

VERDICTS & SETTLEMENTS

matt.yas@lawyersweekly.com

CEO advised to alter retirement plan; loses benefits

\$1.6 million settlement

In 1990, the defendant, an insurance and financial consultant, induced the plaintiff, a

health care CEO, to surrender his supplemental executive retirement plan with his hospital, which provided significant guaranteed benefits, for a less favorable split-dollar agreement. He did so by representing to the CEO that, in making the switch from his SERP to the split-dollar agreement, the CEO's guaranteed benefits under the SERP would remain the same.

Although the defendant understood that it was his job to protect the CEO's interests and preserve the SERP benefits in the split-dollar agreement, the plaintiff claimed that he utterly failed to do so. There was no language in the final signed split-dollar agreement that obligated the hospital to fund the split-dollar agreement through the purchase of additional insurance policies or to reach the level of benefits previously guaranteed under the SERP. Relying on the promises and representations of the defendant, the CEO believed that his guaranteed SERP benefits were carried forward into

the split-dollar agreement.

When the dispute arose between the CEO and the hospital regarding the level of benefits promised in the split-dollar agreement, the matter was submitted to arbitration. The defendant participated actively and testified on behalf of the CEO that the hospital was required to provide the CEO with the level of benefits guaranteed under the defunct SERP. The arbitrator sided with the hospital. The CEO thereafter initiated this action arising out of the consultant's incorrect advice and failure to protect the CEO's interests.

Throughout the progress of this action, the consultant aggressively asserted his mistaken beliefs as to the hospital's obligations under the split-dollar agreement. In July 2007, Judge Allan van Gestel resolved the issue for purposes of trial, ruling that the language of the split-dollar agreement did not require the hospital to provide benefits to the CEO equal to the benefits

previously guaranteed to him under the SERP.

The plaintiff's expert, Dale Cammon of the Bryant Group, was prepared to testify that the loss of retirement benefits to the CEO resulting from the consultant's bad advice has a present value of \$5.2 million.

The defendant argued that his advice and conduct were reasonable and that the CEO was a sophisticated investor who well understood what he was getting (i.e., ownership of the policies of insurance, which would protect his retirement benefits from creditors of the hospital should the hospital go bankrupt). The defendant also argued that the CEO's claim was time-barred because he knew or should have known when he hired an attorney to represent him in arbitration proceedings that the split-dollar agreement did not provide the guaranteed SERP benefits.

The case settled after empanelment for \$1.6 million, part of which is an annuity that allows the plaintiff to obtain a more favorable tax treatment.

Type of action: Retirement

Injuries alleged: Loss of retirement benefits

Name of case: Withheld

Court/case no.: Withheld

Tried before judge or jury: Jury (settled after empanelment)

Amount of settlement: \$1.6 million

Date: January 2008

Attorney: Robert D. Cohan, Cohan, Rasnick, Myerson, Boston (for the plaintiff)