony Raglani at raglani@aalu.org and include a reference to this *Washington Report*.

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