



Alerts

Ninth Circuit Joins Fourth Circuit in Holding that Equitable Estoppel is Barred Where Use Would Contradict Express Terms of an ERISA Plan

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In *Wong v. Flynn-Kerper*, 999 F.3d 1205 (9th Cir. 2021), the Ninth Circuit barred the use of equitable estoppel to challenge the purchase price of company shares under an ERISA stock ownership plan when such use would contradict the plan's express terms.

The defendant Danette Flynn-Kerper's late husband acquired a promissory note in exchange for shares of company stock he sold to an Employee Stock Ownership Plan (ESOP) governed by ERISA. At the time of the sale, Mr. Kerper was the trustee of the ESOP and acted on both sides of the transaction. Per the terms of the plan, purchases of company stock by the ESOP must be purchased at fair market value on the date of the purchase. The plaintiff David Wong, the current trustee of the ESOP, sued the defendant as holder of the promissory note, alleging that the ESOP paid greater than "adequate consideration" for the shares due to Mr. Kemper's failure to disclose material information to the independent appraiser. The plaintiff brought an ERISA Section 502(a)(3) equitable claim against the defendant, seeking an adjustment to the purchase price and a declaration that the ESOP had overpaid.

On a motion to dismiss, the defendant raised the defense of equitable estoppel, claiming that plaintiff was estopped from adjusting the sale price based on a prior transaction between the parties wherein they entered into a Note Repayment Plan under which the plaintiff agreed to pay the outstanding balance on the promissory note in exchange for the defendant dismissing prior litigation between them. The plaintiff, as trustee for the ESOP, argued, *inter alia*, that a trust may not be equitably estopped if doing so contradicts the express terms of an ERISA plan.

The district court granted the defendant's motion to dismiss. Regarding the issue of ERISA preemption, the district court adopted the defendant's position that ERISA does not bar promissory or equitable estoppel in this context, where the defendant is not making a claim pursuant to the ERISA agreement, but is instead seeking to rebuff the plaintiff's own claim for reformation of a promissory note. According to the district court, estoppel has no effect whatsoever on the plan's written provisions in such a scenario.

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The plaintiff appealed to the Ninth Circuit. On the ERISA preemption issue, the Ninth Circuit concluded that the district court erred in its analysis because equitably estopping Wong would contradict the clear terms of the ESOP. The court held that federal equitable estoppel claims can only apply if a party satisfied traditional equitable estoppel principles and also alleges: (1) extraordinary circumstances; (2) that the provisions of the plan at issue were ambiguous such that reasonable persons could disagree as to their meaning or effect; and (3) that the representations made about the plan were an interpretation of the plan, not an amendment or modification of the plan. "A party cannot maintain a federal equitable estoppel claim against a trust fund where recovery on the claim would contradict written plan provisions."

The Ninth Circuit further explained that allowing the defendant to assert her equitable estoppel claim against Wong, as trustee for the ESOP, would contradict the clear terms of the ESOP. If Wong is correct that the ESOP overpaid for the company stock sold to it by Mr. Kemper, then applying equitable estoppel would require the ESOP to pay greater than the fair market value of the shares on their date of purchase. This would contravene the express terms of the ESOP, which requires that the shares be purchased at fair market value on the date of purchase.

The Ninth Circuit joined the Fourth Circuit by holding that a party, whether a plaintiff or a defendant, cannot use equitable estoppel to contradict the express terms of an ERISA plan in litigation with the plan, and deferred to ERISA's focus on what a plan provides, consistent with Supreme Court precedent. See, *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013) (declining to apply "equitable defenses alleging unjust enrichment," *id.* at 95, when doing so would contradict "the plan's clear terms," *id.* at 98, and noting that this holding "fits lock and key with ERISA's focus on what a plan provides," *id.* at 100).

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