FTR Now

Deviation From Prescribed Waiver Form Proves Costly

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In the administration of a pension plan, there are a number of situations which call for the use of prescribed forms. These forms often require decisions to be made that can affect the pension plan entitlements of members and other plan beneficiaries. Sometimes, in an effort to adapt and/or make the prescribed forms more readable and less legalistic, plan administrators will make what they regard as minor alterations to the format and/or content of such forms. However, as demonstrated by the recent decision of the Ontario Court of Appeal in *Smith v. Casco*, changes to prescribed forms, even though well-intended, can backfire and possibly render related decisions or elections void or voidable.

In *Smith v. Casco*, the plaintiff ("Smith") successfully sought entitlement to a survivor pension despite having signed a form prepared by Casco Inc. ("Casco"), the plan administrator, in which she purportedly waived her survivor entitlement. This *FTR Now* discusses the outcome in that case, and its potential implications for plan administration.

BACKGROUND

In February 2000, Smith's husband (the plan member) was given an incentive to take early retirement at the age of 58. Under the Ontario *Pension Benefits Act* ("*PBA*") and the Casco pension plan, the default form of pension for Smith's husband was a joint and survivor pension. As an alternative, Smith's husband could elect other optional forms of pension as long as Smith signed a spousal waiver form.

Instead of the default joint and survivor pension, Smith's husband elected to receive a life only pension, guaranteed for 60 months. Under this optional form of pension, if Smith's husband died prior to the end of the 60 month guarantee period, any payments remaining during that guarantee period would be made to his designated beneficiary.

To give effect to this election, Smith signed a spousal waiver form that had been prepared by Casco (the "Casco Form"). Casco commenced to pay the elected form of pension to Smith's husband in 2000. In 2003, Smith's husband died unexpectedly. Smith received the balance of the payments owing for the 60 month guarantee period, ending June 2005.

Upon the termination of the payments in June 2005, Smith challenged the validity of the Casco Form, and also claimed that Casco made a negligent misrepresentation by failing to fully explain the consequences of signing the Casco Form. At trial, Casco was found liable for negligent misrepresentation in respect of the information it provided (or failed to provide) to Smith and her husband about the consequences of the pension option selected.

Casco appealed to the Divisional Court where that court would have overturned the decision against Casco on the issue of negligent misrepresentation, but found that since the Casco Form was substantially different from the waiver form approved by the Ontario Superintendent of Financial Services (the "Prescribed Form"), it was invalid. Referring to section 46(1) of the *PBA*, the court reasoned that in order for Smith's husband to elect a form of pension other than the default joint and survivor pension, Smith was required to waive her entitlement by delivering "a written waiver in the form approved by the Superintendent". Section 46(1) states:

The persons entitled to a joint and survivor pension benefit may waive the entitlement to receive payment of pension benefits in the form of a joint and survivor pension by delivering to the administrator of the pension plan… **a written waiver in the form approved by the Superintendent**… [emphasis added]

Relying upon the trial court's finding that the Casco Form was not the Prescribed Form (which was the form approved by the

Superintendent) and that the Casco Form was substantially different from the Prescribed Form, the Divisional Court concluded that the Casco Form signed by Smith was invalid and that Smith had not waived her entitlement to a joint and survivor pension.

DECISION OF THE COURT OF APPEAL

The sole issue before the Court of Appeal was the substance and validity of the Casco Form. Casco argued that the differences in the Casco Form did not affect its substance and that, pursuant to section 28(d) of the Ontario *Interpretation Act* ("*Interpretation Act*"), the Casco Form was not rendered invalid.

At the relevant time, section 28(d) of the *Interpretation Act* stated that:

where a form is prescribed, deviations therefrom not affecting the substance … do not vitiate it;

The Court of Appeal compared the Casco Form to the Prescribed Form to determine whether there were deviations affecting the substance of the form. The Court of Appeal noted the following deviations:

- the Casco Form did not make it clear that by signing the waiver, a surviving spouse is waiving all entitlements to a survivor pension: whether the entitlement flows from the *PBA* or the pension plan itself. Even after signing the Casco Form, which waived entitlement to a survivor pension under the *PBA* but did not clearly state that the survivor pension under the Casco pension plan was being waived, a surviving spouse could still believe that she was entitled to a survivor pension flowing from the pension plan;
- the title of the Casco Form – "Pension Plan for Salaried Employees of Canada Starch Operating Company Inc. Postretirement Spousal Survivor Benefit Waiver Form" – did not make clear the purpose or nature of the form, whereas the Prescribed Form was clearly titled "Waiver of Joint and Survivor Pension";
- the consequence of signing the Casco Form was not in **bold** type as was the case on the Prescribed Form;
- the caution given to spouses to obtain independent legal advice was not in **bold** type and was not of prominence on the Casco Form. The Prescribed Form cautioned spouses to obtain independent legal advice in bold type immediately below the signature lines; and
- the Casco Form did not require the delivery of the form to a specific person (e.g. H.R. Manager), as is required by the *PBA* and indicated on the Prescribed Form.

The Court of Appeal held that these differences affected the substance of the Casco Form and that it was invalid.

In ***obiter***, the Court of Appeal suggested that there may be situations in which it might provide relief (i.e., in equity) against such an outcome. The Court noted, for example, that "there may be situations in which people have signed waivers that differ from the Superintendent approved waiver and are fully aware of the consequences of their actions." However, this was not the situation at issue before the Court and the methods available for providing relief were not addressed in the decision.

The result of the case was that Smith was entitled to survivor benefits under the default joint and survivor pension.

POTENTIAL IMPLICATIONS

This decision demonstrates that relatively minor deviations from a prescribed form might be viewed as affecting the form's substance. This could have significant cost implications if the modified version of the form is challenged and determined to be invalid.

Effective July 2007, the *Interpretation Act* was replaced by the Ontario *Legislation Act, 2006* ("*Legislation Act*"). Section 84 of the *Legislation Act*, which is the equivalent to section 28(d) of the former *Interpretation Act*, sets out additional criteria that must be satisfied if a modified form is to be "saved" by this section. Specifically, the deviations must not affect the substance of the form, the deviations must be unlikely to mislead, and the form must be organized in the same or substantially the same

way as the prescribed form.

The take-away from the Casco case is that plan administrators are cautioned against making changes to prescribed forms. If there is a desire to explain the prescribed form or assist in the form's "readability", it may be better to provide a covering letter rather than alter the prescribed form. Plan administrators (including third party administrators) should determine whether forms currently in use deviate from what is prescribed, and consider whether to instead use the prescribed form.

Since the Court of Appeal's decision might have broader application, to prescribed forms used by employers in the general employment context, employers should proceed with caution if considering alterations to prescribed forms that affect employee rights or entitlements.

For more information on this decision or to discuss the potential implications for pension plan administrators and employers more generally, please contact Natasha D. Monkman at 416.864.7302 or any member of the Pension & Benefits Practice Group.

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