

# From the files of

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BRUCKER



MORRA

A Professional Corporation

## Southern California's largest firm exclusively practicing employee benefits law

As experts in every tax and labor aspect of the Employee Retirement Income Security Act (ERISA), we at Brucker & Morra are challenged by our clients to devise creative solutions to a wide range of problems. People's lives, unlike pension law, can be imprecise and messy. We know that. Our job is to bring legal order to personal chaos.

In this newsletter, we open our files to present cases and client predicaments that we find intriguing and, we admit, a little entertaining. We reserve the right to change case specifics to maintain client confidentiality, but we present the legal facts as we see them—and that is the qualifier in any law practice. "Facts are stubborn things," said John Adams, a lawyer and our second president, in his defense of British soldiers at the Boston Massacre. "Whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." We agree. Two hundred years later, John Lennon said, "Reality leaves a lot to the imagination." We agree with him too—particularly when the interpretation of reality is somewhere between "He said" and "She said."

If the reality of a pension or benefits matter is confounding to you or your clients, we invite you to contact us. The attorneys at Brucker & Morra are experts at skillfully applying pension law and common sense to achieve workable solutions. We pledge to resolve your issue in the most efficient and cost-effective manner. Even better, we'll work with you to prevent problems from ever arising.

### PLAN PARTICIPATION

#### They said. We said.

*Our clients said to their former employee:* Go away. We liked you when you were our top salesman, so when you left in 2001 we gave you a couple of big accounts. That settled our association. Now you're back making wild accusations about compensation and yammering about missing pension money. We don't owe you big bucks. We owe you nothing.

*The former employee said to our clients:* Wrong. Back in 1992 when you guys started your 401(k), I didn't get to participate. You owe me at least \$200,000 in matching contributions and earnings for nine years.

*Our clients said:* Are you out of your mind? You got an election form like everyone else. You returned it, signed and dated, and on the line where you stipulate whether to defer a dollar amount or a percentage of your pay, you wrote a big fat N/A. EN-AY. Not applicable. Nada. Zilch. Zero. We matched it: Our zero with your zero. We took zero from your paycheck. You even boasted to other employees that your self-deferred, self-managed IRA would beat their 401(k) returns. Did it, Mr. Smarty-Pants Warren Buffett Wanna-Be?

*The former employee said:* You rats. I get money or I get a lawyer. I'll file a claim for benefits. For good measure, I'll claim you breached your ERISA fiduciary responsibilities by denying me the right to defer. The Department of Labor really hates that. You'll be sorry when they come snooping around.

*Our clients said:* This is blackmail! We think. Meredith, what do you think?

*Meredith Sesser said:* Don't pay him. Don't worry. He thinks he's got a big gun claiming fiduciary breach, but he doesn't. ERISA has a statute of limitations on that, so he should have made his argument, bogus as it is, sooner. Now it's too late. He also thinks he can blast you with his benefits claim. That's also a dud because the claim doesn't exist. He clearly opted out of your plan, and you've got the papers to prove it.

*Our clients said:* Whew!

#### Comment from Meredith:

Angry ex-employees might allege pension law violations to raise the specter of having the IRS and Department of Labor enter a dispute as their allies. No employer wants that. The ex-salesman was using pension-related threats as leverage to settle his non-pension demands. When you eliminate the phony pressure on your pension plan, you gain leverage to deal more reasonably with the real issues.

### PENSION DISTRIBUTIONS

#### He shed. She shed.

*Our client said to his soon-to-be ex-employee:* I have to terminate the defined benefits pension plan for my professional corporation and I'm afraid I have bad news for you. The company is just the two of us, owner and employee, and the plan shoulda-coulda had \$1 million in it,

*continued on other side*

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but it only has a half million. Before you get your underwear in an uproar, you should know I did nothing illegal and I didn't invest the money in an emu farm. The actuaries actually said I funded the plan properly under prevailing Internal Revenue Code and ERISA law, and they blessed it with appropriate certifications. I'll give you a nice check for \$125,000—your 25-percent share of what's there.

*The soon-to-be-ex-employee said:* You dirty rat! Do you really think you can get away with this?

*He said:* Actually, I can. I'm following the law to the letter—the one I got from the IRS after I reported the plan termination. The IRS said that because I have a professional corporation with fewer than 25 employees, I should proportionally divide the assets that are there, not the assets that could have been there. But I'll tell you what. Because I'm a nice guy, I'll give you another \$25,000.

*She said:* In your dreams! You're walking away with \$375,000 as an Internal Revenue Code-abiding citizen or \$350,000 as Mr. So-called Nice Guy—not to mention the \$500,000 you somehow failed to contribute. I get my \$250,000 or I get a lawyer.

*He said:* Oh my. Alex, what do you think?

*Alex Brucker said:* Technically, you're in the right. The IRS understood your situation and could have said, but didn't, that the highly compensated employee would be the only one to take the hit. Then you would have paid her 25 percent of the million. As a point of law, if you as the owner of a small professional corporation gave her more than \$125,000, you'd violate IRS anti-assignment and anti-cutback rules. You are legally obliged to follow the IRS Barber Rule: If there's going to be a haircut, everyone sheds.

*She said:* He'll shed all right. I wish he would shed so he's bald. He'll shed that check for \$125,000. Then he'll shed another one for \$50,000 to make my lawsuit and me disappear.

*He said:* Deal, you arm-twisting vixen.

### *Comment from Alex:*

Pension termination disputes with employees can be hair-raising. Every payout has potential legal and financial consequences. You can run afoul of the Internal Revenue Code by honoring the spirit of a legal agreement rather than the law. Because we know the intricacies of the law, we can come up with lawful solutions. He wrote the second check, from a personal account, under duress. He may think of it as an unkind cut, but it's legal.



## **DUE DILIGENCE**

### **He shied. She sighed.**

*Our client said to the potential buyer of her company:* Yes, I know you like my burlap sack company, and I know you're a little upset with its almost-defunct defined benefit pension plan, but the financial situation is really not as bad as you think.

*The potential buyer said:* What 5500s have you been snorting? We're a publicly held company with a lot of firepower and our ERISA attorneys, CPAs and actuaries all say you're up to your eyeballs in deficiencies, sanctions, penalties, and excise taxes. They say you owe the government more than the \$9 million we're willing to pay for your whole company. That's what's high—along with you. This offer is off the table. We're outta here.

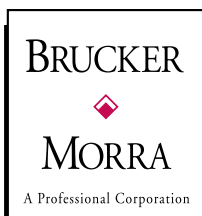
*She said:* Now wait just a darn minute. I froze this plan in 1994. In 1999, and I admit I goofed, I dumped a perfectly good TPA for a new advisor—OK, he's a friend of a friend—who turned out to be, shall I say, pensionally challenged. The advisor 'retired' my actuary because he thought I had a defined *contribution* plan and filed 5500s after 1999 as a DC plan. I'm sure the cost of bringing everything to compliance is lower than you think. Are you sure your people don't have my bags over their heads? Alex! Help!

*Alex Brucker said:* Re-set that table for \$9 million—and without the pension plan. He's wrong and you're right. Tell your buyer that you'll form a new company to adopt the pension plan and you'll take full responsibility for any deficiencies. I un-retired your actuary, who calculated that after 1999 your under-funding liability for funding, sanctions and taxes is quite low. We'll update your reporting and file with the IRS under the Voluntary Compliance Program. If your buyer asks about the cost, you can tell him that his own experts are high. By millions.

### *Comment from Alex:*

People often muddy the bargaining when they put qualified pension and profit-sharing plans on the table. Whether you're buying or selling, you should engage ERISA counsel to perform thorough due diligence. That's where we come in. We uncovered facts that revived this deal by allowing our client to focus on the value of the corporate asset. We actually settled the burlap bag lady's pension liability problem for substantially less than \$100,000. That's what can happen when you give specious claims the sack.

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Brucker & Morra  
10880 Wilshire Boulevard, Suite 2210  
Los Angeles, California 90024  
Telephone: 310.475.7540  
Fax: 310.470.4806  
Email: info@pensionlawyers.com  
Website: www.pensionlawyers.com

Alex M. Brucker – abruck@pensionlawyers.com  
Linda Russano Morra – morra@pensionlawyers.com  
Michael L. Cotter – mlcotter@pensionlawyers.com  
Meredith J. Sesser – msesser@pensionlawyers.com  
Cathryn B. Sportsman – csportsman@pensionlawyers.com  
Jeremy M. Pelphey – jmpelphey@pensionlawyers.com  
Pamela S. Leven, Editor – pleven@pobox.com  
Inquiries – info@pensionlawyers.com

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